INDEX

TESTIMONY.

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New Jersey Supreme Court

DISTRICT COURT OF THE CITY OF TRENTON.

L. LEHMAN & Co.,
Plaintiff,
vs.
TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE,
Defendant.
} Action at Law.

NOTICE OF APPEAL.

(*Filed January* 29, 1917.)

To Malcolm G. Buchanan, Attorney of the Defendant:

SIR—Take notice that the plaintiff in the above-entitled action hereby appeals to the Supreme Court from the judgment of the District Court of Trenton, rendered in said action on the nineteenth day of January, nineteen hundred and seventeen.

MARTIN P. DEVLIN,
Attorney for Plaintiff.

(Endorsed.)

Service of the within notice is hereby acknowledged on

this 25th day of January, nineteen hundred and seventeen.

MALCOLM G. BUCHANAN,
Attorney of Defendant.

MERCER COUNTY. *ss*:

The State of New Jersey, to any Constable of said county, or the Sergeant-at-Arms of the District Court of the City of Trenton.

Summon Trenton Lodge, No. 164, Loyal Order of Moose, and George Hill, partners, to appear before the District Court of the City of Trenton, to be held at the City Hall in said city, on the second day of October, nineteen hundred and sixteen, at ten o'clock in the forenoon, to answer L. Lehman & Co., in an action at law, for the sum of four hundred and eighty-seven and fifty-nine one-hundredths dollars, with interest from December 1, 1915.

Hereof fail not.

Witness, John A. Montgomery, Esquire, Judge of said Court, at Trenton, aforesaid, [SEAL.] the twenty-seventh day of September, in the year nineteen hundred and sixteen.

HENRY M. STRATTON,
Clerk.

MARTIN P. DEVLIN,
Attorney of Plaintiff.

I served the within summons, September 27, 1916, on the defendant corporation, by reading it to Bessie Colclough, bookkeeper of said corporation, and giving her a copy thereof.

WALTER D. POWNALL,
Constable.

The said defendant, George Hill, could not be found in the County of Mercer, nor has he any abode therein.

WALTER D. POWNALL,
Constable.

DISTRICT COURT OF TRENTON.

L. LEHMAN & Co.,
Plaintiff,
vs.
TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE, AND IN THE ALTERNATIVE, TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE, AND GEORGE HILL, PARTNERS,
Defendants.
} Action at Law.

STATE OF DEMAND.

Plaintiff says that:

1. It is a corporation duly incorporated under the laws of New Jersey, engaged in the business of supplying and selling food in a number of stores in the city of Trenton.

2. It supplied and sold to the first-named defendant, a corporation duly incorporated under the laws of New Jersey, through the agent of the said defendant, George Hill, the articles of food enumerated in the account hereunto annexed, for which the said defendant, though often requested, has refused to pay.

3. It supplied and sold to the last-named defendants, acting as partners, the articles of food enumerated in the account hereunto annexed, for which the said defendants, though often requested, have refused to pay.

Plaintiff demands the sum of four hundred and eighty-seven dollars and fifty-nine cents ($487.59), the amount still due and owing on the said account, along with interest on the same from December 1, 1915.

MARTIN P. DEVLIN,
Attorney for Plaintiff.

A bill of particulars, showing the dates, items, and prices is attached to the state of demand.

It is stipulated and agreed that the bond for costs on appeal in this case be waived.

JUDGMENT RECORD

IN THE DISTRICT COURT OF THE CITY OF TRENTON.

STATE OF NEW JERSEY, } ss.
MERCER COUNTY, }

L. LEHMAN & Co.,
Plaintiff,

vs.

TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE, AND IN THE ALTERNATIVE, TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE, AND GEORGE HILL,
Defendants.

In an Action at Law.

Claim $487.59 and interest.

Martin P. Devlin, Attorney for Plaintiff.

A summons was issued in the above-stated cause, September 27, 1916, returnable October 2, 1916, at 10 o'clock A. M., and was returned by the constable as follows: "I served the within summons September 27, 1916, on the defendant corporation, by reading it to Bessie Colclough, bookkeeper of said corporation, and giving her a copy thereof. Walter D. Pownall, Constable," and "The said George Hill is not to be found in the County of Mercer, nor has he any abode therein. Walter D. Pownall, Constable."

September 27, 1916, complaint filed; adjourned to a day to be fixed.

October 2, 1916, adjourned to day to be fixed; trial by jury demanded; placed on list for December 27, 1916.

December 27, 1916, plaintiff appeared by Martin P. Devlin and Charles A. Malloy, and defendant by Malcolm G. Buchanan; right to trial by jury waived.

Harold Vaughn sworn as stenographer.

Charles Throckmorton sworn.

Jay T. Nusbaum sworn.
Mr. Throckmorton recalled.
Charles Gagg sworn.
John S. Phillips sworn.
Contract offered.
Briefs to be submitted.

January 19, 1917, the evidence being closed and submitted to the Court, judgment was given by the Court in favor of the defendant and against the plaintiff, of no cause of action.

January 29, 1917, notice of appeal filed.

I, Henry Stratton, Clerk of the District Court of the City of Trenton, do hereby certify that the foregoing is a true copy of the judgment record in the above-entitled cause. That the names of the parties to said suit, the date of the issue and return of the summons and the return endorsed thereon by the constable, the date of the trial and the judgment of the Court in said action, together with all other proceedings had in said Court in said suit, are correctly set out as the same appear upon the docket of said court.

[SEAL.] Witness my hand and seal of said court at Trenton, aforesaid, this second day of February, A. D. nineteen hundred and seventeen.

HENRY M. STRATTON,
Clerk.

DISTRICT COURT OF THE CITY OF TRENTON.

L. LEHMAN & CO.,
Plaintiff,
vs.
TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE,
Defendant.
} Action at Law.

STATE OF THE CASE ON APPEAL.

I, John A. Montgomery, Judge of the District Court

of the City of Trenton, before whom the above case was tried, do hereby certify the following transcript of the proceedings at said trial, as the state of the case on appeal, the same being made by Harold Vaughn, a stenographer, designated by the defendant and approved by me and thereupon duly sworn in accordance with the statute in such case made and provided.

Dated this fifth day of February, 1917.

JOHN A. MONTGOMERY,
Judge.

DISTRICT COURT OF THE CITY OF TRENTON.

L. LEHMAN & CO., *Plaintiff,* *vs.* TRENTON LODGE, NO. 164, LOYAL ORDER OF MOOSE, AND GEORGE HILL, AS PARTNERS, AND TRENTON LODGE, NO. 164, LOYAL ORDER OF MOOSE, *Defendants.*	In an Action at Law. Claim $487.59 and interest.

Transcript of shorthand notes taken in the above-entitled cause, Wednesday, December 27, 1916, before Hon. John A. Montgomery, Judge.

APPEARANCES—Martin P. Devlin, Esq., and Charles A. Malloy, Esq., for the Plaintiff; Malcolm G. Buchanan, Esq., for the Defendants.

The Court—Proceed, gentlemen.

Mr. Buchanan—If the Court please, a jury was asked for in this case, but through some misunderstanding it was omitted, but as I understand from Mr. Devlin that there is to be no dispute as to the questions of fact in the matter, on that fact I am going to proceed.

Mr. Devlin—The case is a suit by Lehman & Com-

pany against Trenton Lodge of Moose. It is set out in the complaint in the alternative; that is, that we claim either under a partnership or agency.

The Court—Is the amount claimed in dispute?

Mr. Devlin—No, we come with ageed facts. The facts as we say, and I think they are agreed to, are that Lehman & Company supplied goods at the times and as set out.

Mr. Buchanan—We will admit that the goods specified in the State of Demand were furnished by Lehman & Company to the defendant, Hill.

The Court—Hill?

Mr. Buchanan—He is co-defendant in one case. That they were furnished and delivered to him.

Mr. Devlin—Where at?

Mr. Buchanan—At the Moose Home.

Mr. Devlin—On State Street?

The Court—Who is he, the steward?

Mr. Devlin—That's our contention. You will admit that the Moose Home is an organization, beneficial and social, and maintains a home where the members meet for purposes of sociability, recreation, and so forth.

Mr. Buchanan—Yes, we admit that.

The Court—Proceed, gentlemen. Is that the only thing in the case, the capacity of the man?

Mr. Devlin—There is an agreement. A determination of this agreement will determine the case. Mr. Buchanan is comparing my copy with the original now.

The Court—Is it admitted that these goods were delivered to the Moose Home?

Mr. Devlin—That's admitted; we don't know who got them.

Mr. Buchanan—As a matter of fact, we don't know anything about it, but we assume that for the purpose of saving time.

Mr. Devlin—Now, the facts—as I understand, this agreement was entered into between the House Committee of the Moose and Hill, the man who ordered the goods that were delivered to the Moose Home. I will read the agreement. (Reading) "This agreement, made this thirty-first day of August, A. D. nineteen hundred and fifteen, by and between the House Committee, represent-

ing Trenton Lodge, No. 164, Loyal Order of Moose, the party of the first part, and Brother George Hill, of the second part.

"The said George Hill proposes to furnish all the help that is required in the restaurant of the new home, of the said order, he himself to wait on the tables, and also furnish a woman to keep the front of the home clean, such as sweeping, dusting, making beds and taking care of the furniture in general.

"The Committee agrees to give him the rent in the restaurant free. All help to be paid for by the said George Hill. Committee to furnish dishes, gas range and all cooking utensils, the same to remain the property of the said order.

"The said George Hill agrees to furnish free lunch as directed by the said House Committee, and to pay the Lodge twenty-five per cent. (25%) of the net receipts, through the House Committee.

"The said George Hill agrees that he and all help employed by him shall be under the direct control of the House Committee, and he further agrees to pay for all breakage and loss, also for gas used for cooking purposes.

"In case of disposal, it is agreed that the said George Hill shall give the House Committee three months' notice before quittting the premises, and this same agreement shall apply to the House Committee.

Signed:

Arthur Scarborough, Dictator.

Accepted: John S. Phillips, Secretary."

George Hill.

(Moose Seal.)

Mr. Devlin (Continuing)—On these facts as stated, we make the claim that the Moose is liable as this man's employer, or liable as a partner of Hill, for the reason that they in the first place conduct a restaurant there; that the goods bought and delivered there were within the scope of that business; that the fact that they were bought and delivered there is an implication that they are for the use of the Moose Home and restaurant; and that the factor that we deem most important of all in this contract is the last clause which we say is the thing which

makes the Moose liable, "the said George Hill agrees that he and all help employed by him shall be under the direct control of the House Committee, and he further agrees to pay for all breakage and loss," and so forth.

Mr. Buchanan—Are you proceeding to argue the case?

Mr. Devlin—No.

The Court—Doesn't the whole case resolve into the interpretation of that agreement?

Mr. Buchanan—I think there should be in addition shown what was done by and between the Moose and Hill under the agreement, the operation of the agreement which, as your Honor must know, was not drawn up by counsel but apparently by the parties themselves. It doesn't refer to all the points of contact between the two parties as they must necessarily have taken place. What I mean, in the first place, is this, that the agreement is silent as to any question of what Hill should furnish, and I think it is material to show that the Moose, the other party to the contract, that it isn't provided in the contract that they should have anything to say about what was furnished or the prices paid by the members who purchased food of Hill, and that the relationship, as worked out between the parties, shows no such assumption or government on the part of the Moose; and furthermore there is one other matter of testimony that I think should be presented, and that is that no inquiry was made by Lehman & Company of the Moose prior to the contracting of this bill.

The Court—To whom were the goods charged?

Mr. Buchanan—I don't know.

The Court—Mr. Devlin, to whom were the goods charged on Lehman's books?

Mr. Devlin—To the Moose. We will admit that part of it, that there was no inquiry made before the goods were delivered, made by our clients.

Mr. Buchanan—And you will also admit that this done by Lehman & Company was not done by direction of any of the Moose?

The Court—Did your client know of the existence of this agreement that you have read?

Mr. Devlin—No, not at the time. What was that you wanted, Mr. Buchanan?

Mr. Buchanan—That the reason for the Lehman & Company charging these goods was not through any implied authority or anything gotten from the Moose Home or anything, other than from the claim that it was Hill's statement itself.

The Court—How does the date of that agreement compare with the first charge on the books?

Mr. Devlin—October sixteenth, 1915.

The Court—October eighteenth is the first charge?

Mr. Devlin—The account is put on the books due to what Mr. Hill said to Lehmans, and he went into details as to whom it was for and how it should be paid. Mr. Hill went into the details and for whom the goods were.

The Court—Has anything been paid on this account?

Mr. Devlin—No.

Mr. Buchanan—Yes, there has.

Mr. Devlin—Who paid it?

Mr. Buchanan—Mr. Hill.

Mr. Devlin—Paid after the entire account was accrued?

Mr. Buchanan—Five dollars, paid on November fifteenth, by Hill; five on November twenty-second, and three dollars on November twenty-ninth.

Mr. Devlin—That was after the dispute had arisen as to who was liable. They had paid these three payments—of course, Lehman doesn't care who pays them.

The Court—Do you want to call any witnesses? Where is Hill?

Mr. Devlin—We would like to know where he is.

Mr. Buchanan—We would like to know, also.

The Court—It seems to me Hill's testimony is very material.

Mr. Buchanan—I assume that it is material, of course.

The Court—Your client says that Hill can be obtained without any trouble.

Mr. Buchanan—I don't think he could at the time the summons was served.

The Court—I am not talking about the serving of the summons; I am speaking of him as a witness.

Mr. Devlin—My understanding is that Hill could not be found at the time.

The Court—If a short adjournment were granted, would it be possible to get Mr. Hill?

Mr. Thorckmorten—I have been informed that Mr. Hill was working in a restaurant on State Street, and has been there a month. I don't know which restaurant it is; I guess they could have found him all right.

The Court—I can hear this case Saturday morning. I think he is a very material witness.

Mr. Buchanan—We don't care.

Mr. Devlin—You say Hill is material; in what respect?

The Court—What the contract is; what the conversation was at the time the bill was contracted.

Mr. Devlin—I have a witness who can prove that, Mr. Nusbaum, representing Lehman & Company.

Mr. Buchanan—That would not be admissible, a conversation between Hill and Lehman & Company.

The Court—Have you a witness you want to call?

Mr. Devlin—Not unless you want a conversation between Mr. Hill and Mr. Nusbaum.

The Court—Have you any witnesses, Mr. Devlin?

Mr. Devlin—Not that I know about.

The Court—Mr. Buchanan?

Mr. Buchanan—Charles Throckmorten.

CHARLES THROCKMORTEN, a witness produced on behalf of the defense, being duly sworn, testified as follows:

DIRECT EXAMINATION, by Mr. Buchanan:

Q. Mr. Throckmorten, you are connected with the Moose Home, the clubhouse of the defendants, of one of the defendants in this suit?

A. Yes.

Q. In what capacity?

A. Chairman of the Board of Trustees, also a member of the House Committee, *ex-officio*.

Q. And you have been in that position since August twenty-first, nineteen hundred and fifteen?

A. Yes, sir.

Q. You are constantly at the clubhouse?

A. Yes, sir.

Q. Are you familiar with the dealings which have taken place between the defendant Hill and the Moose, in regard to the matters comprised in the contract which has been offered?

Mr. Devlin—I object to that.

The Court—What do you mean, running a restaurant?

Mr. Buchanan—The question is simply, is he familiar.

A. Yes, sir, I am familiar.

Mr. Buchanan—As to the next question, the agreement does not speak for itself.

The Court—You think there is an ambiguity?

Mr. Buchanan—Yes, an omission in the contract.

Q. Was there, or was there not, anything ever said or done by the Moose or by any committee or officer of the Moose in respect to trouble or mistakes over the prices which were charged by Hill to the customers who obtained food at the restaurant?

Mr. Devlin—Objected to.

Mr. Buchanan—That is a matter on which the contract is silent.

Mr. Devlin—That's a matter implied in the contract. The contract expressly states—

The Court—I don't think I will admit it. It looks to me as if by that contract it was certainly implied that Hill was to purchase and pay for all food.

Mr. Devlin—Here's the point we call your attention to in this contract that said George Hill—

The Court—Take the whole contract.

Mr. Devlin (Reading)—"The said George Hill proposes to furnish all the help that is required in the restaurant of the new home, of the said order, he himself to wait on the tables, and also furnish a woman to keep the front of the home clean, such as sweeping, dusting, making beds and taking care of the furniture in general." Then "The Committee agrees to give him the rent in the restaurant free. All help to be paid

for by the said George Hill." Also, "The said George Hill agrees to furnish free lunch as directed by the said House Committee, and to pay the Lodge twenty-five per cent. of the net receipts, through the House Committee."

The Court—If he is to pay for the goods, why should he pay twenty-five per cent.?

Mr. Devlin (Reading)—"The said George Hill agrees that he and all help employed by him shall be under the direct control of the House Committee, and he further agrees to pay for all breakage and loss, also for gas used for cooking purposes." Of course, there is an implication that before there can be any division of profits, the bills had to be paid. Partners can't divide profits until bills are paid. They are both trustees for creditors until bills are paid.

The Court—That is a badly drawn agreement.

Mr. Devlin—That is a number of laymen trying to fix up an agreement between themselves, not knowing the import of all its terms, but it is implied that they divide net profits, and they cannot share profits until the debts are paid.

The Court—I think it comes down to a question of implication; wouldn't that be quite a contract for Hill if the Moose were to furnish all the food, and he just furnish twenty-five per cent. of the profits to them; where was the profit for them?

Mr. Devlin—We don't have anything to do with the wisdom or unwisdom of the contract.

The Court—The question is, what does it mean?

Mr. Devlin—They were to furnish the place rent free, the place to do business in.

The Court—Where does the Moose come out?

Mr. Devlin—They got twenty-five per cent. of the net profits.

The Court—And they paid for all food?

Mr. Devlin—There couldn't be any profit

until debts were paid, and I would not be sharing profits until I paid my debts. This means the net proceeds; committee to furnish gas range and so forth; Hill to furnish free lunch, as directed by the said House Committee, and to pay the Lodge twenty-five per cent. of the net receipts; that means after all claims are liquidated. He gets his rent free. It seems to be not such a bad bargain after all.

The Court—For the Moose?

Mr. Devlin—Yes, because it is net receipts.

The Court—In conducting a restaurant, the big item is the food item.

Mr. Devlin—Yes, but it is not gross receipts; it is net receipts after all debts are paid.

Mr. Buchanan—This has nothing to do with the debts.

The Court—I don't think the question is material anyway, Mr. Buchanan.

Mr. Buchanan—That is a point on which the contract is silent. The argument that the plaintiff makes here is that under the contract the relationship or dealings between these two persons under the contract was that of partners, but the cases hold that that cannot be true unless the relationship, the conduct between the parties has been such as to create such a relation. And then they try to show Hill an agent in this case, such as to show that the Moose exercised a controlling interest in the operation and carrying on of that business which is the subject matter of the contract. What I want to show is that that was not done, that the contract is silent upon that point. The thing to show is what the parties themselves did, which is the only evidence when the contract is silent. There was no such interest or control exercised there. This business of Hill's of the restaurant was an independent contract, and Hill was to operate the restaurant under it. All help and labor in the place was to be under the control of the House Committee. That is naturally within the scope of the House Committee; but

that does not mean that they were under the control of the House Committee in regard to the conduct of the restaurant business. Those are the reasons why it is material.

Mr. Devlin—We submit it is not material nor should be offered, because this contract implies everything under the control of the committee. As Mr. Buchanan says, he wants to prove an independent relationship, our claim is against independent relationship, and we sustain it because of this contract; that is controlling.

The Court—It appears to me that Hill entered into the contract by which he was to take over the restaurant; he was to run it rent free and pay for the help; he was to furnish free lunch; he was to pay to the Moose twenty-five per cent. of the net profits. The only question is, who paid for the food?

Mr. Devlin—There is one more part, and that is, the Moose, through its committee, under this contract, had control over him, and in my judgment that is the part of this contract that gives the case vitality and kills independent relationship. It isn't a question of advisory capacity, or anything of that kind; it is under the control, and it specifies how the relationship shall be severed.

The Court—Don't you think that Hill had absolute control?

Mr. Devlin—I don't think; I know he didn't, if this contract was lived up to.

The Court—In what way?

Mr. Devlin—He didn't own the place in the first place; and in the second place he had to furnish free lunch under their direction; and in the third place, the dishes, and so forth, the committee itself was to furnish them, and the gas range for cooking, the utensils, and they remained their property. Hill was to furnish the free lunch and pay the Lodge twenty-five per cent., and then Hill and his help were under the direct control of the House Committee, and he was to pay them all breakage and loss, and also for the gas used

for cooking, and in case of disposal agreed that he should give the House Committee three months' notice, and the same applied to the committee, they should give him three months' notice. The only thing that Hill had in the place was the privilege to operate the restaurant. They furnished cooking utensils and dishes, he paid for gas and he paid for breakage of their property, and then to cap the climax the committee says that we shall directly control you and your help, and we can't sever in five minutes; three months we give you and three months we will take from you. We say he is either a partner or servant of the Moose.

The Court—We will say the amount of the food bill was five hundred dollars; that stuff would sell for about one thousand dollars; all that would be paid to the Moose would be two hundred and fifty dollars; and yet they must pay the five hundred dollars for the food?

Mr. Devlin—Do you understand that that is twenty-five per cent. of the net receipts, net proceeds?

The Court—Yes, I don't believe the net receipts would be a thousand dollars; of course, there is no evidence one way or the other.

Mr. Devlin—The case stands on this written instrument. I think there has been enough evidence upon which the law can be applied.

The Court—Have you got any law on the subject?

Mr. Devlin—Oh, yes.

Mr. Buchanan—There is a question still pending.

The Court—I will not allow the question.

Mr. Buchanan—I ask an exception.

The Court—All right.

Whereupon defendant by its counsel filed a bill of exception, which is allowed and sealed accordingly.

Judge.

By Mr. Buchanan:

Q. Were there any other employes of the Home at

the club house prior to the execution of this contract other than and not being employes in connection with the restaurant?

Mr. Devlin—I object to this.

Mr. Buchanan—Your Honor is doubtless a member of many clubs; I want to know what this agreement is and who it covers.

The Court—You will see that I am impressed by the agreement.

Mr. Buchanan—Therefore, I think it is material to show that there were other employes in in this place, and the fact that the way the club is carried on shows that there must be and is some supervisory committee in charge of all of the employes of the Home. That is a thing about which the contract is silent and which has a bearing on what the contract means.

The Court—I will not allow the question.

Mr. Buchanan—Exception?

The Court—Yes.

Whereupon defendant through its counsel filed a bill of exception, which is allowed and sealed accordingly.

Judge.

Q. Did Hill receive payment from anyone for the meals which he furnished at the restaurant?

Mr. Devlin—I think that is immaterial.

The Court—I will allow it.

A. He did.

Q. From whom did he receive such payment?

A. From those who consumed the food.

Q. Just the same as any other restaurant?

Mr. Devlin—I object to that.

The Court—Oh, yes.

Mr. Buchanan—Strike it out.

Q. What was done by Hill with the moneys which he received?

Mr. Devlin—I object to that.

The Court—I think that is material; I think that really shows relationship.

Mr. Devlin—It is immaterial what he did with the money; the point is in the case that moneys

constituting profits were taken care of by this agreement.

The Court—It appears in the evidence so far that Hill kept the profit.

Mr. Devlin—Maybe that is true; I suppose it is; but that doesn't make any difference with this agreement. The case can't depend upon what happened between Hill and this organization, because this agreement has said what should happen to receipts; it is immaterial to show what did happen.

The Court—I will allow it.

Mr. Devlin—I ask an exception.

The Court—All right.

Whereupon the plaintiff by its counsel filed a bill of exception, which is allowed and sealed accordingly.

Judge.

Q. If you know.

A. I can't tell you anything about it, what he did with the money; we never got any of it.

Mr. Devlin—I object; he said he didn't know.

Mr. Buchanan—I am the only one who can object to its not being responsive.

Mr. Devlin—I think we can, too.

Q. Who fixed prices that were charged?

Mr. Devlin—Objected to as immaterial and irrelevant.

The Court—I will allow it.

Mr. Devlin—Exception.

The Court—All right.

Whereupon the plaintiff by its counsel filed a bill of exception, which is allowed and sealed accordingly.

Judge.

A. Mr. Hill must have, as far as we know.

Q. Did the Moose have anything to do with the fixing of prices?

Mr. Devlin—Objected to as immaterial and irrelevant.

The Court—Allowed.

Mr. Devlin—Exception.

The Court—You may have it.

Whereupon the plaintiff by its counsel filed a bill of exception, which is allowed and sealed accordingly.

Judge.

A. No.

Q. Did or did not the Moose have anything to do with the kind or quality of provisions or food which was furnished by Mr. Hill at his restaurant?

Mr. Devlin—I object to that; the contract specifically says that lunch was to be furnished, but that they were under the control—

Mr. Buchanan—That is the free lunch; I am not referring to the free lunch which is specified in the contract.

Mr. Devlin—I object to that on any score, because it is contrary, in my judgment, to the whole terms of this contract. The contract implies that he have a satisfactory restaurant there. If he furnished unsatisfactory and unsaleable food they would get rid of him and get a good man in his place; that's why they have control, and that's why they have that notice in there. If I put up a resaurant in their place, and I was the man under this contract, or an agreement similar to this, the supposition is that I can furnish the patrons with reasonably fair lunch.

The Court—I will allow the question.

Mr. Devlin—I ask an exception.

The Court—Granted.

Whereupon plaintiff by its counsel files a bill of exception, which is allowed and sealed accordingly.

Judge.

Mr. Devlin—I will object for the further reason that this gentleman testified to a time after the goods were furnished.

The Witness—My testimony will refer to no particular time.

Mr. Devlin—The last of these goods were furnished late in 1915, and the contract was made on the thirty-first day of August, 1915. I think

the man testified to after these things occurred.

Mr. Buchanan—He testified from August twenty-first, 1915, until to-day.

(Question repeated.)

A. We never had anything to do with reference to anything that he bought.

Mr. Buchanan—Your Honor overruled one question of mine, namely, the one which dealt with other employees than those connected with the restaurant.

The Court—Other employees besides the restaurant?

Mr. Buchanan—I will ask it again.

Q. Were there employed at the Moose Home other employees than those connected with the restaurant?

Mr. Devlin—I object.

The Court—I can't see why.

Mr. Buchanan—There were other employees, besides those connected with the restaurant, having no connection with the restaurant whatsoever, and that all of the employees, not counting those connected with the restaurant, were required to be under some head for the purpose of discipline by the House Committee, or whatever committee there was in charge of the house.

The Court—Same as all clubs.

Mr. Buchanan—It doesn't appear in the record, and I wanted you to take judicial notice of it.

The Court—I won't allow it.

Mr. Buchanan—Exception.

The Court—Yes.

Whereupon defendant's counsel files a bill of exception, which is allowed and sealed accordingly.

Judge.

Q. Was there a conference or an interview between Mr. Nusbaum, the manager of Lehman & Company, and the House Committee of the Moose Home, on November fifteenth, 1915?

A. I think that was the date; there was a conference.

The Court—Between whom?

Mr. Buchanan—The manager of Lehman's and the House Committee.

Q. What took place between the House Committee and Mr. Nusbaum, with regard to this bill, at that time, for which suit is now brought?

Mr. Devlin—I object to that.

A. The minutes will show what took place. Mr. Nusbaum wanted to have a meeting with the House Committee; that Mr. Hill owed him $500.51; he stated he came over to see about it; I made arrangements to have him meet them; he wanted the House Committee to make him some kind of a guarantee that they would see that they made him payments until we paid this bill; we told him we had nothing to do with that; that Mr. Hill had run this bill, but we couldn't do anything financial for him at all, because we had nothing to do with Mr. Hill. And he called Mr. Hill in the meeting, and had a conference with Mr. Hill, and Mr. Hill told him, in our presence, that he didn't buy anything in the Moose's name at Lehman's store, and he said he would pay him this money as fast as he could make it; he put up both hands and said, "This is all I have in this world, and I will work and earn it and pay you." Mr. Nusbaum asked him how much he could pay, and he said five dollars, and he said it was a small amount to be paid on such a large bill, and he pulled some money out and tendered some money at that time. Mr. Nusbaum called Mr. Hill anything else but a gentleman, and I told Mr. Nusbaum that there was five dollars, and if he didn't want it I was going to get it, as Hill owed us some money. Mr. Nusbaum took the five dollars and gave him a receipt.

Q. Was that the time that Nusbaum was given a copy of the agreement between the Moose and Hill?

A. Yes; he asked if we had an agreement, and we said, sure, and he asked for a copy, and we gave it to him.

Q. Up to that time he hadn't seen a copy of it?

A. I think a week or two weeks before that Mr. Nusbaum came over to the school and interviewed me; that's the first they knew of it.

Mr. Buchanan—It is admitted that Lehman & Company didn't have any knowledge of this

agreement prior to the time the entire bill was contracted?

Mr. Devlin—That's admitted. We will also admit that we had knowledge of the agreement before we accepted the payments from Hill.

The Witness—There was just a little other circumstance took place that night; the committee told Mr. Nusbaum that we knew nothing of Mr. Hill's running a bill at Lehman's; we were surprised that Mr. Lehman would send a representative to us to pay his bill. He went to Myers' butcher shop and tried to get a bill there on the Moose—

Mr. Devlin—That's immaterial and irrelevant to this case.

The Witness—This is between me and Myers.

Mr. Buchanan—It is material and relevant, what Mr. Throckmorten said to Mr. Myers about the contract.

The Court—I will allow it.

Mr. Devlin—Exception.

Whereupon plaintiff's counsel files a bill of exception, which is allowed and sealed accordingly.

Judge.

The Witness—Mr. Myers got into communication with the Moose to find out whether goods Hill wanted should be charged to the Moose. We told him that Mr. Hill must use his own credit.

Q. This is what you told Mr. Nusbaum?

A. Yes, sir. Consequently, he must have gone around to Mr. Nusbaum, and he let him have what he wanted.

Mr. Devlin—That's his guess, that he went to Mr. Nusbaum.

The Witness—This was the conversation.

Mr. Devlin—I object to that part of the testimony that evidently Mr. Hill went to Mr. Nusbaum, went from Myers' to Lehman's. That's a guess on his part.

The Witness—That was what we were talking about.

The Court—I will admit it for what it is worth.

Q. What did Mr. Nusbaum say in reply to that?

A. He didn't make any reply at all, he said that the stuff he put out he charged to the Moose, and supposed the Moose was going to pay for it; that Mr. Hill told him when he got these purchases that the Moose House Committee met on Monday night, and they would have the checks ready for him on Tuesday; Hill told him that the reason he had never got the first check was the House Committee didn't meet, and consequently the check didn't come through, and he let him continue on until he got this bill on him.

Q. What did you say?

A. Just general talk; we had a meeting every Monday night; never missed a meeting.

Q. Had the Moose or House Committee any knowledge that he was running this bill in the name of the Moose, prior to the time Nusbaum made this demand?

A. None at all.

Q. Was anything said to Mr. Nusbaum as to why he didn't inquire of someone of the House Committee of the Moose as to Hill's authority?

A. We did.

Q. What was said by Mr. Nusbaum in reply to that?

A. Only that he supposed the Moose was going to pay for these things.

Q. Did he give anything for a basis for his having that idea, other than what Hill told him?

Mr. Devlin—I object.

The Court—Did he say anything else?

The Witness—I cannot recall. I have an idea that there was nothing more said about that to my recollection .

Q. The contract, in the last paragraph, uses the word, "disposal"—in case of disposal, it is agreed, and so forth—what was said at and prior to the time the contract was entered into between the Moose and Hill with regard to that word "disposal"?

Mr. Devlin—I object to that question.

The Court—Yes.

Mr. Buchanan—If the Court please, it is a

word that needs explanation. May I have an exception?

The Court—Yes.

Whereupon defendant's counsel filed a bill of exception, which is allowed and sealed accordingly.

Judge.

CROSS-EXAMINATION, by MR. DEVLIN:

Q. Do you know George Gagg?

A. No, sir; I know Charlie; I don't know George.

Q. There is a George Gagg, a member of the Moose?

A. Yes, sir.

Q. When you called the House Committee together, did they tell Mr. Nusbaum that they would appoint George Gagg as the one man to look after Hill and the management of the restaurant, and to collect moneys?

Mr. Buchanan—The question is objected to for the reason—

The Witness—That it never happened.

Mr. Buchanan—That disposes of it.

Q. Didn't the committee tell Mr. Nusbaum, when you were present, that they had appointed one Gagg to look after Hill and take charge of the moneys as they came in, and see that the bills were paid?

A. No, sir.

Q. Do you say that didn't happen in your presence?

A. No, sir, it didn't.

Q. Did you hear from anybody of it happening?

A. No, sir; if you will allow me to make an explanation I will straighten you out a little.

Q. I have got the conceit to believe I don't need to be straightened out at the present time. You were on the House Committee?

A. Yes, and I was at all the meetings.

Mr. Devlin—That is all.

RE-DIRECT EXAMINATION, by MR. BUCHANAN:

Q. What was the explanation that you wanted to make in regard to this question?

A. Brother Gagg was appointed to look after the hiring of so many boys and women on Sundays; we don't want so many in there.

RE-CROSS, by MR. DEVLIN:

Q. Charlie Gagg is a member of the order?

A. Yes, sir, he is; why?

Mr. Buchanan—I have the balance of the House Committee here, but I don't see the use of putting them on.

REBUTTAL.

J. F. NUSBAUM, sworn in rebuttal, testified as follows:

DIRECT EXAMINATION, by MR. DEVLIN:

Q. You were at Lehman's at the time of the contracting of this bill?

A. Yes, sir.

Q. And you visited the Moose Home to see about the payment of that bill?

A. I did.

Q. And you met, while at the Moose Home, members of the House Committee, men represented to you as members of the House Committee?

A. Yes.

Q. Do you know any of these men by name and appearance?

A. Several.

Q. What were the names, if you remember?

A. Mr. Throckmorten was one, Mr. Phillips was one; I can identify several of the others by appearance, although I don't know their names.

Q. Mr. Throckmorten has testified to a conversation; I will ask you was a man named Charlie Gagg mentioned in the conversation?

A. Yes.

Q. What was said with reference to Mr. Gagg when his name was mentioned?

Mr. Buchanan—By whom?

Q. Did a member of the House Committee inform you that Mr. Charles Gagg was appointed by the House Committee to take charge of Mr. Hill, collect the cash that came in, and see the bills were paid?

Mr. Buchanan—Objected to.

The Court—Do you know who it was?

The Witness—It was a general conversation; the fact that this committee of one—

The Court—Was Charlie Gagg there?

The Witness—I believe he was; is this gentleman Charles Gagg?

Mr. Gagg—Yes.

Mr. Buchanan—My objection was made to that as being an improper question, because it doesn't state the time and place.

The Court—When was it?

The Witness—It was at this meeting.

The Court—When?

The Witness—As has been testified to, on November 15th.

The Court—Where?

The Witness—In the Moose Home Committee room.

Q. What was said in that conversation?

A. I was informed that the committee itself had had some trouble with Hill, in regard to collecting moneys from him; that Hill had never yet turned over to them any part of the profits of the restaurant, though they believed the restaurant had made a profit; in pursuance of that belief they had appointed Mr. Gagg as a committee of one to take charge of Mr. Hill in his conduct of the restaurant, to see that they got what was coming to them.

The Court—That they got the right profit?

The Witness—They did say it in that many words. He was appointed a committee of one to take charge of Mr. Hill and see that the restaurant was properly conducted and that they got what was coming to them. And the members of the House Committee, all the way around, agreed that Mr. Gagg should also take charge of the Lehman bill, take in the money that Mr. Hill took in in the restaurant, deduct the running expenses, and pay over to Lehman & Company the net profits of the restaurant until this bill should be cleared up.

Mr. Devlin—That is all.

CROSS-EXAMINATION, by MR. BUCHANAN:

Q. What do you mean by "all the way around"?

A. There was a general conversation, in which Mr. Throckmorten was the leader. Mr. Gagg also participated in the conversation.

Mr. Buchanan—That's all.

The Court—Anything further, Mr. Devlin?

Mr. Devlin—We stand as we are.

SUR-REBUTTAL.

CHARLES THROCKMORTEN, re-called in sur-rebuttal, testified as follows:

DIRECT EXAMINATION, by MR. BUCHANAN:

Q. At this meeting on November fifteenth, when Mr. Nusbaum was present, did you or anyone else of the House Committee or anyone on behalf of the Moose make the statement to him that Charlie Gagg had been appointed to take charge of Mr. Hill, collect the cash that came in and pay the bills?

A. They did not.

Q. Or any words to that effect?

A. No, sir.

Q. Did you or anyone else on behalf of the Moose say that the Moose would hereafter see that the restaurant was properly conducted?

A. Only in reference to so much help; we wanted him to do the work without so many in there.

Q. What you testified before?

A. Yes, sir.

Q. Did you say or anyone else to Mr. Nusbaum that from that time that Mr. Gagg should take charge of Hill and the running of the restaurant and take the money and pay the money to Lehman until the bill was paid?

A. Nothing like it at all. We told him that we couldn't have anything to do with the bill. The minutes —I wish you would read those; that's directly on that point. On the meeting night he was there we have the minutes of that meeting.

Q. Who else was present at this meeting, besides yourself, on November 15th.

A. I think we had the whole seven members that night.

CROSS-EXAMINAITON, by MR. DEVLIN:

Q. Mr. Throckmorten, I think I understood you to say that Mr. Gagg was appointed for the purpose of looking after some persons there?

A. Some persons?

Q. Is that true?

A. I don't think I made just such a statement.

Q. That Mr. Gagg was appointed to look after some of the help, some other individuals?

A. No, I think not.

Mr. Buchanan—Objected to as not cross-examination.

The Court—My recollection is that he was appointed to see that there were not too many people running around the restaurant—getting in the way.

Mr. Devlin—I think he testified that Mr. Gagg was appointed for that purpose?

The Witness—Yes, that's right.

Mr. Devlin—I wanted to refresh his memory.

Q. At that time, when he was appointed for that purpose, are you sure that he didn't have the additional power to look after Hill when you found out that Hill needed someone to look after him?

Mr. Buchanan—This is not cross-examination.

The Court—I hardly think it is cross-examination.

Mr. Devlin—He has denied a statement made.

The Court—What's your answer?

The Witness—My recollection is that he was only appointed for that one purpose already mentioned.

CHARLES GAGG, sworn in sur-rebuttal, testified as follows:

DIRECT EXAMINATION, by MR. BUCHANAN:

Q. Mr. Gagg, you were present at the conversation that the House Committe and Mr. Nusbaum had on November fifteenth?

A. I was.

Q. Was anything said by Mr. Throckmorten, or any other of the Moose there at that time, to the effect that you had been appointed to take charge of Hill, collect the cash, and pay the bills?

A. Absolutely there was not.

Q. Was anything said that you had been appointed to see that the restaurant was properly conducted?

A. There was not.

Q. To the effect that they would see that you took charge of the restaurant and the Lehman bill, and pay the money to Lehman & Company, or anything of that kind?

A. Absolutely no.

CROSS-EXAMINATION, by MR. DEVLIN:

Q. Did you ever hold this position at any time?

Mr. Buchanan—Objected to.

The Court—What position?

Mr. Devlin—The one he is being examined about.

The Court—The only one is that of taking charge of Hill.

Mr. Devlin—Does the Court rule out the question?

The Court—Yes.

Mr. Devlin—That's all.

JOHN S. PHILLIPS, sworn in sur-rebuttal.

The Court—Is the only object to contradict Mr. Nusbaum's testimony?

Mr. Buchanan—Yes.

The Court—I don't see the necessity of putting on more witnesses, then.

Mr. Buchanan—If they will admit that the whole committee will deny Mr. Nusbaum's statement, all right.

Mr. Devlin—The whole Moose could deny it, but I wouldn't admit they were right.

The Court—All right, one week for the exchange of briefs.

CERTIFICATE OR STENOGRAPHER.

I, Harold Vaughn, stenographer sworn in the within cause, do hereby certify that the foregoing is a true copy of the evidence in said cause, as taken down by me at the time of the trial of said cause, and subsequently transcribed.

Witness, my hand this second day of February, A. D. nineteen hundred and seventeen.

HAROLD VAUGHN.

STIPULATION.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto that:

On January 17, 1917, the attorneys for the respective parties exchanged briefs and argued the case before the Court. At the close of the argument, the attorney for the plaintiff requested the Court to find a verdict in favor of the plaintiff, even though the Court should resolve all disputed questions of fact in the case in favor of the defendant. This request was refused by the Court, and the attorney for the plaintiff prayed an exception, which was duly granted.

CHARLES A. MALLOY,
MARTIN P. DEVLIN,
Attorneys for Plaintiff.
MALCOLM G. BUCHANAN,
Attorney for Defendant.

NEW JERSEY SUPREME COURT.

L. LEHMAN & COMPANY,
Plaintiff,
vs.
TRENTON LODGE, NO. 164, LOYAL ORDER OF MOOSE,
Defendant.

SPECIFICATION OF REASONS FOR APPEAL.

The plaintiff in the above-entitled cause appeals from the directions and determinations of the Court below for the following reasons:

1. Because, despite the written agreement between the defendant and Hill, the terms of which are clear and well defined, the Court allowed the defendant, over plaintiff's objection, to introduce evidence of the conduct of the parties after the agreement had been entered into, for the purpose of explaining the meaning of the written agreement—that is to say, the Court below allowed the following questions to be asked and answered on behalf of the defendant:

a. Did Hill receive payment from anyone for the meals which he furnished at the restaurant?

b. What was done by Hill with the moneys which he received?

c. Who fixed the prices that were charged?

d. Did the Moose have anything to do with the fixing of prices?

e. Did or did not the Moose have anything to do with the kind or quality of provisions or food which was furnished by Mr. Hill at his restaurant?

f. Was there a conference or an interview between

Mr. Nusbaum, the manager of Lehman & Co., and the House Committee of the Moose Home on November 15, 1915?

g. What took place between the House Committee and Mr. Nusbaum with regard to this bill at that time, for which suit is now brought?

2. Because the Court below was requested and refused to find a verdict for the plaintiff, even though it should resolve all disputed questions of fact in the case in favor of the defendant.

NEW JERSEY SUPREME COURT,

June Term, 1917.

L. LEHMAN & CO.,
Plaintiff and Appellant,
vs.
TRENTON LODGE, NO. 164,
LOYAL ORDER OF MOOSE,
Defendant and Appellee.

OPINION.

Submitted July 5, 1917; Decided November 19, 1917.

On appeal from the District Court of the City of Trenton.

Before Justices Trenchard and Minturn.

For the Appellant, Charles A. Malloy and Martin P. Devlin.
For the Appellee, Malcolm G. Buchanan.

PER CURIAM:

The plaintiff delivered foodstuffs to one Hill at the Moose Home. They were ordered by Hill, but the plaintiff in this suit claims that he acted as the agent of the defendant, and that the latter is liable for the price of the goods.

The trial judge, sitting without a jury, found for the defendant, and we think such judgment cannot be disturbed.

The question is, had Hill the authority to pledge the credit of the defendant Lodge?

It is admitted that if such power was not conferred by

the written agreement between Hill and the defendant, it did not exist.

We think the agreement conferred no authority to pledge the credit of the defendant for foodstuffs.

It is admitted that it did not expressly, and we think that such power is not implied from its terms.

It is to be noted that the instrument is to be construed just as though the question were between the defendant and Hill, for the question here is not as to what plaintiff, knowing the contract, and acting upon it, had a right to assume that it meant, but is simply and strictly, what the contract, of which plaintiff was entirely ignorant, does provide. We think that its provisions, taken all together, indicate clearly that the running of the restaurant as a business venture was to be the undertaking of Hill, not defendant. Defendant was to "give him the rent in the restaurant free," and he was to pay to defendant 25 per cent. of the net receipts—obviously *his* receipts. In other words, defendant rented to Hill the restaurant premises for a rental of 25 per cent. of Hill's net receipts.

If the restaurant as a business was being run by the defendant, with Hill as agent, instead of by Hill as a tenant, the provision would not have been that Hill pay to defendant 25 per cent. of the receipts, but instead would have been that Hill should be allowed to retain 75 per cent. of the net receipts, or that defendant should pay to Hill 75 per cent. of the net receipts.

Defendant was to furnish him dishes and utensils, but he was to furnish a "free lunch" to defendant.

The help was to be furnished and "paid for by the said George Hill," and Hill was to pay for breakage and loss of the dishes and utensils loaned him, and also to pay "for the gas he used for cooking purposes."

Also, the provision as to notice of "quitting premises" clearly indicates a tenancy.

The whole instrument, therefore, indicates clearly that the business was Hill's, and not defendant's. The consequence is, that although the agreement is silent as to the purchase of food, yet inasmuch as a supply of food is a necessary factor in the running of a restaurant, the parties must have contemplated it, and from the agree-

ment as a whole must be held to have impliedly agreed that Hill should furnish and pay for the food, just as he was to furnish and pay for the help, and pay for the gas and loss of dishes, and rent for the premises. Since the whole contract negatives any implied agreement that defendant should furnish and pay for the food, the trial judge properly refused to find a verdict for the plaintiff.

We incline to think that there was no error in the admission of evidence. But if there was, clearly in the view we take of the case, there was none that injuriously affected the substantial rights of the plaintiff.

The judgment below will be affirmed, with costs.

JUDGMENT.

This cause was heard before our Supreme Court at the June Term, A. D. nineteen hundred and seventeen, and judgment of affirmance was rendered against said plaintiff-appellant and in favor of the defendant-respondent.

Whereupon it is adjudged that the defendant-respondent, Trenton Lodge, No. 164, Loyal Order of Moose, recover against the plaintiff-appellant, L. Lehman & Co., its costs in the Supreme Court, which are taxed at thirty-one dollars.

Judgment entered November 21, 1917.

WM. S. GUMMERE, *C. J.*

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

(SEAL) In Testimony Whereof, I have set my hand and the seal of said Court at Trenton, this twenty-ninth day of May, A. D. nineteen hundred and eighteen.

ENOCH L. JOHNSON, *Clerk.*

COURT OF ERRORS AND APPEALS.

L. LEHMAN & Co.,
Plaintiff-Appellant,

vs.

TRENTON LODGE, No. 164,
LOYAL ORDER OF MOOSE,
Defendant-Respondent.

On Appeal from the Supreme Court.

REASONS FOR APPEAL.

The plaintiff-appellant appeals from the judgment rendered in the Supreme Court in the above-entitled cause for the following reasons:

1. Because, despsite the written agreement between the defendant-respondent and Hill, the terms of which are clear and well-defined, the Supreme Court affirmed the ruling of the District Court of the City of Trenton in permitting the defendant-respondent, over the objection of plaintiff-appellant, to introduce evidence of the conduct of the parties after the agreement had been entered into for the purpose of explaining the meaning of the written agreement; that is to say, the Supreme Court erred in affirming the action of the trial court in allowing the following questions to be asked and answered on behalf of the defendant-respondent:

a. Did Hill receive payment from anyone for the meals which he furnished at the restaurant?

b. What was done by Hill with the moneys which he received?

c. Who fixed the prices that were charged?

d. Did the Moose have anything to do with the fixing of prices?

e. Did or did not the Moose have anything to do with the kind or quality of provisions or food which was furnished by Mr. Hill at his restaurant?

f. Was there a conference or an interview between Mr. Nusbaum, the manager of Lehman & Co., and the House Committee of the Moose Home on November 15, 1915? What took place between the House Committee and Mr. Nusbaum with regard to this bill at that time, for which suit is now brought?

2. Because the trial court (sitting without a jury) was requested and refused to find a verdict for the plaintiff-appellant, even though it should resolve all disputed questions of fact in the case in favor of the defendant-respondent, and the Supreme Court sustained the action of the said trial court.

C. A. MALLOY,
MARTIN P. DEVLIN,
Attorneys and Counsel for
Plaintiff-Appellant.

TRENT PRESS, Printing, 14 North Warren Street, Trenton, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

L. LEHMAN & Co.,
Plaintiff,
vs.
TRENTON LODGE, No. 164, LOYAL ORDER OF MOOSE,
Defendant.

On Appeal from the Supreme Court.

BRIEF OF PLAINTIFF.

This case was brought in the District Court of Trenton. Decision was against the plaintiff, who appealed to the Supreme Court, where the judgment of the District Court was affirmed. Plaintiff now appeals from the decision of the Supreme Court.

The plaintiff brought suit in the District Court of the City of Trenton upon the following agreement:

This agreement, made the thirty-first day of August, A. D. nineteen hundred and fifteen, by and between the House Committee, representing the Trenton Lodge, No. 164, of the Loyal Order of Moose, the party of the first part, and Brother George Hill, of the second part.

The said George Hill proposes to furnish all the help that is required in the restaurant of the new home, of the said order, he himself to wait on the tables, and also furnish a woman to keep the front of the house clean, such as sweeping, dusting, making beds and taking care of the furniture in general.

The Committee agrees to give him the rent in the restaurant free. All help to be paid for by the said George Hill. Committee to furnish the dishes, gas range and all cooking utensils, the same to remain the property of the said order.

The said George Hill agrees to furnish free lunch as directed by the said House Committee, and to pay the Lodge twenty-five per cent. (25%) of the net receipts, through the House Committee.

The said George Hill agrees that he and all help employed by him shall be under the direct control of the House Committee, and he further agrees to pay for all breakage and loss, also for the gas used for cooking purposes.

In case of disposal, it is agreed that the said George Hill shall give the House Committee three months' notice before quitting the premises, and this same agreement shall apply to the House Committee.

Signed:

Arthur Scarborough,
John S. Phillips.

Accepted:
George Hill.

(Moose Seal.)

In pursuance of this agreement Hill purchased provisions of the plaintiff and ordered the plaintiff to charge the same to the Moose. These provisions were delivered at the restaurant in the Moose Home, where they were used and consumed.

When the plaintiff applied to the defendant for payment of the provisions thus supplied, the defendant exhibited the above agreement and denied any liability for Hill's purchases. The plaintiff thereupon brought suit on the ground that the agreement in question constituted Hill the defendant's agent.

At the trial the Court admitted evidence offered by counsel for defendant as to the conduct of the parties after the agreement had been entered into. This evidence was introduced, as counsel admitted, for the purpose of explaining the meaning of the agreement.

We submit that the admission of such evidence was improper and illegal. The meaning of the terms sought to be explained by such evidence is clear and well defined, and exhibits no ambiguity. When such is the case, it is the duty of the Court to look only to the written agreement. The written agreement must prevail despite the practical construction given it by the parties.

In *Rogers* v. *Colt*, 21 *N. J. L.* 704, Colt, by a written agreement made a valid assignment of his equitable interest to Rogers. Colt admitted, upon cross-examination, that he afterward agreed to "settle" the matter, and give a deed to Rogers. Rogers asserted that this was a good defense to an action for the purchase price. The Court, on page 708, says:

> "The contract must undoubtedly be construed according to intention of the parties. But that intention is to be gathered from the contract itself. If there be no ambiguity in the contract; if the contracting parties have declared their intention in plain and unequivocal language, there can be no construction against the words of the contract. We may not alter the terms which the parties themselves have adopted, or make a new contract for them."

On page 712 of the same case the Court says:

> "Now the object of the patrol evidence introduced, so far as it can be gathered from its exceedingly vague and indefinite character, was to show from the declarations of Colt that he was to procure a deed or do some other act, before the purchase money was to be paid. This, it is manifest, was not only to vary the written contract, but would have been directly in its teeth, and utterly subversive of its terms."

The following cases and citations are authority for the proposition that the practical construction by the parties themselves can in no wise contravene the express terms of the written contract: *Jackson* v. *Perrine et ux.*, 35 *N. J. L.* 137; *Stewart* ads. *The Lehigh Valley Railroad Company*, 37 *N. J. L.* 53; *Reed* v. *Inhabitants of Trenton*, 80 *N. J. E.* 503; *Rheims* v. *Dolley*, 157

N. Y. S. 213; *Tusten* v. *Philadelphia & Reading Coal and Iron Company*, 250 *Pa.* 425; 2 *Page on Contracts, para.* 1126.

Where the meaning of the terms of a written contract are clear, not even an agreement contemporaneous with the contract will be admissible to vary or explain them. *Schwartzman* v. *Creveling*, 85 *N. J. E.* 402.

We think the Court below erred in not finding a verdict for the plaintiff as requested, since the written contract, as we contended, clearly establishes a principle and agent relationship.

The fact that Hill has entered into a written agreement or contract makes him no less the agent of the Moose. "The relationship of Master and Servant arises only out of contract, which, except when controlled by the Statute of Frauds, may be either expressed or implied, verbal or written." 26 *Cyc.* 968.

In construing a written contract, in order to see what relationship it gives rise to, we must look first at the way or manner in which the contract is to be performed. And if, after such consideration, we are in doubt as to what relationship the contract creates, we must look to what is to be done under it, *i. e.*, the nature of the work to be performed. Let us first consider the way in which the work under this contract is to be done.

The last clause but one says, "the said George Hill and all help employed by him shall be under the direct control of the House Committee." In this clause, as we see, the contract gives the House Committee not only the right to control the hands employed by Hill, but it also gives them the right to control Hill himself in the performance of his duties.

We contend that such a situation is utterly inconsistent with the relation of independent contractor. 26 *Cyc.*, 1547, says, "Right to Control." "The test of the relationship is the right to control, and is not in fact the actual interference with the contract, but the *right* to interfere, that makes the difference between an independent contractor and a servant or agent." Again, in 26 *Cyc.*, 966, we find, "The relation of Master and Servant exists wherever the employer retains the right to direct the man-

ner in which the business is to be done, as well as the work to be accomplished, or, in other words, not only what shall be done, but how it shall be done."

Here is a man employed to do a certain kind of work, and the test is, can he do it his way or must he do it somebody else's way. If the man employed to do the work must accomplish it in the way in which somebody else directs, then that man becomes the servant of that somebody else.

Redstrake v. *Swayze*, 52 *N. J. L.* 129.

In the case cited, the defendant hired a man to trim his tree along the street for the wood. The man let a limb fall on the telephone wire, which broke. Later on, the wire caught on the top of the plaintiff's buggy and damaged it. The Supreme Court, through Garrison, J., said:

> "There is nothing in the present case to suggest in the remotest degree that the man whom the defendant employed was in the exercise of an independent employment. The circumstance that he was to cut the tree for the wood instead of for cash, indicates merely the mode of his payment; it throws no new light on the nature of his employment. Indeed, the presumption arising from this mode of payment militates against the notion of an independent employment in respect to which the employer has surrendered all control; the parts of the tree to be cut must have been at the election of the employer, else the workman might take the whole tree as his compensation for trimming it. *And the question of control over the work, while not conclusive in all cases upon the question of service, is to be regarded as a test of the greatest importance.*"

Linnehan v. *Rollins*, 137 *Mass.* 123:

In this case the defendants were trustees of a building. One Elston contracted "to take down the entire building, known the the Adams House in the said Boston, or so much thereof as the trustees may request." * * * "All the work to be done carefully and under the direction and subject to the approval of the trustees." Plain-

tiff was injured by a derrick at work on this job. So far as appears Elston was to supply and pay for all men and machinery needed. The lower court charged:

> "So far as Elston is concerned, the relation in which he stands to the defendants at the outset is a matter of written contract, and, where there is a written contract between parties, the construction of that contract is a matter of law. * * * This contract gives the defendants the right to control and direct the action of Elston. * * * There is no other mode of construing it, than so as to mean that he, by this contract, was subject to their orders as to the time and manner and mode of doing the work; that they had the right to step in and say to him, 'You are not doing the work as we directed you to do it. We direct you to do thus and so, and we direct you to do this in another way." That seems to me so far as the contract is concerned, to bring the case within the relation of Master and Servant, so far as Elston is concerned, and the defendants are concerned. You will observe that, although there has been evidence introduced upon the one side and the other as to the actual control which the trustees, through one of their number, exercised over the work, and that is all proper and competent evidence for you to consider in the matter, yet the absolute test is not the exercise of power or control, but the right to exercise power of control. If, for instance, there was nothing in the case but this contract, and there was no question but that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then, though the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power to control and direct the work, they would be liable, because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly.

> If they have retained to themselves the right of directing the mode of doing the work, then if the work is done wrong, the simple principle is that they are responsible."

Field, J., in the Supreme Court of Massachusetts:

> "In this case, for the reasons given in the instructions, we think the defendants are liable for the injuries occasioned by the negligence of Elston and his employees in doing the work which the defendants requested Elston to do."

In this case we see that the contractor was to furnish, supply and pay for not only all the appliances needed for the prosecution of the work, but also all the help needed for that purpose. The trustees, like the House Committee in this case, retained the power to direct the work and the court said that that test was fatal to the relation of independent contractor.

Sadler v. *Henlock*, 4 *E.* & *B.* 570, is the leading case on the subject, and was the first to lay down the rule that the right to control the doing of the work was the test of the relation. In this case the defendant hired a man to clean a drain. This man had made the drain originally, and was not in the defendant's regular employment. The defendant did not interfere with him in the least while he was doing the work. He covered up the drain so imperfectly that the plaintiff's horse went through and was injured. The man did the job for a lump sum—five shillings. The defendant in defense contended that the man was an independent contractor. The Court said, per Crompton:

> "I decide not on the ground that Pearsons (the man employed) did not employ the hands of another; for, if he was the defendant's servant, the defendant would be liable for the wrongdoing of the person whom the servant employed. The test here is whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man's being employed at so much a day or by the job. I think here, the relation was that of master and servant, and not of contractor and contractee."

It is to be noticed in this case also that the defendant never interefered in the least with the man employed while the latter was doing the work.

In *Quarnam* v. *Burnett*, 6 *M.* & *W.* 499, the defendants owned a carriage, and whenever they wanted to drive they hired a horse, the harness, and a coachman from a job mistress. They always picked out a particular coachman, and had a suit of livery for him which they kept at their house. One day after they returned from a drive the coachman went into the defendant's house to put away his hat, and the horses which he left standing outside ran away and smashed into the carriage of the plaintiff. The Court of Exchequer held that it made no difference if the servant was the defendant's particular choice, that the owner of the horses was responsible for his carelessness.

This case was followed in *Shepherd* v. *Jacobs*, 204 *Mass*, 110 (1910). A chauffeur was involved, and the question of who had the right to direct his services was in dispute, and the Court applied the same test.

In *Rourke* v. *White Moss Colliery Co.*, 2 *C. P. D.* 205, the defendants were sinking a shaft in their colliery. They stopped the work and contracted it out to one Whittle. The defendants supplied the hoisting engine and a man to run it and paid for both. The plaintiff was injured by the hoppet falling down the shaft on him, through the negligence of the defendant's engineer. Held, defendants not liable. Baggallay, J.:

> "It was urged (on the argument) that it was the duty of the defendant to supply the engine and to pay the engineman; and no doubt it was so, but the terms were that the engineman was to be under the orders and the control of the contractor himself. It was necessary for the due carrying on of the work, that the man regulating the sinking and excavating, should also regulate the bringing up of the stuff excavated. Therefore, as far as regards this particular work, Lawrence, the engineer, was acting as the servant of the contractor."

In *Donovan* v. *Laing*, 1 *Q. B. D.* 629 (1893), the

defendants made an agreement with a boat company to send the company a crane to load their boat, and a man to run the crane. Plaintiff, a servant of the boat company, was injured by this craneman's negligence in running the crane while loading the boat. No recovery. Lord Esher, M. R.:

> "The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co. (the boat company).
>
> "That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things, but as to the working of the crane he was no longer their servant, but was bound to work under the orders of Jones & Co., and if they saw the man misconducting himself in working the crane or disobeying their orders they would have a right to discharge him from their employment."

Bowen, L. J.:

> "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense that by the employer is meant the person who had a right at the moment to control the doing of the work. That was the test laid down by Crompton, J., nearly forty years ago in *Sadler* v. *Henlock*, in the form of the question, Did the defendant retain the power of controlling the work?"

In *Singer Mfg. Co.* v. *Rahn*, 132 *U. S.* 518, the United States Supreme Court, per Gray, J., said:

> "And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done

but how it shall be done.' *Railroad Company* v. *Hanning*, 15 *Wall.* 649, 656."

So then it makes no difference whether the House Committee interfered with Hill or not. The important point is that they had a *right* to interfere if they wanted to do so. Even granting, therefore, that the evidence introduced over plaintiff's objection was properly admitted, nevertheless the Court had no right to infer that such conduct of the parties was inconsistent with the relation of principal and agent. The fact that the committee never attempted to control Hill in the purchase of food is no evidence at all that they could not have interfered if they had wanted to do so. For as all the cases above cited hold, it is not the actual control exercised but the *right* to control that is the test.

We do not think that the defendant in this case can very seriously contend that it had no right to control Hill in the purchase of food. There is nothing in the written agreement that would warrant the inference that the Moose could control Hill only as to some of the things he was to do and not as to others. The only possible inference that can be drawn is that they were to control Hill in all that he did under the contract. Indeed, it seems unthinkable that they should ever forego control of Hill in this important respect. If Hill were not subject to the control of the House Committee in this respect, he could defeat one of the very objects for which the home was maintained. This restauarant is maintained for the benefit of all the members of the organization. If Hill were free to purchase the kind of food he pleased, at the prices he pleased, and in the quantities he pleased —in other words, if he were free to conduct the restaurant in an improvident manner, in order to make a profit on the food he sold, he would have to charge prices beyond the reach of the members of ordinary means. Surely the House Committee would never delegate such a power as this to Hill.

While all the cases above cited happen to be tort cases, nevertheless that fact did not have the slightest efficacy in determing the relation existing between the parties to the contract. For the purpose of determining

the nature of the relationship, the Court looks only to the contract and not to the nature of the action which the plaintiff is bringing.

In *Reisman* v. *Public Service Corporation*, 82 *N. J. L.* 464, the Court of Errors and Appeals took the distinction indicated above. The defendant operated a pleasure resort and through its agent employed a man in the fireworks business to give an exhibition. Plaintiff was injured by a rocket while witnessing the exhibition. The defendant was held not liable, and on page 467 the Court says.

> "In *Cyc.*, *Vol.* 26, *page* 1547, an independent contractor is defined to be one who, while carrying on an independent business, contracts to do a piece of work according to his own methods and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work."

26 *Cyc.*, 1547, further says:

> "Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are, the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee, who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress, except as to the results."

This was also the test applied in *Lawrence* v. *Shipman*, 39 *Conn.* 586.

Looking now at the nature of the work Hill was to do we must conclude that the service stipulated for is such as is ordinarily done by servants and is nothing more nor less than housekeeping on a large scale.

We notice also that the services of Hill himself are stipulated for. Under the contract Hill was to await on the tables himself, a fact that makes for an agency relation. When you employ an independent contractor to do

a certain piece of work all that you ask him to do is to see that the work is done. You do not ordinarily stipulate that he himself shall do the work, especially when the work, as here, requires no special skill or training. And then when we construe the fact that Hill was to wait on the tables himself in connection with the fact that in all he did he was under the direct control of the House Committee, the agency relationship looks still stronger.

It is also to be noticed that Hill has not contracted to do "a piece of work," but he has agreed to engage in a continuous service.

By the second paragraph of the contract, Hill was to "furnish all the help." By a clause in the third paragraph he was to pay for all the help employed. Even granting that these two provisions mean that Hill was to be ultimately liable for all the help he hired, nevertheless, under the authority of *Linnehan* v. *Rollins*, *Rourke* v. *White Moss Colliery Co.*, and *Donovan* v. *Laing*, *supra*, he would still be a servant of the Moose. In all these cases the man employed was to furnish not only all the help, but also the tools, and the courts held that he was the servant of the man with whom he made the contract.

The third and fourth paragraphs of the agreement are to be construed together as a method of determining the remuneration to be given to Hill for his services. Such arrangements with servants are common. *Hargreaves* v. *Conroy*, 19 *N. J. E.* 281; *Stone* v. *West Jersey Ice Mfg. Co.*, 65 *N. J. L.* 20; *McMahon* v. *O'Donnell*, 20 *N. J. E.* 306.

We do not think that the fact that Lodge was to receive 25 per cent. of the net receipts and Hill 75 per cent. militates in the least against the master and servant relationship. It must be remembered that no profits were to be shared by either until all the expenses had been paid. In the next place we must remember that the Moose were not running a restaurant for the purpose of making money. It is naturally to be assumed that all they expected was sufficient to meet the operating expenses of that part of the Home. Again Hill was to do all the work of the restaurant, or at least see that the work was done. He had the heavy end of the bargain, and we cannot say that

75 per cent. of the profits received or to be received by Hill were proportionately an excessive remuneration.

Furthermore, under this agreement, the amount that Hill was to receive each week or month would naturally vary, depending entirely upon the amount of business done, or upon the economy with which the restaurant was conducted. This makes the situation look more like an agency relation, for, as we saw above, one of the usual elements of an independent relationship is a fixed price for the work done. 26 *Cyc.* 1547; *Lawrence* v. *Shipman*, 39 *Conn.* 586; *Reisman* v. *Public Service Corporation*, 82 *N. J. L.* 464.

We must not allow ourselves to place to much emphasis on the fact that Hill agreed to furnish "free lunch." We think that it is fair to assume that the term "free lunch" as here used means the food that was to be placed on the bar. It is simply another way of say to Hill, "Apart from the other duties imposed upon you by the contract it shall be your duty to see that the bar is kept supplied with lunch as we shall direct." We contend that the term free lunch should not be construed to mean that Hill was to furnish lunch free—it is not meant to designate the price at which the lunch was to be furnished but it is simply the means of designating that among the other duties imposed upon Hill it is also his duty to see that the bar is kept supplied with a certain *kind* of lunch, as the House Committee should direct. In passing it is well to note that even in this Hill was to act subject to the direction of the House Committee.

Thus if we analyze every provision of this agreement we find there is not a single element present inconsistent with an agency relationship. On the other hand, however, we do find that many of the provisions of this contract are utterly inconsistent with an independent relationship.

We contend that the court below should have found a verdict for the plaintiff on the further ground that the defendant in this case ought not to be heard to deny that Hill had authority to bind it in the purchase of these provisions. Whether the contract creates the relation of

principal and agent or not, nevertheless Hill, under this contract, is put in the position ordinarily occupied by an agent. And so far as third persons dealing with Hill by virtue of his position are concerned, he is to all intents and purposes an agent of the Moose. Ordinarily contracts imposing the duties that Hill wa sto perform in this case are contracts creating an agency relationship. One of the common purposes of an organization like the Moose is to furnish food and drink and other forms of social recreation to its members, and we know that when these things are done they are usually done by the organization itself or under its control and direction. It is so understood by the public. If there was anything peculiar in this contract creating a relationship other than an agency relationship, neither the plaintiff nor any other member of the selling public with whom Hill had to deal could be in position to know it. In such a situation this plaintiff had a right to act upon the apparent relationship of the parties and to charge the Moose for any act done by Hill in pursuance of the authority with which he was apparently clothed. *Law* v. *Stokes*, 32 *N. J. L.* 249; *Elliot* v. *Bodine*, 59 *N. J. L.* 567; *Morris* v. *Joyce*, 63 *N. J. E.* 549; *Calhoun* v. *Buhre*, 75 *N. J. L.* 439, 442; *J. Wiss & Sons Co.* v. *H. G. Vogel Co.*, 86 *N. J. L.* 618; *Beecher* v. *Venn*, 35 *Mich.* 466; *Rice* v. *Groffman*, 56 *Mo.* 434; *Bentley* v. *Daggett and others*, 51 *Wis.* 224; *Levy* v. *Bank*, 27 *Neb*, 577; *Rexroth* v. *Holloway*, 45 *Ind. App.* 36; *Pickering* v. *Busk*, 15 *East* 38; *Over* v. *Schiffling*, 120 *Ind.* 191.

In *Over* v. *Schiffling*, *supra*, the court, on page 197, in discussing the instruction of the court below says: "It does not assert that any particular person was or was not his agent or foreman, but simply asserts the general principle that placing a person in charge of a shop constituted such a person, as to third persons, an agent for the performance of such duties as pertained to the authority of one who in fact was rightfully in charge of the shop."

We insist that the case in hand is as strong as any of the cases just cited, if not stronger. There is no question but that Hill had authority to make the purchases he did. The defendant itself admits that. It was one of his duties

under the contract. The only question, therefore, that the court below had to determine in this aspect of the case was whether or not the Moose were estopped to deny that Hill had authority to pledge their credit for all purchases so made from innocent third parties.

We submit on the authority of the cases above cited that the Moose were estopped and that the court below should have so found.

Respectfully submitted,

CHARLES A. MALLOY,

MARTIN P. DEVLIN.

BRIEF FOR RESPONDENT.

Two suits were brought by plaintiff below to recover from defendant the price of goods alleged to have been sold and delivered by plaintiff to defendant, through one George Hill, who was in the one suit alleged to be an agent of defendant, and in the other alleged to be a partner of defendant.

The cases were tried together by the District Court, without jury, and judgment rendered for defendant in each case.

From the judgment in the agency case, plaintiff appealed to the Supreme Court. No appeal was taken in the partnership case, plaintiff conceding that no recovery could be had under that theory. The Supreme Court affirmed the judgment below. From that judgment of the Supreme Court plaintiff below now appeals.

UNDISPUTED FACTS.

Plaintiff was a dealer in foodstuffs. Defendant was an incorporated fraternal society, for social and beneficial purposes, having a home or clubhouse on State Street, in Trenton. George Hill was a member of this organization.

Plaintiff delivered the foodstuffs mentioned in the state of demand, to Hill, at the Moose Home, on divers days, between October 16th, 1915, and November 6th, 1915.

These goods were charged on plaintiff's books to the defendant, simply because of some statement made by Hill to plaintiff (Case, p. 10, l. 12-16). No inquiry was made of defendant as to Hill's authority (p. 9, l. 35).

In fact, there was a written agreement between Hill and the House Committee of defendant. Of this agreement plaintiff had no knowledge prior to the purchase of the goods by Hill (p. 21, bottom; 22, top).

This agreement between Hill and the House Committee is as follows:

This agreement, made the thirty-first day of August, A. D. nineteen hundred and fifteen, by and between the House Committee, representing the Trenton Lodge, No. 164, of the Loyal Order of Moose, the party of the first part, and Brother George Hill, of the second part.

The said George Hill proposes to furnish all the help that is required in the restaurant of the new home, of the said order, he himself to wait on the tables, and also furnish a woman to keep the front of the house clean, such as sweeping, dusting, making beds and taking care of the furniture in general.

The Committee agrees to give him the rent in the restaurant free. All help to be paid for by the said George Hill. Committee to furnish the dishes, gas range and all cooking utensils, the same to remain the property of the said order.

The said George Hill agrees to furnish free lunch as directed by the said House Committee, and to pay the Lodge twenty-five per cent. (25%) of the net receipts, through the House Committee.

The said George Hill agrees that he and all help employed by him shall be under the direct control of the House Committee, and he further agrees to pay for all breakage and loss, also for the gas used for cooking purposes.

In case of disposal, it is agreed that the said George Hill shall give the House Committee three months' notice before quitting the premises, and this same agreement shall apply to the House Committee.

Signed: Arthur Scarborough,
Accepted: John S. Phillips,
George Hill.
(Moose Seal.)

ARGUMENT.

Appellant's contentions are—

1. That the written agreement was full and complete, and that therefore the trial court erred in permitting testimony as to the conduct and dealings of the Moose and Hill.

2. That by the agreement itself, Hill was constituted a servant of the defendant, and that therefore, without more, defendant is liable for debts contracted by Hill in defendant's name.

POINT I.

It Was Not Error for the Trial Court to Permit the Testimony Set Forth in Appellant's Specification I.

Questions f and g are obviously competent, as designed to bring out possible admissions by plaintiff against interest. In fact, the answer (p. 21) discloses that Hill, at the conference, told plaintiff's manager that he (Hill) had not bought in the name of the Moose, and the silence of plaintiff's manager is an admission; and further discloses that plaintiff's manager at that conference said that Hill owed plaintiff the money (p. 21, l. 9), indicating that Hill had not purchased in the name of defendant.

As to questions a, b, c, d and e—a reading of the agreement shows that it is not full and complete—that it is silent not only as to giving to Hill authority to buy from defendant, but silent upon the entire subject of which party was to provide the food for the restaurant—a subject which certainly constitutes an absolutely essential factor in a contract for the running of a restaurant. The written agreement is obviously not complete on its face. Hence parol evidence was admissible to show what the agreement of the parties was on this point. *Brautigam v. Dean*, 85 *N. J. L.* 549, at 556; affirmed 86 *N. J. L.* 676.

And, in the absence of any express verbal agreement between the parties upon this subject, evidence as to the acts and doings of the parties in respect thereof is not only competent and admissible, but is obviously the only evidence from which the intentions of the parties in respect thereto can be obtained.

POINT II.

THE ALLEGED ERRORS, IF ERRORS, WERE HARMLESS.

For, disregarding all of the testimony, the District Court must still have found for the defendant, on the agreement alone, or on the agreement and the admitted facts—as is shown below. Hence the admission of any or all the testimony complained of, could not have prejudiced plaintiff.

The Supreme Court so holds in its opinion, resting its affirmance on the contract alone.

POINT III.

THERE IS NO EVIDENCE WHATEVER TENDING TO SHOW ANY AUTHORITY IN HILL, TO PLEDGE THE CREDIT OF DEFENDANT.

Appellant cites a large number of cases of master and servant—showing liability of a master for the tort of the servant. We must confess these seem utterly irrelevant. Let us immediately concede, for the sake of argument, that as to negligent acts committed by Hill in the running of the restaurant, resulting in personal injury, defendant would have been liable. It by no means follows that Hill therefore had the authority to pledge defendant's credit.

Take the case of a railroad company, running a train in which was a dining car, operated by a dining car company. We may assume that the steward and employes of the dining car are under direction and control of the conductor of the railroad com-

pany, and that for injuries occasioned by their negligence the railroad company would be liable. Yet, no one would seriously contend that the railroad company would be liable for the price of food purchased by the dining car company's steward, in the name of the railroad company, but without its authority.

Hill may have been a servant or an agent of defendant, but that alone is not sufficient. Plaintiff must show that the power and authority given to such agent included, either expressly or by implication, the authority to pledge defendant's credit.

It is, of course, elemental that in order for A to be bound by the acts of B, A must have in some way given B the power or authority, express or implied, so to do. (The question of agency by estoppel, so-called, does not arise, of course, in the case at bar).

Let us examine, therefore, the agreement which plaintiff contends gives Hill the power to pledge defendant's credit.

Certainly there is not contained therein any expressed authority therefor. From what can it be implied?

This instrument is to be construed—

a. According to the intention of the parties.

b. As expressed by the language used.

c. Considering the entire instrument as a whole.

d. Giving effect to all its words and clauses.

e. In accordance with the ordinary meaning of the words, and the plain import of the language used.

See 1 *Mechem, Agency, 2d Ed., Sections* 766, 767, 768, 776, 779; *pp.* 547-552.

2 *Corpus Juris, tit. Agency—Construction, Sections* 199-201, *incl., pp.* 556-560.

Ashmore v. *Pennsylvania Co.*, 28 *N. J. L.*, 180, *at* 183.

Smith v. *Lunger*, 64 *N. J. L.*, 539, *at* 541.

United Box & Co. v. *McEwan,* 76 *Atl. Rep.* 550, *at* 553.

It is further to be noted, that the instrument is to be construed just as though the question were between the defendant and Hill, for the question here is not as to what plaintiff, knowing the contract, and acting upon it, had a right to assume that it meant, but is simply and strictly, what the contract, of which plaintiff was entirely, ignorant, does provide.

Conceding, for the sake of the argument, plaintiff's contention as to Hill's being constituted a servant of defendant, by this contract—the contract read as a whole, evidently deals with the situation in two phases. The one phase, is that which, interpreted most favorably in accordance with plaintiff's contention, creates the relationship of master and servant between defendant and Hill—makes of Hill a sort of head waiter, and constitutes him an agent of defendant in the sense, but only in the sense, that a servant is the agent of his master.

Of agency on the part of Hill, of any other or different kind than the agency of a servant, the agreement discloses no trace or intention. The other phase of the situation clearly indicates a relationship of independent contractor, not of agent—for the running by Hill of a restaurant concession.

The provisions of the agreeement, taken all together, indicate clearly that the running of the restaurant, as a business venture, was to be the undertaking of Hill, not defendant. Defendant was to "give him the rent in the restaurant free," and he was to pay to defendant 25 per cent of the net receipts—obviously *his* receipts. In other words, defendant rented to Hill the restaurant premises for a rental of 25 per cent. of Hill's net receipts.

If the restaurant, as a business, was being run by defendant, with Hill as agent, instead of by Hill as a tenant, a separate contractor, the provision would not have been that Hill pay to defendant 25

per cent. of the receipts, but instead, would have been that Hill should be allowed to retain 75 per cent. of the net receipts, or that defendant should pay to Hill 75 per cent. of the net receipts.

Defendant was to furnish him dishes and utensils, but he was to furnish a "free lunch" to defendant.

The help was to be furnished and "paid for by the said George Hill," and Hill was to pay for breakage and loss of the dishes and utensils loaned him, and also to pay "for the gas he used for cooking purposes."

Also, the provision as to notice of "quitting premises" clearly indicates evidence of tenancy.

The whole instrument, therefore, indicates clearly that the business was Hill's and not defendant's. The consequence is, that although the agreement is silent as to the purchase of food, yet inasmuch as a supply of food is a necessary factor in the running of a restaurant, the parties must have contemplated it, and from the agreement as a whole, must be held to have impliedly agreed that Hill should furnish and pay for the food, just as he was to furnish and pay for the help, and pay for the gas and loss of dishes, and rent for the premises.

The whole contract negatives any implied agreement that defendant should furnish and pay for the food.

But even if this Court should say that it is unable to determine whether defendant or Hill was to furnish the food, then plaintiff must fail—for the burden is upon him here, as it was in the Court below.

Furthermore, even supposing, for the sake of the argument, that the business was the business of defendant, instead of Hill's, and that defendant was to purchase and supply the food. There is nothing whatever in the agreement to evince any intention of the parties that Hill should order the food for defendant, or have power to pledge defendant's credit therefor. Defendant could do this itself. It

would be neither a necessary nor a fair implication to give Hill this power.

> "The authority will be confined to the plain import of the language, and will not be extended by mere construction, to embrace that which is not fairly included within the terms of the instrument."
>
> 1 *Mechem, Agency, 2d Ed. Sec.* 779, *p.* 552.
>
> "The authority is to be restricted to that which is given in (the instruments) terms under a reasonable construction of the language used, or which is reasonably necessary to the performance of the powers expressly given."
>
> 2 *Corpus Juris, tit. Agency, Sec.* 201, *p.* 560.

And in *Tuttle* v. *Woodward*, 74 *N. J. Eq.* 310, *at* 314, Vice Chancellor Howell says (quoting Chancellor Green in *McCoury* v. *Leek*, 14 *N. J. Eq.* 7):

> "Necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed."

Although there he was speaking of the construction of a will, the principle would seem equally applicable to the present case, or any case, where the intent is sought from the whole instrument, and the language therein used.

No case precisely on all fours can be cited, and under circumstances such as in the case at bar, the analogy of other cases is largely argumentative. Yet the following cases may be cited to show that the Courts of this State have kept within pretty strict confinement the extension of an agent's power and authority "by necessary implication."

In *Dowden* v. *Cryder*, 55 *N. J. L.*, 329, *at* 334, the Court of Errors holds that an agent's authority to negotiate a draft for cash, cannot be extended to negotiate it for cash and merchandise.

In *Murphy* v. *Kastner*, 50 *N. J. Eq.* 214, it is held, that authority to accept, receipt and receipt for a debt due the principal from a third party, implies no authority to accept less than the full amount as payment in full.

In *Camden Safe Deposit & Co.* v. *Abbott*, 44 *N. J. L.*, 257, it is held that a written authority "to sign my name to any paper or papers, notes, etc."—implies no authority to sign the principal's name to any note outside of the principal's business.

In *Law v. Stokes*, 32 *N. J. L.*, 249, *at p.* 251, this Court says:

> "An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales." Citing *Seiple* v. *Irwin*, 30 *Penn.* 513.

In *Cooley* v. *Perrine*, 41 *N. J. L.*, 322 (*aff'd* 42 *N. J. L.* 632), it is held that an agency to sell a horse implies no authority to warrant the horse.

In *Brockway* v. *Mullin*, 46 *N. J. L.*, 448, it is held that a general agency to manage a hotel, implies no authority in the agent to bind his principal by a contract with a livery stable keeper for the supplying of horses and carriages to the hotel and the safe keeping thereof by the hotel

Slingerland v. *E. Jersey Water Co.*, 58 *N. J. L.*, 411, *at* 413, it is held that an agent to take care of a farm has no implied authority to resist an intrusion upon the farm lands. The Court says (p. 414):

> "There is no testimony that even tends to show that she (the agent) had been commissioned by her father to defend * * * an intrusion, no matter how wrongful, into any part of his lands."

The evidence was that the father, leaving home, had "left his farm in the care of his daughter."

In *Clark* v. *Imlay,* 12 *N. J. L.,* 119, *at* 141, this Court holds that an agreement for agents to build machines for the principal, who is to pay the agents for the lumber and materials obtained by them, for use in (and which were actually used in) the machines, implied no authority in the agents to pledge the principal's credit for those materials.

It may not be amiss again to remind the Court, that plaintiff in making these sales supposedly to defendant (if such were indeed the fact), did so, not only not in reliance upon any prior dealings of defendant with plaintiff or any one else, nor upon any holding out by defendant of ostensible authority in Hill, but also not even in reliance upon plaintiff's interpretation of the agreement in question, of which plaintiff knew nothing until the goods were all furnished. Plaintiff relied solely upon Hill's statements (if upon anything), and nothing else whatever—making no inquiry of defendant or any one else.

POINT IV.

There is No Proof of Authority in the Defendant's House Committee.

There is no evidence whatever tending to prove that the House Committee of defendant had authority to enter into the agreement with Hill—even if we should make the violent assumption that under the agreement Hill had authority to pledge defendant's credit.

A House Committee doubtless has power to do certain things in and about the care and superintendance of the Club House premises, but without more evidence as to the powers and authority delegated to them in fact, or by estoppel, the defendant cannot be bound by their act in executing such an agreement as this for the running of a restaurant.

POINT V.

THERE IS NO PROOF THAT THE RUNNING OF A RESTAURANT WAS WITHIN THE POWERS OF DEFENDANT.

The case is barren of any testimony as to the particular powers of defendant corporation. A corporation organized for beneficial and social purposes cannot, without evidence in that behalf, be assumed to have the right or power to engage in the restaurant business.

For the reasons above set forth, it is therefore urged that the case is barren of any evidence upon which a judgment for plaintiff could be rested, and that the judgment appealed from should therefore be affirmed.

Respectfully submitted,

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