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Notice of Appeal.

Hassaic County Circuit Court.

DURALITH CORPORATION, a New
York corporation,
Plaintiff,

vs.

EDMUND VAN HOUTEN and JEN-
NIE HOPPER, trading as A. B.
VAN HOUTEN & SON,
Defendants.

10

Action at Law.

To: WILLIAM B. GOURLEY, Esq.,
Attorney of Defendants,
125 Ellison Street,
Paterson, New Jersey.

20

Please Take Notice, that the plaintiff appeals
to the Court of Errors and Appeals in the last
Resort in all Causes in New Jersey from the whole
of the judgment entered in this case.

Dated: April 10th, 1934.

30

COLE & MORRILL,
Attorneys of Plaintiff.

Service of a copy of the above Notice of Ap-
peal is acknowledged this 10th day of April, 1934.

WILLIAM B. GOURLEY,
Attorney of Defendants.

40

Judgment Record.
 IN THE PASSAIC COUNTY
 CIRCUIT COURT.

	DURALITH CORPORATION, a New York corporation, Plaintiff,	}		
10	vs.			Action at Law.
20	EDMUND VAN HOUTEN and JEN- NIE HOPPER, trading as A. B. VAN HOUTEN & SON, Defendants.			

Edmund Van Houten and Jennie Hopper, trad-
 ing as A. B. Van Houten & Son, the Defendants
 in this cause, were summoned to answer unto
 20 Duralith Corporation, a New York Corporation,
 the Plaintiffs therein, in an action at law upon
 the following complaint.

Complaint.

1. Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of New York and having its principal office in the City of New York, State of New York.
- 30 2. Defendants are residents of the City of Paterson, County of Passaic, and State of New Jersey, doing business under the firm name and style of A. B. Van Houten & Son.
3. On or about June 13th, 1933, the defendant drew a check on the First National Bank of Paterson, New Jersey, to the order of the plaintiff in the sum of Three Thousand One Hundred Ninety-two Dollars and Seventy-six Cents (\$3,192.76).
- 40 4. Said check was duly presented to said First

Complaint.

National Bank for payment, but payment was refused, payment having been stopped by defendant.

5. Plaintiff is now the holder of said check and there is due and owing the full amount thereof.

6. A copy of said check is hereto annexed, marked "Exhibit A" and made a part hereof. 10

Wherefore, plaintiff demands damages in the amount of Three Thousand One Hundred Ninety-two Dollars and Seventy-six Cents (\$3,192.76) together with protest fees in the sum of Two Dollars and Forty Cents (\$2.40), interest from June 16, 1933 and costs of suit.

COLE & MORRILL,
Attorneys of Plaintiff.

20

"EXHIBIT A"

No. 14828 Paterson, N. J. June 13th, 1933

FIRST NATIONAL BANK.

Pay to the order of Duralith Corp. \$3192.76
A. B. Van Houten & Son \$3192.76 Dollars

A. B. VAN HOUTEN & SON 30

Payment Stopped

ENDORSEMENTS

Pay to the order of
THE NATIONAL CITY BANK
OF NEW YORK
42nd Street Branch

DURALITH CORPORATION

40

Answer.

Defendants, Edmund B. Van Houten and Jennie Hopper, trading as A. B. Van Houten & Son, of Paterson, New Jersey say that:

1. Paragraphs 1, 2, 3 and 4 are admitted.
2. They admit plaintiff now holds said check as alleged in paragraph 5 but deny there is anything due and owing thereon.
3. Paragraph 6 is admitted.

FIRST SEPARATE DEFENSE.

1. The check upon which this suit is brought was given by the defendant to the plaintiff as the purchase price for certain texture known under the trade name of Duralith under the terms of a written distributors contract entered into between this defendant and plaintiff, a true copy of which is hereto annexed.

2. Defendant was induced to enter into said contract which included the purchase of said duralith and the giving of said check by the false representations of the plaintiff through its duly authorized agent in positively asserting with the intention of deceiving this defendant, the following:

- (a) That there was no duralith in Passaic County with the exception of a few packages of trifling quantity and that therefore this defendant would have no competition in disposing of it; whereas as a matter of fact, which the plaintiff then well knew there were many tons of the material in Passaic County for sale and which had theretofore been delivered to other dealers in said county by the plaintiff, by reason whereof this de-

Answer.

defendant did not and would in the future have very material competition in disposing thereof.

(b) That the cost of applying said material to a room 12 x 14 feet would cost \$8.00 whereas, as a matter of fact as the plaintiff then well knew such cost would greatly exceed that sum.

(c) That duralith was used at Radio City in the City of New York which would be a very persuasive fact in selling the same, whereas as a matter of fact as the plaintiff then well knew none of said material was used at Radio City.

10

3. The statements made by defendant as set out in paragraph 2 hereof were false, although this defendant at the time believed them to be true and entered into said contract and gave plaintiff said check relying upon their truth; and was deceived thereby; each of said false representations were very material to the subject matter of said contract and if they had not been made this defendant would not have entered into the contract nor given said check.

20

4. Because of said fraud and misrepresentations and immediately upon learning thereof, defendant rescinded said distributors contract, stopped payment upon said check and tendered the return of the duralith.

30

WILLIAM B. GOURLEY,
Attorney of Defendant.

40

Answer.

COPY

AGREEMENT ENTERED INTO BETWEEN
UNDERSIGNED AND DURALITH
CORPORATION

Executive offices
521 Fifth Avenue
New York, N. Y.

10

Duplicate Contract No. G 276

Distributors Contract Ending December 31, 1933.

Dated: June 3rd, 1933.

1. It Is Agreed by and between the parties hereto that the undersigned Dealer shall be the factory Distributor and dealer for the wall texture known under the trade name of Duralith for the Duralith Corporation.

20

TERRITORY

2. The undersigned Dealer will be the Distributor of Duralith in the City or Town of Paterson and the County of Passaic, State of New Jersey from this day and so long as this contract be in force. Duralith Corporation during this term agrees that it will not sell Duralith to any other Dealer in the above territory, that all inquiries and orders received by the Duralith Corporation for Duralith from the Distributor's territory will be referred to the Distributor to be filled from his stock on hand. The company makes no representation regarding previous sales in Distributor's territory.

30

3. This agreement shall become effective when it has been signed by the Dealer and approved by the Duralith Corporation at its New York City office. This contract is mutually renewable, but

40

Answer.

such renewal must be in writing. This agreement is not subject to any change or cancellation except upon the written consent of both parties.

4. Duralith Corporation agrees to circularize the distributor's prospects not later than 30 days after shipment of the order listed below from a list to be furnished by the dealer. All advertising to be in accordance with the advertising programme of the Duralith Corporation. 10

5. Duralith Corporation agrees within thirty days after the receipt of each repeat order for 7½ ton of material and the receipt and acceptance of the merchandise by the Dealer, to contract at the company's expense for either newspaper advertising or radio broadcasting. This advertising to feature the dealer's name and any of his authorized sub-dealers. Newspaper advertising or "spot" broadcasting to be for a minimum of twelve insertions over a period of three months. All copy, lay-outs, mediums, continuity and radio stations to be selected by and in accordance with the advertising program of Duralith Corporation. 20

6. Duralith Corporation agrees to send at its expense a representative to assist in organizing the distributor's Duralith Department and to instruct the distributor's sales manager or any other employee of the distributor in the methods of application and merchandising of Duralith. 30

7. The Dealer agrees to purchase the following order: Ship as soon as possible to A. B. Van Houten & Son.

Street Town—Paterson
County—Passaic State—New Jersey

Via: R. R. Erie R. R. Susquehanna Delivery.

The following merchandise amounting to \$3150.00
7½ Tons Duralith at \$420.00 per Tonw. F. O. B. 40

Answer.

Cars, Starrett-Lehigh Building, New York City.

Sizes to be assorted and to include 25 Pound Bags, 50 Pound Bags and 100 Pound Bags.

8. —

10 9. This order is payable by three trade acceptances in equal amounts dated one, two and three months from date of invoice provided settlement is made within five days of arrival of merchandise; otherwise the invoice is due and payable less 3% discount within fifteen days of date of invoice.

10. No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the Dealer unless it has been incorporated in this agreement.

20 11. The Dealer acknowledges receipt of a duplicate of this agreement.

Purchaser's Signature.

A. B. VAN HOUTEN & SON.

By Edmund Van Houten.

DURALITH CORPORATION

By S. P. Literman

Dealer's Bank

First National Bank

Town, Paterson

30

State, New Jersey.

Line of Business—Contractors and manufacturers—Lumber Dealers.

Reply.

Plaintiff replying to the answer filed herein by defendant says that:

REPLY TO FIRST SEPARATE DEFENSE

Plaintiff denies each and every item, paragraph and allegation contained in this separate defense.

COLE & MORRILL, 10
Attorneys of Plaintiff.

Judgment.

This action was tried before Judge William B. Mackay, with a jury, in the presence of the Counsel of the respective parties, at the Passaic County Circuit Court, on April 3rd, A. D. 1934.

The cause having been heard and submitted to the jury, they returned their verdict in favor of the Defendants, Edmund Van Houten and Jennie Hopper, trading as A. B. Van Houten & Son. 20

Whereupon, it is adjudged that the complaint of the Plaintiff be dismissed and that the Defendants, Edmund Van Houten and Jennie Hopper, trading as A. B. Van Houten & Son, recover of the Plaintiff, Duralith Corporation, a New York corporation, their costs, which are taxed at the sum of Forty-six Dollars and Seventyfive Cents (\$46.75). 30

Judgment entered and signed April 5th, A. D. 1934, at 3:53 P. M. Action No. 16931, Docket N, page 377.

W. B. MACKAY,
Judge.

Clerk's Certificate.

State of New Jersey }
 County of Passaic } ss.:

10 I, Lloyd B. Marsh, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, in re: Duralith Corporation, a New York corporation, Plaintiff, vs. Edmund Van Houten and Jennie Hopper, trading as A. B. Van Houten & Son, Defendants, as the same is taken from and compared with the original entry thereof in Book "D-2" of Circuit Court Judgments, for said County and now remaining of record in my office.

20 In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this Sixteenth day of April, A. D. Nineteen Hundred and Thirty-four.

(L.S.) LLOYD B. MARSH, Clerk.
 By Floyd E. Jones,
 Deputy Clerk.

30

40

Testimony.

PASSAIC COUNTY CIRCUIT COURT.

DURALITH CORPORATION, a New
York corporation,
Plaintiff,

vs.

EDMUND VAN HOUTEN and JEN-
NIE HOPPER, trading as A. B.
VAN HOUTEN & SON,
Defendants.

Action at Law. 10

Paterson, N. J., April 3, 1934.

Before—Hon. WILLIAM B. MACKAY, Judge,

and a Jury. 20

APPEARANCES:

For the Plaintiff: COLE AND MORRILL,
ESQS., by MENDON MORRILL, ESQ.

For the Defendant: WILLIAM B. GOUR-
LEY, ESQ., by ALBERT COMSTOCK, ESQ.

(A jury was duly empaneled and sworn.)
(Mr. Morrill opened the case to the jury
on behalf of the plaintiff.) 30
(Mr. Comstock opened the case to the
jury on behalf of the defendant.)

Mr. Morrill: May it please the Court, Mr. Com-
stock and I have agreed as to the admissibility of
certain documents in this case. First I would like
to have marked as part of the plaintiff's case a
certain writing, a draft form of a contract which
was signed by the defendant. 40

Answer.

Mr. Comstock: Is that the one that was in before?

Mr. Morrill: Yes, signed by Mr. Leiberman as agent.

(Paper marked Exhibit P-1 in evidence.)

10 Mr. Morrill: Bearing date June 3, 1933. Next I would like to offer in evidence a letter from the plaintiff to the defendant, bearing date June 5, 1933.

Mr. Comstock: No objection.

(Paper marked Exhibit P-2 in evidence.)

20 Mr. Morrill: Next we would like to offer in evidence check of the defendant payable to the order of the plaintiff in the sum of \$3,192.76, bearing date June 13, 1933. Mr. Comstock will admit, I think, that this is the check that was made and delivered by the defendant to the plaintiff.

Mr. Comstock: And payment stopped.

Mr. Morrill: And payment stopped by the defendants on it, and that the sum has not been paid to date.

Mr. Comstock: Right.

(Paper marked Exhibit P-3 in evidence.)

30 Mr. Morrill: (To the jury) Gentlemen, I am not going to read all of these exhibits to you. I will just read some of them. Exhibit P-1, I am going to read part of clause 3, which says, "This agreement shall become effective when it has been signed by the dealer and approved by the Duralith Corporation at its New York City office." Clause 10 reads as follows: "No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the dealer unless it has been incorporated in this agreement."

40 Clause 11 reads: "The dealer acknowledges re-

Testimony.

ceipt of a duplicate of this agreement." As to Exhibit P-2, I shall read the first paragraph only: "A. B. VanHouten and Sons, Paterson Street, Paterson, New Jersey: Gentlemen: We are pleased to advise that contract No. G-276, dated June 3, 1933, made with you has been approved." I am going to pass these to you, together with Exhibit P-3, the check in question, on which there is a rubber stamp notation of payment stopped. 10

The plaintiff rests, your Honor.

The Plaintiff Rested.

DEFENDANT'S TESTIMONY.

Mr. Comstock: While I am waiting for my witness, I will offer in evidence a letter dated July 1, 1933. 20

(Paper marked Exhibit D-1 in evidence and read to the jury by Mr. Comstock.)

Mr. Comstock: In reply to that letter the Duralith Corporation wrote to Mr. Gourley. I offer in evidence the letter of June 16, 1933, from the Duralith Corporation to the A. B. VanHouten and Son.

(Paper marked Exhibit D-2 in evidence and read to the jury by Mr. Comstock.) 30

Mr. Comstock: Offer in evidence contract called duplicate contract number G-276 between the Duralith Corporation and A. B. Van Houten and Son, dated June 3, 1933.

(Paper marked Exhibit D-3 in evidence.)

Mr. Comstock: (To the jury) Gentlemen, this is a duplicate of the contract which was put in 40

Edmund Van Houten—Direct.

evidence by the plaintiff, with the exception that it is not approved by the president of the Duralith Corporation. It provides that we shall give them \$3,150 for 7½ tons of Duralith at \$420 per ton f. o. b. cars. The other provisions Mr. Morrill read to you.

10

EDMUND VAN HOUTEN, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Van Houten, are you a member of the partnership known as A. B. Van Houten and Son?

A. Yes, sir.

Q. Who are the partners? A. Myself and sister, Mrs. Jennie Hopper.

20 Q. What is the nature of the business of A. B. Van Houten and Son? A. We are builders and lumber dealers.

Q. In Paterson? A. Paterson, yes, sir.

Q. Where in Paterson? A. 78 Paterson Street, Paterson.

Q. Been engaged there for a good many years, I believe? A. The business has been established sixty-seven years.

30 Q. I think you built this court house? A. Yes, sir.

Q. Do you recall in June, 1933, a representative of the Duralith Company calling upon you? A. The last week in May.

Q. The last week in May? A. The last week in May.

Q. For what purpose did he call? A. Why, he said they had—

Mr. Morrill: I pray your Honor's judgment—

40

Edmund Van Houten—Direct.

Mr. Comstock: All right, I will withdraw that question.

Q. A representative called upon you. As a result of that visit did you go to their offices in New York? A. Yes, sir.

Q. When did you go to New York? A. We went down the 3rd of June.

Q. That was a Saturday? A. On a Saturday.

Q. What time did you arrive at their office? A. About 10:30.

Q. And where is their office? A. On Fifth Avenue.

Q. Have they got large offices there? A. Yes, sir, a suite of offices there.

Q. And did anyone go with you? A. My two sons, Arthur B. Van Houten and Edmund, Junior.

Q. And you arrived at 10:30, you say? A. Yes, sir.

Q. And how long did you stay? A. Stayed there till about six o'clock in the afternoon. Went out to have lunch and dinner at night.

Q. And whom did you meet at their office? A. Mr. Leiberman.

Q. Was he introduced to you by anyone? A. No. We had an appointment there and we were taken right in his office.

Q. For what purpose did you go there? A. Why, they wanted a representative in Paterson to handle Duralith, a wall preparation.

Q. Just what is Duralith? Tell the jury. A. It is a preparation like paint. It is a preparation mixed with water and it is put on with a brush or a trowel to ornament the walls on the interior of a house or store.

Q. Now, you say you met Mr. Leiberman there? A. Yes, sir.

10

20

30

40

Edmund Van Houten—Direct.

Q. And after the conclusion of your conference from 10:30 to 6 I believe this contract known as Exhibit D-3 was signed by you and the Duralith Company; is that right? A. Yes, sir, that is my signature.

10 Q. Before the execution of that contract what discussion did you have concerning this material, if any?

Mr. Morrill: I object. I object on the ground that the contract has been entirely integrated. In its memorial it has been introduced as two exhibits. I object, further, on the ground that there is no evidence that Mr. Leiberman, the agent of the plaintiff corporation, had authority to make any statements or representations; no legal evidence of that authority. I object, 20 further, on the ground that clauses 3 and 10 indicate—that is, clauses 3 and 10 of the contract—indicate that all the representations made by and between both parties have been stated in the contract. I object, further, on the ground that when Mr. Van Houten, the witness now on the stand, signed the contract, which was to be approved by the home office, he represented to the 30 Duralith Corporation, the home office portion of it, in any event, that there were no further representations other than those contained in the contract, and that he is thereby estopped from testifying as to any representations which he now may say were made.

The Court: I will permit it and allow you an exception.

40 Mr. Morrill: Your Honor will note my exception, please.

Edmund Van Houten—Direct.

By Mr. Comstock:

Q. I believe Mr. Leiberman, with whom you discussed the details, signed the contract for the Duralith Company, did he not?

The Court: Wait a minute. I think there was a question that was allowed.

(The question was read by the reporter.) 10

Q. What was your conversation with Mr. Leiberman? A. Why, Mr. Leiberman explained the workings of this thing, what we were to do, how we were to set the machinery up to run this thing; that we were to engage a sales manager, and then after he was approved by the company they were to employ—we were to employ a lot of agents, about twenty agents, and they were to send men up to school these men to handle this Duralith. We were to sell the stuff at 44 cents a pound for 100-pound bags; 45 for 50-pound bags; 46 cents a pound for 25-pound bags. That was stipulated there. We were told that the beauty of this proposition was that we would have no competition; that we were the only agents in this territory. He said that they had tried to sell the stuff through the paint stores but it had not been successful; that there might be a few pounds of that stuff on some paint store shelves, but there was none other in this vicinity. 20 30

Q. Well, after that conversation with Mr. Leiberman the contract was signed, was it? A. Well, of course, he went all over everything that had to be done, the way it was applied. We were taken into a demonstrating room after dinner. We were taken into a demonstrating room and shown how this stuff was put on and we were told that the material would cost about eight dollars a room for an ordinary sized room. 40

Edmund Van Houten—Direct.

Q. Mr. Leiberman told you that? A. Yes, sir.

Q. And Mr. Leiberman then signed the contract for the Duralith Company, did he not? A. Yes, sir, he signed the contract.

10 Mr. Morrill: I pray your Honor's judgment. I object to the question. I may be a bit late. I think it was a conclusion—he "signed the contract." I should rather say he signed Exhibit P-1. The question for the jury is whether it became a contract then or not.

Mr. Comstock: It is Exhibit D-3 which is the contract in evidence.

Q. Was this signed by the Duralith Company? By whom? A. Why, Mr. Leiberman.

20 Q. That is the one with whom you had your dealings? A. He is the only one we had any dealings with.

Q. Was there anything said during the course of this conversation about other places where this Duralith had been used?

30 Mr. Morrill: I object. Now, I don't want to repeat the same lengthy objection as I did at the first question, your Honor. It would be more convenient to object on the same grounds.

The Court: What is the question?

Mr. Comstock: Was anything said during the course of this conversation about other places where Duralith had been used?

The Court: Well, you should not lead the witness. That is not fair.

40 Mr. Comstock: I didn't ask him any particular place. I asked if there was anything said along those lines.

Edmund Van Houten—Direct.

The Court: You are calling his attention to a specific fact. He has told practically everything, and then he said that Exhibit D-3 was then signed by him and Mr. Leiberman. Now you are putting something in his mouth. It is leading.

Mr. Comstock: I will withdraw the question. 10

By Mr. Comstock:

Q. Was there anything further said during the course of the conversation that I haven't asked you?

Mr. Morrill: I object on the same grounds as heretofore, your Honor.

The Court: Is this before or after the signing? 20

Mr. Comstock: Before.

The Court: Before the signing? All right, I will permit it.

Mr. Morrill: Exception, please.

By the Court:

Q. Was there anything else said other than what you have already told us? A. Why, he told us that this material was used in a hotel up in Canada and that— 30

Q. What hotel? A. I don't remember the name of the hotel. And it was used in Radio City. And after dinner we went back there and I asked him particularly about whether there was any of this stuff in this city and he said no, positively no, or I never would have signed the contract.

Mr. Morrill: May that latter portion be stricken out as not responsive, please?

The Court: Yes, strike it out. 40

Edmund Van Houten—Direct.

By Mr. Comstock:

Q. Well, Mr. Van Houten, if you had known there was tons of the material in the City of Paterson for sale would you have entered into this arrangement?

Mr. Morrill: I object.

10 The Court: Sustain it.

A. Well, in the—

The Court: No.

Q. Now, after the signing of the contract, how long after was it that the material arrived in Paterson? A. About ten days.

Q. And what did you do with it when it arrived? A. We put it in a shed. We have it there locked up yet in the building.

20 Q. They haven't asked for it? A. No.

Mr. Morrill: Now, do you need to lead the witness?

Mr. Comstock: It is there, that is all. It is not material, is it?

Mr. Morrill: If it is not material there is no use inquiring about it, Mr. Comstock.

Mr. Comstock: The jury may want to know where the material is.

30 Q. And did you afterwards give them a check for the material? A. Well, Mr. Schill came up, their representative, to start the thing off as their—

Mr. Morrill: I object. The question can be answered yes or no. We admit we received the check for the material. He is telling now about what Mr. Schill—

The Court: Yes. He is not answering the question.

40

Edmund Van Houten—Direct.

Q. I show you Exhibit P-3. Is this the check you gave them? A. Yes, sir.

Q. On the date that it is dated? A. Yes, sir.

Q. June 13. To whom did you hand this check?

A. It was handed to Mr. Schill, I think his name is.

Q. Schill? And where? A. In our office.

Q. The contract, I notice, provides for trade acceptances. How does it come you gave him a check instead of trade acceptances? A. He had the trade acceptances there and he told me—I said I would rather pay cash for the stuff than to have the trade acceptances and I asked him what discount he would give and he telephoned to New York and found out by paying it I could save \$130 or \$140—I don't remember just what the amount was. But it was to get that cash discount I gave the check. 10 20

Q. Now, did you, after having given that check, show the material to any prospective buyers? A. Yes, sir. We built a demonstrating room and we were beginning to demonstrate the stuff to one of the men that came in that we thought would be our best dealer.

Mr. Morrill: I object to any further response to this question. I think it has been fully answered. 30

Q. You say somebody came in. Did you show the material to him? A. We told him we had something which we thought he could use a great deal of.

Q. Who was that? A. Mr. Bert Thomas.

Q. Did you show it to him? A. We took him up in the room and showed him the stuff, and my son told him he had something new here and he wanted to show it to him. 40

Edmund Van Houten—Direct.

Mr. Morrill: I pray your Honor's judgment as to any conversation where neither the plaintiff nor its officers were present.

The Court: Yes, that is so.

Mr. Comstock: Well, I haven't gone that far yet, Mr. Morrill.

10 Q. You showed the material to this prospective purchaser. Now, as a result of that what did you do? A. I stopped payment on the check.

Q. Why?

Mr. Morrill: Now, I object.

A. Because he said there was ten tons of it—

The Court: No, no, no.

20 Q. Never mind what he said. Did you go anywhere to investigate the fact? A. No, sir. My son did.

Q. Your son did? A. Went right down there.

Q. And that was the next day after you gave the check, was it? A. Yes.

Q. You stopped payment on it? A. Yes, sir.

Q. Did you see any members of the Duralith Corporation after you had stopped payment? A. Yes, sir.

30 Q. Who did you see? A. The president of the company.

Q. Mr. Weiner? A. Mr. Weiner. He came up.

Q. He came up to your office? A. Yes, sir.

Q. When did he call, do you remember? A. I don't remember. It was a few days after. Soon after that.

Q. And did you tell him why you stopped payment on the check? A. I did.

40 Q. What did you tell him? A. I told him that it had been misrepresented; that we were told

Edmund Van Houten—Cross.

there was none of it in this part of the country and we could not—we would not go on with it, because we had an advertisement with Mr. O'Blenis' name on for 30, 31, and 32 cents a pound, and how could we go on and sell that stuff when we were told there was no competition, and there were circulars all around the town at 14 cents a pound less than ours. 10

Q. You mentioned O'Blenis' name to him? A. Yes, sir.

Q. What did he say about that? A. He tried to smooth the thing over, wanted me to—to allow us \$300 for extra advertising and tried—he would do anything, he said, to have us go on with the contract.

Q. What did you tell him? A. I refused positively to go on with it. I said that I couldn't do it under the circumstances. 20

Q. Did you mention O'Blenis' name to him? A. Yes, sir.

The Court: Yes, he said that.

Q. What did he say about that? A. Well, he said that the contract had run out and wanted to know if we couldn't make some arrangement with O'Blenis to take that off their hands and work it off that way someday. 30

Mr. Comstock: Cross-examine.

Cross-examination by Mr. Morrill:

Q. You told Mr. Weiner that unless the O'Blenis matter was straightened out you would not go on with the contract, didn't you? A. Yes.

Q. And if the O'Blenis matter had been straightened out you would have gone through 40

Edmund Van Houten—Cross.

with the contract? A. I didn't say that. I didn't say that.

Q. Mr. Van Houten, I show you Exhibit D-3, a draft form of contract, and ask you to look at that, please. You read English, of course? A. Yes, sir.

10 Q. And you were at the New York offices of the plaintiff company for about eight hours, from 10 in the morning till 6 in the evening? A. Half past ten. Well, we were out to the hotel a couple hours to have lunch and dinner.

Q. And you discussed the various phases of the Duralith business, I suppose? A. We had it all explained to us, yes, sir.

Q. And your sons were with you? A. Yes, sir.

20 Q. And before you signed the contract you were given a blank form to read, weren't you? A. Yes.

Q. And your sons were given a blank form to read, weren't they? A. Yes.

Q. And all of you read the contract, didn't you? A. Yes, sir.

Q. And you read clause 3, that "This agreement shall become effective when it has been signed by the dealer and approved by the Duralith Corporation at its New York City office"; is that correct? A. Yes.

30 Q. And you read also clause 10, "No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the dealer unless it has been incorporated in this agreement"; is that right? A. It is in the agreement.

Q. I ask you to look at the last sentence in clause 2, please, Mr. Van Houten. Isn't it a fact that that reads, "The company"—referring to the Duralith Corporation—"makes no representation regarding previous sales in distributor's

40 territory"; is that right? A. Yes, it says that.

Edmund Van Houten—Cross.

Q. You were called the "distributor" in the contract, weren't you? A. Yes.

Q. Now, you signed this contract as a member of the firm of A. B. Van Houten and Sons? A. Yes.

Q. And you have been in the building business for quite a long while, haven't you, Mr. Van Houten? A. Yes, sir. Yes. 10

Q. And I suppose you have signed many contracts in your day? A. Yes.

Q. And you have read contracts that you have signed? A. Yes.

Q. And do you know that contracts represent an agreement or a testimonial between the parties who desire to put their agreement in writing? A. Yes.

Q. And you were aware when you signed this contract that it set forth the rights and duties of the parties? You knew that, didn't you? A. Yes. 20

Q. And you know that in contracts generally which are signed between persons that important matters are put therein? A. Sure.

Q. And you thought that whether or not there was any Duralith in Passaic County was very material, didn't you? A. Yes, I did.

Q. And very important? A. Yes, sir.

Q. And you signed this contract without any provision being put in with regard to the Duralith that may have been in Passaic County; is that right? A. Yes. 30

Q. And you thought that whether there was any Duralith used in Radio City was quite important? A. Why, it would be good advertising.

Q. Sir? A. Good advertising, yes.

Q. And very material, too? A. Yes.

Q. And you signed the contract without any 40

Edmund Van Houten—Cross.

provision being inserted in the contract as to Radio City, didn't you? A. Yes.

Q. And you didn't ask that it be inserted, did you? A. No, sir.

10 Q. And you say now that whether a room eight by fourteen could be finished with Duralith material which would cost about eight dollars was quite important? A. It was, yes, sir.

Q. And it was very material, too, wasn't it? A. Yes, sir.

Q. And you signed the contract without any provision as to that being inserted, didn't you? A. Yes.

Q. Now, when you said eight dollars for a room eight by fourteen—

Mr. Comstock: Twelve by fourteen.

20 Q. Twelve by fourteen, did you mean that is what it would cost with labor and Duralith material? A. No, sir, it was nothing to do with the labor, just the material. The salesmen were to do that. We had nothing to do with installing the stuff.

30 Q. You expected that the material necessary to finish a room with Duralith, twelve by fourteen, would cost approximately eight dollars? A. That is what we were told.

Q. Yes. Now, you were told that you were the only agents in Passaic County after this agreement had become effective; is that correct? A. Before. We were told before.

Q. You were told that— A. Yes, sir, we were told.

40 Q. —that after this agreement became effective you would be the only agents in Passaic County; is that correct? A. We were told that we had no competition; we were the only agents.

Edmund Van Houten—Cross.

Q. Mr. O'Brien, in June, 1933, was not a distributor of this company, was he? A. I suppose according to his agreement he wasn't.

Q. Well, you have seen his contract? A. I have heard of it. I haven't read it.

Q. Well, you know it expired in December, 1932?

Mr. Comstock: I object to that. 10

The Court: What date?

Mr. Morrill: December, 1932, I think it was.

Mr. Comstock: What does he know about O'Brien's contract?

A. I don't know anything about it. I never saw the contract.

The Court: If he knows. Do you know? 20

The Witness: No, I don't know. I had nothing to do with it.

Q. Didn't Mr. O'Brien tell you that his contract expired in December, 1932? A. No, he did not.

Q. Did you hear him testify that on the stand? A. Yes.

Q. When produced as your witness? A. Yes, I heard him say that here.

Q. Now, when you were told that certain Duralith was used in Radio City, that statement was made substantially in that form, that Radio City was using Duralith; is that correct? A. Yes. 30

Q. Yes. They didn't tell you whether there were two inches of Duralith used in Radio City or two miles, did they? A. No, sir.

Q. Would it have been important to you if only two square inches of Radio City had been done with Duralith? A. No, not two inches.

Q. You didn't ask how much Duralith was used 40

Edmund Van Houten—Cross.

in Radio City, did you? A. No. He read out the different things, places it had been used.

Q. And he read you some writing or document or letter concerning the fact that it had been used in some hotel in Canada? A. Yes, sir.

10 Q. Now, if Duralith had been used in other buildings, like Radio City, I suppose it would have been important to you—good advertising? A. I suppose so.

Q. Suppose it had been used in the Chrysler Building? A. Well, there was nothing said about it.

20 Q. Would it have been important to you if it was used in the Roxy Theatre in New York? Would it have been important to you if it had been used by Good Housekeeping in exhibiting its model home?

Mr. Comstock: Oh, I object to that, if the Court please. That has nothing to do with the issue in this case.

Mr. Morrill: The question of the materiality of the Radio City representation, if made, but I won't press it further, your Honor.

30 Q. Mr. Van Houten, I show you what purports to be a paper marked with the Duralith Corporation heading on it and a lot of names and addresses thereon. Are these the names supplied by you? A. Yes, sir. They asked me to send in a list of the different dealers.

Q. Of your prospective customers? A. They wanted the list, yes. They wanted to send the advertising. They were to handle this. We gave them the names of painters in Paterson and they would write direct to them.

40

Edmund Van Houten—Cross.

Q. This was part of the advertising program of the Duralith Corporation? A. They said they would do that.

Mr. Morrill: Mr. Comstock, do you have any objection to my introducing these as my exhibit on your case now?

Mr. Comstock: No.

(Paper marked Exhibit P-4 in evidence.)

10

Q. Mr. Van Houten, I show you what purports to be a prospectus or an advertisement of the Duralith Corporation with your name printed at the bottom. Did you see that before? A. They sent us a few samples, that is all.

Q. And that was part of the advertising program? A. Yes.

Mr. Morrill: The same way may I have these marked? 20

Mr. Comstock: What is it?

Mr. Morrill: That was in before.

(Paper marked Exhibit P-5 in evidence.)

Q. And, Mr. Van Houten, you received this letter from the Duralith Corporation concerning your advertisements? A. Yes, sir.

Mr. Comstock: No objection.

(Mr. Morrill read P-6 to the jury.)

30

Q. You received that letter, I suppose, on June 17, 1933, didn't you, Mr. Van Houten? A. About that date.

Q. And when did you stop payment on your check? A. The check was the 13th, wasn't it? I believe it was the next day.

Mr. Comstock: June 16 the payment was stopped.

40

Edmund Van Houten—Cross.

A. The check was given on the 13th.

Q. Did you use any of the Duralith material at all? A. The demonstrator had a hundred pounds.

Q. But you used none in line with your business? A. No, we never used a bit of it.

10 Q. You just made a test. Do you happen to have an opinion as to whether it is good material or not? A. It is all right.

Q. Did you use or have you used any Duralith material on a room twelve by fourteen? A. No, sir.

Q. Or any other room? A. No, we haven't used it.

Q. Who is Bert Thomas? A. He is a carpenter here in town that works as a foreman for Mr. Louis Gatlin. He does a great deal of store work.

20 Q. You were not told that anyone in Passaic County would not be able to buy Duralith anywhere in the United States, were you? A. No, no.

Q. I mean, there may have been other places in Passaic County, other business firms which were not distributors of Duralith, who may have purchased Duralith from Pennsylvania, New England, or any other place; is that right? A. How is that? I don't get that.

30 Q. Well, O'Blenis, you know, purchased Duralith from the Duralith Corporation? A. Yes, sir.

Q. There may have been at the time you entered into this agreement other Duralith in Passaic County; is that right? A. We were told there was none here except a few pounds on the painters' shelves.

Q. Please don't argue with me. A. Well, you are asking me.

40 Q. If you didn't sign this agreement and you wanted some Duralith you could have purchased

Edmund Van Houten—Cross.

it from Mr. O'Blenis, couldn't you? A. I suppose I could if I needed it.

Q. Or from anyone who sold Duralith material in New York, Pennsylvania, or New England; is that correct? A. Yes.

Q. And other persons besides you might have purchased it and brought it into Passaic County, too, as far as you know? A. Sure. I don't know anything about that. 10

Q. What positions do your sons hold in your firm? A. My oldest son is superintendent.

Q. What is his name? A. Arthur B. Van Houten.

Q. And your other son? A. He is a bookkeeper. Edmund Van Houten, Junior.

Q. Will you please look at your contract, the end of clause 7? Do you have that before you, Mr. Van Houten? A. Yes. 20

Q. That provides that 7½ tons of Duralith were to be shipped to you f. o. b. cars, Starrett-Lehigh Building, New York City; is that correct? A. Yes.

Q. Did you ever ship back the 7½ tons or the remainder of the amount that you had of the Duralith material to the Starrett-Lehigh Building, New York City? A. No, sir.

Q. Did you ever offer the Duralith Corporation to return the Duralith which they had shipped to you, to the Starrett-Lehigh Building? I think you can answer that yes or no. A. Well, my lawyer offered—sent them a letter. Mr. Gourley sent them a letter and told them to take it away. 30

Q. Oh, he told them to come and take it away? A. He told them. That letter is here in evidence.

Q. Are you familiar with that letter? A. I saw 40

Edmund Van Houten—Redirect.

it after Dr. Gourley wrote it. He showed it to me.

10 Q. I show you that letter, Exhibit D-1. I call your attention to the last paragraph. Doesn't that say "A. B. Van Houten and Son, therefore, are no longer responsible for the Duralith sent them and notify you to have it removed"? A. Yes.

Q. And that reflected your sentiment in the matter, too, didn't it? You wanted them to come and have it removed; is that right? A. I was willing to send it if they wanted it sent.

(The answer was read by the reporter.)

20 Q. Now, prior to that letter of Mr. Gourley did you tell Mr. Weiner or write to the Duralith Company that you were willing to return the material to the Starrett-Lehigh Building, the place it had been shipped from, f. o. b.? A. No, no.

Mr. Morrill: That is all.

Redirect-examination by Mr. Comstock:

30 Q. You didn't offer to send it back to that particular building, but did you make any offer to them about it? A. I told them I wouldn't go on with the contract.

Q. Did you say anything to him about returning the material or getting the material? A. No.

Mr. Comstock: That is all.

Arthur B. Van Houten—Direct.

ARTHUR B. VAN HOUTEN, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Van Houten, you are the son of the Edmund Van Houten who was just on the stand? A. I am.

Q. And you work for your father? A. Yes.

Q. What is your particular duty? A. I am superintendent. 10

Q. Did you accompany your father to New York on June 3rd, I think it was, a Saturday? A. I did, yes.

Q. And where did you go? A. To the Duralith office. I believe it is 521 Fifth Avenue.

Q. And whom did you meet there? A. Mr. Leiberman.

Q. Who was with you? A. My father and brother. 20

Q. What was the purpose of your visit to Mr. Leiberman at the Duralith Company's office? A. Well, they sent a representative out to ask if we would like to take on their material and be their agent, and we went down to look into the matter.

Q. You had an appointment to meet them there? A. We had an appointment to meet them at 10:30.

Q. How long did you stay there? A. Well, I would say nearly six o'clock that evening.

Q. During the entire time what representative of the Duralith Company did you deal with? A. Mr. Leiberman. 30

Q. No one else? A. Well, only the demonstrator, Mr. Walters, I believe his name was, but all the business was done with Mr. Leiberman.

Q. Just tell us what conversation you had between you, your father, and Mr. Leiberman.

Mr. Morrill: I object. Shall I restate my first objection, your Honor? 40

Arthur B. Van Houten—Direct.

The Court: On the same grounds?

Mr. Morrill: On the same grounds as to the question put to Mr. Edmund Van Houten.

The Court: On the same grounds as originally stated in the objection to the testimony of Mr. Edmund Van Houten, Senior.

10

Mr. Morrill: Yes. Thank you.

A. Well, we met Mr. Leiberman about 10:30—

Mr. Morrill: I am sorry. May I take an exception to your Honor's ruling?

(The last question was read by the reporter.)

20

A. Well, Mr. Leiberman explained the material to us and how it was used and where they had used it, in Radio City, and the cost of a room which would be about eight dollars, approximately, a room twelve by fourteen, and we were to sell it for 44, 45, and 46 cents a pound. We went out and had lunch. After that we came back and we had a demonstration and we went back into Mr. Leiberman's office and spent the afternoon there. And then, of course, he told us how it was used in some hotel in Canada and different places; and for us there was no competition in handling this material, that they had never sold this material to anybody in this bulk before. They had sold it to paint stores and like that.

30

Q. Just what did he say in that respect, as nearly as you can recall? A. He said there was no competition in this material because they hadn't sold it in bulk this way before. They had sold it to paint stores. He says, "Outside of a pound or two," he says, "you will find no material in Pat-

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Arthur B. Van Houten—Direct.

erson." He says, "That is the beauty of it. You will have no competition."

Q. Go ahead. Anything further that you recall said? A. No, not that I recall.

Q. Mr. Leiberman then signed the contract and your father signed it? A. Yes, yes, Mr. Leiberman.

Q. Do you recall when the material reached Paterson? A. It was approximately a week after the day we were there, the Saturday. 10

Q. Did any representative of the Duralith Company call at your place of business after the material had arrived? A. Mr. Schill.

Q. That is the gentleman to whom your father gave the check, I believe? A. That is right.

Q. What was the purpose of his visit?

Mr. Morrill: Well— 20

Q. What did he say he was there for? A. He was there to set up the organization.

Q. Of what? A. The sales force and like that and to get the trade acceptances signed, as we had three trade acceptances to be signed. Of course, my father told him about a discount on the whole thing if we paid cash, and they called New York and they said there would be a certain percentage on the full amount, so father says, "Well, we have the money in the bank; we might as well pay it and save that discount." So he gave Mr. Schill a check. 30

Q. Did you show the material to any prospective purchasers after that? A. I did.

Q. When? A. Why, the next morning. There were a couple of people came in the office and my brother brought them upstairs. I was on the second floor, where we had a demonstration room, and I started to demonstrate it. These people 40

Arthur B. Van Houten—Direct.

wanted to see the material. I told them we had something new, so I started to show them how the material was used, told them what a good thing I thought we had and how we could put this over, and this one fellow, Mr. Thomas, said—

Mr. Morrill: I object.

10 Q. Never mind what he said. Who is Mr. Thomas? A. Mr. Thomas is the foreman for Louis Gatlin, the contractor.

Q. You thought he might be interested in purchasing? A. We thought he might be interested in purchasing the stuff.

Q. Because of what he told you what did you do? A. Well, I went over to O'Blenis'.

20 Q. What did you see at O'Blenis'? A. Well, I saw Mr. Floyd O'Blenis and his brother John and asked them if they had any Duralith—

Mr. Morrill: Now, I pray your Honor's—

The Court: No.

Q. What did you see there? A. The Duralith.

Q. Much of it? A. I saw about twelve tons.

Q. You had some talk with O'Blenis about it, I suppose?

The Court: Yes or no.

30 Q. Yes or no? A. Yes.

Q. Then you came back and reported that—came back and saw your father? A. I did.

Q. What did he do then? A. We went immediately up to Dr. Gourley's office and stopped payment on the check.

Mr. Comstock: Cross-examine.

*Arthur B. Van Houten—Cross.**Cross-examination by Mr. Morrill:*

Q. Oh, he immediately went to his lawyer's office; is that right? A. That is right.

Q. When you shake your head the stenographer can't tell what your answer is. He didn't call up the Duralith Corporation to find out what it was all about, did he, first? A. No, I don't believe so. 10

Q. Did you call up the Duralith Corporation right away to find out what it was all about? A. I called them up after.

Q. After your father had gone to his lawyer? A. Yes.

Q. Well, it was possible there was some mistake about this Duralith in O'Blenis' store, wasn't it? A. No. I saw the material.

Q. Did you see the contract? A. Their contract? 20

Q. Yes. A. No, not at that time.

Q. And you didn't know how it got to O'Blenis' store, did you? A. Mr. O'Blenis told me.

Q. Well, did he tell you about a contract which had expired a year before? A. No, he did not.

Q. Didn't you think it was important to have these twelve tons of Duralith explained by the Duralith Corporation, as to how they were there and why they were there? A. I called them up about it afterwards and Mr. Weiner came out. 30

Q. But when Mr. Weiner came out you had already consulted your attorney? A. Yes.

Q. You graduated grammar school, didn't you? A. I did.

Q. Do you have Exhibit D-3 before you, purporting to be the draft of the contract? A. Yes.

Q. You read English, of course, Mr. Van Houten? A. Yes, I do.

Q. And you were at the Duralith Company 40

Arthur B. Van Houten—Cross.

about eight hours or with the Duralith representative? A. I was with the Duralith representatives from 10:30 until about 6.

Q. And you were shown all about the offices and given a demonstration? A. I was.

10 Q. And you read all of the contract, didn't you? A. I did, yes.

Q. And you were present when your dad signed it? A. I was.

Q. And you read the provision that says that "The Company makes no representation regarding previous sales in distributor's territory"—that is the end of clause 2? A. Yes.

Q. You knew that was in the contract when your dad signed it? A. Yes.

20 Q. And you read clause 3, "This agreement shall become effective when it has been signed by the dealer and approved by the Duralith Corporation"—A. I did.

Q. "—at its New York City office"? A. I did.

Q. So when your dad signed the contract you knew that was there, didn't you? A. Yes.

30 Q. And you read clause 10, "No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the dealer unless it has been incorporated in this agreement"; isn't that right? A. Yes, I read that.

Q. And you knew that was there when your dad signed the contract? A. I did.

Q. Mr. Leiberman didn't tell you that these provisions which I have just read weren't in the contract, did he? A. No.

Q. He said nothing about these provisions at all; isn't that right? A. Yes.

Q. Now, you made no objection to your father signing this contract? A. No.

40 Q. And whether Duralith was used in Radio

Arthur B. Van Houten—Cross.

City was quite important, wasn't it? A. It would have been a very nice ad.

Q. But it was material? A. Yes.

Q. And you did not insist that it be inserted in the contract before your father signed it, did you?

A. I did not.

Q. And as to the cost of a room twelve by fourteen, this eight-dollar business, you thought that was important? A. I did, yes.

10

Q. And very material, and you didn't insist that that provision or a provision pertaining to it be put in the contract before your father signed it, did you? A. No, I didn't.

Q. And you thought the presence or absence of Duralith material in Passaic County was very important, didn't you? A. I did.

Q. And very material, didn't you? A. I did.

20

Q. And you didn't insist that that be put in the contract before your father signed, did you? A. No, sir.

Q. You didn't tell him not to sign even though any of these provisions which I have mentioned weren't in the contract? A. No, I didn't.

Q. You understand what a contract is, don't you? A. I do.

Q. You know it is a solemn document by which people put their agreement in writing? A. Yes.

30

Q. Did Mr. Leiberman tell you how much Duralith was used in Radio City? A. No, he didn't.

Q. Well, if they had only used about two inches of it in Radio City it wouldn't have been important to you as an ad, would it? A. If it was used there, yes.

Q. You mean you would tell your prospective customers that it was used? A. Why, certainly.

Q. Even though only two inches were used? A.

40

Arthur B. Van Houten—Cross.

I didn't know that. If it was used there I was telling the truth.

Q. Well, assuming it had not been used in Radio City but was used in other important buildings in New York, that would have done just as well, wouldn't it? A. It would have been a nice advertisement.

10 Q. If it had been used in the Empire State Building or the Chrysler Building? A. Yes.

Q. Or the exhibition of a model home by Good Housekeeping Institute? A. It would have helped us, yes.

Q. As good as Radio City, as a matter of fact, wouldn't it? A. I think it would have been a very nice ad.

20 Q. When you signed this contract it was very clear to you, wasn't it? A. Yes.

Q. That is, when your father signed it. And when you saw him sign it you knew the exact document he was signing? A. I did.

Q. He wasn't told that he was signing a release and then presented with this draft form, was he? A. No.

Q. And you didn't intend to deceive the home office of the Duralith Corporation, did you? A. No, I did not.

30 Q. Or the executive offices thereof? A. No.

Q. And you permitted your father to sign a contract stating that no representations had been made, didn't you? A. Yes.

Q. And you at that time were aware of the fact that the draft agreement had to be approved by the home office, weren't you, by an executive officer? A. Yes.

Q. I ask you not to shake your head. A. I answered yes.

Arthur B. Van Houten—Redirect.

Q. Now, you claim that there were those representations made about Radio City and Duralith in Passaic County? A. Yes.

Q. How long have you known Mr. O'Brien?
A. Why, a good many years.

Q. A friend of yours, apart from business? A. Well, no, I wouldn't say that.

Q. A friend of the family? A. No, sir, not a friend of the family. 10

Q. If this O'Brien material had been removed from Passaic County by the Duralith Company would you have gone on with the contract? A. Why, surely.

Mr. Morrill: No further questions.

Redirect-examination by Mr. Comstock:

Q. Just one question, Mr. Van Houten. You say you called up Mr. Weiner, the president of the Duralith Corporation, after you found out O'Brien had this material? A. Yes. 20

Q. What did you say to him? A. I told him just what we had found. He said he would come up and straighten this matter out.

Q. Did he come up? A. Yes, he did.

Q. What did he offer to do to straighten it out?
A. Well, he wanted to make some sort of adjustment on the price, of \$200 or \$300 to set up an advertising fund. 30

Q. Do you know Mr. Schiller, is it, that received the check? A. I believe Mr. Schill is the name. I am not positive about that.

Q. He is the gentleman that received the check?
A. Yes, sir.

Q. Did he say anything about how much it would cost to do a room? 40

Arthur B. Van Houten—Redirect.

Mr. Morrill: I pray your Honor's judgment. This is not examination in chief at the present time. I don't think Mr. Schill—

Mr. Comstock: I neglected to ask that question.

10 Mr. Morrill: I will withdraw the objection on that ground, and I insist on this ground: that there is no evidence of what Mr. Schill's authority was in the matter, except he was a field representative to set up an advertising program or campaign.

20 Mr. Comstock: He was just the man to know what it would cost to do a room. He came from the company's offices in New York. He received our check. He was their representative. Now, his statement certainly was binding upon the corporation. The corporation has to speak through somebody.

The Court: He was just sent there, I thought, Mr. Van Houten said, simply to show him how the thing was done.

Q. What purpose did Schill— A. Well, he showed me how to use the material.

30 The Court: Yes, that is what he was sent there for, to set up the organization.

Q. To show how it was used? A. He showed me how to use the material.

The Court: To set up the organization. They were going to have twenty salesmen.

Q. To show how the material was put on? A. Yes.

40 Mr. Comstock: Then, isn't it likely he would know what it would cost to put it on?

Arthur B. Van Houten—Redirect.

The sales organization has to know the cost, of course.

The Court: Not necessarily, not a man that just goes around demonstrating. He might not sell at all. He might have nothing to do with selling. He might just go around to someone that takes over an agency to show how the thing was done. 10

Mr. Comstock: And to organize. I should think he would have to know how much to tell the people it would cost.

The Court: Well, that was all arranged, 44 cents a pound, 45 cents a pound, and 46 cents a pound, in 100, 50, and 25-pound bags.

Mr. Comstock: And the salesman would have to know how much does this room cost. The man wants to know how much. 20

The Court: A salesman might know, but an organizer might not know.

Mr. Comstock: An organizer of the sales department?

The Court: He might not know. A salesman might know if he goes out to sell, of course.

By Mr. Comstock:

Q. Well, did he tell you what it would cost? 30

A. Yes.

Q. Yes or no.

Mr. Morrill: I pray—

Q. He did tell you? A. He told me it would cost over—

Mr. Morrill: Just a moment.

Q. He did tell you. 40

Arthur B. Van Houten—Redirect.

Mr. Comstock: He is a representative of this company. I think I am entitled to ask him.

Mr. Morrill: I object on the ground of lack of authority for this man.

The Court: This was after the contract was signed?

10 Mr. Comstock: Yes. It is only to prove that their statement made prior about the eight dollars wasn't so.

The Court: Why does it prove it wasn't so?

Mr. Comstock: He will testify it cost a lot more than eight dollars, to tell your Honor frankly.

The Court: Who will?

20 Mr. Comstock: Schill said it would. Leiber-
man said it would cost eight dollars; their other representative said, "No, Leiber-
man was wrong."

The Court: You have got the testimony in as to the man in authority who said it would cost eight dollars for a twelve-by-fourteen room.

Mr. Comstock: That is right.

30 The Court: Now, then, you haven't any grounds for warranting Schill's statement, from the evidence as adduced thus far. I can't permit it at this time. Now, if Schill gets on the stand himself and says that he knows what it would cost and he testifies as to something different from eight dollars a room, of course, that is real evidence as to what the cost would be.

40 Mr. Comstock: Well, he didn't get on the stand at the last trial. I don't know whether he is going to this time.

Arthur B. Van Houten—Redirect.

The Court: Well, I don't know. I thought you intimated he was going to get on the stand.

Mr. Morrill: If you can find him we will put him on the stand.

The Court: That would be only cumulative. Suppose Schill said, after the contract was all signed, "Yes, it would cost eight dollars a room, twelve by fourteen," what has that got to do with it? 10

Mr. Comstock: No, but he said it would cost twice eight dollars a room.

The Court: Who?

Mr. Comstock: Schill.

The Court: What testimony in the case says that?

Mr. Comstock: They induced us to sign by telling us it would cost eight, and then when their sales demonstrator comes up he said, "No, Leiberman was wrong; it will cost you twice that much to do a room." 20

The Court: I can't permit that hearsay.

Mr. Comstock: Well, I will withdraw the question.

By Mr. Comstock:

Q. You never used the material? A. No, I never have. 30

Q. Did you ever figure out yourself how many pounds it would take to do a room? A. Well, a pound to the yard, yes, I figured out that way, and then a room twelve by fourteen.

Q. How many pounds would it take? A. It would take approximately fifty pounds.

Q. Fifty pounds? A. About fifty square yards of wallpaper, twelve by fourteen, with a nine-foot ceiling. 40

Edmund Van Houten, Jr.—Direct.

Q. At that rate, what would the cost of a room be? A. Over twenty dollars.

Mr. Comstock: That is all.

Mr. Morrill: No questions.

10

EDMUND VAN HOUTEN, JR., sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Van Houten, you are a son of Edmund Van Houten? A. I am.

Q. Who testified here this morning? A. I am, yes.

Q. And you work for your father? A. I do.

Q. In what line? A. I am bookkeeper.

20 Q. Bookkeeper. Did you and your father and brother go to New York on June 3, a Saturday, to see the Duralith people? A. We did.

Q. And what time did you arrive at their offices? A. About 10:30.

Q. Whom did you meet? A. One of the stenographers took us in to Mr. Leiberman.

Q. Mr. Leiberman? A. Yes.

Q. How long did you stay with him? A. Well, we stayed till about six o'clock at night.

30 Q. Now, can you tell us what the conversation was that was had between your father and Mr. Leiberman in respect to this Duralith agency and purchase?

Mr. Morrill: I object to this question on the same grounds that the objection was based on when the question was asked of Edmund Van Houten, Senior, and Arthur Van Houten.

40

The Court: Yes.

Edmund Van Houten, Jr.—Direct.

Mr. Morrill: And your Honor rules adversely?

The Court: Yes.

Mr. Morrill: May I have an exception?

The Court: I overrule the objection and allow you an exception.

A. We were taken into Mr. Leiberman's office and, of course, the material was shown to us and the merits of it were talked over for quite some time, and we went out and had lunch and came back and we were taken into the demonstrating room where, I believe, Mr. Walters demonstrated the material to us. In the course of the afternoon's conversation the question of how much we were to charge per pound came up. It was to be 44, 45 and 46 cents a pound, and Mr. Leiberman also told us that Duralith was used in Radio City. And we asked about what it would cost for the material for a room, the average sized room, about twelve by fourteen. Mr. Leiberman said it would cost about eight dollars a room. After father asked Mr. Leiberman if there was any Duralith in our territory, in Paterson or Passaic County. Mr. Leiberman said no, that that was the beauty of the material, we would have absolutely no competition as there was none of the material in the territory, outside of a few pounds that—a pound or two might be in a paint store here or there, because this was a new form of merchandising and they had only sold it in smaller quantities to paint stores.

Q. And finally the contract was signed by your father? A. It was.

Q. And by Mr. Leiberman? A. Mr. Leiberman, yes.

Q. Now, when Mr. Weiner came up to your place in Paterson did you see him? A. Yes.

Edmund Van Houten, Jr.—Cross.

Q. Have any conversation with him? A. Well, we were all talking with him, my father and my brother and I.

Q. Was anything said about whether competition existed in the county?

10 Mr. Morrill: Well, I have no objection, but do you have to lead the witness, Mr. Comstock?

Mr. Comstock: I will withdraw the question. Cross-examine.

Cross-examination by Mr. Morrill:

Q. You are thirty-one years of age? A. Right.

Q. You graduated grammar school? A. Yes.

Q. You read this contract? A. I did.

20 Q. You have it in front of you? A. I did.

Q. Before it was signed by your father? A. I did.

Q. And you understood at the time it was signed that it was a contract? A. I did.

Q. You understood that it was this contract in question? A. Right.

Q. And you knew that binding obligations arose from this contract? A. I did.

30 Q. You knew that it was a memorial of the transaction between the parties? A. Yes, sir.

Q. And you were aware of the last sentence in clause 2, "The company"—that is, the Duralith Company—"makes no representation regarding previous sales in distributor's territory"; is that right? A. Yes, sir.

Q. And you were aware of the first sentence in clause 3, "This agreement shall become effective when it has been signed by the dealer and approv-

Edmund Van Houten, Jr.—Cross.

ed by the Duralith Corporation at its New York City office"? You knew that? A. Yes, sir.

Q. You had read that? A. Yes, sir.

Q. And you were aware of clause 10, that "no representation or warranty of any kind shall be binding either upon the Duralith Corporation or the dealer unless it has been incorporated in this agreement"? A. Right. 10

Q. Is that right? A. Yes.

Q. And you say there were representations made by Mr. Leiberman? A. Yes.

Q. But they weren't incorporated in this agreement? A. No.

Q. Did you intend to deceive the Duralith Corporation as to representations made? A. Did not.

Q. And yet you signed—you permitted your father to sign a contract which said that no representations had been made; is that right? A. Right. 20

Q. I suppose you were there to assist and advise your father with respect to this proposition? A. I was just there to hear the information about Duralith.

Q. And, I suppose, you discussed the matter with your father or your brother? A. Yes, we did. 30

Q. And you may have even talked to Mr. Leiberman, too? A. Some, yes.

Q. And whether or not there was any Duralith in Passaic County was very important to you? A. Yes, sir.

Q. And very material? A. Yes, sir.

Q. And you didn't insist that it be inserted in this contract, did you? A. No, sir.

Q. And you permitted your father to sign with- 40

Edmund Van Houten, Jr.—Cross.

out it being inserted in this contract, didn't you?

A. Yes, sir.

Q. And the same is true with reference to the use of Duralith in Radio City? A. Yes, sir.

10 Q. And the same is true with reference to the cost of the material, Duralith material, in painting or Duralithizing, whatever you do with it, a room twelve by fourteen; is that right? A. Yes, sir.

Q. Were you there when your brother came back from O'Blenis' store? A. I was.

Q. And you heard him report about twelve tons of the material? A. I did.

20 Q. And is your opinion, Mr. Van Houten, the same as his, that if Duralith had been taken out of O'Blenis' store by the Duralith Corporation that you would have no objection to going on with the contract, as he stated on the stand? A. It would if I found there wasn't any more around besides that.

Q. By "any more" do you mean a pound? A. No, any more than besides what O'Blenis had. I would be skeptical even then to go on.

Q. Why, you knew—

By the Court:

30 Q. No. He is saying, if you found that there was none other than what O'Blenis had. A. Oh, then certainly I would go on with it.

Q. If O'Blenis' was moved out of the county? A. Surely.

Q. You would have gone on with the contract?

A. I would have.

By Mr. Morrill:

40 Q. Now, Duralith is a material used in the

Edmund Van Houten, Jr.—Cross.

building trade, isn't it, or painting? A. It is a wall texture.

Q. And it can be applied thick or thin, can't it, or thicker or thinner? A. Yes.

Q. And if you apply a pound of Duralith very thick it will cover less square surface than if you apply it very thin; is that right? A. Right. 10

Q. And the cost of the material depends upon the amount of material used; is that right? A. That is right.

Q. Now, if you have a room four by four and apply Duralith very thick it is going to cost more for material than it would if you applied it very thin; is that right? A. Yes.

Q. And as to this room twelve by fourteen they didn't tell you, as you say, whether it would cost eight dollars applied thick or thin, did they? A. 20
The average.

Q. The average? A. The average.

Q. And you hadn't used Duralith before, had you? A. No.

Q. Now, Duralith is a material that has been used by painters and builders and contractors for quite a while to your knowledge, isn't it? A. I didn't know anything about it until—

Q. Well, you didn't think when your father had entered into this contract that you were the only persons in the United States selling Duralith, did you? A. No, sir. 30

Q. And if you want Duralith today, as a matter of fact, in your business you can go to some store in New York or New England, Connecticut, Pennsylvania, or Maryland and buy it, if you want to, can't you? A. Yes.

Q. And, as a matter of fact, you are not the only ones in Passaic County who have that privilege? If any other builder wants to go out and 40

Edmund Van Houten, Jr.—Cross.

buy it, he can find some way? A. That is right.

Q. Is that right? A. Yes.

Q. And in June, 1933, if one of your competitors or Mr. O'Blenis or some painter or hay and feed man wanted to buy a ton of Duralith he might have gone to the Duralith Corporation and purchased it; right? A. Right.

10 Q. Or he might have gone to Pennsylvania and brought a ton of it in and you wouldn't expect the Duralith Corporation to know of every particular sale of Duralith that was made in the United States, would you? A. No, but they—

Q. Can't you answer that yes or no. A. But they said if we made a connection with Radio City the sale would go through us.

Q. Well, that is for use in a certain building?

20 A. Surely.

Q. But you didn't expect them—strike that out. Let's assume that John Jones was a dealer in the City of Paterson and he went out to West Virginia and bought a ton of Duralith off some dealer there and brought it in the county: Do you expect and did you expect in June, 1933, that the Duralith Company or Mr. Leiberman would necessarily know of that particular purchase? A. No.

30 Q. And I might go to some store in Rhode Island and buy a pound today for my office, if I wanted to, if there was a salesman there; is that right? A. That is right.

Q. And you would not expect Mr. Leiberman to know of every pound that I purchased, would you? A. No.

By the Court:

40 Q. As I understand it, there would not have

Edmund Van Houten, Jr.—Cross.

been anything to stop a man if he wanted to go to Virginia or even to send down to Africa, but if he wanted to buy in Passaic County you were the sole selling agents; is that right? A. We were the distributor. They were to come to us in the county.

Q. He couldn't go to O'Blenis or anybody else in Passaic County and buy, because they were not supposed to be the agent; is that it? A. Yes. We were supposed to be the sole distributors. 10

By Mr. Morrill:

Q. Did you see Mr. Schill when he came down? A. Yes.

Q. And he was talking to you, undoubtedly, about the promotion of it? A. He was talking to my brother, Arthur. 20

Q. Well, he was talking to your brother while you were present? A. Not very much.

Q. Well, did you hear any of the conversation? A. Some, yes.

Q. Did you hear him say he would try to get Radio City for your account? A. No, he didn't say that.

The Court: Who is this, now? Schill?
Mr. Morrill: Mr. Schill. 30

Q. How was Mr. Williams connected with this affair? A. Why, he was to be our sales manager.

Q. Did he say that he would try to get Radio City for an account of Van Houten and Son? A. He said that he might be able to get some business there on account of his connections there.

Q. Then, in other words, if anything was sold to Radio City you were to get credit for it? A. That was right. 40

Floyd S. O'Brien—Direct.

Q. And he was going to try to make an entree into Radio City? A. That was right.

Q. Obviously, then, one hadn't been made before, if he was going to try to make one? A. Oh, yes, the deal wasn't completed.

Mr. Morrill: That is all.

10

FLOYD S. O'BLENIS, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. O'Brien, you are in business in the City of Paterson? A. Yes, sir.

Q. Where? A. River and Washington Street.

Q. Did you at any time purchase any of this
20 Duralith from the Duralith Corporation? A. I did.

Mr. Morrill: I will admit, your Honor, that Mr. O'Brien will testify that in June, 1933, he had ten or twelve—

Q. How many tons did you buy?

The Court: What date?

Mr. Comstock: November 5, 1931.

Q. Is this the contract you had with the Dura-
30 lith Corporation? A. It is.

Mr. Comstock: I offer the contract in evidence.

Mr. Morrill: No objection.

(Paper marked Exhibit D-4 in evidence.)

The Court: What is the expiration of that?

Mr. Comstock: It is for one year.

The Court: One year. It ended in 1932?

40

Floyd S. O'Blenis—Direct.

Mr. Comstock: December 31, 1932, the contract expired.

Q. Now, as part of your contract did you purchase any of the material? A. You mean Duralith?

Q. Yes. A. Yes.

Q. How much of it did you buy? A. I think it was fourteen tons. Offhand I couldn't— 10

Q. You bought that under this contract? A. Yes, whatever the contract calls for.

The Court: How many?

Mr. Comstock: Amounting to \$4,565.

Q. Can you tell us how many tons that says there? Have you got a bill of lading there? A. I have it here. It is twelve tons.

By the Court: 20

Q. Twelve? A. Twelve, yes.

By Mr. Comstock:

Q. Twelve tons of Duralith f. o. b. Brooklyn, New York. Were you supplied with any advertising matter by the Duralith Company? A. Yes.

Q. Is this what you were supplied with? A. Yes, sir.

Mr. Comstock: I offer it in evidence. 30

Mr. Morrill: I object. I don't see the materiality of it.

Mr. Comstock: It was in the last time.

Mr. Morrill: All right, put it in.

(Papers marked Exhibit D-5 in evidence.)

Q. How much of the material have you still on hand? A. I should say between ten and eleven tons. Maybe more. 40

Floyd S. O'Brien—Cross.

Q. And it is for sale, of course? A. Sure.

Mr. Comstock: Cross-examine.

Cross-examination by Mr. Morrill:

Q. Your contract ended December 31, 1932? A. Yes.

10 Q. You were a distributor of the Duralith Corporation after you signed your contract, weren't you? A. Supposed to have been, yes, sir.

Q. Well, under the contract you were, weren't you? A. According to the way the contract read.

Q. And that carried certain privileges for the advertising and so forth, according to the contract? A. Privileges for whom?

Q. Didn't they do some advertising for you?

20 A. Yes.

Q. And that was done at their expense, wasn't it? A. Yes.

Q. Mr. Leiberman didn't sign that contract, did he? A. I never saw Mr. Leiberman.

Q. And during June, 1932 or 1933 you had no contract at all with the Duralith Company? A. If that is after the expiration that is mentioned there. I haven't got the dates. I think it is 1933.

30 Q. That expired in December, 1933? A. Well, whatever it says there.

Q. Well, you recall when your contract expired? A. One year after the date of it, which would be 1932.

Q. Well, December 31, 1932, your contract expired; is that right? A. Yes.

Q. And subsequent to December 31 of that year you didn't enter into an extension of that contract, did you? A. No.

40 Q. Or any other contract that was like it? A. No, no.

Floyd S. O'Blenis—Cross.

Mr. Morrill: That is all.

Mr. Comstock: That is my case, except one witness, Mr. Williams. He will be here at two o'clock. I would like to reserve the right to put him on if he arrived if we have not concluded before then. 10

Mr. Morrill: Shall we consider that other than Mr. Williams your case is closed now?

Mr. Comstock: Yes.

Mr. Morrill: I move to strike out the testimony of Edmund Van Houten, Senior, Edmund Van Houten, Junior, and Arthur B. Van Houten, with reference to conversations had by and between them and Mr. Leiberman pertaining to the alleged representations as set forth in the defendants' defense, all made antecedent to the execution of this instrument marked P-1 and antecedent to the actual approval, on the ground that no legal testimony has been introduced as to the authority of Mr. Leiberman to make any such representations; 20 30

On the ground that the defendants themselves represented to the home office of the Duralith Corporation that no representations were made and that thereupon the plaintiff signed the contract by its approval and the defendants are estopped from now asserting it, when they formerly asserted there was no representation; On the ground that this testimony should have 10

Sidney P. Leiberman—Rebuttal—Direct.

been admitted *de bene* or provisionally, assuming and giving the right to the defendants to tie it up, and I feel there has been no testimony tying it up.

The Court: Your motion was to strike it out, wasn't it?

10 Mr. Morrill: Yes, just to strike out the testimony.

The Court: I will deny the motion and allow you an exception.

Mr. Morrill: Exception, please.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

20 SIDNEY P. LEIBERMAN, sworn.

Direct-examination by Mr. Morrill:

Q. You are an employee of the Duralith Company? A. I was an employee; I am not employed at all today.

Q. Not employed? Will you kindly keep Exhibit D-1 before you in testifying? Do you know Mr. Van Houten and A. B. Van Houten? A. Yes, yes.

30 Q. And you met him on June 3, 1933? A. I did.

Q. In New York City? A. Yes.

Q. At the offices of the Duralith Corporation? A. Yes.

Q. You were employed by the Duralith Corporation then? A. I was.

Q. In what capacity? A. Salesman.

Q. Were you then an officer of the corporation? A. I was not.

40 Q. Are you now an officer? A. No.

Sidney P. Leiberman—Rebuttal—Direct.

Q. Do you recall this draft contract with the Van Houten Company? A. Yes.

Q. Exhibit D-1? A. Yes.

Q. They came to you in the morning? A. Yes.

Q. You took them out to lunch? A. I did.

Q. And dinner thereafter? A. I think I did. I don't remember the dinner, but if they say I did, I did. 10

Q. And you had the Duralith Demonstration take place in your offices? A. Yes.

Q. Did you talk with all the Van Houtens? A. Yes, they were all together in the same office.

Q. And approximately—was there anyone else talking with them while you were there? A. No, not in my office.

Q. And approximately about six o'clock you had this draft form of agreement executed? A. Yes. 20

Q. And you signed that as S. Leiberman? A. I did. I did.

Q. Did you hand that—did you hand them draft copies of that contract before they signed it? A. Each one I handed a copy so we all read it together.

Q. To each one of them, you say? A. Yes.

Q. Did you see them read the contract? A. Yes. 30

Q. In talking with them about their entry into this agreement did you tell them that Radio City had been using Duralith? A. I did not.

Q. Did you mention Radio City at all as far as the use of Duralith goes to the Van Houtens? A. I did not.

Q. Did you tell them that they would have no competition in Passaic County? A. I did not.

Q. Did you tell them that there was no Dura- 40

Sidney P. Leiberman—Rebuttal—Direct.

lith whatsoever in Passaic County? A. I did not.

Q. Did you tell them that it would cost eight dollars for Duralith material in applying it to a room twelve by fourteen? A. I did not.

Q. What department did you work in then? A. Just a salesman.

10 Q. I beg your pardon? A. In the sales department. I was a salesman.

Q. You had no authority to sign contracts in the final form? A. I did not. My contract specifies that.

Q. And after you affixed your signature to that—well, what would you call it? An order? A. I would call it an order, yes. I call it an application. I sell them the merchandise and they—it is an application for a franchise. It has to be approved by the organization. I have no authority whatsoever to do it. I am only a salesman to sell the product.

20 Q. Did you have authority then to sign a binding contract on behalf of the Duralith Corporation? A. No, I never had.

The Court: We will take a recess now for one hour.

(A recess was taken until 1:20 o'clock P. M.)

30

Afternoon Session, 1:20 P. M.

SIDNEY P. LEIBERMAN, resumed.

Direct-examination (continued) by Mr. Morrill:

Q. Mr. Leiberman, I will ask you a few questions which were answered before.

The Court: What is the last question?

40

Sidney P. Leiberman—Rebuttal—Direct.

(The last question and answer were read by the reporter.)

Q. Now, how far is Radio City from the offices of the Duralith Corporation? A. We are on Forty-third Street and Fifth Avenue, and I think Radio City begins on Forty-eighth Street and runs to, I think, Fifty-first or Fifty-second. I am not sure. 10

Q. Now, did you have authority to tell them how much a room twelve by fourteen would cost in Duralith material? A. I never tell them anything about what it would cost.

Q. Did you tell them, that is, Van Houtens? A. I did not.

Q. Did you tell them anything about whether or not there was any Duralith material in Passaic County? A. I did not. 20

Q. Did you know whether there was any Duralith material in Passaic County? A. I did not.

Q. In the course of your duties did you find out or have occasion to find out prior to the signing of this contract whether there was any Duralith material in Passaic County? A. I did not.

Q. Did you tell either of the Van Houtens or all of them together that Duralith material had been used in Radio City? A. I did not. 30

Q. Did you know whether it had been used in Radio City or not? A. I didn't know whether it had or whether it hadn't.

Q. Did you talk to them about Duralith in a Canadian hotel? A. Yes.

Q. Did you show them any documents pertaining to that Canadian hotel? A. Yes, I showed them some letters from that hotel stating they had used it and how much they liked it and how it had worn and the quality of it and so forth. 40

Sidney P. Leiberman—Rebuttal—Direct.

Q. What was the name of that hotel? A. The Rouge Hotel.

Q. Where is that? A. Murray Bay, Canada.

Q. Quebec? A. Yes.

Q. Province of Quebec? A. Yes.

10 Q. Did you tell them that they would be, after the signing of this contract, the only persons or firm who would be able to sell Duralith material in Passaic County? A. I told them that if they became a distributor of this firm that they would be the only ones to whom we would sell our product, the only ones, that is, during the life of their contract.

20 Q. Yes. A. The only ones with whom we would cooperate in the selling of our product. In other words, they would be the only ones that we had authorized during the life of that contract to represent us in that territory.

Q. How long prior to June, 1933, had you been working for the Duralith Corporation? A. I think I went with the Duralith in September, 1932, as a salesman.

30 Q. And were you in June, 1933, the only salesman that the Duralith Company had, to your knowledge? A. No. Other salesmen came in from other territory, from other branches sometimes and would make sales, but at that time I think I was recognized as the salesman. But other salesmen came in and made sales, too, at different times.

Q. Were you then a director of the corporation? A. I was not.

Q. Or an officer? A. No.

Q. Or a stockholder of the corporation? A. No, sir.

40 Q. When did you cease working for them? A. About two and a half weeks ago, I think it was.

Sidney P. Leiberman—Rebuttal—Cross

Mr. Morrill: You may inquire, Mr. Comstock.

Cross-examination by Mr. Comstock:

Q. You testified in this court at the last trial of this case, did you not? A. Yes, sir.

Q. At that time you were working for the Duralith Corporation? A. Yes, I was.

Q. You say about two and a half weeks ago you left? A. I was asked for my resignation. No fault of my own, I assure you.

Q. I hope not. And when did you start working with them? A. With the Duralith? I think it was four or five—oh, maybe about three months before I became samesman. I started with that at about, I think, just about three or four months before that September, 1932. I forget the date.

Q. Did you start as a salesman? A. No.

Q. What did you start as? A. Contact man.

Q. What is a contact man? A. A contact man is a man that goes into the territory, gives a prospect an idea of what Duralith is, what it can do, the possibilities to be achieved with Duralith, and is invited to come into the City of New York and look over the proposition carefully and thoroughly and decide whether he would like to become a distributor or not.

Q. Who was the contact man who saw Mr. Van Houten? A. I am not sure who he was. I can't recall.

Q. But there was a contact man? A. There was a contact man.

Q. And he made arrangements for Mr. Van Houten to meet you? A. Yes, to come into the office.

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Sidney P. Leiberman—Rebuttal—Cross

Q. Did you have your own private office there with the Duralith people? A. Yes, sir. Yes, sir.

Q. How many offices do you have there? A. I think it is six or seven. Something like that.

Q. And you have one of your own? A. Yes.

10 Q. And it is in that office of yours that these negotiations were carried on, wasn't it? A. Yes.

Q. You say you told them about the hotel in Canada? A. Yes, sir.

Q. Did you tell them about any other places? A. I told them—yes, I showed him some endorsements from Good Housekeeping; I showed him how the Swiss catalog carried our catalog in their book; I showed them letters from quite a few people endorsing and approving the use of Duralith.

20 Q. That was part of your sales argument, wasn't it? A. Yes, sir. Yes, sir.

Q. You liked to show big places where the material was used? A. Not only big places. We showed letters from architects and letters from satisfied users of Duralith.

Q. Do they have it in the Chrysler Building? A. Not that I know of.

30 Q. They never had it in Radio City? A. I don't think it is there. I know that I don't know whether it is there or not, but I don't think so.

Q. It wasn't sold to Radio City while you were a salesman? A. I never sold any of it to them.

Q. How many men did you have under you? A. I had no men under me. Just the sales—

Q. How many salesmen were there for the company? A. Well, they had sometimes four, sometimes five. I don't know.

Q. Did they each have their private office on

Sidney P. Leiberman—Rebuttal—Cross

Fifth Avenue? A. No, they just went on the road and contacted the prospects.

Q. You stayed in the office? A. Yes.

Q. And the only way you sold was when the contact man would send a prospect to you? A. When they invited them to come in to look over the proposition.

Q. You were the head salesman? A. I was the salesman, yes. 10

Q. The head salesman? A. Sometimes in that office I was the head salesman, sometimes there was another salesman that came in there that was a bigger man than I was.

Q. The day you dealt with Van Houten you were the head salesman? A. I was the salesman in that office.

Q. On that day? A. Yes. Oh, yes. Oh, yes.

Q. And you signed the contract? A. I signed the contract. 20

Q. For the Duralith Corporation? A. No, I did not sign the contract for them. I signed the sales that I made and the contract was not accepted. I signed that.

Q. This is the distributors' contract, isn't it? A. It says contract, but it—

Q. It doesn't say anything about an order, does it? A. It doesn't become a contract until accepted. 30

Q. Never mind. That is what it says, isn't it? A. It is an application.

Q. It is signed Duralith Corporation by S. P. Leiberman? A. Yes.

Q. So you did sign it for the Duralith Corporation? A. I signed it as a salesman for the Duralith Corporation, making the sale, yes, sir.

Q. Where does it say salesman? A. I don't suppose it says salesman. That is all I am. 40

Sidney P. Leiberman—Rebuttal—Cross

Q. Well, you signed "Duralith Corporation, by S. P. Leiberman"? A. Yes.

Q. So you did sign for the corporation, didn't you? A. Yes, I am working for the corporation and I signed.

10 Q. Well, that is all I asked, Mr. Leiberman. Of course, in order to make a sale you used every argument that a good salesman could think of to put the sale over, didn't you? A. Every fact that I could place before them that would help me consummate a sale I place before each prospect that comes in.

Q. Had you ever been to Paterson? A. Not for the Duralith Corporation.

20 Q. You didn't know anything about the stock of material that O'Blenis had? A. Nothing at all.

Q. You were in frequent consultation with the president, Mr. Weiner, weren't you? A. I saw him, I guess, every day.

Q. You did at that time? A. Yes.

Q. Did you introduce Mr. Van Houten to him? Did you? A. Introduce Mr. Van Houten to who?

Q. Mr. Weiner. A. I don't think so.

30 Q. Didn't you show Mr. Weiner's office that was covered with Duralith to Mr. Van Houten? A. Yes, that was my office formerly.

Q. Didn't you show the president's office to him? A. Yes.

Q. And wasn't the president there? A. I say I think I did, because I very often do that when a prospect comes in. I don't recall this particular time.

Q. Didn't you introduce Mr. Van Houten to the president when you showed him that room? A.

Sidney P. Leiberman—Rebuttal—Cross

If he was in, very likely I did, but I don't recall that.

Q. Then, after you signed the contract and Mr. Van Houten signed it did you take it and hand it to Mr. Weiner? A. No, I never hand Mr. Weiner a contract. When I make a sale I hand it to the—usually to Mr. Orans, who is—

Q. Who is Mr. Orans? A. One of the officers of the company. 10

Q. Who is Mr. Orans? A. I think he is assistant treasurer of the company.

Q. Did you have a conversation with Mr. Weiner about this contract? A. I don't think I did. No necessity for it.

Q. Did you get a straight salary? A. I got a commission with a drawing account.

Q. Then, whether this contract went through or not affected your commission, didn't it? A. I can answer that—I can answer that question— 20

Q. No; did it? A. It would affect my commissions on the books, but the drawing account that I got, I never thought my commissions would equal the—

Q. I am keeping my voice up, because I understand you are hard of hearing? A. Yes.

Q. Do you want me to repeat what I said? Did it affect your commission? A. I am placed on a commission, a small commission. I have a drawing account, and personally I never figured that my drawing account—that my commissions would equal my drawing account. 30

Q. Well, whether or not— A. It is based on—

Q. —this contract went through made a big difference in the amount of your drawing account, didn't it? A. No, sir.

Q. It made a difference in the balance of it at 40

Sidney P. Leiberman—Rebuttal—Cross.

the end of the month, didn't it? A. Well, I can answer that.

Q. Did it? Did it? A. I never had a balance. I have never had—

Q. Then, it didn't make any difference whether you sold it or not, did it? A. I got my drawing account.

10 Q. It didn't make any difference to your commissions whether you made a sale or not; do you want us to understand that? A. I understand—I understand that the commissions—I am working on a commission. When I make a sale it no doubt was credited on the book. I have been there a year and a half and never had an accounting with the firm, because I realized the amounts I sold would not equal the drawing account that
20 I had, and I never called for an accounting.

Q. After all that explanation, you are not answering the question, whether or not this sale went through made a difference in your commission. A. On the books, on my commissions, yes.

Q. On the books. You got credit for it, didn't you? A. Yes.

Q. And yet you never asked Mr. Weiner whether or not he had approved the contract? A. No, sir.

30 Q. Never asked him? A. No, sir.

Q. You never saw Mr. Van Houten after that Saturday in June? A. Last I ever saw him.

By the Court:

Q. Was the material shipped to Paterson? Was the material shipped to Paterson? A. When I make a sale, your Honor—

Q. Was the material shipped to Paterson—the Duralith? A. I believe it was, but I have no—

Sidney P. Leiberman—Rebuttal—Cross.

Q. How did it come about if nobody knew about it but you? A. It is handed—as soon as I make a sale I hand the application for a franchise to one of the officers and it is out of my hands, your Honor. I have nothing more to do with it than to make a sale. May I explain that?

Q. Then, you hand it to the officer in charge?
A. Yes, sir. Yes, sir. 10

Q. Who is the proper agent of the company?
A. Yes.

Q. Is that right? A. Yes.

Q. And that is what you did in this case? A. Yes, sir.

Q. And the goods were shipped? A. Must have been shipped, yes, sir.

By Mr. Comstock:

Q. Now, in making sales isn't it a persuasive argument with the prospect how much it will cost to do a room with this material? Is it or is it not? A. Well, I haven't anything to do with that. 20

Q. I say, is it or is it not? A. I presume it would be.

Q. Sure. And didn't you tell prospects how much an ordinary room would cost? A. No, sir.

Q. Didn't make any difference to you whether it cost a million dollars or five cents? A. I took him where the— 30

Q. Just answer the question. It didn't make any difference in your mind as to whether it cost a million dollars to do a room or whether it cost five cents? A. I knew that would be told to him when he was placed in the technical man's hands.

Q. You were getting the contract signed, weren't you? A. Yes, but that is not my business. I don't get the contract until he knows what it 40

Sidney P. Leiberman—Rebuttal—Cross

costs, until he is told in the demonstration all those things. I put him in the demonstration room, where they spend perhaps an hour or two, sometimes, and I tell them to ask all the questions that they possibly can think of so they will be thoroughly posted and understand what Duralith is and all about it.

10

Q. You as the salesman, then, didn't have any idea what it would cost to do an ordinary room?

A. Well, this is the only part of the price that I ever discuss with the prospect when he is before me.

20

Q. I didn't get the first of that. A. The only part of the price of a room that I discuss when a prospect is before me is to tell him what the craftsmen—salesmen, who are trained by the sales manager in the field—what they should get for a room. And I usually tell them a small room of about forty square yards would be sold by a craftsman—salesman for about seventeen, eighteen or nineteen dollars a room, and that is the only way I ever discuss price, because I am not a technical man and know nothing about it.

Q. Didn't you tell them that an ordinary room, twelve by fourteen, would cost eight dollars? A. I did not.

30

Q. You told them it would cost seventeen? A. No. I told them that the craftsmen-salesmen could do a room for seventeen, eighteen or nineteen dollars.

40

Q. I see. You told them that they would be the sole distributors in the territory, didn't you? A. No. I told them that if that contract was accepted that they would be the only ones with whom we would deal and sell our product to in that territory during the life of that contract. I told them

Sidney P. Leiberman—Rebuttal—Cross.

that they would be the only ones that we would cooperate with in the selling of this product during the life of that contract. They would be what we call our authorized distributors, the man that we would cooperate with and who could call upon us for assistance when he needed it.

Q. Oh, then, did you tell them that there might be other distributors in the territory? A. I did not. 10

Q. You didn't tell them that? A. I did not.

Q. You didn't tell them that they would be the sole distributors? A. That they would be what?

Q. They would be the sole distributors? A. They would be the only ones to whom we would sell our product during the life of his contract.

Q. Didn't you know at that time that Mr. O'Brien had twelve tons of it in stock? A. I never heard of it at that time. 20

Q. You never heard of it? A. No, sir.

Q. You were not with the company at that time? A. I don't think I was at that time.

Q. Didn't Mr. Weiner, the president of the company, tell you that in this territory there was now twelve tons on sale? A. No.

Q. He didn't tell you that? A. No.

Q. Are you sure Mr. Van Houten didn't ask you about it? A. He did not. Yes, I am sure. 30

Q. Or either of his sons? A. They did not.

Q. Well, it was very vital and important to them, wasn't it?

Mr. Morrill: I pray your Honor's judgment. I don't think this witness can testify as to what was important to the other parties to the contract.

Mr. Comstock: I will withdraw the question. 40

Sidney P. Leiberman—Rebuttal—Redirect.

Q. Don't you think that it is of vital importance to a distributor to be the sole distributor in a territory? A. It would be a great advantage to him to have the exclusive sale and nobody else selling it, yes.

Mr. Comstock: That is all.

10

Redirect-examination by Mr. Morrill:

Q. Just one question, please. This price of seventeen to nineteen dollars for a room, is that a price for the material alone or for workmanship included? A. That includes the price that the craftsman will get—his profits.

Mr. Morrill: That is all. No further questions.

20

WILLIAM WEINER, sworn.

Direct-examination by Mr. Morrill:

Q. What office do you hold with the Duralith Corporation, the plaintiff in this suit? A. I am the president.

Q. A director, too, Mr. Weiner? A. And a director.

30

Q. Shareholder? A. Yes.

Q. And were you such in June, 1933? A. I was.

Q. Mr. Leiberman was a salesman for you at that time? A. He was.

Q. Did Mr. Leiberman ever have authority to sign binding contracts for the company? A. He had none.

Q. You are familiar with the particular form of contract which was eventually signed and ap-

40

William Weiner—Rebuttal—Direct.

proved, signed by Van Houtens and approved by you? A. I am.

Q. That is the form your company used at that time? A. Yes, sir.

Q. Did Mr. Leiberman have any authority to make any representations other than those contained in the contract? A. He did not.

Q. After this contract form was signed by the defendants in this case and Mr. Leiberman affixed his signature to it, in the form of Exhibit P-1, did this eventually come to your attention? A. It was referred to me from the credit department. 10

Q. Did Mr. Leiberman himself bring it in? A. He did not.

Q. Did you mark that contract approved? A. I did, on June 5, 1933.

Q. When you approved that contract with your stamp did you discuss this contract with Mr. Leiberman? A. I did not. 20

Q. This contract, Exhibit D-1, is marked "Approved, W. W." Are those your initials? A. That is my initials and my form of marking it when approved.

Q. And that was approved June 5, 1931? A. 1933.

Q. 1933. Was Mr. Leiberman an officer of this corporation during 1933? A. No, sir. 30

Q. Or a director? A. No, sir.

Q. Or a stockholder? A. No, sir.

Q. To your knowledge? A. No.

Q. In June, 1933, did you have in Passaic County an authorized distributor such as the Van Houten became under this contract? A. Not in June, prior to June 5.

Q. Had you had one previous to June, 1933? A. We had one. 40

William Weiner—Rebuttal—Direct.

Q. With O'Brien? A. In 1932.

Q. That ended December, 1932? A. December 31, 1932.

10 Q. When this contract was approved by you was there any other authorized distributor of Duralith in Passaic County? A. I can't say about Passaic County. There was none in Paterson, and no doubt none in Passaic County, if that was the territory that was assigned to Van Houten.

Q. You knew at some time prior to June, 1933, that O'Brien entered into a contract with your company, of course? A. I did.

Q. You knew that you sold a certain amount of Duralith to him under that contract? A. I did.

20 Q. Did you know at all times or at any time subsequent to your signing the O'Brien contract, exactly how many pounds of Duralith he had in Passaic County? A. I did not.

Q. Or in his store in Paterson? A. I did not.

Q. Did he give you a record of any sale or sales that he might have made subsequent to the time he signed your contract? A. He did not.

Q. Which persons connected with the Duralith Corporation have authority to approve those contract forms when they are submitted by the salesman? A. Only the president or the treasurer.

30 Q. And what is the treasurer's name? A. Harry M. Weiner.

Q. And he is your brother? A. Yes.

Q. When you received this Exhibit P-1, this contract application, were you aware of any representations made by Mr. Leiberman to the Van Houtens as to the use of Duralith in Radio City? A. I was not aware.

40 Q. Or of the representations made with reference to the existence of Duralith in Passaic County? A. I did not know.

William Weiner—Rebuttal—Direct.

Q. Or of the fact that Mr. Leiberman allegedly represented that a room eight by twelve or twelve by fourteen would cost eight dollars for material? Did you know that Mr. Leiberman had told them that? A. I did not know.

Q. As a matter of fact, Mr. Weiner, do you know what the cost would be of Duralith material in a room twelve by fourteen? A. Yes.

10

Q. Well, using Duralith in the average or usual or ordinary way, that is, not thick or not too thin, to use it in a room, an average room, twelve by fourteen, what would be the cost of Duralith material to cover such a room? A. Do you want me to strike an average or do you want me to give you on the basis of our experience and knowledge what the extremes might be? Much depends on the skill of the mechanic who applies it, as well as on the condition of the surface to which it is applied.

20

Q. All right, now, let's take a pound of Duralith? A. Yes?

Q. What is the minimum and maximum of square surface, the area, that Duralith can cover in various uses? A. Duralith has covered as much as two and a half square yards to the pound under favorable conditions, and by a skilled laborer; and as little as a square yard to the pound under less favorable conditions.

30

Q. And taking the same condition and applying Duralith, more Duralith would be used, I suppose, if it was applied thicker? A. Yes.

Q. And a good deal, you say, would depend on the craftsmanship of the master worker who applies it? A. That is right.

Q. Now, from your past experience, not giving the extremes, what would be the cost of Duralith material for covering such a room as I mentioned

40

William Weiner—Rebuttal—Direct.

before? A. It could be done for material alone, anywhere from seven dollars to nine or ten.

Q. And is the difference in the prices you have just mentioned dependent upon the conditions and the skill of the workman? A. And the thickness of the texture that is desired.

10 Q. And the thickness, yes. Now, after you had approved this contract did you take any steps in furtherance thereof, such as an advertising program? A. Yes, we proceeded to carry out certain obligations which we had under the contract.

Q. And when you received this form did you rely upon the terms stated therein? A. Fully.

20 Q. And you were aware, I suppose, of clause 10 about no representations having been made except those included in the contract? A. We relied on that very much. That is put in there as a caution for the buyer to make sure that everything that he understands is in there, so that we will understand what he understands.

Q. How many salesmen did you have at that time? A. Possibly six.

Q. And Mr. Leiberman was working on a commission basis with you at that time? A. He was.

30 Q. Now, a room twelve by fourteen—what is the other dimension, nine feet? A. Oh, either a nine-foot ceiling or eight-and-a-half-foot ceiling. Depends on the room.

Q. Take a room twelve by fourteen by nine. How many square yards are there? A. Fifty to fifty-two, if the openings—

Q. By openings you mean what? A. Doors and windows. It should be about forty square yards after the openings have been taken out.

40 Q. And one and a half square yards of Duralith per pound, for the average? A. It would be

William Weiner—Rebuttal—Direct.

about twenty-eight or twenty-nine pounds of material.

Q. And that would cost how much per pound?

A. The cost at twenty-one cents would be that much times twenty-one. Twenty-eight times twenty-one.

Q. That would result in the figures you gave before, between— A. Yes, it is well within that range. 10

Q. Six or seven or nine or ten dollars? A. Yes, it is well within that range.

Q. On June 3rd when the Van Houtens were in your offices did you converse with them at all?

A. No, sir, I didn't remember meeting them at all, but afterwards I heard testimony here which brought to my mind that Mr. Leiberman opened my door and just bowed the gentlemen in to see my room, but I never caught the name or never actually met them or spoke to them at that time, on the day when they were at our office. 20

Q. Then, you discussed nothing about the contract with them before they signed it? A. No, sir.

Q. Was Duralith used in Radio City at that time to your knowledge? A. No, sir, so far as I knew, it wasn't. We were very anxious to get it in there and we thought that through the Van Houtens we would be able to get it in there. 30

Q. When did you receive your first intimation that Van Houten had signed this contract in question? A. At the time when I approved it.

Mr. Morrill: You may inquire, Mr. Comstock.

Cross-examination by Mr. Comstock:

Q. You say Mr. Leiberman had very limited powers in making sales? A. He had no powers 40

William Weiner—Rebuttal—Cross.

of any sort beyond the power that is usually given to a salesman.

Q. Well, he had power to sell your product, didn't he? A. Oh, yes.

Q. And you supplied him with an office in your suite there in New York? A. Yes, sir.

10 Q. A private office for him? A. Well, it wasn't exclusively his.

Q. Well, he occupied it this day, anyhow? A. Yes, he did.

Q. Was his name on the door? A. No.

Q. And you supplied him with his printed blank contracts, didn't you? A. Yes, sir.

Q. For the purpose of getting prospects to sign them? A. Yes, sir.

20 Q. You clothed him with all that authority? A. Oh, yes.

Q. But you had some secret understandings as to the limit of his authority, didn't you? A. I don't know as it was secret.

Q. Well, you put him out, didn't you, with an office, your contracts printed by you, with power to sell, didn't you? A. Yes. What was there secret about it?

30 Q. But you tied his tongue as to other things; is that what you want us to believe? A. Oh, no. He was to give his presentation—

Q. You said no. Now, that answers it. A. All right.

Q. You wanted him to sell Duralith, didn't you? A. Yes, indeed.

Q. You remember selling to Peter O'Blenis? A. I remember we had Mr. O'Blenis as a distributor.

40 Q. You signed his contract? A. I probably approved it.

William Weiner—Rebuttal—Cross.

Q. He took fifteen tons? A. I don't recall what he bought.

Q. Did you ever visit his place of business in Paterson? A. I did.

Q. You did? A. I did.

Q. When did you call on Peter O'Brien? A. Sometime after he was a distributor.

Q. Did you call on him after the end of his contract year? A. I believe it was before the expiration of his contract. 10

Q. Are you sure? A. I am sure of it, yes.

Q. How long before? A. Oh, months before.

Q. Months before? A. Yes.

Q. What do you mean by that? A. Just exactly what I said.

Q. Two months, three months, six months, seven months? A. There was no reason for me to fix that in my memory. I don't recall. 20

Q. For what purpose did you call on him? A. I don't recall the purpose now.

Q. Wasn't it near the close of the contract year? A. It may have been.

Q. It may have been? A. It may have been.

Q. Wasn't it immediately after the contract year had closed? A. I wouldn't say that I didn't call on him after the contract year.

Q. You wouldn't say that, either? A. No, I wouldn't. 30

Q. So you may have called on him after the end of the contract year? A. It is possible. I believe I called on O'Brien maybe three or four times in all.

Q. During the year is that? A. During the time that I knew him.

Q. Well, you know him yet, don't you? A. I beg your pardon? 40

William Weiner—Rebuttal—Cross.

Q. You still know him? A. Oh, yes. Yes.

Q. When is the last time you were in his place of business? A. I don't recall just what the occasion was.

Q. You said on your direct-examination that you didn't know how much O'Brien had on hand, didn't you? A. No.

10 Q. When you called upon him you found out what he had, didn't you? A. Oh, I may not have.

Q. But you don't know why you called on him? A. No. If I called on him—when I called on him it was in relation to our business dealings, but I don't recall just what the particular subject was.

Q. You called three or four times? A. Yes.

Q. And you are not sure whether it was during the year or after the year; is that right? A. Oh, 20 no. I say most of the times that I called on him was probably during the time that he was our agent.

Q. Whether you called after you are not sure? A. I may have called on him once afterward.

Q. That is what I say; you are not sure of it? A. No, I am not sure.

Q. And you are not sure why you called on him? A. Oh, yes.

Q. Why? A. In the interests of our business.

30 Q. Well, what particular purpose did you have in mind when you called on O'Brien the last time?

A. To get him to become a little more active; if it was during the time that he was our agent, no doubt my purpose was to see what I could do to make him more active, to find out what sort of cooperation he might want from us, how we can serve him better, what we can do to build up a business in the territory.

40 Q. Wait a minute. I didn't ask you all that.

William Weiner—Rebuttal—Cross.

The Court: Yes, you did.

Mr. Comstock: Did I?

The Court: Yes. You wanted to know what he called for.

Q. All right, go ahead. A. And the usual purposes that the president of a manufacturing company would have when calling on one of his distributors. 10

By the Court:

Q. No, not what you usually did; what you did on this occasion. A. It was in relation to our business, the furtherance of our business interests.

By Mr. Comstock:

Q. You hadn't received any repeat orders from him, had you? A. No, sir. 20

Q. Maybe that is the reason you came up? A. Possibly.

Q. You were slow in getting orders? A. Right.

Q. He told you, of course, how much he had on hand then, didn't he?

The Court: He doesn't know. He said he didn't remember whether he did or not. If he did, he doesn't recall it. Now, maybe he has refreshed his memory. I don't know. 30

By the Court:

Q. Did he or didn't he? A. I beg your pardon?

Q. Did he tell you? A. No, he did not.

By Mr. Comstock:

Q. He didn't tell you how much he had on hand?

A. No.

Q. Did he tell you how much he had sold? A. No, sir, he did not. 40

William Weiner—Rebuttal—Cross.

Q. Then, you are not sure whether that was—

The Court: What is the purpose of all this?

10 Mr. Comstock: Because he said he didn't know whether Peter O'Brien had gotten rid of all his stuff at the time he signed this contract.

The Court: Well, he has told you a dozen times. He didn't discuss it that way.

Q. I show you a letter dated June 16, 1933, on the letterhead of the Duralith Corporation. Is that signed by you? A. Yes, sir.

Q. Addressed to A. B. Van Houten and Son? A. Yes, sir.

20 Mr. Comstock: I will have it marked for identification, unless you want to admit it.

Mr. Morrill: I have no objection to your admitting it as your exhibit.

(Paper marked Exhibit D-6 and read to the jury by Mr. Comstock.)

Q. So from this you refused to accept the return of the material, didn't you?

The Court: Well, that speaks for itself, doesn't it?

30 Mr. Comstock: It says so in the letter, yes.

Q. You knew the Mr. Williams spoken of in this letter? A. He came to our office. I didn't know him before.

Q. You met him there? A. Mr. Van Houten introduced him to me.

Q. Well, you knew that he was to be the sales manager of your product? A. I didn't know that.

40 Q. You said so in the letter? A. I didn't know

Gordon Williams—Direct.

that he was to be; I knew that Mr. Van Houten was considering him for that position.

Q. And that is the reason he called on you, wasn't it? A. Right.

Q. At your New York office? A. Right.

Q. And who was with him? A. I believe it was Art Van Houten.

Q. And you and Art Van Houten and Mr. Williams had a conversation in relation to this contract? A. Yes. Mr. Williams— 10

Q. Did you or did you not? A. We did.

Q. Was Mr. Williams acceptable to you as a sales manager? A. He appeared to be acceptable, because we were anxious to get Radio City and he said he could get it for us.

Q. He was acceptable to you? A. Yes.

Mr. Comstock: That is all. 20

Mr. Morrill: The plaintiff rests, your Honor.

The Plaintiff Rested in Rebuttal.

GORDON WILLIAMS, sworn.

Direct-examination by Mr. Comstock:

Q. Mr. Williams, what is your business? A. I am a sales manager. 30

Q. Are you working for Mr. Van Houten? A. No, sir.

Q. Have you ever worked for him? A. No, sir.

Q. But you contemplated making connections with him in relation to the sale of Duralith? A. Yes, sir.

Q. And did you visit the Duralith office in New York? A. I did. 40

Gordon Williams—Direct.

Q. With whom? A. With Mr. Arthur Van Houten.

Q. What position did you contemplate taking?

A. I contemplated taking the management of the sales of Duralith for the Van Houten Company.

Q. Now, whom did you meet in the Duralith office? A. Mr. Weiner.

10

Q. The gentleman who was just on the stand? A. Yes, sir.

Q. Did you have any conversation with him in relation to the Duralith contract with Van Houtents? A. Yes, sir.

Q. Just tell us what the conversation was. A. The conversation, in substance, was to the effect that I did not see how I could afford to go ahead on the sales end of it, not the Van Houten Company with the distribution of it, unless the Duralith Corporation took back the stock that had been delivered to them or the O'Brien stock removed from the territory.

20

Q. What did Mr. Weiner say to that? A. He said that could not be done.

Q. Was anything said about Radio City? A. Yes, sir. That was brought up in a casual manner. I asked Mr. Weiner if they had sold any Duralith to Radio City and he told me that they had not, and I told him that I had a connection that might prove to be such that some could be sold to them.

30

Q. Was anything said about the O'Brien stock? Oh, you have told us about that. A. Yes.

Mr. Comstock: That is all. Cross-examine.

*Gordon Williams—Cross.
Motion for Directed Verdict.*

Cross-examination by Mr. Morrill:

Q. You had a connection with Radio City which you thought might work out profitable for the sale of Duralith through Van Houten? A. Yes, sir. I didn't get the last part of the question, sir.

10

(The question was read by the reporter.)

A. Yes, sir.

Q. And you thought you could contact this particular opening you had in Radio City for the sale of Duralith; is that right? A. That is right.

Q. And you thought that because of this contact you could introduce Duralith to Radio City; is that right? A. Not because of the contract, no.

Q. Contact. A. Contact, yes.

20

Mr. Morrill: No further questions.

Mr. Comstock: I rest, if your Honor please.

Mr. Morrill: No further testimony by the plaintiff.

BOTH SIDES RESTED.

MOTION FOR DIRECTED VERDICT.

30

Mr. Morrill: If your Honor please, I move for a directed verdict for the plaintiff as a matter of law on the grounds, to save time, on which I objected to the admission of the testimony of all of the plaintiff's witnesses, or, rather the Van Houtens, with reference to conversation antecedent to the execution of the contract.

On the ground of lack of authority of Leiberman to make any of these representations, there-

40

Court's Charge to the Jury.

by indicating that there is no legal testimony showing authority.

On the ground that because the defendants represented that there were no representations they are estopped from giving testimony as to the representations made antecedent to the contract.

10 I feel that there is no legal evidence of authority of agency. A denial of Mr. Weiner's testimony as to the authority has not been made by the Van Houtens at all. I feel that the Duralith Corporation is an innocent party, taking the type of clause as a whole, and the attitude of the law towards these clauses.

20 The Court: Well, I am not barring you on the question of agency. I am letting the jury decide it. I am leaving it to the jury. I am leaving it to the jury, giving you that advantage.

Mr. Morrill: Then, your Honor denies the motion, so I may take an exception?

The Court: Yes.

COURT'S CHARGE TO THE JURY.

MACKAY, J.

Members of the Jury:

30 The Duralith Corporation, the plain^tiff, is seeking to recover from the defendants, Edmund B. Van Houten and Jennie Hopper, trading as A. B. Van Houten and Sons, the sum of \$3,192.76, the amount of a check on which payment was stopped for the sale of Duralith which is alleged to have been sold under this exhibit that is marked in evidence, which was signed "A. B. Van Houten and Sons, Edmund Van Houten," and by Mr.
40 Leiberman. All it says is "Duralith Corporation,

Court's Charge to the Jury.

by S. P. Leiberman." The plaintiff also seeks interest on this sum of money from June 13, 1933, the date of the check on which payment was stopped, to date, which I figure at \$151.65—I do not know whether that is the correct amount or not, but that is the way I figured it out—making a total due of principal and interest of \$3,344.41.

10

It is contended on behalf of the plaintiff in this case and evidence has been produced to the effect that on June 3, about 10:30 A. M., Mr. Van Houten and his two sons went to New York, on Fifth Avenue near Forty-fourth Street, to the Duralith Corporation's offices in response to a conversation they had with some contact man connected with the corporation; that they stayed there for luncheon and dinner, leaving there about six o'clock P. M.; that during that time there was a demonstration as to how this Duralith material was applied and so forth; that the contract was signed on the 3rd of June, but was not at that time approved by the company, the Duralith Company, not being approved until a later date, June 5, 1933.

20

The defendants in this case charge fraud and misrepresentation, contending that certain fraudulent statements and misrepresentations were made verbally which induced the defendants to enter into this bargain or agreement, and those alleged misrepresentations or untrue or false representations are claimed to be, first, that there was no Duralith in Passaic County except a few pounds in some paint shops, second, that it would cost eight dollars per room for a room twelve by fourteen. There was testimony on behalf of the defendants that it would cost twenty dollars. There was testimony on behalf of the plaintiff

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Court's Charge to the Jury.

10 that if any statement such as that had been made that related to the material itself and it depended on the thickness of the material as applied, as well as the skill in applying it, and that the material would cost only seven or nine or ten dollars for a twelve by fourteen room. There was testimony that O'Blenis, who took the witness-

20 stand, had a contract or agency to sell Duralith in Passaic County, whereas the exclusive agency was given to the Van Houtens. O'Blenis said, however, that he had a contract bearing date November 5, 1931, which expired December 31, 1932, and that under that contract he had bought twelve tons of the material and had ten or eleven or a little more than that left, but the testimony apparently is that his agency had expired, from

30 what he stated to you as a witness in this case, although he had this on hand; in other words, that at the time of the signing of this bargain there was really no contract in existence with anyone in Passaic County, and the O'Blenis contract was ended, according to the testimony, on December 31, 1932, which was several months before the making of the alleged contract in question.

30 The defendants also say that the plaintiff's agent, alleged agent, Mr. Leiberman, stated that Duralith had been used in Radio City, and that the plaintiff denies. Mr. Leiberman denied that he made any of these statements. He denied that he had made any statement as to costing eight dollars per room or that it had been used in Radio City or that there was no Duralith in Passaic County except a few pounds in paint shops. I think he said that. If I am mistaken about that,

40 why, disregard it.

Court's Charge to the Jury.

So those are the three reasons alleged by the defendants as false or fraudulent representations which they say avoid this contract, and they claim that because of these statements or any one or more of them there should be no liability in this case. First, that there was no Duralith in Passaic County except in a few paint shops; second, it would cost eight dollars to apply it to a room twelve by fourteen; and, third, that Duralith was used in Radio City in New York. 10

Now, there is testimony on behalf of the plaintiff in this case that Leiberman was a salesman, that he was not a stockholder, he was not an officer of the company, and that he had no authority whatsoever to bind the Duralith Corporation by making the statements that are alleged to have been made, which are alleged to be false and fraudulent. The plaintiff says that because of the fact that he was not an agent, clothed with authority in the premises, that is, to make representations, that even if he made them that could not bind the Duralith Corporation. Then, there is testimony on the other side that he was the agent with authority to bind the company by making statements. 20

I am going to leave that question for you to determine as to whether or not you find that at the time of and just prior to the signing of this agreement that has been marked in evidence Mr. Leiberman was the agent and servant of the Duralith Corporation, acting within the scope of his authority, having the right to make the statements that the defendants allege he made. You must weigh the evidence on that score and balance it and find out in whose favor it bears down or weighs down. If you find as a fact from the 30 40

Court's Charge to the Jury.

weight of the evidence that Leiberman was not the agent or servant of the Duralith Company, acting within the scope of his authority in the master's service at this particular time, then any statements that he made would not be binding upon the Duralith Company in any respect. If you find, however, as a fact from all of the evidence
 10 that he was the agent and servant, acting within the scope of his authority on this particular occasion, with authority to act in the manner as indicated relative to these verbal conversations, then, of course, you would go on to the next point which the defendants raise in this case.

Of course, if you found that he was not the agent, then the defendants' defense would fall and the plaintiff would be entitled to a verdict at your hands, because then the false and fraudulent statements as alleged, not being attributable to the Duralith Corporation, not binding on it,
 20 the plaintiff would have a judgment at your hands.

If, however, you find that he was the agent and servant, then you go on to the next question, and that is the question of fraud in one or more of these three points raised which I have already given you.

30 On the question of fraud there are certain things that are necessary for the defendant to prove, and the burden of proving fraud is upon the defendant, because the defendant alleges it, and the defendant must prove it by a fair preponderance of the testimony, which means the greater and weightier evidence or the more convincing evidence. The defendant must prove first that the representation was made by the plaintiff, meaning that the defendant should act
 40 upon it, and when I say made by the plaintiff, I

Court's Charge to the Jury.

mean by the plaintiff's agent or servant, acting within the scope of his authority and having the right to make it. Second, that the representation or representations was or were false and that the plaintiff company knew they were false; and, third, that the defendant believed the statement or statements to be true and acted upon it or them, one or more of them, and was injured. That is what has to be proven in a case of fraud. It is not necessary for me to go again into the conflicting testimony or to recite any more of an outline than I have already given you. 10

There is testimony that certain representations were made before the contract was actually signed and there is testimony denying that representations were made. In fact, I believe the Van Houtens said—two of them, at least, Arthur and Edmund, Junior—on cross-examination when questioned, that if the O'Blenis material had been removed from the county they would have gone on with the contract, indicating that they had not relied on the Radio City statement as alleged, and that they had not relied on eight dollars per room as alleged; and that if that O'Blenis material had been removed from the county they would have gone on with the contract. That, of course, you have to weigh with all the testimony in the case and take it all into consideration as to whether or not there were false and fraudulent representations. 20 30

Our courts have said that oral testimony can be used where fraud is charged. In this case, you see, these parties read the draft of the contract, the defendant Edmund Van Houten and his two sons. They read the printed draft. They all read it. They said they read it and they said they un- 40

Court's Charge to the Jury.

derstood it. Yet there is nothing in here as to these alleged fraudulent statements that they claim were made to them and they did not ask that those statements be put in the written agreement. There was no request on their part that they should be put in this contract, that Radio City had used Duralith, that they had the exclusive agency in Passaic County or the agency there for Duralith, and that there was no other Duralith in the county, and the other statement that it would cost eight dollars a room for room twelve by fourteen. In fact, this agreement reads, "No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the dealer unless it has been incorporated in this agreement." They read that, and yet they said there was no request after reading it to have that put in, those three statements put in.

But I have permitted the verbal testimony to be introduced on the charge of fraud because our courts have laid down this rule in a case in 110 New Jersey Law, page 103, where the Court said, "The rule is well established that for the purpose of proving fraud verbal statements which are material and fraudulent, although made before or at the time of the written agreement, may be proved, as such evidence tends to disaffirm the contract and to show that there was no contract in fact. The defendants in the case at bar did not seek to change or alter the agreement, but sought to void it by reason of the false representations which induced it. When fraud is the issue the fact that the agreement contained a provision that it comprised the entire contract between the parties and superceded any and all other agreements respecting the property, does

Court's Charge to the Jury.

not change or affect the rule allowing the introduction of evidence consisting of verbal statements made before or at the time of the written agreement, otherwise such an article would preserve a contract no matter what false or fraudulent representations might have been made before or at the time of the execution. When fraud is involved the rules of evidence are very liberal and a wide latitude is given the party seeking to establish that fact.” 10

Now, there are two questions for you to determine. First, was there an agency in this case which was binding on the Duralith Company? If you find that there was no such agency in the manner I have already indicated, then, of course, the defense of the defendant would fall right there and your verdict would be for the plaintiff. 20

The second question is the question of fraud. On the question of fraud the burden of proof is on the defendant to prove it by the fair preponderance of the testimony. If the testimony on that is evenly balanced or preponderates in favor of the plaintiff in this case, then, of course, there must be a verdict in favor of the plaintiff. If the defendant has sustained that burden by the fair preponderance of the testimony, then you would bring in a verdict in favor of the defendant and against the plaintiff, no cause of action. 30

To make it clear to you by repetition, first the question of agency. Was Leiberman the agent and servant of the Duralith Corporation, having authority in the premises so as to bind the Duralith Company. If you find there was such an agency then you come to the question of fraud. Has the defendant sustained it by a fair preponderance of the testimony? If the defendant has 40

Court's Charge to the Jury.

and you find there was an agency, then your verdict is no cause of action. If you find that the defendant has not sustained that burden by the fair preponderance of the testimony, then, of course, the plaintiff would be entitled to a verdict at your hands.

10 If you find there was no agency the plaintiff would be entitled to a verdict at your hands. If you find in favor of the plaintiff and against the defendant, your verdict will be in the sum of \$3,344.41. In other words, a verdict in favor of the plaintiff and against the defendant for the full amount of the claim with interest.

I have some requests to charge by the defendant.

20 "1. If it has been proved to your satisfaction that the defendant was induced to sign the distributor's contract and purchase the Duralith through fraudulent representations by the seller or its authorized agent, there can be no recovery by plaintiff."

I so charge you.

"2. If you find that Leiberman's statement to defendant that there was no Duralith"—I will use my own.

30 If you find that Mr. Leiberman made the statement to the defendant that there was no Duralith in the territory except a few packages in a paint store and that Leiberman's statement to the defendant was untrue, although he may not have known the said statement to be untrue, yet if he knowingly made that statement, about which he had no positive knowledge, that would constitute false representation, if you find that such statement relates to a material fact and that it induced the defendant to enter into the contract and

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Court's Charge to the Jury.

to give the check, then, of course, in that event you must find in favor of the defendant and bring in a verdict of no cause of action.

I so charge you.

The last request was on the agency. I think I covered that.

Mr. Comstock: Not the way I have it.

10

The Court: You say the agency doesn't make any difference, and I don't agree with that.

Mr. Comstock: I will ask an exception.

The Court: Now, you must decide or determine what the truth of the matter is in this case from the conflicting testimony.

If you find that a witness' story is untrue, you disregard it. If you believe his story is entirely true, you follow it. If you believe it is partly true and partly false, you follow the part that is true and you disregard the part that is false.

20

If you find for the plaintiff it is in a specific sum of money with interest, the figures of which I have given you.

If you find in favor of the defendant your verdict is no cause of action.

Now, take the case, give it your careful and thorough consideration, and render a verdict that you feel will square with the credible evidence as you have it before you.

30

Let the jury retire.

40

Defendants' Exception to Charge.

Mr. Comstock: I will ask an exception to the refusal to charge No. 5 on the agency question.

The Court: Yes.

DEFENDANT'S REQUEST.

10 "5. The plaintiff cannot recover in this suit if the check was given and contract signed by the defendant in reliance upon material false representations made by the sales agent of plaintiff, Lieberman, even though the plaintiff's officers did not know such representations had been made, because a principal, though innocent, cannot assert any rights or retain any benefit upon a contract which is procured by the fraud of his agent."

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Exhibit P-1.

Contract between the parties. It is identical with the copy annexed to the Answer, except that Exhibit P-1 has an approval stamp affixed with the initials "WW" and dated 6/5/33. This contract is printed on page 6, ante.

10

Exhibit P-2.

This is a letter written by appellant to respondents, dated June 5, 1933. The only portion of the letter that is pertinent to this appeal is as follows:

"We are pleased to advise that contract No. G276 dated June 3rd, 1933—made with you has been approved."

20

Exhibit P-3.

This is the check in suit. A copy is annexed to the Complaint, marked "Exhibit A", and is printed on page 3, ante.

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Exhibit P-4.

This is a list of prospective customers of respondents, typewritten on appellant's stationery. Setting forth the list of names and addresses contained therein would be of no assistance to the Court on this appeal.

40

Exhibit P-5.

An advertisement of Duralith, being descriptive of the material in general. On the advertisement are printed the names of appellant and respondents.

Exhibit P-6.

10 This is a letter from appellant to respondents containing the following message complete:

“Under separate cover, you will receive specimen copies of the Latz letters which are out to your prospects.

“Appropriate letters have gone forward to your list of painters, builders and architects.”

20

Exhibit D-1.

This is a letter to appellant from William B. Gourley, Esquire, counsel of respondents, dated July 1, 1933, containing the following message complete:

30

“I am instructed by A. B. Van Houten & Son of this city to notify you that the agreement between Duralith Corporation and them bearing date June 3, 1933 is hereby cancelled because of misrepresentations on the part of your company. I am further instructed to notify you to remove the duralith shipped to said A. B. Van Houten & Son. I deem it unnecessary at present to go into the full particulars of the misrepresentation that induced them to enter into the agreement with your company. These facts have been taken up between you verbally so that you are, I am advised, quite well

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Exhibit D-1.

apprised of them. I may mention, however, a few of the facts. They were told there was no duralith in the County of Passaic save a few packages in a paint store, whereas they discovered there were tons of it in the county; that an average room 12 x 14 would cost but \$8. whereas it would cost twice that sum. You declared that duralith was used in Radio City, whereas they discovered that this statement was not true. Relying on these statements and upon other facts stated by you, they executed the said agreement. 10

“A. B. Van Houten & Son therefore are no longer responsible for the duralith sent them and notify you to have it removed.”

Yours very truly, 20

(Sgd.) WILLIAM B. GOURLEY.

Exhibit D-2.

Letter of appellant dated July 5, 1933, in reply to Exhibit D-1, addressed to William B. Gourley, Esquire. The complete message of the letter is as follows: 30

“Replying to your letter of July 1st:

“We hereby notify you that we shall adhere to the terms in the contract, and that we do not consent to the rescission of or the modification of any part of said contract. The company denies that any representations were made, excepting those contained in the contract.” 40

Exhibit D-3.

Contract between the parties, being the same as Exhibit P-1, but not having an approval stamp affixed.

Exhibit D-4.

- 10 Contract between appellant and respondents' witness, Floyd S. O'Brien. It is dated November 5, 1931 and expired December 31, 1932. In all other material respects it is the same as Exhibit P-1.
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Exhibit D-5.

- 20 Advertising material supplied by appellant to said O'Brien during the term of the contract with O'Brien similar to Exhibit P-5.
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Exhibit D-6.

This is a letter from appellant to respondents dated June 16, 1933 and contains the following message complete:

- 30 "We are writing merely to confirm what we discussed upon the occasion of the writer's pleasant visit with you in Paterson yesterday.
- "Although we feel that we would have been perfectly within our rights to consider Paterson as "open" territory, nevertheless we wish to assure you again that our Mr. Liberman did not know of previous sales which had been made in the territory.
- 40

Exhibit D-6.

“We are pleased to know, however, that friendly relations exist between your firm and O’Blenis’ Sons, and we have no doubt that Mr. Art Van Houten can handle that situation along the lines discussed. We hereby confirm permission that you send reorders, when necessary, to O’Blenis instead of to us until O’Blenis’ original stock, or what there may be left of it, has been absorbed.

10

“Since this arrangement would inevitably postpone for some time the newspaper advertising which the contract calls for, we agree to set up a fund of \$350.00 immediately, for newspaper advertising or radio broadcasting or for any other purpose in connection with the sales promotion of Duralith. As items are requested by your Duralith Department and approved by our Merchandising Division, they can be contracted for either by you or by us, and payment will be made by this company upon presentation of invoices.

20

“With regard to Radio City, any business which Mr. Williams may obtain can be sold through your department directly to the job. We have no conflicting arrangements in New York City.

30

“If we are correct in our understanding that the check has been stopped as to payment, then we hereby extend the privilege (in accordance with your request) of paying our invoices less discount, or by settling with trade acceptances in accordance

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Exhibit D-6.

with the terms of the contract up to and including Monday, June 19th, 1933. After that date, the invoices are due "net".

10

"We were indeed pleased to have made a connection with your firm, and in fact we cancelled other possibilities with people with whom we were in touch, and therefore regret any misunderstanding which exists.

"We trust that you will see our point of view and that you will decide to continue with Duralith wholeheartedly and with the same enthusiasm which prompted the original connection. For our part, we can assure you of the utmost in cooperation and service which may be possible at all times."

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Grounds of Appeal.

Filed April 13, 1934.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

DURALITH CORPORATION, a New
York corporation,
Plaintiff-Appellant,

vs.

EDMUND VAN HOUTEN and JEN-
NIE HOPPER, trading as A. B.
VAN HOUTEN & SON,
Defendants-Respondents.

10

Action at Law.

On Appeal.

To: WILLIAM B. GOURLEY, ESQUIRE,
125 Ellison Street,
Paterson, New Jersey.

20

Please Take Notice, that the appellant hereby states the following grounds of appeal on its appeal to the Court of Errors and Appeals of New Jersey, from the whole of the judgment for the defendants-respondents entered in this cause:

1. The court below erred in permitting the defendants' witness, Edmund Van Houten, over the objection of the plaintiff, to testify on direct-examination as follows:

30

“Q. Before the execution of that contract what discussion did you have concerning this material, if any?

Mr. Morrill: I object. I object on the ground that the contract has been entirely integrated. In its memorial it has been introduced as two exhibits. I object, further, on the ground that there is no evidence that

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Grounds of Appeal.

10 Mr. Leiberman, the agent of the plaintiff corporation, had authority to make any statements or representations; no legal evidence of that authority. I object, further, on the ground that clauses 3 and 10 indicate—that is, clauses 3 and 10 of the contract—indicate that all the representations made by and between both parties have been stated in the contract. I object, further, on the ground that when Mr. Van Houten, the witness now on the stand, signed the contract, which was to be approved by the home office, he represented to the Duralith Corporation, the home office portion of it, in any event, that there were no further representations other than those contained in the contract, and that he is thereby estopped from testifying as to any representations which he now may say were made.

20

The Court: I will permit it and allow you an exception.

Mr. Morrill: Your Honor will note my exception, please.”

2. The court below erred in permitting the defendants’ witness, Edmund Van Houten, over the objection of the plaintiff, to testify on direct-examination as follows:

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“Q. Was there anything further said during the course of the conversation that I haven’t asked you?

Mr. Morrill: I object on the same grounds as heretofore, your Honor.

The Court: Is this before or after the signing?

40 Mr. Comstock: Before.

Grounds of Appeal.

The Court: Before the signing? All right, I will permit it.

Mr. Morrill: Exception, please."

3. The court below erred in permitting the defendants' witness, Arthur B. Van Houten, over the objection of the plaintiff, to testify on direct-examination as follows:

10

"Q. Just tell us what conversation you had between you, your father, and Mr. Leiberman.

Mr. Morrill: I object. Shall I reiterate my first objection, your Honor?

The Court: On the same grounds?

Mr. Morrill: On the same grounds as to the question put to Mr. Edmund Van Houten.

20

The Court: On the same grounds as originally stated in the objection to the testimony of Mr. Edmund Van Houten, Senior.

Mr. Morrill: Yes. Thank you.

A. Well, we met Mr. Leiberman about 10:30—

Mr. Morrill: I am sorry. May I take an exception to your Honor's ruling?"

4. The court below erred in permitting the defendants' witness, Edmund Van Houten, Jr., over the objection of the plaintiff, to testify on direct-examination as follows:

30

"Q. Now, can you tell us what the conversation was that was had between your father and Mr. Leiberman in respect to this Duralith agency and purchase?

Mr. Morrill: I object to this question on the same grounds that the objection was based on when the question was asked of

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Grounds of Appeal.

Edmund Van Houten, Senior, and Arthur Van Houten.

The Court: Yes.

Mr. Morrill: And your Honor rules adversely?

The Court: Yes.

Mr. Morrill: May I have an exception?

10 The Court: I overrule the objection and allow you an exception."

5. The court below erred in refusing to grant plaintiff's motion to strike out certain testimony presented by the defendants, more particularly as follows:

20 "Mr. Morrill: I move to strike out the testimony of Edmund Van Houten, Senior, Edmund Van Houten, Junior, and Arthur B. Van Houten, with reference to conversations had by and between them and Mr. Leiberman pertaining to the alleged representations as set forth in the defendants' defense, all made antecedent to the execution of this instrument marked P-1 and antecedent to the actual approval, on the ground that no legal testimony has been introduced as to the authority of Mr. Leiberman to make any such representations; on

30 the ground that the defendants themselves represented to the home office of the Durolith Corporation that no representations were made and that thereupon the plaintiff signed the contract by its approval and the defendants are estopped from now asserting it, when they formerly asserted there was no representation;

40 On the ground that this testimony should have been admitted *de bene* or provision-

Grounds of Appeal.

ally, assuming and giving the right to the defendants to tie it up, and I feel there has been no testimony tying it up.

The Court: Your motion was to strike it out, wasn't it?

Mr. Morrill: Yes, just to strike out the testimony.

The Court: I will deny the motion and allow you an exception.

Mr. Morrill: Exception, please."

6. The court below erred in refusing to grant or allow plaintiff's motion for a directed verdict in its favor, more particularly as follows:

"Mr. Morrill: If your Honor please, I move for a directed verdict for the plaintiff as a matter of law on the grounds, to save time, on which I objected to the admission of the testimony of all of the plaintiff's witnesses, or, rather the Van Houtens, with reference to conversation antecedent to the execution of the contract.

On the ground of lack of authority of Leiberman to make any of these representations, thereby indicating that there is no legal testimony showing authority.

On the ground that because the defendants represented that there were no representations they are estopped from giving testimony as to the representations made antecedent to the contract.

I feel that there is no legal evidence of authority of agency. A denial of Mr. Weiner's testimony as to the authority has not been made by the Van Houtens at all. I feel that the Duralith Corporation is an innocent party, taking the type of clause as a

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Grounds of Appeal.

whole, and the attitude of the law towards these clauses.

The Court: Well, I am not barring you on the question of agency. I am letting the jury decide it. I am leaving it to the jury. I am leaving it to the jury, giving you that advantage.

10

Mr. Morrill: Then, your Honor denies the motion, so I may take an exception?

The Court: Yes."

7. The court below erred in submitting to the jury the question as to the existence of the authority of S. P. Leiberman to make the alleged representations, since there was no legal testimony upon or from which such authority could be based or found.

20

8. The court below erred in submitting to the jury the issue of fraud raised by the pleading, because there was no legal testimony upon or from which such fraud could be found.

Respectfully yours,

Dated: April 12, 1934.

COLE & MORRILL,
Attorneys of Plaintiff-Appellant.

30

DAVID L. COLE,
Of Counsel.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 12 day of April, 1934.

WILLIAM B. GOURLEY,
Attorney of Defendants-Respondents.

40

Stipulation.

Due and sufficient service and filing of all of the pleadings and all other papers described herein is admitted by all of the parties hereto.

This state of the case sets forth all of the pleadings and matters necessary for the determination of the questions of law involved in this appeal.

Sat below: William B. Mackay, Circuit Court Judge, with a jury. 10

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Appendix

...and sufficient evidence from all of the
...and all other papers described herein
...admitted by all of the parties hereto.

This state of facts is set forth in the plead-
...and matters in controversy for the determination
...of the parties of law involved in this appeal.

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New Jersey Court of Errors and Appeals

Industrial Association, a New York corporation,

Plaintiff-Appellant, vs. Arbitration

On Appeal

from Superior

Courts

Edward Van Hook, et al., Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

The complaint charges the defendant of a debt owed June 11, 1916, in the amount of \$11,512.66, made by the respondents, in which amount was included. These facts are admitted by the respondents.

The defendant by way of defense and as a plea in law, avers that the plaintiff is not entitled to recover the amount of June 11, 1916, as claimed by the plaintiff's representatives, in that it is alleged by the plaintiff's agents that the plaintiff is not the true owner of the property claimed.

The contract, which is alleged, provides that the defendant is to be held liable for the amount of a certain sum of money to be supplied by the plaintiff. Under the contract the plaintiff is alleged to have paid the sum of money for which the debt in question was given.

It is further alleged in the complaint that in the signing of the contract, the

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New Jersey Court of Errors and Appeals

DURALITH CORPORATION, a New York corporation, Plaintiff-Appellant,	} Action at Law.
vs.	
EDMUND VAN HOUTEN and JEN- NIE HOPPER, trading as A. B. VAN HOUTEN & SON, Defendants-Respondents.	} On Appeal from Passaic County Cir- cuit Court.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

The appellant sues as payee-holder of a check dated June 13, 1933, in the amount of \$3,192.76, made by the respondents, on which payment was stopped. These facts are admitted by the respondents.

The defense is by way of confession and avoidance, viz.: the check was given under a certain contract dated June 3, 1933; the contract was obtained by the fraudulent representations of one Liberman, the appellant's agent; that therefore the check was fraudulently obtained.

The contract, briefly stated, provided that the respondents were to be authorized distributors of a material known as "duralith" to be supplied by the appellant. Under the contract the respondents agreed to purchase 7½ tons of duralith, for which the check in question was given.

Liberman is alleged to have represented, prior to the signing of the contract, that

(1) There was no duralith material in Passaic County;

(2) Duralith was used in Radio City, New York;

(3) A room 12 x 14 would require only eight dollars worth of duralith.

These allegations were denied by appellant.

At the trial, the appellant introduced in evidence the contract application, marked Exhibit P-1, (Case, p. 12), the letter of approval, Exhibit P-2, (Case, p. 12), the check, Exhibit P-3, (Case, p. 12), and rested. The contract became legally binding on June 5, 1933, the date of the letter of approval.

The first witness for the defense was Edmund Van Houten. He testified that on June 3, 1933, he went to the office of appellant in New York City, accompanied by his two sons, Arthur B. and Edmund, Jr.; that they met Liberman and that they were with him from about 10:30 A. M. until 6:00 P. M.; that he read the contract, understood it, and realized it was a contract he was signing. Over objections duly made, he was permitted to testify as to the alleged misrepresentations hereinbefore set forth, and this testimony is the crux of this appeal. His sons testified to the same effect and over the same objections.

At the close of the respondents' case, appellant moved to strike out all of the testimony of respondents with respect to the misrepresentations alleged to have been made antecedent to the signing of the contract. This motion was denied.

At the close of all the evidence, appellant moved for a directed verdict in its behalf and this motion was likewise denied.

The court below submitted the case to the jury who returned a verdict in favor of the respond-

ents, and subsequently judgment was entered on the verdict.

Law and Argument.

The testimony in question was improperly admitted; admitted, it should have been stricken on motion; there being no legal testimony of fraud, a verdict should have been directed in favor of appellant. Stated concisely, Liberman had no authority to make the alleged representations; Liberman had no authority to execute a binding contract; respondents knew of these limitations upon his authority; respondents were not deceived as to, and on the contrary, were fully aware of the fact that it was a contract which was being signed, and the terms thereof; respondents represented to appellant that no representations had been made by appellant's agent and are estopped from now setting up that representations were made.

Clause 3 of the contract provided:

"This agreement shall become effective when it has been signed by the Dealer and approved by the DURALITH CORPORATION at its New York City office." Case, p. 6, l. 37.

Clause 10 of the contract provided:

"No representation of warranty of any kind shall be binding upon either the DURALITH CORPORATION or the DEALER unless it has been incorporated in this agreement." Case, p. 8, l. 15.

Clause 11 of the contract provided:

"The Dealer acknowledges receipt of a duplicate of this agreement." Case, p. 8, l. 19.

The objections as to the admissibility of the evidence, and the motions to strike the testimony and for a direction of verdict were based substantially on the same grounds and involve the same points of law. The grounds of the objections and the motions were also substantially the same. They will therefore be argued as one.

For the convenience of this Court, the following is a guide to the alleged errors committed by the court below.

Ground of Appeal	Number	State of Case, page
	1	16
	2	19
	3	33
	4	46
	5	57
	6	85
	7	85
	8	85

I.

On Principles of Agency.

Unquestionably, appellant, as principal, had power to limit its agent's authority. Clause 3 limited Liberman's authority to execute a binding contract. Clause 10 limited Liberman's authority to make legally effective representations.

RESPONDENTS HAD NOTICE OF SUCH LIMITATIONS before they signed the contract. The following is an excerpt of the testimony of Edmund B. Van Houten on cross-examination:

“Q. And before you signed the contract you were given a blank form to read, weren't you? A. Yes.

Q. And your sons were given a blank form to read, weren't they? A. Yes.

Q. And all of you read the contract, didn't you?

A. Yes, sir.

Q. *And you read clause 3*, that "This agreement shall become effective when it has been signed by the dealer and approved by the Duralith Corporation at its New York City office"; is that correct? A. *Yes.*

Q. *And you read also clause 10*, "No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the dealer unless it has been incorporated in this agreement"; is that right?

A. It is in the agreement." Case, p. 24, ll. 19-35 (Italics ours)

Likewise, as to A. B. Van Houten, on cross-examination:

"Q. *And you read clause 3*, "This agreement shall become effective when it has been signed by the dealer and approved by the Duralith Corporation"— A. *I did.*

Q. —"at its New York City office"? A. I did.

Q. So when your dad signed the contract you knew that was there, didn't you? A. Yes.

Q. *And you read clause 10*, "No representation or warranty of any kind shall be binding upon either the Duralith Corporation or the dealer unless it has been incorporated in this agreement"; isn't that right?

A. *Yes*, I read that.

Q. And you knew that was there when your dad signed the contract? A. *I did.*" Case, p. 38, ll. 19-32 (Italics ours)

Similarly as to Edmund Van Houten, Jr.

Case, p. 48, l. 31.

Since respondents had notice of the limitations upon Liberman's authority, they cannot subject

appellant to liability upon the transaction with Liberman if it was in violation of such limitations.

Agency Restatement (Amer. Law Inst.)
secs. 166, 167.

Perry v. Smith, 29 N. J. L. 74.

Catoir v. Amer. L. Ins., 33 N. J. L. 487.

Huie v. Allen, 34 N. Y. Supp. 577.

Gilbert v. Deshon, 107 N. Y. 324.

21 R. C. L., p. 908, sec. 85.

2 C. J., p. 561, sec. 304.

Page, Contracts, 2nd ed. sec. 1762.

This principle applies to misrepresentations: "Fraud or material misrepresentations by a third person renders a transaction voidable by a party induced thereby to enter into it *if the other party thereto is affected by the fraud or misrepresentations under the law of Agency * * **" (Italics ours)

Contracts Restatement (Amer. Law Inst.) sec. 477 (b).

Liberman's authority permitted him to take applications for contracts which were to be approved by the appellant.

Contract, Clause 3

Case, p. 60, l. 12; p. 72, l. 36.

As a solicitor of orders, he had no implied authority to make contracts.

Williston, Sales, sec. 5A.

Rowe Scale Co. v. Wolfshaut, 170 N. Y. Supp. 943.

Presumptively, an agent has no power to vary or modify a contract or to waive his principal's rights.

2 C. J., p. 645, sec. 289.

There is an analogy in the law of TORTS. Proof of ownership of an automobile gives rise to presumptions that the operator thereof is the agent of the owner, and that the operator was acting within the course of his employment. Despite these presumptions, if the owner produces evidence of non-agency which is not contradicted, there must be a directed verdict in his favor.

Tischler v. Steinholtz, 99 N. J. L. 150.

Okin v. Essex Sales Co., 103 N. J. L. 217.

Shefts v. Free, 105 N. J. L. 577.

Maurer v. Brown, 106 N. J. L. 284.

In VOLUNTARY LEGAL RELATIONSHIPS the same conclusion has been reached. In the case at bar THERE IS NOT ONE SCINTILLA OF EVIDENCE THAT LIBERMAN HAD AUTHORITY TO MAKE REPRESENTATIONS other than those contained in the writing. Such authority was clearly and emphatically denied by the appellant (Case, p. 73 , l. 5) and was not controverted or disputed by the respondents. In the absence of proof of such specific authority in Liberman, his authority to sell did not carry with it a power to make representations binding upon the appellant.

Steiner Mfg. Co. v. Kochaniewicz, 3 N. J. Misc. 437 (Aff'd in 102 N. J. L. 468).

Under our decisions the trial court erred in the instances set forth in the Grounds of Appeal.

In the STEINER case, the defendant knew that the plaintiff's agent who took his order was not authorized to accept it, but defended on the ground that the agent had *misrepresented the contents* of the writing. There was no protective clause. This court held it was proper to strike out defendant's testimony as to the agent's representations.

Steiner Mfg. Co. v. Kochaniewicz, 102 N. J. L. 468.

In the EDISON case, the contract provided that "ALL VERBAL AND WRITTEN AGREEMENTS NOT MENTIONED IN THIS CONTRACT ARE VOID." Evidence tending to prove the agent's representations were held to have been excluded properly, the court saying: "It may well be that the contract was an unwise one for the defendant to make. But with that this court cannot concern itself. Our duty is to give effect to legal rights of parties arising under contracts that they have seen fit to enter into."

Edison Fixture Co. v. Copoulos, 3 N. J. Misc. 174.

To the same effect are:

McCabe v. Standard Motor Construc. Co., 106 N. J. L. 227.

R. H. Muir, Inc. v. Church Construc. Co., 7 N. J. Misc. 633 (impliedly).

Glasser v. Dodge Bros. Corp., 11 N. J. Misc. 10.

F. A. North Co. v. Beebe, 11 N. J. Misc. 759.

The *Edison* case, *supra*, approaches the subject of protective clauses from the same point of view as was adopted by the Supreme Judicial Court of Massachusetts.

Colonial Development Corp. v. Bragdon, 219 Mass. 170.

The case of *Guilder v. Boonton, &c. Bus Co.*, 110 N. J. L. 103 is not adverse to appellant's contention, although it might appear so to be on first examination. There, the representations were made by Guilder, a partner, and *he therefore act-*

ed in the dual capacity of principal and agent. The protective clause was a true attempt to contract against one's own fraud. NO QUESTION OF THE SCOPE OF GUILDER'S AUTHORITY WAS RAISED, NOR WAS SUCH QUESTION REFERRED TO IN THE OPINION; there was no evidence that Guilder had no authority to make the representations. On the contrary, under the Uniform Partnership Act, Guilder presumptively had authority to act and contract as he did.

2 *Cum. Supp. Comp. Stat.* pp. 2260 2261,
sec. 9 (1), (4).

The CONCLUSION in the *Guilder* case, therefore, was correct. It was a case of what one annotator calls "personal antecedent fraud", that is, fraud that was personal to one of the contracting parties. In the case at bar, the alleged fraud was that of a third person,—Lieberman.

75 *A. L. R.* 1032, 1041.

"If the distinction between the GUILDER case and the case at bar is not recognized, it is difficult to reconcile the GUILDER case with the STEINER and EDISON cases and the other cases referred to. Surely, it cannot be said that in the GUILDER case this Court openly and avowedly disregarded the principle of *stare decisis*."

The same general principles have been applied in New York.

Electric Paint Co. v. Binghamton, 134
N. Y. Misc. 638.

Cooper Griffin Co. v. Weigand, 123 N. Y.
Supp. 947.

II.

On Principles of Estoppel.

For equitable estoppel, or *estoppel in pais*, the following elements are necessary: (1) A representation or concealment of facts inconsistent with the facts forming the basis of the present claim; (2) Knowledge that the facts were otherwise than as represented; (3) A representation intended to influence the conduct of another person, or a representation under such circumstances that an intent to influence is inferred; (4) The party receiving the representation being ignorant of the true facts; (5) Prejudicial reliance.

Musconetcong, &c. v. D. L. &c. R. R., 78 N. J. L. 717, (E. & A.)

And equitable estoppel applies to courts of law.

LaRosa v. Nichols, 92 N. J. L. 375 (E. & A.)

Crawford v. Winterbottom, 88 N. J. L. 588.

Although it rests upon fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strict legal sense, nor is it essential that there be an intent to deceive. THE TEST IS WHETHER UNDER THE CIRCUMSTANCES CONSCIENCE AND DUTY OF HONEST DEALING SHOULD DENY ONE THE RIGHT TO REPUDIATE THE CONSEQUENCES OF HIS REPRESENTATIONS OR CONDUCT.

Howard v. West Jersey, &c. R. R. Co., 102 N. J. Eq. 517.

By inequitable conduct, one may deprive himself of what otherwise he might rightly claim.

Snyder, &c. Co. v. Burton, 80 Eq. 185 (E. & A.)

As had been pointed out before, Edmund Van Houten and his sons read and understood the contract. THEY MAKE NO CLAIM OF MISREPRESENTATIONS AS TO THE CONTENTS OF THE WRITING.

The following excerpts from Edmund Van Houten's testimony on cross-examination, in addition to those quoted under the previous point, are pertinent:

"Q. And I suppose you have signed many contracts in your day? A. Yes.

Q. And you have read contracts that you have signed? A. Yes.

Q. *And do you know that contracts represent an agreement or a testimonial between the parties who desire to put their agreement in writing?* A. Yes.

Q. *And you were aware when you signed this contract that it set forth the rights and duties of the parties? You knew that, didn't you?* A. Yes.

Q. And you know that in contracts generally which are signed between persons that important matters are put therein? A. Sure.

Q. *And you thought that whether or not there was any Duralith in Passaic County was very material, didn't you?* A. Yes, I did.

Q. *And very important?* A. Yes, sir.

Q. And you signed this contract without any provision being put in with regard to the Duralith that may have been in Passaic County; is that right? A. Yes.

Q. And you thought that whether there was any Duralith used in Radio City was quite important? A. Why, it would be good advertising.

Q. Sir? A. Good advertising, yes.

Q. And very material, too? A. Yes.

Q. And you signed the contract without any provision being inserted in the contract as to Radio City, didn't you? A. Yes.

Q. *And you didn't ask that it be inserted, did you?* A. No, sir.

Q. And you say now that whether a room eight by fourteen could be finished with Duralith material which would cost about eight dollars was quite important? A. It was, yes, sir.

Q. And it was very material, too, wasn't it? A. Yes, sir.

Q. And you signed the contract without any provision as to that being inserted, didn't you? A. Yes."

Case, p. 25, ll. 11-40.

Likewise, the testimony of A. B. Van Houten on cross-examination:

"Q. When you signed this contract it was very clear to you, wasn't it? A. Yes.

Q. That is, when your father signed it. And when you saw him sign it you knew the exact document he was signing? A. I did.

Q. *He wasn't told that he was signing a release and then presented with this draft form, was he?* A. No.

Q. And you didn't intend to deceive the home office of the Duralith Corporation, did you? A. No, I did not.

Q. Or the executive offices thereof? A. No.

Q. *And you permitted your father to sign a contract stating that no representations had been made, didn't you?* A. Yes.

Q. *And you at that time were aware of the fact that the draft agreement had to be approved by the home office, weren't you, by an executive officer?* A. Yes."

Case, p. 40, ll. 19-38.

Likewise, as to Edmund Van Houten, Jr.:

“Q. *And you say there were representations made by Mr. Liberman?* A. Yes.

Q. But they weren't incorporated in this agreement? A. No.

Q. Did you intend to deceive the Duralith Corporation as to representations made?

A. Did not.

Q. And yet you signed—you permitted your father to sign a contract which said that no representations had been made; is that right? A. Right.

Q. I suppose you were there to assist and advise your father with respect to this proposition? A. I was just there to hear the information about Duralith.

Q. And, I suppose, you discussed the matter with your father or your brother?

A. Yes, we did.

Q. And you may have even talked to Mr. Liberman, too? A. Some, yes.

Q. *And whether or not there was any Duralith in Passaic County was very important to you?* A. Yes, sir.

Q. And very material? A. Yes, sir.

Q. *And you didn't insist that it be inserted in this contract, did you?* A. No, sir.

Q. And you permitted your father to sign without it being inserted in this contract, didn't you? A. Yes, sir.

Q. And the same is true with reference to the use of Duralith in Radio City? A. Yes, sir.”

Case, p. 49, ll. 12-40.

When appellant received the contract application, it was ignorant of any alleged representations or of a claim that they had been made.

Case, p. 74, ll. 33-40.

And there was reliance on Clause 10 of the

contract application which induced appellant to approve the contract.

Case, p. 76, ll. 15-24.

Having approved of the contract, appellant changed its position.

Case, p. 28, l. 29; p. 29, l. 12; p. 76, l. 10.

These uncontradicted and undisputed circumstances, appellant contends, estopped respondents from giving testimony as to the alleged representations. Paraphrasing a legal argument we have the respondents saying to appellant: "Here is our application for a contract; this writing includes all representations made by Liberman; we want you to rely on this because we know of the limitations on Libermen's authority; under the circumstances, approve the contract."

Relying on the respondents' representations, appellant approves the contract. Now the respondents say: "Although we previously told you that Liberman made no representations, we fooled you, or at least we were negligent in not informing you to the contrary; the fact is that he did make certain representations, and we are going to hold you responsible for them."

Respondents are trying to blow hot and cold. THEY SHOULD HAVE INSISTED THAT THE ALLEGED REPRESENTATIONS BE INSERTED IN THE CONTRACT. If that was too great a burden on them, then A STROKE OF A PENCIL WOULD HAVE ELIMINATED CLAUSES 3 AND 10 FROM THE CONTRACT, and appellant would have known at the outset what the true situation was. "He who does not forbid what he can forbid, seems to assent." In conscience and honesty, the law should impose silence upon respondents.

Herman, Estoppel, pp. 865, 868.

Williston, Contracts, sec. 1508.

“In these circumstances justice requires the application of the elementary principle of law that where one by his acts, representations, or admissions induces another to believe that certain facts exist, and the latter, without fault, acts in reliance thereon, and will be materially prejudiced if the former is permitted to deny such facts, the one making the representations is estopped from denying the same.”

75 A. L. R. 1032, 1047.

Even if the respondents were innocent, as between them and the appellant the respondents should suffer for Liberman's "fraud". He who enables a fraud to be perpetrated should be held responsible therefor.

Schultz v. Patrick, 110 N. J. E. 295 (E. & A.)

By way of analogy, where an infant represented that he was of age, and apparently was so, he was estopped from setting up his infancy.

LaRosa v. Nichols, 92 N. J. L. 375 (E. & A.)

And where an alleged indorser misleads the holder of a note as to the genuineness of the indorsement, he will be estopped from denying the validity of his signature.

Gluckman v. Darling, 85 N. J. L. 457 (Aff'd 87 N. J. L. 320).

In the GUILDER case, supra, there is no such basis for an estoppel.

III.

Fraud:- Void and Voidable.

The nature of the fraud relied on by respondents is of the type which permits a party to AVOID a contract; it is not of the type which PREVENTS THE FORMATION of a contract. In the latter type, all conversations and representations prior to signing the "contract" are properly admissible, regardless of protective clauses or limitations upon an agent's authority, TO SHOW THAT NO CONTRACTUAL RELATIONSHIP CAME INTO EXISTENCE.

While this distinction is fundamental, it has often been overlooked by various courts, and rulings have been made on the admissibility of evidence, where fraud is claimed, on the general catch phrase that "fraud vitiates every contract". The distinction appears in the leading case of *Foster v. McKinnon*, L. R. 4 C. P. 704: the defendant signed a bill of exchange under the fraudulently induced belief that he was signing a guaranty; the court held that the bill was void even in the hands of a bona fide purchaser.

In *Alexander v. Brogley*, 63 N. J. L. 307, the defendant signed a contract under the fraudulently induced belief that he was giving a specimen of his handwriting; in *Dunston Litho. Co. v. Borgo*, 84 N. J. L. 623, the defendant signed a guaranty under the fraudulently induced belief that he was signing an order for labels. Evidence of the fraud was properly admitted to show that THE DEFENDANT'S ACT OF SIGNING WAS NOT A MANIFESTATION OF ASSENT TO ANY TRANSACTION, OR that the act of signing was a manifestation of assent to a transaction entirely different from that which would be created if there were no mistake as to

the facts. The result of such proof is to show that the act of signing did not affect his contractual relations, that a contract was not formed.

Contracts Restatement, (Amer. Law Inst.) sec. 475.

The court in the *Brogley* case calls the signing "acts which were not intended to have * * * any obligatory force or effect whatever".

"Fraud may induce a person to assent to do something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is. In the first case the act of the defrauded person is effectual though voidable; in the second case the act of the defrauded person is void."

Williston, Contracts, sec. 1488.

In the following cases, fraud *prevented contractual obligations from arising*, on the principle of the *Brogley* and *Borgo* cases:

Fagan v. Central Railroad Co., 94 N. J. L. 454;
Palmer v. Tomlin, 104 N. J. L. 215;
McDonald v. Central R. R. Co., 89 N. J. L. 251.

A protective clause would not help because the DEFRAUDED PARTY DID NOT ASSENT TO THE PROTECTIVE CLAUSE. Estoppel does not apply because the defrauded party made no statements or admissions to the agent * * * he only gave a specimen of his writing,— or * * * he only signed a receipt, not a release.

The rules deducible from these cases as to the admissibility of evidence to prove fraud, have no bearing on the case at bar. These cases are decided on principles of Contract. In brief—there

is no assent. The case at bar is to be governed under principles of Agency and Estoppel. In the STEINER case, supra, 102 N. J. L. 468, this court specifically held that the *Brogley* and *Borgo* principle (*McDonald v. Central Railroad*) did not apply to that case; and the *Steiner* case is like the case at bar.

In *Alexander v. Ferguson*, 73 N. J. L. 479, the defendant knew he was signing a contract but the plaintiff's agent *misrepresented the contents of the writing*. The court held that a directed verdict for the plaintiff was correct, stating that the *Brogley* case did not apply. In the case at bar, besides the protective clauses, the *respondents admitted that there was no deceit as to the contents of the writing*.

Further, in the case at bar, not only did the respondents know they were signing a contract but they also were fully aware of and consciously assented to the provisions of the protective clauses.

IV.

Public Policy.

Giving effect to the protective clause, as New Jersey has in a series of cases, is not against public policy. It is impossible for a principal to be present at every transaction; it is impossible for the principal to know every word that was uttered by his agent and the third party. What more can he do than to impose a ban on his agent and give warning to the third party? Further, if there is collusion between the agent and the third party, or if the agent desires to injure his principal, valid contracts can be disregarded at will without the fault of the principal.

On the other hand, why should the third party be at liberty to assert that a certain set of facts is true, and later seek relief on the ground that the certain set of facts is not true? Having read and understood a writing, is it too much to ask of the third party that he insist that the writing conform to the true mutual understanding?

Such shifting by a party is strongly depreciated by the Supreme Judicial Court of Massachusetts (*Colonial v. Bragdon*, supra), and this is noteworthy in view of the pronouncement by the very same court as to public policy:

“It is a fundamental principle of law, as it is of morals, public policy, and fair dealing, that a party cannot contract against liability for his own fraud.”

Granland v. Saraf, 263 Mass. 76.

V.

Conclusion.

The only testimony produced by respondents on the issue of fraud was improperly admitted, and was improperly permitted to remain in the record.

There was no evidence from which the jury could legally find that Liberman had authority to make the alleged misrepresentations and it was error to submit this specific issue to the jury for their consideration.

Appellant's proof as to the limitations upon Liberman's authority and as to notice thereof by respondents remained entirely uncontradicted.

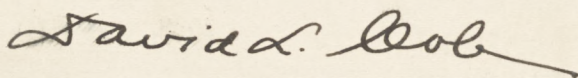
Justice and fair dealing required the trial court to bar the respondents from presenting testimony of representations antecedent to the contract.

There being no legally admitted testimony as to fraudulent representations, appellant was entitled to a directed verdict in its favor.

Appellant respectfully urges this Honorable Court to reverse the judgment of the court below and to direct that the court below enter a judgment in favor of appellant.

Respectfully submitted,

COLE & MORRILL,
Attorneys of Plaintiff-Appellant.



Of Counsel

114MAY.T.1934

New Jersey Court of Errors & Appeals

Duralith Corporation, a New
York corporation,

Plaintiff-Appellant,

vs.

Edmund B. Van Houten and
Jennie Hopper, trading as
A. B. Van Houten & Son,

Defendant-Respondents.

Action at Law
On Appeal from
Passaic Court

Brief of Defendants- Respondents

FACTS

There are two questions involved in this appeal. They are:

FIRST: Was the salesman Lieberman an agent of the plaintiff-appellant corporation whose representations were binding upon it?

SECOND: Did he make fraudulent representations which induced defendant-respondents to enter into the contract?

Both propositions were jury questions and the verdict of no cause of action was proper.

THE AGENCY

It is admitted that Lieberman was a sales agent for the Duralith Corporation. The appellant in its brief refers to him as its agent on page 3 and on page 6. He is referred to as agent to take applications for contracts and Lieberman himself on page 65 of the record testi-

fied that he was the head salesman for the Duralith Corporation. He had a private office at the headquarters of the corporation in New York and by reference to Exhibit P-1, page 12, of the record it will appear that he signed the contract as the agent of the corporation. The contract itself is set out on pages 6, 7 and 8 of the record. On page 8 it is signed "Duralith Corporation, by S. L. Lieberman." He was not an officer of the corporation. It is now claimed that while he was the head salesman at the time in question still his authority in that respect was limited.

After Lieberman signed the contract on behalf of his principal the material was shipped to Paterson in conformity with the terms of the contract page 68-69 and the check in suit was thereafter given by respondents and accepted. Payment of this check was afterwards stopped because of fraudulent representations made by Lieberman.

The method of doing business by the appellant was to send representatives out on the road called contact men to interview prospective customers. Such a person called upon Mr. Edmund Van Houten, p. 15 and 63. This was the first introduction to the appellant. We may add that the material that was sold is known as Duralith and is a preparation to be put upon walls of rooms with a brush or trowel in place of paint or paper. This representative succeeded in interesting the respondents in the material and an appointment was made to meet at the head office in the city of New York on June 3, 1933. Mr. Edmund Van Houten and his two sons called at this head office on Fifth Avenue, p. 15. Upon arriving there they met Mr. Lieberman, the head sales-

man and were entertained by him from 10:30 in the morning until 6 o'clock in the evening. It was at the close of this extended interview that the contract was signed and it can well be understood in consequence how protracted the discussion was. The only representative of the appellant at this meeting was the salesman, Lieberman, who acted as the sole representative of the appellant. To secure the execution of the contract by the Van Houtens, he demonstrated the method of using the material, took them out to lunch, and dinner, and concluded the transaction with them. All this demonstrates that he was agent of the appellant for the purpose. He occupied one of the principal offices of the corporation and it was reasonable to assume that he was clothed with authority to transact the business. Under such circumstances no further proof of agency would be necessary. The contract which he secured was accepted by his principal, the material was shipped in accordance with its terms and the check given therefor accepted. The least that can be said is that such course of action created a jury question as to his agency and scope of his powers. The trial Judge so ruled. He said, p. 86 "Well, I am not barring you on the question of agency. I am letting the jury decide it. I am leaving it to the jury. I am leaving it to the jury, giving you that advantage."

The jury by its verdict found that the agency existed and that such agent's misrepresentations bound the appellant. Under the testimony the court would have been justified in instructing the jury that such agency existed and that any mis-

representations made by the agent were imputable to the appellant. Certainly the appellant can not be heard to complain because the question of agency was left to the jury. The agency having been thus established it follows that the principal is bound by his misrepresentations and that it cannot assert any rights under the contract if they were procured by fraud of the agent.

In *Reitman v. Fiorello*, 76 N. J. L. 815, this court held:

“An innocent principal cannot assert any rights or retain any benefit upon a contract which is procured by the fraud of his agent.”

This case has been followed in many cases both in New Jersey and New York. The latest case in New Jersey is *Camden Security Company v. Azoff*, 112 N. J. Eq. 92, decided by this Court in 1933. The *Reitman* case is there cited and the same principle applied. *Nowack v. Met. St. Ry. Co.* 166 N. Y. 433.

Whether the agency existed or not is a jury question.

“Where any evidence is adduced tending to prove the existence of a disputed agency, its existence or nonexistence is as a general rule a question of fact for the jury, aided by proper instructions from the court even though the evidence is not full and satisfactory, and in such cases it is

error for the court to take the question from the jury by directing a verdict, by instruction, by nonsuit, or by sustaining a demurrer to the evidence."

2 Corpus Juris, Agency, p. 960 sec. 731.

In *Scull v. Skillton*, 70 N. J. L. 792, decided in this court in 1904, the question of agency was the subject of controversy. There was no proof of an express agency but it was implied from the circumstances surrounding the matter and it was held:

"All this was, of course, for the jury, and the trial judge so regarded it and so placed it."

THE FRAUDULENT MISREPRESENTATIONS

Mr. Van Houten testified on page 17 that Mr. Lieberman told him that they would have no competition and that they would be the only agents in their territory and that there was none of the material in the vicinity of the territory except perhaps a few pounds which might be on the shelves of a few paint stores. He also said that the material was used in Radio City, p. 19 and that an ordinary sized room would cost about \$8.00, p. 17.

Mr. Van Houten was corroborated by his two sons, Arthur B. Van Houten who testified, p. 34, to the same effect and Edmund Van Houten, Jr., on page 47 of the record.

Mr. Lieberman the agent, denied that he made these representations, p. 59 and 60.

This conflicting testimony as to these misrepresentations made it clearly a jury question. Mr. O'Blenis testified for the respondents, p. 54 and 55 of the record. He said that he had purchased the same kind of material from the appellant in 1932; that he still had on hand between ten and eleven tons of the material. The appellant does not attempt to deny this but on the contrary admitted it to be true. Therefore the statement made by Mr. Lieberman that there would be no competition and that there was none of the material in the territory was clearly false, as well as the other statements made. It was these false representations that led the Van Houtens to enter into the contract and to give the check. It was admitted at the trial that there was none of the material used at Radio City. Mr. Lieberman denied having told the Van Houtens that it was used at that place. It was also proved at the trial that it would cost more than \$8.00 to do an ordinary room. Mr. Lieberman denied that he ever told the Van Houtens it would cost \$8.00.

These were all questions that were properly submitted to the jury. The respondent offered to return the material and rescinded the contract as is shown by Exhibit D-2, p. 99 of the record where the appellant in a letter of July 5th, 1933 wrote:

“We hereby notify you that we shall adhere to the terms of the contract, and that we do not consent to the rescission of or the modifications of any part of said contract. The company denies that any representations were made, excepting those contained in the contract.”

That there were tons of this material in the county in the possession of Mr. O'Blenis is also confirmed by the letter written by the appellant dated June 16th, 1933 being Exhibit D-6, p. 100, in which they say:

"Although we feel that we would have been perfectly within our rights to consider Paterson as 'open' territory, nevertheless we wish to assure you again that *our* Mr. Lieberman did not know of previous sales which had been made in the territory."

They refer to the agent as "our Mr. Lieberman." These representations were very material to the respondent. It is hardly necessary to say that if in the sale of this material there would be active competition was a material matter. Mr. Van Houten says that it was because of these representations that he made the bargain and he would not have entered into the contract or given the check if he had known or had any reason to believe that there was any other agent in the territory having such quantities of material on hand.

The appellant endeavors to escape liability on the theory that the contract contained a clause that no representations should be binding which were not incorporated in the agreement. This is contrary to the rule in such cases.

"A provision of a sales contract that there were no promises not contained therein does not include false representations

inducing its execution." *R. H. Muir Inc. v. Church Construction Co.*, 7 N. J. Misc. 633, 146 A. 677.

"The fact that a sealed contract of sale of a business recites that no representations in regard thereto have been made, does not preclude the party misled by fraudulent representations of the other from proving them." *Bridger v. Goldsmith* 143 N. Y., 424, 38 N. E. 458.

"It is a fundamental principle of law, as it is of morals, public policy and fair dealing, that a party cannot contract against liability for his own fraud. Fraud which enters into the making of the contract cannot be excluded from the reach of the law by any form or phrase inserted in the contract itself. Parties cannot by writing words prevent the law from inquiring into and granting relief for fraud, in the substance of the contract." *Granlund v. Saraf*, 263 Mass. 76-79, 160 N. E. 408.

In *Bridger v. Goldsmith*, 143 N. Y. 424m the contract for sale of the business &c. provided:

"It is expressly understood and agreed between the parties hereto that the said party of the first part has not in any manner or form stated, made or represented to the said party of the second part, for the purpose of inducing the sale of said business or the making of this agreement,

any statements or representations verbally or in writing in respect to the said business other than that the said party of the first part has been engaged in the piano business in the city of New York since 1867.

Held: A mere device of one party to a contract intended to shield him from the results of his own fraud practiced upon the other party cannot be the basis of an equitable estoppel.

So, also, where one party to a contract has perpetrated a fraud upon the other by means of which the latter was induced to enter into the contract, he cannot be precluded from seeking redress by a provision in the contract purporting to grant to the former immunity against the consequences of any fraud."

"In a suit on promissory notes given upon a sale of a motor truck the court rightfully instructed the jury that if it was proved to their satisfaction that the sale of the truck had been effected through fraudulent representation by the seller, or there was a failure to deliver a bill of sale as required by the statute, in case of an unconditional sale, there could be no recovery.

Where in a suit upon promissory notes given upon the purchase of a motor truck, the purchaser waived the return of a part of the purchase price and any claim for damages arising from fraudulent representations by the seller, purchaser may give

notice of the rescission of the contract because of fraud and *tender the truck back and may set this up as a defense.*

The buyer may rescind upon the ground of innocent misrepresentation by the seller, 55 C. J. pp. 260, sec. 233, citing *Seneca Wire & C. Co. v. Leach*, 247 N. Y. 1.

or if he makes a statement recklessly without knowledge whether it is true or false, especially where the representation is of a fact particularly within the maker's knowledge. If one party makes a positive statement of a material fact concerning the sale it implies a representation of knowledge and is fraudulent if it is in fact false, particularly where the buyer has not an equal means of knowing the truth. 55 C. J. pp. 124, sec. 89 &c. citing *Cowley v. Smyth*, 49 N. J. L. 380; *Hammond v. Pennosh*, 61 N. Y. 14; *Meyer v. Amidon*, 45 N. Y. 169; *Marsh v. Falker*, 40 N. Y. 562.

“But the rule with regard to including the entire agreement between the parties in the writing does not take away or detract from the general rule by which a contract can always be set aside for fraud affecting the transaction as to a material fact that is not promissory in its nature. Any statement of an existing fact material to the person to whom it is made that is false and unknown by the person making it to be false and which is made to induce the execution of a contract, and which does induce the contract constitutes a fraud

that will sustain an action to void the contract if the person making it is injured thereby."

Adams v. Gillig, 199 N. Y. Rp. 314.

"The rule is well established that for the purpose of proving fraud, verbal statements, which are material and fraudulent although made before, or at the time of the written agreement, may be proved, as such evidence tends to disaffirm the contract and to show that there was no contract in fact. The defendants in the case at bar did not seek to change or alter the agreements, but sought to avoid them, by reason of the false representations which induced them.

When fraud is the issue, the fact that the agreement contained a provision that it comprised the entire contract between the parties and superseded any and all other agreements respecting the property, does not change or affect the rule allowing the introduction of evidence consisting of verbal statements made before or at the time of the written agreement; otherwise such an article would preserve a contract, no matter what false and fraudulent misrepresentations might have been made before or at the time of execution.

When fraud is involved, the rules of evidence are very liberal and a wide latitude is given the party seeking to establish the fact."

Guilder v. Boonton &c. Bus Co., 110 N. J. L. 103.

If the law afforded no redress for fraudulent representations made before the execution of a contract there could not be a better plan devised to entrap the unwary. These respondents are firmly convinced that the absence of the principal was of deliberate design. Under the appellant's conception of the law if the written agreement contained a clause that no representation should be binding unless it was incorporated therein they were safe beyond attack. The scheme was to allure prospective purchasers to their office by means of what they called contact men who would exploit the extraordinary qualities of the article. When there the chief of staff, Lieberman, continued the gross misrepresentations and added enough additional fraudulent statements to obtain the signature desired. The principal deliberately remained away until after the execution of the agreement with the clause aforesaid inserted. It expected to coin the fraud into cash and to laugh at the respondents. The spider secreted in its web awaiting a victim typifies this corporation.

The cases cited by appellant only deal with an agent's authority to bind his principal by contract beyond his known authority. They have no application to cases in which the contract is obtained by false and fraudulent representations of the agent inducing the execution of the contract. They, therefore, do not apply to the situation under consideration.

The statement on page 6 of appellant's brief which purports to be a quotation for contracts Restatement, (Amer. Law Inst.) sec. 477 (b) does

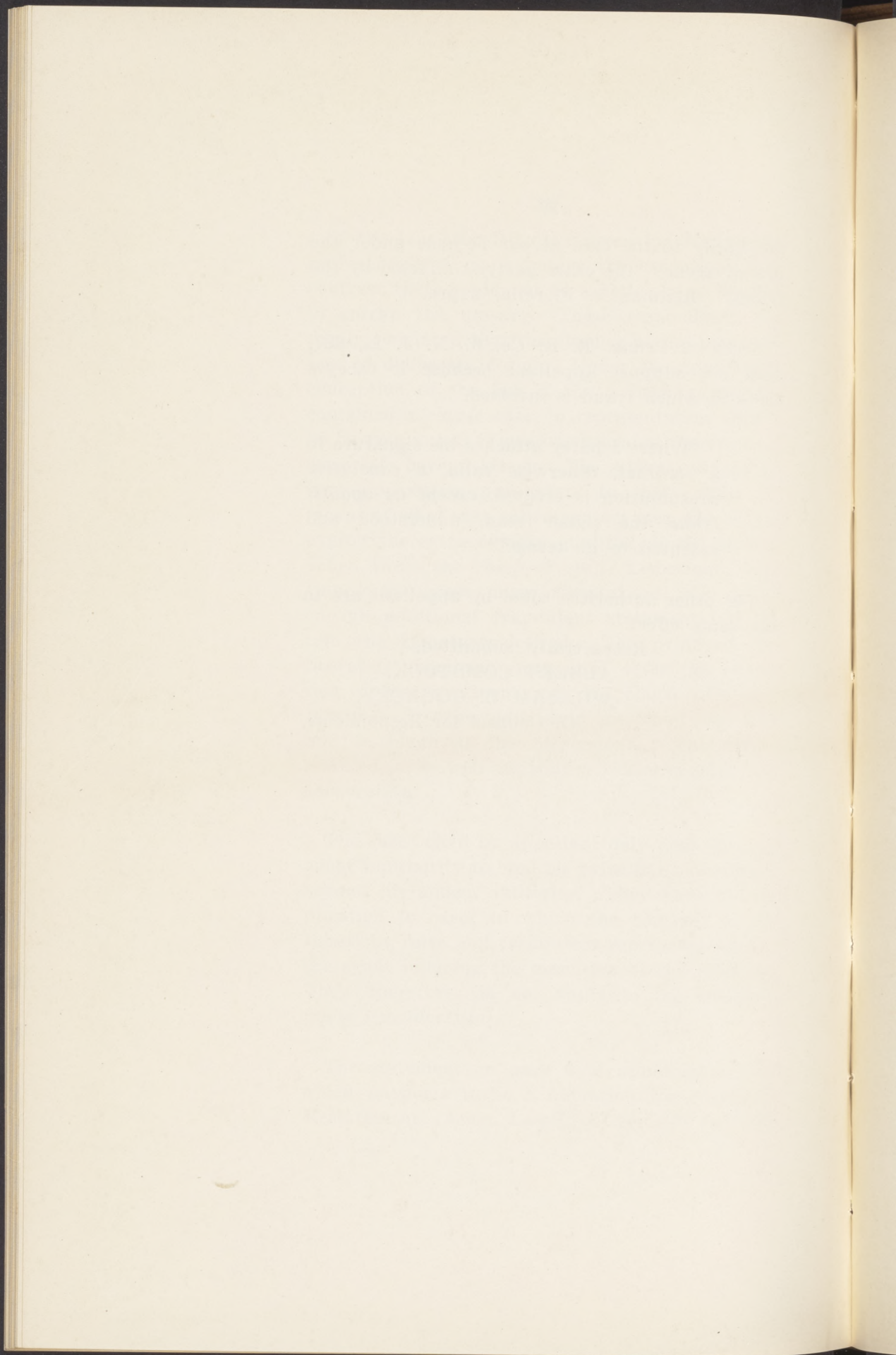
not apply to the case at bar because under the law of agency "the other party is affected by the fraud." *Reitman v. Fiorella*, supra.

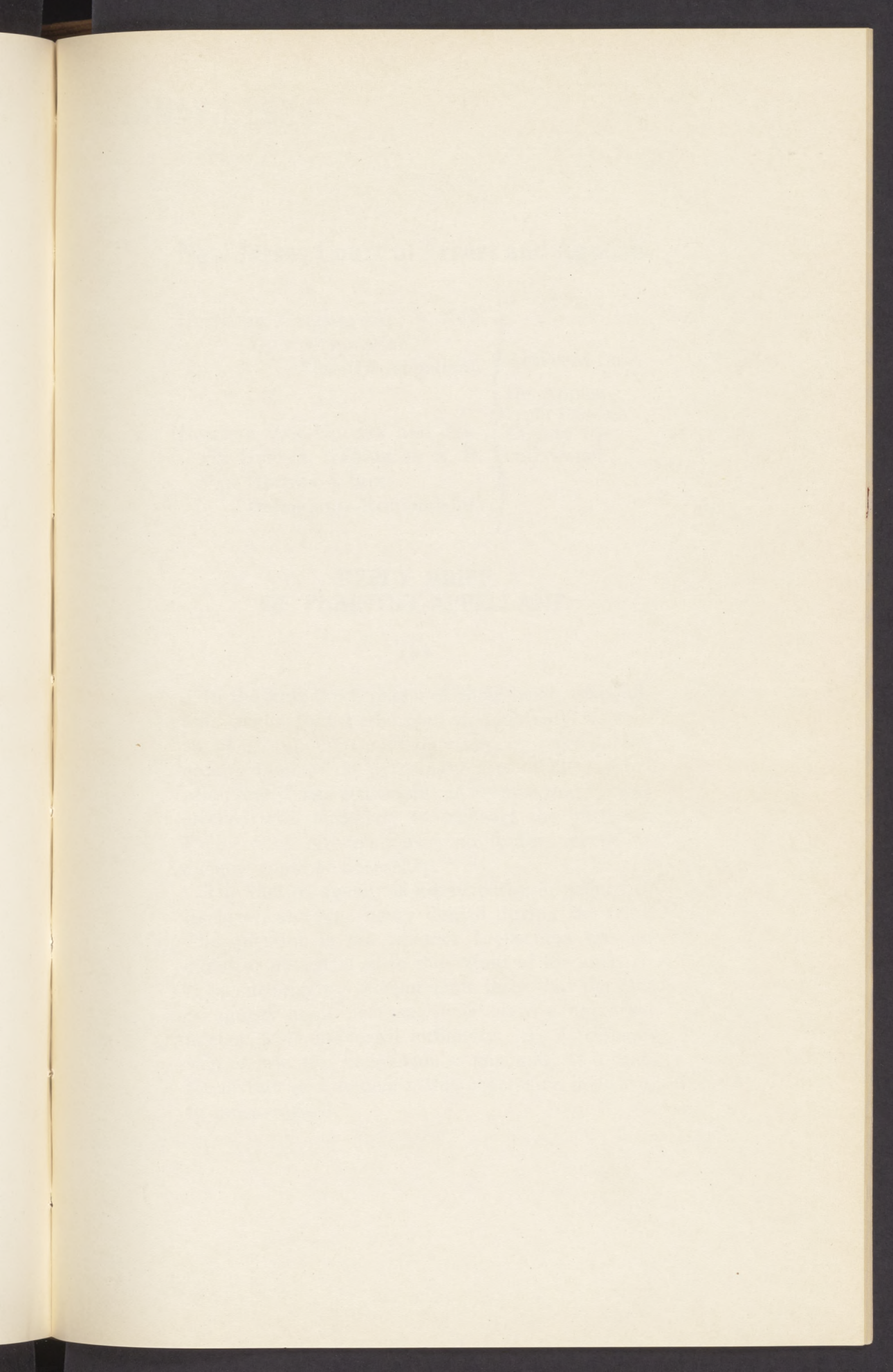
Finey v. Penna. R. R. Co. 67 N. J. L., 627, does not support appellant because it excepts cases in which fraud is involved.

"Where a party attaches his signature to a contract, otherwise valid, a conclusive presumption is created, *except as against fraud* the signer read, understood and assented to its terms."

The other authorities cited by appellant are to the same effect.

Respectfully submitted,
ALBERT COMSTOCK,
WILLIAM B. GOURLEY,
Of Counsel for Respondents.





ASB. I. YAMBI

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New Jersey Court of Errors and Appeals

DURALITH CORPORATION, a New York corporation, Plaintiff-Appellant,	} Action at Law.
vs.	
EDMUND VAN HOUTEN and JEN- NIE HOPPER, trading as A. B. VAN HOUTEN & SON, Defendants-Respondents.	} On Appeal from Passaic County Cir- cuit Court.

REPLY BRIEF OF PLAINTIFF-APPELLANT.

(a)

In the first three pages of their brief, respondents argue that Lieberman undoubtedly was an agent of appellant, and they say, on page 3, "he occupied one of the principal offices of the corporation and it was reasonable to assume that he was clothed with authority to transact the business. Under such circumstances, no further proof of agency would be necessary."

The fact of agency is admitted by appellant in its brief, and was never denied during the trial. The question is not whether Lieberman was an agent or not; it is as to the extent of his authority as such agent. Respondents infer that the fact of agency alone necessarily involves a universal agency, with universal authority. As a proposition of law, this conclusion is unsound; as a matter of fact and evidence, this conclusion is entirely unwarranted.

It was *not* reasonable to assume a universal authority in Lieberman, because the written contract spoke loudly as to the limitations on such authority.

(b)

Respondents rely on the case of *Reitman v. Fiorillo* to sustain the proposition that fraud of an agent always binds his principal.

Brief, p. 4.

In this case, one Hipsch, through his agent, Ruberti, sold whiskey to the defendant, for which Hipsch received the defendant's promissory notes. Hipsch assigned the notes to the plaintiff, who brought suit on them against the defendant. The defense was that the sale of the whiskey was induced by Ruberti's fraudulent representations.

It is to be noted that in this case there was no protective clause as in the case at bar; there was no evidence whatsoever that Ruberti lacked authority to make the particular representations; and there was no discussion by the court of the effect of protective clauses, or what the rule of the law would be if the evidence clearly showed that Ruberti lacked authority to make representations and that defendant knew of such lack of authority.

(c)

At the bottom of page 4 and top of page 5, respondents quote from 2 Corpus Juris, Section 731, page 960.

An examination of this citation discloses that

the words immediately following the paragraph cited by respondents are:

“But whether or not there is any evidence tending to prove the existence of an agency is for the court to determine, and if there is none, or if it is so slight that a finding thereon and the existence of the agency would not be sustained, the question should be disposed of by the court alone, and should not be submitted to the jury.”

And the same author in *Corpus Juris* says, in Section 203, on page 561:

“The principal will not be bound by an act of the agent in excess of his actual authority * * * where the third person has knowledge of the extent of the agent's authority * * * ”

The same author also says in Section 210, on page 569:

“Instructions modifying or limiting the authority of the agent, which are known to a person dealing with him, are as binding upon such person as they are upon the agent, and he can acquire no rights against the principal by dealing with the agent contrary thereto. The principal may make the authority of his agent as broad or as narrow as he will * * * ”

To the same effect see *Elliot v. Bodine*, 59 N. J. L. 567, *Insurance Co. v. Fritz*, 61 N. J. L. 211, *Belcher v. Manchester B. & L.*, 74 N. J. L. 833, *Law v. Stokes*, 32 N. J. L. 249.

(d)

Respondents rely on the case of *R. H. Muir, Inc. v. Church Construction Co.*

Brief, pp. 7-8.

This case supports the contention of appellant, impliedly. The protective clause covered PROMISES, TERMS, CONDITIONS, OR OBLIGATIONS, &c. The defense was as to FALSE REPRESENTATIONS. The court merely held that "promises, terms, conditions, or obligations" did not cover "representations". If respondents' contention is sound, the court should merely have said that such a clause was legally ineffective.

(e)

On pages 8 and 9, respondents quote excerpts from the case of *Bridger v. Goldsmith*, 143 N. Y. 424. This case was one of *personal antecedent fraud* (appellant's brief, p. 9). The court said that the defrauder knew that the protective clause was false and therefore he could not rely on the representation of the defrauded person that the clause was true. Again, the question of authority of an agent to make representations was not involved.

(f)

The first paragraph on page 12 of respondents' brief is a perfect *argumentum ad hominem*. As an argument of law, it is hardly a tribute to the dignity of this Court; as an argument on fact, it

is without foundation under the evidence or in the record.

(g)

The failure of respondents to take issue with several assertions in appellant's brief, either in law or in fact, is ominous:

There is no claim that appellant misrepresented the contents of the writing.

There is no denial that respondents read and understood the contract.

There is no argument as to equitable estoppel.

There is no discussion or refutation of the *Steiner*, *Edison*, and *McCabe* cases.

There is no refutation of appellant's assertions that a principal may limit the authority of his agent.

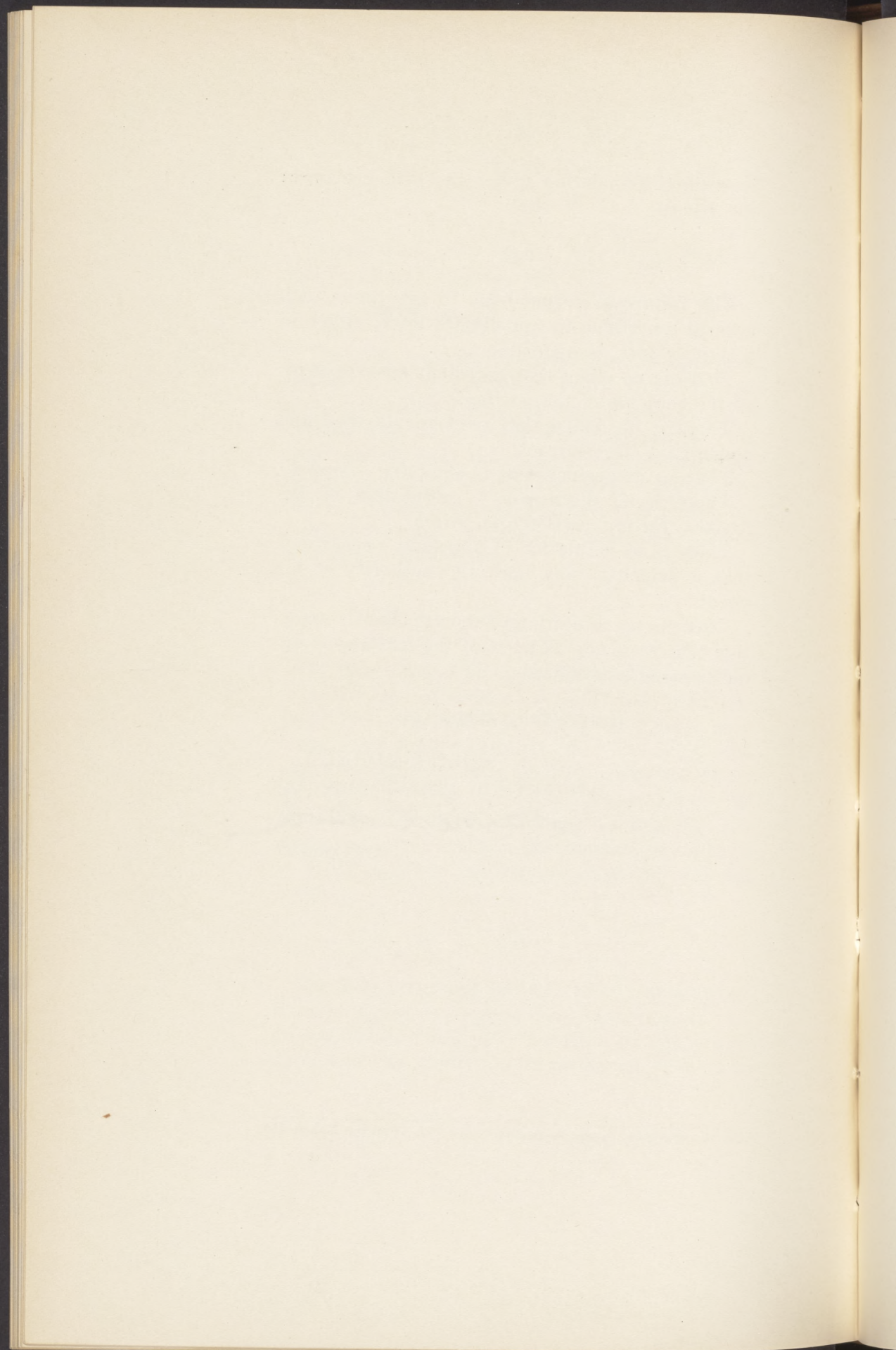
There is no refutation of the appellant's assertion that respondents knew of the limitations upon its agent's authority.

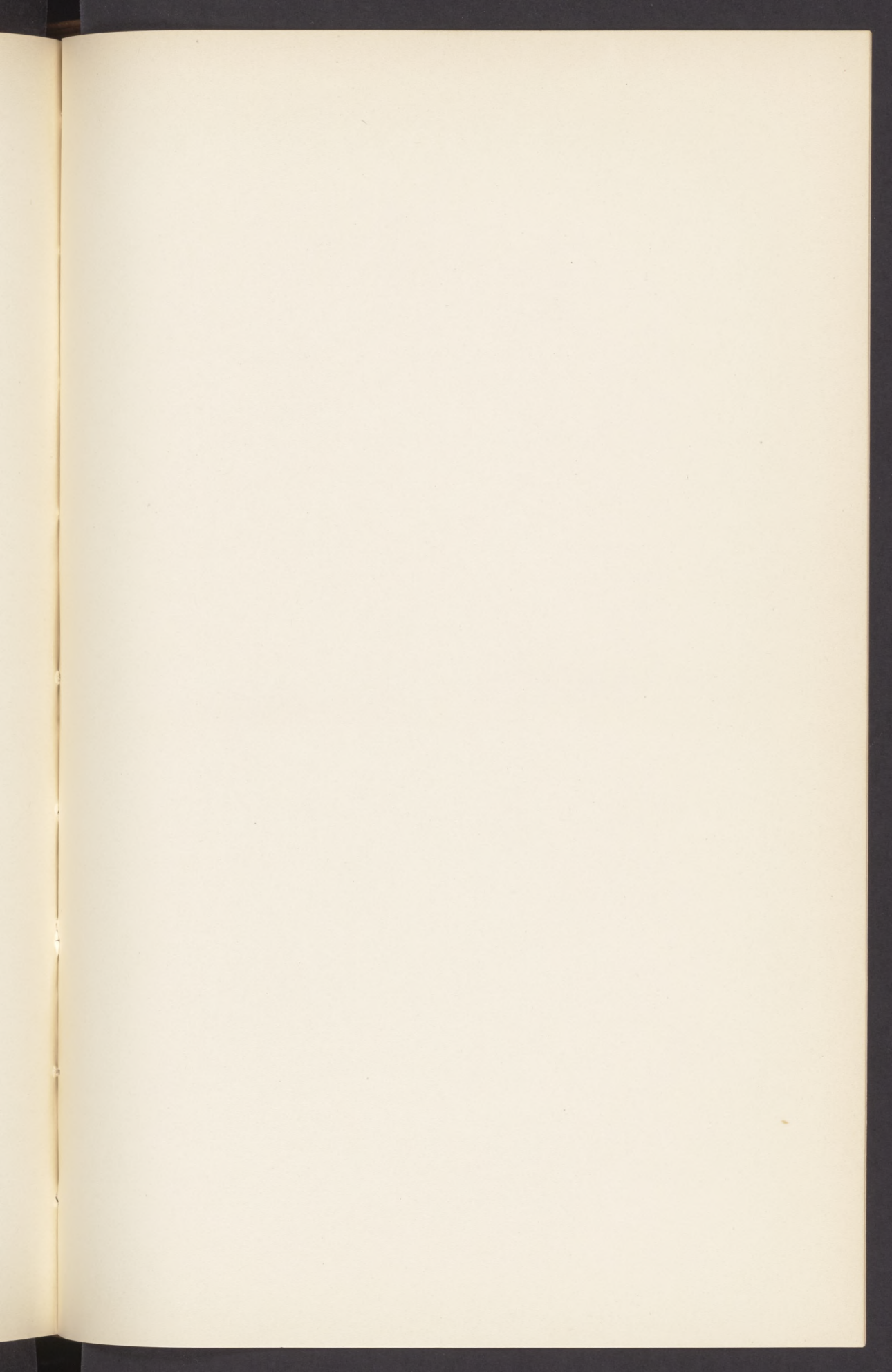
Respectfully submitted,

COLE & MORRILL,
Attorneys of Plaintiff-Appellant.

David L. Cole

Of Counsel.





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