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NOTICE AND GROUND OF APPEAL.

**New Jersey Supreme Court**

UNION COUNTY.

WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers, <i>Plaintiffs-Appellees,</i>  <i>vs.</i> SPICER MANUFACTURING CORPO- RATION, <i>Defendant-Appellant.</i>	}	<i>Action at Law.  Notice of Appeal and Ground of Appeal.</i>	10
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To Saul Nemser, Esq., attorney for plaintiffs. 20

SIR:

TAKE NOTICE, That the defendant above named hereby appeals from the final judgment entered in the above-entitled cause on March 27, 1928, in favor of the plaintiffs and against the defendant for one thousand eight hundred and forty-seven dollars and fifty-nine cents (\$1,847.59) to the New Jersey Court of Errors and Appeals in the last resort in all causes, and assigns the following as its ground of appeal: 30

1. Because the Court refused to grant the defendant's motion for a non-suit of the plaintiffs' case.

Respectfully yours,

FRANCIS A. GORDON,  
Attorney for Defendant-Appellant.

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SUMMONS.

The State of New Jersey to Spicer Mfg. Corporation:

(SEAL) YOU ARE SUMMONED to answer the annexed complaint of Walter E. Lough and Percy F. Lough, co-partners trading as Lough Brothers, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. (And see notice endorsed hereon.)

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 26th day of May, 1927.

EDWARD J. KELLEHER, Clerk.

SAUL NEMSER, Attorney.

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COMPLAINT.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers, Plaintiffs, vs. SPICER MFG. CORPORATION, Defendant. Action at Law. Complaint.

Plaintiffs, co-partners doing business as Lough Brothers, residing at Plainfield, in the County of Union and State of New Jersey, say that:

1. Plaintiffs are foundry brokers engaged in the business of securing customers for foundry products on a commission basis.

2. Defendants are manufacturers of foundry products, drop forgings, etc., with a plant located at South Plainfield, New Jersey.

3. In the month of January, 1921, plaintiffs and defendant entered into an agreement wherein the defendant agreed to pay to plaintiffs a commission of five per cent. on any and all orders obtained for the defendant through the plaintiffs' efforts.

4. Pursuant to said agreement, the plaintiffs did procure a customer known as Fibre Cushion Horseshoe Co., which said last-mentioned company did place a large order with the defendant for the manufacture of certain horseshoes, which

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*Complaint.*

the defendant did consummate and which order amounted to thirty thousand (\$30,000.00) dollars.

10 5. Thereupon, there became due to the plaintiffs from the defendant, as a commission on said order, the sum of fifteen hundred (\$1,500.00) dollars, which the said defendants have refused to pay, although demand has been made upon them for payment thereof.

Plaintiffs demand as damages the sum of \$1,500.00, together with interest and costs of suit.

SAUL NEMSER,  
Attorney for Plaintiffs.

Notice to the within-named defendant:

20 In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to said action you must file an affidavit of merits within ten days from the date of service thereof upon you and must file your answer within twenty days from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of the rule under which this notice is given. (P. L. 30 1912, p. 394, Rule 56.)

SAUL NEMSER,  
Plaintiffs' Attorney.

**STIPULATION.**

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers,  vs. SPICER MFG. CORPORATION,  	}	10  <i>Action at Law.</i>  <i>Stipulation.</i>
<i>Plaintiffs,</i>		
<i>Defendant.</i>		

It is hereby stipulated and agreed between the attorneys for the respective parties hereto that the venue of the above-entitled cause be laid in Union County, and not in Hudson County as heretofore. 20

SAUL NEMSER,  
Attorney of Plaintiffs.

WALTER L. HETFIELD, JR.,  
Attorney of Defendant.

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ANSWER.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10 WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers,

Plaintiffs,

vs.

SPICER MFG. CORPORATION,

Defendant.

Action at Law.

Answer.

20 The answer of defendant, a corporation organized under and by virtue of the laws of the State of Virginia, and having an office and place of business at South Plainfield, Middlesex County, New Jersey, to the complaint of the plaintiffs says:

- 1. It admits the first paragraph.
- 2. It admits the second paragraph.

30 3. It denies the third paragraph except so far as admitted in the following statement: that in the month of January, 1921, the plaintiffs and defendant entered into an agreement whereby the defendant agreed to pay the plaintiffs a commission of 5% or less on all collections made and money received by the defendant from orders obtained through the plaintiffs' efforts.

40 4. It denies the fourth paragraph except so far as admitted in the following statement: that the plaintiffs did procure a customer known as "Fibre Cushion Horse Shoe Company," and that

Answer.

the total collections made and money received by the defendant from orders of the said Fibre Cushion Horse Shoe Company amounted to \$230.40.

5. It denies the fifth paragraph except so far as admitted in the following statement: that the defendant owes the plaintiffs commission on \$230.40, being the amount received and collected by the defendant on orders of the said Fibre Cushion Horse Shoe Company. 10

WALTER L. HETFIELD, JR.,  
Attorney for Defendant.

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STIPULATION.

NEW JERSEY SUPREME COURT.  
UNION COUNTY.

10	WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers,   vs.  SPICER MFG. CORPORATION,  Defendant.	}	Plaintiffs,   Defendant.	Action at Law.  Stipulation.
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20 It is hereby stipulated and agreed between the attorneys of the respective parties hereto that paragraph 4 of the complaint be amended to read as follows, viz.:

30 "4. Pursuant to said agreement, the plaintiffs did procure two customers known as Fibre Cushion Horseshoe Co. and P. C. A. Steel Fibre Horseshoe Co., Inc., both of which said companies did place large orders with the defendant for the manufacture of certain horseshoes which the defendant did consummate, and which orders amounted to upwards of thirty thousand (\$30,000.00) dollars."

It is further stipulated and agreed that the defendant shall have leave to file an amended answer within fifteen days from the date hereof.

Dated, July 6, 1927.

SAUL NEMSER,  
Attorney of Plaintiffs.

40	WALTER L. HETFIELD, JR., Attorney of Defendant.
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ANSWER TO AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT.  
UNION COUNTY.

10	WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers,   vs.  SPICER MFG. CORPORATION,  Defendant.	}	Plaintiffs,   Defendant.	Action at Law.  Answer to Amended Complaint.	10
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The answer of defendant to paragraph 4 of the complaint as amended is as follows: 20

4. It denies the fourth paragraph except so far as admitted in the following statement: that the plaintiffs did procure a customer known as "Fibre Cushion Horse Shoe Company," and that the total collections made and money received by the defendant from orders of the said Fibre Cushion Horse Shoe Company amounted to \$230.40, and that the defendant did receive several orders from the P. C. A. Steel Fibre Horse Shoe Co., Inc., to ship goods to different customers of the said P. C. A. Steel Fibre Horse Shoe Co., Inc., which orders were not procured by or obtained through any efforts of the plaintiffs. 30

WALTER L. HETFIELD, JR.,  
Attorney for Defendant.

POSTEA.

Filed March 27, 1928.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers,

*Pltffs.,*

*vs.*

SPICER MANUFACTURING CORPORATION,

*Deft.*

*Action at Law.*

*Postea.*

20

This case was tried before the Honorable Peter Daly, Circuit Judge, to whom the case was referred for trial, with a jury drawn from the general panel on March 20, 1928, and March 21, 1928, at the Court House, in Elizabeth, N. J.

The jury returned a general verdict in favor of the plaintiffs and against the defendant and did assess the plaintiffs damages at the sum of eighteen hundred forty-seven dollars and fifty-nine cents (\$1,847.59) with costs to be taxed.

(Signed) PETER F. DALY,  
Circuit Judge.

Damages .....\$1,847.59

Costs ..... 66.75

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\$1,914.34

JUDGMENT.

1-28-422.

NEW JERSEY SUPREME COURT.

(1)

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WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers,

*vs.*

SPICER MANUFACTURING CORPORATION.

*At Law.*

*On Postea.*

Saul Nemser, attorney.

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Entered March 27, 1928.

Amount .....\$1,847.59

Costs ..... 66.75

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Total .....\$1,914.34

It is ordered that judgment be and hereby is entered in favor of plaintiffs and against the defendant for the sum of one thousand eight hundred and forty-seven dollars and fifty-nine cents, besides costs to be taxed *nisi* on motion of Saul Nemser, atty.

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*Walter E. Lough, direct.*

SECOND DAY.

March 21, 1928.

Appearances as before stated.

- 10 WALTER E. LOUGH, one of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Goldenhorn.*

Q Mr. Lough, you are a member of the firm of Lough Brothers, are you? A I am.

Q Where do you live? A Plainfield, New Jersey.

- 20 Q How long have you lived there? A About thirty-one years.

Q What is your business? A I am in the iron and steel commission.

Q How long have you been in business? A About twenty-two years?

Q Are you acquainted with Spicer Brothers, the defendant in this action? A The Spicer Manufacturing Company, yes.

- 30 Q How long have you known them? A I have known them by reputation and so forth for about twenty-odd years.

Q In the year 1920 did you have any business dealings with them? A I did.

Q In what way? How did you come to meet them in a business way? A Well, I had a customer come to me and wanted to know if I knew of a drop forging plant that could furnish them with forgings.

- 40 Q What was the name of that customer? A The Fibre Cushion Horse Shoe Company.

*Walter E. Lough, direct.*

Q Where were they located? A Chambers street, New York.

Q After they came to you what did you do? A I went to see the Spicer Manufacturing Company to find out whether they would be interested in taking on that work.

Q Who did you meet? A Mr. Secor.

Q Is Mr. Secor in court now? A He is.

Q Is he connected and was he connected at that time with the Spicer Company, the defendant? A He was.

Q What was your conversation with him?

Mr. Gordon: Objected to on the ground that all prior conversations have been merged in the written correspondence constituting the contract entered into between the parties. If your Honor feels that the question cannot be ruled upon at this time I would like to ask a preliminary question or two.

The Court: All right.

Mr. Goldenhorn: I will withdraw the question.

Q By reason of that conversation you did have some correspondence with the Spicer Manufacturing Company, did you? A I did.

Q On January 25th, after you had a number of talks and letters with the defendant company, did you write a letter, of which this is a copy, showing you a yellow piece of paper dated January 25, 1921? A I did.

Mr. Goldenhorn: I offer that in evidence.

Mr. Gordon: There is no objection to it being marked.

Walter E. Lough, direct.

(Letter dated January 25, 1921, entered in evidence and marked Exhibit P. 1.)

(Letter read to the jury by Mr. Goldenhorn.)

10 Q Now, at that time were you acquainted, Mr. Lough, with the business that the Spicer Manufacturing Company were engaged in? A I knew the character of business, yes.

Q Were they making forgings at that time?

A They had a drop forging plant which they were using primarily on their own product, that is, goods that they were making.

Q Were they using their plant for the making of these forgings for anybody else at that time?

A I couldn't say that.

20 Q What was the condition of the business market at that time?

Mr. Gordon: Objected to as immaterial. Not bearing upon the issue in this case.

Mr. Goldenhorn: I think it will have a great bearing if your Honor will permit it.

The Court: I will allow it.

Mr. Gordon: Prays exception.

A General business conditions were very quiet. 30 It was after the slump in 1920.

Q After you sent that letter, Exhibit P. 1, did you receive a letter from the Spicer Manufacturing Company? A I did.

Q In answer to it? A I did.

Mr. Goldenhorn: I offer this letter in evidence.

(Letter dated January 26, 1921, entered in evidence and marked Exhibit P. 2.)

40 (Letter read to the jury by Mr. Goldenhorn.)

Walter E. Lough, direct.

Q At that time had you any customer for the Spicer Manufacturing Company? A I introduced to him, to Mr. Secor, Mr. Argyro of the Fibre Cushion Horse Shoe Company.

Q Do you know what Mr. Argyro's first name is? A Peter C., I think. 10

Q In what way did you introduce him? Did you bring him over there? A No. I arranged with Mr. Secor to come into New York and took him to their place of business and introduced him there.

Q Where was their place of business? A On Chambers street.

Q Do you remember the number? A I don't recall.

Q After the introduction what, if anything, was said as to on what basis your commission of five per cent. was to be paid? 20

Mr. Gordon: Objected to now upon the ground that it is an attempt to vary the terms of a written contract.

The Court: No. I assume this question is addressed to whether he was to get the five per cent. or less.

Mr. Gordon: I withdraw the objection. 30 (Question repeated by stenographer.)

A There was no question raised as to the percentage. It was understood that it was to be five per cent.

Q Of what? A Of the gross sales.

The Court: What does he mean by understood. If there was nothing said, what was understood could not amount to anything. 40

*Walter E. Lough, direct.*

Q Was there anything said? A The conversations that had taken place were on the basis of five per cent. It was understood—

Q Don't say it was understood. What was said? A Well, five per cent.

10 Q Five per cent. of what? A Five per cent. of the gross sales.

Q Who said that? A Mr. Secor.

*By the Court.*

Q Did he say gross sales or gross collections? A It was paid on the basis of gross collections.

*By Mr. Goldenhorn.*

Q Is that right? A Yes.

20 Q After you introduced Mr. Argyro to Mr. Secor, or Mr. Secor to Mr. Argyro, what was said by either one or both of them in your presence as to the deliveries, if anything? A I don't quite understand you.

Q When did they start taking orders? A There was an order placed at the time that Mr. Secor met Mr. Argyro.

Q For what was the order placed? A For horse shoe forgings.

30 Q After that did you see Mr. Argyro or Mr. Secor again? A Yes.

Q When? A Within a few days after that.

Q What was your conversation with Mr. Secor at that time? A General conversation in regard to the orders that had been placed.

Q What was the conversation? Tell us. A Why, it was in regard to the making of the dies and deliveries.

40 Q Were the dies made? A Dies were built, yes.

*Walter E. Lough, direct.*

Q At that time where was this concern Mr. Argyro was connected with? A They were on Chambers street.

Q In New York City? A In New York City.

Q And how long did that concern continue in business there, do you remember? A A matter of a few months. It may have been four or five months. 10

Q Then what happened? A The place was closed up.

Q After the place was closed up did you see Mr. Argyro again? A I couldn't locate him.

Q Did you find out whether or not he was in business, and if so, in what way? A I couldn't find out that he was in business. I couldn't locate him at all.

Q Did you afterwards find out that he was? 20 A Two or three years later I found out through a call which I received from Mr. Argyro over the telephone.

Q By reason of what Mr. Argyro said to you, what did you do with the Spicer people or with Mr. Secor? A I went to see Mr. Secor and asked him for an accounting for commissions on the business that had been done with Mr. Argyro in the meantime.

Q Well, when you spoke to Mr. Argyro about 30 two or three years afterward, as you say, was he in business then? A He was.

Q Under what name?

Mr. Gordon: I object to that as calling for a conclusion on the part of this witness, that it was Mr. Argyro who was in business under a certain name.

Mr. Goldenhorn: I will withdraw that insinuation and ask you: 40

*Walter E. Lough, direct.*

Q If there was a concern with which he was associated and what was the name, if so? A The name of the concern was the P. C. A. Steel Fibre Horse Shoe Company.

Q After you ascertained that fact did you have a talk with Mr. Secor about it? A I did.

10 Q What did he say? A He said he didn't owe me a penny.

Q Have you ever received any money from them? A A small check about eleven dollars.

Q Have you since ascertained from Mr. Argyro whether or not the concern with which he was associated had been doing business with the defendant company? A Yes.

Q Were you present at the time Mr. Argyro testified in New York? A I was not.

20 Q What was the reason, Mr. Lough, that you waited two or three years before you got in touch with the defendant company? A Because I believed that the business had been wound up.

Q What business had been wound up? A Of the Fibre Cushion Horse Shoe Company, that they had gone out of business, that the horse shoe business had been discontinued entirely.

30 Q Well, did you ascertain from Mr. Argyro that the new company, or whatever it was, was engaged in that business?

Mr. Gordon: Objected to as not binding upon the defendant.

The Court: That would be hearsay, wouldn't it?

Mr. Goldenhorn: It would be if it didn't lead up to the next question, which is: Did you see Mr. Secor by reason of it?

40 A I did.

*Walter E. Lough, direct.*

Q What did you say to Mr. Secor, tell us, about the new company that you heard about?

Mr. Gordon: I would like to have the time fixed.

Q Do you recall when it was, Mr. Lough? A 10 I can't fix it definitely. It was about three years ago.

Q That would be in the year 1925? A About then.

Q Where did you see Mr. Secor then? A At his office, the Spicer Manufacturing Company.

Q What did you say to him and what did he say to you? A I told him that I understood that Mr. Argyro had gone into business again and had followed up—continued the business that had 20 formerly been done by the Fibre Cushion Horse Shoe Company and had taken over the orders and material that was on hand, and so forth, and had gone right along with the business and that therefore I believed that I was entitled to my commission, according to the agreement that we had. Mr. Secor said that it was a new company and that they owed me nothing.

Q Did Mr. Secor say anything to you as to how the new company got to them? A Through 30 Mr. Argyro.

Q He told you that? A Yes.

Q Counsel in his opening yesterday said that you disappeared after the first company went out of business. Is that so? Have you been here all the time? A I have been here all the time, certainly.

Mr. Gordon: I am afraid counsel misinterprets my remark about Mr. Lough's dis- 40

*Walter E. Lough, direct.*

appearance. I would not have it understood for the moment that he left the territory of Union County or the City of New York. I mean as far as the transaction is concerned.

10 Q What I mean is, what was the reason that your interest seemingly ceased for a couple of years, Mr. Lough? A Because I couldn't locate Mr. Argyro, and on inquiring from Mr. Secor if he had heard anything from him, I didn't get any information. Mr. Secor told me that they had business on hand and material on hand and intimated to me that they were stuck. And I thought, for the time being, that the company had gone out of business, that it was over, it was ended, it was permanently discontinued. But later, through my conversation with Mr. Argyro, 20 I found that that was not the case.

Mr. Gordon: I move to strike that out.

Mr. Goldenborn: Will your Honor withhold striking it out until your Honor hears the next question?

Q By reason of what you found out, did you talk to Mr. Secor?

30 The Court: You cannot put in evidence what Argyro told him.

Mr. Goldenhorn: That is true. I ask that be stricken out.

The Court: It is stricken out. The jury will forget what the witness said that Argyro told him. Now, you are asked by reason of whatever he did tell you did you see Mr. Secor.

40 A I did.

*Walter E. Lough, cross.*

Q What did you say to him then? A Just what I—

Q No. Just tell us again. A I told him that I understood that Mr. Argyro had continued in the business and had taken over the orders that had been placed by the original company, had taken in the goods and had assumed the responsibility for the material and that under the conditions I believed that I was entitled, or we were entitled to our commission on the transaction. 10

Q Now, Mr. Lough, after the first company, as you say, went out of business, did the Spicer Manufacturing Company continue to manufacture forgings for horse shoes? A They did.

Mr. Goldenhorn: Cross examine.

*Cross examination by Mr. Gordon.* 20

Q Mr. Lough, you are a member of a firm, Lough Brothers? A Yes, sir.

Q That is composed of your brother and yourself? A Yes, sir.

Q All told, you never brought anyone else to the Spicer Company, or the Spicer Company to anyone other than the Fibre Cushion Company, did you? In other words, there were not any other concerns that you brought to the Spicer Company, were there? A No other business. No other business was closed. 30

Q So that in the early part of 1921 Mr. Secor and yourself visited the Fibre Cushion Company, is that correct? A Yes, sir.

Q Wasn't there someone else with Mr. Secor then? A There was. I don't recall his name.

Q Would you recall the gentleman if I had him stand up? A I might. 40

*Walter E. Lough, cross.*

Q Was Mr. Barry with Mr. Secor at that time? A I don't think so.

Q Was it Mr. Vail? A Mr. Vail, I think.

Q When you went to the Chambers street business did you know who were the members of the Fibre Cushion Company at that time? 10

Mr. Goldenhorn: I object on the ground that it is immaterial. It was a corporation and they were doing business, as I understand it, with one Mr. Argyro. Who constituted the company would be immaterial.

The Court: I will allow it.

Q Did you know who the members of the firm of the Fibre Cushion Company were at that time?

A I knew that there was one party interested by the name of Saxton. Beyond that I did not know the other members of the company. 20

Q Did you know where Mr. Argyro lived at that time? A I did not.

Q Did you look up for his name and address in the city directory of the City of New York in either the Borough of Manhattan or the Borough of Brooklyn? A I did not look in the city directory, but I looked in the telephone directory. 30

Q And you didn't find Mr. Argyro's name in the Brooklyn book at that time? A I did not.

Q When did you start to look for Argyro's name in the telephone directory? A That is a hard question to answer, but I would say right after I lost track of him at the Chambers street address.

Q Well, you learned about May, 1921, that the Fibre Cushion Company had wound up its affairs, didn't you? A Yes. 40

*Walter E. Lough, cross.*

Q And about that time didn't you know that a brand-new company had been formed, away from Mr. Saxton and away from other people who had been associated with Mr. Argyro? A I did not know it.

Q Didn't you know that that company had been formed about a month or two before the Fibre Company had stopped their business? A I did not. 10

Q When you went to the Chambers street address did you inquire as to whether any mail had been directed to be forwarded anywhere? A I couldn't find anyone there from whom to inquire.

Q Well, you were satisfied in May, 1921, that the Spicer Company and the Fibre Cushion Company had come to a stop in their business dealings? A Yes. 20

Q And you were satisfied at that time that although some orders had been placed by the Fibre Company with the Spicer Company, those orders had not been filled? A True.

Q And so, so far as you were concerned, the only time that you spoke to Mr. Secor after that was about three years ago, in the year 1925? A About that time. 30

Q Then you had received information that some business had been transacted by a new corporation with the Spicer Company, isn't that correct? A Yes.

Q The P. C. A. Company, with which Mr. Argyro was connected, was a corporation, wasn't it? A It was.

Q And did you learn that Mr. Argyro in the new company did not have associated with him any of the old stockholders of the old company? 40

*Walter E. Lough, cross.*

10 Mr. Goldenhorn: I object on the ground that that is immaterial and irrelevant. It would make no difference who constituted the new company, if Mr. Argyro was the same man whom we introduced to them, and they continued right on doing business with him; that is the contention we make; that no other instrumentality was ever used in pro-  
 20 curing the work of the new corporation. It would not make any difference who constituted the new corporation, we contend, so long as Mr. Argyro was the instrument and we brought about that instrumentality, under this contract, which we will ask your Honor to look at. It makes no difference whether they call it the P. C. A. Company, or the C. D. Company, or anything else. They have always been doing business with him, and with him alone, and that will be borne out by testimony which I will read to your Honor in a moment. My point is that it makes no difference who constituted the new company, no matter how many shareholders they had, no matter who the board of direc-  
 30 tors were, so long as the instrument in bringing about these sales was Mr. Argyro, and no one else, as we shall show to this Court and jury, it would not make any difference who constituted the new company.

The Court: The Court entirely agrees with you. At the same time that is the very question in dispute as to whether Argyro had any influence in getting the P. C. A., or the new company, as you refer to it, to buy these goods from the Spicer Manufacturing Company; and I am assuming from the  
 40

*Walter E. Lough, cross.*

pleadings and from the openings that that is the very issue of fact in this case.

Mr. Goldenhorn: Yes, sir.

The Court: Now, then, this witness said he used the influence, and that he was the producing cause of bringing business from the P. C. A. Company to the Spicer Manu-  
 10 facturing Company. That is going to be denied, if the pleadings mean anything, and if the openings mean anything. Therefore, so far as the jury is concerned, if there is going to be such a denial as that, then every-  
 20 thing that goes to tend to proving the probability or improbability of the respective stories is entirely competent. On that ground alone I will allow it.

Mr. Goldenhorn: On that ground I will withdraw the objection. I think your Honor is right.  
 20

(Question repeated by stenographer.)

A Mr. Argyro, if I remember correctly, informed me that the new company was made up of himself and one or two other members of his family.

Q Now, when you had your first transaction between the Fibre Company and the Spicer Com-  
 30 pany, your customer was the Fibre Company, isn't that correct? A Yes.

Q And that is the customer that you recognized as your customer, that corporation, isn't that correct? A Correct.

Q And when you wrote the Spicer Company on January 25, 1921: "When sending you inquiries"—I am referring now to Exhibit P. 1, the second paragraph—"we will ask you to include for us a commission which may be five per  
 40

Walter E. Lough, cross.

cent., or less, according to our judgment as to what the job will stand, with the understanding that if we secure the business on the basis of your figures, our customer's order will be placed with you to ship and bill direct, and we will look to you to take care of us for the commission agreed upon, not only upon the initial order, but upon all subsequent orders from this customer, whether they pass through our office or come direct to you"; now, when you used the words, "this customer," at that time you meant the Fibre Cushion Company, didn't you? A Yes.

Q That was the only customer that you had?

A At that time, yes.

Q And you never knew until three years after the business was done, that a new corporation, of which Mr. Argyro was the controlling interest, was doing business with the Spicer Company?

A I did not.

Q Now, when the original order was given between the Fibre Company and the Spicer Company there were certain prices at which those materials were to be shipped by the Spicer Company? A Yes.

Q Do you know whether or not those terms had been changed when the P. C. A. Company agreed to assume the orders of the old company?

Mr. Goldenhorn: I object on the ground it is immaterial and irrelevant, and would have no bearing on the case, for the reason that the contract speaks of a commission of five per cent., does not say anything at all what the prices shall be, or the basis upon which the goods were to be sold or bought, so that the change would not make any difference. I think the main point here is whether

Walter E. Lough, cross.

there was an agency there, or an instrumentality that binds them. It would not make any difference what the change in the contract was.

Mr. Gordon: A condition precedent to recovery of any commissions is, when sending you inquiries, we will ask you to include for us a commission which may be five per cent. or less, according to our judgment as to what the job will stand, with the understanding that if we secure the business on the basis of your figures, our customer's order will be placed with you. Now, I am trying to find out what those figures were of the Spicer Company as to the business that P. C. A. Company were supposed to have given them. And whether or not he had any part in connection with that proposition. The gist of this transaction, as I understand it, is an attempt—and I say this without any disparaging element to this plaintiff, because he is a very fine man, it is merely a legal proposition—is an attempt on the part of the plaintiffs to split a corporate entity. In other words we claim in this case that the bringing of the Fibre Company to us was the customer, not Mr. Argyro. That the bringing of the P. C. A. Company was the bringing of another customer by another individual, over which Mr. Lough had no control and had nothing to do with it. That the attempt to merge Mr. Argyro's identity in the P. C. A. Company, and in the Fibre Company, is an attempt to split a corporate entity which cannot be done in this case. They are separate and distinct propositions. The incidental fact that Argyro happened to

*Walter E. Lough, cross.*

10 have been connected with the Fibre Company, and later on was connected with a brand new company, which he organized with members of his own family, while it may have been just part of a succession of events which ultimately resulted in business to this defendant company, it was not by reason of the proximate efforts of this plaintiff that any business dealings were done between the P. C. A. Company and the defendant company. And that is our contention in this case.

20 The Court: Of course, that is the contention in the case, and the counter is practically the contention of the plaintiff in this case. It narrows itself, according to the pleadings and the openings, to a very, very narrow compass. The plaintiff brought to the defendant the Fibre Company.

Mr. Gordon: That is it.

30 The Court: The Fibre Company bought a certain amount of goods from the defendant company. According to the pleadings the amount was something like \$230, which they admit they still owe the commissions on that, be it five per cent., it is too trifling to talk about, the amount being too small, whether it was five per cent. or whether it was less than that. Now, just when, after the Fibre Company went out of business, was the first order from the P. C. A. Company?

40 Mr. Goldenhorn: That will be produced in the testimony of Mr. Argyro, which was taken in Brooklyn, and which will probably clear up this situation a whole lot.

*Walter E. Lough, cross.*

The Court: Then the only question of fact is, did the business that was done between the Spicer Company and the P. C. A. Company result as a result of the efforts of this plaintiff. That is the question, isn't it?

Mr. Goldenhorn: That is all.

10 Mr. Gordon: In accordance with the terms of the contract for the payment of commissions. In other words, did the plaintiff earn the commissions under the agreement that was entered into between the defendant and the plaintiff, so far as any business was concerned with the P. C. A. Company. I claim, when you read that contract, it was incumbent upon Mr. Lough, or his firm, to do certain things. They could not sit idly by, and because Mr. Argyro happened to go with one company, it might naturally continue that succession of events. He might have gone on with dozens of companies. The fact he had been connected with the first company, I claim, is not, as a legal proposition, the bringing of the customer. In other words, Argyro, in our contention, is not the customer, and Mr. Lough now says that this customer, the customer that he had in mind, the initial customer, and the renewal of that 20 initial customer would be renewal orders from the Fibre Company, that this company was the Fibre Company. 30

The Court: According to this case as framed by the pleadings, there was no specification of any written contract. The plaintiff alleges that he entered into a contract with the Spicer Company, whereby the Spicer Company agreed to pay him a commission of five per cent. on all orders that were brought 40

*Walter E. Lough, cross.*

10 to the Spicer Company as the result of his efforts. The Spicer Company, in their answer, admit that there was an agreement, but instead of being just such a kind of an agreement as the plaintiff alleges, that it was this kind of an agreement, that instead of being paid by per cent., the plaintiff was to be paid by per cent. or less, and that instead of being paid upon all orders received, he was to be paid upon the basis of all collections made and money received. But it does admit that there was an agreement that he was to be paid a commission on all orders that resulted from his efforts, and upon which orders they received money. That is the answer. And it does not limit it, as you have just stated, so far as their admission by their pleadings is concerned.

20

Mr. Gordon: It is quite apparent that the transactions between the parties appear now at the trial in writing, and that that is the proposition. I can explain that—

The Court: Don't you admit, or does not this company admit, that if they sold—if they got orders from the P. C. A. Company, as a result of the efforts of this man, the plaintiff, that they owe him money?

30

Mr. Gordon: Why, certainly, if he brought the P. C. A. Company to them, he should be paid commission. There is not any question about that.

The Court: That is admitted by the pleadings and now frankly admitted by you.

Mr. Gordon: Absolutely, if he brought that company to them he is entitled to commissions.

40

*Walter E. Lough, cross.*

The Court: If he brought those orders and he was the producing cause of those orders, but this plaintiff must show through a preponderance of the evidence that he was the producing cause of those orders, and any money that they received on those orders, that he can prove through a preponderance of the evidence he was the producing cause of, they owe him a commission.

10

*By Mr. Gordon.*

Q Now, in connection with the orders that the P. C. A. Company later placed with the Spicer Company were you familiar with any variance in the terms of those orders as compared to the orders that had originally been given by the Fibre Company? A I was not familiar with just what readjustment of the prices has been made.

20

Q As a matter of fact, Mr. Lough, you didn't know that the old material that Spicer had on hand from the first orders was being used up for orders from the P. C. A. Company, did you, until about three years afterward? A I did not.

Mr. Gordon: That is all.

Mr. Goldenhorn: That is all.

30

Mr. Goldenhorn: With your Honor's permission, we took some testimony, the testimony of Mr. Argyro, under a stipulation, and the original was sent to the Clerk of the Supreme Court at Trenton and the representative of the clerk's office came here day before yesterday with the original record, and as the case was not reached he took it back again. Counsel on the other side very

40

*Walter E. Lough, cross.*

courteously consents that a copy I have in my hand be offered in evidence.

10 Mr. Gordon: No. I think counsel misinterprets that consent. I said I had no objection to his using the copy that he has, as if he had the original, subject to my right to compare it with a copy that I have, and not that it go in evidence, because this record is littered with objections which I intend to present to the Court.

Mr. Goldenhorn: I meant that. Therefore I will have this copy marked and I will read from it.

Mr. Gordon: I object to the copy being marked in evidence.

20 The Court: It may be marked for identification.

(Transcript of testimony marked P. 3 for identification.)

Mr. Goldenhorn: This is the testimony taken in New York of the witness Peter G. Argyro.

(Testimony read to the jury by Mr. Goldenhorn and Mr. Gordon.)

30 Mr. Gordon: Now, at this point I withdraw the objection to the submission of that paper which has been made up. In other words, if the plaintiffs in this case are entitled to any commissions, it should be, and it is no more than fair that the figures submitted by Mr. Argyro are the figures, and I have no objection to the sheets being used.

40 Mr. Goldenhorn: May I say for the record that the sheet shows \$26,024.31 worth of orders?

*Motion for a Non-suit.*

Mr. Gordon: I will have no objection to that sheet going in evidence later on.

Mr. Gordon: I have no objection to this examination being offered and marked in evidence as an exhibit.

(Transcript of testimony heretofore marked P. 3 for identification, entered in evidence and marked Exhibit P. 3.) 10

#### MOTION FOR NON-SUIT.

Mr. Gordon: I move for a non-suit upon the ground that it affirmatively appears on the plaintiff's case that so far as any business developed between the P. C. A. Company and the Spicer Company, it was not because of any acts of Lough Brothers being the instrumentality to bring that business to the Spicer Company. It affirmatively appears in this case now on the part of the witness Argyro, the last page that was read: "What do you mean by a reorder? A That is the Fibre Cushion Company will not take these goods any more on account of being delayed four months, so I, knowing that the new company made arrangements with the Spicer Company that we will take the goods they started to make for the Fibre Cushion Company and continue making them. This was more as a moral obligation, that when I gave the order for nearly \$12,000 for the Fibre Cushion Company, and matters turned out to be that the Spicer delayed the goods, and we were dissatisfied, and they were going to liquidate, I tried to avoid the Spicer Com- 30 40

*Motion for a Non-suit.*

pany losing money from making these goods and I, as president of the new company, would take the goods and not make the company make the loss."

10 As matters stood the Spicer Company, in anticipation of a number of orders that had been brought to them through Mr. Lough, from the Fibre Cushion Company, had materials on hand at times that were made, and they were preparing and were filling orders, and the Fibre Cushion Company becomes insolvent and out of the picture. Mr. Argyro individually starts a company separate and apart from old stockholders, old capital structure, separate place of business, separate capitalization, definite separate corporate entity, composed of himself and his wife and a member of his family, and as a moral obligation he says he got this company, he got this company, not Mr. Lough, but he got this company to give the business to the Spicer Company. I say that the chain of events has been so broken that there is no jury question to pass upon now, and that the absolute fact in the case, on the plaintiff's case is that if any business was done after 20 the P. C. A. Company was formed, it was through the instrumentality of Mr. Argyro, as a moral obligation on his part, and not as the direct result of efforts exercised by the Messrs. Lough Brothers in having the business taken over for the Spicer Company by the P. C. A. Company.

30 The Court: Yes, but would the Spicer Company ever know of Argyro if it hadn't been for the efforts of Mr. Lough?

40

*Motion for a Non-suit.*

Mr. Gordon: The difficulty in this case is that the customer, the individual that we are doing business with, the party to the transaction, is not Mr. Argyro. It is the Fibre Cushion Company, a corporate entity, distinct and separate on one hand, and the P. C. A. Company a corporate entity distinct and separate on the other hand. 10

The Court: Just what brought this distinct entity of the new P. C. A. Company to Mr. Spicer?

Mr. Gordon: A set of conditions whereby he had already placed orders with the Fibre Company; not with Argyro.

The Court: And that set of conditions could never have been resolved to any benefit of the Spicer Company if it had not been for the personality of the man Lough originally brought to the Spicer Company. 20

Mr. Gordon: That is true, and I say we are now attempting, that is the plaintiffs are now attempting to inject into corporate entity the personality of an individual connected with each of those corporate entities, and breach the gap.

The Court: Oh, no, it is not that at all. The question is what brought the P. C. A. Company to Spicer. 30

Mr. Gordon: And the distinct evidence in this case is the moral obligation which Mr. Argyro, an individual, felt he had to bring his company to them.

The Court: Argyro would never have felt a moral obligation to resolve in favor of the benefit of the Spicer Company if it had not been for the efforts of Lough bringing 40

*Bert Secor, direct.*

Argyro to the Spicer Company in the first place.

Mr. Gordon: He did not bring Argyro. He brought the Fibre Cushion Company.

10 The Court: He brought whoever brought the Fibre Cushion Company, or whoever brought the P. C. A. Company.

Mr. Gordon: The testimony in the case is that we were brought to the office of the Fibre Cushion Company a corporation. Not to Mr. Argyro as an individual. The business was done with the Fibre Cushion Company.

The Court: Suppose it was.

20 Mr. Gordon: Then we cannot stretch the corporate entity into the individual.

The Court: I deny your motion.

Mr. Gordon: I respectfully ask for an exception.

The Court: You may have it.

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DEFENDANT'S CASE.

30 BERT SECOR, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Gordon.*

40 Q Prior to May, 1921, the Spicer Manufacturing Company had had certain dealings with a concern known as the Fibre Cushion Horse Shoe Company? A Yes, sir.

*Bert Secor, direct.*

Q And you were connected with the Spicer Manufacturing Company at that time? A Yes, sir.

Q In what capacity? A Purchasing agent.

Q Are you still with the company? A Yes, sir.

Q How long have you been with the company? 10  
A Eleven years.

Q Were you personally familiar with all transactions and all dealings had between the Fibre Cushion Horse Shoe Company and the Spicer Company? A Yes, sir.

Q Who introduced you to the Fibre Cushion Horse Shoe Company? A Mr. Lough.

Q Did you receive orders from the Fibre Cushion Horse Shoe Company? A Yes, sir.

Q Prior to the dissolution of that company do 20  
you know how much in the way of orders the Spicer Company had on hand that had not been filled? A Approximately 8,000 pair.

Q When you had dealings with the Fibre Horse Shoe Company do you know where they were located? A Yes, sir.

Q Where? A Chambers street, New York.

Q When they were winding up their affairs did you have any stock on hand in connection with the unfilled orders? A We did. 30

Q When did you learn that a new corporation had been formed by Mr. Argyro, who was formerly connected with the Fibre Cushion Horse Shoe Company? A Shortly, I should say March, 1921, March or April.

Q And in reference to the unfilled orders that the Fibre Company had not received from you, did you have any business dealings with the P. C. A. Company? A Not directly about those orders. 40

*Bert Secor, direct.*

Q Now, what transactions did you have with the P. C. A. Company that involved the unfilled orders of the Fibre Company? A They wanted prices and so forth, prices and delivery on horse shoes constructed and manufactured in a certain way.

10 Q Now, did the new horse shoes that were being ordered or discussed by the P. C. A. Company involve any of the material that you had on hand in connection with the Fibre Company? A It did.

Q Could you use the old orders for the P. C. A. Company, if they had been filled? A You could not.

Q Why not? A Excepting the steel.

20 Q Why not? A The forgings for the old company had to be reconstructed which necessitated the manufacture of new dies for the reconstructing operation in order to insert the rubber packings.

Q And were there new orders placed by the P. C. A. Company? A Yes, sir.

Q For all of the items that are set forth in Mr. Argyro's statement? A I should say so, yes.

30 Q Did you use the old orders of the Fibre Horse Shoe Company in connection with the new orders of the P. C. A. Company? A No, sir.

Q Did you receive shipping instructions in reference to the orders of the Fibre Company? A Yes, sir.

Q Did you receive the same kind of shipping instructions for the orders of the P. C. A. Company? A No, sir.

40 Q Now, in connection with the making of the horse shoes for the P. C. A. Company, did it

*Bert Secor, direct.*

involve any change in the preparation and manufacture of those shoes? A Yes, sir.

Q What? A Formerly with the Fibre Company we used to ship the shoes in bulk without any rubber packings in. With the P. C. A. Company we had to take those forgings, put in the rubber packings, and then hold the packing in with a die to retain the packing. 10

Q Did that involve any change in connection with the cost of production? A It did.

Q Was it an increase or decrease in the cost of production? A It increases the cost of production.

Q What effect did that have on the selling price? A It would increase the selling price.

*By the Court.* 20

Q Your selling price? A Yes, sir; it would increase our selling price.

Q Would it make any difference to you in the net result? A No.

*By Mr. Gordon.*

Q In making up your selling price for the P. C. A. Company, did you contemplate any commissions? A No. 30

Q Then, to the extent of adding commissions in accordance with the letter of Mr. Lough, did you add any on the P. C. A. orders? A No, sir.

Q Do you recall Mr. Lough calling at the Spicer Company about three years after you started to do business with the P. C. A. Company? A Yes, sir.

Q Do you recall the conversation that took place? A I do. 40

*Bert Secor, direct.*

Q What was the conversation? A His visit there, as I remember, was in connection with other work, castings. He spoke to me about some casting work.

10 Q Yes. A And I told him that we were buying castings. Then he referred to the horse shoe business and asked me if we were doing anything in the horse shoe business. I told him we were. He asked me if I didn't think he was entitled to a commission on the business we were doing. I told him I did not. That was all that was said, to my knowledge.

Q Did he say anything further than that?  
A Nothing more.

20 Q When you started to do business with the P. C. A. Company, was there any discussion between Argyro and yourself as to how you came to get the business from the P. C. A. Company?  
A Nothing more than that he was very glad that he could have the opportunity of helping us liquidate the investment which we had, and had made for the business of the Fibre Company.

Q Was there any discussion in reference to assuming orders of the Fibre Company? A Not that I recall.

30 Q Were there any negotiations in connection with the terms of the old orders of the Fibre Company? A No, sir.

Q Were they included as part of the new orders of the P. C. A. Company? A No, sir.

Q Did they form any part of the new orders of the P. C. A. Company as such? A No, sir.

Q In extending credit to the P. C. A. Company did you cause an investigation to be made of their assets?

40 Mr. Goldenhorn: I object.

*Bert Secor, direct.*

A We did.

Mr. Goldenhorn: I object on the ground it is immaterial and irrelevant and incompetent.

The Court: He says he did.

10

Q Did you know who were the members of the concern of the Fibre Company? A I did.

Q Did you know where Mr. Argyro lived? A I did not at the time.

Q Where was the P. C. A. Company's place of business? A Lafayette street, Brooklyn.

Q Did you, on February 21, 1921, cause a letter to be written to Lough Brothers from the Spicer Company? A I would like to see the letter.

20

Q I show you this letter and ask you if you sent the original of this letter? A Yes, sir.

Mr. Gordon: Have you the original?

Mr. Goldenhorn: You may produce that. I do not find it here among the papers.

Mr. Gordon: I offer in evidence letter dated February 21, 1921, sent by Spicer Company to Lough Brothers.

(Letter dated February 21, 1921, entered in evidence and marked Exhibit D. 1.)

30

(Letter read to the jury by Mr. Gordon.)

Q You sent that letter? A Yes, sir.

Q Under date of March 23, did you send a letter to Lough Brothers which I show you? A Yes, sir.

Q Did it contain an enclosure the original of which a copy is herewith handed to you? A Yes, sir.

40

*Bert Secor, direct.*

Mr. Gordon: I desire to offer this letter in evidence, together with the enclosure.

Mr. Goldenhorn: That is all right. No objection.

(Letter dated March 23, 1921, entered in evidence and marked Exhibit D. 2.)

10

(Letter read to the jury by Mr. Gordon.)

Q From whom did you receive these papers which I now show you, Exhibits D. 1 and D. 2?

Mr. Goldenhorn: I object on the ground it is immaterial who he received them from. He got them and that is all we care about.

The Court: I will allow it. It will help to identify them.

20

Q Have you the original papers in connection with this transaction, the original correspondence, Mr. Secor? A No, sir.

Q Have you made a search for the original correspondence? A Yes, sir.

Q Have you been able to find it? A No, sir.

Q Do you know how I obtained copies of these letters from Lough Brothers' files? A Through some attorney in Jersey City.

30

Mr. Gordon: Will it be stipulated that Mr. Nemser kindly gave us copies of your files?

Mr. Goldenhorn: We will agree we gave you our files.

Q And these are the papers that we are producing? A Yes, sir.

Q Now, did you ever, in connection with the orders that were placed by the P. C. A. Company,

40

*Bert Secor, cross.*

render any figures to Lough Brothers? A No, sir.

Q Did Lough Brothers ever render any figures to you? A No, sir.

Q Did you ever render any statements to Lough Brothers from the time you received the orders from the P. C. A. Company? A No, sir.

10

Q Did you attach to the P. C. A. Company orders any commissions for Lough Brothers? A No, sir.

Mr. Gordon: Cross examine.

*Cross examination by Mr. Goldenhorn.*

Q You never paid Lough Brothers any commissions at all on the P. C. A. contracts, did you? A No, sir.

20

Q Lough Brothers were the instruments, Mr. Secor, were they not, in bringing Mr. Argyro to your office? A No, sir.

Q Who brought Mr. Argyro to your office? A Mr. Argyro? I don't recognize Mr. Argyro. I recognize companies.

Q You got in with the company that Mr. Argyro represented because of the instrumentality of Lough Brothers, didn't you? A What company?

30

Q The first company? A The Fibre Company?

Q The Fibre Company. A Yes, sir.

Q You met them through Mr. Lough? A Yes, sir.

Q And through the introduction of Mr. Lough you met Mr. Argyro, is that right? A Yes.

Q And through Mr. Argyro you met the P. C. A. Company; is that right? A Yes.

40

*Bert Secor, cross.*

Q And no one else; is that right? A That is right.

Q Now, when the Fibre Company got into difficulties you had on hand a number of dies, had you not? A Yes, sir.

10 Q And the Fibre Company could not carry out their contracts? A That is right.

Q And it looked pretty much as if you were going to be pretty much in a good financial hole, didn't it? A Yes, it did.

Q And when you got into that position it was Mr. Argyro who said for the new company he would take over all those old dies and go right on with the contract; isn't that so? A Nothing was said about going on with the contract.

20 Q But he did go on with it, didn't he? A No, he did not.

Q And he took over a lot of the goods that should have been delivered to the Fibre Company, didn't he? A No.

Q Do you mean to say that he didn't take over some of the goods, Mr. Secor? A He didn't take over any goods which we could deliver to the Fibre Company. They could not take them.

30 Q Well, you had manufactured them then for the company and the company could not take none; is that right? A That is right.

Q And because the company could not take them the P. C. A. Company took them; isn't that so? A Not in the same shape; not in the same condition.

Q Well, you put some cushions on them; is that right? A Yes.

Q And then the second company took them? A That is right.

40 Q And they continued to take them all along; isn't that so? A Yes.

*Bert Secor, cross.*

Q Until last year, 1925, '26, is that right? A Yes.

Q But you never said anything to Lough Brothers about it, did you? A No, sir.

Q Never mentioned it? A No, sir.

10 Q Never told Lough Brothers that the new company was giving you work and you were making money through them, did you? A No.

Q Well, Mr. Lough then told you that he thought he was entitled to some commission on it, didn't he? A Yes, sir.

Q You turned him down cold, didn't you? A Well, I turned him down nicely. I told him I didn't think he was.

Q You got extra pay for the cushions, didn't you? A Yes.

20 Q So that it didn't make any difference in the net result, as the judge said? Even though it cost a little more you got a little more, isn't that so? A No.

Q What is the difference? A The net was, if anything, less than before.

Q How could that be? A Why, it was losing money. We lost money on the first contract, or would have.

30 Q You would have lost money, but you would have lost a lot more if it hadn't been for this introduction of Mr. Argyro? A I don't know whether we would or not.

Q You did send out this letter, did you not, from the Spicer Corporation? That is on your letterhead, isn't it? A That is right.

Mr. Gordon: I have no objection to that letter going in evidence.

(Letter dated May 11, 1924, entered in evidence and marked Exhibit P. 4.)

*Bert Secor, re-direct—re-cross.*

(Letter read to the jury by Mr. Goldenhorn.)

Q After you sent that letter then it was that these new deals were put through with the P. C. A. Company, is that right? A Yes.

10

Mr. Goldenhorn: I think that is all.

*Re-direct examination by Mr. Gordon.*

Q Why didn't you recognize Mr. Lough as being entitled to any commissions? A Because he had nothing to do with bringing the new company to us.

20

*Re-cross examination by Mr. Goldenhorn.*

Q But he had brought you Mr. Argyro, didn't he? A He brought the Fibre Cushion Horse Shoe Company.

Q Did he bring Mr. Argyro? A He brought the Fibre Cushion Horse Shoe Company.

Q Won't you answer the question, please?

Mr. Gordon: He has answered it twice.

30 A We don't recognize an individual in our business. We recognize companies.

Q But through the instrumentality of Mr. Argyro you got the P. C. A. Company, and through no one else, you say; isn't that your testimony? A Yes, that is true.

Mr. Goldenhorn: That is all.

Mr. Gordon: The defendant rests.

Mr. Goldenhorn: Nothing in rebuttal.

40

*Motion for Direction of a Verdict.*

MOTION FOR DIRECTION OF A VERDICT.

Mr. Goldenhorn: I would like to ask your Honor at this time, in view of the uncontradicted testimony on the part of the defendant, and the pleadings in this cause, that since the plaintiffs were the producing cause, and no one else, according to the testimony, that your Honor direct the jury to find a verdict in favor of the plaintiff and against the defendant for the amount of \$1,847.59, which represents the amount of the orders, \$26,024.31, five per cent. of that being \$1,301.11, and the interest on it being the difference, making \$1,847.59, as there is no dispute at all as to the facts in the case with respect to the producing cause of this contract.

10

The Court: I think there is a question of fact that is a question of fact for a jury to pass upon, as to whether the goods sold the P. C. A. Company were sold as the result of the efforts of the plaintiff, whether that particular customer was the result of the efforts of Lough Brothers.

20

Mr. Goldenhorn: Will your Honor grant me an exception, and in doing so will your Honor subsequently instruct the jury that the fact your Honor has denied my motion shall in no way prejudice—

30

The Court: I will grant you the exception, of course, and the jury will understand that these kind of motions are motions, just as Mr. Gordon made a motion that was made, by the attorneys, in the proper discharge of their duty, so as to make the record right, and to give their views of what the legal situation is, and the mere fact that the Court disagrees with them does not go at all to the question of the merits of the case submitted to the jury on questions of fact.

40

*Charge to Jury.*

Further than that the lawyers may be right and the Court wrong, so the jury will ignore, in the determination of questions of fact, whatever ruling the Court may make upon these particular motions. The jury understands that. They are going to pass on the questions that will be argued and presented to the jury subsequently through the charge of the Court, and the facts alone. The Court has formed no opinion at all on the question of fact in this case. The Court's rulings on both attorneys' motions are to be ignored entirely by you.

Mr. Gordon sums up the case for the defendant.

Mr. Goldenhorn sums up the case for the plaintiff.

**JUDGE'S CHARGE.**

Court's charge to the jury by Honorable Peter F. Daly, Circuit Court Judge, as follows:

Gentlemen of the Jury: The plaintiff in this case claims that the defendant owes him \$1,301.11, besides interest, which brings that amount up to \$1,847.59; he claims that is due him because of services rendered for the benefit of the defendant, which services were to be paid on the commission basis. The defendant absolutely denies that, with the slight exception that it admits that it does owe the plaintiff \$11.52 for commissions for services rendered. Therefore you are to pass upon the question of whether the defendant owes the plaintiff \$1,301.11, plus interest, or whether it owes him simply \$11.52 plus interest.

*Charge to Jury.*

We have in this case produced upon the part of the plaintiff, and agreed to upon the part of the defendant, the contract under which this claim is made, and so far as the meaning of that contract, it is phrased in such language by the plaintiffs that it is simple and clear in its meaning, but it will be necessary for you men to thoroughly understand this contract in order to intelligently pass upon the question of fact which is in dispute between these two reputable parties.

The plaintiff, with his brother, was in the business of securing orders for drop forgings, and the like, for manufacturers, on a commission basis; and the defendant was in the business of manufacturing drop forgings and the like. This particular character of work involved the making of horse shoes. The plaintiff did obtain a customer, and did obtain orders from that customer for the defendant. And under what terms, as between the plaintiff and the defendant, were those orders obtained? The plaintiffs wrote to the defendant, on January 25, 1921, substantially saying that in order to make definite and specific the relationship as to duties and rights between them, they wrote that letter and said, when we send you inquiries as to what your price will be for a proposed order that we may obtain, we will ask you to include as a commission five per cent., or less, according to our judgment as to what the job will stand. In other words, according to that, when the Lough Brothers got an order, or expected an order, they would send in to the Spicer Company and say, what are your figures on such an order as this, and when you make up your figures we want you to include in the cost price that you give, in the selling price that you give, five per cent. commission for us, or, if

*Charge to Jury.*

we feel that the job will not stand five per cent., then whatever less than five per cent. we ask you to include in the price that you will quote for this order. I hope you get that.

Further than that, once they got such an order as that from the plaintiffs, including what the  
 10 plaintiffs were to get for their services in the form of commission, be it five per cent., or less, then if there were any subsequent orders from that same customer then they were to be paid, the plaintiffs were to be paid by the defendant in the same way, and after the same arrangements and the same quotation of prices, made up in the way that was provided as I have rather elaborately explained to you. They were to be  
 20 paid that in the language of this letter, not only upon the initial order, but upon all subsequent orders from this customer, whether they "passed through our office or come direct to you." "It is our custom of course"—the letter recites in part of it—"to keep in touch and follow up these customers for the plant." Then there is something said about the time that the commissions were to be paid to them. They suggest in their letter that the commissions be paid at a definite time. There was an answer from the Spicer  
 30 Manufacturing Company which accepted the terms as contained in this letter, with the exception they do not agree as to the time of paying these commissions, but suggest that the commissions be paid as each order has been consummated up to the point of and including actual payment, because these commissions were to be paid not upon the orders alone, but upon what was actually received in collections in cash from those orders by the defendant.

40

*Charge to Jury.*

The plaintiff obtained an order under this agreement from the Fibre Company and that order, if you will go back for a moment, was at a price that, according to the letter, should have been figured upon the plaintiff notifying the defendant of the commissions they wanted included  
 10 in the price that was to be quoted by the defendant. The order was obtained, and there is no dispute, whatever the terms were, they were agreeable, so far as the plaintiff and the defendant were concerned, and the commissions, so far as those orders were concerned, there is no dispute, were to be five per cent. The Fibre Company, which the plaintiff obtained as a customer for the defendant, was evidently going through a period of reorganization, or, if not reorganiza-  
 20 tion so as to be succeeded by a new company, then in a period as it is admitted that meant practical liquidation so far as the Fibre Company was concerned. Now, how was the Fibre Company brought to the Spicer Company? It was brought to the Spicer Company through the efforts of the plaintiff, who brought them together through the person of a man named Argyro, and this Argyro, according to all of the evidence, leaves the inevitable inference that he was the  
 30 practical physical director of that company, so far as its manufacturing was concerned. Be that as it may, he was the man who did the direct dealing with the Lough Brothers, and he was the man who was brought into personal contact, representing this Fibre Company, with the Spicer Company; and while these orders were being filled for the Fibre Company, this man Argyro was even then, in his mind, engaged in the formation of a new company, the P. C. A. Company, of which company he subsequently became the  
 40

*Charge to Jury.*

treasurer, and which company was composed, as he says, of himself, his wife, and his two sons. The Fibre Company went into liquidation. The Spicer Company, at the time of that liquidation, had orders from the Fibre Company on hand, and they had material for the making of those orders, which material would have been left on their hands, if someone had not taken that material up, according to their evidence. In other words, as I get it from Mr. Secor—and it is for you to determine—but my impression from his evidence was that they had knowledge of the doubtful condition as to continuance in a successful way of this Fibre Company, and had all this material on their hands which would have meant a loss to them, because they were to make horse shoes according to the particular specifications of that order with the Fibre Company. Mr. Argyro goes to Mr. Secor, according to Mr. Secor, and says, here now, this company, the Fibre Company, is about through, or words substantially to that effect, but I am going to see that this material which you have on hand, that you will not lose on that, that you can use that material in new orders which I will get this new company to make with you. And Mr. Secor says they had to make changes in the kind of horse shoes and the kind of dies that were necessary, in order to take the material which they had for the Fibre Company orders, and suit the order which they got from the new company; and he says that it meant an increased cost, as compared with what was to be the cost, if the material had been worked into shoes according to the order of the Fibre Company, but that their price was increased, because of the increased cost of manufacture, but one thing that they

*Charge to Jury.*

did not include in making up that price was that they did not include the commissions, which as I explained to you before, were to be included in the price to be quoted by them, as a response to orders secured by the Lough Brothers. They dealt from then on with a distinct corporation, the P. C. A. Corporation, distinct from the other corporation, but the same man that brought the Fibre Company to them as a customer, Argyro, brought the P. C. A. Company to them, so far as the intimate contact between the Spicer Company was concerned and the corporations themselves, and Argyro was the man who was brought to the Spicer Company in the first place by the Lough Brothers. So you have a question of fact as to whether or not Lough Brothers, through their efforts, and in accordance with their original contract, which was written by them, were the inducing cause and the producing cause of this second customer, this new corporation, because, if it was the efforts of the Lough Brothers that brought them this customer, and brought them this customer in the way they were to bring customers according to that agreement, then, of course, the Lough Brothers are entitled to be compensated for the services which they rendered.

I hope I have given to you the question of fact that is involved in this case. The burden of proving that the Lough Brothers are entitled to compensation is upon them. They must satisfy you, through a preponderance of the evidence, that they secured this P. C. A. Company as a customer in the way provided for by this contract, and if you believe, from the preponderance of the evidence, that they did, and it was their efforts that brought the P. C. A. Company to them, and they did it in the way they were to

*Charge to Jury.*

do it by this contract, then for such service as they rendered in so doing they are entitled to the commissions on the amount of business they brought to the Spicer Company, and for which the Spicer Company received money. Otherwise they are not entitled.

10

Mr. Gordon: Will your Honor direct the jury in connection with the admitted item of \$11.50, because it is admitted that they must bring in a verdict for some amount for the plaintiff?

The Court: I think they understand that. Of course, you admit, as I said, \$11.52.

Mr. Gordon: Yes, sir.

The Court: That is because there was that amount of goods that had been delivered and paid for by the original company which, according to their books, still remain unpaid, so far as commissions to Lough Brothers.

20

Mr. Gordon: Mr. Lough says he received that \$11.50, so that is out of the case.

The Court: Then cut that out. It is either giving them a verdict for the amount they claim, plus interest, or nothing.

30

40

**EXHIBIT P. 1.**

January 25th, 1921.

Spicer Manufacturing Corp.,  
South Plainfield, N. J.

*Attention Mr. B. Secor.*

10

Gentlemen:—

As there is a probability of our doing more or less business with you on drop forgings from time to time we believe it is to our mutual advantage that we should have a clear and definite understanding as to how our commission account is to be handled and we will therefore outline briefly what we expect in the way of protection.

When sending you inquiries we will ask you to include for us a commission which may be 5% or less, according to our judgment as to what the job will stand, with the understanding that if we secure the business on the basis of your figures our customer's order will be placed with you to ship and bill direct and we will look to you to take care of us for the commission agreed upon, not only upon the initial order but upon all subsequent orders from this customer whether they pass thru our office or come direct to you. This is important because after placing our customers in direct communication with you the almost inevitable result is that future orders go direct to the plant from the customer without passing thru our hands. It is our custom, of course, to keep in touch and follow up these customers for the plant. Commissions to be paid to us as you make collections, or if preferred on a running monthly account as many of our foundry connections settle. This saves making numerous small remittances if there are many accounts.

20

30

40

*Exhibit P. 2.*

Copies of invoices to be mailed to us at time of shipment. Quotations to our customers should be made thru us so that we can follow them up, or if quotations are made direct carbon copy should be sent to us. This is for your benefit as well as ours as it enables us better to keep in touch and work in harmony with yourselves.

10

Will you kindly drop us a line acknowledging the above if it is acceptable to you in every respect.

Yours very truly,  
LOUGH BROTHERS.

WEL/AS.

**EXHIBIT P. 2.**

20

January 26th, 1921.

Messrs. Lough Brothers,  
90 West St.,  
New York City.  
Gentlemen:

30

Replying to your letter of January 25th wish to say that your plan is perfectly agreeable to us. This is a case where we must work very close together and if it becomes necessary for us to make sacrifices in our prices you should bear a certain portion of it.

As far as paying commission is concerned we would prefer to have commissions paid only as collections are made. On such business as is closed, you may rest assured that it will be taken care of in this manner.

Yours truly,  
SPICER MFG. CORP.  
B. SECOR  
JOBGING DIVISION.

40 BS/PB

**EXHIBIT P. 3.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

WALTER E. LOUGH and PERCY  
LOUGH, co-partners trading as  
Lough Bros.,

*Plaintiffs,*

*against*

SPICER MANUFACTURING CORPO-  
RATION,

*Defendant.*

10

*Action  
at Law.*

STATE OF NEW YORK, }  
COUNTY OF NEW YORK. } *ss.*

20

EDWARD A. KOLE, of full age, being duly sworn according to law, on his oath deposes and says: That he is a Master in Chancery of New Jersey and an attorney and counsellor at law, now practicing at Jersey City, in said State; that he is the person before whom the testimony in the above case is to be taken; that he will fairly and impartially take the same.

30

EDWARD A. KOLE,  
Master in Chancery of New Jersey.

40

Exhibit P. 3.

Subscribed and sworn to before me this 11th day of January, 1928.

IRVING EHRLICH,  
Notary Public.

10 Bronx Co. Clk's No. 15 Reg. No. 2942.  
N. Y. Co. Clk's No. 209 Reg. No. 9140.  
Kings Co. Clk's No. 14 Reg. No. 9060.  
Queens Co. Clk's No. 2417 Reg. No. 4605.  
Commission Expired Mar. 30, 1929.

STATE OF NEW YORK, }  
COUNTY OF NEW YORK. } ss.

20 I, DORA VISHOOT, do solemnly swear that I will faithfully, fairly and impartially take stenographically and reproduce in manuscript or type-writing, the deposition of a witness taken in a certain cause now pending in the New Jersey Supreme Court, Union County, wherein Walter Lough and Percy Lough, trading as Lough Brothers, is plaintiff, and Spicer Manufacturing Corporation, is defendant, to the best of my skill and understanding; so help me God.

DORA VISHOOT.

30 Subscribed and sworn to, before me this 11th day of January, 1928:

IRVING EHRLICH,  
Notary Public.

40 Bronx Co. Clk's No. 15 Reg. No. 2942.  
N. Y. Co. Clk's No. 209 Reg. No. 9140.  
Kings Co. Clk's No. 14 Reg. No. 9060  
Queens Co. Clk's No. 2417 Reg. No. 4605  
Commission Expires Mar. 30, 1929

Exhibit P. 3.

Examination of witness in the above-entitled cause, taken *de bene esse*, before me, Edward A. Kole, Master in Chancery of New Jersey, under the provisions of Sections 45, 46, 47 and 48 of an Act concerning evidence, revision of 1900.

Appearances:

Saul Nemser, attorney for plaintiff. 10

Walter L. Hetfield, by Francis A. Gordon, of counsel for defendant.

IT IS HEREBY STIPULATED by and between the parties hereto, that the signature of the witness to the testimony is hereby waived.

PETER C. ARGYRO, having appeared, pursuant to subpoena, in the above-entitled matter, for examination as a non-resident witness, before Edward A. Kole, a Master in Chancery of New Jersey, and having first been duly sworn, testified as follows: 20

Direct examination by Mr. Nemser.

Q Where do you live? A 956 Lafayette Ave.

Q Where is that, Brooklyn? A Yes.

Q Mr. Argyro, what is your business? A I am the treasurer of the P. C. A. Steel Fibre Horse Shoe Company. 30

Q Now, in January, 1921, were you connected with a firm Fibre Cushion Horse Shoe Company? A Yes.

Q Where was their office located? A On Oak St., New York.

Q Do you know what number? A I think it was 65, but I am not sure. 40

*Exhibit P. 3.*

Q In what capacity were you connected with that company? A I was president of that company.

Q Did you own all the stock or was there other stock also? A I only had one share of stock, in order to be president.

10 Q Have you got any records with you, of the Fibre Cushion Horse Shoe Company? A No. I have my own records.

Q You say you have records of your own? A Yes, of the P. C. A. S. Steel Fibre Horse Shoe Company.

Q Will you produce those records? A What records do you want?

Q Just show us what you have.

(Witness hands papers to Mr. Nemser.)

20 Q When was the P. C. A. Steel Fibre Horse Shoe Company incorporated? A May 21, 1921.

Q And you are connected with that company in what capacity? A Treasurer.

Q Who is the president? A Frances J. Argyro.

Q Are there any other stockholders besides you and your wife? A Yes, there is Batice J. Argyro and Stephen E. Argyro.

30 Q Are they all relatives of yours? A They are my two sons, wife and myself.

Q That is the company? A Yes.

Q Are these the same people who were connected with the Fibre Cushion Horse Shoe Company? A No, some of them. Only my wife was in the Cushion Co. and myself.

Q Who was the principal stockholder of the Cushion Co.? A His name is Saxton.

40 Q How many shares of stock did your wife have? A I do not recollect.

*Exhibit P. 3.*

Q Did she have majority control? A No.

Q What happened to the Fibre Horse Shoe Company? A They liquidated.

Q Out of business? A Yes.

Q When? A Sometime in 1921.

Q Was it before May, 1921? A After May, 10 1921, a couple of months after.

Q Was it before or after the formation of the P. C. A. Steel Fibre Horse Shoe Company? A A couple of months after.

Q By liquidating, what do you mean? A Closed up the business.

Q Pay off their creditors? A Yes.

Q What happened to the assets of the Fibre Cushion Company? A The assets were divided 20 amongst the shareholders.

Q Were the assets reduced to cash, and the cash divided amongst stockholders? A Yes.

Q When the P. C. A. Steel Fibre Horse Shoe Company was formed, did they take over any of the assets, debts or liabilities of the Fibre Cushion Co.? A No.

Q What was the address of the Fibre Cushion Company? A On Oak St., New York.

Q Where is the P. C. A. Steel Fibre Horse Shoe Company located? A The office is at 956 30 Lafayette Ave., Brooklyn.

Q Is that the same address where your home is located? A Yes.

Q Is there any connection between the Fibre Cushion Horse Shoe Company, and the present P. C. A. Steel Fibre Horse Shoe Company, outside of the fact of the similarity of stockholders? A What kind of connection?

Q I am asking you, is there any connection? A No. 40

*Exhibit P. 3.*

Q Have you any records that will show orders, for drop forgings, given to the Spicer Manufacturing Company, by the Fibre Cushion Company? A No. I gave the orders verbally, myself.

10 Q When was that, do you know? A It was some time in January, 1921, and February, like that.

Q Can you state, of your own knowledge, the amount of those orders? A I think it was up till nearly \$12,000.

Mr. Gordon: I object to the witness stating what he thinks, on the ground that it is incompetent.

20 Q You say you think, do you know that? A I don't think, it is up to \$12,000, or may be \$10,000, more or less.

Q You know this as a positive fact, or are you guessing? A I know it.

Q That is, you know that \$12,000 worth of orders for drop forgings, were given by the Fibre Cushion Company, to the Spicer Manufacturing Company? A Yes.

30 Q Between what dates? A Between January, February and March of 1921.

Q Who was in charge of the Fibre Cushion Horse Shoe Co., in the months of January, February, March and April, 1921? A I had charge.

Q How did you come to give these orders to the Spicer Manufacturing Company? A Through Lough Bros.

Q Where are they located? A 90 West St., New York City.

40 Q When you say you gave the orders through them, just what do you mean, Mr. Argyro? A

*Exhibit P. 3.*

Walter Lough, of Lough Bros., introduced me to Spicer Manufacturing Company, represented by Mr. Secor.

Q Is he connected with the Spicer Manufacturing Co.? A Yes.

Q When was that? A About January, 1921.

Q And did you and Mr. Walter Lough and Mr. Secor, have a conversation at the time? A Yes. 10

Q Where was that? A In the Horse Shoe Company's office.

Q Whose office? A Fibre Cushion Horse Shoe Company's office, at Oak St., New York.

Q Will you state the conversation you had at that time? A Lough Bros.—saying that they would make the goods very reasonable, in order to know the particulars how to make the horse shoes, that they will bring in the superintendent of the forging establishment, and another party, Mr. Vail, to talk the matter over, how to give the orders and how to make the orders. 20

Q You mean, the horse shoes? A Yes.

Q Do you know what position Mr. Secor held with the Spicer Manufacturing Company? A At that time I didn't know, I just knew that he represented the Spicer Company.

Q Do you know now? A Yes, the General Purchasing Agent. 30

Q Mr. Argyro, did you ever meet Mr. Secor, or any other representative of the Spicer Manufacturing Company after that date? A I did.

Q Where? A I went to the factory several times, to look after the orders that we got, how far in advance to making the dies for the horse shoes.

Q Where was this factory that you visited? A At South Plainfield, New Jersey. 40

*Exhibit P. 3.*

Q How many times would you say you went there altogether? A Once or twice a month.

Q For how long a period of time? A I exactly did not keep track of how often, but I was going after it, to hurry the work, because they were getting late to deliver the goods.

10 Q Between January, 1921 and May, 1921, how many times, altogether, would you say that you visited the plant of the Spicer Manufacturing Company, at South Plainfield, New Jersey? A I can't exactly tell how many times, it was several times.

Q When was the last time you went there? A What do you mean, the date?

Q Yes. A Some time last year, may be.

Q Some time last year? A Yes.

20 Q In reference to what? A In reference to some orders. I don't recollect exactly the last trip.

Q Did I understand you correctly, Mr. Argyro, that the P. C. A. was formed some time in May, 1921? A Yes.

Q After the formation of this P. C. A. Horse Shoe Co., did that company ever give any orders to the Spicer Manufacturing Company? A Yes.

30 Q Have you any records to show orders given by P. C. A. Horse Shoe Co., to Spicer Manufacturing Co., since May, 1921? A Yes.

Q What records have you, to show that? A I have.

Q Mr. Argyro, I show you a sheet, dated May 28, 1921, to Spicer Manufacturing Corporation, South Plainfield, New Jersey, stamped in the upper left-hand corner, P. C. A. Steel Fibre Horse Shoe Co., 956 Lafayette Ave., Brooklyn, New York, and ask you what this paper is? A  
40 This paper is order to Spicer Mfg. Co., to ship

*Exhibit P. 3.*

these goods, about 8,000 pair of shoes, as they are made, to the customers of the P. C. A. Cushion Company.

Q You mean, that these orders were not to be sent to the P. C. A. Horse Shoe Company, but were to be sent to the customers of the P. C. A. Co.? A Yes, to fill our own orders. 10

Q This paper that you have in front of you, shows orders from what date, to what date? A From May 28, 1921. To keep on filling the orders as they were made. They were not made, but these were the goods ordered by the Fibre Cushion Horse Shoe Company, but were not made up till May 28, 1921.

Q Could you tell, from looking at that sheet, the date of the last order you gave the Spicer Manufacturing Company? 20

Mr. Gordon: I object to this question and all other questions pertaining to this sheet of paper, on the ground that no foundation has yet been made or laid to connect these orders with the defendant company and the party plaintiffs to this suit.

Q (Question repeated.) A This is only on that year. Every year we got orders right along. 30

Q You can't tell from looking at this sheet alone? A No.

Q This sheet that you produced, dated May 20, 1921, covers orders for that year? A That covers the order of that day, all those to be shipped as the goods are made.

Q Now, is this sheet in your handwriting? A Yes. 40

*Exhibit P. 3.*

Q You wrote it yourself? A Yes, and the Spicer Manufacturing Company has a copy so that they could fill the orders.

Q According to this sheet, dated May 20, 1921, you say there were 8,000 horse shoes ordered?

10

Mr. Gordon: I object to the question on the ground; first of all, that it recites a contents of a paper which is not in evidence yet. Secondly, upon the ground that the question is incompetent, immaterial and insufficient, and no foundation has been laid for any connection between this paper and the matters in suit.

20 Q Is that correct Mr. Argyro? A The paper speaks for itself.

Q What does the paper say? A It gives the quantity, date, etc.

Mr. Gordon: Same objection as above. Also objection to all questions pertaining to the contents of the sheet dated May 20, 1921.

30 Q Now, Mr. Argyro, referring to this sheet dated May 20, 1921, which you say you kept in your own handwriting, can you give us the amount of the order that was given on that sheet, dated May 20, 1921, given by the P. C. A. Company, to the Spicer Manufacturing Company? A The amount?

Q Yes. A I will have to make it out. I can give you approximately.

Q All right. A About \$3,500 that amounts to.

40 Q Have you any other records which would refresh your memory, or which would assist you

*Exhibit P. 3.*

in recollecting the amount of business or orders for horse shoes given by the P. C. A. Company, to the Spicer Manufacturing Company after May 28, 1921? A I have some more copies of orders.

Q What have you got there, you say? A Copies of our orders sent in to Spicer Manufacturing Company. 10

Q Consulting these copies you have, and any other memoranda you may have, to refresh your recollection, will you state when was the date, after May 28, 1921, that the P. C. A. Corporation, sent to the Spicer Mfg. Company, orders.

Mr. Gordon: I object to the question, on the ground that it is incompetent, immaterial. 20

A July 12, 1922.

Q Was that the next order after May 28, 1921? A Yes.

Q What is the one after that? A August 11, 1922.

Mr. Gordon: Same objection as above, to all testimony bearing upon orders of the P. C. A. Co. 30

A August 12, 1922. Second order, November 16, 1922, November 24, 1922, February 10, 1923, March 10, 1923, March 24, 1923. Some of them might be a repetition, I don't know. July 21, 1923, August 30, 1923, September 18, 1923, January 15, 1924, July 14, 1924, November 24, 1924, November 13, 1925, October 8, 1926, October 16, 1926, that is the last order, I think.

Q Getting back to the date of July 12, 1922, how many horse shoes did you order on that 40

*Exhibit P. 3.*

date? A I got a list of what we got, in the books.

Q Well, referring to the books, or any other records you may have?

10 Mr. Gordon: I object to any testimony referring to any books in connection with the orders given to the Spicer Mfg. Co., by the P. C. A. Fibre Company, on the ground that the testimony is incompetent, immaterial and irrelevant.

Q (Question repeated.) A I give you a list of what we purchased in 1921, 1922 and 1923, the goods sent to us.

Q I understood you to say that the P. C. A. Co. sent an order to the Spicer Manufacturing 20 Company? A Yes.

Q How many horse shoes did they order? A 7,000.

Q What was the amount of that order? A I will have to make it out. We have to make out every one. The amounts are not made out, only the quantity at so much. I have a record of all goods sent us and bill was sent us by the year, from the Spicer Manufacturing Company.

30 Q Suppose you give us that?

Mr. Gordon: I object on the ground that it is not the best evidence and secondly, that it is incompetent and immaterial.

A In 1921 we received goods amounting to \$5,004.24.

Q Mr. Argyro, what is this sheet that you introduced?

40 Mr. Gordon: I object to the witness testifying to any of the items mentioned on the

*Exhibit P. 3.*

sheet, upon the ground that it is not the best evidence first, and secondly, upon the ground that such evidence in reference to these particular items, is incompetent and immaterial.

Q (Question repeated.) A The yearly— 10 purchase from the Spicer Manufacturing Company, by the P. C. A. Co.

Q And the entries on this sheet were made by whom? A Were made by me. Are taken from the ledger of the Spicer account.

Q You have the ledger with you? A Yes.

IT IS HEREBY STIPULATED, subject to the objection of the competency and relevancy of the evidence as such, in reference to the issues involved in this case, that the witness will testify that the 20 items referred to in the paper which the witness holds in his hands, are items which the witness claims are in the books of account of the P. C. A. Fibre Cushion Company, of orders given by that company, to the defendant in this case, and that the paper, which is stipulated to be marked P. 1, is the paper the witness refers to, and objection is made to the introduction of such paper as evidence, upon the ground that the items therein 30 contained, are irrelevant and immaterial and incompetent, in connection with the issues involved.

Q Now, Mr. Argyro, according to Exhibit P. 1, the last date that an order was given, was on February 24, 1927, is that correct? A That is not an order. That is the goods shipped to us. The last shipment we received. That is all we received.

Q Have you received any shipment of goods since February, 1927? A No, that is the last.

*Exhibit P. 3.*

*Cross examination by Mr. Gordon.*

Q At the first conversation, at the Spicer Company's office, when you were introduced to the company, who was present? A That is, when I called on the Spicer Mfg. Co.?

10 Q When you made your first deal with them? A When you say "you," who do you mean? I have been with two companies.

Q The Fibre Cushion Company? A I believe it was Mr. Secor, Mr. Berry, the treasurer of the company, and I saw Mr. Vail, and their superintendent who died, Mr. Ludeck. I met all these gentlemen.

20 Q That was the first time when the Fibre Cushion Co. was introduced to the Spicer Company? A No. That was after being introduced by Lough Bros. at the Fibre Cushion Company's store. I made a visit to the Spicer Mfg. On my first visit I met this gentleman, but I met Mr. Secor before, he came to the store.

Q Where did you first meet Mr. Secor, at the store of the Fibre Company? A At the store.

Q And who was present at that time? A What do you mean?

30 Q In the store of the Fibre Company? A I was there, and Mr. Lough brought them all.

Q Which Mr. Lough? A Walter.

Q And Mr. Secor? A Yes, and I believe it was Mr. Vail too.

Q Was the other Mr. Lough there? A No.

Q On May 20th or 21, 1921, there had been some unfilled orders given by the Fibre Company to the Spicer Company, is that correct? A Yes. I don't get that.

40 Q When the Fibre Company went into liquidation, that was in May, 1921? A No, they in-

*Exhibit P. 3.*

tended to liquidate, but they never did until a couple of months after.

Q Before they liquidated, they had on the books of the Spicer Company, a number of unfilled orders? A Yes.

10 Q Did they ever accept those orders from the Spicer Co., the Fibre Company I am talking about? A They only sent in a couple of hundred of dollars of goods, and after that they stopped the balance. They would not take it, because they were too late and negligent. They were losing their customers.

Q Who had charge of winding up the affairs of the Fibre Company? A The directors.

Q Was it a voluntary dissolution? A Yes.

20 Q That was a New York company? A New York State corporation.

Q When the P. C. A. Co. gave Spicer the orders, in connection with the future dealings, did the terms of those orders vary from time to time? A No, they did not vary.

30 Q Isn't it a fact, that there were certain items that P. C. A. Co. requested, in connection with its orders, that were not included in the orders that the Fibre Company had given to Spicer? For instance, such as the cushions being attached, and the like? A Yes.

Q Do you understand my question? A Yes.

Q Didn't the P. C. A. Company vary its orders in that respect, in comparison with the Fibre Company orders? A Yes, the difference was that the Spicer Company had to attach the Fibre cushions for the P. C. A. account.

40 Q Which was not the same condition that attached itself to the orders of the Fibre Company? A Only on that condition we could take the orders given by the Fibre Cushion Co. The

*Exhibit P. 3.*

P. C. A. Co. will take the goods if they can attach the thing, then they will take the goods.

Q Then, as I understand it, when the P. C. A. Co. accepted certain unfilled orders that had previously been given by the Fibre Company, they exacted a condition, that certain work be done to the shoes that were ordered? A The only thing is to attach the fibre, and we paid extra for that, but the order was the same as before we placed them. No changes was made in the terms of the price originally ordered by the Fibre Cushion Co.

Q If that is the case, did you, on the P. C. A. books, identify the unfilled orders of the Fibre Company, as new orders of the P. C. A. Co.? A The P. C. A. gave the first order to the Spicer Mfg. Co. as to take the goods that they had been ordered by the old concern.

Q But didn't you change the conditions under which those shoes were to be made, in connection with attaching something? A I don't see any changes at all, because they started to make certain numbers and they had not made the other numbers yet, but the orders were given.

Q When the Fibre Co. did business with the Spicer Mfg. Co., there was security given, wasn't there? The Fibre Company deposited security, didn't they? A Yes, for the dies.

Q When the P. C. A. Company did business with Spicer, did they deposit security? A No.

Q Did they have different sizes than the Fibre Company ordered? A The sizes that the Fibre Company ordered was different.

Q When you organized the P. C. A. Fibre Co., did you take with you from the old company, any one other than members of your own family? A

40

*Exhibit P. 3.*

What do you mean by that? If I took any stockholder?

Q Yes. A I took one member of my family.

Q Did you take Saxton with you, or Langdon with you? A No.

Q What other directors were in the old company? A Mrs. Tidgewell. 10

Q She didn't come along? A No.

Q So that the new company was in reality, a distinct and separate organization from the old company? A Of course, a separate company, yes.

Q Different as to stockholders? A Yes.

Q Different as to officers? A Yes.

Q And different as to capital structure? A Yes. 20

Q At a different office? A Yes.

*Re-direct examination by Mr. Nemser.*

Q Who held the greater share of the capital stock of the Fibre Cushion Company? A Saxton.

Q How many shares did he hold? A I can't remember, we had several hundred. 5,000 or 6,000. 30

Q Did you and the members of your family have a majority of the stock of the Fibre Cushion Company? A No, not at all.

Q Do you know how many shares of the Fibre Cushion Company stock were actually issued? A I believe some 3,000 or 4,000.

Q Out of three or four thousand shares issued of the Fibre Company stock, how many did you or any member of your family control? A Only one. 40

40

*Exhibit P. 3.*

Q Did any other members of your family have any shares? A Mrs. Frances Argyro had 300 or 400 shares.

Q Is that your wife? A Yes.

Q You had one share? A Yes.

10 Q Any other member of your family have any shares? A No.

Q Did I understand you before, when you said that when the P. C. A. Co., the second company, was formed, that they took over some unfilled orders of the first company? A Yes.

Q Is that correct, Mr. Argyro? A Yes.

Q How large an order was that, do you know? A 8,000 pair, or about 15,000 pieces, horse shoes.

Q 15,000 single horse shoes? A Yes.

20 Q Do you mean by that, that the Spicer Manufacturing Co. delivered to the P. C. A. Company, 15,000 individual horse shoes, that had been ordered by the first company, the Fibre Cushion Company? A Yes. Ordered by the first company, and by the time they made it up, was dissolved.

Q These 15,000 individual horse shoes, amounted to about how much money?

30 Mr. Gordon: I object to the question, upon the ground that it is incompetent, immaterial and irrelevant.

A 24 cents apiece.

Q And were those 15,000 individual horse shoes, afterwards paid by the P. C. A. Company? A Yes, sir.

40 Q I understood you to say, Mr. Argyro, that the first company, the Fibre Cushion Company, was not actually dissolved until after two months

*Exhibit P. 3.*

after the formation of the second company? A Yes.

Q Would you say then, that the first company, the Fibre Company, was dissolved some time in July, 1921? A July or August, something like that. 1921.

Q During the months, between May 1, 1921, 10 and August 1, 1921, did you ever speak to any officer of the Spicer Mfg. Co., together with any one of the Lough Brothers? A I visited Spicer.

Q Was either one of the Lough Bros. with you at the time? A No, I used to go myself direct to the Spicer Co.

Q Did you ever see any member of the Spicer Manufacturing Company, during that time, together with Walter or Percy Lough? A No. 20

Q Did you ever see either one of the Lough Bros. after May 28, 1921? A I sent them an order about two years after.

Q Two years after? A Yes.

Q Did you ever know of the existence of the Spicer Manufacturing Company, before one of the Lough Bros. introduced you to Mr. Secor? A No.

*Re-cross* by Mr. Gordon. 30

Q Did the P. C. A. Company have any contract with the Fibre Cushion Company, in connection with the unfilled orders of the Fibre Cushion Company? A Not at all.

Q Then the orders that had been unfilled, were a re-order by the P. C. A. Co., weren't they? A Yes. 40

## Exhibit P. 3.

Re-direct by Mr. Nemser.

- Q What do you mean by a re-order? A That is, the Fibre Cushion Company will not take these goods any more, on account of being delayed four months, so I, knowing that, the new company made arrangements with the Spicer Co., that we will take the goods they started to make for the Fibre Cushion Co., and continue making them. This was more as a moral obligation that when I gave the order for nearly \$12,000 for the Fibre Cushion Company, and matters turned out to be that Spicer delayed the goods and we were dissatisfied, and they were going to liquidate, I tried to avoid the Spicer Co. losing money from making these goods, and I, as president of the new company, would take the goods, and not make the company make the loss.

Re-cross by Mr. Gordon.

- Q And that was the time the Fibre Cushion Company was in the course of liquidation? A Yes.

30

40

## Exhibit P. 3.

1921					
May	187.20				
June	2160.00				
July	969.60				
Aug.	709.00				
Nov.	650.20				
Dec.	428.24				5104.24
1922					
Jany.	458.60				
Feb.	159.16				
March	607.98				
April	110.00				
May	542.00				
June	14.40				
" to storage	950.54				2842.68
	July to Dec. to Storage	526.20		Cr.	
	" Ret. Credit "			180.40	
	" " "			40.52	
	Aug. direct	347.60			
	Sept. "	852.64			
	Oct. "	625.52			
	Nov. "	308.00			
	Dec. "	483.60			
	July Credit "			9.40	
	Aug. " "			2.00	
		3143.56	less	232.32	2911.24 5753.92
1923					
Jany. to June, storage	3906.26				
" " Return Credits				611.20	
" " " direct "				33.66	
		3906.26	less	644.86	3261.40
	July to Dec., to storage a/c				2546.40 5807.80
1924					
Jany. to June, to storage a/c	3762.41				
Less Credit "				32.40	
July to Dec. Storage a/c	2624.50				
tools bill	662.00				
		7048.91	less	32.40	7016.51
1925					
Jany. to June, to storage a/c	1510.99				
July to Dec.	210.00				1729.40
1926					
Jany. to Dec., to storage a/c					572.24
1927					
Feb. 24th, "					40.20
					26,024.31

*Exhibits P. 4—D. 1.*

**EXHIBIT P. 4.**

Letterhead Spicer Mfg Corp.

May 11, 1921.

10 Messrs. Lough Brothers,  
90 West St.,  
New York City.

Gentlemen:

Replying to your letter of the 10th relative to horse shoes wish to advise you that we have stopped all work on the orders as we have understood that the Company is undergoing some organizations troubles. We will therefore do nothing further on the orders but will await developments.

20

Yours truly,

Spicer Mfg Corp

B. Secor  
Jobbing Division

BS:PB.

**EXHIBIT D. 1.**

30

Feb. 21, 1921.

Messrs. Lough Brothers,  
90 West St.,  
New York City.

Gentlemen:

Under date of February 7th we quoted you on forgings covered by requisition #7915. Will you kindly advise what the present status of this job is?

40

*Exhibit D. 2.*

You will be glad to know that the Fibre Cushion Horse Shoe Company have placed an additional order with us for 6,000 horse shoes of another size and increased their other order to 8,000 instead of 6,000.

Yours truly,

10

SPICER MFG. CORP.

B. SECOR

JOBGING DIVISION.

BS/PB.

**EXHIBIT D. 2.**

March 23, 1921.

20

Messrs. Lough Brothers,  
90 West St.,  
New York City.

Gentlemen:

Kindly note the attached letter which we have written to the Fibre Cushion Horse Shoe Company.

Yours truly,

30

SPICER MFG. CORP.

B. SECOR

JOBGING DIVISION.

BS/PB.

40

Exhibit D. 2.

March 23, 1921.

Fibre Cushion Horse Shoe Co.,  
81 New Chambers St.,  
New York City.

ATTENTION MR. ARGYRO.

10 Gentlemen:

We wish to acknowledge receipt of the following orders from your company:

ORDERS FOR DIES.

1	Set of finishing and trimming dies for	6H	Horse Shoe
1	" " " " " " " "	6F	Horse Shoe
1	" " " " " " " "	7H	" "
1	" " " " " " " "	5H	" "
1	" " " " " " " "	5F	" "

20

ORDERS FOR FORGINGS.

8000	Forgings	6H
8000	"	6F
5000	"	7H
5000	"	5H
5000	"	5F

In order to avoid any misunderstanding as to the conditions connected with this transaction, would say that orders are accepted on the following basis:

30

1st. Dies: Finishing and trimming dies for each of the horse shoes enumerated above are to be billed you at a cost of \$225 per set. These dies are to be paid for as soon as we have made satisfactory forgings from the same. After you have paid for the dies, they are to become your property

40

Exhibit D. 2.

and we will turn over to you any dies which we have in operation at the time you demand them provided we should sever business relations.

2nd. forgings: The price on the 6F and 6H forging is to be 24c each based on a steel price of \$2.35 base Pittsburgh; steel to be dead soft and not over .10 carbon. It is also understood that if there is any change in the price of steel; the price on the forgings will be changed accordingly. This also supplies to labor. The other

March 23, 1921.

Fibre Cushion Horse Shoe Co.,  
Page #2.

shoes which have been ordered from us are to be based on the price of the 6H and 6F depending entirely on the

10

20

30

40

no  
114114MAY.T.1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

WALTER E. LOUGH and PERCY F. LOUGH, co-partners trading as Lough Brothers, <i>Plaintiffs-Appellees,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		<i>On Appeal from Supreme Court, Union County.</i>
SPICER MANUFACTURING COM- PANY, <i>Defendant-Appellant.</i>		

### BRIEF FOR DEFENDANT-APPELLANT.

#### Statement.

March 20, 1928, after trial before Honorable Peter F. Daly, Judge, and a jury at the Union County Circuit, a verdict was rendered in favor of plaintiffs against defendant for \$1,847.59. Plaintiffs claimed commissions because they procured a customer for horseshoes to be manufactured by defendant.

Appeal is now made by defendant on the learned trial court's denial of motion for a non-suit.

The complaint as amended avers plaintiffs, as foundry brokers, entered into a commission agreement in January, 1921, with the defendant, a manufacturer of foundry products (case, p. 3), and that plaintiffs procured two customers known as Fibre Cushion Horseshoe Company and P. C. A. Steel Fibre Horseshoe Company, Inc. These companies are alleged to have placed orders with defendant for the manufacture of horseshoes and the orders as consummated amounted to upwards of \$30,000.

Defendant admits plaintiffs procured the Fibre Cushion Horseshoe Company and that money received from this company amounted to \$230.40. Defendant also admits it received several orders from the P. C. A. Steel Fibre Horseshoe Company, Inc., but denies plaintiffs procured these orders (case, p. 9). Commissions in connection with Fibre Cushion Horseshoe Company orders were paid and that item was eliminated (case, p. 56).

**The plaintiffs failed to establish they were entitled to any commissions under the contract.**

January 25, 1921, plaintiffs wrote defendant (Exhibit P. 1) (case, p. 57). This was confirmed by defendant's letter to plaintiffs January 26, 1921 (Exhibit P. 2) (case, p. 58). This was the contract. Plaintiffs introduced a Mr. Argyro of the Fibre Cushion Horseshoe Company to defendant. This company was on Chambers street, New York City, and after four or five months it closed up (case, p. 19). Plaintiffs then could not locate Argyro (case, p. 19). Two or three years later, Mr. Walter E. Lough, a plaintiff, ascertained Argyro was associated with P. C. A. Steel Fibre Horseshoe Company (case, p. 20).

Mr. Lough admitted he brought no concern to defendant other than the Fibre Cushion Company (case, p. 23). About May, 1921, the Fibre Cushion Company wound up its business affairs, but Mr. Lough did not know a new company had been formed *away from the other people who had been associated with Mr. Argyro* (case, p. 25). Lough was satisfied the Spicer Company and the Fibre Cushion Company had come to a stop in their dealings.

The customer that Lough recognized as *his* customer was the Fibre Cushion Company (case, p. 27). This was the only customer Lough had (case, p. 28). The testimony of Peter C. Argyro, a non-resident witness, is plaintiffs' Exhibit 3.

In January, 1921, Argyro was connected with the Fibre Cushion Horseshoe Company (case, p. 61). It was located at 65 Oak street, New York City. He was president and had one share of stock (case, p. 62). The principal stockholder was Saxton (case, p. 62).

The Fibre Cushion Company went out of business a couple of months after May, 1921. They paid off their creditors and the assets were divided (case, p. 63).

The P. C. A. Steel Fibre Horseshoe Company was incorporated May 21, 1921, with an office located at 956 Lafayette avenue, Brooklyn. This company was a distinct and separate new organization (case, p. 75). Different as to location, stockholders, officers, and capital structure (case, p. 75). The new company did not take over any assets, debts, or liabilities of the Fibre Cushion Company (case, p. 63). There was no connection between it and the Fibre Cushion Horseshoe Company (case, p. 63).

The P. C. A. Steel Fibre Horseshoe Company gave orders to defendant commencing May, 1921, and ending February 24, 1927 (case, p. 71). These orders totaled \$26,024.31 (case, p. 79). The Fibre Company was dissolved in July, 1921, and from May 1, 1921, to August 1, 1921, Mr. Argyro visited Spicer, but did not go with either one of the plaintiffs. He went himself direct to the Spicer Company (case, p. 77). The P. C. A. Company did not have any contract with the Fibre Cushion Company in connection with the

unfilled orders and the orders that had been unfilled, which had been taken over by the P. C. A. Company, were a re-order (case, p. 77). These orders were in the nature of moral obligation on the part of Mr. Argyro (case, p. 78, folios 10-20) and as president of the new company, he tried to avoid the Spicer Company losing money. The question presented is whether or not the plaintiffs in accordance with the written agreement proven at the trial, earned commissions because the P. C. A. Company gave orders to the Spicer Company.

Defendant respectfully contends that before plaintiffs are entitled to any commission, a condition precedent to recovery is that they secure business on the basis of defendant's figures in which there was to be included a commission of 5% or less. Commissions were to be paid as defendant made collections (case, p. 57) and (case, p. 58). The evidence in the case showed that so far as the P. C. A. Company was concerned, *the plaintiffs did not know of its existence until years after the orders of the P. C. A. Company had been placed with the defendant.* No inquiries were submitted by plaintiffs to defendant in connection therewith, and no attempt made by them to include in price any commission. In connection with the new orders changes had been made, and they were on condition that defendant attach cushions to the shoes (case, pp. 73-74). The sizes of horseshoes that the Fibre Company ordered were different (case, p. 74).

The mere doing of business with the P. C. A. Company did not of itself constitute plaintiffs as brokers.

Plaintiffs produced the Fibre Cushion Company. As to that corporation defendant's dealings resulted in a loss.

Thousands of dollars worth of materials were on hand in anticipation of fulfilling these orders when because of financial difficulties, this company closed.

Without plaintiffs' knowledge and without any collusion between the plaintiffs and the defendant, and without even a suggestion of fraud (and no charge of fraud is made), Mr. Argyro who happened to be the active head of the Fibre Company organized a new company. It was his own company. *He went directly* to defendant and undertook to have the unfilled orders which were on hand with the defendant for the old company, filled as new orders of the new company. Because Argyro was with both companies, *he* was not the same customer.

Plaintiffs concede their customer was the Fibre Cushion Company. It never knew of the P. C. A. Company and never knew of business done by the P. C. A. Company. Lough's customer, the Fibre Cushion Company, was a corporate entity, distinct and separate, from the P. C. A. Company, another corporate entity. The P. C. A. Company was brought through the instrumentality of Argyro and not by plaintiffs.

It is academic that a corporation in the eye of the law is a legal entity, an artificial personality entirely distinct and separate from the members who compose it, and in ordinary everyday business transactions, the distinction between the corporation as a legal entity on one hand, and its stockholders and officials on the other hand, is strictly maintained.

If the corporation form is used for the purpose of evading the law or for the perpetration of fraud, the courts of this land do not permit the

contention of the legal entity to be interposed so as to defeat justice.

In these cases of fraud, the courts will pierce the veil of corporate entity.

In the case at bar, there is no claim of fraud, nor does the testimony indicate that there was any attempt made by any one to perpetrate fraud. In the case at bar, it does not appear that the P. C. A. Company was a business conduit for the Fibre Company, nor that it was organized as a mere sham or device to evade existing legal obligations.

It is respectfully submitted that so far as the efforts of the plaintiffs were concerned, they did not bring, nor were they the producing cause, as a matter of law, of the business done between the P. C. A. Company and the defendant, and the non-suit should have been granted because the plaintiffs failed to establish their right to a recovery. The judgment should be reversed and the complaint dismissed.

Respectfully submitted,

FRANCIS A. GORDON,  
Attorney and of Counsel for Defendant.

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**New Jersey Court of Errors and Appeals**

WALTER E. LOUGH and PERCY F.  
LOUGH, co-partners, trading as  
LOUGH BROTHERS,

Plaintiffs-Appellees,

vs.

SPICER MANUFACTURING COMPANY,  
Defendant-Appellant.

On Appeal  
from  
Supreme  
Court.

**BRIEF FOR  
PLAINTIFFS-APPELLEES.**

**Statement of Case.**

Plaintiffs are Foundry Brokers, engaged in the business of securing customers for foundry products on a commission basis. Defendants are manufacturers of Foundry Products, Drop Forgeries, etc., with a plant located at South Plainfield, N. J.

Plaintiffs brought this suit to recover commissions which they earned by procuring two customers for the defendant, to whom the defendant sold certain Foundry Products. The trial in the Union Circuit resulted in a verdict for the plaintiffs. The sole question presented for review is the legal propriety of the Trial Court's action, denying a motion to non-suit, made on behalf of the defendant, at the conclusion of the plaintiff's case.

### POINT I.

#### **The Trial Court properly denied the motion to non-suit.**

In passing upon a motion to non-suit, the Court cannot weight the evidence, but must take as true, all evidence which supports the view of the party against whom the motion is made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.

*Andre vs. Mertens*, 88 N. J. L. 626;

*Mulrooney vs. O'Keefe*, 98 N. J. L. 853;

*Littman vs. Slack*, 135 Atl. 776.

The Court could not non-suit because it is admitted by the defendant that there were some commissions due to the plaintiffs (p. 30, l. 24, p. 7, l. 9, p. 9, l. 21).

The commission agreement between the parties is set forth in the form of letters, exchanged between the parties, viz., Exhibit P-1 and P-2, pages 57 and 58. The defendant admits that the plaintiffs produced a customer known as Fibre Cushion Horseshoe Company (Appellant's brief, bottom of page 4). The defendant, however, contended at the trial and contends in this Honorable Court that the plaintiffs were not the cause that produced the customer known as P. C. A. Steel Fibre Horseshoe Company. Upon the defendant's admission that the plaintiffs had procured the customer known as Fibre Cushion Horseshoe Company, the Court was warranted in refusing the motion to non-suit. According to the plaintiffs' testimony, between the months of January and March, 1921, the Fibre Cushion Horseshoe Company had

placed orders with the defendant, amounting to ten or twelve thousand dollars (p. 64, ll. 12-30), which of course would entitle the plaintiffs to a commission on this amount, if nothing else.

Mr. Peter C. Argyro, the president of the Fibre Cushion Horseshoe Company, was brought in contact with the defendant company as a result of an introduction arranged by one of the plaintiffs, at the place of business of the Fibre Cushion Horseshoe Company in New York City (p. 65); there were present at that time, in addition to Mr. Argyro and Mr. Lough, the following representatives of the defendant company, viz., a Mr. Secor, Mr. Vail, Mr. Berry and Mr. Ludeck (p. 72). Mr. Secor was the General Purchasing Agent of the defendant company (p. 65, l. 30); in fact, Argyro never knew of the existence of the Spicer Company until the introduction by Mr. Lough of Mr. Secor (p. 77, l. 25). As a result of this introduction and meeting between the parties, arranged by the plaintiffs, certain orders were given by the Fibre Cushion Horseshoe Company to the defendant. There seems to be no question about this. On May 21, 1921, the P. C. A. Steel Fibre Horseshoe Company was incorporated (p. 62, l. 21). The treasurer was the same Argyro, who had been the president of the Fibre Cushion Horseshoe Company (p. 62, l. 24). In addition, certain members of Argyro's family were also stockholders and other officers of the P. C. A. Company (p. 62). However, the Fibre Cushion Horseshoe Company did not wind up its affairs until a couple of months after May, 1921 (p. 63, l. 10). In other words, the Fibre Cushion Horseshoe Company and the P. C. A. Steel Fibre Horseshoe Company were both in existence and operation from May, 1921, until about two months later, when it seems the Fibre Cushion Horseshoe Company liquidated its

affairs and went out of business. In fact, the Fibre Company was dissolved some time in July or August, 1921 (p. 77, l. 9).

From the plaintiffs' testimony it would appear that Argyro was the moving factor in both the Fibre Company and the new company, P. C. A. Company. Argyro was in charge of the Fibre Company during the months of January to April, 1921 (p. 64, l. 31). Argyro's connection with the P. C. A. Company has already been pointed out. The P. C. A. Company also took over certain orders of the Fibre Company, which were completed by the defendant and delivered to the customers of the P. C. A. Company (p. 74). The order consisted of eight thousand horseshoes, originally given on behalf of the Fibre Company and then with some slight immaterial changes, accepted and paid for by the P. C. A. Company (p. 76). Although there were some slight changes made, there was no substantial difference in the money received by the defendant company (p. 41, l. 24). Unquestionably, from the evidence, a jury would have the right to infer that Mr. Peter C. Argyro was the moving spirit in both the Fibre Company and the new company, viz., P. C. A. Company. He was actively in charge of both companies. He came in contact with the defendant admittedly through the introduction by the plaintiffs. The P. C. A. Company continued to do business with the defendant company until some time in February, 1927. If the plaintiffs had never brought Mr. Argyro in contact with the defendant, the defendant would not have received any orders from either the Fibre Company or the P. C. A. Company. Through Argyro's connection with both companies the defendant company did receive the benefit of thousands of dollars worth of orders. From these facts which for the purpose of non-suit must be taken to be true,

the jury could have properly found, as it undoubtedly did find, that the plaintiffs were the procuring or efficient cause of the sales made by the defendant company to both the Fibre Company and the P. C. A. Company.

*Clark vs. Griffin*, 95 N. J. L. 508;

*Queen vs. Jennings*, 93 N. J. L. 353;

*Vreeland vs. Vetterlein*, 33 N. J. L. 247;

*Sommers vs. Wescoat*, 66 N. J. L. 551.

In *Goldsmith vs. Cox*, 61 S. E. 555, the Court held in substance that a broker is entitled to commission during the continuance of his agency if he is the efficient or procuring cause of the sale, though the actual agreement for sale is made by the owner, without the aid of the broker, and that the broker would be regarded as the procuring cause if his intervention is the *foundation upon which the negotiations resulting in the sale is begun*. Appellant's brief lays great stress upon the fact that the Fibre Cushion Horseshoe Company was a separate and distinct corporate entity from the P. C. A. Company. Although appellant concedes that the plaintiffs brought the Fibre Cushion Horseshoe Company to the defendant, still it insists that the plaintiffs are not entitled to recover any commissions on orders placed by the P. C. A. Company, because of the fact the P. C. A. Company is a separate legal entity; appellant in its brief says the P. C. A. Company was brought through the instrumentality of Argyro and not by plaintiffs; but, it might not be amiss at this time to inquire *who brought Argyro to the defendant?* Plaintiffs by bringing Argyro in contact with the defendant had at least laid the foundation and set in motion a chain of events, which directly resulted in thousands of dollars worth of lucrative business being given to the defendant company through

the plaintiff's original efforts. The Trial Court's remarks on the motion to non-suit (pp. 35-38) will further indicate to this Honorable Court why the motion for non-suit was properly denied. The situation that presented itself to the Trial Court at the time the motion to non-suit was made might be summed up succinctly as follows:

Lough Brothers brought Argyro, in charge of the affairs of the Fibre Company. Argyro formed the P. C. A. Company that took over certain orders of the Fibre Company, paid for them, and the new company, P. C. A. Company, continued right on dealing with the defendant company through Argyro until February, 1927, resulting in orders to the defendant company of more than Twenty-six Thousand Dollars (\$26,000) (p. 69). A chain of events set in motion by Lough Brothers of which they were the proximate cause, and the procuring and efficient cause, as a jury would have a right to infer, accepting the plaintiffs' testimony, as we must, for the purpose of this motion, as being entirely true; at least, a jury would have the right to find from all the evidence and circumstances that plaintiffs were responsible for and did produce as a result of their efforts, the P. C. A. Steel Fibre Horse-shoe Company as a purchaser of the defendant's products, resulting in large and lucrative orders for the defendant. Whether the Fibre Company was a separate and distinct corporation from the P. C. A. Company is beside the point. The point is, *that Argyro, acting for both companies and the active head and manager of both companies, was produced by the plaintiffs.* If Argyro had not been produced and brought in contact with the Spicer Manufacturing Company by the plaintiffs, the Spicer Manufacturing Company would have never received any orders from either the Fibre Company or the P. C. A. Company.

It is respectfully submitted that the Trial Court's denial of the motion for non-suit was proper and the judgment of the Supreme Court should be affirmed.

SAUL NEMSER,  
I. F. GOLDENHORN,  
Of Counsel with Appellees.

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