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For Plaintiff.

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NOTICE OF APPEAL.

Filed July 1, 1925.

Essex County Circuit Court

LINDEMAN & Co., a corporation, *Plaintiff,* *vs.* EDWARD M. WALDRON, INC., a corporation, or JACK FRANK or the TRUSTEES OF THE YOUNG MEN'S AND WOMEN'S HEBREW ASSOCIATION, a corporation, or MILTON ADLER, in the alternative, *Defendants.*	*On Appeal to New Jersey Court of Errors and Appeals.* *Notice of Appeal.*

To William K. Flanagan, Esquire, attorney for defendant, Edward M. Waldron, Inc., a corporation:

TAKE NOTICE that plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment of non-suit entered in this case, in favor of the defendant, Edward M. Waldron, Inc., a corporation, and against plaintiff.

Respectfully, etc.,

WILLIAM HARRIS,
Attorney of Plaintiff-Appellant.

Dated June 29, 1925.

Summons.

Service acknowledged this 29th day of June, 1925.

WILLIAM K. FLANAGAN,
Attorney for Defendant,
Edward M. Waldron, Inc.

SUMMONS.

State of New Jersey to Edward M. Waldron, Inc., a corporation; Jack Frank, Young Men's and Young Women's Hebrew Association of Newark, a corporation; Milton Adler:

(SEAL)

You are summoned to answer the annexed complaint of Lindeman & Co., a corporation, in an action at law in the Essex County Circuit Court, and take notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment will be entered against you.

WITNESS, Worrall F. Mountain, Judge of the Essex County Circuit Court at Newark, this 24th day of November, 1924.

JOHN H. SCOTT,
Clerk.

WILLIAM HARRIS,
Attorney.

COMPLAINT.

Filed

ESSEX COUNTY CIRCUIT COURT.

LINDEMAN & Co., a corporation, *Plaintiff,*	
vs.	
EDWARD M. WALDRON, INC., a corporation, or JACK FRANK or the YOUNG MEN'S & YOUNG WOMEN'S HEBREW ASSOCIATION OF NEWARK, a corporation, or MILTON ADLER, in the alternative, *Defendants.*	*Action at Law.* *Complaint.*

Lindeman & Co., a New Jersey corporation, incorporated under the laws of the State of New Jersey, and having its principal place of business in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. At all times hereinafter mentioned it was and still is a corporation duly incorporated under the laws of the State of New Jersey.

2. At all times hereinafter mentioned Edward M. Waldron, Inc., a corporation, was and still is a corporation, incorporated under the laws of the State of New Jersey.

3. At all times hereinafter mentioned the Young Men's & Young Women's Hebrew Association of Newark was and still is a corporation,

incorporated under the laws of the State of New Jersey.

4. Between the dates of January 7, 1924, and April 9, 1924, the defendant, Jack Frank, representing himself to be the duly authorized agent of the defendant, Edward M. Waldron, Inc., a corporation, and its superintendent on the construction job of the Young Men's & Young Women's Hebrew Association building on the southeast corner of High and West Kinney streets, in the City of Newark, County of Essex, and State of New Jersey, ordered from plaintiff on behalf of Edward M. Waldron, Inc., a corporation, coal at the dates and in the quantities set forth in the schedule hereto annexed and made a part hereof and marked Schedule A, to be delivered to the said premises, and agreed that his principal, Edward M. Waldron Co., Inc., a corporation, would pay therefor the reasonable value thereof.

5. In accordance with the said order, and relying on the representations of the said Jack Frank, plaintiff delivered 116 tons of coal between the dates of January 7, 1924, and April 9, 1924, to the said building of the Young Men's & Young Women's Hebrew Association of Newark. The reasonable value of said coal was $1,185.25 for which sum plaintiff had demanded payment.

6. Neither Edward M. Waldron Co., Inc., a corporation, the Young Men's & Young Women's Hebrew Association of Newark, a corporation, or Jack Frank have made payment of the said sum of $1,185.25 although demand has been made upon them and each of them for payment.

7. Defendant, Edward M. Waldron Co., Inc., a corporation, claims that Jack Frank was not

its agent in the purchase of said coal, but purchased the same as the agent of the Young Men's & Young Women's Hebrew Association of Newark, or as agent of Milton Adler, Vice-President of the said Young Men's & Young Women's Hebrew Association of Newark, a corporation. The defendants, the Young Men's & Young Women's Hebrew Association of Newark, a corporation, and Milton Adler, claim that said coal was purchased by defendant Edward M. Waldron Co., Inc., a corporation, through Jack Frank, its duly authorized agent.

Therefore, plaintiff demands judgment against Edward M. Waldron, Inc., a corporation, or the Young Men's & Young Women's Hebrew Association of Newark, a corporation, or Jack Frank or Milton Adler in the sum of $1,185.25 damages besides interest.

SECOND COUNT.

1. It sues for the price of coal sold and delivered to the defendant, Edward M. Waldron, Inc., a corporation, upon a book account, of which a copy is attached hereto and the whole of which is due and unpaid.

Plaintiff demands as damages the amount due thereon being $1,185.25 besides interest.

THIRD COUNT.

1. It sues for the price of coal sold and delivered to the defendant, Young Men's & Young Women's Hebrew Association of Newark, a corporation, upon a book account, of which a copy is attached hereto and the whole of which is due and unpaid.

Plaintiff demands as damages the amount due thereon being $1,185.25 besides interest.

FOURTH COUNT.

1. It sues for the price of coal sold and delivered to the defendant, Jack Frank, upon a book account, of which a copy is attached hereto and the whole of which is due and unpaid.

Plaintiff demands as damages the amount due thereon being $1,185.25 besides interest.

FIFTH COUNT.

1. It sues for the price of coal sold and delivered to the defendant, Milton Adler, upon a book account, of which a copy is attached hereto and the whole of which is due and unpaid.

Plaintiff demands as damages the amount due thereon being $1,185.25 besides interest.

WILLIAM HARRIS,
Attorney for Plaintiff.

Complaint.

Newark, N. J.,
November 10, 1924.

To Lindeman & Co.,
210 Bigelow St., Cor. Badger Ave.,
Newark, N. J.

Edward M. Waldron, Inc., a corporation, or Jack Frank or the Young Men's & Young Women's Hebrew Association of Newark, a corporation, or Milton Adler, in the alternative.

For Coal delivered to Young Men's Hebrew Association Building, High & West Kinney Streets, Newark, New Jersey.

Terms: Cash.

1924				
Jan. 7	3 Tons	Pea Coal	@ 10.25	30.75
9		Do	do	61.50
11	6	Do	do	30.75
21	3	Do	do	30.75
23	6	Do	do	61.50
26	6	Do	do	61.50
30	3	Do	do	30.75
Feb. 2	6	Do	do	61.50
6	6	Do	do	61.50
11	6	Do	do	61.50
16	6	Do	do	61.50
20	3	Do	do	30.75
23	3	Do	do	30.75
26	3	Do	do	30.75
29	1	Do	do	10.25
Mar. 1	6	Do	do	61.50
6	4	Do	do	41.00
8	3	Do	do	30.75
12	3	Do	do	30.75

	13	3	Do	do	30.75
	15	3	Do	do	30.75
	17	3	Do	do	30.75
	22	3	Do	do	30.75
	24	3	Do	do	30.75
	28	6	Do	do	61.50
Apr.	2	3	Do	10.00	30.00
	4	3	Do	do	30.00
	7	3	Do	do	30.00
	8	3	Do	do	30.00
	9	3	Do	do	30.00
					$1185.25

Served the within summons and complaint, December 1, 1924, upon Jack Frank, within-named defendant, by leaving a true copy thereof at his usual place of abode, 9 Monmouth street, Newark, N. J., with his wife, and with a ten days' notice endorsed thereon, personally upon Lawrence Ferrie, Secretary Edward M. Waldron, Inc., a corporation, within-named defendant, by delivering to him a true copy thereof at its place of business, 27 Central avenue, Newark, N. J., personally upon Milton Adler, within-named defendant, individually and as Vice-President of Young Men's & Young Women's Hebrew Association of Newark, a corporation, within-named defendant, by delivering to him two true copies thereof at 36 Shanley avenue, Newark, New Jersey.

HARRY B. O'CONNELL,
Sheriff.

By CHARLES PFEIFER,
Special Deputy.

Affidavit of Merits.

Notice to the within-named defendants:

In case the within writ of 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 thereof upon you, and must file your answer within twenty days from the date of such service, and in default judgment will be entered against you.

Lawful service upon a corporation is deemed personal service for the purpose of this notice.

I hereby appoint and depute Charles Pfeifer to serve the within writ.

Witness my hand and seal this 25th day of November, 1924.

HARRY B. O'CONNELL,
Sheriff.

By ALFRED C. WALKER,
Under Sheriff.

Sheriff Fees, $8.78. (SEAL)

AFFIDAVIT OF MERITS.

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

William J. Waldron, being duly sworn according to law, on his oath deposes and says: I am the vice-president of Edward M. Waldron, Incorporated, one of the defendants in the above-entitled action and I am its agent for this purpose. I verily believe that the said defendant has a just and legal defense to the said action on the merits of the case.

WILLIAM J. WALDRON.

Subscribed and sworn to before me
this 11th day of December, 1924.

JOHN S. DOWNES,
An Attorney at Law of N. J.

ANSWER OF EDWARD M. WALDRON, INCORPORATED.

Filed January 7, 1925.

Edward M. Waldron, Incorporated, a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, one of the defendants in the above-entitled action, says that:

FIRST COUNT.

1. It has no knowledge or information sufficient to form a belief as to the allegations of the first paragraph of the first count of the complaint.

2. It admits the allegations of the second paragraph of the said first count.

3. It has no knowledge or information sufficient to form a belief as to the allegations of the third paragraph of the said first count.

4. It denies the allegations of the fourth paragraph of the said first count.

5. It denies the allegations of the fifth paragraph of the said first count.

6. It admits that it has not paid the sum of money mentioned in the sixth paragraph of the

said first count; it has no knowledge or information sufficient to form a belief as to the remaining allegations of the said sixth paragraph.

7. It repeats the allegation of the seventh paragraph of the said first count that the said Jack Frank did not act as its agent in the purchase of the said coal; it has no knowledge or information sufficient to form a belief as to the remaining allegations of the said seventh paragraph.

SECOND COUNT.

1. It denies that the said plaintiff sold and delivered to it any coal upon a book account as alleged in the first paragraph of the second count.

DEFENSES TO FIRST AND SECOND COUNTS.

1. The said Jack Frank was never expressly or impliedly authorized by it to purchase any coal for its account from the plaintiff.

2. The said plaintiff did not furnish or deliver the said coal upon any representation that this defendant would pay for the same.

3. This defendant is not indebted to the plaintiff in the sum mentioned in the first and second counts or in any sum whatever for the coal alleged to have been delivered by it during the times and at the place mentioned in the said counts.

WILLIAM K. FLANAGAN,
Attorney for Defendant,
Edward M. Waldron, Incorporated,
790 Broad St., Newark, N. J.

Consent is given to the filing of the within answer as in due time.

WILLIAM HARRIS,
Attorney of Plaintiff.

Dated January 6, 1925.

REPLY TO ANSWER OF EDWARD M. WALDRON, INC.

Filed January 14, 1925.

Reply to defenses to first and second counts.

1. It denies each and every allegation contained in defenses to first and second counts and joins issue thereon.

OBJECTIONS IN POINT OF LAW.

1. Plaintiff objects to the answer and each and every part thereof on the ground that same is sham, and/or false and frivolous, vague, indefinite and uncertain, and so drawn as to embarrass and delay the plaintiff in the just trial of this cause, in that, said answer and each and every part thereof is evasive and not responsive to the complaint herein for all of which reasons plaintiff reserves the right at or before the trial hereof to strike out the same.

WILLIAM HARRIS,
Plaintiff's Attorney.

Judgment.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

37174.

LINDEMAN & Co., a corporation, *Plaintiff,*

vs.

EDWARD M. WALDRON, INC., a corporation, and the YOUNG MEN'S and YOUNG WOMEN'S HEBREW ASSOCIATION OF NEWARK, a corporation, or MILTON ADLER, the atlernative, *Defendants.*

Action at Law.

On Non-suit.

Costs $44.34.

Name of Young Men's and Young Women's Hebrew Association of Newark, a corporation, is amended to read "Board of Trustees of Young Men's and Young Women's Hebrew Association of Newark, a corporation; William K. Flanagan, attorney for E. M. Waldron, Inc.; Bilder & Bilder for Young Men's and Young Women's Hebrew Association of Newark, a corporation, or Milton Adler.

Judgment on non-suit in the above-entitled action was rendered on the twenty-ninth day of June, A. D. nineteen hundred and twenty-five, in favor of the defendants, Edward M. Waldron, Inc., a corporation, and Young Men's and Young Women's Hebrew Association of Newark, a corporation, and Milton Adler, and against the plaintiff, Lindeman & Co., a corporation, for

forty-four dollars and thirty-four cents, costs of suit.

Judgment entered and signed June 29, 1925.

WILLIAM S. GUMMERE,
Judge.

Book 100 Circuit Court Judgments, page 269.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey. Do HEREBY CERTIFY, That the foregoing is a true and correct copy of all the records and pleadings together with the judgment record in the case of Lindeman & Co., a corporation, plaintiff, *vs.* Edward M. Waldron, Inc., a corporation, or Jack Frank or the trustees of the Young Men's and Women's Hebrew Association, a corporation, or Milton Adler, in the alternative and the same is taken from and compared with original copies of all records and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed (SEAL) the official seal of said Court and County at Newark, N. J., this eighth day of July, A. D. 1925.

JOHN H. SCOTT,
Clerk.

ESSEX COUNTY CIRCUIT COURT.

Monday, June 29, 1925.

LINDEMAN & COMPANY, *vs.* EDWARD M. WALDRON, INC., *et als.*	*Action at Law.*

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appears William Harris, by Israel B. Greene, Esq.

For the defendant, Edward M. Waldron, appears W. K. Flanagan, Esq.

For the defendants, Adler and Y. M. and Y. W. H. A., appear Bilder & Bilder (by Walter Bilder, Esq.).

(A jury is called and sworn.)

Mr. Greene opens for the plaintiff.

Mr. Bilder opens for the defendants, Adler and Y. M. and Y. W. H. A.

Mr. Flanagan opens for the defendant, Edward M. Waldron.

EDWARD M. WALDRON, one of the defendants, sworn in behalf of plaintiff.

Direct examination by Mr. Greene.

Q Mr. Waldron, you are the president of Edward M. Waldron, Inc., one of the defendants in this case? A Yes, sir.

Q Were you its president in 1923 and 1924? A Yes, sir.

Q Have you in your employ a man by the name of Louis Alter? A Yes, sir.

Q What position does he hold? A He is my head bookkeeper.

Q He orders various materials on your jobs? A Yes, sir.

Q And where he is authorized to, he orders coal on your jobs? A Yes, sir.

Q He was in your employ in 1923 and 1924? A Yes, sir.

Q What was the condition of the job of the Y. M. H. A. at the corner of West Kinney street and High street during the winter of 1923-1924? A Under our contract we were obliged to make a test of the heating plants. For the purpose of making that test we had ordered three, or four, or five tons of coal.

Q You say you ordered five tons of coal from whom? A From Lindeman & Company.

Q Five tons of coal? A It may be five or ten or two; I don't know.

Q Those were paid for? A Yes, sir.

Q Those were ordered by Mr. Alter? A Yes, or by my son.

Q How long have you been dealing in coal with the plaintiff in this case? A Four or five years, maybe.

Q During that time, what has been your custom with respect to ordering and delivering coal on jobs? A To write the coal dealer telling him to deliver so many tons of coal to such and such a job. Often we get some other fellow—sometimes coal is scarce and we have to shop around for it.

Q If any additional coal was needed, you authorized the superintendent to order it and you paid for it? A If the bills were made out to us.

Edward M. Waldron, direct.

Q On previous occasions, in dealing with the plaintiff in this case, after the order was given by your foreman, you paid for it? A If I didn't tell him to stop ordering; yes.

Q Was Mr. Jacob Frank, one of the defendants, in this case, one of your superintendents on that job? A He was my engineer.

Q He was supervising this job? A Yes, sir.

Q Do you know his signature? A I think I do.

Q Did you have a man working on that job by the name of Webner or Helm? A No; I don't think so.

Q I show you a paper and ask you whose signature that is—E. Waldron? A That is the foreman.

Q On the job? A Yes; the foreman carpenter.

(The paper referred to was marked Exhibit P. 1 for identification.)

By Mr. Greene.

Q He was working for you? A Yes.

Q A relative of yours? A Yes.

Q What is the relationship? A I think my mother's nephew.

Q (By the Court.) What is his name? A Ed. Waldron.

By Mr. Greene.

Q I ask you to look at the back, the signature thereon (handing papers to witness). Do you recognize the delivery of these shipments? A I cannot recognize the shipments.

Q Do you recognize the names on the bottom? A Jack Frank; Helm I do not recognize; he

never worked for me as far as I know. Here is another name—Forcinsky—he never worked for me. Here is a slip signed by Forcinsky, or something like that. Another slip signed by C. H. made out to Jack Frank; another C. H. made out to Jack Frank; another one—I don't know to whom this is made out; another obliterated—T. E. Wallop, or some such name—I never heard of him; six slips, C. H. to J. Frank.

Q Do you recognize those as the signature of J. Frank? A Yes, sir.

Q The others you don't know? A No.

Mr. Greene: I offer in evidence Exhibit P. 1 for identification together with twenty-one slips which were recognized and identified as the signature of Mr. Frank.

Mr. Flanagan: I object to it as incompetent against the defendant, Edward M. Waldron Company.

The Court: Objection overruled.

Mr. Bilder: I assume it is offered in evidence as to the defendant Waldron. Counsel should stipulate as to which defendant he has in mind.

The Court: I will allow it in evidence.

Mr. Bilder: I ask your Honor to limit its effect in such a manner so that it will not be evidential as against the Y. M. and Y. W. H. A. on the ground that there is no proof to connect the person signing those slips with either Milton Adler or the Y. M. and Y. W. H. A.

The Court: Objection overruled.

Counsel for the defendants Milton Adler and the Y. M. and Y. W. H. A. prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Edward M. Waldron, direct.

By Mr. Greene.

Q I show you another signed slip. Is that his signature? A That is not his signature.

Q What was the condition of the Y. M. H. A. building in January, 1924? A In course of construction.

Q The plaster had been applied? A I think the plaster was mostly on at that time.

Q For what purpose was the building heated between January 7 and April 9, 1924?

Mr. Bilder: I object to it as incompetent, irrelevant and immaterial and as not bearing on the defendants Adler and Y. M. and Y. W. H. A.

The Court: Objection overruled.

Counsel for defendants Adler and Y. M. and Y. W. H. A. prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: The Young Men's Hebrew Association wanted to expedite the completion of the building. They wanted me to do the heating. I forbade Mr. Frank ordering any coal after testing and proof of the heating was certified by the engineer. It was up to the Y. M. H. A. to heat it. We drew the fires, then Mr. Adler took it up with Mr. Frank and said, "You go on and buy the coal and I will see that you are paid for it." Mr. Frank did that.

Mr. Bilder: I move to strike out the answer on the ground that the alleged conversations were had between third persons.

The Court: I will strike out the latter part of the answer.

Edward M. Waldron, cross.

Mr. Greene: I ask that the answer be stricken out as not responsive.

The Court: I will allow the first part to stand.

Exception noted.

By Mr. Greene.

Q Weren't you obliged to heat the building in carrying out the contract according to the plans and specifications? A No, sir.

Q I show you this contract and specifications. Do you identify them? A I do.

Q Are these the specifications for the job? A Yes, sir.

Mr. Greene: I offer these in evidence.

Mr. Flanagan: Objected to as not relevant.

Mr. Greene: I will withdraw the offer at the present time.

Cross examination by Mr. Flanagan.

Q I understand that some time before January 7, 1924, your company ordered five or ten tons of coal to test this heating plant? A It was either November or December.

Q Bills were sent to your company for that quantity? A Yes, sir.

Q And your company paid those bills? A Yes, sir.

Q In your dealings with this company, were bills ever submitted and made out in the name of any superintendent on the job? A No, sir.

Q Have any of the statements which Mr. Greene has offered in evidence, and which have

been shown to you, ever been seen by you before this day? A No, sir.

Q And all of them, I think you testified, are made out to Jack Frank or J. Frank.

Mr. Greene: I object to that. They speak for themselves.

The Court: Objection sustained.

Q Was any demand ever made upon you or upon your company for the payment of this coal until long after it had been furnished— A No, sir; never was.

Q (Continuing.) —by this plaintiff? A No.

Q Did this plaintiff ever demand payment from your company for this coal which is the subject matter of this suit, until long afterwards? A About nine or ten months afterwards Mr. Lindeman came to me and asked for what information I had and I gave it.

Q Did he, at that time, demand payment from you? A No, sir.

Q Which Mr. Lindeman was this? A Mr. Lindeman, senior.

Q Is he in the room? A No, sir; not that I can see.

Q What is his name? A Mr. Philip Lindeman.

Mr. Flanagan: Is it admitted that Mr. Philip Lindeman is president of the plaintiff corporation?

Mr. Greene: Yes, sir.

Re-direct examination by Mr. Greene.

Q If any material was delivered on this job for you, was Mr. Frank authorized to receipt for it?

Mr. Flanagan: I object to that.

The Court: I will allow it.

Mr. Flanagan: It depends on what material it was.

Mr. Greene: Material on the job.

The Court: Any material?

Mr. Greene: Yes, sir.

The Court: I will allow it.

The Witness: Any material except coal. He was forbade to receive coal charged to me.

Mr. Greene: I ask that that be stricken out.

The Court: I will let it stand.

By Mr. Greene.

Q Did Mr. Frank have authority to receipt for coal before you forbade him to do so? A He did, sir.

Re-cross examination by Mr. Flanagan.

Q And in those instances the coal was purchased from your office? A Yes, sir.

Q And bills came directly to your company? A Yes, sir; and the slips came direct to the company like those to Jack Frank. We checked the bills with the slips. When this question came up I notified Mr. Frank to refuse to receipt for any more.

Mr. Greene: I ask that that be stricken out.

The Court: I will allow it.

Edward M. Waldron, re-direct.

Re-direct examination by Mr. Greene.

Q Before you forbade Mr. Frank to receipt for coal, didn't he receipt for coal on this job? A We had a hoisting engine—

Q No. Didn't he receipt for coal? A Yes, sir; and we paid for it.

By the Court.

Q What was the course of dealing between you and Mr. Lindeman with regard to coal? A And the Waldron Realty Company, the Mansion House Building Company—the companies I was president of?

Q Edward M. Waldron, Inc. A He made a slip to them first that was forwarded daily to our office. As soon as our man received that he put it into an envelope and mailed it to the office. The bill followed on the first or second of the month, and we checked it with the slips.

Q After you ordered this first lot of coal, you continued doing business with him for other jobs? A Yes.

Q Did he bill you? A My bookkeeper would have to answer that.

Q Did he bill you between January 7 and April 9, 1924, for coal on other jobs? A My bookkeeper would have to answer that.

By Mr. Greene.

Q Is there any doubt in your mind that this coal for which suit is being brought was actually burned in the Y. M. H. A. Building?

Mr. Flanagan: I object to that.

The Court: Objection sustained.

Arthur C. Lindeman, direct.

By Mr. Greene.

Q Do you know what disposition was made of this coal? A Yes.

Mr. Flanagan: I object to that.

The Court: It is already answered.

ARTHUR C. LINDEMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q Mr. Lindeman, what office do you hold in the Lindeman Company? A Secretary and treasurer, and general manager.

Q Were you operating in that capacity in 1923 and 1924? A I was.

Q Are you acquainted with the coal delivery on the job to the Y. M. H. A.? A I am.

Q Will you tell us how long your company has been doing business with E. M. Waldron Company? A I should judge about seven or eight years.

Q Have you been connected with the company all that time? A I have.

Q Can you say offhand on how many jobs you supplied coal for the E. M. Waldron Company? A Possibly a dozen or more.

Q What has been the method of doing business with Waldron & Company during that time? A The coal order was generally given by the office and the repeat order by the superintendent on the job.

Q You said you had about a dozen jobs? A About that.

Q Was coal always paid for by Waldron & Company ordered by the superintendent of the job? A Yes.

Q Did they dispute the right of the superintendent to order? A No, sir.

Q You say the order was given by the office and then repeat orders by the superintendent on the job? A Yes, sir.

Q How did you come to deliver coal on this job? A It was ordered in the usual manner by the office first and then by Mr. Frank on the job.

Q Who of Mr. Waldron's office ordered the first shipment? A I think Mr. Alter, the bookkeeper.

Q Had he ordered before that? A Yes, sir.

Q You delivered it? A Yes, sir.

Q And thereafter at whose instance and request did you deliver coal on this job? A Mr. Frank's.

Q Who was the superintendent on the job? A Yes, sir.

Q Have you been paid for any of the coal that was delivered between January 7, 1924, and April 9, 1924? A No, sir.

Q Prior to January 7, 1924, you delivered coal on the job? A Yes, sir.

Q Who accepted the coal on the job?

Mr. Flanagan: How does this witness know that?

Q (By the Court.) Do you know of your own knowledge? A I wasn't with the driver.

Q (By Mr. Greene.) You say up to January 7, 1924, you had been paid for the coal delivered on the job? A Yes, sir.

Q And all the orders from January 7, 1924, to April 9, 1924, were received by Mr. Frank? A Yes, sir.

Q Did you tend to the preparation of the coal for the purpose of delivery? A Yes, sir.

Q What did you do? A I laid out the tickets in the usual way for the drivers.

Q I show you a batch of delivery tickets and ask you whether these are the tickets that you made out (handing papers to witness)? A They are all in my handwriting.

Mr. Greene: Witness refers to all the delivery tickets including those in evidence heretofore marked for identification, receipted by Jacob Frank.

Mr. Greene: I offer for identification all delivery slips other than those identified as having been signed by Jacob Frank. There are fourteen of them.

(The same were received in evidence and marked Exhibit P. 2 for identification.)

FRANK GRAD, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q Mr. Grad, you are an architect in the City of Newark? A Yes, sir.

Q How long have you been an architect? A Nineteen years.

Q You were the architect on the Y. M. H. A. job in the City of Newark? A I was.

Q I show you these papers and ask you whether they are the specifications for that building (handing papers to witness)? A Yes.

Frank Grad, direct.

Mr. Greene: I offer for identification the specifications for the erection of the Y. M. H. A. Building.

(Marked P. 3 for identification.)

By Mr. Greene.

Q Do these specifications contain any provision with respect to whether the owner or the builder should heat the building?

Mr. Flanagan: I object to that. They speak for themselves.

The Court: Objection sustained.

Mr. Greene: I offer in evidence the contract and specifications marked P. 3. for identification.

Mr. Flanagan: I object to that.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

By Mr. Greene.

Q Do you know who ordered the coal on this job? A No, sir; I don't.

Q Did you have any conversation with Mr. Waldron about furnishing the coal on this job? A No, sir.

Q When did you have that conversation? A I believe it was during the month of January—January or February.

Q What year? A Late in 1923, in January, 1923, it was.

Q (By the Court.) Sure about the year? A Yes, sir; because we dedicated the building in

Frank Grad, direct.

May, 1923, and the plastering was done the winter previous to that date.

Q (By Mr. Greene.) What was the occasion of your talking to him about coal at that time?

Mr. Bilder: I object to the question on the ground that it is incompetent, irrelevant and immaterial and not binding on the defendant, Milton Adler.

The Court: I will allow it.

Counsel for the defendants, Adler and Y. M. and Y. W. H. A., prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: Mr. Waldron, after having the building heated for some time, told me that he thought that the owners should provide coal, and I told him that the contract, according to my understanding and recollection—the contract and specifications provided that he was to protect his own work and heat the building during the progress of the work.

By Mr. Greene.

Q What was the condition of the building at that time? A It was being plastered.

Q What did Mr. Waldron say to you? A He wrote me a letter.

Q I show you a letter and ask you if that is the letter you refer to as having been written by Mr. Waldron? A Yes, sir.

Mr. Greene: I offer for identification letter dated December 31, 1923.

The Court: Not in evidence?

Mr. Greene: For identification only. I will offer it in evidence if there is no objection.

Mr. Flanagan: No objection.

Mr. Bilder: I object to that on behalf of the defendants, Adler and Y. M. and Y. W. H. A., on the ground that it is a letter passing between other parties.

The Court: I will note your objection.

Mr. Greene: I offer in evidence letter of E. M. Waldron, Inc., to Mr. Frank Grad, dated December 31, 1923.

(The same was received in evidence and marked Exhibit P. 5.)

(Mr. Greene reads Exhibit P. 5. to the jury.)

By Mr. Greene.

Q In response to that letter what did you say or do?

Mr. Flanagan: I object to that question on the ground that what Mr. Frank Grad did has nothing to do with the case.

(Question withdrawn.)

By Mr. Greene.

Q You supervised this job? A I did.

Q You were the one who issued certificates of payments from time to time? A I did.

Q What did you say or do upon receipt of this letter?

Mr. Flanagan: I object to that. It will not bind the defendant in this particular suit.

Frank Grad, direct.

The Court: Isn't he the agent of the owner?

Mr. Flanagan: My objection is for the defendant, Waldron.

Mr. Bilder: I renew my objection that nothing has been shown as binding on the defendant, Milton Adler.

The Court: I suppose he represented the owner?

Mr. Bilder: Only as an architect, not to order coal. On the subject of coal, Mr. Grad as an architect has no authority to order coal for the owner.

The Court: He was the architect on the job and had a general supervision of the work.

Mr. Bilder. Of the erection of the building to see that it was done properly.

The Court: I will allow it.

Counsel for the defendants, Adler and Y. M. and Y. W. H. A., prays an execption to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: I called up Mr. Waldron and I told him that my interpretation of the contract was that he was to supply temporary heating, but that I would refer his communication to Mr. Richard B. Kimball, my associate on mechanical equipment.

By Mr. Greene.

Q Did you refer the matter to Mr. Kimball? A Yes.

Q How? A I sent him a copy of Mr. Waldron's letter.

Frank Grad, direct.

Mr. Flanagan: I object to that.

(Question withdrawn.)

Q Did you have any subsequent conversation with Mr. Waldron about the coal? A Yes.

Q Tell us when the conversation was held? A A few days later.

Mr. Bilder: I object to that.

The Court: I will note your objection that it is not binding on your client.

The Witness: I told Mr. Waldron I had received a letter from Mr. Kimball and told him Mr. Kimball gave me an opinion and feels about the matter as I do. I had also sent copy of Mr. Kimball's letter to Mr. Waldron.

Mr. Greene: I ask for the production of the letter.

Mr. Flanagan: We never heard of it or saw it.

Mr. Greene: I ask for the production of the letter from Mr. Grad to Mr. Waldron.

(Not produced.)

By Mr. Greene.

Q After that did you have any conversation with Mr. Waldron? A Several.

Q How soon after the letter? A Within a day or two.

Q What was said then?

Mr. Bilder: I object to that.

The Court: I will allow you a general exception to these conversations with Mr. Waldron so far as your client is concerned.

Frank Grad, direct.

The Witness: Mr. Waldron told me that unless the owners would provide coal, he would be obliged to pull the fires and leave the building cold.

By Mr. Greene.

Q What did you say? A I took the matter up with the owners and the owners referred me to the late Leo Stein.

Q A member of the Bar of this State? A For his opinion.

Q After you received his opinion, what did you say to or do with Waldron & Company? A I wrote a letter to Mr. Waldron.

Mr. Greene: I ask for the production of the letter from Mr. Grad to Waldron & Company dated January 15, 1924.

Mr. Flanagan: I haven't any such letter.

The Court: Counsel for Waldron & Company does not produce letter.

By Mr. Greene.

Q Did you have any conversation with Mr. Waldron about the letter after that? A There were no more conversations outside of correspondence.

Q Do you know whether there was any coal delivered on the job? A There must have been. There was fire regularly.

Q Had you seen any coal delivered on the job or burning after that date? A No, I didn't go down the boiler room.

Q You say that before on or about January 7th Mr. Waldron supplied coal for temporary heating? A I know there was heating in the

building. There was never any question about coal. I don't know who supplied it.

Q The burning of coal was necessary for what purpose? A To keep the building from freezing.

Q Any workmen inside the building at that time? A Yes, sir.

Q Whose workmen? A Mr. Waldron's.

Cross examination by Mr. Flanagan.

Q This letter that had been introduced in evidence as P. 5 was dated December 31, 1924. I ask you to read that again so it may refresh your recollection.

(The witness reads the letter as requested.)

A Yes, sir.

Q Having read that letter wouldn't you say such heat as was furnished before January was for the purpose of testing the heating plant? A No, sir.

Q Isn't that statement correct in that letter? A I don't think it is.

Q Can't you answer it categorically, yes or no? Mr. Waldron refused to furnish temporary heat from January 7th? A From that day on.

Q The fact that there had been some temporary heat in the building resulted from testing the heating plant? A It is not so.

Q Doesn't it say in the letter, "Will not furnish temporary coal as the tests have been completed"? A The tests had not been completed.

Q What does the word "tests" mean? A Testing.

Frank Grad, cross.

Q Mr. Waldron said, "I am through. The tests are finished." A Yes.

Q Isn't it true that he did not furnish any heat after that? A Just for one day, I believe.

Q And he told you at the time of your first conversation that if the owners did not supply the coal he would pull the fires? A That is right.

Q And he did pull the fires, didn't he? A That is right.

Q And he steadfastly refused to furnish heat unless the owners paid for it? A Yes.

Q And you and I talked about it? A Yes, sir.

Q And I told you what the owner's position was? A (No answer.)

Q Didn't I tell you that the next day the fires would be out? A Yes.

Q And the fires did go out? A Yes, sir.

Q And that has been Mr. Waldron's position all the way through, hasn't it? A Yes, sir.

Q Isn't it a fact that you had a unit price for furnishing temporary heat? A That specification that called for the unit price was a separate specification for the heating and ventilating. There were two specifications, one for the general work and another for the heating and ventilating.

Mr. Flanagan: I ask that that be stricken out.

The Court: Strike it out.

Mr. Bilder: I object.

Mr. Greene: I object.

Frank Grad, re-direct.

By Mr. Flanagan.

Q Isn't it a fact that you, as agent for the owner, received from Edward M. Waldron & Company a unit price for furnishing heat? A Yes, sir.

Q Isn't it a fact that you accepted that unit price? A Yes, sir.

Q Didn't Mr. Waldron and I refer you to the unit price you had accepted? A That unit price was given when the letters went back and forth. It wasn't original when the contract was signed. It came during the time of this correspondence.

Q You don't know the date? A The letter is there and speaks for itself.

Q You cannot tell us more definitely? A No, sir.

Q (By the Court.) After that letter? A I think it was the beginning of January to the last date of the correspondence. It came not from Mr. Waldron but from the sub-contractor.

Q (By Mr. Flanagan.) Mr. Taft, the heating man? A Yes, sir.

Q And it was in the heating specifications? A Yes, sir. And there was a space marked for the price in the heating specifications, but it was never filled in at the time of signing the contract.

Q But it was contemplated at the time you drew that up?

Mr. Greene: I object to that.

The Court: Objection sustained.

Re-direct examination by Mr. Greene.

Q Referring to Exhibit P. 3 for identification, can you point out any provisions with respect to heating?

Arthur C. Lindeman, cross.

Mr. Flanagan: I object to that.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

By Mr. Greene.

Q Do you know who supplied the coal on this job?

Mr. Flanagan: Objected to.

The Court: Objection sustained.

By Mr. Greene.

Q Did you instruct the Y. M. H. A. to furnish coal after that?

Mr. Flanagan: I object to that.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

By Mr. Greene.

Q Did the Y. M. H. A. instruct you to obtain coal for this job? A No.

ARTHUR LINDEMAN, recalled.

Cross examination by Mr. Flanagan.

Q Mr. Lindeman, did you say there was some coal furnished by your company on this job prior to January, 1924? A Yes, sir.

Arthur C. Lindeman, cross.

Q How much? A I should judge—

Q Are your books here? A Yes—about thirty or forty tons, I believe.

Q Do you know whether that was used for the hoisting engine and that sort of work? A Not altogether.

Q Have you the books here? A Yes.

Q Will you have the books produced?

Mr. Greene: I would like to have it noted on the record counsel for the plaintiff has produced a record of the transactions with Waldron & Company.

By Mr. Flanagan.

Q Are these the loose leaf ledger sheets from your book? (Handing papers to witness.) A They are two separate accounts.

Q Are those the accounts you referred to? A Yes, sir.

Q I show you account No. 21 to E. M. Waldron Company, Inc., 27 Central avenue. Does that show the coal delivered on this job? A Yes, sir.

The Court: State when.

The Witness: Prior to January 1, 1924. From July to the end of the year.

By Mr. Greene.

Q I show you account No. 1 of J. Frank, Y. M. H. A., No. 9 Monmouth street. What is that?

Mr. Bilder: I object to that as being read from a sheet which has not been offered in evidence.

Arthur C. Lindeman, cross.

The Court: I will allow it.

Counsel for the defendants Adler and Y. M. & Y. W. H. A. prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Bilder: I make a further objection on the ground that the words repeated as purporting to be the caption of the sheet. The sheet is marked "Hall Y. M. H. A."

Mr. Flanagan: I will amend it.

By Mr. Flanagan.

Q That is the account of J. Frank, is it not? A Yes, sir.

Q That shows delivery of coal from January 7, 1924, to April 9, 1924? A Yes, sir.

Q And it shows the account of J. Frank? A It says J. Frank, E. M. Waldron Company.

Q When was that put on? A The coal was charged to Mr. Frank, but it is just a bookkeeper's memorandum.

Mr. Flanagan: I offer these sheets in evidence.

Mr. Bilder: I object to their admission in evidence insofar as it is sought to bind the defendants Y. M. & Y. W. H. A. and Milton Adler, and on the ground that there is not shown on either of these sheets any connection with these defendants.

The Court: After they are in I can limit the effect in my charge.

(Sheet marked account No. 21 with E. M. Waldron & Company was received in evidence and marked Exhibit D. 1.)

Arthur C. Lindeman, cross.

(Sheet marked account No. 1 with J. Frank was received in evidence and marked Exhibit D. 2.)

By Mr. Flanagan.

Q You made out the delivery slips for the coal delivered on account No. 21, marked Exhibit D. 1, to E. M. Waldron Company, Inc.? A Yes.

Q That is what you did with reference to all the coal theretofore sent by your company on any of the coal the defendant was interested in? A Yes, sir.

Q Was this your universal practice during the length of time you dealt with this company? A Yes, sir.

Q In this instance, you made all of these slips to Mr. Frank? A Yes; but after 1924—

Q I mean all this coal in controversy? A Yes, sir.

Q Up to the end of December, 1923, you sent the slips and followed them later by bills for coal to the Y. M. H. A. to this defendant Waldron afterwards? A Yes, sir.

Q And afterwards you made a slip for every delivery that was made to Jack Frank or J. Frank or Frank? A Yes, sir.

Q You sent them yourself? A Yes, sir.

Q You sent monthly bills to Mr. Frank at his home address, the same address as on your sheets, 9 Monmouth street, Newark? A Yes, sir.

Q You never made any claim on the defendant for payment of this coal until after it had been furnished? A Oh, yes; we did.

Q When did you send your first bill? A The bills weren't sent to Mr. Waldron except on request of Mr. Frank.

Q When? A When the payment was fifteen days overdue. I think it was Mr. Alter I spoke to.

Q And you demanded payment the first month? A Yes.

Q And they told you they would not pay it? A He said he would have to take it up with Mr. Waldron.

Q Did you take it up? A My father did.

Q Was that at the time Mr. Waldron spoke of? A I believe it was. Mr. Waldron testified to it.

Q What was done? A We called up the bookkeeper and he sent a check for it. Mr. Waldron was not bothered by that.

Q And everything you sent bills for you were paid for? A Yes, sir.

Q Promptly? A Yes, sir.

Q Did you ever have to call up for payment of any coal prior to this delivery? A No, sir; not to my knowledge.

Q This was the first time you ever had to call up to find out whether you were going to be paid? A I didn't ask them; I asked for a check.

Q You made out delivery checks before to Waldron & Company? A Yes.

Q The fact was, that you did not make any of these delivery slips nor any bills to Edward M. Waldron, Inc., from January 7, 1924, to April 9, 1924? A Mr. Frank came to my office personally the first part of January and told me—

Q I don't care what he told you. A He ordered this coal.

Q And told you to bill it to him? A To him personally.

Q Didn't he tell you at that time that Edward M. Waldron & Company would not pay for it? A He didn't; no.

Q When was this conversation held with Mr. Frank? A Probably the second or third day of January.

Q This was the first time you had ever delivered coal on a slip to any man on the job? A Yes, sir.

Q In all the seven or eight years you have done business with the Waldron Company? A Yes, sir.

WALTER HARNISCH, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q Mr. Harnisch, what is your business? A Office manager for Lindeman & Company.

Q How long have you been employed by them? A Seventeen years.

Q In that time, what have your duties been? A To superintend the bookkeeping and general routine of the office.

Q Also to fill coal orders? A Yes.

Q You were acquainted with the price of coal for 1923 and 1924? A Yes.

The Court: I do not suppose there is any dispute about the price of coal.

Mr. Flanagan: No; there is no dispute about that.

Mr. Bilder: I don't know anything about the price.

Walter Harnisch, cross.

By Mr. Greene.

Q Were the prices charged in that paper the current prices for that period? A Yes, sir.

The Court: Referring to the schedule attached to the complaint.

By Mr. Greene.

Q How long has Lindeman & Company been dealing with Waldron & Company? A About seven or eight years.

Q During that time do you know on how many different jobs Lindeman & Company furnished coal? A About ten or twelve.

Q What has been the general custom in ordering and supplying coal on the jobs? A I don't know in what way you mean.

Q Where did you get the orders from? A Mr. Waldron's office.

Q Did you always get that in every shipment of coal to Waldron & Company?

The Court: You called Mr. Waldron on that. Is there any dispute about it? He has testified to it and you are bound by it. The office gave the orders.

Mr. Greene: That is all I want.

The Court: You are bound by what Mr. Waldron stated as being the general practice.

Cross examination by Mr. Flanagan.

Q Outside of this job the only coal your company supplied was for hoisting engines? A I don't know what it was used for.

Q It was soft coal? A There were different kinds.

Milton Adler, direct.

Q On any job where you supplied coal, did you supply anything but soft? A I can't tell without referring to the records.

Q So far as you know there was none furnished on this job except soft coal? A I can't remember without looking at the records.

Q The only other coal you supplied was to the Biltmore apartment house? A We delivered to a number of jobs in different parts of the city. The books would show the deliveries.

MILTON ADLER, one of the defendants, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q Mr. Adler, what officer are you of the Young Men's Hebrew Association? A First vice-president.

Q Had you been the first vice-president during 1923 and 1924? A Yes; I had.

Q Do you remember ordering Mr. Jacob Frank to purchase coal for the Y. M. H. A. from Lindeman & Company in January, 1924?

Mr. Bilder: I object to the question insofar as the fact that the witness ordered coal purchased is concerned.

The Court: I don't think that the vice-president of an eleemosynary corporation has authority to order supplies for that company. He may have had in this case.

By Mr. Greene.

Q What duties, if any, did you have with regard to the construction of this building?

Milton Adler, direct.

Mr. Bilder: The by-laws are here.

The Court: Ask what duties he performed.

By Mr. Greene.

Q What duties, if any, did you perform with respect to the construction and erection of the building? A I was a member of the building committee and took part in the committee's deliberations.

Q Who comprised that committee? A Mr. A. J. Diamond, myself, Mr. Fuld—

Q You mean Mr. Felix Fuld of L. Bamberger & Company? A Yes. (Continuing.) Mr. Isaac Lowenstein and Mr. Leo Stein.

Q What, if anything, did this building committee do with respect to coal in January, 1924?

Mr. Bilder: It does not appear what organization this building committee represented or was a part of.

By Mr. Greene.

Q This was the building committee of the Y. M. H. A.? A There are other organizations —one is a Board of Trustees and the other is the Y. M. H. A.

Q What was this committee you mentioned? A The Board of Trustees.

Q Did they have charge of the erection and construction of the building on High street and West Kinney street, Newark? A Yes, sir.

Q Were they the trustees of the Y. M. H. A.? A Yes.

Q What, if anything, did the committee do with respect to coal in January, 1924? A Nothing that I know of.

Milton Adler, direct.

Q Did they keep any minutes? A Yes; they did keep some minutes.

Q Who has them? A Mr. Stein kept them.

Mr. Greene: I suppose it will be agreed that Mr. Stein died sometime ago.

The Court: Yes.

By Mr. Greene.

Q Was there any discussion at the meetings with regard to coal? A No, sir.

Q Did you authorize Mr. Jack Frank to purchase coal from the Lindeman Company? A No, sir.

Q Did you give him any instructions to purchase coal? A No, sir.

Q Did you know that he had purchased coal? A No, sir.

Q What was done with respect to coal?

Mr. Bilder: I object to that.

(Argument.)

(Question allowed.)

By Mr. Greene.

Q What, if anything, did you say to Mr. Frank with respect to coal? A The conversations that we had between Mr. Frank and myself occurred at various times when I came to the building. Mr. Frank told me on a certain day that he had been buying coal. I was away over the New Year. He had been buying coal and he told me that he had been buying it on his own hook. He said, "I can't keep on." I asked him why he bought it on his own hook. He said, "Waldron won't pay for it; I won't

pay for it; there is a dispute as to who pays for it." He said, "I will have to pull the fires." I said, "What have you been doing up to now?" He said, "I have been firing but can't keep on." He said, "Will you give me an authorization to keep on? I am interested as a member." And I said, "I will go down to see Mr. Stein." All the committee work was done through him.

Q Mr. Stein had full authority? A Yes. When I saw Mr. Stein and told him Frank wanted a written authorization to buy coal, Mr. Stein told me to be sure to do nothing of the kind. I came up a few days later and Frank said that some of the men had gone off the job. The fires had been pulled. They wouldn't work. I went and called up the president of our organization, Mr. Diamond, and I told him about it. He said, "Have you seen Mr. Stein?" I said, "Yes." He said, "We will abide by his advice." When I came back again heat was again turned on in the building. They were heating it.

Q Did you see anything of Mr. Frank at that time? A I did not.

Q Didn't you express surprise?

Mr. Bilder: I object to that.

The Court: Objection overruled.

Counsel for defendants, Adler and Y. M. and Y. W. H. A., prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: No; I didn't express surprise.

Milton Adler, direct.

By Mr. Greene.

Q What did you say? A A few evenings later I met Frank—not at the building—I don't remember where. We talked again about the coal. He said, "I am piling up a nice bill of coal." I said, "You aren't trying to make me believe you are piling up a bill for coal? There is a dispute about it."

Q You didn't say to go ahead ordering coal. "I will stand behind you"? A I did not.

Q Did you report the information you had about subsequent ordering of coal to your building committee? A No.

Q You didn't tell them anything about it? A I didn't know who was ordering it.

Q Didn't you tell Mr. Stein and the committee there was a bill for coal running up?

Mr. Bilder: I object to that.

The Court: Objection overruled.

Counsel for the defendants, Adler and Y. M. and Y. W. H. A., prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: I told Mr. Stein he was running up a bill on his own hook.

By Mr. Greene.

Q At a meeting? A No; at his office.

Q You mean that was the only time you mentioned it to the building committee, that Mr. Frank was running up a bill? Was that the only occasion? A It didn't seem very important to me. The building was heated; we felt it would be completed in time. That is all we were interested in.

Milton Adler, cross.

Q This conversation with Mr. Stein was had when? A I should judge somewhere about the middle of January, 1924, but I am not certain.

Q You mean to say between that time and April, 1924, you didn't mention the subject to Mr. Stein nor the members of the committee? A I can't say that definitely.

Q Can you say whether you did or not? A I cannot.

Q That was the last time you recall? A Yes; I think it was.

Q Has the Y. M. H. A. made any provision to pay for this coal or pay Mr. Frank?

Mr. Bilder: I object to that.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

By Mr. Greene.

Q Did Mr. Frank tell you about the coal situation? A No; I don't think so.

Q You never discussed it with him thereafter? A Yes; I discussed it with him as recently as three months ago.

Q What was said? A I think there was a talk that Lindeman & Company was going to sue for the coal. I said, "How are you going to pay for it?" And he laughed and I laughed.

Cross examination by Mr. Bilder.

Q In what stage of construction was the building when the subject of coal first came under discussion? A As I remember it, they were putting

on plaster inside. The building was completely enclosed.

Q When was the building actually turned over by the contractor to the trustees of the Y. M. and Y. W. H. A. as completed? A About May 15, 1924.

Q And in whose charge and control was the building, if you know, up to that last mentioned date? A In charge of the contractor and his representatives.

Cross examination by Mr. Flanagan.

Q This defendant, Edward M. Waldron, Inc., did not supply all the work that went into the building? A I don't think they did.

Q Isn't it a fact that at the time you refer to there was plastering being done in the rotunda? A I don't remember that.

Q Were the decorators there at the time? A In the rotunda?

Q Anywhere in the building—in the auditorium, for instance. A No; I don't think they were there yet.

Q You aren't sure? A No; they might have been.

Q Were there sub-contractors, other than Mr. Waldron's men, working on the building at the time? A You mean sub-contractors not employed by the Waldron Company?

Q Yes. A I don't remember.

Q You don't remember very much about the details of this? A No.

Q And the plastering might all have been done? A The reason I knew the plasterers were there is because I came up there on a certain occasion when Frank told me the plasterers walked out because of no heat.

Q Did you and Mr. Frank exchange any letters on this subject? A No; I don't think so.

Q You are sure of that? A I don't remember.

Q Did you receive a letter from him about the time of the arrangement between you? A I don't remember that.

Mr. Bilder: Counsel used language there about an arrangement.

The Court: I do not think he has testified to any arrangement.

Mr. Greene: My attention has just been called to a matter of importance. The defendant in this complaint, mentioned as the Y. M.—Young Men's and Young Women's Hebrew Association—is not correct. These trustees held it as owners of the building. The name of the defendant should be amended so as to substitute "The Trustees of Young Men's and Young Women's Hebrew Association of Newark, a corporation of the State of New Jersey," for the "Young Men's and Young Women's Hebrew Association."

Mr. Bilder: The trustees are a separate legal entity and I should like to get authority from them to defend as attorney.

The Court: Let us finish the case in so far as the rest of the proof is concerned.

Israel B. Greene, direct.

ISRAEL B. GREENE, attorney for plaintiff, sworn on behalf of plaintiff.

Direct examination by Mr. Greene.

Q You are a practicing lawyer in the City of Newark? A Yes.

Q Do you know Mr. Jacob Frank? A Yes.

Q How long have you known him? A I have known him about twelve or fifteen years, having met him in high school, and I think we graduated together.

Q This is Mr. Frank who was superintendent on the job mentioned in this case? A Yes.

Q Have you had any conversation with Mr. Frank with respect to the delivery and the use of the coal involved in this suit? A Yes.

Q When did you have that conversation? A We have had numerous conversations about the subject. In fact, it was always a standing topic between me, Mr. Frank, and Mr. Brodsky, the former attorney for Mr. Frank.

By the Court.

Q What is the purpose of these questions? A That Mr. Frank, the superintendent of Waldron, admitted to me on several occasions that the coal in question was delivered and used in the furnaces of the Y. M. H. A. Building.

Mr. Bilder: I must take the position of putting in a general denial. We are in the position of saying we know nothing about it except in so far as Mr. Adler went there and said the building was heated. Another time he testified that the plasterers had walked out. Other than that, we haven't sufficient knowledge.

The Witness: The first time we spoke about it was at the home of Mr. Ilo Orleans, a member of the Bar of New York. We talked the matter over. He said to me, "There is no dispute whatever as to the fact that this coal was delivered on the job and was used in the furnaces of the Y. M. H. A."

PLAINTIFF RESTS.

Mr. Greene: I would like to renew my motion with respect to the amendment of the complaint. If counsel refuse to consent, I will ask for a voluntary non-suit.

Mr. Bilder: I shall probably be able to get authority to act as attorney for the trustees. (Continuing.) Mr. Adler has given me authority to do so.

Mr. Greene: Will your Honor consent to the amendment to the record?

The Court: Yes.

Mr. Greene: To amend the name of the defendant, "Young Men's and Young Women's Hebrew Association, a corporation of Newark," to "Board of Trustees of the Young Men's and Young Women's Hebrew Association of Newark."

Counsel for defendant, E. M. Waldron, Inc., moves that plaintiff be non-suited upon the ground that there is no evidence to charge this defendant with responsibility for payment of this coal.

(Argument.)

Motion granted as to all the parties.

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

Exception noted as ground of appeal.

GROUNDS OF APPEAL.

Filed July 11, 1925.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LINDEMAN & Co., a corporation, *Plaintiff-Appellant,* *vs.* EDWARD M. WALDRON, INC., *et als.,* *Defendants-Respondents.*	*On Appeal from Judgment of Nonsuit of Essex County Circuit Court.* *Grounds of Appeal.*

To WILLIAM K. FLANAGAN, Esquire, attorney for defendant-respondent, Edward M. Waldron, Inc., a corporation:

The appellant will rely upon the following grounds of appeal for the reversal of the judgment of the Essex County Circuit Court, herein.

That the Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant, Edward M. Waldron, Inc., when thereunto moved by counsel for said defendant, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

Respectfully, etc.,

WILLIAM HARRIS,
Attorney for Appellant.

Dated, July 9, 1925.

Exhibit P. 2.

Service of a true copy of the above notice is hereby acknowledged this 10th day of July, 1925.

WM. K. FLANAGAN,
Attorney for Respondent,
Edward M. Waldron, Inc.

Exhibit P. 2.

1170
Telephone 1171 Terrace SIGN THIS
1172

Received of
LINDEMAN & CO.

FULL WEIGHT
Lehigh and COAL Free Burning
OF QUALITY

Main Office
210 Bigelow Street

D 15897 Newark, N. J., March 8th, 1924
Frank
High & Kinney St.
Y M H A
3 tons Pea
Sign here J. Frank
See that the amount on the back of the check is the same as on the face.

Exhibit P. 2.

D 15798 Newark, N. J., March 6th, 1924
Frank
High & Kinney St.
Y M H A
4 tons Pea
Sign here J. Frank
To be signed

D 21798 Newark, N. J., April 1st, 192
Frank
Y M H A
Kinney & High St.
3 tons Pea
Sign here J. Frank

C 42350 Newark, N. J., Jan. 23rd, 1924
Frank
High & Kinney St.
c/o Y M H A Bldg.
3 tons Pea
J. Frank

D 39450 Newark, N. J., March 13th, 1924
Frank
Y M H A
Kinney & Halsey St.
3 tons Pea
J. Frank
Please report any inattention of employes.

C 35782 Newark, N. J., Jan. 30th, 1924
Frank
High & Kinney St.
3 tons Pea
Sign here J. Frank

Exhibit P. 2.

C 42349 Newark, N. J., Jan. 23rd, 1924
Frank
High & Kinney St.
Y M H A Bldg.
3 tons Pea
J. Frank

C 36859 Newark, N. J., Jan. 11th, 1924
Frank
High & Kinney St.
c/o Y M H A Bldg.
3 tons Pea
Sign here J. Frank

C 36575 Newark, N. J., Jan. 9th, 1924
J. Frank
High & Kinney St.
c/o Y M H A Bldg.
3 tons Pea
Sign here J. Frank

C 36576 Newark, N. J., Jan. 7th, 1924
J. Frank
High & Kinney St.
c/o Y M H A Bldg.
3 tons Pea
Sign here J. Frank

C 45578 Newark, N. J., Feb. 11th, 1924
Frank
3 tons Pea
J. Frank

Exhibit P. 2.

C 45577 Newark, N. J., Feb. 11th, 1924
Frank
High & Kinney St.
c/o Y M H A Bldg.
3 tons Pea
J. Frank

To be signed
D 44732 Newark, N. J., Feb. 26th, 1924
Frank
Y M H A
High & Kinney St.
3 tons Pea
Sign here J. Frank

D 44073 Newark, N. J., Feb. 20th, 1924
Frank
High & Kinney St.
c/o Y M H A
3 tons Pea
Sign here J. Frank

To be signed
D 22976 Newark, N. J., March 24th, 1924
Frank
High & Kinney St.
c/o Y M H A
3 tons Pea
Sign here J. Frank
Defreece

D 22952 Newark, N. J., March 22nd, 1924
Frank
High & Kinney St.
c/o Y M H A
Seons
3 tons Pea
Sign here J. Frank

Exhibit P. 2.

D 39765 Newark, N. J., March 17th, 1924
Frank
Y M H A
High & Kinney St.
3 tons Pea
Sign here J. Frank

To be signed
D 39729 Newark, N. J., March 15, 1924
Frank
High & Kinney St.
c/o Y M H A
3 tons Pea
Sign here J. Frank

D 39415 Newark, N. J., March 12th, 1924
Frank
Y M H A
High & Kinney St.
3 tons Pea
Sign here J. Frank

D 22057 Newark, N. J., April 4, 1924
Frank Y. M. H. A.
High & Kinney Sts.
3 tons Pea
Sign here J. Frank

To be signed
D 22330 Newark, N. J., April 9th, 1924
Frank
High & Kinney St.
Y M H A
3 tons Pea
Sign here J. Frank

Exhibit P. 2.

To be signed
D 22237 Newark, N. J., April 8th, 1924
Frank
High & Kinney St.
Y M H A
3 tons Pea
Sign here J. Frank

To be signed
D 22218 Newark, N. J., April 7th, 1924
Frank
High & Kinney St.
Y M H A
3 tons Pea
Sign here J. Frank

Exhibit P. 5.

Exhibit P. 5.

EDWARD M. WALDRON INCORPORATED

BUILDERS

27 Central Avenue
Newark, N. J.

Dec. 31, 1923.

Mr. Frank Grad, Architect.
245 Springfield Ave.,
Newark, N. J.

Re: Y. M. & Y. W. H. A. Bldg.

Dear Sir:—

Will you kindly make arrangements with the Owners to provide temporary heat for the building, as we feel that the necessary test has been made now and we will, therefore, have to ask you to provide for all further temporary heat.

Very truly yours,

EDWARD M. WALDRON INCORPORATED.

E. M. WALDRON,
President.

EMW:RF

Exhibit D. 1.

Sheet No. .....

Terms.
Rating.
Credit Limit.

NAME—E. M. Waldron Co. Inc.
ADDRESS—27-29 Central Avenue
City

Account No. 21

Date		Items		Folio	✓	Debits	Date		Items	Folio	✓	Credits
1923							1923					
July	5	Forward				52.14						
New & High	5	2200 # Bit	1.10 ton 7.50	Pg 203		8.25						
Kinney & High	12	5000 # "	2.50 " "	Pg 218		18.75	Aug	11	Check	293		95.27
" " "	26	4300 # "	2.15 " "	247	95.27	16.13					✓	
" " "	Aug. 8	4700 # "	2.35 " "	272	✓	17.63	Sp	11	Check	12	✓	17.63
do-do	Nov. 1	2300 # Coke	1.15 ton @ 13.00	Pg 65		14.95						
"	19	2800 " "	1.40 " " 13.00	110		18.20						
							Dec	18	Check	77		139.75
454 No. Sixth	19	4000 " "	2 ton 13.00	113		26.00						
Kinney & High	20	2800 " "	1.40 " 13.00	119		18.20						
"	24	2500 " "	1.25 " 13.00	126		16.25						
	26	2500 " "	1.25 " 13.00	141		16.25						
	27	2500 " "	1.25 @ 13.00	145		16.25						
High & K	28	2100 " "	1.05 @ 13	148	139.75	13.65					✓	139.75
							1924					
Dec.	1	3000 " Coke	1.50 @ 13.00	158		19.50	Jan	16	Check	101		168.20
High & Ky	3	2500 " "	1.25 @ 13.00	163		16.25			Disct			5.70
	5	3000 " "	1.50 @ 13.00	172		19.50						
454 No. 6th	18	2 ton Pea	10.85	210		21.70						
High & K	21	3 ton Buck	7.00	235		21.00						
"	27	1 " Pea	10.85	253		10.85						
"	28	3 " "	"	258		32.55						
	31	3 " "	"	267	173.90	32.55					✓	173.90
1924							Feb	12	Ch	122		46.13
H & K	Jan. 2	1½ ton Pea	10.25	275		15.38						
"	4	3 " "	"	277	46.13	3075					✓	
456 6th St.	Feb. 6	2 " Nut	13.40	414		26.80	Mch	11	Ch	149		40.80
Crane Webster	21	4000 # Bitu	2 ton 7.00	472	40.80	14.00					✓	
"	Feb. 29	6100 " "	3.05 @ 7.00	518		21.35	Apr	12	Ch	181		99.63
1016 Broad	Mch 17	5000 # Coke	2.50 ton 12.75	587		31.88						
Webster	25	5600 # Bit	2.80 " 7.00	623		19.60						
	24	2 ton Nut	13.40	620	99.63	26.80					99.63	

Exhibit D. 2.

Exhibit D. 2.

E. M. WALDRON CO., INC.

Sheet No. ..... Account No. 1

Mail Bills

Terms 9 Monmouth Street NAME—J. Frank, Y. M. H. A. Hall

Rating ADDRESS—High & Kinney Street, City

Credit Limit

Date 1924					Folio	√	Charges	Date 19—	Folio	√	Credits
Jan	7	3 ton	Pea	@ 10.25	Pg 295		30.75				
	9	6 "	"	"	Pg 304		61.50				
	11	3 "	"	"	Pg 315		30.75				
	21	3 "	"	10.25	" 350		30.75				
	23	6 "	"	"	Pg 358		61.50				
	26	6 "	"	"	P 376		61.50				
	30	3 "	"	10.25	P. 387		30.75				
Feby	2	6 ton	Pea	@ 10.25	P. 400		61.50				
	6	6 "	"	"	P. 412		61.50				
	11	6 "	"	10.25	P. 425		61.50				
	16	6 "	"	10.25	P. 454		61.50				
	20	3 "	"	10.25	P. 472		30.75				
	23	3 ton	Pea	10.25	P. 487		30.75				
	26	3 "	"	10.25	Pg 500		30.75				
Feby	29	1 ton	Pea	10.25	Pg 524		10.25				
Mch	1	6 "	"	"	Pg 527		61.50				
	6	4 "	"	"	Pg 549		41.00				
	8	3 "	"	"	Pg 554		30.75				
	12	3 "	"	10.25	571		30.75				
	13	3 "	Pea	10.25	573		30.75				
	15	3 "	"	"	586		30.75				
	17	3 "	"	"	587		30.75				
	22	3 "	Pea	"	618		30.75				
	24	3 "	"	"	619		30.75				
	28	6 "	Pea	"	632		61.50				
Apr	2	3 ton	Pea	10.00	650		30.00				
	4	3 "	"	"	661		30.00				
	7	3 "	"	"	669		30.00				
	8	3 "	Pea	10.00	669		30.00				
	9	3 "	"	10.00	674		30.00	$1,185.25			

INDEX.

TABLE OF AUTHORITIES CITED:

New Jersey Court of Errors and Appeals.

LINDEMAN & Co., a corporation, *Plaintiff-Appellant,* —and— EDWARD M. WALDRON, INC., *Defendant-Respondent.*	Action at Law. On Appeal from Essex County Circuit Court. Sat Below: Smith, *C.C.J.*

BRIEF OF PLAINTIFF-APPELLANT.

Statement.

This is an appeal from a judgment of non-suit rendered at the Essex County Circuit Court.

The appellant (the plaintiff in the Court below), a coal dealer, brought the suit against Edward M. Waldron, Inc. (hereinafter referred to as the "respondent"), Jack Frank, the Trustees of the Young Men's and Women's Hebrew Association (hereinafter referred to as "The Y. M. H. A."), and Milton Adler, the latter's Vice-President, to recover $1,185.25 for coal sold and delivered to them, or one of them, between January 7, 1924 and April 9, 1924.

The coal in question was delivered in instalments at The Y. M. H. A. building in the City of Newark, which was being erected by the respondent, who was the general contractor on the job. The defendant, Jack Frank, was the respondent's superintendent and engineer on the job.

Of the five counts alleged in the complaint, only

the first and second allege causes of action against the respondent.

The first count alleges, in substance, that the coal was sold and delivered to the respondent on said construction job, at the instance and request of Jack Frank, who represented himself as a duly authorized agent of the respondent; that respondent refused to pay therefor, claiming that Frank was not its agent and did not purchase the coal in its behalf, but, on the contrary, did purchase the same as the agent of and for the benefit of The Y. M. H. A. or Milton Adler, its Vice-President. The prayer is for judgment against the respondent and the other defendants, in the alternative.

The second count alleges an action against the respondent for the coal in question, on the book account, a copy whereof is annexed to the complaint.

Each of the defendants, excepting Jack Frank, pleaded the general issue. Frank did not file an answer, nor was he present at the trial. For this reason the trial Court refused to entertain the suit as against him. The case, therefore, proceeded against the respondent and the other defendants.

Summary of the Evidence.

At the trial, plaintiff called four witnesses, who testified as follows:

Testimony of Edward M. Waldron.

EDWARD M. WALDRON, the President of the respondent, upon being called by appellant, testified that in 1923-1924 the respondent was the builder and the general contractor on the Y. M. H. A. building then being erected at the corner

of High and West Kinney Streets, in the City of Newark, New Jersey; that the defendant, Jack Frank, was its superintendent and engineer on this job (Case, p. 17); that respondent and several allied companies had been purchasing coal from appellant on various building jobs for about four or five years (Case, pp. 16-23); that respondent's usual and customary practice in purchasing coal from appellant for any job was to order the first shipment from its office, and all additional or repeat orders were given by the superintendent on the job, who was authorized to place the same; that the bills were made out to respondent and paid by it (Case, p. 16); that before January, 1924 (in accordance with the usual custom), respondent thus ordered, direct from its office between 5 and 10 tons of coal on the Y. M. H. A. job, which were delivered and used either in the furnaces of the building for heating or for the hoisting engine; and that respondent paid for this coal (Case, p. 16); that thereafter respondent continued ordering coal on the other jobs (Case, p. 22); that between January 7, 1924 and April 9, 1924, the Y. M. H. A. building was being plastered and heat was required to expedite construction (Case, p. 19); that under the general contract, the respondent was obliged to test the heating plant; that Jack Frank had authority to receipt for all materials for the job and also had authority to receipt for coal on the job in question before he was forbidden to do so some time in January (Case, p. 22); that until then, the respondent paid for the coal which was delivered on the Y. M. H. A. job (Case, p. 22); that the coal was used for a hoisting engine (Case, p. 22); and to test the heating plant of the building; and that he knew what disposition had been made of the coal sued for (Case, p. 24).

Testimony of Arthur Lindeman.

ARTHUR LINDEMAN, Secretary and Treasurer of the plaintiff, testified: That appellant had been selling coal to respondent for seven or eight years, supplying coal to a dozen or more construction jobs (Case, p. 24); that the usual and customary practice in purchasing coal was as follows: The first shipment on the jobs were ordered through respondent's office and the repeat shipments were ordered by the superintendents on the jobs (Case, pp. 24-25); that on all jobs coal thus purchased by the superintendents was paid for by the respondent; that there never was any dispute or question of the superintendents' power or authority to order the coal (Case, p. 25); that in accordance with the usual custom, the first shipment on the Y. M. H. A. job was ordered direct from respondent's office and was paid for; that repeat orders, for which this suit was brought, were delivered on the Y. M. H. A. job at the request and order of Jack Frank, respondent's superintendent (Case, p. 25); that the coal was received by the superintendent (Case, p. 26); that prior to January 7, 1924, he had delivered between 30 and 40 tons of coal on the job for the hoisting engine and other purposes, which had been paid for (Case, p. 37).

At the request of counsel for respondent, the witness offered in evidence, Exhibits D. 1, and D. 2 (Case, pp. 61, 62), being the book accounts of original entry with respondent, showing the various deliveries and coal sales on the Y. M. H. A. job and other jobs (Case, p. 38).

The witness further testified that he demanded payment for the coal from respondent about fifteen days after payments were due (Case, p. 40); and that the bills addressed to respondent were sent to Mr. Frank, at his request.

Testimony of Frank Grad:

Mr. Frank Grad, the architect who drew the plans and specifications for, and supervised the construction of the Y. M. H. A. building, testified: That in January, 1924, while the building was being plastered, he received a letter from respondent (Exhibit P. 5; Case, p. 29) advising him that the heating plant had been tested and that from thenceforth temporary heating would have to be supplied by the Y. M. H. A.; that he referred the matter to Mr. Kimball, his associate engineer on the job (Case, pp. 29-30); that he then advised the respondent that Mr. Kimball agreed with him that, under the terms of the building contract, respondent was bound to supply temporary heat (Case, p. 30); that respondent informed him that unless the owners provided coal, he would be obliged to pull the fires and leave the building cold (Case, p. 32); that before January 7, respondent supplied coal for temporary heating (Case, p. 32); that the burning of coal was necessary to keep the building from freezing (Case, p. 33); that respondent's workmen were working in the building, and that prior to this dispute, the fires were kept regularly burning (Case, p. 33); that respondent failed to furnish heat for just one day (Case, p. 34); that the heat supplied after January 7 was not for testing the heating plant, but for temporary heating (Case, p. 33).

Testimony of Milton Adler:

Milton Adler, the first Vice-President of the Y. M. H. A., testified: That up until May 15, 1924, the Y. M. H. A. building was in charge of respondent; that Frank, respondent's superintendent, told him that some plasterers walked out because there was no heat in the building (Case,

p. 49) ; that neither he, Adler, nor the Y. M. H. A. had ordered any coal on the job and that Frank told him that he had purchased coal after January 7, 1924.

Testimony of Israel B. Greene:

ISRAEL B. GREENE, testified that he knew Jack Frank for twelve or fifteen years; that Frank admitted to him that the coal for which this suit was brought was actually delivered and used in the Y. M. H. A. building (Case, pp. 51-52).

Testimony of Walter Harnisch.

WALTER HARNISCH, the office manager of Lindeman & Company, testified as to the reasonable value of the coal.

At the close of the case counsel for respondent moved for a non-suit, on the ground that *there was no evidence to charge the respondent* for payment of the coal. Without giving any opinion, the Court granted the motion against all the defendants in court.

We respectfully submit that the Court's ruling in granting the motion for the non-suit as against the respondent, is erroneous, that it should be reversed, and that a new trial be granted.

Argument.

It is clear from the foregoing summary of the evidence that at the close of appellant's case it was practically conceded by the respondent, as well as by the trial Court, that Jack Frank had ordered the coal to be delivered on the Y. M. H. A. job; that it was delivered; that the price charged therefor was reasonable and that the coal was actually consumed either in the hoisting engine

of the respondent, or in the furnaces of the Y. M. H. A. building while the building was under construction and in charge of the respondent.

I.

The sole ground upon which the respondent urged the non-suit was *the absence of evidence to charge it with liability.* It was conceded by the respondent and the other defendants in court that the appellant was entitled to be paid for the coal—but the respondent contended that Jack Frank alone must bear the burden. Now on the motion for a non-suit the Court cannot weigh the evidence but must accept as true the testimony adduced by plaintiff and the most favorable inferences that can be drawn therefrom for the plaintiff's benefit. *Fagan* v. *Central Railroad of New Jersey,* 94 N. J. L. 454, 111 Atl. 32; *New Jersey School & Church Furniture Co.* v. *Board of Education,* 58 N. J. L. 646, 35 Atl. 397.

If the judgment of the Court below is to be sustained, it must be because it was so clear that no liability attached to the respondent that no other legitimate conclusion could have been reached by a jury; that the absence of liability was so patent that it was not a debatable question; and that reasonable men might not differ in their conclusions on the facts presented. *New Jersey School & Church Furniture Co.* v. *Board of Education, supra.*

Now it definitely appears from the evidence, and a jury of reasonable men would have been warranted in finding the following: That appellant had been selling coal to the respondent for about seven or eight years prior to the institution

of this suit for twelve or more building jobs; that the usual custom was for the respondent to order the first shipment on a given job through its office; that the superintendent on the job had *express authority* to order and receipt for additional shipments of coal, as well as other materials; that the respondent had always honored the shipments so ordered, as aforesaid, by its superintendents, and paid for the same, and no question was ever raised as to the power or authority of the superintendents to purchase the coal; that the coal sued for was ordered in accordance with the usual practice; *that the respondent had paid for the first 30 or 40 tons of coal, all or part of which had been ordered by and receipted for by Jack Frank*; that respondent gave no notice whatsoever to appellant of any revocation of Frank's authority to order any coal or receipt for the same subsequent to January 7, 1924; that respondent needed the coal in the erection and construction of the Y. M. H. A. building, either for the operation of its hoisting engines or for temporary heating of the building in order to expedite the construction work; that it was the duty of the respondent to supply temporary heating under the plans and specifications; that in fact, the coal was used for said purposes, or one of them; that the Y. M. H. A. building was in the charge and control of the respondent and its agents during the period that the coal in question was delivered and used; and that Mr. Waldron, the President of respondent, knew, or in the exercise of reasonable care should have known, that coal was being purchased by Frank and used for respondent's purposes, and that he permitted and acquiesced therein.

The express agency of Frank having once been established, its existence is presumed to have

continued until notice of revocation was given to the appellant. 2 Corpus Juris 920; *The Perth Amboy Man. Co.* v. *Condit, et al.,* 21 N. J. Law 659; *Gulick* v. *Grover,* 31 N. J. L. 182, affirmed 33 N. J. L. 463.

Since it was conceded that no such notice was given to the appellant, appellant had a right to rely upon Frank's express authority to continue purchasing coal after January 7, 1924.

II.

But even assuming that Frank's express authority to purchase the coal had not been sufficiently proved, nevertheless it appears from the evidence that appellant had a right to rely upon the apparent authority with which the respondent had clothed Frank and its superintendents on other jobs (as a result of past transactions between the appellant and respondent) by holding them out as possessing authority to purchase coal. *Dierkes* v. *Hauxhurst Land Co.,* 80 N. J. L. 369, 79 Atl. 361. See also *Scull* v. *Skilton,* 70 N. J. L. 792; 59 Atl. 457; 2 Corpus Juris, 947-948.

The law governing an agent's power to bind its principal is well stated by Mr. Justice Depue (afterwards Chief Justice) in the case of *Law* v. *Stokes,* 32 N. J. Law 249, 90 Am. Dec. 655, in the following language:

> "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal him-

> self knowingly permits the agent to assume or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority he holds the agent out as having or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases, would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. When established it cannot, on the one hand, be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent."

The rule of law laid down in *Law* v. *Stokes, supra,* has been followed and approved by this Court in the case of *J. Wiss & Sons Co.* v. *H. G. Vogel Co.,* 86 N. J. Law 618, 92 Atl. 360, and *Heckel* v. *Crawford Country Club,* 97 N. J. L. 538, 117 Atl. 607.

In the *Wiss* case plaintiff brought suit to recover damages for defendant's refusal to instal a sprinkling system ordered by plaintiff and to be manufactured and installed by the defendant. The case turned upon the power of defendant's agent to execute a contract. The evidence tended to show that the defendant company was selling said system at a varying price, not a staple product at a fixed price; that it knew it was meeting a keen competition and that their proposed contract had to be modified in order to get the contract; that the very nature of the contract and the negotiations required an agent familiar

with defendant's business and able to figure upon the work; that when the defendant was invited to figure upon this work they sent one Bechtol, to plaintiff, to discuss and negotiate the contract. They supplied Bechtol with their business card, having printed thereon "contracting agent"; that plaintiff knew that Bechtol made such contracts for the defendant. At the trial the defendant contended that Bechtol was a "mere messenger" whose only authority was to "sign proposals" and that he had no authority or authority to modify the proposal. The President of defendant company, called as a witness by the plaintiff, testified that Bechtol's only actual authority was to "sign proposals."

The learned trial Judge being of opinion that there was no evidence from which it could be inferred that Bechtol had power to bind its principal, granted a non-suit, and the plaintiff appealed. In reversing the opinion of the trial Court this Court speaking through Mr. Justice Trenchard said at page 361:

> "1. As between the principal and third persons the true limit of the agent's power to bind the principal is the apparent authority with which the agent is invested. The principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. And the reason is that to permit the principal to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. *Law* v. *Stokes,* 32 N. J. Law 249, 90 Am. Dec. 655.
>
> 2. The question in every such case is whether the principal has, by his voluntary act, placed the agent in such a situation

> that a person of ordinary prudence, conversant with business, is justified in presuming that such agent has authority to perform the particular act in question, and when the party relying upon such apparent authority presents evidence which would justify a finding in his favor, he is entitled to have the question submitted to the jury. * * *
>
> The president of the defendant company, called as a witness by the plaintiff company, testified that Bechtol's only actual authority was to 'sign proposals.' It may be so. But the question here is not what was his actual authority. The question presented to us is this: Was it open to the jury to find from the evidence that the defendant voluntarily placed Bechtol in such a situation that the plaintiff company with its knowledge of business usages and the nature of the business in hand, was justified in presuming that Bechtol had authority to modify the proposal and lower the bid so as to get the contract? We think it was open to the jury to so find, and hence the non-suit was erroneous.
>
> The judgment below will be reversed, and a *venire de novo* awarded."

In the *Heckel* case, *supra,* plaintiff sued to recover the value of food stuffs alleged to have been sold by it to the defendant, the Country Club. The articles were purchased between August 1, 1918 and December 10th of the same year by one Roachman, who prior to March 29, 1918, had been engaged as Manager of the Club and was referred to in the testimony as the Club manager or steward. Roachman received a salary of $200 a month and had the restaurant privileges of the Club; that is, he was to furnish the members of the Club with meals and refreshments for which they were to pay him, and the profit, if any, was to supplement the salary.

Roachman was the steward during the period when the purchases were made from the plaintiff. At the time of the first purchase, he introduced himself as the steward of the Club. The merchandise was charged to the Club, delivered to the clubhouse, and accompanying each order was a charge slip addressed to the Club; and the bills were sent monthly. There was also testimony by plaintiff's bookkeeper that one or more checks had been received and applied in part payment of the account. This was denied. One of the plaintiff's also testified that on one occasion he met the President of the Club and spoke to him about the money which the Club owed for same and said President assured him that it would be paid. This was also denied by the defendant.

From these facts the plaintiffs contended that the Club was responsible to them for the goods ordered by Roachman, but the defendant contended that Roachman was the plaintiff's debtor and that it was in no way liable.

The trial Court permitted the case to go to the jury, which rendered a verdict to plaintiff for the full amount of the claim. From that judgment the Club appealed. The decision in that case was affirmed in this Court by a unanimous opinion; and Mr. Justice Katzenbach, speaking for the Court, after reviewing the facts in the case and citing with approval decisions in law in the *Stokes* and *Wiss* cases, said:

> "* * * Did the plaintiffs present such evidence of Roachman's apparent authority as to justify the trial court in submitting to the jury the question of his authority to bind the club? We think these two question should be answered in the affirmative.

> We think the act of the trial court was correct in submitting the case to the jury and refusing to grant the motion for a non-suit and for the direction of a verdict."

III.

It is unfortunate that we have not the benefit of an opinion by the trial Court, stating the reasons which induced him to grant the non-suit. It is apparent, however, that the trial Court's determination to grant the non-suit was influenced by two conclusions: First, that appellant had injured its right to recover either on the theory of an express agency or implied agency by the adverse testimony of Mr. Waldron to the effect that on or about January 7, 1924, he had forbidden Frank to purchase coal. Second, that the credit for the coal was extended to Jack Frank because the delivery slips were made in his name.

The trial Court seemed to be of the opinion that the appellant by calling Waldron as its witness was bound by his testimony, for it appears that when counsel for the appellant desired to examine the witness Harnisch (appellant's bookkeeper) as to the general custom existing between appellant and respondent in the sale of coal, the Court interrupted and the following colloquy took place:

> "The Court: You called Mr. Waldron on that. Is there any dispute about that? *He has testified to it and you are bound by it.* A. The office gave the orders.
>
> Mr. Greene: That is all I want.
>
> The Court: You are bound by what Mr. Waldron stated as being the general practice."

It is respectfully submitted that appellant was not bound by the adverse testimony of Waldron, and that notwithstanding this testimony it was open for the jury to find express authority or sufficient apparent authority vested in Frank, to hold the respondent liable.

In *Dierkes* v. *Hauxhurst Land Company, supra,* plaintiffs sued for personal injuries sustained through being bitten by several dogs, alleged to have been set upon them by one Wallace, the alleged agent of the defendant owner. In order to elicit evidence as to the scope of Wallace's employment, plaintiff propounded certain interrogatories before the trial under the statute; at the trial plaintiff's counsel being under the impression that all the interrogatories and answers had to be offered to get the benefit of all favorable answers to the interrogatories, offered all the interrogatories and answers in evidence. Some of the answers were favorable to the plaintiff, tending to establish the alleged agent's authority to protect the owner's land, while other answers tended to negative such authority. At the close of plaintiff's case, defendant moved for a nonsuit on the ground, among others, that the answers to some of the interrogatories negatived the existence of the alleged agent's authority. The motion was granted. On appeal this Court reversed the judgment and the Court speaking through Mr. Justice Parker, at page 364, said:

> "Assuming that the answers to the interrogatories negative such authority, the case merely presents a conflict of testimony on a motion to non-suit, when the evidence making more strongly for the plaintiff is alone to be considered. *Hayward* v. *North Jersey Street Railway Co.,* 74 N. J. Law 678, 65 Atl. 737, 8 L. R. A. (N. S.) 1062."

In the case of *J. Wiss & Son Co.* v. *H. J. Vogel Co., supra,* the president of the defendant when called as a witness for the plaintiff denied the authority of defendant's agent to sign the contract sued upon. The trial Court, non-suited plaintiff, but on appeal this Court reversed the trial Court and held that notwithstanding the adverse testimony of the defendant's president, it was open for the jury to find from all the evidence in the case that defendant had clothed its agent with sufficient apparent authority to make the contract.

Nor is the appellant in the case at bar barred from recovery merely because the delivery slips for the coal were made in Frank's name and mailed to him after January 7, 1924. In view of all the testimony in the case and particularly the testimony that the slips were made out in Frank's name at his request without any notice to appellant of any revocation of Frank's authority to purchase coal or receipt for the same; that the same were charged to the respondent as appears by the book account which was offered in evidence; and that demand was made upon defendant for the payment of the coal, it was for the jury to say to whom the credit was extended. *Kean* v. *Davis,* 12 N. J. L. 425; *Yates* v. *Reppetto,* 36 Vroon 294; *Scull* v. *Skilton,* 70 N. J. L. 792; 59 Atl. 457.

It is respectfully submitted that even under the most unfavorable view of the evidence against the plaintiff, the trial Court was not warranted in granting the non-suit for the reason that the books of account of plaintiff showing the book account sued upon was offered in evidence at the request of counsel for respondent. These books

established a legitimate *prima facie* case of the sale and delivery of the coal in the usual course of business. *Benoliel* v. *Homac,* 87 N. J. L. 375; 94 Atl. 605; *Bayonne* v. *Standard Oil Co.,* 81 N. J. L. 717; 78 Atl. 146; *Oberg* v. *Breen,* 50 N. J. L. 146; 12 Atl. 203; 7 Am, St. Rep. 779.

IV.

Even if Frank exceeded his power in ordering the coal, it was also open to the jury to find that respondent accepted the coal and benefitted thereby, with full knowledge of all the facts, and hence ratified its agent's acts.

Bodine v. *Berg,* 82 N. J. L. 662; 82 A. 901;
Looschen Piano Case Co. v. *Steinberg,* 76 N. J. L. 130; 68 A. 1072.

It is respectfully submitted that in any view of the case there was sufficient evidence to go to the jury on the question of respondents' liability for the coal. Hence the judgment of non-suit was error and should be reversed and a new trial should be ordered.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

LINDEMAN & Co., a corporation, *Plaintiff-Appellant,* *vs.* EDWARD M. WALDRON, INCORPORATED, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Essex County Circuit Court.* *Sat Below:* SMITH, *C. C. J.*

BRIEF FOR DEFENDANT-RESPONDENT.

Statement of Facts.

We think we should call attention to some statements in appellant's summary of the evidence, in its brief, which are not supported by the facts. Appellant says, at page 4 of its brief, that Arthur Lindeman testified that he demanded payment for the coal from respondent about fifteen days after payments were due. It is obvious, however, that this testimony (Case, p. 40, l. 1) referred only to coal purchased before January 7, 1924; that is, purchases which admittedly were made by the respondent; for it appears from the witness's testimony, immediately following this statement that payment was demanded fifteen days after it was due, that the coal in question was paid for, whereas, it is undisputed that none of the coal delivered on and after January 7, 1924, has ever been paid for. A reading of this witness's testimony, beginning with the next to the last answer on page 39 of the case, to and including line 28 on page 40, makes it clear that while counsel's next to the

last question on page 39 was apparently intended by him to refer to coal delivered on and after January 7, the witness understood all this examination to refer to coal delivered before that date, and answered accordingly.

Again, appellant's statement, also on page 4 of its brief, that Lindeman testified that the bills addressed to respondent were sent to Mr. Frank at his request, is almost the exact opposite of what the witness did testify to, at the end of page 39, to wit, that "The bills weren't sent to Mr. Waldron, except on request of Mr. Frank." This also is either intended by the witness to refer to transactions before January 7, 1924, or might refer to a request by Frank to send the bills to respondent, after he, Frank, had refused to pay them; but in neither case does it support the statement in appellant's brief. In point of fact, the witness had immediately before (Case, p. 39, ll. 27, *et seq.*), testified that the bills were sent to Frank at his home address, 9 Monmouth street, Newark, so far as all deliveries of coal on and after January 7, 1924, were concerned.

Again, on page 5 of its brief, appellant says that Mr. Grad testified at page 34 of the case that "Respondent failed to furnish heat for just one day." This is a mere distortion of what the witness did say, the question and answer being as follows:

> "Q Isn't it true that he did not furnish any heat after that? A Just for one day, I believe."

The plain and obvious meaning of this testimony is that Mr. Waldron furnished heat for one day after he had said, "I am through," and not at all thereafter. The whole testimony on the subject, beginning at page 34 of the case

and continuing to the end of line 24 on that page, makes any other interpretation impossible.

ARGUMENT.

The granting of a non-suit as to this respondent was proper.

We submit that upon any theory, plaintiff's evidence was insufficient to establish a *prima facie* case as against this respondent as defendant. Appellant's brief being divided into four numbered points, we have for purposes of convenience divided this answering brief into points as follows: Point I in answer to appellant's Points I and II; Point II in answer to appellant's Point III, and Point III in answer to appellant's Point IV.

I.

It is quite true, as appellant contends, that on a motion for a non-suit the court cannot weigh the evidence, but must accept as true the testimony adduced by plaintiff, and the most favorable inferences that can be drawn therefrom for the plaintiff's benefit, and many other cases, in addition to those cited by the appellant, could be added in support of so elementary a principle; but it is also elementary that "the evidence adduced by the plaintiff" must be more than a scintilla, 38 Cyc. 1559; *Baldwin* v. *Shannon,* 43 N. J. L. 596, 602; it must raise more than a mere surmise or conjecture, 38 Cyc. 1555; it must be substantial, 38 Cyc. 1558; sufficient to permit a rational, well-constructed mind to conclude that there is some liability resting upon the defendant, 38 Cyc. 1555. There can be no recovery if the plaintiff's own evidence

negatives the defendant's liability and establishes that the plaintiff's claim is not well founded. To quote the appellant's own brief, if it is so clear that no liability attached to the defendant that no other legitimate conclusion could have been reached by a jury, if the absence of liability is so patent that it is not a debatable question and that reasonable men might not differ in their conclusions on the facts presented, then the granting of a non-suit is proper. To state the same proposition in a slightly different form, if the plaintiff's own evidence is such that the court would consider it its duty to set aside a verdict in the plaintiff's favor, then it is its duty to grant a non-suit, 38 Cyc. 1556; *Keeney* v. *D., L. & W. R. R. Co.,* 87 N. J. L. 595; *Meyers* v. *Birch,* 59 N. J. L. 238; *Baldwin* v. *Shannon,* 43 N. J. L. 596, 603; *Hartman* v. *Alden,* 34 N. J. L. 518, 521.

In *Central Railroad Co.* v. *Moore,* 24 N. J. L. 824, 830, this court said:

> "If the facts clearly settled or uncontroverted, present a case in which the plaintiff is not entitled to recover, it is the duty of the court to non-suit; or if the case made, be such that the court would set aside a verdict in favor of the plaintiff, as contrary to the evidence, the plaintiff should be called. In so doing, the court acts strictly within its province, and declares the law arising from the clearly settled or uncontroverted facts."

So, in *McCormack* v. *Standard Oil Co.,* 60 N. J. L. 243, 245, the Supreme Court said:

> "Where, upon the uncontroverted facts, a plaintiff is not entitled to recover and a verdict in his favor would be set aside, it is the duty of the court to non-suit."

Again, in a recent case, it was held by this court that where the material facts are all con-

ceded, there is no question for the jury to consider, and the trial court's direction of a verdict was proper. *Finnie* v. *Kelsey,* 95 N. J. L. 160.

And in one of the most recent cases on the subject, *Union Garage Co.* v. *Wilner,* 3 N. J. Adv. Rep. 643, it was held by this court that where the question at issue arises upon uncontroverted proofs, it is one for the trial court and not for the jury, and the trial court is right in granting a non-suit. To the same effect is *Keeney* v. *D., L. & W. R. R. Co.,* 87 N. J. L. 505.

So, in a case decided only a few months ago, *Billet* v. *Pennsylvania, etc., Co.,* 3 N. J. Adv. Rep. 977, where the issue was whether assured had used due diligence to maintain the efficiency of a protective device, and the evidence was not conflicting, this court said, at page 981:

> "* * *. Under these facts we think it was error to leave the question of the plaintiff's diligence to the jury. It was a court question, not a jury question. Where the evidence shows no diligence was used, it seems absurd to leave to a jury for their determination the question whether all diligence was used. The facts being uncontroverted, the issue became one of law for the decision of the court. The trial court should, in our opinion, have directed a verdict for the defendant."

In a well-considered case in the Supreme Court, *Baldwin* v. *Shannon,* 43 N. J. L. 596, Justice Reed, speaking for that court, said, at page 602:

> "The power of a court to order a nonsuit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which the direction is given. The view that a mere scintilla of evidence was sufficient to carry a case to the

jury is completely exploded in the English courts.

"The cases are reviewed in the opinion of Willes, *J.*, in the case of Ryder *v.* Wombwell, heard in the Exchequer Chamber and reported in L. R., 4 Exch. 32. The rule deduced from them and applied to the cause then under consideration was this: Is there evidence from which the jury could reasonably come to the conclusion that the facts sought to be proved are established?

"In the case of Giblin *v.* McMullen, L. R., 2 P. C. 317, 335, Lord Chelmsford approved the rule enunciated in the last-named case in the following words: A course of recent decisions, most of which are referred to in Ryder *v.* Wombwell, has established a more reasonable rule, viz., that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

* * * * * * *

"This rule is the equivalent, as I understand it, of the statement in the opinion in the case of Hartman *v.* Alden's Ex'rs, 5 Vroom 518, that the test is whether the verdict, if rendered otherwise than as ordered, would have been set aside, or the more specific, and probably more accurate statement in the case of Denny *v.* Williams, 5 Allen 1, that if the case is such that the court would set aside any number of verdicts, then the court should instruct."

This, we submit, was precisely the state of the evidence in the present case. As we shall point out hereinafter under this point, the uncontroverted evidence, both testimony and exhibits, establishes that all the coal delivered by appellant on and after January 7, 1924, was sold by it to Frank, and not to respondent, so

clearly that the jury could not reasonably come to any other conclusion, and that any number of verdicts otherwise should be set aside by the court.

We consider it necessary, at this point, to contradict some of the statements of fact made by the appellant in its brief, under this point. Appellant says, on page 8 of its brief, that it was the duty of the respondent to supply temporary heating under the plans and specifications. There is not a particle of evidence to this effect. The specifications themselves furnish the only competent evidence of the respondent's duty in this respect; but they were excluded by the court (Case, p. 27, l. 21). All that the record shows on this point is that Grad, the architect, testified that he had at one time stated to Mr. Waldron, respondent's president, that he, Grad, and his associate, Kimball, interpreted the specifications as meaning that there was such a duty upon the respondent(Case, p. 30, l. 29, and p. 31, l. 14), all this evidence being clearly incompetent, as against this respondent, upon the question, and so considered by the court (Case, p. 30, l. 1); while Mr. Waldron, when called as a witness by the plaintiff, placed the opposite interpretation upon the specifications (Case, p. 20, l. 11), and it appeared that he had so stated in a letter to the architect (Exhibit P. 5, Case, p. 60). Further, we wish to remark that even if there had been such a duty upon the respondent, that fact would be irrelevant to the issues in this case, and it was, no doubt for this reason that the court excluded the building specifications, as hereinabove stated. This is not a suit between the owner of the building and the respondent as contractor, with an issue whether the contractor did all that the

specifications required it to do. Whether respondent did or not is, in this action, not of the slightest consequence. If it purchased the coal in question, by its authorized agent, from the appellant, then it was liable therefor to the appellant, even though its purpose in buying such coal was to make a present thereof to the owner of the building; if it did not purchase the coal from the appellant, then it is under no liability to pay for it, even though it failed to perform its duty to heat the building and someone else purchased this very coal and used it to supply the heat which the respondent refused to supply. *Keith* v. *De Bussigney,* 179 Mass. 255, 60 N. E. 614; *Fay* v. *Fay,* 43 N. J. Eq. 438; *Shinn* v. *Budd,* 14 N. J. Eq. 234.

Again, appellant says also, on page 8 of its brief, that Mr. Waldron knew, or, in the exercise of reasonable care, should have known, that coal was being purchased by Frank and used for respondent's purpose. This statement involves no less than three falsities. In the first place, as has already been said, there is no evidence that the coal was purchased for respondent's purposes. Secondly, there is nothing to indicate that Mr. Waldron knew that the coal was being purchased by Frank. Lastly, there is no basis whatever in the case for any conclusion that Mr. Waldron, in the exercise of reasonable care, should have known that Frank was, as his agent, purchasing coal; on the contrary, the undisputed evidence is that he expressly forbade him to do so, and there was no reason for him to suppose that his orders would be disobeyed. Indeed, we can go a step further and say that the evidence shows that Mr. Waldron had a right to believe that if Frank was purchasing any coal he was doing so as agent of the owner.

The two cases cited by appellant on page 7 of its brief constitute an apt illustration of the danger of citing opinions for the sake of the general language they contain, without a careful examination of the facts upon which they are based. They both show, by contrast, how far short the appellant's testimony falls of testimony which has been held sufficient to make the granting of a non-suit improper.

Fagan v. *Central Railroad Co.*, 94 N. J. L. 454, was a negligence case, and the appeal was from the trial court's refusal to direct a verdict for the defendant. This court, in affirming the judgment below, said:

> "In support of the motion it was urged in the court below and is argued here, that there was no evidence of negligence upon the part of the defendant. But we think there was.
>
> "Prior to the accident the plaintiff had been employed on the pier in operating a small hand truck only. The evidence tended to show that on the day in question he was directed for the first time to assist in transporting merchandise from the pier to the float lying alongside, by means of a trailer truck hauled by an electric truck. The evidence tended to show that he had never worked upon an electric truck or trailer before. It tended to show that the trailer (with electric truck attached) had been loaded by other employees of the defendant, with heavy crates of pineapples, and there, without any instruction with respect to the manner of doing the work, the plaintiff was directed to 'get on that truck.' It tended to show that he 'put one foot on the electric truck and one on the pin of the trailer' to balance himself (the position usually assumed by a man engaged in such work), and while he was in that position the electric truck (operated by another employee)

hauled the trailer from the pier to the float. He furthur testified that:

"'When it left the dock to go onto the float and struck the gangplank it shook the merchandise in the trailer, and that commenced to come over on me, and I put my hand over this way to keep them from coming down.' * * *

"The evidence also tended to show that the crates were piled seven feet high on the trailer, which was unusual; that there was no guard rail on the front of the trailer, the one usually there having been removed; that the usual 'race-piece' designed to facilitate a smooth passage from the pier to the gangplank was not in place, and that the accident was caused by these defects, for which the defendant was responsible.

"The fact that it was also open to the jury to have found contrary conclusions as to the various matters of fact is immaterial, because, in passing upon a motion for the direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party, against whom the motion is made, and must give him the benefit of all legitimate inferences which may be drawn therefrom.

"Where, as here, the existence of negligence depends upon the conclusion to be drawn from a variety and combination of circumstances considered in their relation to and their reaction upon each other, the jury and not the court is normally the tribunal to draw such conclusions."

In *New Jersey, etc., Furniture Co.* v. *Board of Education,* 58 N. J. L. 646, plaintiff and defendant, after a preliminary interview, executed a written memorandum whereby plaintiff undertook to furnish 146 "Adjustable" school desks, not later than September 25, 1894, to defendant, at a certain agreed price. No desks were delivered by the agreed date. On October 4, 1894,

defendant's minutes showed that plaintiff's agent was present, and stated that it was as yet unable to deliver all the desks ordered, but promised to put in others, known as "New Era," either permanently or temporarily, and that defendant thereupon requested plaintiff to ship at once as many of the desks ordered as possible, and fill in the balance of the order with the "New Era" desks, to be replaced by "Adjustable" desks as soon as possible. On October 13 plaintiff shipped to defendant 160 "New Era" desks, which were put in use by defendant. On March 7, 1895, defendant's minutes showed that the "New Era" desks were not deemed acceptable, and that one of its members was requested to meet with a representative of plaintiff to see if satisfactory arrangements could be made. At a meeting on March 14 an agent of plaintiff was present, and agreed that if the "Adjustable" desks were wanted they would be put in on April 12 and 13; and plaintiff forthwith shipped two sample desks to defendant.

On April 19, 1895, defendant wrote a letter to plaintiff, complaining of plaintiff's failure to deliver the desks ordered, expressing its dissatisfaction, and stating that defendant expected the "Adjustable" desks at once. On April 22, plaintiff wrote to defendant, bringing up certain matters concerning the color of the desks, stating that this would require some days' time, and asking particulars as to the 14 extra desks, the original order being, as stated, for only 146. Defendant did not reply; and on May 13 plaintiff sent to it another letter, stating that it was about to ship the desks, and again asking for instructions as to the extra desks. On May 15, defendant wrote to plaintiff, stating that "you have failed to keep your part of the agreement,

and we are therefore under the necessity of canceling the order with you and placing it with other parties."

Plaintiff thereupon brought suit for the contract price. The trial court granted a non-suit on the grounds that no proof of the measurements of damages had been offered and that the delay of the plaintiff had released the defendant from its agreement to take the desks. On appeal, this judgment was reversed and a new trial granted; and this court said, at page 648:

> "The facts of the case are not in dispute, being for the most part the written communications between the parties, or the entries in the minutes of the defendant. This circumstance does not, however, of itself create a question of law for the court since if indisputable facts admit of two inferences, one favorable and the other unfavorable to the plaintiff, a question is presented that calls for the opinion of the jury.
>
> "In other words, to warrant a non-suit it is not enough that the facts are without dispute; the inference that is drawn from such facts must likewise be, in a legal sense, indubious, *i. e.,* one about which reasonable men may not honestly differ.
>
> "The proposition, therefore, upon which this non-suit rests must be that upon no reasonable inference deducible from the facts before the trial court was the defendant bound to accept the desks at the time they were tendered.
>
> "* * * From this brief history of this transaction it is entirely clear that the agreement as to time was entirely abandoned, * * *. At least such would be a not unreasonable inference from the conduct of the parties. * * *
>
> "The conduct of the defendants in renewing their order for the desks originally ordered, and continuing to urge their delivery, so far from being notice of a purpose to

abandon the contract, was consistent alone with the notion that the agreement was still in force. Under such circumstances, the delivery of the desks within a reasonable time after receipt of an answer to the pertinent inquiries of the plaintiff would have been a legal fulfilment of the contract. The question of reasonable time is generally one of fact for the jury, and is always so when its rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction.

"In the present case that (*sic*) was undoubted delay, but the question whether a reasonable time had elapsed or even begun to run, in view of all the circumstances, would seem to be susceptible of two answers, one of which would not be unfavorable to plaintiff's contention.

"The further fact that the defendants had in use free of charge one hundred and sixty of the plaintiff's desks and that the school year had nearly terminated, might also be considered upon the reasonableness of the defendant's conduct where no specific date was set for filling the order.

"There are other circumstances of more or less significance, but enough has been said to indicate the test according to which, as we think, the whole case should have gone to the jury, viz., that the conclusion of fact to which the learned justice came, was not one about which reasonable men might not honestly differ."

There is nothing in these two cases to modify or cast any doubt upon the principles we have hereinabove adverted to. In fact, the rules on the subject may be summarized in the terse language used by this court in a very recent case, *Doyon* v. *Massoline, etc., Co.*, 98 N. J. L. 540, 543:

"No question for a jury arises where the facts are uncontroverted unless from the facts conflicting inferences may be drawn."

Finally, under this point, appellant maintains on pages 7 and 8 of its brief, that it had a right to rely upon Frank's express authority (by which we suppose it means express authority before January 7, 1924), to continue purchasing coal after January 7, 1924. Theoretically, this might be true; but what then? We have no hesitation in admitting that Frank had authority to order coal until forbidden by respondent to do so, shortly before January 7; and we are quite willing to go further and say, anticipating appellant's following points, that, supposing Frank had had no express authority, he had been clothed by respondent with sufficient apparent authority to offer some basis for reliance by appellant upon such apparent authority, *if, in point of fact, appellant did rely thereon.* The fundamental difficulty with appellant's case is that not only is the testimony absolutely barren of any evidence that appellant did rely upon Frank's authority, either express or implied, to charge the respondent, but, upon the contrary, the evidence is overwhelming—and it is to be remembered that all this evidence is that of the appellant's own witnesses—that appellant did not rely upon any authority in Frank to buy for the respondent, and that, from and after January 7, 1924, it dealt and meant to deal with Frank as a principal, or possibly as an agent of the owner of the building, and not with respondent, well knowing that respondent refused, whether rightfully or wrongfully, to purchase any more coal for the heating of the building.

This brings us to a consideration of the evience in the case; and we now call attention to the following testimony, all of which is uncontroverted:

Edward M. Waldron (president of respondent), page 20, lines 28-38:

"Q I understand that some time before January 7, 1924, your company ordered five or ten tons of coal to test this heating plant? A It was either November or December.

"Q Bills were sent to your company for that quantity? A Yes, sir.

"Q And your company paid those bills? A Yes, sir.

"Q In your dealings with this company, were bills ever submitted and made out in the name of any superintendent on the job? A No, sir."

Page 21, lines 11-25:

"Q Was any demand ever made upon you or upon your company for the payment of this coal until long after it had been furnished— A No, sir; never was.

"Q (Continuing.) —by this plaintiff? A No.

"Q Did this plaintiff ever demand payment from your company for this coal which is the subject matter of this suit, until long afterwards? A About nine or ten months afterwards Mr. Lindeman came to me and asked for what information I had and I gave it.

"Q Did he, at that time, demand payment from you? A No, sir."

Page 22, lines 31-36:

"Q And bills came directly to your company? A Yes, sir; and the slips came direct to the company like those to Jack Frank. We checked the bills with the slips. When this question came up I notified Mr. Frank to refuse to receipt for any more."

Page 23, lines 11-23:

"Q What was the course of dealing between you and Mr. Lindeman with regard to coal? A And the Waldron Realty Company, the Mansion House Building Company—the companies I was president of?

"Q Edward M. Waldron, Inc. A He made a slip to them first that was forwarded daily to our office. As soon as our man received that he put it into an envelope and mailed it to the office. The bill followed on the first or second of the month, and we checked it with the slips."

Frank Grad (architect), page 32, lines 1-4:

"The Witness: Mr. Waldron told me that unless the owners would provide coal, he would be obliged to pull the fires and leave the building cold."

Page 34, lines 12-24:

"Q And he did pull the fires, didn't he? A That is right.

"Q And he steadfastly refused to furnish heat unless the owners paid for it? A Yes.

"Q And you and I talked about it? A Yes, sir.

"Q And I told you what the owner's position was? A (No answer.)

"Q Didn't I tell you that the next day the fires would be out? A Yes.

"Q And the fires did go out? A Yes, sir.

"Q And that has been Mr. Waldron's position all the way through, hasn't it? A Yes, sir."

Arthur Lindeman (secretary, treasurer and general manager of appellant), page 37, line 19:

"Q Are these the loose-leaf ledger sheets from your book (handing papers to witness)? A They are two separate accounts."

Page 37, lines 32-34:

"Q I show you account No. 1 of J. Frank, Y. M. H. A., No. 9 Monmouth street. What is that?"

Page 38, lines 17-25:

"Q *That is the account of J. Frank, is it not? A Yes, sir.*

"Q *That shows delivery of coal from January 7, 1924, to April 9, 1924?* A *Yes, sir.*

"Q And it shows the account of J. Frank? A It says 'J. Frank, E. M. Waldron Company.'

"Q When was that put on? A *The coal was charged to Mr. Frank,* but it is just a bookkeeper's memorandum."

Page 39, lines 9-34:

"Q You made out the delivery slips for the coal delivered on account No. 21, marked Exhibit D. 1, to E. M. Waldron Company, Inc.? A Yes.

"Q That is what you did with reference to all the coal theretofore sent by your company on any of the coal the defendant was interested in? A Yes, sir.

"Q Was this your universal practice during the length of time you dealt with this company? A Yes, sir.

"Q In this instance, you made all of these slips to Mr. Frank? A Yes; but after 1924—

"Q I mean all this coal in controversy? A Yes, sir.

"Q Up to the end of December, 1923, you sent the slips and followed them later by bills for coal to the Y. M. H. A. to this defendant Waldron afterwards? A Yes, sir.

"Q *And afterwards you made a slip for every delivery that was made to Jack Frank or J. Frank or Frank?* A *Yes, sir.*

"Q *You sent them yourself?* A *Yes, sir.*

"Q *You sent monthly bills to Mr. Frank at his home address, the same address as on your sheets, 9 Monmouth street, Newark?* A *Yes, sir.*"

Page 40, lines 29 to 40:

"Q You made out delivery checks before to Waldron & Company? A Yes.

"Q *The fact was, that you did not make any of these delivery slips nor any bills to*

Edward M. Waldron, Inc., from January 7, 1924, to April 9, 1924? A *Mr. Frank came to my office personally the first part of January and told me—*

"Q *I don't care what he told you.* A *He ordered this coal.*

"Q *And told you to bill it to him?* A *To him personally.*"

Milton Adler (vice-president of Y. M. H. A.), page 45, lines 30-40, and page 46, lines 1-13:

"Q What, if anything, did you say to Mr. Frank with respect to coal? A The conversations that we had between Mr. Frank and myself occurred at various times when I came to the building. Mr. Frank told me on a certain day that he had been buying coal. I was away over the New Year. He had been buying coal and he told me that he had been buying it on his own hook. He said, 'I can't keep on.' I asked him why he bought it on his own hook. He said, 'Waldron won't pay for it; I won't pay for it; there is a dispute as to who pays for it.' He said, 'I will have to pull the fires.' I said, 'What have you been doing up to now?' He said, 'I have been firing but can't keep on.' He said, 'Will you give me an authorization to keep on? *I am interested as a member?*' And I said, 'I will go down to see Mr. Stein.' All the committee work was done through him."

Page 47, lines 1-11:

"Q What did you say? A A few evenings later I met Frank—not at the building—I don't remember where. We talked again about the coal. He said, 'I am piling up a nice bill of coal.' I said, 'You aren't trying to make me believe you are piling up a bill for coal? There is a dispute about it.'"

(We call attention at this point to the words from this witness's testimony which we have italicized above; we think they furnish the key to the entire situation.)

Further, the exhibits in evidence confirm this theory. As has just been seen, the testimony of the appellant's own general manager, Lindeman, is that before January 7, 1924, the crucial date in this case, all the delivery slips were made out to the respondent. All the delivery slips put in evidence (Exhibit P. 2, Case, p. 54, *et seq.*), covering the shipments on and after that date, are made out to "Frank" or to "J. Frank" or to "Frank, Y. M. H. A."

Still further, Exhibits D. 1 (Case, p. 61) and D. 2 (Case, p. 62), show, on their very faces, two different accounts. An inspection of these exhibits discloses that they are loose-leaf ledger sheets, consisting of printed forms. The words "Sheet No.," "Account No.," "Terms," "Rating," "Credit Limit," "Name," "Address," "Date," "Items," "Folio," "Debits," "Date," "Items," "Folio," "Credits," are all printed. The rest of the exhibits is written.

Exhibit D. 1, after the words "Account No.," bears the number "21"; bears in the appropriate space following "Name," the name "E. M. Waldron Co., Inc."; and bears in the appropriate space following the word "Address," the address "27-29 Central Avenue, City"; and although the items in this account run to March 24, 1924, the last item noted as having been delivered at High and Kinney streets, the location of the building here in question being erected for the Y. M. H. A., is dated January 4, 1924, all the items thereafter being for other places of delivery. Exhibit D. 2, in the space after "Account No.," has the number "1," after "Name," has the name "J. Frank, Y. M. H. A. Hall," and after "Address," the address "High and Kinney Street, City." It also has an additional notation in ink immediately

below the space entitled "Sheet No." to this effect: "Mail bills 9 Monmouth Street," which, as has been seen (Case, p. 39, l. 31), was Frank's home address. Every item in this account is on or later than January 7, 1924. Across the top of this account, and considerably above the topmost words of the printed form, hereinabove referred to, and obviously forming no part thereof, appear the words "E. M. Waldron Co., Inc."

It remains but to add that an inspection of this exhibit discloses that the words "E. M. Waldron Co., Inc.," just alluded to, are written with ink different from that used in the account heading, and obviously at a different time.

We think that plainer evidence, out of the appellant's own mouth, that the coal delivered at the Y. M. H. A. building on and after January 7, 1924, was not charged or intended to be charged by appellant to the same debtor to whom the coal delivered there before January 7, 1924, was charged, than is furnished by a mere inspection of these two exhibits, could scarcely be conceived.

In addition, there is one more feature concerning these two exhibits which we wish to point out, and which we think strengthens the conclusion just reached, if that were possible. Exhibit D. 1 (Case, p. 61), admittedly the respondent's account, is numbered "Account No. 21," while Exhibit D. 2 (Case, p. 62), Frank's account, is numbered "Account No. 1." These numbers cannot refer to a numbering in rotation of different customers' accounts, in the first place, because we know that the appellant was in business before January 7, 1924, so that Exhibit D. 2 could not be its first account, and,

further, because the Account No. 21 begins some six months earlier than the Account No. 1. There is only one tenable theory for these numbers, and that is that they represent the number of loose-leaf sheets constituting the customer's account; that is, respondent's account was an old one, as indeed we know from the testimony, and Exhibit D. 1 represents the twenty-first sheet of the account; while Exhibit D. 2 represents a new account, and this was its first sheet —an additional demonstration, if any were needed, that there was no thought, at the time the Frank account, Exhibit D. 2, was begun, that it was in anywise connected with the respondent's account, but that it was a new account, charged to a new and different debtor.

The appellant's own conduct, too, conclusively negatives the theory that on or after January 7 it still believed Frank to be respondent's agent. On that date it began the new account, Exhibit D. 2 (Case, p. 62). Thereafter, as we have said, no further items for any coal delivered at the Y. M. H. A. job, were charged to the respondent's account, Exhibit D. 1 (Case, p. 61), although, as we have also pointed out, charges for coal delivered at other jobs of the respondent, after January 7, continued to be made to that account. According to the appellant's manager's testimony, orders on and after January 7 continued to come to it from Frank in the same manner as they had before January 7, and it had no reason to suspect that his authority to give such orders for the respondent had ceased before that date—and, of course, he could not have testified differently without putting himself out of court, so far as a belief in the continuation of Frank's authority was concerned. Why, then, the new account? We think the answer is obvi-

ous. It is merely another illustration of the ancient proverb, that "Actions speak louder than words."

What we have just said, of course, also disposes of appellant's statement, at the end of page 8 and the beginning of page 9 of its brief, that express authority in an agent, once established to exist, is presumed to continue until the third party learns of its revocation. The principle is as elementary as it is without application to the present case; for it is equally elementary that, except—in "undisclosed principal" cases—with which we are not here concerned—there can be no liability cast upon the alleged principal unless the person dealing with the agent in point of fact relies upon his apparent authority. All such cases rest upon estoppel; if there is no estoppel, there can be no liability. 2 C. J. 464, 465. *Dugan* v. *Lyman,* 23 Atl. (N. J.) 657, 663. And see *Lembeck* v. *Gerken,* 88 N. J. L. 329.

So, too, the cases cited by appellant under Point II of its brief, beginning at page 9, enunciate principles as familiar and undisputed as they are inapplicable to the case now under review.

They all relate to reliance by a third party on the holding out of an agent as having authority from a principal. Every one of them goes to the question of what constitutes a holding out and what the extent of the authority, reasonably to be inferred from such holding out, is. That there was reliance by the third party on such apparent authority is, in each case, the keystone of the arch; and the fact of such reliance is expressly found or necessarily assumed by the court in each case. Without it there is,

as we have said, nothing left, 2 C. J. 464, *et seq.;* and that is the situation in this case. As we have already said, such a proposition is so fundamental that it seems almost ridiculous to cite authority in its support.

Again, however, we think that in the facts of the cases cited by appellant, it has furnished convincing evidence, by contrast, of how far the evidence in this case falls short of being sufficient to justify a refusal to non-suit. In particular, the parallel—if we may so misuse the word—between *Heckel* v. *Crawford Country Club,* 97 N. J. L. 538, and the case at bar, is deadly. There, each delivery slip was addressed to the alleged principal; here, it was addressed to the alleged agent. There, all the bills were sent to the alleged principal, at its place of business; here, to the alleged agent at his home. There, the alleged principal paid part of the debt; here, not one cent. There, the president of the alleged principal made a promise that the account would be paid; here, he has always unequivocally refused to recognize it in any way. Could contrast be more striking? It could be, and is; for even this is not all. It appears without dispute that, in the present case, *up to January 7,* the delivery slips *were* addressed to the respondent; and the respondent not only acknowledged its indebtedness for such shipments, but paid promtly for all of them. It seems to us that the comparison of the two cases is, in itself, sufficient to justify the granting of the non-suit now being appealed from.

II.

Appellant's next contention is twofold. First, that it was not bound by Mr. Waldron's testimony that he had forbidden Frank to purchase coal after January 7, 1924; and second, that the book account put in evidence was sufficient to take the case from the court and require its submission to the jury.

The first of these contentions, on page 14 of appellant's brief, rests, we think, upon a misunderstanding by appellant of the court's meaning in the colloquy between it and plaintiff's counsel (Case, p. 42, l. 26). That meaning, we submit, was that plaintiff was bound by Waldron's testimony, as plaintiff's witness, as to the general practice of ordering coal from plaintiff; and plaintiff's counsel acquiesced in this view, saying: "That is all I want," so that there was no ruling by the court on the admission or rejection of testimony, much less any objection by defendant to such ruling. *Kargman* v. *Carlo,* 85 N. J. L. 632; *Farley* v. *Mikulsky,* 13 N. J. Adv. Rep. 486. Moreover, it is to be noted that the testimony of Harnisch, appellant's office manager, as to the custom in giving orders (Case, p. 42, l. 18) corcoborated that of Mr. Waldron (Case, p. 16, l. 30); and so also did the testimony of appellant's General Manager, Lindeman (Case, p. 24, l. 34).

As to the revocation of Frank's authority to order coal, plaintiff was bound by Mr. Waldron's testimony, but not for the reasons appellant assumes, nor in the sense that it uses the word "bound"; it is because Mr. Waldron's testimony as to the revocation (Case, p. 22, l. 34) was the only testimony by any witness on the subject, and stands uncontradicted and unimpeached.

However, we think that the point is of no practical importance in any aspect; assuming that appellant was not "bound" by Mr. Waldron's testimony as to the revocation of Frank's authority, appellant's situation is in nowise improved. As we have already shown under the preceding point of this brief, the evidence is undisputed and overwhelming that appellant did not rely upon any authority in Frank as agent—neither the continuation of an express authority nor any implied or apparent authority. Otherwise, why such testimony from Lindeman, appellant's secretary, treasurer and general manager, as this:

> "Q That is the account of J. Frank, is it not? A Yes, sir.
>
> "Q That shows delivery of coal from January 7, 1924, to April 9, 1924? A Yes, sir." Case, p. 38, l. 17.
>
> "Q And afterwards you made a slip for every delivery that was made to Jack Frank or J. Frank or Frank? A Yes, sir.
>
> "Q You sent them yourself? A Yes, sir.
>
> "Q You sent monthly bills to Mr. Frank at his home address, the same address as on your sheets, 9 Monmouth street, Newark? A Yes, sir." Case, p. 39, l. 27.
>
> "Q The fact was, that you did not make any of these delivery slips nor any bills to Edward M. Waldron, Inc., from January 7, 1924, to April 9, 1924? A Mr. Frank came to my office personally the first part of January and told me—
>
> "Q I don't care what he told you. A He ordered this coal.
>
> "Q And told you to bill it to him? A To him personally." Case, p. 40, l. 31.

As to appellant's second contention under this point, it may be conceded that books of account are legitimate *prima facie* evidence; but there is an essential condition to this rule, and that is that

the books themselves must, on their face, appear to show an account against the defendant, 22 C. J. 877; *Townley* v. *Wooly,* 1 N. J. L. 377; *Tenbroke* v. *Johnson,* 1 N. J. L. 288, for the sale and delivery of merchandise—as appellant itself says in its brief, "in the usual course of business." *Benoliel* v. *Homac,* 87 N. J. L. 375, cited by appellant, 22 C. J. 868. That, however, is precisely what, so far as concerns respondent, the copies of the accounts put in evidence in this case do not show. As we have already pointed out under the preceding points of this brief, the two accounts, Exhibits D. 1 (Case, p. 61) and D. 2, (Case, p. 62) show beyond any reasonable doubt (so that, as we have also said, a verdict to the contrary would be set aside by the court) that the coal delivered at the building in question, on and after January 7, 1924, was not charged to the respondent, but to Frank. In a nutshell, the book account sued on is *prima facie* an account against Frank, and not against the respondent; the only book account in evidence appearing to be *prima facie* against the respondent is that shown in Exhibit D. 1 (Case, p. 61), and this, it also appears from the account itself, was paid in full.

We have, under the preceding point, called attention to the physical characteristics of these two ledger accounts; and we repeat here that it is not even possible for the appellant to argue, as a "last resort," that account No. 1 (Exhibit D. 2, Case, p. 62) is a new ledger account against the respondent in continuation of account No. 21 (Exhibit D. 1, Case, p. 61). Account No. 21 continued for more than two months after account No. 1 was begun, and contains no less than six items of coal delivered and properly charged to respondent at three different jobs, *but none at*

the Y. M. H. A. job. Thus, there is "not a leg left" to the appellant to stand on. If the appellant had purposely intended to show by its ledger accounts that the coal delivered to the Y. M. H. A. job before January 7, 1924, was sold to respondent, and the coal delivered there on and after January 7, 1924, was not sold to respondent, it could hardly have done so more successfully and clearly.

Another line of reasoning leads to the same result. It is well settled that a ledger account is evidential only when supported by the book of original entry. 22 C. J. 873, 887. In this case the day book or journal, the usual book of original entry, was not put in evidence; the only evidence produced by plaintiff in support of the ledger sheets was the so-called delivery slips. Exhibit D. 2 (Case, p. 54, *et seq.*). It is at least doubtful whether, in this posture of affairs, these exhibits are competent evidence as a book account at all. The case of *Hamilton* v. *Fusco Construction Co.,* 87 N. J. L. 62, deals with a very similar situation. In that case the Supreme Court said:

> "The only question arising under this appeal is the competency of plaintiff's books of account as evidence in support of his claim; no other proof of sale and delivery being made as to a considerable part of the claim. * * *
>
> "The books consisted of the original order sheets made up by various employes and ledger cards kept as a loose leaf system; the latter two had been made up under the supervision of the president of the company, who proved the books.
>
> "The trial court admitted the loose sheets and cards in evidence, attaching copies as part of the findings of fact, and found for the plaintiff, refusing to enter judgment for defendant upon the ground, as requested,

that there was no sufficient proof of sale and delivery, nor testimony of the making of the order sheets by the employes who made them. If the books of account, of the character found by the court, are sufficient *prima facie* proof of sale and delivery, the sufficiency of proof depends upon the weight to be given them, and there is nothing in this record which would justify us in overthrowing the conclusion reached by the trial court on that question.

"It appears from the finding that daily reports were made to the plaintiff's assignor, a corporation, of work done and materials furnished by it to the defendant, and these were entered from the loose-leaf reports, on cards kept in the form of a ledger account, which contained nothing but figures. There were no entries showing the character of the goods sold and delivered, and without the loose sheets made up by the employes, the ledger proved nothing. * * * Assuming that the ledger account cards are competent, they prove nothing in support of the judgment, without the aid of the original sheets, and it becomes necessary to decide whether such sheets are competent proof of sale and delivery. In Diament *v.* Colloty, 66 N. J. L. 295, it was held that such sheets 'cannot be regarded as a book of original entry; they were, in reality, no more than memoranda which might be used by a witness for the purpose of refreshing his memory, but could not of themselves, standing alone, be competent evidence of the facts therein contained.'

"In that case the entries on the slips were transcribed to a daybook and posted to a ledger account, and the court held that the admission of the slips in connection with the daybook and ledger was not error, although, standing alone, they were not competent. In the case under consideration, we are limited to the record laid before us, and from it it appears that various employes made up order sheets, as they are called; precisely what

> was the method does not appear, but they contained items of work done and materials furnished which are reported to have been for the defendant; what became of these reports, how kept or preserved, is not shown. We are of opinion that such sheets ought not to be, and are not, books of original entry, and not receivable in evidence except in connection with a daybook or other substantial record which cannot be tampered with or changed without leaving some evidence thereof. So far as this record goes, any one of these sheets may have been changed and may not be the original entry.
>
> "Whether a ledger account can be proved by the production of cards containing only the account of the party to the action has not been considered and is not decided."

But, be this as it may, if the exhibits in question are competent at all under the book account exception to the hearsay rule, then they clearly show an account against Frank, and not against respondent. As we have before pointed out, everyone of the delivery slips forming part of Exhibit P. 2 (Case, p. 54, *et seq.*) show on its face that it represents a charge against Frank, and not against the respondent; and the matter is clinched and put beyond the last trace of doubt by the testimony of the appellant's General Manager, Lindeman, hereinabove alluded to and quoted (Case, p. 39, l. 9), that before January 7, 1924, all the slips for coal intended to be charged to the respondent, were made in the respondent's name. Needless to say, the appellant did not offer these in evidence.

III.

Appellant's last point is that even if Frank exceeded his power in ordering the coal, it was also open to the jury to find that respondent was liable because it had accepted the coal and bene-

fited thereby, with full knowledge of all the facts. This proposition can be disposed of very briefly. It involves no less than three misstatements of fact: First, there is not only no testimony that respondent accepted the coal, but all the testimony there is upon the subject is to the effect that respondent at all times refused it. Second, not only is there nothing to show that respondent benefited thereby, but the undisputed testimony is that respondent throughout considered that furnishing the heat formed no part of its contract, and was a matter with which it had no concern. Lastly, not only is there no testimony that respondent had full knowledge of all the facts, but what testimony there is shows conclusively that if respondent had any knowledge that Frank was continuing to order coal for the building in question, it believed and had good reason to believe that he was doing so on his own account, or for that of the owner of the building.

To sum up, we think that the situation, on the evidence presented by the appellant, and all the legitimate inferences to be drawn therefrom, was so plain, that to state it in one way, reasonable men might not differ as to their conclusions, or to state it in another way, that the court would have felt itself compelled to set aside a verdict on an opposite theory. We have before alluded to a certain part of the testimony—that of the witness, Adler, Vice-President of the Y. M. H. A. (Case, p. 46, l. 9), where, reciting a conversation with Frank, he testifies that Frank said "I am interested as a member,"—as being the key to the entire situation. That situation was this:

Mr. Waldron, respondent's president, interpreted the contract under which respondent was working as contractor on the building in ques-

tion, as not requiring it to provide any heat after the heating apparatus had been tested. This had been his attitude throughout, and he so finally informed the architect at least as early as December 31, 1923. The latter naturally at once brought the matter to the attention of the owner, the Young Men's & Young Women's Hebrew Association of Newark, referred to in the briefs as the Y. M. H. A. The time was the beginning of winter, and the owner was vitally interested in keeping the building warm, so that no part of it should be injured.

Frank, the respondent's superintendent on the job, was a member of the Y. M. H. A., and, as he told Adler in the testimony just referred to, interested as such. Frank undertook, with at least the tacit assent of Adler, the Vice-President of the Y. M. H. A., if not by the express authorization of that organization, to order more coal to heat the building, on his own account, no doubt expecting, if not relying upon an express promise to that effect that the Y. M. H. A. would reimburse him. The last coal ordered by respondent had been delivered on January 4, 1924. Sometime before January 7, 1924, Mr. Waldron forbade Frank to order any more coal for the building. Frank, acting, as we have said, in the interests of the organization of which he was a member, ordered more coal, the first being delivered on January 7, 1924. Up to this time all delivery slips for coal had been made out to respondent, the bills had been charged to respondent and sent to it, and the charges posted to respondent's ledger account, Exhibit D. 1 (Case, p. 61). Beginning January 7, 1924, all delivery slips were made to Frank, the bills were charged and mailed to him at his home and the charges were posted to a new ledger account, Exhibit D. 2 (Case, p. 62), in the name of Frank, the first entry therein

being January 7, 1924. Beginning with that date, so far as the coal transactions were concerned, Frank ceased to be an employee of the respondent and became and was an agent or a representative of the Y. M. H. A. Appellant, with full knowledge of these facts, shipped the coal and charged it to Frank. It was only after Frank, who, as the record shows, filed no answer, and against whom judgment by default has, presumably, been taken, refused or proved unable to make payment, that the appellant, after, no doubt, first turning to the Y. M. H. A. and being rebuffed by them, as an afterthought endeavored to collect from the respondent, and, in pursuance of that purpose, undertook to make its facts fit its theories; and it was, undoubtedly, at this time, that the words "E. M. Waldron Co., Inc." were inserted at the top of the sheet forming Exhibit D. 2 (Case, p. 62). We submit that, upon the appellant's own evidence, the foregoing theory is so clearly established that reasonable men could arrive at no other conclusion, and that it became the court's duty to grant a non-suit as against the respondent.

> "It is the duty of the trial court to control a jury in its verdict by a binding instruction when the testimony will not support any other verdict." Loper *v.* Somers, 71 N. J. L. 657, 661; Vandegrift Construction Co. *v.* Camden, etc. Co., 74 N. J. L. 669."

We respectfully submit that the judgment of the Circuit Court was right, and should be affirmed.

Respectfully submitted,

WILLIAM K. FLANAGAN,
Of Counsel with Respondent.

February Term, 1926.