

We respectfully submit that the judgment of the Supreme Court should be affirmed.

KRAEMER, SIEGLER & SIEGLER,
Attorneys for and of Counsel with
Defendant-Respondent.

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Notice of Appeal.

Filed March 3, 1928.

Essex County Circuit Court 10

D & L OIL COMPANY, a corpora-
tion of New Jersey,
Plaintiff,

vs.

EUGENE FOLTZER,
Defendant.

On Contract.
Notice of
Appeal.

20

To EGAN & ARMSTRONG, ESQS.,
Attorneys for Defendant,
15 Exchange Pl.,
Jersey City, N. J.

Sirs:

Take Notice that the Plaintiff, D & L Oil Com-
pany a corporation of New Jersey, hereby appeals 30
to the Court of Errors and Appeals in the last re-
sort in all causes in New Jersey, from the whole
of the judgment entered in this cause on the Tenth
day of February, 1928.

GEORGE F. SEYMOUR, JR.,
Attorney for Plaintiff
D & L Oil Company.

40

Summons.

Filed Dec. 18, 1926.

THE STATE OF NEW JERSEY To:

(Seal) EUGENE FOLTZER, trading as D & L Oil Station, No. 3.

10 You are summoned to answer the annexed Complaint of D & L Oil Co., Inc., in an action at law in the Essex County Circuit Court. And take notice that unless you file your Answer to said Complaint with the Clerk of the said Court, at Newark, within twenty days after the service upon you of this Writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20 Witness, NELSON Y. DUNGAN, Esq., Judge of the said Court at Newark, this 18th day of December, Nineteen Hundred and Twenty six.

JOHN H. SCOTT, Clerk.

GEORGE F. SEYMOUR, Attorney of Plaintiff.

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1926 DEC 18 1926

Complaint.

Filed Dec. 18, 1926.

ESSEX COUNTY CIRCUIT COURT.

D & L OIL Co. INC., Plaintiff,

vs.

EUGENE FOLTZER, trading as D & L Oil Station, No. 3, Defendant.

Action at Law. 10

Complaint.

20 Plaintiff, a corporation duly created by and existing under the laws of the State of New Jersey, having its principal office at Wheeler Point Road and South Street, in the City of Newark, County of Essex and State of New Jersey says that:

1. It is and has been for some time engaged in the business of selling automobile-supplies, gasoline, oil, and grease and that while so engaged in the pursuit of its said business, defendant Eugene Foltzer, who conducts a gas and oil station known as the "D. & L. Oil Station No. 3" at Bloomfield Avenue and North Ninth Street, in the aforesaid City of Newark, became indebted to the Plaintiff for divers large sums of money for supplies sold by the Plaintiff to this defendant. 30

2. On December 15, 1924, Plaintiff demanded a settlement of defendant's account and on that date an account stated was entered into between the parties by the terms of which defendant acknowledged that he was indebted to the Plaintiff and said defendant promised to pay the amount agreed 40

Complaint.

upon, viz.: \$358.60 and Plaintiff agreed to furnish supplies, gasoline, oil and grease to defendant for which defendant promise to pay the complainant.

3. In accordance with the terms of this agreement, plaintiff during the period from December 15, 1924, up to and including January 22, 1926, furnished to the defendant supplies, gasoline, oil and grease, the total selling price of which was \$28,771.79. During the same period as aforesaid defendant made various payments for the supplies, gasoline, oil and grease as aforesaid, in the total amount of \$28,464.71, leaving unpaid a balance of \$287.08 exclusive of the amount of \$358.60 being the amount determined upon in the said account stated between the parties, making a total balance due to the plaintiff of \$645.68.

4. Plaintiff has repeatedly requested the defendant to make a remittance to cover the said amount of \$645.68 but defendant refused and still refuses so to do, contrary to his promise.

Wherefore Plaintiff demands judgment in the amount of \$645.68 plus interest from January 22, 1926, together with costs.

GEORGE F. SEYMOUR, JR.,
Attorney for Plaintiff.

Answer.

Filed Dec. 31, 1926.

ESSEX COUNTY CIRCUIT COURT.

D & L OIL Co. INC., Plaintiff,	}	Action at Law. 10
vs.		
EUGENE FOLTZER, trading as D & L Oil Station, No. 3, Defendant.	}	Answer. 10

Defendant, residing in Newark, in the County of Essex and State of New Jersey, answering the complaint of the plaintiff herein, says:

1. Defendant admits paragraph 1 of said complaint. 20

2. Defendant denies the allegations contained in paragraph 2 of said complaint, wherein it is alleged that on December 15th, 1924, plaintiff and defendant entered into a stated account wherein it was stated and agreed that the sum of Three Hundred Fifty Eight and 60/100 (\$358.60) Dollars was due to the plaintiff from the defendant, but defendant says that on the 18th day of December, 1924, plaintiff and defendant entered into an account stated, wherein it was acknowledged and agreed that the defendant was indebted to the plaintiff on the said day, in the sum of Five Hundred Fifty Eight and 60/100 (\$558.60) Dollars but defendant denies that the said amount or any amount is due to the plaintiff from the defendant. 30

3. Defendant denies the truth of the allegations contained in paragraph 3 of said complaint. 40

Amended Complaint.

said Gas and Oil Filling Station, another pump and tank, together with all the necessary appurtenances, for all of which the defendant agreed to pay this plaintiff.

10 4. Plaintiff during the month of April, 1924, as aforesaid did in fact furnish and install the fixtures and equipment as requested by the defendant, the total amount of such service being \$542.08.

20 5. Due to an error, on the part of the plaintiff's clerical department, this last mentioned amount of \$542.08 was not entered on plaintiff's books as a debit charge against this defendant, all this without the knowledge or consent of the plaintiff, so that the same did not appear as an item to be charged against this defendant until a considerable long period of time had elapsed and after an audit of the defendant's accounts, viz, in January, 1926.

6. Defendant since February, 1924 has paid off on the amount of \$2124.78 the sum of \$2035.60 leaving due and unpaid thereon the balance of \$89.18.

30 7. Defendant had been granted extensive credit by the plaintiff so that in December, 1924, it was thought advisable that there be a settlement of accounts between the plaintiff and defendant. To this end, on December 15, 1924, the plaintiff's book showing a balance unpaid by defendant of \$358.60, the plaintiff, being in ignorance of and unaware of the aforesaid unpaid amounts of \$89.18 and \$542.08 entering into an account stated with the defendant whereby the defendant agreed to pay and plaintiff agreed to accept the aforesaid amount of

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Amended Complaint.

\$358.60 in full settlement of plaintiff's claims against this defendant.

8. Plaintiff says that in entering into this aforesaid account stated it acted under mistake and through the misunderstanding that only \$358.60 was due from the defendant. Plaintiff further says that if it had knowledge that \$989.86 was due and unpaid instead of \$358.60 it would not have entered into the said account stated. 10

9. Defendant on December 8, 1925, paid to the plaintiff the sum of \$358.60 in settlement of the amount as determined upon by the terms of the said account stated.

10. Immediately upon the discovery of the aforesaid clerical error, amounting to \$631.26 plaintiff rendered a bill to the defendant and requested payment and has continuously requested defendant to pay the same, but which amount the defendant refused and still refuses to pay. 20

Wherefore plaintiff demands Judgment in the amount of Six Hundred Thirty One Dollars and Twenty Six Cents, (\$631.26) together with interest and costs.

GEORGE F. SEYMOUR, JR., 30
Attorney for Plaintiff.

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Stipulation.

ESSEX COUNTY CIRCUIT COURT.

10	D & L OIL Co. INC., Plaintiff, vs. EUGENE FOLTZER, trading as D & L Oil Station, No. 3, Defendant.	}	Action at Law. Stipulation.
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It is hereby agreed and stipulated by and between George F. Seymour, Jr., Attorney for Plaintiff and Messrs. Egan & Armstrong, Attorneys for Defendant, that the Amended Complaint heretofore filed herein, be and the same is hereby amended in the following particulars:

1. Paragraph Four of the said Complaint to read, "during the month of July 1924" instead of "during the month of April 1924."
2. Paragraph Five of the said Complaint to read, "viz. November 1925" instead of "January 1926."

30 GEORGE F. SEYMOUR, JR.,
 Attorney for Plaintiff.

 EGAN & ARMSTRONG,
 Attorneys for Defendant.

Answer to Amended Complaint.

Filed March 7, 1927.

ESSEX COUNTY CIRCUIT COURT.

D & L OIL Co. INC., Plaintiff, vs. EUGENE FOLTZER, trading as D & L Oil Station, No. 3, Defendant.	}	Action at Law. 10 Answer to Amended Complaint.
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Defendant, answering the amended complaint of the above named plaintiff says:

FIRST DEFENSE:

1. Defendant denies paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the said complaint.

Further answering, defendant says:

1. That between the month of February 1924 and the 18th day of December, 1924, plaintiff sold and delivered to the defendant certain goods, wares and merchandise and equipment; that a dispute arose between the plaintiff and the defendant as to the quantity and value of the equipment, goods, wares and merchandise so sold and delivered to the defendant, and as a result plaintiff and defendant entered into an account stated, wherein the plaintiff claimed that there was due to the said plaintiff from the defendant, the sum of Five Hundred Fifty Eight and 60/100 (\$558.60) Dollars as of the 16th day of December, 1924, and the de-

Answer to Amended Complaint.

10 defendant and the plaintiff agreed upon the said account stated and that it was then and there further agreed that when the sum of Five Hundred Fifty Eight and 60/100 (\$558.60) Dollars by the said defendant to the plaintiff that the same would be in full payment of all and every item of indebtedness of the said defendant to the plaintiff.

SECOND DEFENSE.

Payment.

THIRD DEFENSE.

Accord and satisfaction.

EGAN & ARMSTRONG,
Attorneys of Defendant.

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Rule for Judgment.

Filed Feb. 15, 1928.

ESSEX COUNTY CIRCUIT COURT.

D & L OIL CO. INC.,
Plaintiff,

vs.

EUGENE FOLTZER, trading as D
& L Oil Station, No. 3,
Defendant.

Rule for
Judgment.

10

This cause being recorded in the list for trial during the December Term, 1927, of this Court and both parties appearing, and the cause being moved by the plaintiff, and a jury being impaneled and sworn and the evidence offered by the party submitted and the respective parties by their counsel being heard, and the judge having charged the jury and the jury having returned to consider of their verdict, come again into Court and say they find in favor of the said defendant and against the said plaintiff, it is therefore on this 10th day of February, 1928,

20

30

ORDERED, that judgment final be entered against the said D & L Oil Company, Inc., plaintiff in favor of Eugene Foltzer, trading as D & L Oil Station No. 3, defendant, for the costs of the suit to be taxed.

On motion of

EGAN & ARMSTRONG,
Attorneys of Defendant.

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Replication.

Filed March 23, 1927.

ESSEX COUNTY CIRCUIT COURT.

10	D & L OIL CO. INC., Plaintiff, vs. EUGENE FOLTZER, trading as D & L Oil Station, No. 3, Defendant.	}	Action at Law. Replication.
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The plaintiff joins issue on the Answer to the Amended Complaint, as filed by the defendant.

20	GEORGE F. SEYMOUR, JR., Attorney for Plaintiff.
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Postea.

Filed Feb. 15, 1928.

41991

ESSEX COUNTY CIRCUIT COURT.

D & L OIL COMPANY, Plaintiff, vs. EUGENE FOLTZER, trading as D & L Oil Station, No. 3, Defendant.	}	Action at Law. On Verdict by a Jury Judgment. Entered February 10, 1928. Costs, \$76.35.	10
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EGAN & ARMSTRONG, Attorneys for Defendant.	20
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This action was tried before Judge Worrall F. Mountain with a jury at the Essex County Circuit Court on February 10, 1928.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the defendant Eugene Foltzer trading as D & L Oil Station #3 and against the plaintiff D & L Oil Company.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs which are taxed at Seventy six dollars and thirty five cents.

Judgment entered and signed February 10, 1928.

WORRALL F. MOUNTAIN, Judge. JOHN H. SCOTT, Clerk.	30
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Recorded February 10, 1928 in Book 104 Circuit Court Judgments, page 152.

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Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

State of New Jersey,)
County of Essex.) ss.:

10 I, John H. Scott, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, Do Hereby Certify that the foregoing is a true and correct copy of all the pleadings in the Case of D & L Oil Company, Plaintiff vs. Eugene Foltzer trading as D & L Oil Station #3, Defendants, together with a copy of the Judgment record recorded in Book 104 Circuit Court Judgments, page 152, prepared for Appeal, and the same is taken from and compared with Original Copies of all Records, together with copy of Judgment Record, and as the same now remains on the files of said office.

20 In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this First day of June A. D., 1928.

(Seal)

JOHN H. SCOTT,
Clerk.

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Testimony.

ESSEX COUNTY CIRCUIT COURT.

February 10, 1928.

D & L OIL CO. INC.,
Plaintiff,
vs.
EUGENE FOLTZER, trading as D
& L Oil Station, No. 3,
Defendant.

Action at Law. 10

Before—HON. WORRALL F. MOUNTAIN, J., and a Jury.

APPEARANCES: 20

For the Plaintiff appears GEORGE F. SEYMOUR, JR. (by James J. Skiffington).

For the Defendant appears EGAN & ARMSTRONG (by Thomas R. Armstrong).

(A jury is called and sworn).

Mr. Skeffington: It is stipulated between counsel that paragraph 4 of the amended complaint shall be amended to read now July, 1924, instead of April, 1924. 30

The Court: Instead of being the month of April, 1924, it should be the month of July?

Mr. Skeffington: Yes. And paragraph 5 of the complaint instead of reading January, 1926, shall now read November, 1925.

The Court: That is the very end of that paragraph?

Mr. Skeffington: Yes. 40

Joseph F. Lynch—Direct.

Q. What kind of a contract was that? A. There was no contract at all outside of "Go ahead and make it complete". We were to submit every proposition to him as it came up, for instance, if we bought a grease gun for him they were to submit the price and he would O. K. it and tell us to go ahead.

10

Q. What did you charge him, if anything, for the equipment?

By Mr. Skiffington:

Q. What was the total charge for services rendered to Mr. Foltzer as the result of that agreement? A. I don't recall the exact charges, because there was no set price.

20

By the Court:

Q. What do you mean, "No set price". How do you bill him for these articles? A. As we bought them and delivered them.

Q. Don't you remember what the aggregate was of all the charges for these articles you bought and delivered to him? A. No.

Mr. Skeffington: We have the secretary and treasurer of the company here.

30

The Court: All right.

Q. What was the arrangement between the D. & L. Oil Company and Mr. Foltzer as to the amount due for these services? A. As he got money he was to pay us for it.

Q. How did you carry that? A. In building accounts.

Q. I show you this piece of paper.

40

Joseph F. Lynch—Direct.

Mr. Armstrong: I object.

Q. I ask you what that is.

Mr. Armstrong: I object to that.

The Court: How can you object to a lawyer showing the witness a piece of paper?

Mr. Armstrong: I will withdraw the objection. 10

A. That is the building account.

Q. In whose name? A. Station No. 3, Eugene Foltzer.

Mr. Skeffington: I ask to have this marked for identification.

(Same is marked P-1 for identification.)

Q. I show you this other piece of paper and I ask you if you know what that is? A. Building account, balance due. 20

Q. In whose name? A. Station No. 3, Eugene Foltzer.

Mr. Skeffington: I ask to have this paper marked for identification.

(Same is marked P-2 for identification.)

Q. After you completed that building did you have further dealings with Mr. Foltzer? A. Yes, our understanding was that after the construction of that he was to handle our merchandise one hundred per cent. and we opened a merchandise account with him. 30

Q. What do you mean by that? A. Gasoline, oils and grease.

Q. Was that differentiated from your building account? A. Yes.

Q. How did you keep track of the merchandise 40

Joseph F. Lynch—Direct.

you sold to Mr. Foltzer? A. We had a weekly account with him and entered the items daily.

Q. Where? A. In the merchandise account.

Q. Was that the same as the building account? A. No.

Q. A separate account? A. A separate account.

10 Q. Did you have any further dealings with Mr. Foltzer after February with reference to your building account? A. Our business in the spring had opened up and Mr. Foltzer came to us and said that his one pump and one tank was not adequate enough for his business and instructed us to go ahead and put in another tank for him.

Q. There was an agreement as to the installation of that tank and the payment therefor? A. What was to be charged on the building account as per the original agreement.

20 Q. Do you know of your knowledge whether or not a pump and tank was ever put in? A. I absolutely do.

Q. How do you know that? A. I ordered the pump and I ordered the tank, supervised the installation and I hired the help to put it in.

Q. When you say you supervised the installation what do you mean by that? A. I stayed there with the men and showed them what way to put it in.

30 Q. At Mr. Foltzer's station? A. Yes, sir.

By the Court:

Q. What agreement was made between you and Mr. Foltzer as to the payment for equipment, not only on the second tank, but for the first. I mean by that what was said by you and him as to that? A. To put it on the building account and as soon as he made any money he would pay it.

40

Joseph F. Lynch—Direct.

Q. He was to get it at a cost price? A. Yes, sir.

Q. So you made no profit on it? A. No, sir.

Q. That was agreed upon between you? A. Yes, sir.

By Mr. Skiffington:

Q. Do you know what the total charge was for the installation and the price of the equipment of the second tank and pump? Do you know of your own knowledge how much it was? A. No, not exactly.

Q. Do you recognize that writing on there (indicating)? A. Yes, sir.

Q. Whose writing is that? A. John F. Dyer.

Q. Who is Mr. Dyer? A. Secretary and treasurer of the D. & L. Oil Company.

Q. Do you know what that is a memoranda of? A. Yes, sir.

Q. What? A. The installation of that tank and pump.

Q. Do you know when that memoranda was made? A. Yes, sir.

Q. Did you see this being made? A. Yes, sir.

Q. When was that made? A. That was made during or after the completion of the job, say July.

Mr. Skeffington: I ask to have this paper marked for identification.

(Same is marked P-4 for identification.)

Q. Do you know of your own knowledge whether or not that item represented the total charge and the installation of the second tank and pump was ever entered in the building account as a debit charge against Mr. Foltzer?

40

Joseph F. Lynch—Direct.

Mr. Armstrong: I object to the question as leading.

The Court: I will admit it.

A. No, sir.

10 Defendant's counsel prays an exception to this ruling of the court.
Exception noted as ground of appeal.

Q. You do not know? A. It was not entered.

Q. Do you know of your own knowledge why it was not entered, that item for the second pump and tank? A. Now I do, at the time I didn't.

Mr. Armstrong: I object. We want to know what happened at the time, not now.

20 Mr. Skeffington: Withdraw the question.
The Court: Do not withdraw it. The objection was made after the answer was in. There is nothing before the court.

Q. Who was your bookkeeper at that time? A. Miss Fisher.

Q. Is Miss Fisher in court here today? A. No.

30 Q. Why not? A. Miss Fisher went to Chicago some two years ago and we haven't been able to trace her since.

Q. Do you know of your own knowledge whether or not Mr. Foltzer was ever billed with this charge or price of the second tank and pump? A. I know he was not billed for it, after investigation.

41 Q. What do you mean "after investigation"? A. My duties were on the outside and my interest was to see that everything was made out on a slip form just similar to what that is and returned to the office.

Joseph F. Lynch—Cross.

Q. What is to be done with it when it is returned to the office? A. Be entered on the books.

Cross-examination by Mr. Armstrong:

Q. How long did this stenographer work for you? A. About a year.

10 Q. Did you have any other stenographer or bookkeeper after her time? A. Yes, sir.

Q. About how many other stenographers have you had or bookkeepers? A. Counting the present one, do you mean?

Q. Yes. A. Three since that one, counting the present bookkeeper.

Q. Have you ever inspected the account books? A. No.

20 Q. You have never inspected the account books? A. I have glanced over them, that's all; I never checked up item with item.

Q. What system of bookkeeping do you use in your office?

Mr. Skeffington: I object: The witness said he was not familiar with the bookkeeping system.

30 The Court: What difference does the system make? I think there are a great many systems, in fact most systems are particularly the result of the bookkeeper's own manner of keeping the books, whether single or double entry, which one seems to fit the particular business and that does not make any difference in this case. If the plaintiff agreed with the defendant that the defendant was to pay for certain equipment the fact that the plaintiff forgot to put it in his books is not a defense.

40

Joseph F. Lynch—Cross.

Mr. Armstrong: In its complaint it alleges it did not appear in its books and I believe the theory upon which they sue is on the book account.

Mr. Skiffington: The basis of the action is for goods sold and delivered.

(Argument.)

10

Q. Did you or Mr. Foltzer ever have any dispute as to the amount or price of the installation of the equipment? A. No.

Q. Or the merchandise delivered? A. Never.

Q. Did you or Mr. Foltzer ever get together at any time? A. Yes, sir.

20

Q. In the course of your conversations you both agreed there were certain correct items due each of you which of course were not shown on the books? A. Mr. Foltzer said he did not have a book, so just right after—I recall the matter—I said, “Mr. Foltzer, we have a bookkeeper down there and we have a bookkeeping system at the office and if you will come down to the office we will gladly straighten the bill out for you.

Q. Was anything ever done in reference to that conversation? A. On the merchandise account the bill checked out O. K.

30

Q. Was anything ever stated about the installation of the equipment? A. No.

Q. I show you a slip of paper here dated December 18, 1924, “D. & L. Oil Company, Station No. 3.” Do you know in whose handwriting it is? A. Yes, Miss Fisher’s.

Mr. Armstrong: I ask to have this paper marked for identification.

(Same is marked P-1 for identification.)

40

Joseph F. Lynch—Cross.

Q. On this slip of paper there is a date, December 18, 1924, “D. & L. Oil Company, Station No. 3”, billed to November 16th, with an “M” after it, \$588.60. Paid, December 19th with an “M” after it, \$200, leaving \$258.60 which is up to and including delivery of 662½ gallons of gas on December 16th with an “M” after that. Includes all printing, repairs, tank. Balance of oil and gas and Economy Oil Supply bill, but tell us what was the amount of that on December 16th? A. That was entered in the merchandise account. After the completion of this building and equipment when doing business, Mr. Foltzer discovered time and time again that he was short certain little items of equipment and as a matter of fact we did everything to try and help him. We got the printing done for him cheap and that was all thrown in the merchandise account and this account was kept separately.

10

20

Q. Isn’t there an item here that shows the tank? A. Yes, that would be the oil tank.

Q. Wasn’t there some balance due at that time on the original equipment? A. Yes.

Q. Isn’t it a matter of fact that on December 18th you and Mr. Foltzer got together and agreed that there was due the D. & L. Oil Company \$568.70 as between everything due between the companies? A. No.

30

Q. You are positive of that? A. Positive.

Q. Will you explain what is meant by repairs? A. That pump would get out of order and we would have the manufacturers come up and fix the tank and he would send the bill to us and we would send it to Mr. Foltzer.

Q. Isn’t it a fact that this was to include all

40

Joseph F. Lynch—Cross.

charges of December 18, 1924? A. On everything on the merchandise account?

Q. On everything due Mr. Foltzer by your company? A. No.

Q. Are you positive about that? A. I am positive.

10 Q. I show you some yellow slips of the D. & L. Oil Company dated January 22, 1926. Do you know what these are for, whether they were rendered by you? A. That was attended to by Mr. Dyer, the secretary and treasurer of the company.

Mr. Armstrong: I ask to have these yellow slips marked for identification.

(Same are marked Ex. D-2 for identification.)

20 Q. Do you know what the purpose of this statement is? A. It is an audit of the merchandise account and general account, I believe.

Q. What do you mean by that? A. Taking the building account there was one audit made after we ceased doing business.

30 Q. You have here starting with the balance of \$358.60, which was correct on December 15, 1924. "We have listed below all gasoline and oil, grease charges from the date they were delivered to the conclusion of doing business with you?" A. Yes, sir.

Q. "We are also showing payments and credits made by you" and you say the old balance of \$308.60 as of December 24th. Isn't it a matter of fact that you received a check in payment of that? A. Yes, the \$358 we received.

40 Q. In conclusion then it shows a balance due

Joseph F. Lynch—Cross.

here and then you received \$358.60 too much, is that right? A. No.

Q. Explain the statement there, please. A. We received \$358 on December 8th and that would bring the balance on the old merchandise account to \$14.42.

(By consent of counsel D-1 for identification is marked in evidence.) 10

Q. Do you recognize the endorsement on the back of that? A. Yes, sir.

Q. This is a check for \$358.60 given by Eugene Foltzer to the D. & L. Oil Company.

The Court: What date?

Mr. Armstrong: December 8, 1925.

Mr. Armstrong: I ask to have this paper 20 marked for identification.

(Same is marked D-3 for identification.)

Redirect-examination by Mr. Skeffington:

Q. At this conference which you testified you had with Mr. Foltzer what was the occasion of that conference? A. Mr. Foltzer did not think the bill was right; there was some error.

Q. What bill? A. The merchandise bill. 30

Q. What was done at that conference? A. Mr. Foltzer and Mr. Dyer went over the whole figures; I was right there in the office.

Q. What figures? A. The merchandise, the gasoline, oil and grease.

Q. Was anything said at that time concerning the building account? A. Not to my knowledge.

Q. Were you present at that time? A. Yes, sir.

Q. Did you hear anything said? A. No, I didn't hear anything said. 40

Joseph F. Lynch—Redirect.

10 Q. Was there any dispute as to the amount of the bill which you submitted to Mr. Foltzer? A. There was no dispute, we discussed the bill and I said to Mr. Foltzer, "The only place to do that"—I am not a bookkeeper—"Let us come down to the office and bring down whatever you have and check over the bill and if we are wrong we will make any adjustments.

Q. So after the conference the only items considered were— A. What we would term the active account.

Q. What do you mean by "active account"? A. That is the merchandise account.

20 Q. On this paper marked Ex. D-1 it is stated this is up to and includes delivery of 662½ gallons of gas on December 16th, and includes all printing, repairs, tank, balance on oil and gas and the Economy Auto Supply bill. Are any of those items items which should be properly entered in the building account? A. No, not the way our bookkeeping system is.

Q. What is this tank? A. That was an oil tank.

Q. Where was that oil tank entered in the ordinary course of business? A. In the merchandise account.

30 Q. You admitted receiving this \$558.60. That was agreed upon in relation to the merchandise account. A. Right.

Recross-examination by Mr. Armstrong:

40 Q. What went into your merchandise account? What items were entered in that, if you know? A. After the building was completed, any small item which was run into which was not involved in this (indicating) was entered on the merchandise account.

Joseph F. Lynch—Recross.

Q. Why wasn't it entered in the building account? A. We felt as if that was one separate proposition and more or less wanted that separate as Mr. Foltzer suggested that inasmuch as he wanted to know what the entire building equipment cost.

10 Q. You knew that you were carrying the entire building account at the time these entries were made, didn't you? A. Yes.

Q. You never forgot about this building account, did you? A. I have not, no.

Q. You do not know of your own knowledge whether your partner ever forgot about this building account, do you?

Mr. Skeffington: Whom do you mean by the partner? 20

Q. Mr. Dyer, I believe is a member of the corporation? A. Yes.

Q. You do not know whether Mr. Dyer ever forgot the building account, do you? A. I don't believe he has; I don't know.

Q. Were you present at a conference with Mr. Dyer and Mr. Foltzer on December 18, 1924? A. Yes, at our office.

30 Q. How long did this conference go on when you were there? A. I just can't recall the length of time it took.

Q. At the time you had this conference you never forgot about that building account, did you? A. No, never.

Redirect-examination by Mr. Skiffington:

40 Q. You did not forget the building account but did not discuss it at that time? A. I did not dis-

John F. Dyer—Direct.

cuss it. I always had those things in mind, but I never entered any discussion on the building account.

10 JOHN F. DYER, sworn in behalf of the plaintiff.

Direct-examination by Mr. Skiffington:

Q. Are you connected at present with the D. & L. Oil Company? A. No, sir.

Q. Were you ever connected with them? A. Yes, sir.

Q. At what time were you connected with them? A. From the inception of the company until two years next August; that would be 1926.

20 Q. A year last August? A. Yes, sir.

Q. When you say you were connected with the company from its inception from what time did it begin, the business? A. June 22nd.

Q. What position did you occupy with the D. & L. Oil Company during your connection with that company? A. I was secretary and treasurer.

30 Q. What were your duties as secretary and treasurer? A. Well, as the business progressed, more of the inside work evolved on me. Until such time as we had been in business why Mr. Lynch and I had cooperated on the sales work and all work in general, and when the business got where there was something, I looked after the inside.

Q. When you say, "When the business got where there was something" specifically what work did you look after? A. The office work, the billing of the accounts and receiving of the moneys.

40 Q. Did you have anything to do with the book-

John F. Dyer—Direct.

keeping department? A. It was under my supervision.

Q. Do you know Mr. Foltzer? A. Yes, sir.

Q. Do you recall the business dealings the D. & L. Oil Company had with him around December, 1923? A. As I recall it he brought Mr. Lynch in and said he had—

10

Mr. Armstrong: I object.

Q. Were you present at that time? A. No, but I was present at a bus meeting where he discussed the deal with both Mr. Lynch and myself and wanted us to help him put a station up.

Q. Do you know whether of your own knowledge a station was put up for Mr. Foltzer by the D. & L. Oil Company? A. Yes, sir.

Q. I show you this paper marked D-3 for identification and ask you if you recognize that paper? A. Yes, sir, I do.

20

Q. What is that? A. That is a ledger sheet showing a statement of the building account, the original building account.

Q. Do you recognize the figures there, the handwriting? A. Yes, sir.

Q. Whose handwriting is that? A. Miss Fisher's.

30

Q. Were you familiar with the bookkeeping system at that time? A. Yes, it was under my supervision.

Q. What is the total debit charge on that sheet against Mr. Foltzer?

Mr. Armstrong: I object on the ground that this witness is not as yet qualified to testify as to what those figures are there, as they haven't proved the system used and

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John F. Dyer—Direct.

have not shown that the entries were made under his supervision.

The Court: This case is not brought on the book account as I understand it—and I may be wrong. The plaintiff's action is brought for the cost of this second tank, which I get the impression was omitted somehow or other from the books or charges, and the books are nearly collateral proofs as far as the books are concerned, and the testimony of one who knows the handwriting in the books entitles the books to the equal evidential value as if Miss Fisher was here herself. The action is not on the book account. That is just part of a kind of a proof.

10

(Argument.)

20

Mr. Skeffington: There is added to that amount which was omitted the balance due on the original balance which is around \$89 and we are suing for judgment on both those items.

The Court: That is on the original building account?

Mr. Skeffington: Yes, the building and the first pump and tank.

30

Q. (By the Court.) Mr. Dyer, when the so-called account stated was entered into between the plaintiff company and the defendant was that only as to the merchandise account? A. Yes, your Honor.

Q. Was there a balance then due on the building account? A. Yes, sir.

Q. What was the balance? A. At that particular moment I couldn't say because the balance was

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John F. Dyer—Direct.

paid in installments and I couldn't say just on that date what the amount due was.

Q. That was not included in the account stated? A. No.

Q. In addition to that there was this second tank which was also in that building account? A. Yes, sir.

10

Q. And what was the cost of that tank which the defendant was supposed to pay? A. Approximately \$542.

Q. That was not included in the account stated? A. No, sir, it was just considered merchandise and we were perfectly willing to let the building account stand because it was sort of a connection there that we could command the business from that place, having a little interest in the building naturally we could be sure of getting a continued business in gasoline from that station.

20

Q. What is the total charge as shown by that sheet of the cost of the erection of the building and the installation of the tank itself? A. \$2,139.18.

Q. Were there any credits shown on that sheet? A. Yes.

Q. Kindly state the amounts and the dates of those credits. A. March 24, 1924, \$250 was paid. That was followed on March 28th by \$100. June 11th, \$500. I cannot make the next date out. I think it is April 19th, \$900. October 1st, \$700, making a total of \$2,050.

30

Q. All credits? A. Yes, sir.

Q. What is the difference as shown by that sheet between the debits and the credits? A. \$89.18.

Q. That is what kind of a charge, debit or credit? A. As one, Mr. Foltzer still owed that original entry of \$2,139.18.

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John F. Dyer—Direct.

Mr. Skeffington: I offer these in evidence.

Mr. Armstrong: I make the same objection.

The Court: Sustain the objection.

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

10 Exception noted as ground of appeal.

Q. I show you P-2 for identification and I ask you what that is? A. That is the transfer of the original entry, that is the balance due on the original building account to a different ledger.

Q. When was that transfer made, do you know? A. I think it was made—

Q. Don't you know of your own knowledge?

20 Mr. Armstrong: I object to this line of testimony on the ground it is hearsay, irrelevant, immaterial and incompetent.

Q. Do you know of your own knowledge when that was made?

The Court: Sustain the objection.

Q. Was that transfer made under your supervision? A. Yes, sir.

30 Q. What was the reason for the transfer?

Mr. Armstrong: I object on the ground—

The Court: My thought is that this may be evidential, but I think you have to prove the two points that you allege in your complaint.

Mr. Skeffington: I just want to show—

40 The Court: It may be that you will want to put in some rebuttal and you won't have

John F. Dyer—Direct.

anything left for rebuttal.

Mr. Skeffington: I just want to show by this that between the time the transfer was made this item accrued and was not entered. These are the only two things we have on the building account and the item of \$500 does not appear on either of these sheets showing on the books that this item was not entered. 10

The Court: You are not called upon to prove that yet.

Mr. Skeffington: Withdraw the question.

Q. I show you P-4 for identification and I ask you in whose handwriting that paper is? A. Mine.

Q. What is that? A. A summarization of the installation of this second pump and tank for Mr. Foltzer. 20

Q. Do you know of your own knowledge whether those items and the costs which are placed opposite each item are reasonable charges for that service? A. Very reasonable charges.

Mr. Armstrong: I object to this line of testimony on the ground this witness is not qualified.

The Court: Objection overruled. The question has been answered. 30

Mr. Skeffington: I offer this in evidence.

Mr. Armstrong: I make the same objection on the ground there is nothing to show these are reasonable charges.

The Court: You cannot offer it in evidence, but he can refresh his recollection from it. 40

John F. Dyer—Cross.

By the Court:

Q. What does it show? A. \$541 due.

Cross-examination by Mr. Armstrong:

10 Q. Were you present at a conference on December 18, 1924, between Mr. Lynch and yourself and Mr. Foltzer? A. Yes, sir.

Q. I show you Ex. D-1 and I ask you to explain what the items are as stated there? A. That is a summarization of the merchandise account after \$200 had been paid some following day after the conference.

20 Q. Didn't you have in mind at the time of this conference that there was an outstanding building account or an item due on the building account from Mr. Foltzer? A. I never forgot that there was an amount due.

Q. Was there any discussion between Mr. Foltzer and yourself as to some defects in the pumps and plumbing machinery and the tanks? A. To my knowledge there never was any; there was none to me.

Plaintiff rests.

30 Mr. Armstrong: I respectfully move for a nonsuit on the ground that plaintiff has failed to show a *prima facie* case in accordance with their pleadings and an amended complaint filed.

40 The Court: Well, the plaintiff has proved that there was an account stated, or merchandise account which existed between the plaintiff and the defendant. That at the time that was made it did not include a separate account kept by it known as the building account upon which was due a bal-

John F. Dyer—Cross.

ance of \$89.18 and a balance of about \$541 or \$542 for a tank. I do not see how I can nonsuit the plaintiff.

Mr. Armstrong: They have proved something else beside their pleadings. There pleadings are based on a book account; probably not even that. They haven't shown 10 that these were reasonable charges for the merchandise or that the goods were delivered.

The Court: They do not have to prove that they were reasonable. The president alleges it was the cost price.

Mr. Armstrong: Their proof on their pleadings sets forth a book account action, an action on a book account.

20 The Court: No, it recites that they kept books, but it does not set forth an action on the book account.

We will not discuss that. You put in your defense.

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

Exception noted as ground of appeal.

30 EUGENE FOLTZER, defendant, sworn in his own behalf.

Direct-examination by Mr. Armstrong:

Q. You are the defendant in this action? A. Yes, sir.

40 Q. I show you a paper marked D-1 for identification dated December 18, 1924, and I ask you if

Eugene Foltzer—Direct.

you are familiar with that statement? A. Yes, sir.

Q. Explain to the court and jury what took place at the conference you held at the time that paper was drawn? A. He called me up—

By Mr. Skiffington:

10 Q. Who? A. Mr. Lynch and asked me if he could see me to make a settlement on the full bill that I owed the company. That was on a Wednesday. I says, "You cannot see me tonight, but you can come up to the house on Friday evening at six o'clock and I will be waiting for you".

By Mr. Armstrong:

20 Q. By "house" whose house do you mean? A. Do you mean at the time down in that company?

Q. The conference in your office. A. This conference was held in his office.

Q. What discussion took place there with reference to any building materials or supplies furnished you? A. By me?

30 Q. Yes. A. I called him up one day and I told him that I wanted to have a settlement, I wanted to know where I stood, that I wasn't paying bills for something I didn't receive, so, he made an appointment with me to go down to his office and I went down at six o'clock at night, me and the wife and two children and stayed there until 1:30 in the morning, until we came to a conclusion on the total bill.

Q. What do you mean? A. Everything including the balance.

Q. Was there any defects in the pumps about which you mentioned to Mr. Dyer or Mr. Lynch?

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Eugene Foltzer—Direct.

Mr. Skeffington: I object to the question on the ground that it is entirely outside of the pleadings. There is no counterclaim set up here for breach of warranty or anything of that nature. The defense is payment and accord and satisfaction.

The Court: No, but it seems it may be admissible on this theory: That if the defendant had a conference with the plaintiff concerning its bill with it and among other things which were considered were defective pumps or defective materials or defective merchandise and that after this conversation a certain definite sum was fixed and settled as the amount to be paid and was found satisfactory to both parties, that the defective material has something to do 10
20
with the finding of that amount, it would be evidential, if it is a fact, but that is a question for the jury and I will admit it.

Q. Were there any conversations with reference to any defects of the pumps or tanks or materials furnished to you? A. We had all kinds of discussions, that is why it took until 1:30 to finish it.

Q. Was there or not any discussion as to defects? 30
A. Yes, sir.

Q. How did you come to arrive at the figure of \$558.60 as the amount due and also state what that was for? A. Well, it was me, Mr. Lynch, Mr. Dyer and his bookkeeper was present. Mr. Lynch shoved the bills over to his bookkeeper. Some of the bills the D. & L. Oil Company didn't have; some of the bills I had, that they didn't have and so finally we come to an agreement that I owed the D. & L. Oil Company up to that date for the build- 40

Eugene Foltzer—Direct.

ing, the pumps, materials furnished which showed on one piece of paper what it was made up from, paid to date and after that date I made it my business to save all my paper slips and filed them away and I filed all the papers away and gave instructions for his driver to pick a check up every Monday morning; sometimes Mr. Dyer would come before the driver got there and pick it up, or Mr. Lynch.

Q. Then, December 14th, the date of this paper marked D-1, all accounts you had with the D. & L. Oil Company was straightened out? A. Yes, sir.

Mr. Skeffington: I object as leading.

Q. On December 14th, 1924, was an amount fixed to be all that you owed them? A. Positively.

Q. How did you pay these items, by check or cash? A. Check.

Q. Did you pay that \$558.60? A. I paid him \$200 on the account, that was \$350 and some cents balance.

Q. All the items after that time you paid those? A. By check, weekly.

Cross-examination by Mr. Skeffington:

Q. Who was present at that conference? A. Who was present?

Q. Yes. A. Mr. Dyer, Mr. Lynch and his bookkeeper, I forget her name now, and myself and my wife and two children.

Q. What led up to that conference? What was the purpose of calling the conference? A. To get the total balance I owed the company.

Q. Why? A. So I would be straight, so I knew what I had to pay.

Eugene Foltzer—Cross.

Q. How had you been paying your bills up to the time of the conference? A. Up to the conference?

Q. Yes. A. By check. Mr. Dyer and Mr. Lynch came up and picked up the check.

Q. Did you make any distinction before then as to merchandise accounts and building accounts as to the payments? A. I don't know what kind of accounts they were keeping.

Q. Did you pay any special sum you said would apply against the building account? A. I don't know where they applied it.

Q. Do you know how much was due on the building account during the December conference? A. How much was due?

Q. Yes. A. Do you mean the day we were at the conference?

Q. Yes. A. No, sir.

Q. You do not know, as a matter of fact, that there was anything due, do you? A. Certainly, I know there was some money due.

Q. You did not know how much was due? A. That is why I went down to get my statement so I knew.

Q. Did you or did you not know? A. Not until we figured it out.

Q. Did you or didn't you know whether or not you had paid for this second pump at the time of that conference? A. I had all kinds of bills.

Q. Answer the question. A. What was it?

Q. Did you or did you not know whether you had paid for this second pump at the time of that conference? A. That was all supposed to be included in that.

Mr. Skeffington: If your Honor please I

Eugene Foltzer—Cross.

would request that the witness be instructed to answer the question.

The Court: I think he has answered it.

10 Q. The question calls for a yes or no answer. Did you pay for this pump and tank up to that time? A. I must have, that is what I went for, my total statement.

Q. Will you say you paid for it? A. How can I say.

Q. Will you say you did not pay for it? A. I can't answer the question.

Q. You do not know whether you did or not? A. I can't answer your question.

Q. Now, you say there was a balance of \$558.60 agreed upon? A. Yes, sir.

20 Q. How did you arrive at that figure? A. By figuring up the pumps and tanks and oil and everything in, everything when we had the conference and coming to an agreement how much I owed.

Q. After checking them all up they added to \$558.60? A. They didn't specify.

Mr. Skeffington: I ask that the answer be stricken out.

30 Q. After adding up all the items of merchandise, pumps and tanks, they all totalled \$558.60? A. Yes, sir.

Q. How much is \$541.08 and \$89.18? It is more than \$558, isn't it? A. I don't know, I just took the statement they gave me.

Q. It is a matter of merely mathematics, \$89.00 and \$541. It is more than \$558, isn't it? A. Yes.

40 Q. You say that the \$89 item and the \$541 is included in the \$558? A. I ain't saying nothing;

Eugene Foltzer—Cross.

I asked for my total bill.

Q. Didn't you just tell us all the items added up which you went over with Mr. Lynch and Mr. Dyer totalled \$558.60? A. I told you they didn't show me the items.

Q. (Question read.) A. They didn't show me the items. 10

Q. Do you mean to say that you agreed to pay an amount you were not sure was due? A. I only agreed to pay the bill I owed.

Q. What was that for? A. \$2100.

Q. How much was the balance? A. I couldn't tell you offhand. We come to the conclusion that I owed them that on that date.

Q. You do not know the items which were included in that \$558? A. I couldn't tell you that. I asked for my final statement. 20

By the Court:

Q. Was it your idea you were to pay the final amount after all adjustments and credits and debits were balanced between you? A. Yes, sir.

Q. And after you paid that you did not owe them any more at that time? A. No, sir.

By Mr. Skeffington:

Q. When did you last meet Mr. Dyer? A. When I last met Mr. Dyer? 30

Q. Yes. A. About four months.

Q. Four months previous to today? A. Yes, sir.

Q. Where did you meet him? A. On Orange Street, Orange and Sixth.

Q. Did you have any conversation with him at that time? A. I just asked him what he is doing, what business he is operating. 40

Eugene Foltzer—Cross.

Q. At that time didn't you tell Mr. Lynch, "What was he suing for, for this \$500"? A. Yes.

Q. At that time didn't you admit that you owed him that \$89 on the balance on the original building account? A. No, sir.

10 Q. You say you did not say that positively? A. I didn't say I owed it on the old building account.

Q. Didn't you say, "I admit the \$89 item is due"? A. Not on the old item.

Q. Did you admit the \$89 item was due? A. Yes.

Q. What did you say it was for? A. On gas and oil his driver skipped me on the truck.

Q. Was it before December 24th, or afterwards? A. It was when I paid him the last check, \$354. and some cents.

20 Q. When was that? A. I couldn't tell you the date offhand, it is on the check.

Q. Where did you pay this \$358.60 some cents? A. At the house.

Q. When? A. I can't recall the date.

Q. As a matter of fact, wasn't it a year after the settlement? A. Yes.

Q. With whom did you have a conversation regarding the defects in the materials supplied you?

30 A. Different times with Mr. Dyer and Mr. Lynch.

Q. Can you tell us one specific day when you had it? A. I couldn't tell you.

Q. Who was there at the time? A. Either one or two would be there, I can't remember.

Q. Were any strangers there at the time? A. I couldn't tell you.

Q. You do not know? A. No.

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*Eugene Foltzer—Redirect.
John F. Dyer—Rebuttal—Direct.*

Redirect-examination by Mr. Armstrong:

Q. Did you know or did they ever tell you they carried two separate accounts, one called the building account and one called merchandise account?

A. No.

Defendant rests.

10

JOHN F. DYER recalled in behalf of plaintiff in rebuttal.

Direct-examination by Mr. Skeffington:

Q. Did you meet Mr. Foltzer recently? A. I met him when I got back from California in August, 1927. 20

Q. Did you have any conversation with him at that time? A. Yes, I was coming out of my house on Seventh Street and Mr. Foltzer drove through there with his truck and he hailed me.

Mr. Armstrong: I object to this conversation on the ground that Mr. Dyer is not a party to this action and any statement made by the defendant to an outsider would not be binding or beneficial to the other party to the action. 30

Mr. Skeffington: I think I can show that it is a declaration against interest.

The Court: You can contradict what Mr. Foltzer said, if he called him for that purpose, but you cannot let him give an entire new conversation in rebuttal.

Mr. Skeffington: Very well.

40

Motion for Direction of Verdict for Defendant.

Q. Did you have any conversation with Mr. Foltzer on that day regarding this particular case?

A. Yes, sir, I did.

Q. Did Mr. Foltzer say anything to you about that \$89 item?

10 Mr. Armstrong: I object.

The Court: Sustain the objection.

Q. What did Mr. Foltzer say to you in regard to this case?

Mr. Armstrong: I object.

The Court: Sustain the objection.

Q. What was the conversation you had with Mr. Foltzer on that date?

20 Mr. Armstrong: I object.

The Court: Sustain the objection.

Cross-examination waived.

Plaintiff rests.

30 Mr. Armstrong: I would like to ask for the direction of a verdict in favor of the defendant on the ground that the plaintiff has not sustained the burden of proof by a preponderance of the evidence.

The Court: How can I direct a verdict on the preponderance of the evidence? I cannot do that.

40 Mr. Skeffington: At this time I respectfully move for the direction of a verdict in favor of the plaintiff on the ground that the proof in this case conclusively showed a sale and delivery of goods which was denied by the defendant in his answer.

Motion for Direction of Verdict for Defendant.

The defendant relies on two separate defenses, one defense is payment and the other is accord and satisfaction and it has not proved payment. The defendant did not know whether or not he paid the \$541 item, so, in the payment of the item for which we are suing, the \$548 item, the defendant has not sustained the burden of proof. It has not shown it has paid that item and it throws him on his second defense of accord and satisfaction, and the law as to accord and satisfaction is entirely well settled in this case. 10

(Argument.)

The Court: It is true that when a debt is liquidated the payment of a lesser sum by agreement does not relieve the plaintiff from the payment of the difference. It is true that when a debt is unliquidated and accord and satisfaction is a complete bar to the recovery of what one of the parties may allege to be due under the negotiations or transactions between the parties. 20

The evidence in this case on the one hand tends to indicate that the plaintiffs kept a set of books in which they had two accounts, one which they nominated as the merchandise account and one which they called the building account. Now the fact they chose to keep their books that way did not charge the defendant with knowledge that that was their system of bookkeeping, in fact I think the defendant denied it had any such knowledge. 30

They claimed that they entered into a settlement with the defendant and that the items in this building account were not included in the settlement. They claim that at the time, as I understood them that was known between the parties. Now, if it 40

Motion for Direction of Verdict for Plaintiff.

was not known between the parties they cannot recover a claim against the defendant. The defendant, on the other hand, I infer from the testimony, did not know how much he owed the plaintiff. The amount I cannot say was liquidated, and there was apparently a difference in the opinion between the parties and if it is true they spent many hours in coming to an agreement that would tend to indicate that there wasn't any liquidated amount, that there was a difference of opinion, and that finally, after I suppose confessions on both sides an amount was reached which was agreeable to both of them.

The defendant says that included everything; after it paid that amount it thought it was discharged of its obligations to the plaintiff as of that time. Under certain circumstances that might be found as a matter of fact to be an accord and a satisfaction, but I cannot direct a verdict for either side. I think there is a jury question involved. If there was an accord and satisfaction the defendant is relieved from any obligation to pay this claim of the plaintiff, in fact my answer to you on your motion is this: That I fail to see how I can direct a verdict for the plaintiff in the face of the fact that you have a paper which has been put in evidence indicating that there was a settlement between the parties and indicating that some of the things that were included in the settlement among other things, named a tank which, to be sure, your witness called an oil tank and the question before us is a question of fact which I cannot decide, as to whether or not he knew this system of bookkeeping or whether it was a private account he kept to himself.

If the defendant went to that meeting and thought the entire amount of indebtedness was be-

Charge of the Court.

ing discussed and gave this check and thought he was giving it in final payment, ignorant of the fact that something was being left out of it because of the system of bookkeeping, the plaintiff cannot recover anything.

I cannot direct a verdict for either side and I will have to leave it to the jury to determine. 10

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

Exception noted as ground of appeal.

Mr. Armstrong sums up for the defendant.

Mr. Skeffington sums up for the plaintiff.

CHARGE OF THE COURT. 20

The Court charges the jury as follows:

MOUNTAIN, J:

The plaintiff in this case, the D. & L. Oil Company, has brought an action against Eugene Foltzer alleging that he owes it the sum of \$89.18, in addition to about \$541 or \$542. It states that the latter amount is due because of arrangements which the parties to this action had between them. 30

As I understand it, the plaintiff in this case agreed with the defendant that at a certain site, which was found to have been suitable, it would erect certain buildings for the defendant, put in certain equipment, tanks and driveways, to the end that the defendant might have what is commonly known as an oil or gas station, and I presume to the end that the plaintiff might furnish the defendant with the oil, and gasoline and sup- 40

Charge of the Court.

plies to be distributed by the defendant at that oil station, or gas station.

10 The plaintiff alleges that it had a system of bookkeeping by which all articles of merchandise were entered in the merchandise account and certain equipment and buildings were entered in the building account and it alleges, as I understood the testimony, that this \$541 or \$542 was due on the building account and that there was then a balance of \$89.18 due on the other account. It claims that these amounts were unpaid and there is testimony tending to show that at one time the plaintiff, by its representatives, as a corporation, and the defendant had a conference and as a result of that the defendant paid a certain amount of money to the plaintiff, but the plaintiff alleges that at that time this \$542 was overlooked by error and was not included in the book account and the plaintiff at that time forgot it.

20 Now, turning to the defendant's case. The defendant alleges that it entered into this agreement and operated this oil station, but was uncertain as to what amount it owed the plaintiff.

30 You may find from the consideration of his testimony that he kept no books or accurate accounts, but relied to a certain extent on the plaintiff. You may find, or you may not find that he was dissatisfied with the situation as it existed and sought or was sought out by the plaintiff in an effort to come to some settlement. At any rate, a conference was held, which I have referred to before in discussing the plaintiff's case, which the defendant attended and which he said lasted some hours, I think from about six o'clock in the evening until about one o'clock in the morning and as a result of this con-

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Charge of the Court.

ference and an examination you may find, of the books of the plaintiff company, a memorandum was drawn up on a bill head of the plaintiff company, the writing being as follows: "This is up to and including one delivery of 662½ gallons of gas on December 16th, includes all printing, repairs, tank. Balance on oil and gas, Economy Auto Supply bill." Reference is made by that writing as to an amount of \$368.50, and that amount was paid by Eugene Foltzer, the defendant, to the plaintiff in this case. Subsequent to that time the plaintiff alleges they discovered, as I say, that there was money due on the tank and some more money due on the merchandise account, if I am right in my recollection of the testimony.

20 Turning again to the plaintiff's case: If a grocer sold and delivered to a housewife a long list of goods, but omitted two bushels of potatoes and the housewife paid the bill, there isn't anything about that transaction that would prevent the grocer, upon discovering that these potatoes had not been charged, in making a claim for them; but suppose we go a few steps further and consider the dealings between, if you please, a grocer and a housewife where groceries are ordered daily and the grocer keeps books and the housewife keeps no books and at the end of a certain period there is a disagreement between the grocer and the housewife as to the amount which she owes, and suppose you find that they confer and that at the conference she denies having received some of the merchandise which the grocer alleges that he sold to her. After a long discussion they both agree that the matter shall be settled for a certain price, the grocer, if you please, conceding that he cannot prove

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Charge of the Court.

10 delivery of some of these things in the face of her denial, and she, perhaps, admitting the possible delivery of some of the questioned articles. At any rate, they arrive at a figure which they agree shall represent the settlement of the differences between them and she pays the bill. Now, if a few days later he discovers that there was a barrel of apples omitted from their conversation, and the situation is, as I have described it in other respects, he cannot go to any court and recover for the barrel of apples.

20 The defendant in this case has pleaded both payment and accord and satisfaction. An accord and satisfaction means that the parties have agreed to some settlement which represents their respective disputes, to different terms from which existed before they made this agreement and which contemplates on the one hand the payment of a sum of money and on the other hand the agreement to receive that payment in full for the differences between parties. And where the amounts are unliquidated, that is, uncertain, if that accord and satisfaction is made and the money is paid, the plaintiff cannot bring another suit to recover anything else under that accord. I say if the amount is unliquidated. I do not mean that if you purchased an automobile for \$900 and the seller of the automobile and you agreed for some reason that you would settle that \$900 for \$800 after the agreement had been made, that that would be an accord and satisfaction; acceptance of a lesser sum than the liquidated sum agreed upon does not discharge the debt. If you gave me a note for \$500 and came to my office and said, "I will give you \$400 to settle this note", and I took it, I can still
40 recover the other hundred at law, because the

Charge of the Court.

amount is fixed and definite. You owe me \$500 and there is no consideration for my throwing off the \$100. But, where the matter in dispute contemplates an unliquidated amount, you not knowing how much I owed you, or I not knowing how much I ought to pay, and we come to a settlement of that amount, you cannot afterwards, if I have made payment, discover something that you have left out and say, "No, I am coming out from behind this accord and satisfaction that I made with you, with a new claim". 10

We have the plaintiff in this case saying that this amount of money is due. We have the defendant pleading payment and accord and satisfaction. The questions of fact are for you to decide. If you find that these amounts of money are due and that they were not paid, or that there has been no accord and satisfaction, your judgment should be for the plaintiff for the aggregate of the amount claimed. If you find, on the other hand, that the damages were unliquidated, that the parties met together in conference that they examined the books which were kept by the plaintiff and that the settlement when made contemplated all that was due from the defendant to the plaintiff, if you find that under such circumstances the defendant thought when he paid this account that he was paying for everything he owed and that that was the understanding between the parties your judgment should be for the defendant and the plaintiff should under the circumstances not recover anything. I have been asked to make several charges on behalf of the plaintiff, but I am going to refuse all of them. 20 30

(The jury retires.)

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Plaintiff's Requests to Charge.

Mr. Skeffington: I respectfully pray an exception to your Honor's refusal to charge the plaintiff's requests as requested.

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

Exception noted as ground of appeal.

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PLAINTIFF'S REQUESTS TO CHARGE.

The plaintiff, D. & L. Oil Co., respectfully requests the court to charge the jury:

1. That the negligence, carelessness or inefficiency of the plaintiff's employees in not entering the item of \$542.08 for the pump, tank, installation, etc., in the books of the plaintiff as a debit against the defendant, did not and does not relieve the defendant from his obligation of paying for the equipment furnished and services rendered.
2. That the defendant has the burden of proof in establishing payment, and must prove payment by a preponderance of the evidence.
3. That the defendant has the burden of proof in establishing accord and satisfaction, and must prove an accord and satisfaction by a preponderance of the evidence.
4. "Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given."
5. The debt in this case is a liquidated or certain sum and at December 1924, was due.
6. That no new consideration was given by the

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Plaintiff's Requests to Charge.

defendant to the plaintiff for an extinguishment of the entire debt.

7. That an agreement to pay a pre-existing indebtedness is not a valid consideration or a new consideration.

8. That in order to prove an accord and satisfaction in this case, the defendant must prove affirmatively that he gave some new consideration to the plaintiff, or that he (the defendant) holds a release under seal.

9. That if the defendant does not prove either of these, he has not proved an accord and a satisfaction and the plaintiff is entitled to recover the amount proved to be due.

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Exhibit D-1.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Mitchell 2650 "Where Courtesy Reigns"

Newark, N. J., Dec. 18, 1924

D & L OIL COMPANY, Inc.

Dealers and Jobbers in
Gasoline, Oil and Grease

10

Lincoln Highway at Meadow St.

M D & L Station #3

Terms: Net Cash.

Bill to Dec 16th	558 60
Paid—Dec 19th	200 00

358 60

20

This is up to and includes one delivery of 662½
gal gas on Dec 16th. Includes all printing, re-
pairs, tank, balances on oil & gas and Economy
Auto Supply bill.

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Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in
Gasoline, Oil and Grease

Wheeler Point Road and South Street

10

M D & L Station #3 Eugene Foltzer

Bloomfield Ave & North 9th Street

Terms: Net Cash.

Items from Oct. 30, to Nov. 30, 1925

Balance Forward	\$674.25
Charges	382.02
	345.46
	290.64
	130.50

20

\$1822.77

Credits	\$401.83
	365.34
	317.43
	6.00

Punch Card Credit Nov 12	12.50	1103.10
--------------------------	-------	---------

Balance due Nov. 30, 1925	\$719.77
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Credits		30
Jack Dyer's Bill	\$6.50	
Noll & Fischer	1.40	
Punch Card Credit	16.25	24.15

Paid Mr. Lynch		
Dec 21	322.60	
Paid Dyer & Lynch Dec 8	358.69	705.35

Balance due	\$ 14.42
Bill for building due	89.18
Pump Tank & Installation	542.08

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Balance due	645.68
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Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.
Telephone Market 8500 "Where Courtesy Reigns"
Newark, N. J., January 22, 1926

10 D & L OIL COMPANY, Inc.
Dealers and Jobbers in
Gasoline, Oil and Grease
Wheeler Point Road and South Street
M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

Items from October 2 to October 30, 1925

20	Balance forward		\$703.38	
	Charges		462.28	
			472.35	
			427.72	
			372.45	
			<hr/>	
			\$2438.18	
	Credits	\$469.87		
		429.72		
		446.12		
		395.72		
30	Punch Card Credit Oct. 6	7.50		
	" " " 14	10.00		
	" " " 28	5.00	1763.93	
		<hr/>		
	Balance due Oct. 30, 1925		\$674.25	
			\$674.25	

Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.
Telephone Market 8500 "Where Courtesy Reigns"
Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.
Dealers and Jobbers in
Gasoline, Oil and Grease
Wheeler Point Road and South Street
M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street
Terms: Net Cash.

Items from August 31 to October 2, 1925

	Balance Forward		\$391.56	20
	Charges		687.65	
			444.03	
			635.01	
			482.48	
			454.94	
			<hr/>	
			\$3096.07	
	Credits	687.61		
		625.58		
		558.92		
		503.68		
	Punch Card Credit Sept 14	16.90	2392.69	30
		<hr/>		
	Balance due October 2, 1925		\$703.38	
			\$703.38	

Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

10 Dealers and Jobbers in
Gasoline, Oil and Grease
Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

Items from August 2 to August 30, 1925

20	Balance forward		\$1190.03
	Charges		714.74
			762.57
			602.82
			736.16
			<u>\$4006.32</u>
	Credits	\$773.59	
		716.15	
		762.63	
		582.58	
30	Paid August 31	758.78	
	Punch Card Credit Aug 19	21.03	3614.76
	Balance due August 30, 1925		<u>\$391.56</u>

Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

10 Dealers and Jobbers in
Gasoline, Oil and Grease
Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

Item from June 29th to August 2, 1925

	Balance June 29		\$299.21	20
	Charges		854.98	
			754.08	
			819.83	
			851.99	
			786.89	
			<u>\$4366.98</u>	
	Credits	\$737.25		
		301.85		
		569.88		
		618.36		
		853.49		30
	Punch Card Credit July 16	31.35		
	" " " 27	12.38		
	Overcharge July 19	52.39	3176.95	
	Balance due August 2, 1925		<u>\$1190.03</u>	

Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in
Gasoline, Oil and Grease

10

Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

Items from June 1st to June 29th 1925

Balance Forward \$553.71

20

Charges 838.26
844.48
788.10
766.62

\$3791.17

Credits \$246.28
241.14
383.02
483.06
466.05
321.00
558.85
792.56

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\$3491.96 3491.96

Balance due June 29, 1925 299.21
\$299.21

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Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in
Gasoline, Oil and Grease

10

Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

May 1925 Items

	Balance Forward	\$ 675.79	20
	Charges	104.77	
	Charges Continue	10.50	
	\$86.80	12.00	
	64.33	Credits 73.74	
	.65	\$581.48 60.18	
	64.33	520.74 60.18	
	102.69	236.88 103.68	
	4.55	631.24 15.00	
	62.93	309.02 52.20	
	4.00	110.31 30.74	
	3.00	216.48 76.13	30
	12.00	208.89 30.74	
	12.00	425.85 60.18	
	60.06	12.00	
	86.80	3240.89 58.87	
	78.82	Balance due 81.20	
	22.50	\$553.71 52.20	
	86.18	46.04	
	64.33	125.20	
	49.22	7.50	
	86.80	6.00	

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Exhibit D-2.

	110.31	20.00
	15.00	7.00
	18.00	12.00
	91.74	16.00
	91.74	29.73
	15.00	151.28
	109.32	78.82
10	153.05	86.80
	68.48	13.50
	<hr/>	
	\$3794.60	

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Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in 10
Gasoline, Oil and Grease

Wheeler Point Road and South Street

M D & L Oil Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

April 1925 Items

	Balance Forward	\$537.03	20
	Charges	88.96	
	Charges Continue	64.96	
\$52.20	Credits	94.40	
73.74	\$274.92	13.50	
46.05	299.52	20.00	
81.20	179.12	32.86	
110.35	10.50	86.96	
10.50	447.62	54.00	
96.07	268.90	79.44	
3.00	353.80	15.00	
13.50	823.99	80.62	30
1.30		96.79	
81.93	2658.37	81.20	
9.00	Balance due	10.50	
14.00	\$675.79	44.59	
81.93		14.40	
111.07		15.37	
30.74		96.06	
46.05		147.77	
125.79		52.20	
7.50		74.32	

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Exhibit D-2.

	12.00	12.00
	93.17	18.00
	73.74	60.18
	81.20	52.20
	<hr/>	80.62
	3334.16	3.00
10		2.00
		81.20
		3.00
		12.00

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Exhibit D-2.

All agreements contingent upon strikes, accidents or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in Gasoline, Oil and Grease 10

Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer
Bloomfield Ave & North 9th Street

Terms: Net Cash.

March 1925 Items

	Balance Forward	\$486.05	20
	Charges	131.75	
		12.00	
	Charges Continue	70.55	
\$12.00	Credits	9.00	
53.98	\$329.17	60.35	
54.40	398.02	61.20	
51.20	320.32	70.55	
51.20	371.94	13.50	
9.00	354.71	117.30	
51.20	326.16	94.52	
50.80	387.00	1.30	30
4.50		70.55	
51.20	\$2487.32	10.50	
114.16		1.30	
49.20	Balance due		
12.00	\$537.03	53.98	
10.00		54.40	
89.60		9.00	
106.00		12.00	
13.50		54.40	
9.76		54.40	

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Exhibit D-2.

	49.20	54.40
	89.60	54.40
	50.80	9.00
	64.96	3.50
	15.00	54.40
	106.00	54.40
	17.00	36.04
10	<hr/>	54.40
	3024.35	54.40
		4.55
		10.00

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Exhibit D-2.

All agreements contingent upon strikes, accidents
or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in 10
Gasoline, Oil and Grease

Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer

Bloomfield Ave & North 9th Street

Terms: Net Cash.

February 1925 Items

Balance Forward	\$371.08	20
Charges	84.00	
Charges Continue	34.85	
\$52.28	9.00	
60.35	70.55	
34.85	52.28	
61.20	2.47	
9.00	52.28	
61.20	6.00	
95.37	6.00	
10.50	61.20	
6.30	105.40	30
	3.25	
\$2154.57	34.85	
Credits	61.20	
\$195.90	9.00	
288.88	52.28	

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Exhibit D-2.

	278.31	52.28
	258.72	7.50
	205.18	61.20
	275.28	130.22
	166.25	34.85
	<hr/>	7.50
	\$1668.52	86.45
10	Balance due \$486.05	60.35
		10.00
		52.28
		12.00
		70.55
		147.65
		15.00

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Exhibit D-2.

All agreements contingent upon strikes, accidents or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in Gasoline, Oil and Grease 10

Wheeler Point Road and South Street

M D & L Station #3 Eugene Foltzer

Bloomfield Ave & North 9th Street

Terms: Net Cash.

January 1925 Items

	Balance Forward	\$435.11	20
		Charges	47.73
			64.98
			12.00
	Charges Continue	3.25	
	\$8.00	41.40	
	1.95	7.50	
	28.70	4.55	
	54.00	47.73	
	9.00	36.51	
	54.00	47.73	
	<hr/>	9.00	30
	1736.92	40.83	
	Credits	41.40	
	\$253.88	78.84	
	21.88	9.00	
	41.40	47.73	
	37.95	64.06	
	187.52	69.50	
	190.14	10.50	

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Exhibit D-2.

	226.12	70.13
	155.47	7.50
	302.38	9.00
	<hr/>	77.00
	\$1365.84	77.84
	Balance due \$371.08	7.50
10		79.10
		58.10
		28.70
		43.05
		12.00

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Exhibit D-2.

All agreements contingent upon strikes, accidents or other causes beyond our control.

Telephone Market 8500 "Where Courtesy Reigns"

Newark, N. J., January 22, 1926

D & L OIL COMPANY, Inc.

Dealers and Jobbers in Gasoline, Oil and Grease 10

Wheeler Point Road and South Street

M D & L Oil Station #3 Eugene Foltzer

Bloomfield Ave & North 9th Street

Terms: Net Cash.

Starting with the balance of \$358.60 which was agreed upon December 15, 1924. We have listed below all gasoline and oil grease charges, from that date forward till the conclusion of doing business with you. We are also showing payments and credits made by you. Old Balance \$358.60

Credits	Dec 1924	15.00	
		58.94	
\$ 47.73		.89	
194.39		47.73	
64.51		12.00	
36.80		60.72	
173.30		47.73	30
289.29		36.80	
		64.51	
<hr/>		12.00	
\$815.02			

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Exhibit D-2.

	Balance December 31, 1924	47.73
	\$435.11	76.77
		36.80
		12.00
		47.73
		47.73
		36.80
10		71.30
		47.73
		15.00
		20.00
		41.40
		34.22
		<hr/>
		\$1250.13

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Exhibit D-3.

		55-24
	LIBERTY TRUST COMPANY	
	Central Ave. and Warren St.	
	Newark, N. J. Dec. 8, 1925.	
	Pay to the Order of	
	D L Gas Oil Co Inc	358.60
	Three Hundred Fifty Eight 60/100	Dollars 10
	EUGENE FOLTZER.	
	Endorsed on back:	
	D & L Oil Co Inc	
	Received Payment	
	Through the Newark Clearing House	
	Prior Endorsements Guaranteed	
	Dec 8 1925	20
	Ironbound Trust Co.	
	Branch No. 8	

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Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	<p style="text-align: center;">D & L OIL CO. INC., Plaintiff-Appellant,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">EUGENE FOLTZER, Defendant-Appellee.</p>	}	Grounds of Appeal.
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The above named Plaintiff-Appellant, D & L Oil Co., Inc., assigns the following grounds of appeal from the Judgment of the Essex County Circuit Court in the above case:

1. Because the trial Judge, upon the trial of the said cause, erroneously excluded the ledger sheets of the Plaintiff-Appellant, from evidence, against the objection of the Plaintiff.
2. Because the trial court erroneously denied the Plaintiff's motion for a direction of a verdict at the close of the said case.
3. Because the trial court erroneously denied Plaintiff's request to charge that the negligence, carelessness or inefficiency of the Plaintiff's employees in not entering the item of \$542.08 for the pump, tank, installation, etc., in the books of the Plaintiff as a debit against the Defendant, did not and does not relieve the defendant from his obligation of paying for the equipment furnished and services rendered.

Grounds of Appeal.

4. Because the trial court erroneously denied Plaintiff's request to charge that the defendant has the burden of proof in establishing payment, and must prove payment by a preponderance of the evidence.

5. Because the trial court erroneously denied Plaintiff's request to charge that the defendant has the burden of proof in establishing accord and satisfaction, and must prove an accord and satisfaction by a preponderance of the evidence.

6. Because the trial court erroneously denied Plaintiff's request to charge that, "Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given." Decker vs. Smith, 88 L 630 (E & A).

7. Because the trial court erroneously denied Plaintiff's request to charge that the debt in this case is a liquidated or certain sum and at December 1924 was due.

8. Because the trial court erroneously denied Plaintiff's request to charge that no new consideration was given by the defendant to the plaintiff for an extinguishment of the entire debt.

9. Because the trial court erroneously denied Plaintiff's request to charge that an agreement to pay a pre-existing indebtedness is not a valid consideration or a new consideration.

10. Because the trial court erroneously denied Plaintiff's request to charge that in order to prove

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Grounds of Appeal.

an accord and satisfaction in this case, the defendant must prove affirmatively that he gave some new consideration to the Plaintiff, or that he (the defendant) holds a release under seal.

10 11. Because the trial court erroneously denied Plaintiff's request to charge that if the defendant does not prove either of these, he has not proved an accord and satisfaction and the Plaintiff is entitled to recover the amount proved to be due.

12. Because the trial court erroneously instructed the Jury with reference to the law as it applies to an "account stated", when there was no question of an account stated involved in the said cause.

20 13. Because the trial court erroneously misled the Jury by means of the hypothetical case of the housewife and the grocer in his charge to the Jury.

14. Because the Plaintiff's right to recover was prejudiced by such misleading hypothetical case of the housewife and the grocer.

30 15. Because the trial court altogether failed erroneously to instruct the Jury with reference to the law on the question of an accord and satisfaction.

GEORGE F. SEYMOUR, JR.,
Attorney of Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

D & L OIL Co., INC., Plaintiff-Appellant,	}	On Appeal.
vs.		
EUGENE FOLTZER, trading as D & L Oil Station No. 3, Defendant-Appellee.		

BRIEF OF APPELLANT.

Prefatory Statement of Facts.

The Plaintiff-Appellant brought an action at law in the Essex County Circuit Court to recover certain moneys alleged to be due from the defendant for goods and equipment sold to the defendant.

The main case of the Plaintiff developed that during the month of February, 1924, the plaintiff erected and fitted out for the defendant and at the defendant's request, a type of building known as a "Gas & Oil Filling Station," the said station being known as "D & L Oil Station #3." The total charge for this service was \$2139.18 and the same was entered in the plaintiff's accounts as a debit charge against the defendant, the said account being designated as the "Building Account," in order to distinguish it from the "Merchandise Account" in which were entered all charges for that class of commodities which the plaintiff de-

nominated "merchandise" and consisted of gasoline, oil, grease, and all articles which did not go to make up a permanent part of the said station. The defendant at various times paid to the plaintiff certain sums of money on account of this total debit charge, until the aggregate amount of such payments totaled \$2050.00, leaving a balance of \$89.18 still appearing in the plaintiff's books as a debit charge against this defendant.

During the month of April, 1924, the plaintiff at the request of the defendant, furnished and installed on the premises of the said Gas Station, a second gasoline tank and pump, the total charge of which equipment and service was \$541.08. In some unexplained manner, the entry slip covering this item was misplaced or mislaid and in consequence thereof, the same was not entered in the plaintiff's books until the audit was had of the plaintiff's books in January, 1926.

During the month of December, 1924, the plaintiff and defendant met and discussed the amount of money due from the defendant to the plaintiff. At this conference, as appears from the testimony (page 26, ll. 28-29-30; page 29 ll. 37-38-39; page 30, ll. 16; page 31, l. 40; page 32, ll. 1-2-3; page 34, ll. 32-33-34-35-36,) the only account discussed by the parties was the merchandise account. At that time it was decided that the amount due from the defendant to the plaintiff was \$558.60 and the defendant agreed to pay this amount. Subsequently this amount was paid by the defendant.

Later, during the month of January, 1926, an audit of the plaintiff's books disclosed that there was the unpaid balance of \$89.18 on the building account and also the unentered amount of \$541.08, representing the cost of the equipment and installation of the second gasoline tank and pump.

The plaintiff billed the defendant for the total amount of \$630.26 but payment was refused.

The plaintiff filed its Summons and Complaint against the defendant and the cause came on for trial before the Hon. Worrall F. Mountain, Judge of the Circuit Court of Essex County and a jury on February 10, 1928 and resulted in a verdict in favor of the defendant. From this verdict, the plaintiff has taken this appeal.

POINT ONE.

The Trial Court erred in excluding the ledger sheets of the plaintiff from evidence.

The basis of the original action was goods sold and delivered. There was no denial by the Defendant-Appellee of the delivery and receipt by him of the goods. There was testimony to the effect that plaintiff-appellant carried two separate accounts for business done with the Defendant-Appellee, a building account and a merchandise account, (page 20, ll. 36-37; page 21, ll. 30-40; page 22, ll. 1-20; ll. 39-40; page 33, ll. 23-24). It was further testified that these sheets contained the entries of the business done between the parties hereto, with the exception of the item representing the cost of the installation of the second tank and pump, which item was not entered in the plaintiff-appellants books. These sheets were corroborative of the testimony of plaintiff-appellant's witnesses and moreover, clearly showed that the balance of \$89.18 on the original building account was still due at the time of trial and which amount was admitted by the defendant-appellee was due and owing to the plaintiff-appellant (page 46, ll.

12-13.) Hence the plaintiff-appellant contends that the exclusion of these sheets was erroneous in that the jury lost sight of this particular item whereby the rights of the plaintiff-appellant were prejudiced.

POINT TWO.

The Trial Court erroneously denied the plaintiff's motion for a direction of a verdict at the close of the case.

The answers of the defendant filed in this cause consist of three Separate Defenses, the First, a general denial and a plea of an Account Stated; the Second, Payment; and the Third, An Accord and Satisfaction.

As to the First Defense, the Plaintiff-Appellant's main case affirmatively disclosed a sale and delivery of a second gasoline tank and pump and of this testimony there was no denial by the Defendant-Appellee. Moreover, the question of an account stated, was testified to as affecting merely the merchandise account between the parties. The Defendant-Appellee admitted that he did not know what items were included in this account stated but supposed that it affected both the building and merchandise accounts. (Page 41, ll. 31-40; page 42, ll. 1-20; page 43, ll. 9-39). Contradicting this is the direct testimony of the Plaintiff-Appellant's witnesses (page 26, ll. 27-31; page 29, ll. 30-37; page 30, ll. 1-40; page 31, ll. 39-40; page 32, ll. 1-3; page 34, ll. 31-40; page 35, ll. 1-21) that this account stated affected only the merchandise account. Offsetting the testimony of the Defendant-Appellant that the payment of the sum of \$558.60 was in full settle-

ment of his entire account with the Plaintiff-Appellant, is his own admission (page 46, ll. 12-13) that the \$89. item on the Building was due at that date, namely, four months before the trial date. (page 45, ll. 30-32). This flat contradiction by the Defendant-Appellee of his own testimony was entirely lost sight of by the trial court and the jury, inasmuch as on the Defendant-Appellee's own admission, judgment should have been directed on this item of \$89.18. Moreover, this admission by the Defendant-Appellee absolutely contradicts and defeats his first defense of an Account Stated, since, if as he testified, he considered the payment of \$558.60 discharged his entire obligation to the Plaintiff-Appellant, and since this \$89.18 item was an outstanding debit charge against him at the time the so-called Account Stated was entered into, his admission (page 46, ll. 12-13) that the item of \$89.18 was still due to the Plaintiff-Appellant entirely defeats his contention that the so-called account stated included the balance due on the Building Account. Consequently the defense of Account Stated fails entirely as against the Building Account items.

Further than this, it is clear from the testimony in this case that there never was a "meeting of the minds" as to the items claimed to be included in the so-called Account Stated. Conceding for the sake of the point to be made, that the Defendant-Appellee thought that the items in the alleged Account Stated included both the Merchandise and the Building Accounts, the testimony of the Plaintiff-Appellant's witnesses is to the effect that they never discussed the Building Account and did not include in their calculations any of the items therein. In these circumstances, certainly no valid Account Stated can be created, for a valid account

stated rests upon the mutual agreement of the parties to accept a sum certain in satisfaction of an amount disputed to be due. Nowheres in this case is there any testimony as to a dispute as to the amount claimed to be due. The Defendant-Appellee's own testimony (page 42, ll. 31-40; page 43, ll. 1-30) is ample proof that there was no dispute between the parties for as he testified, he wanted a "total balance I owed the Company," (page 42, ll. 37-38) indicative of the fact that he did not question any of the items charged against him but that his main purpose was, as he expressed it, "to know where I stood." (Page 40, ll. 26-27). From these facts, certainly it cannot be successfully contended that there was a valid Account Stated between the parties hereto with reference to the Building Account.

The second defense of the Defendant-Appellee is a plea of Payment. There was no attempt at the trial of the cause to prove a payment of the amounts which Plaintiff-Appellant claimed was due. This plea of Payment was based upon the so-called Account Stated and an Accord and Satisfaction. Particular attention is directed to the testimony of the Defendant-Appellee wherein he testified that he did not know what items were included in the total charge of \$558.60 (Page 44, ll. 20-40; page 45, ll. 1-20). Certainly, from his own testimony, it cannot be said that the Defendant-Appellee proved by a fair preponderance of the evidence his affirmative defense of Payment.

Moreover, the plea of Payment is based upon the alleged Account Stated, all the points presented in discussing the Account Stated, are applicable here. Since the defense of Account Stated falls under its own weight, it carries with it the defense of Payment.

The third Affirmative defense set up in the Answer was that of an Accord and Satisfaction. The law as to an Accord and Satisfaction is well settled by the case of Daniel v. Hatch, 21 L 391 and a long line of cases culminating in Decker v. Smith, 88 L 630, wherein this Court said: "Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no ^{New} consideration given."

The amounts claimed by the plaintiff-appellant were based upon the actual cost of the goods supplied, amounting to the sum of \$541.08 as to the second gas tank and pump, and the balance of \$89.18 on the original building and equipment. That these respective amounts are "liquidated or certain" is not denied. That they were due on date that the alleged account stated was entered into as not denied. Hence, in order that the Defendant-Appellee establish the defense of an Accord and Satisfaction he must then show (a) that a release under seal was executed by the Plaintiff-Appellant to the Defendant-Appellee; or (b) that there was some new consideration given by the Defendant-Appellee to the Plaintiff-Appellant. In both these particulars the Defendant-Appellee failed altogether to adduce any evidence. There is absolutely no testimony in this case of a release under seal nor any testimony indicating that any new consideration moved from the Defendant-Appellee to the Plaintiff-Appellant. Therefore, the conclusion logically follows that the Defendant-Appellee failed to sustain the burden in establishing this affirmative defense.

In this connection also, for the sake of clarity

and to avoid repetition, it would be well to consider the Plaintiff-Appellant's exceptions to the refusal of the trial Court to charge the Plaintiff-Appellant's requests to charge #3-4-5-6-7-8 and 9.

These requests are as follows:

1. That the negligence, carelessness or inefficiency of the plaintiff's employees in not entering the item of \$542.08 for the pump, tank, installation, etc., in the books of the plaintiff as a debit against the defendant, did not and does not relieve the defendant from his obligation of paying for the equipment furnished and services rendered.

2. That the defendant has the burden of proof in establishing payment, and must prove payment by a preponderance of the evidence.

3. That the defendant has the burden of proof in establishing accord and satisfaction, and must prove an accord and satisfaction by a preponderance of the evidence.

4. "Where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given."

5. The debt in this case is a liquidated or certain sum and at December 1924, was due.

6. That no new consideration was given by the defendant to the plaintiff for an extinguishment of the entire debt.

7. That an agreement to pay a pre-existing indebtedness is not a valid consideration or a new consideration.

8. That in order to prove an accord and satisfaction in this case, the defendant must prove affirmatively that he gave some new consideration

to the plaintiff, or that he (the defendant) holds a release under seal.

9. That if the defendant does not prove either of these, he has not proved an accord and a satisfaction and the plaintiff is entitled to recover the amount proved to be due.

With reference to request #3, the Plaintiff-Appellant contends that the failure so to charge was erroneous and prejudiced its right to recover. The Plaintiff-Appellants was entitled to the benefit of the rule that the one asserting an affirmative defense must sustain that plea by a preponderance of the evidence. And since in this case, the only possible defense which the Defendant-Appellee had was set up in his affirmative defenses, the failure of the trial Court to charge Request #3 deprived the Plaintiff-Appellant of the benefit of the well established rule of law heretofore referred to, and altogether failed erroneously to place properly the burden of proof with respect to the affirmative defense of Accord and Satisfaction upon the Defendant-Appellee.

Request #4 & 5 have been dealt with previously in discussing the question of the validity of the Accord and Satisfaction and for the sake of brevity, reference is directed thereto. The Plaintiff-Appellant contends that the refusal of the trial Court to charge these requests was erroneous and prejudiced its rights.

The trial Court erroneously refused to charge Request #6. The testimony in the case fails to disclose any proof of any new consideration moving from the Defendant-Appellee to the Plaintiff-Appellant. Under the circumstances the question of the existence of a consideration becomes one of law and not of fact, and the refusal of the trial Court to charge this request prejudiced the rights of the Plaintiff-Appellant.

With reference to Request #7, it cannot be doubted that \$89.18 and \$541.08 are liquidated or certain amounts. Nor can it be doubted that in December 1924 each item was due. There was no testimony indicating any agreement between the parties as to any extension in the time for payment of these amounts. Thus, this case falls squarely within the holding in the case of Decker v. Smith, ante, and the refusal of the trial Court to charge this request was erroneous and prejudiced the rights of the Plaintiff-Appellant.

Bound up with and flowing from Request #6 are Request #8-9. It is a self evident fact that if there was an Accord and Satisfaction as to a sum which was liquidated and due, it is incumbent upon the Defendant-Appellee to show affirmatively that there was either a new consideration given or the execution of a release under seal. In such a case, failure to prove either necessarily disproves the claim of an Accord and Satisfaction. Plaintiff-Appellant was entitled to have the jury properly instructed as regards the burden of proof and the amount of proof to be adduced by the Defendant-Appellee. The refusal of the trial Court to charge Requests #8 and 9 was erroneous and prejudiced the rights of the Plaintiff-Appellant.

As regards Request #1, the testimony clearly indicates (Page 23, ll. 36-40; page 24 ll. 1-12) that the item of \$541.08 was not entered in the books of the Plaintiff-Appellant through some error, omission, or negligence on the part of its employees. This fact standing alone is not sufficient to discharge the debt or relieve the Defendant-Appellee of his liability. There was no proof produced by the Defendant-Appellee to show that this item was ever paid, or even that it was included in the alleged "Account Stated." The Defendant-Appellee

received the goods and became legally obligated to pay for them. Now, mere failure on the part of Plaintiff-Appellant's employees to enter the charge on this item cannot work a satisfaction in favor of the Defendant-Appellee and discharge his liability, for that liability is fixed and definite and disappears only when some form of satisfaction is made to the creditor. Consequently, the refusal of the trial Court to charge this request was erroneous and prejudiced the rights of the Plaintiff-Appellant.

That this is so, is made more evident when considered in connection with that part of the charge of the trial court wherein the hypothetical case of the housewife and the grocer is given. (Page 53, ll. 19-40; page 54, ll. 1-14). This hypothetical case was not properly given, inasmuch as there is no testimony in the case to show that there was ever any dispute between the parties as to the delivery and receipt of any of the items charged against the Defendant-Appellee, and in the hypothetical case, this feature of the dispute relative to delivery and receipt is made a premise upon which the trial court based the rule of law which he laid down concerning this case, to the jury. Neither was there any disagreement as to the amount due. The testimony of the Defendant-Appellee is (Page 44, ll. 20-32) that the figure of \$558.60 was arrived at by adding up the various items and a total of that amount was obtained. Defendant-Appellee agreed to pay this amount and did in fact, pay it. This testimony clearly indicates that there was no disagreement in the instant case, whereas the trial court included a "disagreement between the parties" as a premise in the hypothetical case heretofore referred to. The Plaintiff-Appellant contends that the hypothetical case as laid down by the

trial court was not warranted by the proof in the instant case and was erroneous and prejudiced the rights of the Plaintiff-Appellant.

Wherefore the Plaintiff-Appellant prays that the judgment as heretofore entered in this cause may be set aside and as for nothing holden, and the cause remanded for a new trial.

Respectfully submitted,

GEORGE F. SEYMOUR, JR.,
Attorney for and of Counsel with
the Plaintiff-Appellant.

21 / 21 OCT. 1. 1928

N. J. Court of Errors and Appeals

D. & L. OIL CO., INC.,
Plaintiff-Appellant,

—against—

EUGENE FOLTZER, trading as D. & L. OIL STATION
No. 3,
Defendant-Appellee.

ON APPEAL

BRIEF OF APPELLEE.

Prefatory Statement of Facts.

The Defendant-Appellee calls the attention of the Court to the prefatory statement of facts set forth in the brief of Plaintiff-Appellant at page 2, ll. 23 to 27, in which the Plaintiff-Appellant sets forth that the only account discussed by the parties was the merchandise account. This was denied by the defendant in his testimony (page 40, ll. 36-37; page 41, ll. 25 to 40; page 42, ll. 1-3, ll. 13-14, 15, 16; page 43, ll. 35, 36, 37, 38; page 44, ll. 20, 21, 22, 23, 24, ll. 31, 32, 33; page 45, ll. 23, 24, 25, 26, 27) and therefore presented a question of fact for the jury which they, by their verdict found that, as a matter of fact, the merchandise account was not the only account stated.

POINT ONE.

The trial Court rightfully excluded the ledger sheets of the plaintiff from evidence.

The ledger sheets offered in evidence by the plaintiff and objected to by the defendant and excluded by the Court were loose leaf sheets taken from the ledger of the plaintiff. They were not permanent in form and therefore not admissible as books of account.

In the case of *Hamilton v. Fusco Construction Co.*, 87 l. 62, the Court did not pass upon the question whether a ledger account can be proved by the production of cards containing only the account of the party to the action, but it did reverse the decision granted in favor of the plaintiff on the ground that the ledger cards in themselves proved nothing without the production of the loose sheet reports, and it further held that these loose sheet reports were inadmissible in evidence as books of original entry, except in connection with a day book or other substantial record which cannot be tampered with or changed without leaving some evidence thereof.

And in the same case the Court quotes from the case of *Deiment v. Colloty* (E. & A.) 66 N. J. L. 295, where similar sheets were offered in evidence:

“Such sheets ‘cannot be regarded as a book of original entry; they were in reality no more than a memoranda which might be used by a witness for the purpose of refreshing his memory, but could not, of

themselves, standing alone, be competent evidence of the facts therein contained.’”

The ledger sheets in question were used by the witness for the plaintiff to refresh his memory and the information they contained was given by him to the jury as appears from the testimony (page 35, ll. 22 to 39).

Furthermore, since the sheets have not been included in the record nor set forth in the state of the case, this Court cannot properly pass on the action of the trial judge in excluding them from evidence.

4 C. J. Page 73-74 “Alleged error in excluding documentary evidence will not be reviewed where the record fails to preserve the document, or at least as much of it as is necessary to show its legal effect, with sufficient fullness to enable the Appellate Court to determine whether its rejection was prejudicial.

Moreover, the testimony of the defendant (page 46 LL 15-16-17-18-19) shows that the item of \$89.00 which he admitted to be due, was for gas and oil delivered to him after the account stated had been agreed to between the parties and not on the building account. Therefore, failure to admit the ledgers sheets into evidence was in no way prejudicial to the plaintiff.

POINT TWO.

The trial Court rightfully refused the plaintiff's motion for a direction of a verdict at the close of the case.

The defendant set up in his amended answer three separate defenses, the first a general denial and a plea of an account stated; the second, payment and the third, accord and satisfaction.

As to the first defense, the testimony at the trial disclosed a sale and delivery of the second gasoline tank and pump. This the defendant in no wise denied. But the defendant, in the first defense of his amended answer (Page 11, ll. 26 to 39, page 12, ll. 1 to 10) set up a state of facts which set forth the delivery of certain goods, wares and merchandise so sold and the entering into of an account stated in the sum of Five Hundred Fifty Eight and 60/100 (\$558.60) Dollars. The testimony of the defendant (page 40, ll. 23-24-25-26-27-28-29, page 41, ll. 27-28-29-30) shows that there was a long drawn out dispute over the amounts due, the defective conditions of the equipment furnished and the quantity of goods supplied him by the plaintiff. At this conference it appears from the defendant's testimony (page 44, ll. 20, 21, 22, 23, and 24; page 41, ll. 38, 39, 40; page 44, ll. 1, 2 inc.) the tanks, the building, the pumps and the materials furnished were all included in the discussions in arriving at a settlement.

There being sufficient testimony therefore, before the Court as to the facts set forth in the first defense of the amended answer of the defendant, the Court rightfully submitted this question to the jury for their decision and rightfully refused to direct a verdict in favor of the plaintiff.

Moreover counsel for the plaintiff-appellant in his brief (page 5, ll. 2 to 10) calls attention of the Court to the defendants' testimony (page 46, ll. 12-13) that the defendant admitted that the \$89.00 item on the building was due at that date, namely, four months before the trial date, and urges as a ground for reversal that judgment should have been directed for \$89.18 and failure to do so was error. It is further urged (page 5, ll. 10 to 24, of the appellant's brief) that the admission by the defendant of the amount due of \$89., four months before the date of the trial, defeats the defense of an Account Stated, set up in the First Defense of the answer, in that as the amount of \$89.18 was an outstanding debit at the time the Account Stated was entered into, the defendant's admission that \$89 was due at a latter date, defeats his contention that it was included in the Account Stated.

Both of the above contentions might be sustained if the item of \$89 was admitted by the defendant to be due on the Building Account as is contended for by the counsel for the Appellant (Brief of Appellant, page 5, ll. 2-3).

But the testimony of the defendant (page 46, ll. 15-16) shows that such was not the fact. Rather that such was for gas and oil shipped to the defendant by truck.

It appears from the testimony of the defendant (page 41, ll. 29-30, page 41, ll. 36-40) that there was a discussion of the various amounts due; that there was produced some bills that he had, some bills that the Plaintiff Company had, the question of defects in the equipment was raised, that this lasted from six o'clock at night till 1:30 in the

morning (page 40, ll. 32-33-34) and that then the agreement was reached as to the total amount due. All this is indicative of the disputed character of the amounts claimed by the Plaintiff. The testimony of the defendant (page 41, ll. 40; page 42, ll. 1-2-3) was that the items that went to make up the so-called business account were discussed and it was with this discussion before the minds of the parties that they arrived at this agreement. All this testimony was sufficient to make out a valid defense of an account stated as set forth in the first defense of the amended answer of the defendant and therefore, the Court rightfully refused to direct a verdict in favor of the plaintiff.

The second defense of the amended answer filed by the defendant was a plea of payment. The testimony adduced by the defendant in support of this plea is the same as that offered to support his defense of an account stated together with uncontradicted proof of payment of the amount agreed upon of Five Hundred Fifty Eight and 60/100 (\$558.60) Dollars, receipt of payment of \$200. being acknowledged in Exhibit D-1 (page 58, ll. 16) the balance of Three Hundred Fifty Eight and 60/100 (\$358.60) Dollars being paid by check, Exhibit D-3 Page 77, ll. 1 to 21.

As to the Defense of accord and satisfaction set up in the Amended Answer of the Defendant, there is sufficient testimony to support the Court in refusing to direct a verdict in favor of the plaintiffs.

The argument previously urged by the defendant, that there was sufficient proof before the Court of a valid "account stated" to support the action of the trial judge in refusing to direct a verdict in favor of the plaintiff, might again be

urged. The testimony of the defendant (page 40, ll. 23-24-25-26-27-28-29; page 41, ll. 27-28-29-30) shows the disputed character of the amounts due. The length of time consumed, the questions of defective equipment, the quantity of goods furnished, are all indicative of this dispute.

"Whether or not there was a bona fide dispute between the parties is ordinarily a question for the jury" (1 C. J. 583 and cases cited).

And it has been decided in this State, in the case of *Castelli v. Jereissati*, (E & A) 80 N. J. L. 295 "where a claim is unliquidated, or in dispute, a payment and acceptance of a less sum than that claimed, in satisfaction, operates as an accord and satisfaction".

The same doctrine was reiterated and reaffirmed in *Decker v Smith*, (E & A) 88 N. J. L. 630.

For these reasons the Court rightfully refused to direct a verdict in favor of the plaintiff.

POINT THREE.

The Court rightfully refused to charge the plaintiff's requests to charge.

The plaintiff submitted ten requests to charge to the trial judge. All of these the trial judge refused to charge.

The First request to charge (page 78, ll. 31 to 39) comprehended that the failure or neglect of the plaintiff to enter an item in his books would not discharge the defendant of his liability for that item.

The trial court fully covered this question in his charge to the jury (page 53, ll. 19 to 25) therefore there was no error in refusing to charge this request.

With reference to the refusal of the Court to charge ^{the third} request of the plaintiff, the plaintiff was in no way prejudiced, seeing that the Court in its charge (page 55, ll. 15, 16, 17, 18) stated "We have the plaintiff in this case saying that this amount of money is due. We have the defendant pleading payment and accord and satisfaction. The questions of fact are for you to decide."

The trial Court's refusal to charge the fourth request of the plaintiff was in no way harmful to the plaintiff inasmuch as the Court in his charge (page 55, ll. 35, 36, 37) stated "acceptance of a lesser sum than the liquidated sum agreed upon does not discharge the debt." This fully covered the point set forth in the plaintiff's request.

The fifth request to charge of the plaintiff was rightfully refused by the trial court for it assumed a fact in issue, namely, that the debt was liqui-

dated or certain. This was a question of fact for the jury to pass upon.

The trial Court's refusal to charge the sixth request was in no way erroneous or prejudicial to the defendant. It did not apply to the issues as developed by the evidence in the case, nor was there any dispute as to this fact.

The trial Court's refusal to charge the seventh request of the plaintiff was in no way harmful or prejudicial to the plaintiff in that the Court fully covered the point of law involved in its charge (page 54, ll. 37, 38, 39, 40; page 55, ll. 1, 2, 3).

"The denial of requested instructions substantially covered by other instructions given is not error." *Geyer v. Public Service Railway Co.* (E. & A.), 98 N. J. L. 470—*State v. Dragone* (Supreme), 1 N. J. Misc. R. 84.

The eighth Request to Charge of the Plaintiff was rightfully refused by the trial Court, in that it contained a false statement of the law of accord and satisfaction, as it applied to this case. It assumed and was based upon, as ^{an} established fact, that, which was in issue, namely, that the claim was liquidated or certain.

"Where a claim is unliquidated, or in dispute, a payment and acceptance of a less sum than that claimed, in satisfaction, operates as an accord and satisfaction." *Castelli v. Jereissati* (E. & A.), 80 N. J. L. 295.

Decker v. Smith (E. & A.), 88 N. J. L. 630.

No new consideration or release under seal is necessary.

The ninth Request to Charge of the Plaintiff was rightfully refused by the trial Court for the same reasons urged by the defendant appellee in support of the trial Court's refusal to charge the Plaintiff's eighth request.

POINT FOUR.

There was no error in the charge of the trial Court to the jury.

— A —

The trial Court correctly charged the jury as to the law of Accord and Satisfaction as it applied to this case, in that portion of his charge set out in page 54, ll. 15 to 30.

It is substantially the same and comprehends all the requisites set forth by the Court in the case of *Castelli v. Jereissati*, above referred to and reaffirmed in *Decker v. Smith* (E. & A.).

“Where a claim is unliquidated or in dispute a payment and acceptance of a less sum than that claimed in satisfaction, operates as an accord and satisfaction, *Castelli v. Jereissati* (E. & A.), 80 L. 295, *Decker v. Smith* (E. & A.), 88 N. J. L. 630.”

— B —

There was no error in the action of the trial court in submitting the hypothetical case of the housewife and the grocer (page 53, ll. 19 to 39; page 54, ll. 1 to 14).

The same elements are present in this case as in the hypothetical case charged.

That there was a disagreement as to the amount due is borne out by the testimony of the defendant (page 40, ll. 28, 39) “that I wasn't paying bills for something I didn't receive,” the testimony of the defective quality of the pumps (page 41, ll. 29, 30) and the length of time consumed (page 40, ll. 31, 32, 33, 34).

That there was a disagreement of the quantity of goods delivered is borne out by the defendant's testimony (page 40, ll. 28, 29) above referred to.

That they arrived at an agreed amount after a long discussion, is borne out by the testimony (page 40, ll. 31, 32, 33, 34; page 41, ll. 31 to 40; page 42, ll. 1, 2, 3).

That there were some amounts each claimed and the other had no proof to combat is borne out by the testimony of the defendant (page 41, ll. 36, 37, 38, 39, 40) “Some of the bills the D. & L. Oil Company didn't have; some of the bills I had, that they didn't have.”

All these elements bring the case clearly within the hypothetical case given by the trial Court in its charge to the jury and the rule of law as it was laid down by the trial court in the hypothetical case equally applied to the case under discussion and therefore there was no error in the judge's action in so charging the jury.

POINT FIVE.

There was no exception taken by the plaintiff to the charge of the trial Court to the jury.

The Supreme Court has held the giving or refusing of instructions to which no exception was taken in the trial court cannot be reviewed.

“No assignment of error which rests either upon the record itself, nor upon a properly sealed bill of exceptions, is entitled to consideration in a court of review.” *Brady v. Public Service Ry. Co.*, 80 N. J. L. 471.

“Where no exception is taken to instructions they will not be considered on appeal” *Wales Adding Machine Co. v. Huber* (E. & A.), 98 N. J. L. 910. *Benedict v. Teber & Sons Co.*, 1 N. J. Misc. R. 396.

“Objections that the judge misconceived the case and made erroneous comments in his charge cannot be noticed on appeal where no exception was taken to the charge.” *Naugle v. McVoy* (E. & A.), 98 N. J. L. 137.

C O N C L U S I O N .

For the reasons alleged, the defendant appellee submits that the Trial Court rightfully excluded the ledger sheets of the plaintiff appellant from evidence, rightfully denied the appellant's motion for a non suit or a directed verdict, rightfully charged the jury and rightfully refused to charge

the requests made by the Appellant and rightfully submitted the question of the defendant's liability to the jury.

For the reasons herein stated, the defendant appellee submits that the judgment of the trial Court should be affirmed.

Respectfully submitted,

EGAN & ARMSTRONG,

Attorneys for Defendant-Appellee.

THOMAS R. ARMSTRONG,

Of Counsel.