INDEX

	Page
Notice of Appeal	3
Entry on Clerk's Docket	4
Summons	6
State of Demand	7
Counter-Claim	9
State of Case	11
Specification of Determination	16
Opinion	19
Order of Affirmance	21

New Jersey State Library

INDEX

	Page
Notice of Appeal	3
Entry on Clerk's Docket	4
Summons	6
State of Demand	7
Counter-Claim	9
State of Case	11
Specification of Determination	16
Opinion	19
Order of Affirmance	21

ORDER OF AFFIRMANCE

NEW JERSEY SUPREME COURT

ALBERT LIFSON & SONS, INC., a corporation, *Plaintiff-Appellant,* vs. NICHOLAS MELLO, *Defendant-Appellant.*	*On Appeal.*

The above entitled appeal coming on to be heard by the Court at the May Term, 1927, in the presence of Stamler & Koestler, of counsel for the plaintiff-appellant, and Salvatore F. LaCorte, of counsel for the defendant-appellee, and the Court having considered said cause and the arguments of the respective counsel, and it appearing therefrom that the judgment below should be affirmed,

It is thereupon, on this 1st day of November, 1927, ORDERED that the judgment of the Elizabeth District Court be and the same is hereby affirmed with costs.

On Motion of:

SALVATORE F. LACORTE,

Attorney for Appellee.

(3247)

Lecouver Press Co., Law Printers,
51 Vesey St., New York City

NEW JERSEY SUPREME COURT

ALBERT LIFSON & SONS, INC., a corporation, *Plaintiff-Appellant,* vs. NICHOLAS MELLO, *Defendent-Appellee.*	*On Appeal*

NOTICE OF APPEAL

To Mr. Salvatore F. Lacorte, Attorney for defendant-appellee, or whom it may concern:

You are hereby notified that the plaintiff-appellant hereby appeals from the judgment of the New Jersey Supreme Court to the Court of Errors and Appeals as the Court of last resort in all causes from the judgment entered in the Supreme Court November 1, 1927 and alleges as grounds for appeal:

1. That the judgment of said New Jersey Supreme Court is erroneous.

2. That the judgment of the Supreme Court should have reversed the judgment of the Elizabeth District Court.

3. That the judgment of the Supreme Court should not have affirmed the judgment of the Elizabeth District Court.

4. That the judgment of the Supreme Court should have been a judgment in favor of the plaintiff and against the defendant for the unpaid bal-

ance due to plaintiff on the sale of the stove mentioned in plaintiff's State of Demand.

5. That the judgment of the Supreme Court is in all things, erroneous, improper and unlawful and that said Court should have sustained plaintiff's appeal and entered judgment in favor of the plaintiff and should have reversed the judgment of the Elizabeth District Court from which said plaintiff appealed.

STAMLER & KOESTLER,

Attorney for Plaintiff-Appellant.

ELIZABETH DISTRICT COURT

ALBERT LIFSON & SONS, INC., a corporation.
Plaintiff

vs.

NICHOLAS MELLO,
Defendant

NOTICE OF APPEAL

To Nicholas Mello or Salvatore LaCorte, Atty. of Nicholas Mello.

Sirs:

TAKE NOTICE that the plaintiff, Albert Lifson & Sons, Inc., hereby appeals to the New Jersey Supreme Court from a judgment of the Elizabeth District Court rendered in the above stated action on the Twentieth day of December, 1926.

STAMLER, STAMLER & KOESTLER

Attorneys for Plaintiff.

ENTRY ON CLERK'S DOCKET

IN THE DISTRICT COURT OF THE CITY OF ELIZABETH

ALBERT LIFSON & SONS, INC., a corporation,
Plaintiff

vs.

NICHOLAS MELLO,
Defendant

In an action upon Contract. Demand $225.00

County of Union
State of New Jersey ss

Atty of Pl'ff. Stamler, Stamler & Koestler
Atty. of Deft. Feit & Feit.

A summons was issued in the above cause June 4th, A. D., 1926, returnable June 14th A. D., 1926 at 10 o'clock A. D. and was returned by the Constable as follows:

The said defendant not being found, I served the within Summons June 8th 1926 by leaving a copy thereof at his residence with a member of his family above the age of 14 years, informing her of its contents.

Stephen J. Conroy, Constable.

Demand filed June 4th, 1926. Adjourned from time to time to December 20th, 1926. Rudolph Lifson & Alex J. Kirkland was sworn for the plaintiffs. Bridget Mello, Nicholas Mello, Vito Capone, Arthur Baylor was sworn for the defendant. Counter-claim filed June 16th, 1926. Court gave judgment in favor of said defendant on counter-claim in the sum of Two Hundred Fifty Dollars & Costs.

$250.00

Notice of Appeal filed December 21st, 1926
Bond filed December 28th, 1926.
Order extending time filed January 4th, 1927.
Order extending time filed January 21st, 1927.
Order extending time filed January 29th, 1927.
Order extending time filed February 24th, 1927.

Issuing Summons	$2.10
Constable, Mileage	.08
Attorneys Fees for Defendant's Att'y	12.50
Listing, etc.	1.50

SUMMONS

Union County, ss. The State of New Jersey

To any Constable of said County, or the Sergeant-at-Arms of the District Court of the City of Elizabeth.

SUMMON: Nicholas Mello to appear before the DISTRICT COURT OF THE CITY OF ELIZABETH to be held at the District Court Room in the Union County Court House in said City, on the 14th day of June 1926, at Ten o'clock in the forenoon, to answer unto Albert Lifson & Sons, a corporation, in an action on contract wherein plaintiff demands Three hundred dollars damages and then and there have you this writ. Hereof fail not.

Witness, EDWARD A. McGRATH, Esquire, Judge of said Court at Elizabeth aforesaid, the 4th day of June in the year One Thousand Nine Hundred and Twenty-Six, Signed

George J. Smith, Clerk.

STATE OF DEMAND

ELIZABETH DISTRICT COURT

ALBERT LIFSON & SONS, INC., a corporation, *Plaintiff,* vs. NICHOLAS MELLO, *Defendant.*	*On Contract.*

Plaintiff demands of the defendant the sum of Three Hundred dollars on a book account of which the following is a true copy:

Elizabeth, N. J.

Mr. Nicholas Mello,
645 First Avenue,
Elizabeth, N. J.

to

ALBERT LIFSON & SONS, DR.

1925				
Sept. 25	Combination Range		$250.00	
" "	Paid a/c	$20.00		
Oct. 10	" "	5.00		25.00
	Balance			$225.00

2. The defendant has paid Twenty-five dollars on account of the same and there is still due and owing from the defendant to the plaintiff the sum of Two hundred twenty-five dollars, no part of which has been received by the plaintiff from the defendant.

Judgment will be claimed in the sum of Two hundred twenty-five ($225.00) dollars, together with interest ond costs of suit.

(sgd) STAMLER, STAMLER & KOESTLER,
Attorneys for Plaintiff.

TO THE DEFENDANT:

Take notice that the plaintiff demands that the defendant shall file a written specification of the defense intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

(sgd) STAMLER, STAMLER & KOESTLER,
Attorneys for Plaintiff.

COUNTER-CLAIM

ELIZABETH DISTRICT COURT

ALBERT LIFSON & SONS, INC., a corporation, *Plaintiff*, vs. NICHOLAS MELLO, *Defendant*.	*On Contract.*

By way of counter-claim to the demand of the plaintiff, the defendant states:—

COUNT 1.

1. That at the time of the purchase of the said range, the plaintiff agreed to install same in a good and workmanlike manner.

2. That when the said range was installed by the plaintiffs, same was not installed in a good and workmanlike manner because when a fire was made in said range, same exploded and caused damage to the defendant's house and to the defendant.

Defendant demands on this count the sum of Twenty-five Dollars ($25.00) which sum was paid on account of the said range.

Counter-Claim

COUNT 2.

1. Defendant repeats the allegations contained in Count 1 of the counter-claim and makes the same a part hereof.

2. Due to the said explosion, defendant was put to considerable expense in having her kitchen and home repaired.

Defendant demands on this count the sum of Two hundred ($200.) dollars by way of counter-claim.

COUNT 3.

1. Defendant repeats the allegations contained in Count 1 and makes a part hereof, and further states that due to the said explosion she suffered great bodily harm, and was put to great expense in order to secure medical aid to cure herself of injuries sustained by reason of the said explosion.

Defendant demands on the count the sum of Two hundred and fifty dollars ($250.00) by way of counter-claim.

(sgd.) SALVATORE LACORTE,

Attorney for Defendant.

STATE OF CASE

NEW JERSEY SUPREME COURT

ALBERT LIFSON & SONS, INC.,
a corporation,
Plaintiff-Appellant,

vs.

NICHOLAS MELLO,
Defendant-Appelee.

On Appeal

The parties to this cause, by their respective attorneys, agree upon the following as the State of the case on the appeal taken in the above entitled cause.

1. This suit was brought by the plaintiff to recover on a book account for the sale of a stove, the sales price of which was $250.00, the date of the sale being September 25, 1925, on which day the defendant paid the sum of $20.00 on account. On October 10, 1925, the defendant paid an additional $5.00, making a total of payments to be credited on the original sales price of $25.00, thereby leaving a balance of $225.00 unpaid.

2. The defendant admitted the existence of the book account and interposed a counter-claim for damages.

3. The basis and theory upon which the counter-claim was presented and tried was upon two allegations:

First —That the plaintiff's servants, acting within the scope of their employment, negligently

installed and connected the stove in the home of the defendant, and

Secondly—That the stove which was sold was defective and not fit for the purpose for which it was sold; one or both of which acts caused the stove to explode, causing damage to the defendant's home. The defendant therefore desired reimbursement for this damage to his home and also demanded the return of his moneys already paid on account of the purchase price of the stove.

4. The Court decided against the plaintiff on this state of demand and in favor of the defendant on his counter-claim in the sum of $250.00.

FACTS

Rudolf Lifson was sworn as a witness for the plaintiff and proved the book account of the plaintiff, showing a charge for the sale of the stove for $250.00, a payment of $25.00 on account, leaving a balance due of $225.00. He also testified that the stove was a coal and gas range and was delivered to the defendants on September 25, 1925, and that it was not the custom for employees of the plaintiff to make connections, that their sole duty was to make a delivery; that Lifson & Sons had sold many such stoves and had no difficulty with them.

There was no cross-examination and the plaintiff rested its case.

The defendant testified that in the month of September, 1925, both the defendant and his wife went to the store of the plaintiff and purchased a stove for $250.00 and paid $20.00 on account; that the salesman who sold him the stove warranted that the stove was in first class condition and a good

stove, and was entirely suitable for the usual household purposes; and further that the plaintiff's servants would properly install the stove and connect the same in the house of the defendant ready for the defendant's use; that the defendant upon these representations bought the stove.

That the stove was delivered to the defendant in the defendant's home on October 10th by the plaintiff's servants, and the said servants connected it with the chimney, and performed other things to it; that upon the completion of the installation and the connection, these servants told the defendant that he could make a fire in the stove and use it.

That on October 10th, the defendant paid $5.00 to the plaintiff's servants on account of the purchase price of the stove; that after these servants of the plaintiff left, the defendant attempted to make a fire in the stove for the first time by putting wood and paper into the firebox and lighting a match to the paper. When the fire commenced to burn and continued for about two or three minutes, there was an explosion. Different parts of the stove flew about the room and caused damage to the walls and ceilings of the house, and injured bodily the young son of the defendant. That the defendant's house a few days prior to the installation of the stove had undergone repairs and in connection with these repairs his chimney was cleaned. That immediately after the explosion, he called in a carpenter and a stove expert to view the damages.

The wife of the defendant testified substantially the same as the defendant, and corroborated him in all of the details of his testimony.

The carpenter and builder, Vito Caprone, testi-

fied that he was called in on the same day, that he was a neighbor and heard the explosion; that he made an examination of the premises, that the damage was $250, and that the explosion could not come from the chimney because that was intact and in very good condition even after the explosion as well as before the explosion; that he could ascertain no cause for the explosion, except something within the stove itself, or its defective installation or connection.

The stove expert, Arthur Baylor, testified that he was called in the same day and viewed the premises and the stove; that he had experience with stoves for many years, having repaired numerous stoves and viewed and examined stoves that had exploded. That he had worked for numerous utility gas companies for many years who sold and repaired these types of stoves, and that in his opinion the explosion was caused because of either a defect in the stove or a chemical compound used in the painting and polishing of the stove, or a defect in the installation or the connection of this stove. That there was nothing in conjunction with the chimney or about the premises that could possibly have caused the explosion. He further testified that this explosion could not have been caused by the placing of any explosive substance in the stove by the defendant, because of the fact that the firebox in the stove was left intact and was not damaged at all.

The testimony also disclosed that neither the gas or water connection had been made to the stove.

In rebuttal, the plaintiff called Mr. Leon, an agent of the manufacturer of the stove, who testi-

fied that he did not inspect the stove before it went out of the plant; that no explosive substance was used in the manufacture of the stoves, and that these stoves were built so as to allow for expansion due to any ordinary heat; that the stove could not explode with any degree of violence; that his company had sold many similar stoves and had no difficulty with them.

There was a motion for the direction of a verdict made by the plaintiff at the end of the defendant's case, which was denied by the Court.

STAMLER, STAMLER & KOESTLER,

Attorneys for Plaintiff.

S. F. LA CORTE,
Attorney for Defendant.

SPECIFICATION OF DETERMINATION

NEW JERSEY SUPREME COURT

ALBERT LIFSON & SONS, INC.,
a corporation,
Plaintiff-Appellant,

VS.

NICHOLAS MELLO,
Defendant-Appelee.

On Appeal, etc.

The determination of which Appellant is dissatisfied in point of law.

The Appellant, Albert Lifson & Sons, Inc., a corporation, hereby specifies the following as determinations or directions of the Elizabeth District Court with which it is dissatisfied in point of law, and the ground for appeal is as follows, to wit:

1. That the Elizabeth District Court should have entered judgment for the plaintiff against the defendant on the book account on which the plaintiff sued.

2. That there was no evidence before the Elizabeth District Court from which said Court could determine as a matter of law that the merchandise sold by the plaintiff to the defendant was not good and marketable and salable.

3. That the Elizabeth District Court should have directed a verdict for the plaintiff pursuant to the motion for a directed verdict as made by plaintiff's attorney.

4. That there was no evidence before the Elizabeth District Court from which the Court could determine, as a matter of law, that the plaintiff was negligent in selling said stove to the defendant or that the plaintiff, in any way or manner, was negligent in causing the injuries alleged in the counterclaim of said defendant.

5. That there was no evidence before the Elizabeth District Court from which it could conclude, as a matter of law, that the explosion described in defendant's counter-claim was caused by any negligent act or omission chargeable to the plaintiff.

6. That there was no lawful evidence before the Elizabeth District Court to prove that the representations alleged to have been made by plaintiff's salesman to the defendant were false or fraudulent.

7. That there was no evidence before the Elizabeth District Court to prove that the explosion alleged by the defendant to have occurred was caused by any negligence whatsoever of the plaintiff, or negligence imputable to plaintiff.

8. That there was no evidence before the Elizabeth District Court from which could be based a finding that said stove was defectively installed or connected.

9. That there was no evidence before the Elizabeth District Court to show that there was a defect in said stove which would cause the alleged explosion.

10. That there was no evidence before the Elizabeth District Court to prove that a chemical compound had been used in painting or polishing the stove and that said chemical compound caused the explosion in question.

11. That the Elizabeth District Court errone-

ously gave judgment for the defendant against the plaintiff.

12. That the Elizabeth District Court erroneously refused to give judgment for the plaintiff and against the defendant.

STAMLER & KOESTLER,

Attorneys for Plaintiff-Appellant.

OPINION

NEW JERSEY SUPREME COURT

No. 405. May Term, 1927.

ALBERT LIFSON & SONS, INC., a corporation, *Plaintiff-Appellant,*

vs.

NICHOLAS MELLO, *Defendant-Appelee.*

Submitted May 13, 1927; decided October 4, 1927.

Plaintiff's appeal from District Court judgment awarding damages to defendant on Counter-claim.

Before: JUSTICES PARKER, MINTURN & CAMPBELL.

For the Plaintiff-Appellant: STAMLER & KOESTLER.

For the Defendant-Appellee: SALVATORE F. LACORTE.

PER CURIAM: The suit was for the price of a "coal and gas cook stove" sold by plaintiff to defendant. The Court, sitting without a jury, rejected plaintiff's claim and awarded damages of $250.00 to defendant on his counter-claim. The facts, as the Court was entitled to find and as we must assume did find in aid of the judgment, are that defendant purchased the stove at plaintiff's store and at the time of the purchase was assured by the salesman that the stove was in first-class condition

and adapted to its purpose, and that plaintiff's employees would install the stove and make the necessary water and gas connections; that later, the stove was delivered by employees of defendant, who connected it with the chimney and performed other work on it, and before leaving told the defendant that it was in condition to use. Accordingly, after they left, defendant started a fire in the stove, and in a very few minutes it blew up, doing injury to the premises and to defendant's young son.

No trial errors are assigned, except that the Court refused to find for the plaintiff and did find for the defendant.

There is some dispute on the facts, but in view of the finding we must accept the theory of facts most favorable to the plaintiff. In this aspect, the case presented a situation which it was manifestly the duty of the plaintiff to explain: a stove warranted good and serviceable, installed by plaintiff, and which for no apparent reason blows up as soon as lighted. The evidence indicated that defendant's chimney was in good order, and also that in fact the gas and water had not been connected. There was some evidence that it was not customary for plaintiff to connect such stoves, but the employee at the store and those making delivery might properly be assumed by defendant to have authority to make the representations that defendant's evidence indicates they did make.

Bridgeton v. *Fidelity Co.*, 88 N. J. L. 645;

Stuart v. *Farmers' Exchange*, 90 Id. 584.

The judgment will be affirmed.

ORDER OF AFFIRMANCE

NEW JERSEY SUPREME COURT

ALBERT LIFSON & SONS, INC.,
a corporation,
Plaintiff-Appellant,

vs.

NICHOLAS MELLO,
Defendant-Appellant.

On Appeal.

The above entitled appeal coming on to be heard by the Court at the May Term, 1927, in the presence of Stamler & Koestler, of counsel for the plaintiff-appellant, and Salvatore F. LaCorte, of counsel for the defendant-appellee, and the Court having considered said cause and the arguments of the respective counsel, and it appearing therefrom that the judgment below should be affirmed,

It is thereupon, on this 1st day of November, 1927, ORDERED that the judgment of the Elizabeth District Court be and the same is hereby affirmed with costs.

On Motion of:

SALVATORE F. LACORTE,

Attorney for Appellee.

(3247)

Lecouver Press Co., Law Printers,
51 Vesey St., New York City

New Jersey Court of Errors and Appeals

ALBERT LIFSON & SON, INC., a corporation, Plaintiff-Appellant, *vs.* NICHOLAS MELLO, Defendant-Appellee.	On Appeal, etc.

BRIEF FOR APPELLANT.

This appeal brings up a judgment of the Supreme Court affirming a judgment of the Elizabeth District Court rendered in favor of the defendant on its counter-claim against the plaintiff.

Statement of the Case.

The appellant, Albert Lifson & Son, Inc., has for many years been engaged in business in the City of Elizabeth, in the County of Union and State of New Jersey, in the selling of furniture and household goods and on or about the 25th day of September, 1925, sold to Nicholas Mello a combination gas and coal range for the sum of $250.00 and at that time $20.00 was paid on account and on October 10, 1925, $5.00 additional was paid on account. The stove was delivered to the home of Mello and set up. After the plaintiff's workmen left, the defendant caused a fire to be made in the stove and after a short time there was an explo-

sion which is said to have scattered different parts of the stove around the house causing damage to the walls and ceiling of the house. No adequate cause can be found nor has been testified to relating to this explosion.

The plaintiff instituted suit in the Elizabeth District Court on the 4th day of June, 1926, upon a book account for the unpaid balance of $225.00 due for the combination gas and coal range. The defendant filed a counter-claim in three Counts seeking damages. The First Count was

> "That the range was not installed in a good and workmanlike manner because when a fire was built in the stove the same exploded, etc."

Count Two:

> "Due to said explosion, defendant was put to considerable expense in having her kitchen and home repaired."

Count Three:

> "Due to said explosion she suffered great bodily harm, and was put to great expense, etc."

The suit was tried before the Elizabeth District Court and resulted in a judgment in favor of the defendant on his counter-claim in the sum of $250.00, the plaintiff being denied recovery upon its suit on the book account and from the judgment so entered an appeal was taken to the Supreme Court where there was an affirmance with costs and from this judgment of affirmance the present appeal is taken. The appellant urges that the judgment of the Supreme Court in affirming the judgment of the Elizabeth District Court is erroneous and should be reversed.

The Facts.

The testimony in the District Court as set forth in the State of the Case upon which the cause came into the Supreme Court discloses that the suit was on a book account for the balance of $225.00; that the coal and gas range was delivered to the defendant on September 25, 1925; that it was not the custom of the employees of the plaintiff to make connections; that their sole duty was to make delivery; that Albert Lifson & Son, Inc., had sold many such stoves and had no difficulty with them (Case, page 12).

The defendant testified that in the month of September both he and his wife went to plaintiff's store and purchased the stove for $250.00 and paid $20.00 on account; that the salesman who sold the stove warranted that the stove was in first class condition and a good stove and entirely suitable for the usual household use. It was further represented that the plaintiff would install the same and connect the same in the house ready for use (Case, pages 12 and 13); that the stove was delivered on October 10th and connected by plaintiff's servant to the chimney (Case, page 13, line 15); that after plaintiff's servants left, defendant attempted to make a fire in the stove for the first time by putting wood and papers in the fire box and lighting a match to the paper and when the fire commenced to burn and continued about two or three minutes there was an explosion as a result of which different parts of the stove flew about the room causing damage (Case, page 13, line 21 to 30).

Defendant also called a carpenter, Vito Caprone, as a witness, who testified that he examined the

premises, and stated that the explosion could not come from the chimney, because it was in good condition and intact. He could ascertain no cause for the explosion excepting something within the stove itself, or its defective installation or connection.

It will be observed that this witness is a carpenter, and, while he attributes the explosion to some cause or other, he does not testify what caused the explosion, or that there was anything the matter with the stove or state in what way there was any defect in the installation or connection.

The carpenter is followed by a so-called stove expert, who merely gives an opinion not founded on any facts. His opinion is as follows:

> The explosion was caused because of either a defect in the stove, or
> A chemical compound used in the painting and polishing of the stove, or
> A defect in the installation or the connection of the stove.

There was no testimony by this witness or any other witness that there was a defect in the stove, that there was a chemical used in the painting or polishing of the stove or that there was any defect in the installation of the stove or the connection of the stove. This witness went so far as to testify that an explosion could not be caused by the placing of any explosive substance in the stove (Case, page 14). On the contrary, a Mr. Leon testified that no explosive substance was used in the manufacture of the stove; that his company had sold many similar stoves, and had no difficulty with them (Case, page 15).

This was a sale of an ordinary, every-day combination coal and gas range which was delivered

to the home of Mello and the stove pipe stuck into the chimney. It is conceded that the stove was not connected with the gas or water (Case, page 14, line 40). We cannot conceive how there could have been any defective installation of this stove. It wasn't connected to the water and it wasn't connected to the gas. The Court knows that as a matter of common every-day knowledge that stoves do not explode unless something is put in them of an explosive substance. The fact in this case is that no fire was made in that stove by the plaintiff's servants. The servants of the plaintiff left, and thereafter the defendant made the fire and they put the substance in the stove. What they put in is not shown or explained, and there is no testimony excluding that substance as the cause of the explosion.

The Supreme Court, in its *per curiam* opinion, says that the assumption was that the plaintiff's employees would install the stove and make necessary gas and water connections (Case, top of page 20). There is no such statement contained in the state of the facts sent up on the appeal, but, on the contrary, at page 14, line 40, it is disclosed that neither the gas or water connection had been made to the stove. The Supreme Court then says:

> "In this respect, the case presented a situation which it was manifestly the duty of the plaintiff to explain; a stove warranted good and serviceable, installed by plaintiff, and which for no apparent reason blows up as soon as lighted."

and cites in support of its conclusion

> *Bridgeton* vs. *Fidelity Co.,* 88 N. J. L. 645;
> *Stuart* vs. *Farmers' Exchange,* 90 N. J. L. 584.

The whole theory of the opinion of the Supreme Court is that a salesman of the plaintiff had the authority to make representations that the stove was warranted good and serviceable or we can go farther than that and say that under the statute there was an implied warranty as to fitness and quality of the stove but that does not answer the question which is now presented and which was before the Supreme Court and the District Court.

The case resolves itself into two cases, one by the plaintiff to recover the sales price of an article of household furniture and the other the counter-claim of the defendant for damage for negligence.

POINT I.

The sale of the stove.

This was a sale of an ordinary combination gas and coal range. Two payments were made on it. One on September 25th and the other on October 10th. There is a dispute as to whether the stove was delivered on October 10th or on September 25th. That dispute is properly resolved against the plaintiff and we assume that the stove was delivered on October 10, 1925. The servants of the plaintiff who sold the stove connected it to the chimney and went away and thereupon a fire was started which resulted in an explosion either of the stove or within the stove.

We cannot see anything in that situation which is tantamount to proof of a breach of any expressed or implied warranty. There wasn't the slightest bit of evidence that the stove was improper in any way, manner or form; that there was any patent or latent defect in the stove; that

it was improperly connected or that there was any chemical compound of an explosive nature used in the manufacture of the stove. A wild guess of somebody who came in after an explosion and says that the explosion might have been caused by one of five things is not evidence of a breach of warranty.

POINT II.

Plaintiff was not proven guilty of any negligence.

In this case we contend there was an entire absence of any proof of negligence. If there was evidence in the case to make this a question of fact then the finding below is justifiable and sustainable but if no evidence then there is nothing to go to a Jury or to be decided as a fact.

Donus vs. *Public Service Railway Co.*, 133 Atl. Rep. 197;
Piver vs. *Pennsylvania Railroad Co.*, 74 N. J. L. 619;
Cook vs. *American Smelting & Refining Co.*, 99 N. J. L. 82.

The entire case of the defendant is based upon an explosion. There is a rule in this State, New York, Pennsylvania, West Virginia and Illinois that an explosion is not *prima facie* evidence of negligence.

In the case of

Levendusky vs. *Empire Rubber Mfg. Co.*, 84 N. J. L. 698,

plaintiff was injured as a result of an explosion which occurred while he was walking on the street. The plaintiff offered no evidence except the fact

that there was an explosion and as the result of which he was injured. There was no evidence as to the cause of the explosion and he claimed that he did not have to introduce any evidence under the doctrine of *res ipsa loquitur* and thereupon the trial court directed a non-suit which was affirmed by the Court of Errors and Appeals.

In the case of

Cook vs. *American Smelting & Refining Co.*, 99 N. J. L. 82,

an explosion caused the death of Plaintiff's intestate. The cause of the explosion was not proven and it was held that a direction of a verdict for the defendant was proper. Chancellor Walker, in writing the opinion for the Court of Errors and Appeals said:

> "The plaintiff having thus alleged negligence on the part of the defendant, carried the burden of proving it by circumstances from which defendant's want of due care would be an ultimate inference. This the plaintiff failed to do, and therefore the doctrine of *res ipsa loquitur* did not apply. *Bien* vs. *Unger*, 64 N. J. L. 596."

After the *per curiam* opinion of the Supreme Court in the instant case, this Honorable Court, two weeks later filed its opinion in the case of

Noonan vs. *Great Atlantic & Pacific Tea Co.*, 5 N. J. Adv. Rep. 1411,

where this Court unanimously reversed a judgment in a case where a bottle of Ginger Ale exploded causing injury to the plaintiff. In that case the A. & P. Company did not bottle the drink but merely sold the article while in the instant

case, Lifson & Son, Inc. did not make the stove but merely sold it after it was manufactured.

In the Noonan case the Trial Judge said the doctrine of *res ipsa loquitur* applied and declared the effect of that doctrine by saying:

> "It bespeaks negligence which calls upon the defendant to exculpate itself from the legal inference or presumption of negligence arising therefrom * * *.
>
> The question thus presented for your consideration is as to whether or not the defendant has exculpated itself."

This Court held that there was error in both aspects of the charge. The charge in the Noonan case is exactly what the Judge of the District Court did in determining the case and is exactly what the Supreme Court said in its *per curiam* opinion, namely:

> "In this aspect, the case presented a situation which it was manifestly the duty of the plaintiff to explain."

Attention is called to the fact that the plaintiff in the cause of action was really the defendant in the counterclaim; so that we here have exactly the same situation that was presented in the Noonan case.

This Court in the case of

Bahr vs. *Lombard*, 53 N. J. L. 238

laid down the rule that

> "As a general rule, the proof of the occurrence of an accident does not raise a presumption of negligence."

and citing further from the same case:

> "If something unusual happens with respect to the defendant's property, or some-

> thing over which he has control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act was negligent."

In the instant case it is conceded that the stove had been sold by the plaintiff to the defendant, that the fire was started in the stove after the plaintiff's servants had left the premises, that the material or substance used for starting the fire was the property of the defendant; that the defendant made the fire. Therefore, we have a situation where the plaintiff, against whom this judgment has been recovered, did not have control of the situation at the time of the explosion and, therefore, there could be nothing which the plaintiff could explain but on the contrary, the entire case rests with the defendant, counter-claimant, who offered absolutely no evidence showing the cause of the explosion.

What we desire to now impress most strongly upon your Honor is, while Albert Lifson & Son, Inc. are the plaintiffs, the situation is just reversed insofar as this action on the counter-claim is concerned and as to that counter-claim, Albert Lifson & Son, Inc. are defendants so that in this particular case a duty which is ordinarily cast on the plaintiff in a negligence action is in this case thrown upon the defendant, counter-claimant, and that duty and burden has not been sustained by the defendant Mello because he failed to produce any evidence from which there can be a proper and logical inference of negligence.

Therefore, we respectfully urge that the judgment of the Supreme Court affirming the judgment of the District Court should in all things be reversed and that judgment should be entered in this Court in favor of the plaintiff and against the defendant both on its original cause of action for the price of the stove and upon the defendant's counter-claim.

Respectfully submitted,

STAMLER & KOESTLER,
Of Counsel for Plaintiff-Appellant.

73 FEB.T.1923

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

New Jersey Court of Errors and Appeals

ALBERT LIFSON & SONS, INC., a corporation.
Plaintiff-Appellant,

vs.

NICHOLAS MELLO,
Defendant-Appellee.

On Appeal from Supreme Court.

BRIEF OF DEFENDANT-APPELLEE.

Facts.

The plaintiff purchased a stove from the defendant for the sum of $250. on September 25, 1925, and paid on account thereof the sum of $20.

On October 10, 1925, the defendant paid an additional $5.00, making a total of credits $25.00, and leaving a balance of $225 still due from the defendant to the plaintiff.

The plaintiff instituted a suit in the District Court in the City of Elizabeth for the said balance of $225 upon a book account. This book account was admitted by the defendant upon the trial but a counter-claim was interposed. The theory of the counter-claim was presented and tried upon two allegations: Page 9, State of Case, paragraph 3.

First. That the plaintiff's servants acting within the scope of their employment negligently installed and connected the stove in the home of the defendant, and

Secondly. That the stove which was sold was defective and not fit for the purposes for which it

was sold; one or both of which acts caused damage to the defendant's home.

The defendant therefore counter-claimed the damage to his home and also demanded the return of the $25 paid on account of the purchase price of the stove. The defendant also urged this in defense as against the book account of the plaintiff. The Court decided against the plaintiff on its state of demand and in favor of the defendant on his counter-claim in the sum of $250.

ARGUMENT

The state of the case therefore presents the question whether there was any evidence to support the verdict of the Court below. *Breitbart* v. *Lurich,* 98 New Jersey Law, page 556.

The Court's verdict had plenary evidence to sustain it. The state of the case presented a situation whereby the defendant and his wife testified that the defendant purchased a stove from the plaintiff corporation upon an express warranty made by the plaintiff's servants whose authority was not disputed, to the effect that the stove which he, the defendant, purchased was fit for the purposes for which it was sold, that is, for the usual household purposes; that the stove was in first-class condition and a good stove, and that the plaintiff's servants would properly install the stove and connect the same in the house of the defendant ready for the defendant's use.

It will be noted that the stove which was purchased from the defendant was not a stove bought under some trade name or which bore any particular trade mark, but it does appear in the evidence that he bought *a* stove.

Under an act concerning the sale of goods and to make uniform the law relating thereto—4 *Compiled Statutes,* page 4650, Section 15, provides:

> "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract to sell or a sale except as follows:
>
> Section (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment—whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purposes.
>
> Section (6) An expressed warranty or condition does not negative a warranty or condition implied under this Act unless inconsistent therewith."

In the case *sub judice* the plaintiff was the owner of the dwelling house, purchased the stove for household purposes and it was warranted by the seller that it would be fit for household purposes, and would be properly connected.

The defendant, after the stove was connected by the plaintiff's servants and relying upon their statement that it was ready for use, made a fire in the usual way in the stove and then suddenly the whole thing exploded. He produced an expert carpenter who testified that the explosion came from within the stove itself; that there was nothing about the chimney or in the chimney that could cause the explosion.

He also produced a stove expert who had experience with stoves for many years and he testified that he was called in immediately after the

explosion, and that the explosion in his opinion was caused by a defect in the stove or a chemical compound used in the painting and polishing of the stove, or by reason of a defect in the installation or the connection of the stove. This expert also states that the explosion could not have occurred by the reason of the placing of any explosive substance in the stove by the defendant in the making of the fire because of the fact that the fire box in the stove was left intact and not at all damaged.

The plaintiff, by its witnesses, did not contradict the making of the warranty or the authority in the making of those warranties, nor did it dispute the fact that its servants made connections to the stove. As a matter of fact the only witnesses produced by the plaintiff was Rudolph Lifson who testified that it was not the custom of the employees of the plaintiff to make connections but it is not disclosed how this knowledge was obtained by this witness or who gave the authority for that purpose; nor was there any attempt made by the plaintiff to deny the authority of the servants to instruct this defendant to make fire in the stove.

There was one other witness produced by the plaintiff—a Mr. Leon—who purported to be an agent of the manufacturer of the stove and he testified that no explosive substance was used in the manufacture of this stove. There is nothing in the evidence to show what experience he had, what his qualifications were to testify in that capacity, nor did he testify that he examined this particular stove before it was sent out of the manufacturing plant.

It can be impartially stated that the plaintiff did not produce an iota of evidence to contradict

the defense and the allegations of the counterclaim presented by the defendant. The plaintiff made no attempt whatever to exculpate itself from liability or to make any explanation whatever to explain the explosion, or to show that it used reasonable care on its part in the manufacture, assemblying or installation of this stove in the plaintiff's home. To explain this after the defendant put in his case was its duty—*Elmann* v. *Manhattan Rubber Co.*, 136 Atlantic Reporter, page 178—*Heckel* v. *Ford Motor Co.*, 128 Atlantic Reporter, page 242—3 Atlantic Reporter, page 631.

It is true that these cases involve the duty which a manufacturer owes to a vendee of a dealer, but in view of the express and implied warranties of the dealer in this case, it owes to the vendee the duty to fulfill the warranties which it made both expressed and implied.

In other words, if this stove exploded when it was used in a normal manner and if not explained by the plaintiff, it was sufficient to show that it was defective, and it appearing that there was both an expressed and implied warranty that the stove was fit for the usual household purposes and in good condition, which warranty was made by the plaintiff and the servants of the plaintiff having connected the stove, there was ample evidence to substantiate the Court's findings, and as a matter of common justice, it was the only thing the Court could do under the circumstances.

We quote also from the decision of the New Jersey Supreme Court affirming the judgment of the District Court in this case (Case #405, May Term, 1927).

"There is some dispute on the facts, but in view of the finding we must accept the the-

ory of acts most favorable to the plaintiff. In this aspect the case presented a situation which it was manifestly the duty of the plaintiff to explain; a stove warranted good and serviceable installed by plaintiff and which for no apparant reason blows up as soon as lighted. The evidence indicated that defendant's chimney was in good order, and also that in fact the gas and water had not been connected. There was some evidence that it was not customary for plaintiff to connect such stoves, but the employe at the store and those making delivery might properly be assumed by defendants to have authority to make the representations that defendant's evidence indicates they did make. Bridgeton *v.* Fidelity Co., 88 N. J. L. 645; Stuart *v.* Farmers Exchange, 90 *Id.* 584.

The judgment will be affirmed."

~~Respectfully submitted,~~

~~XXXXXXXXXXXXXXXXXX~~

The present case differs from the case of Noonan vs. Great Atlantic & Pacific Tea Co., 5 N. J. Adv. Rep. 1411. In the case subjudice the stove was delivered to the defendant in the defendant's home on October 10th by plaintiff's servants, and the said servants connected it with the chimney, and performed other things to it; that upon the completion of the installation and the connection, these servants told the defendant that he could make a fire in the stove and use it; that on October 10th the defendant paid $5. to the plaintiff's servants on account of the purchase price of the stove and after these servants of the plaintiff left the defendant attempted to make a fire in the stove for the first time by putting wood and paper into the fire box and lighting a match to the paper. When the fire commenced to burn and continued for about two or three minutes, there was an explosion. - Page 13, "State of Case", line 10 to 27.

Respectfully submitted,

Salvatore [illegible]

Attorney for Defendant