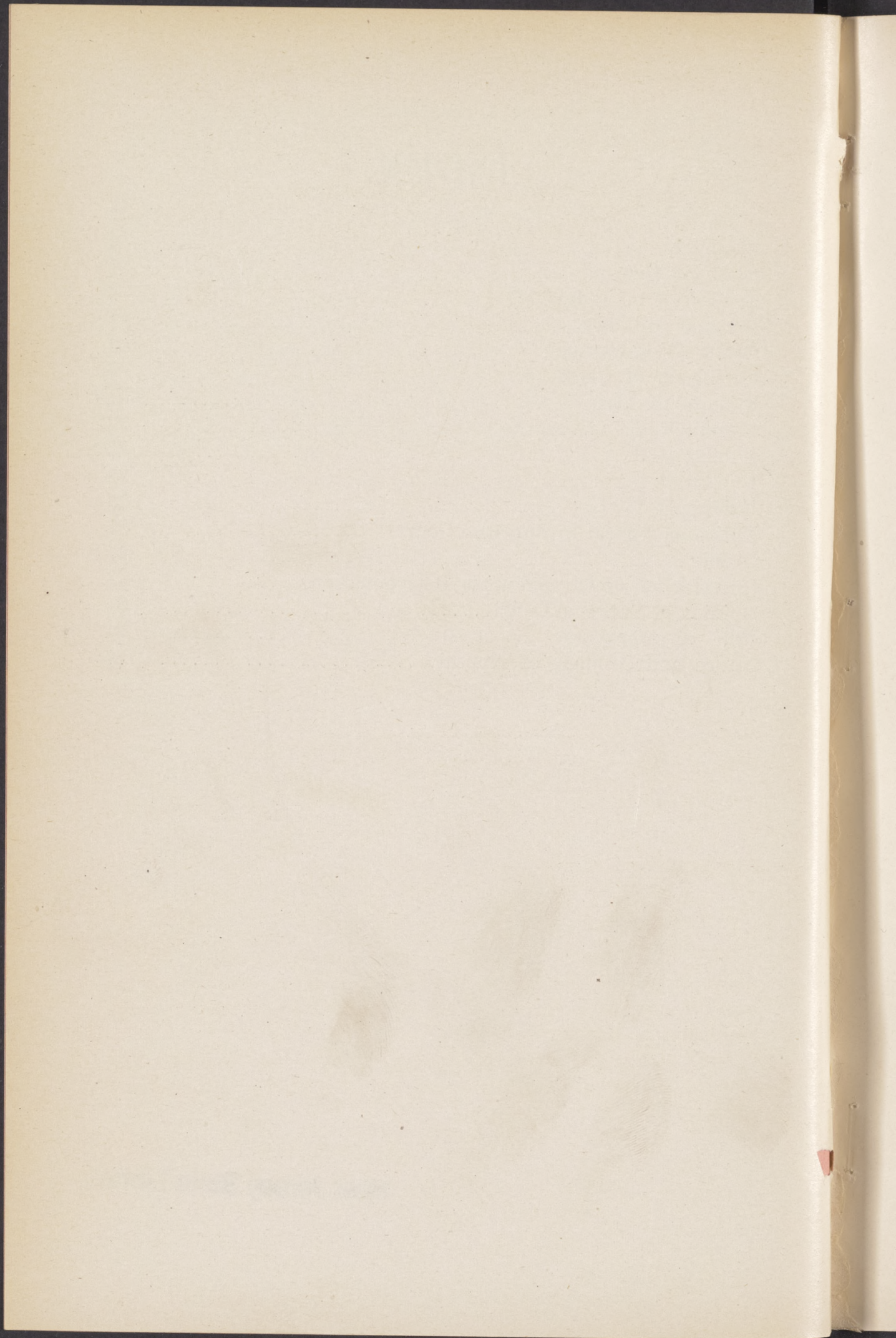


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State of Demand.

STATE OF CASE.

Filed January 30, 1920.

New Jersey Supreme Court

10

DIAMOND MILLS PAPER Co., a corporation,
Plaintiff,

vs.

LEONARD HYGIENE ICE Co., a corporation,
Defendant.

*On Appeal from
District Court.
State of Case.*

20

.TRANSCRIPT OF JUDGMENT, STATE OF DEMAND.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

DIAMOND MILLS PAPER Co., a corporation,
Plaintiff,

vs.

LEONARD HYGIENE ICE Co.,

Defendant.

State of Demand.

On Contract.

30

The above named plaintiff, a corporation, demands of the above named defendant five hundred dollars on contract for the amount due on a certain book account of which the annexed statement is a true copy.

Judgment will be claimed for the sum of two hundred and fifty (\$250) dollars, with interest from March 25, 1915, besides costs.

40

CHARLES A. RATHBUN,
Attorney for Plaintiff.

Transcript of Judgment.

MORRIS COUNTY, ss.

The State of New Jersey, to any constable in
 said county, or to the sergeant-at-arms of the
 (L. s.) District Court of the First Judicial District of the
 County of Morris: SUMMON Leonard Hygiene Ice
 10 Co., a corporation, to appear before the District Court of the
 First Judicial District of the County of Morris to be held at
 the Court House, Washington street (entrance on Court street),
 in the Town of Morristown, on the 1st day of May, 1919, at
 ten o'clock in the forenoon, to answer unto Diamond Mills
 Paper Company, in an action upon contract to the damage of
 the plaintiff one hundred dollars. Hereof fail not.

WITNESS, JOSEPH HINCHMAN, Esq., Judge of said court, at
 Morristown aforesaid, the 25th day of April, in the year one
 thousand nine hundred and nineteen.

HARRY G. ZWENGER,
Clerk.

PLAINTIFF'S COSTS.

Summons	\$ 2.10
Mileage	
Serving subpoena	.35
Listing fee	1.50
Witness fee	1.00
Attorney's fee	15.65

Total cost	\$20.60
Statement for docketing.....	.50

A summons in the above stated case was issued on the 25th
 day of April, 1919, returnable on the first day of May, 1919,
 wherein plaintiff demands of the defendant the sum of \$500.00.

The plaintiff filed a state of demand on , 1919.

The summons was served and returned as follows:

I served the within summons April 26, 1919, on Samuel
 Leonard, he being the president of said Leonard Hygiene Ice
 Co., by reading it to him and giving him a copy thereof.

JAMES H. BRANT,
Constable.

Transcript of Judgment.

This cause was adjourned to May 8, 1919.

This cause was adjourned to May 15, 1919.

This cause was adjourned to May 22, 1919.

This cause was adjourned to June 5, 1919.

Demand for jury filed June 4, 1919.

The plaintiff and the defendant appearing, the cause was
tried and determined at this time.

10

Attorney for plaintiff—Charles A. Rathbun.

Attorney for defendant—Elmer W. Romine.

*Witness Plaintiff.**Witness Defendant.*

1. Harry P. Van Gilder
2. Fred Van Voorhees
3. Chas. G. Van Gilder
4. Ray Leonard

1. Philip Jaqui
- D. Letter to Albright Van
Voorhees June 11/14
- D2. Letter.

20

P. 1. Letter April 11/19 to Leonard Hygiene Ice Co. from
Chas A. Rathbun.

P. 2. Letter April 14/19 to C. A. Rathbun from Leonard
Hygiene Ice Co.

P. 3. Bill of lading dated March 25/15.

The evidence being closed the Court rendered judgment in
favor of the plaintiff and against the defendant in the sum of
three hundred and twelve dollars and ninety-two cents damages,
with costs, whereupon judgment is entered in favor of the
plaintiff and against the defendant in the sum of three hundred
and twelve dollars and ninety-two cents damages, with costs.

30

Statement for docketing issued June 5/19.

Notice of appeal filed June 5/19.

Bond filed June 9/19.

Order restraining plaintiff from collecting said judgment filed
June 9/19.

40

Demand for Jury.

DEMAND FOR JURY.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

10

DIAMOND MILLS PAPER Co.,

Plaintiff,

vs.

LEONARD HYGIENE ICE Co.,

Defendant.

On Contract.

Demand for Jury.

To the Clerk of the District Court:

20 TAKE NOTICE, that the defendant in the above stated action hereby demands a jury on the trial of said cause.

Dated June 4th, 1919.

ELMER W. ROMINE,
Attorney for Defendant.

30

40

Order of Extension.

ORDER OF EXTENSION.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

DIAMOND MILLS PAPER Co., a corporation, <i>Plaintiff,</i> <i>vs.</i> LEONARD HYGIENE ICE Co., <i>Defendant.</i>	{	<i>On Appeal.</i> <i>Order of Extension.</i>
--	---	--

10

It appearing to the Court that the attorneys for the respective parties in the above stated case have been unable to agree upon a state of the case upon appeal within the time required by the statute,

20

Now, THEREFORE, it is ordered on this 19th day of June, A. D. 1919, that an extension be granted the attorneys of the respective parties for the preparing and filing of the state of the case on appeal in the above stated case until Thursday, July 10th, 1919.

JOSEPH HINCHMAN,
*Judge of the District Court of the First
Judicial District of the County of Morris.*

30

40

*Order of Extension.*DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

 DIAMOND MILLS PAPER Co., a corporation,
Plaintiff,

10

vs.

LEONARD HYGIENE ICE Co.,

Defendant.

It appearing to the Court that the attorneys for the respective parties in the above stated case have been unable to agree upon a state of the case on appeal within the time extended by the Court on June 19th, 1919.

20

Now, THEREFORE, it is ordered on this 9th day of July, A. D. 1919, that a further extension of time be granted the attorneys of the respective parties, for the preparing and filing of the state of the case on appeal, in the above stated case, until August 30th, 1919.

JOSEPH HINCHMAN,

*Judge of the District Court of the First**Judicial District of the County of Morris.*

30

I, Charles A. Rathbun, attorney of the plaintiff, hereby consent to the making of the foregoing order.

CHARLES A. RATHBUN,

Attorney of Plaintiff.

40

Order of Extension.

ORDER.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

DIAMOND MILLS PAPER Co., a corporation,

Plaintiff,

vs.

LEONARD HYGIENE ICE Co.,

Defendant.

On Appeal.

Order.

10

It appearing to the Court that the attorneys for the respective parties in the above stated case have been unable to agree upon a state of the case on appeal within the time extended by the Court on the 9th day of July, A. D. 1919,

20

Now, THEREFORE, it is ordered on this 27th day of August, A. D. 1919, that an extension of time be granted the attorneys of the respective parties for the preparing and filing of the state of the case on appeal in the above stated case until September 20th, 1919.

JOSEPH HINCHMAN,

Judge of the District Court of the First

Judicial District of the County of Morris.

30

40

Certificate of Clerk.

ORDER.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

10	DIAMOND MILLS PAPER Co., a corporation,	}	<i>On Appeal.</i> <i>Order.</i>
	<i>Plaintiff,</i>		
	<i>vs.</i>		
	LEONARD HYGIENE ICE Co.,		
	<i>Defendant.</i>		

20 It appearing to the Court that the attorneys for the respective parties in the above stated case have been unable to agree upon a state of the case on appeal within the time extended by the Court on August 30th, 1919,

Now, THEREFORE, it is ordered on this twentieth day of September, A. D. 1919, that a further extension of time be granted for the preparing, settling and filing of the state of the case on appeal in the above stated case, until January 30, 1920.

JOSEPH HINCHMAN,
Judge of the District Court.

30 STATE OF NEW JERSEY, }
COUNTY OF MORRIS. } ss.

I, HARRY G. ZWENGER, clerk of the District Court of the First Judicial District of the County of Morris, do hereby certify that the foregoing is a true copy of the judgment and proceedings in the case wherein Diamond Mills Paper Co., a corporation, is plaintiff, and Leonard Hygiene Ice Co. is defendant, recorded in Docket No. , page .

40 (L. S.) In witness whereof, I have hereunto set my hand and affixed the seal of this court at Morristown, this _____ day of January, one thousand, nine hundred and twenty.

HARRY G. ZWENGER,
Clerk.

*State of the Case.*DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

 DIAMOND MILLS PAPER Co., a corporation,
Plaintiff,
vs.

 LEONARD HYGIENE ICE Co., a corporation,
Defendant.

Action on Contract.

10

Tried before the Court without jury.

Charles A. Rathbun, Esq., attorney for plaintiff.

Elmer W. Romine, Esq., attorney for defendant.

STATE OF THE CASE.

20

By the Court.

This action was brought upon a book account—to recover \$250.00, the price charged for a second-hand boiler, claimed to have been sold and delivered by plaintiff company to defendant company.

Harry P. Van Gilder, a witness produced on part of plaintiff, testified that he was the bookkeeper for and had charge of the books of account of the plaintiff company. A book called a “Journal” being produced, he testified that the same was the book of original entry of accounts of plaintiff company—the book being offered in evidence. Objection to the admission of this book was made by defendant’s attorney on the grounds that the ledger and cash book were not offered at the same time.

30

This objection was overruled, and the book admitted in evidence. An exception was allowed.

The witness further pointed out the account contained in the book showing the charge to the defendant company of \$250.00 for one second-hand boiler, and further testified that no payment had been made thereon, and that the amount was still owing.

40

Fred Van Voorhis, a witness produced on part of plaintiff, testified that he was supervising engineer of the plaintiff company at Saugerties, N. Y., where plaintiff company had a busi-

State of the Case.

ness plant. That pursuant to orders he had shipped the boiler in question to the defendant company, and later had seen it in the plant of the defendant company at Morristown, N. J. That he had there met Mr. Samuel M. Leonard, the president of defendant company.

10 The question was then asked witness:

"Did you then and there have any conversation with him?"

Objection was made on behalf of defendant to the admission of the conversation in evidence.

Mr. Romine stated:

20 "My further objection is this: They claim that the boiler was sold and now they offer a conversation with the president of the corporation. It don't appear that he was president yet, but as a matter of fact it was after the boiler was claimed to have been sold and put into place. How would that bind the corporation, the sale of the boiler?"

The Court overruled the objection and allowed the examination to proceed, subject only to the question whether Mr. Leonard was the president of the defendant company, which he was later admitted to be. An exception was allowed.

The witness testified that he asked Mr. Leonard if the boiler was all right, and was informed by Mr. Leonard that it was, but that it needed a new connection, and the threads to be cut for this before it could be put in.

30 The witness undertook to furnish these if Mr. Leonard would make a small sketch, which was done, and the connection furnished on the part of the plaintiff company.

The witness further testified as to the general good condition of the boiler and that it had been taken out by plaintiff company because too small for its work. That he had had experience of eleven or twelve years in buying and selling boilers.

40 Being cross examined by attorney for defendant as to his qualifications, witness testified that he had bought and sold boilers before, he thought as many as twenty; that he had bought fire tubes and water tubes, for both horizontal and vertical boilers, both new and old. That he had had experience with boilers that had been used four or five years, and up to twenty years. That his business was not regularly the buying and selling of boilers.

State of the Case.

The witness was then asked what he thought was the fair value of the boiler in question.

The question was objected to by the attorney for defendant on the ground that the witness had not qualified as an expert.

The objection was overruled. An exception was allowed.

The witness answered that the boiler in question was worth \$350 to \$400. That another boiler which had been used about six years which was taken out by plaintiff company at same time with the boiler in question was sold for \$350. Upon being cross examined by attorney for defendant, witness, Fred Van Voorhis, testified that his brother and his father were also connected with the Diamond Mills Co. (plaintiff), and further that he never had any correspondence with his brother, Albright Van Voorhis, regarding the boiler. 10

The witness was then asked the question:

“Q Didn't you know before this boiler was shipped from Saugerties that your brother was required under the arrangement with the Leonard Ice Company to furnish machinery up to five thousand dollars?” 20

This question was objected to by the attorney for plaintiff on the ground that the witness' knowledge, if any he had, was not brought home to plaintiff company.

The objection was sustained by the Court. An exception was allowed. The further question was asked the witness:

“Q Did you know before the boiler was shipped from Saugerties that your brother desired the boiler to place in the Leonard Hygiene Ice Co.'s plant as part of his arrangement with the company to furnish machinery?” 30

This question was objected to by attorney for plaintiff upon the same ground of objection to the last previous question.

The objection was sustained by the Court. An exception was allowed.

Further on cross examination, witness testified that his brother, Albright Van Voorhis, gave him instructions where to ship the boiler, that he went to plaintiff company in 1912, that the boilers were taken out in 1913, that the boiler lay outdoors two years until shipped. 40

Witness shown letter marked D. 1 for identification, dated June 11, 1914, admitted that he might have had something to

State of the Case.

do in connection with the writing of the letter, but said that it was written by his brother and not by himself.

10 Charles G. Van Gilder, a witness produced on part of plaintiff, testified that he was the secretary of the plaintiff company, that he had charge of the transaction relating to the disposition of the boiler in question, that Albright Van Voorhis interviewed him at the New York office of plaintiff company.

The question was asked:

“Q Who did he claim to represent at that time?”

The question was objected to by attorney for defendant on the ground that his statement would not bind the defendant company.

The objection was overruled by the Court. An exception was allowed.

20 The witness then testified that Albright Van Voorhis claimed to represent the Leonard Hygiene Co., the defendant company. The witness proceeded to give the substance of the conversation.

Objection to this was made by attorney for defendant on the ground that no authority in Albright Van Voorhis to bind the defendant company had been shown.

Objection overruled by the Court. An exception was allowed.

30 The witness then testified that plaintiff company made a low price on the boiler because of the relations Albright Van Voorhis' father had with plaintiff company. That witness for plaintiff company agreed to sell the boiler to defendant company for \$250 on board the cars at Saugerties, that the plant at Saugerties was then notified by the New York office that the boiler had been so sold.

Upon cross examination the witness testified that he had had a talk with the father of Albright Van Voorhis about the boilers before Albright came to New York; that the father was anxious to have the son purchase the boiler, but that it was not given to him; that no one from the defendant company had consulted him about the boiler other than Albright Van Voorhis.

40 Harry P. Van Gilder, being recalled, testified that it was the custom of the plaintiff company to send monthly statements to all parties having accounts open on the books of the company, and that no exception to the rule had been made in connection with the account claimed to be owing by defendant company.

State of the Case.

Ray Leonard, a witness procured on the part of plaintiff company, testified that he was now secretary and treasurer of the defendant company; that his brother, H. W. Leonard, was the vice-president, and that Samuel M. Leonard, his father, was the president, and that all three of these were directors, and were the only directors of the defendant company. That they seldom held formal directors' meetings, but that they consulted together about the business of the defendant company nearly every day.

10

Attorney for plaintiff at this point asked the witness to produce a certain letter written by Mr. Rathbun to defendant company. The witness stated that the letter was in the possession of Mr. Romine, attorney of defendant company in court. Witness admitted that he had been served with subpoena-ad-duces-tecum, requiring him to produce the letter. Witness asked Mr. Romine for the letter to produce. Mr. Romine refused to do so on the ground that no notice to produce the letter in court had been served upon him.

20

Attorney for plaintiff then moved the Court to order Mr. Romine to produce the letter.

Mr. Romine as attorney for defendant objected on the same ground that no notice to produce had been given.

The Court overruled this objection, and ordered Mr. Romine to produce the letter, which he did, still protesting his objection, which was thus overruled. An exception was allowed.

Plaintiff's attorney asked the witness if the letter in question, which bore date in April 14, 1919, was received by the defendant company from Mr. Rathbun, plaintiff's attorney.

30

Attorney for defendant objected to the question on the ground that no proper notice to produce the letter had been served.

The objection was overruled by the Court. An exception was allowed.

The witness testified as to the receipt of the letter, which was then offered in evidence.

Attorney for defendant objected to its admission on the same ground last mentioned.

40

This objection was overruled by the Court. An exception was allowed.

The letter was admitted in evidence and marked Exhibit P. 2. The witness was next shown a letter dated April 14, 1917,

State of the Case.

purporting to be written by himself on the letterhead of the Leonard Hygiene Ice Co., which he admitted writing.

This letter was offered in evidence by attorney for plaintiff.

10. Attorney for defendant objected to its admission because it did not appear that the letter was written by authority of the board of directors of the defendant company, or that they knew anything about the writing of the letter and because it did not appear that the witness had any authority to bind the defendant corporation.

The objection was overruled by the Court. An exception was allowed.

The letter was admitted in evidence and marked Exhibit P. 3.

20. Upon cross examination, witness testified that in 1915 he was not secretary and treasurer of the defendant company, and that the officers as they now exist were not all of them connected with the company in 1915. Witness also testified that when he wrote the letter dated April 14, 1917, he did not do so in pursuance of any express authority of the defendant company—but on his own initiative, believing that the company owed the bill.

The question was then asked:

“Q Subsequently did you find out that the company did not owe this money?”

30. The question was objected to by attorney for plaintiff on the ground that it called for a conclusion of law and fact—the question now being tried.

The objection was sustained by the court. An exception was allowed.

The following question was then asked:

“Q Did you find out after writing the letter of April 14, 1917, that you had made a mistake in stating that the defendant company had owed this amount?”

40. Attorney for plaintiff objected to the question on the same grounds last stated.

The objection was sustained by the Court. An exception was allowed.

The witness further testified that after April 14, 1917, he obtained some information with reference to the claim from

State of the Case.

Mr. Jaquin, who had been connected with the company in 1915, showing a different situation from that stated in the letter.

At this point attorney for plaintiff rested his case.

Attorney for defendant moved for a non-suit on the ground that it did not appear in the case that Albright Van Voorhis had any authority from the defendant company to bind it on contract—that it did not appear that defendant company had any knowledge that the contract was made whereby it was obliged to pay any money, and that it did not appear that Albright Van Voorhis had any connection with the defendant company, or had any legal right or authority to make any contract with anyone to bind the defendant company; that it did not appear that the defendant company agreed to pay the plaintiff company any price whatsoever, and that the testimony of Fred Van Voorhis is insufficient to place any value upon the boiler. And further that if there is a letter and a promise to pay by the Leonard Hygiene Ice Co. that it is the individual act of Ray Leonard. That he does not sign himself the Leonard Hygiene Ice Co. by any officer; that he simply signed the letter himself personally; that even if he were an officer of the company, in law he would not have any right to bind the company without any authority and there is no evidence shown that he had any authority to write the letter.

The Court denied the motion for a non-suit. An exception was allowed.

The attorney for defendant then proceeded with his defense.

Philip Jaqui, a witness produced on the part of defendant, testified that he was connected with the defendant company in 1915; that witness was then a director and vice-president of the company, and that Albright Van Voorhis was at that time a director and also the secretary and treasurer of the defendant company, and that Samuel M. Leonard was the other director and was also the president of the company.

The witness further testified that he remembered the time when the boiler was received at the company's plant, and was then asked the question:

“Q Did the Leonard Ice Company purchase that boiler?”

State of the Case.

Attorney for plaintiff objected to the question on the ground that it called for a conclusion of law.

The Court sustained the objection. An exception was allowed.

The further question was then asked:

10 "Q Did Albright Van Voorhis have any authority to purchase a boiler for the company?"

Attorney for plaintiff objected to the question on the same grounds last mentioned.

The objection was sustained by the Court. An exception was allowed.

The following questions were also asked:

"Q Did the board of directors of the Leonard Ice Co. ever authorize the purchase of this boiler?"

20 Attorney for plaintiff objected to this question on the same ground last mentioned, and that the minutes should be produced.

The objection was sustained by the Court. An exception was allowed.

"Q Did you confer with Albright Van Voorhis, or was anything said about him purchasing the boiler?"

Attorney for plaintiff objected to the question unless it was shown that some one representing plaintiff company was present.

30 The objection was sustained by the Court, unless it could be shown that plaintiff was represented. An exception was allowed.

"Q Did Albright Van Voorhis tell you that the boiler was to be given to him and he was to put it in the plant of the Leonard Ice Co. without expense to him except the freight on the boiler?"

Attorney for plaintiff objected to the question on the same ground last mentioned.

The Court sustained the objection upon like condition.

40 "Q Did the Leonard Ice Co. at any time agree to pay the Diamond Mills Paper Co. for the boiler which was installed?"

Attorney for plaintiff objected to the question because it called for a conclusion of law.

The objection was sustained by the Court. An exception was allowed.

State of the Case.

“Q Did the Leonard Ice Co. ever make a contract or agree to pay for this boiler?”

Attorney for plaintiff objected to the question for the grounds last stated.

The objection was sustained by the Court. An exception was allowed.

10

The witness then testified that after suit was brought in this case he had a conversation with Ray Leonard—that prior to that time he had been in the State of Florida.

The following questions were asked:

“Q Did you say anything to him about the liability of the company? Not what you said but ‘yes’ or ‘no’.”

Answer: “Yes.”

“Q Did you at that time tell Ray Leonard—or what did you tell him about the liability of the company?”

20

Attorney for plaintiff objected to the question on the ground that no representative of plaintiff had been connected with the information at the time of the sale of the boiler.

The objection was sustained by the Court. An exception was allowed.

“Q Did you tell Ray Leonard at that time that the company was not liable because Albright Van Voorhis had obtained the boiler as a gift?”

Attorney for plaintiff objected to the question for the same reason last stated.

30

The Court sustained the objection. An exception was allowed.

“Q Did you know whether there was any arrangement made between Albright Van Voorhis and the company with respect to his installing the boiler?”

“A Yes.”

“Q Will you tell us what the arrangement was?”

Attorney for plaintiff objected to the question on the ground that it was not shown that anyone representing plaintiff company was present at the time referred to in the question.

40

The Court sustained the objection. An exception was allowed.

“Q Was the arrangement between the Leonard Ice Company and Albright Van Voorhis that in consideration of the

State of the Case.

stock being issued to him he was to furnish \$5,000 worth of machinery?"

Attorney for plaintiff objected to the question on the ground last stated.

The Court sustained the objection. An exception was allowed.

10 "Q Did Albright Van Voorhis, prior to the installation of the boiler in question, furnish \$5,000 worth of machinery to the Leonard Ice Co.?"

Attorney for plaintiff objected to the question because it had not been shown that plaintiff company had any knowledge of such agreement as suggested.

The objection was sustained by the Court. An exception was allowed.

20 The witness then testified that Albright Van Voorhis remained with the defendant company after the boiler was installed about two years.

The following questions were asked:

"Q Did you know how he came to leave the Leonard Ice Co.?"

Attorney for plaintiff objected to the question as it related to a matter after the fact and having no bearing on the question.

Objection sustained by the Court. An exception was allowed.

30 "Q Do you know when he left the Leonard Ice Co. whether he left of his own accord, or whether he was forced out?"

Attorney for plaintiff objected to the question on the grounds last stated.

The Court sustained the objection. An exception was allowed.

40 Attorney for defendant stated that his reasons for asking the question was to show the relations that have existed between the Leonard Ice Co. and Albright Van Voorhis as indicating our inability to use him as a witness to prove the contentions in our case that the boiler was donated by him to this company and given to him by the plaintiff company.

"Q Do you know whether the Leonard Ice Company have a claim against Albright Van Voorhis?"

State of the Case.

Attorney for plaintiff objected to the question on the grounds last stated.

The Court sustained the objection. An exception was allowed.

The witness testified that as an officer of the defendant company he never had any knowledge that the plaintiff company claimed that it had sold the boiler to the defendant company. That the matter was never discussed at the meeting of the directors of the defendant company—while Albright Van Voorhis was connected with the company.

10

The following question was then asked:

“Q Did the board of directors at any meeting while Albright Van Voorhis was connected with the company authorize him or anyone to purchase a boiler from the plaintiff company?”

Attorney for plaintiff objected to the question on the ground that the record of the minutes should be produced—and could not be proved by hearsay.

20

The objection was sustained by the Court. An exception was allowed.

Ray Leonard, a witness produced on the part of defendant, testified that he became connected with the defendant company in June, 1917, and that at that time Albright Van Voorhis had left the company.

He identified a letter dated June 11, 1914, which he found in the files of the defendant company, and which was written on the letterhead of the plaintiff company and addressed to Albright Van Voorhis. This was offered in evidence and not being objected to was admitted and marked Exhibit “D. 1.”

30

Attention of the witness was called to an item in the books of defendant company, showing the amount of \$250 owing to the plaintiff company for the boiler in question. He testified that when he took charge of the books he found the item there. That it was entered under date of December, 1915, and that the handwriting was that of Albright Van Voorhis’ father.

Witness further testified that he found the bill of the plaintiff for the boiler among other bills when he took charge of the office.

40

That the first time he talked to Mr. Jaqui about the matter was after suit was brought.

Upon cross examination the witness testified that it was his custom to make up a statement monthly, which was submitted to

State of the Case.

the other directors showing the bills owing by the company; that he had included in this statement each month the bill for \$250 owing to the plaintiff company for the boiler in question and that no criticism of this item had been made by the other directors.

10 Attorney for defendant at this point asked for an adjournment of the case, so that he might produce in evidence the minutes of meetings of the directors of the defendant company.

Attorney for plaintiff stipulated that it would be admitted that the minutes if produced would not show any resolution directing Albright Van Voorhis to purchase the boiler.

20 Attorney for defendant then moved the Court for an adjournment of the case, so that he might be able to produce as a witness Mr. Samuel N. Leonard, the president of the defendant company, for the purpose of showing that he had no knowledge that Albright Van Voorhis had purchased the boiler on behalf of the defendant company, but on the contrary that there was a distinct understanding between him on behalf of company and Albright Van Voorhis; that the latter was to put in a certain amount of machinery, and to show the amount of the contract and that stock was issued in consideration, and also that Van Voorhis did not put in the full \$5,000 worth called for, and that the installation of this boiler was a part of the contract between the defendant company and Van Voorhis to furnish machinery.

30 Attorney for plaintiff objected to the case being thus adjourned and at once stipulated and agreed that if Samuel M. Leonard was produced as a witness he would testify that prior to the boiler being received by defendant company, witness did not have any knowledge of its being purchased.

The Court thereupon denied the motion of attorney for defendant for such adjournment. An exception was allowed.

40 Attorney for plaintiff at this time stated that he had omitted through oversight to offer in evidence before resting his case the bill of lading, showing the shipment of the boiler in question, and now asked the attorney for defendant to produce the same so that it might be offered.

Attorney for defendant refused to produce it, although he admitted having it with him in court, giving as his reason that sufficient notice to produce the same had not been given.

Attorney for plaintiff moved the Court to order the attorney for defendant to produce the bill of lading.

State of the Case.

Attorney for defendant objected on the ground that sufficient notice had not been given. An exception was taken and allowed.

The Court ruled that under the circumstances immediate notice to produce was sufficient and ordered attorney for defendant to produce the bill of lading.

It was so produced and upon being offered in evidence by attorney for plaintiff was marked Exhibit P. 4.

10

The evidence was declared closed on part of both plaintiff and defendant, and the argument of counsel heard.

The Court found that one second-hand boiler had been sold and delivered by the plaintiff company to defendant company at the agreed price of \$250, upon the order of Albright Van Voorhis, who was at the time a director and also the secretary and treasurer of defendant company, and found further that the book account for the same was owing from defendant company to plaintiff company. Thus finding in favor of plaintiff and against the defendant damages in the amount of two hundred and fifty dollars, with interest.

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Judgment was rendered accordingly.

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Exhibits.

EXHIBIT P. 2.

Charles A. Rathbun,
Counselor at Law
Morristown, N. J.

10

Apl. 11, 1919.

Leonard Hygiene Ice Co.,
44 Abbott Ave.,
City

Gentlemen:—

The claim of the Diamond Mills Paper Co. against you amount-
ing to \$250. with interest thereon from March 25, 1915, has
been placed in my hands for collection. If convenient for you
to do so, I trust you will favor me with a check, payable to my
20 order, for the amount due without delay. In any event please
let me hear from you at once obliging thereby

Yours truly,

Charles A. Rathbun.

EXHIBIT P. 3.

30

Samuel M. Leonard
President

H. W. Leonard
Vice-President

R. Y. Leonard
Secretary & Treas.

LEONARD HYGIENE ICE COMPANY, INC.

Manufacturers and Dealers in
Hygiene and Natural Ice

Office and Factory 44-46 Abbett Avenue

Telephone 839-W

Morristown, N. J., April 14th, 1919.

40

Mr. Charles A. Rathbun,
Counsellor-at-Law,
Morristown, N. J.

Dear Sir:—

Your letter of the 12th received.

We have been strictly up against it for the past two years
due to the condition which our former Treasurer left this Com-

Exhibits.

pany and althou this account has long been past due, sincerely hope you will try and induce your clients to hold off until First of July when we will be in a position to pay claim off. We have just started our plant which has been closed down for the past nine months and expect to have the biggest season this year in our history, due to the scarcity of ice.

Yours sincerely,

Ray Y. Leonard.

10

EXHIBIT P. 4.**WEST SHORE RAILROAD.**

Straight Bill of Lading—Original—Not negotiable.

20

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

At Saugerties, N. Y. March 25, 1915,

from Diamond Mills Paper Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in any or all of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

30

The Rate of Freight from.....
to

Consigned to Leonard Ice Co.

40

Destination, Morristown State of N. J. County of Morris
Route W. S. RR to Jersey City, Erie to Morristown

Exhibits.

	No Packages	Description of Articles and Special marks	Weight
	1	6 x 18' long	
	1	Set Iron front and rear	
	3	Sets " Doors & Frame	
10	39	Grate Bars	
	4	Supporting Irons	
	6	Brick stays long	
	2	" " short	
	6	Lengths 6" pipe short	
	2	" 6" " long	
	1	6" P. & D. Valve	
	1	6x6x3 Tee	
	1	6x6x6 "	
	1	Water Column	24000
20	1	Boxes Gages	
	1	Stack support & Roog Guard	

Diamond Mills Pa Co., Shipper

R. Ryeter, Agent
Per F.

Exhibits.

EXHIBIT D. 1.

R. H. Thompson
President

E. Van Voorhis
Treasurer

C. G. Van Gilder
Secretary

OFFICE OF
THE DIAMOND MILLS PAPER CO.

10

established 1872

by

G. W. Thompson

Manufacturers of fourdrinier (Bloomfield, N. J.
and cylinder tissues, parchment, (Milburn, N. J.
white, buff and railroad copying Mills (New Hampton, N. Y.
papers, grass bleached silver (Saugerties, N. Y.
tissue, white and cream stereo-
type tissue, carbon and manifold
papers, cigarette paper,

20

BROMO GLEN MILLS
and other toilet papers, etc.
Cable Address, "Mondia, New York"

SALES DEPARTMENT

No. 44 Murray Street,

NEW YORK.....191

30

Saugerties, N. Y., June 11, 1914.

Mr. Albright VanVoorhis,
Morristown, N. J.

Dear Brother:—

In regard to the boiler about which you have been asking
would like to know whether you want to do anything about it,
as we have a man on hand who wants to buy same. If you
do not want it, kindly let me know and we will sell to the other
party.

40

Did you receive the blower which I sent via freight?

Will be home Saturday and trust I may see you then.

Yours truly,

F. S. Van Voorhis
H. V. V.

Notice of Appeal.

NOTICE OF APPEAL.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE COUNTY OF MORRIS.

10	DIAMOND MILLS PAPER Co., <i>vs.</i> LEONARD HYGIENE ICE Co., a corporation, <i>Plaintiff,</i> <i>Defendant.</i>	}	<i>On Contract.</i> <i>Notice of Appeal.</i>
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To Diamond Mills Paper Co., or
Charles A. Rathbun, its attorney:

20 TAKE NOTICE, that the defendant in the above stated action hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the First Judicial District of the County of Morris rendered against it in the above stated action on this fifth day of June, A. D. 1919.

ELMER W. ROMINE,
Attorney for Defendant.

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Order.

ORDER.

NEW JERSEY SUPREME COURT.

DIAMOND MILLS PAPER Co., a corporation, <i>Plaintiff,</i> <i>vs.</i> LEONARD HYGIENE ICE Co., <i>Defendant.</i>	}	<i>On Appeal from District Court. Order.</i>	10
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This matter being opened to the Court by Elmer W. Romine, attorney for defendant, in the presence of Charles A. Rathbun, attorney for the plaintiff, and it appearing that an appeal has been taken from the judgment in the District Court in the above stated case and that a bond has been filed; and it further appearing that the defendant neglected to file within the time a specification of objections to the determination of the District Court; and it appearing that the defendant desires to prosecute this appeal and that application is made for an order allowing said specifications to be filed as of time and good reasons appearing,

IT IS ORDERED on this 14th day of October, A. D. 1919, that the defendant have leave to file within five days from the date hereof a specification of objections to the determination of the District Court, the same to be considered filed as of time, and that a copy of said specification of objections be served upon the attorney of the plaintiff within said five days.

Let this rule be entered.

C. W. PARKER, J. S. C.,
Judge.

*Specification of Objections to Determination.***SPECIFICATION OF OBJECTIONS TO DETERMINATION.****NEW JERSEY SUPREME COURT.**

10

DIAMOND MILLS PAPER Co., a corporation,
Plaintiff,

vs.

LEONARD HYGIENE ICE Co.,

Defendant.

*On Appeal from
District Court.*

*Specification of
Objection to
Determination.*

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The defendant and appellant, Leonard Hygiene Ice Co., in compliance with Rule 90 of the Court, hereby specifies its objections to the determinations and directions of the District Court with respect to which it is dissatisfied, in point of law, as follows, to wit:

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1. The District Court allowed evidence on behalf of the plaintiff over objection, whereas such evidence should have been overruled and stricken out.

2. The District Court found as a matter of law that the plaintiff was entitled to maintain its suit, although the defendant moved for a non-suit when the plaintiff rested its case, whereas it should have found in favor of the defendant and granted a non-suit because the plaintiff failed to show by evidence that there was any authority given by the defendant company to Albright Van Voorhis, to purchase the machinery from the plaintiff company, and because it did not appear from the evidence that the defendant company had any knowledge that a contract to pay for machinery had been entered into by Albright Van Voorhis or anyone on behalf of defendant company with the plaintiff for the purchase of the machinery.

40

3. The District Court erred in refusing to grant a non-suit when the plaintiff rested its case and also erred in refusing to direct a verdict in favor of the defendant and against the plaintiff.

4. The District Court erred in refusing to allow plaintiff's witnesses to answer questions propounded on behalf of defendant on cross examination.

Specification of Objections to Determination.

5. The District Court erred in overruling questions asked of defendant's witnesses on behalf of the defendant.

6. The District Court erred in finding a judgment in favor of the plaintiff and against the defendant and decided against the law and the evidence of the case.

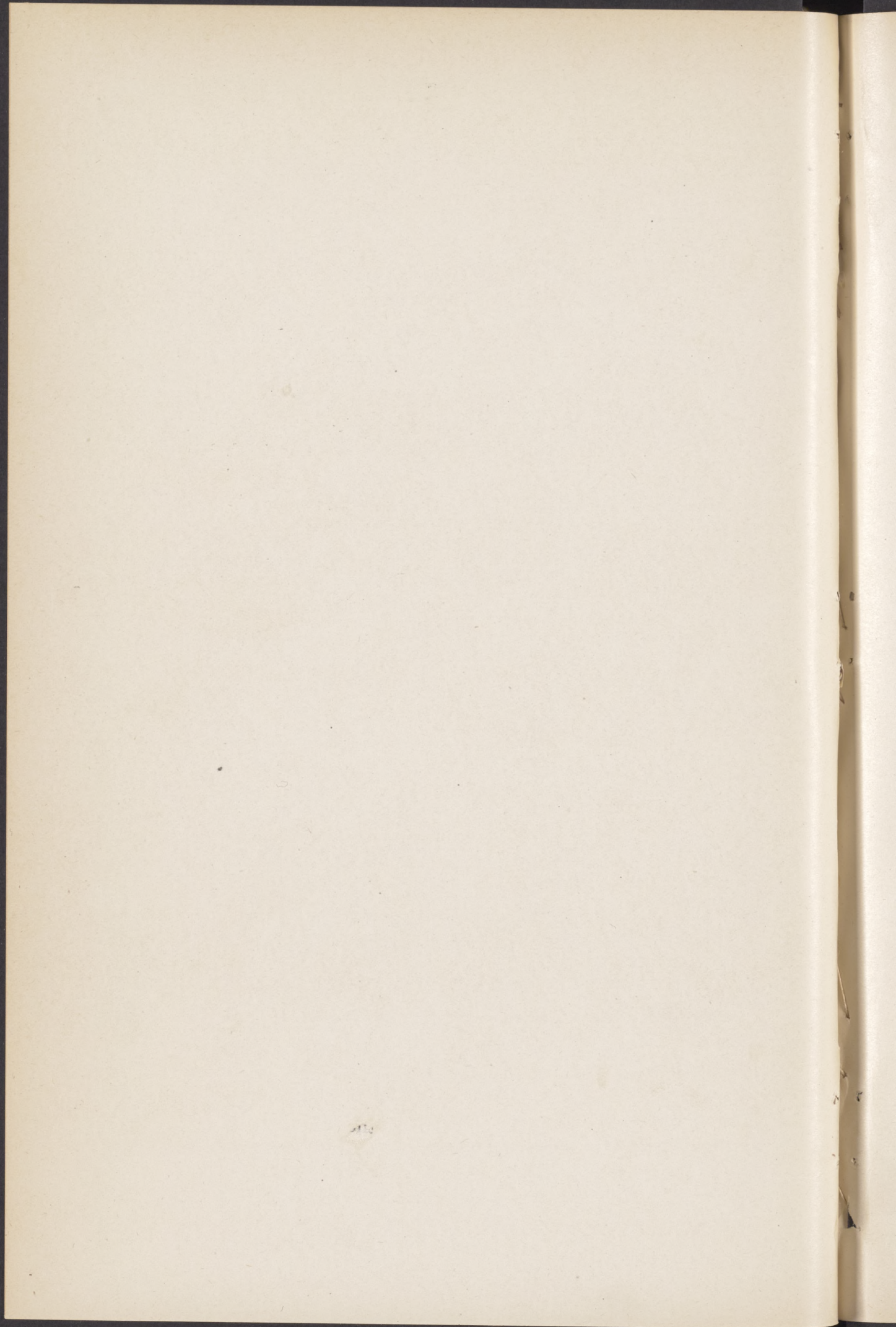
7. The District Court disregarded the evidence of the case and gave judgment for the plaintiff against the preponderating weight of the evidence. 10

8. The District Court erred in refusing to continue the case so that the plaintiff could produce witnesses in behalf of its defense and forced the defendant to trial under circumstances which prevented the defendant from properly interposing a defense.

ELMER W. ROMINE,
Attorney for Defendant. 20

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed July 7, 1920.

NEW JERSEY SUPREME COURT.

No. 409, FEBRUARY TERM, 1920.

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DIAMOND MILLS PAPER COMPANY, a corporation,

Plaintiff-Respondent,

vs.

LEONARD HYGIENE ICE COMPANY, a corporation,

Defendant-Appellant.

20

On appeal from First Judicial District Court of Morris County.

Before Justices Trenchard, Bergen and Kalisch.

For the appellant, Elmer W. Romine.

For the respondent, Charles A. Rathbun.

Per curiam:

The plaintiff recovered a judgment against the defendant in the District Court in an action brought by the former against the latter for the price of a second-hand boiler alleged to have been sold and delivered to the latter by the plaintiff.

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At the time of the alleged sale, March 25, 1915, the board of directors of the defendant company consisted of Samuel L. Leonard, president, Phillip Jaqur and Albright Van Vorhis, the latter being secretary and treasurer. The father of Albright Van Vorhis was treasurer of the plaintiff company, and had two brothers in the employ of the same company, at Saugerties. The testimony tended to establish that Albright Van Vorhis conducted the negotiations for the defendant company for the purchase of the boiler, through his brothers, with Charles Van Gilder, secretary of the plaintiff company. It appears that the price to be paid for the boiler was fixed by the plaintiff company. There was also testimony to the effect that after the boiler was installed, one Fred Van Vorhis visited the defendant

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Opinion of Supreme Court.

company's plant, at Morristown, and there met the company's president, who expressed himself as being satisfied with the boiler, but at the same time pointed out certain things he deemed necessary to be done to perfect the boiler; that the plaintiff company agreed to do the things requested of it, provided it was furnished with a sketch by the president of what was desired. This appears was done and the plaintiff company completed the work. The item of the sale was entered upon the books of the defendant company. Monthly statements of the amount due to the plaintiff were sent by it to the defendant company. The boiler was shipped to the defendant, March 25, 1915. The account ran from that time until action was brought in April, 1919. The defense was that Albert Van Vorhis was not authorized by the board of directors of the defendant company to purchase the boiler. But granting that he was not, the fact that the defendant kept the boiler for a period of four years and made use of it at its plant and caused the plaintiff to make repairs to it raised a permissible inference that the defendant company ratified the act of Van Vorhis, and that being so the finding of the Trial Judge is not reviewable.

Under the 48th section of the Sales Act, 4 C. S. 4658, the buyer is deemed to have accepted goods delivered to him if he does any act in relation to them, which is inconsistent with the ownership of the seller, or when, after a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

There was testimony to the effect that the boiler was a gift to one of the directors of the company, by the plaintiff. This defense raised a controverted question of fact which was for the Trial Judge to decide, and his decision is not open to review.

It is next argued that the Court erred in receiving in evidence a letter written by Ray Leonard under date of April 14, 1919, to the plaintiff, in which the indebtedness for the boiler was admitted and which contained a promise to pay the debt off on July 1st. This letter was written to the plaintiff's attorney. It is urged that because the letter is signed "Ray Y. Leonard" it carried with it only an acknowledgment of indebtedness by the signer in his individual capacity and was not binding on the company. The letter was written on the company's letter paper, which contains at the head the names of the president, vice-president and R. Y. Leonard, secretary and treasurer. It was written in reply to a letter addressed to the defendant de-

Opinion of Supreme Court.

manding payment of the claim. We think under the circumstances the letter was admissible. We also think that the defendant was entitled to show that the letter was written under a misapprehension of the facts and its offer to that effect was improperly overruled. It is obvious that the testimony offered was of a self-serving character, and even though it could have been made to appear that the letter was written under a misapprehension of the facts, we cannot perceive in what respect the exclusion of the offer was harmful to the defendant, especially in view of the circumstances that it was a conceded fact that the plaintiff shipped the boiler to the defendant, who used it in its business for several years, and there was an item on the defendant's books of account showing an indebtedness of two hundred and fifty dollars for the boiler in question from the defendant to the plaintiff.

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It is further insisted that the Trial Judge erred in receiving in evidence the conversation of the plaintiff with Albright Van Vorhis, before there was any proof of Albright's agency to speak for the defendant company. This objection in the present case, under all the evidence, goes to the order of proof. The testimony of Albright with the plaintiff was inadmissible and could not bind the defendant company unless he was its authorized agent for the purpose of which he spoke. But there was testimony of the defendant's acts and conduct in reference to the boiler, the mailing of monthly bills by the plaintiff to defendant for the same and an item of indebtedness of \$250.00 on the books of the defendant company to the plaintiff company for the boiler, all of which tend to establish that the defendant company ratified the acts of Van Vorhis as its agent in regard to the purchase of the boiler.

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Judgment is affirmed, with costs.

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Rule of Affirmance.

NEW JERSEY SUPREME COURT.

10	DIAMOND MILLS PAPER Co., a corporation, <i>Appellee,</i>	} <i>On Appeal.</i> <i>Rule of</i> <i>Affirmance</i> <i>and Remittitur.</i>
	<i>vs.</i>	
	LEONARD HYGIENE ICE Co., <i>Appellant.</i>	

This cause having been duly submitted to the Court, and the Court having considered the same and finding no error in the record or proceedings in the District Court of the First Judicial District of the County of Morris,

20. It is thereupon ORDERED and ADJUDGED that the judgment of the District Court of the First Judicial District of the County of Morris removed by appeal in this cause be affirmed with costs, and that the record be remitted to the District Court of the First Judicial District of the County of Morris to be proceeded with according to law and the practice of said Court.
Entered July 14th, 1920.

On motion of

CHARLES A. RATHBUN,
Attorney for Appellee.

*Notice and Grounds of Appeal.***NOTICE AND GROUNDS OF APPEAL.**

Filed.

NEW JERSEY SUPREME COURT.

DIAMOND MILLS PAPER Co., a corporation,
Plaintiff-Respondent,

vs.

LEONARD HYGIENE ICE Co.,
Defendant-Appellant.

*On Appeal.**Notice.*

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To Charles A. Rathbun, Esq., attorney for plaintiff:

TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals from the judgment of the Supreme Court sustaining the judgment of the District Court of the First Judicial District of the County of Morris, on the following grounds:

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1. The Supreme Court sustained the District Court in allowing evidence on behalf of the plaintiff over objection, whereas such evidence should have been overruled and stricken out and constituted error for which a new trial should have been granted.

2. The District Court found as a matter of law that the plaintiff was entitled to maintain its suit, although the defendant moved for a non-suit when the plaintiff rested its case, and for this reason the Supreme Court should have granted a new trial.

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3. The Supreme Court sustained the District Court in refusing to allow plaintiff's witnesses to answer questions propounded on behalf of defendant on cross examination, whereas the Supreme Court should have found that the questions were proper and reversed the judgment for that reason.

4. The Supreme Court should have granted a new trial because of the action of the District Court in overruling questions asked by the plaintiff's witnesses on behalf of the defendant.

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5. The Supreme Court erroneously sustained the judgment of the District Court, whereas a new trial should have been granted so as to allow the defendant to introduce evidence as to

Notice and Grounds of Appeal.

the transaction, and particularly in reference to a gift of a boiler, and the argument had with Albright Van Vorhis with respect to his installing certain machinery.

6. The Supreme Court erroneously found that the letter written by R. Y. Leonard was admissible in evidence.

10 7. The Supreme Court found that the District Court erroneously and improperly overruled testimony relative to the circumstances under which the letter of R. Y. Leonard was written, but erroneously found that the testimony thus excluded was not harmful to the defendant.

8. The Supreme Court found that the District Court erred in receiving evidence as to the conversation between plaintiff and Albright Van Vorhis and erroneously held that this error was not prejudicial to the defendant.

20 9. The Supreme Court found that there was testimony to the effect that the boiler was a gift to one of the directors by the plaintiff and further held that this raised a controverted question of fact for the Trial Judge and that his decision was final, whereas one of the questions raised on appeal was the failure of the Trial Judge to admit evidence with respect to a gift of the boiler, and for this reason there was error and a new trial should have been granted.

30 10. The Supreme Court erroneously found that there was a ratification of the contract.

Dated July 8th, 1920.

ELMER W. ROMINE,
Attorney of Defendant-Appellant.

New Jersey Court of Errors and Appeals

DIAMOND MILLS PAPER COMPANY,
Plaintiff-Respondent,

vs.

LEONARD HYGIENE ICE Co.,
Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement.

The plaintiff company sold a second-hand boiler to the defendant company for the sum of \$250, and this action was brought to recover this amount with interest from March 25, 1915, and judgment was rendered for the full amount by the District Court of the First Judicial District of the County of Morris on June 4, 1919. At the time the boiler was sold the Board of Directors of the defendant company consisted of Samuel M. Leonard, who was also president; Philip Jaqui and Albright Van Vorhis, the latter being secretary and treasurer (case, p. 15, ll. 30-40). The father of Albright Van Vorhis was treasurer of the plaintiff company and two brothers worked for the plaintiff company at Saugerties, New York. Albright Van Vorhis conducted the negotiations on the part of the defendant company for the purchase of the boiler through one of his brothers at Saugerties, and Charles G. Van Gilder, the secretary of the plaintiff company at New York (case, p. 12, ll. 1-20); but the price was set at the New York office by officers of the plaintiff company. The boiler was shipped from Saugerties, New York, on March 25, 1915, consigned to the defendant company, and in its name, as appears by the bill of lading (Exhibit P. 4, case, p. 23), and it was duly received and installed by the defendant company. After it was installed, Fred Van Vorhis, of the plaintiff company, visited the plant of the defendant company at Morristown, and there met the president, Samuel M. Leonard. Mr. Leonard expressed satisfaction with the boiler, but suggested certain things needed to be done to perfect it, and the plaintiff company's representative agreed to have the same done if Mr. Leonard would make a sketch of what he desired. This was done and the work completed (case, p. 10,

ll. 1-35). Bills from the plaintiff company for this boiler were sent to the defendant company according to custom, monthly, without objection on the part of the defendant company (case, p. 12, ll. 40-45), and the item was carried on the books of account of the defendant company (case, p. 19, ll. 30-40). A change was made in the Board of Directors of the defendant company in 1917 by the substitution of H. W. Leonard for Philip Jaqui and Ray Y. Leonard for Albright Van Vorhis (case, p. 13, ll. 1-10), and (case, p. 19, ll. 20-30). Ray Y. Leonard, who was secretary and treasurer, made up monthly statements of the condition of the business which were submitted to his father and brother, the other directors, which contained a statement of the accounts against the company, and this statement included the account of the plaintiff company. No criticism of the item had ever been made by the directors (case, p. 20, ll. 1-20). The claim not having been paid, it was placed in the hands of the attorney of the plaintiff company, who, on April 11, 1919, wrote to the defendant company for payment (Exhibit P. 2, case, p. 22, ll. 1-20); and a reply was received written upon the letter-head of the defendant company and signed by the secretary and treasurer, although the title of his office was not added to his signature. In this letter it was admitted that the account "has long been past due" and requesting time because of hard luck the company had been under (Exhibit P. 3, case, p. 22). The directors "seldom held formal directors' meetings, but they consulted together on the business of the defendant company nearly every day" (case, p. 13, ll. 10-13).

The defendant sought to defeat the claim by offering testimony that Albright Van Vorhis, who was not called as a witness, although within the jurisdiction of the Court, living at Madison, New Jersey, was under contract with the defendant company to furnish machinery to the amount of \$5,000, contending that the boiler was acquired by the said Albright Van Vorhis in furtherance of this arrangement; and the defendant company further sought to avoid liability upon the plea that neither Albright Van Vorhis, in the purchase of the boiler, nor Ray Y. Leonard, in writing the said letter to the plaintiff company, could bind the defendant company.

The District Court held as a fact that the boiler was sold and delivered by the plaintiff company to the defendant company and that the whole amount was owing. The Supreme Court affirmed the judgment and held that, even though Albright Van

Vorhis may have had no authority to bind the defendant company, yet there was a permissible inference that the defendant company had ratified his acts and, that being so, the finding of the District Court was not reviewable.

POINT I.

The recital of facts in the foregoing statement shows that the defendant company received from the plaintiff company a second-hand boiler, installed it at its plant in Morristown, and that it has not been paid for, although a price was fixed at \$250, for which the defendant company has been billed repeatedly by the plaintiff company, and which has been carried on the books of the company and in the monthly statements prepared by the treasurer of the defendant company, as a liability of the defendant company for these several years. After so long a lapse of time and in view of the fact that the bill of lading shows that the boiler was consigned to the defendant company; that, in fact, the boiler was installed by the defendant company; that it has had the beneficial use of the boiler for these years and has recognized its obligation both by carrying it on its books and in its monthly statements as a liability, it hardly lies within the mouth of the defendant company to say at this late date that Albright Van Vorhis, who was a director, as well as secretary and treasurer, had no authority to bind the company and for that reason it cannot be held liable. The cases cited in the brief of the appellant indicating the limitations upon a secretary or other officer are hardly applicable in this case where the secretary was also treasurer and director of a small board of only three. And even though it might be said that even under such a combination of office holding he could not have bound the company for any unusual purchase or contract, yet it can hardly be contended successfully that the purchase of a second-hand boiler which the company apparently needed because of its prompt installation after its delivery, involving so small a sum as \$250 was beyond the power of a director, who was also secretary and treasurer of the company. If such were the rule, it would be well-nigh impossible for corporation business to be carried on, because every transaction with a corporation would have to be accompanied by a certified copy of the resolution of the directors showing the authority to act. But even though it might be held otherwise, yet there was sufficient ratification by the defendant company. It was

with the president of the company, Samuel M. Leonard, that the representative of the plaintiff company conversed, and by him the suggested changes were made, and apparently by him the sketch was forwarded to the plaintiff company which enabled the plaintiff company to do the additional work to complete the transaction; bills were rendered monthly by the plaintiff company to the defendant company for this item and no objection was ever made thereto, but on the other hand it had been carried by the defendant company among its liabilities and the secretary and treasurer had included this item in his monthly statements to the other directors and in the letter to the attorney of the plaintiff company he admitted the liability. It is true that counsel for the defendant has insisted that the letter in which the liability was admitted was signed only by Ray Y. Leonard and that it did not appear it was with the sanction of the Board of Directors, as a board, and therefore he had no authority to bind the company. Perhaps he would not have had original power or right to make a promise to pay money, but the letter of the plaintiff's attorney was addressed to the defendant company and the reply was made on a letter-head of the defendant company, showing that the defendant company had received the letter; and it was certainly within the lines of the activities of a secretary and treasurer to make such a reply as was made, and therefore it is evidential at least of the recognition by the defendant company of its liability. The action was not upon that promise but upon the original sale, and this letter was only used as evidence of the recognition of the liability of the defendant company for the purchase of the boiler.

The secretary was served with a subpoena *duces tecum* to produce the letter to the company, but he could not, because it was in possession of the attorney of the defendant company who resisted the production of the letter (case, p. 13, ll. 10-30). The bill of lading had also been retained by the defendant company and was also in the possession of defendant's attorney who resisted its production (case, p. 20, ll. 35-40, and p. 21, ll. 1-10).

Besides this, in view of the fact that the secretary, his father and brother were the only directors of the company, and the further fact that they conferred with each other nearly every evening, and that they seldom had formal meetings of the Board of Directors, and the whole business of the company was car-

ried on in this loose and informal way, the Court was warranted in finding as a fact that the letter was authorized by the directors, or at least that the secretary and treasurer wrote the letter with their full knowledge and assent. The mere fact that he failed to add the word "secretary" or the word "treasurer" could hardly affect the situation.

In *Stokes v. N. J. Pottery Co.*, 46 Law, p. 237, at p. 240, it is stated that the president of a corporation may "without any special authority from the Board of Directors, perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of its business," and at page 243 it is said of the president, that he "was the general agent of the company." As such he had power to direct and control its business—to make contracts which should bind the company in the ordinary course of its business, and to borrow money for that purpose on its credit. This case further held that a corporation could not be bound by the act of its president in executing the bond and warrant of attorney upon the theory that this was an unusual transaction and not within the scope of authority of the general agent. If the president of the corporation had the right to bind the company by a contract to purchase the boiler, he certainly had the right to bind the company by ratifying the purchase made by Albright Van Vorhis, the secretary and treasurer, and it is very clear from the statement of the case that even though we concede that Albright Van Vorhis as such secretary and treasurer and director had no authority to bind the company, yet there was a ratification by the president of the purchase. The motion for a non-suit should not have prevailed and the judgment in favor of the plaintiff is well founded.

POINT II.

The plaintiff contends that the Court admitted illegal testimony on behalf of the plaintiff and excluded legal testimony offered by the defendant.

It can hardly be seriously contended that the Court should have excluded the letter written by Ray Leonard, the secretary (Exhibit P. 3). It was written in response to a letter from the attorney of the plaintiff and, as already stated and as shown by the exhibit, it was written upon the letter-head of the com-

pany. Correspondence of a corporation is usually conducted by its secretary, and the payment of bills by its treasurer, so that the letter was within the activities of the writer, and was clearly admissible. While it was probably proper for the defendant to show what was permitted by the Court, viz., that he had no express authority of the defendant company to write the letter, yet it is also clear that the action of the Court in not allowing the witness to answer the questions set out on page 14 of the case was entirely proper because they called for conclusions on the part of the witness.

The defendant in its brief claims the more serious objection to the admission of evidence, was the action of the Court in permitting Charles G. Van Gilder, of the plaintiff company, to testify to a conversation he had with Albright Van Vorhis in New York City. This part of the case is found on p. 12 and it will there be observed that the first question to which counsel objected was an inquiry as to whom Albright Van Vorhis claimed to represent when he went to the New York office. While it is probably true that he could not have bound the company by his mere say-so that he represented the defendant company, yet there is no doubt that the plaintiff was entitled to show that Van Vorhis claimed to represent the defendant company. Having declared himself as the representative of the defendant company, in view of all the circumstances of this case, it is clear that the Court ruled correctly in permitting Mr. Van Gilder to testify to the conversation he had with Albright Van Vorhis at New York City. As a matter of fact, it appears in the case that, on the cross examination of Fred Van Vorhis, the latter was given instructions as to the shipment of the boiler by Albright Van Vorhis (case, p. 11, ll. 40-45), and therefore the subsequent testimony of Charles G. Van Gilder as to the transaction and conversation with Albright Van Vorhis was only in line with that which had been developed by the defendant on the cross examination of Fred Van Vorhis.

Bunting v. Allen, 18 N. J. L. p. 209, at 300, supports the view that, although it is irregular to admit the sayings and doings of an alleged agent, yet if other evidence is given to establish the agency, the irregularity will not vitiate a verdict; and an examination of the whole case clearly indicates the agency of Albright Van Vorhis.

Dowden v. Cryder, 55 N. J. L. 332, gives small comfort to the defendant and does not sustain its objection. In that case the

party represented himself as the agent of Carmack and then undertook to set up the extent of his authority which, in fact, was not as represented by him, and the Court of Errors and Appeals very properly said:

“The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority,” and referring to *Campbell v. Nichols*, 4 Vroom, 81, the Court said that that case did not militate against this rule because “the representation there upheld as an estoppel against the principal related, not to the scope of the agent’s power, but to an intrinsic circumstance affecting the character of the instrument which the agent empowered to dispose of, and which circumstance would be within the cognizance of the agent or his principal, but not of those dealing with the agent. The distinction between a representation by an agent as to such intrinsic facts and his representation as to the scope of his authority is clearly drawn in *Farmers’ Bank v. Butchers’ Bank*, *ubi supra*” (16 N. Y. 134).

POINT III.

In the brief of the appellant before the Supreme Court it was said:

“The defendant should have been allowed to show by evidence, which was overruled, the circumstances under which it permitted and allowed the boiler to be installed for the purpose of establishing that defendant as a corporation was not placing itself knowingly in a position of ratifying some pre-existing contract or of impliedly agreeing to pay a reasonable charge for the boiler, *but it is hardly necessary to press this point in view of the finding by the Court.*”

This seems to indicate an abandonment of the exceptions to the overruling of the questions by the defendant and mentioned in the fifth specification of objections to determination, and, if so, the appellant cannot press this point in this Court. Lest it might be considered that this was not an abandonment, I will briefly refer to this testimony which was sought to be introduced. On p. 11 it appears that on cross examination of Fred Van Vorhis it was sought to show that there might have been some arrangement between the defendant company and Albright Van Vorhis whereby the latter was to furnish machinery to the amount of \$5,000; and a similar question was put to Philip Jaqui of the defendant company on his direct examination (case, p. 18, ll. 1-20). The defendant did not assert that it would be

shown that such a contract, if it existed, had been brought to the attention of the plaintiff company. Moreover, the defendant did not contend that this line of testimony was desired to show "the circumstances under which it permitted and allowed the boiler to be installed for the purpose." The questions were also objectionable because they were so very leading. The offered testimony could have been excluded upon the further ground that, if there was any such contract, it must have been in writing, which writing should have been produced. Certainly the plaintiff company could not have been bound by any information of any such contract given to its employee, Fred Van Vorhis. Even if it were the fact that Albright Van Vorhis was under a contract to furnish \$5,000 worth of machinery, yet the defendant company will not be allowed to perpetrate such a fraud upon the plaintiff company as would result if it were allowed to go free. Albright Van Vorhis in dealing with the plaintiff company had stated that he represented the defendant company; in its name he bought the boiler, which was shipped from the plaintiff company's plant to the defendant company's plant in the defendant company's name; it was received by the defendant company; carried on the defendant company's books as a liability; installed by the defendant company at its plant in Morristown, and thereafter certain defects were remedied at the suggestion of the president of the defendant company. It was certainly the duty of the defendant company when it received the boiler in its name and then received bills from month to month for the price of the boiler, to advise the plaintiff company that it had not authorized Albright Van Vorhis to purchase the boiler. If that were the fact, then it had no right to stand by and permit the fraud upon the plaintiff company. It has received the boiler, had the beneficial use of it and is liable.

The testimony excluded was of the self-serving character. If admissible it would have been only upon the theory that it would have been shown that Van Vorhis did not buy the boiler as the agent of the defendant, and that there had been no ratification because the defendant had no knowledge that Van Vorhis had undertaken to represent the defendant. But both of these views were clearly negated by the acts of the defendant, already mentioned several times, and the receipt of bills for the boiler sent by the plaintiff to the defendant. If the defendant thought that Albright Van Vorhis had furnished the boiler, the president would not have asked the plaintiff to make the desired changes, but would have insisted upon Van Vorhis doing this work.

POINT IV.

The preliminary statement in the appellant's brief is very inaccurate. It is therein stated that:

1. The Supreme Court "found that the District Court had committed error in allowing testimony on behalf of plaintiff as to the conversation with one of the directors of the defendant company with reference to the purchase of the boiler."

2. The Supreme Court had also held "that the plaintiff must show that Albright Van Vorhis, one of the directors, had authority to act for the company, before any evidence of a contract could be introduced."

3. The Supreme Court "concluded that there was, by retaining the boiler, a ratification of the bargain or alleged sale to the defendant company, and for that reason declared that these errors, as pointed out, could not be harmful to the defendant."

What the Supreme Court held in reference to these matters is:

1. "This objection in the present case, under all the evidence, goes to the order of proof" and that there was evidence which indicated that the defendant company had "ratified the acts of Van Vorhis as its agent" (case, p. 33, ll. 20-35).

2. This is covered by the preceding quotations from the opinion.

3. The Supreme Court reached no conclusion from the mere retention of the boiler, but held that this was one of the elements in determining the agency of Van Vorhis and the ratification by the defendant company. The Court called attention to the fact that "there was testimony of the defendant's acts and conduct in reference to the boiler, the mailing of monthly bills of indebtedness of \$250 on the books of the defendant company to the plaintiff for the boiler" (case, p. 33, ll. 25-35) and (case, p. 22, ll. 1-25), and these facts not only tended to establish "that the defendant company ratified the acts of Van Vorhis as its agent in regard to the purchase of the boiler," but also that these acts "raised a permissible inference" of ratification, and the District Court having so found, this finding was not reviewable.

POINT V.

There is no evidence of the facts set forth in the second paragraph on page two of the appellant's brief. Even though there were, it would not be sufficient to set aside the judgment because there was other evidence, which has been referred to already, such as the carrying of the item as a liability of the company and the receipt of bills for the boiler monthly, which would have entitled the Trial Court to have found that the defendant company had ratified the purchase. Moreover, the claim that the boiler was to have been given to Albright Van Vorhis is refuted by Exhibit D. 1 (case, p. 25, l. 40), wherein it appears that Albright was told that the boiler would be sold "to the other party" if he did not want to buy it. The words "will sell to the other party" clearly implying that only a sale was contemplated—either to one or the other. And again, if this were supposed to be a personal transaction between the Van Vorhis's only, why should this letter of June 11, 1914 (D. 1) have been kept among the files of the defendant company where it was found by Ray Leonard (case, p. 19, ll. 27-32).

Paragraph four on page two of the appellant's brief is also misleading. There is no evidence whatsoever that Leonard had no knowledge that no claim had been made on defendant company until after Van Vorhis left, nor is there any evidence that Van Vorhis was forced out. The statement "whereupon suit was instituted in 1919" conveys the erroneous impression that immediately after Van Vorhis left, the suit was brought, whereas the truth is he left the company prior to June, 1917 (case, p. 19, ll. 23-37), nearly two years before the suit was brought, and in the meantime and from the time of sale, monthly statements had been rendered by the plaintiff company (case, p. 12, ll. 40-45). Ray Leonard found the bill of the plaintiff company among other bills against the company when he took charge in June, 1917 (case, p. 19, ll. 38-40), showing that plaintiff company had always claimed this item against the defendant. It was certainly the duty of the defendant company, under the circumstances, to protest the validity of this claim, if the situation were as claimed by it now.

But Ray Leonard, the treasurer, also made up monthly statements which were submitted to the other directors, which contained this particular item and that no criticism of the item had been made by the directors (case, p. 20, ll. 1-10).

In paragraph five on page two of the brief it is stated that Exhibit P. 2 "was received by Ray Leonard and answered by him without consulting any of the directors, his father or other persons connected with the defendant company." The letter was addressed to the defendant company, but there is no evidence as to who received it, nor is there any evidence that he answered the letter without consulting anyone. Case, p. 13, ll. 30-40, shows that the witness was asked if the defendant company received the letter and that, after objection, he "testified as to the receipt of the letter." He also testified that when he wrote the reply Exhibit P. 3 "he did not do it in pursuance of *any express* authority of the defendant company, but on his own initiative; believing that the company owed the bill" (case, p. 14, ll. 20-25), but it does appear that "they consulted together about the business of the defendant company nearly every day" (case, p. 13, ll. 10-12), and a fair inference is that under these circumstances, this demand for payment was brought to the attention of all the directors, and that although no express direction or authority was given for the writing of the letter, yet the mutual understanding was that such a letter would be sent.

POINT VI.

The notice of appeal from the Supreme Court to this Court contains ten different grounds therefor, none of which conform to the proper procedure. This Court has pointed out that this method of prosecuting an appeal is erroneous, and having done so, it would seem fair to hold parties to a compliance with the method laid down by the Court.

State v. Verona, 108 Atl. 250;

Thompson v. East Orange, 109 Atl. 340 at 342;

State v. Metzler, 110 Atl. 922 at 923.

Finally.

This is one of those cases where a defendant's contentions appear to be mainly for the purpose of securing further time in which to meet an obligation—the obligation itself is not seriously questioned, but it is inconvenient to have it pressed for immediate consideration. I respectfully urge that the defense is not meritorious—that the judgment is right and should be affirmed.

CHARLES A. RATHBUN,
Attorney for and of Counsel
with the Plaintiff-Respondent.

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
IN TWO VOLUMES
BY NATHANIEL BENTLEY
VOL. II
PUBLISHED BY J. B. ALLEN, 1856

New Jersey Court of Errors and Appeals

DIAMOND MILLS PAPER Co., a corporation,
Plaintiff-Respondent,

vs.

LEONARD HYGIENE ICE Co., a corporation.
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT.

Preliminary Statement.

The Supreme Court in deciding the appeal of this case, from the District Court, found that the District Court had committed error in allowing testimony on behalf of plaintiff as to the conversation with one of the directors of the defendant company with reference to the purchase of a boiler, and also that the Trial Court should have allowed evidence by the defendants in explanation of a letter that was written; and also held, as urged by defendant at the trial, that the plaintiff must show that Albright Van Vorhis, one of the directors, had authority to act for the company, before any evidence of a contract could be introduced. In passing these manifest errors, the Court, in sustaining the judgment of the District Court, concluded that there was, by retaining the boiler, a ratification of the bargain or alleged sale to the defendant company, and for that reason declared that these errors, as pointed out, could not be harmful to the defendant, but in reaching this conclusion the Court undoubtedly overlooked the defense which the defendant attempted to disclose by its evidence at the trial, and which if allowed would negative any ratification and show that the installing of the boiler was pursuant to Van Vorhis' agreement to furnish machinery and that if there was any purchase it was his individual undertaking and liability. This appeal is therefore taken so that a re-argument may be had in this Court and the defendant's position more definitely presented.

Pertinent Facts.

The defendant company was a corporation manufacturing artificial ice at Morristown. The board of directors, in 1915, consisted of Samuel L. Leonard, president; Philip Jaqui, vice-president, and Albright Van Vorhis, secretary and treasurer. The father of Albright Van Vorhis was treasurer of plaintiff company and had two of his sons in the employ of the plaintiff company at Saugerties, New York.

Albright Van Vorhis as a stockholder of the Leonard Ice Company had agreed with Samuel Leonard, president, that for the payment of his stock he would furnish \$5,000 worth of machinery at his own expense and some time prior to March, 1915, Albright Van Vorhis made known to Samuel Leonard, president, and Philip Jaqui, vice-president, that his father, who was connected with the plaintiff company, had at Saugerties, New York, an old discarded boiler which he would give to him, and pursuant to his arrangement to furnish machinery, he would have it installed, to which both Leonard and Jaqui assented.

Accordingly in March, 1915, the boiler was shipped to the defendant company at Morristown, at the request of Albright Van Vorhis, and the boiler was installed in defendant's plant.

No claim was made on defendant company to the knowledge of its other directors, Jaqui and Leonard, until after Van Vorhis had some trouble with the company and was forced out, whereupon suit was instituted in 1919.

Ray Leonard, who had been in business in New York, came to Morristown and took Van Vorhis' place and endeavored to straighten out the company's affairs. Just before suit was instituted the plaintiff's attorney wrote a letter to defendant company, which was received by Ray Leonard and answered by him without consulting any of the directors, his father or other persons connected with defendant company, and in which letter he said payment would be made and to the introduction of such letter, under the circumstances, objection was made, but overruled.

The defendant offered to show at the trial that when suit was instituted the matter came to the attention of Samuel Leonard, president, and Jaqui and that then Ray Leonard learned the boiler was never purchased by the defendant company, but was allowed to be installed because Van Vorhis said it was a gift to him and he was having it put in under his agreement to furnish the machinery.

The defendant company never authorized the purchase of the boiler, never knew that it was purchased, never gave Albright Van Vorhis any authority to act for it and it was not installed under circumstances which would imply that they were to pay any sum, but said boiler was installed, as defendant offered to show by Albright Van Vorhis pursuant to his agreement to furnish machinery, and after a full understanding that the company would not be obliged to pay for same.

Therefore in the light of the defense which was offered, but excluded, the errors of the Trial Court in admitting and excluding evidence and in rendering judgment, were manifestly prejudicial to defendant and further discussion of the law and facts will now be made pointing to the merit of a new trial being granted so as to allow the defense to be interposed.

POINTS.

1. The judgment of the Trial Court, and as sustained by the Supreme Court, was erroneous.
2. There was no ratification of any alleged contract.
3. The Court admitted illegal evidence.
4. A new trial should be granted.

ARGUMENT.

I.

The judgment of the Trial Court, and as sustained by the Supreme Court, was erroneous.

The Trial Court, in making up its judgment (p. 21, l. 13), found that Van Vorhis had purchased the boiler while an officer of defendant company and for that reason predicated and limited liability of defendant on the sole ground that it was therefore bound to pay for the boiler, but the Supreme Court held that as such officer he had no legal right to make a purchase as alleged by plaintiff (p. 33, l. 24).

Thus the finding of the Trial Court being limited and based upon an alleged contract by an officer who had no authority whatsoever, the plaintiff's contentions must not only fail, but the very judgment of the Court is founded on an illegal assumption.

The law controlling this phase of the case as presented to the Supreme Court is as follows:

“A secretary or treasurer, by virtue of his office alone, has no power to bind the corporation by contract.”

See *Harris v. Congress Hall Hotel Co.*, 76 Law 367.;

Curry v. Id., 73 Atl. Rep 124;

North Penn Iron Co. v. Boyce, 71 Law 434;

Fifth Ward Savings Bank of Jersey City v. First National Bank, 48 Law 513;

Dill on Corporations, 5th Ed., pp. 68-69.

“The principal stockholder of a corporation has no authority by reason of that fact to bind the corporation by contract.”

Collins v. Leary, 74 Atl. Rep. 42.

“~~A~~ director, though owning a majority of the stock of a corporation, has no authority as director, to act for the corporation, except as delegated by the board of directors.”

Clement v. Young, McShea Amusement Co., 70 N. J. Eq. 677.

“Unless the act done by the director or officer is authorized by the board of directors, it is void.”

Louis De Jonge Co. v. Woodport Hotel Co., 77 Law 233.

“Persons dealing with an officer of a corporation who assume to act for it in matters, is put upon inquiry as to the authority and good faith of the officer.”

McCloskey v. Goldman, 62 Mis. (N. Y.) 466;

Moore v. Citizens Natl. Bank, 111 U. S. 156.

II.

There was no ratification of any alleged contract.

The plaintiff during the trial, realizing the weakness of its position in attempting to hold defendant and sustain its claim on a sale to such officer, offered over objection as being outside of the allegations in the state of demand, evidence in an attempt to establish a ratification of this supposed contract, but notwithstanding the evidence along this line the Trial Court did not find that there was any ratification or implied liability (see finding, p. 21). *The Court's finding is silent in this respect and must be taken and interpreted as a finding against the attempt of plaintiff along this line.*

The Supreme Court seemed to hold to the view that while the first point may have been well taken, a ratification existed and yet expressed the view that once a fact was determined by the Trial Court, it could not be reviewed. Holding to this legal conclusion, it seems incredible that plaintiff can now argue ratification when the Trial Court excluded such from its finding, and virtually concurred in a finding of this fact against the plaintiff.

Ordinarily a ratification takes place where goods are purchased without authority, received and retained without objection, or where goods are simply shipped without order, received and retained, creating an implied authority to pay reasonable price, but it is most preposterous to say that a corporation is bound under the theory of ratification when the thing received was so received and installed by specific arrangement with its director having charge of such shipment, *that it was a gift to him and that he was going to furnish it in payment for stock issued to him.*

The law bearing out this reasoning and as presented to the Supreme Court is briefly referred at this juncture:

"The corporation will not be deemed to have ratified a contract of an officer, or estopped from repudiating it, *unless it appears to have had actual or constructive notice of the terms.*"

Clement v. Young, McShea Amusement Co., supra.

"Before a corporation can be bound by the acts of one as its agent, on the ground of implied authority or estoppel, *it must appear that the corporation is chargeable with notice of the acts relied on to establish such implied authority.*"

Schlessinger v. Forest Products Co., 76 Atl. Rep. 1024.

The Supreme Court in its opinion (page 32), after referring to some of the facts in the case, said:

"The boiler was shipped to the defendant March 25, 1915, the account ran from that time until action was brought in April, 1919. The defense was that Albright Van Vorhis was not authorized by the board of directors of the defendant company to purchase the boiler. But granting that he was not, the fact that the defendant kept the boiler for a period of four years and made use of it at its plant, and caused the plaintiff to make repairs to it, raised a permissible inference that the defendant company ratified the act of Van Vorhis, and that being so the finding of the Trial Judge is not reviewable."

It will be perceived the Supreme Court had in mind that the only defense was that Albright Van Vorhis was not authorized to purchase the boiler, but the defendant also attempted on the trial to interpose, incident to this as a defense (p. 17 & 18), that the boiler was installed by an understanding with Van Vorhis that his father had given him the boiler and that he was to put it in as part of an arrangement to furnish \$5,000 worth of machinery, therefore, the fact that the boiler remained in the defendant's plant for four years and the fact that they made use of it and the fact that the president of the defendant concern requested certain things done to the boiler at the time it was installed would, in the light of the defense as attempted to be interposed, create no permissible inference that there was a ratification. If there was any charge on plaintiff's books for the sale of the boiler, it must be taken as the debt and liability of Van Vorhis, and under the existing conditions that Van Vorhis had no authority from defendant to bind it, absolves the defendant company absolutely from any liability. Van Vorhis being bound to furnish machinery for his stock, and offering this boiler as a part of his contribution of the machinery, the defendant company was within its rights to insist that it be installed properly and had the right to request that certain things be done at the time of the installation, without submitting itself consciously or unconsciously to a liability.

The Supreme Court referred to the Forty-eighth Section of the Sales Act, where the buyer is deemed to have accepted goods delivered to him unless after a reasonable time he intimates to the seller that he has rejected them. Under the circumstances of the case, the law just quoted could not become applicable. The defendant company did not purchase the boiler nor did any one on its behalf make a purchase, and it was not accepted under any circumstances that would imply a purchase, but to the contrary, the company understood the boiler was being installed by Van Vorhis pursuant to his arrangement to furnish machinery, if there was any obligation it was the individual obligation of Van Vorhis.

In passing the Supreme Court also said (p. 32, l. 30):

"There was testimony to the effect that the boiler was a gift to one of the directors of the company by the plaintiff. This defense raised a controverted question of fact which was for the Trial Judge to decide and his decision is not open to review."

There was testimony offered and overruled to the effect that the boiler was a gift, but there was no testimony actually received by the Court to this effect.

In referring to the case, the evidence offered to establish a gift and arrangement with Van Vorhis for the installation of the boiler is as follows:

Philip Jaqui, one of the directors, was asked by defendant's counsel (p. 16, l. 24):

Q Did you confer with Albright Van Vorhis or was anything said about him purchasing the boiler?

Attorney for the plaintiff objected to the question unless it was shown that some one representing the plaintiff company was present.

The objection was sustained by the Court unless it could be shown that plaintiff was represented, and exception was allowed.

Q Did Albright Van Vorhis tell you that the boiler was to be given to him and he was to put it in the plant of the Leonard Ice Co., without expense to him, except the freight on the boiler?

Attorney for the plaintiff objected to the question on the same ground last mentioned and the Court sustained the objection upon like condition.

And on page 17 of the state of the case the following questions were asked:

Q Did you know whether there was any arrangement made between Albright Van Vorhis and the Company with respect to his installing the boiler? A Yes.

Q Will you tell us what the arrangement was?

Attorney for the plaintiff objected to the question on the ground that it was not shown that any one representing the plaintiff company was present at the time referred to in the question. The Court sustained the objection and exception was allowed.

Q Was the arrangement between The Leonard Ice Co. and Albright Van Vorhis that in consideration of stock being issued to him, he was to furnish \$5,000 worth of machinery?

Attorney for plaintiff objected to the question on the ground last stated. The Court sustained the objection and exception was allowed.

Q Did Albright Van Vorhis, prior to the installation of the boiler in question, furnish \$5,000 worth of machinery to the Leonard Ice Co.?

Attorney for the plaintiff objected to the question because it had not been shown that plaintiff had any knowledge of such agreement as suggested. The objection was sustained by the Court and exception was allowed.

While some of the questions may have been leading, there was no objection on this ground. The questions were asked for the purpose of apprising the Court of the circumstances under which the defendant company allowed the boiler to become installed and to show that by their acts and understanding, they knew of no purchase, and did not receive the boiler from plaintiff so as to even create an implied contract to purchase, and to show that there was nothing which could be interpreted as a ratification of an alleged or supposed contract which the plaintiff may have made with a director of the defendant company, who had no authority to act for it. The Court having excluded such testimony, the Court did not have before it evidence from which it could decide this fact and this being a legal error, is one of the grounds why a new trial should be granted.

It may be argued by plaintiff that although the offered defense may have relieved it from liability, yet this defense was waived by its receiving bills for the boiler and having an entry on its book of the charge, but as to this suggestion it must be remembered that Albright Van Vorhis received the bills, if any were ever mailed; and that none of the other members of the defendant corporation knew of any bills, and it must also be remembered that the entry in the defendant's books were made by Van Vorhis' father, who was connected with plaintiff company, and evidently entered when young Van Vorhis was leaving defendant company. *Such entry is undoubtedly a self-serving statement.* However, these are controverted facts not passed on by the Trial Court and certainly not the subject of determination by this Court, especially where defendant was excluded from presenting its case so that the Court did not have all the facts for determination.

As the matter stands now before the Court, judgment was given by the Trial Court for plaintiff because it was alleged the boiler was ordered by a director of defendant company and shipped to and received by defendant company at his request, thereby making it responsible for the debt, although the director had no authority to purchase.

As against this the defendant was unsuccessful in offering any evidence. But if defendant could have been permitted to intro-

duce evidence in explanation of how and why it allowed the boiler to be installed it would have raised a question of fact, if not an absolute legal excuse, from which it could be said there was no liability. Thus the defendant was shut off, while the plaintiff was permitted to introduce any sort of evidence which might lead to the conclusion that it was or should pay for the boiler, and it is strongly urged that a new trial be granted so that defendant have an opportunity to present its witnesses and testimony, showing the situation and the facts in exculpation of any liability.

III.

The Court admitted illegal evidence.

The Supreme Court having ruled that testimony of the contract to purchase had with Albright Van Vorhis was illegal, without showing his authority to act for the company, further argument on this point will not be made, as it is well settled that before such evidence is admissible the agent's authority must be shown.

As to the letter written by Ray Leonard under date of April 14th, 1919, and marked Exhibit P. 3, admitted over objection (p. 14, l. 15), the Supreme Court concluded that as it was written on the letter head of defendant company, although signed by him individually that it was admissible, but it is insisted that the same law applies in this instance as to that of a director. Before such letter was evidential and binding, it was necessary to show that Ray Leonard knew, not only that there was such a debt owing, but that he had authority to write such a letter binding the defendant company. While ordinarily a secretary, by virtue of his office, can bind the company by his correspondence, it must be remembered in this case that Ray Leonard had taken Van Vorhis' place and knew nothing about this transaction and where no debt actually existed he could not give it life and create a liability by agreeing to make payment without the consent and concurrence of the other directors. There would be no consideration for the making of such a promise and it was in this light that objection was made so as to eliminate from the case an illegal admission. The admission in this letter undoubtedly impressed the Court as counsel for the plaintiff, throughout the case, laid great stress on this letter as being an admission of

liability, and this was the reason for refusing a non-suit at the trial.

On the offer of the defendant to show the circumstances under which the letter was written, and which was overruled, the Supreme Court held that this was erroneous, but the Court did not see how it was harmful, in view of the supposed ratification. But if we approach the case in the light of the defense as offered and overruled, but which should have been allowed, then there was no ratification by defendant, in fact, could be none, not only under the facts and agreement as offered and overruled, but under the strict finding by the Court as now appears (p. 21), and therefore in connection with the defense setting up an entirely different situation, not only this error but the various others as to admission and rejection of evidence militated against defendant to such an extent as to result in an erroneous judgment for the plaintiff.

IV.

There should be a new trial.

Plaintiff sued to recover for the sale price of a boiler claiming a contract and purchase by Van Vorhis, secretary and treasurer and a director of defendant company. Plaintiff failed to show any authority for the purchase, but incident to the alleged transaction urged a ratification by acceptance and retaining of the boiler by defendant.

The defendant questioned under the pleadings and form of suit then offered evidence tending to show ratification and also moved for non-suit which was refused (pp. 10-15).

The Trial Court in its finding of judgment definitely states that plaintiff is entitled to recover solely because Van Vorhis, who was secretary, treasurer and director of the defendant company, purchased the boiler and agreed to pay the price, but under the ruling of the Supreme Court there could be no liability where the officer did not have authority. It is true that an unauthorized sale may be ratified by subsequent act, but in this case there was not only a defense offered excluding any presumption of ratification, but the Trial Court set at rest any pretense of ratification by its finding, predicated and establishing liability on a ground which is now declared to be erroneous.

In disposing of the case the Supreme Court recognized the errors of the trial and inability of plaintiff to recover under its

manner of contract, but evidently took for granted that the doctrine of ratification was applicable as the boiler was retained, although in fact a different situation exists and which is now fully presented here in this Court. The Supreme Court's opinion is indicative of the assumption that the limited finding of the Trial Court, as well as defendant's position and reason for installing and keeping the boiler, was not considered.

If we adhere to the view expressed by the Supreme Court that the Court's finding is conclusive on question of fact, then we need go no further than the first phase of plaintiff's claim, namely, that Van Vorhis as a director had no authority to act for defendant and therefore in the absence of legal proof to show authority, plaintiff cannot recover.

However, if the other question, *that of ratification*, be a proper consideration on appeal, despite the limited finding, then we are confronted with the fact that defendant was entitled to introduce evidence in rebuttal to show that its acceptance and retaining of the boiler was entirely different from the ordinary case where an unauthorized agent makes a purchase, and to offset the presumption that retaining it would be a ratification, by testimony that the agent was furnishing the machinery pursuant to his contract so to do and free from any charge against the company.

If it can be said that the question of ratification had anything to do with the right of plaintiff's recovery, under its cause of action, then the Trial Court should have passed on the question and if so then defendant's evidence was admissible, so that the question of fact could be established. As it stands this was not done.

In either event, it is respectfully submitted that there should be a reversal of the judgment of both the Supreme and District Courts to the end that a new trial be granted.

ELMER W. ROMINE,
Of Counsel with Defendant-Appellant.

New Jersey Court of Errors and Appeals

DIAMOND MILLS PAPER Co.,	}
<i>Plaintiff-Respondent,</i>	
<i>vs.</i>	
LEONARD HYGIENE ICE COMPANY,	}
<i>Defendant-Appellant.</i>	

REPLY ON BEHALF OF DEFENDANT-APPELLANT.

Counsel for the plaintiff-respondent has so intertwined references to the testimony with conclusions of his own in instances where they are not applicable, has made references to a portion of defendant's brief in the Supreme Court and has also lifted from the Court's entire opinion one expression, with the statement that it applies to all of the other conclusions by the Supreme Court, in which they indicate error by the District Court, so that it becomes necessary for the defendant-appellant to make a reply.

Counsel criticizes defendant for not calling Van Voorhis, whom he states was within the jurisdiction of the Court, residing at Madison. This is an unfair statement for several reasons. There was no evidence where Van Voorhis was, except as we read between the lines of examination (p. 18), that there had been some friction causing his leaving the defendant company. It is not to be expected he would, under such circumstances, give evidence for defendant against his father and brothers, and so far as the case is concerned his testimony was not essential to the defense, but a material asset to the plaintiff, but even they did not call him.

The plaintiff persists in continually urging affirmance of the judgment because of ratification. The major part of plaintiff's brief is consumed in construing evidence and circumstances which were admitted over objection, and which were entirely disregarded by the Court in its finding of judgment.

It has been repeatedly held by our courts that the appellant can only argue such points as are the subject of appeal, having been made so by objection; therefore, plaintiff should not argue a matter not the subject of discussion.

In this case, ratification is not an arguable question, only so far as it co-relates to the admission and rejection of evidence which the defendant offered against the permissible inference that there may have been a ratification.

The Appellate Court does not, according to previous ruling, consider any question of fact not included in the finding.

See *Venable v. Blum*, 77 Law 451.

Therefore, if the Court makes no finding predicated judgment on more than one set of facts, it must be taken as no judgment before the Court on the other set of facts as possibly supporting the judgment. See *Barnes v. Wallington Co.*, 78 L., p. 490.

To classify the situation, the plaintiff offered evidence of a dual nature as tending to establish defendant's liability.

First: That Van Voorhis, as secretary and treasurer of defendant company, had purchased the boiler in question, agreed on the price and that it was shipped to defendant company.

Second: That the defendant company received the boiler, retained it, and committed other acts of ratification.

The Trial Court, by a finding, based judgment solely on the first ground of liability. *There is no judgment before this Court which passes on or embraces the facts or evidence* under the second contention, and, therefore, it is improper to argue affirmance of the judgment because of an alleged ratification, not only because ratification has never been passed upon, but further because defendant's offered evidence, rebutting ratification, has been excluded. It would seem that the determination of error would be limited entirely to the question of whether the judgment, as found, and the basis upon which it was rendered, was legal. In this connection we have testimony given, over objection, which should have been excluded, as held by the Supreme Court, and we also have the motion for non-suit on the ground that it did not appear that Van Voorhis had authority to make such a contract, and no evidence of legal liability on part of defendant.

From the opinion of the Supreme Court sustaining objections of defendant, it would appear that the judgment, by the finding, was illegal and should be set aside. The Supreme Court would undoubtedly have so ordered on the errors pointed out, except

that counsel argued ratification and set up circumstances from which the Court evidently concluded or assumed the Trial Court had held such as a basis for the judgment, whereas such was not the case.

Ratification as pointed out by the decisions has nothing to do with the judgment as it stands. The Court did not consider or decide the question of ratification. It could not very well do so with the overruling of defendant's evidence, which was rebuttal of such contention.

Counsel offers no legal reason for excluding defendant's questions, refuting claim of ratification. If, however, plaintiff's evidence on this second element of liability is to be considered then it cannot be doubted but that the offered testimony of defendant was permissible. As the case stands, on the judgment rendered by the Trial Court, this latter proposition of error may not be before the Court as the preliminary evidence of liability, going to make up the judgment as found, is already held to be insufficient to create liability.

As stated in the original brief, if ratification is not to be considered, then judgment should be set aside on the adjudication by the Supreme Court that Van Voorhis had no authority to act for the company, but if ratification is to be taken into consideration, then there was error in excluding defense for which a new trial should be granted.

See *Martin v. Erwin*, 74 L. 337.

Counsel under Point I argues the propriety of the letter written by Ray Leonard, secretary, which was admitted over objection, and says that undoubtedly he would have had no authority in the first instance to have bound the company, but because, he, as attorney, had written a letter directed to the defendant company, and as this was in reply to that letter, it was within the lines and duties of the secretary to make a reply, and it is therefore evidential as a recognition of the liability. Then, to sum up that conclusion, counsel states, the action was not upon that, meaning the letter, but upon the original sale, and the letter was only used as evidence of recognition of the liability of the defendant company. In the first place, there was no original liability because the act of Van Voorhis in claiming to represent the defendant company was a fraudulent act, because he had absolutely no authority by virtue of his office, nor by direction of the board of directors, to make any such contract, and, secondly, the Supreme Court ruled such a contract

in the first instance was invalid. It further appears that while the letter of Mr. Rathbun was directed to the defendant company, yet it was received and opened by Ray Leonard, and that he answered the same, assuming that it was a just claim against the company. *He did not take the matter up with the defendant company, its directors or the other members in charge of the plant; he simply wrote the letter upon his own responsibility.* He endeavored to explain how he came to write the letter, but this was ruled out. There was no authority to write this letter; there was no consideration therefor, and there was no original liability, therefore, the secretary's attempted recognition of a liability cannot have any binding force and effect on defendant. *The Supreme Court ruled that it was error to preclude the secretary from explaining how and why he came to write the letter.*

Counsel at this point volunteers another conclusion, stating that as the directors often conferred together it was quite possible that they had done so before the letter in question was written by Leonard, but *this is a mere presumption, unsupported by any evidence.*

Counsel argues at some length under Point II the admissibility of the plaintiff's evidence relating to a conversation with Albright Van Voorhis and justifies the position taken by authority of *Butting v. Alland*, reported in 18 Law, p. 209, but in that case, as well as the other cases cited in this connection, *the principle invoked by the Court was that such conversation would be proper, providing there was other evidence given to establish the agency.* Now, in this particular case there was no attempt made to show that Albright Van Voorhis had any authority to represent the defendant company, nor did they attempt to show that he had been in the habit of attending to such matters; therefore, as it stands of record this evidence was clearly inadmissible, as was held by the Supreme Court.

Counsel under Point V states that there was evidence which would have entitled the Trial Court to have found that the defendant company had ratified the purchase, and under Point IV, in referring to various features of the case, quotes the Supreme Court as stating that such acts "raised a permissible inference of ratification," and concludes by saying that the District Court having so found the finding was not reviewable. It will be observed that counsel's statements are not only incorrect, but misleading. Under one point he emphatically states that the

District Court did so find, and in the other declares that the Court would have been justified in so finding. AS A MATTER OF FACT, THE DISTRICT COURT BY ITS FINDING DID NOT SAY ANYTHING ABOUT RATIFICATION, so there was no finding on this point.

Under Point III, counsel refers to a statement in the defendant's brief before the Supreme Court and lifts a disconnected assertion from the whole brief and argues that it would imply that the defendant had abandoned the point with respect to the offer of testimony rebutting the presumption of any ratification. References to the defendant's brief in such a manner are quite unfair for the reason that other statements in the brief which have to do with that subject matter have been omitted, and particularly under Point II wherein it was stated,

"There could, of course, be no ratification of a contract when the directors understood that the boiler was being donated to one of their members, and that he was furnishing it as part of his individual arrangement to supply machinery in payment for stock."

There was no abandonment in the Supreme Court of this point but it was not pressed with such vigor nor argued so extensively as in this appeal because counsel considered that the limited finding of the Trial Court barred consideration of ratification and established that the judgment was founded upon a contract which was illegal. Under this point, however, *the Supreme Court expressed no opinion as to the effect of this finding.*

Under Point IV counsel refers to the preliminary statements in defendant's brief as being inaccurate and concludes with the single reference from the Supreme Court's opinion which is intended to lead the Court to believe that the objections pointed out went to the order of proof only, whereas a reference to the Supreme Court's opinion will establish conclusively that such statement was made at the conclusion of the opinion in referring to a single objection and it is respectfully submitted that the Supreme Court found the errors exactly as stated in the appellant's original brief in this case, and with the elimination of ratification, calls for a reversal of the judgment.

In another attempt to exclude consideration of this appeal, the plaintiff suggests that the form of the appeal is not in compliance with the decisions and rules. References to the cases, however, show that the assignments of error should set forth that the Supreme Court erred in giving judgment for any of the rea-

sons upon which the tribunal rested its decisions, and an examination of the state of the case containing the notice and grounds of appeal, pages 35 and 36 show conclusively that in each instance the statement is made that the Supreme Court erred in sustaining the judgment or in sustaining the District Court in the various matters which were the subject of appeal. How counsel can conscientiously urge that the notice and grounds of appeal are not in accordance with the practice is beyond comprehension.

At the conclusion of the plaintiff's brief there is a statement which is quite erroneous and is the imagination of counsel founded, not upon the evidence, but upon some peculiar notion and reasoning of his own which leads to an unwarranted suggestion that this appeal has been taken merely for the purpose of delay and so as to allow the defendant further time in which to meet the obligation.

The defendant is a substantial corporation. The amount involved is very small, but back of the entire case is the fact that Van Voorhis was required to furnish certain machinery, that the installation of this boiler was a part of his arrangement and that the defendant is not in any way responsible for the creation of this debt and should not pay the bill. In addition thereto the defendant has never had an opportunity to present its defense, which goes not only to the question of ratification but to the right of plaintiff to charge the defendant with this debt.

In the final analysis the case resolves itself into two propositions:

FIRST, *what was the finding of the District Court;*

SECONDLY, *can this Court now consider and determine the question of ratification when the defendant has been precluded from offering testimony to show that there was no ratification.*

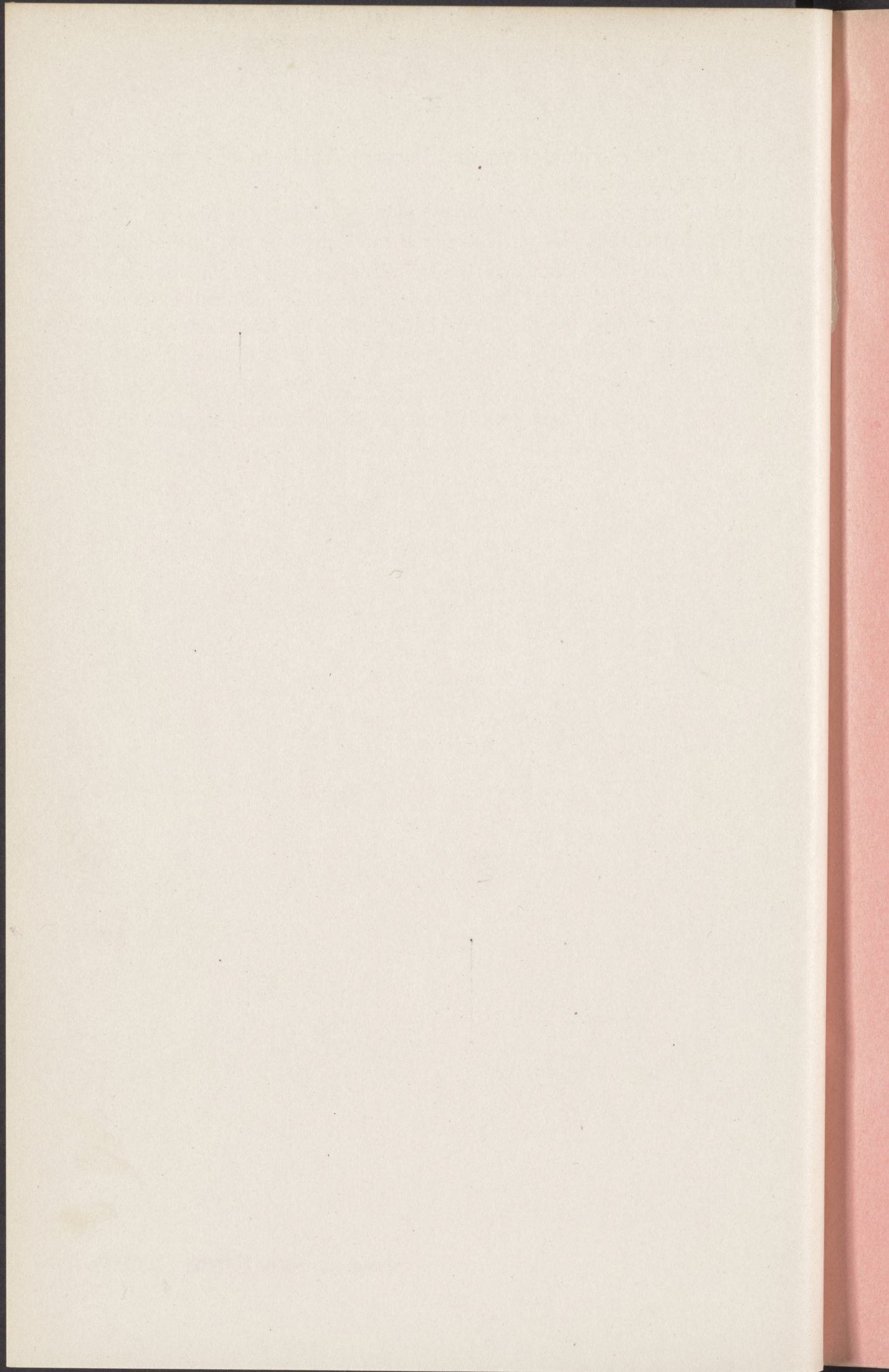
As stated in the original brief the finding of the District Court is limited solely to a judgment based upon an alleged contract or order given by Albright Van Voorhis as a director of the defendant company. There is no pretext in the finding nor the slightest trace of an inference that the Court considered or based its judgment on any collateral fact which had to do with ratification.

Under the circumstances and law applicable to this case it is respectfully submitted,

(a) That the judgment be set aside as being founded on illegal evidence, that the purchase was made by one not authorized;

(b) That the letter was inadmissible as well as conversation had by plaintiff with Van Voorhis, that the offered evidence showing gift and reason for writing letter by Ray Leonard and allowing installation of boiler, should have been admitted.

ELMER W. ROMINE,
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