

It is conceded that the corporation is not a person to whom a license to practice optometry or ophthalmic dispensing can be issued under the laws of the State of New York.

The People claim that such acts of the defendant corporation, as hereinbefore stated, constitute the practice of optometry and ophthalmic dispensing.

The defendant started this particular business in 1914.

Prior to 1908, the business of providing appropriate optical aid to human vision was not regulated in any way. In that year the first statute requiring the licensing of optometrists was enacted (Public Health Law, art. XIII, L. 1908, ch. 460). In essence, it provided that every person desiring to commence or to continue the practice of optometry after January 1, 1909, except as hereinafter provided, shall pass an examination and secure a certificate to practice. Exempted therefrom were persons who neither practiced nor professed to practice optometry, and those who sold spectacles, eyeglasses or lenses either on prescription from physicians or from such duly qualified optometrists; or as merchandise from permanently located and established places of business.

Such act curtailed the seller to a certain extent. Thereafter in 1928, sales were further curtailed under section 1432-a of the Education Law (now § 7109 of said law) as follows:

"§ 7109. Sales of eyeglasses, spectacles and lenses at retail. It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, licensed under part one of this article, be in charge of and in personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. This shall not prohibit, however, a duly certified ophthalmic dispenser from selling, providing, furnishing or adapting spectacles, eyeglasses or lenses only on prescription of physicians or duly qualified optometrists or from duplicating lenses. The peddling of spectacles, eyeglasses or lenses or the practicing of optometry or ophthalmic dispensing from house to house or on the streets or highways, by any person also shall be unlawful, notwithstanding any law providing for licensing peddlers. This shall not prohibit, however, an optometrist or physician from attending, prescribing for and furnishing spectacles, eyeglasses or lenses, or a certified ophthalmic dispenser from furnishing or adapting spectacles, eyeglasses or lenses, to a person who by reason of illness, physical or mental infirmity is confined to his abode."

The plaintiff stresses the words "as merchandise" in said section and contends that the sales are limited to "ready made" articles for which an optometrist is required to be physically present at the counter or booth during the sale to determine whether such "ready made" articles are sufficient to meet the needs of the customers.

Defendant urges that under said section it has a right to employ optometrists for the limited purpose of examining the eyes of its customers in connection with the sale of eyeglasses at retail, and for this purpose to exercise as much of their skill as is necessary to determine the need for eyeglasses and the prescription therefor.

It claims that it has no so-called ready-made spectacles or eyeglasses on display, but merely frames and lenses. It then endeavors to show that the intent of the statute was to assure that a customer was properly fitted with correct spectacles or eyeglasses and that since an examination would ordinarily be necessary and a prescription result, the law was to apply to made-to-order eyeglasses. Otherwise, it asserts, the purpose of the law would not be accomplished.

In recommending the amendment to the statute, now section 7109, the Education Department stated that the law was aimed at that more or less unscrupulous group of dealers who sold at retail spectacles and eyeglasses which were selected by their customers without adequate advice and which articles it was found often impaired or ruined the vision of the individuals so purchasing them.

In interpreting section 7109, the United States Supreme Court in *Roschen v. Ward* (279 U.S. 337, 339), states: "When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary and, if he thinks it is necessary, to make it."