

the defendant and make him pay to Mack, commissions in addition to his salary upon revenues that were never received.

Certainly these books were not shown to plaintiff at all nor is it shown that any books existed in which a revenue of \$400. a week was represented to be received from the theatre in question.

There were 505 seats in that theatre and there were representation at least twice a day. It would seem from writings in the record that the greater number of the seats were sold at 10 cents, but a comparatively small proportion, (about one-tenth), at 5 cents. 505 seats occupied twice would make \$101, which if counted at 10 cents would make \$101 a day, or over \$600 a week. But supposing one-half were reckoned at 5 cents and one-half at 10 cents, it would make an average of $7\frac{1}{2}$ cents, which upon 1010 would make \$70.10 a day or \$420 a week. These sums show that it was clear that the capacity of the building was sufficient to produce the revenue of \$400 which plaintiff alleges was represented. The attendance at the representations of course, would depend upon their popularity, which might either be improved or diminished by the plaintiff as compared with what they had been under the defendant.

The judge in the Court below made an unfavorable comment upon the evidence of the witness Mack and that comment appears to me to be justified by the fact that if the statement made by him was true, the fraud was his own.

Now when we add to these considerations the conduct of the plaintiff in the matter, and in the light of the fact that the receipts of such a business depend entirely upon the popularity of the representations, and these again de-