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New Jersey Court of Errors and Appeals

Notice of Appeal

NEW JERSEY SUPREME COURT

HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased, Plaintiff, vs. JOSEPH W. NORTH & SON, INC., a corporation of New Jersey, Defendant.	Action at Law.

TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

Yours respectfully,
SAUL COHN.
Attorney of Defendant.

To:
Abe J. David,
Attorney for Plaintiff.

New Jersey State Library

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased, Plaintiff-Respondent, vs. JOSEPH W. NORTH & SON, INC., a corporation of New Jersey, Defendant-Appellant.	Action at Law. On Appeal from New Jersey Supreme Court.

The appellant states the following grounds of appeal:

1. The Trial Court permitted Herbert S. North to testify, over the objection of the defendant, as to the costs and expenses to which the plaintiff was put in the replevin suit brought by the plaintiff against the defendant.

2. The Trial Court permitted Herbert S. North to testify, over the objection of the defendant, as to the costs and expenses to which plaintiff was put in moving and storing the goods sold by the plaintiff to the defendant.

3. The Trial Court permitted Herbert S. North to testify, over the objection of the defendant, as to the difference between the contract price of the goods called for by the orders taken by the plaintiff and transferred to the defendant at the time said orders were taken and the market price of said goods during the months of September, October, November and December, 1917, for the purpose of establishing the probable liability of the plaintiff on said orders.

4. The Trial Court admitted, over the objection of the defendant, the tabulations made by the

plaintiff and offered on behalf of the plaintiff, marked Exhibit P-25, showing the aggregate amount of the orders for merchandise turned over by the plaintiff to defendant and the aggregate amount at which the goods called for by said orders could have been bought in the open market during the months of September, October, November, December and up to the 1st of January, 1918, for the purpose of establishing the probable liability of the plaintiff on said orders.

5. The measure of damages adopted by the Trial Court of the plaintiff's damage under the breach of defendant's agreement to indemnify and save harmless the plaintiff against liability, loss or damage on plaintiff's orders, establishing this damage at the difference between the contract price of the goods called for by said orders and the market price which said goods would have brought in the open market during the months of September, October, November and December, 1917.

6. The refusal of the Trial Court to grant defendant's motion for a non-suit.

7. The refusal of the Trial Court to direct a verdict for the defendant.

8. The Trial Court permitted the jury, by his charge, to find substantial damages for the plaintiff on a breach of the agreement to indemnify against liability, without proof of actual damage suffered by the plaintiff by reason of such liability.

9. The Trial Court permitted the jury, by his charge, to consider evidence as to the market value of the goods covered by the plaintiff's orders between the dates of the orders to January 1st, 1918, to establish the amount of damage of the plaintiff under the breach of the agreement to indemnify without proof of actual damage suffered by the plaintiff.

10. The Trial Court instructed the jury in his

charge to consider the testimony of plaintiff as to the market value of the goods, establishing the amount of plaintiff's liability to the customers under the orders at $58,000, although there was no proof of actual damage suffered by plaintiff.

11. The Trial Court instructed the jury by his charge that the amount of plaintiff's damage placed before them by the proofs exceeded $20,000.

12. The failure of the Trial Court to instruct the jury that the plaintiff was limited to a recovery of nominal damages under a breach of the agreement to indemnify against liability, in the absence of proof that plaintiff had suffered and sustained actual damage.

13. The Trial Court instructed the jury by his charge that the measure of damages suffered by the plaintiff under a breach of the defendant's agreement to indemnify was the amount of the liability which fell upon plaintiff without proof of actual damage.

14. The Trial Court permitted Herbert S. North to testify, over the objection of the defendant, that some of the merchandise in question was used in the filling of orders other than the orders that North had turned over to the company.

15. The Trial Court permitted Herbert S. North to testify, over the objection of the defendant, that the company had filled some of the North orders at a loss.

16. The Trial Court permitted Herbert S. North to testify, over the objection of the defendant, that he had not been requested by the North Company to have modified or cancelled any of the North orders.

17. The Trial Court permitted Adolph Schwartz and Lena Fischer to testify, over the objection of the defendant, as to the rent paid by and the overhead expenses of the defendant.

SAUL COHN.

Attorney of Defendant-Appellant.

Reasons

(Filed May 1st, 1918.)

NEW JERSEY SUPREME COURT

HERBERT S. NORTH, individually and as executor of Joseph N. North, deceased, Plaintiff, vs. JOSEPH W. NORTTH & SON, INC., a corporation of New Jersey, Defendant.	Action at Law. On Rule to Show Cause.

The defendant assigns the following reasons why the verdict in the above entitled cause should be set aside and a new trial granted.

The following questions were admitted:

1

To the witness Mr. North:

Q. What merchandise did your books show you had on hand at that time?

Mr. Stamler: I object to it.

The Court: What date was that?

Q. At the time of the signing of the original contract, on or about January third, 1917?

Mr. Stamler: I object to it on the ground that the subject matter of this litigation commenced on June 26, 1917; not at the time of the signing of the first contract. All matters in dispute were settled by the contract of June 26th.

The Court: Objection overruled.

A. My books showed at that time approximately forty-eight thousand dollars worth of merchandise on hand.

2

To the witness Mr. North:

Q. Do you know whether some of this merchandise was used in the filling of orders other than the orders that you had turned over to the Company? A. I do.

Q. Was such merchandise so used?

Mr. Stamler: I object—

A. It was.

Mr. Stamler: (Continuing,)—to it. I ask the answer be stricken out. I object to that question and the answer.

The Court: The answer will be stricken out.

Mr. Stamler: My objection is on the ground that the contract of June 26th is the subject matter of this litigation, and any breach that existed prior to June 26th is not evidential in this case.

The Court: Isn't that evidential to show—as I understand it, under both these contracts the merchandise was to be used to fill the North orders.

Mr. Stamler: That is correct.

Mr. David: Yes, sir.

The Court: Haven't they a right to show the situation under the first contract to show these goods were not used for that purpose?

Mr. Stamler: I say all breaches prior to the 26th of June, 1917, were settled and de-

termined by the contract of June 26th, 1917.

The Court: As a matter of damages.

Mr. Stamler: And, therefore, it is not a subject for inquiry in this litigation.

The Court: As a matter of damages, but doesn't it throw a light on the matter of quantity?

Mr. Stamler: I don't think so. One will say our contention was thus, another will say our contention was this; it will open another—

The Court: I think it is evidential. I do not say on the subject of damages; but I think it is evidential. I will allow it.

3

To the witness Mr. North:

Q. Did you at any time between January third, 1917, and September first, 1917, learn whether or not the company had filled any of your orders at a loss? A. I did.

Q. From whom did you learn that?

Mr. Cohn: We object, if your Honor please.

The Court: What date was this?

Mr. David: Between January third, 1917 and September first, 1917.

Mr. Cohn: Between the dates of the two contracts?

Mr. David: No. Between the date of the first contract and the date for the closing of the second contract.

Mr. Cohn: My objection to the question is it is irrelevant. There is no issue here as

to whether the defendant was able to make a profit on his merchandise or not.

The Court: It may throw some light on his actions. You may answer the question.

4

To the witness Mr. North:

Q. And before you took possession of the goods did you file a bond in the Circuit Court in this County? A. I did.

Q. How much did you pay for that bond?

Mr. Cohn: I object. There is nothing—on the ground that there is nothing in the pleadings in this suit to at all bring up the issue of the pleadings in the other suit which would make this an element of damages. Those damages were recoverable in the replevin suit, if at all. Those damages, if your Honor please, were damages for detention of their merchandise, and they can not be claimed in this action because this proof is absolutely at variance, and it surprises us. There is nothing in the pleadings to give us the least inkling—

The bond cost $600.00.

5

To the witness Mr. North:

Q. How long did it take you to move the goods?

Mr. Cohn: We object, because under the terms of the contract we were to take those goods on September first, and the contract expressly provides we were to hold the goods there, or we were to suffer them to remain there until September 1st. It can

not therefore be an element of damage against us as to what Mr. North paid for the removal of these goods, because had we—notwithstanding what he said about refusing to give them to him—but assuming his testimony was we offered to give them to him, or offered to let him take them away, he would have to do so at his own expense.

It cannot be chargeable to us under any theory, because he had the right to take those goods into his own possession and he had to naturally stand all the expenses of moving. There is no continuation of the right on his part to have us keep those goods indefinitely. The contract expressly provides they are to remain until the 1st of September.

Mr. David: Mr. Cohn is not quoting to your Honor the terms of his contract with reference to that. No doubt unintentionally.

It says that if the goods are not taken by September 1st, that we shall have a reasonable time thereafter to remove them.

The Court: His point is in either event you would have to remove them, so you could not charge them with that.

Mr. David: Yes; but we may have been able to remove so much each day and sold them to somebody in the open market. We were compelled by reason of their refusal to take or give us the goods and hire vans and work all night.

The Court: Why?

Mr. David: To get the goods out.
The Court: You mean in your replevin?
Mr. David: Yes, sir.
The Court: I will allow that.
Mr. Stamler: Pray exception.

6

To the witness Mr. North:

Q. What did you pay for storage on them?

Mr. Stamler: We object to what he paid for storage.

The Court: Question allowed. Exception.

A. Sixty dollars a month.

Mr. Stamler: The reason is it is not a proper element of damage.

The Court: Yes.

7

To the witness Mr. North:

Q. Mr. North, were you ever requested by the defendant company to have modified or canceled any of these orders?

Mr. Cohn: We object, if your Honor please, because it is irrelevant whether he was requested or not in view of an express covenant on his part to perform the services.

The Court: I will allow the question.

Mr. Cohn: Exception.

8

To the witness Mr. North:

Q. Will you state the difference in the market price of these various orders on December 26th, 1917—

Mr. Stamler: I object to that.

Q. (Continuing) as compared with the prices under which you were to deliver the goods under the original orders?

Mr. Stamler: I object to that.

The Court: Why?

Mr. Stamler: There are two grounds of objections.

The Court: You mean with reference to the date?

Mr. Stamler: Yes, sir; December 26th is an arbitrary date. This is six months.

The Court: I will allow the question.

9

To the witness Mr. North:

Q. Difference between the contract price and what the goods could have been bought in the open market for during the months of September, October and December, up to the month of January, 1918? A. That's it.

The Court: Why isn't that admissible?

Mr. Cohn: If your Honor please, wouldn't it be valuable for us to declare one general objection to this proffered testimony and have it all written out on the record so that we will know exactly all the grounds which we think your Honor should consider in determining this?

The Court: Suppose the Judge makes the offer of this statement as taken from the books.

Mr. Cohn: That is what I think.

The Court: The objection of the defendant to the offer of this statement, which I

understand is the statement of the difference between the contract price at which the orders were taken by Mr. North originally, and the price which would duplicate the market value of that merchandise on September 26th, 1917.

The Court: September, October, November and December.

Mr. Cohn: During the months of September, October, November and December, 1917, up to December 26th, 1917, is objected to on the following grounds:

First: That the action was instituted, as appears from the transcript of the pleadings, on September 26th, 1917, and that any damages which the plaintiff may have a right to recover must be damages which would accrue prior to the institution of the suit. And therefore, evidence as to damage which accrued subsequent to the institution of the suit would not be admissible or relevant in this issue. Second, that under the contracts, the cause of action as set out in count three of the plaintiff's complaint (on which count the present offer of evidence is made) does not accrue until the plaintiff has paid to the customers damages arising from his liability to them for the non-fulfillment of orders. Third, that the plaintff is disqualified as an expert in establishing a six months period within which the defendants were to manufacture the merchandise and fill the orders for these reasons:

(A) That the only basis on which his ex-

pert knowledge rests is his own experience in his own business. And that he has adduced testimony showing that on that experience he could not have manufactured the unfilled orders amounting to at least seventy-five thousand dollars within the period stated by him.

Mr. Cohn: I might also say, if your Honor will permit me to add this:

Fourth, that under the contract the plaintiff was obligated to purchase a certain quantity of raw material for the fulfillment of these orders.

The Court: If it was necessary.

Mr. Cohn: If the raw material was requisite. And this further cause which was in my mind which I think is very paramount, that the plaintiff is not entitled to recover damages under the third count, without proof of the continuation of the legal relationship between him and the customers which would entitle the customers to hold him liable in damages.

The Court: I understood him to say that there had been no change in that relationship.

I will overule the objection and allow an exception.

10

To the witness Adolph Schwartz:

Q. Let us see. Your rent is thirty dollars a week?

Mr. Cohn: We object, if your Honor please.

The Court: Allow it.

Mr. Cohn: We object to going into an inquiry as to the overhead because it is not relevant to this issue.

The Court: Yes, it may throw some light on your actions.

Mr. Cohn: It means a collateral issue.

11

To the witness Lena Fischer:

Q. What was the overhead expense of the plant from June 26th to September 1st.

The Court: You mean per week?

Q. Per week?

Mr. Stamler: I object to that because they have not shown the company has been doing the same sort of business.

Mr. David: This is strict rebuttal.

Mr. Stamler: But, as a matter of fact, it is not what the company is doing. There is no evidence in the case the company is only doing what Mr. North did. They might have been doing other business, and therefore would be entitled to a great overhead.

The Court: That might be. I will allow it.

Mr. Stamler: Prays exception.

Mr. Stamler: I object to the use of that memorandum at the same time.

A. If this is added up correctly it is six hundred and ninety dollars.

Q. Will you add it up?

Mr. Cohn: May I interrupt to say this thing will lead us to a new trial. I mean trial of a brand new issue. I can not see how on any theory of evidence—

The Court: What is the purpose of this?

Mr. Cohn: Whether the overhead—

Mr. David: I asked Mr. Schwartz whether they would not have lost on the lightweight orders and heavyweight orders. He said on the heavyweight orders they would have lost eight hundred dollars, and on the lightweight orders they would have made money. I asked him whether his overhead expense was not much greater than North's, and he said no, it was less.

The Court: I think it goes to the actions of the defendant to show whether he wanted to fill the orders or not.

12

To witness Adolph Schwartz:

By Mr. David: Q. Did you deduct expense of twelve vans loading that stuff and taking it to the storage warehouse?

Mr. Cohn: Object to that.

The Court: Allow the question; he has a right to find out.

Q. Did you deduct it?

Mr. Cohn: I do not think he has a right to ask him. He can ask him how he arrives at it, but Judge David can not single out a particular expense Mr. North may have had.

The Court: This does not prove he had that expense. This is simply asking him whether he did that in arriving at his calculation.

Mr. Cohn: If it is not admissible to show that he spent for moving vans, there is not any theory on which it is.

The Court: I allow the question.

Mr. Cohn: Prays exception.

The Court refused to permit testimony on the loss of profits which the defendants would have derived if the plaintiff had turned over to them the merchandise mentioned in the contract of June 26th, 1917. This line of testimony having been overruled in the following manner:

13

To the witness, Adolph Schwartz:

Q. What is the total merchandise in value you would have manufactured out of that merchandise? A. I figured—

The Court: No. How much merchandise?

Q. How much in dollars and cents of merchandise? A. I didn't figure out the value of the merchandise. I only figured out loss of profit, or profit derived on this merchandise.

Q. On what did you base—

The Court: Is this your purpose to show loss of profit on the part of the defendants for failure to receive this merchandise?

Mr. Stamler: Yes, sir.

The Court: Didn't we thrash this out the other day? If they did not deliver the goods to you on the first of September, then you could have gone into the open market and bought the goods. And, havng bought the goods, and paid the increased amount, you would hold them for the increased amount.

Mr. Cohn: If your Honor please, I do not know of any principle of law which obligates us to go out in the market and buy these goods.

The Court: Yes. You can not sit still and say we will not buy goods, and we will lose profits. You have got to minimize the damage. And if they did not deliver the goods it was your duty to go in the open market and buy them and then make them up and you would have made your profits. Wouldn't you?

Mr. Cohn: Yes.

The Court: Of course, you are not obliged to buy them if you ask as damages, the difference between the market value and the contract price. Then, of course, you can show that. But you certainly can not get the difference in the market price and the profits too, can you.

Mr. Cohn: No, sir; but we say we are entitled to present the case to the jury on either theory.

The Court: No. There is one right theory; there are not two theories; one theory must be right.

Mr. Cohn: The theory we have a right to present to the jury, is the theory that we lost profit. The process of our going into the market and buying this merchandise and making it up would not have minimized the damage.

The Court: You mean after they failed to deliver the goods to you, that you sat still and said we are not buying any goods, and we are not making them up. Therefore we have lost so much profit?

Mr. Cohn: We are entitled to the benefit of the bargain. And that is the case I cited

to your Honor, Lodge vs. Binsey, which I think is elementary.

The Court: The trouble is our statute has fixed it. And it states, in the absence of some other agreement, damage for the failure to deliver goods is the difference in price between the market price and the contract price. In other words, suppose they failed to deliver you the goods, you could then have gone into the market and bought the goods for two thousand dollars more than they agreed to sell them to you for. And then, if you had gone in and manufactured the goods just exactly as if they had delivered them, then you would have had your profit. That would be one way to do it. But, as I understand you, you say when they refused to deliver these goods, you can say we are going to make ten thousand dollars profit on these. Now, having failed to deliver the goods, we are going to sit still, and we want ten thousand dollars profit. We will not go into the market and buy these goods, but we will sit still and ask ten thousand dollars profit. Do you think that is the rule?

Mr. Cohn: I think we have a right to assume the attitude we do not have to buy in the open market. As a matter of fact we will show that the purchase price of this raw material in the open market was intensely greater than the contract price, and would have involved an outlay—

The Court: You are entitled to show that.

(Further argument of counsel).

Mr. Cohn: No. Here is a special sale, where it is not subject to the market. Mr. North's calculation showed, as our present experience in making this similar product showed. We could definitely show the difference between the cost and the contract price the customer agreed to pay. This is not an ordinary case where a vendor takes an order for something and does not deliver it. This is where a vendor sells raw material to the vendee, knowing all the circumstances. And I do not know any rule of law, there may be such a thing, but I have never understood that in order for a vendee, purchasing material which the vendor knows is to be applied, and where the vendor knows specifically what the profit is, that under that set of circumstances—not where the vendor has no knowledge of the use of the raw material—but where he has an absolute knowledge and where as alleged in the complaint they are indispensable, the having of this raw material, by reason of the fact some was partly finished—

The Court: That does not appear. I agree with you if they cannot be secured, but there is no evidence of that. The fact is, the expert you brought here yesterday testified it could be bought at a certain figure.

Mr. Cohn: Some of the yarns; yes. But I say, again, I do not know of any principle which obligates a vendee where he buys

raw material and the vendor knows the obligations and knows the profits—

The Court: I agree with you entirely about that, if he can not get it; but, if he can get it he can not get the profits.

Mr. Stamler: Has your Honor ruled on the question?

The Court: I will overrule the question.

Mr. Stamler: Prays exception.

The Court: Yes.

14

To the witness, Adolph Schwartz:

By Mr. Stamler: Q. What profit would you have made on the manufacture of the ladies' vests, as per your profit list?

The Court: I overrule the question.

Mr. Stamler: Prays exception.

The Court: Exception allowed.

15

To the witness, Mr. Adolph Schwartz:

Q. Would you have made any profit in the manufacturing of ladies' garments or vests, indicated by you in the former answer? A. Yes, sir.

Q. Had you done so? A. Yes, sir.

Q. What would that profit have been?

The Court: I have just overruled that.

Mr. Stamler: I want to get it on the record.

The Court: It is not any better to have it twice.

Mr. Stamler: I pray exception.

Reasons

16

To the witness, Mr. Adolph Schwartz:

Q. How much money would you have made had you manufactured the lightweight orders?

The Court: Question is overruled.

Mr. Stamler: Prays exception.

17

Because the Court refused to grant a non suit on the grounds stated.

18

Because the Court refused to direct a verdict for the defendants on the grounds stated.

19

Because the Court refused to charge the jury the third request to charge made by the defendant.

20

Because the Court refused to charge the jury the fourth request to charge made by the defendant.

21

Because the Court refused to charge the jury the fifth request to charge made by the defendant.

22

Because the Court refused to charge the jury the sixth request to charge made by the defendant in the language of the request.

Reasons

23

Because the Court refused to charge the jury the eighth request to charge made by the defendant, in the language requested.

24

Because the Court refused to charge the jury the eleventh request to charge made by the defendant, in the language requested.

25

Because the Court refused to charge the jury the twelfth request to charge made by the defendant.

26

Because the Court refused to charge the jury the thirteenth request to charge made by the defendant, in the language requested.

27

Because the Court refused to charge the jury the fifteenth request to charge made by the defendant.

28

Because the Court erroneously charged the jury the sixteenth request to charge made by the defendant.

29

Because the Court erroneously charged the jury the seventeenth request to charge made by the defendant.

Reasons

30

Because the Court erroneously charged the jury that the measure of damages recoverable by the plaintiff was $58,000.00.

31

Because the Court erroneously charged the jury as to the opportunity of the defendant to examine the merchandise.

32

Because the Court erroneously charged the jury that the merchandise was in the possession of the defendant.

33

Because the verdict was against the weight of evidence.

34

Because the verdict was against the charge of the Court.

SAUL COHN,
Attorney of Defendants.

Summons

The State of New Jersey to Joseph W. North & Son, Incorporated, a corporation of the State of New Jersey:

You are summoned to answer the annexed complaint of Herbert S. North, individually and as executor of the last will and testament of Joseph W. North, deceased, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court at Trenton within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see Notice endorsed hereon).

(L. S.)

Witness, William S. Gummere, Chief Justice of the said Court at Trenton, this 26th day of September, Nineteen Hundred and Seventeen.

ABE. J. DAVID,
Attorney.

WILLIAM C. GEBHARDT,
Clerk.

Transcript Of Pleadings For Trial

NEW JERSEY SUPREME COURT

UNION COUNTY

HERBERT S. NORTH, individually, and as executor of the last will and testament of Joseph W. North, deceased,
Plaintiff,
vs.
JOSEPH W. NORTH & SON, INCORPORATED, a corporation of the State of New Jersey,
Defendant.

Abe J. David, Attorney for Plaintiff.
Saul Cohn, Attorney for Dedendant.
(Summons Issued September 26, 1917.)

Complaint

(Filed, Sept. 29, 1917)

The plaintiff, Herbert S. North, individually and as executor of the last will and testament of Joseph W. North, deceased, residing at No. 12 Vista Avenue, Elizabeth, New Jersey, says:

1. That on January 3d, 1917, the plaintiff did enter into an agreement in writing with one Nathan Schwartz in and by which plaintiff agreed to sell to said Schwartz for a consideration of $16,-

000.00 certain machinery, good-will of business and to assign orders for merchandise then on the books of the plaintiff; part of said consideration to be paid in cash and part by $8,000.00 in notes of said Schwartz and others secured by transfer to said plaintiff of $12,000.00 of the stock of a corporation to be formed under the laws of the State of New Jersey and to be known as Joseph W. North & Son, Incorporated. It was therein also agreed that said Schwartz should assume and fulfil all contracts of the said plaintiff for the delivery of merchandise sold and not then delivered and to save harmless and indemnify said plaintiff from any damages for breach of said contract or from any other cause in connection therewith.

2. That said contract was consummated and the machinery and business sold as provided in said contract of January 3d, 1917.

3. That the Joseph W. North & Son, Incorporated, was formed as a corporation of the State of New Jersey and took over the business, machinery, etc., and assumed the provisions of said contract to deliver merchandise.

4. That dispute arose between the plaintiff and the Joseph W. North & Son, Incorporated, and in order to settle and adjust the same, on June 26th, 1917, the plaintiff entered into an agreement in writing with the Joseph W. North & Son, Incorporated, the defendant; a true copy of which agreement is hereto annexed and made a part hereof, as Exhibit "A."

5. Plaintiff has always been ready and willing to perform and carry out said agreement and each

and every covenant therein contained and upon his part has fulfilled and carried out the terms and covenants in said agreement contained.

6. That the plaintiff and defendant have been unable to obtain cancellations of said orders as shown in schedules 1 and 2 annexed to Exhibit "A," or to have the price increased.

7. That the defendant has breached said contract in that it has used materials sold to it by the plaintiff for the purpose of filling orders other than the orders mentioned and set forth in schedules 1 and 2.

To the damage of the plaintiff $20,000.00.

SECOND COUNT:

8. Plaintiff repeats the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 hereof.

9. That all of the orders mentioned and set forth in schedule 1 and 2 annexed to Exhibit "A" are still in full force and effect; that defendant has failed, refused and neglected to fulfil said orders and to make deliveries of merchandise in accordance with said orders and by reason thereof plaintiff would be obliged to fill said orders and make deliveries of merchandise in accordance therewith at a greatly increased cost and expense to himself.

Wherefore plaintiff is damaged in the sum of $20,000.00.

THIRD COUNT:

10. Plaintiff repeats the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 hereof.

11. That since the 26th day of June, 1917, the defendant has fulfilled and delivered merchandise to only one of the persons named in Schedules 1 and 2 annexed to Exhibit "A," and although defendant has received from plaintiff, materials for the purpose of manufacturing said merchandise, said defendant has wilfully violated and breached said agreement by using said materials for the purpose of manufacturing merchandise and has delivered such merchandise in fulfilling orders other than the orders mentioned in schedules 1 and 2 annexed to Exhibit "A."

12. That defendant received said materials from plaintiff and never intended to use the same in the fulfilling of orders standing on the books of the said plaintiff as set forth in schedules 1 and 2 annexed to Exhibit "A."

13. That the said defendant has not within a reasonable time fulfilled or attempted to fulfil said orders and has not manufactured any merchandise for the purpose of fulfilling said orders, but on the contrary has manufactured goods and delivered them in fulfillment of other orders than those mentioned in schedule 1 and 2 annexed to Exhibit "A".

14. That by means of said conduct of said defendant and the breach of said covenants of Exhibit "A", plaintiff has been and will be obliged to buy materials at a greatly increased cost and will be forced and obliged to manufacture merchandise from said materials at a greatly increased cost for the production thereof, and that the plaintiff will be liable in damages to the persons

named in schedules 1 and 2 of Exhibit "A" for failure to deliver goods and for delays in delivering the goods.

To the damage of the plaintiff $20,000.00.

FOURTH COUNT:

15. Plaintiff repeats the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 hereof.

16. That the defendant has failed to tender or deliver to plaintiff $6,000.00 of the capital stock of the defendant as provided in paragraph 9 of Exhibit "A".

To the damage of the plaintiff $6,000.00.

ABE J. DAVID,
Attorney of Plaintiff.

Exhibit A

Annexed to complaint

THIS AGREEMENT, made the Twenty-sixth day of June in the year Nineteen hundred and Seventeen, by and between Herbert S. North, individually and as executor of the last will and testament of Joseph W. North, deceased, of the City of Elizabeth, in the County of Union and State of New Jersey, of the first part, hereinafter called North; and Joseph W. North & Son, Incorporated, a corporation of the State of New Jersey, whose principal office is located in the City of Elizabeth, aforesaid, of the second part, hereinafter known as the Company, for and in consideration of One Dollar and other good and valuable considerations in hand by each to the other paid.

WITNESSETH:

WHEREAS, the said North entered into a certain indenture of agreement with Nathan Schwartz, dated January 3d, 1917, and said Nathan Schwartz subsequently conveyed to the company the assets mentioned in the said agreement and said company is now conducting the business formerly conducted by North;

AND WHEREAS, since the taking over of the said business by the Company, each of the parties hereto have claimed defaults against the other and various disputes have arisen between them and the parties desire to amicably dispose of any controversies now existing between them,—

NOW THEREFORE, it is agreed as follows:—

1. The Company agrees to assume the liability of performing the aforesaid contract dated January 3d, 1917, to the extent that it will fill all orders for merchandise on the former books of said North, including light weight and heavy weight goods and merchandise of all weights, of which orders 2 itemized schedules are hereto attached, made a part hereof and marked Schedules Numbers 1 and 2. The said Company however, in any and every event, agree to save harmless and indemnify the said North from any and all liability or loss or damage by reason of said orders mentioned in said Schedules Numbers 1 and 2 or the non-fulfillment thereof or any matter or thing connected therewith.

2. The said North and the said Company hereby expressly and mutually release each other of and from all alleged breaches to date hereof, by reason of the aforesaid agreement dated January

3d, 1917, made by and between the said Nathan Schwartz and the said North.

3. The party of the first part agrees to turn over to the Company as required by it from time to time, for cash, all such merchandise belonging to him in said factory, as is suitable for the filling of the orders above mentioned on the aforesaid Schedules Numbers 1 and 2, and known in the trade as heavy weight and light weight orders as the same now are or as they may be modified or substituted in accordance with agreement between the Company and its customers. Such merchandise shall be used solely for the purpose of filling said heavy weight and light weight orders and shall be sold to the Company according to the Schedule of prices hereto attached, made a part hereof and marked Schedules Numbers 3 and 4, provided, however, that each delivery of goods shall be for not less than the amount of Seven Hundred and Fifty ($750) Dollars.

4. It is understood that the merchandise to be sold and delivered by said North to the Company, pursuant to paragraph number 3 hereof, is to be used solely for the purpose of filling orders particularly designated on Schedules Numbers 1 and 2 aforesaid, and for the purpose of insuring to said North a performance of this covenant, the Company agrees to furnish at all reasonable times a statement under oath of its President or such other officer as the party of the first part may in writing elect, that the merchandise so sold and delivered by the party of the first part is being or was used for the filling of the aforesaid orders, and the names of the customers to whom such merchandise is delivered.

5. The parties hereto jointly agree to lend and use their best efforts for the purpose, in the first instance, of procuring a cancellation of the aforesaid orders shown on Schedules Numbers 1 and 2 to the great extent possible, and in the event that the said Company is compelled to fill such orders, the parties agree to use their best efforts jointly for the purpose of procuring as much time as may be possible in this connection and also of procuring increase of prices to the greatest extent possible; and no default under this clause shall be claimed without a written notice being given by the party claiming such default. And the said North agrees to furnish the Company with copies of all letters that he may write to the customers as shown in Schedules Numbers 1 and 2 in connection with the orders contained in said Schedules.

6. Should any merchandise suitable for making heavy weight goods remain in the possession of the said North after the Company has filled all orders not cancelled, the said North agrees to turn over for cash the balance of heavy weight goods remaining on hand at the prices as shown on Schedule #3 hereto attached and made part hereof. It is agreed however, that if said North shall not have on hand sufficient raw or partly finished material for the manufacture of all heavy weight orders which the Company will ultimately be required to fill, the party of the second part will furnish 5000 pounds of yarn to make up the deficiency, and should any material still be required to fill said heavy weight orders, the said North agrees to furnish the entire balance which will be required for this purpose in accordance with Schedule #3.

7. For the purpose of turning over to the Company the merchandise in the manner herein mentioned, and upon the completion of this contract and for a reasonable time thereafter, or on default thereof by the party of the second part, it is understood and agreed that the party of the first part shall have the right at any and all reasonable times to enter the premises occupied by the party of the second part for the purpose of removing any and all merchandise of the party of the first part. It is understood and agreed that the party of the second part shall make no charge for storage of the goods and merchandise belonging to the party of the first part now in the plant occupied by the party of the second part, so long as this contract shall be in full force and effect, nor for a reasonable time thereafter for the removal thereof.

8. The time limited in the contract of January 3d, 1917, in which the said Nathan Schwartz had the right to take merchandise from the said North, and which right of the said Nathan Schwartz has been taken over by the Company, is hereby extended until September 1st, 1917, at 12 o'clock noon. The Company agrees to pay interest at the rate of six per centum per annum on the estimated value of such merchandise, which is fixed for the purpose hereof at the sum of $30,000 from July 3d, 1917, to the date of payment for such material as will be from time to time taken, it being however understood, that the amount of material taken and paid for between the date hereof and July 3d, 1917, shall be credited on the estimated value of $30,000 aforesaid.

9. The contract of January 3d, 1917, between Nathan Schwartz and the said North is hereby ratified and assumed, except as herein modified, and further excepting the Company does not assume the payment of the outstanding notes aggregating $7,000 made by Nathan Schwartz, Adolph Schwartz, Louis Schwartz and Clyde E. Black pursuant to the terms of the said agreement, and excepting further that $6,000 of the capital stock shall be delivered to the said North instead of $12,000 the said Company having been incorporated for $50,000 instead of $100,000, as provided for in the said contract.

10. The said North agrees immediately upon receipt of notice or letters threatening suit or summons out of any Court to notify the party of the second part thereof.

11. The goods known as webbing in the trade for filling of heavy weight orders as per schedule #1 are to be purchased and taken by the party of the second part before the purchasing and taking of the yarns, except the said North agrees to sell the said Company at any time sufficient yarns to make up any special sizes on any special orders contained in Schedule #1, which the Company has assumed, and for which the Company has not sufficient webbing on hand.

In Witness Whereof, the party of the first part has hereto set his hand and seal and the party of the second part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereto affixed, the day and year first above written.

HERBERT S. NORTH, (S)

Individually and as Executor of
the Last Will and Testament of
Joseph W. North, deceased.
JOSEPH W. NORTH & SON,
Incorporated.
By Nathan Schwartz,
President.

Signed, sealed and delivered
in the presence of
A. J. David, as to
Herbert S. North.
Attest:
Clyde E. Black,
Secretary.
(Corporate Seal)

SCHEDULE #1

(heavy weight orders)

Blodgett	300	dozen	#20
Baumgartner	200	"	20
C. P. S.	100	"	20
Dils	100	"	20
Feni Mosher	100	"	20
Farwell	200	"	20
Isaacs	100	"	20
Landauer	200	"	20
Robinson	100	"	20
Meyer Wise	200	"	20
Dills	80	"	61/3
Denison	680	"	"
Finch	120	"	"
Klein	40	"	"
Krolik	160	"	"

	Kaufman	40	"	"
	Keet	40	"	"
	Moon	120	"	"
	Noyes	280	"	"
	Plaut	48	"	"
10	Rauss	160	"	"
	Richardson	168	"	"
	Rosen	150	"	"
	Simmons	80	"	"
	Tootle	200	"	"
	Weber	80	"	"
	Welch	120	"	"
	Byrne H.	160	"	61
	C. P. S. & Co.	96	"	"
	De Wald	80	"	"
20	Finch	240	"	"
	Farwell	440	"	"
	Krolik	80	"	"
	Kaufman	40	"	"
	Lauerman	40	"	"
	Lipschitz	40	"	71
	Mayo	48	"	61
	Patrick	80	"	"
	Plaut	48	"	"
	Plaut	24	"	71
30	Sommers	80	"	61
	L. Stix & Co.	80	"	71
	Stein	40	"	61
	Weber	80	"	"
	Farwell	700	"	11
	Lauerman	50	"	11
	L. Stix	40	"	11
	Patrick	150	"	11/1
40	Simmock	40	"	61

John Stillman order as appears in books of Company.
Welsh Cook " " " " " " "
A. W. Porter " " " " " " "
Hirshfield " " " " " " "
Herbert S. North Nathan Schwartz.

SCHEDULE #2 (light weight orders)

Gutman	212	cases
Porter	60	"
Hambleton	25	"
Larx	22	"
Hirshfield	25	"
Ainsley	6	"
American D. G. Co.	1	"
Burnham	38	"
Baumgartner	6	"
Bissell	5	"
Brett	1	"
Byrne	42	"
Burnham	4	"
Cohen & Levison	5	"
Efroyson	252	dozen
Finch	11	"
Farwell	23	"
Feni Mosher	5	"
Fisher	1	"
Field	16	"
Green	5	"
Goll	7	"
Hess	5	"
Hurst	2	"
Halle	6	"
Hanke	9	"
Hibben	20	"

	Hibben	2	"
	Johnson	20	"
	Jones	4	"
	Klein	10	"
	Kalven	2	"
10	Katz	2	"
	Knickerbocker	20	"
	Larx	22	"
	Lindeke	80	"
	Levin	2	"
	Lauerman	4	"
	Meyer	5	"
	Miller	2	"
	Moore	1	"
	MacDonald	3	"
20	Miller Hadley	7	"
	Mickler	19	"
	Mayer	11	"
	McGlure	6	"
	Patrick	2	"
	Philipson	9	"
	Pitts. D. G. Co.	19	"
	Rathbun	3	"
	Ripkin	1	"
	Rider	2	"
30	Siller	4	"
	Swadley	2	"
	Shannon	4	"
	Stern	5	"
	Shellits	2	"
	Stix	2	"

Herbert S. North Nathan Schwartz.

Schedule #2 continued (Light weight orders).

Sheimerman	1 case	
Sibley, Lindsay	22 cases	
Levi Strauss	14 "	
Stekett	1 "	
Sommers	21 "	
Smith	2 "	
Stillman	3 "	
Stillman	16 "	
Herbert S. North		Nathan Schwartz.
Wieboldt	15 "	
Wienroth	3 "	
Wheller & Motter	12 "	
Youngstown	13 "	
Ward		285 dozen

SCHEDULE #3 (Heavy Weights)

Yarns at 22 1/2¢ per pound;
Peeler webbing at 24¢ per pound;
Silver Grey webbing at 26¢ per pound;
Bleached webbing at 27¢ per pound.
All yarns on hand after the filling, substitution and cancellation of orders as provided for in paragraph #6 of this agreement are to be taken and sold at the price of 33¢ per pound.
Herbert S. North.

SCHEDULE #4 (Light Weights)

All yarns, webbing and supplies for light weight merchandise are to be sold and delivered at the prices which have already been fixed by the parties (and are not in this schedule specifically set

forth) and which prices appear on the books now in the possession of the Company and on the receipted bills for such merchandise already taken and paid for.

Herbert S. North.

Answer

(Filed, Oct. 11, 1917)

The defendant, a body corporate of New Jersey with its principal office located in the City of Newark, County of Essex and State of New Jersey, answering the complaint herein filed, says:

ANSWER TO FIRST COUNT:

1. It denies the allegations contained in paragraph 1 of the complaint.

2. It denies the allegations contained in paragraph 2 of the complaint.

3. It denies the allegations contained in paragraph 3 of the complaint.

4. It admits the making of the agreement referred to in paragraph 4 of the complaint, and denies all the other allegations contained in said paragraph.

5. It denies the allegations contained in paragraph 5 of the complaint.

6. It denies the allegations contained in paragraph 6 of the complaint.

7. It denies the allegations contained in paragraph 7 of the complaint.

ANSWER TO SECOND COUNT:

8. Defendant denies allegations in paragraph 8 of said complaint, in so far as it repeats the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of the said complaint, excepting that the defendant admits the making of an agreement referred to in paragraph 4 of the complaint.

9. Defendant denies the allegations contained in paragraph 9 of said complaint.

ANSWER TO THIRD COUNT:

10. Defendant denies allegations contained in paragraph 10 of said complaint, in so far as it repeats the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of the said complaint, excepting that the defendant admits the making of an agreement referred to in paragraph 4 of the complaint.

11. It denies the allegations contained in paragraph 11 of said complaint.

12. It denies the allegations contained in paragraph 12 of said complaint.

13. It denies the allegations contained in paragraph 13 of said complaint.

14. It denies the allegations contained in paragraph 14 of said complaint.

ANSWER TO FOURTH COUNT:

15. Defendant denies allegations in paragraph 15 of said complaint, in so far as it repeats the

allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of the said complaint, excepting that the defendant admits the making of an agreement referred to in paragraph 4 of the complaint.

16. It denies the allegations contained in paragraph 16 of said complaint.

FIRST DEFENSE TO THIRD COUNT OF COMPLAINT:

By reason of the default of the plaintiff in the performance of the contract referred to in paragraph 4 of the complaint, and the unwillingness of the said plaintiff to furnish the material agreed to be furnished by him pursuant to the said contract, the said defendant has been unable to perform the terms of the agreement aforesaid on its part, although the said defendant at all times tendered itself ready and willing to perform the said contract to accept the delivery of the goods, wares and merchandise mentioned in the said agreement at the time fixed in the said agreement and at the price designated therein.

FIRST DEFENSE TO SECOND COUNT OF COMPLAINT:

Defendant repeats the allegations contained in the first defense to the first count herein.

FIRST DEFENSS TO THIRD COUNT OF COMPLAINT:

Defendant repeats the allegations contained in the first defense to the first count herein.

FIRST DEFENSE TO FOURTH COUNT OF COMPLAINT:

The defendant was always ready, willing and able to turn over to the plaintiff the Six Thousand Dollars (par value) of its capital stock.

SAUL COHN,
Attorney of Defendant.

Transcript of Pleadings for Trial

Replication

(Filed Oct. 17, 1917)

Replication of the plaintiff to the defendant's defenses.

1st Count. 1st Defense.

1. The plaintiff denies the defendant's allegation in the first defense to the first count.

2d. Count. 1st Defense:

1. The plaintiff denies the defendant's allegation in the first defense to the second Count.

3d Count. 1st Defense.

1. The plaintiff denies the defendant's allegation in the first defense to the Third Count.

4th Count. 1st Defense:

1. The plaintiff denies the defendant's allegation in the first defense to the fourth Count.

Dated, October 17th, 1917.

Yours, etc.,

ABE J. DAVID,
Attorney of Defendant.

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

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

ENOCH L. JOHNSON,
Clerk.

(Seal.)

Testimony

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

January Term, 1918

HERBERT S. NORTH, Individually, and as Executor, vs. JOSEPH W. NORTH & SON, INC.,	Action at Law, # 15 in the List.

and

JOSEPH W. NORTH & SON, INC., vs. HERBERT S. NORTH, Individually, and as Executor.	

Transcript of stenographer's notes of evidence, taken in the above entitled matter, before HON. GEORGE S. SILZER, Circuit Court Judge, and a jury in the Union County Court House, Elizabeth, New Jersey, on the fourth of February, A. D. 1918, at 9:30 a. m.

Appearances:

Abe J. David, Esq., for Herbert S. North, Ind. Etc.,

John J. Stamler, Esq.,

Saul Cohn, Esq., for the Joseph W. North & Son, Inc.

A Jury being impanelled and found satisfactory, they were sworn.

Mr. David opens the case for the plaintiff (Herbert S. North) to the jury.

Mr. Stamler: I would like to know what Judge David is going to claim from us in damages.

The Court: Yes. We might just as well know that.

Mr. David: I did not know that was the practice. I understand that our pleadings show.

The Court: I have no intelligent notion, and I do not think the jury has, of what you claim. I understand there was a contract between you and a breach of that contract, and I want to know what loss you suffered, and what you claim.

Mr. David: We claim, if your Honor please, and gentlemen of the jury, that on all the orders we had on our books and turned over to them and which they failed to fill, we are liable to pay the people that placed the orders with us, the difference between the price that we agreed a year or more ago to fill those orders, and the price that they would have to pay in the open market today or at the time of the beginning of this suit to have those orders filled. So that is what they have a right to claim from us; that is what they are claiming from us in the suits that have already been started. And that, in addition to that, we are entitled to the actual expenses that we were put to in disposing of these goods; in the caring for the goods until we did dispose of them; in the proceedings that we had to start to get possession of these goods.

And we will show you all those things amount to many thousands of dollars, after crediting these people with the money which we have al-

ready gotten from the goods that we have been able to sell in the open market, and the value of the goods that are still left in our hands.

Does that clearly outline it?

The Court: As I gather, you claim by reason of the breach of this contract; you ask to recover the expenses incident to the removal of the goods and the disposition of them, the ones you claim were worth twenty-nine thousand dollars, and the legal expenses of the replevin suit. And, in addition to that, you ask to be reimbursed for your liability upon the contracts which your customers had with you.

Mr. David: Yes, sir.

The Court: Are they all paid, or are they still outstanding obligations?

Mr. David: All still outstanding obligations; some sued and some not yet sued.

The Court: How much do you claim they amount to?

Mr. David: That amount, if your Honor please, including the commissions that we were compelled to pay on the sale of the goods that we took over, and the amount that we have to pay or will have to pay the different people we are obligated to, is over sixty thousand dollars.

Mr. Stamler: And how much are you suing us for? Only twenty?

Mr. David: The suit at the time it was started was for twenty thousand dollars.

Mr. Stamler: Do I understand you to say, Judge, that a judgment was recovered in replevin under which you got possession of these goods?

Mr. David: Yes. In this Court. In the Union County Circuit Court.

Mr. Stamler: Was that judgment satisfied?

The Court: They had the goods?

Mr. Stamler: Did they get the goods?

Mr. David: We took the goods under a bond before judgment was entered.

Mr. Stamler: I want to know now whether you adimt the fact that that judgment was actually satisfied

Mr. David: The record will speak for itself. We took possession—

The Court: They put up a bond and took the goods and entered judgment in the replevin? That is the situation?

Mr. David: Yes.

Mr. Stamler: Is there any money due under that judgment?

Mr. David: There was no money judgment except six cents.

The Court: With the costs?

Mr. David: With the costs.

Mr. Stamler: That was settled, was it?

M. David: No. The costs were never paid, nor was the judgment paid.

Mr. Cohn opens the case to the jury for the defendant (Joseph W. North & Son, Inc.).

The Court: Let me ask you, Mr. Cohn, did the second contract entirely supersede the first, or was it an amendment to the first?

Mr. Cohn: It was really a modification, and there is a contractual declaration of the first contract—

The Court: Does the second contract contain all the terms at that time? I mean to say, a read-

ing of the contract of June twenty-sixth, will that show all the terms?

Mr. David: No. Paragraph nine refers to the first contract. Paragraph nine of the second contract says it ratifies and confirms the contract of January third, except as therein modified.

The Court: Is there anything in the first contract necessary to the question in dispute, that is not mentioned in the second?

Mr. David: I think not.

Mr. Stamler: No.

The Court: What do you think?

Mr. Cohn: Well, substantially not.

(Mr. Cohn continues his opening.)

The Court: You claim if the North goods had been delivered to you on September first at their proper value that you would then have finished the North orders?

Mr. Cohn: Exactly.

The Court: And would have made a profit?

Mr. Cohn: Yes. We claim that and we are also able to prove that.

(Mr. Cohn continues his opening.)

The Court: You claim you will be subjected to suits for damages by the persons who gave the orders to North?

Mr. Cohn: We think after having assumed these orders these persons may properly claim a novated liability on our parts. And, in fact, one of those persons has instituted a suit either in this Court or the Circuit Court.

The Court: I do not quite understand. Both of you seem to claim that you can recover, although the parties who claim to have claims

against you have not reduced them to judgment.

Mr. Cohn: If your Honor please, our contention will be, and we are going to try to establish, so far as we are concerned, that our inability to deliver these orders, based upon our inability to get the merchandise, will subject us to a certain claim for damages on the part of those customers who will have a right to hold us for the difference between the value of the orders as mentioned in the orders, and the market value, at least the market value at the time fixed in those orders originally for delivery.

The Court: They may subject you to the claim, but do you think you can recover that until you have been put to the loss?

Mr. Cohn: We think we can.

The Court: Do you think so?

Mr. David: I think so, your Honor.

Mr. Stamler: He means it from his point of the case only, so far as his claim is concerned. He doesn't admit the general proposition of law your Honor has placed before him.

The Court: It works both ways. You are both claiming it.

Mr. Stamler: If your Honor will reserve on that, we will argue that later.

The Court: I understand Mr. Stamler's notion of what you mean, it is you claim you can hold the other side in the claim you make against them but they can not hold you in the claim they make against you.

Mr. Cohn: That is because of the matter of the contract between us. Not as a fundamental legal proposition, but by reason of the contract we have with them.

(Mr. David supplements his opening to the jury.)

The Court: What do you say to their claim that by reason of your failure to deliver the merchandise you received a profit on the goods?

Mr. David: We will show you exactly what we have gotten in for the goods we sold in the open market, and we will show you the goods we have still there, and we will say we hope to get out whole. We hope to get out whole on the value of those goods as fixed by that contract of June twenty-sixth.

The Court: You claim it is not true that you sold at an increased value over the contract price?

Mr. David: We have sold some at increased prices and some are worthless and we could not sell. And we have them on our hands, and we hope to get out whole. And if we make a dollar more than the amount fixed in their contract, we will be awfully glad to credit them with the amount fixed, which is thirty thousand dollars.

Mr. Stamler: Are you satisfied to turn over to us the balance of the merchandise that you still have on hand at the prices fixed in the contract?

The Court: I understand you are not willing to take it.

Mr. Stamler: Yes, sir; we are.

The Court: Mr. Cohn said not.

Mr. David: You mean whether that is an item of damage?

The Court: Whether that is a legal claim of damage?

Mr. David: I merely say to your Honor, it is.

The Court: What do you think, Mr. Stamler?

Mr. Stamler: I am not making any motion at this time.

The Court: I wanted to get your mind on it.

Mr. Stamler: We stand on the case we submitted to the Court.

The Court: The Miller case?

Mr. Stamler: Yes. And the cases, of course, cited therein.

The Court: The case of Miller against Freeze, sixty-six law.

The Court: Well, you may proceed, gentlemen; and when the time comes I will deal with it.

HERBERT S. NORTH, the plaintiff, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. David:

Q. Where do you live, Mr. North? A. Elizabeth, New Jersey.

Q. How long have you lived here? A. I have lived here for a period of five years past.

How long have you been in business in Elizabeth? A. Twenty-five years, up to January first, 1917.

Q. And previous to January first, 1917, with whom were you in business? A. Up until the time of my father's death I was in business with him.

Q. When did your father die? A. He died six years ago, the fourteenth of February.

Q. He left a will? A. Yes, sir.

Q. Under which you continued the running of the business? A. Yes, sir.

Mr. David: We offer the will in evidence.

Will entered in evidence and marked Exhibit P-1.

Mr. David: We will show you we made an inventory of as much of the goods as they required, or requested, and offer in evidence an inventory which was gone over and made with the president of the Company.

The Court: And the prices fixed at that time.

Mr. David: Yes. I think the prices were fixed.

The Court: What did that amount to, do you remember?

Mr. David: That was a partial inventory which did not include laces, buttons, and so forth, and amounted to about some eighteen thousand dollars.

The Court: No part of that ever was taken?

Mr. David: I think some of that was taken, but did not include laces, buttons, trimmings, and so forth. It merely included what they wanted set out at that time.

The Court: What portion of that was taken?

Mr. Stamler: Mr. North will testify nothing actually was taken since the contract of these parties—

Mr. David: Are we going to discuss at this time what the witnesses are going to say?

The Court: How much of this eighteen thousand dollars was used; do you know approximately?

Mr. Stamler: I can't tell. I do not know anything about that inventory. We have another inventory which Mr. North gave us.

Q. Just what was the business you carried on with your father and after your father's death? A. We started some twenty-five years ago and organized a manufacturing industry known as a knit goods manufactory. There are very few of them around this section of the country.

Mr. Stamler: I ask that be stricken out; the latter part of it; there are very few.

The Court: Yes. It will be stricken out.

Q. What was it you manufactured? A. Ladies' and children's ribbed underwear.

Q. And what was the merchandise called you used to manufacture there? A. Cotton yarns, laces, buttons; after the cotton yarns were made into the webbing that was the partially finished operation.

Q. When did you arrange to turn over that business to Mr. Schwartz? A. The arrangements were made in December, 1916.

Q. And following those arrangements, did you sign a contract with Mr. Schwartz? A. I did.

Q. Is this it? (Handing paper to the witness.)

The Court: Gentlemen, I suppose there is no dispute about the two contracts?

Mr. Stamler: None at all.

Mr. David: I offer this contract of January 3rd, 1917 in evidence.

Contract of January 3rd, 1917, entered in evidence and marked Exhibit P-2.

Q. Is this it? A. Yes, sir.

Mr. David: I also offer one of June twenty-sixth, 1917.

Contract of June twenty-sixth, 1917, entered in evidence and marked Exhibit P-3.

Q. At the time you sold your business to Schwartz and the company, how much merchandise did you have on hand?

Mr. Stamler: I object to it.

The Court: Why?

Mr. Stamler: Unless he has a record of it.

Q. Have you got records of it? A. My books will show; yes, sir.

Q. Are they here? A. Yes, sir.

Q. Did you go over those books with Mr. Schwartz or any other members of the company? A. I can't say that I went over these books with any of the members of the company. These were my firm books at the time. They were gone over by the auditors who went there for that purpose.

Q. Whose auditors? A. Auditors supplied by Mr. Schwartz.

Q. Then at the time you were negotiating for the turning over of the business, Mr. Schwartz had some auditors come? A. He did; yes, sir.

Q. Did they go over the portion of your books showing what merchandise you had on hand? A. They did; yes, sir.

Q. And showing what orders you had on hand? A. Yes, sir.

Q. And did they, if you know, report to Mr. Schwartz and the other gentlemen? A. From what Mr. Schwartz told me they did.

Q. Which Mr. Schwartz? A. Mr. Nathan Schwartz.

Q. And that was prior to the signing of the contract? A. Yes, sir; that was prior to the signing of the contract.

Q. What merchandise did your books show you had on hand at that time?

Mr. Stamler: I object to it.

The Court: What date was that?

Q. At the time of the signing of the original contract, on or about January third, 1917?

Mr. Stamler: I object to it on the ground that the subject matter of this litigation commenced on June twenty-sixth, 1917; not at the time of the signing of the first contract. All matters in dispute were settled by the contract of June twenty-sixth.

The Court: Objection overruled.

Mr. Stamler: Exception.

Exception allowed, sealed accordingly.

Judge.

A. My books showed at that time approximately forty-eight thousand dollars worth of merchandise on hand.

Mr. Stamler: I will ask that answer be stricken out.

The Court: Motion denied.

Mr. Stamler: Exception.

The Court: Exception allowed.

Exception allowed, sealed accordingly.

Judge.

Mr. David: I would like to know, if your Honor please, the reason for the request

that the answer be stricken out. I want to make sure—

The Court: I have overruled it.

Mr. David: There may be more than one reason they have in moving to strike it out.

The Court: They have not given any reason at all, so it does not play any part on the record. And no appellate Court will pay any attention to them if they do not give a reason.

Mr. David: All right, your Honor.

Q. Following the making of the contract of January third, 1917, did you turn over any goods to Mr. Schwartz or the company, or both? A. I turned them over supposedly to the company.

Q. Can you tell me how much goods you turned over? A. My agreement called for an immediate turn-over of ten thousand dollars worth of goods; raw material.

Q. Was it turned over? A. It was.

Q. Do you know whether some of this merchandise was used in the filling of orders other than the orders that you had turned over to the company? A. I do.

Q. Was such merchandise so used?

Mr. Stamler: I object—

A. It was.

Mr. Stamler: (continuing)—to it. I ask the answer be stricken out. I object to that question and the answer.

The Court: The answer will be stricken out.

Mr. Stamler: My objection is on the ground that the contract of June twenty-sixth is the subject matter of this litigation,

and any breach that existed prior to June twenty-sixth is not evidential in this case.

The Court: Isn't that evidential to show—as I understand it, under both these contracts the merchandise was to be used to fill the North orders.

Mr. Stamler: That is correct.

Mr. David: Yes, sir.

The Court: Haven't they a right to show the situation under the first contract to show these goods were not used for that purpose?

Mr. Stamler: I say all breaches prior to the twenty-sixth of June, 1917, were settled and determined by the contract of June twenty-sixth, 1917.

The Court: As a matter of damages.

Mr. Stamler: And therefore, it is not a subject for inquiry in this litigation.

The Court: As a matter of damages, but doesn't it throw a light on the matter of quantity?

Mr. Stamler: I don't think so. One will say our contention was thus, another will say our contention was this; it will open another—

The Court: I think it is evidential. I do not say on the subject of damages; but I think it is evidential. I will allow it.

Mr. Stamler: Prays exception.

The Court: Exception allowed.

Exception allowed, sealed accordingly.

Judge.

Q. (Question repeated by the stenographer.)

A. It was.

Q. From whom did you get that information? A. I was present at the time these goods were being shipped.

Q. Which goods?

Mr. Cohn: We object, if your Honor please. We do not desire to have your Honor rule on this subject again, but your Honor will note that in the contract of June twenty-sixth, there is an express contractual declaration between the parties that all prior breaches are waived and determined.

The Court: That is all true, but the dispute has arisen here, as I understand it, as to the quantity of the goods; how much merchandise was in the place; what became of it; how much was left, and it is evidential in order to show what the merchandise was and where it went to and whether there was sufficient after you had made a new agreement, whether there was sufficient to manufacture the North goods.

Mr. Cohn: If your Honor please, it will open up the collateral issue as to the orders we claim we are liable on, and as to the orders they claim they were liable on, and it will supersede this issue. These parties can easily prove, without going into the proof of prior agreement, just what merchandise they had on June twenty-sixth, because they know what they had on hand January third, because Mr. North testified so a few minutes ago.

The Court: Suppose part of it was used

to fill North orders, the question would still remain whether there was sufficient goods left to finish North's orders.

Mr. Cohn: No, sir; we did not require, nor does this contract obligate Mr. North to give anything except what he has. That was admittedly insufficient. We all admit that was insufficient to fill all the orders.

The Court: Do you say that? He says it is admitted that the goods Mr. North had, if you took them all, they were insufficient to fill the North orders.

Mr. David: I have an answer to make to that.

The Court: Do you admit that or not?

Mr. David: No, sir.

The Court: It is not admitted.

Mr. Cohn: Mr. North was not obligated to give us all the merchandise for those orders; he was only obligated to give us what he had. He can in one moment give us that without mentioning the question of period. He knows what he had on January third. He gave us fourteen thousand dollars worth of them. By a process of subtraction he can easily say what he had on June twenty-sixth.

The Court: Does not that depend on how much of the North orders he had to fill on June twenty-sixth?

Mr. Cohn: No, sir; we only agreed on June twenty-sixth to take what he had. We didn't agree, on June twenty-sixth, what he had was sufficient, excepting as to the heavyweight orders. As to those heavy-

weights, there was a specific contractual agreement, we were to take what he had. He was to supply five thousand pounds and we were to supply the deficiency. If your Honor is going to permit the door to be opened as to whom we were to manufacture the material for, that opens the whole door prior to June twenty-sixth.

Mr. David: I say even on that point we are entitled to show breaches of the original contract, first, for the reason that no accord and satisfaction is pleaded, but, on the contrary, they deny they breached the first contract; and, secondly, because, if they breached the second contract, we would still have the right to show they breached the first; because that is not an accord and satisfaction, it is an executory; it is an agreement to do something; it is not a closing or settlement of the proposition any more than the giving of a note and saying, "Thank the Lord, that debt is paid." They made a contract and breached it; they made a second contract and breached it.

The Court: But in the case you have just cited, "Thank the Lord, that debt is paid," if you gave your note on a book account, you could not sue on the book account.

Mr. David: I think you could, if you only took the note in settlement of the debt.

The Court: I understand this contract was in substitution of the contract—

Mr. David: No, sir; it merely ratified the first contract and modified it.

Mr. Cohn: Under paragraph two, there

can be nothing more plain in the English language.

(Reading second paragraph).

Mr. David: Your Honor has already said it is not a question of damages.

The Court: "Various disputes have arisen, and we want to settle these disputes. Now we release each other and we make a new contract.

Mr. David: That is only one clause of the contract. They say we will do certain other things. And we say you did not do those things in the second contract, and we have a right to show to the jury that you breached the first and second contract. Not only did you fail to fulfil your contract by September first, but that you never intended to do it, because if they did take the goods on September first, if they did tender us enough money, they could not have filled all of those orders on September first.

The Court: Do I understand your purpose of introducing this testimony is for the purpose of showing breaches on the first contract?

Mr. David: Yes, sir.

The Court: Is that the only purpose?

Mr. David: No, sir.

The Court: What other purpose?

Mr. David: Breaches in the first, notice of the breaches, breaches in the second, and all the course of conduct between them in order to prove our allegation in one of the counts they never intended to fulfil their orders. And I think we have a right to

show all the facts and circumstances connected with the contracts going to establish to the jury that they never intended to use the goods to fill our orders.

The Court: I will overrule the question.

Mr. David: I ask an exception.

Exception allowed, sealed accordingly.

Judge.

Q. Following the contract of January third, did you cause to be served on Mr. Schwartz and the company a letter calling their attention to the conditions at the plant at that time?

Mr. David: I ask production of letter of May eleventh, 1917, directed to Nathan Schwartz and Joseph Schwartz, and son, incorporated.

Mr. Stamler: We got that letter.

A. I did.

Q. I show you letter under date—

Mr. Stamler: We admit the receiving of it on the record.

Q. (continued)—and ask you whether that is the letter? A. Yes, sir; yes, sir.

Mr. David: I now offer that letter in evidence.

Mr. Stamler: We object to it on the ground already outlined, and ask the Court to read it. On the same grounds raised by Mr. Cohn.

The Court: This is offered for the same purpose as your last?

Mr. David: Substantially the same.

The Court: Overruled.

Mr. David: I ask an exception.

The Court: Exception allowed.

Mr. David: I will not offer any more, your Honor, than I think I ought to in order to make proper offer.

The Court: That is all right.

Exception allowed, sealed accordingly.

Judge.

Letter of May eleventh, 1917, marked for identification P-4 for identification.

Mr. David: I desire to offer in evidence a letter from Joseph W. North and Son, per C. E. Black, Secretary of the Company, addressed to A. W. Porter Company, under date of April ninth, 1917.

Mr. Stamler: We object to it on the same ground. The letter is dated April ninth, 1917.

Letter of April ninth, 1917 marked P-5 for identification.

Mr. David: For the purpose of showing a repudiation of the portion of the contract which compelled them to fill our orders.

The Court: Overruled, and exception allowed.

Exception allowed, sealed accordingly.

Judge.

Q. After June twenty-sixth, 1917, did you at any time have any discussion with Mr. Nathan Schwartz, the President of the Company, or any of the other officers with reference to their filling of your orders? A. I called them up once or twice on the telephone and asked them if they needed stock to fill my orders.

Q. When was that? A. Telephone conversations were in the early part of August.

Mr. David: I desire to make two offers, your Honor, with reference to the other branch of the case before I go on.

I offer in evidence letter of January twenty-sixth, 1917 of Joseph W. North and Son, and a notice of February first, 1917 of Joseph W. North and Son to the trade, with reference to these orders.

Mr. Stamler: We object to them on the same ground as heretofore stated.

The Court: Let me see those, will you? Is this from the defendants?

Mr. David: Yes, sir.

The Court: By the defendant corporation, we have been referring to Schwartz. Is this Joseph W. North and Son?

Mr. David: Yes, sir. They used the old name, and incorporated under it.

The Court: And your suit is against that corporation?

Mr. David: Yes, sir.

The Court: The two letters here are duplicates?

Mr. David: The same, but addressed to two different customers. The substance is the same.

The Court: I think that is on a little different basis, Mr. Stamler.

Mr. Stamler: They bear no signature, if your Honor please, or anything.

Mr. David: Is that the ground of your objection?

Mr. Stamler: Both ways. We want to know something more about that other than the mere letter forwarded to someone.

Mr. David: I will make the further proof it comes from your office.

Mr. Stamler: Go ahead and prove we signed and mailed it.

The Court: It seems to be a printed form.

Mr. Cohn: We waive the proposition that these letters came from us, because they must have, whether they were signed or not. But I have the greatest difficulty in ascertaining how they are admissible. Mere statement of the taking over of this company's business.

The Court: No. "Further, you may rely on the fact the North orders will be filled."

Mr. Cohn: Is this a declaration against interest?

The Court: Yes. It shows your attitude which may be also construed in connection with your contract of June twenty-sixth. You both agree to it; there cannot be any difficulty about that; you say you intended to fulfil them.

Mr. Cohn: I do not see any harm in the letters, but—

The Court: I will allow them in evidence.

Two circular letters, both the same, admitted in evidence and marked as one exhibit, Exhibit P-6.

Mr. David: Is this your signature, of Mr. Schwartz?

Mr. Stamler: That is our signature.

Mr. David: I offer in evidence letter from Joseph W. North and Sons to Crawford, Harris and Goodwin, and signed by

the President of the Company, April thirteenth, 1917.

The Court: Same form letter?

Mr. Cohn: We object to the introduction of the letter on the ground already stated.

The Court: I think this is admissible. It says: (reading letter). The Judge is simply putting it in to have formal proof on his side.

Mr. Cohn: In this letter we make the declaration—

The Court: That although you are not legally liable you have assumed to fill the orders. You see, that is what you say now. You claim damages on that ground.

Mr. Cohn: Yes. But there is a declaration at the end.

The Court: Yes, but I cannot divide the letter if it is admissible at all.

I will allow it.

Letter dated April thirteenth, 1917, entered in evidence and marked Exhibit P-7.

Mr. David reads Exhibits P-7, and P-6 to the Jury.

Q. Did you at any time between January third, 1917, and September first, 1917, learn whether or not the company had filled any of your orders at a loss? A. I did.

Q. From whom did you learn that?

Mr. Cohn: We object, if your Honor please.

The Court: What date was this?

Mr. David: Between January third, 1917 and September first, 1917.

Mr. Cohn: Between the dates of the two contracts?

Mr. David: No. Between the date of the first contract and the date for the closing of the second contract.

Mr. Cohn: My objection to the question is it is irrelevant. There is no issue here as to whether the defendant was able to make a profit on his merchandise or not.

The Court: It may throw some light on his actions. You may answer the question.

A. I did.

The Court: From whom.

Q. From whom did you learn that? A. Both Mr. Nathan Schwartz and Mr. Adolph Schwartz.

Q. Who was Mr. Nathan Schwartz? A. The President of the new company.

Q. And the gentleman with whom you had made the original contract? A. It was; yes, sir.

Q. Who was Mr. Adolph Schwartz? A. Mr. Adolph Schwartz, I don't know whether he bore any relation to the new company as an officer, but he was an office man in charge.

Q. And a brother of Nathan? A. A brother of Nathan; yes, sir.

Q. When did you discuss that matter with them? A. I think it was during February, 1917.

Q. And when and where? A. In their office.

Mr. Stamler: If your Honor please, we ask that the former answer be stricken out for the reason it is evident that the witness did not understand the questions. And your Honor ruled on a different answer than the witness has given. In other words, I want your Honor to listen to three questions and

answers and see whether the witness understood Judge David properly to answer.

The Court: In what way do you think he did not understand Judge David?

Mr: Stamler: Judge David says "did you have a conversation with Schwartz or someone prior—between June twenty-sixth—

Mr. David: You did not listen.

The Court: January and September.

Q. What was the conversation?

Mr. Cohn: I object to that conversation because it was a conversation that happened in February and it was prior to the making of the second agreement. Anything this man might have said to Mr. North which amounted to the most voilent breach on the part of this company would not be evidential. In fact, it would open up—

The Court: I understand Judge David's purpose is to show in February he made certain statements they could not make money on those orders by reason of certain overhead expenses.

Mr. David: Yes, sir.

The Court: And his purpose is to show this condition continued and that frame of mind continued right through to the breach.

Mr. David: Yes, sir.

The Court: From which the jury may infer, as one of the elements, there was no intention on your part to fulfil them. That is your purpose, Judge?

Mr. David: Yes, sir.

Mr. Cohn: It would open up a collateral issue.

The Court: No. The only question is whether they said it or not.

Mr. Cohn: It would be entirely a collateral issue. We would have to go into the question not only what was said to him, but in amplification of what we said to him; what the cost was; what the overhead was. We would have to show reasons why there was a loss, and all those reasons were swept away by the making of this contract.

The Court: As I understand it, they are going to show it was continued right on through.

Mr. Cohn: If it is the intention to show that the manufacture of the merchandise right through to the breach alleged, if that is his purpose to show there was a loss involved in the manufacture of this merchandise, even in consideration of the June contract which decreased the price of the raw material, then I would say that would be admissible, or that portion of it which related to the major controversy. We claim on our side that the merchandise was too high; there was a loss. And Mr. North claims the loss was not because the merchandise was too high, but the overhead was too high. And all those questions which would take two weeks to try were swept away by the agreement of June twenty-sixth. And the only question is what attitude did they take commencing June twenty-sixth? Because that is the only contractual—

The Court: In view of counsel's statement that there was a change in price, which I had forgotten, do you think that is admissible? Conversation before June twenty-sixth, relating to merchandise which was manufactured at a loss? It might have been done at a loss before June twenty-sixth, but when they changed the price of the goods that was a part of their adjustment. Would that then be relevant testimony?

Mr. David: The change in the price made no difference in their attitude and in their intention.

The Court: Yes. The question now is whether they stated previous to June twenty-sixth that they had made these goods at a loss.

Mr. David: We are going to show—

The Court: If there was an adjustment of the price afterwards.

Mr. David: We are going to follow this up and show that in reference to those heavyweights—the goods the controversy was about—not one order was finished after June twenty-sixth.

The Court: I will let you put in the conversation subsequent to June twenty-sixth, and you may renew this offer.

Mr. David: We are going to prove by this witness, or the next witness from their own books if they produce them—and if they do not, without them—that they did not fill a heavyweight order after June twenty-sixth.

The Court: I will allow you to prove that

and then you may renew this statement previous to June twenty-sixth, if you think it is relevant.

Mr. Cohn: If it is going to be the avowed attitude of Judge David that we were obligated to fill these orders in any particular time, or that it was a condition preceding our right to have the merchandise, we want to be heard on that subject. We say the express contemplation of this agreement was not to make any delivery within any specified time.

The Court: Did the North contracts provide for delivery at any time, particular time?

Mr. Cohn: All those dates of delivery had long since expired. The point I make is this, and that is the construction your Honor will have to determine—

The Court: You took over the North contracts and agreed to fulfil those contracts; now the time had expired—

Mr. Cohn: At that time.

The Court: They were expired in September?

Mr. Cohn: They were expired long before June.

The Court: Then you claim that you lost profits by reason of not being able to fulfill the North contracts?

Mr. Cohn: That is one of the most difficult questions your Honor has. The only point I desire to make is this: proof of what we did, proof of the number of orders we filled in the period between June twen-

ty-sixth and September first does not begin to have any controlling value evidentially, because on the one hand we did not agree to fill those orders in that short period. And, on the other hand, Mr. North is utterly bereft of any legal justification for believing we would fulfil those orders in that period.

The Court: September first was the time fixed to take the merchandise?

Mr. Cohn: September first was the time fixed to take the merchandise, but if your Honor will bear with me, we had begun to do it on July first.

The Court: When were those contracts to be filled? I mean, under the original contracts?

Mr. Cohn: The orders originally assumed by Schwartz were to be made up in the early part of 1917. The parties got into a squabble and the time expired.

The Court: The contracts Mr. North had, they had a certain time to be delivered?

Mr. Cohn: According to the custom of the trade the time had all expired prior to June 26th, and some of them probably before January third.

The Court: In that event some of the customers of the North Company may have said we insist on the delivery of these goods within a reasonable time.

Mr. Cohn: Very good.

The Court: Some may have said we will not take the goods, but we will insist on the breach of the contract.

Mr. Cohn: That is what I tried to show, that the parties agreed they would lend joint efforts to the diminution of the orders. And this was made in view of the fact that the customers might have taken the attitude your Honor described. There is nothing in this contract, or the law that gives Mr. North the right to anticipate our breach, and we could have had all the—

The Court: Except the customers of North may have said to Mr. North the time has expired and notwithstanding that I want to call upon you for a fulfillment of that contract. In which event, Mr. North would immediately call on you to do it, and unless you filled them within a reasonable time, then—

Mr. Cohn: Then we are liable under the indemnification clause. But the point I am trying to make to your Honor is that until the time arises that our customers demand the goods and we have to give them, Mr. North has no interest in our controversy, and he has no right to anticipate the breach.

The Court: It is Judge David's intention to show by your conduct you had no intention of ever filling them; your purpose was to cease any effort to fulfil those contracts. That is your theory, isn't it?

Mr. David: We say that in our pleadings.

Mr. Stamler: Do I understand the testimony after the twenty-sixth of June your Honor is going to allow?

The Court: Yes. Any testimony from which the jury might infer you had no in-

tention to fill the orders at all. I understand that is the offer.

Mr. Stamler: From June twenty-sixth?

The Court: And then I am going to let the Judge renew his offer of the evidence before, if he can connect it by subsequent conversations.

(Question repeated by the stenographer).

Q. Now, Mr. North, within what time in the ordinary course of business could the orders assumed by the company have been filled? A. Six months.

Q. Did you at any time learn from the company what orders they claimed to have filled after the twenty-sixth of June, 1917? A. I examined their books.

Q. Did you have this list given you by the company? A. I did; yes, sir.

Q. In answer to interrogatories served in this case? A. I did.

Q. And have you gone over that list? A. I have.

Q. Can you tell me what proportion of the entire orders remaining to be filled this list makes up? A. About two and a half per cent.

The Court: That is to say, subsequent to June?

Mr. David: Subsequent to June.

The Court: And the making of the new contract?

Mr. David: Yes, sir.

The Court: About two and a half per cent of your orders were filled?

A. Yes, sir.

Q. And does this list include any of the heavyweight orders? A. It does not.

Q. And can you tell me how many heavyweight orders you had on your books, and how much they amounted to, in money? A. About one hundred cases, approximately twenty thousand dollars.

Q. Did the company ever deliver to you the shares of stock provided for in the agreement of June twenty-sixth, 1917?

The Court: Do you claim damage for that?

Mr. David: We claim a breach of the contract in our complaint.

A. They didn't.

Q. Did you cause from time to time demand to be made on them for those shares of stock? A. I did.

Q. Who did you have make that demand? A. My attorney, Judge David.

Mr. David: I ask that letter from myself to Mr. Cohn.

Is it admitted Mr. Saul Cohn was and still is attorney for the said defendant company?

Mr. Cohn: Yes, it is.

Mr. David: I ask for the production of the letter from myself as attorney for the North Estate to Mr. Cohn, as attorney for the defendant company, and the date is July third.

Mr. Stamler: This is a true copy, you may offer that in evidence.

Mr. David: I offer in evidence letter of July third, 1917.

Letter of July third, 1917, entered in evidence and marked Exhibit P-8.

(Judge David reads Exhibit P-8 to the Jury).

Mr. David: I offer in evidence copy of my letter to Mr. Cohn of July eleventh.

Letter of July eleventh entered in evidence and marked Exhibit P-9.

(Mr. David reads Exhibit P-9 to the Jury).

Mr. David: Production of the original of the letter of July sixteenth.

Letter of July sixteenth entered in evidence and marked Exhibit P-10.

(Mr. David reads Exhibit P-10 to the Jury).

Letter of August ninth, 1917, entered in evidence and marked Exhibit P-11.

(Mr. David reads Exhibit P-11 to the Jury).

Mr. David: Letter of August thirteenth, 1917.

Letter of August thirteenth, 1917 entered in evidence and marked Exhibit P-12.

(Mr. David reads Exhibit P-12 to the Jury).

Mr. David: I now offer in evidence letter Cohn and Cohn to myself under date of August thirteenth, 1917, with enclosure.

Letter of August thirteenth, 1917 entered in evidence and marked Exhibit P-13.

(Mr. David reads Exhibit P-13 to the Jury).

Mr. Cohn: That letter only relates to a copy of a Bill of Sale.

Mr. David: Is that a fair statement to make to the Jury at this time?

Mr. Cohn: Therefore it is not evidential because the avowed purpose of all this correspondence is to show a demand for the shares of stock.

Mr. David: The letter enclosed in the letter to me is not confined to the Bill of Sale.

The Court: I think the Jury may take all the correspondence and determine what it says, and means.

Q. Now, Mr. North, at any time between the twenty-sixth of June and the first of September were you out of the city? A. I was.

Q. Did you, at any time, notify the defendant company that you intended to go out of the city? A. I did.

Mr. David: I ask for the production of a letter of August thirteenth, 1917, from Mr. North to the company.

Q. I show you a letter addressed to Joseph W. North and Sons, a corporation, under date of August thirteenth, 1917, signed by yourself and ask you whether you sent that letter? A. Yes, sir; I did.

Mr. David: Offer it in evidence.

Letter of August thirteenth, 1917 entered in evidence and marked Exhibit P-14.

(Mr. David reads letter Exhibit P-14 to the Jury).

Q. Did you, at any time prior or after the writing of that letter, telephone to the company? A. I did.

Q. When? A. The day following, confirming my letter.

Q. You say the day following; you mean on August fourteenth? A. August fourteenth.

Q. To whom did you talk over the phone? A. Mr. Nathan Schwartz.

Q. The President of the Company? A. Yes, sir.

Q. What was the conversation? A. I asked him if he had received my letter, and he said he had. I then asked him if he was ready to take over the stock at that time and he said no, he was not. I told him I was going away and he said all right; a few days won't make any difference to us.

Q. What next did you hear from the company? A. I received a registered letter from the company, August twenty-eighth.

Mr. David: You wrote that letter?

Mr. Stamler: Yes, sir.

Q. Is that the letter you got? A. Yes, sir; it is.

Q. And did you also see an exact duplicate of that letter that was sent to me? A. I did.

Q. When? A. On August twenty-eighth.

Mr. David: I offer in evidence letter of Joseph W. North and son to Herbert S. North, and an exact copy or duplicate of a letter enclosed to me, enclosing copy of the letter sent to Mr. North.

The Court: Dated August twenty-seventh; received August twenty-eighth.

Two letters, dated August twenty-seventh; one sent to Judge David and one to Herbert S. North, entered in evidence and marked P-15.

(Mr. David reads Exhibit P-15 to the Jury).

Mr. David: I ask the production of a letter from myself to Joseph W. North and Son, under date of August twenty-eighth. I offer in evidence such a letter.

Letter of August twenty-eighth entered in evidence and marked Exhibit P-16.

(Mr. David reads Exhibit P-16 to the Jury).

Mr. David: I ask production of a letter of August twenty-ninth.

Offered in evidence such a letter; from myself to Joseph W. North & Son.

Letter of August twenty-ninth entered in evidence and marked Exhibit P-17.

(Mr. David reads Exhibit P-17 to the Jury.)

Q. Following the sending of the letter of August twenty-ninth what, if anything did you do with reference to turning over the merchandise? A. I visited the factory with Judge David and told them we were ready to turn over the merchandise in accordance with the contract.

(Question and answer repeated by the stenographer).

Q. When was that?

(Question repeated by the stenographer).

A. That was on August thirty-first.

Q. Previous to that did you receive a letter from the company to you—to me under date of August twenty-ninth? A. I did.

Mr. David: I desire to offer in evidence letter of August twenty-ninth from the company to myself.

Letter of August twenty-ninth entered in evidence and marked P-18.

(Mr. David reads P-18 to the Jury).

Q. Did you go there to the plant? A. I did.

Q. When was that? A. August thirty-first.

Q. What time of day? A. Between ten and ten-thirty in the morning.

Q. In whose presence? A. With Judge David, and met there—

Q. You got there, whom did you meet? A. Mr. Nathan Schwartz, Mr. Adolph Schwartz, Mr. Louis Schwartz and their office force.

Q. What took place after you got there? A. I told them I was down for the purpose of turning over the merchandise and demanded their money for the merchandise in accordance with the contract. They said they wanted to see the merchandise. Se we visited the storehouse where the merchandise was stored in plain sight—

Q. Just let me interrupt you. Where was the merchandise stored? A. In the storehouse adjacent to the factory.

Q. When you say "adjacent to the factory," is it part of the same building? A. Part of the same premises.

Q. Was it locked up from the part of the factory they were using for their manufacturing purposes? A. It was not.

Q. How was access gained from their office, and the part of the plant where they were manufacturing, to the store house? A. By passing through a door.

Q. Was it a locked door? A. It was not.

Q. An open door? A. Open at all times.

Q. Open at all times? A. Yes, sir; it was.

Q. And it was in the plant in which they were conducting business? A. Yes, sir.

Q. Now, go ahead? A. We went in and offered them the merchandise and again demanded the money from them for it. Mr. Nathan Schwartz at that time said that he had the money in his pocket, but wanted a bill, so we went back into

the office and I made out a bill and presented it to Mr. Schwartz and again asked him for the money for it.

The Court: Have you that bill?

Mr. David: I demand the production of the bill.

Mr. Stamler: What date?

Mr. David: August thirty-first.

Mr. Stamler: That is it.

Q. Is that the bill? A. It is.

Mr. David: Offer it in evidence.

Bill entered in evidence and marked Exhibit P-19.

(Mr. David reads bill to the Jury).

By the Court: Q. How did you make up that figure, Mr. North? A. My books will show all those figures, your Honor. The stipulated price at which this merchandise was to be turned over to them is specified in the contract as thirty thousand dollars.

Q. Where is that? I understand it is arranged according to the prices fixed in schedule three. (Reading contract of June twenty-sixth, 1917). Is that it? A. Yes, sir.

By Mr. David: Q. In addition to that clause in the contract do your books show the value at cost price to you of the merchandise still in the storehouse? A. They do.

The Court: At that time.

Q. At that time; on August thirty-first? A. They do.

The Court: How much was it?

Q. What do your books so show as to the value of those goods?

Mr. Stamler: I object to that. What

they cost him. It is what he agreed to sell them for.

Mr. David: It is the same thing.

Mr. Stamler: I do not know.

The Court: Ask the witness that.

Q. At what price did the original contract, first, provide you were to turn over the goods to the company?

The Court: Was it the cost price?

Mr. Stamler: Read the original contract.

The Court: You took this June twenty-sixth contract where you fix the amounts to be paid?

Mr. David: I ask that question first.

By the Court: Q. In Schedule three, there were certain prices fixed here as the cost price of the goods? A. Yes, sir; there are.

The Court: There, you have it. It is fixed by this.

By Mr. David: Q. Under the contract of June twenty-sixth, at what price did it provide you were to turn over the goods to the company? A. At cost.

Q. And do your books show what was the value of those goods based on that price? A. They do.

Q. As of August thirty-first, 1917? A. Yes, sir.

The Court: Was that the amount you put on this bill? A. That was approximately the amount, Your Honor.

The Court: If you say approximately—

Q. How much out of the way is it? A. A few dollars, one way or the other. I didn't feel I was to be called on for the actual amount when I went down there because the price had been stipulated at thirty thousand dollars.

Q. When you say a few dollars, how many dollars? What does your books show the actual value of the books?

The Court: The point is you were making out a bill at that time to them for the goods? A. Yes, sir.

The Court: What we are trying to find out is whether that is the accurate price. A. $29,743.81.

The Court: Is that the amount of the bill?

Mr. David: No, sir; there is a slight variance.

The Court: What is the difference? A. Here is the bill.

Mr. David: The bill is $29,875.00.

The Court: What was the actual value? A. $29,743.81.

The Court: That is $130.00 difference.

Q. And can you account for the difference in the amount of the bill of one hundred and some odd dollars and the valuation cost price as per your books?

Mr. Stamler: I object.

The Court: I will allow it. How do you account for that? A. After turning over some stock previous to June twenty-sixth, in the final settlement of that bill they asked me would I take off their hands some mercerized webbing, or fabric, which I took off their hands, which approximately would make this difference.

Q. You presented the bill? A. I did.

Q. Then what happened? A. Mr. Nathan Schwartz after being asked for the money for the amount of the bill, he immediately said if he had that much money in his pocket he wouldn't dare

to go into the storehouse in our presence and the result was that Judge David stated "you are evidently getting up your evidence for a lawsuit, and we are still willing to turn over this merchandise, and you have until twelve o'clock noon tomorrow to take it off our hands." And we left the plant.

Adjourned until 1:30 p. m.

Afternoon session, 1:30 p. m.

HERBERT S. NORTH, (resumed),

Direct-examination (continued) by Mr. David:

Q. When you were on the stand this morning, Mr. North, the last testimony you gave was to the effect that on August thirty-first, when you said you were ready to turn over the goods you left the plant. Following your leaving the plant with me on August thirty-first, did you receive a letter under date of August thirty-first from the company? A. I did.

Q. Is that the letter? A. Yes, sir; it is.

Mr. David: I offer it in evidence.

Letter of August thirty-first entered in evidence and marked Exhibit P-20.

(Judge David reads Exhibit P-20 to the jury.)

Mr. David: Also offer in evidence letter of the same date, addressed to me, enclosing a copy of the letter just read, being P-20.

Letter entered in evidence and marked Exhibit P-21.

Q. Following the receipt of the letter of August thirty-first did you go to the plant in the morning of September first? A. I did.

Q. In whose company? A. Judge David's.

Q. Will you tell what happened at the plant on the morning of September first? A. Upon our arrival at the plant we were met by Mr. Nathan Schwartz, Adolph Schwartz and all the members of the organization, with the exception of Mr. Clyde Black, secretary; Mr. Nathan Schwartz said "sit down, and wait awhile, as we expect a gentleman from New York with the money to take over this merchandise." So we waited around for possibly a half hour when Mr. Clyde Black and a gentleman whom I have since learned was connected with a New York banking institution, came and said they were ready to take over the merchandise. So we again told them to go into the storehouse and we offered them the merchandise and demanded the money. Mr. Black then asked the stranger to tender to us fifteen thousand dollars, making us a legal tender for the merchandise.

The Court: Did he say how he figured that? How he arrived at that amount? A. No mention was made at that time; no, Your Honor.

Q. Previous to that offer being made, that tender being made, was anything said about how long it would take to check up the goods? A. Yes. They said they would like to count the merchandise, take an inventory, which would take probably three or four days to do so.

Q. Then what happened? A. Judge David said next, "you can't expect us to stand around here

three or four days while you are taking the inventory." And we went back to the office. We were tendered the money, as I recall, in the storehouse, and we went into the office and Judge David reiterated what he said the day before. "You are evidently getting up evidence for a lawsuit." And he demanded of them the entire amount which was not forthcoming and we left the factory.

Q. On that morning did you also present a bill? A. Yes, sir. I did.

Q. What was this bill for?

Mr. Stamler: Speaks for itself, doesn't it?

Q. I call your attention, Mr. North, that under one of the terms of the contract of June twenty-sixth a provision was made that interest would be paid you on the value of the merchandise kept there to be turned over when paid for by the defendant? Is this the bill for the interest on that merchandise? A. That is the bill for the interest.

Q. To whom did you deliver that bill or a copy of it? A. Mr. Black.

Mr. David: Mr. Clyde Black. I ask for the production of it. I offer it in evidence.

Bill of September first entered in evidence and marked Exhibit P-22.

Mr. Stamler: I haven't got that.

Mr. David: You have not?

Mr. Stamler: No.

Mr. David: I offer in evidence letter of September first to Joseph W. North and Son, from myself.

Letter of September first, entered in evidence and marked Exhibit P-23.

(Mr. David reads Exhibit P-23 to the jury.)

Q. Mr. North, from the twenty-sixth of June until September first, how much of the goods from you did the company take? A. Six hundred and eighty odd dollars' worth.

Q. And in how many shipments? A. One.

Q. When, Mr. North, did you obtain possession of your goods? A. It was either September third or the fourth.

Mr. David: Is it admitted that the replevin suit—

Mr. Stamler: I thought you had a copy of it to put in. Pleadings, and judgment, and so forth.

Mr. David: I will offer in evidence, the record in the Union County Circuit Court, of a suit in replevin of Herbert S. North, Individually and as Executor, against Joseph W. North, incorporated, under which the goods which were at the plant and in the possession of the defendant were replevined, and all of the proceedings under that suit.

Mr. Cohn: We object to the introduction of that record on the ground it is not relevant. At no time under the contract did we have either the right of title or possession to those goods.

The Court: I understand from the plaintiff's position that you had possession of this plant and that you refused to give up the goods.

Mr. David: Yes, sir.

Mr. Cohn: We did not have—

The Court: Make this proof they refused to permit you to take the goods.

Mr. Cohn: The question of whether we refused to permit them to take possession or not is not in issue in this case. It is also a collateral issue. We never had the right of title or possession. We never had the—

The Court: You offered them fifteen thousand dollars and insisted you had a right to the goods.

Mr. Cohn: No.

The Court: What did you offer the fifteen thousand dollars for?

Mr. Cohn: Our proposal was, and we tendered ourselves ready to take an accurate inventory to determine as to what the balance was. And we then tendered ourselves ready to pay the balance. What Judge David is trying to do is introduce the record of an action to take possession, in which we filed a disclaimer.

The Court: You filed a disclaimer?

Mr. Cohn: Yes, sir.

Mr. David: You filed an answer which I do not consider is a disclaimer.

Mr. Cohn: You will find it is nothing but a disclaimer.

Mr. David: I say the proof we are prepared to show is this: we demanded our goods and they refused the demand at that time. Subsequent we made a demand in writing and they refused. We were, thereupon, compelled to replevin the goods.

The Court: Do you also claim they insisted they had a right to the possession of them after they made the tender?

Mr. David: No. They filed an answer.

The Court: I mean, before the lawsuit. Do you claim they had a right to hold them?

Mr. David: They told us we had to sue for them.

The Court: Make the proof of that.

Q. What, if anything, was said on the morning of September first as to the goods that were then in the storehouse? A. Judge David made a demand on Mr. Black, the secretary, demanding the goods and Mr. Black immediately said "of course you understand in order to get these goods you will have to start legal proceedings."

Q. And did you authorize me to start such proceedings? A. I did, immediately.

The Court: You offer in evidence the proceedings you started?

Mr. David: Yes, sir.

The Court: I will allow them in evidence.

Record entered in evidence as Exhibit P-24.

Q. Did you take possession of the goods? A. I did.

The Court: As a result of the suit.

Mr. Cohn: Permit me an exception.

The Court: Yes.

Exception allowed, sealed accordingly.

Judge.

Q. And before you took possession of the goods did you file a bond in the Circuit Court in this County? A. I did.

Q. How much did you pay for that bond?

Mr. Cohn: I object. There is nothing—on the ground that there is nothing in the pleadings in this suit to at all bring up the

issue of the pleadings in the other suit which would make this an element of damages. Those damages were recoverable in the replevin suit, if at all. Those damages, if Your Honor please, were damages for detention of their merchandise, and they cannot be claimed in this action because this proof is absolutely at variance, and it surprises us. There is nothing in the pleadings to give us the least inkling.

The Court: Where do you make the charge—

Mr. David: In our claim for damages we propose to prove what we got for those goods, which we sold. And against that we are entitled to set off what it cost us to sell those goods, we had to take possession. We do not allege that as an element of damage, but we allege that we are allowed to set off for what it actually cost us money.

The Court: What do you say to that?

Mr. Cohn: It makes a new case. We do not begin to be ready to meet that now.

The Court: You were ready to meet it this morning.

Mr. Cohn: I am not ready to meet it.

The Court: The judge opened that way this morning, and you went to trial. Mr. Stamler asked him "what do you claim by way of damages?" And he said: "First, liability on the outstanding claims of Mr. North; second, he expended certain money in taking care of the merchandise; next, expenses of securing it, expense of securing it on the replevin."

Mr. Stamler: We are meeting it; but there is nothing in the pleadings. We were not obliged to answer then and there. He is making proof now.

The Court: If you were surprised, you might have stated it at that time, and we would not have gone on with the trial. I will allow such an amendment to be made in view of the fact counsel did not state, or appear to show, any great surprise this morning when the suggestion was made. And I do not see how you can be surprised very much. And, if you are, you will have until tomorrow.

Mr. Stamler: I would like to reply to it. I would like to frame a reply, if Judge David frames that count, and raises an issue of law.

The Court: We adjourn at three-thirty. You better draw it at once and give it to Mr. Stamler, so he may have it tonight.

Mr. Stamler: So we can draw a legal reply.

The Court: That is proper.

Mr. David: Yes, I will do that, your Honor.

Mr. Stamler: Why should the testimony be taken on that until the reply is framed?

The Court: We can deal with it as we go along.

Mr. Stamler: I will move to have the right to strike out all that testimony relating to the cost of replevining the articles if it is not proper.

The Court: Yes.

Argument

Mr. David: I do not want Your Honor to get the impression that I am limiting myself to the cost of replevining. It also includes expenses, as well; expenses and storage.

The Court: Just as you opened this morning?

Mr. David: Yes, sir.

Mr. Cohn: That is not what Your Honor declared a moment ago. That is now for damages for loss arising by reason of our failure to take the merchandise.

The Court: I will allow it to stand in the way he opened.

(Question repeated by the stenographer).

Mr. Stamler: I would like to state further on the record we are totally surprised and are unable to meet the issue raised by the proposed amendment. And counsel, at this time, is unable to state whether or not he will be able to meet the issue tomorrow morning, or before the conclusion of this case.

The Court: We will give you time enough so you will get over your surprise.

Q. How much, Mr. North? A. The bond cost six hundred dollars.

Mr. Stamler: I object to that testimony.

The Court: Objection overruled; exception allowed.

Exception allowed, sealed accordingly.

Judge.

Mr. David: He is in the middle of his answer. Let him answer and then object.

Mr. Stamler: I ask the Court to strike

out that portion of the answer which says that the bond cost six hundred.

The Court: The question is what you paid for the bond.

Mr. David: He is about to tell Your Honor the original cost and rebate.

The Court: Give us what you paid.

Q. What did you finally pay? A. Three hundred dollars.

Q. Did you hire moving vans? A. I did.

Q. Were the goods moved in the presence of the officers of the company? A. They were started to be moved in the presence of the officers of the company, and then they left the men there in charge of the building all night while we removed the balance of them.

Q. How long did it take you to move the goods?

Mr. Cohn: We object, because under the terms of the contract we were to take those goods on September first, and the contract expressly provides we were to hold the goods there, or we were to suffer them to remain there until September first. It can not therefore be an element of damage against us as to what Mr. North paid for the removal of these goods, because had we—notwithstanding what he said about refusing to give them to him—but assuming his testimony was we offered to give them to him, or offered to let him take them away, he would have to do so at his own expense. It can not be chargeable to us under any theory, because he had the right to take those goods into his own possession and he had to naturally, stand all the expenses of

moving. There is no continuation of the right on his part to have us keep those goods indefinitely. The contract expressly provides they are to remain until the first of September.

Mr. David: Mr. Cohn is not quoting to Your Honor the terms of this contract with reference to that. No doubt unintentionally. It says that if the goods are not taken by September first, that we shall have a reasonable time thereafter to remove them.

The Court: His point is in either event you would have to remove them, so you could not charge them with that.

Mr. David: Yes, but we may have been able to remove so much each day and sold them to somebody in the open market. We were compelled by reason of their refusal to take or give us the goods and hire vans and work all night.

The Court: Why?

Mr. David: To get the goods out.

The Court: You mean in your replevin?

Mr. David: Yes, sir.

The Court: I will allow that.

Mr. Stamler: Pray exception.

The Court: Exception.

Exception allowed, sealed accordingly.

Judge.

Q. How long did it take you to get the goods out? A. We started two o'clock in the afternoon and finished the following morning at ten minutes to seven.

The Court: What did that cost you?

Q. Do you know what day of the week?

The Court: What difference will that make?

Mr. David: I want to show it is after September first.

The Court: How much did it cost you to get out? A. About in the neighborhood of one hundred dollars additional.

Q. How many vans did you have? A. We had twelve vans.

Q. How many men worked? A. About twenty men.

Q. Where did you take these goods? A. We took those to the public warehouse on Jefferson Avenue.

Q. Whose? A. Keating's.

Q. What did you pay for storage on them?

Mr. Stamler: We object to what he paid for storage.

The Court: Question allowed. Exception. Exception allowed, sealed accordingly.

Judge.

A. Sixty dollars a month.

Mr. Stamler: The reason is it is not a proper element of damage.

The Court: Yes.

Q. Are the goods still there? A. Some of them are.

Q. What became of those that are not there? A. They were sold and shipped.

Q. And have you tried to dispose of the remainder of them? A. I have.

Mr. Cohn: We object to this line of testimony, because there is not anything in the complaint that makes it necessary for

them to account to us what they did with those goods. They have not started a suit against us on any theory of damages that they have lost profits, or it is not a case where a vendor is suing his vendee because the vendee has mailed to take merchandise, and thereby there has been a consequential loss to the vendor. And, even under the count your Honor is permitting them to frame, that would not be the theory of their count. The theory of their count, as your Honor has delineated, would be by reason of our failure to give them the merchandise, this refusal to deliver up, that they have suffered certain damages. Your Honor has permitted them—

The Court: What do you want to show by this?

Mr. David: I want to show we are crediting them with all the money we have gotten in on the sale of these goods. Crediting them with the value of the goods that are still remaining, and deducting from that the prices they were to pay us for the goods, and our expenses, and after doing this, that we suffered a loss.

Mr. Cohn: May I rehearse with your Honor for one moment—

The Court: He claims that is not set out in your complaint.

Mr. Cohn: That is a brand new theory.

The Court: Where is that set out?

Mr. David: We have offered, if your Honor please, on the complaint, as originally drafted, to prove that we have suffered

damage by reason of the fact that we are liable to our customers for certain claims which they had. In making that proof, we would have been compelled to show we did everything we could to mitigate the damage. And, in showing that —

The Court: It would not be mitigating the damage that your customer had, how much you received for these goods, would it?

Mr. David: We would then show your Honor that we sold the goods as best we could in mitigation of the damage, deducting from the sales price the expenses we were put to, which I take it we would be allowed to deduct.

Now, the Court has ruled, under the law, that the portion of the contract in which they say they will "save us harmless" does not make an item or element of damage that we are liable to pay customers for their claims against us, and so I now ask leave, as I have already asked your Honor, to amend the complaint setting up as a result of the breach of the contract, the damage that we sustained because of their refusal to take the goods. And in making proof of that I say we must, again in mitigation of the damage, sell the goods at the best advantage, and in selling the goods at the best advantage, we are entitled to deduct what it cost us to sell them.

The Court: You are claiming now you received less for the goods than you would have received for them if they had been sold under the contract price?

Mr. David: Yes, sir.

Mr. Cohn: I say it is a brand new theory in the case. We would have to meet that by getting expert evidence of market values, and right of inspection of the merchandise left, and an accurate inventory.

The Court: Was there any examination before trial as to what became of those goods?

Mr. Stamler: Some of them.

The Court: Have you been into that subject?

Mr. David: Yes, sir; they have our answers to the interrogatories, and the examination, both.

The Court: What we want to avoid is this: we have taken the biggest part of the day to get this case started, and get some notion about what your difficulties are, and there is no use wasting a whole day, if you gentlemen are practically ready to thresh it out.

I suppose both sides want the thing out of the way, but this point is apparently new unless you have delved into it with your interrogatories.

Mr. David: They examined Mr. North as a witness before trial.

The Court: On this subject?

Mr. David: On this subject, and got a list of the names of the persons to whom they shipped merchandise; list of the prices at which they were shipped; list of the places at which they were stored.

The Court: I will tell you what I will do. I will permit this amendment to be made.

It is entirely new as far as the pleadings are concerned, and have the Plaintiff exhaust his case on the pleadings that he made. Then I will give you whatever adjournment you want in order to prepare for it.

Mr. Stamler: I can conceive now probably the best ruling would be to withdraw a juror and try it on another date.

The Court: We would lose the time you already put in on this.

Mr. Stamler: We did get interrogatories for the purpose of finding out what they sold, but we never got a reply to what they sold. They simply said this: instead of telling us in pounds or quantities, they simply said five cases, ten cases; there might have been one thousand pounds.

The Court: Won't you get that on cross-examination?

Mr. Stamler: It will require inspection of the remaining goods.

The Court: How much is still left in the warehouse? A. There is about thirty-three per cent, I imagine.

By the Court: Q. Have you any inventory of what is in the warehouse? A. Not as regards quantities. I have, as regards total amount. That is, an amount of merchandise I have there, I have. I have an inventory that enables me to sell from, but it is not what they would require as an accurate inventory.

The Court: It does put it in a most uncertain state.

Mr. David: I am anxious to complete the

case, your Honor, and if your Honor feels that the other side has not had sufficient notice, and would not be able to meet an additional count with reference to this element of damage, I will not press the request to amend the complaint, but will make the offer under my insistment that we are entitled to make it under the complaint as originally drawn.

The Court: You certainly would not be entitled to make it under your original opening.

Mr. Cohn: Judge David offers to make it now under the complaint as it is not drawn.

The Court: That complaint is simply you want to be reimbursed for the obligations?

Mr. Cohn: First count in that complaint is that—is a claim for damages arising because we sold their material for other purposes. In other words, they claim by reason of our taking their material and applying it to non-contract purposes, a certain amount of damages resulted.

The Court: That is the first count.

Mr. Cohn: That is the first count. The second count is on the question in which the indemnification comes in.

The Court: On page two?

Mr. Cohn: Yes, sir. Third is practically the same.

The Court: Page what?

Mr. Cohn: Paragraph fourteen. (Reading). And the fourth count is the count on the failure to deliver the shares of stock.

The Court: Certainly could not get it under any of those.

Mr. David: Except as I have said to your Honor, on our proof of the damage, being unable to fill the orders we have to show we mitigated that damage and, in doing so, we have a right to charge off against them the expense of the sale of the goods.

The Court: How does that work out? Suppose Mr. North had a contract with John Smith to furnish one thousand dresses, and they were not delivered, so that Mr. Smith said "Mr. North, you owe me for them, and there is a breach of your contract with me of two hundred dollars." Would the goods that Mr. North still had in his possession have anything to do with that at all?

Mr. David: Yes, sir. It would in this way—

The Court: Or what Mr. North sold the goods for?

Mr. David: Yes, sir. Because these goods had to be made up by these people before they could be delivered to the customers. When they did not take the goods and deliberately make up the garments for the customers, we had to take the goods and sell them in the open market. And if, on that sale in the open market, we owed Mr. Smith two hundred dollars on his agreement with us—

The Court: That would be so if you were suing the other way. If you were suing somebody for profits you would have made off the goods, when made up. And would have to show that having used up the goods

you would have made a certain amount of profits, and not having made the goods up, you were entitled to profits, less what you made out of the goods.

Mr. David: Yes, sir.

The Court: But take the reverse of it. Mr. Smith says "you owe me two hundred dollars, because you did not live up to your contract," and Mr. Smith is paid that irrespective of what Mr. North did. And Mr. North loses two hundred dollars by having to pay it to Smith.

Mr. David: Yes, but when we said to the other side we have to pay Smith two hundred dollars, they have a right to say to us "You took those same goods, and instead of selling them to us at a certain amount, you sold them to some one else at an increase of two hundred dollars and so you haven't lost anything."

Mr. Cohn: I think I know what Mr. David has in his mind.

The Court: I do not. Not on this point.

Mr. David: We say to that, because you refused to deliver—fill these orders, Mr. Smith has a claim against us for two hundred dollars.

The Court: We will assume he paid Smith the two hundred dollars.

Mr. David: We must show that when we took our goods back and sold them we tried to mitigate the damage. We sold those goods at the best price we could. And got out of the hole the best way we could. When we sold those goods at an increased price of

two hundred dollars we did not lose anything; we had to pay Smith two hundred dollars, but we got two hundred back in the open market. The best we could get would be six cents for the breach of the contract.

Now, we are going to show that in getting the two hundred dollars on the sale of those goods it cost us fifty, and so they are only entitled to a credit of $150.00, as against the two hundred dollars that we had to pay.

The Court: Well, Judge, I do not think you ought to stand on that first count if you want to make this claim. I think you ought to stand on a separate count on that. I do not think you ought to take the chance.

Mr. David: I am anxious to have this disposed of now.

The Court: Because, if I am right, you can not bring that in under the count as it now stands. But if it is also true it could be done under a second count, then, of course, you waived your right to it and could not get any relief.

Mr. David: Yes.

The Court: Of course, if you want to take your chances, why then I am willing to overrule it.

Mr. David: Will your Honor allow me to consult with Mr. Savage, representing the estate?

The Court: Yes, sir.

Mr. David: Will your Honor suspend on this condition, that I will make no further proof at this time with reference to this element, nor will I move to amend. But al-

low me to consult with Mr. North after adjournment, and I will notify the other side immediately after adjournment whether I desire to amend or not. We will notify the other side immediately after adjournment.

The Court: All right. You may reserve your rights.

Mr. Stamler: We ask now that the testimony taken on this point be stricken out.

The Court: I will hold that motion too.

Mr. David: Cross-examine.

CROSS-EXAMINATION by Mr. Stamler:

Q. Under the terms of the contract of June twenty-sixth, you agreed to use your efforts to obtain reductions of the contracts, of your old cntracts, is that so? A. Yes, sir.

Q. Did you make any efforts from June twenty-sixth up to the first of September? A. Not personally; no, sir.

Q. Did anyone on your behalf make any such efforts? A. No, sir.

Q. Mr. North, the contracts assumed by the North Company contemplated that they should complete your old contracts, is that right?

(Question repeated by the stenographer).

A. Yes.

Q. And those consisted of heavyweight garments and lightweight garments? A. Yes.

Q. Heavyweight garments—the orders for the heavyweight garments were taken by you during the year of 1915 and to be completed by you in the year 1916, is that correct?

The Court: And delivered?

Q. And delivered in 1916, is that correct? A. No, it is not.

Q. I am talking about the heavyweights? A. No, sir.

Q. When were the heavyweight contracts to be completed by you and delivered? A. The contracts taken over by the concern to be delivered were in accordance with contracts made with my customers during the latter part of 1916.

Q. Isnt' it a fact that the heavyweight contracts were contracts taken by you in 1915 for delivery in 1916? A. They were remnants of those contracts that with correspondence with my trade we had renewed those contracts the latter part of 1916.

Q. Those contracts, as a matter of fact, were 1915 contracts to be delivered by you in 1916, is that correct, or not? A. They were the balance of those contracts.

By the Court: Q. When were they to be delivered under your contract with the customers? A. During the winter and summer of 1917.

By Mr. Stamler: Q. Under the original contracts taken by you? A. Those original contracts were all cancelled.

The Court: I understand they were made in 1915 but changed or revised.

Mr. Stamler: Yes, I understand that.

The Court: But the deliveries were to be the winter of 1917 and the summer following?

A. The deliveries were to be the winter of 1917 and the summer following.

Q. As to the heavyweight contracts, you had contracts taken in 1915 for delivery in 1916—this you didn't do, but you, instead of that, got extensions of time from customers to complete them in 1917. Is that correct? A. That is correct.

Q. Did you at any time show those extensions or new heavyweight relations showing a change of the contracts to the North people? A. Yes, sir.

Q. Have you got any of them? A. They have all the order books.

Q. They have all the order books? A. Yes, sir.

Q. I show you three books and ask you what they are? What is the book you have in your hand first? A. That is the books of the remainders of the heavyweight orders to be delivered, and the lightweight order of one particular customer, Carl Gutman, and Company.

Q. This book is then known as Fall Orders of Heavyweight goods? A. Yes.

The Court: Plus one lightweight contract.

Mr. Stamler: Plus one lightweight contract. I will ask that be marked for identification.

Book marked D-1 for identification.

Q. Where do the fall orders start in this book? Those are lightweight or heavy? A. Those are fall orders 1917.

Q. I am talking about heavyweight goods. A. I am talking about heavyweight goods; those are fall orders 1917.

Q. Where are your original heavyweight order books? A. In their original heavyweight order book.

Q. Where is that? A. In their possession.

Q. See whether it is there. A. No, sir. This is summerweight order book, 1917.

Q. What is that book? A. This is a cost book.

Book marked D-2 for identification.

Book marked D-3 for identification.

Q. Now, Mr. North, isn't it a fact you have that original book? A. No, sir.

Q. Order book of heavyweights? A. It isn't a fact.

Q. Will you describe that book for us? A. Very similar to the lightweight book.

Q. And in that book there contains contracts showing a change or extension of time? A. That portion of the original order that has been filled you will find in that order book the dates and delivery of those goods. The balance you will find in that book there.

Q. That was rewritten then? A. That was rewritten at their request.

Q. Why didn't you complete those orders in 1916? A. There wasn't time.

Q. Although they were taken in 1915? A. They were taken during the winter of 1915-16, some after the first of January and some prior thereto.

Q. Isn't it a fact that the custom of the trade is it takes a year in which to manufacture these orders? A. No, sir.

Q. You completed them always in six months? A. Not always; no, sir.

Q. It is a fact the 1915's you hadn't completed up to the first of January, 1917? Isn't that so? A. Some of those; yes, sir.

Q. All of those. All of the heavyweights that the North people agreed to manufacture? A. They would have been completed in 1916, except at the request of the customers they were carried over until the following season.

Q. Have you got that request? A. They have all that correspondence in their possession at the factory.

Q. Are you sure of that? A. It was there when I left there.

Q. Mention a concern that requested you to stop making the goods in 1916 and deliver them to them in 1917. Mention one concern like that. A. I do not know as any concern requested me in that manner.

Q. The matter of fact was you didn't deliver them in 1916, and you promised to deliver it to them in 1917; is that correct? A. That is proper; yes.

Q. And the customers wanted the merchandise, insisting on it, in fact? A. Not at all.

Q. They simply let it go? Is that right? Didn't care when you delivered it to them? A. No. I don't say that. I don't think any of them expressed themselves that way.

Q. But simply gave you a voluntary extension of time? A. I think that is more like it.

Q. Of two years? A. Not of two years.

Q. Or one year? A. Not one year.

Q. Why not? A. Because they were to be delivered during the winter or summer.

Q. What year? A. 1917.

Q. Winter orders? A. Winter orders.

Q. You took the winter orders during the year 1915 to be delivered in 1916, is that correct? A. Those goods were delivered; yes, sir.

Q. All of them? A. As I have reiterated here before there was some of them carried over to be delivered during the winter of 1917 and summer of 1917.

Q. Those were all 1916 orders? A. You can express it that way if you want. They were revised orders.

Q. You were under legal duty to deliver those orders during the year 1916, were you not? A. No, sir.

Q. When were you obliged under your original contract to deliver those orders? A. They took different dates of delivery, starting in with June sixteenth, 1916.

Q. Yes? A. And deliveres were continued on after that time.

Q. Heavyweight goods? A. Yes, sir.

Q. Did they want winter or heavyweight goods in July, 1917? A. They certainly did.

Q. Why? A. So as to supply the retail trade of the country and have the goods on their shelves when they needed them.

Q. Why didn't you make up all the goods in 1917? A. I have already stated I didn't have time.

Q. Why could they have done it in six months? A. Because there was only one hundred cases left for them to fill.

Q. They had hundreds of other cases of lightweight to manufacture at that time? A. That wouldn't have interfered with their lightweight business at all.

Q. In other words, you didn't have time enough but they would have had time enough, is that right? A. For one hundred cases; yes, sir; absolutely.

Q. Now, Mr. North, you said originally you made no effort whatever to get a reduction of those contracts or extensions? A. I was never so requested by any of them.

Q. Didn't the contract read that way? A. I didn't interpret it that way; no, sir.

Q. Didn't you at many occasions take the matter up with them and talk to them about it, as to how those contracts were to be filled? A. Not to my knowledge.

Q. Shortly after the twenty-sixth of June, 1917, that is, after the signing of this contract, the North people—when I say "people" I mean the company— A. I understand.

Q. (Continued)—wanted a statement from you of what merchandise you had on hand, did they not? A. I think it was prior to June twenty-sixth.

Q. Shortly prior thereto? A. Yes, sir; prior to June twenty-sixth.

Q. Did you furnish them with such a statement? A. I did.

Q. I show you a paper writing and ask you whether that is the paper you refer to? A. Yes, sir; that is it.

Mr. Stamler: I will ask that be marked for identification.

Paper marked D-4 for identification.

Q. Did this paper writing purport to give them an accurate inventory of the merchandise that you had on hand? A. Accurate? No, sir.

Q. Well, then, approximate inventory? A. Yes, sir.

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

Q. Why did you say it wasn't accurate? A. Because I was never asked for an accurate inventory.

Q. You just look here at the item. You have here 788 pounds. Where did you get that item? A. Two cases of yarn.

Q. You knew that positively? A. Positively.

Q. Seventy-three hundred pounds carded peel-

er? A. That was on a certain number of cases we took the numbers off the end of the cases.

By the Court: Q. What was it you approximated. That is what he wants to know. A. He is asking me—

Q. What was it you approximated? A. Five thousand pounds single eleven's. They might have been; forty-nine hundred pounds, twelve hundred pounds single forty's, that might have been approximate; nineteen hundred pounds might have been approximate. Thirty-two hundred pounds.

Q. You mean in round numbers? A. I mean in round numbers.

By Mr. Stamler: Q. Now, Mr. North, at that time did you have an accurate inventory of the merchandise on hand? A. I wish you would explain what you mean by accurate, and I can answer that question.

Q. I mean by weight or measure or yards. That is exactly what I mean by it; or an accurate inventory. A. Down to the fine point, no.

Q. Did you at any time furnish the North Company with a statement of how many pounds of yarn you had on hand between June twenty-sixth and the first of September? A. No, sir.

By the Court: Q. Did you ever ask the defendants to complete the contracts with your customers? A. I never made such a demand on them, Judge. I was in conference with them on two or three occasions, and asked them the progress they were making. And I called on them the seventeenth of July, I think it was, at which time there was a payment due, and asked them why it was they hadn't taken over some merchandise to fill these orders, and at that time they stated they

would be ready in a few days to do so. I came up from the shore for that purpose. And some few days after I came up for the making of this delivery of six hundred and some odd dollars.

Q. When this contract was made in June, 1917, the goods that were to be delivered in the winter of that year; January, February, and March, that had already gone by? A. That had already gone by.

Q. There was only left the balance of the summer for the delivery of the other goods? A. (Witness nods head affirmatively). They had agreed—

Q. Was there any custom in the trade as to when goods shall be delivered, or is it entirely a matter of contract? A. Custom in the trade is this: in lightweight goods, of course, selling to the jobbing people the way I did in the last twenty-five years, in selling the jobbers of the country, of course, they had their requirements to have the lightweight goods in their possession in sufficient time to deliver it to the retail trade all over the country. And they are not dependent on me alone for the deliveries. They must get one style from me, one style from John Smith, and another from John Doe.

Q. People who had contracts with them to deliver the goods in the winter of 1917, had they the option after the winter had gone by to determine whether they would take them or not take them? A. I presume they did.

Q. That was the situation, then, in June, with reference to the winter goods? A. That is it.

Q. With reference to the lightweight goods, how much longer time was there for delivery of those under the contract? A. Lightweight goods?

Q. I mean in the custom and usage of the trade whether they would require then in 1917? A. Lightweight goods, June twenty-sixth was right in the height of their season, that was the time they needed their goods very badly.

Q. Up until what time could they have been delivered? A. Up until the first of September they could have been delivered, and the trade was all anxious for them at that time.

Q. So that the time for the delivery of the heavy goods had already expired at the time this June twenty-sixth contract was made? A. Yes, sir.

Q. And the time for the delivery of the light goods under your contract would expire the first of September? A. They had expired as well.

Q. They had expired as well? A. They had expired as well, because in the midseason there was a tremendous shortage, and they were crazy for them.

Q. In the summer they could have taken them? A. That's it. Of course, it was on a rising market, and the customers in those times never cancelled. They wanted the goods.

Q. For the things were going up. A. For the things were going up. They knew the price and they wanted them.

Q. I understood you to say you never made a demand upon the defendants to finish the goods? A. No, sir; I offered several times to turn over stock to them in hopes they would take them. They were very busy on other goods of their own; that took their time, I presume.

By Mr. Stamler: Q. Now, Mr. North, after you furnished Mr. Schwartz with this inventory you called at his place of business in the early part of July, did you not? A. I did.

Q. And at that time you took up the question of which contracts of lightweight should be filled promptly or not? A. No, sir; no such matter was taken up at that time.

Q. Did you, at any time, discuss the question as to whose contracts should be promptly filled or not? A. One contract at the time the contract was taken over—

By the Court: Q. Let me ask you another question: Have any of these customers since the first of September, 1917, demanded of you the delivery of their goods? A. Yes, sir; I have a suit on now.

Q. How many have demanded the delivery of their goods? A. I have seen several gentlemen in New York when down in December of last year, buyers from the large houses in the West, and they wanted to know how it was coming out, and when they would get their merchandise.

Q. Did you ever make any demand on North and Company after seeing those people? A. Not since September first. The controversy has come up since that time. I have received summons from a large concern in New York suing me for the non-delivery of these goods.

By Mr. Stamler: Q. Now, Mr. North, I show you a paper which contains a tabulation and ask you whether or not Mr. Schwartz showed you this tabulation as to how he is going to ship lightweight garments from your list? A. I never saw that before.

Q. You never saw that before? A. I never saw that before.

Q. Sure of that? A. Positive.

Schedule marked D-4*a* for identification.

Q. A little after June twenty-sixth, 1917 the North Company sent out a circular letter to all your customers, stating they would complete the contracts? A. I have seen several letters dated July ninth.

Mr. David: I do not see how this is cross-examination of this witness.

The Court: You introduced a letter—

A. Not this letter.

The Court: You introduced letters showing they sent out a number of letters to their customers.

Mr. David: I do not object if that is the purpose.

Q. Now, Mr. North, do you recall being at the office of the company on the sixteenth of July, or seventeenth of July, at the time when you received the check—at the time when you received a check from them for $1460.00? A. Yes, sir.

Q. That was on July seventeenth? A. That was on July seventeenth.

Q. I show you a series of correspondence and ask you whether or not those were shown to you by Mr. Schwartz?

The Court: The same as showed, both the same day?

Mr. Stamler: Yes, sir.

A. I never saw any of those letters.

Q. Never saw any of them? A. No, sir.

Mr. Stamler: I will mark this batch.

Six letters marked in evidence as Exhibit D-10.

Q. What did you do there on July seventeenth? A. I came there to collect money. One of their notes was due. I asked them at that time whether

they wanted to take over some merchandise, and they said no.

Mr. David: What? A. I asked them at that time whether they wanted to take over some merchandise, and they said no.

Q. Didn't Mr. Schwartz at that time tell you he is arranging with the various customers as to what amount they are each to get, and that he is making settlement with other customers?

The Court: As to the North contracts?

Q. Relating to the contracts? A. No, sir.

Q. Never talked to you about it? A. No, sir.

Q. Never? A. Never.

Q. Weren't you interested at the time? A. I was.

Q. Why didn't you talk to him about it? A. I had already asked them when they were to take over more merchandise, and they said in a few days. And I was in a hurry to catch a train, and naturally took the first train back to the shore.

Q. Didn't you at that time, or shortly after the making of the contract, state to them you would take up the questions of getting cancellations or procuring extensions or modification of the terms, with certain definite customers of yours? A. I never made any such remarks.

Q. Didn't you say you would take up the questions, with reference to procuring extensions or modifications from Hibben, Hollweg & Company? A. I never did.

Q. Do you know one Charles Fear (?), connected with that firm? A. I do.

Q. Didn't you, at one time, after the making of this contract of June twenty-sixth tell the North Company that you were personally acquainted

with Mr. Fear, that he was a personal friend of yours, and that they should leave the adjustment of this contract to you? A. I never did.

Q. Did you, after the making of the contract of June twenty-sixth, 1917, state to the company's officers you would take up the question of modification or cancellation of contracts with the Lindeke Company? A. I never did.

The Court: I would like to get this thing straightened out as we go along. I understand your claim is that the defendant company agreed to fill the North contracts, by this contract of June twenty-sixth, and that they thereafter sent out notices to the customers they would do it. You claim they failed to do that. Therefore, there was a breach of the contract. When do you claim it was their duty to fill the North contracts? The contracts having already expired, but having, apparently, been extended?

Mr. David: Under the contract it was their duty to take the merchandise from time to time.

The Court: Do you agree, gentlemen, that that is part of your obligation to take it? To take the goods?

Mr. Stamler: We were only to take the goods on the express condition we were to use them in the manufacture of the North orders. Otherwise we would not have had that reciprocal agreement, permitting Mr. North to cancel the contract if he so desired. This provides that Mr. North could have gone out and cancelled all contracts and we would never have been obliged to take the goods at all.

Mr. Cohn: In that contract of June twenty-sixth, the company has the option of taking this merchandise prior to September first. We never construed that to mean we were obligated to do it because that was the very purpose of making the extension. And that, we think the evidence will show, was to provide a period between June twenty-sixth and September first in which the parties could determine how much of the orders had to be filled. And that is why your Honor sees that covenant in the last agreement. (Reading).

But we never construed this contract to mean we were to fill these orders by September first, because we were sitting down on June twenty-sixth, first, to find the way to go about it.

The Court: Judge, assuming that you are right, that they were obliged to take the merchandise by September first, when do you claim they were obliged to deliver the goods to Mr. North's customers?

Mr. David: I say by September first.

The Court: Let us see.

Mr. David: I do not say it said they were to deliver the orders by September first.

The Court: That is what you did say.

Mr. David: I said it says in so many words they were obliged to fill the orders. And the time that they were to do it within was extended to September first.

The Court: Let us see where it says so.

Mr. David: "The company agrees to assume the liability of performing the afore-

said contract dated January third, 1917,'' and so forth.

The Court: When?

Mr. David: The first contract, as your Honor will remember, was between Schwartz and North, and they said they had nothing to do with Schwartz, and therefore the dispute arose, and this contract says they will fill the orders. They assumed the first contract this time in toto.

The Court: (Reads contract).

Mr. David: Now, the original contract, page three, (reading contract).

The Court: Then your idea is that since the contract of January required one to sell and the other to purchase the stock necessary to fill the North orders and that time being extended to September first, that the defendants had until September first to take the necessary merchandise that Mr. North had in order to make up the North orders?

Mr. David: Yes, sir.

The Court: Then, how long after that would they have in order to make them up?

Mr. David: I suppose that would have to be a reasonable time after September first to get the orders out. But they had to—at least substantially—they had to take all the merchandise by September first, and they had to show substantially they were filling the orders with the merchandise and they would have, I take it, a reasonable time after that to get the orders filled.

The Court: Then your claim is having

refused to take them altogether and refused to pay for them, that was the breach?

Mr. David: Not that alone. I say they took some of the goods and filled other orders with them. Their own orders.

The Court: Irrespective of that, when they refused to take the goods that were left—(ninety-eight per cent of what you agreed to sell them)—on September first, they put themselves beyond the ability of living up to their contract.

Mr. David: Yes, sir.

The Court: So it did not make any difference how much time remained on the contract, they had breached it themselves?

Mr. David: Yes, sir. And from the action of the parties during the time the contract was in force, I say they never intended to fill them.

The Court: All right. The difficulty in these things is that you have studied and read the contracts and know what they are and the Jury and I do not.

Mr. David: They are lengthy and complicated.

By Mr. Stamler: Q. Mr. North, you have stated on direct-examination, and I want to know whether it is correct or not, that you made up recently an inventory from your books showing the balance of the merchandise on hand? A. Yes, sir.

Q. When did you do that? A. I did that at the time we were taking out the goods on replevin.

Q. And the papers you read from and gave your figures are the papers you had made at that time? A. They are the way my books show.

Q. When did you do that? When did you make that statement you read from? A. This statement here?

Q. Yes, sir? A. That has been done recently.

Q. How recently? A. I think that was done about the same time I made up the figures for you in your interrogatories.

Q. After the suit was started? A. Yes, sir.

Q. After the suit was started. You say you have made up some statement or figures on the day when the goods were taken out? A. Yes, sir.

Q. Where are they? A. I have them with me.

Q. That says fourteen cases one quality goods and ten cases another? A. Yes, sir.

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

Q. It doesn't show how many pounds of yarn or how many pounds of Weber Peeler? A. Peeler?

Q. Peeler and light weight yarns and heavy weight yarns, at all, does it? A. Yes, sir, it does.

Q. Your statement of those shows that? A. The book that I have does.

Q. Let us see it. The book you show is a book which you used on the day when the goods were taken out of the store is that correct? A. Yes, sir. That is correct.

Q. The inventory that you made up recently, does that tally? A. I have not checked it back that way to find out whether it does tally.

Q. You haven't checked it up? A. I have checked the shipments off this book. Balance remains in storage.

Q. Do you know on September 1st, 1917 how much merchandise you had on hand in dollars and cents? A. My books will show that.

Q. Did you know on September first in dollars and cents how much merchandise you had on hand to be delivered to the North people? A. Approximately; yes, sir; I did.

Q. Accurately, did you know? A. I would like to know what you mean by the word "accurately."

Q. In dollars and cents? A. In dollars and cents? Yes, sir. Twenty-nine thousand, eight hundred and some odd dollars.

The Court: I understood you to say that was approximately? A. Yes, sir.

The Court: He wants to know accurately. A. I can't tell within a penny one way or the other.

Q. Can you tell within one hundred dollars? A. Yes, sir; I did.

Q. You did tell that day? A. Yes, sir.

Q. Did you take in consideration errors in marking the cases at that time? A. I certainly did. Yes, sir. If there was such errors.

Q. Wasn't there? A. No, sir; there was not.

Q. Didn't you at one time sell a case of goods, recently, containing one quality of goods which contained the other? A. That wasn't because the case was falsely marked.

Q. What was it? A. That was an error on my part because the case had marks on both ends.

Q. There was a mistake in that? A. Not a mistake. It was a mistake on my part.

Q. Didn't you testify heretofore on this particular subject? A. I did.

Q. Didn't you say that was a mistake made? A. On my part.

Q. On your part? A. Yes, sir; I did.

Q. And, therefore, one case of goods contained

—purported to contain a certain quality of goods, when, as a matter of fact, it didn't? A. I so answered the question.

Q. Was that true then? A. It was; yes, sir.

Q. Is it true now? In other words, is that statement correct today? A. Yes, sir.

Q. Therefore, have you opened all the other cases since you received that back? A. It wasn't necessary to open that case—

Q. I asked you did you? A. No, sir.

Q. How do you know there is no error in those cases? A. I know the correct markings are on one end of the case.

Q. There was a mistake in one case? A. There was correct markings.

Q. There was an error made? A. There was an error made in my shipping it.

Q. There was an error in marking it? A. No, sir; positively not.

Q. Now, up to the twenty-seventh of August, you and the North people were on good terms? Good friends? A. As far as it was possible to be; yes, sir.

Q. You had no difficulties with them of any kind? A. Difficulties since last January.

Q. I mean after June twenty-sixth up until the twenty-seventh of August? You had no difficulties with them? A. No, sir.

Q. Every time a note came due you came down and got your money? A. Once; yes, sir.

Q. Did they ever fail to pay any obligation? A. Not at all; no, sir.

Q. They always paid you just what was coming to you? A. Absolutely.

Q. During the month of July you say it was ex-

treme hot weather? A. Yes, sir.

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

Q. And you stayed in the country? A. I went there on the first of July; yes, sir.

Q. And came back on the thirteenth, did you not? A. Or thereabouts; yes, sir.

Q. When you came to the factory did you find the factory working in full force? A. I didn't go into the factory.

Q. Didn't you go through at all? A. Only to the storehouse, that was all.

Q. Didn't at that time Mr. Nathan Schwartz take up the question with you as to adjusting the various contracts so they could get busy and manufacture the goods? A. No, sir; he didn't.

Q. You were not interested? A. Yes, sir: I was interested.

Q. What did you do on your part to find out what they were doing? A. I asked them were they ready to take over the stock.

Q. What did Mr. Schwartz say? A. He said no, sir. They weren't.

Q. Did he say on account of the extreme heat he couldn't get the girls to work at that time? A. No, sir; he did not.

Q. That the plant was disorganized and dead and that he was getting ready to keep on working? A. No such remark made.

Q. Wasn't that why the goods were taken in that time, June seventeenth, to keep the plant working? A. June seventeenth?

Q. July seventeenth? A. There was some goods working—

Q. The object was to start the plant working and keep working and manufacturing your con-

tracts? A. I don't know whether the factory was shut down previous to that time,

Q. Were you inside of it? A. I was not. Only to pass through it. It was running then.

Q. On the seventeenth of July they bought six or seven hundred dollars worth of merchandise from you to make up their orders? A. I think that was the date they paid their note. I think it was three or four days after I came again.

Q. That is correct. You came on the nineteenth? A. Yes, sir.

Q. On the nineteenth of July you came up and delivered to them merchandise amounting to six hundred dollars? A. About one hundred dollars under what they agreed to take. Their contract called for seven hundred and fifty dollars, and they took six hundred and eighty-three dollars.

Q. $683.76? A. $683.76.

Q. And this is the check they paid it with? A. Yes, sir.

Q. Did they at that time discuss with you—

Check marked D-6 for identification.

Q. Did they, at that time, discuss with you what they are going to do with the merchandise they just bought from you? A. They didn't.

Q. Were you interested? A. I was.

Q. Did you find out? A. I didn't.

Q. Simply gave them the merchandise and cared nothing about it? A. My contract covered that entire point.

Q. And you relied everything on your contract? A. Absolutely.

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

Q. Now, Mr. North, as to this contract—you got your books showing the cost of merchandise do you? A. Cost of merchandise?

Q. Yes, sir? A. No, sir.

Q. I understood you to say on direct examination that your books show the cost of merchandise? A. The total quantity; yes, sir.

Q. And the total quantity, and how much per pound? A. Books never show that. That is our individual invoices.

Q. You stated that from your books you made up a statement showing that there was twenty-nine thousand and some odd hundred dollars worth of merchandise on hand? A. Yes, sir.

Q. Show me from your books how that was made up. And in addition thereto you stated you charged—in order to calculate the amount, you charged it at cost price? A. Mr. Adolph Schwartz took those prices himself.

Q. I am asking you didn't you state you charged it at cost price? A. Certainly, it was part of the contract.

Q. All right. Show me. Tell me how many pounds. What are you referring to? Heavy weight goods? A. You are asking for the total goods.

Q. How many pounds of heavyweight goods have you on hand?

The Court: Did you have on hand—

Q. Did you have on hand September first? A. I don't see how you can expect a ledger to show pounds.

By the Court: Q. I understood you to say, as Mr. Stamler does, that your books show what you stated. A. The amount of the total.

Q. Where does it show that? That is what he wants to know. A. It is right here, the amounts

charged through the journal. You can go through the journal.

By Mr. Stamler: Q. I want to know how many pounds? A. Any bookkeeper or auditor here can verify what is shown here. Of course in any amount of bookkeeping I have never known yet a set of books that will show pounds and prices because that is all generally taken off an invoice. An invoice is journalized into a journal.

Q. As a matter of fact you have no record showing the number of pounds of yarn you had on hand on September 1st, 1917, is that correct? A. Certainly I have.

Q. Tell me how many pounds? A. Certainly can't tell it by these books. I would require probably two or three weeks time to go through it.

The Court: You are apparently talking about the same thing. You claim it runs through all your books and would require somebody to go through the books in order to make it up? A. That is just it; yes, sir.

Q. Have you made up any such statement? A. I have never been asked to make up any such statement.

The Court: How did you get the twenty-nine thousand dollars? A. That shows in the lump sum.

The Court: Show it to him, to Mr. Stamler. A. I have. He wants pounds out of it. Here is eighty-six thousand dollars worth of merchandise received. Here is forty-nine thousand dollars that has been disbursed.

Q. Will you just give us an accurate statement, please? That is all yarns. A. No, sir; it is not

all yarns; it is materials going into the manufacture—

Q. I am talking about now; give me a statement of yarns that made up the amount? A. I never stated I had such an accurate statement.

Q. From what did you get the twenty-nine thousand dollar item? A. Why, from the merchandise that has been received, I told you in my preliminary questions there, that by deductions I arrived at my amount. You look it up, the questions you asked me, at your questions you asked me at your office.

By the Court: Q. You made a demand upon them for twenty-nine thousand dollars? A. Yes, sir.

Q. Which you say was the cost price? A. Yes, sir.

Q. As shown by your books? A. Yes, sir.

Q. What Mr. Stamler is trying to ascertain, so you may tell the jury, is where you find upon your books either the total figure of twenty-nine thousand dollars, or the items that make it up, so that he may see where it is. A. I will explain it just as easily as I possibly can. We buy goods from possibly one hundred different jobbers, manufacturers, spinners, pearl button manufacturers, lace manufacturers; and all of those goods are received: Harvey Chalmers and Sons, will invoice: one thousand cases pearl buttons, which would amount to sixty dollars. That is put down in the journal under "Merchandise Received," merchandise account. I will just refer to the debit, to James E. Mitchell Company, Wilson O. Bengel (?) Company, W. B. Paper Box Company, Spool Cotton Company.

Q. And you carry out the amounts of those invoices? A. I carry out the amounts of those invoices.

Q. Well, then? A. That is totalled at the end of the month, entire June receipts, or total and carried to a merchandise account.

Q. Yes? A. Sales Book that I have here shows the goods shipped, and these are shipped to all sections of the country. All over. Hersh Company.

Q. Different ones? A. Different ones. That is carried to the end of the month, at which time the merchandise account is credited for merchandise shipped out, and the difference between the debit and credit side—

Q. Shows what you have on hand? A. —(continued) less the profit, shows what we have on hand.

Q. How did you arrive at twenty-nine thousand dollars at that time, by taking your ledger? A. Yes, sir.

Q. And showing the difference there was on September first? A. That is it, exactly. Less profit on those goods, which gives $29,743.81.

By Mr. Stamler: Q. Is that an accurate statement? A. As near as it is possible to get.

The Court: That is, under your system? A. That is under my system of bookkeeping.

Q. As a matter of fact, suppose some of the goods were stolen by your employees, you would carry that as an asset on your books? A. Naturally.

Q. On some garments there is a great deal of waste, also? A. All the waste is figured in the cost of the goods.

Q. Sometimes labor costs more than at other times? A. No, sir; labor is on piece-work basis, which is uniform at all times.

Q. How about overhead? A. That is uniform at all times.

Q. Break in the machinery? Suppose a machine breaks and you have to put a new one in? A. Breaks?

Q. Yes, sir. Suppose a machine breaks and you have to put a new one in? You would have to charge that to expense? A. No, sir. That is the machinery account.

Q. That is taken out. It would have to be charged to the expense? A. A reduction of ten per cent per annum takes care of that.

Q. You figure that approximately? A. All manufacturers do. You cannot figure that accurately.

Q. Isn't it a fact that the proper way to determine an inventory is by actually taking one? A. Most assuredly.

Q. Did you have one at any time during the year 1917? Such an inventory? A. Not during 1917.

By the Court: Q. What objection was there on your part, if any, to taking an inventory so that both parties might know what they were paying for? A. There was no objection. I was ready at any time. I was never requested for an accurate inventory.

By Mr. Stamler: Q. On the thirty-first they wanted to take an inventory, didn't they? A. They wanted to take an account of what we had there.

Mr. David: On the thirty-first? A. On the first of September.

Q. Is that right? A. On the first of September.

Q. And Judge David said he wouldn't stand around and you would not stand around there waiting for them? A. For three or four days.

Q. How long would it have taken to take that inventory? A. I couldn't say.

Q. Would it take more than a day or two? A. I think it would.

Q. Didn't you think they were entitled, as reasonable people, to find out what they were going to pay for? A. They were familiar with the facts. They had been acquainted with that thing for eight months.

Q. Did they ever open the cases? A. They had access to that place for eight months.

Q. Did you ever permit them to go in there? A. Most surely. They took stuff out of it when I wasn't present and told me about it afterwards.

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

Q. I am talking about June 26th, 1917 to the first of September. Did you permit them to go into the stock room and take whatever they wanted? A. They had that privilege, and they did take some.

Q. They did take some? A. Yes, sir.

Q. There was some merchandise they couldn't use at all? A. I don't think so, except that small lot of mercerized webbing they returned, and I have allowed them for.

Q. Anything else? A. No, sir. It was all bought, and it was suitable for those orders.

Q. Everything else? A. Yes, sir.

Q. Isn't it a fact that they returned quite some items you could not use and you marked them down?

Mr. David: When?

Q. During any time of that transaction? A. Not since June twenty-sixth.

Q. Did you take out any of the merchandise from those cases from—did you take any of the merchandise out of those cases commencing the third of January until the first of September other than you furnished and supplied the North Company with? A. No, sir.

Q. Therefore, all the merchandise that was there on the third of January, and up to the first of September was the merchandise the North people were to take? A. Yes, sir.

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

Q. Less what they had taken before? A. Yes, sir. And merchandise that had come in and that I had paid for in order to aid them to finance their business.

Q. Was there any merchandise they could not use at all to finish your orders with? A. No, sir.

Q. None at all? A. No, sir.

Q. Wasn't there some silver gray webbing? A. That was all on order.

Q. That was all on order? A. Yes, sir.

Q. How about the laces? A. On order.

Q. In other words, you contend that all the laces in your place were necessary to fill the orders with your yarns? A. I do; yes, sir.

Q. Now, Mr. North, look at Exhibit D-2 for identification, and just tabulate—I will give you a pencil and paper—and tabulate for me the value

of the merchandise as per your statement, at prices mentioned in the contract. A. This looks as though it was all tabulated, on the back already.

Q. I want you to do that again. If you want the contract to aid you, you can. A. I prefer to have that and then I can compare it with that.

The Court: Do you understand what will be wanted? A. Yes, sir.

Adjourned until tomorrow morning.

February 5th, 1918, at 9:30 a. m.

Transcript of stenographer's notes of evidence, taken in the above entitled matter, before Hon. George S. Silzer, Circuit Court Judge, and a Jury, in the Union County Court House, Elizabeth, N. J., on the 6th day of February, 1918, at 9:30 a. m.

Appearances:

Abe J. David, Esq., For Herbert S. North, Ind. etc.

John J. Stamler, Esq.

Saul Cohn, Esq., For Joseph W. North & Son, Inc.

The Court: Do I understand the plaintiff rests?

Mr. David: No. Mr. North.

Mr. Stamler: Counsel for the plaintiff, or for Mr. North, Herbert S. North, Indi-

vidual, does not desire to amend his complaint in any respect. Is that correct?

Mr. David: We so state.

The Court: The way it strikes me it resolves itself into this: you claim a breach of the contract, first, for the non-taking of the goods, the merchandise the contract calls for; second, because of the clause you were to be saved harmless from liability.

Mr. David: That is all.

The Court: And the loss incident to the caring for and storage of the goods and replevining them.

Mr. David: Also because they used our goods to fill other than our orders, their own orders. And also, because they—

The Court: What damage do you get from that?

Mr. David: We claim a breach of the contract.

The Court: Yes, I understand, a breach of the contract.

Mr. David: And also because they failed and refused to deliver the shares of stock provided for under the contract.

The Court: That leads to this, for the breaches, what is your damage? In the first place, the measure of damages for failure to accept goods which you agreed to sell them, under our statute, is the difference between what they contracted to pay you and what you were able to get for the same goods in the open market. That is the measure, isn't it?

Mr. David: My contention, Your Honor,

is that the measure is the difference between the price we were to get for the goods and the prices that the customers would have to pay for those goods on the first of September.

The Court: What customers?

Mr. David: We were obligated to fill certain orders.

The Court: I am speaking about the merchandise now. There was an agreement; it divides itself into two parts. One, the failure to take certain merchandise that you agreed to sell them. And, under the statute, and under the old common law, failure to receive goods which are sold to you puts you to the following damage: namely, the difference between what you would have received for the goods if they had taken them, and what you were able to get for the goods from another place as a consequence of their not taking them.

And then, as to the other clause, dealing with the North contract, dealing with the North customers, that contract provides you are to be saved harmless from any liability, loss or damage. The first contract did not have the word "liability" in it, but the second contract has. So that it was the intention in June to protect Mr. North against liability. What is the liability? That is very easily ascertained in certain cases: If I agree to save a man harmless from liability upon the endorsement of a promissory note for one thousand dollars, and the maker fails to pay it,

then my liability at once attaches; and the moment the liability attaches, it does not matter whether I agreed to pay it or not, if I agreed to save you harmless from liability, I will have to immediately pay for it. But in that case there is some method of ascertaining what the liability is. Here, I understand, you have fifty or one hundred contracts outstanding with other people. Mr. North says "you are to save me harmless from liability. You so guaranteed." That is true. And since you have not done it, he would be allowed at least a nominal damage of six cents to establish his right until he can show he has had more loss. Now, Mr. North has a contract with Mr. Smith to send him two hundred cases of certain make of goods. Those cases have not been delivered. Mr. North is liable for his breach of the contract. To what extent is he liable? He is liable to the extent that there is a difference between the price that Mr. Smith agreed to pay Mr. North, and the expense to Mr. Smith for getting other goods in the open market. That establishes the liability on that particular claim. When you have hundreds of those claims, and have aggregated them and totalled them you know what the money liability of Mr. North is. But, until that does happen, can you recover anything except six cents?

Mr. David: Your Honor has outlined the exact situation. And I say it is about as simple as Your Honor has used with the

note, but it will take a little more time, and it has taken a little more time to gather the proof, but we are ready to prove it. I say we have to prove the price Mr. North agreed to deliver the goods and the price Mr. Smith had to pay for those goods in September first by reason of the failure of the defendant to fill the order.

The Court: That proof you are ready to make?

Mr. David: Yes, sir.

The Court: Now, then, on the question of the failure to receive the goods bought. Do you say the measure of damages is any other measure than provided by statute? The difference between what Mr. North received for the goods and what Mr. Schwartz was to pay?

Mr. David: No, I do not. Their contract was to take the goods and fill the orders.

The Court: And you are prepared to make that character of proof?

Mr. David: Yes, sir.

The Court: Gentlemen, what have you to say?

Mr. Stamler: I will let Mr. Cohn argue.

Mr. Cohn: In the first place, there is not anything in his complaint which seeks to recover damages for our failure to take the goods. I mean the raw material. That was never there.

The Court: That was to be subject of amendment the other day. And that was stricken out. And that you abandoned then. And doesn't that leave you to the

question simply to save you harmless from liability?

Mr. David: We say the only claim we make for damage more than nominal damage we sustained because they refused to take the goods and fill our orders and we are therefore liable to all of our customers for any damage that they sustained because we have been unable to have the orders filled by these people.

The Court: I understand the only claim you make is to be saved harmless from the liability under your contract.

Mr. David: Yes, sir.

The Court: Now, let us have your side of it, Mr. Cohn.

Mr. Cohn: Now, I think we have it boiled down a bit. It now comes to the question of the right of Mr. North at this time to recover damages under this contract of indemnity. Your Honor yesterday formed an idea that the case at bar, based on the contract of the case at bar, took these parties out of the operation of the rule in Miller vs. Freeze.

The Court: No, I would hardly put it that way. There is a distinction between where you save a man harmless from liability, and where you save him harmless from the consequences of his liability. The case of Miller vs. Freeze, is one of those cases where you save him harmless from the consequences of liability, namely, loss and damage. The other line of cases is that where a man is saved harmless from liability itself, irrespective of wheth-

er the damage is paid or not. That is the distinction.

Mr. Cohn: Yes, but the distinction does not arise from the mere presence or absence of the word "liability."

The Court: It has much to do with it.

Mr. Cohn: That is Your Honor's present notion. But it would seem clearly by reading from both these cases that the mere physical presence of the word itself does not establish the line of demarkation.

The Court: Don't you think, when one contract says "save him harmless from loss and damage," and the second contract puts in the word "liability," to "save him harmless from liability, loss, and damage," that it was put there for a reason?

Mr. Cohn: I do not think it was.

The Court: Is Mr. North obliged to permit himself to be sued, and go to that expense?

Mr. Cohn: I think so.

The Court: I do not understand so. Not where you agree to save him from liability. It is no different than if you agreed to save him harmless from liability on a note. And he would not be obliged to wait until he was sued before he paid it.

Mr. Cohn: The distinction is very positive. If the indemnitor says to his indemnitee, "I will pay a certain existing debt when it matures, and save you from liability if you do not pay it," then the in-

demnitee without paying the debt begin an action for the amount of the debt indemnified. But Your Honor will see in the case of Miller vs. Freeze and in the earlier case—

The Court: Zabriskie case.

Mr. Cohn: The Zabriskie case, the very condition of the bond was to save and keep harmless from certain existing debts and liability.

The Court: That is a different phase entirely. You saved him harmless from certain debts which are fixed. Here you saved him from the obligation to pay.

Mr. Cohn: This case, if anything, was stronger than our case.

The Court: How would you put it for a promissory note for one thousand dollars? "To save him harmless from the liability which may attach to the endorser of this note?"

Mr. Cohn: You might put it that way.

The Court: Couldn't you sue immediately without paying the note?

Mr. Cohn: You might in that case, yes.

The Court: What is the difference between that and the contract in the suit in which you say you will save him harmless from liability that may attach to him by reason of the failure to fill the orders?

Mr. Cohn: The difference of the law it tries to establish is the physical possibility of the indemnitee proving, in the event of a suit on a note, the existence of a debt which he will be obliged to pay.

The Court: No, the distinction is in one case whether he has to pay it, and in the other case you indemnify him against liability. In one case he has to pay before he sues, and in the other he may sue the moment the liability attaches. That is quite clear in my mind. How about the other part of it?

Mr. Cohn: The condition in our bond was we would save and keep harmless Mr. North from the liability which would accrue—

The Court: If these contracts were not filled.

Mr. Cohn: Liable for what?

The Court: For the damages resulting from the breach.

Mr. Cohn: That is where the line of demarkation exists; at that point. And it does not depend on the existence of the word "liability" in the contract so much as it does the ramification of the law that involves a certain existence of the debt at the time of the making of the contract. Because, as far as your Honor holds in this case there is an accrual of it.

The Court: He may have difficulty in proving that, but that does not prevent him trying to prove it. And if he does not prove that he gets six cents.

Mr. Cohn: Very good. But suppose he proves the difference in the price stated in the orders when he took them in 1915, and the price which these customers would be obliged to pay, your Honor would then be concerned with this proposition,

that he would not have any right to recover that from us. Because that is not the measure of damages under the law, and he is precluded. Because, even if he comes into this Court and shows that difference, that difference may not be the legal measure of damages against us. But, if there is a judicial ascertainment between Mr. North and those customers in a suit between them—

The Court: That is another question. That is a question of evidence; admission of evidence. We are now dealing with the question whether he has the right to maintain his action. Because, if he did not succeed in his proof, he gets six cents. It goes more to the question of evidence. In other words, I could not nonsuit him in either event, if he has the right to sue why then he simply has the right to his empty judgment. If he succeeds in making proper proof, he would be entitled to a substantial judgment.

Mr. Cohn: My argument is not so much with him regarding the question of proof. But the covenant in question precludes a recovery.

The Court: The distinction is if he was responsible or liable here he is entitled to be reimbursed for the liability. He can either sue at once and recover a nominal judgment or he may wait until he has the necessary proof and recover a substantial judgment. If he is premature that is his fault.

Mr. Cohn: Now, so far as the company is concerned, they have three claims for damages. The first claim arises under the refusal of North to furnish us with the raw material.

The Court: There isn't any doubt about the measure of damages in that case? The damages you are entitled to are the difference between the contract price and the market price. We agree on that.

Mr. Cohn: We agree on that.

The Court: You claim you are entitled to that difference whether you went into the market and bought or not?

Mr. Cohn: Yes, sir.

The Court: You certainly do not claim if you get the difference between the market price and the contract price you are entitled to profits?

Mr. Cohn: No, sir; because the difference between the market price and the contract price goes into the question of profits.

The Court: Certainly.

Mr. Cohn: I might say we have still another ground for complaint, in the third count. There is a count in the complaint which seeks to recover damages for our failure induced and caused by the defendant's contract to furnish these goods for the customers.

The Court: You could get what, as a matter of judgment?

Mr. Cohn: The difference between the price fixed in these orders and what the market value of the finished product was

then or on the date which the jury will find was a reasonable date on which we were to make delivery after September first, according to the custom of the business.

The Court: Suppose you had bought other goods, you would have had that profit.

Mr. Cohn: We will prove there was no market for buying these goods. These goods were all specially made up. We would be liable now to those customers for damages to them which will amount to the difference between the price they agreed to pay Mr. North and the price at which they could have bought the finished product.

The Court: You can not get that until they recover it against you.

Mr. Cohn: That is what this case of Lodge vs. Binsey, Law Journal, seeks to establish.

The Court: No, it does not seek to establish that at all.

Mr. Cohn: What is the difference here?

HERBERT S. NORTH, (resumed):

Cross-examination (continued) by Mr. Stamler:

Mr. Stamler: In view of the fact that counsel has not amended his complaint I move now to strike out the following questions and answers from the records:

"Q. Did you at any time between January third, 1917 and September first, 1917,

learn whether or not the company had filled any of your orders at a loss? A. I did.

"Q. From whom did you learn that? A. Both Mr. Nathan Schwartz and Mr. Adolph Schwartz."

The idea of this motion is that we objected at the time this evidence was offered on the ground that the question involved a period of time prior to the twenty-sixth of January, 1917.

The Court: Twenty-sixth of June.

Mr. Stamler: Twenty-sixth of June, 1917. And I ask now it be stricken off the record.

The Court: Was there an objection to it at the time?

Mr. Stamler: The question was asked and then counsel evidently thought it was limited from the third of January until the twenty-sixth of June, and then Judge David said no. This runs from the third of January. From January to September, and I said, oh, that is different. And the question was asked and no objection made to it.

The Court: You can not strike it out if you have made no objection.

Mr. Stamler: Yes, but may I refer to the records?

The Court: You may do that later.

Mr. Stamler: Your Honor has permitted me to reserve my right?

The Court: I will reserve your right a little longer. I will let you renew it at the end of Mr. North's examination.

Mr. Stamler: All right.

RE-DIRECT-EXAMINATION by Mr. David:

Q. Mr. North, you have been in the manufacturing business for how long? A. Twenty-five years.

Q. In this same line? A. Identically the same line.

Q. And are you familiar with the market price of yarns and webbing and the manufactured article at this time? A. I am; thoroughly.

Q. Have you kept in touch with the market since you sold out your business to the new concern? A. Continuously.

Q. And have you sold garments and yarns and webbing during that time?

The Court: During what time?

Q. Since you have been out of business? A. I haven't sold any of the finished garments but I have sold yarns and webbing and laces and all that.

Q. Have you kept in touch with the market as to the price of the finished article? A. I have.

Q. And are so familiar? A. And am so familiar.

Q. Are you familiar with the prices at which the finished article was to be delivered by you to your customers? A. I am.

Q. Have you a list of those orders and the prices at which they were to be delivered? A. I have.

Q. How many orders were there?

Mr. Stamler: I object. He has a written list.

The Court: I will allow that.

Q. Produce that list.

The Court: The list is attached to the agreement, isn't it?

Mr. Cohn: The list is attached to the contract.

Mr. Stamler: Then I have no objection. Are you referring to those papers?

Mr. David: I am asking him the list with the customers attached to the agreement, and I am now going to prove the price at which we were to sell the customers.

Mr. Stamler: I object to it. The contract speaks for itself. The contract determines it.

Mr. David: It does not, your Honor.

The Court: It states the parties; it does not state the amount.

Mr. David: It does not state the amount at all.

The Court: It states the number of cases.

Mr. Stamler: States the number of cases and the dozens.

The Court: Does it state the price?

Mr. Stamler: No.

Mr. David: I am asking him the price at which these goods were to be delivered; that does not appear on the contract. He made it up at the request of the other side.

The Court: I will allow that. I will allow him to state the prices.

Mr. Stamler: I know that, but he is going to refer to some paper we don't know anything about.

By the Court: Q. What are you looking at,

Mr. North? A. I am looking at a list taken from your order books of the quantities and the prices at which these goods were sold.

By Mr. Stamler: Q. When did you take that? A. In your office.

Q. Recently? A. Recently.

Q. And this was done for what purpose? A. To answer a question in our questions to you, submitted by our attorney.

Q. Which question? A. To produce the order books and allow us to take a copy of same.

(Answer repeated by the stenographer).

Q. Who told you that was so? A. I don't understand that question.

Q. Who told you that such demand was made by us?

Mr. David: You do not understand him.

Mr. Stamler: I did understand him very thoroughly.

The Court: What difference does that make? The question here is whether he has something he may use and I understand him to say—it does not make any difference what the circumstances were—that he has something he made up from the original order books, and he is going to state the price.

Mr. Stamler: He ought to take that from the order books.

Mr. David: I have demanded the production of the order books. Produce them.

Mr. Stamler: They are there.

The Court: Is this statement you have in your hand taken from those two books? A. Yes, sir; from those two books.

The Court: I will allow you to use it as a memorandum.

By Mr. David: Q. Now, Mr. North, referring to the order books in the possession of the company, will you tell me at what price the orders which were turned over to you—by you, to the company was to be delivered to the customers?

The Court: Don't the prices vary? A. I was just about to say that. The prices vary from eighty-five cents a dozen up as high as $6.75 a dozen.

Q. What is the total number of dozens?

The Court: That appears in the contract.

Mr. David: I would like to get it on the record and to the jury. It will only take a second.

A. I haven't this figured as the total number of dozens; I have it the total amount.

Q. Well, what is the total amount? A. That is also in various amounts; that is not totalled.

Q. Can you total it? A. I can.

Q. Will you do so? A. I can as readily total the quantity of dozens if you wish, or both.

Q. Both.

The Court: You may do that this noon.

Q. And are you familiar with the price of those finished garments, the market price of those finished garments on or about September first, 1917? A. I am.

Q. Was the market price of those finished garments on or about September first, 1917 greater or less than the market price at the time of the delivery of the orders?

Mr. Cohn: I object on these grounds, if your Honor please—

The Court: I will overrule your question.

Q. Was the market price greater or less on September first than the price at which the orders were taken?

Mr. Cohn: I object.

The Court: September first; is that the time?

Mr. David: That is the time of the breach, we claim, Your Honor.

The Court: No, but they had until September first to take the goods under the contract, and therefore they had within a reasonable time after that to manufacture them.

Mr. David: I have not confined myself to September first; I said about September first.

The Court: You said September first.

Mr. David: I meant to say on or about September first and I did, I think.

The Court: Even that, isn't it a question of reasonable time after that in which to manufacture them? And this witness, as an expert, may be able to know what a reasonable time would be.

Q. I understood you to say, Mr. North, that you are now—that you are familiar with the price at the present time of the market value of the finished article? A. I am.

Q. And have kept in touch with the market since the time you sold out your business? A. Continuously.

By the Court: Q. Mr. North, if these goods had been taken September first, what would have been a reasonable time for the making up of

those goods and the value of them? A. Running to full capacity, your Honor?

Q. No; the conditions these gentlemen had in their factory. A. Their conditions have changed considerably.

Q. I mean in September. A. I am not familiar with the conditions they are operating their factory at.

Q. On September first.

Mr. David: No, but on September first.

A. I have no way to go at that except as to the quantity they turned out of my merchandise in two months, which was about two and one-half per cent. If they continued to operate at that rate, it would take them several years to complete those orders.

By Mr. David: Q. No, but they at the same time turned out other goods, didn't they?

Mr. Cohn: We object.

A. They did.

Q. Are you familiar with the size of the plant? A. I am.

Q. And the number of machines? A. I am.

Q. And what such a plant could turn out? A. I am.

Q. Within what reasonable time after September first could those orders have been filled at that plant? A. Approximately five months.

Q. Now, Mr. North, was the market price for the delivery of these articles finished, as ordered from you and turned over to them, less on September first or greater, and from then down until the present time, than the price at which the goods were ordered?

Mr. Cohn: Object.

(Question repeated by the stenographer.)

The Court: Why?

Mr. Cohn: In the first place, if your Honor please, Mr. North has not qualified as an expert, He has testified that he has not, since September first, either bought or sold any finished product.

The Court: He says he has kept in touch with the product.

Mr. Cohn: Yes, but I contend that the mere keeping in touch as a matter of personal amusement or by reading does not make him an expert. The market value is susceptible of definite proof by persons engaged in that business who bought and sold merchandise similar to this. The mere reading of a sheet and the acquisition of the knowledge in that way does not make anyone an expert. That is one reason. The second reason is that this question is very involved because it takes into contemplation the condition of the market on September first down to date; and that is not evidential. It is misleading because any answer he may give could not begin to be responsive. It might refer to conditions on October first, or November first, or any date which the witness might pick out in his mind, and which the jury can not.

Thirdly, assuming the avowed intention of this evidence is to prove the difference between the contract price of the North orders and the market values, under the

theory your Honor has given us this morning; is that the purpose of this testimony?

Mr. David: Yes, surely.

Mr. Cohn: Assuming that is so, my contention is this proof of Mr. North is not evidential. That contention is subdivided a bit. First, the proof of market values in a case where there are a great number of orders in different sections of the country that is, for delivery in different sections of the country, the only evidential proof is of the price, market price, at or in the nearest market to the vendee. That point has been definitely settled in our Courts.

The Court: I have read that point.

Mr. Cohn: In addition to that, a broader contention, assuming the theory is that this evidence may go in under the idea that the expression of the word "liability" gives them the right to claim these damages, the only evidential proof can be proof taken—

The Court: After there is legal adjudication.

Mr. Cohn: After there is a legal adjudication. The following contention is the real broad one. That any statement this witness may make of the difference between the contract price and the market price for the purpose of fixing the amount of damages to which his vendees are entitled—because that is the fundamental gravamen of his position—can not come from him, because that proof is absolutely

susceptible of a capable ascertainment. The proof must come from those vendees who have purchased, who have sued. Testimony can be had definitely to show, through those vendees, what the market price was in their respective localities, what they were required to pay in the repurchase of the goods.

Now, further than that, the last contention is that before Mr. North can be permitted to testify as to this difference—I will call it that briefly—he must show his liability to his vendees, and as a great many of those orders were cancelled, he must show the status of these contractual relations—

The Court: He will, of course, have to take up each order.

Mr. Cohn: Before he can state the amount of damages which he will be entitled to, under your Honor's theory, which he bases upon the maximum of a delivery of all the orders, he must show the continuance of a contractual relationship between him and his vendees, which entitles him to that damage.

I might also say to you that we ought to be entitled now to a cross-examination as to the reasonable period, because in the testimony given heretofore Mr North has stated it would take six months in his opinion to deliver these orders.

Mr. David: Five months.

The Court: I will overrule this question.

Mr. David: I ask an exception.

The Court: Exception allowed.
Exception allowed, sealed accordingly.

Judge.

Q. Mr. North, were you ever requested by the defendant company to have modified or cancelled any of these orders?

Mr. Cohn: We object, if your Honor please, because it is irrelevant whether he was requested or not in view of an express covenant on his part to perform the services.

The Court: I will allow the question.
Mr. Cohn: Exception.
Exception allowed, sealed accordingly.

Judge.

A. I was not.

Q. Did you at their request or otherwise have cancelled or modified any of these orders? A. I didn't.

Q. So far as you know have any such orders been modified or cancelled? A. There has not.

By the Court: Q. So that you are under the same obligation with reference to these various contracts mentioned in the schedule as you were at the time the paper was signed? A. As far as I know.

Q. How do you mean "so far as you know?" A. I have never been informed otherwise.

Q. So far as any action on your part is concerned are you still obligated now the same as you were at the time this paper was signed? A. I am.

Mr. David: The contract says they shall jointly modify or cancel.

Mr. Cohn: We will adduce considerable testimony to show our jointly efforts were performed.

Q. Now, Mr. North, are you familiar with the market conditions in various sections of the country for the purchase of this class of merchandise? A. I am.

Q. And have you been familiar with those prices from the time you sold out this business to the present time? A. I have.

Q. And have you kept in touch with the market for the purpose of testifying in this suit? A. I have.

Q. And through what means and methods did you familiarize yourself with market conditions and prices? A. By coming in direct contact with the sales of similar articles through their New York agencies, where the trade—I might say ninety per cent of the underwear of the country is sold to the jobbers scattered all over these United States.

Q. Now, Mr. North, from the time of the making of the original contract on January third, 1917, until the present time, has the market for these finished products gone up or down?

Mr. Cohn: We object on the ground it is irrelevant as to what the market price was—

The Court: Yes. I will overrule that.

Mr. David: May I understand the ground of the objection?

The Court: Yes. It does not make any difference whether in February they went up or down. What difference does that make? Certain prices were fixed in June

and they were to be delivered within a reasonable time after September first. What difference does it make in February or March?

Mr. David: In that the last contract between the parties was dated June twenty-six, 1917.

The Court: That fixed the price, didn't it?

Mr. David: No. It fixed the price at which we were selling the raw and unfinished material to them.

The Court: The price was also fixed at which you were to sell to the North customers.

Mr. David: No, your Honor.

The Court: Yes. He had already had the contract with the North people.

Mr. David: That is what I want to show. That price was fixed previous to June twenty-six.

The Court: No, but the prices were already arranged with the customers.

Mr. David: That is what I want to show.

The Court: The question does not show that.

Mr. David: I say that the price to the customers—

The Court: When Mr. North sold to Mr. Smith of Dakota(?), he fixed a price for his goods, didn't he?

Mr. David: Yes, sir.

The Court: And that is settled between the parties?

Mr. David: Yes, sir.

The Court: Why disturb that?

Mr. David: I say they did not obligate themselves to fill these orders until January third, 1917.

The Court: Yes, but the price was fixed, wasn't it?

Mr. David: Yes.

The Court: Your question at the present time asks what the price was, for instance, in February of last year. What difference does that make?

Mr. David: I did not mean to ask such a question.

The Court: That is what you did ask.

(Question repeated by the stenographer.)

The Court: What difference does it make what the price was last year? What difference does that make?

Mr. David: I claim we are entitled to show—

The Court: Suppose he should know what it was in March, does that make any difference in this case?

Mr. David: No, it does not.

The Court: Do not let us waste any time then.

Mr. David: All right.

Q. At the time of the beginning of this suit was the market price of the finished articles to be delivered under these orders greater or less than at the time you made your contracts with your customers?

Mr. Cohn: We object on the ground stated.

The Court: Yes. I overrule the question.

I think the period is within a reasonable time after September first.

Q. Was the market price of these finished articles on, and within a reasonable time after September first, 1917, greater or less than the market price at which you had agreed to sell the articles?

Mr. Cohn: We object.

The Court: I will overrule that.

By the Court: Q. Was there any difference in the market price in September, October, November and December, 1917, or January and February of 1918? A. They have, your Honor, continuously advanced from week to week, from September first to the present time.

Mr. Cohn: I hesittate to object to your Honor's question.

The Court: It brings out the very point you make, namely, there was a fluctuating value, and you are entitled to know what the witness picks out.

Mr. Cohn: My objection goes to the fundamental right of this witness to testify on this market price. I can not see on any theory—

The Court: I think he is capable of doing it.

Mr. Cohn: Does your Honor hold him an expert because he claims to have been in touch with the market?

The Court: I think a man who has been in business as long as he has and is familiar with the practices of the trade and keeps and continues his learning and knowledge is as much of an expert as anybody you can get.

By Mr. David: Q. Can you tell me, Mr. North, at what percentage the market increased, over the price at which the goods were to be sold to the customers, each succeeding month from September first on?

Mr. Cohn: We object to that on the ground—

The Court: Question overruled.

Q. Can you tell me, Mr. North, at what percentage the market increased in the different localities in this country at which the goods were to be delivered?

Mr. Cohn: We object to that.

The Court: Question overruled.

Mr. David: Exception.

The Court: Exception allowed.

Exception allowed, sealed accordingly.

Judge.

Q. Can you tell me, Mr. North, how much more it would have cost to fill each one of these orders on September first and from then on until the present time—

Mr. Cohn: We object.

Q. (Continuing) —than the price at which the goods were to be delivered?

Mr. Cohn: We object.

The Court: I will allow you to answer that yes or no. Can you tell? A. Yes.

Q. Have you a schedule which you have made up so showing? A. I have.

Q. Will you refer to each order and tell me the amount?

The Court: Suppose you take the first one on

the list. What is the first one mentioned in the schedule?

Q. Schedule number one; heavy-weight orders, Blodgett, three hundred dozen.

The Court: Who?

Mr. David: Blodgett.

The Court: What is the price Blodgett was to buy them for? A. Your Honor, three hundred dozen going to Blodgett does not cover the situation.

By the Court: Q. Let us take one that does. A. None of these orders covers the situation; they give the total quantity.

Q. You mean you are not concerned by those at all? A. No. Pardon me. Those orders enumerated there only cover a total quantity that are due that particular customer.

Q. Was that quantity to be furnished by Schwartz? A. It was. But for numerous different styles of underwear.

The Court: Do you have to take each one of them?

Mr. David: Refer to the books.

Mr. Cohn: I think if Your Honor will settle the legal question of evidence involved, the general question, it may help a lot. Although I do not want Your Honor to anticipate any evidence unless you are willing to do so. My contention is, and I reiterate it, that this evidence is not legally admissible without showing in the case—not what this witness' opinion is, by mere keeping in touch with this situation as to what the market prices were in the southern locality—but direct evidence

must be taken by and through the vendees who have gone into the market for the purpose of purchasing, because they can fix the measure of damages to which they are entitled. Suppose Mr. North did keep in touch with the market—

The Court: Here is the way it looks to me; so you may have what you are after, as I understand it: if Mr. North knows and has the knowledge and takes up the contract with Smith to furnish one hundred dozen undershirts, we will say, and agrees to sell them to him for forty cents each, now, if he is sufficiently familiar and knows that in Chicago, where they are to be delivered February first, 1918, that the market there at that time was such that Mr. Smith would have paid sixty cents for them, then I am going to allow the jury to determine that his liability on that particular claim is the difference between what he should have delivered them to Smith in Chicago for on February first, and what Smith would have been able to buy them in the open market on that day for.

Mr. Cohn: My objection to the evidence is that this witness connot give legal evidence of what Smith could buy them for in the market.

The Court: He can if he knows the market.

Mr. Cohn: But the best evidence on that—

The Court: We do not have to have the best evidence on that question.

Mr. Cohn: We do not have to have the best evidence on that question; that is true.

The Court: If he knows what the market price is at this particular place of delivery at this time it is admissible. If he does not, it is not.

Mr. Cohn: But Your Honor permitting him by reason of the mere fact he states he is acquainted with the market, without ever having sold or purchased in that market, it seems to me it would be a very, very dangerous door to open.

The Court: Isn't it a fact that there are a thousand business men in New York to-day, and every day, will tell you in their particular lines exactly what the market price is on that particular day and for weeks, and yet for several weeks they might not have bought and sold a single thing because it might have been inadvantageous to buy.

Mr. Cohn: That is true.

The Court: Here is a man who was in the business for years, and he continues knowledge by keeping in touch with the trade, and the market. Who is better qualified than a man of that kind? I can tell what stocks are worth without buying or selling for six months. The stock broker keeps in touch with the market even though he may not buy or sell.

Mr. Cohn: In one case there is a definite—

The Court: There is also a definite way of finding out in other ways; trade papers, and journals, talking with business men and keeping in touch, one with the other. I assume that is what Mr. North is testifying to.

Mr. Cohn: I say we are entitled to the right of preliminary cross-examination.

The Court: Oh, yes.

Special CROSS-EXAMINATION by Mr. Cohn:

Q. Between September first and now you have testified that you did not purchase or sell any of the finished product for which orders were on your books, and assumed by the North Company; is that correct? A. That is correct.

Q. How many orders did they have, approximately speaking?

The Court: That does not go to his expert knowledge.

Q. What, in detail, have you done to familiarize yourself with the market? A. I have visited New York daily; I have seen the trade as they have come down from different sections of the country.

Q. Whom in particular? A. Do you wish me to mention the buyer's name?

Q. Yes? A. I have seen Mr. Warner, of Lindeke, Warner and Sons, of St. Paul, Minnesota.

Q. When? A. I have seen him twice.

Q. When last? A. Sometime in November

Q. Did you get your knowledge as to the market conditions—or did you base your knowledge of to-day's market conditions of the finished

product that was to go to St. Paul on your conversations with Mr. Warner, in November last? A. Only partially so.

Q. What else do you use? What other information did you use to say now to this jury that you know the market conditions to-day in St. Paul for the finished product that the customer in St. Paul was to get? A. I have seen other sources where I could derive such information.

Q. Where? What are those sources? A. I have come in contact with the selling agencies of various mills.

Mr. David: Of various what? A. Various mills. I would like to correct—

Q. You want to correct something? A. —(continuing) I would like to correct some misconception that is allowed to go out, that there is a difference in value in any particular locality in this country as regards value of ladies' and children's underwear, to the wholesale houses. The values of such merchandise is fixed.

The Court: In New York? A. Yes, sir; in New York.

Q. Where, in New York?

The Court: By the New York market, he means. A. The New York market. Ninety per cent of the buyers of the country come to New York for the purchase of underwear.

Q. Now, for the purpose of determining the reasonable time in which these orders had to be filled, will you tell us approximately how many cases of goods were required to be made up?

The Court: Are you through with him on the question of his expert knowledge?

Mr. Cohn: Yes, for a moment.

The Court: That is all you are cross-examining him on?

Mr. David: Am I not entitled to proceed then?

The Court: Yes.

Mr. Cohn: He has testified as an expert as to the time in which it would take to complete them. Wouldn't we have a right to preliminary cross-examination on that?

The Court: Yes.

(Question repeated by the stenographer.)

A. The tabulation I am to make of those orders taken from your order books will establish the fact.

Q. What do you think they were, approximately? A. Do wish me to guess?

Q. Yes? A. Probably six hundred cases.

Q. What was the approximate total amount which the customers were to pay for that? A. That tabulation is also—

Q. Suppose you guess at that, approximately? A. Possibly seventy-five thousand dollars.

Q. Wasn't it nearer one hundred thousand dollars? A. I can't guess any better than seventy-five.

Q. Did you, in the course of your experience, complete and deliver in any six months in your business career at that mill seventy-five thousand dollars worth of merchandise? A. I did.

Q. When? A. My books, in the past twenty-five years, will show several times.

Q. Did you do it in 1915? A. I can't recall whether I did or not.

Q. Did you do it in 1916? A. I can't recall.

Q. Isn't it a fact you never made up more than one hundred thousand dollars worth of goods in any one year? A. No, sir; it is not a fact.

Q. How many years out of the twenty-five did you make up more than one hundred thousand dollars worth of goods? A. I can't say.

Q. Did you do it in 1915? A. I can't say.

Q. Do your books show it? A. 1915?

Q. Yes, sir? A. I haven't my 1915 books here. My books will show.

Q. Have you the 1916? A. Yes, sir; I have.

Q. Will that book show whether you made up one hundred thousand dollars worth of goods in that particular year? A. I presume it will.

Q. Well, suppose you look at it and tell us. A. (Witness produces loose leaf ledger). I have here the records of the year 1915 which show I shipped from the mill $114,232.69.

Q. In 1916? A. From July fourteenth, 1916 to December thirty-first, 1916 I shipped $49,897.-31.

Q. Well, if you shipped fifty thousand dollars worth of goods in the half year in 1916, on what do you base your idea that these men could ship seventy-five thousand dollars worth of goods in six months from September first, 1917? A. From the fact that I was there alone.

The Court: Do not your people say it is six months?

Mr. Cohn: No; we say it is a year.

A. (Answer repeated by the stenographer.) And my successors have six or seven men to run the business.

Q. But outside of that—but the fact is that you fixed the six months period, not based on your

own experience as a merchant for twenty-five years, but on what you thought the capabilities of your successors were? A. Not entirely.

Q. Well, we want to get it all. Entirely. We want to know what you base it on. A. From the fact that yesterday, or the day before, when I gave testimony of six months time which it took to complete all of the orders you had, I am at present, when I say five months, taking into consideration that during the six months prior to June twenty-sixth they had filled a certain portion of those orders.

Q. We are relating now, Mr. North to the unfilled orders on September first, we want to know on what you base your expert opinion that those orders could have been filled in six months from that time, or five months from that time? A. I am guessing, as I told you before, on account of the fact that those orders have not been tabulated, that it will take five months to do it instead of six.

Q. And on what is that guess based? On your own experience? A. Naturally.

Q. On your own experience; can you show any period within which you have been able to manufacture seventy-five thousand dollars worth of merchandise in five months? A. I could show so if I had my books here; yes, sir.

Q. If you have them here? A. Yes, sir.

Q. In 1916 you could not have done it, could you? A. I might possibly have done so if I had been in business.

Q. Well, you did not do it in 1915 or 1916, did you? A. The years 1915, if I remember correctly—

Q. I do not want any explanation.

The Court: Did you do it in 1915 or '16?

Your Honor, there was certain conditions existing—

The Court: Did you do it? A. No, sir; I didn't.

Mr. Cohn: I submit to your Honor any testimony to be taken on the subject of price by this witness is inadmissible because he has not established, by his testimony, the reasonable period within which the defendant had a right to make these goods. That he must first, as the condition preceding the question as to the market value of this unfinished product, there must be first determined when the date of the delivery was to be.

By the Court: Q. Didn't you give some testimony the other day, in response to a question of mine, what was required by the trade in reference to those goods? A. I did.

Q. The time having expired; will you repeat what you said the other day with reference to the delivery, when it was to take place? When did the trade expect to get those goods under the contract? A. The jobbing trade of the country buy their goods nearly one year in advance of their requirements, for the simple fact that the goods have to travel from the manufacturing sources to their warehouses; and they have to accumulate styles from nearly every manufacturer in the country in order to supply the retail trade.

Q. What was it you said about the heavy weights were to be in the hands of your customers at what time? A. The heavyweight goods naturally have to be in the hands of their customers during the summer months; or the spring; so

they can deliver them over to the retail trade to have on their shelves before the cold weather comes in.

Q. When was the heavyweight orders called for under this contract to be delivered; in the spring and summer of 1918? A. The heavyweight orders, in the winter and early spring of 1917.

Q. When that went by, and you made your contract of June twenty-sixth, then what? Then when would the trade expect them? They did not get them in the spring and summer of 1917, and if they were still holding you to the contract, when would it be delivered, according to the custom of the trade? A. Immediately. So that they could get them to their customers before cold weather set in. That was during the months of July and August.

Q. That is the heavy wear? A. Yes, sir.

Q. What about the light? A. Light weight, owing to the tremendous scarcity of light weight underwear throughout the entire country, immediate delivery was demanded and promised on the lightweight as well.

RE-DIRECT-EXAMINATION (continued) by Mr. David:

Q. Now, Mr. North, will you tell me what the difference in price in the open market on each and every one of these orders was on or about the first of September, 1917? (Question repeated by the stenographer.)

The Court: What difference in price? Between the orders and the market on September first?

Q. Between the open market price on or about September first, 1917 and the price at which the goods were to be delivered?

Mr. Stamler: Suppose he answers yes or no.

The Court: He said each and every item. Repeat that question.

(Question repeated by the stenographer.)

The Court: This contract was dated June twenty-sixth.

Mr. David: Yes, sir.

The Court: Practically the first of July.

Mr. David: Yes, sir.

The Court: As I gather it from Mr. North, according to the capacity of the factory it would take five to six months to manufacture the goods. According to the custom of the trade the goods were to be delivered as quickly as possible; that is to say, practically immediate delivery. He says, at the first of September. But when the parties made this contract Mr. North, of course, knew that Mr. Schwartz could not deliver them the first of September, because the factory could not make them in that time. He says they could make them in six months and in that time the trade would have taken them and were entitled to them. Wouldn't the time then be the first of January? Rather than the first of September?

Mr. David: No, sir. I have never replied to any part of that discussion.

The Court: What date do you think measures the damages?

Mr. David: I thought your Honor addressed your remarks especially to when delivery had to be made?

The Court: Yes, sir.

Mr. David: In the first place, even if it were impossible to perform it would make no difference in the case; you are bound by that contract.

The Court: But the contract does not fix a particular time. If they said in the contract "We will deliver by the first of September," then, of course, they are bound by it, whether they could do it or not.

Mr. David: But, your Honor, some of those orders were over due.

The Court: They were all over due then.

Mr. David: Your Honor will bear in mind that altogether the breach has been confined to a period following June twenty-sixth, this suit is on the two contracts. They are both set up or referred to in the complaint. The first contract was made on January third, they would do this in a certain time, which, if I remember rightly, was sometime in July, 1917. And, on June twenty-sixth, that contract was made stronger, and was ratified again, but the time was set back to September first.

The Court: Let me see those contracts. That simply says he shall take the merchandise.

Mr. David: All such deliveries to be made six months from the date hereof.

The Court: Deliveries of merchandise.

Mr. David: Yes, sir. But it is not contempltated in this contract or in the other they will take those goods on the last day.

The contract was they will, from time to time—

The Court: Yes, but it says within six months.

Mr. David: Yes; that limits the time.

The Court: They could take one part one time and leave ninety per cent until the last.

Mr. David: Then they could never have filled the orders.

The Court: That is where you draw your contract and give them six months to do it. You say about the delivery of the merchandise, but not about the finished product, do you? Then the first contract does not fix the time in which they were to deliver the orders.

Mr. David: No. No contract says that. The contract says the time within which they shall take the merchandise; and it says they will take the merchandise from time to time for the purpose of filling our orders. That is the exact language of our contract.

The Court: I think you said two or two and one-half per cent had been taken. I think you said two and one-half per cent.

A. Delivered; yes, sir.

The Court: You knew you were to deliver to him, and he was to take by September first the balance of the raw material. And you knew you had a plant which had a capacity of finishing these goods within six months time, and the trade were obliged, or glad to take them

within that time. You knew when you made the contract in June, which extended the time for the delivery of the raw material until September first that the factory had a capacity to finish them in six months. You knew they could not have been finished at that time. Mr. North knows the capacity of the plant.

Mr. David: The contract provides they will get modifications or cancellations of the contracts.

The Court: If they could.

Mr. David: Yes. And they banked on whatever was to be done they could clean up on September first.

The Court: Where did they say that? All they say is they will take the raw material by September first.

Mr. David: No, sir, from time to time for the purpose of filling the orders.

The Court: All must be taken by September first. But they do not say they will take ten per cent now and ninety per cent on the last day. Suppose they had taken all they could take from time to time, they could not have finished it according to Mr. North until January; could they?

Mr. David: Yes, sir; if they had procured cancellation of several orders.

The Court: Yes, but that they can not control.

Mr. David: Your Honor, whether they can or cannot, cannot affect this contract that both parties were satisfied to make at this time.

The Court: Whether if they would take the material from time to time, and the last of it on September first, and that by doing that the best they could do was to finish it in five or six months?

Mr. David: No. That is not the exact situation.

The Court: Why not?

Mr. David: Because they were going to procure cancellations of certain orders.

The Court: What is the use talking about "going to procure them," if they could not? That was contingency; if they could, it would shorten the time. But I understand, as far as Mr. North knows, they did not secure any cancellation. And if they did not, the capacity of this mill was limited to the finishing of those orders on January first, wasn't it?

Mr. David: It may have taken them until January first to fill all those orders.

The Court: It must have. He says the mill required five months on all those orders.

Mr. David: That may be so.

The Court: Doesn't that make the time, in which they were to deliver the goods to the customers, January first? I am trying to fix a time. It is very important in this case, because I understand him to say the prices were going up every month.

Mr. David: I am willing to say that so far as the testimony goes to show—

The Court: You fixed the first of September. But it seems to me I could not

sustain that, because it could not have been the contemplation of the parties to do in two months what the mill could not do in six.

Mr. David: They are bound by two contracts. The first contract was dated January third, and they agreed to do certain things. On June twenty-sixth, the time was extended and we say the six months does not, even with the testimony of Mr. North—date from June twenty-sixth, but the entire contract must be taken into consideration. The two contracts are really one.

The Court: You have to treat them in a successive way. On June twenty-sixth a certain proportion of the goods had been used. Practically ninety-eight per cent of them had not been used. With that situation confronting them they made a new contract in which they said you must get this raw material out of the way by the first of September, and then, if the plant could finish them in six months, it must have been the contemplation of the parties they had six months to finish them; especially if that was the time the trade would take them. I think January first, or December twenty-sixth is the practical time, unless you can state some better period, I think if I made it September first, you could not sustain anything.

Mr. David: I will abide by Your Honor's judgment on that.

By Mr. David: Q. Will you state the difference

in the market price of these various orders on December twenty-sixth, 1917—

Mr. Stamler: I object to that.

Q. (Continuing). As compared with the prices under which you were to deliver the goods under the original orders?

Mr. Stamler: I object to that.

The Court: Why?

Mr. Stamler: There are two grounds of objections.

The Court: You mean with reference to the date?

Mr. Stamler: Yes, sir, December twenty-sixth, is an arbitrary date. This is six months.

The Court: And you contend, under this man's testimony five would be sufficient, but this takes you a month later.

Mr. Stamler: Under the contract we were obliged to assume the making of them. And on September fifteenth, to Mr. Blodgett, the first customer, merchandise—

The Court: Under your theory, he says you would not take it at all, so you could not have shipped him. He testified to that the other day.

Mr. Steamler: No, he testified he came in and demanded of us a greater sum of money for the merchandise than he should have. And we refused to give him the money he demanded. That is the evidence, he demanded $29,875.00, and that he made an error in that of $130.00, and he demand-

ed a greater sum of money, and therefore he took the goods back.

The Court: That is a jury question.

Mr. Stamler: Another reason for it is this: Your Honor must read the whole contract. The heavyweight contract provided Mr. North was to supply the merchandise in order to fill the orders. In order to determine that you must first determine how much merchandise Mr. North would be obliged to furnish and buy in the open market in order to have those goods manufactured before he came into Court to buy five thousand pounds, and he was and say I demand thus and thus. We were to buy the balance of it—

The Court: If there was not enough there.

Mr. Stamler: Yes, sir. Let us first determine that. Did he have sufficient material to make all these contracts? Did he have sufficient yarns there to make these contracts. If he did, then the question of damage would be proper.

The Court: I will allow the question.

Exception allowed, sealed accordingly.

Judge.

(Question repeated by the stenographer).

The Court: Take up each order. A. Your Honor, owing to the fact these different style goods bear the same relation as regards prices in the different parts of the country, I didn't provide each and every order separately. I took the total quantity from their order books of each particu-

lar style that bore the price and selling price and deducted the difference.

By the Court: Q. Take the first item of this schedule, Blodgett. What were you to sell Blodgett? A. May I look at their order book?

Q. Yes, certainly. A. Is that a heavy or light weight order?

Mr. Stamler: Heavyweight order, sir. According to your schedule.

By Mr. David: Q. Go right on to the next one. Did you go over the books of the company at Mr. Stamler's office a week or so ago? A. I did.

Q. Did you take from those books a statement of the different kinds of orders shown on the books? A. I did.

Q. Heavyweights, lightweights, and any other distinction in the trade? A. I did.

Q. And did you, from those books make up a tabulation of those orders? A. I did; yes, sir.

Q. Have you got it? A. I have it here.

Q. And did you, from those books, take the prices at which those different commodities were to be sold to the customers? A. I did.

Q. Under the orders? A. Yes, sir.

Q. And have you tabulated a price at which those same articles could be bought in the open market on or about December twenty-sixth? A. I have.

Q. 1917. Refreshing your memory, if necessary, from the tabulation that you made, will you tell us what different classes of articles were to be delivered to the customers as shown on the books of the company? A. In the heavyweight orders there was infant wrappers, vests, and pants, and union suits. In the lightweight orders there were

misses' vests, misses' union suits; ladies' vests and ladies' union suits.

Q. Can you tell me how many of each one was to be delivered? A. I can tell each and every style; the quantity of each and every style.

Q. Tell me each and every style, what quantity of each and every style as shown on the books of the company. A. There is a long list of different styles of goods.

Mr. Stamler: How many styles were there?

A. To enumerate each and every style will take some time.

Q. Have you it there? A. I have it there.

Q. Read it into the record.

Mr. Stamler: I object to it.

The Court: You mean the various styles? A. Yes.

Mr. Stamler: Yes; to read it into the record.

Q. I will ask you then, Mr. North, to take the books of the company.

The Court: You mean vests made up in different ways? A. Yes, sir.

Mr. David: Yes; in order to arrive at the prices we will show how many styles; how many of each style and at what price, as shown on the books of the company.

The Court: Then after you do that, what?

Mr. David: We will show how much it would have cost in the open market to deliver each and every one of those styles.

The Court: And make up your statement from that?

Mr. David: Yes, sir.

The Court: Let me ask you another thing. Take, for instance, with a lady's vest, say style A, you are giving us the price now as of December twenty-sixth? A. Yes, sir.

The Court: Was there any difference in the price, say in the month of September of that year, in certain style of ladies' vest? A. Between September first and January first on ladies' summer underwear, there was very little relative change for the simple fact that it was between seasons. Ladies' summer underwear is sold principally between the months of June and July.

By the Court: Q. On account of it being somewhat off season there was practically no difference? A. That is it, exactly.

Q. That refers to all the lightweight goods? A. That refers to all the lightweight goods.

Q. Was it in September, October, November and December that the heavyweight goods—A. Those prices for delivery during those months were made nearly one year previous, but at that particular time if a customer, on account of non-delivery, would go into the market, the market would be extremely high because it would be in the midst of a very busy season with the manufacturers.

Q. Would there be any difference in the price in September and October, for instance? A. September, and October, and November and December business would practically bear the opening price of the new year, which business is booked during the month of December and January.

Q. So that prices would be practically the same during those four months? A. Yes, sir.

The Court: That simplifies matters very much, too. Now, then, gentlemen, instead of

reading all these various styles he has on this statement, suppose you show what the statement contains, not mentioning the price for the present.

Mr. David: I would be willing to do this. I will offer in evidence their books.

The Court: It will be admitted.

Q. Are those the two books? A. Those are the two books.

Q. Will you please describe those two books.

The Court: What I understand is you are trying to offer in evidence a statement made up from the two books?

Mr. David: Yes, sir.

The Court: Instead of having the man go through the two books.

Mr. David: Yes, sir; that is the idea.

The Court: Let him show how he got that statement.

By the Court: Q. How did you make up that statement? A. I took—we will say style one hundred, which is an infant wrapper.

Q. Yes, sir? A. I went through their entire orders bearing that, which price, upon which they were called upon to deliver was eighty-five cents per dozen.

Q. Yes? A. That price had increased.

Q. The first column contains what? A. First column contains "style number."

Q. The first column contains style number. A. Next column contains "total advance." Next is "original price."

Q. Contract price? A. Contract price. Next column is "total sales" that would have amounted to.

Q. Total price? A. Total price.

Q. Total contract price? A. Total contract price. Next column would be "advanced price."

Q. That is, based upon the prices you have stated during these six months? A. That's it. Next would be "total sales price" after the new price, and the next would be the difference between the two prices.

Q. Difference between the contract price and what the goods could have been bought in the open market for during the months of September, October, and December, up to the month of January, 1918? A. That's it.

The Court: Why isn't that admissible?

Court adjourned till 1:30 p. m.

Afternoon session, 1:30 p. m.

HERBERT S. NORTH, (resumed):

Direct-examination (continued) by Mr. David:

Mr. Cohn: If your Honor please, wouldn't it be valuable for us to declare one general objection to this proffered testimony and have it all written out on the record so that we will know exactly all the grounds which we think your Honor should consider in determining this?

The Court: Suppose the Judge makes the offer of this statement as taken from the books.

Mr. Cohn: That is that I think.

The Court: The offer is before the Court.

Mr. Cohn: The objection of the defendant

to the offer of this statement, which I understand is the statement of the difference between the contract price at which the orders were taken by Mr. North originally, and the price which would duplicate the market value of that merchandise on September twenty-sixth, 1917.

The Court: September, October, November, and December.

Mr. Cohn: During the months of September, October, November, and December, 1917, up to December twenty-sixth, 1917, is objected to on the following grounds: First, that the action was instituted, as appears from the transcript of the pleadings, on September twenty-sixth, 1917, and that any damages which the plaintiff may have a right to recover must be damages which would accrue prior to the institution of the suit. And, therefore, evidence as to damages which accrued subsequent to the institution of the suit would not be admissible or relevant in this issue. Second, that under the contracts, the cause of action as set out in count three of the plaintiff's complaint (on which count the present offer of evidence is made) does not accrue until the plaintiff has paid to the customers damages arising from his liability to them for the non-fulfilment of orders. Third, that the plaintiff is disqualified as an expert in establishing a six months period within which the defendants were to manufacture the merchandise and fill the orders for these reasons:

(A) That the only basis on which his ex-

pert knowledge rests is his own experience in his own business. And that he has adduced testimony showing that on that experience he could not have manufactured the unfilled orders amounting to at least seventy-five thousand dollars within the period stated by him.

The Court: Objection overruled, and exception allowed.

Exception allowed, sealed accordingly.

Judge.

Mr. Cohn: I might also say, if your Honor will permit me to add this:

Fourth, that under the contract the plaintiff was obligated to purchase a certain quantity of raw material for the fulfilment of these orders.

The Court: If it was necessary.

Mr. Cohn: If the raw material was requisite. And this further cause which was in my mind which I think is very paramount, that the plaintiff is not entitled to recover damages under the third count, without proof of the continuation of the legal relationship between him and the customers which would entitle the customers to hold him liable in damages.

The Court: I understood him to say that there had been no change in that relationship. I will overrule the objection and allow an exception.

Exception allowed, and sealed accordingly.

Judge.

Mr. David: I now offer in evidence—

The Court: The statement you have offered, will you give the jury and me some idea of what the result of it was?

Mr. David: I now offer in evidence sheet number one, two, and three, being the tabulation as taken from the books of the company, as testified to by the witness.

Three sheets entered in evidence and marked Exhibit P-25.

By Mr. David: Q. Now, Mr. North, from this tabulation will you tell us the amount, the aggregate amount as shown on the books of the orders to be delivered, and the aggregate amount that it would have taken to fill those orders in the open market, on the dates about which you have been asked?

Mr. Cohn: Objected to on the ground stated.

(Question repeated by the stenographer).

The Court: I will allow it; and exception allowed.

Exception allowed; sealed accordingly.

Judge.

A. The total number of dozen on the spring order book—

By the Court: Q. The Jury and I certainly can not carry that; can you give us the amount it would cost you to fill the contracts according to the contract price, and what it would cost to fill it in the open market, so that we may have the difference between, which I understand is the amount of your liability? A. $58,180.60.

Q. What does that represent? A. That represents the difference between the price as it ap-

pears on their order books, and what that would have cost my customers in the open market to have replaced the same.

Q. Now then, give us the contract price. A. Total contract price of the spring orders $74,374.64, and of the heavy $31,832.87.

By Mr. David: Q. What is the total? A. $96,-207.51.

Q. Now then give us the amount to buy them in the open market? A. A total of both kinds $164,388.11.

Q. Mr. North, were you ever invited to attend a stockholders' meeting of the defendant company? A. I was not.

Q. Were you ever invited to attend a directors' meeting of the defendant company? A. I wasn't.

Q. Did you ever attend a stockholders' meeting of the defendant company. A. I didn't.

Q. Did you ever attend a directors' meeting of the defendant company? A. I didn't.

Q. You were asked under cross-examination, on Monday, with reference to an actual inventory of the stock you had on hand from time to time?

(Question repeated by the stenographer).

Q. Did you have in your books an actual inventory of the merchandise on hand at the time of your first contract, and at the time of the second contract with this company? A. I took an accurate inventory July first, 1916.

Q. Is that inventory in your books? A. It is.

Q. Did the defendant and its officers see those books? A. They have had these books in their possession.

Q. Prior to the time of the signing of the contract.

Mr. Cohn: I ask that the last answer be stricken out as not being responsive.

The Court: I will allow it to stand.

Q. And did they, as a matter of fact, go over those books with you before the contract was signed?

Mr. Cohn: I object as leading.

The Court: I will allow it.

A. They did.

Mr. Cohn: Your Honor will permit me an exception?

The Court: Yes.

Q. Have you those books here? A. I have.

Q. Produce them. What is this book? A. That is my stockbook.

Q. What do you mean by your stock book? A. Book on which a record was made of all inventories taken in past years.

Q. Who, if anybody, connected with the defendant company—to whom did you show this book? A. This book was shown to their auditors. Mr. Adolph Schwartz had that book in his possession several times; his checkmarks appear in the book.

Q. Did Mr. Adolph Schwartz make any checkmarks in this book? A. Yes, sir; he did.

Mr. David: We offer this in evidence.

Mr. Cohn: We object on the ground—

The Court: What is the purpose of this, Judge?

Mr. David: To show they were acquainted with, and had an actual inventory of the merchandise on hand.

Mr. Stamler: As of July first, 1916. How is that binding on us? Mr. North testified to that.

Mr. David: We can not go into the contents of the book until it goes in evidence.

The Court: No, but the testimony is as of 1916, isn't it?

Q. Does this book show what was taken out, and what was there in 1917? A. The book shows the actual inventory taken June twenty-sixth or July first, 1917; my other books will show deductions.

Q. The other books will show what was taken out.

The Court: After you prove the others, offer them all together.

Q. What other books have you, Mr. North? A. We have the ledger.

Q. And what does this ledger show? A. This shows the total amount and the deductions.

Q. That is, the stock was taken out from the date of your last inventory until the time you turned over the business to Schwartz and the company? A. And the additions; yes, sir.

Q. Was this book shown to the Messrs. Schwartz? A. That book was in the safe until after the Messrs. Schwartz took possession of the premisses. Their auditors had full access to that book.

Q. Was the contents of that book explained to them? A. It was.

Q. And a statement made as to the amount of stock that still remained on hand? A. Yes, sir.

Q. By you? A. By me.

Q. To whom? A. By the auditors to the gentlemen who were interested to buy.

Q. Who? A. Mr. Nathan Schwartz, Mr. Adolph Schwartz and Mr. Louis Schwartz and all of them.

Mr. David: I now offer both books in evidence.

Mr. Cohn: We object.

The Court: Why?

Mr. Cohn: Because it does not appear that this book was ever shown to the defendant or any of its officers. The testimony is it was in their possession.

The Court: It was.

By the Court: Q. Was it shown to them? A. Yes, sir.

Q. What about this additional book; what is the testimony about that? Did you show that when they had that in their possession? A. Yes, sir. Those had the deductions from the original stock of June twenty-sixth to July first.

Q. What knowledge had the other side? A. They knew the quantity of stock I had on hand by the fact I explained the situation to them.

Q. Did they have the book? Or did they go over the book at any time? A. This is, of course, my ledger, I can't say positively whether they went over the books, but it was shown to the auditors, when they were there. And they were there that day and I showed it to them.

The Court: I will admit it.

Mr. David: The stock book is marked.

Mr. Cohn: Exception.

The Court: Exception allowed.

Exception allowed, sealed accordingly.

Judge.

Stock book entered in evidence and marked Exhibit P-26.

Ledger entered in evidence and marked Exhibit P-27.

By Mr. David: Q. Does your stock book show

an actual inventory of the merchandise on hand in June, 1916? A. With the same deductions by the ledger; yes, sir.

Q. And does it show your inventory in 1915? A. It does.

Q. And do the ledger and stock book show the merchandise on hand at the time they took over the business? A. It does.

Mr. David: Cross-examine.

RE-CROSS-EXAMINATION by Mr. Cohn:

Q. How long have you had this ledger? A. That has been a ledger that has been in use by the concern of which I was head about five years previous to January first, 1917.

Q. That ledger was in the safe at the time you turned over the business? A. It was there the day they came to take over the business. And when they asked me to remove all my things from the safe so they could put their own in, it was taken away on that day.

Q. You took it away in January when you closed the contract with them? A. I did.

Q. Did you make up any statement of the merchandise that was then on hand in the storehouse? A. Such a statement appears in these books.

Q. Did you make it up? A. For whom?

Q. Did you make one up? A. Either I or my bookkeeper attended to those—

Q. Just answer the question. Did you make one up? A. I don't understand your question.

Mr. Cohn: Read it, Mr. Stenographer.

(Question repeated by the stenographer as follows): Did you make up any statement of the mer-

chandise that was then on hand in the storehouse? A. It is such a broad question.

The Court: Did you make up an inventory? That, I understand, is the question. A. When?

Q. At any time? A. Yes.

Q. When? A. June twenty-sixth, 1916.

Q. Was that inventory—Oh! 1916! Did you show that inventory to them? A. I showed that inventory, as I have so stated, to their auditors.

Q. Where is that inventory? A. In this stock book offered in evidence.

Q. When you say "their auditors," do you mean theirs and yours, or theirs? A. Not mine; no, sir. Theirs.

Q. Didn't you pay the auditors? A. No, sir; I didn't.

Q. Didn't you pay one-half of the expenses of making up this audit? A. I didn't.

Q. Did you ever see these audits? A. Not until the present time.

Q. Not until the present time? A. No, sir.

Q. Didn't you discuss the question of the auditors' charge with Mr. Black and tell him it was excessive? A. I think Mr. Black told me when he came there that he expected to have an audit made of the books and asked my permission to have it done. And I told him it was perfectly agreeable to me because I had nothing whatever to hide.

Q. I don't want to know that. I asked you if you did not tell Mr. Black the auditors' charge was excessive, but you would pay one-half of it anyway? Did you or did you not tell him that? A. No, sir; I didn't tell him that.

Q. Did you pay one-half of it? A. I didn't.

Q. Was the question of the inventory of the merchandise taken up by you specially with them, or do you state that the only knowledge they had was because the books were in their possession? A. They never asked me at all about the inventory during the time preceding the taking over of the business.

Q. And the only basis you have for your statement that they had an inventory was because these books were in the safe up to the time they took over the business? A. I don't remember stating that they had the inventory.

(Question repeated by the stenographer.)

The Court: He says he does not remember stating they had it.

Q. And the only basis for your statement that they knew what merchandise you had on hand is because your books were in the safe up to the time the business was taken over? A. And I knew their auditors were familiar with the fact.

(Answer repeated by the stenographer.)

Q. When was this statement made up, Mr. North? A. Prior to June twenty-sixth.

Q. Of what year? A. 1917.

Q. When was it made up? A. I can't say.

Q. What is your best recollection on the subject? A. It would be a guess at random. I can't say.

Q. What is your guess? A. Sometime during the month of March possibly.

Q. And did you make this statement up from your books? A. No, sir.

Q. Could you have made an accurate statement up from your books at any time up to September first, 1917? A. Yes, sir; I could.

Q. Just how would you have made that? A.

I would have taken my inventory. I would have deducted the quantity shipped from that. I would add it to the other side, all merchandise received, which would have given me the accurate inventory.

Q. Would you have considered the profit in that inventory? A. I would.

Q. And in considering the profit don't you make your inventory inaccurate? A. Not necessarily so.

Q. Don't you make, as a part of that inventory, the profit, the overhead that goes into the manufacture of the finished product? A. I wouldn't have figured that way.

Q. Don't you in making up such a statement in that way, figure in your overhead? A. As I say I wouldn't make it up that way.

Q. You didn't make any statement of any kind except this, Mr. North, did you? A. I wasn't called upon to do so.

Q. I didn't ask you that. I asked you whether you made any statement except this? A. No, sir.

Q. How did you make this up? A. I was asked for it.

Q. By whom? A. Mr. Nathan Schwartz or Mr. Adolph—

Q. Did he ask you for an accurate inventory? A. He didn't.

Q. What did he ask you for? A. He asked me if I could give him a list of the yarns that I had in the storehouse. I told him I could and went out in the storehouse with one of his employees and made up such a list.

Q. Is this accurate? A. It is not.

Q. Did he say to you he wanted a statement of what the actual conditions were with relation to the amount of merchandise you had? A. He didn't.

Q. What did he ask you for? A. I stated what he asked me for.

Q. State it again. A. He asked me for a list of the yarns and supplies I had in the storehouse.

Q. All supplies? A. Not necessarily all supplies; he didn't state it that way.

Q. And this is what you gave him? A. And that is what I gave him and was thoroughly satisfactory to him at the time.

Q. Did he say so? A. I asked him if that was what he wanted and he said yes.

Q. And is this the statement from which you computed the amount of the value of this merchandise? A. It is not.

Q. So that this was not an accurate inventory? A. It positively was not. It is marked "approximate."

Q. You stated in your direct-examination that the value of the merchandise as you figured it in your bill was at cost? A. Yes, sir.

Q. And in that way you arrived at this figure of $29,875.00? A. Yes, sir.

Q. Under the contract of June twenty-sixth, was this merchandise to be purchased at cost by the North Company or was it at your cost—or was it to be purchased according to the price specified in that contract? A. I think the wording of the contract says "as specified."

Q. Did you make—in making that bill up, did you make it up on the basis of the quantity of merchandise you had on hand computed accord-

ing to the prices that are attached to this contract of June twenty-sixth? A. With one or two exceptions.

Q. Well, are those prices attached to this June contract lower or higher than the cost of this raw material to you? A. Some of them are lower and others are actual cost.

Q. None of them are higher? A. No, sir; absolutely not.

Q. So that if you made up a statement of twenty-nine thousand dollars on the basis of the cost to you, you would have made a demand for more money than this contract called for? A. Not at all. That was taken into consideration in rendering that bill.

Q. How did you do it? How did you make up this statement of $29,875.00?

The Court: I do not assume they want you to go over each item. They apparently want the method. A. I took the debit side of my merchandise account.

The Court: Isn't that what you explained the other day? A. I explained it. And, apparently, they are not satisfied with my explanation.

Q. In making that computation you charge these people the costs to you? A. I beg pardon. I took my books as from June twenty-sixth down to the present time. Naturally the last six months of 1916 I made a profit on my business. The difference of it I deducted in order to help these gentlemen out, from my cost price down to twenty-two cents a pound for material that cost me thirty-one. I deducted from my profit. I had to. I took a list I have—

Q. I am not interested in that. A. I am explaining the situation.

The Court: That is how he made it up.

A. And that is how I made it up.

Q. I want to know, Mr. North, whether if you had gone through the simple process of taking this contract of June twenty-sixth which has a statement of the merchandise—the kinds of merchandise that were in the storehouse, and if you had gone to the storehouse and actually made an accurate inventory of everything that was there, and computed it according to the prices fixed in this contract, whether that computation would have amounted to more or less than $29,875.00? A. It might have been one way or the other, a few dollars.

Q. Have you made up a statement to show, on that basis, what it would amount to? A. I have not.

Q. Well, can you make it up? A. Yes, I certainly can.

Q. And can you have it here tomorrow morning? A. No, sir; I cannot.

By the Court: Q. Isn't that the matter you said it would not go over one hundred or one hundred and fifty dollars? A. Yes, sir.

The Court: You have gone into that the other day.

Mr. Cohn: I want to show the only basis, if your Honor please, upon which this computation can be made. Not by a process of subtraction and addition in his books, because that was all precluded by the contract. We have a definite price fixed here. I want to show what this merchandise amounts to based on the—

The Court: Definite price?

Mr. Cohn: (Continuing) definite price.

By the Court: Q. What was it, Mr. North, do you know? A. I haven't figured that way to find out.

By the Court: Q. Well, is there any way of finding out? You may know how many goods there are, and the prices figured in the contract. By a mere process of multiplication you ought to be able to arrive at it. A. I don't think I exactly understand what they are trying to get at.

Q. We are not trying to get at anything. We are trying to find out what was the value of this merchandise on September first, 1917, fixed according to the contract? A. I have already rendered a bill and statement showing exactly.

Q. We want to know now with reference to that bill how that was made up? A. I have explained that.

By the Court: Q. Do you mean, if you took the goods you had in the place and multiplied them by the prices you had in this contract you would reach the same result reached by your method? A. Identically; either one way or the other.

Mr. Cohn: I know his method. I am trying to show his method is not at all accurate.

Q. In other words, the way you arrived at it was to take your old stockbook and add all the material you had on hand and that which you produced, and take off that sold, and take into consideration your net profits; and after all that you arrived at the value of the material you still had on hand? A. That is the way I did it; yes, sir.

Q. In arriving at the net profit, under your way of doing it, you take into consideration the application of a certain quantity of merchandise by yourself in the manufacture of goods, between June, 1916, and January, 1917; is that so? (Question repeated by the stenographer.) A. I did.

Q. And you went on the assumption that it took a certain quantity of goods to make a certain quantity of orders? A. That is it; exactly.

Q. Was that a definite accurate assumption? A. Absolutely.

Q. Do you mean to say that in manufacturing fifty thousand dollars' worth of merchandise you can tell to one pound or one hundred dollars the exact quantity you used? A. Yes, sir; you can.

Q. How can you do it? A. Because the goods are accurately weighed at the beginning to get the absolute cost before being sold.

Q. Would you know definitely what the wastage was? A. The waste is all figured into the goods.

Q. Where is it figured in? A. At the time that goes in the product.

Q. So that the way you get at it was by the process of figuring out your general notion as to the quantity of merchandise it took to fill any particular order, making certain definite allowance one way or the other for wastage, for excess quantity of goods used, and arrived at it by a net profit arrangement? A. I did not arrive at it that way at all. That isn't in accordance with the way I explained that.

Q. Mr. North, in figuring the quantity of your goods you arrived at it by making a definite allowance for wastage to begin with, did you not? A. Two per cent waste.

Q. That did not mean there was only a two per cent waste more or less in making these goods; it meant that was your allowance for wastage? A. That allowance was always over sufficient.

Q. I didn't ask you that. I asked you whether in making a two per cent allowance for wastage you made it because you knew there was an actual wastage of two per cent or because you made a general business allowance of two per cent? A. Because I knew there was an actual wastage of two per cent.

Q. How do you know that? A. By experience for the past twenty-five years.

Q. The whole thing was based upon experience and guess work, was it not? A. No guess work at all.

Q. Why couldn't you have taken a definite, accurate inventory of this merchandise? A. I was never asked for it.

Q. Why couldn't you have taken it? A. I could have done so.

Q. Couldn't you have gone to these people, when they sent for you on August twenty-seventh, and given them a complete and accurate statement based on the actual merchandise in that warehouse, figured under the cost of the June contract? A. I could have done so.

Q. You could have done so? A. I could.

Q. And when they offered to take an inventory on September first you could have taken it? A. I certainly could.

Q. Why didn't you take it? A. Because they said it would take three or four days and we were not there for that purpose. The contract expired at twelve o'clock noon, and they had two hours time.

Q. They asked you to take it on August thirty-first, did they not? A. No, sir; they didn't.

Q. What was the conversation on August thirty-first? A. Judge David and I went down to the factory on the assumption they were ready to take over the stock. Mr. Nathan Schwartz said—

Q. Let me just ask you—

Mr. David: Wait a minute—

Mr. Cohn: I withdraw the question.

Q. Let me ask you whether in that conversation of August thirty-first, 1917, the Schwartzs didn't offer themselves ready to take an inventory? A. They did.

Mr. David: What date?

Stenographer: August thirty-first, 1917.

A. No. I beg pardon. That was September first. Not on August thirty-first.

Q. Tabulating this approximate inventory that you gave them, can you give the jury and the Court any idea of the value of the merchandise, fixed according to the contract, shown in this statement? A. I can.

Q. Would you mind, Mr. North, if it won't take too long, tabulating these items separately? A. I have them all tabulated here separately. Shall I read them off?

Q. No. If you say this paper is a tabulation of the items. Let me see that, please. A. I copied that paper.

Q. This statement, exclusive of the laces and trimmings, amounted to how much? A. Approximate value $18,112.66.

Q. That wasn't approximate value. A. According to your slip there.

Q. That was the value on this slip of merchandise? A. It is approximate on your slip of paper.

Q. That is not what I asked you. That was the value of this quantity of merchandise? A. Less the laces, trimmings, threads, silk tops—

Q. And adding laces, trimmings, and the threads and the silk tops, it would have been twenty-three thousand dollars? A. That is right.

Q. And from that you deduct the $680 worth that was taken before September first? A. Yes, sir.

Q. So that in round figures you had approximately, according to this inventory, twenty-two and a half thousand dollars worth of goods in the storehouse? A. Approximately; yes, sir.

Q. And you were asking them for over six thousand dollars more than what you knew to be the value of the merchandise according to the only inventory you furnished them? Just answer that question yes or no. A. That does not constitute an inventory of the stock in the storehouse.

Q. This question is not unfair to you? A. It is.

Q. Read the question then. A. Absolutely unfair.

Q. If it is we do not want you to answer it. A. And I refuse to answer it.

(Question repeated by the stenographer).

The Court: Answer it yes or no. A. No.

Q. Let us see where we are.

(Question and answer repeated by the stenographer).

Q. Why not? A. Because the bill that I rendered to Joseph W. North and sons, Incorporated, and handed to Mr. Nathan Schwartz was a bill for all the merchandise in the storehouse, and not an approximate amount as you have there.

Q. I realize that. A. You didn't ask it that way.

Q. But the bill as you rendered it was six thousand dollars more of money than what the approximated inventory came to— A. Yes, sir.

Q. (continuing)—according to the contract. And this approximated inventory was the only inventory these people had gotten from you up to the time—

The Court: Up to September first, 1917? A. That was all they asked for.

Q. Now you include in your twenty-nine thousand dollars roughly speaking, the value of all the laces and silk tops? A. I did.

Q. According to the contract, these people were to get from you only such merchandise as were suitable for the orders? A. That is correct.

Q. Did the orders that you had on your books when you turned the business over to them require silk tops? A. They did.

Q. Well, can you mention any order which was on the books which required silk tops? A. Yes, sir; Carl Gutman and Company.

Q. What particular order was it? A. It is in the order book right here.

Q. Who else? A. I think Burnhammer Dry Goods Company.

Q. Can you tell by looking at the order book? A. I can. (Witness looks through order book). No, sir; I am mistaken.

Q. Mistaken on Carl Gutman? A. I don't know. I haven't looked that up. (Witness continues to look through order book). There were several loose leaves of Carl Gutmann's order. Do you know what became of them?

Q. Do you mean now that all the orders are not on the order book? A. They are not; no, sir.

Mr. Stamler: Were they in that book at the time you examined that in my office? A. I don't remember that they were, Mr. Stamler. No, sir; I don't.

Q. Will you take this contract, and by looking at the list of orders on this June contract, will you tell us whether there are any orders on this contract that are not on the books? A. Yes, sir; there are. A. W. Porter; J. B. Hershfeld. Neither one appear on this book.

Q. The looseleaf orders were the orders that were not on the books? A. Yes, sir.

Q. But you are referring to the Gutman's orders? A. I am also referring to some loose leaves of Carl Gutman and Company.

Q. We will come to those at some other time. I know about those. What I am trying to find out about is this: a few minutes ago you said Mr. Gutman's orders required silk tops; I ask you whether the total orders from Carl Gutman are in those books? A. I say there was one or two slips missing evidently. Carl Gutman & Company ordered some silk tops and they are not here.

Q. Don't you keep all your orders on the order book? A. They were not entered at the time. There was a loose leaf in here, yellow slip in here. And what has become of that?

Q. Do these orders that are specified in the contract, do any of those orders require silk tops? A. One order of Carl Gutman.

Q. What was the quantity of silk tops it required? A. About sixty dozen. Two thirty-dozen cases, if I remember.

Q. Sixty dozen? A. Yes, sir.

Q. How much is that in dollars and cents? A. About two hundred and fifty dollars.

Q. That was the only silk top required—only quantity of silk tops required to fill all the orders on this contract? A. That is right.

Q. What is the quantity of silk tops in the storehouse on September first, 1916? A. Sixty dozen.

Q. No more? A. No more.

Q. Have you sold them, any of them? A. No, sir; I have not.

Q. Are they still in the storehouse? A. Yes, sir.

Q. There is no more than sixty dozen? A. There might be one or two-twelfths; that is all.

Q. With regard to the laces, which of the orders on the June contract required the use of lace? A. All of them.

Q. Have you the orders there? A. I have.

Q. What is the percentage of lace requirements against any order, say one hundred dollars worth of underwear requiring lace? A. About ninety percent.

Q. I do not think you quite understand me. Manufacturing one hundred dollars worth of underwear, requiring lace to do so, what is the relative percentage of the value of the lace against the value of one hundred dollars worth of merchandise? A. That is very hard question to say. I have never figured it out in percentages that way. We generally figure a certain amount of lace to each dozen garments.

Q. What is the relative percentage? A. It all depends on the garment itself. Vest, union suit—

Q. Take any piece you want and tell us what. A. Take a union suit sells for three sixty-two and a half, there is generally a bottom lace goes on that that costs some place between fifty and sixty cents a dozen. There is a lace goes in the neck and arm hole costs in the neighborhood of

eight to twelve cents. And there is a ribbon goes in the arm hole costs eight cents. That is about seventy-five to ninety cents per dozen for a garment that sells at $3.62½.

Q. Have you your calculation book here? A. The calculation book I left with Mr. Schwartz. I think it has been put in evidence. Here it is.

Q. Show us the calculation on an order of underwear requiring laces on your book. Show us what relative calculation you made for laces. A. Here is a calculation I will pick out at the top price. 1916 K., it is a tight knee; cuff knee; silk lace around the neck of this garment costs sixty cents; ribbon costs thirty-five cents. And that is on a garment, that is 1916, which I have directly under this I have here—

Mr. David: A dozen? A. A dozen. The same as above with the lace knee added. Cost of the lace, fifty cents. Operation of sewing it on, eight cents.

Mr. David: When you use eight or fifty cents, you mean a dozen? A. This is a dozen.

Q. Did you have any orders on this book for this quality or style of goods? A. Yes, sir.

Q. Whose order? I mean did you have any unfilled orders? A. I would have to go through the order book to find out what orders have been filled and what haven't been filled.

Q. You do not remember offhand you had no unfilled orders requiring the use of lace? A. All the orders unfilled required the use of lace; yes, sir. With very few exceptions.

Q. Did the quantity of lace you had on September first represent more or less than what was necessary for the filling of the unfilled orders? A.

I think a little less from the fact that some of the laces were never delivered.

Q. And weren't these laces an accumulation of merchandise that you had gotten from year to year? A. Positively not.

Q. How long before January, 1917, when you turned the business over had you purchased the oldest of these laces? A. About June of 1916.

Q. So that all of these laces were purchased within a period six months prior to the turning over of the business? A. Within the seasonable period; yes, sir.

Q. Where is that tabulated statement you had a moment ago, based upon the approximate inventory?

Tabulation marked D-7 for identification.

tion).

Q. Will you look at the statement of the business done by you during the period shown and tell us whether that is substantially right? A. That is something I couldn't do.

Q. I am asking you to look at this for the purpose of telling us whether the auditor's figures, showing the gross amount of the business done by you over a five year period, were correct; were approximately correct?

Mr. David: If your Honor please, I have not done any objecting, and I want to object to this question because it seems to me to be so far out of the case, I am compelled to object. They are asking the witness whether a statement made by auditors he knows nothing about—

The Court: He will state that if he does not know.

Mr. David: (continuing)—whether or not that is correct.

The Court: This is testing him on the capacity of the plant.

A. How the auditors arrived at the conclusions—

Mr. Cohn: I do not want a speech.

The Court: He is entitled to answer.

Mr. Cohn: He is saying how the—I am only asking him whether the figures stated on that sheet are substantially correct—showing a period of five years, is substantially correct as to the quantities made.

The Court: Do you know? A. I don't.

Q. Do you know whether that is approximately correct? A. I can't say.

Q. Have you books that will show that? A. I can't say. I do not know how the auditor arrived at those figures; whether he got them out of the books or out of his head.

Q. Weren't you present when that audit was made? A. Yes, sir; but I didn't bother him.

Q. Weren't you present? A. Yes, sir.

Q. Didn't you assist him? A. No, sir; except to hand him the books as he asked for them.

Q. And you know nothing about that statement? A. No, sir.

Q. The first time you ever saw it? A. Yes, sir; absolutely.

Q. And you don't know, for instance, whether when the auditor states that for the period of twelve months between June twenty-fifth, 1915 and June twenty-eighth, 1916, your total business was one hundred and fourteen thousand dollars; you do not know whether that is substantially right? A. That sounds like the figure quoted you here less than an hour or so ago.

Q. That is right? A. Evidently. I can't positively say.

Q. And you do not know whether the figure for the twelve months from July twentieth, 1914 to June twenty-fifth, 1915, ninety thousand dollars; whether that is substantially correct? A. I don't. No, sir.

Q. You can't remember that? A. I don't; no, sir.

Q. Is there any way you can find out? A. I presume so, by looking up my books.

Q. And definitely be able to tell the gross amount of your sales during that period, if you look at your books? A. If the books are in existence that far back.

Q. Are they in existence? A. I can't say.

Q. Were they in existence at the time you turned the business over to the Schwartzs? A. I presume they were. If the auditors got that out of my books they must have gotten them somewhere.

Q. With relation to the period from December fifth, 1912 to December thirty-first, 1913—thirteen months—you do not know whether the figure of one hundred and sixteen thousand dollars approximately was correct? A. I do not; no, sir.

Q. And you do not know whether for that period of thirteen months, from October first, 1911 to December fifth, 1912,—thirteen months, the figure one hundred and five thousand dollars was approximately correct? A. I don't; no, sir.

Q. You know now there was ninety-six thousand dollars of unfilled orders on June twenty-sixth, 1917, when you made this contract? A. Yes, sir.

Q. Now, do you still want the testimony to stand that it would take five months to fill these orders?

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A. I don't know how they have been operating their plant. I can't say.

Q. That is not what I asked you.

The Court: Is that the capacity of this plant, he means? A. Capacity of the plant when it was running to full operation I think they could get it out.

Q. You think so? A. I think so.

Q. Did you ever make one hundred and eighty thousand dollars worth of goods in ten months? A. No; I can't say that I ever did.

Q. Did you ever make one hundred and eighty thousand dollars worth of goods in one year? A. I can't even say I ever did that.

Q. Did you ever make one hundred and fifty thousand dollars worth in any year since 1911 or '12? A. I don't remember.

Q. What do you think? What is your best recollection? A. I think I have come very close to it; yes, I do.

Q. That would be the very top-notch figure, wouldn't it? A. I wouldn't even say that.

Q. 1916 was a year which was a pressing year for merchandise. And isn't it your recollection you did as much in 1916 as you did in any other year in your business? A. No, sir; I don't think so.

Q. Well, can you think up in your minds any year in your business or any period in your business when there was a greater demand for merchandise or your plant was running to better capacity than in the year 1916? A. Yes, several years.

Q. When? A. During the McKinley administration we were running twenty-four hours a day.

Q. I do not mean that. A. That is in my career.

Q. I mean from 1911 or '12 down. A. That is a

different matter. We had hard times since then, until the war began.

Q. Well, since the war began have you ever done it? Have you ever had a better year than 1916? A. I think the war started about that time.

Q. I mean 1914. A. That is only over a period of two years. 1914 there was stagnation over the entire country; ninety percent of the mills were shut down absolutely. That is no criterion whatever.

Q. Is 1915 a criterion? A. No, sir; it is not.

Q. Is 1916 a criterion? A. Times were beginning to better, but it was difficult getting the merchandise.

Q. That is not a criterion? A. No, sir.

Q. You do not consider your plant ran to full capacity in 1916? A. No, sir; I do not.

Q. Now, on the basis it would take months—is it six months or five? A. We will let you have it six months if you wish.

Q. (continued)—to make seventy-five thousand dollars worth of goods. How much in your opinion—how long a time in your opinion would it have taken to make ninety-six thousand dollars worth of goods? A. Well, it is a question whether the ninety-six thousand dollars could not have been turned out in the same time with proper management. That all depends upon the management of the plant.

Q. Could you have done it? A. I don't know whether I could or not, single handed. If I had that amount of business—if I had that amount of business in six months and had to do it I could get it out.

Q. You managed this mill for twenty-five years or participated in its management? A. Only the

past five years I was alone since my father died. I had the selling, buying, and everything to contend with since that time.

Q. You knew this was a new business to these people? A. Absolutely new. And I volunteered my services to stay with them six months to manage it.

Q. You did stay with them two and one-half months? A. Yes, sir.

Q. You managed the plant? A. No, sir; they wouldn't let me.

Q. Didn't you assist in the managing of the plant? A. Not in the slightest. Every suggestion I made, they went contrary.

Q. You still desire to have the Court and Jury to understand it would take six months and no longer to make this ninety-six thousand dollars worth of merchandise? A. I think so.

Q. And if you had had the management of the plant between June 26th, 1917 and the period of six months subsequent thereto you could have made this ninety-six thousand dollars worth of merchandise? A. If you will allow me I will put it a different way. If I had the complete management of that plant from January third to July first.

Q. That is not what I am asking you. A. That is the six months they had to turn this merchandise out.

Q. That is not in the case now. What we are interested in is to have you tell the jury under oath that you could from June twenty-sixth, in a period of six months have made the ninety-six thousand dollars worth of merchandise? A. Not in that plant; no, sir.

Q. Not in that plant? A. No, sir. Not due though, however, to the fact of the plant, but of its organization.

Q. Would the plant have been able to do it under your organization? A. Yes, sir.

Q. But you have been unable to point out to us a period of six months in which you made that much merchandise? A. As I told you, to go back to the McKinley administration; yes, sir.

Q. On the twenty-four hour basis? A. Yes, sir; nothing to prevent that.

Q. Could you operate this plant in 1916 on a twenty-four hour basis with the labor conditions that existed? A. Probably; I can't say.

Q. Could you do that in 1917, keeping in mind the fact there is a labor law? A. Certainly, nothing to prevent working two sets of hands.

Q. How many hours a day, on the shifts? A. Present law in New Jersey, I think, allows sixty hours.

Q. And operating two shifts sixty hours a week could you make ninety-six thousand dollars worth of goods in five months? A. Yes, sir.

Q. What is the limit you set, or the time you set, taking into consideration the capacity of the plant, the fact these people were in a new business, the raw material conditions, and labor conditions, what is the time limit you set for the manufacture of these orders? A. They had the raw material right on hand. No trouble there.

Q. That raw material was not sufficient to make up all these orders, was it? A. It would have gone a long way toward it.

Q. It would have gone a long way toward it, but it wouldn't have gone all ways? A. Possibly, no.

Q. And taking that into consideration, the difference in the raw material they had to buy, the labor conditions, the fact they were managing this plant as a new enterprise, what is the fair time you would say in which they could turn out ninety-six thousand dollars worth of orders? A. This plant was not a new enterprise when they took it over; it was a going concern.

Q. We realize that. Take into consideration how long a time would it have taken? How long a time do you allow, taking all this into consideration, for the manufacturing of these orders, for the filling of these orders? A. Possibly a couple of months or more.

Q. Does that mean eight months? A. I think they could have shipped all of those goods within eight months.

Q. Would that be a fair and reasonable time, taking into consideration labor conditions, the fact they did not have all the material they needed for the manufacture of these orders, and the fact that they were managing this enterprise as a new enterprise to them? A. I don't know what labor conditions they have been up against in the past year. I have been out of that branch of business.

Q. You have a familiarity with the trade? A. You see by reading in the papers, and such things as that weren't authenticated; how could I gain any such information?

Q. Didn't you gain it from your visits to New York daily, and talking with the trade, what the conditions were? A. There is no manufacturing plant in New York.

Q. You do not know? A. Not about New Jersey conditions.

Q. You do not know about New Jersey conditions? A. Not as far as the labor was concerned.

Q. Didn't you know that labor conditions in 1916 were not satisfactory? A. I can't say that I did.

Q. Didn't you have trouble with your labor? A. Very little.

Q. Didn't you have a shortage of help? A. On some operations, possibly, yes.

Q. Didn't that condition continue right along, and get worse? A. Oh, it got worse and then got better, and then got worse and then better. Just depended—

Q. Now, taking that all into consideration, Mr. North, do you really mean that eight months was the fair and reasonable period? A. Yes, sir; I do.

Q. Mr. North, have you any tabulated statement at that time?

The Court: Would the prices in the market be more at eight months than they were at six? A. Yes, sir; they were, your Honor.

Q. Have you made up a statement of the merchandise that you actually had on hand September first? (Question repeatel by the stenographer.) A. I had not made up such a statement.

Q. Is there any way in which you can tell accurately what merchandise there was in the storehouse on September first? A. By taking an inventory.

Q. Have you taken one? A. I have not.

Q. You have sold a great deal of this merchandise since September first, last? A. I have.

Q. What you have sold, Mr. North, did the prices involved in those sales exceed the amount of the contract prices? A. In some cases; some cases is a loss.

Q. The sum total of it is, Mr. North, that the prices you received in the total aggregate for the merchandise you have sold out of this entire quantity that was on hand September first they have involved a considerable net gain to you? (Question repeated by the stenographer.) A. I wouldn't say considerable. Just depends on what you mean.

Q. In round figures what was it? A. About ten per cent.

The Court: What was it in dollars and cents? A. It is hard to say what the profit was in dollars and cents on the amount of merchandise that I sold. Because some was sold at a loss and some was sold at actual cost and some was sold at a profit. I haven't figured up the actual profit I made on the merchandise. When I sell the entire merchandise I had at that time, I feel, owing to the fact I have some merchandise on hand I will have to sell at a considerable loss, that if I break even and get back the actual amount, I will be satisfied.

Mr. Cohn: I ask that be stricken out from the record. The last two statements.

The Court: Yes. The last will be stricken out as not responsive.

Q. You sold some merchandise to Paulson Linkroum and Company? A. I did.

Q. Worth Street, New York. What was the quantity? A. I would have to refer to my books to find out.

Q. Please do that.

Mr. Stamler: Have you made up a statement of that tabulation for me? A. I think I did. Merchandise disposed of since September first. Total weights less—

The Court: Total amount? A. No. That was in my salesbook.

By Mr. David: Q. Have you made up a statement there of all the stock you sold? A. Yes, sir.

Q. And the amount you got? A. Yes, sir.

Q. And the expenses incident to selling it? A. Yes, sir.

Mr. David: Do you want that? A. We gave them all that. Gave them all what they are asking now. They have it in writing.

Mr. Cohn: No. You gave a statement, generally speaking, and said that you sold Paulson Linkroum thirteen cases of carded peeler, one eleven's at thirty-seven and a half cents. A. Yes, sir.

By Mr. Cohn: Q. What we would like to know how many pounds that was. A. Have you the date there, Mr. Cohn?

Q. No, I haven't the date. A. Paulson Linkroum, September twenty-eighth, net ten days; 4494 pounds of single eleven's carded.

Mr. David: I would suggest that if counsel are to examine Mr. North in any other phase of the case that those books will be turned over tonight to the other side so that they may copy out of them anything they want in addition to what they have got.

The Court: What do you say?

Mr. Cohn: It might be better, if your Honor please, to have Mr. North make up

a detailed statement showing the quantities he sold to these various persons, prices at which he sold them.

The Court: Let me understand. Have you made up a statement of what you have received on the sale of the goods? A. Yes, sir; I have.

Mr. David: They have got that.

The Court: And the expenses of selling them? A. Yes, sir; complete.

The Court: What else does your statement contain? A. That is all. Total sales, less debits. One case returned owing to the fact that it did not contain what it was supposed to contain. Replevin expenses with the debit gives the total.

By the Court: And that is made up from your books? A. That is made up from my books.

Q. If you have the books, can't you check up that? If it checks up as he has it you need not waste any time on the detail. You can easily make that, can't you? A. I will gladly do so.

By Mr. Cohn: Q. Showing the name and address of each purchaser, and pounds and yards and the prices which you got? A. I will be glad to do so.

Q. Will you also make up a tabulation, Mr. North, showing the sum which that same quantity of merchandise would have come to if figured according to the contract?

The Court: The difference will show what you have made or lost.

A. If my attorney permits me to do so, I will.

Mr. David: I recommend it.

Q. Mr. North, in the period between June 26, 1917 and September 1st, 1917, what effort did you

make to procure cancellations or diminutions of the orders that were on the books? A. I answered that same question the other day.

The Court: He answered that question the other day; he said he never did.

A. I answered that question on Monday.

Q. During this period didn't you have consultations with Messrs. Schwartz with relation to what they were doing? A. No, sir.

Q. Didn't you know that a general letter had been sent out to the customers? A. Not until after it was sent. I answered that question Monday.

Q. Not until after it was sent? Didn't you know during this period between June 26th, 1917, and September 1st that they had sent out letters to the trade? A. I did.

Q. And didn't you know in this period what the general attitude of the trade was in relation to these unfilled orders? A. I didn't.

Q. Didn't you see any of the correspondence? A. I didn't.

Q. Did you ever ask to see it? A. I didn't know any correspondence had been made except after it had been done.

Q. I don't want to know when you found it out as a fact, I want to know whether you found it out in this period? A. I didn't know any answers had been received by them, if that is what you mean.

Q. Didn't you ever ask them what they were doing in relation to these orders? A. I only saw them twice during that period.

Q. Did you ask them on those occasions? A. No, sir; I did not.

Q. Why not? A. Because they sent for me to come up, and paid a note some of their individuals owed me. They also sent for me to come up to take over supposedly seven hundred and fifty dollars worth of stock. Instead of that they took $683.60 worth.

Q. At that time you say nothing was said in regard to the work they were doing to procure cancellations of orders? A. Nothing at all.

Q. And decrease of orders? A. I did not.

Q. A general decrease of the quantity of orders which they were to fill? A. They said nothing to me and I said nothing to them.

Q. Weren't you interested? A. I certainly was.

Q. Why didn't you make an inquiry? A. I didn't consider if it wasn't enough importance for them to speak to me about them why should I speak to them?

Q. When you called on them in July to receive this payment of a note due, didn't they show you this letter of Marshall Field's? (Handing letter to the witness, who reads it.) A. I never saw that letter before.

Q. Didn't you ever receive any notice from any of these firms having unfilled orders as to what they were going to do? A. During what period?

Q. During this period between June 26th and September 1st? A. No, sir; I did not.

Q. You didn't get a single bit of correspondence from all those customers? A. No, sir; I didn't.

Q. Did you see these cancellations from Montgomery Ward & Company? A. No, sir; I never saw them.

Q. Did you see any of this correspondence which I now show you, J. B. Hershfeld Company, August 3rd, 1917? The Hauke Brothers, July 26th, 1917; Farwell Company, August 7th; Ubley, Lindesey & Ker. Co., July 17th; Weber Walters Company, July 18th; Levy Straus & Company, July 23d; Hambleton, Oesch, *et al.*, July 10th, Baumgartner Company, July 12th; A. W. Porter Company, July 12th, 1917; Samuel Philipson Company, July 12th, Carl Gutmann Company, July 12th, relating to the cancellations and the modifications of the orders? A. Are some of those letters those you put in evidence on Monday? If so, I have seen some of them on that day, but never otherwise.

Q. I am asking you, Mr. North, whether you saw any of these letters written by these customers to the company at any time during the period of June 26th, 1917, to September 1st, 1917? A. No, sir; I never did.

Q. In making up that calculation of the amount it would take to fill all the unfilled orders and the loss which would accrue, have you taken into consideration the cancellation of any orders? A. I have not.

Q. Have you taken into consideration the fact that a great many of these orders have been modified? A. I didn't know that they had been.

Q. I didn't ask you that. I asked you whether you took into consideration in making up your figures—

Mr. David: How could he if he didn't know they had been?

Q. You took into consideration only the full quantity of merchandise to be made up under the

orders as they existed? A. As they exist in your order books today; that is, to appearances.

Q. Without taking into account any changes that had been made in these orders due to the agreement of June 26th which required both sides to procure changes in the orders? A. Only as they appear in your order books today.

Q. I want to ask you whether—did you see the letter written by John W. Farwell Company, dated June 17th, 1917, which I show you? A. That is prior to June 26th?

Q. Yes? A. I can't say that I ever saw that letter. It might have been shown to me at the conference of June 26th. I can't say. I don't remember it.

Q. What was the first time that you received a notice that the company would require you to turn over the merchandise that was in the storehouse? A. I think they telephoned me on July 18th or 19th to come up from the seashore where I was.

Q. And at that time you came up to their place of business? A. Immediately.

Q. Were your relationships with them pleasant at that time? A. Seemed to be.

Q. Did you have any cause for complaint then? A. Not at all. I got through with my business very quickly and got out.

Q. What was the discussion at that time? A. No discussion at all.

Q. What was said? A. "We need a little stock." I said, "All right, I am here for that purpose."

Q. For what purpose did they say they needed the stock? A. They didn't say.

Q. Didn't they tell you they were to use the stock for the manufacture of your orders? A. I don't remember any such conversation.

Q. Well, what was the next time you came there? A. August 31st.

Q. Where were you between July 18th, 1917, and August 31st? A. I was in several parts of the country.

Q. You were touring around? A. Sometimes touring, other times stopping.

Q. Where were you on August 27th, 1917? A. In Elizabeth.

Q. And did you know on that date that they wanted to take over the merchandise? A. I didn't.

Q. When did you first acquire that information? A. I think I got their registered letter on the 28th, if I am not mistaken.

Q. On August 28th did you go to their place of business? A. Not at all.

Q. Did you communicate with them? A. My attorney did; yes, sir.

Q. You wrote a letter to them? A. My attorney did.

Q. Why didn't you communicate with them directly? A. Because I had a conference with my attorney.

Q. And if you had communicated with them directly on August 28th, while you were in Elizabeth, could you have taken an inventory of that merchandise in time to know what it was on September 1st? A. I presume I could. I don't know if I could have done so alone. If they had insisted on me doing so alone, I do not think so.

Q. With their assistance you could have done it? A. With assistance I dare say I could have done it.

Q. At the time you left them in July you were on friendly terms. What was the necessity of all this business of writing them letters and consulting with lawyers? A. For the simple fact that in August, before starting away through the New England States, I wrote them a letter and told them I was going to be in Elizabeth for a few days and asked them if it wasn't pretty nearly time they took over some of this merchandise; and got no reply. I called them on the telephone the next day—

Q. When was this? A. I think it was about in the middle of the month. And asked Mr. Nathan Schwartz on the 'phone if he was ready to take over some additional merchandise. Told him I had written him, and he acknowledged the receipt of the letter. He said he was not ready at that particular time. I told him I was going away and it didn't seem to help matters any. And he said "All right; a few days one way or the other won't make any difference."

Q. Is this the letter to which you refer? A. That is it. Yes, sir. That is the one exactly.

Q. Where is that expression to which you refer that it was pretty nearly time for them to— A. "I have been waiting all summer a call from you for more stock but have not heard from you. Undoubtedly you are now in a position to know what additional stock you will require." That is practically that in so many words.

Q. What did you mean by that? A. I mean I had been waiting all summer. I mean what I said.

Q. What did you mean when you said undoubtedly by this time you know what quantity of stock

you want? A. I meant it was pretty nearly time. If they didn't know then, they never would.

Q. Didn't you mean by that you knew they were getting cancellations of orders? A. I didn't think anything of the kind. It never entered my mind in writing that letter.

Q. What induced you, in writing the letter, to say undoubtedly they knew on August thirteenth, then, what stock they needed? A. They entered the contract on June 26th, and run for eight weeks without knowing what they wanted; it was pretty nearly time they did.

Q. As a matter of fact, you knew they were spending this period in trying to find out what condition the orders would be in? A. I didn't know anything of the kind. How should I know it?

Q. Didn't you know they were making an effort along this line? A. No, sir.

Q. You were not interested in that? A. No, sir.

Q. Why didn't you ask them? A. Because I was never informed. And inasmuch as they didn't consider it of sufficient interest to inform me—

Q. That is what you think. They didn't consider it of sufficient interest. You never asked them although you were in their place of business and communicated with them; isn't that so? A. I was in their place of business once.

Q. You were in their place of business twice in the month of July, is that correct? A. Yes, sir.

(Question and answer repeated by the stenographer).

Q. And prior to August 31st, you were in their place in the month of August? A. Only by telephone.

Q. Now, after your conversations with Mr. Schwartz over the telephone in August, were you satisfied with their conduct? A. Not in the least.

Q. Did you tell them so? A. No. But if they were satisfied to let it go at that—

Q. You argue so much, Mr. North. Did you tell them so? A. No, sir.

Q. Wasn't it agreeable to you, as a matter of fact, that the matter of taking over this merchandise should await your return? A. No, sir. I wanted to get it out of the way before I went away, so I wouldn't have to come back so quickly.

Q. Didn't you testify you said you were going away and they said a matter of delay for a few days would make no difference? A. That is what they said.

Q. Did you demur? A. I don't remember as I did.

Q. If their conduct was so unsatisfactory to you here in the middle of August, 1917, with only fifteen days away from the time they were to take this merchandise, why didn't you tell them "gentlemen, I object to this delay." A. It wouldn't have done any good. What is the use wasting words.

Q. Why wouldn't it have done any good? A. Because I had several of those conversations before. I found out it wouldn't do any good.

Q. When did you have a conversation with them in this period, June 26th to September 1st, in which you demanded they take the goods over? A. I didn't say I had such a conversation. I mean regarding other matters. I knew what to expect in this case.

Q. Did you know Judge David wrote them around August 29th in answer to their letter that he would endeavor to get in touch with you? A. He showed me a copy of the letter.

Q. Before he wrote it? A. Afterwards.

Q. When did he get in touch with you? On August 28th? A. I think he got me on the 'phone late that afternoon.

Q. And instead of 'phoning to the North Company that you were in town and ready to go on with the business of delivering this merchandise, you went to Mr. David's office on the 29th—did you go to his office on the 29th? A. I can't remember whether I did or not.

Q. Did you know that he had written a letter—or that he was about to write a letter "In further reply," and so forth, "I beg to advise Mr. North has returned and is in receipt of your letter of the 27th instant. Kindly advise me," and so forth, "when you desire to take over the merchandise and how much?" A. I knew he had written such a letter.

Q. Why did you have to correspond with these people? A. We thought that was the safest way of doing business with these people.

Q. Did you get any communication from their attorney? A. We got several communications.

Q. Did you get any communications from their attorney, or from anybody but them? A. I think their letter was signed by them, but it had the appearance of being drafted by an attorney.

Q. You guessed that too, didn't you? A. It sounded that way to me.

Q. Let us see what this situation is. You were in town on August 27th; you knew they were

looking for you? A. Not at that time; no, sir; I didn't.

Q. When did you first know they were looking for you? A. On the 28th I got a letter. I didn't know they were looking then.

Q. You knew from their letter? A. Does not say anything about looking.

Q. Let me read you a little. "Pursuant to the agreement made between yourself and this company," and so forth, "being ready to fulfil our part thereof, we are requesting you to appoint the time to take over the merchandise as per agreement." You got that letter on the 28th, did you not? A. I think I did.

Q. Why did you wait until the 31st to go down there? A. We were awaiting their reply. And when we went down on the 31st they were not ready then.

Q. What reply did you need when they wrote you on the 27th of August a letter which you received on the 28th stating "We are ready to fulfil our part of the contract and take the merchandise." A. We were waiting for a reply to Judge David's letter in which he asked immediate attention.

Q. Did you consider that fair to them when you did that? A. Surely. When we went there on the 31st they were not ready.

Q. You were awaiting a reply to Judge David's letter for what purpose? A. To set a time we were to go down there.

Q. That letter to you, a letter of the 27th, which you received on the 28th, in which they asked that question. You knew you were only three days away from the time to take over the

merchandise. Why didn't you telephone them on the 28th and tell them "Gentlemen, we are ready"—A. When we did telephone Mr. Nathan Schwartz wasn't there.

Q. Did you telephone them? A. Yes, sir.

Q. When? A. I don't remember when it was.

Q. Was it on the 28th? A. We were informed—

Q. Was it on the 28th? A. I can't say.

Q. Was it on the 29th? A. I can't say.

Q. Was it on the 30th? A. I can't say.

Q. I ask you to look at this letter of August 28th in which it is said: "I will endeavor"—Judge David's letter—"I will endeavor at once to get in touch with Mr. North and advise you." Can you recollect whether you saw that letter that day? A. I didn't.

Q. When is the first you did see it? A. This is the first time I have seen this letter. I have seen a copy of that.

Q. Did you see it on the 29th? A. I can't remember whether I saw it on the 29th or 30th.

Q. Will you tell us whether you saw this letter on the 29th or 30th? A. I think I saw that on the 30th.

Q. In this letter these people told you: "We already stated our readiness to proceed, and therefore all that is left to be done is for Mr. H. S. North to come here and turn the merchandise over to us." When you saw that on the 30th why didn't you call them on the 'phone? A. As I stated before Mr. David called them up. When, I can't say.

Q. You didn't make any effort to call up? A. Through my attorney.

Q. You, personally, didn't make any effort to call up? A. Not personally; only through my attorney.

Q. And you have no other reason to assign for your failure to call them up than that your attorney called them up once and Mr. Nathan Schwartz wasn't there? A. I think that was sufficient.

Q. What happened—at what hour on August 31st did you go there? A. I think it was about 10:30 in the morning.

Q. Did you call up before you came there? A. I believe we did.

Q. You believe you did? A. Yes, sir.

Q. Who did the calling? A. Judge David.

Q. Were you present? A. I was.

Q. Do you know whether or not—do you know who communicated with Judge David over the 'phone? A. I think Mr. Louis Schwartz did.

Q. When you got to the factory who was there? A. Mr. Nathan Schwartz, Mr. Adolph Schwartz, Mr. Louis Schwartz and several others. Some of the factory hands and office force.

Q. Mr. Black was not there? A. No, sir.

Q. What was the conversation? A. Judge David told them we had come down to turn over the stock. Mr. Nathan Schwartz said, "All right, we are ready." Judge David said, "Have you got the money?" And he said, "Yes, I have; got it in my pocket." And he tapped his pants pocket. He said, "I want to see the merchandise." And we marched out into the storehouse and showed him the merchandise.

Q. How many cases of merchandise, approximately, was there? A. It was piled up. It is hard to say.

Q. One hundred cases? A. Two or three hundred, I guess.

Q. You showed it to him? A. Yes, sir.

Q. You waved your hand at it and said, "Here

is the merchandise," is that what you mean? A. Yes, sir. They had seen it before.

Q. You mean it was in the storehouse? A. All piled in the storehouse.

Q. All these cases were nailed up? A. Not all of them. Nearly all of them.

Q. Nearly all of them? A. Yes, sir.

Q. The percentage of unnailed was so small it is not worth while talking about? A. That is right.

Q. And they said they wanted to see the merchandise. What did you say then, or what did Judge David say? A. He said, "Here is the merchandise."

Q. Well, what else? A. I think that is all the Judge said at that time. "Where is your money? Turn over your money."

Q. Did he say how much money? A. He didn't state at that time.

Q How much did you want them to pay you for this merchandise? A. Mr. Nathan Schwartz then asked for a bill. And we said, "All right, we will go in the office and give you a bill," which we did.

Q. Did he ask you for an itemized statement? A. Not at that time; no, sir.

Q. Didn't he ask you then for a detailed statement of what that merchandise was? A. No, sir; we delivered the bill to him. And Judge David said to him, "Let us have your money." He said, "If I had that much money in my pants pocket I wouldn't go out into the storehouse with you two fellows." And Judge David said—

Q. Just a minute.

Mr. David: I think he should be permitted to finish his answer.

A. And Judge David said, "I think all you people are doing is getting up evidence for a lawsuit. We are down here for the purpose of turning over this merchandise to you. And we have given you a bill for it, and we want your money."

Q. What did they say? A. They didn't say anything.

Q. Didn't they then tell you they wanted a detailed statement of the merchandise? A. No, sir. Evidently on account of the fact they didn't have the money with them for the purpose of the offer for that day. So we told them we would be down there next day. They had until twelve o'clock noon.

Q. What time did you get there next day? A. We again telephoned down, if I remember correctly, and got down there about ten o'clock on September 1st.

Q. And you gave them a new bill? A. Only for the interest.

Q. Didn't you take back the first bill? A. No, sir; didn't see it again.

Q. And at that time did they ask you to take an inventory? A. They said, "Let us go out in the storehouse, and take an inventory."

Q Did they call the hands down in order to do so? A Yes, sir; they did so.

Q. Did they tender themselves ready to find out whether all the merchandise you had was suitable for manufacturing purposes, for filling orders? A. They already were aware of that fact.

Q. Did they tender themselves ready? A. No mention was made of that fact. They said they just wanted to take an inventory.

Q. Didn't they tell you at that time that they

better take an inventory there first to find out what quantity of goods you had and then find out whether those goods were suitable for your orders? A. No, sir; nothing at all.

Q. Nothing said about that? A. Not about suitable; no, sir.

Q. What did they say with relation to the money which was to be paid for this merchandise? A. Before this time, Judge David, after all this controversy had been going on, he said, "How long is it going to take to take this inventory?" He said, "Three or four days." He said, "We are not going to stand around here all this length of time," he said,"evidently you are figuring up for a lawsuit. And if you are going to make your tender, make your tender and we will get away."

Q. Didn't they say anything about the money that would take over fifteen thousand dollars? A. Not a word.

Q. What did they say with relation to the money? A. They didn't say anything.

Q. About the fifteen thousand dollars? A. Mr. Black called on a total stranger to us, who I have since learned is the Assistant Teller of the Coal and Iron National Bank, and told him to tender me fifteen thousand dollars, which he did.

Q. At that time did they say to you that you and they should take an inventory? A. No, sir.

Q. They didn't? A. No, sir; said they were ready there for that purpose and called the men down without any solicitation on my part whatever.

Q. They, Mr. North, without any solicitation on your part, were willing to take an accurate in-

ventory of this merchandise, and called the hands down for that purpose? A. They were willing to do that.

Q. Were you ready? A. Not for the time would be necessary, three or four days.

Q. Were you willing to do it? A. We didn't have the time. If it could have been done when the time limit was up on September 1st, twelve o'clock, yes. But not to stand around three or four days.

Q. But if you had come around on August 28th with the same demand and they had asked you to take an inventory would you then have been willing to take an inventory? A. Most assuredly.

Q. And couldn't you have completed that inventory by September 1st? A. Yes, sir; I suppose so.

Q. Why didn't you do that? A. Because I didn't receive the notice on time.

Q. You knew on August 28th, 1917, that they had written a letter tendering themselves ready to take over this merchandise? A. No mention was made about taking an inventory of the merchandise at that time.

By the Court: Q. As I understand you, the reason you did not do anything further about an inventory on September 1st was because you wanted to stand on your legal position of having matters closed on the time called for? A. Your Honor—

Q. And you did not want any extension that might interfere with that? A. That is it, exactly.

(Question and answer repeated by the stenographer.)

By Mr. Cohn: Q. You saw the letter of August

27th, in which it said "We hereby request you to appoint the time to take over the merchandise." Just read that letter? A. Yes, sir; I received the original of that.

Q. What did you suppose they meant when they said "we are ready to take over the merchandise, and we want you to appoint the time?" A. We appointed the time. That is, we didn't appoint the time, we wrote them.

Q. You said they wanted an inventory? A. Asking for an inventory? That letter to us was after—

Q. They said we are ready to appoint a time when we can take over the merchandise? A. That is simple.

Q. You had given them large quantities of merchandise before, had you not, out of the storehouse? A. Previous to June twenty-sixth.

Q. Hadn't you always given them a bill? A. Yes, sir.

Q. And you always figured out for them on the bill the quantity and kinds of merchandise, and prices, et cetera? A. Certainly.

Q. Did you give them a bill something similar to this, or isn't this bill you gave for the first fourteen thousand lot? A. Yes, sir. This was taken over a period of January third—

Q. Answer the question. Isn't this the bill for the first fourteen thousand lot? A. Whatever it is; it is not made out to the incorporation, it is to an individual.

Q. I want to know isn't this the first bill they took? A. That? I don't know whether they ever took the bill or not.

Q. And isn't this the first bill, Mr. North, for

merchandise that came out of the storehouse? A. That was turned over to Mr. Nathan Schwartz.

Q. Answer the question.

(Question repeated by the stenographer.)

A. A lot of this came out of the factory buildings, as well; yes, sir.

Q. Why didn't you give them a bill like this? A. This bill was requested by Mr. Nathan W. Schwartz. I never turned it over to the corporation.

Q. Wasn't a similar bill requested by these people on August thirty-first? A. No, sir. A similar bill to this?

Q. Yes? A. I don't exactly understand this question.

Q. Didn't you know they wanted a bill for what you were asking money for? A. I rendered them a bill which they asked for.

Q. You rendered them a bill for twenty-nine thousand dollars worth of merchandise? A. Yes, sir.

Q. Contained in three hundred closed cases? A. They had taken it that way before.

Q. Who had taken it that way? A. Mr. Nathan W. Schwartz on behalf of his company.

Q. Taken what? A. Yarns in closed cases.

Q. He always took it in a bill? A. Yes, sir.

Q. And when you checked it up you always made allowance for goods not suitable for orders? A. Only on one small case we took it off to reduce the price of his bill.

Q. Now, Mr. North, as a business man of twenty-five years' experience, would you buy twenty-nine thousand dollars worth of merchandise in three hundred closed cases without an

itemized bill? A. I have done that thousands of times. Closed cases.

Q. Didn't you have the bill first? Invoice before you got the goods and know what you were getting? A. Certainly; and they had the same thing.

Q. How did they have a bill the same way? A. I turned it over to them August thirty-first.

Q. You turned over a bill twenty-nine thousand dollars saying—"merchandise in the storehouse just inspected by you." What did you mean "just inspected by you?" A. We had just returned from the storehouse when we made it out.

Q. How long did that inspection take? A. About ten or fifteen minutes.

Q. And you considered that inspection necessary to know what kind and quantity the merchandise was? A. They had access to that building for six months.

Q. That is not what I asked you.

Mr. David: He has answered.

Q. What did you mean when you said "just inspected?" A. Just what I said.

Q. "And it is agreed to be turned over to you for cash, between you and myself individually," and you put down $29,875.00? A. That is correct.

Q. Couldn't you have given them a detailed statement? A. It wasn't asked for that time.

Q. You mean on August thirty-first when you gave them this bill they didn't strenuously object to taking over the merchandise without a detailed statement? A. No, sir. Not at that time if I remember correctly.

Q. Did they object on September first? A. September first, I think that then—

Q. You think so? Don't you know so?

Mr. David: He is about half through with his answer, when you ask another question.

Mr. Cohn: I will ask him that first question.

Q. Do you think so? A. I am quite sure they asked for an itemized bill on September first.

Q. Couldn't you have given them a bill on September first? A. Not before twelve o'clock.

Q. You had your books for years and years? A. Yes, but I didn't have them with me.

Q. Couldn't you have gotten them there? A. No, sir; not in time, I could not.

Q. Why didn't you say, "gentlemen, give us fifteen thousand dollars on account; we will give you the merchandise, and when we figure it up I want the balance." A. That wasn't the contract. The contract didn't call for it.

Q. You told them at that time "you have to take all that merchandise as it stands or nothing?" A. I told them I wanted the twenty-nine thousand dollars that the bill called for. As my contract called for cash on delivery.

Q. I know you know what the contract said about that? A. Most assuredly.

Q. When you told them that didn't they tell you they wanted to inspect this merchandise with you for the purpose of finding out whether it was suitable for filling orders? A. I think some mention was made whether those cases contained hay, bricks, or something to that effect.

Q. And didn't you say "Gentlemen, I will not

inspect these goods with you; you have got to take them all or nothing." A. I never said anything of the kind.

Q. You knew on September first, 1917 that the market price of all this material had gone up? A. Naturally.

Q. You knew it was worth a great deal more money? A. Naturally.

Q. Than what these fellows were to pay to you? A. Naturally.

Q. You knew that if you—if they did not take the merchandise you could sell it in the open market at a profit? A. I didn't realize whether I could make a profit on it or not. But I knew I could get my money back.

Q. Why do you say you didn't realize whether you could make a profit on it or not? Didn't you know the condition of the market? A. Yes, sir; but there was some merchandise there, which, owing to its present shape I would have to sell at a loss.

Mr. Cohn: That is all.

RE-RE-DIRECT-EXAMINATION by Mr. David:

Q. When you refused to turn over twenty-nine thousand dollars worth of goods and take their fifteen thousand dollars did you have in mind they had filled only one of the orders since June twenty-sixth? A. I did.

Q. Did you have in mind your previous experience with these men? A. I did.

(Questions and answers repeated by the stenographer.)

Mr. Cohn: I would have asked to have that stricken out, but I wasn't listening.

The Court: That is academic now.

Q. Was each and every one of the cases in that warehouse marked with its contents? A. It was.

The Court: We have been all over that.

Mr. David: I was not sure of that, Your Honor.

Q. Did you at any time prior to June twenty-sixth have a talk with Mr. Schwartz and the other officers with reference to whether or not they were going to make or lose on your contracts? A. I did.

Q. When? A. During the preliminaries to drawing up this contract of June twenty-sixth.

Q. And where? A. In your office.

Q. What was that talk?

Mr. Cohn: We object to that.

The Court: Question overruled.

Mr. David: I ask an exception.

The Court: Exception allowed.

Mr. David: That is all.

The Court: That is all.

Mr. Cohn: That is all.

Mr. David: We rest.

Plaintiff rests.

Mr. Stamler: If your Honor please, we have a man here from New York on prices,

and we would like to put him in on our case without waiving our right to go into the defense. We would like to take this gentleman's testimony. In other words I want to take this man's testimony so that he won't have to come back again in the event we rest.

The Court: If you take it you can rest.

Mr. Stamler: Reserving my right to make the motion.

The Court: You have either to rest your case or not.

Mr. Stamler: My theory is before we make our motion relating to the Plaintiff's case that we can take the testimony of one witness.

The Court: No.

Mr. Cohn: We ask Your Honor to begin with, before I make this motion, I assume that the method Your Honor has in mind for the trial of this case does not involve our making now a separate answer to the plaintiff's case, but rather going on with our case both by way of offensive and defensive?

The Court: Yes.

Motion for a Nonsuit

Mr. Cohn: We ask for a direction of a verdict.

The Court: For a nonsuit.

Mr. Cohn: Rather, a nonsuit. First a

nonsuit on the first count. This count is framed to permit the plaintiff to recover damages for the misappropriation, and unlawful diversion of the raw material which the company agreed to purchase from him.

The Court: I understand, Mr. Cohn, that Mr. David has abandoned all claims except the one, namely—

Mr. Cohn: Will Your Honor direct a verdict on the first count?

The Court: (continuing)—That the plaintiff is entitled to recover for the breach of the contract, the amount of liability which he has sustained, and against which you have agreed to save him harmless, amounting to fifty-eight thousand dollars.

Mr. David: Substantial damage; yes sir.

The Court: Fifty-eight thousand is quite substantial.

Mr. David: We would be entitled on the other counts to a six cent verdict on the mere proof of breach of the contract.

The Court: That is for failure to take the merchandise.

Mr. Cohn: May we seek to set your Honor straight on that? There is not a single thing in their case that seeks to recover damages for the failure to take the goods. The first is we have diverted the merchandise.

The Court: And used it for other purposes. And that you abandon?

Mr. David: No, sir.

The Court: That you claim six cents for?

Mr. David: Yes, sir.

Mr. Cohn: The second is that they will be obliged to manufacture the finished product and deliver to the customers at a greatly increased price.

The Court: You do not claim that now?

Mr. David: That is practically the same as the proof we made of the damage.

The Court: No, sir; you do not claim that now. You claim now that by reason of their failure to deliver it you have to pay that damage; not that you are going to deliver the goods.

Mr. David: It is the same thing, Your Honor.

The Court: Oh, no. What is the next.

Mr. Cohn: The third is the deeply mooted question, which Your Honor has stated is fity-eight thousand dollars item.

The Court: Yes, sir; what is the fourth?

Mr. Cohn: Fourth is because we have failed to turn over the shares of stock.

The Court: If any one of those is good I can not nonsuit.

Mr. David: That is the answer.

The Court: If there is anything to sustain the case, the nonsuit must be denied. But it can be taken up on the motion to ask the Court to direct the jury in the charge that there can be no recovery.

Mr. Cohn: If it is the law, and I have no doubt it is, if Your Honor says so, that where there is four counts you can not have a nonsuit where the plaintiff has utterly failed to prove three of them we

should be able to make a motion to direct a verdict now—this is the close of the plaintiff's case—on his first count, on which there is not the scintilla of evidence. Why bother with it?

The Court: If you had not any counter case—

Mr. Cohn: We do rest on their case.

The Court: The way to do it would be to ask me to charge the jury there could be no recovery on the second count, no recovery on the third count, and no recovery on the fourth count. That would be the way to do. I could not nonsuit.

Mr. Cohn: It would seem to me the most orderly way of treating that subject is to remove from the Court and Jury everything except what was a tenable cause of action. And where, at the close of the plaintiff's case, he has four counts, and he has not adduced any evidence at all I do not see why a motion to nonsuit the plaintiff on one count would not have been a tenable motion. I believe I have seen such motions made and prevail, I mean in Essex County. And inherently and logically it should prevail.

The Court: We will take the other course today.

Mr. Cohn: Then your Honor will reserve this?

The Court: No. If you make your motion at the proper time I will direct the jury. You made a motion for a nonsuit. I deny the motion and allow you an exception.

Mr. Cohn: Will Your Honor permit me to make a motion for a direction?

The Court: You can not make a motion for a direction until you rest.

Mr. Cohn: We rest on the first count.

The Court: You have to rest on all of them.

Mr. Cohn: Your Honor will permit me to reserve this?

The Court: Yes, sir. After your case is in you can renew it. That is the proper time for it.

Mr. Cohn: I would like to make this motion for a nonsuit, although Your Honor has denied it. The motion as I have it, relates to the four counts in the plaintiff's case in defensive fashion, and in that way takes in all the plaintiff is seeking to recover.

The Court: As I understand, your motion is to nonsuit on each and every one of his counts of the claim that the plaintiff has presented. And I deny your motion as one count is good. I will deny the motion and allow you an exception.

Exception allowed, sealed accordingly.

Judge.

Defendant's Case

CLINTON A. BENNETT, produced as a witness, on behalf of the Defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Bennett, where do you reside? A. Brooklyn, New York.

Q. How old are you? A. Thirty-six.

Q. What is your business? A. I am a cotton yarn salesman.

Q. With what firm are you connected with at the present time? A. Paulson, Linkroum and Company.

Q. What is their business? A. Cotton yarns.

Q. Wholesale or retail? A. Wholesale, commission house.

Q. How long have you been in the cotton yarn business? A. Nineteen years.

Q. Are you familiar with the prices of cotton yarns that prevailed in the City of New York during the—on or about the first day of September, 1917? A. I am, as far as our transactions were concerned.

Q. As your transactions is concerned? Did you know the market price of yarns during that period of time? A. Yes, sir.

Q. And from what did you derive your knowledge? How did you derive your knowledge? A. From our transactions with customers.

The Court: In the open market? A. Yes, sir.

Mr. David: We admit the qualifications. He is an expert and knows the values and the business.

Q. Is there a distinction in your business between heavy and lightweight yarns? A. Yes. Coarse numbers and fine.

Q. Can you tell me what the market price—withdraw that question. Did you know Mr. North? A. Yes, sir.

Q. Did you know the North Company people? A. Yes, sir.

Q. Do you know what business they are in? A. Yes, sir.

Q. Do you know what kind of yarns they use in the manufacturing of their business? A. I have a general idea.

Q. So when we talk about heavyweight yarns or lightweight yarns, you understand what we are talking about? A. Yes, sir.

Q. What was the market price of heavyweight yarns—or yarns for heavyweight goods on the first day of September 1917?

(Witness refers to paper.)

Q. Does that depend on sizes also? A. Oh, yes.

Q. I will reframe the question so that you and I understand what we are talking about. I will have to reframe the question. What was the market price of yarns one twenty-four—single twenty-four carded peeler?

The Court: Your purpose now, as I understand it, is to show what it would cost you to go into the market and get the goods they did not deliver to you?

Mr. Stamler: On September first, 1917.

The Court: Have you any statement made up at all we could use?

Mr. Stamler: No, sir.

Mr. David: Has Mr. Bennett made out a statement?

Q. Have you made out a statement? A. Just what do you mean?

Q. Have you made out a statement of these prices? A. No. Except I simply heard last night

about half-past four that you wanted to know about the prices around that date, and I simply took them off our books of sales made at that time.

Q. Just tell them. A. Market price on twenty-four's, carded peeler cone, on or about September first would be forty-four to forty-four and one-half cents.

Q. On twenty-eight carded peeler? A. It would be about forty-six.

Q. On twenty-eight double carded? A. I can only guess at the price.

Q. Well, approximate. What it was then. A. I should say in the neighborhood of fifty-one to fifty-two cents.

Q. On thirty, double carded? A. Fifty-two to fifty-three.

Q. And thirty coned? A. Coned peeler?

Q. Coned peeler? A. About seventy-three cents.

Q. And thirty-two coned peeler? A. Seventy-four.

Q. And thirty-five coned peeler? A. Seventy-five and a half.

Q. Twenty-six Nyanza? A. That is simply a certain mill's brand.

Q. Yes? A. I am not familiar with their price.

Q. You are not familiar with that?

By the Court: Q. Do you know the character of the material? A. Yes, sir; I know.

Q. What would material of the same type, same class, be worth at that time? It is simply a factory name, I understand? A. That is a bleached yarn.

Q. There are other yarns of the same kind? A. They are the principal producers of that yarn.

Q. Do you know what the price of it was on September, for yarns of that kind, character? A. Well, I will have to guess at that; in the neighborhood of eighty cents, I should imagine.

By Mr. Stamler: Q. And twentyeight's of the same? A. About eighty-two cents.

Q. And thirty-six's? A. Eighty-five to eighty-six cents.

Q. And forty's? A. Ninety.

Q. Single twenty-two's? A. What is that, carded?

Q. Lisle; bleached lisle. A. I gave you a price of eighty on twenty-sixs. Seventy-eight cents.

Q. Eleven carded peeler? A. That was forty-one and one-quarter cents.

Q. Number twelve Germantown? A. I am giving you prices on an average quality of yarn. Germantown spinning is an extra quality. They might be worth one cent to one and one-half cents above the market price.

Q. What was the worth on or about September first, 1917? A. I would say it was worth forty-one and one-half cents.

Q. Number twelve silver grey? A. Well, based on about two cents more than the natural prices.

Q. How much was that? A. Based on Germantown quality.

Q. Silver grey. You ought to know that. I am asking you that. Is that the same quality? It is an Eastern yarn. A. Forty-four and one-half to forty-five cents.

Q. Number twenty-two carded? Carded peeler

number twenty-two? A. It would be about forty-three and one-half to forty-four cents.

Mr. Stamler: That is all.

CROSS-EXAMINATION by Mr. David:

Q. Mr. Bennett, the prices that you have testified to are prices for goods that are used in the manufacture of the finished product? A. Yes. In making underwear.

Q. And are bought from a going concern? A. Yes.

Q. You would not pay that much when you are buying stuff thrown into a storehouse that has to be sold in order to get rid of it, would you? A. No. We have—

The Court: He is giving the market price.

A. I am giving the market price about that time.

Q. Yes. You are also familiar with the market price for the finished product, aren't you? A. No.

Q. Don't know anything about it? A. Only from hearsay. Talking with my customers.

The Court: He has not been called to testify about that.

Q. You are only a salesman of the—A. Of the raw material.

Q. Of the raw material, and you do not know anything about the increase in the cost of labor and so forth? A. In a general way.

Q. There is some little increase in that? A. I realize that.

Q. You know Mr. North as a satisfactory business man for how long?

Mr. Stamler: I object to that queston.

The Court: Overrule the question. He has not testified to that.

Mr. David: All right; that is all.

Mr. Stamler: We are not attacking Mr. North's character. I can testify to that myself.

ADOLPH SCHWARTZ, one of the defendants, being duly sworn on his oath according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Schwartz, where do you reside? A. In Newark, New Jersey.

Q. And what is your business? A. In the knitting business.

Q. And you are a member of the firm of Joseph W. North and Sons Company? A. Yes, sir.

Q. What office do you hold in that company? A. Second Vice-President.

Q. Second Vice-President. Do you recall the making of a contract of June twenty-sixth, 1917? A. I do.

Q. What was the status of the orders annexed to the contract or mentioned in the contract on June twenty-sixth, 1917, in relation to when were they to be delivered? A. They were all past-due orders, as far as delivery was concerned, and there was no set date when the delivery should be made.

Q. And there were two kinds of merchandise to

be manufactured, lightweight and heavyweight? A. Yes, sir.

Q. I want to know what was the status of the orders on that date, on June twenty-sixth, 1917. Did you know how much each customer was to get at that time? A. No, we didn't. We knew it only in as far as the books showed unfilled orders.

Q. The contract provides that you were to use best efforts in procuring cancellations or modifications or increased prices in the contracts, you know that, don't you? A. Yes, sir.

Q. And what did you do immediately after the contract was signed, or shortly thereafter?

Mr. David: That is objected to, Your Honor; we may as well thresh out one very simple point at this time. The contract provides—

The Court: The purpose of this is to show some of these contracts, on which, you claim Mr. North is liable, have been cancelled. Isn't it? Isn't that the purpose of it?

Mr. Stamler: That is one of the purposes of it.

Mr. David: I do not know what it is.

The Court: If that is so isn't that admissible?

Mr. David: Yes, sir; we will be glad to have them prove—

Mr. Stamler: That is what I say.

(Question repeated by the stenographer twice.)

Mr. David: I object to the question in that form, as to what they did.

The Court: What he did with reference to the cancellation.

Mr. David: What results he produced.

The Court: I think he may say what he did.

Mr. David: I ask an exception.

A. On the basis of the memorandum of stock materials that Mr. North has submitted to me I first figured out what offer we can make to the different customers in order to produce demands —the orders, to such proportion as to satisfy all, and not use more than what Mr. North had material for. And to that effect I looked over all the previous correspondence we had with the several customers, and on that basis I worked out a tentative offer which I made to about thirty-two different customers.

Q. You refer to certain paper that was furnished to you by Mr. North. Is that the paper you are referring to? A. That is the paper.

The Court: Exhibit what?

Mr. Stamler: This is Exhibit D-4 for Identification. I offer it now in evidence.

Paper formerly marked D-4 for identification, entered in evidence and now marked D-4.

Q. I show you a form of a letter—three forms of letters of July tenth, 1917, and ask you what those matters, what those papers are? A. These are the copies of letters that I have written to those customers whose orders were unfilled.

Q. Did you, or did you not ever show the forms of these letters to Mr. North? A. I did.

Mr. Stamler: I offer that in evidence. The one letter.

One letter entered in evidence and marked Exhibit D-8.

Mr. Stamler: And the letter reads as follows: or one of the letters; the first letter will be practically in substance the same as the next three or four or dozen shown.

Mr. David: I do not think that statement is proper to make to the jury. If those are to go in evidence let them be read.

Mr. Stamler: All right. I will read one letter. And let them all go in one by one.

(Reading Exhibit D-8 to the jury.)

The Court: What is the date of that?

Mr. Stamler: July tenth.

Q. When was the contract Exhibit P-1, actually signed?

The Court: You mean the one of June twenty-sixth?

Mr. Stamler: Yes, sir.

A. A few days later. I do not recall exactly.

Q. June twenty-sixth? A. Yes, sir.

Q. And how long a time did it take you to make out a tabulation of the orders for the purpose of writing the letters to the trade? A. It took me all the time until July tenth, when I have written most of these letters.

Q. And you say you made up a tabulation of what you could get out of Mr. North's merchandise as well? A. That served me as a basis.

Q. That served you as a basis? A. Yes, sir.

Q. And you are referring to Exhibit 4 for the defendant? You are referring to this paper? A. Yes, sir.

Q. Now, after you had sent out these notices

what next did you do? A. I was waiting for replies—

Q. Yes? A. (continued)—which I received.

Q. Yes.

(Answer repeated by the stenographer.)

Q. And from whom did you receive replies? A. Practically from all.

Q. Did you have any definite agreements—definite acceptances of your propositions? A. There were some.

Q. A positive acceptance? A. Yes, sir.

Q. Can you name some of them?

The Court: Are these in writing?

Mr. Stamler: Yes, sir. I asked the name first of the persons.

A. I remember well, Johnson, Bird was one accepted our offer.

Q. Yes. Go on.

Mr. David: I do not get the name.

A. Johnson, Bird of Baltimore. I can't recall the names but I know there was several who did accept.

Q. Who else? Was that the first one that accepted? A. I don't know whether it was the first one, but it was one among them. I don't recall the names of the others.

Q. You do not? A. No, sir.

Q. Did some come back with counter propositions? A. Yes, sir.

Q. And did this take up further time of negotiation with them? A. Positively.

Q. And when did you definitely have a statement before you that you knew which customers had accepted definite terms and which had not? A. I couldn't tell exactly the date. It was sometime toward the end of July.

Q. Now, how many times was Mr. North at your plant after the making of the contract of June twenty-sixth? A. He was there in July.

Q. Yes? A. Around the middle of July and a few days later. He was there twice.

Q. I see. Now, on the first occasion what did he come there for? A. He came for the payment of a note and some interest.

Q. Did you pay him that debt? A. Yes.

Q. I show you a check dated July seventeenth, 1917 for $1460.00, and ask you whether that is a check that Mr. North got that date? A. That was the time Mr. North was there when we gave him this check.

Mr. Stamler: I offer the check in evidence.

Check dated July seventeenth, 1917, entered in evidence and marked Exhibit D-9.

Q. What was said on that day between yourself and Mr. North? A. I spoke to Mr. North at that time of what results we had with our request with the customers to reduce demands on their orders.

Q. Yes? A. And showed him some of the copies that I have written to the several customers and also some replies that by that time I had received.

Q. I show you a letter from Carl Gutman and Company, dated July twelfth, 1917; did you show him that letter? A. I don't remember particularly of this one. We went over all the letters that were received by that time.

Q. Well, did you have in your office up to that time—A. Must have had that.

Q. (continuing)—a letter of Gutman and Company? A. Must have had it. It is dated July twelfth and Mr. North was there July seventeenth.

Q. I show you a number of letters dated July twelfth, and ask you whether or not you showed those to Mr. North at the time? A. Yes, sir. These were the letters we showed to Mr. North.

Q. At that time? A. Yes, sir.

Mr. Stamler: I offer these letters in evidence. Baumgarten Company, July 12th, 1917; Marshall Field Company.

The Court: Are these the replies?

Mr. Stamler: Yes. July 12th, 1917; A. W. Porter Company, July 12th, 1917; Samuel Philipson Company, July 12th, 1917; Carl Gutman Company, July 12th, 1917; Also the letter of Hambleton, Oesch and Normile, dated July tenth, 1917.

Above mentioned letters entered in evidence as one exhibit and marked Exhibit D-10; the Carl Gutman Company letter having been heretofore marked D-5 for Identification.

Q. I also show you letters Levy Strauss and Company. Did you show this letter to Mr. North also on the date when he first called? A. I don't remember particularly.

Q. You don't? A. I showed him all I received.

Q. Did you have that letter in your possession at that time? A. Yes, sir.

Mr. David: When was this? July twelfth?

Mr. Stamler: July twelfth, 1917.

Adjourned until tomorrow, Thursday morning, February 7th, 1918, at 9:30 a. m.

Transcript of stenographer's notes of evidence, taken in the above entitled matter, before Hon. George S. Silzer, Circuit Court Judge, and a Jury, in the Union County Court House, Elizabeth, N. J. on the 7th day of February, 1918, at 9:30 a. m.

Appearances:

Abe David, Esq., For Herbert S. North, Ind., etc., John J. Stamler, Esq.,

Saul Cohn, Esq., For Jos. W. North & Son, Inc.

ADOLPH SCHWARTZ, (resumed).

Direct-examination (continued) by Mr. Stamler:

Q. I show you correspondence from Montgomery Ward and Company, relating to the orders of Mr. North and ask you whether you have shown some of this correspondence or all of it to Mr. North? A. I don't remember exactly whether I did or not.

Q. Well, what is this correspondence? A. A cancellation of their orders; of their back orders.

Mr. David: No objections.

Mr. Stamler: I offer it in evidence.

Montgomery Ward & Company letter entered in evidence and marked Exhibit D-11.

(Mr. Stamler read Exhibit D-11 to the jury.)

Q. And the paper annexed to that was a cancellation of the order standing against the North Company or North individually.

Mr. Stamler: I am reading a letter which is in evidence, from Marshall Field and Company, dated July twelfth, 1917.

(Reading letter).

Mr. Stamler: A. W. Porter and Company, July twelfth, 1917.

The Court: Judge, have you gone over these letters?

Mr. David: No. I haven't any objection to all letters going in that cancel or seem to cancel these orders.

The Court: That saves reading them.

Mr. David: I hope it is so.

The Court: Suppose you do that, suppose while you are watching the trial of the case you have Mr. North look over those letters and see if they are proper cancellations, and if they are, that can be so stated to the jury whether they are.

Mr. Stamler: In some cases it is a question of law, and some cases it is a question of fact.

The Court: Does that help any to read it to the jury?

Mr. Stamler: I don't think so, except to see what the trade thought at that time.

The Court: They will take them out with them.

Mr. Stamler: All right. If your Honor does not think I should read them.

The Court: You do not accomplish anything. You have a list of them showing the effect?

Mr. Stamler: Yes, sir.

The Court: As you claim it.

Q. Now, after you had received the correspondence from the various customers relating to the cancellation or modification of the contracts did you make up a list, a tentative list on which basis you were to continue to make up the orders? A. I did.

Q. And that list is the paper which was marked D-4 for identification, is it? A. That is the list on which I made an offer to the customers.

Q. I see. A. Not after the correspondence, but before I had written to them I worked out this schedule, offering the customers this amount of goods.

Q. All right. On what did you base this schedule? A. I based it first on the memorandum of inventory that Mr. North has furnished us, and further on the correspondence I have had with his customers previously, as to the status of his unfilled orders, and I tried to give pro rata per customers so much as the merchandise on hand permitted.

Q. And as the result of this correspondence you finally did get the acceptance of cancellations and of modifications of the orders? A. Practically in every case.

Mr. Stamler: I offer that.

Mr. David: No objection.

Paper heretofore marked D-4 for identification, entered in evidence and marked Exhibit D-4.

Q. When you say every case you mean every case mentioned on the list shown in Exhibit D-4? A. I mean that of the thirty-two customers I have written there were practically all inclined in favor of our proposition.

Mr. David: Is that any evidence at all?

The Court: No. That will be stricken out.

Mr. David: Produce your letters.

A. You have got the letters.

The Court: As I understand, this is a statement made from letters?

Mr. Stamler: No. This is a statement made prior to sending out the letters requesting a modification in the letters, and the replies to that are now in the hands of Mr. North, and I want to find out now which customers did or did not accept the propositions of modification or reduction.

(Question repeated by the stenographer).

Q. You prepared this list marked D-5 prior to sending out letter soliciting cancellations or modifications of the contracts? A. I did.

Q. There were thirty-two in number. There are thirty-two in number? A. Yes, sir.

Q. Did you get modified contracts or cancellations of the contracts contained on list number four, defendant? A. I did.

Q. You did? All that are on the list Exhibit D-4? A. That I don't recollect whether all. We have letters showing which.

Q. Well, then, did you get a modification of Baumgarten and Company?

The Court: He says the letters will show. He apparently does not rely on his recollection. You better give that list to Mr. North and he will check them.

Mr. Stamler: He has that now.

The Court: Give him your list, and he can check them as you go along. Mr. North,

take that list of theirs and check those that are cancelled or modified.

Q. What did you do after you got these letters modifying the contracts? What did you do then? A. We notified Mr. North to turn over to us certain materials we would start the manufacture of them.

Q. When was that? A. About the middle of July.

Q. Did you manufacture? A. Yes, sir.

Q. And ship the orders? A. Yes, sir.

The Court: Was that the part that Mr. North said, about two and one-half per cent of the orders?

A. I don't know what percentage it was. We shipped out—we bought I think some seven hundred dollars worth of raw material and we worked that up and sent out about thirteen or fourteen hundred dollars worth of—

The Court: Goods?

A. (continuing)—finished garments.

Q. I show you answers to the interrogatories by Herbert S. North, Individually and Executor, against the Company, and ask you whether the answer to the fourth interrogatory therein shows how many dozen of merchandise you manufactured, commencing the middle of July, 1917 to the thirtieth day of August 1917? A. This is the list of the goods that were shipped during that period.

Q. Was that shipped under the terms of the modified contract? A. Yes, sir.

Mr. Stamler: I offer in evidence—any objection to it?

Mr. David: No objection to it.

Mr. Stamler: I offer in evidence a list.

The Court: Contained in the interrogatories.

Mr. Stamler: Contained in the interrogatories, showing to whom the merchandise was shipped.

List entered in evidence and marked Exhibit D-12.

Q. You say that the contract was finally signed a few days after the twenty-sixth day of June, 1917? A. Yes, sir.

Q. Why didn't you commence to work immediately upon the orders of Mr. North? A. Because we first had to ascertain to what extent the customers will be willing to reduce their orders, so as to be able to satisfy all the customers with the merchandise on hand.

By the Court: Q. What were you doing between January and June? A. Manufacturing the same kind of goods.

Q. What were you doing about filling these contracts between January and June? A. Filling these contracts for merchandise.

Q. For Mr. North's customers? A. Yes, sir.

Q. What proportion did you fill between January and June and July? A. I couldn't express it in percentage.

Q. Was it half? A. I think we shipped about thirteen thousand dollars worth.

Mr. Stamler: I have a list of that and it will be best to show.

The Court: Put it right in evidence.

By Mr. Stamler: Q. I show you a list. Where did you take this from? A. From our books.

Q. What does that show? A. It shows the lightweight underwear that we manufactured and shipped under North's old orders.

Q. Lightweights? A. Lightweights.

Q. From January twenty-seventh, 1917? A. '17.

Q. To August thirtieth, 1917? A. Yes.

Q. And the entire amount amounts to how much lightweight orders? A. $13,483.48.

Mr. Stamler: I offer that as an Exhibit. Five sheets.

Mr. David: No objection.

Five sheets entered in evidence and marked Exhibit D-13.

Q. Mr. Schwartz, the Court interrupted my question a few minutes ago, and I want to know why you did not commence to manufacture lightweight underwear under the North contract immediately after June twenty-sixth, 1917?

The Court: He said he was trying to ascertain what the customers would do.

Mr. Stamler: He may have some other reasons besides.

The Court: Have you any other reason beside that? A. There was at that time heat very excessive and we had to lay off our help on account of that. The first week in July we didn't work at all, and previous to this—to the making of the contract of June twenty-sixth, we had with Mr. North misunderstandings on account of which he refused to give us light weight materials.

Q. I do not care anything about that. I do not care anything about what happened before June twenty-sixth. I am talking about after June twenty-sixth. A. On account of that we had to bring in new help.

Mr. David: On account of what? A. On account of not having lightweight goods previous to June twenty-sixth.

Mr. David: I haven't any objection to opening the door to what occurred previous to June twenty-sixth.

The Court: There is no use to say anything, then.

Mr. David: I wanted to call your Honor's attention to it they are opening the door.

Mr. Stamler: I did not open any door. I stopped it promptly. We have more than enough with one issue.

Q. After July eighteenth, you commenced to do this work, you commenced to work on these contracts? A. Yes.

Q. Did you see Mr. North between the time of the making of the contract and the time that you commenced to work on these contracts? A. Yes, sir.

Q. Did you talk to him about these contracts? A. Yes, sir.

Q. Did Mr. North talk to you about contracts that he would adjust? A. Yes.

Q. When was that? A. That was at the closing of the contract we talked about that, and he agreed with some customers—

Mr. David: Fix the date.

Q. What date was that? A. On or about June twenty-sixth.

Q. Was it before June twenty-sixth, or after June twenty-sixth? A. On or about. I can't remember the exact date.

Q. Did you talk to him after June twenty-sixth, relating to some adjusted contracts? A. I did.

Q. Which one? That he was to adjust? A. I don't understand the question.

Q. Did you and North have a talk relating to

contracts that Mr. North was to adjust after June twenty-sixth, 1917? A. Yes, sir. When Mr. North was at our place of business sometime in the month of July he said he is going to see Mr. Warner of Lindeke, Warner and Company.

Q. Yes? A. And I don't recollect which others he mentioned. But he said two or three others that were supposed to be adjusted by him.

Q. What did he say about Lindeke, Warner and Company? See Mr. Warner about that contract? A. He said he was going to see him.

Q. Did he tell you why he would look after that contract himself? A. Yes. He said because he was very familiar and friendly with him, and he thinks he would have no difficulty to induce him to reduce their orders.

Q. Did you take up the question of reducing orders with Lindeke, Warner and Company? A. No, sir.

Q. That was left to Mr. North? A. Yes, sir.

Q. Do you know of any other one? A. I am not sure. I think Carl Gutman was one of them, and Hibben Holweg.

Q. As to Hibben Holweg, where was that concern located? A. I am not sure; I think Detroit.

Q. Detroit, Michigan? A. I think so; I am not sure.

Q. What did he say about Hibben Holweg? A. Same thing.

Q. Not the same thing; what did he say? A. He said he would attend to that himself because he will have better results than if we approach him.

Q. On August thirteenth, you received a letter from Mr. North wherein he said "I have arrived

home a few days preparatory to going away to Maine for my health. I have been waiting a call from you for more stock but have not heard from you." And so forth. Did Mr. North come to see you after the receiving of this letter? A. Yes, sir.

Q. Of August thirteenth? A. Yes, sir.

Q. What conversation did you have with him at that time? A. Mr. North stated he is going away for his health to Maine, and he will be away for about two weeks. And should we need some merchandise in the meantime for the purpose he will let us know, he will write us his address after he will arrive there, but we never received any word from him.

Q. I did not ask you that. That was the talk? A. That was talked.

Q. What did you tell Mr. North at that time? A. We told him it is not very likely we will use some of his merchandise before his return.

Q. Yes? A. But should we, we will notify him as soon as we hear from him.

Q. And your relation with Mr. North was friendly at the time? A. Absolutely; yes.

Q. And on August twenty-seventh, you finally wrote a letter to Mr. North asking him to come and give you such merchandise as was suitable for your purposes? A. I did.

Mr. David: I object to the question and answer because the question does not properly state the contents of the letter which is in evidence.

Mr. Stamler: All right; I want to be correct.

Mr. David: You have your copy of it.

Mr. Stamler: I will quote it exactly.

Whatever the letter was, I want to use it correctly. It is not my intention to—August twenty-second.

I consent that the former question and answer be stricken out and I reframe the question.

Q. And on August twenty-seventh, 1917, you wrote to Mr. North stating: "That in pursuance to the agreement made between yourself and this company on June twenty-sixth, and being ready to fill our part thereof, we hereby request you to appoint a time to take over the merchandise as per paragraph eight of the said contract." Paragraph eighth of the contract reads as follows: (reading eighth paragraph).

Mr. David: That is right.

Mr. Stamler: All right.

Q. Now, Mr. Schwartz, before the writing of the letter of August twenty-seventh, 1917, did you figure up how much merchandise Mr. North had? A. I did.

Q. On hand? A. I did.

Q. And what did you base your figures upon? A. On the statement I received from Mr. North.

Q. Statement marked Exhibit— A. Statement which contains the pounds and the quality of the different yarns and webbings.

Q. And it is marked Exhibit D-4? And it is marked Exhibit D-4? A. Yes, sir.

Q. Have you made up a tabulation of that statement? A. I have.

Q. As to value. According to Mr. North's calculation that merchandise of raw material, including webbings, amounted to $18,112.66. Was that approximately the figures that you had at the

time? A. It was approximately the same as I figured it out.

Q. Approximately the same? A. Yes, sir.

Q. And according to that list how much was the entire merchandise worth that Mr. North had on hand, according to his calculation? A. Twenty-three thousand dollars.

Q. Approximately twenty-three thousand dollars? A. Yes, sir.

Q. Now, Mr. Schwartz, did you arrange for money in order to pay Mr. North? A. I have.

Q. I mean, I am talking about the company? A. Yes, sir.

Q. What did you do in order to furnish yourself with finances to meet Mr. North's obligation?

The Court: Which obligation?

Mr. Stamler: For payment for the merchandise.

The Court: What is the use of going all through the process of how he went to the bank. The fact is, as I understand it, he had fifteen thousand dollars ready to give them.

Mr. Stamler: We had more.

The Court: Show how much he had. What is the use showing he went to the bank, and talked to somebody.

Mr. Stamler: I don't want to show that.

The Court: That is the question.

Mr. Stamler: I want to show the entire arrangement; he was able to pay the money.

(Question repeated by the stenographer.)

Mr. Stamler: I will withdraw the question and change it.

Q. Were you able and ready to pay in cash to Mr. North for all the merchandise that he had on hand which were suitable for the manufacturing of the North orders? A. We were.

Q. And in payment of all the merchandise that you were obliged to take under the contract? A. We were ready.

The Court: And I understand on the first of September, was it? A. Yes, sir.

Mr. David: He has not fixed the time.

The Court: First of September you had on hand fifteen thousand dollars ready to pay? A. We had more than that.

The Court: To tender. You had more than that.

Mr. Stamler: We will show what happened with that.

The Court: Now, then, come to it.

Q. Mr. North came to your place of business on August thirty-first 1917, with Judge David, as Mr. North testified? A. Yes, sir.

Q. Who was present at the time? A. My brother Nathan, my brother Louis, myself and office help.

Q. All right; now what happened? A. Mr. David said that he came down to turn over the merchandise to us and asked us how much of it we want.

Q. Yes? A. We told him we want all that is suitable to go into these orders.

Q. Go ahead. A. He then stated I want to see the color of your money.

Q. Yes? A. Which we didn't understand what he means.

Q. You did not understand? A. I didn't understand.

Q. Go ahead. A. We told him if he will submit

us a bill the way he always did when he turned over merchandise to us.

Q. Yes? A. And we checked it up, we are in position to pay him immediately.

Q. Yes? A. Mr. David said that Mr. North make out the bill, and Mr. North went to the desk and made out the bill and handed it to us. I looked over that bill and I found that there was one lump sum $29,875.00, and we said that we are in no position—

Mr. David: We said; your Honor, is that testimony?

Q. What did you say? A. I said, we are in no position to pay $29,875.00 for something that we don't know what it is. We want an itemized bill.

Q. Yes? A. And after some heated arguments pro and con, Mr. North and Mr. David left.

Q. And how did you know and why do you say that Mr. North's merchandise was not worth $29,875.00? A. I had several reasons for that.

Q. What were they? What are they? A. The first reason was that he himself gave me an itemized statement of the contents of his merchandise.

Q. Yes? A. And by figuring it up, presuming that all was suitable to go into the orders, they wouldn't have exceeded twenty-three thousand dollars.

Q. Yes? A. But I knew that in this merchandise there is a whole lot that is not suitable.

Q. What wasn't suitable? A. He had yarns there about between twenty and forty cases.

Q. Yes? A. Of which we had taken before a few cases and they proved to be defective.

Q. What was the name of that yarn? A. Plowman.

Q. Yes? A. Our boss in there called our attention to it that these yarns are defective and are not suitable to use because they make too much waste out of the ordinary.

Q. What else? A. I further knew from Mr. North's statement that he had five thousand dollars worth of laces, trimmings, et cetera, what he called.

Q. Yes? A. On the basis of Mr. North's calculation book I figured it out that in order to use all his materials, it will not take more than one thousand dollars worth of laces. Consequently, the rest of the four thousand dollars wasn't suitable to go into this merchandise. A further reason was that when Mr. North first turned over to us ten thousand dollars worth of merchandise we paid him the ten thousand dollars before we ever had any merchandise.

Q. Yes? A. And it took him about six weeks to turn over a bill to us for that money that we paid him six weeks before, and the bill consisted of about three hundred different items, and when I tried to check up this bill I found errors all in his favor.

Q. All in Mr. North's favor? A. All in Mr. North's favor, and it took about another six weeks to adjust that, as a result of which Mr. North agreed to reduce the amount of that bill between one or two thousand dollars. After this experience we weren't inclined to pay in advance twenty-nine thousand dollars, when we knew that there isn't half of it suitable to go into those orders.

Q. On July nineteenth, when you purchased merchandise did you get an itemized bill from him? A. Yes, sir; this bill Mr. North handed to us.

Q. And you paid it? A. I paid that.

Mr. Stamler: I offer that in evidence.

Mr. David: No objection.

Bill entered in evidence and marked Exhibit D-14.

(Mr. Stamler reads bill to the jury).

Q. Did you buy this merchandise from Mr. North as a job or a lot? A. No, sir.

Q. How was it bought?

The Court: The contract speaks for itself, doesn't it?

Mr. Stamler: I know it does. I would like to have the jury hear it.

The Court: Oh, no. I will overrule the question.

Mr. Stamler: All right.

Q. After you wrote another letter to Mr. North and Judge David asking them to come the following day. Come September first to your place? A. I don't hear the question.

(Question repeated by the stenographer).

A. Yes, sir.

Q. You did? A. I wrote a letter; yes, sir.

Q. And they came to your place of business on September first about ten o'clock or ten-thirty as they testified? A. Yes, sir.

Q. Were you on September first, 1917, ready, able and willing to pay for all the merchandise to North under the terms of the contract?

The Court: For how much money? A. We were.

Q. And how much were you willing and able—how much were you able to pay? A. We had on hand fifteen thousand dollars.

Q. Yes, sir? A. We had in the bank a balance of three thousand dollars.

Q. Yes? A. I am not sure how much we deposited.

Q. Is there any way you can tell surely? A. I can tell surely from our bank deposit book; we deposited on the same day some twenty-four or twenty-five hundred dollars.

Q. Yes. All right. Go ahead. What else? A. And that eighteen thousand dollars we knew is about all at the maximum that Mr. North has got merchandise to turn over to us, but for the emergency sake we have had made arrangements that in case it would be more we could, at a minute's notice, have gotten fifteen thousand dollars more.

Q. With whom did you make that arrangement? A. With Mr. Benjamin J. Klein, nine Church Street, New York City.

Q. That was all prepared in advance? A. It was.

Q. Now, Mr. Schwartz, on September first when they got there what was said, and what was done? Tell us? A. Mr. North and Mr. David appeared on September first and they said they are ready to turn over the merchandise to us, and we said we are ready to take it over.

Q. Yes. And then what happened? A. Then we referred to—reference was being made to the previous day's conversation.

Q. Yes? A. And we stated that if Mr. North—that Mr. North shall render us a bill so that we will be able to check up, and Mr. North refused to do that. He said that the bill he rendered us is all that he is willing to give us.

Q. And the bill is known as bill Exhibit P-19? A. That is the bill; yes, sir.

Q. And the bill reads as follows: August thirty-first, 1917—

The Court: That has been read two or three times.

Mr. Stamler: I beg pardon?

The Court: That has been read two or three times.

Mr. Stamler: Oh, all right.

Q. Have you read that bill? A. Yes, sir.

Q. The bill stated "goods, wares and merchandise in storehouse," in brackets, just inspected by you?

Mr. David: Your Honor, I would like to ask counsel is he directing his examination to August thirty-first or September first.

Mr. Stamler: September first.

Mr. David: He does not say that bill was rendered on September first; it was on August thirty-first.

Mr. Stamler: Oh, I see. You are right there. You are right.

Q. On August thirty-first you received Exhibit P-19, bill? A. Yes.

Q. And it states there "goods, wares, and merchandise in storehouse," and "just inspected by you." Were you in the warehouse that day? A. Yes, sir.

Q. With whom? A. With Mr. North and Mr. David, and my brother Nathan.

Q. And the rest of them? A. Yes, sir.

Mr. David: Name them all.

The Court: What is the use?

Q. Did you inspect the goods that day? A. I didn't.

Q. Did anyone inspect the goods there that day? A. No one; nobody did.

Q. What did you go to the warehouse that day for? A. We went there with the purpose of Mr. North trying to give us an inventory, but when we were there he said "Here are the goods. Take them or leave them. Pay for them"—

Q. And it was after that statement was made he wrote out this bill in your store? A. Yes, sir.

Mr. David: He is testifying as to the visit on September first.

Mr. Stamler: No. August thirty-first. I changed that.

Mr. David: He does not mean to testify, I do not think, about the inventory on August thirty-first.

Mr. Stamler: Well, let us see. I do not want him to make a misstatement.

The Court: What you last testified to do you mean that refers to the thirty-first or the first of September?

A. Your Honor, practically the same thing on—

The Court: No. When was it, that paper written? A. This paper was written on August thirty-first.

Q. Were you in the storehouse with Judge David and Mr. North on August thirty-first? A. I was.

Q. And it was after you had—

The Court: That is the day it took place. He has already testified to it.

A. Yes.

Mr. Stamler: All right, your Honor.

Q. On September first when you say Judge David and Mr. North came, what happened then? What was said? A. Then we asked Mr. David and Mr. North again to render us an itemized bill and we then will pay him.

Q. Yes. A. Mr. David asked us to excuse him for a moment, he wants to talk that over with Mr. North.

Q. Yes? A. And he retired, and after a few minutes he came back and he said; all right. Let us go in the warehouse.

Q. Yes? A. And then we all went into the warehouse.

Q. Was Mr. Jacquot there? A. Yes, sir; we went into the warehouse.

Q. Yes. What did you go there for? A. We went there in order to take an inventory.

Q. All right. Did you call any help? A. Yes. We called two or three of our male help down to assist us, and by the time they came down here Mr. North backed out.

Q. Not backed out. What did he say? A. Mr. North said he wouldn't make any inventory. He said here is the merchandise. He handed them another bill and he said pay me the amount of it. It was something similar to the amount of twenty-nine thousand and some hundred dollars, "And either you take it and pay for it, or I am through."

Q. I show you bill dated September first, 1917; is this the bill you refer to? A. Yes, sir; that is the bill.

Q. That is the bill? A. That is the bill he handed us on September first.

Q. Just look at it and see whether it is. A. Yes, sir; that was the bill.

Q. And that was the bill. And it is referred to as Exhibit P-22. Then what happened? A. Then we tendered him the money.

Q. No, not tendered him the money; what was said? A. He said—Mr. North said if we didn't

pay him the money he rendered those bills for he is through.

Q. Then who said anything, and what was said? A. Then Mr. Black said to Mr. Jacquot; "Mr. Jacquot, tender him fifteen thousand dollars."

Q. Yes? A. And Mr. Jacquot did.

Q. What did Mr. Black say further? A. Mr. Black stated also to Mr. North that in case the bill will amount to more than fifteen thousand dollars, we are prepared to pay him at once.

Q. What did Mr. North say then? A. Mr. North and Mr. David left.

Q. What did they say? A. They said that unless we paid the bills as he submitted them to us, in full, he is through, and he left.

Q. Now, Mr. Schwartz, did you make up from—I withdraw that question. I show you a book which was marked D-3 for identification, and ask you what that book is? A. This is Mr. North's calculation book of the lightweight goods.

Q. I do not know what that means yet. What is it supposed to contain or show? A. It contains the cost of the manufacturing of the different styles of garments and their selling price; and their sale price.

Q. Does it show the profit too? A. Shows the profit.

Q. On each contract. Or on each style? A. On each style garment.

Q. On each style garment. Why was that book made up by Mr. North, do you know? A. What is that question?

(Question repeated by the stenographer).

A. That has to be made up in order to know what he is doing. Every manufacturer makes a calculation of the cost of his products.

Q. I understand there was an auditor working on the books of Mr. North, is that so? A. Yes, sir.

Q. Who employed this auditor? A. We mutually employed him.

Q. Who, we mutually? A. The company and Mr. North.

Q. And who paid the auditor? Who paid the whole bill? A. We paid the whole bill.

Q. Did Mr. North contribute towards it? A. He was to pay half of it.

The Court: No, did he contribute toward it? A. He did.

The Court: How much? A. Seventy-five dollars.

Q. That will show by your books? A. Yes, sir.

Q. Did you talk with Mr. North as to how much business he was doing the various years prior to 1917? A. He told us how much business he has done.

Q. Did he tell you what the business was that he did during the year 1916, '15, or '14? A. He told us; yes.

Q. What did he say?

Mr. David: Wait a minute. Fix the time.

Q. At any time. At any time? A. He gave us—

Mr. David: I ask the time be fixed.

The Court: Of the conversation?

Mr. David: Yes, sir.

The Court: When did this conversation take place? A. Prior to making any contract with him. During the negotiations for the purchase of his business.

Q. What did he say? A. He said his business has been established for so many years, and that now his father died and brother died—

Q. No. I want to know as to the quantity of merchandise he manufactured. Did you have any talk with him about that? A. Yes, sir; we asked him what is the capacity of this plant.

Q. Yes, sir? A. And he told us.

The Court: What did he say? A. He said that he produced so much goods. I don't remember—

The Court: How much? A. I don't remember exactly the different years, to the dollar.

Q. What was the highest amount he told you he had manufactured? A. About one hundred and ten or one hundred and twenty thousand dollars a year.

Q. Did you and Mr. North also talk prior to the making of the contract as to what profit there was in the orders? A. Yes, sir; Mr. North stated to us that there is thirty thousand dollars profit on his unfilled orders. And we stated that if he agrees that we employ mutually an accountant, public accountant to verify his statements, that we will continue our negotiations about the contemplated sale and purchase.

Q. And as a result of that conference you got this auditor? A. Yes, sir.

Q. Now, was that also one of the reasons that book was prepared so that the auditor could make up— A. No, sir; that book was prepared for Mr. North's use prior to the accountant's coming there.

Q. Prior. Were these audits—was Mr. North present when these audits were made up by the auditor, working on the books? A. I wasn't there when the auditor was there. But the auditor could not have worked—

Q. No, no. You were not there when the audi-

tor was there? A. I was not there when the auditor was there.

Q. Do you know whether or not Mr. North saw these audits? A. I know he saw them.

Q. How do you know? A. One day after the auditor reported that he had finished, we came out to Elizabeth and Mr. North received us with this: "Gentlemen, I have got good news for you this morning." I said "That is very good to hear, what is it?" He said, "The accountant finished his work, and he shows there is thirty thousand dollars profit for you in my orders."

Q. I show you two sets of papers and ask you what they represent? I show you first a paper known as J. W. North and Sons Report balance sheets as of June thirtieth, 1916, and merchandise and profit and loss account. Is that one of the papers you refer to? A. That is one of the reports of the auditor.

The Court: He said one of the auditor's reports.

Mr. Stamler: Yes. I offer that.

Mr. David: No objection.

Auditor's report entered in evidence and marked Exhibit D-15.

Q. And a paper shown as statement of unfilled orders, as of June thirtieth, 1916, is the other? A. That is the other, but at that time it wasn't drawn up in this form.

Q. In what form was it drawn up at that time?

The Court: Do you offer this?

Mr. Stamler: Yes, sir.

The Court: Have you any objection to it?

Mr. David: What is the date of it?

Mr. Stamler: It seems to be dated April fifth, 1917.

The Court: What is the significance of that? The unfilled orders are contained in your contract.

Mr. Stamler: Yes, but it also shows the profit they would have made on his orders.

Mr. David: Did he see this? A. No, sir. Not in this form. He seen it in the form as the auditor done it in his work.

A. The other one.

Mr. David: Did he see this? A. No, sir. Not in this form. He seen it in the form as the auditor done it in his work.

The Court: Not in the form you have it there?

Mr. Stamler: I beg pardon.

The Court: Not in the form you have it there.

Mr. Stamler: All right.

Q. Had you completed the lightweight orders of Mr. North would you have made a profit? A. Yes, sir.

Q. Had you completed the heavyweight orders of Mr. North, would you have made a profit. A. No, sir.

Q. You would have taken a loss there? A. A slight loss.

Q. Now, Mr. Schwartz, you, at my request, tabulated the amount of merchandise that you could have produced, as represented on Exhibit D-4, is that right? A. Yes.

Q. I show you that paper, and this is made up from the books of the company, from orders taken. Is that right? A. No, sir.

Q. How is it made up? A. It was made up on the basis of what goods could have been made

from the merchandise that Mr. North had, not as to the specific different styles as they were specified in the orders, but as a whole from the different styles; from the different sizes of material; different styles of garment in bulk.

Q. I see. Is this the paper you have made for that purpose? A. Yes, sir.

Q. And the first item you have seventy-three hundred pounds of carded peeler, one twenty-four? A. Yes, sir.

Q. And is it that figure taken from Exhibit D-4, the inventory? A. Yes, sir.

Q. And so on in each case? A. Yes, sir.

Q. Showing what quality of merchandise you could have made? A. Yes, sir.

Q. And what profit you would have made on it? A. Yes, sir.

Q. And also, in some cases, what loss you would have taken on it? A. Yes, sir.

Q. On which would you have taken a loss? On which merchandise would you have taken a loss in the manufacture of it? A. On the heavyweight.

Q. On the heavyweight orders. And which item in this inventory, Exhibit four, represents the heavy weight orders?

The Court: Have you got them stated on the statement?

Mr. Stamler: I do not know.

Q. Does this show the heavyweight orders? A. No; this is only the lightweight.

The Court: You are going to offer that statement, aren't you.

Mr. Stamler: Yes, sir.

Q. This is the lightweight statement? A. This is the lightweights.

Q. What is the total merchandise in value you would have manufactured out of that merchandise A. I figured—

The Court: No. How much merchandise.

Q. How much in dollars and cents of merchandise? A. I didn't figure out the value of the merchandise. I only figured out loss of profit, or profit delivered on this merchandise.

Q. On what base—

The Court: Is this your purpose to show loss of profit on the part of the defendants for failure to receive this merchandise?

Mr. Stamler: Yes, sir.

The Court: Didn't we thresh this out the other day? If they did not deliver the goods to you on the first of September, then you could have gone into the open market and bought the goods. And, having bought the goods, and paid the increased amount, you would hold them for the increased amount.

Mr. Cohn: If your Honor please, I do not know of any principle of law which obligates us to go out in the market and buy these goods.

The Court: Yes. You cannot sit still and say we will not buy goods and we will loose profits. You have got to minimize the damage. And if they did not deliver the goods it was your duty to go in the open market and buy them and then make them up and you would have made your profits. Wouldn't you?

Mr. Cohn: Yes.

The Court: Of course, you are not obliged to buy them if you ask no damages,

the difference between the market value and the contract price. Then, of course, you can show that. But you certainly can not get the difference in the market price and the profits too, can you?

Mr. Cohn: No, sir; but we say we are entitled to present the case to the jury on either theory.

The Court: No. There is one right theory; there are not two theories; one theory must be right.

Mr. Cohn: The theory we have a right to present to the jury, is the theory that we lost profit. The process of our going into the market and buying this merchandise and making it up would not have minimized the damage.

The Court: You mean after they failed to deliver the goods to you, that you sat still and said we are not buying any goods, and we are not making them up. Therefore we have lost so much profit?

Mr. Cohn: We are entitled to the benefit of the bargain. And that is the case I cited to your Honor, Lodge vs. Binsey, which I think is elementary.

The Court: The trouble is our statute has fixed it. And it states, in the absence of some other agreement, damage for the failure to deliver goods is the difference in price between the market price and the contract price. In other words, suppose they failed to deliver the goods, you could then have gone into the market and bought the goods for two thousand dollars more

than they agreed to sell them to you for. And then, if you had gone in and manufactured the goods just exactly as if they had delivered them, then you would have had your profit. That would be one way to do it. But, as I understand you, you say when they refuse to deliver these goods, you can say we are going to make ten thousand dollars profit on these. Now, having failed to deliver the goods, we are going to sit still, and we want ten thousand dollars profit. We will not go into the market and buy these goods, but we will sit still and ask ten thousand dollars profit. Do you think that is the rule?

Mr. Cohn: I think we have a right to assume the attitude we do not have to buy in the open market. As a matter of fact we will show that the purchase price of this raw material in the open market was intensely greater than the contract price, and would have involved an outlay—

The Court: You are entitled to show that.

(Further argument of counsel.)

Mr. Cohn: No. Here is a special sale, where it is not subject to the market.

Mr. North's calculation showed, as our present experience in making this similar product showed. We could definitely show the difference between the cost and the contract price the customer agreed to pay. This is not an ordinary case where a vendor takes an order for something and does not deliver it. This is where a vendor

sells raw material to the vendee, knowing all the circumstances. And I do not know any rule of law, there may be such a thing, but I have never understood that in order for a vendee, purchasing material which the vendor knows is to be applied, and where the vendor knows specifically what the profit is, that under that set of circumstances—not where the vendor has no knowledge of the use of the raw material —but where he has an absolute knowledge and where as alleged in the complaint they are indispensable, the having of this raw material, by reason of the fact some was partly finished—

The Court: That does not appear. I agree with you if they connot be secured, but there is no evidence of that. The fact is, the expert you brought here yesterday testified it could be bought at a certain figure.

Mr. Cohn: Some of the yarns; yes. But I say, again, I do not know of any principle which obligates a vendee where he buys raw material and the vendor knows the obligations and knows the profits—

The Court: I agree with you entirely about that, if he can not get it; but, if he can get it he cannot get the profits.

Mr. Stamler: Has your Honor ruled on the question?

The Court: I will overrule the question.

Mr. Stamler: Prays exception.

The Court: Yes.

Exception allowed, sealed accordingly.

Judge.

By Mr. Stamler: Q. Now, Mr. Schwartz, can you buy in the open market 725 pounds of S. & G. webbing? Is there any place where you could go and buy that? A. There are places where they sell that, but the prices went up more than double.

Q. All right. Is there a place where you can buy six hundred pounds of lightweight webbing A. No, sir.

Q. Is there a place where you can buy two thousand pounds of heavy bleached webbing? A. No, sir; there is no market for that.

Q. Is there any place where you could buy eight thousand pounds of heavy pecler webbing? A. No, sir.

Q. These webbings, as I understand it, are made from yarns at your own factory, in the large rolls? A. Yes, sir.

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

Q. And from that you cut garments which are afterwards finished? A. Yes, sir.

Q. You can, however, go out into the open market and buy the yarns? A. Yes, sir.

Q. I will ask you this question: how much does it cost per pound to make the webbing? A. That is from three to five cents.

Q. It varies.

The Court: You mean you can buy the yarn in the open market and make the webbing.

Mr. Stamler: Yes, sir, and make the webbing.

Q. And about how much would it cost to make the webbing? A. About from three to five cents a pound.

Q. In which case would it be three and which case five? A. The finer gauge yarns are more expensive to knit than the coarses gauges.

Q. In the particular case of 725 pounds of S. & G. webbing; how much would that cost to make a pound? A. About three cents a pound.

Q. And the six thousand light weight webbings? A. That is about four or five.

Q. And the two thousand heavy bleached webbing. A. Bleached? Bleaching process costs extra about three cents a pound.

By the Court: Do you do webbing at your factory, at this plant? A. Yes, sir; knitting.

Q. Webbing you call knitting? A. After the yarn is knitted into the fabric we call that the web.

Q. I see. Then the difference between the webbing and the wool, that is—and the yarn you were to buy there, one had already been partially manufactured by Mr. North, and had it on hand and the other was yarn which was to be made into webbing? A. Yes, sir.

By Mr. Stamler: Q. Now, Mr. Schwartz. referring to your statement again, I will ask you to look at it and tell me how many dozen of garments you could have manufactured, and the kind of garments, out of the 725 pounds of S. & G. webbing. A. That is heavyweight That I haven't got here.

Q. Have you got it on this sheet I have? A. On that other one. Yes. 725 pounds. It depends on what kind of garment.

Q Tell us what you would have manufactured? A. If we would have manufactured it; it can not be determined unless we know the character of the webbing. There is different size webbing.

Q. Did you see this webbing? A. No, sir; I never seen this webbing.

Q. Assuming it was silver gray webbing? A. I don't know the size.

Q. I see. You do not know the size? A. Yes, sir.

Q. How about—take this statement—six thousand lightweight webbing. Do you know what Mr. North refers to in that? A. That is also only an estimate because I have never seen this webbing.

Q. Assuming when Mr. North gave you a statement six thousand light weight webbing, you knew what it meant— A. In general, not in detail.

Q. In general you knew what it meant? A. Yes, sir.

Q. How many dozens garments could you manufacture out of that? A. I could have manufactured two thousand dozen ladies' vests and seven hundred and fifty dozen ladies' union suits.

Q. What profit would you have made on the manufacture of the ladies' vests, as per your profit list?

The Court: I overrule the question.

Mr. Stamler: Prays exception .

The Court: Exception allowed, sealed accordingly.

Judge.

Q. Would you have made any profit in the manufacture of ladies' garments or vests, indicated by you in the former answer? A. Yes, sir.

Q. Had you done so? A. Yes, sir.

Q. What would that profit have been?

The Court: I have just overruled that.

Mr. Stamler: I want to get it on the record.

The Court: It is not any better to have it twice.

Mr. Stamler: I pray exception.

Exception allowed, sealed accordingly.

Judge.

Q. Do I understand you to say that on September first, 1917, the value of the webbing was three to four cents higher than the value of the yarns? Is that right? In other words the value of the yarns on September first, plus three or four cents for the making of the webbing, would be the value of the webbing? A. Yes, sir.

Q. Have you bought yarns during the year 1917? A. Yes, sir.

Mr. Stamler: If Your Honor please, we would like to have permission from the Court to have Mr. Schwartz prepare a statement of the profits he would have lost, under Your Honor's ruling. We have not got it prepared yet.

Mr. Cohn: That is the difference between the market on the raw material basis.

The Court: Yes.

Q. Mr. Schwartz, you said you would have taken a loss on the heavyweight orders, is that correct? A. Yes, sir.

Q. Have you tabulated that list? Have you tabulated that list on the heavyweight orders? A. According to the contract we were obliged to buy five thousand pounds of yarns—

Mr. David: The question was—

Q. Did you tabulate the loss on the heavyweight orders? A. I did.

Q. What was it under your tabulation? A. Eight hundred dollars.

Q. Eight hundred dollars. In other words, had you manufactured the heavyweight orders, you woud have lost eight hundred dollars? A. Yes, sir.

Q. How much money would you have made had you manufactured the lightweight orders?

The Court: Question is overruled.

Mr. Stamler: Prays exception.

Exception alowed, sealed accordingly.

Judge.

Mr. Stamler: That is all.

CROSS-EXAMINATION by Mr. David:

Q. Mr. Schwartz, before the company took over the business, the auditors which you employed and which you say you and Mr. North paid for, made a complete examination of Mr. North's business, is that right? A. That is what they stated.

Q. And made a report to you? Is that right? A. To us and to Mr. North.

Q. And this is the report, is it? I show you Exhibit D-15? A. This is the report after it was drawn up in this form.

Q. Yes. I see the examination and the report was made either on the date of this date or prior to it? A. Yes, sir.

Q. Now, don't you know, Mr. Schwartz, that the original contract between North and Nathan Schwartz was made on January third, 1917? A. I do know.

Q. And don't you know that your company wasn't formed until the middle of January? A. I do know.

Q. And yet you say this audit was made on

December twenty-third, 1916, was made for the company and Mr. North, do you? A. Not the incorporated company; under the company I mean I and my brothers.

Q. I see. And don't you know that after that contract was signed and the company incorporated, you insisted that the incorporation had nothing to do with the orders?

Mr. Cohn: We object.

A. We didn't.

The Court: I will allow the question.

Q. What? A. We didn't insist.

Q. Didn't you so write to your trade?

Mr. Cohn: We object, if your Honor please.

A. No.

The Court: He says no.

Mr. Cohn: Yes, but evidently he wants to continue.

The Court: See whether he wants to continue.

Q. Now, Mr. Schwartz, you say that Mr. North made up for you this inventory of the merchandise on hand? A. Yes, sir.

Q. When was that made up? A. Sometime between March fifteenth and April first. Sometime during that time.

Q. And prior to that time you had no idea of what merchandise he had on had? A. Not an exact idea, only what Mr. North told us, that he has practically all the merchandise that is required to fill those orders with.

Q. And you made no investigation of that whatsoever? A. Only, we took his word for it.

Q. And you say that this is a complete inven-

tory of the merchandise on hand in March or April, 1917? A. That is what Mr. North represented it to be.

Q. Didn't he make this up at your request? A. Yes, sir.

Q. It wasn't at a request for some of the merchandise that was there to fill certain orders? A. No, sir.

Q. You are sure of that? A. Positive.

Q. And so when you got this inventory it was represented to you to be a complete inventory of the merchandise there? A. With the very slight difference one way or the other as Mr. North represented it to be.

Q. This merchandise, as I understand it, was in a storage room with an open door which joined your factory? A. Yes, sir.

Q. You passed by this door going in and out of where the work was being done, is that right? A. Yes, sir.

Q. And you could simply walk right in there, and there it was. Is that right? A. Yes, sir.

Q. And yet you say on September first you demanded in the storehouse there an inventory of the goods; is that right? A. Itemized bill.

Q. No, no. I am asking you whether you demanded an inventory to be made of the goods? A. We asked for an itemized bill, and Mr. North—

Q. Now you are going to answer my question. A. Yes, sir.

Q. Didn't you and Mr. Black, Mr. Clyde Black say we want an inventory of the goods? A. He may have called it an inventory; I called it an itemized bill.

Q. Did Mr. Clyde Black say he wanted an inventory of the goods? A. I don't recollect.

Q. You do not remember that? A. No, sir.

Q. Didn't he say it would take two or three days to make it? A. Who said that?

Q. Mr. Clyde Black, Secretary of the company? A. I don't recollect.

Q. Will you say he did not say that? A. I don't recollect.

Q. You won't say he didn't say that? A. I answered.

Q. Just go back. Do you know the signature of your brother, President of the concern? A. Yes, sir.

Q. Is that his signature? A. Yes, sir

Q. You say that the company did not tell Mr. North that they never assumed the obligations to fill the orders?

Mr. Cohn: I object.

A. Only that there—

(Question repeated by the stenographer.)

Mr. Cohn: The objection is that this contention of the company on one side and Mr. North on the other, was one of the paramount things that was settled by the June contract. And if the inquiry is opened as to what the respective contentions were it would produce a collateral issue that would subject the case to considerable testimony on both sides. Your Honor will remember that originally, as the testimony shows, this contract was made with Mr. Schwartz, and subsequently the company was formed.

The Court: So that, Mr. David, what difference does it make in view of the fact that in June, they agreed to fill the contracts, and that is the binding contract at

the present time. They are not suing for a breach of the contract of January third.

Mr. David: We are suing for a breach of both contracts.

The Court: Suppose now they did state after the making of the contract of January that they would not fill them and did not intend to fill them, but in June they signed a contract and said "we will." Now, you are suing under the June contract.

Mr. David: No. Under both.

The Court: You are suing under the June contract, including the other one as modified.

Mr. David: Yes, sir.

The Court: So I do not think that when they have come together and settled their disputes in June, what they did before would not throw any light on it.

Mr. David: The argument I make to your Honor is this: that the agreement of June twenty-sixth was not a settlement; it was merely—

The Court: It says it was to dispose of their disputes.

Mr. David: I say it was merely a modification of the contract which was in existence.

The Court: It was more than that. It was a new contract, because it had a new party to it.

Mr. David: It says in so many words—

The Court: It was a new contract. It was a contract with the company, but the

terms of the contract with the company were embodied in that contract. But it made new parties to the agreement. If there wasn't the contract of June twenty-sixth you couldn't hold the company. You could only hold Schwartz.

Mr. David: No, Your Honor.

The Court: You had a contract with Mr. Schwartz before.

Mr. David: We had a contract with Mr. Schwartz before which we say the company took over.

The Court: You have a contract with the Company, but the only purpose of referring to the old contract was for the purpose of referring to the terms.

Mr. David: We allege in our complaint they have never intended to fill our orders. And that when they made a tender of fifteen thousand dollars on September first, the last day that the contract was to run, they did not do it with any intention of filling our orders.

The Court: You can show the matter of their intention after they signed the contract of June.

Mr. David: And my contention is we have a right to show the intention not to fill the orders by the evidence from the first time they entered into the business relations with the plaintiff.

The Court: They evidently did not fill them, but they settled some.

I overrule the question and allow you an exception.

Q. Didn't the company tell Mr. North they did not intend to fill the contract prior to June twenty-sixth?

Mr. Cohn: Objected to.

The Court. Question overruled; and exception allowed.

Mr. David: Exception.

Q. And did the company also notify the trade they never assumed the North contracts?

Mr. Cohn: Objection.

The Court: Previous to June twenty-sixth.

Mr. David: Previous to June twenty-sixth.

The Court: That question will be overruled and an exception allowed.

Mr. David: All right.

Q. After June twenty-sixth, you did fill considerable orders at your plant, didn't you? A. We were working.

Q. Yes, and you delivered out of your plant at least five thousand dozen of heavyweight goods to people who were not the people mentioned as North's customers, didn't you?

Mr. Cohn: We object.

The Court: Why?

Mr. Cohn: Anywhere since June twenty-sixth?

Mr. David: Yes.

Mr. Cohn: I don't see—

The Court: Allow the question.

A. I don't know how many dozen, but we were working; and we delivered goods to customers other than Mr. North's.

Q. Have you got your books here? A. I guess —yes.

Q. Do you understand them? A. Yes.

Q. Can you, on reference to your books, tell me whether you delivered five thousand dozen or more of heavyweight garments to your own customers between June twenty-sixth and September first? A. If I look up the books I can tell.

By the Court: Q. Mr. Schwartz, I suppose the prices you were able to get from others after June twenty-sixth were better than the prices Mr. North had made the year before? A. Yes, sir.

Q. And that being so did you give preference to the new orders? A. No sir. That is—

Q. How many goods did you make out of Mr. North's orders after June twenty-sixth? He said two and one-half per cent. A. Mr. North's orders were to be made only out of his material. Because if we had made them out of our own material—

Q. He said you only made two and one-half per cent of the orders. What do you say? A. We worked up all what we got material.

Q. The material was there? A. No, sir.

Q. It was there so you could get it? A. We couldn't get it.

Q. It was there? A. It was there but—

Q. Up to September couldn't you have gone and got as much as you wanted? A. If Mr. North had delivered it we could have got it.

Q. Couldn't you have gotten it if you paid for it? A. Yes, sir.

Q. Why didn't you pay for it? A. Because we were not ready. First we had to ship to the customers we took.

Q. The whole long and short of it was that since the new business was more advantageous you wanted to cancel the old business if possible. And

Mr. North was to cooperate with you in that? A. Yes, sir.

Q. And you did not take the North orders until you could see whether you could get them cancelled? A. Part of that is so.

Q. Mr. North said you only made two and one-half per cent; do you think you made any more than that of his orders? A. Between June twenty-sixth and September first?

Q. Yes? A. I think that his figure is right.

By Mr. David: Q. Did you fill a single heavy-weight order of the North orders from June twenty-sixth to September first? A. We didn't.

Q. No, sir. At any time prior to August thirty-first and following June twenty-sixth did Mr. North refuse to turn over any material to you? A. What is the question.

Q. At any time between June twenty-sixth and August thirty-first did Mr. North refuse to turn over material to you? A. He didn't refuse.

Q. Did you make any demand for material other than the material that you asked for and got in July, amounting to six hundred and some odd dollars? A. We made only that one request on him.

Q. Isn't it true that between June twenty-sixth and September first you had forty-eight machines in your place you were not working? A. I didn't count them up.

Q. You know about how many? A. Yes.

Q. Was there forty? A. No. I don't think so.

Q. Were there thirty six? A. Lightweight macinery?

Q. Were there thirty-six? A. I couldn't name them by number.

Q. Is Mr. Bellus in Court here? A. Yes, sir.

Q. The man who is still in your employ? A. Yes, sir.

Q. Will he know? A. He will know.

Q. Isn't it a fact that the reason you did not fill these orders was because you were going to lose money on both the lightweight and heavyweight orders? A. No, sir.

Q. And didn't Mr. North tell you after you signed the contract on June twenty-sixth, that you had to lose money because you were increasing the overhead in your plant two hundred percent? A. No, sir.

Q. He never told you that? A. No, sir.

Q. Mr. North didn't tell you that in my office, after the signing of the June twenty-sixth contract? A. No, sir.

Q. And didn't he go over with you the figures and show the salaries that he paid and add them up, and show you that there was $149.00, and then go over your figures and show you the salaries you were paying and showed you that they totaled five hundred and sixty dollars, and tell you you could not make any money on his orders because of your increase in your overhead?

Mr. Cohn: Objection:

The Court: Is that a week or month?

Mr. David: A week.

The Court: What do you say about that?

A. He never done that, and it is not true either. These figures are not correct.

Q. Let us see. Your rent is thirty dollars a week?

Mr. Cohn: We object, if your Honor please.

The Court: Allow it.

Mr. Cohn: We object to going into an inquiry as to the overhead because it is not relevant to this issue.

The Court: Yes. It may throw some light on your actions.

Mr. Cohn: It means a collateral issue.

Q. You pay rent thirty dollars a week? A. Yes, sir.

Q. Mr. Nathan Schwartz draws a salary of seventy-five dollars a week? A. Yes, sir.

Q. Mr. Adolph Schwartz, yourself, draws a salary of thirty-five dollars a week. A. Yes, sir.

Q. Mr. D. W. Schwartz draws a salary of twenty-five dollars a week, is that right? A. Yes, sir.

Q. And the son of Mr. S. W. Schwartz draws a salary of twenty-five dollars a week. A. That is not a salary.

Q. How much? A. He is a working man; a laborer there.

Q. The others do not do any work, do they? A. Oh, yes.

Q. Mr. Louis Schwartz draws fifty dollars a week salary? A. Yes.

Q. Mr. Clyde Black, Secretary, draws fifty dollars a week salary? A. Yes, sir.

Q. Of course all the other items Mr. North had are still there, aren't they? Items of expense? A. I don't know what they had.

Q. Do you mean to tell me you did not go into that before you bought this business? A. Not in particular details.

Q. You did not know what the overhead of that plant was before you bought this business? A. Not in particular detail as you outline it now.

Q. You did not? A. No.

Q. I thought you were a better business man. You say that on September first when Mr. North came down with me, he gave you a second bill, is that right? A. Yes.

Q. And that bill was for twenty-nine odd thousand dollars, somewhat similar to the bill he gave you the day before? A. Yes.

Mr. David: Have you got the bill, P-22.

Q. Are these the two bills? A. Yes, sir; these are the two bills.

Q. I call your attention to the bill dated August thirty first P-19, that was the bill handed to you on the thirty-first? A. Yes, sir.

Q. And the bill dated September first, is the one handed you on September first? A. Yes, sir.

Q. Have you ever read that bill? A. Yes, sir.

Q. Don't you know that bill reads as follows: "Two months interest at six percent on $29,316.24, balance of the thirty thousand dollars stock carried as per contract, $293.16?" A. I do.

Q. Why did you say he rendered you another bill of twenty-nine odd thousand dollars on September first? A. I stated the amount in that second bill was somewhat less than what he gave me on August thirty-first, the amount.

Q. Did you mean this was for the same kind of a bill? A. No. It was an additional bill.

The Court: One bill is for goods and the other for interest.

Mr. Stamler: That is evident now.

A. Yes.

Q. As a matter of fact you never looked at the bill and you did not know what it was about? A. I did.

Q. All you were doing there was getting ready for this lawsuit? A. According to your view.

Q. You are right. You say you wrote a letter to Mr. Gutman and got a modification of his order? Carl Gutman and Company? A. I don't remember exactly what the modification was.

Q. You did get a modification you testified on direct, didn't you, of the Carl Gutman order? A. There was some—

The Court: I think he said the letter would tell.

Q. Did you fill the order as modified? A. We filled part. As much merchandise we had on hand we did fill. We used up all the merchandise Mr. North sold us.

Q. Don't you know Carl Gutman and Company has instituted a suit in the New York Supreme Court for nine thousand dollars against Mr. North? A. I heard so.

Q. And you testified that you also got a modification by cancellation of the Knickerbocker Knitting Company claim or order? A. I didn't.

Q. You never got one of those? A. The letters will show. I don't remember the different—fifty-five or many different customers.

Q. Fifty-five? A. I don't know. Maybe more.

Q. You testified on your direct you wrote to thirty-four. A. But others have written too. I wrote to so many making them a tentative offer, but in the meantime others kept on writing too. Just how many there were I never counted them up.

Q. You, yourself, wrote to thirty-four? A. Thirty-two.

Q. And others in the firm wrote to customers? A. No, sir. Other customers kept on writing.

Q. Have you produced all the letters you have gotten? A. I think so.

Q. Don't you know you have only produced letters from thirteen customers? A. As many as we found.

Q. Haven't you ever counted them? A. No.

Q. Don't you know there was over one hundred customers on the list? A. I produced all the letters we received since June twenty-sixth in answer to our offer to them.

Q. That does not answer my question. I say don't you know there are over one hundred customers on the list? A. I didn't count them up how many there were.

Q. Never counted them up? A. No.

Q. Don't you know you now only produced answers from thirteen customers? A. I didn't count them up, how many.

Q. And the answers you produced you say are the cancellations or modifications of the orders? A. Yes.

Q. This is one of the letters you produce. Letters from G. Summers and Company, July eighteenth, 1917.

Mr. David: I desire to read that letter.

Mr. Stamler: If your Honor please, those letters the witness construes as a modification. Your Honor has not permitted me to read the other letters. If he is going to single out the others I will single out—

The Court: Any one you want to read.

Mr. David: "Joseph W. North and Son,

Inc., Elizabeth, New Jersey. Gentlemen: Your letter of July tenth, sent to our firm has been received by the writer, who is buyer for the underwear department." (Reading letter.)

Q. This is one of the letters you say was a cancellation or modification of the order? A. There is a continuation to that; please read it.

Q. Where is it? A. Read my answer to this letter.

Q. Produce it. A. There it is.

By the Court: Q. Did you get anything further from them? A. Yes, sir.

Q. You also state in your direct, if I remember rightly, that on July twelfth, you wrote to Levy, Strauss and Company; did you get a cancellation or modification from them? A. The letter will show.

Q. Don't you remember that? A. No, sir.

Q. As a matter of fact you did get a modification from Levy, Strauss, don't you know that? A. I don't know.

Q. And don't you know that even after you got the modification you never delivered a single garment to Levy, Strauss and Company? A. We delivered all that we had materials from Mr. North. We could not make it out of nothing.

By the Court: Q. Why didn't you get the rest of the material to make it up? A. What?

Q. Why didn't you get the rest of the material to make it up? A. There wasn't time enough.

By Mr. David: Q. Mr. Schwartz, the contract that we are now talking about is dated June twenty-sixth? A. Yes, sir.

Q. Your letter to Levy Strauss was under date

of July tenth; two weeks later, wasn't it? A. Yes.

Q. And you got a reply from them on July twelfth? A. Yes, sir.

Q. And this is it? A. Yes, sir.

Q. Right? A. Yes, sir.

Levy Strauss letter entered in evidence and marked Exhibit P-28.

Q. After the receipt of this letter from Levy Strauss and Company, Exhibit P-28, did you deliver a single garment to Levy Strauss and Company? A. I have to look up my records; I can't carry them in my head.

Q. Don't you know you didn't? A. I don't know.

Q. Can you tell by looking at your books? A. Yes.

Mr. David: I ask the books be produced.

Mr. Stamler: Here they are.

A. Give me the list of filled orders I made up, and that will tell me. (Exhibit shown to witness.) We made shipment between June twenty-sixth—after June twenty-sixth.

By the Court: Q. The question now is whether you filled this order to Levy Strauss, which he gave you on July twelfth? A. No, sir; there was nothing shipped to Levy Strauss.

Q. Do you recall the contents of the letter of July twelfth? A. I just read it so I remember it.

Mr. David: I am going to read that letter: "Your favor of the tenth inst. wherein you offer to ship us—" (reading letter).

Q. Why didn't your company ship any of these goods? A. We had no time to produce them. They all wanted them at once and we could not make everything at once.

Q. But, Mr. Schwartz, you had only replies from thirteen customers? A. We shipped, I will tell you to how many customers we did ship.

By the Court: Q. Not on Mr. North's orders? A. Yes, sir; on Mr. North's orders.

Q. Here is your list. A. Pittsburgh Drygoods Company; Marshall Field Company.

By the Court: Q. How many dozen did you actually ship?

Q. How many customers and how many dozen, and what was it you shipped to those customers? A. What it was?

Q. Yes? A. Underwear.

Q. Lights or heavies? A. Lights.

Q This was the season that these people were getting their heavyweights, wasn't it? A. Season was past long before.

Q. For heavyweights? A. For lightweights. That is what you are talking about.

Q. No. I say this was the season that people wanted heavyweights on their shelves, wasn't it? A. I don't know what they wanted.

Q. You don't know? A. No.

Q. You are in the business, Mr. Schwartz?

Mr. Stamler: Mr. David, Mr. North said—

Mr. David: I object to an interruption. I did not interrupt you.

Mr. Stamler: Go ahead.

Q. You say you do not know what the merchants want between June and September? A. I do.

Q. Don't you know they want heavyweights shipped? A. Lightweights too. Not only heavyweights.

Q. Will you answer my question? A. Yes, sir.

Q. Is there not a demand, and was there not a demand among your customers between June and September for heavyweight shipments? A. No one wrote us they wanted heavyweight goods. We had no request from neither of these customers to make a shipment of heavyweight garments.

Q. But all of the customers wanted their shipments, didn't they? A. They didn't say so to us.

Q. Isn't it a fact, Mr. Schwartz, that between June twenty-sixth and September first, you were making up, selling, and delivering thousands of dozens of heavyweights at a materially increased price over the North orders? A. That was entirely different orders.

By the Court: Q. Weren't you doing it, he asked?

Q. Weren't you doing it? A. Yes, sir.

Q. Sure.

By the Court: Q. If you did that why couldn't you fill Levy Strauss' order? A. Levy Strauss' order was lights, and was no heavyweight order—

Q. Why couldn't you fill them? A. I couldn't fill both orders at the same time.

Q. And not being able to fill both at the same time you gave your own preference? A. No, sir.

Q. What else? A. I explain in the matter, your Honor.

Q. You say you could not fill them all, and you did fill those you had. And you did not fill Mr. North's and you must have given your own preference? A. Mr. North's was all made as far as the merchandise we got from him.

Q. You did not go and get any more? A. We couldn't at that time.

Q. You could have gone there and gotten it; you have already sworn to that. A. It is to be considered North's orders were all delinquent orders; they were late anyhow.

Q. Then it comes back to exactly what I said a moment ago. You say no, and then explain it to mean the same thing. Namely, you gave preference to your own orders? A. Only for the reason—

Q. It does not make any difference about all reason was, you did. A. I don't call it preference.

Q. It is preference when you send out your own and leave his alone. A. There is no time set when they should be delivered.

Q. It does not make any difference what the of that; the fact is you did not send out his orders, but did give yours preference? A. They were to be given preference.

The Court: Of course, you can dodge it all you want to, but the fact is you did give your own goods preference.

By Mr. David: Q. Mr. Schwartz, let me ask you another question: Isn't it true that of the fourteen thousand dollars worth of merchandise that you got from North to fill his orders, you used it to fill your orders?

Mr. Cohn: We object.

A. No, sir.

The Court: I will allow that question. You mean after June?

Mr. David: Yes, sir; after June.

A. Not true.

Q. I now ask this same question with reference to before June twenty-sixth?

Mr. Cohn: We object.

The Court: I will overrule the objection. Did you figure up the number of dozens?

Mr. Stamler: Yes, sir.

The Court: How many?

Mr. Stamler: 1070. Fourteen or fifteen hundred dollars.

Mr. David: He testified about thirteen hundred dollars.

The Court: How much of Mr. North's goods were secured after June?

Mr. David: Six hundred and some dollars.

The Court: And you manufactured fourteen hundred?

Q. As a matter of fact, you testified on direct that between January and June you shipped thirteen thousand dollars worth of North's orders, is that right? A. Yes.

Q. You testified to that on your direct? A. Yes, sir.

Q. And you had fourteen thousand dollars worth of goods from North, is that right? A. Yes, sir.

Q. And you could have made up at least twenty-eight thousand dollars worth of North's orders, couldn't you?

Mr. Cohn: We object.

Mr. David: That is his direct-testimony.

Mr. Cohn: The direct-testimony was for this purpose, and so far as it went in for right to examine him, it was to show in the prior transactions between the parties relating to the method of taking this merchandise, Mr. North tendered them a bill

for fourteen thousand dollars worth of merchandise. And itemized bill showing in detail the quantities and prices.

The Court: Yes. I overrule the question.

Mr. David: I ask an exception.

Q. You made, according to the schedule, between June twenty-sixth and September first, about eighteen shipments, is that right? A. All these shipments that are enumerated there.

Q. I say about eighteen? A. Yes, sir.

Q. To about six or seven customers? Is that right? A. They are enumerated there. I didn't figure them up.

The Court: He has not counted them.

Q. Don't you know that is so? A. I don't know.

The Court: Six or seven customers?

Mr. Stamler: That is not so.

Q. And of all those eighteen shipments there were two of union suits, isn't that so? A. Yes.

Q. And all the rest were known as vests; and this is what is known in the trade as a vest; is that right? A. Yes.

Q. And on that there is very little, if any, work to be done, isn't there? A. Depends on what you call little and what much.

The Court: As compared with union suits, you mean?

Q. As compared with a union suit, is that right? A. There is more work in that than in this, naturally.

Q. And more profit in that than in this? More percentage of profit? A. That I did not figure out percentage. I can tell if I look it up.

Mr. David: That is all.

The Court: You mean more profit in the vest than union suit?

Mr. David: I was holding the vest in one hand and referring to the union suit in the other.

RE-DIRECT EXAMINATION by Mr. Stamler:

Q. I want you to describe in detail how Mr. North kept the merchandise in the warehouse? How they were packed and how they were put there? A. This merchandise was in the warehouse at the time we came there.

Q. Yes. A. And Mr. North left it there with the understanding that it was his goods—

The Court: He wants to know how it was packed.

Q. Packed. How was it packed? A. It was nailed in nailed cases.

Q. Yes. A. And all in such shaoe that it was invisible to us.

Q. Now, did you ever take any merchandise out of those cases, or out of this warehouse when Mr. North was not present? A. Never did.

Q. In other words, whenever you got merchandise, Mr. North came there to deliver it to you? A. Yes, sir.

Q. Now, Mr. Schwartz, the Judge properly asked you on cross-examination why you did not proceed more promptly to fill the North orders for lightweight merchandise? Up to June 26th, what were you doing in the factory? A. Up to June 26th?

Q. Yes; what were you manufacturing there?

The Court: If you are going into that I will allow the other side to go into it also.

Q. I mean what were you manufacturing after June 26th up to the 3rd of July? To the date of signing the contract? What were you manufacturing then? In your plant? A. Underwear and knit cloth.

Q. Were you manufacturing then heavy underwear? A. Heavy underwear.

Q. Does the same machine that does the lightweight underwear do the heavy underwear? A. No, sir.

Q. Were you then properly equipped with machinery to manufacture the lightweight underwear? A. We had not.

Q. You had no machinery in there? A. We had the machinery, but they were not in the proper shape.

Q. Properly equipped? A. Properly equipped; we had no needles and no help to run the lightweight machines.

Q. How long did that take you before you got yourself properly equipped to go ahead with the work? A. All that took about three or four weeks.

Q. And that was within the time you bought more merchandise from Mr. North?

Mr. David: I object to counsel leading the witness.

Q. When did you begin really to operate?

The Court: He was operating all the time.

Q. I mean on the light weight? A. On the lightweight we didn't begin until after the second week in July.

Q. Did you discuss with Mr. North about when you commence on these orders? A. We did tell Mr. North, when he was there in July and we

took the lot of six hundred and eighty dollars from him, that on account of the excessive heat, and the improper condition of our lightweight machinery, and on account of lack of help we could not start up until fall to turn out any large quantities.

Q. What did he say to that? A. He didn't object.

Q. What did he say to that? A. He said any time you want merchandise, I am ready to give it to you.

Q. You manufactured 1070 dozen merchandise from June twenty-sixth to the day of September first. What would be the ordinary capacity if you were working full time? What would you have turned out? With the machinery as you had them equipped at that time? A. I couldn't tell.

Q. You could not tell? A. No. That depends on so many different conditions.

Mr. Stamler: That is all.

RE-CROSS EXAMINATION by Mr. David:

Q. You had plenty of machinery between June twenty-sixth and September first? A. Machines? Yes.

Q. You were short of needles? A. Yes.

Q. You knew Mr. North had plenty of needles? A. I didn't know.

Q. Didn't you ask him? A. I took from—

Q. Did you ask him? A. For needles?

Q. Yes? A. I knew Mr. North, what needles he had left, sent them away from our factory. He didn't have in our warehouse any needles.

Q. How did you know that? A. That is what Mr. North told us.

Q. He told you he hadn't any needles? A. Yes, sir.

Q. Between June twenty-sixth and September first? A. He told us previously. We were looking for needles a long time and Mr. North knew it and he never said he had any needles.

Q. He never said he had any needles? A. No.

Q. He said he didn't have any? A. I don't know whether he said he didn't have any. But he knew we were looking for needles and he never said he had any needles.

Q. Mr. Schwartz, have you ever seen this book before? Have you ever seen this book before? A. I am trying to remember whether I did or not.

Q. Let me refresh your memory. You will find a lot of marks through here. Right down through here. Do you remember making those marks in this book? Right here, here, here?

The Court: Do you remember the book now? A. Yes, sir. Wait a minute. Yes, sir.

Q. You went over this book with Mr. North? A. Not the book; only the items we took over with him.

Q. How could you check them up unless you went over the book? A. Only that was turned over to us.

Q. Only went over a couple of pages?

Mr. Cohn: Object.

The Court: Allow it.

Q. You went over only a couple of pages? A. I didn't say a couple of pages.

Q. How many? A. All the pages were stated as sold to us and delivered to us.

Q. As a matter of fact, on the original lot you took from North you returned four hundred and

twenty-nine dollars worth of needles? A. Yes, sir.

Q. Didn't you know North had those needles? A. I knew he sold them. I knew he sent them to the Manufacturers' Supply Company, somewhere.

Q. And these needles have all been sold? A. Yes.

Q. Just another question. After June twenty-sixth, and before September first, or at any time thereafter did you fill any part of the order to Denison Ghalson Dry Goods Company? A. I don't remember that we did.

Q. Do you recall after the contract was signed on June twenty-sixth Mr. North speaking to you about this particular order? A. I don't.

Q. Don't you recall that Mr. North showed you this letter under date of March, 1917, and his bill to them of $107.45? A. This letter I have seen sometime in March, but not after June twenty-sixth.

Q. And don't you remember in my office on June twenty-sixth, after the contract was signed, that Mr. North said to you—I withdraw that. Did you also see the bill sometime in March? A. I don't remember whether—you mean the statement?

Q. Yes? A. I don't remember of having seen that.

Q. I will call your attention to the fact that it was dated April twenty-first and now I ask you do you remember seeing it in March? A. No, I don't. A letter I do.

Q. Do you recall having been shown the letter and statement in my office on June twenty-sixth, after the agreement was signed? A. No, sir.

Q. And don't you remember Mr. North said

Denison Ghalson Drygoods Company would not pay the $107.45 because you hadn't filled their order? A. No, sir.

Q. And don't you remember promising to get that order out as soon as possible so he could collect his money? A. I could not have promised because I didn't have the material.

Q. Didn't you say that? A. No, sir; I didn't.

Mr. David: That is all.

By the Court: Q. I understood you to say that the prices of the North contract were not as favorable as those that could be secured after June twenty-sixth in the open market for the finished goods? A. I didn't mean to say that they were not as favorable as those that could be secured after June twenty-sixth in the open market for the finished goods.

Q. You did say that. A. I miss-expressed myself. And what I mean to say was that North's orders were all delinquent orders, the time of delivery had expired long before.

Q. I am not asking you about that? A. The profits—

Q. I understood you to say that you could get better prices with the new orders than you could by North's orders, is that so? A. It is not so.

Q. Why did you want to cancel the North orders? A. I didn't want to cancel only part.

Q. Didn't you start to? A. I will explain it.

Q. No, sir! I do not want you to swear two ways at the same time. I want to know is it a fact you tried to cancel or modify the North orders? A. I did try.

Q. If they were more profitable or as profitable as new orders why did you try to cancel

them? A. Because North's orders were only profitable inasmuch as there was enough material on hand at the corresponding low prices to cover all those orders. If we would have been compelled to go out—

Q. You were not compelled—

Mr. Cohn: Yes he was, if Your Honor please.

The Court: Was not Mr. North compelled to furnish the balance?

Mr. Cohn: No.

A. No.

Mr. Cohn: Mr. North was called on to furnish a certain amount—

Q. Didn't you testify already that the heavyweight orders were filled at a loss? A. Yes, sir.

Q. Couldn't you make new contracts at a profit on heavyweight orders? A. We did make them.

Q. So that your new orders were more profitable than the North orders on the heavyweight? A. They were.

Q. Why did you say a few minutes ago the North orders were not less profitable than the others? A. The lightweights.

Q. Did you say lightweights? A. Yes, sir.

Q. Did you say that before? A. Yes, sir.

Q. Lightweights? A. Yes, sir.

Q. Under the North orders the heavyweight orders were less profitable under Mr. North's contracts than they were under those you could make, that is true? A. I didn't quite get it.

Q. I say, the heavyweight orders were less profitable under Mr. North's contracts, than they were under those you could make, that is true? A. Yes, sir.

Q. Now the lightweight orders were more profitable under Mr. North's contracts than they were under the contracts you could make? A. Percentage of profit was about the same.

Q. Why did you want to cancel them? A. Because I didn't have enough material bought at the low prices to deliver at low prices, as they were sold to North's customers.

Q. Then you wanted to cancel as many of these contracts as you could? A. As I could.

Q. So you would not have to make up the goods? A. Only so much as I have materials at the low prices.

Mr. Cohn: So he would not have to purchase materials.

Mr. David: You are not testifying.

Q. Under the contract that was made you agreed to make up Mr. North's orders? A. Yes, sir.

Q. And Mr. North was to give you whatever merchandise he had on hand for the purpose of doing it? A. Yes, sir.

Q. So you had to furnish the balance of material in order to make these contracts? A. Mr. North contended that he has all the materials that is required to fill all those orders.

Q. He contended there was all the material there? A. Yes, sir.

Q. If that was so and you could make a profit on the lightweight, why did you want to cancel them? A. Because it afterwards turned out that Mr. North didn't have all the materials.

Q. How did you know? A. His own statement showed it; that the materials that he had was not sufficient to fill more than about half of these orders.

Q. If he did not have enough, under your contract you still had to make them up? A. If the customers had insisted, yes.

Q. I understood you to say you wanted to cancel those contracts or modify them and get rid of as many customers as you could and that is the reason you did not make any of those goods, or very few of them, between June twenty-sixth and September first? A. That was one reason.

Q. So that if you had succeeded between June twenty-sixth and September first in cancelling all the contracts then you would not have wanted any of Mr. North's merchandise because you could not use it for your own business? A. That was not to be expected. It was a rising market.

Q. You could only use his material for his orders? A. Yes, sir.

Q. So that if you had succeeded in cancelling all the North orders by September first you would not have needed any of his goods? A. I would not have needed any of his goods.

Q. On the first of September you did not know how many contracts could be cancelled? A. I knew part of them.

Q. You knew the ones that have been in here? A. Yes, sir.

Q. But as to the rest you did not know? A. I know the general tendency of the customers is they would be willing to accept as much as we were able to give them pro rata from the material Mr. North had on hand. So as not to be compelled to go out and buy materials at one hundred and fifty percent rise in the market, and deliver them at the prices sold in 1915, two years ago. All the customers appreciated the situation.

Q. When did you know that? A. From the answers.

Q. At what time did you know that? A. During the month of August.

Q. Did you make any effort after that or offer to go to Mr. North and say "Now, we are going —the time expires on the first of September, and we want time enough now to take an inventory and see where we stand on this thing?" A. I couldn't do that, because Mr. North was not in the city. First thing I done was on August twenty-seventh, I wrote him a letter he should come down. I didn't expect an inventory. I expected a bill as he always did. I knew there was no hard feeling at all between us. And I didn't expect he would come and tender us a bill in bulk twenty-nine thousand dollars.

Q. You thought there would be an itemized bill? A. An itemized bill, as the one he gave us before?

The Court: That is all.

By Mr. David: Q. Now to buy the goods made up in open market that you had agreed to give to the North customers meant an increase of about one hundred and fifty percent over the cost to North customers, is that right? A. Not in all instances. In some. From one hundred to one hundred and fifty percent.

Q. And you sold your made up produce to your own customers at from one hundred and fifty percent higher than what you would have had to sell them to North's customer?

(Question repeated by the stenographer.)

A. No. That wasn't so.

The Court: Why not? A. Because the cost of production of those goods that were sold at the higher price was correspondingly higher too.

Q. You mean your overhead was more? A. No. Overhead was not. Overhead was less than North's.

Mr. David: That is all.

By Mr. Cohn: Q. What was higher? A. Cost of material, labor and trasportation.

Mr. Stamler: And the cost of yarns was higher?

A. Yes, sir.

Mr. Stamler: And therefore, the—

Mr. David: Are you going to testify now?

Mr. Stamler: You can do your share, Judge.

WILLIAM BELLIS, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Bellis, what is your full name? A. William.

Q. Where do you reside? A. 1088 Magnolia avenue.

Q. What is your occupation? A. Boss knitter.

Q. Where were you employed for the last twenty years or more? A. In Joseph W. North's.

Q. Are you at the present time employed by the North Company? A. Yes, sir.

Q. You are friendly with Mr. North? A. Always have been.

Q. Are you a good friend of his today? A. Yes, sir.

Q. Now Mr. Bellis, you knew this stock that

Mr. North had on hand about Christmas time of 1916, which he moved from his various places in the shop into the warehouse? A. A great part of it; yes, sir.

(Answer repeated by the stenographer.)

Q. Which part did you know of? A. Generally the yarns.

Q. Generally the yarns; do you know of the webbings? A. No, sir; not so much of it.

Q. But of the yarns do you know absolutely all of it? A. Very near.

Q. During the year of 1916 Mr. North purchased a special yarn know as Plowman yarn. Do you remember that? A. Yes, sir.

Q. Did you work on that Plowman yarn when Mr. North was there? A. It was tried out: I don't know how much was used.

Q. It was tried out, but don't you know how much was used. Did you work any of that yarn when Mr. North still owned the factory? A. Yes, sir.

Q. Have you handled yarn for twenty-five years or more? A. Very near thirty years.

Mr. David: We admit his qualifications. He is an expert.

Q. Was there anything the matter with Plowman yarn? A. Well, I condemned the yarn when it was first got.

Q. You condemned the yarn when it was first got? A. Yes, sir.

Q. Why? A. Well, it didn't run as well as it should.

(Answer repeated by the stenographer.)

Q. What was the matter with it? A. In spinning yarn, you know, there is some inferior qualities.

Q. I see. A. This wasn't up to standard; not to my estimation.

Q. Did you tell that to Mr. North? A. I did.

Q. What did Mr. North say? A. Well, as near as I can remember he said it was an order and it would have to be used up.

Q. Was any of that yarn left on Christmas of 1916? A. I don't know how much, but I know before the factory was turned over it must have been somewhere around between thirty-five or or forty cases, or more. I don't know exactly.

Q. Did you tell the Schwartzs about that yarn? A. I did.

Q. What did you tell them? A. I told them to use the other yarn if they could because it would make better work.

Q. Did you tell them anything else as to what was the matter with the yarn? A. I told them the yarn was inferior quality, and not up to what it should.

Q. Do you know where Mr. North got that yarn? A. It is a Southern yarn. I don't know exactly where it came from.

Q. Was it a regular stock? A. That I don't remember.

Q. Do you know how many pounds in a case of yarn? About? A. Well, I should judge between, average around three hundred, maybe a little over, and maybe a little less.

Q. Now, Mr. Bellis, you also assisted Mr. North in marking the cases as they were nailed up and hammered up, and set away in the storehouse? A. That was one odd case. Yarn comes in solid bulk, you don't touch that until you use it.

Q. Did you help Mr. North in getting the stock

ready and into the storehouse? A. That was one broken loose; broken case we had taken.

Q. Did you assist him in that? A. Yes, sir.

Q. Did you assist in covering the case and moving from one place to another? A. Each case was marked? It was marked and entered, I suppose, in the list.

Q. Did you mark some of it? A. No, sir.

Q. You didn't mark it? A. No, sir.

CROSS-EXAMINATION by Mr. David:

Q. As I understand, Mr. Bellis, the Plowman yarn was an inferior yarn? A. As far as my estimate was.

Q. And didn't cost as much as the better yarn? A. That I don't know about the cost.

Q. Well, you know there are different grades of yarn, don't you? A. Certainly, certainly.

Q. And the better grade costs more than the inferior grade? A. Exactly.

Q. You know that Mr. North had been buying the yarns for a number of years, didn't you? A. Yes, sir.

Q. You don't know—or do you know that Mr. North was to turn over those yarns to the new company at cost? A. This was before when I condemned the yarn.

Q. Have you learned that since? A. Yes, sir.

Q. That he was to turn over the Plowman yarn at cost? A. Yes, sir; I undertsood that.

Mr. David: That is all.

RE-DIRECT-EXAMINATION by Mr. Stamler:

Q. Who told you that? A. That is what I understood from hearing them all speaking.

The Court: Aren't you going to ask him about the machines?

Mr. David: I will make him my own witness, then.

DIRECT-EXAMINATION by Mr. David:

Q. Mr. Bellis, you are still in the employ of the company? A. Yes, sir.

Q. And were you in the employ from June twenty-sixth to September first? A. Yes, sir.

Q.. How many machines were in the plant and not being operated between June twenty-sixth and September first? A. Well, I couldn't tell exactly. There were quite a number. I should say from thirty to thirty-five machines.

Q. Thirty or thirty-five machines? A. May have been more.

Q. May have been over forty? A. Yes, sir; may have been. I can't tell exactly.

Q. These machines had needles in? A. Yes, sir.

Q. And they were already to do work on? A. Yes, sir.

CROSS EXAMINATION by Mr. Stamler:

Q. Are those machines still idle? A. Yes, sir.

Q. They have never been used for any purpose excepting the manufacture of lightweight underwear? A. That is all.

Q. That is right? A. Yes, sir.

Q. And they were never used by the North people after September first, 1917? A. You mean the people took the place over?

Q. Yes? A. Only a short time.

Q. That is, during the period of June twenty-sixth to September first? A. I can't say exactly as to dates.

Q. During the summer months? A. It was only a short time afterwards.

Q. Why weren't those machines working?

Mr. David: Objected to as immaterial.

The Court: I will allow it.

Q. Why weren't those machines working? A. That I don't know.

Q. You don't know that? A. No, sir.

The Court: That is all.

RE-DIRECT-EXAMINATION (as his own witness) by Mr. Stamler:

Q. Wasn't it true that many of these machines lacked needles and you were repairing them and putting them into condition? A. Not as far as lacking needles. There was lots of needles for all.

Q. You did repair them during that time? A. Always do.

Q. That is your duty? A. Yes, sir.

Q. Now, Mr. Bellis, was this Plowman yarn, as they call it, was it an inferior grade or was it a bad run of yarn? A. Well, I don't exactly know. But it didn't work up to my expectations, and certainly I was always in the habit of notifying them whenever it doesn't.

Q. Would it cost more to manufacture with a yarn of that kind than with a good and proper yarn there? A. Yes, sir.

Q. Would there be more waste? A. Yes, sir.

Q. To what extent? A. That I couldn't tell you.

RE-CROSS-EXAMINATION by Mr. David:

Q. Mr. Bellis, isn't it true that of the Plowman yarn in December, 1916, there were only one or two cases? A. That I don't remember. I con-

demned the yarn when it first came in. And that is all I know about it.

Q. Don't you recall that the yarn you condemned did not come in until February, 1917? A. The first case I always try of yarn and I condemn or pass.

Q. Don't you recall that was in February, 1917? A. It was quite awhile before these people took their place over. I know that.

Q. It was quite a while before these people took their place over? Was it before Mr. Nathan Schwartz took the place over? A. Yes, sir; when I condemned the yarn there.

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

By Mr. Stamler: Q. Did some come afterwards? A. It came right along, but very little of it in my time.

The Court: That is all.

JAMES LAPE, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Lape, where do you reside? A. 448 Monroe Avenue.

Q. What is your occupation? A. Cutter.

Q. Cutter of what? A. Boss cutter of underwear.

(Answer repeated by the stenographer).

Q. In whose plant? A. J. W. North and Sons.

Q. How many years have you worked there? A. Five years altogether.

Q. You worked for Mr. North? A. About four.

Q. And for his father before him? A. No, sir.

Q. No? A. No, sir.

Q. All right. You worked there up until the time Mr. North sold the business? A. Yes, sir.

Q. And continued with the new concern? A. Yes, sir.

Q. During the year 1916, was there an accurate inventory made in that plant? A. There was.

Q. Was that the custom every year? A. Yes, sir.

Q. Made by Mr. North? A. Yes, sir.

Q. Who helped him? A. Mr. Bellis and myself.

Q. Yes. Did your father work there too? A. Yes, sir.

Q. And what part did you take in it? A. Upstairs; second floor.

Q. What is up there? A. Yarns and webbings.

Q. And what did you do there? What was your duty? A. My duty was to put it on the scales and take it back; help put it on.

Q. You are therefore acquainted with all the webbings and yarns in the place? A. Yes, sir.

Q. Did you assist also in 1915? A. Yes, sir.

Q. In that kind of work? A. Yes, sir.

Q. As I understand the yarns are made into webbings, that is, it was Mr. Bellis' duty to see it was made into webbing, and when it gets out of his hands, and into yours, you cut this into garments? A. Yes, sir.

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

Q. At Christmas of 1916, or thereabouts, do you recall when Mr. North was cleaning up the place for the purpose of storing the light goods in the warehouse? A. Yes, sir.

Q. Did you assist him in that? A. Yes, sir.

Q. Were all the cases marked, what they con-

tained, the style, quality, and number of pounds in it? A. All but a few were marked; weight and the number of size rolls in the case.

Q. Yes? A. Styles wasn't there.

Q. So that an inspection from the outside of the case one would not know what style was in them? A. No, sir. But I did. I would know if I opened it up.

Q. If you opened it up? A. Yes, sir.

Q. Now, Mr. Lape, there was some plowman yarn there? A. Yes, sir.

Q. Do you remember that yarn coming in? A. Yes, sir.

Q. And do you remember working with it? A. Yes, sir.

Q. What seemed to be the trouble with that yarn? A. It seemed to be not spun properly; it varies, heavy and light ends.

Q. To whose attention did you call it? A. Mr. Bellis.'

Q. That was your superior in that regard? A. Yes, sir.

Q. What did this defect cause in the webbing? A. Holes.

Q. Holes? A. Yes, sir.

Q. What would you have to do then in order to correct it? A. Why, we would have to cut away pieces in order to cut the right garment, to get the length.

Q. Would that make waste? A. Yes, sir; considerable.

Q. More than the average garment? A. Yes, sir.

Q. How much more? A. About one-third.

Q. About one-third? A. Near one-third.

Q. Do you know approximately, how many cas-

es of that Plowman yarn Mr. North had on hand Christmas, 1916?

The Court: Defective?

Mr. Stamler: Plowman.

The Court: You mean defective?

Mr. Stamler: Plowman yarn.

The Court: Do you mean defective? This alone does not mean anything, unless you mean defective; was this defective?

Mr. Stamler: The Plowman yarn is the only yarn they had there of that kind.

The Court: What I want to avoid is to have the jury get any misapprehension as to whether this witness intends to testify it is all defective or not.

Mr. Stamler: That is what I understood Mr. Bellis to testify to, unless I misunderstood his testimony.

The Court: How many cases of Plowman yarn were there, about? A. I should say about twenty.

The Court: Was it all defective or not, do you know? A. I could not tell you.

Q. Could you tell if you should look at it now? A. Not very well.

Q. Why? A. Because the cone is hid some place. The cone. Outside you could tell, but not all the way through.

Q. You can tell that in working them into the webbing? A. Yes, sir; I could tell.

Q. How many cases had you worked of that particular quality of yarn? A. Under Mr. North, do you mean?

Q. Yes, sir. A. That I couldn't say.

Q. Well, many? A. I don't think so.

Q. What? A. I don't think so.

(Answer repeated by the stenographer.)

Q. Why was it stopped being used? Why didn't you use it? A. I think at that time it was bad, if I remember right, and at that time it was run up in about two weeks, before Mr. Schwartz had taken over the mill.

Q. Who told you to stop using that webbing? That yarn? A. No one told me.

Q. Nobody told you? A. No, sir.

Q. Now, were those cases containing the Plowman yarn marked? A. Yes, sir.

Q. On the outside? A. Yes, sir.

Q. Weight? A. Weight, net and gross.

Q. Gross? A. Tare.

Q. And the size of the yarn? A. Yes, sir.

Q. And the quality? A. Yes, sir.

Q. Did you call the attention of Schwartz to this Plowman yarn? A. Yes, sir. I told Mr. Schwartz about it.

Q. What did you tell him about it? A. I told him it wasn't what it ought to be, but it was bad. Got bad results from it.

Q. Did you work some of that yarn while the Schwartz' were running the factory? A. I did.

Q. Was Mr. Schwartz supervising the factory at the time?

The Court: What is the purpose of this?

Mr. Stamler: Show some of the merchandise in the warehouse on this shipment was not good.

The Court: What for? You were not obliged to take it.

Mr. Stamler: That is it.

The Court: Did you say on the first of September, I will not take the Plowman yarn because it is defective?

Mr. Stamler: No, sir.

The Court: If you wanted to take advantage of it, wouldn't you have to say it?

Mr. Stamler: We go beyond that, and show affirmatively some of the goods were not proper. We were only obliged to take such as were proper and suitable to fill our orders.

The Court: Wasn't somebody obliged to make a statement of that kind at the time? For instance, on September first, if that was your purpose, when Mr. North said "here is all the goods," and he said he would take them but he would not take the defective Plowman yarn. But I do not understand that anybody on September first even brought up the suggestion that it was defective yarn.

Mr. Cohn: Does he have to, in advance, itemize his objections?

The Court: No. But I should think he would say, you have twenty-nine thousand dollars worth; we can not pay you twenty-nine thousand dollars, we understand that you have a lot of Plowman yarn that is defective. We will not take that.

Mr. Cohn: He made a general statement.

The Court: He did not make any statement about Plowman yarn being defective. And suppose if he had said that and Mr. North said why, yes, that is defective; you need not pay for it.

Mr. Cohn: The testimony is Mr. North, when asked to go over and see what was suitable, then said "you have to take all or nothing."

The Court: In the absence of any statement that thing was defective—

Mr. Stamler: I am trying to prove that Mr. Schwartz in the presence of witnesses talked with Mr. North long before September first relative to this Plowman yarn; they refused to buy any more of it. And show they refused to buy any more of it. And call attention of the Court and Jury—

The Court: Why didn't somebody say something about it on September first?

Mr. Stamler: Well, it wasn't said evidently.

The Court: Adjourn until 1:30.

Adjourned until 1:30 p. m.

1:30 p. m. session.

JAMES LAPE, (resumed):

Direct-examination (continued) by Mr. Stamler:

The Court: Did you finish the tabulation of those letters given you yesterday, how much it would reduce it?

Mr. North: The letters given to me yesterday, opposing counsel asked me to eliminate those orders entirely from the testimony, which I have done.

Q. Mr. Lape, I want to know, I understand you to say that after the company took over the business you did have some of the webbings made out of this Plowman yarn? A. Yes, sir.

Q. What did you find about them then? A. Found the same result as before.

Q. Who was superintending the factory during the first ten or twelve weeks that the North Company was running it? A. I expect Mr. North was the superintendent.

Q. Mr. North? A. Yes, sir.

Q. Did Mr. North see those webbings? A. Not to my knowledge.

Q. To whom did you report about that? A. To Mr. Bellis.

Q. To Mr. Bellis? A. Yes, sir.

Q. And did you tell him you called attention to the Schwartzs at any time? A. He knew that.

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

Mr. Stamler: I do not recall whether I asked the witness how many cases of those yarns were there.

The Court: Yes, sir.

Mr. Stamler: That is in the record already?

The Court: Yes, sir.

Q. And some of this Plowman yarn came in after the Schwartz got the business? A. Yes, sir.

Q. What was done with that yarn? A. It was stored in the storehouse, in the warehouse.

Q. By whom was it stored? A. I suppose that Mr. North—

Q. Where was it put? A. In his warehouse.

Q. In his warehouse. How big is that warehouse? A. I should judge a building about—we had to place the yarns in the warehouse at that time. Perhaps about forty by eighty.

Q. How high was that? A. High?

Q. Height of the building? The part where the yarns were in? A. About fifteen feet.

Q. How much room did that occupy? All the

merchandise? A. All of it; all except the two alleyways.

Q. Two alleyways? A. Yes, sir.

Q. Where do they lead to? A. One led to the department where they filled the yarn, the wool yarn. And the other one went to the factory where it is taken there.

(Answer repeated by the stenographer).

Q. I want to know how much of the warehouse did those goods fill? A. About how much taking it all in?

Q. Yes, sir. A. It took it all in space, floor space, all except the two alleyways. Alleyways, I should judge about eight feet.

Q. Where do they lead to? A. One of them led to the place where they filled the wool yarn; that is finished up the wool. And the other one run to the wall on the furthest side.

Q. At Christmas time when you packed these goods in the cases and sealed them? A. Yes, sir.

Q. Did you help mark them? A. Yes, sir; I did.

Q. What did you mark on them? A. I marked the style, the size of the rolls and the weight.

Q. On the outside of the case? A. On the end of the case.

Q. And all the cases were marked that way? A. All the cases except a few.

Q. How many were not marked? A. That I could not say.

Q. But you know some were not marked? A. Yes, sir. The weights—that is the weight, and the size of rolls and how many were marked on the end of the case; I noticed a few were not marked.

Q. What? A. I noticed a few were not marked.

Q. Were all cases marked with the style and quality of the goods inside of them? A. Yes, sir.

Q. Every one of them? A. Every one except a few. I couldn't say all, but there was a few were not marked.

Q. How many? A. Perhaps three or four.

Q. As to webbing, were there any loose weblings there prior to Christmas of 1916? A. Well, when we packed it we left some of it Mr. Schwartz had taken over to fill some of his orders.

Q. Webbings never came in the original cases? A. No, sir.

Q. They were put in afterwards in the cases? A. Yes, sir.

Q. Was there any webbings there during the year 1916 that were there in 1915? A. Yes, sir.

Q. And that were there in 1914? A. Very little.

Q. But there was some? A. Some.

Q. Was that— what as to the quality of the webbing; was there anything the matter with it? A. It had been soiled by laying there.

Q. Where were they put? A. They were put into a case.

Q. Into a separate case? A. Yes, sir. There was all the mercerized together.

Q. Mercerized? A. What we call one, one Swiss rib, two, two, and so on.

Q. In what respects were they bad? A. In some we could get good results and some we could not. They were soiled, and different colors to them.

Q. They were different colors? A. Yes, sir; different shade.

Q. Were they long or short ends, or odds and ends? A. Some were in rolls. One-third of a roll and so on. And some pieces left over from cutting samples. Some, I think, were used up.

Q. Yes? A. Mr. Schwartz had taken over and they were cut up.

Q. What was done with the balance of them? A. Mr. North took those back.

Q. Where were they? A. They were put in the warehouse.

Q. They were in the warehouse? A. Yes, sir.

Q. When did he take them back? A. What month do you mean?

Q. Yes? A. I think it was the latter part of February.

Q. 1917? A. 1917.

Q. And they remained in the warehouse until September? A. Yes, sir; to my knowledge.

Q. As to the machines for lightweight goods, were they being operated? A. No, sir. At what time?

Q. I mean prior to—at any time during the year 1917? A. After Mr. Schwartz had taken over the—

Q. Yes, sir? A. Yes, sir.

Q. When were they operated? A. Operated along toward the spring. That is the Swiss ribs. What we call the Swiss Ribs, two, two. Two, two weren't started up.

Q. In other words, up to June twenty-sixth; between June twenty-sixth and September first were all the machines operated? A. No, sir.

Q. They were not? A. No, sir.

Q. Do you know on whose orders the light weight machines were working? A. I don't.

Q. And how long a time did those lightweight machines operate? How long a time all told? A. Varying one. One would run one time and Swiss rib another time.

Q. How long a period of time would that take you? A. Perhaps three or four weeks.

Q. Perhaps three or four weeks all told? A. Yes, sir.

Q. Are you sure that was in the spring and not the summer? A. I am not positive.

Q. You are not positive of that.

Mr. Stamler: Cross-examine.

CROSS-EXAMINATION by Mr. David:

Q. This mercerized web that Mr. North took back, you are familiar with that? The fact he took it back? A. Yes, sir.

Q. There was 184 pounds of it? A. I think it was around one hundred and twenty-five pounds.

Q. And Mr. North credited them with the amount they paid for that? A. I couldn't say.

Q. You don't know that. That was only a very small percentage of the goods that was there, wasn't it? A. Yes.

Q. That is so in every mill, isn't it? A. Yes, sir.

Q. There is some little stuff that is not just up to snuff? A. As a rule; there is so many styles.

Q. You had gone through the inventory in 1916, with Mr. North, hadn't you? A. Yes, sir.

Q. And you marked these cases on the outside showing just what was in them? A. Not all.

Q. All but a few? A. Well, perhaps two-thirds of them.

Q. You marked about two-thirds of them? A. About two-thirds of them.

Q. The others were marked by your father, weren't they? A. Exactly.

Q. And so practically all of the cases showed on the outside just what was in them? A. Exactly.

Q. And a great many of those cases were just in the shape that North had bought and paid for them? A. Yes, sir.

Mr. Stamler: How does he know?

Q. Do you know? A. The only way I saw them in the storehouse. I went out there frequently and saw they were in pretty good shape from the outside.

Q. I want to make sure I understand your testimony with reference to the style. Was the style also marked on the outside of the case? A. It was.

RE-DIRECT-EXAMINATION by Mr. Stamler:

Q. There was some cases were not marked? A. Yes, sir; some cases.

Q. Wasn't there a mistake made in one case as to marking? A. Not that I remember.

Q. A mercerized case? Don't remember that? A. No, sir.

Q. In some cases the sizes were not marked outside? A. The sizes were, but the style wasn't.

Q. What is the style? A. Style is lisle, mercerized, and so on.

Q. You mean quality? A. We call it style.

Q. And in order to find out what was in them you would have to open them? A. Exactly.

Q. And in order to find out what was in them you would have to open them? A. Exactly.

Mr. Stamler. That is all.

Mr. David: That is all.

NATHAN SCHWARTZ, one of the defendants being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Schwartz, you are a member of the firm of North and Company? A. Yes, sir; I am.

Q. And what did you do in the factory? A. I am manager.

Q. You are manager of the plant? A. Yes, sir.

Q. Devote all your time and attention to it? A. Yes, sir.

Q. During the spring of 1917, did you buy any Plowman yarn from Mr. North? A. I did.

(Question repeated by the stenographer).

Q. Did you get any report from any of the men relative to the Plowman yarn? A. I did.

Q. From whom? A. From the boss knitter and from the cutter.

Q. Who are they? A. The man that—

Q. Mr. Bellis? A. Mr. Bellis and Mr. Lape.

Q. Did you talk the matter over with Mr. North? A. I did.

Q. What was Mr. North doing at that time in the plant? A. He was acting in an advisory capacity.

Q. Being paid for it? A. Yes, sir.

Q. By your company? A. Yes, sir.

Q. And how long was he doing that? A. About three months.

Q. What did you tell him about the Plowman yarn? A. I told him that the men called my attention that the yarn is poor. Is not working right. And therefore—

Q. Talk so the jury can hear you. A. And

therefore I can not use it, and he said, "Well, if you can't use it, you don't have to take it; I will dispose of it elsewhere."

Q. Did you take any more of it?

The Court: In view of that, what is the significance of this testimony?

Mr. Stamler: The significance of it is—

The Court: He tells you he didn't have to take it.

Mr. Stamler: That is right. But Mr. North came on September first and wanted to get paid for it. He made no deduction for that yarn.

The Court: When he did not, isn't that up to you to say you did not want the other yarn?

Mr. Stamler: That is up to the jury to say that.

The Court: You came there on September first and Mr. North said here is the whole thing. Take it or not. As he says, take this defective yarn or if not I will sell it elsewhere. And he comes September first, and says "Here is the goods. Do you want them?" And you did not say "take out the defective material."

Mr. Stamler: Now the evidence is we said we will take all the merchandise that is suitable to our contracts. "Here is the fifteen thousand dollars; we will take all the merchandise that is suitable for your contracts. We will give you the balance of the money as soon as we determine the amount." That is the testimony in the case, and I think this is very material

on this point. They had a right—surely they had a right to see what they were going to get. It is a question as to the conduct.

The Court: When the man said you do not need to take it if you do not want it, why didn't you say you can just eliminate that. We do not want it.

Mr. Stamler: They thought they had a right to inspect it and see what they were going to get. They agreed to buy by pound, weight, and price, according to the contract.

The Court: What is the last question?

(Question repeated by the stenographer.)

A. I don't think we did.

Q. Don't you know? A. I am not sure. There may have been some of it in there in the small lot we took in July. I am not sure.

Q. You are not sure of that? A. No, sir.

Q. Will your bill show it? A. I don't know whether they do or not.

Q. What?

The Court: Is there any dispute as to how much was taken?

Mr. Stamler: I don't know whether we took any after that date.

The Court: What do you say?

Mr. Stamler: Did we take any after that date? After February, 1916?

Mr. David: Take any of what?

Mr. Stamler: Plowman yarns?

Mr. David: Our statement is and Mr. North will go on the stand and say you never took one pound of the Plowman yarn

after they took business, back in January, 1917.

Mr. Stamler: That is so much better. Now, that ends that.

Q. Now, as to your light weight machinery, what was done with that? Did you operate it? A. No, sir; we have not.

Q. Did you operate it to make any other merchandise with it? A. No, sir.

Mr. David: He said he did not operate it.

Mr. Stamler: I want to find out.

Q. Did you make any lightweight goods for any other person excepting North contracts? A. We have not; no, sir.

Q. At any time? A. No, sir; not since we are in there.

Q. With that machinery I am talking about? A. No, sir; not a penny's worth.

Q. Did you take any orders for lightweight underwear? A. No, sir; we have not.

Q. That part of the plant was then idle? A. Idle; yes, sir.

Q. And it is still idle? A. And it is still idle.

Mr. Stamler: Cross-examine.

The Court: Any questions?

Mr. David: No questions.

The Court: That is all, Mr. Schwartz.

WILLIAM H. JAQUITH, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Jaquith, where do you reside? A. West Orange, New Jersey.

Q. What is your business? A. What is what?

Q. What is your business?

The Court: Business? A. Banking. I can't hear very well. You will have to speak a little louder.

Q. What bank are you connected with? A. Coal and Iron National Bank, New York.

The Court: What do you want to prove? That he came there with fifteen thousand dollars in one thousand dollar bills?

Mr. Stamler: Yes, sir. And what was said there.

The Court: Tell us what was said there when you went there on September first. A. I don't remember the whole conversation. As I remember it, it was to this effect, when I presented the fifteen one thousand dollar bills Mr. Black made the remark to this effect; I don't remember the exact words, "We now present to you—tender to you these fifteen thousand one dollar bills."

The Court: One thousand dollar bills? A. "Fifteen one thousand dollar bills, and we are prepared to take care of the balance at any time."

Q. What was said about the inspection of the goods? A. I don't remember the exact words, but they were there ready to be inspected.

Q. Were any men called up? A. Why, as I remember it there were a couple of men called in there. In the storehouse.

Q. And what did Mr. North say, or Judge David, in reply to that? A. That I don't remember. I don't remember their words. They mere-

ly refused to accept the fifteen one thousand dollar bills.

Q. What happened about the inspection? A. Nothing was done.

Q. What did they say about it? A. I couldn't say the words.

Q. You do not recall them? A. No.

Q. Where did you meet first Judge David and Mr. North that day? A. At the factory.

Q. What part of it? A. In the office.

Q. Where did you go then? A. We went into the storehouse.

Q. Why did you go there?

The Court: What is the use of that?

Mr. Stamler: I want to find out what was said.

The Court: Ask him what was said. Why he went there or how he went there is not important.

Q. What was said before you went up to the warehouse?

Mr. David: Not up to the warehouse.

Q. Or, to the warehouse? A. They went into the warehouse to inspect the goods.

Q. Weren't the goods inspected? A. No, sir; they were not.

Q. Why? A. If I remember correctly, Mr. North said they could not inspect them in that length of time.

Mr. David: What length of time? A. While they were standing there, I believe.

CROSS-EXAMINATION by Mr. David:

Q. Don't you recall Mr. Black saying it will take us three or four days to inspect and inven-

tory these goods? A. Something to that effect.

Q. And don't you recall Mr. North saying, "we are not going to stand around here three or four days at this time"? A. Yes, sir.

Mr. David: That is all.

Mr. Stamler: That is all.

CLYDE E. BLACK, produced as a witness, on behalf of the Defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Stamler:

Q. Mr. Black, you are the secretary of the company? A. I am.

Q. And after the making of the contract, did you, in compliance with the contract, deliver the minutes? The first minutes or the minutes of the first meeting of the stockholders to Judge David?

Mr. David: Where does the contract provide for any such delivery? I object to the question.

Mr. Stamler: He was to become a director of the company.

Mr. David: I object to the question on the ground the contract does not provide for the delivery of any minutes, and is a misstatement of the terms of the contract.

Mr. Stamler: My answer to that is—

The Court: Does it provide anything like that?

Mr. Stamler: No. Not in that exact language.

The Court: I overrule the question.

Q. I show you some papers and ask you what they are? A. (Witness examines papers.) I believe these to be the minutes of the company prepared by Mr. Cohn, our attorney.

Q. And what did you do with them? A. Either these or an exact copy thereof I left at Judge David's office.

Mr. David: I now hand over to you, as you demand, the minutes Mr. Black left with me. There they are.

Mr. Stamler: I offer them in evidence.

Mr. David: For what purpose?

Mr. Stamler: To show we were ready—this goes on the theory of the stock transaction.

The Court: Ready to what?

Mr. Stamler: This relates to the stock transaction.

The Court: It relates to that, but what does it prove? The judge claims you were obliged to turn over a certain amount of stock. Did you turn it over?

Mr. Stamler: No, sir.

The Court: Why didn't you turn the stock over?

A. If your Honor please, there was some question about the minutes I had prepared not being in accordance with the Jersey statutes, and at the time we prepared this contract of June twenty-sixth, it was understood that—between Mr. David and Mr. Cohn that Mr. Cohn was to prepare appropriate minutes covering the transaction of the corporation from the date of its formation, and leave these minutes with Judge David, and if after he approved them, make Mr.

North a director, then I was to deliver to him the shares of stock. And I actually did prepare the certificates of stock, but Mr. David never approved the minutes.

The Court: You see, that is very simple.

Mr. David: Will you fix the time when this was delivered?

The Court: When did you give this to Judge David? A. Shortly after the contract of June twenty-sixth.

Mr. David: Will you fix the time? A. That is as near as I can tell.

Mr. David: Was it in July? A. I am sure I don't know. I am sure Mr. Cohn can testify better about that. It must have been the first week in July, because it was a few days after June twenty-sixth when the contract was signed.

Q. I show you a book and ask you what that is? A. This is the stock book.

The Court: What is the purpose of this?

Mr. Stamler: To show—

A. This is the stock book.

The Court: The only question is whether the stock was delivered, and you have given the reason why it wasn't delivered.

Mr. Stamler: We have the stock here.

The Court: It does not make any difference whether you have it or have not. if you could not deliver by reason of the other side's default, it does not matter whether you have it or have not.

A. There is no question to be answered.

Q. No. Mr. Black, were you present at the factory on September first, 1917? A. Yes, sir.

Q. When Mr. David and Mr. North came there? A. Yes, sir.

By the Court: Q. Tell us what happened, Mr. Black. Speak right out so the jury can hear you? A. I will say I was informed—

Q. No. Tell us what happened when you got there. A. On the first day of September I came to the office of the company with Mr. Jaquith, the last witness. Mr. Jaquith brought with him legal tender in one thousand dollar bills. It seems the day before legal tender had been demanded.

Q. Do not argue the matter. The sole question is when all the parties gathered together, tell us what happened, and what was said. A. Mr. Jaquith and I arrived at the factory about half past nine. We took the nine o'clock train from New York—

Q. Nobody is interested in that. A. I am an attorney and they say attorneys make very poor witnesses.

Q. Evidently, you are proving it. Put yourself with your party on the other side, and Judge David there, what happened? A. Mr. North and Judge David came in and Judge David said, "we are here for the purpose of turning over to you the goods." And I said: "We are here for the purpose of taking them." And Judge David said: "All you have got to do is give us twenty-nine thousand and some odd dollars. And that is all there is to it." I thereupon stated to Judge David that we are prepared to take such goods as were suitable for filling orders. Judge David said, "what do you mean by that?" I said "I mean we want to inspect the goods."

Judge David said "Come out in the warehouse and inspect them." I said "That is not what I mean by inspection," I said, "it will be necessary in certain instances to open the cases where they are not original cases, and weigh up the goods" and I told him that certain of the orders had been cancelled and we didn't need certain kinds of fabric that he had on hand. Judge David thereupon retired and conferred with Mr. North. This seemed to be something new in his opinion.

Mr. David: I move that be stricken out.

The Court: This will be stricken out.

A. He said "If you insist on an inventory, we will give it to you. How do you propose to take it?" I said: "I propose, Judge David, to call the men down and take it out case by case; take out the contents if necessary, and weigh it, where it is not an original case. And, after so doing, if it is suitable for filling orders, to put that case in our finishing department." Judge David said all right, first. I called down Mr Lape and his father and all the male help around the factory for that purpose. They came down to the warehouse, and when they got down there, Judge David said, "What you propose doing will take several days." I never said it will take several days. I said whatever time is necessary we must take it. "Because I don't propose to pay you twenty-nine thousand dollars without seeing what those cases contain." In fact, I think there was some mention of the word "hay." They might contain "hay." This took place right at the entrance to the warehouse;

after the men were all down there, and we thought everything was satisfactory. Judge David said, "What is the use of all this bluff? There is the goods, either take it or leave it" and I thereupon directed Mr. Jaquith to tender to Judge David and Mr. North, the amount of money. And at the time Mr. Jaquith tendered that money I made the statement to Judge David that while we tendered him fifteen thousand dollars, we are ready, willing, and able to pay such additional sum as the goods may come to after a suitable inspection and weighing.

By Mr. Stamler: Q. What did Judge David then say? A. Judge David said "Come on, North."

Q. What do you mean by original cases? A. The original cases are the cases of yarn as they came from the spinners, on which there is a gross and net weight marked. And the unoriginal case would be the cases in which North had put the webbing, after getting the yarn and nailed them up himself.

Q. You also took up the question of adjusting some of the North contracts, did you not? A. I did, sir.

Q. And you took up the question of the Gutman contract? A. I did, sir.

Q. What final arrangement did you have with him? A. Whether you could call the arrangement final I don't know. Mr. Leopold agreed to accept—

Q. Who is Mr. Leopold? A. Head of the firm of Gutman and Company. He agreed to accept tentatively one-half of the balance due him. And he said if you didn't have materials enough to

furnish him with that material, that was something to be taken up subsequently. I think there is a letter to that effect.

Q. Did you have any conversation with North, as to who was to take care of cancellation of some of the heavy weight contracts? A. Of the heavywight contracts, Mr. North was to take up all of those.

Q. Why? A. In the unfilled heavyweight orders, it was stated at the time of the making the June twenty-sixth contract there was not enough material on hand to do them. After considerable dickering between us, it was agreed we would first exhaust the materials North had on hand, and subsequently to that we were to buy five thousand pounds additional. And whatever additional in excess of the five thousand we were to buy, and Mr. North had, Mr. North would finish, no matter what the amount would be. And as a condition to him doing that, Mr. North insisted that the arrangement with the heavyweight people he must make himself.

Q. Did you talk to him about that subsequently to that date? A. Yes, sir. I saw Mr. North in the mill sometime in July when he came up from Long Branch.

Q. What was said then about it? A. We went over generally the situation as it had developed subsequently to the making of this friendly agreement of June twenty-sixth.

Q. Did you show him any of the letters, correspondence? A. I showed him the form of letter I had sent out to all the customers as it had been sent to, and all replies that had been received.

Q. At that time? A. At that time. Yes, sir. I remember distinctly calling to his attention the Hibben Holweg matter. I think that is an Indianapolis concern. It seems that Hibben Holweg was not satisfied. North told me that as far as they were concerned, the buyer of that concern is Charlie Fear. He said "I am partly responsible for him being buyer of that concern. And don't let that give you any concern, because Mr. Fear will do as I request. And Lindeke Warner Company, St. Paul, Mr. North said when Warner came to New York he would see him. Mr. Warner was a very sincere friend of his deceased father. And don't worry about Lindeke Warner, that everything would be all right with him.

Mr. Stamler: Cross-examine.

CROSS-EXAMINATION by Mr. David:

Q. You are a nephew to Nathan Schwartz, the President of the Company? A. No. I am a second cousin.

Q. You are a second cousin, and your real name is Schwartz, is it not? A. No, it is not.

Q. You have changed it to Black? A. No, sir.

Q. What is your father's name? A. My father's name is Black, also. I will say that Schwartz and Black are the same thing. Schwartz being the German Black. But our people who came from Ohio, where I came from, are known as Black. That is an Anglo-Saxon name. I was born under that name, and I was admitted under that name.

Q. You are a practicing lawyer? A. I am, sir. I have been since 1904.

Q. And were the legal advisor to the Schwartz concern until Mr. Cohn was called in. A. No, sir. Until Mr. Cohn was called in?

Q. Yes? A. That might, perhaps, be true. Yes, sir.

Q. And you and Mr. Cohn prepared the form of the letter that was mailed to Mr. North on August twenty-seventh? A. No, sir. I know that Mr. Cohn didn't because he was out of town, and I know I didn't because I was in New York.

Q. I see. Now the talk that you had with Mr. North with reference to his taking care of the heavyweight orders was before or after June twenty-sixth? A. Well, it was before, and at the time, and after also.

Q. And was the substance of your understanding put in the contract? A. Nothing further than that we were to both use our efforts.

Q. Was whatever you said put in the contract? A. In the sense we were to both use our efforts, to obtain diminution of contracts.

Q. You were to work jointly? A. No, we were not to work jointly, we were to work separately. But it was to be a joint effort.

Q. A joint effort? A. Yes, sir.

Q. Do you recall that contract was dictated in your presence, wasn't it? A. I think the major portion of it.

Q. And you signed it? A. I suppose I did; yes, sir.

Q. Do you recall that in the clause providing for the using of your efforts, joint efforts, there was to be no default claimed under that clause without a written notice being given by the party claiming such a default? A. I have since seen it.

Q. Since? A. Yes, sir.

Q. Didn't you know it was there the time you signed it? A. I undoubtedly did at the time I signed.

Q. Has any such notice been given to Mr. North claiming default? A. Not to my knowledge.

Q. And you are secretary of the company? A. Yes, sir.

Q. Have you ever claimed until now any such default? A. We have.

Q. To Mr. North? A. No, sir.

Q. Did you hear Mr. Jaquith's testimony to the effect you did say something on September first that it would take you and you wanted three or four days to inspect and inventory the goods? A. I heard Mr. Jaquith's testimony.

Q. Does that refresh your memory? A. No, Mr. Jaquith is in error as to the nature of that talk. You were the one who said it might take three or four days.

Q. I said that? A. Yes, sir; either you or Mr. North.

Q. Don't you recall Mr. North's reply "I am not going to stand around here three or four days at this time for you to take an inventory"? A. Mr. North said—

Q. Do you recall that? A. Mr. North said— I will tell you what Mr. North said.

The Court: No. Do you recall? A. No. He didn't say that.

Q. Did you hear Mr. Jaquith so testify? A. I did.

Q. Does not refresh your memory? A. No. I told you Mr. Jaquith is in error as to the nature of that talk.

Q. You say you called down all the male help in the factory to help with the inspection? A. To help take those cases down. They were piled up to the ceiling of the warehouse.

Q. You called down all the male help? A. Yes, sir.

Q. How many male help have you? A. We had Mr. Bellis and Mr. Lape.

Q. How many else have you here? A. Right at the present time?

Q. Yes? A. I don't think there is anyone else here.

Q. You say there was a tentative arrangement made with Carl Gutman Company they would accept about one-half of the order? When was that arrangement made? A. That arrangement was made immediately after the making of the contract. I should say about the tenth of July.

Q. Between the 26th of June and the 10th of July? A. There is a letter there would refresh my memory; I think it was about that time.

Q. Get the letter. About the 10th of July? A. If I made any error the letter will refresh my memory, Judge.

Q. July 12th? A. Yes.

Q. Was any part of the one-half ever filled after July 12th? A. That I don't know. I am not in the mill.

The Court: Mr. Schwartz testified to that.

A. If Mr.—

Q. Don't you know on September 23d Carl Gutman sued Mr. North in New York for nine thousand odd dollars? A. I didn't know, but I see now they have. I did see an account of it in one of the trade papers.

Q. You say that when the contract was signed there was an understanding that you were to deliver the minutes of the company to me? A. Yes, sir.

Q. Don't you mean, Mr. Black, that on June 26th, the date that the agreement was made, the understanding was that you would present to me a resolution of your board of directors confirming the contract that was agreed upon on June 26th? A. No, sir; that is not true.

Q. And isn't that a copy of the minutes of your meeting that you submitted to me with the contract? A. Yes. I think this was attached to the contract and was held at the time the contract was signed. Knowing the conversation was mainly between you and Mr. Cohn regarding—

Q. Just wait a minute. You say that this resolution was a minute of the meeting held at the time the contract was signed? A. That—

Q. Is that what you mean? A. I mean that formed a part of the contract; yes, sir.

Q. You do not understand me, or I do not understand you. A. Yes?

Q. This contract was settled on June 26th, was it not? A. Yes, sir.

Q. And the certificate that you swore to is dated July 3d, is it not? A. It seems to be. Yes, sir.

Q. Well, isn't it? A. It is; yes, sir.

Q. And wasn't the understanding that we had on June 26th to the effect that you would hold a directors' meeting and pass a resolution confirming this contract and attach such a resolution to it and deliver it to me? A. No. I will tell you what it is.

Q. You say not? A. I say no. This was made out

on the 26th day of June, this resolution, and I was not at the mill until July 3d, when I came in and signed this and swore to it before you. That was dated the 26th day of June.

Q. You say what you expected to do was to deliver me the minutes? A. In accordance with the understanding you had with Mr. Cohn.

Q. Are these minutes? A. I think they are.

Q. Look at them? A. I think so. Yes, sir. Without examining them carefully I would say those are the minutes I left at your office.

Q. These minutes refer to the organization of the company on the fifteenth of January, 1917? A. Yes, sir. That was the rewriting of the minutes which I had prepared and that you and Mr. Cohn decided were not in conformity with the New Jersey statutes on the question.

Q. That I had decided? A. Mr. Cohn, perhaps.

Q. Did you submit to me at my office on June 26th or any other time prior to that any other minutes? A. No, sir.

Q. And I never saw them? A. You asked to see those and Mr. Cohn told you the minutes which were in a book and in printed form in use in New York was not in accordance with the New Jersey statute. And Mr. Cohn was to prepare the proper minutes and submit them to you.

Q. Are these proper minutes? A. You will have to ask Mr. Cohn. I presume they are.

Q. You were secretary of the meeting?

Mr. Cohn: I object to this.

The Court: I do not see the purpose of the whole thing.

Q. These minutes say among other things that Mr. Herbert S. North was present at that meeting? A. Yes, sir.

Q. Was he present? A. He certainly was.

Q. Mr. North was present at your organization meeting? A. He certainly was.

Q. In person or proxy? A. He was over from the time we took over the business at least ten weeks after. And he was present as much as anybody else.

Q. Was he there at the meeting when you elected officers as shown by your minutes? A. Yes, sir.

Q. He was there? A. Yes, sir.

Mr. David: That is all.

NATHAN SCHWARTZ, re-called:

Direct-examination by Mr. Stamler:

Q. Mr. Schwartz, were you at the mill on September 1st, 1917? A. I was.

Q. When Judge David and Mr. North came there? A. I was.

Q. Who came first? Who was at the mill first? You or Judge David and Mr. North? A. I was.

Q. You were there? A. Yes, sir.

Q. You were there waiting for them to come? A. I was.

Q. Now, what happened after Judge David and Mr. North came in?

The Court: This witness was not examined on this before?

Mr. Stamler: No.

A. Judge David and Mr. North came in and I didn't take no part in the conversation that was taking place between Mr. David and Mr. Black and my brother Adolph.

Q. Well, what happened there; tell us. A. They had quite a discussion about it.

Q. What was said there? A. I really, words I connot repeat, just the words were spoken about, but the attitude I observed.

Q. No, not the attitude. A. Well, words are pretty hard to repeat.

Q. I want you to give us the best recollection of what took place there. A. Yes, sir.

Q. When Judge David and Mr. North came was Mr. Black there? A. Yes, sir.

Q. What was said? A. I don't know whether Mr. Black was there or not.

Q. You don't know whether—A. I think Mr. Black came shortly after, if I remember rightly.

Q. And Mr. Jaquith came with Mr. Black? A. I think that is the way it was; yes, sir.

Q. And as soon as Mr. Black and Mr. Jaquith came there all ready to talk business? A. Yes, sir.

Q. What did Mr. Black or Mr. Jaquith say, Judge David, or Mr. North, or your brother? A. Mr. David said he came to finish up this deal.

Q. Yes, sir? A. And he is ready to turn over his merchandise to us, and wanted to know if we are ready to pay for it, and we told him we were.

Q. Who told him? A. Mr. Black. My brother told him and the four were standing and talking about it. I didn't butt in on that conversation at all. Remember it anyway.

Q. Then what happened? A. They agreed to go out into the warehouse and turn the goods over to them. Deliver them.

Q. Did you go to the warehouse? A. Yes, sir; I did.

Q. Go ahead. A. And the proposition Mr. David had said that he cannot turn the goods over, that he has no men to handle those goods.

Q. Yes? A. So I proposed I will get the men, and I got two men, and I was going to get more men if necessary. We have about three or four in about in the mill; the rest are all girls. We all went into the warehouse and just as we got in there the discussion started over again. Mr. David said, "Well, here is the goods. Take it."

Q. What did Mr. Black say? A. Mr. Black said, "I want those goods examined. I want to see what is what. You don't mean to say we shall pay you twenty-nine thousand dollars for a dark warehouse for goods been laying here for years, that you don't know yourself you have got; you are only guessing at. We can't do business that way." Judge David thereupon said something to that effect if we didn't want it we can leave it.

Q. Then what happened? A. Then Mr. Jaquith tendered the money to Mr. David and Mr. North.

Q. What did Mr. Black say when the money was tendered? A. That this is fifteen thousand dollars that we have right here and we have so much more as what we believe is necessary to pay for all that may be in excess of fifteen thousand dollars.

The Court: Mr. Schwartz, did you expect trouble on the first of September, about these goods? A. I did, sir.

The Court: Why? A. On the 31st of September—

Q. August. A. On the 31st of August Judge David and Mr. North came to our office, and when they walked in Mr. David came in just like in

story books a "Texas cyclone." He says I came down here to see that there is nothing put over Mr. North. Something to that effect. And he was very much excited, or pretended to be, I don't know which. And one word brought about another. And he was all the time was harping show me the color of your money. I didn't know he was entitled to such a thing as that. He came in all of a sudden and he got me particularly very nervous. I didn't understand what this was all about. I expected Mr. North to come and turn these goods over the same way as he had prior—previously to that. In place of that he came in as I said. And there was a whole lot of words said pro and con which wasn't very complimentary to either side. And he wanted to have the color of the money. That is what he was all the time saying. And of course I didn't catch on. Didn't know the point like. Didn't know nothing about it. He got me nervous and excited. And didn't tell me it was the law. And finally they left. And we went to Mr. Cohn our attorney, to Newark, and Mr. Cohn was out of town, and Mr. Cohn's brother told us that was—

Mr. David: Is that proper?

Mr. Stamler: The Judge is eliciting that, I am not.

A. We were advised—

Mr. Stamler: That is all, unless the Judge wants to know more about it.

Mr. David: I withdraw my objection.

By Mr. Stamler: Q. Go ahead, and tell what you were advised. A. I was advised, or we were rather advised, that Mr. David was in his legal rights when he demanded money. That was his

opinion. And we therefore should go and get legal tender and produce it, because he was right from a legal standpoint. So we went to New York that same afternoon and made arrangements to have Saturday morning at our office fifteen thousand dollars in cash. And we succeeded in doing that. That is a whole lot of money for fellows of our calibre, but we succeeded of getting it, and we had it there for that purpose.

The Court: You may proceed.

Q. Did you have any arrangements for this money prior to that date? A. Yes, sir; sure.

Q. When did you arrange to have this money? A. Any time I call up on the telephone they were to bring that money out.

Q. When did you make that arrangement? Before you wrote the letter of August 27th, or after? of August.

Q. Of 1917? A. Yes, sir.

Q. With whom? A. With Benjamin J. Klein.

Q. And who is Mr. Klein? A. Mr. Klein is a nephew of a cousin of mine.

Q. Is he a factor of yours? A. He is our factor.

Q. And did you pay interest on this money afterwards? A. We have; yes, sir.

A. We made them arrangements in the early part

CROSS-EXAMINATION by Mr. David:

Q. Mr. Jaquith then came out having money that had been loaned to Mr. Klein and not to you, is that right? A. We have made a note.

The Court: Just answer the question.

Q. Just answer my questions for a few minutes.

A. What is the question.

Q. The fifteen thousand dollars in legal tender that Mr. Jaquith came out with, Mr. Schwartz? A. Yes, sir.

Q. He got at the request of Mr. Klein and not at your request, is that right? A. Sure. Our credit isn't good enough for fifteen thousand dollars there.

Q. And Mr. Klein you know had arranged that this merchandise was to be taken and put in storage and the warehouse receipt delivered to the bank? A. Where did you get that from?

Q. Isn't that so? A. No, sir; that is not so.

Q. Was the bank to have figured at all? A. Our note endorsed by Klein.

Q. That is all? A. That is all.

Q. Was Klein to have any security? A. Klein?

Q. Yes, sir? A. He is our factor.

Q. Was he to have any security? A. As factors have.

Q. He was to have security? A. Absolutely.

Q. He was to have the storage warehouse receipt? A. No, sir.

Q. And he was to get the moneys that came in for the merchandise that you were going to sell in the open market, after you sold this stuff?

Mr. Cohn: We object.

A. Sure; absolutely. We have got the same arrangement now.

The Court: I will allow it.

Q. Answer the question. (Answer repeated by the stenographer.)

Q. In other words I want to make sure you understand this question. A. Put it again. All right.

Q. You had arranged with Klein? A. Yes, sir.

Q. That this material was to be made up and sold in the open market and Klein was to get his money back from the money that—

Mr. Cohn: We object—

Q. (Continuing)—came in on the sale of it? A. We do the same thing now. Everybody has factors does that way.

The Court: That was the arrangement?

Q. And that was the arrangement you had with Klein? A. Yes sir; yes, sir.

RE-DIRECT-EXAMINATION by Mr. Stamler:

Q. I want to know if you understood what Judge David asked you? A. Yes, sir.

Q. What you were to do with the merchandise you were to get from Mr. North, is that so? A. We were to keep it in our premises and use it on the orders that was intended for. And when there was customers paid for it part of that money belongs from that merchandise to Mr. Klein, went to repay him for it.

Q. For what orders were you to use that? A. For the North orders.

Q. For any others? A. No, sir.

Q. I show you the note? A. Yes, sir.

Q. And ask you whether this is the paper—the note on which you folks borrowed the money? A. I think it is.

Q. Look at it. A. I have signed; it must be; sure.

Q. I show you check on the Coal and Iron—The Coal and Iron National Bank for seven-fifty; what was that for? A. For interest on that note.

RE-CROSS-EXAMINATION by Mr. David:

Q. You were going to fill the heavyweight orders with this material? A. Heavyweights too; yes, sir.

Q. And you were going to fill them at a loss? A. Yes, sir; sure.

Q. And Klein knew it? A. Why yes.

Q. And you were borrowing money—A. That is not Klein's business at all.

Q. You say Klein knew it? A. I don't think I talked to him about it.

Q. You didn't tell Klein what this money was to be used for? A. Yes, sir; I did.

Q. Then he did know you were going to use this money to fill the heavyweight orders? A. He don't know anything about heavy or lightweight orders. He don't know anything about those things.

Q. Mr. Klein has been loaning money to you right along? A. Yes, sir.

Q. And you have been assigning your outstanding claims to protect him? A. Yes, sir.

Q. Doesn't he send an auditor over to you to look over your books? A. No, sir.

Q. You, Mr. Schwartz, were going to accept the money from the bank and Klein when you had to fill orders at a loss? A. Yes, sir.

The Court: How were you to pay back that money? A. There was to be thirty thousand dollars profit on the whole transaction, and eight hundred dollars loss on the heavyweight we could easily stand that.

Q. On August 31st you had no cash to take this merchandise over, Mr. Schwartz?

Mr. Cohn: We object to that. There was

no legal obligation to take that over on August 31st.

The Court: I will allow the question in view of the examination.

A. We had the cash ready in New York, sir.

Q. In the plant at Elizabeth? A. No, sir; not in the plant.

Q. And you had to send to New York for it? A. Not to send; just telephone.

Q. And then it had to be brought out? A. That is right.

Q. And that was on August 31st when you were down there?

Mr. Stamler: September.

Q. August 31st. A. August 31st. I told you I was there.

Q. Do you recall when I came in you said I have got the money in my pocket? A. No, sir; I didn't say that.

Q. You did not say that? A. No, sir.

Q. And you are sure of that? A. I am sure. Not these words.

Q. Did you say something like that? Touching your pocket? A. When you got me excited, I said I would be afraid to be in one room with you to have twenty-nine thousand dollars in my pocket.

Q. You are going too fast. I know you did. Let me refresh your memory. A. All right; go ahead.

Q. When I came in "like a cyclone" as you say? A. Yes, sir.

Q. I asked you are you ready to take over the goods? A. That is right.

Q. You said, "Yes, sir; I have the money here in my pocket?" A. No, sir. I didn't say that.

Q. You didn't say that? A. No, sir.

Q. Or anything like that? A. You said you wanted to see the color of the money. The first thing you started out something to that effect.

Q. Yes, sir? A. And you wanted to know if we had the money. I said, of course we have. What do you think that we are here, we are a bunch of fools? We are going to have you, Mr. North, come over here and turn over all this merchandise to us, as per contract, as we understand it, for cash and come here and not have the money. Do you think we are a bunch of fools or fakers?'' And you told me we were fakers, and then I told you something else I don't want to repeat it.

Q. As a matter of fact you did not have the money there, did you? A. Not in the office; no, sir.

Q. You had written him a letter on the 27th—on the 29th, didn't you? A. Yes, sir. August 29th; yes, sir.

Q. Do you remember that letter? A. I do.

Q. And that letter says, ''We have yours of the 28th and 29th, and in reply wish to say that in our letter of the 27th?'' A. Yes, sir.

Q. ''We already stated our readiness to proceed. And, therefore, all that is left to be done is for Mr. H. S. North to come here and turn over the merchandise to us?'' A. That is right.

Q. And he came on the 31st to turn the merchandise over? A. Did he?

Q. Didn't he? A. No, sir; not to my knowledge.

Q. Didn't he come down on the 31st and say, ''We are ready to turn over the merchandise? Show us the color of your money?'' Didn't he? A. He said he was.

Q. Didn't you say give us a bill? A. That is right. Itemized bill.

By the Court: Q. If you did not know what goods were there? A. Yes, sir.

Q. And you wanted an inventory of it. Why didn't you in your letter of the 27th, say, instead of stating, "All is necessary is to come down here and turn over the goods," why didn't you say, "We have until the 1st of September in which to take these goods, and we want you to come down and make an inventory, so that by September 1st we will know what we have got to pay for." Why didn't you say that? A. I didn't personally believe it would take more than about a day, your Honor, to take that stock.

Q. Why didn't you take a day? A. I believed that Mr. North—I didn't expect Judge North down there at all.

Q. Was the storage warehouse open while you were in possession? A. Yes, sir.

Q. You could have taken an inventory at any time during the six months? A. I didn't consider it my right to touch any of the goods and I didn't touch it.

Q. But for the purpose of taking an inventory you would not hurt it? A. I didn't think it was my business to touch it.

Q. On the 27th instead of writing and saying turn over the goods, why didn't you say come down and take an inventory? A. I might have used the other expression.

Q. If it was in your mind that that thing was uncertain why didn't you take steps to clear it up? A. It wasn't uncertain at all, until the 31st when Mr. David and Mr. North came to the office.

Q. It was not certain before according to your notion and theirs. They apparently thought it was a certain amount, and you thought there was certain deductions. A. My notion is there was some goods there—

Q. You should not pay for? A. No, sir; not fitted. According to our understanding with Mr. North, and I don't know much about the intrinsic wordings of the contract. But, personally, that was my understanding with Mr. North, and I thought I understood it.

Q. What I do not understand is if there was some misunderstanding as to the amount you were to pay or the goods you were to take, why you waited until the 1st of September, why you did not sometime before make some arrangements to take that inventory and do those things which were preliminary to the payment of the money. A. Mr. North was at our office sometime in the middle or end of July, and he left for Maine.

Mr. David: That was in August.

A. That was in August. And he will advise us when he gets to Maine. And he will immediately come if we so advise him to come and turn the goods over to us. To that effect. And we waited to hear from Mr. North, and we have not heard from him, and the time commenced to get pretty close to the 1st. And we had written a letter to Mr. North and Judge David advising him we wanted to take the goods over, because we didn't want to lose the chance to get these goods.

Q. You didn't think it would take over a day to straighten this thing out? A. No, sir.

Q. On the 29th why didn't you commence to do

it then? A. I couldn't do it without Mr. North's presence.

Q. On the 31st, I mean? A. I was willing.

Q. Why wasn't it done? A. Because he wanted to see the color of the money.

Q. About taking the inventory? A. That is what I wanted to do. I said let us take an inventory; let us look the cases over.

Q. On the 31st? A. Yes, sir; but he would not do it. He said if you do not want it that way, if you don't give me the money you can't have anything, and out he went. And that was the end of it.

By Mr. David: Q. Now, the letter you sent on August 27th, you say, "Herewith request you to appoint time to take over the merchandise as per paragraph eight of said agreement?" A. Yes, sir.

Q. And signed that? A. Yes, sir; my brother Adolph wrote it and I suppose I signed it.

Q. You knew what paragraph eight of the agreement was? A. Tell you the truth I didn't know.

Q. You referred to the paragraph eight? A. He did. It is left to him. He is the Smart Alec.

Q. Mr. Schwartz, on the 31st? A. Yes, sir.

Q. When you came in you were informed that I had already called up your office? A. I have talked to you.

Q. Wait a minute. You were informed that I had already called up and wanted to come down to turn over the goods? A. I talked to you on the 'phone.

Q. And didn't you then call me up and say: "Judge David, my brother tells you have

'phoned and I am now here," and didn't I say "I will be right down with Mr. North?" Isn't that so? A. That may be so.

Q. Try and tax your memory. Don't you remember when you came in that day? A. Yes, sir.

Q. Your brother Louis told you I had already called up? A. It may have been so. I wouldn't say it wasn't so. But I know I have talked to you. That I do know.

Mr. David: That is all.

The Court: That is all.

By Juror Number Ten: Q. The custom there as to the arrangement for the money, as I understand from Mr. Nathan Schwartz on August 31st, I don't know whether I have the dates right or not. August 31st he did not understand it was necessary for him to have money there, but he took counsel and understood then that Judge David was acting upon his legal rights in requiring that the money be on hand? A. That is right.

Q. I understand, however, that the arrangement for the money had been made in the early part of August?

The Court: That is what I understood this witness to say.

A. That is right.

Q. Notwithstanding the fact that they did not understand that the money was necessary to be on hand? A. That is right.

By Mr. David: Q. You recall what the contract provided? A. Yes, sir.

Q. Strictly that the goods were to be turned over for cash? A. That is right.

By. Mr. Stamler: Q. In other words, to clear up the situation, you knew that you had to pay for the merchandise in cash? A. Yes, sir.

Q. On or about the 1st of September? A. Yes, sir.

Q. And therefore you made your arrangements in advance? A. Yes, sir.

By Mr. David: Q. Didn't your contract say you were to take these goods from time to time? A. And Mr. North was always away.

Q. Did you ever make an application for goods to Mr. North from June twenty-sixth to September first that was refused? A. No, sir.

Q. Did you understand you were to pay for those goods before they were inventoried or itemized? A. No, sir; I didn't so understand it. stand it.

Mr. Stamler: That is all.

Mr. David: That is all.

HENRY M. HAESLOOP, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Cohn:

The Court: I understand this is your last witness?

Mr. Cohn: No. There is one more. This is the auditor.

Q. What is your business? A. Public accountant.

Q. And do you remember working on the books of J. W. North and Son? A. Yes.

Q. At the mill in Elizabeth? A. At the mill, yes.

Q. Do you remember making up this account?

A. (Witness examines it) Yes. That was made up by me.

Q. And were you assisted in the making up of this account by Mr. North? A. Yes, sir.

Q. Explain the process that was used in making up this account.

Mr. David: I cannot understand the object of this question. The witness is asked to state the process he used in making up the account.

The Court: What is the purpose of this?

Mr. Cohn: Mr. North has testified he did not know anything about this audit.

Mr. David: He did not.

The Court He said he was present when the auditor was there, but he did not go over it afterwards and did not know what the contents were, as I recall.

Mr. Cohn: I want to show the process used in making up the audit, which will settle the question whether he knew what was in it.

The Court: Instead of doing that, ask him what part he took.

Q. What part did Mr. North have in the making of this audit? A. I spent most of the time with Mr. North going over the contracts and profits for the past five years, and I went into details with regard to the profits,

By the Court: Q. Did Mr. North have anything to do with the conclusions you reached? A. We arrived at certain conclusions.

Q. I mean the final conclusions? A. Final conclusions?

Q. Yes? A. Well, yes. I believe that Mr.

North and I agreed that the profits were a little higher than—that the book showed a little higher profit than he really made for the last five years, as far as I recall.

By Mr. Cohn: Q. Do you remember whether the sum total of the profits shown on this statement— A. I haven't seen the statement for the past year. I haven't had time to go over it.

Q. You haven't seen the statement? A. I haven't seen the statement since it was put in.

Q. Look at the sum total of profits and tell us whether Mr. North had any part in the labor that finally resulted in coming to that conclusion? A. Yes, sir. We went over the profits. Mr. North and I went over the figures together, and the figures I made up I showed Mr. North and I submitted the report.

By Mr. David: Q. Mr. Haesloop, you were retained by the Schwartz to make an examination of the North business before they bought it? A. Yes, sir.

Q. And you came over to the plant and Mr. North gave you everything he had? A. Yes, sir.

Q. He showed you all his books, is that right? A. Books that were there.

Q. Books that were there. And he gave you any information you asked, is that right? A. Yes, sir.

Q. And from his books, and from his information you made a report to your people? A. Yes, sir.

Q. And they paid you for it? A. That is right.

Mr. David: That is all.

The Court: That is all.

Mr. Stamler: We rest.

Defense Rests.

Plaintiff's Rebuttal Testimony

LENA FISCHER, produced as a witness, on behalf of the plaintiff, in rebuttal, being duly sworn on her oath, according to law, saith:

Direct-examination by Mr. David:

Q. Mr. Fischer, where are you employed? A. Where am I employed?

Q. Yes. A. At the Elizabeth Trust Company.

Q. In this city? A. Yes, sir.

Q. As a bookkeeper? A. Yes, sir.

Q. And have been employed there since the month of October last? A. About the end of October.

Q. And prior to that time were you in the employ of Joseph W. North and Son Company? A. Yes, sir.

Q. And prior to the incorporation of that company were you in the employ of Joseph W. North and Son? A. Yes, sir.

Q. Of which Mr. North was the head? A. Yes, sir.

Q. And for how long were you connected with that concern? A. Nearly five years.

Q. Did you leave the company in October or were you discharged? A. I left the company.

(Question and answer repeated by the stenographer.)

Q. Did you open the books for the company when they took the business over from Mr. North? A. No, sir; I didn't.

Q. Did you take care of the books after they were opened? A. Yes, sir; I did.

Q. And had entire charge of them? A. Yes, sir.

Q. And are you familiar with their contents? A. Yes, sir.

Q. And did you have entire charge of Mr. North's books before the company came? A. Yes, sir.

Q. And are you familiar with their contents? A. Yes, sir.

Q. Mr. Adolph Schwartz has testified that the overhead to run the plant of the company was less than the overhead to run the plant when North had it. Is that true or false?

Mr. Stamler: I object to that.

The Court: Question overruled.

Mr. Stamler: I ask for the production of the books.

Q. On reference to those books can you show me or the jury the overhead expenses in connection with the running of the plant? A. Yes, sir.

Q. Have you taken out from those books such a statement? A. Well, I know through my experience in handling the books.

Q. From your experience with those books have you made up such a statement?

Mr. Stamler: I object to that.

Q. And can you now check it up with those books?

The Court: I will allow the question.

A. Yes, sir. I can check up with those books.

Q. And is that a correct statement of the overhead expenses in the running of that plant from June twenty-sixth to September first, 1917? A. If I am allowed to look over these.

Q. Yes, take your time. A. It is correct with the exception of one or two exceptions which would only make a few dollars. Four or five dollars probably.

Q. What was the overhead expenses of the plant from June twenty-sixth to September first?

The Court: You mean per week?

Q. Per week?

Mr. Stamler: I object to that because they have not shown the company has been doing the same sort of business.

Mr. David: This is strict rebuttal.

Mr. Stamler: But, as a matter of fact, it is not what the company is doing. There is no evidence in the case the company is only doing what Mr. North did. They might have been doing other business, and therefore would be entitled to a great overhead.

The Court: That might be. I will allow it.

Mr. Stamler: Prays exception.

Exception allowed, sealed accordingly.

Judge.

Mr. Stamler: I object to the use of that memorandum at the same time.

A. If this is added up correctly it is six hundred and ninety dollars.

Q. Will you add it up?

Mr. Cohn: May I interrupt to say this thing will lead us to a new trial. I mean trial of a brand new issue. I can not see how on any theory of evidence—

The Court: What is the purpose of this?

Mr. Cohn: Whether the overhead—

Mr. David: I asked Mr. Schwartz whether they would not have lost on the lightweight orders and heavyweight or-

ders. He said on the heavyweight orders they would have lost eight hundred dollars, and on the lightweight orders they would have made money. I asked him whether his overhead expense was not greater than North's, and he said no, it was less.

The Court: I think it goes to the actions of the defendant to show whether he wanted to fill the orders or not.

A. In my statement about six hundred and ninety dollars, that included overhead expenses which were not at the factory; the actual overhead was about five hundred and sixty dollars.

Q. As compared with what of Mr. North's prior to June twenty-sixth? A. About one hundred and fifty.

Mr. Stamler: I object on the ground it is not material and it is not the way to prove the question, by the charge of the overhead.

Mr. David: Mr. Adolph Schwartz has testified that the accountant finished his work, and the company and Mr. North each paid half of his charge; is that so or not?

A. No, sir.

Q. Who paid it? A. North and Son, Incorporated.

Q. Did Mr. North pay any part of it? A. No, sir.

Q. Were you present at the office on August thirty-first, when Mr. North and I came there? A. Yes, sir; I was.

Q. Mr. Nathan Schwartz has testified he did

not say to me "I have the money in my pocket." Is that so, or is it not?

Mr. Stamler: I object to that.

A. He did say it.

The Court: Question overruled.

Mr. David: The question overruled?

The Court: You can not ask a question which characterizes the testimony of the man. You may ask if that is the fact.

Mr. David: I will withdraw that in that form.

Q. Mr. Nathan Schwartz has testified—

The Court: Not what he testified; did he say?

Q. Did he say to me when I came in the office "I have the money here in my pocket"? A. Yes, sir; he did.

Q. Did he say to me he demanded an inventory? A. On the thirty-first?

Q. On the thirty-first of August? A. No, sir. Not in the office.

Mr. David: Cross-examine.

CROSS-EXAMINATION by Mr. Stamler:

Q. I show you a bill of Mr. North to the company and ask you whether you know something about that? A. Yes, sir; that bill of Mr. North—

Mr. David: No. Just answer yes or no.

Q. Answer the question. Was that bill paid by the North company?

Mr. David: Objected to as not cross-examination.

Mr. Stamler: I want to show now definitely that the payment of seventy-five dollars was deducted from this item through this bookkeeper.

The Court: If it goes to the payment of the auditor I will allow it.

Mr. David: I will withdraw the objection.

Q. Was that bill paid? A. No, sir.

Q. Why? A. That I don't know. Mr. Nathan never O. K.'d it to be paid.

(Answer repeated by the stenographer.)

Q. Wasn't it that this seventy-five dollars was to be deducted from that bill, weren't you so informed? A. I was so instructed by Mr. Adolph.

Q. You were so instructed? A. Yes, sir.

Q. The company first paid the whole one hundred and fifty dollars? A. Yes, sir.

Q. And directed you to charge Mr. North seventy-five dollars? A. Yes, sir.

Q. Or deduct seventy-five dollars from this bill? A. Yes, sir.

The Court: Was that done? A. No, sir.

Q. Was that done? A. No, sir.

Q. Was the bill paid? A. No, sir.

Q. That took place when? When is that? A. March thirty-first, 1917,

Q. Did Mr. North at any time demand this money after that period of time? A. Yes, sir.

Q. What was said about it? Wasn't the question of auditor's charge talked about? A. No. This bill Mr. Nathan said he could not understand, what this was for. It was insurance that Mr. North had paid for the corporation, and therefore he would not O. K. it to be paid.

Q. Wasn't it intended to deduct this seventy-five dollars off that account for the auditor's charge, and didn't you so testify a minute ago?

The Court: That was the defendant's—

Q. Didn't she testify?

The Court: She testified that was the defendant's intention.

Q. Did you hear Mr. Schwartz say that to Mr. North? A. No, sir; I didn't. That was to be deducted from this bill?

Q. Yes? A. No. He had instructed me, but I didn't hear him tell Mr. North.

Q. Did you tell Mr. North? A. No, sir.

Q. He had instructed you to do what? A. Mr. Adolph instructed me if this bill was paid I should deduct seventy-five dollars.

Q. For what? A. For this accountant as you say.

Q. Did you tell this to Mr. North? A. No, sir; I didn't.

Q. Why didn't you? You were together working, and you were in the plant there all the time. A. I didn't think it was my place to tell Mr. North.

Q. This was while Mr. North was working at the plant? A. That may be.

Q. Wasn't it so? Isn't that a fact? A. March thirty-first?

Q. Yes? A. I don't know whether he said it in Mr. North's presence.

Q. Was Mr. North working at that time at the plant? A. Yes, sir; he was.

Q. And wasn't this bill O. K.'d for payment? A. No, sir; it was not.

Q. Look at it. A. Mr. Clyde Black O. K.'d by Mr. Nathan Schwartz, the president.

Q. Require both signatures? A. No, sir; it didn't. Only required Mr. Nathan's.

Q. On August thirty-first when Judge David and Mr. North came to the plant you knew what

they were coming there for, didn't you? A. Yes, sir.

Q. You had written the letter yourself? A. For them to come to the plant?

Q. Yes. A. No, sir.

Q. Who did the typewriting? A. Young lady by the name of Buhr.

Q. You knew what they were coming after? A. Yes, sir.

Q. From June twenty-sixth to August thirty-first Mr. North and the Schwartzs were on friendly terms? A. As far as I know.

Q. Yes. What time of day did Judge David and Mr. North come on the thirty-first? A. I should say about ten o'clock. Around ten o'clock.

Q. What took place that day, that time there? What was said and what was done? A. Why, Mr. David called up on Friday, that was the thirty-first, and asked if Mr. Nathan Schwartz was there, and I told him no, but his brother Louis was there. And I called Mr. Louis Schwartz to the phone. And Mr. Louis said his brother would be in shortly and he would have him call up Mr. Nathan—

Q. Yes? A. Mr. David. When Mr. Nathan Schwartz came in he called up Mr. David and they immediately came down. And then Mr. David and Mr. North said here we are to turn over the stuff. Let us see your money.

Q. What did Mr. Schwartz say? A. Mr. Schwartz said let us see the stock, I have the money right here in my pocket.

Q. Let us see the stock? A. Yes, sir.

Q. After they said let us see the stock, what did they do? A. They went outside to the storehouse.

Q. They went outside to the storehouse, did you go in there too? A. No, sir.

Q. From the conversation that took place there didn't you understand they went in there for the purpose of taking the inventory? A. I didn't know what they went in there for.

Q. You heard the whole conversation? What was your idea of it?

The Court: It is not what her construction is, it is what he said.

A. I was in the office and they went out there.

Q. They said let us go and see the stock? A. Yes, sir.

Q. Didn't one say let us get an itemized bill so we can check them up? A. No, sir.

Q. He said let us see the stock. Could you see the stock in there without opening the cases? A. They saw the stock as long as I saw it.

Q. Did you know what was in those cases? A. Yes, sir.

Q. In each case? A. I knew what was there almost every case.

Q. Almost? A. Yes, sir.

Q. And then they went into the storeroom for the purpose of seeing what was in the cases? Is that the idea? A. That I don't know what they went into the storehouse for.

Q. You don't know what happened in the storeroom there? A. No, sir.

Q. After they came out of the storeroom what happened?

The Court: Did they come back into your presence? A. Yes. They came back into the office and made out a bill, Mr. Schwartz requested.

Q. What happened to that bill? A. Handed it to one of the concern. I don't know which.

Q. What was said then? A. Mr. David said "here is the bill let us have your money."

Q. Yes. What did Mr. Schwartz say then? A. And Mr. Schwartz said then, I don't know the exact wording that took place before that, but Mr. Schwartz said "If I had twenty-nine thousand dollars in my pocket I wouldn't go in the storehouse with you."

Q. What did he say about that bill? Didn't he say "I would like to have that checked up so we can know we owe you twenty-nine thousand dollars." Didn't he say that? A. Not in the office.

Q. Not in the office, at no time at all? A. I didn't hear him say so.

Q. Didn't Mr. Schwartz say "I am surprised at you asking twenty-nine thousand dollars for this merchandise? " A. He may have said so. but I didn't hear him say so in the office.

Q. Don't you recall that Mr. Schwartz said: "How do you make up that $29,870.00?" He asked Mr. North how he made those figures, and where he got them from. Don't you recall that? A. No, sir; I don't recall it.

Q. From where did Mr. North get those figures, $29,870? A. That has already been stated,

Q. I am asking you? A. From his books.

Q. How do you know. Were you there too, did you see it? A. No, but I know from his books that merchandise was there.

Q. Was supposed to be there, isn't that so? A. No. I knew from taking the inventory, and from what the books showed at the time that amount of stock was there.

Q. I want to ask you this. Each year after

taking the inventory did the books tally with the inventory? A. What do you mean by that?

Q. In other words, your system was to deduct the merchandise account continually, isn't that so, and thus you determined how much stock you had on hand every day? A. No, sir.

Q. How was it? A. We took actual inventory every year, and sometimes twice a year.

Q. How would you know in the middle of the year how much goods you had on hand? A. Well, if we couldn't take an inventory, then we would take the last inventory and add what we had received up to that time and deduct, less the profits, what had been shipped.

Q. Did you ever try to prove that inventory with a former actual inventory? A. I was never asked to try.

Q. Your books would show that, wouldn't they? A. They showed it at that time.

Q. In other words the inventory—there was an inventory taken on the first of July, 1916, was there not? A. Yes, sir; there was.

Q. The books show that inventory? A. Yes, sir.

Q. Accurately? A. Yes, sir.

Q. Do your books also show what merchandise you had on hand according to your deduction theory, on the thirtieth day of June, 1917—1916?

The Court: You mean by that, if she took the books?

Mr. Stamler: An proved them.

The Court: Could she determine by the books how much was on hand June thirtieth, 1916?

Mr. Stamler: Yes sir; without the inventory?

A. I had never been asked to do that.

Q. Could you tell that from the books? A. I suppose I could.

Q. Where is that book?

The Court: Did you have a merchandise account? A. Yes, sir; we did.

Q. Can you tell me how much stock you had as per actual inventory on June twenty-fifth, 1915? A. We had actual inventory $30,431.19.

Q. Now, where is the inventory book of 1915? How much did your ledger show, or your stock ledger show you had on hand at the same date? By theory of deduction? As I understand the figures shows that is the actual inventory? A. Yes, sir.

Q. What did your book show on June twenty-fourth, how much stock you had on hand? In other words, I want to know whether the inventory tallied with your method of deduction, or how far you were apart? A. From the time we took inventory before that?

Q. Yes. That is right. What is the last date? Here you have June twenty-fifth; what was your amount of inventory you were supposed to have on hand? Your stock on and?

(Witness figures up.)

Q. Do you understand me? In other words, I want to find out assuming you hadn't taken an inventory on June twenty-fifth, would your books tell me how much stock you had on hand on June twenty-fifth? That is what I am trying to get at. That is the figure.

(Witness figures.)

Mr. David: I do not see how that is cross-examination.

(Question repeated by the stenographer.)

The Court: What is this cross-examination on?

Mr. Stamler: As to the correctness of her books.

The Court: She is not here as to the correctness of her books.

Mr. Stamler: She has been testifying from books.

The Court: She was only asked as to the overhead.

Mr. Stamler: Mr. North's overhead?

The Court: Does this go to the over head?

Mr. Stamler: It may go.

The Court: Not what it may go; does it go to the overhead?

Mr. Stamler: I want to show the actual inventory.

The Court: Where is that cross-examination.

Mr. Stamler: I will make her my own witness.

The Court: You may call her later. I am not going to ramble all over in this thing. You cross-examine on the direct-examination. Let us finish that first.

Mr. Stamler: I am through with that.

The Court: You have no other witness?

Mr. David: No, sir.

The Court: You rest?

Mr. David: Yes, sir.

Plaintiff rests.

The Court: You can call her then.

Mr. David: Sur-rebuttal?

The Court: I presume so.

By Mr. Stamler: Q. There was one thing I forgot. The North Company manufactured other merchandise than Mr. North did, isn't that so? A. Yes, sir.

Q. They put in a new department there? A. Yes, sir.

Q. A cloth department? A. Yes, sir.

Q. That was a different department entirely than Mr. North had? A. Yes, sir.

Q. Requiring different management and different help, is that right? A. Yes, sir.

Q. And other supervision? A. Yes, sir.

Defendant's Sur-rebuttal Testimony

LENA FISCHER, recalled, on behalf of the defendant, in sur-rebuttal.

Direct-examination by Mr. Stamler:

Q. I am going to ask you to give me those figures. The question is what was the book value of the inventory during the year on June twenty-fifth, 1915?

The Court: What is this answer in? In the defendant's rebuttal? How is it relevant?

Mr. Stamler: I am asking your Honor to permit this examination for this reason: we had no opportunity to go over those books and we were constantly at

work, and this is the first opportunity we have to ask any question on these books, and I do not want to hold your Honor up or the jury but that is a very important fact for our case to determine, whether or not the inventory as actually made correctly corresponded with the book value of the inventory on the same day.

The Court: Inventory actually made what time?

Mr. Stamler: Same day.

The Court: What date?

Mr. Stamler: June twenty-fifth, 1915, or '16, whatever year it is; either one is just the same. You see Mr. North gave us a bill according to book value.

The Court: You mean this statement that has been referred to as approximate inventory?

Mr. Stamler: No.

The Court: What inventory was given?

Mr. Stamler: Mr. North on the stand said "I can determine the amount of my merchandise on hand on August 31st from my books, because, by the theory of deduction I can tell how much merchandise was on hand."

The Court: Yes?

Mr. Stamler: I want to ask in order to show it is not an accurate one; that that theory is not accurate.

The Court: Why don't you ask that.

Mr. Stamler: That is what I am asking, to give the figures in the two cases.

The Court: Can you make an accurate

statement of the amount of merchandise on hand at any particular time, by taking the books of the company?

That is what you want to know, isn't it?

Mr. Stamler: Yes.

A. I can do that by taking the inventory and adding what has been received and what has been sold. But, off that selling price, has to come a certain profit which I never had charge of while I was in the employ of Mr. North, and I would not know what I should take off to get the result desired.

Q. Do those books show that? The profit? The stock book? A. No, sir. This book does not show that; this is the ledger.

Q. Well, this is the account ledger, isn't it? A. Yes, sir.

Q. Merchandise ledger. How could Mr. North tell how much merchandise he had on hand on September first from this book? A. By taking the inventory when it was last taken.

Q. Yes? A. And add merchandise that was received to the debit of the merchandise.

Q. Yes? A. And subtracting the merchandise that had been sold from this book, less the profits that naturally do not appear in this book, because that is the selling prices on the credit side of merchandise account, and all those profits or gains I never had charge.

Q. Is there any such book from which they can be computed? Is there such a book from which those figures can be computed? A. Yes, sir; there is such a book. What we call the cost book.

Q. Cost book, together with this account here, if you had them both before you, could you tell

how much merchandise he had on hand, September first, 1917? A. I never had charge of the cost book; I don't know anything about it.

Q. So there was no book which you had or Mr. North had which showed the merchandise on hand September first, 1917? A. Yes; this ledger showed the merchandise on hand.

Q. That is what I want to know. How much was on hand September first, 1917, according to the books of Mr. North? A. That was already testified to, what was on hand.

Q. I want to ask you from your books how much merchandise was on hand September first, 1917? A. I couldn't make that up, because I never had anything to do with Mr. North's sales price. I knew they sold an article for so much but how he arrived at that price, I don't know.

Q. There is no book in existence shows how much merchandise Mr. North had on hand at a certain date? A. Yes, sir; from his ledger and from his cost book, where he shows how much he makes on the merchandise he sold, he could arrive at it.

Q. He could arrive at an accurate amount? A. Approximate amount.

Q. Approximate amount? A. Yes, sir.

Mr. Stamler: That is all.

Mr. David: Were you subpoenaed to come here? A. Yes, sir; I was.

Mr. David: That is all; we rest.

HERBERT S. NORTH, re-called, on behalf of the defendant in sur-rebuttal,

Direct-examination by Mr. Stamler:

Q. Did you tabulate for me a tabulation of the figures I asked you to tabulate and relating to the cancelled orders? A. I have.

Q. Where are they? A. I turned over one set of figures to you to-day.

Q. I mean relative to cancelled orders? What does that total up? A. Totals of the orders.

Q. Total profit derived if those orders were filled, were to be filled by you?

The Court: Let me have the question.

Mr. Stamler: I ask to strike that out.

Q. I want to know computing that damage—having in mind the computation of that damage how much would you—have you claimed against us against those contracts in dollars and cents? A. Those several orders?

The Court: Do I understand you mean if those orders that he holds in his hands now were cancelled how much they would reduce the claim of fifty-nine thousand dollars he has made?

Mr. Stamler: Yes, sir.

The Court: How much would it reduce it? A. $14,300.00 within two or three cents.

The Court: Do you concede these were cancelled or modified to that extent?

Mr. David: For the purpose of this trial I will concede that.

The Court: That simplifies it, so that your claim is reduced from fifty-nine thousand down to fourteen thousand less.

Mr. David: Fifty-eight something, to forty-three.

The Court: Yes.

Q. Now, Mr. North, have you given us also credit for the profit that you would make on the merchandise when you sell it? A. I have not.

Mr. Stamler: Didn't you? That is all.

CROSS-EXAMINATION by Mr. David:

Q. What, if any, profit would there be on the sale of all that merchandise?

Mr. Cohn: We object; that is not cross-examination.

Mr. David: You just asked it.

The Court: You just asked it. As I understand it, Mr. Stamler wants him to allow, and wants to know whether he has allowed the profit that he would get on these goods. And the jury is entitled to know what that is, if it is any; not leave it up in the air.

Q. The goods you have sold, and to be sold, what profit would there be? A. I felt at the time—

Q. Tell me what it is. A. There would be no profit.

RE-DIRECT-EXAMINATION by Mr. Stamler:

Q. Didn't you testify before trial that you would have sold it at a profit? Didn't you testify in an examination before trial you would have made a profit? Substantial profit? A. I didn't.

Mr. David: I suppose you now refer to all the goods?

Mr. Stamler: I am talking about all the goods.

Q. Recall this question being asked of you: "Isn't it a fact that the merchandise you have on

hand has a greater value than the price mentioned in the contract?'' And you answered, ''It has.'' Is that now true? A. A greater value? Yes, sir.

Q. Has a greater value. Isn't it a fact that the merchandise you have on hand has a greater value than the price mentioned in the contract? A. Has a greater value; it has.

Q. And you testified it has? A. Yes, sir.

Q. That is true. And that was true on the twenty-eighth day of December, 1917? A. Yes, sir.

Q. And at that time you had the same merchandise on hand as you now have? A. Practically so.

Q. How much profit did you make on what you actually sold? A. About two thousand dollars.

Q. Did you tabulate that or just guess it? A. That is all tabulated.

Q. Where are your figures? A. That is not here.

Q. You have not got them here? A. That is not what you asked me last night.

Q. I will ask you now how much profit have you actually made on the goods you actually sold? A. About two thousand dollars.

Q. And this tabulation will show the actual amount? A. That tabulation is for the purpose of showing to whom I sold, number of pounds and the price at which it was sold.

Mr. Stamler: That is all.

Mr. David: That is all.

ADOLPH SCHWARTZ, re-called, on behalf of the defendants, in rebuttal.

Direct-examination by Mr. Stamler:

Q. Did you tabulate for me sheets one, two, three, and four, and five as produced by Mr. North to show the amount of merchandise he sold and the prices he sold it at, how much does that amount to in all? A. The profits?

Q. The profits on that? A. Profits to Mr. North amount to $8,015.01.

(Question and answer repeated by the stenographer).

Q. How did you tabulate that? How did you arrive at that? A. From his own statement I took the net figures, net amount he received, and I figured it out according to the price he agreed to sell to the company, how much that would have amounted to; each item, and the difference between the two I showed as profit to him.

Q. Can you give us the total of each item? In other words the total—

Mr. David: He gave you the total, eight thousand dollars.

Q. What was the total amount? A. I didn't add that up.

CROSS-EXAMINATION by Mr. David:

Q. Did you deduct expense of twelve vans loading that stuff and taking it to the storage warehouse?

Mr. Cohn: Object to that.

The Court: Allow the question; he has a right to find out.

Q. Did you deduct it?

Mr. Cohn: I do not think he has a right

to ask him. He can ask him how he arrives at it, but Judge David cannot single out a particular expense Mr. North may have had.

The Court: This does not prove he had that expense. This is simply asking him whether he did that in arriving at his calculation.

Mr. Cohn: If it is not admissible to show what he spent for moving vans, there is not any theory on which it is.

The Court: I allow the question.

Mr. Cohn: Prays exception.

Exception allowed, sealed accordingly.

Judge.

Q. Did you? A. I have figured only that what I have seen on his sheets; I couldn't take in anything else.

Q. Did you deduct expense of storage warehouse?

The Court: He said he took nothing out except what was on the sheet.

Q. Did he show that you used—show the amount paid storage warehouse? A. No, sir; he shows net amount received.

Q. Did it show the amount paid to commission merchants on the sale of the goods? A. Yes, sir.

Q. It did? A. Yes, sir.

Q. How much did that amount to? A. I didn't figure it up, a single column; I took the net amount of Mr. North.

Q. Does the tabulation show deductions which were made to the commission on these goods? A. North's tabulation show.

Q. How much? A. North's tabulation shows deduction commissions and discounts.

Q. Did you take at all in consideration the goods that remained in the storage warehouse? A. I made a separate tabulation of them.

Q. Have you ever inspected these goods? A. No, sir.

Q. You know an offer was made to your counsel to come and make an inventory of those goods?

Mr. Stamler: I object.

The Court: That will be overruled.

Mr. David: All right.

RE-DIRECT-EXAMINATION by Mr. Stamler:

Q. Did you also tabulate the webbings Mr. North was supposed to have on hand according to the inventory? A. I did.

Q. What is the difference in value as to the webbings? A. $5499.27 webbings and yarns that he ought to have left.

Q. In order to arrive at those figures you took the amount Wiliam Whitman Company 3788 pounds, at forty cents, $1515.20. You allowed Mr. North the discounts he claims on the commissions. And then you only took the net amount, $1382.44, in order to arrive at the profit Mr. North made? A. That I did.

Q. And that was done—you did that in each and every case? A. Each item.

Q. You allowed Mr. North the commissions and discounts? A. Yes, sir.

Q. That item at forty cents—first item Mr. North sold at forty cents, at what price were you to buy it? A. Twenty-five and one-half cents.

Q. So that there was fourteen and one-half cents profit on it? A. Yes, sir; per pound.

Mr. Stamler: That is all.

Mr. David: That is all.

Mr. Stamler: I ask the following questions be stricken out:

"Q. Did you at any time between January third, 1917, and September first, 1917, learn whether or not the company had filled any of your orders at a loss?" Counsel now states he did not object to that question and the witness answered: "I did." But counsel objects to the next question: "From whom did you learn that?" Counsel objected to that on the ground it was a conversation prior to June twenty-sixth, 1917.

The Court: I will strike that out.

Mr. Stamler: I ask the Court to strike out the following questions and answers:

"Q. Before you took possession of the goods did you file a bond in the Circuit Court in this Country?" "A. I did."

"Q. How much did you pay for that bond?" And the answer thereto. "What did you finally pay?" and the answer thereto. "Did you hire moving vans?" "I did." "How much did it cost you to get it out?" And the answer thereto. "How many vans did you have? How many men worked? Where did you take these goods?" And the answer thereto. "What did you pay for storage on them?" And the answer thereto.

The Court: As I understand it, the

plaintiff claims it was your duty to take those goods under the contract, and if you failed to take them they had to take the goods away from you.

Mr. Stamler: Yes, sir; and pay for them.

The Court: And when they took them away from there they had to pay something for that.

Mr. Stamler: Yes, sir.

The Court: Isn't that incidental to the damage if their contention is correct?

Mr. Stamler: No, sir; because if we breach the contract they can not have double damages.

The Court: They say they are entitled to damages on that first, because they are held liable under this contract; second, because they had to take the goods away which you would have kept and which expense they would not have had if you kept the contract.

Mr. Stamler: But we were not obliged to take any of those goods in the event we got a cancellation of all the orders.

The Court: That event did not happen, did it, by September first?

Mr. Stamler: By September first?

The Court: I understand your position is on September first you were ready to take them; so there cannot be the cancellation of the contracts—

Mr. Stamler: No. We were ready to take and pay for them, and we say under the declaration in this case they are not

entitled to receive these items. Your Honor denies the motion?

The Court: I will take a look at the declaration?

(Court examines declaration.)

The Court: Judge David, where do you find any claim for those items in that declaration.

Mr. David: The goods were sold at a profit, but he had to pay for the carting; he had to pay for a bond; he had to pay commissions where he said it brought it down to where he is about even. Otherwise they say we made eight thousand dollars on the sale of those goods. North said he would have made a couple of thousand dollars, and we are not entitled to that couple of thousand dollars.

The Court: Mr. Stamler, I understand that you claim when they say they are liable upon those various contracts, you say that as long as they made a profit on that sale of the goods, you are entitled to that credit.

Mr. Stamler: I simply say—

The Court: Do you or not?

Mr. Stamler: I am not prepared to answer that.

The Court: Do you want the credit or not?

Mr. Stamler: I am not prepared to answer that.

The Court: When will you be prepared to answer that?

Mr. Stamler: I will leave that to the Court's decision.

Mr. Cohn: The credit would amount to next to nothing.

The Court: It is two thousand dollars. Do you claim there must be a deduction?

Mr. Stamler: No, sir.

The Court: Why did you offer this last witness' statement?

Mr. Stamler: Only to prove under our complaint.

Mr. Cohn: You wanted us to determine our damages on the first count, and we did it.

Mr. Stamler: That was the evidence in that case; that was the object of that evidence.

Mr. David: It would stand no defence in that case.

Mr. Stamler: I am not asking it as a credit at all.

The Court: Do I understand you waive any credit that you may have by reason of Mr. North having sold the goods which were left in his hands so far as the plaintiff's claim against you is concerned?

Mr. Stamler: No.

Mr. Cohn: We say, if your Honor please, we think the theory of evidence under which they put in the net profit they made is legally objectionable because we say you cannot take one side of the ledger and put down this tremendous sum in question, and put down on the other side the credit they want to give. Because, if we answered your Honor's question we would thereby admit they had a right to

receive legally, the fifty-eight thousand dollars.

The Court: Oh, no. Assuming their theory has to be presented, aren't you entitled on your side to whatever credit Mr. North had by reason of having the goods still in his hands?

Mr. Stamler: We do not concede that is the proper theory in this case. We do not concede and do not want to concede on the record that is the proper theory of damages, so that the Court of Errors might say we were trying that on this theory.

The Court: You do not claim for any credit on the amount on their side. You do not claim any credit for the amount that Mr. North may have made by the sale of the goods?

Mr. Stamler: We do not claim it as a credit.

The Court: In that case this item does not play any figure.

Mr. David: I will consent it be stricken out.

The Court: It will be stricken out.

MOTION FOR A DIRECTION OF VERDICT

Mr. Cohn: I desire to renew my motion to direct a verdict.

The Court: On the same grounds you have already given?

Mr. Cohn: On the same grounds with reference to the first and second count in which there has been absolutely no proof of damage. And on the third count on the grounds that were stated, with this addi-

tional ground: that it appears by the testimony of Mr. North on cross-examination that it would take reasonably and fairly in his view as an expert eight months from June twenty-sixth, 1917, to complete these orders; that period would have expired on February twenty-sixth, 1918; whether or not this covenant is a covenant of indemnification purely or a covenant against liability, or whatever it is or may be construed to be, there cannot be any such thing as an accrual of a breach prior to the time that the parties, either definitely by contractual covenant or implied by operation of law, agreed to be the time in which the covenant was to be performed. We are in this position, in much simpler words: we agreed with Mr. North—

The Court: But the testimony, as I understand it, is these goods were to be delivered during the next four months according to the custom of the trade.

Mr. Cohn: The testimony of Mr. North, on cross-examination, and of that I am absolutely certain, is that it would take eight months in which to fill these orders. Now, if your Honor please, there was no definite time in which those goods were to be delivered. There is nothing in this contract which obligated this company to deliver one or the other kind first or last. There was no priority involved. There was simply an agreement between two parties; you can call it what you may.

The Court: Cannot the jury also find in this case, as a matter of fact, you did

not intend to fill the orders in any way? In other words, what I mean is can I find as a matter of law, that what you claim is the only view?

Mr. Cohn: Yes.

(Further argument of counsel).

The Court: The difficulty is, Mr. Cohn, that it is very logical and very entertaining, but it is not the practical application.

Mr. Cohn: Then your Honor disagrees with that view?

The Court: Yes, sir.

Mr. Cohn: Very well; my further ground is in order to establish a liability under a covenant similar to the one at bar, whether that covenant be a covenant purely for indemnity or against liability, the indemnitee must show that the damages are fixed and absolute. And that further he must show the continuance of the legal liability to those persons to whom he claims to be liable.

The Court: Isn't there evidence of that?

Mr. Cohn: There is no evidence of that.

(Further argument of counsel).

Mr. Cohn: In order for Mr. North to recover damages amounting to a difference between the price at which he took the orders and that amount of legal liability against which we indemnified him, he must show liability which would have accrued against him based upon a continuance of the legal liability to his customers and based further upon the measure of liability he had to those customers.

Now, neither he nor we can sit down and say "now it is our notion that these customers should be entitled to a delivery of these goods in February, 1918, or any other time." We cannot seize upon a special set of circumstances, the rise in the market, because that does not begin to be a fair measure for the reason that if the market had gone down, Mr. North could have come in in his status and state the market has gone down.

The Court: Suppose you just state your proposition because my mind is very clear about that. There is some novelty, I agree with you, that has never been applied in New Jersey. It was in England. State your grounds and your motion so the stenographer will get it.

Mr. Cohn: With regard to this particular point?

The Court: You ask for a direction?

Mr. Cohn: I ask for a direction on the third count, on the ground that whether the covenant at bar in paragraph one of the agreement of June twenty-sixth, 1917, whether the covenant contained in paragraph one of June twenty-sixth, 1917 is a covenant to indemnify North against loss or damage arising from a non-fulfilment of the orders, the schedule of which is attached to the contract, or whether the covenant is the one indemnifying North against liability for the non-fulfilment of the orders, in order for a recovery to be made, North must show a con-

tinuance of a legal liability on his part to furnish the merchandise represented by the orders to his customers. Two: that North must show a measure of damage based upon the date of delivery agreed between him and his customers. And that neither party to the action can by their own testimony or conduct or agreement fix any date of delivery for the orders, to which agreement, the customers of North are not parties. And that the liability against which North claims to be indemnified has not become fixed and absolute. And that under the testimony of North that the reasonable and fair period within which to deliver the merchandise would be eight months from June twenty-sixth, 1917, the company would have the legal right to indemnify North by a delivery of the orders up and until February twenty-sixth, 1918, and that there can be no accrual of a breach until that time.

The Court: Motion will be denied and exception allowed.

Exception allowed, sealed accordingly.

Judge.

Mr. David sums up for the plaintiff.

Mr. Cohn sums up for the defendant.

Charge

Charge to the Jury, delivered by Hon. George S. Silzer, Circuit Court Judge, in the above entitled matter, in the Union County Court House,

City of Elizabeth, New Jersey, on the seventh day of February, A. D. 1918.

Gentlemen of the Jury: There are two cases here that you are trying, in which the party is plaintiff in one case, and defendant in the other and vice versa, and in the discussion of the case with you, in order to keep the matter clear and separate so that it may be more easily understandable, I will refer to the one as North, Mr. North, and the other as the Schwartz Company. In this way it will be more easily and readily understood, because the two parties to the case are almost identical in name.

It appears that there was first an agreement of January third between Schwartz and North, and then a subsequent agreement of June 26th, 1917, in which the parties agreed to do certain things. And taking up first the claim of Mr. North, as the first case, so that we may keep them separately as we travel along, Mr. North comes into Court now and claims that he is entitled to damages, because there has been a breach of the contract on the part of the Schwartz Company; and that breach consists principally and primarily in the failure of the Schwartz Company to take the goods, the merchandise, which was necessary to make up the finished goods, to fulfill the contracts which Mr. North had on hand, and which they agreed to perform. And, that, as a result of that breach, he is entitled to recover the sum of twenty thousand dollars.

Now you will observe, if you take up these contracts, (and they will be before you in the Jury room), that the contract of June twenty-sixth

differs in this particular clause from the contract of January third. The contract of January third reads this way:

> "The party of the second part"—that is, Schwartz,—"further agrees to assume and fulfill all the contracts of the party of the first part for the delivery of merchandise sold and not yet delivered." And note this language: "And agrees to save harmless and indemnify the said party of the first part from any damages for breach of said contracts or from other causes in connection therewith."

"Will save harmless and indemnify from any damages for the breach." When they came to the contract of June twenty-sixth, they changed the phraseology of that clause. The contract of June twenty-sixth contains this clause:

> "The company agrees to assume the liability of performing the aforesaid contract dated January 3d, 1917, to the extent that it will fill all orders for merchandise on the former books of said North, including light weight and heavy weight goods and merchandise of all weights, of which orders two itemized schedules are hereto attached, made a part hereof, and marked Schedules one and two.
>
> "The said Company, however, in any and every event, agrees to save harmless and indemnify the said North from any and all liability or loss or damage by reason of said orders mentioned in said schedules number one and two or the non-fulfillment thereof or any matter or thing connected therewith."

Charge

Now, you will observe, gentlemen, in the first contract it was to save harmless from any damage for failure to perform the contract, and in the second to "save harmless from all liability, or loss or damage." So that you see the word "liability" has been put in there, and also the word "loss," and that forms a very important feature in this case.

You want, of course, to know what the law is in a situation of this kind, and our Courts have stated it in this way:

> "A distinction has been made, in numerous decisions, between a contract of indemnity against a liability, and a contract to indemnify or save harmless from the consequences of such liability; namely, for the damage or loss. The difference between saving harmless from liability and the consequences of the liability, which are damage or loss. It is being very generally held that in the former case (that is, liability) the cause of action is complete when the liability is established, although payment of the liability or actual damage arising therefrom is not shown; whereas, in the latter case no right of action accrues until actual loss or damage has been sustained."

So you see, gentlemen, where the guarantee is against liability, the moment the man becomes liable, he is entitled to recover, whether he has paid the money or not. While, where he is guaranteed to be saved harmless against loss or damage, then he must first show the loss or damage by payment of it before he can recover it.

I might illustrate this in this way by a very simple illustration. Suppose you are about to go on a promissory note and you say I want to be indemnified against this endorsement, and the man says all right, and he makes an agreement with you to save you harmless from any loss which you might sustain by reason of that endorsement. Then, if the maker of the note failed to pay it, you could not sue on that until you had a loss, namely, until you were called on to pay the note and had to pay it. Then, you would have a right to be indemnified. But, if the agreement was that you should be indemnified against liability or loss on that note, then the moment the maker of the note failed to pay it and you became liable you would be entitled to recover at once on that liability, whether you had paid it or not. And I am elaborating this, gentlemen, because it is the crux of this case, and that is the legal rule with reference to the liability.

Now, the question of fact that confronts you is: was there a breach of the contract to save harmless from liability? And that is where the parties in this case differ, and where a great deal of testimony has been at variance.

The plaintiff, North, claims that there was such a breach and that the breach consisted in this: that the Schwartz company failed to take the goods, merchandise, and that they failed to fulfill these contracts. And, without rehearsing all of the testimony, the general contention of North is that the defendants not only did not take these goods, that they did not fulfill the contracts, but that they did not intend to, and that their action and conduct was such that you may infer there-

from that they never intended to fill them, and did not fill them, and that, therefore, when they came there on the first of September to pay the money that was due for these goods and to take the goods, that what they did was a mere subterfuge for the purpose of evading their contractual obligation.

On the other hand, the defendants say that is not true; they were ready to fulfill this contract, and they did not have to take the goods before the first of September; that they would have had six months longer to fill the orders; that they intended to fill it, and the reason they refused to take the goods was because Mr. North did not give them the opportunity to see what the cases contained and that they were entitled to know first what they were paying for.

So, you see, that is the real crux of the questions of fact you have to determine. Take the motives of the parties, and look at their appearances and what they said, and weigh the testimony. Somebody, evidently, did intend to perform the contract. And, gentlemen, evidently, somebody did not, and you must weigh the testimony and determine where the truth is. It is not always an easy proposition, but that is the reason we have the Jury system, so that twelve reasonable, disinterested men can take the situation and sit down, and discuss it and say where is the truth in the matter. And in that, gentlemen, you have a right to weigh the interest of the parties, as well as taking their testimony. So determine, gentlemen, was there a breach of the contract.

Was there a breach of the contract? If there was a breach of the contract on the part of the

Schwartz Company of this particular duty; if they refused to take these goods and they refused to carry out these orders, and had no intention of doing it, and if that was the reason that produced that situation which brought about a rupture and ended this thing, then, of course, liability would attach and then you come to the question of damages.

Now, on the question of damages on the North claim (I am taking this claim first), the damages would be limited to the liability which fell upon Mr. North. He claims that the liability that fell upon him was the liability to pay damages to those customers whose contracts had been broken, and you have heard the testimony in which he said it amounted to some fifty-eight thousand dollars. But counsel have conceded that if the cancelled contracts and modified contracts were allowed that would bring it down $14,300.00 less, which would make it forty-three thousand and some odd dollars. It will hardly be necessary for you to take the figures on this thing for the reasons I will state in a moment.

In addition to that Mr. North would be obliged, although the other side has stated they do not claim that, nevertheless Mr. North would be obliged to credit the other side for whatever profit he received out of the sale of the goods. Because, certainly, he could not be reimbursed for his liability upon the outstanding contracts and also benefit from the goods after he got a profit on them.

He claimed that the profit, as I recall it, was two thousand dollars, and the other side claims it was thirteen thousand. But, if you allowed the

whole thirteen thousand it would bring the claim down to some thirty thousand dollars, and you are not concerned with this because the plaintiff, in this case, in drawing his papers only claimed twenty thousand dollars. So that, even if you took these figures, you could not allow that amount because he is limited to twenty thousand dollars, in his claim. And, having limited himself to a claim for twenty thousand dollars, he could not make any claim for fifty-eight, or thirty-four, or forty-three thousand dollars. And, as he is limited to twenty thousand dollars, after making all allowances, only twenty thousand dollars could be allowed anyhow, which would not be up to the amount which has been placed before you in the proof.

On the other hand, in the other suit, the Schwartz Company claims on its behalf that there was a breach of the contract by Mr. North, and it says that it was ready to fulfill this contract. Not only the North contracts, but to take the merchandise. So, you see, you came right up against the same question of fact: was there a breach of contract.

In that particular I ought to read this to you; the Schartwz company claims they had a right to an inventory of these goods, but the law puts it in this way:

> "Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless, and until, he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

"A reasonable opportunity of examining them." Now here, you see gentlemen, the parties again differ. The Schwartz Company says they had no reasonable opportunity of examining the goods; that they wanted an inventory made and the case first opened for the purpose of examination.

On the other hand, the contention is that the goods were in their possession for a number of months, available to them at a place where they could have looked at them and examined them; that abundant opportunity existed to see the goods; that they could have made an application several days before, but they waited until the last moment, then asked for an inventory. So, you see gentlemen, you will have to determine that question.

Was there a reasonable opportunity for inspection? If there was not under all the circumstances, then, of course, the Schwartz Company had a right to say "We refuse to pay." On the other hand if there was a reasonable opportunity for inspection, then they had no right to refuse to pay.

As to the amount of payment, there is a difference between the parties. The Plaintiffs claim (that is, North claims) that the amount that should have been paid that day was, in round figures, something over twenty-nine thousand dollars, and that they represented the actual value of the goods that were to be delivered to the Schwartz Company. The Schwartz Company says that that was not the amount; that after deducting the defective goods and the other things which you have heard spoken of, that the actual

amount was fifteen thousand dollars or thereabouts, and that they were ready then and there to pay that sum. So that is another question of fact, gentlemen, you will have to determine where the truth is as to that. What was the amount.

You see, where there was a contract to sell goods, it was the duty of the man who was to sell them to deliver the goods that were mentioned and provided for in the contract. And it was the duty of the man who was to buy them to take the goods mentioned in that contract, and pay the price mentioned therein. And, of course, neither party could adopt any other course. But, of course, under the testimony, each party claims the other adopted a subterfuge to evade the responsibility. And those facts confront you, and according to how you solve the questions of fact, you will determine the case. And, necessarily, they can not both be right. And, necessarily, you cannot find a verdict for both. Either one is right or he is wrong. And, if one is right, the other is wrong. That must be.

So, gentlemen, take up the cases in the order in which they have been presented; perhaps, that is the more orderly way. And determine first the case of Mr. North against the Schwartz Company. Determine if there was a breach of contract. If there was no breach of contract by the Schwartz Company, then your verdict is, of course, "no cause of action against the Schwartz Company." If you find there was a breach of contract in the way I have outlined, then you assess the damages in favor of Mr. North at the amount which he has suffered, and which can not exceed twenty thousand dollars.

Then you take up the Schwartz Company suit in exactly the same way, and determine whether there was a breach of contract there, or whether there was not; and if there was, assess your damages in the same way. Of course, if you have found in the one case that one party has breached the contract that practically disposes of the other case so your findings of fact practically dispose of the whole thing.

I have several requests to charge on the part of the Schwartz Company. First:

> "That it was the duty of Mr. North to furnish plaintiff with the raw and partly finished goods, a list of which was attached to the contract of June 26th, 1917, upon the plaintiff tendering itself ready, willing and able to pay for the same at the prices mentioned in said contract, on or before September 1st, 1917."

I so charge you. Second:

> "That it was the duty of the defendant in tendering the merchandise to the plaintiff, to make a separation of the merchandise and to tender only such merchandise as the plaintiff was bound to accept, and to demand from plaintiff, in payment thereof, no sum greater than the value thereof according to the prices fixed in the contract, and that a violation of this duty was a breach of the contract by defendant."

Gentlemen, I so charge you that if there were goods which were not mentioned in the contract, of course, Mr. North could not turn them over. But the parties differed there again. Mr. North

claiming on his part that the goods he turned over were the goods called for by the contract, and the other side claiming that a part of them were not.

Third:

> "To tender the merchandise to plaintiff, the defendant was obliged to tender the merchandise in such way as to enable the purchaser to see that what was presented for its acceptance was in reality what it had bargained for, and that therefore a tender of merchandise in closed cases was not adequate."

I refuse to charge that, except as I have already charged you in reference to the statute on receipt and inspection, which speaks for itself.

The fourth I refuse to charge except as I have already charged.

Fifth:

> "That upon the refusal of the defendant to make an accurate inventory or to permit the plaintiff an inspection for the purpose of determining whether in accordance with the contract the merchandise was suitable for the fulfillment of orders, the demand by the defendant of the sum of $29,875.00 was unlawful, because under the testimony of the defendant this sum was in excess of the value of the tendered merchandise, computed according to contract."

I refuse to charge, except as I have already charged, which leaves the questions of fact for you to determine.

Sixth:

> "That upon the demand by the defend-

ant of the sum of $29,875.00 the plaintiff was absolved from the making of a tender."

That is true, gentlemen, if the sum of $29,875.00 did not represent the amount that was due to Mr. North.

Seventh:

"That if you believe the plaintiff's testimony, that on its behalf the sum of $15,000 was tendered to the defendant, in legal tender of the United States, and the plaintiff tendered itself willing, after an inspection and computation, to pay in cash the balance over this sum which would be found due, there was an adequate tender by the plaintiff."

I so charge you gentlemen. There is no question raised by the other side that the tender would not be sufficient if the amount was proper.

Eighth:

"That the refusal of the defendant to make a separation of the merchandise which the plaintiff was bound to accept, first for the purpose of determining the value of said goods and secondly for the purpose of determining whether the same was suitable for the fulfillment of orders and the demand of the defendant from the plaintiff of a sum greater than the value of said merchandise computed according to contract, was a breach of said contract on the part of the defendant, and therefore the plaintiff is entitled to recover."

That is so, if a separation was necessary. And that, of course, brings you back again to the ques-

tion of whether these goods that were tendered by Mr. North were all included in the contract or whether all of them were not included in the contract.

Ninth:

"That the obligation of the plaintiff to fill the orders did not accrue until the defendant had furnished the plaintiff with the merchandise for that purpose according to the contract, and that under the contract the plaintiff had the legal right to wait until September 1st, 1917, in which to acquire the merchandise."

I so charge you. Tenth:

"That the plaintiff, under the contract, had a reasonable time from and after September 1st, 1917, within which to make deliveries of merchandise for the fulfilment of the orders."

I so charge you. Eleventh;

"That on September 1st, 1917, when the plaintiff demanded the delivery of merchandise from the defendant, the defendant had no legal right to anticipate that the plaintiff would subsequently refuse to deliver the orders according to the contracts, and its refusal to let the plaintiff have the merchandise for this reason, was a violation of the agreement on the part of North."

That is true, if it is the fact. But, I do not recall that is the fact. My recollection is Mr. North does not come into Court and say that he refused to let them have this merchandise because they were not going to fill the contracts.

My understanding of Mr. North's position is that he was ready to let them have the goods; that he retained them because they refused to meet the contract. But you will have to remember the facts, gentlemen. Twelfth:

"That any conduct of the plaintiff during the period of June twenty-sixth, 1917, and September 1st, 1917, with relation to the filling of orders could not be treated by the defendant as an abandonment by the plaintiff in the performance of the terms of the contract on its part, unless the defendant relied upon such conduct of the plaintiff, and therefore the conduct of the defendant in causing his attorney to write the plaintiff on August 29th, 1917, inquiring as to what goods the plaintiff wanted was a waiver by defendant of such alleged conduct."

I so charge you. Thirteenth:

"That the failure of the defendant to lend and use his best efforts for the purpose of procuring a cancellation of the orders, as shown on Schedules one and two attached to the June contract, to the greatest possible extent or to use his best efforts for the purpose of procuring as much time as possible for the delivery of orders and of procuring an increase of prices, amounts to a breach of the contract."

Gentlemen, I refuse to charge that, because my recollection is that the contract says this:

"No default under this clause shall be claimed without written notice being given by the party claiming the default."

and the testimony is there was no such claim made, and no such notice given. Fourteenth:

> "Under the first count, the plaintiff is entitled to recover the difference between the prices fixed—"

Oh, yes, gentlemen. I do not know whether I covered that or not. If you find that the Schwartz Company is entitled to recover, and that there was a breach on the part of Mr. North of this contract, then the damages which the Schwartz Company would be entitled to recover would be the difference between the price they agreed to pay for the merchandise, and the sum they would have to pay for it in the open market. Our statute puts it in this way:

> "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing approximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered."

So that the damages, if there was a breach of contract on the part of Mr. North, for failing to deliver these goods would be as I have just read it to you. And, as I understand, the Schwartz Company claims that the amount of that is $13,514.28, which they claim is the amount it would have cost them in the market in excess of what the contract called for. That is what I understand the claim is.

I have covered number fourteenth, haven't I, Mr. Cohn?

Mr. Cohn: I have not got the copy of the requests before me, your Honor.

The Court: Fourteenth:

"Under the first count, the plaintiff is entitled to recover the difference between the prices fixed under the contract of June 26th, 1917, of the merchandise in the possession of the defendant on September 1st, 1917, suitable for filling orders, and the market price of same merchandise as of that date in the City of New York, which under the testimony was the nearest market in which said merchandise could have been purchased."

That is true, gentlemen, if Mr. North was guilty of the breach.

Fifteenth I refuse to charge except as I have already charged. Sixteenth:

"That under the testimony of North it would have taken eight months from June 26th, 1917, to finish the orders, and that there was no accrual of a breach of any covenant in the contract until this period had expired."

That depends on the circumstances. If there had been a delivery of the goods and no breach of any kind then defendant would have a reasonable time. As I recall the testimony it is as quoted in this request, some several months; probably eight months, as the counsel states. But that leads again to a question of fact, Mr. North's contention being that the parties never intended to do it; and the Schwartz people now put in a claim and say that they did not intend to take any seven or eight months, but that there was a breach of the contract on the first of September and, therefore, they were not obliged to go on at all.

On the other hand, if the contention on the other side is as stated in this request and that is, that if they had received the goods and had not been barred from accepting them by Mr. North's conduct, that then having the goods they would have had several months in which to finish them, according as you find the facts to be, (eight months, if that is the true time stated, and you find it that way,) then, of course, there would not be any breach until that time has expired. Seventeenth:

> "That North demanded from the Company on September 1st, 1917, the sum of $29,875.00, and admits in Court that the value of the goods according to the contract on September 1st, 1917, was $29,743.81, therefore the company had a right to refuse to comply with the demand of North."

I refuse to charge that except as I have already charged it, namely, that you must determine what the amount was that was due and whether Mr. North demanded the amount actually due or whether he did not.

The Court: Any exceptions before the Jury retires? Judge, have you any exceptions?

Mr. David: No, if your Honor please, I have not.

Mr. Stamler: A general exception to your Honor's charge.

Mr. Cohn: We desire to except to that portion of your Honor's charge, in which the Court illustrates legal liability on a promissory note, as not coming within the operation of the rule.

The Court: It is merely an illustration; that is all.

Mr. Cohn: I desire to except to that portion of the Court's charge—

Foreman of the Jury: I would like to ask you one question.

The Court: Yes?

Foreman of the Jury: If we find that there was a breach of contract—

The Court: By whom?

Foreman of the Jury: Either party; by the plaintiff or defendant, because it may be reversed.

The Court: Yes?

Foreman: And we determine on the amount of damage on either side on something that has not actually taken place, but may take place, as I understand it, can we cover that in part cash and part bond, or must it all be cash?

The Court: You mean the form of the verdict, as I understand?

Foreman: Yes.

The Court: The form of your verdict is either, if there is no breach, "no cause of action." Or, if you find a breach, you must translate it into dollars and cents.

The Foreman: It means dollars and cents?

The Court: Yes.

Mr. Cohn: We except to that portion of the Judge's charge in which the measure of damages is stated at fifty-eight thousand dollars as total liability of Mr. North. And we further except to that portion of the charge which states—

The Court: I will allow an exception to whatever I said on that score.

Argument

Exception allowed, sealed accordingly.

Judge.

Mr. Cohn: Yes. The portion of the Judge's charge in which it was said that where goods are delivered to a buyer who has not had a reasonable opportunity to examine, and so forth, quoting the statute.

The Court: Yes.

Exception allowed, sealed accordingly.

Judge.

Mr. Cohn: For the reason that this statute is not applicable to the case at bar,

The Court: Why not? Isn't that the Common Law rule?

Mr. Cohn: Yes, but you see this is not an ordinary case of a buyer buying goods.

The Court: Do you claim you are not entitled to an inspection?

Mr. Cohn: Yes, we do.

The Court: You can not claim that.

Mr. Cohn: We say the mere fact that we had a reasonable opportunity to examine does not apply to our case; here there was a judicial ascertainment necessary between the parties as to what goods were suitable. This is a peculiar situation.

The Court: Yes, I will allow an exception to that.

Exception allowed, sealed accordingly.

Judge.

Mr. Cohn: Because the contract required the parties to determine what was suitable for filling orders, and therefore the statute does not apply.

We except to the statement that the goods were in our possession, because under the contract they were not in our possession. The contract merely provided that we suffered North to keep them there without expense.

The Court: Exception allowed.

Exception allowed, sealed accordingly.

Judge.

Mr. Cohn: We except to that portion of the charge in which it is said that it cannot be that both are right, because that removes from the jury the contemplation of giving a verdict for the defendant in each case.

The Court: I say they both can not be right. I am not taking it away from the jury.

Mr. Cohn: I think that is the notion they may get; I think it is important for them to know they may say, in North's case against us, we did not breach him.

The Court: Gentlemen of the Jury, counsel calls my attention to the fact I made the statement that both cannot be right, which I think, of course, you thoroughly understand. But, in order that there may be no misunderstanding about it, Mr. Cohn wants me to say to you that if there was no breach on the part of either one of them, then, of course, there would be no recovery by either one. So I say that to you now.

Mr. Cohn: We except to the Court's refusal to

charge requests number three, four and five, and further except to the Court's refusal to charge eight in the language in which it was requested. And we except to the Court's refusal to charge request fifteen and the manner in which sixteen was charged, because it was not in the language of the request. We except to the Court's remarks at the conclusion of charging request number eleven. And to the refusal to charge seventeen.

I might say to your Honor this is something you might straighten out. In one instance you say Mr. North has never come into Court and said the reason for his refusal to give the goods was because he thought they had no intention to use it. That is in one of the early portions of the requests. And then on the other side your Honor said that he had a right to base his notion or that he had a right to say that because they did not intend to use it.

The Court: Whatever I said I will allow you an exception to it.

Mr. Cohn: That amounted to an abandonment.

The Court: I did not say that. But whatever I said on that subject, I will give you an exception to it.

Exception allowed, sealed accordingly.

GEORGE S. SILZER
Judge.

The Jury retired.

Verdict

The Jury rendered a verdict of $20,000.00 in favor of the plaintiff.

Defendant's (Schwartz Company) Requests

ONE

"That it was the duty of Herbert S. North to furnish plaintiff with the raw and partly finished goods, a list of which was attached to the contract of June 26th, 1917, upon the plaintiff tendering itself ready, willing and able to pay for the same at the prices mentioned in said contract, on or before September 1st, 1917.

TWO

"That it was the duty of the defendant in tendering the merchandise to the plaintiff, to make a separation of the merchandise and to tender only such merchandise as the plaintiff was bound to accept, and to demand from plaintiff, in payment thereof, no sum greater than the value thereof according to the prices fixed in the contract, and that a violation of this duty was a breach of the contract by defendant.

THREE

"To tender the merchandise to the plaintiff, the defendant was obliged to tender the merchandise in such way as to enable the purchaser to see that what was presented for its acceptance was in reality what it had bargained for, and that therefore a tender of merchandise in closed cases was not adequate.

Defendant's (Schwartz Company) Requests

FOUR

"That upon the plaintiff tendering itself willing to take an accurate inventory of the merchandise belonging to the defendant and to pay therefor at the prices fixed in the contract, it became the duty of defendant to make such accurate inventory.

FIVE

"That upon the refusal of the defendant to make an accurate inventory or to permit the plaintiff an inspection for the purpose of determining whether in accordance with the contract the merchandise was suitable for the fulfillment of orders, the demand by the defendant of the sum of $29,875.00 was unlawful, because under the testimony of the defendant this sum was in excess of the value of the tendered merchandise, computed according to contract.

SIX

"That upon the demand by the plaintiff of the sum of $29,875.00 the defendant was absolved from the making of a tender.

SEVEN

"That if you believe the plaintiff's testimony, that on its behalf the sum of $15,000 was tendered to the defendant, in legal tender of the United States, and the plaintiff tendered itself willing, after an inspection and computation, to pay in cash the balance over this sum which would be found due, there was an adequate tender by the plaintiff.

Defendant's (Schwartz Company) Requests

EIGHT

"That the refusal of the defendant to make a separation of the merchandise which the plaintiff was bound to accept, first for the purpose of determining whether the same was suitable for the fulfillment of orders and the demand of the defendant from the plaintiff of a sum greater than the value of said merchandise computed according to contract, was a breach of said contract on the part of the defendant, and therefore the plaintiff is entitled to recover.

NINE

"I charge you as a matter of law, that the obligation of the plaintiff to fill the orders did not accrue until the defendant had furnished the plaintiff with the merchandise for that purpose according to the contract, and that under the contract the plaintiff had the legal right to wait until September 1st, 1917, in which to acquire the merchandise.

TEN

"That the plaintiff under the contract had a reasonable time from and after September 1st, 1917, within which to make deliveries of merchandise for the fulfillment of the orders.

ELEVEN

"That on September 1st, 1917, when the plaintiff demanded the delivery of merchandise from the defendant, the defendant had no legal right to anticipate that the plaintiff would subsequently refuse to deliver the orders according to the contracts, and its refusal to let the plaintiff have

the merchandise for this reason, was a violation of the agreement on the part of North.

TWELVE

"That any conduct of the plaintiff during the period between June 26th, 1917, and September 1st, 1917, with relation to the filling of orders could not be treated by the defendant as an abandonment by the plaintiff in the performance of the terms of the contract on its part, unless the defendant relied upon such conduct of the plaintiff, and therefore the conduct of the defendant in causing his attorney to write the plaintiff on August 29th, 1917, inquiring as to what goods the plaintiff wanted was a waiver by defendant of such alleged conduct.

THIRTEEN

"That the failure of the defendant to lend and use his best efforts for the purpose of procuring a cancellation of the orders as shown on Schedules one and two attached to the June contract to the greatest possible extent or to use his best efforts for the purpose of procuring as much time as possible for the delivery of orders and of procuring an increase of prices, amounts to a breach of the contract.

FOURTEEN

"Under the first count, the plaintiff is entitled to recover the difference between the prices fixed under the contract of June 26th, 1917, of the merchandise in the possession of the defendant on September 1st, 1917, suitable for filling orders, and the market price of same merchandise as of

that date in the City of New York, which under the testimony was the nearest market in which same merchandise could have been purchased.

FIFTEEN

"Under the second count of the complaint, the plaintiff is entitled to recover the difference between the contract price stated in the orders originally taken by the defendant, and afterwards assumed by the plaintiff, and the total cost of manufacturing said merchandise; or the net profits it would have made by completing the orders.

SIXTEEN

"That under the testimony of North it would have taken eight months from June 26, 1917, to finish the orders, and that there was no accrual of a breach of any covenant in the contract until this period had expired.

SEVENTEEN

"That North demanded from the Company on September 1, 1917, the sum of $29,875.00; and admits in Court that the value of the goods according to the contract on September 1, 1917, was $29,743.81; therefore the Company had a right to refuse to comply with the demand of North."

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New Jersey Supreme Court

Rule to Show Cause

(Filed February 9th, 1918.)

HERBERT S. NORTH, individually and as executor of Joseph N. North, deceased, Plaintiff, vs. JOSEPH N. NORTH & SON, INCORPORATED, a corporation of the State of New Jersey, Defendant.	Action at Law.

On application made within six days after the rendering of the verdict herein;

It is on this eighth day of February, Nineteen hundred and eighteen, on Motion of Saul Cohen, Attorney for the defendant Joseph N. North & Son, Incorporated,

ORDERED, that the plaintiff show cause before this Court, on Tuesday the nineteenth day of February 1918, why the verdict in this case should not be set aside and a new trial granted to the said defendant; and it is further ordered that execution be stayed after levy pending the final determination of said application for a new trial.

Rule to Show Cause

IT IS FURTHER ORDERED, that defendant be permitted to reserve all exceptions taken at the trial to the rulings of the trial judge wherein the jury was permitted to consider evidence and find a verdict on the alleged liability of the plaintiff under existing contracts with customers, without plaintiff establishing that he suffered damages or loss thereon, or paid damages on such liability. The liability for which such recovery was sought and had, being paragraph one of the contract and reads in part as follows: "The said Company however, in any and every event, agree to save harmless and indemnify the said North from any and all liability or loss or damage by reason of said orders mentioned, in said schedules numbers 1 and 2 or the nonfulfillment thereof or any matter or thing connected therewith;" and that this rule will not preclude the taking of an appeal by said plaintiff, on said reserved points.

GEO. S. SILZER,
Judge.

Opinion in Rule to Show Cause

NEW JERSEY SUPREME COURT

No. 22, June Term 1918.

HERBERT S. NORTH, individually and as Executor, etc.,
Plaintiff,
vs.
JOSEPH W. NORTH & SON, Incorporated,
Defendant.

Submitted July 5, 1918; Decided November 11, 1918.

Defendants rule to show cause,

Before GUMMERE, Chief Justice, and Justices SWAYZE and TRENCHARD.

For the rule, Saul Cohen, (Alfred F. Skinner and Edward O. Stanley on the brief).

Contra, Abe J. David and Samuel Phillips Savage.

Per curiam:

The rule to show cause in this case contains a very comprehensive reservation of exceptions taken at the trial in this language:

"It is further ordered that defendant be permitted to reserve all exceptions taken at the trial to rulings of the trial judge wherein the jury was permitted to consider evidence and find a verdict on the alleged liability of the plaintiff under existing contracts with customers, without plaintiff establishing that he suffered damages or loss thereon or paid damages on such liability. The

liability for which such recovery was sought and had being paragraph one of the contract and reads in part as follows: 'The said company, however, in any and every event agree to save harmless and indemnify the said North from any and all liability or loss or damage by reason of said orders mentioned in said schedules numbers 1 and 2 or the non-fulfillment thereof or any matter or thing connected therewith,' and that this rule will not preclude the taking of an appeal by said plaintiff on said reserved points."

Now when we come to examine defendant's brief we see that the only *substantial* question raised (though raised in various forms) is that relating to the measure of damages, namely, whether the plaintiff North had a right to recover substantial damages on a breach of contract to indemnify him against liability or whether on such a breach, in the absence of proof that he had actually paid any money by reason of such liability, he would be limited to a verdict of nominal damages. This question, whether raised by exceptions to rulings on the admission or rejection of evidence or to the charge, we should not and do not consider on this rule in view of the reservations contained therein. *Holler vs. Ross,* 67 N. J. L., 60.

All objections argued, not so reserved, we find upon examinaton to be without merit.

The rule to show cause will be discharged.

Exhibit P-2

THIS AGREEMENT made the Third day of January, one thousand nine hundred and seventeen, between Herbert S. North, individually and as Executor under the last Will and Testament of Joseph W. North, deceased, party of the first part, and Nathan Schwartz, of the Borough of Brooklyn, City of New York, party of the second part;

WITNESSETH: Said party of the first part, in consideration of the sum of Sixteen thousand dollars ($16,000.) to be fully paid as hereinafter mentioned, agrees to sell to the said party of the second part all the office furniture, sewing machines and tables, knitting machines, winders and bobbins, napping machine and pressers, and good will of the business; and further agrees to assign all orders for merchandise now on his books, and also the license from Julius Hirsch to manufacture under certain letters patent granted to him, subject to payment of the royalty reserved in and by said license, being all machinery fixtures, furniture and equipment except overhead shafting with pulleys, engine boiler, dynamo and main drive belts.

All the above property being contained in the factory and store house now owned and operated by the said party of the first part, situated on the corners of Fulton, Sixth and Franklin Streets, in the City of Elizabeth, New Jersey.

And the said party of the second part agrees to purchase said property at said consideration of sixteen thousand dollars ($16,000.) and to pay the same as follows: Five hundred dollars ($500.) in cash on the execution of this agreement, the receipt of which is hereby acknowledged; seven

thousand five hundred dollars ($7500.) in cash at the time of closing the sale provided for in this contract as hereinafter mentioned; and the balance of eight thousand dollars ($8000.) to be paid by a series of notes of Nathan Schwartz, Adolph Schwartz, Louis Schwartz and Clyde E. Black, said notes to be eight (8) in number, each drawn for one thousand dollars ($1000.), bearing interest at six per cent (6) per annum, payable semi annually, to be payable respectively at three (3), six (6), nine (9), twelve (12), fifteen (15), eighteen (18), twenty-one (21) and twenty-four (24) months from the date thereof, drawn to the order of Herbert S. North as executor under the last will and testament of Joseph W. North, deceased. Said notes shall be secured by the deposit with the payee therein named of Twelve thousand dollars ($12,000.) par value of the stock of a corporation to be formed under the laws of the State of New Jersey, by the said party of the second part and others, said corporation to be known as Joseph W. North & Son, Inc. The entire capital stock of said corporation shall not in any event exceed one hundred thousand dollars ($100,000.00), which capital is not to be increased during the time that any of said notes remain unpaid. Said corporation shall have a Board of five (5) directors, of which Board Herbert S. North shall be a member and shall remain a member thereof until said series of notes amounting to eight thousand dollars ($8000.) shall be fully paid with interest.

The party of the first part further agrees to sell, and the party of the second part agrees to purchase the manufactured stock, stock in process of manufacture, cotton yarns and all material contained in said factory used in and intended for

the manufacture of goods, together with the coal, oil, packing cases, both made up and in shooks, stationery and needles in stock, from time to time and on the terms as hereinafter provided; said stock so purchased to be taken at the inventory value, said inventory to be made as soon as possible by said Herbert S. North, the party hereto of the first part, on the basis of the cost price of said articles when purchased.

The party of the second part is to take Ten thousand dollars ($10,000.) worth of said stock, to be selected by him at once upon the closing of this contract and the delivery of the possession of said property as hereinafter provided for, and the consideration or purchase price therefore is to be paid by a promissory note for Ten thousand dollars ($10,000.) of Nathan Schwartz, Adolph Schwartz, Louis Schwartz and Clyde E. Black, said note to be payable at five (5) years from the date thereof, with interest thereon at the rate of five per cent per annum, payable semi annually. Said note is to be secured by a bond given by Samuel W. Schwartz, and is to be further secured by a mortgage covering certain premises situate in the Township of Woodbridge, Middlesex County, New Jersey, known and laid down on a certain map entitled "Map of Florida Grove Development, situated in Woodbridge Township, Middlesex County, N. J. owned and developed by S. W. Schwartz, February, 1912, surveyed and mapped by Larsen and Fox, Civil Engineers, Perth Amboy, N. J."

Said premises are lots numbers 1 to 38 inclusive, 63 to 119 inclusive, 122 to 171 inclusive, and 174 to 192 inclusive, one hundred and sixty-four

New Jersey State Library

(164) lots in all. The party of the second part agrees to pay the expenses which the party of the first part shall necessarily incur in the examination of the title to the premises to be covered by said mortgage and also agrees to pay the expenses of drawing and recording said mortgage.

The balance of said stock above referred to is to be delivered from time to time as required by the party of the second part. All such deliveries, however, are to be made within six months from the date hereof of such stock as shall be required to fill said orders hereinbefore agreed to be assigned. Should there prove to be any stock on hand not suitable for making up goods to fill said orders, such balance of stock shall be offered to the party of the second part at cost price and if he fails or refuses to purchase same on or before August 1, 1917, the party of the first part shall be at liberty to sell the same to such persons as he may deem advisable. Payment for such part of said stock as may be delivered from time to time is to be made in cash at the time of delivery. Until so sold said stock is to be carried in the warehouse on said premises without expense to the party of the first part, except that the party of the first part is to take out fire insurance on such stock for such amount as the party of the second part may request. The party of the first part to pay premiums on said fire insurance policies up to the amount of the stock which may be on hand from time to time at inventoried value and the premium for the excess above that amount to be paid by the party of the second part.

The party of the first part agrees at the time

of closing this contract by the delivery of the stock, securities and papers herein provided for, to execute to said corporation to be formed as above mentioned under the name of Joseph W. North & Son, Inc., a lease of said premises now occupied by the party of the first part and fronting on Fulton, Sixth & Franklin Streets in the city of Elizabeth, New Jersey, together with the buildings thereon erected and the machinery, shafting and other property therein contained, belonging to the party of the first part not included in the sale herein provided for. Said lease to be drawn for a period of five (5) years at an annual rental of fifteen hundred dollars ($1500) said rent to be paid in monthly instalments of one hundred and twenty-five dollars ($125.) in advance, with the provision that the tenant shall make all necessary inside repairs to said premises during the term of said lease, and shall pay the water charges; and the landlord shall make all exterior repairs thereto and keep the roof in order. Said lease to contain the option or privilege to the tenant of renewing same for a further period of two (2) years at the annual rental of one thousand seven hundred and fifty dollars ($1750) payable monthly in advance. The tenant also to have the option to purchase said premises at any time during the continuance of said lease or of the removal thereof, for the sum of Twenty-five thousand dollars ($25000.)

Said purchase money to be paid in cash for the delivery of the deed, or at the election of the said tenant by the said tenant executing and delivering to said Herbert S. North as executor under the last will and testament of Joseph W. North, its bond for ($15000) Fifteen thousand dollars pay-

Exhibit P-2

able in five years from the date thereof with interest at five (5) per cent per annum, payable semi annually, said bond to be secured by a purchase money mortgage covering said premises, the balance of ten thousand dollars ($10000.) of said purchase money to be paid in cash on the delivery of the deed.

The landlord agrees, if requested during the term of the original lease to make such alterations in the store house as the tenant may require. Such alterations however shall not exceed in cost the sum of Three hundred dollars ($300.).

The party of the second part further agrees to assume and fulfill all the contracts of the party of the first part for the delivery of merchandise sold and not yet delivered and agrees to save harmless and indemnify the said party of the first part from any damages for breach of said contracts or from other causes in connection therewith.

It is understood and agreed by the parties hereto that this contract shall be closed on or before the eighteenth (18th) day of January, one thousand nine hundred and seventeen (1917) by the delivery of a bill of sale of the property to be turned over to the party of the second part as above provided, and by the payments and delivery of the securities and collateral above mentioned.

In witness whereof the parties hereto have set their hands and seals the day and year first above written.

NATHAN SELMAR, JR., (Seal)
HERBERT S. NORTH, (Seal)
Executor Estate Jos. W. North.

Signed, sealed and delivered
in the presence of
Geo. Klein, Jr.

New Jersey Court of Errors and Appeals

Notice of Appeal

NEW JERSEY SUPREME COURT

JOSEPH W. NORTH & SON, INC., a corporation of New Jersey, Plaintiff-Appellant, vs. HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased, Defendant-Respondent.	Action at Law.

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

Yours respectfully,

SAUL COHN,
Attorney of Plaintiff.

To:
Abe J. David, Esq.,
Attorney of Defendant.

Reasons

(*Filed February 11, 1919.*)

NEW JERSEY COURT OF ERRORS AND APPEALS

JOSEPH W. NORTH & SON, INC., a corporation of New Jersey, Plaintiff-Appellant, vs. HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased, Defendant-Respondent.	Action at Law. On Appeal.

The following are the reasons on which the appeal in this cause is based:

The following questions were admitted:

1.

To the witness Mr. North:

Q. What merchandise did your books show you had on hand at that time?

Mr. Stamler: I object to it.

The Court: What date was that?

Q. At the time of the signing of the original contract, on or about January 3d, 1917?

Mr. Stamler: I object to it on the ground that the subject matter of this litigation commenced on June 26th, 1917; not at the time of the signing of the first contract. All matters in dispute were settled by the contract of June 26th.

The Court: Objection overruled.

A. My books showed at that time approxi-

mately forty-eight thousand dollars worth of merchandise on hand.

2.

To the witness Mr. North:

Q. Do you know whether some of this merchandise was used in the filling of orders other than the orders that you had turned over to the Company? A. I do.

Q. Was such merchandise so used?

Mr. Stamler: I object—

A. It was.

Mr. Stamler (Continuing): —to it. I ask the answer be stricken out. I object to that question and the answer.

The Court: The answer will be stricken out.

Mr. Stamler: My objection is on the ground that the contract of June 26th is the subject matter of this litigation, and any breach that existed prior to June 26th is not evidential in this case.

The Court: Isn't that evidential to show—as I understand it, under both these contracts the merchandise was to be used to fill the North orders.

Mr. Stamler: That is correct.

Mr. David: Yes, sir.

The Court: Haven't they a right to show the situation under the first contract to show these goods were not used for that purpose?

Mr. Stamler: I say all breaches prior to the 26th of June, 1917, were settled and determined by the contract of June 26th, 1917.

The Court: As a matter of damages.

Mr. Stamler: And, therefore, it is not a subject for injury in this litigation.

The Court: As a matter of damages, but doesn't it throw a light on the matter of quantity?

Mr. Stamler: I don't think so. One will say our contention was thus, another will say our contention was this; it will open another—

The Court: I think it is evidential. I do not say on the subject of damages; but I think it is evidential. I will allow it.

3.

To the witness Mr. North:

Q. Did you at any time between January third, 1917, and September first, 1917, learn whether or not the company had filled any of your orders at a loss? A. I did.

Q. From whom did you learn that?

Mr. Cohn: We object, if your Honor please.

The Court: What date was this?

Mr. David: Between January third, 1917 and September first, 1917.

Mr. Cohn: Between the dates of the two contracts?

Mr. David: No. Between the date of the first contract and the date for the closing of the second contract.

Mr. Cohn: My objection to the question is it is irrelevant. There is no issue here as to whether the defendant was able to make a profit on his merchandise or not.

The Court: It may throw some light on his actions. You may answer the question.

Reasons

4.

To the witness Mr. North:

Q. And before you took possession of the goods did you file a bond in the Circuit Court in this County? A. I did.

Q. How much did you pay for that bond?

Mr. Cohn: I object. There is nothing on the ground that there is nothing in the pleadings in this suit to at all bring up the issue of the pleadings in the other suit which would make this an element of damages. Those damages were recoverable in the replevin suit, if at all. Those damages, if your Honor please, were damages for detention of their merchandise, and they can not be claimed in this action because this proof is absolutely at variance, and it surprises us. There is nothing in the pleadings to give us the least inkling—The bond cost $600.00.

5.

To the witness Mr. North:

Q. How long did it take you to move the goods?

Mr. Cohn: We object, because under the terms of the contract we were to take those goods on September first, and the contract expressly provides we were to hold the goods there, or we were to suffer them to remain there until September 1st. It can not therefore be an element of damage against us as to what Mr. North paid for the removal of these goods, because had we—notwithstanding what he

said about refusing to give them to him—but assuming his testimony was we offered to give them to him, or offered to let him take them away, he would have to do so at his own expense.

It cannot be chargeable to us under any theory, because he had the right to take those goods into his own possession and he had to naturally stand all the expenses of moving. There is no continuation of the right on his part to have us keep those goods indefinitely. The contract expressly provides they are to remain until the 1st of September.

Mr. David: Mr. Cohn is not quoting to your Honor the terms of his contract with reference to that. No doubt unintentionally. It says that if the goods are not taken by September 1st, that we shall have a reasonable time thereafter to remove them.

The Court: His point is in either event you would have to remove them, so you could not charge them with that.

Mr. David: Yes; but we may have been able to remove so much each day and sold them to somebody in the open market. We were compelled by reason of their refusal to take or give us the goods and hire vans and work all night.

The Court: Why?

Mr. David: To get the goods out.

The Court: You mean in your replevin?

Mr. David: Yes, sir.

The Court: I will allow that.

Mr. Stamler: Pray exception.

Reasons

6.

To the witness Mr. North:

Q. What did you pay for storage on them?

Mr. Stamler: We object to what he paid for storage.

The Court: Question allowed. Exception.

A. Sixty dollars a month.

Mr. Stamler: The reason is it is not a proper element of damage.

The Court: Yes.

7.

To the witness Mr. North:

Q. Mr. North, were you ever requested by the defendant company to have modified or canceled any of these orders?

Mr. Cohn: We object, if your Honor please, because it is irrelevant whether he was requested or not in view of an express covenant on his part to perform the services.

The Court: I will allow the question.

Mr. Cohn: Exception.

8.

To the witness Adolph Schwartz:

Q. Let me see. Your rent is thirty dollars a week?

Mr. Cohn: We object, if your Honor please.

The Court: Allow it.

Mr. Cohn: We object to going into an inquiry as to the overhead because it is not relevant to this issue.

The Court: Yes, it may throw some light on your actions.

Mr. Cohn: It means a collateral issue.

Reasons

9.

To the witness Lena Fischer:

Q. What was the overhead expense of the plant from June 26th to September 1st.

The Court: You mean per week?

Q. Per week?

Mr. Stamler: I object to that because they have not shown the company has been doing the same sort of business.

Mr. David: This is strict rebuttal.

Mr. Stamler: But, as a matter of fact, it is not what the company is doing. There is no evidence in the case the company is only doing what Mr. North did. They might have been doing other business, and therefore would be entitled to a great overhead.

The Court: That might be. I will allow it.

Mr. Stamler: Prays exception.

Mr. Stamler: I object to the use of that memorandum at the same time.

A. If this is added up correctly it is six hundred and ninety dollars.

Q. Will you add it up?

Mr. Cohn: May I interrupt to say this thing will lead us to a new trial. I mean trial of a brand new issue. I can not see how on any theory of evidence.

The Court: What is the purpose of this?

Mr. Cohn: Whether the overhead—

Mr. David: I asked Mr. Schwartz whether they would not have lost on the lightweight orders and heavyweight orders. He said on the heavyweight orders

Reasons

they would have lost eight hundred dollars, and on the lightweight orders they would have made money. I asked him whether his overhead expense was not much greater than North's, and he said no, it was less.

The Court: I think it goes to the actions of the defendant to show whether he wanted to fill the orders or not.

10.

To the witness, Adolph Schwartz:

By Mr. David: Q. Did you deduct expense of twelve vans loading that stuff and taking it to the storage warehouse?

Mr. Cohn: Object to that.

The Court: Allow the question; he has a right to find out.

Q. Did you deduct it?

Mr. Cohn: I do not think he has a right to ask him. He can ask him how he arrives at it, but Judge David can not single out a particular expense Mr. North may have had.

The Court: This does not prove he had that expense. This is simply asking him whether he did that in arriving at his calculation.

Mr. Cohn: If it is not admissible to show that he spent for moving vans, there is not any theory on which it is.

The Court: I allow the question.

Mr. Cohn: Prays exception.

13.

The Court refused to permit testimony on the loss of profits which the defendants would have derived if the plaintiff had

turned over to them the merchandise mentioned in the contract of June 26th, 1917, this line of testimony having been overruled in the following manner:

To the witness, Adolph Schwartz:

Q. What is the total merchandise in value you would have manufactured out of that merchandise? A. I figured—

The Court: No. How much merchandise?

Q. How much in dollars and cents of merchandise? A. I didn't figure out the value of the merchandise. I only figured out loss of profit, or profit derived on this merchandise.

Q. On what did you base—

The Court: Is this your purpose to show loss of profit on the part of the defendants for failure to receive this merchandise?

Mr. Stamler: Yes, sir.

The Court: Didn't we thrash this out the other day? If they did not deliver the goods to you on the first of September, then you could have gone into the open market and bought the goods. And, having bought the goods, and paid the increased amount, you would hold them for the increased amount.

The Court: I will overrule the question.

Mr. Stamler: Prays exception.

The Court: Yes.

14.

To the witness, Adolph Schwartz:

By Mr. Stamler: Q. What profit would you have made on the manufacture of the ladies' vests, as per your profit list?

Reasons

The Court: I overrule the question.
Mr. Stamler: Prays exception.
The Court: Exception allowed.

15.

To the witness, Adolph Schwartz:

Q. Would you have made any profit in the manufacturing of ladies' garments or vests, indicated by you in the former answer? A. Yes, sir.

Q. Had you done so? A. Yes, sir.

Q. What would that profit have been?

The Court: I have just overruled that.

Mr. Stamler: I want to get it on the record.

The Court: It is not any better to have it twice.

Mr. Stamler: I pray exception.

16.

To the witness, Mr. Adolph Schwartz:

Q. How much money would you have made had you manufactured the lightweight orders?

The Court: Question is overruled.

Mr. Stamler: Prays exception.

17.

Because the Court refused to charge the jury the third request to charge made by the defendant.

18.

Because the Court refused to charge the jury the fourth request to charge made by the defendant.

19.

Because the Court refused to charge the jury the fifth request to charge made by the defendant.

20.

Because the Court refused to charge the jury the sixth request to charge made by the defendant in the language of the request.

21.

Because the Court refused to charge the jury the eighth request to charge made by the defendant, in the language requested.

22.

Because the Court refused to charge the jury the eleventh request to charge made by the defendant, in the language requested.

23.

Because the Court refused to charge the jury the fifteenth request to charge made by the defendant.

24.

Because the Court refused to charge the jury the sixteenth request to charge made by the defendant.

25.

Because the Court refused to charge the jury the seventeenth request to charge made by the defendant.

26.

Because the Court erroneously charged the jury as to the opportunity of the defendant to examine the merchandise.

27.

Because the Court erroneously charged the jury that the merchandise was in the possession of the defendant.

28.

Because the verdict was against the weight of evidence.

29.

Because the verdict was against the charge of the Court.

SAUL COHN,
Attorney of Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

Transcript Of Pleadings For Trial

NEW JERSEY SUPREME COURT

JOSEPH W. NORTH & SON, INC., a corporation of New Jersey, Plaintiff,

vs.

HERBERT S. NORTH, individually and as executor of the Last Will and Testament of Joseph W. North, deceased, Defendant.

Saul Cohn, attorney for plaintiff.
Abe J. David, attorney for defendant.

(Summons issued September 6, 1917.)

Complaint.

The plaintiff, a corporation of New Jersey, with its principal office located in the City of Newark, County of Essex and State of New Jersey, says that:

Transcript of Pleadings For Trial

FIRST COUNT:

1. On or about June 26th, 1917, the parties hereto entered into a written contract, wherein, among other things, it was provided that defendant would deliver to plaintiff on or before September 1st, 1917, certain merchandise belonging to defendant and situate at the factory premises of the plaintiff in the City of Elizabeth, N. J. Attached hereto and made a part hereof, is a schedule of the approximate quantity of said merchandise.

2. By virtue of the said agreement, the price at which the said merchandise was to be purchased by plaintiff from defendant was definitely fixed. On or before the date fixed in said agreement for delivery of said merchandise, plaintiff tendered itself ready and willing to accept said merchandise and to pay for the same in accordance with the said contract.

3. Defendant, although often requested so to do, unlawfully refused and neglected to deliver to said plaintiff the merchandise agreed by him to be delivered according to the tenor of said contract.

Plaintiff demands as damages the sum of $50,000.00, with interest from September 1st, 1917.

SECOND COUNT:

1. On or about June 26th, 1917, the parties to this action entered into a contract wherein and whereby, in consideration of the covenants therein contained on the part of the defendant, the plaintiff agreed to assume and perform certain contracts theretofore made by and between the

defendant and certain persons, firms and corporations, whose names are designated in the schedule attached to the said contract, which schedule is made a part hereof.

2. By virtue of the said contract, the defendant agreed to turn over and deliver to the plaintiff certain merchandise necessary for the fulfillment and performance of the said contract, at certain times and prices.

3. The plaintiff tendered itself ready and willing to perform the said contract and to accept the delivery of said goods, wares and merchandise at the time fixed in the said agreement and at the price designated therein.

4. Defendant unlawfully refused and neglected to deliver the said merchandise, by virtue of which the said plaintiff has been prevented from duly performing and filling the orders for merchandise constituting the contracts between the defendant and the persons, firms and corporations aforesaid, and the plaintiff has thereby lost and been deprived of large gains and profits which might and otherwise would have arisen and accrued to it by reason of the delivery of the said merchandise in the manner aforesaid, and the fulfillment by the said plaintiff of the aforesaid orders.

Plaintiff claims as damages the sum of $50,000 and interest from September 1st, 1917.

THIRD COUNT:

1. On or about June 26th, 1917, the parties hereto entered into an agreement wherein and whereby the said plaintiff, in consideration of the cov-

enants contained in the said agreement on the part of the defendant, assumed and agreed to perform certain contracts theretofore made by and between the defendant and certain persons, firms and corporations whose names are designated in the aforesaid contract, to which contract reference is hereby made and which is made a part hereof.

2. By virtue of the said agreement, the defendant agreed to sell and deliver to the plaintiff certain merchandise at the times and in the prices mentioned in the said agreement, which merchandise the said defendant knew was necessary and indispensable for the prompt and proper completion of the aforesaid contracts made by and between the defendants and the parties aforesaid.

3. Contrary to the covenants, agreements and conditions contained in the said writing, the defendant wholly neglected and refused to deliver to the plaintiff the merchandise aforesaid, by virtue of which unlawful refusal of the said defendant, the plaintiff has lost large gains and profits which it otherwise would have derived and has also been subjected to claims and suits for damages on the part of the aforesaid persons, firms and corporations for the failure of the plaintiff to perform the contracts between it and the defendant, which contracts were assumed by the plaintiff as aforesaid.

Plaintiff claims as damages the sum of $50,000.-00.

SAUL COHN,
Attorney of Plaintiff.

Schedule

7300 lbs.	1/24	Carded Puler
8900 lbs.	1/28	" "
3200 lbs.	1/28	Lisledown Double Carded
4000 "	1/30	" " "
300 "	1/30	Combed
650 "	1/32	"
300 "	1/35	"
2100 "	1/26	Nyanza Lisle
1900 "	1/28	" "
800 "	1/36	" "
1200 "	1/40	" "
250 "	1/22	Lisle
5000 "	1/11	Carded Puler
788 "	1/12	Germantown Puler
575 "	1/12	S. G. Cones
6500 "	1/22	Carded Puler

Laces, trimmings, threads and silk tops.
(Filed Oct. 3, 1917.)

Answer

The defendant, Herbert S. North, individually and *and* Executor of the Last Will and Testament of Joseph W. North, deceased, residing at Number 112 Vista Avenue, in the City of Elizabeth, County of Union and State of New Jersey, says:

As to first count:

1. The defendant admits that a contract was made between the parties of the date set forth in paragraph #1 of the complaint, but the complete terms thereof are not set out, nor mentioned, nor referred to in paragraph #1 of the complaint.

2. The defendant admits that the price of the merchandise to be purchased was definitely fixed, but denies the remainder of paragraph #2.

3. The defendant denies paragraph #3.

4. As a further defense, the defendant alleges that the plaintiff was never ready nor willing to carry out its terms of the said contract, nor it never intended so to do, but on the contrary made default in the said contract, 1st, by refusing to take the merchandise under the terms set forth in said contract; 2d, By its refusal to fill or attempt to fill the orders to be filled by the plaintiff; and 3d, By its refusal and neglect to turn over certain shares of stock as provided in the said contract.

By reason of which defaults, this defendant, before the institution of this suit, instituted his suit for damages in the New Jersey Supreme Court of Union County, against the plaintiff, which suit is still pending.

5. The defendant further alleges that a suit has been started and is now pending against the plaintiff by the defendant upon the same alleged cause of action of the plaintiff in this suit.

AS TO SECOND COUNT:

1. The defendant admits that a contract was made of the date alleged in paragraph #1 of the second count of the complaint, and repeats the further allegations made by the defendant in paragraph #1 of this answer to Count #1 of the complaint.

2. The defendant repeats the allegations contained in paragraph #1 of this answer to this count.

3. The defendant denies paragraph #3.

4. The defendant denies paragraph #4.

5. The defendant repeats the allegations set forth in paragraph #4 of the answer to the first count, and further denies that the plaintiff suffered any loss or was deprived of any gain and profits.

6. The defendant further alleges that a suit has been started and is now pending against the plaintiff by the defendant upon the same alleged cause of action of the plaintiff in this suit.

AS TO THE THIRD COUNT:

1. The defendant repeats paragraph #1 of the answer to the first and second counts.

2. The defendant repeats the allegations set forth in paragraph #1 of this count.

3. The defendant denies paragraph #3.

4. The defendant further alleges that a suit has been started and is now pending against the plaintiff by the defendant upon the same alleged cause of action of the plaintiff in this suit.

ABE J. DAVID,
Attorney of the defendant.

(Filed Oct. 16, 1917.)

Replication

Replication of the plaintiff to the defendants' defenses:

FIRST COUNT:

The plaintiff denies the allegations in paragraph 4 of the Answer herein filed, constituting

the defenses of the defendant to the first count herein.

SECOND COUNT:

The plaintiff denies the defendants' Allegations contained in paragraph 5 of the second count.

THIRD COUNT:

Plaintiff joins issue on the allegations contained in the answer to the third count of the complaint.

SAUL COHN,
Attorney of Plaintiff.

(Filed Oct. 18, 1917.)

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

In testimony whereof I have set my hand and the seal of said Court at Trenton, this first day of January, A. D. nineteen hundred and eighteen.

WM. C. GEBHARDT,
Clerk.

(Seal)

Verdict

The jury rendered a verdict of no cause of action in the above cause.

Stipulation

(*Filed February 20th, 1919.*)

NEW JERSEY COURT OF ERRORS AND APPEALS

JOSEPH W. NORTH & SON, INC., a corporation of New Jersey, Plaintiff-Appellant, vs. HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased, Defendant-Respondent.	Action at law.

It is stipulated and agreed by and between the undersigned respective counsel that on the appeal filed in the above entitled cause, the State of the Case shall contain the following:

Notice of Appeal,
Grounds of Appeal,
Transcript of Pleadings,
Verdict,
Copy of this stipulation.

It is further stipulated and agreed that all of the matter printed on page 42 to and including page 433 in the State of the Case to be used on the appeal in the cause of action entitled Herbert S. North, individually and as executor of Joseph W. North, deceased, plaintiff-respondent vs. Joseph W. North & Son, a corporation of New Jersey, defendant-appellant, shall be deemed by the parties as a part of the State of the Case in the above entitled cause to the same extent as though said printed matter were incorporated in the State of the Case to be filed in this cause.

SAUL COHN,
Attorney of Plaintiff-Appellant,
ABE J. DAVID,
Attorney of Defendant-Respondent.

NEW JERSEY
COURT OF ERRORS AND APPEALS

HERBERT S. NORTH, Individually, etc., Plaintiff-Respondent, against JOSEPH W. NORTH & SON, INC., a Corporation, Defendant-Appellant.	ON APPEAL FROM SUPREME COURT.

JOSEPH W. NORTH & SON, INC., a Corporation, Plaintiff-Appellant, against HERBERT S. NORTH, Individually, etc., Defendant-Respondent.	

Brief for Herbert S. North.

The two appeals bring before this Court for review *a suit* and *countersuit,* which were tried together at the Union Circuit on February 4th, 1918, and both of which resulted in favor of Herbert S. North and against the company. In North's suit he received a verdict of $20,000, while in the company's suit there was a verdict of no cause of action.

The company sought to have the Supreme Court review said $20.000 verdict on a rule to show cause which rule contained a very comprehensive reservation of exceptions in the following language:

> "It is further ordered that defendant be permitted to reserve all exceptions taken at the trial to rulings of the trial Judge wherein the jury was permitted to consider evidence and find a verdict on the alleged liability of the plaintiff under existing contracts with customers, without plaintiff establishing that he suffered damages or loss thereon or paid damages on such liability. The liability for which such recovery was sought and had being paragraph one of the contract and reads in part as follows: 'The said company, however, in any and every event agree to save harmless and indemnify the said North from any and all liability or loss or damage by reason of said orders mentioned in said schedules numbers 1 and 2 or the non-fulfillment thereof or any matter or thing connected therewith,' and that this rule will not preclude the taking of an appeal by said plaintiff on said reserved points."

The company on said rule to show cause advanced thirty-four reasons which are set forth in the printed case herein on pages 3 to 21, inclusive; and with the exception of the eighth. ninth, seventeenth, eighteenth, twenty-fifth, twenty-sixth and thirtieth of said thirty-four reasons, the appellant in the second mentioned case assigns the same reasons as the grounds of appeal in the case of the company against North, individually.

Upon the rule to show cause the Supreme Court in its opinion refused to determine any question as to the measure of damages laid down by the trial Court because that question, whether raised by exceptions to rulings on the admission or rejection of evidence or to the charge, was reserved under the rule to show cause, and pursuant to the statute the Supreme Court did not consider such question.

Citing *Holler* v. *Ross*, 67 N. J. L. 60, the Court further determined that all other objections argued and not so reserved *were without merit.*

Therefore, in the case of North against the Company the only question of law which is now properly before this Court for determination is, whether the measure of damages upon which the jury was permitted to consider the case, was proper.

> "Granting to a party a rule to show cause why a new trial shall not be granted shall be a bar against him to taking or prosecuting an appeal except on points expressly reserved in said rule."
>
> *P. L.* 1912, pg. 399, Rule 83.
> *Supreme Court Rule* 129.

However, in the case of the Company against North, while the result is practically the same, nevertheless the appellant in that case, being the company, has not waived its objections to the admission or rejection of evidence or to any of the rulings, but it is insisted that in such case the complaint in Paragraphs 9 and 12 alleged the failure and neglect of the company to fill the orders or make deliveries of the merchandise, and that the company never intended to use North's material in fulfilling the orders standing on the books (C. P. 25 and 26). Defendant company by its answers denies those allegations (C. P. 39). On this issue and other issues the jury having found in favor of Herbert S. North and the case having been fully and fairly tried and the jury's verdict determined that there was no breach of contract by Herbert S. North while there was such a breach of contract by the company; therefore the company could not under any circumstances have a judgment in its favor against Herbert S. North, and as the company has not had any of its sub-

stantial rights injuriously affected, the judgment should not be reversed.

> "No judgment shall be reversed, or new trial granted on the ground of misdirection, or improper admission or exclusion of evidence or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party."
>
> P. L. 1912, p. 382, sec. 27.

It further appears that the two causes were tried together; that the jury found upon the evidence that the company had made a breach of the contract and that Herbert S. North did not commit a breach of the contract. Applying to such finding the measure of damages, as instructed by the trial Court, the jury gave Herbert S. North a verdict for substantial damages.

Now, on the rule to show cause to review such substantial verdict, the Supreme Court determined that the only substantial question was the measure of damages and as to all other questions there was no error. Thus, the only question left open, as I have above stated, is whether the rule promulgating the measure of damages was the correct one. If it was, the judgment of no cause of action in the case of the North Company against North must stand, and, if not, the other case must go back for a re-trial and a re-assessment of Herbert North's damages. So, that under no circumstances can the North Company now have the judgment of "no cause of action" in its suit set aside by this Court, because the pronouncement by the Supreme Court in the cause in which the same parties were plaintiff and defendant, that there was no error, is res judicata, and a judgment being properly entered in favor of Herbert S. North

against the Company for even six cents is an absolute bar to the Company recovering anything against North for any cause of action arising out of the same contract or contracts.

As above stated in the case of Herbert S. North against the Company a judgment in favor of North will not be disturbed, but the verdict of $20,000 will either be sustained or the damages re-assessed and this carries out our statute which reads as follows:

> "In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable."
>
> P. L. 1912, page 397, sec. 72.

In the case of North against the Company, therefore, the only question before your Honors is that relating to the measure of damages.

POINT 1.

Answering Points Nos. 1, 2 and 3 of Appellant's Brief. The Trial Court adopted the correct measure of damages.

The plaintiff, North's, action against the Company is founded upon two agreements, one under date of January 3rd, 1917, and a subsequent agreement modifying the same, dated June 26, 1917. The complaints being founded on these two agreements (Case, page 23, etc.).

The agreement of June 26, 1917, is printed in the main case on page 27.

Besides the briefs, there are before your Honors four printed cases, (1) the large case North against

the Company, (2) the State of Case in re Company v. North, (3) an addenda to the State of Case entitled in re North against the Company, printing, however, the pleadings in the case of Company against North, and (4) an addenda to North against the Company, including the rule to show cause, decision of the Supreme Court and a copy of the contract of January 3rd, 1917.

This last addenda is very important because a reading of the first contract shows the great difference in the language used by the parties in drawing the modifying agreement of June 26th, 1917, and it is the consideration of the difference of such language which will undoubtedly be the controlling factor in your Honors deciding the case before you.

The earlier contract is an agreement between Herbert S. North, individually, etc., and one Nathan Schwartz (the moving spirit of the North Company), while the latter contract, which expressly adopts the former contract, is between Herbert S. North and Joseph W. North & Son. Inc., a corporation. The earlier contract contains the following clause:

> "The party of the second part agrees to assume and fulfill all the contracts of the party of the first part for the delivery of merchandise sold and not yet delivered *and agrees to save harmless and indemnify* the said party of the first part *from any damages for breach* of said contracts or from any other costs in connection therewith."

In drawing the second contract this clause was materially changed and broadened as will be clearly perceived by reading the first paragraph of paragraph 1 of the latter contract, which contains the following language:

> "The said company, however, in any and

> every event agree to save harmless and indemnify the said North *from any and all liability or loss or damage by reason of said* orders mentioned in said schedules numbers 1 and 2 or the non-fulfillment thereof, or any matter or thing connected therewith."

The plaintiff contends that the obligation which existed at the time of the making of the contract of January 3rd upon his part was to fulfill certain contracts with customers for the manufacture and delivery to them of underwear. The obligation of these contracts was assumed both in the contract of January 3rd and of June 26th. In the contract of January 3rd, North was indemnified merely against loss or damage by reason of the nonperformance by Schwartz or the company of those contracts and it is conceded that under that contract there could have been no recovery for substantial damages except upon proof by North that he had actually paid money. But the situation created by the contract of June 26th was entirely different. By the first clause the company assumed the liability of the contract of January 3rd "to the extent that it will fill all orders for merchandise on the former books of said North—the company, however, in any and every event agrees to save harmless and indemnify the said North *from any and all liability or loss or damage* by reason of said orders mentioned in schedules numbers 1 and 2 or the *nonfulfillment thereof or* any matter or thing connected therewith."

Mere inspection shows that under the second contract North was to be indemnified for something more than actual loss or actual damage. Let us take the situation which resulted in the making of the contract of June 26th. The second recital shows that each party had claimed defaults and that various disputes had arisen and that they desired to amicably dispose of the controversies

existing. The parties are bound by these recitals—they are the truth—and inasmuch as the situation which confronted Mr. North on June 26th was that the company had already made default in the performance of these contracts to manufacture and deliver to North's customers, North observed that he required a greater protection than to be indemnified against actual loss or actual damage. He had been in this business for twenty-five years and could not afford, through the delinquency of the North Company, to have the good name of himself and his father's estate dragged into the courts by reason of the non-performance of contracts for the manufacture of these goods, and there we have the reason for the difference in the two contracts.

Now, how can this court say that the word "liability" superimposed in paragraph 1 of the contract of June 26th did not mean anything? It did have some meaning and that meaning must be construed by the court in connection with the other clauses of the contract with which it is used and the situation which confronted the parties as evidenced by the instruments which they had finally drafted and executed.

We are not so much concerned here with the definition of the word "indemnity" as we are with the definition of the word "liability." The liability which North desired to be protected against was the non-performance and non-fulfillment by the company of the contracts which he, North, had obtained to supply his customers with manufactured goods, and this liability arose at one or two times: (a) At the time when the contract should have been performed, or (b) at the time when the company evidenced by its action that it had no intention of performing the contracts.

> "Liability," as defined in Abb. Law. Dict. 38, means amenability or responsibility to law; the condition of one who is subject to

a charge or duty which may be judicially enforced."

Wood vs. *Currey,* 57 Cal. 208.

The word 'liability" was considered by our court in the following cases:

Haywood vs. *Shreve,* 44 N. J. L. 94;
Newark vs. *Board of Equalization of Taxes,* 80 N. J. L. 258, 81 N. J. L. 416;
Joslin vs. *New Jersey Car-Spring Co.,* 36 N. J. L. 141.

"Liability" is defined by the writers as follows:

Black's Law Dictionary: The state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility.

Webster: The state of being bound or obliged in law or justice; responsibility.

Bouvier: Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action.

The general principle of law is stated in 22 Cyc., 91:

"A distinction has been made, in numerous decisions, between a contract of indemnity against liability, and a contract to indemnify or save harmless from the consequences (damages or loss) of such liability, it being very generally held that in the former case the cause of action is complete when the liability is established, although payment of the liability or actual damage arising therefrom is not shown."

It was upon this principle of law that the learned trial judge submitted the case to the jury (C. pg. 410 l. 16).

If the general principle of law as laid down in Cyc. is a principle of law which the courts of this State will adopt, then the verdict should be sustained, otherwise, it should be reversed.

There are in this State two cases in the Supreme Court as cited in defendant's brief which have some bearing upon this proposition, and they are:

Jeffers vs. *Johnson,* 21 N. J. L. 73;
Miller vs. *Fries,* 66 N. J. L. 377.

In the first of those cases the covenant was "to indemnify and save harmless from all damages, costs and charges;" and in the second case the covenant was "to save and keep harmless from all partnership debts and liabilities existing."

In the case at issue the covenant is "to save harmless and indemnify from any and all liability or loss or damage by reason of the non-fulfillment by the company of certain orders."

Now, is the covenant in the case at bar the same or similar as the covenant which was before this court in the two cases last above cited? If it is, then the learned trial judge was in error upon his ruling in this case.

It is, however, most strenuously insisted that the covenant in the case at bar is a far different covenant from that contained in either of the two New Jersey cases above cited, and in applying the principle of law which controls, we must necessarily be governed by the instrument in which the language is contained and the language so contained in the instrument.

In the earlier case of *Jeffers* vs. *Johnson*, the express language was "to indemnify against damage" and in that case no damage accrued until there was an actual payment.

In *Miller* vs. *Fries* the partnership debts and liabilities which it was intended to indemnify against were existent at the time the bond was given and there the bond was a bond merely of indemnity and it was not a covenant to pay, because if we should otherwise construe the determination in *Miller* vs. *Fries* it would have meant that there was a breach of covenant the moment it was entered into.

While in the case at bar it is true that at the time the contract of January 3rd was entered into there was existing an obligation—the obligation was to fulfill and perform contracts for the manufacture of goods. There was no liability. The liability at that time upon North was merely his obligation to perform, and that obligation to perform the contracts was assumed by the North Company. The liability which North has now incurred arises from the breach by the North Company of its contract of assumption. In other words, it is alleged and proved that the North Company has not fulfilled and performed the contracts for the manufacture of the goods in question and upon the company failing to carry out those contracts, North was subjected to a liability to be sued by all of his customers for the failure to deliver goods and the measure of damages in those cases against North must necessarily be that measure of damages which the statute lays down and which was charged by the trial judge (C. pg. 422).

Therefore it is again urged that the liability of North arose not when he was under the obligation to manufacture goods for the customers but when the North Company breached those obligations so that a cause of action arose against North in favor of his customers.

In *Fenton* vs. *Fidelity & Casualty Company of New York*, 48 L. R. A. 770, the Supreme Court of Oregon reaffirmed the principles for which we above contend and adopted the principle of law as

cited from Cyc. and in so doing the learned court cited with approval, decisions of various States including *Ross* vs. *American Employee's Liability Insurance Company,* 56 N. J. Eq. 41. That case came on for determination before the learned Vice Chancellor Pitney (and was argued by very distinguished counsel), who determined that the recovery of a judgment against the insured by the injured party was not necessary and that it is the liability for the consequences of the accident, and he said that in contemplation of law the insured either was or was not, from the first, liable for the consequences of the accident; and the presumption is that the result of an investigation of the facts was never doubtful from the first, and always sure to result according to the actual fact.

In the Fenton case above cited, there was an insurance policy issued by the Fidelity Company to a manufacturing concern in whose employ a person was injured. The plaintiff, Fenton, rendered medical services to the injured person. The policy of insurance provided to indemnify against liability for damages on account of injuries suffered by employees. The manufacturing company became insolvent and was placed in the hands of receivers who, pursuant to court order, assigned to plaintiff its claim against defendant for liability incurred in providing immediate surgical relief for the injured man. Fenton accepted the assignment in full payment and satisfaction of his claim again the Manufacturing Company and brought suit to recover $150, the reasonable value of his services. The defendant set up the insolvency of the Manufacturing Company and that it had not paid and would not be able to pay any portion of plaintiff's claim. The demurrer was sustained to this answer and defendant took an appeal to the Supreme Court and the judgment below was affirmed on the ground that the contract agreed to indemnify not

only against actual damage but against liability for such damage.

In the defendant's brief lengthy comment is made upon the cases of *Rockefeller* vs. *Donnelly,* 8 Cowan, p. 628, *Chase* vs. *Hinman,* 8 Wendell, p. 452, and *Aberdeen* vs. *Blackmar,* 6 Hill, p. 324.

It is true that these cases years ago created considerable confusion upon the question now at issue but all the confusion so raised was settled by the Court of Appeals of New York in the year 1848.

In the case of *Gilbert* vs. *Wiman,* 1 N. Y. 550, all of the decisions were reconciled and it was determined where a bond or obligation was merely an indemnity that in such case there could be no recovery unless the indemnitee had suffered actual loss or damage and been obliged to pay money; that the mere recovery of a judgment was not sufficient, but that in cases where the obligation was more than a mere indemnity, where it was to save the party harmless from liability and liability ensued, the moment the action accrued against the party although no money was actually paid, there could then be a recovery against the obligor for the full amount.

This doctrine in 1880 was again cited with approval and followed by the New York Court of Appeals in *National Bank* vs. *Bilger,* 83 N. Y. 62, in which a mortgage was given as security and indemnity as against all liability and the event happened which created a liability and it was held that the holder of the mortgage might recover the full amount of the mortgage although he had not paid such liability.

Again in *Stout* vs. *Folger,* 34 Iowa 71, Folger bought a hotel from Stout who had outstanding debts; Folger assumed all of the outstanding indebtedness and agreed to save the seller harmless. The court held that the agreement was not merely one of indemnity but was one to assume the plain-

tiff's debts and was equivalent to an absolute undertaking on the part of the defendant to pay the debt. The defendant contended that the plaintiff could not recover until he had paid the debt. Nevertheless the court held that inasmuch as the assumption of the debt was tantamount to an express promise to pay the debt, that upon the failure to pay such debt a cause of action accrued and that the plaintiff was entitled to recover the whole amount of the debt.

There are numerous cases in all the various states upon this topic which tend to the conclusion that the general doctrine as laid down in Cyc. is the correct rule and principle of law.

The only question which may raise any difficulty is in some instances in determining whether the contract before the court for construction is one merely of indemnity upon which there can be no recovery until there has been loss or damage, or whether on the other hand it is to save harmless from a liability, in which cases there can be a recovery although the liability has not been satisfied by the plaintiff.

It is our insistment that the recitals in the agreement and the other covenants contained in the agreement control.

In *New York City* vs. *Sexton,* 89 N. Y. Supp. 190, it is said:

> "It is well settled in the law that the obligation assumed in a bond is to be construed in connection with and to be controlled by the recitals of the purpose and objects for which it was given."

The following is a citation from Sedgwick on Damages:

> "Liability is a very different thing from payment; and I submit that the literal object

> of the covenant is not attained unless the plaintiff may rest on showing mere proof of *liability.****" Sedgwick on Damages, 7th edition, vol. 2, p. 21.

In support of the doctrine of Cyc. cases are cited from nearly all of the states, but it is only necessary to refer to a few additional ones.

In the *American Employer's Liability Company* vs. *Fordyce,* 62 Ark. 568, the court said, "The insurer binds himself to pay, 'all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable.' " This is plainly a contract to pay liability. This is not simply a contract of indemnity. It is more. It is also a contract to pay liabilities. The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought and a recovery had until the liability is discharged; whereas upon the latter the cause of action is complete when liability attaches. In that case Mrs. Meredith received an injury for which she brought suit and recovered a judgment against the railroad company of which Fordyce was the receiver. The suit was brought by Fordyce to be indemnified before he had paid Mrs. Meredith's judgment and he recovered.

Lathrop vs. *Atwood,* 21 Conn. 117, there was a covenant to pay partnership debts and to save harmless from liability on account of such debts. Part of the debts was paid but the balance was not paid.

The retiring partner had a cause of action on neglect of the defendant to perform an act which was for the plaintiff's benefit and that this would give an immediate cause for action and that the measure of damages was the debts unpaid with interest, although plaintiff had not paid the same or been actually damaged.

The same rules were recognized in

Peacey vs. *Peacey,* 27 Ala. 683;
Thompson vs. *Taylor,* 30 Wis. 68;
Selleck vs. *Griswold,* 57 Wis. 291;
Stephens vs. *Penn. Cas. Co.,* 135 Mich, 193;
Fairfield vs. *Day,* 71 N. H. 65;
Pierce vs. *Plumb,* 74 Ill., 326;
Deval vs. *McIntosh,* 23 Ind. 529.

In *Wilson* vs. *Stillwell,* 9 Ohio State 467, there was a covenant to pay partnership debts. The Court said: "If there be an affirmative covenant to do a certain act or to pay a certain sum of money, then it is no defense to say the plaintiff has not been damnified and the measure of damages in such case is the amount agreed to be paid or the proper expense of doing the act agreed to be done."

We could cite cases without number, but they will serve no real useful purpose. The only and sole difficulty there is will be in placing each separate case in the class to which it belongs, viz.: whether the contract is one merely of indemnity or more. If the contract belongs in the class of a strict contract of indemnity then it is conceded that North could not have recovered substantial damages. The trial court, however, decided that the question was one of law and that in law the contract in question was not merely a contract of indemnity but was a contract falling within the other class where a recovery could be had upon proof of breach or proof of damages, although the damages had not actually been paid.

Let us see whether the North Company was to do an affirmative act for the benefit of Herbert North? By the very contract the North Company assumed the obligation of fulfilling all contracts named in schedules 1 and 2. The evidence shows conclusively that they did not fulfill those con-

tracts and that it would cost Mr. North many thousands of dollars in excess of $20,000 to have fulfilled the very contracts. The language of the agreement between the parties was that the North Company would indemnify North against liability by reason of the orders or the *unfulfillment* thereof. Does not the language "by reason of the orders or unfulfillment thereof" convey the idea that the Company was to perform some affirmative act for the benefit of North? And does not the Company by the first paragraph of its contract with North assume the liability of performing the contract of January 3, 1917, to the extent that it will fill all orders for merchandise on the former books of the said North? (C. 28, line 20). And in this same clause we have the agreement to save harmless and indemnify. Thus we have the North case clearly distinguished from the two New Jersey cases above cited and we have absolutely no quarrel with the doctrine of the latter time. By those cases where there is a covenant of strict indemnity and nothing more then the plaintiff in order to recover substantial damages must show an actual loss or an actual damage. But the North case does not come within this category or class and it comes within the other class so clearly recognized in Cyc. and other cases cited in support.

In *Jeffers* v. *Johnson* (*Supra*) the language of the bond was "to indemnify and save harmless from all damages, costs or judgments which they may or shall be put to or in any wise called upon to pay." This language must of necessity be construed to make payment a condition precedent to the right of action and recovery. Inasmuch as there was no such payment there could have been no recovery. Thus the only point decided in *Jeffers* v. *Johnson* is that the bond was one to indemnify against a payment and that as the payment had not been made there could be no recovery. Mr. Justice Whitehead said:

> "Admitting, however, the case of *Chase* v. *Hinman* to be law, it is clearly distinguishable from the one now before the Court, as the indemnity in that case was against any liability from damages or expenses."

Jeffers v. Johnson was cited with approval and relied upon in the later case of *Miller* v. *Friese,* 66 N. J., 377. In that case Mr. Justice Dixon in writing the opinion for the Supreme Court said that the covenant in the *Jeffers* v. *Johnson* case was not equivalent to a covenant *to pay* existing debts. In the later case the covenant was to save and keep harmless from certain existing debts and liabilities, but the facts appeared in the case that the books of account of the plaintiff company showed a credit of the like amount for which plaintiff had judgment and that on those books the amount was charged against another account whose owner was entitled on plaintiff's books to a larger credit than the amount debited in question. So that while *Jeffers* v. *Johnson* is commented upon in the later New Jersey case the decision in such case turned upon the question of fact.

Mr. Justice Dixon says that the covenant in *Miller* v. *Friese* was not equivalent to a covenant to pay. Such covenant to pay is a covenant to do an affirmative act. In the case at issue there was a covenant to perform an affirmative act for the benefit of Herbert S. North and it is for the failure of the North Company to perform this affirmative act and the damages which Herbert S. North will probably incur by reason of such failure that Herbert S. North sought judgment against the company under the indemnity clause of the contract.

This Court, as far as we are able to learn, has never adopted any doctrine regarding the right of recovery upon the theory as laid down and distinguished in Cyc. The weight of authority of our best courts is in favor of the rule that where there

is an affirmative act to be done there may be a recovery without proof of actual money loss, and this is the rule which Herbert S. North contends is the proper one and the one which controls the case at issue. Mr. North by his contract in plain, clear and explicit language had the Company enter into an express covenant to indemnify him against liability. Were this contract, on the contrary, a covenant against the consequences of liability, Mr. North, before he could institute an action for substantial damages, might probably be compelled to wait six years or more before his customers had all sued him and recovered the damages which they in turn sustained. This, it is manifest, would be unfair where Mr. North after having had trouble with the Company, made a modifying agreement in which the clearest language was used.

It is thus apparent that the general distinction as made in 22 Cyc., page 91, between a contract of indemnity against liability and a contract to indemnify against the consequences of such liability, to wit, actual loss or damage is well established.

POINT 2.

Answering Point 4 of Appellant's Brief.

While it is true that the Court in its charge to the jury limited the question to whether there was a breach of a contract to save harmless from liability, it is not now conceded by the plaintiff that it at any time waived its cause of action under any one of the four counts.

Counsel for the defendant in many places in his brief quotes page 136 as showing an abandonment by the plaintiff of every cause of action except that set forth in his third count. That is not so, and

if we read the entire colloquy between counsel and the court between page 131 and 141 we find that the plaintiff contended that aside from the breach of the indemnity against liability, he claimed only nominal damages but for the breach of the covenant for liability the plaintiff claimed substantial damages.

The objection made to the charge is that the Court stated that North claimed that the company had failed to take the goods and failed to fulfill these contracts. If, as counsel stated, this was a description of a breach of the second count, then there is nothing to complain because there was no express abandonment of the second count or any other count, but I do not construe the language of the Court's charge to the jury to mean that if the Schwartz Company failed to take the merchandise there could be a recovery. The entire charge left for the jury's consideration is the question as to whether defendants intended to perform their contract and that is evidencel by this language of the Court on page 411, line 35: "The general contention of North is that the defendants not only did not take these goods, that they did not fulfill the contracts, but that they did not intend to."

There was much testimony throughout the case relating on the one hand to the failure of the company to take the goods and on the other hand to the failure of North to deliver them and the jury by its verdict placed the fault at the door of the defendant company.

It must be remembered that the Court was trying two cases—North sued the company for the breach of its covenant to save harmless from liability and to perform other covenants of the contract for sale —on the other hand the company sued North for his failure to deliver the merchandise to it, thereby preventing the company from performing and filling the orders for merchandise constituting the contracts between North and his customers and

that the company was thereby deprived of large profits and claimed on these counts $50,000 damages.

All these issues were submitted to the jury and it was therefore necessary for the court on the entire case not only to limit its charge on the question of the indemnity against liability but the court had to charge on the question of what each party contended as to the delivery of the merchandise, and the language of the court as quoted in defendant's brief from page 411 of the case is exactly what the plaintiff, North, did contend. The court also told the jury what the defendant company contended, and therefore, it cannot be said that the court in calling the jury's attention to the contention of one of the litigants can be erroneous.

POINT 3.

Answering Point 5 of Appellant's Brief.

Mr. North presented a tabulation of three sheets which is set forth in the case, and on page 181 testifies that the difference to fill the contracts between the contract price and the cost in the open market would be $58,180.60. That the contract price which spring orders amounted to was $74,374.64 and of the heavy weights $31,832.87; that it would cost $164,388.11 to buy both kinds in the open market (C., page 185).

Mr. North testified on page 149 that a reasonable time after September 1st within which the orders could have been filled at the plant was approximately five months.

He qualified himself as to his expert knowledge on the market to the satisfaction of the court and was permitted to testify that the market prices con-

tinuously advanced from September 1st to the present time (page 157). On page 179 Mr. North testified that the prices for the heavy weights were made nearly a year previous, but at that particular time, if a customer, on account of non-delivery, would go into the market, the market would be extremely high because it would be in the midst of a very busy season with the manufacturers.

Q. Would there be any difference in the price in September and October for instance? A. September and October and November and December, business would practically bear the opening price of the new year, which business is booked during the month of December and January.

Q. So that prices would be practically the same during those four months? A. Yes, sir.

> The Court: That simplifies matters very much too. Now, then, gentlemen, instead of reading all these various styles he has on this statement, suppose you show what the statement contains not mentioning the price for the present.

Mr. North was asked in reference to the statement which he made up and the manner in which it was calculated and was asked this question:

Q. That is based upon the prices you have stated during these six months? A. That's it. Next would be total sales price after the new price and the next would be the difference between the two prices.

Q. Difference between the contract price and what the goods could have been bought in the open market for during the months of September, October, November and December, up to the month of January, 1918? A. That's it.

The prices contained in said statement are the figures shown in the testimony of Mr. North on page 185 as quoted above.

Thus we have the testimony showing that during the months of September, 1917, to January, 1918, the market price for which the goods in question could be obtained was practically the same and Mr. North makes up the figures and testified to them, showing the difference between the contract price and what the goods could be purchased for in the open market. He also supplements this by testifying that the contracts would ordinarily have been delivered during the summer and winter of 1917 (C., pp. 103, 106).

The Court charged the jury on this proposition in the express words of the sales act (page 422).

While the case rests upon the evidence of Mr. North, which was in the form of a written statement made up from the company's books of account and his testimony that the goods were to be delivered to his customers in the summer and winter of 1917 and that the market price was practically the same during the period from September, 1917, to January, 1918, and this is the only testimony which was before the Court, but nevertheless, it was sufficient if the jury believed it, upon which they could render a verdict and they did believe it and rendered a verdict in favor of the plaintiff for $20,000. His testimony showed damages of $58.000, which was reduced by cancellation of some of the orders and an alleged profit from the sale of goods reducing the price of the goods to substantially $30,000, which was $10,000 more than the maximum claimed in complainant's complaint (C., pp. 393, 396).

In other words, the complaint which the defendant now makes against the measure of damages is in substance this: That there should have been proof upon each separate contract of the time when it should have been delivered supplemented by the market value of the particular goods on that day and that a period of reasonable time subsequent to June 26th within which North and the company had agreed that the orders might have been fulfilled

was not the proper time at which the damages should be estimated. This contention, however, overlooks the fact that the testimony of Mr. North, which the jury considered and believed, was that the orders were to be delivered during the summer and winter of 1917; that all of this work could have been turned out in six months and that the defendant by its many actions between June 26th and September 26th evidenced a general intention not to carry out the contracts.

As we have above stated, Mr. North's testimony showed that the market value at which the manufactured goods could have been purchased from September to the end of the year was practically the same for that whole period, and, therefore, it was not necessary to show a separate stated market value as of the time of delivery on each of the separate contracts.

If we take the difference between the market price and the contract price, it leaves a liability chargeable against the plaintiff, North, of $58,-180.60 (C., p. 184); deducting from this the cancellation of orders, $14,300 (C., p. 393) and profits on sales of merchandise made by North, $8,015 (C., p. 396), we have a balance far exceeding $30,000.00 as a liability with which North would have been chargeable. The verdict in the case by reason of the form of the pleading was necessarily limited to $20,000.00.

POINT 4.

Answering Points Nos. 6, 7, 8, 9 and 10 of Appellant's Brief. Admissibility of Evidence.

Under Points 6, 7, 8, 9 and 10 appellant contends that certain items of evidence were erroneously ad-

mitted and for each of those reasons the verdict should be set aside.

It is first contended that in each and every instance if error were committed, the testimony was not absolutely material to the case and that the error, if any, is harmless and would not necessitate setting aside the verdict, but it is insisted, however, by the plaintiff, that all of this evidence was properly admitted, and that the defendant is not in a position now to successfully urge the points which it attempts to make.

Generally speaking it is necessary to reiterate the statement that the trial was of two causes; and in one of those causes the defendant company sought to recover damages against North by reason of North's failure to deliver the goods to the company. North's answer to this claim was that the defendants were bluffing, never made any legal tender and, in fact, never intended to take the goods.

(A) The Testimony as to the Use of Merchandise.

Under Point VI the defendant insists that this line of testimony was improper because it related to the first count of plaintiff's cause of action, which it is claimed by the defendant was abandoned by the remarks of counsel contained on page 136 of the case and that therefore the Court should have instructed the jury to disregard such testimony. Even if the plaintiff had abandoned the first count, it must be recalled that the testimony to which reference is now made came into the case on page 54, long before the happening of this alleged abandonment. The reason then alleged before the Court was that all breaches of contract prior to June 26th, 1917. had been released by the contract of that date, but if we examine page 55

we find that the court admitted the testimony not on the subject of damages.

If the defendants wanted the jury instructed to disregard this testimony after the alleged abandonment of the first count, they should have made that request. They did not make such request, but on the contrary on page 399 of the case motion was made to strike out various answers and questions and this was not one of those questions.

It is, however, insisted that the conduct of the parties prior to June 26th was admissible relative to the defense of North against the claim of the company that he had failed to deliver the goods to the company upon their making a valid tender.

(B) THE COMPANY FILLED ORDERS AT A LOSS.

We have practically the same situation regarding this testimony to which objection is now made. That testimony came into the case on pages 64 and 65 and it was likewise admissible as a circumstance to go before the jury and aid it in charging against either one of the parties a breach of the contract. The jury was entitled to the facts to know whether North failed to deliver the goods or whether the company failed to take the goods.

It must be remembered that the goods were to be taken by the company from North and to be applied to the performance of the North contracts, and if this company took the goods and diverted them to other uses and in filling any of the North contracts suffered a loss, these were certainly circumstances which would greatly influence the jury in saying whether North is telling the truth when he said he was willing to give the raw materials but that the company would not make a proper tender or whether the company was right in its contention in claiming that North did not want to give up the raw material because he wanted to sell them on the open market in order to make a profit. While defendant objected to the question, it did not object to the Court's ruling.

(C) Replevin Expenses, etc.

Counsel seems to have raised considerable clamor at the trial regarding these expenses on the replevin suit but it seems that they were stricken from the record by order of the Court on page 403 and they were not mentioned at all by the Court in its charge to the jury, as we have above stated, the damages proven by North aside of these expenses, was over $10,000 in excess of the amount which North was entitled to recover under his complaint.

(D) Overhead Expenses.
(E) Orders Filled

All of this testimony related more directly to the defense of North to the company's claim than to his own claim against the company and this testimony stands in the same light as that mentioned under the previous subdivisions.

It was competent for Mr. North as a defense to the case against him to show that the tender of $15 000 made on the first day of September was not a bona fide tender. It was also competent for him to show that by reason of the huge overhead expenses of this new company it would have been obliged to fulfill the orders of North's customers at a loss and this would tend to give the jury a real substantial reason for holding that the company was not carrying out the contracts. In fact, the evidence was before the jury that only 2½ per cent. of the contracts had been performed by the company (C., p. 72). Mr. North so testified from his examination of the books of the company and his testimony on this point was not contradicted.

It is, therefore, respectfully insisted that all of this evidence was relevant in some way or other to the two cases being tried. This testimony did not confuse the jury and it did not prejudice the defendants because the Judge's charge expressly

laid down the rules upon which they were to consider plaintiff's case against the company, and if this evidence were in any way improper it related not to the case now challenged by defendant's rule, but to the case in which the company was the plaintiff and North the defendant and the verdict of no cause of action is not now challenged but is assented to.

POINT 5.

Answering Point 11 of Appellant's Brief. Inspection of Goods.

It is insisted that the question as to whether there was a reasonable opportunity to inspect goods was absolutely and purely a jury question. Mr. North testified that all of the goods which he had was suitable for his orders excepting a small amount of mercerized webbing which he took back and gave credit for (C., p. 129). That the goods were in the store house for a period of eight months and that the defendant company had access to them, went into the store-room and on several occasions took goods without Mr. North's consent and subsequently reported the taking to him. It was also evidenced that each case was marked on the outside as to its contents.

Mr. North also testified that about July 17th he asked the defendants if they were then ready to take any of the goods and they said they were not ready (C., p. 109); on the other hand, defendants contend that they had no right or opportunity to inspect these goods because they were in nailed cases.

Now, if the defendant had during any of the time subsequent to January 3rd opened up any of these cases and taken goods and afterwards paid for

them and the payment had been accepted by Mr North, it was reasonable for the jury to assume that if the company desired to carry out its obligation to purchase these goods, it had full, fair and reasonable opportunity to have made inspections of them and that they had no right to wait until half past ten or eleven o'clock on the morning of September 1st and then demand an absolutely accurate inventory which would take three or four days' time to make when the time limit in the contract was fixed at September 1st, noon. It was before the jury that the time limit under the original contract was fixed at August 1st and had been extended by the agreement of June 26th to September 1st.

The defendant company knew by reason of its experience at that factory from January 3rd to June 26th that there was a vast quantity of material there; they knew as business men that they had agreed to pay $30,000 for it and if they were not familiar with this line of merchandise, it was their duty in that eight months to have made themselves familiar and not wait until the last moment of their time limit and then by a subterfuge try to extend the time during which they should comply with their obligation of purchasing.

The question of reasonable time and opportunity to inspect, was therefore clearly submitted by the Court to the jury as a question of fact, and the jury decided that fact on legal evidence against the defendant company.

POINT 6.

Answering Point 12 of Appellant's Brief.

Appellant claims that the Court should have charged the jury that Mr. North's demand for $29,875.00 was unlawful.

It comments upon the fact that Mr. North mentioned that the demand should have been for only $29,748.81. However, the sixth request to charge was in the following language: "That upon the demand by the defendant of the sum of $29,875 the plaintiff was absolved from the making of a tender." The Court said: "That is true, gentlemen, if the sum of $29,875 did not represent the amount that was due to Mr. North" (Case, pp. 418, 419). The Company only tendered $15,000 (Case, p. 344).

The Court did in its main charge call to the attention of the jury, that there is a dispute between the parties as to the actual value of the goods that were to be delivered (Case, p. 115, line 30, etc.). The Court also charged the jury on the question of a reasonable time to inspect (Case, p. 414). An inspection of Exhibit 2, printed in the second addenda in the last paragraph on page 6, shows an agreement upon the one hand to sell and an agreement on the other hand to purchase. So that the language used on page 32 of Appellant's Brief that they merely had a *privilege* is not accurate.

The questions in dispute between the parties were submitted properly by the Court to the jury as disputed question of fact.

Conclusion.

Jeffers vs. *Johnson* (supra) was decided by our Supreme Court in 1848 and commented upon the fact that *Chase* vs. *Hinman* was somewhat doubted in *Aberdeen* vs. *Blackmar*. However, the Court of Appeals of New York, in 1848, in *Gilbert* vs. *Wiman*, 1 N. Y. 550, expressly approved *Chase* vs. *Hinman* and the same doctrine was again approved by the Court of Appeals of New York in 1880 in *National Bank* vs. *Bilger*, 83 N. Y. 62, and is now an established law of New York. The same doctrine is also recognized and approved by the United

States Supreme Court in *Mills* vs. *Allen,* 133 U. S. 432.

Both *Jeffers* vs. *Johnson* and *Miller* vs. *Fries* held that the facts in those cases constituted a case of indemnity against the consequences of liability, but, nevertheless, recognized the doctrine of indemnity against liability. Liability is a responsibility enforcible by action.

Mr. North agreed to manufacture and deliver certain merchandise; Schwartz assumed those orders and "agrees to save North harmless from damages (2nd Addenda to Case, p. 10). Disputes arise (C. p. 28, l. 17) and a modifying agreement is made, under which the Company assumes the liability of performing the contract of January 23, 1917, and "agrees to save harmless and indemnify North against any and all liability *or* loss *or* damage by reason of the orders or the *non-fulfillment* thereof."

It is practically admitted that the Company failed to fill the orders so that the customers could have sued North and recovered damages. North proved, to the entire satisfaction of the jury, and without any contradiction by the Company. that the actual cost of making good on his orders, after allowing all deductions, would have been in excess of thirty thousand dollars ($30,000) (C. pp. 184, 393, 396).

The Company had the opportunity to fulfill the contracts and, by its own action in defaulting, brought about the present situation and should not now be heard to complain that North may not be sued within the statutory period of limitations. This would be no answer to North's cause of action. If there is a liability which North may be lawfully compelled to pay, he then has the basis of an action for substantial recovery.

The question is, will this court of last resort adopt the logical distinction in 22 Cyc. 90 and approved by most of the courts of our several states?

This court should adopt those legal principles so that a defaulting contractor cannot willfully disregard his written contracts in order that he may turn his efforts to the making of more money for himself and thus subject the innocent party to actions for damages which may be brought over a period of many years. The dilemma is one created by the defaulting party and he ought not be permitted to go scot free unless the doctrine for which we contend is without logic and reason. That it is founded on sound logic and good reason is evidenced by the numerous times of its approval by the Court of Appeals of New York and the highest tribunals of many of our states.

The jury by their verdicts determined that North had not committed any breach but that the Company had done so.

If perchance your Honors should not agree with the doctrine approved by the weight of authority, then the proper decision of questions of fact by the jury on a full and fair trial of those questions still renders it necessary to sustain the judgment of no cause of action in the case of the Company vs. North and merely a reversal in North vs. the Company, so far as relates to the measure of damages.

But it is most respectfully insisted that the rulings of the learned Trial Judge were in all things correct and that the judgments in both cases should be sustained with costs.

Respectfully submitted,

ABE J. DAVID,
SAMUEL KOESTLER,
Of counsel with Herbert S. North.

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56 MAR.T.1919

New Jersey Court of Errors and Appeals

HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased,
Plaintiff-Respondent,
vs.
JOSEPH W. NORTH & SON, INC., a corporation of New Jersey,
Defendant-Appellant.

JOSEPH W. NORTH & SON, INC., a corporation of New Jersey,
Plaintiff-Appellant,
vs.
HERBERT S. NORTH, individually and as executor of Joseph W. North, deceased,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

This is an appeal from the judgments of the Supreme Court, one for the respondent, North, in the action in which he was plaintiff, for $20,000 and the other for the respondent North and against the appellant in the action in which North was defendant. Both suits were tried together. The questions involved are as to the admissability of testimony, the refusal of the trial court to grant a non-suit or direct a verdict for the appellant in the action brought by North, the action of the trial court upon the appellant's requests to charge and the contention that the verdicts were against the weight of the evidence.

The appellant took a rule to show cause why the verdict for the respondent in the first suit should

not be set aside. This rule reserved to the appellant, however, all exceptions taken at the trial to rulings of the trial judge wherein the jury was permitted to consider evidence and find a verdict on the alleged liability of the respondent under existing contracts with customers without respondent establishing that he suffered damages or loss thereon or paid damages on such liability. This rule was discharged after argument.

Outline of Facts.

Agreement of Jan. 3rd, 1917, Exhibit P-2 (Case, p. 51).

(1) One Schwartz agreed to buy respondent's business (manufacture of underwear).

Agreement of June 26th, 1917, Exhibit P-3 (Case, p. 27, Case, p. 52).

(2) Appellant agreed to assume Schwartz's obligations under P-2. P-2 is not printed. P-3 tells its terms sufficiently for the purposes of this case. The more important parts of the agreement are recited below.

Section 1 of the agreement:

> "The company agrees to assume the liability of performing the aforesaid contract dated January 3rd, 1917, to the extent that it will fill all orders for merchandise on the former books of said North, including light weight and heavy weight goods and merchandise of all weights, of which orders two itemized schedules are hereto attached, made a part hereof and marked Schedules Numbers 1 and 2. The said company, however, in any and every event, agree to save harmless and indemnify the said North from any and all liability or loss or damage by reason of said orders mentioned in said Schedules Numbers 1 and 2, or the non-fulfilment thereof, or any matter or thing connected therewith."

(Case, p. 28.)

North on his part agreed (Section 3)

> "to turn over to the company as required by it from time to time, for cash, all such merchandise belonging to him in said factory, as is suitable for the filling of the orders above mentioned on the aforesaid Schedules Numbers 1 and 2, and known in the trade as heavy weight and light weight orders, as the same now are or as they may be modified or substituted in accordance with agreement between the company and its customers. Such merchandise shall be used solely for the purpose of filling said heavy weight and light weight orders and shall be sold to the company according to the schedule of prices hereto attached, made a part hereof and marked Schedules Numbers 3 and 4." (Case, p. 29.)

Both parties agreed:

> "Section 5: To lend and use their best efforts for the purpose, in the first instance, of procuring a cancellation of the aforesaid orders shown on Schedules Numbers 1 and 2 to the greatest extent possible, and in the event that the said company is compelled to fill such orders, the parties agree to use their best efforts jointly for the purpose of procuring as much time as may be possible in this connection and also of procuring increase of prices to the greatest extent possible; and no default under this clause shall be claimed without a written notice being given by the party claiming such default." (Case, p. 30.)
>
> "Section 7: For the purpose of turning over to the Company the merchandise in the manner herein mentioned, and upon the completion of this contract and for a reasonable time thereafter, or on default thereof by the (Case, p. 31.)

party of the second part, it is understood and agreed that the party of the first part shall have the right at any and all reasonable times to enter the premises occupied by the party of the second part for the purpose of removing any and all merchandise of the party of the first part. It is understood and agreed that the party of the second part shall make no charge for storage of the goods and merchandise belonging to the party of the first part now in the plant occupied by the party of the second part, so long as this contract shall be in full force and effect, nor for a reasonable time thereafter for the removal thereof."

(Case, p. 32.) "Section 10: The said North agrees immediately upon receipt of notice or letters threatening suit or summons out of any Court to notify the party of the second part thereof."

(Case. p. 31.) (Section 8) By it the right of North or his successor, the North Company, to take over merchandise from North was extended to September 1st, 1917.

Case, p. 28.) (Section 2) It further recites that under the prior agreement disputes had arisen, the North Company claiming that North had defaulted in performance on his part, and North claiming that the company had defaulted in performance on its part, and the parties

> "expressly and mutually release each other of and from all alleged breaches to date hereof by reason of the aforesaid agreement dated January 3rd, 1917."

(3) The appellant took over some of the merchandise and filled some of the orders. In excuse for not taking over more of the merchandise, as

well as in complaint against North, appellant claimed that North should have given opportunity to inspect the merchandise and select such as was suitable and did not give this opportunity. North claimed that the goods were in the company's possession and that it could have inspected if it wanted to. Appellant replied that although the goods were on the premises taken over from said North they were still his goods, which the agreement had permitted him to leave on the premises (Case, p. 31); that they were in packing cases, nailed up, and that to have inspected them without North's permission would have been a trespass; that appellant asked for such permission, but North refused.

(Case, pp. 228, 229, 311.)

The Questions Involved.

The respondent, North, alleged in his complaint that the defendant had breached the agreement of June 26th, 1917, in several particulars, but all of these contentions were abandoned except that set forth in the third count of the complaint, namely, that by reason of the defendant company's failure to fill the orders the plaintiff had become liable to his customers, and was entitled to be saved harmless (Case, p. 136, fol. 10).

The defendant company on the other hand claimed that plaintiff, North, had refused to deliver the merchandise in question so that it had been prevented from filling the North orders, that it thereby lost profits as well as being subjected to claims and suits for damages by the North customers whose orders had not been filled. As defendant was liable to North, and not to North's customers, this latter contention was later abandoned, reducing the defendant company's claim to the loss of profits that it might have derived from the filling of the orders.

The contention of the appellant was presented by

a suit against North begun September 6th, 1917 (Addenda to Case, p. 1). Respondent's contention was not set up by counterclaim in that suit, but was made the subject of independent suit begun September 26th, 1917 (Case, p. 22). Both suits were tried together. It will be necessary to keep this in mind as the line of demarcation is not always clear in the record.

The learned Trial Judge made a distinction between indemnity against liability and indemnity against loss, holding that under the first the itdemnitor would have to pay as soon as the liability attaches, while under the second he would not have to pay until the indemnitee suffered loss (Case, pp. 133-134); that the agreement under examination came within the first class, but that the plaintiff could recover no more than the nominal damage of 6 cents until he proved actual loss. Without proof of any payment by North to his customers by reason of any liability to them or of any judgment against North by any customer, with nothing but proof that only a few customers had presented any claim or demand, he permitted the plaintiff to prove and recover the difference between the price at which the orders were taken by North and the market value of the same goods on December 26th, 1917, computed on all the orders. He fixed this date as follows: The agreement between the plaintiff and defendant was made June 26th, 1917. Plaintiff, North, admitted that defendant would be entitled to reasonable time after that date for the filling of these orders, and that six months would be such reasonable time. Six months from June 26th is December 26th. We think that the Court erred in the interpretation of this contract and the ruling that a cause of action arose with the mere existence of the liabilities indemnified against as well as in the measure of damages adopted, and the admission of testimony at various points.

POINT I.

Every contract to indemnify against existing liabilities is a contract to indemnify against loss.

There are statements in the text books and in cases decided in other states which seem to support the distinction made by the learned Trial Judge. But we respectfully submit that these are based upon an incomplete and inaccurate interpretation of the word "indemnify" and that they have not yet found lodgment in New Jersey law. The quotation which the learned Trial Judge made to support the view that he took is from 22 *Cyc.*, p. 90. (Case, p. 410.) It makes a distinction between saving harmless from liability and saving harmless from the consequences of the liability. Points made later, we think, make it unnecessary to defendant's success on the argument of this rule that it should overthrow this distinction, but we should not let it pass unchallenged.

Of course there is a distinction between "liability" and "loss." But it does not follow (as stated by the learned Trial Judge) that on an agreement to indemnify against liability the cause of action is

> "complete when the liability is established, (Case, p. 410.) although payment of the liability or actual damage arising therefrom is not shown";

nor that

> "where the guarantee is against liability, the (Case, p. 410.) moment the man becomes liable he is entitled to recover, whether he has paid the money or not."

The word "indemnify" means

> "to secure or save harmless against *loss* which may happen *in the future;* to compensate or reimburse one for a *loss previously incurred.* To indemnify is said to be synonymous with 'to save harmless'" (*2 Bouvier's Law Dict.,* Rawl's 3rd Div., p. 1532).

The same writer defines the word "indemnity" as

> "that which is given to a person to *prevent* his suffering damage" (*2 Bouvier's,* p. 1532).

"To save harmless" means to save from harm, that is, to save from loss or damage. Therefore, when defendant company agreed to save plaintiff harmless from liability it was in effect an agreement to save him from loss and in its nature could not be broken until there was loss.

A covenant against encumbrances given at a time when there is an encumbrance against the property is broken as soon as made. But that is because the covenant says that there are no encumbrances. Of course, if there is an encumbrance the covenant is broken. But an agreement to indemnify against liability is not broken as soon as it is made, because it is not a covenant that there are no liabilities; it is only a covenant to save from harm by reason of the liability.

So in *Van Slyck* v. *Kimball,* 8 *Johnson,* p. 198, it was held that a covenant to indemnify against a certain mortgage was equivalent to a covenant for quiet enjoyment, not broken by foreclosure of the mortgage, and that an action for breach of the covenant of indemnity could not be maintained without showing an eviction under the mortgage.

If A says to B,

> "I covenant that there are no liabilities,"

and there is one at the time of the covenant, there is an immediate breach. If A says,

> "I covenant that there will be no liabilities,"

and thereafter a liability comes into existence, at once the covenant is broken without proof of actual loss. But if A says.

> "I covenant to indemnify you against liabilities,"

he does not covenant that there are no liabilities, nor that there will be none. What he says is equivalent to

> "I covenant to save you from harm by reason of liability (present or to come),"

and this is only broken when harm (or loss) comes to the covenantee.

It seems clear that a covenant to indemnify or save harmless, whether it be against liability or loss, contemplates future action, something of present undertaking the performance and enforcement of which, in the contemplation of both parties, are in the future. And this taken with the true meaning of the word "indemnify" as synonymous with "to save harmless" or "to save from harm" justifies the conclusion that every contract of indemnity against *existing* liabilities is one of indemnity against loss, not broken until there is loss.

Jeffers, et al, v. *Johnson,* 1 *Zab.,* 21 *Law,* p. 73, is the first New Jersey decision involving this question.

The plaintiffs were sureties on a postmaster's bond; the defendant gave the plaintiffs a covenant of indemnity against all damages, costs and charges which they might incur on account of said liability as surety. The Court held that this was a case of mere indemnity and that the plaintiffs, in order to recover, were bound to prove actual damage, that the fact that a judgment had been recovered against them was not sufficient. The opinion of Randolph, *J.*, says:

> "The covenant is not to pay money at a certain time, but is to indemnify and save harmless from paying. So that a mere liability or even a judgment for debt and costs will not be sufficient to maintain an action for breach of covenant. The plaintiff was bound to prove an actual payment before he would be entitled to recover, and then only for the amount of payment or actual damage" (21 *Law*, p. 76).

The opinion written by Whitehead, *J.*, says:

> "The plaintiffs rely upon the case of *Rockefeller* v. *Donnelly*, 8 *Cowan*, p. 628, and the case of *Chase* v. *Hinman*, 8 *Wendell*, p. 452, as sustaining this action. The doctrine laid down by the court in 8 *Cowan* has been very properly overruled by the Supreme Court of New York in *Aberdeen* v. *Blackmar*, 6 *Hill*, p. 324, and with reference to the case of *Chase* v. *Hinman* it is said in 6 *Hill* that the court in that case was somewhat influenced by the decision of the Court of Errors in *Rockefeller* v. *Donnelly*. Admitting, however, the case of *Chase* v. *Hinman* to be law, it is clearly distinguishable from the one now before the court, as the in-

> demnity in that case was against any liability for damages or expenses."

This is not an approval of the distinction between an indemnity against liability and one against loss. When the Court says:

> "Admitting, however, the case of *Chase* v. *Hinman* to be law it is clearly distinguishable, &c.,"

it does not hold that case to be law. It treats that as unnecessary to be decided as the case can be distinguished.

Sutherland, *J.*, in *Chase* v. *Hinman,* referring to *Rockefeller* v. *Donnelly,* says that in it Chancellor Jones laid down, as a general proposition, that

> "even when the obligation is to indemnify against damage or expense and the obligee has become absolutely bound and liable to pay the expense or damage and the amount is liquidated so that his demand against his obligor upon the bond of indemnity by reason of the charge against himself is reduced to a certainty, he may enforce his demand against his obligor in the first instance before he satisfies the charge against himself and he observes that it is an operation which avoids circuity."

Judge Sutherland adds:

> "I must confess that this general proposition of the learned Chancellor seems to me to carry the doctrine further than I had supposed, warranted by the authorities, but it is unquestionably sound where the indemnity is not only against actual damages and ex-

> penses, but also against the liability for them."

In *Aberdeen* v. *Blackmar* the Court comments on *Chase* v. *Hinman* and *Rockefeller* v. *Donnelly*, as follows:

> "In *Chase* v. *Hinman*, 8 *Wendell*, 452, the contract was to indemnify against liability as well as against actual damage, and even there the Court was somewhat influenced by the decision of the Court of Errors in *Rockefeller* v. *Donnelly*, 8 *Cowan*, 623, which, to say the least of it, is a very questionable case."

The opinion then goes on:

> "This is not an agreement to indemnify against liability, but it is the common case of agreement to indemnify against the 'claim or demand' of a third person, and before the plaintiff can recover he must show that he has been damnified. The mere fact that the demand of Fuller has changed its form by having passed into a judgment is not enough."

This distinction between indemnity against liability and indemnity against the claim or demand of a third person (at least so far as it is applicable to the agreement under examination) is a distinction without a difference and seems to have no other excuse than the attempt of the Court to avoid following the "very questionable case" of *Rockefeller* v. *Donnelly*.

It is obvious that the grounds upon which the ruling of *Rockefeller* v. *Donnelly* was based do not exist in the case at bar. Consider them as summarized in the above quotation from the opinion of

Sutherland, *J.*, in *Chase* v. *Hinman*. The plaintiff, North has not become "absolutely bound and liable to pay" anything to the customers whose orders were not filled. If he has, it cannot be said that

> "the amount is liquidated so that his demand against his obligor upon the bond of indemnity by reason of the charge against himself is reduced to a certainty."

Take the situation existing at the time this contract was made (and according to the view of the learned trial judge, broken as soon as made). We know that North had accepted orders, that they had not been filled. But there is no proof that any of the customers were then claiming or demanding anything because of these facts, and such a claim or demand is not so necessary a consequence of not filling the orders that it may be presumed. If the market had gone down so that the customers could buy the same goods for a lower price than had been agreed upon with North they would never make any claim or demand upon North. Even if the market had gone up they might have lost their own market for the goods and therefore be glad **not** to be called upon by North to take the goods and pay for them. If they were to make claim and sue North the measure of their damage would be the difference between the order price and the market price at the time of default in delivery. If the market had gone down the damage would be nothing. If it had gone up it would have to be determined for each customer as of the time of non-delivery on his order, involving probably as many different ascertainments as there were customers, or at any rate as there were different times of deliveries specified. There is no proof on these points except that North said that suit had been brought by one customer. (Case, p. 112.)

There is absolutely no proof of the ascertainment of the amount of damages that North would have to pay, and clearly, therefore, the amount of North's liability had not been liquidated,

> "so that his damage against his obligor upon the bond of indemnity by reason of the charge against himself is reduced to a certainty."

The next New Jersey case is *Miller* v. *Friese*, 66 Law, 377, and here we find the distinction not recognized. *Jeffers* v. *Johnson* is cited as settling the law that the

> "mere existence of debts even in the form of judgments against the covenantee does not legally constitute the breach of a covenant to indemnify and save harmless. Such a covenant is not equivalent to a covenant to pay existing debts" (66 Law, p. 379).

The bond in that case was conditioned to save and keep harmless from all partnership debts *and liabilities*, and the Court held that proof that one of those debts had passed into judgment was not sufficient, and set aside the verdict in favor of the plaintiff. Certainly every one of these debts was a liability, but the mere existence of the liability was not sufficient to give the plaintiff a cause of action. Nay, even judgment thereon was not enough. The opinion is by Mr. Justice Dixon. Although it is short and without elaboration of the Court's reasoning it is clear that the conclusion of the Court rested upon the words in the bond "to save and keep harmless," and upon the distinction between such a covenant and one to pay or discharge existing liabilities or debts.

We submit that whatever interpretation be given to the word "liability" as used in the agreement in question made with the respondent, North, and whether or not it was used in a sense other than expressed by the other words, "loss or damage," it was within the meaning of the word "liability" as that word is used in *Miller* v. *Friese,* and that the reason and conclusion of that case is applicable to the case at bar, namely, that it was not a contract broken by the mere existence of the liability at the time the indemnity agreement was made, was not broken by the mere fact that some demand for the filling of the orders was later made by one or more of North's customers, and that no action could be maintained on it without proof of actual loss by North.

As remarked before there are cases in other states which seem to support the view of the learned Trial Judge. In some of these the Court found from the terms of the contract under examination, the context in which the word "liability" or the word "indemnity" appeared and the circumstances surrounding the contract, and that it was an agreement to pay a liability, and that, therefore, the person indemnified could proceed at once upon proof of the existence of the liability. An example of this class of case is *Fenton* v. *Fidelity & Casualty Company*, 48 *L. R. A.*, p. 770. Others of these cases involve the construction of policies of insurance issued by indemnity companies, and the conclusion reached was largely due to the rigorous application of the rule that such contracts will be construed strictly in favor of the insured and against the insurer. All these are plainly distinguishable. Many of the cases rest upon a clear distortion of the word "indemnity," upon a mistaken assumption that it means to discharge or to pay or to relieve from liability and without anything in the context

to show that the parties so meant it. The Courts have found that the cause of action arose with the existence of the liability. These we submit are not founded on reason and are not entitled to weight in this Court.

We will not attempt any exhaustive review of the authorities. So far as they are cases where the Court found that the particular contract in question was a contract to pay or discharge a liability, they can have no application to the case at bar, unless this Court finds that the contract now under examination was of that character, and this, we are confident, the Court will not do (see Point II). So far as these cases overlook the meaning of the word "indemnify" as given in *Bouvier's Dictionary*, above cited, and assume that it means to "relieve from" or "discharge" or "pay" a liability or debt, they are plainly erroneous. Such of them as apply the words "indemnity" or "indemnify" in the meanings that we have claimed for them are so lined up with common sense and with common understanding of the English language as to make it unnecessary to cite them. For examples of this latter class of case we refer to *Cozzens* v. *Paxton & Gallagher Company*, 98 N. W., p. 277; 122 *Iowa*, p. 465.

Jeffers v. *Johnson* and *Miller* v. *Friese* do not recognize the distinction between indemnity against liability and indemnity against loss, nor does any other New Jersey decision, and the learned Trial Judge was in error when he said in the charge that the distinction was one that our Courts had made.

(Case, p. 410, fols. 10 to 20.)

POINT II.

At any rate, the contract in question was one of indemnity against loss.

It is true that it says

> "any and all liability or loss or damage."

But the context and the circumstances under which the agreement was made show that the parties meant only to indemnify against loss; that they contemplated something to be done in the future, and not an agreement that was broken as soon as it was made. Consider the circumstances first: Here were a lot of orders on the plaintiff's books, every one of which was then in default—that is, the time fixed for delivery had expired. Is it not against common sense to think that in making this agreement the parties understood that the defendant was entering into an agreement that was broken as soon as it was made? Then turn to the context, and we have both parties agreeing to jointly use their best efforts to procure cancellation of the orders so far as possible; and, further,

(Case, p. 111, fols. 10 to 20.)

(Case, p. 30, fol. 10.)

> "in the event that the said company *is compelled to fill such orders,* the parties agree to use their best efforts jointly,"

to procure extension of time, etc. Read this in connection with the undertaking in Section 1 of the agreeement, that the company will fill all orders, and that

> "the said company however in any and every event agree to save harmless and indemnify the said North from any and all liability or loss or damage by reason of the said orders, * * * or the non-fulfillment thereof."

(Case, p. 28, fols. 20 to 30.)

And it is clear that neither party understood that the defendant was making an agreement that was broken as soon as it was made.

Certainly this was not a covenant that there were no liabilities, nor was it a covenant to discharge the liabilities. Both parties understood that there were unfilled orders, but that these might never be enforced, might never have to be filled; that the number that might be enforced was to be made as small as possible by the joint efforts of both parties, and that only these should be filled, and that as to those that might be pressed the respondent, North, was to be saved harmless—that is, be saved from loss.

If from the contract itself, in the light of the circumstances surrounding the execution, it appears that the contracting parties understood that the defendant company's undertaking was to save from future harm by reason of his then existing liability or orders that he had taken, the contract was not broken by the mere existence of the liability, and the cause of action did not arise until there was loss. If the parties contracted for something to be done by the defendant company in the way of future protection, they plainly did not make a contract that was broken when made, nor until a failure in the future to give the agreed protection, and, therefore, the contract was outside of the rule of law invoked by the learned Trial Judge.

Even if the Court thinks that there is a distinction between an agreement to indemnify against liability and one of indemnity against loss, as stated by the Court below, it must still find that the contract under examination falls within the first branch of that distinction, and we contend that it does not. If, however, the Court finds against us, the judgment below should, nevertheless, be reversed under our next point.

POINT III.

Assuming that a cause of action arose on the agreement in question by the mere existence of liability, there should be no recovery for more than nominal damages.

It should be remembered that respondent, North abandoned all claim arising out of the alleged breach of the undertaking to fill the orders. Therefore, there was no need to inquire what the measure of damage would be for such breach. The only breach the respondent was claiming on was a breach of the contract to save him harmless from his liability by reason of the acceptance of the orders. The learned Trial Judge said that if the respondent failed to prove actual loss he could only get six cents damage. The Court said:

(Case, p. 136, fols. 10 to 20.)

(Case, p. 139, fol. 30.)

(Case, p. 140, fol. 20.)

(Case, p. 140, fol. 40.)

> "He can either sue at once and recover a nominal judgment or he may wait until he has the necessary proof and recover a substantial judgment. If he is premature that is his fault."

Assuming that the view the Court took of the agreement was correct, namely, that it was an agreement to indemnify against liability as distinguished from loss, and that the cause of action on such an agreement arose upon proof of the mere existence of the liability, this was a correct statement of the law. North offered no proof to show that he had suffered actual loss by reason of the non-filling of the orders, but the Court departed from its own statement of the law that in such case he would be entitled to no more than nominal damages.

The court told the jury that the damages would be limited to the liability which fell upon Mr. North, and allowed him to make proof of the whole amount of the unfilled orders after deduction of cancellations and modifications and certain other credits, reducing the amount of his claim to not less than $30,000, and then limited North further to $20,000 by reason of the fact that in his complaint he had laid his damages at $20,000.

(Case, pp. 413 and 414.)

Respondent offered no proof that he had been compelled to pay any sum of money to any of his customers by reason of the non-filling of the orders. He testified that one of these customers had brought suit against him, but that was all.

(Case, p. 112.)

In *Jeffers* v. *Johnson*, 21 *N. J. Law*, p. 73, the plaintiff, seeking to enforce the contract of indemnity against his liability as surety on a bond, proved that judgment had been entered against him on said bond. Without proof that he had paid anything on the judgment or been put to any expense in defending the suit, this was held insufficient.

In *Miller* v. *Fries*, 66 *N. J. Law*, p. 378, the plaintiff proved a judgment against the firm, whose debts and liabilities the defendant had undertaken to indemnify him against. This was held to justify only a verdict for nominal damages.

This point may be within the exceptions reserved in the rule to show cause.

POINT IV.

There was error in the charge to the jury as to what constituted a breach of the contract to save harmless from liability.

The first charge of the complaint filed by North charges a breach of the contract, in that defendant had

> "used materials sold to it by the plaintiff for the purpose of filling orders other than the orders mentioned and set forth in Schedules 1 and 2." (Case, p. 25, fol. 10.)

The second count charges a breach, in that the defendant had failed

> "to fulfill said orders and to make deliveries of merchandise in accordance with said orders and by reason thereof plaintiff would be obliged to fill said orders &c. at greatly increased expense to himself." (Case, p. 25, fol. 30.)

The third count charges that by reason of the defendant's failure to fill the orders plaintiff

> "will be liable in damage to the persons named in schedules 1 and 2 of Exhibit A." (Case, p. 26, fol. 40.)

As we have already pointed out, all of these claims were abandoned, except the third (see colloquy between Court and counsel, pp. 136 to 140, both inclusive).

The learned Trial Judge in his charge recognized this limitation of the issue, saying:

> "Now the question of fact that confronts you is, was there a breach of the contract to save harmless from liability?" (Case, p. 411, fols. 20 to 30.)

Then follows this statement, of what constitutes a breach:

(Case. p. 411, fol. 30.)

> "The plaintiff, North, claims that there was such a breach and that the breach consisted in this, that the Schwartz Company failed to take the goods and merchandise and that they failed to fulfill these contracts."

This, we contend, was error. It was a description of a breach of the second count, and that had been abandoned. Then the Court went on to tell the jury that North's contention was that the appellant not only did not fill the orders, but that it did not intend to, and submitted that question to the jury. On a breach of the contract to indemnify, this was irrelevant, and yet strongly prejudicial to the appellant (see also what is said further in the charge, at p. 412, fols. 20 to 40, telling the jury what the motives of the parties were).

(Case, p. 411, fol. 40.)

POINT V.

Assuming that the Court below correctly stated the law as to the nature of the agreement of indemnity, and further assuming that there was proof of actual loss, the measure of the damages adopted by the Court was erroneous and without any application to the case at bar.

The learned Trial Judge formulated the measure of damages as follows: He held that the appellant was entitled to a reasonable period after the agreement of June 26th, 1917, for non-performance of its undertaking with respondent, North, to fill the unfilled orders. He then took the respondent's

admission that six months would be such a reasonable time, and thus fixed December 26th (six months from June 26th) as the time for ascertainment of the market price of the goods contracted to be delivered, and the difference between the market price at that time and the order prices as the measure of damage that respondent could recover from appellant, after allowance for cancellations and certain other credits.

This, we submit, was clearly erroneous. The liability, if any, that appellant had agreed to indemnify North against was his liability to his own customers, and that would have been measured by the difference between the order prices and the market prices at the time fixed for delivery as between North and his customers. (*Sales Act, Comp. Stat.*, p. 4663, Sect. 67, Subd. 3.) If the allowance of a reasonable time for appellant to fill North's orders had any application to the suit by North, it could only be as to the time when the company's undertaking may be said to have been breached, but could have no application to the measure of damages for such breach. We say that that measure would be North's actual loss—that is, the amount that he had been called upon by his customers to pay by reason of the non-filling of the orders. But if we are wrong in that, and it could be held that he could recover without proof of actual loss, he could not recover more than would be necessary to meet his customers' demands—in other words, the amount that they could claim of him in damages—and that would not be affected in any way by any time for filling of the orders fixed between North and the North Company, to which his customers were not a party.

POINT VI.

There was error in the admission of testimony by the appellant as to the use of merchandise to fill orders prior to June 26th, 1917.

The contract did not require the appellant to take any merchandise from respondent. It only gave appellant the right to do so. But it did obligate the appellant, if it took any merchandise from North, to use it solely for the purpose of filling North's orders. The learned Trial Judge permitted North to prove that some of the merchandise taken by the company was used in the filling of orders other than the orders the filling of which appellant had assumed. This was objected to on the ground that, so far as it related to such use of merchandise prior to June 26th, 1917, it was irrelevant, because any violation of the original contract of January 3rd, 1917, prior to January 26th, 1917, had been released by Section 2 of the contract. The first count of the complaint covered this alleged breach, and for that reason the proof might be admissible, had it been limited to misuse of the merchandise after June 26th, 1917. There was no such attempt to limit it. Nor was there any attempt to specify any time when the misuse of the merchandise was committed. Moreover, the first count was later abandoned. This abandonment did not take the testimony out of the case. It remained with all its prejudicial effect upon the jury. The only part it played in the case was to give plaintiff an opportunity to tell the jury of some alleged misconduct, not connected with the suit, to the prejudice of the company, and the jury should have been instructed to disregard it.

(Case, p. 54, fol. 30.)

(Case, p. 28.)

(Case, p. 136.)

POINT VII.

There was error in the admission of proof that the appellant had, between January 3rd, 1917, and September 1st, 1917, filled some of the North orders at a loss.

North was permitted to testify that in February, 1917, he had been told by Mr. Nathan Schwartz, president of the North Company, that the company had filled some of the orders at a loss. Apparently this testimony was permitted by the learned Trial Judge on the theory that it might tend to show a reason for the appellant's alleged breach of contract, namely, that it had found that filling the orders would entail a loss, and that, therefore, they had made up their minds not to fill the orders. This was clearly irrelevant, in view of the fact that the failure to fill the orders was not one of the grounds of contention left in the case by the abandonment of all but the third count. There was nothing left, except the alleged breach of agreement, to indemnify. That agreement to indemnify and its enforcement would be absolutely unaffected by any evidence as to whether the orders would be filled at a loss or not. As tending to explain the non-filling of the orders, it was too remote, unless the Court adopted the assumption that because the orders could not be filled at a profit there was a determination not to fill them, and that was an assumption against the appellant entirely unwarranted in fact or in law. The very contract of indemnity contemplated that they might not fill the orders. Therefore, anything tending to show why they did not fill an order was irrelevant.

(Case, pp. 64 and 65.)

(Case, p. 136.)

Later the Court limited the examination to statements by the company's officers, subsequent to

June 26th, implying that any such conversation prior to that date would be inadmissible. But the testimony above cited and objected to was allowed to stand.

(Case, p. 68, fol. 30.)

POINT VIII.

There was error in the admission of testimony showing the expenses respondent was put to in connection with a replevin suit to regain possession of his merchandise, and the cost of removal and storage of the goods (Reasons 4, 5 and 6).

Respondent was allowed to prove that he had begun a replevin suit for the return of merchandise stored in the warehouse of appellant, and that he had to pay for a bond in that suit, as well as for the removal of the goods and storage in another building.

(Case, p. 87.)

(Case, pp. 87 to 93.)

The contract of June 26th provided that the appellant would permit the merchandise to remain on the premises leased to it without charge to the respondent. Apparently the respondent's reasoning was that because the goods were left on the company's premises that it might use them in the filling of the orders, and because the company not having filled the orders the respondent had to remove them; therefore, the cost of getting them and removing them was the result of North's breach, and should be charged against it. The appellant showed, and it was not contradicted, that it had filed a disclaimer making it clear that the replevin suit had not been necessary for the respondent's recovery of his goods, and, anyway, the failure to fill the orders could in no way be regarded as a breach of the agreement to indemnify, which breach

was the only one left in issue after the abandonment by the respondent of all his other contentions. (Case, p. 136.)

Furthermore, there was nothing in the complaint to cover any such claim of damage. This was pointed out by the learned Trial Judge to the counsel for the respondent, and opportunity was given to amend the complaint in this particular. Later respondent's counsel announced that it did not desire to amend its complaint. Moreover, there could have been no amendment, and North could not claim damages of this character, because under the contract there was no obligation on the part of appellant to take the merchandise. It was a privilege and not an obligation. The language of the contract was that the party of the first part agreed to turn over to the company all such merchandise as was suitable for the filling of the orders, and Section 8 of the contract spoke of

(Case, pp. 88 and 89.)

(Case, p. 131, fol. 40.)

(Case, p. 29, fol. 10.)

> *"the right to take merchandise from the said North."* (Case, p. 31, fols. 10 to 20.)

Plainly, this testimony was outside of the issue, and was prejudicial to the appellant as helping the respondent give the jury the impression that the appellant had not only repudiated its obligations, but had harassed the respondent and wantonly put him to expense. This testimony was allowed to go in at great length. There are many pages of it in the record, and the jury must have deemed it important, and it must have resulted in harm to the appellant.

POINT IX.

There was error in the admission of evidence to show the overhead expenses of the appellant.

(Case, p. 300.)

(Case, p. 378.)

Adolph Schwartz, connected with the appellant, was cross-examined as to the overhead expense, and respondent called one Lena Fischer on the same point. The theory on which respondent offered this seems to have been that by proving the overhead expenses of the appellant to have been large the respondent would show that appellant could not fill the respondent's orders at a profit and for that reason had failed to fill them. This was far-fetched and remote, and open to the further objection that it rested on the assumption that because the filling of the orders would have to be at a loss appellant did not fill them, and further open to the objection already mentioned, that the failure to fill the orders was not one of the grounds of action which respondent was relying on. The only issue was upon the agreement of indemnity, and that issue could not be affected one way or the other by any testimony as to the overhead expense of the company, or as to whether they could or could not fill respondent's orders at a loss. Nevertheless, it was distinctly prejudicial to the appellant.

POINT X.

There was error in the admission of testimony to show that the orders filled by appellant between June 26th and September 1st, 1917, amounted to about two per cent. of all the orders.

Apparently this kind of testimony was admitted to prove bad faith on the part of the appellant as showing that from the beginning it did not intend to fill the orders. North admitted that eight months would not be an unreasonable period of time for the appellant to take to fill these orders. Eight months from June 26th would have carried to February 26th, 1918. The suit was started in September, 1917, so that respondent could only complain of the percentage of the orders that had been filled prior to the commencement of the suit. In order to make proof of that relevant it should have been accompanied by testimony showing something in manufacturing practice that would justify the conclusion that a larger percentage of the orders should have been filled within the time, and then only if the quantity shown by such manufacturing practice was so in excess of the amount performed by the appellant as to justify an inference of neglect or abandonment would the testimony in question have been admissible. There was no proof of such manufacturing practice. The company admittedly was going into a new business. Naturally, it would have to get acquainted with the new business, and could not be expected to carry on manufacture from the very first day of the contract, June 26th, at the same rate of accomplishment that a business would be able to do after it was thoroughly established and running. Furthermore, by the very terms of the contract the parties contemplated

that they were not to go ahead at once, but were to first endeavor to obtain cancellation or extensions of time or increase of price or reductions in the amount of the order, so as to lessen the burden. In the light of all this, it seems clear that proof that it had filled only 2 per cent. of the orders between June 26th and September 1st was irrelevant and inadmissible and calculated to prejudice the appellant in the eyes of the jury.

The rulings of the Court above objected to, covering the admission and rejection of testimony, justify, we think, this comment, that a mass of testimony was admitted that obviously could have no relevancy, except to issues that were abandoned or that were not raised by the pleadings, and that its cumulative effect was so prejudicial to the appellant and confusing to the jury that the jury should have been instructed to disregard it in their determination of the one issue that was left in the case, or not to let it prejudice them against the appellant in his decision of that issue.

POINT XI.

There was error in the charge to the jury on the subject of reasonable opportunity for inspection of merchandise.

(Case, pp. 228, 229, 234, 311.)

The proof was uncontradicted that the material which the appellant had the right to take from North for the filling of the orders in question was contained in more than 200 packing cases, piled one on the other and nailed up. The agreement contemplated that the appellant should only take such merchandise as was "suitable for the filling of the orders." It also provided that, although the goods

were to stay on the premises taken over by appellant, North was to have right of access for the purpose of turning the merchandise over to the appellant. Plainly, then, before appellant took any of the merchandise, it had the right to inspect, for the purpose of determining what was suitable, but could not have this inspection without North's consent. (Case, p. 31, Sect. 7.)

Appellant's third request to charge asked the Court to tell the jury that respondent

> "was obliged to tender the merchandise in such a way as to enable the purchaser to see that what was presented for its acceptance was in reality what it had bargained for, and that therefore a tender of merchandise in closed cases was not adequate." (Case, p. 418, fol. 10.)

The jury were told that the statute gave the company reasonable opportunity of examination; that North's contention was that the goods were in a place where appellant could have looked at them and examined them, and left it to the jury to determine whether reasonable opportunity for inspection had been given. In view of the situation of the goods above recited—that is, in nailed packing cases and in respondent's charge—the jury should have been told, as requested, that reasonable opportunity had not been given, and that the tender had not been adequate.

POINT XII.

(Case, p. 418.)

The learned Trial Judge should have charged the jury as requested in the appellant's fifth request to charge.

Respondent came to appellant's place of business and presented a bill for $29,875; demanded that or nothing. Appellant demanded an inventory or opportunity to inspect the goods and select what was suitable. Respondent refused this on the ground that it was too near the expiration of the time limited for the company to take the goods. This reason was specious and manifestly insincere, because the limit was upon the exercise of a privilege, not the performance of an obligation. As remarked before, appellant had the right to take the goods on or before September 1st, 1917. It was not bound to do so. But this demand by North upon the appellant has another aspect. The amount of the demand was admittedly excessive. North himself admitted that it should have been $29,743.81. By this excessive and, therefore, unlawful demand respondent was interposing an obstruction to appellant's taking the goods, and appellant was entitled to have the jury instructed, as requested, that this was an unlawful demand.

For the reasons above given the judgments of the Supreme Court should be reversed.

Respectfully submitted,

SAUL COHN,
Attorney of Appellant.

ALFRED F. SKINNER and
CARL A. FEICK,
Of Counsel.