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NEW JERSEY Court of Errors and Appeals

HARRY KESSLER,
Plaintiff-Appellant,
vs.
DAVID FUCHS,
Defendant-Respondent.

NEW JERSEY SUPREME COURT.
PASSAIC COUNTY.

HARRY KESSLER,
Plaintiff,
vs.
DAVID FUCHS,
Defendant.

} Action at Law. 10

NOTICE OF APPEAL.

To Hudson & Joelson, Esqs.,
Attorneys for Defendant.

TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this case.

ARTHUR H. BISSELL,
Attorney of Plaintiff. 20

Due service of a copy of within notice acknowledged this 19th day of March, 1920.

HUDSON & JOELSON,
Attorneys of Defendant.

Filed August 11, 1920.

NEW JERSEY SUPREME COURT.
PASSAIC COUNTY.

HARRY KESSLER,	}	Action at Law. On Postea.
<i>Plaintiff,</i>		
<i>vs.</i>		
DAVID FUCHS (OR FOX),	}	Hudson & Joelson, At-
<i>Defendant.</i>		
		Judgment for Defendant.

JUDGMENT RECORD.

10 David Fuchs (or Fox), the defendant in this cause, was summoned to answer unto Harry Kessler, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued November 1, 1919.)

Plaintiff, Harry Kessler, whose address is 22d Street and Arch Street, Philadelphia, Pa., says that:

I. On or about the 16th day of April, 1919, the defendant, in the City of New York, sold the plaintiff 200 pieces of silk for \$1.15 a yard.

20 II. By the contract of sale it was provided that the defendant should deliver the silk to the plaintiff at the railroad station in Philadelphia, as follows:

50 pieces on May 25th, 1919.

50 " on June " "

50 " on July " "

50 " on Aug. " "

It was further provided that the said pieces should contain about 65 yards each.

30 III. Defendant did not deliver said silk as agreed, but after the delivery of 85 pieces he refused to deliver the remaining 115 pieces to plaintiff, although requested so to do.

Plaintiff demands \$8,000.00 damages.

ARTHUR H. BISSELL,

Attorney for Plaintiffs,

491 Bloomfield Ave., Montclair, N. J.

Filed November 11, 1919.

The answer of David Fuchs, residing at Paterson, County of Passaic, State of New Jersey, says:

1. He admits Paragraph "2".

2. He denies Paragraph "3" and says that said order provided for the giving of colors in which said material was to be made up and that the said colors were to be given by the plaintiff, and that the giving of said colors would control the time of delivery to the extent that defendant could not make delivery as provided in said contract until the plaintiff gave to defendant the colors 10
in which said goods were to be made up.

First Special Defense.

Plaintiff canceled the said order with the defendant.

Second Special Defense.

Plaintiff and defendant entered into an agreement wherein and whereby the plaintiff was relieved from accepting said merchandise, and defendant was relieved from delivering said merchandise; that after defendant delivered about 85 (eighty-five) pieces of said merchandise the plaintiff requested the defendant to rescind said contract and cancel the agreement for the sale and delivery of said merchandise. It was agreed between the parties that plaintiff need not accept any more merchandise and could return that which he had already received if he so elected, and that the defendant need not deliver any more of said merchandise. Thereupon the defendant ceased manufacturing and delivering said merchandise. 20

Third Special Defense.

Plaintiff failed to furnish or give defendant the colors for the manufacture of said merchandise or to designate the colors in which said merchandise was to be manufactured. 30

Fourth Special Defense.

Plaintiff released the defendant from the performance of said contract from and after the time defendant made

delivery of eighty-five (85) pieces of said merchandise, in consideration of the defendant releasing the plaintiff from accepting said merchandise.

HUDSON & JOELSON,
Attorneys for Defendant.

Filed November 26, 1919.

The defendant denies all allegations in the answer.

10 ARTHUR H. BISSELL,
Attorney for Plaintiff.

Filed December 11, 1919.

This case was tried before Judge George S. Silzer with a jury at the Passaic Circuit on February 19th, 1920.

The jury rendered a general verdict against the plaintiff and in favor of the defendant.

20 Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff his costs, which are taxed at the sum
Costs—\$39.10. of thirty-nine dollars and ten cents.

Judgment entered February 28, 1920.

WM. S. GUMMERE,
C. J.

30 I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this
[I. s.] twenty-sixth day of August, A. D. nineteen hundred and twenty.

ENOCH L. JOHNSON,
Clerk.

NEW JERSEY SUPREME COURT.
PASSAIC COUNTY.

HARRY KESSLER,
 Plaintiff,
 vs.
DAVID FUCHS,
 Defendant.

(Filed January 11, 1920.)

10

PATERSON, N. J., February 18, 1920.

Before Hon. George S. Silzer, J., and a jury.

Appearances—Arthur H. Bissell, Esq., Ezekiel Fixman, Esq. (of the New York Bar), for the plaintiff; Messrs. Hudson & Joelson, for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. Bissell opens for the plaintiff.

Mr. Joelson opens for the defendant.

20

Harry Kessler, the plaintiff, sworn as a witness on his own behalf, testifies as follows:

Direct examination, by Mr. Bissell.

Q. You are engaged in the silk business in Philadelphia?

A. Manufacturing, yes, sir.

Q. Manufacturing what?

A. Shirt waists.

Q. Under the name of what?

A. The Trio Waist Company.

30

Q. You have an office in New York?

A. Yes, sir.

Q. Are you acquainted with the defendant in this case?

A. Yes, sir.

Q. Have you done business with him for some years now?

A. For probably three or four years previous.

Q. With whom have you done your business mostly, with him directly?

A. With him directly, Harry Fuchs.

Q. Do you know his son?

A. That is his son.

Q. The defendant in this case is David?

A. David Fuchs. I met the gentleman a short time ago, that is the first time I ever met him. Before my transactions were all the time with Harry Fuchs, a son
10 of David Fuchs.

Q. On April sixteenth of last year did you have a conversation with Mr. Harry Fuchs in your office in New York?

A. Yes, sir.

Q. At that time did you give him an order?

A. I did give him an order.

Q. Have you that order with you?

A. I have a copy of it. (Producing.)

Q. Is this the order which was given at that time?

20 A. That is the order.

Mr. Bissell—I offer it in evidence.

Admitted and marked *Plaintiff's Exhibit P1* of this date.

Q. Under the arrangement of that order you were to buy two hundred pieces at \$1.15 a yard?

A. I intended to buy at that time only about a hundred—

The Court—Under the order you were to buy two hundred pieces?

30 The Witness—On this order?

The Court—This order calls for two hundred pieces.

The Witness—Yes, sir.

Q. What was the conversation you had with Mr. Fuchs at that time?

The Court—Does not the contract speak for itself?

Q. How many of these pieces were subsequently delivered to you?

A. About ninety-four pieces.

Q. Don't you know exactly?

A. We got ninety-four pieces.

Q. Have you the invoices there?

A. Yes, sir (producing).

Q. I show you an invoice dated April seventeenth, 1919, to which is attached your office memorandum showing the delivery of one piece on April sixteenth, was that the piece that is referred to there taken by you at that time?

10

A. Yes, sir.

Mr. Joelson—That is the sample piece, is it not?

The Witness—Yes, sir.

The Court—Is it necessary to inquire into all these details?

Mr. Bissell—I don't know that it is.

Q. (By the Court) Did you get any more than ninety-four pieces?

A. I did not.

20

Q. What did you do then when you did not get the the others?

A. We are constantly after him, all the time, during that time, almost three or four times a week, I got in touch with him personally and I telephoned to him to make deliveries and he would always promise "Tomorrow, to-morrow," right along, all during that time, he promised deliveries, and up to the present day he has not delivered any yet.

Q. (By Mr. Bissell) These were all delivered, ninety-four pieces, prior to the suit?

30

The Court—There cannot be any dispute about the deliveries which were made, the defendant does not dispute the deliveries, does he?

Mr. Joelson—No.

The Court—Suppose you offer the bills in evidence and they will show the deliveries as far as admitted.

Mr. Bissell—I offer these three invoices in evidence.

Admitted and marked *Plaintiff's Exhibits P2, P3, and P4*, of this date.

Q. Are you in the market for silk constantly?

A. I am in the market almost every day in the week, that is my business, that is the end of it I look after, the purchasing end of it, and I am in New York Tuesday, Wednesday and Thursday and keep in touch with the
10 market as well as anybody in New York City.

Q. Did you buy any silk in August, 1919, which was of the same quality and sample as the sample in this case?

A. About similar goods to these, yes, sir.

Q. At what time?

A. Some time in August.

Q. How much did you pay for it?

A. I paid two dollars a yard.

The Court—Was that the market price at that
20 time?

The Witness—At that time the market price was anywheres from \$1.55 to \$2.00 a yard.

Q. You had had talks with the defendant prior to August in regard to filling this order?

Mr. Joelson—Objected to; we are on the question of damages now.

Mr. Bissell—I will be going back.

Q. After his first refusal or failure to deliver any further silk to you did you request that it be sent?

30 A. We have requested him three or four times a day, almost, during the time, while I was in New York; we needed these goods very badly, and that was probably the biggest purchase we had purchased from him, and we needed those goods; we could not go ahead without them; we called him on the long-distance telephone several times, and wrote him to the New York office, and wrote him to the mills, and saw him in person dozens and dozens of times.

Q. During what months was that?

A. That was during June, July and August, all during those months.

Q. As a matter of fact, according to the contract it appears that the third delivery which is there called for was to be made July twenty-fifth; where the first two deliveries which were anticipated there in April and May made practically enough to take care of the deliveries that were called for under the contract for May and June.

10

The Court—It would not make any difference when they were delivered; your claim begins in July.

Mr. Bissell—I simply want to get at the date when he was entitled to take the price and fix the time at which the damages should be computed. He was entitled to take the price in August.

The Court—As I understand the contract called for fifty pieces to be delivered in May and fifty pieces to be delivered in June. Those were on time. The first default then was in July, the twenty-fifth of July.

20

Q. As to the delivery in July, was there anything said by you which would give him time for putting that over?

A. In fact, I asked him he should kindly help me along and anticipate deliveries and try to give me some of the goods sooner, as we were in urgent need of the same.

Q. When did he finally fail to comply with the terms of his contract?

30

A. Well, he has promised right along to make shipments; he never said that he would not ship any goods; he promised right along he will make shipments. He said, "Well, if you will wait probably next week, probably to-morrow, it is coming through." In fact, he said that he was going to try to get some cloths and ship it to me.

The Court—Did a time come when he finally said he would not ship any more?

The Witness—Well, yes; the last time he brought up these goods to me and showed me this piece of goods and said, "I can get from my uncle this goods, and if you want it I will give you some of the goods."

Q. When was that?

A. I think that was the latter part of August.

10 Q. Did you decline that offer?

A. I declined that offer.

Q. Did he say anything more about it after that?

A. That was all I saw of him.

Q. Did you give him the colors of the other seventy pieces which the contract calls for?

A. The balance of these seventy pieces was left to be given him, colors was sent to him the same time.

Mr. Joelson—It was sent to him; I object to that.

20 The Witness—Mailed.

Q. Do you know whether or not the contract was performed on your part in letting him know the color of the seventy pieces which were to be furnished?

A. Absolutely.

Q. When was that done?

A. That was done some time, I think, some time the latter part of April; I could not recollect exactly the date, and it was also repeated verbally many times to him what the colors should be.

30 Q. In his talks with you was anything said by him as to not having colors?

A. Nothing at all. There was no question of colors; nothing of that kind at all.

Q. Did you have some talk with Harry Fuchs in Philadelphia?

A. Yes, sir.

Q. Was that some time in May?

Mr. Joelson—Objected to as leading.

The Court—When was it?

Q. What time was that?

A. I could not recollect the time.

Q. It appears from the bills that are in evidence here—

A. After the delivery of the first shipment, probably two or three weeks later, we examined those goods, and we found many of those was, about, probably thirty or thirty-five pieces seconds.

Q. That was on the first of May, 1919, that the big shipment was received? 10

A. After we received the shipment, you know you don't examine it the first minute it is received, and probably it will take a few days before we could get to them, and we examined those goods and found about thirty or thirty-five pieces seconds, and I immediately got in touch with Harry Fuchs, and he came over to Philadelphia, and I told him those goods were not perfect, and he said he would replace those. He admitted that those goods were imperfect, and said that he would replace them. 20

Q. What did you say to him?

A. At that time I did not say anything to him, just showed to him and proved to him that those goods were seconds, and he wanted me to send them back and he would replace them.

Q. Did you say you would do it?

A. At that time I did not exactly say I was going to do it, and in the meantime we took those goods and we did not send them back. We were supposed to send them back, but in the meantime a few people came around for goods, and they used seconds at that time, and we sold those seconds "As Are" to a manufacturer in Philadelphia at a dollar and forty; instead of sending them back to him we sold them. 30

The Court—You kept them?

The Witness—I sold them. I could not use them personally myself, because they were not good enough for us, and we sold them "As

Are" for a dollar and forty cents to a manufacturer in Philadelphia by the name of Ost Brothers.

Q. Was anything said by him at that time as regards the balance of the contract?

A. There was not said anything at all, except he was going to make shipment of the balance because he says he owes it to us, and he is going to make shipment of the balance of the goods he owed us.

Q. Did he offer to send the balance at the same time?

10 A. Yes, sir, absolutely. Right along. He never said anything different.

Cross-examination, by Mr. Joelson.

Q. Who was the Trio Waist Company?

A. Max Webber and Harry Kessler.

Q. That is a partnership, is it not?

A. Yes, sir.

Q. These goods were bought in the name of the partnership?

20 A. By the Trio Waist Company.

Mr. Bissell—If the Court please, I want to say this—

The Court—Is there any defence of that sort here?

Mr. Bissell—No, there is not. There was never any motion made or any notice taken of it. I don't know that it is necessary for me to amend or not. I don't care. We are perfectly willing to admit that Mr. Webber was a partner.

30 The Court—Does the defendant admit it makes no difference?

Mr. Joelson—It makes this difference, where there are two members to the firm one may start a suit later.

Mr. Bissell—I am perfectly willing to amend.

The Court—Very well, then, the pleadings may be amended setting up that the plaintiff and his partner Max Webber were together in busi-

ness as the Trio Waist Company and the plaintiffs should be stated as Harry Kessler and Max Webber doing business as the Trio Waist Company. Mr. Kessler here present authorizes his counsel to do that?

The Plaintiff—Yes, sir.

The Court—The defendant's answer will stand as to both plaintiffs.

Q. You notified Mr. Fuchs that thirty or thirty-five pieces of goods were imperfect? **10**

A. Yes, sir, I did.

Q. You notified him of that by telephone?

A. I notified him by telephone and I saw him personally in New York.

Q. And you told him the goods were imperfect?

A. I told him a certain amount of those goods were, when we examined them carefully we found that a certain amount of those goods runs damaged.

Q. In consequence of that telephone call and that conversation he came to Philadelphia? **20**

A. He came to Philadelphia, yes, sir.

Q. And you had a discussion with him as to whether the goods were perfect or not perfect?

A. No, sir, he admitted it himself. He looked at the goods and admitted that the goods were damaged.

Q. As soon as he looked at the goods he said that thirty-five pieces were damaged?

A. He did not look at thirty-five pieces, he looked over some pieces on the table and said they were not as they should be and to send them back and he will replace them. **30**

Q. He said "I will replace these few pieces of damaged goods."

A. Yes, that is what he did.

Q. What did you say to him?

A. I said it was all right, that is all satisfactory to us.

Q. You told him the damaged goods were satisfactory to you?

A. No, I told him I was satisfied to have them replaced.

Q. Why didn't you return those goods?

A. We did not return them for the reason we found after, one of our representatives in the New York office said, "What is the use of your sending them back. You can dispose of them down there." So I went and disposed of them on my own account.

Q. Is it not the fact that Harry Fuchs made a special trip to Philadelphia to examine those goods?
10

A. He did, yes.

Q. He came down at your request?

A. Yes, sir.

Q. And at your request he examined the goods and found a few imperfections?

A. Yes, sir.

Q. And then you said you will send the goods back?

A. Yes, sir, I did.

Q. And on the top of that you did not send them
20 back?

A. It was optional to me if I want to send them back or not.

Q. If it was optional with you to send them back or not why did you send for Harry Fuchs to come to Philadelphia?

A. Because we could not use those goods. Those goods were damaged. I had an offer for those to dispose of them in Philadelphia and I disposed of them.

Q. Why did you send for him to come there if you
30 sold them?

A. Because I wanted him to see those goods.

Q. Did you ask him for an allowance?

A. No, sir.

Q. Did you ask him to take the goods back?

A. Yes, sir.

Q. Why didn't you give them back to him?

A. Because we found we could dispose of them at home later on, after he left, I found we could dispose

of them down there and we did not want to go to the bother of sending them back.

Q. Did you write to Mr. Fuchs saying you were not going to return those goods?

A. He knew all about it.

The Court—What difference does that make?

As I understand from the invoices they were delivered to Mr. Kessler and he accepted them and he is bound by his acceptance of those goods.

Mr. Joelson—He says there were thirty or **10** thirty-five pieces damaged?

The Court—But, as long as he took them.

Mr. Joelson—Just to test the witness's veracity I ask these questions.

The Court—The question now is the delivery of the balance of the contract.

Q. What was the conversation at the time as to the delivery of the balance of the goods?

A. Well, there was nothing particular, no particular conversation at that time, simply he said, "Well, he will **20** send the balance of them, send it right along."

Q. Did you ask him for the balance at that time?

A. I should say I did.

Q. That was in April?

A. That was in April, yes; I think he was there in April. I could not say exactly when he was there.

Q. Was that April or not?

A. I could not recollect exactly.

Q. What month was that in?

A. After, because it was probably three or four weeks **30** later when the goods were delivered in Philadelphia.

Q. Then that might have been the first part of May?

A. Probably it was.

Q. The contract calls for the delivery of fifty pieces in May, June, July and August?

A. Yes, sir.

Q. Why did you ask him for more goods in May when you had already received more goods than was coming to you?

A. I ask him to anticipate if he possibly could not anticipate deliveries, a way we generally do in different houses where we buy.

Q. You asked him to anticipate the delivery of goods and yet you offered to return some goods?

A. Damaged goods; yes, I did.

Q. You sold those damaged goods to whom?

A. To Ost Brothers, manufacturers of shirt waists.

Q. What do you manufacture?

10 A. We manufacture also shirt waists.

Q. You could not use those goods, but you sold them to another concern?

A. They manufactured a cheaper grade of goods.

Q. So you sold them?

A. Yes, sir.

Q. At an increase of how much?

A. At a dollar forty, rather than have them come back at all.

Q. Have you the receipt for those goods?

20 A. I have not got the receipt here with me.

Q. Have you the duplicate bills showing how you sold those goods?

A. I have not got it here.

Mr. Bissell—I object to this. I don't see as it makes any difference.

The Court—No. I don't see that it does.

Q. You say that you replaced these goods at two dollars a yard?

A. Yes, sir.

30 Q. From whom did you buy those goods?

A. I bought them from different people in the City of Philadelphia.

Q. From whom did you buy those goods?

A. Charles Rabe & Co.

Q. Are they silk manufacturers?

A. They are not silk manufacturers. They are waist manufacturers.

Q. So you went out in the open market and bought silk from waist manufacturers?

A. Well, of these people we bought them right along.

Q. Did you try to buy this silk from a silk manufacturer?

A. We tried to buy them, but goods were so scarce at that time you could not get them.

Q. From whom did you try to buy them?

A. From several houses.

Q. From whom did you try to buy them?

A. I could not recall the names just at present.

Q. You needed goods very badly and went to silk manufacturers to buy it, now from whom did you try to buy these goods? From what silk manufacturer did you attempt to buy these goods? **10**

A. From Schwartz & Hummer, they have a representative in Philadelphia and we went to them.

Q. From whom else did you try to buy it?

A. I could not recall now at present, we have probably three or four people which come in and sell us goods.

Q. And yet you bought silk from waist manufacturers? **20**

A. We are in Philadelphia and they are in Philadelphia, and they had it on hand and they helped us out as a favor.

Q. They did you a favor?

A. Absolutely.

Q. They are friends of yours?

A. No. Not friends. They helped us along with those goods.

Q. Because the goods were very scarce?

A. Yes, sir. **30**

Q. And they helped you out?

A. Yes, sir.

Q. And they are not friends of yours?

A. They are friends of mine, as far as I know, each and every manufacturer in Philadelphia is like that, they are nice people.

Q. And you paid them two dollars a yard?

A. Yes, sir.

- Q. What goods did you get for two dollars a yard?
 A. Goods similar to those.
- Q. What construction were they?
 A. We never had bought silk by construction.
- Q. What goods did you ask for when you went out to buy?
 A. I am purchasing silks and I know which is the quality to take the place of his goods.
- Q. What quality did you ask for?
 10 A. We never ask for quality.
- Q. What goods did you ask for?
 A. I ask for similar Georgette stuff, he had two or three grades, that was the grade compared with this what we use from the Savoy Silk Mills.
- Q. There are various prices for Georgettes?
 A. Yes, sir.
- Q. They vary greatly in price?
 A. Yes, sir.
- Q. According to quality?
 20 A. Yes, there is.
- Q. And do you know what quality you purchased from that waist house?
 A. I could not tell you the name or the construction, I don't know what construction it was, it was a piece of goods similar to this, I bought another, but I bought this from the Savoy Silk Mills, but we do not buy goods by construction.
- Q. How do you know it was the same?
 A. I compared them.
- Q. How did you compare them?
 30 A. I compared one piece of goods with another.
- Q. Where did you get that piece of goods to compare with?
 A. I took a swatch along and went down there to see if this would take the place of our material.
- Q. Where did you get the swatch from?
 A. From our Philadelphia office.
- Q. I thought you sold those goods out?

A. We have pieces, remnants always left over always, we don't cut up every inch of goods.

Q. I thought you did not cut it up at all, I thought you sold it.

Mr. Bissell—Only the defective ones.

The Witness—Only the defective ones we sold.

Mr. Joelson—I object to that interruption; that is unfair.

Q. How many pieces of silk did you sell?

A. Thirty-five to thirty-seven pieces. 10

Q. Have you the receipt for the pieces you sold?

A. I have not.

Q. You kept the balance of the goods and cut them up yourself?

A. Yes, sir.

Q. And when you went to buy the goods you took a swatch with you?

A. Yes, sir.

Q. And compared it?

A. Yes, sir. 20

Q. Did you know that this waist house had silk for sale?

A. Did we know?

Q. Yes?

A. In Philadelphia we help each other out right along. We know each other pretty well and if it comes down to an emergency if you need some goods and a fellow can help you along, he will help you along.

Q. They ask you to come and examine them and pick out what you want? 30

A. Yes, to come and examine them and you can buy them without profit, we called up on the telephone and asked him if they would sell us some goods.

Q. And you took a swatch and compared it?

A. Yes, sir.

Q. How many grades of goods did that waist house have?

A. I don't know exactly how many he had, he showed me that piece and I guess that was about the first piece.

Q. The first piece he showed you was exactly the same as the sample, as your switch?

A. Yes, sir.

Q. How much did he ask you for it?

A. What he ask me? He told me at that time the goods was worth more money, but to help me out he will let me have the goods for two dollars.

Q. You did not bargain with him at all?

A. Well, he wanted first two dollars and ten cents, he
10 said the goods was worth more money at present and we agreed to pay him two dollars a yard.

Q. How many pieces did you buy from him?

A. I don't recollect how many.

Q. Don't you recollect how many pieces you bought from that waist house?

A. No, I don't remember how many pieces I bought from them that time.

Q. Have you any paper, any document, to show how many pieces you bought from that waist house?

A. No, not here.
20

Q. Where have you that?

A. I guess it must be in Philadelphia. We have got bills for it.

Q. You knew this case was coming on to-day?

A. I did not think it was necessary to bring those papers along.

Q. Didn't you think it necessary to bring that paper when you claim here damages and you base your claim on that paper?

A. I did not think it was necessary, otherwise I would
30 have brought it along.

Q. Didn't your lawyer ask you to bring all the papers you had?

A. I did not bring any papers.

Q. You brought the invoices of silk you bought from Fuchs didn't you?

A. Yes, sir.

Q. You thought they were necessary?

A. Well, I did not think it was necessary and I did not bring it.

Q. You brought other papers?

A. I did not bring those along.

Q. And you don't know how many pieces you bought at two dollars a yard?

A. No, I do not exactly, because we sent down for them again after a while and got a few additional pieces.

Q. Do you know about how many pieces you bought? 110

A. I could not tell you exactly how many it was.

Q. Did you buy two hundred?

A. No, I did not.

Q. Did you buy twenty?

A. I would not say exactly, around anywhere between twenty and twenty-five pieces, or thirty pieces, I would not say exactly.

Q. Did you buy any other goods?

A. No, I did not.

Q. You needed goods very badly didn't you? 120

A. Yes, sir.

Q. You needed the hundred and six pieces very badly, didn't you?

A. Yes, sir.

Q. And all you bought from that waist house was twenty odd pieces or thirty pieces?

A. We bought a few pieces and we had a few pieces of goods in the house previous also.

Q. So the only place you bought goods from was that waist house and from no other concern? 130

A. At that time, yes, sir.

Q. And no other goods?

A. No, sir.

Q. And you sold the thirty-five pieces to Ost Brothers?

A. Yes, sir.

Q. What was the damage to those goods?

A. There were streaks and holes in it.

Q. And do you say that Ost Brothers could make waists out of silk with holes in it?

A. Yes. They are making a cheaper grade of goods.

Q. You do not make that kind of waists?

A. We do not make the cheaper grade of goods and we are very particular what we use.

Q. When that contract was placed with the Savoy Silk Mills didn't you tell Mr. Fuchs all you wanted to buy was a hundred pieces of goods originally?

10 A. Yes, sir.

Q. And that you could not use too much of that goods?

A. I did not say we cannot use it.

Q. Most of your goods consist of cotton?

A. Well, we make a great deal of cotton stuff, yes, I did not say we cannot use it, I thought at the present time it was enough and he insisted.

Q. When Mr. Fuchs came to you to Philadelphia you told him that he talked you into accepting two hundred
20 pieces of goods and that you cannot use two hundred pieces?

A. I did not.

Q. You cannot use any Georgette?

A. I did not say anything of the kind.

Q. You wanted him to take those ninety-four pieces back with him?

A. I did not.

Q. Didn't you have quite a dispute with Mr. Fuchs at that time?

30 A. In reference to those damaged pieces of goods, yes, sir.

Q. You had quite a dispute?

A. Not quite a dispute. He agreed immediately that those goods were damaged.

Q. No dispute at all?

A. No. There was not much of a dispute.

Redirect examination, by Mr. Bissell.

Q. Counsel brought out the fact that you had some

conversation at the time this order was given and that you said you did not want more than a hundred pieces, what did he say at that time?

A. He said that goods is going to go very high and I should better buy two hundred pieces, and being I knew him for several years and that all previous transactions were satisfactory to us I took his advice and bought two hundred pieces from him.

Q. After that, what was the fact in regard to the market?

10

A. The market went just as he said, it went up.

Recross examination, by Mr. Joelson.

Q. He told you that the market would go up?

A. Yes, sir.

Q. And, is it not the fact, that the market dropped in April?

A. It did not.

Q. Is it not the fact, you said to him, "You told me the market would go up and it went down and you take your pieces back"?

20

A. Nothing of the kind. The market never dropped and everybody living knows that it did not drop.

By Mr. BISSELL:

Q. I show you this invoice for the eighty-five pieces of silk, will you state what date that was received in Philadelphia?

A. I cannot say what date.

Q. Have you got a receipt attached to that?

A. Oh, yes, that was received fifth first.

30

Q. The first of May?

A. Yes, sir.

Q. And it was how long after that that you had your talk with Mr. Fuchs with regard to the damaged goods.

A. We had quite some time getting him down there, it must have been the latter part of May.

Q. And the market in May was going what?

A. It was gradually going up.

Q. And in June?

A. In June still higher and in July still higher.

Morris Schneider, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination, by Mr. Bissell.

Q. Where do you live?

A. In Philadelphia.

Q. What is your business?

10 A. Buyer of silks.

Q. For whom?

A. A. L. Wisner & Co.

Q. How long have you been in the silk business?

A. About seven years.

Q. What amount of silk do you buy in the course of a year?

A. About seventy-five to a hundred thousand yards a year.

20 Q. Are you familiar with the prices of silks in the market as it stood in August and July, 1919?

A. I am.

Q. I show you this sample of silk and ask you, can you tell me what was the market price in July and August, 1919, of Georgette silk similar to the one which I show you?

Mr. Joelson—I object to that.

Mr. Bissell—I will connect that up.

The Court—With the understanding that you will connect it, I will allow it.

30 A. About a dollar eighty-five to two dollars a yard.

The Court—That blue colored?

The Witness—Yes, sir.

Q. Now, I show you a sample of flesh-colored silk, what was the price of that?

A. About the same price.

Q. A dollar eighty-five to two dollars a yard?

A. Yes, sir.

Q. What was the condition of the market with regard to Georgette silks from May, 1919, up to August?

A. It was a rising market.

Q. Would you be able to say what difference there was between the market in April and the market in August?

A. Do you mean the difference in price?

Q. Yes.

A. Yes; there was a rise of about fifty per cent., approximately.

Q. So that silks which were worth a dollar fifteen in April, 1919, would be worth approximately how much? 10

A. About a dollar eighty-five to two dollars a yard.

Cross-examination, by Mr. Joelson.

Q. You are not a judge of silks?

A. I am familiar with silks.

Q. Which is the better grade of goods of those two you looked at, the blue or the flesh colored?

A. The flesh.

Q. The flesh is the better grade? 20

A. Yes, sir.

Q. How much better?

A. Not very much better, about the same.

Q. Is there a two-thread or a three-thread in one?

A. That I cannot tell you.

Q. You don't know?

A. No, sir.

Q. What would determine the price of that silk?

A. The weight, the quality, by feeling it.

Q. The weight and quality?

A. Yes, sir.

Q. In other words, the amount of silk in it? 30

A. That is right.

Q. And you say the flesh has more silk?

A. Not more silk; the finish might be better; it brings the price up to have the finish better; it is a different construction and weight, but the general weight and construction and looking at it it is better,

looking at the construction and weight you determine the price.

Q. You say there is a difference in the construction and the finish in the flesh and blue?

A. I like the finish of the flesh better than the blue.

Q. Is it not the fact that this blue has more gum than the other?

A. No, sir.

Q. It is not?

10 A. No, sir.

Q. Did you ever examine a piece of goods?

A. Yes, sir.

Q. Do you know how to count the threads in a piece of goods?

A. I know how to count them, but I don't count them in buying goods.

Q. Can you count the threads now if I give you a glass?

A. I don't think I could, no; not enough to make it **20** positive for evidence.

Q. You could not even count the threads?

A. No, sir.

Q. And yet you say you can tell which is the better piece and which is the worst piece?

A. By feel, yes, sir.

Q. Can you tell which is two-thread and which is three-thread?

A. No; I can tell the weight.

Q. In other words, you guess, by the feel of the **30** silk?

A. I do not guess. I judge by the feel of the silk, by the weight.

Q. That is how you buy your silk?

A. Yes, sir.

Q. By the feel of it?

A. Yes, sir; by the feel and the appearance.

Q. Did you ever hear of a three-thread Georgette?

A. Yes, sir.

Q. Did you ever buy silk by specifications?

A. Do you mean to buy it by specifications?

Q. Yes.

A. No, sir.

Q. You never bought silk by specifications?

A. No; I specify my own materials; I know what I need. You mean specifications from somebody else to me, and I am understood to buy that kind?

Q. No, specifications as to the construction, whether three-thread, two-thread construction of the warp, or four-thread?

A. No, sir.

Q. You do not buy silk that way at all?

A. No, sir.

Q. You just buy it on the goods, the appearance?

A. Not on that alone; I know the goods what I need, and I buy just what I want.

Q. Will you tell us which has more silk in it, the blue or the flesh sample before you?

A. They are both about the same, the flesh is a better finish. 20

Q. Where did you study the silk business?

A. I never studied it, from practical experience.

Q. And your experience is only feeling and looking at a piece of goods?

A. Yes, sir.

Q. Is it not the fact when a man buys a piece of goods he buys it by the specifications?

A. No, sir; it is not the fact.

Q. A man never questions how much silk is in it, how many threads to the inch, how many picks to the inch? 30

A. They sometimes question it, not always.

Q. Did you ever hear of such a thing as eighty picks?

A. Yes, I have heard of that.

Q. What does that mean?

A. The count.

Q. Does that determine the price of silk?

A. It helps determine the price, yes, sir.

Q. Is eighty picks more valuable than seventy-two picks?

A. Yes, sir; naturally.

Q. Is forty-five warp more valuable than forty warp?

A. Right.

Q. That is how silk is determined?

10 A. Yes, sir.

Q. Then you do not know how to determine that?

A. I do know by the feel of my hand.

Q. Can you tell how many threads there are in a piece of silk by the feel of your hand?

A. No. But I can tell which is the heavier. I can tell the kind of goods you are showing me and the value of it at the time by comparing it with other merchandise in the market.

Q. Tell us how many picks is in this piece?

20 A. I cannot tell you how many picks is in it; I can tell you what the cloth is worth.

Q. Did you sell any silk in May or buy any silk in May?

A. I did.

Q. How much did you pay for it?

A. About a dollar and fifteen cents or a dollar and twenty cents, around that price.

Q. What construction of goods?

A. Similar to this one.

30 Q. Similar to the flesh?

A. Similar to both of these; they are about on a par, there is not very much difference between them.

Q. How much did you pay for goods similar to the flesh?

A. I said, about a dollar fifteen to a dollar twenty.

Q. How much for goods similar to the blue?

A. About the same price.

Q. How much did you pay in June?

A. About a dollar fifty to a dollar fifty-five.

Q. How much in July?

A. About a dollar eighty.

Q. How much did you pay in August?

A. About a dollar eight-five to two dollars.

Q. From whom did you buy silk at that time at two dollars?

A. From people in Philadelphia and New York.

Q. From whom did you buy silk in August at two dollars?

10

A. From Meyers in New York.

Q. What is he? Who is he?

A. A silk house.

Q. A manufacturer?

A. A jobber. Or, maybe a manufacturer; I don't know, but he sells the piece goods, and whether he manufactures it himself or is a jobber, I don't know.

Q. By whom are you employed, did you say?

A. L. Wiesner & Co.

Q. What do they do with the silk?

20

A. Manufacture dresses.

Q. You buy other things than silks, don't you?

A. All fabrics.

Q. You say you paid a dollar eight-five to two dollars in August?

A. Yes, sir.

Q. Have you any bills here showing what you paid?

A. No, sir.

Q. You were asked by Mr. Kessler to be here to-day?

A. Yes, sir.

30

Q. And you came here from Philadelphia to testify for him?

A. No, sir.

Q. From New York?

A. From New York.

Q. He told you what he wanted you to testify to?

A. Yes, sir.

Q. Why didn't you bring the bills with you?

A. I was in New York and got a telephone call at eleven o'clock this morning and I did not look that up.

Q. You are quite friendly with this man?

A. Mr. Kessler? Yes.

Q. Very friendly?

A. Very friendly, yes, sir.

Q. Did you ever buy goods from the Savoy Silk Mills?

A. Not to my knowledge.

Q. Did you ever buy goods from Fuchs?

A. No, not Mr. Fuchs. His face is familiar to me,
10 but I never bought anything from him.

Q. Do you know whether your house ever bought any goods from Mr. Fuchs?

A. Not to my knowledge.

Q. What was the price of the goods in the latter part of April?

A. About a dollar ten to a dollar fifteen.

Q. Was there ever a drop in the market during the year?

A. What period, between what period? What year?

20 Q. From April until August?

A. No, sir.

Q. There was not a drop in the market at all?

A. No, sir.

Q. Are you sure of that?

A. Absolutely.

Q. There was not a drop in the market in June, was there?

A. No, sir. It was a rising market.

Q. Always a rising market?

30 A. Yes, sir.

Harry Kessler, the plaintiff, recalled as a witness on his own behalf, testifies as follows:

Direct examination, by Mr. Bissell.

Q. I show you this blue Georgette waist and ask you how that compares with the pieces which were the subject of the contract between you and the defendant?

Mr. Joelson—Objected to. The question is whether that is the goods that were sold, not how it compares.

The Court—I will allow the question.

Mr. Joelson—I will ask if this man is qualified to show how he knows how to compare them.

The Court—I will allow the question. The witness has testified that he has been in business for a large number of years, and a man who has been in the business as many years as he has ought to know something about it. 10

Mr. Joelson—This man himself confesses that he does not use much silk. He is only in the waist business and does not manufacture silk. A man may be in the waist business all his life and yet not know the construction of silk or the value of it, and he would not know how it compares with the pieces of silk bought from the Savoy Silk Mill.

The Court—He testified that he was in the market every day buying and selling silk. 20

Objection overruled. Defendant excepts.

A. It is about similar material.

Q. When you say that, is it as good or is it better or is it about the same quality?

A. Just about the same; when it comes down to Georgette you cannot exactly get it to the sixteenth of perfect, it varies sometimes you know from one man between two pieces of goods; it varies, one piece will look one way and one piece will look a little bit different. 30

Q. I ask you the same question in relation to the flesh colored waist?

A. It is about the same, finished a little different.

Q. Are these waists made by you?

A. Yes, sir.

Q. Did you make waists out of the material which you bought from the Savoy Silk Mills?

A. Yes, sir.

Q. Would the prices of the waists in these goods be similar to the prices of the waists made out of the Savoy Silk Mills goods?

A. I don't get you.

Q. These waists, are they of the same value as the waists made out of the Savoy Silk Mills goods?

The Court—Do they sell for the same prices?

The Witness—Yes, sir, the same prices; that is what we replaced them with.

10

Cross-examination, by Mr. Joelson.

Q. Is this the goods that you bought from that waist house in New York?

A. Which?

Q. The flesh and the blue.

A. From which waist house?

The Court—You had better specify which one you refer to.

Q. Where did you buy the flesh?

20 A. This flesh I think is original goods, the Savoy goods.

Q. So that is the Savoy goods?

A. Yes, sir.

Q. Are you sure of that?

A. I am almost sure.

Q. Why do you say you are almost sure? And where did you get these blue goods?

A. This is the goods that we replaced and bought.

Q. So you replaced it with cheaper goods than you got from the Savoy?

30 A. Not exactly cheaper; as I said, as close as we could get to it.

Q. How close is it?

A. I could not tell you. The only thing I can tell you we made garments up and put this material in some of the garments.

Q. Where did you get this waist?

A. In the factory.

Q. Why didn't you bring a piece of cloth down, instead of a waist? Why didn't you bring that swatch down that you said you showed the waist house, instead of this waist?

Mr. Bissell—Objected to.

Objection overruled.

A. I did not think it was necessary to bring it along. I will tell you why I did not. This call was made in such a hurry that I had to leave the factory. You see we did not know exactly when this suit would come up and I had to run over pretty fast and did not get time to get ready, to get all these things along. Otherwise I would have brought the papers along and would have brought the swatches along and everything. 10

Q. In other words, you were in too much of a hurry to get here?

A. Yes, sir.

Q. Did you look for that swatch before you left Philadelphia?

A. I did not. 20

Q. Wouldn't it have taken you just as long a time to get the swatch as to get this waist?

A. No. The call was made about six o'clock in Philadelphia last evening and we were closing up at that time and they told me to come out here this morning.

Q. So you went in and grabbed a waist and did not look for the swatch?

A. Yes, sir.

Q. How do you know this is Savoy Silk then if you just grabbed it at random? 30

A. Well, we made samples of that goods.

Q. How do you know it is not another silk you used?

A. I know it is their sample, because I look after the sample end of it also, I gave them those goods to make the samples out of.

Q. Gave who the goods?

A. The designer, I specified what they should make the samples out of.

Redirect examination, by Mr. Bissell.

Q. As a matter of fact you don't know whether you still have that particular swatch?

A. Why, sure we have it.

Q. You say you got this call at Philadelphia last night and came along, and that waist where did you get that from?

A. From our show room.

Q. Where?

10 A. In Philadelphia.

Q. The show room in Philadelphia?

A. No, I got this from our New York office.

Q. When did you get it?

A. I got it this morning.

Recross examination, by Mr. Joelson.

Q. So you were mistaken when you said you just grabbed the waist at six o'clock when you were closing up?

20 A. I got the waist in the New York office.

Q. You said you left Philadelphia at six o'clock.

A. At seven o'clock last evening.

Q. You said you took the waist from the designer.

A. No, sir, I did not.

Q. And that you did not take time to take the swatch?

A. I did not take it from the designer at all. I said I generally gave instructions to the designer before he makes the samples out of what goods to make the samples.

30 Q. Didn't you say on your direct examination that you grabbed this waist in Philadelphia?

A. I got this from my New York office.

Q. Didn't you say on your direct examination that you got this from Philadelphia?

A. In Philadelphia?

Q. Yes.

A. No. I said I got the call in Philadelphia, but I did not get the waist in Philadelphia, I got the waist in our New York office.

Q. What did you say about Philadelphia, about being in a hurry to close up at six o'clock and did not have time to look for the swatch?

A. I said I got the call in Philadelphia about six o'clock and I did not have time to take anything along down here, and I took the seven o'clock train, left for New York and took the sample from the New York office.

Q. So that you did not take it from Philadelphia at all?

10

A. No, sir.

Q. You did not make any attempt to get the swatch at all?

A. I did not. I did not have time.

Q. What did you say about the designer in Philadelphia?

A. I said whoever duplicates the samples I give him instructions what goods to use for duplicating the samples.

Q. Didn't you buy any colors from anybody else, 20
this same flesh color, than the Savoy?

A. Yes, I think we did buy some.

Q. From whom did you buy some?

A. We got goods from John H. Meyers and from Sands.

Q. Might this be John H. Meyers' goods?

A. No, that goods did not come in till very late, this was the first purchase we had and was the first shipment we received too.

Plaintiff rests.

30

Mr. Joelson—May it please the Court, I ask for a nonsuit. There is no proof here of any damage. The only proof of damage that we have here so far is that the plaintiff purchased twenty-five or thirty pieces at two dollars a yard and there is no proof that these thirty pieces he purchased were in any way similar to these other pieces. Mr. Bissell said he would connect

these two waists with the goods that were purchased from the Savoy Silk Mills. So far there has not been any connection at all between these waists and the Savoy Silk Mill waists.

The Court—The testimony is that at the time this delivery should have taken place that it was a rising market and silk of this character was worth from a dollar eighty-five to two dollars. So that establishes how much the damage is, doesn't it?

10 Mr. Joelson—No. From the proof nobody purchased from anybody one bit of this kind of silk.

The Court—Mr. Kessler testified, and I understand the other witness also testified, that that was the market value of the silk at that time.

Mr. Joelson—That was the market value of the silk, yes, but there was no proof of what kind of silk.

The Court—They said silk of this character.

Mr. Joelson—They said similar to it, but could not testify that it was the same silk, they did not know
20 what variety of silk was made by the Savoy, they never bought any silk from them, they just see these waists here. The witness just took a casual glance at these waists and said it was silk of this kind.

Motion denied. Defendant except.

Mr. Bissell—I offer these two waists in evidence.

Admitted and marked the flesh-colored waist "*Plaintiff's Exhibit P6*" of this date, and the blue-colored waist "*Plaintiff's Exhibit P5*" of this date.

Plaintiff rests.

30

Harry A. Fuchs, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination, by Mr. Joelson.

Q. You are a son of David Fuchs, the owner of the Savoy Silk Mills?

A. Yes, sir.

Q. Who is in charge or has the management of the selling affairs in New York?

A. I have.

Q. You have charge of the selling affairs in New York?

A. Yes, sir.

Q. Do you know the Trio Waist Company?

A. Yes, sir.

Q. Did you sell them any goods in April, 1919?

A. Yes, sir.

Q. Subsequent to the sale of the two hundred pieces of goods in April, 1919, did you have a conversation 10 with Mr. Kessler?

A. Do you mean before the sale was made.

Q. After the sale, after the contract was signed did you see Mr. Kessler?

A. No, sir.

Q. Did you see Mr. Kessler in Philadelphia after this contract was made?

A. I seen him after we made a shipment of goods to him, I went to Philadelphia.

Q. For what purpose did you go to Philadelphia? 20

A. He claimed most of the goods were damaged and wanted me to look at them.

Q. When you came there, what was the conversation?

Mr. Bissell—When was this?

Q. Do you recall the date?

A. No, I don't remember exactly, but it was sometime after the last shipment of goods sent to him, sometime after April.

Q. Can you say about when that was?

A. In the early part of May I think. 30

Q. Tell us what conversation took place at the office of the Trio Waist Company?

A. When I got in he showed me most of the goods were damaged and he wants to return the whole lot, and he says he don't want any more goods shipped; if we shipped any more goods against the contract he will return them to us, and he considers the order cancelled because the goods are not like the sample piece

we showed him, they were damaged. I says, "Let me look at them." He says, "Yes, go ahead." I examined the goods and found two or three pieces were damaged and I told him we would gladly take them back and change them for him and ship him other goods in the place of them. He said, "No, I don't want any goods at all, I am going to send you back the whole lot of silk." I says, "If that is the way you feel you send them back and we won't do any more business with you. Just because there is a little depression in the price now, and you find you can buy the goods a little cheaper, you want to return the whole lot."

10

Q. What other conversation took place? Was there any conversation as to the replacement of these thirty-five pieces?

A. No; he wanted to return the whole lot.

Q. How many did you want to accept?

A. There were two or three pieces which were really badly damaged, and I wanted to replace them for him.

20

Q. You wanted to take back those two or three pieces?

A. Yes, sir.

Q. Would he let you take those two or three pieces back?

A. No; he said he wanted to ship the whole lot back, and we should not ship him any more goods against his order, and if we did he would return them.

Q. What did you say to that?

30

A. I told him, "If that is the way you feel about it we won't do any more business with you; because you feel there is a little depression in the price and you can probably buy goods a little cheaper you want to return them." And I went away with the intention that he would return the goods.

Q. Did you say to him you would ship him more goods?

A. I wanted to ship him the balance. He told me if we shipped him any more he would return them. Not to ship him any more goods.

Q. What did you say to that?

A. I could not say anything to it. I considered the matter closed. He canceled the order. We could not ship him any more. He was going to return the first shipment, and would not receive any more, so there was no use shipping him any more goods.

Q. Did you see Mr. Kessler subsequent to that?

A. You mean after that?

Q. After that, yes?

A. Yes; I saw him in New York.

10

Q. For what purpose did you go to see him in New York?

A. About the return of the goods. He had not returned them yet.

Q. What did he say to you?

Mr. Bissell—What time was this?

Q. What date was that?

A. I don't remember exactly. It was some time after I had seen him in Philadelphia.

Q. About how long after you saw him in Philadelphia?

20

A. About a week or two.

Q. What was the conversation at that time?

A. "Well," he says, "I sold the goods." He says, "I was supposed to return them, and," he says, "I sold them." I says, "Who did you sell them to?" And he told me Ost Brothers. I said, "How is it Ost Brothers could use them and you could not?"

Q. Was there any other conversation at that time?

The Court—What was his answer to that?

30

The Witness—He says, "Well, we could not use them."

Q. Was there any other conversation at that time?

A. After I told him that, why could Ost Brothers use the goods and not he, he turns around and says, "Well," he says, "we cut them up. We cut around it and cut them all up."

Q. Was there any talk about payment for those goods at that time?

Mr. Bissell—Objected to.

(Question withdrawn.)

Q. What kind of merchandise did you sell to the Trio Waist Company?

A. Georgettes.

Q. What quality Georgette was it?

A. It was two in a forty, seventy-two picks.

Q. Is that a good quality or a cheap quality?

A. It is a cheap quality.

10 Q. What was the price of that quality goods at that time?

A. Around a dollar and fifteen cents. In fact, it was a dollar and fifteen cents and a little later on it sold down to a dollar and ten cents.

Q. Will your sales book show the price for which you sold this quality of goods?

A. Yes, sir.

Q. Will you please turn to the accounts showing at what prices you sold these goods?

20 Mr. Bissell—Objected to. I don't know exactly what the purpose of this testimony is.

The Court—The purpose is to show the condition of the market, I presume?

Mr. Joelson—Yes, the book is used to refresh his memory more than anything.

The Witness—Here is a few sales in April at a dollar and fifteen cents.

The Court—What month do you want?

Q. May, June, July and August?

30 A. Here is a sale in May at a dollar and fifteen cents.

Q. To whom was that sale made at a dollar and fifteen cents?

A. M. Schoenfeld & Co., Philadelphia.

The Court—Give us June? Can't the witness look this up while some other witness is put on the stage, and mark the pages, and then return to the stand to testify about it?

Mr. Joelson—Yes, sir.

Q. Was there any drop in the market price between the time this contract was made and August first, down to the month of August?

A. Why, between the latter part of May and June there was a dull season, and prices took a little flop.

Q. Between May and June, you say, there is a dull season?

A. Yes, sir.

Q. Did Mr. Kessler ever come to your place of business in reference to this transaction? 10

A. Yes, sir.

Q. When, about, was that?

A. That was in the latter part of August.

Q. Did you have a conversation with him at that time?

A. Yes, sir.

Q. What was the conversation?

A. He wanted the balance of his order, and was willing to pay me a little more money to get it—

Mr. Bissell—What did he say? 20

Q. What did he say to you and what did you say to him?

A. He wanted the balance of his goods and wanted to pay a little more money to get it, and I told him—

Mr. Bissell—Objected to.

Q. Tell us what the conversation was?

A. He wanted the balance of his goods.

The Court—What did he say?

The Witness—He wanted to pay me twenty cents a yard more. 30

Q. What did you say to him?

A. He said he would like to have the balance of his goods.

Q. What did you say to him? Tell us as nearly as you can the exact wording.

A. I told him I did not care to do any more business with him. The deal I got in Philadelphia from him was enough. I did not care to sell him any further.

Q. What did he say to that?

A. He wanted that we could do business further, he says, "I will give you a little more for the goods."

Q. What did you say to him?

A. I says, "No, we cannot do any further business after that Philadelphia deal."

Q. Who was present at that time?

A. Mr. Schwartz.

Q. Who was Mr. Schwartz?

10 A. He is one of our selling agents.

Cross-examination, by Mr. Bissell.

Q. When you went to Philadelphia at the time of which you have spoken, you were summoned to come down there by Mr. Kessler?

A. Yes, sir.

Q. You had a talk with him about the damaged goods, did you? And that you say was something about the middle of May?

20 A. No. It was the early part of May. Right after the last shipment. It was right after the last shipment we made him which was around the end of April.

Q. At that time the price was still firm at a dollar and fifteen cents?

A. No, prices were easing off a little.

Q. You said on your direct examination that the slump came around the latter part of May?

A. During May and the early part of June.

Q. Was it the end of May?

30 A. During the month of May and the early part of June.

Q. As a matter of fact you had sales that were made in May at a dollar and fifteen?

A. Yes, sir.

Q. Did you make any sales in May at a dollar and ten cents?

A. Not that I know of. I will have to look that up.

Q. You have no sales outside of the dollar and fifteen?

A. I could not say. I will have to look it up.

Q. What makes you say there was a slump in May?

A. I know it was hard to sell goods and people were offering a little cheaper prices.

Q. Did you offer yours at any cheaper than a dollar and fifteen?

A. No. We were in a position to hold ours. There were different people who could not afford to hold the goods until August and they sold it a few cents cheaper, which caused the market to react. 10

Q. Did you have any sales at less than a dollar and fifteen cents?

A. Any number of sales made at a dollar twelve and a half, a dollar and ten and a dollar and seven and a half, and as low as a dollar and five.

Q. And you say that the slump continued during June?

A. Around the middle part of June the prices came up again.

Q. Did you anticipate that they were going to come up or not? 20

A. Yes, sir.

Q. And in July?

A. I did not anticipate just when, but I figured that prices would come up a little.

Q. And the contract your father had with Mr. Kessler called for the delivery of the remaining hundred and six pieces the latter part of July and August?

A. Whatever the contract called for.

Q. So that when these deliveries were called for there was no probability that the market would be as low as it was in May? 30

A. Well, around what time?

Q. In July and August? You have told me that it was expected, that you anticipated that the market would go up in July and August?

A. Yes, sir.

Q. And they did not have to call for these goods until July and August?

A. Well, this contract was settled at the time I was in Philadelphia, and Mr. Kessler told me he did not want any more goods and wanted to return what he had.

Q. I say, the contract that was made between Mr. Fuchs and Mr. Kessler called for the delivery of the last hundred pieces in July and August, didn't it?

A. Yes. Whatever the contract called for.

Q. And the probability was that in July and August
10 the silk would be worth more than it was in May?

A. The probability would be both ways, probably up and down. I figured it would be up.

Q. That was the general feeling?

A. I don't know as it was general. I felt that way.

Q. You knew what the general feeling was in regard to the situation then?

A. I did not say general; I said I felt that way.

Q. What do you mean by the feeling of the market, is it your idea?

20 A. My idea in general.

Q. Then it was your idea that there was a falling market in May?

A. At that time there actually did exist a lower market; that is, people who could not afford to hold their cloths let it go at five to seven and a half cents below the market, which caused the market to ease off. Whatever houses could afford to hold their stocks until their received the same prices again, they done it.

Q. And you say the market was going up during July
30 and August?

A. Yes, it went up.

Q. And it did go up?

A. Yes, sir.

Q. You expected it would?

A. Well, I figured it would, yes, sir.

Q. And Mr. Kessler did not have to call for the goods he had ordered until the last of July and the last of August under the original contract?

A. Well, whenever the deliveries were determined during those months?

Q. You said that you told him you would not do any more business with him?

A. Yes, sir.

Q. You considered the order was cancelled?

A. He told me the order was cancelled, because he said the goods we shipped him were not like the sample piece.

Q. You did not consider it was cancelled? **10**

A. Yes, sir.

Q. I asked you just now if you considered it was cancelled, did you or did you not?

A. I did. He said to cancel it. He told me not to ship any more goods, he would not receive any more. That is what he said.

Q. Did you feel he had a right to do that?

A. Yes.

Q. Why?

A. Why didn't he have the right. **20**

Q. If you make a contract with a man—

Mr. Joelson—I object to this line of questioning.

The Court—I think it is a perfectly proper question.

A. If I make a contract with a man and at the time the goods are received the market is easing off, and he felt he could buy the goods at a lower price, a dollar and seven and a half, was there any reason to keep him to a dollar and fifteen when he did not want to keep his contract when he felt that he could buy it cheaper? I told him that I thought of him, and I could not do any more business with him. **30**

Q. Did you say you could have compelled him to live up to that contract?

A. I probably could have compelled him, but I did not care to do it.

Q. Why not?

A. Well, it was so small, the amount involved was so small it would not pay me to go to a lawyer and hire him, and before I got through where would I get all my expenses and my time.

Q. You were perfectly willing to say, "If you don't want to take the silk don't take it?"

A. Yes, sir.

10 The Court—At that time you anticipated the market would go up in June and July and August?

The Witness—Yes, I felt that way; that is why I was not anxious for him to take them.

Q. And you thought that he had guessed wrong?

A. I did not know how he guessed. It was none of my business how he guessed.

Q. What was the general feeling in the trade at that time in regard to the market?

A. During what time?

Q. During May. During the month of May.

20 A. I tell you, they were selling goods down as low as a dollar seven and a half, which I originally sold for a dollar and fifteen.

Q. Is there a seasonal change in the market?

A. Different months, different times, prices change.

Q. What is the ordinary rule in May? Is the market lower in May for this particular kind of goods?

A. Yes. As a rule the market is a little lower in May.

3 Q. Mr. Kessler is familiar with the condition of the market, isn't he?

A. Mr. Kessler is a very infrequent buyer, he buys very little silk.

Q. Do you know what you were getting for this same quality of silk in the end of August?

A. The prices were around a dollar and thirty, a dollar and twenty-five to a dollar and thirty.

Q. Were you making any at that time?

A. No, sir.

Q. You were not making any?

A. Not during August.

Q. Did you make any in July?

A. I cannot say. I don't remember.

Q. Would you have been in condition to deliver the hundred and six pieces which you were under contract to deliver to Mr. Kessler after the first of July?

Mr. Joelson—Objected to.

A. We were in a position to deliver the goods right after the time I made him the first shipment, the fact that I shipped him the goods before the contract time shows that.

Q. I say, with regard to the hundred and six pieces which were left and under the terms of the contract which you were not called upon to deliver until the last of July and the last of August, if Mr. Kessler had asked you for them in July and August could you have delivered them?

A. Yes. Not during August. During July we could have delivered him everything, all the hundred and six 20 pieces, whatever it was.

Q. Would they have been your own manufacture?

A. Yes, sir.

Q. Did you say something to him about being able to get some from your uncle at higher prices?

A. No, sir.

Q. Was your uncle in the business?

A. Yes, sir.

Q. Was he making the same thing?

A. I don't know what he was making, whether he 30 was making Georgettes or not, I don't know.

Q. You could not have sold him any of your own Georgettes in August?

A. No, sir.

Q. What did you do with what you had?

A. We shipped them to different people like M. Schoenfeld, people in New York and in Jersey and in Philadelphia, at the same price.

Q. Was he asking for them during July?

A. Well, he wrote me several letters and telephoned to me, but I paid no attention to him. I considered the thing settled.

Q. He telephoned to you?

A. He probably did.

Q. Did he do that during June?

A. I don't remember.

Q. Did you have any correspondence with your selling agents Bouten & Von Emerick in connection with that?

A. No, I did not.

Q. Did the Savoy Silk Mills have any such correspondence in that connection?

A. No, sir, none at all.

Q. Are Bouten & Von Emerick your selling agents?

A. No. They are the factors. They guarantee the accounts; they are bankers.

Q. And they had guaranteed the account of Mr. Kessler?

A. Yes, sir.

Q. And you had some correspondence with them in that connection?

A. We had no correspondence. It is the usual run every day.

Q. Do you know whether Mr. Kessler made any complaint to Bouten & Von Emerick about your failure to deliver these goods?

A. I don't know.

Q. Did Mr. Kessler never say anything to you about having called the attention of Bouten & Von Emerick to that?

A. Never. Mr. Kessler never said anything to me about it.

Q. Did the Savoy Silk Mills enclose a letter from Mr. Kessler in answer to a copy of a letter which he had sent to Bouten & Van Emerick?

A. I have never seen it.

Mr. Bissell—I call for the production of the original letter which was written to the Savoy Silk Mills August 20th, 1919.

Mr. Joelson—We have not got it.

Mr. Bissell—Have you the telegram which is referred to in that letter?

Mr. Joelson—We have not any correspondence except the letter which I showed you this morning.

Mr. Bissell—Do you remember getting it? 10

Mr. Joelson—I spoke to Mr. Fuchs this morning about it; he says now he received a telegram. What else did you receive?

The Witness—Several letters.

Q. Where are the letters?

A. I think I tore them up. In fact, I know I did, as I considered the matter settled, and did not care to correspond with Mr. Kessler in any way.

Mr. Bissell—You have notice to produce those letters. 20

Mr. Joelson—Yes, sir. Did you consult anyone about this correspondence?

The Witness—Yes. When I received a telegram I consulted my lawyer, because my father said perhaps it might lead to a law suit or something, and then I consulted our attorney.

Q. I show you a writing and ask you if that is a copy of the letter which was received by the Savoy Silk Mills written under date of August thirteenth from the Trio Waist Company? 30

A. I never remember receiving any letter like this.

Q. I show you a letter dated October 7th, 1919, which purports to be a copy of a letter from the Trio Waist Company to the Savoy Silk Mills, and ask you if you received that?

A. I probably received this letter; I received some letters and destroyed them.

Mr. Bissell—I offer this letter in evidence.

Admitted and marked *Plaintiff's Exhibit P7* of this date.

Q. I show you a letter from Bouten Emerick & Co. to the Trio Waist Company, dated July 19th, 1919, in which reference is made to the turning over to you of a certain letter received from them, and ask you if you know anything about that?

10 Mr. Joelson—I object. This is a letter written by a third person to the defendant in this suit.

Mr. Bissell—I am not offering it in evidence, I am asking a question.

The Court—I will allow the question.

A. What was the question?

Q. Was there anything said by Bouten, Emerick & Co. to you in regard to the request of the Trio Waist Company for the completion of your contract?

A. No, sir; they have nothing to do with it.

20 The Court—There was not?

The Witness—No, sir.

Q. Notwithstanding the reference that you see in that letter to that fact, you say they did not do what they say they did?

A. No. They did not take up those things with us, because they only act as bankers, and when they charge up the invoice the invoice is due from the people to them and payable to them, and we have nothing to do with it at all.

30 Q. Do you say any statement in there is false?

A. I don't know whether it is false or not. There is the letter.

Redirect examination, by Mr. Joelson.

Q. Upon receipt of that letter *Exhibit P7* what did you do?

A. I went to our attorneys, yourself, for advice.

Recross examination, by Mr. Bissell.

Q. Was there ever any written cancellation of the order?

A. No, sir.

Q. Was there ever any answer given by you, either in writing or otherwise, to the repeated requests made by Mr. Kessler for the balance of the order?

A. I considered the matter settled.

Q. Was there ever any answer?

A. No. There was no answer. I considered the matter settled when I left Philadelphia. 10

Emanuel Schwartz, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination, by Mr. Joelson.

Q. You are employed by the Savoy Silk Mills?

A. I am.

Q. What are your duties? What is your work?

A. I am selling agent.

Q. During the months of June, July and August did you sell any Georgettes for the Savoy Silk Mills? 20

A. I did.

Q. What prices did you get for those goods?

A. A dollar and fifteen cents.

Q. What month are you referring to now?

A. The month of May and some part of June.

Q. What quality of silk did you sell at that time?

A. Two in a forty with seventy-two picks.

Q. That was the only quality the Savoy made at that time? 30

A. That is right.

Q. Are you acquainted with the conditions of the market as to prices and demand for that quality of June?

A. I am.

Q. And in the month of May?

A. Yes, sir.

Q. What was the market condition in the month of May as to the demand for merchandise?

A. Very poor.

Q. What was the merchandise selling for in the month of May?

A. About a dollar and ten cents or a dollar and twelve and a half cents.

Q. What was the condition of the market in June?

A. About the same.

Q. What was the merchandise selling for?

A. About a dollar and fifteen cents, or a dollar and
10 twelve and a half cents.

Q. When did the market rise in the month of June? What part of the month of June did the market for Georgettes advance?

A. About the fifteenth of June.

Q. And after the fifteenth, say from the fifteenth of June to the first of July, what were Georgettes selling for?

A. About a dollar and forty cents to a dollar and fifty cents, as best I can remember.

20 Q. After that what were Georgettes selling for in the month of August?

A. Well, around a dollar and sixty cents to a dollar and seventy cents.

Q. Did you sell any in the month of August?

A. No, sir.

Q. You did not sell any at all in the month of August?

A. No, sir.

Q. Did you make any attempt to sell any merchandise in the month of August?

30 Mr. Bissell—Objected to.

(Question withdrawn.)

Q. Do you know Mr. Kessler?

A. Yes, sir, I do.

Q. Did you ever see Mr. Kessler in the office of the Savoy Silk Mills in New York?

A. I did.

Q. Did you hear a conversation between Harry Fuchs and Mr. Kessler at that time? Tell us when it was about?

A. About some time in the latter part of August Mr. Kessler came down to our New York office and I happened to be in the office at the time with Mr. Fuchs and Mr. Kessler.

The Court—Tell us what the conversation was?

The Witness—Mr. Kessler asked for his goods and Mr. Fuchs said, "Why, you cancelled your goods in Philadelphia, claiming they were damaged." And then Mr. Kessler said, "Why 10 let us forget about that. How much do you want, I will give you more money for the balance." That is all I know.

Q. What did Mr. Fuchs answer to that?

A. "I don't want to do any more business with you."

Cross-examination, by Mr. Bissell.

Q. You were not selling any of these goods in August because the company had stopped making them then?

A. I don't know, I don't remember. 20

Q. Did you have any to sell?

A. I believe we had some.

Q. Did you hear Mr. Fuchs' testimony here this afternoon in regard to stopping the manufacture of Georgettes?

A. I did not hear that.

Q. Did you know when you went out what you had to put on the market?

A. What was that?

Q. Did you know when you went out to the trade 30 what you had to offer them?

A. When was this?

Q. Whenever you went out to sell goods as selling agent?

A. Certainly.

Q. Why didn't you offer any Georgettes in August?

A. I could not answer that.

The Court—You did not have it in your hands to offer it, did you?

The Witness—No, not in hand, we were making them all the time.

Redirect examination, by Mr. Joelson.

Q. What did you sell in the manufactured goods for the Savoy Silk Mills, what kind of merchandise did you sell?

A. Satins.

Q. You sell satins exclusively?

10 A. Yes, sir.

Q. What does the Savoy specialize in mostly?

A. Satins.

Re-cross examination, by Mr. Bissell.

Q. You say Mr. Kessler came in the office when you were there?

A. He came in the office.

Q. And asked for his goods?

A. Yes, sir.

20 Q. And is that the first time you had heard Mr. Kessler asking for those goods?

A. Well, that is the first time I did, yes, sir.

Q. Had you not heard anything said about that, repeated demand made that he was wanting those goods, and repeated demands that he was making for those goods?

A. I did not.

Q. What offer did Mr. Kessler make at that time?

30 A. He said, "Let us forget about it, about the cancellation, and the balance of the goods that you owe me I will give you more money for."

Q. Was anything said at that time about Mr. Fuchs being able to get some goods from his uncle at a higher price?

A. I did not hear anything of that sort.

Q. That is all that you know about that?

A. That is all.

William Yoneff, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination, by Mr. Joelson.

Q. What is your business?

A. Silk manufacturer.

Q. What is the name of your firm?

A. Atlantic Silk Company.

Q. Are you a member of that firm?

A. Yes, sir.

Q. How long have you been a member of the Atlantic Silk Company? 10

A. Five years.

Q. What are your duties with that concern?

A. Selling the silk.

Q. You are the selling representative of the concern?

A. Yes, sir.

Q. Did you sell Georgettes of a construction of two in a forty seventy-two picks in the month of June, July and August?

A. We have been making a different quality. 20

Q. Was it a better or a worse quality?

A. It was a better quality.

Q. What did you sell your better quality for?

Mr. Bissell—Objected to.

The Court—It is some evidence of the market value. I will admit it.

A. The better quality we are selling for a dollar and twenty cents in the month of July, the early part of July, a dollar and seven and a half in the raw.

The Court—Is this in the raw? 30

The Witness—No, this not in the raw, you would have to add the dyeing and finishing and the discount.

The Court—How much would that be in all?

The Witness—It would make about a dollar and fifty cents in August.

The Court—How much would that be in July?

The Witness—In July it would be about a

dollar and thirty cents, about a dollar and thirty cents to a dollar and thirty-five cents.

Q. What construction of goods did you make?

A. Two in a forty-five and eighty pick.

Q. How much was that goods worth, more than the two in a forty and seventy-two picks?

A. Well, ordinarily, it would sell for about ten cents a yard more than the two in a forty and seventy-two picks.

10 Q. So that your goods would cost ten cents on the yard more to purchase than the two in a forty and seventy-two picks?

A. Yes, sir.

Q. You have a book here showing what sales you made and the prices you received; will you please turn to that book and tell us to whom and when those sales were made and the prices that you received for them?

Mr. Bissell—All the sales he made are you asking for?

20 The Witness—These are the sales made during the months of May, June, July and August.

Mr. Bissell—I must ask that all the sales that were made be given or none at all.

Q. Does that book contain a record of all the sales made by you?

A. Yes, sir.

Mr. Bissell—That is the evidence he will give, of all of the sales that were made?

Mr. Joelson—Yes.

30 The Witness—In the month of May we sold to L. A. Rose Waist Company, 25 West 32d Street, New York, at a dollar and fifteen cents.

Mr. Bissell—Is there anything to indicate whether those sales were made on preliminary contracts?

The Court—When were these goods sold?

The Witness—These were sold May eighth.

The Court—When were they delivered?

The Witness—They were delivered May eighth.

The Court—What quantity?

The Witness—Well, about forty or fifty pieces.

The Court—Does not your book show?

The Witness—I will have to count them. (Counting them.) Thirty-four pieces.

Mr. Bissell—I would like to ask if in that book there is any indication as to whether the sales were made in compliance with previous contracts or not? 10

The Witness—We have not taken contracts on that goods; we are not large operators on Georgettes, and only sell it as it comes over.

Q. So that the goods were sold at that price and the price was made at the time the goods were sold?

A. Well, it was sold probably a week ahead of time, not longer than that. May twelfth we sold to Charles Fagin, 718 Arch Street, Philadelphia, at a dollar and fifteen cents. 20

Q. That is for the better quality?

A. That is for the better quality.

The Court—Eighty picks instead of seventy-two?

The Witness—Yes, sir, and then more in the warp two in a forty-five.

On May sixteenth sold to Samick Brothers, 3 East Twenty-second street, at a dollar and seventeen and a half cents; sold it finished. May twentieth sold to Oldman & Grotchius, 377 Fourth Avenue, New York, ninety-six cents in the raw, which probably is equivalent to a dollar and seventeen cents. May twenty-second charged up again to Sumick Brothers, at a dollar and seventeen and a half cents. 30

Mr. Bissell—You are giving us everything there?

The Witness—Exactly, everything, as it comes off the book. May twenty-third we

charged up to Oldman & Grotchius at a dollar and fifteen cents, that is 377 Fourth Avenue.

The Court—That is in the raw?

The Witness—No. That was finished, flesh Georgette. The market was starting to decline a little bit at the end of the month.

Q. When did the market decline a little bit?

A. The latter part of May the market started to sag a little bit.

10 Q. What next?

A. June third we sold to Oldman & Grotchius Georgette in the raw again at a dollar a yard.

Mr. Bissell—What would that mean?

The Witness—That would mean adding the dyeing and the finishing, that would be eleven and eleven, that would be about a dollar and twenty-two and a half a yard.

Q. That is for the better quality?

A. That is for the better quality. June fifth, sold
20 Sumanchik Brothers at a dollar and twenty-five.

Mr. Bissell—How much was that?

The Witness—That was a dollar and twenty-five unfinished white Georgette.

Mr. Bissell—You can tell from those notes what those are? Are they all your own notes?

The Witness—Yes, sir, my own handwriting.

Mr. Bissell—Do you know whether a sale was of material that was finished or unfinished, or whatever it was?

0 The Witness—These were finished, they are marked white and was returned eventually under the circumstances.

Q. Do you know whether when the goods are marked white or flesh that means that they are dyed and finished?

A. Yes, sir, when it says raw, it means in the raw state. June sixth to H. Borak, 1170 Broadway, New York, at a dollar and eighteen and a half cents, the market must have been a little bit easier at that time.

The Court—Was that raw or finished?

The Witness—This was finished, flesh.

Q. Turn to July, please.

A. I have June tenth, Levy Bernstein, 117 Madison avenue, at a dollar and twenty-five, finished white Georgette, that was returned to us. June eleventh, Farquette Waist Company, New York, at a dollar and twenty-five, that was finished.

Q. Now, return to the July account.

A. Well, we have here June we sold in the raw at a dollar and seven and a half to the Banner Silk Mills right here in Paterson. 10

Mr. Bissell—What was that in the finished?

The Witness—That would be equivalent to about a dollar and twenty-five. Now, do you want the month of July?

Q. Yes.

A. June twenty-fourth, sold Victory Broad Silk Works Georgette in the raw at a dollar and ten, that would mean about a dollar and twenty-seven and a half cents or a dollar and thirty. July first, sold to Oldman & Grotchius at a dollar and ten, equivalent to about a dollar and twenty-seven and a half to a dollar and thirty; we always allowed in the raw about a cent cheaper than it would be in the finishing goods because they carry the account while it is being dyed. 20

Q. Turn to August.

A. August sixth, sold to H. Borak, 1170 Broadway, some Georgette at a dollar and thirty, that must have been something special; it is only a couple of pieces, and he must have had that promised. 30

Q. That will do as to the prices. I show you two silk garments in evidence here as P5 and P6 and ask you to examine the cloth in those garments and tell us whether or not there is any difference between those two cloths, and if so what the difference is?

A. The flesh color seems to be a heavier piece of goods than the navy, with more silk in it.

Q. What construction would you say that flesh color silk to be, the flesh material?

A. The flesh material would be probably equivalent to ours, two in a forty-five by eighty picks, or probably a little bit better yet.

Q. Is that two thread or three thread?

A. It looks like two thread, but heavy woven piece of goods, closely woven; it may be more than eighty picks. It is not as transparent as the blue. The blue
10 is very transparent and the flesh is closely woven.

Q. What would you say as to the construction of the navy piece of goods?

A. The navy piece of goods looks like two in a forty by seventy-two picks, a cheap piece of goods.

Cross-examination, by Mr. Bissell.

Q. During the summer, from April to August, what was the general trend in the market prices of silk, Georgettes?

20 A. Well, advancing slightly.

Q. What was the difference in the market price in August from what it was in April?

A. Of course, while I say the market is advancing there are certain times when the market is declining, and while it keeps on jumping up the market is many times flopping.

Q. What was the difference between the April price and the August price in general?

A. Well, Georgette was selling in April at about a
30 dollar and ten to a dollar and seven and a half somewhere up to a dollar and fifteen, and in August, as far as I can recollect, about a dollar and fifty or a dollar and sixty cents.

Harry Fuchs, recalled as a witness on behalf of the defendant, testifies as follows:

Direct examination, by Mr. Joelson.

Q. Did you examine your book to learn what prices you charged for merchandise in the months of May and June?

A. Yes, sir.

Q. What prices did you charge?

A. A dollar and fifteen cents.

Q. Did you sell any goods in July or August?

A. There is some goods sold in July.

The Court—Crepes?

The Witness—Georgettes.

10

Q. I will show you these two garments, P5, the flesh color, and ask you if that is the silk you sold to the Trio Waist Company?

A. No. This quality is much better quality than we are in the habit of making, or rather than we made.

Q. I show you the navy, *Exhibit P6*, and ask you if that is your stuff?

A. I cannot tell whether it is ours or not, but it is a quality similar to ours, perhaps the least bit better; I cannot tell whether it is ours or not.

20

No cross-examination.

Defendant rests.

Ada Simon, sworn as a witness on behalf of the plaintiff in rebuttal, testifies as follows:

Direct examination, by Mr. Bissell.

Q. You are with the Trio Waist Company, of Philadelphia?

A. Yes, sir.

Q. In their New York office?

30

A. Yes, sir.

Q. You were with them during last summer?

A. Yes, sir.

Q. How long had you been with them before that?

A. I started January, 1919.

Q. Do you know Mr. Harry Fuchs?

A. Yes, I do.

Q. Had you seen him there in the office?

A. Yes, sir.

Q. Do you know his voice?

A. I do.

Q. Did you have any telephone conversations with him in June or July?

A. Yes, at least about fifty times, if not more.

Q. During what months?

A. During July and August.

Q. You called him up in Paterson?

10 A. No. I called him in New York. I tried to get him in Paterson several times. Mostly in New York.

Q. In the conversations which you had with him in July and August what did you say?

A. I asked him how soon he expects to ship the balance of our order he owes us?

Q. What did he say?

A. He kept on putting me off.

Q. What did he say?

A. He said he did not know just how soon he is going **20** to ship them.

Q. Was there anything said by him about the order having been cancelled?

A. Absolutely no, not a word.

Cross-examination, by Mr. Joelson.

Q. You were employed in the New York office?

A. Yes, sir.

Q. How long had you been employed in the New York office?

30 A. I started January, 1919.

Q. And you say you talked to Mr. Harry Fuchs and asked him for the goods?

A. I did.

Q. What goods did you ask him for?

A. The Georgette that he owes us.

Q. What did he say?

A. He said he did not know just how soon he would ship it, he could not give me a definite answer.

Q. You say he told you in August he told you he would ship it to you later?

A. Yes, sir.

Q. Didn't he ever tell you he does not make that kind of goods?

A. He never did.

Q. He told you he will make them?

A. Absolutely.

Q. In August did he give you any date of delivery?

A. He did not give me any date at all, he never gave me any date.

Q. Didn't you ask him to specify the date?

A. I did ask him just when he expected to ship the Georgettes.

Q. What did he say to that?

A. He said he did not know, he did not know how soon they are coming through, that is the answer I got from him.

Q. Did he tell you where the goods were?

A. No, he did not tell me a word about it. 20

Q. Where they were coming through from?

A. He did not say a word about it.

Q. Did you ask him?

A. I knew they manufactured their goods at Paterson.

Q. When he said the goods were coming through didn't you ask him from where?

A. He just said he did not know how soon they were coming through.

Q. Did you ever go to Mr. Fuchs' place? 30

A. No, I have never been there.

Q. You always called over the 'phone?

A. Over the telephone. He has been in our office several times.

Q. He was up there about May?

A. Yes, sir.

Q. You got Mr. Fuchs on the telephone didn't you?

A. Yes, several times.

Q. Who spoke to him when you got him on the telephone?

A. I got Mr. Fuchs himself several times.

Q. Who spoke to him?

A. I did.

Q. Always?

A. I did, sometimes Mr. Kessler did, sometimes I put Mr. Kessler on the wire.

Q. First you spoke, then Mr. Kessler?

10 A. When I could not get a decided answer I put Mr. Kessler on the wire.

Q. First you tried to get a decided answer and when you could not get it then Mr. Kessler would try?

A. Exactly.

Q. Several times you called and several times you said, "Just wait, Mr. Kessler wants to talk to you"?

A. I did, yes, sir.

Redirect examination, by Mr. Bissell.

20 Q. The conversation that you had with him would be when Mr. Kessler was not there at all sometimes wouldn't it?

A. When I called him?

Q. Yes.

A. Yes, several times.

Q. When did Mr. Fuchs come to the office?

A. When did he come to the showroom?

Q. Yes.

A. About what time?

Q. Yes.

A. After he sold the goods or before?

Q. After he sold the goods.

A. He has been up a few times, I don't know just when.

Q. Did you ever overhear a conversation between him and Mr. Kessler?

A. I did, yes.

Q. Was anything said at any time in your presence about cancelling the order or the contract?

A. Absolutely I never heard anything about it.

Q. Was anything said by Mr. Kessler to him in regard to the delivery of the goods?

A. Every time he came up Mr. Kessler asked him when he expected to ship the goods.

Q. What was his answer?

A. He did not know; as soon as they come through he will give us deliveries.

Recross examination, by Mr. Joelson.

10

Q. You are not in the Philadelphia office?

A. No, I am in the New York showroom.

Q. Did you hear all the conversation that went on there between Mr. Kessler and anybody that came in there?

A. Yes, most of them I do.

Q. You make it your business to hear all the conversation?

A. I do not make it my business, I am in the showroom and I cannot help but hear it.

20

Q. There are two offices there aren't there?

A. What do you mean?

Q. You have two rooms there in New York?

A. We have a showroom and my office.

Q. And do they come into your office to talk?

A. Mr. Kessler comes into my office, because that is where Mr. Kessler does the purchasing, in my office.

Q. So they would not talk in the showroom?

A. They do, yes; but if Mr. Kessler walks in they come right in after him.

30

Q. When they have a conversation they come into your office to let you hear it?

A. It would not be intentional, I could not help to hear it, because I am right there and hear pretty near everything that goes on.

Q. When they talk in the showroom you cannot hear it?

A. Not unless I am in there.

Q. If you are not in there you do not hear it?

A. But I am in there, I have charge of the showroom; I have charge of the entire office, showroom and office.

Q. So when anybody comes in to talk to Mr. Kessler you are there to hear it?

A. I cannot help to hear it because I am right there.

Q. How far is the office from the showroom?

A. About fifteen or twenty feet.

10 Q. Whenever anybody comes in the showroom you are right there to hear whatever goes on?

A. Yes, if I am right there I hear it.

Q. You come right in immediately.

A. I cannot help but hear it because I am right there.

Q. You are fifteen or twenty feet away?

A. It is not so far away that you cannot hear what people say.

Q. You hear what goes on fifteen or twenty feet away?

20 A. Absolutely.

Q. You always hear?

A. I cannot help but hear it.

Q. You say you called Mr. Fuchs on the telephone?

A. Yes, sir.

Q. Who told you to call Mr. Fuchs?

A. Mr. Kessler.

Q. When Mr. Kessler was there he would take the receiver and speak to him, would he not?

A. Yes, if I could not get satisfaction he would talk

30 to him, but he could not get satisfaction.

Q. First you would talk to him and then he did?

A. Yes, sir.

Harry Kessler, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Direct examination, by Mr. Bissell.

Q. You have heard the testimony in regard to the conversation which Mr. Fuchs said he has with you in

Philadelphia in May, 1919, at which he said you canceled the order, was there any such conversation?

A. There was never any such conversation at all.

Q. Was anything said by you and by him at that time further than what you testified to on your direct examination in regard to your being satisfied?

Mr. Joelson—Objected to as not rebuttal.

The Court—I think he has denied that already.

Mr. Bissell—I want to inquire in regard to the telephoning. **10**

The Court—He said he telephoned a number of times.

No cross-examination.

Testimony closed.

The Court thereupon adjourned until to-morrow, February 19th, 1920, at 10 o'clock A. M.

SECOND DAY.

PATERSON, N. J., February 19, 1920. **20**

The trial was continued this day pursuant to adjournment.

Mr. Bissell—If it please the Court, I move that the Court direct a verdict for the plaintiff in this case, submitting to the jury only the question of the amount of damages. The question of the cancellation of the contract is only a question as I understand that is brought forward as a defense and the only question of defense, and the only testimony as to that cancellation is the testimony of Harry Fuchs, who has shown no agency and no authority whatever for his going to the defendant for such purpose; it was an important matter, regarding the cancellation of a contract which is in writing. **30**

The Court—The testimony is that you consented to it and he acted for the other side.

Mr. Bissell—His statement is that the cancellation was as to the entire contract with the return of the goods that were shipped, and those goods were accepted by the plaintiff and paid for, and my contention is that

they cannot come here and say that this contract was canceled in one way and then say it was not in another, that he may have had authority to do one thing for his father and his father ratified another thing, but I can see no possible ground for holding that a contract made in writing could have been canceled in one way by an agent and then that cancellation not acted upon, but a different agreement, modifying the contract apparently made by the parties, and it seems to me the evidence is

10 devoid of any testimony upon anything which would indicate a cancellation of the contract for the delivery of the balance of these goods. If the market had broken and the prices gone down so that it would have been a profitable thing for the defendant to have enforced the delivery, could we claim for a minute that he could not assert his rights in July and August and deliver the goods as agreed to be delivered.

The Court—I think it is a question for the jury and I will deny the motion.

20 Plaintiffs except.

Mr. Joelson—I would ask Mr. Bissell if he has with him the plaintiff's sales book?

The Court—Why do you ask that? The case was closed yesterday.

Mr. Joelson—The case was closed, but Mr. Bissell was notified to produce that and I thought if he had it, it could be offered in evidence.

The Court—Naturally he would not have it here when both sides closed the case yesterday. You may proceed

30 and sum up the case.

(Mr. Joelson sums up for the defendant.)

(Mr. Bissell sums up for the plaintiffs.)

The Court then charged the jury as follows:

The Court—Gentlemen of the jury, there are certain facts in this case that are not in dispute; there is no dispute about the fact that the parties to this case entered into a contract whereby the one party agreed to sell to the other two hundred pieces of silk at a dollar and

fifteen cents a yard, these pieces consisting of approximately sixty-five yards, as I recall it, and that the other party agreed to take the two hundred pieces at a dollar and fifteen cents a yard.

That was a definite, binding contract; made by two business men. And contracts, gentlemen, are serious matters. Business would not continue very long in any country where people did not observe the obligations created by their contracts. And this contract bound both parties. It was the duty of the party who agreed to deliver the silk to deliver it; it was the duty of the party who agreed to take the silk, to take it when it was tendered to him. 10

Now, that was the obligation of both of these parties. Nobody can make a contract and then avoid it by saying they are not going to keep it, or giving any flimsy excuse. Neither of these parties could do that, because, once they made their contract or bargain, that was an obligation on the part of both of them to keep it.

The plaintiff in the case admits that he received ninety-four of these two hundred pieces and that there were one hundred and six pieces yet to be delivered, that those hundred and six pieces were not delivered, and that, in spite of the fact that he tried a number of times to get the balance of the silk, that the silk was not delivered, and that the reason the silk was not delivered, the plaintiff contends, was because the price had gone up from a dollar and fifteen cents a yard, which was the contract price, to somewhere between a dollar and eighty-five cents and two dollars a yard. 20 30

There does not seem to be any dispute, gentlemen, about the fact that the price of silk did advance; because, as I recall it, the witnesses for the defense testified that the price advanced to a dollar and fifty or a dollar and sixty cents in the same period from May to August.

So the plaintiff's contention is that the reason the defendant did not deliver the balance of the silk was

because the price having advanced the defendant could sell the silk to somebody else and make more profit than he would if he delivered it to the plaintiff.

The defendant contends that the reason the silk was not delivered is because in the latter part of May the son of the defendant went to the plaintiff's place of business and was there told that some of these goods were defective, that they had holes and streaks, and that the plaintiffs would not accept any more goods and
10 that the defendant need not send any more of the goods, and that Mr. Fuchs then said to the plaintiffs, "Well, if that is your wish about the matter and you do not want any more of these goods, all right, call it off." The defendant contends that this position was taken by the plaintiffs because there was an easing up or slackening in the price of silk, and that later on, when the temporary slackening in the price had ceased, that then the plaintiff came to the defendant again and wanted the goods, but the defendant said to him, "No, you
20 made your choice; you cancelled your contract, now you cannot have the goods."

So you see, the defence here is that the contract was cancelled, and the burden of satisfying you that there was a cancellation is upon the defendant.

The plaintiff answers by saying that there was no such cancellation, that the plaintiff would not cancel a favorable contract of that kind because he believed that the price was going to advance further as also did the defendant believe that the price was going to advance,
30 and that the only change in the price was a seasonal slackening up of the advance in price in the latter part of May; and the plaintiff says that he never agreed to cancel the contract, but continually asked for his goods; and then the counsel for plaintiffs raises the additional point that young Mr. Fuchs had no authority to bind his father, that young Mr. Fuchs was not the agent of his father for the purpose of cancelling the contract, and that, if Mr. Kessler had desired to claim that Mr.

Fuchs Junior's action was a cancellation of the contract and the price had declined instead of advanced, that the father could have insisted on his contract and said that his son had no right to cancel the contract.

So that there is raised a question of agency, whether there are facts enough here to satisfy you that young Mr. Fuchs was dealing for his father and authorized to do so will be a question for you to determine. It is in evidence that most of the conversations during all this time were with young Mr. Fuchs, even over the telephone, and evidently the Kessler firm felt that they were talking with the defendant's firm when they talked to young Mr. Fuchs. **10**

Now, the question, gentlemen, is, was this contract satisfied? And are you satisfied that this contract was cancelled by the agreement and consent of both parties? Because one party could not cancel it. If it was so cancelled and you are satisfied of that, then your verdict will be no cause of action.

On the other hand, if this contract was not cancelled, and you are not satisfied by the burden of the evidence that it was cancelled, the contract then remains in full force and effect and then the defendant would be responsible for the failure to live up to his agreement. The defendant would then be responsible for his failure to deliver the balance of the goods which he had sold to the plaintiffs, the hundred and six pieces. **20**

The measure of damages in a case of that kind, gentlemen, is fixed by our statute:

The measure of damages is the loss directly and naturally resulting in the ordinary course of business from the seller's breach of the contract. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. **30**

So you see, the measure of damages in this case is the difference between the contract price and the market or current price at the time when the goods ought to have been delivered.

The parties differ on that also; the plaintiff contends that the difference in the price was the difference between a dollar and fifteen cents which he agreed to pay and the market price which was between a dollar and eighty-five and two dollars. The defendant's contention

10 is that the market price was a dollar and fifty cents to a dollar and sixty cents, and not a dollar and eighty-five cents to two dollars; and I think that there was one other witness who testified to a smaller figure, the last witness who spoke about the raw material.

You have all those facts before you, and if you come to the question of damages, then you must determine what the current or market price was at the time these goods ought to have been delivered, and when you fix that price then the plaintiff will be entitled to the difference

20 between a dollar and fifteen cents and the sum that you find to have been the market price per yard; take the number of yards that were not delivered, multiply that number by the difference between a dollar and fifteen cents and the market price and that will be the plaintiff's damages.

So take the case, gentlemen, and determine, first, was there a cancellation of this contract? If there was a cancellation of the contract, then your verdict is no cause of action. Because, if the parties agreed to cancel it, that ends the matter. If there was no cancellation

30 of the contract, then the plaintiffs would be entitled to damages represented by the difference between the price agreed to be paid and the current or market price at the time the goods were to be delivered.

Have I covered your requests Mr. Bissell?

Mr. Bissell—I think that covers it entirely, except that I take exception to number three there.

The Court—Yes, number three I decline to charge. I think it is a question for the jury on the evidence.

And the defendant's requests I decline to charge except as already charged, and I allow an exception.

(Plaintiffs except to the refusal of the Court to charge Request for the Plaintiff number three, as follows:

"3. There is no evidence that Harry Fuchs had authority to cancel the contract in question."

(The defendant excepts to the refusal of the Court to charge the Requests for the Defendant, as follows:

"1. If the jury finds from the facts that plaintiff did not purchase any goods in place of those that the defendant did not deliver, judgment should be for the defendant. 10

"2. If the jury finds that plaintiff purchased goods in place of those that defendant did not deliver, then judgment should be for the difference in the price for the number of yards purchased by plaintiff to replace goods which defendant did not deliver."

(The jury is returned to the Court.)

Mr. Bissell—May it please the Court, I thought I might save the jury's time in case they wanted to find a verdict for the plaintiff, and I have made a figuring out here and had it written out to be sent in, but by reason of the wish of defendant's counsel I am giving it to the Court and reading it and the jury may take it down: 6890 yards, if you take the difference between a dollar and fifteen cents and a dollar and ninety cents, a dollar and ninety cents being the average difference, would be a difference of seventy-five cents a yard and that would total \$5,167.50. 20

The Court—How many yards do you claim? 30

Mr. Bissell—6890 yards, and if you take the fifty per cent increase it would be less.

The Court—The number of yards you claim is how many?

Mr. Bissell—6890 yards, and at a dollar and fifteen cents a yard, if you take a dollar and ninety cents as being the correct market price then the difference is \$5,167.50; if you take a fifty per cent increase of which

there was some testimony it would make a difference of fifty-seven and a half cents a yard increase and that would amount to \$3,951.75.

(The jury then retire.)

EXHIBIT P 1.

Office Copy

No. 650

10

TRIO WAIST COMPANY

Makers of Trio Waist

S. W. Cor. 22nd & Arch Sts.

Philadelphia, Pa.

4/16/19

To Savoy Silk Mills

Terms 6/10 60

200 pcs. @ 1.15 a yd.

50 pcs. May 25th	} 1.15	50 pcs. flesh	} H. Kessler
50 pcs. June 25		" " white	
50 pcs. July 25		15 " black	
50 pcs. Aug. 25		" " navy	
		75 pcs. colors to be given later	

Must be like sample

Last lot short—15 yd. pieces

EXHIBIT P 2.

Receiving Report

5/2/19

No. 4260

30

TRIO WAIST COMPANY

22nd & Arch Streets

Philadelphia, Pa.

From Bachmann Emmerich & Co.

44 East 23rd Street

New York City

Via American Express

Charges \$1.19

Georgette 70³ 53⁶ 67⁵ 59⁴ 59⁵ 57⁴ 59⁵ 67⁵

(198)

Total 495⁵/₈ yards

EXHIBIT P 3.

Receiving Report No. 1533
 Piece Goods Recd. 4/16 Inv. Date 4/17
 TRIO WAIST COMPANY
 39 West 32d Street
 New York, N. Y. 4/17
 Recd. by W. Kessler
 From Savoy Silk Mills
 Payable to Bachman, Emmerich & Co. 10
 44 E. 23 St.
 Via Del by Sol
 1 pc. 500 Georgette 115 68.71
 Wht 6155—59-6

EXHIBIT P 4.

Receiving Report 5/1/19
 No. 4255 20
 TRIO WAIST COMPANY
 22nd & Arch Streets
 Philadelphia, Pa.
 From Savary New York City
 Via Express
 Georgette 57², 55¹, 62⁴, 58⁴, 60⁶, 62⁶, 61², 68⁴, 57⁴,
 55, 60, 61², 61⁴, 57³, 62⁵, 60⁷, 64⁵, 37², 47⁴, 64¹, 55³,
 70, 60³, 55⁷, 61⁵, 60⁷, 67⁴, 66², 61², 55⁶, 61², 53², 62⁶,
 58⁴, 72⁴, 57, 55⁴, 57⁴, 76⁷, 62⁵, 58⁷, 60, 42⁴, 61⁵, 19¹,
 60⁴, 47¹, 53², 61³, 59¹, 60³, 60⁵, 57⁷, 62⁴, 60⁷, 56⁵, 58⁶, 30
 19, 53⁶, 60, 53, 61⁴, 60⁵, 59, 61³, 56², 58⁶, 62⁴, 64⁴, 60¹,
 54⁵, 41², 58⁶, 60, 52⁵, 58⁶, 51², 60¹, 60, 66, 74⁶, 59¹,
 42³, 58³, 60.

4938
 (198) Total 4913²/₈ yds.

EXHIBIT P 7.

Savoy Silk Mills,
Paterson N. J.

Gentlemen:—

10/7/19

We have not as yet received the balance of the goods due us, nor have we heard from you as to when you will complete our order.

10 We have advised you previously that you are compelling us to go into the open market and buy goods, and will charge you for the difference.

We again wish to state that unless we have merchandise by return express you will again compel us to go out in the open market and purchase the balance due us from the order placed with you.

Yours very truly,

P. S. Call up our New York Office and advise Mr. Kessler what you are doing so that we may know how to guide ourselves,

20 Unless you call him up we will take immediate action.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY KESSLER,	}
<i>Plaintiff-Appellant,</i>	
<i>vs.</i>	
DAVID FUCHS,	}
<i>Defendant-Respondent.</i>	

GROUNDS OF APPEAL.

10

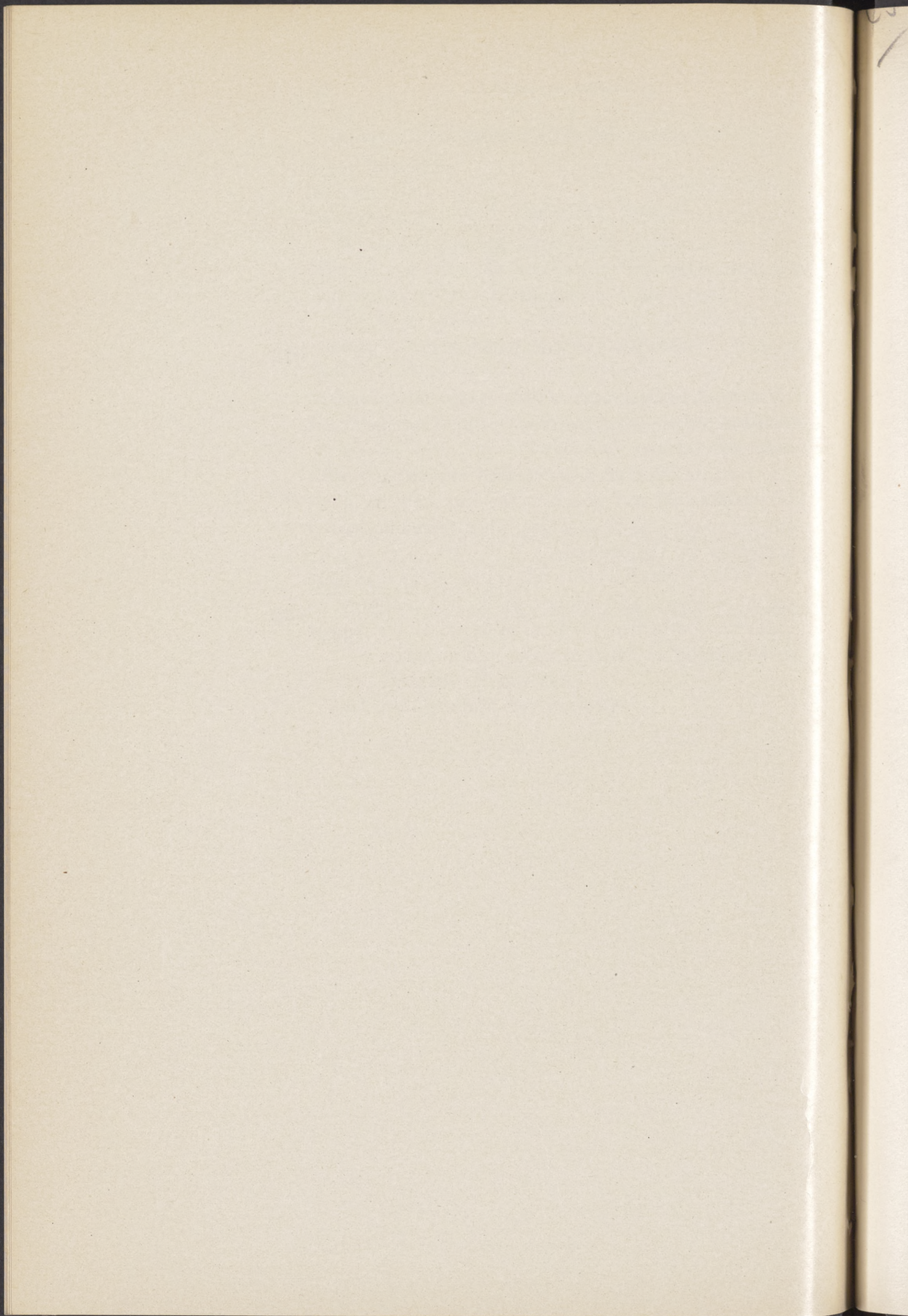
The appellant assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above cause:

1. Because the trial court refused to direct a verdict for the plaintiff, and submit to the jury only the question of the amount of damages, when thereunto moved by counsel for the plaintiff.

2. Because the trial court refused to charge that there was no evidence that Harry Fuchs had authority to cancel the contract in question, in denial of the request of the plaintiff's counsel to make such a charge.

20

ARTHUR H. BISSELL,
Attorney for Plaintiff-Appellant.



New Jersey Court of Errors and Appeals.

HARRY KESSLER,

Plaintiff-Appellant,

vs.

DAVID FUCHS,

Defendant-Respondent.

On Appeal
from
Supreme Court. 10

APPELLANT'S BRIEF.

1.

Statement of the Case.

The plaintiff's suit is on a contract made about April 16, 1919 with the defendant for the sale to the plaintiff of 200 pieces of silk at \$1.15 a yard to be delivered by the defendant to the plaintiff at Philadelphia, Pa., 50 pieces on May 25, 1919, 50 pieces on June 25, 1919, 50 pieces on July 25, 1919 and 50 pieces on August 25, 1919, (p. 2). There is no dispute that only 94 pieces of the 200 were delivered. These 94 pieces were delivered in April and May (Plaintiff's Exhibits 2-3-4, pages 74, 75) for the May and June delivery but lacked 6 of fulfilling the contract requirements, so that defendant was in default in June to that extent, in July 50 pieces additional, and in August the remaining 50 pieces, a total of 106 pieces, which at 65 yards a piece, amounted to non-delivery of 6890 yards. 20 30

On inspecting the goods in May shortly after delivery plaintiff discovered defects in certain of the pieces and notified defendant and as a result Harry Fuchs, the selling agent of defendant who 40

had made the sale went to Philadelphia to examine the goods. Having examined them Harry Fuchs admitted that some of the pieces were imperfect and said that if returned defendant would replace them (p. 13, ll. 28-p. 15, l. 9). The defective goods were not returned but were sold by plaintiff and paid for by plaintiff to defendant.

10 Plaintiff personally orally, by writing, and telephoning and by Miss Simon his employee during May, June, July and August, communicated with the defendant requesting the balance of the goods and was promised the same by the defendant but the contract was not kept (p. 8, ll. 30-39; pp. 9, 10, 41, 62-66). The letter of October 7, 1919 (Exhibit P-7, p. 76) written to the Savoy Silk Mills, defendant's mill, stating plaintiff's request for fulfillment of contract, shows plaintiff's position. Defendant never answered this letter. But his testimony as to receiving and destroying some
20 letters is significant (p. 49, ll. 1-37). To replace the undelivered goods in part plaintiff bought on a rising market, paying \$2.00 a yard. The average market price in August when the breach was complete was, according to the plaintiff's witnesses from \$1.55 to \$2.00 a yard and according to defendant from \$1.50 to \$1.70 (p. 8, l. 24; p. 24, l. 36; p. 25, l. 11; p. 32, l. 22; p. 60, l. 32), an advance of from \$.35 to \$.85 over the contract price of \$1.15.

30 Suit was brought by plaintiff for the breach of contract and loss to him arising out of the defendant's failure to deliver the balance to him on a rising market.

Defendant, as shown by his answer has made several defenses (p. 3) viz: First Special Defense is "cancellation"; Second Special Defense is "agreement to relieve from delivery"; Third Special Defense is "failure of plaintiff to furnish
40 to defendant 'colors' in which goods were to be

manufactured"; Fourth Special Defense is "release from performance". At the trial the defendant seemed to rely on the defense of "cancellation" judging from the testimony of Harry Fuchs. As to the other defenses no attempt was made to prove the third special defense while the testimony on the part of the defendant did not show any such agreement as was set up in the second defense. As to the Fourth defense, the plaintiff having paid for the first shipment, the consideration for the release claimed by the defendant was lacking. The Court in its charge referred to the defense as that of "cancellation" (p. 70, l. 22; p. 71), and no exception was taken to the charge in that respect by the defendant. 10

Defendant attempted to draw an inference that plaintiff desired a cancellation and to return the goods in order to buy in May and June 1919 at a price lower than the contract price, but the evidence shows plaintiff did not return the goods paid for then and in fact sold them at a profit, defective as they were; also that at the time the remaining deliveries were due in July and August the market price was rising and in August, at least \$.75 a yard over the contract price and that defendant refused to deliver the goods required. 20

2.

Grounds of Appeal.

1. That the trial court committed error in refusing to direct a verdict for the plaintiff submitting to the jury only the question of the amount of the plaintiff's damages. (p 67 ll. 22, 23, p 68 ll. 18 + 19) 30

2. That the court committed error in its refusal to charge that there was no evidence that Harry Fuchs had authority to cancel the contract in question. (p 73 ll. 5, 6) 40

3.

Brief of the Argument.**I. The Trial Court erred in not directing a verdict for the plaintiff submitting to the jury only the question of damage.**

(a) The facts, and inferences support plaintiff's claim.

10

(b) The facts, and inferences do not support defendant's defense nor is there any legal evidence produced by defendant to support any one of them.

(c) As a matter of law there was no fact in doubt or dispute except the question of damages.

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(d) The goods delivered were 106 pieces short of the contract number. Of the 94 pieces received some were defective, and Harry Fuchs went to Philadelphia to see about them (p. 11, ll. 12-20). He admitted the goods were damaged (p. 11, l. 18; p. 13, ll. 24, 25; p. 22, l. 34), and agreed that the defendant would replace the damaged goods if returned (p. 11, ll. 19, 26; p. 13, ll. 28-32). The damaged goods were not returned but were sold by the plaintiff (p. 14, ll. 4-40; p. 16, l. 8), as the defendant knew (p. 15, ll. 1-10), for he accepted payment for them. Plaintiff's testimony (p. 7, ll. 22-29; p. 8, ll. 30-39) shows that he was anxious to get the balance of the goods and was promised delivery of the same by or on behalf of the defendant. This was during June, July and August 1919 (p. 9, ll. 1-2; p. 9, ll. 26-29; p. 9, ll. 32-38; p. 12, ll. 5-11). The testimony of Ada Simon proves plaintiff was continuously after defendant for the goods (pp. 61-62-63-64-65-66); also that Harry Fuchs told plaintiff the price was going up (p. 23, ll. 4-5); it went up in July and August 1919

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(p. 8, ll. 11-22; p. 16, ll. 27-34; p. 23, l. 22; p. 24, ll. 30-36; p. 25, l. 1; p. 43, ll. 30-37; p. 44, ll. 29-33).

There was no falling market in May or June (p. 30, ll. 20-30; p. 60, ll. 23-26). Nor did plaintiff buy any goods elsewhere during these months. In short there was no reason for plaintiff to cancel the contract. He was even able to sell the defective goods at a profit (p. 12, l. 1). Defendants relied on their defense of "cancellation", but they submitted no legal proof of it. There is absolutely no proof of the authority of Harry Fuchs to make such an agreement of cancellation. There is no proof of the ratification by defendant of Harry Fuchs' alleged agreement to cancel and accept return of the goods. As payment for the said goods was accepted by the defendant there was a repudiation, not a ratification of the said alleged agreement. Very significant are the admissions in defendant's evidence.

(1) That there was a rising market in July and August (p. 52, l. 22; p. 60, ll. 30-33).

(2) That they were unable or unwilling to deliver the balance of the goods to plaintiff (p. 46, ll. 8-12; p. 47, ll. 19-20-32; p. 48, ll. 1-4).

(3) That they had received many messages in writing and by telephone from plaintiff requesting fulfillment of the contract (p. 48, ll. 1-4).

(4) That they had received and destroyed a number of letters and a telegram from the plaintiff (p. 49).

The failure of the defendant to reply in writing to any of these communications is strange if they thought the contract was actually cancelled as they claim (p. 51, ll. 1-11).

In brief the appellant's position is this. The defendant set up as a defense an oral agreement between him and the plaintiff (which agreement

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was made by his sales agent) to cancel the entire contract, no part of the purchase price having then been paid. The original contract having been in writing under the Statute of Fraude, a parole agreement of cancellation was void. Furthermore, the undisputed testimony showed that the parties did not carry out this alleged agreement of cancellation but that the plaintiff paid for the goods already received and repeatedly demanded the delivery of "the balance of his order" as it was put by the defendant's own witness (p. 41, l. 18). The defendant therefore cannot rest his defense of cancellation upon this alleged agreement when it appears from the testimony of his own witness that the terms of that agreement were not carried out by him.

In speaking of the discharge of contracts by agreement it is said in 9 Cyc 593 "A contract may be discharged at any time before the performance is due by a new agreement with the effect of altering the terms of the original agreement or rescinding it altogether and a claim under the original contract may then be met by the new agreement so far as the latter operates to alter or rescind the former." And on page 595, "In such case the new agreement takes the place of the old and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged." The claim of cancellation of the entire contract set up by the defendant was not sustained by his own proof. There is no testimony in the case from which it can now be claimed that the contract was modified by a completion as to part and the rescission as to the balance. The burden of proof of a change or modification was on the defendant. 9 Cyc 761, and cases cited. This burden was not sustained.

II. The Trial Court erred in its refusal to charge at the plaintiff's request that "There is no evidence that Harry Fuchs had authority to cancel the contract in question.

In a recent case in this court where a selling agent visited a customer of his principal, where the goods "were not up to the standard", and he agreed to relieve the customer of liability from the sale and to have the goods shipped elsewhere, this court held that there was nothing in the case to show the agent had any power to agree to a modification of the contract, or to relieve the defendant of any of its provisions. *E. Clemens Horst Co. vs. Peter Breidt City Brewery* 109 At. Rep. 727. "On an issue of agency when the facts are not in dispute and the inferences from them are not in doubt the question is one of law for the court." 103 At. 202. There was no conflict on the evidence as to this point as there was no evidence whatever to support Harry Fuchs' authority. The evidence and presumption are to the contrary. The only evidence is (p. 36, l. 37; p. 37, l. 2) to the effect that Harry Fuchs had charge of "selling affairs," in New York.

"Presumptively an agent is employed to make contracts, not to rescind or modify them; to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up right or interests for his principal." 2 Corp. Juris. 645.

"Ordinarily a sales agent is supposed to be employed to contract a sale and has no implied power, once this is done either to undo or to modify the contract. The sale completes the transaction and there is no

presumption from the mere authority to sell, that the agency continues so as to enable the agent to rescind the sale, and accept a return of the property." 2 Corp. Juris 608.

Citing *Mange Weiner Co. vs. Patton Warsham Drug Co.*, 27 Pa. Super 315, as saying

10 "That no implied authority to rescind and accept a return of the goods is to be inferred in a selling agent from the mere fact of his authority to sell; if the salesman has a greater or different authority, that fact must be ascertained by the jury upon competent evidence.

"As a general rule a power to sell land or to do some act in connection with a sale conveys no authority to modify or rescind the contract of sale after it is made; and the agent cannot thereafter without his principal's consent, cancel the contract so as to release the purchaser." 2 Corp. Juris 617.

20 The defendant repudiated any attempt of Harry Fuchs to cancel the contract by accepting payment for the goods which Harry Fuchs claimed were to have been returned as a part of the "cancellation agreement."

See also *Interstate Chem. Co. v. Jqs. Leo. Co.* 110. ATL. 303

III. There was no legal evidence to support the verdict.

(a) There is no legal evidence to support any defense of the defendant.

30 (b) To make a jury question of the defense of "cancellation of contract", on which the defendant relied at the trial there must be not only

(1) evidence as to Harry Fuchs' authority to cancel the contract, or

(2) ratification by the defendant of Harry Fuchs' unauthorized act, but also,

(3) no act of defendant inconsistent with the alleged cancellation.

When defendant accepted payment he repudiated any attempt of Harry Fuchs to cancel the contract and the defense falls and there is no question for the jury except damages.

"A judgment which the evidence undisputedly shows is not sustained by the facts will be reversed." *Warren vs. Finn*, 86 At. 530.

**The judgment should be reversed for 10
the reasons stated.**

Respectfully submitted,

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When defendant requested payment he should
also pay attention of Henry Lewis to cancel the
contract and the defense falls and there is no
question for the jury except damages.

"A judgment which the evidence and the
facts show is not sustained by the facts
will be reversed." Thomas vs. Thomas, 38 A.

The judgment should be reversed for 19
the reasons stated.

Respectfully submitted,

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NEW JERSEY
COURT OF ERRORS AND APPEALS

HARRY KESSLER,
Plaintiff-Appellant,

vs.

DAVID FUCHS,
Defendant-Respondent.

On Appeal
from
Supreme
Court.

DEFENDANT'S BRIEF.

In this brief we will answer appellant's brief and his grounds of appeal in the same order as taken up by him.

I.

The trial court committed no error in refusing to direct a verdict for the plaintiff, and to submit to the jury only the question of the amount of the plaintiff's damages.

Had the trial court done as requested and directed the jury to find for the plaintiff, leaving to them only the question of the amount of damages, he would have usurped the functions of the jury. Whether the defendant was liable at all for any damages was purely a matter of fact to be determined by the jury.

The defendant had presented evidence of a rescission or cancellation of the contract sued upon and of admissions by the plaintiff, made on different occasions, of the fact of a mutual rescission or cancellation. The plaintiff, of course, denied that any rescission or cancellation had been made. In this state of affairs, if the court had directed the jury to find a verdict for the plaintiff, it would have ignored all the following evidence introduced by defendant pointing to the rescission or cancellation.

A short time after a shipment of goods was made under the contract plaintiff complained that some of the goods were faulty and sent for defendant's agent to call upon him in Philadelphia, and defendant's witness Harry A. Fuchs' (the agent) testimony is as follows (Case, p. 37, lines 30, etc., and p. 38):

Q. Tell us what conversation took place at the office of the Trio Waist Company (plaintiff's company).

A. When I got in, he (meaning plaintiff) told me most of the goods were damaged and he wants to return the whole lot, and he says he don't want any more goods shipped; if we shipped any more goods against the contract, he will return them to us, and he considers the order cancelled because the goods are not like the sample piece we showed him, they were damaged. I says, "Let me look at them"; he says, "Yes, go ahead"; I examined the goods and found two or three pieces were damaged, and I told him we would gladly take them back and change them for him and ship him other goods in place of them. He said, "No, I don't want any goods at all, I am going to send you back the whole lot of silk." I says, "If that is the

way you feel, you send them back, and we won't do any more business with you. Just because there is a little depression in the price now, and you find you can buy the goods a little cheaper, you want to return the whole lot."

Q. What other conversation took place? Was there any conversation as to the replacement of these 35 pieces?

A. No, he wanted to return the whole lot.

Q. How many did you want to accept?

A. There were 2 or 3 pieces which were really badly damaged, and I wanted to replace them for him.

Q. You wanted to take back those 2 or 3 pieces?

A. Yes, sir.

Q. Would he let you take those 2 or 3 pieces back?

A. No, he said he wanted to ship the whole lot back, and we should not ship him any more goods against his order, and if we did, he would return them.

Q. What did you say to that?

A. I told him, "If that is the way you feel about it, we won't do any more business with you; because you feel there is a little depression in the price, and you can probably buy goods a little cheaper, you want to return them," and I went away with the intention that he would return the goods.

Q. Did you say to him you would ship him more goods?

A. I wanted to ship him the balance. He told me if we shipped him any more he would return them. Not to ship him any more goods.

Q. What did you say to that?

A. I could not say anything to him. I considered the matter closed. He cancelled the order. We could not ship him any more. He was going to return the first shipment, and would not receive any more, so there was no use shipping him any more goods.

If there had been no further evidence on the part of the defendant with reference to the alleged cancellation, the foregoing testimony, if credited by the jury, would have sustained a finding by it of a mutual cancellation.

The goods, however, were not in fact returned by the plaintiff, and Harry A. Fuchs testifies about a conversation in New York between him and the plaintiff with reference to the failure of the latter to ship back the goods (Case, p. 39, lines 10, etc.) :

Q. What was the conversation at that time?

A. "Well," he says, "I sold the goods." He says, "I was *supposed* to return them, and," he says, "I sold them." I says, "Who did you sell them to?" And he told me, "Ost Bros." I said, "How is it Ost Bros. could use them and you could not?"

Q. Was there any other conversation at that time?

The Court: What was his answer to that?

The Witness: He says, "Well, we could not use them."

Q. Was there any other conversation at that time?

A. After I told him that, why could Ost Bros. use the goods and not he, he turns around and says, "Well," he says, "*we cut*

them up. We cut around it and cut them all up."

If the jury credited this witness, he furnished in the above excerpt from his testimony further proof of a cancellation of the contract sued upon; he reports the plaintiff as saying that he "was supposed to return" the goods then shipped on account of the contract.

Again, if the jury deemed this witness to be veracious, his testimony signally discredits the plaintiff, since he describes the plaintiff as contradicting himself as to what disposition he had made of the goods which he "was supposed to return"; plaintiff first claims that he sold them to Ost Bros., and when asked why Ost Bros. could utilize the goods when he could not, he says that he cut around the damaged spots and used the goods himself.

The same witness tells of a further conversation with plaintiff (Case, p. 41, lines 9-40, and p. 42, lines 1-10) :

Q. Did Mr. Kessler ever come to your place of business in reference to this transaction?

A. Yes, sir.

Q. When about was that?

A. That was in the latter part of August.

Q. Did you have a conversation with him at that time?

A. Yes, sir.

Q. What was the conversation?

A. He wanted the balance of his order, and was willing to pay me a little more money to get it.

Mr. Bissel: What did he say? What did he say to you and what did you say to him?

A. He wanted the balance of his goods and wanted to pay a little more money to get it, and I told him——

Mr. Bissel: Objected to.

Q. Tell us what the conversation was.

A. He wanted the balance of his goods.

The Court: What did he say?

The Witness: *He wanted to pay me 20 cents a yard more.*

Q. What did you say to him? Tell us as nearly as you can the exact wording.

A. I told him I did not care to do any more business with him. The deal I got in Philadelphia from him was enough. I did not care to sell him any further.

Q. What did he say to that?

A. He wanted that we could do business further; he says, "I will give you a little more for the goods."

Q. What did you say to him?

A. I says, "No, we cannot do any further business after that Philadelphia deal."

The above testimony of witness Harry A. Fuchs is fully corroborated by the testimony of defendant's witness Emanuel Schwartz (Case, p. 52, lines 30, etc., and p. 53).

Q. Do you know Mr. Kessler?

A. Yes, sir, I do.

Q. Did you ever see Mr. Kessler in the office of the Savoy Silk Mills in New York?

A. I did.

Q. Did you hear a conversation between Harry Fuchs and Mr. Kessler at that time? Tell us when it was about.

A. About some time in the latter part of August Mr. Kessler came down to our New York office and I happened to be in the office at the time with Mr. Fuchs and Mr. Kessler.

The Court: Tell us what the conversation was.

The Witness: Mr. Kessler asked for his goods, and Mr. Fuchs said, "Why, you cancelled your goods in Philadelphia, claiming they were damaged." And then Mr. Kessler said, "Why, let us forget about that. How much do you want; I will give you more money for the balance." That is all I know.

Q. What did Mr. Fuchs answer to that?

A. "I don't want to do any more business with you."

On cross-examination said Emanuel Schwartz again testifies as follows (Case, p. 54, lines 26, etc.):

Q. What offer did Mr. Kessler make at that time?

A. He said, "*Let us forget about it, about the cancellation, and the balance of the goods you owe me I will give you more money for.*"

Not only does the foregoing testimony show a cancellation and rescission of the contract in the early part of May, 1919, but the testimony of both Mr. Fuchs and Mr. Schwartz shows that plaintiff admitted in August of that year that he had cancelled the contract.

Furthermore, the reason given by witness Harry A. Fuchs for consenting to accept the request of plaintiff to cancel the contract (Case, p. 45, lines 6, etc.) bears out most strongly that such a cancellation took place. This evidence was brought out upon the cross-examination of defendant, Harry A. Fuchs, as follows:

Q. You considered the order was cancelled?

A. He told me the order was cancelled, because he said the goods we shipped him were not like the sample piece.

Q. You did not consider it was cancelled?

A. Yes, sir.

Q. I asked you just now if you considered it was cancelled; did you or did you not?

A. I did. He said to cancel it. He told me not to ship any more goods, he would not receive any more. That is what he said.

Q. Did you feel he had a right to do that?

A. Yes.

Q. Why?

A. Why didn't he have the right?

Q. If you make a contract with a man——

Mr. Joelson: I object to this line of questioning.

The Court: I think it is a perfectly proper question.

A. If I make a contract with a man, and at the time the goods are received the market is easing off, and he felt he could buy the goods at lower price, a dollar and seven a half, was there any reason to keep him to a dollar and fifteen when he did not want to keep his contract when he felt that he could buy it cheaper? I told him what I thought of him, and I could not do any more business with him.

Q. Did you say you could have compelled him to live up to that contract?

A. I probably could have compelled him, but I did not care to do it.

Q. Why not?

A. Well, it was so small, the amount involved was so small, it would not pay me to go to a lawyer and hire him, and before I got through where would I get all my expenses and my time?

Q. You were perfectly willing to say, "If you don't want to take the silk, don't take it"?

A. Yes, sir.

The Court: At that time you anticipated the market would go up in June and July and August?

The Witness: Yes, I felt that way; that is why I was not anxious for him to take them.

Q. And you thought that he had guessed wrong?

A. I did not know how he guessed. It was none of my business how he guessed.

Plaintiff, of course, in the trial, denied that he had ever cancelled the contract, and insisted that he persisted in having the balance of the silk sent him. This necessarily made the fact, as to whether the contract was cancelled or not, purely a jury question.

Counsel for the plaintiff in his brief endeavors to show that it was not a jury question for the following reasons:

1. Because the original contract having been in writing under the Statute of Frauds, a parol agreement of cancellation was void.

2. Because Harry A. Fuchs, defendant's agent, had no authority to cancel the contract; and

3. Because there was no legal proof of cancellation.

As to his first reason, we know of no law holding that a contract coming within the Statute of Frauds involving personal property cannot be cancelled by parol.

The power to rescind a sale by agreement is co-extensive with the power to contract, and the mutual release of the rights of the parties under the contract of sale is regarded as a sufficient consideration for the agreement.

Gant v. Shelton, 3 B. Mon. (Ky.), 420.

Brooke v. Waring, 7 Gill (Md.), 5.

Bryant v. Thesing, 46 Nebr., 244; 64 N. W., 967.

Kelly v. Bliss, 54 Wis., 187; 11 N. W., 488.

The agreement to rescind may be by parol.

Gant v. Shelton, 3 B. Mon. (Ky.), 420.

Bryant v. Thesing, 46 Nebr., 244; 64 N. W., 697.

Dignan v. Spurr, 3 Wash., 309; 28 Pac., 529.

The parties to a written contract may not only modify it orally, but they may rescind it in the same manner. 6 R. C. L., Contracts, Sec. 306.

The general rule permitting written contracts to be abrogated or rescinded by an oral agreement *is fully applicable to contracts required by the Statute of Frauds to be in writing; and such a contract may be the subject of an oral accord and satisfaction, or may be rescinded by a subsequent*

oral agreement. 25 R. C. L., Statute of Frauds; Abrogation or Discharge of Contract, Sec. 357.

As to the second reason, that defendant's agent, Harry A. Fuchs, had no authority to cancel the contract, such a position by this plaintiff is contrary (a) to his own conduct in all his dealings with said agent, and is contrary (b) to the conduct of the agent's principal after the cancellation of the contract.

(a) *What was plaintiff's conduct toward said agent?*

Let us look to plaintiff's own testimony (Case, p. 5, lines 32, etc.) :

Q. Are you acquainted with defendant in this case?

A. Yes, sir.

Q. Have you done business with him some years now?

A. For probably three or four years.

Q. *With whom have you done your business mostly, with him directly?*

A. *With him directly, Harry A. Fuchs.*

Q. *Do you know his son?*

A. *That is his son.*

Q. *The defendant in this case is David?*

A. *David Fuchs. I met the gentleman a short time ago. Before my transactions were all the time with Harry Fuchs, a son of David Fuchs.*

Q. On April 16th of last year did you have a conversation *with Mr. Harry Fuchs* in your office in New York?

A. Yes, sir.

Q. At that time did you give *him* an order?

A. I did give *him* an order (referring to the order upon which plaintiff grounds his suit).

Furthermore, plaintiff further testifies that after delivery of the big shipment (on May 1, 1919), and after he had examined those goods and found some faulty—“*I immediately got in touch with Harry Fuchs * * * I told him those goods were not perfect, and that he said he would replace them*” (Case, p. 11, lines 10, etc.). On page 13 of case, lines 9, etc., plaintiff further testified that he notified *Harry Fuchs* by telephone and *saw him personally* in New York City about the goods, and that in consequence of the telephone call and conversation *Harry Fuchs made a special trip to Philadelphia to examine those goods at plaintiff's request* (Case, p. 14, lines 10, etc.).

Furthermore, both plaintiff and his assistant in the New York office, Ada Simon (Case, p. 61, lines 23, etc.), testify as to numerous alleged conversations with *Harry Fuchs* in regard to the transaction, but neither of them testify that they ever talked about the matter, over the telephone or otherwise, to the principal, David Fuchs. There is no evidence that either plaintiff or Miss Simon, for him, ever even tried to get the principal by telephone.

Plaintiff during all his transactions in regard to the matter in controversy never treated the agent in any other manner than an agent with the broadest authority; he never requested the principal to come to Philadelphia or never even notified him of the alleged poor quality of some of the silk shipped and of his alleged grievance.

Plaintiff not only recognized defendant's agent as having broad authority, but, according to defendant's witnesses, plaintiff in the early part of May, 1919, demanded of and received through defendant's said agent a cancellation and rescission of the contract of sale. See testimony of Harry A. Fuchs and Emanuel Schwartz heretofore set forth in our brief.

If plaintiff obtained on his own initiative a cancellation or rescission of the contract in question through defendant's agent, he is unquestionably estopped by his own act from later asserting that defendant's agent had no authority to acquiesce in such cancellation or rescission, and it was for the jury to say under the conflicting evidence in the case at bar whether or not there was such a cancellation or rescission of the contract.

If the plaintiff requested and defendant's agent consented to the cancellation or rescission of the contract in question, then it was for the defendant alone to say whether or not his agent acted within the scope of his authority or whether he would ratify his agent's act.

This brings us to our second point.

(b) The uncontroverted testimony in the case is that after the agent's trip to Philadelphia in the early part of May, 1919, defendant shipped no more silk under the contract to plaintiff, and defendant asserts that he shipped no more silk because at that time the contract was cancelled and rescinded at the request of plaintiff and with the consent of defendant's agent.

The uncontroverted testimony in the case is that plaintiff had been dealing with defendant for three or four years; that during all of said time in all his dealings he never met or knew defendant; all his dealings were with defendant's agent; that when

the alleged trouble arose over the contract in question plaintiff never sought an interview with defendant, but always with defendant's agent, and that whatever defendant's agent did in the matter defendant stood behind him.

Furthermore, defendant himself sets up the cancellation or rescission of said contract as his defense to plaintiff's suit, thus either acknowledging the authority of his agent to assent to the cancellation or ratifying his agent's act in cancelling the contract.

A sales agent may be expressly given any authority the principal desires, and the acts and conduct of the principal may be equivalent to the grant of express authority. * * * *Certainly, if the principal asserts the authority of the agent to rescind the sale, third persons will not be heard to deny it, 31 Cyc., 1360, Principal and Agent: Authority to Rescind or Modify.*

As to the third reason, that there was no legal proof of cancellation.

If at the trial the jury believed the testimony of Harry A. Fuchs and Emanuel Schwartz (heretofore quoted in this brief), there was ample proof of the cancellation or rescission of the contract, and it was for the jury alone to determine whether said Fuchs and Schwartz should be believed or whether they should believe the testimony of plaintiff.

Furthermore, besides the positive evidence of defendant's witnesses as to the cancellation, plaintiff's conduct bears out such a step by him. It must be borne in mind that, according to plaintiff's own testimony, a few days after he received the big shipment in Philadelphia defendant's agent called at Philadelphia to inspect the goods shipped and made a special trip for that purpose at plaintiff's request.

Plaintiff testifies (Case, p. 11, lines 10, etc.) that upon examination of the goods he found about thirty or thirty-five pieces "seconds"; plaintiff would then have the jury believe that, notwithstanding the fact that he considered the damage so great as to require the personal presence of defendant's agent, nothing was decided that day in respect to what was to be done in the matter, and in his very same answer testifies, "*We were supposed to send them back*, but in the meantime a few people came around for goods, and they used 'seconds' at that time, and we sold those seconds 'as are.'"

These words of plaintiff, "We were supposed to send them back," when coupled with the testimony of Emanuel Schwartz that defendant said to plaintiff in his presence in New York City in the latter part of August, "Why, you cancelled your goods in Philadelphia claiming they were damaged," and the reply thereto of plaintiff, "Why, let us forget about that. How much do you want? I will give you more money for the balance," furnishes good legal evidence of the cancellation of said contract, to say nothing of the testimony of defendant's agent in regard to the cancellation in Philadelphia in the early part of May.

In order to circumvent this positive testimony, plaintiff in his brief contends that, inasmuch as plaintiff afterwards sold the goods which he should not have sold, and thereby force defendant to accept payment in lieu of the goods so sold, defendant thereby repudiated instead of ratified the act of his agent in consenting to the cancellation of the contract. In other words, his argument is, that there was a cancellation of the contract in Philadelphia in May, 1919; that thereafter plaintiff sold certain goods, which he should have returned to defendant; that by his own wrongful act he put de-

defendant in the position that he could not accept the goods back, and that by reason of defendant being unable to do the impossible defendant could not ratify his agent's act.

The answer to this proposition is obvious: Plaintiff cannot take advantage of his own wrong, and defendant, if a ratification was necessary, did ratify the act of his agent by (1) shipping no further goods to plaintiff, and (2) by accepting in lieu of the goods which plaintiff had wrongfully sold money therefor.

II.

The trial court committed no error in its refusal to charge at the plaintiff's request that "there is no evidence that Harry Fuchs had authority to cancel the contract in question."

Under this point plaintiff cites cases which seem to us far afield. The case cited in 109 *Atl.*, p. 727, as well as the case cited in 103 *Atl.*, p. 202, were both cases in which the principal asserted that his agent had no right to do the act which he did. In each of those cases the question of ratification of the agent's act was not involved, and in each of those cases it was obvious that the agent transcended his authority. The quotations from *Corpus Juris* likewise state principles of law involving the scope of the agent's authority as between him and his principal.

In the case at bar, to use the language of plaintiff in quoting from the 103 *Atl. Rep.* case, *it is obvious both from the facts and from the inferences to be drawn from the facts that the agent had authority to cancel the contract.* As hereinbefore

shown, plaintiff treated defendant's agent and dealt with him as having the broadest authority; when the alleged trouble arose concerning the silk sent, he dealt solely with defendant's agent and did not communicate with defendant at all. According to defendant's witnesses, plaintiff on his own initiative obtained a cancellation of the contract through defendant's agent; after such cancellation was obtained, the principal shipped plaintiff no further silk. Furthermore, the principal never questioned his agent's authority in cancelling the contract, never sent any more goods to plaintiff after the contract was cancelled by his agent, and defends this suit on the grounds that such a cancellation of the contract took place. The above-stated facts are supported by the evidence heretofore quoted in this brief, and by the pleadings.

The last argument made under this point in plaintiff's brief, that defendant repudiated any attempt of his agent to cancel the contract by accepting payment in lieu of return of the goods, has already been dealt with by us under our first main argument.

III.

There was legal evidence to support the verdict.

This is the last point raised by plaintiff in his brief, and he there states that there was no legal evidence to support the verdict.

As we have heretofore shown and quoted in our brief, there was ample legal evidence to support the verdict.

If the legal propositions set up by plaintiff under caption (b) are sound, then we insist from the evi-

dence heretofore quoted by us or referred to by us that there was (1) evidence as to Harry Fuchs' authority to cancel the contract; that there was (2) ratification by the defendant of his agent's act, and that there was no act of the defendant inconsistent with the cancellation of the contract.

The judgment should be affirmed for the reasons above stated.

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BRNO & NRO

ern Bond