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**Notice of Appeal.**

(Filed Feb. 27/17.)

**New Jersey Supreme Court** 10

<p>ABRAHAM BOCKIAN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>UNITED CANDY Co., a corp. of New Jersey, Defendant.</p>	}	<p>Notice of Appeal.</p>	20
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*To Isidor Haber, attorney for plaintiff-respondent:*

*Sir:*

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the Judgment entered in this cause.

LEVITAN & LEVITAN,  
Attorneys for Appellant. 30

Feb. 26, 1917.

B

**Grounds of Appeal.**

(Filed March 27/17.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10

ABRAHAM BOCKIAN,  
Respondent,

vs.

UNITED CANDY COMPANY, a corpo-  
ration of New Jersey,  
Appellant.

On Appeal.  
Grounds of  
Appeal.

20

The appellant states the following grounds of  
appeal:

1. That the Supreme Court affirmed the judg-  
ment of the Second District Court of Jersey City,  
although there was error in doing so.

30

2. Because the Supreme Court affirmed the re-  
fusal of the Second District Court of Jersey City  
to grant a nonsuit at the close of respondent's case  
(plaintiff below), although there was error in do-  
ing so.

3. Because the Supreme Court affirmed the judg-  
ment of the Second District Court of Jersey City,  
although there was no evidence to support said  
judgment.

40

4. Because the Supreme Court affirmed the judg-  
ment of the Second District Court of Jersey City,  
although the contract upon which the action was  
brought specifically fixed the liquidated damages at  
\$225.00; and the District Court gave judgment for  
\$450.00.

C

*Grounds of Appeal.*

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5. Because the Supreme Court affirmed the judgment of the Second District Court of Jersey City, although the court admitted in evidence irrelevant and improper testimony over the objection of the defendant-appellant.

6. Because the Supreme Court affirmed the refusal of the District Court to exclude expert testimony, without prior proper qualification of the expert witness. 10

7. Because the Supreme Court affirmed the refusal of the District Court to allow parole evidence to explain ambiguous parts of the contract, upon which the suit was brought.

8. Because the Supreme Court affirmed the ruling of the District Court, when it overruled the following question on cross-examination: 20

“Q. Didn’t you have a receipt in Court the last time?

Mr. Burtis: I object to that as incompetent, irrelevant and immaterial.

The Court: I think I will overrule the question.

Mr. Levitan: Note my objection.”

9. Because the Supreme Court affirmed the ruling of the District Court; admitting in evidence a statement of the profits of the United Candy Company, which was objected to, and its admission resulted in prejudicial error to the defendant, because this statement contained preliminary negotiations that were later reduced to writing in the contract, Exhibit “P-1,” page 130—case. 30

10. Because the Supreme Court affirmed the ruling of the District Court, when it admitted in evi- 40

*Grounds of Appeal.*

dence a paid bill by the witness Follender, which resulted in prejudicial error.

11. Because the Supreme Court affirmed the refusal of the District Court to allow the following question :

10           “Q. In this case the prices billed in September would be according to the prices at the selling date, August, or whatever time prior to that the order was taken?

Mr. Burtis: I object to that.

The Court: I think I will overrule the question as relating to this particular instance.

Mr. Lévitán: Exception.”

20           12. Because the Supreme Court affirmed the refusal of the District Court to exclude the following questions, which resulted in prejudicial error :

“a. Q. I call your attention to the fact that on August 27, and practically the first of September, that you paid 18 cents a box for Big 5 gum drops.

30           Mr. Levitan: I object to that on the ground that the price in August is no criterion of what the price was in September.

Mr. Burtis: This was three days before.

Mr. Levitan: That makes no difference; the market is fluctuating every day.

The Court: I think I will hear the testimony.

Mr. Levitan: Your Honor will note my objection.

40           b. Q. Will you swear that on the 27th day of August, 1914, the United Candy Co. did not buy 250 5-lb. boxes of Big 5 gum drops

E

*Grounds of Appeal.*

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at 18 cents a pound from the Novelty Candy Company?

Mr. Levitan: I object to that as irrelevant and immaterial, for these reasons: in the first place, whether we bought ten thousand boxes in August, the issue here is what the market price was at the time we sold these gum drops to Bockian. 10

Mr. Burtis: I now offer this bill in evidence.

Mr. Levitan: I object to that as incompetent, immaterial and irrelevant.

The Court: Well, I think that this may be received; it may be some evidence of the value.

Mr. Levitan: Your Honor will note my objection. 20

c. Q. Have you any book here to-day which would show the profits, if any, that were made by the United Candy Company up to the 1st day of September, 1914?

Mr. Levitan: I object to that as wholly irrelevant and immaterial, whether or not we made any profits.

The Court: You may answer the question.

Mr. Levitan: Exception. 30

d. Q. Will you explain to the Court what the circumstances were under which this note was given?

Mr. Burtis: I object to that on the ground that the contract speaks for itself, and on that point no parole evidence can be offered as to why that note was given; the contract is clear and explicit.

The Court: I think he will have to stand on the contract as to the character of that note. 40

Mr. Levitan: Exception."

*Grounds of Appeal.*

---

13. Because the Supreme Court affirmed the ruling of the District Court, when it allowed in evidence certain slips, which resulted in prejudicial error.

10           “Mr. Burtis: I offer all these slips which have been identified by the witness as being the items charged to the plaintiff under the contract in evidence.

          Mr. Levitan: I object to them on two grounds: in the first place, they are not offered at the proper time and should have gone in on the direct case of the plaintiff; and, secondly, on the ground that they are not paid.

20           The Court: Well, I think I will allow them.

          Mr. Levitan: Your Honor will note my objection.

          (All the slips were thereupon marked as one exhibit and numbered P-11.)”

30           14. Because the Supreme Court affirmed the judgment of the District Court, although there was no evidence of any breach of the contract on the part of the appellant (defendant) warranting the District Court to enter judgment for the respondent (plaintiff).

LEVITAN & LEVITAN,  
Attorneys for Appellant,  
ABRAHAM LEVITAN,  
Of Counsel.

**Opinion of Supreme Court.**

(Filed Feb. 16/1917.)

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">ABRAHAM BOCKIAN, Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">UNITED CANDY COMPANY, Appellant.</p>	}	10
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Appeal from Second District Court of Jersey City. 20

Argued November Term, 1916, before Justices GARRISON, PARKER and BERGEN.

LEVITAN & LEVITAN, for Appellants.

ISADOR HABER & CHARLES H. BURTIS, for Appellee.

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PER CURIAM: 30

The plaintiff was the owner of 8 shares of the defendant company which they purchased from him for \$1,200., paying therefor by assigning him certain outstanding accounts and a note for \$225. This note was dated September 8, 1914, payable one year after date, "Subject to the conditions contained in the agreement bearing even date." The agreement referred to was one made on that day between the plaintiff and the defendant with reference to the 40

*Opinion of Supreme Court.*

10 sale of this stock, and the condition was, "That if the said party of the first part (the plaintiff) should retire from business or should sell out the said business, and shall also remove out of the County of Hudson and the County of Bergen, then the said note shall be paid 30 days after notice of such retirement or sale and the removal."

The agreement also provided that the plaintiff should continue as a sub-jobber of the party of the second part for the term of one year and purchase from it all the merchandise required by him usually handled by the party of the second part.

20 It was further agreed that the goods should be sold to him "At a price or profit to the party of the second part over and above the then existing market value of the same, together with an additional profit," of one, two or three cents on every box, according to its value, running from 50 cents to \$3.00. The plaintiff continued as sub-agent for about four weeks, when he left, and on the 20th day of May, 1916, brought his suit to recover on the note, and also the sum of \$225., that being the sum named in the agreement as liquidated damages if either of the parties should violate any of the covenants of the agreement, the alleged breach being that the defendant had agreed to sell merchandise to the plaintiff at a certain price and violated this agreement. The plaintiff recovered and the defendant appeals. Plaintiff put in evidence his note, which was past due, for it was more than a year after it was dated when the suit was brought. The ground which he sets up as a violation of the agreement and which justified him in leaving was as he testifies, "They were supposed to charge me certain prices according as mentioned in the agreement; they have overcharged me on the prices; they

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I

*Opinion of Supreme Court.*

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charged me higher prices for goods which I could not turn out for a living, that I had to leave them on account of that," and in proof of this he testified that they charged him 27 cents for a box of candy which they sold to others for 18 and 20 cents, but his real ground of complaint seems to be that he had a notion that by the terms of this contract he was to pay one, two or three cents over the cost price, and the ground of his complaint appears to be that they charged him a profit over the cost beside this additional charge.

10

As we read this contract defendants were to sell him the goods at a price or profit over and above the then existing market value, together with the additional profit, and to sustain the plaintiff's claim we will have to say that the existing market value means cost, which would not mean a price or profit over and above the existing market value. It may be that the prices which they charged the plaintiff exceeded a reasonable profit, and that seems to be the question which was tried.

20

The first point which the appellant makes is that there was error in the admission and exclusion of certain testimony.

We have examined the different parts of the testimony referred to, but do not find in them any harmful error.

30

The second point is that the plaintiff was not qualified to testify as to the market value of the candy in 1914. We think it sufficiently appears that he had been in the business long enough, and had sufficient knowledge of the market to testify as to market value.

The third point is that there should have been a nonsuit.

This cannot be sustained, because manifestly the plaintiff was entitled to recover on the note. It was

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*Opinion of Supreme Court.*

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drawn to mature one year after date, and earlier if certain conditions happened.

The note was past due when the suit was brought without regard to the conditions, and was given to him in payment for his stock.

10 The fourth point is that there was error in excluding parole evidence to explain ambiguous parts of the contract.

The evidence referred to on this point is to be found on page 99, and the question was, "Will you explain to the Court what the circumstances were under which this note was given?"

20 The Court refused this, because he said the defendant was bound by the contract as to the purpose for which the note was given; this was correct. It is also urged that it was error to refuse testimony to explain the following provision of the contract, "Shall be at a price or profit to the party of the second part over and above the then existing market value of the same." We do not think parole testimony was competent to explain this, because it is well known what is the meaning of market value, and the construction of the contract was a court question.

30 The last clause of the contract provides that if either of the parties should violate the contract, they fix the sum of \$225 as liquidated damages, and that the note should, in the event of a breach on the part of the party of the first part, be considered as the amount of the liquidated damages.

In other words, the contract seems to provide that if the plaintiff breached the contract and was liable to pay the fixed damages, he could do so by surrendering the note, and the party of the second part would be entitled to appropriate it for that purpose.

K

*Opinion of Supreme Court.*

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Thus, whether plaintiff should surrender the note depends upon whether he has made out his case that he, and not the defendant, was entitled to liquidated damages for a breach of the contract, if he has made out his case he was entitled to his note, and also to recover the damages fixed. Whether there was a breach of the contract by the defendant was a question of fact which the jury have solved in favor of the plaintiff, therefore the judgment should be affirmed, with costs.

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**Rule of Affirmance.**

(Filed Feb. 21, 1917.)

## SUPREME COURT OF NEW JERSEY.

10	ABRAHAM BOCKIAN, Plaintiff-Appellee,  vs.  UNITED CANDY COMPANY, a cor- poration, Defendant-Appellant.	}	On Appeal. Rule of Af- firmance.
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20 This cause having been duly argued at the No-  
 vember, 1916, term of this Court by Isador Haber  
 and Charles W. Burtis, of counsel for the plaintiff-  
 appellee, and Abraham Levitan, of counsel for the  
 defendant-appellant, and the Court having consid-  
 30 ered the same, and finding no error in the record  
 or proceeding in the District Court,

IT IS THEREUPON ORDERED AND ADJUDGED that the  
 judgment heretofore rendered in the District Court  
 and removed by appeal to this Court, be affirmed,  
 with costs, and that the record thereof be remitted  
 30 to the Second District Court of the City of Jersey  
 City, to be proceeded with in accordance with this  
 judgment and the practice of said Court.

Entered February 21, 1917,

On motion of

ISADOR HABER,  
 Attorney.

Summons, Filed May 20, 1916.

Supreme Court of the State of  
New Jersey

10

ABRAHAM BOCKIAN, Plaintiff,  vs.  UNITED CANDY COMPANY, a corp. of New Jersey, Defendant.	}	On Contract.	20
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SECOND DISTRICT COURT SUMMONS.

STATE OF NEW JERSEY, }  
HUDSON COUNTY, } ss. :  
CITY OF JERSEY CITY, }

The State of New Jersey, to any Constable of  
the County of Hudson or to any Sergeant-at-Arms  
of the (Second) District Court of the City of Jer- 30  
sey City :

(L. S.)

Summon United Candy Company, a corporation  
of New Jersey, to appear before the (Second) Dis-  
trict Court of Jersey City, John A. Blair, Judge, to  
be held at the court room, No. 662 Newark Avenue,  
in said City, on the 26th day of May, one thousand  
nine hundred and sixteen at 10 o'clock in the fore- 40  
noon, to answer unto Abraham Bockian in an ac-

*Summons.*

tion upon contract. Damage Four hundred and fifty dollars.

Witness, John A. Blair, Esq., Judge of said (Second) District Court at Jersey City aforesaid, the twentieth day of May, in the year one thousand nine hundred and sixteen.

RICHARD McAGHON,  
Clerk.

ISADOR HABER,  
358 Central Avenue,  
Jersey City, N. J.,  
Plaintiff's Attorney.

20

**State of Demand, Filed May 20, 1916.**

SECOND DISTRICT COURT OF  
JERSEY CITY.

30

ABRAHAM BOCKIAN,  
Plaintiff,

vs.

UNITED CANDY COMPANY, a corp.  
of New Jersey,  
Defendant.

On Contract  
State of  
Demand.

40

1. The plaintiff demands of the defendant the sum of \$225 upon a certain promissory note of which the defendant is the maker and of which the following is a true copy and no part of which has been paid :

*State of Demand.*

“\$225.00            Jersey City, N. J. Sep. 8, 1914.

One year after date we promise to pay to the order of Abraham Bockian, Two Hundred and Twenty-five and 00/100 Dollars, at 368 Hoboken Av., J. C., Subject to the condition contained in the agreement bearing even date. 10  
Value Received.

UNITED CANDY Co.,  
N. H. Glickman, Pres.  
Due            Benjamin D. Urdang, Sec. & Treas.”

2. The plaintiff demands of the defendant the sum of \$225 as and for liquidated damages for the breach of a certain agreement made and entered into on September 8, 1916, between the plaintiff as party of the first part and the defendant as party of the second part wherein the said defendant agreed to sell certain merchandise to the plaintiff at certain prices, but the defendant did not fulfill this agreement, but made a breach thereof in that it overcharged the plaintiff, in violation of the said agreement and of the terms therein stated. 20

Judgment will be claimed for the sum of \$450, together with lawful interest and costs of suit. 30

ISIDOR HABER,  
Attorney of Plaintiff.

**Specification of Defenses, Filed May 26,  
1916.**

SECOND DISTRICT COURT OF  
JERSEY CITY.

10

ABRAHAM BOCKIAN,  
Plaintiff,

vs.

UNITED CANDY COMPANY, a corp.  
of N. J.,  
Defendant.

On Contract.  
Specification  
of Defenses.

20

1. No consideration given for the note.
2. Plaintiff broke his agreement.
3. Defendant does not owe any money to the plaintiff.
4. Defendant denies any liability in the matter.

LEVITAN & LEVITAN,  
Attorneys for Defendant.

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**Rule to Show Cause, Filed July 21,  
1916.**

SECOND DISTRICT COURT OF  
JERSEY CITY.

<p>ABRAHAM BOCKIAN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>UNITED CANDY COMPANY, a corp. of New Jersey, Defendant.</p>	}	<p>10</p> <p>On Contract. Rule to Show Cause.</p>
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It is hereby, on this 19th day of July, 1916, on motion of Levitan & Levitan, attorneys for the above-named defendant, ORDERED, that the said plaintiff, Abraham Bockian, show cause before this Court, at the Second District Court in the City of Jersey City, on the 10th day of August, 1916, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why a new trial should not be granted in the above-entitled cause, or a judgment rendered in favor of the defendant instead of the plaintiff. 20

And it is further ORDERED, that in the meantime, and until the further order of this Court, all proceedings in said cause, and on the execution issued on the judgment, be, and the same are, hereby stayed. 30

And it is further ORDERED, that the granting of the within rule to show cause shall not be waiver of any grounds for appeal existing in favor of the defendant, and that judgment herein shall not be considered as entered until the rule to show cause taken herein has been disposed of, and shall not be a 40

*Rule to Show Cause.*

waiver of any grounds of appeal existing in favor of the defendant.

And it is further ORDERED, that all exceptions taken at the trial are hereby reserved.

10

JOHN A. BLAIR,  
*Judge of the Second  
District Court of J. C.*

**Transcript and Judgment, Filed  
October 22, 1916.**

SECOND DISTRICT COURT OF  
JERSEY CITY.

20

STATE OF NEW JERSEY, }  
HUDSON COUNTY, } ss. :  
CITY OF JERSEY CITY, }

Before :

JOHN A. BLAIR, Esq.,  
*Judge.*

30

ABRAHAM BOCKIAN,  
Plaintiff,

vs.

UNITED CANDY Co.,  
Defendant.

No. 44,532.  
Transcript  
and  
Judgment.  
In Contract.

40

ISIDOR HABER, Plaintiff's Attorney.  
ABRAHAM LEVITAN, Defendant's Attorney.

*Transcript and Judgment.*

Costs.	City.	Al.	
Summons and copy.....	\$1.50		
Service and return.....		\$.60	
Mileage.....		.10	
Trial fee.....	1.50		
Attorney fee.....	24.26		10
	-----	-----	
	\$27.26	\$.70	
	.70		
	-----		
	\$27.96		
Rule.....	1.00		
Appeal.....	1.00		
Execution.....	.60		
Service and return.....		.75	
Levy.....		.50	20

A summons was issued, tested May 20th, A. D. 1916, returnable May 26th, A. D. 1916, at 10 o'clock in the forenoon. The Sergeant-at-Arms returned the summons as follows, viz.: I served the within summons and demand May 20th, 1916, on United Candy Company, a corporation, the defendant, by leaving a copy thereof with Mr. Glickman, president of the defendant corporation, whom I informed of the contents thereof. Andrew J. Mellor, Sergeant-at-Arms. Plaintiff's demand was filed May 20th, A. D. 1916 Defendant's specification of defenses was filed May 26th, A. D. 1916. May 26th, A. D. 1916, this cause was called for trial at 10 o'clock in the forenoon, and by adjournments continued to June 30th, 1916. June 30th, A. D. 1916, the plaintiff appeared and the defendant appeared, and the trial of the cause was proceeded with as follows: On the part of plaintiff, Harry Sherman, Abraham Bockian and David Hollender were sworn and testified. On the part of the de-

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*Transcript and Judgment.*

fendant, Abraham J. Goldstein and Peter J. Burke were sworn and testified.

(Reserved.)

Whereupon, it is, on this 13th day of July, A. D. 1916, by this Court considered and adjudged that  
 10 said Abraham Bockian, plaintiff, recovered against said United Candy Company, a corporation, defendant, the sum of Four hundred and eighty-five dollars and twenty-six cents damages and Twenty-seven dollars and ninety-six cents costs of suit, July 15th, A. D. 1916; execution was issued to Andrew J. Mellor, Sergeant-at-Arms, July 14th, A. D. 1916, who returned the said execution as follows, viz.: "I return the within writ this 14th day of  
 20 July, A. D. 1916, wholly unsatisfied, with levy annexed." Andrew J. Mellor, Sergeant-at-Arms. I do hereby certify that foregoing statement is a correct copy of the record in the above-stated cause.

RICHARD McAGHON,  
 Clerk.

July 17th, 1916, notice of appeal filed.

July 21st, rule filed; returnable August 10th,  
 30 1916.

August 14th, rule discharged.

August 16th, notice of appeal and bond filed.

On rule to show cause, Benj. Urdang and Nathan H. Glickman were sworn on the part of the defendant.

**Notice of Appeal, Filed August 16, 1916.**SECOND DISTRICT COURT OF  
JERSEY CITY.

<p style="text-align: center;">ABRAHAM BOCKIAN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">UNITED CANDY COMPANY, a corp. of New Jersey, Defendant.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: center;">On Contract. Notice of Appeal.</p>
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*To Abraham Bockian, or Isidor Haber, Attorney  
of Abraham Bockian:*

20

*Sir:*

TAKE NOTICE that the defendant, United Candy Company, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court rendered in the above-stated action on the 13th day of July, 1916.

Dated, August 15, 1916.

LEVITAN & LEVITAN,  
Attorneys for Defendant.

30

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**Specifications of Determinations on  
Appeal, or Reasons for Reversal,  
Filed October 25, 1916.**

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">ABRAHAM BOCKIAN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">UNITED CANDY Co., a corporation of New Jersey, Defendant.</p>	}	<p>On Appeal. Specifications of Determina- tions on Appeal, or Reasons for Reversal.</p>
----	--	---	--

20       The following are the specifications or directions of the Second District Court of Jersey City with respect to which the defendant is dissatisfied in points of law :

1. Because the Court admitted in evidence irrelevant and improper testimony over the objection of the defendant's counsel.
2. Because the Court erred when it admitted expert testimony of the market price of gumdrops without the witness being previously properly qualified.
- 30       3. Because the Court erred when it admitted expert testimony of the market price of lolly-pops without the witness being previously properly qualified.
4. Because the District Court refused to allow parole evidence to explain an ambiguous part of the contract, Exhibit "P-1."
- 40       5. Because the District Court erred when it overruled the following question on cross-examination :

*Reasons for Reversal.*

“Q. Didn’t you have a receipt in Court the last time?

Mr. Burtis: I object to that as incompetent, irrelevant and immaterial.

The Court: I think I will overrule the question.

Mr. Levitan: Note my objection.”

10

6. Because the Trial Court admitted in evidence a statement of the profits of the United Candy Company, which was objected to, and its admission resulted in a prejudicial error to the defendant, because this statement contained preliminary negotiations that were later reduced to writing in the contract, Exhibit “P-1.”

7. Because the Court erred when it admitted in evidence a paid bill by the witness Follender, which resulted in prejudicial error.

20

8. Because the Trial Court erred when it overruled the following question:

“Q. In this case the prices billed in September would be according to the prices at the selling date, August, or whatever time prior to that the order was taken?

Mr. Burtis: I object to that.

30

The Court: I think I will overrule the question as relating to this particular instance.

Mr. Levitan: Exception.”

9. Because the Court erred when it allowed the following questions:

“Q. I call your attention to the fact that on August 27, and practically the first of September, that you paid 18 cents a box for Big 5 gum drops.

40

*Reasons for Reversal.*

Mr. Levitan: I object to that on the ground that the price in August is no criterion of what the price was in September.

Mr. Burtis: This was three days before.

Mr. Levitan: That makes no difference; the market is fluctuating every day.

10 The Court: I think I will hear the testimony.

Mr. Levitan: Your Honor will note my objection.

Q. Will you swear that on the 27th day of August, 1914, the United Candy Co. did not buy 250 5-lb. boxes of Big 5 gum drops at 18 cents a pound from the Novelty Candy Company?

20 Mr. Levitan: I object to that as irrelevant and immaterial, for these reasons: in the first place, whether we bought ten thousand boxes in August, the issue here is what the market price was at the time we sold these gum drops to Bockian.

Mr. Burtis: I now offer this bill in evidence.

Mr. Levitan: I object to that as incompetent, immaterial and irrelevant.

30 The Court: Well, I think that this may be received; it may be some evidence of the value.

Mr. Levitan: Your Honor will note my objection."

10. Because the Court erred when it allowed the following question:

40 "Q. Have you any book here to-day which would show the profits, if any, that were made by the United Candy Company up to the 1st day of September, 1914?"

*Reasons for Reversal.*

Mr. Levitan: I object to that as wholly irrelevant and immaterial, whether or not we made any profits.

The Court: You may answer the question.

Mr. Levitan: Exception." 10

11. Because the Court erred when it allowed the following question:

"Mr. Burtis: I offer all these slips which have been identified by the witness as being the items charged to the plaintiff under the contract in evidence.

Mr. Levitan: I object to them on two grounds: in the first place, they are not offered at the proper time and should have gone in on the direct case of the plaintiff; and, secondly, on the ground that they are not paid. 20

The Court: Well, I think I will allow them.

Mr. Levitan: Your Honor will note my objection.

(All the slips were thereupon marked as one exhibit and numbered P-11.)" 30

12. Because the Court erred when it allowed the following question:

"Q. Will you explain to the Court what the circumstances were under which this note was given?

Mr. Burtis: I object to that on the ground that the contract speaks for itself, and on that point no parol evidence can be offered as to why that note was given; the contract is clear and explicit. 40

*Reasons for Reversal.*

---

The Court: I think he will have to stand on the contract as to the character of that note.

Mr. Levitan: Exception."

10       13. Because the Trial Court refused to grant the motion for a nonsuit.

14. Because there was no evidence to support the judgment of the Trial Court.

15. Because the judgment of the District Court was against the weight of the evidence.

20       16. Because the District Court Judge refused to render judgment in favor of defendant.

LEVITAN & LEVITAN,  
Attorneys for Defendant-Appellant.

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**Testimony.**

SECOND DISTRICT COURT OF  
JERSEY CITY.

Before:

Hon. JOHN A. BLAIR,  
*Judge.*

10

ABRAHAM BOCKIAN,  
Plaintiff,

vs.

UNITED CANDY COMPANY,  
Defendant.

On Contract.

20

Jersey City, N. J., June 16, 1916.

ISIDOR HABER, Esq., Attorney for Plaintiff; CHARLES  
H. BURTIS, Esq., of Counsel.  
ABRAHAM LEVITAN, Esq., Attorney for Defendant.

THE CASE OF THE PLAINTIFF.

30

ABRAHAM BOCKIAN SWORN.

*Direct examination by Mr. Haber.*

Q. Mr. Bockian, what line of business are you  
in? A. Wholesale confectionery.

Q. How long have you been in that business? A.  
For the last six years.

Q. Do you know the defendant, the United  
Candy Company? A. Yes, sir.

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*Abraham Bockian—Direct.*

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Q. Did you ever have any business dealings with them? A. Yes, sir.

Q. In what way? A. I was a member of the corporation.

10 Q. When were you a member of that corporation? A. For one year.

Q. Do you remember when the United Candy Company was organized?

Mr. Levitan: I object to that as irrelevant and immaterial. This is an action on a promissory note and on a written contract. Let him offer the contract in evidence in this case.

20 Mr. Haber: This is an action on a written contract, which arises out of the incorporation, and if your Honor will permit it to go in evidence, subject to striking it out later on, I think it will appear why it is proper.

The Court: Well, is there any question about the incorporation?

Mr. Levitan: Why, there is no question about the incorporation.

Mr. Haber: Yes, there are questions arising as to the consideration for this agreement.

30 The Court: Yes, but the corporation made its part of the agreement.

Mr. Haber: Yes.

The Court: It must be assumed that the corporation is regularly and properly organized.

Mr. Haber: I am not trying to attack it.

The Court: You are asking when it was incorporated.

Mr. Haber: I mean just to fix the date.

*Abraham Bockian—Direct.*

Q. When was that corporation organized? A. It was organized in 1913.

Q. You were a member of the corporation when it organized? A. Yes, sir.

Q. Who were the other members? A. The other members was Nathan Lichman, George Pfeiffer and Benjamin Urdang. 10

Q. So there were four incorporators? A. Yes, sir.

Q. How many shares of stock did you have? A. Eight shares.

Mr. Levitan: I object to that. Now, if your Honor please, he is just doing precisely what your Honor ruled against, that he should not waste a lot of time here.

The Court: Why is it important to show the stockholding? 20

Mr. Haber: To show the consideration for this agreement which arose out of this man reassigning his shares.

Mr. Levitan: The contract, sir, is in writing and alleges nine hundred and some odd dollars; the consideration speaks for itself and is the best evidence as to what agreement was made.

The Court: Suppose you state to the Court what the case is about. 30

Mr. Haber: Mr. Bockian was a member of the defendant corporation; there were three other incorporators; there was, at the incorporation, twenty-four shares; Mr. Bockian had eight shares; another one of the incorporators had eight shares, and the other two gentlemen had eight shares between them. Mr. Bockian did more business in that corporation than any of the others, and for some reason or other they wanted to get 40

*Abraham Bockian—Direct.*

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10 this man out, and they actually did force him out within two hours' notice. Thereafter a written memorandum of agreement was entered into, the consideration thereof being that the plaintiff was to resell back to the corporation his eight shares of stock, and he agreed to work for the corporation as a sub-  
20 jobber for a period of one year on certain conditions; he was to buy all his goods from this corporation at certain prices. He was to receive, in consideration for his agreement and the transfer of these shares, the sum of \$1,250; having figured that the shares originally having been \$100 apiece, they were now worth at least \$150 apiece, taking into  
30 consideration the enormous profits that were made; so eight shares of stock at \$150 a share would be \$1,200, and that was the consideration for this agreement. This \$1,200 the defendant corporation did not have in cash, so they paid him nine hundred and ninety odd—a few dollars less than a thousand dollars—in outstanding accounts on this man's personal route when this man was a member of the corporation; they figured that as \$1,000, and they gave him a note for \$225. The reason that they made it \$225, being \$25 in excess of the agreement, the \$25 being for losses that this man might have in collecting over \$990 worth of accounts, and that would really make it \$1,200. Now, after collecting these accounts, and this note was still outstanding, which was due in one year, and says that it is subject to the conditions of this agreement, so I want to show these facts, that this man did live up to the agreement.

40 The Court: Well, there is no difficulty about that.

*Abraham Bockian—Direct.*

Mr. Levitan: Now, if your Honor please, I desire to say in reply to that: in the first place, counsel is entirely confused as to the issue. We have a copy of the state of demand, of which your Honor has the original, and the action on the state of demand expressly says it is on a promissory note; that is one count; and the other count is on an express written contract, dated September 8. Counsel should be censured for going into a lot of irrelevant and immaterial matters to this action. We are prepared to meet these two issues: one is for \$225 alleged for damages for breach of a certain written contract, dated September 8th, and the second count is for a promissory note. That is the issue we are prepared to meet. Our defense is there is no consideration for the note, and that the contract was completely complied with on our part, and, therefore, I again urge that the entire opening is improper and is not confined to the issue at all, and, secondly, that the case stands or falls on the written agreement on which the suit is brought.

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The Court: Well, now, proceed.

Q. (Last question repeated) How many shares of stock did you have?

30

Mr. Levitan: That is objected to.

Mr. Haber: I think that is quite important.

The Court: The contract shows that he conveyed, for a certain consideration, all his stock, eight shares; the contract says that; that answers the question you have now asked.

40

*Abraham Bockian—Direct.*

Q. What was the value of each share of stock when the corporation was organized?

Mr. Levitan: I object to that as irrelevant and immaterial.

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The Court: I don't see how that is material.

Mr. Haber: To show the consideration.

The Court: The contract says in consideration of twelve hundred dollars.

Mr. Haber: The contract does not say in consideration of twelve hundred dollars.

Mr. Levitan: The contract enumerates the consideration minutely.

Mr. Haber: The contract, if your Honor please—

20

The Court: What is the consideration in the contract?

Mr. Levitan: \$995, sir.

30

Mr. Haber: The consideration clause of this contract is as follows: "Said party of the first part hereby agrees to reassign and transfer unto the said party of the second part all the outstanding accounts according to the books of the company which had been previously assigned to the company by the said party of the second part, which accounts are now approximately the sum of \$995. Said party of the first part further agrees to give to the said party of the second part a note for the sum of \$225, payable one year after the date thereof." That is the consideration I am trying to show, why the note was given and why the cash was given, what the real original consideration was, why that was split up into the note and the cash, because that is quite important and material in this case, because the defense is going to

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*Abraham Bockian—Direct.*

argue that that is liquidated damages, that the note was liquidated damages and was not part of the debt at all.

The Court: How is it important to determine the value of the stock? That does not seem to enter into the contract at all, does it?

Mr. Haber: Why, he has reassigned to the corporation the eight shares of stock.

The Court: Well, under that agreement.

Mr. Haber: Under this contract, it so specifically provides.

The Court: Why determine the value of the stock if he is going to reassign it?

Mr. Haber: In order to show what this note of \$225 upon which this suit was brought is given for. The defense is going to be that \$995 was the value of the stock, and we want to show that this note was part of the value of the stock, and that the stock was worth more than \$995. In other words, that the stock was worth \$1,200.

The Court: The question now was what the stock was worth at the time of the incorporation; that is \$100.

Mr. Haber: Yes.

The Court: Then the value of all his stock was \$800.

Mr. Haber: Yes. But we will bring that down to the time when this man entered into this contract.

Q. (Question repeated) What was the value of each share of stock when the corporation was organized?

Mr. Levitan: That is objected to as immaterial.

The Court: That is put in at \$800, I understand.

*Abraham Bockian—Direct.*

Q. Mr. Bockian, you were with the corporation then for how long?

Mr. Levitan: I object to that as irrelevant and immaterial.

10 A. For one year.

Q. How long after the corporation was organized was this agreement entered into?

Mr. Levitan: I object to that; the agreement speaks for itself.

The Court: I suppose the agreement is dated.

20 Q. Let me ask you how long before this agreement was dated was this corporation organized?

Mr. Levitan: I object to that as irrelevant and immaterial.

The Court: I think he may answer that.

A. One year.

Q. Now, I show you a statement, dated July 25, 1914, which says "Inventory taken," and ask you whether you recognize that piece of paper?

30 Mr. Levitan: I object to that as irrelevant and immaterial. The action here is on a written contract, dated September 8th, and anything prior to that is immaterial and irrelevant.

The Court: What is your purpose to show?

40 Mr. Haber: The purpose here is to show the true consideration for this agreement, to show that the real amount of consideration was \$1,200 and not \$995, which is specified in this agreement—that it was \$1,200. In order to show that, we have to show the cir-

*Abraham Bockian—Direct.*

cumstances surrounding the parties at the time when this contract was entered into, when this man left or was forced to leave the corporation, to show that at that time his interest in that corporation was a certain amount, and they agreed to pay him a certain amount for it. 10

The Court: Doesn't the contract indicate that amount?

Mr. Haber: The contract does indicate it, yes, as I mentioned before, the contract indicates \$995 or over 990, and a note for \$225.

The Court: Yes; and that makes the full consideration?

Mr. Haber: Yes; that makes the full consideration. I want to show that that note was a part and parcel of the indebtedness due to the plaintiff at that time. 20

The Court: Well, what does this inventory prove?

Mr. Haber: This inventory tends to show that there were certain profits—at the time when this agreement was entered into this corporation had certain profits for the year that had just passed, and that this man, the plaintiff, being a holder of one-third of the interest of that corporation, was entitled to one-third of those profits; and that if that would be figured together with the value of his shares of stock, they tend to show that that is the real consideration—not nine hundred and ninety some odd dollars, but twelve hundred dollars, and that this note was part of the indebtedness. 30

The Court: Then the contract does not show the proper consideration? 40

*Abraham Bockian—Direct.*

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Mr. Haber: Why, the contract shows it, but the question is as to how to construe that language, the language describing the consideration. I have a right to show it, what that language means, what that consideration is.

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The Court: I think you may show that.

Mr. Levitan: Well, if your Honor please, I don't know where we are at. The case, as I understand it, is upon two counts: one is on the written contract——

The Court: Yes.

Mr. Levitan: The other one is on a promissory note; very simply. Why my friend is complicating the matter by throwing in a lot of immaterial issues I do not understand. Now, anything, exclusive of the contract, is objectionable on a number of grounds, the strongest one being that it may tend to vary the terms of this agreement. I say anything that happened prior to this agreement is objectionable.

20

The Court: Yes.

Mr. Levitan: That is what he is doing now.

Mr. Burtis: We are simply showing how these figures were arrived at, what the true consideration is. We always have the right to show the consideration for the agreement—not to vary it, but to explain it, to construe it.

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The Court: The consideration has not been attacked here. Why not present your contract?

Mr. Burtis: I will offer the contract in evidence.

40

*Abraham Bockian—Direct.*

The Court: Very well. Doesn't that tend, so far as it goes, to prove itself until it is attacked? Under that contract you are entitled to so much money.

Mr. Burtis: A certain amount of money, part of which has been received by collecting certain outstanding accounts, and we are suing for the balance of the note. The note provides— 10

The Court: I assume, under that contract, you are entitled to \$1,200 or thereabouts; you have had so much on account—

Mr. Burtis: We have had \$990.

The Court: And you are suing for \$225 on this note. Suppose you confine your examination to the amount of the note, and the character of the note. 20

(Without objection the contract was thereupon admitted and marked Exhibit P-1.)

Q. Now, Mr. Bockian, I show you a note, dated Jersey City, New Jersey, September 8, 1914, signed by United Candy Company, made out to Abraham Bockian, for \$225, and ask you if that note was received by you from the United Candy Company at the time that agreement was entered into? A. 30  
Yes, sir.

Q. Has this note ever been paid? A. No, sir.

Q. Have you made demand for payment? A. Yes, sir.

Mr. Haber: I ask that this note be marked in evidence.

(Without objection the note was admitted and marked Exhibit P-2.)

Q. How long have you worked for the defendant company under the terms of that agreement? A. 40  
About four weeks.

*Abraham Bockian—Direct.*

Q. Will you explain to us why you worked four weeks, and why you did not work a whole year?

Mr. Levitan: I object to that as calling for a conclusion.

10 Q. Tell the Court exactly what happened.

Mr. Levitan: I object to that; there is no time fixed.

The Court: Well, it was during the periods covered by this contract, I suppose.

Mr. Burtis: Subsequent to that contract.

20 Q. Tell the Court, Mr. Bockian. A. When I was ordered out from this corporation, so these people come to a settlement with me for my eight shares of stock which I have invested \$800 in the business, and profits over during the year I was with them a member of the corporation—

Mr. Levitan: Just a minute, now; if your Honor please, I object to that answer as not responsive, the witness going into a lot of collateral matters extrinsic of the contract.

Mr. Haber: I am asking what happened.

30 Mr. Levitan: Subject to the making of the contract.

Q. Go ahead. A. So after the year was over I was a member of that corporation, I was ordered out suddenly from that business.

Mr. Levitan: I object to that, and ask that that be stricken out.

The Court: All right. (To the witness) Just answer the question.

40 Q. You started to work for the defendant corporation, did you? A. Yes, sir.

*Abraham Bockian—Direct.*

Q. Tell us what you did. A. While I was a member of the corporation?

Q. No; while you were working for them after that agreement was signed. A. Well, I was a sub-jobber of them, and they were supposed to charge me certain prices according as mentioned in the agreement; they have overcharged me on the prices; they charged me higher prices for goods which I couldn't turn out for a living, and I had to leave them on account of that.

10

Mr. Haber: I wish to read to your Honor the pertinent clause in this agreement which provides for the plaintiff working for the defendant and the prices he is to pay or receive, because this is the pertinent part of the case. "And the said parties hereby further mutually covenant and agree that the goods which shall be purchased by the party of the first part (that is the plaintiff) from the party of the second part shall be at a price or profit to the party of the second part over and above the then existing market value of the same, together with an additional profit of one cent on every purchase of a fifty-cent box; two cents on every purchase of a box costing from fifty cents to \$2, and three cents on every purchase of a box costing \$2 or more."

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30

Q. Now, you say that they overcharged you? A. Yes, sir.

Q. When did you first notice that they overcharged you?

The Court: It seems to me, in the presentation of your contract and your note, you made out a *prima facie* case, and then you should let them defend it; isn't that the time

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*Abraham Bockian—Direct.*

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in which you can put in this part of the testimony which you are now offering?

10 Mr. Haber: No; because there are two counts in this case. We are suing for \$225, which we allege to be due on the note, and also \$225 for liquidated damages by reason of the breach of the contract by the defendant. We are suing for \$450, and not for \$225, our contention being that they had agreed to sell us this candy at the market price plus one cent per box, and that they broke the contract by charging us a larger price than the agreed price in the contract.

20 Q. Now, Mr. Bockian, when did you first notice that they overcharged you? A. A week after.

Q. Now, will you explain to the Court how you bought your goods from the defendant under this agreement?

Mr. Levitan: I object to that as irrelevant and immaterial.

The Court: Well, I think I will hear that.

Mr. Levitan: Exception.

30 A. I come in with my orders, and I pack up my goods; each order separate was laying out on the floor, and they charge it in a book, each box separate, with the price; then they add together and made me pay for it before they put it on the wagon.

40 Q. Did you pay for all of it before you put it on the wagon? A. Well, just they left a small balance, according to what it amounts to, because the books it wasn't added together, but they judged as much as the amount to pay as so much, and I gave them a check Saturday, at the end of the week; the bookkeeper has everything added together, and I had to pay the balance what was coming to him.

*Abraham Bockian—Direct.*

Q. Now, will you tell us then what happened on Saturdays when you paid the balance? A. On Saturday, when I pay the balance and the goods was loaded up on the wagon to send out, so I took them, and he give me the book to look over if they charge me right prices; I notice in the book that they overcharge me on them goods; I call their attention; I made marks on it at the time on each item where they overcharge me for those goods. Then they say they can't give me any cheaper prices. "If you don't like it, you can get out, and you will lose your \$225."

10

Mr. Haber: I now ask the defendant to produce the book containing those accounts, for which I served notice to produce, which the defendants, I believe, admit.

20

Mr. Levitan: That book, sir, is in the custody of the Court. Your Honor recalls—

Mr. Haber: Just a moment. I ask that this notice to produce be marked.

Mr. Levitan: We admit that notice. There is no question about that. If your Honor please, that case was the United Candy Company against Schuchman; that case was affirmed by the Supreme Court a year ago. We then offered the book in evidence; that is the book that Mr. McMahon was interested in; the United Candy Company was plaintiff there, and we then left the book here with the Court, and we have been trying to locate it since; nobody has been able to find it. I don't know what happened to it; it must have been mislaid. It had two accounts in it; it had the Bockian account, and it contained the account with Schuchman.

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The Court: You haven't the book?

40

Mr. Levitan: We haven't the book.

*Abraham Bockian—Direct.*

Q. Mr. Bockian, what goods did they overcharge you on that you remember? A. They overcharged me on gumdrops.

Q. What kind of gumdrops? A. Big 5 gumdrops, and ten-for-a-cent gumdrops, five pounds, two boxes—

10

Q. What did they charge you? A. They charge me twenty-seven cents for a box which they all have for eighteen cents and twenty cents.

Q. Now, Mr. Bockian, did you find out at the end of the week that they had overcharged you on various goods during that week? A. Yes, sir.

Q. You mean for Big 5 gumdrops and nothing else; do you mean that? A. And ten-for-a-cent gumdrops.

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Q. Anything else? A. And lolly-pops, what was ordered outside of it; they charged me forty-three cents a box, which cost them forty cents, and I was supposed, according to this agreement, to pay forty-one cents, and they charged me forty-three cents, and a good many more items which I can't remember; if the book was here, why I would show it.

Q. Did you call the attention of the defendant to the fact that they overcharged you? A. Yes, sir.

Q. How long did you continue to work for them under this agreement? A. About four weeks.

30

Q. Did they overcharge you during the four weeks? A. Yes, sir; and I complained all the time; they say they can't help it. "If you don't like it, you can do what you like, but if you don't stay there a year, you will lose \$225."

Q. They said you will lose your \$225? A. Yes, sir.

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Q. Do you recall about what day it was that you finally left, or was forced to leave, the defendant corporation under those conditions? A. I left them; it was October 3rd, but I gave him a week's

*Abraham Bockian—Direct.*

notice before that that I am going to leave if they don't come up to the agreement.

Q. When you told them that you were going to leave because they didn't comply with their agreement, what answer did they give? A. They told me, "If you don't like it, you can go; but if you go, you lose your \$225." 10

Q. Now, Mr. Bockian, how long had you been in the candy business? A. For the last six years.

Q. Have you been buying and selling candy for the last six years? A. Yes, sir.

Q. Do you know the price in the markets of Hudson County, in Jersey City and Hudson County? A. Yes, sir.

Q. Did you know at the time that you were buying these goods from the defendant and when they were overcharging you the price that those goods sold for? A. Yes, sir. 20

Q. Being the same goods that you bought under this contract and for which they overcharged you? A. Yes, sir.

Mr. Levitan: I object to this witness' qualifications as an expert on the ground that he has not shown that the man was in the wholesale purchasing business; he says he was only a jobber, and there is a distinction between a wholesale purchaser and a jobber. 30

Mr. Haber: But he testifies he knows of his own knowledge.

The Court: If you have any doubt about his ability, you may examine him and show what he knows.

*By Mr. Levitan.*

Q. Your business as a candy buyer was purely as a jobber? A. As a jobber; yes, sir. 40

*Abraham Bockian—Direct.*

Q. You never bought any candies direct from the manufacturers? A. Yes, sir.

Q. Which manufacturers did you ever buy candy from? A. From about seventy-five different manufacturers.

10 Q. Which ones? A. I bought from the Novelty, I bought from the Two Star, because I have ordered the goods for the United Candy Company when I was there.

Q. Well, during the month of October you weren't buying any goods? A. No, sir.

Q. And you did not know the market prices at that time? A. Well, I find out from different jobbers, because when there were certain items when they don't have them in stock, I take them for orders of stock from other jobbers.

20 Q. So that the source of your information as to the price of these gumdrops and other candies is from what other jobbers told you? A. Well, I have seen before——

Q. Yes or no. A. What other jobbers tell me and what I have seen on factory bills.

*By Mr. Haber.*

30 Q. Now, Mr. Bockian, in the month of September did you buy gumdrops?

Mr. Levitan: I object to that as irrelevant and immaterial. The issue here is the market price in October, and not September.

Mr. Haber: The purchases were all from the 8th day of September, the date that agreement was entered into, up to the 3rd of October.

40 Mr. Levitan: All right; I will withdraw the objection.

*Abraham Bockian—Direct.*

Q. During the month of September, and up to the 3rd of October, did you buy and sell these goods in the market? A. Yes, sir.

Q. Did you know the sale price of these goods to jobbers? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. Did you know the market price of goods to jobbers at that time? A. Yes, sir. 10

Q. Now, what was the market price to jobbers of Big 5 gumdrops in the month of September, 1914?

Mr. Levitan: I object to that on the ground that the witness has not been qualified.

The Court: Well, I think from his information, from what he stated, that he can testify to that. 20

Mr. Levitan: If your Honor please, here the witness testified that in the month of October he got his information from hearsay.

The Court: He is now speaking of September.

Mr. Levitan: May I cross-examine him on his source of knowledge in September?

The Court: You have your opportunity. 30

*By Mr. Levitan.*

Q. Your information, Mr. Bockian, as to the prices of gumdrops, Big 5 gumdrops, and lolly-pops, the price to jobbers, is based upon what; also what jobbers told you? A. Well, I have been out in the factories, too.

Q. But what jobbers told you, mostly? A. Mostly what jobbers told me, and I seen factories' bills what the goods cost on that date; I was in them factories myself to find out what they charged jobbers for the goods. 40

*Abraham Bockian—Direct.*

Q. But you chiefly based your information upon what other jobbers told you; you didn't buy or sell any goods—you didn't buy any goods? A. What do you mean?

10 Q. You didn't buy any goods as jobber? A. Well, I had to buy the goods from them during that time.

Q. So you don't know the prices of the factories. A. Couldn't I find out the prices from the factories if I bought goods from them?

*By Mr. Haber.*

Q. Did you buy all your goods from the United Candy Company during that time? A. Yes, sir.

20 Q. All your goods? A. With the exception of a few days that they were short and I had to buy from someone else.

Q. When you did buy from someone else, did you learn then what the prices were? A. Yes, sir.

Mr. Levitan: I object to that as hearsay.

Mr. Haber: Where a man is in that business, actually in that business, that is a method of proving the knowledge of prices.

30 The Court: He has testified that he was in the factories and found out their prices. I think he can testify to that.

Mr. Levitan: Your Honor will allow me an exception.

Q. What was the market selling price of Big 5 gumdrops to jobbers in the month of September and in the early part of October, 1914? A. Well, the highest price—

40 Q. For Jersey City and Hudson County, where you are located, and the United Candy Company was? A. The highest price what was in that time was, in some factories was twenty-two cents, some

*Abraham Bockian—Direct.*

factories was twenty-three cents, the highest there was was twenty-four cents. I have proof to it.

Q. What factories sold it at twenty-four cents?

A. The Two Star Confectionery Company.

Q. At twenty-four cents? A. Yes, and cheaper yet; twenty-four cents was the highest price they ever had. 10

Q. What did the United Candy Company, the defendant, charge you for the same goods? A. Twenty-seven cents.

Q. The other articles that you mentioned—ten-for-a-cent gumdrops? A. Yes, sir.

Q. What was the selling price to jobbers in that locality at that time of this?

Mr. Levitan: I make the same objection to that. 20

The Court: I will allow him to answer.

Mr. Levitan: Exception.

A. The same price.

Q. What did the defendant charge you for those articles?

Mr. Levitan: The same objection.

The Court: I will allow him to answer.

Mr. Levitan: Exception. 30

A. Twenty-seven cents.

Q. What was the selling price to jobbers in that locality of lolly-pops that you speak of? A. Lolly-pops was the price to the jobber forty cents, and two boxes free, thirty-two boxes to a case.

Q. What did the United Candy Company charge you for those articles? A. Forty-three cents.

Mr. Levitan: Your Honor will note my same objection and exception to his qualifications on lolly-pops? 40

The Court: Yes.

*Abraham Bockian—Direct—Cross.*

Q. Did you call the attention of the defendants at that time to the prices they were charging and the market prices at that time? A. Yes, sir.

10 Q. What did they say? A. They say, "This is our price; we can't give it to you any cheaper; if you don't like it, you can get out, and you lose your \$225."

*Cross-examination by Mr. Levitan.*

Q. When you got out of the company, they gave you this \$225 note as a bonus that you should remain with them and try hard to make good with the company, didn't they?

20 Mr. Burtis: I object to the question on the ground that the contract speaks for itself as to what the note was given for.

Mr. Levitan: Well, if the contract refers to the note—

30 Mr. Burtis: The note itself says that it is subject to the conditions contained in the agreement bearing even date, and the agreement is in evidence, so counsel has no right to characterize the note as a bonus, because the contract will show what the note was given for.

The Court: Yes.

Mr. Levitan: How does your Honor rule on the question?

The Court: I think perhaps the question is objectionable in the form in which it is put.

Mr. Levitan: Strike out the question.

40 Q. That note was given to you, Mr. Bockian, for the faithful performance by you of all the conditions in the agreement?

*Abraham Bockian—Cross.*

Mr. Levitan: The same objection.

The Court: What does the contract say about it?

Mr. Levitan: I just want the witness' answer. The agreement says, "It is further stipulated and agreed by the parties hereto that if either of the parties should violate any of the covenants and agreements herein contained, then they hereby fix the sum of \$225 as liquidated damages for such breach. And it is further understood that the said note to be given as above mentioned (the note in evidence), shall, in the event of breach on the part of the party of the second part (that is, on the United Candy Company's part) be considered as the amount of liquidated damages," that is, if we broke the agreement we would pay the note, "and shall, upon the demand of the party of the first part," if Bockian breaks the agreement, "be delivered up to be cancelled."

Mr. Burtis: Now, if your Honor please, Mr. Levitan very shrewdly only refers to a very small portion of the contract. This contract is over three pages long; it starts off and says, "That whereas the said party of the first part, Bockian, is the holder of eight shares of the capital stock of the party of the second part, (that is, the United Candy Company) and the party of the first part has agreed to sell such shares of stock to the United Candy Company, and the United Candy Company has agreed to purchase said shares of stock, under the terms and agreements hereinafter set forth:" Now, then, going over on the second page, of course, the next essential thing is, what was the United

*Abraham Bockian—Cross.*

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10 Candy Company going to pay for these eight shares of stock? Near the bottom of the second page we find what the United Candy Company was going to pay. There cannot be any doubt about it; there is no ambiguity about it. It says, "Said party of the first part hereby agrees to reassign and transfer unto the said party of the second part, all the outstanding accounts according to the books of the company which had been previously assigned to the company by the party of the first part, which accounts are now approximately the sum of \$995. Said party of the second part further agrees to give the

20 said party of the first part a note for the sum of \$225, payable one year after date; provided, however, that if the said party of the first part should retire from business or should sell the said business or should remove out of the County of Hudson and the County of Bergen, then said note shall be paid thirty days after notice of said retirement, sale or removal." Now, there cannot be any question as to the consideration for the selling to the United Candy Company of eight shares of capital stock of the

30 company, that it was \$995 approximately and a note for \$225 which I hold in my hand. Now, here is the question: Suppose either party broke the contract, then they came down to the question of discussing damages; they agreed that \$225 should be liquidated damages, and that if Mr. Bockian broke the contract he should forfeit \$225 and if the United Candy Company broke the contract they should forfeit \$225. Your Honor can

40 very easily see the position that the United

*Abraham Bockian—Cross.*

Candy Company is in. They said to this Mr. Bockian, he has a note of ours for \$225 and if he breaks the contract he won't be out anything unless we make the note contingent on his keeping the contract; in other words, there was his \$225 if he breaks the contract; and if they broke the contract they were going to pay \$225 more, or \$450. It is plain; there cannot be anything else said about it. Now, what happened? Within four weeks, as we claim, the United Candy Company broke the contract. If our contention is correct and they did break the contract, immediately the note became due and payable, and in addition to that we were entitled to \$225 as liquidated damages, which they had agreed upon in the contract. Now, Mr. Levitan has been trying to establish or install in the mind of the Court that this note was an afterthought, it simply was held up as a bonus to require this man to faithfully keep the contract for a year, so he very shrewdly, very adroitly, only read that last portion of the contract. Now, it seems to me if your Honor will read this contract during the recess, just glance over it, your Honor will see without any question of doubt, that the statement I have just made is the correct and fair one.

Mr. Levitan: If your Honor please, as to my friend's insinuations of shrewdness and adroitness, it seems to me that he does not understand plain language. If your Honor please, the clauses that he has just read, provide that the consideration shall be \$995, which is indicated by the value of the book accounts, and stops there. Then it goes on

*Abraham Bockian—Cross.*

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10 as he has already read, "The said party of the first part hereby agrees (that is, Mr. Bockian) to reassign and transfer unto the party of the second part (the United Candy Company) all the outstanding accounts according to the books of the company which had been previously assigned to the company by the party of the first part, which accounts are now approximately the sum of \$995," the idea being that the consideration for this agreement at the time of the transfer was originally that this man had \$800 invested in the business, which consisted of his good will in certain accounts, and they had a certain value; on his retirement from the business he did not get any cash; he got an assignment there of certain accounts which belonged at that time to the company, but which originally belonged to him. And it was found to be due \$995 from these individual customers, and that was the consideration paid to him for this stock. Then the contract goes on and says, "The party of the second part further agrees"—it does not say as part of the consideration—"further to give the party of the first part a note for the sum of \$225, payable one year after date hereof; provided, however," that the note was given with a big string, and then goes on and says, "that if the said party of the first part (meaning apparently second part) Mr. Bockian, retires from business or should sell his business or should remove out of the County of Hudson to the County of Bergen, then the said note shall be paid thirty days after, etc."

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Mr. Burtis: How can you reconcile that with a bonus?

RECESS UNTIL 2 O'CLOCK P.<sup>M.</sup>

*Abraham Bockian—Cross.*

## AFTERNOON SESSION.

Hearing resumed at 2 o'clock P. M.

ABRAHAM BOCKIAN recalled.

10

*Cross-examination (continued) by Mr. Levitan.*

Q. This note was given for the faithful performance of the conditions of this contract, wasn't it?

Mr. Burtis: I object to that. The contract speaks for itself, as to what this note was given for.

The Court: I suppose I will have to take the contract and determine that. 20

Mr. Levitan: Well, sir, in view of the fact that counsel differ on the interpretation of the contract, then, I think, there is a subject for explanation.

The Court: Well, you differ upon the contract as it stands.

Mr. Levitan: On the face of it.

The Court: On the face of the contract. Now, you are asking this man to explain the contract. 30

Mr. Levitan: Not to alter it, but to explain. We cannot alter it.

Mr. Burtis: I contend that the question is by purely parol evidence to alter the contract. The contract is very plain as to what the note was for, it seems to me, and there cannot be any question about it.

The Court: Yes.

Mr. Burtis: Unless, as I understand the rule, if your Honor concludes the contract is 40

*Abraham Bockian—Cross.*

ambiguous, there cannot be any explanation,—unless the Court having read the contract feels that the Court's mind is in doubt as to what the meaning of the contract is, then the Court can permit evidence to explain it.

10

The Court: Well, I suppose Mr. Levitan would argue that there was some ambiguity about this contract, because two lawyers disagree as to what it means.

Mr. Levitan: Judge McCauley, when he read the contract, put a third construction upon it which was entirely different from Mr. Burtis' and Mr. Haber's minds.

20

The Court: I think you may ask this witness what the note was given for.

30

Q. What was this note given for, Mr. Bockian?  
 A. That note was given to me in settlement of \$150 to a share and turning over outstanding accounts was nine hundred and ninety-some dollars—it was near one thousand—and the note of \$225 is the \$1,225 they gave me in settlement of my eight shares, because the profit during that year was amounted on my stock about \$800 because I had a one-third part of the stock; it was nearly \$2,200 was made clear profit during that year and I had one-third part of the stock, eight shares, so was coming to me about \$800 and \$800. I had invested in the business which was about \$1,600 so after I was ordered out I came to a settlement \$150 a share and they turned over that outstanding accounts, about a thousand dollars, and \$25 they figure my allowance for losses on that account, and \$200 to cover \$1,200 so they gave me that note of \$225 in settlement of the eight shares of stock.

40

*Abraham Bockian—Cross.*

Q. Isn't it a fact that that note was given for the simple reason of your faithfully performing the conditions of the agreement? A. No, sir.

Q. And didn't Mr. Lichtman tell you at the time that if you lived up to your agreement, if you did all the business properly, you could have that extra \$225 at the end of the year? A. No, sir. 10

Q. And wasn't it a fact that the only reason that the note was made payable for one year was to have you live up to that arrangement? A. No, sir.

Q. And wasn't it further agreed between you at the time that one year was fixed as the time because that was the life of the agreement? A. No; the note was given me in settlement of my shares, because there was, when we took an inventory, after the inventory—— 20

Q. Just answer my question.

Mr. Burtis: He is answering your question.

Q. And wasn't it also a fact that because the contract was for a year you were to work for them as a sub-jobber under this contract for one year, that the note was given to you to be payable at the end of the year when that contract would be finished? A. No, sir; they claimed that they had no money to pay me—— 30

Q. Just answer my question. A. I am telling you, no; I am telling you that they gave me that in settlement.

Q. And wasn't it further provided between you at the time that the only change which would be made in reference to that note would be if you quit immediately and left the county, went away, so that the United Candy Company could then have your customers and serve them? 40

*Abraham Bockian—Cross.*

Mr. Burtis: I object to that; he is going outside of the note.

Mr. Levitan: I am going right to the contract, where it says if he left the county, that the note would be payable in thirty days.

10

The Court: I think the contract is pretty conclusive on that part of it.

Q. When did you make your complaints about the overcharges? A. Well, Saturday, after the week was over.

Q. You paid your bill just the same? A. I had to pay the bill before they took the goods out to the wagon, otherwise I wouldn't have them.

20

Q. Didn't you check up the bills when you got the goods? A. No, sir; I had no chance, because I took my orders, my orders was delivered with others together and they would not put the goods on the wagon before I paid for them.

Q. You paid them money on account and on Saturday night squared up in full? A. Paid what the goods amounted to in full according to the bill of the goods, what that amounted to.

30

Q. When your goods were shipped out they approximated that they were worth a certain amount of money, and on Saturday night you checked up the bills with them and paid in full? A. No, sir; after the week was over, Saturday, I paid that in full.

Q. So that you did have an opportunity of looking over the bills? A. No, sir. How did I? When I took up my orders they just entered the goods, they entered it, and it wasn't added together.

40

Q. Didn't you just say a minute ago that on Saturday night— A. Saturday night, yes.

Q. You checked up the week's business? A. Not checked up; I beg your pardon; I say I paid.

*Abraham Bockian—Cross.*

Q. You looked over the bills. A. They told me that there was so much balance from the week's business.

Q. Do you mean to tell this Court that you paid a bill without looking it up; is that what you want to tell us? A. They showed me the bottom figure, only I don't have a chance to see the prices for each box separately. 10

Q. Do you mean to tell the Court that you paid those bills without looking at it?

Mr. Burtis: I object to this; he says that he did look at the book but he didn't see each item separately.

A. At the end of the week.

Mr. Levitan: The question is perfectly plain. This witness is trying to dodge, and I don't think he ought to be instructed. 20

Q. When your goods were delivered to you during the week they were put on the wagon? A. Yes, sir.

Q. And you paid an amount that you thought was the value of those goods? A. Yes, sir.

Q. And on Saturday you got an itemized bill of the goods? A. Yes, sir.

Q. And you looked over that and paid up the difference? A. I paid before I looked. 30

Q. You paid before you looked? A. It took me an hour to look over this, each one separate.

Q. So you want this Court to believe that you paid up without— A. They was overcharging me one time, they could overcharge me two or three dollars on a shipment and say, "See, I could price them so much."

Q. Just answer my questions. You never looked at the books you say until after you paid, that is right? A. Yes, sir. 40

*Abraham Bockian—Cross.*

Q. You never looked at it? A. But after the bill was paid I gave him the check, then he gave me the book to look over and examine it.

10 Q. When did you leave the United Candy Company? A. Well, I wasn't in their employ; I just bought goods from them, and stopped buying goods from them October 3rd, I think it was.

Q. And that was the day you quit? A. Well, October 3rd, I think.

Q. You never knew before that that you were going to quit? A. Well, I gave them a week's notice, I told them if they keep on overcharging me why I am going to leave, so I gave them a week's notice they should not overstock, they should not buy goods, they should not figure on me because a week after that I am going to quit.

20 Q. When did you first give them notice that you were going to leave?

Mr. Burtis: He has answered that question.

A. A week before I leave I told them that I am going to leave because they overcharge me.

Q. To whom did you tell that? A. To the firm.

Q. Which one? A. To Mr. Lichtman and Mr. Urdang.

30 Q. Where were they when you told them that? A. In the store.

Q. When was that? A. That was a week before I went.

Q. What day was it? A. I don't remember exactly.

Q. What time of the day was it? A. I don't remember the date.

40 Q. But you know it was to Mr. Urdang and Lichtman? A. I spoke to Mr. Lichtman and Urdang, complained all the time to him, that they overcharge me.

*Abraham Bockian—Cross.*

Q. Will you please answer the questions; we have heard of your overcharge a hundred times. Was anybody else there at the time when you told them that you were going to quit? A. I don't remember.

Q. What date was it? A. A week before I left I gave them notice that I am going to leave on account them overcharge me. 10

Q. What did you say to them? A. I told them that they overcharged me on the goods during those few weeks I was with them and I don't make enough profits on the goods to make my living because I show them on those books they overcharge, prices wasn't so high, that they overcharge me for them, and I told them, and they say, "If you don't like it you can get out and you will lose your \$225."

Q. They said if you quit you are going to lose your \$225? A. Yes, sir. 20

Q. And what did you say? A. Well, I couldn't help it, I decided to quit.

Q. So that your arrangement was if you went away before that time, that if you broke the agreement before that time, you would lose \$225 on the note? A. I was satisfied to lose it.

Mr. Burtis: I object to that.

The Court: I think the question in that form is objectionable. 30

Q. So that when you told them, or when they told you that you would lose your \$225 if you quit, you said what? A. I didn't say anything.

Q. You knew then at the time that if you had left them and if you broke your contract you would lose \$225? A. I didn't break the contract.

Q. Answer my question.

Mr. Burtis: I object to that; there is no evidence whatever that this witness broke the contract. 40

*Abraham Bockian—Cross.*

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Mr. Levitan: I think the question is proper because the contract says if he did break the contract that he would lose \$225.

Mr. Burtis: Then I object to the question because that is a fact not in dispute. The contract says if he broke the contract—

10

Mr. Levitan: Strike that question out.

Q. So that when Lichtman told you at that time that if you left you broke your contract, you knew that that was the fact? A. Oh, he said it; I could not help it if he said so.

Q. And that was your understanding of the agreement? A. Well, if I would break the contract I would know it; they broke the contract; I understood that they broke it.

20

Q. But if you had broken the contract you were to lose your \$225 on that note? A. I don't know if it is on the note, or besides the note.

Q. Well, Mr. Lichtman said to you you would then lose your money? A. I would lose \$225 he said; I don't know if that is the amount of the note or some other \$225.

30

Q. Don't you know at the time that he was referring to the note which wasn't paid? A. Well, the note wasn't paid after that when the note came due.

Q. If he was referring to the note at the time he spoke to you— A. No, he said I lose \$225. That is what he answered me.

40

Q. Do you mean to tell this Court that you got out of that business and left the balance in the hands of the United Candy Company of \$225 in the form of this note? A. Yes, sir; because they claimed that they had no money in cash to pay me, because they had no money, and they turned over that outstanding accounts because they had no money in their bank.

*Abraham Bockian—Cross.*

Q. Isn't it a fact that that was the amount agreed upon on that sketch, when you had this account for the \$995, with this little slip of paper?

A. In this little slip of paper they gave me I had to go out to collect that money from the customers, otherwise I had no right to collect the money; would not give a written receipt.

10

Q. Didn't they give you a receipt at the time you closed this agreement, indicating that the \$995 was to be in consideration of the entire amount of your interest? A. No, sir.

Q. Didn't you have a receipt in court the last time?

Mr. Burtis: I object to that as incompetent, irrelevant and immaterial.

The Court: I think I will overrule the question.

20

Mr. Levitan: Note my objection.

Q. You had made an arrangement to get out of that place on the 26th of September, didn't you?

A. I don't remember the date.

Q. You hired a store from Mr. Goldstein on the 26th of September? A. I don't remember, because I hired from Mr. Goldstein after I gave them notice.

Q. How many days after you gave them notice?

30

A. It was the same week when I gave them notice.

Q. You went to Goldstein the day before you gave that notice, didn't you? A. No, sir; I beg your pardon.

Q. When did you go to Goldstein? A. I don't remember the date.

Q. How many days after you gave that notice?

A. I don't remember, but it was in the same week.

Q. How many days after? A. I can't tell.

Q. Isn't it a fact that you went to Goldstein—

40

A. What is a fact?

*Abraham Bockian—Cross.*

Q. The day before you gave that notice? A. Have you got proof to it?

Q. I am asking you the question. A. I want you to prove it, if you say so; I say no, you say yes.

10 Mr. Levitan: I ask that the witness be instructed to answer the question.

The Witness: I say no ten or twelve times.

Mr. Levitan says it is a fact; I want him to show the fact.

Q. When do you say you went to Mr. Goldstein to rent that store? A. The same week when I give notice; what day I don't remember.

20 Q. You had no intention of leaving the place until the 26th of September? A. I don't remember about the 26th, but I gave notice on October 3rd when I paid the last bill, no, the week before, when I paid the last bill, I told him I am going to go because they overcharge me in that week when I gave him notice, so I went to rent a store.

Q. Why was that note dated for one year after termination of the contract, that is part of the consideration of this agreement? A. Because they had no money in cash, because they were going to give me a note payable one year after date.

30 Q. So they tied up \$225 for a whole year? A. They wouldn't give me, they wanted to chase me out of the business altogether.

Q. What was the reason they wanted to chase you out? A. I don't know why; they claimed that they had no money, and it took a lot of argument that he should pay.

Q. You had some trouble? A. I don't know any trouble.

40 Q. You were caught stealing in that business and that is why they wanted to chase you, isn't it?

Mr. Burtis: I object to that.

*Abraham Bockian—Cross.*

A. If you prove that I was stealing. Don't let him call anybody a thief.

The Court: I think I will overrule that question, the last question, on the stealing.

Q. What was the reason that you came to such a sudden termination of your relations? A. I don't know; because I wanted to get hold of them, you know; that was the only reason. 10

Q. Because you wanted to get hold of them? A. I was head salesman, what business I worked up, I worked up mostly all their business.

Q. Will you please give this Court the reason why that note which was part of the consideration, was payable in one year and payable under certain conditions? 20

Mr. Burtis: I object to that; he has answered it.

A. Yes, I answered it.

Mr. Levitan: I submit to the Court that this is an important matter, this question of a note without any consideration on the face of it, and requires a great deal of explanation. The Court should give counsel some more leeway to go into that, more than an ordinary instrument. 30

The Court: I think the question has been asked and he has answered, that they gave him a note payable in one year because they said they had no money with which to pay it.

Q. Why didn't you insist on interest; why wasn't this note payable with interest? A. Because I didn't ask for it.

Mr. Burtis: I object to that as immaterial. The contract shows that it did not bear in- 40

*Abraham Bockian—Cross—Redirect.*

terest and it would not affect the case one way or the other, if your Honor please.

Q. You are sure that this was part of the consideration? A. Our settlement was so, without interest.

10

Q. That was your settlement? A. Yes, sir.

Q. That is the best answer you can give to that? A. Yes, sir.

20

Q. Isn't it a fact that this \$225 was offered to you to be paid only at the end of the year as \$225? Wasn't that part of the arrangement? A. No; the agreement shows plain enough it was part of that, because the agreement says if I sell my business, after this agreement is drawn a week or two weeks, the note is to be paid in thirty days; that shows plain enough it was in settlement.

*Redirect examination by Mr. Burtis.*

Q. Now, in answer to a question of Mr. Levitan's you stated that prior to the making of this agreement, you and the United Candy Company agreed that you should sell your eight shares at \$150 a share? A. Yes, sir.

30

Q. Now, the original par value was \$100, was it? A. Yes, sir.

Q. Now, I show you a paper, and ask you, if before the making of that agreement, you and the United Candy Company together made up this paper to show the profits that were then existing in the United Candy Company? A. Yes, sir. Each of the partners had a copy.

Q. That was shown to Mr. Lichtman—he saw it? A. Yes, Mr. Lichtman.

40

Q. And the other gentleman—I forget his name? A. Mr. Urdang.

*Abraham Bockian—Redirect.*

Q. And did they agree with you that this paper contained a true statement of the amount of the profits that the United Candy Company had made up to the time that this statement was made up?

Mr. Levitan: I object to that as irrelevant and immaterial, what the profits were, because the contract provides for the consideration at the time. 10

Mr. Burtis: Now, this is very material, to show that the stock was worth \$150 a share.

The Witness: It was worth more yet.

The Court: There is no dispute about the stock being worth that much.

Mr. Burtis: Oh, yes; Mr. Levitan started in here to tell you that \$995 was the value of the stock, and that that is why they gave him \$995. It is our contention that the stock was worth more even than what we sold it for. 20

The Court: Well, I think I will hear that.

Mr. Burtis: I offer this statement in evidence.

Mr. Levitan: I object to that on the ground that it is wholly irrelevant and immaterial. It is a written memorandum made before the written contract and has no bearing upon the issues in this case at all. 30

The Court: Well, it only has reference perhaps to the value of the stock, which seems to be in dispute.

Mr. Levitan: Well, the value of the stock is not in dispute. It is only the interpretation of the contract. We contend that in that contract it is written and speaks for itself, and the consideration for his reassignment is \$995, for which we assign certain accounts. 40

*Abraham Bockian—Redirect.*

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(The statement was thereupon admitted and marked Exhibit P-7.)

10 Q. Now, Mr. Bockian, the statement which has been offered in evidence shows that there was \$2,100 profits? A. \$2,179, about \$2,200.

Q. Now, as a stockholder of that company, at the time that this——

Mr. Levitan: Just one moment before your Honor admits this in evidence. This witness says it was made before this contract.

The Court: That you would have to disprove.

Mr. Levitan: I would like to cross-examine on it before your Honor admits it.

20 Mr. Burtis: We served you with a notice to produce.

Mr. Levitan: We have no copies of it and we say that it was never made with our knowledge.

The Court: I will let it stand and you can disprove it if you like. I will take that into account.

30 Q. Now, Mr. Bockian, this shows that there were profits of \$2,179 at that time? A. When they took the inventory.

Q. Now, what proportion of that profit were you, as a stockholder at that time, entitled to? A. To a third.

Mr. Levitan: I object to that as irrelevant and immaterial, on the same grounds, if your Honor please, that we are going into a question now to change the terms of this agreement.

40 Mr. Burtis: Not at all; I do not propose to change this agreement.

*Abraham Bockian—Redirect.*

The Court: I don't know how important these profits are, but he has already testified that he was a stockholder, owning eight shares, or one-third of the company, and if he was entitled to one-third the Court can draw its own conclusion from that point on. 10

Q. Now, Mr. Bockian, in answer to a question of Mr. Levitan's I understood you to say that during the week when you were in the United Candy Company's place, you gave in your order, and the orders would be assembled together on the floor? A. Yes.

Q. And then some one of the corporation would estimate about what the order amounted to, and on that estimate you would pay? A. Yes; then they entered the goods, each box separate in that book, each item and the price, on so many pages. 20

Q. Yes. A. And they estimated the value on that pile and I have to give them so much on account, and the end of the week I pay the balance.

Q. Don't go beyond that; that estimate was made before the goods were put on the wagon? A. Yes.

Q. And that amount, estimated, was paid to them before the goods were taken out; they would not let you have the goods unless you did pay that estimated amount? A. Yes, sir. 30

Q. And that was supposed to mean the full value of those goods? A. Yes, sir.

Q. Now, then, so that on Saturday night when you came there if there was a very little balance then you paid it to them? A. Yes.

Q. And they would then tell you what that balance was, is that it? A. Yes, sir.

Q. And you would pay that balance? A. Yes, sir.

Q. Then they would give you receipted bills? A. Then they mark in the book paid. 40

*Abraham Bockian—Redirect—Recross.*

Q. Now, then, was that during the first part of the week that you had the seeing of that book? A. Yes, sir; on Saturday only.

Q. Did you, every Saturday night that you paid the bills up, object to the amount that they had charged on that book?

Mr. Levitan: I object to that as leading.

The Court: Yes, your question is pretty leading.

Q. What did you do every Saturday night when they showed you that book? A. When they showed me that book I made crosses in the book and I complained they overcharged me on a certain item so much and so much, and they say, "These are our prices, we can't give it to you any cheaper."

*Recross-examination by Mr. Levitan.*

Q. So you did look over the items of the accounts in these books before you paid them? A. Added them together; when the goods was on the floor, how much about that will make, sometimes they get \$10, sometimes \$15, sometimes less or more.

Q. You said before that you never had any chance to look over the bills, except on Saturdays you looked over them. A. I mean to say now the same thing, that I didn't look over the bills during the week, only on Saturday, when the week was over.

Q. You said before that on Saturday you looked over the bills? A. I looked over the whole book, over the books, all the goods I took during the week.

Q. There were some errors which were corrected on those Saturday nights, before you paid? A. They don't want to correct anything; they said—

Q. Before the money was paid over? A. No.

*Abraham Bockian—Recross.*

*David Follender—Direct.*

Q. Now, you say that you would pay the approximate value of the goods; do you remember the first bill of goods, which you got on the 7th of September, which was \$397.16? A. I don't remember that.

Q. And you paid on account of that \$60? A. 10  
How do you know it, when the book is not produced?

Q. I am asking you the questions; don't ask me. A. Well, I can't say; are you reading from every paper just the exact amount how much I pay; I can't tell.

Q. On the 23rd of September you bought \$349 worth of goods and paid \$6.50? A. On \$300 I paid \$6?

Q. Yes. A. No, sir; it never happened. 20

Q. On the 23rd day of September you bought \$84; then you continued to pay on account from September 7th, you paid on the 10th \$6.50, on the 10th you paid \$40, on the 16th \$29, on the 11th \$2.16, on the 11th you paid \$257.41; isn't that the way you paid for those goods? A. No, sir.

Q. Isn't it a fact that you paid for those goods in many instalments and after you had ample time to examine the bills and figure them up carefully? A. No, sir.

Q. That is not so? A. No, sir. 30

DAVID FOLLENDER SWORN.

*Direct examination by Mr. Burtis.*

Q. You are in the confectionery business, are you, Mr. Follender? A. Yes, sir.

Q. Here in Jersey City? A. Yes, sir.

Q. How long have you been in that business? A. 40  
Twenty-eight years.

*David Follender—Direct.*

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Q. Are you a jobber? A. Yes, sir.

Q. How long have you been a jobber? A. All the twenty-eight years.

10 Q. Are you familiar with the prices to jobbers of Big 5 gumdrops, ten-for-a-cent gumdrops and lolly-pops in the months of September and October, 1914? A. You mean manufacturers' prices?

Q. Yes. A. Well, it didn't, to my estimation, it didn't cost any more than 24 cents, and no less than 18 cents.

Q. From 18 to 24 cents? A. A variation from 18 cents to 24 cents.

Q. What was the price of ten-for-a-cent gumdrops during that same period? A. The same price.

20 Q. If you had made a contract with a sub-jobber to sell him Big 5 gumdrops at 1 cent per box over the market price in September and October, 1914, what would have been the price that you would have billed them to that sub-jobber?

Mr. Levitan: I object to that as an improper hypothetical question.

The Court: Yes; I think he may answer what the price was.

30 Q. What would be the price of a box of Big 5 gumdrops at 1 cent above the market in September and October, 1914? A. Why, if I would pay 18 cents I would charge him 19, and if I pay 24 I would charge him 25.

Q. Then it would not have been 27 cents? A. No, sir.

Q. Would the price at 1 cent above the market at any time during September or October amount to 27 cents? A. No, sir; not to my estimation.

40 Q. What was the price of lolly-pops during that same period? A. Forty cents.

*David Follender—Direct.*

Q. There are thirty-two boxes of lolly-pops to a case, are there? A. Used to be thirty-two boxes and pay for thirty only.

Q. In October and September, 1914, there were thirty-two boxes to a case, were there? A. Thirty boxes you pay for and you get two extra.

Q. And 40 cents was the price? A. Yes, sir. 10

Q. And at 1 cent above the market price would the price at any time during September and October, 1914, have been as much as 43 cents? A. No, sir.

Q. Was there any difference in the price of Big 5 gumdrops in August and September of 1914?

Mr. Levitan: I object to that as irrelevant and immaterial. 20

Q. I show you a bill, dated September 10, 1914, and ask you if that is a bill of where you bought Big 5 gumdrops?

Mr. Levitan: I object to that as irrelevant and immaterial, and not a proper method of proof.

A. This is a bill what I paid.

The Court: I think that may be some evidence. 30

Mr. Burtis: I offer the bill in evidence.

The Court: I will admit it, and an exception may be noted.

(Bill marked Exhibit P-8.)

Mr. Burtis: Now, if your Honor please, if Mr. Levitan will make no objection, I make an offer to show by this witness that the price of Big 5 gumdrops was the same in the month of August as it was in September and October, and I have some bills here showing those prices. 40

*David Follender—Direct—Cross.*

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Mr. Levitan: I object to the cost price as being irrelevant and immaterial, and not bearing upon this case.

The Court: Well, I think I will exclude them.

10

*Cross-examination by Mr. Levitan.*

Q. Mr. Follender, you are a competitor of the United Candy Company? A. A competitor?

Q. Yes, a competitor; you are in the same line of business as they are? A. Yes.

Q. What was the average amount of gumdrops that you bought at a time? A. As much as I need.

20 Q. What is the average amount; how many do you need? A. Sometimes I can get a hundred, sometimes I need five; a jobber buys from five up.

Q. Well, as a rule you never buy more than twenty-five or thirty or fifty boxes? A. How do you know?

Q. I am asking you the question; answer my question. A. I am answering; I bought more than 500.

30 Q. How is it on this bill you bought other articles, from twenty to thirty, and gumdrops was 110; what was the reason you bought 110 at a time?

A. Because I need them.

Q. Isn't it because the market price went up after that? A. No, sir.

Q. Are you sure about that? A. Not at that time.

Q. The market price never changed? A. Not at that time.

Q. When did the prices go up? A. Well, since last year.

40 Q. When did you give the orders on those gumdrops that were shipped in September? A. I gave

*David Follender—Cross.*

the order Tuesday and I got it delivered in the next couple of days.

Q. Ordered and delivered at the same time? A. Yes, sure.

Q. Different manufacturers have different prices for their merchandise, have they not? A. Well, the highest is Henry Heide. 10

Q. Heide is the highest; they sell the best grade? A. It isn't the best; it is the highest.

Q. You don't know what price Henry Heide was charging at that time? A. I don't think it was more than that.

Q. Answer my question; not what you think; do you know? A. I wouldn't swear to it.

Q. You don't know? A. No.

Q. You never bought any lolly-pops from Heide, did you? A. From Heide? 20

Q. Where did you get your lolly-pops from? A. There is only one that makes lolly-pops.

Q. Who is that? A. Bradley & Smith in Connecticut.

Q. You haven't got any bills for the prices that you paid for lolly-pops? A. I haven't any amongst here; I didn't bring any bills here.

Q. The price of lolly-pops is quoted at 40 cents plus freight? A. To the jobber? 30

Q. The jobber always pays the freight on lolly-pops? A. Yes.

Q. What is the freight on a box? A. One cent or a trifle over.

Q. As much as two cents? A. No.

Q. How much? A. One cent.

Q. Over a cent, isn't it? A. Sometimes.

Q. It is always over a cent, isn't it, on lolly-pops? A. Not always.

Q. Isn't it 48 cents for thirty-eight boxes? A. There is no fixed freight; as much as the company charges. 40

*David Follender—Cross.*

Q. The company charges one rate; isn't that so  
 A. It is according as how the goods is heavy; some-  
 times it costs more on another railroad, you paid  
 more than 15 cents.

10 Q. The freight does not appear on the bill? A.  
 The jobber pays always the freight, yes.

*By Mr. Burtis.*

Q. But, as I understand it, you get two boxes  
 free, and that will pay the freight? A. That pays  
 the freight, yes.

*By Mr. Levitan.*

20 Q. Those free boxes are given then for display  
 purposes, aren't they? A. No, sir.

Q. The market price when quoted never take into  
 consideration the free boxes? A. Two boxes are  
 free.

Q. The free boxes are given instead of the dis-  
 count? A. No; you get the discount, too.

Q. You don't get any discount on lolly-pops? A.  
 I do get a discount on lolly-pops and a free case,  
 too.

30 Q. These free boxes are given instead of addi-  
 tional discount, aren't they? A. No, sir.

Q. They are not? A. I am getting a discount be-  
 sides the free boxes.

*By Mr. Burtis.*

Q. What is the amount of discount that you get?  
 A. Two per cent., ten days.

*By Mr. Levitan.*

40 Q. What is the custom in the jobbers trade on  
 the market price; do they consider the free boxes or  
 do they consider the price on the regular boxes? A.  
 This is bonus for the jobber.

*Motion for Non-suit.*

Q. What? A. The two boxes are bonus to the jobber.

Mr. Burtis: The plaintiff rests.

Mr. Levitan: Well, if your Honor please, 10  
I move for a nonsuit on the following grounds:

First, that the plaintiff has not made out any case, in that he has failed to show that the contract was broken by the defendant. The law is well settled on the question of contracts. In order to be a breach such as would entitle the plaintiff in this case to vacate or terminate the agreement it would have to be one of the essentials of the agree- 20  
ment. Here we made a contract, the essence of which was to supply the plaintiff with candy at a certain price, and he on his part agreed to be in our employ for one year. Now, the plaintiff comes into this court and sues for damages on that contract, and admits on the stand that he has terminated his agreement at the expiration of four weeks. Clearly that states him out of court.

Assuming, on his part (he is entitled to every benefit that his testimony in court now can receive), that we overcharged him on an item of two or three dollars; would your Honor think that that would be a sufficient ground for him to break his contract and quit an agreement which had to run for a year? The situation, if your Honor please, is exactly the same where one man agreed with another to pay a thousand dollars to a builder to build a house; now, the house is 40  
completed, with the exception of the shutters

*Motion for Non-suit.*  
*Abraham J. Goldstein—Direct.*

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10 not being on, and the owner then refuses to pay. Clearly the breach there on the part of the builder is not of such a nature that would go to the essence of the contract, and therefore the owner could not recover for the breach.

I submit to the Court as an additional reason that there should be a nonsuit on the note, that the note contains no consideration, inasmuch as it says on the face of it that the note was subject to the conditions of the agreement. The contract says that he was to be employed for one year from date; that was the consideration of that note under the agreement, and therefore, where the plaintiff failed to perform his part he is not entitled to recover on that.

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I move, if your Honor please, that on any one of these grounds the plaintiff is entitled to a nonsuit.

The Court: I think I will hear the defense.

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THE CASE OF THE DEFENDANT.

ABRAHAM J. GOLDSTEIN SWORN.

*Direct examination by Mr. Levitan.*

Q. Mr. Goldstein, where do you live? A. 47 Duman Avenue.

Q. Do you know Mr. Bockian, the plaintiff in this suit? A. I know him a little, yes.

40 Q. Have you ever had any business with him?  
 A. No, sir.

*Abraham J. Goldstein—Direct.*

Q. Do you remember making any agreement with him in the year 1914? A. No agreement.

Q. What business did you have with him? A. I rent him a store.

Q. When? A. On October, 1914.

Q. What was the first time he spoke to you about renting that store? A. Well, my real estate department is generally conducted by my daughter, and she does— 10

Mr. Burtis: I object to any testimony by this witness of what his daughter said.

A. —she transacted this particular business.

Q. Did you ever speak to Mr. Bockian? A. Yes, sir.

Q. What was the first time you spoke to him? A. 20  
It was previous he rented the store October 10th, 1914, that was the time his rent began, and previous to this, some days before that he rented the store, I couldn't say what day.

Q. Do you remember referring to your books and telling me the date when you had the first conversation with him as you recollect it, some time before the first of October? A. No, I don't.

Q. Do you remember telling me at the time, several months ago, at the last trial, that the first conversation you had with him was on the 26th of September, 1914? 30

Mr. Burtis: I object to that on the ground that it is leading. I think that is manifestly unfair.

Mr. Levitan: Well, the witness is under subpoena; he has no interest whatsoever in the case.

The Court: That is rather leading. 40

*Abraham J. Goldstein—Direct.*

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10 Q. Mr. Goldstein, can you recall the first day that you talked with Mr. Bockian about this renting? A. I don't recollect; the only thing which I do recollect is this, Mr. Levitan called me up some time ago, and he asked me what date Mr. Bockian rented the store, and at that time I asked my daughter about it; she has got charge of this particular department, and she told me about that.

Mr. Burtis: I object to what the daughter told him.

Q. Tell the Court what you told me as a result of your inquiry?

20 Mr. Burtis: I object to what he told Mr. Levitan, because that would not be binding on the plaintiff.

The Court: Yes, that would be hearsay evidence.

Mr. Levitan: Only as to the date.

The Court: Yes, but this gentleman got all his information about that from his daughter.

30 Q. Do you remember when you had the first conversation with Mr. Bockian about the renting of the store, how many days before the first of October?

Mr. Burtis: I object to that as an unwarranted assumption of a fact.

Q. How many days before the 10th of October?  
A. As a matter of fact he rented the store from my daughter but he spoke to me a couple of days before that.

40 Q. Before the 10th? A. Two days before the 10th, before he rented the store, the rent I said was

*Abraham J. Goldstein—Direct—Cross.*

to begin on the 1st, and he rents it on the 15th of October.

Q. How long before that did you rent it to him?

A. Well, probably a week or two before; I couldn't say.

Q. And he spoke to you, you said, how long before he rented the store? A. About a day or two days; I don't remember; as much as I could recollect. 10

Q. Your daughter, you say, has a record of the time that you rented the store? A. Yes, sir.

Q. What is your daughter's name? A. Minnie.

Q. Just fix the time, how many days before the actual leasing that you talked to Mr. Bockian for the first time? A. I told you before, from a day or two days.

Q. You are sure about that, are you? A. Yes. 20

Q. How many times did you speak to him all together? A. Once or twice.

Q. When you say a day or two days, do you refer to the first time or the second time? A. The first time.

*Cross-examination by Mr. Burtis.*

Q. You mean a day or two days before the 10th of October? A. No, that was a day or two days before he rented the store; the rent begins on the 10th of October. 30

Q. He went into possession on the 10th, is that it? A. Yes, sir.

Q. And it was a day or two days before that that the renting was made, is that it? A. No, it was about a week or two weeks; I couldn't say.

Q. About a week before the 10th the letting was made? A. Yes.

Q. And then a day before that he had some little talk with you? A. Yes, sir. 40

*Abraham J. Goldstein—Cross.*  
*Peter J. Burke—Direct.*

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Q. That would bring it at the most it would be one of the last days of the month of September?

A. About that.

10 *By Mr. Levitan.*

Q. Do you remember giving me over the telephone that date as September 26th, the date of your conversation?

Mr. Burtis: I object to that as leading and entirely improper.

The Court: Well, he got his information from his daughter and he gave you that information that he received from his daughter.

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Mr. Levitan: If your Honor will pardon me, I desire at this time—I forgot for the time being—to state my objection to your Honor's ruling on the motion for a nonsuit.

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PETER J. BURKE, SWORN.

*Direct examination by Mr. Levitan.*

30 Q. Where do you live? A. Jersey City.

Q. What street and number? A. 47 Bidwell Avenue.

Q. What is your business? A. Salesman.

Q. For whom? A. Henry Heide, New York City.

Q. How long have you been employed by this concern? A. Seventeen years.

Q. What do you sell? A. Oh, I sell all kinds of goods.

Q. Do you sell gumdrops? A. Yes, sir.

40 Q. Do you sell lollypops? A. No, sir.

*Peter J. Burke—Direct.*

- Q. Just gumdrops? A. And assorted chocolates.
- Q. How many boxes of gumdrops have you sold in your experience? A. Thousands.
- Q. Do you remember selling any goods to the United Candy Company during the months of September and October, 1914? A. Yes. 10
- Q. Do you know from your own knowledge what the market price was of gumdrops during the months of September and October, 1914?

Mr. Burtis: I object, unless I have an opportunity to examine him as to his qualifications.

*By Mr. Burtis.*

- Q. I understand you are a salesman for the Heide Company? A. Yes, sir. 20
- Q. You have nothing to do with the manufacturing of the candy? A. No.
- Q. Where did you get your experience or information as to the market prices? A. From the office.
- Q. Then the testimony that you were going to give would be the amount that you as salesman were allowed to sell Heide's candies to your customers for, is that it? A. I am not allowed to sell any amount; I sell anything that they want to buy. 30
- Q. But the prices were fixed by the office? A. According to the market.
- Q. How do you know that they are fixed according to the market? A. I know that because they change so often with the market.
- Q. Just answer my question; you get a price list from the Heide people, do you not? A. Yes.
- Q. And you must follow that price list? A. Yes.
- Q. If you go to a customer and he wants to buy Big 5 gumdrops of the Heide manufacture, you got 40

*Peter J. Burke—Direct.*

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to sell it to him at the price that they have given you? A. Exactly.

Q. You don't know what somebody else might sell those for, do you? A. It is none of my business.

10 Q. All you know is what the Heide Company price is? A. Yes, sir.

Mr. Burtis: I object to this man, as to his qualifications to qualify as to the market price of gumdrops.

*By the Court.*

Q. Do you know anything about the price of these articles outside of your own manufacture?

20 A. Yes.

Mr. Burtis: He just said he didn't.

The Witness: You just asked me about the price paid and I said it was none of my business.

*By Mr. Burtis.*

30 Q. I asked you if you know what other people were selling Big 5 gumdrops for and you said you didn't know. A. No, I did not. I didn't get that right, possibly.

Q. I ask the stenographer to go back and read the last question that I asked him.

(The answer was read to the witness as follows: Q. All you know is what the Heide price is? A. Yes, sir.)

Q. Have you ever bought any gumdrops in the open market? A. No, I have not.

40 Q. Do you know what the price of gumdrops in the open market was in 1914? A. Yes, 26 cents.

*Peter J. Burke—Direct.*

Q. Is that Heide's price? A. Yes.

Q. Can you tell me any other firm that was charging 26 cents in October and September, 1914?

A. I don't think that I can recall that.

Q. Didn't your firm ever sell the United Candy Company in October and September, 1914? A. I won't swear that they sold them gumdrops in that particular month. 10

Q. You are selling to them now? A. Off and on all the time.

Q. Now you are selling to them? A. I have been selling to them for the last few years.

Q. What are you selling them now for? A. 26 cents.

Q. Isn't it a fact that the market price now is the highest it has ever been for the last few years? 20

A. No, sir; it is not.

Q. Doesn't the market price depend upon the trade conditions? A. Not always, no.

Q. Hasn't it a great deal to do with it? A. No more than corn products mostly.

Q. And aren't they higher to-day than they were for the last two years? A. No; about the same thing.

Q. Was the price any different in August, 1914, and September, 1914? A. Why, the price from August 22nd to about October 12th was about 26 cents, then it dropped to 25. 30

Q. That is Heide's price? A. Yes.

Q. What is it that causes you to so forcibly remember the prices in 1914 between those dates?

Mr. Levitan: I object to that as improper cross-examination. The purport of this examination is to test this man's ability as an expert.

The Court: I will allow it. 40

*Peter J. Burke—Direct.*

Q. Do you know the Novelty Candy Company?  
A. Yes, sir.

Q. Are they a big concern? A. Well, fairly big.

Q. They sell Big 5 gumdrops? A. Yes.

10 Q. If they sold 250 boxes of 5-pound Big 5 gumdrops at 18 cents a box in August, 1914, were they selling at the market? A. No, sir.

Q. Then they were giving them away, were they? Do you know S. Fischer & Company?

Mr. Levitan: I object to that.

Q. Do you know S. Fischer & Company? A. Yes, sir.

Q. Do they deal in Big 5 gumdrops? A. Possibly they do.

20 Q. Then in October, 1914, if they sold Big 5 gumdrops at 24 cents would they be giving them away?

Mr. Levitan: I object to that as improper examination.

Q. Were they selling below the market? A. Why, I don't know how they regulate their prices.

Q. I am asking you whether they were selling below the market if they sold at 24 cents? A. I would figure it that way.

30 Q. Do you know the Two-Star Confectionery Company? A. Yes.

Q. They are one of the largest dealers in Big 5 gumdrops, aren't they? A. No.

Q. But they deal in them? A. Yes.

Q. In large quantities? A. In some places, yes.

Q. I show you Exhibit P-3 and call your attention there to Big 5 gumdrops at 19 cents a box, and that is in September, 1914; were they selling under the market? A. Yes, sir.

40 Q. Then everybody except Heide in September and October and August, 1914, were selling below

*Peter J. Burke—Direct.*

the market, weren't they? A. They weren't figuring their goods.

Q. Who fixes the market prices—the Heide Company? A. No.

Q. Do you know the Arlington Candy Company on Paterson Avenue, West Hoboken? A. Yes, sir.

Q. Do you know the Novelty Candy Company? A. Yes, sir.

Q. I show you a bill of the Novelty Candy Company and to that, Big 5 gumdrops at 18 cents a box; were they selling below the market? A. Yes, sir.

*By the Court.*

Q. Is there any difference in the quality of gumdrops? A. There is no large difference.

Q. They just differ in price? A. Well, there is a difference in the way the goods are put up; they are put up in cheaper boxes and packed up by cheaper people, packed in a cheaper way; gumdrops would not vary much one way or the other in quality; these people don't figure; I find it as a rule, my experience is, that the majority of those manufacturers used the gumdrops as a leader; they practically give them away in order to get other business; that is the whole thing in a nutshell.

*By Mr. Levitan.*

Q. Without any regard for the market price? A. Yes, sir. We have an instance of where the market price to-day is 26 cents—if this evidence is any good here—the Novelty Candy Company is filling some orders at 21 and 22 cents. What is their idea? In order to get business in their other lines, they are really giving goods away at a loss, as an inducement.

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*Peter J. Burke—Direct.*

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*By Mr. Burtis.*

Q. Can you give me the name of one other manufacturer of Big 5 gumdrops that in September and October, 1914, was charging 26 cents a box? A. I don't think I can, because as a rule it is pretty  
10 hard to keep track of these bills and prices; we have to depend on the jobber.

Q. The only one that you can tell me is Heide that you know of? A. That I can recollect at this time.

*By Mr. Levitan.*

Q. How many gumdrops does Heide sell in a week, as compared with those other dealers? A. We probably turn out as many as any of the lead-  
20 ing concerns.

Q. Would the selling price billed on a bill in September be any criterion of the market price at that time? A. No; we change according to the market.

Q. Is it customary in your business to buy goods in advance and bill them at a later date according to the prior prices? A. No, sir; we do not do that.

Q. You don't do that? A. No.

Q. Do you know whether other houses do that? A. I believe they do.

30 Q. In this case the prices billed in September would be according to the prices at the selling date, August or whatever time prior to that the order was taken?

Mr. Burtis: I object to that.

The Court: I think I will overrule the question as relating to this particular instance.

Mr. Levitan: Exception.

*Peter J. Burke—Cross.**Cross-examination by Mr. Burtis.*

Q. As a matter of fact, in 1914 you were employed as shipping clerk with Heide, weren't you?

A. No, sir; I was not.

Q. How long is it since you gave up that position as shipping clerk with Heide? A. Why, I have been salesman now for six and a half years. 10

Q. And before that you were shipping clerk? A. A. I was, yes.

Q. And as salesman, as I understand it, you are given, from day to day or week to week, a sales slip or price slip according to the market, and you have no discretion whatever in changing those prices? A. No, I don't make any of the prices; the house does that.

Q. If you come in to me and solicit an order, you have got to sell at the prices on that sales slip? A. Exactly. 20

Q. So that there is no occasion for you as a salesman for Heide to familiarize yourself with the market conditions at all, is there? A. Oh, yes, there is.

Q. Where, if you have no discretion? A. Don't you suppose we talk over those things at the office?

Q. You don't fix prices, do you? A. I know, but I have always to report to my house the prices of other houses and we go over the figures and we see where we are. 30

Q. You have to report prices to them? A. Always.

Q. And you have invariably been under the Heide's price, haven't you? A. Sometimes.

Q. Haven't they always been so? A. I wouldn't say that.

Q. Can you tell me the name of one single house that has ever charged more for Big 5 gumdrops than Heide? A. Yes. 40

*Peter J. Burke—Cross.*

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Q. Who? A. I got one, I believe, one in Brooklyn, who charged 27 cents.

Q. Tell me the name? A. W. W. Debevoise, I believe.

Q. Is that the first quality? A. Yes, some.

10 Q. And that is the first time you found any house charging more than Heide? A. I wouldn't say that.

Q. Can you point me to one other instance of any other house charging more than Heide? A. I wouldn't say that; I have no case right now.

Q. Because that is the only one? A. Well, we have one with the Novelty Candy Company. They are asking 28 cents for sugar roller tenners gumdrops.

20 Q. I am asking you about Big 5. A. That is in the same list.

Q. Have you got your price list for August, September and October, 1914? A. No, sir; not here.

Q. Is it in existence? A. Yes, sir; I got a little memorandum.

Q. Were you subpoenaed to come here? A. Yes, sir.

Q. You knew for what purpose they wanted your testimony? A. I found it out Tuesday morning.

30 Q. You knew that you were to testify as to the value of Big 5 gumdraps in September and October, 1914? A. Yes, sir.

Q. And yet you did not bring this price list? A. I looked it up on a memorandum.

Q. You did not think it worth while to bring the original? A. No.

Q. Didn't you know that the memorandum you have in your hand would be of no value here? A. Well, I am talking under oath here, and I swore that the price was 26 cents.

40 Q. Henry Heide packs all its goods in tin boxes, doesn't it? A. No, sir.

*Peter J. Burke—Cross.*

Q. Well, they pack them in better boxes, don't they, than the other fellow? A. Paper boxes only.

Q. Any better ones? A. I believe they are packed up better, as I said, and tied better.

Q. And done up more tastily, and that adds to the cost, does it not? A. I believe it does, yes. 10

Q. So that that accounts for the difference in the price, does it not, between Heide and the others? A. Well, I should think that has got to be taken into consideration.

Q. That should be taken into consideration? A. Yes, sir.

Q. So that Heide's prices are not a fair criterion of the market value? A. I would not say that.

Q. Unless one takes into consideration this better packing and better quality of boxes? A. Well, we have always made it an object in our house to put everything out in good condition. 20

Q. To do everything better than the other fellow? A. Yes.

Q. It has always been the boast of Heide that they put out goods a little better than the other fellow? A. In better condition.

Q. And for that reason they charge a little more? A. I wouldn't say on all; we have on some things.

Q. In 1914 you charged a little more? A. We charged 26 cents. 30

Q. And you charged more than the other fellow? A. According to the market value, yes.

*By Mr. Levitan.*

Q. And the prices that you charged were the market prices at the time? A. They were regulated according to the market at that time.

Hearing adjourned to June 30, 1916, at 10 A. M. 40

*Benjamin D. Widang—Direct.*

Jersey City, June 30, 1916.

Hearing resumed this day at 10 o'clock  
A. M.

BENJAMIN D. URDANG SWORN.

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*Direct examination by Mr. Levitan.*

Q. Mr. Urdang, where do you live? A. Jersey City.

Q. What street and number? A. 206 Ogden Avenue.

Q. You are an officer of the United Candy Company? A. Yes, sir.

Q. Do you know Mr. Bockian? A. Yes, sir.

20

Q. Do you remember the occasion when this contract had been signed, the contract between Bockian and the United Candy Company? A. Yes, sir; September 8th.

Q. What happened after the contract was signed?  
A. Well, he say that is for three weeks—

30

Mr. Levitan: Just pardon me one minute. If your Honor please, just to give an outline of the facts in the case, so that your Honor can get the gist of it. The suit, your Honor recalls, is for damages for breach of this contract; they claim on a series of items under this contract we overcharged them for gumdrops and lollypops, and the contract provides that we are to charge one cent over the market price. Our contention is that we charged them one cent over the market price; and the second contention on the claim in this case is for \$450, \$225 being for liquidated damages and \$225 on the note; our defense as to the note and the damages is that they

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*Benjamin D. Widang—Direct.*

are the same thing, that the \$225 as liquidated damages and the note are the same; in fact the note was given as liquidated damages.

Q. Now, Mr. Urdang, after the contract was signed what happened? A. Well, he was supposed to me, Mr. Bockian that made the agreement with us, that he was supposed to be with us for one year after we bought his shares, when we bought his shares he went to work with us again as sub-jobber— 10

Q. Never mind that; just tell us after this agreement was made what happened. A. This is why the agreement was made, because we wanted him to stay with us and to remain as a sub-jobber with us. 20

Mr. Burtis: I object to that on the ground that the contract speaks for itself.

The Court: Yes.

Q. Well, what happened after the contract was signed? A. What happened after the contract was signed, after three weeks, you know when he was with us, he left us and he started in business for himself. 30

Q. Did you sell him the candy in accordance with the terms of the contract?

Mr. Burtis: I object to that on the ground that it is not proper proof whether they carried out the conditions of the agreement.

The Court: He can tell what he did.

Mr. Levitan: I will withdraw that question.

Q. What did you do after the contract was signed? A. After it was signed, well, he was to 40

*Benjamin D. Widang—Direct.*

take out goods from us and I used to put in the book——

Mr. Burtis: I object to that on the ground that to show what was charged they ought to produce their books and they will show.

10 The Witness: Well, the book is right here in the office.

Q. Did you make any entries of the transactions between you and Mr. Bockian in that book? A. Certainly, I used to make them.

Q. Where is that book? A. That book was only a memorandum book like for sub-jobbers and at the end of the week when it is made up we can throw it away.

20 Q. Where is that book? A. It is in the court here; it was in the same book when Schuchman was in the same case; it was a memorandum book and we used this for different purposes after. You see, this was in the store, and the memorandum book, the account was in that book, and after this one was mislaid right here in this court.

Q. What prices did you charge Mr. Bockian?

Mr. Burtis: I object to that.

30 A. According to the agreement.

Mr. Burtis: I object to that on the ground that it is improper proof.

Q. What are your specific duties with the United Candy Company? A. I am in this line of business seven years already.

40 Q. What is your part of the business? A. My part of the business, I look over bills and I am signing checks, looking over sub-jobbers and mark down sub-jobbers' prices, and after we start we try

*Benjamin D. Widang—Direct.*

to figure out what he will have to pay, you see, I have to figure that, I give him the bottom figure on the payments, and I give him the book and he makes a check and pays the balance.

Q. You are also an officer of the United Candy Company? A. I am president and secretary.

10

Q. Who had all these dealings with Mr. Bockian? A. Well, he had dealings with everybody, only personally I used to mark down when he was to take the goods and I used to mark down in the book when the week is over, and he used to look over the book like everyone; we have more sub-jobbers, but everyone looks over; in the week time everybody is busy, they are going out for orders, and they only come in and take the orders and it is marked in and I put on the prices; then at the end of the week, Saturday, everybody comes in to pay, we have such customers like these, they straighten up what is credited, cash collection wagon collections, you know, we used to deliver, too, and if they pay anything, everything we put in the book, and then when the week is out we check them out and receive the balance; that is all it is.

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Q. Now, Mr. Urdang, did you buy any goods during the months of September and October, 1914?

A. Yes, sir; in September I bought goods.

30

Q. Did you buy lolly-pops? A. Well, yes.

Q. Did you buy gumdrops? A. Yes.

Q. At that time were you familiar with the market prices? A. Yes, sir.

Q. How much did you charge Mr. Bockian? A. A penny a box above the cost price, that is, above the market price.

Q. Did you ever charge him any more than one cent? A. Not a cent.

Q. At any time? A. Why should I do that; because he was a good customer and we would make

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*Benjamin D. Widang—Direct.*

on him a thousand dollars that year, we would make \$25 some weeks; what is the use of overcharging a man; you can gain 50 cents a day and lose a good customer like this; it is foolishness. Even he had to say all right, "Is this the prices?" this way, he wouldn't believe it, and he used to take the bills and see these prices on Saturday night when he used to pay. I used to show him the book to convince him and I say, "Here is the bill, so that you witness that I won't overcharge you," and when everything was all right he paid; that is all.

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20  
Q. Did he ever object, Mr. Urdang, that you were overcharging? A. I never heard him do that, because he had no ground to do that, I was trying to treat him right and I was trying the best for him; he was only two or three weeks with us; with a plain customer, an ordinary customer you would make \$2 a week, and I would not try to do him like he claims; we wanted to keep him as a customer, he was a good customer.

Q. If he remained with you folks you were going to make a profit on him? A. A profit about \$1,200. At least a thousand dollars in a year.

30  
Q. During the few weeks that he was with you you sold quite a good deal of goods to him? A. Yes, we sold about \$350 or \$400, and the pennies and two cents amounts to a large lot.

Q. Did he ever notify you that he was going to quit? A. He came on Monday and he took in the orders; he says, "Boys——"

Q. What Monday was that, do you know? A. That was the Monday before he left; it was about the 3rd. He picks up——

Q. What day did he leave? A. He left on the 3rd, I think.

40  
Q. How many days before he left did he have any talk with you? A. He never had any talk; he came

*Benjamin D. Widang—Direct.*

in and asked me yet, he says, he was on good terms yet, he says, "Will you allow me to be in your place Tuesday and order goods?" I says, "What is the matter?" He says, "I am going to start in for myself," that the salesman don't know him and don't know their place; he called only one day, and that was Tuesday, he used to come to me and he was asking me I should allow him to do that; I say, "No, I tell you right straight," I say, "No, because you don't do right; you agreed to stay with us for one year, you broke your contract; what notice is that; and it is not nice, anyhow." He said it was his intention to go in business right away, only he couldn't do that.

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Q. On Tuesday did he have any further talk about leaving? A. Not leaving, no. He says he is going in business for himself and that is all. We have another partner yet, and he shook hands with him yet; and he said, "I suppose, George, you have nothing against me and I like everything."

20

Q. Was anything said at that time about the note? A. Well, Mr. Lichtman told him.

Q. Were you there at the time? A. Yes.

Q. What did you hear Mr. Lichtman tell him? A. He is president of the corporation.

Q. Tell us what you heard? A. Mr. Lichtman told him, "Bockian, you know that that agreement we have with us is for one year; now, just figure it up if it is possible for you to lose \$225 to go in business for yourself"; he says, if he will go in business for himself he will make a thousand dollars, and what he makes it is clear profit, besides, he says, maybe he will work up his business more and more and he will take in sub-jobbers like we are doing, and in this way start in to make money, and then he could afford to lose \$225, because he could make more than that. You can't keep the man back.

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*Benjamin D. Widang—Direct.*

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Q. Did Mr. Lichtman tell him——

Mr. Burtis: Don't lead.

Q. Did you hear Mr. Lichtman say anything else to him? A. No, I don't remember; it is two years already.

10 Q. Bockian testified that he demanded his money, and that it was refused? A. Demanded his money?

Q. Yes. A. How can he demand his money?

Q. Did he ask for any money at any time? A. Never.

Q. Did he say anything about being entitled to \$225? A. No.

Q. Or any other sum? A. What he said was, he says, "I am willing to leave \$225," and he knew that he was going to lose \$225 by leaving the United Candy Company; he says it pays him to lose \$225, because he will make three or four times as much; he says we make money on him and right away he will take in sub-jobbers, they will pay the rent, and he pays only \$15 and \$12 rent.

20

Q. How much wages did Mr. Bockian draw at the time of the incorporation? A. First, we started off with \$20, and when he left he had \$22.

Q. Were the profits ever figured up by the corporation and found to be a hundred per cent.? A. Oh, no.

30

Q. Did you ever know that they declared any dividend? A. This corporation has no dividends anyhow, because we have in our corporation minutes which says after \$10,000 it is no dividends; we have the minutes right here.

Q. Mr. Bockian testified that the corporation declared a dividend, which was over 100 per cent. A. We can't declare no dividend, because it is up to \$10,000 no dividend; even if it is \$9,000 we can't declare no dividend. Another thing is, the first

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*Benjamin D. Widang—Direct—Cross.*

year we were in business we did not make a cent; to start in business, fixtures cost money and you have to buy horses and everything when you start in, then you can't figure up profits, because all business is credit business.

Q. Did you have any other conversation with Mr. Bockian, other than what you stated to the Court? 10

A. No.

*Cross-examination by Mr. Burtis.*

Q. If I understand correctly your testimony, if Mr. Bockian had remained with the United Candy Company for a year, you figured that the profits to the United Candy Company would be over \$1,200?

A. Would be a thousand or \$1,200. 20

Q. And possibly more than that? A. If he would sell more we would make more.

Q. And that you figured on a basis of charging one cent above the market? A. At one cent and two cents and three cents.

Q. That is, if you had charged him according to the terms of the contract? A. Yes, sir.

Q. So that if you charged him two or three cents above the market your profit would have been two or three times greater, wouldn't it? A. Why? 30

Q. Well, if you did make \$1,200 legitimately under the contract, and you overcharged him two or three cents, you would make two or three times that profit, wouldn't you? A. What do you mean?

Q. If you make \$1,200 a year charging one cent above the market? A. Yes.

Q. And if you charged three cents above the market you would charge three times? A. I suppose it is like you say.

Q. In your opinion the cost to the United Candy Company of this candy was the market price, is that it? A. Yes, sir. 40

*Benjamin D. Widang—Cross.*

Q. So that in all your testimony there is no distinction between the cost price and market price, is there? A. No, it is the market price; it is not the cost price.

10 Q. They are one and the same thing? A. It is not the same thing.

Q. Well, in your testimony did you mean to have them as one and the same thing? A. No, not the cost, the market; that means the market price that I would have to pay; for instance, I buy to-day an article which is worth 10 cents, and to-morrow it is worth 15 cents, that means the cost, and I have to charge him 16 cents, that means the cost, the market it is 15; that means the cost and 1 cent a box above cost.

20 Q. What was the market price of Big 5 gumdrops in the month of August, 1914? A. I don't know how much was the market at that time, you know, when I put on the cost and everything—

Q. You don't know; do you know or do you not? A. All right.

Q. Do you know or do you not? A. I don't know how much the market price was at that time; I didn't have to know that.

30 Q. Do you know what the market price of Big 5 gumdrops was in the month of September, 1914? A. I don't know, only by finding out through having the gumdrops; I had to find out about them gumdrops that it was 26 cents; before Mr. Bockian started in I didn't know, I didn't keep any records, he didn't even pay last week's bills or anything.

Q. Just answer my question. Was there any marked increase in the price of Big 5 gumdrops from August 1, 1914, to October 1, 1914? A. Yes.

40 Q. What was that increase? A. It was a big increase.

*Benjamin D. Widang—Cross.*

Q. How big? A. Well, I think it was 25 or 20 per cent., I don't know how much; at that time gumdrops was very high.

Q. Let us have it in pennies? A. About 5 or 6 cents above.

Q. If you don't know what the market price of Big 5 gumdrops was in August, how can you testify there was an increase? A. Why, I find out; I must find out them gumdrops, how much it was, and I would go according to that; from Heides there, the cost, I don't know that. 10

Q. Well, then, your testimony now is that the market price in September was 26 cents is based on information that you obtained from Heides; is that it? A. Yes, sir.

Q. And nothing else? A. Nothing else; I don't know anything else. 20

Q. I show you a paper, and ask you if that is a signed bill to the United Candy Company from the Novelty Candy Company? A. Yes, sir.

Q. Did you pay that bill? A. I don't know.

Q. I call you attention to the fact that on August 27th, and practically the first of September, that you paid 18 cents a box for Big 5 gumdrops.

Mr. Levitan: I object to that on the ground that the price in August is no criterion of what the price was in September. 30

Mr. Burtis: This was three days before.

Mr. Levitan: That makes no difference; the market is fluctuating every day.

The Court: I think I will hear the testimony.

Mr. Levitan: Your Honor will note my objection.

Q. Will you swear that on the 27th of August, 1914, the United Candy Company did not buy 250 40

*Benjamin D. Widang—Cross.*

five-pound boxes of Big 5 gumdrops at 18 cents a pound from the Novelty Candy Company?

10 Mr. Levitan: I object to that as irrelevant and immaterial, for these reasons: in the first place, whether we bought 10,000 boxes in August, the issue here is what the market price was at the time we sold these gumdrops to Bockian.

Mr. Burtis: I now offer this bill in evidence.

Mr. Levitan: I object to that as incompetent, immaterial and irrelevant.

The Court: Well, I think that this may be received; it may be some evidence of the value.

20 Mr. Levitan: Your Honor will note my objection.

Q. Do I understand you to say that at no time while Mr. Bockian was buying from the United Candy Company did he ever complain about the prices that you were charging him for this candy?

A. Never.

30 Q. This testimony then that he checked off this book, the items, and called them to the attention of the United Candy Company is not true, is that it?

A. No, not true; I testified no.

Q. You were the only one representing the United Candy Company that ever had any dealings with Bockian as to the prices that were charged? A. Yes, sir.

Q. So that if he had made any complaint to anybody it would have been a complaint made to you, is that right? A. To me.

Q. I am right in that, am I? A. Yes, sir.

40 Q. Then the first intimation that you had that he was leaving the employ of the United Candy

*Benjamin D. Widang—Cross.*

Company was on the 3rd of October, when he quit?  
A. Yes.

Q. For no reason whatsoever? A. No, no reason whatsoever.

Q. He did not complain to the United Candy Company from the date he started buying under this contract until this Monday morning, the 3rd of October, when he simply said, "I am quitting"?  
A. Exactly. 10

Q. Then when he said that Mr. Lichtman said, "You lose your \$225"? A. Yes.

Q. And he said he was willing to lose it? A. That is right.

Q. And he walked out? A. He didn't walk out; he packed his orders.

Q. And that is the last order that ever was taken by him from the United Candy Company? A. Yes, sir. 20

Q. Yet you knew when he walked out like that that the United Candy Company was losing a profit of \$1,200? A. Well, if he is not with us we can't help it; that is a customer.

Q. You knew that? A. What do you mean?

Q. You knew that you were losing \$1,200 if he walked out? A. We would make that if he stayed with us, we would make so much. 30

Q. And if he quit you would lose it? A. If he leaves us it is all right, if we lose a customer, we lose him, that is all.

Q. You knew on the 3rd of October that you were going to lose about \$1,200? A. I don't know how much; maybe his business dropped off, you know, or maybe his business would be more; I can't tell that; only if he would be with us we would make it, that is all.

Q. As a matter of fact, he was selling more candy than any other sub-jobber in the United Candy Company, wasn't he? A. Well, yes. 40

*Benjamin D. Widang—Cross.*

Q. I show you a paper marked P-7, and ask you if you ever saw that paper, or some similar to it?

A. No, I don't remember.

Q. Look at it. A. I see it.

10 Q. You never saw a paper like that? A. Well, we did take stock, I don't remember if this was the figures.

Q. Look those figures over and tell me if those are not the figures when you took stock? A. I couldn't tell you.

Q. Have you anything in the books of the United Candy Company that would show whether these figures are correct?

Mr. Levitan: I object to that as irrelevant.

20 A. I don't know.

Q. Isn't it a fact that on the 25th of July an inventory was taken of the amount of business, stock, etc., and assets on hand of the United Candy Company, and subtracted from that the liabilities, and it showed that there was a net profit of \$2,179.60?

30 Mr. Levitan: I object to that on the ground that it is wholly irrelevant and immaterial. The contract shows that it was executed on the 8th of September, almost two months after that transaction, if there was such transaction, and it has no relevancy whatever to the issues here.

The Court: Well, how is this important?

Mr. Burtis: Showing the value of the stock. If your Honor will recall, the plaintiff testified that he had made up this inventory and arrived at the amount of the profits, and that was divided into three parts.

40 The Witness: There were four; I beg your pardon.

*Benjamin D. Widang—Cross.*

Mr. Burtis: They divided it——

The Witness: Into four parts.

Mr. Burtis: I am talking to the Court; suppose you keep your mouth shut until questions are asked. Which would be \$700 apiece, plus the \$800 which he invested would make \$1,500 and he sold his eight shares for \$1,200 or \$1,225, something like that. This gentleman has sworn on his direct examination there weren't any profits, and now I am trying to attack his credibility on that point. 10

The Court: You may do that.

Q. Now, isn't that a fact, that there was \$2,179.60 profit? A. No, I don't know anything. 20

Q. Have you got any books here by which you could refresh your memory as to what profits there were on the 25th of July, 1914?

Mr. Levitan: I object to that on the ground that it is irrelevant and immaterial to the issues.

Q. Have you got your inventory book here? A. No, sir.

Q. Who has charge of the inventory book? A. 30  
The inventory book is in the store; we used to take only a temporary inventory, not to show anything.

Q. Now, with the notice to produce that was served upon you, you were required to bring with you that book? A. What kind of book?

Q. The inventory book.

Mr. Levitan: I object to that. I don't think the notice required any inventory book; and I further object to it on the ground that it is wholly irrelevant and immaterial to this issue. 40

*Benjamin D. Widang—Cross.*

The Court: How could that affect the issue in any way?

Q. Have you with you to-day your books of account of the United Candy Company? A. What accounts?

10 Q. Have you here to-day the books of account of the United Candy Company? A. Mr. Bockian's, I think, I have.

Q. I didn't ask you for that account; suppose you listen to what I ask you. Have you all the books of the United Candy Company here to-day? A. Yes, sir.

Q. Where are they? A. (Witness produces ledger sheet.)

20 Q. So this paper that I hold in my hand is all the books of account of the United Candy Company? A. This is the transactions what we had with Mr. Bockian, and it is posted in that book what is up in your Honor's office yet; this is the only transaction we had with Mr. Bockian.

Q. Are you feeble minded? A. What do you mean, feeble minded?

Q. Are you weak minded? A. I don't know what that is.

30 Mr. Levitan: I object to that. They cannot, in this case, compel us to bring down here our private books showing transactions with other creditors and other customers; they cannot pry into our affairs in this way by notifying us to produce books here which have no relevancy whatsoever to this issue.

Mr. Burtis: We are not trying to pry into your private affairs at all.

*Benjamin D. Widang—Cross.**By the Court.*

Q. Is this leaf that you produce here the only record that you have of these transactions? A. Yes, sir; that shows how much he bought and how much he paid; the other book that was lost contained all the items.

10

*By Mr. Burtis.*

Q. You understand English, don't you? A. A little bit.

Q. Well, now, see if you can understand this question: Have you here to-day all the books of account of the United Candy Company?

Mr. Levitan: Don't answer that; I object to that as irrelevant and immaterial.

20

The Court: Well, I think he may answer that yes or no.

A. No, sir.

Q. Have you any book here to-day which would show the profits, if any, that were made by the United Candy Company up to the 1st day of September, 1914?

Mr. Levitan: I object to that as wholly irrelevant and immaterial, whether or not we made any profits.

30

The Court: You may answer the question.

Mr. Levitan: Exception.

A. No, sir.

Q. Have you with you to-day the bills which you paid for candy in the months of September and October, 1914?

Mr. Levitan: I object to that as irrelevant and immaterial, on the ground that what we

40

*Benjamin D. Widang—Cross.*

paid and what those bills contained would not be a criterion of the market prices.

The Court: I think it might have some reference to the market price.

10 A. No, sir.

Q. So that you have no way——

Mr. Levitan: Just a moment, if the Court please, I think the question is improper on this ground, that we have bought goods in September——

Q. I show you a paper, and ask you if that is in your handwriting? A. Yes, sir.

20 Q. That is one of the bills of the United Candy Company to Bockian, isn't it? A. Oh, yes.

Q. Under the contract? A. Yes.

Q. I call your attention to this item here, where you are charging 27 cents a box for Big 5 gumdrops? A. Yes, ten-for-a-cent gumdrops.

Mr. Burtis: I offer that in evidence.

Q. I show you another paper; is that in your handwriting? A. Yes, sir.

30 Q. That is a bill to Bockian under the contract? A. Yes, sir.

Q. On September 29th? A. Yes, sir.

Q. I call your attention to where you are charging 27 cents again for Big 5 gumdrops? A. Yes, this was the market price.

Mr. Burtis: I offer that bill in evidence.

Q. Those bills have been paid? A. I don't know; this is my writing all right.

40 Q. Those are bills which you rendered to Bockian from time to time under the contract, aren't they?

A. No—well, sometimes we had a book there.

*Benjamin D. Widang—Cross.*

Q. Where is the book? A. The book is right here in court.

Q. That is the book that is lost? A. Yes, that is lost.

Q. These papers that I show you would be accurate copies of the items that are in that book, would they not? A. Well, I couldn't tell; this is my writing, and this is everything, I don't know what you mean; this is all right; this is my writing. 10

Q. I show you another one; that is in your writing, isn't it? A. Yes.

Q. I call your attention to the fact that there you are charging 43 cents a box for lolly-pops, aren't you? A. Yes.

Q. I show you another one; that is in your handwriting? A. Yes. 20

Q. There you are charging 27 cents for gumdrops? A. Yes.

Q. These are all in your handwriting? A. Everything, this is mine.

Q. Did you copy these from the book or did you copy into the book from these? A. I don't know; I don't remember.

Q. Well, now, which would come first, the book or this slip? A. Well, sometimes we used to make it in the books. I don't know how that happened he has these bills. 30

Q. You are surprised that he has these bills? A. Well, I am surprised. Maybe I couldn't find the book, well, then I put it in here this time and we mark it down from here.

Q. Then I take this to be the fact, that either you copy this paper from the book, or you copy into the book from the paper, one or the other?

Mr. Levitan: Don't answer that. The witness said he doesn't know. 40

*Benjamin D. Widang—Cross.*

Q. Let me refresh your recollection; didn't Mr. Bockian demand of the United Candy Company, through you, a copy of the items on this book? A. I don't know.

10 Q. And didn't you, in order to furnish him with that copy, copy off these slips—and I show you this paper, and ask you if that is not where you signed "Paid in full"? A. No, sir. This is not my signature "Paid in full"; I beg your pardon.

Q. That is not in your handwriting? A. No.

Q. All the rest of the paper is in your handwriting? A. Yes.

Q. But the signature? A. No.

Q. What is that "W"? A. I don't know.

Q. Or is it a "U"? A. No, sir.

20 Q. Just write "Paid, U." on that paper. A. (Witness writes as directed.)

Mr. Burtis: I offer all these slips which have been identified by the witness as being the items charged to the plaintiff under the contract in evidence.

30 Mr. Levitan: I object to them, on two grounds; in the first place, they are not offered at the proper time and should have gone in on the direct case of the plaintiff; and secondly, on the ground that they are not paid.

The Court: Well, I think I will allow them.

Mr. Levitan: Your Honor will note my objection.

(All the slips were thereupon marked as one exhibit and numbered P-11.)

*By Mr. Levitan.*

40 Q. Mr. Urdang, how often would the wholesale price for candy and gumdrops and lolly-pops change in the market?

*Benjamin D. Widang—Cross.*

Mr. Burtis: I object to that as improper redirect.

The Court: He may answer it.

A. Well, the prices would change sometimes every day and sometimes every week, and sometimes it is six months all the one price. It is not only lolly-pops and gumdrops; it is the whole line of business. Even last week was 26 cents and this week is 28, the same thing, the same gumdrops. 10

Mr. Burtis: I move to strike that out.

Mr. Levitan: I think that that is part of his answer.

The Court: I think that that may be stricken out. 20

*By Mr. Burtis.*

Q. All your testimony here to-day as to the changes in the market price during the months of September and October, 1914, is based upon information which you recently got from the Heide people? A. No, from the order, who took our order, Heide or somebody else, you know.

Q. What they told you? A. Not what they told me, if I paid it black and white, you know, they take it from the books. 30

Q. You went to the Heide people and looked at their books? A. I don't look; you can't look in Heide's books; they have special men, and that man tends to it.

*By Mr. Levitan.*

Q. Heide's have a special man and he attends to that? A. He tends to every bill what comes in in the place and it don't go out before he checks it up; he checks off the prices, and he says the price 40

*Benjamin D. Widang—Cross.*

is so much and he has to charge so much, and he keeps on the record every day how much they charge and they have a statement every day, a different slip.

10 *By Mr. Burtis.*

Q. This is the man that showed you those slips?

A. For Henry Heide.

Q. What is his name? A. I didn't have to ask him any name, I asked him for the information.

Q. Then you went over there and saw this man?

A. Yes.

Q. And he had these slips? A. Yes.

Q. And he showed you these slips? A. Yes.

20 Q. And from what he showed you on those slips you have testified to to-day, is that it? A. He don't show the slips; I sent in and he says he will look it up, he is in a hurry, and he will send a bill, and he did send it by mail.

30 Mr. Burtis: Now, if your Honor please, I move to strike out from the record every bit of the testimony of this witness fixing the market value and cost price, etc., of the articles in question during the months of September and October, 1914, on the ground that it is pure hearsay, based, as he testified on the last part of his examination, on information furnished him from an unknown man in the employ of Henry Heide, and he sent the information through the mail.

The Court: Yes, I think that it is very doubtful testimony, but I will let it stand and consider it for what it is worth.

Mr. Burtis: Exception.

*Nathan H. Lichtman—Direct.*

NATHAN H. LICHTMAN SWORN.

*Direct examination by Mr. Levitan.*

Q. Mr. Lichtman, where do you live? A. I live at 144 Bowers Street, Jersey City.

Q. What is your business? A. Wholesale confectionery. 10

Q. You are an officer of the United Candy Company? A. President.

Q. What office do you hold? A. President.

Q. Do you know Mr. Bockian? A. Yes.

Q. Do you remember the time this contract was made between Mr. Bockian and the company?

A. Yes, sir.

Q. What happened after the contract was made?

A. Well, he took orders from the 6th of September until the 3rd of October. 20

Q. Just one minute; at the time the contract was made was there a note executed with the contract?

A. Yes.

Q. I show you a note which has been marked in evidence P-2, and ask you if that is the paper? A. Yes, that is the note.

Q. Will you explain to the Court what the circumstances were under which this note was given? 30

Mr. Burtis: I object to that on the ground that the contract speaks for itself, and on that point no parol evidence can be offered as to why that note was given; the contract is clear and explicit.

The Court: I think he will have to stand on the contract as to the character of that note.

Mr. Levitan: Exception.

Q. Now, Mr. Lichtman, after the contract was signed what happened? A. Mr. Bockian started to 40

*Nathan H. Lichtman—Direct.*

take orders with us from the 6th of September until the 3rd of October.

Q. Then what happened? A. Then he left, went away.

10 Q. What specific duties are yours in the company? A. I don't understand what you mean.

Q. What did you do in the company? A. Oh, I look everything over, of course, sign checks and look over bills, look all around like, all over, everywhere.

Q. Did you have to talk to Mr. Urdang about these sales?

Mr. Burtis: I object to that as immaterial, what they talked between themselves; that is not binding on my client.

20

Q. I mean with Mr. Bockian? A. No, sir.

Q. Who sold Bockian the goods? A. Well, we all was taking it; he came in and we all would take the orders and put them up on the floor, the way all sub-jobbers does, and we wrote on the goods, that is all.

30 Q. Just tell the Court the manner in which those goods were charged to Mr. Bockian. A. These sub-jobbers would come in, the jobber put the goods up, and whatever he sold, on Monday evening, we generally came in when we would have time, Monday evening or Tuesday morning, and would mark down the goods either on bills or books, whatever that represents to us, and when the week is over, during the week the sub-jobber generally checks over the book and goes over every item and foots it up from where it is to see if it is the right figures and looks over everything, and he gives us a check for the amount, or money.

40 Q. Did this happen with Mr. Bockian? A. Exactly; Mr. Bockian seen it in the week, and also

*Nathan H. Lichtman—Direct.*

he took the book and looked it over where it was figured up, because he used to get some accounts during the week and he did not wait until Saturday.

Q. Did he ever complain or object to the charges?

A. No, sir; never said a word. 10

Q. Did he look over the different items? A. Every time.

Q. Did he have an opportunity to examine every item as charged? A. Yes, sir; he only went on the road three days a week, and he had plenty of time to do so; he went on the road Monday, Wednesday and Friday and he was in the store almost every day.

Q. When he paid a bill did he have an opportunity to examine the charges? A. Yes, sir; he would not pay unless the book was examined. 20

Q. After that what happened? A. After that he went away.

Q. Who fixed the charges or prices that Mr. Bockian paid? A. Mr. Urdang generally used to do that and I would go over it like, look it over; it might have been mistakes on our side, we can't tell, we are no angles and I would go over, and if it is an error I would mark "error," and it may be an error on the other side. 30

Q. What prices did you charge Mr. Bockian for the candies that he purchased? A. According to the agreement.

Mr. Burtis: I object to that.

*By Mr. Burtis.*

Q. Did you sell any goods in the company? A. Yes, sir.

Q. Are you familiar with the prices? A. Exactly. 40

*Nathan H. Lichtman—Direct.*

Q. Of all the goods? A. Exactly.

Q. Are familiar also with the market price of goods? A. Positively. I know that the market goes down and up, because we are always in the market.

10 Q. How do you base your information on the market price? A. We get postal cards from the houses and sometimes a salesman comes in the place and tell us the prices, and maybe in a month or six months it drops; to-day it may be up and the salesman tell us.

Q. And the method of fixing the market price, that is all indicated to the trade in a similar way? A. If we have bought for 26 cents and to-day it is 28 he says that that is the sub-jobbers' price.

20 Mr. Burtis: Never mind what he told you.

Q. When you would charge your candies, or gum-drops, or lolly-pops on the books upon what did you base your charges?

Mr. Levitan: I object to that on the ground that the witness testified that he did not charge it, but that the other witness did.

30 Q. Did you have anything to do with fixing the prices for Mr. Bockian?

Mr. Levitan: I object to that, because he has testified that he did not have anything to do with it.

A. I have to look over these things, I have to look over to see whether it is right or not, I have to look over the bills to see whether or not it is correct.

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*Nathan H. Lichtman—Direct.*

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*By Mr. Levitan.*

Q. When you examined these bills with Mr. Bockian, did you compare them with the market price in accordance with the contract? A. Yes.

Mr. Burtis: I object to that.

Mr. Levitan: It has already been answered. 10

Mr. Burtis: Then I move to strike out the answer.

The Court: Yes.

Q. Now, Mr. Lichtman, on these occasions that Mr. Bockian paid, were you ever present to check up the bills? A. Yes, sir.

Q. On every occasion? A. Mostly; there is only about three occasions; he was only about three weeks with us. 20

Q. Was anything said between you and Mr. Bockian on these occasions? A. Absolutely nothing.

Q. Did Mr. Bockian ever make complaint against any charge to your knowledge? A. None whatsoever.

Q. And the bills were paid? A. Exactly.

Q. He does not owe you any money? A. No, sir; he does not. 30

Q. And he had an opportunity of examining the bills that he paid? A. Exactly, every time he wanted; he would be foolish if he says that, because he examined every time together, he looked over every item and the footing whether it is the correct amount.

Q. You heard Mr. Bockian testify that he paid the bills and he had no opportunity of knowing what the items were, because you did not permit him to see them? A. He did not tell the truth about that. 40

*Nathan H. Lichtman—Direct.*

Q. Now, Mr. Lichtman, when did Mr. Bockian ever talk to you about leaving? A. The day he left, the day I seen him last.

Q. Did he give you a week's notice at all that he was going to quit? A. Nothing of the kind.

10 Q. Did you know that he was going to quit? A. No, sir.

Q. When was the first you found it out? A. After, when he was supposed to come back, I don't know exactly whether it was Monday or Wednesday; I couldn't tell you.

Q. Were you there that day? A. Yes, sir; I am every day in the store.

Q. You are always in the store? A. Yes, sir.

20 Q. Mr. Urdang was there at the time? A. Yes, he was there, too.

Q. What did Mr. Bockian say? A. He says he was going away.

Q. Is that all he said? A. That is all.

30 Q. What did he say? A. Well, I said, "Mr. Bockian, that is not fair," I says, "You have signed a contract, you made us a lot of trouble, you have, we have all the goods for you, we have ordered a thousand dollars or twelve hundred, this is September, this is a perishable month for the candy, you remember," I say, "you have got a contract and you have also a note for \$225." "Well," he says, "the \$225, the way I figure now," he says, "will not amount to anything; I am going to open a store for myself; I don't want to be a sub-jobber this way," he says, "I may lose \$225, still I can make probably a thousand dollars what you are making on me."

Q. What did you say? A. I said, "I can't keep you; there is no way I can hold you." He said, "That is all right," and he went away.

40 Q. Did Mr. Bockian demand any money from you at the time he left? A. Nothing whatsoever; he didn't say a word.

*Nathan H. Lichtman—Direct—Cross.*

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Q. Did he ever ask you for the money? A. No, Bockian did not.

Q. Did you have any other talk? A. No, sir.

Q. Did you see Mr. Bockian after that at any time? A. Very seldom; I saw him, but never spoke to him.

10

*Cross-examination by Mr. Burtis.*

Q. Mr. Lichtman, this contract went into existence about September 6th, did it? A. Made out, yes.

Q. And the last day that Bockian was there was when? A. October 3rd.

Q. Between September 6th and October 3rd you say there was no complaint made by him? A. Nothing whatsoever.

20

Q. So the first intimation that you had he was going to leave was on the 3rd of October? A. The day he left.

Q. Then you had this conversation? A. I had with him the conversation, yes.

Q. Since then you have not had any talk with him whatever? A. No.

CASE CLOSED.

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Mr. Levitan: If your Honor please, I ask for a judgment for the defendant on the grounds urged for judgment of nonsuit, and on the additional ground now that it is conclusively shown by the testimony of the defendants that this plaintiff entered into an agreement and deliberately broke it, and therefore he is not entitled to any damages whatsoever. The condition to be performed by the plaintiff was to be employed for a

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*Motion for Judgment.*  
*James F. McHugh—Direct.*

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10                    year, and that was a condition precedent before any action could be brought by him for the breach of the defendant's condition. The matter was fully taken up before the Court on motion for nonsuit.

Jersey City, August 10, 1916.

20                    Mr. Haber: Before we proceed I wish to move to vacate the rule to show cause made by your Honor, on the ground that, as served on the plaintiff's attorney, it had no affidavits attached supporting it, and therefore we came here without notice of the reason for the trial, and they are presumably going to contest every angle of the case.

The Court: I will let the rule stand and will confine the testimony to the price of candy during the period of the plaintiff's employment under the contract.

Mr. Haber: I ask an exception.

30                    JAMES F. MCHUGH sworn.

*Direct examination by Mr. Levitan.*

Q. Mr. McHugh, what is your business? A. I am manager of the Novelty Candy Company.

Q. How long have you been such manager? A. Four and a half years.

Q. As manager what do your duties consist of? A. The supervision of the office records.

40                    Q. Anything else? A. Why, general supervision would cover it, Mr. Levitan, in all its details.

*James F. McHugh—Direct.*

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Q. You have charge of the charging department, of the prices to customers, and the amount?

Mr. Haber: I object to that.

Mr. Levitan: Strike out that question.

Q. What other duties have you in connection with your business as manager? A. Credit manager. 10

Q. What does that consist of? A. To pass all orders for credit.

Q. Anything else? A. Nothing.

Q. In passing orders for credit is your attention ever brought to the prices charged to customers?

Mr Haber: I object to that question on the ground that it is leading. 20

The Court: Well, it is somewhat leading.

Mr. Levitan: I will withdraw the question.

Q. In passing upon credits to customers is your attention ever brought to any particular part of those credits? A. Why, the very nature of the transaction, the party to whom goods are sold, the nature of the goods and the prices of them.

Q. Are you familiar with the prices as they exist in your business, of gumdrops and lolly-pops, during the month of September, 1914? A. I am. 30

Q. Upon what do you base your familiarity? A. Why, the supervision of those orders, the passing of the orders, and the supervision of the records.

Q. During your experience as manager of the Novelty Candy Company how many dollars' worth of orders have you supervised? A. You mean in the aggregate?

Q. In the aggregate, yes. A. Five million dollars' worth. 40

*James F. McHugh—Direct.*

Q. I ask you, Mr. McHugh, if you can tell what the price of gumdrops was during the month of September, 1914—what the market price was? A. To the best of my knowledge, it was 26 cents.

Q. Upon what do you base that information? A. Why, the general conditions existing at that time.

10 Q. Did you sell any gumdrops during the month of September, 1914? A. We did.

Q. Have you a record of those sales that were made at the time? A. We have.

Q. Where is the bookkeeper who made the entries in your books of those sales now? A. I don't know.

Q. Has he left your employment? A. Yes.

20 Q. And are you familiar with the man's handwriting? A. Yes.

Q. Have you those books with you showing those? A. Not that particular book; no, sir.

Q. Have you any books showing the charges for gumdrops during the month of September, 1914, to customers? A. I have the sales record.

Q. Are you familiar with the contents of that record? A. Thoroughly.

30 Q. In whose handwriting is that? A. In the salesmen's handwriting and in the handwriting of the clerk in the office whose duty it is to record mail orders.

Q. In the regular course of his business? A. Yes.

Q. Have you that record with you now? A. I have.

Q. Will you produce it? A. (Witness produces book.)

Q. What are those slips you have there, Mr. McHugh? A. These are order blanks.

40 Q. What records do they comprise in your office? A. These are original entries.

*James F. McHugh—Direct.*

Q. What do they contain? A. A list of the goods ordered by the customer.

Q. During what period? A. August and September.

Q. Of what year? A. 1914.

Q. Have you any charges there of gumdrops made to customers during that year? A. I have. 10

Q. Will you kindly turn to them? A. (Witness refers to binder No. 334 of the Novelty Candy Company containing the following items: Sold United Candy Company, 368 Hoboken Avenue)——

Mr. Haber: I object to any of this evidence going on the record on the ground that this man from his own mouth testified that he did not keep the records, and, therefore, he is not qualified to testify to the contents. 20

The Court: I think I will hear the evidence.

Mr. Haber: Exception.

A. Binder No. 334, of the Novelty Candy Company, sold to United Candy Company——

Mr. Haber: Just a moment. Will your Honor allow me to cross-examine this man as to his qualification to testify? 30

The Court: Yes.

*By Mr. Haber.*

Q. Mr. McHugh, you are working for the Novelty Candy Company how long? A. Four and a half years.

Q. What are your duties? A. Office manager, credit manager.

Q. Just a moment. Office manager you say. As office manager what do you do? A. Supervise all the details of the office. 40

*James F. McHugh—Direct.*

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Q. Supervise all the details of the office? A. Yes.

Q. What else do you do? A. Credit manager.

Q. You are credit manager? A. Yes.

10 Q. As credit manager who do you do? A. Pass all orders for credit.

Q. Anything else?

Mr. Levitan: I object to this line of cross-examination.

The Court: You may go on.

Q. As credit manager what are your duties? A. To pass all orders for credit.

Q. Have you any other duties besides those you have just mentioned? A. None.

20 Mr. Haber: Now, I object to the admission of any testimony by this man as incompetent.

The Court: Well, I will hear this testimony for what it is worth.

Mr. Haber: Exception.

*By Mr. Levitan.*

30 Q. Now, for the third time, you have here——

Mr. Haber: I think I am entitled to continue my cross-examination as to his knowledge.

Mr. Levitan: I think your Honor has already passed on this.

The Court: As far as it has been brought out. I think I will let him testify to that.

Q. There is an entry here——

40 Mr. Haber: Wait a minute; I am on cross-examination, Mr. Levitan.

*James F. McHugh—Direct.*

*By Mr. Haber.*

Q. Mr. McHugh, do you know when this sheet was made out? A. Yes.

Q. How do you recognize that particular sheet?

A. What do you mean, how do I recognize that sheet? 10

Q. How do you recognize this particular sheet that I hold before me from which you have been testifying? A. By the standard form used by us and by the handwriting.

Q. You recognize that because it is a standard form used by the Novelty Candy Company? A. Yes.

Q. And you also recognize it by the handwriting? A. Yes.

Q. What about this handwriting that enables you to identify it? A. What about the handwriting? 20

Q. Yes. A. Why, your question is a little indefinite, Mr. Attorney.

Q. In what way? A. What about the handwriting? I recognize the handwriting as being one of our salesman that wrote it; if you had sent me several letters, I would say it was your writing, and in that way I would recognize your writing. 30

Q. Is the last line of this sheet written in the same handwriting as the others? A. It is not.

Q. Then this sheet is not written all by the same person? A. No.

Q. Do you know who wrote the last line? A. I do.

Q. Who wrote the last line? A. Thomas Griffin, assistant shipping clerk.

Q. Has he charge of making these original entries? A. He hasn't charge, but he has the privilege of adding this item onto his orders. 40

Q. Those are his duties? A. Part of his duties.

*James F. McHugh—Direct.*

Q. Those are part of his duties? A. Yes.

Q. Where is he? A. At the present in the factory.

Q. He is at the factory? A. At present, yes.

10 Q. These other items are written by whom, do you know? A. Yes, Mr. McGee.

Q. Where is he? A. Mr. McGee is at present in New York City; he is in our employ at present.

Q. He is in your employ at the present time? A. Yes.

Mr. Haber: Then I move to strike out any evidence offered by this man on these sheets on the ground that the other testimony is available and this is not the best evidence.

20 The Court: The evidence, so far as the handwriting is concerned, is satisfactory enough, but there is no evidence that this witness has any information as to the correctness of that statement.

*By Mr. Levitan.*

Q. Mr. McHugh, where did Mr. Griffin get the authority to charge that last item on that book?

30 Mr. Haber: I object to that on the ground that it is hearsay.

Mr. Levitan: Before we examine further on that I want to read the entry. The entry is "250, shipper's check, quality 250; boxes, 5; No. 255 five-pound Big 5 gumdrops, weight blank, price 18, total \$45."

Q. How do you explain the fact, Mr. McHugh, that this entry is in a different handwriting than

40 the other items on that sheet?

Mr. Haber: I object to that.

The Court: No; I overrule that.

*James F. McHugh—Direct.*

Q. Mr. McHugh, will you please explain why that entry is in a different handwriting? A. Why, it happens very often that we get in orders—

Q. Never mind what happens. Tell us what happened in this case. Just come down to the point.

A. Very often we are short of goods which are ordered some time previous—

10

Q. I don't care what occurred very often. I want to know what happened in this particular case. A. In this particular case, when the man took the order, there was already a standing order in the house for Big 5 gumdrops for the United Candy Company; we took the order, and the balance of the order went on the shipment which we made to the United Candy Company, and we did not have the Big 5 gumdrops, consequently we were obliged to send that order without the Big 5 gumdrops; it so happened that this large order came to the shipping department, so he went and filled in the 255 boxes of Big 5 gumdrops for the United Candy Company, and the assistant shipping clerk entered that in there so that it would appear as a prior charge, therefore, you see that 250 boxes of Big 5 at 18 cents delivered on the contract which they had already given us.

20

Q. Do you know when that contract was given, Mr. McHugh? A. Not definitely, no.

30

Q. Do you know how long before the 22nd day of August it was given? A. To the best of my knowledge, some time in the month of July.

Q. How much was the order for? A. I can't say.

Q. Why weren't those gumdrops charged by the regular man who charged the other items and entered on the slip? A. Because the United Candy Company had an order, a standing order, in the house for Big 5, and it wasn't necessary to sell them every time we went to see them.

40

*James F. McHugh—Direct.*

Q. The assistant shipping clerk had knowledge of that? A. Yes.

Q. Now, have you any other records of sales during the month of September of Big 5 gumdrops, Mr. McHugh? A. Yes.

10 Q. Will you please turn to them? A. The month of September or August?

Q. Take August first; take the latter part of August. A. Here is the 27th, the same day as the United Candy Company.

Q. What price were gumdrops sold for on that day? A. Twenty-six cents.

Q. Will you read the item? A. Fifteen boxes Big 5 gumdrops, 26 cents.

Mr. Haber: I object to that.

20 Mr. Levitan: The sheet is merely offered, if the Court please, for the purpose of corroboration, and not for any other purpose.

Q. Have you any other records of sales for August? A. In August, yes.

Q. This was the 27th, you say? A. The 27th.

Q. Never mind looking for any more for August; see what you can find for September. A. Here is September 4th, 30 boxes, 26 cents.

30 Q. Any more in September? A. Yes, September 17th, 80 boxes, 26 cents.

Q. Any more for September? A. September 25th, 5 boxes, 26 cents.

Q. Any more for September? A. I haven't got them.

Q. To your knowledge, Mr. McHugh, were any gumdrops ever sold to anybody for a price other than 26 cents, except what was sold on a previous order?

40 Mr. Haber: I object to that.

The Court: I overrule the question.

*James F. McHugh—Direct.*

Q. Were any sales, to your knowledge, Mr. McHugh, made for any other prices during the month of September, 1914, other than you have enumerated, 26 cents? A. To my knowledge, no; except on this contract.

Q. What is that? A. Except on this contract. 10

*By Mr. Haber.*

Q. You haven't looked through all those slips? A. I am saying to the best of my knowledge and belief.

*By Mr. Levitan.*

Q. Do you remember the occasion that you made an affidavit at your office and my being present in the office, Mr. McHugh, on the 20th of July of this year? A. I do. 20

Q. You remember on that occasion looking through all the sales of the months of August, September and the early part of October then of all gumdrops made at the time? A. I do.

Q. Do you remember also checking off the yellow slips on your books at that time?

Mr. Haber: I object to that as leading.

The Court: Ask him what he did. 30

Q. Do you remember what search you made for sales of gumdrops on this occasion when I was at your office, Mr. McHugh? A. I do.

Q. What was that? A. I went through the books and records for the purpose of determining how many sales of gumdrops were made at 26 cents and how many were made at 18 cents.

Q. What did you find at that time? A. I found the majority of them were made at 26 cents, practically all of them at 26 cents 40

*James F. McHugh—Direct—Cross.*

Q. Were there any at 18? A. Yes.

Q. How many? A. Those on contract.

Q. Those 26-cent sales were made in accordance with what standard? A. The market price.

10 Mr. Haber: I object to that on the ground that the witness has not qualified to say whether they were made at the market price.

The Court: No, I don't think so.

Q. Do you know how the duplicate bill of this order of August 27th of the United Candy Company came to be issued, which I showed you, which has been offered in evidence and marked P-10?

Mr. Haber: I object to that.

20 The Court: I will exclude that.

*Cross-examination by Mr. Haber.*

Q. How many of these sheets did you actually locate and examine thoroughly every day? A. How many of these sheets?

Q. Yes. A. None.

Q. None of them? A. No.

30 Q. And despite that, despite the fact that you have never actually examined any of these sheets before— A. I didn't say never, Mr. Attorney.

Q. Despite that answer, you still come here and say that you know, of your own knowledge, that the statements herein contained are correct? A. These records; that system was discontinued a year ago, and I am not referring to any of these sheets at the present time.

Q. In whose handwriting is this sheet? A. Mr. M. Rissiter, Jr.

40 Q. Is that the same man who wrote the entry on the sheet to which you testified? A. No.

Q. A different man? A. A different man.

*James F. McHugh—Cross.*

Q. For all that you may know, the man that actually made the entries on these various sheets may have made mistakes in the entries? A. It is possible.

*By Mr. Levitan.*

10

Q. When you testified that you did not handle these sheets, Mr McHugh, explain what you mean. A. These sheets were a form that we used possibly during the year 1914 and discontinued in 1916, in March; the present form which we are using now allows for the examination of the original orders as it comes in from the customer or from the salesman; a different form entirely from these forms.

Q. During the year 1914 when these sheets were being used they passed under your supervision? A. 20 Absolutely, every one of them.

*By Mr. Haber.*

Q. Did you have to look at each one of them? A. I had to look.

Q. Didn't you just testify that you never examined them and did not look? A. No, I did not; you asked me how many of these sheets passed through my hands every day.

30

*By Mr. Levitan.*

Q. Those sheets did pass your inspection? A. Yes, every one of them.

40

*Robert Young—Direct.*

ROBERT YOUNG SWORN.

*Direct examination by Mr. Levitan.*

10 Q. Mr. Young, what is your business? A. Supervision of the orders, as far as routing them and examining them as to the prices shown there.

Q. Where are you employed? A. Novelty Candy Company.

Q. How long have you been in their employ? A. Four and a half years.

Q. During those four and a half years did you do any other work in the Novelty Candy Company?

A. Why, I did minor detail work.

20 Q. Does your business bring you in connection with the market price of candies? A. Yes, sir.

Q. Do you know at the present time what the market price of Big 5 gumdrops was during the month of September, 1914? A. Why, I do if I refer to the records.

Q. Without referring to the records, what do you find now to have been the market price of Big 5 gumdrops during the month of September, 1914?

30 Mr. Haber: I object to that, because it is predicated on what the records show, and unless they show what the records are, and that they are authentic, any oral evidence as to what the records may show is immaterial.

The Court: I suppose that is so.

Q. When you said, Mr. Young, that you referred to the records, what records do you mean? A. The records of sales.

Q. And any other records? A. Well, at that time our records of sales, and we also kept a copy of the order, the original order, in some cases.

40 Q. Is that what you used to refresh your recollection? A. Yes, sir.

*Robert Young—Direct.*

Q. After examination, what did you find to be the market price?

Mr. Haber: I object to that. I think I am entitled to cross-examine this witness to see whether those records are available and where they are kept.

10

*By Mr. Haber.*

Q. What copies do you refer to? A. These (referring to records).

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

Q. These copies before you now? A. Yes, sir.

Q. Do you know in whose handwriting they are?

A. By examining I probably could tell.

Q. You probably could tell? A. Yes, sir.

Q. The persons that made those entries, do you know where they are? A. Some of them I may know.

20

Q. Are any of them in your employ yet? A. Yes.

Q. Right here in Jersey City? A. No.

Q. But in the employ of the Novelty Candy Company? A. Yes.

Q. You heard Mr McHugh testify, didn't you, before you? A. Yes.

Q. Did you hear him testify that one of the men that made these entries is right here in Jersey City?

30

A. Yes.

Q. So one of these men is in Jersey City, isn't that so? A. Yes.

*By Mr. Levitan.*

Q. Mr. Young, when you testified to the market price of gumdrops during the month of September being 27 cents, upon what do you base your information? A. By referring to the records.

Q. Have you referred to those records? A. I have, before.

40

*Robert Young—Direct.*

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Q. You have referred? A. I have.

Q. Do you remember the occasion when you referred to them the first time? A. The first time, back in July, I believe.

10 Q. Do you remember the occasion of my being present at the office of the Novelty Candy Company—

The Court: Is that material? I don't care whether it was yesterday, last week or last year.

Q. Will you tell us, Mr. Young, what the market price of gumdrops was in the month of September, 1914?

20 Mr. Haber: I object to that on the ground that this witness is not qualified to say what the market price was.

The Court: I will hear the evidence and consider it for what it is worth.

Q. Upon your examination of those records, Mr. Young, what did you find to be the price? A. Twenty-six cents.

30 Q. Is that all the record that you have of the market price of gumdrops during the month of September, 1914? A. No.

Q. What other records are available? A. Records showing the price of 18 cents, on contract.

Q. What do you mean by that? A. Why—

Q. Explain to the Court what you mean by on contract? A. Why, during the month of July we had a price—

40 Mr. Haber: Just a moment; if the records are available the records will speak for themselves.

*Robert Young—Direct.*

Q. What do you mean when you say other records are available, where are those records? A. The records are here.

Q. Will you please refer to them? (After witness examines records.) Have you examined those records, Mr. Young? A. I have.

Q. Did you find any sales at 18 cents? A. Yes, sir.

Q. How many did you find? A. I have one here.

Q. Can you explain how that sale at 18 cents occurred?

Mr. Haber: I object to that.

Q. Do you know of your own knowledge how the records and prices are made on those slips? A. Well, by a salesman.

Q. Have you anything to do in connection with the fixing of prices in the office? A. Why, I supervise them after they are sent in by the salesmen.

Q. Are you familiar with this price of 18 cents which was made at that time? A. I am.

Q. What is the date of that sale? A. September 5th.

Q. And that is 18 cents for gumdrops? A. Yes, sir.

Q. How do you explain the fact that that sale was made at 18 cents when you have said that the market price was 26 cents? A. Why, it was contracted for in July.

Q. How do you know that? A. How do I know that? By the prices shown thereon.

Q. Upon what do you base your information of the prices? A. Why, by the record.

Q. Were there any other sales made in August, other than those that were contracted for in July? A. No, not that I recall.

*Robert Young—Direct—Cross.*

Q. Are you sure about that? A. Not that I recall.

Q. During the month of September have you a record of sales that were made at the market price?

A. Yes.

10 Q. What do those records show? A. The price of 26 cents.

Q. All the way through? A. Yes, sir.

*Cross-examination by Mr. Haber.*

Q. You have examined every one of these sheets in front of you just now in order to find this one sheet of 18 cents? A. I went through them.

Q. Every one of these? A. Not every one.

20 Q. There may be others showing at 18 cents? A. Possibly.

Q. You say that you know it was contracted for in July, because it is 18 cents? A. Yes, sir.

Q. That is your only knowledge; there is nothing on those slips other than the price of 18 cents, to show that it was contracted for in July? A. And the fact that I was familiar with the price at that time.

30 Q. Now, as a matter of fact, what is this 8/24 and 8/26 up here; doesn't that show the time it was contracted for? A. No.

Q. What does that show? A. That shows the first delivery made on the order.

Q. Didn't you hear the previous witness testify that this showed the time it was contracted? A. It may have, on the one he had.

Q. But not on this sheet? A. No.

Q. So all the sheets are not kept in the same way? A. This order is what is known as a balance order.

*Robert Young—Direct.*  
*Samuel Kreenwich—Direct.*

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*By Mr. Levitan.*

Q. This sheet which you have indicated is different from the other sheet which was referred to in what respect? A. Why, at the time that that was sold for delivery we were not in a position to fill it and we filled the other items on the order, and that was carried over as a balance. 10

Q. You base your information upon the statements on the order with the stamp "Balance order; transferred from No. 385-H"? A. "H" indicates August.

*By Mr. Haber.*

Q. So it was taken over from August? A. This balance was, yes. 20

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SAMUEL KREENWICH SWORN.

*Direct examination by Mr. Levitan.*

Q. What is your business? A. Wholesale confectioner.

Q. Where do you live? A. 405 Palisade Avenue.

Q. How long have you been in the confectionery business? A. The last thirteen years. 30

Q. As such have you had occasion to buy and sell gumdrops and lolly-pops? A. Yes.

Q. Are you familiar with the market price of candies to-day? A. Certainly.

Q. How much candies do you buy and sell a month on an average? A. I average about \$10,000 worth.

Q. You were in business in the months of July, August and September, 1914? A. Yes, sir. 40

*Samuel Kreenwich—Direct.*

Q. Do you recall at that time what the market price of gumdrops was during the month of September, 1914? A. According to my invoices, in looking up, you know, the prices on gumdrops were 26 cents, purchased from the Novelty Candy Company.

10

Q. And did you sell any goods to the United Candy Company at market price during the month of August, 1914? A. Yes.

Q. I show you a slip, bearing the name Kreenwich, dated August 21, 1914, sold to United Candy Company, and containing an item here of one lolly-pops at 43 cents, and ask you if that is in your handwriting? A. All those prices are put on by me, personally, nothing goes on from the place without my O.K. The items may be written by the shipping clerk that I got, but all the prices is made by me.

20

Q. All those prices are in your handwriting? A. My own.

Q. What is the price that you sold lolly-pops for in August, 1914? A. Forty-three cents.

Q. What was the market price of lolly-pops at that time? A. Forty-two cents they cost us.

Q. How did you come to sell them for 43? A. As a customer we accommodate the trade, our competitors with 1 cent above the cost of the goods, then if I am short I refer to my next competitor and he obliges me.

30

Mr. Levitan: I offer this bill in evidence.

Mr. Haber: I object to that until I have a chance to examine the witness.

Q. I show you another slip on your billhead, dated September 8th, and ask you in whose handwriting that is? A. The prices are also put on by me personally.

40

*Samuel Kreenwich—Direct—Cross.*

Q. And the items are written by somebody else?

A. Yes, one of the shipping clerks.

Q. There is a charge there of two gumdrops at 54 cents? A. Right.

Q. What does that mean? A. That means that the cost of the gumdrops was billed to me at 26 cents and we charged them at 27 cents, a cent above cost price. 10

Q. Can you state now, Mr. Kreenwich, upon an examination of your records, and from your examination of different records, what the market price of gumdrops was during the month of September, 1914? A. Yes, we had previous to the months of August and September, we had contracted from the Novelty Candy Company at 18 cents; that was when they issued contracts specially to the jobbers; after, you know, the market raised, and it was advanced, and we had to pay the advanced price. 20

Q. What was that advanced price that prevailed in the months of August and September? A. Twenty-six cents for gumdrops.

Q. Do you know the price of lolly-pops? A. The price of lolly-pops was always 42 cents f. o. b., New Haven.

Q. Was it ever any cheaper than 42 cents? A. Never was; not in my experience. 30

*Cross-examination by Mr. Haber.*

Q. Mr. Kreenwich, do you recall that when you bought lolly-pops you got certain boxes of lolly-pops free? A. Well—

Q. Yes or no? A. This is not given to us as free goods, but as a window display.

Q. Did you get two boxes of lolly-pops with certain orders, for which you were not charged? A. As a window display, yes. 40

*Samuel Kreenwich—Cross.*

Q. You say it was a window display? A. That was free for the customer, not for the jobber.

Q. For the customer? A. For the customer.

Q. So you never got any from them? A. No, no.

Q. You never received any boxes free? A. We were never benefited by it.

10 Q. Did you ever receive any boxes of lolly-pops from the manufacturer of lolly-pops that you did not have to pay for, which you received with your orders? A. Well, yes, I did.

Q. You did not tell that to the Court before on your direct examination? A. No; the cost price of lolly-pops was certain at 42 cents.

Q. How do you know that? A. By my invoices.

Q. Have you those invoices? A. Yes.

20 Q. Why didn't you bring them to court? A. Why didn't I bring that to court?

Q. Yes. A. Because I didn't know they were necessary absolutely, but every jobber—

Q. You have invoices that show 42 cents? A. Every jobber knows that.

Q. You saw Mr. Levitan about this case, didn't you? A. No.

Q. Never been to see Mr. Levitan? A. Absolutely not until I was subpoenaed to come, to appear in court; that was on Tuesday.

30 Q. So you saw him on Tuesday? A. I was to testify on Tuesday.

Q. Did you tell Mr. Levitan that you had invoices? A. No.

Q. Didn't you tell Mr. Levitan that you had invoices showing 42 cents? A. I had no conversation with Levitan.

Q. You just had a conversation with him before you went on the stand, didn't you? A. About what?

40 Q. You had a conversation with him before you went on the stand while I was coming in. A. The question is about what?

*Samuel Kreenwich—Cross.**By Mr. Levitan.*

Q. Tell him what you said to me before you went on the stand. A. I simply asked him whether I could get away, as I am a very busy man; that is the only thing.

10

*By Mr. Haber.*

Q. Mr. Kreenwich, you worked for Mr. Follender, didn't you? A. No, I didn't work for Follender.

Q. You never were under Mr. Follender, were you? A. No.

Q. You know what Mr. Follender I mean? A. I know; he is in Jersey City.

Q. You know him as being a jobber for a long time? A. Yes.

Q. Another competitor of yours? A. Yes, probably.

20

Q. If he said the market price of gumdrops was not 26 cents in August and September, 1914, he was not telling the truth, is that right? A. That is something I don't know; I know my business and I know the prices and I know that I bought.

Q. Mr. Kreenwich, you say that the figures on these bills are in your handwriting? A. Absolutely.

Q. But the writing is not? A. No.

30

Q. In whose handwriting is the writing? A. That is one of my shipping clerks.

Q. Who is he? A. B. Mann.

Q. Is he here? A. He is in Jersey City.

Q. Is he working for you? A. He is working for me.

Q. In whose handwriting are those items (indicating)? A. This is all Mrs. Kreenwich's.

Q. She is your wife? A. Yes.

Q. She is available? A. She is available.

40

*Samuel Kreenwich—Cross.*

Q. On June 30th, immediately before or after June 30th of this year, were you in Jersey City?

A. At times; I am often out of town.

Q. Were you in Jersey City? A. At times, yes.

Q. Just as much at times as you are now? A. I am mostly out of town.

10 Q. Just the same as now? A. Just the same as now.

Q. You have your business here in Jersey City?

A. Yes.

Q. And you were doing business there at that time? A. Yes.

Q. Now, do you buy gumdrops from anybody else except the Novelty Candy Company? A. Oh, in cases of emergency I do.

20 Q. Did you do any in August and September, 1914? A. What is that?

Q. Did you, in August and September, 1914, buy gumdrops from anybody else except the Novelty Candy Company? A. That is something I couldn't tell you.

Q. The price of the Novelty Candy Company's and the other companies that manufacture are always the same? A. Absolutely.

30 Q. You are positive they were always the same? A. What is that.

Q. You are positive the prices were always the same? A. Yes, prices were always the same.

Q. You know the Fischer people, don't you? A. I never dealt with them.

Q. Well, then, how can you say that the prices charged by the Novelty people and the other people manufacturing gumdrops are the same? A. That is the manufacturers that I deal with, that I have business with.

40 Q. The Three Star Confectionery Company, do you know them? A. Yes, heard of them.

*Samuel Kreenwich—Cross.*

Q. They manufacture gumdrops, don't they? A. Yes.

Q. Were their prices the same in August? A. I will have to look it up.

Q. Did you ever buy from them? A. I certainly did.

Q. Why did you make that particular statement in court when you know you are under oath, saying that you know that the prices charged by the Novelty Candy Company and by other people that manufacture gumdrops are the same? A. From those that I have dealt with at that time.

Q. You just testified, didn't you, that you could not say unless you looked at your invoices? A. Yes, and the gumdrops that I purchased, I got invoices from them; I never quoted other prices.

10

20

*By Mr. Levitan.*

Q. When you testified that these bills were made up as you did, that is the custom of the trade to have the charges made up like that? A. Absolutely.

CASE CLOSED.

*To the Chief Justice of the Supreme Court of New Jersey:*

30

I do hereby certify the foregoing transcript, made by Harry Schirmer, a stenographer designated by me and sworn, as the testimony and proceedings had on the trial of the above-entitled case, to be used on the appeal herein.

JOHN A. BLAIR,  
Judge of Second District  
Court of Jersey City.

40

*Exhibits.*

I do hereby certify that the foregoing is a true copy of the testimony and proceedings on the trial of the suit of Abraham Bockian, plaintiff, against United Candy Company, defendant, in the Second District Court of Jersey City.

10

HARRY SCHIRMER,  
Stenographer.

**Exhibit P-1.**

## THIS AGREEMENT.

Made this eighth day of September, in the year Nineteen Hundred and fourteen. Between Abraham Bockian, of the city of Jersey, in the County of Hudson and State of New Jersey, party of the first part; and The United Candy Co., a corporation of the State of New Jersey, party of the second part.

20 WITNESSETH:

Whereas the said party of the first part is the holder of eight (8) certain shares of capital stock in the party of the second part, and the party of the first part has agreed to sell the said shares of stock to the said party of the second part and the said party of the second part has agreed to purchase the said shares of stock under the terms and agreements hereinafter set forth. NOW THEREFORE, the parties hereto in consideration of the premises and of the sum of ONE (\$1.00) dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, do hereby covenant and agree as follows:

30 THE SAID PARTY OF THE FIRST PART hereby covenants and agrees to sell, transfer and assign to the said party of the second part the eight (8) shares of the CAPITAL STOCK of the said party of the second part

40

*Exhibits.*

now held by him and to give a proper assignment simultaneously with this contract.

THE SAID PARTY OF THE FIRST PART further agrees to continue as a sub-jobber of the said party of the second part for the term of one (1) year from the date hereof and during the said term he will purchase from the said party of the second part all the merchandise required by him, his said business of sub-jobbing which is usually handled and dealt in by said party of the second part consisting principally of confectionaries and shall pay for the same as hereinafter provided. 10

SAID party of the first part further agrees to pay to said party of the second part the sum of five (\$5.00) dollars per week for delivering the merchandise sold by the said party of the first part as sub-jobber, such deliveries to be made at the time or times when the said party of the second part is making its regular deliveries to its customers in the conduct of its business, but it is hereby understood and agreed that the said party of the first part may at any time hereafter make or cause to be made his own deliveries and then and in that event the payments for deliveries to the said party of the second part shall cease. 20

Said party of the first part further agrees to pay to said party of the second part at the time of delivery of each order of goods an appropriate amount not less than.....per cent., toward the selling price of the goods and the balance of the said order shall be paid weekly. 30

The said party of the second part hereto agrees to re-assign and transfer unto the said party of the first part, all the out-standing accounts according to the books of the company which had been previously assigned to the company by said party of the first part and which accounts are now approximate- 40

*Exhibits.*

ly the sum of Nine Hundred and ninety-five (\$995.00) dollars, the said party of the second part further agrees to give the said party of the first part a note for the sum of two hundred and twenty-five (\$225.00) dollars payable one (1) year after the date thereof, provided however, that if the said party of the first part should retire from business or should sell the said business and shall also remove out of the COUNTY OF HUDSON and the COUNTY OF BERGEN then the said note shall be paid thirty (30) days after notice of such retirement or sale and the removal.

AND the said parties hereto do further mutually covenant and agree that the goods which shall be purchased by party of the first part from the party of the second part shall be at a price or profit to the party of the second part over and above the then existing market value of the same together with an additional profit of one cent on every purchase of a fifty cent box, two cents on every purchase of a box costing from fifty cents to two dollars and three cents on every purchase of a box costing two dollars or more.

IT IS FURTHER MUTUALLY COVENANTED AND AGREED that the said party of the first part will not interfere or solicit among the trade (either directly or indirectly, as servant, agent or employee) which is usually supplied by the said party of the second part and the said party of the second part covenants and agrees that it will not interfere or solicit among the trade (either through its agents, servants or employees) which is usually supplied by the said party of the first part, but this agreement shall not restrain either of the parties hereto from selling to any customer who may come and order goods without the solicitation of either of the parties hereto.

*Exhibits.*

although such customer may have heretofore dealt with the other of the parties.

It is further stipulated and agreed by the parties hereto that if either of the parties should violate any of the covenants and agreements herein contained, then they hereby fix the sum of two hundred and twenty-five dollars as liquidated damages for such breach and it is further understood that the said note to be given as above mentioned shall in the event of breach on the part of the party of the first part be considered as the amount of the liquidated damages and shall upon the demand of the said party of the second part be delivered up to be cancelled.

10

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal and the said party of the second part hath caused its corporate seal to be hereto affixed and attested by its Secretary and these presents to be signed by its president the day and year above written.

20

A. BOCKIAN. (L. S.)

THE UNITED CANDY CO.,  
a corporation of the State  
of New Jersey.

By N. H. Glickman.

30

President.

Secretary, Benjamin D. Urdang.

Signed, sealed and delivered  
in the presence of

JOSEPH DAVIS,  
as to both parties.

United Candy Co.  
Corporate Seal.

Attest.

1913.

New Jersey.

40

**Exhibit P-2.**

\$225.00

Jersey City, N. J. Sep. 8, 1914.

10 One year after date we promise to pay to the order of ABRAHAM BOCKIAN, Two Hundred and Twenty-five and 00/100 Dollars, at 368 Hoboken Av., J. C., Subject to the Condition contained in the agreement bearing even date.

Value received.

UNITED CANDY CO.

N. H. Glickman, Pres.

Benjamin D. Urdang, Sec. & Treas.

Due.

20

30

40

**Exhibit P-3.**

NOVELTY CANDY COMPANY.  
Manufacturing Confectioners  
"Haggis" and "Mysco"  
Brands

New York, N. Y. Aug. 27, 1914. 10

Sold to United Candy Co., 8 25 14  
368 Hoboken Ave.,  
Jersey City, N. J.

Salesmans order No.  
Cornwell.

Our Order No.  
H. 1670

Terms.  
10 days less 2 %

Boxes	Description	Price	Extension	Total	20
15	5 lb. Monarch M. M.	.65	9.75		
50	100 C. Asst. Haggis	.16	8.00		
50	100 C. Black Haggis	.16	8.00		
5	5 lb. P. R. Babes	.26	1.30	72.05	
250	5 lb. Big 5 Gum Drops	.18	45.00	1.30	
				73.35	
				1.47	
				\$71.88	30

Received Payment.  
Sep. 10, 1914.  
Novelty Candy Co.  
Per S.  
ENTERED.

**Exhibit P-7.**

## STATEMENT.

Jersey City, N. J., July 25, 1914.

Inventur taking,

10	Bought of United Candy Co. Wholesale confectioners. 368 Hoboken Av.,		
	Stock	\$2238.49	
	Fixtures, Horses & Wagon	471.00	
	Balance in Bank	127.87	
	Cash on hand	35.19	
	Deposit on Electr	10.00	
	Outstanding	3280.68	
20			6163.23
	Investment	2432.00	
	Bills Due	836.67	
	Bills not Due	714.96	
			3983.63
			\$2179.60

30

FOR COMPARISONS ONLY.

40

**Exhibit P-11.**

UNITED CANDY CO. Inc.  
Wholesale Confectioners

High Grade Chocolates and Bon-Bons.

368 Hoboken Avenue.

Jersey City, N. J. Sep. 29. 1914.

10

Sold to A. Bockian.

1.	1	90 cherries, Bklyn	.57	
2.	1	Hersheys Almond bar.	.67	
3.	1	90 cherries, L.	.65	
4.	2	Haggis	.34	
5.	1	10/1 gum drops	.27	
6.	1	Bulls eye gum	.52	
7.	2	Clams	.62	
8.	1	W. F. Carmels—5lb.	.72	20
9.	1	Joy cake.	.41	
10.	2	Haggis	.34	
11.	1	L—90 cherries	.65	
12.	1	Fruit Bar	.41	
13.	1	War Prize	.39	
14.	1	H. F. Captain	.47	
15.	1	Sour Balls	.39	
16.	1	Butter Melow	.41	
17.	1	Fruit Bar—72	.41	
18.	1	72 Maple-walnuts	.41	30
19.	1	2c. cherry bar	.62	
20.	1	Domino	.42	
21.	1	Obelisk	.41	
			<hr/>	
			10.10	

*Exhibits.*

Sold to A. Bockian.

Sep. 29, 1914.

	1.	1	1 lb. Flange	.33
	2.	3	1 lb. Bklyn.	.50
10	3.	1	Joy cake	.41
	4.	1	Whipped cream caramels	.39
	5.	1	Jelly Bean	.36
	6.	1	Clarabel	.27
	7.	1	144 bananas	.41
	8.	1	10/1 gum drops	.27
	9.	1	U. Sam	.36
	10.	1	Violet Ball	.37
	11.	1	364	2.10
	12.	1	Have a Heart	.33
20	13.	1	Cocoanut kiss.	.33
	14.	1	Cluster bar.	.40
	15.	1/2	Choc. wafers	.50
	16.	1	Sultana Fudge	.33
	17.	1	Ass. J. J.	.50
	18.	1	72 Paragon	.41
	19.	2	Lemon Coc.	.66
	20.	1	Starmint Loz.	.55
	21.	1	Ass. Coc. Bar.	.33
30				<hr/> 10.11

*Exhibits.*

1.	2	Sp. Gum	.98	
2.	1	Take me bar	.41	
3.	2	Prize boxes, 72	.78	
4.	1	Ass. Lolly pops	.43	
5.	1	Hershey Almond bar	.67	
6.	1	Me too.	.62	
7.	3	Maple walnuts	1.23	10
8.	1	36 P. Corn	.20	
9.	1	Joy cake	.41	
10.	2	Dominos, 216	.84	
11.	1	Doz. S. Bros.	.31	
12.	3	Pep. Giants	.63	
13.	1	Lic. Pipes.	.44	
14.	1	75 Rockwood	.72	
15.	1	Gr. W. Bars	.41	
16.	1	48 Peanut Sq.	.33	20
17.	1	Nonp. Gum Dr.	.29	
18.	1	Giant nuget.	.33	
19.	1	200 cream bar	.47	
20.	1	Trocodiro	.21	
21.	1	Ass. Lolly pops.	.43	
			<hr/>	
			11.14	

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*Exhibits.*


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	1.	1	216 Choc. cream	.42
	2.	1	216 Whipped	.42
	3.	1	Doz. Y & S. Lic.	.31
	4.	1	Trocodiro	.21
	5.	1	Pep. giants	.21
10	6.	1	Coltfoot	.33
	7.	1	Big 5	.27
	8.	1	Doz. Dudens	.30
	9.	1	Ass. Rock candy	.65
	10.	1	U. Sam	.36
	11.	1	Cluster Bar	.40
	12.	1	Salt. peanuts	.41
	13.	2	Extra Dry	.42
	14.	1	Whipped creams—144s.	.41
	15.	1	P. corn 36	.20
20	16.	2	Lemon drops, stag	.82
	17.	2	Pea. ovals	.78
	18.	½	Klont. almonds	.70
	19.	1	3c. Hooton	.62
	20.	½	Klont. Almonds	.70
	21.	1	salted peanuts	.41

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9.35

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*Exhibits.*


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1.	1	Won prize	.33	
2.	1	Pea. Sq. 48	.33	
3.	1	Afr. Carmel	.39	
4.	1	Union Sq.	.41	
5.	1	Porta Rico.	.31	
6.	1	216 Fudge	.41	10
7.	1	Jelly bar 36	.21	
8.	1	110 Jelly	.31	
9.	1	Sweet Cap.	.31	
10.	1	4/1 wine bottles	.21	
11.	1	It. cream 72	.41	
12.	1	Big 5	.27	
13.	1	Ice Cream Ball	.41	
14.	1	144 Choc. nuget	.41	
15.	1	Cocoa. treats	.41	
16.	1	Long Gum bar	.21	20
17.	1	Clarabel	.27	
18.	1	Fancy Daisy	.39	
19.	1	Violet Ball	.37	
20.	1	Nonp. Sq.	.33	
21.	1	360 Laces	.41	

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7.11

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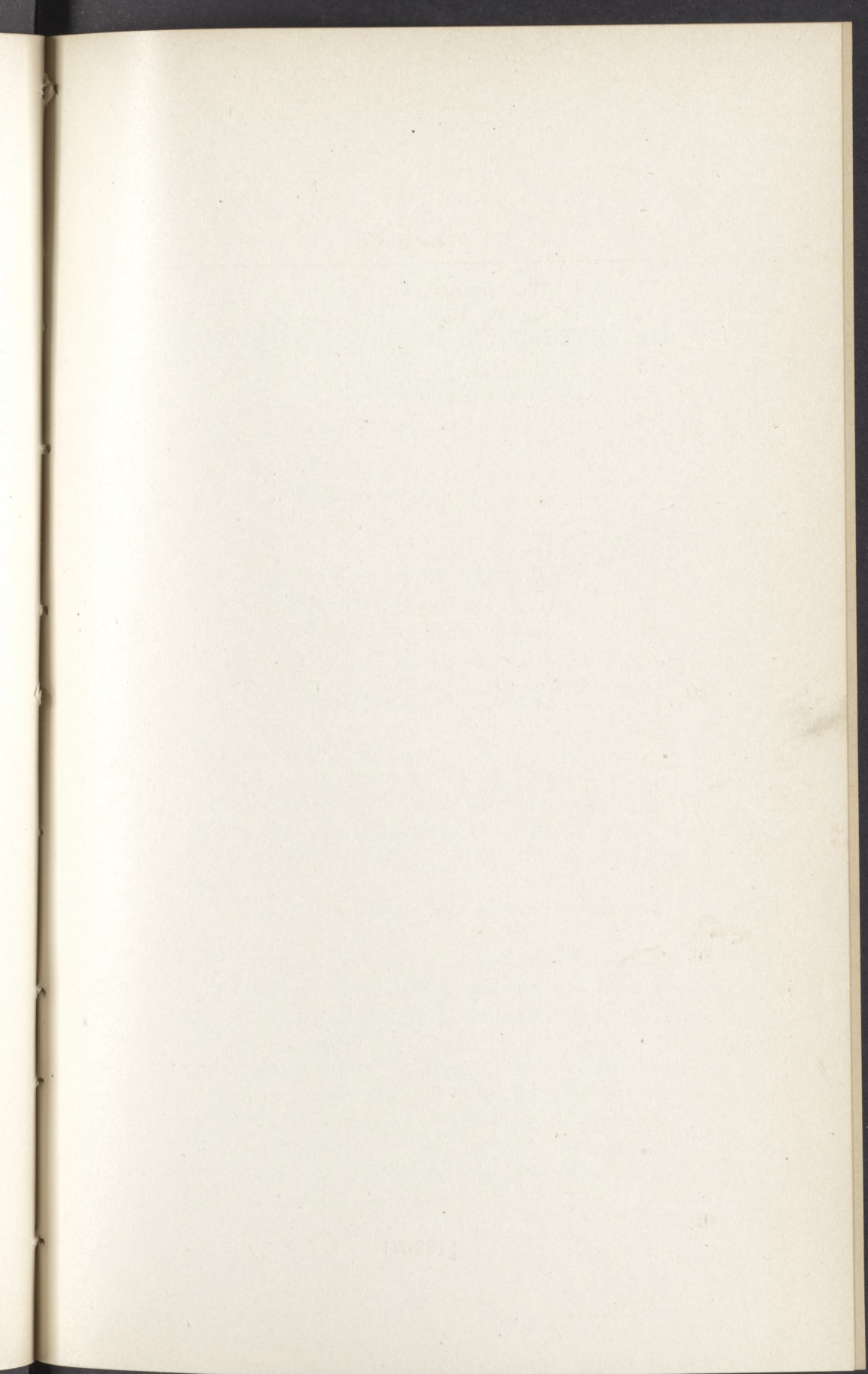
*Exhibits.*

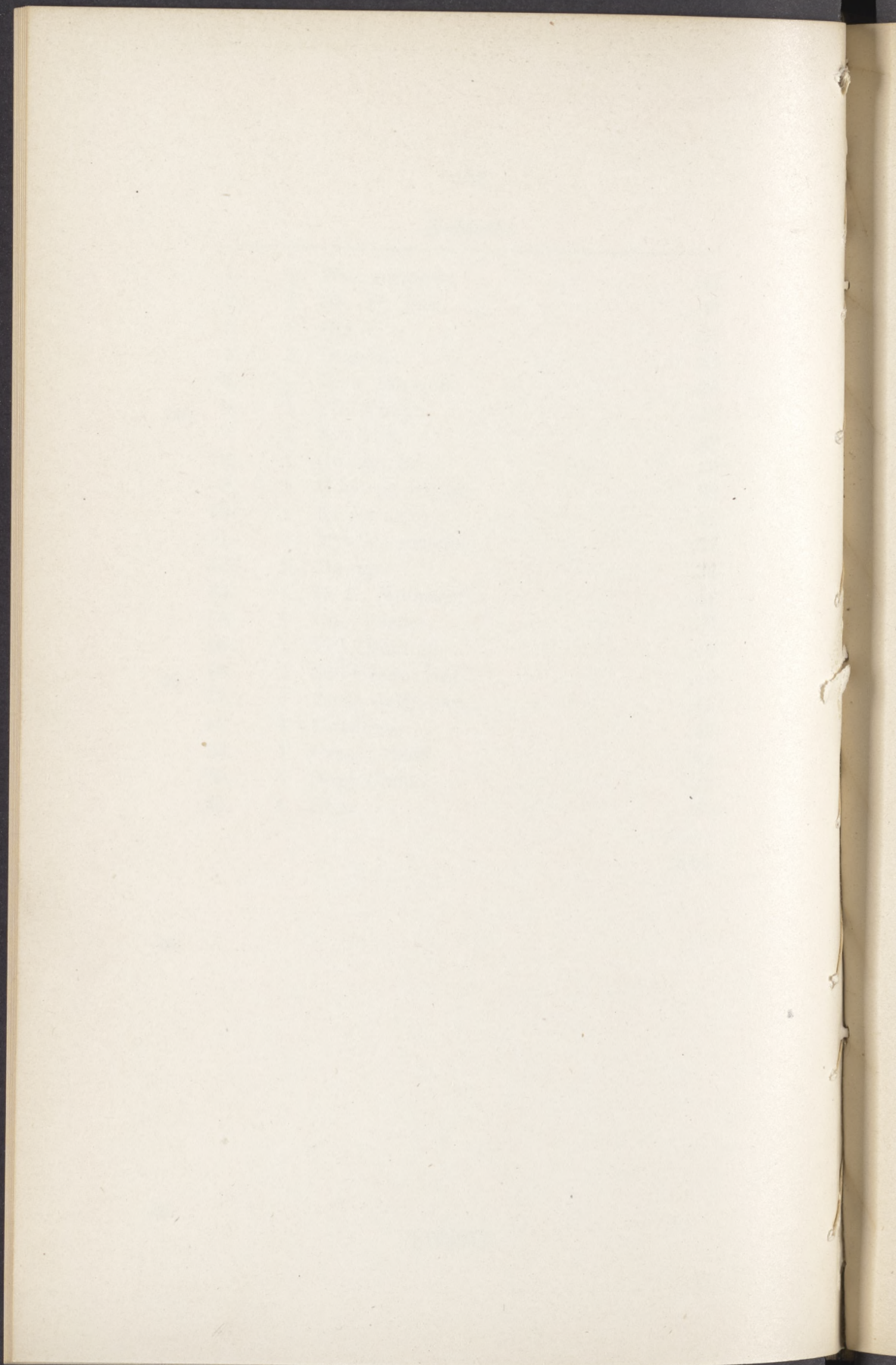

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	1.	1	Wal. orange	.41
	2.	1	Gr. W. Bar	.41
	3.	1	Big 5	.27
	4.	2	Haggis	.34
	5.	1/2	Elca Almond	.90
10	6.	1	216 Fudge	.41
	7.	1	Sp. Gum	.49
	8.	1	Golden Rd.	.20
	9.	1	Bordens Silver	.82
	10.	1	Nuget cake	.41
	11.	1	Mystic caramels	.37
	12.	2	Haggis	.34
	13.	1	O. F. Molasses	.41
	14.	1	Coc. Kisses	.33
	15.	1	216 Dominos	.42
20	16.	1	200 Cream Bar	.47
	17.	1	Choc. Jelly bar	.41
	18.	1	Gordons.	.42
	19.	1	Cream tarts	.39
	20.	1	Stag Chew.	.21
	21.	1	Stag	.21
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				8.64

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## New Jersey Court of Errors and Appeals

ABRAHAM BOCKIAN, Plaintiff-Respondent,  vs.  UNITED CANDY Co., a corporation of New Jersey, Defendant-Appellant.	}	On Appeal. Appellant's Brief.
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### Statement of Facts.

Briefly the facts in this case are as follows:

This is an appeal from the Supreme Court affirming a judgment for plaintiff-respondent.

The action was brought in the District Court to recover the sum of \$450 and was founded upon two counts.

The first count was on a conditional promissory note.

The second count was on a written contract, referred to in the note. The contract and note are fully set forth on pages 131 and 134 of the case, Exhibits P-1 and P-2.

The United Candy Co. entered into a written contract (p. 1) with Bockian, whereby Bockian was to work for the company for one year. Simultaneous with the execution of this contract the company gave Bockian a conditional note for \$225 (p. 2), payable one year from date.

The conditions of the contract were:

“\* \* \* And it is further understood that the said note to be given as above mentioned shall, in the event of breach on the part of party of the first part, be considered as the amount of liquidated damages, and shall, upon the demand of the said party of the second part, be delivered up to be cancelled.”

It must be observed that the contract of employment was to expire on the same day that the note was to become due.

It is uncontradicted that the respondent deliberately broke his contract with the company, leaving the employ of the defendant within four weeks after the execution of the contract, giving as his reasons the breach of the contract (p. 1) by the company in overcharging plaintiff on the sales of goods, as provided in clause 8 (p. 132, Case, ll. 17, 28).

At the maturity of the note the company refused to pay same, because Bockian did not comply with the condition precedent in the contract, viz., to remain in the employ of the company for one year.

The Trial Court gave judgment for the plaintiff-respondent for the sum of \$450.

The testimony was reported by a stenographer, and the case has all the testimony printed in full.

On appeal this judgment was affirmed by the Supreme Court.

This appeal is taken to review the judgment of the Supreme Court.

The main grounds for appeal in the case are as follows:

1. The alleged error by the Supreme Court in affirming the refusal of the Trial Court to nonsuit.

2. The alleged error by the Supreme Court in its construction of the contract.

3. The alleged error of the Supreme Court in its rulings upon the admission and rejection of evidence.

A reversal of the judgment of the Supreme Court is therefore respectfully urged for the following reasons:

## ARGUMENT.

### POINT I.

**The Supreme Court erred when it affirmed the refusal of the Trial Court to non-suit.**

The plaintiff-respondent rested his case on proof of the contract and note, and on the defendant's alleged breach of paragraph 8 (p. 132, Case, ll. 18 to 28) concerning the overcharges.

Plaintiff also testified (p. 46, Case, l. 12) that he left defendant's employ on the 3rd day of October, 1914; four weeks after the execution of the contract.

The plaintiff, to make out a *prima facie* case, was required to prove:

1st: The contract.

2nd: The performance of all conditions precedent on his (plaintiff's) part.

3rd: Breach by the defendant.

4th: That the breach went to the essence.

Here the performance on the plaintiff's part, to wit, to work for a year, was an express condition

precedent, and the plaintiff was required to allege and prove compliance with this condition, or in default thereof tender of compliance to perform. No such compliance was shown here; in fact, the testimony is that the plaintiff wilfully left the employ of the defendant (p. 46, Case, ll. 10 to 20).

It is clear, upon examination of the contract, that the plaintiff was required to work for a whole year, and that was an entire contract on his part, a termination of which at any time during the year would constitute a breach that would go to the essence of the plaintiff's promise. Defendant could not go out in the open market and procure a contract with another sub-jobber for a year and charge the difference in its sales or receipts to the plaintiff. But if the defendant was overcharging the plaintiff, it was an easy matter for the plaintiff to go out in the open market, buy his confectioneries there and have his action in damages against the defendant for the excess, if he paid any. In other words, the breach of the defendant's promise, assuming that there was one, was a mere minor breach and could not go to the essence of the agreement, defendant's covenant clearly being devisable, as each particular transaction could readily be gauged and adjusted, while the plaintiff's could not.

Appellant's breach, therefore, not having gone to the essence of the contract, plaintiff was not lawfully justified in refusing to perform his part of the agreement, and his refusal to comply was an absolute bar to any recovery by him against the defendant for damages, and the plaintiff, having broken his part of the agreement, he (plaintiff) was liable for the liquidated damages mentioned in the contract, viz., the cancellation of the \$225 note.

The promise or contract of respondent was absolute and unconditional; *i. e.*, he was bound to continue the employment or tender performance of his services to appellant for the entire year specified in the contract, before he would be entitled to expect performance on the part of the appellant-defendant (*i. e.*, payment of the note). It is a well-recognized principle of law that the plaintiff would have been justified in refusing to perform or tender performance to the appellant, in case the appellant had done an act or acts which made it impossible for the plaintiff to continue his services, such as, for instance, dissolution of the appellant's business, or wilful refusal to further employ the respondent. But giving the evidence of the plaintiff the most favorable construction on the motion for a nonsuit, the mere overcharge, as is testified by the plaintiff on part of the appellant, was not sufficient justification for the plaintiff to terminate the agreement, because the performance of the plaintiff, of his part of the agreement, was absolute and unconditional; irrespective of what happened plaintiff was bound to work one year before being entitled to the \$225.

In the learned discourse, on the law of contracts, written by the late Professor Langdell, *Langdell's Summary of Contracts* (Second Edition, pp. 209-212), and cases cited, on page 209 (about middle), the learned author says:

"If the breach goes to the essence of the contract, the party committing it cannot complain of this result; but if it is slight and unimportant and especially if it happens after the performance is nearly completed, he may justly say that the penalty is out of all proportion to the wrong. In

this connection there is an important distinction between express and implied conditions. An express condition is the creature of the parties to the contract. \* \* \* It cannot, therefore, in legal contemplation, work any injustice to either of them, nor can it operate in such a manner as to take either of them by surprise. The Court, not being responsible for its existence, has nothing to do with its consequences, and has neither power nor duty in connection with it beyond enforcing it according to its terms. \* \* \*

On the bottom of page 210 the author says:

“If the breach goes to the essence, they (Courts) permit it to be set up as a defense, but if it does not go to the essence, they permit the plaintiff to recover, and leave the defendant to his cross-action.”

Section 162, page 211:

“FIRST: When the plaintiff's breach consists in not doing, or offering to do, all that the contract requires and the amount that he is to receive as payment is absolutely fixed, it seems that the breach will necessarily go to the essence as matter of law, for the defendant can say that he has not performed on his part, because the plaintiff has not rendered the equivalent agreed upon and that is a good defense.”

The plaintiff's testimony concerning the overcharges shows that they were very minor, to wit, an overcharge of a few cents on a box of candy. This being a matter of simple computation could have very readily been determined what the exact amount of plaintiff's damages were, and hence the

Courts have laid down the ruling if the breach does not go to the essence of the contract, the Courts will leave the party to his remedy by way of damages, because that would be adequate, and will not justify the plaintiff in breaking his agreement, and refusing to perform.

The plaintiff, who was to work for one year and only worked four weeks, surely committed a breach of his contract, which went to the very essence thereof and operated as an absolute bar to any recovery by him.

The general principles above cited have been followed in the courts of New Jersey as far as was practical.

In *Frey v. Mills*, reported in 71 *Law*, page 293. the Chief Justice, in writing the opinion for the Court of Appeals, says, at the bottom of page 295 :

“In the second place, to entitle the plaintiffs to recover upon the contract they were bound to show performance on their part, or else that their performance was prevented by the wilful or fraudulent act of the defendants in violation of their own undertaking. *Hinds v. Henry, 7. Vroom*, 328. That they did not carry out their part of the agreement they admit; that they were prevented from doing so by any act on the part of the defendants, which was in violation of the defendants' undertaking, is not suggested by the evidence. *Their claim on the contract therefore failed.* Nor were they entitled to recover on a *quantum meruit*. Their services were rendered under a special agreement, by the terms of which their compensation was contingent upon performance on their part. The contract furnished the sole ground of

recovery. *Hinds v. Henry, supra; Runyon v. Wilkinson, Gaddis & Co., 28 Vroom, 420.*"

Of course, it is apparent that the plaintiff's remedy on the note stands or falls with the contract, as the note is part of the contract, each instrument being incorporated in the other by reference. The plaintiff therefore having failed to properly establish all the elements essential to make out a *prima facie* case when he rested, the nonsuit should have been granted, and the Supreme Court erred in affirming the ruling of the Trial Court.

## POINT II.

**The Supreme Court erred in its construction of the contract, and the judgment should be reversed.**

The contract provides for liquidated damages of \$225 (p. 133, Case, ll. 3 to 18) :

"It is further stipulated and agreed by the parties hereto that if either of the parties should violate any of the covenants and agreements herein contained, then they hereby fix the sum of two hundred and twenty-five dollars as liquidated damages for such breach, and it is further understood that the said note to be given as above mentioned shall in the event of breach on the part of the party of the first part be considered as the amount of the liquidated damages and shall upon the demand of the said party of the second part be delivered up to be cancelled."

It is very clear and from the ordinary construction of the language of this paragraph until the

word breach (and there is no ambiguity there) that the damages are shaped in so many words by the contract at the sum of \$225. The next clause, however, provides as follows:

“\* \* \* and it is further understood that the said note to be given as above mentioned shall in the event of breach on the part of the party of the first part be considered as the amount of the liquidated damages and shall upon the demand of the said party of the second part be delivered up to be cancelled.”

The above provision of the contract simply provides for the manner in which and the source whence the damages are to be paid. \$225 is the amount of liquidated damages. In case the defendant (the employer) breaks the agreement, the note is to be paid by it. In case the plaintiff (the employee) breaks the agreement, he is to deliver up the note to the defendant for cancellation.

The note was the liquidated damages in physical form, to be paid in one case, or cancelled in the other.

If we assume that the Supreme Court properly found that the defendant had broken its part of the contract, then it is respectfully urged that the Court erred in affirming the judgment for \$450 when the parties expressly provided between themselves that the liquidated damages was to be only \$225 (p. 133, Case, II. 3 to 18).

It is so well settled in this State that it needs no authorities; that Courts will not enforce a penalty, neither will they award damages in excess to what the parties themselves agreed the damages should be.

But the argument that the defendant broke its agreement, cannot be satisfactorily maintained.

Paragraph 8 of the contract, page 132, Case, lines 17 to 28, provides as follows:

“And the said parties hereto do further mutually covenant and agree that the goods which shall be purchased by party of the first part from the party of the second part shall be at a price or profit to the party of the second part over and above the then existing market value of the same, together with an additional profit of one cent on every purchase of a fifty-cent box, two cents on every purchase of a box costing from fifty cents to two dollars and three cents on every purchase of a box costing two dollars or more.”

It will be observed that the plaintiff's sole grievance is based upon the overcharges, and the question of charges or prices in the contract is dealt with in the above clause, clause 8 of the contract. A careful examination of the said clause shows that the parties under the contract provide as follows:

1. That the plaintiff shall purchase his goods from the defendant.

2. That said goods shall be sold at a profit to the appellant.

3. That besides the regular profit there was to be the additional profit of 1 cent on every purchase of a 50-cent box and 2 cents on the purchase of a box from 50 cents to \$2 and 3 cents on a \$2 box or more.

It is, therefore, respectfully urged that under the very terms of the contract, the parties agreed for a double charge or profit, viz.: the ordinary regular profit and an extra profit of 1 cent, 2 cents and 3 cents under certain cases, so that when the plaintiff testified that appellant overcharged the respond-

ent by charging more than 1 cent profit over the market price, appellant was not violating any terms of the agreement, but only complying therewith. The language of this clause is not ambiguous, in fact, the words "*additional profit*" are used, indicating that this 1 cent, 2 cents and 3 cents profit is to be added to the ordinary or regular profit. Therefore, it is difficult to perceive on the evidence before it, how the Supreme Court could determine that the plaintiff had sustained damages to the amount of \$450, when the appellant was complying with all of the terms and conditions of the agreement.

In fact the reason for the plaintiff's alleged overcharge is very apparent. Under the agreement the plaintiff was required to not only purchase all of his goods from the appellant, but he was to pay more than he would be obliged to elsewhere. This provision being undoubtedly in consideration of some advantages that respondent gained by reason of the contract, it would be a most unusual course for the appellant to pursue to overcharge the respondent. As a matter of fact its legitimate charges would bring it a profit substantially more than from its other customers.

With these provisions of the contract before it, the Supreme Court manifestly erred in its interpretation of the contract, and it is, therefore, respectfully submitted that the judgment should be reversed.

**POINT III.****The Supreme Court erred in its rulings upon the admission and exclusion of evidence.****A. ADMISSION OF IMPROPER TESTIMONY ON DIRECT EXAMINATION:**

“Q. I show you a bill, dated September 10, 1914, and ask you if that is a bill of where you bought Big 5 Gumdrops?

Mr. Levitan: I object to that as irrelevant and immaterial, and not a proper method of proof.

A. This is a bill of what I paid.

The Court: I think that may be some evidence.

Mr. Burtis: I offer the bill in evidence.

The Court: I will admit it, and an exception may be noted.

(Bill marked Exhibit P-8.)” (P. 58, Case, ll. 21 to 35.)

The Court should have sustained the above objection for these reasons:

1st. It was not shown how this bill compared with the market price in September, 1914, which was important.

2nd. It is not proper proof of the market price of an article by showing what a certain individual paid for that article at a certain time. For all that appeared at the trial, this particular witness may have been overcharged, or bought his goods much below the market price.

B. EXCLUSION OF PROPER TESTIMONY ON DIRECT EXAMINATION :

“Q. Will you explain to the Court what the circumstances were under which this note was given?

Mr. Burtis: I object to that on the ground that the contract speaks for itself, and on that point no parol evidence can be offered as to why that note was given; the contract is clear and explicit.

The Court: I think he will have to stand on the contract as to the character of that note.

Mr. Levitan: Exception” (p. 99, Case, ll. 28 to 40).

The Court clearly erred in its ruling on this testimony :

1st. It deprived the defendant of a right to answer a certain charge made against it, because the plaintiff on page 42 (Case) gives his version of what the note was for, and consequently the defendant would be entitled to a similar right.

2nd. There was a separate count on the note, and the provision on its face, “subject to the conditions of the contract,” opened it manifestly for an explanation.

“Q. In this case the prices billed in September would be according to the prices at the selling date, August or whatever time prior to that the order was taken?

Mr. Burtis: I object to that.

The Court: I think I will overrule the question as relating to this particular instance.

Mr. Levitan: Exception" (p. 74, Case, ll. 31-40).

The Court clearly erred in its ruling on this question, because the question involved, was what was the price of the merchandise at the time the order therefor was given and not at the time the goods were shipped. It is not unusual for merchants to purchase goods at a certain price for future deliveries, irrespective of what the prevailing market price is at the time of delivery. The point attempted to be shown here was that, notwithstanding the fact that the market price in September was 26 cents, the defendant was only paying 18 cents because it had purchased in July, for deliveries in August and September, at the July price.

C. ADMISSION OF IMPROPER TESTIMONY ON CROSS-EXAMINATION:

"Q. I call your attention to the fact that on August 27th, and practically the first of September, that you paid 18 cents a box for Big 5 gumdrops.

Mr. Levitan: I object to that on the ground that the price in August is no criterion of what the price was in September.

Mr. Burtis: This was three days before.

Mr. Levitan: That makes no difference; the market is fluctuating every day.

The Court: I think I will hear the testimony.

Mr. Levitan: Your Honor will note my objection" (p. 87, Case, ll. 25 to 39).

"Q. Will you swear that on the 27th day of August, 1914, the United Candy Company

did not buy 250 five-pound boxes of Big 5 gumdrops at 18 cents a pound from the Novelty Candy Company?

Mr. Levitan: I object to that as irrelevant and immaterial, for these reasons: In the first place, whether we bought 10,000 boxes in August, the issue here is what the market price was at the time we sold these gumdrops to Bockian.

Mr. Burtis: I now offer this bill in evidence.

Mr. Levitan: I object to that as incompetent, immaterial and irrelevant.

The Court: Well, I think that this may be received; it may be some evidence of the value.

Mr. Levitan: Your Honor will note my objection" (p. 87, Case, l. 40, continued to p. 88, l. 21).

The ruling on this objection was manifest error by the Trial Court. This controversy occurred in September, 1914, just one month after the great European war had been declared, and prices were unstable in every commodity, especially in candy, which is mostly sugar. It is, therefore, very seriously urged that the market price four days before the 1st of September, to wit, on August 27th, is clearly no criterion of the market price of September 1st.

The additional ground also urged at the trial that it was not shown what quantity was purchased also falls short of being a proper criterion of the market price, as it is a matter of common knowledge that the market price for a dozen articles will be different from a gross or a great gross, or any larger quantity, so that in order to establish properly the market price it was necessary to show

the market price of the particular quantity purchased.

“Q. Have you any book here to-day which would show the profits, if any, that were made by the United Candy Company up to the 1st day of September, 1914?”

Mr. Levitan: I object to that as wholly irrelevant and immaterial, whether or not we made any profits.

The Court: You may answer the question.

Mr. Levitan: Exception” (p. 93, Case, ll. 24 to 34).

The question before the Court here was squarely under the contract of September 8th, which must be construed on its face, except as to those parts thereof that are ambiguous.

Therefore, it is difficult to perceive for what reason it was material to the issue for the Trial Court to know what the profits of the defendant company were up to the 1st day of September, 1914.

The objection raised to the admission of testimony on pages 87 and 88 also applies to the testimony on page 93, line 36, to page 94, line 9.

“Mr. Burtis: I offer all these slips which have been identified by the witness as being the items charged to the plaintiff under the contract in evidence.

Mr. Levitan: I object to them, on two grounds; in the first place, they are not offered at the proper time and should have gone in on the direct case of the plaintiff; and secondly, on the ground that they are not paid.

The Court: Well, I think I will allow them.

Mr. Levitan: Your Honor will note my objection.

(All the slips were thereupon marked as one exhibit and numbered P-11.)" (P. 96, Case, ll. 22 to 38).

The Court manifestly erred when it admitted these slips printed on page 137 (Case, Exhibit P-11), for these reasons:

1st. This was defendant's case, and plaintiff had no right to offer any exhibits.

2nd. The exhibits, if plaintiff decided to offer them at all, should have been offered on his own direct case.

3rd. The slips, not being paid, would have no evidential value when admitted.

D. EXCLUSION OF PROPER TESTIMONY ON CROSS-EXAMINATION:

"Q. Didn't you have a receipt in court the last time?

Mr. Burtis: I object to that as incompetent, irrelevant and immaterial.

The Court: I think I will overrule the question.

Mr. Levitan: Note my objection" (p. 49, Case, ll. 16 to 22).

It will be observed that this question was asked the witness on cross-examination, for the purpose of testing the witness' credibility, and should have been allowed. The question should have been allowed on the additional ground that it was within the scope of the direct examination and was material to the issue.

E. IN THE ADMISSION OF EXPERT TESTIMONY  
WITHOUT PROPER QUALIFICATION OF THE EXPERT.

The plaintiff, Bockian, was not qualified to testify to the market price of gumdrops and lolly-pops for the month of October, 1914. On cross-examination as to his source of special knowledge on the subject on page 33 (Case, ll. 30 to 40), the witness clearly does not give a proper source for his information, and his whole knowledge is chiefly from hearsay, as he says, "Mostly what jobbers told me," etc. (p. 33, Case, l. 39).

In *Electric Park Amusement Co. v. Psychos*, 83 *Atl.*, page 766, the Supreme Court (Mr. Justice KALISCH) has laid down the rule as follows:

"The indisputable rule of law governing the admission of expert testimony is that the person called upon to give such testimony must first establish that he has such special knowledge of the subject in controversy between the parties that qualifies him to give an opinion."

F. IN ITS REFUSAL TO ALLOW PAROL EVIDENCE TO  
EXPLAIN AMBIGUOUS PARTS OF THE CONTRACT.

On page 42, the Court permitted the plaintiff to explain what the note (P-2) was given for, while, on page 99 (Case, l. 28), the Court refused to permit one of defendant's witnesses to give his version of the note.

"Q. Will you explain to the Court what the circumstances were under which this note was given?

Mr. Burtis: I object, etc.

The Court: I think we will have to stand on the contract as to the character of that note.

Mr. Levitan. Exception."

The Supreme Court says it finds no harmful error (p. 1, Case, II: 28-30).

It must be remembered that the case was tried without a jury.

The Trial Court decided the facts. It was, therefore, important to exclude all matters from the Court's mind which might tend to influence it in weighing the evidence, and at the same time the Court should have admitted evidence tending to affect the credibility of witnesses on cross-examination.

It will be observed that the testimony was important for the defendant to show its version of the giving of the note, inasmuch as the plaintiff had shown his. It was manifestly error on the part of the Trial Court to refuse testimony explaining that phase of the contract, once it had received plaintiff's explanation.

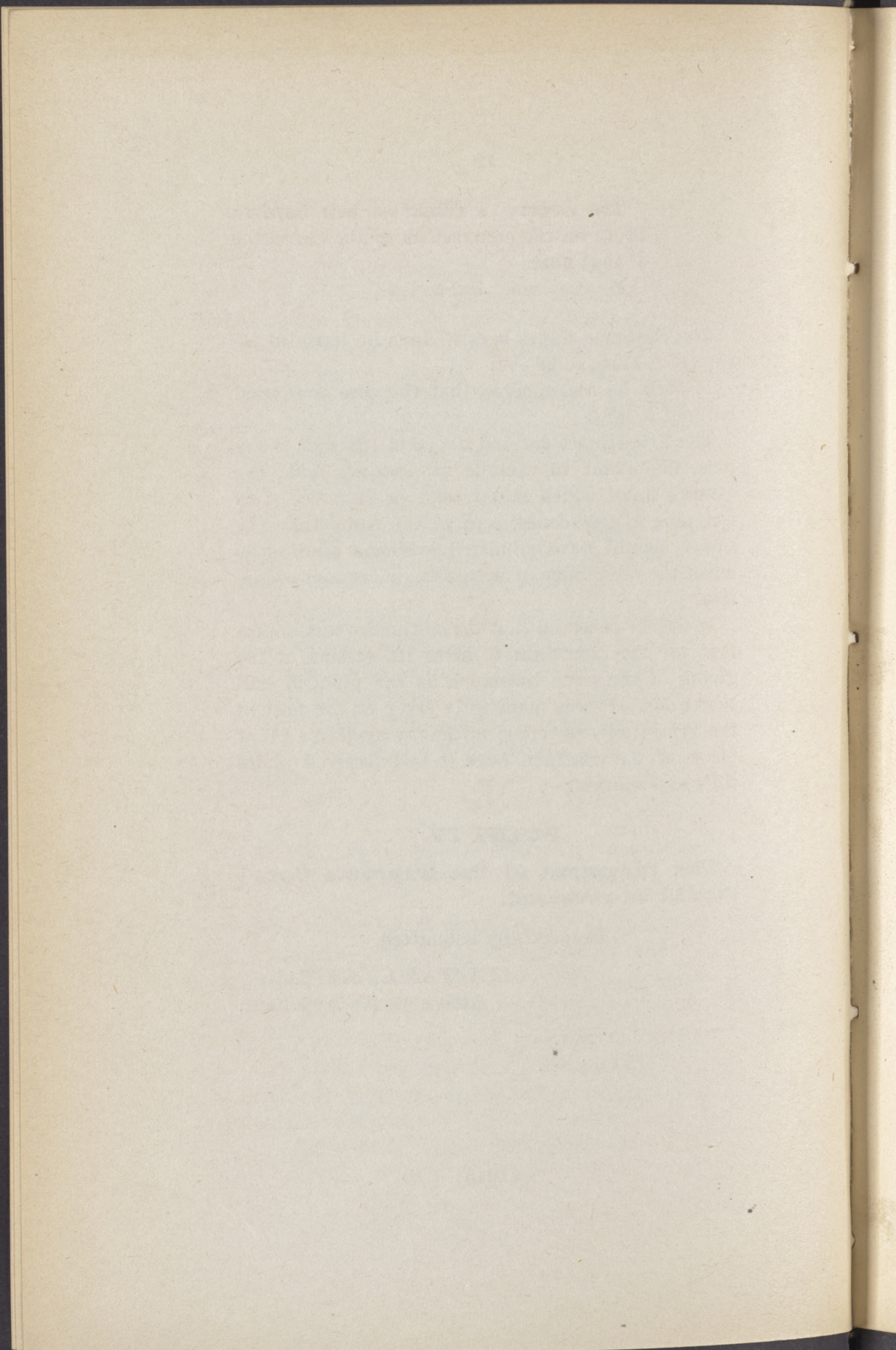
#### **POINT IV.**

**The judgment of the Supreme Court should be reversed.**

Respectfully submitted,

LEVITAN & LEVITAN,  
Attorneys for Appellant.

ABRAHAM LEVITAN,  
Of Counsel.



**New Jersey Court of Errors and Appeals** 10

<p>ABRAHAM BOCKIAN, Plaintiff-Respondent,  vs.  UNITED CANDY COMPANY, Defendant-Appellant.</p>	}	<p>On Appeal From New Jersey Su- preme Court.</p>
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**BRIEF OF PLAINTIFF-RESPONDENT.**

**Statement of Facts.**

This is an appeal from a judgment of the New Jersey Supreme Court affirming a judgment rendered in favor of the plaintiff in the Second District Court of Jersey City. 30

In 1913 plaintiff and others organized the defendant corporation. On September 8th, 1914, plaintiff was the owner of eight shares of the defendant company, which represented one-third of all the capital stock of the corporation. It purchased the shares from the plaintiff for \$1,200.00. These were paid for by the corporation assigning to the plaintiff all its outstanding accounts amounting to \$995.00 and giving him its promissory note 40

for \$225.00. This note was also dated September 8th, 1914, payable one year after date and contained the words, "Subject to the condition contained in an agreement bearing even date."

10 The agreement referred to on the face of this note was the one above referred to, made on that date by the plaintiff with the defendant company. By this agreement the plaintiff assigned his interest in the defendant corporation back to the corporation by assigning his eight shares of stock to the corporation at a valuation of \$150.00 per share, making a total of \$1,200.00. He received payment therefor by the corporation assigning to him its outstanding accounts or bills receivable in the sum of \$995.00 and the corporation's note for \$225.00, payable in one year as above stated, the excess over \$1,200.00 representing possible losses in collecting the outstanding accounts. It further provided that the plaintiff should enter the employ of the defendant as a sub-jobber for the term of one year and purchase from it all the merchandise required by him in the usual course of his business as a sub-jobber and that said merchandise should be sold by the defendant company to the plaintiff at a profit to the defendant above the market price of one, two or three cents on each box according to its value.

20 30 The agreement further fixed as liquidated damages in case of a breach by either party the sum of \$225.00.

40 Four weeks after the making of the agreement, plaintiff was compelled to leave the employ of the defendant claiming an alleged breach of the agreement on the part of the defendant and in May, 1916, and after the note in question had matured, he brought suit against the defendant to recover the amount of the note and damages for breach of the contract. The case was tried by

the court without a jury and a judgment rendered in favor of the plaintiff for the sum of \$450.00. From this judgment defendant appealed to the New Jersey Supreme Court, which court by opinion filed February 16th, 1917, affirmed the judgment of the District Court and it is from this judgment that the defendant now appeals.

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**POINT I.**

**No testimony was admitted by the Trial Court regarding market price except by witnesses properly qualified.**

Two witnesses testified on behalf of plaintiff regarding market price. One, plaintiff himself, and the other David Follender.

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Plaintiff testified (page 31) that he had bought and sold candy in Hudson County for the last six years, and up to the time of the making of the agreement had purchased in the open market all the candy bought by the defendant company. He also testified (pages 32 and 33) that after the agreement was made, on a number of occasions, because of defendant's inability to fill his orders he was compelled to purchase his candy in the open market, and also that he talked with other jobbers and visited factories at this time, in order to ascertain what was the correct market price.

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David Follender testified (pages 57, 58 and 59) that he had been in the confectionery business, as a jobber in Hudson County, for twenty-eight years, and was familiar with the market price of the candy sold plaintiff by the defendant during the months of September and October, 1914. He then

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testified as to what was the market price of this candy during that period and to the fact that defendant had charged plaintiff a greater price for the same than that agreed upon in the agreement.

10 Both these witnesses, because of the length of time that they had been in this business, had sufficient knowledge and were qualified to give this testimony.

## POINT II.

**It was not error for the Trial Court to refuse to allow parol evidence to explain alleged ambiguous parts in the agreement.**

20 There is no ambiguity in any part of the agreement between plaintiff and the defendant which required parol evidence to explain its terms.

At the trial counsel for defendant endeavored to introduce parol evidence in an attempt to prove that the promissory note, upon which plaintiff was suing, was in reality a bonus and not given as part payment for the stock sold defendant. His theory was that if the plaintiff fulfilled his part of the agreement, then at the expiration of a year, he was to receive the amount of the note as a bonus, but if he broke the agreement, he was to forfeit this bonus, and also \$225.00 liquidated damages.

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There is absolutely nothing in the contract to sustain this theory. On the contrary the agreement plainly indicates that the note (paragraph 6; pages 131-132) was given as part payment for the sale of plaintiff's stock to defendant. Paragraph 9 of the agreement begins by fixing the amount of liquidated damages for breach of the agreement at \$225.00 and then provides that in

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case of a breach on the part of the plaintiff, that this note, which represents an unpaid indebtedness by the defendant to the plaintiff, is to be surrendered to the defendant and considered as the amount of the liquidated damages. In case of a breach on the part of the defendant, the amount of liquidated damages was fixed at \$225.00 in addition to the amount of the note. No other construction can possibly be placed on the wording of the agreement, and the Trial Court was correct when it refused to allow defendant to introduce parol evidence in an attempt to change or alter the plain meaning of this agreement. 10

### POINT III.

**There was no error on the part of the Trial Court in the admission or exclusion of evidence.** 20

Reasons Nos. 8, 9, 10, 11, 12 and 13, are all on rulings of the Trial Court on the admission or rejection of evidence.

Reason No. 8 deals with the question of a receipt. If asked for the purpose of testing the witnesses' credibility, counsel for defendant should have so stated. He did not do so, hence the question was properly excluded as immaterial. 30

Reason No. 10 deals with a bill paid by the witness Follender (Exhibit P-8). Counsel for defendant has neglected to print this exhibit in the case on appeal. The bill was relevant and material for the purpose for which it was admitted in evidence to show that the market price in September, 1914, of the article mentioned in the bill was as the witness Follender testified.

The testimony under Reason No. 11 was clearly irrelevant. The contract between these parties 40

fixed the price to be charged, and that was the market price at the time of delivery plus a fixed amount of profit.

10 The testimony under Reason No. 12, A and B, was relevant. It showed the market price a few days before the making of the contract as plaintiff alleged. This testimony was introduced in the cross-examination of one of the officers of defendant company. Certainly it was relevant to show, if possible, by him, that the market price a few days before the making of the contract was so much and then go on and show that in days and weeks following, there was no change in the market price. Nowhere in the entire case does it appear that the market price varied materially from day to day.

20 The testimony allowed under Reason No. 12C was material. Defendant claimed that the \$995.00 of assigned accounts paid for the stock sold it by plaintiff and that this amount constituted the value of the stock in question. Plaintiff claimed that he sold the stock for \$1,200.00, and that this price was based on profits made by defendant prior to the making of the contract (Exhibit P-7, page 136). If such profits did exist, then it tends to bear out plaintiff's testimony that he sold his eight shares at \$150.00 per share.

30 The slips allowed under Reason No. 13 were properly admitted. They had to be identified first by some one of the officers of the defendant, as being the slips given to plaintiff by it. When this was done they became admissible in evidence.

40 The testimony sought to be admitted under Reason No. 12D was clearly wrong. The contract was not ambiguous. There was no need of any parol evidence to show why the note was given, the contract itself showed this. Plaintiff did not (on

page 42) give any testimony as to why or how the note came to be given; his testimony was as to how the amount of the note came to be made \$225.00, not why was the note given; very much different from the testimony which defendant sought to introduce under this question.

Even granting that there may have been error on the part of the Trial Court in the admission or exclusion of the evidence complained of, nevertheless, unless appellant can show that there was harmful error therein, the judgment of the Trial Court as affirmed by the Supreme Court cannot be reversed. 10

#### POINT IV.

**It was not error on the part of the Trial Court to refuse to grant defendant's motion for non-suit.** 20

Defendant's motion to non-suit was based solely on the ground that plaintiff had failed to establish a breach of the agreement by defendant. On the contrary, plaintiff's case presented ample proof of such a breach. He proved first the making of the agreement; secondly, impossibility of further performance on his part because of wilful breach by the defendant; and thirdly, a breach of agreement by defendant. 30

The agreement provided that defendant should sell plaintiff all his merchandise at the market price plus a fixed amount for profit. He was bound by the agreement to purchase from defendant all the merchandise required by him in his business. It is plain, therefore, that this portion of the agreement which deals with the price to be paid by plaintiff is one of the most important covenants in the agreement. 40

10 Plaintiff testified that almost from the day of the making of the agreement he learned that he was being overcharged. He testified that he repeatedly called this fact to the attention of the proper officers of the defendant company and pointed out to them the items wherein they were overcharging him and quoted to them the market price as he found it to be and yet in spite of all his complaints he never received any satisfaction from the defendant company nor did that company cease to overcharge him (pages 29, 30 and 56).

20 Plaintiff showed by the witness Follender, who had absolutely no interest in this case, what was the correct market price and that he had been overcharged by the defendant. What more was it necessary for plaintiff to prove? He established an agreement and a breach of one of the most essential covenants contained in the agreement and established that this breach was willful and intentional on the part of the defendant.

Under these circumstances it would have manifestly been error on the part of the trial judge to have granted defendant's motion to non-suit.

### POINT V.

#### 30 **The evidence does support the judgment of the District Court.**

40 Two important questions of fact had to be determined by the trial judge in reaching his decision. First, was the plaintiff entitled to recover on the promissory note for \$225.00 given to him by the defendant as part payment for the sale of his stock to the defendant? Secondly, was there a breach of the agreement by the defendant entitling the plaintiff to recover the amount of liquidated damages in

addition to the amount of the note? Both these questions of fact were determined by the District Court in favor of the plaintiff and there is ample evidence in the case to show that it was justified in so doing.

Regarding the promissory note, the agreement (Exhibit P-I) speaks for itself. Nowhere in the contract is there anything which tends to indicate that this note was given as a bonus. On the contrary, that the note for \$225.00 represented an indebtedness is evident by the provision in the agreement that "If the said party of the first part should retire from business or should sell out the said business and shall also remove out of the County of Hudson and the County of Bergen, then the said note shall be paid thirty (30) days after notice of such retirement or sale and the removal" (Exhibit 1, paragraph 6, page 132). To try to read into this contract that this note was given as a bonus is absurd and contrary to every rule of construction. When we come to consider this contract in connection with the testimony taken at the trial, then this theory of a bonus becomes even more absurd. Plaintiff (page 42) testified that his eight shares of stock represented one-third of the capital stock of the company and prior to the making of the agreement he and the other stockholders in the defendant company agreed on a valuation of \$1,200.00 or \$150.00 a share for his stock; that it was agreed that the outstanding accounts valued at about \$1,000.00 should be assigned to him and a promissory note given for the balance; that at that time they estimated that he might lose about \$25.00 in the collection of these outstanding accounts and so that amount was included in the promissory note.

The financial statement (Exhibit P-7) bears out the testimony of the plaintiff as to the value of the

stock. This statement shows that in July, two months before the making of the contract, the defendant had nearly \$2,200.00 of undivided profits, besides other assets. Eight shares or one-third of the capital stock of this company was therefore worth at least \$1,200.00, the amount which plaintiff says was agreed upon, and the fact that the figures mentioned in the contract are practically those which the plaintiff says were agreed upon in July shows beyond any question that in the making of the contract the parties intended to carry out the understanding which they had reached some months earlier.

There was sufficient evidence in this case to justify the trial court in finding that the defendant did overcharge the plaintiff and commit a breach of the agreement.

#### POINT VI.

#### **The breach on the part of the defendant went to the essence of the contract.**

The respondent claims that granting that the defendant had committed a breach of the contract by overcharging the plaintiff, yet inasmuch as the overcharge was merely a few cents on a box the breach was a minor one and did not go to the essence of the contract. How profitable it was to the defendant company to make these small overcharges can best be gathered from the testimony given by Benjamin D. Urdang, an officer of the defendant company. The testimony is as follows:

“Q. Did you ever charge him any more than one cent? A. Not a cent.

Q. At any time? A. Why should I do that; because he was a good customer and we would make on him a thousand dollars that year, we would make \$25 some weeks; what is the use of overcharging a man; you can gain 50 cents a day and lose a good customer like this; it is foolishness" (Case, page 81, lines 38-41; page 82, lines 1-8).

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The same officer of the defendant company further testified as follows:

"Q. If he remained with you folks you were going to make a profit on him? A. A profit about \$1,200. At least a thousand dollars in a year.

Q. During the few weeks that he was with you you sold quite a good deal of goods to him? A. Yes, we sold about \$350 or \$400, and the pennies and two cents amounts to a large lot" (Case, page 82, lines 25-31).

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How important a breach of the contract was committed by the defendant in overcharging the plaintiff a few pennies on a box may be gathered from this fact; the defendant testified that under the contract, by charging merely a penny above the market price on a box of \$.50, two cents upon a box costing between \$.50 and \$2.00, and three cents upon every box costing more than \$2.00, the defendant would make a profit of about \$1,200.00 on the plaintiff. How much more profit would the defendant have made if the plaintiff had permitted himself to be overcharged a few pennies upon a box throughout the year. By charging twenty-seven cents for a box the market price of which was from eighteen to twenty cents (case, page 30, lines 11-13) it is established beyond a doubt that

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the question of overcharging goes to the essence of the contract and was not merely a trivial detail to be lightly passed by and dismissed without much consideration, and therefore the trial judge was right in holding that the defendant had committed a breach which went to the essence of the contract and entitled the plaintiff to recover.

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**POINT VII.**

**The judgment of the District Court was not against the weight of the evidence.**

20 This Court has held repeatedly that if there is sufficient evidence in a case to have justified the Trial Court in reaching its conclusions of fact, that this Court will not set aside the verdict of the Court below on the ground that the verdict was against the weight of the evidence.

In this case there is ample evidence to sustain the verdict of the District Court.

Respectfully submitted,

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of Counsel.

