INDEX.

Notice and Grounds of Appeal.

New Jersey Supreme Court

SOMERSET COUNTY. 10

(Filed May 17, 1927.)

BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION COMPANY, INC., a corporation, and F. R. UPTON, INC., a corporation, Defendants.	Action at Law. 20

To:

HARRISON AND ROCHE,
Attorneys for Plaintiff.

Gentlemen: 30

PLEASE TAKE NOTICE that the defendant Wilson & English Construction Company appeals to the Court of Errors and Appeals from the whole of the judgment entered for the plaintiff in this cause on May 7th, 1927, on the following grounds:

1. The Supreme Court erred in granting the motion of the plaintiff to strike out the answer of the defendant Wilson & English Construction Company. 40

2. The Supreme Court erred in refusing to deny the plaintiff's motion to strike out the answer of the defendant Wilson & English Construction Company.

3. The Supreme Court erred in directing entry of judgment for the face of the claim of the plaintiff.

4. The Supreme Court erred in giving final judgment for the plaintiff.

Dated May 16, 1927.

HOBART & MINARD,
Attorneys for defendant Wilson & English Construction Company.

Service of the annexed Notice and Grounds of Appeal is acknowledged this 16th day of May, 1927.

HARRISON & ROCHE,
Attorneys for plaintiff, Bound Brook Crushed Stone Co.

Summons and Complaint.

(Served October 5, 1926. Filed October 8, 1926.)

STATE OF NEW JERSEY:

To Wilson & English Construction Co., Inc., a corporation:

YOU ARE SUMMONED to answer the annexed complaint of Bound Brook Crushed Stone Company, a corporation, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

L. S.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at Trenton, this 30th day of September, 1926.

EDWARD J. KELLEHER,
Clerk.

HARRISON & ROCHE,
Attorneys.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION CO., INC., a corporation, Defendant.	Action at Law. Complaint.

Bound Brook Crushed Stone Company, a corporation of the State of New Jersey, having its principal office in the Borough of Bound Brook, Somerset County, New Jersey, says that:

1. It sues for the amount of goods sold and delivered to the defendant on a book account, a true copy of which is hereto annexed and made a part hereof, and on which there is due plaintiff the sum of $1,028.81. Plaintiff has made demand upon defendant for the payment of said sum of $1,028.81, but defendant has failed, neglected and refused to pay the same.

Judgment will be claimed for the aforesaid sum of $1,028.81.

HARRISON & ROCHE,
Attorneys of Plaintiff.

Statement

Bound Brook, N. J.,

September 20, 1924

Wilson & English Construction Co., Inc.,
Box 131,
South Amboy, N. J.

To BOUND BROOK CRUSHED STONE CO., Dr.

MACHINE BROKEN TRAP ROCK

Long Distance Telephone: Office, No. 5; Residence, No. 299-M

Dec.	8–1924	Bill Rendered	$408.98	Feb. 20	Cash on account,	$2200.62
"	22–1924	do	2278.50		Balance due,	1028.81
"	27–1924	do	541.95			
			$3229.43			$3229.43

Balance due..... $1028.81

Branch Office
F. R. UPTON INC.
Union Bldg., Newark, N. J.

TERMS AND CONDITIONS OF SALE.

Cash settlements to be made monthly, on or before the fifteenth of each month to cover in full all shipments of the previous month.

All contracts and agreements are contingent upon strikes, accidents, delays of carriers or other delays unavoidable and beyond our control.

No claims allowed unless made within ten days from date of shipment.

Shipments made in carloads only. R. R. weight to govern.

Quotations subject to change without notice.

Quarries
ON C. R. R. OF N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

Bound Brook, N. J.
December 8, 1924

Long Distance Telephones { Office No. 5 / Residence 299-M & 39-M

Sold to

Wilson & English Construction Co., Inc.,

Address: Box 131,

South Amboy, N. J.

Shipped to Morgan, N. J.

Your Order No. F. O. B. Quarry.

Date	Initials	Car No.	Size	Weight	Amount	Total
Dec. 5	CRR	85725	Reinforced Concrete	102900 lbs.		
		81333		94300 "		
6		88091		87700 "		
		88025		87900 "		
		81600		86000 "		
		82025		86500 "		
				545300 "		
				272.65 Tns.		
				@ $1.50	$408.98	

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen and sixteen years were employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock p. m. or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

Branch Office
F. R. UPTON INC.
Union Bldg., Newark, N. J.

TERMS AND CONDITIONS OF SALE.

Cash settlements to be made monthly, on or before the fifteenth of each month to cover in full all shipments of the previous month.

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Shipments made in carloads only. R. R. weight to govern.

Quotations subject to change without notice.

Quarries
ON C. R. R. OF N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

Bound Brook, N. J.
Dec. 22, 1924

Long Distance Telephones { Office No. 5 / Residence 299-M & 39-M

Sold to

Wilson & English Construction Co., Inc.,

Address: Box 131,

South Amboy, N. J.

Shipped to Morgan, N. J.

Your Order No. F. O. B. Quarry.

Date	Initials	Car No.		Size	Weight	Amount	Total
	Reinforced Concrete				1½-¾" Con.		
Dec. 16	CRR—81017	85400 lbs.		Dec. 17	CRR—80025	81000 lbs.	
	84256	97600 "			85902	100800 "	
	81708	84400 "			88392	87300 "	
17	81655	82100 "			81869	85600 "	
	80233	80700 "			88391	89400 "	
	82083	83600 "			82111	93500 "	
19	81816	83300 "		18	85114	103300 "	
	81909	86200 "			88261	89300 "	
	81620	82900 "			81405	89200 "	
	82266	86100 "			81846	90300 "	
	81791	89300 "			82212	88600 "	
	85325	107300 "			80066	82300 "	
	84229	103300 "					
20	81287	83200 "					
	80195	87900 "					
	80005	90100 "					
	81103	88100 "		Total:	3038000 lbs.		
22	82276	91000 "			1519 Tons—		
	80571	92300 "			@ $1.50	$2278.50	
	82205	92200 "					
	82174	89100 "					
	80048	91300 "					

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen and sixteen years were employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock p. m. or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

Branch Office
F. R. UPTON INC.
Union Bldg., Newark, N. J.

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Shipments made in carloads only. R. R. weight to govern.

Quotations subject to change without notice.

Quarries
ON C. R. R. OF N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

Bound Brook, N. J.
Dec. 27th, 1924

Long Distance Telephones { Office No. 5 / Residence 299-M & 39-M

Sold to

Wilson & English Construction Co., Inc.,

Address: Box 131,

South Amboy, N. J.

Shipped to Morgan, N. J.

Your Order No. F. O. B. Quarry.

Date	Initials	Car No.	Size	Weight	Amount	Total
Dec. 24	CRR	81528	1½-¾"	87600 lbs.		
		85072		103400 "		
		81398		88000 "		
		80866		91600 "		
		80077	Massed Concrete	85300 "		
		80446		86900 "		
		84957		84800 "		
		80817		85000 "		
				722600 "		
				361.3 Tns. @ $1.50	$541.95	

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen and sixteen years were employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock p. m. or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

To the within named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this rule.

HARRISON & ROCHE,
Attorneys of Plaintiff.

Affidavit of Merits.

(Filed October 9, 1926.)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

CHARLES W. S. WILSON, being duly sworn, says:

I am the treasurer of the defendant corporation in the above entitled case.

Said defendant has a just and legal defense for said action on the merits of the case.

CHARLES W. S. WILSON.

Sworn and subscribed before me
this 8th day of October, 1926.

LAURA E. SMITH,
A Foreign Commissioner of Deeds for
(Seal) New Jersey in New York.

Summons, Answer and Counterclaim.

(Served October 23, 1926. Filed October 25, 1926.)

Summons.

STATE OF NEW JERSEY:

10 *To F. R. Upton, Inc., a corporation (third party):*

YOU ARE SUMMONED to answer the annexed counterclaim of Wilson & English Construction Company, a corporation, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said counterclaim with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed answer and counterclaim, the defendant, Wilson & English Construction Company, may proceed in the suit and judgment may be entered against you.

L. S.

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WITNESS, WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at Trenton, this 21st day of October, 1926.

EDWARD J. KELLEHER,
Clerk.

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HOBART & MINARD,
Attorneys.

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Answer and Counterclaim.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION COMPANY, a corporation, and F. R. UPTON, INC., a corporation, Defendants.	Action-at-Law. Answer and Counterclaim.

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Defendant Wilson & English Construction Company, a corporation of the State of New York duly authorized to transact business in the State of New Jersey, with its principal office in New Jersey at number 246 Elm Street, Perth Amboy, New Jersey, says that:

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FIRST DEFENSE.

1. It denies the truth of the matters contained in the complaint.

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SECOND DEFENSE.

1. It denies that it has ever purchased any materials or commodities of any kind from or ever had any business transactions with the plaintiff and that any book account ever existed between it and the plaintiff.

OBJECTION IN POINT OF LAW.

At or before the trial the defendant Wilson & English Construction Company will move to dis-

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miss the complaint for the reason that it fails to show a cause of action in that neither it nor the alleged book account, annexed thereto, state any commodity or material which was the subject of said alleged book account.

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COUNTERCLAIM.

By way of counterclaim against the defendant F. R. Upton, Inc., a third party, a corporation having its principal office at number 9 Clinton Street, Newark, N. J., the defendant Wilson & English Construction Company says:

1. On or about September 29, 1924, it entered into an agreement with the defendant F. R. Upton, Inc., for sand and gravel in quantities and at the prices and of the character and quality to conform to certain specifications therein specified.

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2. Owing to the failure of said defendant F. R. Upton, Inc., to furnish sand and gravel of the character and quality specified, the class "A" Concrete made therefrom was rejected by the Central Railroad Company of New Jersey, for whom the work was being done, and defendant Wilson & English Construction Company was compelled to provide other sand, and to mix with the gravel certain proportions of crushed stone, which was furnished by said defendant F. R. Upton, Inc.

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3. All of the crushed stone used by defendant Wilson & English Construction Company during the month of December, 1924, consisting of 48 cars, was ordered from and furnished by said defendant F. R. Upton, Inc., including all of the carloads, indicated by car initials and car numbers in the alleged book account annexed to the complaint, and

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the charges for said crushed stone together with the charges for all the sand and gravel furnished by said defendant F. R. Upton, Inc., during said month of December, 1924, was included and comingled in an account stated between said defendant F. R. Upton, Inc., and defendant Wilson & English Construction Company on February 16, 1925.

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4. By reason of the failure of said defendant F. R. Upton, Inc., to furnish sand and gravel of the character and quality required by said specifications, the defendant Wilson & English Construction Company was compelled to and did incur and pay the following items of expenses:

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4037 tons of crushed stone @ 72¢ per ton	$2,906.64
1145 additional tons of sand @ 10¢ per ton	114.50
Demurrage	1,154.00
Hiring locomotive crane, 110 hours @ $3.20 per hr.	352.00
Engineer for locomotive crane, 110 hours @ $1.20 per hr.	132.00
Fireman for locomotive crane, 110 hours @ 55¢ per hr.	60.50
11 tons coal for crane @ $6.00 per ton	66.00
Labor, 300 hrs. @ 50¢ per hr.	150.00
Superintendence 30 hrs. @ $1.35 per hr.	40.50
Time-keeper, 30 hrs. @ 77¢ per hr.	23.10
Compensation and liability insurance	13.00
Overhead expense on labor	41.91
Total	$5,054.15

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5. The defendant Wilson & English Construction Company counterclaims against the defendant F. R. Upton, Inc., $5,054.15 damages.

HOBART & MINARD,
Attorneys for defendant Wilson & English Construction Company.

October 21, 1926.

To the within named defendant F. R. Upton, Inc.:

In case the within summons and answer and counterclaim are served upon you personally, take notice that if you intend to make a defense to this action you must file an affidavit of merits within ten days from the date of service hereof upon you, and file your answer to said counterclaim within twenty days from the date of such service, and in default of the filing of such affidavit or answer, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this rule.

HOBART & MINARD,
Attorneys for defendant Wilson & English Construction Company.

I hereby appoint and depute OLIVER WERKHEISER to serve the within writ.

Witness my hand and seal this 23rd day of Oct., 1926.

HARRY B. O'CONNELL,
Sheriff.

By ALFRED C. WALKER,
(Seal) Under Sheriff.
Sheriff Fees 3.78

Served the within Summons and Complaint with a ten-day Notice endorsed thereon October 23rd, 1926, upon F. R. Upton, Inc., a corporation, the within named defendant, by delivering a true copy thereof personally to Lucy Upton, its President, at her principal office #707 Union Bldg., Newark, N. J.

HARRY B. O'CONNELL,
Sheriff.

By OLIVER WERKHEISER,
Special Deputy.

Affidavit of Merits.

(Filed October 26, 1926.)

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

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BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION COMPANY, a corporation, and F. R. UPTON, INC., a corporation, Defendants.	Action at Law.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

L. C. BONNELL, of full age, being duly sworn upon his oath according to law, deposes and says, that he is the treasurer of F. R. Upton, Inc., a corporation, one of the defendants in the above entitled action; that deponent believes that the said defendant has a just and legal defense to the action on the merits of the case.

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L. C. BONNELL.

Subscribed and sworn to before me
this 26th day of October, 1926.

JOHN J. MCDONOUGH,
Notary Public of New Jersey.

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Demand for Agreement.

(Served October 27, 1927.)

To defendant Wilson & English Construction Company, a corporation, and/or its attorneys Hobart & Minard, 24 Branford Place, Newark, New Jersey:

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TAKE NOTICE that the defendant F. R. Upton, Inc., a corporation, demands that you serve upon it within 5 days after service of this demand upon you, a copy of the agreement mentioned and set forth in paragraph 1 of the counterclaim of Wilson & English Construction Company, a corporation, against defendant F. R. Upton, Inc., a corporation, in the above entitled matter.

Yours respectfully,

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HARRISON & ROCHE,
Attorneys of defendant F. R. Upton, Inc.

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Compliance with Demand for Copy of Agreement.

(Filed April 30, 1927.)

To:

Messrs. Harrison & Roche,
Attorneys for Defendant,
F. R. Upton, Inc.

Gentlemen:

In compliance with demand served October 27th, 1926, for copy of the agreement mentioned and referred to in paragraph 1 of the counterclaim filed herein on the 25th of October, 1926, by the defendant Wilson & English Construction Company we attach hereto the correspondence between the defendant Wilson & English Construction Company and the defendant F. R. Upton, Inc., which constitutes said agreement.

Yours respectfully,

Newark, N. J., October 27, 1926.

HOBART & MINARD,
Attorneys for Defendant
Wilson & English Construction Co.

Telephone
Market 4710

Wholesale
Crushed Stone
Sand
Crushed Slag
Brick
Sewer Pipe
Gravel
Hollow Tile
Cement

F. R. UPTON, INC.
808 Union Building, No. 9 Clinton Street
Newark, N. J.

Sept. 19, 1924.

Recd. 9 20 1924
Refd. to.....
Ansd. .....
Copy to.....

Wilson & English
50 Church St.
New York City

Gentlemen:

All contracts and agreements are contingent upon strikes, accidents, delays of carriers, car and coal supply, and other conditions unavoidable and beyond our control. Railroad shipments are made in carload lots only, R. R. weights and tariffs to govern. Quotations subject to change without notice, and are made for shipments only during the current open season, April to December. Winter shipments are subject to extra charge and prior sale of stock on hand. After the material is de-

livered to the Railroad Company it becomes the property of the consignee. Terms Cash.

Confirming conversation of yesterday with Mr. Bonnell, and subject to the above printed terms and conditions we are pleased to confirm prices given you on Gravel and Sand as follows:

Gravel $1.70 per net ton, f. o. b. cars Morgan and Sand $1.08 per net ton, f. o. b. cars Morgan. This on the NY&LBRR.

Trusting that you will favor us with your order for these materials for this work and thanking you for the courtesy shown Mr. Bonnell.

Yours very truly,

F. R. UPTON, INC.
By L. UPTON Pres.

LU:MFT

September 29th, 1924.

F. R. Upton, Inc.,
808 Union Building,
Newark, N. J.

Gentlemen:

We hereby accept your amended proposal of the 19th inst., covering our requirements for sand and gravel at Morgan, N. J. as follows:

5,000 tons (approximate) gravel @ $1.70 per ton
2,500 " " sand @ $1.08 " "
F. O. B. Cars, Morgan, N. J.

It is understood that the same will be furnished in accordance with the specifications of the Central

Railroad of New Jersey, with which you are familiar.

Consignments will be shipped as follows:
Wilson & English Construction Co.,
Morgan, N. J.
N. Y. & L. B. R. R. Delivery, South Amboy.

Invoices and bills of ladings to this office.

Yours truly,

WILSON & ENGLISH CONST. CO.,
W. D. LAW,
Purchasing Agent.

WDL.

SPECIFICATIONS.

FINE AGGREGATE.

20. *General Requirements:*

The approval of the Engineer shall be secured for the fine aggregate it is intended to use under this contract before any work is started.

Fine aggregate shall consist of sand having clean, hard, strong, durable, uncoated grains and free from injurious amounts of dust, lumps, soft or flaky particles, shale, alkali, organic matter, loam or other deleterious substances.

21. *Grading:*

Fine aggregate shall range in size from fine to coarse, preferably within the following limits:

Passing through No. 4 sieve—not less than 95 per cent

Passing through No. 50 sieve—not more than 30 per cent

The weight removed by decantation shall not be more than 3 per cent.

22. *Mortar Strength Test:*

Fine aggregate shall be of such a quality that mortar briquettes, cylinders, or prisms, consisting of one (1) part by weight of Portland cement and three (3) parts by weight of fine aggregate will show a tensile or compressive strength at ages of seven (7) and twenty-eight (28) days not less than that of 1:3 standard Ottawa sand mortar of the same plasticity made with the same cement.

Coarse Aggregate.

23. *General Requirements:*

The approval of the Engineer shall be secured for the coarse aggregate it is intended to use under this contract before any work is started.

Coarse aggregate shall consist of gravel, crushed gravel, crushed granite, or crushed trap rock, having clean, hard, strong, durable, uncoated particles free from injurious amounts of soft, friable, thin, elongated or laminated pieces, alkali, organic or other deleterious matter.

24. *Grading:*

Grading of the coarse aggregate for the various classes of concrete shall range in size from fine to coarse within the following limits.

Class A Concrete.

Passing 1″ sieve (maximum size) not less than 95%
Passing No. 4 sieve not more than 10%
Passing No. 8 sieve not more than 5%

Class B Concrete.

Passing 1½″ sieve (maximum size) not less than 95%
Passing ¾″ sieve (intermediate size) 40 to 75%
Passing No. 4 " .....not more than 10%
Passing No. 8 " ..... " " " 5%

Class C Concrete.

Passing 3″ sieve (maximum size) not less than 95%
Passing 1½″ sieve (intermediate size) 40 to 75%
Passing No. 4 " .....not more than 10%
Passing No. 8 " ..... " " " 5%

Notice of Motion to Strike Out Answer and Enter Summary Judgment.

(Filed Apr. 29, 1927.)

To:

Hobart & Minard,
Attorneys of Defendant Wilson & English Construction Company.

Sirs:

PLEASE TAKE NOTICE that on Saturday, November 13, 1926, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, before the Hon. Charles W. Parker, a Justice of the Supreme Court of New Jersey, at the Court House, in the City of Morristown, we shall move to strike out the answer filed by said defendant Wilson & English Construction Company, and enter summary judgment against said defendant. And take notice that said motion will be based upon an affidavit attached hereto and made a part hereof.

Yours respectfully,

HARRISON & ROCHE,
Attorneys of Plaintiff.

Affidavit of Lucy Upton.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

LUCY UPTON, of full age, being duly sworn according to law upon her oath, deposes and says:

1. I am the President of F. R. Upton, Inc., a corporation of the State of New Jersey, having its principal office in the City of Newark, Essex County, New Jersey, and I am familiar with the matters and things hereinafter set forth.

2. F. R. Upton and said F. R. Upton, Inc., a corporation, has, for the past twenty years, represented, as sales agent, a number of companies dealing in stone, gravel, sand and cement and other materials, including the plaintiff in this suit, Bound Brook Crushed Stone Company, a corporation, throughout the State of New Jersey. The fact that said F. R. Upton, Inc., is sales agent for said Bound Brook Crushed Stone Company, a corporation, is generally known to all of the customers of said F. R. Upton, Inc., and other persons, firms and corporations engaged in contracting, building and construction work. Said F. R. Upton, Inc., a corporation, has represented for many years past said Bound Brook Crushed Stone Company, a corporation of the State of New Jersey, in the sale of stone and other materials.

3. Said defendant Wilson & English Construction Company, a corporation, purchased from Bound Brook Crushed Stone Company, a corporation, stone required by it to carry out and perform the terms of a contract between said defendant Wilson & English Construction Company, a corporation, and the Central Railroad Company of New Jersey. Said stone was purchased through F. R.

Upton, Inc., a corporation, who was the sales agent for said Bound Brook Crushed Stone Company. Said stone was delivered to the defendant at the times, in the amounts and at the prices stated in the itemized account, a copy of which is annexed to the complaint. Said stone was shipped by the Bound Brook Crushed Stone Company in its name to the defendant Wilson & English Construction Company. The statements or bills for the stone sold to the defendant Wilson & English Construction Company, from time to time, were billed in the name of Bound Brook Crushed Stone Company and said bills or statements rendered to defendant in the usual course of business.

4. Said defendant Wilson & English Construction Company for months prior to the sale of the stone set forth in the itemized account annexed to the complaint, had purchased materials from said Bound Brook Crushed Stone Company, through its sales agent, F. R. Upton, Inc., a corporation, and was fully aware of the fact and knew that said F. R. Upton, Inc., a corporation, was the sales agent for said Bound Brook Crushed Stone Company, and that the said stone was purchased from said Bound Brook Crushed Stone Company.

5. I further state that said account is in all things just and true and that there are no set-offs or counterclaims to the same, and that the stone mentioned was duly delivered to said defendant Wilson & English Construction Company and accepted by it and that the sum of $1028.81 remains unpaid on said account and is justly due and owing to said Bound Brook Crushed Stone Company, a corporation, together with lawful interest thereon from January 1, 1925, to date, amounting to the additional sum of $113.16.

6. I further state that I believe that there is no defense to the action of said Bound Brook Crushed Stone Company against the said defendant Wilson & English Construction Company.

LUCY UPTON.

Sworn and subscribed to before me
this 3rd day of November, 1926.

JOHN J. McDONOUGH,
Notary Public
of New Jersey.

Opposing Affidavit of William D. Law.

(Filed Apr. 29, 1927.)

WILLIAM D. LAW, of full age, being duly sworn, on his oath deposes and says:

1. I am the Purchasing Agent of the defendant Wilson & English Construction Company, and am personally familiar with the matters and things hereinafter set forth.

2. I am the representative of the defendant Wilson & English Construction Company, who received the bid of September 19, 1924, from the defendant F. R. Upton, Inc., for sand and gravel and who wrote and signed the letter of September 29, 1924, by which that bid was accepted, and I am the person who conversed with Mr. Bonnell on September 18, 1924, as referred to in said bid of September 19, 1924.

3. I am the only officer of the defendant Wilson & English Construction Company with whom the defendant F. R. Upton, Inc., had any correspondence, conferences or negotiations regarding the transactions involved in this suit, as well as in the other previous transactions between the defendant Wilson & English Construction Company and the defendant F. R. Upton, Inc.

4. I have been transacting business in the purchase of crushed stone, sand and gravel from the defendant F. R. Upton, Inc., since the spring of 1924, and during that time I have conferred frequently either personally or by telephone with Mr. Bonnell, a representative, and Miss Lucy Upton, the president of the defendant F. R. Upton, Inc. When in the spring of 1924 deponent bought crushed stone and sand from the defendant F. R. Upton, Inc., for a job on the Central Railroad at Somerville, Mr. Bonnell said that he would furnish crushed stone "from our quarries at Bound Brook." When the bills came, the billheadings of Bound Brook Crushed Stone Company were corrected by rubber stamp to read "F. R. Upton, Inc., Union Bldg., Newark, N. J.," and all bills received for crushed stone furnished at Morgan, N. J., in the month of December, 1924 (and which are involved in this suit), were billed on Bound Brook Crushed Stone Company billheads corrected by rubber stamp as aforesaid, and these bills, together with bills for sand and gravel furnished by the defendant F. R. Upton, Inc., were paid by check to F. R. Upton, Inc., as all bills for sand, gravel or crushed stone had theretofore or since been paid.

5. The defendant F. R. Upton, Inc., held itself out, in its representations to deponent and also in

its correspondence, letterheads and billheads, as being dealers in crushed stone, sand, crushed slag, brick, sewer pipe, gravel, hollow tile and cement and never did it or any of its representatives represent to deponent that it acted merely as sales agent. During all of the times of deponent's negotiations with the defendant F. R. Upton, Inc., he was informed and believed and still believes that the crushed stone quarries of the plaintiff, Bound Brook Crushed Stone Company, were and are owned by the defendant F. R. Upton, Inc., or Miss Lucy Upton, its president.

6. During all of the time aforesaid, namely, since the early spring of 1924, when deponent began to purchase sand and gravel and crushed stone from the defendant F. R. Upton, Inc., although deponent has handled all of the transactions of this kind for the jobs conducted in New Jersey by the defendant Wilson & English Construction Company, he has never seen or heard of or from any representative of the Bound Brook Crushed Stone Company either with respect to furnishing materials or with respect to the alleged book account set forth in the complaint filed herein. No representative of the plaintiff, Bound Brook Crushed Stone Company, ever submitted any bids to the defendant Wilson & English Construction Company for crushed stone or other materials. It never communicated by representative, correspondence or by telephone regarding such materials or regarding any alleged book account or alleged sums due to it for furnishing crushed stone or any other materials in December, 1924, or at any other time. The use of crushed stone by the defendant Wilson & English Construction Company at the Morgan job in December, 1924, was made necessary by the failure of the de-

fendant F. R. Upton, Inc., to furnish sand and gravel in conformity with the specifications referred to in the acceptance of their bid, and this default in materials is the basis of the counterclaim filed herein by the defendant Wilson & English Construction Company against the defendant F. R. Upton, Inc. In sending out requests for bids for materials on the several jobs which the defendant Wilson & English Construction Company have had in New Jersey during the past three years, deponent has never requested bids from the plaintiff, Bound Brook Crushed Stone Company, for the reason that from the beginning and during all of that time he has been given to understand both by Mr. Bonnell and by Miss Upton that the latter, or the defendant F. R. Upton, Inc., owned the Bound Brook Crushed Stone quarries and company and that except for different corporate names the interests of the plaintiff, Bound Brook Crushed Stone Company, and the defendant F. R. Upton, Inc., were identical.

7. I never understood that the defendant Wilson & English Construction Company was dealing with the defendant F. R. Upton, Inc., as the sales agents for anybody. Bills for all sand and gravel, no matter where the material came from, were always submitted on the billheads of F. R. Upton, Inc., and these bills did not indicate that F. R. Upton & Company were acting as sales agents, but did indicate that it was selling its own materials to the defendant Wilson & English Construction Company. All the crushed stone ever furnished by the defendant F. R. Upton, Inc., to the defendant Wilson & English Construction Company came from the Bound Brook quarries, which Mr. Bonnell and Miss Upton both said belonged to the de-

fendant F. R. Upton, Inc., and although crushed stone was usually billed on the billheads of "Bound Brook Crushed Stone Co.," these bills were all corrected by rubber stamp, as aforesaid, to read, "F. R. Upton, Inc., Union Bldg., Newark, N. J., sold to Wilson & English Construction Co.," and the defendant Wilson & English Construction Company never paid for any of this material directly to the plaintiff, Bound Brook Crushed Stone Company, but always paid for it by checks drawn to F. R. Upton, Inc., and such payments have always been accepted without question by the defendant F. R. Upton, Inc.

8. During the month of December, 1924, the defendant Wilson & English Construction Company received from the defendant F. R. Upton, Inc., certain commodities covered by the following invoices:

December	4,	1924	Sand	$24.02
"	8,	"	Crushed Stone	408.98
"	11,	"	Sand and Gravel	151.70
"	12,	"	Gravel	339.18
"	12,	"	Sand	225.09
"	16,	"	Sand	125.35
"	16,	"	Gravel and Sand	186.91
"	22,	"	Sand	65.37
"	22,	"	Crushed Stone	2,278.50
"	23,	"	Sand	88.10
"	23,	"	Sand	65.59
"	26,	"	Sand	86.68
"	26,	"	Sand	95.32
"	27,	"	Gravel and Sand	387.70
"	27,	"	Crushed Stone	541.95
"	29,	"	Sand	39.81
"	29,	"	Gravel and Sand	97.06
"	31,	"	Sand	21.50
			Total.....	$5,228.81

of which $1,999.38 was for sand and gravel and $3,229.43 for crushed stone. The work on the job was interrupted during December because certain sand and gravel furnished by the defendant F. R. Upton, Inc., was condemned and rejected by the State Highway Commission and Central Railroad Company of New Jersey. At a conference which I had with Mr. Bonnell in the early part of January, 1925, I drew his attention to the expense incurred by the defendant Wilson & English Construction Company on account of such rejection of materials and it was suggested by Mr. Bonnell that instead of holding up the payment due February 15, 1925, for all the materials furnished during the month of December, 1924, the defendant Wilson & English Construction Company make a payment on account, holding out the sum against which charge might be made for such loss incurred by reason of defective sand and gravel. Accordingly, instead of paying $5,228.81, which was the full amount of the invoices for all material furnished during December, defendant Wilson & English Construction Company paid to the defendant F. R. Upton, Inc., $4,200.00, covering sand, gravel and crushed stone, and leaving a balance of $1,028.81, which is the precise amount claimed as the book account of the plaintiff, Bound Brook Crushed Stone Company. The defendant F. R. Upton, Inc., applied this payment of $4,200.00 to payment for all of the sand and gravel furnished during that month and the balance of $2,200.62 on account of the invoices for crushed stone. I had charge of the payment of these bills and had I known or suspected that the defendant Wilson & English Construction Company was obligated in any way to the plaintiff, Bound Brook Crushed Stone Company, I would have paid the bills for crushed stone separately

and withheld payment of part of the sand and gravel bills because it was the sand and gravel that had been defective and caused the loss involved.

9. The defendant Wilson & English Construction Company has never had any business relations with the plaintiff, Bound Brook Crushed Stone Company, and does not owe it any book account and has never purchased any materials or commodities from it and never knew that the defendant F. R. Upton, Inc., was the sales agent of the plaintiff, Bound Brook Crushed Stone Company. On the contrary, I was informed and believed that the former owned the latter company entirely. If the plaintiff, Bound Brook Crushed Stone Company, was entitled to any money for crushed stone furnished during the month of December, 1924, and if the defendant F. R. Upton, Inc., is the sales agent for the plaintiff, Bound Brook Crushed Stone Company, then the latter should look to the former for payment of such sums because Wilson & English Construction Company made full and complete payment to the defendant F. R. Upton, Inc., for all crushed stone furnished during said month.

10. The defendant Wilson & English Construction Company has a good and valid defense to the above entitled suit on the grounds set forth in the answer and counterclaim served and filed herein on October 25, 1926.

WILLIAM D. LAW.

Sworn and subscribed this 9th day of November, 1926, before me, a foreign commissioner of deeds for New Jersey

in New York, duly commissioned and sworn as witness my hand and official seal.

LAURA E. SMITH,
A Foreign Commissioner of Deeds for
(Seal) New Jersey in New York.

Answering Affidavit of Lawrence C. Bonnell.

(Filed Apr. 29, 1927.)

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

LAWRENCE C. BONNELL, of full age, being duly sworn according to law, upon his oath deposes and says: I am treasurer of F. R. Upton, Inc., a corporation, and one of the sales representatives for that company. Said F. R. Upton, Inc., a corporation, is agent for a number of stone companies, including the Bound Brook Crushed Stone Company, and is in the business of selling crushed stone, trap rock, limestone and cement and other building materials. I have been in the stone business for twenty-five years or more, and have been associated with said corporation, F. R. Upton, Inc., since the year 1921. I am the person referred to in the affidavit made by William D. Law, dated November 9, 1926, on behalf of the defendant Wilson & English Construction Company.

In this suit the Bound Brook Crushed Stone Company demands the sum of $1,028.81 on a book account for stone furnished to said defendant Wilson & English Construction Company under its

contract with the Central Railroad of New Jersey for a highway bridge over its tracks at Morgan, N. J. A few months prior to the furnishing of stone for said job at Morgan, N. J., said Bound Brook Crushed Stone Company had furnished stone to said Wilson & English Construction Company under another contract which it had with the Central Railroad of New Jersey at Somerville, N. J. Said defendant Wilson & English Construction Company ordered said stone for said work at Somerville, N. J., through F. R. Upton, Inc., as sales agent. All bills for stone furnished on said Somerville job were billed to said defendant on the billheads of Bound Brook Crushed Stone Company, and all bills of lading and other evidences of said shipments were in the name of Bound Brook Crushed Stone Company as the shipper; all monthly statements for stone furnished on said Somerville job were prepared on Bound Brook Crushed Stone Company statements forms, on which the name of F. R. Upton, Inc., did not appear in any way, all of said statements and bills being mailed direct from Bound Brook Crushed Stone Company at Bound Brook, N. J., to the defendant Wilson & English Construction Company. I personally took the orders from Wilson & English Construction Company for said stone furnished on the Somerville job, and said Wilson & English Construction Company and its representatives well knew that it was purchasing said stone direct from Bound Brook Crushed Stone Company, and not from F. R. Upton, Inc. The stone on said Somerville job was furnished a few months prior to the furnishing of the stone on the Morgan job, to recover the price of which this suit is being brought. On June 13, 1924, a letter was written to said Wilson & English Construction Company on Bound Brook Crushed Stone Com-

pany letterhead, a copy of which letterhead is attached hereto and marked Exhibit 2, signed "F. R. Upton, Inc., Sales Agent, by L. Upton, Pres." While this letter refers to the stone being furnished on the Somerville job, it indicates conclusively that said Wilson & English Construction Company knew in that case, and long prior to its orders for stone on the Morgan job, that stone was being sold direct by Bound Brook Crushed Stone Company to it through F. R. Upton, Inc., as agent.

In connection with the stone furnished on the Morgan job above mentioned to Wilson & English Construction Company by Bound Brook Crushed Stone Company, as set forth in the complaint, I find that F. R. Upton, Inc., by its letter to Wilson & English Construction Company, dated August 5, 1924, first quoted the price of stone for said job to said defendant Wilson & English Construction Company. On the following day, August 6, 1924, said F. R. Upton, Inc., agent, wrote the defendant as follows: "Supplementing our letter of August 5, the gravel quoted on is ¾" and the stone similar to what you are now getting at Somerville." On or about November 18, 1924, said defendant, through said F. R. Upton, Inc., put in its first order for stone on the Morgan job. Thereafter stone was regularly shipped to said job as ordered, as set forth in the affidavit of L. Upton, hereto attached.

I have read the affidavit of William D. Law, dated November 9, 1926, and note that, in Paragraph 3 thereof, said Law states that he is the only officer of the defendant with whom said F. R. Upton, Inc., had any correspondence, conferences or negotiations. I state that from time to time eleven bills or statements of account, and at least twelve

letters from time to time were mailed and written to said defendant, all on the billheads and letterheads of Bound Brook Crushed Stone Company, the dates on which said bills and letters were sent being particularly set forth in the affidavit of L. Upton, hereto attached, all of said bills and letters being mailed to said defendant corporation Wilson & English Construction Company at its New York address, 50 Church Street, New York City, in the regular course of business. I further state that I never represented in any way or manner, as stated in Law's affidavit, that the quarries at Bound Brook, from which the stone ordered by said defendant for its work at Morgan, N. J., would be shipped, were owned by F. R. Upton, Inc., or anyone else except the Bound Brook Crushed Stone Company. I further state that it was well known to said Law and the other officers and representatives of said defendant that F. R. Upton, Inc., which company I represented in making said sales, was only acting in its usual capacity of agent for the Bound Brook Crushed Stone Company, which company was furnishing the stone for said work. I note that said Law, in Paragraph 4 of his affidavit, admits that the bills for said stone sent to said defendant were on Bound Brook Crushed Stone Company billheads. He states, however, that said billheads were corrected by rubber stamp to read "F. R. Upton, Inc., Union Building, Newark, N. J." Said billheads were on the Bound Brook Crushed Stone Company billhead form hereto attached and marked Exhibit 1, and the rubber stamp to which said Law refers in his affidavit merely corrected the name of the agent, as set forth on the left-hand side of said billhead, under the heading "Branch Office" to read "F. R. Upton, Inc.," instead of "F. R. Upton." It is evi-

dent from an examination of Exhibit 1 that said rubber stamp is in no way misleading as to the identity of the corporation to which the account set forth on said billhead is due, but, on the contrary, said rubber stamp merely emphasizes the fact that said F. R. Upton, Inc., is agent for said Bound Brook Crushed Stone Company, and not the real party at interest.

The usual letterhead of said F. R. Upton, Inc., is hereto attached and marked Exhibit 5. As stated in the affidavit of said L. Upton, in connection with most of the transactions relating to the furnishing of stone on the Morgan job, the F. R. Upton, Inc., letterheads were not used, but the Bound Brook Crushed Stone Company letterheads were used, and likewise its billheads. The bills of lading for all stone shipped to Morgan, N. J., were made out in the name of Bound Brook Crushed Stone Company as shipper. I note that said Law states in Paragraph 5 of his affidavit that during all of his negotiations in this matter he believed, and still believes, that the Bound Brook Crushed Stone quarries were owned by defendant F. R. Upton, Inc., or Miss Lucy Upton, its president. In view of the former transactions relating to stone shipped on the Somerville job, and the letter of June 13, 1924, above referred to, and in view of the fact that I at all times distinctly informed Mr. Law that stone for this job would be furnished by the Bound Brook Crushed Stone Company, I am at a loss to understand the statement contained in his affidavit, as above mentioned.

As to Mr. Law's statements in Paragraph 6 of his affidavit, I reiterate that at all times in my dealings with him it was distinctly known and understood that the stone for the Morgan job was being furnished by the Bound Brook Crushed

Stone Company, and that F. R. Upton, Inc., which company I represented, was acting merely as sales agent. I deny the statement made in Paragraph 6 of Law's affidavit that the use of stone on this job was made necessary by the failure of F. R. Upton, Inc., to furnish sand and gravel in conformity with the specifications. I state that the sand and gravel furnished on said job had been accepted and used on said job by the defendant, and that, because of defendant's delay in ordering the material forward before the cold weather set in, it became necessary for the defendant to use stone, instead of gravel, in said work. Shipments of stone were ordered by defendant beginning on or about November 18, 1924. Stone was ordered and used in said work by said defendant nearly a month before any question arose as to the compliance of the materials furnished by plaintiff with the specifications. Later on, through no fault of the plaintiff, due to the fact that the progress of said work was interfered with, and due to the fact that defendant had ordered forward more material than it could take care of, the stone furnished by plaintiff, Bound Brook Crushed Stone Company, was allowed to remain on the tracks of the New York & Long Branch Railroad Company, and demurrage accrued against said shipments amounting to about $1,100.00.

I deny that I ever stated to said Law that the quarries from which the crushed stone came were owned by F. R. Upton, Inc., a corporation, as stated in Paragraph 7 of Law's affidavit. I note that said Law admits that all bills for crushed stone were billed on the billheads of Bound Brook Crushed Stone Company, but says that these billheads were corrected by rubber stamp, all of which I have referred to above in my affidavit, and all of

which is explained more fully by Exhibit 1. I note that in Paragraph 8 of his affidavit, said Law sets forth, item by item, all materials shipped during December, 1924. In answer thereto, I state that all stone shipments were billed on billheads of Bound Brook Crushed Stone Company, all bills of lading for stone were made out in the name of Bound Brook Crushed Stone Company (see copy of Bill of Lading—Exhibit 6), and all payments made by the defendant for stone shipped on said job were transmitted by F. R. Upton, Inc., as agent, to said Bound Brook Crushed Stone Company. I state that the rejection of materials mentioned by Law in Paragraph 8 of his affidavit was due to no fault of the plaintiff, Bound Brook Crushed Stone Company, or F. R. Upton, Inc., as all materials were furnished in accordance with the terms of the contract or orders between Bound Brook Crushed Stone Company and said defendant. Said materials were all later accepted for the work, and used in the work, but, as above stated, a delay occurred, and demurrage charges accrued against the shipments of stone made by the plaintiff, Bound Brook Crushed Stone Company. I further state that the defendant Wilson & English Construction Company was warned not to order materials faster than they could be used in the work, but that defendant undertook to order more stone than could be used at one time in the work, and hence the materials were allowed to remain on the tracks and demurrage charges accrued. I deny, as stated in Paragraph 8 of Law's affidavit, that the sand and gravel furnished in connection with this job were defective and in any way responsible for the loss alleged by the defendant to have been incurred. I state that said materials in all respects complied with the terms of the con-

tract and orders given by the defendant for said materials. Attached hereto, and marked Exhibit 4, is a copy of a letter written by Wilson & English Construction Company, the defendant herein, to A. E. Owen, Chief Engineer, Central R. R. Co. of N. J., dated November 16, 1925, in which letter said defendant outlines the facts and circumstances relating to the interference with the work on the Morgan job, and makes claim against said Central R. R. Co. of N. J. for the sum of $1,154.00, being the amount of demurrage charges incurred by said defendant owing to the fact that the materials for the job, including the stone mentioned in the complaint in this case, remained on the railroad tracks for several days before they were unloaded. I state that the real reason and underlying cause for the defendant's refusal to pay the amount due Bound Brook Crushed Stone Company, as set forth in the complaint, is the fact that said defendant Wilson & English Construction Company has failed to make settlement of its claims against the Central R. R. Co. of N. J., as set forth in its said letter of November 16, 1925, marked Exhibit 4.

In conclusion, I state that at all times in my dealings with the defendant Wilson & English Construction Company, I made it known distinctly that all stone ordered by them for the work at Morgan, N. J., would be furnished by the Bound Brook Crushed Stone Company, which company F. R. Upton, Inc., represented as sales agent. I have never at any time informed Mr. Law or any other person connected with Wilson & English Construction Company, the defendant herein, or any other person or corporation, that F. R. Upton, Inc., was the owner of the quarries from which the stone was being shipped. Due credit has been given to said defendant Wilson & English Con-

struction Company for all payments made on account of stone, and there remains a balance due Bound Brook Crushed Stone Company on this account amounting to $1,028.81, with lawful interest. I deny that said defendant Wilson & English Construction Company has a good and valid defense to the action brought by Bound Brook Crushed Stone Company. I state that all of the stone mentioned in the complaint was furnished to said defendant and used in the work at Morgan, N. J., and that the amount above stated, to wit, $1,028.81, together with lawful interest, remains due and unpaid for the same.

LAWRENCE C. BONNELL.

Sworn to and subscribed before me
this 22nd day of December, 1926.

JOHN J. McDONOUGH,
Notary Public of New Jersey.
(L. S.)

BRANCH OFFICE
F. R. UPTON, UNION BLDG.
NEWARK, N. J.

Terms and Conditions of Sale

Cash settlements to be made monthly, on or before the fifteenth of each month to cover in full, all shipments of the previous month.

All contracts and agreements are contingent upon strikes, accidents, delays of carriers or other delays unavoidable and beyond our control.

No claims allowed unless made within ten days from date of shipment.

Shipments made in carloads only, R. R. weight to govern.

Quotations subject to change without notice.

QUARRIES
ON C. R. R. OF N. J.

F. R. UPTON, Inc.
UNION BLDG.,
NEWARK,
N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

BOUND BROOK, N. J.

LONG DISTANCE TELEPHONES { OFFICE No. 5; RESIDENCE, No. 39-J AND L

SOLD TO

ADDRESS

SHIPPED TO

YOUR ORDER NO. F. O. B.

MADE BY BAKER-VAWTER CO.

DATE	INITIALS	CAR NO.	SIZE	WEIGHT	AMOUNT	TOTAL

EXHIBIT 1.

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen years and sixteen years were employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock p. m., or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

45 346 W

Exhibit 1.

TERMS AND CONDITIONS OF SALE

Terms net cash. All contracts and agreements are contingent upon strikes, accidents or delays unavoidable and beyond our control. No claims allowed unless made within 10 days from date of shipment. Shipments made in carloads only, R. R. weight to govern. Quotations subject to change without notice and made for shipments only during the open season, April to December. Winter shipments are subject to extra charge and prior sale of stock on hand.

BOUND BROOK CRUSHED STONE CO.

QUARRIES:

Trap Rock
BOUND BROOK, N. J.

Limestone
VERNOY, N. J.

GENERAL OFFICES
17 SOUTH ST., MORRISTOWN, N. J.

TRAP ROCK AND LIMESTONE

QUARRIES ON CENTRAL R. R. OF N. J.

PLANT OFFICE:

Bound Brook, N. J.
J. L. HAELIG, Sec'y-Treas.

Newark, N. J.
F. R. UPTON, Inc., Sales Agents
808 Union Building, 9 Clinton St.

Exhibit -2-

Exhibit 2.

Exhibit 3.

WILSON & ENGLISH CONSTRUCTION COMPANY
Incorporated
General Contractors

July 16th, 1925.

Bound Brook Crushed Stone Co., 10
Bound Brook, N. J.

Gentlemen :—

Attached please find correspondence which is self explanatory. Please advise.

Yours truly,

WILSON & ENGLISH CONST. CO., 20

By (Signed) WM. D. LAW.

WDL.

30

40

Exhibit 4.

November 16th, 1925.

File—No. 5676-M

Subject—Bridge 3/03, Morgan, N. J.

A. E. Owen, Chief Engineer,
Central R. R. Co., of N. J.,
Jersey City, N. J.

Dear Sir:—

Please refer to your letter of October 1st, 1925, in which you suggest that we have the facts clearly set forth regarding the demurrage accrued due to the condemning of the concrete material by the State Engineer on December 13th, 1924, at Morgan, N. J. The facts were as stated, the details are as follows:

On Saturday morning, December 13th, about eleven thirty o'clock, Mr. Vogel, Bridge Engineer, New Jersey State Highway Department, arrived at Morgan, N. J. He went over our work and also examined the concrete aggregate we were using and informed our superintendent that the aggregate material was unsatisfactory and that we must not unload any more material until he further advised us, although there were five cars standing on our siding at the job, which we were intending to use and unload that afternoon.

Our Mr. Law, arriving on the job shortly after Mr. Vogel's departure, immediately called Mr. VanNess's office on the telephone and advised him of the circumstances above stated, about twelve fifteen o'clock of the same day. As we were concreting one construction section at that time, we completed the same, and on the following two days, finished this section of the abutment to the bridge

seat, with the material which was already unloaded and stored on the ground when Mr. Vogel was there the previous Saturday. The concreting we did on the 18th was with a mixture of gravel with stone we had on the ground from a previous shipment.

Had these orders not been issued by Mr. Vogel, we would have unloaded on Saturday the five cars then on the siding, on Sunday ten additional cars, and on Monday the other cars in transit as they arrived, we having previously prepared a storage site for the same.

On Wednesday, the 17th, the concrete aggregate was again inspected by the State Highway Commission with representatives of the Bennett Sand & Gravel Co. and F. R. Upton, Inc., and on the 18th, we received word thru your inspector, that the gravel aggregate could be used if we would mix the gravel with equal amounts of a special size crushed stone, and that the gravel and stone must be unloaded and piled together, in other words, we could unload an equal number of cars of gravel and stone at the same time, so that he could see that the same was properly mixed. We were also requested to use Lakewood sand.

We immediately ordered crushed stone and stopped the shipments of sand and gravel, (of which there were more than thirty cars in transit) and it was this waiting for the stone, and the necessity of unloading the accumulated gravel and stone together that caused the great delay and accumulation of demurrage charges on the sand, gravel and stone cars after this date.

In this connection we wish to call your attention to the fact that the sand and gravel used on this work was approved by your office before order for same was placed, and that similar sand and

gravel from the same company, has been and is being used on other jobs under your supervision. The increased cost to us of the sand and stone which we were required to purchase to complete the work, amounted to $1.00 more per cubic yard of concrete for the 3,000 yards that were placed after this date.

There is no question but that the delay on account of the condemning of the gravel and the waiting for the stone caused the great amount of demurrage that accumulated after these dates, and we feel sure that when you consider these facts as we have stated, you will allow us this item of $1,154.00. On other jobs that we have done for your company, our demurrage charges on concrete material, have not amounted to more than $10.00 per month, and under as favorable conditions at Morgan, there is no reason why our bills should have exceeded this amount, other than thru the causes above stated.

We shall be glad to take this matter up with you personally, should you so desire.

Very truly yours,

WILSON & ENGLISH CONSTRUCTION CO.
Treasurer.

CWSW/SIE

Exhibit 5.

Wholesale
CRUSHED STONE
SAND
CRUSHED SLAG
GRAVEL
SEWER PIPE
CEMENT
HOLLOW TILE

F. R. UPTON, Inc.

707 Union Building, 9 Clinton Street

NEWARK, N. J.

Telephone
Market 4710

All contracts and agreements are contingent upon strikes, accidents, delays of carriers, car and coal supply and other conditions unavoidable and beyond our control. Railroad shipments are made in carload lots only, R. R. Weights aud tariffs to govern. Quotations subject to change without notice and are made for shipments only during the current open season, April to December. Winter shipments are subject to extra charge and prior sale of stock on hand. After the material is delivered to the Railroad Company it becomes the property of the consignee. Terms Cash

EXHIBIT 5.

EXHIBIT 6.

Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922.

Uniform Straight Bill of Lading—Original—Not Negotiable.
(PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION)

CENTRAL RAILROAD CO. OF NEW JERSEY

Shipper's No. ____
Agent's No. 161

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

At Bound Brook, N. J. Nov. 20, 1924 **From BOUND BROOK CRUSHED STONE COMPANY**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to Wilson & English (Mail or street address of consignee—For purposes of notification only.)

Destination Morgan, N. J. State of ____ County of ____

Route NYS & LBRR

____ (Delivering Carrier)

No. Packages	THE FOLLOWING CARS OF CRUSHED STONE, SAND OR GRAVEL Initial	Car No.	Size	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
	CRR	85653	Mason Cons.	98500		
		84658		101200		

Copy

Box 131 So. Amboy

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.
(See Section 7 of conditions.)

____ (Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be prepaid."

Collect

Received $____ to apply in prepayment of the charges on the property described hereon.

____ Agent or Cashier
Per ____
(The signature here acknowledges only the amount prepaid.)
Charges Advanced:
$____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ____.

per ____
BOUND BROOK CRUSHED STONE COMPANY, Shipper ____ Agent

Per A. T. H.
Permanent post-office address of shipper, Bound Brook, N. J.

Per ____
PARAGON (TRADE MARK)—MFD. BY AM. SALES BOOK CO., LTD., NIAGARA FALLS, N. Y.

Exhibit 6.

Answering Affidavit of Lucy Upton.

(Filed Apr. 29, 1927.)

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

LUCY UPTON, of full age, being duly sworn according to law upon her oath, deposes and says: I am the president of F. R. Upton, Inc., a corporation of the State of New Jersey, as stated in my former affidavit herein, dated November 3, 1926. I have read the affidavit made by William D. Law, of Wilson & English Construction Company, a corporation, the defendant in this suit, and in answer thereto I state as follows:

1. Mr. Law states in Paragraph 4 of his affidavit, "When the bills came, the billheadings of Bound Brook Crushed Stone Company were corrected by rubber stamp to read, 'F. R. Upton, Inc., Union Bldg., Newark, N. J.'" Attached hereto and marked, Exhibit 1, is a copy of the billhead on which all bills for stone due to Bound Brook Crushed Stone Company, as stated in the complaint, were sent to the defendant Wilson & English Construction Company, a corporation. As will be observed from an inspection of said billhead, the name F. R. Upton, Union Bldg., Newark, N. J., appears in a square on the left-hand side of the billhead. Owing to Mr. Upton's death some years ago and the formation of a company bearing his name, a rubber stamp was procured and the words, "F. R. Upton, Inc., Union Bldg., Newark, N. J.," were stamped over the name, F. R. Upton, in said square on the left of said billhead. All bills sent to said Wilson & English Construction Company for the stone mentioned in the complaint were on billheads of Bound Brook Crushed Stone Company, a copy of which is attached hereto and

marked, Exhibit 1. Regular statements were rendered to said defendant Wilson & English Construction Company by said Bound Brook Crushed Stone Company, all on statement forms, copy of which is attached hereto, marked Exhibit 5, on which the name, F. R. Upton, Inc., does not appear as agent or otherwise, on the following dates and in the following amounts:

Oct. 13, 1924	$2914.02
Nov. 13, "	1226.23
May 29, 1925	1028.81
Aug. 25, "	2787.34
Oct. 14, "	1448.06
Nov. 18, "	1028.81
Mar. 8, 1926	1229.42
" 24, "	1229.42
May 11, "	1028.81
June 7, "	1028.81
Sept. 20, "	1028.81

I further state that said Wliliam D. Law and other officers, agents and representatives of defendant Wilson & English Construction Company well knew that F. R. Upton, Inc., was acting as sales agent in this matter for Bound Brook Crushed Stone Company, a corporation, and that letters in connection with the transactions mentioned in the complaint were written to Wilson & English Construction Company on letterheads of Bound Brook Crushed Stone Company on the following dates: June 13, 1924, Jan. 15, 1925, April 3, 1925, July 15, 1925, Oct. 19, 1925, Jan. 27, 1926, Feb. 15, 1926, March 9, 1926, April 20, 1926, May 15, 1926, July 15, 1926, Sept. 8, 1926, a copy of which letterhead is hereto attached and marked, Exhibit 2. Furthermore, on July 16, 1925, said Wilson & English Construction Company, by William D. Law, wrote direct to Bound Brook Crushed

Stone Company, at Bound Brook, New Jersey, a letter in the above entitled matter, a copy of which is hereto attached and marked, Exhibit 3.

2. I note that Mr. William D. Law, in said Paragraph 4 of his affidavit, states that Mr. Bonnell, of F. R. Upton, Inc., said that we would furnish crushed stone "from our quarries at Bound Brook." I state that said F. R. Upton, Inc., a corporation, has been in the business of acting as agent for various stone companies for about ten years last past with offices on Clinton Street, Newark, New Jersey, and that said F. R. Upton, Inc., is well known in the trade as such agent; that said F. R. Upton, Inc., a corporation, succeeded to the agency business of F. R. Upton, who had been in said business since the year 1905, until the time of death in the year 1921, at the same address in Newark, New Jersey; that the name, F. R. Upton, as sales agent for the Bound Brook Crushed Stone Company, and other quarry companies is well known generally throughout the state of New Jersey, and has been well known as such agent for more than twenty years; that the expression, "our quarries," is frequently used to refer to the quarries of the various companies for which said F. R. Upton, Inc., so acts as sales agent; and that it was clearly stated to said Law at the time the order for said stone was entered that said stone would be furnished by Bound Brook Crushed Stone Company, and that F. R. Upton, Inc., was merely acting as sales agent in the transaction. Furthermore, as above stated, many letters and all billheads sent to said Wilson & English Construction Company from time to time in connection with this account had clearly stated and printed upon them the words, in small type near the name, Bound Brook Crushed Stone Com-

pany, "F. R. Upton, Inc., Sales Agents," or "Branch Office, F. R. Upton, Inc., Union Bldg., Newark, N. J." Deponent denies that said F. R. Upton, Inc., ever held itself out to be the owner of the quarry or quarries from which the crushed stone mentioned in the account attached to the complaint was shipped.

3. In Paragraph 6 of his affidavit, said Law states that he had been given to understand by both Mr. Bonnell and by Miss Upton that she or F. R. Upton, Inc., owned the Bound Brook Crushed Stone Company quarries, and that, except for different corporate names, the interests of the plaintiff, Bound Brook Crushed Stone Company, and the defendant F. R. Upton, Inc., were identical. I deny said statements made by said Law and I state that I never, personally, have had any dealings with said Law, or made any statements to him over the telephone or otherwise. I have never seen said Law or conversed with him, and I deny that I made the statements above referred to or in any way caused Mr. Law to understand the facts stated by him concerning the ownership of the Bound Brook Crushed Stone Company quarries.

4. I state that a few months prior to the furnishing of stone by said Bound Brook Crushed Stone Company to said defendant for its work at Morgan, New Jersey, on which job the stone mentioned in the complaint was sold and delivered to said defendant, said Bound Brook Crushed Stone Company had furnished stone to it under another contract which it had with the Central Railroad of N. J., at Somerville, New Jersey, and that in connection with said contract at Somerville, New Jersey, a letter was written to said defendant Wilson & English Construction Company dated June

13, 1924, on letterhead of Bound Brook Crushed Stone Company signed "F. R. Upton, Inc., Sales Agent, by L. Upton, Pres.," which letter stated prices, sizes, etc., of the stone to be furnished on the work. On August 5, 1924, said F. R. Upton, Inc., as agent, first quoted to said defendant prices for stone on its work at Morgan, New Jersey, and on August 6, 1924, the day following, said F. R. Upton, Inc., wrote said defendant Wilson & English Construction Company as follows: "Supplementing our letter of August 5th the gravel quoted on is ¾″ and the stone similar to what you are now getting at Somerville."

5. I further state that the fact that said F. R. Upton, Inc., was merely sales agent for Bound Brook Crushed Stone Company for all stone sold and delivered to defendant on its job at Morgan, New Jersey, was well known to said defendant Wilson & English Construction Company and to its agent and representative, William D. Law. I further state that the real and underlying reason for the failure of said defendant to pay the bill of said Bound Brook Crushed Stone Company is set forth in a letter written by said defendant to Central Railroad of N. J., dated November 16, 1925, and marked Exhibit 4, which letter is more particularly referred to in the affidavit of Lawrence C. Bonnell, Treasurer of said F. R. Upton, Inc., hereto attached.

LUCY UPTON.

Sworn and subscribed to before me
this 27th day of December, 1926.

JOHN J. McDONOUGH,
Notary Public of New Jersey.
(Seal)

Answering Affidavit of Lucy Upton.

(Filed Apr. 29, 1927.)

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

LUCY UPTON, of full age, being duly sworn, deposes and says: I am the same person who executed an affidavit in this matter, dated December 27, 1926. In that affidavit I refer to Exhibit No. 3, attached thereto, which exhibit is a copy of a letter written by Wilson & English Construction Company to Bound Brook Crushed Stone Company. Said Exhibit 3 refers to correspondence which was not attached to my former said affidavit.

Attached hereto are copies of the letters and correspondence referred to in said Exhibit 3, said original letters being in my possession—one written by Wilson & English Construction Company to Central Railroad Company of N. J., dated July 2, 1925, and the other written by F. M. Snyder, Auditor Freight Traffic, Central Railroad Company of New Jersey, to Wilson & English Construction Co., dated July 13, 1925. These letters have reference to stone furnished by Bound Brook Crushed Stone Company on the job at Morgan, New Jersey, mentioned in the affidavits heretofore made in this matter, which is the same job on which the stone, which is the subject-matter of this suit, was furnished by Bound Brook Crushed Stone Company to said Wilson & English Construction Company.

LUCY UPTON.

Sworn to and subscribed before me
this 22nd day of April, 1927.

SUSIE O'CONNOR,
Notary Public
of New Jersey.
(Seal)

Copy.

WILSON & ENGLISH CONSTRUCTION COMPANY
INCORPORATED

General Contractors

Main Office
50 Church Street
New York, N. Y.

Telephone
6845 Cortlandt

July 2nd, 1925.

Central Railroad Co. of N. J.,
Freight Claim Dept.,
143 Liberty Street,
N. Y. City.

Gentlemen:

Attached please find freight bill 6/1042, for $168.97, covering car of stone from Lambertville to Perth Amboy, N. J.

This stone was originally consigned to us at Morgan, N. J. but we found that it would exceed the quantity needed, so we notified the Bound Brook Crushed Stone Co. to reconsign to us at Perth Amboy, C. R. R. delivery—they claim that thru the P. R. R. Agent at Perth Amboy they did this, he, however, claims that no mention was made about delivery and that he presumed that it was a P. R. R. delivery, this reconsignment was made at Trenton.

Our contention is that practically every resident in Perth Amboy knows that we are working for the Central Railroad Co. and the freight agent there particularly knows this, we feel that if no mention was made of delivery, but we are very much inclined to think that this was mentioned, in any event, he should have made the reconsignment a

C. R. R. delivery. We also feel that we should receive at any rate the advantage of a commodity rate, we can ship this stone in from Bound Brook for $0.92 per ton, and we do not think we should be charged double for an inter-city movement. We could easily have trucked this material for one mile for fifty cents per ton.

On our job at Perth Amboy there will be at least 20,000 ton of sand-gravel-stone shipped in there this year, we can ship it in cheaper by scow than by rail, but we want to reciprocate for the work we are receiving from the C. R. R. but occasions like the above do not help our otherwise pleasant relations. If you can help us in this matter, it would be appreciated very much.

Yours truly,

WILSON & ENGLISH CONST. CO.,
W. D. LAW,
Paymaster.

WDL.

(*Copy*)

Enclosure.

FREIGHT BILL.

6/25/25

Perth Amboy N. J. Station
Freight Bill No. 6/1042

Wilson English Cons Co
Consignee
Destination
Route PRR PA JCT OAK ISLAND JCT CRR

To
The Central Railroad Company of New Jersey, Dr.
For charges on articles transported.

Way-billed from: Perth Amboy N J
Way-Bill Date and No.: 6/19 256
Full name of Shipper: Wilson & English
Car Initial and No.: PRR 270037
Point and Date of Shipment: Originally Billed
Connecting Line Reference: Lambertville N. J.
Previous Way-Bill Reference: Reconsigned Authy of W & E Const Co.
Original Car Initial and No.: 6/18/5

Number of Packages, Articles and Marks	*Weight*	*Rate*	*Freight*	*Advances*	*Total*
C/L Crushed Stone	109200	9/5	10374		
Demurrage				600	
R/C				630	
Frt Ins				5033	
Deversion				270	16897
146100					
36900				6523	
75 D/D ½ inch					
25 D/D ¾ inch					
SL&C 109200					

The Central Railroad Co. of N. J.
Perth Amboy N. J.
Paid July 1st, 1925
S. Garis, Agent

(*Copy*)

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.
Accounting Department.

10 Jersey City, N. J.

July 13, 1925

Audit H 10743-SK

Wilson & English Construction Co.,
50 Church Street,
New York, N. Y.

20 Gentlemen:

Returning herewith your letter of the 2nd inst. representing alleged overcharge on car of crushed stone delivered in error to the Pennsylvania RR. at Perth Amboy, desire to state that in order to place your claim under proper investigation it will be necessary to furnish us with copy of reconsigning orders issued by the Bound Brook Crushed Stone Co. If this order called for CRR delivery at Perth Amboy we will be in a position to handle claim
30 promptly and reimburse your company for any overcharge that may have accrued through this error.

Yours truly,

F. M. SNYDER
Auditor Freight Traffic

40

Memorandum Decision.

NEW JERSEY SUPREME COURT.

(Filed Apr. 30, 1927.)

BOUND BROOK CRUSHED STONE COMPANY

vs.

WILSON & ENGLISH CONSTRUCTION COMPANY.

10

On motion to strike out answer and for summary judgment.

Before PARKER, J., at Chambers.
For the plaintiff: HARRISON & ROCHE. 20
For the defendant: HOBART & MINARD.

MEMORANDUM.

This is an action on a book account of goods sold and delivery. No question arises as to the delivery, or quantity or quality of the goods (crushed stone) nor as to the amount. The defense as developed on the affidavits is that the stone was not purchased from the plaintiff but from another and independent corporation called F. R. Upton, Inc., 30 to whom, if to anyone, defendant is liable, and against whom defendant asserts a counterclaim substantially equal to the claim sued on. As authorized by the existing practice, defendant brought in F. R. Upton by an independent summons in this action, to which is attached a complaint asserting the counterclaim against F. R. Upton, Inc.

I am not concerned on this motion with the question whether defendant has a valid claim against 40

F. R. Upton, Inc. The question before me is whether the plaintiff or F. R. Upton, Inc., is the owner of the primary claim for the stone.

The answer denies the complaint generally and denies any purchase from or account with plaintiff. There is an "objection in point of law" which was not passed, I think, at the argument, and which appears to be without substance.

Touching the denials in the answer there can be no question but that the stone delivered came from the quarries of the plaintiff and was consigned by plaintiff directly to defendant by rail. It is plain also that the sale was made through F. R. Upton, Inc., as "sales agent" or "branch office" of plaintiff, operative in an office building at Newark and without any physical possession of the property or of any muniments of title thereto. Whether defendant honestly believed it was buying crushed stone from F. R. Upton, Inc., under representations on which it was entitled to rely and for which plaintiff is accountable, may be in dispute, but on the papers before me there can be no doubt that F. R. Upton, Inc., was an agent or agency of plaintiff, and that the plaintiff was a principal, disclosed or undisclosed; just which, seems immaterial for present purposes, because the counterclaim is asserted only against F. R. Upton, Inc., and not against the plaintiff.

It appearing, therefore, that the plaintiff is the principal in the transaction and the real creditor, and no counterclaim being asserted as against it, judgment may be entered for the face of the claim on filing the usual assessment of damages.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Assessment of Damages—Affidavit.

NEW JERSEY SUPREME COURT,

SOMERSET COUNTY.

(Filed May 7, 1927.)

BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION COMPANY, INC., a corporation, Defendant.	Action at Law.

STATE OF NEW JERSEY, COUNTY OF } SS.:

I, W. WORTMAN, of full age, being duly sworn according to law, on his oath deposes and says: I am the President of Bound Brook Crushed Stone Company, the plaintiff in the above entitled case, and I am personally familiar with the account of said plaintiff against Wilson & English Construction Company, a corporation, the defendant above named.

Said defendant Wilson & English Construction Company is indebted to plaintiff, Bound Brook Crushed Stone Company, in the sum of Ten Hundred and Twenty-eight Dollars and Eighty-one Cents ($1,028.81), as shown on the book account, a true copy of which is attached hereto, said account being for crushed stone sold and delivered to said

defendant by said plaintiff at the times, in the amounts and for the prices stated in said account.

Deponent further says that the balance due from said defendant to said plaintiff is the sum of Ten Hundred and Twenty-eight Dollars and Eighty-one Cents ($1,028.81), as above stated, together with interest thereon from the 1st day of February, 1925, amounting to the further sum of $138.89, making a total due to plaintiff, Bound Brook Crushed Stone Company, a corporation, from said defendant Wilson & English Construction Company, a corporation, with interest as aforesaid, of Eleven Hundred and Sixty-seven Dollars and Seventy Cents ($1,167.70). Deponent further says that no part of said sum of $1,167.70 has been paid; that there are no credits, set-offs or counterclaims to the same, but that said sum of $1,167.70 remains still due, owing and unpaid to plaintiff from defendant.

I. W. WORTMAN.

Sworn to and subscribed before me
this 4th day of May, 1927.

CLAYTON W. TOYE,
Notary Public of N. J.

(Seal)

My Commission Expires Dec. 1, 1930.

(*Copy*)

STATEMENT

Bound Brook, N. J.,

September 20, 1926.

Wilson & English Construction Co., Inc.,
Box 131,
South Amboy, N. J.

To BOUND BROOK CRUSHED STONE CO., Dr.

MACHINE BROKEN TRAP ROCK

Dec. 8, 1924	Bill Rendered	$408.98		Feb. 20	Cash on account,	$2200.62
" 22, 1924	do	2278.50			Balance due,	1028.81
" 27, 1924	do	541.95				
		$3229.43				$3229.43

Balance due..... $1028.81

Branch Office
F. R. UPTON INC.
Union Bldg., Newark, N. J.

TERMS AND CONDITIONS OF SALE.

Cash settlements to be made monthly, on or before the fifteenth of each month to cover in full all shipments of the previous month.

All contracts and agreements are contingent upon strikes, accidents, delays of carriers or other delays unavoidable and beyond our control.

No claims allowed unless made within ten days from date of shipment.

Shipments made to carloads only. R. R. weight to govern.

Quotations subject to change without notice.

Quarries
ON C. R. R. OF N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

Bound Brook, N. J.
December 8, 1924

Long Distance Telephones {Office No. 2 / Residence 299-M & 39-M

Sold to

Wilson & English Construction Co., Inc.,

Address: Box 131,

South Amboy, N. J.

Shipped to Morgan, N. J.

Your Order No. F. O. B. Quarry.

Date	Initials	Car No.	Size	Weight	Amount	Total
Dec. 5	CRR	85725	Reinforced Concrete	102900 lbs.		
		81333		94300 "		
6		88091		87700 "		
		88025		87900 "		
		81600		86000 "		
		82025		86500 "		
				545300 "		
				272.65 Tns.		
				@ $1.50	$408.98	

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen and sixteen years were employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock p. m. or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

Branch Office
F. R. UPTON INC.
Union Bldg., Newark, N. J.

TERMS AND CONDITIONS OF SALE.

Cash settlements to be made monthly, on or before the fifteenth of each month to cover in full all shipments of the previous month.

All contracts and agreements are contingent upon strikes, accidents, delays of carriers or other delays unavoidable and beyond our control.

No claims allowed unless made within ten days from date of shipment.

Shipments made to carloads only. R. R. weight to govern.

Quotations subject to change without notice.

Quarries
ON C. R. R. OF N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

Bound Brook, N. J.
Dec. 22, 1924

Long Distance Telephones {Office No. 2 / Residence 299-M & 39-M

Sold to

Wilson & English Construction Co., Inc.,

Address: Box 131,

South Amboy, N. J.

Shipped to Morgan, N. J.

Your Order No. F. O. B. Quarry.

Date	Initials	Car No.	Size	Weight	Amount	Total
	Reinforced Concrete			1½-¾" Con.		
Dec. 16	CRR—81017	85400 lbs.	Dec. 17	CRR—80025	81000 lbs.	
	84256	97600 "		85902	100800 "	
	81708	84400 "		88392	87300 "	
17	81655	82100 "		81869	85600 "	
	80233	80700 "		88391	89400 "	
	82083	83600 "		82111	93500 "	
19	81816	83300 "	18	85114	103300 "	
	81909	86200 "		88261	89300 "	
	81620	82900 "		81405	89200 "	
	82266	86100 "		81846	90300 "	
	81791	89300 "		82212	88600 "	
	85325	107300 "		80066	82300 "	
	84229	103300 "				
20	81287	83200 "				
	80195	87900 "				
	80005	90100 "				
	81103	88100 "	Total:	3038000 lbs.		
22	82276	91000 "		1519 Tons—		
	80571	92300 "		@ $1.50	$2278.50	
	82205	92200 "				
	82174	89100 "				
	80048	91300 "				

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen and sixteen years were employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock p. m. or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

Branch Office
F. R. UPTON INC.
Union Bldg., Newark, N. J.

TERMS AND CONDITIONS OF SALE.

Cash settlements to be made monthly, on or before the fifteenth of each month to cover in full all shipments of the previous month.

All contracts and agreements are contingent upon strikes, accidents, delays of carriers or other delays unavoidable and beyond our control.

No claims allowed unless made within ten days from date of shipment.

Shipments made to carloads only. R. R. weight to govern.

Quotations subject to change without notice.

Quarries
ON C. R. R. OF N. J.

BOUND BROOK CRUSHED STONE CO.

MACHINE BROKEN TRAP ROCK

Bound Brook, N. J.
Dec. 27th, 1924

Long Distance Telephones {Office No. 2 / Residence 299-M & 39-M}

Sold to

Wilson & English Construction Co., Inc.,

Address: Box 131,

South Amboy, N. J.

Shipped to Morgan, N. J.

Your Order No. F. O. B. Quarry.

Date	Initials	Car No.	Size	Weight	Amount	Total
Dec. 24	CRR	81528	1½-¾"	87600 lbs.		
		85072		103400 "		
		81398		88000 "		
		80866		91600 "		
		80077	Massed Concrete	85300 "		
		80446		86900 "		
		84957		84800 "		
		80817		85000 "		
				722600 "		
				361.3 Tns.		
				@ $1.50	$541.95	

We, the undersigned, do hereby guarantee that the articles or commodities listed herein were produced or manufactured by or for us in a manufacturing establishment in which within thirty days prior to the removal of such product therefrom no children under the age of fourteen years were employed or permitted to work, nor children between the ages of fourteen and sixteen years were employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock p. m. or before the hour of six o'clock a. m.

BOUND BROOK CRUSHED STONE CO.

Damages $1167.70
Costs 54.75

$1222.45

Summary Judgment.

NEW JERSEY SUPREME COURT.

(Entered May 7, 1927.)

BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION COMPANY, INC., a corporation, Defendant.	Action at Law. Summary Judgment. Harrison & Roche, Attorneys.

$1,167.70
54.75

$1,222.45

Judgment entered this seventh day of May, A. D. nineteen hundred and twenty-seven, in favor of plaintiff and against the defendant for the sum of eleven hundred sixty-seven dollars and seventy cents damages and fifty-four dollars and seventy-five cents costs.

WM. S. GUMMERE,
C. J.

Final Judgment.

NEW JERSEY SUPREME COURT.

(Entered May 7, 1927.)

BOUND BROOK CRUSHED STONE COMPANY, a corporation, Plaintiff, vs. WILSON & ENGLISH CONSTRUCTION COMPANY, INC., a corporation, Defendant.	Action at Law.

10

1926 Sept. 30,
Sums. & Com.;
Middlesex;
Served Oct. 5.
$1,167.70
54.75

$1,222.45

20

The answer filed by defendant in the above stated cause having been ordered stricken out by the Court, it is ordered that judgment final be and hereby is entered in favor of plaintiff and against the defendant for the sum of one thousand one hundred and sixty-seven dollars and seventy cents, besides costs to be taxed.

30

On motion of

HARRISON & ROCHE,
Attorneys.

40

New Jersey Court of Errors and Appeals

BOUND BROOK CRUSHED STONE COMPANY, *Plaintiff-Respondent,* *vs.* WILSON AND ENGLISH CONSTRUCTION COMPANY, *Defendant-Appellant,* *and* F. R. UPTON, INC., a corporation, *Defendant-Respondent.*	*On Appeal from the Supreme Court.*

BRIEF FOR DEFENDANT-APPELLANT.

(1)

STATEMENT OF THE CASE.

This is an appeal from a judgment entered May 7, 1927, in favor of the plaintiff-respondent and against the defendant-appellant for the sum of $1,167.70 damages, and $54.75 costs (p. 69), pursuant to a decision of the Supreme Court filed April 30, 1927 (p. 61).

In order to avoid a confusion of the parties the plaintiff-respondent, Bound Brook Crushed Stone Company, will hereinafter be referred to as the "Stone Company"; the defendant-appellant, Wilson & English Construction Company, Inc., will hereinafter be referred to as the "Construction Company" and the defendant-respondent, F. R. Upton, Inc., will hereinafter be referred to as the "Upton Company."

The Supreme Court struck out the answer of the Construction Company and after the assessment of damages (p. 63) ordered summary judgment entered in favor of the Stone Company and against the Construction Company (p. 69).

In September, 1924, the Construction Company was engaged in the construction of a bridge and its appurtenances to carry a State highway over the tracks of the Central Railroad Company at Morgan, Middlesex County, N. J. For the purpose of obtaining materials for the construction of concrete abutments for this bridge, the Construction Company asked for bids for sand and gravel. By letter dated September 19, 1924 (p. 19), the Upton Company, representing itself to be engaged in the business of "Wholesale crushed stone, sand, crushed slag, brick, sewer pipe, gravel, hollow tile and cement," submitted its bid for sand and gravel. The form of the letterhead used in submitting this bid is exactly reproduced by photographic process as Exhibit 5 (p. 49). By letter dated September 29, 1924, the Construction Company accepted this bid for

> "5,000 tons (approximately)
> gravel ..... @ $1.70 per ton
> 2,500 tons (approximately)
> sand ..... @ $1.08 per ton
> F. O. B. cars, Morgan, N. J.
>
> It is understood that the same will be furnished in accordance with the specifications of the Central Railroad of New Jersey, with which you are familiar" (pp. 20 and 21).

The specifications referred to in this letter of acceptance are printed on pages 21 and 22 and 23 of the record. The bid of the Upton Company, dated September 19, 1924, was submitted after a conversation between Mr. Bonnell its treasurer,

and Mr. Law, the purchasing agent of the Construction Company (p. 27).

In December, 1924, the gravel furnished by the Upton Company under this agreement was condemned by the State Highway Commission (which had supervision over the highway) (Upton Company, Exhibit 4, pp. 46, 47), and the Central Railroad Company, causing a suspension of work for several days (p. 32). The Construction Company was then permitted to proceed with the work, under a requirement that it mix crushed stone with the gravel (Exhibit 3, p. 47). Crushed stone for this purpose was purchased from and furnished by the Upton Company (p. 32). In the early part of January, 1925, Mr. Law called the attention of Mr. Bonnell, the treasurer of the Upton Company, to the expense incurred by the Construction Company on account of the rejection of gravel furnished by the Upton Company and the suspension of work resulting therefrom. Mr. Bonnell thereupon suggested that instead of holding up all of the payment due February 15, 1925, for materials furnished during the month of December, 1924, when the trouble occurred, the Construction Company make a payment on account, holding out a sum on account of such a claim, pending its adjustment. Pursuant to this suggestion, when the December bill for $5,228.81 came in, the Construction Company paid the Upton Company $4,200 "on acct. of Dec. Sand, Grav. and Stone," leaving a balance of $1,028.81 (p. 32) for future adjustment. Owing to the fact that the Upton Company refused to adjust this dispute, the account is still open.

On October 5, 1926, the Stone Company brought this suit for the balance thus retained.

(2)

GROUNDS OF APPEAL.

The Construction Company assigns, as grounds of this appeal, that the Supreme Court erred:

1. In granting the motion to strike out the answer.

2. In refusing to deny the motion to strike out the answer.

3. In directing entry of judgment for the face of the Stone Company's claim.

4. In giving final judgment for the Stone Company (pp. 1 and 2).

(3)

BRIEF OF THE ARGUMENT.

This argument will be presented under the following points:

I. The record raises several questions of disputed fact, for determination by a jury.

II. There was no valid proof of the alleged agency of the Upton Company.

III. The account sued upon in this action was fully paid and satisfied.

IV. The Supreme Court erred in striking out the answer and in giving judgment in favor of the Stone Company and against the Construction Company.

Issues Raised by the Pleadings.

Complaint.

The Stone Company sues for the amount of goods sold and delivered to the Construction Company on a book account, on which there is

alleged to be due to the Stone Company the sum of $1,028.81; that demand has been made upon the Construction Company for the payment of this sum but that it has failed, neglected and refused to pay the same (p. 4).

The alleged book account consists of bills or statements giving dates, car initials, car numbers, weights, prices and amounts, but nowhere states any commodity (pp. 5-8).

Answer and Counter-Claim.

(The counter-claim is not involved in this appeal, but frequent reference thereto in the record makes it necessary to describe it here.)

On October 23, 1926, the Construction Company caused to be served upon the Upton Company a summons and counter-claim (under Section 12 of the Practice Act), bringing in the Upton Company, as a third party, and answered the complaint as follows:

First Defense: It denied the truth of the matters contained in the complaint.

Second Defense: It denied that it ever purchased any materials or commodities of any kind from, or ever had any business transactions with the Stone Company and that any book account ever existed between it and the Stone Company.

Counter-claim was made by the Construction Company against the Upton Company on the following allegations:

(1) On September 29, 1924, it entered into an agreement with the Upton Company for sand and gravel in quantities and at prices and of character and quality specified in that agreement.

(2) Owing to the failure of the Upton Company to furnish sand and gravel of the character and quality specified, it claims a concrete made therefrom was rejected by the Central Railroad Company for whom the work was being done by Construction Company and it was compelled to provide other sand and gravel and to mix a proportion of crushed stone which was furnished by the Upton Company.

(3) All the crushed stone used by the Construction Company during the month of December, 1924, consisting of 48 cars, was ordered from and furnished by the Upton Company, including all the carloads indicated by car initials and car numbers in the alleged book account annexed to the complaint, and the charges for said crushed stone together with the charges for all the sand and gravel furnished by the Upton Company during December, 1924, was included and commingled in an account stated between the Upton Company and the Construction Company on February 16, 1925.

(4) By reason of the failure of the Upton Company to furnish sand and gravel of the character and quality required by said specifications, the Construction Company was compelled to and did incur and pay the sum $5,054.15 for items mentioned and enumerated in the counter-claim.

(5) Whereupon the Construction Company counter-claims against the Upton Company for damages of $5,054.15 (p. 11).

Motion to Strike Out Answer.

On November 4, 1926, the attorneys for the Stone Company (who were also attorneys for the

Upton Company), served a notice that, on a certain date, they would

> "Move to strike out the answer filed by said defendant, Wilson & English Construction Company, and to enter summary judgment against said defendant, and take notice that said motion will be based upon an affidavit attached hereto and made a part hereof" (p. 24).

(The notice does not specify any grounds for the motion.)

The Faces Disclosed by the Affidavits and Exhibits.

Affidavits for the Motion.

The affidavit of Lucy Upton, dated November 3, 1926 (p. 25), states as follows:

(1) That she is the President of the Upton Company, and is familiar with the matters and things in the affidavit set forth.

(2) That F. R. Upton and F. R. Upton, Inc., has for the past twenty years represented as sales agents a number of companies dealing in stone, gravel, sand and cement, and other materials, including the Stone Company, throughout the State of New Jersey; that this fact is generally known to all of its customers and other persons, firms and corporations engaged in contracting, building and construction work; that it has represented for many years the Stone Company in the sale of stone and other materials.

(3) That the Construction Company purchased from the Stone Company, stone required to carry out and perform the terms of a contract between Construction Company and the Central Railroad of New Jersey (p. 25); that said stone was purchased through the Upton Company, who

was the sales agent of said Stone Company; that said stone was delivered to the Construction Company at the times, in the amounts, and at the prices stated in the itemized account attached to the complaint; that said stone was charged by the Stone Company in its name to the Construction Company; that statements or bills for the stone sold to the Construction Company from time to time were billed in the name of Stone Company and said bills or statements rendered to the Construction Company in the usual course of business.

(4) That the Construction Company, for months prior to the sale of the stone set forth in the itemized account annexed to the complaint, had purchased materials from said Stone Company through its sales agent, the Upton Company, and was fully aware of the fact and knew that said Upton Company was the sales agent for said Stone Company, and that said stone was purchased from said Stone Company.

(5) That said account is in all things just and true and that there are no set-offs and counterclaims to the same and that the stone mentioned was duly delivered to the Construction Company, and accepted by it and that the sum of $1,028.81 remains unpaid on said account and is justly due and owing to said Stone Company, together with lawful interest thereon from January 1, 1925, to date, amounting to the additional sum of $113.15 (p. 26).

(6) That she believes that there is no defense to the action of Stone Company against the said Construction Company (p. 27).

The affidavit of Lawrence C. Bonnell dated December 22, 1926 (p. 34), states that he is the treasurer of the Upton Company, and one of the

sales representatives of that company; that the Upton Company is agent for a number of stone companies, including the Stone Company, "and is in the business of selling crushed stone, trap rock, limestone and cement and other building materials"; that he has been in the stone business for twenty-five years or more and has been associated with the Upton Company since the year 1921; that he is the person referred to in the affidavit made by Mr. Law, November 9, 1926; that in this suit the Stone Company demands $1,028.81 on a book account for stone furnished to said Construction Company (p. 34), under its contract with the Central Railroad of New Jersey., for a highway bridge over its tracks at Morgan, N. J.; that a few months prior to the furnishing of stone for the job at Morgan the Stone Company had furnished stone to said Construction Company under another contract which it had with the Central Railroad of New Jersey at Somerville, N. J. The Construction Company ordered said stone for work at Somerville through the Upton Company as sales agent; that all bills for stone furnished on Somerville job were billed to Construction Company on the billheads of Stone Company and all bills of lading and other evidences of said shipments were in the name of Stone Company as the shipper; that all monthly statements for stone furnished on said Somerville job were prepared on Stone Company statement forms on which the name of the Upton Company did not appear in any way, all of said statements and bills being mailed direct from Stone Company at Bound Brook, N. J., to the Construction Company; that he personally took the orders from Construction Company for said stone furnished on the Somerville job and the Construction Company and its representatives well knew that it was purchasing said

stone direct from the Stone Company and not from the Upton Company; that the stone on said Somerville job was furnished a few months prior to the furnishing of the stone on the Morgan job, to recover the price of which this suit is brought; that on June 13, 1924, a letter was written to Construction Company on Stone Company letterhead (p. 35), a copy of which letterhead is attached as Exhibit 2, signed "F. R. Upton, Inc., sales agent, by L. Upton, Pres."; that while this letter refers to the stone being furnished on the Somerville job, it indicates conclusively that said Construction Company knew in that case and long prior to its orders for stone on the Morgan job, that stone was being sold direct by Stone Company to it through the Upton Company as agent.

In connection with the stone furnished on the Morgan job he advises that the Upton Company, by a letter dated August 5, 1924, first quoted the price of stone to the Construction Company. On August 6, 1924, the Upton Company, "Agent," wrote the Construction Company as follows:

> "Supplementing our letter of August 5th, the gravel quoted on is ¾" and the stone similar to what you are now getting at Somerville."

On or about November 18, 1924, the Stone Company, through the Upton Company put in its first order for stone on the Morgan job, thereafter stone was regularly shipped to said job as ordered as set forth in the affidavit of Miss Upton (p. 36). He states that from time to time eleven bills or statements of account and at least twelve (p. 36) letters were mailed and written to the Construction Company on billheads and letterheads of the Stone Company, the

dates of which bills and letters are set forth in the affidavit of Miss Upton and all of said bills and letters were mailed to the Construction Company at its New York address in the regular course of business. He never represented in any way or manner, as stated by Mr. Law, that the quarries in Bound Brook were owned by the Upton Company or anyone else except the Stone Company; that it was well known to Mr. Law and the other officers and representatives that the Upton Company in making sales was only acting in its usual capacity of agent for the Stone Company, which was furnishing the stone for this work; referring to Mr. Law's statement that the Stone Company billheads were corrected by rubber stamp to read "F. R. Upton, Inc., Union Bldg., Newark, N. J." (p. 37), he states that said bills were on the Stone Company billheads, the form of which is attached as Exhibit 1 (p. 43), and the rubber stamp referred to merely corrected the name of the agent under the heading of "Branch Office"; that said rubber stamp is in no way misleading as to the identity of the corporation to which the account is due but that the rubber stamp merely emphasizes the fact that the Upton Company is agent to the Stone Company and not the real party in interest.

The usual Upton Company letterhead is annexed as Exhibit 5 (p. 49). In most of the transactions relating to the furnishing of stone on the Morgan job the Upton Company letterheads were not used, but the Stone Company letterheads and billheads were used. The bills of lading for stone shipped were made out in the name of the Stone Company as shipper. In view of the former transactions relating to stone shipped on the Somerville job and the letter of

June 13, 1924, and the fact that he at all times distinctly informed Mr. Law that stone for this job was furnished by the Stone Company, he is at a loss to understand Mr. Law's statement that he was informed and believed that the Stone Company quarries were owned by the Upton Company or Miss Upton, its president; at all times in his dealings with Mr. Law it was distinctly known and understood that the stone for the Morgan job was being furnished by the Stone Company (p. 38), and that the Upton Company was acting merely as sales agent. He denies that the use of stone was made necessary by the failure of the Upton Company to furnish sand and gravel in conformity with the specifications. He states that the sand and gravel furnished had been accepted and used by the Construction Company and that because of the Construction Company's delay in ordering the material forward before cold weather set in it became necessary for the Construction Company to use stone instead of gravel; shipments of stone were ordered beginning on or about November 18, 1924. Stone was ordered and used for said work by the Construction Company nearly a month before any question arose as to compliance to materials furnished by the Stone Company with the specifications. Later on through no fault of the Stone Company, due to the fact that progress of the work was interfered with and that the Construction Company had ordered forwarded more material than it could take care of, the stone furnished by the Stone Company was allowed to remain on the tracks of the railroad company and demurrage accrued amounting to $1,100.

He denies that he ever stated to Mr. Law that the quarries from which the stone came were

owned by the Upton Company (p. 39). That all stone shipments were billed on billheads of the Stone Company and bills of lading for stone were made out in the name of the Stone Company, as shown by Exhibit 6 (p. 50); that all payments made by the Construction Company for stone were transmitted by the Upton Company as agent, to the Stone Company. The rejection of materials as mentioned by Mr. Law was due to no fault of the Stone Company or the Upton Company as they were furnished in accordance with the terms of the contract for orders between the Stone Company and the Construction Company; said materials were all later accepted and used in the work, but a delay occurred and demurrage charges accruing against shipments of stone made by the Stone Company; that the Construction Company was warned not to order materials faster than they could be used in the work, but the Construction Company undertook to order more stone than could be used at one time and hence materials were allowed to remain on the tracks and demurrage charges accrued. He denies that the sand and gravel were defective and in any way responsible for the loss alleged by the Construction Company to have been incurred; said materials complied in all respects with the terms (p. 40) of the contract and the orders given by the Construction Company. Attached to his affidavit, as Exhibit 4 (p 46) is a copy of a letter from the Construction Company to A. E. Owen, Chief Engineer, the Central Railroad Company, dated November 16, 1925, outlining the facts and circumstances relating to the interference of the work and making a claim of $1,154.00 for demurrage. He states that the real reason and underlying cause for the Construction Company's refusal to pay the amount due to the Stone Company is the

fact that the Construction Company has failed to make a settlement of its claim against the railroad company.

At all times in his dealings with the Construction Company, he made it known distinctly that all stone ordered by them was furnished by the Stone Company, which the Upton Company represented as sales agent. Never at any time did he inform Mr. Law or any other person connected with the Construction Company, that the Upton Company was the owner of the quarries from which the stone was shipped. Due credit has been given to the Construction Company (p. 41) for all payments made on account of stone and that there remains a balance due to the Stone Company of $1,028.81 with interest. He denies that the Construction Company has a good and valid defense to the action brought by the Stone Company. He states that all the stone mentioned in the complaint was furnished to the Construction Company and used in the work at Morgan and that a balance of $1,028.81 remains due and unpaid (p. 42).

Miss Upton (in her answering affidavit) states:

That she is President of the Upton Company and has read the affidavit of Mr. Law. She refers to Exhibit 1 (p. 43), as the billhead upon which all bills for stone due to the Stone Company were sent to the Construction Company and to the name of the Upton Company in the square on the left-hand side of the billhead and states that owing to Mr. Upton's death some years ago, and the formation of a company bearing his name, a rubber stamp was procured and the words "F. R. Upton, Inc., Union Bldg., Newark, N. J.," were stamped over the name F. R. Upton in said square; that all bills sent to the

Construction Company for stone mentioned in the complaint were on billheads of the Stone Company like Exhibit 1 (p. 51); regular statements were rendered to the Construction Company by the Stone Company on statement forms like Exhibit 5 (p. 49), on which the name of the Upton Company does not appear as agent or otherwise; the dates and amounts of these statements are tabulated in this affidavit (p. 52). She states that Mr. Law and other officers, agents and representatives of the Construction Company well knew that the Upton Company was acting as sales agent in this matter for the Stone Company and that letters in connection with the transaction mentioned in the complaint were written to the Construction Company on letterheads of the Stone Company under dates of June 13, 1924; January 15, 1925; April 3, 1925; July 15, 1925; October 19, 1925; January 27, 1926; February 15, 1926; March 9, 1926; April 20, 1926; May 15, 1926; July 15, 1926; and September 8, 1926, on letterheads like Exhibit 2 (p. 44); on July 16, 1925, the Construction Company by Mr. Law, wrote direct to the Stone Company at Bound Brook, N. J. (p. 52), a letter of which a copy is attached as Exhibit 3 (p. 45). With respect to Mr. Law's statement that the officers of the Upton Company said the stone to be furnished "from our quarries at Bound Brook," she states that she has been in the business of acting as agent for various stone companies for about ten years past with offices at Clinton street, Newark, N. J., and that the Upton Company is well known in the trade as such agent; and succeeded to the agency business of F. R. Upton, who had been in said business since 1905, until his death in 1921, at the same address; that the name F. R. Upton, as sales agent of the Stone Company and other quarry companies was well

known generally throughout the State of New Jersey and has been well known as such agent for more than twenty years, that the expression "our quarries" is frequently used to refer to the quarries of the various companies for which the Upton Company acts as sales agent; that it was clearly stated to Mr. Law at the time the order for stone was ordered, that said stone would be furnished by the Stone Company and that the Upton Company was merely acting as sales agent in the transaction; many letters and all billheads sent to the Construction Company in connection with this account had clearly stated and printed upon them the words, in small type near the name of the Stone Company (p. 53), "F. R. Upton, Inc., Sales Agent," or "Branch Office, F. R., Inc., Union Bldg., Newark, N. J." She denies that the Upton Company ever held itself out to be the owner of the quarry or quarries from which this stone was shipped.

She denies that the Upon Company owned the Stone Company quarry, and that their interests were identical, and further states that she never had any dealings with Mr. Law, or made any statements to him over the telephone or otherwise; that she has never seen him or conferred with him and that she made any statements such as above referred to, to cause Mr. Law to understand the facts as stated by him with respect to the ownership of the stone company quarries.

A few months prior to the furnishing of stone by the Stone Company to the Construction Company for the work at Morgan, the Stone Company had furnished stone to the Construction Company under another contract which it had with the Central Railroad at Somerville, N. J., and in connection with that contract a letter was written to the Construction Company (p. 54) on

the letterhead of the Stone Company signed "F. R. Upton, Inc., Sales Agent, By L. Upton, Pres.," which stated prices, sizes, etc., of the stone to be furnished on the work. On August 5, 1924, the Upton Company as "agent," first quoted to the Construction Company, prices for stone on the work at Morgan and on August 6, 1924, the Upton Company wrote to the Construction Company, as follows:

> "Supplementing our letter of August 5th, the gravel quoted on is ¾″ and the stone similar to what you are now getting at Somerville."

She further states that the fact that the Upton Company was merely sales agent for the Stone Company for all stone sold and delivered to the Construction Company at Morgan, was well known to the Construction Company and to Mr. Law; that the real and underlying reason for the failure of the Construction Company to pay the bill of the Stone Company is set forth in a letter written by the Construction Company to the Central Railroad Company, dated November 16, 1925 (Exhibit 4, p. 46) (p. 55).

Miss Upton in an affidavit made April 22, 1927 (p. 56), states that she attached copies of the correspondence referred to in Exhibit 3 (p. 45), one, a letter written by the Construction Company to the Central Railroad Company of N. J., dated July 2, 1925 (printed at p. 57), and the other written by F. M. Snyder, Auditor of the Freight Traffic, Central Railroad Company of N. J., to Wilson and English, dated July 13, 1925 (printed at p. 60) and says that these letters refer to stone furnished by the Stone Company on the job at Morgan (p. 56).

Opposing Affidavit.

The affidavit of William D. Law, dated November 9, 1927 (p. 27), states:

(1) That he is the purchasing agent of the Construction Company and is personally familiar with the matters and things set forth in this affidavit.

(2) That he is the representative of the Construction Company who received the bid September 19, 1925, from the Upton Company, for sand and gravel and who wrote and signed the letter of September 29, 1924, by which that bid was accepted and he is the person who conversed with Mr. Bonnell (the Treasurer of the Upton Company), on September 18, 1924, as referred to in that bid (p. 27).

(3) He is the only officer of the Construction Company with whom the Upton Company had any correspondence, conferences or negotiations regarding the transactions involved in this suit, as well as in all previous transactions between the Construction Company and the Upton Company.

(4) He has been transacting business in the purchasing of crushed stone, sand and gravel from the Upton Company since the spring of 1924, and during that time he has conferred frequently, either personally or by telephone, with Mr. Bonnell (the Treasurer), and Miss Lucy Upton (the President) of the Upton Company; that when in the spring of 1924, deponent bought crushed stone and sand from the Upton Company for a job on the Central Railroad at Somerville, Mr. Bonnell said that he would furnish crushed stone "from our quarries at Bound Brook." When the bills came in on billheads of Stone

Company, they had been corrected by rubber stamp to read, "F. R. Upton, Inc., Union Bldg., Newark, N. J.," and all bills received for crushed stone furnished at Morgan, N. J., in the month of December, 1924 (involved in this suit) were billed on Stone Company billheads corrected by rubber stamp as aforesaid, and these bills, together with bills for sand and gravel, furnished by the Upton Company, were paid to the Upton Company as all bills for sand, gravel and crushed stone had theretofore or since been paid (p. 28).

(5) The Upton Company held itself out in its representations to deponent and also in its correspondence, letterheads and billheads, as being dealers in crushed stone, sand, crushed slag, brick, sewer pipe, gravel, hollow tile and cement and never did it or any of its representatives represent to deponent that it acted merely as sales agent; that during all of the times of deponent's negotiations with the Upton Company, he was informed and believed and still believes that the crushed stone quarries of the Stone Company were and are owned by the Upton Company or Miss Lucy Upton, its President.

(6) During all of the time aforesaid, namely, since the early spring of 1924, when deponent began to purchase sand, gravel and crushed stone from the Upton Company, although deponent has handled all of the transactions of this kind for the jobs conducted in New Jersey by the Construction Company, he has never seen or heard of or from any representative of the Stone Company, either with respect to furnishing materials or with respect to the alleged book account set forth in the complaint. No representative of the Stone Company ever submitted any bids to the Construction Company for crushed stone or other materials. It never communicated with him by

representative, correspondence or by telephone regarding such materials or regarding any alleged book account or alleged sums due to it for furnishing crushed stone or any other materials in December, 1924, or at any other time. The use of crushed stone by the Construction Company at the Morgan job in December, 1924, was made necessary by the failure of the Upton Company (p. 29) to furnish sand and gravel in conformity with the specifications referred to in the acceptance of its bid and this default in materials is the basis of the counter-claim filed herein by the Construction Company, against the Upton Company. In sending out requests for bids for materials on the several jobs which the Construction Company have had in New Jersey during the past three years, deponent has never requested bids from the Stone Company, for the reason that from the beginning and during all of that time he has been given to understand both by Mr. Bonnell and by Miss Upton that the Upton Company owned the stone quarries and company at Bound Brook and that except for different corporate names the interests of the Stone Company and the Upton Company were identical.

(7) He never understood that the Construction Company was dealing with the Upton Company as the sales agents for anybody. Bills for all sand and gravel, no matter where the material came from, were always submitted on the billheads of the Upton Company and these bills did not indicate that the Upton Company were acting as sales agents, but did indicate that it was selling its own materials to the Construction Company. All the crushed stone ever furnished by the Upton Company to the Construction Company came from the Bound Brook quarries,

which Mr. Bonnell and Miss Upton both said belonged to the Upton Company (p. 30) and although crushed stone was usually billed on the billheads of "Bound Brook Crushed Stone Co.," these bills were all corrected by rubber stamp to read, "F. R. Upton, Inc., Union Bldg., Newark, N. J., sold to Wilson & English Construction Co." and the Construction Company never paid for any of this material directly to the Stone Company, but always paid for it by checks drawn to the Upton Company and such payments have always been accepted without question by the Upton Company.

(8) During the month of December, 1924, the Construction Company received from the Upton Company certain commodities as enumerated in his affidavit (p. 31) by dates, commodity and amounts, consisting of sand, crushed stone and gravel aggregating $5,228.81 of which $1,999.38 was for sand and gravel and $3,229.43 was for crushed stone (p. 31). The work on the job was interrupted during December because certain sand and gravel furnished by the Upton Company was condemned and rejected by the State Highway Commission and Central Railroad Company of New Jersey. At a conference which he had with Mr. Bonnell in the early part of January, 1925, he drew Mr. Bonnell's attention to the expense incurred by the Construction Company on account of such rejection of materials and it was suggested by Mr. Bonnell that instead of holding up the payment due February 15, 1925, for all the materials furnished during the month of December, 1924, the Construction Company make a payment on account, holding out a sum against which charge might be made for such loss incurred by reason of defective sand and gravel. Accordingly, instead of paying $5,228.81 which

was the full amount of the invoices for sand, gravel and stone furnished during December, the Construction Company paid to the Upton Company $4,200.00 covering sand, gravel and crushed stone, and leaving a balance of $1,028.81 which is the precise amount claimed as the book account of the Stone Company. The Upton Company applied this payment of $4,200.00 to payment for all of the sand and gravel furnished during that month and the balance of $2,200.62 on account of the invoices for crushed stone. He had charge of the payment of these bills and had he known or suspected that the Construction Company was obligated in any way to the Stone Company, he would have paid the bills for crushed stone separately (p. 32) and withheld payment for part of the sand and gravel bills because it was the sand and gravel that had been defective and caused the loss involved.

(9) The Construction Company has never had any business relations with the Stone Company and does not owe it any book account and has never purchased any materials or commodities from it and never knew that the Upton Company was the sales agent of the Stone Company. On the contrary, he was informed and believes that the former owned the latter company entirely. If the Stone Company was entitled to any money for crushed stone furnished during the month of December, 1924, and if the Upton Company is the sales agent for the Stone Company, then the latter should look to the former for payment of such sums because the Construction Company made full and complete payment to the Upton Company for all crushed stone furnished during said month.

(10) The Construction Company, has a good and valid defense to the above entitled suit on

the grounds set forth in the answer and counterclaim served and filed herein on October 25, 1926 (p. 33).

(Unless otherwise indicated *italics* are ours.)

POINT I.

The record raises several questions of disputed fact for determination by a jury.

1. *The Book Account.*

The allegation of a book account between the Stone Company and the Construction Company is asserted in the complaint (p. 4) and denied in the answer (p. 11). It is asserted in the affidavits of Miss Upton (president) (p. 26) and Mr. Bonnell (treasurer) (p. 43) of the Upton Company and denied by Mr. Law, Purchasing Agent of the Construction Company (p. 29). Except for the (unverified) allegation in the complaint, over the signatures of its attorneys, the Stone Company is silent on this question. No officer or representative of it confirms or corroborates this allegation under oath or otherwise.

The alleged demand for payment was not proven and the only testimony on the subject is that of Mr. Law who handled all the transactions, and who says that he has never seen or heard of or from any representative of the Stone Company either with respect to furnishing materials or the alleged book account set forth in the complaint (p. 29).

2. *Agency.*

There is no allegation in the pleadings that the Upton Company acted as the agent of the Stone Company in this transaction, or in any part

thereof. The Upton Company's bid of September 19, 1924, to furnish sand and gravel was submitted in its own name on its own letterhead (see Exhibit 5, p. 49) and signed "F. R. Upton, Inc., By L. Upton, Pres." (p. 19, 20). The acceptance of September 29, 1924, is addressed to "F. R. Upton, Inc., 808 Union Building, Newark, N. J." (pp. 20, 21). These letters, together with the specifications (pp. 21, 22, 23), constituted the agreement for sand and gravel. There is no claim or suggestion of agency, by or on behalf of the Upton Company, and nowhere in the record or in the affidavits of Miss Upton or Mr. Bonnell do they say or intimate that they were not acting as principal in the transaction, in so far as the sand and gravel was concerned.

The only evidence of a written agreement for stone, appears in Mr. Bonnell's affidavit (pp. 36, 39) and in Miss Upton's affidavit (p. 55) where they refer to a letter dated August 5, 1924, from the Upton Company to the Construction Company, quoting a price on stone, a supplemental letter dated August 6, 1924, referring to the letter of August 5, 1924, and an order of November 18, 1924, from the Construction Company for stone, presumably pursuant to that quotation (p. 36). *These letters or copies are not produced by or on behalf of the Upton Company or the Stone Company,* to speak for themselves, nor does Mr. Bonnell say the order of November 18, 1924, for stone was in writing. He does say that that quotation was made and the order was received by the Upton Company, as agent for the Stone Company (p. 36). The conclusions stated in the affidavit are inadmissible in the absence of the original letters referred to or an explanation of their absence. Mr. Law's statement (p. 28) that bills for sand, gravel and

stone were all paid by check *to the Upton Company,* is not denied by anyone. A photographic copy of the face and back of the cancelled check dated February 16, 1925, for $4,200 on account of the sand, gravel and stone, furnished during December, 1924, which included the cars of stone involved in this suit referred to by Mr. Law (p. 32) is annexed to this brief as an appendix, and the original cancelled check will be presented upon the argument. This check was exhibited to the Supreme Court on the argument of the motion to strike out the answer.

Mr. Bonnell says (p. 40) that "all materials were furnished in accordance with the terms of the contract or orders between Bound Brook Crushed Stone Company and the said defendant," but no such "contracts or orders" are produced, and the "contracts or orders" that appear in the record, show that they were between the Upton Company and the Construction Company, without mention of or reference to its alleged agency. He says (p. 40) that "all payments made by the defendant for stone shipped on said job were transmitted by F. R. Upton, Inc., as agent, to said Bound Brook Crushed Stone Company." No proof of this statement was offered and the check of February 16, 1924 (appendix), covering the stone involved in this action, was drawn to the order of "F. R. Upton, Inc.," and deposited by it to its own account in the National Newark & Essex Banking Co., Newark, N. J.

Miss Upton swears that "it was clearly stated to said Law at the time the order for said stone was entered that said stone would be furnished by Bound Brook Crushed Stone Company, and that F. R. Upton, Inc., was merely acting as sales agent in the transaction" (p. 53). Since she

also swears (p. 54) "that I never, personally, have had any dealings with said Law, or made any statements to him over the telephone or otherwise. I have never seen said Law or conversed with him," her statement above quoted (from p. 53) must be hearsay evidence and inadmissible. She does not say who told Mr. Law that the stone would be furnished by the Stone Company and that the Upton Company was merely acting as sales agent in the transaction. She states in several places (pp. 25, 26, 52, 53, and 55) that the Construction Company, and Mr. Law, its Purchasing Agent, "well knew" that the Upton Company acted only as agent for the Stone Company with relation to the furnishing of stone on the Morgan job, but these are all inadmissible conclusions, since she does not show how they knew it, or facts that would justify such a conclusion.

Mr. Bonnell states the same inadmissible conclusions at pp. 35, 37, 38 and 39, and he also makes the following general statements: (1) "That at all times in my dealings with him (Law) it was *distinctly known and understood* that the stone for the Morgan job was being furnished by the Bound Brook Crushed Stone Company and that F. R. Upton, Inc., which company I represented, was acting merely as sales agent" (pp. 38, 39), and (2) "that at all times in my dealings with the defendant Wilson & English Construction Company, I made known distinctly that all stone ordered by them for the work at Morgan, N. J., would be furnished by the Bound Brook Crushed Stone Company, which company F. R. Upton, Inc., represented as sales agent" (p. 41).

Neither of these persons (nor any other) expressly state that at any specified time or occa-

sion they told any officer or representative of the Construction Company that the Upton Company acted as agent. These statements are confined to general assertions of knowledge of the fact by the Construction Company. Its Purchasing Agent, Mr. Law, who was its only representative dealing with the Upton Company (p. 28) swears that the Upton Company "held itself out, in its representations to deponent and also in its correspondence, letterheads and billheads, as being dealers in crushed stone, sand, crushed slag, brick, sewer pipe, gravel, hollow tile and cement and never did it or any of its representatives represent to the deponent that it acted merely as sales agent. During all of the times of deponent's negotiations with the defendant F. R. Upton, Inc., he was informed and believed and still believes that the crushed stone quarries of the plaintiff, Bound Brook Crushed Stone Company, were and are owned by the defendant F. R. Upton, Inc., or Miss Upton, its president" (pp. 28, 29). While both Miss Upton and Mr. Bonnell deny that they so informed Mr. Law, Miss Upton admits it was customary for the Upton Company representatives to refer to "Our quarries" (p. 53), which, without the explanation she now adds, would naturally give rise to Mr. Law's belief that the quarry at Bound Brook was owned by the Upton Company, or its president, corroborated, of course by the corrected billheads upon which he received bills for all stone (Exhibit 1, p. 43). The letters of September 19, 1924 (p. 19) and September 29, 1924 (p. 20), constituting the written contract for sand and gravel; and the cancelled check of February 16, 1925 (appendix to this brief) do not support these statements of Miss Upton and Mr. Bonnell, but do support the statements of Mr. Law, and

justify his understanding that he was dealing solely and only with the Upton Company, as principal (p. 30). He never had any bids from or dealings with the Stone Company in connection with this transaction (pp. 29, 30).

In Mr. Bonnell's affidavit (pp. 35, 38) and in Miss Upton's affidavit (p. 52), reference is made to a letter of June 13, 1924 (pp. 35, 38), alleged to have been written "*on* Bound Brook Crushed Stone Company *letterhead,* (*not by* the Stone Company), a copy of which *letterhead* is attached hereto and marked Exhibit 2, signed 'F. R. Upton, Inc., Sales Agent, by L. Upton, Pres.,' " referring to stone furnished on another job. This letter is not produced in evidence—only what he says is a like letterhead is offered as Exhibit 2 (p. 44). Such a self-serving device, all in the control of the Upton Company is not admissible evidence, or proof of its alleged status of Agent of the Stone Company, especially in the face of the more definite letters by the Upton Company, *per se,* to the Construction Company, constituting the written contracts for sand, gravel and stone involved in this action.

Miss Upton refers (p. 52) to alleged statements rendered to the Construction Company by the Stone Company on the dates there mentioned, but, those alleged statements are not offered in evidence, no statement is made as to what they covered, and from their dates as compared with the dates set forth in the statement attached to the complaint (p. 5) appear not to cover any consignment involved in this action. She also refers (p. 52) to 11 letters (besides the one of June 13, 1924, above referred to), alleged to have been written to the Construction Company "*on letterheads* of Bound Brook Crushed Stone Company." None of these 11 letters are produced in evidence and we do not know what they referred to, but since they are not claimed to have been written *by* the Stone Company we assume they were all written by the Upton Company and signed like the one of June 13, 1924, "F. R. Upton, Inc., Sales Agent, by L. Upton, Pres." These 11 letters are self-serving, not only for the reason stated with respect to the letter of June 13, 1924, but more particularly because all of them were written after the December, 1924, bill for materials had accrued and the dispute had arisen over the quality of gravel and the consequent necessity of using stone in place of the defective gravel. The Upton Company was by that time, fully aware of its impending liability for damages, and had sufficient incentive to lay the foundation for its future alibi of agency, *which was not raised or suggested by the Upton Company until after the settlement for the December, 1924, bill had been made.*

The letter of July 16, 1925, from the Construction Company to the Stone Company (Exhibit 3, p. 45) and its enclosures (pp. 57, 58, 59, 60) are all dated and refer to matters arising after the transaction involved in this action had closed. This correspondence is not determinative of the question of agency, since it relates merely to the routine of transportation of materials.

The significant thing in this case, on this question of agency, is the fact that the claim of agency is presented *solely* by the totally inadmissible affidavits of the president and treasurer of the Upton Company whose agency is sought to be established, and which is financially interested and involved in success or failure of that contention. *There was no competent evidence of agency.* The Stone Company is not financially interested in this question of agency.

If the Upton Company dealt with the Construction Company as a principal, and purchased the stone from the Stone Company, the latter can collect from the former. It has nothing to lose either way.

No documentary or written evidence of agency was presented or offered, and no one claiming to be an officer or representative of the Stone Company appeared or offered a word of evidence or testimony. The Upton Company's self-serving and self-styled agency is totally devoid of any support, save by the affidavits of its president and treasurer, and these are incompetent to prove the fact. (We discuss the decisions on this point later).

The letter of November 16, 1925, from the Construction Company to Mr. Owen, Chief Engineer of the Central R. R. Co., Exhibit A, referred to in Mr. Bonnell's affidavit (p. 41) and in Miss Upton's affidavit (p. 55), a copy of which was offered in evidence by the Upton Company and is printed at pp. 46, 47, 48, does not relate in any way to the question of agency, and serves only to show that the job was delayed by the condemnation by the engineer of the State Highway Commission of the gravel furnished by the Upton Company. Moreover, it relates to only one of the items of damage (demurrage amounting to $1,154.00) claimed by the Construction Company in its counter-claim (p. 13).

The question of the alleged agency of the Upton Company is one which the Construction Company is entitled to have determined by a jury.

Principal and Principles.

It was not until after the transactions involved in this cause of action had been closed and the right of the Construction Company to retain part of the amount of the December (1924) bill for materials on account of damages already accrued for inconvenience, expense and delay resulting from the furnishing by the Upton Company of defective gravel arose, that the Upton Company, for the first time, claimed it was acting as agent, and not as principal, in the transaction, and the bringing of this action revealed for the first time, that the Upton Company had applied the payment of $4,200.00 made on February 16, 1924, on account of sand, gravel and stone furnished during December (1924), first, to the extent of $1,999.38 to the payment for sand and gravel (including all the defective gravel) which it does not deny that it furnished as principal, and second, the balance amounting to $2,200.62, on account of crushed stone, about which there was no dispute.

If, as the Upton Company now claims, it dealt as principal in the furnishing of sand and gravel, and, as agent, in the furnishing of crushed stone, and a dispute existed about the quality of the gravel, the dictates of common honesty should have prompted the Upton Company to apply that $4,200.00 payment, first; $3,229.43 to its principal for all of the crushed stone (about which there was no dispute) and the balance $970.57 on account of its own sand and gravel, particularly since it was because of the defective quality of the gravel (condemned by the State Highway Engineer), that this balance was withheld at the special instance and suggestion of the Treasurer of the Upton Company (p. 32).

By the inducement of a future adjustment of the claim of the Construction Company against Upton Company for the price of defective gravel furnished by the latter in violation of its agreement, and the damages resulting therefrom, the Upton Company procured from the Construction Company a substantial payment on account of the December (1924), bills. Without disclosing that it was not acting as principal with respect to crushed stone, as well as with respect to sand and gravel (it has never disputed its status as principal as to sand and gravel), it was willing, although it had ample funds in that payment to pay its (alleged) principal in full, to pay itself in full for the material in dispute and let its (alleged) principal take its chances in collecting from the Construction Company, the balance for the crushed stone, which was not in dispute.

The arrangement suggested by Mr. Bonnell and adopted by the Construction Company, of retaining part of the money, gave the latter that much security for the settlement of its claim for damages. If the Upton Company had sued for this balance the Construction Company had the right to dispute the claim for gravel, to the extent that it was defective and to counter-claim for the amount of its damages and apply the retained balance on whatever amount was recovered. By adopting the method it did, with respect to the application of the payment, the Upton Company placed the Construction Company in the position of a debtor to an undisclosed (alleged) principal against which it could neither claim the retained balance or counter-claim for its damages. By this maneuver the Upton Company sought to jockey the Construction Company out of the position of having a good defense against a suit for the balance re-

tained, and into a position of defenselessness against the claim of an (alleged) undisclosed principal. In equity this would be abhorrent as taking advantage of one's own wrong. It is equally unconscionable in law. As Mr. Law (who had charge of paying bills) says (p. 32), "had I known or suspected that the defendant, Wilson & English Construction Company was obligated in any way to the plaintiff, Bound Brook Crushed Stone Company, I would have paid the bills for crushed stone separately and withheld payment of part of the sand and gravel bills because it was the sand and gravel that had been defective and caused the loss involved" (pp. 32, 33).

One of two conclusions seems inevitable; either the "posthumous" claim of the Upton Company that it is the agent of the Stone Company, is not true, or it has practiced a deception upon its principal as well as upon its customer in applying the $4,200.00 payment to paying itself for defective material, and "holding out" on its principal for material that was not defective.

> "The relation of an agent to his principal is ordinarily that of a fiduciary, and as such it is his duty, in all dealings concerning or affecting the subject matter of his agency, to act with the utmost good faith and loyalty for the furtherance and advancement of the interests of his principal" 2 *C. J.* Sec. 353, p. 692.

It was, therefore, the duty of the Upton Company to apply the $4,200. payment so as to satisfy first, the claim of the Stone Company for stone, about which there was no dispute, and the balance on its own account for sand and gravel, the quality of which was in dispute.

The conduct of the Upton Company in the application of this money manifests a total dis-

regard of its duty to principal and principles, as well as of its duty to its customer.

3. *The Counter-Claim for Damages.*

The answer and counter-claim alleges (pp. 12, 13), that the Construction Company entered into an agreement by the letters of September 19 and 29, 1924 (pp. 19, 20, 21), with the Upton Company for sand and gravel to be furnished by the latter of a quality conforming with certain specifications (pp. 21, 22, 23), that the Upton Company failed to furnish sand and gravel complying with such specifications, and as a result of that breach of the agreement, the Construction Company suffered damages amounting to $5,054.-15. This allegation is supported by the affidavit of Mr. Law (pp. 29, 30) and in part by Exhibit 4 (p. 46), presented by Mr. Bonnell. Miss Upton does not deny this allegation, Mr. Bonnell denies that the stone used on the job in December (1924), "was made necessary by the failure of F. R. Upton, Inc., to furnish sand, and gravel in conformity with the specifications," and says that "*because of defendant's delay in ordering the material forward* before cold weather set in, it became necessary for the defendant to use stone, instead of gravel, in said work" (p. 39). Then he says (with some inconsistency) "due to the fact that defendant *had ordered forward more material than it could take care of*" the stone was allowed to remain on the tracks until demurrage accrued. The fact is the demurrage accrued not on stone, which was not then in use, but upon the sand and gravel whose use was interrupted by the condemnation of the defective gravel. He says in denial of Mr. Law's affidavit, that the rejection of materials "was due to no fault of the plaintiff, Bound Brook Crushed Stone

Company, or F. R. Upton, Inc., as all materials were furnished in accordance with the terms of the contract and orders *between Bound Brook Crushed Stone Company and said defendant*" (p. 40). This denial is meaningless, since nobody claims there was an agreement *between the Stone Company and the Construction Company.*

The agreement of September for sand and gravel (pp. 19, 20, 21), as claimed by the Upton Company, purports to be between the Upton Company *per se* and the Construction Company.

Then Mr. Bonnell says the Construction Company "was warned (by whom or to whom, he does not say) not to order materials faster than they could be used in the work, but that the defendant undertook to order more stone than could be used at one time in the work" (p. 40). He again denies (by a general denial) "that the sand and gravel furnished in connection with this job were defective and in any way responsible for the loss alleged by the defendant to have been incurred. I state that said materials in all respects complied with the terms of the contract and orders given by the defendant for said materials" (p. 40).

There is not one word of denial that the engineer of the State Highway Commission condemned the gravel or sand, or both, furnished by the Upton Company, or that the Construction Company suffered damage from the resulting delay in the work and the subsequent necessity of using stone (a much higher priced material) as a substitute for gravel. These facts, alleged in the answer and counter-claim (pp. 11, 12, 13) and sworn to by Mr. Law (p. 29), are confirmed in part by the letter (Exhibit 4, p. 46) annexed to Mr. Bonnell's affidavit.

The knowledge of the existence of this counterclaim, growing out of the furnishing of defective materials, inspired the Upton Company's alibi of agency.

4. *The Invoices.*

Repeatedly, also, Miss Upton and Mr. Bonnell, state in their affidavits that all bills for stone were on the billheads of the Stone Company, such as is offered by them as Exhibit 1 (p. 43). This only example is a blank and proves nothing with respect to any bills for stone actually shipped.

Mr. Law swears that although the bills for stone were on the printed billheads of the Stone Company, all such bills received were corrected by rubber stamp to read:

"F. R. Upton, Inc., Union Bldg., Newark, N. J., sold to Wilson & English Construction Company" (pp. 28, 31). It is undenied that all payments for stone were made to and accepted by the Upton Company in accordance with this corrected billing (p. 28), and no payments were ever made to the Stone Company, for anything (p. 31).

Mr. Bonnell (p. 37) and Miss Upton (p. 51) both admit the fact that billheads were altered as Mr. Law claims, but they claim that this alteration was *intended* to apply only to the branch office address printed in the upper left-hand corner of the form. They say that Exhibit 1 (p. 43) is an illustration of this alleged intention. The meaning of the rubber stamp depends not only upon its text but also upon its location on the paper. If the stamp read:

"Branch Office
F. R. Upton, Inc.,
Union Bldg.,
Newark,
N. J."

and had been stamped over the printing which they say it was intended to replace, its meaning and purpose would have been clear. But, contrary to the statement of Miss Upton that the stamp reads "F. R. Upton, Inc., Sales Agents," or "Branch office, F. R. Upton, Inc., Union Bldg., Newark, N. J.," the stamp says nothing about "Sales Agents" or "Branch office," and Miss Upton exhibited none that did. It is merely a name and address which might be used for any purpose, and, when applied a little more toward the centre than it was applied for the purposes of Exhibit 1 (p. 43) it serves quite effectively to obliterate the Stone Company's name on the billhead.

At best, this evidence raised a question of fact as to agency upon which the Construction Company is entitled to have a jury pass judgment.

5. *The Bills of Lading.*

Miss Upton and Mr. Bonnell, in their affidavits, state that all stone was shipped on bills of lading like Exhibit 6 (p. 50).

The only example of such bill of lading, offered in evidence (Exhibit 6), covers two cars of stone shipped in November, 1924. Since all the stone involved in this action was furnished in December, 1924, Exhibit 6 relates to none of the stone in question. But aside from that, what does Exhibit 6 signify? For instance, when a purchaser buys steel rails, girders, bridges, rods or other forms of steel products from the United States

Steel Company, they are invariably shipped by the "Cambria Steel Company," "Republic Iron and Steel Company," "Carnegie Steel Company," "Union Rolling Mill" or any one of a score of other producing constituent or connected companies who ship directly from their plants on their own bills of lading, to fill orders received by the United States Steel Company at its general office at 71 Broadway, New York City, or at the office of its U. S. Steel Products Company at 50 Church street, N. Y. It is common, under the present-day conditions of specialized industry, for manufacturers to sell nothing, but to contract for the distribution of their entire output through corporations or individuals who only sell. It is apparent from the attitude of the Upton Company, and its President and Treasurer, in this case, that it is responsible to the Stone Company, not as agent, but in every sense, including the guaranteeing of the bills for material sold, as Principal, otherwise the officers of the Stone Company would not have relied entirely upon the Upton Company in this case; it would have done or said something on its own behalf. The Upton officers swear to every detail of the Stone Company's business, corporate, financial, manufacturing and transportation, with an all-sufficient attitude, that leads one to doubt the very existence of the Stone Company as a separate entity.

Again this evidence raised questions of fact as to agency, which the Construction Company is entitled to have determined by a jury.

POINT II.

There was no valid proof of the alleged agency of the Upton Company.

Proof of the agency of F. R. Upton, Inc., depends exclusively upon the affidavits of Lucy Upton, the President, and Lawrence R. Bonnell, the Treasurer of the Upton Company. They offer no documentary or written proof of this claim and they are not corroborated by any statement or word, letter or paper from any officer or representative of the Stone Company.

The question is whether an agent can establish his own agency by his own statements, alone. This we think cannot be done.

Corpus Juris (Agency).

"If a person has acted in his own name, holding himself out as principal, he cannot afterward, as against persons interested in the transaction, set up that he was acting as agent only" (p. 460, Sec. 68).

"It is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of his principal, to disclose not only the fact that he acted in a representative capacity, but also the identity of his principal, as the person dealt with is not bound to inquire whether or not the agent is acting as such for another." Horan *v.* Hughes, 129 Fed. 248, affirmed 129 Fed. 1005.)

"A person who enters into a contract in his own name without disclosing the identity of his principal renders himself personally liable even though the third person knows that he is acting as agent, unless it affirmedly appears that it was the mutual intention of the parties of the contract that the agent should not be bound" (Sec. 491).

"*Disclosure of agency.* With stronger reason an agent who, without disclosing his

agency, enters into contractual relations in his own name with one who is unaware of the agency binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in like manner as if he were the real principal, although in contracting he may have intended to act solely for his principal, and although the other party afterward discovers the undisclosed principal, unless he waives his right to hold the agent, and elects to hold the principal.

"(§ 492) (b) *Nature of Duty to Disclose.* This duty to disclose principal and agency is a positive one, and the agent cannot be relieved of liability, if he fails to make such disclosure, by the fact that the third person fails to discover his representative capacity, although if in fact the third person has actual knowledge of the agency and the identity of the principal it will have the effect to relieve the agent, whether the agent himself makes the disclosure, or the third person acquires his knowledge through some other source."

* * * * * * * *

"(§ 494) (d) *Sufficiency of Disclosure.* Ordinarily the agent should clearly indicate by apt words or other means the name or identity of his principal in such a manner that the contract will be entered into, not on his own behalf, but on behalf of the principal. But, although it has frequently been said that the name of the principal must be disclosed, a disclosure of the principal's name, while a convenient form of disclosure, is not indispensable, if his identity is otherwise established. It is not sufficient, however, that the third person has knowledge of facts and circumstances which would, if reasonably followed by inquiry disclose the identity of the principal; actual knowledge on his part of the principal's identity is necessary to exonerate the agent. Thus a person dealing in his own name, without disclosing the name of his principal, is personally bound by his contract, even though he is known by the other party to be an auctioneer, broker, or other professional agent usually employed in contracting as the agent of others" (2 *C. J.*, pp. 816 to 821).

New Jersey Cases.

In *Pederson* v. *Kiensel,* 71 N. J. L. 525, the Supreme Court said:

"Agency cannot be proved by the declaration of the person whose agency is sought to be established. 1 *Elliott Evid.* § 252."

In *Brounfield* v. *Denton,* 72 N. J. L. 235, the Court of Errors and Appeals in an opinion delivered by Mr. Justice Garrison, held (p. 238):

"The trial court correctly ruled that there was no proof of Mortimer's agency, and from this it followed of necessity, that the declarations made by him were inadmissible against the defendant.

Notably, the acts and declarations of Mortimer were inadmissible to prove his own agency. (Citing cases.)

Mortimer's agency not having been shown, his declarations could not be proved against the defendant and with these declarations stricken out there was admittedly no case for the plaintiff."

In the statement of the facts of that case, which preceded the opinion, the following appears (p. 237).

"Incidentally, it also appeared that Mortimer as the owner of the rest of the stock in the hardware company, had a direct personal interest in securing a purchaser for the defendant's shares."

In *Sadler* v. *Young,* 78 N. J. L. 594, 596, Chief Justice Gummere in delivering the opinion of Court of Errors and Appeals said:

"Since the decision of Kean *v.* Davis, Spenc. 425; S. C. on error, 1 Zab. 683, the

law has been settled in this state that an agent who contracts in such form as to make himself personally responsible cannot afterward, whether his principal was or was not known at the time of the making of the contract, relieve himself from that responsibility.''

In *Gifford* v. *Landrine,* 37 N. J. E. 127, Vice-Chancellor Van Fleet considered a foreclosure suit where the defense was usury. A loan was made to a broker who, the defendant contended, was the agent of the complainant and attempted to establish that fact by the declarations of the broker. The Vice-Chancellor says in his opinion (p. 128):

> ''No communication of any kind passed between the complainant and the defendant during the negotiation for the loan, nor until long afterwards. These are the facts, found in the defendants proofs, on which he relies to establish his defense.
>
> The rule is perfectly well settled, that the declarations of an agent, made pending a transaction in which he is authorized to represent his principal, and constituting part of the transaction, are, in law, to be regarded as the declarations of the principal; but to entitle them to this effect, it is plain, it is necessary, both as a matter of reason and justice, that the fact of his agency should first be established by competent evidence. The agent's unsworn declarations are utterly incompetent for such a purpose. They are, at their very best, mere hearsay. A proposition so rudimental needs no proof.''

In *Smith* v. *Delaware & Atlantic Telegraph and Telephone Company,* 64 N. J. E. 770, the Court of Errors and Appeals reviewed a decision of Vice-Chancellor Reed (63 N. J. E. 93). In that case the plaintiff's attorney sought to bind the defendant by means of statements of a person

whom the plaintiff claimed to be the general manager of the defendant. The question was whether the statements, of the so-called general manager, were sufficient to establish his agency for the defendant company. The Court held as a general proposition (p. 772):

> ''A person cannot by his own mere assertion prove that he is the agent of another.''

There were circumstances in that case which the Court held were sufficient to corroborate the claim of agency; namely, the person who claimed to be the agent was found in the office of the defendant company acting in the capacity of general manager and seemed to be familiar with the correspondence previously directed to the company. The Court declined to presume that the person found in the general manager's office at the defendant's headquarters, under these circumstances, was an intruder or usurper. None of these circumstances, nor any other circumstances likely to produce the same result, occurred between any of the parties to the proceedings *sub judice* between the time the first proposal to furnish materials was made by the Upton Company, and the completion of the transaction out of which this claim arose. All of the suggestions respecting agency arose after this transaction ended and the Construction Company's claim for damages arose, and there is no proof even in the affidavits of Miss Upton or Mr. Bonnell that any act or statement or circumstance occurred during that time that would inform, or intimate to, the Construction Company, that the Upton Company was acting as agent for Stone Company, instead of as principal, in this transaction.

The only witnesses who assert the agency are, like Mortimer in *Brounfield* v. *Denton,* per-

sons who have a direct personal interest in that assertion. If they are principals then the Construction Company retains a sum which it would naturally apply toward its claim against the Upton Company for damages. If the Upton Company is an agent, as its president and treasurer alone (and only after the transaction) assert, then the Construction Company must pay this retained money, without recourse, to the alleged principal and look to the Upton Company for the full amount of its claim for damages, which if it should recover judgment, it may be unable to collect.

If an agent can, by his own assertions establish the fact of agency so as to bind his principal, it would be a great injustice if, by such assertions he could establish such an agency for the benefit and advantage of an undisclosed principal and to the detriment of an innocent party who relied upon him as principal, when the (self-styled) agent, by such assertion, benefits thereby and at the same time substantially injures the innocent third party. Having held itself out as principal and asserting its alleged agency only after the transaction is closed, and when it can financially benefit itself and prejudice its customer thereby, it is estopped from claiming or obtaining a benefit therefrom. It was paid a sum of money sufficient to pay for all the stone involved in this suit. It chose to apply that money to the payment, in full, for sand and (defective) gravel, with respect to the furnishing of which it does not deny that it is the principal, and leave the balance (retained at its own suggestion and mutual arrangement with the contractor), against the stone, about which there was no complaint, and afterwards claim it furnished the same as agent, and not as principal.

In *Gifford* v. *Landrine,* Vice-Chancellor Van Fleet refers to "the agent's *unsworn* declarations." The question is not whether the statement is sworn or unsworn, but whether it is the statement of the agent seeking to prove his own agency. In the case *sub judice* the assertions of agency appear in the form of affidavits sworn to by the officers of the self-styled agent, but the proof is purely self-serving and comes from parties financially interested, to enable them to escape financial responsibility, and under circumstances which afforded no opportunity for cross examination. Upon this testimony alone, the question of agency is sought to be established. We believe it is inadmissible, but, if admissible, was not conclusive, and raised a question of fact.

POINT III.

The account sued upon in this action was fully paid and satisfied.

Let us, for the purposes of this point, assume that the Upton Company acted as agent for the Stone Company, in so far as the stone was concerned. Here are facts, and the *only* undisputed facts in the case:

1. The Upton Company entered into an agreement to and did furnish sand and gravel, about which there is no contention or claim that it acted as agent for anyone. As to the furnishing of sand and gravel, therefore, that it acted as principal is not disputed.

2. It is not disputed that on December 13, 1924, Mr. Vogel, Bridge Engineer, New Jersey State Highway Department, arrived on the Morgan job where these materials were being used, and condemned, as unsatisfactory, the concrete aggregate made therefrom, and forbid the fur-

ther use of the material furnished by the Upton Company. On December 17, 1924, representatives of the State Highway Commission again examined the concrete, in the presence of a representative (Mr. Bonnell) of the Upton Company, and authorized the resumption of use of these materials if the Construction Company would mix the *gravel* with equal parts of a special size of crushed stone, in a certain specified manner. This all clearly appears from Exhibit 4 offered by the Upton Company (p. 46). From this it clearly and indubitably appears that from December 13 to December 17, 1924, the work was suspended by order of the State Highway Department, and, as a natural consequence, some damage to the contractor for delay, as well as for the increased cost of crushed stone in the place of gravel, was bound to ensue. Although Miss Upton and Mr. Bonnell, on behalf of the Upton Company, and Mr. Law, on behalf of the Construction Company, disagree as to the cause of this delay and damage, the fact that it occurred and that the Construction Company had a claim for damage (if only for demurrage, which Miss Upton (p. 55) and Mr. Bonnell (p. 39) admit) (Exhibit 4, p. 46) is not disputed.

3. It is not disputed that at a conference between Mr. Law and Mr. Bonnell held early in January, 1925, when the former called the latter's attention to the Construction Company's claim for damages on account of the rejection of the materials, Mr. Bonnell suggested that, instead of holding up the payment due February 15, 1925, for materials (including those in question) furnished during December, 1924, the Construction Company make a payment on account and retain the balance pending an adjustment of that claim.

4. It is also not disputed that the Construction Company adopted this suggestion and made a payment on February 16, 1925, of $4,200.00 on account of a bill of $5,228.81 for sand, gravel and stone furnished during December, 1924, leaving as a balance on account of the claim the sum of $1,028.81 (p. 32), which is the exact amount sued for in this action (p. 5).

5. It is also undisputed that the materials, and value thereof, furnished during December, 1924, were as follows: Sand and gravel, $1,999.38; crushed stone, $3,229.43 (p. 31).

6. The $4,200.00 payment of February 16, 1927, if so applied, was sufficient to constitute full payment for the crushed stone, about which there was no dispute, and leave a balance of $970.57, about half of the account for the sand and stone, the quality of which was—to say the least—in dispute.

The balance was retained at the suggestion of Mr. Bonnell. Plainly, it was the mutual understanding and intention that this balance was retained on account of the dispute over the quality of the sand or gravel, or both, and not on account of the stone, concerning which there was no dispute or objection. The balance should, therefore, have been charged against the sand and gravel and not against the stone. These circumstances being known to both parties, and undisputed, it is to be presumed, as a matter of law, that this payment was applied on account of stone, which was admitted, rather than on account of sand and gravel, which was in dispute (30 Cyc. 1273).

Such an appropriation of the $4,200.00 payment if not made by the parties will by law be

so made in the interest of intrinsic justice and the equity of the case.

2 *Greenleaf,* Sec. 529;
Terhune v. *Colton,* 12 N. J. E. 232, 237;
Turner v. *Hill,* 56 N. J. E. 293, 302.

Payment is a valid affirmative defense under a general denial of an allegation of the existence of an unpaid book account.

This was a question of fact for a jury (30 Cyc., p. 1296).

This, also, raised a question of fact.

POINT IV.

The Supreme Court erred in striking out the answer and in giving judgment in favor of the Stone Company and against the Construction Company.

The Statute and Rules on Summary Judgment.

The *Practice Act of 1912* provides in Section 15:

> "Subject to rules, any frivolous or sham defense to the whole or to any part of the complaint may be struck out; or if it appear probable that the defense is frivolous or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section."

The *Supreme Court rules* provide:

> "80. When an answer is filed in an action brought to recover a debt or liquidated demand arising—
>
> (a) Upon contract, express or implied, sealed or not sealed * * * the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided unless the defendant, by affidavit or other proofs, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

It was not contended, either in the notice of the motion (p. 24) or on the argument, or found by the Supreme Court, that the answer was either frivolous or sham. It is only on such grounds that it could have been properly stricken out.

Corpus Juris:

> "The granting of judgment upon the pleadings upon motion is not looked upon with favor by the courts, and on such a motion, at any stage of the case, the court will not declare a pleading defective if it can be sustained by the most liberal construction, since every reasonable intendment is to be taken in favor of the pleading claimed to be defective."
>
> "2. *Nature of Motion.* A motion for judgment upon the pleadings is in the nature of a demurrer. It is in substance both a motion and a demurrer. It is a demurrer for the reason that it attacks the sufficiency of the pleadings; and it is a motion for the reason that it is an application for an order for judgment. Like a demurrer it admits the truth of all well pleaded facts in the pleadings of the opposing party, it may be carried back and sustained against a prior pleading of the party making the motion, and the court will consider the whole record and give judgment for the party who, on the whole, appears entitled to it. But averments in the pleadings of the moving party are not necessarily to be taken as true. It is wholly immaterial upon whom rests the burden of proof."
>
> "b. *Defective Pleadings in General.* The pleading must be clearly bad in order to justify a judgment in favor of the other party, and if there is any reasonable doubt as to its

sufficiency judgment on the pleadings will not be rendered." (31 Cyc. 605, 606, 607.)

The Decisions.

In *Eisele & King* v. *Raphael,* 90 N. J. L. 219, the Court of Errors and Appeals reviewed an order for summary judgment made by a justice of the Supreme Court. The order of the Supreme Court Justice decided that the answer filed was frivolous and sham and that the defendant failed to show such facts as said justice deemed sufficient to entitle him to defend. The Court of Errors and Appeals held that the finding of the judge must be assumed as the truth until the contrary appears *and that since it did not appear in that case,* the finding must be taken as correct. Mr. Justice Bergen in delivering the opinion of the Court gives a history of the practice as follows (pp. 220-1):

"That an order striking out an answer and the entering of a summary judgment rested in discretion and was not the subject of a writ of error, prior to the Practice Act of 1912, has been long settled in this state and is not open to argument (*State Mutual Building and Loan Association* v. *Williams,* 78 N. J. L. 720), but it is claimed that the Practice Act of 1912 has altered the rule in this state. This is so to the extent of allowing an appeal and a review of such an order.

Section 15 of the new Practice Act (*Pamp.* L. 1912, p. 380) provides that 'subject to rules, any frivolous or sham defence to the whole or any part of the complaint may be struck out; or if it appear probable that a defence is frivolous or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section.'

This section being made expressly 'subject to rules' must be read in connection with rules 80 to 84, inclusive, relating to the entry of summary judgments. Rule 80 provides that 'the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.'

Rule 81 requires that the motion to strike out be made upon affidavit of 'the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and stating the amount claimed, and his belief that there is no defence of the action.' Reading the rules, to which the statute is subject, and the statute together, a plaintiff will be entitled to a summary judgment upon presenting an affidavit complying with rule 81, which should set out fully the facts upon which the cause of action is based, *unless the defendant by affidavit or other proof* shall show facts deemed by the judge hearing the motion sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts set up by the defendant, and his conclusion that they are not sufficient should not be set aside unless the sufficiency clearly appears."

(p. 223) "Striking out a sham or frivolous plea is not an infringement of the right of trial by jury. A plea of general issue, although it denies the entire claim of the plaintiff, and, apparently, raises a question of fact, is not protected for that reason against a motion to strike out as sham or frivolous. *Coykendall* v. *Robinson,* 39 N. J. L. 98."

In *Fidelity Mut. Life Ins. Co.* v. *Wilkes-Barre & H. R. Co.,* 98 N. J. L. 507, the Court of Errors and Appeals reviewed an order of a Supreme Court Justice striking out an answer filed by the defendant as frivolous and entering summary

judgment thereon. Mr. Justice Minturn in delivering the opinion of the Court said (p. 735):

> "The notice to strike out was based upon the ground that the answer was sham and frivolous. The learned justice in the Supreme Court, struck it out on the ground that it was frivolous. In this we conceive he was legally correct, since a pleading cannot under the common-law rules applicable thereto be possessed of both legal infirmities at the same time. At common law a plea was considered sham when it was palpably or inherently false, and from the plain or conceded facts in the case must have been known to the party interposing it to be false. Such a plea, says Chitty, 'has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs. 1 Chitty, Pl. 542; 1 Tidd's Pr. 611; 2 Bouv. Law Dict. 680.
>
> A frivolous plea need not be false, but is palpably insufficient as a legal defense to the action, and hence legally insubstantial or frivolous, and therefore presumably interposed for the purpose of delay. 2 Bouv. Law Dict. 853. Under the common-law practice in New York and the Supreme Court rules, a plea might be condemned as either palpably false (sham) or frivolous, and could be struck out upon either ground, but was never summarily dealt with upon both grounds. Oakley *v.* Devoe, 12 Wend. 196; 1 Burrill's Pract. 180; 21 R. C. L. 452, and cases cited."

In *Milberg* v. *Keuthe,* 98 N. J. L. 779, the Court of Errors and Appeals reviewed a summary judgment in favor of the plaintiff entered on an order made by a Supreme Court Commissioner in an ejectment suit. The notice stated as the ground of the motion that the answer was sham and frivolous and disclosed no defense. The order vacated the answer and directed that the plaintiff recover the

possession of the premises. The Court of Errors held (p. 780) that a summary judgment was authorized by sections 15 and 16 of the Practice Act of 1912 "when the answer is frivolous or sham, and has been stricken out, leaving the plaintiff's claim wholly uncontested."

In delivering the opinion of the Court Mr. Justice Trenchard said (p. 781):

> (p. 781) "It may, however, be worth while to point out that the terms 'frivolous' and 'sham' as used in section 15 do not mean precisely the same thing. A sham answer is one good on its face, but false in fact; a frivolous answer is one which on its face sets up no defense, although it may be true in fact. A frivolous answer is always assumed to be true, while a sham answer must be admittedly false or conclusively proved to be so; the character of the former is determined by mere inspection, while that of the latter is usually determined by proof *aliunde.* See in *re Beam,* 93 N. J. Eq. 593, and *Fidelity Mutual Life Insurance Co.* v. *Wilkes-Barre, &c., Ry. Co., ante* p. 507. But of course, neither a sham answer nor a frivolous answer is a legal defense to an action, and sections 15 and 16 of the Practice Act of 1912 provide a summary method of striking out such an answer and for the entry of summary judgment."

In *Muhlenbeck* v. *Town of West Hoboken, et al,* 2 N. J. Misc. Rep. Mr. Justice Minturn heard a motion to strike out an answer and said (p. 8):

> * * * "I am therefore not disposed to deprive the defendant of the opportunity of substantiating his contention upon a trial before a jury. To warrant the court in striking out a plea as false or sham, it must be so palpably false or insufficient in law as to enable the court to conclude that the defendant is seeking delay or trifling with the process of the law. *Fidelity Insurance Co.*

v. *Wilkes-Barre Railroad Co.,* 120 Atl. Rep. 734.

When to decide the question it becomes necessary to take testimony to enable the court to determine the relative merits of the controversy, or the justice or injustice of the defense, the defendant's constitutional right to a jury trial requires that the motion to deprive him of his defense be denied."

There are a number of decisions sustaining an order striking out an answer under section 15 of the Practice Act and Rule 80 but, with the exception of *Eisele & King* v. *Raphael* (*supra*), they all seem to be cases where the defendant filed no answering affidavits, or such as failed to show any color of a valid defense. Some of these cases are:

In *Lembeck & Betz Eagle Brewing Co.* v. *Krause,* 94 N. J. L. 219, the Court of Errors and Appeals sustained a summary judgment entered by the Supreme Court. The opinion in that case delivered by Mr. Justice Kalisch says, in part, as follows (p. 294):

"The plaintiff, under the Practice Act, gave due notice to defendant that he would move to strike out the answer upon the ground that it disclosed no legal defense to the action, and that he would also move for a summary judgment for the amount due plaintiff on affidavits, properly verified, which were annexed to the notice, and which set out facts which justified the circuit judge in finding that the defendant had no meritorious defense to the action. *It further appears that the defendant made no reply to the moving affidavits, and therefore, under the rules relative to summary judgments, so far as the merits of the case were concerned, the plaintiff was entitled to judgment.*"

In *Danenhower* v. *Birch,* 97 N. J. L. 193, 194 the Court of Errors and Appeals sustained such

an order. The opinion of the Court, delivered by Justice Trenchard, gives the following reason therefor (p. 195):

"In the present case the motions to strike out the answers and for judgment final were respectively supported by a proper affidavit verifying the cause of action, stating the amount claimed, and that there was no defence. Neither defendant filed any affidavit or submitted any proofs in reply.

In view of the *uncontradicted* affidavit of the plaintiff, it is clear that each defendant was the owner of the stock on account of which he was assessed; that neither defendant was a *bona fide* holder of the stock for value, and that neither defendant had taken an appeal from the order of the District Court affirming the assessment."

In *Schiff* v. *Alexander,* 130 Atl. 133, the Supreme Court sustained an order of the Circuit Court Judge striking out an answer and counterclaim as sham and frivolous. In that case the notice of motion to strike out was accompanied by affidavits or other proof as to the fact set forth in the complaint. *The defendants filed no answering affidavits in support of the counterclaim* and the conclusion of the Circuit Judge adopted and supported by the Supreme Court was:

"*There is nothing else for the court to do but to assume that the facts set forth by the plaintiffs' affidavits are true, and that the defendants cannot show such facts as to be sufficient to entitle them to defend.*"

In the case of *Boynton Lumber Company* v. *Evans,* 101 N. J. L. 120, the Court of Errors and Appeals reviewed a summary judgment entered by one of the justices of the Supreme Court. The motion was to strike out an answer on the ground that it was sham and frivolous. Gallagher, as a building contractor, entered into an

agreement with Tanner to erect a resident upon Tanner's lot, afterwards Gallagher sub-let the entire contract to Evans. Tanner paid the full amount of the contract price to Gallagher, the only contractor with whom he had relations. Gallagher paid Evans, but Evans did not pay the lumber company. The lumber company brought a Mechanic's Lien suit against its contractor, Evans, and against the owner Tanner. Tanner filed an answer contending that he had no legal relations with Evans and that since he (Tanner) performed all of his obligations with Gallagher, his contractor Evans had no right of action against Tanner. It was contended that these questions of fact raised by the answer should be subjected to the discretion and scrutiny of a jury for determination.

Mr. Justice Minturn, in delivering the opinion of the Court of Errors, held that there was no jury question involved in the case and that the answer was properly struck out, for the reason that—

> "Obviously the contractual relationship of the parties is not the matter in issue, since the right of the plaintiff to recover is based entirely upon the statutory remedy provided for the purpose by the Mechanic's Lien Act (P. L. 1898, P. 538).
>
> Under the statutory liability created by the act, where the contract *inter partes* has not been filed, it becomes immaterial to inquire whether the owner paid the contractor, and whether the contractor paid his subcontractors; the only inquiry being whether the materialman has been paid. Gardner & Meeks Co. *v.* N. Y. Cen. R. R. Co., 72 N. J. Law, 257, 62 A. 416.
>
> An answer, therefore, which avers facts not legally responsive to this inquiry, is in contemplation of law either sham or frivolous, and upon motion may be struck out upon either ground. Eisele & King *v.* Raphael, 90 N. J. Law, 220, 101 A. 200; Fidelity, etc. Co. *v.* Wilkes-Barre Co., 98 N. J. Law, 507, 120 A. 734."

This exception serves to prove the rule, and is particularly significant in support of our contention in the present case.

Applicability of Decision to Present Case.

The decision of the Supreme Court (p. 62) is predicated upon the determination, by that court, of all questions of fact against the Construction Company and the Court expressly found

> "that the sale (of stone) was made through F. R. Upton, Inc., as 'sales agent' or 'branch office' of plaintiff (Stone Company), operative in an office building at Newark and without physical possession of the property or any muniments of title thereto."

The Court said:

> "Whether defendant honestly believed it was buying crushed stone from F. R. Upton, Inc., under representations on which it was entitled to rely for which plaintiff is accountable, *may be in dispute,* but on the papers before me there can be no doubt that F. R. Upton, Inc., was an agent or agency of plaintiff, and that plaintiff was a principal, disclosed or undisclosed; * * *. It appearing, therefore, that the plaintiff is the principal in the transaction and the real creditor, * * * judgment may be entered for the face of the claim on filing the usual assessment of damages."

The principal, and most highly controverted, question of fact was, therefore, decided by the Court on conflicting affidavits and on a motion for summary judgment. This, we submit, was error.

The Supreme Court Justice in the decision below refers to the Upton Company as "opera-

tive in an office building in Newark, New Jersey, and without any physical possession of the property or of any muniments of title thereto."

The fact that the Upton Company is "operative in an office building at Newark, New Jersey, and without any physical possession of the property" is not significant. The gravel and sand which they sold to the Construction Company, as principal, was not kept at their offices in the Union Building at Newark, any more than the crushed stone was kept there. The United States Steel Co. doesn't keep its steel and pig iron in its general offices at 71 Broadway, New York City. When it takes an order for steel products they are shipped by some constituent separate corporation direct to the purchaser. The Standard Oil Company does not keep any oil at 26 Broadway, New York City. Its orders are filled by any one of the number of constituent separate companies who happen to have the grade or quality of oil and lubricant desired and who ship it direct to the purchaser. The Lehigh Wilkes-Barre Coal Company does not keep its coal at its offices, 143 Liberty street, New York City. It makes arrangements to furnish coal but the company has no physical possession of the vast quantities of coal which it sells and is paid for. Illustration could be multiplied to show that the material business is not conducted on the basis of the seller keeping the supply of material in his office or place of business, and delivering with his own hand the physical possession thereof to the purchaser. *But regardless of this observation of the Court, the indubitable facts remain that the arrangements for sand, gravel and stone were made by the Upton Company in its own name, on its own letter-heads, and on its own exclusive initiative and it, alone, conducted the*

negotiations and received the pay for the materials furnished.

The answer of Construction Company was not merely a general denial of the allegations of the complaint. In addition to the general issue pleaded to every allegation of the complaint, it set up as a second defense, an affirmative defense which, if true, was sufficient to defeat the cause of action.

The answer was neither frivolous nor sham. The notice of the motion to strike it out, did not assert, nor was it urged in support of the motion, that the answer was either frivolous or sham, nor did the Supreme Court Justice so hold. It was based, as the decision indicates, upon a determination of the facts, *as developed entirely outside the pleadings themselves,* but not on all the facts capable of being developed at a trial, through cross examination of witnesses and the inspection of the originals of papers, letters, etc., that could be required to be produced under subpoena, but only part of which are merely referred to in, but not annexed to, the affidavits presented in support of the motion. Hence we have a final decision on the facts, *without cross examination and without all the evidence.*

It is our contention that, whether or not the averment in the answer and affidavits presented on behalf of the Construction Company, constituted a "successful challenge of those of its adversary," they presented a good defense to the action which it was the constitutional right of the Construction Company to have determined by a jury. It was also the right of the Construction Company to cross examine the president and treasurer of the Upton Company, and to have produced in evidence all of the letters, bills, doc-

uments and other evidence which, though referred to in the affidavits of those persons, were neither annexed to the affidavit nor submitted at the argument. The letter of August 5, 1924, referred to by Mr. Bonnell (p. 36) and by Miss Upton (p. 55) as being evidential of the agency of the Upton Company but which, in fact, proves the contrary, is an illustration of what the actual production of the papers might show at the trial. In view of the highly controverted state of facts before him, we think the Supreme Court Justice erred in not denying (and in granting) the motion for summary judgment.

Undisclosed Principal.

On the argument in support of the motion, counsel argued his motion on the theory that the Stone Company was entitled to sue as an undisclosed principal. In support of this contention he cited the case of *Bernshouse* v. *Abbott,* (45 N. J. L. 531). In that case Bernshouse bought from Joseph E. P. Abbott two carloads of cedar siding. The delivery of the lumber was accompanied by bills in the name of Joseph E. P. Abbott. Bernshouse held three promissory notes against Joseph E. P. Abbott amounting to about the price of the lumber and tendered these notes in payment therefor. Joseph E. P. Abbott then advised Bernshouse that in disposing of the lumber he had acted as the agent of another person. John C. Abbott (the father of Joseph E. P. Abbott) brought the suit on common counts on the bill of particulars. Bernshouse pleaded the general issue and a special plea of set-off of the debt of the agent. Issue was joined and the case came to trial at which the Court overruled the motion for non-suit and at the conclusion of the trial ordered a verdict for the plaintiff without permitting the case to go to a jury.

It appeared at the trial that the lumber belonged to John C. Abbott but had been levied on by the sheriff under an execution against John C. Abbott and his two sons (including Joseph E. P. Abbott) for a joint debt. The sheriff authorized Joseph E. P. Abbott to dispose of the lumber at private sale to raise money to pay the execution. John C. Abbott also authorized Joseph E. P. to dispose of the lumber for the same purpose. Joseph E. P. Abbott disposed of the lumber to Bernshouse without disclosing his father and his father was not disclosed in the transaction until after the delivery of the lumber and the trouble about the set-off arose.

The opinion of the Court of Errors and Appeals delivered by Mr. Justice Depue held (p. 540):

> "The transaction was a sale of personal property by an agent who had authority to sell, and who sold in his own name without disclosing his agency, to a purchaser who bought in good faith, believing that the agent was the owner, and the inquiry is, under what circumstances such a purchaser, in an action by the principal for the contract price, is entitled to set off a debt due him from the agent.
>
> The son, when he negotiated the sale, had neither the possession of the property nor any muniment of title to it in himself. He sold it in his own name, without any authority from his father to sell it in that way.
>
> The two leading cases on the subject of the right of a purchaser of personal property to set off a debt due to him from the agent through whom the sale was made, where an action has been brought by the principal to recover the contract price, are Rathbone, Jr. *v.* Williams, reported in a note to George *v.* Claggett, 7 T. R. 359, and Baring *v.* Corrie, 2 B. & Ald. 137. In Rathbone *v.* Williams, the action was for the value of goods sold.

The sale was made through Rathbone, Sr. & Co., who were the plaintiff's factors, and had sold the goods in their own names as principals, without disclosing their agency. The purchaser, in an action by the principal for the contract price, was allowed to set off a debt due to him from the factors. In Baring *v.* Corrie, the sale was made by a broker, who did not disclose his principal; and the purchaser, in an action for goods sold, brought by the principal, was not allowed to set off a debt he had against the broker.

The distinction between these two cases is explained by Abbott, *C. J.*, in his opinion in Baring *v.* Corrie. He says: 'The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale * * * and he usually sells in his own name, without disclosing that of his principal. The latter, therefore, with a full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation. He is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker has a right to expect that he will not sell in his own name.' And, referring to the cases cited in which the set-off had been allowed, including Rathbone *v.* Williams, the Chief Justice said that 'in all the cases cited, the factor was in actual possession of the goods, and the purchaser could not know whether they belonged to him or not and at all events, they know that he had a right to sell the goods.' In Baring *v.* Corrie, where the claim of set-off was disallowed, the property sold was not in the possession of the broker who negotiated the sale. It was lying in the West India docks, from which it could not be obtained without a delivery order, countersigned by the plaintiffs' custom-house clerk; and, as was said by Bailey, *J.*, 'the plaintiffs

did not trust the broker with either the muniments of their title or the possession of the goods, as was done both in the case of Rathbone *v.* Williams and that of George *v.* Claggett.'

The language of Abbott, *C. J.*, and Bailey, *J.*, quoted from Baring *v.* Corrie, is quoted with approval by Cresswell, *J.*, in Fish *v.* Kempton, 7 C. B. 687, 693. And the distinction between a factor having the possession of the goods with power to sell, under the usages of trade, and a broker or other agent who has not such possession, has been adopted as settled law in cases where the right to set-off has arisen—the right to a set-off being recognized only where the sale was made by a factor." (Citing cases.)

* * * * * * * * * *

(p. 542.)

"Mr. Chitty, with characteristic exactness, states the principle to be that 'Where a principal permits one who is not known to be an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the actual principal as if the agent had been the real contracting party; and he is entitled to the same defence against the principal, whether it be by common law or by statute, as he was entitled to at that time against the agent, the apparent principal. Accordingly, if in such a case the defendant has acquired a set-off against the agent, before the principal has interposed, the latter will be bound by the set-off.' 'But,' he adds, 'this doctrine does not apply where the agent is a mere broker, and has not the possession of or is not entrusted with the *indicia* of property in the goods.' *Chitty on Cont.* 306.

In the case now before the court the son had neither the possession nor the *indicia* of property. He was an agent with a naked power to sell. The judge properly denied the defendant's claim to set off the son's debt, and the judgment should be affirmed."

In *Wysakowska v. The Polish-American Building and Loan Association of the City of Newark*, 96 N. J. L. 447, the Court of Errors and Appeals considered a case in which the plaintiff had sued an association for moneys deposited by her for her sister, the sister having drawn the money out and misappropriated it. In delivering the opinion of the Court, the Chancellor at p. 449 quotes the doctrine of Chitty on Contracts 306 quoted in *Bernshouse* v. *Abbott* (p. 542), then the Court says (p. 450):

> "The facts in the case at bar fall within this rule, as Josefa permitted Catherine, who was not known to be her agent, to deposit as apparent principal, with defendant building and loan association Josefa's money for stock, and now that Catherine's forgery and embezzlement has been disclosed after the association has paid Catherine, innocently believing her to be Josefa, it is entitled to be placed in the same situation as if Catherine had been the depositor of her own money; and the association is entitled to the same defence against Josefa as it was entitled to against Catherine at the time of the withdrawal of the funds, namely, payment. Of course, the doctrine of estoppel *in pais* applies, but not for the reason given by the Supreme Court that Catherine was held out as agent with apparent authority."

The distinction drawn in the cases discussed in the Bernshouse case, between Rathbone Sr. & Co., who sold as factors and against whom the set-off was allowed, and Baring, who sold as a broker and against whom the set-off was not allowed, seems to have been based upon the fact that a factor "usually sells in his own name without disclosing that of his principal," and has authority from his principal "to sell in his own name," while a broker has no authority to "and he ought not to sell in his own name."

Under the rule stated in Corpus Juris (*supra*), the Upton Company, having acted in its own name, holding itself out as principal, it cannot afterward, as against persons interested in the transaction, set up that it was acting as agent only.

Both of these cases related to an isolated transaction of a unique or specific nature, peculiar to itself and to the subject of the particular transaction.

In our case we have no such isolated transaction, but one of many of the same kind, occurring repeatedly over a long period of time, between parties who claim to be generally engaged in such business.

There is no comparison between the transaction in question and those involved in the Bernshouse and Wysakowska cases. The transaction involved in our case occurred in the ordinary course of business as one of many transaction of a day's work. In the same transaction, it sold sand, gravel and stone, indiscriminately, yet its claim of agency applies only to the stone.

If the Upton Company's uncorroborated contention (the Stone Company makes no such contention) of agency were true, it must have acted as broker or factor.

Neither the letters which constituted the agreement for sand, gravel and stone, nor any proof submitted in support of the motion, show the relationship of either broker or factor between the Upton Company and the Stone Company.

The idea of agency was not suggested until after the transaction here involved had closed and the Construction Company had a claim for damages against the Upton Company, which the

latter had a reason for, and financial interest in, avoiding by the afterthought of agency. By this means the Upton Company seeks to deprive the Construction Company of its right of counterclaim for damages arising out of the same transaction.

In *Tiffany on Agency,* (Horn book series, 2d. Ed.), Sec. 97, p. 269, it is stated:

> "In suits brought by an undisclosed principal against T., defenses based upon payments by T. to A. must be carefully distinguished from defenses based upon offsets claimed by T. against A. It would be clearly unfair to allow P. to recover against T., without allowing T. at least some of the defenses which would have been available to T., if sued by A. It may therefore be laid down as a general rule that, in an action by the undisclosed principal, the other party to the contract may successfully interpose all equities or defenses which existed in his favor against the agent at the time when the existence of the agency was first discovered by T. A payment made by T. to A., or a set-off acquired against A., at any time before T. has notice that A. is acting for some one else, is a good defense to a suit subsequently brought by P." * * * "However, a payment made by T. to A. may be a good defense, although made after T. knows there is some principal, and even after T. knows the identity of A.'s principal. The validity of such payment depends upon the question whether the agent has the authority or the power to collect the money due." (T means "Third Party," A means "Agent," P means "Principal.")

The authority of the Upton Company to receive payments for the Stone Company is admitted by the credit shown on the book account attached to the complaint (p. 5).

We submit that, under the circumstances of this case, the theory of an undisclosed principal does not apply.

Conclusion.

The Construction Company had no intimation or knowledge that their transaction was not between themselves and Upton Company, exclusively, until twenty-one months after the transaction involved in this suit had concluded, when it received a letter,

dated

"Newark, N. J.
F. R. Upton, Inc., Sales Agents,
808 Union Bldg.,
9 Clinton Street,
Newark, N. J.
Sept. 8, 1926."

signed

"F. R. Upton, Inc.,
Sales Agents,
By L. Upton,
Pres."

on what purported to be a letterhead of "Bound Brook Crushed Stone Co." printed on the identical paper and in the identical type as the Upton Company's own letterheads, stating that the Stone Company had a claim against it for materials. No such claim or statement was ever received from the Stone Company. Mr. Law says that if he had known or suspected that his company was obligated in any way to the Stone Company he would have paid the bills for crushed stone separately and withheld payment on part of the bills for sand and gravel because it was the sand and gravel that had been defective and had caused the loss involved.

This suit is brought in the name of the Stone Company for an amount of goods sold and delivered on a book account. Demand for payment and a refusal thereof is alleged. A book account presupposes a voluntary entering into business relations between the parties. There was no proof of the book account and there was no proof of the making and refusal of the demand for payment. All that the affidavits do is to create a clearly defined and disputed question of fact, namely, did the Construction Company receive a bid from and accept a bid of the Upon Company for sand, gravel and stone, or was the Upton Company merely acting as the agents for somebody? Out of the use of defective gravel furnished by the Upton Company, arose the condemnation of work and the necessity for using crushed stone. It is not contended anywhere in the affidavits that the question of the failure of the gravel to comply with specifications, was one in which anyone was interested except the Upton Company and the Construction Company. In order to make the job good the Upton Company undertook to furnish the stone and the Construction Company paid them for sand, gravel and stone by a check drawn to the order of "F. R. Upton, Inc.," upon which check is a notation "In settlement of the following items on acc. of Dec. sand, grav. and stone, $4,200.00." That check is endorsed, "Pay to the order of National Newark & Essex Banking Company, Newark, N. J., 867, F. R. Upton, Inc."

That check was sent with nineteen separate invoices, sixteen of which were headed as follows:

> "Wilson & English Const. Co. Inc. to F. R. Upton, Inc., dr.
> Wholesale crushed stone, sand, crushed slag, gravel, brick and sewer pipe."

These sixteen invoices are for sand and gravel. The remaining three invoices are printed

> "Bound Brook Crushed Stone Co., etc.,
> Sold to Wilson & English Construction Co."

and cover crushed stone alone. Two of these three invoices are stamped across the face in the place of Bound Brook Crushed Stone Company as follows:

> "F. R. Upton, Inc.,
> Union Bldg.,
> Newark, N. J."

just before the words

> "Sold to Wilson & English Construction Company."

On one the words "Bound Brook Crushed Stone Company" were stricken out in ink and the letters and word, "F. R. Upton, Inc.," written in ink above it. The third invoice has no rubber stamp or correction at all but all of the nineteen were stamped paid by and at the office of F. R. Upton, Inc., on February 16, 1925, and the number of the check making the payment is written into the payment stamp.

The arrangement covering the purchase of sand, gravel and crushed stone was a single and entire transaction between the Upton Company and the Construction Company, exclusively. The Construction Company had a right to counter-claim damages arising out of the same transaction, against the Upton Company on account of the bills for sand, gravel and crushed stone for December. The amount retained was retained at the suggestion of Mr. Bonnell, the treasurer of the Upton Company, for the purpose of such a counter-claim subject to further adjustment. If the Upton Company were the agents for the Stone Company for the sale of crushed stone and the agents of somebody else

for the sale of sand and gravel and failed to disclose to the Construction Company that it was such agent instead of the principal as its bid represented it to be, then the Upton Company had no right to apply the $4,200.00 paid by the Construction Company for December's bills by paying for all of the sand and gravel which was the cause of the trouble, and apply the balance toward the payment for crushed stone, about which there was no dispute. If the Upton Company had applied this money first to the payment of crushed stone, which was satisfactory, and the balance to sand and gravel, which was defective, and which defect occasioned the withholding of the balance, then the application of the money would have been properly made and then the Construction Company would have had a proper defense to a suit that might be brought for the balance (in the name of the undisclosed principal or otherwise) who furnished the sand and gravel, instead of being compelled to defend itself in a suit brought by the alleged undisclosed principal who claims to have furnished the crushed stone and against which claim the Construction Company have no counter-claim for defective material.

Throughout the entire proceedings and particularly in the motion papers, the Stone Company did not appear. All of the affidavits upon which the motion was made and decided were confined exclusively to those of Mr. Bonnell, the treasurer, and Miss Upton, the president, of the Upton Company. In other words, the agent, who we supposed was the principal, when confronted with the counter-claim for damages, rushes to cover and claims it was only the agent in the transaction and thereby seeks to obtain a judg-

ment against the Construction Company for the full amount of the bill and at the same time seeks to escape the counter-claim set up by that company. These affidavits are entirely self-serving and attempt to prove an agency by a means that is not competent in a court of law. They do not offer any documents, or proofs except their own statements, to prove such agency and their statements are made under circumstances of such personal advantage to be gained thereby, as to raise a serious question as to the admissibility, if not the truth, of those statements. It seems that the Construction Company, in a case where the important fact of agency is so highly disputed and where there is so much collateral proof to support their side of the argument in the form of receipted bills, letters and checks, is entitled to a determination by a jury of the fact question of agency.

The pleadings presented a square, definite and positive issue of fact. To the allegation of a book account the answer pleads a general denial which includes the defense of payment. It also denies a demand for payment. In the second defense it denies that the Construction Company ever purchased any commodities of any kind from, or had any business transactions whatever with, the Stone Company. No more clear and definite traverse of fact could be imagined than that presented by the complaint and answer. In addition to that there was an objection in point of law to the effect that the alleged book account fails to show a cause of action in that neither it nor the statement annexed thereto states that any commodity or material was furnished by the plaintiff. The decision of the Supreme Court Justice who heard and granted the motion is predicated upon the assumption of certain facts which

are the very facts in dispute. For the purposes of deciding this motion the Court assumed in favor of the motion, but did not find as facts, the very questions in dispute. It assumes without proof or evidence that the sale was made through the Upton Company, as sales agent or branch office of the Stone Company. Obviously, the Upton Company would not store a quantity of crushed stone in an office building in the heart of the city of Newark, consequently it did not have physical possession of this stone in its office. Whether it had any muniments of title thereto is a question of fact neither alleged nor proven in the record. It undertook to furnish the material in its own name and not as the agent of anyone and it received in its own name and deposited to its own credit in its own bank account the pay for the stone. Evidently it guaranteed the accounts since it is the only party who has participated in any way in the litigation or furnished any proof or affidavits in the matter. The decision of the Justice of the Supreme Court admits that the question of whether the Construction Company honestly believed it was buying crushed stone from the Upton Company is in dispute, but assumes that there can be no doubt that the Upton Company was the agent of the Stone Company and that the Stone Company was the principal, disclosed or undisclosed. Just which, the Court says, is immaterial for present purposes. It seems to us that this is the sole and all-important question of fact to be determined, for the same reason assigned by the Court, namely, because the counter-claim is asserted against the Upton Company, and will be otherwise lost so far as the balance of the amount claimed is concerned.

Dickens' "Artful Dodger" has no advantage over a business concern that, by its letterheads

and representations, offers in its own name to furnish materials of various kinds and when one of such materials becomes defective and gives rise to a counter-claim for damages, that company immediately dissolves itself into an aggregation of agencies for the purpose of representing an undisclosed principal in the furnishing of any of the several separate commodities so that the purchaser of such materials must pursue several "will of the wisps" before he finds out which of the undisclosed principals he was really doing business with.

The Upton Company should be required to prove its contentions (since the Stone Company makes none) before a jury and be required to stand up to the proposition as it made it itself and perform the obligations of the contract which it entered into in its own name. If there is any accounting to be made afterward with its alleged principal, that is a matter for it to take care of rather than for an innocent third party who has been duped by its assumed role of principal or by its failure to disclose its principal until after its customer has been victimized.

We respectfully submit that in view of the disputed questions of fact, the lack of valid proof of agency, and the foregoing decisions and reasons, the judgment of the Supreme Court should be set aside, with costs, that the case may go to trial before a jury, in the usual manner.

Respectfully submitted,

HOBART & MINARD,
Attorneys for Defendant-Appellant.

George S. Hobart,
Duane E. Minard,
Of Counsel.

(October Term, 1927.)

WILSON & ENGLISH CO.
GENERAL COMMISSION
NEW YORK

THE FOLLOWING ITEMS

DATE	AMOUNT

WHEN PROPERLY ENDORSED, NO OTHER RECEIPT IS NECESSARY.

NEW ROCHELLE, N.Y. FEB 16 1925 192 No. 15383

NORTH AVENUE BANK

PAY TO THE ORDER OF F.R. Upton, Inc

FOUR THOUSAND TWO HUNDRED DOLLARS Dollars

$4,200 00/100

WILSON & ENGLISH CO.

TREASURER.

ORDER OF
ASSEMBLY
N. J. 807
OH, INC.

PAY ANY BANK, BANKER OR TRUST CO. OR ORDER
FEDERAL RESERVE BANK
FEB 20 1925
1-120 OF NEW YORK
PAYING SUMMARY
1-120

WILSON & ENGLAND
GENERAL COMPANY
NEW YORK

THE FOLLOWING ITEMS

DATE		AMOUNT

WHEN PROPERLY ENDORSED, NO OTHER RECEIPT IS NECESSARY.

NEW ROCHELLE, N.Y. FEB 16 1925 192 No. 15383

NORTH AVENUE BANK

PAY TO THE ORDER OF F. R. Upton, Inc

FOUR THOUSAND TWO HUNDRED DOLLARS Dollars

$4,200 00/100

W. S. Wilson

TREASURER.

PAY TO THE ORDER OF
FABRICS & FELT LINING CO.
NEWARK, N. J.
FOR F. R. UPTON, INC.

ANY PAYING BANKER OR TRUST CO.
PRIOR ENDORSEMENTS GUARANTEED
FEB 19 1925
NATIONAL NEWARK & ESSEX BANKING CO.
NEWARK N. J.
55-1 55-1

PAY ANY BANK, BANKER OR TRUST CO.
OR ORDER
FEDERAL RESERVE BANK
FEB 20 1925
1-120 OF NEW YORK
1-120

43

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BOUND BROOK CRUSHED STONE COMPANY, *Plaintiff-Respondent,* *vs.* WILSON and ENGLISH CONSTRUCTION COMPANY, *Defendant-Appellant,* *and* F. R. UPTON, INC., a corporation, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

REPLY FOR DEFENDANT-APPELLANT TO BRIEF FOR PLAINTIFF-RESPONDENT.

Complete answers to the arguments contained in respondent's brief, are in the appellant's brief.

There are, however, some statements that require comment, namely:

1. *The Title of the State of Case and Brief.*

This title is criticized as improper (p. 1). It is the same as the title of the case as it stood on the motion before the Supreme Court, and is in accordance with the practice where third parties are brought in as defendants under Section 12 of the Practice Act.

2. *The Counter-claim.*

It is said (pp. 2, 5, 6, 7, 10, 12 and 15) that the counter-claim is improperly printed and re-

ferred to in appellant's brief. As stated at page 5 of that brief,

> "(The counter-claim is not involved in this appeal, but frequent reference thereto in the record makes it necessary to describe it here.)"

Reference thereto in the record and at a number of places in the appellant's brief was necessary to a clear understanding of the transaction involved in this action.

Several times reference is made to the fact that suit on the counter-claim has been noticed for trial at the Somerset Circuit of the Supreme Court (pp. 2, 10 and 21). This case, insofar as the counter-claim is concerned, is at issue in the Somerset Circuit and naturally must be noticed for trial to keep it alive, pending the determination of this appeal and by stipulation, the trial thereof is being continued from term to term on the Somerset calendar until the decision of this Court upon the presently contested question of the sufficiency of the pleadings. The danger suggested at page 5, that might result from the appellant winning the case in the Somerset Circuit as well as this appeal, is purely imaginary.

A distinction is sought to be made (p. 3) by the respondent (for the first time by it) between the sale of sand and gravel and the sale of stone. That the sand, gravel and stone were all in the same transaction and sold by the same party, is the allegation of the appellant and is argued at length in its brief. That they were all paid for in the same account and by the same check is not disputed.

3. *Undisputed facts.*

The respondent's brief states as *undisputed* (or *admitted*) facts:

> that the sum claimed "still remains due and unpaid *to the plaintiff*" (p. 4), "that defendant admits the book account and the correctness *of the amount due*" (p. 6).
>
> "(1) That the stone in question was furnished to the defendant *by the plaintiff*.
>
> (2) That the sum of $1,028.81 remains due on account thereof from defendant *to plaintiff*"; (p. 10)
>
> "that the sum remains unpaid on the account *due the plaintiff* for stone" (p. 16)
>
> "that this stone was ordered *from and furnished by the plaintiff*" (p. 20).

But these are the very questions of "fact" that *are* in dispute, they are included among the "several questions of *disputed* fact" discussed under Point I (p. 23) of the appellant's brief. If these "facts" were undisputed or admitted, as stated in respondent's brief, there certainly would be no law suit, or appeal before this court. They comprise the *quod erat demonstrandum* of the whole case.

4. *The "Overwhelming Proof."*

It is said (pp. 7, 8 and 11) that the fact of agency "is overwhelmingly established" by the affidavits of Miss Upton and Mr. Bonnell. If the selfserving statements of their own agency, were admissible (which we deny), the allegation of that fact by two witnesses and its denial by one witness would simply raise a question of fact for a jury. That the "defendant must have known" and "that defendant knew" it was dealing with the agent of the stone company is a mere conclusion unsupported by any evidence and denied by the appellant. This argument

begs the question. Here, as at pages 11 and 17 (where the case of Eisele & King is discussed) there seems to be a confusion in the mind of counsel as to the functions of the Court under the Practice Act and the rules, on a motion to strike out an answer. In such a case the question is whether the quality of the facts alleged in the answer is "sufficient to entitle him (the pleader) *to defend,*" not whether their quantum is sufficient to entitle him to *prevail;* the question is whether the answer sets up facts which, if true, constitute a defense, not on which side lies *the weight of the evidence.* It is the function of the Court to determine the sufficiency of the defense, not the *sufficiency of the proof or the weight of the evidence.* They are for the jury and not for the Court.

5. *The Letter to Mr. Owens.*

This letter referred to at page 9, related to but one of the items in dispute between the appellant and the Upton Company. The interruption of the work and the necessity of waiting for stone is fully discussed in the appellant's brief, and as there stated, was due to defective materials furnished for the work. The "In other words" interpretation of counsel for respondent, is purely his own.

6. *Defective Materials.*

The statement on page 10, that "the Upton Company furnished sand and gravel *as agreed and as specified*" is one of the disputed questions of fact, asserted by the Upton Company, and denied by the appellant.

7. *The Cancelled Check.*

Counsel for respondent does not deny that the cancelled check, annexed as an appendix to the

appellant's brief, was exhibited to the Court and discussed on the argument of the motion. He merely states that "to the best of our recollection" this was not done. As a matter of fact that check, as well as several letters and corrected invoices were exhibited to the Court and discussed to a considerable extent on the motion. This is the check which is described in the affidavit of Law at (p. 32, l. 28, of State of Case) and is not disputed or denied. It is argued that because that check read, "On Acct. of Dec.—sand, grav. and stone—$4,200.00," it was intended as a payment of the items in the sequence named. While this assumption could not be justified by a mere accident of sequence, it is conclusively rebutted by the affidavit of Mr. Law showing that this check was given, by agreement of the parties (not denied) as a partial settlement pending the adjustment of the dispute over the sand and gravel. Since there was no dispute about the quality of the *stone,* it must be presumed that the stone was paid for in full. All this is explained in Mr. Law's affidavit and is not denied.

8. *The Defective Notice.*

Counsel errs in stating (p. 18) that no question was raised on the argument of the motion as to the insufficiency of the notice for want of specification of defects in the answer. That deficiency was called to the Court's attention on the motion but was not treated in the opinion.

Respectfully submitted,

HOBART & MINARD,
Attorneys for Defendant-Appellant.

GEORGE S. HOBART,
DUANE E. MINARD,
Of Counsel.

(October term, 1927.)

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BOUND BROOK CRUSHED STONE COMPANY, *Plaintiff-Respondent,* *vs.* WILSON & ENGLISH CONSTRUCTION COMPANY, *Defendant-Appellant,* [*and* *F. R. UPTON, INC., a corporation,* *Defendant-Respondent.*]	*On Appeal from the Supreme Court.*

BRIEF FOR PLAINTIFF-RESPONDENT.

Introductory.

The State of the Case and the brief of defendant-appellant are not correctly entitled. The plaintiff, Bound Brook Crushed Stone Company, a corporation, instituted suit against the defendant, Wilson & English Construction Company, a corporation, on a book account (pp. 4-8), and demanded of the defendant the balance remaining unpaid thereon, amounting to $1,028.81. The defendant answered the complaint (p. 11) and also issued summons against F. R. Upton, Inc., a corporation, a third party, and filed its counter-claim against it (pp. 12-14). A motion was made by the plaintiff to strike out the answer of the defendant, Wilson & English Construction Company (p. 24), and enter summary judgment against it, and it is from the successful result of that motion and the order made pursuant to the decision of Justice Parker (p. 61), and the judgment entered thereon in

the Supreme Court in favor of the plaintiff, Bound Brook Crushed Stone Company, and against the defendant, Wilson & English Construction Company (p. 69) that this appeal is taken. The name of F. R. Upton, Inc., a corporation, does not appear (and properly so) in the title to Justice Parker's memorandum opinion, nor in the titles to the order for judgment and judgment (pp. 69-70). F. R. Upton, Inc., is not a defendant-respondent in this appeal, as shown on the titles used in the State of the Case and defendant's brief, and it is not interested in the outcome of this appeal. A new and separate suit was begun against it by the defendant, Wilson & English Construction Company, by its counter-claim (pp. 12-14), which counter-claim is not before this court on this review of the order for summary judgment against Wilson & English Construction Company. In our opinion, the counter-claim is improperly printed and referred to in both the State of the Case and defendant's brief. Although the counter-claim against F. R. Upton, Inc., has been printed in full in the State of the Case (pp. 12 through 14), and is frequently referred to in defendant's brief, the answer of the third party, F. R. Upton, Inc., thereto, has not been printed or referred to. The issues in the suit instituted by the defendant, Wilson & English Construction Co., against the third party, F. R. Upton, Inc., have been noticed for trial at the Somerset Circuit of the Supreme Court. These issues, as above stated, have no bearing upon this appeal. All other matters relating to the counter-claim are likewise, in our opinion, improperly printed in the State of the Case, such as "Affidavit of Merits" (p. 16), "Demand for Agreement" (p. 17), "Compliance with Demand" (p. 18), and the matters entitled "Correspondence" (pp. 19 to 23). As will be hereinafter pointed out, these matters relate to the sale of sand and gravel by the third party, F. R. Upton, Inc., to defendant, Wilson & English Construction Co., and not to the sale of stone by the plaintiff to the defendant, which alone is the subject matter of this suit. As stated by Justice Parker in his opinion (p. 61, bottom); "I am not concerned on this motion with the question whether defendant has a valid claim against F. R. Upton, Inc. The question before me is whether the plaintiff or F. R. Upton, Inc., is the owner of the primary claim for the stone." And again (p. 62, l. 25), "but on the papers before me, there can be no doubt that F. R. Upton, Inc., was an agent or agency of plaintiff, and that the plaintiff was a principal disclosed or undisclosed; *just which, seems immaterial for present purposes, because the counter-claim is asserted only against F. R. Upton, Inc., and not against the plaintiff.*" We shall endeavor to point out that counsel for defendant, Wilson & English Construction Company, has wandered far afield in the brief submitted on defendant's behalf, both as to the facts and the law bearing upon this case. We shall adhere as closely as possible to the only matters before the court on this appeal, which are (1) the complaint of Bound Brook Crushed Stone Company; (2) the answer thereto of defendant, Wilson & English Construction Company; and (3) the motion to strike out.

Facts.

Plaintiff, Bound Brook Crushed Stone Company, brought suit against defendant, Wilson & English Construction Company, to recover the sum of $1,028.81 remaining due to it on a book account for goods sold and delivered to said de-

fendant. Attached to the complaint are itemized statements setting forth the dates, quantities, car numbers and kind of material (machine broken trap rock) and the credits. There were three separate shipments—on December 8th, December 22nd and December 27, 1924, the price or cost of all the material sold being $3,229.43, on account of which $2,200.62 had been paid, leaving the unpaid balance of $1,028.81. *It is not denied by the defendant, Wilson & English Constuction Company, that it received the stone in question, nor is it denied that the sum of $1,028.81 still remains due and unpaid to the plaintiff, Bound Brook Crushed Stone Company, on account thereof.* It is true that defendant's answer denies generally the complaint and denies that defendant ever had any business transactions, etc., with the plaintiff, but when put to its proof on plaintiff's motion to strike out, it appeared from the affidavit (p. 27) of William D. Law, defendant's agent or representative (the only affidavit filed by defendant on the motion), that the defendant admitted both the receipt of the material and the non-payment of the balance due (see affidavit of William D. Law, p. 31 and p. 32). At page 32 he says: "Accordingly, instead of paying $5,228.81, which was the full amount of the invoices for all material furnished during December, defendant, Wilson & English Construction Company, paid to the defendant, F. R. Upton, Inc., $4,200.00, covering sand, gravel and crushed stone, leaving a balance of $1,028.81, which is the precise amount claimed as the book account of the plaintiff, Bound Brook Crushed Stone Company." So, as above stated, it appears from defendant's affidavit that the stone was duly purchased and received, and that $1,028.81 of the purchase price remains unpaid. The sole point of the defense was that the defendant, Wilson & English Construction Company, did not know it was dealing with Bound Brook Crushed Stone Company when it purchased the stone; that it believed it was dealing with the agent, F. R. Upton, Inc., as principal, and that it had a counter-claim (which it has since asserted, as above pointed out) against the agent or third party, F. R. Upton, Inc. Justice Parker, in deciding the agency question, said that it seemed immaterial, because the counter-claim was asserted only against the third party, F. R. Upton, Inc., and not against the plaintiff. This reasoning becomes the more potent and convincing because defendant's suit on its alleged counter-claim for $5,054.15 (pp. 12, 13 and 14) is now pending in the Supreme Court, Somerset County, and if defendant should succeed in defeating the Bound Brook Crushed Stone Company's claim in this suit and then recover the amount of the alleged counter-claim against the third part, F. R. Upton, Inc., in the suit now pending, defendant would of course entirely escape payment of the balance due for the stone, although it admits that $1,028.81 remains unpaid.

Although the foregoing facts, admissions and reasoning are sufficient without more to sustain Justice Parker's decision and the entry of the summary judgment against the defendant, we submit the following brief replies to the main points of defendant's brief.

There are no disputed facts in this case for determination by a jury.

At page 5 of defendant's brief, its counter-claim against F. R. Upton, Inc., a third party, is set out at length, with a parenthetical note that it is not involved in this appeal but frequent

reference thereto makes it necessary to set it out at length. Our examination of defendant's brief leads to the conclusion that the entire argument is based upon the counter-claim and that, to all intents and purposes, defendant's counsel treats the counter-claim as though made against the plaintiff. We submit that this counter-claim is improperly set forth in defendant's brief.

At page 7 of the brief appears the notice of motion to strike out and the supporting affidavit attached thereto, which ends at page 8, last paragraph; in reply to that affidavit the defendant, by its agent, William D. Law, made a counter-affidavit (pp. 18-23, top of the brief); and in reply to Law's affidavit, Lawrence C. Bonnell and Lucy Upton, on behalf of the plaintiff, made the affidavits which are set forth in the brief at page 8 (last paragraph) through 17. The necessity for printing all of these affidavits in the brief does not appear inasmuch as they are set forth in full in the State of the Case at pages 25 through 60.

In answering defendant's argument under this heading as to the book account (p. 23 of the brief), it is sufficient to say, as above pointed out, that defendant admits the book account and the correctness of the amount due.

On the question of agency (pp. 23-34, top, of the brief), we find defendant immediately reverting to its counter-claim against the third part F. R. Upton, Inc. From page 24, top, of the brief, we quote the following: "The Upton Company's bid of September 19, 1924, *to furnish sand and gravel*, etc." The furnishing of sand and gravel to defendant by a third party has nothing to do with the sale in December, 1924, of machine broken trap rock to the defendant

by the plaintiff. In the affidavit of William D. Law (the only affidavit made on defendant's behalf), he also reverts to the counter-claim against the third part, F. R. Upton, Inc., and states as follows (p. 22, bottom, and p. 23, top): "The Construction Company has a good and valid defense to the above entitled suit on the grounds set forth in the answer *and counter-claim* served and filed herein on October 25, 1926." Again we are irresistibly drawn to the conclusion that unless defendant can in some unaccountable manner work in its counter-claim against the third party, F. R. Upton, Inc., as a part of its defense to the suit brought by the plaintiff herein, Bound Brook Crushed Stone Company, it has no valid defense to this action.

But, in further answer to defendant's argument as to the agency of the third party, F. R. Upton, Inc., it is overwhelmingly established by the Upton affidavit of November 3, 1926 (p. 25), the Bonnell affidavit of December 22, 1926, (p. 34), the Upton affidavit of December 27, 1926 (p. 51), the Upton affidavit of April 22, 1927 (p. 56), and the exhibits attached, that, in the matter of the sale of the stone by the plaintiff to the defendant, F. R. Upton, Inc., was acting as agent, and defendant knew that it was so acting as agent. If all of the statements in the affidavits are disregarded, there still remain the exhibits, documents received by the defendant consisting of bills or invoices (Ex. I, p. 43), letterheads (Ex. 2, p. 44), bills of lading (Ex. 6, p. 50), from which defendant must have known that it was dealing with plaintiff, Bound Brook Crushed Stone Company, as principal, and not with F. R. Upton, Inc., the agent. In addition, it appears from Ex. 3 (p. 45) that defendant in July, 1925, wrote directly to plaintiff, Bound

Brook Crushed Stone Company, enclosing correspondence (copies of which are set forth at pp. 57-60) relating to the shipping of stone from Bound Brook to Morgan, N. J. The Bonnell (p. 34) and Upton (p. 51 and p. 56) affidavits filed in reply to Law's affidavit (p. 27) on defendant's behalf, set forth that the defendant received regular statements of its account with Bound Brook Crushed Stone Company on the Stone Company's letterhead, and that at least twelve letters were written by Bound Brook Crushed Stone Company to the defendant during the period from June, 1924, to September, 1926 (Bonnell affidavit, p. 36, bottom, and p. 37, top; Upton affidavit, p. 52). In his affidavit, defendant's witness, Law, admits (p. 31, ll. 1-10) that the crushed stone which the defendant purchased was billed on the billheads of Bound Brook Crushed Stone Company, but says that these bills or invoices were corrected by rubber stamp to read "F. R. Upton, Inc., Union Building, Newark, N. J." A glance at the billhead in question, Ex. 1 (p. 43), will show at once how incorrect and misleading Law's statement is. A rubber stamp was used to correct the name "F. R. Upton" on the left of the billhead under the heading "Branch Office," to "F. R. Upton, Inc.," a change made necessary by Mr. Upton's death several years ago. The billhead, thus stamped, emphasized the fact that F. R. Upton, Inc., is a branch office of the plaintiff, Bound Brook Crushed Stone Company (Upton affidavit, p. 51, ll. 22-37). In view of the dealings between plaintiff and defendant, it conclusively appears that F. R. Upton, Inc., was acting as agent for plaintiff, Bound Brook Crushed Stone Company, and that defendant knew it was acting as such agent. A further illuminating exhibit is attached to the Bonnell affidavit (see Ex. 4, p. 46).

This exhibit consists of a letter written by the defendant, Wilson & English Construction Company to A. E. Owen, Chief Engineer, Central Railroad Company of N. J., in which the defendant asks the railroad company to make it an allowance of $1,154.00, the demurrage charges against it, which charges arose in December, 1924, during the progress of the work at Morgan, N. J. In this letter defendant writes (p. 47, l. 30): "We immediately ordered crushed stone and stopped shipments of sand and gravel, etc." And again, at p. 48, l. 12: "There is no question but that the delay on account of the condition of the gravel and the waiting for the stone caused the great amount of demurrage that accumulated after these dates, *and we feel sure that when you consider these facts as we have stated you will allow us this* item of $1,154.00, etc." In other words, had the defendant succeeded in its efforts with the Central Railroad Company and received the allowance for demurrage which it sought, it doubtless then would have paid the amount remaining due to plaintiff on this claim. Having failed to make this settlement with the railroad company, it now seeks to save itself by holding out the balance due plaintiff, the Stone Company, and by instituting, through its counter-claim, a suit for more than $5,000.00 damages against a third party, the agent, F. R. Upton, Inc. As stated by defendant in the letter above referred to, the stone was ordered unexpectedly and hurriedly (p. 47, l. 30), because a representative of the State Highway Commission (p. 46, ll. 26 through 33) found the sand and gravel which were being used in the work unsatisfactory. It is indeed a curious defense to the Stone Company's claim for the price of the stone then ordered by defendant, for it to say

that it has a counter-claim against a third party, which furnished the alleged defective sand and gravel, to cure which defect the stone was purchased. The suit on defendant's counter-claim against F. R. Upton, Inc., is pending in the Supreme Court, Somerset County Circuit. If there is any merit in the counter-claim, the third party, F. R. Upton, Inc., stands ready and able to respond, but it has vigorously contested the alleged counter-claim, and these issues now await trial.

The record raises no dispute as to the following facts: (1) That the stone in question was furnished to the defendant by the plaintiff; (2) That the sum of $1,028.81 remains due on account thereof from defendant to plaintiff; (3) That defendant asserts no counter-claim, set-off or valid defense against the plaintiff; (4) That the defendant does assert a counter-claim against a third party, F. R. Upton, Inc.

Under the heading "The Counter-claim for Damages" (pp. 34-36 of the brief) defendant again refers to the counter-claim against the third party, F. R. Upton, Inc., which has no bearing on the case at issue. Suffice it to say that from the Bonnell and Upton affidavits, filed in reply to defendant's affidavit made by William D. Law, it appears that the Upton Company furnished sand and gravel as agreed and as specified, and that if the defendant sustained losses on the work at Morgan, N. J., such losses were due to its own fault. These disputed questions of fact form the basis of the counter-claim against the Upton Company, and are awaiting trial, as above stated.

We have commented on the billheads or notices sent by plaintiff to defendant, and again call

attention to Ex. 1 (p. 43). Defendant admits that these invoices were received (Law affidavit, p. 31, ll. 1-10). The bills of lading (Ex. 6, p. 50) speak for themselves. Every shipment of stone was accompanied by a bill of lading similar to Ex. 6, in the name of Bound Brook Crushed Stone Company (Bonnell affidavit, p. 40, ll. 11-13).

There is abundant proof that, in the sale of stone, F. R. Upton, Inc., was acting as the agent of the plaintiff, Bound Brook Crushed Stone Company.

The facts and exhibits above mentioned and referred to fully substantiate the foregoing statement. The proofs are so overwhelming that the court below might have decided, on plaintiff's motion to strike out, that the agency of the Upton Company and defendant's knowledge of it, had been so clearly established that these matters were no longer jury questions. The court, however, took a different view, and says (p. 62, ll. 21 to 32): "Whether defendant honestly believed it was buying stone from F. R. Upton, Inc., under representations on which it was entitled to rely and for which plaintiff is accountable, may be in dispute, but on the papers before me, there can be no doubt that F. R. Upton, Inc., was an agent or agency of plaintiff, and that the plaintiff was a principal disclosed or undisclosed; just which, seems immaterial for present purposes, because the counter-claim is asserted only against F. R. Upton, Inc., and not against the plaintiff." While we are entirely in accord with the court's finding, in reply to defendant's brief on this point we quote a few of the authorities touching upon the rights of an undisclosed principal against third parties. The authorities quoted in

defendant's brief hold that "an agent who contracts in such form as to make himself personally responsible cannot afterward, whether his principal was or was not known at the time of the making of the contract, relieve himself of that responsibility." So we are again confronted with defendant's counter-claim against the Upton Company, and we repeat that the Upton Company is not seeking to avoid or relieve itself of responsibility, but that it has filed its answer to the counter-claim, and the issues thereby raised are awaiting trial, as above stated. We wish to emphasize the fact that the authorities quoted in defendant's brief, relate to the liability of an agent to a third party with whom he has dealt without disclosing his agency and not to the rights of the undisclosed principal against the third party.

In the case of *Bernhouse* v. *Abbott,* 45 N. J. L. 532, this court has laid down the rule that "A purchaser from an agent having authority to sell, and selling in his own name without disclosing his principal, is not entitled, in an action by the principal for the contract price, to set off a debt due to him from the agent, where the agent had neither the possession nor the indicia of property in himself."

In this case it appears that the third party, the agent, F. R. Upton, Inc., maintains only a business office in Newark, New Jersey, and that the stone in question was shipped to the defendant by the plaintiff, Bound Brook Crushed Stone Company, from its quarries at Bound Brook, New Jersey.

Rome v. *Nicholson,* 8 Abb. Prac. (N. S.) 343: (N. Y.).

"One who buys goods from an agent cannot defend, in an action by the true principal,

on the ground that he bought the goods on the faith of false representations by the agent that his principal was a third party, against whom the defendant claims a set-off."

Taintor v. *Prendergast,* 3 Hill. 72, 38 Am. Dec. 618.

"The principal may sue in his own name, though the business was conducted by an agent and the agency was not disclosed."

Culver v. *Bigelow,* 43 Vt. 249:

"Where a party by simple contract deals with an agent, who does not disclose the fact of his agency, he may be made liable in a suit in the name of the principal to the same extent as if the agent had been principal and the suit had been brought in his name."

Edwards v. *Golding,* 20 Vt. 30:

"Where, in an action to recover the price of property sold, it appears that it was the property of plaintiff and that the person who made the sale acted merely as his agent, the plaintiff may maintain the action, though the agent did not at the time disclose his agency, and the defendant supposed the property belonged to the agent."

Oelrichs v. *Ford,* 21 Md. 489:

"The right of a principal to maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal, although formerly sometimes questioned, is now well settled."

Noel Const. Co. v. *Atlas Portland Cement Co.,* 63 A. 384, 103 Md. 209:

"Where a contract for the purchase of cement was made by certain individuals on behalf of plaintiff corporation, acting as mere agents for the corporation, the latter was entitled to sue for breach thereof, though the seller was without knowledge of such agency."

Wiehle v. *Saffold,* 58 N. Y. S. 298, 27 Misc. Rep. 562:

"An undisclosed principal may sue on a contract entered into by his agent, although the person contracting supposed he was dealing with the agent as principal."

Bertoli v. *Smith,* 38 A. 76, 69 Vt. 425:

"One who purchases from an agent that has neither possession of the goods nor muniments of title, cannot defend an action by the undisclosed principal for the price by showing that he credited the goods on a claim against the agent, supposing that he was the owner."

Navarre Hotel & Importation Co. v. *American Appraisal Co.,* 142 N. Y. S. 89:

"A principal may sue upon a contract not under seal made by his agent with a third person, although the agency was not disclosed at the time the contract was made."

Kilpatrick v. *America West Africa Trading Co.,* 110 N. Y. S. 381:

"An undisclosed principal in a contract for sale of personalty may enforce the same against the buyer, irrespective of whether or not the buyer knew that the ostensible seller was or was not an agent."

Ballard v. *Friedeberg,* 164 N. Y. S. 912:

"Sale by agent of undisclosed principal gives principal authority to sue, although agent sold property as his own."

Malles v. *Morring,* 92 So. 470 (Ala.):

"Except in the case of executory contracts involving personal trust and confidence, where an agent on behalf of his principal enters into a simple contract as though made for himself, without disclosing the existence of the principal, the contract inures to the benefit of the principal who may sue thereon as the real party in interest."

Fernandina Shipbuilding & Dry Dock Co. v. *Peters,* 283 F. 621:

"Where an agent on behalf of his principal enters into a contract as if made for himself and the existence of the principal is not disclosed, such contract inures to the benefit of the principal, who may appear and hold the other party to the contract made by the agent."

The cases cited in defendant's brief tend to show that a principal cannot be held upon the mere unsupported testimony of the agent, and that, where it is sought to hold one as principal, it is necessary first to establish the fact of agency; this, the court says in *Pederson* v. *Kiensel,* 71 N. J. L., 525, cannot be done by the declarations of the person whose agency is sought to be established.

The balance due plaintiff has not been paid and satisfied.

The argument under Point III of defendant's brief (p. 45 of the brief) reverts immediately to the counter-claim against the third party. Paragraphs 1, 2, 3, 4, 5 and 6 (pp. 45-47 of the brief) relate largely, if not entirely, to facts which concern the counter-claim only. There has been attached to defendant's brief (improperly, we think) a photostatic copy of a check for $4,200.00 given by the defendant to the third party, F. R. Upton, Inc. This check was not attached to any of the papers at the time of the motion to strike out, nor was it offered in evidence, or, to the best of our recollection, referred to in the argument at that time. We, therefore, believe that it has been improperly attached by the defendant to his brief on this appeal. An examination of the check discloses on the left-hand side under the heading, "In settlement of the follow-

ing items," the words, "On acct. of Dec.—sand, grav. and stone—$4,200.00." It seems to us obvious from the check itself, that it was given in payment of the three commodities named in the order named, and inasmuch as defendant admits that $1,028.81 remains due and unpaid, it, by implication gathered from the above-quoted words written by it on the check, also admits that this sum remains unpaid on the account due the plaintiff for stone. The defendant had the right, if it so desired, to direct the application of the $4,200.00 payment. It did so direct as indicated by the words above quoted. Defendant's counsel indulges in presumptions (p. 47, fourth paragraph of the brief) in an effort to sustain the argument on this point; plaintiff's contention that its account is unpaid is based upon facts and the admissions of the defendant.

POINT IV.

Under Point IV of defendant's brief (p. 48) counsel for defendant cites the section of the Practice Act and Rule 80 of the Supreme Court Rules pertaining to motions to strike out and the entry of summary judgment, and many decisions are cited and referred to relating thereto. It is not clear to us whether or not defendant's counsel is urging that plaintiff's notice of motion to strike out was defective, although he seems to make this contention at page 59, second paragraph, of the brief. Defendant's brief does not refer to Rule 26 of the Practice Act of 1912 (P. L. 1912, p. 389; Supreme Court Rules No. 40) "Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counter-claim respectively." Plaintiff's notice of motion to strike out was based upon the Upton affidavit attached thereto

(p. 25), which was served on defendant with the notice. As required by Sections 57 and 58 (P. L. 1912, p. 394; Supreme Court Rules Nos. 80 and 81), the affiant duly verified the cause of action, stated the amount claimed, and her belief that there was no defense to the action. The burden was then put on defendant to show by affidavit such facts as would entitle it to defend, which, in the opinion of the court hearing the motion, it failed to do.

In the case of *Eisele & King* v. *Raphael,* 90 N. J. L. 219, this court held (p. 221, l. 8, etc.) as follows:

> "Reading the rules, to which the statute is subject, and the statute together, a plaintiff will be entitled to a summary judgment upon presenting an affidavit complying with rule 81, which should set out fully the facts upon which the cause of action is based, unless the defendant by affidavit or other proof shall show acts deemed by the judge hearing the motion sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts set up by the defendant, and his conclusion that they are not sufficient should not be set aside unless the sufficiency clearly appears."

Justice Parker's conclusions that the facts set up by defendant in its affidavit are not sufficient to entitle it to defend, should not be set aside. We have examined the cases cited in defendant's brief and submit that all of the following cases support the action taken by the court in striking out the answer and ordering summary judgment. In all of these cases such action on the part of the lower court was sustained on appeal:

Fidelity Mutual Life Insurance Co. v. *Wilkes-Barre & H. R. Co.,* 98 N. J. L. 507;

Milberg v. *Keuthe,* 98 N. J. L. 779;

Lembeck & Betz Eagle Brewing Co. v. *Krauss,* 94 N. J. L. 219;
Danenhower v. *Birch,* 97 N. J. L. 193;
Schiff v. *Alexander,* 130 Atl. Rep. 133;
Boynton Lumber Co. v. *Evans,* 101 N. J. L. 120.

But, furthermore, no question having been raised by the defendant when the motion was argued before Justice Parker as to any irregularities or omissions in the moving papers, or in the reasons urged for striking out the answer, these matters cannot now be argued before this court on appeal and considered by it.

Questions not raised in the lower court will not be considered on appeal.
Ruggles v. *Ocean Accident, &c. Corp.,* 89 N. J. L. 180;
Shaw v. *Bender,* 90 N. J. L. 147.

The Practice Act of 1912 (P. L. 1912, p. 377) and rules in pursuance thereof have made no change in the fundamental rules for review of actions at law, as in error, that there must be some ruling adverse to appellant and challenged below.
Webster v. *Board,* 86 N. J. L. 256;
Nygren v. *Board,* 86 N. J. L. 364.

The Court of Errors and Appeals in reviewing the judgment of the Supreme Court will not, as a general rule, consider any question not set up or argued in the court below.
Donahue v. *Campbell,* 98 N. J. L. 755;
See also *State* v. *Shupe,* 97 Atl. Rep. 271.

Conclusion.

The defendant assigned four grounds of appeal (pp. 1 and 2). These four grounds of appeal, in our opinion, resolve themselves into only one, and are all included in the first, to wit: that the court erred in granting the motion to strike out the answer. We respectfully submit that the defendant has not sustained its contentions, and that the decision of Justice Parker in the Supreme Court, the order for summary judgment and the judgment entered against the defendant in favor of the plaintiff should be affirmed.

In fairness to plaintiff, Bound Brook Crushed Stone Company, and the third party so often mentioned in defendant's brief, F. R. Upton, Inc., we deem it necessary, before closing, to refer to certain statements and comments contained in defendant's brief. These statements seem to us entirely unnecessary and of no argumentative value to the defendant, their purpose apparently being to create an improper atmosphere against the plaintiff and the third party. We quote from page 32 of the brief, last sentence—"By this maneuver the Upton Company sought to jockey the Construction Company out of the position of having a good defense, etc."; page 33 of the brief, last paragraph—"The conduct of the Upton Company in the application of this money manifests a total disregard of its duty to principal and principles, etc."; page 72, last paragraph—"Dickens' 'Artful Dodger' has no advantage over a business concern that, etc."; page 73, second paragraph, last clause—"An innocent third party who has been duped by its assumed role of principal or by its failure to disclose its principal until after its customer has been vic-

timized." These are some of the statements in defendant's brief which, on behalf of plaintiff, we criticize and resent. The defendant seems never to weary of pointing the finger of accusation at the third party, F. R. Upton, Inc. Its protestations have been so loud and oft repeated that we retort in words similar to those of the Bard of Avon "Methinks the gentleman protesteth too much."

More than twenty years ago Mr. F. R. Upton established an agency in the City of Newark, N. J., for certain stone companies, and from the beginning represented Bound Brook Crushed Stone Company. After Mr. Upton's death several years ago, the agency was incorporated under the name of F. R. Upton, Inc., and continued business at the same place in the City of Newark. The fact that F. R. Upton, Inc., is an agent or agency of the Bound Brook Crushed Stone Company has been generally known far and wide throughout the trade for many years, and several million tons of stone have been sold by it for plaintiff, Bound Brook Crushed Stone Company. This statement is made in reply to the "artful dodger" and other statements above referred to in defendant's brief.

But, to return to the facts in this case and to restate them briefly. We find that in December, 1924, the defendant, Wilson & English Construction Company found itself unexpectedly in need of crushed stone for the work under its contract at Morgan, N. J. It is admitted that this stone was ordered from and furnished by the plaintiff, and that the sum of $1,028.81 remains unpaid on account of the purchase price. No counter-claim, offset or meritorious defense has been interposed by defendant to plaintiff's claim. Defendant has, however, filed a counter-

claim against a third party, F. R. Upton, Inc., and the issues on this counter-claim are awaiting trial in the Supreme Court. Under such facts and circumstances the plaintiff was clearly entitled to a summary judgment against the defendant.

We respectfully submit that the decision of Justice Parker in the Supreme Court, the order for judgment, and judgment in favor of plaintiff against defendant should be in all respects affirmed.

Respectfully submitted,

HARRISON & ROCHE,
Attorneys for Plaintiff-Respondent.

Auguste Roche, Jr.,
Of Counsel.

(October Term, 1927.)

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