# INDEX.



TESTIMONY.

*Plaintiff's Witness.*



*Defendant's Witnesses:*

EXHIBITS.

*Plaintiff's Exhibit.*

**Notice of Appeal and Ground for Appeal to Court of Errors and Appeals.**

(Filed March 8, 1917.)

# New Jersey Supreme Court

| | |
|---|---|
| CHARLES STEINMEYER,<br>Plaintiff and Appellee,<br><br>against<br><br>PHENIX CHEESE COMPANY, a Corporation of the State of New York,<br>Defendant and Appellant. | Action at Law, Notice of Appeal and Grounds for Appeal. |

To Alfred A. Franck, Esq., Attorney and of Counsel with Plaintiff and Appellee.

Sir:

PLEASE TO TAKE NOTICE that the defendant and appellant, the Phenix Cheese Company, a corporation of the State of New York, appeals to the Court of Errors and Appeals in the Last Resort in all Cases in New Jersey from the whole and each and every part of the judgment entered in this cause on the following grounds, to wit:

FIRST.—Because the New Jersey Supreme Court decided that, having considered this cause and finding no error in the record of proceedings in the Second District Court of Jersey City, that the judgment of said Second District Court of Jersey City be affirmed whereas by the law of the land judgment ought to have been given setting aside the judgment of the Second District Court of Jersey

City, in this cause and rendering judgment in favor of the defendant appellant.

SECOND.—Because the New Jersey Supreme Court decided that the judgment of the Second District Court of Jersey City in this cause be affirmed with costs and that the record be remitted to the District Court of Hoboken.

THIRD.—Because the New Jersey Supreme Court decided that the judgment of the Second District Court of Jersey City for the sum of Thirty-seven Dollars and Thirteen Cents ($37.13) in favor of the plaintiff-appellee and against the defendant-appellant was without error whereas by the law of the land said judgment ought to have been given for the defendant-appellant against the plaintiff-appellee for the sum of One Hundred and Twelve Dollars and Eighty-seven Cents ($112.87).

FOURTH.—Because the New Jersey Supreme Court decided that the judgment of the Second District Court of Jersey City was without error in finding that the contract sued upon by the plaintiff-appellee provided for a penalty instead of for liquidated damages in case of a breach thereof.

FIFTH.—Because the New Jersey Supreme Court decided that there was no finding in the judgment of the Court below that the plaintiff had misappropriated the sum of Three Dollars and Two Cents ($3.02).

SIXTH.—Because the New Jersey Supreme Court assumed that the judgment of the Second District Court of Jersey City was based on a find-

ing of the Trial Judge that the plaintiff-appellee had not embezzled or misappropriated, contrary to his duty, funds of the defendant-appellant to the extent of Three Dollars and Two Cents ($3.02), whereas the contrary appears to be the fact.

SEVENTH.—Because the New Jersey Supreme Court decided that there was no error in the judgment of the Second District Court of Jersey City that the contract sued upon was one providing for a penalty and not for liquidated damages, whereas by the law of the land the contrary appears.

EIGHTH.—Because the New Jersey Supreme Court decided that there was no error in the judgment of the Second District Court, that there had been no breach upon the part of the plaintiff-appellee of the contract sued upon by him, whereas the contrary appears by the record of the proceedings in the Court below.

NINTH.—Because the New Jersey Supreme Court decided that the evidence upon the trial of this cause in the Second District Court of Jersey City was in conflict as to embezzlement or misappropriation of funds of the defendant-appellant by the plaintiff-appellee, whereas the evidence of such embezzlement or misappropriation is without legal contradiction.

TENTH.—Because the New Jersey Supreme Court decided that the evidence upon the trial of this cause in the Second District Court of Jersey City was in conflict as to the falsifying of accounts by the plaintiff-appellee whereby cash transactions were returned by him as charge transactions, whereas the evidence is undisputable as to the contrary.

ELEVENTH.—Because the New Jersey Supreme Court decided that the evidence upon the trial of this cause in the Second District Court of Jersey City was in conflict as to the unauthorized giving of credit to customers by the plaintiff-appellee, whereas the evidence is undisputable as to the contrary.

TWELFTH.—Because the New Jersey Supreme Court decided that the judgment of the Second District Court of Jersey City in this cause was based on sufficient evidence, whereas according to the law of the land there is no evidence to support the judgment.

THIRTEENTH.—Because the New Jersey Supreme Court decided that the contract sued upon was illegal and unenforcible by the defendant-appellant as being in restraint of trade in respect to its provisions as to the plaintiff-appellee not competing with the defendant-appellant for a period of one year from the time of his leaving its employ.

Dated, Montclair, New Jersey, January 17, 1917.

Yours, etc.,

FRANK R. PENTLARGE,
Attorney for Defendant-Appellant,
55 Liberty Street,
New York City,
and 67 Union Street,
Montclair,
N. J.

## Opinion of Supreme Court on Appeal From District Court.

(Filed February 28, 1916.)

NEW JERSEY SUPREME COURT.

Nov. Term, 1915.

CHARLES STEINMEYER,
Plaintiff,

vs.

PHENIX CHEESE COMPANY, a Corporation of the State of New York,
Defendant.

Submitted Dec. 4, 1915; decided February 28, 1916.

Appeal from District Court.

Before Justices Parker, Minturn and Kalisch.

For the appellee, CHARLES H. BURTIS.
For the appellant, FRANK R. PENTLARGE.

PER CURIAM:

This is an appeal from the District Court. There are fifteen determinations in the court below which appellant claims are erroneous, but the sum and substance of them seems to be that the District Court should have decided the other way. The Judge found for the plaintiff.

The facts roughly stated are that plaintiff entered the employ of the defendant as soliciting and selling driver; his business being to peddle and deliver their goods and collect and turn in the proceeds of sales. He also seems to have had authority to give credit to a limited extent. He executed an agreement to serve them faithfully and deposited $150 as security for his performance of the agreement, which contained a stipulation that in case of violation of the agreement, the money should be retained by the company and would become their absolute property; it being agreed that the company's damage for violation would at least amount to said sum. After the termination of his service the company returned to him $112.35; and it is now claimed this was before the discovery of various derelictions on plaintiff's part. He brought suit for the difference between this $150 and which was paid and the court gave him judgment for the full amount of his claim, less some $3.02 which it called discrepancies. It is claimed that the trial court held that the provision of the contract for the retention of the money amounted to a penalty and not liquidated damages. We find no such ruling in the case. There is no written memorandum of the trial judge, except the figures on which the judgment is made up. Assuming that the agreement is for liquidated damages, this fact alone will not lead to a reversal because the evidence is in conflict as to a breach and the Appellate Court will assume a finding of fact that will support the judgment below.

We have examined carefully the various claims made by the appellant, viz: the claim of embezzlement, of cash sales as charge items, of unauthorized credit to customers, and of alleged breach of contract not to engage in business as a servant

or employe of others. With respect to the first three, we find that in each case the evidence was fairly in conflict, and consequently that a finding of the trial court in favor of the plaintiff on such disputed sets of facts is supportable, and therefore cannot be reversed here.

With respect to the last, the alleged breach of contract, not to engage in business as a servant or employe of others, we think that this requirement was entirely too broad, and therefore illegal as an unlawful restraint of trade. If enforced it would prevent the plaintiff from working at any employment. Apart from this the evidence shows that the defendant went out of business, sold out its rights, and that one of the officers of the defendant told the plaintiff to go and work for the purchaser of the business.

We find no error of law that calls for a reversal, and the judgment below will therefore be affirmed.

## Rule of Affirmance in the Supreme Court.

(Filed March 14, 1916.)

NEW JERSEY SUPREME COURT.

| | |
|---|---|
| CHARLES STEINMEYER, Plaintiff-Respondent, vs. PHENIX CHEESE COMPANY, a Corporation of the State of New York, Defendant-Appellant. | On Appeal. Order affirming Judgment. |

This cause having been duly submitted at the November Term of this Court by Charles H. Burtis, of counsel for plaintiff-respondent and Frank R. Pentlarge, of counsel for defendant-appellant, and the Court having considered the same and finding no error in the record or proceedings in the District Court,

It is thereupon Ordered and Adjudged that the judgment of the District Court of Hoboken removed by the appeal in this cause be affirmed with costs, and that the record be remitted to the District Court of Hoboken to be proceeded with in accordance with the judgment and the practice of said Court.

Entered March 14, 1916.

On motion of
CHARLES H. BURTIS,
Of Counsel with Plaintiff-Respondent.

A true copy,
WM. C. GEBHARDT,
Clerk.

## State of Demand.

(Filed December 3, 1914.)

SECOND DISTRICT COURT OF JERSEY CITY, N. J.

Before—Hon. JOHN A. BLAIR, Judge.

| | |
|---|---|
| CHARLES STEINMEYER, Plaintiff, vs. PHENIX CHEESE COMPANY, a Corporation of the State of New York. | On Contract, State of Demand. |

The plaintiff demands of the defendant the sum of One hundred dollars, for that, whereas, heretofore, to wit:

That on or about the fourteenth day of October, nineteen hundred and eleven, the plaintiff was in the employ of the defendant, and that the plaintiff did deposit with the defendant the sum of One hundred and fifty dollars in money as security.

That the said plaintiff is now out of the employ of said defendant company, and that said defendant company did return unto said plaintiff the sum of Ninety-eight dollars and ninety-five cents ($98.95), part of said security; and that there is still due and owing unto the plaintiff the sum of Fifty-one dollars and five cents ($51.05), together with the interest thereon.

That the plaintiff has made demand on the defendant for the return of said deposit and interest, and said defendant has refused to pay the

same, and that no part of the same has been paid.

Judgment will be asked for the sum of Fifty-five dollars and fourteen cents, together with the costs of this action.

Dated, Jersey City, N. J.,
this 24th day of July, 1914.

ALFRED A. FRANCK,
Attorney for Plaintiff.

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(Upon motion State of Demand amended so as to refer to copy of contract annexed as forming a part thereof.)

Contract annexed.

New York,

THIS MEMORANDUM CERTIFIES AS FOLLOWS:

That Charles Steinmeyer
of 156 Leonard St., Jersey City, N. J.

as condition of his employment by the Phenix Cheese Company, has agreed faithfully and honestly to perform his duties as such employee, and that he will not, within the period of one year after his employment by said Company, shall, for whatever cause cease, directly or indirectly, engage in business in the City of New York, or at any point within a radius of ten miles from said City, in competition with said company either upon his account or as a servant or employee of others.

That the said Phenix Cheese Company, have this

day received from Charles Steinmeyer the sum of One Hundred and Fifty Dollars, to be held by said Company, as security, and to be returned, with interest at six per cent. per annum from date thereof, at the expiration of three months after the termination of the employment of said Charles Steinmeyer by said Company, provided he shall have carefully, honestly and faithfully performed his duties and shall have in all things honestly and truly accounted for all moneys merchandise and property that may have been entrusted to his care, or which may have come into his possession, or to which he may have access as an employee of said Company and shall have so conducted himself as such employee that said Company or their customers shall have suffered no damage by reason of dishonesty, negligence or other misconduct on his part and provided also that the said Charles Steinmeyer shall up to that time, have abstained from entering into competition with said Company as hereinbefore agreed and

THAT, in case of violation of any of the above conditions on the part of the said Charles Steinmeyer the said sum of One hundred Fifty dollars shall be retained by the said Company and become their absolute property; it being hereby agreed that the damage which the said Company will sustain by any such violation, will at least amount to said sum.

PHENIX CHEESE COMPANY,
Byron E. Brooks,
Assistant Manager.

IT IS DISTINCTLY UNDERSTOOD that the sooner the return of said deposit shall not relieve Charles Steinmeyer from his above agreement to abstain from entering into competition with said Company until after the expiration of one year from the termination of his employment.

I have read the above, and agree to same.

CHARLES STEINMEYER (L. S.)

Witness:
William Schmedes.

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## Notice of Appearance of Defendant and Intention to Defend.

(Filed, December 23, 1914.)

SECOND DISTRICT COURT OF JERSEY CITY.

CHARLES STEINMEYER,
Plaintiff,

vs.

PHENIX CHEESE COMPANY, a Corporation of the State of New York,
Defendant.

Sirs:

PLEASE TO TAKE NOTICE that the defendant Phenix Cheese Company above named hereby

appears in the above entitled action, and hereby notifies you of its intention to defend the same, and the undersigned hereby notifies you that he has been retained by the defendant as its attorney in the above entitled action, and he hereby demands service of all papers herein upon him at his office number 233 Broadway, New York City, Borough of Manhattan.

Dated, New York, December 23rd, 1914.

FRANK R. PENTLARGE,
Attorney for Defendant,
233 Broadway,
New York City,
Borough of Manhattan.

To

CLERK OF THE SECOND DISTRICT COURT
OF JERSEY CITY.

ALFRED A. FRANCK, Esq.,
Attorney for Plaintiff,
1130 Summit Ave.,
Jersey City, N. J.

## Recoupment of Damages.

(Filed January 6, 1915.)

SECOND DISTRICT COURT OF JERSEY CITY, N. J.

CHARLES STEINMEYER,
Plaintiff,
against
PHENIX CHEESE COMPANY, a Corporation of the State of New York.

PLEASE TO TAKE NOTICE that the defendant herein hereby gives notice that at the trial of the above stated case, it will seek to recoup damages from the plaintiff, because of the plaintiff's failure to carry out the contract more fully set forth in the State of Demand, in the following particulars, to wit:

That the said plaintiff utterly failed to carefully, honestly and faithfully perform his duties as an employee of the defendant, as contemplated by the said contract, and likewise utterly failed to honestly and truly account for all monies, merchandise and property that was entrusted to his care, or which came into his possession, or to which he had access as such employee of said defendant, and likewise, utterly failed to conduct himself as such employee in such a manner that said defendant or its customers should suffer no damages by reason of his dishonesty, negligence or other misconduct, but, on the contrary, actually did so conduct himself as such employee that said defendant and its

customers did suffer damage by reason of his dishonesty, negligence and other misconduct, and likewise, the said plaintiff did directly and indirectly, within the period of one year after his employment by the defendant herein, engage in business within a radius of ten miles of the City of New York, in competition with the defendant, contrary to the provisions of the said contract, all to defendant's great damage, the exact amount whereof defendant is unable to estimate.

WHEREFORE defendant elects to limit itself to the amount of one hundred and fifty ($150) Dollars as damages being the liquidated damages provided for in the said contract sued upon by the plaintiff, the defendant hereby alleging that said damage equals at least said amount.

Dated, New York, January 2nd, 1915.

FRANK R. PENTLARGE,
Attorney for Defendant,
151 Hollywood Avenue,
East Orange, N. J.

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New York City.
233 Broadway,

## Notice to Produce.

(Filed February 26, 1914.)

SECOND DISTRICT COURT OF JERSEY CITY.

CHARLES STEINMEYER,
Plaintiff,

against

PHENIX CHEESE COMPANY,
Defendant.

SIR, PLEASE TO TAKE NOTICE, that you are hereby requested to produce upon the trial of the above entitled action all books of account, ledgers, route books, cash slips, report slips, used by the plaintiff above named while in the employ of the defendant herein and likewise all ledgers, books of account and route books and records used by the above named plaintiff from October 1, 1912, to January 1, 1913, and likewise all letters from the defendant herein to the plaintiff herein and particularly a certain letter to said plaintiff dated December 5, 1912.

YOU ARE HEREBY NOTIFIED that upon your failure to produce the records and writings aforesaid secondary evidence as to their contents will be offered.

Yours, etc.,

FRANK R. PENTLARGE,
Attorney for Defendant,
233 Broadway,
New York, N. Y.,
151 Hollywood Avenue,
East Orange, N. J.

To

ALFRED A. FRANCK, Esq.,
Attorney for Plaintiff.

## Memorandum of Trial Judge Upon Entering of Judgment.

(Filed March 5, 1915.)

| | | |
|---|---|---|
| Paid on account | $112.35 | |
| | 38.65 | |
| Interest from January 9, 1913, | 2.50 | 10 |
| | 41.15 | |
| Discrepancies | 3.02 | |
| | $37.13 | |

## Notice of Appeal to Supreme Court.

(Filed March 10, 1915.)

NEW JERSEY SUPREME COURT. 20

| | |
|---|---|
| CHARLES STEINMEYER, Plaintiff and Appellee, against PHENIX CHEESE COMPANY, a Corporation of the State of New York, Defendant and Appellant. | On Contract. On Appeal from Second District Court of Jersey City. |

30

To

ALBERT A. FRANCK, Esq.,
Attorney for Charles Steinmeyer,
Plaintiff and Appellee.

RICHARD MCAGHON, Esq.,
Clerk of the Second District
Court of Jersey City.

Sirs:

PLEASE TO TAKE NOTICE that the defendant, the Phenix Cheese Company, a corporation of 40

the State of New York, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of Jersey City and entered in the above stated action, on the 5th day of March 1915, against the defendant and in favor of the plaintiff, for the sum of Thirty seven & 13/100 (37.13) Dollars damages and Six & 70/100 ($6.70) Dollars costs.

FRANK R. PENTLARGE,
Attorney for Defendant-Appellant,
151 Hollywood Avenue,
East Orange,
New Jersey,
and
233 Broadway,
New York City,
New York.

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## District Court Clerk's Minutes.

SECOND DISTRICT COURT OF JERSEY CITY.

Before—JOHN A. BLAIR, Esq., Judge.

| | |
|---|---|
| CHARLES STEINMEYER,<br>vs.<br>PHENIX CHEESE COMPANY. | In Attachment. |

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

ALFRED A. FRANCK, Plaintiff's Attorney.

FRANK PENTLARGE, Defendant's Attorney.

| | |
|---|---|
| Taking Affidavit | $1.50 |
| Writ, Service | 1.85 |
| Trial fee | 1.50 |
| Att'y fee | 1.85 |
| | $6.70 |
| Order (four) | $4.00 |

July 29th A. D. 1914, an affidavit was filed by the plaintiff alleging that Phenix Cheese Company a Corporation of the State of New York is not to the knowledge or belief of the deponent, resident of this State of New Jersey at the present time, and that the said Phenix Cheese Company a Corporation of the State of New York owes deponent, the sum of fifty-five dollars and fourteen cents, as nearly as this deponent can specify.

July 29th A. D. 1914, a Writ of attachment was issued to Andrew J. Mellor, Sergeant at Arms.

December 1st A. D. 1914, said Sergeant at Arms returned said writ as follows, viz:

By virtue of the within writ, I did on the 1st day of December A. D. 1914, in the presence of a credible person attach the property and estate of the defendant in the annexed inventory mentioned and described.

Witness, my hand, this First day of December A. D., 1914.

ANDREW J. MELLOR,
Sergeant at Arms.

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Notice of Appearance filed by defendant.

Plaintiff's demand was filed December 3rd, 1914.

Recoupment of damages filed January 6th, 1915, by defendant.

December 23rd, 1914, this case was called for trial and by adjournments continued to February 26th, 1915.

State of demand amended so that contract be annexed.

February 26th, 1915, plaintiff appeared and the defendant appeared and the case proceeded as follows:

On the part of the plaintiff Charles Steinmeyer was sworn and testified.

On the part of the defendant William Schmedes, Charles Reinhard, Charles Steinmeyer and Bryan E. Brooks were sworn and testified.

George A. Ingersoll was sworn as Stenographer.

(Decision reserved.)

Whereupon it is on this 5th day of March, 1915, by this Court considered and Adjudged that said Charles Steinmeyer plaintiff recover against said Phenix Cheese Company a Corporation of the State of New York, the sum of thirty-seven dollars damages and six dollars and seventy cents costs of suit.

March 10th, 1915, Notice of Appeal filed.

March 10th, 1915, the sum of eighty-eight dollars and eight-three cents paid into court in lieu of bond.

March 15, 1915, order staying extension five days.

March 17th, 1915, order extending time to make up state of case filed by defendant's Attorney.

April 22nd, 1915, order extending time to make up state of case filed this day by defendant's attorney.

I do hereby certify, that the foregoing statement is a correct copy of the record in the above stated case.

RICHARD McAGNON,
Clerk.

## Specifications on Appeal From District Court to Supreme Court.

(Filed March 24, 1915.)

NEW JERSEY SUPREME COURT.

| | |
|---|---|
| CHARLES STEINMEYER, Plaintiff and Appellee, against PHENIX CHEESE COMPANY, a Corporation of the State of New York, Defendant and Appellant. | Specifications On Contract. On Appeal from the Second District Court of Jersey City. |

Specifications of determinations of the Second District Court of Jersey City in this matter, with respect to which said appellant is dissatisfied in the point of law:

(1) The Court erred in ruling and determining that upon the testimony in the case, the written agreement sued upon by the plaintiff-appellee (Exhibit D3) was one providing for a penalty and not for liquidated damages.

(2) The Court erred in ruling and determining that upon the testimony of the case that the defendant could only recoup upon the trial to the extent of damages actually proven.

(3) The Court erred in ruling and determining that upon the testimony in the case, showing violations of the contract sued upon, the plaintiff-appellee was still entitled to a recovery.

(4) The Court erred in ruling and determining that upon the testimony in the case, that losses sustained by the defendant-appellant, by reason of credit extended by the plaintiff-appellee, contrary to instructions, was no basis for a claim for damages by way of recoupment by the said defendant-appellant.

(5) The Court erred in ruling and determining that the defendant-appellant could not recoup the amount of damages sustained by it by reason of over-credit extended by the plaintiff-appellee, contrary to instructions, as shown in the testimony.

(6) The Court erred in ruling and determining that the testimony in the case was not sufficient to show damage by the defendant-appellant in excess of plaintiff-appellee's claim.

(7) The Court erred in ruling and determining that the failure of the plaintiff-appellee to account for monies received by him during the employment by the defendant-appellant, as shown in the testimony, was not sufficient to preclude from recovering upon the contract sued upon.

(8) The Court erred in ruling and determining upon the testimony in the case that the defendant-appellant was not entitled to a verdict in its favor by reason of the facts as shown in the testimony that the plaintiff-appellee had entered into com-

petition with the defendant-appellant contrary to the provisions of the contract sued upon.

(9) The Court erred in rendering a verdict in favor of the plaintiff-appellee because the testimony showed that the plaintiff-appellee had broken the covenants of the agreement upon which he sued.

(10) The Court erred in rendering a verdict in favor of the plaintiff-appellee because his testimony showed that the plaintiff-appellee had failed to return collections made by him while employed by defendant-appellant contrary to the provisions of the contract sued upon.

(11) The Court erred in rendering a verdict in favor of the plaintiff-appellee because the testimony showed the plaintiff caused the defendant-appellant material damage by reason of extending credit contrary to instructions.

(12) The Court erred in rendering a verdict in favor of the plaintiff-appellee because the testimony showed that the plaintiff-appellee contrary to the provisions of the contract sued upon, entered into competition with the defendant-appellant within the prohibition set forth in said contract.

(13) The Court erred in rendering a verdict in favor of the plaintiff-appellee because the testimony showed that the defendant-appellant was entitled to a verdict in its favor upon the recoupment set forth to the amount of the liquidated damages set forth in the contract sued upon by the plaintiff-appellee.

(14) The Court erred in rendering a verdict in favor of the plaintiff-appellee because the testimony showed that the defendant-appellant was entitled to a verdict in its favor to at least the amount of damages sustained by it by reason of the extension of credit contrary to instructions as shown in the testimony.

(15) The Court erred in giving judgment in favor of the plaintiff-appellee because, according to the evidence, judgment should have been in favor of the defendant-appellant.

FRANK R. PENTLARGE,
Attorney for Defendant-Appellant,
233 Broadway,
New York City.
and
151 Hollywood Avenue,
East Orange,
New Jersey.

## Testimony on Trial in District Court.

SECOND DISTRICT COURT OF JERSEY CITY, N. J.

CHARLES STEINMEYER,
Plaintiff,

against

PHENIX CHEESE COMPANY, a Corporation of the State of New York,
Defendant.

Jersey City, N. J., February 26, 1915.

Before—Hon. JOHN A. BLAIR, Judge.

APPEARANCES:

For the plaintiff, CHARLES H. BURTIS, Esq., ALFRED A. FRANCK, Esq.
For the defendant, FRANK R. PENTLARGE, Esq.

CHARLES STEINMEYER, having been duly sworn, testified as follows:

Direct Examination by Mr. Burtis:

Q. Where do you live? A. 156 Leonard Street, Jersey City Heights, New Jersey.

Q. Do you know the Phenix Cheese Company? A. I do.

Q. Were you formerly in the employ of the Phenix Cheese Company? A. I was for one year.

Q. When did you enter the employ of the Phenix Cheese Company? A. In July, 1913.

Q. July, 1913? A. Yes.

Q. And when did you leave the employ of the Phenix Cheese Company? A. Well—the business—

Q. No—just answer my question—when did you leave the employ of the Phenix Cheese Company? A. In July, 1913.

Q. In July, 1913? A. Yes.

Q. So you were working there about two months? A. No, I had been working for one year.

Q. A little over a year? A. A little over a year.

Q. And when you went to work for the Phenix Cheese Company, did you deposit any money? A. I did.

Q. How much? A. $150.00.

Q. When you left the employ of the Phenix Cheese Company, did you demand back that $150? A. I demanded the money back, yes.

Q. Did they pay you any part of the $150.00? A. Yes.

Q. How much did they pay you? A. I received in January, 1913, $98.95.

Q. Leaving still in their possession $51.05, is that right? A. No, I received afterwards $13.39.

Q. $13.39 afterwards? A. Yes.

Q. Then there is still $47.66 of your money in the possession of the Phenix Cheese Company? A. Yes.

Q. And have you ever received any part of that $47.66? A. No.

Q. And have you demanded the return of that? A. I did.

Q. And they have refused, have they? A. Up to so far, yes.

Mr. Burtis: That's all.

Cross Examination by Mr. Pentlarge:

Q. Mr. Steinmeyer, did I understand you to say that you went into the employ of the Phenix Cheese Company— A. 1911.

Q. 1911? A. Yes.

Q. You wish to correct your former statement as to 1913? A. 1911, excuse me.

Q. Mr. Steinmeyer, you said that there was $150.00 deposited by you? A. Yes, sir.

Q. And you received one check for $98.95 and and for $13.39? A. I did.

Q. That is all you received from them? A. That's all.

Q. Mr. Steinmeyer, I show you this signature (showing witness check), is that your signature? A. That is my signature.

Q. Will you look at that please (indicating)? Did you receive that from the Phenix Cheese Company? A. How much is this, $10.00?

Q. $10.00, yes, dated March 1, 1913. A. It is such a length of time—

Q. Did you or did you not receive that—yes or no? A. I did.

Q. You did? A. It is my signature.

Mr. Pentlarge: I offer this in evidence and ask that it be marked.

Received in evidence and marked D-1.

Q. Mr. Steinmeyer, is this your signature? A. That is my signature; yes, sir.

Q. Will you look at it—at the face of that check—did you or did you not receive that amount from the Phenix Cheese Company? A. That is my signature, undoubtedly.

Q. Did you receive it at the time of the date of

the check? A. Well, it is marked here 1913, March 27.

Mr. Pentlarge: I offer this in evidence and ask that it be marked.

Received in evidence and marked D-2, check $3.75.

Q. Mr. Steinmeyer, will you kindly look at this agreement and see whether your signature is attached thereto? A. That is my signature, yes, sir.

Q. Do you wish to look at it again? A. No, that is my signature.

Received in evidence and marked D-3.

By Mr. Pentlarge:

Q. Mr. Steinmeyer, is that the contract on which you are suing (showing witness paper)? A. What?

Q. Yes or no.

The Court: Just look at it, if you have any doubt about it, and see whether it is.

The Witness: I didn't sign no contract to any effect; I only gave security.

By Mr. Pentlarge:

Q. Mr. Steinmeyer, will you please look at this Exhibit D-3. Is that the contract upon which you are suing? A. Yes, sir.

Q. It is? A. It is.

Q. Mr. Steinmeyer, what were your duties while with the Phenix Cheese Company? A. As driver and salesman.

Q. Mr. Steinmeyer, will you state your duties while in the employ of the Phenix Cheese Company? A. I did, to the best of my ability.

Q. Mr. Steinmeyer, will you state your duties while in the employ of the Phenix Cheese Company—state in detail exactly what you did as driver and salesman? A. Well, selling goods for this firm.

Q. Did you use a horse and wagon? A. I did.

Q. And did you go out on the road? A. On the road.

Q. And found customers? A. I did.

Q. And sold to those customers? A. Yes, sir.

Q. Where were your routes? A. In the Greenville Section, Hoboken, Union Hill and West New York.

Q. Now, when you sold goods of the Phenix Cheese Company to a customer, will you describe the operation, so far as keeping of accounts was concerned; that is, for the purpose of making it plain, let us first take a cash sale; now, when you made a cash sale will you describe the operation? A. I had a book with a blue-print of every sale, cash sale; the copy was left in the store and the second copy went to the office.

By Mr. Pentlarge:

Q. Yes? When the customer made the purchase you wrote the article— A. The articles down, yes, sir.

Q. And the amount? A. And the amount.

Q. And then when there was a cash sale, did you sign that slip (indicating)? A. I put my signature to it, my name, yes, sir.

Q. Did the customer sign the slip? A. No, not cash sale.

Q. What color was the slip you left with the customer? A. Yellow.

Q. You left a yellow slip with the customer? A. No, the white; the yellow went to the office.

Q. You left the white slip with the customer? A. Yes.

Q. And the yellow was a carbon of the white slip? A. Yes, sir.

Q. And you wrote them both at the same time? A. Yes, sir.

Q. So they were duplicates? A. Duplicates, yes, sir.

Q. So that the signature of the parties—your signature appeared on both slips? A. On both slips.

Q. One as a carbon? A. Yes.

Q. And one as the pencil copy? A. Yes.

Q. I show you this slip, Mr. Steinmeyer; is that your signature? A. That's right.

Q. Is that one of these white slips you have just referred to? A. Yes, sir; this seems to be the copy.

Q. You stated that you gave the customer the white slip? A. Yes, sir.

Q. Is that one of those white slips? A. Yes, sir.

Q. That shows a cash sale? A. That was a cash sale, $3.75.

Mr. Pentlarge: I offer this slip in evidence for the purpose of showing the system used by the defendant company.

Received in evidence for the purpose offered and marked D-4.

By Mr. Pentlarge:

Q. Mr. Steinmeyer, will you tell me what you did with the duplicate slip when you made a cash

sale—when you returned to the office of the Phenix Cheese Company? A. Yes. First I took and copied the amount—the white slips and the original slips which I received—came back—they went into the office—

Q. Yes— A. For close examination.

Q. That was to make up the record, the record of your sales from these slips? A. Yes, sir.

Q. Those you returned were the records of your sales? A. Record of daily sales.

Q. And you held yourself accountable according to the slips that you returned? A. For that day's sales, yes; in case there would be any mistake they told me the next day.

Q. And you turned them in each night? A. Every night.

Q. And that was your custom? A. Yes, sir.

Q. Now, Mr. Steinmeyer, we have ascertained from you the procedure in a cash sale; will, you now explain the operation for a charge sale? A. The charge sale was another of the same system; but it was a special duplicate used for that purpose and a copy went also to the office and I receipted my bills right in the business places and they kept the receipt.

Q. Did the customer sign the charge slip as a record? A. They did.

Q. Then the slips—you used the same form of slips, but there was a difference between a cash sale and a charge sale? So that in a cash sale you signed the slip and in the charge sale the customer signed the slip, is that right? A. That's right.

Q. And then you returned to the office the yellow slip, which is a duplicate, with the customer's name thereon and that was a case of a charge sale? A. All charge sales, yes, sir.

Q. And they were returned each evening with those— A. Yes, sir.

Q. Mr. Steinmeyer, is that your signature (showing witness paper)? A. Yes.

Q. Does that indicate—does that slip indicate a cash or a charge sale—you have signed it? A. I did sign it; at first off it was a charge sale and afterwards it was paid, because this party what received it—what receipted it were unfit to write their name and they made an "X" and about a week later it was paid.

Mr. Pentlarge: I ask that this be marked in evidence.

Exhibit marked Exhibit No. 5 for indentification.

By Mr. Pentlarge:

Q. Mr. Steinmeyer, are you quite sure that you understood the question—referring to Plaintiff's Exhibit No. 5, marked for identification—who was the customer—will you look at the same, please? A. I did.

Q. Who was the customer? A. That customer?

Q. Yes. A. That was a customer by the name of Notolino.

Q. Mr. Notolino? A. Yes.

Q. One of your customers while you were working for the Phenix Cheese Company? A. Yes; at those times.

By Mr. Pentlarge:

Q. Are you quite sure, Mr. Steinmeyer, that Mr. Notolino could not sign his name? A. No, he was not able to sign his name.

Q. He could not sign his name? A. No.

Mr. Steinmeyer, is that your signature (indicating on paper)? A. That is the same.

Offered in evidence and marked Exhibit D-6 for identification.

By Mr. Pentlarge:

Q. Is that you signature, Mr. Steinmeyer (indicating)? A. Yes.

By Mr. Pentlarge:

Q. Mr. Steinmeyer, is that your signature? A. Yes, sir.

Mr. Pentlarge: I ask that this be marked in the same manner.

Received and marked D-7 for identification.

Q. Mr. Steinmeyer, is that your signature (showing witness paper)? A. Yes, sir.

Mr. Pentlarge: I ask that it be marked.

Received and marked D-8 for identification.

Q. Mr. Steinmeyer, is that your signature (showing witness paper)? A. Yes.

Mr. Pentlarge: I ask that it be marked.

Received and marked D-9 for identification.

Q. Mr. Steinmeyer, is that your signature? A. It is.

Mr. Pentlarge: I ask that it be marked.

Received and marked D-10 for identification.

Q. Mr. Steinmeyer, I show you this slip; is that your signature (showing witness paper)? A. That is a charge, it was—

Q. No, no, answer my question—is that your signature? A. It is.

Mr. Pentlarge: I ask that this be marked.

Received and marked D-11 for identification.

Q. Mr. Steinmeyer, this is a customer whose name was Bosco, was it not? A. Yes, sir.

Q. This is the yellow slip you returned to the to the Phenix Cheese Company? A. Yes, sir.

Q. And this is the form you used for the yellow slips—duplicate yellow slips? A. At that time; yes, sir.

Received in evidence and marked D-12 as an exhibit to show the nature of the slips and for no other purpose.

Mr. Pentlarge: That will be all on the cross examination.

Re-direct Examination by Mr. Burtis:

Q. After you left the employ of the Phenix Cheese Company, was the first payment they made you $98.95? A. Yes, sir.

Mr. Burtis: Will your Honor let me have the two checks that were offered in evidence?

The Court then handed the checks asked for to Mr. Burtis (D-1, D-2).

By Mr. Burtis:

Q. Do you remember when you received this $98.95? A. It was in January, I believe, on the 15th day of January, 1913.

Q. And that was in the form of a check, was it? A. Oh, yes; it was a check.

Q. Now, in addition to that $98.00— A. Yes.

Q. You received these two checks here (indicating)? A. Yes.

Mr. Burtis: I might refer to them as exhibit numbers, to keep the record straight D-1 and D-2.

The Witness: Yes.

By Mr. Burtis:

Q. And do those three checks, the check for $98.95 and the Exhibit D-1 for $10.00 and Exhibit D-2 for $3.75, represent all the money that has been paid back to you by the Phenix Cheese Company? A. So it is.

Q. So when you said in answer to a question of mine on the direct examination that you had received $13.39, you were referring to these two checks representing an aggregate of $13.75? A. Yes.

Q. You were mistaken in the number of pennies? A. The exact amount.

Q. 35 instead of 34 or 39? A. Yes.

By Mr. Burtis:

Q. From the time you entered defendant's employ and until you left its employ did you account for

all the money, merchandise and property of the Phenix Cheese Company that came into your possession while in their employ? A. Yes, sir.

Q. Do you know of any loss or damage which the Phenix Cheese Company sustained while you were in its employ by reason of any dishonest act or negligence or other misconduct on your part? A. No.

Q. Did any of the officers or the officials of the Phenix Cheese Company ever charge you while you were in their employ with any dishonesty or negligence? A. No.

Q. Or did they charge you since you left their employ of being dishonest or negligent? A. No.

Q. Has there ever been any charge made by any official of the Phenix Cheese Company since you have left its employ that you had not fulfilled the terms of this contract? A. No.

Q. I show you a paper, Mr. Steinmeyer, and ask you if this is a letter you received from the Phenix Cheese Company? A. Yes.

Q. And enclosed in that letter was a check for $98.95? A. I couldn't say.

By Mr. Pentlarge:

Q. Mr. Steinmeyer, will you refer to Plaintiff's Exhibit No. 1? I will read to you from Plaintiff's Exhibit No. 1 (reading as follows):

> "We are putting forth every effort to collect these accounts, and if you can give us any suggestions, or render any assistance it would be highly appreciated. Some of these are considerable in the aggregate, and we think within a short time we will be able to secure the remainder of those outstanding, etc."

By Mr. Pentlarge:

Q. Did you receive any communications from me in regard to these claims? A. No.

Q. You never received any communication from me in regard to these claims or any of them A. No.

Q. Please look them over, Mr. Steinmeyer? A. These are bills.

Q. Answer my question, please? A. Yes.

Q. Did you or did not? A. I did.

Q. I show you this letter with a signature; will you say whether that was your letter or not (witness examines paper)? A. Yes.

Q. That is your signature? A. Yes, sir.

Q. You wrote that letter? A. Yes. I signed it.

Mr. Pentlarge then read the letter aloud.

Offered in evidence without objection and marked D-13.

Mr. Pentlarge: I ask and now call upon the plaintiff's attorney to produce all books of account, ledgers, route books, cash slips, report slips used by the plaintiff—used by the plaintiff Steinmeyer while in the employ of the defendant, particularly a certain letter from said defendant to plaintiff, dated December 5, 1912—will you kindly produce those?

Mr. Burtis: We haven't any of those now.

Plaintiff rests.

WILLIAM SCHMEDES, having been duly sworn, testified as follows:

Direct Examination by Mr. Pentlarge:

Q. Mr. Schmedes, by whom are you employed? A. At the present time?

Q. Yes. A. William Buechse & Son Company.

Q. By whom were you employed between July 1, 1911 and October 1, 1912? A. The Phenix Cheese Company.

Q. In what capacity? A. As manager for a branch.

Q. What branch? A. The Jersey City branch.

Q. Is that the branch now run by William Buschse & Son Company, Inc.? A. It is.

Q. The same store? A. The same place.

Q. You have been continuously in the employ of the William Buechse & Son Company. Inc., since October 1, 1912? A. Yes, I have..

Q. Mr. Schmedes will you tell us in detail your duties while in the employ of the Phenix Cheese Company from July 1, 1911 to October 1, 1912? A. I was employed as manager of the store; took care of the business there.

Q. Did you keep the books? A. At times I did.

Q. And did you keep the cash book? A. Yes, we had a cash book.

Q. Did you keep a sales journal? A. Known as a charge book.

Q. Known as a charge book? Was it your duty to enter items as turned in to you by Mr. Steinmeyer? A. It was.

Q. Will you describe just how you did that? A. I will, to the best of my ability. When drivers came home at night they made up their charge ac-

counts of the day's business on a white slip which we had there and from there we copied it into a ledger, as the charge ledger is known.

Q. And how about the cash? A. We entered the cash into a cash book.

Q. And you also made entries in that? A. Yes.

Q. So you had a cash book and a journal? A. Charge book as we called it.

Q. And the items were made up by you as they were turned in each night from these slips which Mr. Steinmeyer turned over? A. They were entered in the book, yes, each night.

Q. Were you served with a subpoena? A. Yes.

Q. To produce the slips? A. Yes.

Q. Have you produced those slips? A. I have no slips.

Q. When did they go out of your control? A. Oh, about a year ago I should judge.

Q. What happened to them? A. At the time when the Phenix Cheese Company gave up business Mr. Brooks had taken what he thought he needed A. Well, when they went out of my control was when the gave up business, which I believe was about the 30th or 31st of October, 1912.

Q. What did you do with these slips at that time? A. They were laying around there for some time—around the place and Mr. Brooks took what he needed of them.

Q. You state that they were lying around for some time; then what happened? A. Then we cleaned house, and everything that was of no further use we burned up.

Q. These slips included—all these slips included? A. I cannot tell you—I don't know.

Q. What happened to these slips? A. I am telling you everything that was of no further use we burned up.

Q. Were the slips turned in by the drivers previously testified to by you, particularly by Mr. Steinmeyer—were these slips burned up at that time? A. I cannot tell you; I am telling you it was cleaned up.

Q. What happened? A. To those slips? I didn't watch them; I didn't have them about me.

Q. What happened to them? A. We burned up all that stuff.

Q. So you burned up these slips? A. I don't say I burned them up.

Q. Did you know what happened to these slips? A. If you will let me tell you, I can tell you. I tried to tell you and you objected. I told you Mr. Brooks came there and took what slips away—what he thought that he needed. He said, Well I think that is all we need.

Q. Then what happened to the rest of the slips? A. We let them lay around and then I began to clean up everything and burned it all up because they were no use any more.

Q. You also kept a ledger, did you not? A. Yes, sir.

Q. For the Phenix Cheese Company? A. That was a ledger.

Q. And the items were transferred by you from day to day from the charge account book and cash book to the ledger? A. The amount of the bills sold on each article or each item.

Q. The amounts from day to day were transferred by you from the cash book and the charge book into the ledger? A. Some of them, yes.

Q. What do you mean by some? A. Because three or four men were working on the books at different times.

Q. It was your duty to do that? A. It was.

Q. Have you produced the ledger containing the sheets referring to the customers served by Steinmeyer? A. No, I have no sheets.

Q. Were you served with a subpoena to so do? A. I was.

Q. Where are those sheets? A. I could not tell you; I haven't got them.

Q. When did you last see them? A. Oh, that is since 1912, I guess.

Q. Since when? A. About 1912, October or November.

Q. Do you mean to say these slips; that these ledgers—these ledger sheeets were destroyed? A. I don't think that at all; I say I didn't see them.

Q. You have charge of those ledgers? A. No; not after the Phenix Cheese Company gave up business there.

Q. Do you know of your own knowledge whether these accounts were going on? A. I couldn't tell you; I didn't take care of the books.

Q. Is this sheet, ledger sheet, showing the account of Notolino during the time that the Phenix Cheese Company sold him, that is, between the dates of July 5, 1911, and October 1, 1912? A. Yes, it is.

Q. And that ledger at that time was kept by you? A. Part of it was kept by me.

Q. You testified a moment ago that you kept the ledger. A. I told you three or four had the ledger.

Q. That ledger was kept by you so far as the items in your handwriting are concerned? A. My handwriting I can point out, yes.

Q. And those items were kept by you and entered from the cash book and journal? A. Yes.

Q. Is the name in your handwriting at the top

of the page indicating Notolino as a customer? A. Yes.

Q. And the address? A. And the address.

Received in evidence and marked D-14.

Q. I now show you, Mr. Schmedes, a book entitled "Sales Journal, P. C. Company, Jersey City, No. 1"—was this book kept by you so far as the items in your own handwriting are concerned? A. On this page, yes.

Q. Will you kindly look through the book and see whether this is so between the period from July 1, 1911, to October 1, 1912— A. Page 55.

Q. That was the book kept by you so far as the items in your own handwriting are concerned? A. Yes.

Q. And you kept that as bookkeeper of the Phenix Cheese Company at that time? A. I did.

Q. And those items were made up from the sales slips returned by the employes, the drivers and salesmen of the Phenix Cheese Company? A. They were recopied from the white slips.

Q. From what slips? A. From the white slips.

Q. What do you call the white slip? A. What the driver makes up when he comes in.

Q. The driver's account? A. The driver's account.

Q. Now Mr. Schmedes did you check up this report slip returned by the drivers with the yellow slips? A. I did, when we had time..

Q. Was it your duty before entering these items to check them off? A. Now, we would—

Q. Answer me yes or no. A. Not for two months after I was told about it..

Q. Did you make the entries in that manner? A. I did and checked them off the slips.

Q. Before that time, if you did not, you entered them from the slips made by the drivers? A. What the driver made up.

Q. And that was the usual method? A. Yes.

Q. A method you pursued in making the entries in this book. A. It was.

Mr. Pentlarge: Your Honor, as previously with the ledger I will ask that this (referring to Sales Journal) be marked in evidence as I wish susequently to refer to it. I will refer to the records, to the items only entered by this witness.

Sales Journal received in evidence and marked D-15.

By Mr. Pentlarge:

Q. I show you, Mr. Schmedes, a book entitled "Cash, P. C. Co., Jersey City No. 1." Will you kindly examine that book and see whether that was the cash book kept by you for the Phenix Cheese Company during the period between July 1, 1911, and October 1, 1912, so far as the entries in your own handwriting are concerned? A. It was.

Q. Mr. Schmedes, were these entries made from the record slips returned by the various drivers? A. They were entered from the slip made up by the driver on his return home at night.

Q. Each night? A. Each night.

Mr. Pentlarge: I ask that this be marked in evidence.

Cash Book received in evidence and marked D-16.

By Mr. Pentlarge:

Q. I show you Defendant's Exhibit No. 5 for identification. Is that one of the white slips used; do you recognize that as one of the slips given to the drivers? A. That is one of the slips given to the drivers.

Q. I ask you now to turn to page 55 in the Sales Journal. A. I have it.

Q. Will you inform me whether that page is in your handwriting? A. It is.

Q. The entire page? A. Yes, the entire page.

Q. Will you look for a charge against one Notolino, August 30, 1911, and see whether there is any there? A. There is.

Q. Is that the only one on the page of Notolino for that date? A. It is on that page and date.

Q. Will you go to the next page and see whether the date is carried forward? A. No, it is not, the next date is the 31st.

Q. What is the amount shown as charged against Mr. Notolino? A. $3.60.

Q. $3.60. Will you now turn to the ledger sheet which was marked D-14 and see whether there are any charges against Mr. Notolino for $4.20 on August 30, 1911? A. No, there is not.

Q. Is there any charge at all? A. There is.

Q. How much? A. $3.60.

Q. The same as in the cash— A. The same as in the book, the charge book.

Q. Is that in your own handwriting? A. That is.

Q. That item (indicating)? A. That is.

Q. What is the number of the slip for that charge? A. 21,590.

Q. Is that in your own handwriting? A. That is.

Q. Is there any number given in your charge book? A. It is, the same number, 21,590.

Mr. Pentlarge: Your Honor, I now ask that this be marked in evidence as D-5 (Defendant's Exhibit No. 5 for identification), and call your attention to the fact that the amount is $4.20, thirty dozen eggs at two cents; that is sixty cents.

By Mr. Pentlarge:

Q. Turn to the Sales Journal to page 83. A. I have it.

Q. Is it in your own handwriting? A. Not all.

Q. I ask you to look for the date September 27, 1911, and see whether there is a charge against one Notolino? A. There is.

Q. Is that in your handwriting? A. It is.

Q. How much is the charge? A. $4.20.

Q. What is the number of the slip? A. 19,381.

Q. Is that in your handwriting? A. It is.

Are there any other charges against Notolino on that date? A. Not on that date, no.

Q. Was that returned by Steinmeyer? A. Yes, by Steinmeyer.

Q. I ask you now to turn to the cash book, page 69. A. I have it.

Q. Will you see whether there is any item there for slip No. 19,381, with Notolino as the customer —have you got it? A. Not yet (witness examines book). Page 69 you said?

Q. Page 69, yes. A. What slip number?

Q. 19,381. A. I don't see it here.

Q. May I see that book a minute (witness hands book to Mr. Pentlarge).

Q. See if you do not find it if you look through it again. (Witness looks through book). A. I don't find that number you spoke about. Will you give me the amount, please?

Q. The amount is what I want. A. What date did you give me, please?

Q. October 21, 1911. A. Do you want me to call off October 21st?

Q. Yes, October 21st. A. Paid $4.20.

Mr Burtis: That is not the same slip; the slip number there is 18,473 and you have got slip No. 19,381.

By Mr. Pentlarge:

Q. There is an entry there for how much? A. A collection of $4.20.

Q. Will you look at your ledger and see when that charge was made? A. Well, I cannot tell you that.

Q. Will you look through the ledger and see when the charge was made? A. There was a charge made September 27th, $4.20.

Q. Now, you stated on September 27, 1911, there is a charge of $4.80. A. What page is that; can you tell me?

Q. That is page 83? A. Now what is it you want?

Q. Look for the charge against one Notolino. A. Yes, there is one for $4.20.

Q. And the slip number? A. 19,381.

Q. Is it in your handwriting? A. It is.

Q. Both the slip number and the charge? A. It is.

Q. And the amount is what? A. $4.20.

Mr. Pentlarge: I offer this in evidence.

The Court: It may be marked in evidence.

Received and marked D-6 (previously marked D-16 for identification).

The Court: I think, gentlemen, we will now take a recess until two o'clock.

Mr. Pentlarge: Your Honor, will you direct the plaintiff to return after recess?

The Court: Yes.

Mr. Burtis: He most assuredly will be here.

The Court: Mr. Steinmeyer will come back after recess.

Recess for lunch.

Q. I ask you, Mr. Schmedes, to turn to page 63 of the Sales Journal. A. Page 63?

Q Yes—of the Sales Journal—will you look on that page and see whether you see a sale charged to one Notolino, September 6th, Slip No. 21,628—September 6, 1911? A. There is a charge here.

Q. Is it in your handwriting? A. It is not in my handwriting, no.

Q. That is not in your handwriting? A. No, it is not in my handwriting.

Q. Then I ask you to look at this ledger sheet and see whether on September 6, 1911, there is a charge against Notolino? A. There is.

Mr. Burtis: Your handwriting?

The Witness: My handwriting.

By Mr. Pentlarge:

Q. What is the slip number. A. 21,628.

Q. In your handwriting? A. In my handwriting.

Q. And what is the amount charged there? A. $1.80.

Mr. Pentlarge: I ask that the slip be marked in evidence. It is Defendant's Exhibit No. 7 for identification, showing the sum of $2.10—fifteen dozen eggs—a discrepancy again of two cents a dozen.

Received in evidence and marked D-7.

By Mr. Pentlarge:

Q. I now ask you to turn to the Cash Book, page 46. A. I have it.

Q. Will you see whether there is a cash charge—paid cash entry; a cash entry against one Notolino?

Mr. Burtis: In you handwriting?

By Mr. Pentlarge:

Q. Is it in you handwriting? A. It is not in my handwriting, no.

Q. That is on what date?

Mr. Burtis: That is objected to; that is not in evidence.

Mr. Penlarge: I want to see if more than one appears on a page.

By Mr. Pentlarge:

Q. It is not in your handwriting? A. It is not in my handwriting.

Q. Now; will you look at this ledger—will you look at this credit of $1.80—is that in your handwriting? A. Yes.

Q. That shows a payment by Notolino—crediting him with $1.80? A. $1.80.

Q. On what date? A. September 16th.

Q. That is subsequent to the date of the slip? A. It calls for—paid $1.80 on September 16th.

Q. Will you turn to page 74 in the Sales Journal? A. Page 74.

Q. And kindly look for a charge against Notolino on September 6, 1911. A. September 16th.

Q. September 16, 1911; is that in your handwriting? A. That is in my handwriting.

Q. What is the slip number? A. 7,765.

Q. 7,765—for what amount is it? A. For $4.27.

Mr. Pentlarge: I now offer this slip in evidence, Defendant's Exhibit No. 8 for identification ; slip No. 7,765, showing a sale of $4.89.

Received in evidence and marked D-8.

By Mr. Pentlarge:

Q. Will you kindly turn to the cash book, page 52? A. Page 52.

Q. Will you look for a credit in favor of Notolino? A. Yes.

Q. What date is that? A. September 27th.

Q. And what is the amount of the payment? A. $4.27.

Q. And what is the slip number? A. 19,380.

Mr. Burtis: That is a different slip number—the slip number is 7,765.

By Mr. Pentlarge:

Q. Now I show you the ledger; does that show the payment of that amount on that date?

Mr. Burtis: In your handwriting is it?

Mr. Pentlarge: In whose handwriting—always state that and then we won't go on, if it is not—it will save time.

The Witness: Paid $4.27—in my handwriting.

Mr. Pentlarge: I ask for Exhibit No. 9 for identification.

The Clerk then handed the paper to Mr. Pentlarge.

By Mr. Pentlarge:

Q. Will you turn to page 227 in the Sales Journal? A. 227.

Q. Will you look for a charge against Notolino on— A. Not in my handwriting.

Q. Not in your handwriting, all right. I will withdraw that, then.

Q. I ask you to look at the cash book? A. What page?

Q. No. 171—you will find the entry of Notolino $1.44. A. There it is.

Q. On what date? A. On the 27th of March.

I ask that this be marked in evidence; you will notice the payment is of the same date.

Received in evidence and marked D-9.

By Mr. Pentlarge:

Q. Is there any other payment on that date? A. In my handwriting—it is—no other payment.

Q. Will you look at the ledger and see whether the charge just referred to—pointed out by you—A. The date is March 27th, $1.44, in my handwriting.

Q. When was the charge made—on the charge side of the ledger? A. $1.44, charged March 23rd.

Q. Is the slip number there? A. 227—No, there is no slip number there.

Q. There is no slip number at all? A. No, not on this one.

Q. Will you turn to page 104 (Sales Journal); do you find a charge against Notolino? A. It is not in my handwriting.

Q. Will you look at the ledger, please—will you look at October 21, 1911? A. It is not in my handwriting.

Q. Not in your handwriting? A. No.

Exhibit No. 10 for identification.

Q. Turn to page 236 of the journal.

Mr. Burtis: Exhibit No. 11 for identification?

Mr. Pentlarge: Yes.

By Mr. Pentlarge:

Q. Will you look for a charge against one Bosco on slip No. 1926? A. On what date?

Q. On April 2nd. A. April 2nd?

Q. 1912? A. $6.90.

Q. Is it in your handwriting? A. It is in my handwriting.

Q. And that is a charge on that date? A. A charge on that date.

Q. Slip Number 1926? A. There is no slip number here.

Q. No slip number there; that is the only char on that date? A. Yes, to Bosco.

The Clerk: Received in evidence as D-11.

Cross Examination by Mr. Burtis:

Q. Mr. Schmedes, when did you sever your connection with the Phenix Cheese Company? A. When they turned over their business to William Buechse & Son Company, Inc.

Q. When was that? A. I believe in 1912, the end of October, I believe.

Q. In October, 1912? A. Yes.

Q. And that was at the same time that the Plaintiff Steinmeyer—A. Or was it the end of September?

Q. Well, it was around the 1st of October, 1912? A. Finished up the month anyhow.

Q. And that was at the same time that the Plaintiff Steinmeyer severed his connection with the Phenix Cheese Company?

Q. You were the manager of the Phenix Cheese Company? A. I was.

Q. Of the Jersey City branch? A. Of the Jersey City branch.

Q. You were manager for the Phenix Cheese Company—from the time that they purchased that branch—until about October 1st, 1912? A. I was.

Q. And the driver, the Plaintiff Steinmeyer was under your immediate jurisdiction as manager, was he not? A. He was.

Q. And when your duties as manager ceased that was when the Phenix Cheese Company ceased

to own that branch? A. That is what I did during—

Q. Now how long after the 1st of October, 1912, was it that Mr. Brooks came over to the office to look over these slips that you mentioned? A. Well, I cannot mention dates but he has been very irregular, seeing about collections at different times; to get different ones—might be about a year after.

Q. About a year after. You will say it was at least a year from the time that you severed your connection with the Phenix Cheese Company that Mr. Brooks, on one occasion, was there and took some slips, saying to you, "Well, those are all I need?" A. Yes.

Q. That was at least a year after? A. It might have been more.

Q. It might have been more? A. Yes, more or less.

Q. And it is a fact that the Plaintiff Steinmeyer severed his connection with the Phenix Cheese Company about the 1st of October, 1912, and this conversation that you had with Mr. Brooks would be over a year after he left the employ of the company? A. About that.

Q. Now, did Mr. Steinmeyer have a large route? A. Well, I won't say that.

Q. About how many customers did he have all told on his route; could you give me any idea? A. On a day's route or the whole business?

Q. The whole business that he served. A. Maybe ninety or one hundred or eighty—something like that; I never counted them. I could not tell you.

Q. Somewhere between seventy-five and one hundred customers that he served all told? A. Yes.

Q. And he handled a considerable amount of

money each week, did he not? A. He handled all he made sales for and his collections. From $50.00 to $100.00 a day.

Q. A day? A. Yes—sometimes less, sometimes more.

Q. And when he came in at night he made out his returns to you as manager? A. Yes.

Q. And you entered some of these returns in the books? A. When he came in he made a slip and the next day we entered them in the books.

Q. And he did that all the time that you were manager of that branch, did he? A. He did.

Q. And that was over a period—a period of over a year that he was doing that, was he? A. Just a year it was.

Q. And did you ever have any occasion to question his honesty? A. No.

Q. The Phenix Cheese Company is a corporation, is it not? A. I believe so.

Q. Do you know who the President of the Corporation was while you were manager? A. Mr. Carpenter.

Q. And was Mr. Brooks one of the officers of the company at that time? A. I believe so.

Q. Do you know what official position he held at that time? A. No; at the time I believe he was Assistant President; I am not sure but then he had charge over the branches.

Q. Mr. Brooks was your immediate superior, was he not? A. Yes, he looked after the branches.

Q. In all the time that you were manager of the Jersey City branch did Mr. Brooks as your immediate superior ever charge the Plaintiff Steinmeyer with having been short in his accounts? A. Mr. Brooks was not with us all the time. There was a time in between; he was away for awhile and then he came back

Q. Well, during the time that he was there did he ever make any such charge? A. I don't remember; I don't think so.

Q. And did the person that was in charge or was performing the duties that Mr. Brooks performed; while he was away; did he ever make any such charge to you as manager, that Steinmeyer was short? A. No, sir.

Q. Assuming now, Mr. Schmedes, that the entries in these books do correspond with the amounts entered upon these slips, did the plaintiff Steinmeyer pay over to you as the manager of that branch the amounts of money that those slips called for? A. The amounts he paid in is what I have here.

Q. On— A. On the ledger; those are the amounts he paid in.

Q. Which agrees in every particular— A. With my charges.

Q. With your charges? A. Yes, sir.

Q. You explained one item there which was a charge but has never been collected? A. I don't know about that; all he paid to me has been entered.

Mr. Pentlarge: These slips are identical with the slips that Steinmeyer returned?

The Witness: Yes.

By Mr. Burtis:

Q. During the time that you were manager for this branch, Mr. Schmedes, was it customary that some of these customers used to visit the branch office? A. Well, very few; once in awhile. If they were short they might get down for something but even those customers lived—none of

those customers lived far away. We seen them twice a week.

Q. Where was Notolino's place of business at that time? A. In 26th Street—425 26th Street, West New York.

Q. West New York? A. Yes, sir.

Q. Did he ever come down, do you know? A. I never seen him.

Q. Was it your custom to render these customers a statement of their account at different times? A. Well, I did once in a while but very seldom that I sent statements.

Q. If you did render such statement it would of course agree with the statement as contained in the books, would it not? A. It would.

Q. So that if there was any descrepancy between the slip that the customer got and the slip that was turned over to you, it would be very apparent when that customer got such a statement? A. It would be.

Q. Now, in all the time that you were manager for that branch and all these statements which you sent out to any customer, had you ever had a customer come back and say that the statement differed from the slips? A. No.

Q. I show you Exhibit D-11; as I understand it that is the slip that would be given by the driver to the customer? A. Yes.

Q. If it was white it would be the slip that would be given by the driver to the office? A. No, the yellow one goes to the office and the white one goes to the customer; the office keeps the blue prints, as we call it.

Q. Can you tell me from the slip itself whether or not that was turned in as charge or a cash transaction? A. I cannot.

Q. You cannot? You have testified from the

books that it was turned in as a charge, have you not? A. I have.

Q. I call your attention to the fact that there are the words "Paid" and do you know those initials underneath it—"C. S." mean; would that indicate that it was a cash transaction? A. That is what it is meant for—to be cash—and then it has been erased.

Q. Just answer my question. I call your attention to the fact that the word "paid" and the initials "C. S." are in the same blue indelible pencil as the name and the amount and the date? A. Yes.

Q. Wouldn't that indicate that the words "Paid" and the signature were made at the same time that the date and items and the name was made? A. It would.

Q. Can you tell me whether or not the pencil marks were drawn with the word "Paid" and his initials at the time that you turned them in? A. I cannot.

Q. Now, Mr. Schmedes, when a driver who went to a customer and the customer should order thirty dozen candled eggs, it would be possible, would it not, for him to say to the driver. "I am going to pay you cash" and the driver would then fill out the slip as it is now, marking it paid? A. Yes.

Q. Now, Mr. Schmedes, assuming that the customer, after the driver had filled out his slip like this and marked it paid, should say to the driver, well, I have decided to have it charged; then the driver would take his pencil and scratch out the word "Paid," wouldn't he? A. He would.

Q. That way (indicating)? A. He would.

Q. And you have had in the course of your experience hundreds of slips come in like that? A. I have done that, yes.

Q. So the fact that the word "Paid" and his initials are scratched out in pencil—lead pencil,

does not indicate that he collected $6.90 and put it in his pocket? A. No, it does not.

Q. You have had during the time that you were manager of the Phenix Cheese Company, on an average of from 75 to 100 slips turned in by this man Steinmeyer every night, haven't you? A. No, I won't say that many.

Q. How many? A. From 35 to 50; something like that.

Q. 35 to 50 and that would cover a period of over a year, would it not, that you were manager? A. Yes.

Q. And in all that period of all those slips that have been turned in to you night after night by this driver, never once has there been a slip called to your attention that it was wrong, was there? A. There are times where they make a mistake in figuring and then we correct them.

Q. But that would be in addition? A. Yes.

Q. And you would call his attention to it and put the right amount down? A. Put the right amount down.

Q. Yes—but in all these—on all these occasions, so far as you knew or could see as manager, it was an honest mistake? A. As far as I could see.

Q. That any man would make? A. It was.

Q. Can you point out one occasion or show any occasion where Steinmeyer apparently deliberately admitted falsifying one of these slips? A. I cannot.

Q. Can you point out one specific instance where Mr. Steinmeyer falsified one of these slips—can you? A. I cannot.

Re-direct Examination by Mr. Pentlarge:

Q. When a charge is made, wasn't it the duty, to your own knowledge, for the driver to get the signature? A. Yes.

Q. Of the customer on the slip? A. It is.

Q. Well, now, I show you this slip (Exhibit D-11) and ask you whether or not there is a signature on that slip other than that of Mr. Steinmeyer? A. I cannot say there is; I cannot say there ain't.

Q. Is there or is there not? A. I don't see any signature, no.

Q. I ask you whether these words in pencil, "This is a charge," with the initials under—whether that is in your handwriting and those your initials? A. Yes, that is mine.

Mr. Pentlarge: Your Honor, it is conceded that this is the signature or Mr. Steinmeyer.

The Court: Yes.

By Mr. Pentlarge:

Q. I show you this slip; isn't this one of the slips—the slips that were used during the period in question for the reports of the drivers? A. Yes, one like that.

Q. Those were day slips that were turned in? A. Yes.

Q. And they showed the charges and the cash sale which you entered up according to these slips in the books? A. Yes, sir.

Q. And the collections? A. And the collections.

Mr. Pentlarge: I offer this in evidence.

Received and marked D-17.

By Mr. Pentlarge:

Q. I ask you to look at this slip under the word charges and see whether there is a charge against one Bosco? A. There is for $6.90.

Q. $6.90, what is the date of that return? A. April 2nd.

Q. 1912—the same as this slip (indicating)? A. The same as this slip.

Q. I ask you, Mr. Schmedes, in making up the records previouly testified to, to-wit: the cash book, the sales journal and the ledger—whether it was your custom to use these slips—slips of this nature or the ones you just— A. We checked a slip similar to D-11—on Exhibit D-17 and I think from there into the ledger.

Q. Mr. Schmedes, prior to the time of your employment by the Phenix Cheese Company, by whom were you employed? A. I don't see that that has anything—

Q. Prior to the time of your employment by the Phenix Cheese Company, as previously testified to by you, by whom were you employed? A. By William Buechse & Sons Company, Inc. I was working for William Buechse & Sons Company, Inc.

Q. Was Mr. Steinmeyer employed by William Buechse & Sons Company, Inc., while you were with them? A. He was.

Q. And you have both been in the same employment ever since? A. Ever since.

Q. That is, in the employment of who? A. William Buechse & Sons Company, Inc.

Q. Are you any relation to Mr. Buechse? A., I am.

Q. What? A. Son in law.

By Mr. Burtis:

Q. How long before the Phenix Cheese Company bought out William Buechse & Sons Company, Inc., was Mr. Steinmeyer employed by Beuchse? A. I think about one month.

Q. And you were manager for Buechse then? A. No, I was driving a wagon.

Q. Driving a wagon—and after the sale in 1912 back to Buechse Steinmeyer continued in that employment, did he? A. He did.

Q. And he is still in the employ of Buechse? A., Still in the employment of Buechse.

Q. And you were manager for Buechse? A. No. I am on a wagon.

Q. On a wagon now—were you manager for Buechse at all after the sale in 1912? A. No, just for a short time and then I went out on a wagon.

Q. Now, you say that this is in your handwriting? A. Yes.

Q. Referring to the notation; this is a charge and your initials—did you make that notation on the date that that slip was turned in? A. On the same day.

The Court: Referring to Exhibit No. 10.
Mr. Burtis: D-11.

By Mr. Burtis:

Q. Then your attention was directed of course to the word "paid" there? A. "Paid"—it was.

Q. Mr. Steinmeyer gave you an explanation of why the word "paid" was stricken out? A. No, he did not. I have seen it entered as he turned it in as a charge there.

Q. So as to make no mistake, you put it there—this is a charge? A. Yes.

Q. I call your attention to the fact that on that slip D-17, that he accounts for having collected $6.75 from Bosco on that same day? A. Probably he did.

Q. And he turned in $59.76? A. On the collections?

Q. Yes—so that when you saw that he charged Bosco with $6.90 and he collected $6.75, you assumed, did you not, that he collected a charge of some earlier date? A. Some earlier date.

By Mr. Pentlarge:

Q. Mr. Schmedes, to your knowledge is it uncommon for a driver to make a sale on one day and make a charge and also collect on prior bills? A. Make a cash sale?

Q. No, he collects on prior bills and then makes a sale? A. Yes.

Q. And charges the sale and collects on the prior bills? A. They do that.

Q. That is not uncommon? A. No, sir.

Q. And this collection already referred to by you from Bosco $6.75 for all intent may have been on prior bills? A. It might.

Q. Were you subpoenaed to produce this ledger? A. I was.

Q. All ledgers covering this period? A. This period.

Q. And you could not produce them? A. I cannot.

Q. Mr. Schmedes, you state that sometimes you rendered statements? A. Yes, sir.

Q. Now, these statements were given to the

drivers to deliver? A. Sometimes and sometimes we mailed them.

Q. But it was generally the custom to deliver them to the drivers, wasn't it? A. Not at all times —sometimes. Sometimes they did; other times we mailed them.

Q. Small accounts? A. We generally gave them to a driver.

Q. But you generally gave them to a driver? A. And mailed them.

Q. But you generally gave them to a driver? A. Sometimes; we mailed them and sometimes we gave them to a driver.

By Mr. Burtis:

Q. Just one question, Mr. Schmedes. While it was customary when a charge was made for the customer to sign or initial the slip, did it not frequently happen that customers did not do that?

Q. Each night you had a slip similar to D-17, did you not? A. I did.

Q. And that you give you—and you also had—if there were ten charges here and ten collections here you would have twenty slips of this character, wouldn't you? A. Yes.

Q. Now, the first thing you did was to take out the slips similar to D-11 and see whether it was entered on D-17? A. I would.

Q. And whether the amount on D-17 agreed with the amount on D-11 and so forth? A. I would.

Q. Now, did it not frequently happen that you would get a slip similar to D-11 which would be

entered on D-17 as a charge which wouldn't bear the name or initials of the customer? A. Yes, it would.

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CHARLES REINHART, having been duly sworn, testified as follows:

Direct Examination by Mr. Pentlarge:

Q. Mr. Reinhart, were you employed by the Phenix Cheese Company between July 1 and October 1, 1912? A. I was.

Q. And at that time did you make entries upon the books as one of the bookkeepers? A. I did.

Q. And did you make entries in the books—the journals and cash book? A. I did.

Q. In the ledgers? A. I did.

Q. I ask you to turn to page 69 of the cash book —Exhibit D-16.

By Mr. Pentlarge:

Q. Will you turn to page 69—D-16?

Mr. Burtis: What slip are you referring to?

Mr. Pentlarge: Exhibit 6.

By Mr. Pentlarge:

Q. Will you look for a cash book payment of Notolino? A. What day?

Q. October 21st—is that in your handwriting? A. Yes, sir.

Q. He paid the sum of $4.20? A. Yes.

Q. I show you this entry—do you identify the same payment on that ledger on the same date? A. There is a credit which appears on the ledger sheet No. 1 for $4.20, folio 69 of the Cash Book.

Q. Is that in your handwriting? A. It is.

Q. Any other entry on that date as to Notolino? A. Why, there is a charge for $5.20.

Q. Entry of a payment? A. Any other payment?

Q. Yes? A. No other payment on that date appears on the ledger sheet.

Q. Now, I ask you to turn to the sales journal, page 104.

By Mr. Pentlarge:

Q. Page 104—will you look on that page and see whether in your handwriting there is any entry of a charge against Notolino? A. There is an entry here for $5.20; charge; page 104, October 21st.

Q. How much is the amount? A. $5.20.

Q. Is the number there of the slip? A. The slip number has—appears as 18,479.

Mr. Pentlarge: I ask that the slip be marked in evidence.

The Court: This is admitted as Exhibit No. 10.

By Mr. Pentlarge:

Q. Now, I ask you to look at the ledger; look on the same date and see whether there is an item in your handwriting as to the account of Notolino? A. There appears October 21st, sales journal, page 104, a charge of $5.20—ledger sheet 1.

Q. Is there any credit there on your ledger for

goods returned by Notolino on October 21, 1911? A. There is not, it wouldn't appear.

Q. Do you see any item as to a credit for goods returned? A. I do not.

Q. Have you examined all the three books? A. The credit showed on the driver's cash slip which he turned in.

The Court: No record of it in the books anywhere?

The Witness: No, I don't see any here.

By Mr. Pentlarge:

Q. I ask you to turn to page 115 of the sales journal; whose handwriting is that? A. (Looking at book.) This is not my handwriting. I believe it to be Mr. Schmedes,' who was manager.

Q. It is not your handwriting? A. Not my handwriting.

Cross Examination by Mr. Burtis:

Q. How long were you employed as a bookkeeper in the Jersey City branch of the Phenix Cheese Company? A. I couldn't say exactly how long; it was probably from three to six months.

Q. Was it the last three to six months or the first three to six months that they had that branch? A. Why, I should say they had it a few months. One month or two months before I went there and they ran it a month or so after I left there.

Q. Are you employed by the Phenix Cheese Company? A. I am.

Q. In their New York office? A. The Newark branch.

Q. As bookkeeper? A. Bookkeeper and manager.

Q. You filled out part of this slip marked D-14, did you? A. I did.

Q. Now, that is a charge, is it? A. That is.

Q. That is what the customer paid, is it? A. Yes.

Q. Then there was no balance due? A. Right.

Q. There is another charge of $3.60? A. Right.

Q. And a payment of $3.60? A. Right.

Q. And no balance? A. Right.

Q. And a charge of $1.80? A. Right.

Q. And a credit of $1.80? A. Right.

Q. And no charge? A. Correct.

Q. A charge of $4.27? A. Correct.

Q. And a balance of $4.27? A. Correct.

Q. And a charge of $4.20? A. Correct.

Q. And that is charged up, isn't it? A. That shows the balance at that time when that entry was made.

Q. It shows a payment of $4.27 there, doesn't it? A. Correct.

Q. And a balance of $4.27 left? A. Right.

Q. And a charge next of $4.50? A. Correct.

Q. And a payment of $4.50? A. Correct.

Q. Leaving a balance of $4.20? A. Correct.

Q. So then the next item is the item that Mr. Pentlarge was just questioning you about, $5.20? A. That is a charge.

Q. So at the time that charge of $5.20 was made there was a $4.20 item away up above here that had never been paid? A. It appears as if it was a skipped bill.

Q. Yes—so that while this slip here calls for $4.57, as a matter of fact the customer did owe more than the $4.57, didn't he? A. He owed—part of this charge was put on the sheet, $4.20.

Q. Yes; it is possible, is it not, that he might

have paid some on account of that $4.20, isn't it, which would make the item come up to $5.20? A. Why, he is liable to pay straight bills or pay on account.

Q. Now, if he paid something on account of this bill; paid something on account, that would have been applied to this $4.57? A. Where is that?

Q. This slip that makes that $5.20. It is the same paid October 21st; you wouldn't find any $4.57 in your books because it is $5.20 all the way through. A. I couldn't say.

Q. I am asking you that if he bought goods to the amount of $4.57 on that day and then paid something on account of the old bill, the amount he paid on account would be added with the $4.57 and turned in, would it not, that night by the driver? A. What paid on account would be turned in as a collection.

Q. Yes—and if he had paid something on account which would bring that item up to $5.27 that would be the amount that you would enter in your book, would you not? A. If this $4.57 item could be paid?

Q. Now, I am not asking you to argue the question with me, I am asking you to answer my questions. A. I don't understand the question.

Q. All right; we will put it a little bit differently, then; if a driver sold Notolino $4.57 worth of eggs or cheese on October 21st and Notolino paid $4.57 cash for what he sold him and in addition to the $4.57 he paid him 63 cents on account of an old bill—when the driver came in that night he would turn in $5.20, wouldn't he? A. He would turn in for the goods which he sold him on that day, he would turn it in as a cash sale.

Q. A slip like that, wouldn't he? A. He would

turn it in and if he turned in an account he would turn it in as a collection.

Q. Yes; turn in any other slip in addition to this, wouldn't he? A. He would.

Q. And the two would total $5.20, won't they? A. I don't know.

Q. If it was 63 cents he paid on account of the old bill?- A. He would—

Q. Isn't $4.57 plus 63 cents $5.20? A. But he wouldn't turn in one item of $5.20.

Q. I don't say he would turn in one item; he would turn in two items, one for 4.57, and one for 63 cents? A. Right.

Q. And that would total $5.20, wouldn't they? A. If the two figures were added together.

Q. And you would give Notolino's account credit for $5.20? A. No, sir.

Q. Would you stick the poor customer? A. No, sir.

Q. How would you credit him? A. If he bought goods and paid $4.57 it would be turned in as a cash sale. If he paid the amount of $5.20 the difference between $4.57 and $5.20 or 63 cents would be turned in as a collection—63 cents.

Q. Wasn't that a cash sale? A. I could tell if I saw a cash sale of that date.

Q. Isn't that the cash slip of that date? A. I mean where he makes up his total cash for the day.

Q. Oh, then unless you have got that cash slip which is similar to D-17 like this—you cannot tell anything that is in these books correctly, can you—what they mean? A. The driver turns in this slip.

Q. Now, answer my question—unless you have got a slip from the driver similar to D-17 you cannot tell whether these books are correct or not, can you? A. Why, yes, if the correct entry is made in those books.

Q. You cannot tell whether the correct entry is made in those books unless you have got them—got that slip before you, can you? A. Should have this slip.

Q. And unless you do have it you cannot tell? A. Yes, you can.

Q. How? A. Well, the correct entry would be made there.

Q. Oh, that all depends upon the accuracy of your work and the others that were working on the books, doesn't it? A. Yes.

Q. Well, have you ever made mistakes? A. Certainly.

Q. You are not infallible, are you? A. No, sir.

Q. And the other men that have worked on those books have made mistakes, haven't they? A. Nobody is.

Q. Yes—and it is possible they are honest mistakes and that honest mistakes could creep into those books? A. They must balance correctly.

Q. And unless you have those slips before you to check it off you cannot tell whether those mistakes creep into the books or not, can you? A. I do not quite get you.

Q. I say, unless you have got a slip the same as D-17 to use as a check-off you cannot tell whether mistakes have crept into the books, can you? A. No, you must have—

Q. And all the testimony that you have given here to-day is based, is it not, upon the assumption that you transcribed from the slips similar to D-17 the figures into these books correctly—isn't that it? A. Yes.

Q. And if you did not, then the books are not correct, are they? A. Why, yes, they are correct, as far as what the drivers turn in, and those slips must appear in these books.

Q. But you could make mistakes there, couldn't you? A. Where?

Q. In entering it up in the books? A. Here?

Q. Yes. A. Well, we would catch ourselves because the totals on those slips would have agreed with the totals in these books; if they did not, then you would have made a mistake.

Q. This plaintiff Steinmeyer was turning in from $50 to $100 every day, wasn't he? A. Probably.

Q. Yes—and from 35 to 50 slips every day? A. Yes.

Q. Sometimes there were mistakes in the slips, weren't there? A. On which slips?

Q. The slips that the driver turned in? A. Yes.

Q. Quite a common occurrence, wasn't it? A. Why, no.

Q. It frequently happened, didn't it, that they made errors? A. Well, they may have, in addition, but you would correct the slip.

Q. And you all found those mistakes and called their attention to it, didn't you? A. That all depended; I didn't go over those books, the manager checked those and checked them against the cash slips which they turned in.

By Mr. Pentlarge:

Q. Mr. Reinhart, after the entries were made by you, you took the slips and checked them up, did you not? A. Yes.

Q. And then you would know whether there was an error or not by checking? A. The checking would show the error.

Q. And all you had to do was—all you had to go by was the slips the drivers turned in, those two slips turned in by the driver, the yellow slip and the long white slip, the day report slip? A. Yes.

Q. Those are the slips that you had before you? A. Right.

Q. You didn't have before you, did you, these white slips that were the customers' slips, were they? A. Customers' slips.

Q. So all you would have would be the other slips? A. The yellow slip and the cash slip.

Q. When you took one of these slips the driver turned in to you and started to enter it, you would look at it to see whether it had a signature on it; whether to put it in as a charge or cash, is that correct? A. No; I checked the yellow slips against the cash slips.

Q. What do you call a cash slip? A. Where they make up a total.

Q. Oh, the total report slip.

Mr. Burtis: D-17.

Mr. Pentlarge: Yes.

By Mr. Pentlarge:

Q. You checked one against the other? A. Yes.

Q. And then entered it up? A. Right, and whatever the amount showed on the white slip appeared in these books and had to check.

Q. Then a credit for merchandise would show the same way on the slip? A. Yes.

By Mr. Burtis:

Q. Did I understand you to say that these customers, if they had a bill for $2.50 to-day and they settled up day after to-morrow, they invariably paid the amount of the bill? A. Most always.

Q. Sometimes, though, they paid odd amounts,

didn't they, on account? A. Sometimes they would pay $5.00 or $10.00 on account.

Q. Now, going back to this Notolino, I call your attention to the fact that the first item for $5.20 about which you have been called on by Mr. Pentlarge, is $3.30; that is a charge, isn't it? A. Yes.

Q. Yes—now, the day that that charge was made he owed $8.50, didn't he; there was a balance, wasn't there? A. He owed $8.50.

Q. Now, the next item is a credit for $3.67, isn't it? A. Yes.

Q. Now, I ask you to go up the column of charges and see if you can find any charge there of $3.67? A. There don't appear to be any—one item.

Q. He was on that day paying a fractional part on account of his old bill, was he not? A. Yes.

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CHARLES STEINMEYER, recalled.

By Mr. Pentlarge:

Q. What date was it when you stopped working for the Phenix Cheese Company, approximately? A. I don't remember the date any more.

Q. Approximately? A. After it was dissolved.

Q. Do you recollect the date? A. No.

Q. Can you give approximately the date, as near as you can? A. It was about October, 1912; something like that.

Q. October, 1912? A. Yes.

Q. Then you went into the employ of William Buechse & Son Company, Inc.? A. Yes, sir.

Q. The same address as the old, as the Phenix Cheese Company had been? A. Yes.

Q. Did you continue on the same routes as you

had been working on? A. Continued on the same routes, yes.

Q. And ever since have you continued on those routes? A. I have.

Q. And you have been selling butter, cheese and eggs? A. Yes, sir.

Q. Ever since on that same route? A. Yes, sir.

Q. And will you just again state just what were those routes you covered? A. Jersey City, Hoboken and Union Hill and West New York.

Q. Within ten miles of the City of New York?

Mr. Burtis: Well, we will admit it is within ten miles.

Mr. Pentlarge: I think the Court ought to take notice that it is within ten miles.

The Witness: Ten miles, yes.

Mr. Burtis: The whole of Hudson County is within ten miles. I think I am right, am I not, Judge?

The Court: I think you are within the limit.

By Mr. Burtis:

Q. Now, Mr. Steinmeyer, after the change of ownership from the Phenix Cheese Company to William Buechse & Son Company, Inc., did you continue on the identical same route that you had when the Phenix Cheese Company owned the business? A. I did.

Q. Serving the same customers? A. Yes, sir.

Q. Did you have any talk at that time or any conversation with Mr. Brooks about the sale of the Jersey City branch to Mr. Buechse? A. I did.

Q. What did Mr. Brooks say to you about that? A. I had a conversation with Mr. Brooks in regard to a few bills outstanding.

Q. Just say what Mr. Brooks said to you; I don't care about the details—about the sale as well as what you were to do. A. He told me to continue further with Mr. Buechse after the sale was made.

Q. Did he tell you why you were to continue with Mr. Buechse? A. Because the business was sold.

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BYRON E. BROOKS, having been duly sworn, testified as follows:

Direct Examination by Mr. Pentlarge:

Q. Where do you live? A. No. 102 North 19th Street, East Orange.

Q. What is your occupation? A. I have general supervision of the branches of the Phenix Cheese Company.

Q. Were you with the Phenix Cheese Company from July 1, 1911, to October 1, 1912? A. Part of the time.

Q. During what part of the time Mr. Brooks? A. The latter part of the time.

Q. The latter part of the time? A. The very early part and the latter part.

Q. Well, what do you call the latter part? A. I will say the last time—the 1st of July on until September.

Q. And at that time did you have general charge of the Jersey City branch of the Phenix Cheese Company? A. Yes, sir.

Q. Did you likewise have general charge of the books there? A. Yes, sir.

Q. Did you make entries in these books in the course of your duties? A. Yes, sir.

Q. From the drivers' slips? A. Yes, sir.

Q. Well, Mr. Brooks, will you tell me if you know the custom in regard to credits for returned goods? A. When goods are returned by a driver for any reason he notes that fact on the slip, the date of the return with the quantity and the address and the slip in his salesman book that he carries, just in the same manner he would note a collection or a sale. That is brought in and that is put through the sales journal and from there transferred into the ledger just the same as a charge sale would be or a collection.

Q. Mr. Brooks, will you turn to page 115 in the sales journal, Book No. 2? A. Yes, sir.

Q. I call your attention to this entry here—returned goods at the bottom of the bill? A. Yes, sir.

Q. Is that the method used in noting the return of goods? A. That is the method used. "Hauerstein return."

Q. And they should appear in the book? A. They should appear in the book.

Q. I show you this exhibit, Defendant's Exhibit No. 10,—is there an item on that exhibit returning goods? A. Yes, sir.

Q. How much? A. Nine dozen eggs at 17 cents amounting to $1.53.

Q. What was the total sale as shown by that particular bill? A. $6.10.

Q. On what date is that? A. October 21, 1911.

Q. Will you look at the ledger in evidence and see whether there is an item on the ledger? A. There is an item, under date of October 21st, but not of that amount.

Q. Of what amount? A. $5.20.

Q. Is there an item showing as to the return of those goods? A. None whatever.

Q. No item whatsoever? A. No, sir (looking again). No, sir.

Q. Mr. Brooks did you ever call on Mr. Notolino? A. I did.

Q. He was a customer of the Phenix Cheese Company? A. Yes, sir.

Q. The one testified to previously—you have heard the testimony today? A. Yes, sir.

Q. Why did you call on him? A. Because there was a balance due that we could not collect.

Q. Did you ever receive any letters from Mr. Notolio? A. Yes, sir.

Q. I show you this letter—did you receive that letter from Mr. Notolio? A. I did.

Q. Did you call after the receipt of that letter? A. I did.

Q. Did you show him the letter? A. I did.

Q. Do you ask him whether that was from him? A. He said it was.

Q. He said he had written it? A. Yes, sir.

Q. Mr. Brooks, did you at any time go to William Buechse & Son Company, Incorporated, or any one at the old store kept by the Phenix Cheese Company and subsequently obtained any slips concerning which there has been testimony given today, as items contained in either ledger, journal or the sales book, which have been put in evidence today? A. Yes; I obtained this ledger sheet from there (D-14).

Q. No, I mean have you any of the original day slips? A. I have not.

Q. Did you ever have? A. No, sir.

Q. Have you asked for those slips? A. Recently?

Q. Oh, at any time? A. Yes.

Q. Who did you ask? A. I personally didn't ask for them; the President of the Company dic-

tated the letter to Mr. William Buechse asking if our automobile—that is this storage place very near Buechse's plant, asking if we could bring over that box of books and cash slips and so on.

Q. Did you personally make any request? A. Not personally, no, sir.

Q. Did you ever write any letters asking? A. I dictated a letter that Mr. Carpenter signed; I thought it would be better for Mr. Carpenter as President to sign the letter.

Q. But you took charge of it? A. Yes; the matter was referred to me and I referred it to you and at the same time dictated the letter and thought Mr. Carpenter's official signature was better than any one else's in the company and he signed the letter accordingly.

Q. But to your knowledge there were absolutely none of those original slips— A. Positively not.

Q. Mr. Brooks, in your capacity as general manager of Jersey City branch of the Phenix Cheese Company did you attend to the credits so far as customers were concerned? A. Yes, sir.

Q. Mr. Brooks, did you ever give Mr. Steinmeyer any instructions in regard to the extending of credit to Mr. Notolino? A. Yes, sir.

Q. I ask you to look at this ledger page and see whether it is in your handwriting; you noted the credit? A. Yes, sir.

Q. How much? A. $25.00.

Mr. Burtis: How much?

By Mr. Pentlarge:

Q. $25.00? A. Yes, sir.

Q. When did you note that? A. When the account was first opened.

Q. Did you inform Mr. Steinmeyer not to give credit above that? A. Yes, sir.

Q. Did you tell him that he would be held responsible if he did? A. Yes, sir.

Q. Now, will you turn to the other side of that ledger, is there any further notation as to the credit? A. Yes, sir.

Q. What directions in regard to the giving of credit did you give Mr. Steinmeyer? A. Whenever these notices were put on the ledger page it was after the result of careful investigation of the customer.

Mr. Burtis: You are not answering the question.

The Witness: The driver was instructed immediately upon our decision being—

By Mr. Pentlarge:

Q. Did you instruct him—what instructions did you give him? A. Not to give more than one bill and that bill not to exceed $5.00.

Q. At what time did you give him those instructions? A. In the evening after he had come in.

Q. No, I mean the date? A. Oh, 7/15/12.

The Court: August 15th?

The Witness: Yes, sir.

By Mr. Pentlarge:

Q. Will you look at that account and tell me whether the credit was exceeded? A. It was.

Q. To what extent? A. $7.60.

Q. Have you attempted to collect this account from Mr. Notolino? A. I have.

Q. Has it been paid? A. It has not.

Q. How much is now due upon it? A. $4.40.

Q. I ask you whether you gave Mr. Steinmeyer any instructions in regard to the credit of one Beck? A. I gave him directions concerning the credit of every man on the ledger that he served.

Q. Well, in regard to Mr. Beck, did you recall —can you recall now without looking at this memorandum, of the instructions as to credit? A. I could not.

Q. Will it refresh your memory to look at the memorandum? A. It will.

By Mr. Burtis:

Q. When was this made? A. This memorandum?

Q. Yes. A. This memorandum was made at the time the company sold out its business to William Buechse & Son Company, Incorporated. This was a statement which was drawn off from each and every ledger page that had an open account.

Q. I ask you to look at this memorandum in the case of Mr. Beck, and after looking at that will you state when and what instructions you gave to Mr. Steinmeyer as to the extending of credit to Mr. Beck? A. On August 29th, 1912, Mr. Steinmeyer was instructed to give no further credit to Theodore Beck, after which time Mr. Steinmeyer gave two bills.

Q. For what amount? A. The total amounts to $5.14. One bill $1.76 and one bill $3.38—a total of $5.14.

Q. Mr. Brooks, at this time I ask you whether you had in charge the collecting of the outstanding accounts for the Phenix Cheese Company? A. Yes, sir.

Q. All of them? A. Yes, sir.

Q. Did you attempt to collect this bill of $5.14 from Beck? A. I did.

Q. And what was the result? A. I could not find the gentleman.

Q. Just state what place you went to? A. I went to the place of his address, 604 Merrill Street shown on the ledger as his place of business, but the place was closed; he had sold out.

Q. Did you try to find out where he was? A. Yes, sir.

Q. Could you? A. I understood—I found out that he lived on the corner but I could not locate him because I could not find the particular corner that he lived on.

Q. You tried? A. I did, yes, sir.

Q. Has any part of that $5.14 been paid? A. No, sir.

Q. Mr. Brooks, do you remember without looking at your memorandum—your instructions in the matter of credit to one Mr. Desmond? A. No, I could not.

Q. After looking at this memorandum will you kindly inform the Court as to the instructions you gave to Mr. Steinmeyer concerning credit?

The Court: And when.

In order to save the time of the Court, counsel stipulated as follows: That Mr. Brooks would testify after refreshing his memory from memoranda, in the same manner as done in the matter of the extension of credit to one Theodore Beck, testified to immediately preceding the stipulation that the plaintiff had given excess of credit beyond instructions given him by the plaintiff for various accounts which the defendant had been unable

to collect although using due diligence so to do, said uncollectible accounts amounting, in excess of the limit of credit imposed, to the sum of $31.41. And it was further conceded and stipulated that the defendant reasonably expended the sum of $22.50 in collecting other accounts, wherein the plaintiff had given excess of credit beyond instructions given him. It was further stipulated that all exceptions of counsel and rulings of the Court, in connection with the Theodore Beck account should equally apply to the accounts stipulated.

By Mr. Pentlarge:

Q. Mr. Brooks, you heard Mr. Steinmeyer testify that you instructed him to continue in the employ of William Buechse & Son Company, Incorporated, after the Phenix Cheese Company retired from the Jersey City store. Did you ever give Mr. Steinmeyer any such instructions or any similar instructions? A. Never in any way, shape or manner.

Q. Did you give him any advice or suggestion in regard to the matter? A. Never in any way, shape or manner.

Mr. Pentlarge: It is conceded that these two checks have been signed by the plaintiff—endorsed by the plaintiff and represent payments to him on account of the deposit made by him on which he is suing.

Checks received in evidence without objection and marked Exhibits D-18 and D-19.

The Court: The interest is the $6.75 according to this?

Mr. Pentlarge: Then that amount of $6.75 is interest.

Mr. Burtis: Let us concede that there hasn't been paid back $40.76 and that makes it right—of the $150.

Mr. Pentlarge: Then the interest has been paid down to the date of that check?

Mr. Burtis: Yes.

Mr. Pentlarge: We had better settle what that is.

The Court: February 10, 1913.

By Mr. Pentlarge:

Q. Mr. Brooks, when you refunded to Mr. Steinmeyer the sums conceded did you know of these discrepancies in his account? A. I did not.

Q. And you found them out subsequently? A. I found them out by writing letters on these uncollected accounts such as Notolino and in reply to my communication requesting him to pay $4.40 I got this letter in evidence saying I don't owe; if you think I do come and see my bills.

Q. And that is from letters— A. From letters I received in reply to mine.

Q. And you started to investigate? A. Yes, sir.

Q. Mr. Brooks, is the Phenix Cheese Company now in business? A. It is.

Q. It has been in the butter and egg business—butter, cheese and egg business ever since it left—since it ceased to have a store in Jersey City from October 1, 1912? A. It has.

Q. Did you deliver any goods in Jersey City, Hudson County, New Jersey? A. Yes, sir.

Q. And you delivered goods more or less frequently? A. Yes, sir.

Q. You deal in butter, eggs and cheese? A. Yes, sir.

Q. And carry on a trade in Hudson County? A. Yes, sir.

Cross Examination by Mr. Burtis:

Q. When was the Phenix Cheese Company incorporated, Mr. Brooks? A. Approximately 12 years ago. I was not with the company when it was incorporated so I don't know definitely.

Q. It was incorporated at the time that they bought the business from William Buechse & Son Company, Incorporated? A. Yes, sir.

Q. And that was in 1911, wasn't it? A. Yes, sir.

Q. And Mr. Buechse had a wholsale and retail butter, egg and cheese business here in Jersey City? A. Yes, sir; prior to our buying it.

Q. And he had certain established routes throughout the County of Hudson did he not? A. Yes, sir.

Q. The Phenix Cheese Company took over the entire business did it not, rights and all? A. Yes, sir.

Q. And Charles Steinmeyer, the plaintiff in this suit, was a driver in the employ of William Buechse & Son Company, Incorporated, at the time of this purchase and transfer to the Phenix Cheese Company? A. Yes, sir.

Q. And he had the same route that he had while he was in the employ of the Phenix Cheese Company, didn't he? A. Yes, sir; so far as I know.

Q. So far as you know? A. Yes, sir.

Now, in September, 1912, the Phenix Cheese Company, sold back that business to William

Buechse & Son Company, Incorporated, did it not? A. I believe it did, yes, sir.

Q. And in that sale they turned over everything that they had acquired from William Buechse & Son Company, Incorporated, under the original purchase rights, horses, wagons, &c., did they not? A. I believe they did. I didn't draw the contract; I am not sure on that, but I believe they did.

Q. You knew all about it at the time? A. I saw the contract at the time it was drawn.

Q. I show you a paper and ask you if this signature is that of Mr. Carpenter the President of your company? A. I believe it to be Mr. Carpenter's signature.

Q. And you know Mr. Buechse's signature? A. I wouldn't like to testify about Mr. Buechse's signature.

Q. This is a contract, is it not, Mr. Brooks, you just examined it—or a copy of the contract that was entered into between the Phenix Cheese Company and William Buechse & Son Company, Incorporated in September, 1912, when Buechse bought out the business? A. I cannot swear to that of my own knowledge.

Q. Look through it and see; you must have been familiar with it when the thing took place?

Mr. Pentlarge: I am willing to concede that this is the contract.

Mr. Burtis: Then I offer it in evidence.

Objected to by Mr. Pentlarge and ordered by the Court.

By Mr. Burtis:

Q. Now, Mr. Brooks, on the 14th day of September, 1912, the Phenix Cheese Company sold this

business to Buechse, didn't he? A. Well, if that is the date; I cannot remember exactly.

Q. And at that time this memorandum was made by you, was it? A. Yes, sir.

Q. So that in September, 1912, you knew everything that is contained in this memorandum? A. Why, yes, in a general way.

Q. In a general way? A. I mean I copied it from the ledger pages.

Q. So you knew in September, 1913, that Theodore Beck owed $5.14? A. Yes.

Q. And you knew that what has been testified to here be true that that was in violation of instructions that you had given to Steinmeyer? A. Yes.

Q. And you knew that every one of these accounts amounting to $34.41 were outstanding, didn't you? A. Yes.

Q. And you knew these other accounts which were subsequently collected through Mr. Pentlarge amounting to over $100.00 were due? A. Yes.

Q. Those accounts were not paid until long after September, 1912, were they? A. Some of them were not; some of them were paid almost immediately and some of them have never been paid. The next week a considerable amount of it was paid, something like $1,000 if my memory serves me rightly.

Q. A thousand dollars of Steinmeyer's? A. No, no, of the total accounts.

Q. And yet, although you knew that Mr. Steinmeyer had violated these instructions that you had given him, the Phenix Cheese Company, in January, 1913, paid him $98.95 on account of this $150.00? A. Yes, sir.

Q. And although the Phenix Cheese Company

knew that he had violated these instructions, in February you paid him $6.64 more, did you not? A. Yes, sir.

Q. And you paid him $6.75 interest on the $150.00? A. Yes, sir.

Q. And in March you paid him $13.75 in two checks? A. If those are the dates, yes, sir.

Q. And you paid him altogether $122.00 and something? A. Whatever the figures are that you have there.

Q. Now, if I understand correctly, the Phenix Cheese Company contends that because of the violation on the part of Mr. Steinmeyer of these instructions by you, that it is entitled to keep the whole $150.00? A. Not alone on those instructions given by me; that isn't all the basis of the suit; in addition to that is the fact that he collected and sold eggs for two cents a dozen more than he turned into us; that is, the slips seemed to indicate that.

Q. Leave out the 2 cents a dozen proposition. A. You are asking me.

Q. I ask you if it is your contention that the Phenix Cheese Company would be entitled to retain the whole of the $150.00—it is your contention, is it not—because he gave this credit contrary to your instructions? A. That he was negligent in doing so.

Q. Yes. A. He should have obeyed instructions —the instructions that were given to him.

Q. And when he disobeyed those instructions it is your contention and opinion that he should forfeit the $150.00? A. If we did not have such a clause how would we hold our drivers anywhere? It must of necessity be that way.

Q. If you knew in September, 1912, that he had violated his instructions and had forfeited, as you

say, under the contract, the whole of the $150.00, why did you pay him $98.95 with a check? A. Because we don't want to take away from a poor man anything that doesn't belong to us.

Q. Then why don't you pay him the balance still due? A. Because we suffered that loss; we collected up to that amount that is indicated there.

Q. Then you waived all the other violations except this question of the loss which you might sustain by bad bills? A. We did not intend to waive any rights that we have.

By Mr. Burtis:

Q. If you did not intend to waive any rights, why did you pay it? A. Because we were not going to suffer damage beyond these uncollected bills which we could not collect.

Q. That's it; you held back just enough to protect you from loss for these bad bills? A. That is what our bonds are for.

Q. And that loss is $34.41? A. If that be the correct figure; I have understood you to say $40 and something.

Q. And you have held back $40; that is the amount that we have agreed upon? A. Well, that is thirty-four dollars and twenty odd cents legal fees, which makes $54 and something; whatever that total is; I haven't the figures in front of me whatever those two totals would amount to.

Q. But you knew these legal fees—knew of them in January, 1913, didn't you? A. Not all of them; no, sir. You see, the point was this. Mr. Buechse was going to collect these accounts for us. When we took over the business from Buechse, and we agreed to collect his unpaid bills. When they took over the business, he was going to collect accounts

for us, up to a certain point; apparently all of the accounts that could be comfortably collected, if I may express it, could be gotten in, because his drivers were going around on the routes.

Q. Because his drivers were going around on the routes; Steinmeyer was one of the drivers, wasn't he? A. We did not know he was going to employ Steinmeyer.

By Mr. Burtis:

Q. You knew all about this sale, didn't you? A. I new in a general way I didn't draw the check.

Q. You had charge of the Jersey City branch up to the sale, didn't you? A. Yes, sir; up to the sale.

Q. Didn't you go over and tell these drivers of the sale? A. I did not.

Q. Who told them about it? A. I don't know.

Q. Then the Phenix Cheese Company has never officially informed Charles Steinmeyer of the sale to Buechse, has it? A. I don't know; I could not tell you that.

Q. You were not interested enough, as one of the officials of the Phenix Cheese Company, to go over and tell these drivers? A. Why, the matter was talked over with Mr. Schmedes from time to time frequently before the actual transfer took place, Mr. Schmedes being our manager there, and Mr. Schmedes, being a son-in-law of Mr. Beuchse, knew all about the transaction going on, and the matter was under negotiation for a considerable time. In fact, it was taken up by two of our directors some time before the sale; but the matter dragged along for months, and I do not believe Mr. Buechse, if he had wanted to, could have told the drivers we were going to sell at that time, when he was going to purchase.

Q. You knew all these drivers of the Jersey City branch had signed contracts similar to Mr. Steinmeyer?

Q. And you knew what each one of these contracts contained? A. Yes.

Q. They are all alike in form? A. Yes.

Q. And you knew that every one of them contained this clause, that the driver should not engage in business within a radius of ten miles within a period of one year? A. Yes.

Q. You knew that when the contract of sale was signed by the president of the Phenix Cheese Company and delivered to Buechse, that from that moment the Phenix Cheese Company ceased to own that branch of the business, didn't you? A. Yes.

Q. And you knew from that moment that the employment of Charles Steinmeyer ceased, did you not, with the Phenix Cheese Company? A. Not at all; why should it?

Q. It did not? A. Why should it? We have more routes than one.

Q. Did you send over to Jersey City and ask Charles Steinmeyer to come to the office of the Phenix Cheese Company? A. I did not.

Q. Did anyone? A. Not so far as I know; but I could not testify on that point.

Q. You knew, did you not, the very day after the sale to Buechse, that Charles Steinmeyer, Pelz, Von Sergern were continuing on their routes with Buechse? A. I don't think I went there the next day; in fact, I don't remember that I did.

Q. You did go there and find out shortly after? A. About a week or ten days.

Q. You found that out? A. Yes; I don't even know that I found it out then; I went to look after our accounts. I didn't raise the question.

Q. Didn't you know? A. No.

Q. It didn't interest you at all? A. Why should it? We have business enough of our own without attending to Buechse. He is a good business man and is quite capable of taking care of his own business.

Q. And you never told any one of these men who are sitting down there—Steinmeyer, Pelz and Von Sergen—that the Phenix Cheese Company had sold out to Buechse, and that they were to continue to work for Buechse? A. Never went there.

Q. You knew, or the Phenix Cheese Company knew, in January that Steinmeyer was working for—January, 1913, that Steinmeyer was working for Buechse, didn't you? A. Let's see, what was the date of the sale?

Q. September, 1912. A. In January, 1913, was it?

Q. That Charles Steinmeyer was working for Buechse? A. Yes.

Q. When you gave him the $98.95 you knew that, didn't you? A. I think so; yes.

Q. And you knew—if your contention be right—that he had violated this agreement, didn't you? A. Yes.

Q. And yet, with all that knowledged, you have paid him $122? A. Yes, sir.

Q. And you knew in January that there was some discrepancy between the slips and the books of the Phenix Cheese Company, did you not? A. If you will let me have Notolino's letter I will let you know the date; I knew, but I cannot tell you without that. (Looks at letter.) That is March 24, 1913. No, I wouldn't have known it at that time. I think that is your question.

Q. Yes, January; but you knew on the 21st of March? A. No, not the 21st of March; I didn't

get up there, perhaps, within the next week or ten days. As soon as I went up.

Q. Have you totalled up the amount of the alleged descrepancies? A. Beg pardon.

Q. Have you totalled up the amount of the alleged discrepancies of Notolino? A. I think Mr. Pentlarge has the summary.

Q. It totals up $3.02, doesn't it? A. I have not totalled that myself.

Q. Well, there is 60 cents, 60, 30, 62 and a possible 90 on another? A. You heard Mr. Schmedes say that he served between 60 and 100 customers a day. Now, if he worked the same game on all—

Q. It totals up $3.62; didn't you go to the other customers and get their slips? A. No.

Q. Why did you pick out Notolino's, if he skinned you? A. Because of his letter.

Q. Then if you were skinned on Notolino, why did you not find out? A. Did go to a majority of them up there.

Q. Then you have tried to find some other customer besides Notolino where there was crookedness and you have not succeeded, have you? A. In some other cases.

Q. Which ones were they? A. My recollection is Basco.

Q. That is the $6.90? A. Correct.

Q. And that is the only other one? A. The only ones I found.

Q. The only ones? A. The only ones I found.

Q. And how long have you been doing this detective work? A. I put in a month.

Q. You put in a month? A. You mean in this particular case?

Q. Yes. A. Why after March 24th, because I called on ten or twelve of the customers whose bills were unpaid.

Q. Spent several days, didn't you? A. Such ones as are noted on that list.

Q. You spent several days, didn't you? A. Not on this particular case; I was collecting over the whole ground.

Q. Has the Phenix Cheese Company ever discharged Charles Steinmeyer? A. I cannot tell you.

Q. Wouldn't you know it if they had? A. Not at all; a great many drivers of the Phenix Cheese Company are discharged that I know nothing whatever about.

Q. What is your official position there? A. I have charge of the Newark branch and I purchase supplies, but there are seven routes, ten routes.

Q. You branch includes all of the New Jersey, doesn't it? A. Not at all.

Q. Does Hudson County come within the Newark Branch? A. Let me think; is Rutherford in Hudson County?

Q. It is in Bergen County? A. Is Arlington?

Q. Hudson County? A. Nutley?

Q. Essex County? A. I don't think we go into Hudson County at the present time. We go through Arlington and Nutley and strike down—what is that town?

Q. Englewood? A. Yes, Englewood and the town this side.

Q. Between that and— A. We go right down through Kearney, Harrison, Arlington, right straight out through the road passing—Kingsland.

Q. Kingsland, that's it. A. That is, we go through there three times a week.

Q. What branch is the Hudson County store? A. New York branch.

Q. You have nothing to do with that? A. Nothing; eleven routes go out from New York branch that we have nothing to do with whatever.

They go through West Hoboken, Guttenberg, Union Hill and so on.

Re-direct Examination by Mr. Pentlarge:

Q. Mr. Brooks at the times these various payments were made on account of the deposit you didn't note these discrepancies, did you? A. No, I did not.

Q. And at that time no suit had been brought? A. No, sir.

Q. And you at that time thought that up to the point of loss that is all you were looking out to see that you didn't make a loss? A. That's right; to do justice to both parties as far as possible.

Q. You didn't know then of the discrepancies? A. No, I did not.

Re-cross Examination by Mr. Burtis:

Q. Are you now Mr. Brooks the person employed by the Phenix Cheese Company who has had entire charge of these cases and who has consulted with counsel and had the preparation of the defense and so forth? A. Not alone, in some; there are other men of our company also, Gus Spielberger and L. E. Carpenter the President of the company.

Mr. Burtis: That's all.

Mr. Pentlarge: It is conceded that Mr. William Buechse was duly subpoenaed to produce the ledgers and original vouchers, report slips and all papers bearing upon the accounts of the driver Charles Steinmeyer during the period that Charles Steinmeyer was employed by the Phenix Cheese Company and that they cannot produce them as they have been destroyed.

Mr. Burtis: That's all right.

CHARLES STEINMEYER, recalled:

By Mr. Burtis:

Q. Mr. Steinmeyer, I show you Exhibit D-11 and ask you how it comes, if you know, that the word paid there and your initials are scratched out with lead pencil? A. These people had the intention to pay me first and afterwards they didn't have the money and I had to scratch it off again.

Q. In other words it was first the intention by them to pay—to be a cash transaction and afterwards they asked you to change it? A. So it is.

Q. Mr. Steinmeyer did you sell Notolino eggs at 2 cents a dozen, that is, charge Notolino on the slip that you gave him 2 cents a dozen more than what you charged on the slip that you turned in each night to the Phenix Cheese Company? A. No.

Q. Did you ever collect from Notolino more money than you turned in and accounted for nightly to the Phenix Cheese Company? A. More money, no.

Q. In other words did Notolino ever pay you $6.50 and you turned in something less than that amount? A. I turned in according as it was paid to me.

Q. The exact amount? A. Yes.

Mr. Burtis: That's all. That is my case.

Mr. Pentlarge: Then the defendant rests, your Honor.

## EXHIBITS.

**Printed Pursuant to and in Accordance With a Stipulation Dated May 11, 1915, Entered Into Between the Attorneys for the Respective Parties hereto.**

---

### Plaintiff's Exhibit P-1.

(Letterhead)

of

Phenix Cheese Company.

January 9th, 1913.

Mr. Chas. Steinmeyer,
#156 Leonard Street,
Jersey City, N. J.

Dear Sir:

Herewith, please find enclosed our check for $98.95 on account of bond.

The following accounts are still outstanding:

| | |
|---|---|
| Theo. Beck | $ 5.14 |
| J. Pallister | 6.64 |
| M. A. Chard | 3.00 |
| M. Desmond | 19.98 |
| Felix Notolino | 4.40 |
| Chas. Disteche | 11.89 |
| Total | $51.05 |

We are putting forth every effort to collect these accounts and if you can give us any suggestions,

or render any assistance, it would be highly appreciated. Some of these are at present in court, and we hope that within a short time, we may be able to secure the remainder, which is outstanding, at which time we will forward to you the additional sum together with the interest on the bond.

Very truly yours,

PHENIX CHEESE COMPANY,
Per (Signed) Byron E. Brooks.

enclosure—
BEB/IVN

---

**Defendant's Exhibit D-1.**

Cancelled check of the defendant corporation made payable to Charles Steinmeyer, endorsed by him and marked paid.

Dated, March 10, 1913, amount $10.00.

---

**Defendant's Exhibit D-2.**

Cancelled check of the defendant corporation made payable to Charles Steinmeyer, endorsed by him and marked paid.

Dated, March 27, 1912, amount $3.75.

**Defendant's Exhibit D-3.**

New York, Oct. 14, 1911.

THIS MEMORANDUM CERTIFIES AS FOLLOWS:

THAT, CHARLES STEINMEYER of 156 Leonard St., Jersey City, New Jersey, as condition of his employment by the PHENIX CHEESE COMPANY, has agreed faithfully and honestly to perform his duties as such employee, and that he will not, within the period of one year after his employment by said Company, shall, for whatever cause, cease directly or indirectly engage in business in the City of New York, or at any point within a radius of ten miles from said City, in competition with said Company, either upon his account or as a servant or employee of others.

THAT the said PHENIX CHEESE COMPANY have this day received from CHARLES STEINMEYER the sum of One Hundred Fifty Dollars, to be held by said Company as security, and to be returned, with interest at six per cent., per annum from the date thereof, at the expiration of three months after the termination of the employment of said CHARLES STEINMEYER by said Company; provided he shall have carefully, honestly and faithfully performed his duties, and shall have in all things honestly and truly accounted for all moneys, merchandise and property that may have been entrusted to his care, or which may have come into his possession, or to which he may have had access as an employee of said Company, and shall have so conducted himself as such employee that the said Company or their customers shall have suffered no damage by reason of dishonesty, negligence or other misconduct on his part, and provided also that the said CHARLES STEIN-

MEYER shall up to that time, have abstained from entering into competition with said Company, as hereinbefore agreed, and

THAT, in case of violation of any of the above conditions on the part of the said CHARLES STEINMEYER the said sum of One Hundred Fifty Dollars shall be retained by the said Company, and become their absolute property: it being hereby agreed that the damage which the said Company, will sustain by any such violation, will at least amount to said sum.

PHENIX CHEESE COMPANY,
(Signed) Byron E. Brooks,
Assistant Manager.

IT IS DISTINCTLY UNDERSTOOD that the sooner return of said deposit shall not relieve CHARLES STEINMEYER from his above agreement to abstain from entering into competition with said Company until after the expiration of one year from the termination of his employment.

I HAVE READ THE ABOVE, AND AGREE TO SAME.

(Signed) CHARLES STEINMEYER.

Witness:

(signed) WILLIAM SCHMEDES.

REVERSE SIDE OF CONTRACT ENDORSED AS FOLLOWS:

| | | | | |
|---|---|---|---|---|
| | Int. Pd. to 4/1/12 | | | |
| | " " " 2/1/13 | | | |
| Jan. | 9-13 Pd. | | 98.95 | |
| Feb. | 10-13 " | | 6.64 | and Int. 6.75 |
| | | | 105.59 | |
| Nov. | 10-13 " | | 10.00 | |
| 4/30/13 | Pd. | | 115.59 | (Rubber Stamp) |
| | Felix Notolino | 4.40 | | "Paid |
| | Theo. Beck | 5.14 | | Apr. 30, 1913 |
| | Mary Desmond | 19.98 | | Phenix Cheese Co. |
| | M. A. Chard | 3.00 | | By ———" |
| | Legal Expenses | 1.89 | 34.41 | |
| | Total | | 150.00 | |

## Defendant's Exhibit D-4.

Being a driver's sales slip introduced solely for the purpose of showing the general character of said slips and being in all respects similar to the one attached hereto except as to its number and the address of the defendant corporation thereon inscribed.

Telephone, Worth 102
" " 103
" " 104

**PHENIX CHEESE CO.**

IMPORTERS AND MANUFACTURERS

**FOREIGN and DOMESTIC CHEESE**
**BUTTER and EGGS**

TERMS CASH 345-347 GREENWICH STREET

New York,_____

M_____

| | | | |
|---|---|---|---|
| | Neufchatel | | |
| | Phila. Cream | | |
| | Isigny Red Miniature { F. M. P. S. | | |
| | Imp. Swiss | | |
| | Dom. " | | |
| | Limburger | | |
| | Roquefort | | |
| | Sweet Print Package | | |
| | Dairy | | |
| | Salt Print Package | | |
| | White Eggs | | |
| | Excelsior Eggs | | |
| | Empire Eggs | | |
| | Candled Eggs | | |
| | | | |
| | | | |

Received by_____

**Route No. 25**

Patented. The Wilkins Press, Boston

No. 5826

## Defendant's Exhibits D-5 to D-10 Inclusive.

These Exhibits are drivers' sales slips similar in characteristics to Defendant's Exhibit IV, and show charge sales to a customer F. Notolino, on the dates and for the amounts set forth as follows:

| Exhibit No. | Date of Sale Slip | Number | Items | | Amounts |
|---|---|---|---|---|---|
| D-5 | Aug. 30, 1911 | 1590 | 30 doz. eggs @ 14 | | $4.20 |
| D-6 | Sept. 27, 1911 | 19381 | 30 doz. eggs @ 16 | | 4.80 |
| D-7 | Sept. 6, 1911 | 21628 | 15 doz. eggs | | 2.10 |
| D-8 | Sept. 16, 1911 | 7765 | 30 doz. eggs | 4.20 | |
| | | | 3¾ D. S. Cheese | .67 | 4.89 |
| D-9 | Feb. 23, 1912 | 1729 | 6 Doz. Candled eggs @ 24 | | 1.44 |
| | | | Paid bill | | 2.16 |
| D-10 | Oct. 21, 1911 | 18479 | 30 doz. eggs @ 17 | 5.10 | |
| | | | 5 lbs. dom. Swiss @ 20 | 1.00 | |
| | | | | 6.10 | |
| | | | Rt. 9 doz. eggs @ 17 | 1.53 | |
| | | | | | 4.57 |

Page reprinted to show proper tabulation of Exhibits D-5 to

## Defendant's Exhibit D-11.

This slip is yellow in color. The date, name of customers, the words "30 doz." and "Paid," the signature of Charles Steinmeyer and the figures "23" and "6.90" are all in blue carbon. All other numbers and words upon the slip (other than printed matter) are in pencil.

## Defendant's Exhibits D-5 to D-10 Inclusive.

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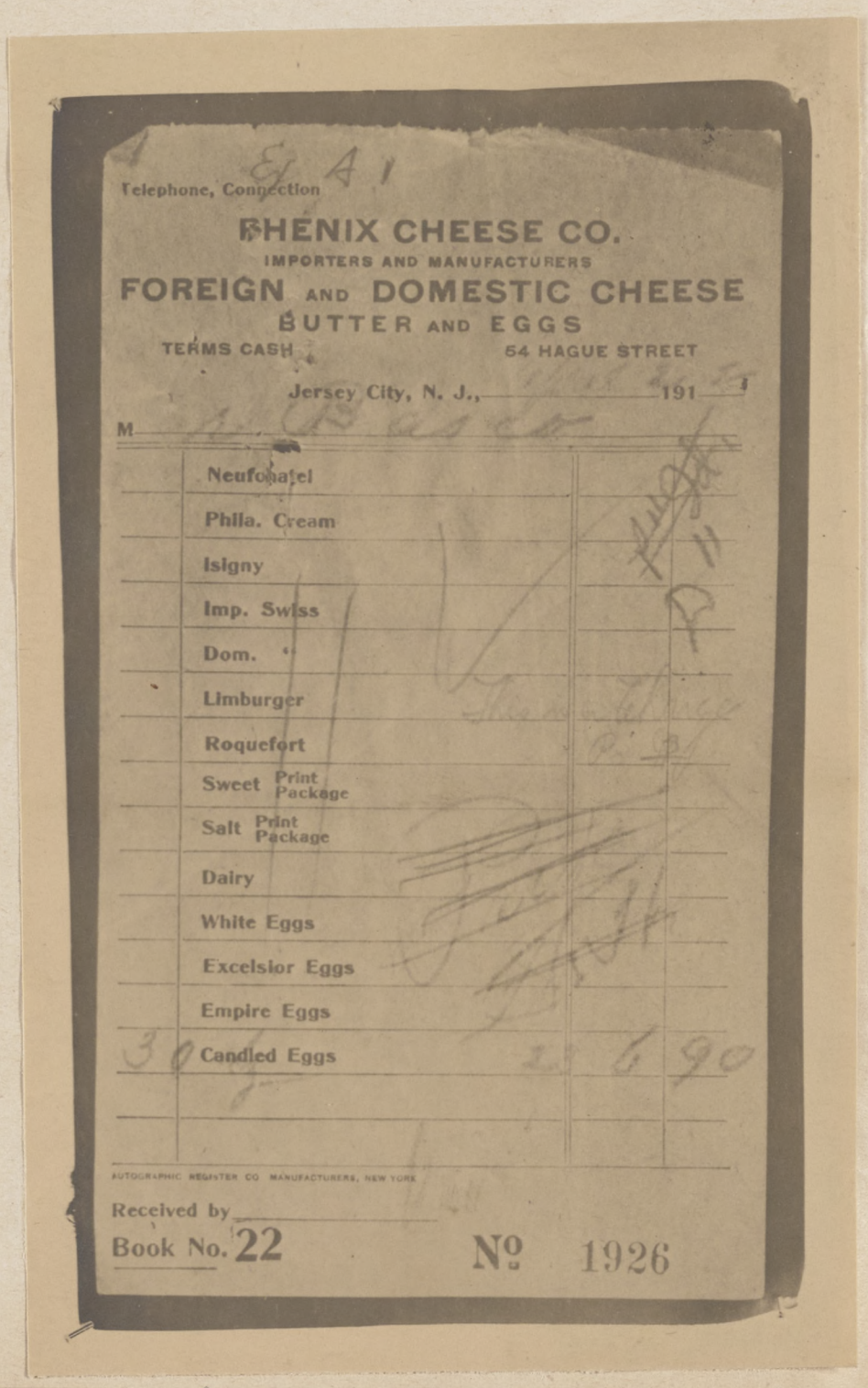
| D-7 | Sept. 6, 1911 | 21628 |
| D-8 | Sept. 16, 1911 | 7765 |
| D-9 | Feb. 23, 1912 | 1729 |
| D-10 | Oct. 21, 1911 | 18479 |

| Items | | Amounts |
|---|---|---|
| 30 doz. eggs @ 14 | | $4.20 |
| 30 doz. eggs @ 16 | | 4.80 |
| 15 doz. eggs | | 2.10 |
| 30 doz. eggs | 4.20 | |
| 3¾ D. S. Cheese .67 | | 4.89 |
| 6 Doz. Candled eggs @ 24 | | 1.44 |
| Paid bill | | 2.16 |
| 30 doz. eggs @ 17 | 5.10 | |
| 5 lbs. dom. Swiss @ 20 | 1.00 | |
| | 6.10 | |
| Rt. 9 doz. eggs @ 17 | 1.53 | |
| | | 4.57 |

## Defendant's Exhibit D-11.

This slip is yellow in color. The date, name of customers, the words "30 doz." and "Paid," the signature of Charles Steinmeyer and the figures "23" and "6.90" are all in blue carbon. All other numbers and words upon the slip (other than printed matter) are in pencil.



Telephone, Connection

PHENIX CHEESE CO.

IMPORTERS AND MANUFACTURERS

FOREIGN AND DOMESTIC CHEESE

BUTTER AND EGGS

TERMS CASH 54 HAGUE STREET

Jersey City, N. J., 191

M

| | | |
|---|---|---|
| | Neufchatel | |
| | Phila. Cream | |
| | Isigny | |
| | Imp. Swiss | |
| | Dom. " | |
| | Limburger | |
| | Roquefort | |
| | Sweet Print Package | |
| | Salt Print Package | |
| | Dairy | |
| | White Eggs | |
| | Excelsior Eggs | |
| | Empire Eggs | |
| 30 | Candled Eggs | 6 90 |
| | | |
| | | |

AUTOGRAPHIC REGISTER CO. MANUFACTURERS, NEW YORK

Received by

Book No. 22 No. 1926

## Defendant's Exhibit D-12.

A yellow slip similar to D-11, introduced as an illustration of the general appearance of the duplicate yellow slips testified to by the witness.

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## Defendant's Exhibit D-13.

156 Leonard St., Jersey City, N. J.,
Dec. 8, 1912.

Phenix Cheese Co.,
345 Greenwich St., N. Y.

Sirs:

In answering your letter of the 5th, I would like to give you correct information concerning the unpaid bills. It was Mrs. Diedericks, not Chas. Dexhexte that owed $11.89. The former paid said amount, two months ago. I never served a customer by the name of G. Shnauer. M. A. Chard is dead for 9 months. His relatives paid part of the bill, another part was paid by me. The balance cannot be collected. $4.20 of the $5.64 owed by Mr. Notaleo was paid in small payments, which I can prove by my ledger. Three months ago he sold his store. John Palasite owed $6.64 for a case of eggs. The eggs were worthless, he returned a portion of them, and wishes to be sued for the bill. Mr. Derida and L. Bosco can prove by their receipts, they paid for all the goods they purchased. Mr. Beck and Mary Desmond have failed in business. Their store was sold on auction, and it was impossible to collect even a portion of their bill.

Besides your men investigated all overdue bills. The 150 Dollars I paid to you as security was done so with the distinct understanding that I should not be responsible for uncollectable bills.

Yours respectfully,

(Signed) CHAS. STEINMEYER.

---

## Defendant's Exhibit D-14.

Loose-leaf Ledger sheets from the Ledger of Accounts kept by Phenix Cheese Company and shows the account of Felix Notolino from July 8, 1911, to June 2, 1912.

The first sheet is endorsed at top

"Credit $25.00."

The second sheet is endorsed

"One bill not to exceed $5.00 B. E. B. 7/15/12."

The dates, slip numbers, charges, credits and balances are as follows:

| | | | | | |
|---|---|---|---|---|---|
| July | 8 | | 2.85 | | 2.85 |
| | 15 | 10 | | 2.85 | 0.00 |
| Aug. | 30 | 21590 | 3.60 | | 3.60 |
| Sept. | 6 | 21629 | | 3.60 | 0.00 |
| | 6 | 21628 | 1.80 | | 1.80 |
| | 16 | 1166 | | 1.80 | 0.00 |
| | 16 | 7765 | 4.27 | | 4.27 |
| | 27 | 19381 | 4.20 | | 8.47 |
| | 27 | 19380 | | 4.27 | 4.20 |

| | | | | | |
|---|---|---|---|---|---|
| Oct. | 7 | 19862 | 4.50 | | 8.70 |
| | 7 | 58 | | 4.50 | 4.20 |
| | 21 | 104 | 5.20 | | 9.40 |
| | 21 | 69 | | 4.20 | 5.20 |
| Nov. | 11 | 123 | 3.30 | | 8.50 |
| | 11 | 82 | | 3.67 | 4.83 |
| | 25 | 91 | | 3.30 | 1.53 |
| | 25 | 134 | 3.30 | | 4.83 |
| Dec. | 6 | 142 | 1.17 | | 6.00 |
| | 23 | 110 | | 3.30 | 2.70 |
| | 23 | 158 | 6.60 | | 9.30 |
| Jan. | 6 | 119 | | 1.17 | 8.13 |
| | 26 | 132 | | 2.00 | 6.13 |
| Feb. | 3 | 137 | | 1.00 | 5.13 |
| | 2 | 155 | | 1.00 | 4.13 |
| | 20 | 224 | 2.16 | | 6.29 |
| | 20 | 166 | | 2.00 | 4.29 |
| | 23 | 168 | | 2.16 | 2.13 |
| | 23 | 227 | 1.44 | | 3.57 |
| | 27 | 230 | 3.75 | | 7.32 |
| | 27 | 171 | | 1.44 | 5.88 |
| | | | | Carried forward | |

No 2.

| | | | | | |
|---|---|---|---|---|---|
| Brought Forward. | | | 5.88 | | 5.88 |
| Mar. | 30 | 234 | 1.08 | | 6.96 |
| Apr. | 3 | 237 | 5.64 | | 12.60 |
| | 3 | 175 | | 4.00 | 8.60 |
| | 24 | 189 | | 1.20 | 7.40 |
| May | 1 | 194 | | 1.00 | 6.40 |
| | 5 | 216 | | 1.00 | 5.40 |
| June | 26 | 230 | | 1.00 | 4.40 |

## Defendant's Exhibit D-15.

Sales Journal of the Defendant Corporation showing accounts during period covered by the plaintiff's employment by the defendant.

The items therein referred to are more particularly set forth in the testimony.

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## Defendant's Exhibit D-16.

Cash Book of the Defendant Corporation showing accounts during period covered by the plaintiff's employment by the defendant.

The items therein referred to are more particularly set forth in the testimony.

---

## Defendant's Exhibit D-17.

Example of Driver's Daily Report Slip.

FACE.

| | |
|---|---|
| Date April 2 D | |
| Bills | 83.00 |
| Specie | 3.94 |
| Gold | |
| Checks | 15.00 |
| | 4.35 |
| Total | 106.29 |

Route 22.
Turned in by Chas. Steinmeyer.
Received by.....
Checked by.....

REVERSE.

| Cash | Charges | | |
|---|---|---|---|
| 3.45 | Roll | 9.19 | 10 |
| .25 | Nelson | 6.90 | |
| .45 | Hasselm | 4.02 | |
| 1.67 | Basco | 6.90 | |
| 1.21 | Wagner | 7.05 | |
| 2.92 | Hoevsk | 13.10 | |
| 1.23 | Palasit | 8.50 | |
| .43 | Abrahen | 4.83 | |
| | | 60.49 | |
| 7.05 | | | 20 |
| 3.34 | | | |
| 2.49 | | | |
| 6.14 | | | |
| .95 | | | |
| 2.60 | | | |
| 1.96 | | | |
| 1.42 | Collections. | | |
| 4.05 | Cooper | 5.00 | |
| .70 | Roll | 10.48 | |
| 4.22 | Hasselmeyer | 7.75 | 30 |
| 46.53 | Wagner | 7.99 | |
| 59.76 | Murthag | 6.60 | |
| 106.29 | Palasit | 15.19 | |
| | | 53.01 | |
| | Basco | 6.75 | |
| | | 59.76 | 40 |

## Defendant's Exhibit D-18.

Cancelled check of the Phenix Cheese Company, endorsed by Charles Steinmeyer and endorsed by him in blank and subsequently cancelled. The check on its face shows that the payment is made up as follows:

| | | |
|---|---|---|
| Palistice a/c..... | $664 | |
| Interest to date..... | 674 | $13.39 |
| | Amount | $13.39 |

Check is dated Feb. 10, 1913.

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## Defendant's Exhibit D-19.

Cancelled check of the Phenix Cheese Company to order of Charles Steinmeyer. Endorsed in blank by him and subsequently cancelled.

Amount $98.95

Dated Jan. 9, 1913.

## Stipulation.

COURT OF ERRORS AND APPEALS.

CHARLES STEINMEYER,
Plaintiff and Appellee,

against

PHENIX CHEESE COMPANY, a Corporation of the State of New York,
Defendant and Appellant.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing shall constitute the State of Case on appeal in the above entitled action.

Dated May 20, 1917.

ALFRED A. FRANCK,
Attorney for Plaintiff and Appellee.

FRANK R. PENTLARGE,
Attorney for Defendant and Appellant.

# Court of Errors and Appeals.

| | |
|---|---|
| CHARLES STEINMEYER,<br>Plaintiff and Appellee,<br><br>against<br><br>PHENIX CHEESE COMPANY, a corporation of the State of New York,<br>Defendant and Appellant. | Action at Law.<br>Appeal from Judgment of the Supreme Court affirming judgment of the District Court. |

## THE FACTS.

1. *As to the nature of the suit and history of the litigation.*

This action was brought to recover a balance alleged to be due upon the sum of One hundred and fifty Dollars ($150.00), deposited by the plaintiff with the defendant pursuant to the terms of a certain written agreement (Defendant's Ex. D-3), entered into between the parties at the time the plaintiff entered the defendant's employ. The suit is based upon the said contract, the same being set forth in full as a part of the State of Demand (Vide, State of Demand, page 9).

The defendant pled plaintiff's breaches of the contract by way of recoupment of damages, al-

leging that it had sustained losses by reason of such breaches to, at least, the sum of One hundred and fifty Dollars ($150.00), to which sum it limited itself in accordance with the provisions for liquidated damages contained in the aforesaid contract (Vide, Recoupment of Damages, page 14).

It was conceded upon the trial that of the sum of One hundred and fifty Dollars ($150), deposited by the plaintiff with the defendant, all but Thirty-four Dollars and forty-one cents ($34.41) had been returned prior to January 9th, 1913.

The defendant contended upon the trial of this cause that it was entitled to a judgment in its favor because of various alleged breaches by the plaintiff of the agreement under which the money sued for had been deposited, inasmuch as the contract sued upon provided for liquidated damages in case of its violation by the plaintiff. Much testimony was adduced to support the contentions raised for the purpose of showing:

1. That the plaintiff had been dishonest in the performance of his duties under the contract, misappropriating funds of the defendant through the falsification of his accounts.

2. That the plaintiff had failed to "faithfully and honestly perform his duties" by reason of his recklessness (to the defendant's great loss) in the extending of credit to customers contrary to instructions.

3. That the plaintiff had broken the stipulation in the agreement in reference to not entering into competition with the defendant within a certain prescribed territory within one year of the termination of his employment with the defendant.

At the close of the trial, decision was reserved and thereafter the Trial Judge filed a written memorandum giving judgment against the defendant as follows:

| | | |
|---|---|---|
| "Paid on account ..... | $112.35 | |
| | 38.65 | |
| Interest from January 9, 1913.. | 2.50 | |
| | 41.15 | |
| Discrepancies ..... | 3.02 | |
| | $ 37.13" | |

for which sum judgment was entered with costs.

It is to be noted that (as is more fully hereafter commented upon) the Trial Court *allowed* the defendant for each and every item which it sought to prove upon the trial as having been misappropriated by the plaintiff, the allowance being set forth in the judgment under the term "discrepancies," *yet* gave judgment against the defendant for the balance of the deposit money in its hands.

The defendant duly appealed from said judgment to the Supreme Court upon the grounds set forth in the Specifications on Appeal (Vide, Specifications on Appeal to Supreme Court, page 21), the substance of the same being that inasmuch as the contract sued upon provided for the forfeiture of the deposit money by way of liquidated damages, in the event of its breach by the plaintiff and

1. The allowance by the Trial Court in favor of the defendant of the sum of $3.02 (being the exact sum claimed by the defendant upon the trial to have been misappropriated by the plaintiff) was

in effect a finding as to such misappropriations, and the Court having so found, it should have given judgment as demanded by the defendant upon its recoupment.

2. That the testimony being undisputed as to the failure of the defendant to "faithfully and honestly" perform his duties as provided for by the agreement, there was absolutely no evidence upon which to give judgment in favor of the plaintiff and same should have been rendered in favor of the defendant upon its recoupment.

3. That the testimony being undisputed as to the plaintiff having entered into competition with the defendant after he left its employ, contrary to the provisions of the contract, the Trial Court erred in not rendering judgment in favor of the defendant.

The Supreme Court affirmed the judgment below (Vide, Opinion of Supreme Court, page 5), and from said judgment of affirmance, the defendant appealed to this Court upon the various grounds set forth in the Notice of Appeal (Vide, Notice of Appeal, page 1). The grounds now relied upon for a reversal of the Court below are set forth specifically hereafter.

2. *As to the Parties.*

The defendant was engaged in the wholesale dairy produce business (Brooks, page 1), having its principal office in New York City, and branches throughout the Metropolitan District of New York (Brooks, pages 83-84). An important branch of its activities consisted in the operation of wagon routes in and around New York (Brooks, pages

83-84). In 1911-1912 it had a branch store in Jersey City, New Jersey.

The plaintiff entered the defendant's employ about July 1st, 1911, as a driver and salesman on one of defendant's wagons, operated from the Jersey City store of the defendant (Steinmeyer, page 26). The duties of the plaintiff, as such driver-salesman, were to build up for the Phenix Cheese Company, within certain prescribed territory, a wagon sales route, selling defendant's merchandise directly from the wagon to the defendant's customers (Steinmeyer, page 29).

He was naturally likewise expected to use his best efforts to increase the volume of business on the route, and maintain the reputation of the defendant for fair business dealings.

Each morning the plaintiff was in the habit of taking out the wagon assigned to him, filled with defendant's merchandise and was supposed each night to account for the goods received in the morning, either by returning the same or the amount received in selling the goods, or in lieu of cash for such goods sold, equivalent charges against customers in such cases where credit was permitted. His duties and work were subject to the rules and regulations of the defendant (Steinmeyer, pages 35-36). In short, the plaintiff was virtually in charge of a branch store on wheels for the defendant.

The fact that so much of detail of necessity had to be left to the plaintiff, placed him in an unusually responsible position, wherein either through dishonesty or carelessness or unfaithfulness, he could misappropriate funds or merchandise or damage the defendant's reputation for honesty and fair dealing among the trade served by the plaintiff. The defendant, therefore, to protect itself,

procured from the plaintiff as a condition for employing him a deposit of One hundred and fifty Dollars ($150.00) as "security" and to be returned "provided he (the plaintiff) shall have honestly, carefully and faithfully performed his duties" (see Contract, Defendant's Ex. D-3, page 98).

3. *As to the Terms of the Contract of Indemnity Sued Upon.*

The terms under which the said deposit was made was set forth in a contract entered into between the parties hereto. As has been already stated the same is incorporated in the State of Demand. (It is also set forth as an exhibit page 98.)

So far as the contract is pertinent on this appeal it may be summarized as follows:

First Paragraph. The plaintiff, as a condition for his employment agreed, "faithfully and honestly to perform his duties as employee."

Second Paragraph. This paragraph acknowledges the receipt by the defendant from the plaintiff of the One Hundred and Fifty Dollars ($150.00) "as security and to be returned * * * provided he (plaintiff) shall have *carefully, honestly and faithfully performed his duties.*" The paragraph then continues to enumerate more specifically what constitutes the careful, honest and faithful service.

Third Paragraph. This paragraph provides "that in case of violation of any of the above conditions * * * the said sum * * * shall be retained by the said Company (the defendant)

and become their absolute property; *it being hereby agreed that the damages which the said company will sustain, by any violation, will at least amount to said sum.*" In short the parties, realizing the difficulty of proving dishonest, careless and faithless service in regard to duties of the nature of the plaintiff, in his position as a driver-salesman, *expressly agreed upon liquidated damages.* To hold otherwise would be to destroy the clear and manifest intent of the parties.

The balance of the contract pertains merely to its execution.

4. *As to the Plaintiff's Breaches of the Contract.*

The defendant, despite the difficulties of proof in regard to breaches of a contract, such as the one in question, showed many separate violations of the contract by the plaintiff, embracing peculations, faithlessness and carelessness during the period of employment.

FIRST.—As to the breaches involving moral turpitude:

A. The first series of acts of this character involves the falsifying of returns enabling the plaintiff to misappropriate a portion of the funds received by him on cash sales. *The Trial Judge recognized this series of peculations, and in the memorandum filed at the time the judgment was rendered, allowed the defendant for the amount thereof,* the Trial Judge designating them in the said memorandum as "discrepancies." (Vide Memorandum of Trial Judge upon Entry of Judgment, page 17.) It is contended as hereafter more fully set forth that such finding made it imperative

upon the Trial Court to give judgment for the defendant under the provision for liquidated damages contained in the contract of indemnity.

It appears that the plaintiff, as driver-salesman for the defendant, carried with him pads containing sales slips, similar to defendant's Ex. D-4 (page 100). These slips were alternatively white and yellow in color. The duty of the plaintiff upon making a sale was to record the same on the slips, inserting a piece of carbon paper between the white and yellow slips. The white slip constituted the original record and the carbon yellow slip the duplicate original. If the transaction were a cash sale, the plaintiff signed the slips, giving the white one to the customer as a receipt; and if a charge sale, the customer signed the slips thus acknowledging the liability (for method of using slips see Steinmeyer's testimony, pages 29-30-31). It was plaintiff's duty, and he actually did turn in these yellow slips each evening to the defendant's Jersey City store, and he likewise turned in with the said slips, a daily report slip, upon which was totaled all the transactions of the day, divided into cash collection and charge items (see Defendant's Ex. D-17, page 106).

From the daily report slips and the original duplicate yellow slips, defendant's sales journal, cash book and ledger, were made up (Schmede's, page 38-39; Reinhart, pages 71-72), and settlements with the drivers and customers made.

The defendant, subsequent to the termination of plaintiff's employment, attempted to collect outstanding accounts due from customers, which plaintiff had permitted to accrue during his employment. The defendant found that many of the customers disputed the items involved. One in

particular, Notolino, requested the defendant, by letter, to send a representative to see him in regard to his bill. Accordingly, Mr. Brooks the general manager of defendant's branch stores, called on Mr. Notolino and from him discovered that certain sales slips held by Notolino as receipts indicated the payment of larger sums than the duplicate slips turned in by the plaintiff, while in defendant's employ, had called for (Brooks, page 83). These white slips bearing the signature of the plaintiff were obtained by Mr. Brooks from the said Notolino, and on the trial of this action offered and received in evidence, being Defendant's Exhibits D-5 to D-8 inclusive, and D-10. A tabulation of the amount of sales as per the said white slips, and the entries in the books of the company, previously entered from the original yellow slips, shows the following discrepancies:

| Amount shown on white slips (customers' receipts.) | | Amount shown on books of defendant corporation as made up from duplicate yellow sales slips. | | | Discrepancy. |
|---|---|---|---|---|---|
| | | Ledger | Sale Journal | Cash Book | |
| EX. 5 | 4.20 | 3.60 | 3.60 | 3.60 | .60 |
| 6 | 4.80 | 4.20 | 4.20 | 4.20 | .60 |
| 7 | 2.10 | 1.80 | 1.80 | 1.80 | .30 |
| 8 | 4.89 | 4.27 | 4.27 | 4.27 | .62 |
| 10 | 6.10 | 5.20 | 5.20 | | .90 |
| Total | | | | | $3.02 |

THIS SUM BEING THE EXACT SUM ALLOWED THE DEFENDANT BY THE TRIAL JUDGE UNDER THE DESIGNATION "DISCREPANCIES," IT IS CONTENDED BY THE APPELLATE HEREIN THAT SUCH ALLOWANCE IS A FINDING IN THE DEFENDANT'S FAVOR ON THE ABOVE

MENTIONED MISAPPROPRIATIONS AND BEING SUCH, IN VIEW OF THE PROVISION IN THE CONTRACT FOR LIQUIDATED DAMAGES, THE RENDERING OF A DECISION IN FAVOR OF THE PLAINTIFF FOR THE BALANCE OF THE DEPOSIT MONEY WAS AN ERROR AS A MATTER OF LAW.

It is to be noted that in reference to the above discrepancies the difference between the amount paid by the customer, Notolino and the amount turned in by the plaintiff in this action in all but two of the transactions above set forth, amounted, to a difference of two cents per dozen eggs sold. (See Exhibits D-5 to D-8, page 101.) In the case involving Defendant's Exhibit D-8 and D-10 the transactions included the sale of cheese as well as of eggs and the discrepancies are a little higher.

B. A second series of acts on the part of the plaintiff, while in defendant's employ, and which involved actual wrongdoing, pertain to the juggling of accounts in such a manner that cash transactions were made to appear as charge items, and while the sums involved were ultimately turned in, the plaintiff was enabled, by reason of his manipulation of the accounts, to temporarily retain the moneys which rightfully belonged to the defendant. Attention in this regard, is directed to the testimony regarding Defendant's Exhibit D-9 (Schmedes, page 50), showing that although the white sales slip was signed by the plaintiff, showing conclusively that it was a cash transaction, it was entered as of the date of sale as a charge item and the money only paid in to the defendant corporation four days thereafter.

Again attention is called to Defendant's Exhibit D-11, and testimony regarding same (Schmedes, pages 51-52). This is another case of a cash sale

being called a charge. In reference to this exhibit the Court's attention is called to the photographic reproduction thereof. (See Exhibit D-11, page 102.) An examination thereof shows that all of the figures and words involved in the sale set forth on the slip are written in blue carbon; so also is the signature of the plaintiff, thus showing a usual cash transaction. The words "Paid C. S. (plaintiff's initials)" are then stricken out in lead pencil and the item turned in as a charge. Schmedes, the bookkeeper, testified (page 62) that he, seeing the slip returned as a charge, wrote across the same the pencil notation "This is a charge." It is to be noted that the slip bears no signature of the customer thus showing the transaction to be a charge one.

This second series of acts on the part of the plaintiff involving actual wrongdoing which the Appellant although it has heretofore claimed as being undisputed, will not be urged upon this appeal as a ground for reversing the Court below in view of the Supreme Court's contention that the evidence is in conflict in regard thereto. The evidence has been set forth in this statement of facts because of the light it throws upon the case as a whole.

SECOND.—As to the breaches involving a flagrant disregard of the plaintiff's duty as an employee of the defendant to "faithfully and honestly perform his duties as such employee."

The plaintiff was limited by the defendant in the amount of credit to be given to each customer. The limitation being not only noted on the various ledger pages, but oral instructions were given to plaintiff in every instance by Mr. Brooks. The driver was forbidden to give credit beyond these

sums and if he did he was held accountable for any such extension of credit (Brooks, pages 78-79 and 80). Even the plaintiff concedes this in his letter of December 8th, 1912 (Defendant's Exhibit D-13, page 103), in which he states

> "besides your men investigated all over due bills. The $150 I paid to you as security was done so with the distinct understanding that I should not be responsible for uncollected bills."

Defendant's general manager testified without contradiction that the defendant after using all due diligence, had been unable to collect the sum of $31.41 from various customers in cases of extended credit, and that it had likewise necessarily expended the sum of $22.50 in collecting other acounts where plaintiff had wrongfully extended credit, making a total loss to the defendant of $53.91, by reason of plaintiff's breach of his duties, in regard to the extension of credit.

*As To The Proof.*

Because of the peculiar disadvantage under which the defendant labored in the litigation herein in supplying evidence of the plaintiff's breaches of the contract, the Court's attention is called to the circumstances in reference thereto. The defendant had, over a year before the commencement of the action herein, given up its Jersey City store, selling the same including most of the old records to the party from whom it had originally purchased it (Brooks, pages 84-85). It had retained in its possession only its old sales journal and cash book. Subsequently it obtained the ledger sheet on which appeared the account of one of the former customers, Notolino. As testified to by Mr. Brooks

(Brooks, page 77), it also obtained from Mr. Notolino several of the old duplicate white sales slips showing sales made by the plaintiff herein to the said customer, and likewise had procured a duplicate white sales slip from a former customer named Bosco. These were the only records it had in its possession.

The original duplicate yellow slips corresponding to the white slips, which it had obtained from Bosco and Notolino, had previously been turned over by the plaintiff, in the course of his employment, to the defendant, at its Jersey City store and had been left there by it when it sold the same (Schmedes, pages 39-40; Brooks, page 77). These slips were destroyed prior to the commencement of the action. The defendant, in order to explain why it did not produce these yellow slips, served a subpoena duces tecum on William Buchse & Son, Incorporated, the successor to the defendant in Jersey City, and likewise a notice to produce on the plaintiff, who it is to be remembered, was at the time in the employ of William Buchse & Son, Incorporated, calling upon them to produce the records in question. Both failed to do so and William Schmedes, who had general charge of these records immediately after the defendant had sold the store to William Buchse & Son, Incorporated, testified that all the old records had been destroyed by him (Schmedes, page 25).

The defendant thereupon introduced evidence showing the method used in compiling its ledger, cash book and sales journal from the original white sales slips as the same were daily returned to the Jersey City store and these books were used upon the trial in lieu of the destroyed duplicate white sales slips.

## GROUNDS FOR REVERSAL RELIED UPON ON THIS APPEAL.

1. THE JUDGMENT OF THE TRIAL COURT WAS INCONSISTENT WITH ITS FINDINGS AND THE SUPREME COURT ERRED IN NOT SO DECIDING.

2. THE TESTIMONY IS UNDISPUTED THAT THE PLAINTIFF FAILED TO "FAITHFULLY AND HONESTLY" PERFORM HIS DUTIES AS PROVIDED FOR BY THE AGREEMENT AND HENCE THE PROVISIONS FOR LIQUIDATED DAMAGES CONTAINED IN THE AGREEMENT SHOULD HAVE BEEN ENFORCED BY THE TRIAL COURT AND THE SUPREME COURT ERRED IN NOT SO DECIDING.

3. THE CONTRACT SUED UPON PROVIDED FOR LIQUIDATED DAMAGES IN THE EVENT OF ITS BREACH THEREOF BY THE PLAINTIFF AND VIOLATIONS THEREOF BY THE PLAINTIFF HAVING BEEN PROVEN JUDGMENT SHOULD HAVE BEEN RENDERED IN FAVOR OF THE RESPONDENT AND THE SUPREME COURT ERRED IN NOT SO DECIDING.

4. IRRESPECTIVE OF THE QUESTION AS TO WHETHER THE CONTRACT PROVIDED FOR LIQUIDATED DAMAGES OR NOT, JUDGMENT SHOULD HAVE BEEN RENDERED IN FAVOR OF THE PLAINTIFF FOR THE SUM OF $53.91, ITS LOSSES PROVED WITHOUT REFUTATION, BY REASON OF OVER EXTENDED CREDIT GIVEN DEFENDANT'S CUSTOMERS BY THE PLAINTIFF CONTRARY TO INSTRUCTIONS.

Such additional grounds for reversal of the trial court as were urged in the Supreme Court and again set forth in the notice of appeal herein, are abandoned, as this appellant desires to confine itself to the most salient points involved herein.

## The Law.

### POINT I.

### The judgment of the Trial Court was inconsistent with its findings and the Supreme Court erred in not so deciding.

Upon entering judgment for the plaintiff the Trial Court filed a memorandum (Vide, Memorandum of Trial Judge, etc., page 17) which is set forth in full herein as follows:

| | | |
|---|---|---|
| Paid on account | | $112.35 |
| Interest from January 9, 1913 | | 2.50 |
| | | 41.15 |
| Discrepancies | | 3.02 |
| | | 37.13 |

Upon the appeal to the Supreme Court the appellant herein urged that the only possible inference to be drawn from the allowance by the Trial Court in the defendant's favor of "discrepancies" in the sum of $3.02 is the finding in the defendant's favor upon its contention on the trial that the plaintiff has misappropriated sums of money to the exact extent of $3.02, and the contract sued upon providing for liquidated damages in case of its breach by the plaintiff, the judgment of the Trial Court was inconsistent with its findings in this particular. The Supreme Court in passing upon this phase of the question ruled (Vide, Opinion, page 5):

> "The Appellate Court will assume a finding of fact that will support the judgment below."

The appellant does not for a moment dispute the rule as stated by the Supreme Court but most strongly urges that such an *assumption* cannot prevail when there is absolutely no testimony to support the same but on the contrary the evidence being incompatible to such an assumption. As is seen by the memorandun of the Trial Judge (supra), he allowed the defendant $3.02 for "discrepancies." *This was a finding in the defendant's favor and under the provisions of liquidated damages made it error for the Trial Judge not to give judgment for the defendant.* What are these "discrepancies" of $3.02? They represent the misappropriations which the defendant claimed upon the trial the plaintiff had been guilty of in violation of the contract when he falsified his cash sales by selling defendant's eggs at one price and making returns to the defendant for such sales at another. A glance at the testimony in reference to Exhibits D-5-6-7-8-10 makes this self evident. For the convenience of the Court a tabulation of these exhibits and the facts relative thereto is set forth as follows:

| ınt shown on slips (cus- s receipts). | Amount shown on books of defendant corporation as made up from duplicate yellow sales slips. | | | Discrepancy. |
|---|---|---|---|---|
| | Ledger | Sale Journal | Cash Book | |
| 5 $4.20 | 3.60 | 3.60 | 3.60 | .60 |
| 6 4.80 | 4.20 | 4.20 | 4.20 | .60 |
| 7 2.10 | 1.80 | 1.80 | 1.80 | .30 |
| 8 4.89 | 4.27 | 4.27 | 4.27 | .62 |
| 0 6.10 | 5.20 | 5.20 | | .90 |
| ıder the term "Discrepancies." | | | | |
| tal as allowed by the Trial Judge | | | | 3.02 |

The contract provided that in case of its breach by the plaintiff the deposit would be forfeited by way of liquidated damages. An examination of the memorandum of judgment filed by the Trial Judge upon entering judgment, particularly when considered in relation to the evidence, shows a finding as to a breach of the contract by the plaintiff and hence the judgment entered was inconsistent with the finding and should have been reversed by the Supreme Court.

## POINT II.

**The testimony is undisputed that the plaintiff failed to "faithfully and honestly" perform his duties as provided for by the agreement and hence the provisions for liquidated damages contained in the agreement should have been enforced by the Trial Court and the Supreme Court erred in not so deciding.**

If appellant's contention set forth in Point I herein is favorably recognized by this Court then, of course, appellant's right for a reversal is established without further argument. Although recognizing the correctness of the statement of the Supreme Court that a question of fact will not be reviewed by an Appellate Tribunal and recogniz ing the rule as stated in Benjamin vs. Laffray, 79 N. J. L. (50 Vroom), 310, that the Appellate Court "will only look to see if there is any legal evidence upon which the judgment of the District Court might rest" and finding such evidence it will not review the decision on question of fact, the appellant contends that as a matter of law

the Trial Court should have been reversed by the Supreme Court because there is undisputed, uncontradicted and convincing evidence that the plaintiff broke the contract sued upon.

In addition to the violation set forth in Point I hereof (actually found by the Trial Court if appellant's contention on this appeal is sustained) the plaintiff violated his agreement when he recklessly gave credit beyond instructions given him, resulting in a loss to the defendant of $53.91. The testimony in this particular is found at pages 80-81-82 of the Case, counsel stipulating as to the actual loss of the defendant. Nowhere is the testimony controverted by the plaintiff.

In the early stages of the trial long before the testimony of Mr. Brooks as to these credits plaintiff's counsel asked the plaintiff (page 36):

> "Q. Do you know of any loss or damage which the Phenix Cheese Company sustained while you were in its employ by reason of any dishonest act or negligence or other misconduct on your part?"

and the plaintiff answered "No." This is the only testimony in anywise controverting the direct evidence as given by Mr. Brooks. In the first place the question merely called for an answer as to plaintiff's *knowledge* of any loss of the defendant and secondly it was put and answered long before the testimony of Mr. Brooks' (pages 80-81-82) in respect to such extension of credit and hence could not be deemed a refutation thereof. Nor did the plaintiff when recalled and testifying *after* Mr. Brooks had been on the stand in any wise contradict the testimony, nor was the evi-

dence contradicted by any other person.

It is contended that as a matter of law such reckless extension of credit as set forth in the testimony of Mr. Brooks (supra) was a breach of the contract by the plaintiff and made judgment in defendant's favor imperative.

## POINT III.

**The contract sued upon provided for liquidated damages in the event of its breach thereof by the plaintiff, violations thereof by the plaintiff having been proven, judgment should have been rendered in favor of the respondent, and the Supreme Court erred in not so deciding.**

A. THE INTENTION OF THE PARTIES AS PLAINLY EXPRESSED IN THE CONTRACT, THEIR INTERPRETATION THEREOF AS EXPRESSED IN THEIR ACTIONS THEREUNDER, CONCLUSIVELY SHOWS THAT THE CONTRACT IS ONE PROVIDING FOR LIQUIDATED DAMAGES AND NOT FOR A PENALTY.

1. THE CONTRACT ITSELF CLEARLY AND UNEQUIVOCALLY SHOWS THE INTENTION OF THE PARTIES TO TREAT THE DEPOSIT AS LIQUIDATED DAMAGES IN THE CASE OF BREACH OF THE CONTRACT BY THE PLAINTIFF, AND IT SHOULD THEREFORE HAVE BEEN CONSTRUED BY THE COURT AS SO PROVIDING.

The plaintiff, as one of the contracting parties and as a condition of his employment by the de-

fendant, agrees "Faithfully and honestly to perform his duties as such employee;" and further agrees not to enter into competition with the defendant within a certain prescribed territory within a year after the termination of his employment.

The deposit of $150 is then acknowledged in the contract by the defendant, and the agreement then provides for the return of the said deposit; conditionally, however, upon proper performance by the driver-salesman (the plaintiff herein) of his duties and obligations under the contract. The stipulation for liquidated damages contained in the contract, in the event of its breach by the plaintiff, is as follows:

> "That in case of violation of any of the above conditions on the part of the said Charles Steinmeyer the said sum of $150 shall be retained by the said company and become their absolute property; it being hereby agreed that the damage which said company will sustain by any such violation will at least amount to said sum."

It is to be noted that the words "forfeit" or "penalty" or the like are not used, nor is the paragraph technical in its wording, but, on the contrary, the manifest intention of the parties is expressed in simple and clear language.

The text of the indemnity contract itself so clearly shows the intention of the parties that the rules of construction which might possibly be applied, were the contract ambiguous, are of no application, and the Court should give to the contract its plain meaning as appearing on its face.

That the intention of the parties as appearing

on the face of an instrument must prevail is well settled.

"Where a contracting party stipulates upon a given event to forfeit and pay a specified sum, the natural and plain import of the language is that he will pay that precise sum unless a contrary intention is to be inferred from other parts of the agreement."

Cheddick vs. Marsh, 21 N. J. L. (13 Ab.), 463.

"The contention is that notwithstanding the explicit language employed, 'the sum of $500 per day as liquidated damages and not by way of penalty,' the sum named was, in fact, a penalty and not liquidated damages. *It would be quite impossible for the parties to express themselves with greater clearness. * * * The argument must therefore be that the parties are prevented, by some rule of law or equity, from so stipulating. I know of no such rule of law or equity preventing the parties from so stipulating.* * * * In this class of cases, as in every other, some regard must be paid to the words used."

Mayor, etc., of Jersey City vs. Flynn, 74 N. J. Eq. (4 Buchanan), 104; affd. 76 N. J. Eq. (6 Buchanan), 607.

"In determining whether a sum which contracting parties have declared payable on default in performance of their contract is to be deemed a penalty or liquidated damages, *the general rule is that the agreement of the parties will be effectuated.*"

Monmouth Park Assn. vs. Wallis Iron Works, 55 N. J. L. (26 Vroom), 133.

"Whether a particular stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages, is to be determined by the contract, and it is the duty of the Court, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

Sun, etc., Ass'n vs. Moore, 183 U. S., 642.

(The above quotation appears in full and cited with approval in Robinson vs. Centenary Fund Ass'n, 68 N. J. L. (39 Vroom), 723.)

Again, in the case of Lansing vs. Dodd, 45 N. J. L. (16 Vroom), 526, a case involving the question as to whether a contract should be construed as providing for liquidated damages or a penalty, the Court held that

"The intention is to be ascertained from the provisions of the entire contract."

In the English case of Wallis vs. Smith, L. R., 21 Ch. Div., 243, cited with approval in The Mayor, etc., of Jersey City vs. Flynn (supra), the Master of Roles in his opinion states:

"Here is a large sum *stipulated to be paid in a variety of events.* What damages would be in any of these events is not to be found specified in the agreement, nor can we say that it must be necessarily small or trivial. Under the circumstances I cannot see my way clear to say that the clause is not to have the meaning which is a prima facie meaning of the words used. In other words, I do not feel compelled

> by the decisions * * * to say * * * that the clause does not mean what it says."

It is respectfully contended that the exposition of the rules of construction given in the above case in reference to whether or not a stipulation shall be construed as providing for liquidated damages or a penalty is as clear and succinct a statement of the law as can be had.

No sympathy need be wasted upon the plaintiff in this action, who has sued for the return of a deposit made pursuant to a contract of indemnity. It would have been far easier for him to have performed his duties honestly and faithfully than to attempt by a distortion of the plain meaning of his contract to regain a sum which he has very properly lost by reason of his own acts. The highest tribunal of the State of New York has very aptly stated the situation as follows:

> "It it be said that the measure (for liquidated damages) is a hard one, it may be replied that the defendants should not have stipulated for it; or, having been thus indiscreet, they should have sought the only exemption which was still within their power, namely, the faithful fulfillment of their agreement."
>
> Daken vs. Williams, 17 Wend., 447.

2. EVEN SHOULD THE COURT FIND THAT THE CONTRACT DOES NOT SUFFICENTLY SHOW ON ITS FACE THE INTENTION OF THE PARTIES TO PROVIDE FOR LIQUIDATED DAMAGES, THE INTERPRETATION GIVEN IT BY THE PARTIES CONCLUSIVELY SHOWS THAT SUCH WAS THEIR INTENTION.

As to this point it is only necessary to quote from the letter sent by the plaintiff to the defendant, after he had left his employ, in reference to certain outstanding accounts. This letter very naively sets forth Charles Steinmeyer's interpretation of the contract *prior* to his starting suit. The letter reads:

> "Besides, your men investigated all overdue bills. The 150 dollars I paid to you as security was done so with the distinct understanding that I should not be responsible for uncollectible bills." (See Defendant's Exhibit D-13, page 134.)

See

Conover vs. Wardell, 20 N. J. Eq. (5 C. E. Gr.), 266.

Burleu vs. Hillman, 10 N. J. Eq. (6 C. E. Gr.), 23.

Wise vs. Fuller, 29 N. J. Eq. (2 Stew.), 257.

Considering the relationship of the parties; the nature of plaintiff's duties, which were such as to afford him unusual opportunities to injure the defendant through actual fraud or carelessness; the great difficulty of proving damages of the nature which the plaintiff could inflict on the defendant in his position as driver-salesman in sole charge of a sales route—it would be a distortion of the plain provisions of the contract to construe its provisions as providing for a penalty instead of liquidated damages.

The intention to provide for liquidated damages being apparent from a consideration of the circum-

stances surrounding the making of the contract, and from the acts of the plaintiff relative thereto, it should be so construed.

SHOULD THE APPELLATE COURT FIND EITHER

(1) THAT THE CONTRACT ON ITS FACE SHOWS THAT IT IS ONE PROVIDING FOR LIQUIDATED DAMAGES; OR

(2) THAT THE PROVISIONS OF THE CONTRACT CONSIDERED IN THE LIGHT OF ITS INTERPRETATION BY THE PARTIES SHOW THAT IT IS ONE PROVIDING FOR LIQUIDATED DAMAGES,

THEN THE JUDGMENT HEREIN SHOULD BE REVERSED AND JUDGMENT FOR THE DEFENDANT-APPELLANT GIVEN.

## B. EVEN DISREGARDING THE PLAIN INTENTION OF THE PARTIES AS EXPRESSED ON THE FACE OF THE INDEMNITY CONTRACT, AND THEIR INTERPRETATION THEREOF AS SHOWN BY THEIR ACTS THEREUNDER, UNDER THE GENERAL RULES OF CONSTRUCTION THE COURT SHOULD HAVE TREATED THE CONTRACT AS ONE STIPULATING FOR LIQUIDATED DAMAGES.

The text of the contract, the circumstances surrounding its inception, as well as the interpretation given it by the parties, so clearly show that it provided for liquidated damages rather than a penalty that general rules of construction used by the courts where the meaning of a contract is ambiguous need hardly be applied. Their application, how-

ever, further tends to strengthen the appellant's contention that the contract provides for liquidated damages.

1. A CONTRACT WILL BE CONSTRUED AS PROVIDING FOR LIQUIDATED DAMAGES AND NOT A PENALITY WHEN

a. THE DAMAGES RESULTING FROM A BREACH ARE UNCERTAIN IN AMOUNT, OR

b. THE AMOUNT IS ONLY ASCERTAINABLE BY PROOF OUTSIDE OF THE CONTRACT ITSELF AND DIFFICULT OF ASCERTAINMENT.

c. THE DAMAGES SPECIFIED ARE NOT IN AMOUNT BEYOND WHAT MIGHT BE REASONABLY ANTICIPATED UPON A BREACH OF ANY ONE OF THE COVENANTS AFFECTED.

"It is a general rule of construction that the sum agreed upon will be treated as a penalty, unless it is payable for an injury of uncertain amount or extent, *or if payable for more than one breach, unless the damages which arise from each of them are of uncertain amount.*"

Lansing vs. Dodd, 45 N. J. L. (16 Vroom), 526.

"This sum (amount of liquidated damages) will be held to be liquidated damages if on a reasonable view of the case they cannot be said to be in excess of what might be recovered in a suit for such damages."

Gusson vs. Beineson, 76 N. J. L. (47 Vroom), 209.

"It is readily conceivable, if not evidence, that the lands sold were a more or less speculative property * * *. Hence damage considerable in amount, but difficult of estimation would result from non-fulfillment of the contract to fill. In such a case an agreement for liquidated damages is eminently proper."

Tilton vs. McLaughlin, 83 N. J. L. (54 Vroom), 107.

That breaches of the contract in question would be difficult of proof is self evident upon a perusal of the testimony given on the trial herein; that the extent of the damage would be difficult to determine is apparent when it is considered that the plaintiff had endless opportunities for misappropriation, but that in each case by reason of the nature of the business, the damage would necessarily be small; that $150 is not a sum out of all proportion to possible losses is likewise apparent. In short, the contract is just such a contract as falls within the well defined class of indemnity contracts which provide for liquidated damages.

2. THE FACT THAT THE CONTRACT CONTAINED A PROVISION FOR LIQUIDATED DAMAGES IN THE EVENT OF THE BREACH OF MORE THAN ONE STIPULATION, IN NOWISE CHANGES ITS CHARACTER AS SUCH.

The mere fact that the contract provided liquidated damages, in the event of its breach in regard to faithful performance, while in the defendant's employ and non-competition for a limited time thereafter, in nowise changes its character as one providing for liquidated damages.

The contract plainly provides for liquidated damages as follows:

Upon a breach of the stipulations for careful, faithful and honest performance of duty; in short, for failure to give loyal service.

Upon breach of the stipulation against competition with the defendant for a limited period after the termination of the employment.

Summarizing the stipulations, it may be said that they are stipulations all tending to one purpose, to wit: To insure fair dealing on the part of the plaintiff in connection with his employment. Each stipulation provides for but a minor part of the rather complex purpose of the parties to protect the defendant against loss by reason of its employing the plaintiff. Even a superficial consideration of the contract is sufficient to show that the acts stipulated for are not independent acts, but are but subordinate parts of the chief aim of the contract of idemnity to secure the defendant against loss by reason of its employing the plaintiff.

a. SHOULD, HOWEVER, THE COURT CONSIDER THAT THE CONTRACT CONTAINED DISCONNECTED STIPULATIONS AS TO LIQUIDATED DAMAGES, IT WOULD IN NO WISE CHANGE THE EFFECT OF THE PROVISIONS FOR LIQUIDATED DAMAGES.

The rules of construction applicable to provisions for liquidated damages apply for each and every subordinate stipulation in the agreement. In each instance

1. The damage resulting from breach could not be ascertained from the face of the document.

2. The damage would be difficult of proof.

3. The sum provided for as liquidated damages in no case could be considered as out of proportion to the probable loss.

As has been well stated in the case of Crisdel vs. Bolton, 3 Car. & P., 240, the Courts

> "have said that the law relative to liquidated damages has always been in a state of great uncertainty and that this has been occasioned by Judges endeavoring to make better contracts for the parties than they have made themselves."

Although there may be dicta, which, upon a superficial examination apparently holds otherwise, the true rule is

EVEN WHERE THERE ARE DISCONNECTED STIPULATIONS FOR A BREACH OF ANY ONE OF WHICH DAMAGES ARE PROVIDED, THE CONTRACT WILL BE CONSTRUED AS PROVIDING FOR LIQUIDATED DAMAGES UNLESS AS TO ANY ONE OF THE STIPULATIONS TAKEN SEPARATELY. THE COURTS UNDER THE GENERAL RULES OF CONSTRUCTION WOULD HOLD THE STIPULATION TO BE ONE PROVIDING FOR A PENALTY.

> "The sum named must be regarded as liquidated damages as to all the provisions to which it may extend or it will not be so regarded as to any."

Lansing vs. Dodd, 43 N. J. L. (16 Vroom), 926.

The courts have distinguished cases where there are a variety of stipulations and the loss from the breaches thereof must clearly differ in amount or is easily ascertainable as to any, and in such cases hold that the stipulations provide for a penalty, but such cases are not applicable to the present litigation were in each instance the damages cannot clearly be ascertainable. *Furthermore, the parties have by expressed stipulation conceded the equality of the damage, the contract reading:*

> "It being hereby agreed that the damage which the said company will sustain by *any* such violation will at least amount to said sum."

The cases making the foregoing distinction being but exceptions to the general rule, they but support the same.

> "This agreement provides the same damages on the breach of any one of several stipulations *when the loss resulting from the breaches must clearly differ in amount.* The amount fixed is the same whether the breach of Cooper is the failure to convey the land or the failure to convey the manure and the compost. The amount is to be paid for failure to perform all and singular the covenants and agreements, not merely for a breach of all the covenants, but as well for a breach of a single one. It would be most extraordinary to mulct the defendant in the same amount for failure to convey the manure as for failure to convey the farm; *the amount seems excessive for the failure to convey the manure and the real damages must be readily reducible to certainty by proof before a jury.*"

Gibbs vs. Cooper, 86 N. J. L. (1 Gummere), 226.

It is clear in the above case that the court decided that the clause provided for a penalty and not liquidated damages *not* because there were several independent stipulations, but because "the amount seems excessive," "and the real damages must be readily reducible to certainty by proof before a jury."

In Hoagland vs. Segur, 38 N. J. L. (9 Vroom), 230, the Court considered the question of liquidated damages in reference to several stipulations in one contract and held that *where there are independent covenants of various degrees of importance* the provision is in the nature of one providing for a penalty.

In the case of Cheddick's Exr. vs. Marsh, 21 N. J. L. (1 Zabriskie), 463, the *same distinction* was made. It is to be noted that in this case the amount of damages stipulated was grossly in excess of any possible loss, to wit: a forfeiture of $1,500 for a probable $5.00 damage.

Again in the case of Wallis vs. Smith, L. R., 21, Ch. Div., 243, cited with approval in the Mayor, etc., of Jersey City vs. Flynn, 74 N. J. Eq. (4 Buchanan), 104 (Affirmed 76 N. J. Eq. [4 Buchanan], 607), the master of the Rolls in upholding a clause for liquidated damages says:

> "Here is a large sum stipulated to be paid in a variety of events. What the damages would be in any of these events is not to be found specified in the agreement nor can we say that it must be necessarily small or trivial."

The latest case in this state on the question of liquidated damages is that of the City of Summit

vs. Morris County Traction Company, 85 N. J. L. (56 Vroom), 193. The City of Summit sued a Street Railway Company upon a bond given in connection with a certain contract wherein the Street Railway Company agreed to lay down its tracks through the city streets according to the provisions of the contract; pay a certain sum as compensation to the City; and operate its roads in a cerain manner. It is evident that all of the stipulations were *independent stipulations as regards which the extent of loss by reason of a breach as to each would be at a great variance.* Again, we find the Court making this distinction, Chief Justice Gummere stating:

> "But where the agreement contains disconnected stipulations *of various degrees of importance* the sum named therein to be paid in case of a failure of performance will be construed as a penalty."

This is as far as the Courts of this State go in making a distinction. The case is far different from the one at bar, where

1. The damages from its breach are unascertainable from the face of the contract.

2. The damages would be difficult of proof.

3. The sum stipulated as damages is reasonable in amount as to *each* stipulation and it is not apparent on the face of the contract that the stipulations are of various degrees of importance. In fact, the parties agree that the loss in each instance would amount to the same sum ($150).

Furthermore, it is to be remembered that the stipulations provide for but one single, although

complex situation:—a relationship of employer and employee conducted in such a manner that the employer either during or after the employment, will not suffer by reason thereof.

C. THE INDENTICAL CONTRACT HAS BEEN UPHELD BY THE COURTS.

While the tribunals of sister states are in nowise controlling on the Courts of this State, yet weight should be given to the fact that the *identical contract* (except as to parties plaintiff and defendant) *has been repeatedly upheld* in the appellate Courts of New York.

See

Hackett vs. J. L. & J. J. Reynolds Co., 62 N. Y. Supp., 1076;

Reynolds vs. Dreyer, 12 Misc., 369; 33 N. Y. Supp., 649.

D. THE DEFENDANT PROVED SEVERAL DISTINCT BREACHES OF THE CONTRACT OF INDEMNITY AND THE PROVISIONS FOR LIQUIDATED DAMAGES BECOME EFFECTIVE IRRESPECTIVE OF THE ACTUAL AMOUNT OF DAMAGES PROVEN.

That the plaintiff repeatedly broke his contract of employment with the defendant is most manifest. These breaches are set forth at length in the "Statement of Facts" but may briefly be referred to as follows:

1. Acts involving moral terpitude.

a. Embezzlement of receipts. Called "discrepancies," by the trial judge, and allowed by him to the extent of $3.02.

b. Falsifying returns by entering cash transactions as charges thus enabling the defendant to retain for a time moneys for the defendant which he should have turned in.

(In view of the decision of the Supreme Court that the evidence in regards to this particular was in conflict, this contention has been abandoned except so far as the testimony in relation thereto throws light upon the case as a whole.)

2. Acts involving faithless and careless attention to duty, contrary to the provisions of the contract.

a. Reckless giving of credit, beyond instructions given him, resulting in a loss to the defendant of $53.91.

3. Competition with the defendant within the prohibited time, and restricted territory, contrary to the provisions of the contract.

(In view of the decision of the Supreme Court that the evidence in regards to this particular was in conflict, this contention has been abandoned except so far as the testimony in relation thereto throws light upon the case as a whole.)

1. THE CONTRACT PROVIDED FOR LIQUIDATED DAMAGES AND ALL THAT IS NECESSARY IS TO SHOW ITS BREACH, THE ACTUAL DAMAGE NEED NOT BE SHOWN.

Hoagland vs. Segar, 38 N. J. L. (9 Vroom), 230;

Baerenklau vs. Peerless, etc., Co., 80 N. J. Eq. (10 Buchanan), 26.

## POINT IV.

**Irrespective of the question as to whether the contract provided for liquidated damages or not, judgment should have been rendered in favor of the plaintiff for the sum of $53.91, its losses, proved without refutation, by reason of over extended credit given defendant's customers by the plaintiff contrary to instructions.**

A. THE TRIAL COURT SHOULD HAVE ALLOWED THE DEFENDANT THE SUM OF $53.91, ITS LOSSES SUSTAINED BY REASON OF OVER CREDIT GIVEN CUSTOMERS BY THE PLAINTIFF CONTRARY TO INSTRUCTIONS.

The facts in relation to this point have been fully discussed in connection with Point II to which reference is made.

## POINT V.

**No waiver by the defendant of its rights under the contract can be construed by the payment by it of a portion of the deposit money to the plaintiff prior to the commencement of the action.**

In the first place the payments were all made prior to March 13th, 1912, long before the defendant knew of the violations of the contract by the plaintiff (Brooks page 83) furthermore even if it had knowledge it could, if it so elected, pay over a portion of the deposit money to the plaintiff with-

out having said action construed as a waiving of its rights in the *balance retained* by it. It certainly had the right to defend a suit brought upon a contract by standing upon its rights thereunder.

## CONCLUSION.

**The judgment of the Trial Court and the judgment of affirmance thereof in the Supreme Court should be reversed and judgment given for the defendant-appellant.**

June 19th, 1917.

Respectfully submitted.

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