

INDEX

	PAGE
Notice of Appeal.....	1
Grounds of Appeal.....	2
Complaint	4
Answer and Counter-claim	8
Reply	12
Findings of Circuit Court Judge.....	14
Postea	16
Judgment	17

TESTIMONY.

For Defendant.

George Hofe,	
direct examination	20
cross “	25, 27
(recalled) direct “	55
cross “	55
Leroy I. DeCaisse,	
direct examination	39
cross “	41

For Plaintiff.

Jesse F. Bromund,	
direct examination	43
Elmer Helmbold,	
direct examination	48
cross “	50
Joseph H. Gerethy,	
direct examination	51
Louis J. Boniface,	
direct examination	53
Ernest Schuemann,	
direct examination	54

EXHIBITS.

	Off'd	P't'd
D. 1. Contract, October 7, 1930.....	20	56
D. 2. Invoices and Checks.....	22	58
D. 3. Order of April 30, 1931 and two invoices	22	60
D. 4. Order of May 25, 1931 and four invoices	22	62
P. 1. Contract, November 1, 1928..	28	65
P. 2. Check, dated June 11, 1931...	30	67
P. 3. Letter, dated June 15, 1931...	30	68
P. 4. Letters, dated June 22, 1931, June 30, 1931 and July 1, 1931	33	69
P. 5. Orders, dated October 6, 1930, November 29, 1930, Janu- ary 3, 1931, February 10, 1931 and April 6, 1931.....	35	73

NOTICE OF APPEAL.

New Jersey Supreme Court

JOHN E. HUTH, Assignee of
E. A. Bromund Co., a cor-
poration,

Plaintiff,

vs.

JEAN JORDEAU, INCORPORATED, a
corporation,

Defendant.

*Action
at Law.*

*Notice of
Appeal.*

10

To Tumulty & Tumulty, Esqs., attorneys of
plaintiff, 921 Bergen avenue, Jersey City,
N. J.

20

SIRS:

PLEASE TAKE NOTICE, that the defendant in the
above-entitled cause hereby appeals from the
judgment heretofore entered in this Court on
January 21st, 1932, for \$2,781 damages and
\$66.10 costs and from every part thereof, to the
New Jersey Court of Errors and Appeals in the
last resort in all causes.

30

Dated: January 30, 1932.

Yours, etc.,

LIONEL P. KRISTELLER,
Attorney for Defendant-Appellant.

40

GROUND S OF APPEAL.

New Jersey Court of Errors and Appeals

10	JOHN E. HUTH, Assignee of E. A. Bromund Co., a cor- poration, <i>Plaintiff-Respondent,</i>	<i>Action at Law.</i> <i>On Appeal from Supreme Court.</i> <i>Grounds of Appeal.</i>
	<i>vs.</i>	
	JEAN JORDEAU, INCORPORATED, a corporation, <i>Defendant-Appellant.</i>	

20 To Messrs. Tumulty & Tumulty, 921 Bergen ave-
nue, Jersey City, N. J.

SIRS:

The appellant specifies the following as the grounds of appeal in the above-entitled cause:

30 1. That the Court below erred in construing the contract in suit to mean that the price to be charged by the respondent to the appellant was to be 36c. per lb. unless the market price declined below that figure; whereas, under a true, accurate and legal construction of said contract, the terms "36c. per lb., subject to proportionate reduction if the market price should decline," could not be construed other than to mean that the price per lb. to be charged was always to be such proportion of the market price as 36c. bore to 48c., the market price at the time the contract was executed.

40 2. That the Court below erred in finding that the failure of the appellant to claim allowances

Grounds of Appeal.

under its construction of the contract as each invoice was made was disposition of its right to enforce the contract in strict accordance with its terms.

3. That the Court below erred in basing its findings upon extrinsic evidence and the acts of the parties in construing said contract, whereas said contract was unambiguous and could definitely be construed by the terms used within the four corners of the paper writing constituting the contract in question. 10

4. That the Court erred in declining to adopt appellant's construction of the contract in question to wit: that the price of bees' wax to be charged by respondent to appellant for purchases made under the contract in question, was at no time to exceed $\frac{3}{4}$ of the market price and that under said construction the appellant was entitled to an allowance of \$1,335.25, and that judgment should have been entered for \$1,473.75 without costs, which was admittedly due from appellant to respondent, instead of \$2,781.00. 20

Dated: February 16, 1932.

LIONEL P. KRISTELLER,
Attorney for Defendant-Appellant. 30

COMPLAINT.

Filed October 6, 1931.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

JOHN E. HUTH, Assignee of
E. A. Bromund Co., a cor-
poration,

*Plaintiff,**vs.*

JEAN JORDEAU, INCORPORATED, a
corporation,

*Defendant.**Action
at Law.**Complaint.*

20

Plaintiff, residing in Jersey City, Hudson
County, New Jersey, assignee of E. A. Bromund
Co., a corporation of the State of New York,
says that:

FIRST COUNT.

1. He sues for the price of goods sold and
delivered to defendant upon a book account of
30 which a copy is attached hereto, and the whole
of which is due and unpaid.

2. Plaintiff demands as damages, on this
count, the amount due thereon, being Twenty-
seven hundred (\$2700) dollars with interest and
costs of suit.

SECOND COUNT.

1. He sues for the reasonable price of goods
40 sold and delivered to defendant under an agree-

Complaint.

ment between E. A. Bromund Co., a corporation, and defendant, that E. A. Bromund Co. should charge defendant a reasonable price for the goods so sold.

2. The amount due from defendant to plaintiff, charged in conformity with said agreement, was and still is Twenty-seven hundred (\$2700) dollars. 10

3. Demand has been made for the payment of the aforesaid sum but defendant has failed, neglected and refused to pay same.

4. Plaintiff demands as damages on this count the sum of Twenty-seven hundred (\$2700) dollars with interest and costs of suit.

THIRD COUNT.

1. He sues for the price of 7500 lbs. of S. B. White U. S. P. Beeswax delivered to defendant under orders from defendant for which defendant agreed to pay at the rate of thirty-six cents per lb. 20

2. The sum of Twenty-seven hundred (\$2700) dollars, being the cost of said merchandise at the rate aforesaid, is due and owing from defendant but defendant has failed, neglected and refused to pay same. 30

3. Plaintiff demands as damages on this count the sum of Twenty-seven hundred (\$2700) dollars with interest and costs of suit.

FOURTH COUNT.

1. He sues for the price of 7500 lbs. of S. B. White U. S. P. Beeswax delivered to defendant under order from defendant in which defendant agreed to pay the market price thereof. 40

Complaint.

2. The market price for said 7500 lbs. on delivery thereof was thirty-six cents per lb.

10 3. Plaintiff has demanded of defendant the sum of Twenty-seven hundred (\$2700) dollars being the market price on delivery of the goods aforesaid but defendant has failed, neglected and refused to pay same.

4. Plaintiff demands as damages on this count the sum of Twenty-seven hundred (\$2700) dollars with interest and costs of suit.

TUMULTY & TUMULTY,
Attorneys for Plaintiff.

20

30

40

Complaint.

SCHEDULE A

E. A. BROMUND CO.
258 Broadway, New York

Sold to

Jean Jordeau, Inc.

Third & Sloan Sts.

South Orange, N. J.

Order No. 8533

10

Terms 1% 10 days. 30 net.

May 27, 1931.

15 cases, 150 lbs. net each

2250 Lbs. S. B. White U. S. P. Beeswax,

in Lbs. @ 36c..... \$810.00

May 29, 1931

10 Cases, 150 Lbs. net each.

1500 Lbs. S. B. White U. S. P. Beeswax,

in Lbs. @ 36c..... 540.00

20

June 2, 1931

12 Cases, 150 Lbs. net each

1800 Lbs. S. B. White U. S. P. Beeswax,

in Lbs. @ 36c..... 648.00

June 4, 1931

13 Cases, 150 Lbs. net each

1950 Lbs. S. B. White U. S. P. Beeswax

in Lbs. @ 36c..... 702.00

30

7500

\$2700.00

40

ANSWER AND COUNTER-CLAIM.

Filed October 16, 1931.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

JOHN E. HUTH, Assignee of
E. A. Bromund Co., a cor-
poration,

*Plaintiff,**vs.*

JEAN JORDEAU, INCORPORATED, a
corporation,

*Defendant.**Action
at Law.**Answer and
Counter-
claim.*

20

The defendant, answering the complaint filed
herein, says:

1. It denies each and every allegation con-
tained in the complaint.

FIRST SEPARATE DEFENSE.

1. That on or about October 7th, 1930, the
30 plaintiff's assignor and the defendant, entered
into a written agreement, wherein and whereby,
in consideration of the plaintiff's assignor agree-
ing to sell and deliver to the defendant, approx-
imately 15,000. pounds of pure white beeswax,
to be taken as required thruout one year from
the date of said contract, the defendant agreed
to pay therefor the sum of Thirty-six Cents
(\$.36) per pound, subject to proportionate reduc-
tion, if the market price should decline, which
said agreement is hereby expressly referred to
40 as if herein set forth fully and at length, and

Answer and Counter-claim.

the original of which will be produced upon the trial of this cause.

2. That at the date of the signing of said agreement, the market price for said merchandise was Forty-eight Cents (\$.48) per pound, and the contract price of Thirty-six Cents (\$.36) per pound was consequently three-quarters of the market price at said date. 10

3. That thereafter, and within one year from the date of said written agreement, the defendant ordered and obtained delivery from the plaintiff's assignor of a total of 27,000. pounds, and the said written agreement herein referred to was extended by mutual agreement between the parties, to include said total amount.

4. That subsequent to the date of said contract, and during the period that the defendant obtained deliveries of said merchandise, the market price thereof declined from Forty-eight Cents (\$.48) per pound, to Thirty-nine Cents (\$.39) per pound, in accordance with the following Schedule: 20

Period of Delivery.	Market Price.	Delivery.	Total Market Price.	
10-13-30				30
to				
12-8-30.	\$.48	7500 lbs.	\$3600.00	
12-15-30				
to				
2-23-31.	.41	6000 lbs.	2460.00	
3-2-31				
to				
6-15-31.	.39	13500 lbs.	5265.00	
			\$11325.00	40

Answer and Counter-claim.

5. That thereupon there became due and owing from the defendant to the plaintiff's assignor the sum of Eight Thousand Four Hundred and Ninety-three Dollars and Seventy-five Cents (\$8,493.75), being three-quarters of the total market price.

10

6. That the defendant has paid to the plaintiff's assignor the sum of Seven Thousand Forty-seven Dollars (\$7,047.00) and has tendered to the plaintiff's assignor the balance of One Thousand Four Hundred Forty-six Dollars and Seventy-five Cents (\$1,446.75), which said sum the plaintiff's assignor has refused and still refuses to accept.

20

7. That the plaintiff is bound by all the transactions and agreements had between the plaintiff's assignor and the defendant.

WHEREFORE, the defendant demands that the complaint herein be dismissed, with costs.

BY WAY OF COUNTER-CLAIM, THE DEFENDANT SAYS:

30

1. That on September 16th, 1931, a judgment was entered in favor of this defendant, and against the plaintiff, in a suit pending in the New Jersey Supreme Court, wherein the present plaintiff was plaintiff, and the present defendant was defendant, for the sum of Forty-one Dollars (\$41.00) costs.

2. That said judgment is still open of record, and the same has not been paid or satisfied, and there is now owing from the defendant to the plaintiff, the sum of Forty-one Dollars (\$41.00).

Answer and Counter-claim.

WHEREFORE, the defendant demands judgment affirmative on its Counter-claim, in the sum of Forty-one Dollars (\$41.00) and costs.

Dated: October 16, 1931.

LIONEL P. KRISTELLER,
Attorney of Defendant.

10

20

30

40

REPLY.

Filed November 2, 1931.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

JOHN E. HUTH, Assignee of
E. A. Bromund Co., a cor-
poration,

*Plaintiff,**vs.*

JEAN JORDEAU, INCORPORATED, a
corporation,

*Defendant.**Action
at Law.**Reply.*

20

Plaintiff, replying to the answer of the defend-
ant herein, says that:

He joins issue with defendant on the matters
alleged in the complaint.

AS TO THE FIRST SEPARATE DEFENSE.

30

1. Plaintiff admits to the making, by his as-
signor, of the contract referred to therein, but
says that the 15,000 lbs. of Pure White Beeswax
anticipated by said contract were delivered to
defendant and said contract in all respects was
satisfied; that the goods for non-payment of
which this suit is founded, were sold and deliv-
ered to defendant over and above the amount
hereinabove referred to, and sold to defendant
under open order at the rates therein specified.

2. Plaintiff denies paragraph 2.

40

Reply.

3. Plaintiff denies that the written agreement was extended.

4. Plaintiff denies paragraph 4.

5. Plaintiff denies paragraph 5.

6. Plaintiff denies paragraph 6.

10

7. Plaintiff denies paragraph 7.

TUMULTY & TUMULTY,
Attorneys for Plaintiff.

20

30

40

FINDINGS.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10	JOHN E. HUTH, Assignee of E. A. Bromund Co., a cor- poration, <i>Plaintiff,</i> <i>vs.</i> JEAN JORDEAU, INCORPORATED, a corporation, <i>Defendant.</i>	}	<i>Action at Law. Findings.</i>
----	--	---	---

- 20 For the plaintiff, Tumulty & Tumulty, Esqs.
For the defendant, Lionel P. Kristeller, Esq.
Oliphant, Circuit Court Judge.

This case was heard by the Court sitting without a jury. On October 6, 1930 plaintiff and defendant entered into a contract whereby plaintiff agreed to sell to defendant approximately fifteen thousand (15,000) pounds of beeswax, to be taken as required throughout one year from

30 date. The price was to be thirty-six cents per pound ("subject to proportionate reduction if the market price should decline"). A total of twenty-seven thousand (27,000) pounds was ordered and delivered. The market price of beeswax at the date of the signing of the contract was forty-eight cents per pound. The price declined during the life of the contract, but never below the figure of thirty-six cents. On December 15, 1930, the price had gone to forty-one

40 cents and on March 2, 1931 to thirty-nine cents

Findings.

but the defendant continued to pay the price of thirty-six cents. Orders under date of May 25, 1931 were delivered and billed for. The goods purchased on that date at thirty-six cents a pound amounted to twenty-seven hundred dollars (\$2700.00). The defendant then claimed that the contract provided that the price should always be three-fourths of the market price, made deductions accordingly for all goods bought under it and offered payment of \$1446.75 in settlement of the account. This was refused, plaintiff contending the price was to be thirty-six cents per pound unless the market price declined under that figure. The whole course of dealings between the parties bears out the plaintiff's contention. Practically all orders given by defendant specified a thirty-six cent price, all bills were made out at that figure and paid for by defendant except the last order of May 25. It seems to be a belated discovery by defendant that it was entitled to a deduction or rebate. Its excuse for not taking it on each bill was that they thought they would do so at the end of the contract. Business men do not deal in that manner. They take what they believe is due them at the time it is due. As before stated, I am satisfied from the whole course of dealing between the parties that the construction of the price clause of the contract is that the price of the beeswax be thirty-six cents per pound unless the market price declined below that figure. As that contingency never happened, the plaintiff is entitled to a verdict in the sum of \$2781.00.

Judgment for that amount will be awarded.

A. DAYTON OLIPHANT,
Circuit Court Judge.

POSTEA.**NEW JERSEY SUPREME COURT.****HUDSON COUNTY.**

10	JOHN E. HUTH, Assignee of E. A. Bromund Co., a cor- poration, <i>Plaintiff,</i> <i>vs.</i> JEAN JORDEAU, INCORPORATED, a corporation, <i>Defendant.</i>	}	<i>Action at Law. Postea.</i>
----	---	---	---

20 This case was tried before Judge A. Dayton Oliphant at the Hudson Circuit on Friday, December 18, 1931.

By consent of counsel for the respective parties a trial by jury was waived.

The Court rendered a general verdict against the defendant, Jean Jordeau, Incorporated, and in favor of plaintiff, John E. Huth, for twenty-seven hundred eighty-one dollars (\$2781) be-

30 sides costs to be taxed.

A. DAYTON OLIPHANT,
 Judge.

JUDGMENT.

Filed November 2, 1931.

This case was tried before Judge A. Dayton Oliphant at the Hudson Circuit on Friday, December 18, 1931.

By consent of counsel for the respective parties a trial by jury was waived. 10

The Court rendered a general verdict against the defendant, Jean Jordeau, Incorporated, and in favor of plaintiff, John E. Huth, for twenty-seven hundred eighty-one dollars (\$2781) besides costs to be taxed.

Whereupon it is adjudged that the plaintiff John E. Huth, Assignee of E. A. Bromund Co., a corporation do recover of the said defendant Jean Jordeau, Incorporated, a corporation the sum of two thousand seven hundred eighty-one dollars damages together with his \$2,781.00 costs which have been taxed at the 66.10 sum of sixty-six dollars and ten cents, making in the whole the sum of two \$2,847.10 thousand eight hundred forty-seven dollars and ten cents. 20

Judgment signed and entered January 21, 1932. 30

WM. S. GUMMERE,
C. J.

Judgment.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

10 IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this fourth day of May, A. D. nineteen hundred and thirty-two.

FRED L. BLOODGOOD,
(SEAL) Clerk.

20

30

40

TESTIMONY.**HUDSON COUNTY CIRCUIT COURT.**

JOHN E. HUTH, Assignee of
E. A. Bromund, a corporation,
Plaintiff,

vs.

JEAN JORDEAU, INC.,
Defendant.

10

Before Hon. A. Dayton Oliphant, Judge.

Jersey City, New Jersey.

December 18, 1931.

20

Appearances:

Tumulty & Tumulty, Esqs., for the plaintiff.

Lionel P. Kristeller, Esq., for the defendant.

By Mr. Kristeller.

In order to expedite the trial and simplify the issues involved, the defendant waives the production, introduction and formal proof of the plaintiff's books of account, and admits that if produced, the books would disclose an open account against the defendant as set forth in the complaint.

30

The defendant, however, reserves all its rights to dispute the validity and correctness of and liability for, said account.

40

George Hofe, for Defendant, Direct.

GEORGE HOFE, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination by Mr. Kristeller.

10 Q What is your occupation, Mr. Hofe? A Manufacturer of toilet preparations.

Q How long have you been in that business? A Twelve years.

Q Have you been in the business of buying and selling drugs, chemicals, other preparations connected with the toilet preparation business?

A Buying.

Q And how long have you been doing that?

A Twelve years.

20 Q Before that what were you? A Instructor at Columbia University.

Q Instructor of what? A Physics.

Q What is your connection with the defendant Jean Jordeau Company, Incorporated? A President and treasurer.

Q Did your company enter into this agreement dated October 7, 1930? A Yes, we did.

30 Mr. Kristeller: I offer the agreement in evidence.

(Marked Exhibit D. 1 in evidence.)

Q As a result of this contract did the plaintiff's assignors ship you beeswax at various times from October 13, 1930, to June 14, 1931?

A Yes.

Q I show you a bill for fifteen hundred pounds dated October 17, 1930, and ask you if that bill was received and if this check was used in payment of it? A Yes.

40

George Hofe, for Defendant, Direct.

Q That check is dated October 30, 1930, number 165824 \$534.60? A Yes.

Q I show you bill dated November 6, 1930, for three thousand pounds and ask you whether this check for \$500 was paid on account of that bill? A Yes, sir.

Q And this check \$435.55, paid the balance of that bill? A Yes, sir.

10

Q I show you bills of December 1, 1930 for 1,500 and December 10th for 750 pounds, and December 11, 1930, for 750 pounds and ask you whether this check of \$534.60, this check of \$267.30 and this check of \$113.65 and this check of \$69.50 were in payment of those invoices? A Yes.

Q I show you invoices of the plaintiff's assignor, January 7, 1931, 2,250 pounds of beeswax and January 12, 1931, for 750 pounds of beeswax and ask you if this check for \$801.90 covers the amount \$810 under January 7? A Yes.

20

Q And this check of \$267.30 covers the invoice of January 12th? A Yes.

Q I show you invoices of the plaintiff's assignor February 13, 1931 and February 19, 1931, 1,500 pounds each and ask you whether these two checks of \$534.60 each pay those invoices? A Yes, sir.

30

Q I show you invoice of April 10, 1931, April 14, 1931, for a total of 3,000 pounds and ask you whether this check \$1,069.20 covers these two invoices? A Yes, sir.

Q I show you the two invoices, one dated May 4, 1931 and one dated May 8, 1931, for 3,000 pounds and ask you whether this check \$534.60 pays the invoice of May 4? A Yes, sir.

40

George Hofe, for Defendant, Direct.

Q And this check of \$534.60 pays the invoice of May 8th? A Yes, sir.

Q That makes a total of payments of \$6,732? A Yes, sir.

10 Mr. Kristeller: I offer these in evidence.
I don't think they need be marked separately.
The Court: No.
Invoices and checks grouped and marked
D. 2 in evidence.

Q Were the shipments of May 4, 1931 and May 8, 1931, delivered pursuant to contract or order dated April 30, 1931, your number 8517? A Yes, delivered.

Q Delivered pursuant to this order? A Yes.
20 Q Have you the original order, Mr. Tumulty?

Mr. Tumulty: Yes.

Mr. Kristeller: I offer in evidence the original, and I have the carbon here.

Order dated April 30, 1931 and two invoices grouped and marked D. 3 in evidence.

Q Were the shipments of May 27, 1931; May 29, 1931; June 2, 1931 and June 4, 1931, covering seventy-five hundred pounds delivered pursuant to your written order dated May 25, 1931 number 8533? A Yes.
30

Q And this is the original order of which copy is annexed to these invoices? A That is right.

Mr. Kristeller: I offer in evidence the originals.

Order dated May 25, 1931 and four invoices grouped and marked D. 4 in evidence.
40

George Hofe, for Defendant, Direct.

Q Now, you have charged against that account \$68.20 for discount. What was the percentage of discount? A One per cent.

Q And that is noted upon these invoices? A Yes.

Q There is an adjustment \$135 charged December 12, 1930, will you tell us what that was? 10

A Due to the fact that the beeswax was adulterated.

Q And was that agreed upon between you? A Yes, sir.

Q And also an adjustment \$64.80, January 2, 1931, what was that for? A Also due to the fact that the beeswax was adulterated.

Q And that was agreed upon and deducted from these invoices when you paid these checks? A Correct. 20

Q Then there was a charge of \$20 for analysis. Was that agreed upon between you? A Yes, sir.

Q So that your total credits for cash paid, cash discount, adjustments, and so forth is \$7,020, is that correct? A Yes.

Q Now, you have before you some magazines. Will you tell me what they are? A Copies of the Oil Paint Drug Reporter.

Q Of what dates? A From October 6, 1930 through May 25, 1931. 30

Q And is this publication recognized in the trade as a means of obtaining quotations on beeswax? A This publication is considered an authority on its quotations.

Q From an inspection of this periodical can you testify as to the market value of beeswax on the dates in question? A Yes.

Mr. Tumulty: I object to any testimony from any trade journal unless the authentic- 40

George Hofe, for Defendant, Direct.

ity of that trade journal is established by expert proof.

The Court: I think you have to show something more.

10 Mr. Kristeller: I have a man here who is connected with the publication. I am not offering them, but this witness has been in this business.

20 The Court: I think you will have to show, before you use the books, that he has some knowledge of it himself. Of course, a person cannot keep in his head—at least most people cannot—the prices of articles at certain times. He may be familiar with the general prices and may need such a record to refresh his recollection as to prices on certain dates.

Q How long have you been in this business?

A Twelve years.

Q And have you bought beeswax during that time? A Yes.

Q And are you familiar with the market prices from time to time? A Yes.

30 Q And do you keep posted and informed by any particular method? A Through the Oil Paint and Drug Reporter, yes.

Q And is that recognized in the business as an authority upon market prices?

Mr. Tumulty: I object, not qualified to express an opinion on that.

The Court: Let me ask you: you buy and sell beeswax, I presume, in the open market?

40 The Witness: I buy beeswax. I grade it into other products.

George Hofe, for Defendant, Direct.

The Court: And by reason of buying beeswax continuously you are familiar with the selling prices of beeswax?

The Witness: Yes.

The Court: At different times?

The Witness: Yes, correct.

10

Q Now, by reason of your experience can you tell without referring to the Reporter the particular prices on particular dates? A No, not unless I refer to the Reporter.

The Court: I will allow it.

Mr. Tumulty: May I examine him as to his qualifications?

The Court: Certainly.

20

Cross examination by Mr. Tumulty (on qualifications).

Q Mr. Hofe, have you ever once in your experience as president of this defendant corporation had occasion to sell beeswax? A No.

Q Never once? A No.

Mr. Tumulty: I object to his testimony as to what constitutes any market price. I object further to reference to the trade journal as being independently qualified to testify as to market value.

30

The Court: I will allow it.

By Mr. Kristeller.

Q Now, will you turn to the dates of October 13, 1930; December 8, 1930, and tell us what the market value of beeswax was? What was the

40

George Hofe, for Defendant, Direct.

average during that time? Did you make this sheet up from an examination of the various issues of this periodical during that period? A Yes.

Q Will you open to the page on which this market price is fixed? What is the date of that?
10 A October 6th.

Q What was the market price on that date?
A Forty-eight cents.

Q And how long did it continue at forty-eight cents? A Up to December 15th.

Mr. Tumulty: I object to the witness referring to anything other than the trade journal.

The Court: Yes.

20 Q How long did that price continue? A Up to December 29th.

Q Then what was the price from then on?
A Forty-one cents.

Q And how long did that last? A Until March 9, 1931.

Q Then what was the price? A Thirty-nine cents.

Q And how long did that continue? A That continued to May 25th.

30 Q And have you calculated the amount due, in accordance with your construction of the contract to be \$8,493.75? A Yes.

Q And there has been paid on account of that \$7,020? A Correct.

Q And your company admits that it owes to the plaintiff or to its assignor \$1,473.75? A Yes.

The Court: Let me ask you, Mr. Hofe: do I understand your construction of this contract

George Hofe, for Defendant, Cross.

is that, for instance, the price on December 8th, according to your testimony was forty-eight cents; now, if that price dropped twelve cents, that would be one-quarter, that then the price under the contract should drop one-quarter, which would be nine cents?

The Witness: That is correct.

10

The Court: Under those conditions you should pay twenty-seven cents?

The Witness: Yes, sir. The contract states a proportional decline.

The Court: I know what the contract states, but under your conception you should pay, under your construction, twenty-seven cents?

The Witness: Yes, sir.

Mr. Kristeller: Cross examine.

20

Cross examination by Mr. Tumulty.

Q Mr. Hofe, you have been doing business with the Bromund Company over a period of at least ten years, have you not? A Yes.

Q Why did you hesitate? A I didn't know whether we began when he first got in the business, whether I was purchasing from them or not.

30

Q And prior to the time when you entered into this contract which you make the defense in this suit, you had another contract with him, did you not? A Yes.

Q I show you a contract dated September 1, 1928, and ask you if that is one of the contracts that have formed part of the dealing between your company and the Bromund Company over the years you have been doing business together? A Yes.

40

George Hofe, for Defendant, Cross.

Q I draw your particular attention to the clause in that particular contract reading: "Subject to proportionate reductions if the market price should decline" and ask you if you can tell us did not this defendant, Jean Jordeau Incorporated, insert that clause in that contract after the contract had originally been drawn by the Bromund Company?

Mr. Kristeller: I object. This is not the contract in suit and it would not make any difference if he did, if it was accepted with that addition.

Mr. Tumulty: I am offering it to show a course of dealings.

The Court: I think it may be proper, Mr. Tumulty, to show what was done by reason of those former contracts, but I don't see that this particular question is relevant in this case. I may say if that clause was in there and this advantage which the defendant is claiming here was not taken advantage of under the previous ones, I think it would be proper to show it as a course of dealing.

Contract dated Sept. 1, 1928, marked P. 1 in evidence.

Q You have had many other contracts with the Bromund Company, that is correct, is it? A Not many, I think two or three.

Q You have had two or three contracts with them? A Yes.

Q Have you ever before thought to take advantage of any clause in any one of those contracts similar to the clause which you seek to take advantage of in this suit? A We always take advantage of all clauses in all contracts.

George Hofe, for Defendant, Cross.

Q Just answer the question. A I am sorry but I don't understand the question.

Q Did you ever before in this course of years of dealings with this plaintiff, seek to take a similar advantage of that contract clause that you seek to take advantage of in this instance?

10

Mr. Kristeller: I object to the form of the question: "Seek to take advantage of." I don't know that any other contract, as far as I know, contained that clause except the one shown the witness.

The Court: Here is one in 1928.

Mr. Kristeller: That is the one shown to the witness.

The Court: Let me ask Mr. Hofe a question: under this 1928 contract that you have been shown, did you ever buy beeswax down a proportionate sliding or buying scale, as you are claiming under this contract?

20

The Witness: The answer is no, because the market price was very stable.

Q Now, you make claim for a reduction of some sort. Can you tell us when you first made that claim to Bromund Company? A When our check was tendered to them, this being the check which they ultimately returned.

30

Q Under date of June 11, 1931, your check number thirty-seven, drawn on the National Newark and Essex Banking Company to the order of E. A. Bromund Company in the sum of \$1,038, is that it? A Yes.

Q And this is the check? A Yes, sir.

40

George Hofe, for Defendant, Cross.

Mr. Tumulty: I offer the check in evidence.

Check dated June 11, 1931, marked P. 2 in evidence.

10 Q You endorsed or caused to be endorsed on there, "Accepted as payment in full to date"?

A Yes, correct.

Q And that check was returned to you immediately, was it not, by Bromund Company?

A Yes, sir.

Q And you likewise received their letter of June 15, 1931, did you not? A Yes.

20 Mr. Tumulty: I want to offer the original of this letter: "We are returning your check herewith. However, as stated in our phone conversation regarding a reduction on your last purchase of seventy-five hundred pounds of white beeswax, we have allowed you one cent per pound, a total of \$75 and if you wish this discount at one per cent. for payment in ten days of the amount due of \$2,700, your prompt remittance will be accepted.

30 In regard to your notations on the back of the enclosed check, they are so prejudicial and so grossly absurd, we cannot consider the same worthy of comment nor reply. The contract of October 6, 1930, for fifteen thousand pounds was concluded on April 10th. This contract was placed below market and your recent orders and those sold you after April 10th were bought under open order."

40 Letter dated June 15, 1931, marked P. 3 in evidence.

George Hofe, for Defendant, Cross.

Q Prior to the time when you sought to prevail upon Bromund Company to accept the check which you say is in full payment, had you ever made a demand of Bromund Company for any reduction, such as constitutes your defense in this case? A No.

Q So that throughout the entire running of the contract as far as the fifteen thousand pounds were concerned, and throughout the running of the time when the other deliveries were made to you, you had never made a demand for any reduction in the amount of this invoice? A No, not up to the time of this check. 10

Q Now, prior to May 27, 1931, you had received from Bromund Company fifteen thousand nine hundred pounds of beeswax, had you not? A Yes, sir. 20

Q And you had paid for that fifteen thousand nine hundred pounds at the rate of thirty-six cents per pound, had you not? A I could not tell you that. We sent them checks to cover the invoices, but that payment was subject to deduction at such time as should clear up our contract.

The Court: Suppose you had never ordered any more? 30

The Witness: On the last order I would have done just what I did on this last order, deducted it.

The Court: Well, suppose after your check of April you had determined not to order any more beeswax from this plaintiff and your account would have been settled, would it not?

The Witness: If I had finally decided not to order any more, yes, but I think in that 40

George Hofe, for Defendant, Cross.

event I would have sent them a debit memorandum; but I permitted this matter to lie because I was continuing to purchase.

The Court: Why didn't you take it off on every order as it went in? That is what I am trying to get at?

10

The Witness: One of the reasons is because I had not followed the weekly market prices. The second is because I knew that any time when we got to the end of our contract, which we understood ran a year, the matter would be adjusted. I had been dealing with them for a long period.

Q You had been dealing with Bromund and you expected the same courtesy from them that you felt you would extend to them, is that correct? A Exactly.

20

Q The deliveries which you ordered and accepted between May 27, 1931 and June 4, 1931, totaled seventy-five hundred pounds of beeswax, isn't that correct? A Yes.

Q And those invoices have not yet been paid, have they? A Payment was rendered, partial payment, as we consider, the full payment.

Q Those invoices have not been paid, have they?

30

Mr. Kristeller: That is admitted.

Q And even while you have received fifteen thousand nine hundred pounds and ordered seventy-five hundred pounds additional and likewise received them, you have not yet brought to the attention of Bromund Company the question of this proposed reduction, have you? A Not until after the seventy-five hundred pounds were received.

40

George Hofe, for Defendant, Cross.

Q You had a conference with Mr. Bromund and Mr. Helmbold shortly following the return of your check, didn't you, in your office? A Yes.

Q It was anything but a friendly conference, wasn't it? A It was not very friendly.

Q And wasn't it then, for the first time, that a discussion was had as to what was meant by this proposed reduction? A No. 10

Q Well, you say you had no discussion with them up to the time you sent this check we have referred to, that is correct, isn't it? A Yes.

Q When did you see Mr. Bromund or Mr. Helmbold following June 11, 1931? A Several days later.

Q And that was the time when you had this discussion about this proposed reduction? A That was one of the discussions, yes. 20

Q And when was there another discussion between June 11, 1931, and the several days following June 11th? A In between those two dates.

Q Where did that take place? A Over the telephone.

Q And you spoke to whom? A I believe Mr. Helmbold. I am not sure.

Mr. Tumulty: It is agreed that the defendant received the original of this letter dated June 22, 1931. 30

Letters dated June 22, 1931, June 30, 1931, and July 1, 1931, received and marked P. 4.

(An adjournment was taken until 2 P. M. December 21, 1931.)

George Hofe, for Defendant, Cross.

GEORGE HOFE, recalled.

Cross examination continued by Mr. Tumulty.

10 Q You have asked your counsel to have produced here today these order sheets, your number 8533 and 8517. What was your purpose in asking that those originals be produced?

Mr. Kristeller: I object to that.

The Court: They are not in evidence, are they?

Mr. Kristeller: Yes, they are in evidence, D. 3 and D. 4.

The Court: I don't see that it is material, what the purpose is of his asking.

20 Mr. Tumulty: I withdraw the question.

Q In all of the orders that you sent in to the office of Bromund Company you specified thirty-six cents a pound, did you not?

Mr. Kristeller: I object.

The Court: They speak for themselves.

30 Mr. Tumulty: Is there any objection to my offering in bank all these orders over the course of dealings?

Mr. Kristeller: Certainly not.

Q I show you order number 8504 dated April 6, 1931, calling for twenty cases at thirty-six cents per pound. That is your order, isn't it? A Yes, sir.

40 Q I show you a letter dated February 10, 1931, an order for twenty cases at thirty-six cents per pound, correct? A Yes, sir.

George Hofe, for Defendant, Cross.

Q And I show you your letter of November 29, 1930, likewise twenty cases at thirty-six cents per pound. I show you order of January 3, 1931—

The Court: Are these during the life of this agreement or contract?

10

Mr. Tumulty: Yes, both during and after.

Q I show you order dated January 3, 1931, thirty-six cents per pound and October 6, 1930, order number 7914 at thirty-six cents per pound all of those orders specify the same cost per pound as the agreement between the parties, do they not? A They all specified thirty-six cents a pound.

20

Orders dated Oct. 6, 1930; Nov. 29, 1930; Jan. 3, 1931; Feb. 10, 1931; Apr. 6, 1931, marked P. 5, in evidence

Q And I believe you said that there was no discussion about a rebate of any sort until after the time when the check you presented in full settlement was returned to you—

Mr. Kristeller: I object to the form of the question.

30

The Court: I remember the testimony.

Q Now, when was the contract extended, if at all, to cover the shipment of wax over and above fifteen thousand pounds? A The contract stated approximately fifteen thousand pounds.

Q I ask you when it was extended? Just answer my question? A I am sorry I cannot an-

40

George Hofe, for Defendant, Cross.

swer the question because it was extended automatically. It was part of the contract.

The Court: Do you mean by that Mr. Hofe that you considered that it would cover any amount?

10 The Witness: Any reasonable amount within the year I should think, Judge.

Q You filed an affidavit in these proceedings, didn't you, Mr. Hofe? A Yes.

Q And you said in that affidavit, some part thereof, that the contract was extended, reading your own words, "Paragraph six of your affidavit, that thereafter and between October 7, 1930, and April 10, 1931, approximately fifteen
20 thousand pounds of beeswax were delivered to the defendant pursuant to the contract, and the contract was extended by mutual agreement to include the balance twelve thousand pounds of beeswax purchased by and delivered to defendant by plaintiff's assignor." Now, I ask you when was that mutual agreement or extension entered into and where? A Every time we sent an order and the plaintiff accepted it.

Q When you said in your affidavit, "by mutual agreement," you did not mean that there
30 was any written or oral agreement between you, did you? A Only insofar as an order is a written agreement.

Q So that when you made affidavit to the facts that the contract was extended you were referring only to the fact that those orders may have been accepted from you, isn't that the case? A Yes.

Q Now, when you originally entered into this
40 contract you sought other manufacturers to give

George Hofe, for Defendant, Cross.

you a basis of price, did you not, before contracting with Bromund?

Mr. Kristeller: I object; that it is immaterial.

The Court: I don't see the materiality now, but I will allow the question. 10

A Your question was whether I inquired of other firms?

Q Yes. A I presume we did. We usually do.

Q You do not recall? A I do not recall exactly, no.

Q Didn't you have a price from some other manufacturer at thirty-nine cents per pound? 20

Mr. Kristeller: I object to that.

The Court: I do not see the materiality of it, Mr. Tumulty.

Mr. Tumulty: That is all.

The Court: Let me ask you, Mr. Hofe, was it your understanding of this contract that it was to cover your needs for the year?

The Witness: Yes, it was.

The Court: No matter what the quantity was? 30

The Witness: I think there should be some kind of a limit.

The Court: Well, wasn't this the picture—correct me if I am wrong—that you and the Bromund Company got together and you determined that your needs for the year would be approximately fifteen thousand pounds and that you made this contract based upon what you thought, that that 40

George Hofe, for Defendant, Cross.

would be your yearly requirements, approximately?

The Witness: No. I think the fifteen thousand pounds was the minimum amount.

10 The Court: Minimum amount, and it could go to any maximum?

The Witness: As I think back I think it was because I should think the more orders we gave them the better they would like it.

The Court: No, not what you think. What was in your mind at the time you entered into the contract.

The Witness: Yes, sir, that is my understanding.

20 The Court: Now, thirty-six cents at the time you made this contract was under the market price, was it not?

The Witness: Yes.

The Court: And was it your understanding that no matter how much the market price dropped that this cost price to you would correspondingly drop?

The Witness: Yes.

30 The Court: It was not that thirty-six cents being under the market price, that you were to get the advantage if the price stayed above thirty-six cents and the seller would get the advantage if the price went below thirty-six cents?

The Witness: Oh, no. My understanding was that we were to pay three-quarters of the market price.

40 The Court: They didn't have much chance under that then, did they?

Leroy I. De Caisse, for Defendant, Direct.

The Witness: I think with the type of wax they were selling they did, yes, sir.

(Witness excused.)

LEROY I. DE CAISSE, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows: 10

Direct examination by Mr. Kristeller.

Q Are you connected with the Oil Paint and Drug Reporter? A Yes, sir.

Q In what capacity? A Market editor.

Q And how long have you been doing that?

A Oh, about fifteen years. 20

Q Do you prepare the current market quotations contained in that periodical? A Not all of them.

Q Do you prepare the market quotations on beeswax? A Yes, sir.

Q You tell the Court how you prepare them. Before you do that let me ask you how often does this magazine come out? A Once a week.

Q And is it considered an authority as to the market value of the articles therein mentioned? 30

Mr. Tumulty: I object to that.

The Court: Yes.

Q How do you prepare the market quotations? A The market quotations are prepared usually by telephoning to representative houses in the wax trade, asking for market information and prices. 40

Leroy I. De Caisse, for Defendant, Direct.

The Court: Do the quotations in that paper reflect the general market price of the commodity for the time in which the paper is published?

The Witness: We aim to have them so, sir.

10

The Court: Well, they do, don't they?

The Witness: From our point of view, as far as we are able to ascertain the prices, they do, yes, sir.

Q Do you know what the circulation of your Drug Reporter is? A I do not.

20

Q Can you tell us the market price of beeswax at any particular time without referring to your quotation sheets? A I should prefer to refresh my memory.

Q Using these Reporters, can you refresh your memory? A I can.

30

Mr. Tumulty: I may as well object at this time, unless he has some personal knowledge independent of the knowledge he may gain from refreshing his recollection from these periodicals. If my understanding of the law is correct the testimony must show both personal knowledge acquired from years in the trade, both buying and selling the particular commodity. That being established, the use of the trade journal to refresh that already established knowledge is permissible. I don't think this gentleman is qualified to testify as such an expert.

The Court: I think I will accept it.

40

Leroy I. De Caisse, for Defendant, Cross.

Q On October 6, 1930, will you give us the market prices of beeswax? A You refer to white pure beeswax, do you?

The Court: Pure white beeswax.

The Witness: Forty-eight to fifty-two cents. 10

Q And on November 10, 1930? A The same price.

Q December 1, 1930? A Forty-eight cents.

Q December 29, 1930? A Forty-one cents.

Q January 12, 1931? A Forty-one cents.

Q February 16, 1931? A Forty-one cents.

Q March 9, 1931? A Thirty-nine cents.

Q April 6, 1931? A Thirty-nine cents.

Q April 27, 1931? A Thirty-nine cents. 20

Q May 4, 1931? A Thirty-nine cents.

Q May 25, 1931? A Thirty-nine cents.

Mr. Kristeller: Cross examine.

Cross examination by Mr. Tumulty.

Q Now, your business is that of a more or less market editor, is it not? A Yes, sir.

Q And do you know what white beeswax is? 30
A Do I know what it is?

Q Yes. Why, I think so. It is bleached beeswax.

Q Do you know what yellow beeswax is? A Yes.

Q And how is yellow beeswax distinguished from white beeswax? A White beeswax is bleached.

Q Have you ever seen the bleaching process?
A I never have. 40

Leroy I. De Caisse, for Defendant, Cross.

Q You have never bought or sold any beeswax in the course of your fifteen years? A No.

Q And the only source of information you have, that you have incorporated into your report, is derived by you from telephonic conversations with different manufacturers? A That
10 is correct.

Q If I understand correctly, there are only about five manufacturers in the United States, is that correct? A I don't know how many there are.

Q Well, how many do you inquire of in establishing your cost sheet? A I should say between three and four.

Q And do you know offhand their names? A Well, I know some of them, yes.

20 Q What are they? A C. W. Jacobs, Allison Stormeyer, Arckley Smith, Nicholas Casey and the Wilbaumer Handle Company in Syracuse, I believe.

Q Did you ever inquire of the E. A. Bromund Company? A Rarely. On some other waxes, but not on this particular wax.

Q They, too, are manufacturers, are they not? A They are a reputable house.

30 Q I mean they bear the same authority in the trade as the other houses you have mentioned? A Quite.

Q And only from those sources that you have mentioned is the market price of beeswax determined, isn't that so? A Correct.

The Court: You mean the market price as contained in the periodical?

40 Mr. Tumulty: The market price as we understand it. I don't know what this gentleman has reference to.

Jesse F. Bromund, for Plaintiff, Direct.

Q I understand that Jacobs, Allison, Stormeyer and Arckley are not manufacturers, is that correct? A I do not know. They are the folks that I obtain prices from.

Q But you do not know them to be or not to be manufacturers? A I do not know if they are manufacturers or what they are.

10

Mr. Tumulty: That is all.

(Witness excused.)

Mr. Kristeller: We rest.

JESSE F. BROMUND, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

20

Direct examination by Mr. Tumulty.

Q You are president of the E. A. Bromund Company? A Yes, sir.

Q Assignor to John E. Huth, plaintiff in this action? A Yes, sir.

Q Do you recall the occasion of your entering into this agreement which has been offered in evidence with Mr. Hofe? A Yes.

Q With the discussion as to market prices and contract price at the time? A No discussion whatever.

30

Q Was there any distinction made between what Mr. Hofe has testified to as being a market price and a contract price at the time? A None whatever.

Q Your firm delivered fifteen thousand nine hundred pounds of beeswax and was paid for that delivery at thirty-six cents per pound, is that correct? A Yes, sir.

40

Jesse F. Bromund, for Plaintiff, Direct.

Q And subsequent deliveries for which payment is sought in this suit totals seventy-five hundred pounds and those seventy-five pounds have been similarly billed but not paid for? A Exactly.

10 Q When was the first time, Mr. Bromund, that a discussion of any sort about this rebate that this defendant seeks was had?

Mr. Kristeller: I object to the form of the question "rebate."

The Court: You had better reframe the question.

The Court: When was the first time that the defendant ever made a claim for a reduction by reason of the contract?

20 The Witness: We only knew of such a claim after receiving a check in payment in full for invoice totaling \$2,700 and the check only totaled \$1,038.

Q I show you the check. It has already been offered, the check bearing date June 11, 1931. Would that refresh your recollection as to when for the first time there was any discussion of any sort? A The discussion occurred a few
30 days after the return of this check which was sent back immediately.

Q Where did that discussion take place? A In Mr. Hofe's office over in South Orange.

Q Who was present in Hofe's office? A Mr. Hofe's and Mr. Helmbold.

Q And yourself? A Yes, sir.

Q What, to the best of your knowledge, was that discussion about? A Well, Mr. Helmbold and myself entered Mr. Hofe's office and I expressed the opinion that he in all probability
40

Jesse F. Bromund, for Plaintiff, Direct.

knew the reason for our visit and he answered in the affirmative that he did, and I went on to say that I thought it was rather unbusinesslike and unethical to send us a check and not have any explanation attached to it for the reduction and he said the explanation was on the back of the check. I said we did not understand it, and as the discussion proceeded Mr. Helmbold, I believe, mentioned that he understood Mr. Hofe to say over the phone that he had a price of thirty-five cents a pound and Mr. Hofe said that he didn't mention any such price but that he said he had a price of thirty-nine cents a pound and the discussion proceeded along and we didn't get anywhere at all and Mr. Hofe mentioned that he might be mistaken about his procedure in this matter and we might think him to be sort of a rogue, or something to that effect, and I simply agreed with him and we were ordered out of the office. I presume that a man must certainly have a guilty conscience when he mentioned a thing of that sort himself. 10 20

Q How long have you been doing business with the Jordeau Incorporated? A About ten years.

Q During those ten years you have had several other contracts with them, have you not? 30

A I believe we have had two or three others.

Q During the ten years you have been doing business together, was there ever any request for an allowance similar to the one that has been made in this case or which was made when you received that check which you refused?

Mr. Kristeller: I object as immaterial.

Mr. Tumulty: I want to show a course of dealings. 40

Jesse F. Bromund, for Plaintiff, Direct.

Mr. Kristeller: But this is a special contract.

The Court: Well, were the contracts the same wording as this one?

10 The Witness: A previous one I know for a fact in 1928 or 1929, the same clause was stipulated.

The Court: I think I will allow the question with regard to that contract.

Mr. Kristeller: The previous contract?

The Court: Yes.

Mr. Kristeller: That is perfectly all right.

20 Q I show you a contract dated September 1, 1928, and I ask you if you can explain to the Court whether or not your company, or someone else, inserted in that contract the words "subject to proportionate reduction if the market price should decline."

Mr. Kristeller: I object. They are producing this contract and there is no allegation of fraud, or any inserting anything other than what is on the paper.

30 Q How many years have you been in the business of manufacturing, buying, selling and in all ways trading in beeswax? A About fifteen years.

Q During that fifteen years have you had occasion to buy and sell? A Most every day.

40 Q Did the market price of white beeswax reduce below thirty-six a pound from the date of this contract in October to and inclusive of the date of the last delivery, whenever it may have been?

Jesse F. Bromund, for Plaintiff, Direct.

Mr. Kristeller: Objected to, if your Honor please, immaterial.

The Court: I will allow the question to be answered.

Mr. Kristeller: Exception.

A No, the price never went below thirty-six cents per pound. 10

Q Who makes the market price of pure white beeswax in the trade, if you know?

Mr. Kristeller: I object to that. This man is not qualified to tell who makes the market price.

The Court: I think you are doing a certain amount of quibbling. In any business the market price is set by the sellers and the buyers in that business. Certainly one company does not, unless they have a trade organization. 20

Mr. Tumulty: I withdraw the question.

Q Is the Oil Paint and Drug Reporter an authentic medium used in the trade for establishing market prices?

Mr. Kristeller: I object. I do not think he is qualified. 30

The Court: Do you follow that in fixing your prices at all?

The Witness: No, sir, we were not guided by it in the least.

Mr. Tumulty: That is all.

Mr. Kristeller: No questions.

The Court: Let me ask you, Mr. Bromund, what was your understanding of this contract? 40

Elmer Helmbold, for Plaintiff, Direct.

The Witness: Our understanding was that we were treating these gentlemen very fairly in giving them—

10 The Court: I do not mean that. You have specified thirty-six cents per pound. And there is a clause there “subject to proportionate reduction if the market price should decline.” You say there was no conversation or talk between the parties in regard to those words?

20 The Witness: Well, our impression of the price of thirty-six cents a pound is based upon manufacturers’ prices like ours at which time there was never quoted a price below the figure mentioned in the contract. Nor did we change our figures during the entire lifetime of the contract.

(Witness excused.)

ELMER HELMBOLD, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Tumulty.

30 Q You are the treasurer of E. A. Bromund Company? A Yes, sir.

Q You have been engaged in the business of buying and selling wax for over a period of how many years? A Twenty-five years, about.

Q You were present when this contract was signed? A I was present. I believe that was mailed to us, but I took the order on the phone.

40 Q Was there any discussion as to a difference in market price and contract price at the time?

Elmer Helmbold, for Plaintiff, Direct.

A There was no discussion at the time when I took the order from Mr. Hofe over the phone. It was simply a question of price.

The Court: What was said about price?

The Witness: I made them a price of thirty-six cents, a very low figure at that time, one of the lowest figures we had at that time, and I think I understood Mr. Hofe to say he could buy it at thirty-five cents. Anyway I got the order and that was all there was to it. That clause, he put in himself about the proportionate rebate or decline, or something, and that is all there was to it. 10

The Court: What was said about that clause?

The Witness: When we saw that on there we didn't pay any attention at all. We took it for granted that in the event of our prices being lowered we would have to give him an adjustment on it to equal the other manufacturer's prices which might be lower. We always do that. The manufacturer's prices are not all the same. They are not uniform. One manufacturer may be much higher than another, some midway and some lower. It is not at all uniform. Some prices are higher on account of a duty. The price varies according to the manufacturer. I could mention the names of those high and those low, if you wish. 20 30

The Court: Your understanding, of this conversation with regard to this clause was that if your price went below thirty-six cents, you would give the Jordeau Company the benefit of any reduction? 40

Elmer Helmbold, for Plaintiff, Cross.

The Witness: Naturally, we do it with everybody.

The Court: What do you consider the market price of beeswax?

10 The Witness: Well, that is a very difficult question to answer, your Honor.

The Court: I mean stated prices at which your competitors—

The Witness: Usually gathered by our competitors, what they are selling at, and of course there is a good deal of competition among us.

20 Q Can you tell us whether or not Jacobs and Allison and Stormeyer and Arckley are manufacturers? A No, sir, they are jobbers. We sell them. They naturally have to put a higher price on it to make their profit. They are not manufacturers.

Q Are you in any way guided in your establishment of prices by the Oil, Paint and Drug Reporter? A No, sir, neither in buying nor selling.

Mr. Tumulty: That is all.

30 *Cross examination by Mr. Kristeller.*

Q You are the treasurer of the Bromund Company? A Yes.

Q The Bromund Company are they manufacturers? A Yes, sir, we are manufacturers and bleachers of beeswax.

40 Q So that you only sell beeswax, you do not buy it? A Yes, sir, we have to buy the crude material to bleach.

Joseph H. Gerethy, for Plaintiff, Direct.

Q You manufacture part of it or do some work on the crude beeswax? A Why, we could not produce the white without it.

Q And this contract of September 1, 1928, also has the same clause, subject to proportionate reduction if the market price should decline? A I believe it has, yes. 10

Q I will show it to you. A I do not contradict it. There is no use dwelling on that. That could be in there. I have seen it many times. I have been selling Mr. Hofe for ten years.

Mr. Kristeller: No further questions.
(Witness excused.)

20

JOSEPH H. GERETHY, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Tumulty.

Q What is your business? A Chemicals, drugs, wax and so forth.

Q How long have you been engaged in that business? A Thirty-five years or more. 30

Q Are you familiar with the usages in the trade generally in the manufacture of beeswax? A I am.

Q From what sources is the market price of white beeswax established?

Mr. Kristeller: I object. I don't know who this gentleman is, whether he is qualified to tell. 40

Joseph H. Gerethy, for Plaintiff, Direct.

The Court: He says he has been engaged in the business for thirty-five years. What branch of the business?

The Witness: All branches, but including wax.

10 Q You mean all branches of the oil, paint and drug business? A Drugs, waxes, chemicals and also essential oils.

Mr. Kristeller: What firm are you connected with?

The Witness: Connected with McKesson-Robbins for about twenty years. I was an importer myself for several years, and I am now connected with the United Chemical and Drug Corporation with offices at 135 Wall street, New York.

20 Mr. Kristeller: What branch do you take care of?

The Witness: Importer, seller. I do the importing for them and I also sell goods for them. I have always been in this line.

Mr. Kristeller: What kind of business?

The Witness: Waxes and including most commodities.

30 Mr. Kristeller: All right.

Direct examination (resumed) by Mr. Tumulty.

Q You are familiar with the Oil, Paint and Drug Reporter? A Yes.

Q Is it an authority upon which to base market prices of beeswax? A I would not consider it so.

40 Q Have you had occasion to refer to it as an authority in the thirty-five years you have been

Louis J. Boniface, for Plaintiff, Direct.

in the trade? A I referred to it but not as an authority.

Mr. Tumulty: That is all.

Mr. Kristeller: No questions.

(Witness excused.)

10

LOUIS J. BONIFACE, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination by Mr. Tumulty.

Q You are a wax broker? A Yes, sir.

Q With experience of how many years? A 20
About twenty-six.

Q During that time you have bought and sold pure white beeswax in all its forms? A Yes, sir.

Q Yellow beeswax? A Yellow beeswax and white beeswax.

Q What is your opinion of the Oil, Paint and Drug Reporter as an authority upon which to base market prices?

Mr. Kristeller: I object. 30

The Court: Sustain the objection.

Q During the years you have been engaged in the business have you ever had occasion to refer to the Oil, Paint and Drug Reporter as an authority for market prices? A Never.

Q And why not?

Mr. Kristeller: I object to that, why not.

The Court: Yes, sustain the objection. 40

Ernest Schuemann, for Plaintiff, Direct.

Q Are you familiar with the situation in the trade with regard to these contracts as they have been offered in evidence in this suit and particularly with reference to the words "subject to proportionate reduction if the market price should decline"?

10

Mr. Kristeller: I object.

A I am familiar with those conditions.

Q In the regular usage of the trade what would that clause mean in any contract?

Mr. Kristeller: I object as not part of the pleadings.

The Court: I think usage of the trade is pleaded.

20

Mr. Tumulty: That is all.

Mr. Kristeller: No questions.

(Witness excused.)

ERNEST SCHUEMANN, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

30 *Direct examination by Mr. Tumulty.*

Q What is your business? A Importers of beeswax and spices.

Q And for how many years have you been engaged in that business? A Over thirty years.

Q During those thirty years you have bought and sold imported beeswax? A Yes.

Q And you are familiar with market conditions generally? A Yes, sir.

40

George Hofe, recalled, Direct—Cross.

Q In establishing the market prices of that commodity do you ever have occasion to refer to the Oil, Paint and Drug Reporter?

Mr. Kristeller: I object.

The Court: Objection is sustained.

Q How is the market price on beeswax fixed, 10
if you can tell us?

Mr. Kristeller: I object.

The Court: I think I know how market prices are fixed.

Mr. Tumulty: No further questions.

Mr. Kristeller: No questions.

(Witness excused.)

Mr. Tumulty: That is all we have to offer. 20

GEORGE HOFE, recalled.

Direct examination by Mr. Kristeller.

Q Mr. Helmbold said that at the time the order was taken which is in suit here, you said to him you could buy this beeswax at thirty-five cents. Did you ever say anything like that to him? A No, I did not. 30

Cross examination by Mr. Tumulty.

Q Did you ever say you could buy it at thirty-nine cents?

Mr. Kristeller: That is objected to. This is sur-rebuttal.

Mr. Tumulty: That is all. 40

*Exhibit D. 1.***Exhibit D. 1.**

Not responsible for Strikes, Lockouts; Fires and
other delays beyond our control.

Tel. Barclay 8445 Incorporated 1909

10 Cable Address—Bromund New York
Code A. B. C. 5th Edition

Factory
Elmsford, N. Y.

E. A. BROMUND CO.
Bleachers and Refiners of
BEESWAX
258 Broadway

New York Oct. 7, 1930.

20 OUR ORDER NUMBER CONTRACT.
CUSTOMER'S ORDER NUMBER 10/6/30

Retain this copy for your files.

To: Jean Jordeau, Inc.
3rd & Sloan Sts.
South Orange, N. J.

We confirm having sold to you:

ARTICLE: Pure White Beeswax 1-lb cakes
QUALITY: SNOWFLAKE BRAND U.S.P.
30 (AS HAD)
QUANTITY: approximately 15,000 lbs
PRICE: 36c per lb. (subject to propor-
 tionate reduction if the mar-
 ket price should decline)
DELIVERY: FOB South Orange, N. J. ex-
 press prepaid above address
TERMS: 1% 10 days net 30
SHIPMENT: To be taken as required through-
40 out one year beginning from
 above date.

Exhibit D. 1.

BROKER:

Thanking you for the order, we
are

Very respectfully,

SIGNED E. A. BROMUND COMPANY.

JEAN JORDEAU INC.

J F Bromund

PER.

L C 10

Address all communications to 258 Broadway,
New York
LC.

20

30

40

Exhibit D. 2.

Exhibit D. 2.

Not responsible for Strikes, Lockouts, Fires and
other delays beyond our control.

Bleachery—Elmsford, N. Y.

10

E. A. BROMUND CO.
Bleachers and Refiners of
BEESWAX
258 Broadway

Cable Address: Incorporated 1909
Bromund, New York
Code: A. B. C. 5th Edition

Telephone Barclay 8445

O. No. 7914 New York, Oct. 17 1930

20 Sold to Jean Jordeau, Inc. 3rd & Sloan Sts.
So. Orange. N. J.

All Claims Must Be Made Within Three Days
After Receipt of Goods

10 Cases. 150 Lbs, net each.
1500 Lbs. S. F. White U. S. P. Beeswax,
in Lbs. @ 36c..... \$540.00
Checked O. K. given to RM-DT
Ex. Pd.

30 Terms Net Cash 1% 10 days. 30 net.

* We hereby guarantee that the goods covered
by this invoice were produced or manufactured
in accordance with the Federal Child Labor Act
of September 1st, 1916.

Exhibit D. 2.

CHECK.

No. 16582

JEAN JORDEAU INC.

South Orange, N. J., October 30, 1930

Pay Five Hundred Thirty Four Dollars Sixty Cents \$534.60 10

To the order of
E. A. Bromund Co.,
258 Broadway,
New York, N. Y.

JEAN JORDEAU INC.

Geo. D. Hofe
Treasurer

National Newark & Essex Banking Co.
Newark, New Jersey 20

(Endorsed)
E. A. Bromund Co.

This exhibit consisted of a series of plaintiff's invoices and defendant's checks for the period Oct. 17, 1930 to May 8, 1931 inclusive. The invoices (all of which were similar to the foregoing printed exhibit), totalling 19,500 lbs. @ 36c per lb. or a total to that date of \$7020—were admittedly paid as follows: 30

Checks attached to the invoices	
in aggregate	6732.—
Cash Discount allowed.....	68.20
Adulteration Adjustment	135.—
“ “	64.80
Analysis	20.—
	7020.—

40

Exhibit D. 3.

Exhibit D. 3.

Purchase Order

Please Place This
Order No. 8517
on all Packages
and Invoices.

10

JORDEAU
Executive Offices and Laboratories
South Orange, New Jersey

Date April 30, 1931

To E. A. Bromund Co.
258 Broadway
New York City

20

Kindly enter the following order as per your quotation of....
This is to be delivered at earliest possible date.
This order is subject to cancellation if not delivered by May
5, 1931

Quantity	Unit	Description	Price
This order is placed with the understanding that goods are to be billed F. O. B. South Orange, N. J.			
20	cases	Pure White Sunbleached Beeswax, Snowflake Brand 1# cakes —	
		U. S. P.....	\$.36 per lb. or less

All cuts, drawings and other material our property must be returned prior to our passing invoice.

JEAN JORDEAU INC.
By D Tirkel

30

40

Exhibit D. 3.

E. A. BROMUND CO.

Bleachers and Refiners of Beeswax

Dealers in All Kinds of Waxes

258 Broadway, New York May 4 1931

Sold to Jean Jordeau, Inc.

South Orange. N. J.

Order No. Part of 8517 **10**
Representative

Terms 1% 10 days. 30 net.

10 Cases, 150 Lbs, net each.1500 Lbs. S. B. White U. S. P. Beeswax,
in Lbs, @ 36c..... \$540.00

Rec'd & checked O. K.

Given to RM 5-7-31

DT

Ex. Pd.

Bleachery: Elmsford, N. Y. **20**

E. A. BROMUND CO.

Bleachers and Refiners of Beeswax

Dealers in All Kinds of Waxes

258 Broadway, New York May 8 1931

Sold to Jean Jordeau, Inc.

South Orange. N. J.

Bal of Order No. 8517 **30**
Representative

Terms 1% 10 days. 30 net.

10 Cases. 150 Lbs. net each.1500 Lbs. S. B. White U. S. P. Beeswax,
in Lbs, @ 36c..... \$540.00

Rec'd & checked O. K.

Given to RM 5-12-31

DT

Ex. Pd.

Bleachery: Elmsford, N. Y. **40**

Exhibit D. 4.

Exhibit D. 4.

Purchase Order

Please Place This
Order No. 8533
On All Packages
and Invoices.

10

JORDEAU

Executive Offices and Laboratories
South Orange, New Jersey

To E. A. Bromund Co.
258 Broadway
New York City

Date May 25, 1931

Kindly enter the following order as per your quotation of....
This is to be delivered at earliest possible date.
This order is subject to cancellation if not delivered by June
1st, 1931 or sooner

20	Quantity	Unit	Description	Price
			This order is placed with the understanding that goods are to be billed F. O. B. South Orange, N. J.	
			RUSH RUSH RUSH	
	50	Cases	Pure White Sunbleached Beeswax, Snowflake Brand one # cakes—	
			U. S. P. — As per Contract	

All cuts, drawings and other material our property must be returned prior to our passing invoice.

JEAN JORDEAU INC.
By D Tirkel

30

40

Exhibit D. 4.

E. A. BROMUND CO.
 Bleachers and Refiners of Beeswax
 Dealers in all kinds of Waxes
 258 BROADWAY, NEW YORK

Sold to May 27 1931
 Jean Jordeau, Inc. Part Order No. 8533
 South Orange. N. J. Representative 10
 Terms 1% 10 days. 30 net.

15 Cases. 150 Lbs, net each.
 2250 Lbs. S. B. White U. S. P. Beeswax, in
 Lbs. @ 36c.....\$810.00
 Rec'd & checked O. K.
 given to RM 6-2-31

Ex. Pd. DT
 Bleachery: Elmsford, N. Y.

20

E. A. BROMUND CO.
 Bleachers and Refiners of Beeswax
 Dealers in all kinds of Waxes
 258 BROADWAY, NEW YORK

Sold to May 29 1931
 Jean Jordeau, Inc. Part of Order No. 8533
 South Orange. N. J. Representative
 Terms 1% 10 days. 30 net.

10 Cases. 150 Lbs, net each. 30
 1500 Lbs. S. B. White U. S. P. Beeswax, in
 Lbs. @ 36c.....\$540.00
 Rec'd & Checked O. K.
 Given to RM 6-3-31—DT

Ex. Pd.
 Bleachery: Elmsford, N. Y.

40

Exhibit D. 4.

E. A. BROMUND CO.

Bleachers and Refiners of Beeswax

Dealers in all kinds of Waxes

258 BROADWAY, NEW YORK

Sold to

Jun. 2 1931

Jean Jordeau, Inc. Part of Order No. 8533

10

South Orange. N. J.

Representative

Terms 1% 10 days. 30 net.

12 Cases 150 Lbs. net each.

1800 Lbs. S. B. White U. S. P. Beeswax,

in Lbs. @ 36c.....\$648.00

Rec'd & Checked O. K.

Given to RM 6-5-31

Ex. Pd.

DT

Bleachery: Elmsford, N. Y.

20

E. A. BROMUND CO.

Bleachers and Refiners of Beeswax

Dealers in all kinds of Waxes

258 BROADWAY, NEW YORK

Sold to

Jun. 4 1931

Jean Jordeau, Inc. Bal. of Order No. 8533

South Orange. N. J.

Representative

Terms 1% 10 days. 30 net.

13 Cases. 150 Lbs. net each.

30

1950 Lbs. S. B. White U. S. P. Beeswax,

in Lbs. @ 36c.....\$702.00

Rec'd & Checked O. K.

Given to RM 6-9-31

Ex. Pd.

DT

Bleachery: Elmsford, N. Y.

40

Exhibit P. 1.

Exhibit P. 1.

Not responsible for Strikes, Lockouts; Fires and
other delays beyond our control.

Tel. Barclay 8445

Incorporated 1909

Cable Address—Bromund New York

10

Code A. B. C. 5th Edition

Factory

Elmsford, N. Y.

E. A. BROMUND CO.

Bleachers and Refiners of

BEESWAX

258 Broadway

New York Sept. 1st, 1928.

OUR ORDER NUMBER CONTRACT.

20

CUSTOMER'S ORDER NUMBER.

To: Jean Jordeau, Inc.
3rd & Sloan Sts.,
South Orange, N. J.

We confirm having sold to you:

ARTICLE: White Beeswax discs 5-lb ctns
120-lb cases

QUALITY: Snowflake Brand USP

QUANTITY: 5000 lbs

30

PRICE: 52c per lb—subject to propor-
tionate reduction if the market
price should decline.

DELIVERY: FOB Elmsford NY express pre-
paid above address

TERMS: 1% 10 days net 30

SHIPMENT: To be taken as required over a
period of one year beginning
Sept. 15th, 1928

40

Exhibit P. 1.

BROKER:

“Seller agrees to meet competitive price at time of shipment on goods of equal quality or allow the buyer to purchase elsewhere”

Thanking you for the order, we are

10

Very respectfully,

E. A. BROMUND COMPANY.

J. F. Bromund.

SIGNED

JEAN JORDEAU INC.

Per G D Hofe

EPH—

20

30

40

Exhibit P. 2.

Exhibit P. 2.

NATIONAL NEWARK & ESSEX
BANKING CO.

Newark, N. J June 11, 1931 No. 37

Pay to the order of E. A. Bromund Co. \$1038.00

One Thousand Thirty Eight Dollars

JEAN JORDEAU, Inc.

10

(Back of check)

Accepted as payment in full to date

5-27-31	Invoice	\$810.00
5-29-31	"	540.00
6-2-31	"	648.00
6-4-31	"	702.00

20

\$2700.00

Less 1% 27.00

\$2673.00

Credit due us on market de-
cline since beginning of contract 1635.00

Due you\$1038.00

30

40

Exhibit P. 3.

Exhibit P. 3.

Bleachery
Elmsford, N. Y.

E. A. BROMUND CO.

10 Bleachers and Refiners of Beeswax
Dealers in All Kinds of Waxes
258 Broadway

New York June 15, 1931.

Jean Jordeau, Inc.
3rd & Sloan Sts.,
South Orange, N. J.
Att. Mr. Geo. D. Hofe.

Gentlemen:—

20 We are returning your check herewith, however, as stated in our phone conversation regarding a deduction on your last purchase of 7500 lbs. of White Beeswax, we have allowed you 1c per lb. a total of \$75.00 and if you wish to discount at 1% for payment in ten days on the amount due of \$2700.00, your prompt remittance will be acceptable.

30 In regard to your astounding notations on the back of the enclosed check, they are so preposterous and so grossly absurd, we cannot consider same worthy of comment nor reply.

Your contract of Oct. 6th, 1930 for 15,000 lbs. was concluded on April 10th, this contract was priced below the market and your recent orders

Exhibit P. 4.

and those sold you after April 10th were bought under open order.

Very truly yours,

E. A. BROMUND COMPANY.

J. F. Bromund
President.

JFB:LC

10

Address all communications to 258 Broadway,
New York

Exhibit P. 4.

June 22, 1931.

Jean Jordeau, Inc.
3rd & Sloan Sts.,
South Orange, N. J.
Att. Mr. Geo. D. Hofe.

20

Gentlemen:—

In further detail and comment regarding particulars connected with our recent interview and your very unusual and astounding claims for deduction from the amount of our invoice, we would state briefly that we have gone into this matter quite thoroughly to obtain all the essential and authoritative facts regarding the market situation on the cost of White Beeswax since the date of your first purchase and contract of Oct. 6, 1930, and it appears very conclusively that you have been, from that period, very thoroughly protected against any decline, as stipulated in the protective clause and therefore you have no just nor reasonable complaint nor grievance.

30

The contract of above mentioned date at the price agreed upon was at the time, considerably

40

Exhibit P. 4.

under competitive cost and selling prices as you know.

10 We wish to say however in conclusion, that statements are made sometimes under distressful and aggravating circumstances without forethought which are very regrettable and for which we feel sincerely apologetic. We believe if you will look into this matter more thoroughly we are sure you will find our contract and attention to the details have been perfectly just and fair to you.

Very truly yours,

E. A. BROMUND COMPANY.

President.

JFB:LC

20

Salon
562 Fifth Avenue
New York City

JORDEAU
Offices-Laboratories
South Orange, N. J

MADAME BERTHE
Specialist

South Orange, N. J. June 30, Zip-Year*

E. A. Bromund Company
30 258 Broadway
New York City

Att: Mr. J. F. Bromund

Gentlemen:

We have your letter of June 22 and regret that we cannot accept your interpretation of the contract. The language used in the contract that the price was thirty-six cents per pound "subject to proportionate reduction if the market price should decline" certainly had some meaning.

40

Exhibit P. 4.

The contract price was fixed at thirty-six cents per pound at a time when the market price was forty-eight cents per pound, thus showing a definite relation between the contract price and the market price in the proportion of three to four. The language quoted above, therefore, seems to us to clearly mean that as the market price might decline, the contract price should automatically decline with it, so that the contract price at any time should always remain three-quarters of the market price.

10

On this basis the deduction to which we are entitled should be \$1,226.25 and not \$1,635.00 as claimed in our letter of June 18. A deduction of \$1,226.25 would leave a balance due you of \$1,446.75 as payment in full of balance due on all purchases made from October 6, 1930 to June 6, 1931. Will you kindly advise us whether you will accept check immediately.

20

We appreciate the expression of apology contained in your letter. On our part, we are only seeking to make a fair interpretation of the contract according to its terms.

Very truly yours,

JEAN JORDEAU INC.

G D Hofe

30

GDH:HJ

40

Exhibit P. 4.

July 1, 1931.

Jean Jordeau, Inc.
3rd & Sloan Sts.,
South Orange, N. J.
Att. Mr. Geo. D. Hofe,

10 Gentlemen:—

We have for acknowledgment your favor of June 30th, and note that you cannot accept our interpretation of the contract, we might add, however, that this was not only our interpretation but also that of no less a legal authority than Hastings & Gleason, Attorneys, as well as other prominent representatives and brokers for various wax houses.

20 The market price never went below your contract price, therefore you were always amply protected at the contract price, thus it does appear very evident that you are endeavoring to avail yourself of outside conditions of the market which did not effect you in the least.

Your absurd statement that contracts are based on three quarters estimate of the market price, is too erroneous and incomprehensible for comment.

30 However, if you still fail to see our point and insist upon your interpretation, we suggest that the matter be left to arbitration and this method for settlement should be satisfactory to all concerned since we believe it will also be the most expedient.

Your proposition of settlement is entirely out of the question and we insist upon payment of invoices in full.

Very truly yours,
E. A. BROMUND COMPANY.

President.

40 JFB:LC

Exhibit P. 5.

Exhibit P. 5.

Purchase Order

Put This Order
No. 7914
on All Packages 10
and Invoices.

This is for our information

JEAN JORDEAU INC.

Third and Sloan Sts.

South Orange, N. J.

Date October 6, 1930

Deliver to

To E. A. Bromund Co.

258 Broadway 20

New York, N. Y.

Kindly enter the following order as per your quotation of....
Same to be delivered at earliest possible date.
This order is subject to cancellation if not delivered by Oct.
10, 1930

Quantity	Unit	Description	Price
10	boxes	This order is placed with the understanding that goods are to be billed F. O. B. South Orange, N. J. Pure White Sunbleached Beeswax, Snow Flake Brand One pound cakes—U. S. P.—same as before. \$.36 per lb. JEAN JORDEAU INC.	30

Approved.....

Jean Jordeau Inc.

Third and Sloan Sts.

So. Orange, N. J.

By S

Detach This Stub and Mail at Once

Date

192

This is an acknowledgment of your order No 7914

Shipment will be made.....192

Firm Name.....

By.....

Exhibit P. 5.

JORDEAU
Executive Offices and Laboratories
South Orange, New Jersey

November 29, 1930

10 E. A. Bromund Co.
258 Broadway
New York, N. Y.

Gentlemen:

Kindly fill our order as follows:

20 cases Pure White Sunbleached Beeswax,
Snowflake Brand—1# cakes, U. S. P. F. O. B.
South Orange, @ \$.36 per lb.

20 Kindly 'phone this order to your factory, so that
shipment can be made immediately. If you can-
not ship 20 cases at once, kindly send part ship-
ment.

Cordially,

JEAN JORDEAU INC.

G D Hofe

GDH:DT

30

40

Exhibit P. 5.

JORDEAU
Executive Offices and Laboratories
South Orange, New Jersey

January 3, 1931.

E. A. Bromund Co.
258 Broadway
New York, N. Y.

10

Gentlemen:

Kindly fill our order as follows:

20 cases Pure White Sunbleached Beeswax,
Snowflake Brand, 1# cakes, U. S. P. \$.36 per lb.
F. O. B. South Orange, N. J.

Cordially,
JEAN JORDEAU INC.

G D Hofe

GDH:28

20

JORDEAU
Executive Offices and Laboratories
South Orange, New Jersey

February 10, 1931

E. A. Bromund Co.
258 Broadway
New York, N. Y.

30

Gentlemen:

Kindly fill our order as follows:

20 cases Pure White Sunbleached Beeswax,
Snowflake Brand, 1# cakes, U. S. P. \$.36 per lb.
F. O. B. South Orange, N. J.

Cordially,

JORDEAU INC.

G D Hofe

GDH:28

40

Exhibit P. 5.

Purchase Order

Please Place This
Order No. 8504
on All Packages
and Invoices.

JORDEAU

10

Executive Offices and Laboratories
South Orange, New Jersey

Date April 6, 1931

To E. A. Bromund Co.
258 Broadway
New York City

Kindly enter the following order as per your quotation of....
This is to be delivered at earliest possible date.
This order is subject to cancellation if not delivered by April
13, 1931

20

Quantity	Unit	Description	Price
		This order is placed with the understanding that goods are to be billed F. O. B. South Orange, N. J.	
20	cases	Pure White Sunbleached Beeswax, Snowflake Brand 1# cakes—	
		U. S. P.....	\$.36 per lb.

All cuts, drawings and other material our property must be returned prior to our passing invoice.

JEAN JORDEAU INC.
By D Tirkel

30

40

New Jersey Court of Errors and Appeals

JOHN E. HUTH, Assignee of E. A. BROMUND Co., a corporation, <i>Plaintiff-Respondent,</i> <i>vs.</i> JEAN JORDEAU, INCORPORATED, a corporation, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Supreme Court.</i>
---	---	--

BRIEF ON BEHALF OF APPELLANT.

(Italics ours, except where otherwise noted.)

Statement.

This is an appeal from a judgment in favor of respondent, and against appellant, entered in the New Jersey Supreme Court on January 21, 1932, for \$2,781.00 damages, and \$66.10 costs, upon findings filed by Hon. A. Dayton Oliphant, Circuit Judge, before whom the issues were tried without a jury (S. C. 16-17).

Facts.

Appellant for the past twelve years has been engaged in the business of manufacturing and selling preparations for the removal of superfluous hair. These preparations require the use of beeswax as a base.

E. A. Bromund Co., respondent's assignor, is engaged in the business of selling beeswax. On October 7, 1930, Bromund agreed, in writing, to sell appellant "approximately 15,000 pounds of pure white beeswax in one-pound cakes, to be

taken as required thruout one year beginning from above date" (S. C. 56, ll. 31-40). The contract price of the beeswax was "*36c per lb. (subject to proportionate reduction if the market price should decline)*" (S. C. 56, l. 32). The determination of this appeal depends upon the construction of the above-quoted price clause.

Appellant contended below that the provision in the contract respecting price was clear, unambiguous, and susceptible of but one construction, namely: that the price to be charged appellant was always to be such proportion of the current market price on the respective days that beeswax was taken as 36c bore to 48c, which was the current market price at the time the contract was made. Appellant submitted, and the Court below found as a fact that the market price, when deliveries commenced, was 48c; that on December 15, 1930 the price had declined to 41c, and on March 2, 1931, to 39c (S. C. 14, l. 34).

Respondent contended that the price to be charged appellant was to be 36c per pound, unless the market price declined below that figure. The Court below adopted respondent's construction of the agreement (S. C. 15, l. 14).

Between October 13, 1930 and June 15, 1931, appellant ordered a total of 27,000 pounds from Bromund, who billed each order to appellant at 36c per pound. Appellant paid all but the last four invoices, totalling 7,500 pounds, and these for mthe basis of this suit.

Upon receipt of the four last-mentioned invoices, appellant deducted the amount to which it was entitled by reason of a decline in the market price when the latter beeswax was taken. The decline was from 48c, which was the market

price on the date of the first shipment, to 39c, which was the market price on the date of the last shipment. Respondent claimed an indebtedness of \$2,700.00 against appellant, the latter admitting liability only to the extent of \$1,473.75 (par. 6—Ans. S. C. 10).

The following schedule setting forth the market prices on the dates of the respective shipments and the contract price as claimed by appellant, show the computation to be as follows:

Dates	Amount Purchased	Market Price	Contract Price ¾ of Mkt. Price
October 13, 1930			
— to —			
December 8, 1930...	7,500 lbs.	@ .48—\$3,600.00	@ .36 —\$2,700.00
December 15, 1930			
— to —			
February 23, 1931...	6,000 lbs.	@ .41—\$2,460.00	@ .30¾—\$1,845.00
March 2, 1931			
— to —			
June 15, 1931.....	13,500 lbs.	@ .39—\$5,265.00	@ .29¼—\$3,948.75
Total	27,000 lbs.	\$11,325.00	\$8,493.75
Total Contract Price.....			\$8,493.75

Payments on account:

Total payments by checks.....	\$6,732.00
Cash Discount	68.20
12/12/30—Adjustment	135.00
1/2/31—Adjustment	64.80
Analysis	20.00
	7,020.00

(S. C., 23, ll. 1-26, inc., and Exhibit D. 2,
S. C., 59, ll. 25-40, inc.)

Balance still due for which tender has been made.....\$1,473.75

(S. C., p. 10, Par. 6 of Appellant's Answer)

The above credits are admittedly correct since they are not disputed by respondent.

The foregoing schedule discloses that the price contended for by appellant was constantly three-fourths of the current market price. This maintains the "proportionate reduction of the market price," as contemplated by the contract.

Respondent claimed that the delivery of 15,000 lbs. satisfied the terms of the contract and that the balance of shipments were upon open order. Appellant claimed that the contract was sufficiently elastic to include the delivery of the entire 27,000 lbs. The Court sustained appellant's contention in this respect, and found that all of the deliveries were made pursuant to the written contract dated October 7, 1930 (S. C. 14).

As stated at the outset of this brief, the decision in this case turns solely on the construction of the provision in the contract determining the price to be charged for the merchandise delivered. Respondent says that the price, under the contract, was fixed at 36c per pound, *unless the market price declined below that figure*. Appellant says (S. C. 26, l. 39, *et seq.*) that the price for the merchandise was never to exceed such proportion of the current market price as 36c bore to 48c, which was the prevailing market price when the contract was made.

The decision of the Court below should, therefore, be reversed, or modified to the extent of ordering the judgment to be for \$1,473.75 without costs—this sum having been tendered in appellant's answer in the Court below as well as at the trial (S. C. 26, l. 36, *et seq.*).

The first and fourth grounds of appeal, and the second and third grounds, will be argued together.

POINT I.

In refusing to adopt the construction that the selling price to appellant could not exceed three-fourths of the current market price, the Court below erred.

The construction of the price clause in the contract, was the sole question presented to the Court below. It reads as follows:

“PRICE: 36c per lb. (subject to proportionate reduction if the market price should decline)” (S. C. 56, l. 32).

The testimony established, and the Court below found as a fact, (a) that the market price at the inception of the contract was 48c per lb.; and (b) that during the life of the contract, the price had declined from 48c per lb. to 39c per lb. (S. C. 14, l. 34, etc.). Simple arithmetic reveals that 36c (the price charged at the commencement of deliveries) was exactly three-fourths of the market price.

Appellant maintained thruout, that the price it was obligated to pay under the contract was to be three-fourths of the current market price. That is obviously so, for the contract price was 36c per lb. at the outset of deliveries; and when the final deliveries were made, the current market price was only 39c, resulting in a consequent proportionate reduction of the contract price to $29\frac{1}{4}$ c. To adopt any other construction would be not only not “proportionate,” but the very antithesis thereof, and wholly illogical.

Respondent contended that appellant was to be charged less than 36c only when, as and if, the market price declined below 36c. The fallacy in that construction is that it overlooks completely the word “proportionate.” In the inter-

pretation and construction of written contracts, effect must be given to all of the words employed. Webster defines the word "proportionate" as "adjusted to something else according to a certain rate." Clearly, therefore, the price to be charged to appellant was to decline in a precise ratio to the decline of the market price. With that as the basis for computation, the amount due from appellant to respondent, is \$1,473.75. That is in accord with the schedule set forth on page 3 of this brief. Appellant tendered that sum, but it was refused by respondent who claimed \$2,700.00, based upon a constant figure of 36c per lb.

It follows, therefore, that the Court below erred in its construction of the price clause; and the judgment should be reversed or modified by awarding respondent the sum of \$1,473.75.

POINT II.

The definite, certain and unambiguous character of the price clause precluded any consideration of matters aliunde or extrinsic for a proper construction.

The Court below, in holding that the price was to be 36c per lb. unless the market price declined below that figure, was influenced by, and relied upon, the fact that up until the last order, appellant paid at the rate of 36c per lb. The Court believed also that business men might have taken the claimed deductions during the course of dealings. Appellant's adjustment of the price on the last order was termed "a belated discovery." The answer that appellant had a legal right to take advantage of this adjustment, is dispositive. What other business men might or would do under similar circumstances is not

pertinent. The price clause was definite and unambiguous. It speaks for itself; and to understand or interpret it, required no recourse to extrinsic circumstances. Evidence as to the course of dealings was immaterial and improper. The contract alone must control; and the construction should have been in conformity therewith.

In *Suffern and Galloway v. Butler*, 21 N. J. E. 410 (1869 E. & A.), the Court held at page 412:

“* * * The plain answer is, that we are asked not to reform, but to construe this agreement, and in the absence of any allegation of fraud or mistake, we are bound to presume that if such had been their meaning they would have used words proper to express it, or at least words which might, without doing violence to the laws of language, bear that signification. If they have failed to do this they have placed themselves beyond the power of any court to help them by construction. For while courts are always solicitous to ascertain and carry into effect the real intentions of the parties, they can do this only within certain well established limits. ‘The rule of law,’ says Professor Parsons, ‘is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties, as the words they saw fit to employ when properly construed, and the rules of law, will permit. In other words, courts can not adopt a construction of any legal instrument which shall do violence to the rules of language, or to the rules of law.’ 2 Parsons on Con. 494, 495.”

and at page 413:

“* * * It is further urged by the appellants, that their construction, even if not

appearing from the writings themselves to be the true one, must nevertheless be taken to be true as against the respondents, on the ground that, by their own acts and admissions, they are estopped from denying it.

Where the language of a written contract is ambiguous, or otherwise doubtful, such evidence is admissible, and may be very convincing to show the real intent of the parties. *But to admit it when the language is so clear and explicit as to leave no room for doubt as to its meaning, would be to disregard the familiar rule, which, while it permits the introduction of evidence from without for the purpose of explaining, prohibits it for the purpose of contradicting or varying a valid written contract.* 2 Parsons on Con. 547."

See also *Naumberg v. Young*, 44 N. J. L. 331.

In *Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271 (1913 E. & A.), the Court was called upon to construe a provision in an insurance policy. The Court held that the policy was to be strictly construed inasmuch as the terms were clear, and among other things held:

"The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. *The judicial function of a court of law is to enforce a contract as it is written.* In the present case the parties agreed that the responsibility of the company to answer to the plaintiff for loss sustained by him through damage done to his property by fire should cease if he left it unoccupied for more than ten days, and this without regard to the reason for his doing so. If he had seen fit, he might have insisted that the policy should contain a provision that the vacancy clause should not be applicable in case the building should be rendered uninhabitable through a cause for which he was

not responsible, and have refused to accept it unless the defendant would so agree. He did not see fit to do this, but entered into an agreement by which he obligated himself, without condition or limitation, not to permit the insured premises to remain unoccupied for a period longer than ten days, and consented that, if he should do so, the policy should become void. As was said by Whelpley, *C. J.*, speaking for the Supreme Court in *School Trustees v. Bennett*, 27 N. J. Law 513, 72 Am. Dec. 373: 'No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. The law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement.' "

To the same effect is *Edison Fixture Company v. Copoulos*, 3 Misc. 174 (1925 Sup.), wherein the Court in language singularly applicable to the instant case, said:

"It may well be that the contract made was an unwise one for the defendant to make, but with that this court cannot concern itself. Our duty is to give effect to legal rights of parties arising under contracts that they have seen fit to enter into."

If respondent's assignor made an unwise contract, it must bear the burden of its own act. The phraseology of the price clause was plain and unmistakable. It carried its own interpretation. The consideration of extrinsic matter was unnecessary and unwarranted.

It follows, therefore, that the action of the Court below in considering extrinsic circumstances constituted reversible error.

CONCLUSION.

The refusal of the Court below to adopt appellant's construction of the price clause, and its consideration of extrinsic circumstances, notwithstanding that the clause itself was definite and unambiguous, constituted reversible error, and the judgment below should be reversed and modified to the end that judgment should be entered in the Court below, in favor of respondent for the sum of \$1,473.75.

Respectfully submitted,

LIONEL P. KRISTELLER,
Attorney of Appellant.

October 1932 Term.

JACOB L. NEWMAN,
SAUL J. ZUCKER,
On the Brief.

22
1

New Jersey Court of Errors and Appeals

JOHN E. HUTH, Assignee of E. A.
BROMUND Co., a corporation,
Plaintiff-Respondent,

vs.

JEAN JORDEAU, INCORPORATED,
a corporation,
Defendant-Appellant.

Action at Law.
On Appeal from
Supreme Court.

BRIEF ON BEHALF OF RESPONDENT.

Facts.

For a period of about ten years prior to the institution of this suit, the parties hereto were engaged in a friendly business intercourse (S. C. 27, l. 27; S. C. 45, l. 28). Over that period appellant purchased its supplies of beeswax from the assignor of respondent, E. A. Bromund Co., who is one of the few recognized leading manufacturers of beeswax products in the United States. Its reputation as such is attested to by appellant's own witnesses (S. C. 32, l. 21; S. C. 42, l. 28).

On October 7, 1930, respondent's assignor entered into a written agreement with appellant to furnish appellant with

"approximately 15,000 lbs. of pure white beeswax in 1 lb. cakes to be taken as required throughout one year beginning from above date."

At the time of the making of the contract appellant caused to be inserted therein the words

“Subject to proportionate reduction should the market price decline.”

The insertion of the latter clause remained unnoticed and undiscussed and no particular significance or interpretation was placed thereon at the time. Respondent's assignor entered upon the fulfilment of appellant's anticipated needs as set forth in the contract and, under orders from appellant, delivered some 15,900 lbs. of beeswax by April 10, 1931. The orders of appellant continued thereafter and an additional 7,500 lbs. were delivered. It is significant that each of appellant's orders for the goods specified a price of thirty-six cents per pound. Respondent's assignor made its deliveries and entered its charges against appellant. It is for these unpaid bills that the instant suit was brought.

No demand for deduction from the price specified was made upon respondent's assignor until after a total of 27,000 lbs. had been ordered and delivered (S. C. 31, ll. 1 to 10). In fact, no reference was made to the words of the contract until after the final bill had been rendered. Appellant had, heretofore, paid its bills regularly and in full. Hence, to respondent's assignor, the claim for deductions came as a complete surprise (S. C. 49, ll. 15 to 26; ll. 35 to 40). The market price had never dropped below that price guaranteed by respondent's assignor as a maximum. The minds of the parties had been in full accord over the ten-year period covered by their previous business dealings and appellant had never voiced so preposterous a claim before. It is interesting to note the correspondence that was exchanged immediately upon the proffer by appellant of its check to respondent's assignor (S. C. 68, Exhibit P-3; S. C. 69, Exhibit P-4). It is likewise interesting to note the attitude of George Hofe, Presi-

dent of appellant corporation in answering the interrogations of the Trial Court (S. C. 29, ll. 20 to 26; S. S. 31, ll. 28 to 40; S. C. 32, ll. 1 to 17). The claim of appellant would seem ridiculous when the exhibits in the case are examined (S. C. 58, Exhibit D-2, *et seq.*), and we note that appellant's own orders specified the price of thirty-six cents per pound. Certainly this is corroboration of respondent's assignor's contention that "all goods were delivered under open order."

The Trial Court's opinion recites that:

"The whole course of dealings between the parties bears out plaintiff's contention . . . all orders given by defendant specified a 36¢ price, all bills were made out at that figure and paid for by defendant . . . it seems to be a belated discovery by defendant that it was entitled to a deduction or rebate" (S. C. 15, ll. 17 to 24).

The resourcefulness of appellant, in seeking to avoid payment of its just debt, went further. It contended that the contract for "approximately 15,000 lbs." was sufficiently elastic to anticipate and include the delivery of 27,000 lbs. Respondent submits that this proposition is absurd in the light of the facts above stated and from the deductions of the Trial Court after a discussion of the point between the Court and Mr. Hofe (S. C. 31, l. 28, *et seq.*). From that discussion and analysis the Court concluded (S. C. 15, l. 30, *et seq.*) from "the whole course of dealings between the parties that the construction of the price clause of the contract is that the price of beeswax be thirty-six cents per pound unless the market price declined below that figure." Such conclusion was the only logical one to follow in determination of the legal rights of the parties.

The decision of the Court below should, therefore, be, in all respects, affirmed.

POINT I.

There was no justification for appellant's construction of the contract that the selling price could not exceed three-fourths of the market price.

In attempting to support the contrary of the above stated proposition, appellant seeks comfort in the opinion of Woodhull, J., in *Suffern, et al., vs. Butler*, 21 Equity 410. That comfort must certainly be disturbed after a *proper examination of the opinion*. Justice Woodhull recites, *inter alia*, "COURTS ARE ALWAYS SOLICITOUS TO ASCERTAIN AND CARRY INTO EFFECT THE REAL INTENTIONS OF THE PARTIES." Need more be said? The Court below, in the opinion of Oliphant, J., did just that. Judge Oliphant states:

"I am satisfied from the whole course of dealings between the parties that the construction of the price clause of the contract is that the price of beeswax be 36¢ per pound unless the market price declined below that figure."

The "whole course of dealings between the parties" is worthy of analysis. For a period of ten years they carried on a business relationship and both profited by the benefits they derived from that alliance. This appellant knew that it was "*protected against a decline*." It had had other contracts which were satisfactorily complied with. It signed, ordered under, and lived up to its contract of the year 1928. The same clause found its way into that contract. Strange to say, appellant had no occasion to seek any reduction in its indebtedness under that agreement. The truth of the matter is that the clause itself was the brain-child of appellant (S. C. 28). It is worth the time to analyze that 1928 contract (S. C. 66, Exhibit

P-1). In the light thereof, it is inconceivable that appellant is sincere in its claim for reduction when we read "seller agrees to meet competitive price at time of shipment of goods of equal quality or allow the buyer to purchase elsewhere."

The authority of *Kupfersmith vs. Delaware Insurance Company*, 84 Law 271, as cited by appellant in support of its second point, reacts as a sort of boomerang. *This appellant seeks a better contract for itself than its years of business dealings can possibly justify.* Chief Justice Gummere properly said:

"The law will not make a better contract for the parties than they themselves have seen fit to enter into or alter it for the benefit of one party and to the detriment of the other."

In *Bellisfield vs. Holcombe*, 102 Equity 20, Chancellor Walker says, at page 31:

"The practical construction placed upon the contract, as shown by the conduct of the parties and the partial performance, is a clue to their intention, where more than one construction of the language is permissible." Citing *Basic Iron Ore Co. vs. Dahlke*, 103 Law 635.

Chancellor Walker continues:

"A practical construction of the contract becomes evidential only when the whole writing is ambiguous and where it appears that the acts done under it were those of the very parties thereto, and were done in pursuance, and by reason, of it."

It is submitted that the practical construction was that placed upon the contract by the Trial Court; that that construction was so placed as a result of the Court's investigation into the conduct of the parties to the suit; that there was no

ambiguity in the evident intent of the paper writing if for no better reason than the fact that respondent's assignor had already delivered more than the full 15,000 lbs. for which the contract itself made provision.

In *Coffin vs. Coffin*, 105 Equity 8, at page 10, the Court refers to the approved rule of construction laid down by Lord Wensleydale in *Grey vs. Pearson*, 6 H. L. C. 61. We read:

"The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

The Court of Errors and Appeals confirms this view in the case of *Rogers v. Colt*, 21 Law 704, wherein it was declared that

"the contract must undoubtedly be construed according to the intention of the parties . . . we may not alter the terms which the parties themselves have adopted or make a new contract for them. The construction must be agreeable to the common understanding of the terms used without regarding technical meaning or grammatical propriety."

Finally, and seemingly conclusively, Vice Chancellor Griffin in *Kislak v. Muller*, 100 Equity 110, at 113, says:

"The rule of law is that where a contract is ambiguous the interpretation placed upon it by the parties by their conduct and actions and treatment of the same, will receive the same construction by the court. Counsel will find numerous cases on this subject."

Further on in his opinion the late Vice Chancellor states:

"It is the rule that where a contract is ambiguous it should be construed most strongly against the party preparing it, or employing the words concerning which doubt arises." Citing *Fletcher v. Interstate Chemical Co.*, 94 Law 332; affirmed, 95 Law 543.

It is apparent that two important elements in the instant case are here disposed of:

(a) The ambiguity complained of by appellant is one which was sought to be created by appellant itself but not until after respondent's assignor had completed its end of the bargain and payment for its products had become past due (S. C. 31, ll. 1 to 10);

(b) The ambiguity, if any exists, must be resolved against appellant for the reason that the clause, interpretation of which is sought in this appeal, was the brain-child of appellant, having been inserted in the contract itself by appellant (S. C. 28, ll. 1 to 11; ll. 19 to 29; S. C. 44, ll. 17 to 23; S. C. 49, ll. 15 to 40).

Authority without limit can be found to support the foregoing conclusions. In *Fletcher v. Interstate Chemical Co.*, 94 Law 332, affirmed, 95 Law 543, Justice Trenchard says:

"While a written instrument must be construed according to the intent of the parties as manifested by the instrument itself, yet, where the construction is doubtful, the court may look into the surrounding circumstances and avail itself of such light as they may afford in ascertaining the true meaning of the language and terms employed." Citing *Morris Canal Co. v. Matthiesen*, 17 Equity 385; *United Boxwood and Paper Co. vs. McEwan Brothers Co.*, 76 Atlantic 550; *Ryer v. Turkel*, 75 Law 677.

It is submitted that the Trial Court, as appears from its opinion filed in this cause, looked to the surrounding circumstances which attended the years of dealings between these parties. Having availed itself of the light which those circumstances threw on the meaning of the contractual relationship of the parties, it properly concluded that the demands of appellant were a "belated discovery." "The whole course of dealings between them" satisfied the Trial Court "that the construction of the price clause of the contract is that the price of the beeswax be 36¢ per pound unless the market price declined below that figure."

Vice Chancellor Lane, in *International Signal Co. v. Marconi Wireless Telegraph Company*, 89 Equity 319, affirmed 90 Equity 271, at 320, states:

"The cardinal rule to be applied in construing a contract is to ascertain the intention of the parties. If more than one construction of the language is possible, the circumstances surrounding the transaction may be construed as well as the written document. If the intention is doubtful or obscure, a construction should be adopted which is most fair and reasonable and which will impose the least hardship upon either of the contracting parties. Citation of authority would be superfluous."

It is submitted that the Trial Court must have had the foregoing proposition in mind when we observe its comment that this respondent "didn't have much chance" (S. C. 38, ll. 29 to 40).

POINT II.

The contract between the parties had been concluded prior to the delivery of the goods upon which suit was founded.

The truth of this proposition is abundantly established. The contract (S. C. 56, Exhibit D-1) anticipated the needs of defendant-appellant at 15,000 lbs. On or before May 27, 1931, *15,900 lbs. had already been delivered to, and paid for, by appellant* (S. C. 31, ll. 17 to 40; p. 32, ll. 1 to 18). The deliveries ordered and accepted by appellant between May 27, 1931, and June 4, 1931, totaled 7,500 lbs. and payment therefor was never made (S. C. 32, ll. 21 to 31). It was not until after the delivery of the total of 27,000 lbs. that appellant developed its "shylock tactics" in seeking to exact its "pound of flesh" (S. C. 32, ll. 32 to 40). Pressed by the Court for an explanation, appellant was unable to explain its claim (S. C. 31, ll. 28 to 40). The "discovery" to which the Court makes reference in its opinion (S. C. 15, l. 22) is properly characterized "belated" when we read further (l. 28), a proposition which does not bear contradiction:

"Business men do not deal in that manner; they take what they believe is due them at the time it is due."

The business association of these parties covered a period of ten years. Never once had there been a note of dissatisfaction in their dealings. Previous contracts of a similar character had been made and fully lived up to. Neither had cause to complain. Appellant ordered and received its goods. Respondent's assignor accepted the orders and delivered its product. When apprised of

the peculiar demand of appellant, letters changed hands, and we read in Exhibit D-3 (S. C. 68) a definite statement by respondent's assignor which is more than borne out by the evidence.

"Your contract of October 6, 1932, for 15,000 lbs. was concluded on April 10th. This contract was priced below the market and your recent orders and those sold you after April 10th were bought under open order."

Can this proposition possibly bear contradiction when we review the exhibits beginning with P-5 (S. C. 73)? Each order blank specified "36¢ per lb." even as late as April 6, 1931 (S. C. 76).

Conclusion.

The decision of the Court below, in disposing of both law and fact questions, after seeing and interrogating the witnesses, should not be disturbed. Its consideration of all of the elements involved in the determination of the legal rights of the parties was a careful, exacting and proper one. Its conclusions, deduced from such consideration, led to the entry of the judgment below in favor of respondent and against appellant with costs. No error whatsoever should be found and the judgment as entered should be affirmed with costs.

Respectfully submitted,

TUMULTY & TUMULTY,
Attorneys for Respondent.

JAMES TUMULTY, JR.,
Of Counsel.



