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Notice and Grounds of Appeal.

(Filed, .)

New Jersey Supreme Court

HUDSON COUNTY.

THE CRAVENETTE COMPANY, U. S. A., Plaintiff, vs. C. A. WOOLSEY PAINT & COLOR COMPANY, Defendant.	Action at Law.

To Carlyle Garrison, Esquire, Attorney for Plaintiff:

PLEASE TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this case, upon the following grounds:

1. The trial court, when thereunto moved by counsel for the defendant, at the close of the plaintiff's case, refused to grant a judgment of non-suit, whereas said court should then and there have granted said motion.

2. The trial court, when thereunto moved by counsel for the defendant, at the conclusion of the evidence taken in behalf of both parties, refused to direct a verdict in favor of the defendant, whereas

said court should then and there have granted said motion and removed from the decision of the jury the questions involved in the issues.

Dated, January 22, 1926.

CARRICK & WORTENDYKE,
Attorneys for Defendant-Appellant.

Complaint.

(Filed, .)

NEW JERSEY SUPREME COURT.

THE CRAVENETTE COMPANY, U. S. A., a Corporation, Plaintiff, vs. C. A. WOOLSEY PAINT & COLOR COMPANY, a Corporation, Defendant.	Judgment Record. Action at Law. On Postea. Carlyle Garrison, Attorney.

C. A. Woolsey Paint & Color Company, a Corporation, the defendant in this cause was summoned to answer unto The Cravenette Co., U. S. A., a Corporation, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued February 23, 1922.)

Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its statutory office in Hudson County. N. J., says that:

FIRST COUNT.

1. Plaintiff is and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

2. Defendant is and was at all times hereinafter mentioned a corporation organized and existing by virtue of the laws of the State of New Jersey and engaged in the manufacture and sale of paints, oils and colors.

3. Plaintiff is and for many years prior to June 25, 1921, was engaged in the business of cravenetting or rubberizing cloth sent to it by its customers from which said business it received large profits; that in the process of cravenetting or rubberizing said cloth, plaintiff stamped its name or trademark on the back of said cloth four times to the yard; that the paint suitable for such stamping was required to be of such a quality that it would not run through or penetrate from the back to the face of said cloth or show through on the face of said cloth.

4. Defendant at all times herein mentioned knew of the kind and character of the business in which plaintiff was engaged as above set forth and knew of the required quality of paint used by plaintiff in its business as above set forth.

5. Defendant for many years prior to June 25, 1921, had sold and delivered to plaintiff special red paint for use by plaintiff in its said business and had knowledge of the particular purpose for which said paint was required and had knowledge that the plaintiff relied on defendant's skill and judgment in the preparation of said paint and by reason of the premises warranted said special red paint to be of a quality that would not run through from the back

to the face of goods or show through to the face of goods when stamped thereon by plaintiff; and said special red paint sold to plaintiff by defendant during said period of time did not run through from the back to the face of goods or show through to the face of goods when stamped thereon by plaintiff.

6. On or about June 25, 1921, plaintiff ordered from defendant 50 lbs. of special red paint of the same quality and made known to plaintiff that the same was to be used for the same purposes as hereinabove set forth, and defendant thereupon sold and delivered to plaintiff 50 lbs. of special red paint and impliedly warranted that the same would be reasonably fit for the purposes for which it was to be used as aforesaid.

7. On or about June 27, 1921, and at various other times shortly thereafter and theretofore, plaintiff notified defendant that said 50 lbs. of special red paint was not reasonably fit for the purpose for which it was to be used and that when stamped upon the reverse side of cloth said paint ran through from the back to the face of said cloth or goods and showed through to the face.

8. On or about June 27, 1921, and after notifying and complaining to defendant as set forth in the last preceding paragraph, plaintiff returned to defendant and defendant received and retained 34 lbs. of said 50 lbs. of special red paint referred to in paragraph 6 hereof.

9. On or about June 27, 1921, and upon return of said 34 lbs. of special red paint as set forth in the last preceding paragraph defendant advised plaintiff that said paint was not similar in quality with the paint theretofore sold by defendant to plaintiff and that defendant had neglected to use the usual quantity of special oil therein.

10. On or about July 20, 1921, defendant de-

livered to plaintiff 50 lbs. of special red paint in replacement of the 50 lbs. referred to in paragraph 6 hereof and stated and represented to plaintiff that said 50 lbs. of special red paint therein referred to was of such a quality as to be reasonably fit for the particular purpose for which the same was to be used by plaintiff as hereinabove set forth.

11. Plaintiff immediately started to use said special red paint mentioned in the last preceding paragraph in stamping its name or trade-mark upon goods as above set forth and found that said paint ran through from the back to the face of the goods or cloth and showed through to the face thereby ruining said goods and destroying their commercial value, and immediately notified defendant thereof.

12. On or about July 25, 1921, defendant delivered to plaintiff another lot of 10 lbs. of special red paint in replacement of the paint that had been returned as set forth in paragraph 8 hereof and then and there stated and represented to plaintiff that the same was reasonably fit for the purpose for which it was required in plaintiff's business as above set forth.

13. Plaintiff immediately endeavored to use said 10 lbs. of said special red paint mentioned in the last preceding paragraph and said paint ran through from the back to the face of the goods or cloth to which it was applied and destroyed their commercial value and plaintiff notified defendant thereof.

14. On or about August 9, 1921, plaintiff returned to defendant 69 lbs. of the aforesaid special red paint with the same complaint and statements set forth in paragraphs 7, 11 and 13 thereof.

15. On or about August 12, 1921, defendant delivered to plaintiff 25 lbs. of special red paint upon

the same representation and warranty as set forth in paragraphs 6, 10 and 12 hereof and when the same was used in part by plaintiff it ran through from the back to the face of the goods to which it was applied and destroyed their commercial value.

16. None of the paint sold and delivered by defendant to plaintiff as above set forth was reasonably suitable for the purposes for which it was required by plaintiff, and destroyed the commercial value of practically all goods to which it was applied.

17. Plaintiff has been obliged to pay and has paid to the owners of the goods and cloth ruined and destroyed as aforesaid, the cost or reasonable value thereof and thereby has suffered damages.

18. Plaintiff has demanded that defendant reimburse it for the damages it has suffered as aforesaid and defendant has refused to pay the whole or any part thereof.

SECOND COUNT.

1. Plaintiff repeats each and every allegation and statement in paragraphs 1 to 16 both inclusive, of the First Count.

2. Plaintiff by reason of the premises has lost large profits which it would have made and received from its said customers, for cravenetting or rubberizing the aforesaid goods or cloth.

3. Plaintiff has demanded that defendant pay its said loss and defendant has refused to pay the whole or any part thereof.

THIRD COUNT.

1. Plaintiff repeats each and every allegation and statement in paragraphs 1 to 16 both inclusive, of the First Count.

2. Plaintiff promptly notified defendant, of the matters and things set forth in the First and Second Counts hereof and requested defendant to endeavor to remedy or cure the aforesaid damage to said goods, which defendant refused and neglected to do and thereupon plaintiff expended the sum of upwards of $300 in endeavoring to remedy and cure the damage to said cloth or goods by said defendant's paint.

3. Plaintiff has demanded of defendant that it pay to plaintiff the moneys expended by plaintiff as set forth in the last preceding paragraph and defendant has refused to pay the same.

FOURTH COUNT.

1. Plaintiff repeats each and every allegation and statement in paragraphs 1 to 16 both inclusive, of the First Count.

2. Defendant is indebted to the plaintiff in such sum of money as plaintiff has paid to defendant on account of said special red paint.

Plaintiff demands as damages the sum of $3,500.

CARLYLE GARRISON,
Attorney of Plaintiff.

Answer.

(Filed, February 27, 1922.)

The defendant, a corporation of the State of New Jersey, having its principal office at 500 Grand Street, Jersey City, says:

ANSWER TO FIRST COUNT.

1. The defendant was informed that the plaintiff was engaged in the business of rubberizing cloth, and that it stamped upon such goods its name or trade-mark; but it had no knowledge of the quality

of the paint required by the plaintiff in its business, as set forth in paragraph 4 of the first count of the complaint.

2. Defendant admits that for many years prior to June 25, 1921, it had sold to the plaintiff a special red paint, made by the defendant on the plaintiff's order, and was informed that it was to be used for stamping or marking the goods which were being rubberized by the plaintiff, but denies that the plaintiff relied on the defendant's skill and judgment in the preparation of said paint, or that the defendant warranted said paint to be of a quality that would not run through from the back to the face of the goods, or show through to the face of the goods when stamped by the plaintiff, or that it made any warranty or representation whatever as to the quality or effect of such paint. The plaintiff first came to the defendant, stating that it had been using printer's ink for stamping its material, but found it too expensive, and suggested that the defendant make up a red paint at a much diminished expense, which would answer the plaintiff's purpose in stamping its goods. Defendant made up said red paint as ordered, and delivered it to the plaintiff, which, after trial, reported to the defendant that it was satisfactory, and since that time the defendant has furnished the plaintiff such red paint made from the same formula as ordered, without objection on the part of the plaintiff until the times mentioned in the complaint.

3. From time to time on and after June 25, 1921, the defendant did furnish to the plaintiff red paint and replaced the same on complaint being made by the plaintiff as to the results obtained by its use of said paint, as alleged in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the complaint. The defendant denies, however, that it ever implied or explicitly warranted that the paint supplied would

be reasonably fit for the purpose for which the plaintiff designed to use it. The defendant has no information of the failure of the paint supplied to operate as theretofore except as alleged in the complaint, if it did so fail, but is informed and believes that the failure of the plaintiff to obtain the same results from the use of said paint as theretofore, was due to incompetence or negligence of its employees, or to unskillful or improper use of the press or machine with which the marking or stamping was done, or to some defect or variation in the cloth which was being stamped, or to some change in the method used in rubberizing the goods, and to persistence in the use of such improper and negligent methods after the damage to the cloth was discovered or should have been discovered.

4. All of the paint sold and delivered by the defendant to the plaintiff was suitable for use as paint, for which purpose alone it was manufactured and sold by the defendant, and was of the same quality and composition as had theretofore been made and delivered to the plaintiff. The defendant denies that the use of said paint destroyed the commercial value of practically all or any of the goods to which it was applied, as alleged in paragraph 16 of the first count of the complaint.

5. The defendant denies that the plaintiff has sustained damages by reason of the acts complained of as alleged in the first count of the complaint.

ANSWER TO SECOND COUNT.

6. The defendant in answer to the second count, repeats the allegations of this answer to the first count.

ANSWER TO THIRD COUNT.

7. The defendant in answer to the third count, repeats the allegations of this answer to the first count.

ANSWER TO FOURTH COUNT.

8. The defendant in answer, to the fourth count, repeats the allegations of this answer to the first count.

CARRICK & WORTENDYKE,
Defendant's Attorneys.

Verdict and Judgment.

(Filed, April 29, 1922.)

This case was tried before Judge Willard W. Cutler, with a jury, at the Hudson Circuit on December 11, 1925, and December 14, 1925.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of Two thousand three hundred and sixteen Dollars and fifteen cents ($2,316.15/100).

Whereupon it is adjudged that the plaintiff The Cravenette Co., U. S. A., a corporation, plaintiff, do recover of the said defendant C. A. Woolsey Paint & Color Company, a corporation, the sum of Two thousand three hundred sixteen Dollars and fifteen cents damages, together with its costs, which have been taxed at the sum of Forty-four Dollars and sixty cents, making in the whole the sum of Two thousand three hundred and sixty Dollars and seventy-five cents.

$2,316.15
44.60

$2,360.75

Judgment entered January 7, 1926.

WM. J. GUMMERE,
C. J

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

THE CRAVENETTE CO., U. S. A.,
Plaintiff,
v.
C. A. WOOLSEY PAINT & COLOR CO.,
Defendant.

Before—Hon. WILLARD W. CUTLER, and a Jury.

Jersey City, N. J., Dec. 11, 1925.

APPEARANCES:

CARLYLE GARRISON, Esq., for the Plaintiff.
CARRICK & WORTENDYKE, by Mr. Carrick, for the Defendant.

FREDERICK SUNDERMANN, sworn.

Direct Examination by Mr. Garrison:

Q. Where do you live? A. 562 West 141st Street, New York City.

Q. What is your connection with the Cravenette Company, the plaintiff? A. General manager.

Q. How long have you held that position? A. About four years.

Q. In the summer of 1921 was it within the scope of your duties as general manager to observe the operation of the plant? A. Yes.

Q. Was the operation of the plant under your direction? A. Yes.

Q. Describe briefly the operation from the time the goods come in until they go out? A. When piece goods are received in the plant, they are measured to see that they contain the yardage which the customer says he sent to us, then they are examined to find out if they are free from imperfections which might make them unmerchantable. After that they are cravenette processed, and after they are processed they are run through finishing machines, stamped, rolled up and sent out.

Q. And by cravenette processing you mean they are made water proof, in common language? A. We say they are made water repellent. We do not close the pores in any way to make them waterproof.

Q. Did your company at that time keep a record of the examination of all the goods that came in? A. Yes.

Q. And were the goods that came in assigned a number so that they could be traced through the process? A. Yes.

Q. And was each piece of goods assigned a number? A. Yes.

Q. About how long did it take to cravenette the goods? A. Oh, four or five days.

Q. And after that process was completed, then were they stamped with the Cravenette stamp? A. Yes.

Q. How fast are the goods stamped? A. The machine would stamp a couple of hundred pieces a day.

Q. How many pieces a minute, or five minutes? A. I would say a piece every minute.

Q. And a piece is approximately how many yards? A. About fifty yards.

Q. Do you know whether your company had purchased paints from the defendant for a number

of years for the purpose of stamping your trademark stamp on the goods? A. Yes.

Q. Up to June, 1921, had it been fully satisfactory? A. No, there had been one instance, I believe, where we found it to be unsatisfactory.

Q. That was in the summer of 1920? A. Yes, just about a year before.

Q. And they corrected that? A. They corrected that, yes.

Q. In making that correction, did they send anyone to your factory to examine the process? A. Yes, I believe they did.

Q. Now, in the latter part of June, 1921, did you purchase from the defendant the paint that was designated as unfading red paint, special, in oil? A. Yes.

Q. Is this the bill that accompanied that paint? A. Yes.

Q. Was the bill paid by your company? A. Yes.

Q. When was the paint mentioned in that bill received? A. I believe about the 25th of June.

Mr. Garrison: I would like to offer the bill in evidence.

Mr. Carrick: No objection.

(Bill marked Exhibit P-1.)

Q. When you received this fifty pounds of unfading red paint, special, in oil, did you find it was any different from the previous paint that had been supplied by that company?

Mr. Carrick: I object to the question unless it is shown that the witness knew it himself, and not by reports from others.

The Court: Of course he may tell us if it is within his own knowledge.

Q. Do you know of your own knowledge whether the unfading red paint, special, in oil, mentioned in Exhibit P-1 was different in appearance from

the paint that had been supplied theretofore? A. I do.

Q. What examination did you make personally? A. When the paint was called to my notice, I examined the paint and noticed that it was very liquid, whereas the paint that had been satisfactory had been very thick, very much like a putty.

Q. Who called this to your attention? A. The man who operated the marking machine.

Q. What is his name? A. Gould.

Q. He is here in court? A. Yes.

Q. After you received the complaints from Gould—by the way, what were the complaints from Gould? A. He told me that it was—

Mr. Carrick: I object.

The Court: Yes; don't tell us what you were told.

Q. After you received the complaints from Gould, what, if anything, did you do about the paint? A. I telephoned to the Woolsey Company and explained what we found and that we could not use the paint for the purpose for which it was intended.

Q. Just state the conversation. A. Why, I explained that the paint was very liquid, whereas the paint we had heretofore received and which was satisfactory was thick; and that in applying this paint to some samples of cloth we found it penetrated the cloth.

Q. What did the defendant say to that? A. They said they thought we were not mixing it properly.

Mr. Carrick: I object; the defendant, of course, did not speak. We ought to find out if the witness knows with whom he was talking.

The Court: Yes; find out who it was.

Q. After you made this complaint to the Woolsey Paint Company, did anyone come up to your factory from their office? A. Not immediately.

Q. What did they do? A. They didn't do anything about it, and we kept on complaining. We were not able to do anything with the red paint. They finally sent us another lot of red paint.

Q. How much was in that lot? A. 50 pounds.

Q. I show you a bill for 50 pounds of special red paint, dated July 20, 1921. Did you receive this bill with the second lot you refer to? A. Yes.

Mr. Garrison: I would like to offer this bill in evidence.

Mr. Carrick: No objection.

Bill marked Exhibit P-2.

Q. After you received this second lot of 50 pounds of red paint referred to in Exhibit P-2, did you personally examine it? A. Yes.

Q. Why? A. It was reported that this paint was also very liquid.

Q. Reported by whom? A. By Mr. Gould.

Q. And did you examine it? A. Yes.

Q. What was its condition? A. It was liquid, instead of being putty-like, like the previous paint had been.

Q. What did you do then? A. Reported the matter to the Woolsey Company again and told them we were unable to use this paint and would like to know the reason.

Q. After you made the second complaint, what did the Woolsey Paint Company do? A. They told us that they would prepare another special lot of paint.

Mr. Carrick: I object. What particular individual spoke to him?

The Court: Yes; he should state so that we may know whether it was a person au-

thorized to make these statements. Do you know to whom you were talking?

The Witness: I don't know.

Q. Did they subsequently make up another batch of paint for you? A. They did.

Q. Is that the third batch of paint mentioned in this bill I now show you? A. Yes.

Q. 10 pounds of red paint, dated July 25th, 1921? A. Yes.

Q. Did your company receive that paint? A. Yes.

Q. And pay the bill? A. Yes.

Mr. Garrison: I offer the bill in evidence.

Mr. Carrick: No objection.

Bill marked Exhibit P-3.

Q. When this 10 pounds of red paint was delivered to you, which is mentioned in Exhibit P-3, dated July 25th did anyone come from the factory of the Woolsey Paint Company? A. They did come after that.

Q. Did you have any talk with them? A. Yes. I reported again that this paint didn't seem to be any better than the others.

Q. Is the gentleman in court that came from the Woolsey factory? A. Well, I don't recognize him; I don't see him.

Q. What did the person from the Woolsey factory do in your factory? A. He mixed up some of the paint from this ten pound lot, and we applied it to some cloth, and showed him that it came through.

Q. Proceed. A. He mixed several batches of paint when he found the first did not work, and we continued to apply it to other pieces, and in each case it came through. Finally he gave up trying; he found he was not able to use the paint for the stamping of these goods.

Q. Did you have a further conversation with him in regard to making a paint that would be satisfactory? A. We asked him what he thought was the matter with the paint, that it was coming through and causing so much trouble, and that previous to this the paint had been satisfactory, and he told us that the man who had been mixing this paint was no longer with the company, and the new man had perhaps put in wrong oils.

Q. When he said that, do you know to what paint particularly he was referring? A. I believe he was referring to the three lots of red paint we had received up to that time.

Q. While he was there, were there any goods run through the stamping machine? A. Yes.

Q. What goods were they? A. There were some pieces delivered to us by the New York Mackintosh Company, and a piece delivered by the Peerless Coat Company.

Q. Under whose directions were those goods run through the stamping machine? A. Mr. Gould was the operator of the machine.

Q. And who was giving him directions? A. This man from the paint company.

Q. What talk did you personally have with him as to whether or not this paint would or would not spoil the goods? A. He was the man who had been telling us what was the matter with the oils, why it would not work satisfactorily. He stated that the man who mixed it was no longer with the company, and the new man may have used the wrong oil.

Q. Before you ran these goods through, what talk did you have with him as to whether or not the paint would injure the goods? A. I do not believe I had any conversation with him.

Q. Can you tell me when you received these

goods from the New York Mackintosh Company? A. About the 28th of July.

Q. Have you your records here? A. Yes.

Q. I wish you would tell me the kind and quality of the goods, and the numbers that designate them?

Mr. Carrick: May I ask what records you are referring to?

Mr. Garrison: The records are the style and piece numbers that these pieces are known by when they are shipped to us.

Mr. Carrick: That is a record that is kept in your factory?

The Witness: Yes. Each of these pieces has a piece number given to it by the manufacturer, and a mill number which we give to it.

Q. This yellow sheet is your record? A. Yes; and this is the record from the mill.

Q. How many pieces were there? A. 12 pieces from the New York Mackintosh Company, and one piece from the Peerless Coat Company.

Q. And they were processed in your factory sometime during the period of what? A. They were received on July 25th and shipped out about August 5th.

Q. Now, I show you a bill from the New York Mackintosh Company, marked Exhibit P-3 for identification, and ask you whether you have compared this bill with your records as to the number of pieces, and whether you can say that they are identical? A. The piece numbers I know are identical, and the yardage is correct. This does not cover all the pieces we processed; that only covers eight pieces out of twelve; the other four pieces were cut into coats.

Q. After the pieces of the New York Mackintosh Company were processed, were they delivered

to the New York Macintosh Company? A. Yes.

Q. Did you receive any complaint from the New York Macintosh Company? A. Yes.

Q. What was the complaint?

Mr. Carrick: I object, if the complaint was received by somebody else.

Q. As a result of the complaint made by the New York Macintosh Company, were any of these pieces sent back? A. Yes.

Q. How many were sent back? A. There were eight pieces, and about one hundred coats.

Q. About one hundred coats? A. Yes.

Q. Did you personally examine the pieces that were sent back? A. Yes.

Q. What was the trouble with them? A. The trade-mark had come through on the face.

Q. What effort, if any, did your company make to remedy that? A. We tried to find a way to remove it on the pieces and we found nothing that was successful. The coats we sent to a dry cleaner and the dry cleaner was successful in getting some of them into pretty decent shape, and they were sold.

Q. What was done with the ones that were sent back? A. I think about 88 coats were put into merchantable shape, and twelve of them it was impossible to do anything with.

Q. Did you finally receive a bill from the New York Macintosh Company for those you could not remedy or clean up? A. Yes.

Q. Is this the bill? A. Yes.

Q. What did you pay the New York Macintosh Company?

Mr. Carrick: I object.

Mr. Garrison: I withdraw the question. I now offer this bill to which I have just referred.

Mr. Carrick: No objection.

(Bill marked in evidence Exhibit P-4.)

Q. Have you any of these coats still on hand? A. Yes.

Q. How many? A. About 12.

Q. What is their present value?

Mr. Carrick: I object.

The Court: It does not appear that he knows anything about it.

Q. Have you any of the goods on hand that were sent back to you by the New York Macintosh Company? A. Yes.

Q. How many? A. Eight pieces.

Q. Now, referring to the Peerless Company, did they reject any of these goods? A. One piece.

Q. What piece was that? A. The mill number of the piece is 133398, and our factory number would be 2437.

Q. What date was that cloth from the Peerless Company received, and what date was it shipped? A. It was received about the 28th of July and shipped about August 25th.

Q. Did you examine the piece that was sent back to ascertain what, if anything, was wrong with it? A. Yes, the stamp came through on the face.

Q. Did the Peerless Company make any claim against your company for that? A. Yes.

Q. Is this the bill they sent you? A. Yes.

Mr. Garrison: I offer this bill in evidence.

Mr. Carrick: No objection.

(Bill marked Exhibit P-5.)

Q. After this did you receive any further shipment of paint from the Woolsey Paint Company? A. Yes.

Q. Is that the shipment referred to in this bill? A. Yes.

Mr. Garrison: I offer this bill in evidence.

Mr. Carrick: No objection.

Marked Exhibit P-6.

Q. Was any of this twenty-five pounds used? A. No, we found that to be very liquid also, and we didn't use it.

Q. Now, did you return any of this paint to the Woolsey Paint Company? A. Yes.

Q. How much? A. I should say about 100 pounds.

Q. Did you subsequently write them about this? A. About the return?

Q. About the failure of the paint? A. Yes.

Mr. Garrison: I call for the production of the letter to the C. A. Woolsey Paint Company, August 23rd, 1921.

Mr. Carrick: I produce, upon plaintiff's call, letter of August 23rd, 1921.

Mr. Garrison: I offer the letter in evidence.

Mr. Carrick: I have no objection; in fact I suggest to Mr. Garrison now that all the correspondence go in, but I don't imagine it is competent to offer letters which are self-serving, without the rest of the correspondence.

The Court: No; all the letters would have to go in.

Letter marked in evidence, Exhibit P-7.

Q. You wrote this letter, P-7, Mr. Sundermann? A. Yes.

Mr. Garrison: I offer letter of the C. A. Woolsey Paint Company to the Cravenette Company, dated August 26th, 1921.

Marked in evidence, Exhibit P-8.

Q. You received Exhibit P-8? A. Yes.

Q. Now, what reliance, if any, did your company

place on the skill and judgment of the C. A. Woolsey Paint Company, in making the paint you have been talking about?

Mr. Carrick: I object; this man has had nothing to do with the ordering of this material, and he is not competent to state what reliance his company had in the skill and judgmentof the C. A. Woolsey Company.

The Court: Yes; I don't think he is in a position to answer that question.

Q. What, if anything, did you have to do with ordering the 50 pounds of unfading red special, in oil, mentioned in Exhibit P-1? A. All orders were put through under my observation.

Q. I show you Exhibits P-2, P-3, and P-6, and ask you what, if anything, you had to do with ordering the paint shown on those exhibits? A. I told them to order the paint.

Q. I ask you again what reliance, if any, you and your company, placed in the skill or judgment of the defendant in making these paints just referred to?

Mr. Carrick: I object; it is not a question of what reliance they had in the skill or judgment of the defendant. All this man has done is order the paint; he cannot testify as to the condition of mind of the officers of the company.

The Court: I think you may show what was required of the company that was furnishing the paint,

Q. After the first lot of 50 pounds of paint, unfading red, special, in oil, was received, did you have a talk with a representative of the Woolsey Paint Company? A. I talked with somebody on the telephone.

Q. And what was your talk?

Mr. Carrick: I object to that; it is not shown with whom he had his talk.

The Court: It must be somebody who has some responsibility.

Q. Did you have a talk with a person sent from the Woolsey Paint Company to your factory about the paint? A. I talked with a man that was sent to our factory, after the third lot had been delivered.

Q. And was he the gentleman who is here in court? A. Yes, sir.

Q. Is that the gentleman, Mr. Vanderwyk? A. Yes, I believe so.

Q. What was your talk with him?

Mr. Carrick: I object. I don't know what he is going to bring out, but there is no evidence that this man was in a position to bind the defendant by his statements.

The Court: Find out what representations he made when he came there as to his authority.

Q. Did he say anything about who he was from, or anything? A. He said he was from the C. A. Woolsey Paint and Color Company, and that he was superintendent.

Q. Did he say why he came down to see you? A. He came because of our repeated calls. He said he had come from the Woolsey Paint & Color Company.

Q. And that he was superintendent? A. Yes.

Mr. Garrison: I submit that I am now entitled to find out what the conversation was.

The Court: I will allow you to show any statements he made about the paint that had already been furnished, or any statements he made about paint to be furnished in the future.

Q. Just state what conversation you had with him in regard to paint already furnished, or paint that was to be furnished? A. He said that the man who had been preparing the paint that we used had left the company and that the new man undoubtedly had used the wrong oils in preparing the paint that we were having trouble with.

Q. What, if anything—

Mr. Carrick: Please don't lead.

Q. State anything else. A. That is about all there was to the conversation.

Q. While he was in your factory did you have any talk at all about your business, or your processing? A. We showed him how we used the paint. We showed him the machine in operation applying the marks to the processed cloth.

Q. Was any of the material run through while he was there? A. The paint we were using was satisfactory; it didn't go through to the face when we demonstrated to him.

Q. What color paint was that? A. Yellow.

Q. And during all the time that you had this trouble with the red paint, were you using any other paint purchased from the Woolsey Company? A. We were using their paint, but it was yellow paint.

Q. Was the yellow paint satisfactory? A. Yes.

Q. Did you have any talk with the representative about the fact that the yellow paint was satisfactory and the red paint was not? A. We showed him that we were using the yellow paint successfully.

Q. Did he endeavor to mix any paints while he was there? A. I don't believe that gentleman did.

Q. Was he there more than once? A. Yes.

Q. How often? A. At least two or three times.

Q. Now, with reference to the second lot of 50

pounds, was he there before or after the delivery of that? A. I believe it was after.

Q. You say there was another man came to the factory? A. They sent a man, as I understand it, who came to the plant after the delivery of the ten pound lot.

Q. What did he do? A. He mixed some of this ten pound lot and requested that we apply it to some cloth and see if it would work satisfactorily. Even the paint prepared by him came through, and we showed it to him.

Q. That was done while he was there? A. Yes. When the first batch didn't work, he prepared several more batches of paint and in every case we found it unsuccessful.

Q. In whose handwriting are these sheets kept? A. Our examiner, Mr. Ader.

Q. Is he here in court? A. Yes.

Mr. Garrison: That is all.

Cross Examination by Mr. Carrick:

Q. Mr. Sundermann, you became general manager of the Cravenette Company about four years ago, I understood you to say? A. Yes.

Q. And had you any connection with the company before you became general manager? A. Yes, I was superintendent of the factory.

Q. And for how long had you acted in that capacity? A. I imagine about five years.

Q. Was that your first connection with the Cravenette Company? A. No, I had worked up from the factory, right on.

Q. So that your experience with them had run back for a considerable period? A. Yes; about fifteen or sixteen years.

Q. Were you with the old Summit Proofing Company? A. Yes.

Q. You had been with them? A. Yes.

Q. Then you continued on with the Cravenette Company when they took over the business? A. Yes.

Q. Now, you have spoken of processing the material which was delivered to you by dealers who wanted this operation performed upon their cloth. What was the processing? A. The Cravenette process?

Q. Yes. A. The fabrics are treated with chemical solutions which make them resistant to water.

Q. What chemicals do you use? A. We used some alum and paraffine wax, that is about all.

Q. You make use of some sort of a solution in which the fabric which has been delivered to you by your customers is dipped? A. Yes.

Q. And it is kept in this solution for a period of three or four days? A. No.

Q. What is done with it? A. It is run through the solution of the alum acetate and after that is dried, then we treat it with a surface coating of a paraffine preparation.

Q. After that has been done is the processing finished? A. That is the complete process.

Q. And that process takes about four or five days? A. That takes about a day for the actual chemical treatment of the fabric.

Q. Then what else is done to it? A. Then the finished pieces are run through the stamping machines, to be stamped and rolled up.

Q. By stamping, I understand you mean stamping it with your name? A. Yes.

Q. Before stamping you have to send the goods through some finishing process? A. Yes.

Q. That is necessary to make the surface smooth? A. Yes; when we run these pieces through the

solution we remove the appearance of the surface as it comes from the mill, and we restore that surface.

Q. After that has been completed you then run it through the machine which you have for stamping the name of the Cravenette Company on the fabric? A. Yes.

Q. Are you familiar with the way that work is done? A. Yes.

Q. Is that done under your supervision? A. Yes.

Q. I do not mean do you stand there to watch it. A. No.

Q. But you are familiar with it? A. Yes.

Q. Your business takes you about the factory most of the time? A. Yes.

Q. And that stamping machine is about how high, how large? A. I imagine it is about six or eight feet high.

Q. And the material which is to be stamped runs over a roller and comes down and meets another roller on which the stamps are placed, and upon coming in contact with those stamps the imprint "Cravenette Company" is placed on the fabric? A. Yes.

Q. During all this time of which complaint is made in this suit, were you using any other product for the purpose of marking the goods other than the paint of the Woolsey Company? A. No, sir.

Q. You were using their yellow paint though? A. Yes.

Q. During your experience with the Summit Proofing Company and the Cravenette Company, had you used any other material for making this imprint except the product of the Woolsey Company? A. I do not believe so.

Q. You were not familiar with the practice of

the factory before they began using the Woolsey Company paint? A. No.

Q. Now, in addition to the paint which was purchased from the Woolsey Company, your company sometimes bought oil and turpentine from the Woolsey Company? A. Yes, sir.

Q. What was the use you made of the oil and turpentine you bought from the Woolsey Company? A. The oil and turpentine was added to the coloring or the paint that was furnished us by the Woolsey Company to make it suitable for our use. In other words, it was delivered to us very thick, like putty, and we had to thin it down.

Q. Who did that work, thinning it down and making it adaptable for your purpose? A. Mr. Gould.

Q. And it was his judgment that governed as to when the paint and oil and turpentine were of the proper consistency to be used for the purpose of making these imprints, is that so? A. Yes.

Q. And he was an experienced man? A. Yes.

Q. How long had he been with you? A. He had been with us for, I imagine, five years.

Q. Had he always been doing that work? A. No; he had been doing this work for about three and a half years before this trouble arose.

Q. And had he been doing that work continuously? A. Yes.

Q. And he continued doing this work afterward? A. Yes.

Q. Is he still doing that work for you? A. No.

Q. When did he cease doing that work for you? A. Well, I don't remember.

Q. Is it recently? A. Oh, it is a couple of years.

Q. Is he still in your employ? A. Yes.

Q. But doing other work? A. Yes.

Q. Was he taken off this work because of the

result which was obtained in this particular case? A. No.

Q. You are pretty certain about that, are you? A. Positive.

Q. Now, how was the paint conveyed to the stamp after it was made into proper consistency by Mr. Gould due to the admixture of turpentine and oil? Just describe to the jury how the process was carried on, so that they may have some conception of the way the cloth was marked in going through this machine. A. The paint was placed in trays at the bottom of the machine, and there were a series of rubber rollers revolving which carried the paint to the rollers bearing the stamp which we use to trade-mark our goods. This revolved and came in contact with another series of rollers bearing the goods, leaving our trade-mark on the back of the cloth.

Q. As I recall it, you remember that some three or four years ago I had the pleasure of going to your factory and talking about this subject? A. Yes.

Q. And as I recall it there were two hard rubber rollers at the bottom which came in contact with an upper roller which was also hard, and then that second hard roller was in contact with another softer rubber roller? A. Right.

Q. And as the paint was picked up by the lower roller, it transferred it onto the softer roller, and that then inked the stamps which were upon another roller which kept coming around and meeting the soft rubber roller which contained the paint? A. Yes.

Q. And from that it was transferred to the roller on which the goods were wound? A. It came in contact with the back of the cloth.

Q. And these stamps which were upon the roller that did the marking were detachable? A. Yes.

Q. That is, they could have been taken off and used for some other purpose? A. I presume so, but we never used them for any other purpose.

Q. But you could take the stamps off? A. Yes.

Q. Were the stamps ever taken off? A. The stamps were taken off to be cleaned, yes.

Q. As I understand it, on each one of these rollers there were four stamps? A. Yes.

Q. The material being quite broad—how long was the axle? A. The material would be somewhere about 54 inches wide, 54 to 60 inches wide.

Q. And every revolution of the roller containing the stamps would make four marks? A. Correct.

Q. Now, opposite the stamps where they came in contact with the cloth as it came over the machine, was there some felt or other soft material which pushed the fabric toward the stamps? A. Well, there was a felt, but it didn't push the fabric toward the stamps.

Q. Was it a felt that covered the whole roller? A. Just at the point where the stamp struck.

Q. And it was to give a soft surface for the stamp to run on? A. Yes.

Q. Did you in any way supervise the mixing of the paint for the purpose of doing this particular stamping on these goods as to which complaint is made? A. Yes; some of the mixing, after we found that the paint was not just as we wanted it. I suggested that perhaps we change the combination a little, add a little more oil and a little more turpentine, just for experimental purposes.

Q. But when this first batch of paint came in, of which you complain, you saw that its consistency was different from what you had been receiving? A. Yes.

Q. Did you then start to use it? A. The man reported that the consistency was different, and we

tried some of it on samples of cloth and found that it struck through.

Q. Did you then try to make it either less thin, or to make it dry more quickly, or do anything more with it? A. We reported it to the Woolsey Company.

Q. And you used no more of that paint? A. They told us that we were not using it properly, that we had made a mistake in the mixing, and we played around with it for quite a length of time to see if we could find a combination to give us results.

Q. But you used it, of course, on samples before you used it on your customers' fabrics? A. Yes.

Q. When you got the second batch, as I understand about July 20th, 1921, you found that of about the same consistency, did you? A. About the same.

Q. And did you endeavor to use that? A. No. We first made some experiments with it on samples, and found we had the same trouble.

Q. But you did not use it on any fabrics? A. No.

Q. When you made complaint, I understand that on July 25th, five days later, you received another batch of paint? A. Yes.

Q. And that you also found to be of a consistency much thinner than what you had been accustomed to? A. Yes.

Q. Did you use that? A. It was used only when the representative of the Woolsey Company prepared it for us.

Q. Did you test it at all before he came there? A. We complained about it before he came.

Q. And then after you had had the representative come there—this was Mr.— A. Mr. Vanderwyk.

Q. He mixed it up, and how did you use it? A. In the machine.

Q. Upon customers' fabrics which you had there? A. He wanted to try it out on some pieces; he insisted that the paint was satisfactory after he prepared it.

Q. Did you try it out on some samples so that he could find out if he were right or not? A. I do not recall.

Q. You knew from appearance that it was like the other stuff that was not satisfactory? A. Yes.

Q. Why then did you try it on pieces, without giving it a test? A. The representative of the company told us it was all right and we went ahead and tried it.

Q. But you could have tested it on samples and found out how it came through. You didn't do that? A. No.

Q. You knew that if the paint did come through and showed on the other side, a large part of the fabric would be destroyed? A. Yes.

Q. Do I understand then that it was at the time when this technical man from the Woolsey Company was there, that all of these pieces about which you complain, were marked? A. Yes.

Q. That is, thirteen pieces? A. Yes.

Q. Twelve of the New York Macintosh Company? A. Yes.

Q. And one of the Peerless Company? A. Yes.

Q. And of the twelve pieces of the New York Mackintosh Company, four were accepted? A. Yes.

Q. And eight were returned to you? A. Yes.

Q. Have you those pieces here in court? A. No.

Q. Is the defect apparent to anyone who examines the cloth? A. No.

Q. In other words, it is not easy to determine that there is a defect in the cloth? A. No.

Q. There were some other pieces sent you by Bing & Company in Cincinnati? A. One piece, I believe.

Q. How many came from the Peerless Company altogether? A. I think there were about three pieces came to us about that time.

Q. Won't you look at your records and see if you did not get six pieces? A. This says three pieces; there may be another report, I don't know.

Q. At any rate, when the technical man from the company was there and when the cloth was put through this stamping machine, there was more than one piece? A. More than one piece stamped?

Q. Yes. A. Yes.

Q. And one was returned to you as being improperly marked? A. There were thirteen returned.

Q. I am only speaking now of the goods from the New York Mackintosh Company. A. I don't know how much were stamped at the time.

Q. Haven't you some record that would show? A. No; I could not tell you if all of these pieces were stamped at that time or not.

Q. Doesn't your record show that three pieces were received? A. It shows three pieces received.

Q. What does it show about shipping out? A. All shipped out about the same time.

Q. And one came back rejected? A. Yes.

Q. What became of the others? A. I presume they were all right.

Q. You did not have any complaint about them? A. No.

Q. And the process used on those other two was just the same as the process used on the one that was rejected? A. The proofing process?

Q. Yes. A. Yes.

Q. And the process of stamping was just the same was it not? A. Yes.

Q. Now, during all the time you were having trouble with this red paint, you made use, from time to time, of the yellow paint which was furnished by the Woolsey Company? A. Yes.

Q. And the results from that were satisfactory? A. Yes.

Q. When you discontinued using the read paint, what was your substitute for it? A. We were able to get another red paint from a different company which was satisfactory.

Q. What company? A. Sherwin-Williams, I believe.

Q. When did you first obtain that red paint? A. I don't know.

Q. Was it shortly after this? A. I believe it was.

Q. Did you continue using the yellow paint which you had received from the Woolsey Company? A. I don't know if we continued to use the yellow paint of the Woolsey Company or not, or whether the Sherwin-Williams people made red paint for us—I don't remember.

Q. But up to the time when you began dealing with the Sherwin-Williams Company, the paint used for marking these goods had been obtained from the Woolsey Company? A. Yes.

Q. Now, during this period from June, 1921 to August, 1921, a period of somewhat less than two months, your factory was in operation and you were proofing material and stamping it? A. Yes.

Q. About how much processing did you do in this time? A. Of course it all depends upon how busy we would be. It varies; it all depends upon business conditions.

Q. What I mean to ask is, this was not the only work that was done at your plant, was it? A. No.

Q. In fact, I suppose it was only a small fraction of the goods you processed? A. Yes.

Mr. Carrick: That is all.

Re-direct Examination by Mr. Garrison:

Q. Was there any difference in the printing or proofing during the period that the trouble arose with the red paint? A. No difference.

Q. And what paint did you use to stamp your other materials with during the period of the trouble? A. We used the yellow paint.

Mr. Garrison: I offer in evidence carbon copy of letter, Cravenette Company to Woolsey, December 8, 1920.

Marked Exhibit P-9.

Mr. Garrison: I also offer in evidence the answer of December 9th, 1921.

Marked Exhibit P-10.

(Witness excused.)

DANIEL GOULD, sworn.

Direct Examination by Mr. Garrison:

Q. You are employed by the Cravenette Company, the plaintiff, at the present time? A. Yes.

Q. Were you employed by them in the summer of 1921? A. Yes, sir.

Q. What did you do for them at that time? A. Stamped goods, ran the stamping machine.

Q. How long had you been running the stamping machine? A. About three and a half years before that.

Q. You have heard the testimony that has gone so far? A. I have heard it, yes.

Q. Do you recall the fifty pounds of paint that was delivered, red paint, in June, 1921? A. Yes.

Q. Did you personally examine that paint? A. I examined the paint.

Q. What difference, if any, was there, between that paint and the paint you had been getting from the Woolsey Paint Company? A. The paint I used to get before that fifty pounds used to be thick like putty; I used to have to get a stick to take it out of the can. This paint I could pour out.

Q. Did you use any of it? A. Only some samples.

Q. And what was the result? A. It went through, and I reported that it was not fit to use.

Q. To whom did you make that report? A. To Mr. Sundermann.

Q. After you made that report to Mr. Sundermann, did you receive another lot of 50 pounds from the Woolsey Paint Company the latter part of July, 1921? A. Yes, sir.

Q. Did you examine that lot? A. I examined it and tried it on a little piece of cloth.

Q. Was it the same or different than the usual line of red paint you had been using? A. It was the first lot of 50 pounds that was not of any use.

Q. Did you try it out? A. Yes, sir, on a sample.

Q. What was the result? A. It was not any good.

Q. Why not? A. It showed through.

Q. Did you report that to anyone? A. I reported it to Mr. Sundermann.

Q. Up to that time had anybody come from the Woolsey Company to talk to you about this? A. No, sir.

Q. After a few days did you receive another lot of ten pounds from the Woolsey Company; ten pounds of red paint? A. Yes, sir.

Q. And did you examine it? A. Yes, sir.

Q. What was its condition? A. I found it the same as the last lot.

Q. Did you report that to Mr. Sundermann? A. Yes, sir.

Q. After you reported it to Mr. Sundermann, did anyone come up from the Woolsey factory? A. Yes, sir.

Q. Is that gentleman in court? A. I could not say.

Q. Did you have a talk with him? A. Only about mixing the paint. He mixed the paint for me and he said, "How do you like that?" I said it looked pretty thin. He said, "No, I know how to mix paint; go ahead and try it." I put it in the machine and ran it, and it started to spot through, and I showed it to him and he said, "I will mix it up different, make it a little thicker." He mixed it a little thicker, and I started running it again, and it went through a few more pieces. He mixed it again and I started running again, and it was all stamped through the goods.

Q. What batch was that? A. A batch of the New York Mackintosh, and one piece of the Peerless.

Q. How do you know now it was New York Mackintosh goods? A. Every piece is numbered; like New York Mackintosh has number 104; that shows those goods belong to the New York Mackintosh.

Q. Before you ran the New York Mackintosh and the Peerless lot, I want you to tell us the whole talk you had with this fellow from the Woolsey Paint Company. A. Why, I just talked to him about mixing the paint. I showed him a batch of yellow paint I had. The batch of yellow paint was in a big round tub, and it was like

putty, and I showed him that and showed him how I mixed a batch of yellow paint, which was all right. Then I told him about this paint being so thin, and he said, "All right, I will fix it." He fixed a batch of red paint, and I explained to him that I was afraid it was going to go through, that I never made it so thin. He said, "No, it is all right, go ahead and use it." That is why I went ahead and used it.

Q. After he told you, "Go ahead and use it," you ran off the Peerless and the Mackintosh batch? A. I ran off one batch on the machine.

Q. Did you tell him why the red paint was not satisfactory? A. I told him why it was no good.

Q. Did he say anything to you after that as to why he thought it was unsatisfactory? A. Yes, I asked him why it was we were having trouble like this, and he told me he imagined the oil in the paint was not any good. He said he heard they got stuck with some bum oil, and he said, furthermore, there was another mixer in the Woolsey Paint Company. He said they had a fellow that worked for them a good many years, but he was out of there now.

Mr. Garrison: That is all.

Cross Examination by Mr. Carrick:

Q. How long had you been mixing paint and using it for marking fabric? A. We didn't mark them; we used it in the machine and the machine stamped them.

Q. That is what I mean, marking them with a stamp? A. Yes.

Q. How long had you been doing that work for the Cravenette Company? A. Before this happened?

Q. Yes. A. About three and a half years.

Q. You had been doing that work continuously? A. Yes, sir.

Q. And was anybody else doing any of it? A. Not while I was there.

Q. What do you mean by that? A. Before my time there was another man that did it, and I helped him before that.

Q. I mean during the period from three and a half years before this trouble arose until after the trouble was through, was there anybody else who mixed the paint? A. No, sir, I done all that.

Q. Now, you had been accustomed to receive this paint in a consistency of about putty? A. Yes, sir.

Q. And what did you do with that paint in order to make it suitable for your purpose? I would measure it and I used to use turpentine and oil and put it all in a can and stir it up.

Q. You would stir it in a paint can? A. Yes.

Q. Not the can in which it came? A. No, sir.

Q. You would take it out of that can and put it in another can? A. Yes, sir.

Q. A can which you used for that purpose? A. Yes, sir.

Q. You would take it out of the original can and put it into another can? A. Yes, sir.

Q. And you would stir in oil and turpentine until it got to a consistency which you thought was suitable for your purpose? A. Yes, sir.

Q. How often did you receive new batches of paint from the Woolsey Company? Would you get it every week, or every month, or how? A. Sometimes I would get it in a month, other times once in six weeks, according to how much goods I was stamping.

Q. And while you were not using the paint after you had opened one of these cans, where did you keep it? A. I had a closet there.

Q. You would open a can and you would always put it back in the closet? A. Yes.

Q. And of course, after you kept it for a month or six weeks, it would become somewhat thicker as time went on, would it not? A. I would not use a can of paint that long. I mixed it day by day.

Q. But you would mix it from a can you got from the Woolsey Company? A. I would take it out of the Woolsey can and put in a can of mine.

Q. Now, the can that you received from the Woolsey Company contained paint which was about as thick as putty, you have said. What would you do with that while you were using it? A. That can would stand down there.

Q. In the closet? A. Yes, sir.

Q. And wouldn't that can get somewhat dryer as time went by? A. No.

Q. Wouldn't the oil evaporate somewhat from it? A. The 50 pound can?

Q. Yes. A. There was no oil in that.

Q. It was not putty was it? A. No.

Q. It was like putty? A. Like putty.

Q. Then when you would mix it to what you considered the proper consistency, with the turps and the oil, what would you do with it? A. Put it in a pan in the machine.

Q. Underneath the rollers? A. Yes.

Q. And how often would you replace the supply in that pan under the rollers? A. Whenever it needed it. I had a mark, and whenever the plant went down too low, so that the roller would not pick it up, I would add some more.

Q. Now, when this batch of paint came to you in the latter part of June and you found it was not like the paint you had been receiving, that is, that it was very much thinner, you tried that out on some samples of cloth? A. Yes.

Q. You did not put it in to work on fabric you were putting through for your customers? A. No, sir.

Q. And you found that it would actually come through the cloth? A. In spots, yes, sir.

Q. So that you did not use any more of that? A. No, sir, I reported that.

Q. You reported that to Mr. Sundermann and you discontinued its use? A. Yes, sir.

Q. Now, on July 20th, you got a second batch in substitution for that? A. Yes, sir.

Q. And that you found to be of the same consistency? A. Yes, sir.

Q. And you tried that out on samples of cloth and found that it also came through? A. Yes, sir.

Q. So that you did not use that on customers' cloth? A. No, sir.

Q. Well, then, there came a third batch in substitution? A. Yes, sir.

Q. Which I think you received about the 25th of July, and that you tried also upon a sample?

A. No, sir, I didn't try that on a sample.

Q. Didn't try it at all? A. No, sir.

Q. You did not make any experiments with that at all? A. No, sir, it looked the same as the rest, and as soon as I saw it I knew it was no use to try it.

Q. You did not use that at all? A. No, sir.

Q. Who did actually use that in operating the machine? A. Well, the man that came from Woolseys, he mixed the paint up for me then.

Q. Now, you knew that the other paint which looked just like that, and which was of the same consistency, had gone through the fabric and marked it, and if you had used that upon customers' goods that were there it would have spoiled them; now, why did you use this paint on custom-

ers' fabrics instead of trying it on one of these samples which you could have done without much loss to anybody? A. I didn't want to use it on the goods but this man told me to go ahead, the paint was all right. He told me that he was a mixer from Woolseys, and I told him all right, and he went ahead with the paint.

Q. But you were the man that used the paint? A. I didn't use that paint.

Q. The paint he mixed? A. He mixed this paint.

Q. He gave that paint to you? A. Yes, and told me it was all right.

Q. And then you used it? A. I ran the machine.

Q. You had been stamping with paint, and using this paint for over three and a half years, and you found that the paint which appeared thin came through on the samples? A. Not with this paint.

Q. With two other batches? A. Yes, I tried that on a sample.

Q. Now, why didn't you try this on a sample to see whether it was all right or not? A. I took this man's word that he was from the Woolsey factory and was a mixer, and he said the paint was all right.

Q. You could have easily tried it, couldn't you? A. He told me put it in the machine and go ahead, and I did.

Q. Now, you put it in the machine and went ahead with it. Did you look at a sample as you ran it? A. Yes, sir.

Q. And found it came through? A. Yes.

Q. Then you continued it? A. He mixed it again.

Q. And you found it had spread? A. Two pieces of cloth, I believe, were spoiled the first time.

Q. Yet, in spite of that, you went on and tried it on some more cloth? A. Yes.

Q. Did you find it was going through? A. Yes, sir.

Q. Just as soon as you looked at the back of the cloth you could see it was coming through? A. We seen the spots.

Q. Why didn't you stop the press right away? A. We did stop it, and he mixed the paint again.

Q. I understand you did, but you stopped it after you had run through two pieces. Why didn't you look at the first piece you took off? A. We looked at it.

Q. And saw that it had come through? A. Yes, sir.

Q. Then you ran through another piece? A. He put different paint in it.

Q. I understood you to say you tried two pieces? A. The first mix, yes. On the second mix we tried quite a few, I don't know how many pieces.

Q. You tried first one piece after the mixture had been made by this man from the Woolsey factory, and when you took that piece off the machine you saw that the mark had come through? A. Two pieces.

Q. You did not take off two pieces at once, did you? A. Yes, sir, that is all together, the whole batch.

Q. Wasn't it possible after the machine had made one or two revolutions to look at the fabric and see how it was coming through? A. Well, after it lays a while that is the time it comes through; first you only see portions.

Q. But even those portions indicated it was coming through? A. Yes, sir.

Q. And you knew that if it came through it

would spoil the goods? A. I was getting orders to go ahead with the cloth.

Q. But you were not getting orders from your employer to spoil goods? A. I was getting orders from the mixer, he was telling me he knew how to mix paint.

Q. But you knew when you saw those marks coming through the fabric that it was wrong, didn't you? A. I knew that the mixture was wrong, and he said he would make it thicker.

Q. Then you started in and used it on some more pieces? A. Yes, sir.

Q. Now, how many mixtures did you try all told? A. I don't remember how many batches.

Q. As I understand from the testimony that has gone before, there were about eleven more pieces went through? A. Yes, but not all in that next mixture.

Q. When were those put on? A. We mixed after that again.

Q. You found after you took off a piece that every one of the mixtures was going through the fabric and spoiling the fabric, and you still went on and tried it on other commercial fabric? A. Yes, sir.

Q. You did not try it on any samples? A. No, sir.

Q. When did you cease to run this machine? A. About two years ago.

Q. Can you give us the exact time you stopped? A. Well, I could not give you the time exactly.

Q. Wasn't it just about the time that these complaints came in? A. No, I went on after that.

Q. How long after that? A. A couple of years.

Q. Did you ever strain the paint to get the skins out after you mixed it? A. Yes, sir, I had to strain the paint.

Q. Did you do that with the batch of paint which resulted in this injury to the fabric? A. Yes.

Q. You put that through, did you? A. I didn't put it through, the man did; he had the stuff there and put it through.

Q. Now, you recall, do you, the time when two men from the Woolsey Company came over there? A. I didn't know; they didn't deal with me; I was on the machine.

Q. And wasn't it the time when this man came over and mixed paint that you used on these fabrics? Wasn't there another man with him? A. No, sir, he was alone.

Q. Do you know Mr. Vanderwyk? A. I don't remember him.

Q. Was he the man did the mixing? A. I don't remember, I could not pick out the man that mixed.

Q. Do you know Mr. Cohen? A. No.

Q. Did you see him over there? A. No.

Q. Didn't see either of these men? A. No.

Q. Isn't he the man that came over there and mixed the paint for you? A. I don't believe it was either one of those two men.

Q. Can you describe the man? A. No, I cannot.

Q. Do you remember my being over there after this complaint? A. Yes.

Q. And do you remember Mr. Vanderwyk being with me at the time? A. No, sir.

Q. Now, wasn't there somebody else who had charge of your place when these two men came over? Weren't you away at the time? A. No, sir.

Q. Weren't you ever away during the summer of 1921? A. No, sir.

Q. What are your hours there? A. Eight in the morning to half past four.

Q. Do you go out for lunch? A. Yes, sir.

Q. One hour? A. A half hour.

Q. And you had no vacation during that summer season? A. No, sir, only Saturdays off; the whole plant closed down Saturdays.

Q. But all other days except Saturdays you were there, every day? A. Yes, sir.

Mr. Carrick: That is all.

(Witness excused.)

Mr. Carrick: There is considerable testimony that has been taken in the form of depositions, and I made the suggestion to Mr. Garrison that if that is only for the purpose of proving damages, I would like to make my motion for non-suit now, and he agrees to it. The jury might be excused and could come back on Monday morning, and we could argue the motion out of the hearing of the jury.

The Court: It is now practically four o'clock; we will adjourn until Monday morning.

Motion for Non-suit.

10 a. m., December 14, 1925.

Mr. Carrick: When court adjourned on Friday, the plaintiff had completed its evidence as far as it related to the question of liability, and by agreement between Mr. Garrison and myself, we thought this motion might as well be made now, before the depositions were read, which relate only to the subject of damages, and I am, therefore, now asking your Honor to direct a non-suit in this case on the following grounds:

First; there is absolutely no proof to show that the plaintiff relied upon the skill and judgment of the defendant in the use ofthe paint in lieu of printers' ink.

Second; that the plaintiff did not use the product as sold by the defendant, but modified it by mixing;

Third; no statement by a workman or technical man from the defendant's factory who was said to have inspected the paint could vary the liability of the defendant, as he had no authority to give warranty and could not enlarge the Woolsey Company's liability, nor was an enlargement alleged in the complaint.

The Court: I think it is a question to go to the jury. I refuse your motion.

Mr. Carrick: Exception.

Stipulation.

In order to reduce the printed record, it is stipulated between attorneys of record in this action as follows:

1. That Exhibits P-1 to 6 inclusive need not be printed.

2. That none of the depositions need be printed.

3. That the amount that the plaintiff paid to New York Mackintosh Company and The Peerless System mentioned in the complaint aggregated with interest on December 14, 1925, the sum of $2,316.15 and that if the court shall find that the defendant is liable in damages to the plaintiff in any sum whatsoever, the said amount shall be the aforesaid sum of $2,316.15 besides interest from December 14, 1925, with costs.

Dated, April 5th, 1926.

CARLYLE GARRISON,
Plaintiff's Attorney.

CARRICK & WORTENDYKE,
Defendant's Attorneys.

DEFENSE.

FRANK WOOLSEY, sworn.

Direct Examination by Mr. Carrick:

Q. You are president and manager of the C. A. Woolsey Paint and Color Company, are you not? A. I am.

Q. And how long have you been president of the company? A. About 23 years.

Q. Prior to that time you were connected with the former company known as the C. A. Woolsey Paint and Color Company? A. I was.

Q. For how long a period of time? A. 55 years altogether—I have been connected with it 55 or 57 years.

Q. The company gets its name from your brother Charles A. Woolsey, is that so? A. Yes.

Q. You recall the orders given by the Cravenette Company for red paint, which came to the Woolsey Company from time to time? A. Yes.

Q. With whom did that business begin? A. Summit Proofing Company.

Q. The predecessor of the present Cravenette Company? A. Yes.

Q. Who took that order originally? A. I took the original order.

Q. And what was that order which was given you originally? A. I don't recall the man's name, but the man who had charge of that business at that time, the manager there, first rang up on the telephone and stated that they were using printers' ink and that he thought it was possible for paint to be made that could be used for the same purpose, that would cost less money. He came down and we had a talk regarding the matter, and he asked me if I would try to make up something that would answer

the purpose. I told him that I had never had any experience making printers' ink but I would do the best I could and send him a sample which he could try out and see if it would meet his approval, which I did, and to the best of my recollection the first samples we sent him he adopted. I don't remember ever having any conversations with him after that. We simply received orders from him and filled them, to supply material that was the same as the sample which I originally sent him.

Q. So that the formula under which you first made the sample which was submitted to him was followed out in these later years? A. It stood all those years; we supplied the same thing. The formula was never changed, and was never asked to be changed until the complaint came from the Cravenette people. They complained that it didn't dry. That was the complaint as I understood it at the time; that was the only complaint that we ever had.

Q. That is, that the paint would not dry quickly enough? A. That is what they claimed over the telephone, that it would not dry quickly enough.

Q. Is that the usual experience in the use of inks, that they sometimes dry more quickly than others —the use of paints, I should say? A. It is liable to happen.

Q. How is that corrected? How do you overcome that, if the paint does not dry quickly? What do you do? A. Simply add a little more dryer.

Q. To the oil? A. To the mixture.

Q. Have you at any time during your business experience, with the exception of this one order which was first placed with you by the Summit Proofing Company, and afterward continued by the Cravenette Company, ever made, or been called upon to make, a paint which could be used for marking fabrics? A. No, never.

Q. Have you any information, or judgment, or skill, or experience in that particular line? A. Never studied the situation at all.

Q. Have you been the active manager of your company, the Woolsey Company, ever since you became its president? A. Always, yes.

Q. Did you ever see the product which was supplied to the Summit Proofing Company or to the Cravenette Company after it was applied on fabrics? A. No, I never saw it.

Q. You never went to the place and saw it? A. No, I never saw it.

Mr. Carrick: Cross examine.

Cross Examination by Mr. Garrison:

Q. Mr. Woolsey, when was it that the Summit Proofing Company came to you and asked you to make up a paint for them? A. Well, it was a good many years ago; I have not the date before me, but it was a good many years ago.

Q. And was the Summit Proofing Company engaged in the same line of business as the Cravenette Company? A. As far as I know.

Q. That is, waterproofing coats, and things of that sort? A. That is what I understood.

Mr. Garrison: That is all.

JOHN ALBERT JOHNSON, sworn:

Direct Examination by Mr. Carrick:

Q. You are connected with the C. A. Woolsey Paint & Color Company, are you? A. Yes.

Q. And what is your employment there? A. At the time this matter came up, I was export manager.

Q. How long had you held that position? A. About three or four years.

Q. You are the gentleman who wrote and signed, in behalf of the Woolsey Company, this letter of August 26th, 1921, which I show you, and which has been marked Exhibit P-8? A. Yes, sir.

Q. That was after the receipt by your company of the letter signed by Mr. Sundermann, of August 23, 1921, which has been marked Exhibit P-7? A. Yes, sir.

Q. Was Mr. Woolsey at the office or attending to the business of the Woolsey Company during that time in August? A. No, sir.

Q. Where was he? A. He was on a vacation trip.

Q. Will you state whether you had any prior communication with Mr. Sundermann before the receipt of this letter to you of August 23rd and your reply of August 26th. A. Why, he called me up on the 'phone after we delivered the first lot of paint and complained that it would not dry. I assured him that it was made in the same way and manner as all the other red paint we had delivered to him, and there was no good reason why it should not dry and act the same as that which they had gotten previously. After that talk with him he decided to try that same paint again and for some little time—I don't recall now just how long, I would say a few days, at least—we didn't hear from him. When he called up the next time he said again that the paint would not dry and he would like us to send him another lot. We told him then that we could not see that it would make so much difference to send him another lot, but nevertheless, to try and accommodate him, we sent him another lot and took back the first lot.

Q. And was there any change made in the manufacture of the latter lot? A. Not to my knowledge.

Q. Was there any more dryer used in it? A. I

was led to believe there was. His complaint was that it would not dry, and I was led to believe that there was some more dryer put in it to overcome that complaint.

Q. Is that a customary and ordinary change that is made in the manufacture of paint, putting in more or less dryer? A. Yes.

Mr. Carrick: Cross examine.

Cross Examination by Mr. Garrison:

Q. How many years have you been with the Woolsey Paint Company? A. About 19.

Q. Were you familiar with the business of the Summit Proofing Company, the predecessor of this company? A. Except I knew we had been receiving orders from them and filling them.

Mr. Garrison: That is all.

(Witness Excused.)

JOHN M. VAN DERWYK, sworn.

Direct Examination by Mr. Carrick:

Q. You are connected with the C. A. Woolsey Paint & Color Company? A. I am.

Q. In what capacity? A. Superintendent.

Q. Superintendent of the factory? A. Superintendent of the factory, yes, sir.

Q. And did you hold that position in the year 1921? A. I did.

Q. How long have you been with the Woolsey Company? A. 20 years in January next.

Q. Now, do you know of complaints which were made by the Cravenette Company of the failure of paints supplied by your company to accomplish results? A. Yes, I do.

Q. And did you at any time go to the factory of the Cravenette Company? A. I did, on three occasions.

Q. Now, when was the first occasion that you went there? A. Well, after I got a complaint through the office, I believe, and they had said that they destroyed about thirteen rolls of cloth, then I went over to see what the trouble was.

Q. Did you go alone? A. No, I took a chemist with me.

Q. Who is the chemist? A. Mr. Cohen.

Q. He is chemist of the Woolsey Paint Company? A. Yes.

Q. You two went over there. Who did you see there and what happened? A. I believe Mr. Sundermann.

Q. And what happened, what did you do when you went over there? A. Why, he showed me the goods that had been destroyed and showed me the impressions in the cloth, and he showed me where the paint had gone through, but the whole stamp didn't go through the cloth, as I told him at that time, there was just little particles that had been pressed through the cloth. He showed me the paint and I saw that the paint had skins in it, and I called his attention to that. That is all there was to that. I took a piece of the cloth back with me and I tried to find something to remove the spots, but without success.

Q. Did you see any of the fabric being cravenetted, or going through the press and being marked? A. Not the first time, no.

Q. Did you see the press at all the first time? A. Just looked at it, that is all, from a distance, I didn't examine it.

Q. You did not see it working? A. Not the first time, no.

Q. Did you meet the man then who was operating the press that first time? A. No, sir.

Q. Now, then, after that you found that you were unable to remove the marks from the cloth, did you? A. I did.

Q. And you say you called the attention of Mr. Sundermann to the skins. What were the skins doing there? A. That was the dirty can they mixed the red paint in that caused some of it. It was not a clean can, it was an old can and the paint had skinned over and had been deliberately mixed in with the paint.

Q. Paint that is exposed to the air accumulates a skin? Does it oxidize and become covered with a skin? A. It does.

Q. And if you use the paint without removing the skin what is the effect? A. Well, it won't make an even job at all.

Q. And is it a fact that in examining the red paint there, you found skins in it? A. There were skins in it.

Q. Now, what was the occasion of your going the second time to the plant? A. Well, the second time we went over, we brought the material back and we showed him what we had done, but with no success at all. We told him we could not do anything further with it, and that is all there was to that.

Q. When you say you showed him what you had done, you mean by trying to remove the paint marks? A. Trying to remove the paint from the cloth.

Q. Had he requested you to attempt that? A. Yes, he did.

Q. And you had taken some of the cloth back to the Woolsey Company to try to remove the marks? A. Yes, sir.

Q. The second time you went there, who was with you? A. Mr. Cohen.

Q. The chemist, as before? A. The chemist of our plant.

Q. Tell us what happened on that second occasion—first, how long was that after the first visit? A. I should imagine a couple of days; I could not say exactly, but when we went back there we saw Mr. Sundermann, showed him the cloth and stated that the paint would not come out, in fact only made the job worse by trying to use solvents on it. I believe the press was running that day and they were using yellow paint at the time which we furnished them, and with which they had success.

Q. Did you go down to where the press was running at the time? A. I was right on that floor, yes, sir.

Q. Did you see the press running? A. I did.

Q. Was it running with red paint? A. No, they were using the yellow paint.

Q. Did they run any red paint while you were there? A. No, sir.

Q. Do you recognize this witness, Mr. Gould, as the man who was running that press? A. No, I could not say that I do.

Q. Did you have any talk with the man who was running the press? A. I don't remember whether I did or not.

Q. Did you mix up any paint for him, or tell him to mix up the paint for the purpose of running his press? A. I certainly did not.

Q. Did you tell him to run the press? A. I did not.

Q. Did you give him any directions of any kind? A. I certainly did not.

Q. Was Mr. Sundermann with you when you went down on that floor? A. He was with me all the time.

Q. And Mr. Cohen was with you? A. Mr. Cohen was with me.

Q. Did you see any cloth run through the press that was claimed to be spoiled while you were there? A. As I said before, I saw thirteen rolls, something like that.

Q. But I am speaking of the second time you were there, did you see any cloth being run through at that time which was claimed to be spoiled? A. No, I did not.

Q. They were operating, you say, with yellow? A. Yellow.

Q. You have spoken of a third time you were over to the factory; when was that? A. I believe you were along at that time.

Q. That was several months afterward? A. Yes.

Q. After the action had been started? A. Yes.

Q. And we saw Mr. Sundermann there, did we? A. Yes.

Q. And also the man who was operating the press? A. Yes.

Q. You recognize Mr. Gould as that man? A. I don't remember seeing him at all, no, sir.

Q. But there was a man there who was operating the press? A. There was; I could not describe him to you, though.

Q. Did you ever, or did Mr. Cohen ever in your presence, instruct the man who was operating the press (whoever he might be) how to run the press? A. No, sir.

Q. Did Mr. Cohen in your presence do anything in the way of mixing paint? A. No, sir.

Q. Or instructing the press man to do anything with the press? A. No, sir.

Mr. Carrick: Cross examine.

Cross Examination by Mr. Garrison:

Q. How long have you been with the Woolsey Paint Company? A. Twenty years.

Q. And you knew the prior company, the Summit Proofing Company? A. I knew of them, yes.

Q. What did they do, waterproof coats? A. I could not tell you that, I don't know.

Q. What does the Cravenette Company do? A. I know that they waterproof coats, I know that.

Q. You know what a cravenette coat is? A. I certainly do.

(Witness excused.)

ASHER Z. COHEN, sworn.

Direct Examination by Mr. Carrick:

Q. You are employed as chemist by the C. A. Woolsey Paint & Color Company? A. Yes, sir.

Q. And you were so employed in the summer of 1921? A. Yes, sir.

Q. Did you know of the complaint which was made by the Cravenette Company in regard to the red paint? A. Yes, sir; all complaints are referred to our laboratory and I have to take care of them.

Q. When the complaint came in, what did you do with regard to it? A. Why, Mr. Van Derwyk and myself went over and took some samples of solutions with us to see if we could remove it.

Q. That is, to see if you could remove the paint? A. Yes, sir.

Q. Prior to going over to the plant, after you knew of the complaint having been made by the Cravenette Company, did you do anything to examine the paint which had been supplied, or samples of the paint that had been supplied? A.

All our paint is manufactured from formula, and we keep samples to have a chemical control.

Q. In this case did you keep a sample of the paint which had been supplied to the Cravenette Company, of which they complained? A. We certainly did; we keep samples of all paint we send out.

Q. Did you examine the sample you retained? A. Yes, sir.

Q. What did you find in regard to it? A. Why, it was the regular formula; it was nothing but pigment and oil.

Q. And having found it in accordance with the formula, you went over with Mr. Van Derwyk to Hoboken, to the Cravenette plant, and what did you do when you got there? A. Why, we were introduced to Mr. Sundermann, if I am not mistaken and we had all our dealings with him. We tried to remove the paint from the cloth, and we were not successful. We decided we had better take along a piece of cloth with us in the hope that we might find better success in the laboratory.

Q. While you were there on this occasion, when you and Mr. Van Derwyk were over there, did you go down to see the press? A. Well, the press was on the same floor.

Q. And was Mr. Sundermann with you when you went down there? A. With us all the time.

Q. Did you see the press in operation at that time? A. No, sir.

Q. Did you see the pressman at the time? A. No, sir, we had our dealings with him the first time.

Q. Then you took a sample of the cloth to the laboratory of the Woolsey Paint Company and tried to remove the paint, did you? A. Yes, sir.

Q. And you were not successful? A. Unsuccessful.

Q. And you took the cloth back to Mr. Sundermann? A. Just to show Mr. Sundermann the result; that we were not successful.

Q. Was Mr. Van Derwyk with you? A. Yes, sir.

Q. What happened when you went back the second time? A. Why, we went back the second time and we showed the result to Mr. Sundermann, and we asked that the paint be shown to us; that is the only time I recollect any other man coming into the case. He simply brought in a pail of paint and showed it to us. Mr. Van Derwyk noticed a skin and pointed it out to us. At no time was any paint mixed in front of us.

Q. Did you mix any paint, or did Mr. Van Derwyk mix any paint? A. No, sir.

Q. Did you see any paint mixed by this pressman? A. No, sir.

Q. Did you see the press in operation? A. The press was running, but I was not anywhere near the press.

Q. Do you know what was being run on the press? Was it red paint? A. No, sir, the red paint was not run at that time, they didn't want to run any red paint on account of the trouble with the paint going through.

Q. Did you see whether the paint had skins on it? A. Yes, sir.

Q. Did you say anything to Mr. Sundermann about that? A. Why, Mr. Van Derwyk took care of that part, so I didn't say anything.

Q. He spoke in your presence? A. Yes, sir, we were all together, all the time.

Q. Now, did you or Mr. Van Derwyk, or anybody in your presence, give any instructions to the pressman, whoever he may have been, as to running the press? A. No, sir, we certainly did not.

Q. Or as to mixing the paint? A. No, sir; I would never think of doing a thing like that.

Q. Were you there on any other occasions? A. No; those were the only two times.

Cross Examination by Mr. Garrison:

Q. How long have you been with the Woolsey Paint Company? A. About five years, now.

Q. Do you know Mr. Johnson, the Export Manager? A. Yes, sir.

Q. You say that all complaints are referred to you? A. Generally.

Q. Do you recall any complaint the latter part of July, 1921? A. Yes, sir.

Q. Did you consult with Mr. Johnson before he wrote the letter to the Cravenette Company? A. I really don't know, except Mr. Johnson told me that complaint was made that the paint would not dry.

Q. I didn't ask you that; I asked you whether he consulted with you at any time before he wrote this letter? A. I do not know if anybody referred the complaint to me.

Q. All complaints come to you? A. Yes, sir.

Q. Not to Mr. Johnson? A. They come to the laboratory. They have to go through Mr. Johnson, but they are referred to me.

Q. And this complaint was referred to you? A. By Mr. Johnson.

Q. How many different kinds of oils go into this paint? A. Two oils.

Q. Two oils? A. Yes, sir.

Q. Why does Mr. Johnson say there were three oils? A. When that complaint came up he told us about it, and that is the time we simply added the drying oil.

Q. Well, which is it, two oils, or three oils? A. Two oils.

Q. How long does it take to make the paint? Is that quite a complicated process? A. No, sir, the oil is mixed with the pigment and sent through the mill.

Mr. Garrison: That is all.

Re-direct Examination by Carrick:

Q. You speak of two kinds of oil? A. Yes, sir.

Q. You mean by that, any kind of oil can have a dryer in it? A. Of course.

Q. But of course, if a dryer is put in the oil, it makes it somewhat different than the oil before the dryer is put in? A. Simply makes it dry faster; but that does not change the value of the paint in any way; it does not alter the case.

Mr. Carrick: That is all.

(Witness excused.)

Mr. Carrick: The defense rests.

Mr. Garrison: That is all.

Mr. Carrick: At this stage I wish to ask your Honor on the proofs that are now in, which have, I think, materially changed the situation from what it was at the time I moved for a non-suit this morning, for the direction of a verdict in this case. We all seem to agree on the law, that this action can be maintained only upon proof which a jury is entitled to consider, that there has been reliance by the plaintiff in this case upon the skill and judgment of the defendant in the manufacture of a paint of the quality specified in the complaint, namely, that it will not run through from the back to the front, and it is absolutely shown now, through the testimony of Mr. Woolsey, that this company, and he as president of the company and in active management of the company, had no knowledge whatever, no experience whatever, no skill or judgment on this particular subject. It

also comes out that when this order was given to him it was given by the representative of the predecessor of the Cravenette Company to be used in lieu of printers' ink, to make a cheaper process for them, and that Mr. Woolsey expressly disclaimed knowing anything about the subject, but made up a sample and said, "Try it and if you find it is correct, there it is." That is all that is shown in this case. After that, from time to time, the order was repeated. It is not shown in any way whatever that liability was incurred at any time. In that view, in addition to the other matters which I suggested to your Honor in moving for a nonsuit, it seems to me the situation is such now that there is really no evidence which would justify the jury in finding the elements which the plaintiff must show in order to justify a recovery, namely, that the defendant had judgment and skill in the manufacture of this product and that the plaintiff relied upon that judgment and skill in the purchase of the article complained of.

The Court: There are facts in dispute, which makes it a jury question.

Mr. Carrick: Exception.

Mr. Carrick summed up to the jury.

Mr. Garrison summed up to the jury.

Charge.

The Court thereupon charged the jury as follows:

The Court: Members of the Jury: There was a motion in this case to non-suit, and a motion made to direct a verdict. Both of those motions were decided adversely to the defendant, but that is no indication of what you should do in arriving at a verdict. Neither is it any indication of what the

court thinks of the merits of this case. That is simply the decision of the court that this is a question of fact which you have to decide, applying the rules the court will lay down for your guidance. There being facts in issue, it becomes a jury question and not one that the court can take away from a jury, so the decision of the court in refusing a non-suit and the decision of the court in refusing to direct a verdict is simply the decision of the court that you are the ones who must determine the rights of the parties to this litigation.

It appears from the evidence in this case that the plaintiff company was engaged in cravenetting, or waterproofing goods, and after they had so treated the goods they stamped them with their trade-mark or name. Originally they used printers' ink to do that work, but in order to reduce the cost of production they applied to the defendant company, a paint company, to make a paint that could be used as a substitute for printers' ink, and the defendant company, not engaged in making printers' ink, made up a paint which they gave this company as a sample, and it appears to have been satisfactory, and it was used for a number of years. The original paint was made for a company that was in existence prior to the present plaintiff company. Things went along for a number of years, and some time in 1921 the plaintiff ordered additional paint for this purpose and the defendant company furnished them fifty pounds of this paint. When the plaintiff opened the paint and examined it they found it unsatisfactory and they so notified the defendant, and the paint was taken back and fifty pounds more was furnished. That was likewise unsatisfactory and was returned. There appears to be a difference in the evidence about this stage of the dealings between the parties. The defendant

says that the only objection made to them at that time was that the paint wouldn't dry quickly enough, while the plaintiff says that the trouble with the paint was that it ran through the fabric and showed on the right side. There you see, members of the jury, you have an entire difference in the evidence, the plaintiff claiming that the paint went through and showed on the right side and so spoiled the fabric, and the defendant saying that that was not the complaint that was made. According to the defendant, the complaint was that it would not dry fast enough, and to remedy this they added more dryer to the paint.

Then there is another question in dispute. The plaintiff says that after the two lots had been furnished and the defendant had been told it was unsatisfactory, they sent over a man from their works with some additional paints; that this representative said that such new paint would do the work satisfactorily; and that thereupon, in the presence of the man from the defendant company, their operator started printing the trade-mark on the goods and although he saw the mark came through, he kept on with the piece that was on the machine; that then the paint company's representative changed the mixture, a new piece was tried, and again the operator saw that the paint came through but he kept on running off the goods; that these goods were sent to the owners for whom the work was being done, and they were rejected.

So far as I recall, there is no evidence as to who that man was that the plaintiff claims was there and gave them those instructions. His name was not given. The defendant company, however, says that it sent over two men, their superintendent and their chemist, and that when they got there they found that thirteen rolls of material had been returned to the plaintiff, rejected by the owners be-

cause of paint appearing on the face of the cloth. These men say that no goods were stamped while they were present, that on the occasion of their visit to the plaintiff's plant these spoiled goods had already been rejected, and they were shown the rolls of goods which had been returned; that they took a portion of the goods back to the defendant's factory and tried to remove the paint which appeared on the right side of the cloth, and that they were unsuccessful.

Now, gentlemen, you see there is a question which you have to determine. When were those goods damaged? Were those goods damaged at a time when a representative of the defendant, authorized to speak and act for the company, was present?

The plaintiff claims that this defendant is liable because there was an implied warranty. They refer to what we know as the sale of goods act, which reads as follows: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The plaintiff must establish his case by a preponderance of the evidence. He must show you that there was this implied warranty, and that relying on such warranty the paint was used on this stamp.

If you find that these goods were damaged by reason of the paint which this defendant furnished be-

ing mixed, after it came into the possession of the plaintiff, so as to leave in skins or any other product in that paint, so that the condition of the paint was different than when it came from the defendant, of course there could be no recovery. If you find, however, that this paint was not fit for the purpose for which it was intended when the defendant furnished it, and that the plaintiff relied upon such an implied warranty, and the goods were spoiled by reason of such defect in the paint, then the plaintiff can recover.

If the plaintiff knew that the goods were being spoiled, if after the first piece was run over this machine they saw that the paint had gone through and saw the condition of those goods, then of course, they had no right to go ahead and spoil other goods if they knew that they were spoiling them. They could not ask damages of the defendant if they knew at the time that the paint would not do what they say the defendant impliedly warranted it would do.

There is some evidence that the paint, in not drying quickly, blurred the cloth. If you find that the paint blurred, and did not go through, and that was the trouble, then you cannot find a verdict for the plaintiff, because that is not what suit is brought for. They especially bring this suit and claim that the paint went through, penetrated the goods and came out on the other side—not that it blurred, not that it didn't dry quickly enough, so that it blurred the trade-mark. That is not what the suit is for: they say the paint was in such condition that it went through these goods and appeared on the right side.

Now, if the plaintiff has established its case by a preponderance of the evidence, then the plaintiff is entitled to recover the amount of money that would

compensate it for the loss which it sustained by reason of this implied warranty, and that you have to determine from the evidence you have heard.

If you find that the plaintiff knew of this condition after it had run off the first piece of goods, of course it cannot ask you to have the defendant respond in damages for something they knew was happening at the time. But if you find, acting in good faith, they discovered after the goods were run off that this damage had been done, and they have established to your satisfaction that there was an implied warranty and that they relied upon that warranty, then they can recover, and you should determine the amount of damages in the way and manner I have indicated.

I have been requested to charge certain principles of law, which I shall dispose of now:

It is an essential element in the plaintiff's case, which must be satisfactorily established by a preponderance of the evidence, that the Cravenette Company in the purchase of the paint and in applying it to stamp the fabrics which it was processing, relied upon the skill and judgment of the Woolsey Company in the belief that the paint was of a quality that would not run through from the back to the face of the goods, or show through to the face of the goods when stamped thereon. In the absence of such evidence, there can be no recovery by the plaintiff.

That is the law and I so charge you.

To entitle the plaintiff to a verdict, it must be satisfactorily established, by a preponderance of the evidence, that the paint supplied by the Woolsey Company was impliedly warranted by that Company to be reasonably fit for the purpose of stamping the fabrics which had been processed so that it would not run through from the back to the face of the goods, or show through to the face

of the goods when stamped thereon by the plaintiff; that said paint was not so reasonably fit, and that such unfitness was the proximate cause of the plaintiff's damage. If any other agency, not controlled by the defendant, intervened between the delivery of the paint to the plaintiff, in the condition in which it then was, which caused the injury to the fabrics of which the plaintiff complains, there can be no recovery by the plaintiff.

I so charge you.

The defendant being a corporation, can be bound only by a representation or warranty made or given in its behalf by a duly authorized executive officer or representative. The burden is upon the plaintiff to establish, by a preponderance of the evidence, that any person purporting to make a representation or warranty in behalf of the defendant corporation, was duly and properly thereunto authorized. In the absence of such proof, the defendant corporation is not affected by such representation or warranty.

That is the law and I so charge you.

"Exhibit P-7."

Madison Square 8162

CRAVENETTE CO., U. S. A.

HOBOKEN — PHILADELPHIA — BOSTON
354 FOURTH AVENUE
New York

August 23, 1921.

Messrs. C. A. Woolsey Paint & Color Co.,
Grand & Mercer Sts.,
Jersey City, N. J.

Dear Sirs:

As a result of our recent trouble with the paint which you supplied to us, and in order to prevent a

recurrence of the same difficulty and annoyance, we are interested to find out the reason why this paint was not as satisfactory as it has been in the past.

One of your men told the writer that you had discovered that there had been a difference in the oils which you used, and we would like to know, so that if a similar trouble arises, we can put our finger on it at once.

Awaiting your reply, we remain,

Very truly yours,

CRAVENETTE CO., U. S. A.,
F. SUNDERMANN.

Dictated to GL
by FS

Exhibit P-8.

August 26th, 1921.

Cravenette Co.,
354 Fourth Ave.,
New York City.

Attention Mr. Sundermann.

Dear Sirs:

We beg to acknowledge receipt of your favor of August 23rd, having reference to the paint we have been supplying you with, especially those lots that were unsatisfactory, and advise that you are correct in that the trouble was caused by a slight difference in the oils used. In the manufacture of this paint there are three kinds of oils used, and we discovered that one of our workmen had neglected

to use the usual quantity of one of the oils that we put in to give this paint quicker drying qualities and make the paint spread more smoothly.

We assume that the last lot of paint sent you was satisfactory and in the future we will see that the error above mentioned does not again occur.

Regretting any annoyance this matter must have caused you, and awaiting the pleasure of your further favors, we remain,

Yours respectfully,

C. A. WOOLSEY PAINT & COLOR CO.,
Export Mgr.

LA/JAJ.

New Jersey Court of Errors and Appeals

IN THE LAST RESORT IN ALL CAUSES.

THE CRAVENETTE COMPANY, U. S. A., Plaintiff-Respondent, v. C. A. WOOLSEY PAINT & COLOR COMPANY, Defendant-Appellant.	Action at Law. On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

This is an appeal from a judgment entered in the Supreme Court, on the verdict of a jury at the Hudson Circuit, for $2,316.15, damages alleged to have been suffered by the plaintiff from the breach of an implied warranty of certain paint sold by the defendant. The complainant (pp. 3-7) alleges that the paint was purchased for the purpose of stamping the plaintiff's name or trade-mark upon cloth in the process of being cravenetted or rubberized; that such paint was required to be of such quality that it would not run through or penetrate from the back to the face of the cloth, or show through on the face; that the defendant had knowledge of the purpose for which the paint was required, and that the plaintiff relied upon its skill and judgment in the preparation of the paint, and the defendant, "by reason of the premises, warranted said special red paint to be of a quality that

would not run through from the back to the face of the goods or show through to the face of the goods when stamped thereon by the plaintiff." The breach of the implied warranty upon which the verdict is predicated is the sale by the defendant of a lot of 10 lbs. of special red paint which when used is said to have destroyed the fabric to which it was applied.

The Facts.

The business relations of the parties began when the predecessor of the plaintiff, the Summit Proofing Company, was conducting a similar business (p. 48, l. 25). As the plaintiff company had been in business fifteen or sixteen years (p. 25, l. 37), the original order antedated that time. Mr. Frank Woolsey, president and manager of the defendant company thus describes the beginning of the relation (p. 48, ll. 30, *et seq.*):

> "Q. And what was that order which was given you originally? A. I don't recall the man's name, but the man who had charge of that business at the time, the manager there, first rang up on the telephone and stated that they were using printers' ink, and that he thought it was possible for paint to be made that could be used for the same purpose, that would cost less money. He came down and we had a talk regarding the matter, and he asked me if I would try to make up something that would answer the purpose. I told him that I had never had any experience making printers' ink but I would do the best I could and send him a sample which he could try out and see if it would meet his approval, which I did, and to the best of my recollection the first

samples we sent him he adopted. I don't remember ever having any conversations with him after that. We simply received orders from him and filled them, to supply material that was the same as the sample which I originally sent him.

Q. So that the formula under which you first made the sample which was submitted to him was followed out in these later years? A. It stood all those years; we supplied the same thing. The formula was never changed, and was never asked to be changed until the complaint came from the Cravenette people. They complained that it didn't dry. That was the complaint as I understood it at the time; that was the only complaint that we ever had."

With the exception of the plaintiff's order, the defendant had never made or been called upon to make a paint which could be used for marking fabrics (p. 49, ll. 33-40). It had no information, judgment, skill or experience in that particular line, never studied the situation at all (p. 50, ll. 1-5).

In addition to paint, the plaintiff purchased from the defendant oil and turpentine, in order that Gould, the plaintiff's workman, might thin down the paint which when delivered was very thick, like putty. It was Gould's judgment that determined when the paint and oil and turpentine were of the proper consistency for use (p. 28, ll. 4-25). Sundermann, plaintiff's general manager, describes the process of marking the cloth (pp. 29-30). The batch of paint which is claimed to have done the damage, as well as two batches delivered shortly before and which were rejected, are stated by him to have been of much thinner consistency than they had been using theretofcre (pp. 30-31).

The earlier batches were tried on samples of cloth, found to strike through, and were returned. Sundermann claims that an employee of the defendant came to plaintiff's plant when the complaint was made of the third batch, mixed the paint, insisted it was then satisfactory, and wanted it tried on some pieces of customer's fabrics. He does not recall whether it was first tried out on samples of cloth to find out if it was right (p. 32, ll. 5, 12). Later he says that although he knew from the appearance that it was like the other stuff that was not satisfactory, and that if the paint did come through a large part of the fabric would be destroyed, and it could have been tested on samples, that was not done (p. 32, ll. 13, 26).

Gould, the plaintiff's workman who marked the fabrics, confirms this. He says the paint when received was of the consistency of putty, and he would use turpentine and oil to make it suitable for his purpose; that he would put the paint in a can and stir in oil and turpentine until it got to the proper consistency (p. 39, ll. 15, 30). He describes his manipulation of the material (pp. 39, 40). The June batch of paint he found much thinner than usual, tried it out on samples of cloth, not on customers' fabrics, found it came through and used no more of that (p. 40, l. 35; p. 41, to l. 12). The second batch of July 20. was found of the same consistency, tried out on samples of cloth and found to come through, and was not used on the customers' cloth (p. 41, ll. 13, 20). The third batch of July 25 (which is stated to have done the damage) he did not try on a sample, saw it looked the same as the rest, and knew it was no use to try it (p. 41, ll. 20, 33). He then tells how the man from Woolsey's mixed up the paint, told him it was all right and to use it, and although he saw

it was like the other paint that had gone through the sample, he did not try it on the samples, but used it on customers' goods (pp. 41, 42). He put the cloth in the machine and went ahead with it, looked at a sample as he ran it, saw that the paint came through and after he found two pieces of the cloth spoiled, kept on, although he could see spots on the back of the cloth just as soon as he looked at it (pp. 42, 43). His examination then proceeds:

"Q. Why didn't you stop the press right away? A. We did stop it, and he mixed the paint again.

Q. I understand you did, but you stopped it after you had run through two pieces. Why didn't you look at the first piece you took off? A. We looked at it.

Q. And saw that it had come through? A. Yes, sir.

Q. Then you ran through another piece? A. He put different paint in it.

Q. I understood you to say you tried two pieces? A. The first mix, yes. On the second mix we tried quite a few, I don't know how many pieces.

Q. You tried first one piece after the mixture had been made by this man from the Woolsey factory, and when you took that piece off the machine you saw that the mark had come through? A. Two pieces.

Q. You did not take off two pieces at once, did you? A. Yes, sir, that is all together, the whole batch.

Q. Wasn't it possible after the machine had made one or two revolutions to look at the fabric and see how it was coming through? A. Well, after it lays a while that is the time it comes through; first you only see portions.

Q. But even those portions indicated it was coming through? A. Yes, sir.

Q. And you knew that if it came through it would spoil the goods? A. I was getting orders to go ahead with the cloth.

Q. But you were not getting orders from your employer to spoil goods? A. I was getting orders from the mixer, he was telling me he knew how to mix paint.

Q. But you knew when you saw those marks coming through the fabric that it was wrong, didn't you? A. I knew that the mixture was wrong, and he said he would make it thicker.

Q. Then you started in and used it on some more pieces? A. Yes, sir.

Q. Now, how many mixtures did you try all told? A. I don't remember how many batches.

Q. As I understand from the testimony that has gone before, there were about eleven more pieces went through? A. Yes, but not all in that next mixture.

Q. When were those put on? A. We mixed after that again.

Q. You found after you took off a piece that every one of the mixtures was going through the fabric and spoiling the fabric, and you still went on and tried it on other commercial fabric? A. Yes, sir.

Q. You did not try it on any samples? A. No, sir."

The testimony of John M. Van Derwyck (pp. 52, 57) and of Asher J. Cohen (pp. 57-61), the only two "men from Woolsey's" who visited the plaintiff's plant around the time in question, is in direct denial of having ever mixed paint for the plaintiff's workman, or given directions as to the operation of the stamping machine. But on this ap-

peal, where the weight of testimony is not considered, their denial does not seem of present importance.

I. The elements from which a warranty will be implied are wholly lacking.

Our statute covering the subject is as follows:

> "15. *Implied warranty as to quality and fitness:* Subject to the provisions of this act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> *Seller's knowledge of purpose and reliance thereon:* (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."
>
> *4 Comp. Stat.*, 4650, 1, Sec. 15.

It is an essential factor in raising an implied warranty that the buyer shall have relied on the seller's skill and judgment. Such is the literal requirement of the statute.

> "In order to bring a case within the purview of this subdivision two things must appear; first, that the seller was informed, expressly or by implication, of the purpose for which the goods were purchased; and, second, that the buyer relied on the seller's skill and judgment."
>
> *Uniform Laws Annotated—Sales Act* (*Ed. Thompson Co.*), page 66.

The case is barren of evidence that the plaintiff relied upon the defendant's skill or judgment. Mr. Sundermann, the plaintiff's general manager, was interrogated on this point by his counsel, but the questions were, on objection, excluded (pp. 21, 22). When the plaintiff rested its case there was no testimony from which it could be inferred that reliance was had by the plaintiff, in making the purchase, on the skill and judgment of the defendant.

On the defense, Mr. Frank Woolsey testified (pp. 48, 49) that he took the original order from the Summit Proofing Company, the predecessor of the plaintiff corporation; that the man ordering the paint stated that they were using printers' ink, and thought it would cost less money to use paint; that witness (p. 49, ll. 4, 8) "told him I had never had any experience making printer's ink, but I would do the best I could and send him a sample which he could try out and see if it would meet his approval, which I did, and to the best of my recollection the first samples we sent him he adopted" (p. 49, ll. 35, 41); that he had never made, or been called upon to make, a paint which could be used for marking fabrics (p. 50, ll. 3, 6); that he had no information, or judgment, or skill, or experience in that particular line, never studied the situation at all.

The mere sale raises no presumption that the purchaser relied on the seller's skill and judgment.

> (Syllabus) "Where the plaintiff sold clothing to the defendant for his wife, the mere purchase was insufficient to raise a presumption that defendant relied on plaintiff's skill or judgment, or that of his salesman, and in the absence of proof that defendant notified plaintiff of the particular purpose for which

the goods were required, and that he relied on plaintiff's skill and judgment, there was no implied warranty which survived acceptance that the goods were reasonably fit to wear under 'Sales of Goods Act.'"

Bonwit v. *Kinlen,* 150N. Y. Sup., 966 (1914), Dowling, J.

(Syllabus) "To bring a case within Personal Property Laws (Laws, 1911, C. 571) Sec. 9, Subd. 1, providing that where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods were required, and the buyer relied on the seller's skill and judgment, there is an implied warranty that the goods are reasonably fit for the purpose, it must appear that the seller was informed, expressly or by implication, of the purpose for which the goods are purchased, and that the buyer relied on the seller's skill and judgment; and where a buyer of leather to be used in making shoes had as wide an experience and knowledge as the seller's salesman, knowing the purpose of the buyer, there was no implied warranty."

Wasserstrom v. *Cohen,* 150 N. Y. Sup., 638 (1914), Scott, J.

See also

Eichler v. *Kahnweiler* (1919), 178 N. Y. Sup., 257;

Williston on Sales, 2d Ed., Sec. 231, p. 446.

II. No statement or action of an employee of the defendant, after the sale was completed by delivery of the goods, could enlarge the defendant's liability; nor is such enlargement set up in the complaint.

It is evident that the implied warranty must arise out of the circumstances of the sale itself. The complaint alleges (p. 3, ll. 38, *et seq.*) that the defendant "warranted said special red paint to be of a quality that would not run through from the back to the face of goods, or show through to the face of goods when stamped thereon by plaintiff." It sets up no claim to liability of the defendant because its employee meddled in the plaintiff's business and directed it to use the paint after he had mixed it. There is nothing in the testimony to indicate that the man from the Woolsey Company who is alleged to have visited the plaintiff's plant had any authority to make any representations or warranty in behalf of the defendant. In fact he is not alleged to have given a warranty. He appears to have been a bad adviser, a meddler, dealing with the plaintiff's workman Gould, who, if his own account of his actions is to be credited, was entirely lacking in plain, ordinary common sense.

III. The loss was not occasioned by any defect in the material sold, but through the negligent action of the plaintiff's employee.

The substance which damaged the cloth in process of being cravenetted was not the material sold by the defendant in the condition in which it was

sold. The plaintiff's workman Gould (p. 39, ll. 16, *et seq.*) took the paint, of the consistency of putty when delivered, and stirred it up in a can with turpentine and oil until it reached a consistency which he thought suitable for his purpose. After this he would (p. 40, ll. 26, *et seq.*) put it in a pan in the machine underneath the rollers, and replenish the supply as needed. He describes trying out the earlier rejected batches upon samples (pp. 41, 42, 43), and the use of the shipment of July 25th upon the customer's fabrics, without preliminary testing upon samples.

If it were possible to imply as against the defendant the warranty charged in the complaint, viz., that the paint would not run through from the back to the face of the goods, there is no evidence of a breach. No use was made of the substance as delivered. It was combined by the plaintiff's workman with other materials, and the proof of the injury to the fabric to which it was applied is directed exclusively to the effect produced by the mixture made up by plaintiff's agent. There is no breach shown of the warranty alleged.

IV. It was error to deny defendant's motion for a non-suit.

If our argument under Point I is sound, the essential elements to raise an implied warranty had not been proved when the plaintiff rested. On the contrary, it appeared from the plaintiff's witnesses that the injury to the cloth to which the plaintiff had applied its stamp, was occasioned by the stupidity and negligence of its own workman to whom it had committed the office of making a mixture of paint, oil and turpentine of a consistency suitable for using upon the stamping machine.

V. It was error to deny defendant's motion for direction of a verdict.

The evidence of Mr. Woolsey, for the defendant, showed affirmatively that the plaintiff could not have relied on the defendant's skill and judgment in making the sale of paint. Not only was no representation or warranty made, but this order of paint for the plaintiff was defendant's sole experience with the use of paint, in lieu of printer's ink, for marking fabrics. This was made known to the representative of the Summit Proofing Company, the plaintiff's predecessor, when the order was first taken. No subsequent change in the relation of the parties is shown or alleged. The defendant had no skill or judgment about the business in question, to the knowledge of the plaintiff.

The judgment below should be reversed.

CHARLES L. CARRICK,
of Counsel with Appellant.

New Jersey Court of Errors and Appeals.

THE CRAVENETTE COMPANY, U. S. A., *Plaintiff-Respondent,* *vs.* C. A. WOOLSEY PAINT & COLOR COMPANY, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF OF RESPONDENT, THE CRAVENETTE COMPANY, U. S. A.

The facts in this case are simple and easy of statement, and the points raised by the appeal are only two in number.

It has been stipulated (p. 47) that if the court shall find the appellant, Woolsey Paint & Color Company, is liable in damages to the respondent, Cravenette Company, in any sum whatsoever, that amount shall be the sum of $2,316.15, besides interest and costs (the amount of the verdict), being the amount Cravenette Company paid to the New York Mackintosh Company and the Peerless System.

The only grounds of appeal (p. 1) are that the appellant's motion for non-suit and for a direction of a verdict in favor of the appellant were denied by the trial court.

It is conceded by appellant's own witnesses and by its letter to the respondent (Exhibit P-8, p. 69) that the trouble with the paint supplied the respondent which injured the cloth in question and caused the damage for which the verdict was given was caused by the neglect of one of appellant's workmen in mixing the oils in the paint in question.

There is abundant proof that the appellant was familiar with the fact that the particular lot of paint (referred to as the *third* batch of 10 pounds of red paint), which destroyed the goods in question, was purchased for the purpose of stamping respondent's trademark on the goods in question.

Respondent's contention is that directly, or, by implication, appellant knew the particular purpose for which the paint purchased was required, and that the respondent relied on the seller's skill or judgment that the paint was reasonably fit for such purpose, and that there was evidence upon which the Jury could properly base its verdict in favor of the respondent, and that under the settled rules of this court, the judgment below should therefore not be set aside.

The Facts.

The original order for paint was given to the appellant, Woolsey Paint & Color Company, many years prior to 1921 by the Summit Proofing Company, the predecessor of the respondent, Cravenette Company (p. 48).

Mr. Woolsey, President and Manager of the appellant and connected with the Company for 55 years testified (p. 48, l. 31) that the original order was given to him; that the Manager of the Company at that time telephoned him (Woolsey) and stated they were using printer's ink and that he thought it would be possible for paint to be made that could be used for the *same purpose*, that would cost less; and *he came down and had a talk with Mr. Woolsey regarding the matter and asked Mr. Woolsey if he would try to make up something that would answer the purpose; that thereupon Mr. Woolsey made up and submitted a sample which was adopted, and thereafter received orders to supply material that was the same as the sample* (p. 49), that the respondent later claimed that the paint did not dry quickly enough; that he understood that the respondent, Cravenette Company, was engaged in waterproofing coats and things of that sort as was its predecesssor, Summit Proofing Company.

Mr. Sundermann, who was connected with the business for fifteen years and was General Manager and Superintendent of the factory of the respondent, Cravenette Company about five years, (p. 25) testified that "Cravenetting" is a process by which goods are made water repellent (p. 12) and takes about a day for the actual chemical treatment of the fabric (p. 26), and that after that process is completed, the goods are run through the machine for stamping the name of the Cravenette Company on the fabric; that the machine stamped approxi-

mately *fifty yards of fabric a minute* (p. 12, l. 32); *that the respondent, Cravenette Company, had purchased paints from the appellant, Woolsey Paint Company, for a number of years for the purpose of stamping the former's trademark on the fabric and the paint had been satisfactory until the Summer of 1920 (p. 13); that the appellant, Woolsey Paint Company, in making this correction, sent someone to the factory of the respondent, Cravenette Company, to examine this process* (p. 13, l. 3).

Thereafter, on or about June 25, 1921, respondent, Cravenette Company, purchased of appellant, 50 pounds of unfading red paint, special in oil, and paid for the same (p. 13, l. 25). This paint appeared to be different from the paint that was satisfactory and thereupon Mr. Sundermann reported that fact to the appellant (p. 14). Mr. Sundermann telephoned to the appellant, Woolsey Paint Company and explained that they found that they could not use the paint for the purpose for which it was intended and further testified (p. 14, l 27):

> "Q. Just state the conversation. A. Why, I explained that the paint was very liquid, whereas the paint we had heretofore received and which was satisfactory was thick; *and that in applying this paint to some samples of cloth we found it penetrated the cloth.*"

Sundermann made further complaints, and testified that they were not able to do anything with the red paint, and that finally the appellant, Woolsey Paint Company, about July 20, 1921, sent another lot of 50 pounds of special red paint (p. 15, l. 10); that he personally examined this *second lot of special red paint* and that it was liquid instead of being putty-like, like the previous paint had been, and again reported the situation to the appellant, Woolsey Paint Company (p. 15, l. 19):

"Q. What did you do then? A. Reported the matter to the Woolsey Company again and told them we were unable to use this paint and would like to know the reason." (p. 15, l. 29).

After this second complaint, the appellant told Sundermann that they would prepare another lot of paint, which they did (p. 16) and on or about July 25, 1921, delivered to the respondent, Cravenette Company, a *third batch of 10 pounds of red paint.* The appellant, Woolsey Paint Company, sent a man to the factory of the respondent, Cravenette Company, and Sundermann testified at page 17:

"Q. Did you have a further conversation with him in regard to making a paint that would be satisfactory? A. We asked him what he thought was the matter with the paint, that it was coming through and causing so much trouble, and that previous to this the paint had been satisfactory, and he told me that the man who had been mixing this paint was no longer with the company, and the new man had perhaps put in wrong oils.

"Q. When he said that, do you know to what paint particularly he was referring? A. I believe he was referring to the three lots of red paint we had received up to that time.

"Q. While he was there, were there any goods run through the stamping machine? A. Yes.

"Q. What goods were they? A. There were some pieces delivered to us by the New York Mackintosh Company, and a piece delivered by the Peerless Coat Company.

"Q. Under whose directions were those goods run through the stamping machine? A. Mr. Gould was the operator of the machine.

"Q. *And who was giving him directions?* A. *This man from the paint company.*

"Q. What talk did you personally have with him as to whether or not this paint would or would not spoil the goods? A. He was the man who had been telling us what was the matter with the oils, why it would not work satisfactorily. *He stated that the man who mixed it was no longer with the company, and the new man may have used the wrong oil.*"

Mr. Sundermann, commencing at page 18, identifies the identical pieces of fabric which were spoiled by the paint in question, and that a subsequent delivery of 25 pounds of paint was returned to the appellant, Woolsey Paint Company, and that he wrote them a letter (Exhibit P-7, p. 68), as follows:—

"August 23, 1921

Messrs. C. A. Woolsey Paint & Color Co.,
Grand & Mercer Sts.,
Jersey City, N. J.

Dear sirs:

As a result of our recent trouble with the paint which you supplied to us, and in order to prevent a recurrence of the same difficulty and annoyance, we are interested to find out the reason why this paint was not as satisfactory as it has been in the past.

One of your men told the writer that you had discovered that there had been a difference in the oils which you had used, and we would like to know, so that if a similiar trouble arises, we can put our finger on it at once.

Awaiting your reply, we remain,

Very truly yours,
CRAVENETTE Co., U. S. A.,
F. SUNDERMANN."

Dictated to GL
by FS

To this letter, Mr. Sundermann received the following reply (Exhibit P-8, p. 69):

"August 26th, 1921.

Cravenette Co.,
354 Fourth Ave.,
New York City.
Attention Mr Sundermann.

Dear sirs:

We beg to acknowledge receipt of your favor of August 23rd, having reference to the paint we have been supplying you with, especially those lots that were unsatisfactory, and advise that you are correct in that the trouble was caused by a slight difference in the oils used. In the manufacture of this paint there are three kinds of oils used, *and we discovered that one of our workmen had neglected to use the usual quantity of one of the oils that we put in to give this paint quicker drying qualities and make the paint spread more smoothly.*

We assume that the last lot of paint sent you was satisfactory and in the future we will see that the error above mentioned does not again occur.

Regretting any annoyance this matter must have caused you, and awaiting the pleasure of your further favors, we remain,

C. A. Woolsey Paint & Color Co.,
Export Mgr.
Yours respectfully,"

LA/JAJ.

Mr. Sundermann on cross-examination (p. 30), repeated that after finding that the *first* batch of paint was unsatisfactory, he reported it to the appellant, Woolsey Paint Company (p. 31, l. 7). and that the *third* batch of paint (which admittedly ruined the goods for which damages were awarded by the judgment) were used only when the representative of the appellant, Woolsey Paint Company, had prepared it (p. 31) and *that the*

representative of that Company mixed the paint and insisted that the paint was satisfactory after he had prepared it, and stated that it was all right and thereupon it was tried, and that it was at the time that this technical man from the appellant, Woolsey Paint Company, was there in the factory of the Cravenette Company, that the pieces of fabric complained about were marked (p. 32, l. 25); that the process of stamping was the same during the period (p. 34, l. 1) and that there was no difference in the printing or proofing during the period that the trouble arose with the red paint, and that during the period of the trouble in question they stamped satisfactorily other materials with yellow paint furnished by the appellant, Woolsey Paint Company. (p. 35).

Daniel Gould, who operated the stamping machine in the Summer of 1921 for the respondent, Cravenette Company, and for about 3½ years before that, testified with reference to the third lot of ten pounds of red paint which injured the goods for which damages were awarded in this case, that he examined this lot of 10 pounds, that it was thin like the other paint and reported it to Mr. Sundermann, and that after that someone came up from the Woolsey factory (pp. 35-36) continued at page 37, l. 11:

"Q. Is that gentleman in court? A. I could not say.

"Q. Did you have a talk with him? A. Only about mixing the paint. He mixed the paint for me and he said, 'How do you like that?' I said it looked pretty thin. He said, 'No, I know how to mix paint; go ahead and try it.' I put it in the machine and ran it, and it started to spot through, and I showed it to him and he said, 'I will mix it up different, make it a little thicker.' He mixed it a little thicker, and I started running it again, and it went through a few

more pieces. He mixed it again and I started running again, and it was all stamped through the goods.

"Q. What batch was that? A. A batch of the New York Mackintosh, and one piece of the Peerless.

"Q. How do you know it was New York Mackintosh goods? A. Every piece is numbered; like New York Mackintosh has number 104; that shows those goods belong to the New York Mackintosh.

"Q. Before you ran the New York Mackintosh and the Peerless lot, I want you to tell us the whole talk you had with this fellow from the Woolsey Paint Company. A. Why, I just talked about mixing the paint. I showed him a batch of yellow paint I had. The batch of yellow paint was in a big round tub, and it was like putty, and I showed him how I mixed a batch of yellow paint, which was all right. Then I told him about this paint being so thin, and he said, 'All right, I will fix it.' He fixed a batch of red paint, and I explained to him that I was afraid it was going through, that I never made it so thin. He said. 'No, it is all right, go ahead and use it.' That is why I went ahead and used it.

"Q. After he told you, 'Go ahead and use it.' you ran off the Peerless and the Mackintosh batch? A. I ran off one batch on the machine.

"Q. Did you tell him why the red paint was not satisfactory? A. I told him why it was no good.

"Q. Did he say anything to you after that as to why he thought it was unsatisfactory? A. Yes, I asked him why it was we were having trouble like this, and he told me he imagined the oil in the paint was not any good. *He said he heard they got stuck with some bum oil, and he said, furthermore, there was another mixer in the Woolsey Paint Company. He said they had a fellow that worked for them a good many years, but he was out of there now.*"

On cross-examination Gould reiterated his direct testimony and testified at p. 41, l. 21, that he did not try the *third* batch of paint (*which is the batch that did the damage in question*) even on a sample, as it looked like the rest and he knew it was no use; that the man from Woolsey's mixed the paint up for him and told him to go ahead, that the paint was all right (p. 42, l. 3); that he was the mixer from Woolsey's and he went ahead with the paint, that he mixed the paint and gave the paint to Gould and told him (Gould) that it was all right, and not until then did Gould run the machine, that the mixer told him (Gould) to put it in the machine and go ahead and he did (p. 42), that it was not possible after the machine had made one or two revolutions to look at the fabric and see the paint coming through (as it comes through only after it lays for awhile (p. 43, l. 32); that he (Gould) was taking his orders from the mixer from Woolsey's and he was telling him (Gould) how to mix the paint (p. 44).

The witness, Johnson, examined on behalf of appellant, Woolsey Paint Company, corroborated Mr. Sundermann's testimony (p. 50). Johnson was Export Manager in the Summer of 1921 when the trouble occurred, and wrote and signed the letter of that Company to the respondent, Cravenette Company, quoted above, "Exhibit P-8".

Johnson testified that prior to Mr. Sundermann's letter of August 23rd, 1921, to the appellant, Woolsey Paint & Color Company, "Exhibit P-7", *someone had telephoned him after the first lot of paint was delivered, and complained that it would not dry* (p. 51), that after the talk with him, Sundermann decided to try the same paint again and, for some few days, they didn't hear anything from Sundermann (p. 51, l. 27). That when he (Sundermann) called up the next time,

he said again that the paint would not dry, and that he (Sundermann) would like another lot of paint sent, that Sundermann's complaint was that it would not dry and that he (Johnston) was led to believe that there was some more dryer put in it to overcome the complaint; that he had been with the Woolsey Paint Company about 19 years and knew that orders were received and filled for paint.

John M. Van Derwyk, a witness on behalf of appellant, Woolsey Paint Company, (p. 52) testified (p. 53), that he went to the factory of the respondent, Cravenette Company, on *three* occasions; that the first occasion he went was after he got a complaint through the office that thirteen rolls of cloth had been destroyed, and he went over to see what the trouble was and took the company's chemist, Mr. Cohen, with him; that he believes he met Mr. Sundermann, who showed him the goods that had been destroyed, the impressions in the cloth and where the paint had come through, and that he took a piece of the cloth back and tried to find something to remove the spots but without success (p. 53, l. 32); that the second time he went to the Cravenette Company's plant, he took the material back and showed him (Sundermann) what he had done, without success, and told him (Sundermann) that he could not do anything further with it, and that he could not remove the paint marks (p. 54). The second visit was a couple of days after the first visit (p. 55, l. 8) and on the second visit, he saw Mr. Sundermann, showed him the cloth and stated that the paint would not come out, in fact, only made the job worse by trying to use solvents on it; that the press was running on the occasion of his second visit to the Cravenette Company's factory.

"Q Tell us what happened on that second occasion—first, how long was that after the first visit? A. I should imagine a couple of days; I could not say exactly, but when we went back there we saw Mr. Sundermann, showed him the cloth and stated that the paint would not come out, in fact only made the job worse by trying to use solvents on it. I believe the press was running that day and they were using yellow paint at the time which we furnished them, and with which they had success.

"Q. Did you go down to where the press was running at the time? A. I was right on that floor, yes, sir.

"Q. Did you see the press running? A. I did.

"Q. Was it running with red paint? A. No, they were using the yellow paint.

"Did they run any yellow paint while you were there? A. No, sir."

Again referring to his second visit to the factory, he testified (p. 56) that he did not see any cloth being run through at that time which was claimed to be spoiled; that they were operating with yellow.

He further testified at page 57, that he had been with the Woolsey Paint Company for twenty years, that he knew the Summit Proofing Company and knew what a Cravenette coat was, and that that Company waterproofs coats.

Asher Z. Cohen, a witness on behalf of the appellant, Woolsey Paint Company, testified that he was employed as chemist by that Company during the Summer of 1921 (p. 57,) and that he knew of the complaint made by Cravenette Company in regard to the red paint, and that he went over to the factory of the Cravenette Company with Mr. Van Derwyk and was introduced to Mr. Sundermann and tried to remove the paint from the cloth, but was not successful, and took a piece of the cloth back in the hope of finding

better success in the laboratory (p. 58, l. 20), that he went back a second time and showed the result to Mr. Sundermann (p. 59, l. 8) and testified (p. 59, l. 24):

> "Q. Do you know what was being run on the press? Was it red paint? A. No, sir, the red paint was not run at that time, *they didn't want to run any red paint on account of the trouble with the paint going through.*"

Mr Cohen testified at page 60, that he recalled the complaint made in the latter part of July, 1921, that Mr. Johnson had told him that the complaint was that the paint would not dry (p. 60, l. 16), that all complaints were referred to him, that this particular complaint was referred to him by Mr. Johnson (p. 60, l. 31).

Argument.

The rule as to the circumstances under which an implied warranty exists is clearly expressed in the provisions of the statute of this State quoted and decisions, some of which are cited herein. The question under consideration therefore is simply whether an implied warranty is raised under the particular circumstances of the case under consideration.

I.

There is an implied warranty that the 10 pounds of red paint (which admittedly injured the goods in question) were reasonably fit to stamp Respondent's trade name on said goods.

The New Jersey statute in question is, "*An act concerning the sales of goods and to make uniform the law relating thereto*" (4 Comp. Stat, p. 4647. At p. 4650, it provides:

> "15. *Implied warranty as to quality and fitness.*—Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> "*Seller's knowledge of purpose and reliance thereon.*—(1) Where the buyer, expressly or by *implication,* makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The courts of this State and the Federal courts have dealt with this question in numerous decisions.

Berg vs. Rapid Motor Vehicle Company, 78 N. J. L. 724 (decided February 28th, 1910). The opinion of the Court of Errors was delivered by Mr. Justice Minturn. The opinion states that the result of the correspondence between the par-

ties was a proposition from the defendant that it would manufacture a certain model automobile, and guarantee it for one year. The car was delivered and did not "stand up." The correspondence indicated that the plaintiff was depending on the defendant to supply him with an article to enable him to successfully prosecute the business he was about to undertake.

The opinion at the bottom of page 726, cites *Jones v. Bright,* 5 Bing, 533, where it was *held* that a manufacturer or maker who undertakes to supply an article for a particular purpose, warrants it to be reasonably fit for that purpose; and continues at the top of page 727:

> "And the reason for the existence of the warranty thus implied is that the purchaser must rely upon the judgment and skill of the vendor. This doctrine has been held to apply, whether the subject of the contract is already manufactured and in stock, or is to be made on the purchaser's order. *George v. Skivington, L. R.,* 5 Ex. 1; *Behn v. Burness,* 6 Eng. Rul. Cas. 492; *Curtis & Co. Manufacturing Co. v. Williams,* 48 Ark. 325; *Blackmar v. Fairbanks,* 70 Iowa, 282; *Kellogg Bridge Co. v. Hamilton,* 110 U. S. 108; *Dushane v. Benedict,* 120 Id. 630; *Seits v. Brewers Machine Co.* 141 Id. 510."

Stuart v. Burlington County Farmers' Exchange, 90 N. J. L. 584 (decided June 18th, 1917). The opinion of the Court of Errors was delivered by Mr. Justice Parker.

Plaintiff, a farmer, contracted to purchase fertilizer called "crude fish", upon the representation that it was specially good for raising sweet corn. The crop failed and he brought suit for damages and recovered judgment. It was argued that it was error to permit the plaintiff to testify to a conversation with Mr. Embree, the manager

of the defendant, *after* his crop failed, wherein plaintiff complained that the fertilizer was not as represented, and the manager said: "we stand behind what we sell." The opinion continues at page 585:

> "There is no doubt of the competency of statements by Embree, as manager, that were relevant to the issue. *Agricultural Insurance Co. vs. Potts,* 55 N. J. L. 158; *Smith v. Telephone Co.* 64 N. J. Eq. 770; *Carey vs. Wolff & Co.,* 72 N. J. L. 510; *Bridgeton v. Fidelity Company,* 88 Id. 645."

Judgment below affirmed.

Spencer Heater Company, vs. Randolph Abbott, etc., 91 N. J. L. 594, (decided June 19, 1918). Mr. Justice Trenchard delivered the opinion of the Court of Errors.

The opinion states at p. 596 that the evidence tended to show that what occurred was that *after receiving the order* for the steam heat in question, the plaintiff sent its *salesman* to defendant's place, and the *salesman* took measurements and told defendant that a Number 11 and Number 12 would supply the heat required, and agreed to furnish them.

The opinion continues at page 596:

> "A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not. *Wolcott v. Mount,* 38 N. J. L. 496. *Tested by that rule, it was open to the jury to find (as they did) that the plaintiff warranted the heaters to do the work the defendant required.*

"The plaintiff, however, contends that its salesman had no authority to warrant the heaters. In view of the evidence, we doubt if there is any merit in this contention. But whether so or not is immaterial. A principal may ratify his agent's unauthorized warranty, and if, with full knowledge of all the facts and circumstances attending the transaction, he does so, he is bound thereby. *Gulick vs. Grover,* 33 N. J. L. 463. In the present case, the evidence tends to show that *after* the heaters furnished had failed to do the work, the facts and circumstances were brought to the attention of the manager of the plaintiff, who had ample authority. He acknowledged that the trouble was due to the mistake of their agent, offered to pay the expense of a temporary maskeshift, proceeded to install adequate heaters, and all without any repudiation of the acts of their salesman.

"We think, therefore, that the motion for a direction was properly denied."

Kellogg Bridge Company vs. Hamilton, 110 U. S. 108, 28 L. Ed. 86. The opinion says:

"So, in *Leopold-Vankirk,* 27 Wis. 152, 'The general rule of law with respect to implied warranty is well settled, that when the manufacturer of an article sells it for a *particular purpose,* the purchaser, making known to him at the time the purpose for which he is buying it, the seller thereby warrants it fit, and proper for such purpose and free from latent defects.' So, also, in *Brenton vs. Davis,* 8 Blackf. 318: 'We consider the law to be settled that if a manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose; and that if owing to some defect in the article, not visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on

his implied warranty.' 2 Story Cont., Sec. 1077, 5th Ed., by Bigelow; 1 Chit. Cont., 11th A. M. eb., 631-2, Note, M; A. D. Cont., Ch. 7 Sec. 1, p. 212."

In Williston on Sales, 2nd. Edition, Vol. 1, Section 235, at p. 459, in discussing implied warranties of fitness, the statement is made:

"The manufacturer, and in some jurisdictions, the dealer, is held to warrant not simply that the goods he sells are fit for the general purpose for which they are manufactured or usually sold, but are fit also for some *special purpose* of the buyer's which will not be satisfied by mere fitness for the general purpose goods of that sort fulfill."

In *Ideal Heater Co. vs. Kramer,* 127 Iowa, 137, 102 N. W. 840, a heating plant was purchased for a particular building, and it was *held* impliedly warranted to heat the building; and that it was not enough that a merchantable and workmanlike plant was furnished which might have heated satisfactorily some other buildings.

Cleveland Linseed Oil Co. v. Buchanan, 120 Fed. 906 (C. C. A. 2nd. Circuit, Jan. 8, 1903). Opinion by Circuit Judge Townsend. The plaintiff purchased quantities of oil from the defendant which were satisfactory in use. The last time the plaintiff gave an order for two tank cars of the same oil as it had before, which proved of inferior quality, not fit for plaintiff's use, and a large loss resulted and it was *held* that there was an implied warranty by the defendant that such oil was of the same quality as that previously furnished the plaintiff and fit for the purpose for which the defendant knew it was to be used.

The opinion states that the defendant's agent stated to the plaintiff that the oil was adapted for the elimination of an objectionable product known

as "foots", and a sample was tested and the agent stated that the oil would be satisfactory to manufacture table cloth and it so proved. Thereafter, plaintiff gave another order and continued to use defendant's oil for six or seven months before the two tank cars of oil in question were delivered. By reason of the defect in the oil, the cloths were so damaged that the plaintiff was obliged to sell them at public auction and sued for the difference between the price thus obtained and the fair market value.

The opinion contains a very full discussion of the subject with long citation of authorities, including *Kellogg Bridge Co. vs. Hamilton,* 110 U. S. 108, 28 Law Ed. 86, supra.

An extensive note on this subject will be found on page 856, Vol. 15 L. R. A. N. S.

It is uncontroverted that the particular purcase of red paint that injured the goods for which damages were awarded to the respondent by the verdict, is the 10 pounds of paint sold and delivered to the respondent by the appellant on or about July 25th, 1921, and referred to as the "third batch" (pp. 16, l. 11, p. 18, l. 22, p. 31, l. 27, p. 36, l. 38, p. 37, l. 26—Stipulation, p. 47).

The communications between the respondent and the appellant prior to the receipt and use of this "third batch" of 10 pounds of paint which did the damage, are such as to leave no doubt that the appellant, Woolsey Paint Company, knew from the respondent expressly or by implication that this particular batch of 10 pounds of red paint was to be used for the purpose of stamping respondent's name upon the fabrics in question, and that the respondent relied on the appellant's skill and judgment in the preparation of the paint.

The proof is uncontradicted that many years prior to 1921, Mr. Woolsey was requested to make up something that would answer the purposes of the respondent or its predecessor; that Mr. Woolsey did make up and submit a sample which was adopted, and thereafter numerous repeat orders for the same material as the sample were filled by the appellant (pp. 49, 12, 13). The paint supplied was satisfactory until the Summer of 1920 (p. 13, l. 3). and in order to correct the paint, *the appellant sent someone to the respondent's factory to examine the process* (p. 13, l. 3); the paint thereafter supplied apparently was satisfactory, for no complaints were made, until the lot of 50 pounds delivered on or about June 25, 1921. It will be noted that this is referred to as "unfading red paint, special in oil" and is referred to in the record as the "first batch" (p. 13, l. 15). This paint was found unsatisfactory and Mr. Sundermann, respondent's Superintendent, reported that fact to the appellant (p. 14, l. 21) and explained that it penetrated the cloth (p. 14, ll. 27-32). After this complaint, appellant sent respondent another lot of 50 pounds of special red paint on or about July 20, 1921, which is referred to in the record as the "second batch". This was unsatisfactory, and Mr. Sundermann again reported that fact to the appellant and stated he would like to know the reason why it was wrong. (p. 15, ll. 9-32). On or about July 25, 1921, appellant delivered to respondent a "third batch" of 10 pounds and sent a man the factory of respondent, who personally mixed this paint and said that it was all right, and directed that it be applied in the machine to the goods in question which were injured (pp. 17, 18, 37, l. 11, p. 41, l. 21, p. 42, l. 3).

It will be noted that the machines stamped ap-

proximately 50 yards of fabric a minute (p. 12, ll. 32-38) and that the paint comes through the fabric only after it lays for awhile (p. 43, ll. 32-36), so that it was impossible to detect the damage instantly and stop the machine from doing any further damage to the goods.

It is uncontradicted that the appellant got stuck with some "bum oil", and that the fellow that mixed for them for a good many years had left them (p. 38, l. 18) and that in appellant's letter to respondent, referring to the damage done by this paint (Exhibit P-8, p. 69), the appellant stated that they had discovered one of their men neglected to use the usual quantity of one of the oils that they put in to give this paint quicker drying qualities and make the paint spread more readily.

When the damage to the goods in question was brought to the attention of the appellant, it evidently realized its responsibility and sent its export manager and chemist to the factory of the respondent on several occasions to investigate the matter and to endeavor to clean and restore the damaged material (pp. 51-55).

The actions of Mr. Sundermann prove conclusively that the respondent had no knowledge of the manufacture of paint and relied on the appellant's judgment and skill in that respect; each time that the paint was improper and came through on the goods, he reported that fact to the respondent and wanted to know what the trouble was and in his letter to them after the trouble was all over (Exhibit P-7, p. 68), he says in part:

> "As a result of our recent trouble with the paint that you supplied us, and in order to prevent a recurrence of the same difficulty and annoyance, we are interested to find out the reason why this paint was not as satisfactory as it has been in the past."

Counsel for appellant argues at page 10 of his brief that no statement or action of an employee of the defendant after the sale was completed by delivery of the goods, could enlarge the defendant's liability. No authorities are cited to support this point. There are opinions in this State whch directly oppose this argument.

In the case of *Stewart vs. Burlington County Farmers' Exchange,* 90 N. J. L. p. 584, a case somewhat similiar with the one under discussion, it was argued that it is error to permit the plaintiff to testify to a conversation with Mr. Embree, the manager of the defendant, *after* his crop had failed. The opinion states at page 586:

> "There is no doubt of the competency of the statements by Embree, as manager, that were relevant to the issue". (Numerous cases cited.

And likewise in the case of *Spencer Heater Company vs. Randolph Abbott*, 91 N. J. L. 594, the opinion states at page 596:

> "In the present case, the evidence tends to show that *after* the heaters furnished had failed to do the work, the facts and circumstances were brought to the attention of the manager of the plaintiff, who had ample authority. He asknowledged that the trouble was due to the mistake of their agent, offered to pay the expense of a temporary makeshift, proceeded to instal adequate heaters and all without any repudiation of the acts of their salesman.
>
> "We think, therefore, that the motion for a direction was properly denied."

It is therefore respectfully submitted that the loss was occasioned by the defective "third batch" of 10 pounds of red paint delivered on or about July 25, 1921, and applied under the direct su-

provision of the representative of the appellant, and that the loss was not occasioned through any negligent action of the respondent's employee, as argued by counsel for appellant under Point 3, on page 10 of his brief.

II.

The judgment below should be affirmed.

It is respectfully submitted that it has been demonstrated in this brief that there was testimony in the case upon which the verdict of the Jury could properly be based. Some of the testimony was in conflict. It cannot be said, nor does counsel for appellant argue, that the verdict indicates mistake, prejudice, partiality or passion.

Under the established rule in this State, the verdict should not be disturbed on appeal under these circumstances.

Hann v. Rockwood Sprinkler Co., 88 N. J. L. 564;
Imbeninato v. Mendl, 92 N. J. L. 516;
Henny v. Public Service R. Co., 2 N. J. Mis. R. 396;
Cohen v. Ah Kee, 1 N. J. Mis. R. 34.

It is respectfully submitted that the judgment below should be affirmed.

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The Cravenette Company, U. S. A.

HARRY LANE,
Of Counsel.