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Transcript of Pleadings for Trial.

New Jersey Supreme Court

ESSEX COUNTY.

10

LOESSER MANUFACTURING COMPANY,  
a corporation,

Plaintiff,

*v.*

JULIUS SCHMID, INC., a corpora-  
tion,

Defendant.

Action at Law.

Complaint.

20

MCCARTER & ENGLISH, Attorneys of Plain-  
tiff.

MACKAY & MACKAY, Attorneys of Defend-  
ant.

Plaintiff says that:

FIRST COUNT.

1. It is a corporation organized and existing  
under the laws of the State of New Jersey, with a  
place of business at Montclair, New Jersey.

30

2. The said plaintiff is and at all times herein-  
after mentioned, was in the business of manu-  
facturing and selling various kinds of vanity  
powder boxes.

3. Between May 31st, 1921 and August 4th, 1921,  
the said defendant purchased from the said plain-

40

*Complaint.*

tiff, and the said plaintiff sold and delivered to the said defendant, large quantities of vanity powder boxes as appears from the bill of particulars annexed hereto and made a part hereof and marked Schedule A.

10 4. Said goods so sold were delivered by the plaintiff to and received by the said defendant between May 31st, 1921, and August 4th, 1921 inclusive, for which goods the defendant agreed to pay the sum of \$2,437.20.

5. The said defendant is entitled to credits on the said book account in the sum of \$351.41, leaving a balance due and payable on August 4th, 1921 of \$2,085.79.

## SECOND COUNT

20 6. Plaintiff repeats paragraph one of the First Count.

7. Plaintiff repeats paragraph two of the First Count.

8. Plaintiff repeats paragraph three of the First Count.

30 9. Said goods so sold were delivered by the plaintiff to and received by the said defendant between May 31st, 1921 and August 4th, 1921 inclusive, and were of the reasonable value of \$2437.20.

10. Plaintiff repeats paragraph five of the First Count.

Plaintiff demands judgment on both counts in the sum of \$2085.79 with lawful interest and costs of suit.

McCARTER & ENGLISH,  
Attorneys of Plaintiff.

## Complaint—Schedule A.

## SCHEDULE A.

Julius Schmid, Inc.,  
344 West 38th Street,  
New York City.

to

1921

Loesser Manufacturing Company, Dr.

May 31	4752 Nylotis S C } 17500 Bezels }	\$ 234.81	
June 1	2952 Nylotis S C		91.51
2	3168 Lady Esther S C 5000 Bezels	123.21	
3	1584 Lady Esther S C	49.10	
6	3456 Large W-C Hinge	241.92	
7	1656 Lg. W-C Hinge	115.92	
15	1584 Lady Esther S C	49.10	
16	1584 Lady Esther S C	49.10	
17	3168 Lady Esther S C	98.21	
18	1584 Lady Esther S C	49.10	
21	1584 Lady Esther S C	49.10	
21	10000 Bezels } 792 Lady Esther S C }	74.55	
24	216 Plain Double	39.96	
28	Die Petty	75.00	
28	Die CYRANO	100.00	
July 7	1584 Cyrano S C	49.10	
8	3168 Cyrano S C	98.21	
12	1584 Plain W-C	110.88	
12	278 Cyrano—1031 Plain	91.10	

*Complaint—Schedule A.*

14	420 Plain W-C	29.40	
14	1584 Pettys	110.88	
21	1584 Pettys	110.88	
Aug. 4	1933 Pettys	135.31	
6	Nylois S C	199.14	
12	Lady Esther S C	61.71	
			\$2,437.20
CREDITS.			
July 12	Credit	\$ 150.41	
July 14	Contrary Acct	145.00	
Aug. 4	Contrary Acct	56.00	
			\$ 351.41    351.41
			\$2,085.79

(Filed Nov. 5, 1921.)

## THIRD COUNT.

11. Plaintiff repeats the first paragraph of the First Count.
12. Plaintiff repeats the second paragraph of the First Count.
13. Plaintiff sues for the price of goods sold and delivered to the defendant upon a book account, of which a copy is hereto annexed and made a part hereof. The sum of \$2,085.79 remains due and unpaid thereon.

Plaintiff demands as damages Two Thousand and Eighty-five Dollars and Seventy-nine Cents (\$2,085.79), with lawful interest and costs of suit.

McCARTER & ENGLISH,  
Attorneys of Plaintiff.

## Complaint—Schedule A.

## JULIUS SCHMIDT                      LEDGER ACCOUNT

1920			1920			
June	8 die	FANTASIE	75.00	July	8 By Check	75.00
	8 die	ARABIAN	75.00		10 By Check	75.00
	8 die	BLAIRS	75.00		15 By Check	75.00
	8 die	LADY ESTHER	75.00		15 By Check	75.00
	8 die	LAVALLIERE	125.00		16 By Check	125.00
	8 die	ADORMEE	125.00		19 By Check	125.00
	25	1500 La Vall. SC	48.00		28 By Check	48.00
	28	4500 " " "	144.00		31 By Check	144.00
	29	1500 " " "	48.00		31 By Check	48.00
	30	2500 " " "	80.00		31 By Check	80.00
July	12	4500 Lady Est SC	144.00	Aug.	13 By Check	144.00
	13	3000 " " "	96.00		14 By Check	96.00
	15	3000 Arabian SC	96.00		19 By Check	96.00
	15	3000 Lad Est SC	96.00		19 By Check	96.00
	22	3000 " " "	96.00		24 By Check	96.00
	26	10000 Pencils	170.00		11 Pencils Retd	170.00
	27	3000 Lad Est. SC	96.00		28 By Check	96.00
	28	5400 Pencils	91.80		11 Pencils Retd	91.80
	29	1500 Lad Est SC	48.00		31 By Check	48.00
	30	4500 Grecian SC	144.00		31 By Check	144.00
	30	1500 Lad Est SC	48.00		31 By Check	48.00
	31	1500 Lad Est SC	48.00	Sept.	2 By Check	48.00
	31	1500 Grecian SC	48.00		2 By Check	48.00
	31	1000 Hilrose DCO	185.00		8 By Check	185.00
Aug.	2	2000 Hillrose "	370.00		8 By Check	370.00
	3	2000 Hillrose "	370.00		8 By Check	352.98
				Aug.	11 Mdse. Retd.	17.02
					532 La Val SC	
	4	1000 Hilrose DC	185.00	Oct.	14 By Check	185.00
	4	1500 Grec. SC	48.00	Sept.	9 By Check	48.00
	5	3000 Grec. SC	96.00	Oct.	14 By Check	96.00
	5	2000 Hillros DC	370.00	Oct.	15 By Check	370.00
	7	3000 Grec. SC	96.00	Oct.	15 By Check	96.00
	7	1500 Arab SC	48.00	Oct.	15 By Check	48.00
	7	1000 Hilrose DC	185.00	Oct.	19 By Check	185.00

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.	
1920			1920		
9	4500 Arab	SC	144.00	Sept. 16 By Check	144.00
9	3000 Trev	SC	96.00	Sept. 13 By Check	96.00
10	4500 Arab	SC	144.00	Oct. 15 By Check	144.00
10	3000 Trev	SC	96.00	Sept. 16 By Check	96.00
11	3000 Trev	SC	96.00	Sept. 17 By Check	96.00
				Oct. 20 By Check	123.78
11	4500 Arab	SC	144.00	Sept. 20 180 F.P.	SC } SC {
				452 Trev	20.22
11	1500 Grec	SC	48.00	Oct. 19 By Check	48.00
12	1500 Trev	SC	48.00	Sept. 17 By Check	48.00
12	7500 Arab	SC	240.00	Oct. 21 By Check	240.00
13	die MARINELLO		150.00	Sept. 18 By Check	150.00
13	die HILLROSE		150.00	Sept. 21 By Check	150.00
13	die TREVERE		125.00	Sept. 22 By Check	125.00
13	die GRECIAN GIRL		125.00	Sept. 24 By Check	125.00
13	2000 Marin	DC	370.00	Sept. 28 By Check	370.00
14	2000 Marin	DC	370.00	Oct. 5 By Check	370.00
16	3000 Marin	DC	555.00	Oct. 30 By Check	555.00
17	3000 Marin	DC	555.00	Nov. 12 By Check	555.00
18	3000 Arab	SC	96.00	Oct. 20 By Check	96.00
18	3000 Trev.	SC	96.00	Sept. 25 By Check	96.00
18	1500 Renee	HG	108.75	Sept. 29 By Check	108.75
18	2000 Mar	DC	370.00	Oct. 26 By Check	370.00
19	700 Hilrs	DC	129.50	Nov. 6 By Check	129.50
19	2000 Mar	DC	370.00	Nov. 4 By Check	370.00
19	1500 Arab	SC	48.00	Nov. 4 By Check	48.00
19	1500 Renee	HG	108.75	Sept. 30 By Check	108.75
19	1500 Trev.	SC	48.00	Sept. 30 By Check	48.00
20	1000 Mar	DC	185.00	Sept. 30 By Check	185.00
21	1000 Mar	DC	185.00	Dec. 11 By Check	185.00
23	1500 Renee	HG	108.75	Oct. 2 By Check	185.00
23	1000 Mar	DC	185.00	Dec. 14 By Check	185.00
24	1500 Trev.	SC	48.00	Oct. 2 By Check	48.00
24	1000 Mar	DC	185.00	Dec. 14 By Check	185.00
24	3000 Blairs	SC	96.00	Oct. 4 By Check	96.00

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.
1920			1920	
			{ Oct. 4 By Check	64.00
25	7500 Blairs	SC	240.00 { Oct. 19 By Check	160.00
			{ Jan. 18 By Check	16.00
26	3000 Trev.	SC	96.00 { Oct. 6 By Check	96.00
27	3000 Trev.	SC	96.00 { Oct. 7 By Check	86.93
			{ Sept. 20 Retd 49 Mar	9.07
27	3000 Jardin	SC	96.00 { Oct. 7 By Check	96.00
28	3000 Jardin	SC	96.00 { Oct. 8 By Check	96.00
28	1000 Marin	DC	185.00 { Dec. 15 By Check	185.00
30	4500 Jardin	SC	144.00 { Oct. 9 By Check	144.00
31	3000 Jardin	SC	96.00 { Oct. 27 By Check	96.00
31	1000 Plain	DC	205.00 { Oct. 12 By Check	205.00
Sept. 1	1000 Plain	DC	205.00 { Oct. 13 By Check	205.00
1	1500 Jardin	SC	48.00 { June 6 Credit—	48.00
			{ Claim shipmt not recd.	
1	3000 Fant	SC	96.00 { Oct. 13 By Check	96.00
			{ Oct. 27 By Check	64.00
2	7500 Jardin	SC	240.00 { Jan. 11 By Check	160.00
			{ June 6 By Note	16.00
Sept. 7	7500 La Val	SC	240.00 { Nov. 11 By Check	240.00
7	4500 Trev	SC	144.00 { Nov. 10 By Check	144.00
10	6000 Blairs	SC	192.00 { Feb. 10 By Check	144.00
			{ June 6 By Note	48.00
10	540 Jardin	SC	17.28 { June 6 By Note	17.28
10	1000 Trev	SC	32.00 { Nov. 6 By Check	32.00
			{ Nov. 6 By Check	36.00
10	1500 Renee	HG	108.75 { Dec. 18 By Check	72.00
			{ May 12 By Check	.75
10	130 Fant	SC	4.16 { Nov. 6 By Check	4.16
10	725 La Val	SC	23.20 { Nov. 6 By Check	23.20
11	die RENEE	HG	125.00 { Dec. 21 By Check	125.00
11	die BLUSH OF Y		125.00 { Dec. 21 By Check	125.00
11	die MONTEBELLO		125.00 { Dec. 21 By Check	125.00
11	die OWL		125.00 { Dec. 21 By Check	125.00
11	die Maybelle		125.00 { Dec. 21 By Check	125.00
11	die NYLOTIS		125.00 { Dec. 21 By Check	125.00
10	die ZANOL		125.00 { Nov. 9 By Check	125.00

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.
1920		1920		
	11 700 Blairs	22.40	June 6 By Note	22.40
	11 4500 Fairplex SC	144.00	Nov. 6 By Check	144.00
	11 die FAIRPLEX	125.00	Nov. 9 By Check	125.00
	10 816 Marin DC	150.96	Dec. 16 By Check	150.96
	15 1000 Adormee DC	185.00	{ Oct. 28 By Check	177.97
			{ June 6 Allow for short	7.03
	15 1500 Zanol SC	48.00	Oct. 28 By Check	48.00
	17 1000 Adormee DC	185.00	Oct. 29 By Check	185.00
	17 2000 Bridges	40.00	Oct. 29 By Check	40.00
	17 1000 Adormee DC	185.00	Nov. 2 By Check	185.00
	18 1000 Bridges	20.00	Nov. 2 By Check	20.00
	27 100 Fair. SC	35.20	{ Nov. 2 By Check	16.00
			{ May 14 By Check	19.20
	27 6265 Zanol SC	200.48	Nov. 15 By Check	200.48
	30 7500 Nylotis SC	300.00	Nov. 16 By Check	300.00
Oct.	1 9000 Nylot SC	360.00	Nov. 17 By Check	360.00
	2 6000 Nylot SC	240.00	Nov. 18 By Check	240.00
	4 1782 Zanol SC	57.02	Nov. 18 By Check	57.02
	4 5434 Nyloti SC	217.36	Nov. 19 By Check	217.36
	5 5955 Owl SC	190.56	Nov. 22 By Check	190.56
	5 1500 Blush of Y	48.00	Nov. 20 By Check	48.00
	5 3443 Blush of Y	110.18	Nov. 20 By Check	110.18
	7 Drawings Bon	6.00	Dec. 3 By Check	6.00
	7 1551 Lady Es. SC	49.63	Nov. 23 By Check	49.63
	7 4900 Maybelle SC	156.80	Nov. 24 By Check	156.80
	8 4879 Mont. SC	156.13	Nov. 26 By Check	156.13
	8 3000 LaVal SC	96.00	May 12 By Check	96.00
	8 1500 LaVal SC	48.00	Nov. 23 By Check	48.00
	8 403 Mont. SC	12.90	Nov. 23 By Check	12.90
	11 607 LaVal SC	19.42	May 14 By Check	19.42
	11 3200 Renee HG	232.00	Dec. 20 By Check	232.00
	11 10200 Renee HG	739.50	{ Dec. 18 By Check	58.00
			{ June 6 By Note	681.50
	12 6800 Rene HG	493.00	June 6 By Note	493.00
	13 748 Renee HG	54.23	Nov. 26 By Check	54.23

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.	
1920		1920			
15	3400 Nylot	SC	136.00	Nov. 27 By Check	136.00
15	3400 Nylot	SC	136.00	{ Nov. 29 By Check	114.60
				{ June 6 Allow—Short	21.40
16	1620 Nylot	SC	64.80	Nov. 27 By Check	64.80
18	1700 Trev.	SC	54.40	Nov. 29 By Check	54.40
19	3400 Trev.	SC	108.80	Nov. 30 By Check	108.80
19	3400 Trev.	SC	108.80	Dec. 1 By Check	108.80
20	8500 Trev	SC	272.00	Dec. 4 By Check	272.00
21	7321 Trev.	SC	234.27	Dec. 2 By Check	234.27
22	3400 LaVal	SC	108.80	May 13 By Check	108.80
22	3450 LaVal	SC	110.40	May 20 By Check	110.40
25	129 Hilrose	DC	23.87	Dec. 3 By Check	23.87
25	9 Marinell	DC	1.67	Dec. 3 By Check	1.67
25	28 Adornee	DC	5.74	Dec. 3 By Check	5.74
25	8500 Nylot	SC	340.00	Dec. 29 By Check	340.00
25	1700 Nylot	SC	68.00	Dec. 3 By Check	68.00
26	3320 Nylot	SC	132.80	Dec. 7 By Check	132.80
30	5000 Beau	SC	160.00	Dec. 10 By Check	160.00
30	die BEAUCOUP		125.00	Dec. 9 By Check	125.00
Nov. 8	864 Adorme	DC	177.12	Dec. 17 By Check	177.12
13	1728 Adormee	DC	354.24	Jan. 6 By Check	354.24
15	1728 Adorme	DC	354.24	Feb. 3 By Check	354.24
16	Sketches		13.00	{ Dec. 23 By Check	6.00
				{ June 6 By Allowance	7.00
16	684 Adormee	DC	140.22	{ Dec. 23 By Check	140.22
1920		1921			
18	864 Plain	DC	159.84	Jan. 14 By Check	159.84
23	7656 Doriat	SC	244.99	Jan. 25 By Check	244.99
23	die DORIOT		100.00	Jan. 18 By Check	100.00
24	1728 Renee	DC	319.68	Feb. 17 By Check	319.68
24	die RENEE	DC	150.00	Jan. 20 By Check	150.00
26	Renee	DC	159.84	Feb. 14 By Check	159.84
26	6800 Talc	SC	217.60	{ Mar. 2 By Check	100.00
				{ Mar. 3 By Check	117.60

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.
1920		1921		
26 die	TALCOLETTE	125.00	Feb. 14 By Check	125.00
27	1700 Talc SC	54.40	Jan. 18 By Check	54.40
29	1728 Plain DC	319.68	{ Mar. 5 By Check	100.00
			{ Mar. 5 By Check	100.00
			{ Mar. 9 By Check	119.68
29	1387 Talcol SC	44.38	{ Jan. 20 By Check	30.85
			{ Nov. 23 127 SC 51 DC	13.53
29	1700 Jap 1 SC	54.40	Jan. 20 By Check	54.40
29	die JAP. INC.	125.00	Mar. 1 By Check	125.00
30	4100 Jap 1 SC	131.20	Mar. 10 By Check	131.20
30	1700 Lacas. SC	54.40	Mar. 12 By Check	54.40
30	die LACASSIA	125.00	Mar. 11 By Check	125.00
Dec. 1	3516 Lac. SC	112.51	Mar. 15 By Check	112.51
2	864 Plain DC	159.84	Mar. 19 By Check	159.84
			{ Mar. 22 By Check	123.64
3	5145 Blush of Y	164.64	{ Oct. 7 11 Mai Dor	.85
			{ Feb. 2 217 Amer Id	40.15
3	864 Plain DC	159.84	{ Mar. 26 By Check	150.03
			{ Feb. 18 53 Plain DC	9.81
4	1700 Fair. SC	54.40	Mar. 16 By Check	54.40
6	3265 Fair SC	104.48	Mar. 23 By Check	104.48
9	7500 Eulal. SC	240.00	{ Mar. 30 By Check	71.09
			{ Jan. 18 913 DC Retd	168.91
9	die EULALLIA	125.00	Mar. 29 By Check	125.00
14	766 Renee DC	141.71	Apr. 5 By Check	141.71
14	1700 Bells SC	54.40	Mar. 31 By Check	54.40
14	die BELLS	125.00	Apr. 1 By Check	125.00
15	3400 Bells SC	108.80	Apr. 6 By Check	108.80
17	3400 Bells SC	108.80	Apr. 12 By Check	108.80
			{ Apr. 26 By Check	183.70
17	1728 LaVal DC	319.68	{ Feb. 25 735 Hilrose	133.98
			{ June 29 By Check	2.00
17	die LaValliere	150.00	Apr. 20 By Check	150.00
17	1700 Carmel SC	54.50	Apr. 7 By Check	54.40
17	die CARMELITA	125.00	Apr. 13 By Check	125.00
18	864 LaVal DC	159.84	Apr. 23 By Check	159.84
18	3400 Car. SC	108.80	Apr. 28 By Check	108.80

## Complaint--Schedule A.

JULIUS SCHMIDT			LEDGER ACCOUNT		CONT.	
1920			1921			
18	864 LaVal	DC	159.84	Apr. 30	By Check	159.84
21	1535 Bells	SC	49.12	May 2	By Check	49.12
21	864 LaVal	DC	159.84	May 4	By Check	159.84
22	5985 Mayb	SC	191.52	May 9	By Check	191.52
23	5015 Jap 1	SC	160.48	May 14	By Check	160.48
24	957 La Val	DC	177.05	{ May 14	By Check	27.84
				{ June 6	By Note	149.21
1921						
Jan. 6	684 Plain	DC	126.54	June 6	By Note	126.54
7	1682 Renee	DC	311.17	June 6	By Note	311.17
8	1584 Jardin	SC	50.69	June 6	By Note	50.69
8/27	die JARDIN		125.00	Feb. 10	By Check	125.00
Feb. 1	2772 Love D	SC	88.70	May 14	By Check	88.70
1	die LOVE DREAM		125.00	June 1	By Check	125.00
1	1584 Jardin		50.69	May 16	By Check	50.69
2	3168 Love D.	SC	101.38	June 2	By Check	101.38
4	787 Jardin	SC	25.18	June 2	By Check	25.18
4	307 Love D	SC	9.82	June 2	By Check	9.82
4	216 Hilrose	DC	39.96	June 6	By Note	39.96
5	519 Hilrose	DC	119.14	June 6	By Note	119.14
	114 Marin	DC				
	11 Adorme	DC				
15	1728 Nylotis	SC	53.57	Feb. 25	Shipmt Retd.	53.57
17	15000 Bezels } 4320 Nylotis }		208.92	Feb. 25	Shipmt. Retd.	208.92
18	5184 Nylotis		160.70	Feb. 25	Shipmt. Retd.	160.70
21	3456 Nylotis		107.14	Feb. 25	Shimpt. Retd.	107.14
24	1011 Nylotis		31.34	Feb. 25	Shipmt. Retd.	31.34
Mar. 1	1728 Nylotis		53.57	{ Feb. 25	Exp. all 4 cases	1.60
				{ June 6	By Note	51.97
1	1728 Lac	SC	55.30	June 6	By Note	55.30
1	864 Adormee	DC	159.84	June 6	By Note	159.84
1	1728 Nylotis	SC	53.57	June 6	By Note	53.57
2	1728 Nylotis	SC	53.57	June 6	By Note	53.57
2	864 Adormee	DC	159.84	June 6	By Note	159.84

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.		
1921		1921				
2	1728 Lac	SC	55.30	June 6	By Note	55.30
4	1728 Lady Est.	SC	53.57	June 6	By Note	53.57
4	1589 Lac	SC	50.85	June 6	By Note	50.85
7	1728 Adormee	DC	319.68	June 6	By Note	319.68
7	1656 Lady Esth	SC	51.34	June 6	By Note	51.34
8	864 Adormee	DC	159.84	June 6	By Note	159.84
8	1584 Lady Est.	SC	49.10	June 6	By Note	49.10
9	864 Nylot	SC	101.78	June 6	By Note	101.78
	15000 Bezels					
10	5616 Nylotis	SC	174.10	June 6	By Note	174.10
19	2772 Lady Est	SC	85.93	June 6	By Note	85.93
10	432 Adormee	DC	79.92	June 6	By Note	79.92
10	807 Plain	DC	149.30	June 6	By Note	149.30
10	1080 Blue Rose	DC	199.80	June 6	By Note	199.80
10	die BLUE ROSE		100.00	{ Mar. 23	Allow Overchg	25.00
				{ June 6	By Note	75.00
11	1080 Blue Rose		199.80	June 6	By Note	199.80
11	1728 Nylotis	SC	53.57	June 6	By Note	53.57
11	1008 Plain	SC	31.25	June 6	By Note	31.25
12	1080 Blue R.	DC	199.80	June 6	By Note	199.80
12	1728 Nylotis	SC	53.57	June 6	By Note	53.57
14	1080 Blue R	DC	199.80	June 6	By Note	199.80
15	3204 Lad Est	SC	99.32	June 6	By Note	99.32
15	841 Blue R	DC	155.59	June 6	By Note	155.59
15	1656 Kosan	SC	52.99	June 6	By Note	52.99
15	die Kosan		125.00	{ Mar. 23	By allow	25.00
				{ June 6	By Note	100.00
16	3276 Kosan	SC	104.83	June 6	By Note	104.83
16	1080 Plain	DC	199.80	June 6	By Note	199.80
17	1080 Plain	DC	199.80	{ June 6	By Note	199.80
17	792 Lad Est	SC	24.55	{ June 6	By Note	24.55
17	214 Kosan	SC	6.85	June 6	By Note	6.85
17	3456 Nylotis	SC	107.14	June 6	By Note	107.14

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.		
1921		1921				
	21 1438 Nylotis	SC	44.58	June 6	By Note	44.58
	21 4000 Bezels		20.00	June 6	By Note	20.00
	22 5000 Bezels		25.00	June 6	By Note	25.00
	22 751 Hilrose	DC	138.94	June 6	By Note	138.94
	28 515 Lady Esth	SC	15.97	June 6	By Note	15.97
	28 279 Lac	SC	8.93	Mar. 30	252 Lac SC	8.06
				June 6	By Note	.87
Apr.	7 5228 June B	SC	162.07	June 6	By Note	162.07
	7 die JUNE BRIDE		100.00	June 6	By Note	100.00
	7 1566 Love Dream	SC	57.94	June 6	By Note	57.94
				Mar. 30	525 Lad Est.	16.28
				Apr. 6	1584 Love D.	50.69
	9 6336 Nylotis	SC	196.42	Apr. 9	1077 Mylot	33.39
				Apr. 9	3000 Bezel	15.00
				Apr. 18	Short 259 Zan	8.29
				June 6	By Note	72.77
				May 19	939 Marin DC	173.72
	12 9504 Nylot	SC	294.62	May 19	2445 Nylot SC	75.80
				June 6	1158 Short N.	35.90
				June 6	By Note	9.20
	13 7920 Nylot	SC	245.52	June 6	By Note	245.52
	13 5000 Bezels		25.00	June 6	By Note	25.00
	14 7920 Nylotis	SC	270.52	June 6	By Note	270.52
	5000 Bezels					
	15 1584 Nylot	SC	49.10	June 6	By Note	49.10
	16 1604 Nylot	SC	174.72	June 6	By Note	174.72
	25000 Bezels					
	21 1125 Plain	WC	78.75	June 6	By Note	78.75
	21 3000 Bezels		15.00	June 6	By Note	15.00
May	2 1584 HOROKO	SC	49.10	June 3	By Check	49.10
	2 die HOROKO		100.00	June 3	By Check	100.00
	3 1584 Horoko	SC	49.10	June 4	By Check	49.10
	4 1584 HoRoKo	SC	49.10	June 4	By Check	49.10
	6 396 HoRoKo	SC	12.28	June 7	By Check	12.28
	10 3168 Lad Est	SC	98.21	June 13	By Check	98.21

## Complaint—Schedule A.

JULIUS SCHMIDT		LEDGER ACCOUNT		CONT.
1921		1921		
10	5100 Bezel Est	25.50	June 13 By Check	25.50
11	1584 Lad Est SC	49.10	June 13 By Check	49.10
12	Ball Burnish			
	Love Dream	17.38	June 13 By Check	17.38
12	396 Lad Est. SC	12.28	June 13 By Check	12.28
13	506 Hilross Refin	5.06	June 14 Credit to cancel	5.06
19	11520 Marin Refin	115.20	June 14 " " "	115.20
19	47 Lady Esth SC	1.46	June 20 By Check	1.46
25	3168 Nylot SC	98.21	June 29 By Check	98.21
27	3168 Nylot SC	98.21	June 28 By Check	98.21
28	3168 " SC	98.21	June 29 By Check	98.21
31	4752 Nylois SC			
	17500 Bezels	234.81		
June 1	2952 Nylotis SC	91.51		
2	3168 Lad Est SC			
	5000 Bezels	123.21		
3	1584 Lad Est SC	49.10		
6	3456 Lg WC HG	241.92		
7	1656 Lg WC HG	115.92		
15	1584 Lad Est SC	49.10		
16	1584 Lad Est SC	49.10		
17	3168 Lad Est SC	98.21		
18	1584 Lad Est SC	49.10		
21	1584 Lad Est SC	49.10		
21	10000 Bezel " }			
	792 Lad Est SC	74.55		
24	216 Plain DC	39.96		
28	die PETTY	75.00		
28	die CYRANO	100.00		
July 7	1684 Cyrano SC	49.10		
8	3168 Cyrano SC	98.21		
12	1584 Plain WC	110.88		
12	278 Cyrano SC	8.62		
	1031 Plain WC	82.48		
12	1059 First L	No Chg.		

## Complaint—Schedule A.

1921			1921	
JULIUS SCHMIDT			LEDGER ACCOUNT	CONT.
14	420 Plain	WC	29.40	
14	1584 Petty	WC	110.88	
21	1584 Petty	W C	110.88	
Aug. 4	1933 Petty	WC	135.31	
6	11374 Nylotis		113.74	1
	Refin			
	2440 Nylot	SC	85.40	
12	5107 Lad Est		51.07	
	Refin			
	304 Lad Est		10.64	
			July 14 Contra Acct.	
			Mdse Purchased	145.00
			Aug. 4 Contra Acct.	
			Mdse Purchased	56.00
			Dec. 7/12 Retd. 156 WC	
			Retd 764 DC	150.41
			38,319.76	
				36,233.97

(Filed Jan. 16th, 1923.)

*Amended Answer.*

The defendant, a foreign corporation, for an amended answer to the complaint in the above entitled cause, says:

## ANSWER TO FIRST COUNT.

10 1. It has no knowledge or information sufficient to form a belief as to the matters alleged in paragraphs one and two of the First Count and therefore neither admits nor denies the same, but leaves the plaintiff to its proof.

20 2. It admits that between May 31st, 1921, and August 4, 1921, this defendant purchased from the plaintiff and the plaintiff sold and delivered to the defendant large quantities of vanity powder boxes as set forth in the Bill of Particulars attached to the Bill of Complaint with the exception of the items of August 6th and August 12th, respectively, which items were never received by the defendant.

30 3. The defendant, further answering, says that all of the said orders were for vanity powder boxes which the plaintiff was to manufacture for the defendant in a first-class workmanship manner and to be of a particular grade, style and finish, and it was agreed between the plaintiff, its agents and servants, and the defendant, its agents and servants, that should any of the said orders be defective or any of the vanity boxes be of an inferior grade, style or finish, the plaintiff would re-finish the same and replace any defective work, without cost to this defendant, and the plaintiff did on several occasions replace and refinish orders that were defective, without additional cost.

*Amended Answer.*

4. Paragraph 4 is denied in so far as it alleges that the defendant agreed to pay the sum of \$2,437.20.

5. Defendant has no knowledge or information sufficient to form a belief as to the matters alleged in paragraph 5, but alleges that in addition to any credits set forth therein the plaintiff is indebted to the defendant as set forth in the counterclaim hereinafter set forth.

10

## ANSWER TO SECOND COUNT.

Defendant denies paragraphs 6, 7, 8, 9 and 10 of the second count.

## FIRST DEFENSE.

This defendant denies that it is indebted to the plaintiff in any sum of money whatsoever.

20

## SECOND DEFENSE.

This defendant will contend that it has overpaid the plaintiff and that the plaintiff is indebted to this defendant, as shown by the counterclaim hereinafter set forth.

BY WAY OF COUNTERCLAIM THIS  
DEFENDANT SAYS:

30

1. During the years 1920 and 1921 the plaintiff was engaged in the business of manufacturing vanity powder boxes. The defendant on March 19th, 1920, made an agreement with the plaintiff, its agent and servants whereby the plaintiff was to manufacture for the defendant certain vanity powder boxes of different styles, quality and finish, among which were styles known as "Marinello

40

*Amended Answer.*

Double," "Hillrose Double," and "Adormee Double." That by verbal agreement between the plaintiff, its agent and servants and the defendant, its agents and servants, the plaintiff agreed that should any of the said merchandise be of an inferior quality, style or finish or should the same become tarnished within a reasonable time, that the defendant should return the same and the plaintiff would replace or refinish the said merchandise without additional charge or cost to the defendant, and that this was done on several occasions.

2. On March 19th, 1920, the defendant placed with the plaintiff two certain orders known as Orders 6385 and 6386 for vanity powder boxes known as "Hillrose Double" Vanity, copies of which orders are hereto annexed and marked schedule A.

3. On the same date, defendant placed with the plaintiff four more orders known as orders 6391, 6392, 6393 and 6394 for a special kind of vanity box, known as "Marinello," copies of which orders are hereto annexed and marked Schedule B.

4. On February 14th, 1921, the defendant placed with the plaintiff another certain order known as order number 490 for a special kind of vanity powder box, to be stamped "Adormee" a copy of which order is hereto annexed and marked Schedule C.

5. That the said orders were filled at different times and shipped in different quantities and within a reasonable time after shipment of the same defendant discovered that the said boxes were not of the proper style, finish and material and that a great number of them were composed of

*Amended Answer.*

two different kinds of metal. That these quantities or shipments that were rejected were as follows: 8730 P C S Marinello Double \$185 M; 4510 P C S Hillrose Double \$185 M; 3276 P C S Adormee Double \$185 M; making a total amount of \$3,055.46. That after receipt of these quantities by the defendant, they discovered the defects and improper workmanship and so notified the plaintiff, its agents and servants, and the plaintiff, its agents and servants, assured the defendant, its agents and servants that they would make good if they would pay the bill therefor and the defendant relying upon the promise of the plaintiff, its agents and servants paid the bill and subsequently returned the goods to the plaintiff and the said goods are now in the possession of the plaintiff, its agents and servants.

10

20

6. The plaintiff, its agents and servants, notwithstanding their promise to refinish and replace the defective goods without additional charge or cost to the defendant, neglected and refused so to do and did attempt, surreptitiously, to compel or force redelivery of the defective merchandise upon the defendant. The said defective goods or merchandise are now in the possession of the plaintiff, its agent and servants and they have not been refinished or replaced in accordance with the agreement of the plaintiff, its agents and servants.

30

This defendant further says that the difference between the amount alleged to be due from this defendant to the plaintiff and the amount which the defendant has overpaid to the plaintiff is \$1,761.06, as shown by the Statement hereto annexed and marked Schedule D.

MACKAY & MACKAY,  
Attorneys of Defendant.

40

## Amended Answer--Schedule A.

## SCHEDULE "A."

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6385	C			

Ship to	Date
349 West 37th St., New York City	3-19-20

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY WILL BE AFFECTED.

NAME	E. Loesser Mills, Inc.
ADDRESS	142 Pine St., New York City.

5,000 Double Compact Hinge Boxes @ 18½c.  
Stamped "Hillrose Double Vanity"  
Sketch for this will be sent you within a few days.

To apply against  
contract #6370

DELIVERY—AT Once.

Approved by CF EMP      MATT FINISH

All bills must be sent to  
JULIUS SCHMID, Inc.,  
New York City.

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6386	C			

Ship to
349 West 37th St., New York City

Order Dept. and shipping Numbers must appear on your bill      Shipping number must appear on all cases and packages

*Amended Answer—Schedule A.*

THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND  
DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY  
WILL BE AFFECTED.

---

NAME           E. Loeser Mills, Inc.,  
                  142 Pine St.,  
ADDRESS       New York City.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Hillrose "Double Vanity."

To apply against  
contract #6370

DELIVERY—September 1920  
"MATT FINISH:"

Approved by CF   EMP

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City.

*Amended Answer—Schedule B.*

## SCHEDULE "B."

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6391	C			
Ship to			Date	
349 West 37th St.,			3/19/20	
New York City				

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY WILL BE AFFECTED.

NAME	E. Loesser Mills, Inc.
ADDRESS	142 Pine St., New York City.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Marinello"—sketch with a few days

To apply against  
contract #6370

DELIVERY—AT Once.

Approved by CF EMP      MATT FINISH

All bills must be sent to  
JULIUS SCHMID, Inc.,  
New York City.

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6392	C			
Ship to			Dated	
349 West 37th St.,			3-19-20	
New York City				

Order Dept. and shipping Numbers must appear on your bill      Shipping number must appear on all cases and packages

*Amended Answer—Schedule B.*

THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND  
DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY  
WILL BE AFFECTED.

---

NAME E. Loesser Mills, Inc.  
142 Pine St.,  
ADDRESS New York City.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Marinello" 10

To apply against  
contract #6370

DELIVERY—in May 1920  
"MATT FINISH:"

Approved by CF EMP

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City. 20

30

40

*Amended Answer—Schedule B.*

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6393	C			

Ship to	Date
349 West 37th St., New York City	3-19-20

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

**THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY WILL BE AFFECTED.**

NAME	E. Loesser Mills, Inc. 142 Pine St., New York City.
ADDRESS	5,000 Double Compact Hinge Boxes @ .18½ Stamped "Marinello"

To apply against  
contract #6370

DELIVERY—in July 1920.

Approved by CF EMP      MATT FINISH

All bills must be sent to  
JULIUS SCHMID, Inc.,  
New York City.

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6394	C			

Ship to	Date
349 West 37th St., New York City	3-19-20

Order Dept. and shipping Numbers must appear on your bill      Shipping number must appear on all cases and packages

*Amended Answer—Schedule B.*

THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND  
DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY  
WILL BE AFFECTED.

---

NAME           E. Loeser Mills, Inc.,  
                  142 Pine St.,  
ADDRESS       New York City.

5,000 Double Compact Hinge Boxes @ .18½  
                  Stamped "Marinello" 1

To apply against  
contract #6370

DELIVERY—September 1920.  
"MATT FINISH:"

Approved by CF   EMP

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City. 2

*Amended Answer—Schedule C.*

## SCHEDULE "C."

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
490	C		AT Once	Del.

Ship to	Date
349 West 37th St.	2-14-21

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
---	---

THIS ORDER MUST BE ACKNOWLEDGED BY RETURN MAIL AND DEFINITE STATEMENT MADE ON WHAT DATE DELIVERY WILL BE AFFECTED.

NAME	E. Loesser Mills, 142 Pine Street, ADDRESS Montclair, N. J.
------	---

3000—Double Metal Boxes	"Plain" @ 185 M
5000—Double Metal Boxes	"Adormee"
All Matt Finish	

To be delivered as soon as possible.

RUSH

All bills must be sent to  
JULIUS SCHMID, Inc.,  
New York City.

Approved by

## Amended Answer—Schedule D.

## "SCHEDULE D."

STATEMENT OF LOESSER MFG.  
ACCOUNT

July 14th, 1921—Contra Account				
	7 gross—8607 Lip Sticks	9.50 gr.	\$66.50	
	Die charge on Label		9.00	10
	7 gross—2 piece Eye Brow			
	pencils	8.50 gr.	59.50	
	Die charge on Label		10.00	145.00
<hr/>				
8/31/21	7 gr.—Rouge Compacts	4.00 gr.	28.00	
	7 gr.—Labelling Boxes	.50 gr.	3.50	
	7 gr.—Wool puffs	3.50 gr.	24.50	56.00
<hr/>				
July 12th, 1921—Defective Boxes				
	156 pieces Single Hinge Boxes		\$70 M 10.92	
	754 " Double " "		185 M 139.49	
	4425 " Nylotis Boses		31 M 137.18	287.59
<hr/>				
July 28th, 1921—Debit Memo				
	5107 Pcs. Lady Esther Boxes		31 M 158.32	
	6948 Pcs. Nylotis Boxes		31 M 215.39	373.71
<hr/>				
Aug. 5th, 1921—Debit Memo				
	8730 Pcs. Marinello Double		185 M 1615.05	
	4510 " Hillrose Double		185 M 834.35	
	3276 " Adormee Double		185 M 606.06	3055.46
<hr/>				
Aug. 22—Debit Memo				
	200 Pcs. Nylotis Boxes		31 M 6.20	6.20
<hr/>				

## Amended Answer—Schedule D.

Aug. 16th, 1922—Debit Memo

434 Pcs. Defective Nylotis Boxes	31 M	13.45	13.45
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TOTAL			<u>13.45</u>
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			<u>\$3937.41</u>
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Cr.

*Their invoices as follows:*

May 31—3752 Nylotis S C—17500 Bezels		\$234.81	
June 1—2952 “ S C		91.51	
2—3168 Lady Esther—5000 Bezels		123.21	
3 1584 “ “		49.10	
6—3456 Lg W-C Hinge		241.92	
7—1656 “ “		115.92	
15—1584 Lady Esther		49.10	
16—1584 “ “		49.10	
17—3168 “ “		98.21	
18—1584 “ “		49.10	
21—1584 “ “		49.10	
21— 792 “ “ —10000 Bezels		74.55	
21— 216 Pl		39.96	
28—Die Petty		75.00	
28—Die Cyrano		100.00	
July 7—1584 Cyrano		49.10	
8—3168 Cyrano		98.21	
12—1584 Plain W-C		110.88	
12— 278 Cyrano—1031 Pol		91.10	
14— 420 Plain W-C		29.40	
14—1584 Petty		110.88	
21—1584 Petty		110.88	
Aug. 4—1933 Petty		135.31	
TOTAL			<u>2176.35</u>

BALANCE DUE US

\$1761.06

(Filed May 3, 1922.)

*Reply.*

Defendant's reply to the plaintiff's answer to defendant's counterclaim:

1. It denies that part of paragraph one of the first defence that alleges that the agreement of March 19th, 1920 was cancelled and a new agreement substituted in place thereof.

10

2. It denies that the goods were manufactured in accordance with the terms thereof and were paid for by the defendant as alleged in paragraph two.

3. It denies that the goods were manufactured in accordance with the terms thereof and were paid for by the defendant as alleged in paragraph three.

4. It denies that the goods were manufactured in accordance with the terms thereof as alleged in paragraph four.

20

REPLY TO SECOND DEFENSE TO COUNTER-CLAIM.

It denies the allegations contained in the second defense to counterclaim.

REPLY TO THIRD DEFENSE TO COUNTER-CLAIM.

30

It denies the third defense to counterclaim but alleges that upon discovery by the defendant of the defective condition and failure of the plaintiff to carry out its contract, the goods were immediately returned to the plaintiff, its agents and servants.

REPLY TO FOURTH DEFENSE TO COUNTER-CLAIM.

It denies the fourth defense to the counterclaim.

40

*Answer.*

REPLY TO FIFTH DEFENSE TO COUNTER-  
CLAIM.

It denies the fifth defense to the counterclaim.

MACKAY & MACKAY,

Attorneys for the Defendant.

10 Filed Aug. 31, 1922.

Plaintiff's answer to the counterclaim of the de-  
fendant says that:

FIRST DEFENSE TO COUNTERCLAIM.

1. It denies paragraph 1 of the counterclaim,  
except that it admits an agreement was made on  
March 19, 1920, which agreement was in writing,  
and it requires the production thereof as to its  
terms and conditions. Thereafter said agreement  
20 of March 19, 1920 was cancelled and a new agree-  
ment substituted in place thereof.

2. It admits paragraph 2 of the counterclaim  
and says that the goods mentioned in said two or-  
ders were manufactured in accordance with the  
terms thereof and were paid for by defendant.

3. It admits paragraph 3 of the counterclaim  
and says that the goods mentioned in said four  
orders were manufactured in accordance with the  
30 terms thereof and were paid for by defendant.

4. It admits paragraph 4 of the counterclaim  
and says that the goods mentioned in said order  
were manufactured in accordance with the terms  
thereof and were paid for by defendant.

5. It admits that said orders were filled and  
shipped, and it denies the balance of said fifth par-  
agraph of the counterclaim.

40

*Answer.*

6. It denies the sixth paragraph of the counterclaim.

## SECOND DEFENSE TO COUNTERCLAIM.

The goods on which the defendant seeks to counterclaim were delivered to, accepted and paid for by defendant.

10

## THIRD DEFENSE TO COUNTERCLAIM.

More than a reasonable time has elapsed within which the defendant may claim any defect in the goods.

## FOURTH DEFENSE TO COUNTERCLAIM.

All of said goods were manufactured in accordance with the terms and conditions of the contract.

20

## FIFTH DEFENSE TO COUNTERCLAIM.

The plaintiff owes the defendant nothing.

Filed Aug. 29, 1922.

McCARTER & ENGLISH,  
Attorneys of Plaintiff.

30

40

**Answer to Third Count of Amended  
Complaint.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	LOESSER MANUFACTURING COMPANY, a corporation, <div style="text-align: right;">Plaintiff,</div>	} Action at law.
	<div style="text-align: center;"><i>v.</i></div> JULIUS SCHMID, INC., a corpora- tion, <div style="text-align: right;">Defendant.</div>	

The defendant, answering the Third Count of the amended complaint of the plaintiff, says:

20

1. It repeats herein the answers to the First and Second Counts of the complaint.

2. It denies all of the other allegations set forth in the complaint under the caption Third Count.

MACKAY AND MACKAY,  
Attorneys for the Defendant.

30

40

**Postea.**

## NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

LOESSER MANUFACTURING Co., Plaintiff,  <i>v.</i>  JULIUS SCHMID, INC., Defendant.	} 10
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This case was tried at the December, 1922 term of the Essex Circuit, before Hon. Nelson Y. Dungan, Circuit Court Judge to whom the Chief Justice of the Supreme Court had referred said case for trial.

The jury returned a verdict for the plaintiff and against the defendant in the sum of \$2,273.51. 20

Dated Feb. 13, 1923.

NELSON Y. DUNGAN,  
 Circuit Court Judge.

Endorsed:

Filed Feb. 14, 1923.

ENOCH L. JOHNSON,  
 Clerk.

30

40

**Order for Judgment.**

NEW JERSEY SUPREME COURT.

10	LOESSER MANUFACTURING COMPANY, Plaintiff,  <i>v.</i>  JULIUS SCHMID, INC., Defendant.	}	Action at Law. On Postea.
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It is ordered that judgment be and  
 \$2,273.51 hereby is entered in favor of plaintiff  
 66.53 and against the defendant for the sum  
 \_\_\_\_\_ of two thousand two hundred seventy-  
 \$2,340.04 three dollars and fifty-one cents besides  
 costs to be taxed nisi.

20 Entered February 14, 1923.  
 On motion of

McCARTER & ENGLISH, Attys.

30

40



*Ernest Loesser, direct.*

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Wednesday, October 24, 1923.

Before—Hon. NELSON Y. DUNGAN, J., and a jury.

10

LOESSER MANUFACTURING COMPANY

*v.*

JULIUS SCHMID, INC., a corporation.

Action at Law.

For the Plaintiff appear McCARTER &  
ENGLISH (by CONOVER C. ENGLISH),

For the Defendants appear MACKAY &  
MACKAY (by HOWARD MACKAY).

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(A jury is called and sworn.)

Mr. English opens in behalf of plaintiff.

Mr. Mackay opens in behalf of defendant.

ERNEST LOESSER, sworn in behalf of plaintiff:

*Direct examination by Mr. English:*

30 Q. Are you the president of the Loesser Manufacturing Company? A. Yes, sir.

Q. Where is their business now? A. 161 Ogden Street, Newark.

Q. Where was it in 1920, and '21? A. 142 Pine Street, Montclair.

Q. And at that time what was the business of your company, from 1920 to '21? A. Making vanity cases, only.

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*Ernest Loesser, direct.*

Q. Have you got a sample of one of the vanity cases? A. I believe so, yes, sir (producing article).

Q. I show you a little box. Is that what you call a vanity case A. Yes, sir.

Q. Designed to have what put in them? A. Designs were made to two different people.

Q. You mean, to put in extracts? A. Yes, sir. 10

Q. Designed for the use of young ladies? A. Yes, sir.

Q. In March, 1920, did your company and the defendant company make a contract? A. Yes, sir.

Q. (Showing witness paper.) I show you a contract, being order No. 6369, dated 3/16/20, signed Charles Schmid, Inc. Is that the contract that you made at that time? A. Yes, sir.

Q. (Showing witness another paper.) I also show you another order No. 6370, dated 3/16/20, from the same concern. That is also a contract dated that time? A. Yes, sir. 20

Q. I do not turn to our original letter. Mr. Mackay has produced a letter from this company to your company dated March 18, 1920. Is that a true copy of the letter which accompanied the order?

The Court: From whom and to whom?

Mr. English: From the defendant to the plaintiff, March 16, 1920. 30

A. I think it was a similar letter like that. I don't know.

Mr. English: Mr. Mackay tells me it is a copy. I will offer in evidence the order 6369. Mr. Mackay has no objection.

(Paper referred to is marked Exhibit P-1.)

*Ernest Loesser, direct.*

Mr. English: Also order 6370.

(Paper referred to is marked Exhibit P-2.)

10 Mr. English: And also the letter of the defendant to the plaintiff dated March 16, 1920, which is referred to in the two orders Exhibits P-1 and P-2.

(Paper referred to is marked Exhibit P-3.)

Q. (Showing witness another paper.) I show you a letter of March 16, 1920, produced by the otherside. That is your letter? A. I believe so.

Q. And that letter, together with the letter P-3 and the two order slips, constitute the contract? A. Yes, sir.

20 Mr. English: I offer in evidence the letter of the plaintiff to the defendant dated March 19, 1920.

(Paper referred to is marked Exhibit P-4.)

Q. Mr. Loesser, following the making of those orders, did specific orders come in for a shipment of goods under them? A. Yes, sir.

Q. And those goods were manufactured and shipped? A. Yes, sir.

30 Q. I know you are not the bookkeeper, but you are familiar with the fact that payments were made down to what point? A. Until June, 1921.

Q. To be specific, May 31st? A. May, probably.

Q. May 31st, 1921. And were payments of the goods shipped made up to that date? A. Everything was paid for.

Q. The goods that were shipped after May 31st, were they paid for? A. They were entirely different goods.

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*Ernest Loesser, direct.*

Q. Were the goods made and shipped after May 31st paid for? A. No.

Q. The orders which I have shown you were made in March, 1920. Were other orders made about January 21, 1921? A. I didn't get that.

Q. Were other orders or contracts made between you and the Loesser Manufacturing Company about January 21, 1921? A. Yes, sir. 10

Q. For the same general kind of goods? A. Yes, sir.

Q. (Showing witness another paper.) I will show you an order No. 472, dated 1/21/21, and on the side that the 21 is is 31. That order was made between you and the defendant company? A. Yes, sir.

Q. (Showing witness another paper.) I show you another order No. 473, dated January 31, 1921. That order was also made? A. Yes. Both of these are blanket orders. 20

Q. In large quantities? A. They show an order and from that order they would draw a certain amount of whatever kind they wanted.

Q. These orders are subject to modification as per letter of February 8th, and are also in accordance with the defendant's letter of January 31st. (Showing witness another paper.) I show you the letter of the defendant company to your company dated January 31, 1921, in which it says, "Enclosed contracts 472 and 473." That is the letter referred to in the contract? A. Yes, sir. 30

Q. I notice the contract refers to a modification, "As per your letter of February 8th." I show you the letter. Is that a letter that your company wrote? A. Yes.

Q. Merely referring to the question of terms.

Mr. English: I will offer in evidence order No. 472 and 473. 40

*Ernest Loesser, direct.*

(Papers referred to are marked Exs. P-4 and 5 respectfully.)

Mr. English: And also letter from defendant to the plaintiff enclosing the order dated January 31st, 1921.

(The paper referred to is marked Ex. P-7.)

10 Mr. English: Next, letter of the plaintiff to the defendant, acknowledging the orders and modifying the terms.

(Paper referred to is marked Ex. P-8.)

Q. Mr. Loesser, you have said that these orders were blanket orders, meaning for a large quantity of them, against which specific requisitions were made? A. Yes, sir.

20 Q. And the goods which were set up on your book account relates to either one? A. Exactly. They were different requisitions. They would order ten thousand of one kind and one hundred of another. No two of them were alike.

Mr. English: I understand counsel admits the physical receipt of the goods and at the price stated in the book account.

30 Mr. English (After discussion): The defendant admits the receipt of the goods set up in the bill of particulars annexed to the third count of the plaintiff's complaint to the amount of \$2,176.35, which includes all of the goods mentioned in the bill of particulars except the items of August 6th and 12th. I will direct myself to those last two items, to complete Mr. Loesser's testimony.

Q. What was your practice in billing the defendant when he shipped goods? A. As we got a ticket from the shipping department we would make out our bill and send them the bill.

*Ernest Loesser, cross.*

Q. The bill went with the goods or the same time with the goods? A. The bill went after the goods.

Q. I mean, about the same time? A. The same day sometimes. Sometimes the next day.

Q. Was it your practice to make carbon copies of these bills? A. Yes, sir.

Q. And to preserve them in sort of a bound-up loose leaf ledger? A. Yes, sir. These goods were ordered according to the shipment. 10

Q. The bill corresponds with the shipment? A. Yes, sir.

Q. Who in the office looked after this—the bookkeeper? A. Yes, sir.

Q. Mrs. Smith? A. Yes.

Q. (Showing witness another bill.) I show you a bill 1547, dated August 6th, 1921—

Mr. Mackay: I don't think this ought to go on the record as part of their case. I may want to object to this book going into evidence. 20

The Court: I will sustain the objection. You must produce the book of accounts.

Q. Who was the bookkeeper in 1921? A. Mrs. Smith.

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

*Cross examination by Mr. Mackay:* 30

Q. Ex. P-1, at the time you received that, you received that order, was your attention directed to the paragraph referring to letter of March 16th? A. I believe so.

Q. And also with reference to P-2, referring to letter of March 16th? A. Yes, sir.

Q. So that in filling these orders you went in ac-

*Ernest Loesser, cross.*

cordance with the letter of March 16th, or Ex. P-3; is that correct? A. Absolutely.

Q. Did you, in accordance with this letter of March 16th, make deliveries of each requisition placed with you within two to three weeks after you had received from us a number of sketches?

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Mr. English: I object to that, first, as not cross examination. Secondly, the receipt of the goods is admitted; and, thirdly, it is no matter of defense set up in the pleadings or the bill of particulars.

The Court (After argument): It seems to me it is not relevant either to the plaintiff's case or the defense or the defendant's claim under the contract to show that there were delays in delivery. That is the basis of the Court's ruling.

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Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Mackay: I would like to ask leave to amend so as to cover that phase of the case in my answer and counterclaim alleging failure of the defendant to make deliveries as agreed.

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Mr. English: I object to that. This case was started several years ago.

The Court: Ordinarily amendments are granted with great liberality, but this case has been at issue a long time and has a history with which the Court is familiar, and I think the plaintiff is taken unawares by the proposed amendment, unless it is submitted in such shape, either dictated or in writing, so that we know just what your proposed

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*Ernest Loesser, cross.*

amendment is. If you will prepare the amendment and submit it to the plaintiff, then I will endeavor to ascertain whether or not the plaintiff is prepared at this time to meet that issue. If I think he is, it may be that I will permit it.

Q. After deliveries were made did Julius Schmid, Inc., ever make any complaints to you? 10

Objected to as not cross examination.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Complaint about what?

Q. About these particular goods that have been ordered. A. What goods? I don't know what you mean. There is so many of the different various kinds that we shipped over there at once that we don't know. 20

Q. Well, with reference to the goods ordered in Ex. P-1 first? A. I can't answer that because there is probably twenty different designs on that order there. Tell me which design you have reference to.

The Court: Any of them, he said.

The Witness: Most of them not. There may have been one that they found fault with the design. The design may not have been correct. 30

Q. Isn't it a fact that they returned some of these goods to you under these orders for the purpose of refinishing? A. Two years later.

Q. You mean they didn't make any returns to you of the finishing until 1922? A. Until 1921, a year later. 40

*Ernest Loesser, cross.*

Q. Did you take the goods back for the purpose of refinishing them? A. I did not. I refused to take them and their driver had left them there with the mark on them to be refinished, and I called up the firm and they said, "Refinish these and charge us for same." So I accepted them.

10 Q. Isn't it a fact that they did refinish a number of these goods that were sent back and render a credit memorandum to the Loesser Manufacturing Company? A. Yes.

Q. Not only for refinishing, but for goods that were imperfect, defective? That is true, isn't it? A. Yes, some.

Q. A great many of them? A. No.

Q. I show you a paper and ask you what that is? A. Yes, that is correct.

20 Q. What is the paper? A. That is a credit for defective goods. Rather than to dispute that bill—

The Court: No. Just answer the question.

Q. This is a credit memorandum, is that what it is? A. Yes.

Q. (Showing witness another paper.) Is that a credit memorandum also? A. Yes, sir.

30 Q. Are these all credit memorandums that I show you? A. Yes, sir; these are not for defective boxes. This is not for defective boxes.

Mr. English: "This" does not mean anything on the record.

Q. Then it is a fact that goods were returned from time to time because of imperfections in the manufacture of them? A. Yes, a few.

Q. And in August, 1921, weren't there returned

*Ernest Loesser, cross.*

a number of Marinelli boxes? A. Were they returned?

Q. Weren't they returned to you? A. Not to us. They were returned, but we refused the shipment.

Q. What became of the shipment? A. They were put in storage, I believe.

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Q. Where? A. In Caldwell. The express company had them in storage.

Q. Who was the express company? A. The Caldwell Express.

Q. Who instructed them to put them in storage in Caldwell? A. I don't know. I told them we had nothing to do with them, that they belonged to you.

Q. Where did they get them from? A. From the Schmid Company.

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Q. Didn't they get them from your place? A. Yes, they originally came—no, I don't remember that.

Q. Isn't it a fact that they were originally shipped to Julius Schmid? A. Yes, sir.

Q. And Julius Schmid returned them to your place? A. They were not taken from our place. They were taken from Julius Schmid's place.

Q. Are you positive of that? A. I am quite sure of it.

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Q. And what is the name of the express company? A. The bookkeeper would know that.

Q. You don't know that? A. I don't recall his name. It is some Caldwell express company.

Q. And you say they were sent to that express company by Julius Schmid, Inc.? A. They were sent to us, by some express company to us.

Q. Isn't it a fact that Julius Schmid's own

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*Ernest Loesser, cross.*

truckman brought things to your place? A. At various times.

Q. And these particular goods? A. These particular goods were packed up at his place.

Q. Are you sure of that? A. I am not so keen about that, no. I don't remember. I have an idea  
10 that they came from Schmid.

Q. Do you recall Mr. Schmid coming over to your place and talking to you with reference to these goods that had been returned? A. No.

Objected to as not cross examination.  
Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Isn't it, as a matter of fact, that Julius Schmid  
20 Company returned very frequently a number of these boxes that were imperfect or defective, as they claim? A. No, not a number.

Q. Not a number? A. Not a number. A few.

Q. And you did refinish them at times and send them back, didn't you? A. When they amounted to more than twenty-five or thirty of them we would refinish them and send them back, but  
30 anything less than that we would throw away rather than dispute whether they were defective or not.

Q. And isn't it a fact that they returned some 1,210 of these boxes that they should be entitled to a credit for? A. After having them for two years?

Q. Two years. A. Or a year, rather, from 1920 to '21.

Q. And the ones which were returned, do you

*Elizabeth Smith, direct.*

recall when they were shipped? A. When they were shipped—what do you mean?

Q. When they were delivered to Julius Schmid?

A. In June, 1920.

Q. All at one time? A. No, five, ten thousand, fifteen thousand at a time.

Q. What space between? A. A week between.

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Q. A week between? A. Sometimes a day or two days.

Q. Were some of the deliveries made in September? A. No later than August; they were the last deliveries we made of any of that material, or the majority of that material, rather.

Q. In August, 1921? A. 1920.

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ELIZABETH SMITH, sworn in behalf of plaintiff:

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*Direct examination by Mr. English:*

Q. Mrs. Smith, you are employed by the Loesser Manufacturing Company? A. Yes, sir.

Q. As bookkeeper? A. Yes, sir.

Q. Have you before you the book account that shows the entries between the Loesser Manufacturing Company and the Julius Schmid Company? A. Yes, sir.

Q. You are familiar with the transcripts of the account which is annexed to the pleadings, are you not? You made it up? A. Yes, sir.

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Q. And was that taken from that book which is before you? A. Yes, sir.

Q. The first entry begins on what page? A. On page 119.

Q. And the first date is what date? A. June 8, 1920.

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*Elizabeth Smith, direct.*

Q. And it runs over several pages of the ledger?

A. Yes, sir.

Q. What do you call that book? A. Ledger.

Q. What is the date of the last entry of goods sold? A. August 12, 1921.

10 Q. Is there an entry on August 6th also? A. Yes, sir.

Q. Now, those entries are in your handwriting, August 6th and 12th? A. Yes, sir.

Q. Where did you get the information from which you used to make the set up in the ledger?

A. From the shipping memorandums.

Q. (Showing witness papers.) Are these the papers that are in this book which I have here which is called a sales-book or a loose leaf ledger affair?

A. Yes, sir.

20 Q. Do these shipping memorandums come to your desk? A. Yes, sir.

Q. And you make the entries in the book? A. Yes, sir.

Q. These are the first papers that are made out by the company when the goods are bought? A. The shipping memorandum is made and those charges are made from the shipping memorandum.

30 Q. What are the shipping memorandums? A. Just a memorandum made by the shipping clerk.

Q. Describing the goods? A. Yes, sir.

Q. Who makes up the invoice? A. I did that time.

Q. You make the invoice up from the shipping memorandum? A. Yes.

Q. And then you enter in the ledger which you have the same record which is on the invoice; is that right? A. Yes, sir.

*Elizabeth Smith, direct.*

Q. (Showing witness another paper.) I show you paper which is labeled "Shipping memorandum," printed on the letter head of the Loesser Manufacturing Company. Is that the paper you refer to as a shipping memorandum? A. Yes, sir.

Q. Those two that I show you are each dated August 6th? A. Yes, sir.

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Q. From this did you make up an invoice under date of August 6th? (Showing witness paper.) I show you an invoice out of this invoice book dated August 6th, 1921. A. Yes, sir; that is included.

Q. (Showing witness paper.) I show you two shipping memorandums dated August 12th. Are those shipping memorandums for goods shipped on those dates? Do they correspond with the number of the invoice? A. Yes, sir.

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Q. There is invoice of August 12th to correspond with it? A. Yes, sir.

Q. These invoices are numbered? A. Yes, sir.

Q. And the shipping memorandum has a number? A. Yes, sir.

Q. Do the numbers of the invoices of the shipping memorandums correspond? A. Yes, sir.

Q. Those same items which are in the shipping memorandum of goods and in the invoice were for goods and prices as set up in your ledger book? A. Yes, sir.

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Q. And these three papers taken together, the shipping memorandum, the invoice and the book, are your records? A. Yes, sir.

*By the Court:*

Q. They are all part of your system of book-keeping? A. Yes, sir.

Q. You don't keep the record that comes to you

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*Elizabeth Smith, direct.*

in bound form, the shipping record? A. We have these here.

Q. You don't keep them in bound form? A. No, sir; only on file. They are put on file in rotation.

Q. They have been taken out for the purpose of this case? A. Yes, sir.

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Mr. English: I offer in evidence two shipping memoranda dated August 6th, 1921, and each bearing No. 1547. I offer that for identification, rather.

(Marked Exhibit P-9 for identification.)

Mr. English: I also offer for identification the carbon copy of the invoice, the defendant having failed to produce it, 1547, covering the same items under date of August 6th, 1921.

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(The paper referred to is marked Exhibit P-10 for identification.)

Mr. English: I also offer in evidence shipping memorandum 1557 dated August 12th, consisting of two sheets.

(Paper referred to is marked Exhibit P-11 for identification.)

Mr. English: I also offer carbon copy of invoice No. 1557, dated August 12, 1921, covering the same items.

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(The paper referred to is marked Exhibit P-12 for identification.)

Mr. English: I also offer the ledger, and particularly so much of it as relates to the entries of August 6th and 12th, covering the same items which are referred to in the shipping memorandum and the invoices.

(The paper referred to is marked Exhibit P-13 for identification.)

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*Elizabeth Smith, cross.*

Mr. Mackay: May I cross examine on this?

The Court: You may.

*Cross examination by Mr. Mackay:*

Q. I understand you to say that these exhibits that have just been marked for identification constitute a part of your system of bookkeeping? A. Yes, sir. 10

Q. What else is there to your complete system? What else is there beside these books that will complete your system of bookkeeping? A. There is the journal, but there is nothing relative to shipments that fixes it.

Q. Where is your record of delivery? Haven't you a record of delivery of shipments when shipments are made? A. There are other receipts made out. We have the receipts from the express company. 20

Q. Delivery receipts? A. The express company receives them.

Q. Where are those kept? A. They are kept on file.

Q. And they show the receipt of the goods or delivery of the goods to the customer? A. No, they show the receipt of the goods to the express company. 30

Q. To the express company? A. Yes, sir.

Q. Do you get any return back from the express company as to whether or not the goods are delivered? A. We do of some shipments and some we don't.

Q. Why do you make a distinction? A. For instance, if issued to the American Express we get no receipt except the express company receipt.

Q. Is there any way from these books that you

*Elizabeth Smith, cross.*

can tell us how these goods were shipped? A. Yes, sir.

Q. How were they shipped? A. They were shipped by the express man in Verona.

Q. What is his name? A. Garrity Brothers.

10 Q. When you deliver goods to him you employ him specially for that purpose, don't you? A. We never employ any one.

Q. How do you get your goods to the expressman? A. He makes a regular stop.

Q. Doesn't he sign for goods that he takes out? A. Yes, sir.

Q. Where is his receipt for these particular items that you have mentioned? A. They are on file.

20 Q. They are not contained in these books that you have shown us now? A. No, because they are all on separate express receipts.

Q. Does the expressman make a report back to you that he has made delivery of these particular items? A. Not necessarily. He doesn't go out of his way. If he happens to come around we sometimes inquire.

The Court: That is, does he make any written report?

30 Q. Does he come back and report in writing? A. On some shipments he does and some he does not.

Q. On what ones would he make a written report on? A. Well, of course, if we get a receipt and give him the receipt, one of our own receipts, he furnishes us a separate receipt.

Q. Then, as I understand it, very often you make your receipts out in duplicate and you give them to the expressman in duplicate, is that the idea,

*Elizabeth Smith—Redirect.*

and have him get the customers to sign? A. We do on some, yes, sir.

Q. On what ones do you do that? A. Where there is only one case to a shipment they take a duplicate copy of the memorandum.

Q. Do you ever recall sending goods to this expressman to Julius Schmid? A. Yes, sir. 10

Q. And requesting him to bring back a receipt showing delivery? A. Yes, sir.

Q. How many times? A. Quite a number of times.

Q. When that receipt is brought back what is done with it? A. It is filed as a receipt with other express receipts.

Q. Filed where? A. On a loose file.

Q. Is it under your control? A. Yes, sir.

Q. And you have a record, as I understand it, under your control of certain receipts signed by Julius Schmid under that contract? A. We have for some of them, yes, sir. 20

Q. And others you have not? A. No, sir.

Mr. Mackay: I think I shall object. They have not the complete record here.

*Redirect examination by Mr. English:*

Q. Do you know what f. o. b. Montclair means? A. Yes, sir. 30

Q. What does it mean? A. It means the other company pays the express.

Q. The other company pays the freight? A. Yes, sir.

Q. I call your attention to Exhibit P-7 which accompanied the orders and which says, "All prices are f. o. b. Montclair, N. J." Who pays the freight or expressage on these, your company or the

*Elizabeth Smith, recross.*

Schmid Company? A. As far as I recollect, the Schmid Company.

*By the Court:*

Q. Is your business located in Montclair? A. It was at that time.

10 Q. So that you delivered these boxes specified in these papers which are before you and offered to the expressman f. o. b? A. Yes, sir.

Q. Sent by the Schmid Company? A. Yes, sir.

Q. Whom were those goods delivered to? An express company, you said? A. Yes, sir.

Q. When sent by the express company did the Loesser Manufacturing Company hire the expressman or the Schmid Company? A. It was an express company that done business from Caldwell to New York.

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Q. Who paid the express company? A. Why, the customer that received the goods.

Q. Did the Loesser Manufacturing Company pay it? A. No, sir.

*Recross examination by Mr. Mackay:*

Q. How do you know with reference to these particular items—how can you tell us now at this time whether Julius Schmid paid the express company or not on these particular items? A. I don't know. The express company would probably know that.

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Q. You don't know that, do you? A. No, sir.

Q. Isn't it a fact that every shipment that went to Julius Schmid that the expressman was given a duplicate receipt to take with him to have signed by Julius Schmid? A. Not every shipment, no, sir.

Q. Can you recall now offhand where a ship-

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*Ernest Loesser, direct.*

ment was not sent that way? A. I don't recall the exact shipment, but I know the first few months I was there there wasn't any.

Q. When were you there first? A. September 5, 1920.

Q. How long after you were there was that practice commenced of giving the expressman duplicate receipts? A. I think about two months or so. 10

*By the Court:*

Q. What was the practice of your company in August, 1921? A. We gave him an additional receipt to be signed by the customer.

Q. So that was your practice since 1921? A. Yes, sir.

Q. Were those express receipts part of your system of bookkeeping? A. Yes, they were, as far as keeping the records—that is, as far as keeping the records of receipted merchandise. 20

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ERNEST LOESSER, recalled in behalf of the plaintiff.

*Direct examination by Mr. English:*

Q. How were these goods shipped by you to Schmid? A. By an express company.

Q. How were the terms of shipment? A. F. o. b. Montclair. 30

Q. Who paid the expressage? A. I don't know who paid it. We didn't. I don't know whether he ever got paid.

Q. Did you ever pay expressage on shipments to Schmid? A. No, sir.

Q. Did Schmid ever send a truck direct for them? A. At various times. Toward the last they did.

Q. So that the goods were either delivered to their own truck or to an expressman? A. Yes, sir. 40

*Ernest Loesser, cross.*

Objected to as leading.

Q. By what method of transportation were the goods shipped to Schmid? A. By express.

Q. Private or public express? A. Both.

Q. Who was the private express? A. Schmid.

10 Q. And which was the public express? A. Gar-  
rity Brothers.

Q. Who paid the expressman? A. I don't know whether he ever got paid.

Q. Do you know whether you paid it? A. We didn't pay it.

Q. Was there ever any complaint of the goods to this expressman, the fact that they had been delivered to this expressman? A. No complaints whatever.

20 Q. Any complaint when he delivered the goods to Schmid's own truck? A. No, sir.

*Cross examination by Mr. Mackay:*

Q. With reference to these two particular items that have been mentioned of August 6th and August 12th, 1921, wasn't your system of bookkeeping, as testified by your bookkeeper that you had a duplicate slip that you gave to the expressman to have signed by the customer? A. I believe so. There should be a slip of some kind if there was  
30 anything shipped.

Q. If the delivery was made? A. There would be a record of it.

Q. The mere fact that Julius Schmid was to pay the expressman under the contract does not change your system of giving the expressman a duplicate receipt to have signed, does it? A. There were times—I am not familiar with that—I don't know whether they gave the express company or Julius

*Charles F. Schmid, direct.*

Schmid any goods without a receipt. I don't remember they did. I am not familiar with it.

Q. Your bookkeeper is familiar? A. I should imagine we would have some kind of a receipt for the stuff that was given out.

*By the Court:*

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Q. In other words, according to your system of bookkeeping, you either took a receipt from the expressman to whom the goods were delivered, or from the Schmid Company, or, in certain instances, from both; is that right? A. We would make shipments to different people in New York.

Q. I am speaking particularly of Schmid? A. There must be some record of some kind.

Mr. English: I withdraw the offer at this time. May I have an opportunity to prove that later?

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The Witness: I can get the receipts.

Mr. English: With that reservation the plaintiff rests.

Plaintiff Rests.

CHARLES F. SCHMID, sworn in behalf of defendant.

*Direct examination by Mr. Mackay:*

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Q. Are you an officer of Julius Schmid, Inc? A. I am.

Q. What office do you hold? A. Secretary.

Q. Are you familiar with the dealings between the Loesser Manufacturing Company and Julius Schmid, Inc? A. I am.

Q. (Showing witness paper.) I show you Exs. P-1, 2 and 3 and 4, and ask you what those are?

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*Charles F. Schmid, direct.*

A. P-1 and P-2 are contracts placed with the Loesser mills. P-3 is a copy of a letter written by us to the Loesser mills pertaining to those two contracts, and P-4 is a letter from the Loesser mills to us acknowledging the contract.

10 Q. When deliveries were made under that contract were the goods returned by you in each instance? A. At times they were returned, some of the goods.

Q. Why were they returned? A. Because the boxes were imperfect.

Q. Imperfect in what respect? A. Well, a vanity box consists of a bottom and a top, and in a great many instances the bottom would be all one color and the top of another colored metal, making a very bad appearing package.

20 Q. Was that what you ordered? Was that in accordance with your orders? A. It was not.

Q. In what other respects were they imperfect, if you can recall?

Mr. English: I object to this unless the inquiry is limited to those which are set up in the pleadings. We are here to meet the case on the pleadings.

(Question read.)

30 The Court: The question may be answered.

A. The boxes would be tarnished and for other imperfections—

Q. That is what I want to know, what they were.

A. Tarnished.

Q. Anything else? A. Spotty. Would have spots on them, different colors. Some parts would be colored properly; others would not be.

*Charles F. Schmid, direct.*

Q. And between May 31st, 1921, and August 4, 1921, were there orders filled by the Loesser Company? A. I wouldn't be able to say just what came in at those times. Mr. Kroenig is more familiar with dates and figures than I am.

Q. But you know about them? A. Yes, sir.

Q. Did you know about these boxes being returned to Loesser after May 31, 1921? A. Yes.

10

Q. Can you tell us what they were? A. They were, as I recollect, three different kinds of boxes.

Q. Do you recall the names of them? A. I know that one was Marinelli.

Q. Have you any record by which you can refresh your recollection? A. I haven't them here. I believe Mr. Kroenig has all the records that would tell us that.

Q. Will you tell us from this memorandum? Will that refresh your recollection? A. Yes, it would.

20

Q. Can you tell the Court and jury what boxes were returned after May 31st 1921? A. From November?

*By Mr. English:*

Q. What is that paper that you have got before you? A. Record of goods that was returned to the Loesser Company.

Q. Made up by you? A. The Loesser Company credit memorandum.

30

Q. Was it made up by you? A. They were made up by the Loesser Company, the memorandum.

Q. When did you first see it? A. I have seen this at different times.

Q. You don't remember when? A. I believe—

Q. You have no records of your own to refresh your recollection from? A. No, sir.

40

*Charles F. Schmid, direct.*

Q. You merely find these papers in the file? A. I have a record showing what returns were made.

Q. Who made that record? A. This is a total of all these papers.

Q. Who made this up? A. Mr. Kroenig.

10 Q. When? A. I don't know when he made this up.

Q. You don't know anything about these details personally? A. I don't know anything about dates or quantities returned. I just know general conditions of the affair.

*By Mr. Mackay:*

Q. After May 31, 1921, did you see Mr. Loesser with reference to goods that had been returned? A. I did, yes.

20 Q. Where did you see him? A. At Mr. Loesser's factory in Montclair, New Jersey.

Q. When? A. I can't say exactly when, but it must have been the end of November.

Q. What year? A. 1921.

Q. What date? A. In November. I don't know what date.

*By Mr. Mackay:*

30 Q. Was there any one with you? A. Mr. Kroenig was with me.

Q. Was there any one else present? A. Mr. Loesser and Mr. Loesser's son.

Q. They were both there? A. They were.

Q. And you saw them at your office, did I understand you to say? A. Yes, sir.

Q. Just tell the Court and jury what conversation you had with reference to these boxes.

Mr. English: I object. This was after the institution of the suit.

*Charles F. Schmid, direct.*

The Court: Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I first called Mr. Loesser on the 'phone and asked him if I might come over to see him—

10

The Court: Never mind the preliminaries.

The Witness: I called on Mr. Loesser and I asked him whether the matter of boxes that we had returned as imperfect could not be settled in some manner than bringing suit, and after a long time Mr. Loesser said he didn't have the boxes, but he finally located the expressman that did have them.

Q. What did you say to Mr. Loesser and what did he say to you? A. The final answer of Mr. Loesser was that he would finish—

20

Mr. English: Are you undertaking to repeat his words or giving your conclusion of what he said?

The Witness: I am giving the facts of what happened, what Mr. Loesser said to me.

Mr. English: This is subject to my objection?

30

The Court: Yes.

The Witness: Mr. Loesser said that he would refinish the boxes, provided we would pay the open bill or the amount that was open, which was less than the boxes we had returned, to which we had objected.

40

*Charles F. Schmid, direct.*

Q. The amount of money was less than you had returned? A. Yes, sir.

Q. Do you know how much, about? A. I should say approximately eight or nine hundred dollars.

Q. Did you say anything to Mr. Loesser about that? A. Yes.

10 Q. Did you see the boxes that had been returned? A. Yes.

Q. At this same time? A. At the same time.

Q. Where did you see them? A. In a barn, belonging to the expressman.

Q. In what place? A. In Caldwell, New Jersey.

Q. Was Mr. Loesser and his son with you? A. They were both there.

Q. Did they look at the boxes? A. We looked at them, yes.

20 Q. Did you have a talk about them? A. We did.

Q. What did Mr. Loesser or his son say about them?

Mr. English: Which Mr. Loesser?

Q. First, what did Mr. Loesser, senior, say about them?

Mr. English: I object. It is after the suit.

The Court: Objection overruled.

30 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Mr. Loesser said that a great many of them should not have been sent us, as they were imperfect.

Q. In what way were they imperfect? A. Having two different color metals and, by this time, having been stored in an open place, some of them had become damp by the weather, and, further-

40

*Charles F. Schmid, direct.*

more, that some had tarnished, which Mr. Loesser, junior, said, which is something which Mr. Loesser, senior, didn't say.

Q. Tell us what Mr. Loesser said? A. Some of the boxes should never have been sent to us.

Q. What did Mr. Loesser, junior, say? A. Mr. Loesser, junior, said that some of the boxes had tarnished from the fact that they were packed in cardboard containers, and the action of the cardboard on the box had tendency to discolor them. 10

Q. Who packed the boxes? A. The Loesser Manufacturing Company, the Loesser people.

Q. Did you have anything to do with that? A. No, sir.

At one o'clock P. M. the Court took a recess of one hour.

20

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AFTER RECESS.

CHARLES F. SCHMID resumes the stand:

*Direct examination (continued) by Mr. Mackay:*

Q. Prior to that time, Mr. Schmid, when you saw Mr. Loesser at their place in Montclair, had you seen him before? A. Oh, yes. I have seen him several times.

Q. With reference to these boxes that were returned in August, 1921, speaking of the Marinelli, Hillrose and Adormeé; had you spoken to Mr. Loesser before that? 30

The Court: Before what?

Mr. Mackay: Before August, 1921?

A. Yes.

Q. And when? A. Some time in May.

Q. And what happened in May, 1921? A. They were returned to him in May, 1921.

40

*Charles F. Schmid, direct.*

Q. For what purpose then? A. Because they were unsatisfactory, in finish, and they were to be refinished by the Loesser people.

Q. Did he take them back in May, 1921? A. He did.

10 Q. Did he return them to you again after that?  
A. Yes.

Q. Then what happened after they came back, after he had taken them apparently for the purpose of refinishing them? A. We still found them unsatisfactory and returned them again in August.

Q. Prior to returning them in August had you taken the matter up with him? A. Yes.

Q. How, in what way? A. By correspondence.

Q. Did you write to him? A. Yes, sir.

20 Mr. Mackay: I will offer that letter of July 27, 1921.

Mr. English: No objection.

Q. I show you a copy of letter addressed to Loesser Mills, Inc., and ask you if that is a copy of the original letter you sent to the Loesser people on July 27, 1921? A. Yes, that is a copy of it.

(The paper referred to is offered in evidence and marked Ex. D-1.)

30 Q. After that letter was signed I understand the boxes were returned. Is that so? A. They were.

Q. After they were returned did you receive a letter from Mr. Loesser? A. I believe we did.

Q. (Showing witness paper.) I show you a letter dated August 5, 1921, and ask you if you received that from the Loesser Manufacturing Company? A. We did.

40

*Charles F. Schmid, direct.*

Q. And after receipt of that did you reply to it?  
A. Yes.

Mr. Mackay: Mr. English, have you the letter of August 5, 1921?

The Court: That is, from the plaintiff to the defendant?

Mr. Mackay: Yes.

Plaintiff's counsel produces paper.

(The paper referred to is offered in evidence and marked Ex, D-2.)

10

Q. I ask you if that is a copy of the letter sent by you to the Loesser people in reply to Exhibit D-2? A. It is.

Mr. Mackay: I offer that in evidence.

Mr. English: I have the original, if you want to substitute it. (Producing paper.)

20

(Paper referred to is offered in evidence and marked Ex. D-3.)

Q. Was there any understanding between you and the Loesser Manufacturing Company about refinishing of these boxes?

Mr. English: I object to that. He should state the conversation.

Q. Did you have a conversation with Mr. Loesser with reference to the refinishing of these boxes?  
A. Yes.

30

Q. When was it? A. I cannot state an exact date, but I have had numerous talks with Loesser about imperfect boxes, and he said—

Objected to.

Q. What did he say?

40

*Charles F. Schmid, direct.*

Mr. English: I object unless the time is fixed.

The Court: About the time. Of course, the exact time need not be fixed.

A. I had a conversation with Mr. Loesser within a month after we started to do business with him.

10

Mr. English: I object to that. That is outside of the complaint in this case. If he had a conversation it ought to be with respect to these things that are set up in the complaint and counterclaim.

The Court: Do I understand that the counterclaim is limited?

Mr. English: We feel that it is limited by the bill of particulars.

20

The Court: The objection will be overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. When did this conversation take place? A. Within a month after we started to do business with them.

Q. What was said by Mr. Loesser and what was said by you with reference to the refinishing?

30

Mr. English: I object to this on the ground that it is not within the issue pleaded and therefore immaterial in this suit.

The Court: Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Mr. Loesser told me that he would at all times refinish and make good such boxes as were not perfect.

40

*Charles F. Schmid, cross.*

Q. And during the course of your dealings, and under the contract, did he undertake to refinish?

A. Quite a few times, yes.

Q. Did he charge you for them? A. He did attempt to charge for them. He later cancelled the charge.

Q. When you say he did attempt to charge, do you refer to his letter of August 5th? 10

Objected to as leading.

Q. I withdraw it. Well, when did he attempt to charge you? A. I don't know the date, but I think he did at one time send in a small bill for refinishing, which he later turned up and gave us credit for, when we called it to his attention.

Q. Will you say then that you never paid for refinishing? A. To the best of my knowledge, no. 20

*Cross examination by Mr. English:*

Q. What is your position in the Julius Schmid, Inc? A. Secretary.

Q. Do you have in your business practice anything to do with the matter of the making and filling of orders? I was in doubt as to what you said before lunch, that you had no familiarity with this? A. I knew everything about the entire business in a general way, but I don't know anything about quantity or dates. 30

Q. You bought from Mr. Loesser's Company a great many hundreds of boxes, didn't you? A. Yes, sir.

Q. This contract covers a period, roughly, of a year and a half? A. Yes.

Q. And in the course of the period of this contract there were made and shipped to you a great many hundreds of boxes? A. Yes, sir. 40

*Charles F. Schmid, cross.*

Q. It is to be expected that in a business of that size, that in the quantity of boxes that appears here, some little defects would exist, isn't it? A. We wouldn't object to any small defect.

10 Q. You didn't understand my question. It is to be expected, in a volume of business of that size, there would be some defects? A. No, sir; I wouldn't think so.

Q. You think it ought to be perfect? A. Yes.

Q. Let me show you a letter of your company, written under date of September 15th, referring to a thousand boxes in which they say that only twenty-eight were defective. That is your letter (showing witness paper)? A. Yes, sir.

20 Q. So out of a thousand shipped there turned out twenty-eight that were not perfect. That is right, according to that letter? A. No, sir.

Q. Whether it is 951 shipped and 28 not perfect? A. Yes, sir.

Q. That is a sample of the general course of practice in this sort of thing, isn't it? A. No, sir.

Q. That there are bound to be some little defects? A. No, sir.

Q. At any rate, when there were defects you took them up with Mr. Loesser? A. Yes, sir.

30 Q. And you and he were getting along under that arrangement? A. I thought so.

Q. And you were pleased with his work? A. No, we were not.

Q. Whenever you called his attention to any of these little defects he would fix them up, wouldn't he? A. Yes.

Q. And this bill of particulars contains credits back and forth, doesn't it, for credit memorandums, and what not, for goods refinished and sent back? A. Yes, sir.

*Charles F. Schmid, cross.*

Q. And everything went along all right until you got in the summer of 1921? A. It never went along all right, no, sir.

Q. He was shipping goods and you were taking goods, and when something was called to his attention he would fix it up and you would go on; that is right? A. Yes.

10

Q. Along in the late spring of 1921, you got pretty well behind in your payments, didn't you, your money? A. The books will show that, but I don't think we got very far behind.

Q. You were familiar with this business and the financial end is a pretty important thing? A. Yes.

Q. Isn't it a fact that in the late spring of 1921, you got pretty well behind in your payments? A. We fell somewhat behind, yes, sir.

Q. The Loesser Company began to press you a little bit, didn't they? A. They were very nice.

20

Q. They were very nice about it, but at the same time they did intimate they would like to have their bills paid? A. Yes, sir.

Q. And finally that resulted, in the month of June, 1921, you gave a series of notes? A. Yes.

Q. And in round figures, \$7,500? A. Yes.

Q. Have you got those notes given by the Schmid Company to the Loesser Company?

Mr. Mackay: And that were paid?

30

Mr. English: Yes, and returned back to you.

Mr. Mackay: I have not got them here.

Q. These notes ran along for a period of time, didn't they, one month and two months? A. At one time we gave notes.

Q. All dated the same date? A. Yes, sir.

40

*Charles F. Schmid, cross.*

Q. They didn't all come due the same date? A. No.

Q. All dated June, 1921? A. I don't know the exact date.

Q. All dated June 6th, 1921, and each for \$1251.-52? A. Yes.

10 Q. Except the last two? A. That was to make the amount even.

Q. And they totaled up \$7,509? A. Yes, sir.

Q. And these notes were due following the first one of June, and then one month after, in each case, July 15th, August 15th, September 15th, October 15th, November 15th, December 15th, 1921. Is that true? A. Yes.

20 Q. And those notes were all paid by your company, were they not, as they became due? A. They were.

Q. Are you able to say what specific boxes there were which were returned by you in August? A. I know they were Marinelli boxes and one or two other brands.

Q. You didn't personally see the boxes? A. I did.

Q. Did you inspect them all? A. No, sir.

Q. How many hundreds of them were there, do you know that? A. There were thousands of them.

30 Q. Do you know how many thousands of them? A. I don't know.

Q. Did you look at any of them? A. I looked at a great many of them.

Q. They came back in cardboard cartons? A. Yes, sir.

Q. Done up in tissue paper? A. Yes, sir.

Q. Each little box wrapped up in tissue paper? A. Yes, sir.

*Charles F. Schmid, cross.*

Q. Did you take off that tissue paper and examine those things? A. We examined a great many of them.

Q. You couldn't say how many? A. No, sir.

Q. I suppose they were stacked up in your storehouse? A. The shipment we returned was quite a large one.

10

Q. You say that some of these boxes had been sent back before? A. In May of the same year.

Q. How many? A. I don't know.

Q. The ones that were sent back in May were sent back because when you came to use them you tarnished them? A. No, they were two different color metal.

Q. Do you remember that you had some kind of powder puff that had a tarnishing effect on these little boxes? A. No.

20

Q. And that the Loesser Company, when you called this to their attention to help you out under this arrangement, took them back and refinished them so as to take off the tarnish? A. They agreed to refinish some boxes.

Q. They were the ones that were tarnished by this powder puff? A. No, sir.

Q. You received these boxes originally late in 1920, or in the first part of 1921, didn't you? A. Yes, sir.

30

Q. So by the time August came around you had them on hand for a period of six or eight months? A. They were returned in May.

Q. Just answer my question. You got them the latter part of 1920, and the first part of 1921? A. Yes, sir.

Q. So that you had them on hand between whatever date and August, when you finally re-

40

*Charles F. Schmid, cross.*

turned them, except a few that you returned on account of that tarnishing? A. No, sir.

Q. You had them on hand from the latter part of 1920, and the first part of 1921, didn't you? A. Yes.

10 Q. You always sent a duplicate memorandum, didn't you? A. Yes, sir.

Q. And you kept a record of it in your books? A. Yes, sir.

Q. Can you give us a record of how many you sent back in May? A. We have a record, I believe, that will show that.

Q. You don't know? A. I don't know; no, sir.

Q. Do you remember that the ones that were sent back in May were Marinelli? A. Yes, sir.

Q. Double compact; is that right? A. Yes, sir.

20 Q. You abbreviated that "D. C."? A. It could be abbreviated.

Q. Do you remember that the Loesser Company at first charged you with refinishing those Marinelli boxes? A. No, sir.

Q. And they afterwards, when you took the matter up with them, cancelled the charge? A. Yes, sir.

Q. But they did send you a bill, did they? A. Yes, sir.

30 Q. I show you a bill dated May 19, 1921, for 11,520 Marinelli boxes, refinished, at one cent each, \$115? A. Yes, sir.

Q. That was the bill they sent you and which was afterwards cancelled, but you took the matter up with them? A. Yes, sir.

(The paper referred to is marked Exhibit P-13 for Identification.)

40 Q. You sometimes complained about matters

*Charles F. Schmid, cross.*

which were unjustified, didn't you? A. What is that, please?

Q. You sometimes complained about matters which were unjustifiable, didn't you? A. No, I don't think so.

Q. Your letter of August 9th, which you put in evidence as Exhibit D-3, you asked to have some Nylotis boxes lacquered on the inside, didn't you? A. Yes. 10

Q. And you say in your letter, "It is true that we did not contract to have these boxes lacquered on the inside"? A. Yes, sir.

Q. And then you went on to say that they should do it for their customers? A. Yes.

Q. You felt a license to complain either within or outside of the contract? A. The boxes should be a matter to give satisfaction. 20

Q. It was according to the contract and the contract had been performed, nevertheless you complained that it didn't quite suit you? A. No, sir. If we saw something of interest to Mr. Loesser to make his boxes correctly we would advise him.

Q. So in this particular case you thought it would be the interest of Mr. Loesser to lacquer boxes on the inside, although they hadn't agreed to do it? A. Yes.

Q. Do you say that all of these Marinelli boxes that were refinished sent to you without cost in May were returned to you in August? A. That I could not say. 30

Q. Do you know what other boxes you returned in August which had nothing to do with those sent back in May? A. I believe some Hillrose and Adormée.

*Charles F. Schmid, cross.*

*By the Court:*

Q. That is, in August they were sent back to you the first time? A. The latter two, I believe.

Q. And you got all those boxes back in the latter part of 1920, or the first part of 1921? A. We never got them back.

10

*By Mr. English:*

Q. You got them shipped to you originally in the latter part of 1920, or the first part of 1921? A. Yes.

Q. So that those which you shipped back for the first time in 1920, the Hillrose and Adormeé, you had on hand ever since you received them in the early part of 1921, or the latter part of 1920? A. Well, we might have gotten them as late as June, I don't know.

20

Q. You answered interrogatories in this case under oath, didn't you? A. Yes, sir.

Q. Did you swear truly in those answers? A. I did.

Q. Did you see the counterclaim which your counsel filed in this case? A. I have seen it.

Q. And you know that it refers to various order numbers, don't you, which were annexed to the paper as part of the bill of particulars? A. I believe so.

30

Mr. English: Will you consent that I use the copy you sent me, Mr. Mackay?

Mr. Mackay: Yes.

Q. (Showing witness paper.) I show you copy of your company's counterclaim which refers to order No. 6391 for Marinelli. Did you see that? A. Yes, sir.

40

*Charles F. Schmid, cross.*

Q. And 6392 for Marinelli? A. Yes, sir.

Q. And 6393 for Marinelli? A. Yes, sir.

Q. And 6394 for Marinelli? Did you see that?

A. That is right; yes, sir.

Q. Do you remember that I asked you this question on written interrogatories: "On what date or dates were the boxes referred to, Nos. 6391, 6392, 6393 and 6394 received by the defendant?" And you replied in answer to that: "Various dates, from August 13, 1920, to February 5, 1921." I show you the paper signed by you and sworn to by you. You are C. F. Schmid? A. Yes, sir. 10

Q. Did you answer truly when you answered under oath that question? A. I surely did.

Q. You now want to say that you got some of them as late as June? A. I didn't say I did. I said we might have. 20

Q. Do you still want to say you might have? A. Whatever is in that paper is true.

Q. Then I come back to my question, that the boxes which you sent back in August of 1921, you had on hand from the time between August 13, 1920, and February 5, 1921; is that correct? A. That is correct.

Q. You got a letter in reply to your letter of August 9th which your counsel put in evidence, did you not, dated August 18, 1921? I show you a letter dated August 18, produced by your counsel, and ask you if that is a reply to your letter of August 9, 1921, Exhibit D-3? A. Yes, sir. 30

(Marked Exhibit P-14 for identification.)

Q. You had sent with that letter a debit memorandum setting up the goods returned, hadn't you? A. Yes, sir.

Q. I mean, by letter of August 9th? A. Yes, sir. 40

*Charles F. Schmid, cross.*

Q. The letter which I show you of August 18th returned that, and that is the paper? A. Yes, sir.

Q. It is dated August 5, 1921, and covers the same items which are set up in the bill of particulars, Schedule D? A. Yes, sir.

10 (The paper referred to is marked Exhibit P-15 for Identification.)

Q. In this letter the Loesser Company said they couldn't allow your claim at that time, didn't they? A. Yes.

Q. Too late? A. They didn't say it was too late.

Q. That is what is fairly implied in that letter? A. They say they couldn't allow it.

Q. That is to be fairly implied from the letter? A. I don't know that.

20 Q. Do you remember that at the same time they sent you a statement of the money you owed them? A. I don't remember, but they may have.

Q. The letter says so? A. Yes.

Mr. English: Will you produce that statement, Mr. Mackay?

(Defendant's counsel produces paper.)

30 Q. (Showing witness paper.) I show you the statement your counsel produces enclosed in the same letter of August 18th. That came along with the letter? A. Yes.

(Paper referred to is marked Ex. P-16 for identification.)

Q. While all this was going on back and forth between your company and the other company, those notes were coming due serially, month by month, weren't they? A. Yes, sir.

*Charles F. Schmid, cross.*

Q. You paid the notes, didn't you? A. Yes.

Q. Do you know when this suit was brought against your company? A. In November, 1921, I believe.

Q. And after that suit had been brought you went up to see Mr. Loesser? A. I did.

Q. Wanted to settle the matter up? A. Yes. 10

Q. Do you remember that he demanded that you pay his bill? A. Yes.

Q. And then he said that if you would pay his bill he would refinish those things for you at cost? A. Yes.

Q. You didn't pay the bill, did you? A. No.

Q. In the summer of 1921, you had a very large quantity of these boxes on hand, didn't you? A. I can't say that without having the records before me. 20

Q. Who would know about that? A. Mr. Kroenig would know about that.

Q. What is Mr. Kroenig in your company? A. Mr. Kroenig had charge of the toilet goods department.

Q. Was he an officer of that company? A. No, sir.

Q. He wrote a good many letters, though, didn't he? A. Yes.

Q. You had not repudiated what he did in the matter of exercising authority in writing letters or anything like that, had you? A. No, sir. 30

Q. He would know whether you had a small quantity or large quantity on hand, which you could conveniently use? A. He would know and he would know why we had them, yes, sir.

Q. You know that the company was behind in its payments, didn't you? A. Yes, sir.

*Charles F. Schmid, cross.*

Q. Was that in your department or his? A. No, sir.

Q. Who? A. The bookkeeping department.

Q. The bookkeeping department does not assume financial management of the company? A. Our credit man.

10 Q. Who was he? A. I don't recollect at that time.

Q. It was all subject to your oversight? A. Yes, sir.

Q. When you went out to Montclair at that time when suit was brought and saw Mr. Loesser, you went from there to the express office to see the boxes did you? A. We went to the barn of the expressman.

Q. Where they had them stored? A. Yes, sir.

20 Q. You didn't unpack them all, did you? A. No, sir.

Q. There were thousands of them? A. We didn't unpack them all, no, sir.

Q. Did you unpack any of them? A. Yes, sir.

Q. Who was in that party? A. Mr. Loesser, senior, and Mr. Loesser, junior, Mr. Kroenig and myself.

Q. When you broke up it was agreed that you would send a check to pay this bill? A. No, sir.

30 Q. And they were going to refinish these things at cost for you? A. No, sir.

Q. Do you know a concern called Leber Brothers? A. I know of them. yes, sir.

Q. You do business with them? A. Yes, sir.

Q. Do you know whether they ever inquired of you to recommend to them any metal box manufacturers? A. I don't know. That would be under Mr. Kroenig's charge.

40 Q. Any correspondence on that matter he carried on? A. Yes, sir.

*Charles F. Schmid, redirect-recross.*

*Redirect examination by Mr. Mackay:*

Q. As I understand you to say, when you had this conversation out at the expressman's place that Mr. Loesser said, "If you pay the bill we will refinish the boxes"? A. He did.

Q. He did say that? A. Yes, sir.

Q. (By the Court.) He said what? A. He said he would refinish them.

10

*By Mr. Mackay:*

Q. What did you say when he said that? A. I said we wouldn't pay the bill until they were refinished. In fact, we wrote him to that effect a few days later, still willing to settle.

Q. Is that what your dispute was about the refishing of these boxes? A. Yes, sir.

Q. And the amount of credit that you were entitled to? A. Yes.

20

Q. Before you went to the expressman's place where did you meet Mr. Loesser? A. At his office, his factory.

Q. You went to his office to see him? A. Yes, sir.

Q. And at the store there did you go to the expressman's place? A. He took us up there.

*Recross examination by Mr. English:*

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Q. The dispute was over who was going to pay for the refishing of these boxes? A. No, sir.

Q. You conceded that you owe the money that is demanded in this suit, didn't you? A. No.

Q. But you credited it on your counterclaim. Do you know that, that you credit it on your counterclaim? A. We credited it, yes.

Q. So if you credit it you concede it, don't you?

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*Charles F. Schmid, recross.*

Objected to.

The Court: I think that is argument.

Q. At the time you were with Mr. Loesser had the counterclaim been filed? A. Yes.

Q. Sure about that? A. Yes, sir.

10 Q. Or hadn't you taken that up with counsel?  
A. No, sir.

Q. Didn't you know at that time that you had credited the amount of that bill on the counterclaim? A. I know that a credit memorandum was sent when the goods were returned, as usual.

Q. In your counterclaim you say that the Loesser Company owe you money? A. They do.

Q. Against which you gave them certain credit. That is the theory of your counterclaim? A. I am not a bookkeeper. I don't know.

20 Q. Are you bookkeeper enough to know you claim they owed you certain money and they are entitled to a certain credit? Are you bookkeeper enough for that? A. No, I don't think so.

Q. Are you bookkeeper enough to know that the credits which you credited them with is the same bill that they are suing you for in this suit? A. The same amount.

Q. The same amount? A. The suit is over the amount returned, naturally.

30 Q. Let me show you once more the bill of particulars annexed to the counterclaim as filed by your company. I call your attention to schedule D annexed to your counterclaim and I am showing you the papers sent me by your counsel. You see, you charged them with a certain amount on what you call a contra account, and then you credit them with their invoices, and they are all specified. Do you say that? A. Yes, sir.

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*Carl A. Kroenig, direct.*

Q. Look at the bill of particulars on our side and see if it is not exactly the same thing. It starts with May 31, 1921, so many Nylotis and goes right on down. Don't you see that it does? It runs right down to the last two items that we claim of August 6th and 12th. A. Yes, sir.

Q. With the exception of those two little items you credit them with the same thing they are suing you for? A. We credit them with all bills. 10

Q. Do you now say that you don't concede that you owe them that money? A. I don't think we do.

Q. The only dispute between you was as to who was to pay for these boxes? A. That was the dispute.

*By Mr. Mackay:*

Q. Isn't it so that the amount of your counterclaim for the amount of goods returned by you includes this claim for which the Loesser Manufacturing Company is suing you? 20

Objected to as leading.

Objection sustained.

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CARL A. KROENIG sworn in behalf of defendant.

*Direct examination by Mr. Mackay:* 30

Q. Where do you live? A. 937 Thirty-ninth Street, Brooklyn.

Q. Whom are you employed by? A. Charles Schmid, Incorporated, New York.

Q. In what capacity? A. As manager of the toilet goods department.

Q. Are you familiar with the transactions between the Loesser Manufacturing Company and 40

*Carl A. Kroenig, direct.*

Julius Schmid, Inc., referred to in this case? A. I am.

Q. (Showing witness paper.) I show you Exs. P-1 and P-2 and ask you if you can identify those and what they are? A. I do.

10 Q. And Exs. P-3 and P-4, are they in any way connected with Exs. P-1 and P-2? A. Yes. That gives no conditions which were not mentioned on the first two exhibits.

Q. After Exs. P-1, P-2, P-3 and P-4 were delivered what was your method of transacting business then with the Loesser Manufacturing Company? What did you do after that? A. We sent them requisitions from time to time for boxes with various imprints and designs.

20 Q. At what intervals would you send those requisitions as you call them? A. At the time of starting our connections, I believe, we sent quite a few immediately with the contract, or on the same date, and then later we sent them, as we received them from our customers or through our salesmen, as we received orders from our customers or our salesmen.

Q. Can you tell the Court and jury when the first requisition was sent in under Exs. P-1 and P-2? A. On March 19, 1920.

30 Q. Can you tell us what that requisition was for? A. Well, there were several; not only one.

Q. Have you any records with you that will show what those were? A. Yes, sir.

Q. Will you refer to them? A. There is a requisition No. 6385, dated March 19, 1920, for 5,000 double compact hinged boxes, stained, "Hillrose," double vanity, to be delivered at once. There is requisition No. 6386, dated March 19, 1920, for 5,000 double compact hinged boxes, stamped "Hillrose,"

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*Carl A. Kroenig, direct.*

double vanity, delivery December, 1920. Requisition 6391, dated March 19, 1920, 5,000 double, compact hinged boxes, stained, "Marinelli," delivery at once. Requisition 6392, 5,000 double compact hinged boxes, stained, "Marinelli," deliver in May, 1920. Requisition 6393, 5,000 double compact, hinged boxes, stamped "Marinelli," deliver in July, 1920. Requisition 6394, 5,000 double compact, hinged boxes, stamped "Marinelli," deliver September, 1920. There is quite a number more. Is it necessary to state them all? 10

Q. Let us take this at this time. We are referring to the first one, requisition 6385, "5,000 Hillrose, deliver at once." When was delivery made on that, if you know?

Mr. English: I object to this as being immaterial in the case. 20

The Court: The question may be answered.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. The first delivery was made on July 31, 1920.

Q. And requisition 6386, 5,000 Hillrose, September, 1920, delivery. When was delivery made on that? 30

Mr. English: I object on the same ground.

The Court: The question may be answered.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. The first delivery on requisition 6386 was made on August 4, 1920. 40

*Carl A. Kroenig, direct.*

*By the Court:*

10 Q. I understood you to say that order 6386, delivery was to be September, 1920? A. Yes. The Loesser Mills delivered the merchandise in contradiction of our original specifications and subsequently we forced them to date their invoice November 3rd, because that was the time at which these goods should be actually delivered.

*By Mr. Mackay:*

20 Q. November 3rd? A. Yes, sir; because they were behind about two months on the first requisition, and our idea, in originally placing the order, with the understanding that 5,000 should be delivered at once, which meant two or three weeks after the O. K. sketch had arrived in Loesser's possession—

Q. Why do you say that? What is there to indicate that "at once" means two or three weeks? A. The letter which was written at the time the contract was placed and formed part of the contract, the letter of March 19, 1920.

30 Q. So you are complaining now because order 6386 was delivered too soon? A. Yes, sir; because we had no outlet for the merchandise. Our customers ordered their merchandise to be delivered at intervals of thirty or sixty days or ninety days, and they only had facilities to dispose of a limited quantity at the time.

Q. Requisition 6391, 5,000 Marinelli. When was that delivered?

Mr. English: I object.

The Court: It will be overruled unless there is some other purpose than the mere

*Carl A. Kroenig, direct.*

fact of showing that they were delivered out of time?

A. Deliveries on requisition 6391 were made between August 13th and August 16th, 1920.

Q. What dates? A. There were three delivery dates, 13th, 14th and 16th.

Q. On order 6392, 5,000 Marinelli.

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Objected to.

The Court: Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. August 16th and 17th, 1920.

Q. Order 6393, 5,000 Marinellis? A. August 18, 19th and 20th, 1920.

Q. On August 4, 1920, did you see Mr. Loesser at all with reference to these orders that were sent in under contract P1 and P2? A. Mr. Loesser saw us in our office, in our factory, about August 1st, 1920. I don't recollect the exact date.

20

Q. Did you talk with him about these boxes at that time? A. Yes. I showed him several—

Mr. English: I object to that answer.

The Court: The witness may continue.

The Witness: I showed to Mr. Loesser several containers with defective boxes. There were Hillrose boxes and the others I don't remember. I believe there were some with Grecian Girl or something of the kind. I don't recollect all of them. I only know that we pointed out defective boxes, but the designs I don't remember.

30

Q. What did he say? A. "All right, whatever isn't right you send them back, we will make good."

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*Carl A. Kroenig, direct.*

Q. And from that time on did you continue to send boxes back to them? A. We sent boxes back on various occasions.

10 Q. I show you a copy of a letter addressed to the Loesser mills and ask you if that was sent to the plaintiff after you had your conversation with him? A. Yes, it was.

Q. Did you get any reply to that letter? A. I couldn't say.

Mr. Mackay: I offer that letter dated August 4, in evidence.

(Marked Exhibit D-4.)

Q. From that time on did you send boxes back to Mr. Loesser? A. Yes, we sent boxes back on various occasions.

20 Q. For what reason? A. Owing to imperfect finishes and owing to the fact that many boxes were made of two kinds of metal. The top didn't match the bottom.

Q. How long after you had received them did you send them back to Mr. Loesser? A. In some instances we sent them back at once and some instances we let them accumulate until we had more of one particular kind, so it would be easier for the Loesser mills to put them through the process of refinishing them.

30 Q. And during what period of time would you say was covered from the time of receiving them until you sent them back to Loesser for refinishing? A. I don't understand the question.

Q. I will withdraw that question. How long a time elapsed between the time you received the boxes and you returned them to Loesser for refinishing? A. In some instances we returned them

*Carl A. Kroenig, direct.*

the day after we received them and in some instances we had them for several months before we made any return of that particular style.

Q. Why would you wait several months before you would send them back?

Objected to as immaterial.

The Court: I think that is so.

10

Q. When these goods were received by you what was done with them? A. If we had an order for immediate shipment for all or part we examined them, shipped the perfect ones to the customer filled up with our product, our rouge and puff, and the imperfect ones we returned either immediately to Loesser or whenever we made a return making it worth while to make a return.

Q. And when you returned them did they accept them? A. Yes, on many occasions.

20

Q. Before you would send them to your customer where would they be kept in your place? A. They were kept on shelves in our stock room.

Q. In what condition were they, that is, in reference to their packing, and so forth? A. In the beginning I believe Loesser didn't pack them in tissue paper—I don't know whether at the beginning or later—but some of them were wrapped in tissue paper and then put into paper cartons.

30

Q. What did you do with the cartons from the time you received them until you sent them in to your customers? A. We kept the boxes in the cartons that they came in.

Q. What understanding did you have with Mr. Loesser with reference to examining these boxes?

Mr. English: I object to an understanding.

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*Carl A. Kroenig, direct.*

The Court: Yes. It must be the result of a conversation or correspondence. It might have been your understanding and might not have been Mr. Loesser's.

10 Q. Did you have any conversation with Mr. Loesser with reference to the refinishing? A. Yes, we had quite a few conversations, particularly, as far as I am concerned, with Mr. Loesser, junior.

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

Mr. English: Fix the time.

20 Q. And fix the time. A. Well, I cannot state the exact date, but we have letters in which I complained of both finishes—

Objected to.

The Court: Do not state what the letters say. You are only asked for conversations. If you have had conversations with him you may state what they are.

30 The Witness: We had conversations about once every two weeks or so, whenever Mr. Loesser came to New York and came over about a certain matter, sometimes he came in to show me designs, sometimes he showed me new samples they had gotten out—

The Court: I do not think counsel means that. They want the conversation relative to this dispute.

The Witness: About every two or three weeks.

40 Q. Getting right down to those particular boxes in question, do you recall when they were received

*Carl A. Kroenig, direct.*

by Charles Schmid? A. Yes. The Hillrose boxes were received in July and early in August and the Marinelli boxes were received from the middle of August to the end of August.

Q. What year? A. 1920.

Q. And was the Marinelli order covered by requisitions 6191, 6192, 6193 and 6194? A. Yes, sir. 10

Q. Was the Hillrose covered by requisitions 6535 and 6536? A. Yes, sir.

Q. When they were delivered to the Julius Schmid Company tell us what was done with them? A. We opened sufficient cartons to find a number of boxes which were required for a shipment on the orders placed by our customers and the balance of the boxes we left in there, in their original containers. 20

Q. What was the condition of the original containers? A. They were the containers that the Loesser mills delivered their merchandise in.

Q. What condition were they in? Had they been touched in anyway? A. No, they were in good condition, otherwise we would have exchanged them.

Q. Was it after that that that Mr. Loesser was in your office? A. Mr. Loesser was in our office previous to that and after that up to the time we broke our connections. 30

Q. Did you have any conversation with him with reference to those containers that you had opened? A. Yes, we did.

Q. What was said by him or what was said by you? A. I called their attention to the—

Objected to.

*Carl A. Kroenig, direct.*

The Court: Objection sustained. You are asking about conversations with Mr. Loesser, senior, I suppose you mean?

Mr. Mackay: Yes.

10 Q. What did you say to Mr. Loesser and what did he say to you? A. I spoke mostly to Mr. Loesser, junior. About these particular boxes I didn't speak to Mr. Loesser, senior, until some time in January, 1921, I believe, when we spoke about placing a new contract. It was Mr. Loesser, junior.

20 Q. What conversation did you have then with reference to placing a new contract, referring to January, 1921? A. I called his attention to the trouble we had in finding enough perfect boxes to take care of our orders and that we also received from our customers that the boxes were not right.

Q. What did he say?

Mr. English: Was this junior or senior that you had your conversation with?

The Witness: Junior.

Q. What did he say? A. He never said very much, but he always figured they would have to make good—

30 Objected to.

Q. What did he say? A. He said, "All right, send them back, we will refinish them."

Q. After that did you send boxes back to him? A. We did.

40 Q. Did they refinish them? A. They refinished part of them and part of them they threw away, because it wasn't worth while to refinish them, but they always gave us credit for whatever we returned.

*Carl A. Kroenig, direct.*

Q. When did your first disagreement arise with reference to boxes returned? A. I think in May, 1921.

Q. And what was that? A. It was about a lot of Marinelli boxes that were returned and Loesser refinished them and after they were refinished he sent us a bill charging for refinishing, but we didn't recognize the bill and he tore it up, he destroyed it. 10

Q. You say he destroyed it? A. He destroyed the bill and cancelled it. He cancelled this invoice for refinishing.

Q. Then what happened after he cancelled the bill for refinishing the Marinellis in 1921? A. First I wrote him that we would—

Objected to.

The Court: Conversations you are asked for. 20

Q. What did he say? A. Well, he tried first to induce me to let the bill stay.

Q. What did he say to you and what did you say to him? A. He said, "You had those boxes there a long time and you should have told us something sooner." I said, "How could we tell you, and, furthermore, I can't examine boxes the day after they come in and pass a verdict." 30

*By Mr. English:*

Q. Is that what you told him? A. Yes, sir; and pass a verdict whether they are perfect because only time will bring out whether a box is perfect or not. The box may be perfect when it leaves the factory.

*Carl A. Kroenig, direct.*

*By Mr. Mackay:*

10 Q. What did you mean by that, when you said he sent you a number of boxes? A. We had authorized 5,000 of the boxes, for instance, to be delivered at once; 5,000 sixty days later; 5,000 ninety days later and 5,000 120 days later, and all of a sudden he threw in all the boxes of these various requisitions upon us and we took them, but we insisted that the shipments were to be in accordance with the dates of delivery which we had originally specified.

Q. Those are the boxes that you are now speaking of, the ones that were returned in May to be refinished. Were they ever sent back after he refinished them? A. Yes, they were sent back, the end of May or the beginning of June, 1921.

20 Q. What did you do after that? What was done with the boxes when they came in? A. We put them in stock.

Q. When did you examine them? A. I think the first opportunity I had was in July.

Q. What did your examination disclose? A. That there were quite a lot of boxes in that lot on which the refinishing had absolutely no effect, or, rather, they didn't show the effect of refinishing.

30 Q. In what way didn't they? A. On some the tops were yellow and almost red and in others the tops were red and the bottoms yellow. Others had finger marks and spots and various defects.

Q. Was that the time you sent Exhibit D-1? A. Yes.

Q. And after sending that Exhibit D-1 what became of the boxes? A. I gave orders to the forelady in the factory to put the girls to work and examine all the Marinelli boxes, examine all the Hill-

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*Carl A. Kroenig, direct.*

rose boxes and the Adormée boxes. They examined, I couldn't tell exactly, fifty per cent. or—

*By Mr. English:*

Q. Were you there when this examination was made? A. Yes, sir; I was in the office.

Q. Were you in the room and making an examination with him? A. I told him exactly what was perfect and what was not perfect. 10

Q. Were you there at the time the examination was made, right in the room looking at it? A. Yes, sir.

Q. Standing beside this person? A. I didn't stand by them while they examined every box and see every one that was perfect or imperfect, and I convinced myself that they were perfect by going through possibly 500 of them or 1,000 of those cartons that were there. 20

Q. Did you unpack them all, and look at them, every one of them? A. I say about a thousand out of the lot, a thousand of the double boxes, and I took maybe 200 out of those cartons, 200 out of that one and 200 out of that one to satisfy me that all the cartons were equally bad.

*By Mr. Mackay:*

Q. And after that examination was had what was done with the cartons then? A. We sent them back to the Loesser mills with our truck. 30

Q. Did they ever come back to the Julius Schmid Company's place? A. Loesser's expressman tried to deliver them to our place, but I had passed orders to the receiving department to refuse acceptance.

Q. Did you see them after that? A. I saw them quite sometime later, sometime in November or December, in the expressman's stable. 40

*Carl A. Kroenig, direct.*

Q. Who was with you at that time when you saw them? A. There was Mr. Loesser, senior, Mr. Loesser, junior, C. F. Schmid and myself.

Q. Before you went to the expressman's place did you go anywhere else? A. We first went to Loesser's office.

10 Q. From Loesser's office you went to the expressman's place? A. Yes, sir.

Q. Did you know that they were at the expressman's place when you went to Loesser's office? A. No, we didn't know where they were.

Q. And then when you got to the expressman's place with Mr. Loesser, senior and junior, and Mr. Schmid, did you examine the boxes there? A. Some of them we examined.

20 Q. Did Mr. Loesser, senior or junior, say anything with reference to them?

Mr. English: I object to that on the ground that conversations after institution of the suit are immaterial.

The Court: Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 A. Mr. Loesser, senior, said, "You are right, Mr. Schmid, there are quite some boxes in here that should never have been delivered to you."

Q. What was the matter with them? A. They had a different colored part, they had red bottoms and yellow tops or the reverse.

Q. Do you recall anything else that was said after that? A. We talked about—

Objected to.

*Carl A. Kroenig, direct.*

Q. Did Mr. Loesser make a demand for the amount that he said was due him?

Objected to as leading.

The Court: Ask him what was said.

The Witness: Mr. Loesser did not say anything in the shed there of the expressman, but we went back to the office. He didn't say anything different about refinishing the boxes in the expressman's shed, but when we got back to the office—

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Mr. English: I object on the same ground.

The Court: The objection is overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. When we got back to the office, he said, "Well, Mr. Schmid, I tell you what we do. You pay us what you owe us and we will refinish the boxes." I said, "How can you refinish those that have different colored parts, you can't make red yellow and yellow red." So they were talking to each other and Mr. Loesser, junior, mentioned, "Well, we can brass plate them, put them through a brass plating process." He said, "That would, of course, make the two parts alike, because they go in a galvanic bath, they would come out alike, the two parts." And I said, "Have you ever tried that?" And he said, "Yes, we did that with a lot of other boxes." I said, "All right, if you make them alike that is all I want. I don't care what you do, whether you brass plate them or anything else, it does not concern me." Mr. Loesser said, "Now, Mr. Schmid, we will put those boxes in shape, but you have to pay what you owe us." Mr. Schmid said, "We can't do that, that is out of the question,

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*Carl A. Kroenig, cross.*

10 because we returned I guess about eighty-two hundred dollars worth of merchandise and your account against us is \$1,800, so how can we pay you that you will make good on the \$8,200?" The thing was not settled definitely that night. Both parties thought, "All right, we will give it another thought," and then Mr. Schmid and I went back to New York.

Q. After that did you still continue to do business with the Loesser people? A. We did not.

*Cross examination by Mr. English:*

Q. What did you say your position was with the Schmid Company? A. To-day I am the manager of the toilet goods department.

20 Q. I mean back in 1920 and 1921? A. 1920 I had charge of the manufacturing department and of the purchasing of the supplies pertaining to the toilet department.

Q. What is the business of Schmid & Company? A. Importing and manufacturing.

Q. What? A. We are importing rubber goods, principally rubber goods from Europe, and in this country we manufacture toilet goods, rouge, face powder, eyebrow pencils, and powder puffs.

30 Q. Do you manufacture rubber goods in this country? A. No, sir.

Q. You are familiar with making these contracts in suit; are you not? A. I didn't make the contract but I am familiar with the conditions.

Q. Did you issue those requisitions with the numbers on which are set up in your bill of particulars? A. I didn't send them.

Q. Did you make them out? A. No; a girl made them out on the typewriter. I remember at the time I was not connected—in March, 1919, I was

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*Carl A. Kroenig, cross.*

not connected yet with the manufacturing end of the toilet goods department. I was helping the purchasing man and Mr. Schmid asked me to look over their orders and see if they were made out in accordance with the orders of the customers.

Q. You looked them over? A. I did.

Q. Here is 6385 and 6386 for Hillrose. Do you recognize them? A. Yes, sir. 10

Mr. English: I will offer them as part of my case.

(Marked Ex. P-17 for identification.)

Q. I show you numbers 6391, 6392, 6393 and 6394, Marinelli. Do you recognize those? A. Yes, sir.

Q. Those are the ones you talked about on your direct examination? A. Yes, sir.

(Paper referred to is marked Ex. P-18 for identification.) 20

Q. As I gather from what you said, when you had a customer who wanted some of your preparations you would order up a set of boxes from the Loesser Manufacturing Company to put the preparation in? A. Yes, sir.

Q. If anything happened that your customer didn't want stuff just then you had the boxes on your hands? A. But there is a reason why we had boxes on our hands, because we weren't able to any time— 30

Q. Answer my question.

The Court: This is cross examination. Counsel is entitled to a strictly responsive answer.

Q. On March 19, as appears from those orders

*Carl A. Kroenig, cross.*

that I have just shown you, you ordered under this contract a large quantity of goods? A. Yes, sir.

Q. Did you at that time anticipate orders from your customers or did you have orders? A. We had orders.

10 Q. But you didn't have orders from your customers for all the goods mentioned in those orders? A. We had orders for all of them, but not for immediate delivery.

Q. You would like to time it so that when the boxes came in you could fill up your boxes and send them out? A. Yes, sir.

Q. It wasn't your practice to examine these boxes except that you handled them for immediate use to fill up your orders? A. We examined the boxes whenever we needed something.

20 Q. When you needed a box for use to fill up an order for your customer then you would examine the boxes? A. Yes, sir.

Q. And the rest of the time you put them on the shelf? A. Yes, sir.

Q. The goods that were mentioned in those orders that we are talking about, P-16, 17 and 18 for identification, were all sent in, as I understood your testimony, during the month of July and August; is that correct? A. A small part in September.

30 Q. You didn't tell us any such date.

The Court: He gave us to September.

Q. Yes, to the end of August. So at the 1st of September they had all been received; is that right? A. The Hillrose and the Marinelli; there may have been a small balance of a thousand or five hundred or something. They didn't come in August, but they came in in September.

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*Carl A. Kroenig, cross.*

Q. But practically all up to the 1st of September?

A. Yes, sir.

Q. Then out of that same quantity of boxes which came in July and August and a few in September, that you afterward sent back to Mr. Loesser's company in August of 1921? A. I didn't understand the question fully.

10

Q. Do you know these orders, that I call 17 and 18 for identification, calls for Hillrose and Marinelli boxes, were sent out under date of March 19, 1920? A. Yes, sir.

Q. And they called for those at various times?

A. Yes, sir.

Q. As I understood you, all the boxes called for in those orders were received at your business not later than the first week in September? A. Yes, sir.

20

Q. That is true? A. Yes, sir.

Q. Is it not true that that large quantity of boxes received in August of the next year, 1921, you sent back to the Loesser Company, the quantity of Marinelli and Hillrose boxes which you now claim in your counterclaim, and which is the subject of this dispute? A. Yes, we returned them, but not for the first time.

Q. What I am trying to find out is if it is not true that of the goods that were shipped at the time, in July and in August, 1920, you shipped back to the Loesser Company in 1921, a year afterwards, and now make that the basis of this dispute and counterclaim. That is true, isn't it? A. Yes, sir.

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Q. You didn't examine these boxes which you afterwards sent back until the spring of 1921? A. No, we examined them sooner. We examined some of them right after we got them.

40

*Carl A. Kroenig, cross.*

Q. I don't mean that. I mean those that are now the subject of dispute? A. Yes, those that are the subject of dispute, we examined right after we got them.

Q. They were all fixed up? A. I don't understand what you mean.

10 Q. You said in answer to your counsel's question, this sort of give and take process back and forth, and when you called attention to some boxes which may have been defective they were fixed up by the Loesser people? A. Yes, sir.

Q. And you also told him that it was not until May of 1921, that any question arose about who was to pay for them and they sent you a bill which you say they afterwards tore up? A. Yes.

20 Q. What I am trying to find out, do you mean now, first it is not true that it was not until May of 1921 that you examined any of those boxes which are now the subject of this dispute? A. No, we examined some of them sooner. In fact, we returned some sooner to Loesser.

Q. That was all taken care of? A. Whatever we returned was all taken care of either by refinishing or giving us credit for it.

30 Q. You didn't examine the ones which were taken care of and hence are now the subject of this dispute earlier than in May, 1921? A. Some of these that were returned in May were examined since May, but we didn't return them immediately. We let them lay there until we would make another return and make it worth while.

Q. So it was in May, 1921, the first time you called attention of the Loesser Company to these boxes which you now make claim as part of your counterclaim, is that true? A. We returned some of the boxes previous to May.

40

*Carl A. Kroenig, cross.*

Q. Yes; but they were taken care of. I am asking about the ones that were not taken care of. It was not until May, 1921, that you called their attention to any boxes which were not afterwards taken care of? A. They were taken care of to the extent that they refinished them, but I wouldn't admit they were perfect when we got them at the time. 10

Q. In May, 1921, you did send back the Marinelli boxes? A. Yes, sir.

Q. And they were refinished? A. They were refinished.

Q. And the Loesser Company sent a bill which you say they tore up? A. It was cancelled. Whether it was torn up, I don't know.

Q. I happen to have it here. Do you recognize it? A. That is the one. I brought it back to Loesser's office. 20

Q. That has already been marked Exhibit P-13 for identification. Is that right? A. Yes, sir.

Adjourned until Thursday, October 25th, 1923, at 10 o'clock A. M.

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SECOND DAY.

October 25th, 1923.

Continued pursuant to adjournment. 30

Present, counsel as before stated.

CARL A. KROENIG resumes the stand:

*Cross examination (continued) by Mr. English:*

Q. Mr. Kroenig, yesterday, in response to your counsel's question, you mentioned certain orders for Marinelli, Hillrose double compacts. You didn't mention an order for Adormeé boxes which are 40

*Carl A. Kroenig, cross.*

also set up in your counterclaim. I show you an order, No. 490, 2/14/21, for, among other things, 5,000 double boxes Adormeé. That appears to be signed by you, that is correct? A. Yes, sir.

10 Q. Can you tell us when those goods were delivered? A. Yes, they were delivered between the dates of March 1, 1921, to March 10, 1921.

Q. They got them out within less than a month after the order; is that true? A. Yes, the order was placed on February 14th, yes.

Q. Before that, in September to November previous, you had bought some 8,000 of the same Adormeé boxes? A. I would have to refer to my orders, but I believe so.

(The paper referred to is marked Exhibit P-19 for identification.)

20 Q. You are aware, of course, that your company paid for all these boxes which were ordered back there in June, July and August, are you not? A. What year?

Q. 1920, I am speaking of? A. Yes.

Q. Also paid for this last order which I just showed you, these Adormeés? A. I don't know whether they were paid for or not.

30 Q. Your counterclaim admits it, have you any disposition to dispute it? A. No.

Q. As I understood you yesterday, you didn't open those Marinelli boxes until some time in the spring, is that correct? A. No, some of them were opened immediately upon arrival, some of them.

Q. And others you let go awaiting orders from your customers? A. We had orders from our customers, only not for immediate delivery.

Q. Did any of your customers go back of their orders with you? A. In some instances, due to the

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*Carl A. Kroenig, cross.*

fact that the Loesser Company didn't deliver them in time.

Q. It is a fact that some of your customers went back on their orders to you? A. They did.

Q. When was that? A. I remember one particular instance, the Lavalliere Company in New Orleans, they cancelled 5,000 double boxes because Loesser only delivered—

10

Q. Wait a minute? When was that? A. Some time in December, 1920.

Q. That was December of 1920? A. Yes, sir.

Q. And what kind of boxes were they? What was the name of them? A. Lavalliere boxes.

Q. Give us the name of some other customers that cancelled orders on you. A. Well, I will tell you. I haven't got the facts. I can't memorize them. This happens to be one that I recollect.

20

Q. What is that? A. This happens to be one that I recollect, but the others I can't recollect. I would have to refer to correspondence.

Q. But there were others, were there not? A. I may find some here among these orders which I have.

Q. These boxes were all of the shape which I show you, one of these Adormée boxes, were they not? They were all of a general shape? A. Yes, sir.

30

Q. Of course, the name is different, I understand that. A. The name and the finish.

Q. An elongated shape with two little compartments inside A. Yes, sir.

Q. This particular shape has gone out of style, hasn't it? A. It wenth out of style about a year ago.

Q. That would bring us back into 1922. Did they go out of style earlier than that? A. No. In

40

*Carl A. Kroenig, cross.*

fact, we have been selling some lately, but with the trade in general they have not been as popular as they were for about a period of one year back.

Q. The round boxes have taken their place? A. Some other styles have come up, some round boxes.

10 Q. The most popular style which superseded this earlier style is a round box? A. Yes, but only for a year back.

Q. Here is a round box which I understand is a double round box, seems to have two lids to it. That is the thing that I show to you, which is a round one, which later superseded this style that you had been dealing in back in 1920 and '21? A. This is one of the styles.

20 Q. You refer to the round one? A. Yes, sir; there are several patent rights, of course.

Q. These round ones and other styles began to come in in 1921, did they not? A. We never had one in 1921.

Q. You didn't quite understand my question. I ask you, leaving out what you personally might have dealt with your company, didn't this round style begin to show itself during the year 1921? A. To my knowledge, the first one came up some time in April or May, 1922.

30 Q. That is the first time that it came to your attention? A. That is the first time it came to my attention; yes, sir.

Q. You remember that in January, 1921, you made a new contract, or your company made a contract with the Loesser people? A. Yes, sir.

Q. That is in evidence, that contract, dated January 31, 1921. You remember at that time Mr. Loesser, junior, suggesting to you that you might

*Carl A. Kroenig, cross.*

better consider a change of style, that those round boxes were coming in now and would probably supersede these elongated boxes. Do you remember his discussing that with you? A. I do not.

Q. You don't remember that? A. I do not.

Q. I showed you last night as Exhibit P-15 for identification a copy of your debit memorandum dated August 5, 1921. That is a carbon copy, that particular paper, isn't it? A. Yes, sir. 10

Q. (Showing witness paper.) Now, I show you what purports to be the original of that paper, August 5th, 1921. That is it, that which I now show you? A. Yes, that is the original.

Q. That was sent with the goods? A. Not with the goods. It was sent the same day or the day afterwards.

Q. You sent a sort of shipping receipt or paper along with it. I show you a paper, a yellow paper, headed "Requisition." That accompanied that last previous paper I have shown you, didn't it? A. Well, I don't know. That must have been in one of the carbons. 20

Q. Well, it came from your office, that is what I mean? A. Yes, came from our office.

Mr. English: I would like to have marked for identification the original debit memorandum of August 5, 1921. 30

(Paper referred to marked Exhibit P-20 for identification.)

Q. What do you call this paper? A. Packing slip.

Q. Also the packing slip which accompanied the goods mentioned in the debit memorandum which is dated August 4, 1921? A. Yes, sir.

*Carl A. Kroenig, cross.*

(Paper referred to is marked Exhibit P-21 for identification.)

Q. In the summer and fall of 1920 your company was doing a pretty large business in these things, wasn't it? A. We were.

10 Q. And that business somewhat fell off in 1921, didn't it? A. Yes, due to a general slackening towards the end of 1920.

Q. That resulted in some of your customers cancelling their orders with you, didn't it? A. Not cancelling, but asking for postponement of shipment.

Q. That resulted in your being stocked up with more of these boxes than you could really use at the time? A. We couldn't use the boxes as fast as we had anticipated.

20 Q. And at the same time it resulted in your company getting very much behind in its payments to the Loesser Company? A. Yes, because the Loesser people delivered the boxes too late—

Q. Wait a minute. It did result in your getting behind? A. Exactly what was the cause I don't know.

Q. But you were behind, were you not? A. I had nothing to do with the credit.

30 Q. But, as connected with the company, you know, as a matter of fact, that along in May, 1921, your company was some eight or nine or ten thousand dollars behind? A. Loesser claimed—

Q. Will you please answer my question. Do you or do you not know that? A. I don't know that.

Mr. English: Mr. Macay, will you please produce a letter of May 2, 1921, together with a statement which was attached.

(Defendant's counsel produces paper.)

*Carl A. Kroenig, cross.*

Q. Do you know how many thousands of boxes you bought from the Loesser people? A. I don't know.

Q. You bought many? A. Yes, sir.

Q. Different names, beside these names that we have been talking about here? A. Yes, sir; maybe about fifteen different names; I don't know.

10

Q. It ran into a great many thousand boxes, didn't it? A. Yes, quite a number.

Q. Your order was for five thousand to a million? A. Yes, sir.

Q. In lieu of the original, I show you a copy of a letter from the Loesser Company to your company dated May 2nd, 1921. Did that come to your attention? A. It didn't.

Q. But did you hear of it, if you didn't see that letter? A. I couldn't tell.

20

Q. Did you learn of the fact that this letter called attention to the fact that your company owed the Loesser Company \$9,924.09 and sent a bill? A. I hardly think it was ever brought to my attention, because I had nothing to do with credits.

Q. Did Mr. Schmid ever discuss it with you? A. No.

Q. You know as a matter of fact that your company was pretty badly behind on payments, didn't you? A. I knew that Loesser claimed that we were behind.

30

Q. Now you know it is a fact as well as a claim? A. No, the fact I wouldn't admit, only the claim.

Mr. English: I would like to have the letter of May 2nd, together with the statement attached, marked.

(Papers referred to are marked Exhibit P-2.)

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*Carl A. Kroenig, cross.*

Q. Whether you admit the fact or not, do you know as a matter of fact that your company gave certain notes to Mr. Loesser's company? A. I heard of some notes.

Q. Which notes were paid? A. Yes, sir.

10

Mr. Mackay: In order to save time, we will admit all those. We will admit that they were behind in their payments and that these notes were given in June, as Mr. English says.

20

Mr. English: By consent of counsel, I will offer in evidence a typewritten statement. The schedule gives the issuance of the note in each case, June 26th, sets up the amount of the note, which in each case is \$1,252, except the variation of one cent, and the due date it was receivable, July 15th, August, September, October, November and December 15th, each, and the schedule also shows the date of it, which was the due date.

(Paper referred to is marked Exhibit P-23.)

Q. You had some trouble with tarnishing, you said? A. Well, we hadn't any trouble with tarnishing. Loesser's boxes were tarnished.

30

Q. You say some of the boxes tarnished? A. Yes, sir.

Q. You said you dealt in rubber goods, too, your company? A. Yes.

Q. And you had quantities of rubber stored in your place? A. Not in the same place where we had the boxes.

Q. How near? A. The boxes were on the fifth floor and the rubber goods were on the third floor.

40

*Carl A. Kroenig, cross.*

Q. Never came together? A. Never.

Q. You know, as a matter of fact, rubber tarnishes brass, don't you? A. I do.

Q. You had some trouble with a puff in the summer of 1921? A. Not with the boxes at issue.

Q. That was not my question. I asked you if you had some trouble? A. We had a suspicion that a puff had caused some tarnishing of one particular style of box, but I was never absolutely satisfied that it was the puff did it. It was only suspicion. 10

Q. Whether the suspicion was well founded it was important enough for you to take it up with the Loesser people to see if it would work in some of the boxes, a new puff? A. I suggested to the Loesser Company to lacquer their boxes on the inside— 20

Q. Wait a minute. My question is whether you didn't take up with the Loesser people a sample of a new kind of puff to find out whether it would be satisfactory to work with their boxes in the hope that it wouldn't tarnish? A. It was—

Q. Did you or did you not? A. The Loesser mills—

Q. Did you or did you not? A. I can't answer your question.

Q. Look at your letter of July 26, 1921. Is that signed by you? A. Yes, I want to explain it, but you wouldn't let me. 30

Q. This says, "Enclosed please find samples of a wool puff which we can insert in the lady Esther boxes with the reasonable assurance that it would not tarnish?" A. Yes, I said that. I suspected certain puffs might tarnish a box.

Q. You suspected it somewhat and said a new 40

*Carl A. Kroenig, cross.*

puff you were reasonably certain would not tarnish. That is correct? A. Not the way you ask me. It is not correct.

Q. What is not correct? A. You say, "I went out and bought some new puff"—

10 Q. Didn't you investigate this matter of puff?  
A. When I had some trouble with some boxes one day tarnishing I had some kind of theories—

Q. You did investigate? A. I made experiments, yes.

Q. Well, you call it experiments, I call it investigation. A. All right.

Q. Were you the person that bought these boxes for your own use? Were you familiar with the sales and prices and all that? A. I was familiar with the sales and prices.

20 Q. Yes. A. In what respect?

Q. Just in the general knowledge, line of business. Was it within your knowledge what the prices of these various products were on the market and what you could buy them for? A. Yes, I knew that.

Q. The prices of these things went down in 1921, they became cheaper? A. With some people.

30 Q. So that it was possible to go out in the market and buy these things cheaper by contract price, which had been made some months previous to that time, is that not true? A. Only from irresponsible firms.

Q. Whether responsible or irresponsible, is that the fact? A. It was possible to get boxes for less money, but not satisfactory boxes.

Q. You found that your salesmen, when they went out to do business, were confronted with the facts that your customers could buy boxes elsewhere. It might have been these boxes that you

*Carl A. Kroenig, cross.*

were selling them? A. We got reports to that effect.

Q. I suppose when you billed the goods to your customer you had to make a profit on a box and the contents of the box, didn't you? A. Yes, sir.

Q. And you were met with the fact that your customers could go out and get these boxes cheaper than you? A. Yes, sir; in some instances they could. 10

Q. So much so that you wrote a letter to the Loesser people in which you said, "Our salesmen are being confronted with the fact that these customers can buy boxes cheaper and it make us look funny?" A. We did.

Q. So you, having made a contract a year or more previous, and the price having changed, you now found in May, 1921, you were in the position of having a large quantity of goods on hand, and the price had gone down? A. The price— 20

Q. Pardon me. Where you had a large quantity of these boxes on hand, that the prices had gone down over the contract price, which you had made, according to the contract in evidence? A. It didn't affect us because we had orders.

Q. (Question read.) A. It didn't affect us because we had these boxes sold—

The Court: I will have to strike that out. I told you that counsel is entitled to a strictly responsive answer. If any explanation is necessary your counsel will allow you to make the explanation. 30

The Witness: I don't know how to answer it otherwise.

The Court: However, that seems to be a statement, rather than a question.

*Carl A. Kroenig, cross.*

Q. Isn't it true that in May, 1921, your company had on hand a large quantity of boxes which it had ordered either in March, 1920, or January, 1921, pursuant to the orders in evidence, and that in May of 1921 the price for that kind of box had gone down? A. Not in general. It had gone down only with some manufacturers whom I wouldn't have considered competent.

Q. You considered the Loesser Company competent? A. I considered the Loesser Company competent up to sometime in May, 1921.

Q. Up to this you considered them competent? A. I did.

Q. In May, 1921, you wrote them that you had learned that the Loesser people were selling boxes to your customers cheaper than you had gotten them from them under your contract? A. Not cheaper than we had got them under the contract, but cheaper than we were selling them.

Q. In other words, the Loesser Manufacturing Company sold them cheaper than you could at a profit, cheaper than you had bought them from the Loesser Company? A. Yes, I was told that Loesser offered boxes cheaper than we could sell them.

Mr. English: I offer in evidence letter of May 13, 1921, which is the letter I have just shown the witness.

(Letter referred to is marked Ex. P-24.)

Q. You know Leber Brothers of Toronto? A. I know them from some business dealings we had with them.

Q. Mr. Schmid said you were the man who handled the business with them. That is true? A. Yes, sir.

*Carl A. Kroenig, cross.*

Q. Do you remember writing them a letter under date of May 19, 1921? A. I wrote them several letters.

Q. Do you remember sending a carbon copy of one of your letters to them, to the Loesser Company? A. I do.

Q. Your letter dated May 19, 1921? A. It may be about that date. 10

Q. I show you a carbon copy of such a letter. That is a carbon copy of a letter that you sent the Loesser Company, is it not? It seems to have your initials "C. K." in the corner? A. Yes, I wrote that letter.

Q. And Leber Brothers had been inquiring of you for some reputable metal box manufacturers? A. They—

Q. Had they or hadn't they? A. They hadn't. They— 20

Q. You have answered the question. Why did you advise them as to where they could get good metal box manufacturers? A. They had asked us for a quotation on packages complete and I wrote them inasmuch as we were not box manufacturers, I would suggest that they buy them direct from the manufacturer.

Q. And you were met with the fact that your customers could go out and get these, you recommended the Loesser people to them? A. Yes, sir. 30

Q. And you said, "We are not metal box manufacturers, and have turned the matter over to the Loesser mills whom we have been doing business with for sometime and whom we can conscientiously recommend as giving good service."

Mr. English: I offer in evidence the letter to Leber Brothers, dated May 19, 1921.

(Paper referred to is marked Ex. P-25.)

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*Carl A. Kroenig, redirect.*

*By the Court:*

Q. Was that letter written before or after your disagreement with the Loesser people about the Marinelli boxes? A. Before our disagreement.

10 Q. I thought you said that that disagreement occurred in May, 1921? A. In the latter part of May we had some disagreement as to whether they were entitled to charge us for refinishing or not, but this letter was written before we received Loesser's invoice for refinishing.

Q. Up to that time had there been any charges by Loesser for refinishing? A. No, sir.

Q. And when did you get a charge from Loesser for refinishing products? A. As I recollect, sometime toward the end of May, 1921.

20 *By Mr. English:*

Q. The very day you wrote that letter you got a bill from Loesser for the refinishing of those Marinelli boxes. Is that the same date? A. The bill is dated and received the same date.

Q. Is that the same date? A. The bill is the same date.

*Redirect examination by Mr. Mackay:*

30 Q. I understand that prior to May 19, that Mr. Loesser had not charged you for refinishing any of the boxes that had been returned? A. I am not absolutely sure. He might have charged for some small quantity, but the bill was not recognized. It was cancelled, but I don't know whether any were paid. I believe there were notes, but I wouldn't be absolutely sure.

Q. Prior to that time had you been receiving orders at the time from your customers that you

40

*Carl A. Kroenig, redirect.*

had been fulfilling? A. What do you mean, orders cancelled?

Q. Orders that you had billed? A. Cancellations?

Q. Cancellations. A. Then we received cancellations.

Q. When you received those cancellations what did you do? Did you notify Mr. Loesser in any way? A. Whenever we received a cancellation and we had some boxes on back order we cancelled the remaining portion. 10

Q. So you took it up with Loesser each time? A. Yes, sir.

Q. So everything went along all right until May, when the dispute arose as to the amount they were going to charge you for refinishing? A. Yes. We had some little dispute, but nothing very serious. 20

Q. Had you been complaining about these orders that you were sending in?

Mr. English: I object. I think that is an improper question.

The Court: I think whether or not it was a complaint would depend upon what was said. I think it was suggested during the direct examination that the conversation should be given and the jury can determine whether or not it was a complaint. 30

Q. When you looked at Exhibit P-13 a minute ago, that Mr. English showed you, is for the same date as the letter you wrote to Loesser Brothers. At the time you wrote that letter did you receive that bill? A. No, we didn't have that bill.

Q. You didn't have it at that time? A. No, we got it on the 20th or 21st.

*Carl A. Kroenig, redirect.*

Q. When you got that, is that when your dispute began to arise between you and Loesser? A. Yes, sir.

10 Q. And it continued from that time on? A. We paid matters by a little letter, but then we had other occasions. We were getting some very poor deliveries from defective boxes and we had more disputes from then on than we had previous to that.

Q. And Mr. English asked you the name of one of the customers that had cancelled orders and mentioned some Lavalliere company? A. Yes.

20 Q. Why was that order cancelled? A. The customer placed the order with us in March, 1920, and he expected delivery by the 1st of June, the latest. In fact, that is what we had promised to him, on the strength of our contract with Loesser, and then we didn't get any boxes on the first requisition that they had placed with us before September 17th, and they said—

Objected to.

Q. No, don't tell us what they said. When did you receive the boxes? A. We received the first lot on November 17, 1920.

30 Q. And they had been ordered when? A. March 19, 1920.

Q. And had the entire order been filled at that time? A. No, we got the entire order in between the dates of December 17th and December 24, 1920.

Q. In 1921 Mr. English asked you if it wasn't a fact that the boxes could be bought cheaper, that they were being sold cheaper than you were buying them from Loesser, on your direct examination, and I believe you said that was so. A. Some boxes could be bought cheaper.

40

*Carl A. Kroenig, redirect.*

Q. Did you buy boxes at any other place at that time?

Objected to as immaterial.

A. No.

Q. You didn't buy them any other place? A. No, we didn't.

10

Q. Although you could have bought them cheaper than you were buying them?

Objected to.

The Court: The question may be answered.

A. Yes.

Q. He asked you about some trouble that you had with a powder puff? Are you still using that puff? A. We use it in some instances, yes.

20

Q. Still use it? A. Yes.

*By the Court:*

Q. Had that puff, or any of those puffs of which you had your suspicion that they had a tarnishing effect, been used in the boxes that were sent back?

A. They were not. We didn't use these puffs in any of the boxes. We sent back—I mean, the boxes were sent back in August, 1921, the boxes, in other words, which are at issue, over which the litigation started.

30

Q. Was there any attempt made at all to take these boxes? As I understand it, you purchased these boxes and put in them your products and sold them after the powder and rouge and whatever goes in it had been put in, did you? Is that right? A. Yes, sir.

Q. You didn't sell the boxes just as you got them

40

*Carl A. Kroenig, redirect.*

from the manufacturer, did you? A. We did not. We filled them up with our products.

Q. These boxes that were sent back in August, had your products been in any of those boxes? A. They had not, no, sir.

*By Mr. Mackay:*

10

Q. How did you fill the orders to your customers? When did you fill those orders? A. Well, if we had boxes we filled them as they called for them, and when we got the boxes too late we filled some orders when we got the boxes in.

Q. In other words, when—

Objected to as leading.

20

Q. Did you fill your customers' orders from the boxes you got from Loesser as soon as Loesser made deliveries to you? A. No, only in some instances we did where the order for immediate delivery calls for as many boxes as we received from Loesser at the time. If, however, Loesser's deliveries amounted to more than what our shipping instructions, immediate shipping instructions amounted to, we only shipped a portion, for which we had an order from the customer.

30

Q. In filling that order what did you do if you found any defective boxes? A. Well, sometimes when we found many defectives, or the whole lot was defective, we returned them immediately, and when the proportion was not too large we just kept them there until we would accumulate some more to make it worth while to return, or, rather, to make it worth while to put them through the refinish period.

*By the Court:*

40

Q. To what period does this answer that you

*Carl A. Kroenig, redirect.*

have just made apply? A. It applies to the period from about August, 1920, to August, 1921. In other words, from the time Loesser started making deliveries to us.

Q. Did you send any of these defective boxes out to customers? A. In one or two instances, I believe our operators had filled some boxes which were not in perfect condition and on which we afterwards received a complaint from the customer. 10

Q. And were there any times when the boxes were sent out that the customers notified you that they were not perfect? A. Yes.

Q. And when you got that notification from your customer what did you do? A. I notified Loesser.

Mr. English: It seems to me that this evidence ought to be limited to the claim set up in the counterclaim. That is the only case we are trying here. 20

The Court: The answer may remain.

Mr. Mackay: I would like to offer a number of letters, correspondence between the parties. Mr. English has no objection to these letters that I have in my hand now, and I will offer them in bulk, and I offer letters February 1st, 1921, to August 23rd, 1921. 30

(Papers marked Exhibit P-26.)

*By Mr. Mackay:*

Q. I show you a letter dated March 21, 1921, and ask you if you recall that letter? A. Yes, I do.

Q. Was that sent to the Loesser Manufacturing

*Carl A. Kroenig, redirect.*

Company in the ordinary course of business? A.  
Yes.

Mr. English: I do not dispute any fact like that.

Mr. Mackay: I offer that letter.

10 Mr. English: I object to this letter because it relates to a matter that has nothing whatever to do with this case. Counsel need not prove that they were sent in the ordinary course of business. I don't dispute them. Just make your offer by the date.

The Court: What is the relevancy of this?

20 Mr. Mackay: Reading from the complaint, it says that during the years 1920 and 1921 the plaintiff was engaged in the business of manufacturing vanity powder boxes; that the defendant on March 19, 1920, made an agreement with the plaintiff, its agent and servant, wherein the plaintiff was to manufacture, and so forth. I contend on that contract, and the evidence before the court, that there were several orders sent in under this contract of March, 1920, and we are not confined to any particular style or name, if we come within the scope of  
30 any orders given under this original contract of March, 1920, and that letter is offered for that purpose, to show the dealings between the parties subsequent to the making of this contract.

40 The Court (after discussion): If you think this is important, I suggest that you have it marked for identification, because my inclination is to sustain the objection. It may be marked for identification.

*Carl A. Kroenig, redirect.*

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Paper referred to is marked Exhibit P-5 for identification.)

Mr. English: I offer letter of March 28, 1921, from Julius Schmid to E. Loesser mills. 10

Objected to as incompetent and immaterial.

The Court: This one will be admitted.

(Marked Exhibit D-6.)

Mr. English: I offer a letter dated March 29, 1921, from Julius Schmid to E. Loesser mills.

Objected to as immaterial and irrelevant.

The Court: The objection will be sustained. 20

(Marked D-7 for identification.)

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: I offer letter dated April 1st, 1921, from Julius Schmid, Inc., to E. Loesser mills.

Mr. English: I object to it as incompetent and immaterial and call your Honor's attention to the fact that it relates to the same subject matter that your Honor ruled out. 30

The Court: The objection will be sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Marked Exhibit D-8 for identification.)

Mr. Mackay: I offer copy of letter from 40

*Carl A. Kroenig, redirect.*

Julius Schmid to E. Loesser mills dated April 16, 1921.

Mr. English: I object to it as immaterial and irrelevant.

The Court: Objection sustained.

10 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Marked Exhibit D-9 for identification.)

Mr. Mackay: I offer letter dated May 11, 1921, from Julius Schmid, Inc., to E. Loesser mills.

Mr. English: I object to that as immaterial and irrelevant.

The Court: The exception will be sustained.

20 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Paper referred to is marked Exhibit D-10 for identification.)

Mr. Mackay: I offer copy of letter from Julius Schmid, Inc., to E. Loesser mills, dated May 14, 1921.

Mr. English: I object to it as incompetent, irrelevant and immaterial.

30 The Court: The objection will be overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Paper referred to is marked Ex. D-11.)

40 The Court: I suppose counsel understands the theory upon which I am admitting them and overruling them. This speaks of imperfections, which is one of the defenses in this suit. The others relate only to the

*Carl A. Kroenig, redirect.*

matter of delay, and that is what I am excluding.

Mr. English: The point of my objection is that it has nothing to do with the matter set up in the bill of particulars.

Mr. Mackay: I offer letter of December 12, 1921, from Julius Schmid, Inc., to E. Loesser mills. 10

Mr. English: I object to it as incompetent, irrelevant and immaterial and for the additional reason that it is a letter written after the suit was brought.

The Court: You do not introduce this as part of correspondence containing any admissions on the other side not in reply to it.

Mr. Mackay: I introduce that as correspondence between the parties and also in corroboration of the testimony of Mr. Schmid and Mr. Kroenig. 20

The Court: The objection will be sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Letter referred to is marked Ex. D-12 for identification.) 30

Mr. Mackay: I offer letter of December 1, 1921, from Julius Schmid to E. Loesser mills, together with registered receipt attached thereto.

Mr. English: I object to it as incompetent, irrelevant and immaterial and for the reason that it was after the suit was brought and comes within the ruling made on the last offer. 40

*Carl A. Kroenig, redirect.*

The Court: The objection will be sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.  
(Marked Ex. D-13 for identification.)

10 Mr. Mackay: I offer letter dated January 5, 1922, from McCarter & English to Julius Schmid, Inc., together with a copy of a letter from Julius Schmid, Inc., to E. Loesser mills and registered receipt attached thereto.

Mr. English: I object to both letters as being incompetent, immaterial and irrelevant and that it was after the suit and comes within your Honor's ruling just made sustaining my objection.

20 The Court: It will be admitted.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.  
(Paper referred to is marked Ex. D-14.)

*By Mr. Mackay:*

Q. Mr. Kroenig, what in your opinion would be a reasonable time to determine whether or not these boxes delivered were in good condition?

30 Mr. English: I object to that.

The Court: Objection sustained. I think that is a question for the jury to determine, after a statement of the facts as to their handling, where they were, and it may be possible that it would be in some instances proper to state the reasons for the lapse of time. I do not want to decide that now because it may be objectionable.

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*Carl A. Kroenig, recross.*

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Recross examination by Mr. English:*

Q. In the thousands of boxes which you bought from the Loesser people, as some of those letters show, there would occur now and then some little defect? A. Yes, sir. 10

Q. And in many cases your company called the Loesser company's attention to that and it was corrected; that is true? A. Yes, sir.

Q. And that was always done before the bill went through and was paid? A. I am not sure as to that.

Q. Except the Marinelli boxes which are set up in the bill Exhibit P-13 for identification, which bill was afterwards cancelled, that is true? A. No, I passed bills through many times, and I think they were found paid, those bills, before I sent back defective boxes pertaining to that lot. 20

Q. If it was corrected after it was by agreement between your company and the Loesser Company? A. Yes.

Defendant Rests.

Mr. English: I am going to move for a nonsuit on the ground that there is no proof of damages. 30

The Court: As to the state of the proofs that have been offered, I think I will have to grant the motion.

Mr. English: There is nothing in those letters bearing upon this.

Mr. Mackay: I would like to refer to Mr. Kroenig's testimony. I have a recollection

*Carl A. Kroenig, direct.*

of his saying that he did not pay this one bill that they wanted because there was enough goods in their possession.

10 Mr. Mackay (After argument.): I would like to reopen the case and put Mr. Schmid on the stand as to the quantities. I have an exhibit here. I recollect Mr. Kroenig referred to it.

The Court: Whose credit memorandum?

Mr. Mackay: Julius Schmid's credit memorandum for the boxes returned, a debit memorandum for the defendant. I am not sure that it is in evidence.

20 The Court: That would seem to justify my recollection of Mr. Schmid's testimony. You may take whichever course you think best. If you want to reopen your case, you may do so.

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CARL A. KROENIG, recalled in behalf of the defendant.

*Direct examination by Mr. Mackay:*

30 Q. (Showing witness paper.) I show you Exhibit P-20 and ask you what that is? A. That is a memorandum issued by Julius Schmid, Inc., charging the Loesser mills with the return of 8,730 Marinelli boxes, 4,510 Hillrose boxes and 3,276 Adorméé boxes, returned to the Loesser mills on or about August 5, 1921.

Q. Are these boxes that are in dispute in this case? A. They are.

Mr. Mackay: I offer that as an exhibit for the defendant.

The Court: It is in evidence.

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*Carl A. Kroenig, cross.*

*Cross examination by Mr. English:*

Q. You are familiar with the bill of particulars annexed to the counterclaim, are you not, which your lawyer filed in this suit? A. Not with the particulars.

Q. (Showing witness paper.) I show you your lawyer's office copy he served on me as the bill of particulars. You see this entry of August 5, 1921, debit memo? A. Yes.

10

Q. Referring to Marinelli, Hillrose and Adormeé double? A. Yes, sir.

Q. It is identically the same thing as referred to in your testimony? A. Yes, sir.

Q. Taken from it exactly? A. Yes, sir.

*By the Court:*

Q. What do these figures mean on this debit memorandum P-20, Mr. Kroenig? I mean the figures following the names of the boxes? A. The word "double."

20

Q. No, the figures following? A. That is the price per thousand.

Q. What price? A. \$185 a thousand is not what Loesser originally billed us with, the contract price for those particular style of boxes.

Q. What do you know, if anything, of your own personal knowledge, of the condition of those boxes that were returned under this invoice, debit memorandum of August 5th? A. Yes.

30

Q. What do you know about it? A. A great percentage of the boxes were made of two different colors of metal. The bottom of the box in some instances was of a copperage look—

Q. Yes, you have testified to that in your former examination and you testified to spots on them and discolorations. My question is aimed at your

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*Carl A. Kroenig, cross.*

knowledge as to how many of these boxes were in that condition? A. There were over fifty per cent.

Q. And these boxes, as I understand you, were packed in cartons, pasteboard cartons, holding how many? A. A thousand, approximately, I believe.

10 Q. In each carton? A. In each carton.

*By Mr. English:*

Q. There is a total on record of 15,000 boxes mentioned on that debit memorandum. Do you want to tell this court and jury that you personally inspected 7500 of these little boxes to say that 50 per cent. were defective? A. Well, I—

20 Q. Pardon me. You want me to understand that? A. I inspected out of every thousand from two hundred to three hundred.

Q. Did you inspect 7500 of them so that you can say fifty per cent. are defective? A. How I came to say it is fifty per cent.—

Q. No. Did you personally inspect 7500 out of the 15,000 so as to be enabled to say that fifty per cent. were defective? A. I did not.

Q. Isn't it a fact that this carton came to you sealed up? A. They were sealed with a slip of paper.

30 Q. Where the back of the lids came together, they were sealed with paper? A. Yes, sir.

Q. They were sealed in the Loesser Company before they were shipped? A. Yes, sir.

Q. They came to you sealed? A. Yes, sir.

Q. Isn't it a fact that most of them went back to the Loesser Company with the seals unbroken? A. We broke the seals and put new seals over them because we happened to have the type in our place that they were using.

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*Carl A. Kroenig, cross.*

Q. Where did you get that from? A. Because I know it.

Q. Did you personally see it? A. No, sir.

Q. Isn't it a fact that they came back with the same identical seals after standing on your shelves for over a year? A. They can't have.

Q. Not what can't have—isn't that what happened? A. I didn't see them when they went back. 10

Defendant Rests.

Mr. English: I move for a nonsuit of the defendant's case on the counterclaim, on the ground that there is no proof of damages, and, on the further ground, that the defense of payment which is set up and which is admitted has not been overcome by the counterclaim. 20

The Court: (After argument.) I have some doubt about the situation of the proof on the counterclaim as set up by the defendant because of the testimony of Mr. Schmid, that the first conversation between him and Mr. Loesser took place a month after their business transaction commenced, which I presume he meant a month after making these contracts, in which he agreed to make good these imperfections. Mr. Kroenig puts it later than that, about the 1st of August, when his first conversation took place; so it does not appear to have been a part of the original agreement. Indeed, I do not understand that the answer or the counterclaim set up that it was a part of the original agreement, but it is stated in the counterclaim that when these goods were received in August, one shipment the last part of July and the 1st 30

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*Motion for Non-suit.*

of August and imperfections were discovered, that it was then that the conversation was had, or that it was then that it was agreed in the consideration that the defendant would pay the bill if these imperfections were made good. There is no proof establishing that at all, and on the promises made one month later, testified to by Mr. Schmid—that is, one month after the original contract was made—and Mr. Kroenig on August 4th, there seems to be no consideration proved, in view of the fact that the proof being entirely barren that the payments for those goods were made in consideration of the agreement to make good the imperfections; but I am just wondering, and I would like to hear counsel, upon the effect in this case of payment upon the implied warranty which there would be in every instance that the boxes would be of the kind and character ordered and fit for the purposes for which both parties knew they were. It requires no proof to demonstrate the fact that if half inch boxes were ordered and something else was sent entirely different, or if half inch boxes of a different kind and quality were manufactured and sent, that there would be no obligation to pay for them because of the implied warranty that they should be of the kind and character ordered and suitable for the purposes.

(Counsel argue.)

The Court: After hearing this argument the views which I expressed before the ar-

*Elizabeth Smith, direct.*

gument would seem to cover all the situation raised in the counterclaim, and, as has been suggested on behalf of the plaintiff, the thought of the Court that the defendant might sustain its counterclaim, upon the idea of implied warranty, has not been pleaded. These views, I think, necessarily result in a judgment of nonsuit on the counterclaim and that will be the order of the Court. 10

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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ELIZABETH SMITH, recalled in behalf of plaintiff in rebuttal.

*Direct examination by Mr. English:* 20

Q. Yesterday, just before you left the stand, you said that you took express company receipts for the goods that had been shipped? A. Yes, sir.

Q. Have you been since able to find the express company receipt or receipts which cover the items of August 6th and 12th, 1921, set up in the book of accounts? A. Yes, sir.

Q. (Showing witness paper.) I show you the receipt which is included in the book here, Loesser Company, series of articles does not include the items in the bills of August 6th and August 12th? A. Yes, sir. 30

Q. Which are those items in the bill of August 6th and 12th? A. Four cases of Lady Esther, two cases of Nylotis.

Q. Were they receipted for by the expressman? A. Yes, sir.

*Elizabeth Smith, cross.*

Q. Garrity? A. Yes, sir.

Q. And these goods were delivered f. o. b. to Garrity and receipted for by him? A. Yes.

(At one o'clock P. M., the Court took a recess for one hour.)

10 *Cross examination by Mr. Mackay:*

Q. Is this in your handwriting? A. The receipt is made out in my handwriting.

Q. When you make it out what do you do with it? A. I give the driver one to have signed.

Q. You didn't have it signed personally yourself? A. I had the driver sign one of them. I give the driver a copy of one. It is made out in duplicate form. That is a carbon copy of the original.

20 Q. I say, you give it to the driver? A. Yes, sir.

*By the Court:*

Q. The original? A. The original.

*By Mr. English:*

Q. What does the driver do with the original? A. He takes the original when he makes delivery of the goods.

Q. And then doesn't he bring that back to you signed by the party to whom he delivers the goods?

30 A. He does sometimes and sometimes he does not.

Q. That is the purpose you give it to him for?

A. Yes, sir.

Q. Do you know whether this receipt came back in regard to those particular articles? A. No, sir.

Q. Then you haven't the original signed by Julius Schmidt, Inc., of those items? A. We have not.

Q. Do you know what became of that original?

A. I don't know.

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*Elizabeth Smith, cross.*

Q. You don't know where the original is? A. No.

Mr. Mackay: I think the original ought to be produced.

Q. Have you made any attempt to hunt for the original? A. No, sir.

10

Q. Is it the original that is part of your system of bookkeeping or is this carbon copy? A. This is part of our system until we get them back. Some customers we just keep the driver's receipt.

Q. In this case you never got any receipt back? A. No, sir.

Q. I see on this original receipt there is some other goods, Marinelli, Hillrose and Adormeé.

Mr. Mackay: I don't think counsel ought to read that into the record.

20

The Court: I will permit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: I offer in evidence the books which were marked for identification yesterday and which are as follows: Your Honor will remember I withheld the offer until I proved this receipt, Exhibit P-9 for identification, which is the shipping memorandum covering the shipment of goods under date of August 6th.

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Mr. Mackay: I object to this. I don't see how it is material. It is a memorandum of the plaintiff himself.

The Court: I think the testimony was yesterday on the part of Mrs. Smith that that was a part of their system of book-

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*Elizabeth Smith, cross.*

10 keeping. Under the decision rendered many years ago by Chief Justice Beasley, where there was an attempt to prove an account, that it required all the books of accounts to be produced and offered in evidence, and I suppose that means that the plaintiff would have a right to anticipate that an objection might be offered.

Mr. English: He did object to the offer and that is why I ask to have this admitted.

The Court: It will be admitted.

(Marked Exhibit P-9.)

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

20 Mr. English: I also offer in evidence Exhibit P-10 for identification, which is the duplicate for the invoice of August 6th.

Mr. Mackay: I make the same objection to that.

The Court: That is in the invoice book?

Mr. English: Yes, This is our copy of the invoice.

The Court: I say, it is bound in the regular invoice book?

Mr. English: Yes, sir.

30 The Court: It will be admitted.

(Marked Exhibit P-10.)

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. English: I offer in evidence shipping memorandum dated August 12th, which was marked D-11 for identification.

Mr. Mackay: I make the same objection.

The Court: The same ruling.

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*Elizabeth Smith, cross.*

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(Marked Exhibit P-11.)

Mr. English: I also offer in evidence out of the invoice book the plaintiff's carbon copy of the invoice of August 12, 1921, which was marked Exhibit P-12 for identification. 10

Mr. Mackay: Same objection.

The Court: Same ruling.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(Marked Exhibit P-12.)

Mr. English: I also offer in evidence plaintiff's ledger which was marked P-13 for identification. We have two P-13's now. There is this ledger and there was that other bill that was talked so much about on the counterclaim. 20

(Marked Exhibit P-13.)

Q. Mrs. Smith, I hold in my hand a typewritten transcript of the July 2nd ledger account. Was that made up by you? A. Yes, sir.

Q. And taken from this ledger Exhibit P-13? A. Yes, sir.

Q. And it is a true copy of that? A. Yes, sir. 30

Mr. English: I will refer to that for convenience.

The Court: Ledger transcript we will call it.

(Marked Exhibit P-29.)

Q. Referring to the ledger account up to what date were payments made by the Schmid Company? A. Up to May 31st, 1921. 40

*Elizabeth Smith, cross.*

Q. And the balance from that date on is owing and unpaid? A. Yes, sir.

Q. And on the ledger account that amounts to how much? A. It is marked in the ledger.

10 Mr. Mackay: Isn't this part of the plaintiff's direct case? I understood he was only reserving the right to offer the book.

The Court: He is simply asking for the record of what the books show. The books can't go with the record.

Mr. English: The plaintiff admitted up to a certain amount. I simply want to get the total.

20 Q. What is the total of the amount owing and unpaid, including the items of August 6th and 12th unpaid? A. \$2085.79.

Q. So that the total amount due, allowing for credit and including the items of August 6th and 12th is \$2,085.79. Is that correct? A. Yes, sir.

Q. Will you total for us, so that we will have it in the record, the amount of the items of August 12th and August 6th? A. \$260.85.

Q. Will you please subtract that \$260.85 from the total of \$2,085.79? A. \$1824.94.

30 Q. So with the items of August 6th and 12th, the total due is \$2,085.79? A. Yes, sir.

Q. And leaving out the two items of August 6th and 12th you have a balance of what? A. \$1,824.94.

Plaintiff Rests.

*Carl A. Kroenig, direct-cross.*

CARL A. KROENIG, recalled in behalf of defendant in surrebuttal.

*Direct examination by Mr. Mackay:*

Q. Referring to Exhibit P-29 and the items of August 6th and August 12th, can you tell the Court and jury whether Julius Schmid, Inc., ever received those items? A. We did not receive them. 10

Q. Do you know where they are? A. I think they are also in the expressman's shed.

Q. Are they part of the goods that are in the expressman's shed that you mentioned in your other testimony? A. I think they are there, yes.

*Cross examination by Mr. English:*

Q. Do you remember in August, 1921, the expressman brought to your place of business those boxes which contained the Marinelli and the Hillrose and the Adormeé which you had sent back and also the cases containing these boxes which are the subject of the items of August 6th and August 12th, all in one shipment—do you remember that? A. Whether they all came at the same time or not, I can't say. 20

Q. They didn't all come, did they? A. Whether these two items came to our place at all I am unable to say. 30

Q. You say you don't remember. Do you remember that you sent that to Montclair, the Adormeé, Hillrose and Marinelli boxes, and that the expressman refused to leave some and take in others and insisted on taking back the whole consignment, which included these boxes which are in the items of August 12th and August 6th? A. I don't recollect.

*Carl A. Kroenig, cross.*

Q. You don't know that one way or the other?

A. No, sir.

Q. You do know that they are in the hands of the expressman? A. I am not positive, but I think they are.

10 Q. You saw them up there? A. I saw some of them, but I wouldn't claim I saw all of them.

Q. And they are being held there subject to your order? A. No, not subject to our order. They are held there because we refused to take them in. We sent them back to Loesser.

Q. Did you have any reason not to take in those? Certainly, because we sent them back as imperfect—

Q. That was the Adormeé and the Hillrose and the Marinelli? A. Yes, sir.

20 Q. I am talking about Lady Esther and Nylotis? A. I remember I wrote Loesser a letter out of order.

Q. If you wrote a letter we have the letter. Did you open those boxes? A. We never took them in. They never got on our premises.

Q. Then you wouldn't undertake to say they were imperfect? A. No, sir, that I couldn't say. There was a different reason for not accepting them.

30 Q. You never took them in? A. No, sir.

Q. That is true of Lady Esther? A. Nylotis and Lady Esther.

Q. You didn't take them in, did you? A. No, sir; we had another reason.

Q. What was the reason? A. The Loesser mills had overshipped our order, and when I received an invoice showing the overshipment I notified them that I would refuse a shipment of the Nylotis, which was in excess of our order. The Lady

*Ernest Loesser, direct.*

Esther boxes I notified them I would not accept them because I had given them plenty of time to refinish them, and they had failed to return them within a reasonable time.

Defendant Rests.

ERNEST LOESSER, recalled in behalf of plaintiff in further rebuttal.

10

Mr. English: I offer this expressman's receipt in evidence.

(Marked Exhibit P-30.)

*Direct examination by Mr. English:*

Q. Do you know what goods that were shipped on the expressman's receipt of August 5, 1921, which is in evidence as Exhibit P-30? A. Yes, sir.

20

Q. That included, according to this receipt in evidence, 4 cases of Lady Esther, 2 cases of Nylotis, 2 cases of Marinelli double and four cases of Hillrose double and Adorméé double. Did they all leave your place at the same time? A. Yes.

Q. And this Hillrose and Adorméé and Marinelli are the boxes which are the subject-matter of the counterclaim? A. Yes.

Q. And that left the Lady Esther and the Nylotis? A. Yes, sir.

30

Q. Do you know what became of those? A. The expressman still has it.

Q. Do you know why the expressman still has it? A. They refused to accept it.

Q. Who did? A. The Julius Schmid Company.

Q. What did the expressman do? A. He took them up to his warehouse.

Q. They are still up there? A. The last time I seen them. I guess that is a year ago.

40

*Ernest Loesser, cross.*

Q. And those goods were shipped f. o. b. like the rest of them under the contract? A. Yes, sir.

*Cross examination by Mr. Mackay:*

10 Q. How did you know the expressman took them back to his place? A. He was there the next day and told us that you refused to accept them.

Q. He brought them to your place first? A. Yes, sir.

Q. And then took them up to his place? A. Yes, sir.

Q. You didn't notify Schmid when the expressman came back with them, when he said they wouldn't take them? A. I don't know. I don't believe so.

20 A. Do you remember when Mr. Schmid came to your office? A. Yes, sir.

Q. Did you tell where they were? A. Yes, sir.

Q. Where did you tell him they were? A. I took them there.

Q. They didn't know where they were and you took them up there? A. I don't know the date they were in the office and I took them up there.

Q. Did you make an examination of them? A. Yes, sir.

30 Q. Isn't it a fact that you found them imperfect? A. We found every one perfect.

Q. Didn't you find some different colors, top and bottom? A. No, sir.

Q. Did you examine them all? A. We opened three cases and all the three cases, they were in the original packing that we had them in. They hadn't been disturbed or opened or anything else. They were just originally the way we sent them to you. We opened, I should say, probably three cases and of the three we didn't find any that even

*Ernest Loesser, cross.*

had any tarnishing mark on them after being packed away nearly a year and a half.

Q. Isn't it a fact that some of the cartons were opened there? A. No, we opened them.

Q. Were not some of them opened when they were taken by the expressman up there? A. No.

Q. Do you mean to say they are all in the original cartons when you originally shipped them a year before? A. Some of them. The Lady Esther and that other small package, they were in the new cartons. They are the only two that were in the new cartons. The others were in the old cartons, which is the way they left the Schmid factory a year before, and they are still there now for examination. You can go up there still and find them just the way we left them. 10

Q. And didn't show any signs of having been opened by Julius Schmid, Inc.? A. No, not at the time I was up there. I haven't been up there since. 20

Q. That was after they were sent back to Julius Schmid in August, 1921? A. Yes, sir.

Q. And they were still in the original parcels that you had sent them in a year ago? A. Yes, sir.

Q. And they didn't look as if they had been touched? A. They looked that way to me.

Q. Hadn't any of them been opened? A. No, sir; except the ones were open when I went up there. 30

Q. What did you do? A. We took them out of the tissue paper and examined them. I should say we took out probably three or four out of each carton and we opened up maybe four or five cartons. The cartons we opened were the ones convenient to get at. They happened to be up in a convenient place. 40

*Ernest Loesser, cross.*

Q. Isn't it a fact that in August, 1920, when you originally sent those to Mr. Schmid that you talked to Mr. Schmid and Mr. Kroenig with reference to the covers being different, the tops and bottoms?

10 Mr. English: I object to that. That is not the question we are trying. I asked the witness about this shipment of August 6th and 12th, 1921. He is referring back to 1920. That is out of the case now.

Mr. Mackay: That has all been asked on rebuttal.

The Court: I suppose because counsel failed to make objections to two or three questions which were objectionable does not oblige him to remain seated and fail to make objection to this question, does it?

20 Mr. Mackay: I think it does.

The Court: Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Was your son there at that time, too? A. Yes, sir.

Q. And was Mr. Schmid there? A. Yes, sir.

Q. And Mr. Kroenig? A. Yes, sir.

30 Q. And you all looked at the boxes together? A. Yes, sir.

Q. You say you found them all perfect? A. I couldn't find anything imperfect.

Q. Did they say they were imperfect? A. No, they didn't.

Q. Didn't they show you some imperfect boxes also? A. No, they didn't.

Q. They didn't show you any? A. No, sir.

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*Ernest Loesser, redirect.*

Q. What did you go there for? A. To examine the boxes.

Q. And you say you found everything perfect?

A. Yes, sir.

Q. Would you say when they went away they were satisfied? A. I don't recall whether they were satisfied or not; that I couldn't say, because I demanded them to pay their bill before I would do anything else for them.

10

*Redirect examination by Mr. English:*

Q. Have you any knowledge of the Schmid Company calling up and asking to have those boxes sent back, the Lady Esther and the Nylotis? A. Yes, sir.

Q. Did they talk to you or did they talk to somebody else in the office? A. I don't know whether it was myself or Mr. Schmid or whether we got a letter.

20

Q. You got a letter? A. I believe we have a letter in which they ask us to send the Lady Esthers to them.

Q. Did you make any effort to get the expressman to take them back? A. No.

Plaintiff Rests.

Defendant Rests.

30

Mr. English: I was wondering whether there was anything for the jury except possibly the two items. I suppose your Honor can direct as to the \$1824.94, or at least, limit the discussion before the jury to those two items, which aggregate \$260.85. It is only a question of whether our verdict should be \$2,085.79 or \$1,824.94.

The Court: The ruling of the court will be that the only question involved in this

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*Charge.*

case is as to the items of August 6th and 12th, 1921, amounting to \$260.85, the balance \$1,824.94 having been established by the proofs in this case.

Defendant's counsel prays an exception to this ruling of the court.

10 Exception noted as ground of appeal.

Mr. Mackay sums up in behalf of the defendant.

Mr. English sums up in behalf of plaintiff.

The court charges the jury as follows:

DUNGAN, J.:

20 Gentlemen of the jury: In this case you start, as you heard the court state a moment ago, with the plaintiff's claim established to the amount of \$1,824.94, to which interest may be added from August 25th, which date I have fixed, for convenience, in figuring interest. The last charge here is August 25th, 1921, and, this being the 25th day of October, that would make two years and two months, or thirteen per cent.

The items which are in dispute, according to the ruling of the Court in this case, are the two items of August 6th, 1921, for Nylotis boxes, \$199.14, and the item of August 12th, Lady Esther boxes, \$61.71.

30 Where an action is brought upon a book account the proof of the account is *prima facie* evidence of sale and delivery; so that when the plaintiff had proved its books of account as to those two items, if there had been no other testimony, it would have been entitled to recover for those items, as well as the others. The two together amount to \$260.85, but the defendant, by Mr. Kroenig, said they never received them. By that testimony he does not mean that they were never offered for acceptance,

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*Charge.*

because, according to his testimony, these goods were returned, with other goods, that is, the Marinelli and Hillrose and Adormeé, which they refused to receive, goods which had been sent to the plaintiff for refinishing, and they were sent back, and they refused to receive them, and Mr. Kroenig said something about the expressman refusing to divide the shipment—that is, to leave part of them and take part of them back. Of course, if that be so, if the expressman did refuse to leave these goods, the other items being out of this case (that is, the Marinelli and Hillrose and Adormeé), and it was not their refusal to accept these goods, then the plaintiff cannot recover for either of these items, that is, either the Nylotis or the Lady Esther. But he goes further than that and says that they refused to receive the Nylotis because that shipment was in excess of their order. Of course, the defendant was obliged to accept delivery of such goods as were according to their specifications and within their order, and if they refused to accept delivery, when delivery was tendered, they are liable for the price of these goods, which is the same as if the goods had been left there and received by them. But if the goods were in excess of their order, then they are not obliged to give a reason beyond that for refusing to accept them. That is a sufficient reason. If you decide in this case that these Nylotis boxes were in excess of the order, then the plaintiff is not entitled to recover for them. He did not say that same thing with reference to the Lady Esther, and so that does not apply to the Lady Esther boxes; but if they were tendered, if you find that the Lady Esther boxes were tendered and were within their order—and there is no contention that they

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*Charge.*

were not within the order—and they refused to accept them, without this action that I mentioned at the outset, the refusal of the expressman to leave any part of them, without the acceptance of all of them, then the plaintiff would be entitled to recover for the Lady Esther, although it may not  
10 be entitled to recover for the Nylotis.

These are questions for you to consider and determine, and for whatever amount you find the plaintiff is entitled to receive your verdict, interest will be added as I have indicated.

Mr. English: Mrs. Smith tells me, and I learned it for the first time, that this Lady Esther did run over the order, and we withdraw that. That amounts to \$61.71. So the jury need not spend any time on what your Honor has just charged them,  
20 as to whether the Lady Esther did or did not run over. They did run over. Mrs. Smith says it did run over.

The Court: (To the jury.) The testimony is that the Lady Esther did overrun the order, and nobody has testified to the contrary, and counsel states that the \$61.71 is withdrawn. Therefore, you will not consider that.

(The jury retires.)

Mr. Mackay: I want to except to that part of  
30 your Honor's charge where you refer to the testimony of Mr. Kroenig, that there was no contention that the goods were not within the order for the Lady Esther and the other.

The Court: I said he did with the other. The Lady Esther is withdrawn, even if I made a mistake about it.

Mr. Mackay: I understood your Honor to say

*Postea.*

that there was no contention on our part that they were not within the order.

The Court: You may have an exception to what I said on that subject.

Exception noted as ground of appeal.

---

**Postea.**

16

NEW JERSEY SUPREME COURT,  
ESSEX COUNTY.

<p style="text-align: center;">LOESSER MANUFACTURING COMPANY, a corporation, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">JULIUS SCHMID, INC., a corpora- tion, Defendant.</p>	}	<p style="text-align: center;">Action at Law</p>
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This case came on for trial before Honorable Nelson Y. Dungan, Circuit Judge to whom the case was referred for trial by the Chief Justice, with a Jury, at the Essex Circuit on October 24th, 1923 and was finished on October 25th, 1923.

The Court directed a judgment of non-suit against the defendant, Julius Schmid, Inc., on its counter-claim against plaintiff, Loesser Manufacturing Company.

30

The jury rendered a general verdict against the defendant, Julius Schmid, Inc., and in favor of the plaintiff, Loesser Manufacturing Company, for \$2,062.18.

NELSON Y. DUNGAN,  
Essex Circuit Judge.

40

**Notice of Appeal.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10	LOESSER MANUFACTURING COMPANY, a corporation, Plaintiff-Appellee,  <i>v.</i>  JULIUS SCHMID, INC., a corpora- tion, Defendant-Appellant.	} Action at Law
----	--	--------------------

To Messrs. McCarter &amp; English.

Sirs:

20 TAKE NOTICE that the defendant appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above entitled cause for the following reasons:

1. Because the court erroneously granted a motion of non-suit upon the counter-claim filed by the defendant appellant.

30 2. Because the court erroneously directed a verdict in favor of the appellee and against the appellant at the trial of the above entitled case for a part of the amount alleged to be due to the appellee.

3. Because the court erroneously admitted testimony over objection of counsel for the defendant appellant.

*Notice of Appeal.*

4. Because the court erroneously excluded testimony on behalf of the defendant appellant.

5. Because the court erroneously omitted to submit the proper issues to the jury.

Dated November 5th, 1923.

MACKAY & MACKAY,  
Attorneys for the Defendant-Appellant.  
By HOWARD MACKAY,  
Of Counsel.

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*Exhibits.*

**Exhibit P-13 for Identification.**

LOESSER KNITTING NEEDLE CO., INC.

OFFICE: 48 SPRING STREET

Newark, N. J.

May 19th, 1921.

No. 1449

Folio No.....

10

USE THIS NUMBER AS REFERENCE

Sold to Julius Schmid, Inc., 344 West 38th St., N. Y.

Your Order No.

Packing Case No. 4413-14-15-17-18-19-20-22-24-25-28-29-30-32

Date	Quantity	Part No.	Price
5/19	11520	Marinella D C refinished @ 1c. ea	115.20

(Stamped on face of foregoing exhibit):

CONDITIONS

20

The delivery and completion of all orders are subject to delays over which we have no control and for which we are not responsible, such as mill delivery of material, strikes, lockouts, fire, or any other unforeseen condition beyond our control

TERMS

Prices f.o.b. our plant, net 10 days from date of billing and shipment

30

40

*Exhibits.***Exhibit P-14 for Identification.**

TELEPHONE MONTCLAIR 5136

E. LOESSER MILLS, INC.

MAKERS OF METAL NOVELTIES

142 PINE STREET

MONTCLAIR, N. J.

Aug. 18, 1921.

16

Julius Schmid, Inc.,  
344 West 38th St.,  
New York, N. Y.

Gentlemen,—

Replying to your letter of Aug. 9th wish to inform you that we cannot allow any such claim at this time. We are herewith returning your "DEBIT MEMO" for \$3055.46.

20

We wish to call your attention to the enclosed statement, and inform you that unless same is paid within ten days, we shall take other means of collection.

Very truly yours,

LOESSER MFG. CO.

E. W. LOESSER

EL:ES

30

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Exhibits.

Exhibit P-15 for Identification.

INVOICE NO.

YOUR NO.

ESTABLISHED 1883

JULIUS SCHMID

INCORPORATED

Manufacturer and Importer

344-348 West 38th Street

New York

10

Aug 5 1921

The goods covered by this invoice were double checked and packed with the utmost care by experienced packers and receipted for in good condition by the transportation company, against whom all claims for loss or damage should be made. All goods are shipped at buyer's risk.

20

Positively no claims allowed unless made within 5 days after receipt of goods

30

Sold to Loesser Mills  
142 Pine Street  
Address Montclair New Jersey

TERMS

1% 10 days 30 days net  
Payable in New York  
Exchange  
Absolutely no discount  
after 10 days

Shipped  
Via

All goods f.o.b. New York

DEBIT MEMO

8730	PCS	Marinello	Double	185 00 M	1615 05	
4510	PCS	Hillrose	Double	185 00 M	834 35	
3276	PCS	Adormee	Double	185 00 M	606 05	3055 46

40

Allowances  
Fol 40



*Exhibits.***Exhibit P-17 for Identification**

Order No.	Dept. No	Shipping No.	Ship When	Ship How
6385	C			

Ship to	Date
349 West 37th St., New York City.	3-19-20

10

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
--	--

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME	E. Loeser Mills, Inc. 142 Pine St., New York City.
ADDRESS	

20

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Hillrose Double Vanity"

To apply against  
contract #6370

Sketch for this will be sent you within a few days.

**DELIVERY—At once**

Approved by CF \* EMP \* MATT FINISH \*  
J. Schmid

30

All bills must be sent to  
**JULIUS SCHMID, INC.**  
New York City

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*Exhibits.*

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6386	C			

Ship to	Date
349 West 37th St., New York City.	3-19-20

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
--	--

**This order must be acknowledged by return mail and definite statement  
made on what date delivery will be affected**

NAME	E. Loeser Mills, Inc. 142 Pine St., New York City.
ADDRESS	

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Hillrose Double Vanity"

To apply against  
contract #6370

DELIVERY--September 1920

Approved by CF \* EMP \* MATT FINISH \*  
J. Schmid

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

*Exhibits.***Exhibit P-18 for Identification**

Order No.	Dept. No	Shipping No.	Ship When	Ship How
6391	C			

Ship to	Date
349 West 37th St., New York City.	3-19-20

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
--	--

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME	E. Loeser Mills, Inc.
ADDRESS	142 Pine St., New York City.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Marinello"—sketch within a few days.

To apply against  
contract #6370

DELIVERY—At once

Approved by CF \* EMP \* MATT FINISH \*  
J. Schmid

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

*Exhibits.*

Order No.	Dept. No	Shipping No.	Ship When	Ship How
6392	C			
Ship to 349 West 37th St., New York City.				Date 3-19-20

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
--	--

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME	E. Loeser Mills, Inc.
ADDRESS	142 Pine St., New York City.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Marinello"

To apply against  
contract #6370

DELIVERY—in May 1920

Approved by CF \* EMP \* MATT FINISH \*  
J. Schmid

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

*Exhibits.*

Order No.	Dept. No	Shipping No.	Ship When	Ship How
6393	C			

Ship to	Date
349 West 37th St., New York City.	3-19-20

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
--	--

**This order must be acknowledged by return mail and definite statement  
made on what date delivery will be affected**

NAME	E. Loeser Mills, Inc.
ADDRESS	142 Pine St., New York City.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Marinello"

To apply against  
contract #6370

DELIVERY in July 1920

Approved by CF \* EMP \* MATT FINISH \*  
J. Schmid

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

*Exhibits.*

Order No.	Dept. No	Shipping No.	Ship When	Ship How
6394	C			
Ship to 349 West 37th St., New York City.				Date 3-19-20

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME                      E. Loeser Mills, Inc.  
                                 142 Pine St.,  
ADDRESS                   Montclair, N. J.

5,000 Double Compact Hinge Boxes @ .18½  
Stamped "Marinello"

To apply against  
contract #6370

DELIVERY—in September 1920—

Approved by    CF \* EMP                      \* MATT FINISH \*  
                                 J. Schmid

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

*Exhibits.*

**Exhibit P-19 for Identification**

Order No. 490	Dept. No C	Shipping No.	Ship When at once	Ship How Del
Ship to 349 West 37th St.				Date 2-14-21

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME            E. Loesser Mills,  
                  142 Pine Street,  
ADDRESS        Montclair, N. J.

3000—DOUBLE METAL BOXES      "Plain  
5000—DOUBLE METAL BOXES      "Adormee"  
All matt finish.  
To be delivered as soon as possible.

**R U S H**

Approved by

.....

All bills must be sent to  
JULIUS SCHMID, Inc.  
New York City

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*Exhibits.*

**Exhibit P-21 for Identification**

<u>Order No.</u>	Requisition	<u>Ship when</u>
	Date	
<u>Dep't No.</u>	Name Loeser Mills	<u>Ship how</u>
<u>Shipping No.</u>	Address .....	<u>Ship to Aug 4/21</u>
<u>Quantity</u>	<u>Article</u>	<u>Cost</u>

60 GR. 7 DOZ. 6 pcs.  
 MARINELLO—DOUBLE  
 31 GR. 3 DOZ. 10 pcs.  
 HILL-ROSE—DOUBLE  
 22 GR. 9 DOZ.  
 ADORMEE—DOUBLE

FOR REPAIRS

(Name illegible.)  
 DEPARTMENT MANAGER

*Exhibits.***Exhibit P-22 for Identification.**

May 2nd, 1921.

Attention Mr. Schmid.

10 Julius Schmid, Inc.,  
344 West 38th St.,  
New York, N. Y.

Gentlemen,—

We enclose herewith statement of your account, showing a balance of \$9224.09, of which there is \$7200.00 due for payment in accordance with the terms of our agreement.

20 We must insist that you reduce your account considerably within the coming week, especially in view of the fact that bills of Nov., Dec., Jan. and Feb are from four to six months past due.

Very truly yours,

LOESSER MFG. CO.

EL:ES

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*Exhibits.*

May 2nd, 1921.

STATEMENT OF ACCOUNT OF  
JULIUS SCHMID, INC.

Date of Invoice	Name	Quantity	Amount	
Sept. 1	Jardin	1500	48.00	
" 2	Jardin	500	16.00	as Nov. 28
" 10	Blairs	1500	48.00	as Dec. 10
" 10	Jardin	540	17.28	as Nov. 28
" 10	Renee Hinge	Balance due	.75	
" 11	Blairs	700	22.40	as Dec. 10
" 15	Adormee		7.03	
" 27	Fair Plex	600	19.20	
Oct. 8	La Valliere	3000	96.00	
" 11	La Valliere	607	19.42	
" 11	Renee Hinge	5000	362.50	as Jan. 10
" 11	Renee Hinge	4400	319.00	as Mar. 10
" 12	Rence Hinge	600	43.50	as Mar. 10
" 12	Renee Hinge	5000	362.50	as May 10
" 12	Renee Hinge	1200	87.00	as July 10
" 15	Nylois		21.40	
" 22	La Valliere	3400	108.80	
" 22	La Valliere	3450	110.40	
Nov. 16	ANONDON	SKETCH	7.00	
Dec. 17	La Valliere	Balance due	2.00	
" 21	Bells Com.	1535	49.12	
" 21	La Valliere	864	159.84	
Dec. 22	Maybelle	5985	191.52	
Dec. 23	Jap Incense	5015	160.48	
" 24	La Valliere	957	177.05	
1921				
Jan. 6	Plain	684	126.54	
" 7	Renee	1682	311.17	
" 8	Jardin	1584	50.69	
Feb. 1	Love Dream	2772	88.70	
" 1	LOVE DREAM	DIE	125.00	
" 1	Jardin	1584	50.69	
" 2	Love Dream	3168	101.38	
" 4	Jardin	787	25.18	
" 4	Love Dream	307	9.82	
" 4	Hillrose	216	39.96	
" 5	Hillrose	519	119.14	
" 5	Marinella	114		
" 5	Adormee	11		

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*Exhibits.*

	Date of Invoice	Name	Quantity	Amount
	Mar. 1	Nylotis	1728	53.57
	" 1	Lacassia	1728	55.30
	" 1	Adormee	864	159.84
	" 1	Nylotis	1728	53.57
10	" 2	Nylotis	1728	53.57
	" 2	Adormee	864	159.84
	" 2	Lacassia	1728	55.30
	" 4	Lady Esther	1728	53.57
	" 4	Lacassia	1589	50.85
	" 7	Adormee	1728	319.68
	" 7	Lady Esther	1656	51.34
	" 8	Adormee	864	159.84
	" 8	Lady Esther	1584	49.10
	" 9	Nylotis	864	101.78
	" 9	Bezels	15000	
	" 10	Nylotis	5616	174.10
	" 10	Lady Esther	2772	85.93
	" 10	Adormee	432	79.92
20	" 10	Plain	807	149.30
	" 10	Blue Rose	1080	199.80
	" 10	BLUE ROSE	DIE	100.00
	" 11	Blue Rose	1080	199.80
	" 11	Nylotis	1728	53.57
	" 11	Plain	1008	31.25
	" 12	Blue Rose	1080	199.80
	" 12	Nylotis	1728	53.57
	" 14	Blue Rose	1080	199.80
	" 15	Lady Esther	3204	99.32
	" 15	Blue Rose	841	155.59
	" 15	Kosan	1656	52.99
	" 15	KOSAN	DIE	125.00
30	" 16	Kosan	3276	104.83
	" 16	Plain	1080	199.80
	" 17	Plain	1080	199.80
	" 17	Lady Esther	792	24.55
	" 17	Kosan	214	6.85
	" 17	Nylotis	3456	107.14
	" 21	Nylotis	1438	44.58
	" 21	Bezels	4000	20.00
	" 22	Bezels	5000	25.00
	" 22	Hillrose	751	138.94
	" 28	Lady Esther	515	15.97
	" 28	Lacassia	279	8.93

*Exhibits.*

Date of Invoice	Name	Quantity	Amount	
Apr. 7	June Bride	5228	162.07	
" 7	JUNE BRIDE	DIE	100.00	
" 7	Love Dream	1566	57.94	
" 9	Nylois	6336	196.42	
" 12	Nylois	9504	294.62	
" 13	Nylois	7920	245.52	
" 13	Bezels	5000	25.00	10
" 14	Nylois	7920	270.52	
" 14	Bezels	5000		
" 15	Nylois	1584	49.10	
" 16	Nylois	1604	174.72	
" 16	Bezels	25000		
" 21	Plain	1125	78.75	
" 21	Bezels	3000	15.00	
			<hr/>	
			9,407.40	

## CREDIT :—

1921				
Feb. 25	Allow for express	1.60		20
Mar. 23	Allow on Die	25.00		
Mar. 23	Allow on Die	25.00		
Mar. 30	525 Lady Esther	16.28		
Mar. 30	252 Lacassia	8.06		
Apr. 6	1584 Love Dream	50.69		
Apr. 9	1077 Nylois	33.39		
Apr. 9	3000 Bezels	15.00		
Apr. 18	250 Zanol	8.29		
			<hr/>	
			183.31	
			<hr/>	
			9,224.09	30



*Exhibits.***Exhibit D-1**

July 27, 1921.

Messrs. E. Loesser Mills, Inc.,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

10

We are enclosing herein a few orders, which we would kindly ask you to give your immediate attention. If you can deliver all of these boxes to us by Thursday, August 4th, it would be greatly appreciated.

We are just filling an order for Marinello and Hillrose double boxes and I was awfully disappointed to find only a small percentage of boxes which are good enough to be accepted by our customers. We will go over the entire lot of boxes at the first chance and as soon as we get through we will return all those, which are unfit to use, to you.

20

Very truly yours,

JULIUS SCHMID INC.

Per

K:BB

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*Exhibits.***Exhibit D-2**

LETTERHEAD OF

E. LOESSER MILLS, INC.,  
142 Pine Street,  
Montclair, N. J.

10

August 5th, 1921.

Attention Mr. Kroenig.

Julius Schmid, Inc.,  
344 West 38th St.,  
New York, N. Y.

Gentlemen,—

20

Regarding the double compact boxes, which you returned to-day for repairs, beg to advise that we cannot proceed with this work unless we have your assurance that you will pay for the process of refinishing these boxes—we cannot, at this time, state just what this will amount to.

We are holding these goods awaiting your reply.

Very truly yours,

LOESSER MFG. CO.

EL:ES

E. LOESSER

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*Exhibits.***Exhibit D-4**

August 4, 1920

Dict. Aug. 3rd

Loesser Mills,  
142 Pine St.,  
Montclair, N. J.

10

Gentlemen:—

In reference to my conversation with Mr. Loesser, we will pick out those where the covers and bottoms are not evenly matched and return them to you.

The writer looks forward to see Mr. Loesser over here and will then go over with him several matters that are pending.

Regarding the lip stick tubes, the writer was going to make a special sale on these tubes, and in order to make same, it would have been necessary for the tubes to be delivered to us as per the specifications on my order which was: 25,000 to be delivered at once and 25,000 per week thereafter.

20

I know that you will readily understand that in trying to make a special sale on this article, we could only have used them if they came in just as specified on our order and as our salesmen are well on their way, we cannot use these goods at this date, and therefore ask you kindly not to ship any more.

30

Trusting to see Mr. Loesser in the very near future, I am

Very truly yours,

JULIUS SCHMID INC.

Per

CFS:MB

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*Exhibits.***Exhibit D-5 for Identification.**

LETTERHEAD OF

JULIUS SCHMID, INCORPORATED,  
344 West 38th Street,  
New York.

10

March 21, 1921.

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

Why did you not submit the Ho-Ro-Co Sketch to us as yet, for which we asked you in our letter of March 14th?

20

If we hold up matters of this nature for such a great length of time our chances of getting and retaining business are very slim indeed.

Yours very truly,

JULIUS SCHMID INC.

Per C. A. KROENIG

CK:G

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*Exhibits.*

**Exhibit D-6**

LETTERHEAD OF

JULIUS SCHMID, INCORPORATED,  
344 West 38th Street,  
New York.

March 28, 1921.

10

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

We are enclosing an order for 2500 Doriot Boxes.

As explained to your Mr. Loesser, by the writer,  
this is to be considered as an accommodation to  
an important customer, who will give us nice or-  
ders in the future after his trade-mark difficulties  
have been settled.

20

Please give this order your immediate attention,  
and do not side-track it.

Yours very truly,

JULIUS SCHMID INC.

Per C. A. KROENIG

CK:G encl.

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*Exhibits.*

**Exhibit D-7 for Identification**

LETTERHEAD OF

JULIUS SCHMID, INCORPORATED,  
344 West 38th Street,  
New York.

10

March 29, 1921.

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

20

As advised by your Mr. Loesser over the telephone this morning, we have promised our customer that the first lot of "June Bride" Boxes, as per our Order #461, would come forward by the middle of next week.

Please see that we will not fall down on this promise.

Yours very truly,

JULIUS SCHMID INC.

Per C. A. KROENIG

CK:G

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*Exhibits.***Exhibit D-8 for Identification**

LETTERHEAD OF

JULIUS SCHMID, INCORPORATED,  
344 West 38th Street,

New York.

10

April 1, 1921.

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

We received the "June Bride" samples, and think that, as a whole, this job will be satisfactory.

The writer noticed that one of the boxes is badly mutilated on the bottom, and that the other one has some spots on the inside. We trust, however, that these are only minor faults which will not appear in the actual delivery.

20

Is it not possible to make the little knob on the shoulder a little more pronounced. I have noticed on several occasions that the boxes do not close any too well. This does not imply, by any means, that you should make them so tight that it requires a chisel to open them.

We received the Ho-Ro-Co Sketch, and have submitted same to our customer.

30

Yours very truly,

JULIUS SCHMID INC.

Per C. A. KROENIG

CK:G

40

*Exhibits.***Exhibit D-9 for Identification**

April 16, 1921.

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

10 Gentlemen:

We are enclosing debit memo covering a shortage of 259 Zanol Boxes.

On this lot we had an arrangement with our customer whereby we charged him for all the boxes on receipt of same from you. As a basis for our charge we took your invoices which called for 9547 boxes. We did not count the boxes at time we completed them.

20 We received a letter from the customer, however, a few days ago, in which he asked us for a credit memo covering the difference between the boxes billed originally and the quantity actually shipped to him, which, latter, amounted only to 9288 pieces.

We had to allow him credit, of course, for the shortage, and have to hand the charge on to you, as the only reason why we shipped less boxes to the customer than we billed him for originally is that we received so many less from you.

30

Yours very truly,

JULIUS SCHMID INC.

Per

CK:G  
encl.

40

*Exhibits.*

**Exhibit D-10 for Identification**

LETTERHEAD OF  
JULIUS SCHMID, INCORPORATED,  
344 West 38th Street,  
New York.

May 11, 1921. 10

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

Up to this writing we have not yet received the sketch "Petty," for which we asked on our order of May 4th.

Is it not possible to get these sketches through a little faster and avoid complaints? 20

Yours very truly,

JULIUS SCHMID INC.  
Per C. A. KROENIG

CK:G



30

40

*Exhibits.***Exhibit D-11**

May 14, 1921.

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

10 Gentlemen:

Please take notice that we do not care to receive the Nylotis boxes back which we returned to you the other day owing to being imperfect.

We have finished the order of our customer and would not like to send another piece-meal lot and create the impression as if we were not competent enough to forward their merchandise in decent lots.

20 It will be useless for you to give these boxes to our driver. They will never be accepted.

Yours very truly,

JULIUS SCHMID INC.

Per

CK:G

30

40

*Exhibits.***Exhibit D-12 for Identification**

LETTERHEAD OF

JULIUS SCHMID, INCORPORATED,

344 West 38th Street,

New York.

Dec. 12, 1921.

10

The E. Loesser Mills,  
Montclair, N. J.

*Attn. Mr. Loesser Sr.*

Dear Mr. Loesser:

In reference to the interview we had the other day, we have given this matter most careful consideration with the object in view of facilitating an amicable settlement with you.

20

We believe that you will agree that we have evidenced our desire beyond a question of doubt to eliminate any disagreeable proceedings, and our good will in this respect is not to be questioned.

At the present time, considering the value of the boxes you have in your possession, there is a balance amounting to approximately \$1700 in our favor. This is surely security enough for you to proceed with the reconditioning of these boxes along the lines requested, and if you will do this we will pay you for whatever balance remains due you after we have received the boxes reconditioned. To eliminate any further controversy of any kind, we would even go so far as to look at the boxes in your place, after you have reconditioned them, and pass on them at that time.

30

We trust this meets with your approval and that

40

*Exhibits.*

we may hear from you promptly so as to finally dispose of this matter.

Very truly yours,

JULIUS SCHMID INC.

Per C. F. SCHMID

10 CFS:G

---

**Exhibit D-13 for Identification**

Dec. 31, 1921.

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

20 You have not replied to our letter of Dec. 12th, which is rather a surprise to us.

Owing to the fact that we face a cancellation on the part of our customers unless the boxes which you agreed to refinish will be in our possession within a very short time we must request you to put the boxes in salable condition ready for an inspection by one of our representatives at your plant by January 7, 1922.

30 If you will not assure us by return mail that you are ready to comply with this request, we shall be compelled to obtain the corresponding boxes from another source and decline any further interest in the boxes manufactured by you.

Yours truly,

JULIUS SCHMID INC.

By

CFS:G

*Exhibits.*

Registered.

(This registered letter receipt is stamped thus:)

MONTCLAIR, N. J.

JAN 3

1 - P M

1922

POST OFFICE DEPARTMENT

10

OFFICIAL BUSINESS

REGISTERED ARTICLE

No. 356717

Return to Julius Schmid

Street and Number, or Post Office Box: 344 W  
38 St.

Post Office at: 38 St

State: NYC

RETURN RECEIPT.

20

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

E. LOESSER MILLS

(Signature or name of Addressee.)

E. SMITH

(Signature of addressee's agent.)

Date of delivery, Jan 3rd, 1922

30

**Exhibit D-14**

## RECEIPT FOR REGISTERED ARTICLE

No. 558110

Registered at the Post Office Indicated in Postmark

Complete record of registered mail is kept at the post office, but the sender should write the

40

*Exhibits.*

name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry.

POSTMASTER, JE

(The following is stamped across face of above:)

10

REGISTERED  
NEW YORK (TIMES SQ. STA.) N. Y.  
JAN 6 1922

(The following name is written on the reverse side:)

LOESSER

Jan. 6, 1922.

20

E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

Your attorneys have advised us that you are unwilling to make good your previous promise to refinish the defective boxes which we had to reject some time ago, and in accordance with our letter of Dec. 31st we shall now procure the corresponding number of boxes from another source.

30

Yours truly,

JULIUS SCHMID INC.

Per

CK:G

Reg. return receipt requested.

40

*Exhibits.*

LETTERHEAD OF

McCARTER &amp; ENGLISH

Counsellors at Law,

Prudential Building,

765 Broad St.

Newark, N. J.

10

January 5th, 1922

Re: Loesser *vs.* Schmid

Julius Schmid, Inc.,  
344 West 38th Street,  
New York City.

Attention C. F. Schmid.

Dear Sirs:—

Your two letters of December 12th and December 31st respectively, addressed to E. Loesser Mills, have been handed us for reply.

20

The plaintiff never agreed as stated in your letter of December 31st to re-finish the goods. The goods were manufactured according to order and shipped to you, and we understand are now held by the Express Company subject to your order.

At such time as you see fit to pay the bill, which is the subject of the suit, the Loesser Company will be very glad to make whatever changes in the goods you may desire at cost.

30

Yours very truly,

McCARTER &amp; ENGLISH

40



## INDEX OF EXHIBITS.

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*(Note: Offered pages refer to Original State of Case.)*

	Admitted Page	Printed Page
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P-3.—Letter, Schmid to Loesser Mills, March 16, 1920 .....	38	3
P-4.—Letter, Loesser Mills to Schmid, March 19, 1920 .....	38	4
P-5.—Order No. 472, Dated January 31, 1921 .....	40	6
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P-8.—Letter, Loesser Mfg. Co. to Schmid, February 8, 1921 ..	40	10
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20	1.20 - Chapter 20: Final Remarks

**Exhibit P-1.**

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6369	C			

Ship to  
349 West 37th St.,  
New York City

Date  
3-16-20

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME            E. Loeser Mills, Inc.,  
                  142 Pine St.,  
ADDRESS        Montclair, N. J.

500,000 to 1,000,000 Round Slip Cover Brass Boxes @ \$32.00 M.

Samples to be submitted in both dull and light finish and approved of by us.

Specifications as given in our letter of March 16th, 1920 to be part of this order.

TERMS—30 days NET F.O.B.

Montclair, N. J.

Approved by CF \* EMP

J. Schmid  
All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

MAR 18 1920

**Exhibit P-2.**

Order No.	Dept. No.	Shipping No.	Ship When	Ship How
6370	C			
Ship to 349 West 37th St., New York City				Date 3-16-20

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME            E. Loeser Mills, Inc.,  
                    142 Pine St.,  
ADDRESS        Montclair, N. J.

75,000 to 150,000 Double Compact Hinge Boxes—Quality same as “Mary Garden” box and similar in style to “Mary Garden” box. @ 18½ cents.

Samples to be submitted in both dull and light finish and approved of by us.

Specifications as given in our letter of March 16th, 1920 to be part of this order.

TERMS—30 days NET F.O.B.

Montclair, N. J.

Approved by CF \* EMP

J. Schmid  
All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

MAR 18 1920

**Exhibit P-3.**

March 16, 1920.

E. Loeser Mills, Inc.,  
 142 Pine St.,  
 Montclair, N. J.

Gentlemen:

We hand you herewith our order #6369 for 10  
 500,000 to 1,000,000 Round Cover Brass Boxes at  
 \$32.00 per thousand; also our order #6370 for  
 75,000 to 150,000 Double Compact Hinge Boxes at  
 18½ cents each.

Kindly furnish us with marked and identified  
 samples which will furnish the basis of quality  
 on which our orders are placed. We are to have  
 the privilege of ordering out these boxes in lots  
 of 5,000 or more from time to time as we require;  
 the time of contract to extend to within one year 20  
 from the time of the first delivery applying on  
 each order is received by us.

On each lot of 5,000 of either single or double  
 boxes, we are to have the privilege of a change of  
 stamping in the lids at your cost price. Wherever  
 stamping dies are required, you are to supply  
 same on a rough pencil sketch to be submitted by  
 us. The cost of these dies to be about \$35.00 to  
 \$100.00, but in no case to exceed the last mentioned  
 sum. 30

We are to have the privilege of ordering either  
 bright or matt finish at the contract prices men-  
 tioned on our orders. Packing is to be in suitable  
 uniform containers, guaranteed to prevent dam-  
 age and scratching of the boxes in transit. You  
 are to make delivery of each requisition placed  
 with you within two to three weeks, after you  
 have received from us approved sketches. Such  
 delivery to be made by local express to New York  
 unless we otherwise instruct you. 40

*Exhibit P-4.*

Kindly let us have conformation of our orders  
by return mail and oblige,

Very truly yours,

JULIUS SCHMID INC.

Per

10 FO.\*EMP

**Exhibit P-4.**

TELEPHONE MONTCLAIR 5136

E. LOESSER MILLS, INC.

MAKERS OF METAL NOVELTIES

142 PINE STREET

MONTCLAIR, N. J.

March 19, 1920

20 Julius Schmid, Inc,  
344 West 38th Street,  
New York City

Gentlemen:

We are in receipt of your letter of the 16th inst.  
specifying certain detail and conditions covering  
your official orders #6369 and #6370 for which  
we thank you, and accept under the following  
terms and condition.

30 The delivery and Completion of these orders are  
subject to delays over which we have no control,  
and for which we are not responsible, such as,  
Delay in Mill Delivery of Metal, Strikes, Lockouts  
Fire, or any other unforeseen condition beyond  
our control.

It is also understood and agreed that if there is

*Exhibit P-4.*

an increase in the price of Brass, on or before the receipt of your firm's order for 150,000 Double Compact Boxes and 1,000,000 Round Slip Cover Boxes, there will be a corresponding increase in the price of these two Compact Boxes.

Yours very truly,

10

E. LOESSER MILLS, INC

GEO. H. HARMAN

Sec.

GHH/VH

20

30

40

**Exhibit P-5.**

Order No.	Dept. No.	Shipping No.	Ship When	Ship How Del.
472	C			
Ship to 349 West 37th St., New York City				Date 1-31-21

Order Dep't and shipping numbers must appear on your bill      Shipping number must appear on all cases and packages

**This order must be acknowledged by return mail and definite statement made on what date delivery will be affected.**

NAME	E. Loesser Mills,	
	142 Pine Street,	CONTRACT
ADDRESS	Montclair, N. J.	

200,000 to 300,000 Single Metal Boxes.

Beaded, straight side, or hinged.

To be ordered out during 1921, subject to terms and conditions stipulated in our letter of Jan. 31st, which forms a part of above contract.

ACCEPTED:

Subject to modification as per our letter Feb. 8, 1921.

LOESSER MFG. CO.

Approved by

Per C. C. KROENIG

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

**Exhibit P-6.**

Order No.	Dept. No.	Shipping No.	Ship When	Ship How Del.
473	C			
Ship to 349 West 37th St., New York City				Date 1-31-21

Order Dep't and shipping numbers must appear on your bill	Shipping number must appear on all cases and packages
--	--

**This order must be acknowledged by return mail and definite statement  
made on what date delivery will be affected.**

NAME	E. Loesser Mills, 142 Pine Street, Montclair, N. J.	CONTRACT
ADDRESS	50,000 to 100,000 Double Metal Boxes.	

With mirror, bezel, bridge and locking device.

To be ordered out during 1921, subject to terms and conditions stipulated in our letter of Jan. 31st, 1921, which forms a part of above contract.

ACCEPTED:

Subject to modification as per our letter Feb. 8/21

LOESSER MFG. CO.

Approved by

Per C. C. KROENIG

All bills must be sent to  
JULIUS SCHMID, INC.  
New York City

**Exhibit P-7.**

[LETTERHEAD OF]

**JULIUS SCHMID**

INCORPORATED

NEW YORK

Jan. 31, 1921.

10 E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

Enclosed contracts #472 and #473 are placed subject to the following terms and conditions, which form a part thereof:

20 We are to have the privilege of ordering out the boxes, as wanted during the year 1921, in lots from 5000 pieces up with individual embossing. If, against our expectations, it should be impossible for us to order out all of the boxes during 1921, we to have the option of extending the time limit.

This agreement to include our orders #444, 460, 461, 462 and 463 placed recently.

30 The embossing dies required will be furnished by you upon our rough sketches at a cost of \$75.00 to \$100.00 on single boxes, and \$100.00 to \$125.00 on double boxes. The last mentioned sum not to be exceeded in any case. No new die charges will be made on boxes for which dies have been furnished in connection with previous orders.

The dies are at all times to be used exclusively on orders placed by us. The same applies to dies furnished on our former contracts.

After the expiration of enclosed contracts, and in case of non-renewal, we are to have the privi-

*Exhibit P-7.*

lege of further ordering boxes from you embossed with dies furnished previously. Such boxes to be billed at your current prices without any additional die charges. We also reserve the right to destroy all dies made upon our orders and paid for by us.

The contracts are placed at the following maximum prices: 10

Contract #472

Single beaded or straight side slip cover boxes ..... \$31.00 per M.

Single hinge boxes ..... \$60.00 per M. without mirrors or bezels, in matt or bright finish.

Contract #473 20

Double boxes, with mirror and bezel, bridge and locking device, in matt or bright finish .....\$185.00 per M.

Above prices are guaranteed against declines. Any decrease in the current quotations to your regular trade shall entitle us to a corresponding reduction. Your current prices in effect on the various dates of delivery a/c of our orders, to serve as a basis. All prices are F.O.B. Montclair, N. J. Terms, as had. 30

The boxes are to be packed in suitable containers to prevent damage or scratching while in transit.

On all orders for which new dies are required, sketches are to be submitted for our or the customer's approval within one week. The initial delivery is to be made four to five weeks after ap-

*Exhibit P-7.*

proved sketch has been submitted to you. On orders for which dies are already in your possession, two weeks are allowed for the first delivery.

If any order should be cancelled by our customers, owing to your inability to deliver within the time specified, we shall not be liable for the die  
10 or any other expenses.

Yours very truly,

JULIUS SCHMID INC.

Per C. C. KROENIG

CK:G

ACCEPTED:

Subject to modification as per our letter Feb. 8,  
1921

20 LOESSER MFG. CO.

30

40

**Exhibit P-8.**

TELEPHONE MONTCLAIR 5136

LOESSER MANUFACTURING CO.

142 PINE ST. MONTCLAIR, N. J.

Successors To

E. LOESSER MILLS, INC.

MAKERS OF METAL NOVELTIES

10

142 PINE STREET

MONTCLAIR, N. J.

Feb. 8th, 1921.

Julius Schmid, Inc.,

344 West 38th St.,

New York, N. Y.

Gentlemen,—

We acknowledge receipt of your letter of Feb 5th in reference to your new contracts #472 and #473, and beg to advise that we will accept the same as per terms stipulated in your letter of Jan 31st, subject however to the following modification.

20

On page two you say "Terms, as had." Your order is accepted with a modification of that part above quoted as follows: 1% in 10 days, or 30 days net.

Trusting the above is satisfactory to you, we remain,

30

Very truly yours,

LOESSER MANUFACTURING CO.

E. LOESSER

EL:ES

40

**Exhibit P-11 for Identification.**

LOESSER KNITTING NEEDLE CO., INC. No. 4566

OFFICE 142 PINE ST. MONTCLAIR N. J.

Newark, N. J. Aug 12/20

## SHIPPING MEMO

Shipped to Julius Schmidt Cust. Ord. No.....  
 Address 349 W. 37 St. Our Ord. No.....  
 City N. Y. City Via.....

## CONTENTS.

## WEIGHTS

Number	Description	Gross.	Lbs.	Ozs.
659	Lady Esther	Tare	"	"
		Net	Lbs.	Ozs.

Counted by.....

Weighed by.....

REMARKS:—

1557  
@ Verona.....  
SHPG CLK.

*Exhibit P-11 for Identification.*

LOESSER KNITTING NEEDLE CO., INC.

No. 4565

OFFICE 142 PINE ST. MONTCLAIR N. J.

Newark, N. J. Aug 12/21

SHIPPING MEMO

Shipped to	Julius Schmidt Inc	Cust. Ord. No.....
Address	349 W. 37 St.	Our Ord. No.....
City	N. Y. City	Via.....

16

CONTENTS.		WEIGHTS		
Number	Description	Gross.	Lbs.	Ozs.
1584	Lady Esther	Tare	"	"
		Net	Lbs.	Ozs.

Counted by.....

Weighed by.....

20

REMARKS:—

1557  
@ Verona

.....  
SHPG CLK.

30

40

**Exhibit P-12 for Identification.**

Aug. 12th, 1921

1557

Julius Schmid, Inc. 349 West 37th St. N.Y.  
4562-4563-4565-4566

	8/12	5107	LADY ESTHER S.C. (your returns 7/28) lacquered on inside & refinished @ 1c ea	51.07
10		304	LADY ESTHER S C Lacquered inside @ \$35.00 M	10.64
				61.71

**Exhibit P-20 for Identification.**

INVOICE NO.

YOUR NO.

ESTABLISHED 1883

20

JULIUS SCHMID  
INCORPORATED  
Manufacturer and Importer  
344-348 West 38th Street  
New York

Aug 5 1921

30

The goods covered by this invoice were double checked and packed with the utmost care by experienced packers and receipted for in good condition by the transportation company, against whom all claims for loss or damage should be made. All goods are shipped at buyer's risk.

40

*Exhibit P-20 for Identification.*

		Positively no claims allowed unless made within 5 days after receipt of goods	
Sold to	Loesser Mills	TERMS	
	142 Pine Street	1% 10 days 30 days net	
Address	Montclair New Jersey	Payable in New York Exchange	10
		Absolutely no discount after 10 days	
Shipped		All goods f.o.b. New York	
Via			

## DEBIT MEMO

8730	PCS	Marinello Double	185 00 M	1615 05	
4510	PCS	Hillrose Double	185 00 M	834 35	
3276	PCS	Adormee Double	185 00 M	606 06	3055 46

20

**Exhibit P-23.**

## JULIUS SCHMIDT—NOTES RECEIVED IN PAYMENT OF ACCOUNT ENDING APRIL 21, 1921.

Date Issued	Amount	Due Date	1921 Date Paid	
June 6/1921	1251.52	July 15th.	July 15th.	
June 6/1921	1251.52	Aug. 15th.	Aug. 13th.	
June 6/1921	1251.52	Sept. 15th.	Sept. 15th.	
June 6/1921	1251.52	Oct. 15th.	Oct. 15th.	
June 6/1921	1251.51	Nov. 15th.	Nov. 15th.	
June 6/1921	1251.51	Dec. 15th.	Dec. 15th.	30
	7509.10			

40

**Exhibit P-24.**

[LETTERHEAD OF]

**JULIUS SCHMID**

INCORPORATED

NEW YORK

May 13, 1921.

10 E. Loesser Mills,  
142 Pine Street,  
Montclair, N. J.

Gentlemen:

You will oblige us by having your Mr. Loesser call on the writer at your earliest convenience.

20 Our salesmen have on various occasions been confronted with the fact that you are selling boxes cheaper to our customers than we can buy them from you, and we would like to know where we stand in order not to appear foolish.

Yours very truly,

JULIUS SCHMID INC.

per C. C. KROENIG

CK:G

---

**Exhibit P-25.**

Copy to Loesser Mills

30

May 19, 1921

Lever Bros. Ltd.  
Toronto, Ontario.

Attention Mr. Makay.

---

Gentlemen:

40 Our Mr. C. F. Schmid, who had the pleasure to call on you last week, reported that you are in

*Exhibit P-25.*

the market for a considerable quantity of metal boxes and compacts to be inserted into same. Mr. Schmid had to leave on a hurried trip to Chicago and was unable to explain the details of his conversation with you.

We are not Metal Box Manufacturers, and have therefore turned the matter over to the Loesser Mills with whom we have been doing business for quite some time, and whom we can conscientiously recommend as giving good service. We are entirely disinterested in the metal box question proper; may say, however, from our extensive experience in this line that it is advisable to deal with a house which can be relied upon, even if some lower figures might be submitted by another firm. We have invariably found that cheaper quotations were ultimately reflected by inferior merchandise which caused endless annoyance to the purchaser and to the party which completes the package.

We do not know whether Mr. Schmid has submitted quotations for our products, as compacts, puffs, etc. and upon your kind advise we shall not fail to serve you with all the necessary details.

Trusting to hear favorably from you, we beg to remain

Yours very truly,

JULIUS SCHMID, INC.

per

CK:G

THE HISTORY OF THE

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... of the ...

... of the ...

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THE HISTORY OF THE

... of the ...

... of the ...

... of the ...



The first contracts were made in March of 1920 (Exhibits P.1 and P.2). Deliveries were begun in June, 1920.

The complaint was first filed in two counts (pp. 1 and 2) to which was annexed a bill of particulars (p. 3). Later the plaintiff filed a third count (p. 4) to which was annexed a bill of particulars (pp. 5 to 15).

The bill of particulars annexed to the first two counts and printed on page 3, begins with the item of May 31, 1921. The bill of particulars annexed to the third count contains the entire book account between the parties beginning June 8, 1920 (p. 5), and on p. 14, l. 17, will be found the same item of May 31, 1921, and from that point on the bill of particulars is the same as that printed on page 3. The case was tried on the third count.

The third count, with the larger bill of particulars annexed, was made necessary by the answer of the defendant which set up matters running back into the earlier history of the transaction; hence the bill of particulars annexed to the third count sets up the entire book account between the parties beginning June 8, 1920.

Schedule "D" to the defendant's amended answer also sets forth a book account (p. 28). This book account begins with the same item of May 31, 1921 (p. 28, l. 11), and is the identical book account which the plaintiff annexed to its first and second counts (p. 3), and it also is identical with that part of the book account annexed to the third count of the complaint, beginning with the item of May 31, 1921 (p. 14, l. 18).

By setting up as a credit in its counter-claim this same account beginning with the item of May 31, 1921, the defendant admitted that it was due and owing; in addition to the specific admission which its counsel made on the record (p. 40, ll. 26-34).

The defendant admitted the receipt of goods to the amount of \$2,176.35. The plaintiff sued for \$2,085.79 (p. 2, l. 36; p. 21, l. 35). The plaintiff proved a balance due

of \$1,824.94 (p. 144, l. 5) the difference being represented by the disputed items of August 6 and August 12 amounting to \$260.85.

The defendant failed to prove its counter-claim, and the Trial Judge non-suited the defendant on the counter-claim (pp. 129-131).

There was no evidence adduced by the defendant to dispute the plaintiff's claim to the amount of \$1,824.94.

The receipt of the goods going to make up the total of \$1,824.94, was admitted, both on the record (p. 40, ll. 26-34) and by the counter-claim (p. 28). The Trial Judge, therefore, properly instructed the jury to start with the undisputed amount of \$1,824.94 and to determine the disputed items in excess of that amount (p. 144, l. 16).

**The Trial Judge properly non-suited the defendant on its counter-claim.**

(a) The counter-claim depended on proof of the agreement alleged in paragraph 5 of the counter-claim (p. 19, ll. 10-20). There was no such proof.

(b) The defendant proved no damages on its counter-claim.

(a) The defendant failed to prove its case laid in its counter-claim.

The fatal weakness in the defendant's case on counter-claim was, that the defendant had long previously made voluntary payment of the item counter-claimed.

The defendant limited its proofs on counter-claim to three particular styles of boxes; and on these it based its counter-claim, namely: Marinello Double, Hillrose Double and Adormee Double (p. 17, l. 38, to p. 19, l. 20; also p. 126, ll. 26-35). See also Schedule "A," annexed to answer (pp. 20 21); Schedule "B," annexed to the answer (pp. 22 to 25); and Schedule "C," annexed to answer (pp. 26 and 27).

These boxes were manufactured under the agreements of Exhibits P. 1 and P. 2.

The requisitions for Hillrose and Marinello boxes were both dated March 19, 1920 (Exhibits P. 17, pp. 154-155 and P. 18, pp. 156 to 159). All of the goods under those requisitions were delivered during August (p. 83, l. 39; p. 85, l. 7; p. 98, ll. 30 to 40).

Mr. Kroenig said that practically all were delivered by the first of September (1920), (p. 99, l. 3).

The Adormee boxes were ordered by requisition dated February 14, 1921 (Exhibit P. 19, p. 160).

These goods were delivered between March 1st and March 10, 1921 (p. 102, l. 10).

These goods had been ordered by the defendant to fill orders from its customers (Kroenig, p. 89, l. 16). Toward the end of 1920, defendant's business slackened a good deal (p. 106, l. 10), which resulted in their customers asking for postponement of shipments (p. 106, l. 15). The result was that the defendant could not use the boxes as fast as it had anticipated (p. 106, l. 18). Furthermore, the market price of these boxes went down below the contract price (p. 110, l. 26), with the result that defendant's customers found they could buy boxes cheaper in the market than they could from the defendant (p. 111, ll. 10 to 18). From May of 1921, on (p. 111, l. 20), defendant began to seek excuses to throw back boxes on the plaintiff and become lax in its payments, so that on May 2, 1921, it owed plaintiff as much as \$9,924.09, on goods delivered (p. 107, ll. 15 to 25).

Mr. Kroenig, the manager of the defendant's Toilet Goods Department (p. 81, l. 36) and who was most familiar with the matter (Schmid, p. 77, l. 25; p. 59, l. 18; p. 60, l. 10) said that everything went along all right until May (1921); that they had some little disputes but nothing very serious, prior to that (p. 115, l. 20).

At that time (May, 1921), the defendant was overloaded with boxes, its customers having disappointed it in taking them off its hands.

In June, of 1921, as a result of pressure exerted by the plaintiff, defendant gave it a series of promissory notes to pay for goods previously ordered and shipped. These notes were all dated June 6, 1921, for \$1,251 and some cents each. There were six notes, payable July 15th and monthly thereafter and the notes were paid as each matured. This was admitted (p. 108, ll. 1 to 27), and see Exhibit P. 23 (Supplemental State of the Case, p. 15) for a schedule of the date, amount, due date and date of payment.

These notes were accepted as payment, and paid the account up to May 31, 1921.

Now, it will be observed that the boxes in dispute, namely: Adormee, Hillrose and Marinello, had been shipped, received and paid for and so were not included in the balance for which the plaintiff brought its suit, which balance began with May 31, 1921. None of these boxes is included in the account from May 31st on.

Nevertheless, the defendant sought to counter-claim these same Adormee, Hillrose and Marinello boxes and in its bill of particulars annexed to its amended answer, as Schedule "D" (pp. 27 and 28) it set up a number of items against the aggregate amount of which it credited plaintiff with its unpaid book account from May 31, 1921, on, and struck a balance which it claimed was due on its counter-claim.

On page 27, appears the various items which are the basis of the counter-claim. The only ones relied on, however, were the items of August 5, 1921 (p. 27, l. 35), which were the Marinello, Hillrose and Adormee boxes (p. 126, ll. 26 to 35).

The issue, therefore, on the counter-claim was a very narrow one, namely: could the defendant counter-claim against the plaintiff the \$3,055.46 representing the value

of the Adormee, Hillrose and Marinello boxes which it had long previously accepted and paid for, and later sought to return in August, 1921.

The defendant in its counter-claim (p. 17, l. 30, to p. 19, l. 40) properly recognized that it was necessary to allege and prove a situation which would overcome the effect of the voluntary payment for the goods. Accordingly, the counter-claim, in paragraph 1, alleging the making of the agreement for the manufacture and sale of the goods, sets up (p. 18, l. 2) an independent verbal agreement between plaintiff and defendant, that the plaintiff agreed that should any of the merchandise be of inferior quality, etc., or become tarnished within a reasonable time, it would replace or refinish such merchandise as should be returned by the defendant.

The counter-claim also set up in paragraph 5, that the Marinello, Hillrose and Adormee boxes were not of proper style and finish, etc., and alleges that after receipt of these boxes (p. 19, l. 10) defendant discovered the defects, and so notified plaintiff, and the plaintiff assured the defendant that it would make good if the defendant would pay the bill for the boxes, and that the defendant, relying upon this promise, paid the bill and subsequently returned the goods.

No consideration was proved for the alleged agreement in paragraph 1 of the counter-claim, and there was an utter and absolute failure of proof to establish the alleged agreement in paragraph 5. See remarks of Judge Dunagan (pp. 129 to 130).

It did appear that of the thousands of boxes that were manufactured and shipped, some slight discrepancies occurred, which were brought to the attention of the plaintiff by defendant and adjusted. It was admitted by the defendant that all of the corrections which were made by the plaintiff were the result of special agreements between the parties in each case (see testimony of Kroenig, p. 125, ll. 9 to 27).

Mr. Schmid said that within a month or two after they started to do business, Mr. Loesser told him that he would at all times refinish and make good such boxes as were not perfect (p. 66, ll. 10 to 40). This had no specific reference to the Adormee, Hillrose and Marinello boxes because at that time they had not been manufactured. Furthermore, no consideration appears for any such agreement, if it was made (p. 130, l. 15).

Mr. Kroenig testified to some generally similar conversation with Mr. Loesser about August 1st, but he could not remember what design of boxes was being talked about (p. 85, ll. 20 to 40). At that time no Marinello boxes had been delivered because no deliveries were made of them until August 13th (p. 85, ll. 5 to 19; Exhibit P. 18, pp. 156 to 159).

The Adormee boxes were not delivered until much later, since the requisition for them was not made until February 14, 1921 (Exhibit P. 19, p. 160).

No Hillrose boxes were delivered until July 31, 1920, on requisition 6385 (p. 83, ll. 15 to 27) nor until August 4, 1920, on requisition 6386 (p. 83, l. 37), and the witness frankly said "I only know we pointed out defective boxes, but the designs I don't remember" (p. 85, l. 37), and he says that Mr. Loesser told him to send back what was not right and they would make them good (p. 85, l. 40).

Counsel for appellant comments on this at the bottom of page 4 of his brief, but I observe he is careful to say that "*boxes* were shown to Mr. Loesser about August 1, 1921." He does not claim that the boxes which were the subject of the dispute, namely: Marinello, Hillrose and Adormee, were shown to Mr. Loesser at that time.

These conversations, however, had nothing to do with the alleged agreement set up in paragraph 5 of the counter-claim on which defendant's case depends, and which refers specifically to the Marinello, Hillrose and Adormee boxes (p. 18, l. 34, to p. 19, l. 20). The agreement there alleged is specific. It set forth that plaintiff

agreed, in consideration of the defendant paying the bill for these boxes, to make good any defects in the goods paid for. Such an allegation was necessary to overcome the fact of the voluntary payment.

Now, there is no proof of this allegation.

The goods previously shipped were paid for in full up to May 31, 1921. Several months after that payment, and in August, of 1921, the defendant, then being overloaded with goods and the market having gone down, shipped back to the plaintiff the Adormee, Hillrose and Marinello boxes, which it made the subject of its counter-claim. Mr. Kroenig admitted on cross examination as follows (p. 99, l. 29):

“Q What I am trying to find out is if it is not true that of the goods that were shipped at the time, in July and August, 1920, you shipped back to the Loesser company in 1921, a year afterwards, and now make that the basis of this dispute and counter-claim? That is true, isn't it? A Yes, sir.”

Previous to that boxes had been sent back from time to time which had been refinished by agreement in each specific case, as Mr. Kroenig admitted. He testified (p. 125, l. 25):

“Q If it was corrected after, it was by agreement between your company and the Loesser company? A Yes.”

At the time the Marinello, Hillrose and Adormee boxes had been sent back in August of 1921, the defendant sent with them a so-called debit memorandum, in which it sought to credit itself with the value of these returned goods (Exhibit P. 15, p. 152, l. 36). (The same Exhibit appears in Supplemental State of Case, as Exhibit P. 20, pp. 14 to 15.)

Counsel for appellant in his brief, bottom of page 5, comments on this and says that the Schmid company asked for a credit for the boxes returned of \$3,055.46. They did ask for a credit but it was not granted. He overlooks

that the defendant's request for credit in this connection was repudiated. Certainly the defendant could not create either a credit for itself or a charge against the plaintiff by merely returning the boxes with a credit memorandum. Following receipt of the memorandum the plaintiff wrote:

"We cannot allow any such claim at this time. We are herewith returning your credit memorandum for \$3,055.46."

(Exhibit P. 14, p. 151, l. 18). At the same time the plaintiff called defendant's attention to its unpaid bills and said:

"Unless same is paid within ten days we shall take other means of collection" (p. 151, l. 22).

Enclosed with the letter, plaintiff sent a statement (Exhibit P. 16, p. 153) which set up the same charges as the bill of particulars (Schedule "A," pp. 3 and 4; see p. 75, l. 30, to p. 76, l. 10).

Mr. Schmid admitted that the Loesser company did not allow their claim. He testified (p. 76, l. 12):

"Q In this letter (P. 14, p. 151) the Loesser company said they could not allow your claim at that time, didn't they? A Yes."

He also admitted the statement of account enclosed (p. 76, l. 30; P. 16, p. 153).

Not only had the defendant paid for the goods long prior to August, 1921, when it attempted to return them, but the notes which it had given in June came due serially month by month and were paid by it (p. 76, l. 35, to p. 77, l. 1). The suit was brought in November, 1921 (p. 77, l. 5) and the last note did not come due until December 15, 1921, when it was paid (Supplemental State of Case, Exhibit P. 23, p. 15, l. 30).

Counsel in his brief, at the top of page 6, says that after the giving of these notes a dispute arose as to the refinishing of the boxes, which were returned in August, 1921. Counsel is in error in so stating. The dispute arose in May, 1921. Kroenig says that it was some time

toward the end of May (p. 114, ll. 8 to 20). Prior to that he thought so highly of the Loesser company that he recommended them as box manufacturers in glowing terms to Leber Brothers (p. 113, l. 17 and ll. 30 to 36).

The boxes were not returned "under the standing agreement," as counsel argues (p. 6), because no such agreement existed or was proved (p. 130, l. 15). At the time the goods were returned on August 5th, only one of the notes had come due. If the agreement was as defendant alleged in its counter-claim, it could easily have stopped payment on the remaining five notes, which aggregated over \$6,000 (Supplemental State of Case, p. 15, Exhibit P. 23), but it did not see fit to do this, but continued its voluntary payments.

The case could hardly be stronger to establish that the defendant voluntarily made payment of the goods, which payment it sought to recover back by means of its counter-claim.

In *Camden v. Green*, 54 N. J. Law 591, this Court by Justice Dixon laid down the general principle (p. 593):

"that where a party, without mistake of fact, or fraud, duress or extortion, voluntarily pays money on a demand which is not enforceable against him, he cannot recover it back. *Flower v. Lance*, 59 N. Y. 603; *Schwarzenbach v. Odorless Excavating Co.*, 65 Md. 34; *Sowles v. Soule*, 59 Vt. 131."

The same rule was reiterated in this Court by Chancellor Walker, in *Koewing v. West Orange*, 89 N. J. Law 539, p. 541, and again most recently in *Schaedel v. Liberty Trust Co.*, Vol. II, N. J. A. R. No. 11, p. 370 and p. 373.

The case at bar is ruled by the decision of this Court in *New Jersey Brick Co. v. A. M. Krantz Co.*, 109 Atl. 350, where this Court adopted the opinion of the Supreme Court. In that case the Court said (p. 350):

"The plaintiff sold defendant a large quantity of brick at \$7 per thousand. Before the deliveries were completed, the plaintiff notified defendant that it would raise the price to \$7.50 per thousand. The

defendant objected but as the brick was of peculiar character not procurable in the market, he accepted subsequent deliveries until the contract was fully performed, and then paid in full at the higher price under protest. He continued buying brick, and more than two years afterward, when sued for a small balance on a later sale, undertook to counter-claim for the alleged overpayment.

'Clearly the payment was voluntary. However embarrassing it may have been for the defendant to be without the brick, he cannot now rely on that situation as amounting to duress; when he paid the money he had already had the brick and was no longer subject to embarrassment. He was perfectly free to pay or not, and, if he did not pay, to defend on the ground that the plaintiff was entitled only to the original price. He chose not to do so.' "

As already pointed out, the defendant recognized that it must allege and prove such facts as would overcome the effect of its voluntary payment. It alleged, in paragraph 5, of its counter-claim (p. 18, l. 35, to p. 19, l. 20) an agreement that if it paid its bill the plaintiff would make good such boxes as it returned, but it utterly failed to prove the agreement which it alleged and on which it relied and this was the basis of the non-suit (p. 129, l. 12, to p. 131, l. 16).

The record can be searched from cover to cover and no proof of this alleged agreement set up in paragraph 5 of the counter-claim will be found. Counsel for appellant in his brief points out no evidence to sustain the allegation of paragraph 5 of the counter-claim. Conversations which he sets forth on pages 6 and 7 of his brief occurred in November or December, 1921, after the suit had been brought. Such conversations, if admissible at all (which we question), certainly had no bearing on an agreement alleged to have been made prior to August 5, 1921, which was the date when the goods were returned (see Exhibit P. 15, p. 152, l. 14).

Judge Dungan, in deciding the motion for a non-suit, said (p. 130, l. 10): referring to the allegation in paragraph 5 of the counter-claim:

“There is no proof establishing that at all” and he also pointed out that the alleged agreement referred to in paragraph 1 of the counter-claim (p. 18, ll. 2 to 15):

“There seems to be no consideration proved, in view of the fact that the proof being entirely barren that the payments for those goods were made in consideration of the agreement to make good the imperfections” (p. 130, ll. 14 to 19).

Judge Dungan queried whether the counter-claimant could go to the jury upon the implied warranty that the boxes would be of the kind and character ordered (p. 130, l. 24), but after argument he was satisfied that no such question was in the case since it had not been pleaded (p. 131, l. 10). In so ruling, he was squarely within the decision of this Court in *A. F. Brown Co. v. C. Pardee Works*, 95 Atlantic 976.

That suit was to recover a reasonable price for making and finishing a gear. The answer denied that the gear had been made as agreed and alleged that it was defective and not according to contract. The Trial Court charged that there was no warranty in the case and that the jury had no right to consider any question of warranty. This Court upheld the Trial Judge on the ground that the question of warranty was outside the issue, and said (p. 976):

“The Practice Act of 1912 (p. 391, sec. 40), provides that the answer must specially state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint.”

That decision applies with full force here and the Trial Judge correctly held that the question of warranty was not involved, and the appellant does not now contend otherwise.

(b) The defendant failed to prove any damages on its counter-claim.

The judgment for non-suit could be equally sustained on this ground.

When the defendant rested its case on its counter-claim, plaintiff's counsel moved for a non-suit "on the ground that there is no proof of damages" (p. 125, l. 30).

On this the Court said:

*"The Court.* As to the state of the proofs that have been offered I think I will have to grant the motion" (p. 125, l. 33).

Counsel for the defendant recognized the force of this situation and asked leave to reopen his case, which was granted (p. 126, ll. 7 to 20).

To prove his damages, counsel attempted to introduce in evidence the debit memorandum dated August 5, 1921, which was the memorandum which defendant sent the plaintiff when, in August, 1921, it returned the Marinello, Hillrose and Adormee boxes (see p. 126, ll. 27 to 40); and which the plaintiff had repudiated as Schmid admitted (p. 76, l. 12).

The Court said that that exhibit was already in evidence and it is printed as Exhibit P. 15, p. 152, and in the Supplemental State of the Case, as Exhibit P. 20, p. 14.

The motion for a non-suit was then renewed on the ground "that there is no proof of damages and on the further ground that the defense of payment which is set up and which is admitted has not been overcome by the counter-claim" (p. 129, ll. 15 to 20).

As already pointed out, the defendant could not create a credit for itself or a charge against plaintiff by merely returning the boxes with the credit memorandum. Particularly is that true here, where the boxes had been previously paid for and their return was repudiated by the plaintiff (Exhibit P. 14, p. 151, l. 8, and p. 76, l. 12). No other attempt was made to prove damages than by this debit memorandum, and the judgment of non-suit, if

for no other reason, was proper upon the ground that the defendant had failed to prove any damages on its counter-claim.

**The Trial Judge committed no error in submitting the case to the jury or in the exclusion of testimony as argued in appellant's Points II and III.**

(a) The Trial Judge submitted the proper issues to the jury.

The Trial Judge instructed the jury to begin their consideration of the case with the amount of \$1,824.94, already established in the plaintiff's favor.

After the defendant's case on its counter-claim had been thrown out, no issue remained in the case with respect to the plaintiff's claim up to \$1,824.94. The defendant, by its counter-claim, admitted unpaid items after May 31, 1921, to an amount of \$2,176.35 (p. 28) and counsel for the defendant admitted on the record the receipt of the goods set up in the bill of particulars to that amount, and only disputed the items of August 6th and August 12th, in the plaintiff's bill of particulars (p. 15, ll. 10 to 15). The plaintiff sued for \$2,085.79 (p. 4, l. 21). The difference between the \$2,176.35 admitted and the \$1,824.94, was arrived at by the plaintiff conceding certain items of the counter-claim which had no bearing on the Marinello, Hillrose and Adormee boxes, or on the disputed items of August 6th and August 12th—\$260.85.

The \$1,824.94 was arrived at by taking the balance due as shown by plaintiff's books (p. 4, l. 20, and p. 15) of \$2,085.79 and subtracting from it the disputed items of August 6th and August 12th—\$260.85, which left a balance of \$1,824.94 (see discussion between Court and counsel, p. 143, l. 30, to p. 144, l. 6).

There was nothing to dispute the figure \$1,824.94 and no issue with respect to that amount for submission to the jury.

The Trial Judge left to the jury the question of the items of August 6th and August 12th, which the defendant did dispute, on the ground that it had never received those goods.

Counsel argues in his brief (p. 9), that the Court picked out a part of the defendant's claim and passed upon the remainder of it itself. There is no force in this contention in view of the admission which counsel made on the record (p. 40, l. 30), as well as the admission which necessarily grew out of the credit which the defendant allowed in its bill of particulars annexed to its counterclaim (p. 28), and the absence of evidence disputing the \$1,824.94 proved by plaintiff.

The disputed items the Court did submit to the jury and the jury found for the defendant on those items. The amount of the verdict is the exact amount of the \$1,824.94, with interest for two years and two months (p. 144, ll. 20 to 25) amounting to \$2,062.18 (p. 147, l. 36).

(b) The Court properly excluded the question asked Mr. Kroenig by his counsel (p. 124, l. 26).

The question required Mr. Kroenig to state what would be a reasonable time within which to determine whether or not the boxes delivered were in good condition. Nothing was shown which would qualify the witness to express an opinion, such as an answer to this question required, and the Trial Judge properly ruled that the question of a reasonable time was for the jury to determine upon the facts. It had already appeared that the Marinello and Hillrose boxes had been shipped during August, 1920, and the Adormee boxes in March of 1921. Further, Mr. Kroenig admitted that they only examined the boxes whenever they needed some to fill orders. He testified (p. 98, l. 16):

“Q It wasn't your practice to examine these boxes except that you handled them for immediate use to fill up your orders? A We examined the boxes whenever we needed something.

Q When you needed a box for use to fill up an order for your customer then you would examine the boxes? A Yes, sir.

Q And the rest of the time you put them on the shelf? A Yes, sir."

There was, therefore, no room in the case for Mr. Kroenig to express an opinion as to what was a reasonable time when the jury had the facts before them from which they could reach their own determination.

The Trial Judge, therefore, properly ruled that it was a question for the jury to determine, after a statement of the facts as to their handling, and not a case for opinion evidence (p. 124, l. 35).

Moreover, if the judgment of non-suit was correct, as it was under *New Jersey Brick Co. v. A. M. Krantz Co.*, 109 Atl. 350, this question becomes purely academic.

We respectfully submit that there is no error in the record sent up and that the judgment for the plaintiff should be affirmed.

Respectfully submitted,

McCARTER & ENGLISH,  
*Attorneys of Plaintiff-Appellee.*

CONOVER ENGLISH,  
*Of Counsel.*

## New Jersey Court of Errors and Appeals

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LOESSER MANUFACTURING COM-  
PANY, a corporation,  
Plaintiff-Appellee,

v.

JULIUS SCHMID, INC., a corpora-  
TION,  
Defendant-Appellant.

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ON APPEAL.

### **BRIEF FOR DEFENDANT-APPELLANT.**

#### **Statement.**

This action is brought by Loesser Manufacturing Company against Julius Schmid, Inc.

The complaint was originally filed on November 5th, 1921, and contained two counts for goods sold and delivered to the defendant between May 31st, 1921, and August 4th, 1921. Subsequently the plaintiff amended its complaint on January 16th, 1923, by adding a third count upon a book account, a copy of which account is set forth in the State of the Case, pages 5 to 15, inclusive, showing a running account between the appellant and the appellee between June 8th, 1920, and August 12th, 1921. To this complaint the appellant filed an answer and counterclaim (Case, p. 16). And in Paragraph five of the answer to the first count appellant alleged that in addition to any credits set forth in Paragraph five of the first count of the complaint the appellee was indebted to the appellant as set forth in the counterclaim.

Under the first separate defense in the answer the appellant denied that it was indebted to the appellee and in the second defense the appellant contended that the appellee is indebted to the appellant as shown by the counterclaim (Case, p. 17). And in the counterclaim the appellant contended that during the years 1920 and 1921, the appellee was engaged in the manufacture of vanity powder boxes. That an agreement was made on March 19th, 1920, whereby the appellee was to manufacture for the appellant certain vanity powder boxes of different styles, quality and finish in which were styles known as "Marinello Double," "Hillrose Double" and "Adormee Double" and then alleges the verbal agreement and the placing of certain orders. Paragraph five of the counterclaim alleges the filling of certain orders at different times and the discovery by the appellant that a great number of them were composed of two different kinds of metal and were rejected. That after discovery of the defects and improper workmanship the appellant notified the appellee, its agents and servants, and the appellee, its agents and servants assured the appellant, its agents and servants that they would make good if they would pay the bill therefor. And the appellant relying upon the promise of the appellee, its agents and servants, paid the bill and subsequently returned the goods to the appellee and they are now in the possession of the appellee, its agents and servants, and demanded the difference between the amount alleged to be due from the appellant to the appellee, and the amount which the appellant had overpaid to the appellee, namely, \$1,761.06 (Case, pp. 17 to 19).

At the trial after hearing all the evidence the Court directed a judgment of non-suit against Julius Schmid, Inc., on its counterclaim and ruled

that the only question involved in this case was as to the items of August 6th and August 12th, amounting to \$260.85, the balance of \$1,824.94 having been established by the proof. To this ruling an exception was taken and the Court then charged the jury, leaving for the jury to determine in its charge, two items, one of August 6th, 1921 for \$199.14 for Nylotis boxes, and the item of August 12th Lady Esther boxes, \$61.71 (Case, p. 144).

After the charge of the court the attorney for the appellee admitted that the item of August 12th for the Lady Esther boxes of \$61.71 should not be charged against the appellant, and the court then charged the jury to that effect, thereby leaving for their consideration, only the item of August 6th, amounting to \$199.14.

The jury evidently following the charge of the court, returned a verdict in favor of the appellee and against the appellant for \$2,062.18, which, according to computation, represented the \$1,824.94 with interest for thirteen months at six per cent., which brought their total to the amount of their verdict.

The grounds of appeal are set forth in the Notice of Appeal (Case, p. 148). The first reason set forth therein is:

#### POINT I.

**The Court erroneously granted a motion of non-suit upon the counterclaim filed by the defendant-appellant.**

By the third count added to the complaint, the appellee sued for the balance alleged to be due upon a book account for goods sold and delivered between June 8th, 1920 and August 12th, 1921. The testimony discloses that Exhibits P-1, P-2 and P-3 and two order slips constituted the contract be-

tween the parties (Case, p. 38). And that the orders were blanket orders for a large quantity against which specific requisitions were made (Case, p. 40). That goods were returned from time to time because of imperfection in the manufacture of them (Case, p. 44). And particularly the goods in question were returned to the appellee but the appellee denied that it accepted them (Case, p. 45). It also appears that the goods were returned because of imperfections because they were tarnished, because they had different colors (Case, pp. 58, 59, 61 and 62), and that after they had been returned in August, 1921, Mr. Loesser, Jr., after talking with Mr. Schmid, said that some of the boxes should never have been sent (Case, p. 63). And with reference to the particular boxes in question, namely, Marinello, Hillrose and Adormee, Mr. Schmid testified that they were returned to Loesser in May, 1921, because they were unsatisfactory in finish. That Loesser returned them to the Schmid Company who assumed that they had been refinished, but after making an inspection of them they found they were still unsatisfactory, and returned them again to the Loesser Company, and on July 27th, 1921, wrote a letter which is Exhibit D-1 (Case, p. 167) (Case, pp. 63 and 64). That after writing this letter the boxes in question were again returned and a dispute then arose as to the payment for the refinishing of them. This is evidenced by the letter of the Loesser Company to the Julius Schmid Company of August 5th, Exhibit D-2 (Case, p. 168). After this dispute about the payment the Julius Schmid Company refused to again accept the boxes and evidently they were never refinished by the Loesser Company. That boxes were shown to Mr. Loesser about August 1st, 1920 and Mr. Loesser said: "All right, whatever isn't right you send them back, we will make good" (Case, p. 85, bottom of the page).

"Q. And from that time on did you continue to send boxes back to them? A. We sent boxes back on various occasions.

"Q. From that time on did you send boxes back to Mr. Loesser? A. Yes, we sent boxes back on various occasions.

"Q. For what reason? A. Owing to imperfect finishes and owing to the fact that many boxes were made of two kinds of metal. The top didn't match the bottom" (Case, p. 86).

All this goes to show the course of dealings between the parties under their contract, between June, 1920, and August, 1921. That everything seems to have gone along smoothly until May, 1921, when this large amount of boxes was sent back to be refinished and which the Loesser Company evidently attempted to refinish and returned, but upon examination by the Julius Schmid Company it appeared that they were not refinished and were again returned in August, 1921, after the letter from the Schmid Company to the Loesser Company was sent on July 27th (Exhibit D-1). That upon the return of these boxes Julius Schmid Company asked for a credit and sent a credit memorandum (Exhibit P-20). This exhibit is set forth in a supplemental State of the Case which contains several of the plaintiff's exhibits which which were not obtained in time to be printed with the original State of the Case. This exhibit was offered in evidence by the appellee and was also tendered as an exhibit on the part of the appellant, Julius Schmid Company (Case, page 126), but the Court said it was already in evidence. From an examination of this exhibit it shows that the Schmid Company asked for a credit for the boxes returned of \$3,055.46. Prior to August, 1921, the Schmid Company had been falling behind in payments to the Loesser Company and on June, 1921, the Schmid Company gave to the

Loesser Company its note totalling \$7,509, payable monthly (Case, page 70). These notes were given on account of the balance remaining on the general account or the book account upon which the plaintiff-appellee relied in its third count, but after the giving of these notes the dispute arose as to the refinishing of the boxes that were returned in August, 1921, and under the standing agreement between the Loesser Company and the Schmid Company, the Schmid Company expected that they would refinish the boxes and return them.

That the practice or custom of the Schmid Company in returning boxes to the Loesser Company for refinishing covered the periods between August, 1920, to August, 1921. In other words, from the time the Loesser Company started making deliveries (Case, pp. 118 and 119). That after the boxes in question were sent back in August, Loesser's expressman tried to deliver them to Schmid's place, but the Schmid Company had given orders to refuse to accept them (Case, p. 93, bottom of the page). That some time later in November or December Mr. Kroenig, of the Schmid Company, saw the boxes in the expressman's stable, in the presence of Mr. Loesser, Sr., Mr. Loesser, Jr., and C. F. Schmid. That before going to the expressman's place they went to Loesser's office first; that from Mr. Loesser's office they were taken to the expressman's place, where they examined the boxes, and Mr. Loesser, Sr., said:

"You are right, Mr. Schmid, there are quite some boxes in here that should never have been delivered to you" (Case, p. 94).

That they went from there back to Mr. Loesser's office, and the following conversation took place:

"A. When we got back to the office, he said, 'Well, Mr. Schmid, I tell you what we do. You

pay us what you owe us and we will refinish the boxes.' I said, 'How can you refinish those that have different colored parts? You can't make red yellow and yellow red.' So they were talking to each other, and Mr. Loesser, junior, mentioned, 'Well, we can brass plate them, put them through a brass plating process.' He said, 'That would, of course, make the two alike, because they go in a galvanic bath, they would come out alike, the two parts.' And I said, 'Have you ever tried that?' And he said, 'Yes, we did that with a lot of other boxes.' I said, 'All right, if you make them alike that is all I want. I don't care what you do, whether you brass plate them or anything else, it does not concern me.' Mr. Loesser said, 'Now, Mr. Schmid, we will put those boxes in shape, but you have to pay what you owe us.' Mr. Schmid said, 'We can't do that, that is out of the question, because we returned I guess about eighty-two hundred dollars' worth of merchandise and your account against us is \$1,800, so how can we pay you that you will make good on the \$8,200?' The thing was not settled definitely that night. Both parties thought, 'All right, we will give it another thought,' and then Mr. Schmid and I went back to New York" (Case, pp. 95 and 96).

It must be borne in mind that at the time this conversation occurred the boxes were in the possession of an expressman, who took the boxes from Loesser's place and attempted to deliver them at Schmid's place of business, where they were refused, and who, after the refusal, took them back to his stable, so that it raises a question for the jury to determine whether or not the goods had been returned to the Loesser Company, and the Schmid Company was entitled to a credit upon their book account for the return of these goods, and whether or not they had not been returned to

the Loesser Company by the Schmid Company under their continued dealings and alleged agreement that the Loesser Company was to refinish all imperfect boxes. And if such an agreement did exist between the parties the jury would have a right to so find and to say that the Schmid Company were entitled to the credit as shown by the credit memorandum (Exhibit P-20) amounting to \$3,055.46, which would overbalance any alleged claim made by the appellee upon its book account set forth in the third count of the complaint.

And again, taking the three counts in the complaint, it was a jury question as to whether the Loesser Company was suing for goods sold and delivered between May 31, 1921, and August 4th, 1921, or for the balance alleged to be due upon a book account for goods sold and delivered between June, 1920, and August, 1921.

#### **POINT II.**

**The Court erroneously directed a verdict in favor of the appellee and against the appellant at the trial of the above entitled case for a part of the amount alleged to be due to the appellee.**

Upon this point we might use the same argument that has been set forth in Point I, and respectfully submit to the Court that the question as to whether there was anything due to the Loesser Company by the Schmid Company under the third count of its complaint, should have been submitted to the jury in view of the large amount of boxes that had been returned by the Schmid Company to be refinished under the alleged agreement between the parties that the Loesser Company would accept the return of all goods that were not in good

condition, and had previously accepted them during their course of dealings, and these goods being part of the dealings between the parties between June, 1920, and August, 1921, the jury should have been entitled to say whether or not Schmid Company should be charged with them.

And also in conjunction with this point may be taken Point 5 in the Notice of Appeal, namely, **THAT THE COURT ERRONEOUSLY OMITTED TO SUBMIT THE PROPER ISSUES TO THE JURY**, because the Court in submitting the item of August 6th to the jury, picked out a part of the appellee's claim and passed upon the remainder of it itself, and we respectfully submit that the action being upon a book account for goods sold and delivered between June, 1920, and August, 1921, and the denial by the appellant that it was indebted to the appellee, raised a sufficient dispute for the jury to say whether or not there was anything due upon the book account.

### **POINT III.**

#### **The Court erroneously excluded testimony on behalf of the defendant-appellant.**

Upon this point we only want to bring one question to the Court's attention, and that is on page 124 of the State of the Case, where the question was asked of Mr. Kroenig, a witness for the appellant, as follows:

"Q. Mr. Kroenig, what in your opinion would be a reasonable time to determine whether or not these boxes delivered were in good condition?"

This question was objected to, and the objection was sustained. The Court said, in sustaining the objection:

"I think that is a question for the jury to determine, after a statement of the facts as to their handling, where they were, and it may be possible that it would be in some instances proper to state the reasons for the lapse of time. I do not want to decide that now, because it may be objectionable."

This, to our mind, coupled with the other testimony in the case to the effect that the goods had been returned from time to time on various occasions and had been accepted by the Loesser Company and refinished and returned, this question became very material to the issue for a jury to determine whether or not the return of the boxes in question by Julius Schmid Company in August was a proper return in accordance with their dealings under the alleged agreement on the part of the Loesser Company to refinish all imperfect work. The Court below undoubtedly had this phase of the case in mind during the course of the trial, as is shown by the admission and rejection of certain letters, the Court permitting the introduction of letters wherein there was any reference to imperfections (Case, p. 122).

Before closing, we want to bring to the Court's attention the fact that we had been served with a notice objecting to the State of the Case, wherein counsel for the appellee objected to the printing of the Postea, Order for Judgment and Judgment, set forth on pages 33, 34 and 35, respectively, and also to the failure to print Exhibits P-1 to P-12 of the plaintiff-appellee. Upon receipt of this notice, we communicated with the attorneys for the appellee, and we now respectfully ask the Court to disregard the Postea, Order for Judgment and Judgment on pages 33, 34 and 35 of the State of the Case.

After communicating with counsel for the appellee, they obtained from their client the exhibits that had been omitted and forwarded them to us, and we have had them printed as a supplemental state of the case.

**We respectfully submit that the judgment should be reversed and a new trial granted.**

MACKAY AND MACKAY,  
Attorneys for the Defendant-Appellant.

HOWARD MACKAY,  
Of Counsel.

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