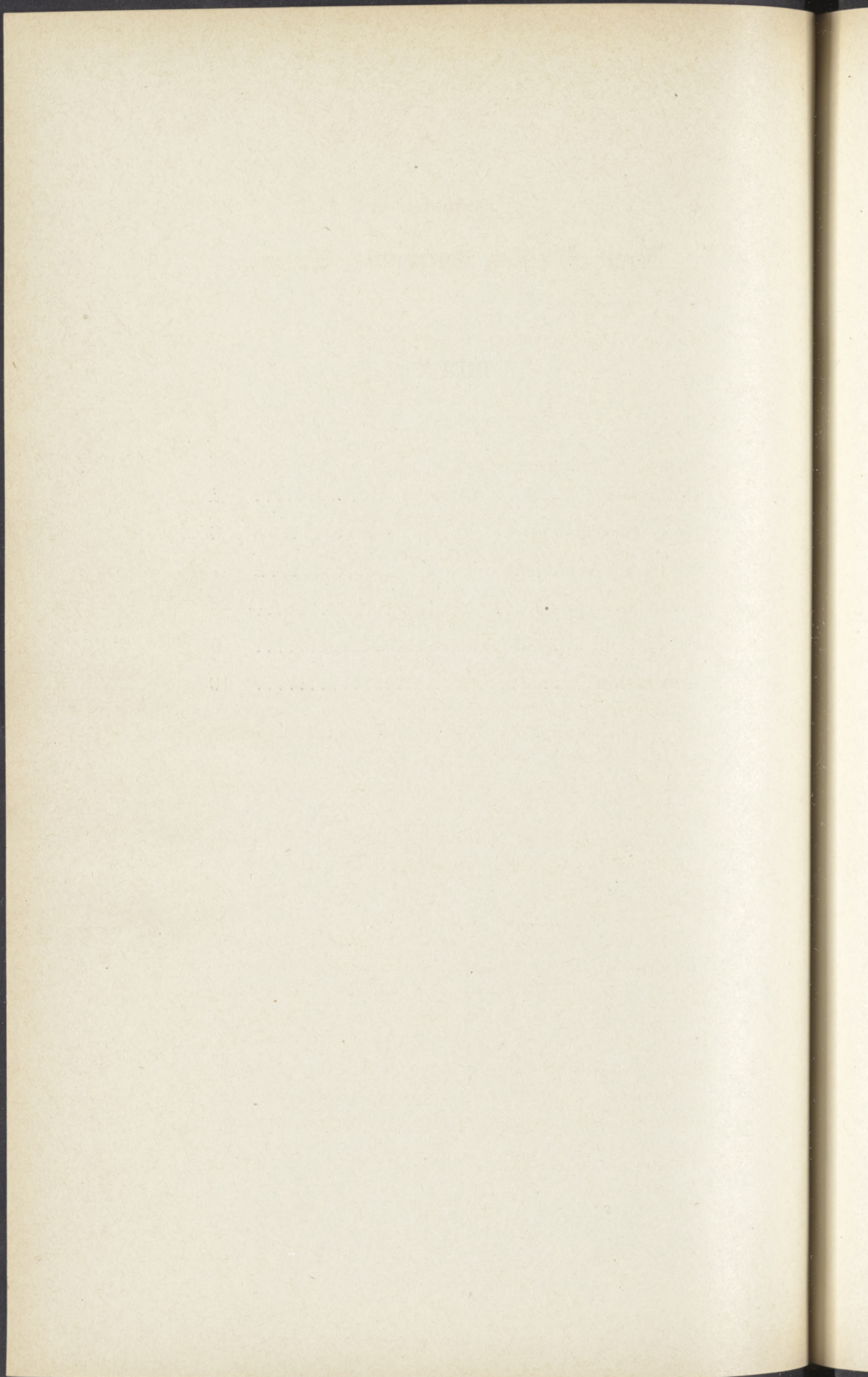


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Opinion.

New Jersey Supreme Court

MONMOUTH PLUMBING AND SUP-  
PLY Co.,

Plaintiff-Appellee,

vs.

GEORGE F. HERBERT and ARLING-  
TON REALTY Co., Builders,  
Defendants,

and

ARLINGTON REALTY Co., Owner,  
Defendant-Appellant.

10

20

Submitted January Term, 1930.

Decided May 6, 1930.

On appeal from the Monmouth County Circuit  
Court.

Before GUMMERE, Chief Justice, and Justice  
CAMPBELL.

For the appellant, MICHAEL J. TANSEY.

For the respondent, CHARLES F. SEXTON.

30

*Per Curiam.*

This was an action upon lien claim. The com-  
plaint is in three counts, the first being the usual  
one in lien claim actions; the second is for goods  
sold and delivered to the defendants, Herbert and  
Arlington Realty Company, and the third is for  
goods sold and delivered to the defendant Herbert.

Upon the trial the action lost its character as a  
lien claim suit because of the production of a re-

40



*Opinion.*

lease from the plaintiff and the defendant Herbert to the defendant Arlington Realty Company, as owner, releasing the lands from lien and the trial of the cause resulted in a verdict in favor of the plaintiff for the full amount of its claim against the Arlington Realty Company and for one dollar as against the defendant Herbert.

10 It appears that a rule to show cause why these verdicts should not be set aside, was allowed to and argued by the appellant, and it further appears that the grounds or reasons urged under the this rule were that the verdict for the nominal amount against Herbert was inconsistent, under the proofs, with that for the entire amount of the claim against the defendant, appellant here, and that the guaranty offered in evidence which appeared to have been executed by the president of the Arlington Realty Company was *ultra vires* and not binding upon the company, and that the claim 20 of the plaintiff was not properly proven.

The result under such rule was that it was discharged as to the Arlington Realty Company, the appellant here, and made absolute as to the nominal verdict against Herbert, and such verdict was set aside.

30 It would seem that strictly this would dispose of the questions raised upon this appeal.

*Catterall v. Otis Elevator Co.*, 103 N. J. L. 381. We think it does, but turning to the grounds of appeal we also think the same result must be reached.

The first three grounds are directed at an alleged guaranty to the respondent alleged to have been executed by the president of the appellant.

40 The facts seem to be that the appellant company being the owner of lands on Garfield Avenue in



*Opinion.*

Avon, undertook to erect thereon an apartment house and in furtherance of that project entered into the following agreement with the defendant Herbert as follows:

"January 25th, 1927.

Working Agreement between  
C. H. Walker, Pres., Arlington Realty Co., and 10  
George F. Herbert plumber.

I will agree to install all plumbing work according to Avon Code and Tenement House Code in apartment house at 15 Garfield Avenue, Avon, New Jersey, and for which I am to be paid ten per cent. upon all labor and materials. Labor to be met weekly. It is understood that you will guaranty entire cost of materials in writing. All commission to be paid at the completion of this work. All complaints about labor to be made to Mr. Herbert." 20

This in form was an offer signed by Herbert and a duplicate was accepted and signed by the president of the Arlington Realty Company.

Subsequently and apparently in accord with such agreement the following paper was executed by the president of the Arlington Realty Company:

"February 11th, 1927. 30

Monmouth Plumbing Supply Co.

33 Second Avenue, Long Branch, N. J.

Gentlemen—We hereby guarantee payment of plumbing materials as per contract amounting to \$8,272 as per estimate dated January 18th, 1927. Also all extra material that you furnish, to be installed by plumbing contractor, George F. Herbert, on apartment house job, Garfield Avenue, Avon, New Jersey. Terms of payment are two per cent. for cash on the tenth of the month following 40



*Opinion.*

date of invoice or thirty days net, or note in full upon completion of delivery of all material, excepting extra material."

10 It is contended that the total amount of materials furnished reached the sum of \$13,744.38. Labor bills for plumbing work were paid weekly by the appellant. On May 7th, 1927, appellant gave the plaintiff its note for \$4,000 which was not paid at maturity but subsequently by an order of August 3d, 1927, of appellant, signed by its president, the sum of \$8,206 was paid plaintiff from the proceeds of a mortgage loan made to the appellant. This left a balance of \$5,700 due plaintiff. On the same date and in the same manner and from the same fund \$2,577.98 was paid Herbert, the plumbing contractor, for the balance due him under his contract for plumbing labor. Thereafter appellant suggested, through its president, that it give a second mortgage to the plaintiff for the balance of its account. While negotiations in this direction were in progress the appellant was decreed to be insolvent and a receiver was appointed. From the proofs it is apparent, and, in fact, convincing that the materials, the price and value of which constitutes the plaintiff's claim, went into the building of the appellant, and also that C. Herbert Walker, the president of the appellant company was in full and absolute control of its affairs and all the details of the construction of the apartment house in question.

20

30

The first ground of appeal is directed at a portion of the charge in which the court referred to the proofs as indicating power conferred expressly, or by implication, by holding out the president

40 of the appellant as its agent.



*Opinion.*

Appellant does not point out or direct our attention to any error in such portion of the charge so singled out for attack.

The next ground is alleged error in refusing to charge appellant's third request.

We think there was no error in this for two reasons: first, because the request does not fully cover the theory upon which the cause was tried in that it fails to include the question of ratification of the acts of its president, by the corporation, and, second, because the trial court fully, and we think, correctly, charged upon the matters covered by the request. 10

The third ground is that the court erred in permitting the agreement of guaranty of February 11th, 1927, to be introduced in evidence.

Under the proofs in the case we think this was not error, at least a jury question was presented as to its being the act and obligation of the appellant corporation, and this question was presented to the jury. 20

The final ground is that the judgment should be set aside because the verdict of one dollar against the defendant, Herbert, is inconsistent with the judgment against the appellant.

We are not by any means certain that under the proofs this verdict was inconsistent with the verdict and judgment against the appellant but if it may be said to be, this ground is without merit for two reasons, first, that it is not a proper ground of appeal, and, second, being a proper ground for setting aside the verdict under a rule for a new trial, it was so treated under such a rule and the verdict was set aside. 30

The judgment below should be affirmed, with costs. 40



**Order of Affirmance.**

Filed May 22, 1930.

**NEW JERSEY SUPREME COURT.**

No. 65. January Term, 1930.

10      MONMOUTH PLUMBING AND SUP-  
          PLY Co.,  
          Plaintiff-Appellee,

vs.

GEORGE F. HERBERT and ARLING-  
      TON REALTY Co., Builders,  
          Defendants,  
      and

20      ARLINGTON REALTY Co., Owner,  
          Defendant-Appellant.

On Appeal  
 from Mon-  
 mouth County  
 Circuit Court.  
  
 Order of  
 Affirmance.

This cause having been duly argued at the Jan-  
 uary Term, 1930, of this Court by Charles F. Sex-  
 ton, Attorney for Plaintiff-Appellee, Michael J.  
 Tansey, Attorney for Arlington Realty Company,  
 Defendant-Appellant; and the Court having con-  
 sidered the same and finding no error in the record  
 and proceeding in the Circuit Court

30      It is, on this 22nd day of May, in the year of  
 our Lord, One Thousand Nine Hundred and  
 Thirty, ORDERED and ADJUDGED that the judgment  
 of the Circuit Court of the County of Monmouth,  
 removed by the appeal in this cause, be affirmed  
 with costs and that the record be remitted to the  
 Circuit Court to be proceeded with in accordance  
 with this judgment and the practice of said court.

Entered May 22, 1930

On motion of

40

CHARLES F. SEXTON,  
 Counsel for Plaintiff-Appellee.



# Notice of Argument.

Filed Sept. 27, 1930.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

MONMOUTH PLUMBING AND SUP-  
PLY Co.,

Plaintiff-Appellee,

vs.

GEORGE F. HERBERT and ARLING-  
TON REALTY Co., Builders,  
Defendants,

and

ARLINGTON REALTY Co., Owner,  
Defendant-Appellant.

10

On Appeal

Notice of  
Argument.

*Guinness C. J.*  
*Campbell J.*

20

Sir:

Take Notice, that the argument of the appeal in this cause will be moved before the New Jersey Court of Errors and Appeals on the third Tuesday of October, 1930, at Trenton, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

30

To: Charles F. Sexton, Esq., Attorney for Plain-  
tiff-Appellee,

George F. Herbert, Defendant,

Or: To whom it may concern.

MICHAEL J. TANSEY,  
Attorney for Defendant-Appellant.

40



**Notice of Appeal.**

Filed June 3, 1930.

## NEW JERSEY SUPREME COURT.

10

MONMOUTH PLUMBING AND SUP-  
PLY Co.,  
Plaintiff-Appellee,

vs.

GEORGE F. HERBERT and ARLING-  
TON REALTY Co., Builders,  
Defendants,  
and

20

ARLINGTON REALTY Co., Owner,  
Defendant-Appellant.

On Appeal  
Notice of  
Appeal.

To: CHARLES F. SEXTON, ESQ.,  
Attorney for Plaintiff-Appellee.

30

Take Notice, that the defendant-appellant here-  
by appeals to the New Jersey Court of Errors and  
Appeals from the whole of the judgment entered  
in this cause by the New Jersey Supreme Court,  
affirming the judgment of the Monmouth County  
Circuit Court.

Dated: May 29, 1930.

MICHAEL J. TANSEY,  
Attorney for Defendant-Appellant.

40



Filed June 5, 1930.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

MONMOUTH PLUMBING AND SUP-  
PLY Co.,  
Plaintiff-Appellee,

vs.

GEORGE F. HERBERT and ARLINGTON REALTY Co., Builders,  
Defendants,

and

ARLINGTON REALTY Co., Owner,  
Defendant-Appellant.

10

## On Appeal

## Grounds of Appeal.

20

To: CHARLES F. SEXTON, ESQ.,  
Attorney for Plaintiff-Appellee.

Sir :

Please Take Notice that the following are the grounds set forth by the defendant-appellant as the grounds of appeal in the above entitled cause:

1. Because the Supreme Court erred in affirming the judgment of the Monmouth County Circuit Court.

30

Dated: June 25th, 1930.

MICHAEL J. TANSEY,  
Attorney for Defendant-Appellant.



**Conclusion.****MONMOUTH COUNTY CIRCUIT COURT.**

|    |                                                                                                                                                                                                                                  |   |                                                                                      |
|----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|--------------------------------------------------------------------------------------|
| 10 | MONMOUTH PLUMBING AND SUP-<br>PLY Co.,<br>Plaintiff-Appellee,<br><br>vs.<br><br>GEORGE F. HERBERT and ARLING-<br>TON REALTY Co., Builders,<br>Defendants,<br><br>and<br><br>ARLINGTON REALTY Co., Owner,<br>Defendant-Appellant. | } | Action at Law.<br>On Mechanic's<br>Lien.<br>On Rule to<br>Show Cause.<br>Conclusion. |
|----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|--------------------------------------------------------------------------------------|

20      This was a mechanic's lien suit in which the trial was had before the court and a jury and resulted in a verdict of one dollar against the defendant Herbert and a general judgment against the other defendant, Arlington Realty Company, for the full amount of plaintiff's claim. No special judgment against the land involved was returned for the reason that the trial judge found as a matter of law that a release executed by plaintiff at the time of the execution of a mortgage by the defendant corporation effectuated the release of the lien, whereupon the suit proceeded as an ordinary action to recover the price of goods sold and delivered by plaintiff to it either under a guaranty of payment referred to in the evidence or an assumption of primary liability. This defendant obtained this rule to show cause why a new trial should not be granted for the reason that the nominal judgment against the defendant Herbert is

30

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*Conclusion.*

inconsistent with that for the entire claim of plaintiff against it, also that the guaranty offered in evidence which appears to have been executed by the corporation's president was *ultra vires* and therefore not binding upon it. It is further argued that the claim of plaintiff was not proven in accordance with the recognized rules.

10

An examination of the record discloses that the defendant Herbert while testifying as a witness at the trial had filed no answer and in the circumstances the verdict against him was irregular, since under the practice the proper course would have been to have taken interlocutory judgment by default against him and an assessment of damages either by the clerk or in open court. The other defendant, however, it would seem, cannot raise or take advantage of this question, for the reason that it appears under the evidence that it was open to the jury to find that it in fact assumed the payment of the debt incurred to the plaintiff, even though the paper writing involved purports to be a guaranty "for all extra material that you furnish, to be installed by plumbing contractor, George F. Herbert, on apartment house job," which refers, of course, to the building to be erected or then under construction for the corporation. Moreover, it is clear that the evidence warranted the finding of fact that Walker, the president of the corporation, had apparent authority to sign the so-called guaranty and that ratification followed his action. The circumstances developed are not unlike those found in *Walker v. Arlington Realty Company*, 143 Atl., 378, and in the "*White*" *Dool Bed Co. v. United States Mortgage and Title Guaranty Co.*, 7 N. J. Adv. Repts., (June 1, 1929)

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*Conclusion.*

862,865, a late case in the Court of Errors and Appeals, with relation to the liability of a corporation for the acts of its officers or agents within the scope of apparent authority in dealing with third persons. Finally, the suggestion on the argument of the present rule that plaintiff failed to prove the items of its claim is found to be without substance with the result that the defendant corporation can take nothing of it. The rule to show cause will be discharged. With regard to the verdict against the defendant Herbert carrying an assessment of nominal damages it is manifest that the jury was without jurisdiction, and the court of its own action, since its attention has been called to the irregularity, will direct that it be set aside.

RULIF V. LAWRENCE,  
Judge.

30

40



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## Notice of Appeal.

Filed June 25, 1929.

### New Jersey Supreme Court.

MONMOUTH PLUMBING SUPPLY

Co., a body corporate,

Plaintiff,

vs.

GEORGE F. HERBERT *and* ARLING-

TON REALTY Co.,

Defendants.

Action at Law.

Notice of  
Appeal.

10

20

Sir: .

Please Take Notice that the defendant Arlington Realty Company hereby appeals from the Monmouth County Circuit Court to the New Jersey Supreme Court the whole of the judgment entered in the above cause against the Arlington Realty Company.

Dated June 17, 1929.

MICHAEL J. TANSEY. 30

To: CHARLES F. SEXTON, Esq.,

Attorney for Plaintiff.

176 Broadway,

Long Branch, N. J.

or to Whom it May Concern.

Service of the within Notice of Appeal is hereby acknowledged this 18th day of June, 1929.

40



## Grounds of Appeal.

Filed Sept. 21, 1929.

### NEW JERSEY SUPREME COURT.

|    |                                                                                                                                     |   |                                         |
|----|-------------------------------------------------------------------------------------------------------------------------------------|---|-----------------------------------------|
| 10 | MONMOUTH PLUMBING SUPPLY<br>COMPANY, Body Corporate,<br>Plaintiff-Respondent,                                                       | } |                                         |
|    | vs.                                                                                                                                 |   |                                         |
|    | GEORGE F. HERBERT, Builder,<br>Defendant,<br>and<br>ARLINGTON REALTY COMPANY,<br>Builder, and ARLINGTON REAL-<br>TY COMPANY, Owner, | } | Action at Law.<br>Grounds of<br>Appeal. |
| 20 | Defendants-Appellants.                                                                                                              |   |                                         |

The defendant-appellant, Arlington Realty Company, Builder, and Arlington Realty Company, Owner, state the following grounds of appeal in this cause:

1. The Trial Court erred in denying defendants' motion for a Non-suit.
- 30    2. The Trial Court erred in denying defendants' motion for the direction of a verdict in favor of the defendants and against plaintiff.
3. The Trial Court erred in charging the jury as follows:

40        "As I remember the testimony; perhaps, I haven't it all clearly in my mind or remembered all the principal acts of the Corpora-



*Grounds of Appeal.*

tion, but it seems to me they tended to show that it had conferred the necessary powers upon him and had ratified his acts; that first of all the confirmation which occurred in the testimony that the material was delivered to the Arlington Realty Company's property, and the use of the plumbing material supplied by the Plaintiff Company, as being under the terms of the contract, and the construction of the building has been testified to; that he ordered what should go into the building, and how it should go into it. All various details or approval of the plan from time to time, you may take into consideration and also the fact of there having been no objection on the part of the Corporation made anywhere.

These things, coupled with the fact that thereafter this Corporation made a mortgage upon this building, and it was admitted in evidence and consented to being admitted, and which names Mr. Walker as President of the Corporation, and becomes admittedly the act of the Corporation. The receipt of the profits of that Corporation, according to the promise of Mr. Walker, were taken out of the profits of various persons who worked on this building and the payment out to the Monmouth Plumbing Supply Company of \$8700.00, and the check was made out to the Arlington Realty Company by Mr. Walker, and he subsequently assented to the fact.

There has been no testimony whatsoever of any objection by the Corporation in this matter or as to these acts of Mr. Walker or



*Grounds of Appeal.*

to the statement that large sums of money were obtained on the mortgage."

- 10 4. The Trial Court erred in refusing to charge the following request of the defendants, Arlington Realty Company, Builder and Arlington Realty Company, owner:

*Request No. 3.*

20 "The signing of the alleged guarantee by C. Herbert Walker, President of the Arlington Realty Company, in the name of the Corporation, would not of itself bind the Defendant Corporation, the Arlington Realty Company. It must appear that he has express authority from its Board of Directors for the signing and delivery of the guarantee, or that the Corporation held him out as having that authority."

5. The Trial Court erred in permitting the plaintiff to offer in evidence against the defendant, Arlington Realty Company, guaranty purporting to have been signed Arlington Realty Company, by C. H. Walker, President.

- 30 6. The verdict is contrary to the charge of the Court.

7. The verdict is excessive.

8. The verdict is contrary to law.

MICHAEL J. TANSEY,  
Attorney for Defendants-Appel-  
lants Arlington Realty Company,  
Builder and Arlington Realty  
Company, Owner.



**Mechanics Lien Claim.**

Filed Aug. 24, 1927.

Summons issued Aug. 27, 1927.

|     |          |               |    |
|-----|----------|---------------|----|
|     | Claimant | } Lien Claim. | 10 |
| vs. |          |               |    |
|     | Owner    |               |    |

County, ss.

Be it known, that Monmouth Plumbing Supply Co., body corporate of State of New Jersey, hereby claim a lien upon the building and lands hereinafter described pursuant to the statute in such case made and provided, for a debt contracted and owing to        for labor performed and materials furnished for the erection and construction of a certain building described as follows: 20

First. The said building is a 3 story hollow tile brick face building on a lot or curtilege situate in the Borough of Avon, County of Monmouth and State of New Jersey, more particularly described as follows: 30

Beginning at a point in the Southerly line of Garfield Avenue, distant three hundred and fifty feet east from the southeast corner of Garfield Avenue and First Avenue, formed by the intersection of the southerly line of Garfield Avenue, with the easterly line of First Avenue; Thence (1) Southerly at right angles to Garfield Avenue paral- 40



*Mechanics Lien Claim.*

10      lel to First Avenue along the easterly line of lot  
          510½ a distance of one hundred and forty feet to  
          the northerly line of an alley running east and  
          west parallel to Garfield Avenue and distant one  
          hundred and forty feet south from the south side  
          thereof; Thence (2) Easterly along the said North-  
          erly line of said alley a distance of fifty feet to the  
          westerly line of another alley running north and  
          south between Garfield Avenue and Lincoln Ave-  
          nue, parallel to First Avenue and distant four hun-  
          dred feet east from the easterly line thereof, Thence  
          (3) Northerly along said easterly line of said alley  
          a distance of one hundred and forty feet to the  
          said southerly line of said Garfield Avenue; Thence  
          (4) Westerly along the said southerly line of the  
 20      said Garfield Avenue, a distance of fifty feet to the  
          point or place of beginning.

Being a lot fifty feet frontage on Garfield Avenue  
 by one hundred and forty feet deep.

Second: The name of the owner of the land and  
 the estate therein on which the said lien is claim-  
 ed is Arlington Realty Company.

30      Third. The name of the person who contracted  
          the said debt and for whom and at whose request  
          the said labor was performed and materials fur-  
          nished for which the aforesaid lien is claimed are  
          George F. Herbert and Arlington Realty Co. here-  
          inafter deemed the builder.

Fourth. The following is a bill of particulars  
 of the aforesaid labor performed and materials  
 furnished by      the said      the amount



*Mechanics Lien Claim.*

and kind of labor performed and materials furnished and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon and deductions that ought to be made therefrom, exhibiting the balance justly due to      from the said

4. The following is a bill of particulars exhibiting the amount and kind of materials furnished and the price at which and times when same were furnished together with credit for all payments made thereon, and deductions that ought to be made thereon, and exhibiting the balance justly due to the said Monmouth Plumbing Supply Co., claimant, from the said George F. Herbert and Arlington Realty Company.

George F. Herbert and Arlington Realty Co.

to

Monmouth Plumbing Supply Co., *Dr.*

To furnishing from the 3rd day of February, 1927 to the 29th day of July, 1927, of plumbing materials necessary for four-story terra cotta brick face building pursuant to contract:

|         |                    |             |          |
|---------|--------------------|-------------|----------|
|         |                    | \$13,744.38 |          |
| Aug. 2. | Credit Merchandise | \$18.38     |          |
| Aug. 3. | Credit cash        | 8,026.00    | 8,044.38 |

|                             |            |
|-----------------------------|------------|
| Balance justly due claimant | \$5,700.00 |
|-----------------------------|------------|

Add interest from August 3, 1927 until paid.

All above materials were furnished between 2nd day of February, 1927 and 29th day of July, 1927,

10

20

30

40



*Mechanics Lien Claim.*

which said last mentioned date is the date the last material was furnished for which said debt is due.

MONMOUTH PLUMBING SUPPLY CO.

Thos .J. Berkstresser,  
President.

10 State of New Jersey, )  
County of Monmouth ) ss.:

20 Thomas J. Berkstresser, of full age, being duly sworn according to law, upon his oath deposes and says: that he is President of the Monmouth Plumbing Supply Company, claimant in foregoing claim; that the bill of particulars and statement therein in said lien claim set forth and shown are true; that the said is for material furnished in the erection of the building in said claim described, at the time specified, and that the amount as claimed therein is justly due and owing from the said George F. Herbert and the Arlington Realty Company to claimant.

THOS. J. BERKSTRESSER.

Sworn and subscribed before me  
this 19th day of August, 1927.

G. B. Noyes,  
Notary Public of N. J.

30

40



**Summons.**

Filed Aug. 27, 1927.

*The State of New Jersey:*

George F. Herbert and Arlington  
Realty Company:

(Seal) You, George F. Herbert and Ar-  
lington Realty Company, owners, 10  
are summoned to answer the an-  
nexed complaint of the Monmouth  
Plumbing Supply Company, body  
corporate, in an action at law, in the Circuit Court  
in and for the County of Monmouth, in which the  
said Monmouth Plumbing Supply Company claims  
a building lien on a certain building and lands of  
said Arlington Realty Company, described in said  
complaint. And Take Notice that unless you file 20  
your answer to said complaint with the Clerk of  
said Court at Freehold, within twenty days after  
service upon you of this writ and the annexed  
complaint, the plaintiff may proceed in the suit  
and judgment may be obtained against you.

Witness, RULIFF V. LAWRENCE, ESQUIRE, Judge  
of said Court at Freehold, this Twenty-seventh day  
of August, Nineteen Hundred and Twenty-seven.

JOSEPH McDERMOTT, 30  
Clerk.

CHARLES F. SEXTON,  
Attorney.



**Complaint.**

Filed Aug. 27, 1927.

**MONMOUTH COUNTY CIRCUIT COURT.**

|    |                                                                                                                                                                   |   |                                     |
|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|-------------------------------------|
| 10 | MONMOUTH PLUMBING SUPPLY<br>COMPANY, a body corporate,<br><div style="text-align: right;">Plaintiff,</div>                                                        | } | Action at Law.                      |
|    | vs.                                                                                                                                                               |   |                                     |
|    | GEORGE F. HERBERT and ARLING-<br>TON REALTY COMPANY, Build-<br>ers, and ARLINGTON REALTY<br>COMPANY, Owners,<br><div style="text-align: right;">Defendants.</div> |   | On Mechanics<br>Lien.<br>Complaint. |

20      Plaintiff, Monmouth Plumbing Supply Com-  
 pany, Body Corporate of the State of New Jersey,  
 says:

1. That at the times hereinafter specified the defendant, Arlington Realty Company was the owner of a lot or curtilage of land situate in the Boro of Avon, in the County of Monmouth and State of New Jersey, which is described as follows:

30      Beginning at a point in the Southerly line of  
 Garfield Avenue, distant three hundred and fifty  
 feet east from the southeast corner of Garfield  
 Avenue and First Avenue, formed by the intersec-  
 tion of the southerly line of Garfield Avenue, with  
 the easterly line of First Avenue; Thence (1)  
 Southerly at right angles to Garfield Avenue paral-  
 lel to First Avenue along the easterly line of lot  
 510½ a distance of one hundred and forty feet to  
 40      the northerly line of an alley running east and  
 west parallel to Garfield Avenue and distant one



*Complaint.*

hundred and forty feet south from the south side thereof; Thence (2) Easterly along the said Northerly line of said alley a distance of fifty feet to the westerly line of another alley running north and south between Garfield Avenue and Lincoln Avenue, parallel to First Avenue and distant four hundred feet east from the easterly line thereof, Thence (3) Northerly along said easterly line of said alley a distance of one hundred and forty feet to the said southerly line of said Garfield Avenue; Thence (4) Westerly along the said southerly line of the said Garfield Avenue, a distance of fifty feet to the point or place of beginning.

Being a lot fifty feet frontage on Garfield Avenue by one hundred and forty feet deep.

2. On the Second day of February, Nineteen Hundred and Twenty seven, the Arlington Realty Company contracted with George F. Herbert, whereby the latter agreed to do certain plumbing work on a certain three story terra cotta brick faced building, then existing on said lot or curtilage for the said Arlington Realty Company.

3. Said contract was not filed in the office of the Clerk of the County of Monmouth in accordance with the Statute hereinafter mentioned.

4. On the days mentioned in the Schedule hereto annexed and marked Schedule "A" the plaintiff sold and delivered to the said George F. Herbert and Arlington Realty Company, body corporate, the materials mentioned in said Schedule to the said George F. Herbert and Arlington Realty Company, and in consideration thereof the said George



*Complaint.*

F. Herbert and Arlington Realty Company agreed to pay the plaintiff therefor, the price in each case in said Schedule stated and there remains a balance due and unpaid the sum of Fifty Seven Hundred Dollars.

10      5. The materials aforesaid were furnished by said Monmouth Plumbing Supply Company, body corporate to and for said George F. Herbert and Arlington Realty Company for the purpose of being installed and used in the erection and construction of said three story terra cotta brick face building above mentioned.

20      6. That the said George F. Herbert and Arlington Realty Company have not paid plaintiff the said sum of Fifty Seven Hundred Dollars due, or any part thereof; that the said sum of Fifty Seven Hundred Dollars and total amount therefor is still due and unpaid.

30      7. The indebtedness of said George F. Herbert to the plaintiff for items mentioned in said Schedule "A" so contracted by him with the consent in writing of the said Arlington Realty Company and in writing by said Company guaranteed the payment thereof.

8. Said indebtedness is a lien upon the said lands and buildings above described by virtue of the Statute entitled "An Act to secure to Mechanics and others of payment for their labor and materials in erecting any buildings and in making improvements to lands (Revision of 1898)".



*Complaint.*

## SECOND COUNT.

1. All of the paragraphs of the First Count and the allegations therein contained are made part of this count with the exception of Paragraph Four and in lieu of Paragraph Four and its allegations the Plaintiff says:

10

2. On the dates mentioned in the schedule hereto annexed and marked Schedule "A" the plaintiff sold and delivered to said George F. Herbert and the Arlington Realty Company materials listed in said Schedule and said George F. Herbert and Arlington Realty Company in consideration thereof agreed to pay plaintiff therefor so much as the same were reasonably worth.

20

3. The same were reasonably worth the sum in each case mentioned in said Schedule and the balance due on the whole amounts to the sum of Fifty Seven Hundred Dollars.

## THIRD COUNT.

1. All of the paragraphs of the first count and allegations therein contained are made a part of this count.

30

Plaintiff says:

2. Said George F. Herbert purchased the said material from the plaintiff set forth in Schedule "A" and agreed to pay therefor said several sums set forth in said schedule, upon which there remains a balance due of the sum of Fifty Seven Hundred Dollars.

2. Said George F. Herbert purchased the said

40



*Complaint.*

material from the plaintiff set forth in Schedule "A" and agreed to pay therefor said several sums set forth in said schedule, upon which there remains a balance of the sum of Fifty Seven Hundred Dollars.

- 10      3. That said Arlington Realty Company in writing, a copy of which said writing is attached hereto and marked Schedule "B", agreed to pay unto the plaintiff for the materials furnished to said George F. Herbert, and in consideration of the said plaintiff furnishing to the said George F. Herbert the said material mentioned in Schedule "A", to be used in the building being constructed for the Arlington Realty Company the said Arlington Realty Company agreed to pay unto the
- 20      plaintiff for the material furnished to said George F. Herbert as set forth in Schedule "A" at the prices set forth in said schedule; that there remains due and owing for materials for which said Arlington Realty Company agreed to pay according to said agreement marked Schedule "A" the sum of Fifty Seven Hundred Dollars.

- 30      On all of the foregoing Counts the Plaintiff demands as damages the sum of Fifty Seven Hundred Dollars with interest from the Third day of August, Nineteen Hundred and Twenty Seven.

CHARLES F. SEXTON,  
Attorney for Plaintiff.



## SCHEDULE "A".

MONMOUTH PLUMBING SUPPLY CO., INC.

Long Branch, N. J.

Aug. 15, 1927

Mr. Geo. F. Herbert

c/o Arlington Realty Co., Security

|         |         |         |    |
|---------|---------|---------|----|
| Feb. 2. | To Mdse | 500.00  |    |
| 3.      |         | 60.00   | 10 |
| 5.      |         | 40.00   |    |
| 9.      |         | 70.00   |    |
| 10.     |         | 89.15   |    |
| 15.     |         | 425.00  |    |
| 11.     |         | 62.65   |    |
| 11.     |         | 115.00  |    |
| 11.     |         | 10.58   |    |
| 23.     |         | 23.22   |    |
| 21.     |         | 5.62    | 20 |
| 23.     |         | 10.25   |    |
| 25.     |         | 10.70   |    |
| Mar. 1. |         | 1100.00 |    |
| 1.      |         | 900.00  |    |
| 3.      |         | 21.38   |    |
| 7.      |         | 65.00   |    |
| 10.     |         | 514.35  |    |
| 9.      |         | 366.64  |    |
| 9.      |         | 1.04    |    |
| 10.     |         | 7.80    | 30 |
| 11.     |         | 20.02   |    |
| 11.     |         | 7.46    |    |
| 12.     |         | 22.50   |    |
| 15.     |         | 200.00  |    |
| 16.     |         | 11.70   |    |
| 16.     |         | 12.06   |    |

Forwarded

4,672.12

40



*Schedule A—Annexed to Complaint.*

|    |          |                 |          |
|----|----------|-----------------|----------|
|    |          | Brought forward | 4,672.12 |
|    | Mar. 17. |                 | 215.63   |
|    | 17       |                 | 24.30    |
|    | 17.      |                 | 513.75   |
|    | 26.      |                 | 278.45   |
|    | 28.      |                 | 198.79   |
| 10 | 28.      |                 | 166.73   |
|    | 28.      |                 | 295.56   |
|    | 29.      |                 | 10.12    |
|    | 29.      |                 | 22.03    |
|    | Apr. 6.  |                 | 400.00   |
|    | 6.       |                 | 14.56    |
|    | 14.      |                 | 30.80    |
|    | 8.       |                 | 150.03   |
|    | 8.       |                 | 62.80    |
|    | 8.       |                 | 16.28    |
| 20 | 11.      |                 | 20.76    |
|    | 13.      |                 | 43.36    |
|    | 14.      |                 | 68.10    |
|    | 16.      |                 | 185.38   |
|    | 18       |                 | 99.82    |
|    | 16.      |                 | 7.20     |
|    | 18.      |                 | 7.84     |
|    | 18.      |                 | 33.18    |
|    | 20.      |                 | 16.26    |
| 30 | 21.      |                 | 221.58   |
|    | 25.      |                 | 94.60    |
|    |          | Forwarded       | 7,870.03 |



*Schedule A—Annexed to Complaint.*

|      |                 |           |    |
|------|-----------------|-----------|----|
|      | Brought forward | 7,870.03  |    |
| Apr. | 20              | 23.31     |    |
|      | 25.             | 86.09     |    |
|      | 25.             | 32.82     |    |
|      | 26.             | 47.86     |    |
|      | 28.             | 46.68     |    |
|      | 28.             | 5.97      | 10 |
|      | 28.             | 9.73      |    |
| May  | 2.              | 201.09    |    |
|      | 3.              | 4.20      |    |
|      | 5.              | 72.00     |    |
|      | 6.              | 142.84    |    |
|      | 9.              | 700.00    |    |
|      | 2.              | 73.88     |    |
|      | 3.              | 10.52     |    |
|      | 5.              | 54.31     | 20 |
|      | 7.              | 19.15     |    |
|      | 9.              | 4.42      |    |
|      | 10.             | 9.20      |    |
|      | 10.             | 11.04     |    |
|      | 11.             | 119.83    |    |
|      | 13.             | 32.83     |    |
|      | 16.             | 62.70     |    |
|      | 16.             | 5.76      |    |
|      | 10.             | 1,145.00  |    |
|      | 18.             | 61.57     | 30 |
|      | 19.             | 4.80      |    |
|      | Forwarded       | 10,857.63 |    |



*Schedule A—Annexed to Complaint.*

|    |         |                 |           |  |
|----|---------|-----------------|-----------|--|
|    |         | Brought forward | 10,857.63 |  |
|    | May 20. |                 | 2.80      |  |
|    | 23.     |                 | 2,000.00  |  |
|    | 23.     |                 | 990.00    |  |
|    | 23.     |                 | 99.20     |  |
|    | 23.     |                 | 130.33    |  |
| 10 | 23.     |                 | 17.28     |  |
|    | June 1. |                 | 9.00      |  |
|    | 7.      |                 | 67.36     |  |
|    | 7.      |                 | 25.10     |  |
|    | 7.      |                 | 25.25     |  |
|    | 11.     |                 | 7.50      |  |
|    | 9.      |                 | 195.00    |  |
|    | 10.     |                 | 8.72      |  |
|    | 28.     |                 | 58.50     |  |
|    | 18.     |                 | 433.00    |  |
| 20 | July 6. |                 | 18.00     |  |

---

 14,944.67

## CREDITS

|    |          |       |          |
|----|----------|-------|----------|
|    | May 7.   | Note  | 4,000.00 |
|    | June 30. | C. M. | 32.24    |
|    | 30.      | "     | 20.78    |
|    | 30.      | "     | 86.17    |
|    | 30.      | "     | 94.14    |
| 30 | 30.      | "     | 226.83   |
|    | 23.      | "     | 10.00    |

---

 Forwarded 4,470.16



*Schedule A—Annexed to Complaint.*

|          |                            |                      |          |           |    |
|----------|----------------------------|----------------------|----------|-----------|----|
|          |                            | Brought forward      | 4,470.16 | 14,944.67 |    |
| July 29. | C. M.                      |                      | 13.03    |           |    |
| 29.      | "                          |                      | 135.75   |           |    |
| 29.      | "                          |                      | 77.20    |           |    |
| 29.      | "                          |                      | 103.28   |           |    |
| 29.      | "                          |                      | 128.46   |           |    |
| 29.      | "                          |                      | 84.63    |           | 10 |
| 29.      | "                          |                      | 111.00   |           |    |
| 29.      | "                          |                      | 46.16    |           |    |
| 29.      | "                          |                      | 20.45    |           |    |
| 29.      | "                          |                      | 53.87    |           |    |
| 29.      | "                          |                      | 15.80    |           |    |
| 29.      | "                          |                      | 60.70    |           |    |
| 29.      | "                          |                      | 36.68    |           |    |
|          |                            |                      |          | 5,357.17  | 20 |
|          |                            |                      |          | 9,587.50  |    |
|          |                            | Interest to Aug. 1st |          | 90.19     |    |
| July 30. | Note with interest & costs |                      |          | 4,066.69  |    |
|          |                            |                      |          | 13,744.38 |    |
| Aug. 2.  | C. M.                      |                      | 18.38    |           |    |
| 3.       | Cash                       |                      | 8,026.00 | 8,044.38  |    |
|          |                            |                      |          | 5,700.00  | 30 |



## SCHEDULE "B".

Feb. 11th, 1927

Monmouth Plumbing Supply Co.  
33 Second Avenue,  
Long Branch, N. J.

Gentlemen:

10 We hereby guarantee payment of plumbing material amounting to eight thousand one hundred dollars (\$8,272.00) as per estimate dated January 18th, 1927, also for all extra material that furnish, to be installed by plumbing contractor, George F. Herbert, on Apartment House Job, Garfield Ave., Avon, N. J.

20 Terms of payment are 2% for cash on the 10th of the month following date of invoice, or 30 days net. On Note in full upon completion of delivery of all material. Excepting extra material

Very truly yours,

ARLINGTON REALTY COMPANY,  
C. Herbert Walker, Pres.

Witness

Ernest Stauch  
George F. Herbert

30

40



# **Answer of Arlington Realty Co.**

Filed Sept. 19, 1927.

## **MONMOUTH COUNTY CIRCUIT COURT.**

MONMOUTH PLUMBING SUPPLY  
COMPANY, a body corporate,  
Plaintiff,

vs.

GEORGE F. HERBERT and ARLING-  
TON REALTY COMPANY, Build-  
ers, and ARLINGTON REALTY  
COMPANY, Owners,  
Defendants.

Answer of  
Arlington  
Realty Co.

10

Arlington Realty Company, Body Corporate of  
New Jersey, answering the Complaint herein, say:

26

1. It admits Paragraph One.
2. It admits Paragraph Two.
3. It admits Paragraph Three.
4. It denies Paragraph Four, except that some materials for building were delivered on the grounds in said complaint described.

5. It admits that the materials furnished were for use in the building mentioned but denies the remainder of Paragraph Five.

30

6. It denies that the whole or any part of said \$5700. mentioned in Paragraph Six is due and unpaid from Arlington Realty Company to said Plaintiff.

7. It denies Paragraph Seven of said Complaint.

40



8. It denies Paragraph Eight.

*Answering Second Count, Defendant says:*

1. It denies Paragraph One.
2. It denies Paragraph Two.
3. It denies Paragraph Three.

10

*Answering Third Count, Defendant says:*

1. It denies Paragraph One, renewing its answer to the same allegations in former Counts as far as necessary.

2. It denies Paragraph Two in so far as the same seeks to bind this defendant.

20 3. It denies Paragraph Three and says that there is nothing remaining due and unpaid from defendant, Arlington Realty Company, to said Plaintiff.

It prays to be hence dismissed with its reasonable costs and charges.

#### FIRST DEFENSE.

30 1. Plaintiff did not furnish all the materials set forth in Schedule "A", nor were same used in the construction of said building. The Schedule is excessive both as to quantities and prices.

#### SECOND DEFENSE.

Plaintiff has been paid in full for all materials furnished.

#### THIRD DEFENSE.

The alleged guaranty was not made by author-

40



*Answer of Arlington Realty Co.*

ity of Arlington Realty Company and has not been agreed to or ratified by it. Same is illegal and not binding on said defendant.

MICHAEL J. TANSEY,  
Attorney for Defendant, Arlington  
Realty Company.

10

**Reply.**

Filed Sept. 22, 1927.

1. Plaintiff denies the allegations contained in First, Second and Third Defense in the answer.

CHARLES F. SEXTON,  
Attorney of Plaintiff. 20

30

40



**Amended Answer.**

Filed Jan. 7, 1929.

**MONMOUTH COUNTY CIRCUIT COURT.**

|    |                                                                                                                                      |   |                                                 |
|----|--------------------------------------------------------------------------------------------------------------------------------------|---|-------------------------------------------------|
| 10 | MONMOUTH PLUMBING SUPPLY<br>COMPANY, a corp.,<br>Plaintiff,<br>vs.<br>ARLINGTON REALTY COMPANY, (a<br>corp.) et als.,<br>Defendants. | } | On Mechanics<br>Lien.<br><br>Amended<br>Answer. |
|----|--------------------------------------------------------------------------------------------------------------------------------------|---|-------------------------------------------------|

20 Defendant Arlington Realty Company, (a corp.)  
 with principal office in the City of Newark, County  
 of Essex and State of New Jersey, hereby amends  
 its answer to the Plaintiff's Complaint in the above  
 cause of action, and says:

1. It denies the matters and things set forth in  
 said complaint.

**FIRST SEPARATE DEFENSE.**

30 1. Said Plaintiff was paid in full for said  
 claim.

**SECOND SEPARATE DEFENSE.**

1. On or about August 3rd, 1927, Plaintiff by  
 its servants and agents, signed and delivered a  
 release of Mechanics Lien against the premises de-  
 scribed and set forth in said complaint.

MICHAEL J. TANSEY,  
 Attorney for Defendant  
 Arlington Realty Company.



**Rule to Show Cause.**

Filed Jan. 16, 1929.

**MONMOUTH COUNTY CIRCUIT COURT.**

|                                                                                                                             |   |                        |    |
|-----------------------------------------------------------------------------------------------------------------------------|---|------------------------|----|
| MONMOUTH PLUMBING SUPPLY<br>COMPANY, a body corporate,<br>Plaintiff,                                                        | } | Action at Law.         | 10 |
| vs.                                                                                                                         |   | On Mechanics<br>Lien.  |    |
| GEORGE F. HERBERT and ARLING-<br>TON REALTY COMPANY, Build-<br>ers, and ARLINGTON REALTY<br>COMPANY, Owners,<br>Defendants. |   | Rule to<br>Show Cause. |    |

On application made within six days after the rendering of the verdict herein, it is on this 14th day of January, 1929, on motion of Michael J. Tansey, attorney for the defendant, Arlington Realty Company, body corporate, Ordered, that the plaintiff and the defendant, George F. Herbert, show cause before this court at Freehold, on the 9th day of February, 1929, why the verdict in this case should not be set aside and a new trial granted. 20

And it is Further Ordered that the said defendant, Arlington Realty Co., body corporate, be permitted to reserve all the exceptions taken at the trial on questions of law, and rulings of the trial judge on the admission and rejection of evidence, and the exceptions taken to portions of the judge's charge to the jury, and the exceptions taken to the refusal of the trial judge to grant defendant's motion for non-suit and for direction of a verdict. 30

And it is further Ordered that all proceedings 40



RULIF V. LAWRENCE,  
Judge.

10 Rule Discharging Rule to Show Couse.

Filed June 14, 1929.

MONMOUTH COUNTY CIRCUIT COURT.

Plaintiff,

vs.

GEORGE F. HERBERT and ARLINGTON REALTY COMPANY, Builders, and ARLINGTON REALTY COMPANY, Owners,  
Defendants.

### Action at Law.

On Mechanics  
Lien.

### Rule Discharging Rule to Show Cause.

30 It appearing to the Court on the 14th day of January, 1929, a rule was granted on application of Michael J. Tansey, attorney for the defendant, Arlington Realty Company, Body corporate, to show cause before this Court on the ninth day of February, 1929, why the verdict in the above mentioned cause should not be set aside and a new trial granted, which said rule was continued to April 27, 1929, at which time the matter was brought on for argument by Michael J. Tansey, attorney for the Arlington Realty Company in the presence of Charles F. Sexton, attorney for the Monmouth



*Rule Discharging Rule to Show Cause.*

Plumbing Supply Company, body corporate, and this Court having heard and determined the matter,

It is on this 14th day of June, 1929, on motion of Charles F. Sexton, attorney for the Monmouth Plumbing Supply Co., plaintiff herein, Ordered, that the said rule be discharged and for nothing holden with costs. 10

It is Further Ordered by the Court on its own motion that the verdict entered against the defendant George F. Herbert for assessment of nominal damages be set aside.

RULIF V. LAWRENCE,  
Judge.

On motion of

CHARLES F. SEXTON, 20  
Attorney for Plaintiff.

Let the above rule be entered on the minutes.

Rule entered June 14, 1929.

Consent is given to the entering of the foregoing rule.

MICHAEL J. TANSEY,  
Attorney for Defendant,  
Arlington Realty Co. 30



# Testimony.

## MONMOUTH COUNTY CIRCUIT COURT

10 MONMOUTH PLUMBING SUPPLY  
COMPANY, a body corporate,  
Plaintiff,  
vs.  
20 GEORGE F. HERBERT and ARLING-  
TON REALTY COMPANY, Build-  
ers, and ARLINGTON REALTY  
COMPANY, Owners,  
Defendants.

20 Transcript of testimony taken in the above stat-  
ed cause, before Jacob Steinbach, Esquire, Judge  
of the above Court, and a Jury, at the Court House  
Freehold, New Jersey, on Friday, January 4th,  
1929, at two o'clock in the afternoon.

### APPEARANCES:

MR. CHARLES SEXTON, Attorney of Plain-  
tiff.

MR. MICHAEL J. TANSEY, by MR. MCGILL,  
Attorney of Defendant Arlington Real-  
ty Company.

30

Jury sworn.

40 Mr. Sexton: I will explain, if your Honor  
please, to the Jury, that by agreement with  
Counsel, we have impaneled this Jury, and  
as it seems that another Counsel for Mr.  
Walker is not present, I am taking a witness  
out of turn; in other words, we have not  
reached a position in the case where this  
testimony will come in, but as this witness



*Thomas J. Berkstresser—Direct.*

is going to leave the State, I will call him, and then the case will go over until Monday morning, when we will formally open.

THOMAS J. BERKSTRESSER, being duly sworn, according to law, on his oath testifies as follows: 10

*Direct-examination by Mr. Seaton:*

Q. Mr. Berkstresser, you live where? A. Long Branch, New Jersey.

Q. You are in what business? A. President and General Manager of Monmouth Plumbing Supply Company.

Q. They do business where? A. Practically all over the county and counties adjoining. 20

Q. You are also interested in the plumbing company? A. I am President and General Manager.

Q. You are also interested in another company? A. Oh, yes.

Q. Where? A. In Miami, Florida.

Q. And you are about to sail for Miami, Florida, in the interest of that business? A. Yes.

Q. Do you know the defendant, C. Herbert Walker? A. Yes, sir. 30

Mr. McGill: I object.

Q. Or rather, do you know C. Herbert Walker? A. Yes, sir.

Q. Where did you meet him? A. I met him down to the Arlington Hotel—or Arlington apartment house in Avon the first time.

Q. Where did you meet him? A. At the Arlington Apartments when they were in construction. 40



*Thomas J. Berkstresser—Direct.*

Q. With reference to what? A. I just went down, Mr. Davis and I, to look over the conditions and character of the land, and to arrange how we were going to get our money—lines of credit—

Q. And at that time, did you have a paper with you signed by the Arlington Realty Company? A. No, sir.

10

Q. You did not have it at that time? A. No, sir.

Q. Did you have a talk with Mr. Walker? A. Only Mr. Davis and I—Mr. Davis, the Treasurer—why, he talked over the lines of credit; he explained what he intended to do—how he was going to get his money, etc.

Q. What did Walker say?

20

Mr. McGill: I object unless we first see if Mr. Walker had authority to bind the defendant.

The Court: I suppose that is the trouble that you always get in when you swear a witness out of turn. If you are going to object to that, the only thing Mr. Sexton can do is to go ahead and complete his case now.

Mr. Sexton: The pleadings will show he is President of the Arlington Realty Company, one of the defendants in this case; the Court will take judicial notice of that.

30

Q. (Last question read as follows): What did Walker say?

The Court: It states in the pleadings that he is President of the Arlington Realty Company; that is so, Mr. McGill. If you still object—

40

Mr. Sexton: We have agreed to take this witness out of turn, and I am not going to



*Thomas J. Berkstresser—Direct.*

have an objection to this now, and put us right back in the same position that we were this morning. I ask to have this stricken out, and we will start over.

The Court: The Plaintiff has put you in this position, now go ahead and try your case; Mr. Tansey ought to say nothing— 10

Mr. McGill: I am not putting Mr. Sexton in that position; I don't feel like permitting the witness to be examined in a manner which would bind the defendant corporation unless it could be shown that the conversation had with some individual would be binding upon the corporation.

Mr. Sexton: If your Honor please, I would like to go on with my case; withdraw this witness and go ahead. 20

Mr. McGill: I ask permission to withdraw from the case because I am not in a position to try it; when I agreed this morning, it was on my authority from Mr. Tansey merely to examine one or two witnesses who were about to leave the State.

The Court: Mr. McGill, I don't see how the defendant can blow hot and blow cold.

Mr. McGill: (After discussion.) If your Honor please, I will consent to the examination of this witness along the lines commenced by Mr. Sexton, with the understanding that if Mr. Sexton is unable later on to show that Mr. Walker has authority to bind the corporation, that this testimony be stricken out. 30

The Court: Very well.

Q. (Last question re-read, as follows:) What did 40



*Thomas J. Berkstresser—Direct.*

Mr. Walker say? A. Mr. Walker claimed with Mr. Davis and I, when we had this conversation, and so forth, that he might have to give us a little paper, in the mean time, if it might help us out, and Mr. Davis told him as long as everything was satisfactory along this line, and he took care of everything, there was no objection to it.

10 Q. Can you fix the time of this conversation with reference to whether the materials had been furnished then or not? A. Part of the materials had been delivered, because I noticed they were putting in a lot of odd sizes of brass pipe, and so forth.

Q. Later on, did you have a conference when Mr. Walker was present? A. I went down to see Mr. Walker, and made an arrangement to come up and meet Mr. Davis on Tuesday morning. Mr. 20 Davis looks after our financial affairs on Tuesdays, and I said we would take it up, and see what the balance of the account—

Q. You mean Mr. Harry Davis here? A. Yes.

Q. Had the materials been furnished at that time? A. Oh, yes; everything had been furnished; materials returned and credited for, and the account was agreed to—the statement of how much the balance was.

30 Q. Had there been a payment made at that time? A. Our manager had gone to them and signed a release—

Mr. McGill: I object.

Objection sustained.

Q. Had there been a payment made? A. I believe the Monmouth County Mortgage Company had paid eight thousand, or eight thousand and some odd dollars.

40



*Thomas J. Berkstresser—Direct.*

Q. And this conference was after that payment was made? A. Yes, sir.

Q. Who was present at the time of the conference? A. Mr. Walker, Mr. Davis and myself. Mr. Rosenkranz heard part of it, not all; that's the reason he was not here today; he is in New York.

Q. Mr. Stauch? A. Yes, Mr. Stauch was there. 10

Q. And that was held where? A. That was held in our office about—around the 9th of August, 1927, which was a Tuesday night; around that time.

Q. And your office was at the Marlborough Building? A. 32 Second Avenue.

Q. What was said by Mr. Walker and by anyone else to Mr. Walker in reference to the settlement of the balance due?

Mr. McGill: I object to what somebody else might have said. 20

Mr. Sexton: In the presence of Mr. Walker.

The Court: What do you want to show?

Mr. Sexton: That there is an account stated right here, an account agreed upon.

Objection overruled and exception allowed Mr. McGill.

Q. What was said at that time? A. Well, Walker put up a holler that he did not have the money to go on with the building; he couldn't raise it; this \$5700—he had been to Newark—he said he had been all over there and done everything to raise it, and wanted to know if we could take a mortgage. Mr. Davis told him we are not in the mortgage business. He got very angry about it and we would have to wait for the balance of the 30 40



*Thomas J. Berkstresser—Cross.*

money which was agreed upon, and so after conversations back and forth, Mr Davis said to him, "I'll tell you what we will do; we will take \$5700.00 plus a bonus of twenty per cent., and if we can get rid of it for you, if you can sell it inside of three months—we don't want a nickel; we don't want nothing; we don't want no bonus; we are not in that business, and we will be willing to waive it, if you can raise it in three months, and won't ever charge you anything." Walker said, "I will go to Freehold tomorrow and get a description of the property, and bring it back here, and you will draw up the mortgage." Instead of that, the next day, he made a holler or claim he didn't owe the money, or something that I don't know what it was, but up to that moment, there was never a dispute on that account.

Q. Was there any claim made that goods had not been furnished? A. Not for a minute.

Q. Or anything said by Mr. Walker that he did not owe this sum of \$5700.00? A. Not a word; why would he go and—

Q. Was any claim made that proper credits had not been given him? A. That had all been figured out with Mr. Stauch, our Manager, and Mr. Herbert here went over the bills; they checked them for two or three days to get him satisfied, and he was satisfied, too.

*Cross-examination by Mr. McGill:*

Q. When was that checking up that you spoke of, done? A. Well, that was the checking that was right after the job was completed; I don't know just what the date it was done, but they were doing it for two or three days.



*Thomas J. Berkstresser—Cross.*

Q. Are you sure it was before this conference you said you had with Mr. Walker? A. Oh, yes; long before that. We had to satisfy him first before he would make any kind of settlement.

Q. Do you recall receiving a check from the Mortgage Title Guaranty Company? A. I know a check came into the office.

10

Q. You were not present when it came in? A. No; no.

Q. Did Mr. Walker at any time complain to you or to some member of your firm, in your presence, that there was some mistake about the delivery of material on that job? A. I believe he did mention it, and I wanted him and our plumbing manager to get together with their bills and see about it, but Mr.—I didn't see Mr. Walker; he had to go to Newark, or something; he phoned he would not be down that night.

20

Q. He complained to you— A. No, he complained to our Manager; he told him, and I went down to see him, but he went to Newark, and I didn't see anything of him.

Q. At that particular time, he did find out that Mr. Walker had complained about deliveries? A. Our manager had told me, and I went down and checked it over.

30

Q. Didn't he tell you that the material that you claimed had been delivered on that job had, as a matter of fact, not been delivered? A. No, sir.

Q. At any time? A. Not at any time.

Q. Didn't that conversation take place when you were down in Mr. Walker's apartment? A. No, no, sir; not that the goods were not delivered. He said there were some differences; I said, "We will check them with you. We want you satisfied; we

40



*Thomas J. Berkstresser—Cross.*

don't think this job is the last we will do. We want to get the business." He has a very good, fine building.

Q. Do you know when this \$8026.00 was paid?

10 A. I imagine that was paid somewhere along in August; just a few days before this mortgage; he was to get a description of the property; we were to take a mortgage on the apartment—just a few days before that.

Q. Was the job fully completed at that time?

A. No; there are a few odds and ends to be done there yet.

Q. Was the plumbing work finished at that time?

A. I don't know.

20 Q. Have you furnished any materials to that job since? A. No; he bought somewhere else; that was not for the plumbing materials; the heating materials.

Q. Do you know whether he did or not, or are you just guessing now? A. I know he did.

Q. How do you know he did buy other materials from other supply houses? A. Another supply house told me.

30 Q. You made inquiries? A. Certainly; I wanted to know why we did not get the business, and I asked them if they got it, and they said, "Yes," they did.

Q. After all the materials you furnished, he had to go elsewhere and— A. No; he didn't buy the heating materials; he did not; he was supposed to but did not; that's what started me asking about that, and what I understand was—

Q. You don't know that, either? A. I don't know that, but I understood so. He can tell you that.

40 Q. Where did this conversation take place when you said this agreement, generally, was entered in-



*Thomas J. Berkstresser—Cross.*

to? A. I was not there; I was in Florida at the time.

Q. You don't know about that? A. No, I don't know about that.

Q. When did you remove to Florida? A. Around the 15th of March.

Q. 1927? A. Yes; I think at that time.

10

Q. And about what date did you have this first conversation with Mr. Walker? A. When the job was pretty well along, when I went down there, as I explained to Mr. Sexton.

Q. You received payments from time to time for material on this job? A. I received a bum note.

Q. There were payments made, weren't there—a payment of \$8026.00 which you got from the Title Company? A. I never heard of them if there was.

26

Q. Was any officer of the Arlington Realty Company present with Mr. Walker when you say you had this conversation with him about the settlement of this account? A. I don't know who the officers were; he seemed to be the whole show.

Q. Was anyone present whom you did not know? A. I didn't see anybody. I met his wife for a few minutes, or his wife's sister, or somebody.

Q. Was that in the apartment or in your office? A. No, that was the apartment; that was the first or second time I met Mr. Walker.

30

Q. You went down voluntarily; you were not requested to come down and see Mr. Walker? A. Oh, no.

Q. Do you, or did you, know Mr. Walker? A. No, sir; he told me his sister was in the real estate business, in Florida.

Q. Do you know whether she was an officer of the company? A. I don't know anything about her.

40



*Thomas J. Berkstresser—Redirect.*

Q. She was not present when you had this conversation? A. If she was, I never met her.

Q. Those present were Mr. Walker, Mr. Davis, Mr. Rosenkranz and yourself? A. I don't know whether Mr. Rosenkranz was there or not; I don't think he was there. Mr. Davis and I.

10

*Redirect-examination by Mr. Sexton:*

Q. Did you know, Mr. Berkstresser, that there was a guarantee given by the Arlington Realty Company? A. I did not know it at that time, no.

Q. Did you know it at the time you went down to speak about money matters? A. I found it out about that time; we had a guaranty from them that they would pay us when they got the money from the mortgage company.

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The Court: This case is now continued to Monday, January 7th, at 10 A. M., and will proceed immediately upon the opening of Court. The jurors who are in this case are excused until Monday at 10 A. M.

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## NEW JERSEY SUPREME COURT,

## MONMOUTH COUNTY.

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MONMOUTH PLUMBING SUPPLY  
COMPANY, a body corporate,  
Plaintiff,

vs.

GEORGE F. HERBERT and ARLING-  
TON REALTY COMPANY, Build-  
ers, and ARLINGTON REALTY  
COMPANY, Owners,  
Defendants.

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On Petition, &c. 10  
Testimony.

Transcript of testimony taken in the above en-  
titled cause before STEINBACH, J., and a Jury, at  
the Court House, Freehold, New Jersey, on Mon-  
day the seventh day of January, A. D. 1929. 20

## APPEARANCES:

MR. CHARLES SEXTON, Attorney of Plain-  
tiff.

MR. MICHAEL J. TANSEY, by MR. MCGILL,  
Attorney of Defendant Arlington Real-  
ty Company.

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The Court: Mr. Sexton, I believe you were  
going to file an order with me.

Mr. Sexton: I have a copy of it here.  
During the day I will have another copy  
made. I borrowed this from Mr. Tansey.

Mr. Tansey: If your Honor please, we  
want to file an amended answer setting up  
a second separate defense.

The Court: Any objection, Mr. Sexton? 40



*Jacob Perri—Direct.*

Mr. Sexton: With the reply to it that we deny that there was a release of the mechanic's lien as against the owner, the Arlington Realty Company.

Mr. Tansey: The release will speak for itself, I suppose.

10

Mr. Sexton: We certainly have a right to reply to it. I do object to the filing of it at this late date but I realize the Court has absolute discretion in the matter.

The Court: Are you going to be surprised?

Mr. Sexton: No, we are not surprised.

The Court: You desire to file your reply later.

Mr. Sexton: Yes.

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The Court: The amendment will be allowed.

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JACOB PERRI, sworn for the Plaintiff.

*Direct-examination by Mr. Sexton:*

Q. Mr. Perri, you reside where? A. Long Branch.

Q. And you are in the employ of whom? A. Monmouth Plumbing Supply Company.

30 Q. And you have been for how long? A. Since 1919.

Q. In what capacity? A. Bookkeeper.

Q. And as such are you familiar with the books of the Monmouth Plumbing Supply Company? A. Yes, sir.

Q. And with the account of the Arlington Realty Company? A. Yes, sir.

40

Q. I show you some papers and ask you if you



*Jacob Perri—Direct.*

know what they are? A. This is an estimate for material to be furnished on the Walker apartments of the Arlington Realty Company given to George F. Herbert, plumbing contractor.

*Mr. Tansey:*

Q. Did you make this copy yourself? A. No, sir. 10

Q. Did you make the book entries yourself? A. Yes, sir.

Q. Do you know who made this copy? A. It was made by the stenographer, the typewritten part, but it was filed.

Q. She is not here? A. No, sir.

Mr. Tansey: I object to this.

Mr. Sexton: I haven't offered it yet. I just wanted to show it to him. I have demanded of you to produce the duplicate copy of this estimate, the original copy. 20

Mr. Tansey: What?

Mr. Sexton: The original copy of the estimate.

Mr. Tansey: Have we such a thing, Mr. Walker?

Mr. Walker: No. 30

*Mr. Sexton:*

Q. How many copies were made, Mr. Perri? A. The original and this copy.

Q. And what became of the original? A. That was given to either Mr. Herbert or the Arlington Realty Company. I really couldn't tell you. You would have to ask Mr. Stout about that.

Mr. Sexton: At this time I ask that it be marked for identification. 40



*Jacob Perri—Direct.*

The Court: It may be marked.  
Marked Exhibit A for identification.

Q. Was this estimate made in the usual course of business of the Monmouth Plumbing Supply Company, Mr. Perri?

10 Mr. Tansey: I object to that if your Honor please.

The Court: Objection sustained.

Mr. Sexton: If he knows.

Mr. Tansey: I don't see it is material.

The Court: Objection sustained.

Mr. Sexton: May I have an exception?

The Court: Yes.

20 Q. Mr. Perri, have you the books of the Monmouth Plumbing Supply Company in reference to the claim against the Arlington Realty Company?  
A. Yes, sir.

Q. Before producing them, will you state the manner in which the books of the company are kept?

Mr. Tansey: I object to that if your Honor please as immaterial. What difference does it make?

30 The Court: Well, it makes a great deal of difference unless you are going to admit the books without proving them.

Mr. Tansey: As to how they were kept? They may have been kept in a thousand different ways.

40 The Court: Oh yes, it does, Mr. Tansey. Just think a minute. It shows they were properly kept and may become evidence. He is laying the foundation for proving his books.



*Jacob Perri—Direct.*

Mr. Tansey: Does your Honor say by whom and so on is material?

The Court: Yes, I think that is what it means. I am going to allow it.

A. The material when charged or when delivered is charged, making four copies—

10

The Court: Just a moment. He is jumping to conclusions.

Mr. Sexton: I don't think so.

Q. When the charge—

The Court: Just a moment. The goods are delivered by whom?

The Witness: If they are not called for they are delivered by the truck driver.

20

*By the Court:*

Q. You are speaking of four copies of what, made by whom? A. There are four copies made by the counter man or stock man.

Q. Four copies of what? A. Of the charge.

Q. The order or the charge? A. The charge.

Q. Have you a copy of those charges? A. I have a copy, yes, sir.

Q. And I shall ask you to produce copies of the invoices and charges.

30

Mr. Tansey: I object, if your Honor please, because he says they were made by the counter man and not by himself, apparently. I don't see that he can identify them. The man who made them must identify them.

The Court: He hasn't attempted to. He

40



*Jacob Perri—Direct.*

has asked you to produce them. After you produce them they will put on the proper person to identify them.

Mr. Sexton: Are you going to produce them? Are these produced?

10 Mr. Tansey: If they are what you are asking for, I don't know anything about them.

Q. I show you, Mr. Perri, papers attached with a clip and ask you if you know what they are? A. These are original invoices of our charges and also credits.

Q. You say there are four copies made? A. Yes, sir.

20 Q. And what is done with the original? A. The original is what you have there, that is mailed to the customer.

Q. And what is done with the second copy? A. The second copy is kept without files as an office copy.

Q. Have you the second copies? A. Yes, sir.

Q. Will you produce them? A. They are right here.

30 Q. And these slips attached by rings through the holes are the second copies? A. Yes, sir.

Q. What is done with the third copy? A. The third copy is left as a memorandum copy when the material is delivered on the job to the customer.

Q. Is it returned? A. No, sir.

Mr. Sexton: I ask you if you will produce the third copies.

Mr. Tansey: We haven't anything like that, have we?

40 Mr. Walker: We haven't got those. We have got some extra copies.



*Jacob Perri—Direct.*

Mr. Sexton: Will you produce some of them?

Mr. Walker: These are the ones left with the builder.

Mr. Tansey: Put a rubber band around them, Charley.

Mr. Sexton: The third copy is rolled with the rubber band. 10

The Court: Do you want to mark them?

Mr. Sexton: I am going to mark them altogether.

Q. And what becomes of the fourth copy, Mr. Perri? A. The fourth copy is the delivery receipt to be signed by whoever receives the material and that is returned.

Q. I show you another package and ask you if that is the fourth copy? A. That was the other way around, the number three is the receipts and number four is the memorandum copy. 20

Q. What do you mean? Just get it straight. A. The one I said before, the third copy, was the memorandum copy, I mean the third is the delivery receipt.

Q. And then the one with the band around would be numbered four? A. That is right. 30

*By the Court:*

Q. Number four is what? A. That is the memorandum copy, left on the job.

*By Mr. Sexton:*

Q. And number three are the delivery receipts? A. Yes, sir.

Mr. Tansey: Mark them properly. 40



*Jacob Perri—Direct.*

Q. And they are what you have in your hand?

A. Yes, sir.

Mr. Sexton: Now I offer, if your Honor please, for identification these memorandums. I offer the originals.

10 The Court: They have been marked for identification, haven't they?

Mr. Sexton: No.

Originals marked B for identification.

The Court: These you are marking now are the ones he testified he sent to the customer, is that right, Mr. Tansey?

Mr. Tansey: I understood he was marking all four. I think the originals are the ones that were sent to the customer.

20 The Court: Show them to the witness.

The Witness: Yes, sir.

The Court: Mark them B for identification.

Mr. Sexton: I offer for identification number two, those that are kept by the office for the office copy.

Marked C for identification.

Mr. Sexton: I offer for identification number three, the delivery receipts.

30 Marked D for identification.

The Court: Left on the job or receipted and returned?

The Witness: Receipted and returned.

Mr. Sexton: I offer number four, those that are left on the job.

Marked E for identification.

40 Q. I show you C for identification, Mr. Perri and ask you if they were made in the regular course



*Jacob Perri—Direct.*

of business of the Monmouth Plumbing Supply Company?

Mr. Tansey: I object, if your Honor please, it is not material.

The Court: Objection sustained. He may testify, however, how they were made.

10

Q. How were they made, Mr. Perri? A. They are charged and later billed up.

Q. Charged by whom? A. Charged by the counter-clerk or whoever put out the material to be delivered on the truck.

Q. And billed up by whom? A. By myself.

Q. And all the billing up that was on those slips was done by you? A. Yes, sir.

Q. In your handwriting? A. Yes, sir.

20

Q. And the billing done by you also appears on the copy, B for identification, does it not? A. Yes, sir.

Q. And that copy is the one that was mailed to the customer? A. Yes, sir.

Q. What is then done in reference to this account? A. Why from these three copies, the amount of the charge is posted to the account.

Q. Have you the account? A. Yes, sir.

Q. Will you produce it? A. There it is.

30

Q. That is the account of whom? A. George F. Herbert, secured by the Arlington Realty Company, the apartment house job.

Q. Who makes up that account? A. This is made by the bookkeeper, most of it and part of it by myself.

40



*Jacob Perri—Direct.*

*By the Court:*

Q. What was the bookkeeper's name? A. Ludwig.

*By Mr. Sexton:*

10 Q. Is he in the employ of the company at the present time? A. Yes, sir.

Q. How much of it was made up by you? A. Only the credits were put through by myself.

Q. All the credits? A. Yes, sir.

Q. And simply the items were written in by the bookkeeper? A. Yes, as charges.

Q. Copied from the original slips? A. Yes, sir.

Mr. Sexton: I ask that that be marked for identification.

20 Marked F for identification.

Q. What further, if anything, was done in reference to the billing of this account to the customer? A. A monthly statement was mailed out.

Q. Were monthly statements mailed out in this case? A. Yes, sir.

Mr. Sexton: I ask you to produce the monthly statements, Mr. Tansey?

30 Mr. Walker: These were not mailed to me, they were given to me.

Q. I show you four papers and ask you if you recognize those? A. Yes, sir.

Q. What are they? A. Statements of the account.

Q. Of what account?

A. Of the George F. Herbert account, secured by the Arlington Realty Company.

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*Jacob Perri—Direct.*

Q. Who were they made by? A. By myself. Some of them were made by myself and one by Mr. Ludwig.

Q. All the others are made by yourself? A. Yes, sir.

Q. I ask you if they are all the statement mailed out? A. No, they are not all here.

10

Mr. Sexton: Have you any more?

Mr. Walker: No.

Q. There were more mailed out? A. Yes, sir.

Mr. Sexton: I ask that they be marked for identification.

Mr. Tansey: I object to the offer as being immaterial.

The Court: Why?

20

Mr. Tansey: A statement mailed is not any evidence of any liability on the part of the party to whom it is mailed.

Mr. Sexton: Under my theory in this whole case they are material, coming from the plaintiff and demanding it be produced I say it is.

The Court: The defendant must have known they were charged.

Mr. Sexton: Yes, sir.

30

The Court: I think I am going to allow them to be marked for identification.

Mr. Tansey: Your Honor will note my exception?

The Court: They will be marked G for identification. You can take your exception on the record if you desire.

Mr. Tansey: I want to be in time.

40



*Jacob Perri—Direct.*

Q. Do you find credits, Mr. Perri, given on this account? A. Yes, sir.

Q. And when credits are given, what is the procedure in that case? A. The procedure of writing up the credit, which is made in duplicate, the original mailed out to the customer and a copy kept in the office.

10

Q. I show you again papers marked for identification B and attached to it appears some papers in cream or white and ask you what they are? A. They are the original credit slips.

Q. And what was done with them? A. These were mailed to the customer.

Q. And then again referring to the papers marked C for identification I see some papers which is light yellow and ask you what they are? A. These are the office copies of the credits.

20

Q. And they are copies of the white or cream papers that are attached to the papers marked B for identification, are they? A. Yes, sir.

The Court: Attached to what?

Mr. Sexton: The papers marked Exhibit B for identification.

The Court: What were the ones sent the customer attached to?

30

Mr. Sexton: Your Honor is confused, the ones sent to the customer are B for identification.

The Court: These are the office copies?

Mr. Sexton: Yes.

The Court: What are they attached to?

Mr. Sexton: They are attached to C for identification. I will withdraw this witness for the time being, if your Honor please, I don't want to encounter any objection.

40



*Jacob Perri—Direct.*

Mr. Tansey: I would like to question him on one or two phases of his testimony.

Q. Mr. Perri, what is the amount of goods purchased on this account as shown by the books?

Mr. Tansey: I object, if your Honor please.

10

The Court: Yes, objection sustained.

Mr. Sexton: That is just the reason I asked the question.

Mr. Tansey: You wanted to see whether I was awake.

Mr. Sexton: Mr. Perri, I will withdraw you.

Mr. Tansey: Just let me ask him one or two questions.

20

*Mr. Tansey:*

Q. These slips that were made by you were not from your original knowledge of the shipment, were they? A. Yes, sir.

Q. You, yourself, saw the shipment go out? A. No, sir.

Q. Somebody told you it had gone out? A. Most of it is signed for.

Q. What? A. Most of it is signed for.

30

Q. Or you got it from some card or ticket, didn't you? A. Just from the original charge.

Q. You, yourself, copied your figures from some other ticket, didn't you? A. What do you mean?

Q. You copied the figures you made from some other slip? A. From the price book.

Q. No, I mean the order or whatever it was you entered on the sheet you copied from somewhere else, didn't you? A. No, sir.

40



*Jacob Perri—Direct.*

*By the Court:*

Q. Just a moment. Pick up what you call your ledger book, that is in your handwriting, isn't it?

A. No, sir, not all of it.

Q. All that which is in your handwriting, where did you get your information from? A. From the charges or credits.

Q. These physical pieces of paper that you saw? A. Yes.

The Court: Does that answer you, Mr. Tansey?

Mr. Tansey: I suppose so. My question was whether he knew it himself or whether he got it from some slips of paper.

The Court: He answered you and said he got it from some slip of paper.

*By Mr. Tansey:*

Q. You had some slips there which were receipted for for the goods delivered? A. Yes, sir.

Q. And would that in every instance cover the goods that were delivered? A. No, sir.

Q. There were some goods delivered or alleged to have delivered which were not receipted for? A. Right.

Q. And so the slips you have there as receiving for goods are not complete, are they? A. No, sir.

Q. Does that mean goods would be left there without being receipted for? A. Yes, sir.

Mr. Tansey: That is all.

Mr. Sexton: That is all.



*George F. Herbert—Direct.*

GEORGE F. HERBERT, sworn for the Plaintiff.

*Direct-examination by Mr. Sexton:*

Q. Mr. Herbert, you reside where? A. In Avon.

Q. And what is your business? A. Plumber.

Q. You know Herbert Walker? A. Yes, sir.

Q. When did you first meet him? A. I couldn't tell you when I first met him. 10

Q. Approximately? A. Prior, I imagine it was in January sometime.

Q. Of what year? A. 1927.

Q. Did you do any work for him? A. No, sir.

Q. Did you do any work for the Arlington Realty Company? A. Yes, sir.

Q. And who did you see in reference to this work? A. What do you mean, in reference to the work? 20

Q. In reference to the work of the Arlington Realty Company? A. Who I did business with?

Q. Yes. A. Mr. Walker.

Q. When was it that you first had dealings with Mr. Walker in reference to the Arlington Realty Company? A. I think it was January twenty-fourth, if I am not mistaken.

Q. What was that? A. Well, it was seeing about doing work in this building. 30

Q. What building are you speaking of? A. The apartment house.

Q. Apartment house where? A. Avon.

Q. Where? A. Garfield Avenue, near the beach.

Q. How far from the beach? A. One block. Part of the block, it isn't a block, it is about half a block.

Q. Garfield Avenue runs in what direction? A. East and west. 40



*George F. Herbert—Direct.*

Q. And which side of Garfield Avenue is the building on? A. South side.

Q. And between what streets? A. Ocean Avenue and First, I think they are, I don't know.

Q. What is the nature of the building, the character of building that is there now? A. Construction?

10 Q. No, what kind of a building is it? A. Apartment house.

Q. How many apartments has it? A. Twenty-four, I think.

Q. Did you do the plumbing work for this apartment house? A. Yes, sir.

Q. And this conversation you had or this transaction you had with Walker, the Arlington Realty Company was in reference to doing the plumbing work for the building which you have just described? A. Yes, sir.

20 Q. Did you have a contract with the Arlington Realty Company? A. No, sir.

Q. Did you have a memorandum or agreement? A. I had an agreement, yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. Did you see this paper signed? A. Yes, sir.

Q. And signed by whom? A. Mr. Walker.

30 Mr. Sexton: Any question about that?

Mr. Tansey: We object to it as soon as you offer it.

The Court: Why do you object to it?

Mr. Tansey: It has no bearing upon the amount due from the Arlington Realty Company to the Monmouth Plumbing Supply Company.

The Court: Is that your only objection?

40 Mr. Tansey: It is immaterial.



*George F. Herbert—Direct.*

The Court: It shows contract, doesn't it? It shows authorization by the builder?

Mr. Tansey: It is a contract between third persons.

The Court: No, it isn't.

Mr. Tansey: It is an alleged contract between George Herbert and the Arlington Realty Company. 10

The Court: They are both parties in this suit, aren't they?

Mr. Tansey: That may be but there is no alleged contract between the Arlington Realty Company and the Monmouth Plumbing Supply Company.

The Court: I presume it is the basis upon which goods were ordered for the building. 20

Mr. Tansey: He can't show that.

The Court: Not all at once.

Mr. Tansey: They are suing upon a guarantee.

The Court: They are also suing upon a mechanics lien. Wasn't the Arlington Realty Company the owner?

Mr. Tansey: The Arlington Realty Company was the owner. 30

The Court: Is that admitted?

Mr. Tansey: There is no doubt about the fact that the Arlington Realty Company was the owner. A contract between the Arlington Realty Company and George Herbert has no bearing on this case.

The Court: It has a bearing on whether the goods were ordered for that building.

Mr. Tansey: It is possible. 40



*George F. Herbert—Direct.*

The Court: We are talking on mechanics liens.

Mr. Tansey: The mechanics lien possibly is based upon a contract, it is based upon a filed contract.

Mr. Sexton: No, that is just what it isn't based on.

10

The Court: If this builder was not doing the work for the Arlington Realty Company, the Arlington Realty Company wouldn't be liable unless they stood by and saw it going in there. If there was an agreement between the Arlington Realty Company and Herbert to do certain work and in furtherance of that agreement the builder ordered or received goods to go into that building it seems to me to be very material, isn't it?

20

Mr. Tansey: It seems not to me, if your Honor please. I think that the question wholly before the Court at the present time is whether or not the Arlington Realty Company owes anything to the Monmouth Plumbing Supply Company.

The Court: Or whether there is a lien on the property.

30

Mr. Tansey: Yes, sir, as to whether George Herbert owes something to the Monmouth Plumbing Supply Company, that is a different proposition entirely.

The Court: We are not asking that.

Mr. Tansey: How can a contract between the Arlington Realty Company and George Herbert show what is due to the Monmouth Plumbing Supply Company?

40

The Court: It might show a great deal. I am going to admit it.



*George F. Herbert—Direct.*

Mr. Tansey: Allow me an exception. I would like to have another objection there. This appears to be a contract with the Arlington Realty Company and there is nothing to show that is signed by Mr. Walker, that he had any authority to bind the company.

The Court: I asked you if there was any reason other than those you gave. 10

Mr. Sexton: I can't prove this case all at once.

The Court: I think you will have to prove agency before you can admit that in evidence. You can have it marked for identification.

Mr. Sexton: I will ask to have it marked for identification.

Marked H for identification.

20

Q. When was this paper signed, Mr. Herbert?

A. The date of it.

Q. It was signed on the date it bears? A. Yes, sir.

Q. What is the date? A. January twenty-fifth.

*By the Court:*

Q. What year is that? A. 1927.

*By Mr. Sexton:*

30

Q. And as a result of the signing of that paper, did you have any transactions with the Monmouth Plumbing Supply Company?

Mr. Tansey: I object to that, if your Honor please.

The Court: Why?

Mr. Tansey: We have already ruled the paper out for the present and then he says

40



*George F. Herbert—Direct.*

"as a result of signing that paper" I don't think he can refer to it that way.

The Court: I will sustain the objection.

10 Q. Did you have transactions with the Monmouth Plumbing Supply Company relative to material to be supplied at the Arlington Realty Company building? A. I got an estimate from the Monmouth Plumbing Supply Company.

Q. Did you transact business with any member of the Monmouth Plumbing Supply Company? A. Well, the business transacted was with Mr. Stauch.

Q. Ernest Stauch? A. Representing the Monmouth Plumbing Supply Company.

20 Q. Did you receive any paper from Mr. Walker in reference to goods to be delivered by the Monmouth Plumbing Supply Company? A. Guarantee by Mr. Walker.

Q. Have you such a paper? A. Yes, sir.

Mr. Tansey: Guarantee by whom?

The Witness: Arlington Realty Company, signed by Mr. Walker.

Q. Did you see this paper signed? A. Yes, sir.

30 Mr. Sexton: I ask that it be marked for identification.

Mr. Tansey: I am reserving my objection.

The Court: Reserve them on the record if you want them.

Mr. Sexton: State them, if you please.

The Court: What is it, Mr. Tansey? What is the objection to this?

40 Mr. Tansey: The objection is he must show authority for the signing of the alleged guarantee by the Arlington Realty Company.



*George F. Herbert—Direct.*

The Court: It can be marked for identification. Why waste time.

Mr. Tansey: You asked me what my objection was.

The Court: Then you have no objection to its being marked for identification?

Mr. Tansey: No.

The Court: It may be marked for identification.

10

Q. I show you paper marked "A" for identification and ask you if you know what that is? A. Yes, sir.

Q. What is it? A. It is an estimate on the goods furnished, part of them.

Q. Furnished by whom? A. The Monmouth Plumbing Supply Company.

20

Q. Furnished to whom? A. It was furnished to the Arlington Realty Company through me.

Q. And when you received this from whom did you receive this estimate? A. Mr. Stauch.

Q. Did you have any transactions with Mr. Walker in reference to this? A. Prior to this or concerning this?

Q. Concerning this? A. Yes, sir.

Q. Will you state them?

30

Mr. Tansey: I object to that if your Honor please, not showing Mr. Walker's authority.

The Court: I suppose that is true at the present state of the case.

Mr. Sexton: If your Honor please, you will probably note that we are driving along a line which I am going to urge and which I think is very sound that where a scheme, a

40



*George F. Herbert—Direct.*

10        general scheme, has been carried out an officer of a corporation has transacted business and generally managed and operated and run the business and allowed it to be done by a corporation without objection and then a little later when we get to the point where benefits have been received and taken by that corporation that the corporation is then estopped from denying the authority of the agent.

          The Court: That may be so.

          Mr. Sexton: Sooner or later there is going to be a point which we are going to reach or we are going over the top of these objections. It is for your Honor to say when we have arrived at that point.

20        Mr. Tansey: If your Honor please, he ought to get to that point at once, that would be true if he could prove all those things but he had no authority to bind the corporation or they can't show authority. It wouldn't make a bit of difference anyhow.

          The Court: No, that isn't so. It is according to what you mean by the rest. There is a lot of testimony in here perfectly admissible if the Arlington Realty Company hadn't taken any part in the work.

30        Mr. Tansey: As to George Herbert, but not as to the Arlington Realty Company.

          The Court: They were the owners, you have admitted that on the record.

          Mr. Tansey: Their action is based on a guarantee.

          The Court: No, it isn't, Mr. Tansey.

40        Mr. Tansey: That is the count in the declaration.



*George F. Herbert—Direct.*

The Court: There is also a count on the Mechanics Lien Act, isn't there, Mr. Sexton?

Mr. Sexton: Yes.

The Court: Unless, I have misread it.

Mr. Tansey: That is possible. It may be there is an act of that kind, but at any rate you would have to show there was an agreement made between the alleged officers of the company and Mr. Herbert. They have to show something not by innuendo but the Arlington Realty Company itself was bound not merely by inference. 10

The Court: I will sustain the objection until there is testimony to show that Mr. Walker is an agent of the corporation either testimony direct or such facts that would constitute an agency under the law. 20

Mr. Sexton: I will ask for an exception to that ruling, whether or not he is an authorized agent if the company receives the benefit.

The Court: You haven't proven that yet.

Mr. Sexton: I know I haven't.

The Court: I am only ruling as far as the testimony now is. 30

Mr. Sexton: Your Honor overruled on the ground I haven't shown it.

The Court: Either expressly or such facts as will constitute him an agent in law.

Mr. Sexton: All right.

Q. After obtaining this estimate, Mr. Herbert, did you receive goods from the Monmouth Plumbing Supply Company? A. Yes, sir. 40



*George F. Herbert—Direct.*

Q. And where were those goods received? A. At the apartment house.

Q. The apartment house of whom? A. Mr. Walker, the Arlington Realty Company.

Q. Did you see Mr. Walker at the Arlington Apartment House? A. Yes, sir.

10 Q. What did you see him do in reference to the building? A. He was general superintendent, he was the man in charge of all the work, he run it all.

Q. Was the building built according to any particular plans? A. He had a plan there for a little while and then the plan was discarded and it was run according to his direction.

Q. Meaning Mr. Walker? A. Mr. Walker.

20 Q. Was he on the job all the time? A. Practically all the time.

Q. Giving orders? A. Yes, sir.

Q. And making changes in the building? A. Yes, sir.

Q. In fact he had general superintendence of the construction of this building? A. Yes, sir.

Q. He would give orders to you? A. Yes, sir.

30 Q. Would he be there when the goods of the Monmouth Plumbing Supply Company were delivered on the place? A. He was there practically all of the time when goods were delivered there, sir.

Q. The materials were delivered to the Arlington Realty Company? A. Yes, sir.

Mr. Tansey: If your Honor please, I move that the testimony be stricken out.

The Court: I direct that it be stricken out, it calls for a conclusion.

Mr. Sexton: What calls for a conclusion?

40 The Court: Your question.



*George F. Herbert—Direct.*

Mr. Sexton: The last question? Put the question again.

Q. Was he there when material was delivered upon the premises of the Arlington Realty Company? A. Was Mr. Walker there?

Q. Yes. A. Yes, sir.

Q. Was he there when material was delivered on the premises of the Arlington Realty Company to be used in the construction of a building of the Arlington Realty Company?

10

Mr. Tansey: I object, if your Honor please. I don't see how his presence there can bind the Arlington Realty Company in view of the fact there is no proof he had any authority to bind them.

The Court: That isn't the question. The question is whether or not he was there when these goods were delivered.

20

Mr. Tansey: His being there even if he answered yes, wouldn't make any difference.

The Court: I presume he is going to prove he is an agent or qualify Walker as a witness. In either case it would perfectly proper.

Mr. Tansey: In other words it isn't in itself sufficient to show agency.

30

The Court: Not standing alone, no.

Mr. Tansey: I would like to have my objection entered.

The Court: You may have your objection entered. I will overrule the objection and you may take your exception.

(Question repeated) A. Yes, sir.

40



*George F. Herbert—Direct.*

Q. Do you know whether material mentioned in the estimate marked for identification "A" was delivered on the property of the Arlington Realty Company? A. This is a duplicate of the original. Mr. Walker should have the original.

10 Q. He says he hasn't got it? A. Because it was turned over to him and each and every article on that estimate was correct. If this, I presume, is the original it was all received.

Q. You say you haven't got that original?

Mr. Walker: I haven't that.

Q. Do you know whether the goods in that estimate marked Exhibit A for identification which has been testified as a copy sent to you was delivered on the premises of the Arlington Realty Company? A. I don't quite get your question.

20 Q. Do you know whether the goods mentioned in that estimate? A. In this estimate?

Q. Yes, sir, marked Exhibit A, which has been testified too as being a copy of the one furnished you. Who delivered it to you Mr. Herbert, by the way? A. Yes, sir.

Q. That was delivered on the premises of the Arlington Realty Company? A. Yes, sir.

30 Q. And do you know that those same goods were used in the construction of a building for the Arlington Realty Company? A. Yes, sir.

Mr. Tansey: I object to that, don't answer.

Mr. Sexton: It is answered.

Mr. Tansey: I object to that because I think it is leading.

The Court: All right, I will sustain the objection. Reframe it, Mr. Sexton.

40 Q. What was done with the goods that were de-



*George F. Herbert—Direct.*

livered on the premises of the Arlington Realty Company? A. It was used as part of the construction of the building.

Q. Whose building? A. The Arlington Realty Company.

Q. Were other goods furnished for the construction of the Arlington Realty Company's building other than those mentioned in that estimate? A. Yes, sir. 10

Q. When they were so furnished, what papers, if any, did you receive in connection with them? A. We received a delivery sheet.

Q. A delivery sheet? A. Yes.

Q. Who receipted the delivery sheets? A. There was different ones receipted them, if I didn't happen to be just there one of the other fellows receipted it. I didn't receive all the material. It was all put on the job, but it was receipted for by other fellows beside myself. 20

Q. I am speaking of the delivery sheet, who receipted the delivery sheets? A. I did.

Q. What did you do with the delivery sheets? A. We filed them for Mr. Walker in the tool room.

Q. I now show you paper marked for identification Exhibit 4, produced by Mr. Walker and ask you if they are the papers receipted by you as the delivery receipts? A. Yes, sir. 30

The Court: This is Exhibit E, isn't it, Mr. Sexton?

Mr. Sexton: There are no Exhibits yet, if your Honor please.

The Court: For identification?

Mr. Sexton: Yes, "E" for identification.

Q. Did you later receive another paper in ref- 40



*George F. Herbert—Direct.*

erence to the delivery of goods to the Arlington Realty Company? A. Yes, sir.

Q. What was that? A. Invoices.

Q. And I show you a bundle of papers marked for identification Exhibit B and ask you if they are the invoices received by you? A. Yes, sir.

10 Q. And what did you do with them? A. These were kept in the office.

Q. Whose office? A. My office.

Q. And eventually what became of them? A. They were turned over to Mr. Walker together with the monthly statements and the original estimate.

Q. That is the original estimate? A. The copy of that, yes, sir.

Q. The copy of Exhibit A for identification? A. Yes, sir.

20 Q. Did you check the goods mentioned in the invoices? A. Yes, sir.

Q. With Mr. Walker? A. Yes, sir.

Q. And when was that done? A. On Sunday afternoon preceding August 3rd.

Q. And who was present at the time? A. Mr. Stout.

Q. And who else? A. Mr. Walker.

Q. And yourself? A. Yes, sir.

30 Q. And as I understand the goods mentioned in the estimate were all gone over and checked? A. Every slip, not only the estimate, the estimate and all the extra material were checked over also.

Q. That includes items marked on Exhibit A for identification and Exhibit B for identification? A. All the material.

Q. Look at those and make sure? A. Sure, this is the estimate.

40 Q. And they were all checked with Mr. Walker? A. Yes, sir.



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Q. Were there some goods returned? A. Yes, sir.

Q. And were credit memorandums given for them? A. Yes, sir.

Q. You received credit memorandums? A. I did.

Q. And having received them what did you do later with them? A. Filed them with the invoices. 10

Q. And they were then later delivered to whom? A. Mr. Walker.

Q. And they are the credit receipts produced by Mr. Walker and marked Exhibit B for identification, are they not? A. Yes, sir.

Q. You have already testified you were the man in charge of the plumbing work of the Arlington Realty Company, is that right? A. Yes, sir.

Q. Do you know of your own knowledge that the goods mentioned in this estimate and the invoices were used or supplied for use to the Arlington Realty Company building at Avon? A. Yes, sir. 20

Q. And were actually used in the construction of that building? A. Sure.

Q. What remuneration if any, were you receiving for your work done for the Arlington Realty Company? A. Ten percent on all labor and material. 30

Mr. Tansey: I object to that if your Honor please, it is of no importance the remuneration he was to receive.

The Court: I don't see how it matters at all. How does it matter?

Mr. Sexton: The witness has said ten percent for all the labor and material and I am going to show they not only having received 40



*George F. Herbert—Direct.*

the goods, but they paid this witness ten per cent on these goods as received.

The Court: Objection overruled.

Mr. Tansey: They are speaking of a contract.

10

The Court: What Mr. Sexton proposes to show and I am going to take his good faith offer as I must, that they settled with this builder on the basis which shows the account or very nearly the approximate that they considered the material furnished by the plaintiff to be worth.

Mr. Tansey: Compensation paid to him wouldn't show the contract between him and the Monmouth Plumbing Supply Company.

20

The Court: He testified it was ten percent of the goods of the Plumbing Supply Company.

Mr. Tansey: On any rate, I would like to have my objection entered to that.

(Question repeated) A. Ten percent on all labor and materials.

Q. Did you furnish the Arlington Realty Company with a statement of the money due to you?

30

A. Yes, sir.

Q. And in that statement you asked for ten percent of the material furnished by the Monmouth Plumbing Supply Company?

Mr. Tansey: I object if your Honor please.

The Court: Why?

Mr. Tansey: It is immaterial what he asked them for.

40

The Court: It wouldn't be unless Mr. Sex-



*George F. Herbert—Direct.*

ton had stated as he did that they settled on the basis of ten percent. Of course, if it were in writing you would have to produce the writing.

Q. Have you a memorandum of it? A. Yes, sir.

Q. Will you produce it? A. Yes, sir.

10

Q. Does that paper contain the amount for which you received ten per cent of for materials furnished by the Monmouth Plumbing Supply Company to the Arlington Realty Company? A. Yes, sir.

Q. What is the amount?

Mr. Tansey: I object to that, until the paper is offered.

The Court: Yes, the objection will be sustained.

20

Q. Put the paper in your pocket. Did you give a copy of that paper to Mr. Walker? A. Yes, sir.

Mr. Sexton: Will you produce a copy of the bill from Herbert to the Arlington Realty Company?

Mr. Walker: I will if I have got it, I haven't got it now.

Mr. Sexton: You had one.

Mr. Tansey: He is not on the stand.

30

The Court: He is asking you Mr. Tansey.

Mr. Tansey: I haven't seen it.

The Court: You mean your defendant, hasn't it?

Mr. Tansey: No, he hasn't it.

Q. Did you deliver a copy of this to Mr. Walker?

A. I delivered that to Mr. Walker.

40



*George F. Herbert—Direct.*

Q. You delivered a copy of it?

The Court: Notice to produce has been served.

Mr. Sexton: Oh, yes.

Q. Would you tell me what amount the Arlington Realty Company paid ten per cent of?

10

Mr. Tansey: I object.

The Court: Don't answer until Mr. Tansey has a chance to object.

Mr. Tansey: I object, until the paper is offered.

Mr. Sexton: Do you want me to offer the paper, I will be glad to offer the paper. I now offer the paper in evidence, if your Honor pleases.

20

Mr. Tansey: I would like to see the paper first, if your Honor please. I object to this because it appears to be an account with C. Herbert Walker.

Mr. Sexton: It says on it Arlington Realty Company.

Mr. Tansey: And there is nothing yet to connect up the liability of the Arlington Realty Company with George Herbert.

30

The Court: There is something to connect it.

Mr. Tansey: Very faint, if any.

The Court: Here is a very large building construction which you admit was on this property and on which he done the plumbing work and it seems to me there is some evidence there, how far his authority went I don't know, the objection will be overruled.

Mr. Tansey: Allow me an exception?

40

The Court: All right.



*George F. Herbert—Direct.*

Mr. Sexton: The paper is offered, if your Honor please.

The Court: It may be marked. Marked Exhibit P-1.

Q. This paper states that the item for which you received ten per cent was \$13,744.38, is that right? A. Yes, sir. 10

Q. I show you a paper which has the signature George Herbert on the back of it and ask you if that is your signature? A. Yes, sir.

Q. What is that paper? A. That is a check from the Monmouth Title and Mortgage Guarantee Company.

Q. For how much? A. Two thousand five hundred and seventy-seven dollars and seventy-eight cents. 20

Q. And I show you a paper bearing date August 3, 1927 and ask you what that is? A. That is an order from Mr. Walker to get this check.

Q. Signed how? A. C. H. Walker, president of the Arlington Realty Company.

Q. And that was given to you by whom? A. Mr. Walker.

Q. You saw him write it? A. Yes, sir.

Q. And you saw him sign it? A. Yes, sir. 30

Q. What amount of this check for two thousand five hundred and seventy-seven and seventy-eight cents were paid on account of the bill marked Exhibit P-1? A. Twenty-two hundred dollars and twenty-eight cents, wasn't it?

Q. I don't know, you tell me. A. Twenty-two hundred dollars and twenty-eight cents.

Q. And the balance was for what? A. Odds and ends that he owed me for. 40



*George F. Herbert—Direct.*

Q. What have you to say as to the difference between the twenty-two hundred dollars and twenty-eight cents and the amount of twenty-four hundred and sixty-eight dollars and thirty-eight cents?

10 A. Why when I presented this bill to Mr. Walker he gave me an argument that I shouldn't receive commission on my own wages, so I compromised with him and knocked off two hundred and sixty-eight dollars.

Q. And that credit was on your own wages? A. That was on a percentage of my own labor and nothing to do with the material or other labor.

20 Mr. Sexton: I offer now, if your Honor please, the check of the Monmouth Title Company to George Herbert for two thousand five hundred and seventy-seven dollars and seventy-eight cents.

Mr. Tansey: I object, if your Honor please, it is immaterial and not binding upon the Arlington Realty Company.

The Court: I suppose that is so.

Mr. Sexton: I will withdraw it.

The Court: You may have it marked for identification.

30 Mr. Sexton: All right.

Paper marked Exhibit J for identification.

Mr. Sexton: I offer in evidence the slip for which the payment was made, signed C. H. Walker, president of the Arlington Realty Company.

Mr. Tansey: I object, on the same ground it is immaterial.

The Court: The same ruling.

40 Mr. Sexton: May I have an exception to your rulings along this line, if you please.



*George F. Herbert—Direct.*

The previous ruling and this ruling, I then offer it for identification.

Paper marked Exhibit K for identification.

The Court: Mr. Walker has not been shown as president.

Mr. Sexton: The affidavit of merits shows he is. 10

Mr. Tansey: I can't see that is evidence to bind the company.

The Court: Why not, an affidavit of merit? Are you representing the company?

Mr. Tansey: I represent the company.

The Court: You filed the papers.

Mr. Tansey: I have.

The Court: Haven't you filed an affidavit of merits? 20

Mr. Tansey: I am not sure of that.

The Court: If you haven't you are out of court, aren't you?

Mr. Tansey: We have filed our answer and not an affidavit of merit, we didn't have to file an affidavit of merit.

Mr. Sexton: You filed one, I certainly have got it.

The Court: Here is the affidavit of merit, Michael J. Tansey on the outside. 30

Mr. Tansey: That ought to be enough to authenticate it.

The Court: Then as president he certainly wouldn't file a false affidavit.

Mr. Tansey: We are not saying he was not president or was not in fact president, what we are saying is, that would not necessarily bind the company. 40



*George F. Herbert—Direct.*

The Court: An affidavit of merits wouldn't.

Mr. Tansey: No.

The Court: I am inclined to think it would be absolutely conclusive on the part of the company.

10

Mr. Tansey: As to the agency at the time this work was done, even if he were president he wouldn't show he had authority to bind the company on these contracts.

The Court: Proceed with your case.

Mr. Tansey: It has been held in a great many cases, that where the agent says he is, it is not binding on the company.

The Court: But the company says he was an officer.

20

Mr. Tansey: There would have to be other evidence than merely showing he was the president of the company.

Mr. Sexton: I didn't get that.

The Court: Suppose you proceed, it is not material, so that you may be informed it was merely a statement of law made by Mr. Tansey to the court.

30

Mr. Tansey: I understand your Honor ruled with us?

Mr. Sexton: I offer the record, if your Honor please of the mortgage made by the Arlington Realty Company to the Prudential Insurance Company, I will send for the book, if Mr. Tansey wants me to have it up here, but I don't suppose he is going to insist on it.

Mr. Tansey: What is that?

40

Mr. Sexton: The original mortgage book.

Mr. Tansey: I don't think that is neces-



*George F. Herbert—Direct.*

sary, except as I say it is immaterial. How does the mortgage prove they were indebted as a company to the Monmouth Plumbing Supply Company? How can a mortgage to the Prudential Insurance prove that, it is immaterial.

The Court: What are you offering it for? 10

Mr. Sexton: I am offering it to lay the foundation to show these moneys were paid, this check was paid from the moneys received by the Arlington Realty Company from the proceeds of this mortgage.

Mr. Tansey: It wouldn't make any difference what it was paid from.

The Court: Objection overruled, you may have your exception.

Mr. Sexton: I offer, if your Honor please, 20 the mortgage made by Arlington Realty Company to the Prudential Insurance Company of America, dated July 28th, 1927, and recorded in the Monmouth County Clerk's Office August 2nd, 1927, securing the sum of Fifty-five thousand dollars. If you want me to Mr. Tansey, I will read this whole description.

Mr. Tansey: No.

Mr. Sexton: Unless you will admit the 30 copy of the description in the mortgage is the same as that in the lien claim.

Mr. Tansey: This is merely a transcript of the mortgage.

Mr. Sexton: I said I will go downstairs and get the book if you insist.

Mr. Tansey: It is merely a transcript of the mortgage, isn't it?

Mr. Sexton: Yes, sir. 40



*George F. Herbert—Direct.*

Mr. Tansey: And it shows dates, etc.

Mr. Sexton: And the description.

Mr. Tansey: I don't know that there is any point in reading the description.

10 Mr. Sexton: Is it admitted on the record that the description contained in the mortgage is the description of the same property?

Mr. Tansey: I am not going to question it. I will admit it to save time.

Mr. Sexton: Then it is admitted on the records?

Mr. Tansey: That the description is the same?

Mr. Sexton: Yes.

Mr. Tansey: But I will say it is immaterial.

20

Q. Mr. Herbert, what is the construction, the plumbing construction of this building of the Arlington Realty Company in reference to the water supply? A. It is all brass.

Q. And I notice that there was considerable brass fittings, pipes, etc., returned to the Monmouth Plumbing Supply Company that was occasioned by what, if you know? A. There were so many changes made on the job that was necessary to get this material every once in a while.

30

Q. Who would order the changes? A. Mr. Walker.

Q. Will you briefly describe some of the changes that were made? A. One day he changed six bathrooms and so on and so forth, he kept on going that way.

Q. How long were you engaged in the plumbing work? A. Mr. Walker can tell you he has the time

40



*George F. Herbert—Direct.*

book; I think it was around six or seven months we was down there.

Q. Six or seven months? A. I don't know how long it was to tell you the truth.

Q. I show you papers marked Exhibit D for identification and ask you to run through them and tell me whether or not these delivery sheets signed by the name George Herbert were signed by you or not? A. Yes, all of them. 10

Q. Yes, those that were signed, whether you are the George Herbert that signed them?

The Court: We will take a recess of five minutes.

A. All the signatures that are on these slips are mine with the exception of one that is marked by Mr. Richard Brace, my name is on there and Richard Brace's afterward R. B. 20

Q. What is that item? A. That is twenty feet, I guess it is three inch black pipe.

Q. Was black pipe used on the building? A. Yes, sir.

Q. Do you know whether that item of black pipe was used on the building? A. Yes, sir.

*By the Court:*

Q. What do the signatures signify on the rest of those? A. That I received the material. 30

Q. Was that material used in the building? A. Some of it was sent back.

Q. How about that which wasn't sent back was that used in the building? A. Yes, sir.

*By Counsel:*

Q. Do you recall Mr. Herbert an occasion when Mr. Walker and you met at the Monmouth Plumbing Supply Company? A. Yes, sir. 40



*George F. Herbert—Direct.*

Q. Who was present at the time? A. Mr. Burnstresser and Mr. Davis, Mr. Stout and Mr. Rosen-  
craz I think. I see him in the building but.

Q. They were not at the conference? A. He was  
in the building.

Q. How did Mr. Walker get to this conference?  
10 A. I took him there.

Q. From where to where? A. At his apartment.

Q. And his apartment was where? A. At the  
apartment house we are talking of.

Q. Mr. Walker lived at the apartment? A. Yes,  
sir.

Q. Do you remember whether or not that confer-  
ence was before or after you had received your  
check? A. It was after.

Q. How long after if you know? A. I think it  
20 was on the 9th of August, 1927. It was on a  
Tuesday that Mr. Davis was to be at the Supply  
house.

Mr. Sexton: I now, if your Honor please,  
offer in evidence Exhibit H for identification  
which has been testified to as the agreement  
entered into between Herbert and the Ar-  
lington Realty Company, C. Herbert Walker,  
president.

30 Mr. Tansey: I object, if your Honor please  
because it don't appear to have any bearing  
upon the claim of the Monmouth Plumbing  
Supply Company against the Arlington Real-  
ty Company. It proposed to be an agree-  
ment between C. Herbert Walker, president  
of the Arlington Realty Company and  
George F. Herbert, plumber and it appears  
not to be signed by Mr. Herbert.

40 A. Mr. Walker has one signed by me.



*George F. Herbert—Direct.*

Mr. Sexton: Produce the one signed by Mr. Herbert.

The Court: Suppose you produce that one.

Mr. Tansey: I haven't it, if your Honor please, and Mr. Walker says he hasn't it.

Mr. Sexton: He didn't say that, he said, he hasn't it with him.

10

Mr. Tansey: He has already in substance testified to the fact that he got a certain percentage. This contract can't seem to help that out any.

The Court: Is that your only objection.

Mr. Tansey: It doesn't bind the Arlington Realty Company anyhow.

The Court: How about that, Mr. Sexton?

Mr. Sexton: Why, we have progressed this far, if your Honor please. We have shown that a man who filed in the proceeding a paper swearing he is president of the company known as the Arlington Realty Company, that he takes charge of, manages and lives in a twenty-four story apartment house.

20

Mr. Tansey: Twenty-four families.

Mr. Sexton: Twenty-four family apartment building, which is constructed under his supervision; that there was delivered plumbing materials to that building to a large amount; that that material was used in the construction of the building.

30

The Court: And that the company afterwards gave a mortgage on it.

Mr. Sexton: And that the company afterward gave a mortgage and money was paid from the proceeds of that mortgage to this contractor for a ten per cent of the amount of that building.

40



*George F. Herbert—Direct.*

The Court: Have you proven that Mr. Walker was president of the corporation at the time these transactions were had?

Mr. Sexton: If your Honor please, I don't have to prove that with all due respect.

The Court: I ask you if you did.

10

Mr. Sexton: He has presented the record in the book where we have the company itself filing papers.

The Court: No, you see that was somewhat later.

Mr. Sexton: What is that?

The Court: It was somewhat later that the company filed its affidavit of merits.

20

Mr. Sexton: Right along here signed his name as president of the Arlington Realty Company.

The Court: You mean he has so signed his name?

Mr. Sexton: Yes, sir.

The Court: How about the mortgage, what date was that?

Mr. Sexton: August 28th, 1927.

The Court: What date is the paper you proposed now to offer?

30

Mr. Sexton: January 25th.

The Court: 1920?

Mr. Sexton: 1927.

The Court: And was the mortgage signed by Mr. Walker as president?

Mr. Sexton: Yes, sir.

The Court: It sort of looks to me as though the corporation has accepted the benefit of that agreement, Mr. Tansey?

40

Mr. Tansey: If your Honor please, your



*George F. Herbert—Direct.*

Honor's point seems to be right about the dates. If he were president in August it wouldn't necessarily show he was president and had authority in January preceding.

The Court: It wouldn't necessarily show, but how about the fact that after this contract was signed they settled on the basis of that contract? The Arlington Realty made the mortgage and part of the proceeds of which were used to settle with this man. 10

Mr. Tansey: Using the proceeds doesn't show how it worked by authority of the corporation.

The Court: It doesn't show conclusively but it is some evidence of it.

Mr. Tansey: If your Honor please, unless he connects some other evidence to show that Mr. Walker was president at this term there can be no assumption that he was. 20

The Court: Suppose he were, was there still sufficient evidence that he was agent? Isn't there enough shown that he was agent?

Mr. Tansey: Oh, no, he might have been as Mr. Herbert said, general superintendent.

The Court: I am going to allow it in evidence and allow you an exception. 30

The paper marked Exhibit P-2.

Mr. Sexton: I will read it to the jury.

Mr. Tansey: If your Honor please, I move that that be stricken out now because it appears by its own terms it is an agreement between C. Herbert Walker, president of the Arlington Realty Company and Mr. Herbert. It plainly appears it is an individual agreement and not binding upon the company. 40



*George F. Herbert—Direct.*

The Court: May I see it Mr. Sexton? The objection will be overruled.

Mr. Tansey: May I have an exception?

The Court: Yes, you may have an exception.

10 Mr. Sexton: I offer now, if your Honor please, as an exhibit the paper marked Exhibit I for identification.

Mr. Tansey: Which is what?

Mr. Sexton: Which is what purports to be a guarantee given to the Monmouth Plumbing Supply Company by the Arlington Realty Company, C. Herbert Walker, president.

Mr. Tansey: If your Honor please, I object to that in any way binding upon the Arlington Realty Company.

20 The Court: May I see it, Mr. Sexton.

Mr. Sexton: By the way I ask you to produce the copy you had Mr. Tansey.

Mr. Tansey: This proposed to guarantee an estimate of January 16th while the ones they produce are February.

Mr. Sexton: We needn't be concerned about that.

30 Mr. Tansey: Your Honor has already ruled in regard to this matter, that his authority must be shown as agent.

The Court: Now, Mr. Sexton, I would like to hear you on this.

Mr. Sexton: Why, if your Honor please we have in evidence a contract between a plumber and the Arlington Realty Company and part of that contract is that the Arlington Realty Company shall guarantee the materials furnished on the building.

40



*George F. Herbert—Direct.*

The Court: As part of that contract.

Mr. Sexton: Yes, sir.

The Court: Yes, all right.

Mr. Sexton: And that following up the contract that by its very terms the Arlington Realty Company takes the next step and goes to the supply house from whom the materials are to be furnished and it lives up to its agreement made with the plumbing contractor by giving the very guarantee which it stated it would give and which is made a condition of that contract and the Monmouth Plumbing Supply Company is the company by whom the goods were supplied and to whom for the carrying out of that agreement the guarantee was given. Now, you will bear in mind that the contract between the contract plura and the Arlington Realty Company is that Herbert is to get ten per cent of the material and the Arlington Realty Company is to pay for it, when it comes to a question of paying for it. The guarantee was given. It is not like a guarantee given for goods delivered to a third person, it is saying to the Monmouth Supply Company we have agreed to pay a man ten per cent to get the material for us and we will pay for them and the goods have actually been received and have been taken by the Arlington Realty Company. It is true there has been a flaw and to have a man by the name of Walker, a disgrace to the bar.

Mr. Tansey: I object to that, I don't think Mr. Sexton ought to talk that way.

The Court: There is nothing in this case of that kind.



*George F. Herbert—Direct.*

10 Mr. Sexton: They come here and quibble and repudiate that. It shows that was the contemplation. They got the goods and they paid their ten per cent and we are going ahead and in a few minutes we will show they paid eight thousand dollars of it and then to come along and say we are not the president of the company and not the agent of the company, if your Honor please, the decision in this case and I have decisions in my hand where it says this fellow Walker mismanaged the funds of the Arlington Realty Company when he was president of it and a receiver was appointed.

The Court: Are you through, Mr. Sexton?

20 Mr. Tansey: My associate, Mr. Walker suggest these remarks are highly prejudicial being made in the presence of the jury and I would like to have my objection noted to the matter on the records.

The Court: Your objection may be noted.

Mr. Tansey: My objection will be noted and I move to strike them out.

30 The Court: We will rule that such remarks as are prejudicial to Mr. Walker will be stricken out. How about the motion, where were you on that?

Mr. Tansey: If your Honor please, of course this guarantee so far as the corporation is concerned is quite a solemn act and has been repeatedly held where an act of that kind is sought to be taken advantage of, if for instance the corporation had given its note signed in the way that this is signed unless the authority of the corporation to the

40



*George F. Herbert—Direct.*

person was shown it would be considered as a personal obligation of an official of the corporation. It can't be shown he is anything else in the present situation but an obligation of the officer who signed it. There is not even a seal of the corporation on it.

The Court: It is signed the Arlington Realty Company, C. Herbert Walker, President. 10

Mr. Tansey: But it hasn't even the seal of the company which is the ordinary way of authenticating a corporate act.

The Court: Lets see as to the rule as to that, is that the corporation would be required to use its seal whenever an individual would be required to use his seal and not otherwise. 20

Mr. Tansey: I think not, because a corporation only authenticates its work by its seal.

The Court: Go on.

Mr. Tansey: If in this case it had even a seal attached to it, that would be somewhat of an authentication, but there isn't a solitary thing to show this was an act of the corporation and then Mr. Sexton then goes around and shows certain acts were done by somebody else, which he thinks inferentially binds this corporation with this guarantee. There is nothing that shows the corporation authorized C. Herbert Walker to do anything but build this building. If it can be shown to that extent it wasn't necessary to build the building that this guarantee be given. 30

The Court: Just a moment, there is some- 40



*George F. Herbert—Direct.*

thing running through my mind. Do you think this is actually a guarantee, in the usual form as we view guarantees. Does it stand liable, does the paper purport to stand liable for someone else's debts that they purport to guarantee or do they stand liable to pay their own debt?

10

Mr. Tansey: It apparently is.

The Court: It says, we hereby guarantee. Do they mean they are guaranteeing somebody else's debt or did they mean they were guaranteeing payment on material furnished to them?

20

Mr. Tansey: They wouldn't have to give a guarantee if it were their own debt and apparently it is not their own debt and it is conceded not to be their own debt, because they make George Herbert, one of the defendant's and they bring these people in of course, only by the lien claim and alleged guarantee. If it were not for the guarantee, they would have nothing to stand on but the lien claims.

30

The Court: You have a situation here where there is an alleged corporation that wanted certain work done through a builder; that before that work was done an estimate was obtained; that the matter was taken up with the president of the alleged owner and that the president signed or agent, not the president, a person who certainly has shown some agency with the corporation, signed an agreement that they would pay if the builder did not pay, they would pay to the person who furnished the

40



*George F. Herbert—Direct.*

material to go into the job. Now, is that the ordinary guarantee for the debt of another, it doesn't seem to me it is, Mr. Tansey.

Mr. Tansey: What is the efficacy of it, it isn't in the nature of a guarantee to pay its own debt.

The Court: They contracted the matter to a builder. 10

Mr. Tansey: But your Honor is holding that their only relation to the builder would be the fact that the goods went into the building which is on their land. That would be so under the lien law. They wouldn't have to especially guarantee the debt of another in order to make themselves liable for everything that went into their building so that they would be responsible under the lien claim for everything that was furnished. 20

The Court: You mean the building would be responsible, they wouldn't be individually.

Mr. Tansey: As to the present situation it is either a guarantee or nothing. If it is a guarantee it would have to be especially authorized there is nothing to show any authority to sign this special agreement and if it were their own debt which your Honor seems to raise the question, I don't say your Honor doesn't say so, but it is plainly treated by everybody as guaranteeing collateral to the man that furnished the material and it has to be especially authorized and even if this were not a collateral guarantee being something which is ordinarily in the line of the president. 30

The Court: Was he president, is that admitted? 40



*George F. Herbert—Direct.*

Mr. Tansey: I am taking the evidence as it stands now.

The Court: You do not admit it?

10 Mr. Tansey: No, there is only inferential proof here that at a subsequent time some papers were signed by Mr. Walker as president. It seems to me it is wholly without authority or proof of authority not binding upon the corporation.

The Court: We will take a recess now, until one thirty.

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After Recess.

20 The Court: Gentlemen, I understand we have arrived at the point where Mr. Sexton is withdrawing the offer of the paper in evidence.

Mr. Sexton: For the time being if your Honor please.

Mr. Tansey: That paper being the alleged guarantee, if your Honor please?

The Court: Yes.

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30 GEORGE F. HERBERT, resumes witness stand.  
*Direct-examination by Mr. Sexton (continued):*

Q. Mr. Herbert, you arranged with the Arlington Realty Company that you were to receive ten per cent upon all labor? A. And materials.

Q. And did you receive payments on account of labor? A. Yes, sir.

40 Q. From whom? A. Mr. Walker.



*George F. Herbert—Direct.*

Q. And when were those payments made? A. On Saturday morning.

Q. Each week? A. Yes, sir.

Q. How were they made? A. There was a check, I wouldn't say all of them were drawn the same but the majority of them were checks drawn such as the Arlington Realty Company—

10

Mr. Tansey: I object to this, if your Honor please.

Mr. Sexton: We have demerited that.

The Court: The objection will be sustained. Make your demand for the production.

Mr. Sexton: We have demanded you to produce checks given by the Arlington Realty Company to Mr. Herbert, will you produce them?

20

Mr. Tansey: They have not been demanded up to now. This seems to me to be an inappropriate time to demand them right in the midst of a trial. It seems to me they should be demanded in time.

Q. You received checks Mr. Herbert? A. Yes, sir.

Q. And how were they signed?

Mr. Tansey: I object to that.

30

The Court: The objection is sustained. Was notice to produce served, Mr. Sexton?

Mr. Sexton: There was notice to produce served and I understood it covered that. The demand has a clause in it and that you produce all other papers, letters and memorandums relating to it.

Mr. Tansey: All letters, papers and data, that isn't checks.

40



*George F. Herbert—Direct.*

Mr. Sexton: I think it is.

Mr. Tansey: We didn't expect that the investigation would be as to our bank account. We might just as well have been expected to bring in our bank books on such notice as that.

10

Mr. Sexton: Not bank books, but checks in payment to the contractor would come under that memorandum.

The Court: Let me see your notice to produce, that has been held you know not to be sufficient.

Q. How soon after the memorandum of January 25th, did you start working? A. I think I started on the 24th to dig a ditch for the water main.

20

The Court: On the 24th of what?

The Witness: 24th of January.

Q. And thereafter when did you receive your first payment? A. Every Saturday.

Q. Every Saturday? A. Yes.

Q. And from whom did you receive them? A. Mr. Walker.

Q. And that paid for employees working upon what building? A. The apartment house.

30

Q. Of the Arlington Realty Company? A. Yes, sir.

Q. Who prepared the paper marked Exhibit P-2? A. The clerk working in my office.

Q. That was prepared at your instructions? A. Yes, sir.

Q. And signed by you? A. The one that Mr. Walker has was signed by me.

40

Q. Was it prepared and signed by you? A. Yes, sir.



*George F. Herbert—Direct.*

Q. And given to Mr. Walker? A. Yes, sir, it won't have this on the bottom about all complaints about labor to be made to Mr. Herbert, Mr. Walker put that on himself everything up to where it says work.

Q. The I in this paper refers to you? A. Yes, sir.

Q. And the word you refers to the Arlington Realty Company? A. Yes, sir. 10

Q. That was your proposition then to the Arlington Realty Company? A. Yes, sir.

Mr. Tansey: I object to that. The paper speaks for itself if your Honor please.

The Court: Yes, the objection will be sustained.

Mr. Sexton: I am not trying to vary the terms of a written instrument. 20

The Court: No, but you are evidently trying to incorporate some negotiations before the time of the making of the instrument.

Mr. Sexton: I am asking him what was in the mind of the man who delivered it at that time to find out if there was any ambiguity.

The Court: He has already answered as to the you and I. 30

Mr. Sexton: Was there a ruling on that? What was the last question?

(Question repeated by stenographer)

Q. Have you received any money from the Arlington Realty Company for the plumbing material furnished by the Monmouth Plumbing Supply Company? A. Received money from the Arlington 40



*George F. Herbert—Direct.*

Realty Company for the material.

Q. Yes, sir. A. No, sir.

Q. Did you bill the Arlington Realty Company for the material? A. Only through invoices delivered by the company.

The Court: By what company?

10

The Witness: By the Monmouth Supply Company.

Q. Which were turned over to the Arlington Realty Company? A. Yes, sir.

Q. You were present at the time these articles were all checked up by Mr. Walker? A. Yes, sir.

Q. Do you know of your own knowledge whether or not moneys of the Arlington Realty Company was paid on account of the Monmouth Plumbing  
20 Supply Company bill?

Mr. Tansey: I object to that, if your Honor please.

The Court: The answer is yes or no.

A. Yes, I know that they received money.

Q. How much?

Mr. Tansey: I object to that, if your Honor please.

30

The Court: Objection sustained. You will have to show the source of his knowledge.

Q. Were you present when Mr. Davis visited Mr. Walker? A. At the Apartment house?

Q. At the Apartment house. A. Yes, sir.

Q. Did you hear the conversation between Mr. Walker and Mr. Davis at that time? A. No, I introduced Mr. Davis to Mr. Walker and left them.  
40



*George F. Herbert—Cross.*

Q. Was that before the work started or after? A. That was after the work started.

Q. How soon after? A. I can't tell you that.

Mr. Sexton: Take the witness.

*Cross-examination by Mr. Tansey:*

Q. Mr. Herbert, when these slips came to you from the Monmouth Plumbing Supply Company, did they come by mail? A. Which bills do you refer to, Mr. Tansey?

10

Mr. Tansey: Please repeat the question.

A. What are you referring to, Mr. Tansey?

Q. I mean the delivery slips. A. They came with the truck, with the man that delivered the material.

20

Q. And these other statements which they say they sent through the mail, the monthly statements or what not?

Mr. Sexton: I object to the what not.

Mr. Tansey: Leave off what not and say the monthly statements.

A. The monthly statements come by mail.

Q. Whatever statements did come came to you, didn't they? A. Yes, sir.

30

Q. When it got to the Arlington Realty Company, it was through you that it got there? A. Yes, sir.

Q. And the way you got it to the Arlington Realty Company was that you left it in the tool room? A. No, I didn't. The delivery sheets were in the tool room.

Q. What did you leave beside the delivery sheets? A. In the tool room?

40



~ George F. Herbert—Cross.

Q. What did you give to the Arlington Realty Company beside the delivery slips? A. I got the invoices and the monthly statements.

Q. How did they get to the Arlington Realty Company? A. Delivered to them.

Q. By you? A. Yes, sir.

10 Q. Or by leaving them with the others in the tool room? A. No, the only thing left on the job was the delivery sheets.

Q. The delivery sheets were sheets that came with each shipment? A. Yes, sir.

Q. And there was others that were to be signed and returned, wasn't there? A. No, there was generally two sheets, one was left on the job and one the driver took back to the office.

20 Q. Was that supposed to be signed? A. Well, if anybody was there to sign it.

Q. What was the purpose in signing it? A. I suppose to see the material was there.

Q. They were signed in a great many cases, weren't they? A. Yes.

Q. And also in a great many cases they were not signed? A. Some.

30 Q. A great many cases? A. There were times when material was delivered after working hours and there was nobody there to sign for them.

Q. You weren't there after working hours? A. Not after half past four, no, sir.

Q. There were some signed by somebody else on the job besides you? A. Yes, sir.

Q. Was that once or more than once? A. I guess more than once.

Q. Was the signing done by different men or the same man? A. Different men.

40 Q. They would be signed as the men would be casually on the job as the load came? A. If the



*George F. Herbert—Cross.*

men happened to be there, they would check the material and sign the slip.

Q. Why was that checking done? A. To see that the material was there.

Q. If the material was not there, you wouldn't sign the slip? A. In some cases we did when he said he was going to bring it from one house to another. These people have not only one supply house, but another. 10

Q. There were cases when slips were signed when the material wasn't there? A. I suppose there was, but the slip was never sub-signed until the goods was there.

Q. I understand you to say a moment ago in some cases you did sign the slip? A. Maybe, I did say it.

Q. What did you mean? A. I didn't mean what I said. We never signed for material unless the goods were there. 20

Q. In some cases you wouldn't sign because the material wasn't there? A. All these slips signed, the material was there. The slips weren't signed unless the material was brought afterward or if I wasn't there or anybody else wasn't there.

Q. Do you remember the time when you didn't sign the slip when you were there? A. No. 30

Q. In every case the material checked up with the slip? A. Yes, sir.

Q. I understand you to say that you had a check-up on this building in August, 1927? A. What do you mean by a check-up on the building?

Q. My understanding was, there was a check-up on the building for material furnished this building in August, 1927? A. Yes, sir.

Q. Did you check that up beside the original 40



*George F. Herbert—Cross.*

checking, did you check up the material there in August, 1927? A. You will have to put the question again.

Q. Beside the original check-up of material that was delivered, did you check-up on the building again in August, 1927? A. Yes, sir, every sheet.

10 Q. Where were you when you checked up every sheet? A. In Mr. Walker's apartment.

Q. In the building? A. In the building.

Q. How did you check up the sheets then from memory or from inspecting the premises? A. It would be an impossibility to check the material that is in the building because ninety-five per cent of it is under cover. The way we did the checking in Mr. Walker's apartment was to check the delivery sheets against the invoices and the in-  
20 voices against the statements.

Q. And the check that I am asking you was that at the time, did you check from memory or did you check from actual inspection of the material? A. I don't know how you could inspect material, if it is not in sight.

Q. I am asking you. A. No, we checked from the sheets.

30 Mr. Sexton: I object, because it isn't necessary that we show this stuff actually went into the building.

The Court: No, it is perfectly proper. I think it is material.

Q. So, when you did your checking in August, in 1927, you didn't do it from an inspection of the material? A. It couldn't be done.

Q. I am asking you a question, you didn't do it, did you? A. No.

40 Q. All right, and if it hadn't been for the delivery



*George F. Herbert—Cross.*

slips on the invoices, you couldn't have checked at all, could you? A. They had a copy in the office, in the Plumbing Supply house, they had the same copies that I had.

Q. That would only be a duplicate of the papers, the same as you had? A. That would be a duplicate of the original which I had.

10

Q. And that would still be an inspection by the papers? A. Sure.

Q. That wouldn't be by inspection of the actual material in the building, would it? A. No.

Q. On those shipments of material that you didn't receive, how did you check up on that? A. The men, they received that material if there was a man there beside myself they signed for it. He certainly knew the material was there.

Q. I asked you a while ago and you answered me there were a number of slips for delivery that weren't signed by anybody? A. Yes, I did say that.

20

Q. That is true, isn't it? A. Yes, sir.

Q. How would you check up on those slips? A. I couldn't check them.

Q. So far as you know they might not have been delivered? A. Yes, sir.

Q. I am asking you from your personal knowledge? A. I can't say there was anything more, except what I signed for.

30

Q. Those you didn't sign for, may or may not have been delivered? You can't, personally? A. I can't swear they were or they weren't.

Q. That is all we are asking you to do. Tell what you know yourself. So far as those special shipments were concerned there was nobody that could tell so far as the job was concerned whether that got there or not, was there? A. No, not the ones that wasn't signed.

40



*George F. Herbert—Cross.*

Q. Isn't it a fact, that at the time this checking up in August, 1927, was made you actually checked any material at all, that was delivered there?

A. No, every sheet that was signed for was checked.

Q. Isn't it a fact that was the only time you checked it? A. The entire amount of the bill?

10 Q. Yes. A. Yes, sir.

Q. That was the only time you checked the entire amount of the bill? A. Yes, sir.

Q. And you did that from the invoices themselves? A. Yes, sir.

Q. Wasn't it at that time that Mr. Walker raised the question with you that the building was largely extras? A. I don't ever remember that.

Q. And there was something like three thousand or twenty-five hundred dollars in over charges? A.  
20 I don't remember that.

Q. Didn't he raise the question of over charges at that time? A. Not to me.

Q. Weren't you and he discussing over charges? A. Yes, sir, the over charges, the extra material, you mean?

Q. Didn't Mr. Walker then take up with you, the question of the unsigned slips for deliveries? A. Yes, I think he did question that at that time.

30 Q. He was opposed to including that in the balance that alleged to be due? A. No.

Q. You don't know why he took it up with you? A. He didn't raise any question with me as to any over charges.

Q. Didn't he tell you that he wouldn't pay, that he was not bound by unsigned delivery slips? A. I can't recall that he did.

Q. Didn't he say that because he objected to unsigned delivery slips and didn't you yourself make  
40



*George F. Herbert—Cross.*

a rebate equivalent to ten per cent of twenty-six hundred dollars? A. No, sir.

Q. And that was the reason you made the rebate? A. No, sir.

Q. How long did you work on the job? A. I worked there from the time it started until it finished.

10

Q. That was a period of seven months? A. Yes, sir.

Q. You were getting sixty dollars a week, weren't you? A. Sure.

Q. How much were you getting? A. I was getting one dollar a day more than wages. Do you want the plumber's wages?

Q. I don't know what plumber's wages are, I happen to be a lawyer? A. What do you want to know? I get twelve dollars a day to start off with.

26

The Court: Do you mean this witness personally or for the entire job?

Mr. Tansey: Personally.

The Witness: I got a dollar a day more than wages. The wages started off seven dollars a day and the first of March they went to eleven dollars and a half.

Q. What did you figure you were getting by the week? A. I worked forty-four hours, five and a half days.

30

Q. How much would that be at eleven dollars and a half a day? A. That would be sixty-six dollars by the week. I don't know, figure it up.

Q. That would be fifty-seven dollars and fifty cents a week, wouldn't it, and about seven months would be twenty-eight weeks to thirty weeks? A. Yes, sir.

40



*George F. Herbert—Cross.*

Q. And thirty times sixty-five dollars would be about eighteen hundred dollars, wouldn't it? A. Yes, sir.

10 Q. You have shown on your bill here which you have submitted a deduction of two hundred and sixty-eight dollars, Exhibit P-1, you have shown here a reduction of two hundred and sixty-eight dollars and some cents upon this bill submitted and that would be ten per cent of twenty-six hundred dollars about, wouldn't it? A. Yes.

20 Q. Now, would you say your dispute with Mr. Walker was about your wages and that you deducted ten per cent off your wages? A. I wouldn't say I deducted any per cent at all. I thought I compromised with the man and told him to take off two hundred and sixty-eight dollars.

Q. You compromised that ten per cent of twenty-six hundred dollars, didn't you and that made two hundred and sixty-eight dollars and your testimony was that you agreed—

Mr. Sexton: The witness doesn't say that Mr. Tansey.

30 Q. Your testimony was that your dispute with Mr. Walker was about your wages, wasn't it? A. Yes, sir.

Q. And you agreed to knock off some percentage on your personal wages?

Mr. Sexton: I object to it as not being the testimony.

Mr. Tansey: What was the testimony on that subject?

The Court: Ask the stenographer to turn back.



*George F. Herbert—Cross.*

Mr. Tansey: We don't want to go clear back there.

The Court: Do you know what it was?

Mr. Tansey: Yes, I am telling him what it was.

The Court: Suppose you ask him the question.

10

Q. What was it, you and Mr. Walker discussed on the settlement? A. When I presented this bill, Mr. Walker he questioned me as to the percentage on my own labor. I says all right Mr. Walker, I will tell you what I will do. I need the money, I need the cash, I will take off two hundred and sixty-eight dollars and he gave me an order.

Q. What was your per cent? A. I just told him what I would take off.

20

Q. You said you would take off two hundred and sixty-eight dollars? A. I didn't claim anything, he claimed it.

Q. You included your own labor? A. Yes.

Q. And he objected to that? A. Yes.

Q. And then you knocked off two hundred and sixty-eight dollars? A. Yes, sir.

Q. And your labor only amounted to about Sixteen hundred dollars? A. I don't know that, you will have to get the time book.

30

Q. If your labor amounted to what you said it did, considering the weeks you work and what you were paid, how could ten per cent of that labor amount to two hundred and sixty-eight dollars? A. I can't tell you, because I don't know the amount of it.

Q. Ten per cent of the labor, ten per cent rather two hundred and sixty-eight dollars is about ten

40



*George F. Herbert—Cross.*

per cent of twenty-six hundred dollars? A. Yes, sir.

Q. And that is the amount that Mr. Walker claimed was over charged on the plumbing bill, wasn't it? A. I don't remember Mr. Walker saying anything about an over charge.

10 Q. Your memory might not serve you right on that then?

The Court: There is no use making statements to the witness, Mr. Tansey.

Q. Mr. Walker may have disputed with you then on the Monmouth Plumbing claim? A. No, he did not. He never disputed anything about the plumbing supplies billed to me.

Q. You say now, it was only about your wages?  
20 A. That is all it was and that is the only thing that was mentioned was my wages.

Q. Now, Mr. Herbert, how do you know that all the material that was delivered there went into the building? A. How do I know it?

Q. Yes. A. I couldn't say it all went into the building.

Q. You don't say that, do you? A. No, sir.

Q. How do you know the material that was included in the invoices were delivered at the job?  
30 A. I told you a little while ago, I know the only thing I could swear to, was what I signed for anything else I couldn't swear to.

Q. Then you don't know whether all of the material included in the invoices was delivered? A. I honestly believe it was there.

Q. I am not asking you that, I am asking you do you know? A. I can't tell you something I don't know.

40 Q. That is right. When the plumbing supplies



*George F. Herbert—Cross.*

was delivered there, did you find that you had ordered sizes too large for the job? A. In what respect?

Q. Pipes, for instance, three-inch pipe instead of two. A. What pipe are you referring to, water pipe or steam pipe?

Q. Any pipe. Did you find you had ordered three inch instead of two inch? A. No, sir. 10

Q. Did you find you had made orders for sizes which were more expensive than ordinarily required? A. No, sir.

Q. When there was a two inch opening, you would have a two inch pipe for it? A. Yes.

Q. And when you used a three inch pipe for a two inch opening, you were using too large a pipe, weren't you? A. I should think it would be.

Q. Wherever that happened it was a mistake of yours? A. Yes. 20

Mr. Sexton: I move that it be stricken out, because we are not bound, if there are any mistakes of the plumbers.

The Court: What do you mean by returned?

Mr. Tansey: The stuff which was ordered which was entirely too large and had to be returned. 30

The Court: I don't see how it is harmful, go on.

Q. As to those returns who took care of the returned articles when pipe or supplies or material would be returned to the Monmouth Plumbing Supply Company who looked after that? A. We checked every article that went back.

Q. Who did? A. I did. I think Daddy Sofield and I made a copy. 40



*George F. Herbert—Cross.*

Q. Was Sofield on the job or not? A. Yes, sir.

Q. Was he working for you? A. Yes, sir.

Q. You think Sofield checked some and you checked some of the others? A. I think both of us worked together. There was a other item of them made up and given to the supply man all at once.

10 Q. You mean all those supplies that were returned at once? A. Not at one time.

Q. In one shipment? A. No, I don't think they were in one shipment. I couldn't swear to that either.

Q. Here we have about ten pages on Exhibit B, I am not going to use it unless you have offered it.

Mr. Sexton: I am going to offer it now. You have used it, you have been cross-examining on it. I submit counsel took the Exhibit and cross-examined the witness on it.

Mr. Tansey: I thought—

Mr. Sexton: I know you thought.

Mr. Tansey: I haven't asked any questions on it at all, none whatever. Whether it was marked for identification or in evidence.

The Court: You may proceed with your cross-examination.

30 Q. When did you make this check-up or examination in order to return these materials? A. What do you mean, the dates?

Q. Yes. A. I can't tell you that.

Q. Was it before or after the building was done? A. Some of it was under construction.

Q. But you didn't do it all at once? A. No, it wasn't all sent back at one time.

40 Q. You mean occasionally you would check up



*George F. Herbert—Cross.*

what was going to be returned and ask Mr. Sofield to check it with you? A. No, we did it together. One would call the fixtures out and the other put it on the memorandum.

Q. In that way you knew everything that was returned was checked up? A. Yes, sir.

Q. That would show according to the invoices or credits? A. Yes, there was cases there where there was lime and mortar and fittings and I don't know whether they credited every one or not. 10

Q. How many fittings were there you returned that they didn't credit to you? A. I don't know.

Q. You couldn't tell yourself, whether they credited you with all the fittings or not that you returned? A. That were returned?

Q. Yes. A. No.

Q. So far as you know, they may have done so or may not have done so? A. Sure. 20

Q. You can't tell definitely? A. Only from the sheets is all.

Q. Did you check up afterwards the invoices or anything to show whether or not this return had been credited? A. It was given to the truck driver when the stuff was loaded.

Q. Then you have no means of showing whether or not they gave you the proper credit for the material you returned? A. No. 30

Q. Did you notice when you looked over the bills whether or not they had quoted you the proper prices for the material? A. I never paid any attention to prices.

Q. So, you couldn't tell whether they were quoting you at the market price or much above the market price? A. I don't know.

Q. Wasn't that your duty to see they weren't overcharged? A. No. 40



*George F. Herbert—Cross.*

Q. Did you think it was proper to take any charge they might make to you? A. It wasn't my business.

Q. Why not, weren't you there representing the owner? A. I was there getting the material.

Q. You were getting a percentage on the material? A. Yes, sir.

10 Q. Didn't it strike you as being very important to your employer as to whether or not they were over charged on the material? A. If I stopped to check all the material, I would be there yet, I guess.

Q. Weren't you supposed to check the material as to price? A. I checked the material as to quantity and the kind that was there.

20 Q. If they should happen to charge you fifty per cent more than the market allowed you let that go? A. I didn't pay any attention to it.

Q. So, you don't know as a matter of fact, three things, you don't know whether all the material claimed was delivered on the job, you don't know whether the material returned was credited, do you and you do not know whether the prices were fair and market prices, do you? A. No.

30 Q. But you do know, you were getting about sixty dollars a week to look after the place? A. I know I was getting my wages.

Q. And you are in doubt as to whether Mr. Walker spoke to you in August about the over charge? A. He never said anything to me about overcharges at all.

40 Q. What was your idea of checking up at the end of the building? A. Well, when the invoices was handed to Mr. Walker he couldn't find all the delivery receipts to begin with and he began scrap-



*George F. Herbert—Cross.*

ing around here and there and every place and he got them all with the exception of six or eight.

Q. And then he raised the question about delivery sheets that weren't there or haven't been signed? A. I think he said something about some not having been signed.

Q. Then you checked up with the invoices? A. 10  
Yes, sir.

Q. And you did that to show Mr. Walker whether or not the material had been delivered or used? A.  
Yes, sir.

Q. And Mr. Walker called your attention to the fact that he was about twenty-six hundred dollars short? A. No, he didn't.

Q. I think you said that some of that material could not be checked up because it was concealed in the walls of the building? A. Yes, after it was 20  
finished.

Q. You yourself knew the size of pipe that was used and concealed in the wall? A. I did at the time.

Q. You could tell from the invoices what it was, couldn't you? A. I think I could.

Q. Couldn't you with the aid of the invoices tell what size pipe would be used that was concealed in the walls? A. Some of it. 30

Q. Can you tell right now? A. Some of it.

Q. What was the size of the pipe? A. Which was concealed in the walls or floors? Some of it one inch, one inch and a half, two and a half inches, some one-half inch and some three-eighths.

Q. And some three inches? A. No, I didn't say three inches, I said two inches.

Q. Some one and a half inches and some three eighths inches? A. One inch, three-quarters inch half-inch and three-eighths. 40



*George F. Herbert—Cross.*

Q. That was all the sizes of pipes that were used that were concealed in the walls? A. And of course under the floors, some under the basement floors was three inch.

Q. Was that all brass pipe? A. You are talking about water pipe now?

10 Q. The first you mentioned are water pipes? A. That is brass pipe.

Q. I am asking you were the sizes you have mentioned were they water pipes or steam pipes? A. You will have to ask me what you want, if you want water pipe I will tell you about water, if you want steam I will tell you about steam.

Q. Let's confine our attention at present to the water pipes. What was the size of the water pipes from the main to the works on the first floor? A.  
20 The water pipe from the street main was three inch and to all the bath room risers or bath-room radiators were three inch and the bath room piping was two inch and there was a circulating line and that was one and a half inches and it was increased to two inches.

Q. Does that mean the entire amount of water pipes that was used? A. You are talking about mains now, aren't you?

30 Q. Yes. A. You have pipe under the bath room floor ranging from one inch to three-eighths inch.

Q. Were they all bath pipes? A. Yes, sir, and the water pipes.

Q. When you gave this last statement that comprises the whole of the pipe, doesn't it? A. The sizes range on the entire building from three inch to three-eighth inch. Nickel-plated brass was three-eighth inch but the smaller brass pipe was one-half inch.

40



*George F. Herbert—Cross.*

Q. The nickel-plate was then also brass nickel-plated pipe? A. Yes, sir.

Q. Did you run an individual service line to each apartment? A. On what?

Q. On the water pipe. A. Individual, yes, sir, to every apartment.

Q. Yes. A. To each tier of bath rooms and kitchenette. 10

Q. How many would there be to each? A. Three, yes, three and everyone of them was different. Each bath room was controlled separately and each kitchen was controlled separately.

Q. Was that a double line of pipe? A. Yes, sir.

Q. What was the size of it? A. Two inch going up through the wall.

Q. Where was the three inch used? A. In the basement. 20

Q. That was from the main to the meter? A. From the main to the meter and all along through the cellar where branches were taken off.

Q. Does that comprise all of the water pipe that you have named now? A. It comprises all the sizes from three inches to one-half inch on brass and three inches to three-eighth inch on nickel-plated brass.

Q. You could tell nearly all the material that was used even though it was concealed in the walls, couldn't you? A. No, I can't remember year after year where each one of them were. 30

Q. You were checking it up? A. We were checking up here from these bills that is what I got it from.

Q. I say, you could not tell from the work? A. I couldn't check the material from the building, no, because I can't remember that long. I don't remember the runs. 40



*George F. Herbert—Cross.*

Q. You couldn't remember then, as well as you do now? A. No.

Q. You mean you couldn't remember as well in 1927 as you do now? A. I could remember at the time where they were, but I can't go down there now and show you where they are.

10 Q. Couldn't you know the sizes of pipe and figure out the number of feet that was used even though it was concealed? A. No, I could not.

Q. What was the size of the water pipe returns? A. All the water pipe returned from where?

Q. From the radiator or wherever they may be? A. What are you talking about now, steam or water?

20 Q. Water, the size of the return pipes going to the basin and supply the bath room? A. The size of the returns going to the supply tanks and the basins, they are all the same.

Q. What is the size? A. Two inch with the exception of the third floor.

Q. What was it on the third floor? A. One and a half inch.

Q. Does that comprise the whole water system? A. I don't know what you want to know.

Q. We were talking about the size of the pipes?

30 A. I gave you the size of the pipe from three inch to one-half inch.

Q. Of course, your trouble was you couldn't tell the length of pipe used? A. No, I could tell you if I could see it.

Q. Couldn't you have told from the plans? A. The plans were disregarded. There was plans there for a few days and after that there was no plans and every day there was something different.

40 Q. You mean the house got built without any



*George F. Herbert—Cross.*

plans? A. Yes, Mr. Walker was the plans and the supervisor.

Q. Couldn't you tell from the plans how far those pipes ran from floor to floor? A. Yes, sir.

Q. If you measured the length that the pipes ran from floor to floor you could tell how much was used, couldn't you? A. Provided there was 10  
no waste.

Q. Was there any waste? A. Yes, sir.

Q. How did that happen? A. From changes.

Q. How much was the waste on changes? A. I couldn't tell you that.

Q. Didn't you check up on waste at all? A. What difference would that make to me, if he wanted to make changes.

Q. It made quite a difference to him? A. No, if 20  
he wanted to make the changes it was up to me to make them for him. After I got the job finished and he wanted to make a change I used the material up as near as I could but there is bound to be waste.

Q. You didn't keep any track of what wasted pipe there was? A. No.

Q. Was there any that was fit to be returned? A. After it was cut you mean?

Q. Yes. A. No, sir. 30

Q. So far as that pipe was concerned you did not get any allowance on that? A. You can't return cut pipe.

Q. You didn't keep any record of that? A. Whatever was taken out we used to the best of our advantage, but there was plenty pieces around there that couldn't be used.

Q. Having the information which you had when you started checking up in August, 1927, could you have told approximately whether or not the mate- 40



*George F. Herbert—Cross.*

rial specified in invoice as delivered was actually delivered and used in the building? A. I think it was delivered but so far as being used, Mr. Tansey, it was used to the best of my knowledge. I don't know whether any of it got away from there or not. I know one day I unloaded a junk wagon that was loaded down with material and then I called Mr. Walker's attention to it at the time. I caught the junk man this time with a whole load of material. Mr. Walker had no night watchman there, he had nobody around the property.

10

Q. You think that some of it was not actually used in the building? A. I don't know. I know one morning I unloaded a junk wagon or I called Mr. Walker's attention to it at the time it was being unloaded.

20

Q. Where was this material kept? A. All over.

Q. And it was thrown outside the house? A. Yes, sir.

Q. And then when it was thrown out there you didn't pay any further attention to it? A. Why should I cart it all back, if he didn't care, why should I?

30

Q. Mr. Herbert, let's ask you this question again. Do you think you could have told in August, 1927, even approximately whether the material as specified on the invoice had been delivered and used in the building? A. Whether the material as invoiced was used in the building was to the best of my knowledge, yes.

Q. You could have told that? A. Yes, sir.

Q. Notwithstanding the fact that it had been concealed, some of it in the walls and floors? A. I can't tell you what is concealed.

40

Q. You could have approximated whether or not



*George F. Herbert—Cross.*

it had been delivered? A. I think I could at the time.

Q. Was that your idea of checking it to find out whether it had been delivered? A. No, we checked from the sheet.

Q. The steam pipe, that was a little different from the water pipe? A. Yes, sir.

10

Q. What kind of pipe did you use there, brass or iron? A. We used iron pipe on the steam.

Q. What was the size you used? A. From six to one inch.

Q. Could you tell whether or not the steam pipes as specified and invoiced had been delivered and used in the building? A. I think so, yes, sir.

Q. Do you know whether or not such was the case? A. There was all of it used, but what was returned.

20

Q. What was the size of the steam pipe under the basement floor? A. Some two inch, some two and a half inch and some three inch, I think that can be seen.

Q. That is under the floor, it cannot be seen? A. Yes, sir.

Q. Do you know how much of it was two inch and how much was one and a half inch and how much was three inch? A. I think there was some two inch, some two and a half inch and some three inch.

30

Q. But you can't tell how much? A. No.

Q. Well, was any of that the whole length of the building? A. There is two lines I think that run the whole length of the building.

Q. How big were they? A. I can't tell you that unless you go down and look at them. I knew when it was put in there, the sizes, but I can't tell you now.

40



*George F. Herbert—Redirect.*

Q. Can you tell whether it was three and a half inch or three inch or two and a half inch? A. By looking at it, yes.

Q. But you can't tell from memory? A. I can't tell you now, no, sir.

Mr. Tansey: That is all.

10

*Redirect-examination by Mr. Sexton:*

Q. How many bath rooms were in this building?

A. I think there was twenty-four, Mr. Sexton, that is that were finished. There is two, three or four, I think there is four that isn't finished. They was roughed in. He intended to put a cafeteria in the front and a ladies and mens' room in that and then there was a kitchen in back of that that was roughed in and there was a bath room alongside of that and there is a bath room alongside of the air shaft in the basement that was roughed in and never finished and they have been knocked off and buried.

20

Q. What do you mean by knocked off and buried?

A. When they went to grade the cellar the laborers took a shovel and bent the pipes off and buried them.

30

Q. That was by reason of one of the changes made? A. Yes, it has never been finished.

Q. What hasn't been finished? A. That cafeteria or the kitchen neither one.

Q. And all of that material was wasted? A. You might say it was wasted, surely. It was bent over and left there.

Q. When the estimate was given, did you go over the estimate with Mr. Walker? A. Yes.

Q. And Mr. Stauch was there? A. Yes, sir.

40

Q. And the price agreed upon? A. Yes, sir.



*George F. Herbert—Redirect.*

Q. Do you remember what it was? A. I think it was eighty-one hundred and something or eighty-two hundred and something, I can't tell you because there is two estimates.

Q. What was the occasion for the two estimates?

A. There was a change in storage tanks.

Q. How much was that, do you remember? A. 10  
I think it was a hundred dollars.

Q. And did Mr. Walker go over the items in the estimate? A. Yes, sir.

Q. Do you remember at the time whether he had an estimate from any other firm? A. He did.

Q. Did he talk to you about it? A. Yes.

Q. What did he say? A. He said Harris was lowest. I think there was a couple items on there about seats and I think on the Monmouth Plumbing Supply, it was mahogany and on the other bill 20  
was white seats and it was changed.

Q. Did you see the other estimate that Walker had? A. Yes, sir.

Q. Was it for the same material? A. No, there is some material on there such as bibs.

Q. What do you mean by bibs? A. Faucets and on all the work we used Seville bibs.

Q. And did Walker know the price at the time he signed the Exhibit referred to as "I" for identification? A. Did he know the price when he signed this? 30

Q. Did he know the price of the estimate? A. Yes, sir.

Q. Did you have any conversation with Walker as to the improper storage of material that was furnished on the property? A. Yes, sir.

Q. What was it? A. I asked him to make some provision to store the material he had several hun- 40



*George F. Herbert—Recross.*

dred dollars worth of brass goods there under no lock and key and no watchman.

Q. What did he do about it? A. He didn't do anything.

Q. He was on the job every day? A. Most of the time.

10 Q. And was he there when the material was delivered? A. Yes, sir.

Q. He had the opportunity of checking up each one of these bills? A. Yes, sir.

Q. Were the invoices so that he could have seen them? A. Yes, sir.

Q. And he was exercising general supervision over the construction of the building? A. Yes, sir.

Q. You say he was the brain? A. I say he was the whole works.

20

Mr. Sexton: That is all.

*Recross-examination by Mr. Tansey:*

Q. Mr. Herbert, weren't you looking after this thing at all while you were there in the day time? A. Yes.

30 Q. So when you were there in the day time there wasn't any stunts or taking away of material? A. Oh, yes.

Q. Whatever was done would be done at night? A. After I left there, yes.

Q. Suppose there was some deliveries back of stuff which wasn't used and you weren't there, would that sometimes be taken back by the regular carters without your being there? A. What do you mean from the supply house?

Q. Yes. A. No, no.

40

Q. This stuff you say was unnecessary by reason



*George F. Herbert—Recross.*

of changes was that returned? A. What do you mean?

Q. I mean the material, when you said the material was not used by a reason of changes in the plan? A. There was quite a lot of goods returned, whether it was by changes or whatever it was I don't know.

10

Q. Part of the material was bent over and left there, I think you said? A. Part of it, that was installed, yes, sir.

Q. And that was not returned? A. That couldn't be returned, that is still there I guess, buried in the sand.

Q. This estimate you speak about would be changed by the returns on the materials, wouldn't it? A. No, the estimate was changed by Mr. Walker.

20

Q. I am asking you whether the material specified in the estimate were returned and whether that would be credited against the estimate? A. That would be credited as a whole, I suppose.

Q. So, the original amount of the estimate would be decreased by the returns? A. If stuff was returned from the estimate, yes, sir.

Q. If it turned out there were any changes in the estimate was there any arrangement about correcting those? A. I never heard of anything.

30

Q. You didn't ascertain whether there was such changes of course? A. No.

Mr. Tansey: That is all.

*Re-redirect-examination by Mr. Sexton:*

Q. During the progress of the work, did Mr. Walker ever say to you or anyone else in your presence

40



*George F. Herbert—Re-redirect.*

that there were any wrong changes made for material furnished by the Monmouth Plumbing Supply Company? A. No, never anything mentioned to me as to goods.

- Q. Did you ever see him go over the estimates?

10 A. He went over them the day that the three of us were together.

Q. And before that? A. No.

Q. Did you go over the monthly statements? A. Yes, sir.

Q. And they were furnished to you every month? A. Yes, sir.

Q. Did you check them with the invoices? A. Yes, sir.

20 Q. And would you have been able to detect whether anything had been charged which had not been received on the job? A. Yes, I think I would at the time.

Q. Did you find any errors? A. No.

Q. You received the monthly estimates? A. The monthly invoices?

Q. I beg your pardon, you received those? A. Yes, sir.

Q. And turned them over to Mr. Walker? A. Yes, sir.

30 Q. And they are the same ones produced here today by Mr. Walker? A. Yes, sir.

Q. And the invoices and credit slip under Exhibit B for identification, they are the same ones that were turned over to Mr. Walker? A. Yes.

Q. And the delivery sheets marked E for identification are the same ones that were turned over by you to Mr. Walker? A. Yes, that's it.

Mr. Sexton: That is all.

40

Mr. Tansey: That is all.



*Ernest Stauch—Direct.*

ERNEST STAUCH, sworn for the Plaintiff.

*Direct-examination by Mr. Sexton:*

Q. Mr. Stauch, you are employed by the Monmouth Plumbing Supply Company? A. Yes, sir.

Q. In what capacity? A. Manager.

Q. And you were in January, last? A. Yes, sir.

Q. Did you meet C. Herbert Walker? A. Yes, sir.

10

Q. When? A. First, the first I met him was at Mr. Herbert's house one evening around seven-thirty or eight o'clock.

Q. What month was it? A. January, 1927.

Q. And did you have any conversation with reference to plumbing business? A. He told me he was going to put up an apartment house in Avon and wanted to know if I thought it would pay him and whether we were able to supply the material.

20

Q. And what did you say? A. I told him, we could supply the material and was right close by and could take care of his deliveries and everything as he wanted them.

Q. Was an estimate furnished? A. There was an estimate furnished in January for twenty-seven apartments.

Q. And at that time had the Exhibit marked "I" for identification been signed? A. It had not.

30

Q. What was done if anything in reference to the estimate for the twenty-seven apartments? A. It went along for two or three weeks I imagine, and Mr. Herbert informed me they were going to make some changes, that they were going to cut down the amount of the apartment.

Q. And was another estimate made? A. Another estimate was made, yes, sir.

40



*Ernest Stauch—Direct.*

Q. For how many apartments, do you recall? A. For twenty-four apartments.

Q. And I show you Exhibit A for identification and ask you if that was the estimate furnished?

A. That was the one.

10 Q. What became of the original of that? A. The original of that I delivered personally to Mr. Herbert and he and I together went to the apartment and delivered it to Mr. Walker.

Q. Was it talked over? A. It was talked over, yes, sir.

Q. What is the amount of that estimate? A. Eight thousand two hundred and seventy-two dollars for the plumbing fixtures and some of the soil pipe and brass pipe.

20 Q. Had the paper marked "I" for identification been signed at the time that estimate was given? A. This paper was dated February the 11th, but it wasn't signed until the day the estimate was delivered February 20th, it had been made up but it wasn't signed.

Q. C. Herbert Walker signed it as president?

Mr. Tansey: I object to that, if your Honor please.

The Court: The objection is sustained.

30 Q. Did you see it signed?

Mr. Tansey: I object to that again.

The Court: Why?

Mr. Tansey: It is of no importance, not material.

The Court: Objection overruled.

A. I didn't see it signed.

40 Q. Was there another estimate given later for material on this job? A. There was two or three



*Ernest Stauch—Direct.*

estimates given for a different kind of material for a heating boiler and for other things.

Q. Can you tell by looking at these papers the references to them? A. There is a separate price of four hundred and thirty-three dollars for a hot water supply boiler to go in the basement to supply hot water in addition to the eight thousand two hundred and seventy-two dollars. 10

Q. And any other? A. There was another price for brass fittings of approximately six hundred and forty dollars; no list of brass fittings to be estimated on.

Q. Was that estimate made by anyone in your presence and in the presence of Mr. Walker? A. No.

Q. Was the brass fittings spoken of by you in the presence of Mr. Walker? A. No. 20

Q. Do you recall at the time Mr. Herbert in the presence of Mr. Walker having any talk with reference to brass fittings? A. The only thing he said was, it was impossible to get an exact list.

Mr. Tansey: I object to this.

The Court: Objection overruled.

Q. Who said? A. The plumber said it was impossible to get an exact list of the brass fittings. 30  
*By the Court:*

Q. Who else was there, Mr. Stauch, when Mr. Herbert said that? A. I imagine that was when Mr.—

Q. Do you know? A. I think Mr. Herbert gave me this list to be figured on at his house in the evening.

*By Counsel:*

Q. Was any exact amount mentioned in the 40



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presence of Mr. Walker? A. It wasn't mentioned in the presence of him, it was put on the estimate at approximately six hundred and forty dollars for brass fittings. There is a separate estimate here for steam pipe fittings.

10 Q. Of how much? A. Amounting to nine hundred dollars for the steam pipe and fittings.

Mr. Tansey: If your Honor please, I object to this as reading from a paper that hasn't been offered in evidence. It has only been marked for identification.

*By the Court:*

Q. How is that estimate given? A. There were several different sections of it.

20 Q. In writing? A. In typewriting.

The Court: Objection sustained.

*By Counsel:*

Q. Do you know whether other goods were furnished for this job by the Monmouth Plumbing Supply Company other than those mentioned in the estimate? A. There was a lot of extra material sent on the job.

30 Q. And you are familiar with these invoices, are you not? A. Yes, sir.

Q. Do you recall meeting with Mr. Walker and Mr. Herbert and going over the items set forth in the invoices? A. I do.

Q. And checking them up? A. Yes, sir.

Q. When was that? A. It was either in the latter part of July or first part of August, I don't recall just which.

40 Q. Were they checked up? A. They were checked up.



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Q. And as a result of the check-up did you receive anything?

Mr. Tansey: I object to that, if your Honor please.

The Court: From whom?

Mr. Sexton: From Mr. Walker.

10

A. I did not.

The Court: Objection overruled.

Q. Do you recall when you checked over these lists? A. Mr. Walker asked me to come down there one evening and go over them with him, which I did, and there was some little dispute about two or three slips, we couldn't seem to straighten out and I told him the only thing I could do was to get the plumber to come there.

20

Q. Did the plumber come there? A. We made an appointment for the following Sunday afternoon, I think it was, which was about the first part of August.

Q. Was that at the time you went over that? A. Mr. Herbert and Mr. Walker and myself went over them.

Mr. Tansey: I object to that. How is that going to bind the Arlington Realty Company? They have to show sale and use of the building to connect up the Arlington Realty Company.

30

The Court: The objection is overruled.

Mr. Tansey: An exception.

Q. Had you received any payment on account of the building at that time? A. I don't recall any payment being paid since that, only a note.

40



*Ernest Stauch—Direct.*

Q. There has been a note given? A. There had been a note given.

Q. And I show you a paper marked "L" for identification and ask you if you received that?

10 Mr. Tansey: If your Honor please, I object.

The Court: Why?

Mr. Tansey: As not binding on the Arlington Realty Company.

The Court: Let me see it, who is it from? I don't understand why it isn't.

Mr. Tansey: It is not in the name of C. Herbert Walker.

The Court: As President of the Arlington Realty Company.

20 Mr. Tansey: That is merely his assertion.

The Court: He is the man that had all his negotiations all along and it was the Arlington Realty Company's property and the Arlington Realty Company gave a mortgage on the property.

Mr. Tansey: That don't appear in this paper.

The Court: That appears in the evidence.

30 Mr. Tansey: Here is a piece of paper which happens to be in the name of C. Herbert Walker, President of the Arlington Realty Company, he may say he is, but that don't prove he is.

40 The Court: It seems to me to be so evident to my mind when a man named Walker goes out and makes a plumbing contract and it goes into a building and the Arlington Realty Company gives a mortgage to the Prudential Life Insurance Company giving them



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a mortgage on the same building which has been erected on property which they own all of which facts are admitted, that the further acts of Mr. Walker in regards to that raise the question for the jury as to whether or not they were corporate acts or not.

Mr. Tansey: C. Herbert Walker, president, he says he is president. His saying so would never bind the company as agent. 10

The Court: Unless the company had denied there was agency.

Mr. Tansey: You mean there might have been a ratification of course.

The Court: If they accepted the benefit of it.

Mr. Tansey: As I remember the cases, it says the statement by a man claiming to be an officer or agent of a corporation does not in any way bind the corporation and here it isn't as strong as that. Here is a party that bills C. Herbert Walker. 20

The Court: Bills him?

Mr. Tansey: That is their statement there.

The Court: Come and look at this, will you please. I think we are talking on cross purposes, you haven't seen it. 30

Q. Did you receive that? A. I did receive it.

Mr. Tansey: I was going to object to it as not binding upon the Arlington Realty Company even if he received it. It would not be binding upon the Arlington Realty Company.

The Court: I will overrule your objection. 40



*Ernest Stauch—Direct.*

Q. I show you a paper marked for identification "M" and ask you if you recognize that? A. I do.

Q. Did you receive it? A. I did.

Q. And you received it from whom? A. The Monmouth Title and Mortgage Guarantee Company.

10 Q. And that paper is what? A. A check for eight thousand and twenty-six dollars.

Q. Payable to whom? A. The Monmouth Plumbing Supply Company.

Q. And bears date?

The Court: How much?

A. Eight thousand and twenty-six dollars.

Q. And bears date what? A. August 3, 1927.

20 Q. And the other paper that you have marked for identification "L" is what? A. Is an order for the eight thousand and twenty-six dollars.

Q. On whom? A. On the Monmouth County Title Guarantee and Mortgage Company.

Q. What did you do with that paper with reference to the receiving of this check? A. I took it down to the Monmouth Title & Guarantee Mortgage Company in Asbury Park.

30 Q. Who did you see there? A. A man by the name of Mr. McDermott.

Mr. Tansey: I object to this as not binding on the Arlington Realty Company.

The Court: If it is not we will strike it out.

Mr. Tansey: That is my motion.

The Court: The motion is denied.

Mr. Tansey: An exception.

40 Q. Did you receive the check at the time upon



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the delivery of the order, did you receive this check? A. I did.

Mr. Sexton: If your Honor please, I offer these two papers in evidence.

Mr. Tansey: I object to the offer, because it can be seen very plain there is nothing there to bind the Arlington Realty Company. 10

The Court: I think, Mr. Sexton, you will have to show this fund, somehow belongs to the Arlington Realty Company from which they were paid.

Q. Mr. Stauch, were you present later at a conference with Mr. Walker, Mr. Davis, yourself and Mr. Rosecrains with reference to this building? A. I heard part of the conversation, yes, sir. 20

Q. Where did it take place? A. In the Monmouth Plumbing Supply Company office in Long Branch.

Q. Was that before or after this check was given? A. That was after the check was given.

Q. I notice at the time you received the paper marked Exhibit L for identification did you have a talk with Mr. Walker as to the amount due on the Monmouth Plumbing Supply Company bill? A. He made that amount on that order, specified that amount himself, so as to leave a certain balance. 30

Q. That balance was how much? A. Fifty-seven hundred dollars.

Mr. Tansey: If your Honor please, I move to strike that out as being no more admissible than the paper itself. 40



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The Court: Why? I am not sure the paper isn't admissible. I am telling Mr. Sexton to prove it come out of that fund.

Mr. Tansey: Why should the fact they discussed the amount, why should that bind the Arlington Realty Company?

10

The Court: How does the Arlington Realty Company act?

Mr. Tansey: It acts through agents.

20

The Court: Do you mean to say this company can accept this material in its building and this land and the construction of the building for some months for the building growing up for the corporation, the corporation giving a mortgage on its own land and therefore that isn't sufficient evidence prima facie to bind the corporation itself?

Mr. Tansey: You see in the first place the corporation did not buy the material. If they are reliable at all such relationships were had through a third part.

The Court: Who was the third party.

Mr. Tansey: Mr. Herbert.

30

The Court: There is lots of testimony they dealt directly with these people. Now, before anything was done, they got the agent of the Monmouth Supply Company and talked over with him how much the material could be furnished for.

Mr. Tansey: If the corporation was liable at all under the law, it would only be liable for the amount which they got the benefit of.

The Court: That is true.

40

Mr. Tansey: And it would be incumbent upon these people to show, first of all if the



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material was delivered and used in the building and the mere question of whether they got payment from somebody would not prove the stuff had been delivered and been used in the building.

The Court: It might not, but—

Mr. Tansey: There is a way of proving 10  
these things.

The Court: I take it Mr. Tansey, from the opening, I don't recall the statement being made that you are disputing this bill on the ground that the material charged for was not actually furnished.

Mr. Tansey: Certainly we are.

The Court: One of the agents in charge of the construction and ordering of these goods has agreed or disagreed as to the price and 20  
it is some evidence as to whether that agent on the ground believes the price was correct or not correct.

Mr. Tansey: It is possible he agreed, but they will have to show the corporation agreed to the same thing that he did.

The Court: The objection is overruled, the motion is denied.

Q. And as I understand it, the odd sum of eight thousand and twenty-six dollars was agreed upon by Mr. Walker, so as to leave the balance an even fifty-seven hundred dollars. 30

Mr. Tansey: I object to that, if your Honor please, as leading.

The Court: Yes, the objection is sustained.

Q. Why then was the odd sum of eight thousand 40



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and twenty-six dollars agreed upon. A. It was Mr. Walker's own proposition to make it eight thousand and twenty-six dollars, so as to leave an even balance of fifty-seven hundred dollars.

Q. Can you tell whether or not the Monmouth Plumbing Supply Company received that check?

10           Mr. Tansey: I object, if your Honor please, as being immaterial whether they received it or not.

The Court: The objection is overruled.

A. The check was given to the bookkeeper of the Monmouth Plumbing Supply Company and deposited in the Citizen's Bank to their account.

20           Mr. Sexton: I don't see that there can be any objection to the offering of the check in evidence.

Mr. Tansey: I object to that, if your Honor please.

The Court: Why?

Mr. Tansey: I think it is immaterial.

The Court: The objection will be overruled.

Check marked Exhibit P-3.

30           Q. Do you recall material being returned which had been furnished to the Arlington Realty Company building? A. Yes, sir.

Q. And did you visit the building yourself? A. I was to the building several times.

Q. And with whom did you converse relative to the supplies received and returned? A. Mr. Herbert either called me up at the office and asked me to come down or send the material down or called

40



*Ernest Stauch—Direct.*

me on the phone for me to stop down there the next morning.

Q. Did you talk to Mr. Walker? A. Mr. Walker was generally around there.

Q. At any time did Mr. Walker ever state to you that the materials had not been received? A. No, sir. 10

Q. Or that proper credit had not been given? A. No, sir.

Mr. Tansey: I move to strike that out, if your Honor please, there is no testimony as yet of sale and delivery.

The Court: That is rather negative testimony, I will direct that it be stricken out.

Q. Had you received any credit when the Plumbing Supply Company received any credit on account of this account before you received the check for eight thousand and twenty-six dollars. 20

A. We received a note sometime in May, if I recall correctly.

Q. Do you know how much the note was for? A. Four thousand dollars.

Q. Do you know whether or not the note was paid? A. To my knowledge it was never paid, it was protested. 30

Q. I show you a note and ask you if that is the note to which you referred? A. Yes, sir.

Q. And by whom is it signed?

Mr. Tansey: You haven't offered it yet, have you? It ought to be offered if he is going to use it.

The Court: Do you object to the answer?

Mr. Tansey: I do, yes.

The Court: The objection will be sustained. 40



*Ernest Stauch—Direct.*

Mr. Sexton: I offer it in evidence, if your Honor please.

The Court: Do you object to it going in evidence?

10

Mr. Tansey: Yes. I will object until I see it. I object to this as not being binding upon the Arlington Realty Company.

The Court: You may ask him, if he knows the signature to it, Mr. Sexton, it hasn't been proven yet.

Mr. Sexton: Do you deny the signature of that?

Mr. Tansey: We don't have to say yes or no.

20 Q. Do you know whose signature that is, Mr. Stauch? A. C. Herbert Walker.

Q. Are you familiar with this signature? A. I saw it on this note and the guarantee he gave the company.

Q. Did you see the note signed? A. Yes, sir.

Q. And who signed it? A. C. Herbert Walker as president of the Arlington Realty Company.

Mr. Sexton: I renew my offer, if your Honor please.

30

The Court: It may be admitted. Note marked Exhibit P-4.

Mr. Tansey: My objection stands. Did your Honor admit that?

The Court: The objection does not stand, I overrule it.

Mr. Tansey: I mean, I wanted on the record.

40

Mr. Sexton: And this is a note dated Newark, New Jersey, May 7th, 1927.



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Mr. Tansey: Do we take an exception?

The Court: Let your exception be noted.

Mr. Sexton: Sixty days after date we promise to pay to the order of the Monmouth Plumbing Supply Company four thousand dollars at the City Trust Company with interest. Arlington Realty Company, C. Herbert Walker, President and the top to it is a notice of protest. Take the witness. 10

*Cross-examination by Mr. Tansey:*

Q. This estimate was only a proposal of the amount which might be used in the building and which would be charged for, wasn't it? A. There was more than one estimate.

Q. These estimates, can't you answer that question? These estimates were only proposals of what might be used in the building and what might be charged for materials, wasn't it? A. Yes. 20

Q. There wasn't anything sure that much material might be used in the building, was there? A. That was what the estimate was given on.

Q. It might vary, there might more or less used? A. Yes, sir.

Q. According to the occasion? A. Yes, sir.

Q. So that the estimate was not supposed to be binding as to the amount of material used or as to the price, was it? A. To a certain extent it was. 30

Q. But not finally was it? A. Yes, sir.

Q. It would depend on how much was actually used in the building? A. Yes, sir.

Q. And if there were any returns on the material it would be taken off the estimate, wouldn't it? 40



*Ernest Stauch—Cross.*

A. Some items have been charged off as taken from the estimate.

Q. And the estimate would be subject to change according to the event that happened? A. There was no change on the estimate after it was accepted.

10 Q. If there was less pipe used, wouldn't you estimate there would be less money for pipes? A. Yes, sir.

Q. So the fact that the estimate named a certain sum wouldn't make it binding, would it? A. Not when there was more pipe called for, no.

Q. Or if there was less called for, it would be taken off? A. Yes, sir.

Q. So it actually depended on how much was used in the building? A. Yes, sir.

20 Q. You don't know of your own knowledge about deliveries at the building, do you? A. On some of them I do, yes.

Q. You yourself didn't personally deliver the material, did you? A. Once in a while a few small fittings of an evening I would deliver them to Mr. Herbert or sometimes I would go down early and deliver them before closing time.

30 Q. And you don't know yourself about what was returned, do you? A. I can't tell you that exactly, no. There was a truck load or two returned of pipe and fittings.

Q. When they were returned they were supposed to be credited back? A. Yes, sir, after we got them sorted out.

40 Q. At the time you and Mr. Walker had some discussion about some slips that were lost or hadn't been signed, when was that? A. That was on Sunday afternoon, Mr. Herbert and I went over the invoices.



*Ernest Stauch—Cross.*

Q. Was that in August, 1927? A. Around the latter part of July or first part of August.

Q. And Mr. Walker made a claim there was a shortage of material, didn't he? A. He said he couldn't understand where it was all used.

Q. And when he said he couldn't understand where it was all used, did you show him where it was all used? A. I could not, I didn't install any of it. 10

Q. It was a fact that a number of slips hadn't been signed for? A. There were some that hadn't been signed for.

Q. And there was no proof at that time to Mr. Walker whether or not those had actually been delivered, was there? A. I couldn't prove it to him, it was up to Mr. Herbert. I wasn't on the job to receive the material. 20

Q. So far as the materials themselves went there was no proof of the deliveries that had been made? A. Not that I could make.

Q. And you heard Mr. Herbert say he could not tell whether the material had been used in the building by reason of the large amount of it being under cover? A. I don't recall the conversation.

Q. So at the time there wasn't any means of finding out whether or not certain things had been delivered, was there? A. It was impossible to find them then. 30

Q. Didn't Mr. Walker at that time claim he was about twenty-five hundred dollars over-charged?

A. I don't know as he specified any amount.

Q. He did say he was over-charged? A. I can't recall he was over-charged.

Q. What were you checking up for? A. Check- 40



*Stephen McDermott—Direct.*

ing up to show him where the material had been delivered and to check it up with the invoices.

Q. So far as you find it had been delivered and he claimed it hadn't been delivered? A. The only thing he said it run more than he figured on.

10 Q. How much did he say? A. He didn't say any special amount.

Q. Didn't he say about twenty-five hundred dollars? A. Not that I recall.

Mr. Tansey: That is all.

Mr. Sexton: That is all.

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STEPHEN McDERMOTT, sworn for the Plaintiff.

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*Direct-examination by Mr. Sexton:*

Q. Mr. McDermott, do you reside where? A. Freehold.

Q. And you are associated with the Monmouth Title & Mortgage Guarantee Company? A. Yes, sir.

Q. Do you know C. Herbert Walker? A. I do.

30 Q. Did you meet him in reference to a mortgage on the property of the Arlington Realty Company? A. Yes, sir.

Q. And who made arrangements for the placing of the mortgage? A. Mr. Walker made the arrangements with us.

Q. Mr. Walker made the arrangements? A. With the Monmouth Title Company.

Q. That is the Mr. Walker that is here? A. Yes, sir.

40 Q. A mortgage was executed? A. It was.



*Stephen McDermott—Direct.*

Q. For fifty-five thousand dollars? A. Yes, sir.

Q. By the Arlington Realty Company to the Prudential Insurance Company, is that right? A. That is right.

Q. And bears date as set forth in the memorandum which I have here? A. Yes.

Q. Did you disburse the moneys of this mortgage? A. I did. 10

Q. I show you a paper marked "K" for identification and a check marked "J" for identification and ask you whether you received those papers? A. Yes, sir, I did.

Q. And the order was drawn upon, what month? A. Upon the proceeds of this mortgage. The mortgage granted by the Prudential Insurance Company.

Q. To whom? A. To the Arlington Realty Company. 20

Q. And that is an order for two thousand five hundred seventy-seven dollars and seventy-eight cents with a check for a lack amount payable to George Herbert, is that right? A. That is right.

Mr. Sexton: I offer those in evidence.

Mr. Tansey: I object, that is not in any way binding upon the Arlington Realty Company. 30

The Court: The objection is overruled.

Mr. Tansey: An exception.

The order marked Exhibit P-5 and check P-6.

Q. I show you a paper marked "L" for identification and a check marked Exhibit P-3 and ask you if you received them? A. I did.

Q. And this is an order for what? A. An order 40



*Stephen McDermott—Direct.*

to pay to the Monmouth Plumbing Supply Company eight thousand and twenty-six dollars signed C. Herbert Walker, President of the Arlington Realty Company.

10 Q. And check of what? A. Check of the Monmouth Title & Mortgage Guarantee Company to the Monmouth Plumbing Supply Company.

Mr. Sexton: That check is marked as an Exhibit and I offer the order.

The Court: It may be marked.

Mr. Tansey: I renew my objection.

The Court: The same ruling, same objection.

Order marked Exhibit P-7.

20 Q. I show you an order bearing date the 31st day of October, 1927 made to the Arlington Realty Company, C. Herbert Walker, President and ask you if you received that? A. I did.

Q. I show you a check bearing date October 22nd, 1927 made to B. V. Poland, Attorney for P. J. Fluck one hundred and fifty dollars, was that paid? A. It was.

Q. And paid from the same funds? A. Paid from the same funds.

30

Mr. Tansey: I move that that be stricken out because it doesn't appear to belong to any of these parties.

The Court: Let me see it.

Mr. Tansey: It hasn't any bearing on this case.

The Court: At the time the mortgage was signed, Mr. Walker, I presume was admittedly the President of this corporation?

40



*Stephen McDermott—Direct.*

Mr. Tansey: He probably admitted it himself.

The Court: Doesn't the mortgage say so?

Mr. Tansey: I don't know I didn't see it.

The Court: I understood that mortgage was admitted this morning and it was admitted he signed it.

10

Mr. Tansey: That is a far cry to the February before that.

The Court: These negotiations were contemporaneous to the mortgage, weren't they? What was the date of the mortgage?

Mr. Sexton: July 28th, 1927. The purpose of this, if your honor please, is to show C. Herbert Walker paid out of this money belonging to the Arlington Realty Company and was recognized and acquiesced in and was the same source from which we obtained our check and it all bears on the authority of C. Herbert Walker to bind the Arlington Realty Company.

20

The Court: That would be some evidence, that he had control of the disposition of the funds.

Mr. Tansey: At the time the supplies were bought there was no evidence he was president of the corporation.

30

The Court: I am going to allow these. You take your exception.

Order marked Exhibit P-8 and check marked Exhibit P-9.

Q. Did that letter accompany that order, Mr. McDermott? A. Yes, it did.

Q. That is a letter from one of the attorneys here asking that that order be paid? A. Yes.

40



*Stephen McDermott—Direct.*

Mr. Sexton: I offer that.

The Court: Is there any objection to that?

Mr. Tansey: I object to it on the ground it doesn't bind the Arlington Realty Company.

10

The Court: I don't suppose that is admissible unless you prove he was acting as attorney for the Arlington Realty Company at the time.

Q. I show you a check dated December 6th, 1927 for two hundred and thirty-six dollars and fifty-three cents and that check was given from that fund also? A. That was the balance remaining in the fund.

20

Q. And who was that check given to? A. The Arlington Realty Company.

The Court: It is made out to the name of the Arlington Realty Company?

A. The Arlington Realty Company.

Q. Who is it endorsed by? A. The Arlington Realty Company, C. Herbert Walker, President.

Mr. Sexton: Do you object to that?

30

Mr. Tansey: We object to this as being immaterial to the question as to how much was owing to the Monmouth Plumbing Supply Company.

The Court: I think it is immaterial to that, but I think it is material to Mr. Walker's agency to the company. We will allow it.

Check marked Exhibit P-10.

40

Mr. Sexton: To save time, I have bound



*Stephen McDermott—Direct.*

a number together, Mr. McDermott and they appear to be orders all signed by C. Herbert Walker, President of the Arlington Realty Company to one George Andrews, one Farmer Coal & Supply Company, another to George Andrews, another to Harry I. Adelman, Fire Safe Products Company, J. Steinberg & Sons and Hirsh Awning Works and ask you if you received them? 10

The Witness: I did.

Q. As a result did you pay out money?

Mr. Tansey: I object to that.

Q. What did you do when you received the orders? A. Checks were drawn for the amounts requested in the orders to the people. 20

Mr. Tansey: I move that that be stricken out, because the matter is immaterial to this cause in question.

The Court: Immaterial to the agency of Mr. Walker?

Mr. Tansey: Yes.

The Court: He drew one to different people and he drew one to this plaintiff company and the balance was sent to the Arlington Realty Company and could not have been endorsed unless he had authority. I think there is some evidence and I am going to overrule the objection and let them go in. You may have an exception. 30

Mr. Sexton: I offer those as a lot, if your Honor please.

Marked Exhibit P-11.



*Stephen McDermott—Direct.*

Q. I find one here dated October 13th, C. Herbert Walker and H. Vivian Walker, Secretary, did you also pay on that one? A. I would say, yes.

Mr. Tansey: Let me look at that, Mr. Sexton, please that seems to be different. I have no objection to that.

10 The Court: Let it be marked. Marked Exhibit P-12.

Q. I also find another check for one thousand nine hundred and forty-four dollars and eighty-seven cents and ask you if that was paid out? A. Yes.

Q. And that is made payable to whom? A. The Arlington Realty Company.

20 Q. And endorsed by whom? A. Arlington Realty Company, C. Herbert Walker, President.

Mr. Sexton: I offer that.

Mr. Tansey: This apparently was deposited. No objection.

Marked Exhibit P-13.

Mr. Sexton: There is no deposit at all, it is endorsed in blank. I don't think that statement was quite fair Mr. Tansey, the paper speaks for itself. Take the witness.

30

*Cross-examination by Mr. Tansey:*

Q. Mr. McDermott, when you prepared that mortgage upon which this money, fifty-five thousand dollars, was loaned, you saw to it that the officers had authority to make the mortgage, didn't you? A. I think we were supplied with a resolution at that time.

40 Q. That is the way you saw they had authori-



*Stephen McDermott—Cross.*

ty by resolution of the Board of Directors, saying they had authority? A. That is right.

Q. What became of that resolution? A. I think it is now in the Prudential Insurance Company Office at Newark.

Q. Did you before you got that mortgage or paid the mortgage out, get a release of the Mechanics Lien? A. I did. 10

Q. Have you got the release with you? A. Yes, sir.

Q. And the release of the Mechanics Lien was the complete release of the lien, was it not?

Mr. Sexton: That is objected to.

The Court: The objection sustained.

Q. Have you the release here? A. Yes. 20

Q. Will you kindly produce it? And this release was in complete form was it to satisfy you in believing that everything was released? A. There are a number of them together there.

Q. There are a number of releases and the idea was to—

Mr. Sexton: I object to what the idea was or whether it was to satisfy him.

Q. Was it to satisfy you in making this loan that the premises were clear of all Mechanics Liens? A. For the protection of the mortgagee. 30

Q. That was intended to be done by these release, wasn't it? A. They are not all releases.

Q. Or whatever they are? A. No the intention was to release, but it wasn't the intention to subordinate.

Q. Some were subordinations and some were releases? A. Yes. 40



*Stephen McDermott—Cross.*

Mr. Tansey: Has this been marked?

Mr. Sexton: Not yet.

Q. I show you what purports to be a release.

10

Mr. Sexton: I don't want to take up the court's time, but it is not proper cross-examination. It is part of the affirmative defense.

Mr. Tansey: I understand that Mr. McDermott wants to get away and it is necessary for us to have this testimony.

The Court: Is there any objection to that?

Mr. Sexton: No.

20

Q. I show you what purports to be a release of lien of the Arlington Realty Company covering thirteen and fifteen Garfield Avenue, Avon and signed by the Monmouth Plumbing Supply Company among other things P. E. Stauch, Manager and ask you if that was one of the papers which you obtained in order to satisfy you of the clearing of that premises from Mechanics Liens? A. It was.

30

Mr. Tansey: I offer that in evidence.

The Court: Hadn't you better have it marked for identification and have it offered on your own case.

Mr. Tansey: I think he is a subscribing witness.

The Court: You have your testimony all here.

Mr. Tansey: That will be all right. I will offer it for identification.

40



*Stephen McDermott—Cross.*

Q. This is your signature as attesting witness?

A. Yes, sir.

Mr. Tansey: We offer it for identification.

Paper marked "M" for identification.

Q. Did you take the acknowledgment of it, Mr. McDermott? A. There was no acknowledgment there. 10

Q. You signed as subscribing witness to all these signatures? A. Yes, sir.

Q. They were made in your presence? A. Yes, sir.

Mr. Tansey: That is all.

*Redirect-examination by Mr. Sexton:*

Q. Mr. McDermott, you were representing whom in the closing of this title? A. The Prudential Insurance Company of America. 20

Q. And this release has been in your possession from the time it was signed? A. In my possession or in the files of the company.

Q. Did you ask for a resolution when you got the signature of the Monmouth Plumbing Supply Company by Mr. Stauch, Manager? A. No. 30

Q. You were willing to take Mr. Stauch's signature? A. Yes.

Q. And this releases whose property? A. The Monmouth Title & Mortgage Guarantee Company.

Mr. Tansey: I object.

The Court: The objection is sustained, as to whose property the release is.

Mr. Sexton: Here is a man that takes a release— 40



*Stephen McDermott—Redirect.*

The Court: Just a minute. Why do we want Mr. McDermott's opinion as to whose property it is?

10 Q. I have already asked him. It has been in your possession, Mr. McDermott, and you are going to continue to hold back. A. If I can get it back, all right.

Q. And having once gotten it back from me, you intend to keep it? A. Yes, sir.

Q. And when you say you, you mean the Monmouth Title Company? A. Yes, sir.

20 Mr. Sexton: I don't know what to do about these exhibits of the Title Company. I suppose we are pretty near ready for an adjournment?

The Court: Yes, sir.

Mr. Sexton: And I have subpoena Mr. McDermott to produce these files and I don't suppose you want to come back tomorrow.

The Witness: I don't want to.

Mr. Sexton: All right, Mr. McDermott.

The Court: Are you through with this witness?

30 Mr. Sexton: Yes, sir.

---

JOHN H. DAVIS, sworn for the Plaintiff.

*Direct-examination by Mr. Sexton:*

Q. Mr. Davis, you reside at Long Branch? A. I do.

40 Q. And you are in what business? A. The banking business.



*John H. Davis—Direct.*

Q. You are President of the Citizen's National Bank? A. Yes, sir.

Q. Are you connected with the Monmouth Plumbing Supply Company? A. I am.

Q. And in what capacity? A. Treasurer.

Q. Do you recall meeting C. Herbert Walker?  
A. I have had two meetings with him.

Q. And when was the first time that you met him? A. About the middle of March, 1927.

Q. And where did you meet him? A. At the Apartment in Avon.

Q. At where? A. The apartment in Avon.

Q. What was the occasion of your going there?  
A. I went down on that investigating trip.

Q. On whose behalf? A. On behalf of the company.

Q. Did you meet Walker? A. Yes, I did.

Q. And have a conversation with him? A. I did.

Q. And where was it? A. It was on the sidewalk in front of the building.

Q. Who was with you? A. Mr. Berkstresser, Mr. Stauch and myself and Mr. Herbert introduced me.

Q. Mr. Herbert, the plumbing contractor? A. Yes, sir.

Q. Did you have the paper marked "I" for identification with you at that time? A. I did.

Q. And that is the paper which purports to be the guarantee of this account? A. It is.

Q. And did you talk with Mr. Walker at that time in reference to it? A. I questioned Mr. Walker's authority to sign that paper and that is the reason I went down.

Q. What did he say?

10

20

30

40



*John H. Davis—Direct.*

Mr. Tansey: I object to this, if your Honor pleases, it still hasn't been shown any authority for the offering of that paper and your Honor ruled it out this morning on the ground he hadn't shown any authority from the corporation to sign it.

10

The Court: No, I didn't rule it out. Mr. Sexton withdrew it, until such as he had other evidence.

Mr. Tansey: He shouldn't examine on it, until he proves it somehow.

The Court: He is not examining on it. He is examining on the circumstances of its creation.

20

Q. What did Mr. Walker say? A. I questioned along the line of his authority and he told me what he had been doing in Florida and what he and his sister had been doing and also the buildings his company had been interested in in Newark and gave me to understand that he was quite some man and I looked up Mr. Walker and had bank references on him and I previously stopped the shipment of goods until I had this conversation with Mr. Walker.

30

Q. Did you talk about the Arlington Realty Company? A. Well, the conversation was entirely about the Arlington Realty Company.

Q. What did he say? A. He said it was a family corporation and he had full authority to do as he pleased.

Mr. Tansey: If your Honor please, I move that that be stricken out.

40

The Court: Why do you wait? Take your objection in time.



*John H. Davis—Direct.*

Mr. Sexton: I submit, if your Honor please, that is material.

The Court: That is material, but he can't prove it by his say so.

Mr. Sexton: I think he can.

The Court: Well, your wrong.

Mr. Sexton: I have a case before where  
a man wrote a letter as President of a cor- 10  
poration and following that the person to  
whom it was written visited the place and  
there met the man and that man was intro-  
duced as the man who wrote the letter and  
he was at the place where the corporation  
was doing business and the court there said,  
while it is true the man himself cannot say  
he is the agent or is the officer of the com-  
pany nevertheless that fact considered with 20  
the other facts in the case shall be construed  
as the evidence of the fact that he was such  
a person as he represented himself to be.

The Court: I can't stretch the ruling that far in this case.

Mr. Sexton: Will you look at the case?

The Court: Yes.

Q. Did you meet Mr. Walker again, Mr. Davis? 30  
A. I did.

Q. And when was that? A. About August 9th, 1927.

Q. And where was it you met him? A. In the office of the Plumbing Supply Company.

Q. At that time, did you have a conversation with him? A. Mr. Walker, was there by appointment as to how he was going to finish paying the balance of his account.

40



*John H. Davis—Direct.*

Q. What was the balance at that time? A. Fifty-seven hundred dollars.

10

Mr. Tansey: If your Honor please, of course, it may come to late, but I don't want to make an objection ahead of time and have your Honor displeased about it. His statement that there was that much due at that time is wholly unwarranted, it should be supported by books, affidavits or sworn testimony. They should put in what is due and what was paid in the regular way instead of going about it like they are with this witness. There isn't a single bit of evidence except his word that such a thing was spoken about.

20

The Court: Isn't that some evidence?

Mr. Tansey: No.

The Court: I am going to overrule the objection.

Mr. Tansey: Allow me an exception.

Q. Go ahead, what was said by Walker and by you to him? A. The whole proposition came from Walker.

30

Q. What was it? A. Walker said in his calm, slick easy way, I will give you a mortgage for two years for the fifty-seven hundred dollars.

Q. What did you say. A. I told him we weren't in the banking business, but we were in the mercantile business and wanted our money.

Q. What did Walker say?

Mr. Tansey: I object to this, if your Honor please. How is it shown that what he said will bind the company?

40

The Court: Here is an agent of the com-



*John H. Davis—Direct.*

pany or a person on whom there is some evidence was an agent, that, when the entire case is in, may be strong or it may be weak, but there is some evidence he was agent of the company and their conversation as to the balance due is some evidence.

Mr. Sexton: At this time, if your Honor please, he has paid out fifty-five thousand dollars. 10

The Court: All right, go on.

Q. Go ahead, Mr. Davis. A. Well, I went off and left him and finally I walked and said what we want is fifty-seven hundred dollars that is what you owe us and if you will add enough to that, which may be twenty per cent so that we can sell the second mortgage I will accept it and he followed me back in the other room and said will you give me until the end of this week I think I can sell it for ten per cent and I said I will be glad to do so and I told him we needed our money and we must have it. Of course, he has failed up until the present time to make good. 20

Q. And was anything said about a description, obtaining of description for the mortgage? A. He said he would get a description for the property and give it to Mr. Stauch, so we could have the mortgage drawn. 30

Q. And at that time when was he to deliver that to Mr. Stauch? A. He was to deliver that at the end of the week, unless he sold it for the ten per cent.

Mr. Tansey: If your Honor please, I move to strike this out on the further ground it took place after the debt was in- 40



*John H. Davis—Direct.*

curred and had no bearing upon the matter, except that he might admit such and such was due which would not in any way bind the company.

The Court: The objection is overruled. Your motion is denied.

10

We will adjourn now, until ten o'clock tomorrow morning.

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30

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IN THE CIRCUIT COURT OF MONMOUTH  
COUNTY, NEW JERSEY.

December Term, 1927.

|                                                                                                                                                                                                                              |   |                       |           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|-----------------------|-----------|
| <p>MONMOUTH PLUMBING SUPPLY<br/>COMPANY, a body corporate,<br/>Plaintiff,</p> <p>vs.</p> <p>GEORGE F. HERBERT, ARLING-<br/>TON REALTY COMPANY, Build-<br/>ers, and ARLINGTON REALTY<br/>COMPANY, Owners,<br/>Defendants.</p> | } | <p>Action at Law.</p> | <p>10</p> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|-----------------------|-----------|

Freehold, N. J., January 8th, 1929.

Testimony before HON. JACOB STEINBACH, JR., 20  
Judge, and a Jury.

APPEARANCES:

MR. CHARLES SEXTON, Attorney of Plain-  
tiff.

MR. MICHAEL J. TANSEY, by MR. MCGILL,  
Attorney of Defendant Arlington Real-  
ty Company.

30

Mr. Sexton: I offer in evidence at this time the  
Exhibit marked "T" for identification.

The Court: That is the guaranty.

Mr. Tansey: I object to that, first of all because  
there is no proper proof of authority to admit the  
guaranty which is embodied in this paper on the  
part of C. Herbert Walker as President, and by  
the Realty Company because the paper offered va- 40



*Testimony.*

ries from the paper that is to be set up and sued on in the complaint.

10 The paper in suit is set up in the complaint as a guaranty or alleged guaranty of an estimate dated February 23, 1927, and this paper is a guaranty of an estimate dated January 19, 1927. It varies from the complaint; varies from the paper set up in the complaint, and therefore, it appears to be a variance in the pleading.

The Court: It seems to be a different matter altogether; quite a different paper.

Mr. Sexton: No, it is not a different paper; it is simply an error in copying the thing; you recall the evidence was that there were two estimates given, and there was a change from 27 rooms to 24 rooms, and I ask at this time that be amended.

20 The Court: So that it made a second estimate. How much did they change the paper Schedule "B". Schedule "B" does not conform with the paper you offered, the alleged promise to pay.

Mr. Sexton: It is an error in copying of the paper which I offered. There would not have to be the evidence of error in reference to this paper. At the present time, there appears to be a variance between the paper and the proper offer, Schedule "B", and I ask to amend Schedule "B".

30 Mr. Tansey: Objected to at this time as the offer is premature; he should amend first. We have a right to examine as to what you have assumed in the paper as it appeared in the pleading, and we have not examined on it. I am talking about the actual offer of evidence, we have not examined on that paper which Mr. Sexton has in his hands. It has only been offered for identification, and I can recall that day it was withdrawn but used all the  
40 time through the proceedings.



*Testimony.*

The Court: The question is now as to the pleadings; they have not been proved and whether they are to be amended.

Mr. Tansey: It is too late to amend; he can amend after the trial; no harmful thing done. It surprises us as we appear to try a case on the pleadings, and I suppose he offers the guaranty of the date which appears in the complaint, and apparently now he wants to offer an estimate of a different date. 10

Mr. Sexton: I ask that Schedule "B" set forth in the complaint be amended so as to read as follows:

"The Monmouth Plumbing Supply Company, 23 Second Avenue, Long Branch, New Jersey— 20

Mr. Tansey: Objected to.

The Court: He is reading an amendment and the Jury will take it under advice.

Mr. Sexton: We hereby guarantee payment of the plumbing material as per contract amounting to \$8000, as per estimate dated January 18, 1927; also for all extra material that we furnished to be installed by plumbing contract. George F. Herbert on apartment house, Garfield Avenue; terms of payment are two per cent. for cash on the 10th of the month following date of invoice or thirty days net, or note in full upon completion of delivery of all material except for extra work. 30

Very truly yours,

Arlington Realty Company,

C. Herbert Walker, Pres. 40



*Testimony.*

Witnesses:

Ernest Stauch

George F. Herbert."

The Court: The motion is allowed.

10 Mr. Tansey: There is further objection to this paper as offered from the fact that the pleadings and the estimate date of January 18, 1927, when the evidence is that the estimate was not used before February 23, 1927, and this apparently held out from the fact that was the estimate used in the complaint.

20 This guaranty applies to one of the estimates dated January 18, 1927 and not used, but a subsequent estimate was made on February 23rd. The paper offered should show specifically as to the amount, and therefore, on that account we object to the reception of it.

Mr. Sexton: The testimony, if your Honor please is that there are two estimates.

The Court: Which one do you proffer in evidence; let me see that.

Mr. Sexton: I offer the one of February 23rd, with the evidence of the witnesses that there was a previous estimate of January 18th, 1927.

30 The Court: It is the date I am talking about.

Mr. Sexton: The date refers to the original estimate which was changed by Mr. Walker himself.

The Court: Which one do you offer in evidence; let me see that.

Mr. Sexton: February 23rd, marked for identification. I ask him to produce the original estimate.



*Ernest Stauch—Recalled—Direct.*

ERNEST STAUCH, recalled:

*By Mr. Sexton:*

Q. Was there an original estimate given on this job? A. Yes, sir.

Q. I show you a paper and ask you what that is?  
A. That was a list of material; the first list of material that we received to figure on. 10

Q. Did you talk with Mr. Walker about it? A. I talked with him in Mr. Herbert's house before I was given this list to figure on.

Q. Did you figure on it and take it then to Mr. Walker? A. I did not think Mr. Walker was in town, and I delivered it to Mr. Herbert first.

Q. Later on you took the estimate of February 23rd to him, did you not? A. Yes, sir.

Q. What was the amount of the estimate? 20

Mr. Tansey: Objected to; the amount of the estimate speaks for itself.

The Court: Objection sustained.

Exception to Plaintiff.

Q. Did you later take the second estimate? A. Yes, sir.

Q. Is that the one you have, marked Exhibit "A" for identification? A. Yes, sir. 30

Q. Did you talk with Mr. Walker about it? A. Yes, sir.

Q. Were you present when the paper marked "I" for identification was signed, and you witnessed the signature? A. Yes.

Q. Did you have it with you at the time that the first estimate was given? A. Not at the time the first estimate was given.

Q. Did you have it at the time the second esti 40



*Ernest Stauch—Recalled—Direct.*

mate—when you took the second estimate to Mr. Walker? A. I did.

Q. Did you have a conversation with Mr. Walker about it? A. Yes, sir.

Q. What was the nature of it?

10 Mr. Tansey: Objected to.  
The Court: Why?

Mr. Tansey: Because it does not appear that it should bind the Realty Company, which is not Mr. Walker.

The Court: Objection overruled.  
Exception to Defendant.

Q. What was it? A. Well, the first thing I delivered the estimate to Mr. Herbert.

20 Q. Which estimate? A. The second estimate, dated February 23rd; we met at Mr. Herbert's office on the job.

Q. Did you proffer the first estimate at that time Mr. Stauch? A. I do not understand that question.

Q. Did you show him the first estimate at that time? A. He already had the first estimate.

Q. And it was in his possession? A. This was the second estimate I delivered to Mr. Herbert.

30 Q. Is that the one in his possession (showing witness paper)? A. In Mr. Walker's.

Q. How was that marked? A. Plaintiff's Exhibit "O" for identification.

40 Q. Go ahead, what happened? A. After locating Mr. Walker on the Apartment Building, he came out and went in our car with Mr. Herbert and checked over the amount of the estimate, which estimate is the one I spoke of February 23rd, and after examining it for maybe fifteen minutes, he



*Ernest Stauch—Recalled—Direct.*

decided to give us an order for it, and asked me if I had a guaranty, and I told him I had one with the amount of the original estimate of January 18th; that I would like to go back to the office at Long Branch, New Jersey, and have a new guaranty made up. He asked Mr. Herbert if he had a typewriter in his office, and he said yes, and he also said "why cannot we change the date of it and the amount." 10

Q. Did you go there? A. We went up to Mr. Herbert's office and changed the amount, but through some circumstances we overlooked changing the date.

Q. Was there anything added by Mr. Walker at that time to the paper you had prepared? A. We wished to make an objection to it, and that he would give us a note in full upon completion of the building. 20

Mr. Tansey: Objected to, and I move to strike out this testimony about this estimate or this guaranty and about the changes in it, as the paper speaks for itself.

The Court: The motion is denied.

Exception to Defendant.

Q. And he did what? A. I recall Mr. Herbert dictating to the stenographer. 30

Q. Was that in the presence of Mr. Walker? A. In the presence of Mr. Walker and myself.

Q. And the amount thereon corresponded with the estimate? A. The estimate of February 23rd, which Mr. Walker accepted.

Mr. Tansey: I move to strike that answer out. 40



*Ernest Stauch—Recalled—Cross.*

The Court: It may be stricken out, that is the words "which he accepted."

Q. It was after Mr. Walker had gone over the estimate of February 23rd that the guaranty was signed? A. Yes, sir, about an hour afterwards.

10 Q. And the amount was affixed to that estimate, and it was done by the dictation of Mr. Walker? A. Yes.

*Cross-examination by Mr. Tansey:*

Q. You say this meeting was held at the apartment house of the Arlington Realty Company in Avalon? A. Yes.

20 Q. And work upon the apartment house was even started? A. The apartment house was under construction then.

Q. On February 23rd, 1927? A. Yes.

Q. When you just had given that estimate? A. Yes, sir, at that time it was under construction.

Q. As a matter of fact, the first estimate was not used or was it? A. No, sir.

Q. And they rejected and did not order that? A. Yes, sir.

30 Q. I mean the estimate of January 18th, 1927? A. It was changed from twenty-seven to twenty-four apartments.

Q. And that first estimate was put aside? A. Yes, sir.

Q. And you acted entirely upon the second estimate of February 23rd, 1927? A. Yes, sir.

Mr. Sexton: I offer the estimates of January 18th, 1927 and of February 23rd, 1927 in evidence.



*Ernest Stauch—Recalled—Cross.*

Mr. Tansey: I renew my objections which have been previously stated, and which I do not now think I ought to repeat to the Court.

The Court: In the complaint they especially set forth the fact it was a guaranty and offer it in evidence, and so far it shows that this material was charged to Mr. Herbert, and in the third count or second, they especially set forth the fact that the Arlington Realty Company guaranteed the payment, not that it was the original date, but guaranteed it according to the statement. 10

Mr. Tansey: I deny the said Company guaranteed a payment, reading from top of page three, paragraph seven, and indebtedness of George S. Herbert to the Plaintiff for items in Schedule "A" contracted by him with the consent of the Realty Company and in writing guaranteeing the payment thereof. 20

The Court: How about the third count—"the said George Herbert purchased and agreed to pay several sums, upon their shipments, etc.; that the said George Herbert purchased and agreed to pay the plaintiff the balance, etc., and the Arlington Realty Company is hereby included, and in the material used in the construction or furnished to the said George Herbert, etc., agree to pay for the material furnished the said George S. Herbert." 30

Mr. Tansey: They guaranteed the debt of somebody else; they did not make themselves the principal debtor because of the words of 40



*Ernest Stauch—Recalled—Cross.*

the guaranty "we hereby guarantee payment."

The Court: I do not think there is much to your argument.

10 Mr. Tansey: Nowhere does it appear on these estimates that they were made to the Arlington Realty Company. They are primarily debts that ought to be guaranteed by this defendant, the Arlington Realty Company.

The Court: Is that the only objection?

20 Mr. Tansey: I have already enumerated a number of them without repeating them, my reason is there is no authority appearing in the testimony to the effect that Mr. Walker, as President of the Arlington Realty Company had any authority to bind the Company.

The Court: I am going to admit that, and grant an exception on the record to the defendant.

Mr. Sexton: I offer the paper marked Exhibit "I" for identification in evidence.

---

30 HENRY E. DUPONT, having been duly sworn, was examined and testified as follows:

*Direct-examination by Mr. Sexton:*

Q. Mr. Dupont, you reside where? A. Belmar, New Jersey.

Q. During the early part of 1927 were you working on the Arlington Realty Company's job, and in what capacity? A. Plumber.

40 Q. And you were working for whom? A. George Herbert.



*Henry E. Dupont—Cross.*

Q. I show you a paper with the writing upon it of Henry Dupont and ask you if that is your signature? A. Yes, sir.

Q. Did you receive the goods or material mentioned on that paper? A. Yes.

Q. The first one is No. 7876; I show you another paper marked No. 187273 and ask you if that is your signature and if you received the goods mentioned there? A. Yes.

10

Q. Where were they received? A. At the apartment house.

Q. I show you another paper marked No. 1799, and ask you if this is your signature and if the goods were received? A. Yes, sir.

Q. I show you another paper marked No. 17002, and ask you if the goods were received? A. Yes, sir.

20

*Cross-examination by Mr. Tansey:*

Q. Mr. Dupont, were you working as a plumber there? A. Yes, sir.

Q. And it was part of your job to look after and install the plumbing fixtures? A. Yes.

Q. What part of your job applied to receiving goods? A. When material was delivered there and I happened to be around, I took care of it then and signed the delivery receipts.

30

Q. What did you do beside signing the delivery receipts for the material? A. I checked up on the goods.

Q. Did you leave your regular work to do that? A. Yes, sir, if there was nobody else around at that time.

Q. Did you receive all the goods, or was it only

40



*Henry E. Dupont—Redirect.*

occasionally so? A. I received it all that was listed.

Q. Did this take very much of your time away from your regular work? A. No.

Q. How often would these deliveries come in there? A. I do not know just how often they would come in; I cannot tell you.

10 Q. Was it once a day or twice a day? A. Sometimes twice a day.

*Redirect-examination by Mr. Sexton:*

Q. Do you recall occasions when the goods were delivered after working hours? A. Well, I am not sure about that; they must have been delivered, because there were some such without names.

20 Mr. Tansey: I ask that the answer be stricken out.

The Court: I direct that it be stricken out.

---

JOHN BROGAN, having been duly sworn, was examined and testified as follows:

*Direct-examination by Mr. Sexton:*

30 Q. Mr. Brogan, where do you live? A. In Neptune City.

Q. What is your business? A. Plumbing and heating.

Q. For whom were you working in the early part of the year 1927? A. George F. Herbert.

Q. And you were working on the building of the Arlington Realty Company, and how long did you work there? A. From the time it started until

40 completion.



*John Brogan—Direct.*

Q. I show you a paper marked No. 16777, and ask you if that is your signature thereon? A. Yes, sir.

Q. Did you receive the goods mentioned there? A. Yes, sir.

Q. I show you another paper marked No. 16253, and ask you if that is your signature, and whether you received the goods marked thereon? A. Yes, sir. 10

Q. I show you another paper marked No. 5655 and ask you if that is your signature and if you received those goods? A. Yes, sir.

Q. I show you another paper marked No. 5628 and ask you if that is your signature and whether you received those goods? A. Yes, sir.

Q. I show you another paper marked No. 5706 and ask you if you received those goods? A. Yes, sir. 20

Q. I show you another paper marked No. 5724 and ask you if you received those goods? A. Yes, sir.

Q. I also show you another paper marked No. 5989 and ask you if you received those goods and whether that is your signature? A. Yes.

Q. I show you another paper marked No. 6427 and ask you if you received those goods? A. Yes, sir. 30

Q. I show you another paper marked No. 6518 and ask you if you received those goods? A. Yes.

Q. I show you another paper marked No. 689 and ask you if you received those goods? A. Yes, sir.

Q. I show you another paper marked No. 702 and ask you if you received those goods? A. Yes, sir.

Q. I show you another paper marked No. 7186 40



*John Brogan—Cross.*

and ask you if you received those goods? A. Yes, sir.

Q. I show you another paper marked No. 7291 and ask you if you received those goods? A. Yes, sir.

10 Q. I also show you another paper marked No. 296 and ask you if you received those goods? A. Yes.

Q. I also show you another paper marked No. 7401 and ask you if you received that material? A. Yes, sir.

Q. I show you another paper marked No. 7712 and ask you if you received those goods? A. Yes.

Q. I also show you another paper marked No. 7829 and ask you if you received that material? A. Yes, sir.

20

*Cross-examination by Mr. Tansey:*

Q. Were you a plumber there and working actually on the job? A. Yes, sir.

Q. When these shipments came in you left your regular duties to look after the shipments? A. Yes, sir.

30 Q. What did you do after looking at the shipments? A. I checked them over before I signed for them.

Q. What did you use when you checked them over? A. A lead pencil.

Q. Is your check mark on them? A. Yes, sir.

Q. Where? A. My signature is on that.

Q. Where is your check mark as to the checking up? A. I never check with a check mark.

40 Q. You say you just put your signature down, and that is the way you checked it, was it? A. Yes, sir.



*Theodore Schofield—Direct.*

THEODORE SCHOFIELD, having been duly sworn, was examined and testified as follows:

*Direct-examination by Mr. Sexton:*

Q. Where do you live, Mr. Schofield? A. Asbury Park, New Jersey.

Q. And your business is what? A. Now.

10

The Court: Strike it out.

Q. Were you employed on the Arlington Realty Company job in 1927? A. Yes, sir.

Q. By whom? A. George Herbert.

Q. At that time you were employed there in what capacity? A. Plumber's helper.

Q. Do you recall the goods being delivered at the Arlington Realty Company apartments by the Monmouth Plumbing Supply Company? A. Yes, sir.

20

Q. Did you receive them on some occasions? A. Yes, sir.

Q. I show you a slip of paper marked No. 5637 and ask you if that is your signature? A. Yes, sir.

Q. Did you receive those goods? A. Yes, sir.

Q. You signed for the receipt of them? A. Yes, sir.

Q. They were received where? A. At the Apartment house.

30

Q. I show you another slip of paper marked No. 6448 and ask you if that is your signature thereon? A. Yes.

Q. And you received those goods at the Apartment house? A. Yes, sir; only just in some of these slips I did not receive them at the Apartment house, I called for them.

Q. Therefore, you find that some you received

40



*Theodore Schofield—Direct.*

at the Supply house and you receipted for them at that time? A. Yes.

Q. What did you do with the goods? A. I took them and delivered them to the plumber.

Q. And you were able to deliver the stuff as they needed it in there? A. Yes, sir, I went right to the Supply house to save time.

10 Q. I show you another slip of paper marked No. 6060 and ask you if that is your signature thereon and whether you received those goods? A. Yes, sir.

Q. I show you another slip of paper marked No. 6783, and ask you if that is your signature and whether you received those goods? A. Yes, sir.

20 Q. I also hand you another slip of paper marked No. 6889 and ask you if that is your signature and if you received those goods? A. Yes.

Q. I also hand you another slip of paper marked No. 7031 and ask you if that is your signature thereon, and whether you received those goods? A. Yes.

Q. I hand you another slip of paper marked No. 7060 and ask you whether that is your signature thereon and if you received those goods? A. Yes.

30 Q. I hand you another slip of paper marked No. 706 and ask you whether or not that is your signature thereon and if you received those goods? A. Yes, sir.

Q. I hand you another slip of paper No. 7170 and ask you whether or not that is your signature thereon and if you received those goods? A. Yes, sir.

40 Q. I also hand you another slip of paper marked No. 7687 and ask you whether or not that is your signature thereon and if you received those goods? A. Yes, sir.



*Theodore Schofield—Direct.*

Q. Do you recall the goods being left or delivered on some occasions after working hours? A. Yes, sir.

Q. And where were they left? A. Outside the workshop. The door was locked sometimes; it was inside.

Q. And would there be a delivery slip left with them? A. Yes. 10

Q. How would the goods be checked? A. In the morning when I went there, and it was my duty to do that.

Q. And you did the checking of the goods? A. When I was there I did.

Q. What did you do with the receipts? A. The receipts were put on a nail called a file.

Q. Where was the file? A. In the workshop.

Q. Whose workshop was it? A. Well, it was 20  
everyones workshop.

Q. Was Mr. Walker there in the workshop? A. Yes; several times.

Q. He was there on the job? A. Yes, sir.

Q. He was on the job how long while you were there? A. He was there off and on all the time, but away on some occasions.

*Cross-examination by Mr. Tansey:*

30

Q. You were a plumber employed on this job, were you not? A. A plumber's helper.

Q. You were just a helper? A. Yes, sir.

Q. Did you leave your work when these goods were delivered in order to receive the goods? A. Yes, sir.

Q. What did you do on receiving them? A. I checked them to see if they were all there, and I then signed for them. 40



*Theodore Schofield—Cross.*

Q. You checked them and signed for them? A. Yes, sir.

Q. Mr. Schofield, what kind of a check mark did you use? A. I did not use any mark for checking; I counted and looked on the slip to see if they amounted to so much, and then went to the next one.

10 Q. The only mark you put on the slip of paper was the signing of your name? A. Yes, sir.

Q. Do you remember when there was a long list of goods? A. Do I remember long lists?

Q. Do you remember when putting your check mark at the time you went through a long list, what you did? A. I looked at one column, and I looked for the dates.

Q. Did you count them? A. Yes, sir.

20 Q. You put nothing on the list of goods but your name? A. That was my check mark.

Q. You say just putting your name there was your check mark? A. Yes.

Mr. Sexton: I offer the delivery receipts and Exhibit "D" for identification in evidence.

The Court: Which are the ones that have been testified to.

30 Mr. Tansey: Objected to as not being sufficiently shown by the books of the Company that sales and deliveries had been made, and there is not sufficient proof and some slips there not being receipted for.

The Court: You are looking at the wrong list.

Mr. Sexton: I will make it clear if there are any here that are not receipted for. It is not my intention to offer them.

40



*Theodore Schofield—Cross.*

The Court: Run through them.

Mr. Sexton: There seems to be some that are not signed, and I do not offer them.

The Court: Cannot you pick them out, inasmuch as this matter ought to go to the Jury. There are some papers not admitted.

Mr. Sexton: I offer in evidence Plaintiff's Exhibit "P" for identification. 10

Mr. Tansey: I further object as there is nothing to show any prices on these.

The Court: Objection overruled. Exception to Defendants.

Mr. Sexton: I call for those papers we had the other day—the originals. I offer Exhibit "B" for identification in evidence, which has been demanded and received from the Defendant. These slips are the slips that were sent to their Mr. Herbert, as the testimony shows, and turned over to Mr. Walker, in the ordinary course of the business by the Monmouth Plumbing Supply Company. They were sent, as testified to, while the work was progressing, and I think on two or three occasions a month. They have been in the possession of the Defendant for the entire time, and are produced by them at my request. 20 30

Mr. Tansey: We object to the offer because first, it was not shown these were the cards or delivery slips that were signed for; and second, because it appeared from the testimony they were not sent to the Arlington Realty Company but to George Herbert, and that he, perhaps, turned them over; but there was nothing directly from the Plaintiff to the Defendant, the Arlington Realty 40



*Theodore Schofield—Cross.*

Company to charge them with the goods or any amount, and the bills being made out in the name of George Herbert avers no notice that we were chargeable with them.

The Court: What are they offered for.

10        Mr. Sexton: As an estoppel from the Company, which denies this account. They were delivered to the Company's representative, Mr. Herbert of the Company, and accepted by him, and the testimony is that there was no complaint, and they become evidently, not as a book account, but as memorandums. All the evidence is that the goods have been sold and delivered, and as proof of that transaction, the goods themselves have been enumerated and prices  
20        have been fixed and sent to them, the Defendants, and they had acknowledged the receipt of them. There is testimony that they paid on account of them, and we also have proof that they offered to settle it, and there is pertinent proof as to the account which was \$13744.38.

30        Mr. Tansey: I do not recall this offer that was in evidence. You are reading from a paper.

Mr. Sexton: I am not reading; I am just telling you about that. Mr. Herbert testified that he received 10 per cent on \$13744.38.

Mr. Tansey: That doesn't appear on these slips.

40        The Court: Mr. Tansey, of course, you recognize as well as I do that the question is to determine whether the paper at this time is admissible; you have to take into



*Theodore Schofield—Cross.*

consideration the testimony that proceeded it and that Mr. Stauch has offered, and probably call the attention of the Court to the testimony which he believes bears on the eventuality. He will have to tie it up as to this particular offer as being an estoppel, and it should appear from itself to this extent. There is some evidence of what the Plumbing Supply Company claims to be entitled to charge for anything further. It was against George Herbert and not against the Arlington Realty Company, if we find that the Arlington Realty Company is liable. There is some evidence and there is a paper submitted for evidence in the case. 10

Mr. Tansey: I do not think there is an offer as estoppel. At least Mr. Walker, as to whom there is some evidence, who was the agent of the Company knew what goods the Monmouth Plumbing Supply Company claims to have delivered and the prices to be charged. I believe there is some reason for that evidence of the debt that would bind the Arlington Realty Company if the goods were delivered on the jobs by the slips offered in evidence. But it shows the Plumbing Supply Company claims that they delivered them and made that known to Mr. Walker, and Mr. Walker has raised no objection and thereafter a payment was made based on the claim to the title to these slips. If I am wrong, I want to be corrected; I am stating these matters to you the way it shapes up to my own mind. 20 30

The Court: Objection overruled. Exception to Defendants. 40



*Theodore Schofield—Cross.*

10 Mr. Sexton: I offer these slips; these are the slips that were delivered with the goods to Mr. Herbert, and were placed upon the file as the goods were delivered in this workshop that we have heard of, and it was the place where Mr. Walker had access to and they were evidently turned over to Mr. Walker and have been demanded from Mr. Walker to be used in the proceedings in Court:

20 Mr. Tansey: We object and state that none of these delivery slips are admissible, except those that had been signed. We do not know whether those slips are the same, and some of them are even rolled out, and we do not think they ought to be put in evidence.

The Court: Mr. Tansey, it seems to me that the material called for by the slips was left with the goods on the job. There has been offered a great deal of testimony as to the purchase, the slips and things that seems to be an acknowledgment that the slips were produced with the goods.

30 Mr. Tansey: It does not prove the goods were delivered if the slips were left with the goods. I do not see the force of that. Your Honor has already ruled that certain goods were received even though the slips were left. That is not the only thing, but we were asked to produce the slips left with the goods, and Mr. Walker promptly produced them; isn't that true. We did not state that the goods were left, as mentioned in those slips.

40 Mr. Sexton: If you recall yesterday I



*John Ludwig—Direct.*

checked up and examined the procedure as to the four copies of these papers and at the time discovered that there were four copies made, and these were the ones left on the job and marked yesterday for identification. There were no number marks on these and they were sent through the mail. 10

Mr. Tansey: Objected to; I do not see that is any evidence of delivery of the material and the signed slip; that has all been ruled out. In other words, there is no proof that it was brought to the attention of the Arlington Realty Company at the time the estimates were made.

Mr. Sexton: There is proof that it was brought to the attention of Mr. Walker; there is proof that Mr. Herbert put them on his files. 20

Mr. Tansey: Is there any proof that Mr. Herbert did receive them?

Mr. Sexton: He received them at the same time.

The Court: I will allow them to be admitted. Exception to Defendant.

(Plaintiff's Exhibit "R" offered in evidence). 30

JOHN LUDWIG, being duly sworn was examined and testified as follows:

*Direct-examination by Mr. Sexton:*

Q. Mr. Ludwig, do you reside at Long Branch, N. J.? A. Yes, sir.

Q. And you are employed by whom? A. The Monmouth Plumbing Supply Company. 40



*John Ludwig—Direct.*

Q. I show you a book and ask you if you know what that is? A. The ledger.

Q. The ledger of what Company? A. Of the Monmouth Plumbing Supply Company.

Q. I have it opened to an account, and ask you in whose name is it? A. George F. Herbert, Arlington Realty Company job.

10

Q. And there are entries made in that book by whom? A. By myself.

Q. They were made from what? A. From the invoices.

Q. I show you some papers marked Plaintiff's "C" for identification, and ask you what they are? A. They are the invoices which are entered in the ledger.

20

Q. And they were entered in the ledger by you? A. Yes, sir.

Q. All of them; did you make all the entries? A. Yes, sir.

Q. And you are still working for the Monmouth Plumbing Supply Company? A. Yes, I am.

Q. Did you make out any monthly statements? A. Yes, sir.

Q. In reference to that account? A. Yes, sir.

30

Q. And when were the monthly statements sent out? A. The first of each month.

Q. To whom were they sent? A. To Mr. Herbert.

Q. I show you a paper marked "G", and ask you in whose handwriting that is? A. That is my handwriting.

Q. Was that forwarded? A. Yes, sir.

Q. What month is it? A. It is June.

Q. To whom was it sent? A. It was sent to Mr. Herbert.

40



*John Ludwig—Direct.*

Mr. Sexton: I offer that paper above referred to in evidence.

Mr. Tansey: Objected to; it appears not to be an itemized statement; there is nothing but figures on it.

Mr. Sexton: It is a proper statement, which has been testified to by the witness as having been made out and sent each month, in his own handwriting, to Mr. Herbert. Mr. Herbert has testified they were turned over to Mr. Walker, and I say now it is competent. 10

The Court: Mr. Herbert is a defendant in the suit, and I admit it. Exception to defendant.

Q. Do you know, of your own knowledge, whether the statements were sent every month? A. Yes, sir, they were. 20

Q. Do you know whether there was a final statement sent? A. Yes, sir.

Q. Do you recall whether or not the final statement was sent to Mr. Walker, if you know?

Mr. Tansey: Objected to; it is immaterial; if they sent the statement, it is a self-serving declaration. 30

The Court: Objection overruled. Exception to Defendant.

Q. Do you recall whether or not a final statement was sent to Mr. Walker or Mr. Herbert? A. A statement was made out every month and sent to him, whether or not they requested any statements to be made.

Q. Will you look at your book—I ask you if 40



*John Ludwig—Direct.*

this is a copy of the account of July, 1927 A.  
Yes, sir, it is.

Mr. Sexton: I offer Plaintiff's Exhibit  
"R" in evidence.

10 Mr. Tansey: I object to that; a copy is  
not admissible where the book is not pro-  
duced.

Q. Do I understand you to say that a statement  
was sent every month? A. Yes, sir.

Q. To Mr. Walker? A. It was sent to Mr. Her-  
bert.

Q. Have you served a notice on Mr. Herbert?

20 Mr. Sexton: They produced a number of  
them here, but there is one missing, the July  
one.

The Court: I have already admitted the  
one in June.

The Court: Mr. Walker fails to produce  
it?

Mr. Sexton: The testimony is that Mr.  
Herbert turned them over to Mr. Walker.

The Court: Whose testimony is that?

30 Mr. Sexton: Mr. Herbert's testimony; he  
testified as the monthly statements came  
out, he would check them up, and he gave  
them all to Mr. Walker.

Mr. Tansey: Objected to; I don't remem-  
ber that as in their testimony. They have  
the books in Court, and even if Mr. Walk-  
er got it, it would not be evidential.

The Court: Objection overruled. Excep-  
tion to Defendant.

40 (Recess to 1:30 o'clock P. M.)



*John Ludwig—Cross.*

JOHN LUDWIG, recalled.

*Cross-examination by Mr. Tansey:*

Q. When you made these entries in your ledger, Mr. Ludwig, where did you get the data from? A. These entries were made from the invoices into the ledger.

Q. Who made the invoices, did you? A. No, sir. 10

Q. Somebody else made them? A. Yes, sir.

Q. You only know of the data from the invoices being entered by you in the ledger? A. Yes, sir.

Q. You do not know anything about the actual sale and delivery of these goods, do you? A. No, sir.

Q. When you issued these statements, which you testified about, they were sent by mail to Mr. Herbert? A. Yes, sir. 20

Q. When you say they were sent to him, you mean they were sent to Mr. Herbert? A. Yes.

Q. And that was the case all the way through the business? A. Yes, sir.

GEORGE F. HERBERT, recalled.

30

*Direct-examination by Mr. Sexton:*

Q. Mr. Herbert, I show you invoice No. 15410 and ask you if you recognize the articles mentioned on it? A. Yes, sir.

Q. Do you know whether or not these articles were actually delivered at the Arlington Realty Company's apartment building? A. Yes, sir.

40



*George F. Herbert—Recalled—Direct.*

*By Mr. Tansey:*

Q. You mean one of the delivery slips not signed? A. Yes, sir.

*By Mr. Sexton:*

10 Q. Do you know whether or not that is part of the estimate? A. Yes, sir.

Mr. Tansey: I object to it; what difference does it make if it was a part of the estimate; he is trying to prove delivery.

Q. Do you mean it was part of the goods that were enumerated in the estimate? A. Yes, sir.

20 The Court: He says that he knows they were actually delivered; as to whether or not they were part of the estimate; do you not think it is somewhat material if they were extra goods. All the goods were proved as delivered.

Mr. Tansey: That is what they are doing now.

The Court: The witness was asked if they were a part of the goods included in the estimate, and he said yes.

30 Q. I show you slip No. 15214 and ask you to look at those items thereon? A. Yes, sir.

Q. Do you know whether or not those items were actually delivered to the building of the Arlington Realty Company? A. Yes, sir.

Q. What is the amount stated there? A. \$70.

Q. Do you know whether that is part of the estimate or not? A. Yes, sir.

40 *By the Court:*

Q. What number did you give?



*George F. Herbert—Recalled—Direct.*

Mr. Sexton: No. 15214.

Mr. Tansey: Objected to; he went through a great number.

The Court: He picked out those signed for. On August 4, 1927, he checked up all the material on the invoices, and he testified in regard to its delivery. I will allow it. Objection overruled. Exception to Defendant. 10

Q. You say that is not part of the contract? A. Yes, sir.

Q. I show you invoice No. 15267 and ask you to look at those articles mentioned thereon? A. Yes, sir.

Q. Do you know whether or not they were delivered on this job? A. Yes, sir. 20

Q. And whether they were part of the contract or not? A. Yes, they were.

Q. And the last two items are what? A. Are not.

Q. Are not what was part of the contract? A. Yes.

Q. I show you invoice No. 15319 and ask you what that is? A. On account of a cooking pot.

Q. Do you know whether that article was delivered on this job; what was the cooking appliance used for? A. To put iron pipe together. 30

Q. And you say you do know? A. Yes.

Q. I show you invoice No. 5417 and ask you what that is? A. Galvanized steel pipe.

Q. And the amount is how much? A. 514 feet.

Q. And what is the price? A. \$115.

Q. Do you know whether it was on the contract price or not? A. Yes. 40



*George F. Herbert—Recalled—Direct.*

Q. What was that used for? A. It was used for waste pipe.

Q. I show you invoice No. 5155 and ask you to look at those items? A. Yes, sir.

Q. Do you know whether or not they were delivered upon this job? A. Yes, sir.

10 Q. Are they part of the contract? A. No, sir.

Q. I show you invoice No. 15501, and ask you to look at those items? A. Yes, sir.

Q. Do you know whether or not they were delivered on this job? A. Yes, sir.

Q. Are they part of the contract or not? A. No, sir.

Q. I show you invoice No. 5295 and ask you to look at those items? A. Yes, sir.

20 Q. Do you know whether or not those items were delivered upon this job? A. Yes, sir.

Q. Were they part of the contract or not? A. They were, yes, sir.

Q. I show you invoice No. 5359 and ask you to look at those items? A. Yes, sir.

Q. Were they delivered upon this job? A. Yes.

Q. The amount is how much? A. \$10.50.

Q. Were they a part of the contract? A. They were not.

30 Q. I show you invoice No. 5442 and ask you to look at those items? A. Yes, sir.

Q. Do you know whether or not those articles were delivered upon this job? A. Yes, sir.

Q. Do you recognize them? A. Yes.

Q. And the amount is how much? A. \$21.38.

Q. Are these part of the contract or not? A. Yes, I think that one is.

40 Q. I show you invoice No. 5518 and ask you to look at those items? A. Yes, sir.



*George F. Herbert—Recalled—Direct.*

Q. And the amount is how much? A. \$55.

Q. Were they delivered as part of the contract?

A. Yes, sir.

Mr. Tansey: Objected to. I understand when talking about the contract, he means the estimate of January 23rd that has been offered in evidence, and the estimate should speak for itself as to what is included in it. There may have been a double supply; there may have been goods duplicated. If they are included in the estimate, the estimate shows it, and there is no use asking this witness. 10

Q. Were you the person who did the ordering?

A. Yes.

Mr. Tansey: We cannot check up on this matter; we would have to check it up, the estimate, to see whether or not these are included. 20

The Court: Do you want the jury to check it up instead of you.

Mr. Tansey: At that time, the question was as to which estimate would be put in use in this case; it appears that the estimate of February 23rd is introduced. We have already checked up the estimate of January 18th. As to the estimate of February 23rd, we object to being bound by it. 30

Mr Sexton: I compared myself with Mr. Walker the estimate on Thursday afternoon, so that they would have and know every item of that estimate.

Q. I show you invoice No. 5583 and ask you to look at those items thereon? A. Yes, sir. 40



*George F. Herbert—Recalled—Direct.*

Q. I ask you if you recognize those articles? A. Yes, sir.

Q. How much is the amount? A. Two feet of eight inch pipe.

Q. Was that part of the contract? A. No, sir.

Q. Was that delivered on this job? A. Yes.

10 Q. You say you recognize it? A. Yes.

Q. I show you voucher No. 5603 and ask you if you recognize those items? A. Yes, sir.

Q. The amount is how much? A. \$22.02.

Q. Were they delivered on this job? A. Yes, sir.

Q. Were they a part of the estimate or not? A. No, sir.

Q. I show you voucher No. 5637 and ask you to look at those items? A. Yes, sir.

20 Q. Do you recognize them? A. Yes, sir.

Q. And the amount is how much? A. \$22.50.

Q. Were they delivered on this job? A. Yes, sir.

Q. Were they a part of the contract or not? A. No.

Q. I show you voucher No. 5644 and ask you if you recognize that item? A. Yes, sir.

Q. What is that? A. A storage tank.

30 Q. And you say that went in the building? A. Yes, sir.

Q. Was that a part of the contract or not? A. Yes, sir.

Q. Could Mr. Walker see that today if he wanted to? A. Yes, sir.

Q. And that was delivered? A. Yes, sir.

Q. And it is part of the contract? A. Yes, sir.

40 Q. I show you invoice No. 5970 and ask you to look at this item? A. Yes, sir.



*George F. Herbert—Recalled—Direct.*

Q. What is that price that is represented there?  
A. \$12.12.

Q. Was that a part of the estimate or not? A.  
No.

Q. Do you know whether or not it was delivered  
upon this job? A. Yes, sir, it was.

Q. I show you invoice No. 16575 and ask you to  
look at those items? A. Yes, sir. 10

Q. Do you know whether those items were de-  
livered upon the job? A. Yes, sir.

Q. Were they a part of the estimate or not? A.  
Yes, sir.

Q. I show you voucher No. 6553 and ask you to  
look at those items? A. Yes, sir.

Q. Do you recognize them? A. Yes, sir.

Q. Do you know whether they were delivered at  
the job and used at the job? A. Yes. 20

Q. And the amount of money is how much? A.  
\$30.80.

Q. I show you invoice No. 16696 and ask you  
to look at those items? A. Yes, sir.

Q. Do you recognize them? A. Yes.

Q. Do you know whether they were delivered  
upon this job and used upon the job? A. Yes.

Q. And the amount is how much? A. \$20.76.

Q. Were they part of the estimate or not? A. 30  
No, that is extra.

Q. I show you voucher No. 16819 and ask you  
to look at that item? A. Yes, sir.

Q. Do you recognize that? A. Yes.

Q. Do you know whether it was used on the job?  
A. Yes.

Q. And the amount is how much? A. \$68.10.

Q. Was that a part of the estimate or not? A.  
No. 40



*George F. Herbert—Recalled—Direct.*

Q. I show you invoice No. 16884 and ask you to look at those items? A. Yes, sir.

Q. Do you recognize them? A. Yes, sir.

Q. Do you know what portion of that was on the contract? A. All but the last item.

Q. And the total amount is how much? A.  
10 \$185.38.

Q. Do you know whether they were used on the work or job? A. Yes, sir.

Q. I show you invoice No. 17034 and ask you to look at those items? A. Yes, sir.

Q. Do you recognize them? A. Yes, sir.

Q. Do you know whether that material was delivered on the job? A. Yes.

Q. And used on the job? A. Yes, sir.

Q. And the total amount is how much? A.  
20 \$221.58.

Q. Do you know whether any portion of that material was on the contract? A. The first six items.

Q. And the amount is how much? A. \$120.

Q. I show you invoice No. 6637 and ask you to look at those items? A. Yes, sir.

Q. Do you know whether those goods were delivered upon this job? Do you know whether they  
30 were used on the job? A. Yes, sir.

Q. Are they part of the estimate or not? A. No.

Q. And the amount is how much? A. \$86.80.

Q. I show you invoice No. 6642 and ask you to look at that and tell me whether you recognize the items? A. Yes, sir.

Q. Do you know whether they were delivered on the job and used in the building? A. Yes.

Q. How much money did that amount to? A.  
40 \$32.80.



*George F. Herbert—Recalled—Direct.*

Q. And were they a part of the estimate or not?  
A. No.

Q. I show you invoice No. 6757 and ask you to look at those items? A. Yes, sir.

Q. Do you recognize the items? A. Yes, sir.

Q. Do you know whether they were delivered on the job and used in the building? A. Yes.

10

Q. And the amount of money is how much? A. \$5.97.

Q. Were they a part of the estimate or not? A. No.

Q. I show you invoice No. 17413 and ask you to look at those items? A. Yes, sir.

Q. Do you recognize the items? A. Yes, sir.

Q. Do you know whether they were delivered upon this job and used in the building? A. Yes, sir.

20

Q. And the amount of money is how much? A. \$201.09.

Q. Were they part of the estimate or not? A. No.

Q. I show you invoice No. 17447 and ask you to look at that item? A. Yes, sir.

Q. Do you recognize it? A. Yes, sir.

Q. Do you know whether that was delivered on the job and used in the building? A. Yes.

30

Q. And the amount of money is how much? A. \$4.20.

Q. I show you invoice No. 15512 and ask you to look at that item? A. Yes, sir.

Q. Do you recognize that? A. Yes, sir.

Q. Do you know whether it was delivered upon this job and used in the work? A. Yes, sir.

Q. And the amount of which is how much? A. \$72.

40



*George F. Herbert—Recalled—Direct.*

Q. Was that part of the estimate or not? A. No.

Q. I show you invoice No. 17660, and ask you if you recognize those items? A. Yes, sir.

Q. What are they? A. Bath tubs.

Q. How many are there? A. Fourteen.

10 Q. They were used in the building and they were there if Mr. Walker wanted to see them and know he had them? A. Yes, sir.

Q. How much is the amount thereof? A. \$700.

Q. And were they part of the estimate or not? A. Yes, sir.

Q. You did not pick them out after you put them in? A. I do not think so.

Q. I show you invoice No. 6841 and ask you to look at that item? A. Yes, sir.

20 Q. Do you recognize that? A. Yes, sir.

Q. Do you know whether that was delivered upon this job and used in the work? A. Yes.

Q. And the amount of money is how much? A. \$73.88.

Q. Do you know whether it is part of the estimate or not? A. No.

30 Mr. Tansey: If Mr. Sexton would make out a list of these things, we could better examine the whole of it and tend to save time.

Q. I show you invoice No. 7712 and ask you to look at that item? A. Yes, sir.

Q. Do you recognize it? A. Yes.

Q. Was it delivered on the job and used in the building? A. Yes.

40 Q. I show you invoice No. 17699 and ask you



*George F. Herbert—Recalled—Direct.*

to look at those items and if you recognize them?

A. Yes, sir.

Q. What are they? A. There are seventy bath tubs, and twenty-two combination faucets and three hundred and two fittings and two hundred showers.

Q. What do you mean by fittings? A. The sink fittings. 10

Q. And the showers? A. The showers are shower baths.

Q. Do you know whether they were delivered on the job and used in the building? A. Yes.

Q. And the amount of money is how much? A. \$145.

Q. Was it part of the estimate or not? A. Yes, sir.

Q. These tubs were actually installed in the building, were they not? A. Yes, sir. 20

Q. I show you estimate No. 17992 and ask you to look at it and if you recognize those articles?

A. Yes, sir.

Q. Were they delivered on this job? A. Yes.

Q. Were they also a part of the estimate or not? A. No.

Q. And the amount of money is how much? A. \$51.67. 30

Q. I show you invoice No. 18124 and ask you to look the items over? A. Yes, sir.

Q. Do you recognize them? A. Yes, sir.

Q. Do you know whether they were delivered on the job? A. Yes, sir.

Q. Are they part of the estimate or not? A. Yes, sir.

Q. And the amount of money is how much? A. \$2000.

Q. Did that include fixtures? A. Yes, sir. 40



*George F. Herbert—Recalled—Direct.*

Q. Such as what? A. Bath tubs; basins; flash plates and seats for lavatories.

Q. What kind of seats have you got marked there? A. We have wooden seats.

10 Q. Were you present at that time there were some delivered and were you in a position to see whether the wooden seats were furnished and used? A. Yes.

Q. These seats could be seen that were for the lavatory basins, and everything could be seen and he would know whether he got them, would he not? A. Yes, sir.

Q. I show you invoice No. 18215 and ask you to look at those items? A. Yes, sir.

Q. Do you recognize them? A. Yes, sir.

20 Q. Do you know whether they were delivered upon this job and used in the building? A. Yes.

Q. Were they a part of the estimate or not? A. Yes.

Q. How much money is the amount of it? A. \$990.

Q. Are they fixtures? A. Some of them are, and some of them brass goods.

30 Q. What kind of fixtures were put in there? A. Combination of sink and valves; drains, and shower baths.

Q. Do you know whether they were delivered to the building and did you see them? A. Yes.

Q. I show you invoice No. 18158 and ask you first to look at those items and tell me whether you know they were delivered upon this job? A. Yes, sir.

Q. Do you recognize them? A. Yes, sir.

40 Q. Were they used in the construction of the building? A. Yes.



*George F. Herbert—Recalled—Direct.*

Q. And the amount of money is how much? A. \$99.20.

Q. Were they part of the estimate or not? A. No.

Q. I hand you invoice No. 18159 and ask you to look at those items? A. Yes, sir.

Q. Are they part of the estimate or not? A. No. 10

Q. And the amount of money is how much? A. \$130.33.

Q. Were they delivered at the building and used in the construction thereof, and do you know that of your own knowledge? A. Yes, sir.

Q. I show you invoice No. 18461 and ask you to look at those items? A. Yes, they are souder collars.

Q. Do you recognize them? A. Yes. 20

Q. And the amount of money is how much? A. \$9.00.

Q. Do you know whether they were delivered upon this job and used in the construction work? A. Yes.

Q. I hand you invoice No. 18683 and ask you to look at those items? A. Yes, sir.

Q. Do you know whether they were delivered upon this job and used in the construction of the building? A. Yes. 30

Q. Are they a part of the estimate or not? A. No.

Q. And the amount of money is how much? A. \$67.36.

Q. I show you invoice No. 19112 and ask you to look at that item? A. Yes, sir.

Q. Do you recognize that item? A. Yes, sir.

Q. What is it? A. A hot water heater. 40



*George F. Herbert—Recalled—Direct.*

Q. And the amount of money is how much? A. \$143.

10 Q. Do you know there was a hot water heater and do you know it was this heater that was delivered on the premises and that Mr. Walker could have seen it today if he wanted to know it was part of the estimate or not? A. Yes, sir.

Q. I hand you invoice No. 19440 and ask you to look at those items? A. Yes, sir.

Q. Do you know whether or not they were delivered on this job? A. Yes, sir.

Q. And they were used in the work? A. Yes, sir.

Q. Are they a part of the estimate or not? A. Yes, sir.

20 Q. I show you invoice No. 19650 and ask you to look at those items? A. Yes, sir.

Q. Do you know whether or not they were delivered on this job and do you recognize those items? A. Yes, closet bolts.

Q. How many were there of them? A. Two.

Q. Could Mr. Walker see them, and were they actually delivered and installed on the job? A. Yes, sir.

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30 JOHN LUDWIG, recalled.

*Cross-examination by Mr. Tansey:*

Q. Mr. Ludwig, you rendered some bills for payrolls and for your own services on this job from time to time? A. Payrolls and time book.

Q. Did you not render statements? A. For the time, no.

40 Q. I am showing you a paper which purports to



*John Ludwig—Recalled—Cross.*

be a payroll of January 24th, 1927 signed by George F. Herbert, and ask you if that was one that you rendered in the course of your work, or can you tell by looking at it? A. Sure, that is my bill.

Q. And that was rendered as indicated? A. Yes.

Q. And rendered to Mr. C. Herbert Walker, wasn't it? A. Mr. Walker's apartment house.

Q. Does it say to Mr. C. Herbert Walker? A. I do not see Mr. C. Herbert Walker on there; it is Mr. Herbert's apartment house.

Q. It is to Mr. Walker's apartment house, isn't it? A. Yes, sir.

Q. I show you one dated May 20th, 1927, purporting to be a payroll for a number of weeks, beginning January 29th, 1927 and running to May 22, 1927, and ask you whether that was one that you rendered when you were working on the job? A. Yes, sir.

Q. To whom is that rendered? A. To Mr. C. Herbert Walker.

Q. Do you recognize that as being bills rendered by you? A. Well, there is—

Q. Answer the question, do you recognize it? A. This is a bill; I mean this other.

*By the Court:*

Q. On this job? A. Yes, it is to Herbert Walker.

Q. And it applies to this particular job? A. Yes, sir.

Mr. Tansey: I offer this for identification.

The Court: It may be marked for identification.



*John Ludwig—Recalled—Cross.*

Q. These bills you have been testifying to, have been some on the contract and some not on the contract—was that from your own memory? A. No, they are all marked on this sheet.

10 Q. Are they marked as belonging on the contract or marked as being extras—so you were reading from the bills when you said they were on the contract or whether they were extras—then it had not been from your own memory? A. No.

Q. And you had been making out the bills; these invoices were not made out by you, but were invoices which had been made out by the Monmouth Plumbing Supply Company? A. Yes.

Q. You testified in this case before that there was a lot of that material delivered when you were not there? A. Yes, sir.

20 Q. And it was delivered and signed for by other persons? A. Yes, sir.

Q. Of course, such material as that you would not testify to as having been actually delivered? A. Yes, I remember seeing it.

Q. You would not testify competently or truthfully that the material had actually been delivered? A. I could say it was used, yes.

30 Q. I am talking about delivery—we will get the use later? A. That it was delivered to the job.

Q. Would you say, of your own knowledge, you did not receive it? A. I did not receive it myself.

Q. You do remember that you used the material? A. Yes.

Q. What causes you to remember that you used long lines of plumbing materials and supplies? A. Well, that is only natural that you should use long lines.

40 Q. You remember them because you see them



*John Ludwig—Recalled—Cross.*

now before you on the list? A. I can see a part of it; I can see the job for that matter.

Q. I understand that you say you can only testify to part of the materials after having seen the job? A. I said I checked them; made a check.

Q. I understand that you cannot testify to all materials? A. I said most of the materials.

Q. Can you testify to the materials that had been actually delivered and used up on that job now? A. I do not get you.

Q. I said that you had no previous knowledge of the materials that had been used, and I ask you at the present time, could you by inspecting the job tell what materials had been used and how much, etc.? A. I cannot tell you; the man from the job would know.

Q. How much material was used could you tell from the job? A. I can tell you what I could see.

Q. What you could see, you can state? A. Yes, sir.

Q. I understand you to say that you did not check up the materials that had been delivered until about the next day? A. On the materials that were delivered, the check was always taken. Now, you can take it up with Mr. Walker and see that it was checked; also with Mr. Walker from the sheets.

Q. Am I wrong in saying that your testimony was that up until the present time you had not checked them—the material had not been checked at all? A. You must have misunderstood me.

Q. It was checked on delivery by whom? A. By the boy you saw and myself.

Q. And there was no other check except what you have here testified to? A. That time by Mr Walker on his apartment.



*John Ludwig—Recalled—Cross.*

Q. I mean before that time? A. The material was checked before being delivered to the job, is that what you are talking about?

Q. When you made the formal check, it was made in 1927? A. With Mr. Walker, yes, sir.

10 Q. How are you going to say it and reconcile it in the face of the present time that the material was delivered on the job and actually used on the work? A. I know that material was used there.

Q. Do you recall it having been used and did you inspect it lately? A. I know that kind of material was used in there.

Q. Do you know how much? A. Mr. Walker has return slips there.

20 Q. Can you say by inspecting those slips at the present time that the material was delivered and used? A. I know it was delivered because it was checked over as it was delivered.

Q. How do you know when the material came in when you were not there? A. I think I can prove it and trusted the man I had there.

Q. That is the way it was checked? A. It was checked by the people.

30 Q. Having been checked by that man, how can you take these checks just now and say by looking at them, that all that material was received as stated on the slips; that is the purport of your testimony, is it, that the material used, a statement of which is on these slips, was delivered and used? A. I say used if the material was delivered and used.

40 Q. How can you testify that the specific material on these slips was delivered and used? A. I know the material was used. You did not ask me as to any kind.



*John Ludwig—Recalled—Cross.*

Q. Then you do not mean to say that the amounts were as delivered on the slips? A. All the material on these slips was used, as shown by the return slips.

Q. Do you undertake to say that each and every one from your inspection was delivered and used?

A. I say the material was delivered and used. 10

Q. Now did you buy any tools in this invoice?

A. Yes, I think you will find a couple of things that were bought.

Q. Were they charged to you or Mr. Walker?

A. They were charged to the job.

Q. And eventually paid by the Arlington Realty Company? A. Yes.

Q. Is it the usual thing for a plumber to charge his tools to his employer? A. Everybody had access to the tool room and many things were missing, and thought I was right that Mr. Walker shall supply the tools. 20

Q. You did not think the Arlington Realty Company was liable for them? A. I know his man had some of my tools; I know the man worked for him and had my tools.

Q. And you charged them for the original purchase? A. Mr. Walker had no way to take care of them. 30

Q. Have you specified in your testimony that certain tools had been lost, and inquired what you should do and asked the Arlington Realty Company to pay for what had been taken? A. From the beginning.

Q. Beginning of the charge in the invoice were they the tools, and why should you expect the Arlington Realty Company to pay for them; there was nothing said about the tools being lost, is there? A. I do not think so. 40



*John Ludwig—Recalled—Cross.*

Q. Did you expect Mr. Walker or the Arlington Realty Company to look after those tools when you were employed on the job? A. I should think there would have been somebody there to take care of the stuff.

10 Q. And that is the reason you thought the Arlington Realty Company would take care of your tools? A. It is customary to have someone take care of the stuff.

Q. How many four inch lead bends were used in the building? A. Mr. Tansey, there were a few lead bends that were destroyed, due to the fact that Mr. Walker never had his floors laid in time on the floors above and we were generally one floor behind before the bricklayers and laborers had cleaned up and quite a little bit of lead bends destroyed, but a material amount of the lead bends were used in the job; there were 28 of them.

20 Q. How many did you use? A. Whatever that sheet says were used.

Q. How many were destroyed? A. I cannot tell you.

Q. I am asking you how many were actually used or destroyed? A. Whatever you can see on them sheets.

30 Q. Tell me how many were ordered? A. They were used.

Q. What became of the ones destroyed? A. They were used for pig lead; cooking lead.

Q. Can you give me now how many were ordered originally? A. I think there were twenty-eight.

Q. How many were used? A. There are thirty-two in the building right now, you can count them.

40 Q. You say there was 28 ordered and used;



*John Ludwig—Recalled—Cross.*

where did the other 4 come from? A. There must be an extra; only 28 on the contract.

Q. I am asking you—you say there were 28 ordered, and you also say there were 32 used? A. I say there were 28 on the contract.

Q. How many lead bends were ordered? A. There was ordered just what was used.

Q. What was ordered? A. Whatever is on those sheets were ordered. 10

Q. Where did the pig lead come from, you said some of them were pig lead? A. The ones destroyed were taken out and used for pig lead.

Q. And were you running any other job except this particular job, and if so, where was that? A. I had one by the name of Deals; I had my own job, and I did not need any more during that time.

Q. Where was your own job located? A. 5th & Washington. 20

Q. In Avon, New Jersey? A. Yes.

Q. What was this other job you were working on? A. The same thing.

Q. Where was that located? A. On Lincoln Avenue.

Q. In Avon, New Jersey, too? A. Yes.

Q. Beside the jobs in Avon, was there anything else, any other jobs? A. I do not know whether I had any more during that time. 30

Q. Did you send any of these lead bends that had been ordered and not used, around to any other jobs? A. No, sir.

Q. Did you, at any time, send any of these lead bends to these jobs? A. No, sir.

Q. Now there appears from your invoice 53 lead bends were delivered on that job, and you say 28 were used? A. I say 28 are in the building now. and they were used. 40



*John Ludwig—Recalled—Cross.*

Q. And does it appear to be that any of these lead bends were returned or credited, of the 53?

A. Whatever is the difference is what we have taken out.

Q. Whatever is the difference between 28 and 53, and you say they all went into pig lead? A. There were no lead bends taken from the job.

10

Q. You received 25 lead bends and used them for pig lead? A. Is that the difference?

Q. Yes, 28 and 25 and 53? A. 32 I can count in the building.

Q. According to your schedules, there are 53 lead bends; then the difference between 32 and 53 was used for cooking lead? A. Yes, sir.

Q. So you used 21 lead bends for pig lead? A. We must have.

20

Q. Is that as cheap as using lead bends? A. What are you going to do; throw it in the ocean.

Q. Did it occur to you to burn it? A. Damaged material; I told you what was the difference and it must have been damaged.

Q. Do you mean it was taken out after it was set up? A. It was taken out after it was set in place.

Q. Do you mean to say there were 21 of these lead bends? A. Whatever was the difference.

30

Q. Tell us how many? A. I cannot tell you how many.

Q. It was damaged material? A. Damaged material, yes.

Q. Did you at any place give credit for them, the damaged material? A. Only by showing it.

Q. Was it worth anything to you to use as pig lead? A. That is all you can use it for.

40

Q. What do you use it for usually? A. Lead is bought by the name of pig cooking lead.



*John Ludwig—Recalled—Cross.*

Q. You used that as cooking lead? A. Yes.

Q. I heard you speak of an item in the examination a while ago as cooking lead? A. Yes, sir.

Q. And you use some cooking lead beside this?  
A. Sure.

Q. Did you ever credit back to the bill the value of these lead bends you used for cooking lead? A. Credit to the bill? 10

Q. Did you ever put back as a credit to the Arlington Realty Company on any bill any credit for the lead bends you used for cooking? A. Credit to the Arlington Realty Company was allowed; I credited it to them; it was used there.

Q. You did not credit it back, did you? A. No, sir.

Q. How much damaged were these lead bends?  
A. It was showing they could not be used. 20

Q. In what respect? A. Smashed.

Q. Were they smashed to pieces? A. Some of them were cracked.

Q. If your memory serves you good, you think there were a difference of 21 lead bends put in and taken out? A. Yes, whatever was the damage.

Q. How many gate valves were used in that building? A. I cannot tell you that.

Q. I thought your memory was good on these items—can you say that all or any gate valves were used? A. There are fixtures in that house so controlled separately with the valves, every line and fixture. 30

Q. Can you remember every line and fixture?  
A. Not unless I go down there and count them for you.

Q. Well, you looked over those bills and you testified that each and every one of those items was delivered there? A. I did, yes. 40



*John Ludwig—Recalled—Cross.*

Q. And you testified from your memory, and when I asked you how many gate valves are there, you cannot tell me how many were there? A. You asked me how many were used.

Q. Whatever were used there? A. Whatever was on your slip.

10 Q. Are you sure about it that everything on the slip was delivered on the job? A. Yes, because it was checked up.

Q. Do you have in your memory that you checked the valves on here? A. Have I the memory?

Q. Have you the memory that you checked these valves? A. Sure.

Q. How many of them did you check? A. Whatever is on your list.

20 Q. How many did you use? A. Whatever is in the building.

Q. How many is that? A. I cannot tell you unless I go there and count them.

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GEORGE F. HERBERT, recalled.

*Cross-examination by Mr. Tansey:*

30 Q. Mr. Herbert, what was not included in the list of material in the second estimate, that is, of February 23rd, 1927? A. What was included?

Q. What was not included that was used in the building? A. What was not included in the estimate?

Q. In the second estimate of February 23rd, 1927? A. Whatever your invoices call for.

40 Q. What was not included in the second estimate? A. Several brass gas pipes; soil pipe; gas pipe and some steam fittings; some steam pipe.



*George F. Herbert—Recalled—Cross.*

Q. Was it for a steam fitting? A. Steam pipe was for steam fitting.

Q. Had the steam system or steam heating been covered in the estimate first? A. No.

Q. So that whatever was additional and beyond the second estimate was the steam pipe? A. Steam brass pipe; some fittings and some soil pipe.

Q. Speaking in a large way, it was the same? 10  
A. No.

Q. Something outside the estimate anyhow?  
A. Yes, sir.

Q. Beside these articles, there was the steam pipe? A. There was some water pipe; soil pipe and gas pipe.

Q. When you stated a number of deliveries had been made without being receipted for, did you total up the amounts of these receipts, I mean these deliveries? A. I totaled them up the next month. 20

Q. As to what they amounted to of the deliveries that were not receipted for? A. No.

Q. Beside the lead bends we talked about yesterday, we spoke about some valves, sixty-three valves? A. Whatever that sheet calls for.

Q. Did you see sixty-two valves in the building?  
A. I used quite a number. 30

Q. What became of the ones you did not use?  
A. I do not know whether they were not all used or not; I can count them, quite a number of them.

Q. How many can you count off from your memory? A. There are twenty-four bath-rooms; then the cellar floor, and there are two on each pipe to each bath; three on each pipe in the cellars; that is I counted all of them.

Q. How many were there? A. I think I have got 61 or 62 now. 40



*George F. Herbert—Recalled—Cross.*

Q. Were they all bought after you used what had only been estimated or ordered? A. I cannot tell you that.

Q. They were different sizes, were they not? A. Several different sizes.

Q. We are speaking about the 62 inch valves? A. Yes.

10 Q. There were 62 of all sizes? A. There must have been 62—two inch ones.

Q. There were 62 two inch ones, how many other kinds? A. I cannot remember any kinds.

Q. Were none of these returned? A. I think there was.

Q. How many? A. I do not know that.

20 Q. When you stated yesterday in regard to statements on the bills, as to whether they belonged to the contract or were extra, did you say that you knew that of your own knowledge and from inspecting the bills? A. From inspecting the sheets.

Q. And you saw from inspecting the bills it was written there contract or extra, did you? A. Yes, sir.

Q. And you had not written on the bills somebody else's statement? A. No, sir.

30 *Redirect-examination by Mr. Sexton:*

Q. Do you know whether or not, for instance, the bath-room fixtures were in the estimate? A. Yes, sir.

Q. Do you know, of your own knowledge, whether they were furnished? A. Yes.

Q. And you would then know, of your own knowledge, they were part of the estimate without looking at the files? A. Yes, sir.

40 Q. So while you have made a general statement



*George F. Herbert—Recalled—Cross.*

of your own knowledge, can you give me a statement of any knowledge other than that as to material called for by the estimate being furnished?  
A. Yes, sir.

Mr. Tansey: Objected to.

Q. I ask you whether the toilet seats, for instance, were part of the estimate? A. Yes, sir. 10

Q. Do you know whether there was soil pipe in the estimate, and do you know that of your own knowledge? A. Yes, sir.

Q. Do you know whether or not there were basins mentioned in the estimate? A. Yes, sir.

Q. Do you know whether or not there were showers mentioned in the estimate? A. Yes, sir.

Q. And whether or not there were other pipes mentioned in the estimate? A. Yes, sir. 20

Q. So if you had known of your own knowledge without relying—

Mr. Tansey: Objected to.

The Court: Objection sustained. Exception to plaintiff.

Q. Do you recall the copy of the estimate that was furnished you? A. Yes, sir.

Q. Do recall checking that? A. The estimate that I had and which Mr. Walker should have now. I think Mr. Sexton, every item on it was checked; every item has a mark on it. 30

Mr. Sexton: I ask them to produce it.

Q. Who made the marks on that estimate, and who was checking it with you and how did you check it? A. There was another man with me; one counted the fittings and checked them up, 40



*George F. Herbert—Recalled—Cross.*

whatever was on the delivery at that time, was checked off from the material by Schofield and myself.

10 Q. Do you know whether the whole estimate was checked? A. I cannot tell you; we counted a couple of items that were not there at that time and marked on the side of the estimate, and delivered after.

Q. And that is the estimate Mr. Walker should have? A. Yes.

*Cross-examination by Mr. Tansey:*

Q. When this checking you now speak of was made, all the material was already in the building? A. Yes.

20 Q. Can you say they were delivered? A. Yes.

Q. And you may be wrong as you said before you made the check before August 3rd, and it was the first one taken from the invoices? A. I checked up with Mr. Walker from the sheets; I know it was on a Sunday afternoon.

Q. Was that an additional check that you made each time the material was delivered? A. Yes, sir.

30 Q. What was done in the line of checking when you were not there? A. One man who did it; counted the material and checked it and signed for it.

Q. The checking was made by the other men as they testified yesterday, and the check that was made by you, was when you were there? A. You have several sheets with my name on them.

Q. And the checking was made when you were there? A. I was on the delivery when several checks were made there.

40 Q. Do you know that the amount of goods that



*George F. Herbert—Recalled—Cross.*

were delivered but not receipted for was over \$4000? A. No, sir.

Q. Would you be surprised to learn that the value of the delivery sheets that were not signed have amounted to over \$2695? A. I do not know.

Q. And that would be as to these items, of course, that which was not checked up? A. A witness so testified yesterday that the material was left there after hours and the sheet was left with him, and the material was counted by checking, in order to get the signatures on it. 10

Q. It was not counted nor checked as delivered? A. It was counted the next day.

Q. You heard it was so checked? A. I have done it myself.

Q. Do you know, Mr. Herbert, that sixty feet of 4 inch black pipe was never used in the building nor returned as a credit? A. Four inch? 20

Q. Sixty feet of four inch pipe? A. No, sir.

Q. Do you know that six feet of three inch pipe was never used in the building or accounted for as being returned? A. No, sir, that is six feet.

Q. Six feet of three inch pipe? A. I do not know how you can get that.

Q. Do you know that 105 feet of 2½" black pipe was never used in the building nor accounted for as being returned and credited? A. No, sir. 30

Q. Do you know that 342 feet—

Mr. Sexton: I enter an objection at this time.

The Court: You have objected to this testimony; it is a recital of allegation; is there anywhere in the evidence that you want to object to it.

Mr. Sexton: I withdraw the objection. 40



*Gustave Meikrentz—Direct.*

Q. Do you know that 342 feet of two inch black pipe had not been installed in the building or otherwise accounted for? A. No, sir.

Q. Or that 330 feet of 1½ inch pipe had not been installed in the building or otherwise accounted for? A. No, sir.

10 Q. Or that 59 feet of 4 inch pipe covers have not been accounted for nor installed in the building? A. No, sir.

Q. Do you know that the 3 inch brass pipe was short 85 feet? A. No, sir.

Q. Do you know that the 2 inch pipe was short 10 feet? A. No, sir.

Q. And one length of brass pipe was short 50 feet? A. No.

20 Q. And there are 99 feet and how much is that and was that bought by you? A. It was bought by the town, and you will have to ask the man who did the hauling, and paid the bill.

Q. It was quite expensive? A. Cost more than galvanized, sure.

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GUSTAVE MEIKRENTZ, being duly sworn,  
was examined and testified as follows:

30 *Direct-examination by Mr. Sexton:*

Q. Mr. Meikrentz, do you live at Belmar, N. J.? A. Yes.

Q. In 1927 were you employed by the Monmouth Plumbing Supply Company? A. Yes.

Q. I have asked you to go over a number of invoices and to mark them as to whether or not they were in your handwriting? A. Yes, they are.

40



*Gustave Meikrentz—Cross.**By the Court:*

Q. All of them? A. Well, there are a few here.

Q. Will you run through them and see? A. (Witness runs through them). Yes, sir, they are all in my handwriting.

*By Mr. Sexton:*

Q. What was your position with the Monmouth Plumbing Supply Company? A. A clerk or counter clerk.

Q. Did you prepare for shipment the items mentioned on these slips? A. Yes, sir.

Q. Did you check them up? A. They were checked before they left the yard on a truck.

Q. They were checked by whom? A. By me.

Q. So that you know, in reference to these slips which I am showing to you that all the items were checked by you, delivered to the truck for delivery on this job, and the job is what? A. The Walker job.

*Cross-examination by Mr. Tansey:*

Q. Did you yourself see that the material was shipped out? A. Yes, sir.

Q. And your handwriting is on this invoice where you say contract or extra, is it? A. Yes, sir, that is all in my handwriting.

Q. Where did you get that information from? A. I got it from the sheets in the office; I telephoned.

Q. From sheets in the office and by telephone? A. Yes, sir.

Q. Who made up the sheets in the office? A. Sometimes the bookkeeper made them and one of the stenographers, either one.



*Gustave Meikrentz—Redirect.*

Q. You yourself did not put it down from your own knowledge? A. No, sir.

Q. Whatever was there you know from somebody else? A. Yes, sir.

*Redirect-examination by Mr. Sexton:*

10 Q. You do not mean that literally, you mean whatever is there if there are any marks as to contract and you put in the material itself? A. Every thing on them was sent out.

Mr. Sexton: I offer the slips in evidence.

Mr. Tansey: Objected to as not being proper evidence.

The Court: How do they tie up with the other things.

20 Mr. Sexton: They tie up in this manner there are four sheets made, and the sheets which are in evidence are carbon copies of the sheets which I have produced, and were written by this witness.

30 This material left the plumbing shop, and the first entry of it is by the shipping clerk, who is the man that actually did the shipping and checked it and went on the truck. There was another copy which went with the goods. These copies I have demanded from the defendant and they have been produced and are in evidence.

Again there was a third copy, and that copy was used as a delivery receipt and is in evidence, and the other which we will deal with later.

40 Then the fourth copy is turned into the office. The prices were made by Mr. Berry who told you in his direct-examination that



*James A. Stewart—Direct.*

he did all the pricing, and the copy of that was then mailed out several times a month to the Contractor, to Mr. Herbert and delivered by Mr. Herbert to Mr. Walker, and was demanded by me from Mr. Walker, produced and offered in evidence.

The Court: How are these evidential in this case? 10

Mr. Sexton: Evidential only that these show different parts of the particular system. They go in as a whole transaction.

The Court: The whole transaction has not been offered. The other three copies are in evidence. Offer the rest of your system here.

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JAMES A. STEWART, being duly sworn, was examined and testified as follows: 20

*Direct-examination by Mr. Sexton:*

Q. What is your full name? A. James A. Stewart. 25

Q. Mr. Stewart, you were employed by the Monmouth Plumbing Supply Company? A. Yes.

Q. And you live at Long Branch, New Jersey? A. Yes. 30

Q. I asked you to go over some lists and now inquire whether or not they are in your handwriting, and also show you some slips and ask you if they are in your handwriting? A. Sure.

Q. And they were made by you? A. They were.

Q. Were the goods shipped out at that time? A. Yes.

Q. You acted as the shipping clerk in this in- 40



*James A. Stewart—Cross.*

stance and checked the goods, and therefore know they were shipped? A. I did.

*Cross-examination by Mr. Tansey:*

10 Q. Are these additional to the ones as testified to as having been checked up and shipped? A. Yes, sir.

Q. Mr. Stewart, did you personally check them up? A. I did.

Q. What is your position with the Monmouth Plumbing Supply Company? A. Assistant Treasurer and Shipping Clerk.

Q. Beside the other gentleman who was an Assistant? A. Yes.

20 Q. Sometimes he would act as the shipping clerk and then you would do so? A. Yes, sir.

Q. And you looked after the shipping of every one of these items? A. I did.

Q. And you shipped this material out—were these the ones, the slips that should have been receipted for? A. There are four copies; two copies are kept in the office and two copies sent with the driver.

30 Q. Were these the ones that are kept in the office? A. That is the original and the second.

Q. They are kept in the office all the time? A. Yes.

Mr. Sexton: I object to them being used. I offer them for identification.

*Redirect-examination by Mr. Sexton:*

40 Q. Mr. Stewart, I hand you some credit memorandums, and ask you if they are in your handwriting? A. I have turned them down, and the



*James A. Stewart—Redirect.*

ones that are turned are in my handwriting.

Q. Did you check up the goods that came in on the credit memorandums, and from the memorandum of these credits, you received the goods where?

A. Yes, at the plant.

(No questions by Mr. Tansey).

Mr. Sexton: I offer them for identification. 10

Q. Did you make the credits yourself? A. Yes.

Q. Did you use the same cost price that was on the shipping bills? A. I had nothing to do with the prices.

Q. Who told you about that? A. They are not my writing.

Q. Your writing is what—and the credit and prices are not yours? A. The prices are not in my writing. 20

Mr. Tansey: I object to the offer.

ERNEST STAUCH, recalled.

*Direct-examination by Mr. Sexton:*

Q. I show you some of the slips and ask you if they are in your handwriting? A. Sure. 30

Q. And you acted as the shipping clerk in this case? A. No, sir, I was helping them out while they were busy.

Q. Did you ship these goods? A. I helped out at the counter; I got the material ready when the men were up there in the yard.

Q. I notice the checking of these things is in your handwriting here? A. Yes, sir. 40



*Ernest Stauch—Recalled—Cross.*  
*James A. Stewart—Recalled—Redirect.*

*Cross-examination by Mr. Tansey:*

Q. Did you put the prices on these slips, Mr. Stauch? A. In one or two instances I may have looked up a certain market price by asking the bookkeeper.

10 Q. You will not say that you put these prices on them? A. Not all of them.

Mr. Tansey: I object to the offer of the slips.

Mr. Sexton: I ask that they be marked for identification.

Q. Who did fix the prices on them? A. The bookkeeper.

20 Q. What are they—you were examined on returned items, were you not? A. No, sir.

Q. Who did put the prices and credits returned on them? A. Mr. Berry, the bookkeeper. These do not happen to be credits.

Mr. Tansey: I object to the use of them.

The Court: They may be marked for identification.

30

JAMES A. STEWART, recalled.

*Redirect-examination by Mr. Sexton:*

Q. Mr. Stewart, I show you some credit memorandums, those which are not turned down, and ask you whether they are in your handwriting? A. sure.

Q. And did you receive the goods and check them for the credits? A. I helped to check some mate-

40



*James A. Stewart—Recalled—Recross.*

rial and recounted it, and some of it was rejected by the yard man and the shipping clerks.

Q. Did you do any pricing? A. No, sir.

*Recross-examination by Mr. Tansey:*

Q. Mr. Stewart, were these copied in your office?

A. In my office.

10

Q. In the office of the Monmouth Plumbing Supply Company? A. These carbon copies were.

Q. The ones you have just testified from, they were kept in the office and never went out? A. Not these carbon copies, no, sir.

Mr. Tansey: I object to their use as not being brought to the attention of the Arlington Realty Company.

Mr. Sexton: I ask that they be marked for identification.

20

The Court: They may be so marked.

*By Mr. Sexton:*

Q. Do you recall a conference had with Mr. Davis? A. With Mr. Walker; I recall a part of it.

Q. After that conference, what did you do, if anything?

Mr. Tansey: I object to this witness being questioned further, and it is not a proper subject for re-examination.

30

The Court: We will admit it.

A. The following day, I was given instructions by Mr. Davis to get a description of this property.

The Court: The answer may be stricken out.

40



*James A. Stewart—Recalled—Recross.*

Q. What did you do? A. The following day I went down to see Mr. Walkér to get a description of the property.

Q. Did you have a talk with him and what did he say?

Mr. Tansey: Objected to.

10

The Court: Objection overruled. Exception to defendant.

A. He informed me that he would go to Freehold that afternoon and get a description and bring it back to our office for the use of the second mortgage.

Mr. Tansey: I object to that and move that it be stricken out.

The Court: Why?

20

Mr. Tansey: As being immaterial.

The Court: Objection overruled. Exception to defendant.

Q. What did you do next? A. That is all I had to do in that particular case.

Q. Did you get the description? A. It was never delivered to our office.

30

Q. Did you have another talk with Mr. Walker after that time? A. I had a talk with him on the telephone a couple of evenings after my going home.

Mr. Tansey: I object to the 'phone conversation.

The Court: Why?

Mr. Tansey: He has first to show whether he knew it was Mr. Walker.

Q. Did you know it was Mr. Walker talking to you over the 'phone? A. Yes, sir.

40



*James A. Stewart—Recalled—Recross.*

Q. What was the conversation? A. I told him that we had not seen him or anything of the description, and he decided not to settle with the second mortgage; that he would go to Newark, N. J., and make arrangements there to borrow the money and pay the bill with a check or cash.

Q. Did you have any further talk with him? A. I said that will be more satisfactory with us than a second mortgage, and he said "I will let you know as soon as I get it." 10

Q. Did you see him again? A. I imagine it was a week or ten days when he called me at my house, and he told me that he had made arrangements to secure the money from Newark, New Jersey, and if I would come down, he would give me a check.

Q. Did you go down? A. I went down and went into his little den or living room at the apartment. 20

Q. At what apartment? A. On Garfield Avenue. He started to make out a check and put in it the amount of \$4700, which I refused and told him it was a right account, and he said that was all he was going to pay.

*Recross-examination by Mr. Tansey:*

Q. Was this before or after you had received the \$8000? A. After. 30

Q. Did Mr. Walker have any discussion with you as to the amount due? A. He did not.

Q. Did he discuss with you as to the amount he was to pay? A. When he made out the check, he made it for \$4700, and he said that was all he was going to pay.

Q. And he did not pay any amount of money since? A. No.

Q. Did he give any reason for not paying the 40



*Richard W. Berkstresser—Direct.*

money? A. I said that I could not accept it.

Q. Did he not say that he had been overcharged and would not pay the amount of money that you claimed? A. He said that our prices were too high.

10 Q. Did he claim that the material had not been furnished? A. No, sir.

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RICHARD W. BERKSTRESSER, being duly sworn, was examined and testified as follows.

*Direct-examination by Mr. Sexton:*

Q. What is your full name? A. Richard W. Berkstresser.

20 Q. Mr. Berkstresser, you were employed by the Monmouth Plumbing Supply Company? A. Yes.

Q. Were you in the employ of that Company in 1927? A. I was.

Q. I show you some invoices and ask you if they are in your handwriting? A. They are.

Q. There were two men who wrote on it, and were you one of them that wrote on the invoice? A. I wrote the original entries; the first two entries.

30 Q. You wrote the first two entries on No. 7687? A. That is correct.

Q. Were the goods shipped? A. They were called for in most of the cases.

Q. In this case, when they were not called for, were they shipped? A. Oh, yes.

Q. Did you do the shipping of the goods? A. I did the shipping.

40 Q. You delivered them when called for? A. Yes, sir.



*Richard W. Berkstresser—Cross.*  
*Richard W. Berkstresser—Redirect.*

*Cross-examination by Mr. Tansey:*

Q. Are you one more shipping clerk of the Monmouth Plumbing Supply Company? A. I am Assistant Branch Manager.

Q. You are another man who made up and shipped out some goods with the slips, the lists of goods? 10  
 A. Yes, sir.

Q. What you did was in addition to what was testified by the other three or four men? A. Yes, sir.

Q. Some goods were called for and some were uncalled for? A. Some goods were called for and some unshipped.

Q. And most of them were called for. A. No, sir. 20

*Redirect-examination by Mr. Sexton:*

Q. What store did they come from? A. The Belmar Branch.

*By Mr. Tansey:*

Q. Where were the main shipments made from, what branch was that? A. Long Branch, New Jersey. 30

Q. So you came in second from Long Branch at Belmar? A. Belmar was near to Long Branch.

Q. These slips did not come out of your place, did they? A. I do not understand that question; do you mean the other slips he had in his hand?

Q. Were they retained in your office? A. They were not; they were shipped to Long Branch; all of our records are kept in Long Branch.

Q. And what you did, after you made them out, was to send them to your other office in Long 40



*William Hunter—Direct.*

Branch—that is as far as you know about it? A.  
Yes, sir.

---

WILLIAM HUNTER, being duly sworn, was  
examined and testified as follows:

10 *Direct-examination by Mr. Sexton:*

Q. Mr. Hunter, one of the invoices No. 7687,  
which Mr. Berktresser has testified to the effect  
that the first two items were in his handwriting,  
the rest of the items is in your handwriting? A.  
The balance is in my handwriting.

Q. And did you ship the goods? A. They were  
called for.

Q. And delivered? A. Yes, sir.

20 Q. I show you some other invoices and ask you  
if they are in your handwriting? A. Sure.

Q. Were these goods shipped or delivered? A.  
They were all called for.

Q. And you delivered them to the party who  
called for them? A. I did.

*Cross-examination by Mr. Tansey:*

30 Q. Did you make out this slip yourself? A.  
Yes, sir.

Q. And you made out a set of slips yourself? A.  
Yes, sir.

Q. Are you another shipping clerk? A. I was  
in the Sales Department and at times on the coun-  
ter.

Q. Did you act as a shipping clerk on those oc-  
casions? A. No, sir; they would call for the  
goods.



*William Hunter—Cross.*

Q. Do you know who called for them? A. Mr. Herbert or one of his men.

Q. All you know about the distribution of these goods is what they told you? A. They asked for that material that is all I know; I delivered it to them.

Q. You did not know where it was going? A. They were sent to Mr. Herbert. 10

Q. You charged it to Mr. Herbert with Mr. Walker on the next line? A. Yes, sir.

Q. Who told you to charge it to Mr. Walker besides? A. One of Mr. Herbert's men.

Q. Did you know that Mr. Herbert was running shipments besides these? A. Not at that time, I was not familiar with this work.

Q. Do you know whether or not he made further orders for shipment? A. At that time, I did not know anyone other than the Walker job. 20

Q. You did not know what the material was for, as you did not ship it out? A. I delivered to him or one of his men.

Q. Did you make up these goods yourself or wrap them up? A. I handed them to him.

Q. And that was done on as many occasions as these slips would show here? A. Absolutely.

Q. What did you do with the slip, that is, the slip you made out? A. The charges came into our office in Belmar. 30

Q. Did you send the slip to Belmar or rather to your main office? A. I was at Belmar. They went through the hands of Mr. Berktresser.

Q. And he did something else with it? A. Yes.

Q. Were these slips sent to the Long Branch office? A. They were.

Q. And they remained there until you produced 40



*Howard E. Lippincott—Direct.*

them here now? A. They remained there until someone produced them.

Q. Are they the original slips you made? A. They are duplicates.

Q. How are these slips made? A. They are duplicates of the originals—carbon copies.

10 Q. They are made at the same time? A. Yes, sir.

Mr. Sexton: I offer Mr. Berktrasser's slips for identification.

Mr. Tansey: I object to this as not being binding upon the Defendant.

The Court: They may be marked for identification.

Mr. Sexton: I offer the Hunter slips for identification.

20

HOWARD R. LIPPINCOTT, being duly sworn, was examined and testified as follows:

*Direct-examination by Mr. Sexton:*

Q. What is your full name? A. Howard R. Lippincott.

30 Q. Lippincott, you were employed at the Belmar Station of the Monmouth Plumbing Supply Company, and I show you these slips and ask you if they are in your handwriting? A. Yes, sir.

Q. Did you deliver the goods? A. Yes, sir.

*Cross-examination by Mr. Tansey:*

Q. Mr. Lippincott, are these your original slips? A. Yes, sir.

Q. Were they made out by you? A. Yes.

40



*Howard E. Lippincott—Cross.*

Q. In the capacity of shipping clerk? A. Counter Clerk.

Q. Where do you work? A. Belmar, New Jersey.

Q. To whom were these goods delivered? A. He called for them, Mr. Walker, or his man.

Q. They were delivered to Mr. Herbert or his man? A. Yes, sir. 10

Q. And there was none of them delivered by you on the job? A. Yes, sir.

Q. What became of the slips when you made them out? A. The originals?

Q. Yes? A. They were kept in our office and then sent to Long Branch.

Q. What is the color of these slips, why should they be this color than white? A. That distinguishes the different branch offices. 20

Q. Can you tell me this, whether the deliveries were made right from the store or called for? A. I cannot unless they were called for personally only.

Q. Is there anything on this slip to tell whether or not they were called for personally? A. There is no man's signature on them.

Q. Someone signed it by a man's name, Brogan, what does that indicate to you? A. It indicates he called at our plant for it. 30

Q. It might have been delivered at the job? A. They were numbered three and four at that time to show that.

Q. This number is two? A. These are our original copies; there were two copies.

Q. Here is number two not signed up, now what would that indicate to you? What does that indicate to you in regard to whether it was deliver 40



*Howard E. Lippincott—Cross.*

ed over the counter or on the job? A. Over the counter.

Q. What is there to indicate that it was delivered over the counter? A. I beg your pardon.

Q. What is there on it to indicate that it was delivered over the counter? A. Only my writing.

10 Q. Is there any writing on here to show that it was delivered over the counter, what is the writing? A. Just the items and who received it.

Q. What is there to show that it was delivered over the counter? A. Unless there is a signature there.

Q. There is not any signature on it, and I ask you to tell me what is there to show that it was delivered over the counter? A. Nothing.

20 Q. Can you tell whether or not that material was delivered on the job or over the counter? A. I cannot swear to it.

Q. You would not say that? A. If I knew.

Q. What became of those slips after you made them out? A. They are kept in our office for awhile, then sent to Long Branch.

Q. And they were kept there until produced in Court? A. Yes, sir.

30 Mr. Sexton: I ask that all the slips be marked for identification. I now offer in evidence the slips which have just been marked for identification, namely, those marked "S", "T", "U", "V", "W", "X", "Y" and "Z".

40 I also offer the ledger, which shows the account as being entered from the delivery receipt. I do not offer these as books of account if the objection is made. I offer them for the purpose of showing this transaction of the sale and delivery. I should not say that I offer them as books of account, but as showing this whole transaction, because evident-



*Howard E. Lippincott—Cross.*

ly they should be taken together with all the other evidence and circumstances. Furthermore, they are memorandums from which Mr. Herbert refreshed his memory when he was examined as to whether these goods were actually shipped. So on all these matters, I offer these slips and books, and they are coupled with a part of a system of bookkeeping and they are No. 2, and three and four copies which have come from the hands of the Defendant. 10

The Court: Now you are offering the entire system of slips, the charge slips, credit memorandums and the original books taken from the charge slips, the memorandums as a permanent account and as a system of bookkeeping.

Mr. Sexton: There is no proof as to the book of original entry. The gentleman who attempted to prove it, showed that he had only got his information from hearsay. These slips were only admitted if they bound the Defendant. 20

The Court: They were not admitted at all yet.

Mr. Sexton: They were only admitted subject to the fact if they bind the Defendant, having brought to them notification showing the delivery and receipt for delivery, and in so far as they had been delivered and showed receipts on them. There is some evidence to bind the Defendant, inasmuch as we can show the Court that Mr. Herbert was the agent of the Defendant Company. There was no evidence to show this was a book of original entry. They took all these delivery slips to Mr. Walker and compared them all and checked them over and found them the same. 30

Mr. Tansey: These particular slips were never brought to his attention. 40



*Howard E. Lippincott—Cross.*

10 Mr. Sexton: They are part of the evidence or record, and the duplicates of which were a part. They were to compare the papers in their possession. The testimony is binding, as they were brought to his attention and in his custody, and he never went out of his office to get or have the book of original entries:

Mr. Tansey: No, they were going to tie up the book of original entry. There were about 50 slips not testified to. They testified that he should have went out and checked them over. Mr. Herbert said they were checked over by someone in his employ and by himself.

The Court: Objection overruled. Exception to Defendant.

20 Mr. Sexton: I offer the ledger in evidence which is marked Plaintiff's Exhibit No. 2. We offer the record of a deed the Equitable Company to the Arlington Realty Company, dated and recorded April 19, 1926 in book, page 34.

Mr. Tansey: We never denied we owned the property.

The Court: It is admitted.

Mr. Tansey: I will admit you filed a lien.

30 Mr. Sexton: I offer a lien filed in the case of the Monmouth Plumbing Supply Company vs. Herbert and the Arlington Realty Company, filed August 4, 1927. Summons issued on this lien claim this 27th day of August.

The Court: Let it be marked as an Exhibit.

Plaintiff Rests.



*Motion for Non-Suit.*

Mr. Tansey: I move for a non-suit. On the lien claim particularly there is no evidence at all that ties up this Defendant, the Arlington Realty Company, and the fact that these goods were delivered to go in the building without the consent of the Arlington Realty Co., show that there is no balance due or owing.

I offer as a second reason for a non-suit, that there is no evidence showing that the Arlington Realty Company became responsible in any way for the goods which were shipped to George Herbert; that a certain paper a so-called guaranty was not made by Mr. C. Herbert Walker as President of the Arlington Realty Company, and in no way had it been brought home to the Arlington Realty Company as binding upon it, and is not responsible for anything that has appeared in this case.

The Court: Have you given all your motion and grounds for it?

Mr. Sexton: I do not understand his objection and his raising an objection to the lien. It seems to me on that aspect of it we have sufficiently proved our case—a prima facie case.

On the question of binding the Arlington Realty Company for the purchase of the goods, in that respect, you should take the whole transaction and view it from all angles; the first thing we find is that the Arlington Realty Company owns a piece of land and they admit they do; that they are erecting a building upon it; that they have engaged an agent in charge, and that agent conducts the business, apparently from all the evidence, and he is appointed in sole charge; that he is the Architect and the Manager and contracts too; he buys the goods and pays the money and employs the

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*Motion for Non-Suit.*

sub-contractors, and makes material changes as to how many apartments there shall be, whether 27 or 24, so that there is supervision by this agent at all times.

- 10 The construction of this building is nothing but what can be seen; it is obviously on the lands of the Arlington Realty Company, and they must have owned the property, as they were constructing that building, and they were willing to get a contractor to install the plumbing; they have their estimates and Mr. Walker does this, of course. They get a proposition from Mr. Herbert who says that he will install all the plumbing work on a certain building of the Arlington Realty Company at Avon, N. J.; they to guarantee the payment of all the material, and I am to receive 10 per cent
- 20 for labor and material. Couple that up with Mr. Walker then, he was constructing the building for the Arlington Realty Company, and it seems there is evidence that Mr. Stauch was brought into it and Mr. Stauch visits the site where the building was being constructed, which was then on its way to completion, and he has given an estimate and the figures upon it, and he takes it to Mr. Walker, who is running the construction of the building for the Arlington Realty Company as Agent
- 30 of the Arlington Realty Company and there sees the estimate. All the goods mentioned in the estimate had been furnished and checked up and testified to as having been furnished. Therefore we have other extras that have been running along, and they amount to a considerable extent. There has been furnished the testimony as to establish a prima facie case, at least we have furnished and delivered material on the place and the Arlington
- 40 Realty then received all the goods and they are



*Motion for Non-Suit.*

made a part of its building. This man, this strange mysterious man who knows nothing about the works of the Arlington Realty Company, and for him counsel fixes no responsibility. He puts it up as President of the Arlington Realty Company that they need money, and they execute a mortgage on the property, and a resolution is passed and C. Herbert Walker, the same man who got the material, signed the mortgage, and the Secretary some other Walker. They have signed it and the sale is placed. 10

Mr. Tansey: Objected to.

Then the Arlington Realty Company became the owner of \$55000 which it has expended on the orders of C. Herbert Walker, President of the Arlington Realty Company. They admit that, and there can be no doubt the admission must be that the mortgage was duly executed and that he was President of the Arlington Realty Company and expended the money and signed as C. S. Herbert, President. 20

Part of that money went to pay Mr. Herbert 10 per cent on the total bill of \$13744 and some odd cents, and then an order is given for \$8026. From this money was paid out the \$5500 to the Monmouth Plumbing Supply Company, and after that is given the talk is about the second mortgage, etc. 30

Now I say that where a Corporation, through its officers, or through its agent, and we will leave out the word officers, receives and takes a benefit of the goods, and there was a delivery, and whatever the benefit may be, makes a part payment on it, there is a ratification by the agent. Not only 40



*Motion for Non-Suit.*

that, but I do not think the Court or the law will allow it, as in this case and permit to be perpetrated. Where a Corporation, through an Agent, can obtain goods and then deny that they should pay for it, especially in view of the particular situation we have here, it doesn't appear to be an ordinary act.

10

While the word guaranty is used, there is no magic in that word, it doesn't appear in that class of cases at all; it appears that the Arlington Realty Company purchased these goods, and I asked Mr. Herbert after we had demanded a check in payment if they would pay us anything, and he said no. And afterwards, the Arlington Realty Company, through its President, and certainly we have shown who was the President, tries to get us a second mortgage.

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If you will read and take the whole transaction and consider it, I think it is a fair jury question, as to whether or not this man, Herbert, was not the agent and that there was a ratification and confirmation by acceptance of the goods and by payment on account thereof, and I respectfully insist that a non-suit should not be granted on the only ground in reference to the lien.

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As to the next question, the purchase of the goods, it will be said that there was no agreement and sale and delivery. If we would take that, they would be bound by it. There is no magic in the word guaranty, and when we speak of it, it simply means that if a party primarily receives the benefit, he is responsible, and for that reason I respectfully insist that the non-suit be not granted.

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Mr. Tansey: I merely asked about something in



*Motion for Non-Suit.*

regard to Mr. Herbert's testimony. I move to strike out his testimony as to whether the materials as testified to by him were according to contract or according to extra, inasmuch as he had said that he only based his testimony on what he saw on the tickets, whether they were marked contract or extra. He did not know of his own knowledge, and my motion was to strike out his testimony as to whether certain goods were delivered. 10

The Court: Why should not that be done.

Mr. Sexton: I asked the witness whether the bath tubs were part of the estimate; I also asked him as to the toilet seats, and whether he knew from the facts they were on there, and he said "if you have it there, they came in."

The Court: I deny the motion for a non-suit, and also the motion to strike out certain testimony of Mr. Herbert. Exception to Defendant. 20

Recess until 1:30 o'clock P. M.

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Mr. Tansey: I offer in evidence, marked Defendant's Exhibit "A", the release, or purported to be a release of mortgage liens against the Arlington Realty Company, covering a plot of 50 x 140 feet, 15 and 17 Garfield Avenue, Avon, New Jersey, by the consent among others, and by the Monmouth Plumbing Supply Company. 30

Mr. Sexton: I object on the ground that there has never been a delivery of the release to the Arlington Realty Company. I recall the circumstances under which it was given, and we denied at that time it was signed when the mortgage money was paid. 40



*Motion for Non-Suit.*

10 It was signed at the request of the agent of the mortgagee, who has testified to it, and I asked him who he represented and he said the mortgagee, and it was produced by him, he taking it from his files, and I asked if it was to be returned to him, and he said yes. So that it is on the question of delivery, and it is quite unnecessary for me to cite your Honor any cases on the proper question of delivery of any written instrument. In consideration there is mentioned one Dollar. The money was received at that time.

Mr. Tansey: Did not Mr. Davis testify that amount was agreed upon.

20 Mr. Sexton: Mr. Davis did testify that \$8026 was to be paid on the mortgage money, but nothing in reference to the release; it was not brought up and at that time it developed it was out of the office of the Monmouth Title Company.

The Court: Unless you show me to the contrary, I am inclined to think that delivery for the purpose of it and proper presence at the building, would be a sufficient delivery.

30 Mr. Sexton: Case 42 Atlantic, p. 284. The nearest I can get to the proposition I find in this case. The question was raised as to whether the release given was prior to the mortgage. I think the question arose as to whether the release would release the property from liens which had accrued subsequent to the time the release was signed. In this trial the Vice-Chancellor Mayer held that it did as to the mortgage, but that the claim of the person granting the release was subsequent to the mortgage. You will see as it reads along to the last of the case, he held it in that. Now, if that is so, and if the release is not as a release for all pur-

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*Motion for Non-Suit.*

poses, then such finding could not be had in that case.

The Court: Why does he make it conclusive?

Mr. Sexton: It says here it doesn't destroy the lien; it says prior to the mortgage lien.

The Court: It doesn't say so; it doesn't seem to say what Mr. Sexton says. It was in subordination. 10

Mr. Sexton: No, it was an actual release, which your Honor can see.

The Court: The only question in Mr. Sexton's mind is that although it was a release, it does not bear against the Arlington Realty Company.

Mr. Sexton: On that mortgage there were two parties; the Arlington Realty Company was the mortgagor and the Monmouth Title Company was the agent of the mortgagee, and so was the testimony, and in disbursing that money, for its protection it took that release. I frankly say to you, and I am putting this as my own information, I cannot find a parallel case, and unless I find it, I take it that the lien as to the rest of it was subordinated after the mortgage. But this all depends on the major premise as to whether or not there was a delivery. If the Court finds that Mr. Stephen McDermott of the Monmouth Title Company was acting for the Arlington Realty Company, then I think it is a valid release. 20 30

The Court: Of course, that is like when a person wrote or would say to another person should on his orders pay out of his indebtedness.

Mr. Sexton: In fact the release was never intended to be delivered.

The Court: There was no offer of actual delivery made of it. 40



*Motion for Non-Suit.*

10 Mr. Sexton: It was not produced; it comes from the files of the mortgagee or representative of the mortgagee. I respectfully urge at this point that the release was not a surprise to me. I acquiesced in the amendment of the plea at any time after that, and it is my theory, I can show you the law that a release, the same as any other release, must be delivered.

20 The Court: The question is was there a sufficient delivery here. I am lead to think the purpose of the release was undoubtedly to release these lands from that lien, and it was delivered to the mortgagee or mortgagee's agent, for the purpose of effectuating that very thing. Now, by its terms you cannot say it was delivered just to subordinate it or for the benefit of the mortgagee. It was a mortgage given you, and that being so, I am inclined to think that it operates as a release; otherwise, it would be only a subordination agreement.

30 Mr. Sexton: It would be in effect that; it seems to me as I thought it. I have given the matter a lot of thought, and that I would possibly be assured that an instrument of this nature and of its purport and even thought it would in effect work other than the terms or what it was intended for and to tell to a third person the delivery was not made to the person intended in this case, the Arlington Realty Company.

The Court: In other words, it is a full release; there is no question about it.

40 Mr. Sexton: We have not raised the question of agency. We cannot raise it, and we are not doing that. We feel that it would not be an ethical thing for the Monmouth Plumbing Supply Company to do.



*George Glickfield—Direct.*

The Court: I am going to admit the release in evidence. Exception to Plaintiff.

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DEFENDANT'S TESTIMONY.

GEORGE GLICKFIELD, being duly sworn, 10  
was examined and testified as follows:

*Direct-examination by Mr. Tansey:*

Q. Mr. Glickfield, where do you reside? A.  
North New Jersey.

Q. What is your business? A. Plumbing and  
heating contractor.

Q. And you also estimate for plumbing and  
heating of buildings? A. Yes, sir. 20

Q. How long have you been in that particular  
line of business? A. Over twenty years.

Q. On how many buildings have you estimated  
for work within the last four or five years? A.  
Numbers of them.

Q. Did the estimate include the cost of materi-  
al, the plumbing and steam fitting? A. Yes, sir.

Q. And it included the labor performed? A.  
Yes, sir.

Q. In other words, your business was to figure 30  
out the material to be used and the cost of install-  
ing the same, the plumbing and heating, in the  
various buildings? A. Yes, sir.

Q. In such a line of business, have you examin-  
ed or have you at times examined buildings already  
constructed in order to determine the amount of  
material used, and the cost of the same in plumb-  
ing and heating work? A. Yes, sir.

Q. And in how many instances have you done 40



*George Glickfield—Direct.*

that? A. Well, about twenty-four or twenty-five different times.

10 Q. Are you able from an examination of a building already constructed, in connection with the plans and specifications, to determine exactly the amount of material and the plumbing and heating used? A. Not exactly; approximately.

Q. Would you from knowing approximately the amount of material to be used on a job of any kind, be able to determine a fair price for the same? A. Yes, sir.

Q. What experience have you had, if any, in putting prices on such materials? A. In my estimating a job of any kind, I have to price it myself first.

20 Q. Does that incur putting prices on plumbing and steam fitting supplies? A. Yes, sir.

Q. And when you have been able to determine approximately the amount of materials, of supplies, and of steam fittings to be used, can you tell the cost of the same? A. Yes, sir.

Mr. Tansey: As to his qualifications, I offer him as an expert.

*By Mr. Tansey:*

30 Q. Did you examine the building of the Arlington Realty Company which is in question in this case? A. Yes.

Q. Did you go there several times? A. I have been there the first time.

Q. Did you go there several times? A. Yes, sir.

Q. And yet you went there for what purpose, was it to examine the plumbing and heating work that had been done on the place? A. Yes, sir.

40 Q. Did you make such an examination of that



*George Glickfield—Direct.*

building as to determine exactly the amount of plumbing used and steam fittings in the place?

A. Not the entire building.

Q. I am talking about it approximately? A. Approximately.

Q. I believe you could not tell what was inside the walls? A. No, sir.

10

Q. Except to approximate it from the outside? A. (No reply)

Q. Could you after determining the amount of material used in the building, decide on what a fair price would be for the installing of the plumbing as it now stands?

Mr. Sexton: Objected to; it is not a question of installing, it is a question of price of the material. From an inspection of the estimates, there was such other data as may have been offered in this case.

20

Q. Can you determine what was a fair price for the materials used as installed now in the building? A. Only the material that is in the building.

Q. I am talking about the material—can you determine a fair price of that material as of the day when the building was completed, August, 1927? A. No, I cannot; I can only give that of the day I saw it last.

30

Q. Taking a period of time between August, 1927 and the present date as to prices? A. As to prices, no. Not fully to any extent. I think you refer to the building as completed at that time.

Q. I am referring to the prices as then obtained as compared to the prices today? A. The prices are practically the same.

40



*George Glickfield—Direct.*

Q. If the prices are the same, can you tell what would be a fair price for the material furnished to that building for plumbing and heating—can you or can you not tell? A. Only what was installed in the building.

10 Q. Can you give me what was installed? A. Yes, sir.

Q. Did you determine what was a fair price for what was installed in the building? A. Yes.

Q. What did you determine was a fair price for what was installed in that building? A. Does that include all the material or a portion of it.

Q. I am talking about the material that was installed in the building? A. Well, there is plumbing material in there; steam material, boilers and radiators.

20 Q. As to the steam, the plumbing and heating or anything else, I leave out the radiators and the pipes leading to them, I am talking about the material furnished by the Monmouth Plumbing Supply Company?

Mr. Sexton: I object to it.

The Court: What do you object to.

30 Mr. Sexton: It has not been shown that he knows what the material was as supplied by the Monmouth Plumbing Supply Company.

Q. Were you informed as to the material that was not furnished by the Monmouth Plumbing Supply Company?

Mr. Sexton: Objected to.

The Court: Objection sustained. Exception to Defendants.

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*George Glickfield—Direct.*

Q. Did you examine the lists that were furnished by the Monmouth Plumbing Supply Company?

A. I did.

Mr. Sexton: Objected to. I have the first estimate.

The Court: Is that one of the lists produced by Mr. Walker, and offered in evidence today. 10

Mr. Sexton: Let him identify them. They have their own lists.

The Court: Show him the lists and ask him which one he examined.

Mr. Tansey: I want to examine him on the February 23rd estimate.

Q. I show you part of Exhibit No. 4, which was mentioned as the second estimate, the estimate of February 23rd? A. Yes, sir. 20

Q. Did you examine that in connection with the material that was supplied? A. I did; I made a copy of it.

Q. You say you made a copy of it? A. Yes, sir.

Q. Then there was some other material that was not supplied by the Monmouth Plumbing Supply Company and that was not mentioned in that estimate? A. And not supplied? 30

Q. And not supplied, yes? A. I made no list of that.

Q. Such as the radiators and the risers to the radiators? A. The risers in the building were supplied by the Monmouth Plumbing Supply Company, but not the radiators.

Q. Now leaving out what was not supplied by the Monmouth Plumbing & Supply Company, were you able to determine what would be a fair price 40



*George Glickfield—Direct.*

for what was supplied by the Monmouth Plumbing Supply Company? A. No, sir.

Q. Why not? A. I have not checked it as to price.

10 Q. Well, you do not have to check it as to price, I am talking to you about the material you saw in the building as installed? A. Yes, that I have checked.

Q. As to the material you saw in the building and that you have checked, what would be a fair price for supplying the same? A. I understand for all the materials installed in the building; I checked on the estimate list and the extras. I am making allowance for practically more materials concealed. I cannot see to make my measurements from the outside. The cost of that material would amount to about \$8900.

20 Q. Is that a fair price for the materials furnished by the Monmouth Plumbing Supply Company for that building? A. I cannot answer that.

Q. Well, it was a fair price for what you saw there and estimated up? A. What I estimated in the building.

Q. Does that include what was all concealed in the walls? A. Yes, sir.

30 Q. By the way, did you check up the number of bills and delivery receipts that were not receipted—that is another branch of the case? A. I checked from the list that was given.

Q. Did you sum up the amount of delivery slips not receipted? A. Yes.

Q. What was the total amount of the delivery slips that were not receipted? A. \$2754.25.



*George Glickfield—Cross.*

*Cross-examination by Mr. Sexton:*

Q. Mr. Glickfield, I was rather surprised when you say that for the sum of money charged by the Monmouth Plumbing Supply Company was for materials which they claim to have delivered on the job is \$13744 and some odd cents; do you say that is only worth \$8000? A. I did not say that. 10

Q. Then your answer refers to what you estimated the material would cost that is actually in the building? A. Exactly.

Q. It has nothing to do whatever with the cost of what material was delivered at the building, as shown by the slips which you have?

Mr. Tansey: Objected to. I have not figured it.

The Court: Well, he has not done that alone, Mr. Tansey. As I understand, what he has done, he has presented testimony to show how much material was delivered to the use of the building. Now this gentleman has testified that he would make a rough estimate or about approximately. I think he stated the cost of the material he believed to be in the building, and he said that he could not tell, could only approximate it. Mr. Sexton asked him if he checked up and the material was all delivered to that building. The question is what he bases that estimate on. 20 30

Q. You had in your possession the slips which are marked in evidence in this case, did you not?

A. Yes, I have copies.

Q. You had in your possession at that time a 40



*George Glickfield—Cross.*

list of slips which were produced by Mr. Walker and marked as an Exhibit in this case, did you not? A. Yes, sir.

Q. And you were able, if you so desired, to find or estimate the price of all these materials delivered, as shown by these slips? A. Yes, if I had taken the time.

10 Q. But you did not do it? A. Yes.

Q. How long have you been in this case? A. Since last Thursday.

Q. And you have done the best you could in that particular matter for your client, I suppose, Mr. Walker, is that so? A. I did the best I could in the case.

Q. I asked you to help him and you expected to be paid for it? A. I did not expect to be paid for it.

20 Q. As to Exhibit No. 2, of course, you had no way of knowing what pieces or material that were used throughout the partitions? A. Yes, I did.

Q. You cannot say what were in the partitions? A. I could see the valves and open them up and determine the size, going up through the wall, and use my lists, such as the estimate sheet and the extras, and determine the various sizes, and make an allowance for more than what I could actually see from the outside.

30 Q. Did you work from a plan? A. I did.

Q. May I see it? A. Yes, sir (hands attorney sheet)

Q. And you drew lines on it and naturally you would do it by drawing a pipe as running a short distance between two given points? A. I went up between the roof and ceiling, right in the ceiling there and made my measurements.

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*Motion to Strike out first part of Complaint.*

Q. And you say that your figure is \$8000? A. I did not say that.

Q. \$8900 is your estimate of all the plumbing work in that building, is that right? A. No, sir.

Q. Including some concealed? A. Plumbing material and some material that was supplied by the Monmouth Plumbing Supply Company.

10

Q. Could you tell it was supplied by the Monmouth Plumbing Supply Company to this building or to some other building? A. From the extra sheet or extra list.

Q. You could not tell whether one inch valves were supplied by the Monmouth Plumbing Supply Company? A. I could see what it called for, and the sheet called for 144 valves, and I only found 96.

Q. You then figured on what you found? A. Exactly.

20

Q. So that after all that you tell us now, has an estimate been made since last Thursday on that job? A. Yes, sir.

Defendants Rest.

Mr. Tansey: I move to strike out the first part of the complaint as being negative entirely as far as the lien is concerned.

30

The Court: Strike it out.

Mr. Sexton: I concede in view of the fact that the release is in evidence that portion of this particular count which seeks to charge the Arlington Realty especially, would be that portion which would go out, but there is the defendant, Mr. Herbert, here, and there is also through the complaint

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*Motions for Direction of Verdict in favor of Def't.*

10 that element from which we would ask for judgment against the Arlington Realty Company generally, which would be the third count, but I do not feel that I should assign each of these counts other than that fact. If you cannot strike out the first count because Mr. Herbert is mentioned in it, I think it would be better taken care of by the Court and jury when the matter comes up.

The Court: I think you refer to the paragraphs of the first count.

Mr. Tansey: I move for the direction of a verdict in favor of the Defendant for the reason that Plaintiff seeks to obtain judgment.

The Court: The requests for charge must be made before counsel starts to sum up.

20 Mr. Tansey: I move for the direction of a verdict in favor of the defendant upon the second count which seeks to hold the Defendant, the Arlington Realty Company by reason of some mention of a guaranty upon the ground. There is no evidence to sustain the notification to the Arlington Realty Co. that there is such a guaranty to be made.

The Court: I deny that motion. Exception to Defendant.

30 Mr. Tansey: I also move for the direction of a verdict on the third count in favor of the defendant, the Arlington Realty Company, because the Defendant has given no evidence on the merits of the case.

The Court: It does not do that with the price as set forth in the schedule.

Mr. Tansey: And the price set forth in the schedule was reasonably worth, etc.

40 The Court: I do not see that.



*Motions for Direction of Verdict in favor of Def't.*

Mr. Tansey: That is in the second column, page 3, entitled to have and receive as much as the same was reasonably worth.

The Court: Is there any testimony of reasonable value as to the price of these goods. You had better ask that by way of instructions in the charge.

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Mr. Sexton: Will your Honor grant me an exception to that instruction.

The Court: Is there any testimony in this case as to what reasonable value was.

Mr. Sexton: I think I asked Mr. Berry at the time whether that was a reasonable charge, and that was in the testimony. Mr. Berry testified on Monday.

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## CHARGE OF THE COURT.

*Monmouth Plumbing Supply Co. v. Herbert, etc.*

Ladies and Gentlemen of the Jury: The Plaintiff, the Monmouth Plumbing Supply Company has sued generally George Herbert and the Arlington Realty Company, and in their complaint have alleged that they are suing under what is known as our mechanic's lien law, and in that event where material is furnished to a building, to a contractor, to go into a building of the owner, even though he be under contract directly, whether or not between the owner of the land and the person who furnishes the material, and certain conditions are not complied with, the lien will exist against the building. But that is not the case now, and I am speaking about that case which has been mentioned so many times, because there is an allegation

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*Charge of the Court.*

of a mechanic's lien in the complaint. There has been a proper offer by the Plaintiff, the Monmouth Plumbing Supply Company which I charge you is a release of a mechanic lien which this Plaintiff made.

10 So that we get down to the suit by the Monmouth Plumbing Supply Company against these two Defendants for certain goods alleged to have been sold and delivered to these Defendants.

There was a contract, which has been offered in evidence and admitted, between George F. Herbert who said that he bound himself, and which was also signed by the Arlington Realty Company, C. H. Walker, President.

20 Now I am going to read to you that contract: "I will agree to install all the plumbing work in the Arlington Realty Company's apartment building at Avon, New Jersey, for which I am to be paid 10 per cent for all labor and materials and to be made weekly. To this extent you will guarantee all cost of materials in writing. All conditions to be paid for as change of plans made by you later, and to be made to Mr. Herbert."

30 We are told by the testimony he is not connected with Mr. Herbert, who sent one copy to them or delivered it to Mr. Walker and Mr. Walker signed the Arlington Realty Company, C. H. Walker, President, and the other copy was delivered to Mr. Herbert. Then Mr. Herbert after some talk with representatives of the Monmouth Plumbing Supply Company and after he had been furnished with different estimates of the work, signed this paper dated February 11, 1927; "Monmouth Plumbing Supply Company, Long Branch, We hereby guarantee the payment of plumbing materi-

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*Charge of the Court.*

al as per contract amounting to \$8000," the word contract stricken out and then the word dollars, and another pencil mark above that, and in figures \$8722 as per estimate January 18th, with a line starting across and something written upon that which I cannot distinguish; also "extra material you furnish to be furnished by contractor on the apartment house premises, and terms of payment are 2 per cent, and shall on the 10th of the month bill invoice of 30 days net, and not in full, for delivery of material except the extra material. Yours truly, Arlington Realty Company", then C. Herbert Walker written with pen, as testified to, and after that the word Pres., then the witnesses: Ernest Stauch and George S. Herbert, who testified. I think both testified they saw Mr. Walker sign this, and one testified that he witnesses the changes made here. And as that had originally been written up on the typewriter in accordance with the estimate that was actually furnished and dated January 21, 1927 and that estimate was after a change sometime in February, I think the 23rd, the time the new estimate was given, and that changed the cost price to \$8722.

Then at the time this writing was actually signed, that was when the attention of the parties to that proceeding was called and they proceeded to amend it, as far as they have amended by the typewriter.

Now if we look these papers over, there is nothing in these two contracts that I have been able to see, showing that Mr. Herbert was paying the Monmouth Plumbing Supply Company, unless you read it into these contracts by the word "guaranty."



*Charge of the Court.*

10 However, Mr. Herbert has taken the witness stand and he has not definitely answered this, and has by reason of his contract and his failure to file an answer, given you and the Court sufficient inference to show that he deems himself liable for what indebtedness then existed to the Monmouth Plumbing Supply Company because of the materials that were left on the property of the Arlington Realty Company by the Monmouth Plumbing Supply Company.

20 If Mr. Walker was the agent of the Arlington Realty Company, his various acts in this connection, will bind that Company. Before you can take into consideration any evidence against the Arlington Realty Company, it would seem to me that as a jury it would be your duty to say whether or not Mr. Walker was the agent of the Arlington Realty Company for the purpose of doing the acts, which it is testified here today, he did. Of course, you can take that into consideration with all the personal acts that Mr. Walker did and that has been testified he did here today, which have not been denied by him, although he has been in the court room throughout the trial and referred to by various witnesses and counsel.

30 There has not been shown anywhere in the testimony that the Corporation, as a body, either in its Constitution or by-laws or by act of its Board of Directors either directly or indirectly authorized Mr. Walker to do the acts that have been testified to, that he did. Of course, a corporation acts only through its corporate action or through its agents who may be its officers or may not be its officers.

40 So the question for you to determine is whether



*Charge of the Court.*

or not the acts which Mr. Walker did, were done in pursuance of the apparent powers given to him by the Corporation, thereby causing the Monmouth Plumbing Supply Company to believe it had conferred upon him. But following that, if the Corporation has ratified the acts which he did, and thereby adopted them as the acts of the Corporation.

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As I remember the testimony; perhaps, I haven't it all clearly in my mind or remembered all the principal acts of the Corporation, but it seems to me they tended to show that it had conferred the necessary powers upon him and had ratified his acts; that first of all the confirmation which occurred in the testimony that the material was delivered to the Arlington Realty Company's property, and the use of the plumbing material supplied by the Plaintiff Company, as being under the terms of the contract, and the construction of the building has been testified to; that he ordered what should go into the building, and how it should go into it. All various details or approval of the plan from time to time, you may take into consideration, and also the fact of there having been no objection on the part of the Corporation made anywhere.

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These things, coupled with the fact that thereafter this Corporation made a mortgage upon this building, and it was admitted in evidence and consented to being admitted, and which names Mr. Walker as President of the Corporation, and becomes admittedly the act of the Corporation. The receipt of the profits of that Corporation, according to the promise of Mr. Walker, were taken out of the profits of various persons who worked or

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*Charge of the Court.*

this building and the payment out to the Monmouth Plumbing Supply Company of \$8700, and the check was made out to the Arlington Realty Company by Mr. Walker, and he subsequently assented to the fact.

10 There has been no testimony whatsoever of any objection by the Corporation in this matter or as to these acts of Mr. Walker or to the statement that large sums of money were obtained on the mortgage.

20 If you find that this Corporation did not confer necessary powers on Mr. Walker to do these things which he did do in connection with the Monmouth Plumbing Supply Company, and did not ratify his actions thereafter, you should not go any further as far as the Arlington Realty Company is concerned. But if you do find that he was at the time of this transaction clothed with the power and authorized by the Corporation to do these acts, or that the Corporation thereafter ratified his acts, then it is for you to consider whether or not, under the testimony, there is any additional indebtedness owing by these defendants to the Plaintiff, and if there is, how much it is.

30 I do not recall any testimony stating that these were fair and reasonable prices, in so many words. You may take these prices into consideration under a certain count in this complaint. Excepting that such inferences may be drawn to the fairness and reasonableness or to agreed prices, from the testimony that has been given, as well as to the acts of Mr. Walker. Of course, it is also assumed that he was the Agent of the Corporation, and I speak to you as I am doing now in relation to the various charges from time to time with-

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*Charge of the Court.*

out objection to the charge slips that were referred to him, and in his agreeing, if he did agree; he doesn't contradict the conversations alleged to have been had with him as to the amount of money due. I think there is testimony that when there was some settlement at the time this mortgage was paid, he made an order for \$8026 at the time of this situation. 10

If my recollection serves me properly, at that time there were \$5700 remaining as a balance, and there is other testimony by another witness, Mr. Stauch, that Mr. Walker agreed with Mr. Stauch to settle the claim of the Monmouth Plumbing Supply Company for \$5700, and he said he was going to Newark to get a second mortgage. Then the witness said he told him to come down and he would give him a check, and according to Mr. Stauch when he came there, Mr. Walker said "I will make that \$4700 and not \$5700," and Mr. Stauch then refused to enter into the agreement. That is a matter in which another person was representing the Monmouth Plumbing Supply Company. 20

There is other testimony as to the various slips which were sent and left on the job and the receipts signed and the books of account, all of which may be taken into consideration. Also consider whether there is anything due beyond the stated amount. There has been some testimony given you that the amount or the value of the work actually installed would not reach more than—I think it was said about approximately, \$8900. 30

There is other testimony that some of the material was destroyed by the mechanics, and there is 40



*Charge of the Court.*

10 testimony if I recall some of it, that it was poor goods; that it came in being sound goods, and it was put in for a purpose that was not carried out. Of course, if the Plaintiff delivered the goods on this job, and it was by instructions of these Defendants, and under their promise to pay, but through their carelessness and negligence it was destroyed or lost, the Plaintiff would not be liable for any such loss.

As to the second charges, I will not charge any requests of Plaintiff's counsel, other than I have already charged them.

I will not charge the first and second requests of the Plaintiff other than I have already charged them.

20 Only the third request, except as I have already charged them.

I have not admitted, of course, all the testimony that has been offered during these three or more days. In arriving at your verdict, you are to take into consideration all the testimony that the Court has allowed to be admitted, and in the case such testimony as questions that were asked and the Court did not permit to go in, you will disregard, and also disregard such parts of the testimony as the Court ordered to be stricken from the record, from time to time.

30 There is only one more thing, the Plaintiff must prove his case and all material elements of it by a preponderance of the evidence. If the Plaintiff fails to do so, you should find for the Defendant or Defendants, as the case may be.

40 It happens that in this case there is no defense made by the Defendant, George Herbert, so you will bring in your verdict such as you presume is due against George Herbert.



*Charge of the Court.*

And if you find under the rules which I have laid down, that the Defendant, the Arlington Realty Company is also liable, you will bring in your verdict for such an amount as you believe to be due against the Defendant or against both Defendants.

And you will add to whatever you find for the Plaintiff against the Defendant, or in case you find your verdict against both Defendants, interest from August 1st, 1927. 10

Counsel for the Defendants has submitted requests for charge, which read as follows:

1. You will render a verdict of no cause of action in favor of the Defendant, the Arlington Realty Company, on the first count of Plaintiff's complaint. 20

2. You will render a verdict of no cause of action in favor of the defendant, the Arlington Realty Company, on the second count of Plaintiff's complaint.

3. The signing of the alleged guarantee by C. Herbert Walker, President of the Arlington Realty Company, in the name of the Corporation, would not of itself bind the Defendant Corporation, the Arlington Realty Company. It must appear that he has express authority from its Board of Directors for the signing and delivery of the guarantee, or that the Corporation held him out as having that authority. 30

Mr. Tansey: I ask for an exception to the refusal to charge as requested, and wherein you say that he was Agent of the various matters and his actions will bind the Company. Then where your Honor said, quoting the various actions, as indicating that he was the Agent of the Company. 40



*Charge of the Court.*

We except to your Honor's conclusion in your charge that he was an Agent.

The Court: That charge will be taken under consideration.

Counsel for Plaintiff submitted requests for charge, which read as follows:

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1. When the Arlington Realty Company received the plumbing material from the Monmouth Plumbing Supply Company, even though the agent was without authority, to order the same, by using such material, in the construction of the building, there is an adoption and ratification of the acts of the agent.

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2. The President of the Arlington Realty Company, is presumed to have been authorized to purchase material for a building being constructed by it when the material was placed therein and adapted thereto and inured to the benefit of the Company.

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3. Materials delivered in good faith in the erection of a building in the absence of fraud on the part of the party delivering the same, even though there had been a diversion of the same by a contractor, the owner could not take advantage of this breach and deny responsibility for delivery of material.

Mr. Sexton: I am not taking an exception; I think you have covered what I had in mind in your charge.

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Mr. Tansey: Your Honor said that Mr. Walker was the agent of the Arlington Realty Company for the purpose of doing the acts that he testified he did do. Of course, you cannot take into consideration all the personal duties witnesses tes-



*Charge of the Court.*

tified Mr. Walker to have done by himself. It is not denied by him, although he was in the Court room and did not give testimony. We except to that as being in connection with the matter in question. When your Honor says the question is for you to determine whether or not the acts which Mr. Walker performed were in pursuance of the apparent powers conferred by the Corporation, and led the Monmouth Plumbing Supply Company to believe it had bound him; whatever you said in that connection. 10

The Court: I say with apparent powers; the apparent powers that led the Monmouth Plumbing Supply Company to believe he had been given.

Mr. Tansey: Then where your Honor outlined the acts, such as the Corporation allowing him to erect the building on the property of the Arlington Realty Company. We ask for an exception to your language in regard to the guaranty in question. 20

Then where your Honor said that is coupled with the fact that this Corporation made a mortgage upon this building, and agreeing to the mortgage, which was not denied and offered in evidence; that Mr. Walker was President of the Company. Whatever was said in that connection indicated that he had authority to sign that guaranty. We except to that portion of your Honor's charge in that respect and ask you to give us an exception. 30

The Court: Yes, I give you an exception as above.

(The jury returned to the Court room and asked for further instructions which were given to them by the Court, and they retired again. Their re 40



*Charge of the Court.*

quest for instructions was as follows:)

"We want to know whether we have to bring in a verdict against both Defendants, or possibly against one, and if there is to be a specific amount. There being two Defendants, is it necessary to mention both Defendants?"

10     The Court: If you find that Mr. Herbert has not denied the claim, then you will bring in a verdict against George F. Herbert in favor of the Plaintiffs for such an amount of money as you find they would be entitled to, under the evidence and under the rules which I stated to you.

20     If you should find that both Defendants are liable, you should bring in a verdict in favor of the Monmouth Plumbing Supply Company and against both Defendants, and the amount, specify what it is. They are either of them liable, and the other one, Mr. Herbert, is liable in any case in such a sum as you find against him; the question is for you. If you find that the Arlington Realty Company is liable, you will bring in a verdict against them, and if you do not, bring in a verdict against Mr. Herbert only.

30     I want to say in regard to the question as to whether the Arlington Realty Company conferred apparent powers or authority upon Mr. Walker to do these acts on its behalf or ratify his acts thereafter, is for you to say. There is some question whether or not I take it away from you; that is for you to say.

(Jury returns and renders a verdict in the sum of \$6000 in favor of the Plaintiff against the Defendant, Arlington Realty Co. George F. Herbert, \$1.

40



**Exhibit P-1.**

Avon, N. J., August 1, 1927

In account with Mr. C. Herbert Walker

Arlington Realty Co.

To GEORGE F. HERBERT, Dr.

Plumbing & Heating  
514 Garfield Avenue

10

|                     |             |
|---------------------|-------------|
| Labor               | \$10,018.35 |
| Sanitary Supply Co. | 770.64      |
| Good Mfg. Co.       | 106.80      |
| Gas                 | 30.35       |
| S. C. Applegate     | 13.28       |
| Monmouth Supply Co. | 13,744.38   |

---

\$24,683.80

10% com. as agreed

2,468.38

20

Check rec'd from Monmouth Title Co  
a/c Walker Job, Aug. 3/27

---

2,200.28

---

\$ 268.10

30

40



**Exhibit P-2.****GEORGE F. HERBERT**

514 Garfield Ave

Avon-by the Sea, N. J.

January 25, 1927

*Working Agreement Between:*

- 10 C. H. Walker, Pres.                      George F. Herbert  
Arlington Realty Co.                      and              Builder

I will agree to install all Plumbing work, according to Avon Code and Tenement House Code, in Apartment House at 15 Garfield Ave., Avon, N. J. and for which I am to be paid Ten Percent (10%) on all labor and materials. Labor to be met weekly. It is understood that you will guarantee entire cost of materials in writing. All commissions to be paid at the completion of this work. All complaints about labor to be made to Mr. Herbert.

20

Signed .....

Signed Arlington Realty Co.,  
C. Herbert Walker, Pres.

G.F.H./E.R.S.

30

40



**Exhibit P-3.**

No. 535

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 3, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

10

Pay to the

Order of Monmouth Plumbing Supply Co. \$8,026.00

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company  
Countersigned

By L. R. Ward, Jr.

Frank C. Borden, Jr.

Asst. Treasurer

Vice-President

20

**Exhibit P-4.**

\$4000 00/100

Newark, N. J. May 7, 1927

Sixty Days after date we promise to pay to  
the order of Monmouth Plumbing Supply Co.  
Four Thousand 00/100 ..... Dollars  
At City Trust Co.

Value received with interest

30

ARLINGTON REALTY Co.

C. Herbert Walker, Pres.

No. 3316 Due 7/6

*Endorsed:*

C. Herbert Walker

40



**Exhibit P-5.**

No. 537

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 3, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

10

Pay to the

Order of George Herbert

\$2,577.78

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

Frank C. Borden, Jr.

Asst. Treasurer

Vice-President

20

*Endorsed*

George Herbert

30

40



**Exhibit P-6.**

Monmouth County Guarantee Title & Mtg. Co.

Kindly pay Geo. Herbert \$2577.98 balance on plumbing labor.

C. H. Walker  
Pres. Arlington Realty Co.

Aug. 3, 1927

10

**Exhibit P-7.**

Monmouth County Title Guaranty & Mortgage Co.

Kindly pay Monmouth Plumbing Supply Co.  
Eight Thousand twenty six dollars on account of plumbing materials.

C. H. Walker  
Pres. Arlington Realty Co.

Aug. 3rd, 1927

20

**Exhibit P-8.**

Avon, N. J.

Monmouth Title Guarantee & Mtg. Co.

Kindly pay Bernard Poland, Atty of Flood Bros  
One Hundred and fifty dollars. Release to be signed.

Arlington Realty Co.  
C. H. Walker, Pres.

Oct. 3, 1927

30

40



**Exhibit P-9.**

No. 1056

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. October 22, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

10

Order of B. V. Poland, Atty. for P. J. Flood

\$150.00

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Asst. Treasurer

President

*Endorsed*

B. V. Poland

20

Atty. for P. J. Flood

**Exhibit P-10.**

No. 1457

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. December 6, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

30

Order of Arlington Realty Co.

\$236.53

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Treasurer

President

*Endorsed*

Arlington Realty Co.

40

C. Herbert Walker, Pres.



**Exhibit P-11.**

6473 Asb. Pk

Monmouth Co. Title Guarantee &amp; Mortgage Co.

Asbury Park, N. J.

Pay Harry I. Adelman Three Hundred eighty dollars out electrical work, 15 Garfield Ave., Avon, N. J.

C. H. Walker,  
Pres. Arlington Realty Co. 10

Aug., 1927

\$150.00 balance due Mr. Harry I. Adelman

Received check for \$353.44 in full settlement of this order dated Aug. 19, 1927.

H. I. Adelman

---

 Monmouth Title & Mtg. Guaranty Co.

Pay Fire Safe Products Co. \$1128.56

C. H. Walker 20  
Pres. Arlington Realty Co.

---

 Monmouth County Guarantee Title & Mortgage  
Asbury Park, N. J.

Pay J. Steinberg & Sons \$2373.00, Two Thousand three hundred seventy three dollars for Kalamen work at 15 Garfield Ave. Avon, N. J.

C. H. Walker 30  
Pres. Arlington Realty Co.

Aug. 3, 1927

---

 Monmouth Title Guarantee & Mortgage

Asbury Park, N. J.

Pay Hirsch Awning Works Four Hundred dollars.

C. H. Walker  
Pres. Arlington Realty Co. 40

Aug. 4, 1927



*Exhibit P-11.*

Monmouth Title Guarantee & Mortgage Co.

Pay Geo. Andrews Four hundred eighty eight dollars

C. H. Walker  
Pres. Arlington Realty Co.

Nov. 3, 1927

10

November 28, 1927

Monmouth Title Land & Mortgage Guarantee Co.,  
406 Main St., Asbury Park, N. J.

Attention of Mr. McDermott.

Gentlemen:

20 Pay to the order of the G. P. Farmer Coal and  
Supply Co., the sum of Six Hundred Dollars and  
seven cents, \$600.07 out of monies due me on  
mortgage loan.

Very truly yours,

Arlington Realty Co.,

C. H. Walker

President

30

40



*Exhibit P-11.*

Monmouth County Title Guarantee Co.  
Asbury Park, N. J.

Kindly pay George Andrews Two Thousand Two  
Hundred dollars out of mortgage loan.

C. H. Walker  
Pres. Arlington Realty Co.

July 30, 1927

10

No. 525 Voucher No.  
*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 2, 1927

Asbury Park and Ocean Grove Bank  
Asbury Park, N. J.

Pay to the  
Order of Snyder & Robins \$627.90  
Arlington Realty Co. Loan  
Monmouth Title and Mortgage Guaranty Company  
Countersigned

20

By L. R. Ward, Jr.  
Asst. Treasurer

H. A. Watson  
Vice-President

No. 526 Voucher No.  
*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 2, 1927

30

Asbury Park and Ocean Grove Bank  
Asbury Park, N. J.

Pay to the  
Order of American Glass, Sash Door Co. \$962.00  
Arlington Realty Co. Loan  
Monmouth Title and Mortgage Guaranty Company  
Countersigned

By L. R. Ward, Jr.  
Asst. Treasurer

H. A. Watson  
Vice-President

40



*Exhibit P-11.*

No. 527 Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 2, 1927

## Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

|    |                                              |            |
|----|----------------------------------------------|------------|
| 10 | Pay to the<br>Order of Wolcott Holding Co.   | \$1,159.26 |
|    | Arlington Realty Co. Loan                    |            |
|    | Monmouth Title and Mortgage Guaranty Company |            |
|    | Countersigned                                |            |

By L. R. Ward, Jr.

|                |                 |
|----------------|-----------------|
| H. A. Watson   | Asst. Treasurer |
| Vice-President |                 |

For deposit

Wolcott Holding Co.

20 No. 528 Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 2, 1927

## Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the  
Order of Merchants National Bank \$1,128.56  
For Fire Safe Products Co.  
Arlington Realty Co. Loan  
Monmouth Title and Mortgage Guaranty Company  
Countersigned

By L. R. Ward, Jr.

|                |                 |
|----------------|-----------------|
| H. A. Watson   | Asst. Treasurer |
| Vice-President |                 |



*Exhibit P-11.*

No. 516

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 1, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

Order of Berthon Textile Mills \$4,106.00 10

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Asst. Treasurer

President

Berthon Textile Mills

H. Shoppe

for deposit

20

No. 538

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 4, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

Order of J. Steinberg &amp; Sons \$2,373.00

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company 30

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Asst. Treasurer

President

40



*Exhibit P-11.*

No. 540

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 4, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

10

Order of Hirsh Awning Works

\$400.00

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Asst. Treasurer

President

*Endorsed*

Hirsh Awning Works

H. Hirsh

20

Mrs. S. H. Hirsh

No. 541

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 4, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

30

Order of Arlington Realty Co.

\$5,000.00

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Asst. Treasurer

President

*Endorsed**For deposit*

Arlington Realty Co.

40

C. Herbert Walker, Pres.



*Exhibit P-11.*

|                                                     |                    |    |
|-----------------------------------------------------|--------------------|----|
| No. 1380                                            | Voucher No.        |    |
| <i>Monmouth Title and Mortgage Guaranty Company</i> |                    |    |
| Asbury Park, N. J. Nov. 30, 1927                    |                    |    |
| Asbury Park and Ocean Grove Bank                    |                    |    |
| Asbury Park, N. J.                                  |                    |    |
| Pay to the                                          |                    |    |
| Order of J. H. T. Thompson or Arlington             |                    | 10 |
| Realty Co.                                          | \$320.00           |    |
| Arlington Realty Co. Loan                           |                    |    |
| Monmouth Title and Mortgage Guaranty Company        |                    |    |
| Countersigned                                       |                    |    |
|                                                     | By L. R. Ward, Jr. |    |
| R. W. Stout                                         | Asst. Treasurer    |    |
| President                                           |                    |    |
| <i>For deposit</i>                                  |                    |    |
| Arlington Realty Co.                                |                    | 20 |
| C. Herbert Walker, Pres.                            |                    |    |

---

|                                                     |                    |    |
|-----------------------------------------------------|--------------------|----|
| No. 1377                                            | Voucher No.        |    |
| <i>Monmouth Title and Mortgage Guaranty Company</i> |                    |    |
| Asbury Park, N. J. Nov. 30, 1927                    |                    |    |
| Asbury Park and Ocean Grove Bank                    |                    |    |
| Asbury Park, N. J.                                  |                    |    |
| Pay to the                                          |                    |    |
| Order of Perrine & Buckalew                         | \$293.04           | 30 |
| Arlington Realty Co. Loan                           |                    |    |
| Monmouth Title and Mortgage Guaranty Company        |                    |    |
| Countersigned                                       |                    |    |
|                                                     | By L. R. Ward, Jr. |    |
| R. W. Stout                                         |                    |    |
| President                                           |                    |    |



*Exhibit P-11.*

No. 1376

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. Nov. 30, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

10 Order of Sanitary Supply Co. \$1,683.82

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Treasurer

President

No. 1375

Voucher No.

20 *Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. Nov. 30, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

Order of Farmers Coal &amp; Supply Co. \$600.07

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

30 R. W. Stout

Treasurer

President



Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. Nov. 30, 1927

### Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

### Order of George Andrews

**\$488.00    10**

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

## Countersigned

By L. R. Ward, Jr.

R. W. Stout

Treasurer

President

*Endorsed*

George Andrews

Voucher No.

20

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. Nov. 30, 1927

### Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

Order of Park Iron Works, Inc.

\$617.46

## Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company 30

## Countersigned

By L. R. Ward, Jr.

R. W. Stout

### Treasurer

President

For deposit only

Park Iron Works Inc.

M. E. Pilling, Secy



*Exhibit P-11.*

No. 699

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 22, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

10

Pay to the

Order of Ella Blain Thompson

\$3,357.25

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

Frank C. Borden, Jr.

Asst. Treasurer

Vice-President

*Endorsed*

Ella Blain Thompson

20

No. 510

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 1, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

Pay to the

Order of G. P. Farmer Coal &amp; Supply Co.

\$7,489.46

30

Arlington Realty Co. Loan

Monmouth Title and Mortgage Guaranty Company

Countersigned

By L. R. Ward, Jr.

R. W. Stout

Asst. Treasurer

President

*Endorsed*

G. P. Farmer Coal &amp; Supply Co.

J. M. Talman

40



20



*Exhibit P-11.*

No. 513

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. August 1, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

10 Pay to the  
 Order of Perrine & Buckalew \$3,077.72  
 Arlington Realty Co. Loan  
 Monmouth Title and Mortgage Guaranty Company  
 Countersigned

By L. R. Ward, Jr.

R. W. Stout  
 President

Asst. Treasurer

October 17, 1927.

20 Monmouth Title & Mortgage Guaranty Co.,  
 Asbury Park, N. J.

Gentlemen:

I am enclosing order of Arlington Realty Company drawn on you for the payment of \$150.00 to Bernard V. Poland, Attorney for Flood Bros. Upon closing the loan made by your Company to the Arlington Realty Company I understand you held back a sum to cover the Flood claim. Mechanic's  
 30 Lien suit was commenced and I have effected a settlement. If you can let me have the check as suggested by the order I will procure a discharge of the Lien Claim and have the claim discharged of record.

Very truly yours,

JOSEPH R. MEGILL.



**Exhibit P-12.**

Avon, N. J.  
Oct. 13, 1927

Monmouth Title Co.  
529 Bangs Ave.  
Asbury Park, N. J.

Gentlemen:

You are hereby authorized and instructed to pay 10  
Sanitary Supply Co. Avon, N. J. for any and all  
materials delivered to premises commonly known  
and designated as Garfield Apartments, 15 Gar-  
field Ave., Avon, N. J., in the name of Arlington  
Realty Co., amount not to exceed \$1,592.50.

Receipt of such material to be acknowledged  
without question by signature of J. T. H. Thomp-  
son or any one of his employees.

Signed, 20

ARLINGTON REALTY CO.

Per C. Herbert Walker,  
Pres.

Per H. Vivian Walker,  
Sec'y. & Treas.

30

40



**Exhibit P-13.**

No. 1382

Voucher No.

*Monmouth Title and Mortgage Guaranty Company*

Asbury Park, N. J. Nov. 30, 1927

Asbury Park and Ocean Grove Bank

Asbury Park, N. J.

- 10 Pay to the  
     Order of Arlington Realty Co.                      \$1,944.87  
     Arlington Realty Co. Loan  
     Monmouth Title and Mortgage Guaranty Company  
     Countersigned

By L. R. Ward, Jr.

R. W. Stout  
     President

Treasurer

*Endorsed*

- 20      Arlington Realty Co.  
         C. Herbert Walker, Pres.

30

40



*Exhibit P-11.*

Long Branch, N. J. Feb. 11, 1927

Monmouth Plumbing Supply Co.,  
33 Second Avenue  
Long Branch, N. J.

Gentlemen :

We hereby guarantee payment of plumbing material as per contract amounting to eight thousand two hundred and seventy two dollars (\$8,272.00) as per estimate dated February 23rd, 1927. Also for all extra material that you furnish, to be installed by plumbing contractor, George F. Herbert, on Apartment House Job, Garfield Ave., Avon, N. J. 10

Terms of payment are 2% for cash on the 10th of the month following date of invoice, or 30 days net. Or note in full upon completion of delivery of all material Excepting extra material. 20

Very truly yours,

ARLINGTON REALTY COMPANY

C. Herbert Walker,

Pres.

Witness: Ernest Stauch

George F. Herbert

30

40



**Exhibit A.***Release.*

Whereas, We, the Undersigned, have furnished materials or performed labor for the erection of a certain 3 story building belonging to Arlington Realty Co. situate on a lot of land 50 ft. wide by 140 deep on the Southerly side of and being known as 13-15 Garfield Av. in the Borough of Avon, County of Monmouth and State of New Jersey, and have agreed to release all lien which we, or any of us, have or might have on the said land and building by reason of the premises.

Now These Presents Witness, that we, the subscribers for and in consideration of the premises, and of One Dollar to each of us paid, the receipt whereof is hereby acknowledged, have remised, released and forever quit-claimed, and by these presents do remise, release and forever quit-claim unto the said Arlington Realty Co. and to their successors and assigns, all and all manner of liens, claims and demands whatsoever, which we, or any or either of us, now have or could or might have on or against the said building and land by reason of the premises, so that the said Arlington Realty Co. its successors and assigns and all other persons interested therein, shall and may have, hold and enjoy the same, freed and discharged from all liens, claims and demands whatsoever, which we or any or either of us, now have or might or could have, on or against the same, if these presents had not been made.

In Witness Whereof, we have hereunto severally each for himself, set our hands and seals the 30th day of July A. D. One Thousand Nine Hundred and twenty seven.

Signed, sealed and delivered in the presence of  
Signatures of materialmen and journeymen



*Exhibit A.*

|                                |                 |    |
|--------------------------------|-----------------|----|
| G. P. Farmer Coal & Supply Co. | (L.S.)          |    |
| D. V. Talman, Mgr.             |                 |    |
| Trimble Bros. Tile Contractor  | (L.S.)          |    |
| Per R. P. Trimble              |                 |    |
| Davis & Son, Roofer            | (L.S.)          |    |
| Per G. Davis                   | S. H. McDermott |    |
| Perrine & Buckalew Inc.        | (L.S.)          |    |
| C. H. Klausmann                |                 | 10 |
| American Glass Sash & Door Co. | (L.S.)          |    |
| D. Muhlmeister                 |                 |    |
| Monmouth Plumbing Supply Co.   | (L.S.)          |    |
| Per E. Stauch, Mgr.            |                 |    |
| George F. Herbert              | (L.S.)          |    |
| Plumber                        |                 |    |

State of New Jersey, }  
 County of Monmouth }<sup>ss.:</sup>

C. Herbert Walker, being duly sworn on his oath says that he is President Arlington Realty Co. for whom the various contractors were performing the work of the building described in the foregoing release: 20

And deponent further says that no person other than those who have executed said release, has any lien upon the said building or the lands upon upon which the same situated by reason of work done or materials furnished in connection with the erection and construction of said building, and that the claims of all other persons for labor performed or materials furnished in connection with the work of said building have been paid for in actual cash. 30

C. HERBERT WALKER.

Subscribed and sworn to at N. J. before  
 me the 30th day of November, 1927.

Stephen H. McDermott, 40  
 Notary Public of N. J.



**Exhibit I.**

Estimate

MONMOUTH PLUMBING SUPPLY CO., INC.  
Belmar, N. J.

Job Walker Apartments  
To George F. Herbert  
Avon, N. J.

Feb. 23rd, 1927

10

- 
- 50' 3" SH Soil Pipe Medium
  - 25' 3" DH Soil Pipe Medium
  - 180' 6" SH Soil Pipe Medium
  - 80' 6" DH Soil Pipe Medium
  - 200' 4" SH Soil Pipe Medium
  - 150' 4" DH Soil Pipe Medium
  - 1 6" DH Improved Trap Medium
  - 20 6 6" Y's Medium
  - 8 4" Y's Medium
  - 8 6x4" Y's Medium
  - 18 4x2" Y's Medium
  - 1 6" Dble Y Medium
  - 11 4x2" Dble Y's Medium
  - 1 6x4" TY's Medium
  - 20 4" TY's Medium
  - 4 6" Comb. Y &  $\frac{1}{8}$  Bends Medium
  - 6 6x4" Comb. Y &  $\frac{1}{8}$  Bends Medium
  - 30 12 4"  $\frac{1}{8}$  Bends Medium
  - 12 3"  $\frac{1}{8}$  Bends Medium
  - 2 4"  $\frac{1}{4}$  Bends Medium
  - 4 4"  $\frac{1}{6}$  Bends Medium
  - 4 4"  $\frac{1}{5}$  Bends Medium
  - 4 4"  $\frac{1}{16}$  Bends Medium
  - 8 4x10" Offsets Medium
  - 6 6x3" Y's Medium
  - 6 6x2" Y's Medium

40



*Exhibit I.*

|      |                              |    |
|------|------------------------------|----|
| 3    | 6" Longsweeps Medium         |    |
| 3    | 4" Longsweeps Medium         |    |
| 3    | 3" Longsweeps Medium         |    |
| 1    | 4" Vent Cap Medium           |    |
| 6    | 6" T/S Ferrules Medium       |    |
| 6    | 3" T/S Ferrules Medium       |    |
| 4    | 4" T/S Ferrules Medium       | 10 |
| 600# | Caulking Lead                |    |
| 32   | 1½" 3# Long P. Lead Traps    |    |
| 6    | 1½" 3# Long S Lead Traps     |    |
| 20'  | 1½" Lead Pipe                |    |
| 200# | Wiping Solder                |    |
| 32   | 4" 8# 5½x18" Lead Bends      |    |
| 4    | ¾" Com. Stop and Waste Cocks |    |
| 62   | 2" Brass Gate Valves         |    |
| 5    | 3" Brass Gate Valves         | 20 |
| 4    | ¾" Sill Cocks                |    |
| 32   | 4" Brass Ferrules            |    |
| 12   | 2" Brass Ferrules            |    |
| 40   | 2" Male Solder Nipples       |    |

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*Exhibit I.*

## Estimate

MONMOUTH PLUMBING SUPPLY CO., INC.  
Belmar, N. J.

Job Walker Apartments  
To George F. Herbert  
Avon, N. J.

Feb. 23rd, 1927

10

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|       |                          |
|-------|--------------------------|
| 69    | 2" Black Drge Y's        |
| 33    | 2" Black Drge TY's       |
| 28    | 2x1½" Black Drge TY's    |
| 72    | 2" Black Drge 45o Elbows |
| 48    | 2" Black Drge Elbows     |
| 55    | 2x1½" Black Drge Elbows  |
| 4     | Bales Oakum              |
| 6     | 4" Lead Roof Flanges     |
| 20    | 6 2" Lead Roof Flanges   |
| 1250' | 2" Galvanized Pipe       |
| 600'  | 3" Brass Pipe            |
| 600'  | 2" Brass Pipe            |
| 240'  | 1½" Brass Pipe           |
| 160'  | 1½" Brass Pipe           |
| 200   | ¾" Brass Pipe            |

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*Exhibit I.*

## Estimate

MONMOUTH PLUMBING SUPPLY CO., INC.

Belmar, N. J.

Job Walker Apartments

Feb. 23rd, 1927

To George F. Herbert

Avon, N. J.

10

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|    |                                                     |    |
|----|-----------------------------------------------------|----|
| 24 | 5' P-2315-17 Pembroke Baths                         |    |
| 24 | #22 Bath & Shower Combinations                      |    |
| 24 | 5' Recess Rod & Curtains Complete                   |    |
| 4  | 5' P-2501 Essex on Base                             |    |
| 4  | #3 Dble compression bath cocks                      |    |
| 4  | N. P. Conn W & Overflow                             |    |
| 4  | pr. 1/2" Supplies & Esc                             |    |
| 8  | 1/2" NP WH Stops                                    |    |
| 4  | Four Valve Showers, complete to floor               | 20 |
| 28 | Reverse Trap closet bowls, 1 1/2" side inlet        |    |
| 28 | Pilot Flush Valves                                  |    |
| 28 | White seats & covers                                |    |
| 28 | Brass closet floor flanges, with bolts & china caps |    |
| 28 | 20x24" P-3117 Lavatories                            |    |
| 28 | China Knob Pop up wastes                            |    |
| 28 | pr. L-1033 Basin cocks                              |    |
| 28 | pr. 3/8" NP supplies & escs                         | 30 |
| 56 | 3/8" NP WH Angle stops                              |    |
| 28 | 1 1/2" NP NY Reg P Traps with tubing & esc          |    |
| 11 | 20x24" P-6800 Sinks                                 |    |
| 11 | K-900-S Sink Bibbs                                  |    |
| 11 | Duplex Sink Strainers                               |    |
| 11 | 1 1/2" HP NY Reg P Traps with Tubing & Esc.         |    |
| 22 | Angle 1/2" S. S. Globe Valves                       |    |

40



*Exhibit I.*

- 15 P-7430-31 Sink & Tray Combs, with painted legs
- 25 pr. Savill Jr. sink cocks, Hot & Cold
- 25 1½" NP Tubing Traps, less plugs
- 15 NP Duplex Strainers
- 15 1½" NP Sink Plugs
- 10 120 ½" Soft Seat Globe valves
- 27 1½" Galv. Ice Box Drains
- 2 NP Two valve showers, complete to floor
- 1 1000 Gallon X. H. Galvanized Storage Tank
- 5 17x19" P-4205 Lavatories
- 5 pr #5 Chain indexed Basin cocks
- 5 pr ⅜" Supplies & Escs
- 10 ⅜" NP Angle Valves
- 5 1½" NP Ny Reg P Trap with tubins & escs, plug & chain
- 20 1 #7 H. B. Smith #24 Hy-Test Hot Water supply boiler 1800 to 2100 gallons capacity

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*Exhibit I.*

## Estimate

MONMOUTH PLUMBING SUPPLY CO., INC.

Belmar, N. J.

Job Walker Apartments

March 5th, 1927

To George F. Herbert

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|      |                                    |    |
|------|------------------------------------|----|
| 260' | 1" Black Pipe                      | 10 |
| 80'  | 6" Black Pipe                      |    |
| 60'  | 5" Black Pipe                      |    |
| 40'  | 4" Black Pipe                      |    |
| 40   | 3" Black Pipe                      |    |
| 380  | 2½" Black Pipe                     |    |
| 600  | 2 Black Pipe                       |    |
| 1000 | 1½ Black Pipe                      |    |
| 160  | 1¼ Black Pipe                      |    |
| 80   | 6" 3 Ply Pipe Covering             | 20 |
| 60   | 5" 3 Ply Pipe Covering             |    |
| 40   | 4" 3 Ply Pipe Covering             |    |
| 40   | 3" 3 Ply Pipe Covering             |    |
| 40   | 2½ 3 Ply Pipe Covering             |    |
| 600  | 2 3 Ply Pipe Covering              |    |
| 1000 | 1½ 3 Ply Pipe Covering             |    |
| 160  | 1¼ 3 Ply Pipe Covering             |    |
| 260  | 1" 3 Ply Pipe Covering             |    |
| 4    | #6 Hoffman Air Line Valves         | 30 |
| 2    | 6" F. M. Hangers                   |    |
| 6    | 5" F. M. Hangers                   |    |
| 4    | 4" F. M. Hangers                   |    |
| 4    | 3" F. M. Hangers                   |    |
| 36   | 1½ F. M. Hangers                   |    |
| 18   | 2 F. M. Hangers                    |    |
| 6    | Bags Asbestos Cement               |    |
|      | Allows for Pipe Fittings & Nipples |    |
|      |                                    | 40 |



*Exhibit I.*

MONMOUTH PLUMBING SUPPLY CO., INC.  
Long Branch, N. J.

Aug. 15, 1927

Mr. Geo. F. Herbert  
c/o Arlington Realty Co., Security

|           |         |         |          |
|-----------|---------|---------|----------|
| 10        | Feb. 2. | To Mdse | 500.00   |
|           | 3.      |         | 60.00    |
|           | 5.      |         | 40.00    |
|           | 9.      |         | 70.00    |
|           | 10.     |         | 89.15    |
|           | 15.     |         | 425.00   |
|           | 11.     |         | 62.65    |
|           | 11.     |         | 115.00   |
|           | 11.     |         | 10.58    |
|           | 23.     |         | 23.22    |
| 20        | 21.     |         | 5.62     |
|           | 23.     |         | 10.25    |
|           | 25.     |         | 10.70    |
|           | Mar. 1. |         | 1100.00  |
| 30        | 1.      |         | 900.00   |
|           | 3.      |         | 21.38    |
|           | 7.      |         | 65.00    |
|           | 10.     |         | 514.35   |
|           | 9.      |         | 366.64   |
|           | 9.      |         | 1.04     |
|           | 10.     |         | 7.80     |
|           | 11.     |         | 20.02    |
|           | 11.     |         | 7.46     |
|           | 12.     |         | 22.50    |
|           | 15.     |         | 200.00   |
|           | 16.     |         | 11.70    |
|           | 16.     |         | 12.06    |
| Forwarded |         |         | 4,672.12 |
| 40        |         |         |          |



*Exhibit I.*

|          |                 |          |    |
|----------|-----------------|----------|----|
|          | Brought forward | 4,672.12 |    |
| Mar. 17. |                 | 215.63   |    |
| 17       |                 | 24.30    |    |
| 17.      |                 | 513.75   |    |
| 26.      |                 | 278.45   |    |
| 28.      |                 | 198.79   |    |
| 28.      |                 | 166.73   | 10 |
| 28.      |                 | 295.56   |    |
| 29.      |                 | 10.12    |    |
| 29.      |                 | 22.03    |    |
| Apr. 6.  |                 | 400.00   |    |
| 6.       |                 | 14.56    |    |
| 14.      |                 | 30.80    |    |
| 8.       |                 | 150.03   |    |
| 8.       |                 | 62.80    |    |
| 8.       |                 | 16.28    |    |
| 11.      |                 | 20.76    | 20 |
| 13.      |                 | 43.36    |    |
| 14.      |                 | 68.10    |    |
| 16.      |                 | 185.38   |    |
| 18       |                 | 99.82    |    |
| 16.      |                 | 7.20     |    |
| 18.      |                 | 7.84     |    |
| 18.      |                 | 33.18    |    |
| 20.      |                 | 16.26    |    |
| 21.      |                 | 221.58   | 30 |
| 25.      |                 | 94.60    |    |
|          |                 | <hr/>    |    |
|          | Forwarded       | 7,870.03 |    |



*Exhibit I.*

|    |        |                 |           |
|----|--------|-----------------|-----------|
|    |        | Brought forward | 7,870.03  |
|    | Apr.20 |                 | 23.31     |
|    | 25.    |                 | 86.09     |
|    | 25.    |                 | 32.82     |
|    | 26.    |                 | 47.86     |
|    | 28.    |                 | 46.68     |
| 10 | 28.    |                 | 5.97      |
|    | 28.    |                 | 9.73      |
|    | May 2. |                 | 201.09    |
|    | 3.     |                 | 4.20      |
|    | 5.     |                 | 72.00     |
|    | 6.     |                 | 142.84    |
|    | 9.     |                 | 700.00    |
|    | 2.     |                 | 73.88     |
|    | 3.     |                 | 10.52     |
|    | 5.     |                 | 54.31     |
| 20 | 7.     |                 | 19.15     |
|    | 9.     |                 | 4.42      |
|    | 10.    |                 | 9.20      |
|    | 10.    |                 | 11.04     |
|    | 11.    |                 | 119.83    |
|    | 13.    |                 | 32.83     |
|    | 16.    |                 | 62.70     |
|    | 16.    |                 | 5.76      |
|    | 10.    |                 | 1,145.00  |
| 30 | 18.    |                 | 61.57     |
|    | 19.    |                 | 4.80      |
|    |        | Forwarded       | 10,857.63 |



*Exhibit I.*

|        |                 |           |    |
|--------|-----------------|-----------|----|
|        | Brought forward | 10,857.63 |    |
| May 20 |                 | 2.80      |    |
| 23     |                 | 2,000.00  |    |
| 23     |                 | 990.00    |    |
| 23     |                 | 99.20     |    |
| 23     |                 | 130.33    |    |
| 25     |                 | 17.28     | 10 |
| June 1 |                 | 9.00      |    |
| 7      |                 | 67.36     |    |
| 7      |                 | 25.10     |    |
| 7      |                 | 25.25     |    |
| 11     |                 | 7.50      |    |
| 9      |                 | 195.00    |    |
| 10     |                 | 8.72      |    |
| 28     |                 | 58.50     |    |
| 18     |                 | 433.00    |    |
| July 6 |                 | 18.00     | 20 |
|        |                 | <hr/>     |    |
|        |                 | 14,944.67 |    |

## CREDITS

|           |       |          |    |
|-----------|-------|----------|----|
| May 7     | Note  | 4,000.00 |    |
| June 30   | C. M. | 32.25    |    |
| 30        | "     | 20.78    |    |
| 30        | "     | 86.17    |    |
| 30        | "     | 94.14    | 30 |
| 30        | "     | 226.83   |    |
| 23        | "     | 10.00    |    |
|           |       | <hr/>    |    |
| Forwarded |       | 4,470.16 |    |



*Exhibit I.*

|    |          |                            |          |           |
|----|----------|----------------------------|----------|-----------|
|    |          | Brought forward            | 4,470.16 | 14,944.67 |
| 10 | July 29. | C. M.                      | 13.03    |           |
|    | 29.      | "                          | 135.75   |           |
|    | 29.      | "                          | 77.20    |           |
|    | 29.      | "                          | 103.28   |           |
|    | 29.      | "                          | 128.46   |           |
|    | 29.      | "                          | 84.63    |           |
|    | 29.      | "                          | 111.00   |           |
|    | 29.      | "                          | 46.16    |           |
|    | 29.      | "                          | 20.45    |           |
|    | 29.      | "                          | 53.87    |           |
|    | 29.      | "                          | 15.80    |           |
|    | 29.      | "                          | 60.70    |           |
|    | 29.      | "                          | 36.68    |           |
|    |          |                            |          | <hr/>     |
| 20 |          |                            |          | 5,357.17  |
|    |          |                            |          | <hr/>     |
|    |          | Interest to Aug. 1st       | 90.19    | 9,587.50  |
|    | July 30. | Note with interest & costs | 4,066.69 |           |
|    |          |                            |          | <hr/>     |
|    |          |                            |          | 13,744.38 |
|    | Aug. 2.  | C. M.                      | 18.38    |           |
|    | 3.       | Cash                       | 8,026.00 | 8,044.38  |
|    |          |                            |          | <hr/>     |
| 30 |          |                            |          | 5,700.00  |



*Exhibit I.*

January 23, 1927.

The Monmouth Plumbing Supply Co.,  
23 Second Avenue,  
Long Branch, N. J.

*Gentlemen:*

We hereby guarantee payment of the plumbing material as per contract amounting to \$8,000. as per estimate dated January 18, 1927; and also for all extra material that we furnished to be installed by plumbing contract George F. Herbert on apartment house Garfield Avenue; terms of payment are two per cent, for cash on the 10th day of the month following date of invoice or thirty days net, or note in full upon completion of delivery of all material except for extra work.

Very truly yours,

ARLINGTON REALTY COMPANY,  
C. Herbert Walker, Pres.

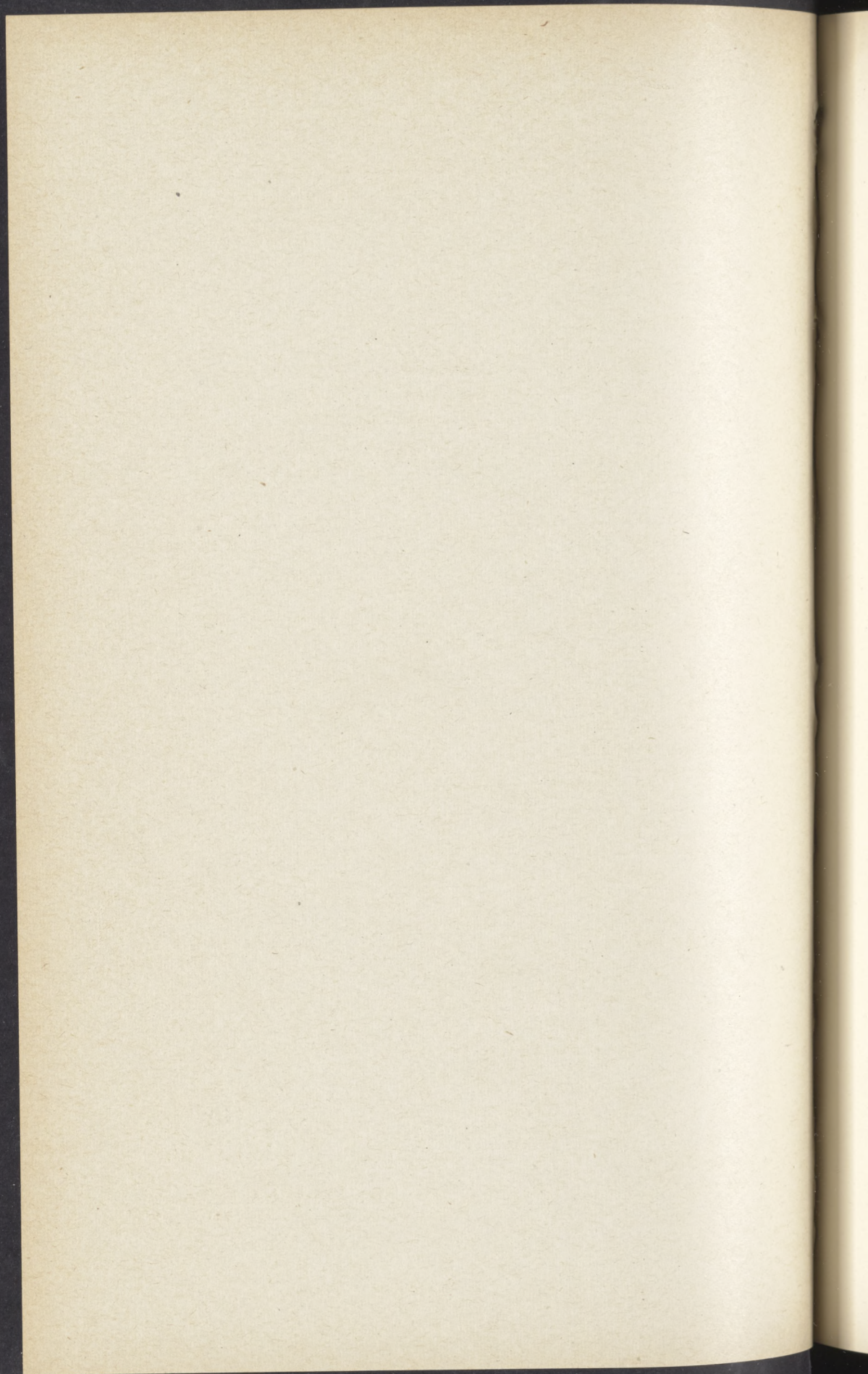
Witnesses:

ERNEST STAUCH  
GEORGE F. HERBERT

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## New Jersey Court of Errors and Appeals

MONMOUTH PLUMBING SUPPLY  
COMPANY, body corporate,  
*Plaintiff-Respondent,*

VS.

GEORGE F. HERBERT and ARLING-  
TON REALTY COMPANY, Build-  
ers,

*Defendants,*

AND

ARLINGTON REALTY COMPANY,  
Owner,

*Defendant-Appellant.*

***Brief  
of  
Plaintiff-  
Respondent***

Arlington Realty Company is the owner of a plot of land in the Borough of Avon, Monmouth County, New Jersey, whereon it erected an apartment house. During the course of the construction of the said apartment house one George F. Herbert, a plumbing contractor, entered into an agreement with the Arlington Realty Company as follows:

EXHIBIT NO. P-2.

(Pg. 258, Printed Case.)

January 25, 1927.

### WORKING AGREEMENT BETWEEN

C. H. Walker, Pres., and George F. Herbert,  
Arlington Realty Co. Plumber.

I will agree to install all Plumbing work, according to Avon Code and Tenement House Code, in Apartment House, at 15 Garfield Avenue, Avon, N. J., and for which I am to be paid Ten Percent (10%) on all labor and materials. Labor to be met weekly. It is understood that



you will guarantee entire cost of materials in writing. All commission to be paid at the completion of this work. All complaints about labor to be made to Mr. Herbert.

Signed: Arlington Realty Co.

Signed: C. Herbert Walker, Pres.

G.F.H./E.R.S.

Thereupon the Arlington Realty Company through C. Herbert Walker, its President, entered into an agreement with the Monmouth Plumbing Supply Company, a copy of which agreement is as follows:

EXHIBIT NO. 11.

(Pg. 277, Printed Case.)

Feb. 11th, 1927.

Monmouth Plumbing Supply Co.,  
33 Second Ave.,  
Long Branch, N. J.

Gentlemen:—

We hereby guarantee payment of plumbing material as per contract amounting to eight thousand two hundred and seventy-two dollars (\$8,272.00) as per estimate dated January 18th, 1927. Also for all extra material that you furnish, to be installed by plumbing contractor, George F. Herbert, on Apartment House Job, Garfield Ave., Avon, N. J.

Terms of payment are 2% for cash on the 10th of the month following date of invoice, or 30 days net, or note in full upon completion of delivery of all material, excepting extra material.

Very truly yours,

ARLINGTON REALTY COMPANY,

C. Herbert Walker, Pres.

Witness: Ernest Stauch.

George F. Herbert.



Monmouth Plumbing Supply Company after the execution of said agreement furnished and delivered plumbing materials for use in the construction of said apartment house in the total amount of \$15,101.55 upon which there was paid by Arlington Realty Co. and credits given for merchandise returned the sum of \$9,401.55, leaving a balance due of \$5,700.00.

A receiver was appointed for Arlington Realty Company. (See *Walker v. Arlington Realty Co.*, 143 A.378, New Jersey Court of Errors and Appeals. Not reported as yet in State reports.)

Permission was obtained and suit brought for the collection of said \$5,700, which was tried before Jacob Steinbach, Jr., and a jury and verdict rendered in favor of Monmouth Plumbing Supply Company and against Arlington Realty Company.

Suit was brought on a mechanics' lien. Complaint is in three counts.

An Affidavit of merits was filed by C. Herbert Walker, President of Arlington Realty Company, and answer filed denying that the money was due, that the materials were not furnished and that the agreement entered into was not made by authorization of the Arlington Realty Company. An amended answer was thereafter filed setting forth a mechanics' release having been given by the Monmouth Plumbing Supply Company.

At the trial a mechanics' lien release was produced by the defendant, admitted in evidence whereby it showed that at the time the payment was made of \$8,026.00 by the Arlington Realty Company to the Monmouth Plumbing Supply Company, a mechanics' release had been signed and delivered to the title company who was representing the mortgagee for the purpose of closing a loan granted to the



Arlington Realty Company. The release was produced from the files of the title company and it was testified that it had been obtained for the protection of the mortgagee.

However, it being a general release the court held that a release was binding upon the plaintiff and releasing the lands in question from the lien by virtue of the mechanics' lien law. The action lost its character as a lien claim suit, and the suit proceeded against George F. Herbert and Arlington Realty Company to obtain a general judgment.

A verdict was rendered in favor of the plaintiff for the full amount of its claim against the Arlington Realty Company and for One Dollar as against the defendant Herbert.

After the verdict a rule to show cause why these verdicts should not be set aside, was allowed which was argued by the appellants and the reasons urged in support of the rule were that the verdict for the nominal amount against Herbert was inconsistent, under the proofs, with that for the entire amount of the claim against the defendant, Arlington Realty Company, and that the guarantee offered in evidence which appears to have been executed by the President of the Arlington Realty Company was ultra vires and not binding upon the company and that the claim of the plaintiff was not properly proven.

This rule was discharged as to the Arlington Realty Company, the appellant and made absolute against defendant, Herbert. (See Conclusions of Hon. Rulif V. Lawrence filed in this cause.)

The questions raised by the appellant, Arlington Realty Company in this appeal are the same as argued upon the rule to show cause and were disposed of by the conclusions filed therein.



"The general rule is well settled that, where rule to show cause why a verdict should not be set aside is allowed, with the exception reserved, and the party obtaining the rule specified, as his reasons for asking that it be made absolute, the matters upon which the reserved exceptions are based, and, upon the return of the rule, argues those matters, and the court afterwards considers and determines them, the exceptions are to be considered as abandoned with the approval of the court, and the right to have them renewed by an appellant tribunal is lost."

Catterall vs. Otis Elevator Co., 103 N.J.L.381.

See also cases therein cited.

### ARGUMENT.

Notwithstanding the fact that I believe the appeal should be dismissed for the reasons hereinabove stated, this brief is continued as to the matters raised.

Grounds of appeal No. 1 and 2 are directed to the refusal of the trial court to non-suit and direct a verdict and appeal to be directed particularly to the guarantee of the Arlington Realty Company to pay for the materials furnished, and the proofs furnished in reference to the same.

As above stated these matters were argued and disposed of on the rule to show cause.

The guarantee in question is undisputed, it was made by the president of the appellant corporation for the benefit of the corporation as a result of which goods were furnished by respondent, payments were made by appellant corporation on account thereof and the acts of Walker, the President of the corporation were ratified and confirmed.

The claim of the Monmouth Plumbing Supply Company was abundantly proven. Its system of



books was proven as to every individual item that entered into the sale and delivery of the goods in this case, which system was as follows: when goods were ordered they were put up by the shipping clerk and four copies of the goods were listed which were disposed of as follows:

The original copy was delivered to the office, priced up and later mailed to the customer.

The second copy was retained in the office as the record of the plumbing company, which is also priced up.

The third copy was delivered to the driver which the customer signed as a delivery receipt and was returned to the company.

The fourth copy was delivered to the customer as a check sheet at the time of the delivery of the goods.

Signed delivery receipts were produced as to nearly all of the sales receipting for the delivery of the goods specified therein. Notice to produce was served upon the defendant, Arlington Realty Company and C. Herbert Walker who was in court during the whole trial; assisting counsel produced two copies of each sale, namely, the copy delivered on the Arlington Realty Company job at the time the goods were delivered and the priced copy of each sale which had been later mailed by the Monmouth Plumbing Supply Company to the defendant, George F. Herbert, and delivered by the said George F. Herbert to C. Herbert Walker, and the fourth copy was produced by the Monmouth Plumbing Supply Company and testified to by its proper officer.

In addition to this, the handwriting of each one of these large number of slips was testified to by the men who actually wrote the same, who were the shipping clerks and who testified that the goods



were shipped. The bookkeeper then produced the ledger and books and showed the entire account as entered therein. All this system of bookkeeping, including all sets of slips and the books, were admitted as evidence.

In addition to this, George Herbert, the plumber, testified in detail that to his own knowledge he knew that all goods had been sold as set forth in the complaint and had been actually delivered on the job of the Arlington Realty Company and used in the construction of the building or returned to the Plumbing Company and that credits for all returns had been properly given. On May 7, 1927, appellant gave respondent its note for \$4,000, which was not paid at maturity.

Payment of \$8,026.00 was made by the Arlington Realty Company from the proceeds of a mortgage which the Arlington Realty Company had negotiated upon the building under construction, which check was delivered to the Monmouth Plumbing Supply Company by the Monmouth Title and Mortgage Guarantee Company upon the order of the Arlington Realty Company issued to the Monmouth Plumbing Supply Company, which order is as follows:

EXHIBIT NO. P-7.

(Pg. 261, Printed Case.)

Monmouth County Title Guaranty  
& Mortgage Co.

Kindly pay Monmouth Plumbing Supply Co.  
Eight Thousand Twenty-Six Dollars on account  
of plumbing material.

C. H. WALKER,  
Pres. Arlington Realty Co.

Aug. 3rd, 1927.



Thereafter the entire account was checked over by C. Herbert Walker, president of the Arlington Realty Company with George F. Herbert, the plumber, and members and agents of the Monmouth Plumbing Supply Company and the Arlington Realty Company paid to George F. Herbert, the plumber, the sum of \$2,577.98 from the proceeds of the said loan and check of the Monmouth Title and Mortgage Guarantee Company upon the order of C. Herbert Walker, president of the Arlington Realty Company, as follows:

EXHIBIT P-6.

(Pg. 261, Printed Case.)

Monmouth County Guarantee Title  
& Mortgage Co.

Kindly pay Geo. Herbert \$2,577.98 balance  
on plumbing labor.

C. H. WALKER,  
Pres. Arlington Realty Co.

Aug. 3, 1927.

In figuring this amount a large portion of this check was to pay ten percent commission which George F. Herbert was entitled to on labor and materials in accordance with agreement above set forth between him and the Arlington Realty Company, which included ten percent of the Monmouth Plumbing Supply Company total bill, which was \$13,744.38, a copy of statement rendered by George F. Herbert to the Arlington Realty Company upon which these figures are based is herein set forth:



EXHIBIT NO. P-1.  
(Pg. 257, Printed Case.)

Avon, N. J., August 1, 1927.

In Account with

Mr. C. Herbert Walker, Arlington Realty Co.

To GEORGE F. HERBERT, Dr.

Plumbing and Heating

514 Garfield Avenue

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|                     |             |
|---------------------|-------------|
| Labor               | \$10,018.35 |
| Sanitary Supply Co. | 770.64      |
| Good Mfg. Co.       | 106.80      |
| Gas                 | 30.35       |
| S. C. Applegate     | 13.28       |
| Monmouth Supply Co. | 13,744.38   |

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\$24,683.80

10% Com. as agreed \$2,468.38

It was testified to by John H. Davis, Jr., Thomas Berkstresser and Ernest Stauch. The Arlington Realty Company, through its president, C. Herbert Walker, agreed to pay the balance of the claim due the Monmouth Plumbing Supply Company by giving a mortgage therefor.

So that we have on this phase of the case abundance of evidence of proof of the claim of the Monmouth Plumbing Supply Company.

- a. By proof of the books of account.
- b. By proof of the actual receipt of the goods and use in the building.
- c. By proof of payments on account of the claim and recognizing the balance as due by paying to the plumber, George F. Herbert, ten percent of the entire claim.
- d. By agreeing to the amount of the balance due and offering to make adjustment thereof.



On that phase of the case where the Arlington Realty Company denies that the agreement to pay for the plumbing materials furnished its apartment house by the plaintiff was the authorized act of the corporation, there can absolutely be no question on this point.

Among the proofs offered in this connection we have the following:

By the affidavit of merits filed in this cause, C. Herbert Walker is the president of the Arlington Realty Company.

He has actual charge of and gave all orders for the construction of the apartment building.

The apartment building was constructed upon land which is admitted in the records as owned by the Arlington Realty Company.

C. Herbert Walker for the Arlington Realty Company entered into the contract with George F. Herbert.

He also for the Arlington Realty Company entered into the agreement with the plaintiff.

He receives and checks the estimate at the beginning and finishing of the work.

He receives on the job all the materials and slips and vouchers in reference thereto.

He gives orders for changes in the construction of the building.

He has an office in the building and is openly held out by the corporation as being its president.

He makes application for the mortgage upon the land and apartment house and upon his orders the entire sum of money is expended, including the \$8,026.00 paid on account of this claim and the ten percent to George F. Herbert on the balance of material furnished.

C. Herbert Walker effects as president of the corporation the mortgage upon the property of the Arlington Realty Company upon which the money is raised.



C. Herbert Walker in the release offered in evidence in this case swears:

"C. Herbert Walker, being duly sworn, on his oath says that he is president of the Arlington Realty Company for whom the various contractors were performing their work of the building described in the foregoing release."

C. Herbert Walker is a lawyer admitted to practice in this State.

He sets up this defense and actively engages as one of the defendant's, Arlington Realty Company, attorneys.

He sat in the court room during the entire trial and the case is closed and C. Herbert Walker does not take the stand to deny that any of the goods were not furnished as claimed by the plaintiff or that he is not the president or agent of the Arlington Realty Company to whom the goods were sold and delivered.

In fact, the only attempt to set up any defense in this cause was one witness called who attempted to give some sort of an estimate as to the cost of the plumbing material in the apartment building.

From the above it must at once be apparent that while the agreement with Herbert and Arlington Realty Company and the agreement, Arlington Realty Company and Monmouth Plumbing Supply Company, speak of a guaranteed account, the real situation was that the Arlington Realty Company were the purchasers of the goods and paid for some of the goods and agreed to pay for the balance. At all times the Arlington Realty Company dealt with the account as its own account, and ratified the account by paying to Herbert ten percent on the purchase. All the goods were accepted and went



into the building. The account was checked up by the President of the Arlington Realty Company and he agreed to pay the same.

Citations:

As between principal and third persons limits of agent power to bind principal is apparent authority with which he is vested, since to permit principal to dispute agents' authority in such cases would be to enable him to commit fraud on innocent persons. N. J. Error and Appeals (May 22, 1929). *White Door Bed Co. v. United States Mortgage & Title Guaranty Co. of New Jersey*, 7 N. J. Adv. Repts. 862; 146 Atl. Rep. 216.

See *Smith vs. Delaware and Atlantic Tel. & Tel. Co.*, 64 N. J. Eq. 770, 53 At. Rep. 818.

*Wiss & Sons v. Vogel*, 86 N. J. L. 621, 92 At. Rep. 360.

*Bridgeton v. Fidelity & Deposit Co.*, 88 N. J. L. 645, 96 At. Rept. 918.

*Low v. Stokes*, 32 N. J. L. 249.

Grounds of appeal Nos. 3 and 4 are directed to statements made by the trial court and a refusal to charge.

The statements made by the trial court are all clearly warranted by the evidence and a reading of the whole charge of court will show no error was committed.

As to the refusal to charge set forth in ground of appeal No. 4 the court in his charge covered this and no error was committed in refusing to charge in the exact language of the request.

Ground of appeal No. 5 relates to court permitting to be offered in evidence paper signed by Arlington Realty Company by C. H. Walker, President.



This paper was clearly admissable; witnesses testified Walker signed it and on the strength of it the materials were delivered, all of which were accepted and used in the building of the Arlington Realty Company and ratified by the payment on account from the proceeds of mortgage placed on the property.

The questions in this suit revolve around the authority of the President who signed this paper and the subsequent acts of the corporation in ratifying his conduct and a jury question was thus presented.

Ground of Appeal No. 6. The verdict is contrary to the charge of the court.

Ground of Appeal No. 7. The verdict is excessive.

Ground of Appeal No. 8. The verdict is contrary to law.

Grounds of appeal thus stated are insufficient to raise any question for the court's determination and are inappropriate to an appeal at law on which only matters of law are considered.

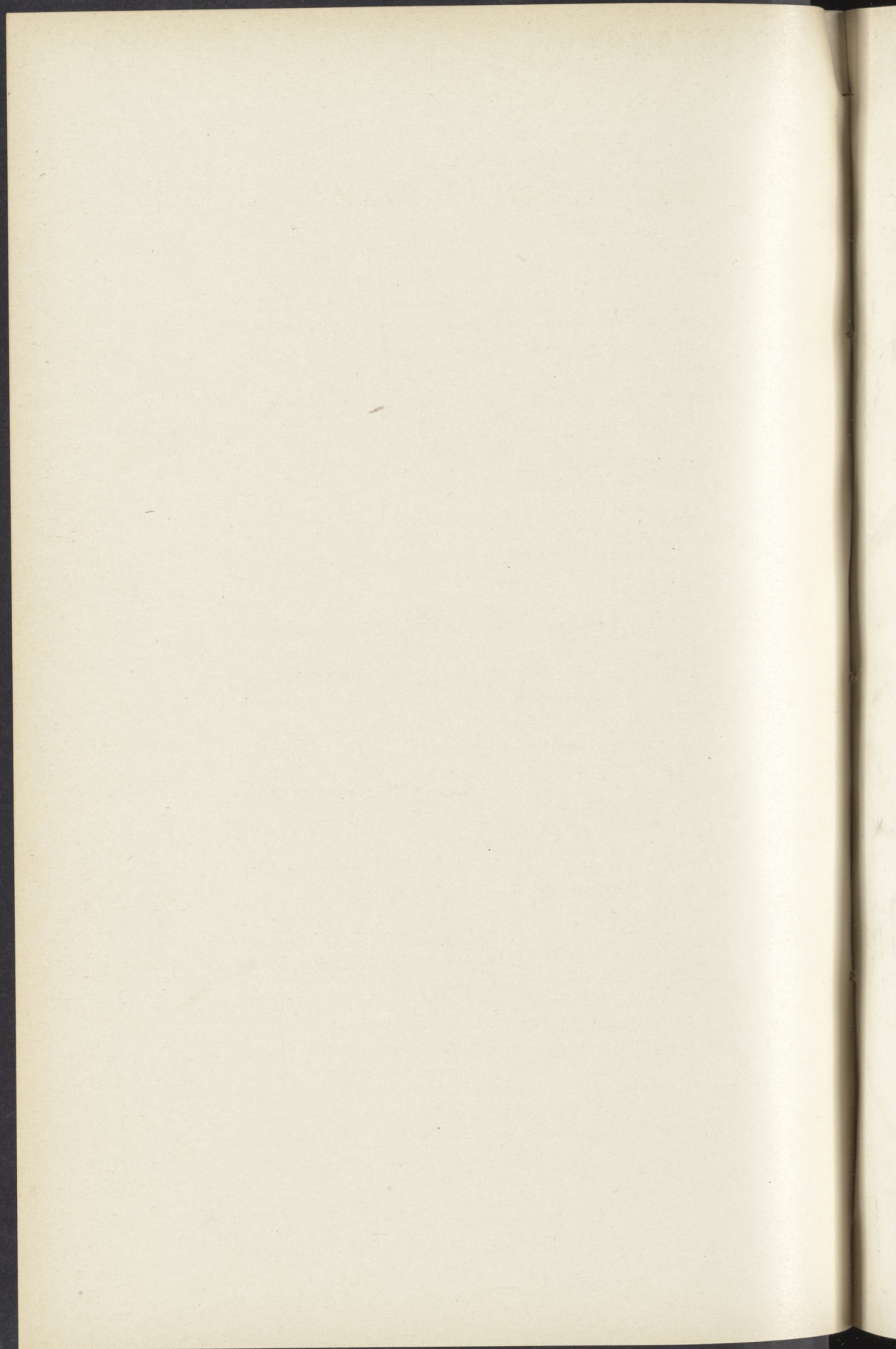
Valenti, et al, v. Blessington, 96 N. J. L. 498, 115 Atl. Rep. 377.

Mangone v. Patterson, 104 N. J. L. 132, 139 Atl. Rep. 17.

It is respectfully submitted that the appeal should be dismissed and judgment below affirmed.

CHARLES F. SEXTON,  
*Atty. for Plaintiff-Respondent.*







## New Jersey Court of Errors and Appeals

MONMOUTH PLUMBING AND SUP-  
PLY Co.,  
Plaintiff-Appellee,

vs.

GEORGE F. HERBERT and ARLING-  
TON REALTY Co., Builders,  
Defendants,

and

ARLINGTON REALTY Co., Owner,  
Defendant-Appellant.

On Appeal  
from Supreme  
Court.

### BRIEF FOR APPELLANT.

The appellant, Arlington Realty Company, dealt with Monmouth Plumbing Supply Company, Plaintiff, if at all, not directly, but as guarantor, under the following agreement:

February 11th, 1927.

Monmouth Plumbing Supply Co.,  
33 Second Avenue,  
Long Branch, N. J.  
Gentlemen:

We hereby guarantee payment of plumbing material as per contract amounting to Eight Thousand Two Hundred and Seventy-two Dollars (\$8,272.00) as per estimate dated January 18th, 1927, also for all extra material that you furnish to be installed by plumbing contractor, George F. Herbert, on apartment house job, Garfield Avenue, Avon, N. J.

Terms of payment are 2% for cash on the 10th of the month following date of invoice, or 30 days net, or note in full upon comple-



tion of delivery of all material, excepting extra material.

Schedule B, Case, p. 20.

The price in the guarantee was changed to Eight Thousand (\$8,000.00) Dollars by amendment, Case, p. 155.

There was an estimate of material and prices dated January 18th, 1927, but this was not acted upon. There was another estimate dated February 23rd, 1927, which was in fact used to ship material by. See case, pp. 156, 157, 158, 159. The guarantee in fact did not cover this estimate.

Verdict was directed for defendant, Arlington Realty Co., on the first count and the Court dismissed the lien claim, case, pages 244-245. No evidence was given to sustain the second count, case, pages 244-245, and the third count is the only one left, seeking to hold Arlington Realty Company on the alleged guaranty. It is only on that theory that the Arlington Company can be held at all because it is plain that the plaintiff considered Herbert as the principal debtor. All goods were billed to him as "Mr. Geo. F. Herbert, c/o Arlington Realty Co., Security" See case, page 15 also page 286. ; And it was necessary in order to hold Arlington Realty Company liable that plaintiff recover against Herbert as the principal debtor.

### **Argument.**

The contract was one of guaranty on the part Arlington Realty Company to make which by the president, C. H. Walker, no authority on the part of the company was shown, and the power to make it was not included in his general powers as president. It was no part of the business of the corporation to guarantee the debt of another.



See *Mausert vs. Feigenspan*, Err. & App.  
68 Eq. 671.

In that case it was sought to charge the corporation with a modification made by the President of a formal agreement executed by the corporation pertaining to the sale of beer, its product. No attempt was made to show any express authority conferred upon him for this purpose by the board of directors, and he had no power to do so by virtue of his office. It was said by the Court:

The act of the President of a corporation unless it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. His powers over its business and property are strictly the powers of an agent, delegated to him by the directors, who are the managers of the corporation, and the persons in whom the control of its business and property is vested. He may without any special authority of the Board of Directors perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. To this extent by virtue of his office he is the agent of the corporation, but beyond this his official position gives him no more control over its property, funds or business than any other director. Any act done by him which is outside the scope of the powers which inhere in his office will not bind the corporation unless it is shown that authority was conferred upon him for the purpose by the Board of Directors either expressly or by their consent and acquiescence in permitting him to assume the direction and control of the business of the company. No express power was shown to have been conferred and it cannot be inferred from the testimony that such power had been confer-



red upon him inferentially by *his assumption of the direction and control of the business of the corporation* with the consent and acquiescence of the directors.

See also *Stokes vs. N. J. Pottery Co.*, 46 L. (17 Vr.) 237-243.

In that case a bond and warrant of attorney to confess judgment was given in the name of the corporation as obligor, signed in its corporate name by its president. The Company was afterwards declared insolvent and put in the hands of a receiver. The President was the owner of all the capital stock of the company except two shares; he was also treasurer and active manager, using the money of the corporation as he saw fit, and borrowing money for the company so far as its banking business was concerned, he never executed security such as this except in this instance. He was general agent of the company and as such had power to direct and control its business—to make contracts which should bind the company in the ordinary course of its business and to borrow money for that purpose on its credit. He had no power in virtue of such agency merely to make a mortgage on its property real or personal. He had power to secure the debt of the company in the usual way (by note perhaps) but not by mortgage, or judgment confessed as security for repayment. Nor can their judgment acquire validity from the fact that the money advanced by the plaintiff was applied for the benefit of the company.

The judgment was vacated.

In the case of *Barnes vs. Wallington & Co.*, a corporation, Err. & App. 78 L. 490, it was held that a contract made by plaintiff with the treasurer and manager of the company to pay part salary in stock of the Company could not be enforced



against the Company because there was nothing in the treasurer's position as manager or officer of the Company which would authorize them to issue stock of the Company to an employee in pay for services and no special authority conferred upon him by the Company to make the bargain was shown.

See also *Sattler vs. Howe Rubber Co.*, Err. & App. 98 L. 460.

Nowhere was it shown in the evidence that the President's action in signing the guaranty was brought to the attention of the Board of Directors of the Arlington Realty Company or that any of his payments made on account were so brought to their notice, so that the mere fact of delivery of material for construction of a building on premises of the Company without objection from the Board would not show acquiescence in such action of the President, so there was nothing before the Court on which to base acquiescence or ratification to go to the jury. No act of the corporation misled the plaintiffs to its disadvantage. The most that can be said is that the President appeared to have the authority to bind the Board from his own actions and declarations but no attempt was made by plaintiff to prove the truth of the statements or bring the actions of the president to the knowledge of the corporation; for, of course, as was said in *Sattler vs. Howe Co.*, the mere assertion of an assumed agent (the president) that he is authorized in a given matter and in a specified manner by the principal he claims to represent is no evidence at all of the existence of the agency or of his right to represent his alleged principal.

See case 98 L. at p. 463.



Mere fact of acceptance of part of the fruits of the contract can neither be regarded as acquiescence in or ratification of the president's unauthorized act in executing the guaranty.

Ib. pg. 464.

The defendant's motions for non-suit and direction of verdict in favor of defendant should therefore have been granted, as there was nothing to go to the jury in the plaintiff's case as presented.

The charge of the Court under specification 3 was erroneous in assuming that the acts of the corporation therein specified such as receipt of the lumber and use in the building on its premises, that the president ordered what should go into the building and how it should go into it; all various details or approval of the plan from time to time, and also the fact there having been no objection on the part of the corporation made anywhere; coupled with the fact that this corporation made a mortgage (to another company) admitted in evidence, naming Mr. Walker as president; receipt of the profits of the corporation and the payments to various persons working on the building and the payment to plaintiff of Eight Thousand Seven Hundred (\$8,700.00) Dollars on account, the check being made out to Arlington Realty Company by Mr. Walker, and he subsequently assented to the fact. There has been no testimony whatsoever of any objection by the corporation in this matter or as to these acts of Mr. Walker or to the statement that large sums of money were obtained on the mortgage.

Where it did not appear that any of those acts had ever been brought to the knowledge of the Board of Directors, even the execution of the mortgage, they afforded no basis for taking failure of



objection on the part of the Arlington Realty Company as acquiescence in or ratification of the signing of the guaranty by its president in the name of the Company.

Sattler vs. Howe Rubber Co.

The third request to charge was not fully covered by the Court's charge inasmuch as he qualified all he said in that regard by saying it did not appear anywhere that the defendant corporation had objected to the acts of its president. This was harmful, because it left the jury to determine from that fact both acquiescence and ratification by the company, although wholly lacking in information of such acts.

There was no evidence as the court said (Case, p. 248) that the corporation as a body, either in its constitution or by-laws or by act of its Board of Directors, either directly or indirectly, authorized Mr. Walker to do the acts he did. There was nothing in the apparent powers given him by the corporation as seen by the plaintiff to warrant it in believing that he could bind the company by signing a guarantee and there was nothing in the evidence to show that the Arlington Company ever had knowledge of such guarantee, and having such knowledge acquiesced in or ratified it. It was not proved, therefore, sufficiently to go to the jury as legal evidence to charge the defendant company, although it may be conceded that C. H. Walker as an official of the Company knew all about it and executed and delivered it to further the Company's business. The Company could be held only in ordinary and usual business methods, such as the direct purchase of lumber, not in the extraordinary method pursued here—by guaranteeing the debt of another for that lumber.

See cases cited.



The Court charged that the jury must find a verdict for plaintiff Company against George F. Herbert for the amount they were entitled to which under the evidence was Fifty-seven Hundred (\$5700.00) Dollars. The jury brought in a verdict against him of One (\$1.00) Dollar. The defendant, Arlington Realty Company could, therefore, not be held on its guaranty for more than the amount found against Herbert. The verdict against it for Six Thousand (\$6,000.00) Dollars was, therefore, illegal.

The words of the guaranty were restrictive,

“Plumbing material \* \* \* as per estimate of January 18, 1927, also for all extra material that you furnish to be installed by plumbing contractor, George F. Herbert, &c.”

If the jury found no material had been furnished to Herbert, as they did, then there could be no liability on the alleged guaranty of the defendant Company because the wording confined it only to such material.

Bloomington Mining Co. vs. Searles, 63  
L. 47.

No verdict against the Arlington Company could be based on such finding and the verdict against it was contrary to law.

**It is respectfully submitted that the judgment of the Supreme Court should be reversed.**

MICHAEL J. TANSEY,  
Of Counsel with Appellant,  
Arlington Realty Company.



