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New Jersey Supreme Court

Notice of Appeal

(Filed May 9 1919.)

FIRST DISTRICT COURT OF JERSEY
CITY

INTERSTATE CHEMICAL Co.,
Plaintiff,
vs.
JAMES LEO COMPANY,
Defendant.

20

To Robert Carey, Attorney for Defendant:

Sir:

Take notice that the plaintiff, Interstate Chemical Co., hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court, Jersey City, rendered in the above stated action the 30th day of April, Nineteen hundred and nineteen. 30

FRANK G. TURNER,
Attorney of Plaintiff.

Testimony

FIRST DISTRICT COURT OF JERSEY CITY

10	INTERSTATE CHEMICAL COMPANY, Plaintiff, vs. JAMES LEO COMPANY, Defendant.	}	On Contract.
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Jersey City, January 9, 1919.

Before, HON. CHARLES L. CARRICK, Judge.

20 Frank G. Turner, Esq., Attorney for Plaintiff;
 Robert Carey, Esq., (William L. Rae), for Defendant.

WILLIAM H. ROSE, sworn:

Direct-examination by Mr. Turner:

Q. Mr. Rose, you are connected with the plaintiff company? A. I am.

Q. On or about July 16th, 1918, did you give an order—

30 The Court: What is Mr. Rose's connection with the plaintiff company?

Q. You are president of the plaintiff company?
 A. Yes, sir.

Q. On or about July 16th, 1918, did you give an order for your company to the James Leo Company? A. Yes, sir.

40 Q. (Exhibiting paper to witness) Is this the order? A. Yes, sir.

William H. Rose—Direct

Q. How was that sent to the Leo Company?
A. By mail.

Mr. Turner: I offer the order in evidence.

Without objection the order was admitted and marked Exhibit P-1.

10

Q. Did the Leo Company acknowledge that order? A. Yes, sir.

Q. I show you a letter dated July 17th. A. That is correct.

Q. Is that the acknowledgment? A. Yes, sir.

Mr. Turner: I will read that order. The order is dated July 16, 1918, Purchase Order No. 161. (Reading)

“To James Leo Co.

251 Varick St. Jersey City, N. J.

20

Please Deliver 10,000 folding boxes, 6x8x11, for Key Dry, two color printing as per sample submitted, at \$47.50 per 1000. Delivery to be within four weeks.

“Interstate Chemical Co.

Per William H. Rose.”

At the bottom is a notation. “Please acknowledge receipt of order, giving date of shipment.”

Then I will read the letter:

30

Jersey City, N. J. July 17/18

Interstate Chemical Co.

667 Garfield Ave.

Jersey City, N. J.

Gentlemen:

We are in receipt of your order of July 16th for 10,000 5 pound folding boxes, size 8x6x11, to be made from Orange Coated

40

William H. Rose—Direct

board printed in two colors, you to furnish original plate for front and back. Price for the same to be \$47.50 per M. packed in paper bundles and delivered at your place of business less 1-10-30 days net.

10 We note that you want delivery of these boxes in about four weeks, we think it will be fully six weeks before we can make delivery.

Yours respectfully,
JAMES LEO COMPANY,
James Leo, President.

20 P. S. We find that we have on hand undelivered at the present time 10,000 1 pound and 10,000 1/2 pound boxes, which are in process of work, and will be delivered as fast as they are finished."

That refers to the small boxes made up like the one in issue in this case.

Q. That box marked Half Pound Box Key Dry Arsenate of Lead, was that made by the defendant company? A. Yes, sir; that is two color work.

30 Mr. Turner: I will ask that that be marked Exhibit P-2.

Q. This box marked One Pound Box Arsenate of Lead, Key Dry, in black and red, was that made by the defendant company? A. Yes, sir.

Mr. Turner: I will ask that that be marked Exhibit P-3.

A. Then we came along and gave him an order for the five pound which was to be uniform in two colors, corresponding to these.

40 Mr. Rae: I object to that characterization.

William H. Rose—Direct

The Court: Yes; strike that out.

Q. This box marked Five Pounds Arsenate of Lead, which is printed only in black, where did your company receive that box from? A. That was shipped by the Leo Company, and when it came in we called them up and told them that was a mistake. 10

Mr. Rae: I didn't hear that.

A. When it was delivered we called up the Leo Company and told them that it was a mistake, told them that they made the boxes in one color.

Q. Did Mr. Leo respond to that? A. Someone on the other end who claimed to be Leo; I could not say who was on the other end of the line.

Q. You called up the Leo Company? A. Yes, sir; immediately, they were notified. 20

Q. What was the reply that was made by the Leo Company? A. That we would take those or we would not get anything.

Q. Now, these boxes that were sent up to your factory, how did they get into your factory—by what means? A. They were delivered by the Leo Company.

Q. By their own truck? A. Yes, sir.

Q. Were they unloaded by your men? A. Well, we have a regular receiving department there; we have been receiving stuff right along and naturally they were taken off. 30

Q. Were they loaded by your own men? A. Whether it was our men or their man I couldn't state.

Q. How soon after the delivery of these boxes in one color did you see them? A. As soon as they unpacked them, when they opened them and looked at them they reported to the office, I presume either that same day or the next. 40

William H. Rose—Direct

Q. Then this telephone conversation immediately followed, did it? A. I immediately notified them.

Q. Did you at any time indicate to the Leo Company that you would accept these boxes? A.
10 No, sir.

Q. Did they ever send for them? A. No, sir. They requested that the man who was sent down there, that is, Mr. Gardner, to O. K. the proofs on the back—there are the directions, if you will notice—after the printing was in shape they called us up and asked to send somebody down there to O. K. the proofs on the directions there, and there were several changes in there that were
20 rather important, and as that matter naturally refers to an insecticide the directions had to be particular, so we sent Mr. Gardner down there to O. K. the proofs.

Q. Then, after they had delivered this amount—do you know how many there were? A. I couldn't tell you.

Q. Did they ever offer any more boxes after that? A. Nothing was ever done after that as far as delivery goes.

Q. Now, upon the failure to furnish the boxes
30 in two colors what did you do? A. I called up several box manufacturers, it was necessary for us to have those boxes, we had ordered on file, the materials were used for agricultural spraying purposes and it is necessary for us to get this material shipped, because there were orders on file to be used for spraying to protect fruit and vegetables, and we had to get busy and get them
40 out; we had sold these materials and our representatives and our salesmen were waiting. We

William H. Rose—Direct

had our line of goods in uniform packages made up in two colors and for that reason it was necessary to have these made in two colors instead of one color.

Q. The purpose in having two colors was to make your line uniform? A. Yes, sir, and to facilitate their sale, in having attractive packages to sell them quicker. 10

Q. Then did you have to procure boxes from any other source? A. We secured them from the National Folding Box Company of New York.

Q. Did you place an order with them? A. We placed an order with them.

Q. For how many boxes? A. The same quantity, 10,000.

Q. At what price? A. I think it was \$68.70. 20

Q. (Exhibiting paper to witness) This is your contract with the folding box company—the National Folding Box Company? A. They made us their proposition in writing and we accepted it; that is the confirmation.

Q. You have here the proposition and acceptance of that contract? A. Yes, sir.

Mr. Turner: I offer this in evidence, the proposition and acceptance and printed contract.

Mr. Rae: I object to the introduction of these. They are copies and are unexecuted. 30

The Court: Of course your copy of the letter is not evidential. The papers will not be received in evidence.

Q. Now, this order to the National Folding Box Company for these five pound boxes, is that of the same size as this Exhibit P-4? A. Yes, sir. 40

William H. Rose—Direct

Q. In how many colors was this box to be printed? A. Two colors.

Q. Those two colors which are to be put on the five pound boxes, are they similar to the colors which are shown on Exhibit P-3? A. Red and black, sir.

10 Q. And the purpose of that is, I think you testified, to make a uniformity in them? A. Yes, sir.

Q. Well, have you suffered any other loss by reason of the failure of the defendant to carry out its contract? A. It has been very inconvenient to us because these goods are always out in the fall while the conditions are satisfactory, and as it was, we haven't got those goods packed and we are handicapped because we should pack them in the fall while the weather is good and now we have to pack them under unfavorable conditions.

20 Q. Have you as yet lost any orders because of the failure to get those boxes? A. We should have shipped those out but we have asked those people to hold off; so far no orders have been cancelled but we are holding off deliveries that we should have shipped.

Q. You are now late in shipping? A. Yes.

30 Q. And there may be cancellations? A. Yes.

Mr. Rae: I object to what there may be.

The Court: Yes; that will be excluded.

Q. With what representative of the National Folding Box Company did your company deal?

A. Mr. Stone, I think it is, the New York Manager.

40 Q. The New York Manager? A. I think he is their New York Manager, Mr. Stone, of that office.

William H. Rose—Direct

Q. Who is the Mr. Gardner that was mentioned? A. Mr. Gardner is the salesman of our company.

Q. What are his duties in your company? A. He sells merchandise and travels.

Q. The usual duties of a salesman? A. Yes, 10
sir.

Q. Does he hold any office in your company? A. No, sir.

Q. Is he the gentleman you spoke of as having been sent to the Leo Company to O. K. proofs? A. Yes, sir; he is familiar with that. The Sales Manager and Mr. Gardner were the two that got up the directions for that; those are the field men, they are on the outside and they are more familiar with the use of those insecticides than the officers of the company; for that reason he was brought in on that so that they would read satisfactory to the user and the people that sell. 20

Q. Mr. Gardner was familiar with what are called suggested directions as matter on that? A. Yes, sir.

Q. Now, did your company afterwards indicate any other work that was to be done on these boxes by the Leo Company? A. When the boxes, several samples, were filled, they did not seem to be strong enough and we thought it advisable to put in the wire stitching on the side to reinforce the glue on the boxes. 30

Q. That is the wire stitching shown on Exhibit P-4? A. Yes, there are three of them; it was a question whether that glue would hold out satisfactorily; the difference in the cost was very slight and we thought it advisable to reinforce it with wire stitching. 40

William H. Rose—Direct

Mr. Turner: Have you the letter written to the Leo Company for that purpose?

Mr. Rae: What is the date of that letter?

10 Mr. Turner: That is the letter of August 7th.

(Upon the call counsel for the defendant produces letter written by the plaintiff to the defendant.)

Mr. Turner: This letter is addressed to James Leo Company, 251 Varick Street, Jersey City.

(Reading):

“Gentlemen:

20 Please refer to our order #161 calling for 10,000—5 lb. boxes.

Will you kindly arrange to have these boxes made up with 3 wire stitches in addition to the gluing as per arrangements with our Mr. Gardner, you to charge us \$2.50 extra per thousand for this work.

Very truly yours,

INTERSTATE CHEMICAL COMPANY,

30 Letter marked Exhibit P-5 in evidence.

A. The question was discussed whether that— as I said before, whether that box glue was strong enough. Mr. Gardner, Mr. Mendelinger and several others in the office stated that it would be safer and better to have wire stitching and I raised no objection and naturally it went through as a regular course of business; there was a small
40 charge for that but we would rather be on the safe side.

William H. Rose—Cross

Q. Now, after this discussion came up as to the mistake of the Leo Company did the Leo Company call for an affidavit from Mr. Gardner? A. They requested that we furnish them with an affidavit from Mr. Gardner, Mr. Gardner was on the road, they asked to see Mr. Gardner and we told them he was on the road travelling, and they asked for an affidavit, and an affidavit was furnished them. 10

Mr. Turner: I call for the original affidavit.

Mr. Rae: I object to the introduction of the affidavit; I don't believe it is competent evidence at all.

The Court: I don't see that that is part of the transaction. 20

The Witness: It isn't really part of the transaction, but it was requested from us by the Leo Company.

The Court: Please don't interrupt. I don't think it is evidential at this time.

Mr. Turner: The only point is this, that the Leo Company, after they had been informed that they had made a mistake, they then requested that the man who gave them the order should furnish them with an affidavit showing what the transaction was as to this alleged mistake. 30

The Court: It may be evidential later but I don't think it is now. I will exclude the affidavit at this time.

Mr. Turner: I will pray an exception.

CROSS-EXAMINATION by Mr. Rae:

Q. Mr. Rose, you note by the original offer of the Interstate Chemical Company that nothing was stated as to who was to provide the plate? 40

William H. Rose—Cross

Mr. Turner: I object to that question on the ground that he calls it an offer. You mean the order?

Mr. Rae: The order, Exhibit P-1.

10 Q. That is so, is it not? A. The Leo Company had the plates there and the original drawings there.

Q. Just a moment. There was nothing provided in that order as to who was to provide the plate? A. I think the order speaks for itself, so far as it goes, but Leo had our original drawings and plates.

Q. Before this time the Leo Company had manufactured for you several half-pound and one-pound boxes, had they not? A. Those were
20 made.

Q. Those were furnished in the two colors? A. Yes, sir.

Q. And by the two colors you mean black and red? A. Yes, sir.

Q. Who provided the plates for the half-pound and one-pound boxes? A. I couldn't tell you if we furnished them or whether they were furnished by the Leo Company; I couldn't tell you.

30 Q. Now, you note in the answer of the Leo Company that it provides for the Leo Company to furnish the plates, does it not? A. I don't know what you mean by the answer.

Q. You will note that their offer read as follows: "We are in receipt of your order of July 16th for 10,000 five pound boxes, size 8x6x11 to be made from Orange Coated board, printed in two colors, you to furnish original plate for front and back"? A. Yes.

40 Q. That letter, of course, was received as you have testified? A. Yes, sir.

William H. Rose—Cross

Q. When these boxes came to be made were the plates furnished by your company? A. I think so.

Q. You think so? A. Yes, sir.

Q. Do you know whether or not they were? A. I could say positively; I couldn't tell you whether those were furnished, only as a matter of course. 10

Q. As a matter of fact you did not have much to do with the details of this contract and the original order, did you? A. Yes, I did; I followed it right through.

Q. Did you see the Leo Company personally? A. No, sir; a representative called on us.

Q. Mr. Gardner was the man who did most of the business? A. No, Mr. Meeker, I think.

Q. Of your company? A. I am not sure of the name; that is the gentleman sitting over there (indicating). 20

Q. For your company I am talking of. A. Yes, Mr. Ribakoff, our Sales Manager; we arranged for the half and one-pound boxes, which are satisfactory, and came through very nicely.

Q. Now, the Leo Company made two deliveries of these boxes to your company, did they not, at two different times? A. I could not answer that.

Q. Of these five-pound boxes? A. I could not answer that. 30

Q. You don't know? A. I know the factory report was 2,900 had been delivered.

Q. But you don't know whether that was at one time or two times? A. I could not tell you.

Q. When was it that you called up the Leo Company about this delivery? A. As soon as it came to my attention, and that was in October.

Q. It did not come to your attention until when? A. In October. 40

William H. Rose—Re-direct

Q. What time in October? A. I couldn't tell you; as soon as the first package was unpacked they immediately noticed it was one color instead of two and the Leo Company was immediately notified.

10 Q. Those deliveries were made to you about September 18th and September 25th, were they not? A. I couldn't tell you that.

Q. You would not say they were not? A. No, I would not say, but I can say that they have never been used; they are there the same as they were sent.

Q. You never made a tender of these boxes to the Leo Company, never offered to ship them back? A. Yes, we told them immediately that they were unsatisfactory.

20 Q. But you never shipped them back? A. No.

Q. They are still in your place? A. Held at their risk, as I take it is the customary procedure.

RE-DIRECT-EXAMINATION by Mr. Turner:

Mr. Turner: I call for letters of October 3d and October 1st, to the Leo Company from the Interstate Chemical Company.

30 (On the call counsel for defendant produces letters.)

Q. I show you two letters, one dated October 1st, addressed to the Leo Company, and one dated October 3d, 1918; were those sent by your company to the Leo Company? A. Yes.

Q. Will you read the letter of October 1st, please?

The Court: Is there any objection to his reading that?

40

Mr. Rae: No objection.

William H. Rose—Re-direct

A. (Reading) "With reference to our order #161, calling for 10,000 folding boxes 6x8x11 printed in two colors, which you are now delivering to us in one color. You advised us that our Mr. Gardner gave you instructions to print these boxes in one color and not in two colors, as per order and as per the half and one-pound Key Dry Boxes which you made for us. We took this matter up with Mr. Gardner and are enclosing herewith affidavit which he executed and which is self-explanatory. 10

Our order to you as mentioned above covers boxes printed in two colors as per the half and one-pound Key Dry boxes which you made for us but instead you printed them in one color. This matter is entirely up to you as we want the Key Dry Boxes made and printed as per our order #161. Kindly see that proper delivery is made promptly." 20

Mr. Turner: I offer that letter in evidence.

Letter admitted and marked Exhibit P-6.

Mr. Turner: I will read the letter of October 3d:

"Messrs. James Leo Company,
251 Varick Street,
Jersey City, N. J. 30
Gentlemen:

With reference to our order #161, calling for 10,000 folding boxes 6x8x11 printed in two colors, you advised us over the telephone today you are not in a position to make proper delivery of these boxes as ordered. 40

William H. Rose—Re-direct

10 It would therefore appear to us the only thing left would be to have the boxes made on the outside, charging you with the difference between the price we will have to pay and the price at which you accepted our order. However we would prefer to have you make proper delivery.

Awaiting your pleasure in the matter, we are

Yours very truly,
INTERSTATE CHEMICAL COMPANY,

20 Q. Was any response made to your letter by the Leo Company? A. There was no delivery made, or no indications to show that they were going to make delivery that I know.

Q. Did you see the original sample that was submitted and was referred to in order 161? A. The original sample was a dummy box made up the same as that large box there, without any printing matter on.

Q. A perfectly plain box? A. A perfectly plain box; that was accepted. Then the order was given and the printing and such as that came along afterwards.

30 Q. Well, this five-pound box is a box of different design than the one-pound and half-pound boxes? A. That is correct, the box is right as we agreed; that was the same as the dummy sample that they submitted. They submitted samples perfectly plain, without printing; then the proofs for printing came through in the usual way and they were passed upon.

40 Q. These boxes which were spoken of as having been sent to your place, the 2,900, Exhibit

Emil V. Gardner—Direct

P-4, have you used those boxes? A. Never used them; we can't use them because they are out of line with our other products.

Q. They are awaiting the Leo Company's disposition? A. Yes, sir.

Q. Ready to be delivered to them? A. Yes, 10
sir.

RE-CROSS-EXAMINATION by Mr. Rae:

Q. You were not present at any time, were you, and saw the sample which the Leo Company submitted of this box with the printing— A. The printing was not on the box.

Q. You never saw that? A. The printing was never on the box; the printing was on a slip of paper.

Q. You never saw that slip, that sample? A. 20
The Leo Company asked us to send down there to have it O. K'd. which we did.

Q. You personally did not see that? A. I did not see that; no, sir.

Q. Mr. Gardner was the one that went down? A. Yes, sir.

Q. The Leo Company had never furnished you, before this contract, with any five-pound boxes, had they? A. No, sir.

Mr. Turner: I offer the letter of October 30
3d, 1918, in evidence.

Letter marked Exhibit P-7 in evidence.

EMIL V. GARDNER, sworn:

Direct-examination by Mr. Turner:

Q. Mr. Gardner, what is your business? A. I 40
am a salesman.

Emil V. Gardner—Direct

Q. Of the Interstate Chemical Company? A. Yes, sir.

Q. In July, 1918, were you in their employ? A. I was.

10 Q. Did you have any occasion to do any work on the five-pound arsenate of lead boxes such as Exhibit P-4? A. I did.

Q. You prepared, or aided in preparing this matter called "Suggested Directions" on the box? A. I did.

Q. Did you go to the Leo Company's office? A. I did.

Q. On how many occasions? A. Perhaps three or four.

20 Q. Now, when you were there did you do anything in connection with the proofs of the matter that was to be printed on these boxes? A. I did.

Q. I show you two papers that are brought into Court by the defendant company; are those the proofs that you saw? A. They are.

Q. Is there any way that you can identify them? A. By my initials.

Q. Did you initial them? A. I did.

30 Q. Was there any talk at the time you initialled that, or was there any discussion between you and the Leo Company? A. None whatever.

Q. For what purpose did you initial that? A. As regards the directions, the typesetting matter.

Q. Did that have any relation to the color? A. None whatever.

Mr. Rae: I object to that question as leading.

40 The Court: Yes, I think it is. I will exclude the last question.

Emil V. Gardner—Cross

Q. Was there any discussion between you and the Leo Company as to the colors in which the matter was to be printed? A. No.

Q. How many times were you there in connection with proofs? A. Well, I was just down there one time with the proofs. 10

Q. With the proofs? A. That is the only time.

Q. Did you take the proofs down with you? A. Yes, sir.

Q. They were taken from your office? A. From the office.

Q. Down to the Leo Company? A. Down to the Leo Company.

Q. When you delivered these proofs there whom did you see? A. Mr. Leo, who is here.

Q. This gentleman who is here (indicating)? A. Yes, sir. 20

Q. You delivered them personally to him, did you? A. Yes, sir.

Mr. Turner: I offer these proofs in evidence.

Proofs admitted, without objection, and marked Exhibits P-8 and P-9.

CROSS-EXAMINATION by Mr. Rae:

Q. Mr. Gardner, there was some discussion between you and Mr. Leo in regard to who was to furnish the plates for those proofs, was there not? A. No, he asked about them and I told him while I had always furnished the plates, of course we had a different size but there was nothing discussed between him and I in regard to these plates. 30

Q. Wasn't there a discussion as to who should supply them in this particular instance for the 40

Emil V. Gardner—Cross

five pound boxes? A. I don't believe there was, no.

Q. Are you prepared to say there was not? A. No, there was nothing said about them.

Q. Don't you know that the prices of the plates was discussed between you and Mr. Leo? A. The
10 price of the plates?

Q. Yes. A. Yes. He said there were no plates; of course he knew that; we said there were no plates and plates would have to be made.

Q. Didn't you discuss as to how much the plates would cost? A. Not that I recall.

Q. Didn't you and he discuss the fact that if the Leo Company should provide the plates they would do the work in one color, to even up the
20 cost of plates, that it would cost about \$20 more to make a two color plate? A. Nothing at all was said about that.

Q. Nothing at all? A. There may have been a discussion that he would have plates made and charged to us.

Q. Was there, or wasn't there? A. I couldn't say; we did not have the plates; the plates had to be made it was either that we would have to get them made or he would have them made and
30 charged to us. The usual practice is to have the printer furnish them and charge it to us.

Q. Then, as a matter of fact, the Leo Company did furnish the plates? A., I couldn't say; I left about the time this was O. K'd.

Q. What date was it that you saw these proofs?

By the Court: Q. Let me ask you, I don't understand: You say you left about that time but the plates must have been prepared at the time
40 you O. K'd. the proofs, weren't they? A. Yes;

Emil V. Gardner—Cross

when that was given to us it was in this form (indicating); I have never seen the plates, it was just in that form.

By Mr. Rae: Q. What time was it that you came to Mr. Leo's place of business to O. K. these proofs? A. Some time in July, I believe it was. 10

Q. This was down at his office? A. At his office.

Q. Those proofs show a one color job, don't they? A. Well, they show the type set.

Q. They show a one color job, black only? A. That is black.

Q. So that if this background was orange, as it would be on the board, it would show just exactly what is on here, wouldn't it? A. I don't know whether it would or not. 20

Q. Look at it? A. I haven't got the color; that is not the same.

Q. Assuming that this white background was the orange background on which they were to be printed, it would be the same as that? A. The same as that.

Q. When you got back you put your O. K. on this proof? A. I did.

Q. At that time he said the job would be a one color job, didn't he? A. No. 30

Q. Now, you know a good deal about proofs for boxes, don't you? A. I do.

Mr. Turner: I am not offering this witness as an expert on proofs. I don't think I have qualified him on that.

The Court: I understand; but his knowledge may be very material on that phase of it.

Q. You know when dummies or proofs of this 40

Emil V. Gardner—Cross

kind are made up the dummy will show all the colors that will show on the finished product, with the exception of the background, don't you? A. Not at all; I have had work done before and I am very familiar with proofs.

10 Q. That is the custom with proofs, if you order a two or three color job, the proofs will show a two or three color job? A. Not the paper sketch; it would on the box itself; on the article itself.

Q. I show you a proof or paper sketch; if you were going to have a two color job, it would show two colors, wouldn't it; it would show red and black, the only difference would be the background? A. Yes.

20 Q. Because if it were printed on orange board it would have an orange color in addition to the colors which were ordered, that is so, isn't it? A. Yes.

By the Court: Q. What is the difference, Mr. Gardner—I understand when the proof is shown to you, if it is a two color job, or more than one color, the proof does not show? A. It does if it is on the original package; but on the paper proof which is usually submitted, this proof is in regard to type and set-up, and not as regards colors.

30 Mr. Turner: If the Court please, the paper that was shown to this witness last is not a proof; it is the finished product. Therefore I think that should be straightened out as to that point.

The Court: You can bring that out on your examination.

40 Q. Those are your signatures (indicating); that is your signature (indicating)? A. That is not my signature; that is the other man's.

Emil V. Gardner—Cross

Q. Was that done in your presence, that signature O. K.? A. Yes, sir.

Q. And he was one of the employees of the plaintiff company? A. Yes, sir.

Q. And that was with your consent, putting that signature on there and O. K.? A. Yes. 10

Q. You were satisfied with it at the time? A. A. Well, he is really over me; he is our Sales Manager.

Q. Had there been any discussion about the color between you or in your presence between the representatives of your company and Mr. Leo A. Well, at our first meeting it was general; there could not be any discussion, we had the old box that the Leo Company had made for us before and the only thing we said was that we wanted the five pound identical with the one, the same as they had done for us before as regards color, our standard box. 20

Q. Was there anything said at that time about the plates? A. No.

Q. And the old boxes, the plaintiff company—your company—furnished the plates for them, the half and one-pound boxes? A. I believe we did; I had nothing to do with the making of the boxes and the set up of the work. 30

Q. What is the reasonable cost for a plate for a job like this? A. That I couldn't say.

Q. You don't know? A. No.

Q. But it takes some time to make up a plate; it is quite an expensive plate; you know that, don't you? A. Yes, but I wouldn't have any idea as to the cost.

Emil V. Gardner—Re-direct

RE-DIRECT-EXAMINATION by Mr. Turner:

10 Q. Counsel on his cross-examination showed you a paper which is not in evidence, which brings about an apparent contradiction in your testimony where this paper appears to have been printed in two colors. Is that paper a proof such as you have had in your work up there on these boxes? A. No, we have no such proof.

Q. Did you ever get a proof like that? A. No.

Q. Printed in two colors? A. No, sir.

Q. How are proofs always printed? A. The proofs are printed in the usual form to show the typesetting in the proof and not as to colors.

20 RE-CROSS-EXAMINATION by Mr. Rae:

Q. Do you mean to say that these proofs never show the colors, on proofs similar to the ones offered in evidence? A. Not from my experience.

RE-DIRECT-EXAMINATION by Mr. Turner:

30 Q. This paper that was shown to you, which has been referred to last, do you know the process by which that goes on the one-pound and half-pound boxes? A. Yes, that is pasted on, I believe.

Q. The paper is first printed and then pasted on the box, is it? A. Yes.

Q. But that is not the case with the five-pound boxes? A. That is not the case with the five-pound boxes.

Q. So that is how these papers happen to be separated from the box itself? A. Yes.

40 Mr. Rae: I think, if the Court please,

J. Albert Hinnners—Direct

that these papers that have been referred to should be offered in evidence.

Mr. Turner: I have no objection.

Papers marked Exhibits D-1 and D-2.

Q. On this half-pound box this paper is already pasted on? A. Yes. 10

Q. Then the matter is printed on the paper first and then the paper is pasted on the box? A. Yes.

Q. Now, look at the five-pound box and tell us if that is the case there? A. No; that is printed on the board.

Q. Did you have anything to do with the cuts or the plates that were to be made, if any? A. No.

By Mr. Rae: Q. What is the man's name who initialled that? A. M. D. Ribakoff. 20

J. ALBERT HINNERS, sworn:

Direct-examination by Mr. Turner:

Q. Mr. Hinnners, what is your business? A. Printer.

Q. You are connected with what company? A. The Herald Company. 30

Q. How long have you been a printer? A. Twenty years.

Q. Are you familiar with the printing of matter on pasteboard boxes? A. Yes, sir.

Q. As well as other kinds of printing? A. Yes, sir.

Q. Well, you tell us, in the printing business, where a job is to be done in two colors, how many colors are used in printing the proofs? A. One. 40

J. Albert Hinnert—Re-direct

Q. What color ordinarily is used in printing proofs on a two color job? A. Black.

Q. I show you Exhibits P-8 and P-9 and ask you if those are in the usual form of proofs for two color jobs? A. They are in the usual form.

10 Q. Well, you tell us now why it is that the proof of a two color job is printed in only one color type? A. Why, in the first place, the proof is submitted for O. K. of general style of the type corrections in the job, if any. To make a full proof in colors the cost is prohibitive and it would have to be made extra and they would put a price on that, so the proof is only made in one color and submitted to the customer in that form.

CROSS-EXAMINATION by Mr. Rae:

20 Q. You say that is the universal custom; is it generally done or always done? A. It is always done.

Q. So that in any case a one color proof is submitted? A. Not in any case, where the customer is willing to pay the cost he can get the full proof.

RE-DIRECT-EXAMINATION by Mr. Turner:

30 Q. How much additional ordinarily would it cost to have a proof printed in two colors? A. That all depends on the job; some jobs would cost more than others.

Q. Take a job such as this. A. It would take some time to make that job ready, it may be two or three hours, and the cost today is \$2 an hour, and that would run your cost up.

Q. So it would cost six or seven dollars extra to have the proof in two colors? A. I would not
40 say that much; possibly.

Albert F. Stone—Direct

ALBERT F. STONE, sworn:

Direct-examination by Mr. Turner:

Q. Mr. Stone, what is your business? A. I am a salesman for the folding box company.

Q. Are you connected with the National Folding Box Company? A. I am. 10

Q. Do you know the Interstate Chemical Company? A. I do.

Q. I show you a letter dated October 17th, 1918, signed A. F. Stone, addressed to Interstate Chemical Company; is that your signature? A. That is mine.

Q. In what connection was that letter written to the Interstate Chemical Company? A. That is a quotation on a five-pound box, arsenate of lead. 20

Q. Did your company make a contract with the Interstate Chemical Company for some five-pound boxes? A. It did.

Q. I show you a paper and ask you what that paper is? A. That is the acknowledgment of our order.

Q. From the Interstate Chemical Company? A. Yes.

Q. For 10,000 five pound boxes, is it? A. Yes. 30

Q. At what price? A. Sixty-eight dollars and seventy cents.

Q. Per thousand? A. With an extra charge for making special cuts required in printing; it is stated on there.

Q. Is that price a reasonable price for such boxes at the time you accepted the order? A. It was to us; I don't know whether it was to the Interstate Chemical Company. 40

Albert F. Stone—Direct

Mr. Turner: I offer this acknowledgment of order and order in evidence.

Without objection the order was admitted and marked Exhibit P-11.

10 Q. Are these boxes being made for the Interstate Chemical Company? A. Yes, sir.

Q. Are you familiar with the printing on boxes? A. Yes, sir.

Q. In a two color job what is the custom as to the submission of proofs; how many colors should there be on the proof? A. The custom is to submit it in one color unless the customer requires a color proof.

Q. If they require a color proof do you make a charge for that? A. We certainly do.

20 Q. Exhibits P-8 and P-9, are they the usual form of proofs submitted on a two color job? A. Yes; all made in one color.

Q. That is the way you submit a proof of a two color job, is it, unless the customer requires otherwise? A. I would not say that, no.

Q. I mean to say in one color? A. We submit it in black, but—

By the Court: Q. How would you submit it? A. We would designate the color.

30 Q. How would you do that? A. By a pencil mark, that is the correct way it is done, without any charge; of course once in a while those things would go through; on a simple job that might not do, especially if the customer supplied the plates; if we supplied the plates then we would do that; if the customer supplied the plates and we made a proof from them we would not do it; but where we make the plates, it would be in one color and we would designate them in pencil.

40

Albert F. Stone—Cross

By Mr. Turner: Q. If the order that you received called for a two color job would that proof be sufficient? A. Well, as I say, our standard of doing business, if we made the plates it would not be just like that; that is a standard in different firms; one firm might do one thing and one another. The National Folding Box Company is the leading manufacturer in this line, they have been in business thirty years, and they have had a great deal of experience in printing, our standard is pretty high; if a customer supplied plates we would do that. 10

Q. Now, speaking of your custom, if you had an order for a two color job and an employee should attempt to change that order, would you have that change noted in writing? A. Sure. We would not proceed with the order, our factory would not proceed with the order unless that was done, unless it was notified somewhere, we would have it noted there on the proof; that is where we would prefer to have it done. 20

CROSS-EXAMINATION by Mr. Rae:

Q. Who prepared the plate for your company? A. I think we used—my impression of it is that we used some plates that we had there on some other job and that we made other plates and changes in order to arrive at the exact copy that they wanted, it was sort of a combination in that way, and we charged extra for the cuts that we had to make to conform to the copy they wanted. I think we had some plate; my recollection is that we had some plate that we happened to use on another job and with that we saved quite some money. 30
40

Albert F. Stone—Re-direct

Q. Did your company furnish the proofs to the plaintiff? A. We did; we furnished that in black.

10 Q. Your proofs indicate two colors, do they not? A. I can't recall now; I haven't those proofs before me; I can't positively say; I know it was in black; that I know; whether there were any notations on the copy or not that I don't know.

20 Q. That is the universal rule, isn't it, in expecting proofs either to indicate—to put the colors on the proof or to indicate the colors that go on? A. As I say, I think that the careful printer, if he made the plates and they were a two color job, that is what he would do; that is what he ought to do, but they don't always do what they ought to do.

RE-DIRECT-EXAMINATION by Mr. Turner:

30 Q. On your proof, if you marked it, would you indicate here as being orange color, would you write that in? A. No; for instance, if this was black here, or if this was to be red, then we would make a line out here calling attention to the fact that that was to be red; if this was blue we would draw a line out here and show that that was to be blue (indicating); that is, if we made the plates that is what we would do; if you made the plates or if you furnished us with the plates, we would give them to you just like that (referring to proofs).

40

Mr. Turner: The plaintiff rests.

James Leo—Direct

JAMES LEO, sworn:

Direct-examination by Mr. Rae:

Q. Mr. Leo, you are the President of the Leo Company, the defendant in this action? A. Yes, sir.

Q. And you were the one in charge of the transaction on behalf of the Leo Company? A. This occasion I did most all of it. 10

Q. After your letter of August 17th—you wrote that letter, by the way? A. Yes, sir.

Q. Did you have any discussion with any representative of the plaintiff? A. Yes, sir.

Q. Where did this first discussion take place? A. In the office.

Q. In regard to this contract? A. In the office. 20

Q. In your office? A. Yes.

Q. Who was the representative? A. I can't recall his name; I said his name was Mr. Gardner but it was not Mr. Gardner; that is not the man.

Q. Did he state that he was a representative of the plaintiff?

Mr. Turner: I object to any statement made by the representative.

The Court: Yes, that will be excluded. 30

Q. Was Mr. Gardner present with him—this gentleman (indicating)? A. No; Mr. Gardner didn't call but once or twice in company with the other gentleman; the other gentleman does all the business; I always thought he was Mr. Gardner; that is not the man that done business with us.

Q. After your letter did you have any talk in regard to the furnishing of a plate? A. Yes, sir. 40

James Leo—Direct

Q. With any representative of the plaintiff company? A. Yes, sir; the other gentleman.

Q. And as a result of that talk who actually did furnish the plate for this job? A. I did at their request.

10 Mr. Turner: I object to the statement
“at their request.”

The Court: You refer now to the representative without identifying him; I don't think that is proper.

Q. Do you know who the representative was?

A. I would know him if I saw him; I don't see him here.

20 Q. Was he the gentleman who was in with Mr. Gardner at the time the initialling took place? A. That gentleman came with the initials, or I was over there, a big stout gentleman; he is a salesman, too.

Q. Is he the same gentleman who came to you first? A. He is the first man that came in and done all the business from start to finish.

Q. That is the same gentleman that came in with him? A. He got the pound and half pound boxes, everything; he is the man that done all the business with us.

30 Mr. Rae: I think that identifies him; he says he is the same man that came in with Mr. Gardner and Mr. Gardner said he is the head man.

The Court: Why isn't that sufficient?

40 Mr. Turner: I think not. It doesn't show any authority on this so-called person to represent the company. I presume the purpose of it is to vary the terms of a written contract and I object to it on that ground.

James Leo—Direct

The Court: It doesn't vary the terms of a written contract; it shows a change in the proposition.

Mr. Turner: I pray an exception.

Q. What conversation did you have with this general salesman? A. They gave me an order for 10,000 boxes printed in two colors; I acknowledged it the following day, except that they were to furnish the plates for the back and front. 10

Q. What discussion did you have, if any, in regard to those plates? A. He came down the following day and wanted to have me furnish the plates; they furnished all the plates for the pound and half-pound boxes and I told them they would have to furnish them, but finally they wanted to have me make a one color job and furnish the plate, and I figured what I spent for making a plate for a one color job I could just about save on the other. 20

Q. Did you go into the matter of cost with this gentleman, the cost of the plate? A. We already had the price, \$47.50 per thousand.

Q. I know, but did you go into the question of the cost of preparing a plate with this gentleman? A. I went into the cost by saying it would cost in the neighborhood of fifteen or twenty-five dollars for the plates, which he was trying to save. 30

Q. Why were you willing then to do the job? A. Simply because he said he will have only one color.

Q. If he hadn't said that would you have gone ahead with the contract? A. No, I would not have gone ahead until he furnished the plate. 40

James Leo—Direct

Q. Does it cost more, Mr. Leo, to put on two colors on a box than it does one? A. It certainly does.

Q. How much more a thousand? A. It depends on the size of the box.

10 Q. On a five pound box. A. About two dollars.

By the Court: Q. It means double press work? A. Yes, sir.

By Mr. Rae: Q. It means double the time? A. Yes.

Q. When was this talk, that Mr. Gardner spoke about—when did that take place? A. When was that?

20 Q. When was this talk about the proofs? A. Me and Mr. Gardner had no conversation at this place; it was the other gentleman.

Q. This sales manager, Mr. Gardner was there with him? A. He was there on one or two occasions but he never had anything to say about proofs or anything of this kind; the other gentleman done all the business.

Q. Your company prepared those proofs? A. Yes, sir; they did that to make sure.

Q. You sent those proofs to the plaintiff, did you? A. Yes.

30 Q. Then the representative of the plaintiff that you have spoken about came back to your company, did he? A. He came down to the office.

Q. Were those initialled? A. Yes, sir, when he made the correction in here (indicating).

Q. Now, your company besides manufacturing these boxes does all the printing, doesn't it? A. Yes, sir.

40 Q. Now, will you tell the Judge what your idea of a proof is? If this was supposed to be a two

James Leo—Direct

or three or four color job, as a rule would those colors show on a proof of this kind? A. That would not on this kind of proof, no; it would have to be marked on different lines out here, red and black and so forth, where they should be.

Q. Is that the custom? A. That is the custom, yes; the customer is supposed to know where he wants red—

10

Q. If this was to be red and this was to be blue and this was to be orange (indicating)? A. We would draw lines and it would be marked "Red" here and "Orange" here, and if this was blue we would draw a line here and mark that "Blue" (indicating). The color would not appear there at all.

Q. If there was no indications according to your custom what would that indicate? A. One color; that is strictly understood.

20

Q. I show you this Exhibit P-5, dated August 7th, in regard to putting in three wire stitches in addition to the glue at the cost of \$2.50 a thousand. A. That is right.

Q. That was received by your company? A. Yes, sir.

Q. Was that work done? A. That was done on the boxes delivered.

30

Q. Had any boxes been delivered before that letter? A. No; not before that.

Q. So that made the cost \$50. per thousand? A. Yes.

Q. Now, the plaintiff has testified that he has received 2900 boxes— A. 2950, two shipments.

Q. I am telling you what he testified to. He says that there were 2900 boxes delivered to him;

40

James Leo—Direct

did they all have those stitches on? A. Yes, sir.

Q. How many shipments made up this? A. Two shipments.

Q. Has any part of these boxes been returned to you? A. No.

10 Q. Has your company manufactured the rest of the boxes? A. Got them all cut and printed laying in the flat; after this time we did not proceed any further, we stopped right away.

Q. Are you prepared to make delivery? A. They are all cut and flat, only got to be stitched and glued.

Q. In addition to showing the representative of the plaintiff this proof, did you at any time show any finished product before shipment was made? A. Yes, sir.

20 Q. I show you what purports to be a five-pound box printed in one color, and ask you if that box was ever exhibited to him? A. Yes, that was passed on by the gentleman.

Q. The same gentleman? A. Yes, sir.

By the Court: Q. Do you mean now the one you called Mr. Gardner, or the other one? A. Not Mr. Gardner; the other man.

By Mr. Rae: Q. He is the man you have called Mr. Gardner before? A. I did; I mistook myself.

30 Q. Was the box made up that way? A. Just as it is exactly, it has been standing on the safe since.

Q. He saw it as you see it now? A. Yes, sir.

Mr. Turner: I object to that unless the time is fixed.

40 Q. When was that? A. It was shortly after the—

James Leo—Direct

Q. In reference to those proofs? A. It might have been a week.

Q. After that? A. A few days; the box, we had that printed and set up in the office and two small boxes, two others, set opposite to show how they appear.

Q. At the same time did you have those boxes there? A. Yes, sir; those two over there (indicating).

10

Q. So that he saw the three boxes just as we see them now, all together? A. Yes, sir; there are the three boxes.

Q. The half-pound and pound boxes? A. That is it exactly.

Q. And he passed on them? A. Yes, sir. That gentleman done business with us for pretty nearly a year, I guess, of several hundred dollars worth of goods and everything that we done was satisfactory; I would have taken his word for anything.

20

Q. The plaintiff company furnished the prints for those pound and half-pound boxes, did they not? A. Yes, sir.

Mr. Turner: What do you mean by prints?

Mr. Rae: Or the plates, I mean.

A. Yes, two color plates. This gentleman came down and wanted to take those plates to give them to the National Folding Box Company for the pounds and half-pounds and I gave them to him.

30

Mr. Rae: I don't know whether your Honor wants me to proceed on the set off now or not. We have a set off arising from a different transaction. Will I proceed with that now.

40

James Leo—Direct

The Court: You had better proceed with it now.

Q. Did you have any other business dealings with the plaintiff company prior to this contract?

A. Yes, sir.

10 Q. What did that consist of? A. Well, their company wanted to have—

Q. Who came to you? A. This other gentleman, this salesman came to me and wanted me to change the setup to folding boxes; I got up samples and proofs and had those printed and pasted them all over the boxes.

Q. What kind of boxes were they? A. Just the same as these.

20 By the Court: Q. That transaction had nothing to do with these five-pound boxes? A. No, not at all.

Q. Describe what the work was? A. He wanted to change the setup to folding boxes, the same style as this box; I went to work and got him samples and proofs for three or four weeks, he kept me busy making those proofs and samples, and all the while he was using the samples.

30 By Mr. Ræ: Q. What kind of boxes were they? A. Folding boxes like this exactly, made up in a folding box instead of a setup box.

Q. What were they, one-pound boxes or two-pound boxes? A. They were half-pound and one-pound boxes.

Q. Half-pound and one-pound boxes? A. Then they wanted samples made after that to put their goods in.

40 Q. By folding boxes you mean one that is collapsible? A. Yes. Then they wanted samples submitted of the boxes so that they could test the strength of the board.

James Leo—Direct

Mr. Turner: I object to that. This is an attempt to fasten on the corporation some liability alleged to have been created by some person whose authority is not proved. I object to that and ask that it be stricken out.

10

The Court: As I understand this witness, this was the same gentleman with whom he had the dealings about the half and one-pound boxes for the company and that they made the contract for that, I understood him to say.

Mr. Turner: If the Court please, he has not shown any authority on this man to bind this company.

The Court: If the man had been there and made contracts, the goods had been delivered to them and he came there again, that, I think, would show some authority; at least the jury might draw such an inference from that.

20

Q. Let me ask you, Mr. Leo—

Mr. Turner: If the Court please, from the statements already in as testified to by this witness—as a matter of fact we dispute all those statements—as to Mr. Ribakoff, I suggest the impossibility of getting him here today, and I respectfully submit in view of that, since this witness has referred to him as Mr. Gardner, I think we should have an opportunity to produce Mr. Ribakoff before we go into those things.

30

The Court: That is very proper, as this matter has grown up through Mr. Leo

40

James Leo—Direct

10 getting the names confused. That certainly is misleading and it seems to me Mr. Ribakoff should be here. I think you should have an opportunity to bring him. I will continue this case over until February 11, 1919, when it will be taken up as a preferred case.

The case was afterwards adjourned until February 25th, 1919, at 10 o'clock.

Jersey City, February 25, 1919.

20 Hearing resumed in the presence of counsel for the respective parties.

JAMES LEO, re-called:

Further direct-examination by Mr. Rae:

Mr. Rae: When we closed we were proceeding on this set off, as I recall it.

Q. Mr. Leo, did you have any previous transaction with this plaintiff company prior to this box deal? A. Oh, yes.

30 Q. In or about the month of July, 1918? A. I should say it was six months before that; perhaps nearly a year; I don't recall just how long or how long ago.

Q. What was the nature of that transaction?

Mr. Turner: I object to that; I don't see how that can be material in this case.

The Court: On the set off?

Mr. Turner: What set off?

40

Mr. Rae: We claim for the reasonable

James Leo—Direct

value of services and materials furnished \$50. for work which we did in July, 1918.

Mr. Turner: If the Court please, if this question relates to the set off, as counsel states, then I object to it unless it is shown that he had the transaction with some officer of the company who had authority to make such transaction. 10

The Court: Of course this is merely preliminary; he would have to show that he was dealing with somebody authorized to act for the company.

Q. What representative of the company did you have that with? A. This gentleman sitting here (indicating); I can't recall his name.

Mr. Rae: Is it conceded that this gentleman is a duly authorized representative of the company? 20

Mr. Turner: No, it is not conceded that he is duly authorized. It is conceded that he is a salesman of the company.

The Court: What is his name?

Mr. Turner: Mr. Ribakoff.

Q. That is the same gentleman that you were discussing before? A. That is the only man we have ever done any business with us.

Q. Did he represent himself as a representative of the Interstate Chemical Company? 30

Mr. Turner: I object to that.

The Court: I think that is improper. It will be excluded.

Q. What dealings did you have with this gentleman? A. All the dealings that we had with the company we done through him.

Q. I am referring to this previous transaction? A. He gave the orders for the goods. 40

James Leo—Direct

Mr. Turner: I object to any orders given.

Q. Did you have any written order from the company? A. Yes, sir; and signed by him.

Mr. Turner: The written order speaks for itself then, if the Court please.

10 Q. I show you a paper and ask you if you know what that is? A. Yes, sir; that is the order for the goods that he ordered, signed by Mr. Ribakoff.

Mr. Turner: If the Court please, I object to it because it seems to be some correspondence in relation to an order and the order itself is not produced.

The Court: Do you object to it because it is not signed by your company?

20 Mr. Turner: It is not signed by anyone who has authority to give an order.

The Court: It will be excluded at this time.

Q. Well, reverting to the subject of the main suit, as a matter of fact, who did supply the print from which these boxes were made? A. I did.

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

30 Q. What is that, Mr. Leo? A. Why, that is the plates that they instructed us to make, that this man instructed us to make for a one color job, to leave off the color and I should furnish the plates.

Q. And that is his bill? A. In my acknowledgment to them I said they would have to furnish the plates for the back and front, and to overcome that he made a one color job of it if I would furnish the plate.

40

James Leo—Cross

Mr. Turner: I object to that and ask that it be stricken out because the purpose of it is to contradict the written contract of the plaintiff company.

The Court: I will refuse to strike it out.

Mr. Turner: I pray an exception.

10

Mr. Rae: I offer this bill in evidence showing the company paid for the plate.

Mr. Turner: I object to that on the ground that it is incompetent.

The Court: Of course the bill is not evidential. If Mr. Leo says he paid so much for it, that stands by itself, but the bill is not evidential.

Q. What was the amount of that bill, Mr. Leo?

A. Twenty dollars.

20

Q. Who paid that? A. I did.

CROSS-EXAMINATION by Mr. Turner:

Q. You paid twenty dollars for a plate and for artist's time, didn't you? A. Yes, sir.

Q. Then you did make a plate for the one color job, didn't you? A. I did, at their request.

Mr. Turner: I move to strike out "at their request."

The Court: That is not responsive.

Q. You did not order a plate for the two color job, did you? A. No; he ordered a one color job.

30

Q. The only plate that you ordered was a plate for a one color job? A. Yes; he ordered a two color job and I acknowledged it as a two color job, from plates to be furnished by him.

Mr. Turner: I ask that that be stricken out as the acknowledgment speaks for itself.

40

James Leo—Cross

The Court: Well, I will let it stand for what it is worth.

Q. Did you ever make up a perfectly plain dummy of this box? A. Yes, sir.

10 Q. Without any printing on it at all? A. Yes, sir.

Q. Did you ever show that perfectly plain dummy without any printing on it to Mr. Ribakoff? A. Yes, sir.

Q. In your office in Jersey City? A. I don't know whether it was in my office or I sent it to his office, one or the other; it was made as to size, to show the size of the box.

20 Q. You did show him a perfectly plain dummy? A. Yes, sir; it was the first thing I showed him, just to give him the size.

Q. Are you familiar with the cost of plates to do work such as this? A. No, sir; only as I get them from other people; we are not plate makers.

Q. You get them all made? A. Yes, sir.

Q. You know there is a standard charge per square inch? A. Yes, sir.

Q. They all charge the same? A. Pretty nearly.

30 Q. You claim you paid \$20. for a plate for the one color job? A. Yes, sir.

Q. Do you know what a plate for the two color job would be worth? A. It would cost about twice as much, pretty nearly.

Q. It would not cost more than twice as much? A. No more than twice as much.

Q. Perhaps less? A. Yes, sir.

40 Q. Not much more than a one color plate? A. No; possibly.

James Leo, Jr.—Direct

JAMES LEO, JR., sworn:

Direct-examination by Mr. Rae:

Q. Mr. Leo, what is your occupation? A. Vice-President of James Leo Company.

Q. Were you Vice-President of the Leo Company last August? A. I was. 10

Q. Do you know this gentleman (indicating)? A. I have seen that gentleman in our office.

Q. Indicating Mr. Ribakoff? A. Ribakoff; yes, sir.

Q. Did you have any conversation with this gentleman about this transaction? A. No, I did not; my father took care of that transaction; but one morning I was called into the office—

Mr. Turner: One moment; I object to that. 20

The Witness: I say I had no conversation about the boxes, but I was called in about—

The Court: Just wait until you are asked about that.

Q. You say you were called in by your father? A. Yes, sir.

Q. Was this gentleman there? A. He was at the office.

Q. When was that? A. Oh, some time last summer; I can't say just what date it was.

Q. Who was there in the room? A. It was in my father's office; just he and father. 30

Q. What did this gentleman say in reference to this transaction?

Mr. Turner: I object to that. It is the evident purpose of the question to contradict a written contract between the parties and the contract speaks for itself. 40

The Court: What is the purpose of it?

James Leo, Jr.—Cross

Mr. Rae: That purpose is, that we allege that Mr. Leo, Jr. heard this conversation relative to the change.

The Court: I will permit it.

Mr. Turner: I pray an exception.

10 Q. What was said in your presence by this gentleman? A. My father said, "This gentleman is over from the Interstate Chemical Company; he wants to know when he is going to get his boxes." I said, "I can't tell him anything until I run this grade of board out." Of course I had charge of the paper mill and I really expected to go on to that grade of board the next thing. Mr. Ribakoff said, "That is all right, if you can make that board next week, you can
20 rush it through because it is only to be a one color job."

Q. Did he say anything further? A. Why, no; I went out of the office and went back to the paper mill.

Q. Was he there any other time? A. Not in reference to this particular transaction.

Q. About when was this conversation, can you fix the time? A. I could not just say, only it was around July; something like that.

30 CROSS-EXAMINATION by Mr. Turner:

Q. Had you known anything about the contract up to this time? A. Nothing about the contract, no.

Q. You did not know what kind of an order it was, did you? A. Why, I knew about the board order, yes.

40 Q. That was all you knew about it? A. Yes, about the board order.

James Leo, Jr.—Cross

Q. And that was about August? A. I could not say whether it was August or July; I know it was some time around summer.

Q. Of 1918? A. 1918.

Q. Up to that time had you done any printing at all on this job? A. Why, I hadn't done anything about the order at all, only I knew just about the board. 10

Q. Nothing had been done about the order until this man came that day looking for his boxes?

A. No, sir.

Q. Nothing had been done about the printing?

A. Nothing.

Q. You had not gotten the plates yet, had you?

A. I don't know anything about that; I didn't have anything to do about the plates; I didn't know anything about it. 20

Q. Can you fix the time a little more definitely when this conversation took place? A. No, I cannot; I know it was around the summer.

Q. Would you say it wasn't in September?

A. I would not say anything.

Q. Do you know whether it was in September?

A. I could not say.

Q. Do you know whether it was in October?

A. I know it was previous to that, to the best of my knowledge it was around July; some time around July. 30

Q. Why do you think it was around July? A. I said some time around there; as I remember the order, the order was on the books some time around July.

Q. Is there anything at all that makes you think that it was in July? A. Well, as far as the order being on the books is concerned, that is for our mill order. 40

James Leo, Jr.—Cross

Q. Did you look at the order? A. We always look at the orders every day.

Q. Did you look at the order for the purpose of fixing the time of this conversation? A. No.

10 Q. Did you look at all at the date of it? A. Not lately I haven't.

Q. Did you see this other gentleman with Mr. Ribakoff that day? A. No, he wasn't there; just this gentleman alone.

Q. What time of day was it? A. Why, it was in the morning, about 10 o'clock.

Q. Are you at all certain now that it was in July? A. I couldn't swear to it, no.

20 Q. How long was it after you had gotten the order? A. That I couldn't say, but I know the order was on the books, but we hadn't reached it yet to make it.

Q. You had not yet done anything at all in connection with getting out the order, had you? A. Making the board, no, not at that time.

Q. How long after that conversation was it that you actually did start work on this order? A. I think the following week, because we were running one grade of board a week.

30 Q. Then this conversation took place a week before you actually started work? A. Yes, sir.

Q. When did you actually start to work—on what date? A. I couldn't say for sure now.

Q. Are you able to find out on what date you actually did start work? A. I think I could, yes.

Q. How long will it take you to find out? A. About half an hour.

Q. Who else was present at the time of this conversation? A. No one.

40 Q. Just you and your father? A. And this gentleman.

James Leo, Jr.—Cross

Q. And Mr. Ribakoff? A. Yes, sir.

Q. Where did it take place? A. In my father's office.

Q. In Jersey City? A. Yes, sir.

Q. Have you told us everything that was said there at that time? A. That is all.

Q. That is all that was said; and you immediately went out? A. That was all that I was asked, and I went right out.

Q. Do you know anything about the cost of plates? A. No, sir; I do not.

Q. Do you know anything about the difference in time in printing? A. No, sir; I do not.

Q. Who has charge of the printing? A. Why, on that particular job my father did.

Q. Your father had charge of it? A. He took full care of that particular job.

Q. Well, then, you were not going to supervise the printing of this job, were you? A. I didn't say I was.

Q. What were you doing that particular morning that you came into the office? Did anybody call you in? A. Yes, my father sent for me.

Q. He called you in? A. Yes.

Q. Why should your father call you in if you had nothing to do with this job? A. I have charge of the paper mill and in the paper mill that board is made, that is under my charge.

Q. Where is that paper mill? A. Attached to the building, at the other end of the block, on the Monmouth Street end.

Q. You simply cut up the stock from the paper? A. Why, I do that, and look around the shop in general.

Q. Well, so far as your work was concerned,

James Leo, Jr.—Re-direct

it didn't make any difference to you whether it was a one color job or a two color job, did it?
A. I don't know, only just what he said.

Q. It had nothing whatever to do with your work? A. No.

10 Q. It would not take you any longer in actual time to get out your material, whether it was a one color job or a two color job, would it? A. It would not take any longer.

Q. So that the fact of the colors had absolutely nothing to do with any part of your work in this transaction at all, did it? A. Only the conversation which I heard.

20 Q. So far as your work in concerned, it did not relate to your work at all? A. No, I had nothing to do with the job, so far as the printing is concerned.

Q. At this time you did not have this pasteboard made up, did you? A. Not the morning I was called to the office; that is what I was called in to find out.

Q. You had still to make up the pasteboard stock of which the boxes were to be made? A. That is right.

30 RE-DIRECT-EXAMINATION by Mr. Rae:

Q. You are acquainted, are you not, with the printing end of the business? A. Oh, yes, I have taken orders outside.

Q. How long have you been acquainted with the printing end of your father's business? A. For the last fifteen years.

40 Q. As such are you acquainted with the proofs that are used in that business at all? A. On particular jobs that I take care of I am; any job I

James Leo, Jr.—Re-direct

take on the outside, I look after the printing altogether.

Q. I show you what purports to be proofs, and ask you—

Mr. Turner: I object to the form of the question, "I show you what purports to be proofs." 10

Q. I show you some papers and ask you what they are?

Mr. Turner: I object to that if the Court please. They are not material, relevant or competent to this issue.

The Court: What is the purpose of it?

Mr. Rae: To show a trade custom in regard to plates for five color, three color and two color jobs. 20

Q. Are you acquainted with the customs of the printing business, Mr. Leo? A. Why, I don't know as you would call it customs; here we have our own system.

Q. Do you know the system that was employed by other concerns? A. They are generally all alike; I don't know as they all follow the one principle or not; we have our system of having proofs submitted and samples.

Q. Have you had any opportunity to observe the customs of other concerns than the Leo Company? A. Why, I have seen different proofs from different concerns in the same line of business. 30

Q. Now I ask you if this paper that I show you, what that is?

Mr. Turner: I don't think the witness is qualified.

The Court: I don't believe he is. 40

Edward F. Higgins—Direct

EDWARD F. HIGGINS, sworn:

Direct-examination by Mr. Rae:

Q. Mr. Higgins, what is your occupation? A. I am in the Supply Department of P. Lorillard Company.

10 Q. What is your particular line of business? A. Purchasing wrapping material, cartons, labels and all kinds of such material.

Q. How long have you been engaged in the business of printing lithographed matter? A. Why, I was with them about six years; prior to that I was about six years more—no, eleven more, with the Jay Bond Lithographing Company, which was afterwards taken over by the United States Printing Company.

20 Q. What was your particular work with those people? A. My last position with that concern was purchasing—I had charge of purchasing all materials in connection with paper and other stuff that goes in the manufacture of printed products.

Q. Are you a printer? A. No, I am not.

Q. Are you acquainted with the printing business? A. In a general manner; yes, sir.

Q. For all this period of time in question? A. I should say about 16 or 17 years.

30 Q. Do you know what proofs are? A. I do.

Q. Do you know the difference between proofs for a one color, two color and three color jobs are? A. I do.

Q. Do you know what the general custom of printers is in reference to proofs for a one color job, a two color job and a three color job? What would be the difference in the proofs?

40 Mr. Turner: I object to that. The question should be answered yes or no.

Edward F. Higgins—Direct

Q. Do you know? A. Yes, sir, I do.

Q. Then, if I should come to you and ask you for a proof of a two color job, what kind of a proof would be customarily prepared by the printer?

Mr. Turner: I object to that on the ground that it is incompetent and irrelevant; the witness is not qualified to answer, and the purpose of this testimony is to contradict a written instrument showing the contract between the two parties and the instrument speaks for itself. 10

The Court: You may cross-examine the witness as to his qualifications if you care to do that; otherwise I think the question is proper. 20

By Mr. Turner: Q. Have you ever been engaged in the printing business? A. In the general line, not personally; I worked for a printing concern. 20

Q. How many years is it since you worked for a printing concern? A. About six years, I would say; six or seven years.

Q. You work now for a tobacco concern, do you not? A. Yes, I do.

Q. For the last six years you worked for that tobacco concern? A. I have; yes, sir. 30

Q. Previous to that time what position did you hold in the printing business? A. Well, I was, as I say, I had charge of the purchasing and also, in fact I came up from the bottom, as far as general details of the office and factory is concerned.

Q. Are you talking about the Lorillard Company now? A. No, I am talking about previous to that. 40

Edward F. Higgins—Direct

Q. Your previous experience. What was your last position with this printing concern? A. As I say, I was first assistant there in charge of purchasing; I was also assistant to the superintendent of the factory.

10 Q. Well, did you have anything to do with supervising the printing and getting out proofs? A. I supervised them; I followed them through the factory, having designs drawn on stone, plates made, whatever it might be, and then have the proofs submitted, have the proofs approved, have corrections made if necessary, etc., until the job was completed and delivered. General follow up man, as it were, assistant to the superintendent.

Mr. Rae: I submit that this witness is qualified.

20

The Court: I think he is competent.

By Mr. Rae: Q. (Question repeated as follows: Then if I should come to you and ask you for a proof of a two color job, what kind of a proof would be customarily prepared by the printer?)

A. You submit a design in two colors, the same as the sample or sketch approved, whatever the design might be that was submitted.

30 Q. Customarily two colors would show on the proof? A. By all means.

Q. Now I show you Exhibit P-8 and ask you if that proof was submitted to you by the printer and O. K'd how many colors would the finished product be made in?

Mr. Turner: I object to that for the same reasons stated as to the previous question. This witness has no knowledge of the system employed by the Leo Company, which is the party concerned in this suit.

40

Edward F. Higgins—Direct

The Court: You may answer the question. A. Why, I would take that for a one color job.

Q. A one color job? A. Yes, sir.

Q. I show you what appears to be a series of pages and ask you what those are? A. That is a four color job.

Q. That would indicate a four color job? A. Yes; this is also a sort of a progressive proof here; the proof shows red, yellow—

Q. That would show a four color job? A. Yes, sir.

Mr. Rae: I offer the four color series in evidence.

Mr. Turner: I object to them because the witness has not stated, as I understand, that they are proofs.

A. They are proofs; here is the proof, the key of the plate; you see they fit right into the key, each color plate is made up with a key, right in here (indicating) and that fits in with each one of these subsequent colors and then they all combine into the one; there is the answer; the whole four colors is right in that (indicating).

The Court: This is a combination of this and the others (indicating)? A. This and this; that is what they call progressive; that all comes out on one field, you see there is 2 right in there (indicating), and here is where you find the whole four of them (indicating); this key would fit in one on top of the other; that is what we call progressive.

Q. These keys run in different colors? A. They would have to be fit together; when the four plates are approved you will find that they do not have the key; the four colors would be there but they would not have the key.

Edward F. Higgins—Cross

Q. That would not show on the regular run of the stuff, would it? A. No.

Q. Why wouldn't it? A. They take that off and you wouldn't see that.

10 Mr. Rae: I offer the four color series in evidence.

Mr. Turner: I object to that as immaterial and incompetent.

The Court: I think they are. The witness has used them for demonstration, but I don't think they are evidential.

20 Mr. Rae: Well, the contention is that this proof does not show whether it is a one color or a two color job, and I think, it seems to me it is very vital to show it is the custom of the business to show two colors in a two color proof.

The Court: These papers have been used by the witness and they may be marked for identification; of course they are not evidential.

Q. I show you another series and ask you what they are? A. Two color proofs.

Q. And that shows how many colors in the proofs? A. Two colors.

30 Mr. Rae: I ask that they be marked for identification.

Q. I show you another and ask you what that is? A. One color.

Mr. Rae: I ask that this last one be marked for identification.

CROSS-EXAMINATION by Mr. Turner:

40 Q. Mr. Higgins, this work that has been marked for identification, Butler's Triumph Brand, is

Edward F. Higgins—Cross

that the same type of work as this Key Dry work?

A. No, sir.

Q. What is the difference? A. That is progressive proofs; this here is just black and white.

Q. What do you call progressive? A. This is a four color job; they get a combination of five colors, and four here; you see they get the blue and yellow there making green, and they get the blue and yellow and red in there (indicating). That is a four color art. 10

Q. When you say "Art," what do you mean?

A. That is a different type, what I would term just plain work.

Q. When you used the word "Art," what did you mean by that? A. It is engraved that way.

Q. What is this printing done from? A. From plates. 20

Q. How many plates are used for this Butler's job? A. Four.

Q. They use four different plates, don't they? A. Yes.

Q. What is the process by which this is put on?

A. What do you mean?

Q. How do they do it? A. They engrave it on.

Q. How many engravings do they have? A. Four. 30

Q. Four different engravings? A. Yes, sir.

Q. Now, are you able to positively swear that this Butler's Triumph Brand label here is a proof and is not part of the regular run? A. Why, I cannot—

Q. Can you or can't you? Will you just look at this top; can you swear that that top one is not part of the regular run? A. I would say no; that it is a proof. 40

Edward F. Higgins—Cross

Q. Can you swear to that? Are you positive about that? A. I don't know anything about it; it appears to be a proof. I can't answer for something I haven't seen done.

10 Q. You don't know whether this paper here that has been marked for identification as Butler's Triumph Brand, is a proof or whether it is part of the regular run? A. I would; as far as my decision I would say it was proof.

Q. You think so, don't you? A. I imagine so; because I will tell you why; because this is a carton, it appears to me to be a carton, in which they could not get that class of paper; this appears to be proof paper.

20 Q. You could not swear positively that it is not part of the regular run? A. I cannot answer for something I have not seen.

Q. You don't know then? A. I can answer only as far as my experience goes and I would swear that is a proof.

Q. You think it is a proof? A. I think it is a proof.

Q. And your thinking is based simply on the kind and thickness of the paper? A. Thickness and the way the proofs are.

30 Q. Because they are in a series? A. It shows a key and that would not show, they would take that off, and they would not use that class of paper in making cartons.

Q. The only reason you think it is proof is because of the class of paper; otherwise it would be regular run? A. I do.

40 Q. Do you know what kind of paper Butlers use? A. I know what class is generally used.

Edward F. Higgins—Cross

Q. Do you know whether Butlers use that class of paper for regular run? A. I don't know.

Q. Are you able to say that this Butlers' Triumph Brand is not the design that is submitted by the man who made the plates for this work, and that it is not part of the printing at all? Can you say as to that? A. No, I can not. I might explain that in this way: These might be plates submitted by the man that made the job or by the plate man; I can't even say it is part of the printing room. 10

Q. You would not say what it is? A. Other than it appears to me to be a set of progressive proofs.

Q. And that you base on the fact that there are produced other papers here and they are on a thick paper? A. Generally a proof appears on a high gloss paper. Again, as I say, I don't think you could pack bird gravel, which is heavy, in a class of stock like that, because that would need stiff consistent stock to make any kind of a folding box like that, otherwise it wouldn't carry. 20

Q. That is what you base your opinion on? A. Yes.

Q. There is nothing on which you can base your opinion as to this being a proof, other than that? A. Other than the proofs marked here in the way it is, and you see it fits in. 30

Q. You never, in all your experience, then, have seen a two color job where the proof did not show the colors printed out on the proof, have you? A. I have.

Q. As a matter of fact, you have seen many such, have you not? A. No, no; only on special occasions, there might be a case of time, a case of 40

Edward F. Higgins—Cross

urgency, and in that case there would be noted that the finished proofs are to be printed in extra colors.

10 Q. Now, when a proof is submitted on paper such as this thin proof paper, do they usually print two colors on that thin paper? A. Why, they print two or three or four colors all on that paper.

Q. Do they usually do that? A. Yes, they can.

Q. Do they usually do that? A. Yes, to paste it on the box or the article it goes on.

Q. I am talking about the proof paper now. A. Proof paper, you can put it on any kind of paper.

20 Q. When they use this kind of proof paper, do they usually print two colors on that kind of paper? Just look at this paper here; do they print two colors on that kind of paper? A. Yes, you could put two colors; it is a question of one way with one man and another way with another.

Q. Then there is no general custom in the trade about it? A. On the quality of paper?

30 Q. Is there any general custom in the trade as to putting colors on that kind of paper? A. No, you can put it on any paper, but the higher grade of paper is used on the higher quality of goods, in some cases they use paper of that kind with a rough finish and use two colors on that just as well as on the other.

Q. Is it your opinion that this came from a printer's office, these plates? A. No, they are not, they don't look to me like printer's.

Q. They are not printer's plates at all? A. They look like engraver's plates.

40 Q. You know, don't you, that these are fur-

Edward F. Higgins—Re-direct

nished by the engraver? A. No, I don't know that.

Q. Customarily? A. Not customarily, unless you request it.

Q. For the purpose of showing the printer where he is to put his colors? A. Well, he knows that, too, as well as the plate man, because he looks at the sketch and the sketch shows that. 10

Q. And if he does not look at the sketch? A. That is the design anyway, and with a plate man he will know where the colors hit; generally they submit them with the plates as a guide.

Q. The plate man submits that? A. Yes.

Q. They are not printer's proofs then? A. They might be and might not be.

Q. Ordinary proofs such as these are plate proofs? A. Not ordinarily; you can make them printer's proofs. 20

Q. Is there any custom about that? A. No custom about that.

Q. No custom about that at all? A. No.

RE-DIRECT-EXAMINATION by Mr. Rae:

Q. You say occasionally where the proofs are printed in one color if it was to be a two, three or four color job they make a note; how should that be done, will you indicate? 30

Mr. Turner: I object to that; he says there is no custom about those things.

The Court: He says there is a custom about it, that they do it in one or two ways and he has mentioned that it is done in some way. Now he is asked how is that indicated. I will allow it. 40

Edward F. Higgins—Re-cross

Q. Answer that. Supposing this was to be blue and that red (indicating), how would that be indicated? A. Why, we indicate it with a mark.

10 Q. What kind of mark? A. May I mark one of these? You would indicate by a line and mark that with a circle showing what the color would be.

RE-CROSS-EXAMINATION by Mr. Turner:

Q. If you know what colors were to be used you would not do that? A. Or would give some other directions.

Q. To protect yourself, I suppose. There is nothing obligatory about it; you don't have to do it? A. Necessarily, yes.

20 Q. Why do you have to do that? A. Because for the printer's guidance, so that he would not go wrong. Supposing the salesman took in the job without any marks and handed it over to his printing department and says "Go ahead with two colors," they might print two different colors than what you want.

Q. Then these marks that you put on the proof are the directions to the men who do the mechanical work? A. It is always a guide that you have
30 to go by for those colors.

Q. Did you ever have any printing done by the James Leo Company? A. Personally?

Q. Yes. A. No.

Q. But I understood you to say that the custom was to print two colors on this proof paper,—did you? A. I did not say on this, I said on any paper; I did not say on proof paper; on any
40 paper.

Edward F. Higgins—Re-cross

Q. Then, if you used that why should you write on there at all? A. If you have two colors on there you would not have to write; they speak for themselves; you would O. K. the proof as being approved or not approved, noting the corrections, whatever they might be.

10

Q. How many proofs have you ever seen where the colors were indicated by marks on the side? A. Oh, I have, on different occasions, where it is a matter of speed, where I would have a job done over night.

Q. How many jobs did you see? A. I done so myself maybe a dozen times or two dozen times, but as a rule I don't follow that system; I insist on having the proofs submitted the way the job is going to be delivered to me complete.

20

Q. You would pay additional for that, wouldn't you? A. No, I don't; it is all included in your cost, in the estimate.

Q. You would figure on that in your contract? A. Why, yes, when we write up an order we always state "Proof to be submitted."

Q. In two colors? A. Well, whatever the job calls for, either five or six, or it might be ten colors.

Q. If you did not include that in your contract you usually get the proof entirely printed in black? A. No, sir; I do not.

30

Q. What do you get? A. I get it exactly as the job is to be delivered finished, unless it is a matter of urgency or speed, where I can't wait for those to come along.

Q. You say it has happened about two dozen times in your experience? A. I won't say; maybe two dozen, or one dozen; I don't know.

40

Edward F. Higgins—Re-direct

Q. Where a job having more than one color has been submitted to you in proof with one color printing? A. In cases like that I would always note that there were to be additional colors.

10 Q. When you got this two color job proof do you say they write on the side what the colors were to be? A. Who?

Q. Who did? A. I would note the two colors if I got one.

Q. If you got a proof of a two color job you would put a notation out here showing what the colors were to be on the finished product? A. I would, with my name alongside of it.

Q. You would do it yourself when you corrected the proof? A. Yes, sir.

20 Q. So that if the proof the printer submitted to you was entirely one color— A. Yes.

Q. You yourself wrote out the colors? A. That is my custom.

Q. And you did that because of the fact that you did not want the printer to make any mistakes? A. I wanted him to follow my copy and naturally so there would be no mistake.

30 Q. So that when you got this proof in black you would indicate here by writing the word "red" and then draw a line? A. If it was red.

Q. And if it was orange here you would draw a line and write "orange" here? A. Yes, sir.

Q. And after you had written those things you would send it back to the printer? A. I would say "O. K. with corrections noted."

RE-DIRECT-EXAMINATION by Mr. Rae:

40 Q. Supposing you should hand that back to the printer without any marginal note of your O. K. what would that indicate to a printer?

Edward F. Higgins—Re-cross

Mr. Turner: I object to that.

The Court: I will permit it.

A. I would expect a one color job.

RE-CROSS-EXAMINATION by Mr. Turner:

Q. Would you expect a one color job if you made a contract for two colors? A. I would either change my order and look for a reduction in price or write a letter to that effect that I wanted a reduction in price. 10

Mr. Turner: I ask that that be stricken out as not responsive.

Q. If you had made a contract for a two color job and you sent that proof back, simply O. K. that proof, would you expect, in the face of your order, that the job would come to you as a one color job? A. I would not O. K. it; I would not O. K. that proof, if my order read for two colors I would not O. K. a proof for one color without this notation marked thereon. 20

Q. You would mark that yourself? A. Yes, sir.

Q. Suppose you didn't mark it? A. I would not O. K. it—

Q. Suppose you did, in the face of this contract— A. I would not O. K. that for something that was not ordered. 30

By the Court: Q. If you O. K.'d that job and sent it to the printer, would you be surprised if you got a one color job? A. No, I would expect a one color job on that O. K.

By Mr. Turner: Q. You would expect a one color job even if your contract called for a two color job? A. I would change my contract.

Q. If your contract called for two colors, and it stood? A. I would not O. K. it. 40

Edward F. Higgins—Re-cross

Q. But if you sent it back after O. K'ing it. A. I would not O. K. it unless he submitted a two color proof.

10 Q. You would expect two colors if you ordered two colors? A. Yes, if I entered into a contract for a two color job I would expect a two color job.

Q. Supposing that these proofs were submitted to you simply for printed matter that was on it, would you O. K. the printed matter if it was correct? A. I would note "O. K. for printing only."

Q. You do that because of your vast experience in these matters? A. Yes, sir.

Q. You do that because you know the printer makes mistakes? A. I don't take any chances on it.

20 Q. Why don't you take chances on these printers? A. They are just natural like anybody else; they might do what you want or they might do just opposite.

Q. If you did O. K. this as to printed matter and your contract called for a two color job, would you expect a one color job? A. I would say I O. K.'d that for reading matter only and not for colors.

Q. You would write that out? A. By all means.

30 Q. Not as to colors? A. Yes, sir. By all means.

Q. You would? A. Yes, sir; because I explain that in this way: Because they would give me something in black and I would have a two color proposition in green and red, say, and I can't very well expect them to know them colors, which would be green and which would be black and which would be red; if it was submitted for reading matter I would so mark it on the outside in

40

Edward F. Higgins—Re-cross

such cases where it would be necessary, when it would be urgent.

Q. It would not be necessary only in matters of urgency? A. In matters of urgency, when I would need something over night; I would do it in that case; otherwise I generally submit the proof the way the job is to be all complete, then there is no question. 10

Q. Now, if you had submitted to you a box such as this for a copy of a line of boxes to be made, and you had a contract calling for a two color job, and this proof were submitted entirely in black, would you expect that job to be only in black?

Mr. Turner: I object to that question: I don't think there is any fair basis for such a question. 20

The Court: You have already examined the witness as to what he would expect if he O. K.'d it without any notations and he said he would expect a black and white job, and if it were to carry colors that would be noted on the O. K.

Mr. Turner: But, if the Court please, these are boxes printed by Leo, made up by Leo, which he had in his possession, and with which he was familiar. 30

The Court: The whole theory of his case, Mr. Turner, is that after this was made some changes were made by some representative of the other side who was authorized to do so.

Joseph Craw—Direct

JOSEPH CRAW, sworn:

Direct-examination by Mr. Rae:

Q. Mr. Craw, what is your business? A. Folding box maker.

10 Q. How long have you been in the folding box business? A. 48 years.

Q. What kind of folding boxes do you deal in? A. Any box that folds, collapses.

Q. This kind of boxes? A. Yes, we deal in them.

Q. You say you have been in the business 48 years? A. About that.

20 Q. As a result of your experience in folding boxes and as a result of inquiries which you have made, can you tell the Court what 1000 6x8x11 five pound boxes with five inch flaps, furnished in two colors, red and black, are worth, glued and wired?

Mr. Turner: I object to that as incompetent. The witness is not qualified to answer. This is a hypothetical question and there has been no proper foundation laid for it.

30 The Court: I think you should have an opportunity to examine him as to his qualifications, otherwise the question may be answered.

Q. Do you know the value? A. Well, I got a quotation from the Brown Board Company of Philadelphia.

Mr. Turner: I object to that. I understood he was in the business.

40 The Witness: As a broker, I told you.

Joseph Craw—Direct

Q. Do you know of your own knowledge what these boxes are worth? A. Yes, I know by the quotation, \$55.

Mr. Turner: I object to that and ask that that be stricken out.

The Court: It will be excluded. 10

Q. Do you know from your experience as a box dealer, a folding-box dealer, what these boxes are worth? A. I can give you the price of any box you hand to me, by figuring it out.

Q. Suppose I should hand you this box, to be made in two colors— A. I just figured out—

Q. Glued and wired? A. I haven't seen this box; if this box is the same measurement as that I would furnish them for \$55.

Mr. Turner: I object to that because that 20
is based on this quotation as he testified.

Q. Look at that box, assuming that that was in two colors, though, and tell us what you would furnish that box for a thousand?

Mr. Turner: I object to that on the ground that he is not qualified.

The Court: He says that he can figure it out without reference to having obtained any quotations at all, from his own knowledge. If he can figure it out that way he 30
may do so and tell us the result.

Q. Can you do that?

Mr. Turner: Without using the quotations at all. A. I have done that; that is how I do it.

Q. Just figure it out and tell us how you arrive at it and what the result is?

The Court: We will now take a recess until two o'clock and in the meantime you may make your estimate. 40

Recess until 2 o'clock p. m.

Joseph Craw—Direct

After recess the witness resumed the stand.

By Mr. Rae: Q. Mr. Craw, before recess I asked you if you could estimate the value of boxes similar to the box which is in dispute; have you made that estimate? A. Yes, sir.

Q. Can you tell the Court what your idea of the value of that box is and on what it is based?

Mr. Turner: May I cross-examine as to his method of making the estimate?

The Court: You may.

By Mr. Turner: Q. What point of pasteboard did you estimate on? A. Equal fifties.

Q. Fifty point? A. 26-38, equal fifties; he asked for an estimate on this and I figured on 26-38, equal fifties, that is what the trade knows it as; in other words, a sheet 26x38 has fifty sheets in it and there is forty bundles to a ton in them sheets.

Q. On what thickness of board did you estimate? A. That is the thickness, that is what the trade knows as board equal fifties.

Q. How thick is this board here? A. That is the one we are speaking about.

Q. Well, did you measure the thickness of this board? A. Yes.

Q. What did you measure that with? A. With my hand.

Q. With your hand? A. Yes.

Q. You can't measure the thickness of pasteboard with your hand, can you? A. So near as the man makes it, yes.

Q. As a matter of fact, don't you have to use an instrument? A. You do if you want to be exact.

Q. If you want to be exact? A. A micrometer.

Joseph Craw—Direct

Q. You did not measure that with an instrument, did you? A. No, sir.

Q. So you don't know whether you are exact, do you? A. I am so exact; I had that pasteboard, I examined that with an instrument—

Q. How can you— A. Wait a minute now (producing sample) there is the same thickness of board. 10

Q. How can you tell that without an instrument? A. This was tried with an instrument; I had this piece of one of them boards to figure on when I gave you the other estimate.

Q. When you gave what estimate? A. When I gave my written estimate.

Q. To whom? A. To you, right here.

Q. You didn't give me any estimate. A. Didn't you ask for it? 20

Q. No. A. What was that estimate you asked for?

Q. I didn't ask for any estimate. A. The other gentleman did.

Q. You haven't given me any written estimate. A. That has been calipered.

Q. Did you caliper this? A. Yes, sir.

Q. Did you yourself caliper it? A. Yes, sir.

Q. From what source did you get the price which you proposed to put on it? A. The price is what I know the market price to be on the board, and the rest I figured out. 30

Q. Doesn't the market price change from time to time? A. Yes.

Q. It is not the same as it was six months ago, was it? A. Yes, just the same.

Q. Is it? A. Yes, sir.

Q. As six months ago? A. Yes, there has not been any change in six months. 40

Joseph Craw—Direct

Q. When was the last change in market price?

A. The first of the year.

Q. Nineteen what? A. Nineteen hundred and eighteen.

10 Q. Your market prices you get from the quotation which you have from these paper houses, do you? A. Well, we have regular quotations that come out; when there is a change made we are notified.

Q. By your paper house? A. The mill that makes the paper.

Q. The mill that makes the paper you use? A. Yes, sir.

Q. You are notified of that change? A. Yes.

20 Mr. Rae: If the Court please, I think he is qualified.

Mr. Turner: I suggest that he is not qualified.

The Court: I will permit it.

By Mr. Rae: Q. Did you reckon out the value of these boxes? A. Yes.

Q. What value did you put on those per thousand?

Mr. Turner: Are you going to read from a paper now?

30 A. He asked me what price; he told me I should figure out, didn't he? Now he asked what the result of that figuring is.

Q. These are your figures? A. Yes.

Q. In your own handwriting? A. Yes, sir; they are. I put them in there so that you should not think I wrote them outside.

Q. What do you estimate the value at? A. Fifty-five dollars and twenty cents per thousand.

Q. And that was the price three months ago?

A. Yes.

40 Q. Or six months ago? A. Or a year ago.

Joseph Craw—Cross

CROSS-EXAMINATION by Mr. Turner:

Q. How many square inches were there in this box, this Exhibit P-4? A. Five hundred square inches; the blank is 20x25.

Q. What blank did you use? A. Well, the one that you handed me. 10

Q. I didn't hand you any. Which one did you use? A. The one that is 8x6x11 with five-inch—I forget what it is.

Q. (Exhibiting box) Is that the one you used? A. Yes, it is; you can measure it; that is the size.

Q. The thickness of the board, you guessed at that? A. No, I knew the board; I know it from this here board that I had calipered. I had a piece of that box. 20

Q. Do you say that these two boards are the same (referring to sample produced by witness and box exhibited to witness)? A. Yes, sir.

Q. Do you think they are? A. I know they are as near as we can make it.

Q. You think so because it is the same color; that is the reason, isn't it? A. I know that is taken off one of the boxes.

Q. How do you know that? A. Why, I took it off.

Q. Where did you take it from? A. When they asked me to quote from a box of that kind. 30

Q. Who asked you to quote? A. Mr. Leo.

Q. He gave you this piece of board, did he? A. Yes.

Q. If you were asked to quote on a box of that size and you were familiar with the market price, why did you have to go to someone else to get the price? A. I didn't have to go; he came to me. 40

Max E. Ribakoff—Direct

Q. You did go to someone else to get the price, didn't you? A. No, he asked me if I would get him the price of that size box with that stock, then I went and got the price.

10 Q. Then you went to get the price from someone else? A. The trade knows; I am a broker; I go all over.

Q. You went to a mill and got the prices? A. Yes.

Q. Now, then, the price which you are giving us now is based on the figures you obtained from the mill? A. I had the market price on board, the regular price; the figuring anybody can do.

20 Q. As a matter of fact, the price you are giving now is based on the figure which you obtained from the mill with which you do business; isn't that so? A. Yes; that any man can get.

Mr. Rae: The defendant rests.

MAX E. RIBAKOFF, sworn:

Direct-examination by Mr. Turner:

30 Q. Mr. Ribakoff, you are connected with the Interstate Chemical Company? A. Yes, sir.

Q. What is your position? A. Sales Manager.

Q. What are your duties as such? A. Looking after the field work; after the field sales work.

Q. Do you go out and sell goods? A. Yes, sir.

Q. About the month of July, 1918, did you have any conversation with the defendant company, or one of its officers, relative to an order for folding boxes? A. I did; yes, sir.

40 Q. And as a result of that conversation did you

Max E. Ribakoff—Direct

have anything to do with this Exhibit P-6? A. Yes, I did.

Q. What were the circumstances relative to your sending that written order? A. I did not send the written order; I went there and got the information as to the price, sizes of the boxes, colors of printing, samples of board, and so forth, and when I got those, those being satisfactory in comparison with other prices that we had gotten, I notified the office that it might be well to give Leo the order—the James Leo Company an order for these boxes at the price he submitted, as per samples that he submitted. 10

Q. To whom did you communicate that information? A. I communicated that to the office, since Mr. Leo would not go ahead with the order without getting a written order from the company. 20

Q. Did he say that? A. Yes, he did.

Q. Who signed this order? A. Mr. William H. Rose.

Q. What is his position? A. Mr. Rose is the president of the company.

Q. He signs all the orders of the company? A. To my knowledge Mr. Rose is the only one that signs orders for the company.

Q. Did you ever sign any orders? A. No, sir; I did not. 30

Q. Have you any authority to give orders for the Interstate Chemical Company? A. No, sir; I have not.

Q. Now, Mr. Leo has testified concerning a conversation which he says he had with you in reference to the plates for the printing which would go on boxes such as P-4; will you tell us what, if any, conversation you had with him relative to that? 40

Max E. Ribakoff—Direct

A. So far as the plates were concerned, the plates were to be supplied by the Leo Company and we were to pay for them.

10 Mr. Rae: Just a moment; that calls for a conclusion. The question was what conversation did you have. I object to that answer.

Q. Will you tell us what the conversation was itself? A. The conversation regarding the plates?

Q. Yes. A. The conversation regarding the plates was that we were to supply the plates, that is, Leo was to supply the plates and we were to pay for them.

Q. Did you see young Mr. Leo when you were at the office? A. Only once.

20 Q. Can you tell us when that was, with reference to whether it was before or after this written order was given? A. I believe it was before the order was given.

Q. Did you hear the testimony of young Mr. Leo in reference to a statement made by you? A. I did—this morning?

Q. This morning? A. Yes.

30 Q. Did you say to Mr. Leo, Sr. in the presence of his son, in effect, that the order could be rushed through because it was only to be in one color? A. No, sir; I did not.

Q. Did you ever mention the fact that this order was to be in one color, to anyone? A. No, sir; I did not.

Q. What was the purpose in having this job in two colors?

Mr. Rae: I object to that.

40 The Court: It will be excluded.

Q. Did you have any discussion with Mr. Leo,

Max E. Ribakoff—Direct

Sr. relative to this job being in two colors? A. Not except that he was to figure on the two colors; that was the only way we had figured on the job, that we had asked for the job.

Mr. Rae: I object to that answer as not responsive to the question.

10

The Court: The portion that is responsive may stand; the rest will be excluded.

Q. Now, the other boxes, such as Exhibit P-3, were they printed by the Leo Company? A. Yes, they were.

Q. How were they printed? A. Two colors.

Q. Did the Leo Company submit proofs for those?

Mr. Rae: I object to that as immaterial and irrelevant.

20

The Court: It will be excluded.

Mr. Turner: I pray an exception.

Q. Relative to the question of proofs such as Exhibit P-8, is your signature or initials on there? A. No, sir.

Q. It is not? A. No, sir.

Q. I show you what appears to be the second sheet of Exhibit P-8, has that your signature on there? A. Yes, sir; it has.

Q. Had you had anything to do with proofs previous to this time with the Leo Company? A. Yes, sir; I had.

30

Q. For two color work? A. Yes, sir.

Q. How have those proofs for the two color work been submitted by the Leo Company to you, as to what the proofs show? A. They were submitted as these proofs were, in one color.

Mr. Rae: On this job; on this particular job?

The Witness: No, not on this particular job.

40

Max E. Ribakoff—Direct

Mr. Rae: Then I object to that question.

The Court: I will allow it.

10 Q. On the previous proofs for former jobs, was there any notation on the side of the proofs showing what color it was to be printed in? A. No, sir; there was not.

Q. Now, in your transactions with Mr. Leo, on what do you rely for the purpose of fixing the colors to be printed; what was it that fixed the colors to be used on the job? A. Well, if it were a new job the colors would naturally be specified, but if the job were a continuation or having something to do with previous work, it would naturally follow that the job is the same as the previous one.

20 Mr. Rae: I object to that as a conclusion.

The Court: That will be excluded.

Q. Now, does your contract provide anything relative to the color?

The Court: The contract speaks for itself.

Mr. Rae: I object to him calling it a contract, anyway.

The Court: The paper will show what it is.

30 Q. Did the defendant company, on the previous proofs, for Exhibit P-3, submit a proof in red and black, or how? A. No; they submitted them just in black.

Q. The same as this one? A. As this one is.

Q. Have you ever had a proof from Mr. Leo in more than one color? A. No, sir.

40 Q. No matter how many colors were to be printed on the job? A. Well, we haven't had very much work done by the Leo Company.

Max E. Ribakoff—Direct

Q. Except this line of boxes? A. That line of boxes, and one or two other boxes.

Q. Now, Exhibit P-2 is also in red and black, isn't it—the half pound box? A. Yes, sir.

Q. What is that red and black; why is that put on the boxes? A. That is a color scheme that we struck upon when we got out this material, which is proprietary; it was a color scheme that we designed so as to follow through a uniform package in all our materials of that kind. 10

Q. How many sizes of packages were there on which that would appear? A. There were three sizes, the ones, the halves and the fives.

Q. Those are the sizes that are produced here, Exhibits P-4 and P-3 are two of them? A. Yes; there is the third size (indicating). 20

Q. In your capacity as salesman did you have any reason for wanting them printed in two colors? A. Yes, sir.

Mr. Rae: I object to that question as immaterial, irrelevant and incompetent.

The Court: Is there any question about his reasons? If he ordered them in two colors, unless the contract was modified, he was entitled to get two colors, regardless of any reasons. 30

Q. Was there ever, at any time, any discussion between you and Mr. Leo, or any officer of the Leo Company, relative to changing the terms of the order of July 16th, Exhibit P-6? A. No, sir; there was not.

Q. Now, Mr. Leo has testified concerning the making up of a dummy and having shown it to you in his office; which of these boxes indicates the size of the dummy that he showed you? A. 40

Max E. Ribakoff—Direct

Relative to the five pound; this would be it (indicating).

Q. Now, was there any printed matter on that box at the time he showed you the dummy? A. No, sir; there was not.

10 Q. What color was it? A. It was only in the board sample like this (indicating).

Q. Did you ever at any time see in his office a five pound box such as Exhibit P-4, on which the printed matter appeared? A. No, sir; I did not.

Q. Now, after the Leo Company delivered some of these boxes to the Interstate Chemical plant, did you come to the plant and find some of the boxes? A. Why, I was on a trip when the boxes were first delivered and I did not see those come
20 in; when I got in they showed them to me, they were pointed out to me.

Q. What was pointed out to you? A. The fact that they were in one color instead of the way the order appeared as two colors.

Mr. Rae: I object to that.

The Court: Of course it is objectionable. You ought not to let the answer come before and then make your objection. What discussion he had with his own employers was not in the presence of anybody on the
30 other side and it is not evidential.

Q. And thereupon was this matter taken up with the Leo Company? A. It was taken up by the office.

Q. Now, did your company use any of these boxes printed in one color?

Mr. Rae: I object to that question.

The Court: I will permit it.

40 A. I don't know anything about whether they

Max E. Ribakoff—Cross

did or not; I didn't have anything to do with that end of it.

Q. That is out of your department, is it? A. Yes, sir.

Q. Now, you spoke about the Leo Company refusing to go ahead with this order until they had a written order, when did that question come up, or when was it discussed? A. It was discussed, yes, on my last visit there, when he gave me the prices and so forth so that I could take it up with the company and get the order through for him. 10

Q. How long prior to July 16th was that? A. It could not have been more than a day or two.

CROSS-EXAMINATION by Mr. Rae:

Q. You say that you O. K.'d this page, this initial that has your initials? A. Yes, sir. 20

Q. You were authorized by your company to put your O. K. to it, weren't you? A. I was, this one.

Q. You say you never O. K.'d any proofs before from Leo except showing one color, is that true? A. To my knowledge, that is so.

Q. Are you quite sure about that? A. To the best of my knowledge that is so.

Q. What are your initials? A. M. E. R.

Q. (Handing paper to witness) Is that your O.K. on that one? A. No, sir. 30

Q. That was not written by you? A. No, sir.

Q. "O. K. M. R." was not put on by you? A. That is "W. H. R.," sir.

Q. Who is W. H. R. do you know? A. Mr. William H. Rose.

Q. Are those Mr. Rose's initials on that? A. Well those are Mr. Rose's initials.

Q. Do you know whether those are his initials, 40

Max E. Ribakoff—Cross

that he put those on? A. I don't know whether he put those on; they look very much like his writing.

Q. And that shows a proof, does it not, in two colors?

10 Mr. Turner: I object to that; that does not show any proof at all.

Q. These initials on this Exhibit P-8, whose initials are those, do you know? A. Those are E. K. That is Mr. Gardner's.

Q. Whose are they? A. Those are Mr. Gardner's initials.

Q. What position does he hold in the company? A. Gardner is a salesman of the company.

20 Q. Is that the same position you hold? A. He operates under me; I have charge of him; I am the sales manager.

Q. He has authorization to initial proofs, has he not?

Mr. Turner: I object to that.

The Court: Do you know? A. I don't know of any authorization.

30 Q. Now, you know that there was a communication from the Leo Company to your company in response to this Exhibit P-6, do you not? A. A communication of what kind?

Q. Addressed to your company from the Leo Company in response to this? A. No, I do not.

Q. You did not know it, or you never saw any? A. I don't believe I saw it.

Q. You never saw the letter of July 17th from the Leo company?

Mr. Turner: I object to that; there is no proof of any such letter.

40 The Court: It is in evidence.

Max E. Ribakoff—Cross

Q. I show you this copy of a letter, which is agreed may be submitted in place of the original, and ask you if you are familiar with that letter from the Leo Company to your company?

Mr. Rae: I will read this letter, if your Honor please:

10

“July 17, 1918.

Interstate Chemical Company,
667 Garfield Avenue,
Jersey City, N. J.

Gentlemen:

We are in receipt of your order of July 16th for 10,000 5 pound folding boxes, size 8x6x11 to be made from Orange Coated board, printed in two colors, you to furnish original plate for front and back. Price for the same to be \$47.50 per M. packed in paper bundles and delivered at your place of business less 1-10-30 days net.

20

We note that you want delivery of these boxes in about four weeks, we think it will be fully six weeks before we can make delivery.

Yours respectfully,”

Q. Do you know who did furnish the plates for this job? A. No.

30

Q. You do not? A. No.

Q. Do you know the value of plates for a two color and a one color job of this sort? A. No; I don't know the value of it.

Q. How many times were you over to the Leo Company after this, immediately after this order? A. I don't believe I was over at all after that.

40

Max E. Ribakoff—Cross

Q. Not over at all? A. Except once.

Q. And that is the time Mr. Leo and Mr. Leo, Jr. were present? A. No. I believe it was previous.

10 Q. Previous to the order, you are not sure about that? A. I believe it was, because I was only over there once after that order and that was on an entirely different matter.

Q. You are sure about that? A. Yes, sir.

Q. It had nothing to do with that at all? A. Had nothing to do with that order.

20 Q. How do you fix the time when you say Mr. Leo appeared in the room with his father, when you were there? A. That was all gone over, regarding the question of boards, there came up the question of thickness of boards, the color of boards and several other things.

Q. How do you fix that in reference to the date of this order? A. The order had not been given at the time I am speaking of.

Q. Was there any discussion about the plates about that time? A. No, sir.

Q. No discussion? A. No, sir.

Q. You never went over with Mr. Gardner after this contract was made? A. No, sir.

30 Q. After this order? A. No, sir; not with Mr. Gardner.

Q. All by yourself? A. I was over there once after that on an entirely different matter.

Q. You did not know whether it was a one color job or a two color job at the time? A. I was not in when the boxes arrived.

40 Q. When was it that you initialled that Exhibit P-8? That was after this order, wasn't it? A. It was after the order, yes.

Max E. Ribakoff—Re-direct

Q. You were having some discussion about the job before, weren't you? When you initialled that did they shove it at you and you initialled that without any discussion? A. I had nothing to do down at Leo's office; that was signed in my office.

10

Q. That was signed in your office? A. Yes, sir.

Q. In whose presence? A. In the presence of Mr. Gardner, or whoever else may have been there.

Q. Did this other sheet come with it? A. Yes, sir.

Q. How did it come that you initialled one and Mr. Rose initialled the other? A. Mr. Rose did not initial that.

Q. I mean Mr. Gardner. A. I was going over the printing matter; he had nothing to do with the printing matter; and Mr. Gardner initialled that evidently for the arrangement there.

20

Q. For the color? A. I don't know that there was anything said about colors.

Q. You did not hear anything about colors? A. No.

Q. You are not an expert printer, are you? A. No, sir.

30

RE-DIRECT-EXAMINATION by Mr. Turner:

Q. I think I neglected to ask this witness about these samples that are claimed by the defendant. Did the defendant company make up any samples for you or your company—sample boxes? A. Of the five pound boxes?

Q. Well, claim is made here that about July 26th, 1918 they made up various samples, styles of folding boxes, at your request. A. Yes.

40

Max E. Ribakoff—Re-direct

Q. Did they make up any? A Samples, you mean styles of folding boxes?

Q. Yes. A. Were those five pound, or other kind of boxes?

Q. Other kinds of boxes. A. Other kind of boxes.

10 Q. Did you order them to make them up? A. They offered to make them up at my request.

Q. For what purpose? A. They were samples that I wanted, of the sizes I wanted for a possible order from us for a given number of boxes.

Q. Was there ever any agreement made as to your paying for those samples? A. No, nothing was said about payment.

Q. Afterwards did you receive a bill for them? A. Why, the office manager handed me a bill that Mr. Leo had sent in, and I went down to Leo's office when that bill was handed to me and talked it over with Mr. Leo.

20

Q. What did you say and what did he say? A. Well, I told him that under the circumstances he could not very well charge us for making up these sample boxes, which he agreed to make up, which he had made up in the past for us, and he agreed to cancel the charge.

Q. Now, what did he say when you say he agreed to cancel the charge, what did he say? What were his words? A. He was pretty surly about it generally, but in view of the business that he was getting from us, I suppose, he agreed to cancel the charge.

30

Mr. Rae: I object to that answer as not responsive and calling for a conclusion.

Q. I am asking you what his words were.

The Court: Don't tell us what you suppose.
40 Tell us what was said. A. I don't recall the ex-

Max E. Ribakoff—Re-cross

act words, but the gist of it was that he cancelled the charge that he made against the company for \$50.

Mr. Rae: I object to that as calling for a conclusion.

The Court: He says that is the gist of it; that is the substance. 10

RE-CROSS-EXAMINATION by Mr. Rae:

Q. How much work was involved in preparing these samples, do you know? A. No, I don't know.

Q. It took considerable time and material? A. I don't know how much time it took.

Q. Well, it must have been a considerable time?

Mr. Turner: I object to that.

A. I don't know what you mean by considerable. 20

Q. How much material was furnished in these samples? A. Well, sufficient to make a couple of dozen boxes.

Q. How many different styles? A. Two different styles.

Q. How many colors? A. They were not any color at all; they were just plain natural board.

Q. What were the sizes of those samples? A. Half pound and pound boxes similar to these. 30

Q. Wired? A. No.

Q. Glued? A. Well, practically, they were glued, because they were folding boxes and set up boxes.

Q. Entirely different from what you had been using? A. Yes, quite different.

Q. How did they come to make up these boxes for you? A. Well, they were bidding in on a job, we wanted them to bid in on the job to furnish us 40

Emil V. Gardner—Cross

with those boxes, and in order to bid in for them they made samples of the boxes they would submit, as to thickness, board, size, etc.

Q. Was there anybody else bidding in besides the Leo Company? A. Oh, yes; Mr. Leo knew it.

10 Q. Over what period of time did he furnish all these sample boxes? A. Several weeks.

Q. Two samples were submitted of one; how many samples altogether were submitted? A. Two samples of what?

Q. Of these folding boxes. A. They were all of them sample folding boxes.

Q. I mean how many different types? A. Two different sized boxes.

Q. How many different kinds of each size? A. Well, there were quite a few samples there.

20

EMIL V. GARDNER, re-called:

Direct-examination by Mr. Gardner:

Q. I show you Exhibit P-8, are those initials on there your initials? A. Sure.

30 Q. Did you have any conversation, or any talk, with Mr. Leo or the Leo Company's representative relative to changing the written order? A. I did not.

CROSS-EXAMINATION by Mr. Rae:

Q. Where were those initials put on, Mr. Gardner? A. At the office of the company, the Interstate Chemical Company.

40 Q. In the presence of Mr. Ribakoff? A. Mr. Ribakoff.

J. Albert Hinnners—Direct

Q. How do you explain that Mr. Ribakoff signed this proof and you signed that one (indicating); how did that happen? A. He was going over the one and I was going over the other, we worked that out together.

Q. And when was that, do you know? A. About 10
July.

Q. The latter part of July? A. The latter part of July.

Q. Immediately after this order was given? A. No, before the order was given.

Q. The paper antedates July 16th? A. Around that, July 16th or 20th.

Q. Well, these proofs were made after the order was given, weren't they, with these initials, or was it before? A. No. 20

J. ALBERT HINNERS, re-called:

Direct-examination by Mr. Turner:

Q. Mr. Hinnners, I show you some papers that have been testified to by Mr. Higgins, which show Butlers Triumph Brand, and there seems to be sort of a series, will you tell us what those are?

A. Why, they are proofs; they are engraver's proofs. 30

Q. Are those such proofs as are furnished by a printer? A. No; these are submitted by the engraver, submitted to the printer, to show the progressive styles and the color scheme, you see, because the various inks blend, you know. While the ordinary pressman can follow that color scheme himself, these proofs are furnished for his particular benefit, so that he has no trouble in following them. 40

J. Albert Hinners—Cross

Q. Does the printer ever furnish any such proofs as this, in your experience? A. No.

CROSS-EXAMINATION by Mr. Rae:

Q. What are these, Mr. Hinners? A. These are
10 proofs.

Q. What kind of job is that; how many color job is that? A. That is a two color job.

Q. Those are printer's proofs, are they not? A. No, they are engraver's proofs, I guess.

Q. You guess? A. Yes.

Q. You would not say that these are not printer's proofs, would you? A. They are engraver's proofs.

Q. Why do you say that? A. Because he has
20 his key marks on here; they are invariably removed from a printer's proof; they must be, because these would show in the job when it was printed, when these key marks are left on.

Q. They can be removed, can't they? A. When they are put on the press and the job is ready to go ahead, then they are removed; they are cut off by the pressman, because if they are not they would show on the printed job.

Q. A printer could very easily remove these
30 marks? A. That is his business, to remove those marks.

Q. How about this (exhibiting paper to witness)? A. This is an artist proof; that is a proof by the artist; this is the way, he just submits this proof of colors before he makes the plates, then when it is O. K.'d for the color scheme, then the plates are submitted in proof in that shape.

Q. I show you this proof; what would that
40 indicate to you in reference to number of colors that

J. Albert Hinnners—Cross

would appear on the finished product? A. On the finished product, now?

Q. Besides the base, I mean; how many colors?

Mr. Turner: Is it a proof, or are you talking about finished product?

Mr. Rae: I am talking about his knowledge, as to whether, if he was shown that proof, what would he expect the finished product to look like in regard to number of colors. 10

A. That question is not a proper question, in my judgment; it is misleading, for the simple reason that I would have to know what the original order on my job was, because I say now, as a printer of 21 years experience, perhaps ten or fifteen per cent of my work is in colors, and I also know, that we never turn out a two color proof in the general job line. The original order comes in to us, Mr. Leroy Cavanaugh, Mr. William H. Taft, or somebody else, send us in an order and they want it in colors and they designate the colors that they want. 20

Q. On the proof? A. Not on the proof; on their original copy they designate the colors; we go ahead and we set our job to conform with that; then we submit our proof in one color. 30

Q. Yes, how are the colors that the finished product is to bear indicated; are they indicated on the proof? A. Before they are finished?

Q. By initial, are they not? They O. K. the proof after marginal notes have been made as to the colors? A. No, not always.

Q. Well, generally? A. Not even generally. Not even generally. If you send me in a job tomorrow, on your original copy you designate the col- 40

J. Albert Hinnners—Cross

ors you want here, and when that proof comes back with your O. K. on it, without the indication of colors, I follow your original instructions as per your original copy.

10 Q. Don't you every often see marginal notes on these proofs? A. Yes, in this way—

Q. Indicating what colors are to go on? A. Yes, in this way: you send me a particular job now, you want a two color job, you leave it to me to designate the colors. I go ahead and complete my job, then I submit it to you; in submitting it to you I suggest that we will run this in red, that we will run this in green, or something else, by marginal notes; if you have already suggested that in your original copy I don't pay any attention to that, because I follow your original copy to the letter.

20 Q. But if you were sending a representative to deal with me, it would certainly be the part of discretion to have the marginal notes indicate what the colors would be, would it not? A. I admit that you are right in that; there is nothing like safeguarding it.

Q. How much would the plates cost for a two color job of this sort? A. In this thing here?

30 Q. Yes. A. I can only approximate it. A two color job, you see, on plates, would approximate we will say \$40 you know, about \$20 for each color. But I am only approximating that, because we, in our business, get our estimates from the engraver; we go direct to him on all those things.

Q. That would be a fairly reasonable price? A. I would say so, yes.

40

Testimony closed.

J. Albert Hinners—Cross

I do certify that the foregoing is a fair and accurate transcript of the minutes and proceedings taken by me at the trial of the case of Interstate Chemical Company, plaintiff, against James Leo Company, defendant, at the First District Court of Jersey City.

HARRY SCHIRMER.

Stenographer.

10

To the Chief Justice of the New Jersey Supreme Court:

I do certify the foregoing transcript, made by the stenographer designated by me and sworn, as the minutes and proceedings of the trial of the case and as the state of the case of Interstate Chemical Company, plaintiff, against James Leo Company, defendant, at the First District Court of Jersey City, to be used on the appeal herein.

20

CHARLES L. CARRICK,

Judge of First District Court of Jersey City.

Judgment Record

NEW JERSEY SUPREME COURT

FIRST DISTRICT COURT OF JERSEY CITY

10 Before CHARLES L. CARRICK, ESQUIRE, Judge

 INTERSTATE CHEMICAL COMPANY,
 Plaintiff,

vs.

 JAMES LEO COMPANY,
 Defendant.

No. 113636

 20 State of New Jersey, }
 Hudson County, } ss:
 City of Jersey City. }

Upon Contract, Demand \$500

Frank G. Turner, Plaintiff's Attorney.

Robert Carey, Defendant's Attorney.

	Costs	City	AL
	Summons, Copy	1.50	
	Service, Return		60
30	Trial Fee	1.50	
		<hr/>	
		3.00	60
		<hr/>	
	Bond	1.00	

 40 A summons was issued tested December 4,
 A. D. 1918, returnable December 12, A. D. 1918,
 at 10 o'clock in the forenoon at the Court Room
 of the said Court in the City of Jersey City. The

Judgment Record

Constable returned the summons as follows, *viz*:
I served the within summons December 6, 1918,
on W. W. Randolph, agent in charge of defend-
ant's principal office by reading the same to him
and delivering to him a copy thereof.

ROBERT J. LIVINGSTON, 10
Constable.

Plaintiff's demand was filed December 5, 1918.
Counterclaim of defendant filed December 24,
1918.

Notice of Recoupment filed January 9, 1919.

Set-Off filed January 8, 1919.

January 9, A. D. 1919, the plaintiff appearing
and the defendant appearing the trial of the
cause was proceeded with as follows: 20.

Upon application of defendant Harry Sherman
was appointed and sworn as stenographer.

On the part of the plaintiff—William H. Rose,
Emil V. Gardner, J. Albert Hinnens and Albert
F. Stone were sworn and testified. One Order,
Three Boxes, Three letters, two proofs and One
Acknowledgment were offered and received in
evidence.

On the part of the defendant—James Leo was
sworn and testified and trial was adjourned to 30
February 25, 1919, upon which last date trial was
resumed and for plaintiff—Max D. Ribakoff was
sworn and testified.

For defendant—James Leo, Jr., Edward F.
Higgins and Joseph Craw were sworn and testi-
fied. One Order was offered and received in evi-
dence.

April 30, 1919—Stipulation without prejudice
and not to operate as waiver of appeal that judg- 40

Exhibit P-1

ment in the sum of Five hundred dollars together with costs be entered in favor of James Leo Company, defendant, and against Interstate Chemical Company, plaintiff, filed.

10 April 30, 1919, Order that judgment be entered therefor filed.

Whereupon it is on this thirtieth day of April, A. D. 1919, by this Court considered and adjudged that said James Leo Company, defendant, recover against said Interstate Chemical Company, plaintiff, the sum of Five hundred dollars, debt and Twenty-five dollars costs of suit.

May 8, 1919, Notice of Appeal by plaintiff, filed.

May 14, 1919, Appeal Bond filed.

A true copy.

20

JAMES N. BRADEN,
Clerk.

Exhibit P-1

667 Garfield Ave., Jersey City, N. J.

Interstate Chemical Co.

Telephone 924 Bergen

Purchase Order Date July 16th, 1918

30

No. 161

To James Leo Co., 161
251 Varick St., Jersey City, N. J.

Please Deliver

10,000 Folding Boxes, 6 x 8 x 11, for Key Dry, two color printing, as per sample submitted, at \$47.50 per 1,000. Delivery to be made within four weeks.

INTERSTATE CHEMICAL CO.

Per William H. Rose.

40

NOTE—Render all bills in duplicate.

Please acknowledge receipt of order, giving date of shipment.

Exhibit P-2

July 17/18

Interstate Chemical Co.,
667 Garfield, Ave.,
Jersey City, N. J.

Gentlemen:

10

We are in receipt of your order of July 16th for 10,000 5 pound folding boxes, size 8 x6 x 11, to be made from Orange Coated board, printed in two colors, you to furnish original plate for front and back. Price for the same to be \$47.50 per M. packed in paper bundles and delivered at your place of business less 1-10-30 days net.

We note that you want delivery of these boxes in about four weeks, we think it will be fully six weeks before we can make delivery.

20

Yours respectfully,
JAMES LEO CO.

P. S. We find that we have on hand undelivered at the present time 10,000 1 pound and 10,000 1/2 pound boxes, which are in process of work, and will be delivered as fast as they are finished.

Exhibit P-4

ACKNOWLEDGMENT OF ORDER—READ CAREFULLY.

If your understanding of the order is in any way different from this acknowledgment please advise us at once; your failure to do so relieves us of responsibility for errors. As soon as order is accepted and entered no time is lost in getting same into the works, and countermand will not be accepted for any cause.

All orders are accepted subject to fires, strikes or other contingencies beyond our control.

NEW HAVEN, CONN.

Oct. 25/1918

L INTERSTATE CHEMICAL Co.,
12 BAYVIEW AVE., JERSEY CITY, N. J.

When writing or telegraphing in reference
to this Order, use this number.

LETTER

28985

We have entered your order No. 10/17/18 of 10/17 received through A. F. STONE as follows

Exhibit P-4

Quantity	Description or Name	Size			Stock Style	Printing Ink	Remarks	Price Per 1000
		High	Wide	Thick				
10 M 5	Lb. Key-Dry Arsenate of Lead Cartons	11	8	6	36 Pt Dbl Hook S. L. C. Top and Yellow Bottom Stained	Red & Black Sample and Letter of Instructions*	68.70	

Arthur Locks
On Bottom

Side Flaps: Extra Charge from Cost
Three Wire Stitches Record for Making Spec
On Glue Lap ial Cuts Required in
Printing

66

Sample Herewith for Size, Color of Stock and Printing: See Letter of Instructions Re Ptg:

On all orders it is understood that a shortage
or surplus not exceeding ten per cent, will be
accepted and paid for pro rata as filling order

Submit Proof

Class 3: Gov't License No. Food Administration No. A-00002:

Shipment to be made as much sooner than 10 to 12 weeks as possible. Pk in Bdls: 10 Bdls to M:

Via

F. O. B.

Terms

Delivered at Present Frt and

Net 30 Dys 1% -0 Dys

09812

Ctg Rates: 2.36 M

NATIONAL FOLDING BOX CO.

8700

Exhibit P-5

INTERSTATE CHEMICAL CO.

12-20 BAYVIEW AVENUE

10

Jersey City, N. J., Aug. 7, 1918.

James Leo Co.
251 Varick St.,
Jersey City, N. J.

Attention of Mr. Leo.

Gentlemen:

Please refer to our order #161 calling for
10,000-5 lb boxes.

20 Will you kindly arrange to have these boxes
made up with 3 wire stitches in addition to the
gluing as per arrangements with our Mr. Gard-
ner, you to charge us \$2.50 extra per thousand
for this work.

Very truly yours,
INTERSTATE CHEMICAL CO.
J. Mendelwanger.

J. M*. L.

Exhibit P-6

INTERSTATE CHEMICAL CO.

12-20 BAYVIEW AVENUE

Jersey City, N. J., Oct. 1st, 1918. 10

Messrs. James Leo Company,
251 Varick Street,
Jersey City, N. J.

Gentlemen:

With reference to our order #161, calling for 10,000 folding boxes 6x8x11 printed in two colors, which you are now delivering to us printed in one color. You advised us that our Mr. Gardner gave you instructions to print these boxes in one color and not in two colors, as per order and as per the half and one pound Key Dry Boxes which you made for us. We took this matter up with Mr. Gardner and are enclosing herewith affidavit which he executed and which is self-explanatory. 20

Our order to you as mentioned above covers boxes printed in two colors as per the half and one pound Key Dry boxes which you made for us but instead you printed them in one color. This matter is entirely up to you as we want the Key Dry Boxes made and printed as per our order #161. Kindly see that proper delivery is made promptly. 30

Yours very truly,
INTERSTATE CHEMICAL CO.

J. Mendewanger. 40

JM/B

Exhibit P-7

INTERSTATE CHEMICAL CO.

12-20 BAYVIEW AVENUE

10

Jersey City, N. J., Oct. 3, 1918.

Messrs. James Leo Co.,
251 Varick St.,
Jersey City, N. J.

Gentlemen:

20 With reference to our order #161, calling for
10,000 folding boxes 6 x 8 x 11 printed in two
colors, you advised us over the telephone to-day
you are not in a position to make proper deliv-
ery of these boxes as ordered.

It would therefore appear to us the only thing
left would be to have the boxes made on the
outside, charging you with the difference be-
tween the price we will have to pay and the
price at which you accepted our order. How-
ever we would prefer to have you make proper
delivery.

30 Awaiting your pleasure in the matter, we are

Yours very truly,
INTERSTATE CHEMICAL CO.

J. Mendewanger.

JM/B

EXHIBIT P-9
SPRAYS THAT PAYS
Cut of Key
KEY BRAND

SUGGESTED DIRECTIONS

FOR DRY DUSTING

On Fruit Trees 1 lb., KEY DRY to 9 lbs. of Superfine Sulphur. For vegetables and small fruits use equal proportions of KEY-DRY and superfine sulphur or air slacked lime. May also be used as a dust just as it comes from package.

FOR WET SPRAYING

Fill tank with water, start the agitator and slowly skake in proper amount of KEY-DRY. When using small sprayer put water in first, add proper amount of KEY-DRY, then shake thoroughly. For power or barrel sprayers use proportions below--thorough spraying is necessary.

APPLE - PEAR - QUINCE

CODLING MOTH	}	1 to 1 1-2 lbs.
BUD MOTH		
CANKER WORM		
CASE BEARER		
TENT CATERPILLAR		
		to
		50 Gallons.

PEACH - PLUM - CHERRY

CURCULIO	}	1 to 1 1-2 lbs.
SAW FLY		
CHERRY FRUIT FLY		
		to
		50 Gallons.

GRAPE

BERRY MOTH	}	1 1-2 to 2 lbs.
ROSE CHAFER		
FLEA BEETLE		
ROOT WORM		
		to
		50 Gallons.

POTATOES

COLORADO BEETLE	}	1 to 2 lbs.
(POTATO BUG)		
FLEA BEETLE		
		to
		50 Gallons.

SMALL FRUITS

CURRENT WORM	}	1 to 1 1-2 lbs.
RASPBERRY Fruit FLY		
STRAWBERRY WEEVIL		
		to
		50 Gallons.

TOBACCO- Apply as a Dust.

SHADE TREES

GIPSY MOTH	}	1 1-2 to 3 lbs.
BROWN TAIL MOTH		
TUSSOCK MOTH		
ELM LEAF BEETLE		
FALL WEB WORM		
		to
		50 Gallons.

FOR SMALL GARDENS

When using automatic sprayer use about 1 oz. to 5 gals. water. When using small hand sprayer use from 1-2 to 1 teaspoonful to quart of water.

POISON

Antidote--Produce Vomiting give mustard and warm water, white of egg, or Hydrated Oxide of Iron in teaspoon doses.

SEND FOR DOCTOR

CAUTION

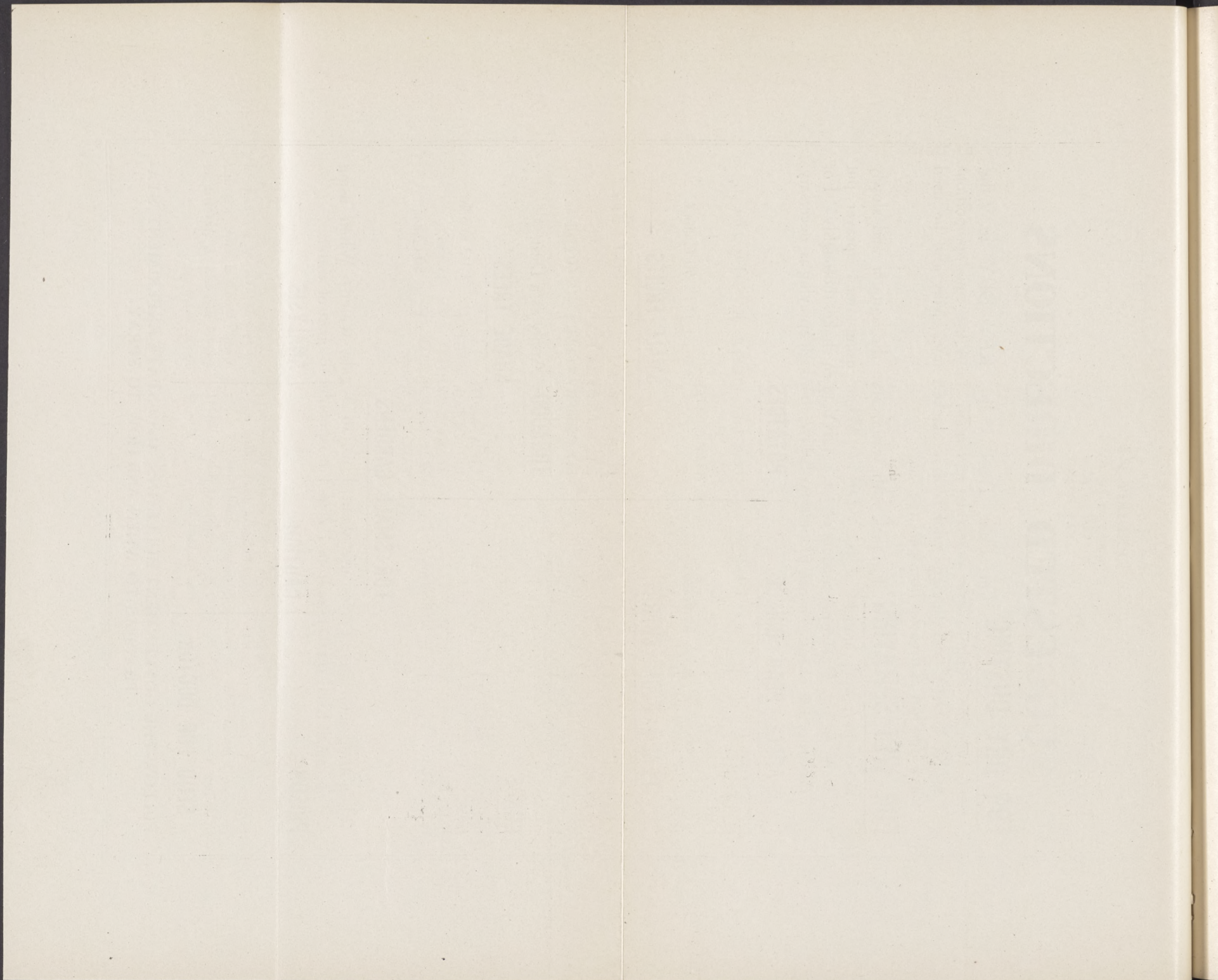
All Lead Arsenates are liable to injure foliage of peach, plum, cherry trees and small fruits.

We recommend that 2 lbs. of lime be used to each 50 gals. of spray.

ANALYSIS

Contains over 30 per cent. of Arsenic Oxide of which less than 3-4 of 1 per cent. is *Arsenic* soluble in water.

FOLLOW THE GOVERNMENT BULLETINS, ALSO STATE EXPERIMENT STATIONS AS TO WHEN AND HOW TO SPRAY.



State of Demand

FIRST DISTRICT COURT OF JERSEY
CITY

INTERSTATE CHEMICAL Co., Plaintiff, vs. JAMES LEO Co., Defendant.	}	10
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James Leo Company, the defendant herein was summoned to answer unto the Interstate Chemical Co., plaintiff and thereupon the said plaintiff by Frank G. Turner, its attorney complains:

20

1. On the sixteenth day of July, Nineteen hundred and eighteen, the plaintiff gave the defendant a written order and the defendant accepted the same in form following:

July 17th, 1918.

To James Leo Co.,
251 Varick St., Jersey City, N. J.
Please deliver

30

10,000 Folding boxes, 6 x 8 x 11, for Key Dry, two color printing, as per sample submitted at \$47.50 per 1,000. Delivery to be made within four weeks.

INTERSTATE CHEMICAL CO.

State of Demand

2. The defendant neglected and refused to carry out the terms of its said contract and neglected and failed to deliver the said boxes within four weeks from July 16th, 1918, and still neglects and refuses to deliver the same.

10 3. Because of the neglect and refusal of the defendant to carry out its said contract, the plaintiff has been obliged to contract for the said boxes in the open market at a price Two Hundred and twelve (\$212) Dollars higher than that fixed in the contract with the defendant and in addition to the said loss, the plaintiff has suffered a further loss because of the failure of the defendant to carry out its said contract and
20 make delivery of the boxes in the sum of Two Hundred and Fifty (\$250.) Dollars, making a total loss of the plaintiff because of the nonperformance of the defendant in the sum of Four Hundred and sixty-two (\$462.) Dollars.

Plaintiff demands damages in the sum of Four Hundred and sixty-two (\$462.) Dollars with interest and costs of suit.

FRANK G. TURNER,
Attorney of Plaintiff.

Notice of Recoupment

FIRST DISTRICT COURT OF JERSEY
CITY

10	INTERSTATE CHEMICAL Co., <div style="text-align: right;">Plaintiff,</div>	}	On Contract
	vs.		
	JAMES LEO COMPANY, <div style="text-align: right;">Defendant.</div>		

The defendant hereby gives notice that at trial of the above-stated case it will seek to recoup damages from the plaintiff because the said plaintiff and defendant on or about August 7, 1918, entered into a contract wherein and whereby the defendant agreed to manufacture and deliver to the plaintiff ten thousand (10,000) folding boxes 6 x 8 x 11, one color printing (orange) at \$50.00 per thousand.

Thereafter the defendant company manufactured, prepared and printed said boxes all as agreed upon between plaintiff and defendant, and did make delivery on or about September 18, 1918, of one thousand of said boxes to plaintiff and on or about September 25, 1918, did make delivery of 19 of said boxes to defendant and thereafter was ready to make delivery of the remainder to the plaintiff, but was advised by the said plaintiff that it would not receive the remainder of said boxes.

Said defendant performed in all things what it agreed to in the manufacture and preparation of said boxes and duly performed all the duties incumbent upon it by virtue of the said

Memorandum

agreement between the plaintiff and defendant
Therefor there became due from the plaintiff
to the defendant the sum of \$500.00.

ROBERT CAREY,
Attorney for Defendant.

10

Memorandum

(Filed April 1, 1919.)

FIRST DISTRICT COURT OF JERSEY CITY

INTERSTATE	CHEMICAL	COM-
PANY,		
	v.	
LEO COMPANY.		

Case No. 113636.

The evidence convinces me that the contract
between the parties formed by the correspond-
ence of July, 1918, was later modified by an
agreement of the plaintiff's representative, Mr.
Ribakoff, consenting to take the job in one col-
or, instead of two, the defendant to furnish the
plate, which was done. I think it is a reason-
able inference from the dealings of the parties,
that Mr. Ribakoff had authority to make this
change. If there is doubt about this, however,
the approval of the proofs, one sheet of which is
O. K.'d by Mr. Rose, the president of the plain-
tiff company, is a confirmation of the change as
to color. The meaning of the O. K.'ing of this
proof is, I think, that it is to be printed in one

30

40

Memorandum

color. This conclusion is warranted not only by the defendant's witnesses, but by the testimony of Mr. Stone. I therefore think the defendant has performed the contract as far as it was possible for it to do, until the plaintiff refused to accept the boxes.

10 I do not think the defendant's set-off for furnishing dummy boxes at a prior date, is sufficiently supported to warrant a recovery. Presumably such work was done with the expectation that it would lead to a profitable order, and I cannot find sufficient evidence that it was made known to the plaintiff that it was to be charged for this work if an order did not follow.

20 As I recall the situation at the close of the trial—although it does not appear in the stenographer's minutes—there still remains some work to be done to complete this order for delivery by the defendant. The defendant is entitled to a judgment on its counterclaim of \$500.00, less the expense of completing the work under the contract as modified. If counsel can agree upon this amount, judgment will be entered for \$500.00, less this agreed upon sum; otherwise I will take testimony at a time to be fixed, on notice to counsel, of the cost of completing the job.

30

CHARLES L. CARRICK,
Judge.

Specification of Points

NEW JERSEY SUPREME COURT.

INTERSTATE CHEMICAL COMPANY, <div style="text-align: right;">Plaintiff,</div>	}	
--	---	--

vs.

JAMES LEO COMPANY, <div style="text-align: right;">Defendant.</div>	}	
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10

The following is a brief specification of the determinations and directions of the First District Court of Jersey City, with respect to which the plaintiff is dissatisfied in point of law:

1. Judgment should have been awarded in favor of the plaintiff.

20

2. Judgment should have been awarded against the defendant.

3. The Court erroneously admitted parol evidence to contradict the terms of a written instrument.

4. The Court erroneously held that an unauthorized salesman of a corporation could bind the corporate plaintiff in a contract with the defendant.

30

5. The Court erroneously permitted an express contract between plaintiff and defendant to be contradicted by proof of usage or custom.

6. The Court erroneously held that the plaintiff's salesman had authority to change the written contract of the corporate plaintiff.

40

Specification of Points

7. The Court erroneously held that the terms of the express contract between the plaintiff and defendant were changed by the O. King of the proof of printed matter that was to be printed on the boxes referred to in the contract.

10 8. The Court erroneously refused to non suit the defendant's counterclaim.

9. The Court erroneously held that the defendant had performed its contract as far as it was possible for it to do until the plaintiff refused to accept the boxes.

10. The Court erroneously held that the contract between the plaintiff and the defendant was modified.

20

FRANK G. TURNER,
Attorney of Plaintiff-Appellant.

Notice of Appeal

NEW JERSEY SUPREME COURT

INTERSTATE CHEMICAL COM- PANY, Plaintiff-Appellant, vs. JAMES LEO COMPANY, Defendant-Appellee.)))	10
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To Robert Carey, Attorney of Defendant-Appellee:

TAKE NOTICE, that the Appellant, Interstate Chemical Company, appeals to the Court of Errors and Appeals in the last resort in all causes 20 in New Jersey from the whole of the judgment entered in this case on the following grounds:

1. That the Supreme Court affirmed the judgment of the First District Court of the City of Jersey City, although there was error in doing so.

2. Because the Supreme Court affirmed the refusal of the First District Court of Jersey City to award a judgment in favor of the plaintiff and 30 against the defendant, and therein erred.

3. Because the Supreme Court affirmed the judgment of the First District Court of Jersey City, which had erroneously admitted parol evidence to contradict the terms of the written instrument.

4. Because the Supreme Court affirmed the said 40 judgment, although there was no legal evidence to support the same.

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5. Because the Supreme Court affirmed the said judgment although the District Court had erroneously held that an unauthorized salesman of a corporation could bind the corporate plaintiff in a contract with the defendant.
- 10 6. Because the Supreme Court affirmed the judgment of the said District Court, although the District Court had erroneously permitted an express contract between the plaintiff and defendant to be contradicted by proof of usage or custom.
- 20 7. Because the Supreme Court affirmed the judgment of the said District Court although the said District Court erroneously held that the plaintiff salesman had authority to change the written contract of the Corporate plaintiff.
8. Because the Supreme Court affirmed the judgment of the District Court although the Court had erroneously held that the terms of the express contract between the plaintiff and defendant were changed by the O. K'ing of the proof of the printed matter which was to be printed on the boxes referred to in the contract.
- 30 9. Because the Supreme Court affirmed the judgment of the District Court in erroneously refusing to non suit the defendant's counterclaim.
10. Because the Supreme Court affirmed the judgment of the District Court, which had erroneously held that the defendant had performed its contract as far as it was possible to do so, until the plaintiff refused to accept the boxes.
- 40 11. Because the Supreme Court affirmed the

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judgment of the District Court which had erroneously held that the contract between the plaintiff and the defendant was modified.

12. Because the Supreme Court found that the fact was established that the defendant should furnish the plates and in consideration of so doing should be recouped by doing the printing in one color instead of two. 10

13. Because the Supreme Court held that the case is one of those where the testimony justifies the inference that the agent was held out by the company through a course of dealings, as authorized, and the principal is consequently estopped from denying the actual existence of authority, and therein erred. 20

14. Because the Supreme Court erroneously held that the plaintiff was estopped from denying the alleged authority of its agent.

FRANK C. TURNER,
Attorney of Plaintiff.

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NEW JERSEY SUPREME COURT

No. 431, JUNE TERM, 1919

10	INTERSTATE CHEMICAL COM- PANY, Plaintiff-Appellant, vs. JAMES LEO COMPANY, Defendant-Appellee.	}
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Submitted July 3, 1919; decided October ,
 1919.

20 Appeal from District Court.

Before Justices SWAYZE and PARKER.

For the Appellant, Frank G. Turner.

For the Appellee, Robert Carey.

PER CURIAM.

30 The suit was for damages by reason of alleged failure of defendant to execute a contract for paper boxes printed in two colors, and undertaking to deliver them printed in one color. Plaintiff rejected them and obtained two-color boxes elsewhere, and sued for the excess over the contract price. Defendant recouped for price of the rejected boxes and had judgment. Plaintiff appeals.

40 The only questions raised relate to the legality of findings of fact by the trial Court. The order

Opinion

was in writing, specified two colors, like previous boxes of smaller size made by defendant. It was acknowledged in writing, and accepted except that as no "plates" for the printed matter were furnished by plaintiff at the time, defendant put in the acceptance that plaintiff was to furnish them. In fact plaintiff did not furnish them, and defendant did. Defendant's claim was that plaintiff's agent came in about the plates, and a conversation ensued, the purport of which was that as plaintiff did not wish to go to the expense of some \$20 or \$25 for procuring the plates, defendant should make them and in consideration of so doing should be recouped by doing the printing in one color instead of two, the saving in which would about balance the cost of the plates. Plaintiff denied that any such conversation took place, but as it was testified to for defendant and the Court found it did take place, we must consider the fact as established.

The only other question of moment is as to the authority of the man who undertook to modify the order. His name was Ribakoff, and he was the general sales manager of plaintiff company, who by the testimony of the president of the company was the one to deal with these details and decide upon them, and as he knew what was needed to suit the customers. Associated with him was one Gardner who examined and O. K.'d the proof which was in one color. Plaintiff claimed the custom was to furnish proof only in black, whatever the color scheme may be, but there is contradictory testimony that when there is to be other color it is indicated on the black proof in pencil. There was no such indication.

Rule of Affirmance and Remittitur

10 Ribakoff himself testified that he had no authority to change the order; but he is inferentially contradicted on this point by his own testimony. He dealt with Leo for plaintiff throughout all their dealings lasting over a year and covering two or more other orders. The case is one of those where the testimony justifies an inference that the agent was held out by the company through a course of dealing, as authorized, and the principal is consequently estopped from denying the actual existence of authority.

The judgment is affirmed.

Rule of Affirmance and Remittitur

20

NEW JERSEY SUPREME COURT

INTERSTATE	CHEMICAL	COM-	}	On Appeal.
PANY,				
		Appellant,		
	vs.			
JAMES LEO COMPANY,			}	On Appeal.
		Appellee.		

30 This cause having been argued before the Court, and the Court having considered the same, and finding no error in the record and proceedings in the District Court,

40 It is Ordered that the judgment of the District Court removed by appeal in the above entitled cause, be and the same is hereby affirmed with costs, and the record remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered October 16, 1919,

On motion of ROBERT CAREY,
Attorney of Appellee.

10,000 Folding boxes, 6x8x11, for Key Dry, two color printing as per sample submitted, at \$47.50 per 1,000. Delivery to be made within four weeks.

INTERSTATE CHEMICAL CO.,
Per William H. Rose."

The foregoing Order was signed by the President of the plaintiff corporation (case, p. 96).

On July 17th, 1918, the defendant corporation by its president accepted the order by letter in words following:

"Jersey City, N. J., July 17/18.

Interstate Chemical Co.,
667 Garfield Avenue,
Jersey City, N. J.

Gentlemen:

We are in receipt of your order of July 16th for 10,000 5-pound folding boxes, size 8x6x11, to be made from Orange Coated board, printed in two colors, you to furnish original plate for front and back. Price for the same to be \$47.50 per M, packed in paper bundles and delivered at your place of business less 1-10-30 days net.

We note that you want delivery of these boxes in about four weeks, we think it will be fully six weeks before we can make delivery.

Yours respectfully,

JAMES LEO CO.,
James Leo, President.

P. S. We find that we have on hand undelivered at the present time 10,000 1-pound and 10,000 1/2-pound boxes, which are in process of work, and will be delivered as fast as they are finished.

L."

(case, p. 97).

On August 7th, 1918, the plaintiff corporation wrote to the defendant as follows:

“Aug. 7, 1918

James Leo Co.,
251 Varick St.,
Jersey City, N. J.

Attention of Mr. Leo.

Gentlemen:

Please refer to our order #161 calling for 10,000—5-lb. boxes.

Will you kindly arrange to have these boxes made up with 3 wire stitches in addition to the gluing as per arrangements with our Mr. Gardner, you to charge us \$2.50 extra per thousand for this work.

Very truly yours,

INTERSTATE CHEMICAL CO.”

(case, p. 100).

On October 1st, 1918, the plaintiff corporation wrote the defendant as follows:

“Oct. 1st, 1918

Messrs. James Leo Company,
251 Varick Street,
Jersey City, N. J.

Gentlemen:

With reference to our order #161, calling for 10,000 folding boxes 6x8x11 printed on two colors, which you are now delivering to us printed in one color. You advised us that our Mr. Gardner gave you instructions to print these boxes in one color and not in two colors, as per order and as per the the half and one pound Key Dry Boxes which

you made for us. We took this matter up with Mr. Gardner and are enclosing herewith affidavit which he executed and which is self explanatory.

Our order to you as mentioned above covers boxes printed in two colors as per the half and one pound Key Dry which you made for us but instead you printed them in one color. This matter is entirely up to you as we want the Key Dry Boxes made and printed as per our order #161. Kindly see that proper delivery is made promptly.

Yours very truly,

INTERSTATE CHEMICAL CO."

(case, p. 101.)

On October 3d, 1918, the plaintiff wrote the defendant as follows:

"Oct. 3, 1918

Messrs. James Leo Co.,
251 Varick St.,
Jersey City, N. J.

Gentlemen:

With reference to our order #161, calling for 10,000 folding boxes 6x8x11 printed in two colors, you advised us over the telephone to-day you are not in a position to make proper delivery of these boxes as ordered.

It would therefore appear to us the only thing left would be to have the boxes made on the outside, charging you with the difference between the price we will have to pay and the price at which you accepted our

order. However we would prefer to have you make proper delivery.

Awaiting your pleasure in the matter, we are

Yours very truly,
INTERSTATE CHEMICAL CO.”
(case, p. 102.)

As a result of this error on the part of the defendant in printing the boxes in one color, the plaintiff was obliged to go into the open market and purchase the same quantity of boxes at a price \$212 higher than the price fixed by the contract between the plaintiff and defendant (case, p. 98).

The defendant corporation had at previous times furnished to the plaintiff corporation one-half pound and one pound boxes printed in two colors as per exhibits furnished herewith and the proofs were submitted in black only. The defendant corporation was familiar with the line of boxes used by the plaintiff corporation in marketing its goods. The two-color printing in red and black of the plaintiff's trade boxes for their goods was of great trade value to the plaintiff and made up a part of its trade line. This two color mark was known to the trade and was a means of easy identification of the packages containing the plaintiff's product (case, p. 79).

The Court gives judgment for the defendant on its set-off in the sum of \$500 for the price of the boxes printed in one color. The Court says (case, p. 107), that Mr. Ribakoff, a salesman of the plaintiff corporation, modified its written contract and consented to take the job in one color instead of two. The Court thinks it is a reasonable inference that Mr. Ribakoff had authority to make this change. But if Mr. Ribakoff did not

have authority, that the fact that Mr. Rose O. K.'d one sheet of the proofs, is a confirmation of the change as to color (case, p. 107). The Court finds the alteration of a written contract by the manner in which the proofs were submitted. The proof was printed in black on white paper. The finished product was to be in black and red on orange background. It was made only in black on orange background. If the printer's proof is to be made into the contract then the defendant should have furnished black printing on a white background. Altering a written contract through the medium of a printer's proof leads in this case to an absurdity.

There was no evidence in the case that Mr. Ribakoff had authority to change the terms of the written contract signed by the President of the plaintiff corporation, but on the contrary, the evidence was that Mr. Ribakoff had no authority to change the contract. He could not even give an order and had no authority to order merchandise.

There is no evidence on which the Court could have found that an approval of the proofs was a confirmation of a change as to color, because the witnesses of the plaintiff all testified that the approval of the proofs was merely an approval of the printed matter and was understood by them or intended by them to indicate nothing other than the approval of the type matter itself as to any errors in spelling and the like (case, p. 18). The correspondence between the two corporations shows clearly that no change from two color to one color was contemplated. All orders given by the plaintiff corporation were given in writing and signed by its president and this was its custom and practice and no other person had authority to give such orders or to modify them after they were given.

The president of the defendant corporation claims that the contract was modified by a salesman whose name he did not even know. It was necessary to continue the trial in order that the salesman might be brought back to testify. The president of the defendant corporation had believed him to be a Mr. Gardner who is connected with the plaintiff corporation and it appeared that the man he believed to be Mr. Gardner was in fact another salesman, Mr. Ribakoff and this salesman, unknown to the defendant, is claimed by defendant to have modified the written contract of the plaintiff corporation. Until the trial day the defendant insisted that Mr. Gardner had altered the contract of the two corporations. On the trial day he said it was another salesman who had made the modifications.

There was no legal evidence on which the Court was justified in finding that the contract had been modified. If a salesman can be held to have such extraordinary powers, then every salesman holds the destiny of a corporate employer in the hollow of his hand.

If a salesman, without authority, may be held to be able by his spoken words to modify a written contract of a corporation signed by its president, the very foundations of business are shattered. The corporation might be plunged into insolvency by an unauthorized act on the part of a salesman who might attempt to modify a written contract made by the corporation. The defendant corporation might with equal consistency have come in and set up that a salesman of plaintiff corporation had agreed with it that the price was to be \$100 per thousand instead of \$47.50 per thousand. The damage to plaintiff would be about the same as in the present case because the

present boxes are of no value to plaintiff, and cannot be used (case, p. 17). The matter of dollars and cents would be so forcibly apparent that there would be no hesitancy in deciding that such an act by a salesman such as Mr. Ribakoff was unauthorized. The modification of the contract charged to have been made by Mr. Ribakoff is equally unauthorized.

The policy of the law is to safeguard written contracts so the doors may not be thrown wide open to those who seeking to profit thereby, would contradict their terms. The defendant has absolutely no writing authorizing the change to one color and every written word contradicts such claim of the defendant. The written contract contradicts the claim and the subsequent correspondence shows that an alteration of the contract was not thought of.

Authority of a Salesman

Mr. Ribakoff had no power to bind the corporate principal to a contract. He could not sign a contract or order. He was merely a salesman sent with another salesman to make sure that the printed matter to be placed on the boxes contained no typographical errors. He denies that he had authority to change the order or modify the contract, and denies that he did so. The prompt refusal of the plaintiff to accept the goods shows there was no modification of the written contract.

“An agent who has power to sell lands, without more, cannot bind his principal by written contract to convey.”

Tyrrel vs. O'Connor, 56 N. J. E., 448.

“An agent employed by a pottery company to take orders from customers for its

wares, in the absence of express authority or proof of similar previous dealings known to and approved by the company, cannot bind his principal by entering into a contract with a purchaser that his company will receive and allow deductions for imperfect goods previously shipped to the customer by other companies.”

Phoenix Pottery vs. Perkins, 74 At., 259.

“Plaintiff claimed that he made a contract with the superintendent of a water company for a supply of water at a certain pressure for fire purposes, but at the regular scheduled rate charged to persons who did not have a contract for fire purposes. It was not shown the superintendent had ever made a similar contract with anyone, that he had never been authorized to make such a contract, that the other officers and directors never knew of it; that he had made contracts for water for ordinary household and mill purposes. HELD: that the corporation was not liable thereon.”

Hall vs. Passaic Water Co., 85 At., 349.

“Where the business of a husband is managed generally by his wife, as his agent, who was accustomed with his knowledge to sign his name to notes and checks given in the course of his business, the liability of the husband will extend no further than to include such notes as were given in the usual course of business, and will not extend to accommodation paper, signed by her, in his name, without his knowledge or consent.”

Gulick vs. Grover, 33 N. J. L., 463.

“The continued possession of securities by an agent who was empowered to make an investment, is not, when such possession is plainly consistent with the original authority, to be deemed evidence of a further authority to receive payments of principal and interest on account of such investment.”

Belcher vs. Manchester, 74 N. J. L., 833.

“Where a hotel proprietor was authorized by a guest to deliver her trunk to an express company’s agent and get a receipt he had no authority to assent for her to a limited liability clause contained in the receipt which he accepted.”

Stickel vs. U. S. Express Co., 89 At., 23.

Mr. Ribakoff merely went to defendant’s plant and obtained information as to price, sizes, colors, samples, etc., and reported to his company. Ribakoff had no authority to give orders (case, p. 75).

There was no Ratification

There was no evidence from which the Court was justified in finding that the alleged modification of the contract was ratified by Mr. Rose, president of the plaintiff. There was no legal evidence of the modification which it is claimed Mr. Ribakoff, the salesman, made, but the approval of a proof, if it had been made would not be a ratification. The defendant actually did furnish the plate so the mistake was one of printing.

The rule is stated in 31 *Cyc.*, page 1647.

“A party relying on the ratification of the unauthorized act of an agent has the burden of proving it. To meet the burden it is necessary to show that the ratification was made under such circumstances as to be binding on the principal, especially to see to it that all material facts were made known to him, or, as is sometimes stated, to see to it that there was an adoption of the act by the principal with full knowledge of what had been done in his name and on his behalf; and it does not suffice to show that the principal omitted to make inquiries, and that the facts might have been learned by diligence on his part, if it appears that he misapprehended or was mistaken as to material facts.”

The first time that the matter of changing the boxes from two color to one color was known to the corporate plaintiff was when a delivery was attempted to be made. Mr. Rose, president of the plaintiff corporation, never saw the printing (case p.17). The corporation then promptly repudiated the alleged arrangement and refused to take the boxes. It notified Leo that he had not performed his contract. Leo knew that he had an order for two colors signed by the president of plaintiff and knew that he had accepted that order. Leo would not proceed with the contract until he had that order. Leo accepted the order in writing. When wire stitching was to be done Leo acknowledged that in writing, yet there is not a single word of writing as to the entire change of the contract from two color to one color until Leo tries to deliver the one color and delivery is refused.

“The fact that an agent was sent to collect a bill for wares sold by him to a purchaser, and that he received a check in part payment of the bill, and with that check received a claim for defective goods, and the fact that the principal used the check with knowledge of such claim is not a ratification of the agent’s authority; the agent’s right to so contract being at once repudiated by the principal.”

Phoenix Pottery vs. Perkins, 74 At.,
259.

In the case at bar the salesman had no authority to do anything in the matter, more than an office boy would have if sent to make a copy of papers. The salesman was sent because it was assumed that he had greater intelligence than would an office boy, and that he would be able to correct the proofs, and could report back to his employer with a greater degree of accuracy. He did not report any proposed change from two color to one color because there was to be no such change.

In 2 *Corp. Jur.*, page 490, the rule is stated:

“It is not necessary in order to prevent a principal from being bound by the unauthorized act of an agent that he should expressly repudiate it, since a repudiation or intention not to ratify may be implied from the acts and conduct of the principal.”

“Where a corporation promptly disaffirmed the unauthorized act of its selling agent in warranting goods sold, its act in shipping the buyer samples of its goods did not constitute a ratification of the unauthorized warranty.”

Reid vs. Alaska Pkg. Co., 47 Or., 215,
83 Pac., 139.

Usage or Custom

On proofs for former jobs there had been no notation as to colors. Proofs were submitted in black only (case, p. 78).

“Where there is a contract, either by parol, or in writing, its terms must fix the rights of the parties, and it cannot be contradicted by proof of usage or custom.”

Schenck vs. Griffin, 38 N. J. L., 463.

“Plaintiffs had been directed to sell corn for cash, but offered evidence to show that at New York, there was a custom by which sales for cash were made upon a credit of a few days. The Court held that evidence of usage or custom may not be given to contradict the express terms of a contract.”

Steward vs. Scudder, 24 N. J. L., 96.

“A custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of it is inadmissible. While usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain. The test as to whether or not the custom is repugnant is whether or not the custom or usage if written into the contract would make it insensible or inconsistent.”

12 Cyc., 1092.

“Where a bill of goods is marked ‘O. K.’ by the agent effecting the sale, proof of custom is inadmissible to show that the letters

used implied a guaranty of payment by the agent."

Salmon vs. Mc Rae, 9 Colo. App., 23.

"Where a contract of sale names a price f. o. b. cars at a certain place, it cannot be shown by proof of custom that these letters have a meaning or effect different from what would have attached to the full words if they had been inserted in the contract."

Sheffield Furnace Co. vs. Hull, 101 Ala., 446.

"It is not enough to plead a custom without alleging that the other party to the contract knew of it."

Gano vs. Palo, Pinto County, 71 Tex., 99, 8 S. W., 634.

The Judge of the District Court finds:

"If there is doubt about this (the modification) however, the approval of the proofs, one sheet of which is O. K.'d by Mr. Rose, the president of the plaintiff company, is a confirmation of the change as to color. The meaning of the O. K'ing of this proof is, I think, that it is to be printed in one color."

The only knowledge Mr. Rose had in relation to proofs is that they are submitted in black ink. Mr. Hinners also so testifies. We think the Court can take judicial notice of the purpose for which a proof is submitted. Printers make mistakes. Sometimes they misspell words. The submission of proof is for the purpose of correcting errors. Leo asked that someone be sent down to O. K. the

proofs as to directions (case, p. 6). The directions are shown (case, p. 102). These directions relate to insecticide poisons and it was highly important that there should be no errors in these directions. For this reason a salesman, familiar with the directions was sent down to the Leo office to examine the directions and O. K. them if correct, and for no other purpose. Suppose for illustration, the matter was to be printed on canvas. Would one, not a printer, be expected to note on the proof "This is to be printed on canvas," or "This is to be printed on orange paper," when there was a written contract between the parties for a certain number of copies to be printed on canvas, or a certain number on orange paper. Even if it were the custom of the trade to make such notations the evidence is that Mr. Rose had no such knowledge and the corporate plaintiff had a right to rely on the facts that its written contract should be carried out. Mr. Leo said it was his custom to write in lead pencil a note on the proofs of the colors to be used. If he did so, it was an internal matter in his shop and would be for the information of his employees. Because he failed to do so in this case, and his printer may have followed the apparent instructions of his master and printed in one color, is the plaintiff to have its written contract altered by such neglect of Leo? As a matter of law the Court should have found there was in this case no modification of the written contract. If this judgment were sustained it would establish a precedent whereby those who made negligent errors might recover on contracts not performed.

The Modification Cannot be Sustained

The trial judge is convinced that the contract between the two corporations was modified by plaintiff's salesman.

The evidence is clear that the salesman had no authority to modify the contract and he denies that he modified it.

There was no consideration to support the alleged modification. Drawings and plates had been furnished for previous orders in two colors. The original drawings and plates were in possession of Leo (case, p. 12). Leo could have used the old plates on the new boxes or he could have made new plates and charged them to plaintiff. The question of the change in plate was never brought to the attention of the plaintiff company after the making of the written contract, and could not be a consideration for engrafting new terms upon the original written contract. As a matter of fact Leo did have a new plate made but he printed the boxes in only one color.

The case of *Titus v. Cairo*, 37 N. J. L., 98, holds:

“An agreement to engraft new terms upon an existing contract not binding, is without consideration. The authority of G to sell bonds of the Company will not be inferred from his position as director of the company, nor from the fact that the president of the company gave him power of attorney to sell. The authority of the president to execute such power of attorney must be shown.”

The case of *Moneyweight Scale Co. v. Vansciver*, 68 Atl., 905, holds:

“After a written contract providing for the delivery to the purchaser of a chattel ‘as soon as possible’ by the vendor had been executed by the parties and delivered, the agent of the vendor verbally promised to deliver such chattel within ten days from the date of the contract. HELD, that such verbal promise was *nudum pactum*.”

It is well settled in this state that where the parties have put their contract in writing, the written contract shall be the only evidence of the contract as finally concluded, and that oral testimony is inadmissible to contradict or vary the writing (citing *Naumberg vs. Young*, 15 Vr., 331).

Hanrahan vs. Nat'l Assn., 37 Vr., 85.

The printing of the boxes in one color was a profound secret until the attempted delivery of a portion of them. Leo was then immediately notified (case, p. 14). There was prompt repudiation.

The Supreme Court says in its opinion:

“The case is one of those where the testimony justifies an inference that the agent was held out by the company through a course of dealing, as authorized, and the principal is consequently estopped from denying the actual existence of authority.”

Plaintiff insists that there is no evidence in the case justifying such an inference.

Plaintiff insists that it is not estopped from denying the authority of Ribakoff.

The written contract was made up of a written order signed by the president of the plaintiff

company and letters signed by the defendant company. Defendant sent the proofs to the plaintiff company (l. 28, p. 34, case).

These were standard boxes printed in two colors and when accepting the order the defendant writes (Exhibit P-2, p. 97, case):

“P. S. We find that we have on hand undelivered at the present time 10,000 1-pound and 10,000 1/2-pound boxes which are in process of work and will be delivered as fast as they are finished.”

These were Exhibits P-2 and P-3 (p. 4, case).

Evidence as to the course of dealing.

The order was sent by mail (p. 3, l. 2, case). When the boxes were delivered by Leo and Leo was informed of the mistake Leo said that the plaintiff would take those or it would not get anything (p. 5, l. 22, case).

There are directions for the use of the poison and after the printing was in shape Leo telephoned for someone to be sent down to O. K. the proofs as to directions (p. 6, lines 11 to 22, case) and Mr. Gardner was sent down to O. K. the proofs.

The Leo Company had the plates there and the original drawings there (p. 12, l. 9, case). Plaintiff's president handled the details and followed the order through (p. 13, l. 13, case). Defendant would not take the contract without a written order from plaintiff (p. 75, l. 18, case). Mr. Ribakoff never signed orders and was without authority to give orders (p. 75, l. 32, case).

The plates were to be supplied by defendant and plaintiff was to pay for them (p. 76, l. 1, case).

Defendant never submitted a proof other than in black and there was no notation as to colors (p. 78, ll. 10 and 38, case). There was no course of general dealing between these parties. This line of boxes that is the 1/2-pound, 1-pound and 5-pound boxes and one or two samples were all that Leo made for plaintiff (p. 78, l. 40, p. 79, l. 1, case). Leo claimed that he made these samples in July, 1918, (p. 40, l. 30, case) and this was the only other transaction between the parties.

Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power (1 Am. & Eng. Enc. Law (2d ed.) 987).

Carelessness of the principal in reposing confidence in his agent does not make him liable to a third party who, in dealing with such agent fails to exercise the diligence usual with good business men under the circumstances (*Hurley vs. Watson*, 68 Mich., 531).

The principal is responsible only for the appearance of authority which is caused by himself, and not for an appearance of conformity to the authority caused only by the agent (*Edwards vs. Dooley*, 120 N. Y., 540).

In the case at bar all transactions relating to the contract were carried on in writing. The order was signed by the president of the plaintiff

company. There was no general course of dealing between the parties. The one previous order was signed also by the president. The agent was sent to Leo's to correct the proofs, not to alter the terms of a written contract between two corporations, entered into by their respective presidents.

No estoppel arises, if at the time he changed his position, the person asserting the estoppel knew that no authority in fact existed, or should, as a reasonably prudent man have known that fact, as where he was acquainted with facts that should have suggested an inquiry, which, if pursued, would have led to the discovery of the alleged agent's want of authority (31 *Cyc.*, 1243-1244).

An estoppel cannot be invoked in favor of one who has relied upon the alleged agent's declaration of his authority, and made no further inquiry (31 *Cyc.*, 1244).

Anyone dealing with a person assuming to act as agent can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist and to what extent, while the alleged principal has no similar mode of protecting his interests (*Pole vs. Leask*, 9 Jur. N. S., 829; 33 L. J. Ch., 155).

If there can be said to be a course of dealing between the parties in the case at bar, it was such a course of dealing as to indicate that Mr. Ribakoff had no such authority as the defendant assumed, but on the contrary his was a limited authority to examine the printed matter relating to the use of the poison so it should conform to the laws relating to insecticides. It is a matter of

common knowledge that thousands of dollars are spent by concerns in commercial lines to make known the appearance of the packages containing their product to the public, yet the defendant, familiar with that fact, without the knowledge of the principal pretends that in order to save a mere twenty dollars on a five hundred dollar contract, changed the written contract, and altered the design of the package. We insist that the plaintiff was not estopped to deny the authority of the agent.

It is respectfully urged that the judgment of the Supreme Court affirming the judgment of the District Court should be reversed.

Frank G. Turner
FRANK G. TURNER,
Attorney and of Counsel
with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

INTERSTATE CHEMICAL COMPANY,
Plaintiff-Appellant,

v.

JAMES LEO COMPANY,
Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT.

Facts.

Did the New Jersey Supreme Court err in affirming the judgment of the 1st District Court of Jersey City on the defendant's recoupment where the facts show that the written order of July 16, 1918, of the Interstate Chemical Company, Exhibit P-1, was silent as to the question of the plate, which question was first raised by the Leo Company (Letter of July 17, 1918, Exhibit P-2), and which is not further mentioned in any later writing of either of the parties; the undisputed fact being that the Leo Company actually did furnish the plate used for the print? The two exhibits, P-1 and P-2, did not form a complete contract and the Trial Court held that there was an executed change of the proposition as set forth in the two exhibits, which change was authorized by Mr. Ribakoff, the plaintiff's sales manager, and was subsequently ratified by Mr. Rose, the president.

The Trial Court found as a matter of fact, from the testimony of Mr. Leo, Sr. (Case, p. 33), that the contract between the parties, formed by the correspondence of July, 1918, was modified by an agreement of the plaintiff's representative, Mr. Ribakoff, whereby the plaintiff agreed to take the job in one color instead of in two, the defendant to furnish the plate, which was done; that thereafter proofs were made by the Leo Company, one sheet of which was O. K.'d by Mr. Rose, the president of the plaintiff company; and the Court also found for a fact that the proofs as O. K.'d designated a one-color job. It was also proved as a fact that Mr. Ribakoff actually saw a sample of the box as completed in a one-color job and passed upon it as "all right" (Case, p. 36), before delivery was made.

The Court also found as a matter of fact that Mr. Ribakoff was authorized to make the change in the contract. He had done business on behalf of the plaintiff company with the defendant company for a year or more prior to July, 1918 (Case, pp. 37, 39). He had had charge of the orders for the pound and one-half pound boxes previously given to the Leo Company and delivered to the plaintiff. He also had negotiated with the Leo Company for certain samples of other kinds of boxes (Case, p. 86). From this and other evidence the Trial Court had a right to find as a fact that Mr. Ribakoff had authority to bind the plaintiff company.

Counsel in his brief (p. 6), states:

"That all orders given by the plaintiff corporation were given in writing, signed by its president, and this was its custom and practice, and no other person had authority to give such orders or to modify them as they were given."

If the Court will examine Plaintiff's Exhibit P-5 (Case, p. 100), it will readily be seen that this statement is not in accord with the facts. The Court's attention is also drawn to the testimony of Mr. Ribakoff (Case, p. 75), in which he states that he communicated Leo Company's terms to the office since Mr. Leo did not go ahead with the *order* without getting a written order from the company, clearly intimating that he was authorized to give the order.

Counsel in his brief (p. 7), also states:

"That the defendant corporation might, with equal consistency, have come in and set up that a salesman of the plaintiff corporation had agreed with it that the price was to be \$100 per thousand instead of \$47.50 per thousand."

It seems to us that this statement is begging the question. If the salesman was authorized to bind the company, he could legally contract at a price of \$1,000 per thousand, except where the price is absolutely unreasonable, the party dealing with him might be expected to verify his authority before proceeding.

Counsel also states (Brief, p. 8), that the written contract contradicts the claim, and the subsequent correspondence shows, that the alteration of the contract was not thought of. The Court will note, however, that there is no correspondence from the Leo Company to this effect and that the only correspondence of the plaintiff's referring to the matter of Exhibits P-6 and P-7, both dated in October, 1918, after the plaintiff company had decided that the boxes were unsatisfactory.

Authority for the Salesman.

The Trial Court found that Mr. Ribakoff had power to bind the plaintiff, ^{and} ~~if~~ there were facts

shown from which such a conclusion could be reasonably drawn.

The finding of the Trial Court as to matters of fact cannot be disturbed (*Phelps v. Seymour*, 70 N. J. L., 626).

The facts in relation to this point, as brought out by the defendant, were, that Mr. Ribakoff had done business with the Leo Company for a year or more before this contract came up (Case, p. 37). He had had dealings about the one-half and one pound boxes for the plaintiff company (Case, p. 39), and had had Leo Company change the set-up of folding boxes (Case, p. 38). He himself testified (Case, p. 75), that he communicated Leo's information to the office, since Mr. Leo would not go ahead with the order without getting a written order from the company.

The rule of law applicable to this situation is laid down in 10 Cyc., page 937, viz.:

Both Appointment and Powers of Agent Proved by Recognition? Adoption and Habitual Action.

(1) IN GENERAL: Stated generally, both the appointment and the powers of an agent may be proved by his having habitually exercised certain powers as agent with the adoption or recognition of the corporation or its superior agents, that is, of those entitled to oppose him, without the production of any record or other writing showing his appointment or authorization.

Rightful Possession of Power Legally Inferred from Continuous Habit of Exercising It.

(a) IN GENERAL: In general it may be stated to be well settled that if an officer of a corporation

is allowed to exercise a particular authority in respect to the business of the corporation, or a particular branch of it, continuously and publicly, for a considerable time; in other words, if he is in effect held out to the world as having authority in the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted, in which case it is not necessary, in order to charge the corporation, to prove special authorization. It is sometimes said that the corporation is bound on the theory of a recognition of the course of action of the agent; but a little reflection will make it clear that this recognition is the same as a holding out. The same conclusion is differently expressed by saying that if an officer of a corporation openly exercises a power which presupposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed.

(b) CORPORATION MUST HAVE CONSENTED TO APPEARANCE OF POWER EXHIBITED BY AGENT: A governing principle, and one which brings the matter down to the ordinary rule of estoppel in pais, is that the circumstances must have been such that the corporation must have apparently consented to the appearance of power exhibited by the agent. To illustrate this, take the case where a sale of chattels belonging to a corporation was made by the treasurer of the corporation, who was not authorized by any by-law to make such sale, but was proved to have been in the habit of doing such business, with the knowledge and sanction of the company, and to have been in fact its sole managing agent. It was

held that the sale was valid. A stronger illustration is found in a case where a railroad company, without objection, allowed a person to rent an office on its right of way and display a sign styling it the office of the company. It thereby became bound by the purchase of goods by him in its name, although he was in fact agent of a foreign corporation of the same name.

In *Stokes v. New Jersey Pottery Company*, 17 Vroom, 237, at page 242, Mr. Justice Depue, speaking for the Supreme Court, said:

“There are cases in which the powers of an officer of a corporation and his authority to act for the company are enlarged beyond those powers which are inherent in his office, but those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the control and direction of the business of the company, thus, when, in the usual course of business of a corporation, an officer has been allowed, in his official capacity, to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent and a responsibility will be laid upon the principal for the act of his agent within the apparent authority so conferred upon the agent, a doctrine which has come to be applied upon corporations in many respects as well as to individuals, and with the same qualifications and limitations.”

See, also, *Fifth Ward Savings Bank v. First National Bank*, 19 Vroom, 513.

In the case of *Murphy v. W. H. and F. W. Cane, Inc.*, 82 N. J. L., 557, Chancellor Pitney, speaking for the Court of Errors and Appeals, says:

“It is not correct, I think, to confine the application of this doctrine to cases of strict estoppel, at least where a third party seeks to charge a corporation with a contract made by it through the agency of one of its officers. It is not incumbent upon such third party to show that the previous course of business was known to and relied upon by him.”

These authorities, we think, clearly support the defendant's contention that Mr. Ribakoff, at the time of the alteration of this contract was acting within the apparent scope of his authority, and that the defendant company was fully justified in accepting his authorization for the change from the one-color to the two-color job, as the authorization of the plaintiff company. A corporation must deal through agents, and having dealt through the agency of Mr. Ribakoff in prior transactions which were ratified by his company, it is estoppel to deny his authority in this particular case. The cases cited by appellant in support of its contention that Mr. Ribakoff had no authority in the premises are not in point and have no application to the present case because in these cases there was no proof of any similar previous dealings and the decisions were predicated upon such fact.

As the Trial Judge pointed out (Case, p. 39):

“If the man [meaning Mr. Ribakoff], had been there and made contracts and the goods had been delivered to them and he came there again, that, I think, would show some authority, at least the jury might draw such an inference from that.”

There Was Ratification.

Of course, if the Court agrees with defendant's contention that there was evidence to justify the

Court in finding as a fact that Mr. Ribakoff was authorized to give orders for the plaintiff company, there is no need of going into the question of ratification, but even on this point there is abundant proof before the Court below to justify it in deciding that the alterations as agreed to by Mr. Ribakoff were afterwards ratified.

The evidence in the case shows that after the discussion between Mr. Ribakoff and Mr. Leo, relative to the change from a two-color job to a one-color job, that proofs were submitted to plaintiff company for a one-color job, which proofs were O. K.'d by Mr. Ribakoff and Mr. Gardner (Case, pp. 23, 81 and 82), with the authorization of their company. The proofs were signed at the office of the plaintiff company (Case, p. 85). Mr. Rose, the president of the plaintiff company, knew, then, that they were submitted in one color only (Appellant's Brief, p. 14).

The Trial Court found as a fact from the evidence, not only of the defendant's witnesses, but from the evidence of plaintiff's witness Stone (Case, p. 28), that the proofs, as submitted, exhibit, page 8 and exhibit, page 9, indicated proofs for a one-color job, and therefore the O.' K'ing of them by the plaintiff's agents, authorized, as they testified, to do so, constituted a clear ratification of the modification of the original contract.

The plaintiff corporation did not disaffirm the act of its agent, Mr. Ribakoff, until after it had ratified the change.

Usage and Custom.

The plates for the former jobs were made by the plaintiff company (Case, p. 37). The proofs appear to have been submitted in one color, but there is nowhere in the case any testimony as to

whether or not the former proofs were marked with notations showing where the two colors were to go.

We agree absolutely with the law as laid down in *Schenck v. Griffin*, 38 N. J. L., 463. In the present case there was a change from the original proposition whereby the defendant agreed to furnish the plates and to do the work in one color. The proof of custom is obviously not offered by the defendant to contradict this contract as modified. In the *Schenck* case both parties relied on an express contract. In the case before us both parties are relying on different contracts.

In 12 Cyc., 1044, the following rule is laid down:

“If there is a general usage applicable to a particular profession or business, parties employing an individual in that profession are supposed to deal with him according to that usage.”

In *Barton v. McKelway*, 22 N. J. L., 165, evidence was admitted for the avowed purpose of explaining the true intent and meaning of “trees one foot high” and not to alter contract or even modify the terms of the contract.

So in the case at bar testimony of the custom and usage in reference to printers’ proofs, was offered by defendant for the purpose of verifying its contention that there had been a modification of the contract, and was entirely predicated on the proof before offered that there had been such a modification.

Counsel states in his brief, page 14, that the sole purpose of submitting proof is for the purpose of correcting errors in printing, overlooking completely the testimony of the defendant’s witness Higgins and plaintiff’s own witness, Sloan (Case, p. 28), and asks, on page 15, if one not a printer should be expected to note on the proof,

"This is to be printed on canvas," etc. Of course, the question involved in this case is not what the plaintiff was expected to put on the proof, but what the printer is supposed to put on, and the Court below has found from the evidence that the proof as submitted showed a one-color and not a two-color job.

The modification should be sustained.

It can be very readily seen that there was ample consideration to support the modification. The plate for a one-color job of this sort is worth approximately \$20 (Case, p. 92). Mr. Leo, Sr., testified that he paid this amount for it (Case, p. 43). He further testified that the cost would have been about the same if his company supplied the plates for a one-color job or if the plaintiff supplied the plates for the two-color job, as a two-color job requires double press work (Case, pp. 33 and 34). It was for this reason that he was willing to make the plate for a one-color job. The consideration is apparent. Counsel states that Leo Company could have used the old plates, but these plates were not large enough for a five-pound box; they were for the one-half and one-pound boxes, which had already been supplied.

Counsel cites two cases in support of his last contention, i. e., *Titus v. Cairo*, 37 N. J. L., 98, and *Moneyweight Scale Company v. Vansciver*, 68 Atl., 905, but neither is applicable to the case at bar because in neither case was there any consideration to support the new premises.

The case of *Church v. Florence Iron Works*, 45 N. J. L., 129, is authority for the proposition that a contract in writing for work may be waived by a substituted parol agreement subsequently made

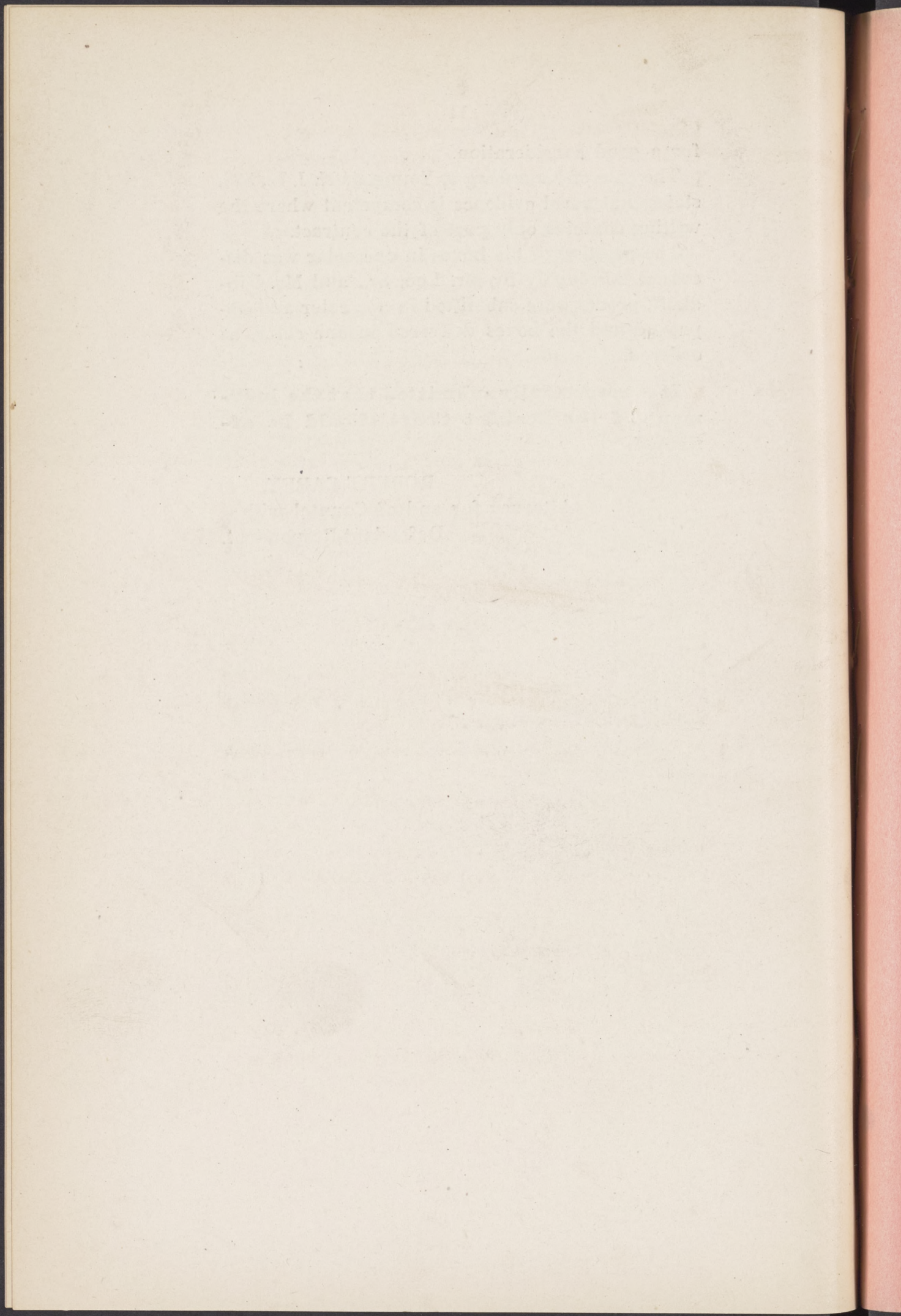
for a good consideration.

The case of Naumberg *v.* Young, 44 N. J. L., 333, states that parol evidence is competent where the writing contains only part of the contract.

The printing of the boxes in one color was discussed thoroughly by Mr. Leo, Sr., and Mr. Ribakoff, proofs were submitted in one color and approved and the boxes delivered in one color, as ordered.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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