Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

EZRA O. MCDOWELL,
Plaintiff-Respondent,

vs.

HEMMING MANUFACTURING COMPANY,
Defendant-Appellant.

Points for Respondent.

Statement of the Case.

The statement of the case which appears in the memorandum of points for the appellant is incorrect or incomplete in some particulars.

The suit arose out of a contract for the manufacture of insulating joints. These were described in the contract as

> "certain insulating joints, samples of which were presented to the Underwriters Laboratory in the City of New York in the month of September, 1915."

(Case, page 337, lines 20 to 30.) The Underwriters Laboratory is a corporation maintained in the interests of insurance companies for the inspection of appliances used in connection with electric lighting wires, &c. It first subjects samples of the appliance to various tests. If approved a label is supplied to the manufacturer certifying this approval. It is to be given facilities for factory inspection, and if the product passes this inspection the labels may be put upon the manufactured article, so that when an electrical inspector, going over a building, sees that label he will know that the appliance is safe and will

pass the construction in that particular. (Case, pages 20 and 21; page 25, lines 20 to 40.)

The appellant's brief, speaking of this factory inspection says (page 3, line 35):

> "The Underwriters Laboratories, Inc., must have approved the manufacturing process of the defendant for the production of the article in commercial quantities."

This would give the impression that it was an inspection made at the factory and made only once in advance of the commencement of manufacture to determine whether the factory was equipped for the production of the article in commercial quantities. That was not the nature of the inspection. It made no difference to the Underwriters Laboratory whether the factory was equipped to produce in commercial quantities or not. Their inspection at the factory was continuous or from time to time for the purpose of checking up on the factory production of the article and to see that it conformed to the sample first approved by the Laboratory. (Case, page 21 and page 25.)

We think that the contract (Exhibit P. 9, page 337, line 40), required the Hemming Manufacturing Company to manufacture the joints in question

> "In accordance with the Underwriters' standard specifications"

(Case, page 337). These standard specifications are referred to at page 20, line 43; page 22, line 48; page 23, line 20; Exhibit P. 1, page 327; lines 30 to 40; page 328, top of page; Exhibit P. 6, page 334, lines 20 to 30; page 90, lines 16 to 20.

Reply to Point I in Defendant-Appellant's Brief.

The non-suit was properly denied.

Defendant-appellant's brief says that the full approval of the Underwriters Laboratory was pre-requisite to the manufacture of these joints by the defendant and the plaintiff's evidence showed only a partial approval. This would have no bearing upon the point that a non-suit should have been entered unless we take it as an excuse by the defendant-appellant for non-performance of its contract. On the contrary the very fact of failure to obtain this complete approval is one of several aspects of defendant-appellant's default. It was the business of the Hemming Manufacturing Company to proceed with the installation of the testing equipment (Case, page 30, line 25 &c., and page 94); to go on with the manufacture of the insulating joints like the samples approved by the Underwriters Laboratory and in accordance with its standards. But plaintiff-appellee, having supplied the necessary material for the manufacture of the joints was put off with excuse after excuse, with promise after promise, with an occasional explicit refusal to go on with the contract sandwiched in between. The first approval, that is, the approval of the sample insulating joints was obtained February 23rd, 1916. (See Exhibits P. 3, P. 4 and P. 5, pages 329 to 332, with insert at page 332.) On February 29th the Hemming Manufacturing Company agreed with the Underwriters Laboratory to arrange for

> "the conduct of your factory inspection and label service."

(Exhibit P. 6, page 334, line 25.) The testing apparatus was installed (Case, page 30). It

should be noticed that the Hemming Manufacturing Company had been working on the production of these insulating joints long prior to the contract of October 13th, 1915, had been making inquiries for the steel stampings, metal parts, &c., necessary for manufacture (Case, page 33). On October 23rd, 1915, they supplied McDowell with a new blue print which they told him was to take place of the prior drawings not checking exactly with it. This was a blue print for the outer shells of the insulating joint (Exhibit P. 10, page 339, Case, page 35). The Hemming Company changed the specifications that they had first given for the steel shells (pages 36 and 98). In February, 1916, McDowell asked them to send him some samples of the joints and specifications of size of the joints so that he could have pasteboard boxes made to hold a certain number of the joints when manufactured (Case, pages 40, 41, Exhibit P. 16, Case, page 343). Mr. McDowell testified that he never got these specifications and he did not think he ever got any answer to the letter (pages 40 and 41). Mr. Wilde, former foreman of the defendant-appellant testified that he went to Philadelphia to furnish the General Pressed Metal Company with specifications, that they were not furnished then nor were they ever furnished entirely (pages 287 and 288), and subsequent to that visit a letter was written by the Hemming Company to the Pressed Metal Company stating that they could give no further information than had been given by Mr. Wilde (Case, page 292, bottom of page, Exhibit P. 66, Case, page 407). On March 21st, 1916, the Hemming Company wrote McDowell that they would not furnish him samples until

"we have the mould in regular production"

(Exhibit P. 22, Case, page 348). On March 29th the Pressed Metal Company wrote to McDowell, enclosing a copy of a letter written to the Hemming Company on March 21st, mentioning the uncertainty in which Mr. Wilde had left them, calling for particulars, and told McDowell that they had as yet received no answer. It does not appear that they ever did get an answer to this letter. Apparently the General Pressed Metal Company had sufficient specifications to make up samples, but the Hemming people had not finally determined upon the height of the shell (Exhibit P. 65, page 406). The samples were furnished, see list of material which the Hemming Company acknowledge the receipt of (Exhibit P. 56, page 401), the item of April 24th, 1916, General Pressed Metal Company, 216 steel shells. On April 25th McDowell wrote urging speedy action (Exhibit P. 27, Case, page 353). On April 22nd he wrote urging that the matter be pushed, pointing out that in a short time the use of insulating joints would be largely decreased or altogether discontinued and expressing his desire

"to make hay while the sun shines"

(Exhibit P. 26, page 352).

There was a reason for all this delay and it certainly did not excuse the defendant company or lessen its default. Mr. Emile Hemming was vice-president and general manager of the company. He was an expert chemist, a specialist in insulating compounds and the brains of the manufacturing end of the defendant company's business. He testified that when the contract with McDowell was placed the company was slack of work (Case, page 275, bottom), but that a few months afterwards they received a large number of orders and at once put their workmen on these orders and took them away from the

McDowell work. *This was because the new orders were more profitable than the McDowell work* (Case, pages 275, 276). He left the defendant company on April 18th, 1916, and says that at the time that he left, while the factory had not reached the point of manufacturing these insulating joints in quantities it would not have taken long; that if the one man who was in charge of making the dies for the McDowell work had not been put on other work

> "he could have cleaned up the whole thing within two or three weeks, * * * to the point where it would have been practical to manufacture"

(Case, page 276, lines 30 to 45). This testimony was in rebuttal and therefore was not before the court on the motion for non-suit. On March 1st, 1916, the Hemming Company sent two letters to McDowell. The first (P. 19, page 346) is apparently a sort of circular to the trade stating that advance of cost in materials will require them to get a higher price on future orders. The other seems to be a letter specially intended for McDowell and tells him that he will have to pay a higher price—not on future orders—but on the very goods that they had contracted in October, 1915, to furnish at a specified price (Exhibit P. 20, Case, page 347). Then on March 28th, 1916, they wrote him that they could not execute his order at the price named without a loss and therefore

> "It would be necessary to charge him $40.00 a thousand."

They added the polite expression of hope that this increase in price would not inconvenience him (Exhibit P. 23, Case, page 349). He answered that while willing to consider a suggested increase in price he could not acquiesce with the suggestion; that he had made certain contracts

on the strength of his contract with them, and because of their delay in getting the article started had been compelled to pay a largely increased price for shells (Exhibit P. 24, Case, page 350). They replied on April 1st that the suggestion of increase in price was to be regarded as held in abeyance

> "until we are producing quantities of these parts"

(Exhibit P. 25, Case, page 351). Then as he wrote them urging them to action they replied (on April 26th, 1916), that

> "in view of the fact that this matter has dragged so long and as Mr. Hemming is no longer with this company it would be well for you to call on us to talk the matter over"

(Exhibit P. 28, Case, page 353, at bottom).

On April 28th, Mr. McDowell went to the defendant-appellant's factory, and interviewed Mr. Howell, its president. Mr. Howell told him that they did not care to go on with the production of the joints. McDowell testifies,

> "I called to his attention the fact that the material was sold and would have to be delivered or a very large damage paid because of the fact that insulating joints in the market had been raised considerably since my sales had been made,"

that is, McDowell had made sales, contracting for future delivery in expectation of having the joints furnished by the defendant company and would suffer large damage if he had to go out into the market to get other insulating joints with which to fill these orders (Case, page 51). Mr. Howell he says suggested that it would be cheaper to do this, go into the market and buy a substitute, rather than to go on with the contract to which McDowell replied that he was willing to have him try it (Case, page 51). Either

then or at a subsequent interview Mr. Howell also confessed the inability of his company to manufacture the joints. It is reasonable to suppose that this was because their manufacturing expert Mr. Hemming was gone. He called in his chemist (evidently Mr. Hemming's successor), asked him if he could make the joint or one that would answer the purpose similar to the samples that had been approved by the Underwriters Laboratory. The chemist replied that he believed he could. It was then agreed that they would go ahead and produce the joints sufficient to fill the orders that McDowell had already taken, after he should do what he could to procure cancellation, and that he would not take any more (Case, pages 52 and 53). Apparently there was some other correspondence along the same line, some of which was not put in evidence, but in a letter of May 6th, 1916 (Exhibit P. 68, page 408), we find the defendant company taking the position that the agreement of October 13th, 1915, bound them only to manufacture the joint specifically referred to in it. They made the point that the first joint had never been approved finally, and interpreted the contract as calling only for the production of that joint and would tender themselves as ready and willing to go on with its production. They did this knowing and pointing out to McDowell that it would be useless to him without that approval. This entirely overlooked the fact that the Hemming Company itself, for reasons of economy in manufacture, had obtained McDowell's consent to a change in the insulating joint material. Perhaps Mr. Howell, president of the company, did not know that that change had come from his side, that Mr. Hemming, his general manager, had himself arranged it. Mr.

McDowell testified that it made no difference to him whether the insulating joint was made of the original material or of the substitute and that he told that to Howell (Case, pages 55, lines 20 to 40, and page 60), and in the letter above referred to (Exhibit P. 31, Case, page 357, says):

> "The particular type of insulation material is of no interest to me."

On May 16th the Hemming Company again said that there was nothing in the contract obligating them to produce any joint other than the one similar to the sample submitted to the Underwriters, adding,

> "The joint you now want costs more to make than the joint covered by the contract. It also infringes several patents. Samples were made for you by employees of this company without proper authority or reference to the contract and the existing patent situation to oblige you" (Exhibit P. 30, and page 355).

This contained several misstatements. Mr. McDowell was not insisting upon the modified joint with its substituted insulation material, and the samples of the substituted joints had been made by Mr. Hemming who was general manager and had therefore proper authority to make them and to propose to McDowell the substitution. The Hemming people, however, taking this position, added:

> "As you feel you can oblige us to proceed to make this new joint under the old contract we must decline to do anything further in the matter" (Case, page 356).

On May 22nd, 1916, the Hemming Company wrote McDowell that they were not under any obligation to produce a joint which would be accepted by the Underwriters Laboratory (Exhibit P. 56, Case, page 398, line 40). This was followed by plaintiff's interviews with Mr. How-

ell, president of the defendant company, at which it was agreed that the defendant company would go on with the manufacture of sufficient joints to fill the orders already taken by the plaintiff. The plaintiff, on the other hand, was to cancel as many of his existing contracts as he could, so as to reduce the number that would be required of the Hemming Company and not to take any more orders (Exhibit P. 38, Case, page 376; Exhibit P. 34, Case, page 371).

While the defendant-appellant in this correspondence sought to save itself from any admission that it had broken its contract with the plaintiff, it is plain that that was the case, and that the arrangement made was for the minimizing of plaintiff's damages. See also testimony of McDowell, Case, page 54 and page 55 (where plaintiff told Mr. Howell that it made no difference to him whether the first form of sample was used or the form that had been substituted by Hemming) (Case, page 56, line 30; Case, page 60, lines 20-30).

Apparently defendant-appellant contends that whatever had been the original contract and no matter how much the defendant-appellant had broken it, such breach was all wiped out by this arrangement in the early part of June, 1916, and that in determining whether or not defendant-appellant defaulted so as to be liable to the plaintiff, time must begin to be counted from that date. This is not fair to the plaintiff. He entered into the contract in October, 1915, presumably with high hopes of large business to be done through it and of large profits. He was put off with promise after promise and with excuse after excuse. Then at last, receiving the admission of the defendant company that it would not or could not perform the contract, he was

indulgent enough to let them off with the performance of a small part of it, that is, with the furnishings of enough to fill the orders already placed. It is unfair to interpret this indulgence as a forgiveness of all past admitted default and as wiping out all pre-existing liability.

If the defendant's contention on this point be accepted and it be held that these interviews in June made a clean slate and that defendant's undertaking began then and there, every bit of the delay and disappointment and excuses to which plaintiff had been subjected before then, together with all of the admitted default by the defendant company, must be taken into consideration in determining how long plaintiff should be expected to wait for the defendant to go on with the performance of its reduced undertaking and what circumstances of further delay or disappointment would justify plaintiff in bringing suit.

On June 6th or 7th Mr. Howell told plaintiff that the company would be ready for the first factory inspection by the Underwriters Laboratory representatives in the early part of the following week (see Case, page 59, line 40). (Note misprint "early part of August," should read "early part of next week") (Exhibit P. 34, Case, page 372, line 25). On June 13th, 1916, McDowell wrote the defendant,

> "I will expect definite word from you without further delay."

(Exhibit P. 58, Case, page 401). The plaintiff testified that he got no definite word following this letter and no definite assurance of any number of joints, and that no statement was made that joints were in the course of manufacture or production (Case, page 123). On

June 14th the Hemming Company wrote McDowell:

> "Will advise you as soon as we are ready for you to arrange for Underwriters inspection."

(Exhibit P. 39, Case, page 377). McDowell testified that they never did advise him that they were ready (Case, page 61, lines 30 to 40). As a matter of fact the testing apparatus was installed by the defendant company as early as February, 1916 (see Case, page 94, line 43, and page 95, top of page), and there was no excuse for the defendant company's failure to commence the manufacture immediately after the modification agreement of June 6th or 7th.

Plaintiff sent the defendant specifications of sizes, etc., as they requested (Exhibits P. 32, 34, 35 and 36, Case, pages 358, 371-4). But on June 25th he received the discouraging bulletin from Mr. Howell that

> "They were getting the mould in the test today so that we can figure on something to tell you this week * * *. The new mould is ready now and going on the test today so we will phone you as soon as I know."

(Case, pages 123 and 124). McDowell testified that he got no telephone message as promised that week nor any other week. Then on July 5th came the renewed assurance from Mr. Howell:

> "In this connection we would say that we have made up a number of samples which are now being cured and will be tested during this week. As soon as we have results of these tests we will advise you."

(Exhibit P. 60, Case pages 402 and 403). At that date, July 5th, the plaintiff wanted deliveries of manufactured goods, not samples. He wanted the orders that he had placed with the Hemming Company filled. He did not get the deliveries, nor even the samples, nor any modi-

fication, nor any statement of the results of the test as promised (Case, page 125, line 25, page 123, lines 30 to 40, page 126). On July 6th McDowell wrote the Hemming Manufacturing Company,

> "You advised me on or about June 26th that you would give me full information by the end of that week. Now you state you will advise me as soon as tests are made. This situation is not one where a delay of this kind should occur but one where you should take the proper action to clear the matter up. Prompt advice will be appreciated."

(Exhibit P. 37, Case, page 375). On July 7th, 1916, came another bulletin from the Hemming Company.

> "We regret that we have been somewhat delayed in our experiments, etc. The samples are now being tested and we hope to be able to give you satisfactory advice in a day or two."

(Exhibit P. 57, Case, page 400). The plaintiff waited but no deliveries came, no samples came, not even any further promise or excuse or "advice." So plaintiff consulted attorneys and instructed them to begin suit, which was done by summons tested July 24th, 1916, just one day before the date of the next bulletin from the Hemming Company (Exhibit D. 19, page 422), in which they told him that they had at last succeeded in making up satisfactory samples and invited him to come out to the factory,

> "To make some further tests on these samples,"

after which they assured him,

> "We believe we will be in a position to proceed with the production of regular samples to be passed on by the Underwriters Laboratory,"

and after getting their approval would be able to commence shipments. Plaintiff's patience being by this time exhausted, this letter was referred to his attorney, who already had started the suit (Exhibit P. 62, Case, page 404).

We submit that on the above proofs the Trial Judge was justified in denying the motion to non-suit. There was nothing about the work that was experimental or that would justify the defendant in taking from October 23rd, 1915 to July 24th, 1916, without yet having produced the manufactured article or begun the factory inspection. Even if it was experimental in its nature there was nothing to show that the plaintiff was apprised of that or in any way put in a position where he was in contemplation of law bound to await the completion of the experiments, and even if it was experimental and he knew it, at least there was sufficient evidence to submit to the jury the question as to whether enough time had not been allowed for all reasonable experiment.

Defendant-appellant's brief says that the full Underwriters' approval had not been obtained, and apparently argues that this excused the defendant. On the contrary, this approval had been obtained, label service had been authorized and labels had been purchased. No more approval was needed except to have the actual manufacture of the joints conform to the samples upon which the authorization of label service had been based, and this was the duty of the defendant-appellant. The jury was entitled to consider the evidence on this point as showing default on the part of the defendant. Then there was all the testimony, not referred to in detail, showing how the defendant company had "stalled" on the job, with changes in the specifi-

cations to McDowell, for the shells and other parts that he was to furnish, with promise after promise that was not kept, with continued excuse for delay, all illuminated by the disclosure of the defendant's attempts to repudiate its contract and to strike the plaintiff for a higher price, and by the defendant's admission after the departure of his manufacturing expert, Professor Hemming, that they did not know how to make the goods. No trial judge would have been justified in taking the case from the jury on the plaintiff's proofs. The additional exhibits and testimony introduced by the defendant only strengthen the case made by the plaintiff.

We have not thought it necessary to discuss the defendant-appellant's point that plaintiff was in part responsible for the delays in that he did not furnish sufficient or satisfactory metal parts. This certainly was not shown by anything in the testimony at the close of the plaintiff's case and could not therefore have anything to do with the Trial Judge's determination of the motion to non-suit. The testimony shows that while McDowell did not furnish enough metal parts to make up the 450,000 joints that he had taken orders for he had done all that the contract called upon him to do, which was to provide these parts

> "in sufficient quantities to permit the Hemming Company to manufacture the said joints without interruption."

For what he furnished see list attached to letter of May 22nd, from Hemming Company to McDowell (Exhibit P. 56, Case, page 398). (For the list referred to in the letter as enclosed see top of page 401.) It was significant that there was never a complaint from the Hemming Company that McDowell had not furnished

enough parts, and the defendant company's president, Mr. Howell, admitted,

> "We had not got to the position where we needed them."

(Case, pages 218, 227 and 228.) McDowell was to furnish the Underwriters labels. This he had done so far as he could, or so far as was needed, that is he had paid for 25,000. They were not to be delivered until after final factory test, and it was the Hemming Company's fault that that never came. He did not actually furnish the labels on the boxes, but he purchased or contracted for the purchase of a preliminary quantity, and as the joints never got to the boxing stage the fact that he did not deliver these box labels to the Hemming Company became immaterial.

Defendant-appellant's brief cites cases relating to the recission of contracts. We do not see the pertinancy of these cases as the plaintiff was not seeking to rescind but sues for breach of contract. Defendant-appellant's contention that the delay in execution of the contract was due to the inability of the plaintiff to secure necessary metal inserts and outer shells which would stand the strain of the tests is supported only by citations of testimony on behalf of the defendant and is therefore not available to defendant on its Point I that judgment of non-suit should have been entered.

Reply to Point II in Defendant-Appellant's Brief.

The defendant objects that the contract provided that at no time shall an order be for a less quantity than 25,000 joints, and that many of the orders that were placed were below that number. Plaintiff's recovery was based upon the proof that the plaintiff had obtained orders for 450,000 joints at the time when he agreed to relieve the defendant company from the further performance of its contract if they would supply him with enough to fill existing orders; that he then succeeded in cancelling orders to the extent of 325,000 joints. Defendant-appellant's reference to the contract provision for order of not less than 25,000 has no relevancy. That was practically eliminated by the modification agreement in June, 1916. At that time, Mr. Howell, representing the defendant-appellant, accepted the plaintiff's statement that he had placed orders for 450,000 joints, urged him to obtain cancellation of all or a part of these orders to such extent as was possible, and agreed to manufacture the balance. It was within the contemplation of that arrangement that an order that had already been placed for 50,000 might be reduced by partial cancellation to 10,000 or any other sum less than the minimum requirement of the original contract. In other words, in the original contract the defendant-appellant wanted to be protected from orders of less than 25,000 joints. By the modified arrangement they wanted to be protected by getting orders down to as low a figure as possible, and if possible to less than 25,000 (Exhibit P. 38, Hemming Company to McDowell).

> "It is our understanding that you are taking the necessary steps to bring your obli-

> gations down to the lowest possible amount by cancelling contracts in whole *or in part* to reduce the number of joints you will require to a minimum,"

(Case, page 376, lines 20 to 25.) Even if the minimum requirement of 25,000 still obtained, it was within the power of the defendant-appellant to waive this requirement, and the proof was clear that it did so waive. For the orders placed by McDowell with the Hemming Company (aside from his general order for 450,000 contained in the modification agreement as reached between Mr. Howell and Mr. McDowell and confirmed in Exhibits P. 34, 38 and 39), see Exhibit P. 32, Case, pages 358 to 370. All of these orders were received by the defendant-appellant long prior to the modification agreement of June, 1916, and taking the terms of that agreement as reached between Mr. Howell and Mr. McDowell, together with the failure to object to such orders as being for less than the required minimum, we are justified in concluding that that requirement was waived. The defendant-appellant contends that the orders were not accompanied by sufficient specifications of size, &c. Specifications did accompany a number of the orders; for example, P. 34, specifying for 30,000 joints (Case, page 371), P. 36 specifying for 50,000 and P. 55 (Case, page 398) referring to specifications for 35,000 joints (testimony, pages 120 and 122). It is obvious that the defendant could not complain that it did not get specifications for more if it appeared that it had not manufactured or made any delivery on any of the orders as to which there were specifications. See cross examination of Mr. Howell, page 214:

> "Q You had specifications of some sizes, didn't you? A Some sizes, yes.

Q Did you make up any of those sizes? A Made the samples of those sizes.

Q Did you make any but samples? A No, I told you before we did not make anything but samples."

(Case, page 214; see also page 218, lines 27 and 40.) Again at page 228, lines 10 to 20, Mr. Howell says that they had been delayed by McDowell before the new arrangement was made, but admits that there was no delay by him after that.

We assume from the failure of the defendant-appellant's attorney to discuss them in his brief that the other points set up as grounds for the appeal have been abandoned. We submit that there is nothing in the two points that are presented to justify this court in reversing the judgment below.

Respectfully submitted,

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Court of Errors and Appeals of New Jersey

Ezra O. McDowell,
Plaintiff=Appellee,

vs.

Hemming Manufacturing Company,
Defendant=Appellant.

POINTS FOR APPELLANT

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EZRA O. McDOWELL,
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HEMMING MANUFACTURING COMPANY;
Defendant-Appellant

Points for Appellant.

STATEMENT OF THE CASE.

This is an appeal from the New Jersey Supreme Court in a cause wherein Eza O. McDowell was plaintiff and Hemming Manufacturing Company was defendant. The case was tried at the Essex Circuit.

The plaintiff, Ezra O. McDowell, is a manufacturers' agent and a dealer in electrical supplies and equipment. The defendant is a manufacturer of molded insulating materials.

On October 13, 1915, plaintiff and defendant entered into a contract—Exhibit P 9—for the manufacture and sale of an insulating joint desired by the plaintiff, to be known as the "McDowell Joint". The contract was wholly executory on both sides and contained no time limit or provision for its completion or termination. These joints were to be simi-

lar to a sample which had been submitted to the Underwriters' Laboratories Inc. in September, 1915, for approval.

The Underwriters' Laboratories Inc. is an organization maintained by the Fire Insurance Companies to safeguard their interests in the use of insulating or other materials having to do with fire hazards. Articles approved by the Underwriters' Laboratories Inc. may be marked with a label showing such approval. Without this label the joints in question would have been worthless for the purposes of the plaintiff.

There were two conditions precedent to the authorization of this label service.

First, samples of the specific article must have been approved by the Underwriters' Laboratories Inc. as to form, strength and fire-resisting qualities.

Second, the Underwriters' Laboratories Inc. must have approved the manufacturing process of the defendant for the production of the article in commercial quantities, it being one thing to make a laboratory or experimental sample and a far different thing to manufacture the same article in commercial quantities.

The first approval was secured on the original McDowell joint, mentioned in the contract. The second approval was never secured. In February, 1916, a substitute joint was offered by the defendant to the Underwriters' Laboratories Inc. and the first approval secured.

The subject matter of the contract was more or less experimental in its nature and was so recognized by both plaintiff and defendant and because of difficulties encountered, the plaintiff and the defendant, in the early part of June, 1916, entered into a new agreement, which was a modification of the original contract. Under this new agreement the plaintiff was to take no new orders and was to cancel as far as possible, all orders then on hand. The defendant agreed to produce enough of the substitute joints to fill what orders plaintiff could not cancel and thus terminate their contractual relations. Before the Underwriters' Laboratories, Inc. had approved the manufacturing processes on the substitute joint, suit was started without notice to the defendant.

Judgment was rendered for Twelve Thousand Five Hundred ($12,500) Dollars damages besides costs.

POINT ONE

JUDGMENT OF NON-SUIT SHOULD HAVE BEEN ENTERED AGAINST THE PLAINTIFF BECAUSE AT THE CLOSE OF HIS CASE THERE WAS NO EVIDENCE OF DEFAULT ON THE PART OF THE DEFENDANT.

The full Underwriters' Laboratories Inc. approval was a prerequisite to the manufacture of these joints by the defendant, and the plaintiff's evidence showed only a partial approval..

Exhibits P1, P3, P4, P17, P39, P54 and P57.

Testimony of Ezra O. McDowell, pages 25, 30, 84, 87, 91 and 93.

Plaintiff was well aware of the experimental nature of the work and in June, 1916, assented to a modification of the contract in question and the substitution of a new agreement

Exhibits P17, P23 to 29, P38, P39 and P56.

Testimony of Ezra O. McDowell, pages 50, 51, 52, 88 to 95, 113, 114 and 115.

During June and the early part of July, 1916, practically down to the date of the issuing of the summons, plaintiff and defendant were co-operating and were busily engaged in trying to produce joints under the modified agreement of the early part of June, 1916.

Exhibits P26, P35, P36, P39, P55, P57 and P60.

Testimony of Ezra O. McDowell, pages 96, 97 and 99 and 105, 114 and 115.

Plaintiff, himself, was in part responsible for the delays in that he was furnishing metal parts which were not satisfactory and with which it was difficult to make samples and was unable to specify sizes. He was also worried over a possible infringement of patents.

Exhibit 56.

Testimony of Ezra O. McDowell, pages 110 and 111.

Exhibits P10, P21, P26, P27, P29 and P63

Testimony of Ezra O. McDowell, pages 96, 97, 104 to 109 and 124.

One seeking to rescind a mutual contract of which time is not the essence, on the ground of delay by the other party in complying with its term, must show such willful and intentional delay as will evince the intention of the party delaying to treat the contract as at an end.

Reid vs. Mix. 63 Kan. 745, 55 L. R. A. 706.

An executionary contract that contains no stipulation for its rescission and that has not been induced by fraud, may in general, be rescinded by one party only when the other expressly refuses to perform or has rendered himself incapable of performing it, or has otherwise evinced his abandonment of it.
Cranwell vs. Clinton Realty Co. 58 Atl. 1030.
American Loan and Trust Co. vs. Toledo C. & S. R. Co. 47 Fed 343.
Holt vs. United Security Life Ins. & Tr. Co. 72 Atl. 301 & 21, L. N. S. 691.

The defects in the plaintiff's case were not cured by evidence produced by the defendant or by the plaintiff in rebuttal. It was later shown that the entire matter was largely experimental and both the defendant and the plaintiff were busily engaged down to the time of issuing summons, under the terms of the modified agreement of June, 1916, defendant in trying to perfect a manufacturing process which would meet with the Underwriters' Laboratories Inc. approval, and the plaintiff in trying to secure the necessary metal inserts and outer shells which would stand the strain of the said tests.

Testimony of B. H. Howell, pages 169, 170, 194, 195, 201, 202, 216 and 217.

Testimony of H. W. Appleton, pages 232 to 235, 240 to 242 and 257.

Exhibits D2, D9, D14 to D19, incl.

It was shown that before the service of the summons and with no knowledge of the impending suit, the defendant notified the plaintiff on July 25th, 1916, that it had succeeded and was ready to proceed with the manufacture of the joints as soon as the plaintiff overcame a difficulty in the threading of the inserts.

Exhibit D19.

POINT TWO.

THE COURT ERRED IN PERMITTING THE PLAINTIFF TO PROVE, OVER THE OBJECTION OF THE DEFENDANT, ORDERS PLACED BY THE PLAINTIFF, WITH THE DEFENDANT, WHICH DID NOT COMPLY WITH THE TERMS OF THE CONTRACT.

The contract provided as follows:—"Hemming Company agrees to manufacture exclusively for McDowell the joints hereinabove described as and when he may call for the same, but at no time shall an order be for a less quantity than twenty-five thousand joints." Exhibit P32, being the orders placed

by the plaintiff with the defendant company, shows over twenty orders so placed, all but two of the said orders being contrary to the terms of the contract, in that they called for quantities of joints very much under the minimum of twenty-five thousand specified in the contract. On the orders H2, H5 (H22) of Exhibit P32, being the only ones which complied with the terms of the contract, no specifications were ever received. Consequently, such orders were incomplete and could not have been filled.

Testimony of Ezra O. McDowell, page 122.

Exhibit P32. Exhibit P36 reviews all the specifications which had been given down to June 28th, 1916, but shows no specifications on the two orders that complied with the terms of the contract.

Appellant submits that for the above reasons the judgment below should be reversed and a new trial ordered.

ROBERT APPLETON,

Attorney for Defendant-Appellant.

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Notice of Appeal.

Filed Jan. 22, 1917.

Court of Errors and Appeals on Appeals from New Jersey Supreme Court.

NEW JERSEY SUPREME COURT.

EZRA O. MCDOWELL, Plaintiff, *vs.* HEMMING MANUFACTURING COMPANY, Defendant.	Notice of Appeal.

To Messrs. Pitney, Hardin & Skinner,
Attorneys of Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated, January 17th, 1917.

WHITEHEAD & APPLETON,
Attorneys for Defendant.

Served, January 19, 1917.

Grounds of Appeal.

Filed, Feb. 26, 1917.

NEW JERSEY COURT OF ERRORS AND APPEALS.

EZRA O. MCDOWELL, Plaintiff-Appellee, *vs.* HEMMING MANUFACTURING COMPANY, Defendant-Appellant.	Action at Law.

The defendant-appellant states the following grounds of appeal from the judgment of the New Jersey Supreme Court, in the above entitled case:

1. The court refused defendant's motion for a non-suit on the evidence given by the plaintiff.

2. The plaintiff was permitted to prove, over the objection of the defendant, orders placed by him with the defendant, which did not comply with the terms of their contract.

3. The plaintiff was permitted to prove, over the objection of the defendant, contracts for re-sales made by him with third parties, of which contracts, defendant had no knowledge at the time of the making of the contract.

4. The plaintiff was permitted to prove, over the objection of the defendant, his profits on orders for re-sales to third parties.

Dated, February 19, 1917.

WHITEHEAD & APPLETON,
Attorneys for Deft.-Appellant.

Served, February 19, 1917.

Summons.

Filed, Aug. 8, 1916.

THE STATE OF NEW JERSEY TO HEMMING MANUFACTURING COMPANY, a corporation of the State of New Jersey:

You are summoned to answer the annexed complaint of Ezra O. McDowell in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-fourth day of July, 1916.

WILLIAM C. GEBHARDT,
Clerk.

Pitney, Hardin & Skinner,
Attorneys.

Complaint.

Filed, Aug. 8, 1916.

SUPREME COURT OF NEW JERSEY.

EZRA O. MCDOWELL, Plaintiff, *vs.* HEMMING MANUFACTURING CO., a corporation of the State of New Jersey, Defendant.	Action at Law. Complaint.

Plaintiff residing at 551 Summer Avenue, Newark, New Jersey, says that:

FIRST COUNT.

1. The defendant was at all times stated in this complaint, and is now, a corporation organized and existing under the laws of the State of New Jersey.

2. By a contract in writing, dated October 13, 1915, a copy of which is hereunto annexed, the defendant agreed with the plaintiff to manufacture exclusively for, and deliver to, said plaintiff, certain insulating joints, samples of which were presented to the Underwriters' Laboratories, Inc., in the City of New York, in the month of September, 1915, under the name of "McDowell Insulating Joint", as and when said plaintiff might call for the same, but that at no time should an order be for a less quantity than 25,000 joints, nor should less than 1000 joints be included in any one shipment; that said defendant agreed

with said plaintiff to manufacture the said joints including varnishing, boxing, packing, shipping, testing and labelling, in accordance with the standard specifications of, and in a manner acceptable to, the Underwriters' Laboratories, Inc., for a price of $30.00 per thousand joints, delivered at Garfield, New Jersey.

3. Plaintiff, in consideration thereof, agreed that he would neither sell, nor cause to be sold, joints not manufactured for plaintiff by defendant, nor would he cause joints to be manufactured by others; plaintiff further agreed to furnish to defendant the necessary metal parts, paper boxes and labels of the Underwriters' Laboratories Inc., in sufficient quantities to permit defendant to manufacture the said joints without interruption; plaintiff further agreed to pay all invoices for the manufacture of said joints which were received from said defendant during any one month on the first of the month next following, and at the price hereinabove named.

4. Plaintiff at no time gave defendant an order for a less quantity than 25,000 joints, nor requested defendant to make a shipment of less than 1000 joints.

5. Plaintiff duly performed all the conditions of said contract upon his part.

6. Plaintiff informed defendant before, at, and after, the making of said contract, that he was having said joints manufactured by said defendant for resale by said plaintiff among his customers and other dealers in insulating joints.

7. Said defendant, notwithstanding its said

promise and undertaking, has neglected and refused to carry out and perform its said contract, promise, and undertaking, as and when said plaintiff called for the same, or at any other time thereafter, and still does neglect and refuse to carry out and perform its said contract, promise, and undertaking, although often requested so to do, whereby the said plaintiff has lost great and divers profits and gains, and has sustained other losses and been put to great expense.

8. After the making of the said contract with the said defendant as aforesaid, the said plaintiff, confiding in the said promises and undertakings of the said defendant, and expecting its performance thereof, did make and enter into many contracts and agreements with individuals and corporations for the sale and delivery to them of large numbers of said insulating joints so agreed to be manufactured for, and delivered to, the said plaintiff by the said defendant, and by reason of the refusal of the said defendant to carry out its contract, promise and undertaking with the said plaintiff as aforesaid, the said plaintiff has been unable to carry out his said contracts and agreements with the said individuals and corporations to deliver to them, or any or either of them, the said insulating joints, and the said plaintiff has therefore become responsible to the said individuals and corporations for the damages suffered by them, and each of them, by reason of the plaintiff's inability to carry out his said contracts and agreements as aforesaid with said individuals and corporations, and the said plaintiff, by reason of such responsibility, has been compelled to expend and pay over large sums of

money, and has thereby sustained great injuries by reason of the failure and refusal of the said defendant to carry out its said contract, promise and undertaking with the plaintiff .

SECOND COUNT.

1. Plaintiff repeats paragraph 1 of the first count.

2. On October 13, 1915, defendant agreed with the plaintiff to manufacture exclusively for, and deliver to, said plaintiff, certain insulating joints, as and when said plaintiff might call for the same, including varnishing, boxing, packing, shipping, testing and labelling, in accordance with the standard specifications of, and in a manner acceptable to, the Underwriters' Laboratories, Inc., for a price of $30.00 per thousand joints delivered at Garfield, New Jersey; and that it was further agreed that at no time should an order be for a less quantity than 25,000 joints, nor should less than 1000 joints be included in any one shipment.

3. Plaintiff, in consideration thereof, agreed that he would neither sell, nor cause to be sold, joints not manufactured for plaintiff by defendant, nor would he cause joints to be manufactured by others; plaintiff further agreed to furnish to defendant the necessary metal parts, paper boxes and labels of the Underwriters' Laboratories, Inc., in sufficient quantities to permit defendant to manufacture the said joints without interruption; plaintiff further agreed to pay all invoices for the manufacture of said joints which were received from said defendant during any one month on the first of the month next following, and at the price hereinabove named.

4. Plaintiff repeats paragraph 4 of first count.

5. Plaintiff duly performed all the conditions of said contract upon his part.

6. Plaintiff informed defendant before, at, and after, the making of said contract, that he was having said joints manufactured by said defendant for resale by said plaintiff among his customers and other dealers in insulating joints.

7. Said defendant, notwithstanding its said promise and undertaking, has neglected and refused to carry out and perform its said contract, promise and undertaking, as and when said plaintiff called for the same, or at any other time thereafter, and still does neglect and refuse to carry out and perform its said contract, promise and undertaking, although often requested so to do, whereby the said plaintiff has lost great and divers profits and gains, and has sustained other losses and been put to great expense.

8. After the making of the said contract with the said defendant as aforesaid, the said plaintiff, confiding in the said promises and undertakings of the said defendant, and expecting its performance thereof, did make and enter into many contracts and agreements with individuals and corporations for the sale and delivery to them of large numbers of said insulating joints so agreed to be manufactured for, and delivered to, the said plaintiff by the said defendant, and by reason of the refusal of the said defendant to carry out its contract, promise and undertaking with the said plaintiff as aforesaid, the said plaintiff has been unable to carry out his said contracts and agreements with the said individuals and corporations

to deliver to them, or any or either of them, the said insulating joints, and the said plaintiff has therefore become responsible to the said individuals and corporations for the damage suffered by them, and each of them, by reason of the plaintiff's inability to carry out his said contracts and agreements as aforesaid with said individuals and corporations, and the said plaintiff, by reason of such responsibility has been compelled to expend and pay over large sums of money, and has thereby sustained great injuries by reason of the failure and refusal of the said defendant to carry out its said contract, promise and undertaking with the plaintiff.

Plaintiff demands as damages:
On the first count $90,000.
On the second count $90,000.

PITNEY, HARDIN & SKINNER,
Plaintiff's Attorneys.

Exhibit P-9 Annexed

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Answer.

Filed—Aug. 11, 1916.

SUPREME COURT OF NEW JERSEY.

EZRA O. MCDOWELL, Plaintiff, *vs.* HEMMING MANUFACTURING CO, a corporation of the State of New Jersey, Defendant.	Action at Law. Answer.

Defendant, a corporation of the State of New Jersey, having its office and principal place of business in the Borough of Garfield, County of Bergen and State of New Jersey, answering the complaint herein says:

FIRST DEFENSE:

1st. Defendant admits the first paragraph of the first count.

2nd. Defendant admits the written contract referred to in the second paragraph of the first count, a copy of which is annexed to the complaint, and says that the contract speaks for itself and denies each and every allegation of the second and third paragraphs of the first count which is not exactly within both the letter and the intent of said written contract.

3rd. Defendant denies paragraph four of the first count.

4th. Defendant denies paragraph five of the first count and says that the plaintiff failed to furnish to defendant the necessary metal parts, paper boxes and underwriters' labels as required by the said agreement.

5th. Defendant admits paragraph six of the first count.

6th. Defendant denies each and every allegation of paragraphs seven and eight of the first count.

SECOND DEFENSE:

Defendant will object that parole evidence is not admissible to vary the said written agreement.

FIRST DEFENSE TO SECOND COUNT:

1st. Defendant admits paragraph one of the second count.

2nd. Defendant denies paragraphs two and three of the second count and says that the only agreement between the parties is the agreement in writing referred to in the first count.

3rd. Defendant denies paragraphs four, five, six, seven and eight of the second count.

SECOND DEFENSE:

Defendant will object that the second count sets up no cause of action and will rely upon sections five and six of the Statute of Frauds.

WHITEHEAD & APPLETON,
Attorneys for Defendant.

Bill of Particulars.

Filed—Jan. 15, 1917.

SUPREME COURT OF NEW JERSEY.

EZRA O. MCDOWELL, Plaintiff, *vs.* HEMMING MANUFACTURING CO., a corporation, Defendant.	Action at Law Bill of Particulars.

Pursuant to a rule entered in the above entitled action on September 29, 1916, the plaintiff specifies the following items of damages upon which his claim in this suit is based.

FIRST COUNT.

1. *Loss of Profits and Gains.*

Name of Customer or Dealer.	*Amount.*
Louis D. Baily, trading as Baily Electrical Supply Company	$ 642.60
Charles E. Bentz, trading as Holloway Bentz & Company	267.75
G. & G. Electrical Supply Company	321.30
Peerless Light Company	3765.00
Peerless Light Company	4265.00
Peerless Light Company	6000.00
Louis D. Baily, trading as Baily Electrical Supply Company	4265.00
W. R. Ostrander & Company	5331.25
American Brass & Copper Company	17650.00

Bill of Particulars.

II. *Losses sustained and Expenses Incurred by Plaintiff in Reliance upon Contract.*

General Pressed Metal Company, difference between actual cost of steel for shells and price realized on resale	$ 244.81
General Pressed Metal Company, dies for steel shells	85.00
General Pressed Metal Company, pressed steel shells	16.00
Grabler Manufacturing Company 5000 3/8 Castings	23.52
Grabler Manufacturing Company, liability on purchase of 200,000 maleable castings	1000.00
Harman Bros., letter heads	3.00
Harman Bros., linen sample tags for insulating joints	3.75
Harman Bros., 10,500 labels for insulating joints	8.40
Legal expenses	500.00
Underwriters Laboratories Inc., one-half of fees for examination and test work on and inspection of, etc., insulating joints	21.49
Underwriters Laboratories, Inc., insulating joint labels	12.50

III. *Liability of Plaintiff to Customers or Dealers by Reason of his Inability to Carry out Contracts or Agreements Mentioned in Paragraph 8 of the First Count of Complaint.*

Name of Customer or Dealer.	*Amount.*
Louis D. Baily, trading as Baily Electrical Supply Company	$6600.00

Bill of Particulars.

Charles E. Bentz, trading as Hollaway Bentz & Company	250.00
G. & G. Electrical Supply Company	300.00
Peerless Light Company	6500.00
W. R. Ostrander & Company	7500.00

SECOND COUNT.

1. *Loss or Profits and Gains.*

Name of Customer or Dealer.	*Amount.*
Louis D. Baily, trading as Baily Electrical Supply Company	$ 642.60
Charles E. Bentz, trading as Holloway Bentz & Company	267.75
G. & G. Electric Supply Company	321.30
Peerless Light Company	3765.00
Peerless Light Company	4265.00
Peerless Light Company	6000.00
Louis D. Baily, trading as Baily Electrical Supply Company	4265.00
W. R. Ostrander & Company	5331.25
American Brass & Copper Company	17650.00

II. *Losses Sustained and Expenses Incurred by Plaintiff in Reliance upon Contract.*

General Pressed Metal Company, difference between actual cost of steel for shells and price realized on resale	$ 244.81
General Pressed Metal Company, dies for steel shells	85.00
General Pressed Metal Company, pressed steel shells	16.00
Grabler Manufacturing Company, 5000 3/8 castings	23.52

Bill of Particulars.

Grabler Manufacturing Company, liability on purchase of 200,000 maleable castings	1000.00
Harman Bros., letter-heads	3.00
Harman Bros., linen sample tags for insulating joints	3.75
Harman Bros., 10,500 labels for insulating joints	8.40
Legal expenses	500.00
Underwriters' Laboratories, Inc., one-half of fees for examination and test work on and inspection of, etc., insulating joints	21.49
Underwriters' Laboratories, Inc., insulating joint labels	12.50

III. *Liability of Plaintiff to Customers or Dealers by Reason of His Inability to Carry out Contracts or Agreements Mentioned in Paragraph 8 of the Second Count of Complaint.*

Name of Customer or Dealer.	*Amount.*
Louis D. Baily, trading as Baily Electrical Supply Company	$6600.00
Charles E. Bentz, trading as Holloway Bentz & Company	250.00
G. & G. Electrical Supply Company	300.00
Peerless Light Company	6500.00
W. R. Ostrander & Company	7500.00

PITNEY, HARDIN & SKINNER,
Plaintiff's Attorneys.

Judgment.

NEW JERSEY SUPREME COURT.

EZRA O. MCDOWELL, Plaintiff, *vs.* HEMMING MANUFACTURING CO., a corporation of New Jersey, Defendant.	On Postea. PITNEY, HARDIN, & SKINNER, Attorneys.

The Jury rendered a general verdict against the defendant and in favor of the plaintiff for twelve thousand five hundred dollars ($12,500).

Whereupon it is adjudged that the plaintiff recover of the defendant, the sum of twelve thousand five hundred

$12,500.00
65.57

dollars and his costs, which are taxed at the sum of sixty-five dollars and fifty-seven cents, making in the whole

$12,565.57

the sum of twelve thousand five hundred and sixty-five dollars and fifty-seven cents.

Judgment entered January 15th, 1917.

WM. S. GUMMERE, C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this nineteenth day of April, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

Substitution.

Filed—April 3, 1917.

NEW JERSEY SUPREME COURT.

Between EZRA O. MCDOWELL, Plaintiff, *vs.* HEMMING MANUFACTURING CO., a corporation of New Jersey, Defendant.	Action at Law.

It is hereby consented and agreed that Robert Appleton be and he is hereby substituted as attorney for and counsel with the defendant in the above entitled suit in the place and stead of Whitehead & Appleton.

Dated, February 28th, 1917.

WHITEHEAD & APPLETON,
By Henry C. Whitehead.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

EZRA O. McDOWELL,

vs.

HEMMING MANUFACTURING COMPANY,

} Action at Law.

Before: Hon. WILLARD W. CUTLER, Judge and a Jury, January 9, 1917.

For plaintiff appear PITNEY, HARDIN & SKINNER, by Alfred F. Skinner.

For defendant appear WHITEHEAD & APPLETON, by Henry C. Whitehead for defendant.

Jury impanelled and sworn.

Mr. Skinner opened for plaintiff.

Mr. Whitehead opened for defendant.

EZRA O. McDOWELL, plaintiff, sworn in his own behalf.

Direct Examination by Mr. Skinner:

Q. Mr. McDowell, where do you live?

A. Summer Avenue, Newark, New Jersey.

Q. How long have you lived there?

A. I have lived in Newark all my life

Q. What is your business?

A. Selling electrical material as manufacturer's representative.

Q. How long have you been in that business?

A. Ten years.

Q. Did you in the year of 1915 come in contact with the Hemming Manufacturing Company?

A. Yes sir.

Q. How?

A. By introduction of a gentleman by the name Arthur C. Noad.

Q. Where and how did he introduce you?

A. Took me out to their plant and introduced me to Mr. Hemming and Mr. Howell.

Q. The plant was where?

A. Garfield, New Jersey.

Q. What was Mr. Howell's connection with the Hemming Company?

A. I believe president.

Q. And Mr. Hemming?

A. Vice president and general manager.

Q. Did negotiations between you and the Hemming Company for some joint arrangement then begin?

A. Yes, sir, they wished me——

Q. What was the subject matter of the negotiation?

A. That they should manufacture for me an insulating joint.

Q. Did you have the plans and specifications for whatever there was for those insulating joints or did they?

A. No, sir, they had a metal which they submitted to me on that occasion.

Q. Have you preserved that very metal?

A. Yes, sir.

Q. Look among this collection and see if you find it?

A. That is a side section showing half of the insulating joint.

Q. This you say was produced to you by them on that occasion?

A. Yes, sir.

Q. Was that the joint which was then proposed to manufacture?

A. Yes.

Q. And this you say is a cross section; that is, a joint cut right through the middle?

A. Yes, that is a half of a joint.

Q. To get it on the record and for the further understanding of the jury and unless counsel will object I will lead. This black stuff here, is that an insulating material?

A. Yes, sir.

Q. And these two metal inserts that seem to be further in and surrounding the insulating material and are opposite each other, are they called nipples?

A. So-called by the Hemming Company.

Q. Are they also called metal inserts?

A. Yes, sir.

Q. And this particular shell of metal, what is that called?

A. Steel shell.

Q. Was there anything done in the way of production or testing of these joints?

A. I don't understand the question.

Q. Was there anything done in the way of production or testing of such joints as those?

A. That particular sample, I am sure, was not tested. It was delivered in part and could not be, but they represented this material to be as satisfactory and stated that it would pass the necessary tests.

Q. What do you mean when you say "necessary tests"?

A. The tests prescribed by the Underwriters Laboratory necessary to secure the label service. By label service, I mean the issuing of labels to

the manufacture to attach to the insulating joints before they are shipped after testing.

Q. This Underwriters Laboratory, what is that?

A. It is a corporation maintained in the interests of the insurance companies and for the examination of all materials of electrical as well as fire extinguishers, fire doors and everything that would have to do with fire hazards on building construction.

Q. You say it is maintained for the examination of these articles. To what end?

A. If a joint has not been examined by them and is found on a building the electrical inspector will not pass the insulation.

Q. Is this label service one of the methods by which their approval is to be manifested to the inspectors?

A. On articles that are of a nature where it is not visible to the inspector whether the article shown is perfect or not, which is necessary.

Q. What is necessary?

A. It is necessary that it be labelled because it is not visible to the inspector whether it is perfect or not.

Q. Were there any tests made that you had personal knowledge of?

A. There were tests made on the joints, on insulating joints which the Hemming Manufacturing Company sent to the Laboratories at 92 Van Dam Street, New York.

Q. Were you present when the tests were made?

A. I was.

Q. Who was present?

A. Mr. Hemming, Mr. Wild and the inspector for the Laboratories.

Q. Who was Mr. Wilde?

A. He was in the employ of the Hemming Manufacturing Company.

Q. What was the name of this inspector for the Laboratory, if you know?

A. I can't answer that for the moment. I will think of it later.

Q. Did you give the time and the date of this?

A. September 1, 1915.

Q. Were there further tests?

A. Further tests, second day following.

Q. After this did you receive a letter from the Underwriters Laborataries, September 10th?

A. Yes, sir.

Q. Is that the letter?

A. That is the letter reporting what happened at that test.

Mr. Skinner: I offer this in evidence.

(Admitted in evidence and marked Ex. P1.)

Mr. Skinner: I would like to offer this cross-section joint.

(Admitted in evidence and marked Ex. P2.)

(Ex. P1 read to the jury.)

Q. Did you send a copy of this letter, Exhibit P1, to the Hemming Company?

A. Yes, sir.

Q. Just tell us in rather condense form, not too much detail, what else was done in the way of testing either there or at the factory?

A. The next test was held, I believe in February. That is the test suggested in this letter at the factory of the Hemming Manufacturing Company.

Q. At Garfield?

A. Garfield, New Jersey. I was present at that test and it was made by Mr. Edgar P. Slack, the assistant electrical engineer, and several employees of the Hemming Company assisted in this test and were present at all times. The standard was

closely followed, that is the corrected standard with the slight change in the gas burner and testing the joints electrically after they had had the torsion and bending tests. I was present while the tests were conducted, which were strictly in accordance with the latest standards.

Q. What do you mean when you say the latest standards?

A. The corrected standard which was mentioned in the letter of September 10th.

Q. Some change in the standards which this Underwriters Laboratory Company put out as the one to which such articles as this were to form?

A. Yes, sir.

Q. Did you give the date of that test in February?

A. I did not.

Q. Look at this, purporting to be a letter from the Hemming Manufacturing Company dated January 28, 1916, and refreshing your memory by that, see if that gives you the date of the February test?

A. Yes, sir.

Q. What date was it?

A. February 3rd.

Q. Just a letter is it not, from the Hemming people confirming an arrangement made by you for the test for February 3d, for such tests?

A. Yes, sir.

Q. Did the test take place?

A. Yes, sir.

Q. Who was present?

A. A great many employees of the company I didn't know, but there was Mr. Wild of the Hemming Manufacturing Company, Mr. Martin and myself and Mr. Slack.

Q. With Mr. Hemming?

A. No, Mr. Hemming wasn't present.

Q. Was Mr. Howell present?

A. I don't believe he was.

Q. What was the result of the test?

A. Satisfactory when the test was done.

Q. Satisfactory to whom?

A. The Underwriters Laboratory. I put the question to the engineer, asking him, Mr. Slack, what would be his recommendations. He stated that he would recommend that label service be issued on the joints.

Q. Later did you receive a report from the Underwriters Laboratory?

A. I did, sir.

Q. I show you letter, dated February 9, 1916, purporting to come from the Underwriters Laboratory addressed to you. Is that the letter?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

Q. Do you recall whether a copy of this letter of February 9th was sent to the Hemming Company?

A. To the best of my knowledge it was.

Q. While Mr. Whitehead is examining this letter, let me ask you, this letter of February 9th, I show you what purports to be a carbon copy of the letter from you to the Hemming Manufacturing Company. Was the orignal of it, that is. the copy sent by you?

A. Yes, sir.

Q. It says, "Gentlemen, I am inclosing you herewith copy of a letter from the Underwriters Laboratory on the insulating joints which is self-explanatory." Was the letter they refer to the letter of February 9th which I have just shown you?

A. Yes, sir.

(Letter of February 9th admitted in evidence and marked Ex. P3.)

(Ex. P3 read to the jury.)

Q. Won't you explain to the jury and the Court just what is the factory inspector which is referred to her?

A. When a contract is entered into between the laboratories and a manufacturer of fittings—

Q. You mean a contract for label service?

A. A contract for label service; in fact, a contract for any approved fittings, an inspector from the laboratories calls regularly at that plant and checks up the actual inspection of the fittings which is by a courtesy done by an employee of the manufacturer. The Underwriters Laboratory allow the manufacturer of fittings to apply these labels and conduct the test in general themselves once a week or twice a week or once a month, come in and go promiscuously through the factory gathering samples and then put them through the test to see that the routine is being carried out as prescribed.

Q. So that the factory inspection then is the continued inspection by the Underwriters Laboratory after giving their official approval to see that the product is manufactured in accordance with the standards?

A. Yes.

The Court: Who pays the expense of the laboratories investigation?

Mr. Skinner: In this case I suppose your Honor means?

The Court: I mean in general.

Mr. Skinner: I will produce the contract.

Q. Following that was there anything else done with the Underwriters Laboratory?

A. In due course of time a copy of the card was mailed to me and notification that it had been mailed to all of the districts controlled by the Underwriters Laboratories and a copy was sent to the Hemming Manufacturing Company. We will try to find one of those cards but in the meantime I show you this letter, dated February 8, 1916. Did you receive that from the Underwriters Laboratory Company?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

Admitted in evidence and marked Ex. P4.

Q. I show you an envelope and cards, the envelope bearing the imprint of the Underwriters Laboratory, and ask you if that came in the due course of mail?

A. Yes, sir, it did.

Q. With these cards inclosed?

A. There was one of those cards. There have several been added to it.

Q. Which one?

A. And then, there was a quantity mailed in a separate envelope.

Q. Which one?

A. This one right here.

Mr. Skinner: I offer that in evidence.

Mr. Whitehead: I object to the admission of them in evidence because they don't relate to the joints that are the subject of our contract.

The Court: I think they are competent as it stands now.

Mr. Skinner: I call attention to the fact that the letters, Exhibit P1 and Exhibit P4 from the Underwriters Company, also Ex-

hibit P3, all bear the inscription at the top, E. L. E. C., and then the number 3778 and the card that is now under consideration has the same number, 3778. These are offered in evidence.

(Admitted in evidence and marked Ex. P5.)

Mr. Skinner: It is the envelope bearing the postmark, March 18, 1916, Chicago, Ill., and the contents consisting of a printed postal card from the Underwriters Laboratory addressed in blank "Dear Sir," and a card, apparently made for card index use with the heading, "Insulating joints, McDowell, E. O. submitter, 154 Nassau Street, New York, Hemming Manufacturing Company, Garfield, N. J.," and on the back of this last card apparently a label is pasted on.

Q. I also notice in this clip, you have several in this clip. Here are two other things. Were they with the card?

A. No, sir.

Q. These cards will show for themselves. Was there any other joint than the one we have been talking about that the Hemming Manufacturing Company was manufacturing for you or discussing with you?

A. No, sir.

Q. This was the only subject matter you had under discussion with them?

A. Absolutely.

Q. Was there any arrangement or communication of any kind in this connection between the Underwriters Laboratory and the Hemming Manufacturing Company?

A. Yes, sir.

Q. What was it?

A. A contract between the Hemming Manufacturing Company and the Underwriters Laboratory as to the maintenance of factory inspection of which I spoke in my previous statement whereby they would attach the labels to the joints as they inspected them themselves.

Q. Is that contract in your possession or theirs?

A. A copy of the contract was furnished by the Hemming Manufacturing Company. The original I have seen.

Q. Was there any payment made to the Underwriters Laboratory?

A. Yes, sir.

Q. Who made it?

A. I made the payment and the Hemming Manufacturing Company reimbursed me for half.

Q. Was that the arrangement you had with the Hemming people?

A. Yes, sir.

Q. That they should reimburse you or should bear half?

A. That relates to the inspection. The stamps, I paid for those and under the contract that was changed so that the Hemming Manufacturing Company purchased the stamps.

Q. Let me understand that. Then, it was the Underwriters Laboratory charges for the factory test that was shared. You were the one to bear and did bear the entire expense of the charge for the labels?

A. Yes, sir. However, the Hemming Manufacturing Company under the later contract purchased those and I was to reimburse them for them.

Q. I show you a letter, purporting to be from the Hemming Manufacturing Company on their

paper. Did that come to you in the due course of mail?

A. Yes, sir.

Q. It says, "You will see we are attaching hereto copy of letter written the Underwriters' Laboratory, Inc., and attached to it is a copy." Is that the one that was attached when it came to your hands?

A. It is the contract I refer to.

Mr. Skinner: I offer it in evidence.

Admitted in evidence and marked Ex. P6.

(Ex. P6 read to the jury.)

Mr. Skinner: This contract is dated March 8, 1916. It is admitted that to complete this contract there should be the signature of—it reads here, Hemming Manufacturing Company by blank, sales manager; that the blank should be filled in with the name of Eugene Nelley.

Q. I show you what purports to be a receipted bill from the Underwriters' Laboratory. Did you receive and pay that bill and later get the receipt?

A. Yes, sir.

Mr. Skiner: I offer it in evidence.

Admitted in evidence and marked Ex. P7.

Q. And this one, also, did you receive and pay that? The first one appears to be dated, September 30, 1915, and this second one I am showing you is dated February 29, 1916?

A. I paid those, yes, sir.

Mr. Skinner: That also is offered in evidence.

(Admitted in evidence and marked Ex. P8.)

Q. In the course of your negotiations with the

Hemming Company did you get to a written contract?

A. Yes, sir.

Q. I show you this paper. Is that the contract?

A. That is.

Q. Was it executed in duplicate?

A. It was.

Q. Is this one of the two?

A. Yes, sir.

Mr. Skinner: I offer this contract, dated October 13, 1915.

(Admitted in evidence and marked Ex. P9.)

(Ex. P9 read to the jury.)

Q. Was there any testing apparatus installed in the Hemming factory?

A. Yes, sir.

Q. I mean apparatus for the testing of these joints as they were produced?

A. Yes, sir.

Q. At whose expense was that?

A. Hemming Manufacturing Company.

Q. I notice that this exhibit, P9, speaks of you as agreeing to furnish necessary metal parts, paper boxes and Underwriters labels. What were the necessary metal parts?

A. An outer shell of steel, a malleable iron insert or nipple of which there were two used for each joint.

Q. This cross section that we have already marked Exhibit P2 shows the shell and the inserts, doesn't it?

A. In general, yes, sir.

Q. Is this a sample shell?

A. Yes, sir. The jury will see that has been filled with those nipples and insulating material,

black material and that this is the filled shell cut in two so that you get a cross section.

Q. Have you separate nipples here? A. I don't think so.

Q. Was there any change in the material or construction of the insulating joints from this sample, P2?

A. Yes, sir.

Q. What was it?

A. The nipples were changed. I am not certain as to whether the shell was lengthened up or changed at all. The material was changed.

Q. Take first the manufacture of the nipples, who made the change? How was it agreed upon?

A. The Hemming Manufacturing Company furnished me with other prints and specifications on which these goods were produced.

Q. That is, your purchase of the metal parts, as your contract bound you to do, was upon specifications furnished by them. Is that right?

A. Yes, sir, and blueprints.

Q. And in this specification or blueprint they made some change from this original sample, P2. Now, you described the change in the insert?

A. Yes, sir.

Q. Then you said there was a change in something else?

A. In the insulation material.

Q. What was that change?

A. I am not a chemist ~~on ink~~, but ~~it~~ there is a difference in ~~ent~~ color and a different name.

Q. This is black, P2, what was the color of the changed material? A. White.

Q. Do you remember the name of it?

A. Hemit.

Q. How did that change come to be made?

A. I didn't really know about that until after it was made.

Q. Then, what did you know about it?

A. I was notified that the change had been made.

Q. Who notified you?

A. Mr. Hemming.

Q. The general manager of the defendant company?

A. Yes, sir.

Q. What did he notify you?

A. He informed me that the black material dried too slowly and he decided to use white.

Q. Did he notify you by letter or conversation or how?

A. In conversation, I believe, only.

Q. Did he give you any further explanation for the reason of the change?

A. That it would be mechanically stronger.

Q. In any other reason?

A. Not at that time.

Q. Did he later?

A. Yes.

Q. What was the additional reason?

A. They would save money by this formula and the fact that the joints would dry quicker after being pressed.

Q. You mean that would cheapen the cost of production?

A. Yes, sir.

Q. Did you assent to this change which he said they were making at the factory?

A. Certainly. All I cared for that the goods would be approved and salable.

Q. When the joint was complete would the insulating material be visible to anybody who inspected the article?

A. No, sir, it was varnished all over.

Q. Nobody could tell whether the insulating

material that had been used on the inside was white or black?

A. No, sir.

Q. Now, in the performance of your part of this contract about furnishing the necessary metal parts, what did you do, and first, I want you to answer that question with reference to what you called the shell, the outer casting?

A. The manufacture had been started before this was taken up by me. The Hemming Manufacturing Company, themselves, had written a general trade letter to various manufacturers throughout the country, who are capable of turning out steel stampings of this kind and had practically decided who was best equipped to deliver this type of goods and forwarded all of their correspondence from these manufacturers to me.

Q. Why had they done this?

A. Because they had contemplated furnishing the article complete.

Mr. Whitehead: I object to what the Hemming Company contemplated.

Q. Had there been any understanding between you and the Hemming people as to the furnishing of these metal parts prior to this contract of October 13th, this written contract?

A. The representation made me by the Hemming Manufacturing Company included their furnishing of metal parts,

Q. And then it was decided that you should furnish the parts?

A. Yes, sir.

Q. Did they deliver to you their correspondence with these various manufacturers that they had been corresponding with?

A. Yes, sir.

Q. Who had been practically decided upon to make and furnish the metal shells?

A. The General Pressed Metal Company of Philadelphia, because they had had experience in making shells for others of this type.

Q. Had anybody been consulted or subsequently consulted for the furnishing of inserts or nipples?

A. Yes, sir.

Q. Who?

A. Grabler Manufacturing Company of Cleveland, Ohio.

Q. I show you a letter from the Hemming Manufacturing Company or purporting to be from the Hemming Manufacturing Company, dated October 23, 1915. Did that come to you in the due course of the mail?

A. It did.

Q. It speaks of the attached blueprint. There seems to be several small blueprint sheets attached. Were they all attached when the letter came?

A. No, sir, two of them.

Q. Take off the ones. Are they all together now? Two of them were attached.

Mr. Skinner: I offer those in evidence.

(Admitted in evidence and marked Ex. P10.)

Mr. Skinner: I call for the production of the letter from Mr. McDowell to the Hemming Manufacturing Company, dated December 24, 1915.

Q. Did you show that letter to the Hemming Manufacturing Company, showing you the letter just produced by counsel for the defendant?

A. Yes, sir.

Mr. Skinner. I offer it in evidence.

(Admitted in evidence and marked Ex. P11.)

(Ex. P11 read to the jury.)

Q. The Trenton Plug referred to here, does that have anything to do with this case?

A. Nothing at all.

Q. Why did you say to them, "If we don't get busy and find out exactly what we want in the way of nipples and shells it will be months before you would be able to get deliveries."

A. That was after I had been notified that the changes were going to be made on these blueprints furnished on the previous letter and that new ones would be furnished.

Q. You have been notified by the Hemming Manufacturing Company?

A. Yes, sir.

Q. Then, you had in mind on that day this letter of October 23rd, Exhibit P10, in which they had sent this blueprint to you and in which they had said it would be necessary to make the shells in accordance with the attached blueprint and any drawings you might have not checking exactly with the same should be destroyed, is that right?

A. Yes, sir.

Q. They say in this letter of P10 that they had found the nipple made by the General Pressed Metal Company useless. What does that refer to?

A. General Pressed Metal Company submitted a sample of a pressed steel nipple whereas their specifications called for a malleable iron treaded nipple.

Q. Whose specifications?

A. Hemming Manufacturing Company.

Q. Were any of these shells procured?

A. On final specifications the Hemming Manufacturing Company.

Q. When did you get those final specifications?

A. I misstated myself. There were changed specifications.

Q. When did you get those?

A. I believe they were sent direct to the General Pressed Metal Company.

Q. Direct by the Hemming Manufacturing Company?

A. By the Hemming people, yes.

Q. Can you give me the date?

A. Not the exact date.

Q. You are speaking of the outer shells?

A. Yes. There was a ~~bid~~ order placed for shells with the General Pressed Metal Company.

Q. Were any furnished by the General Pressed Metal Company?

A. Yes, sir.

Q. To the Hemming people?

A. Yes, sir.

Q. Do you know how many?

A. I have a report from the Hemming Manufacturing Company stating how many they received.

Q. I show you a letter of May 22, 1916, purporting to be from the Hemming Manufacturing Company to you and attached to it is what seems to be a list of shells and nipples. Is that the report that you spoke of?

A. Yes, sir.

Q. Then, refreshing your memory——

Mr. Skinner: I will offer this letter later.

Q. ——but, in this connection, refreshing your

memory by the sheet attached, how many shells would you say had been purchased by the General Pressed Steel Metal Company to the Hemming people?

A. The earlier invoices I had nothing to do with. They were purchased by the Hemming Manufacturing Company direct from the General Pressed Metal.

Q. I call your attention to the last paragraph in this letter, "We are inclosing herewith a list of material received, as requested." Had you requested that they give you a list of the material received?

A. Yes, sir.

Q. Is this the list?

A. Yes, sir.

Q. The list is 7/30/15, General Pressed Metal Company, 105 steel shells. 9/15/15, General Pressed Metal Company, 98 steel shells. 10/14/15, Grabler Manufacturing Company, 130 small iron nipples. 10/19/15, Grabler Manufacturing Company, 222 small iron nipples. 11/24/15, General Pressed Metal Company, 432 steel shells. 4/24/16, General Pressed Metal Company, 216 steel shells. 5/5/16, Grabler Manufacturing Company, 2475 cast iron nipples. 5/9/16, Grabler Manufacturing Company, 2480 cast iron nipples.

Mr. Skinner: I call for a letter from McDowell to the defendant, dated January 15, 1916.

Q. Did you send such a letter as that one, of which this is a copy?

A. Yes, sir.

Q. To the Hemming people?

A. Yes, sir.

Mr. Skinner: While waiting for the production, by consent of counsel I will use the carbon copy. I offer it in evidence.

(Carbon copy admitted in evidence and marked Ex. P12.)

(Ex. P12 read to the jury.)

Q. What did you mean by saying that it would be wise to take this matter up at once, referring to the shells?

A. I felt that I should have an approval on exactly what they wanted so we could proceed.

Q. That is what you felt. Had you talked with them about it?

A. I had.

Q. And called on them for this approval?

A. I had.

Q. That is, you wanted an approval of what?

A. Of what they physically wanted.

Q. In the arrangement made with the General Pressed Metal Company were they to make it according to the specifications of the Hemming people?

A. They were.

Q. And you wanted those specifications, is that it? A. Yes, sir.

Q. The letter, P12, speaks of a copy of a letter to the Grabler Manufacturing Company inclosed. Is this a copy of the copy that you spoke of as inclosed here in P12? It is dated January 15, 1916, and is addressed, "Grabler Manufacturing Company, Mr. Rosenfeld."

A. That letter was sent to me by the Grabler Manufacturing Company, the original of it.

Q. And the copy referred to in P12 was a copy of this letter?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P13.)

(Ex. P13 read to the jury.)

Q. In P12 you say, "Of course, it would not do for me to say, 'I told you so,'" and so forth. What were you referring to?

A. The fact that the material was not coming through, if I remember correctly.

Mr. Skinner: I call for a letter of January 21, 1916, from the Grabler Manufacturing Company to the Hemming Manufacturing Company. While counsel is looking for the original I wish to use our carbon copy.

Q. Is that a copy of the letter which you sent?

A. Yes, sir.

Mr. Skinner: I offer in evidence the original letter, now produced by Mr. Whitehead, dated January 21, 1916.

(Admitted in evidence and marked Ex. P14.)

Mr. Skinner: Also the original letter from the Grabler Manufacturing Company to Mr. McDowell, which is referred to in P14 as enclosed.

(Admitted in evidence and marked Ex. P15.)

(Ex. P14 read to the jury; Ex. P15 read to the jury.)

Q. As a matter of fact, do you know whether it has been completed and shipped? Did you hear anything from the Hemming people as to whether that was true?

A. I don't know.

Q. You don't recall it?

A. No, I do not.

Mr. Skinner: I call for a letter of February 19, 1916, McDowell to the Hemming Manufacturing Company. I offer this in evidence.

(Admitted in evidence and marked Ex. P16.)

(Ex. P16 read to the jury.)

Q. This letter, P16, asks them to give you the specifications or sizes for the boxes. Did you get those specifications from them?

A. I did not.

Q. Never?

A. No, sir.

Q. Did you ever have any answer to that letter, I mean, any answer purporting to give the sizes that you wished?

A. I don't think so.

Q. Did you have any statement of approximate sizes?

A. I did.

Q. Could you order boxes on merely approximate sizes?

A. I don't think so.

Q. Why not?

A. If I furnished a pasteboard box which didn't hold these iron fittings closely together and they were shipped by freight to some distant point the weight of the material would spoil the container and the material couldn't be rehandled.

Q. The containers were to be made of what?

A. Pasteboard.

Q. Were they not to contain a certain number of nipples, I mean, to be of a size which would contain just so many of these insulating joints?

A. They were to be made to contain ten joints.

Q. Then, in order to know the size of the box did you have to know the exact size of the joints and how much space it woudl take to hold ten nipples?

A. Yes.

Q. Is that what you were calling upon them to give you?

A. It was.

Q. And you didn't get it?

A. No, sir.

Q. Except approximately?

A. Except approximately.

Q. Did you supply them with labels?

A. Inspection labels

Q. Labels. I suppose that is these—

A. There was a label to be pasted on the box containers as well that I was furnishing.

Q. I show you a letter from the Hemming Manufacturing Company to you, dated February 19, 1916. Did you get that letter?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P17.)

(Ex. P17 read to the jury.)

Q. Had you forwarded a quantity of labels, as stated here?

A. Yes, sir. Those were box labels.

Q. I think we have had already in the evidence that you had ordered labels and paid for them. Were the labels that were spoken of as ordered and paid for the ones to go on the finished product or were they to go upon the boxes?

A. I had bought and paid for both, the Underwriters' labels and these little pasters for the containers.

Q. Were the pasters for the containers mere descriptive labels?

A. Descriptive of what the box contained.

Q. Had nothing to do with the Underwriters?

A. Nothing at all.

Q. Did you supply the Underwriters Laboratories labels, did you actually deliver any to the Hemming people?

A. The delivery was to be made by the Underwriters Laboratories. I paid for them.

Q. Was that delivery to be made before factory production or after

A. After.

Q. On this date of February 19th, as stated here in P17, was the manufacture still in the testing stage? You notice the letter says, "Relative to further tests."

A. They hadn't started regular manufacturing at that time.

Q. The February approval shows by these cards that came from the Underwriters Company was February 23d?

A. Yes, sir.

Q. Did the Hemming people ever get to the point of factory production where these Underwriters labels would be required?

A. I believe not.

Q. Did you place any orders for those joints with customers of yours, customers for the joints whom you procured?

Mr. Whitehead: I object to that question, if it is designed to go to the question of damages, on the ground that possible orders or possible profits could not constitute the measure of damages in a case of this kind. I am prepared to refer the Court to authorities in

the State that deal with what is the measure of damages in a case of this kind since the early decision of Hedley v. Baxtondale, followed by the case in this state of Wallack v. Mount, 36 Law 262. That case is subsequently followed by the case of Hope v. Ferguson and the same authorities follow in a somewhat earlier case in the Supreme Court, Skirm v. Hilliker, 66 N. J. Law 410.

(Argument followed.)

RECESS.

Mr. Skinner: On behalf of the plaintiff I offer to accept the rule of damages contended for by my friend, Mr. Whitehead, as being the rule to be applied to this case and declared by the Court as to the law applicable to this case.

Mr. Whitehead: By that you mean the rule of damages is the difference between what the joints would have cost him if manufactured by the Hemming Manufacturing Company, the defendant, and what they would have cost them to produce them in the open market? Just what rule do you mean

Mr. Skinner: I mean this; we would then, instead of offering proof, that we would not attempt to prove damages in the form of profits lost, but that the proof in this case shall consist of the proof of the market value of the goods that were available to us to be purchased in the market, similar joints that might be substituted for these goods. I cannot say that these very goods could be purchased anywhere and, of course, if it shall appear that they cannot be purchased in the

market then we should prove the value in some other way than the market value.

The Court: In other words, at the present time, it is not competent to prove your expected profits as the case now stands.

Mr. Skinner: No, sir.

EZRA O. McDOWELL, resumes the stand:

Direct Examination (continued) by Mr. Skinner:

Q. Mr. McDowell, before I go into another subject with you, I want to finish one already opened. Did you have a contract with the General Pressed Steel Metal Company for shells?

A. Yes, sir.

Q. That is in your files here?

A. Yes, sir.

Q. Did you send an order to the General Pressed Metal Company?

A. I did.

Q. And did you keep a copy of it?

A. Yes, sir.

Q. Where is their office?

A. Philadelphia.

Q. Is that where you sent the order?

A. Yes, sir.

Q. Is this the carbon copy of the order?

A. It is.

Q. Taken from your files?

A. Yes, sir.

Mr. Skinner: I offer that in evidence.

(Admitted in evidence and marked Ex. P18.)

Mr. Skinner: This is an order, dated April

3, 1916, directing the General Pressed Metal Company to ship to the Hemming Manufacturing Company 50,000 steel shells.

Q. Those, I suppose, were for those insulating joints?

A. They were.

Q. Are those the shells of which you spoke before when you said the Pressed Metal Company were waiting for specifications from the Hemming Company, which they never got?

A. Yes, sir.

The Court: Was that an order for a particular kind of shell or just a general order?

Mr. Skinner: It says, "50,000 steel shells. .060 stripped shell in accordance with specifications of Hemming Manufacturing Company."

Q. I show you a letter, purporting to come from the Hemming Manufacturing Company, dated March 1, 1916. Did you receive that letter?

A. Yes, sir.

Q. I call your attention to the fact that the signature is typewritten. Do you say that letter came to you in just that way?

A. It did.

Q. And it came in the mails?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P19.)

(Ex. P19 read to the jury.)

Q. Mr. McDowell, at the time you got that letter had you had any order filled by the Hemming Company?

A. I had not.

Q. Had you put any orders through them?

A. I had.

Q. Have you placed orders or procured estimates for those joints prior to this date?

A. I had.

Q. At prices based upon the contract price you had with the Hemming people?

A. Yes, sir.

Q. Would it have cost you some inconvenience had you been called upon to increase the price that you were to pay the Hemming people, ten per cent., as this letter suggests?

Mr. Whitehead: I object to that as immaterial.

Mr. Skinner: I will withdraw it. It is manifest.

Q. Again, I show you another letter bearing the same date, March 1, 1916, also from the Hemming people, this time signed for the company by its sales manager. Did you get that in the due course of the mails?

A. I did.

Mr. Skinner: I offer that letter.

(Letter admitted in evidence and marked Ex. P20.)

(Ex. P20 read to the jury.)

Q. Mr. McDowell, at that time was there any proposition pending or anything by way of arrangement between you and them other than the contract of October 13, 1915?

A. Yes, sir, there were other quotations which were entirely foreign to the insulating joint business.

Q. On other matters?

A. Yes, sir.

Mr. Skinner: I call for the original letter from Mr. McDowell to the Hemming Manufacturing Company, dated March 17, 1916. Letter being produced, I offer it in evidence.

(Admitted in evidence and marked Ex. P21.)

(Ex. P21 read to the jury.)

Q. Can you explain that? You say in this letter of March 17th, "I have placed the order with them." That is March 17th, but the order itself we have here is dated April 3d?

A. Offhand I cannot explain why that was signed later. The order was placed verbally in Philadelphia and was confirmed later.

Q. Then the April 3d is the formal order?

A. Yes, sir.

Q. And in your letter of March 19th you were speaking of an informal order? A. Yes, sir.

Q. Did you get this letter of March 21, 1916, from the Hemming Manufacturing Company?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P22.)

(Ex. P22 read to the jury.)

Q. On that date, March 14, 1916, did they have the mold in regular production or was that something yet for the future?

A. For the future.

Q. Now, I show you a letter of March 28, 1916, from the Hemming Company. Did you get that from the Hemming Company?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P23.)

(Ex. P23 read to the jury.)

Q. Did you reply to that?

A. Yes, sir.

Mr. Skinner: I call for the original letter from Mr. McDowell to the Hemming Manufacturing Company November 29th. I offer it in evidence.

(Admitted in evidence and marked Ex. P24.)

(Ex. P24 read to the jury.)

Q. Have you been compelled to pay any increased price for any parts which you were to furnish?

A. Yes, sir.

Q. Where, in what cases? A. For both the insert and for the shells.

Q. What increase?

A. I had been compelled to pay two cents a pound additional for the machine malleable castings and I can't quote you the figure on the shells, but it was something over the sum, about $2 a thousand.

Q. $2 a thousand on the castings?

A. On the shells.

Q. And the other was what?

A. Two cents a pound.

Q. How many pounds were bought at that two cent increase?

A. 100,000 pieces.

Q. Have you any idea——

A. Yes, I think I can tell you.

Q. What are you referring to, some memorandum?

A. Yes, some figures I have worked out. 2000 of the machined nipples weight 117.61 pounds.

Q. Just tell me how much you had to pay by reason of this increased price? A. I can't answer that.

Q. You haven't got it figured out?

A. Yes, sir.

Q. Well, Mr. McDowell, anything else that you were compelled to pay that was additional?

A. Yes, sir, pasteboard box prices raised.

Q. Anything else

A. I have already stated shells.

Q. The prices raised, but did you have to pay?

A. I did actually pay.

Q. For the boxes?

A. Not for the boxes, for the shells.

Q. About the boxes, did you have to pay or was that simply a raise in the price?

A. Raise in the price.

Q. You didn't place the order. Was there anything else you had to actually pay besides those two cents a pound and this other $2 a pound?

A. Not that I recollect.

Q. Did you have to make any arrangement with the General Pressed Metal Company to reimburse them for some excess price they had to pay to go out in the market and get steel, did you agree to pay them extra price

A. I did.

Q. What was that?

A. The price was based on the price of raw steel. The metal price at that time was in the neighborhood of 3¼, 3½ cents a pound for pickled annealed hot rolled steel and they were compelled to pay to a Philadelphia jobber a price of $4.95 per hundred for this steel to be used, and that was figured in on the price of the shells.

Q. I show you a letter purporting to come from the Hemming Company, dated April 1st, and addressed to you. Did you get that?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P25.)

(Ex. P25 read to the jury.)

Mr. Skinner: I call for a letter of April 22, 1916, from McDowell to Hemming. The original being produced I offer it.

(Admitted in evidence and marked Ex. P26.)

(Last paragraph of Ex. P26 read to the jury.)

Q. Did you from time to time in person or by letter urge upon the Hemming people the production of these joints?

A. I did.

Mr. Skinner: I call for a letter of April 25th from McDowell to Hemming. I offer it in evidence.

(Admitted in evidence and marked Ex. P27.)

(Ex. P27 read to the jury.)

Q. I show you a letter. Did you get that from the Hemming people?

A. Yes, sir.

Mr. Skinner. I offer it in evidence, dated April 26, 1915, Hemming to McDowell.

(Admitted in evidence and marked Ex. P28.)

Q. Did you go out to Garfield as suggested in that letter?

A. Not that day, but the day following.

Q. Did you have any interview with Mr. Howell?

A. Yes, sir.

Q. Tell us what took place at that interview

A. About a two hour interview.

Q. Was anything said about whether or not they would go on with the production of the joints under the contract?

A. Stated they didn't care to go on with the production of the joints. I called to their attention the fact that the material was sold and would have to be delivered or a very large damage paid because of the fact that the price of insulating joints in the market had raised considerably since my sales had been made.

Q. Mr. McDowell, when you called their attention to the fact that the price of insulating joints had raised considerably, did Mr. Howell say anything at all in assenting or dissenting from that?

A. Mr. Howell suggested, I believe at that interview, at an interview with him that he believed that it would be cheaper to go into the open market and buy a substitute insulating joint to fill these orders.

Q. Rather than go on with the contract?

A. Rather than go on with the contract of manufacture.

Q. What did you to that?

A. I was willing to have him try.

Q. Did he do anything at all as far as you know along that line or did you hear anything more from him?

A. I don't think there was any further letters on the subject.

Q. Back to this interview out at Garfield that you were telling about, what else was said about going on with contract?

A. I am liable to quote from subsequent interviews.

Q. You mean, liable to confuse the various interviews?

A. Liable to confuse the various interviews if I am not careful and I have to be very slow.

Q. Tell us anything that happened at that particular interview as to which you feel fairly certain that this was the time?

A. At this moment I would not want to make any further statement.

Q. Was there more than one interview after this letter, which invited you to come there? Did you have more than one interview with Mr. Howell?

A. Yes, sir.

Q. I mean on the subject as to whether or not they would go on and deliver their contract

A. Yes, sir.

Q. At any of those interviews, not attempting to fix time except as best as you can, tell us the attitude of the company as expressed by him.

Mr. Whitehead: I think the question should be what the officer said.

The Court: Of course.

Q. Yes, I mean, tell us what he said in expressing the company's attitude.

The Court: What he said is competent.

A. Mr. Howell stated he didn't believe the company could manufacture the insulating joints which would meet with the Underwriters approval, I believe, and at an interview there he asked me to go down to their laboratory and identify the joint which had been approved and tested by the Underwriters inspector, which we did, and he called in this conference his chemist, who was asked if he could reproduce a material

similar or that would answer the purpose for the insulating joint.

Q. That is similar to what?

A. Similar to the samples which were approved and tested by the Underwriters inspector.

Q. Yes.

A. The chemist in my presence stated he believed he could produce what they wanted and there was a further conference in Mr. Howell's office where the manager of the company and I believe the foreman of the pressroom, where the question consisting of presses which would be required for the manufacture of the joints was brought up and as to whether there were any of these presses in the plant available to work and then in that interview it was decided that they were going to try and produce the joints to fulfill my orders and warned me and requested that I not take any further business.

Q. Can you give us the date of that latest interview?

A. I believe there were two interviews subject to this one mentioned in the letter; however, I can't swear to that.

Q. Give us the date of the latest?

A. No, I can't.

Q. Can you give us the month?

A. I believe there was a second interview in April and one the early part of May. They were very close.

Q. Perhaps you can fix the date with reference to something that you know the date of?

A. I followed each interview, I believed, with a letter to the Hemming Manufacturing Company.

Q. Do you remember when your latest order was placed, I mean, orders that you placed with your customers for the finished product?

Mr. Whitehead: How is that relevant?

Mr. Skinner: I am going to ask him if he can fix the time of the interview.

A. Prior to the last visit of the Hemming Manufacturing Company, because at that time I couldn't fix that date accurately. All of the original orders were taken with me to their office and gone over.

Q. Well, I show you a letter from the Hemming Manufacturing Company, dated May 3, 1916. Did you get that letter in due course? A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P29.)

(Ex. P29 read to the jury.)

Q. I show you a letter, rather an order, what purports to be an order by W. R. Ostrander & Company, dated May 2, 1916, for 125,000 insulating joints. Can you tell us when this last interview with Mr. Howell was when they were going on with the work with reference to that date on that order? A. Why, I can't. This order was solicited at the time of the option on 500,000 shells and solicited in connection with this and this or- was mailed in at a later date. I can't testify as to the relationship between those dates.

Q. Did you have a conversation with Mr. Howell on May 4th?

A. Yes, sir.

Q. Tell us what passed in that converation, just what was said as near as you can?

A. I don't believe I can quote from that. There is a memorandum made of it at that time.

Q. Tell us, as well as you can, without referring to the memorandum, was there anything said about whether or not you would go on?

A. No, I remember this, there was a statement to the effect that they were up against it and couldn't go on. I believe that was the words used.

Q. Told you they couldn't go on. I show you a letter, purporting to come from the Hemming Manufacturing Company, dated May 16, 1916. Did you get that letter?

A. Yes, sir.

Mr. Skinner: I offer it.

(Admitted in evidence and marked Ex. P30.)

(Ex. P30 read to the jury.)

Q. Was it a matter of any consequence to you whether the joints were made of the black material or the white material or any change from the old form of sample?

A. Made no difference as long as it was satisfactory.

Q. Did you say anything of that to the Hemming people?

A. I did, sir.

Q. To whom?

A. Mr. Howell, and called his attention to the fact that the black joint, as he tried to read the contract, was tested and the letter from the Underwriters of September 10th, did not adversely criticise the black joint in any way and stated that would be acceptable to him.

Q. What did he say? Did he say then as to whether they would make it or not?

A. That leads back to my former testimony. That conversation was just prior to my going out to the Laboratory where we went down and picked out samples.

Q. Did he ask his engineer whether they could make them?

A. Yes.

Q. Then, it must have been around some time in April, was it, or May?

A. Yes, sir.

Q. This letter of the 16th speaks of a letter of yours of May 12th.

Mr. Skinner: I call for the original. The original being produced I offer it.

(Admitted in evidence and marked Ex. P31.)

(Ex. P31 read to the jury.)

Q. Did he ever take any different stand or express any doubt after that?

A. I believe the correspondence will show there was quite some different stand taken.

Q. Did they ever after that date make any delivery of any kind of joints, old kind or new kind, change the specifications or not?

A. They did not.

Q. After your statement to Mr. Howell that you would be perfectly willing to accept the joint made with the black insulating material did they ever deliver to you any insulating joints.

A. No, sir.

Q. Did you put in various orders to the Hemming people?

A. Yes, sir.

Q. Did you keep copies of them?

A. Yes, sir.

Mr. Skinner: I call for the production of the original orders from Mr. McDowell to the Hemming Company.

Mr. Whitehead: We will object to the admission of any orders in evidence that are not within the terms of the contract. The con-

tract provides that no order shall be less than 25,000.

Q. I will ask you now, did you ever hear from the Hemming people any objection to any of the orders you put in because of the amount?

A. I did not.

Q. Did they ever say before this, state that they would not receive an order because it was for less than 25,000?

Mr. Whitehead: I object to that. It seems to me the contract binds.

The Court: I will allow the evidence.

Q. (Question read.)

A. No, sir.

Q. Did you have any method of numbering these?

A. Yes, sir.

Q. How?

A. Using the letter H and following it with a numeral.

Q. Following it with a numeral.

Mr. Skinner: I offer these orders in evidence. There are a number of them and I think I should simply put the enumeration last. As Mr. McDowell has indicated, there is a method of numbering. I offer first one of October 14, 1915, numbered by him H 1.

Mr. Whitehead: For how many joints?

Mr. Skinner: It is for 400.

Mr. Whitehead: I object to that. It is less than 25,000.

The Court: I will allow the offer but whether they will comply with the contract is another matter unless there was a waiver.

Mr. Whitehead: There has been no waiver proved.

The Court: They cannot put it all in at once.

Mr. Whitehead: I object as they go in to preserve my right.

Mr. Skinner: I understand that Mr. Whitehead objects to any of these under 25,000 without repeating it. The first is H 1, October 14, 1915. The next is H 2. It is for 25,000. Then, H 3, October 16, 1915, that was for a thousand. H 4, same date, that was for a thousand. H 5, same date, that was for a thousand. H 6, same date, that was for a thousand. H 7, same date, was for a thousand. H 8, same date, was for a thousand. H 9, same date, was for a thousand. H 10, dated October 18, was for altogether a thousand. H 11, dated October 18th, was for a thousand. H 12, dated October 18th, was for a thousand. H 14, dated October 18, was for a thousand. H 15, dated October 18th, was for a thousand. H 16, dated October 18, was for a thousand. H 17, dated October 18, was for a thousand. H 18, dated October 18th, was for a thousand. H 19, dated October 18th, was for a thousand, H 20, dated October 18th, was for a thousand, H 21, dated October 18th, was for a thousand. February 19, 1915, also, numbered H 5—I think that should have been No. 22, but it is H 5—that is for 100,000 joints.

Q. Did you send such a letter as this to the Hemming people

A. Yes, sir.

Mr. Skinner: I offer the orders.

(Admitted in evidence and marked Ex. P32.)

Mr. Skinned: I offer this letter.

(Admitted in evidence and marked Ex. P33.)

Mr. Skinner: I offer these letters produced by the defendant of June 8th.

(Admitted in evidence and marked Ex. P34.)

Mr. Skinner: I offer this letter produced by the defendant of June 16th.

(Admitted in evidence and marked Ex. P35.)

Mr. Skinner: I offer this letter produced by the defendant of June 29th.

(Admitted in evidence and marked Ex. P36.)

Mr. Skinner: I offer this letter produced by the defendant of July 6th.

(Admitted in evidence and marked Ex. P37.)

(Ex. P34 read to the jury.)

Q. After that date did you get any joints from this concern?

A. No, sir.

Q. Had you at that time arranged with the inspector of laboratories to call and inspect as your letter here said?

A. Yes, sir.

Q. This says, "I understand from you that you would be ready for this test by the earliest part of ~~August~~ next week." Who had told you they would be ready for that test?

A. Mr. Howell.

Q. How long before?

A. A day or two.

Q. This was June 8th. You say a day or two before that Mr. Howell had said they would be ready for testing. Did you at any time agree with them on the increased price that he had proposed?

A. No sir.

Q. Or say that you would pay the increased price or anything of that kind?

A. No, sir.

Q. Did you at any time tell them that the old contract was regarded by you as rescinded?

A. I did not.

Q. When you told Mr. Howell that you would be perfectly willing to accept the joints made of the black material, as in the first, did he say anything as to whether they would make it of that material or whether they would make it of the white or which they would use?

A. Not to my recollection.

Q. Were these tests that are spoken of in this letter tests that were to be had of the joints as per samples of the black material or the white joints?

A. That I can't answer as I didn't see the material.

Q. You don't know? A. Not directly.

Q. Before this letter of June had you not had the telephone conversation in which he had said that he couldn't or would not make the joints?

A. Yes, sir.

Q. What reason did you have for thinking they had reconsidered that attitude and we are going to make them?

A. I believe I received a letter from Mr. Howell, several letters.

Q. I show you a letter of June 7, 1916, from the Hemming Company to you. Did you receive that?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P38.)

Mr. Skinner: The letter of June 8th already offered and marked Exhibit P34, appears to be in answer of this letter of June 27th. I didn't read that letter except part of it and now I turn back to it (Ex. P34 read to the jury).

Q. Do you recall whether there was a reply to that?

A. I believe there was.

Q. I show you a letter of June 14th from the Hemming people to you. Is that the one you just referred to?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P39.)

(Ex. P39 read to the jury.)

Q. Did they ever advise you that they were ready for the Underwriters inspection?

A. No, sir.

Q. Did they ever tell you any time after that?

A. No, sir.

Q. Did you do what you could after that or what did you do towards reducing your liability or getting cancellation of contract?

A. I have individually gone to each customer where I have had goods sold and endeavor to have them cancel. Some of the orders I have secured written cancellation of.

Q. What orders did you procure cancellation of?

A. The order of W. R. Ostrander & Company, the order of the Peerless Light Company.

Q. Take the Ostrander order, you procured cancellation how?

A. Without obligation in that case.

Q. Without what?

Q. Without payment.

Q. They simply cancelled as a matter of grace?

A. They did. They are personal friends of mine.

Q. What other cancellation did you get?

A. The Peerless Light Company.

Q. Do you remember the amount of the Ostrander order?

A. 125,000 pieces.

Q. The next was what?

A. Peerless Light Company.

Q. You got a cancellation there?

A. One of their orders, there were two, I secured cancellation on without obligation. The first order they had considerable of the material sold and I pleaded mercy with them and they figured what they would take for it and finally accepted a very small sum.

Q. How much?

A. $150.

Q. The first order they cancelled without obligation was how many?

A. 100,000 pieces.

Q. And then for the other, how much was the order they cancelled for $150?

A. That was 100,000 also.

Q. Any others that you could get a cancellation of?

A. Not to my recollection. I don't think there are any others cancelled.

Mr. Skinner: I offer this check.

Q. Did you give that check to the Peerless Light Company?

A. I did.

Mr. Skinner: Check of October 5, 1916, to the order of the Peerless Light Company for $150.

(Admitted in evidence and marked Ex. P40.)

Q. Had you sent any orders to the Hemming people for as many of these joints as you had yourself obtained orders for from outside customers?

Mr. Whitehead: I object to that. The orders have been proved and admitted in evidence.

Q. If you got orders from your outside customers were they by word of mouth or in writing?

A. In writing.

Mr. Whitehead: I don't see that they are relevant at all. They are not going into the question of damages. They don't prove anything unless they go to the question of damages. I don't see they are relevant for any reason.

The Court: I will allow them.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, I show you this letter of October 8, 1915, from the Bailey Electrical Supply Company. Is that one of the orders that you obtained?

A. Yes, sir.

Q. And from whom did you obtain it? A. Mr.

L. V. Bailey, the president of the company or owner of the company.

Q. Does this go with it? A. Those specifications on that order.

Q. This other paper, the second paper I show you. Are the specifications on that order a different date, October 14, 1915, did it come at a different date?

A. Yes, sir.

Mr. Skinner: I offer them.

Mr. Whitehead: I object to the admission of them on the ground they are irrelevant and also hearsay.

The Court: Objection overruled.

(Admitted in evidence and marked Ex. P42.)

Q. I show you what I think would be an order dated October 14, 1914, signed Halloway Bentz Company, per Bentz. Is that another order?

A. Yes, sir.

Q. From whom?

A. Mr. Bentz, personally.

Q. What Mr. Bentz is that?

A. The proprietor of this concern.

Mr. Skinner: That is for 5000 joints. I offer it.

Mr. Whitehead: Objected to.

The Court: Objection overruled.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Admitted in evidence and marked Ex. P42.)

Q. Another of October 15, 1915, signed G. & G. Electrical Supply Company. Did you get that order?

A. Yes, sir.

Q. Who is this Mr. Goffer?

A. He is a stockholder. I don't know what his office is, but he is the buyer for that company.

Q. And this was an order for 6000 of these joints?

A. Yes, sir.

Mr. Skinner: I offer that.

Mr. Whitehead: Objected to.

The Court: Objection overruled.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Admitted in evidence and marked Ex. P43.)

Q. Here is an order from the Peerless Light Company. Did you get that order?

A. Yes, sir.

Q. Dated, February 16, 1916, for 1000?

A. Yes, sir.

Q. Of these joints. These orders in every case give the price?

A. Yes, sir.

Mr. Skinner: I offer this in evidence.

Mr. Whitehead: Objected to.

The Court: Objection overruled.

Counsel for defendant prays an exception to the ruling of this Court.

Exception noted as ground of appeal.

(Admitted in evidence and marked Ex. P44.)

Q. Letter of April 25, 1916, from the Peerless Light Company to you. Did you receive that letter?

A. Yes, sir.

Q. In this letter they ask you to enter their order for 100,000 more. Did you enter it?

A. I did.

Q. Did you do anything in the way of acceptance of it?

A. Verbally accepted by me in their store.

Q. And this other paper of April 25th, their letter to you, looks like specifications. Did they come with this last order?

A. No, that was mailed.

Q. Came separately?

A. Yes, sir.

Q. That doesn't have anything to do with us.

Mr. Skinner: I offer this order of April 25th.

Mr. Whitehead: Objected to.

The Court: Objection overruled.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Admitted in evidence and marked Ex. P45.)

Q. I show you a letter or an order, dated May 2, 1916, from the Bailey Electrical Supply Company. Did you get that order?

A. Yes, sir.

Q. For insulating joints, these joints?

A. Yes, sir.

Q. 100,000 of them?

A. Yes, sir.

Mr. Skinner: I offer it.

Mr. Whitehead: Objected to.

The Court: Objection overruled.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Admitted in evidence and marked Ex. P46.)

Q. This one of May 2, 1916, from W. R. Ostrander Company, for 125,000. Did you get that order?

A. Yes, sir.

Q. From that company?

A. Yes, sir.

Mr. Skinner: I offer it.

(Admitted in evidence and marked Ex. P47.)

Q. Is that all? A. A total of 448,000. The figures are somewhat off, but you mention 450,000.

Q. Never mind the total. Are there any other individual orders that you recall that we haven't produced here?

A. I believe you have them all.

Q. What was the MacAllen Insulating joint, what was it?

A. That is the only other insulating joint which is being commercially manufactured in this country today.

Q. Is there any other joint that you could have procured in substitution for this joint which the Hemming people were to furnish than the MacAllen one?

A. Not to my knowledge.

Q. Does the MacAllen Company manufacture joints for other people and put the other dealer's name on?

A. They do.

Q. So there may be some other joints on the market with some other name than the MacAllen joint?

A. Yes, sir.

Q. But they are all made by the MacAllen people?

A. To the best of my knowledge.

Q. Do you know whether the market price of these MacAllen joints have changed at all from the time you made your contract with the Hemming people?

A. It had changed.

Q. How?

A. Had raised considerably.

Q. Do you know what the MacAllen joints could be gotten for in the market on or about June 1, 1916?

A. If I had been on their distribution list at that time I could have enjoyed a discount of fifty-five per cent. from the list price of thirty-six cents.

Q. For what, one or a thousand?

A. One joint, thirty-six cents each less a discount of fifty-five per cent.

Q. If you had been on their distributor's list. Were you?

A. No, sir.

Q. Could you get on that list?

A. No, sir.

Q. Why not?

A. Because they already had distributed in my district.

Q. Let me see if I understand that. You say you could have gotten it then at the price of thirty-six cents for one joint less the discount of fifty-five per cent.?

A. Yes, sir.

Q. You are used to it and you can tell us what that would have been that price?

A. In the neighborhood of fifteen cents each.

Q. When you say in the neighborhood, would it

have been less than fifteen or more? A. A little under.

Q. What was the contract price for these with the Hemming people, the joints that you were going to get from the Hemming people, what would they have cost you?

A. Under six cents.

Q. How do you figure that?

A. Hemming's price to me under their contract of $30 per thousand.

Q. That is three cents apiece, the cost of the outside shell?

A. Steel shell which amounted to $15.85 per thousand.

Q. That makes $45.85 a thousand. Go on.

A. The cost of the malleable iron insert, which would be $9.50 a thousand for two inserts for each joint.

Q. That is $9.50 added to $45.85?

A. The pasteboard boxes which cost $9.25 per thousand and there were ten joints packed to each box, so that the cost would be reckoned there 92 cents per thousand. The labels for the fronts of the boxes cost 80 cents a thousand, so there would be a charge of eight cents there and in addition fifty cents per thousand for the Underwriters labels.

Q. You would have had to pay freight, of course, upon the part that you supplied to the Hemming people. That would have been an added element of cost?

A. Yes, sir.

Q. Am I correct in this that the steel shell, outer shells, were to come from the General Pressed Metal Company at Philadelphia?

A. Yes, sir.

Q. And the nipples from the Grabler Company at Cleveland, Ohio?

A. Yes, sir.

Mr. Skinner: It is agreed upon the record that the freight rate upon the shells from Philadelphia would have been 12.6 cents per hundred pounds and the freight rate upon the nipples or insert from Cleveland to Garfield would have been 21.1 cents per hundred pounds.

Q. In order to get that to a basis of a thousand, can you tell us how many thousand shells there would have been in a hundred pounds?

A. 100 pounds to the thousand.

Q. Does that mean ten to a pound?

A. Yes, one 1.6 ounces each or 10 to the pound.

Q. Then, have you figured what the freight would be on a thousand shells if there were a thousand to the hundred pounds? If a hundred pounds cost 1.26 we have to divide that among these thousands or we have to apply that to the thousands?

A. 12.6, yes, sir.

Q. How many would there be of the nipples to the hundred pounds?

A. Requires 2000 nipples to a thousand insulating joints and these 2000 nipples would weigh 117.61.

Q. How much would that add to the cost per thousand?

A. 27.1 cents.

Q. Some of these orders, perhaps only one of them, testified that the goods were sold, one that you exhibited, were sold by you on the terms that it was f. o. b. New York or Chicago. That was the case of the Peerless Light Company. I suppose that meant, did it not, that they had the option of directing whether it be shipped to Chi-

cago or New York and wherever they directed you had to send it without any added charge for the increased freight rate?

A. Yes, sir.

Q. I don't suppose you know how many of those would have been called for to go to Chicago?

A. No, sir, I do not.

Q. Is a representative of the Peerless Light Company here?

A. Yes, sir.

Mr. Skinner: May we put upon the record that it is also agreed that the freight rate from Garfield to Chicago on the finished article would be 52.2 cents a hundred pounds? We will also put upon the record as part of the same agreement that it is agreed that in the absence of anything in the contract specifying whether the goods, where the goods are to be delivered, that by trade usage applicable to this kind of article the terms are understood to be f. o. b. New York and that the freight rate from Garfield to New York would be 8.04 cents per hundred.

It is further understood and stipulated for the purpose of this case that it is the fact under trade usage that if the customer, Mr. McDowell's customer, was entitled to have the goods delivered at New York; that is, the terms of the order were f. o. b. New York and were to give shipping instructions to McDowell that they be sent to Chicago to the buyer's own customer, then the buyer would be entitled to an allowance from McDowell of the difference between the freight rate from Garfield to Chicago or to whatever the point might be of shipping and from New York and

the same place not exceeding the freight rate from Garfield to New York of 8.04 cents per hundred.

Q. Did you make any settlement with any of the persons with whom you had ordered these metal parts, and so on?

A. I did.

Q. What settlement did you make?

A. Made settlement with the Grabler Manufacturing Company of Cleveland, and with the General Pressed Metal Company of Philadelphia.

Q. What was the settlement in each case?

A. The Grabler Manufacturing Company, they canceled the order and scrapped such material as they had made up for the consideration of $380. In the case of the General Pressed Metal Company they had on hand this steel, 60 gauge, four-inch stripped steel that they had purchased for the purpose of these shells and I was compelled to go in the open market and sell this material at such price as I could get for it and to find a customer and incurred a loss of some $242. I paid the General Pressed Metal Company their purchase price for the steel, ~~which required no loss of profit of me~~ and was not required to pay them any loss of profit.

Mr. Skinner: Is there any requirement of the defense that we give any further proof of this settlement with the Grabler Company of $380 or will it be conceded that was a reasonable settlement of liability, if it is admissible and subject to any objection you may have as to it? Do we have to go to the length of trying to show that was a reasonable settlement?

Mr. Whitehead: The check is dated October 20, 1916, which is three months after this

suit was started. It seems to me a settlement made of that kind to which we were not parties, of which we had no knowledge, can't be binding upon us in any way unless all the circumstances connected with it are shown.

The Court: They must show it then.

Mr. Skinner: Witness withdrawn.

BENJAMIN H. HOWELL, sworn in behalf of plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Howell, you are the president of the defendant company?

A. I am.

Q. Been in the business for how long?

A. Eight years.

Q. You have heard the testimony as to Mr. McDowell's arrangement with the Grabler Manufacturing Company, his contract for 200,000 nipples or inserts for these insulating joints and that they had made up 50,000 and that his settlement with them by which he paid $380 and they kept the 50,000 inserts. Does your experience in the business qualify you to criticise that settlement?

A. No.

Q. It does not? A. My own personal experience, no.

Adjourned to Wednesday, January 10, 1917.

SECOND DAY.

Wednesday, January 10, 1917.

Met pursuant to adjournment.
Present, counsel as before stated.

EZRA O. McDOWELL, recalled in his own behalf.

Further Redirect Examination by Mr. Skinner:

Mr. Skinner: It is further agreed between Mr. Whitehead and me that this $380 payment was a reasonable adjustment without waiving in any way their right to object to its allowance on any other ground.

Mr. Whitehead: We do that to save the time of the Court.

The Court: But not admitting it is a proper charge for which you are liable.

Mr. Whitehead: No, sir.

The Court: If it is a proper charge that is the amount?

Mr. Whitehead: Yes.

Mr. Skinner: I offer this check of McDowell's to the Grabler Manufacturing Company.

(Admitted in evidence and marked Ex. P48.)

Q. I show you two bills, possibly they are orders, on the Grabler Manufacturing Company. What were they for?

A. Those were invoices to me for malleable iron inserts forwarded to the Hemming Manufacturing Company.

Q. For these joints?

A. Yes, sir.

Q. This check of June 14th, drawn by you to the order of the Grabler Manufacturing Company. Is that in payment of those two bills?

A. Yes, sir.

Q. And you sent that check and it was paid that way?

A. Yes, sir.

Mr. Skinner: I offer the two invoices and the check.

(Admitted in evidence and marked Ex. P49.)

Q. I show you letter from yourself to the Grabler Manufacturing Company, February 17, 1916. Did you send that to them?

A. I did.

Q. Then, another one from you to the same parties, February 21, 1916. Did you send that?

A. Yes, sir.

Q. That says, "I am inclosing you herewith my order," and so forth. Is that other sheet marked order sheet the one referred to in that letter?

A. Yes, sir.

Q. How did this get back to your possession if they were sent by you?

A. By direct request of the Grabler Manufacturing Company that they be returned.

Q. Were they not produced at some examination of the rights of the Grabler Company?

A. They were.

Mr. Skinner: I offer them.

(Admitted in evidence and marked Ex. P50.)

Q. Did you have any further disbursements in connection with this matter?

A. Yes, sir. Small printing bills for labels, shipping tags, letterheads.

Q. Items of the cost to you?

A. Yes, sir.

Q. On joints that were to be obtained from the defendant?

A. Yes, sir.

Q. Here is a bill for labels, $8.40, dated December 15, 1915. Did you pay that?

A. Yes, sir.

Q. Here is another one, without saying what it is for, which shows additional items of $5.75. Did you pay that?

A. Yes, sir, but all of those are not applicable. The item of $3.75 is all that would apply.

Q. How about the $8.40, dosen't that apply?

A. If you take that statement and read these two invoices you have the items.

Q. Give them to me. $8.40 and $3.75 and they were expenditures in connection with these labels?

A. Yes, sir.

Q. And you paid them?

A. Yes, sir.

Mr. Skinner: I offer them in evidence.

(Admitted in evidence and marked Ex. P51.)

Q. I think you told us something about your settlement with the General Pressed Metal Company. I show you now—I want to make that more specific. I show you check for $569.25, dated July 15, 1916, drawn to the order of the General Pressed Metal Company, and another one of the date of July 28, 1916, for $18.11. Were those sums the money paid by you to the company?

A. They were.

Q. And by these checks?

A. And by those checks.

Q. What for?

A. For some 11,800 pounds approximately of

steel which they had purchased for the manufacture of these shells.

Q. Do you mean by that that you paid that for 11,000 pounds of steel? How much would that be a pound?

A. $4.95 a pound plus the charge of hauling in and out without any profit.

Q. Did you make any adjustment with the General Pressed Metal Company of any claim by them against you for damages?

A. They made no such claim and it was cancelled.

Q. So that you procured cancellation of that without expense?

A. I did.

Q. This is for the extra material that you purchased?

A. The extra material which I purchased.

Q. That material, what did you do with that?

A. Sold it to the Chelton Electrical Company, Philadelphia.

Q. For how much?

A. I would have to see the records for that.

Q. Look through these papers and see if they will refresh your memory. Do you find it?

A. Yes, sir, three cents a pound less cartage.

By the court:

Q. What is the amount of it?

A. Invoice of $8.55 for excess of 285 pounds which I figured in original shipment. Original shipment was 11,500 pounds, amounted to $345, makes a total of $353.55 less a cartage charge of $11. Their check to me was $342.55.

Q. And that is what you paid for the material that you had bought?

A. Yes, sir.

Mr. Skinner: I offer these checks made payable to the General Pressed Metal Company.

(Admitted in evidence and marked Ex. P52.)

Q. I show you two checks from yourself to the General Pressed Metal Company, dated May 18, 1916, and May 20, 1916, invoices. What were they for?

A. Invoice of May 18th was for parts furnished the Hemming Manufacturing Company. The invoice of April 22d was for 218 shells furnished to the Hemming Manufacturing Company.

Q. And the amount $16?

A. $16.

Q. And the other was $85?

A. $85.

Q. And these two checks for $85 and $16 were in payment of these bills?

A. They were.

Mr. Skinner: I offer them.

(Admitted in evidence and marked Ex. P53.)

Q. You spoke in your former examination of paying something to the Underwriters Laboratories Company for labels. I show you check of February 18th, I think it is 1916, for $12.50. Was that such a payment?

A. It was.

Q. I think you spoke of sharing some cost. Was this shared?

A. It wasn't.

Q. By the defendant company?

A. It wasn't.

Mr. Skinner: I offer this check and a letter or a copy of a letter from McDowell to the

Underwriters Laboratory Company, "Inclosed please find my check," explaining this check I have just shown for $12.50.

(Admitted in evidence and marked Ex. P54.)

Mr. Skinner: I offer this letter of July 8, 1916, from McDowell to the Hemming Manufacturing Company.

(Admitted in evidence and marked Ex. P55.)

(Ex. P55 read to the jury.)

Mr. Skinner: I want to put in now a letter of May 22, 1916, from the Hemming Company to McDowell.

(Admitted in evidence and marked Ex. P56.)

(Ex. P56 read to the jury.)

Mr. Skinner: I also offer a letter from the Hemming Company to McDowell, dated July 7, 1916.

(Admitted in evidence and marked Ex. P57.)

(Ex. P57 read to the jury.)

Q. The date of this letter I have just read of July 7, 1916, ~~under~~ after that date did you have any deliveries from this company?

A. I did not.

Q. Did you have any promise of deliveries of any definite sum?

A. Not that I remember.

Re-cross-examination by Mr. Whitehead:

Q. Mr. McDowell, when did you start this suit?

The Court: The record will show.

Q. What I mean is, when did you direct the suit to be started?

A. I can't fix that date. It was after our correspondence.

Q. Was it in the month of July?

A. July or August.

Q. 1916?

A. Yes, sir.

Q. How long have you been in business?

A. Ten years.

Q. Have you been in the same line of business continuously during the ten years?

A. Yes, sir.

Q. That you said yesterday was the handling of electrical devices?

A. Yes, sir.

Q. What nature, electricl devices of what nature?

A. I have a line of brass shell sockets. Do you want me to go into detail?

Q. No, just in a general way; line of brass shell sockets?

A. Full line.

Q. Sockets for what use, fixtures?

A. Used by the fixture trade and electrical jobbers.

Q. You have been handling this for ten years?

A. About eight years.

Q. What else?

A. Line of porcelain insulators.

Q. How long have you been handling those?

A. Ten years.

Q. What else?

A. Line of push button switches for switches.

Q. And how long have you been handling those?

A. Seven years.

Q. The goods that you handled are kindred goods in the same general classification as those you mentioned?

A. Yes, sir. I have handled insulating joints.

Q. When did you handle those?

A. About 1910 as sales agent for the James Company in Newark, James Insulating Joint Company.

Q. How long did you continue to handle those?

A. I think that company was sold to the Trumble Electrical Company.

Q. Did you represent Trumble?

A. I did not. Trumble had their own agent.

Q. How many years were you working for the James people?

A. The James Company only lasted a short while. Mr. James died.

Q. By a short while you mean a year or two?

A. I believe the company was in active operation only about six months.

Q. During that time you handled insulating joints?

A. Yes, sir.

Q. Who is Mr. Noad, that you referred to in your direct testimony?

A. He is a gentleman in the employ of Watlington Company of London.

Q. A friend of yours?

A. Yes, sir.

Q. You say he first spoke of this particular joint proposition to you?

A. Yes, sir.

Q. Do you recall the circumstances?

A. I do.

Q. State the circumstances.

A. Mr. Knight made a trip to Trenton to one of my factories in Trenton.

Q. One of your factories?

A. A factory that I represent. They had a model of an insulating joint they were attempt-

ing to manufacture on the desk and he suggested to me he had friends that were making insulation material and he believed that they could manufacture it to much better advantage for me than the people in Trenton and suggested the trip in order to introduce me to those friends.

Q. Did he do that?

A. He did.

Q. How long after that?

A. Within a week.

Q. About what time was that?

A. Summer of 1915. I can't just give you the exact day.

Q. Probably some time around July, August, June?

A. Yes.

Q. You can't fix——

A. I can't fix the date.

Q. You can't fix it even by the month?

A. No, sir.

Q. It was some time in the summer of 1915?

A. Yes, sir.

Q. Did Mr. Knight come out to the Hemming Manufacturing Company with you?

A. He did.

Q. And introduced you?

A. He did.

Q. Whom did you meet at that time?

A. Mr. Howell and Mr. Hemming.

Q. Had you ever met Mr. Hemming before?

A. I had not.

Q. What was the conversation at that time?

A. Mr. Knight introduced me and stated I was in the selling business and interested in insulating joints. I can't state whether it was Mr. Howell or Mr. Hemming talking, but they stated they had experimented in insulating joints and they

represented it would pass the Underwriters test.

Q. What they represented would pass the Underwriters test, do you want to say that?

A. Yes, sir.

By the Court:

Q. What did they say?

A. They stated there had been tests made on the samples which they had made.

By Mr. Whitehead:

Q. Did they show you any reports from those tests?

A. They did not.

Q. Did they state anything as to the results of those tests?

A. They stated they were satisfactory.

Q. What tests did they say had been made, factory tests or tests by the Underwriters Laboratories or what?

A. They stated the tests had been made by Trumble. His name was mentioned on their joints, samples that had been made in the Hemming plant.

Q. Did they show you a sample?

A. They showed me a sample of a joint, yes, sir.

Q. Was this it? Was it like that?

A. I don't think so.

Q. It wasn't like that?

A. They gave me a half section, which is in evidence. I don't know that I saw a full sample.

Q. The half section that is in evidence is what they showed you at that time?

A. Yes, sir.

Q. That time then you say they said that

New Jersey State Library

Trumble had made some tests of the joints, is that right?

A. One of their employees had tested with Trumble.

The Court: You mean P2 was shown to him at that time?

Mr. Whitehead: Yes, sir.

Q. What did you say, then, to Mr. Howell and Mr. Hemmings?

A. Said that if they had a joint which could be manufactured and approved I would be very much interested in making an arrangement for the sale of it.

Q. Didn't they tell you at that time that the proposition was experimental?

A. No.

Q. They didn't tell you, did they, that the joint was one that had already passed the Underwriters Laboratories inspection?

A. They did not.

Q. Didn't you distinctly understand it hadn't passed such inspection?

A. I did.

Q. Your familiarity with insulating joints was such that you knew it would have to pass the Underwriters Laboratory before it would be useful?

A. Of course.

Q. It is true, is it not, that the Underwriters Laboratory label must be fixed to each joint?

A. That is correct.

Q. Before it is salable in the market?

A. Yes, sir.

Q. You knew that no such test had been made upon the joint, did you not?

A. I did.

Q. What next did you do with the company or

with the officers of the company in reference to the matter?

A. I can't state what was the next move. I made further calls out there and subsequently entered into a contract.

Q. Prior to the making of the contract you worked with them, did you not, to try to get together a joint that would pass the Underwriters Laboratory, is that true?

A. No, I would not say that was true.

Q. Didn't you make investigations with regard to the securing of shells and nipples at that time?

A. I don't think that came until later.

Q. I show you letter dated July 28, 1915, written to the Hemming Manufacturing Company. Is that your letter?

A. Yes, sir.

Q. Will you just examine that letter? Doesn't that relate to the subject matter of this contract?

Mr. Whitehead: I would like to offer that in evidence.

The Court: Mark it for identification.

(Marked D1 for identification.)

Q. There is a letter written July 31 to the Hemming Manufacturing Company. Was that letter written under your instruction?

A. Yes, sir.

Q. Does that relate to the subject matter of this suit?

A. Yes, sir.

(Marked D2 for identification.)

Q. That one is your letter, August 4, 1915?

A. Yes.

(Marked D3 for identification.)

Q. August 5, 1915?
A. Yes.

(Marked D4 for identification.)

Q. August 11, 1915?
A. Yes.

(Marked D5 for identification.)

Q. August 12, 1915?
A. Yes.

(Marked D6 for identification.)

Q. August 17, 1915?
A. Yes, sir.

(Marked D7 for identification.)

Q. August 19, 1915?
A. Yes, sir.

(Marked D7 for identification.)

Q. September 13, 1915?
A. Yes, sir.

(Marked D8 for identification.)

Q. Any of those letters refer to the subject matter of the suit?
A. Yes, sir.

Mr. Whitehead: I would like to have this letter marked for identification from the Hemming Manufacturing Company to McDowell, dated July 19, 1915.

(Marked D9 for identification.)

Mr. Whitehead: And letter of July 20, 1915.

(Marked D10 for identification.)

Mr. Whitehead: And letter of August 4, 1915.

(Marked D11 for identification.)

Mr. Whitehead: And letter of August 20, 1915.

(Marked D12 for identification.)

Q. After seeing that correspondence you wish to change your statement you made a moment ago?

A. I said I didn't think I had at that time.

Q. How do you think now?

A. I am sure I took it up earlier.

Q. You took it up through the month of July, August and September, 1915?

A. Yes, sir.

Q. After taking it up what did you do?

A. Assisted them in getting prices on the material which they contemplated using.

Q. What else?

A. Communicated with the Underwriters requesting their printed matter on the method of tests and arranged an engagement for the representatives of the Hemming Company and myself to go to the Laboratories and have the tests made.

Q. You were working right with the Hemming people in an effort to get together something in the line of a joint that would pass the tests and be a marketable article?

A. Yes, sir.

Q. How did that joint differ from joints that were then in the market with which you were familiar?

A. It was a little larger than the Standard MacAllen joint and it was smaller than a joint which was then on the market known as the Yost joint.

Q. Was there any other distinguishing mark aside from the size?

A. Not in the finished product, that I remember.

Q. It was different in process of manufacture from any other joint?

A. That I don't know. I do not know MacAllen's process of manufacture, nor do I know of the Yost other than by hearsay.

Q. You handled them, didn't you?

A. I had handled the James joint which was made in a process very similar to the joint which the Hemming Manufacturing Company contemplated making.

Q. You did know how the James joint was made?

A. I did.

Q. Do you know how this joint was made?

A. I never saw any of them made, but I have a fairly good idea.

Q. Will you state to the jury what the process was?

A. It was pressed in hydraulic presses.

Q. Little more in detail than that.

A. I don't think I am competent to testify on that. I never saw them pressed.

Q. You know that the proposition was to press those inserts into the insulating material all in one process?

A. I did not.

Q. Did you not know that the shells required to be constructed in a certain way in order to stand that pressure?

A. I know there were changes made in the specifications of the shells and would believe that was so.

Q. You knew that was the reason? A. I believe so.

Mr. Skinner: Not what you believe, what you did know at that time.

A. I did not know.

The Court: I would like to know whether you are referring to some other shell or this particular shell?

Mr. Whitehead: I am asking him about this particular shell and we might refer to the shell indicated by Exhibit P2.

Q. Did you undertsand that the nipples or inserts had to be of a certain quality and kind of manufacture in order to stand the process that they were to go through?

A. I didn't know the qualities they had to contain. I was furnished with a blueprint.

Q. Didn't you come out, weren't you at the company's plant quite frequently during the summer and fall of 1915?

A. Yes, sir.

Q. A good many times, weren't you?

A. Yes, sir.

Q. Didn't you meet Mr. Hemming and Mr. Wilde there?

A. Yes, sir.

Q. And it was your custom to go right down into the plant, into the buildings where the actual manufacturing was being done, was it not, with them?

A. I did on several occasions, yes, sir.

Q. What did you do that for?

A. The time that I spent, the most, the longest visit I paid down at the plant was when we made tests.

Q. When was that?

A. The first test that I was present at was held

shortly after the making of the contract at the plant.

Q. Shortly after the making of the contract and that test was at the company's plant?

A. Yes, sir.

Q. What did that test show?

A. It showed the joints to be satisfactory in accordance with the standards which we had then procured.

Q. In conformity with what standard was that test made?

A. The Underwriters Laboratory.

Q. Did you see the tests made?

A. I did.

Q. What did the test consist of?

A. Tortional and bending tests.

Q. Is that all?

A. Yes, sir.

Q. You knew, did you not, that the joint had been submitted to the Underwriters Laboratory for their testing in September, 1915?

A. Yes, sir.

Q. You knew what report they had made?

A. I did.

Q. What they had done with the joints in September, 1915?

A. I did.

Q. That report, I think, is in evidence.

Mr. Skinner: Letter of September 10th.

Q. Was there any other report that you knew of from the Underwriters Laboratories subsequent to that report and prior to the report of February, 1916, to which you have testified?

A. Do you ask whether there was any other report of the Underwriters other than the September 10th report?

Q. After that and before February, 1916.

A. There was no other report to my knowledge.

Q. Then, so far as you know, the Underwriters Laboratory never approved the joint of which P2 is a specimen?

A. The Underwriters did approve of a joint in so far as they went in the September test and requested that a factory test on that joint be made for approval for the using of label service.

Q. You didn't consider the report of September 10, 1916, an approval of the joint, did you?

A. It was an approval in so far as that test could be.

Q. Isn't it true that that report stated that there were additional tests that must be made before they can pass the joint?

A. He said certain changes in the test might be made and suggested that those changes might be made to better advantage when the final inspection was made at the factory and that they could at that time inspect the testing apparatus of the Hemming plant and do the job all at once.

Q. So, your understanding of it was that there were certain other things additional to be done before the Underwriters Laboratory would put the stamp of their approval on this joint, is that right?

A. Other things consisted——

Q. Is that not right?

A. Yes, there were other things.

Q. And matters stood just in that condition when you entered into this contract in August, 1915, didn't they?

A. They did.

Q. So that when you made the contract of October 13, 1915, in which you specified, in which it was specified that the contract related to joints,

samples of which have been submitted to the Underwriters Laboratories, you knew at that time that those samples hadn't been approved finally by the Underwriters Laboratory?

A. A final approval could not have been made.

Q. Isn't that so?

A. No, not as you said.

Q. All right. State it.

A. To obtain an approval from the Underwriters Laboratory it is necessary to have tests made in their laboratory and a further test at the actual place of manufacture. The test at the Laboratories had been made and found satisfactory and it was up to the Hemming Manufacturing Company to have their testing apparatus ready for the final test.

Q. You know this report in evidence, the report of the Underwriters Laboratory of September 10th (Ex. P1 read). You read that letter?

A. Yes, sir.

Q. You sent a copy of it out to the Hemming Manufacturing Company?

A. Yes, sir.

Q. You knew what was in that letter. When you sent that out to the Hemming Manufacturing Company in September, 1915, you knew that wasn't a final approval of the joints?

A. I did, as I have stated.

Q. That is the way the matter stood when you made your contract of October 3, 1915?

A. That is the way the matter stood, yes, sir.

Q. After you had made your contract of October, 1915, what did you do about the Underwriters Laboratory and their examination of this sample, did you follow it up?

A. Kept writing the Hemming Manufacturing Company asking them to hurry through this ap-

paratus and to be ordered for the inspection which the Underwriters Laboratory had asked for in their letter of September 10th.

Q. Did you go to the Underwriters Laboratory in an effort to obtain a final conclusion from them on this sample?

A. I did not. I knew they couldn't hurry the case. This must be a factory test.

Q. This doesn't say so, Exhibit P1, that doesn't say so?

A. I was inconsistent with the Underwriters letters on many other matters. Every few days it may have been that that was entered by me in personal conversation with them. I thought it was contained in that letter.

Mr. Skinner: It is contained in that letter. (Ex. P1 read.)

Mr. Whitehead: I withdraw anything I have said that is inconsistent with the whole of the letter.

Q. Did you apply to the Underwriters Laboratory to make those additional tests?

A. I did not.

Q. Why didn't you?

A. Because the Hemming Manufacturing Company had notified me they were prepared with their testing apparatus and ready for the test.

Q. You had come out to the plant after the test of October, 1915, was made?

A. Yes, sir.

Q. You talked with Mr. Hemming, with Mr. Walker, didn't you?

Q. Yes, sir.

Q. Didn't they say anything to you with regard to the condition of the joints, with respect to tests made?

A. Stated they were making progress on that proposition, there had been considerable delay in getting a testing apparatus ready. I had looked after that for them to an extent.

Q. You had helped with that? A. I had.

Q. That was subsequent to the making of the contract?

A. I can't swear as to the dates.

Q. You had aided them in getting their testing apparatus installed?

A. I had, in procuring it.

Q. Who paid for that? A. Hemming Manufacturing Company.

Q. Well, now, in February, 1916, there were other samples submitted to the Underwriters Laboratory for inspection?

A. No, sir.

Q. But the Underwriters Laboratory made tests, didn't they?

A. At the Hemming Manufacturing Company's plant on their testing apparatus.

Q. They made none in their own laboratories after February, 1910?

A. They did not.

Q. You are sure about that?

A. Positive.

Q. How do you know?

A. I wasn't there at the laboratories all the time, but Mr. Slack, the engineer, would have told me if there had been any sample submitted on an article that I was interested in when I wasn't present.

Q. Tests were made in February, 1916, at the company's plant in Garfield?

A. Yes, sir.

Q. Didn't you know that the time that elapsed between September, 1915, and February, 1916,

was consumed in working out a joint which would pass the Underwriters test?

A. Part of the time was consumed in getting the testing apparatus and I had felt that they could have pushed the matter a good deal faster if they had been willing to get established.

Q. Were not you during that period working with them in an effort to perfect the proper shells and nipples?

A. The Hemming Manufacturing Company furnished me with blueprints on which I endeavored to submit material for them.

Q. During that time you were endeavoring to procure those metal parts, weren't you?

A. Yes, sir, it was necessary that I purchased for them material which they had specified and which they were to pass on and O. K.'d before I finally had deliveries made to their plant.

Q. That is, you were to furnish not only the material, but you were to furnish to them the completed shell, have the shell ready for the process of manufacturing and the nipples ready for the process of manufacturing and the nipples ready for the insertion of the joints?

A. Yes, sir.

Q. And they furnished you with blueprints for that purpose?

A. Yes, sir.

Q. Had you furnished the shells and nipples?

By the Court:

Q. When did you get the blueprints? A. I received several lots of blueprints. There were changes made.

By Mr. Whitehead:

Q. When did you receive the first blueprint?

A. I can't state that without seeing the dates. I believe they are in evidence.

Mr. Skinner: The one that is in evidence accompanies a letter of October 23, 1915, Exhibit P10.

Q. What were those blueprints of?

A. Malleable iron insert and shell.

Q. You received them on October 23, 1915. Did you purchase those metal parts, did you get them?

A. I didn't purchase those. They were ordered changed. I got prices on the material specified.

Q. When were they ordered changed?

A. I can't testify to that date.

Q. Haven't you any idea?

A. Prior to February. If you will show me a paper in evidence, my bill from the General Pressed Metal Company for a die, it will refresh my memory.

The Court: That is Exhibit P53.

A. I can now state that I received additional blueprints in the month of February or March.

Q. 1916?

A. Yes, sir.

Q. What were you doing in the meantime? You had the original blueprint in October, 1915, and then you say you got changes in February or March, 1916. What were you doing in the meantime about getting these metal parts?

A. There were other changes on there in the interim.

Q. Who ordered those?

A. Hemming Manufacturing Company.

Q. Verbally or by letter?

A. That I can't testify to.

Q. The orders were given to you?

A. Yes, sir.

Q. Do you remember who represented the Hemming Manufacturing Company in these orders?

A. I can't state, but I believe I have in my possession letters from the Hemming Manufacturing Company directed to the General Press Metal Company. This matter was being carried on just after I had decided to purchase from the General Pressed Metal Company the shells. Correspondence was carried on direct between the General Pressed Metal Company and the Hemming Manufacturing Company.

Q. That was by your consent?

A. Yes, sir.

Q. In fact, by your instructions, was it not?

A. By consent.

Q. It was to relieve you?

A. It was.

Q. Then, between October, 1915, and February, 1916, I ask you again what were you doing about getting these shells?

A. Such as I could with the instruction from the Hemming Manufacturing Company and their letters to the people from whom I was to purchase the material.

Q. You didn't actually procure the shells, did you, or the nipples?

A. If you will give me my order.

Q. You can just answer that yes or no.

A. I can't answer that until I see my order from the General Pressed Metal Company.

Q. Now, between October, 1915, and February, 1916, you didn't furnish any shells or nipples, did you?

A. I did not.

Q. To the Hemming Manufacturing Company?

A. I did not.

Q. You say that the reason you didn't do that was because the Hemming Manufacturing Company were changing their instructions or, at least, were dealing with the General Pressed Metal Company direct?

A. Yes, sir.

Q. When the Hemming Manufacturing Company changed their instructions, didn't they tell you why they did it?

A. No.

Q. Didn't you, as a matter of fact, advise with them about it?

A. No.

Q. You knew the insulating market, didn't you, and the insulating joint, you were familiar with it?

A. I would like the question more definite.

Q. You were familiar with the insulating joint, were you not?

A. I was familiar with insulating joints.

Q. As a matter of fact, isn't it true you advised with them as to the proper form anl method of construction of this joint?

A. No, sir.

Q. You just stood perfectly quiet from October, 1915, to February, 1916, and waited for the instructions from the Hemming Manufacturing Company, which kept changing all the time, is that right?

A. It is not.

Q. What is it?

A. My letters in evidence to the Hemming Manufacturing Company will show that I was at all times urging them to get this thing going and allow me to purchase material which they wanted

before the metal market went up. I saw this condition, that we now have, coming and didn't want to get caught in it.

Q. What did you do towards furnishing your metal parts?

A. Urging the Hemming Manufacturing Company to advise me exactly what they wanted.

Q. You say they did. They sent you blueprints, didn't they?

A. And then changed them.

Q. And when they changed them what change did they make of the blueprint of October 15th?

A. I can't tell you that without having blueprints, both blueprints before me.

Q. When did they make it? Here are both blueprints. What was the first change that they made? (Showing witness P10.) What was the first change they made and when did they make it?

A. I can't testify to that. I can tell you what they finally changed to and testify as to the date of the final one.

Q. That was the other blueprint that was furnished you, you said in February or March, 1916?

A. Yes, final change, I have a sample there of the final joint.

Q. You didn't have to let the Hemming Manufacturing Company out of the contract with the General Pressed Metal Company if you didn't want to?

A. I did not. I did that to save time and expedite the manufacturing of the joints.

Q. It helped you?

A. It did.

Q. It was intended to help you?

A. I presume so.

Q. When the joint came up for inspection by the Underwriters Laboratory in February, 1916, was it at no time brought to your attention that it contained an entirely different insulating material from what the joints, represented by Exhibit P2, contained?

A. It had been brought to my attention.

Q. By whom?

A. Mr. Hemming.

Q. It has been very carefully discussed with you, hasn't it?

A. No, sir, I would not say that.

Q. The reason for the change has been stated to you, hasn't it?

A. It has.

Q. And Mr. Hemming had told you that the gummon material, which is in Exhibit P2, was not sufficient for the purpose of the joint, hadn't he?

A. He had stated that in his opinion he could use to better advantage another type of insulation material.

Q. To better advantage, what do you mean by that?

A. He said he could dry the finished product quicker and it would have more mechanical strength.

Q. You testified on your direct examination that he said that the new product would have more mechanical strength. Didn't he tell you, as a matter of fact, the material that had been used in P2 wasn't of sufficient mechanical strength?

A. He did not. I already had the Underwriters suggestion that it was of sufficient strength.

Q. I may ask you if Mr. Hemming didn't tell you that the material used in P2 did not have sufficient mechanical strength?

A. I don't remember that, whether he ever did or not.

Q. But you do remember that he advised you that he was going to use another material because it was of greater mechanical strength, is that right?

A. And would dry quicker.

Q. Have you had any experience at all with insulating material?

A. No, sir. I should answer that differently. I should say I had not had any.

Q. When do you mean?

A. That my relationship with the Hemming Manufacturing Company was the first knowledge I had of insulation material.

Q. As such, of course, you knew the product?

A. I knew the product by sight but not by nature.

Q. This contract that you entered into that is in evidence as P9, who prepared that contract?

A. Mr. Howell drew the final draft.

Q. You drew the first draft, didn't you?

A. I did.

Q. And you brought it out to the mill?

A. I did.

Q. Mr. Howell wanted some part of it changed, didn't he?

A. He did.

Q. For that reason he drew a final draft to accomplish that change, did he not?

A. He did.

Q. Do you recall what that change was?

A. I do not.

Q. Do you not recall the fact that Mr. Howell stated at that time that he wanted the contract to specify precisely the joint that was to be made and that the contract was redrawn in order to accomplish that?

A I don't remember that, no, sir.

Q. You don't remember it?

A. No sir.

Q. Will you say that is not true?

A. No, I can't say that is not true.

Q. You have no memory on why the contract was redrawn?

A. No, sir. I don't remember the changes even.

Q. Do you remember the conversation that took place with regard to it?

A. I can't testify to it, no, sir.

Q. You had prepared the contract yourself originally?

A. I had prepared the original contract.

Q. With some care probably?

A. Yes.

Q. You say now you submitted to changes in that contract?

A. I did.

Q. And you can't remember what they were or any conversation regarding it?

A. I can't.

Q. After the Underwriters tests were made in February, 1916, and you got these new blueprints from Hemming in February or March or April of 1916, you placed an order for some material, didn't you?

A. I did.

Q. I think the evidence shows an order placed with the Grabler Manufacturing Company for 200,000 nipples. Is that right?

A. Yes, sir.

Q. And that order was placed when?

A. I can't tell without seeing the order. The order would consist of my letter to Grabler of February 17, 1916, and my former order sheet of February 21, 1916.

Q. And you ordered those 200,000 nipples from Grabler in February, 1916?

A. Yes, sir.

Q. Did you ever order any other nipples?

A. I did not.

Q. Not from Grabler or from anybody else?

A. No, sir.

Q. What shipments were received on that order, if any?

A. The only statement that I can make on that is Mr. Howell's evidence that they had some 5000 pieces in the plant at Garfield. Those I have never seen.

Q. You refer to the letter in which he sent you a statement of the materials that he had received?

A. That is what I refer to.

Q. Do you know when those were received?

A. No, sir. Mr. Howell's letter stated when they were received.

Q. That is the only evidence you know of?

A. Yes, sir.

Q. And that letter is the only evidence you know of with regard to how many were received?

A. Except that I paid for that number of pieces. I have no direct evidence.

Q. You placed an order for shells?

The Court: 5000 or 2000.

A. 5000.

By Mr. Whitehead:

Q. You placed an order for shells with the General Pressed Metal on April 3, 1916, according to Exhibit P18, is that right?

A. Yes, sir.

Q. Did you order any other shells?

A. I did not.

Q. From anybody else but the General Pressed Metal?

A. No, sir.

By the Court:

Q. How many was that for?

A. 50,000.

By Mr. Whitehead:

Q. While we are on that, how many of those were delivered? You paid on the account by that list?

A. I paid on the account by that list, but wish to state in that connection that I would like to refresh my memory from a letter from the Hemming Manufacturing Company to the General Pressed Metal.

Q. Is it in evidence?

A. I believe it is.

Mr. Skinner: I produce here a copy or what purports to to be a copy, and he says he would like to refresh his memory from that.

Q. The question is, were there any shipments and when of those shells ordered from the General Pressed Metal?

A. I would say about 300 in April. Further than that the evidence of my February invoice to General Pressed Metal Company would be the only direct evidence I have on the subject.

Q. Your oral evidence would show how many?

A. I would have to see it to testify.

Q. It is something like 45,000?

A. No, only a few hundred. That had never been finally approved by the Hemming Manufacing Company for me to ship any.

Q. Then, according to your recollection there was less than a thousand of those shells actually delivered?

A. Only one sample shipment. There was never a stock shipment made of shells. They hadn't been approved by the Hemming Manufacturing Company.

Q. You never ordered any shells from anybody else?

A. I did not.

Q. You never ordered any boxes at all?

A. I did not.

Q. When you say that the shells had not been approved by the Hemming Manufacturing Company you have testified to two sets of blueprints. Were there further blueprints than those?

A. I believe there were. Without further proof I myself furnished to the Hemming Manufacturing Company a sample which they had pronounced satisfactory and on which I could deliver material.

Q. Did you do that?

A. I submitted samples.

Q. Were they approved?

A. They were not.

Q. Wasn't the reason why they were not stated to you?

A. I have never had an explanation of that.

Q. And over all that time you never required an explanation?

A. The material which I understood was satisfactory was furnished to them on this die which I paid for and samples of those shells furnished the Hemming Manufacturing Company, as I have testified, on this invoice from the General Pressed Metal Company and I have never received an approval of those shells or disapproval.

Q. And you want the jury to understand from the time these negotiations opened in the summer of 1915 until the summer of 1916, during all that year that this transaction was pending you never could get from the Hemming Manufacturing Company any approval or disapproval of a sample shell?

A. That is exactly what I wish the jury to understand.

Q. And that during that time you did nothing in connection with getting the shell elsewhere?

A. That question I believe I can't answer the way you put it. Do you want a statement of facts on the subject?

Q. Yes, I want to put a definite question to you.

A. The Hemming Manufacturing Company had finally decided what type of shell they desired. One of their men went with me to the office of the General Pressed Metal Company. We placed the order for shells. A few samples were sent to the Hemming Manufacturing Company and a letter was written by the Hemming Manufacturing Company to the General Pressed Metal Company stat- they would require first two hundred pieces on which to give their final approval of the shells. That is the letter you just now mentioned.

Q. When was that, about when?

A. Early part of April, 1916.

Q. You were stating something that happened then. You say the Hemming Manufacturing Company sent word to the General Pressed Metal Company they must have 200 more shells in order to make accurate tests?

A. And give their final approval, I believe the letter was worded.

Q. There was nothing improper about that?

A. Nothing at all except I have never gotten

approval and couldn't deliver shells until I got approval.

Q. When you ordered 50,000.

A. To be furnished on the approval of the Hemming Manufacturing Company.

Q. Did you ever go to the Hemming Manufacturing Company and ask them why they didn't approve them?

A. I believe I did.

Q. Don't you know the letter you referred to stated why they couldn't approve them?

A. I don't know.

Q. You don't challenge the good faith of the Hemming Manufacturing Company for not giving their approval? You know it was for some manufacturing reason?

A. I don't know that. I don't know why it was withheld.

Q. Have you ever doubted that in your own mind?

A. I believe that the reason the approval was not given was because the contract had been carried on by some employees up to that time and the new employees, it took them some time to find out what they wanted.

Q. You have nothing to base that on, have you?

A. No.

Q. Don't you know that the shell that was sent to the General Pressed Metal was with regard to its height and with regard to the thickness of the metal and with regard to the turning in of the shell under pressure?

A. I do not know that without looking at the letter again.

Q. You would not say that isn't so?

A. No, sir.

Q. Wasn't the request of the Hemming Manu-

facturing Company that they have at least 200 of those to test with a perfectly fair request?

A. It was.

Q. Do you know whether they ever received 200?

A. Only by Mr. Howell's letter that they had received them in his letter to me.

Q. You were in some doubt about where and how to get these materials and what price to pay for them, weren't you, during this time?

A. According to what time you mean.

Q. Well, during the spring, February and March and April of 1916? A. I wasn't.

Mr. Whitehead: I would like to call for Mr. McDowell's letter of March.

A. I will verify that by saying I had contemplated arrangements for additional sources of supply if these fell down that I had decided on.

Q. Didn't you write the Hemming Manufacturing Company and you said you were under considerable doubt whether the Grabler Company could make deliveries on orders and that you had considered getting them from some other concern?

A. It is quite possible because before I advised with the Hemming Manufacturing Company and they referred me to friends of theirs.

Q. That is your letter, isn't it?

A. That is my letter, yes, sir.

Q. That was written on March 22d?

A. Yes, sir. I have an explanation of that change in the testimony of Mr. Rosenfeld.

Q. I am not talking about that. You asked the Hemming Manufacturing Company if they would consider on March 22, 1916, if they would consider using a steel nipple instead of a malleable iron?

A. Yes, sir. The General Pressed Metal had

asked why they couldn't secure the entire business.

Q. And you asked the Hemming Company if they couldn't use a steel nipple instead of a malleable iron ?

A. Yes, sir.

Mr. Whitehead: I offer this letter in evidence.

(Marked D13 for identification.)

Q. I refer to Exhibit P26, written April 22, 1916, by you to the Hemming Manufacturing Company in which you wrote the Hemming Company, "Will you kindly mail one of the cast iron insulating joints inserts to the Ellcon Company of 50 Church Street, New York City. I desire to have these people quote on same. The Grabler Company have not proved to me they are capable of making prompt delivery necessary to this line and I, therefore, thought it advisable to make inquiries elsewhere regarding deliveries on raw material."

A. That letter verifies my statement that the Hemming Company or one of their employees thought the Ellcon Company was in a position to quote on this class of material and that I was contemplating for an additional source of supply.

Q. I am simply asking you if the statements that I have just read from that letter were correct at the time this letter was written?

A. They were.

Q. I refer to Exhibit P27, written on April 25, 1916, in which you wrote the Hemming Company, "I have experienced some difficulty in securing promises of delivery of steel shells owing to the inability of my people to secure the thickness of the steel which is required for this purpose." That was a correct statement at that time?

A. It was.

Q. The whole proposition was understood to be more or less experimental? And there were outstanding question of infringement of patent, wasn't there?

A. How can I answer that all at once?

Q. The whole proposition was experimental?

A. No, sir.

Q. Not experimental?

A. No, sir.

Q. This joint had never been made before, had it?

A. Not to my knowledge.

Q. It wasn't made by the methods that joints you knew then in the market were made by, was it?

A. I do not know how other joints in the market were made other than that of the James Company to which I have testified.

Q. There was some question as to whether this joint was an infringement of outstanding patents?

A. There was no question in my mind or the mind of my patent attorney whom I had examine into the patent situation.

Q. Isn't it true that in March, 1916, you wrote to the Hemming Company and asked them to send you samples so that you might refer them to your patent attorney?

A. That is true.

Q. I show you a letter written to Hemming Manufacturing Company, March 22, 1916. That is your letter, isn't it?

A. Yes, sir.

(Marked D14 for identification.)

Q. At that itme you were not sure that there wasn't some patent question, were you?

A. You can never be sure there is not a patent question.

Q. Just answer that question, will you? Were you sure at that time?

A. I wasn't.

Q. And for that reason you referred the whole proposition again to your attorney?

A. I would not say again. I had referred it to him.

Q. You had referred it to him in June, 1916, don't you remember that?

A. No.

Q. I show you another letter, written to the Hemming Company of January 17, 1916. Refresh your recollection from that. Isn't it true that on January 17th you had it up before your patent attorney?

A. Yes, sir.

(Marked D15 for identification.)

Q. In the last of April you were notified that the Hemming Manufacturing Company did not consider itself bound to make any joints but the one specified in its contract, were you not?

A. Yes, sir.

Q. You were notified to come out to the plant of the company at Garfield to discuss the matter, were you not?

A. Yes, sir.

Q. And your testimony yesterday was that you did go out?

A. I did.

Q. And you fixed the date yesterday at about April 28th?

A. I believe that is correct.

Q. And at that interview you saw Mr. Howell and Mr.——

A. I saw Mr. Howell.

Q. Anybody else?

A. I don't know.

Q. At that time Mr. Hemming was no longer with the company?

A. He wasn't.

Q. Do you know when he left the company?

A. Not the exact date, no, sir.

Q. It was very shortly before that date, was it not?

A. I can't fix the date except I 'phoned the Hemming Manufacturing Company and was notified that he had left the day before. I asked for him.

Q. He was a friend of yours?

A. A friend that I had made out there at the Hemming Manufacturing Company.

Q. The bulk of your dealings, the greatest part of your dealings in connection with this joint had been with Mr. Hemming, hadn't they?

A. Yes, they had.

Q. Do you know why he left the company's employ?

A. Only as Mr. Howell stated to me.

Q. You have been in touch with Mr. Hemming ever since, haven't you; that is, you still maintain your friendship with him?

A. I do.

Q. You have been in frequent consultation with him about this suit, haven't you?

A. No, sir.

Q. At the end of April, 1916, when you came out to the company's plant just what was the arrangement made between you and Mr. Howell?

A. I testified yesterday that I could not state exactly the conversation that was held at the call of April 28th, but testified in general as to the two or three calls which I made there; that is,

between the latter part of April and the early part of May.

Q. Between the latter part of April and early part of May there were two or three calls and the conversation at those two or three calls was to what effect?

A. The Hemming Manufacturing Company had not gone ahead with the manufacture of joints, they didn't see how they could. The conversation drifted, as I testified, to what joint was finally tested and approved by the Underwriters Laboratory and Mr. Howell and myself walked from the office of the company to the testing laboratory and I there identified the joints, the joints that had been tested and approved by the Underwriters Laboratory. There was further conversation at one call, it might have been the same at which Mr. Howell and Mr. Appleton, the new manager of the company, was present and I called Mr. Howell's attention to the fact that the joints—he raised the question of the type of insulation material. I told him it didn't interest me at all and further advised him, I believe in response to a letter from him, that the black material would be satisfactory to me if it bore the Underwriters labels, didn't care what the insulation was.

Q. There was an arrangement made, was there not, between you and Mr. Howell for the Hemming Company, and I believe you testified to it yesterday, that if you would cut down your orders and take no new orders he would undertake by purchase or by manufacture to fulfill such orders as you could not cancel. Is that correct.

A. Mr. Howell made such an offer, I believe.

Q. And you accepted it, didn't you?

A. If he had performed it I would have accepted it probably.

Q. We are talking now about what happened at the time that arrangement was entered into between you?

A. It was discussed.

Q. Wasn't it understood that you would go out and undertake to fulfill your orders and take no new ones and that upon your doing so the Hemming Manufacturing Company would obtain by purchase or by manufacture enough joints to fill the orders which you couldn't cancel. Wasn't that the arrangement?

A. I believe such an offer was made.

Q. Wasn't that the arrangement made between the two of you?

A. It was discussed.

Q. Do you say you would not do that?

A. I can't testify.

Q. Didn't you as a matter of fact, go out and try to cancel your orders?

A. I did.

Q. And you didn't take any more, did you?

A. I did not.

Q. And you knew that the Hemming Manufacturing Company was starting in to produce those joints which they had written you that they would do?

A. I do not know that.

Q. They called upon you, didn't they, in June and July to specify sizes of joints?

A. I don't remember that.

Q. Don't you remember that you did specify as to sizes of joints in June and July?

A. I do.

Q. You did. You remember that, you did that?

A. Yes. I don't remember the date but I remember I specified at a later date.

Q. There is a letter of June 15th, written by

the Hemming Manufacturing Company to you. Did you receive that letter?

A. Yes, I received that.

Q. There is one, June 20th, did you receive that, 1916?

Q. Yes, I received that.

Q. From that are you able to say whether in June we called upon you for specifications of sizes?

A. You did.

(Marked D16 and D17 for identification.)

Q. Are you able to say whether in June and July you furnished us with specifications and sizes?

A. I furnished you with some specifications and sizes.

Q. Didn't you understand that was for the purpose of enabling the Hemming Manufacturing Company to furnish you with the joints that you wanted or needed?

A. I did not.

Q. Why do you suppose they called upon you to specify sizes?

A. For manufacturing purposes, as I read the letter.

Q. And they were manufacturing, weren't they?

A. Yes, but they hadn't approved the material to go into the manufacture yet.

Q. That is not the point. I ask you whether you are not aware that subsequent to the arrangement that you have testified was made between you and the Hemming Manufacturing Company the 1st of May, in this conversation whether you didn't know that subsequent to that Hemming Manufacturing Company were proceeding to produce?

A. I had no reason to believe they were.

Q. And you say that in spite of the fact that in June they called upon you to specify joints, do you?

A. I do.

Q. Then I ask you, what do you suppose they called upon you to specify joints for if it wasn't to enable them to proceed with the manufacture?

A. I believe to show the letter in court. They probably thought at that time that there probably might be a suit upon this subject.

Q. Do you challenge their good faith in the writing of that letter?

A. I did at that time.

Q. You answered that?

A. Yes, sir.

Q. Were you doing it, too, just because you thought it was going to come to a suit?

A. I secured the specifications from my customer the best I could answer that letter, the best I could at that time.

Q. You say now to the jury that in your opinion the only reason we called upon you to specify the sizes was because we were trying to frame ourselves up to meet a lawsuit?

A. It is.

Q. Don't you know, as a matter of fact, we were then laboring over a die?

A. I do not.

Q. Did you go out to our mill after the first part of May?

A. After the first part of May, I did.

Q. When did you go out after the first part of May?

A. I can't testify to that date.

Q. Was it during May or during June? A. I can't state.

Q. When was the last time you were at the mill?
A. I can't testify to that.
Q. You don't know that?
A. No, sir.
Q. Then, you are unable to say whether the Hemming Manufacturing Company was actually working in its mill to produce these joints?
A. I am unable to testify to that fact.
Q. You received that letter, didn't you, July 25, 1916?
A. Yes.

(Marked D18 for identification.)

Q. Do you remember what your answer to that was?
A. I do not.

By the Court:

Q. Did you notify these people that you were going to bring suit?
A. I did.
Q. When?
A. The letter is in evidence, I believe.

By Mr. Whitehead:

Q. You refer to that exhibit where you said if we didn't do something you were going to refer it to the courts?
A. Yes, sir.

By the Court:

Q. Is that the only notification you gave them?
A. Yes, sir. I answered that question incorrectly with the understanding that bringing suit had been discussed by Mr. Howell and myself at his office.

By Mr. Whitehead:

Q. In the first place, this letter, Exhibit P31, of May 12th, is that the letter to which you referred when you say you notified us you were going to sue us?

A. That is the letter I referred to.

Q. That is the only letter with regard to a suit?

A. I believe it is.

Q. You say you had a conversation with Mr. Howell about a suit?

A. Yes, sir.

Q. Where was that?

A. In his office.

Q. When?

A. The date I can't fix; but one of the three visits, I would say.

Q. And you have sworn those were in the latter part of April or early part of May, 1916?

A. To the best of my remembrance.

Q. Those were the same covenants in which arrangement was made that you should cut down your orders and take no new ones? I refer to Exhibit P26 and your statement, their letter written April 22, 1916, to the Hemming Manufacturing Company, your letter, "It is very possible that within a short while the use of insulating joints will be largely decreased or altogether discontinued and it is my desire to make hay while the sun shines. We have both exerted considerable energy in trying to get this article to where it is to-day, and therefore, we should push the matter as much as we can so as to get some monetary consideration out of it for the energy we exerted." You wish to add nothing to that statement? That was correct at the time it was made?

A. It was.

Q. You will stand by that?

A. Yes, sir.

Q. What did you mean by making hay while the sun shines?

A. Why, they should manufacture and I should deliver and get the profit out of some of the joints before their use was discontinued.

Q. So that on April 22, 1916, your suggestion was that we had both exerted considerable energy in getting this joint to the point in which it had come. That was your statement?

A. It was.

Q. Now, with reference to your orders, you furnished us with orders and those orders are in evidence as Exhibit P2. I show you this order of October 14, 1915, H 2 for 25,000 joints. Were any specifications ever sent?

A. Yes, they are included. I believe if you will look those up you will find they are the specifications.

Q. Then, this one is a duplicate of the other?

A. Yes, sir.

Q. Do you know whether it would be possible for the Hemming Manufacturing Company to fill orders in the absence of specifications as to details? A. I don't think it would be possible.

Q. So, if, as to any orders included in Exhibit P32, the Hemming Manufacturing Company never received specifications as to details, those were not complete orders, is that correct? If that is puzzling for you——

A. That is a little bit.

Q. Take this top order. There is an order for 25,000 insulating joints found in P2, H 2, specifications to follow. If no specifications ever followed that would not be a complete order?

A. It would not.

Q. I show you Exhibit P41, which purports to be an order from Bailey Electrical Supply Company and I ask you whether that is the complete order?

A. That is a complete order to me for 12,000 insulating joints.

Q. And calls for deliveries in twelve equal shipments the first of each month or one year from date?

A. Yes, sir.

Q. Did Bailey Electrical Supply Company ever tell you the sizes that they wanted?

A. They did, and the orders are in evidence. I believe there is a separate order in evidence specifying the sizes.

Q. I thought you said this was the complete order?

A. I might verify that by using a shipping memorandum if that would make it clear, shipping instructions on this contract.

Q. Are there in evidence shipping instructions of Bailey Electrical Supply Company? A. There must be because I just had their name in my bill ordering joints on the Hemming Manufacturing Company with the specifications of that contract.

Q. Now, all shipments required to this Bailey Electrical Company did not come due until October, 1916, did they? A. They did not.

By the Court:

Q. When was that order taken?

A. October 18, 1915. That is the date of it.

By Mr. Whitehead:

Q. When did you take that order?

A. On that date, I believe.

By the Court:

Q. What did the Bentz Supply Company order from you?

A. They placed a contract with me for 12,000 insulating joints, a thousand a month for one year.

Q. What kind of joints?

A. McDowell insulating joints.

Q. Did that refer to the sample that was passed in the laboratory in New York?

A. It referred to the only sample I had in my possession from the Hemming Manufacturing Company.

Q. And that was like the sample they had in New York?

A. I believe it was. I can't testify to that.

Q. I want to know what you were going to deliver, what the 12,000 were going to be?

A. An approved insulating joint they were furnishing. I can't testify to the type of the insulating material inside unless I scraped it off.

Q. It was a sample you had gotten at that time from the company?

A. From the Hemming Manufacturing Company.

Q. And you showed them that and took their order from that sample?

A. Yes, sir.

By Mr. Whitehead:

Q. This Exhibit, P45. That is an order from the Peerless Light Company for 100,000?

A. Yes, sir.

Q. Given on April 25, 1916, was it?

A. Yes, or prior to that. I don't recollect the date.

Q. Look at the order.

A. April 25th.

Q. That was the date the order was given. Did they ever furnish you specifications on that order?

A. I believe they did. They furnished me some specifications and I believe they are in evidence. I don't know whether they are furnished on that particular order or not.

Q. But only such specifications as are in evidence, is that right, as have been produced?

A. I am not sure of that. It may be other specifications that haven't yet been introduced.

By the Court:

Q. Is that the same sample of joint that you showed to the Bailey Electrical Supply Company?

A. No, that was on a sample of an insulating joint that the Hemming Manufacturing Company had themselves mailed to the Chicago office of the Peerless Light Company.

Q. Then, it was a different joint from what you agreed to sell to the Bailey Company?

A. It was on a different sample. I never saw the sample that went to Chicago.

Redirect Examination by Mr. Skinner:

Q. Mr. McDowell, I show you a letter of April 25, 1916, from the Peerless Light Company. Did you receive that?

A. I did.

Q. And was any word of that communicated to the defendant company?

A. I can't testify to that. I presume it was.

Mr. Skinner: I call for a letter of June 13th, McDowell to the Hemming Company.

Letter being produced I offer it, dated June 13, 1916.

(Admitted in evidence and marked Ex. P58.)

(Ex. P58 read to the jury.)

Q. Did you get any definite word from the ~~Bentz~~ Hemming Company following this letter?

A. I did not.

Q. Any definite assurance of any number of joints?

A. I did not.

Q. Or any statement that joints were in the course of manufacture or production?

A. Not to my remembrance.

Mr. Skinner: I offer this copy of letter of June 16, 1916, McDowell to the Hemming Company, in evidence.

(Admitted in evidence and marked Ex. P59.)

(Ex. P59 read to the jury.)

Q. Did they tell you they wanted anything more than that?

A. They did not.

Q. I refer you to P36, in which you review the specifications already given on the quantity of joints and say, "It will be possible for me to give you details of all of the other orders shortly after you start delivery." Did they ever start delivery?

A. They did not.

Q. You also say, "I trust this information will be of service to you and will wait to hear from you?" Did you hear from them?

A. I did not.

Q. Did you have a telephone conversation with Mr. Howell on June 25, 1916?

A. I believe I did, but I can't testify exactly as to that date.

Q. Did you make any memorandum of it?

A. I made a memorandum of two or three different telephone conversations.

Q. I show you this. Is that the memorandum made by you?

A. Yes, sir.

Q. With your initials?

A. Yes, sir.

Q. Refresh your memory from that. Will you tell us the conversation with Mr. Howell that day?

A. Mr. Howell said to me, "I am up against it on the steel proposition. Have you been able to do anything"—no, I spoke to Mr. Howell, "I am up against it on the steel proposition. Have you been able to do anything on the joints? Mr. Howell, they are getting the mold in the test to-day so we can figure on something to tell you this week. Other mold wasn't properly made. You remember we told you about this and we had the whole thing over again. The new mold is ready now and going on the test to-day so we will 'phone you as soon as I know."

Q. Did he afterwards 'phone you telling you of that?

A. He did not.

Q. The last sentence, "I will surely be able to 'phone you one day this week."

A. That he did tell me. My eyes were tired and I didn't go that far.

Q. He told you what?

A. He told me he would let me know one day within a week.

Q. Did he?

A. He did not.

Q. Within the next week?

A. No, sir.

Q. Or the week after?

A. No, sir.

Q. Or ever?

A. No, sir.

Q. He says, "'Phone as soon as I know they can make the samples so that you can come out and see it." Did he ever 'phone you they had any samples?

A. No, sir.

Q. Did he ever tell you in any way they had them; I mean, the samples referred to in this conversation?

A. No, sir.

Q. Or furnished you with any?

A. No, sir.

Mr. Skinner: I offer a letter of July 5, 1916, the original from the Hemming people to us.

(Admitted in evidence and marked Ex. P60.)

(Ex. P60 read to the jury.)

Q. At that date, July 5, 1916, so far as you know, had any work been done in the Hemming factory in the production of anything to supply joints or the making of tests?

A. It wasn't to my knowledge.

Q. You were out there?

A. Yes, sir.

Q. And this was nearly, it was about seven or eight months—I am not very good in lightning calculation—after your contract of October 23rd and over a year after the time the negotiations first begun. At any time between the commencement of the negotiations in the summer of 1915

and your last call at the factory some time in June or July, whatever it was, of 1916, did you ever see any indication in the Hemming plant of any manufacturing or course of manufacturing of these insulating joints or anything but sample joints?

A. I did not.

Q. At this date, July 5, 1916, did you want samples or did you want deliveries? A. I wanted deliveries.

Q. Could you satisfy your customers, that you had procured, with samples? A. I could not.

Q. This speaks of the further specifications that you speak of. Did that refer to your previous letter where you had said you would furnish further specifications as deliveries began?

A. Yes, sir.

The Court: What is the date of that letter?

Mr. Skinner: July 5, 1916.

Q. Is your letter of July 6, 1916, Exhibit P57, the reply to this one of theirs of July 5th, Exhibit P60?

A. It is.

Q. In this letter of July 6th of yours to them, P57, you say, "I know the orders will be filled within a reasonable time." Did you after that receive any promise or assurance of any kind from the Hemming Company as to when the orders would be filled?

A. I did not.

Q. Did you try to get it?

A. In July.

Q. 5th, 1916?

A. I can't state that without seeing copies of my correspondence.

Mr. Skinner: I offer this in evidence, copy instead of original of the letter of July 6, 1916, from McDowell to the Hemming Manufacturing Company.

(Admitted in evidence and marked Ex. P61.)

(Ex. P61 read to the jury.)

Q. Had you had instructions from Mr. Howell to do that or from any one connected with the Hemming Company?

A. From the Hemming Manufacturing Company by letter, I believe.

Q. And the order that was referred to, was that an order that you had placed for the sale of these joints or was the order to the Grabler Manufacturing Company for the material they were to finish?

A. An order of Grabler to furnish the malleable iron nipples.

Q. To the Hemming Company?

A. Yes, sir.

Q. This contemplated a cancellation of that order to the Grabler Company?

A. It did.

Q. Did the Hemming people ask you to procure that cancellation to see if you could?

A. Yes, sir.

Q. At the time that they asked that was there anything suggested as to your getting the same material from anybody else?

A. There wasn't.

Q. Was there anything said for the reason why that Grabler contract should be cancelled? I call your attention to the fact that the cancellation of that order would apparently leave you and the Hemming people without any supply of that nec-

essary part of the material. Now, was there anything said? Why was that?

A. Mr. Howell's statement that he couldn't make up the goods, couldn't make up insulating joints and that there was no further use of having inserts shipped to them.

Q. When was that statement made to you?

A. I believe it is in a letter from the Hemming Manufacturing Company to me.

Q. On sending this letter of July 6, Exhibit P61, to the Hemming people, did they reply, did they say to you by letter or conversation or telephone or otherwise, "Don't cancel with the Grabler people because then we won't have any material to go on with?"

A. They did not.

Q. Say anything at all about the fact that you should not continue to attempt to procure that cancellation?

A. I think not.

Q. You were shown a letter by Mr. Whitehead, a letter of February 17, 1916, in which you entered your order with the Grabler people for 200,000 small inserts. Why didn't you order more than 200,000?

Mr. Whitehead: I object to that. I do not think that is material.

The Court: I will allow that question.

Q. Why didn't you order more than 200,000?

A. Mr. Hemming advised that he accompany me to the hotel so as to meet Mr. Rosenfeld.

Q. What did he advise?

A. Only a small quantity be ordered and a portion of that be sent to the factory and after they had been manufacturing for a reasonable time it would be wiser to order more.

By Mr. Whitehead:

Q. Was that on Mr. Rosenfeld's advice?

A. On Mr. Hemming's advice.

By the Court:

Q. Who was Mr. Rosenfeld?

A. The general manager of the Grabler Manufacturing Company.

By Mr. Skinner:

Q. You were asked if you had consultation with your patent attorney about any patent in connection with this matter. Did your consultation with your patent attorney in any way prompt you to any indication to the Hemming people of the order that they had or the contract that they had was not going to be carried out by you?

Mr. Whitehead: Objected to. I think that is leading.

The Court: Yes, that is leading.

Objection sustained.

Q. Did your consultation with the patent attorney lead to any action or expression of attitude on your part towards the defendant?

A. It did not.

Q. Did it lead you to any action or modification of your former attitude with reference to the purchasing of supplies that you were under obligation to obtain?

A. It did not.

Mr. Skinner: I call for a letter of July 27, 1916, McDowell to the Hemming Company. Letter being produced I offer it in evidence.

(Admitted in evidence and marked Ex. P62.)

Q. Did you receive from the Hemming Manufacturing Company copy of a letter sent by them to the General Pressed Metal Company, dated April 13, 1916?

A. I did.

Q. Is this the one?

A. It is.

Mr. Skinner: I offer it.

(Admitted in evidence and marked Ex. P63.)

(Ex. P63 read to the jury.)

Q. Did you receive a copy of any letter under date of April 15, 1916, sent by them to the General Pressed Metal Company?

A. I did.

Q. Is this the one?

A. It is.

Mr. Skinner: I offer this in evidence.

(Admitted in evidence and marked Ex. P64.)

(Ex. P64 read to the jury.)

Q. I show you a letter from the General Pressed Metal Company to you, dated March 29, 1916. Did you get that?

A. I did.

Mr. Skinner: I offer it.

(Admitted in evidence and marked Ex. P65.)

(P65 read to the jury.)

Q. Did you receive from the Hemming Company copy of letter of March 20, 1916, which they said they had sent to the General Pressed Metal Company?

A. I did.

Q. Is this it?

A. Yes, sir.

Mr. Skinner: I offer it.

(Admitted in evidence and marked Ex. P66.)

(Ex. P66 read to the jury.)

Q. You spoke of accompanying Mr. Wilde or he accompanying you to call upon the General Pressed Metal Company of Philadelphia, did you not? A. I did.

Q. At that time Mr. Wilde was with the Hemming Company?

A. He was.

Q. Did he give final instructions or specifications for the making of the shells or was there something left to be determined?

A. He gave instructions at that time, I believe, for the manufacture of the die upon which samples were submitted at a later date. These letters are of a later date.

Q. At the time that Mr. Wilde was there was there something still to be supplied in the specifications or was it complete?

A. It was not complete.

Q. Something was said about the change of standards of the Underwriters Laboratory. Do you know whether those general, whether those changes were of a character to make the standards more severe or less severe? What was the effect of that change upon the situation?

A. The change was so slight that the effect would have been very small. The principal change was in the gas flame in which they were to be tested for how much heat they would stand.

Q. Gas flame instead of what?

A. The size of the burner and nature of the burner.

By the Court:

Q. Benson burner gives a great deal more heat than the gas jet?

A. I can't say.

By Mr. Skinner:

Q. Why did you start suit at the time you did?

A. Because I had exhausted every other means of getting deliveries out of the Hemming Manufacturing Company.

Q. You had exhausted every means of getting deliveries, but what about their making future deliveries or going on with the work or the testing they had in hand, what was your conclusion as to that?

A. To the best of my knowledge they were doing nothing towards making deliveries or anything of the kind.

By Mr. Whitehead:

Q. Didn't you say a minute ago that June 28th you had a telephone conversation and you had your notes of it there in which you stated to the jury that the Hemming people told you they were then making up the die. Isnt' that just what you swore to?

A. I believe they did tell me that they were.

Q. Did you doubt it?

A. I did.

Q. Did you have any reason to doubt it?

A. They have told me a great many things which haven't been fulfilled.

Q. Did you have any reason to doubt that statement?

A. I believe I did.

Q. What?

A. They had made other statements that they were going to be ready within one week, three days, and so forth.

Q. Did you tell them in that conversation that you didn't believe what they said?

A. I can't state that.

Q. Did you go out there to the mill to verify what they said?

A. I did not.

Q. And subsequent to that conversation you sent them specifications and orders to be filled, didn't you?

A. I don't remember. I would have to see the records again.

RECESS.

EZRA O. McDOWELL resumes the stand.

Cross-examination (continued) by Mr. Whitehead:

Q. Mr. McDowell, I had asked before whether you had specified any orders to the Hemming Manufacturing Company after June 28th and your answer, as I recall it, was that you would have to see the correspondence?

A. Yes, sir.

Q. You stated a few minutes ago in answer to Judge Skinner's question that nothing had been done by the Hemming Manufacturing Company but make samples?

A. To the best of my knowledge.

Q. Don't you know that molds were made or dies were made by the Hemming Manufacturing Company?

A. I do not.

Q. You do not know that?

A. I presume they were.

Q. Didn't you, as a matter of fact, see the molds there at the Hemming Manufacturing Company's plant?

A. I never did.

Q. You went to Philadelphia, you say, some time in April with Mr. Wilde to see the General Pressed Metal Company?

A. I don't know as I recollect that I stated some time in April. You can tell that from my correspondence. I did go to Philadelphia with Mr. Wilde and place the order for shells.

Q. It was about the time that the order was placed?

A. Yes.

Q. You went down there with Mr. Wilde and inspected the shells?

A. We did not place the order for the shells.

Q. Why did Mr. Wilde go?

A. He knew the details and specifications.

Q. In regard to the making up of the shells?

A. Yes, sir.

Q. You went way to Philadelphia for that purpose?

A. We did.

Q. Well, you were not at any time interested enough to go to the Hemming Company's plant to find out if they were making the samples?

A. I was interested.

Q. Will you say that the Hemming Manufacturing Company did not make dies and molds?

A. I did not.

Q. Will you say that?

A. No, sir.

Q. You simply say you don't know whether you did or not?

A. Yes, sir.

Q. And you never went to the mill to find out?

A. Never asked to see the dies, no.

By the Court:

Q. When was the last time you visited the plant?

A. May or June.

By Mr. Skinner:

Q. How many times were you there altogether?

A. I can't state that.

Q. Did they ever show you any die?

A. They did not.

Q. Did they ever tell you they had any die?

A. They did tell me they had a die.

Q. Now, did I get out what cancellations of orders that you procured by arrangement with your various customers?

A. I don't know that I have testified as to the cancellations.

Q. What cancellations did you procure?

A. I procured a cancellation of an order of 125,000 from W. R. Ostrander & Company. I procured a cancellation from the Peerless Light Company. That was without damages. Secured a cancellation from the Peerless Light Company for one order upon payment of $150 and I secured cancellation on the second Peerless order without damages.

Q. How much cancellation did that make altogether?

A. 325,000.

Q. How many did that leave, orders that you had, orders that you hadn't cancelled?

A. 125,000.

Q. Did you attempt to procure cancellation of those 125,000?

A. I did.

Q. How?

A. Personal calls I made on the people and told them I was unable to deliver and I requested them to cancel the orders.

Q. To what extent, once or more than once or how?

A. I think several times. I believe I have letters to the effect that I wrote them and asked them to cancel the orders.

Q. Whom did you call on in connection with the Bailey order?

A. Mr. L. D. Bailey, proprietor of the business.

Q. Do you recall what attempt you made in regard to the G. & G.

Mr. Whitehead: I think that testimony went in yesterday and my objection was noted to it at that time. If there is any question about it I would like to have my objection noted now.

The Court: I will allow it.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Whom did you see in connection with the G. & G. Electrical Supply Company?

A. Mr. Goffer.

Q. Whom did you see for the purpose of securing the cancellation?

A. The same man who signed the order, Mr. Goffer.

Q. Whom did you see for the purpose of securing, if you could, cancellation of the Halloway Bentz Company order?

A. Mr. Bentz.

Q. The same man from whom you had gotten the order?

A. Yes.

Q. I show you a letter of October 5, 1916, from the Bailey Electrical Supply Company. Was that the expression of the attitude of that company as to those negotiations that you have spoken of?

A. It was.

Mr. Skinner: I offer it.

Mr. Whitehead: I object to it.

The Court: I do not see how it is competent.

By the Court:

Q. Did you make known to the defendant that you had all these orders?

A. I did, sir.

Q. All of them?

A. Yes, sir. I had all of the original orders out there to the office and showed Mr. Howell the originals.

Q. When?

A. May, one of those April or May visits. I often computed the profits that accrued from these orders.

Q. The whole 450,000?

A. Yes, sir.

By Mr. Skinner:

Q. Did you have any discussion with Mr. Howell as to what damages you would be likely to suffer from the failure to perform on their part?

Mr. Whitehead: I object to that. I don't think that is relative.

The Court: I think the whole conversation in reference to the parties themselves is competent. I do not know what bearing it has, but I think it is competent. I think the conversation is competent.

Mr. Skinner: I do not offer it as being an arrangement of compromise.

Q. Did you have any conversation on that subject?

A. I did.

Q. What, if anything, did you tell him as to the amount that you thought would be your damage?

The Court: No, let us have the conversation, when it was and what was the conversation.

A. I can't testify to the actual date, but it was in the private office of Mr. Howell.

By the Court:

Q. About, give us some idea?

A. April or May, and I figured out what the individual profit would be; in one case particularly, that of the Peerless Light and on one of their orders the damage would have amounted to something like $7600.

Q. Anything more?

A. I figured out the others, but I can't testify to them.

Q. I don't ask you to tell the figures, but tell us what you talked about if you can't tell us what was said.

A. Mr. Howell stated at that time that the damage was so large, it wouldn't pay them to manufacture these few if they incurred a loss in the manufacturing of them.

Q. Did you make any estimate of the profits that you would lose by the cancellation?

A. I did.

Q. Did you make any estimate of the total amount of your damage as you then figured it?

A. I made a statement to him of the damages that had or would possibly accrue on the purchase orders of raw materials together. In a separate column I showed him the profits on the orders taken would amount to $17,000 or $18,000. The damages have since been reduced on the purchase order by the evidence shown.

Q. When you made this tally of $17,000 or $18,000, what did Mr. Howell say?

A. I have already testified. He stated it would be cheaper for them to manufacture at a loss than to pay these profits for damages.

By Mr. Whitehead:

Q. That was only your claim for damages?

A. My computing of the orders which I showed him at that time.

Q. That was your demand; that is, what you said you thought you ought to have?

A. That was the actual profit which would have been secured by me had those orders been filled.

Q. Plus damages that you say might have resulted?

A. No, sir, actual profit.

Q. I thought you said damage?

A. That was in another column. $17,000 or $18,000 was only profit.

Q. Did Mr. Howell say anything in regard to the figures other than what you have just testified to?

A. Not that I remember.

Q. You told the Court a minute ago that you

took all these orders out to the Hemming Manufacturing Company. Can you recall the day you did that?

A. I do not.

Q. You don't recall the date?

A. No.

Q. Could you tell about when it was?

A. I might be able to. I have a memorandum somewheres in the papers, I think, with the date on it; in fact, the papers were submitted to Mr. Howell that I had figured up in his office.

Q. Was it before the 1st of May?

A. I can't testify to that.

GUSTAVE FRANKEL, sworn in behalf of plaintiff.

Direct examination by Mr. Skinner:

Q. Mr. Frankel, where do you live?

A. New York City.

Q. What is your business?

A. Well, I do buying and managing of the New York office of the Peerless Light Company.

Q. Did you have any business dealings with Mr. McDowell in connection with an insulating joint?

A. Yes sir.

Q. In 19—when was it, '15?

A. '15.

Q. Did you for the Peerless Light Company give Mr. McDowell an order for any of these joints?

Mr. Whitehead: I object to that as immaterial, has nothing to do with the case. It

is the same objection I have advanced to other questions on this point.

The Court. I will allow the question.

Q. (Question read.)

A. Yes, sir.

Q. I show you Exhibits P44 and P45. Did you give those orders?

A. Yes, sir.

Q. For how many altogether?

A. 200,000; 100,000 on each order.

Q. Were those orders subsequently cancelled?

A. They have been.

Q. How long have you been in the business that you have spoken of?

A. Twenty-eight years.

Q. How long have you been connected with the Peerless Light Company?

A. Four and a half years.

Q. What has been your experience in the buying and selling of electrical insulating appliances?

A. I don't quite understand what you mean.

Q. Have you had to do with the buying and selling of electrical insulating appliances?

A. Yes, sir.

Q. And among them insulating joints?

A. Yes, sir.

Q. Are you familiar with the various makes of joints?

A. Yes, sir.

Q. See if I name some of them correctly? Yost?

A. Yes, MacAllen, and Wirt. Those are the only ones on the market.

Q. Were you shown any sample of the McDowell or Hemming joint when the orders were placed?

A. Yes, sir.

Q. Now, are you familiar with the market prices of these various makes of joints at and around—well, May, June, July, 1916?

A. Since that time there has only been one joint on the market. That is the MacAllen joint. The Wirt joint and the Yost joint were both put out by MacAllen.

Q. That is since when?

A. Since March 1st of last year.

Q. So, since May 1st of last year the only joint on the market was the MacAllen joint?

A. Yes, sir.

Q. Are you familiar with the prices for which the MacAllen joint was sold in the months of June and July?

A. Distributor's prices fifty-five per cent. off list less a cash discount of five per cent.

Q. What was the list?

A. Thirty-six cents a joint.

Q. That means thirty-six cents even?

A. Thirty-six cents each.

Q. With a discount of fifty-five per cent. off the list and five per cent. off for cash. What would be the net price?

A. 16.20 less five per cent.

Q. 16.20 is the result after taking the fifty-five per cent.?

A. Yes, sir.

Q. Would you get that five per cent. if you didn't pay cash?

A. The terms is ten days five net thirty.

Q. That is, you would get the five per cent. if you paid within ten days?

A. Yes, sir.

Q. Figuring the fifty-five per cent. and then the five per cent. what would the net result be?

A. 15.39.

Q. What do you mean when you say the distributors?

A. Distributors, MacAllen distributed in each different district. For instance, in New York they select one man as distributor and they would probably be the only price cutter in that vicinity as the distributor for the MacAllen joint. Then, there couldn't be another distributor in that district that would allow it.

Q. If a man was not a distributor for the MacAllen Company would he be able to get those prices that you have spoken of?

A. No, sir.

Q. What price would he make?

A. I don't know. It goes according to schedule. They have a regular printed form. I haven't any with me.

Q. There is a regular printed form?

A. Yes, sir.

Q. This printed form that you speak of, is that put out by the MacAllen Company?

A. It is put out by the MacAllen Company every time the price goes into effect.

Q. Have you had one of those?

A. We get them right along.

Q. You spoke of some change in March, 1916?

A. Yes, sir.

Q. From that time on until, say August 6, 1916, was there any change of price with the MacAllen people?

A. No, sir, none that I know of.

Q. I show you a pink sheet, the resale adjustment sheet, J10. Is that one of these announcements of the McDowell prices that you spoke of?

A. Yes, sir.

Q. Refreshing your recollection by that, can you tell us what would have been the price of Mr. McDowell or any other person not a distributor?

A. If he was a jobber his discount would be fifty per cent. provided he used one thousand or upwards.

Q. And if he wasn't a jobber?

A. They have another price.

Q. What is that?

A. It says here 100 lots 36 per cent.

Q. What would he pay if he wasn't a jobber?

A. He would be a dealer.

Q. Would the discount be more or less than the jobber?

A. Less.

Q. So that he couldn't have got better than discount of fifty per cent. on the list price?

A. Yes, sir.

Q. Instead of 55 and five off?

A. Yes, sir.

Q. This would also have a five off?

A. Yes, five per cent. cash discount.

Q. So the difference is 50 and 5 to the dealer and to the distributor 55 and 5, a difference of five per cent. on the list price in favor of the distributor?

A. Yes, sir.

Q. So, then taking the price of 36 cents at 50, you have 18. What would the discount of 5 from that be?

A. 17.10.

Q. 17.10 on the hundred?

A. 17.1 each.

Q. Could the MacAllen joint be used in substitution of the McDowell or Hemming joint?

A. If the people wanted them they could. If the people wanted the McDowell joint they would want the one they ordered. As a matter of fact, you could use the MacAllen joint in place of a McDowell joint in use.

Q. Would it or would it not do the work?

A. It would do the work. Both are approved by the Underwriters.

Cross-examination by Mr. Whitehead:

Q. Mr. Frankel, the McDowell joint, as a matter of fact, has never been on the market, has never been objectionable; that is, the joint in this case called the McDowell joint had never been objectionable? You never dealt in any?

A. I bought some. I had samples. That is all I know.

Q. As a matter of fact, the only joint used in the trade and known as insulating joints were these joints to which you have testified?

A. Yes, sir.

Q. Does your concern do a very big business in joints?

A. I guess we do our share.

Q. You have offices in New York and Chicago?

A. One in Syracuse and one in Toledo.

Q. Are you distributors?

A. We are not distributors for MacAllen today.

Q. Then, you are not distributors for anybody?

A. We bought out the Yost insulating joint.

Q. You did?

A. Yes, sir.

Q. I thought you said MacAllen did?

A. We bought out their stock. MacAllen bought their patents. We bought out the old stock which they had.

Q. You bought the stock of the Yost joints?

A. Yes, sir.

Q. But, aside from that stock you are not distributors and cannot get a distributive discount in the market?

A. We can get a distributor's discount on the McDowell joint any time we desire one.

Q. Is that by a special arrangement?

A. They have been after our business continually but we have never given them much hope.

Q. If you went into the open market to buy these what price would you pay? You would not get distributors prices?

A. Yes, we buy in immense quantities insulating joints and naturally we would be entitled to distributors discount provided we gave a large enough order.

Q. You ordered some McDowell joints?

A. Yes, sir.

Q. Do you recall when you gave those orders?

A. We gave one about a year ago, the other one about three months following.

Q. One about January, another about April of last year?

A. Somewheres through there.

Q. What price did you agree to pay for those joints?

A. I believe it was nine and a half cents each.

Q. Any discount on that? A. I believe a cash discount of five per cent.

Mr. Skinner: The orders are there and speak for themselves.

Q. You did specify some sizes that you wanted, didn't you?

A. Yes, sir.

Q. Do you remember how many you specified?

A. I believe it was for 25,000.

Q. Somewhere between 25,000 and 30,000?

A. I can't tell you exactly.

Q. Do you remember when you specified those sizes?

A. When Mr. McDowell asked us for the specification of sizes he told us they were coming too slowly and I said to him, "Well, I will tell you, we will give you a few sizes so you can go ahead with our order. In the meantime, when they started coming through we will give you a list of the sizes which we want."

Q. McDowell had to have those before he could fill your order?

A. No, sir, as soon as they started coming through it was easy enough to insert any size nipple.

Q. But the nipple had to be inserted in the process of manufacture?

A. Yes.

Q. So, then, they couldn't be manufactured until the manufacturer had the size?

A. Yes, they had specifications on 30,000. I don't believe he could make 30,000 in a day and we took it for granted in two weeks time we could give a list of what we wanted.

Q. You don't get my point. The actual manufacture couldn't be done until the sizes were specified?

A. No, the manufacture couldn't be done.

Q. And you didn't specify more than 25,000 or 30,000 joints until when?

A. I can't tell you the date. I don't remember it. Mr. McDowell has a letter to that effect.

Q. Wasn't it somewhere along June of 1916?

A. No, sir.

Q. Was it earlier than that?

A. Yes, sir.

Q. How much?

A. I think a year earlier.

Q. You sent those specifications to Mr. McDowell?

A. I believe we did.

Q. When did you cancel those orders?

A. I don't remember, about in October.

Q. Did you cancel them yourself?

A. At the request of Mr. William Haskovitz, the vice president of the concern, who was in New York at the time, and Mr. McDowell came over to our office and Mr. McDowell told us what trouble he had with those joints. We had gone to a little trouble—the business policy of the concern is never to sell merchandise before it was in the house and that is one reason——

Q. It is all interesting to know, but I simply asked you, did you cancel them or did some one else cancel them?

A. I was there at the time. I don't remember whether my signature went on the letter, but I dictated the letter which Mr. Heskovitz signed.

Q. When was that?

A. This last October.

Q. And you collected $150?

A. Yes, sir.

Q. As your damage?

A. Yes, sir.

By Mr. Skinner:

Q. Is this the letter that you spoke of, showing you letter of September 20, 1916, from the Peerless Light Company, is that the letter of cancellation?

A. Yes, sir.

Mr. Skinner: I offer it in evidence.

(Admitted in evidence and marked Ex. P26.)

Q. Between the time of giving the orders and the time of cancellation had there been any change in the market price of these joints?

A. Yes, sir.

Q. The McAllen joints, for instance?

A. Yes, sir.

Q. To what extent, small or large?

A. About 33 1/3 per cent.

Q. When you cancelled these orders for 200,000 joints for the price of 9½ or 10 cents, what ever it was, with the market price of the substituted joints at a little over fifteen cents, was the $150 an ascertainment of your damage?

A. The only way I can explain that is we got up different preparations of making cuts and different things and we also had a few orders on hand for this material from some of our friends which we afterwards shifted for some other joints and we figured that was our nominal expense and Mr. McDowell agreed that if he at any time would sell these joints he would take care of us.

Q. I am trying to find out whether this settlement of $150 was the result of an actual computation of your actual damage, whether anything, other than consideration, of course, for Mr. McDowell, entered into it? Did that finally compensate you?

A. It didn't fully compensate us, no, sir.

Q. You had a contract for ten cents and you would have to go out in the market and pay fifteen? You were paying that?

A. Not only that. We were losing our profits on the joints.

Mr. Skinner: It is agreed by and between counsel of the statement that the settlement with the Peerless Light Company for $150 was a reasonable adjustment.

EDWIN K. BURKHIMER, sworn in behalf of plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Burkhimer, are you connected with some concern in the business of selling electrical appliances?

A. Yes, sir.

Q. What is the name?

A. W. R. Ostrander & Company.

Q. What is your connection?

A. Purchasing agent.

Q. How long have you been purchasing agent?

A. About fifteen years.

Q. What do you buy for them?

A. All kinds of electrical supplies, all kinds of sundries, insulating joints.

Q. Among other things do you buy insulating joints?

A. Yes, sir.

Q. In 1915 and 1916, at any rate, by March 1, 1916, what insulating joints were on the market?

A. Why, to the best of my memory, the MacAllen was the only one left on the market. I understand they had taken over the other joints that had been made up to that time.

Q. And those joints are how many?

A. Yost and Wirt.

LOUIS D. BAILEY, sworn in behalf of plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Bailey, were you connected with the Bailey Electrical Supply Company?

A. Yes, sir.

Q. Are you still?

A. Yes, sir.

Q. Where is that concern in business?

A. 18 Warren Street, New York City.

Q. What business?

A. Jobbers and electrical supplies.

Q. How long have you been connected with them?

A. Eighth years.

Q. What capacity?

A. Treasurer.

Q. Did you place any orders for electrical insulating joints with Mr. McDowell?

A. Yes, sir.

Q. What joints were they?

A. McDowell joints.

Mr. Whitehead: I would like to note my objection on the same grounds.

The Court: Yes.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. I show you Exhibit P56 and P41. Are those signed by you?

A. This order is signed by my order clerk and this is signed by myself.

Q. The one signed by your order clerk is P46?

A. Yes, sir.

Q. The one signed by you is P41?

A. Yes, sir.

Q. Later did Mr. McDowell come to you for the cancellation of those joints?

A. Yes, sir.

Q. Ask you to cancel them?

A. Yes, sir.

Q. What was your attitude?

A. It was impossible to accept cancellation.

Q. Why did you tell him that?

A. I told him it was impossible for me to accept cancellation.

Q. Are you familiar with the market price of other insulating joints in May, June, July of 1916, joints I mean that might be substituted for this McDowell joint?

A. Why, the MacAllen joint.

Q. Is that the only one?

A. Yes, sir.

Q. Are you familiar with the price of that?

A. Yes, sir.

Q. In those months of May, June, July, 1916, what was the market price of them?

A. 55 off.

Q. Of the list?

A. Yes, sir.

Q. What was the list?

A. Thirty-six cents.

Q. Was there a further discount?

A. Five per cent. in ten days.

Q. Was that the price to everybody or to any special few?

A. Just the jobbers.

Q. Do you know anything about distributors?

A. Why, they only got one distributor in New York City.

Q. Was this price you spoke of the price to distributors generally or the price to the particular jobber that has been selected as their distributor?

A. Generally to jobbers.

Cross-examination by Mr. Whitehead:

Q. Mr. Bailey, how many joints did you order?

A. As far as I can recollect one order of 100,000 and another order for about 12,000.

Q. What price?

A. Unless I see the order I can't tell you.

Q. Are those the orders I show you, Exhibit P46 and P41?

A. Yes, sir.

Q. Those are the orders, and the price is what?

A. One order of ten cents less 5 per cent. for cash in ten days.

Q. That is on the hundred thousand?

A. Yes, sir.

Q. And what is the other?

A. 60—10—10 and 5; five for cash, list price 36 cents.

Q. What would that be net?

A. I will have to figure it out. I have the net price of 100,000 ten cents less five.

By the Court:

Q. The other one, you have the order there. Don't you know what you were going to pay for them?

A. It brings it around ten cents.

By Mr. Whitehead:

Q. That order for 12,000, was that given on October 8, 1915?

A. Yes, sir.

Q. And this order of 100,000, was that given on the date it bears date, May 2, 1915?

A. Yes, sir.

Q. When did Mr. McDowell ask you to cancel those orders?

A. I can't recollect the exact date.

Q. It wasn't before you gave him that order of May 2, 1916, was it?

A. I don't believe so.

Q. Aren't you sure about it?

A. I am sure it wasn't before this order was given.

Q. When you gave Mr. McDowell that order on May 2, 1916, did he say anything to you about the uncertainty of not being able to get the joints?

A. No, sir.

Q. Nothing was said to you then about cancelling the order?

A. No, sir.

Q. How long after that do you think it was before he asked you to cancel the order?

A. I believe there is a letter on record. I can't recollect the date.

Q. You don't have to give the exact date, about how long was it, a week after, a month after? Can't you fix it somewhere near?

A. I can't recollect the exact date.

Q. How did he ask you to cancel it? Did he come to see you?

A. Yes, sir.

Q. And you would not cancel it?

A. No, sir.

Q. Have you ever done anything about it?

A. I have made several demands.

Q. Have you ever gone beyond that? Do you know what I mean?

A. No.

Q. Have you ever done anything more than make demands?

A. No.

Q. You are still doing business?

A. Yes, sir.

GEORGE F. GRANT, sworn in behalf of plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Grant, are you in business?

A. Yes, sir.

Q. Where?

A. 272 Broadway, New York.

Q. What business?

A. Electrical supplies, jobbers.

Q. How long have you been in that business?

A. For myself about twenty months.

Q. And before that?

A. I have been engaged in the business in various branches for twenty-two years.

Q. In what capacity?

A. As a stockman and shipper at one of the factories and for the past nine years in the jobbing business as an employee and for myself in working every branch of the business.

Q. When you say you were in the jobbing business as an employee, will you tell us what you had to do? Did you have to buy or sell?

A. Sell.

Q. At any time have you been purchasing agent?

A. That has been a part of my duties during part of that time, yes, sir.

Q. Have you had any experience in the purchasing of insulating joints?

A. I have.

Q. To what extent?

A. I have purchased quite a good many thousand and have sold a great many thousand.

Q. In the year 1916 was there a joint on the market, an insulating joint known as the MacAllen joint?

A. Yes, sir.

Q. Was there any other?

A. Yes, sir, two or three.

Q. Are they still on the market?

A. I believe they are all manufactured now by the MacAllen, who have absorbed the other companies who have lost that part of the business.

Q. Are you familiar with the market prices of the MacAllen Company's insulating joints in May, June and July of 1916?

A. Yes, sir.

Q. What was the market price?

A. To the distributor the maximum discount was fifty-five per cent. in certain quantities.

Q. Fifty-five per cent. of what?

A. From the list price.

Q. What was that?

A. They vary according to size. List prices are uniform regardless of who manufactured them.

Q. Have you ever seen a sample of the McDowell joint?

A. I think I have.

Q. I show you Exhibit P2, which is a cross section of a sample. Did you ever see a joint like that, imagining it could be cut in two?

A. Perhaps not exactly like it but substantially, perhaps.

Q. I show you a sample that has been offered by counsel on the other side.

Q. Have you seen joints like that?

A. Similar to it, yes, sir.

Q. Was the MacAllen joint at all similar to that?

A. In general construction and size, yes, sir.

Q. Could the MacAllen joint be used in substitution for this one?

A. Yes, sir.

Q. On the MacAllen joint like that what was the list price like this one I have just shown you?

A. I have to speak from memory. I think thirty-six cents.

Q. And to the distributing jobber fifty-five off?

A. If they bought the required quantity.

Q. Do you know what the quantity was?

A. 1000 at one time entitled the purchaser to the maximum discount.

Q. Could any jobber get that fifty-five per cent. other than the distributor?

A. Distributing jobbers.

Q. What would the other jobbers have to pay?

A. Depending upon their connection. I don't think there was an established price.

Q. And they get fifty-five per cent.?

A. No, sir.

Q. How near to it could they come?

A. Five to ten per cent. higher.

Q. You think they might get a fifty per cent. discount. That would be within five points of the other?

CHARLES B. BENTZ, sworn in behalf of the plaintiff:

Direct Examination by Mr. Skinner:

Q. Mr. Bentz, I show you Exhibit P42. Did you sign that?

A. Yes, sir.

Q. Then, you are the Bentz of the Holloway Bentz & Company that gave this order that is marked P32?

A. Yes, sir.

Q. Was that order subsequently cancelled?

A. No, sir.

Q. Did Mr. McDowell ever ask you to cancel it?

A. Several times and I told him I would not do it.

Q. This order is dated?

A. October 14th.

Q. October 14, 1915. Between that time and, say, July 1, 1916, did the price of insulating joints change at all?

A. Upwards I imagine at least twenty per cent.

Q. The price of materials that went into it, steel, and so forth, had that changed in the same time?

A. I don't deal in that line of goods, but I know they have raised.

Q. You are in the business of buying and selling insulating joints among other things?

A. I am.

Q. Familiar with other joints than the joints that were on the market in the year 1915 and 1916?

A. Yes, sir.

Q. Was there a joint called the MacAllen joint?

A. There was.

Q. In the year 1916 was there any other joint on the market?

A. I believe MacAllen makes all the joints.

Q. I mean at that time. At that time, July, 1916, could the MacAllen joint be substituted in actual use for the joints you gave an order for here?

A. Yes, sir.

Q. What was the price of the MacAllen joint in May, June and July of 1916?

A. To the distributing jobber it was fifty-five per cent. off the list.

Q. And the list price was what?

A. Three-eighths by three-eighths, 36 cents.

Q. And a discount of five per cent. for ten days?

A. Yes, sir.

Q. Suppose a man was not a distributing jobber and wanted to buy the MacAllen joint would he get fifty-five per cent. off?

A. No, sir.

Q. What would he get?

A. About fifty per cent.

Q. Would he get any more than that?

A. No, not from me.

Cross-examination by Mr. Whitehead:

Q. Did you pay thirty-six cents?

A. With fifty-five off less five.

Q. Then you got the distributors price?

A. That is the list price. I paid fifty-five off. We always discount our bills. We get an extra five.

Q. That is the distributors rating?

A. I don't know whether—I know that is the price we got.

Q. What is called the distributors rating is sometimes applied to buyers; that is, it is not exclusively applied to distributors?

A. According to their agents it is.

Q. In actual work you can get the benefit of it?

A. You can get the benefit of it.

Q. Most any other firm could get it?

A. I don't know.

Q. But you do?

A. That is the last discount I got in buying insulating joints.

By the Court:

Q. When were those goods to be delivered?

A. Insulation joints, the orders said to be taken in one year's delivery as per our requirement.

By Mr. Whitehead:

Q. What price were you going to pay on that order?

A. 60-10-5 and five cash.

Q. On what?

A. On thirty-six cents list.

Q. What would that be net?

A. I think between ten and eleven cents.

Q. Did you ever send in any requirements on that order?

A. I notified Mr. McDowell what sizes we would require on that order.

Q. Do you remember when you did that?

A. No, I can't say the date.

Q. When did Mr. McDowell ask you to cancel the order?

A. That was, I believe, some time in June or July of last year.

Q. June or July?

A. 1916.

Q. You said you would not do it?

A. I told him I would not do it.

Q. And you never have done it?

A. I never have done it.

Q. Have you done anything about it?

A. No, I told him I would like to have the joints. I had to buy joints since then.

Q. But you have never done anything?

A. Nothing in the way of a suit.

By the Court:

Q. Did you buy from a sample?

A. Yes, sir, I saw the sample.

By Mr. Whitehead:

Q. Could you recognize the sample if you saw it now?

A. From general appearance I can.

Q. What would you say about that? I show you P2. That is only a cross section, but it gives a general idea.

A. When I gave him the order he had an insulating joint and that looked like it. I don't know whether he had this joint or not, but it was something similar to this.

Q. Do you recall any discussion with Mr. McDowell as to how it was made, what it contained?

A. No. All we required was an Underwriters label.

Q. The price that he was giving you of ten cents or so was quite a little below the prevailing price?

A. That is the reason we gave him the order.

Q. How did he account for that?

A. I don't know.

Q. Didn't you ask him?

A. No.

Q. Just thought you were getting a bargain?

A. Getting a bargain.

By Mr. Skinner:

Q. I think you said you did buy other joints?

A. Yes, sir, buying them all the time.

Q. Have you bought the MacAllen joint?

A. Yes, sir.

Q. Paid the price you have been speaking of?

A. Yes, sir.

PLAINTIFF RESTS.

Mr. Whitehead: I ask for a nonsuit in this case on the ground that the plaintiff's case

shows that the contract that is produced in evidence was modified and the time of performance for the defendant extended by an agreement made between the parties on or about the 1st of May, 1916. The correspondence with the plaintiff was introduced. The evidence of Mr. McDowell goes to show that around the 1st of May Mr. McDowell came out to the mill of the Hemming Manufacturing Company and it was then and there agreed—let me say first, prior to his coming out he had been advised by the Hemming Manufacturing Company that they would not proceed to manufacture the joints that had been approved by the Underwriters, that they were willing to manufacture the joints that were subsequently referred to in the contract. Mr. McDowell came out to the plant of the Hemming Manufacturing Company and it was then and there agreed that if the Hemming Manufacturing Company would proceed he would cancel orders, he would not take any more orders. Upon that express acknowledgment upon his part the Hemming Manufacturing Company agreed that they would proceed to do what they had refused to do, and that was to furnish him, as he says, joints either by manufacture or by purchase which would be sufficient to fill the orders that he had and which he could not cancel. Acting under that arrangement the matter proceeded and the evidence shows and Mr. McDowell's testimony shows that, that we proceeded and he proceeded under that arrangement until the 6th or 7th of July. The correspondence shows that during the last week in June and the first days in July Mr.

McDowell was specifying to us orders for us to fill and we were corresponding with him requesting him for his details of orders. There is, I submit to the Court, no proof of the fault on our part of the modification of our agreement. There is nothing on which the jury can find a default. Mr. McDowell's own testimony is that he understood we had a reasonable time to fulfill the contract. The last correspondence in evidence is on the 7th of July and the evidence in the case is that on the 25th of July or 27th of July the summons and complaint in this action were served. Now, I submit that that proof on the part of the plaintiff does not show any default on our part of our contract. They voluntarily extended our time of performance by an agreement for which there was consideration found in the fact that we proceeded to do something that we said we would not do. We took our position relying upon Mr. McDowell's statement that he would cut down his orders and that he would not take any more orders. The exact situation is perfectly plain as a matter of business. There was a contract there with which we did not proceed. Mr. McDowell goes out to the plant and sits down with our representative and says, "If you will fill my orders for me, if you will get me some kind of a joint to fill these orders with I won't take any more and I will cancel all I can." We say "All right." Mr. McDowell on that understanding proceeded and we proceeded and Mr. McDowell knew we were proceeding and he proceeded with us and the correspondence shows that without any claim on his part, without any demand

for damages or compensation in any way, shape at all, we proceeded working on it in good faith until the 27th day of July when this suit was brought. I submit there is no evidence here to go to the jury that we had defaulted on our contract, our time of performance was extended by this supplementary agreement, and, therefore, the plaintiff should be non-suited.

The Court: I think it is a jury question. Motion refused.

Counsel for defendant prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

BENJAMIN H. HOWELL, recalled in behalf of defendant.

Direct Examination by Mr. Whitehead:

Q. Mr. Howell, you are the president of the Hemming Manufacturing Company?

A. I am.

Q. How long have you been president?

A. Eight years about.

Q. Are you acquainted with Mr. McDowell?

A. I am.

Q. Do you remember Mr. McDowell calling at the office of the company in reference to this contract, which is in evidence and marked Exhibit P9?

A. I do.

Q. Will you state about when that was?

A. Some time in October, 1915. You refer to the original contract?

Q. The date of the contract?
A. October, 1913.
Q. October 13, 1915?
A. '15, I should say.
Q. Did you see Mr. McDowell there that day?
A. Yes.
Q. What took place?
A. Mr. McDowell was brought into my office by Mr. Hemming and submitted to me a draft of a contract which he desired to have signed by me on behalf of the company to which I objected, as I wished to have the joints specifically covered. I wished the specifications in the contract to name the joint we were to make and I therefore took his draft and rewrote it, writing in a single clause which would specify the joints that had been submitted to the Underwriters. My intention was to have that specify the gummon material we were then making.

Mr. Skinner: I object to a statement.
The Court: Yes, what he did is competent.

Q. The contract was drawn to specify a particular joint by your especial instruction, was it?
A. Yes.
Q. You redrafted the contract, did you, at that time?
A. I did.
Q. Was there any other change made of the redraft except with reference to that particular joint? A. Nothing of importance that I can recall.
Q. What reason did you have for naming the joints that were to be manufactured, specified and defined?
A. I wanted to confine it to a material that we made.

Q. What is your business?

A. Manufacture of molding and insulating material, molded insulation.

Q. Just what do you mean by that?

A. We produced a molded compound which we pressed into shapes as called for by our customers. That is to say we do not make any particular individual article.

Q. That molded compound is a material only as it is used in the making up of articles? A. That is correct.

Q. When you get an order for an article your part in the contract is the furnishing of the insulation material united with the metal parts which goes to make up the material?

A. Yes, if there are metal parts. Sometimes there are not metal parts, merely the molding made from blueprints of the customers.

Q. Were you making at that time what might be called a stock insulating material?

A. We were making one or two insulating materials.

Q. Do you know—I show you this cross section marked P2, do you know what kind of insulating material that cross section consists of?

A. That is a material known in our plant under the trade name of gummon.

Q. Is that a special or standard or stock?

A. That is a standard manufacture with us.

Q. In the spring of 1916 did you meet Mr. McDowell?

A. Yes, I saw him at that time.

Q. Where?

A. In my office.

Q. Garfield?

A. In Garfield.

Q. Can you state about when?

A. April or May, at about the time I think he stated in his testimony, I think was correct.

Q. Had you seen him around the plant since October 15th, the date of the making of the contract and this later date that you mention in April?

A. Yes, he had been there once or twice.

Q. Had you ever seen him?

A. Yes.

Q. What was the occasion of his visit to the plant the last of April or 1st of May, 1916?

A. He came out at our request.

Q. Who do you mean by our?

A. A letter from the company requested him to call to go on with his order.

Q. That was your request?

A. My request, yes, but the letter was signed by the secretary.

Q. When he came out he met with you and anybody else?

A. There was Mr. Appleton, the factory manager, who was in my office at the time and I think he subsequently met our chemist.

Q. What was the conversation?

A. You refer now to the conversation in May?

Q. Let's take the interviews in order. Take the first one first.

A. The first interview, Mr. McDowell came to our office and discussed with us the possibility of proceeding with the contract. We informed him that owing to conditions which had been made at that time that we would be delayed, that we had some difficulties in making the material which he wished used and that we had found this material, the gummon material, which we had originally contracted to make and that we thought there should be some new agreement. I may have that mixed up with subsequent interviews but I think that is about——

Q. Can you fix that date?

A. That was the first interview, at the same date as given by Mr. McDowell some time in April. It would probably have been immediately after April 18th, probably the 19th or 20th.

Q. Who had charge of your factory operations down to that date?

A. Mr. Hemming.

Q. When did he leave the company's employ?

A. April 18th.

Q. Who succeeded him?

A. In the management of the factory Mr. Appleton succeeded him but there was some changes made in the general management of the company at that time.

Q. Why did you send for Mr. McDowell to come to Garfield?

A. In order to discuss the contract which was not clear to me as I wasn't entirely familiar with what arrangements there had been made in the past and I wanted to straighten out the contract with him and see if I couldn't get some arrangement that would be mutually satisfactory to us.

Q. What did you find that the factory was doing with regard to this insulating joint?

A. Up to April 18th the factory was proceeding with the joint. There was some difficulty at that time. Until some time after April 18th the factory was doing nothing as Mr. McDowell had testified.

Q. Do you know what insulating material the factory was using in connection with this?

A. It used a material which hadn't been used for any other purpose. It was a material which was new to me and which wasn't a standard material from the factory.

Q. Was it the material shown in P2?

A. No.

Q. How can you distinguish it from that material?

A. The material in question was white and free of colors. It contained no asbestos. It was a material used in all our other articles.

Q. What was the subject of your conversation at that interview or at the interviews that succeeded that, if any?

A. What do you mean; the interviews following this first interview?

Q. Yes, what was the subject of the conversation?

A. Mr. McDowell brought with him a number of letters, papers, which he wished to show me, discussed with me the advisability of continuing the purchasing of these joints for him and, as he has stated, pointed out to me that he would have claims which he would want to make against—he mentioned these claims under various headings, partly under the heading of loss to him from necessary cancellation of orders he had placed for some of the metal parts, partly under the heading of loss of profits to himself and other various headings. I told him we might be willing to meet him on all of these items with the exception of profits, but we didn't feel we felt called upon to suffer any loss on profits and he himself suggested it would be far preferable if we would go on and make the joints and I think it was afterward arranged he would cancel as many orders as he could and we would undertake to make of this special material in question the joints necessary to fill his orders, or failing in that, to purchase the joints for him.

Q. Did he say whether or not he would take any new orders?

A. He said he would take no new orders. I think he said that in the correspondence as well.

Q. Can you fix about the date of that conversation?

A. Some time in May.

Q. What did you do as a result of that conversation?

Q. We proceeded to make a new mold.

Q. Do you know that of your own personal knowledge?

A. I do. I saw the mold being made.

Q. You are there at the factory every day?

A. I am.

Q. How active a part have you taken?

A. Since April I have taken a very active part.

Q. Was anything else done besides making molds?

A. Yes, samples were made up and as many pieces as possible were made with the very few metal parts that we had. We did not have very many of these metal parts in stock, and, therefore, we couldn't manufacture in quantity.

Q. Did your factory proceed towards manufacturing in the ordinary and customary way?

A. We did.

Q. How long did you continue that way?

A. Up to the time we received notice of this suit.

Q. Do you remember what day you received notice of the suit?

A. I think it was the 27th of July.

Q. Was there any word, verbal or written, by Mr. McDowell prior to that date apprising you of his intention of bringing a suit?

A. None.

Q. Was your factory in actual operation in connection with the turning out of those joints up to the time of that suit?

A. It was, yes. Do you mean were we making joints in quantity?

Q. No.

A. Then, my answer was correct.

Q. Did your company receive that letter?

A. I presume so.

Mr. Whitehead: I offer in evidence D1 for identification.

(Admitted in evidence and marked Ex. D1.)

(Ex. D1 read to the jury.)

Mr. Whitehead: I offer in evidence D2 for identification, letter from McDowell to Hemming Company, dated July 31, 1915.

(Admitted in evidence and marked Ex. D2.)

(Ex. D2 read to the jury.)

Mr. Whitehead: I offer in evidence the letter marked D3 for identification.

(Admitted in evidence and marked Ex. D3.)

(Ex. D3 read to the jury.)

Mr. Whitehead: I now offer in evidence letter marked D4 for identification.

(Admitted in evidence and marked Ex. D4.)

(Ex. D4 read to the jury.)

Mr. Whitehead: I now offer in evidence letter marked D5 for identification.

(Admitted in evidence and marked Ex. D5.)

(Ex. D5 read to the jury.)

Mr. Whitehead: I offer in evidence D6 for identification.

(Admitted in evidence and marked Ex. D6.)

(Ex. D6 read to the jury.)

Mr. Whitehead: I offer in evidence D7 for identification.

(Admitted in evidence and marked Ex. D7.)

(Ex. D7 read to the jury.)

Mr. Whitehead: I now offer D8 for identification.

(Admitted in evidence and marked Ex. D8.)

(Ex. D8 read to the jury.)

Mr. Whitehead: I offer in evidence letter also marked D9 for identification.

(Admitted in evidence and marked Ex. D9.)

(Ex. D9 read to the jury.)

Mr. Whitehead: I offer in evidence letter marked D9 for identification.

(Admitted in evidence and marked Ex. D10.)

(Ex. D10 read to the jury.)

(D10 marked D11 for identification.)

Mr. Whitehead: I offer in evidence letter marked D11 for identification.

(Admitted in evidence and marked Ex. D12.)

(Ex. D12 read to the jury.)

Mr. Whitehead: I offer in evidence letter marked D12 for identification.

(Admitted in evidence and marked Ex. D13.)

(Ex. D13 read to the jury.)

Mr. Whitehead: I offer in evidence letter marked D13 for identification.

(Admitted in evidence and marked Ex. D14.)

(Ex. D14 read to the jury.)

Mr. Whitehead: I offer in evidence letter marked D14 or identification.

(Admitted in evidence and marked Ex. D15.)

(Ex. D15 read to the jury.)

Mr. Whitehead: I offer in evidence letter marked D15 for identification.

(Admitted in evidence and marked Ex. D16.)

(Ex. D16 read to the jury.)

Mr. Whitehead: I offer in evidence D16 for identification.

(Admitted in evidence and marked Ex. D17.)

(Ex. D17 read to the jury.)

Mr. Whitehead: I offer in evidence D17 for identification.

(Admitted in evidence and marked Ex. D18.)

(Ex. D18 read to the jury.)

Mr. Whitehead: I offer in evidence D18 for identification.

(Admitted in evidence and marked Ex. D19 for identification.)

(Ex. D19 read to the jury.)

Cross-examination by Mr. Skinner:

Q. From whom, by the way, did the company take its name?

A. Hemming.

Q. The Mr. Hemming who is the general manager?

A. Yes, sir.

Q. That is, this gentleman sitting here?

A. That is the one.

Q. You were president?

A. I was.

Q. You had to do, however, with the financial end of the business?

A. Practically owned the business. I could do anything I wished.

Q. But, in the management of it, you had the handling of the financial end of it and Mr. Hemming had the management of it?

A. He had at such times as I delegated him those powers.

Q. He had at such times as you delegated. What times did you delegate?

A. What I wished to say is that Mr. Hemming was the general manager of the company and I was the president of the company and——

Q. And what?

A. That is all right.

Q. Mr. Wilde was Mr. Hemming's assistant?

A. No.

Q. What was his place?

A. Draughtsman.

Q. Whom did he assist, if anybody?

A. He had charge of the drawing department.

Q. When Mr. McDowell came to you or was brought to you it was in reference to the making of a mold of an insulating joint?

A. It was.

Q. Your company had wanted to do that for some time?

A. Not particularly.

Q. Well, unfortunately——

A. We wanted any order we could get.

Q. Hadn't you been planning to put a joint on the market?

A. Not that I know of.

Q. Hadn't you had some correspondence with a Mr. Trumbel or a Trumbel Company?

A. Yes.

Q. You were in the business of Manufacturing electrical appliances?

A. No, the manufacture of modern insulating materials.

Q. And among your customers were men or concerns who were manufacturing electrical appliances?

A. Yes.

Q. They bought your material and used them in the making of their stuff?

A. No.

Q. Well, they bought your material?

A. They bought articles that they had made by us.

Q. They were customers of yours?

A. Yes.

Q. You didn't attempt to put an insulating joint on the market under your own name?

A. No.

Q. It might jar upon or seem to be, might be offensive to some of your customers if they knew of your being and engaging in competition with them?

A. That wasn't the reason.

Q. That was so.

A. No.

Q. At any rate, you didn't want to go on the market directly?

A. No.

Q. You wanted somebody else to do it?

A. No.

Q. You didn't want to go on the market at all?

A. I merely wanted to sell our product.

Q. You heard of Mr. McDowell as a man to sell your product, didn't you?

A. That wasn't exactly it, no.

Q. At any rate, he came to you?

A. Yes.

Q. And you entered into the arrangement of this contract of October 13, 1915?

A. Not immediately. That was some time after he came to us.

Q. No, at first when he came to you and in your negotiations you agreed that you would manufacture the whole article, including all the parts?

A. That I don't know.

Q. Don't you know that you had actually, before the contract of October, 1915, had actually negotiated with different concerns for the furnishing of shells and nipples and all that?

A. That was for experimental purposes.

Q. Wasn't it in large quantities?

A. Not that I remember.

Q. And then it was finally decided that the arrangement should include the furnishing by Mr. McDowell of the shells and nipples?

A. That was the arrangement.

Q. At that time you were making a kind of insulating material called gummon?

A. We were.

Q. Making any other kind?

A. We were.

Q. Making a kind called hemit?

A. We were.

Q. Hemit was white?

A. It was.

Q. Gummon was black?

A. It was.

Q. A sample joint was shown to Mr. McDowell?

A. At what time?

Q. When he first came to you?

A. There were some samples, yes.

Q. This Exhibit P2 was shown to him, wasn't it?

A. One similar to that. I woudl not say that one particularly. Some similar to that.

Q. If he says that was the one shown to him at that time you would not question it, would you?

A. No.

Q. And that black material there is the gummon?

A. That is the gummon.

Q. You understood, did you not, that in order to market this insulating joint it would be necessary to secure the approval of the Underwriters Laboratory?

A. I did.

Q. You knew without that there would be a very limited market, if at all, for the product?

A. Correct.

Q. You expected to have your joints or the joint you were to make such as would receive their approval, didn't you?

A. Not necessarily.

Q. What do you mean by that?

A. Why, I mean by that, that we would undertake to make a joint, but we at no time guaranteed that joint would pass the tests of the Underwriters.

Q. You knew it would be worthless unless it would?

A. Then, McDowell didn't have to buy it.

Q. That is, if the ones you made were such as would not receive the approval they would be worthless, but he would not have to buy them?

A. He would not have to buy them.

Q. But suppose you had undertaken to supply him with joints as he ordered them to the quantity of any dozens you would not expect to deliver him worthless joints?

A. No.

Q. You expected to supply him with joints conforming to the requirements of the Underwriters Laboratory?

A. We hoped to.

Q. Was there any doubt?

A. At times, yes.

Q. Did you communicate that doubt to Mr. McDowell?

A. We did.

Q. When?

A. At various times.

Q. I show you this letter, signed by you, and addressed to Mr. McDowell, of July 22, 1916, and call your attention to this paragraph, "We will prepare new samples to be submitted to the Underwriters." Now, then, if you want to read the whole letter.

A. No.

Q. Had you then any doubt of your ability to make one that would secure the approval of the Underwriters?

A. At that time, no. The Underwriters had already approved it.

Q. In July, 1915?

A. I beg your pardon! I thought that was '16.

Q. Had you any doubt of your ability to get that?

A. No, I don't think there was.

Q. When did the doubt arise?

A. The doubt was at the beginning.

Q. It had been dispelled by this time?

A. No.

Q. You said you know there was a doubt. There wasn't any after this time?

A. There was doubt. The samples that were originally shown to Mr. McDowell when he came to our place were there and there was no guarantee on our part that those samples or that joint would pass the Underwriters but we would attempt to make it for him.

Q. You were speaking of samples for McDowell

when he first came but at this time the doubt was gone?

A. We believed we could make it.

Q. Didn't you tell McDowell himself? Didn't you tell him that you could make joints that would have the approval of the Underwriters Laboratory?

A. We told him we believed we could. I don't think we guaranteed so or made it definite.

Q. You knew how that approval was to be obtained?

A. We certainly did.

Q. You knew all you had to do was to make your goods so that they would meet the tests of the Laboratory and you could get the approval? A. Yes.

Q. You knew that was open to anybody? Anybody could go there, pay a small fee and make a test and get their approval?

A. Yes.

Q. You expected to submit it to those tests?

A. Yes.

Q. You expected to manufacture the article in accordance with those standards, didn't you?

A. Yes.

Q. And you so contracted?

A. No.

Q. You did not?

A. We didn't contract, no.

Q. Well, I will show you the contract. I call your attention to P9, paragraph 2. "The Hemming Company agrees to manufacture said joints including varnishing, boxing, packing, shipping, testing and labelling in accordance with the Underwriters specifications." Did that mean you were going to label them in accordance with the specifications?

A. Test and label them in accordance with the specifications. There is a comma after the word "shipping."

Q. You never practiced law?

A. No.

Q. You say, then, that the meaning you understood this to mean that you were to test and label in accordance with the Underwriters standard specifications?

A. That is what we understood.

Q. What is there in the Underwriters standard specification? You know that?

A. Not very clearly.

Q. Don't you know they are specifications of the quality of the goods, of the article and the work that they will do when subject to certain tests. Aren't those the specifications?

A. No, there are as I recall it, in the Underwriters specifications no definite method of proceeding with tests.

Q. Then, you mean you understood this to be an undertaking on your part to test the thing according to the Underwriters specification without any obligation to meet the test?

A. I do.

Q. All you had to do was to put them through the test and if they were failures McDowell was just as much bound to take them as if they had passed the test, is that it?

A. That is it.

Q. And you were to label them according to the specifications?

A. We were.

Q. Was there anything in the specifications requiring the labeling?

A. That I don't recall.

Q. Then, what makes you say you were to label them according to the specifications?

A. To use the labels provided by the Underwriters.

Q. The Underwriters provided the labels. They don't say anything about them in their specifications?

A. That I can't say.

Q. The labels are the evidence that the goods have passed the test of conforming to the specifications?

A. I believe so.

Q. Then, when you said, "We agree to manufacture, including varnishing, boxing, packing, shipping, testing and labeling in accordance with the standard specifications," you didn't take that as a contract to manufacture in accordance with the Underwriters specification, but only as to testing and putting on the labels?

A. I took that as qualifying the price.

Q. Were you to varnish in accordance with the Underwriters specifications?

A. No, that clause simply states what we shall do for the amount of three cents, what we shall perform.

Q. What comes after the words, "including"—

A. "The Hemming Company agreed to manufacture the said joints, including the varnishing, boxing, packing, shipping, testing and labelling in accordance with the Underwriters standard specifications for the price of $30 a thousand," I understood that clause to be read and these are the different things we were to do for that $30.

Q. That is, you were to varnish and box ?

A. Yes, sir.

Q. And pack them?

A. Pack them.

Q. Ship them?

A. Ship them.

Q. Test them?

A. And do the testing.

Q. And labeling?

A. And labeling.

Q. Was that all?

A. That is all there is there.

Q. No, there is manufacturing there. Weren't you to do that?

A. They agreed to manufacture, including.

Q. Is that all that it included?

A. Those are the things that are included in the manufacture.

Q. So, your understanding of the words "manufacture," in your agreement to manufacture was limited by the latter words, to include nothing but the varnishing, boxing, packing, shipping, and the testing, and the labeling, is that right?

A. Included those things besides the self-understood molding or pressing of the pieces which was our work.

Q. The self-understood molding or pressing. Is that something that was self-understood?

A. Yes, sir.

Q. Wasn't there something besides molding and pressing?

A. There was molding and pressing.

Q. Nothing else?

A. Molding and pressing is the same thing.

Q. Wasn't there anything besides that in your factory operation?

A. Nothing much except some cause that the parts had to be molded in our factory.

Q. You said you understood it to be a contract to manufacture, including so and so, and that what follows the word "including" is the enumeration of the things that are within the words "manufacture", is that so?

A. Something to that effect.

Q. Then, you don't find there any agreement to mold and press? That was self-understood, it isn't in this contract?

A. It is in the word to manufacture.

Adjourned to January 11, 1917, at ten o'clock, A. M.

THIRD DAY.

Newark, N. J., January 11, 1917.

Met pursuant to adjournment.
Present, counsel as before stated.

BENJAMIN H. HOWELL, resumes the stand.

Cross-examination (continued) by Mr. Skinner:

Q. Mr. Howell, did you understand that the insulating material that was to go into these joints was to be gummon?

A. I did, yes.

Q. And you said that you personally attended to the revising of the contract because you wanted to have it specify in detail the joint, is that right?

A. Not the joint, the material.

Q. And it was for that purpose that you revised the contract?

A. Yes, sir.

Q. You didn't put any specification of the material in the contract, did you?

A. I specified the joint which has been submitted to the Underwriters.

Q. You did specify it?

A. I think that was it, yes. It was to be a joint the same as was submitted to the Underwriters.

Q. Will you find where in the contract you specified the particular sample that had been submitted to the Underwriters or—wait, how many samples had been submitted?

A. That I don't recall.

Q. Do you recall more than one?

A. There might have been two or three.

Q. As far as you know there was only one?

A. I would not say there was only one. There were probably two or three samples.

Q. How do you know but what there was two or three different samples?

A. They were all made of gummon at that time.

Q. Did you know at that time?

A. Yes, I did.

Q. Did you know what gummon was?

A. Yes, I did.

Q. Did you know what hemit was?

A. Yes, I did.

Q. Were not you making both?

A. We were, yes.

Q. Who submitted the sample, you or Mr. Hemming, that were submitted to the Underwriters Laboratory?

A. An employee of our office. I would not say whether it was Mr. Hemming or somebody else.

Q. Did you see him before he left?

A. No, I did not.

Q. Did you know what samples he took?

A. I knew he took samples that were made in the factory.

Q. Were not you using both insulating materials in the factory?

A. We were, yes.

Q. Did you know then from any personal knowl-

edge of your own which of the two insulating materials had gone into the samples submitted to the Underwriters Laboratory?

A. Yes, I knew as near as it was possible to know that we were making them of the gummon material.

Q. You were not making any at all?

A. The samples, we were using gummon material and that was the only material discussed.

Q. Let's turn to the contract. What did you specify?

A. Sample of which was presented to the Underwriters Laboratory in the City of New York.

Q. In the month of September, 1915? A. Under the name of McDowell insulating joints.

Q. Then, you understood in the contract for the manufacture of joints just the same as the samples that were submitted in September?

A. Yes, sir.

Q. Did it make any difference to you at that time what material was used, whether it was gummon or hemit?

A. Not whether it was gummon or hemit.

Q. Then, why were you so anxious to specify?

A. Because I didn't want to be called upon to find any other material.

Q. If called upon to find any other and you already had it right there in your factory you would not mind, would you?

A. I didn't have necessarily other materials in the factory. I only had the hemit.

Q. Then, it would not be any trouble for you to find hemit, would it?

A. No, but I didn't consider hemit to be a suitable material.

Q. You didn't consider it to be a suitable material, is that right?

A. At the time, yes, sir.

Q. You knew the difference between gummon and hemit?

A. Yes.

Q. Mr. McDowell didn't, did he, as far as you know?

A. As far as I know he didn't.

Q. Why didn't you use gummon?

A. I didn't think it was necessary as long as he was satisfied with the joint that was being submitted to the Underwriters.

Q. Well, you knew, did you not, at that time that it didn't make any difference to Mr. McDowell whether the material was gummon or hemit or what it was called if it only got the approval of the Underwriters Laboratory; you knew that, didn't you? A. Yes, certainly.

Q. Was hemit given that name because of any connection with it of Mr. Hemming, your general manager?

A. That might possibly be the case. It was simply a fictitious name and possibly the name of Hemming had suggested the name to me.

Q. When was that name given to it?

A. In the early days, when the business was first started.

Q. Were you there?

A. Yes.

Q. Didn't you give it that name?

A. I did.

Q. Why do you say probably that had something to do with it. You know perfectly well if it did have a great deal to do with it?

A. I say probably the name was discussed and a trade name selected in the ordinary conversation.

Q. Did you know that the black material, gum-

mon, had been abandoned for the white material, hemit?

A. It never had been abandoned for the white material, hemit.

Q. Did you know that the white material, hemit, was the one that was being used in the later experiment?

A. What we call the white material, hemit wasn't used in the later experiments. It was a supplementary material that was used. It wasn't a regular hemit.

Q. Did you know that anything other than gummon was being used in the later experiment?

A. Yes, I was told that.

Q. And you saw it?

A. I saw it, yes.

Q. You saw the samples that were submitted to the Underwriters Laboratory in February 1916, didn't you?

A. I would not say I saw those identical samples. I saw samples of the material at that time.

Q. Were you told they were samples that had been submitted to the Underwriters Laboratory?

A. Yes, sir.

Q. And they had this same white material in?

A. Yes.

Q. Not hemit but a white material?

A. It was a white material, yes.

Q. And it was gummon with the asbestos left out?

A. No, it wasn't gummon with the asbestos left out. It was a white material which contained no asbestos, but was different than gummon.

Q. When you saw that white material being used and knew it was being used in the joint submitted for tests to the Underwriters Laboratory

did you say to McDowell that that is not in accordance with our contract?

A. I didn't see McDowell at that time.

Q. Did you say that to anybody?

A. Not that I know of.

Q. Why not?

A. It didn't occur to me at that time.

Q. It didn't occur to you it was a violation of this contract or it was a manufacture of something other than what you had agreed to make?

A. It didn't come to me at that time at all.

Q. And the reason for that was that it didn't make any difference to you, isn't that so?

A. No, I would not say that exactly.

Q. Were you not told that the course of construction would be cheaper?

A. No, I don't think I was.

Q. Will you say you were not?

A. The cost of material I was told would be cheaper, not the cost of manufacture.

Q. Well, the cost of manufacture?

A. No, I don't think I was.

Q. If the material were cheapened would it not make the article cheaper?

A. There were different operations. Other operations were made necessary. The whole thing was experimental.

Q. At the time when the samples were submitted to the Underwriters Laboratory in February, 1916, you didn't know of any additional operations, then?

A. I don't know. At that time I didn't know anything about it.

Q. At that time, not knowing of any additional operations, and being told that his white material would cost less, you thought that the cost of the performance of your part of this contract with

Mr. McDowell was going to be made less by the substitution of this white material, didn't you?

A. No, I didn't think that.

Q. How could you help thinking that if you knew the material cost less to produce?

A. Possibly I can explain that.

Q. Do that.

A. I didn't think very much about it one way or the other. It was a matter that was left largely in the hands of a man in the factory. If we could have found something we would have been willing to go on with it and I suppose they were attempting to get some other material which would suit.

Q. It was largely left in the hands of the men in the factory to get over this matter?

A. They had heard that this gummon material had passed the Underwriters.

Q. Then, it was left to the men in the factory to find the material that would pass the inspection of the Underwriters?

A. Yes, because Mr. McDowell wished it.

Q. Just because Mr. McDowell wished it?

A. We were in good faith trying to get this joint through.

Q. You were perfectly willing that any material should be used that would help Mr. McDowell to get it through?

A. If it was reasonable for us to use, yes.

Q. You were satisfied with this white material if it could be purchased at a price that was reasonable to you?

A. Not at that time.

Q. You just said you thought it would cost less?

A. I said the material.

Q. Did you have any idea that would cost more?

A. I didn't know anything about it.

Q. You were satisfied, then, that this white material should be used, weren't you?

A. I couldn't be satisfied at that time because I hadn't the information at that time that would permit me to form a judgment.

Q. When did you get that information?

A. At very much later date.

Q. When?

A. Around April.

Q. From whom?

A. My own investigation in the factory.

Q. Knowing that the white material was being used in the factory test you made no objection?

A. No.

Q. You didn't say to anybody, "That is not the stuff that we are bound to use?"

A. I may have discussed that with members of the staff.

Q. You might not have?

A. I probably did suggest that and was told it would be all right and I waited to see.

Q. I would rather have, as far as we can, your memory and not your guesswork or speculation. Do you remember telling anybody, calling the attention of anybody in your plant or out of it to the fact that the thing that you had so carefully guarded in the specifications of this contract was being departed from and that another material was being used?

A. I would not like to say absolutely that I did but I am quite sure that I did.

Q. You would not like to say whom you said it to?

A. If I said it to anybody I said it to Mr. Hemming.

Q. Were you told that the Underwriters Laboratory test in February was satisfactory and that the approval had been obtained?

A. It would take——

Q. Were you told at that time that the joint that was being produced in your factory had received the approval of the Underwriters Laboratory?

A. Yes, I was told that in February. I think it was February, the second time that they were tested. I think I was told that.

Q. When you were told that did you give instructions at all as to going on further with the work?

A. No, I gave no instructions.

Q. You understood then that the work was going on, the work of manufacturing or that it was to go on?

A. I understood it was going on.

Q. You understood that it was to go on. You didn't understand it was going on?

A. Yes.

Q. Did you? Well, at any rate, understanding then it was going on you were satisfied to have it go on?

A. I would not say that I was exactly. You are entering into conditions in the factory that makes it very difficult to answer those questions.

Q. Some of the conditions possibly that you have in mind is the fact that you had found out at this that this thing was going to costs more than you had expected?

A. Not in the conditions. That had nothing to do in this matter.

Q. Hadn't you found out it was going to cost more than you expected?

A. In April, it was possibly known before that.

Q. Well, at any rate, in February or say March 1, 1906, you understood, did you not, that the joint produced in your factory with the white ma-

terial was the one that had been submitted to the Underwriters Laboratory?

A. Yes, I knew that.

Q. You knew it was the one that had received their approval?

A. Yes.

Q. You knew it was the one that had been submitted to Mr. McDowell?

A. No, the one that was submitted to Mr. McDowell was the black one.

Q. Did you think that McDowell didn't know of this change of material?

A. I didn't know anything about that. I presume he did know.

Q. Did you then think that he knew?

A. I can't answer that very well.

Q. Didn't you think that it didn't make any difference to Mr. McDowell as long as the Underwriters Laboratory approval was obtained?

A. Of course, it would not make any difference and the price was the same and the material was satisfactory to the Underwriters.

Q. Therefore, you didn't think it was necessary to tell him you had changed from the contract which you so carefully specified, did you?

A. Didn't consider it necessary, no.

Q. Were you familiar with the specifications furnished the Underwriters Laboratory?

A. Why, I read them, that is all.

Q. Are those the specifications that you had read or duplicates of which you had read?

A. Yes, I think they are.

Q. Well, I call your attention to this description, "The insulating material is hemit B." Isn't that that white material?

A. That name is. That name is the name of the white material.

Q. You knew then that had been specified to the Underwriters Laboratory as the material of which you were going to make these joints?

A. Yes.

Q. Then, you meant to use that material, didn't you?

A. Evidently from that.

Q. Why do you now complain, why do you now defend this suit by saying you were under no obligation to furnish anything but the black material?

A. I consider that to be the obligation under the original contract. We may have submitted this to the Underwriters at this time as the material. This would not control the contract to my mind.

Q. So, although you had actually made this change in the construction of the joint, incorporated into the specification that went to the Underwriters Laboratory and required to make the joint of that material, you think you have the right now to fall back on the contract and refuse to deliver to Mr. McDowell anything but the black, is that it?

A. We did think under the contract, earlier in the month of April if we refused to deliver, we subsequently made an arrangement with him and agreed to deliver the white material.

Q. When you say you later made arrangement with Mr. McDowell for the furnishing of the white material do you refer to the arrangement of June 7, 1916?

A. I refer to the arrangement to which Mr. McDowell testified. I think it was during May, wasn't it?

Q. Made with you or with Mr. Hemming?

A. No, Mr. McDowell, when he came to our office and then we then made a new arrangement under

which he agreed we would cancel as many of his contracts as possible and we agreed we would make this white material for hi min order to help him fill as many contracts as he was unable to cancel.

Q. There have been letters introduced in which you took the position that your only obligation to Mr. McDowell was to furnish according to the original sample agreement?

A. Yes, that is correct.

Q. We may then regard any of those letters or that position as being binding upon you by reason of this later arrangement with Mr. McDowell?

A. I consider that that later arrangement with Mr. McDowell was a new arrangement that we made. We had had some correspondence. Mr. McDowell had particularly said at one time in the early correspondence and had come out to see us and we in good faith were trying to come to an understanding to help him out and we, therefore, said if he would try to cancel as many of his contracts as possible we would furnish white material, we would fill as many of his contracts as he was unable to cancel.

Q. You didn't understand that to do away with the old contract?

A. I understood so.

Q. You had no arrangement in May as to the price?

A. The price was to remain the same.

Q. There wasn't anything said about price?

A. It wasn't necessary in my opinion inasmuch as Mr. McDowell said he had those contracts and, therefore, we took it for granted we would furnish the material for the same price or else he would have incurred a loss.

Q. But the cost of production of these joints

increased between the time when Mr. McDowell first made his arrangement with you and the time this suit was began?

A. The cost of production yes,—the cost of labor would probably increase.

Q. The cost of material, too?

A. Not to any extent.

Q. Didn't you find out or didn't you think in April or May, 1916, that it would cost you about ten cents a piece to produce these joints?

A. I don't recall that, I am not sure.

A. About that?

A. No, I would not like to say anything about the cost. I am not very competent to discuss that.

Q. Didn't you write Mr. McDowell saying that you would have to have a higher price because of the advances in the cost of insulating material?

A. I believe such a letter was written. Some of these letters were circular letters that were sent to the trade in general and would have been sent to Mr. McDowell possibly concerning other matters.

Q. You spoke of an arrangement with Mr. McDowell in May. Was that the arrangement that was expressed in the letters of June or were the letters expressed of some other arrangement?

A. I think so, but I would rather see the letters.

Q. Here is a letter of Mr. McDowell to you, P34, dated June 8, 1916, and you see it refers to your letter of June 7th. Just look at that.

A. Yes, I recall that letter.

Q. When you speak of the arrangement that you made with Mr. McDowell in May, was it something over the arrangements that are being discussed in these letters?

A. You haven't shown me my letters. I can't remember the exact contents of the letter I wrote.

Q. I show you the letter of June 7th, Exhibit P38.

A. That is it. That confirms his calls of those dates.

Q. It says, "Confirming your calls of May 31st and June 6th."

A. "It is our understanding you are taking the necessary steps to bring your obligations down to the least possible amount by cancelling contracts."

Q. Don't read the whole letter to the jury. Just enough to satisfy yourself and then I want to know whether the arrangement you have spoken of as being made in May is the one referred to here in these letters?

A. It is so stated in this letter.

Q. Did you not in that discussion with Mr. McDowell say it would cost you, you were afraid, as much as he was going to get for those joints, prices at which he had sold?

A. Yes.

Q. You knew he had sold them at about ten cents, didn't you?

A. He had told me that.

Q. Then, you must have then understood and expected it was going to cost you about ten cents to produce, ten cents apiece?

A. That is possible, yes.

Q. Did you not then say to him that you would either produce the article in your own factory at whatever cost it might be or would go out and buy joints in the market?

A. Yes, that is what we understood.

Q. What joints were there to buy in the market?

A. McAllen joints.

Q. Anything else?

A. Yes, the Yost joint.

Q. In June, 1916?

A. Yes.

Q. Isn't it the fact that the MacAllen people had acquired the Yost and the other joint?

A. I believe that is so, but the Yost joint was manufactured by the Cutler Hammer Manufacturing Company in Milwaukee, and I had seen the vice president of that company at a luncheon in New York and had requested him to make some arrangement to procure these joints for me and I understood he was prepared to make them for me on a special arrangement.

Q. Did you not ask this gentleman of the Cutler Hammer Manufacturing Company to make these very joints you had contracted with McDowell?

A. No, he had the dies for the Yost joint.

Q. I show you this joint. Isn't that a specimen of the Yost joint?

A. I don't know that. It has the name of Yost on it.

Q. With your experience in the business and knowledge of joints, added to the finding of the name "Yost" on it, don't you think that is a Yost joint?

A. I presume it is, but I cannot say absolutely it is.

Q. That is considerably larger than the joints you were going to make for McDowell?

A. It is.

Q. Would not that make a difference?

A. I don't think so.

Q. In its acceptability or salability?

A. I should not think so. It was sold for the same purpose in the trade.

Q. Those larger joints would not go in a canopy chandelier at all, couldn't use them for that?

A. That I am not prepared to say.

Q. As a matter of fact, when you told Mr. McDowell you would either make the goods in your factory or go out and buy, you didn't go out and buy, did you?

A. No, I didn't, because Mr. McDowell expressed a preference in the matter, asking us if we would not make them for him and we tried to make them.

Q. That is the reason, perhaps. I only asked you, you did not buy?

A. We did not buy.

Q. You didn't make?

A. We proceeded to.

Q. You didn't make?

A. Yes.

Q. How many?

A. We made as many as we could with the metal parts we had.

Q. How many?

A. That is difficult to say how many.

Q. Why difficult?

A. Because we were making samples at the time and we hadn't yet got to the point of producing in quantity.

Q. That is, you only made samples?

A. Yes.

Q. Then you never made goods for delivery?

A. No.

Q. You never tendered any at all?

A. If we didn't make them we couldn't tender them very well.

Q. You never told Mr. McDowell you had any for delivery?

A. We wrote him, I believe, telling him we were ready to go ahead with the proposition. We didn't tell him we had any joint for delivery.

Q. In the production of a sample joint you made a good many joints that were bad, didn't you, before you got one that was good?

A. No, at times, yes, in the earlier stages of the experiment.

Q. Right then in June, 1916?

A. No.

Q. Were not two-hirds of the joints that you turned out in your factory, practically two-thirds of them rejected?

A. I don't think so.

Q. In your own factory inspection?

A. I don't think so.

Q. Would Mr. Goggin here know?

A. I should not think so.

Q. Mr. Goggin, he is in your employ?

A. Our employ.

Q. Was he then?

A. He was then.

Q. Wasn't he in your employ testing these joints?

A. That I don't recall, whether he was testing the joints or not. A Mr. Moran was testing the joints at that time. He may have been assisting.

Q. Wasn't he your chief electrician?

A. He was electrician in the shop of the electrical apparatus in the plant.

Q. You don't know then whether he was the one that tested these joints or not?

A. No, sir, I do not.

Q. You don't know who did test them?

A. No.

Q. Then, how can you say how many of them came through good and how many came through bad?

A. Because they were brought to my office.

Q. Who brought them?

A. Our factory manager, Mr. Appleton.

Q. Brought all that were produced, good or bad?

A. Brought samples to my office.

Q. I am talking about the failures. Didn't bring those, did he?

A. I don't think he did.

Q. Do you know of your own knowledge that there was ever a time in your factory when you were able to produce these joints so that in your factory process more than seventy-five per cent. of the joints would come out good?

A. I think we were prepared for that. I think we would have got that many, but I think we would be prepared also to have a certain percentage of loss.

Q. You think you would. I am asking you if you ever did?

A. I think we were in a position to make those joints.

Q. You know the difference, being in the position and doing the work. I ask you did you ever do it?

A. No, I have already told you we only made experimental joints. We didn't actually produce.

Q. On July 25, 1916, Exhibit D19, you wrote to Mr. McDowell, "We some time ago started work on a new die which is now nearing completion." What was that die for? Wasn't it for the manufacture of these joints?

A. Yes, certainly it was.

Q. And you couldn't manufacture without a die?

A. Impossible.

Q. Then you were not ready to the extent of having a die?

A. We had the old one. We were making an improved die.

Q. Why did you discard the old one?

A. Apparently because the old one was worn and apparently because there were changes in the metal inserts and parts that were coming to us, and we were doing our best to use what we were getting.

Q. You were not using the old die?

A. We were using the old die up until the time we had the new die ready.

Q. Those words, "We are glad to be able to inform you that we have now succeeded in making up satisfactory samples of joints, which will stand the required test." What did you refer to when you said the required test?

A. It would be difficult for me to say. I didn't write that letter myself. That is signed by Mr. Nelley, who was then secretary of the company. I don't know what meaning he may have given to these individual words.

Q. This goes on mentioning what I have said about a new die and one or two points on which you would like to consult Mr. McDowell before placing that in operation. Then you asked him or this letter asked him to come and make further tests on the samples, advised as to furnishing of the joints and then says, "We found the threads of some of the inserts had stripped the tests. After we have gone into these matters with you here we believe we will be in a position to proceed with the production of regular samples to be passed upon by the Underwriters Laboratory. Once we have their approval we will be able to commence shipments of your orders." Why couldn't you commence shipments before you had their approval?

A. Their approval was necessary.

Q. Why? All you had to do was to put the

thing to the test and whether it got their approval or not you had fulfilled your contract you told us yesterday?

A. That was the original contract. This was a new agreement with Mr. McDowell in which we were trying to do every thing we possibly could and acting in good faith tried getting those joints out and we wanted the Underwriters to approve them before we started to make them in large quantities. I think that was understood with Mr. McDowell.

Q. So, whatever was understood under the old contract, you were at that time under obligation to make the joints so that they would conform to the requirements of the Underwriters test?

A. Yes, and I think you will find in the correspondence a letter from Mr. McDowell telling us he had made arrangements with the Underwriters inspectors to come out and make the inspection.

Q. You understand my question and your answer is yes?

A. I beg your pardon!

Q. That is because you were trying to answer something else than what I asked?

A. No, we were not under that obligation under the contract.

(Testimony read.)

Q. Do you say now you were?

A. It was never so stated it was necessary to get the Underwriters approval before we could make any delivery on those joints when there was no obligation that we should be able to do it.

Q. Didn't you say a few minutes ago in this later agreement you had agreed with Mr. McDowell you would do it?

A. No, we would agree that we would either make them ourselves or failing that we would produce the joints.

Q. Didn't you say a minute ago in your later agreement with Mr. McDowell you had agreed to get the Underwriters approval?

A. I don't think I said so.

Q. If you said so do you take it back?

A. I don't think so, no, because that wasn't intended.

Q. You remember, I asked you, calling your attention to this "Once we have their approval we will be able to commence shipments on their orders." I asked you why you should get their approval and you said you had to get their approval.
A. No, sir, I said Mr. McDowell had written us a letter in which he tells us he has made arrangements or is about to make arrangements to have the Underwriters come out.

Q. Did you not know that Mr. McDowell was endeavoring to cancel the orders that he had given to the Grabler Manufacturing Company for part of this material?

A. He has said that he would, yes.

Q. Wasn't he doing it under arrangement with you?

A. Well, I would not say he was cancelling that particular order. The general arrangement was he was to cancel all orders that he could.

Q. You are speaking of the orders that he had placed for the goods?

A. Yes, and naturally he was to get out of any obligation he could.

Q. That is, get out of the obligation. Did you understand he was to get out of the obligation he had incurred by the ordering of materials for these joints?

A. Yes.

Q. How did you expect to make the joints if he was to cancel all the orders for procurement of the material?

A. Well, it wasn't necessary that he cancel all of the orders. I only told him to get out of such obligations he had. I naturally expected he would reserve enough material to use for the joint he wanted because it was up to him to furnish the necessary material.

Q. You knew the only place or contract he had for the inserts was with the Grabler Company?

A. Yes, but I considered it necessary for me to advise him in such a matter.

Q. You did?

A. I requested that he get rid of the obligations.

Q. You knew he had a contract with the Grabler people for 200,000 inserts?

A. He had told us.

Q. And you knew they would only be sufficient for 100,000 joints. It takes two to every joint, without any allowance for spoiled ones. You told him to cancel that one long order for inserts that he had with the Grabler people?

A. I don't recall that I told him to cancel that one long order.

Q. I show you Exhibit P61, a letter of Mr. McDowell to you, July 6, 1916, which has been read to the jury. He says to your company, "I am enclosing you herewith copy of a letter received from the Grabler Manufacturing Company in response to my inquiry as to what they had done on my order and on what basis they would accept cancellation of the balance of the order. The letter to Grabler was written to me on direct instructions from you." Wasn't that so?

A. I don't recall the direct instructions.

Q. You won't say that there were not such instructions?

A. I don't think so, any direct instructions on that. The only instructions I gave to Mr. McDowell was that I wished him to cancel orders, as much as possible, because we didn't want to pay for the material, but I expected him to reserve the necessary material for us to make the joints, the material for which he was under obligation to furnish. We couldn't furnish the parts without the material.

Q. But you knew that the Grabler contract was the only one he had, didn't you?

A. He had another one with the Pressed Metal Company.

Q. No, I mean for inserts.

A. By inserts, you mean these nipples?

Q. Yes.

A. I believe he told me so. I didn't know it.

Q. You knew that didn't supply more than 100,000 or enable you to manufacture more than 100,000 joints and he had orders outstanding for 150,000. How did you think you were going to make as many joints as you might be called upon to make, to fill those orders with the one contract for inserts cancelled?

A. I didn't consider that to be my business. That was Mr. McDowell's business to furnish the inserts. It was agreed he was to furnish all the necessary inserts.

Q. I call your attention to a letter of May 6, 1916, written by the Hemming Manufacturing Company, signed by you, isn't it?

A. Signed by me, yes, sir.

Q. To Mr. McDowell?

A. Yes.

Q. I ask you to notice this, "With regard to

your request for us to telephone Grabler, we think under the circumstances it is not our place to give them any instructions.'' Didn't you mean by that that inasmuch as the contract was with him it was up to him to cancel the contract?

A. Wasn't that rather long before the understanding?

Q. Surely, May 6th, it probably was. Now, you see the time it was written. When you said just as I have read, didn't you mean it was his place as he was the contracting party rather than you?

A. Exactly.

Q. ''I, therefore, suggest that you take this matter up promptly with Grabler and with any other manufacturers from whom you have ordered material.''

A. Quite so.

Q. You meant then he should cancel every order he had placed for material, didn't you?

A. We meant he should make his arrangements.

Q. You meant the arrangement he should make were cancellations?

A. He could cancel any orders that would be an obligation under the arrangement which he had made.

Q. Later when you made your arrangement, the later arrangement in the latter part of May and June, by which you did arrange to give Mr. McDowell as many joints as might be necessary to supply the orders that he couldn't cancel, you then must have expected to go out and buy them in the market?

A. Buy what?

Q. Buy the necessary joints to supply McDowell?

A. No, we were preparing to manufacture them at that time. Mr. McDowell had expressed a pref-

erence for the joints manufactured by us and we were, therefore, arranging to do so and we hadn't arranged to purchase them.

By the Court:

Q. Did Mr. McDowell ever tell you how many orders he cancelled?

A. I don't think he did. I don't recall it.

By Mr. Skinner:

Q. He had placed orders with you for 125,000, hadn't he?

A. The orders are in evidence, aren't they? I don't remember exactly.

Q. Isn't that your recollection?

A. I don't remember what they were, something probably about that amount.

Q. At the time you had this arrangement with Mr. McDowell you had in mind the possibility that you might have to supply 450,000, didn't you?

A. Yes.

Q. And stood ready to supply and agreed to supply as many up to that amount as he might need?

A. That was the idea.

Q. He wanted to charge you in this suit between the difference what it would have cost him to get the joints under his arrangement with you and what it would cost to get a substituted joint out in the market. Do you criticise that position?

Mr. Whitehead: I think that is immaterial, improper cross-examination.

Q. Do you say that he has no right to do that under the arrangement that you made in June, 1916?

The Court: Is not that a legal question?
Mr. Skinner: I think it is.

Q. Was there not something said in your arrangement of June, 1916, about the price of the goods, the cost of getting the substitute in the market as the measure of damages?

A. I think Mr. McDowell did give me some information as to market prices at that time.

Q. Didn't he tell you, didn't he figure up his damages and include in that figure the profit that he was going to lose?

A. He did.

Q. And didn't you say he ought not to have any more than the difference between what it would have cost him and the market price of the goods?

A. I don't think I said it that way. I said simply I didn't feel we should be called upon to pay his profits.

Q. Didn't you say as a substitute for that that you would go out in the market and buy the goods and that was the measure or the manner of determining your loss?

A. No, those would be legal phrases I would hardly have used.

Q. You did go out and talk about the buying of the goods?

A. Yes, I did go out and talk about the buying of the goods. That I can understand.

Q. Could anyone else in June, 1916, have made this joint you had contracted to make for Mr. McDowell?

A. Make the same joint?

Q. Yes, it could have been made.

A. Other companies could have made it.

Q. Wasn't this insulating material made un-

der some process known to your concern and only to yours?

A. I don't think so.

Q. Wasn't it secret?

A. I don't think so.

Q. Was it patented?

A. I don't think so.

Q. Didn't you have a patent suit over it?

A. No, sir.

Q. Which are you talking about?

A. I am talking about the white material.

Q. Gummon was, wasn't it?

A. Gummon was patented.

Q. Did you have all the machinery in your factory at the time necessary for the making of these joints?

A. At any time? Would you mind explaining that?

Q. Was there any time prior to this date when you have had in your factory all of the machinery necessary for the manufacture of these joints?

A. I should say we always had the machinery necessary, yes.

Q. Did you have the varnishing machinery?

A. I think we had a few brushes there.

Q. Did you have the varnishing machinery for the making of these joints?

A. There was no machinery necessary.

Q. Were not you going to get some?

A. Not that I know of.

Q. Or to dry the joints?

A. The joints were dried in our company's plant.

Q. You mean you were going to varnish each of these joints by him with a brush?

A. Possibly that or dip them in the varnish.

Q. Possibly spraying them too?

A. That I am not competent to say.

Q. You don't know what method was contemplated?

A. Not exactly what method was contemplated.

Q. Then, you don't know whether you were equipped to do it in the way it was contemplated?

A. I think we were equipped to varnish, yes.

Q. You knew that there had to be a final factory inspection, did you not, by the Underwriters Laboratory before their label service would be given?

A. Yes.

Q. On this white material?

A. Yes.

Q. Did you ever call for that factory inspection?

A. We hadn't called for it.

Q. You couldn't until you were ready for it?

A. We couldn't call for it until Mr. McDowell had, until the Laboratory had completed the inspection of the samples which we wrote to Mr. McDowell we had ready.

Q. But the Laboratory's approval was given in February to the new material?

A. Yes, but we were ready for them, we had the apparatus.

Q. But, having had the Underwriters Laboratory approval in February of the joints made with the changed material what was there needed after that except the factory inspection?

A. There was some question as regards the metal parts that were not being furnished satisfactory. There was a long correspondence and discussion with Mr. McDowell as regards those metal parts.

Q. Then, as between you and the Underwriters Laboratory there was nothing to be done except the factory inspection?

A. That is all.

Q. And you never called upon them for that?

A. No, we didn't.

Q. You never told them or anybody else you were ready for it?

A. No.

Q. You never were ready for it, were you?

A. We were not ready, no.

Q. And so the reason you were not ready was because Mr. McDowell hadn't furnished the parts?

A. The parts were only furnished in small quantities to that time.

Q. Was the fact that parts were only furnished in small quantities the reason why you were not ready for the Underwriters factory inspection?

A. That was a reason, yes.

Q. You could have a factory inspection even if you only had the parts in small quantities?

A. I don't think so, as I understand a factory inspection.

Q. Don't you understand it to be an inspection at the factory?

A. Yes.

Q. When the joints, when the sample joints are submitted to test?

A. Such tests were made in the factory.

Q. That February, 1916?

A. I think the factory tests were made in our factory.

Q. Then, what were you waiting for?

A. What we were waiting for?

Q. Yes.

A. We were waiting to get the matter of the metal parts settled.

Q. Were you waiting for metal parts?

A. We were waiting to get the designing of the metal parts settled.

Q. And that designing was to be settled by you?

A. We were to assist Mr. McDowell.

Q. You were to furnish that design, weren't you?

A. It was never so distinctly stated, no.

Q. Wasn't it so understood by you?

A. It was necessary that we should, yes.

Q. You never did, did you?

A. I think we did.

Q. When?

A. I think at various times Mr. McDowell was requested to get changes made in the inserts.

Q. You were not waiting for that, were you?

A. We didn't get it.

Q. Get what?

A. Get the inserts.

Q. Business improved with you, with your company after you got this order or made this contract with Mr. McDowell?

A. Not immediately after.

Q. No, but shortly after?

A. No, some time.

Q. Well, some time after that. At that time you took the contract the work at the factory was slack?

A. No, I would not say that.

Q. Didn't you keep so busy after that that you didn't care so much about this McDowell contract at the price you had contracted?

A. No, I would not say that.

Q. Didn't the fact that you were going to produce this thing at a loss in any way affect your eagerness to perform?

A. Well, I don't think anybody would be particularly anxious to make material at a loss, but I would still make it if I was under an obligation to do so.

Q. Did you complain to Mr. McAllister Dowell that he hadn't done his part of the contract?

A. I think I did in conversation, yes.

Q. Where and when?

A. In these various conversations that we had.

Q. What did you say?

A. I told him we must have the inserts and we must have information as to the sizes of the inserts required, that we couldn't make arrangements until we had those sizes.

Q. Did not Mr. McDowell frequently call upon you for the production of these articles and urge speed?

A. I think over the telephone on one or two occasions.

Q. And write?

A. The letters are in evidence.

Q. Don't you recall his writing to that effect?

A. Yes.

Q. And don't you recall his urging haste on your part at the factory?

A. Yes.

Q. Did you ever in reply to any of those urgings say, "Mr. McDowell, we are not to blame; you haven't done your part."

A. I think that was probably said.

Q. You don't remember having said it?

A. No, I don't recall it.

By the Court:

Q. When was the first order he actually gave you for any of these joints?

A. I think he sent a number of orders into us from time to time after or before the signing of the contract. He sent quite a number of orders; in fact, I think they were all of the orders that were received at that time in the one bunch.

Q. You made up those orders without receiving the size?

A. No, we couldn't. We could fill part of them because the specifications were given on some of the sizes. We couldn't have completed them until we know what the sizes were.

By Mr. Skinner:

Q. Did you make up—you had specifications of some sizes, didn't you?

A. Some sizes, yes.

Q. Did you make up any of those sizes?

A. Made the samples of those sizes.

Q. Did you make any but samples?

A. No, I told you before we didn't make anything but samples.

By the Court:

Q. When you gave those samples to Mr. McDonell ~~Allister~~ was he satisfied with the samples and tell you to go ahead?

A. To the best of my belief was.

Q. Did he tell you to go ahead with those samples?

A. I don't think he did.

By Mr. Skinner:

Q. It wasn't necessary for him to do so, was it?

A. No, provided the Underwriters——

Q. You knew perfectly well it didn't make any difference to him how they looked or how it was made if it got the Underwriters approval?

A. Yes, quite right.

Q. You spoke of Mr. Wilde as the chief draughtsman. Wasn't he Mr. Hemming's assistant manager? A. He was never assistant manager.

Q. He was, in fact, doing that work, wasn't he? 10

A. I think Mr. Hemming delegated a great deal of work to him.

Q. You knew he went out representing the company to the various cities and points in the act of this business?

A. Yes.

Q. I now show you Exhibit P58, dated June 13, 1916, from McDowell to you, urging haste, wasn't he?

A. Yes. 20

Q. "I have expected some word from you as to what progress you are making on my insulating joints." Did your reply to him say, "We can't go on until you furnish us some parts"?

A. I think we replied to this letter. Isn't the letter on file?

Q. Do you think you recall saying you couldn't go on because of something he had to supply?

A. I don't know what we replied. May I see the letter? 30

Q. Here is your letter of June 14th. Is that a reply? Apparently this letter of June 13th was received June 14th. See the stamp mark?

A. Yes.

Q. There is a letter of June 13th. Is that a reply to this one? That is the letter, P39?

A. No, that would not be a reply.

Q. You have your files of letters, pressed copies. I show you Exhibit D17. That says, "Replying to your letter of the 13th." That must be 40 the reply, isn't it?

A. That is the reply.

Q. I call your attention to this. You didn't say anything about this, that Mr. McDowell hadn't supplied you with the necessary parts?

A. We did tell him he wasn't supplying us with the necessary sizes.

Q. "As we advised you," you say, "we are making every effort to produce these joints, but up to the present you haven't informed us of the quantities and sizes you desire," and so forth. Does that mean the total quantity?

A. No, the quantity of each size.

Q. He couldn't tell you that until he got through with the cancellation?

A. He could not tell us somewhat.

Q. He had given you specifications for 25,000 joints, all of one size. Why didn't you make those?

A. We said we were ready to go ahead and make them but we wanted this other information to arrange for the work so we could continue.

Q. But your letter of July 25th, I showed you a little while ago, spoke of the new die and so on, showed you were not ready to make any, even the 25,000 which were specified?

A. I think we said in that letter of July 25th we were ready. I think we told Mr. McDowell we were ready to make the joints but one or two minor matters we wanted to discuss with him.

Q. I show you D19 so you can see if that is the letter of July 25th. You don't say there you are ready to furnish, do you?

A. We say there we have now succeeded in making up satisfactory samples of joints from the old mold which will stand the required test.

Q. You know what else it says. You don't say you are ready to furnish, to make deliveries?

A. We say we are, subject to one or two minor matters.

By the Court:

Q. What are the minor matters?

A. One of them is, we told Mr. McDowell that the threads on the inserts were stripped.

Q. What effect did that have?

A. The Underwriters would not pass them after one of their tests. They would test the threads for strength, the tests on the metal parts that had nothing to do with us and we advised him to take it up with his people.

Q. That was the situation, the threads stripped on the test. You say now they are all bad and would have to be taken up?

A. Some of them stripped. We didn't know how many of them we made up at all. It would be necessary for him to take it up with the manufacturer for future deliveries. We only had a few of those.

Q. That stripping of the threads might have been the result of your manufacture?

A. No, couldn't be. I don't think so.

Q. Couldn't strip the thread?

A. I don't think so.

Q. You don't know much about that, the manufacturing end?

A. No.

Q. Mr. Wilde and Mr. Hemming knew more about that?

A. Possibly.

Q. Possibly. You know to a certainty?

A. Don't give me such an embarrassing question.

Q. Is that embarrassing for you to admit that these two men know more about the manufacturing end of the business than you do?

A. Yes.

Q. Did you not, on June 25, 1916, over the telephone say to Mr. McDowell, "the other mold was not properly made. You remember we told you about it and we had to do the whole thing over again," or words to that effect?

A. That is possible. I don't recall it.

Q. You have told us here a little while ago that the old mold was one you were using and could use in the production of those joints. Don't you want to change that?

A. There were several molds made at various times.

Q. There wasn't any one ofh them that you could use?

A. Yes, they could be used.

Q. Why do you say this, "We had to do the whole thing over again"?

A. The mold had to be remade, repaired.

Q. That is because the old one would not do?

A. Worn out, probably.

Q. Why didn't you say to Mr. McDowell then, "We haven't got enough of these parts. You must give us some more inserts."

A. Well, because we had not then got to the point where we needed them.

Q. Mr. McDowell said to you, did he not, "I am up against it on the steel proposition. Have you been able to do anything on the joints?" You didn't say to him then, "We haven't, because you haven't supplied us with the parts?"

A. I think Mr. McDowell was referring to the experiments.

Q. (Question read.)

A. I don't think we said so at that time. We did at other times.

Q. You didn't say in reply, "Mr. McDowell, we can't do anything until you furnish us with specifications and sizes."

A. Not at that time.

Q. You had no reason to give, no reply to make except to state that you were not ready, that you were making a new mold in place of the old and it wasn't done, isn't that so?

A. At that time, yes.

Q. That was June 26, 1916. When were you ever in any better position that that?

A. When the new mold was completed.

Q. When was that?

A. Shortly thereafter in July, in the end of June or beginning of July. I can't tell you the exact date.

Q. You don't know but what it might have been the middle of July, do you?

A. Before that.

Q. Before the middle of July. Is the mold the same as that die?

A. Mold or die, the same thing.

Q. On July 25th, P19, you say, "We some time ago started work on a new die." Isn't that the mold you had been speaking of in your telephone conversation of June?

A. I presume it is.

Q. And you go on to say, "It is now nearing completion." So, it wasn't ready on July 25th?

A. If it was nearing completion it would have been practically ready at that time.

Q. Are these joints of yours or rather, these joints that were the subject of this contract, were they for the same use as the McAllen joint?

A. As far as I know, yes.

Q. And just as well adopted to that use, just as good joints?

A. I presume so.

Q. You believe so, don't you?

A. Yes.

Q. And with the approval of the Underwriters Laboratory it was just as likely to be acceptable to the trade?

A. I should say so.

Redirect examination by Mr. Whitehead:

Q. Mr. Howell, just state briefly, what was this joint used for, what was the insulating joint for, do you know? What do you do with it?

A. It is used to connect electrical fixtures to the pipe in the wall or in the ceiling.

Q. That is where a pipe goes into the middle of the ceiling and there is to be a chandelier attached to that?

A. The chandelier would be attached to that. If the wires in the fixture should become bare or touch the metal parts of the fixture the fixture would not be connected through the pipe to the ground. It would be insulated.

Q. Take that as a sample, the upper end would be attached to the pipe in the ceiling and the end that carried the chandelier would hang from here?

A. Yes, so that the pipe on the chandelier would not extend from each other.

Q. If there was a hole in the middle that would allow the gas to come through?

A. Yes, for a combination gas and electric chandelier.

Q. So that the weight of the chandelier, the weight of whatever was held and dropped below this joint would fall upon the whole joint, on the threads of the joint and upon the threads of this?

A. Of the nipple, yes.

Q. Do you know whether the tests of the Underwriters Laboratory included tests as to the strength of those threads?

A. I believe they do. I think they place a weight, I believe a piece of pipe is screwed into the joint and the joint has to stand a fixed amount of weight. I don't know the exact weight.

Q. You remember Mr. Noad bringing Mr. Mc-

Dowell to the Hemming Company's plant?

A. I do.

Q. Do you recall the conversation and about when that conversation took place?

A. Mr. McDowell made a previous visit to me. He came with a letter of introduction from friends and was shown in my office.

Q. About when?

A. That would have been in 1915, in June, probably early of the summer of 1915, and he told me a friend of his, a Mr. McDowell, was interested in insulating joints and as I recall it at that time Mr. McDowell had been representative or was representing the James' joints and he was, therefore, looking for a joint he could put on the market and in going over various matters in my office Mr. Noad seen some samples on my table or desk of those joints which we had been experimenting with for the Trumble Company, and as a result of that he told me he thought Mr. McDowell might be interested in those joints because the Trumble Company had given the matter up, so subsequently Mr. Noad took one sample with him and gave it to Mr. McDowell and Mr. McDowell came out with him a few days later and was introduced and we told him this joint was now an open matter. We were not bound to the Trumble Company and if he wished it he could have it and we would be glad to make it for him.

A. That is how the negotiations originated?

Q. Did the company ever receive any metal parts from Mr. McDowell other than those that have been put in evidence here in the list furnished by your company?

A. No, there were none others received.

Q. There is a letter, marked Exhibit P12. That

was the list furnished by you in a letter that you wrote Mr. McDowell. Were there any other metal parts received by your concern other than that list shows?

A. No, none, if it is a complete list of all the parts received.

Q. Did your concern ever receive from Mr. McDowell metal parts in sufficient quantities to manufacture in regular production?

A. No.

Q. With regard to the new agreement that was made in May or June of 1916, you said it was your understanding and it was agreed that Mr. McDowell cancel his orders. What orders—to what did orders refer?

A. The orders he had taken from his customers, I believe.

Q. The orders he had taken from his customers?

A. Yes.

Q. Was it your understanding that the word "orders" referred to the orders he had placed for materials? I am referring now to the terms of your agreement whereby it was agreed that Mr. McDowell should do so and so and you should do so and so?

A. I think it would have referred to such orders as he had from his customers, cancelling as many of those orders as possible.

Q. Isn't it true that he also agreed he would not take any new orders?

A. Yes.

Q. Do you know Mr. Emil Hemming?

A. I do.

Q. Do you know Mr. Wilde?

A. Yes.

Q. Were they formerly related to your company?

A. They were employed by my company.

Q. When did Mr. Hemming's employment with your company cease?

A. On April 18, 1916.

Q. Did he resign voluntarily or was he discharged?

A. He was discharged.

Q. Do you know what he is doing now?

A. I understand he is in competition with my company manufacturing insulating material in competition with my company in New Freedom, Pennsylvania, near Baltimore.

Q. Do you know the name of his company there?

A. I believe it is the American Insulating Company.

Q. Is that company designed to do the same kind of business that your company is doing?

A. I understand it is.

Q. Have your relations since Mr. Hemming's discharge from your company been friendly or unfriendly?

A. I should say unfriendly.

Q. Is he here in court?

A. He is.

Q. Have you called him as your witness?

A. I have not.

Q. Is Mr. Wilde with your company now?

A. I believe he is in the employ of Mr. Hemming.

Q. Did he resign voluntarily from your company?

A. He was discharged.

Q. Have you called him as a witness in your case?

A. I have not.

Q. Did the Hemming Manufacturing Company

actually spend any money on this proposition, on this joint proposition?

A. Yes, we spent considerable money.

Q. For what?

A. For the making of the dies, time and experimental work in making the samples at various times. We purchased a testing test.

Q. How much did that cost?

A. We had to buy a transformer and various other reostats, parts and special testing transformer. The price for the machine was two hundred, I think, and some dollars, and the cost of installing these—

Mr. Skinner: I object to all this. There is no setoff or counterclaim.

The Court: It is immaterial what it cost.

By Mr. Skinner:

Q. You say Mr. Hemming was discharged?

A. Yes, sir.

Q. What for?

A. For—

Q. Why do you hesitate?

A. I had to think for a minute. He was discharged for improper attention to his duties by order of the board of directors of the coppany.

Q. Who managed this business from 1908 to 1912?

A. I did.

Q. Ran it into debt $400,000?

A. I did not.

Q. Ran it into debt?

A. No.

Q. Heavy debt?

A. No.

Q. Mr. Hemming was brought in in 1912?

A. Mr. Hemming was with the company from the start.

Q. Well, made general manager—

A. Mr. Hemming was made general manager in 1912, yes.

Q. After he had been with you from the start?

A. Yes.

Q. Shown his entire competency?

A. No.

Q. Didn't you have anything to do with making him general manager in 1912?

A. Yes.

Q. Weren't you satisfied—or how long had he been with you then?

A. I was satisfied at that time.

Q. How long had he been with you then?

A. He had been with me since the beginning of the company.

Q. How long was that?

A. Since 1908.

Q. He had been with you four years and you were satisfied to make him general manager?

A. No, only under the circumstances it was necessary.

Q. He was forced on you then?

A. Possibly.

Q. You didn't have everything to say about that company?

A. Yes, I did.

Q. He ran that company or was general manager, at least, from 1912, to April, 1916. When did you find out he was incompetent?

A. Some considerable time before.

Q. You personally found it out?

A. I did.

Q. The others found it out?

A. Not until I told them.

Q. Didn't you have some trouble in persuading them?

A. None whatever.

Q. Why didn't you tell them sooner?

A. The particular circumstances connected with the business made it inadvisable.

Q. After Mr. Hemming had left and Mr. Wilde had left was there anybody there who knew how to make this joint?

A. There was.

Q. Didn't you send the engineer or your chemist or whatever you call him in Mr. McDowell's presence and ask him if he could make that joint?

A. Our chemist was brought in and asked whether he could make that joint—didn't ask him whether he could make the joint. I asked him if he knew about what proportions of the mixture was used in making the insulation.

Q. Didn't you ask him whether he could reproduce that insulating material?

A. Yes.

Q. And didn't you have to ask him to find out?

A. Yes.

Q. There wasn't anybody there that knew?

A. No.

Q. After Hemming left?

A. No, because the formula was taken away at that time.

Q. The formula was taken away?

A. It was taken, yes.

Q. By Mr. Hemming?

A. I can't say that. It was taken, it disappeared at that time.

Q. You would not hesitate?

A. I would not like to accuse anybody.

Q. When Mr. Hemming was discharged did you tell him he was discharged because he was incompetent?

A. We did.

Q. You did, didn't you?

A. The Board of Directors did.

Q. You did it, didn't you? Did the Board of Directors send up and say this or did you do it?

A. The Board of Directors passed a resolution, which resolution was read to Mr. Hemming by the secretary of the board.

Q. You have said you were the whole company. You recall that, that you had the whole say?

A. I didn't put it in those words.

Q. That was true?

A. Yes.

Q. And the board of directors did this under your instruction and request?

A. Yes.

Q. So it was you saying it. When you told Mr. Hemming did he ask you why it had taken you so long to find it out?

A. He didn't ask me anything.

Q. Did not the business of the company increase during Mr. Hemming's management?

The Court: Do you think that is competent?

Q. Mr. Hemming is in competition with you now, is he?

A. He is.

Q. You said in answer to Mr. Whitehead that you never had enough of these parts to produce the joints, or, is that right?

A. That is correct.

Q. You never were delayed in the production of the joints by that fact, were you?

A. We couldn't produce the joints by that fact. We were not delayed by that fact because we hadn't yet got to the point where you needed the parts, had you?

A. We were about to need them.

Q. Then you were not delayed by any failure on Mr. McDowell's part to perform his part of the contract, were you?

A. We had been delayed before this new arrangement was made, yes. At that time we were not getting the metal parts from Mr. McDowell. On the subsequent arrangement we were not delayed because we were making new samples, but we had been previously delayed.

Q. How could you have been delayed in production if you were not ready to produce joints if you didn't have the mold?

A. We did have the mold.

Q. But you said it was no good?

A. We didn't say it was no good. The mold was worn, but we were ready to use the mold and was able to use the mold.

Q. Do you say that the reason you made a new die was because the old one was worn out? Was that the only reason?

A. Part that and part to accommodate Mr. McDowell's inserts that were coming in different sizes and thicknesses.

Q. How long is a mold supposed to last?

A. I had no previous experience with the production of these joints.

Q. Do you think you have produced enough of them to wear out a die?

A. On special experimenting with imperfect metal parts that we used in the dies, yes. The dies had been constantly worn and broken because the metal parts did not properly fit the dies.

HARRY W. APPLETON sworn in behalf of defendant.

Direct examination by Mr. Whitehead:

Q. Mr. Appleton, what is your business?

A. I am a mechanic and electrical engineer.

Q. Where are you employed?

A. At present I am vice president and general manager of the Hemming Manufacturing Company.

Q. How long have you been connected with that company?

A. In my present capacity?

Q. In any capacity?

A. Since the early part of 1910.

Q. Actively?

A. Yes, sir.

Q. How long have you been engaged in the factory of the defendant?

A. Since the first of February.

Q. What year?

A. 1916.

Q. You are a graduate engineer?

A. Yes, sir.

Q. What degree do you hold?

A. The degree of mechanical engineer, which is the only degree at Stevens Institute of Technology.

Q. How long ago did you get that degree?

A. 1900.

Q. What has been your experience since 1900?

A. General factory work, supervision of machinery maintenance, factory production. When I graduated from Stevens Institute I went to the Passaic Print Works in an executive capacity.

Q. Have you had charge of the factory produc-

tion of the defendant's factory since April, 1916?

A. April 18th.

Q. Your duties include what? A. I am factory manager. I have entire charge of the plant.

Q. All matters coming in the factory are under your direction and control?

A. Yes, sir.

Q. Are you familiar with this McDowell insulating joint proposition?

A. I am.

Q. Can you state what if anything, the factory has been doing in connection with that since your time, since April, 1916?

A. After I took charge of the plant I went over with Mr. Howell a number of things. Naturally, we went over the situation in the factory and among the things which we discussed was the situation of the McDowell joint and he told me that this thing had been hanging fire for a long time and he would like to have me put particular attention to it and clean it up find out what was the matter and get the thing out; at least, find out just exactly what the situation was and make the joint if possible and get it out. McDowell called at the plant on three different occasions during the latter part of April and in May and we had several conversations. Is that what you want?

Q. I want to know more particularly with reference to what the mill did what were you busy with if anything during May, June and July of 1916 and to what point had you arrived?

A. When I took charge of the plant the process and means for producing these joints was pretty nearly completed; that is there had been a great deal of work done when I took charge. I found there were dies for making these molds, these

insulating joints and that there were metal parts on hand which had been received from Mc Dowell and we talked it over with McDowell in Mr. Howell's office.

Q. Just for the purpose of clearness suppose you describe to the jury just what the factory had to do to put out these joints through what processes did the thing go? You have talked about testing and molds and presses. What were those? What relation did they have to the manufacture?

A. The process of manufacturing an article of this kind is the thing is formed in a hydraulic press, not in a tool or apparatus but in a mold consisting of three parts. There is the box or the body of the mold and there is a bottom piston, which closes up that hole in the box and there is a top piston. In the operation of making a part like this, there is, you see, in this here section here, there are three metal elements. There is an insert here or nipple and a nipple here into which the pipe is pushed; then, there is an outside shell surrounding the whole and separating the metal parts and filling in of the cavity in this shell and insulating the metal parts, each from the other, is the insulating material. When this shell is made the box of the mold and in that box is a movable bottom piston which holds this bottom insert. The shell which has been already formed partially closes on the bottom which was entirely open on the top, the sides being straight, is put in the mold, this insert is laid on it and then the insulating material is placed inside of this shell and then the top insert here is fastened on the upper piston, which is at this time up here somewhere so as to leave a man room to manipulate and then the insulat-

ing material is introduced into this shell, the pressure is put on and the top piston comes down, squeezes that hole in together, puts pressure on the insulating material and at the same time crimps over this steel side of the shell, which was formerly straight, crimps it over so it is like the bottom, forms a box that holds the insulating material.

Q. The machine that does that final process is what you call the press?

A. Press.

Q. The mold is used for what purpose?

A. The mold is the thing we put in the press and in which we form our various insulating parts.

Q. What was the mill actually doing during April and May and June and July, if anything, in connection with these molds, presses and working towards putting out a completed project?

A. If I may answer that question at a little length—

Q. Yes, I think so, but not too long.

A. Our business is the manufacture of insulation and we don't sell anything, that is we sell nothing to the general market. We only sell to manufacturers to form part of their output and everything that we make unless we made it before, is more or less subject to experimentation at the beginning.

Mr. Skinner: I do not think we need have this sort of an address. He is asking the question of what they were doing in the month of April, May and June.

The Court: I think it is competent.

A. In a piece of this character there are a great many elements which enter into the economical production. The geometrical form, weight, size

and in the shell, the weight, thickness, temper, hardness, ductility and flexibility all of which contribute or affect the cause of production. When I took charge a great deal of this preliminary work had gone through to determine the right weight, temper and so forth, hardness of the mold, and then we had to adopt our process or die to the nearest approach to what we wanted. That all took time and when I came on that work was pretty nearly finished, but there still remained a little experimentation to perfect the molds. We had made a lot of molds. We were generally making molds, renewing parts of this particular mold, so it was going through a process of elimination of the parts and there had been a great deal of time spent on making the mold.

Q. Is the mold and die the same thing?

A. Yes, we still had to make some final changes in the mold to adopt this to the manipulation of the shells. We had still to do a little work to determine the proper viscosity or plasticity of the insulating material. You see, it is one thing to make a laboratory sample. You don't care what the laboratory sample costs you so long as you can show you made the thing, but when you come to producing things in enormous quantities you have to go on into the financial end of it to get those things out at the smallest possible cost and the saving of a cent on one means a whole lot on a hundred thousand, and that is what we were doing, and I reported to Mr. McDowell we had gotten to that part and that we wanted the parts and the matter was in that situation.

Q. Did that matter receive the same attention as the other matters received in the mill?

A. It received unusual attention because Mr.

Howell said to me, "Give this matter your particular attention." In fact, we were pretty well disorganized and upset after Hemming got out and it wasn't very easy to affect a thing of this kind that wasn't going along in actual production and I can say two or three times a week he would say, "What are you doing about the McDowell joint?"

Q. How long did that condition of things exist?

A. Probably a week or two after Hemming left and perhaps a month or so after that he was assured I was working on it and he didn't then ask me so often.

Q. During what period did your active business attention continue?

A. I should say from the end of April, some time right up until the time we were served with notice of this suit.

Q. At the time you were served with notice in this suit what position was the factory in with reference to its ability to produce these joints?

A. You mean in regard to equipment or in regard to the development of this thing?

Q. In regard to its general ability to produce. Did they have the equipment?

A. We had the equipment. We would not have had to buy anything. We had everything in the plant to make the joints.

Q. Was it ready to go ahead?

A. Except the minor details. The fact that those inserts that McDowell sent us varied in size; that is, the holes varied, when we pressed those in we put the bottom inserts down in the bottom mold. If it is a little less it doesn't matter, but the top piston is up here, the insert has to go on upside down. It is not screwed on. It is

only held on by friction because after the end is pressed together and the mold comes back the insert has to remain in the joints and we had a great deal of difficulty, due to variation in the size of the things we got from many sources of supply.

Q. In reference to shells, did you have any difficulty with shells?

A. We had some difficulty in crimping them over, but we overcame that.

Q. What was the difficulty in crimping them over?

A. The shells were heavier than in my judgment was necessary and I believed; in fact I was told that they were heavier than we had specified, but McDowell asked us if we could use them because at the state of the market he couldn't buy this kind of metal we wanted.

Q. Did you experience difficulty with the seams of the shells?

A. That difficulty had come up, but it had been obviated before I took charge.

Q. During the period of April, May, June and July was the chemist of the mill engaged in any way in connection with this matter?

A. Yes, sir.

Q. What other of your departments were engaged in the matter?

A. The mill shop, the mixing department and the press room and the drawing room.

Q. Practically all the departments?

A. Practically all the departments, yes.

Q. Will you describe briefly the difference between gummon and the mix that was actually used and the samples submitted in February, 1916, samples to the Underwriters Laboratories?

A. Gummon is the product which was invented

by a man named Mueller in Munich, Bavaria. It was made for a substitute for hard rubber for electrical purposes and it looks like hard rubber, but contains no rubber, but it is composed of hard pitch dissolved in various solvents such as benzine, and things of that kind. He put the pitch in a sort of thick syrup, something like milasses in consistency, and it is then mixed with asbestos fibre until the fibre is covered with this solution and then it is more or less of a sticky fibre and it is put in molds and formed under hydraulic pressure and the volatile portion, the solvents are driven off afterwards and you have hard substance that looks like hard rubber. In fact, we make most of the automobile radiator caps, which is practically our product because our material holds its gloss and rubber don't.

Q. What about the drying qualities of gummon as compared with the product that was used; that is, the product that is used in the samples?

A. This material here?

Q. What is that stuff?

A. It is something like mortar. Of course, it is much finer, but it is something like blue mortar. It is a silicate of lime.

Q. Has it got any asbestos in it?

A. No, sir.

Q. What is hemit?

A. Hemit is more or less cement and asbestos. We use the term in the factory more or less to cover several modifications of that material. Some are made strictly from Portland cement and some are mixed with sand to give better molding facilities, but all hemit has asbestos in it. The proportions vary.

Q. Is the gummon a quick drying or slow drying material?

A. Gummon is dried under heat; that is, in a gas furnace and takes from twenty-four to forty-eight hours.

Q. Does it require to be subject to a greater heat itself?

A. Yes, this stuff is mixed together with a certain amount of water, the water being merely a manufacturing expediency so as to keep the stuff together in a plaster form until we get it in here and then it is baked in an oven and put in a box with a steam pressure and the heat and the steam completes the chemical union of the elements in here. That would take place at a temperature below 200, while gummon is baked over 400.

Q. Would gummon's slow drying properties effect its textile strength?

A. In a thing of this kind, which is entirely encased in metal so that the proportion of the surface exposed through which the gases would have to escape is so small as compared with a whole mass of the material in the thing that once subject to heat the outside will dry before the inside would have a chance to dry out; that is, a slight amount of heat above the temperature of a room the stuff would soften up and the joint would always be weak. It would wabble. There would be no stability. If you had a chandelier screwed in the bottom of that thing and you had something in here in the nature of soft rubber; that is, uncured or chewing gum, and you move your chandelier you would move these parts last.

Cross-examination by Mr. Skinner:

Q. Mr. Appleton, you went to the Hemming Manufacturing Company on what date?

A. About the 1st of February. I think the exact date was the 3d day of February, 1916.

Q. I probably misunderstood. I thought you said in the direct answers you had been with them since 1910?

A. Counsel asked me how long I had been connected with the company and I answered that question, I had been connected with the company since 1910.

Q. What has been your connection since February, 1916?

A. I was employed in February as an expert engineer on some special work, special engineering.

Q. You have been an employee since February, 1916?

A. Yes, sir.

Q. And before that you were not an employee?

A. I was not regularly on the payroll, no, sir.

Q. What did you have in mind when you answered you had been connected with the company since 1910?

A. In the early part of 1910 the company was having considerable difficulty with its valves. They couldn't get sufficient production and I was engaged by Mr. Hemming to assist him in producing a valve, to be produced for him in connection with a man named Spillman, who was a hydraulic engineer in the employ of the Worthington Company, and also to write a book on metal insulation, which I did.

Q. You wrote the book for the Hemming Company?

A. Yes, sir.

Q. And turned it over to them?

A. All my dealings were with Mr. Hemming.

Q. And turned over to Mr. Hemming?

A. Mr. Hemming, yes, sir.

Q. Was the writing of that book under your connection with the company?

A. I never received any money for services which I rendered the company after that.

Q. Were you connected with the company after that?

A. Was I on the payroll or did I receive money from the company, no. If you mean did I go over to the company and give Hemming advice on various engineering matters, yes.

Q. And that was from time to time?

A. From time to time.

Q. At intervals?

A. Yes, sir.

Q. And special employment for which you were paid?

A. Yes, sir.

Q. And when the special employment was ended, that ended your connection with the company until you were called again?

A. Yes, sir.

Q. And that is what you mean when you said you had been connected with the company since 1910?

A. Yes, sir.

Q. When you went there in February, 1916, Mr. Hemming was still there?

A. Yes, sir.

Q. Were you his assistant or what was your relation to him, what was your employment then?

A. I was engaged in working on special engineering under Mr. Hemming's direction.

Q. Didn't Mr. Hemming really write that book?

A. No, sir.

Q. Didn't you simply correct the English?

A. No, sir.

Q. When you got there you found there were dies and metal parts on hand; you mean that in February, 1916?

A. No, after I took charge of the plant the question which I answered was, what was done in April and June and July on this work.

Q. Your answer that I took down, I think correctly, was I found there were dies and metal parts on hand?

A. Yes, sir.

Q. When did you find that?

A. Along about the latter part of April.

Q. How many dies?

A. Well, as I say, that is a difficult thing to say because this work was in process of experiment and a die consists especially of three parts, the box and the top and bottom piston, but there are numerous other parts which contribute to it. When you are experimenting you are continually discarding parts of the dies and you are making rearrangements. They are repaired, without which you would not have enough to make three or four dies and perhaps not enough in good working order to make one die.

Q. There was really then one complete die?

A. Yes, sir.

Q. Was not that being discarded for another one?

A. No, sir.

Q. Did you discard it?

A. No, sir—wait a minute. I had ordered the die maker to make a new die, yes, sir.

Q. Why didn't you use the one that was there?

A. That is a regular routine in our business. We spend considerable making new dies to supersede the ones that wear out.

Q. Was this one worn out?

A. Yes, sir, worn out experimenting with it.

Q. Instead of saying you found there were dies you actually should have said you found one die and that worn out?

A. It wasn't worn out to the point where it couldn't be used, but it was time to make another.

Q. And by metal parts you mean the metal parts that go to the making up of the joint?

A. Yes, sir.

Q. Then you went through further experimentation?

A. I suppose you call it that.

Q. It was then directed toward the problem of cost, wasn't it?

A. It was to determine just exactly the angles and curvatures and radius and proportions of the die to produce these pieces in quantities. We were trying with the experiment to make a joint, but the point was to make them in quantities to make them for the market. We had never up to that time made them for the market, but we were getting ready to do that.

Q. You had made complete samples?

A. Oh, yes, lots of them.

Q. Then you had gotten past the making of the sample stage. Any more samples to be made?

A. It depends on what you call samples. If you call samples simply the submitting to the Underwriters to say we could make a joint we were past that stage, but we were not through experimenting. When you are making samples for the laboratory you might submit those samples and every one of them pass, but they might be pretty crude. And when you are putting them out on the market you have to have them look attractive as well as to be uniform.

Q. In the manufacture of these joints there were need not only for equipment but for the right kind of equipment and the handling of it could be done one way cheaper than another. All those were things you had to consider?

A. Yes, sir.

Q. You were—calling it "experimenting," perhaps you use another word—you were reaching out to determine the best way of making these?

A. Yes, sir.

Q. Did you report to Mr. Howell or anybody else that the metal parts which you found were imperfect or unsatisfactory?

A. Yes, sir. Of course, Mr. Howell asked me as I was continuing how I was getting along. I told him "We were having trouble with it but we are coming along. We will soon be in shape to make these things in quantities when we get materials."

Q. You told him you were coming along all right with the metal parts you had there?

A. Yes, sir.

Q. Didn't tell him that you must have different metal parts, did you?

A. I told him that the inserts varied considerably.

Q. Did you tell him that you must have deliveries?

A. Why, yes, it would be necessary to have the parts come uniform if we made these things in quantities for the market. It didn't matter so much for samples.

Q. If these different metal parts were furnished on specifications that had been provided by your concern it was up to you to reject them, wasn't it, when they came?

A. We were trying to get this thing out. We were using anything we could that was anywhere near what we wanted.

A. I would not call it poor and imperfect.

Q. In that spirit you used poor and imperfect stuff. We used metal shells that were not fit-

ted to the press and we used inserts which didn't fit the mold and which varied in size and weight.

Q. Had you made them before?

A. What?

Q. Insulating joints.

A. Had this company?

Q. Had you?

A. Had I made insulating joints, no, sir.

Q. As far as you know, the company hadn't?

A. No, sir; I don't know anything about that.

Q. So that you had to do some ascertaining or finding out of the correct way to make them, didn't you?

A. Only as much as any new man coming into the plant would have to do to get hold of the reins of manufacturing.

Q. Take for example, the inserts. Wasn't there a plunger that came through them?

A. No, I said there is a projection in the bottom piston of the molds on which we put the bottom inserts—this one here. That, there is a similar projection on the top piston of the mold and we put the other insert on there and then the press comes down and squeezes them together.

Q. Well, Mr. Appleton, there was something there for you, as the responsible head, to do in perfecting the mechanical process?

A. A little, yes.

Q. You thought this stripping of the threads might be removed by some little readjustment?

A. No, that is another matter entirely. The question of whether the inserts have any threads in them or not would not have made any difference in the mold.

Q. Did you expect to remedy this stripping of the threads?

A. I could answer your question if you let me talk my own way.

Q. Did you expect to remedy the stripping of the threads?

A. That wasn't our business.

Q. Did you expect to have it done?

A. We felt that we were obligated to tell McDowell the way his stuff was coming his joints would not be salable and it was up to him to get them fixed.

Q. Did you tell him about the stripping?

A. Yes.

Q. Did you, yourself, tell him?

A. I did not, no.

Q. Do you know that he was told of your own knowledge?

A. I think I can say of my own knowledge he was informed. There was a letter written to him.

Q. That is all you have to justify your statement, "We told him?"

A. What is all?

Q. That you can say that he was told.

A. The best of my recollection is that McDowell was notified those inserts were not coming right and I think that is in the correspondence.

Q. You mean the stripping?

A. No, they didn't strip—they stripped in the test. The threads were bad.

Q. You think he was told that?

A. Yes, sir.

Q. Did they strip in the laboratory test?

A. They stripped in the tests we subjected them to.

Q. How do you account for them having stood the laboratory test?

A. You misunderstand that the nipples or threads that strip in our tests were not made the

same identical threads that strip in the laboratory.

Q. That is, it makes a difference who tests them?

A. It makes a difference.

Q. Who handles the machine?

A. No, sir; because these tests are made in suspension. There is a leather put in there and a weight on the end of the leather and the thing pulled.

Q. Have you handled those testing machines before this?

Q. Those machines?

A. Not for testing insulating joints, but for the same purpose, for testing threads.

Q. You knew the difference between gummon and hemit and hemit B, did you?

A. Yes, sir.

Q. The foreman in the mixing room, did he know, too?

A. Yes, sir.

Q. Didn't have to have any formula, did he?

A. Oh, yes.

Q. You say that, do you?

A. Yes.

Q. And the foreman in the mixing room had to have a formula to do this?

A. He had to have a recipe.

Q. He had to know.

A. Yes.

Q. And he did know, didn't he?

A. The foreman of the mixing room?

Q. Yes.

A. Knew what?

Q. How to mix hemit B?

A. Sure.

Q. And if any formula had been taken away it didn't harm him one bit?

A. This stuff is not hemit at all.

Q. That stuff, he knew how to mix that?

A. No, I don't think he knew what it was.

Q. Do you?

A. Yes, I know what it is.

Q. Have you found out since?

A. Yes, sir.

Q. By analysis?

A. Yes, sir.

Q. Nobody there knew how to mix it?

A. Lots of people around the plant knew in a general way what it was, but they didn't know the exact proportion.

Q. Somebody had mixed it?

A. Yes.

Q. Mr. Hemming wasn't the one who had done the mixing?

A. I don't know who mixed it. That was before my time.

Q. What is that white stuff that is in there?

A. That is a silicate of lime.

Q. What is it called in your factory?

A. White mix. There is no name for it. We never made it before.

Q. Then, it is not hemit B?

A. No, it is not.

Q. It is not gummon?

A. No, sir.

Q. Then, if the specifications to the Underwriters Laboratory, the description furnished by your company to the Underwriters Laboratory describe the insulating material as hemit B you were not making the joints with that material, were you?

A. The word "hemit" is loosely applied more or less to a very large number of mixes, but they all have asbestos in them. This was the only

thing our company had ever made that didn't have asbestos in it and it may be possible they called it hemit B because it was white. I don't know. It was before my time.

Q. You think that just because of the color they might have called it hemit B?

A. All Portland cement and asbestos compounds are more or less white or gray and our other stuff is black.

Q. The asbestos is only put in for heat resistance?

A. No, the asbestos is used to strengthen the material.

Q. You think asbestos is stronger than Portland cement?

Q. I am not talking about Portland cement. Portland cement in itself is the finest heat resisting substance there is. Portland cement will stand far more heat than asbestos will.

Q. Do you say the asbestos was in to strengthen the joint?

A. I am talking about the joint.

Q. Well, was it in it to strengthen it?

A. Yes, to strengthen it and to cheapen it.

Q. Cheaper than pitch?

A. Yes, sir.

Q. What was it in the cement mixture for?

A. Strength.

Q. Cheaper than cement?

A. Yes, considerably cheaper than cement.

Q. Is or is not this hemit B?

A. No, that is a special material that we never made before except for that joint.

Q. And it was that special material that you had never made before?

A. That we had never made before.

Q. You hadn't been there earlier than February to know?

A. I am talking about what I made. It was as near as we could determine in the absence of the formula and recipes, which disappeared when Mr. Wilde and Mr. Hemming left or about that time; this is the same thing that was used in the joints that was submitted to the Underwriters Laboratory.

Q. Do you know that it contains what was specified to the Underwriters Laboratory?

A. No, sir.

Q. Did you look at those specifications?

A. I have read them over.

Q. Did you look at those specifications in connection with the manufacture of those joints?

A. No, sir.

Q. Do you mean to say you took charge of this factory and took charge of the manufacture of these joints without ever looking at the specifications to which that manufacture was to conform?

A. Why, I read that specification over. I knew in a general way what tests the things had to meet, but I wasn't interested in the Underwriters test in its minuteness. What I was interested in was to produce a joint in the factory and get the molds in shape.

Q. I asked you the plain simple question, whether you read the specifications or looked at them. You said you did not?

A. I take that back. I have looked them over.

Q. Dd you look at them before you started in to manufacture or superintending of the processes that were then going on in connection with this joint?

A. Yes, I looked them over casually.

Q. You knew they had to conform—

A. No, it didn't make any difference. The Underwriters would not care whether it was hemit

B or G, whether it was lime or what it was. They had to have it called something with a record. If we made joints that passed them and altered the mixture a little bit it would not matter.

Q. Why alter the mixture by trying to get something that had been taken away and that you couldn't find out instead of using the plain hemit B that was called for in the specifications?

A. Hemit B wasn't suitable for this purpose.

Q. You know that?

A. Anything with asbestos in it would not be porous and anything that would leak gas would not be suitable.

Q. Hemit B, then, wasn't used in the joints?

A. Not as I understand the term "hemit B," but as I say, hemit was loosely applied to all kinds of white mixes.

Q. How many joints did you make or were to while you were there?

A. I can't say that. I had many things to attend to and I didn't individually superintend the making of the joints, but I had given instructions that that thing should be pushed and I personally saw the mold on the press a number of times.

Q. But, Mr. Howell had been so special in his instructions to you about speeding this matter and get it through?

A. Yes, sir, but I had a disorganized factory of about 350 men and building operations going on and a leaky boiler and gas producers that were that were not working right and furnaces that were not working right and I had a lot of things to look after. So far as it was possible I had to look after every department. I couldn't put all my time on the insulating joints.

Q. Did you not, at least inquire what McDowell joints they had made?

A. At various times, I did.

Q. How many did you learn they had made?

A. I can't say. I know on one occasion, I remember distinctly where we had trouble with the mix, not with the chemical composition but with the preparaton of the water to get the fluidity or plasticity of the thing where we wanted it. I asked the chemist and he told me that morning they had made twelve and he was trying them out and he would give me a report the next morning.

Q. So far as you know did they make more than one hundred altogether?

A. Possibly not, possibly yes. I should say somewhat more than that. You understand these experiments were not so much to make a jont as to get the insulating material of the proper plasticity and the mold of the proper shape and design in its length.

Q. Of course, Mr. McDowell had nothing to do with that?

A. No.

Q. Was there ever a time when you were compelled to halt your factory work on these things because of any failure of McDowell to supply metal parts?

A. Not after I took charge. The metal parts that I had to work with were such as I couldn't have used in production, but they were perfectly good enough for experiment.

Q. And you yet were not ready for production?

A. We were through that point and I think we wrote to Mr. McDowell on the 25th of July that we were ready to produce in quantity.

Q. You say "We wrote, I think, on the 25th?"

A. I think that was the date.

Q. Did you see the letter? I show you D19.

A. That is the letter, yes, sir, that is the letter.

Q. After havng read it now would you speak of that letter as a letter notifying Mr. McDowell that you had reached the point where you were ready to produce?

A. That is what they were intended to convey and that is the condition in the factory.

Q. Is the gummon joint a joint made of gummon? Would that dry out properly?

A. No, sir.

Q. Would it be necessary for you to have one that would dry out and cure properly?

A. Gummon wasn't a special material to make insulating joints there.

Q. Wasn't the Yost joint made of gummon?

A. No, sir.

Q. What is that made of?

A. I don't know exactly. The Cutler Hammer Company who make the Yost joint started in to infringe our patent, but they don't make gummon. They make a different substance and while we know some of the things that are in it we don't make it.

Q. You sued the Cutler Hammer people for infringement of your patent?

A. Yes, sir.

By Mr. Whitehead:

Q. Do you recall Mr. McDowell coming out to the plant of the Hemming Manufacturing Company in April or May, 1916?

A. Yes, sir.

Q. There had been certain conversation testified to that took place between Mr. McDowell and Mr. Howell. Were you present at any of those conversations?

A. Yes, sir I was present part of the time on

each of his visits. I wasn't there the full time, but was in the plant.

Q. Can you state what conversation you heard between the two men?

A. Why, the first time Mr. McDowell came out Mr. Hemming told me——

Mr. Skinner: There is no right to bring out this conversation unless the foundation is laid of the cross-examination of Mr. McDowell.

The Court: Proceed.

Q. Will you state what conversation took place between Mr. McDowell and Mr. Howell in your presence?

A. Why, the first conversation, Mr. Howell sent for Mr. McDowell to discuss this joint and we told Mr. McDowell that we doubted the advisability of going ahead and manufacturing this thing at all because gummon was in its nature unsuited and we were afraid if we used the other material that we would be liable to have suits from MacAllen and Wirt as infringement of their patent and Mr. Howell told Mr. McDowell that he didn't want McDowell to lose any money and he would do the fair thing by him and if McDowell felt as we did he would be glad to drop the matter on that account and that Mr. Howell would pay Mr. McDowell for every expenditure that he had been put to in the way of getting steel and inserts and that sort of thing.

Q. Was there anything further?

A. I think that was about the substance of that first conversation.

Q. What was the second?

A. There were two or three conversations. Then, at a later conversation I think it was Mr. Howell——

Q. What is the date?

A. I can't give you exactly, but Hemming left the company on the 18th of April and this conversation took place during the latter weeks of April and the first weeks of May and as I recollect, there were three different visits that McDowell made to the plant.

Q. What was the conversation at the second or third visit?

A. At the second visit Mr. McDowell said he had sold a great many joints and his customers would be disappointed and Mr. Howell said he was willing to reimburse for any loss and asked him what that loss amounted to and Mr. McDowell had some figures which we thought were rather fancy, going into his profits and what he would make, and so forth, and he wanted a very considerable sum of money out of proportion.

Q. Just state the conversation.

A. I can't remember the words of the conversation. I can only remember the substance of them.

Q. What was the substance?

A. The substance was when Mr. Howell offered to pay Mr. McDowell for all his losses and expenditures Mr. McDowell wanted so much money. Mr. Howell told him that was unreasonable and he wasn't entitled to make as much; as counter to the thing, for all orders he couldn't cancel, provided McDowell would reduce the obligations as much as possible, Mr. Howell agreed to either manufacture or procure the joint in the open market for McDowell to fill his orders with.

Q. What did McDowell agree to, if anything?

A. That was agreeable to McDowell. I don't know whether it was that conversation or a later one, I think a later one, McDowell asked us if we

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had a mold or if we were in shape to make a mold. I don't remember the exact words he used, but, anyhow, he satisfied him that we had a perfectly good mold that was in operation. I sent for the mold and had the foreman of the press room bring it up to Mr. Howell's office and show it to Mr. McDowell.

By Mr. Skinner:

Q. And the mold that the foreman of the press-room brought up was this old worn out one?

A. No, I would not call it a worn out mold.

Q. It is the same mold we spoke of before?

A. That mold which was an experimental mold, being constantly changed or changed from week to week. It was being experimented with.

Q. Was it the same mold you found when you went there?

A. I don't think the new mold had been made at that time.

Q. Then, it must have been the one that was there?

A. Yes, sir, I think so.

Q. And the reason that you sent for it was to satisfy Mr. McDowell's suspicions that you hadn't any?

A. Something of that sort.

Q. He said practically, did he not, he didn't believe that you were in any state to produce, didn't he?

A. He asked us if we were in shape to produce and Mr. McDowell asked if there was a mold and I said, "Yes." He said, "Where is it"? and I said, "If you want to see it I will bring it up and show it to you."

Q. That was when

A. In the first part of May.

Q. When Mr. Howell and Mr. McDowell spoke about the changes there was no question about Mr. Howell's willingness to reimburse him for his losses, but the dispute was over the amount?

A. Mr. Howell said he was willing to reimburse for any money he had actually expended.

Q. Why did you say before he was willing to reimburse him for his losses and expenditures?

A. Did I say that?

Q. You did. Do you want to take it back?

A. Why, no, but when I say losses or expenditures, I don't mean to intend to mean the extravagant idea of losses McDowell had, which included his profits and the losses he might incur through those suits which he said might be started against him by his customers.

Q. You did include something besides expenditure, didn't you?

A. I don't know how I intend losses and expenditure. If I used those words I meant the same thing, the money he spent, anything within reason.

Q. The fact he had gone out and placed orders which would insure him a profit of perhaps four cents apiece, that wasn't considered at all?

A. No, sir, we felt we had been under considerable loss and Mr. McDowell and ourselves were in the nature of a partnership. I had lost a lot of time.

Q. If your company had gone out and bought the goods and supplied them to Mr. McDowell he would make the profit?

A. Yes.

Q. Why did you think he ought not to have that profit? Then, you did expect he would get that profit if that course was taken?

A. We were willing to supply him with joints

and fulfill our condition, whether he made any money on them or not. Of course, we knew he expected to make money when we were in a position to make those joints or buy them from another manufacturer for a very considerable sum of money less than the sum he would lose or which he wanted in order to take the thing back.

Q. When was it you made the inquiry to the other manufacturer with reference——

A. Mr. Howell did that.

Q. With reference to this conversation?

A. Before the conversation, of course, he knew when he made the offer he could get the joints.

Q. This book that I show you is a published list of approved appliances, published by the Underwriters Laboratory?

A. Yes.

Q. It is the issue of July, 1916?

A. Yes, sir.

Q. And in that the Hemming Manufacturing Company is illustrated as prepared to furnish insulating joints, bearing label?

A. Yes, sir.

Q. In other words, at that time there wasn't any question about this joint being able to procure the approval of the laboratories and the label when your company turned them out to meen the test, is that right?

(Question withdrawn.)

Q. At this time there was no question about your being able to procure the label service?

A. I never knew that thing was illustrated in that list. I don't know how it got in there.

Q. You know it did get in there?

A. I can see it there now. I don't know who put it in. Maybe McDowell put it in.

Q. Any reason why it should not be in?

A. We were not ready to produce the joints for the market at that time.

Q. When were you?

A. July 25th, if McDowell furnished us the necessary metal parts.

Q. And if you got the new die?

A. Well, we were making dies right along. We have thirty or forty dies going through the shop at the present time.

Q. It takes only a little while to make it?

A. Oh, no. A die is quite a job.

DEFENDANT RESTS.

Mr. Skinner: There were some depositions taken in New York. I was not present at the taking and I am not sure that it is rebuttal, but I think it was entirely understood with Mr. Whitehead that it was to go in and that no objection would be made to our putting it in if it be part of our affirmative case. Then, we had a further understanding with Mr. Whitehead waived cross-examination of the witness.

(Testimony read to the jury.)

RECESS.

Mr. Skinner: I desire to offer this letter, dated May 6, 1916, from the Hemming Manufacturing Company to McDowell. It was one that was used at the cross-examination, I think, of Mr. Howell.

(Admitted in evidence and marked Ex. P68.)

JAMES F. GOGGIN, sworn in rebuttal in behalf of plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Goggin, where do you live?

A. Passaic.

Q. Were you at one time in the employ of the Hemming Manufacturing Company?

A. Yes, sir, I was.

Q. You are no longer with them?

A. No, not since the 18th of December.

Q. What was your work?

A. I was the electrician in charge of the maintenance of the plant, the electrical upkeep and case of the machines, care of the electrical work and done any repairing of the equipment throughout the whole place.

Q. Was there any testing; I mean, electrical testing of insulating joints that were being manufactured or samples that were being made?

A. Yes, sir, there was.

Q. Who did that?

A. I did the testing.

Q. Did you do that between October 13, 1915, and the time of your leaving?

A. Yes, sir; I did.

Q. When did you leave?

A. I left there on the 18th of December.

Q. This last December?

A. Yes, sir.

Q. For what purpose were you testing?

A. Why, to meet the requirements of the Underwriters tests, the Underwriters standard.

Q. That is what you were testing these joints for?

A. Yes, sir.

Q. How many in all the time that you were there or in this period, at least, how many do you suppose you tested?

A. To an exact number I can't state positively.

Q. Name the maximum? ?

A. About 150 in all.

Q. Were these insulating joints like this one, which I show you, allowing for that being a cross-section?

A. There was some of the samples of this white gummon, some was of the white material.

Q. Did any samples conform to the tests or meet the requirements?

A. Some did, and the biggest majority didn't.

Q. What would you say was the percentage of these that were in compliance with the tests?

A. Those that would were about one-third per cent. or a little bit over.

Q. You said one-third per cent. Didn't you mean one-third?

A. Of the entire proportion.

Q. That would be 33 1/3 per cent.?

A. Yes, thirty-three per cent.

Q. Were you instructed by anybody else to make these tests?

A. As a rule when Mr. Hemming and Mr. Wilde was at the shop these fuses were brought to the Laboratory and there I was told to make the test on the insulating joint.

Q. Were you told to report?

A. I tell you what they did. Mr. Wilde, as a rule, he had the overseeing of that. We generally checked up which part of this joint fell down.

Q. Wasn't Mr. Wilde the chief draughtsman?

A. As far as I know, Mr. Wilde. I know he had charge of the draughting room. He also is assistant to Mr. Hemming.

Q. What were you to do after you made the test?

A. The perfect samples went to Mr. Wilde.

Q. How would he know they were perfect? Were you to report?

A. The good one I took to him. The bad ones we checked up, checked which part fell down.

Q. Do you know what Mr. Wilde or Mr. Hemming would say when you brough to him these samples and told him which were good and which were bad?

A. That I can't say.

Q. Were you to pass upon the sufficiency of the joint or not?

A. I had to pass on the electrical end, yes.

Q. I am trying to find out, were you to pass upon the sufficiency of each particular sample or joint as it was brought to you or let somebody else determine whether they were good enough?

A. Yes, sir.

Q. Or were you to determine for Mr. Wilde and Mr. Hemming whether the joints had reached the point where they could go on with the manufacture of them?

A. In the insulating test I was the one appointed to take care of that, so on the electrical test, there was several other examinations that had to take place before the joint was perfect. Under the electrical testing it was up to me to pick the good ones. Of course, it was up to them for the other parts.

Q. Out of one hundred you picked thirty-three as good and the other seventy-seven as bad. Were you to determine whether or not that was a large enough percentage?

A. Well, no, I never had anything to do with that.

Q. Is there some percentage of failures or rejected articles in most manufacturing processes?

A. There is, yes.

Q. How would it be, do you know what the ordinary percentage would be?

A. I think in the course of manufacturing a piece that we was to be manufacturing. I think that a percentage of ten in one hundred would be very bad.

Q. Was the factory ready for the production of these joints in December when you left?

Mr. Whitehead: I object to that. He distinctly stated he doesn't know anything except the electrical end of it.

Mr. Skinner: I asked him whether he knew.

Q. I only ask you now to say yes or no. Do you know whether the plant was in shape to produce these insulating joints for McDowell or for customers?

A. From the last time I had anything to do with it, with them joints, was in July.

Q. That is not the answer.

A. No, I can't tell you that.

Q. You say the last was in July?

A. July.

Q. What time in July?

A. Why, the middle part of it, middle or latter part of July.

Q. At that time do you know whether they were in shape to produce these joints? A. No.

Q. You don't know?

A. No.

Q. You mean you don't know or they were not?

A. From the tests I had they didn't live up to the tests, there either.

Q. Do you remember Mr. Hemming being there?

A. Yes, sir.

Q. And you remember his leaving and Mr. Appleton coming?

A. Yes, sir.

Q. Was the condition, were conditions with respect to these joints improved after Mr. Appleton came?

A. I didn't see any.

Q. You didn't see any at all?

A. No.

Q. None came to you for testing?

A. For a couple of months, Mr. Hemming left there in April and the next test which I practically made on them joints was in July.

Q. After Mr. Hemming left?

A. After Mr. Hemming left.

Q. Is that the only test you made?

A. The only one I can remember.

Q. In that test do you remember how many failures there were?

Q. Mr. Steinberg, the chemist, he brought over, I should say, about fifteen insulating joints with the white material. He got a very small margin out of them.

Q. How many?

A. I should say four or five good ones.

Q. Four or five out of fifteen?

A. Four of five out of fifteen.

Cross-examination by Mr. Whitehead:

Q. Mr. Goggin, where did you work before you entered the Hemming Company?

A. Trucker Electric, 45 Clinton Street, Newark, New Jersey.

Q. How long did you work there?

A. Two years.

Q. What was the character of the work there?

A. I was foreman of the electrical construction at the Westinghouse Electric on Orange Street and also at P. F. Collier's Home at Wickaton, New Jersey.

Q. What was your job before that?

A. Watson Electric Company at 88 Ellison Street, Patterson.

Q. What was your job there?

A. I was foreman of construction.

Q. How long?

A. I was foreman for about eight months.

Q. What was your job before that?

A. I was with the telephone company, New York Telephone Company.

Q. So your experience in this electrical work covers a period of about three years?

A. No, covers a period of over twelve years.

Q. What was you work at the telephone company?

A. I was a district inspector for the telephone company in Rutherford.

Q. You would not call that work—that was of the same kind or not?

A. It is a branch.

Q. As the work you have done in the last three years?

A. It is a branch. There are different branches of the electrical branch.

Q. And that was a different branch than this?

A. Yes, sir; it was the telephone then.

Q. You were with the Hemming Company how long?

A. I should judge—I am a little bit mixed up —I think if I had stayed until the 2d day of January, 1917—but I was there for awhile before. It was my second trip in the Hemming shops.

Q. You left on December 16, 1916?

A. 1916.

Q. Did you leave voluntarily?

A. I will leave that up to Mr. H. W. Appleton how I left and what for.

Q. Then it wasn't voluntarily on your part?

A. It wasn't voluntarily?

Q. I am asking you.

A. I think it was because three weeks before that I gave Mr. Appleton notice that I was leaving.

Q. Now, your work with the Hemming Manufacturing Company during the last year or two just what was that?

A. Last year or two?

Q. Within the last year. Call it from October, 1915, down to the time you left, what was the character of your work?

A. General maintenance of the shop.

Q. That is as relating to the electrical part?

A. Relating to the electrical part.

Q. It was your business to see that the electrical apparatus of the shop was kept in proper condition?

A. It was.

Q. What would be—describe such electrical apparatus?

A. Motors, generators, lights.

Q. Did you have occasion to do any testing in connection with anything else but this insulating joint that you spoke of?

A. Not the production of the mill, but the upkeep of the shop.

Q. Except for this insulating joint?

A. This is all.

Q. You had no testing to do?

A. No testing whatever.

Q. And you never do any testing in the mill except as to those joints?

A. Nothing outside of that.

Q. Who told you to test the insulating joints?

A. I did the first testing that took place in the shop.

Q. Answer me, please.

A. I was under instruction from Mr. L. D. Moran.

Q. Who was he?

A. He was chief engineer, my superior.

Q. He had charge of all the testing?

A. No, sir, he didn't.

Q. Did he have charge of any of the testing?

A. Mr. Moran was present at some of the testing.

Q. I am not asking you if he was present, but did he have charge of any of the testing?

A. No, he didn't.

Q. You say he was your superior. How, then, did you get any of the testing to do if your superior had charge of none of it?

A. Because Mr. Moran would be there.

Q. Please answer me. I am not asking you as to who was present. I am trying to find out under what authority you made these tests?

A. Under Mr. Moran's authority.

Q. You said Mr. Moran had no authority of the testing?

A. Mr. Moran told me at the time on account of the other work, the different upkeeps of the shop that he could not possibly stay all the time there and he depended upon me entirely for this testing.

Q. Is that true, that your superior had nothing to do with the testing?

A. Well, it is true in that respect which I am trying to show you now.

Q. You have stated that your superior, Mr. Moran, had nothing to do with the testing. Is that right or isn't it?

A. That is right, yes.

Q. How many joints did Mr. Steinberg test?

A. Mr. Steinberg?

Q. Who was Mr. Steinberg?

A. He is the chemist of the Hemming Manufacturing Company at the present time.

Q. And has been for how long?

A. Before Mr. Hemming left the shops.

Q. How many joints did he test?

A. Mr. Steinberg did not test a joint until the middle part of July.

Q. Not any at all?

A. No, sir; he did not.

Q. Do you know that of your own knowledge?

A. I do, because Mr. Steinberg came to me and asked me to show him how the system worked, the switch, and the location, and everything else. It was me who showed Mr. Steinberg the instrument and the working parts of it and everything else.

Q. Was this one the only testing machine in the shop?

A. It was in the shop. There was an electrical testing machine out in the laboratory.

Q. When did you show Mr. Steinberg?

A. It was the latter part, the day I did the testing for him.

Q. When was that?

A. That was about the middle part or last part of July.

Q. How do you fix that?

A. By the resignation of Mr. Moran. He left the shop at the first of July.

Q. Can you be reasonably sure of that?

A. Well, that is the nearest day I can possibly place to it.

Q. Who became your superior when Mr. Moran left?

A. Mr. Appleton.

Q. The testing you speak of showing Mr. Steinberg took place after Mr. Moran left. So you think it was about the middle of July?

A. It was either in the middle of June or July. I know he left on the last of the month or the first of the month. I am not sure which.

Q. At any rate, it was very shortly after his leaving?

A. A short while after.

Q. He might have left in June?

A. I am not sure whether it was July or June.

Q. You showed Mr. Steinberg how to make the test?

A. Yes, sir.

Q. How many joints did Mr. Steinberg test?

A. I don't know. He brought in some from the finishing room. They were hot and I thought he had no more than fifteen.

Q. Do you know whether after that occasion he tested any joints when you were not there?

A. Just as I told you before.

Q. Please answer my question. Do you know whether after that occasion he tested any joints when you were not present?

A. No, I do not know.

Q. It is possible he might?

A. Just as I told you.

Q. Won't you please answer that? Isn't it possible he may have tested when you were not there?

A. Sure, it is possible.

Q. And you can't say to this Court and jury he didn't do that?

A. No, I can't.

Q. What did an electrical test consist of?

A. If you will let me have an insulating joint I can show you. The electrical test consisted of electrical voltage of 4000 volts which have to pass between for one minute. The other tests, between the outside shell and inserts for three thousand volts of one minute test.

Q. The test related entirely to the resisting power of the insulating material?

A. Yes.

Q. So it had reference to the makeup of the joint only to the insulating mix that was used in the construction?

A. Yes, but I will tell you at times I have seen

———

Q. Just answer my question. Isn't that a fair question?

A. Yes, sure.

Q. It had to do only with the insulated mix?

A. Yes.

Q. And iw the mix was right the joint would ordinarily pass the test A. Why, certainly.

Q. And if some of them passed and if some of them failed to pass it would indicate that the defect was not in the mix, but somewhere else?

A. By all means.

Q. So that when you say of the joints that Mr. Steinberg tested in July some were good and some were bad there couldn't have been any of them good if the mix hadn't been all right?

A. Yes, that is right, too.

Redirect Examination by Mr. Skinner:

Q. Mr. Goggin, you say your testing was only to determine the electrical resisting strength of this material?

A. Yes, sir.

Q. Suppose the joint was so made that the outside shell, showing you P2, would come down too close to the insert would not that tend to make the current jump the gap?

A. Every time.

Q. And would not that effect the completeness or perfectness of the joint?

A. That would throw that out entirely.

Q. Wasn't that something that would also be disclosed in your testing?

A. Yes, sir.

Q. Something other than the mere electrical resisting strength?

A. Yes, sure.

Q. There were other tests besides the electrical tests?

A. Other tests, but I never had anything to do with the other tests.

Q. Do you know whether any of these that came to you had passed the other test?

A. No, they generally came to me first.

Q. So that after the one-third that you passed got from you they had to go to some other test?

A. Yes, sir.

Recross-examination by Mr. Whitehead:

Q. If I understand the answer you gave to Judge Skinner's question in regard to why those joints might not have been passed through cases other than imperfections and insulating material that would be because the metal parts were set too close together?

A. No, sometimes as I said before, this here insulating joint, we would look for the trouble, to see where it was. Sometimes you would see one of these inserts, the material would not be even; say for instance, this insert would be high in this corner and down in this.

Q. That was due to the construction of the insert?

A. Well, I don't know.

Q. Didn't you know that if the bottom of that insert wasn't entirely smooth and flat that in the pressure in the test where it sat on the nub on the bottom and the nub came down on the top unless these surfaces were perfectly true the test would put those inserts out of exact true and make one lower and one side higher?

A. Not exactly. Suppose the flow of the material wasn't even around in that shell.

Q. Just as I say.

A. The flow is the material. It is not the shell.

Q. It might be the shell?

A. In most cases it could be the material, if you know.

Q. Isn't it possible it was the shell or an irregularity in the face of the nipple resulting in that malformation of the completed joint?

A. No, I don't think you could blame it on the shell itself.

Q. Are you willing to say that in no case that happened?

A. No, I won't say that. I would not say one way or the other.

Q. You don't know about it. Do you know what was the cause of that?

A. I can't tell no cause. Nobody can in that respect.

EMIL HEMMING, sworn in rebuttal in behalf of plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Hemming, where do you live?

A. New Freedom, Pennsylvania.

Q. Are you connected with some business there?

A. Yes, I am president of the American Insulator Company.

Q. Were you at one time connected with the Hemming Manufacturing Company?

A. I was.

Q. Was there any other Hemming connected with that company beside yourself?

A. No, sir.

Q. Were you discharged?

A. I was.

Q. How long had you been with the company when you were discharged?

A. About eight years.

Q. What position did you occupy at the time of your discharge?

A. I was vice president and general manager.

Q. And as general manager what did you manage?

A. Most everything except the finances.

Q. Who managed that?

A. Mr. Howell.

Q. Did you have any personal duties with Mr. Howell?

A. No.

Q. Was any cause assigned for your discharge?

A. No cause was given to me.

Q. Prior to your discharge were you given any warning or intimation that you might be asked to resign or might be compelled to go?

A. No, sir. Mr. Howell was very nice to me until the last minute.

Q. And at that last minute what happened?

A. He called his board of directors together and showed one of the directors a long document, which his lawyer read. That paper stated that I was discharged. That document was read and that was the end of it.

Q. Prior to that time had you heard anything from Mr. Howell in criticism of your management of the business in reference to the so-called McDowell insulating joint?

A. No, sir.

Q. Did you have anything to do with the bringing of these parties together, McDowell and your company, to make the contract?

A. No, sir.

Q. How do you happen to be here as a witness? Were you subpoenaed?

A. Mr. McDowell subpoenaed me in Newark Sunday night.

Q. Before that, without subpoena, had you been invited to come?

A. Well, Mr. McDowell told me of his difficulty he had with the Hemming Manufacturing Company and he asked me to come here as a witness in the case to state the facts as I knew them.

Q. Were you willing to do that?

A. Most certainly, I was willing.

Q. Do you think your testimony will be in any way colored or affected by the way you were discharged by the company?

Mr. Whitehead: I object to that.

(Question withdrawn.)

Q. Mr. Howell says that under the contract of October 13, 1915—you know what I refer to?

A. Yes.

Q. The contract with McDowell?

A. Yes.

Q. And up to some time in May, 1916, he understood the contract as one that did not obligate your company to procure the approval of the Underwriters Laboratory by making your goods conform to their test, and so on. Did you so understand it?

Mr. Whitehead: I object to that. I think the contract speaks for itself.

The Court: Objection sustained.

Counsel for plaintiff prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Did you prior to your discharge from the Hemming Manufacturing Company ever hear Mr. Howell say that under this contract with Mr. McDowell they were only bound, your company were only bound to test and label according to the specifications of the Underwriters Laboratory and were not bound to make the goods conform to those specifications?

Mr. Whitehead: I object to that as immaterial. No matter if Mr. Howell had said it or hadn't said it.

The Court: Does it not contradict what he said on the stand, if he did say it. I think I will admit it on that ground.

Q. (Question read.)

A. Mr. Howell never mentioned anything like that to me.

Q. Did he talk to you at all about the procurement of the Underwriters Laboratory approval?

A. No, Mr. Howell left me in entire charge of getting the joint out and getting it approved.

Q. Can you tell us whether he knew that you were trying to get that approval?

A. Why, sure, he knew. I went to the Underwriters Laboratories myself and was present at the tests.

Q. Did you report anything of these tests to Mr. Howell?

A. Well, we spoke about those tests.

Q. Was there a change made in the insulating material?

A. Yes, there was.

Q. At whose instance?

A. At my own instance.

Q. For what reason?

A. First, we made a black insulating joint, a joint made with a black composition.

Q. Is that what they call gummon?

A. That is what the Hemming Manufacturing Company called gummon. Then, we discovered it would take us ten days or fourteen days to dry out a black insulating joint properly to harden it so that it could be used for testing, and every time we made some new samples we had to dry them ten or fourteen days. I thought to myself we would never get out if we were ten to fourteen days with new samples, so I used a new composition, our hemit.

Q. Did you use it?

A. We used our white material.

Q. Was that used in the test of February, 1916, in the tests at the Underwriters Laboratory?

A. Yes, sir.

Q. Did Mr. Howell know anything about that.

A. Yes, he was in the factory every day—I

believe he was. He was present when we tested some samples. He saw the white insulating joints and he was pleased that we could turn out samples in two days while before it took us ten days or fourteen days to make samples.

Q. How do you know he was pleased?

A. He said so to me.

Q. You talked with him about the saving of time?

A. Yes, certainly.

Q. Was there any other reason for the change?

A. No, the cost of the hemit and of the gummon was about the same. There wasn't much difference in price.

Q. Saving of time?

A. Saving of time and saving of our ovens. We didn't have many ovens to dry and if we were able to dry, to harden the molded insulating pieces in twelve hours or twenty-four hours, we could get a baking through during that time, otherwise it would have taken us ten or twelve ovens to do what we could do with one oven with the hemit material and we had only about six ovens in the plant.

Q. It was in the summer of 1915 that Mr. McDowell first came to you, wasn't it?

A. Yes, it was in the summer of 1915.

Q. You left when?

A. April 18, 1916.

Q. You said you hadn't got the production, hadn't got the joints to the production stage?

A. Well, when the order was accepted we had several hydraulic presses idle. We had no work, but a few months after we received quite a considerable number of orders for which we had to make new dies, so our diemakers were instructed to proceed with the dies for the other customers and we

neglected in some way or other to get out the McDowell dies.

Q. Were these other orders, you think more profitable than the McDowall work?

A. Yes, they were more profitable.

Q. Did you have any talk with Mr. Howell about that?

A. We discussed these matters almost every day.

Q. Up to the time that you left had the performance by the Hemming people of their part of this contract been by Mr. McDowell in any way?

A. No, the delay was ours because it was our fault.

Q. At the time that you left had your factory reached the point where you could turn them out for delivery or were you only producing sample after sample?

A. At the time I left we were not in a position to do manufacturing of these joints in quantities.

Q. Would it have taken long to have gotten——

A. No, it would not have taken long if our diemakers had other work to do and could have found their time to make the dies properly and devoted their entire attention to turning this joint out. It would have taken a very short time.

Q. How long?

A. Oh, I would say if the upper man who was in charge for making the dies for the McDowell joint would have had nothing else to do than devote his time to this joint he could have cleaned up the whole thing within two or three weeks.

Q. To the point where you would be ready?

A. To the point it would have been practical to manufacture.

Q. Is there a book known as Hemming on Molded & Electrical Insulation?

A. There is.

Q. Called Hemming on Molded Electrical Insulation?

A. It is my book.

Q. Did Mr. Appleton write that book?

A. It is the first time I heard today.

Cross-examination by Mr. Whitehead:

Q. Mr. Hemming, you are in business now in New Freedom?

A. Yes, sir.

Q. You have a company that you have organized there?

A. I can't say that I organized.

Q. Well, you are connected with a company there?

A. I am president of the company.

Q. The name of the company is what?

A. American Insulator Company.

Q. They are doing just the same class of work, just the same work that the Hemming Manufacturing Company does?

A. Not exactly.

Q. Very nearly, aren't they?

A. They are making molded insulated materials.

Q. That company has been reorganized and you have become president of it since you left the Hemming Manufacturing Company?

A. Yes, sir.

Q. You were the manager of the Hemming Manufacturing Company from October, 1915, down to April, 1916?

A. I can't recollect exactly the date when I was manager.

Q. I ask you when did you leave there?

A. April 18, 1916.

Q. What were you then?

A. Then I was manager.

Q. How long had you been so?

A. About a year and a half or two years.

Q. As manager you had full charge of everything but the finances, is that right?

A. Yes, sir.

Q. Every bit of that factory was under your direction, wasn't it?

A. We had a superintendent.

Q. He was under you?

A. He was under me.

Q. You were head and in full control of the factory?

A. Yes, sir.

Q. As to its manufacture?

A. Yes, sir.

Q. As to everything but the finances?

A. Yes.

Q. So that when you state to the Court and jury that the delay in getting out this joint for McDowell was the fault of the Hemming Manufacturing Company you mean to say it was your fault?

A. With the approval of Mr. Howell.

Q. What did Mr. Howell do to block it?

A. Sometimes I had discussions with him, which customers should be given the preference, if we should go ahead with one die or should go ahead with another die or should send the material to one customer or another one.

Q. What case do you recall where he did that?

A. In practically every case.

Q. Can you name a single customer that was given priority over McDowell to McDowell's detriment?

A. Yes, sir.

Q. Which?

A. We made dies for the General Electric Company. We had to make dies for the Byrant Electrical Company. We had to make dies for the Benjamin Electrical Company, which concern gave us much orders for material and which were very anxious they should get their goods as soon possible.

Q. When did their orders come in, do you remember?

A. I can't remember any date of any orders that came in. They came in continuously.

Q. Do you know whether their orders were before McDowell's or after McDowell's?

A. The orders I refer to were put ahead over McDowell's die. They came in afterwards.

Q. Come in after McDowell's.

A. Yes, sir.

Q. You had quite a number of customers to dispose of?

A. Certainly.

Q. It was quite a common thing in your actual work to arrange your factory operations in accordance with the size and importance of your orders, wasn't it?

A. With the size and importance of the orders and with the size and importance of the customers.

Q. Does not every mill do that?

A. I suppose they do.

Q. Don't you know that? Done in New Freedom now?

A. Done in New Freedom? When we accept an order we intend to get it out at the time we promise it.

Q. That is your answer to my last question?

A. That is what we do down in New Freedom.

Q. Didn't you have the power in the Hemming Manufacturing Company to say which die should be operated upon first?

A. I had the power.

Q. And you didn't exercise the power; do you say that?

A. I did not exercise that power unless I got it from the office, inside of the company.

Q. Then, it wasn't Mr. Howell's fault that those dies were put ahead of Mr. McDowell. Did you tell the Court and jury it was your fault?

A. It wasn't my fault. It was the company's fault.

Q. You were manager?

A. I had managed the company in the past, the inside of the company.

Q. There wasn't anybody to overrule you but Mr. Howell and he didn't do it?

A. He had the power to overrule in every instance.

Q. He didn't do it?

A. He didn't do it.

Q. So that you come here in behalf of the plaintiff in this case to tell the Court and jury that the plaintiff should have a judgment against us for damages because you didn't do your duty by the plaintiff, isn't that right?

A. I didn't come here for that purpose.

Q. What was the matter with gummon?

A. Nothing was the matter with the gummon.

Q. The insulating joint?

A. The trouble was it took too long to dry it, to bake it after it was molded.

Q. It stayed wet too long?

A. Yes, sir.

Q. What is its tensile strength?

A. If gummon isn't properly baked it is soft.

Q. And a soft insulating material would never do for an insulating joint?

A. It would not be strong enough.

Q. Are you a chemist?

A. I was a chemist.

Q. Were you the chemist?

A. I wasn't chemist for the Hemming Manufacturing Company.

Q. I am not asking you if you had the job to carry the title of chemist. I am asking you if you are a chemist?

A. I am a manufacturing chemist.

Q. In your opinion, as a manufacturing chemist, is gummon a proper matedial for an insulating joint?

A. It depends upon the construction of the joint.

Q. All right. I show you Exhibit P2, and ask you, is gummon a proper material for that joint?

A. I will say it is not practical for the joint that is here as I found by experience.

Q. That is just what you found out in the mill?

A. Yes.

Q. You found out that gummon wasn't going to do for that joint, didn't you?

A. No, I didn't find out that. I find it is not practicable.

Q. If it wasn't practicable it wouldn't do, would it?

A. Not exactly.

Q. If it was not practicable you would not want to use it?

A. Not if I had something better.

Q. You would not want to use it at all?

A. Yes, if I couldn't find any other material I would use gummon in making a slight change in the material in that joint.

Q. You found it wasn't practicable and in view

of the fact you thought you could get something better you proceeded to undertake to get something better?

A. I didn't proceed to get something better. We had it.

Q. Did you tell Mr. McDowell that gummon wouldn't do?

A. I didn't have to tell him that because gummon was approved.

Q. By Hemming?

A. By the Underwriters.

Q. Have you anything to show that?

A. Their report of September from the Underwriters Laboratory. The gummon samples were approved.

Q. Is that the report which you say was approved by the Underwriters Laboratory?

A. Yes, sir.

Q. I show you Exhibit P1. That is the report you mean, I suppose?

A. Yes, sir, that is the report.

Q. You consider that an approval by the Underwriters Laboratory?

A. That is not an approval, but this letter was sufficient to me to indicate that the samples could be made so they could be approved.

Q. That is very different?

A. Not to me.

Q. Do you mean to say, now, to the Court and Jury that this letter is not an approval, but was an indication to you that the joint could be made so that it could be approved?

A. It was an approval to me. It showed me the material was sufficiently good enough to be used for that purpose.

Q. What more did it require to make it so that it could be absolutely approved?

A. It required further samples and further tests in accordance with that letter.

Q. You proceeded to find a new material?

A. I didn't proceed. The material was there.

Q. Why was it that from September, 1915, there were no other joints presented to the Underwriters for tests until February, 1916?

A. Because our diemaker, who was in charge of the making that particular die, did not find time to supervise the molding of the new samples.

Q. What were you doing about it?

A. Oh, I gave instructions that new samples should be made as soon as possible.

Q. Who did you give the instructions to?

A. Gave instructions to Mr. Wilde.

Q. You think he fell down on carrying your instructions out?

A. I don't think he fell down, but he couldn't force the diemaker to go and stop his die work and supervise the getting out of the insulating joint.

Q. So that Mr. Wilde did his duty and you did your duty, but the diemaker was the one who fell down?

A. No, the diemaker made certain promises to get this out at a certain specific date and he had to get this out according to his promises.

Q. Is it true that during that time you were not trying to find out an insulating mix that would stand the test?

A. No, sir.

Q. Do you know what hemit is?

A. Yes, sir.

Q. What is it?

A. A silicate of lime.

Q. What else?

A. Silicate of lime and magnesia.

Q. What else?

A. Aluminum.

Q. Is that all?

A. Sure.

Q. Is there any asbestos in hemit?

A. Sure, that is what asbestos is.

Q. Do you know what the composition of that white material is?

A. I don't know what the composition of this material is, but I know what the composition of the material is that we made. This looks like some lime compound.

Q. Do you know what the composition of the material was that was used in the McAllen joint?

A. No, I never analyzed that.

Q. Isn't it true you made an analysis of the McAllen joint, the insulating material used in it in order to find a mix that would be serviceable in this so-called McDowell joint?

A. If I recollect right, in our chemical laboratory some time previous to this joint question an analysis was made of the McAllen joint, but I never inquired what the composition was. I knew more or less what it was, but I did not know what the exact proportions were.

Q. You say that when you left the company's employ you were not in a position to manufacture these joints?

A. Our die equipment was not sufficient to manufacture the joints in quantities.

Q. What was the trouble?

A. We were not ready.

Q. What was the mater with them?

A. We only made an experimental die, which was not ready to turn them out in large quantities.

Q. Hadn't the mill been active in making a die that would do the business?

A. No.

Q. That was your fault?

A. No, it wasn't my fault. We had too much business on hand.

Q. Oh, you let McDowell slide?

A. I let McDowell slide.

Q. McDowell was a fried of yours?

A. As much as any of my customers.

Q. You are here, you say, to help him?

A. I am here to tell the facts as I know them.

Redirect Examination by Mr. Skinner:

Q. When you left did you take any formula away with you of this stuff, this insulating joint material?

A. I had no chance to take any formula away with me.

Q. Did you take any?

A. I had no chance. At four o'clock in the afternoon I was called from my office—I was signing some letters—I was called in the office where Mr. Howell had those directors there and I was told, "You are discharged," and then I went to my office and I had a few personal belongings there and I packed them in and while I do that Mr. Howell and Mr. Appleton were outside all the time. I don't know what they were out there for but to look what I did and I simply left and never came back. I didn't even go down to the shop.

By Mr. Whitehead:

Q. Was there a foreman in the mixing room?
A. The foreman in the mixing room. He kept records and everything he made in the mixing room.

Q. After you left was the company just as well

able as before, so far as knowledge of the mixture went, to make that material?

A. The foreman who made the mix wrote down the formula. He made the mix. I didn't make it.

Q. Did you give him the directions for the mixing?

A. No, I didn't get the formula. I told Mr. Wilde to go down to the foreman of the mixing room and told him to make a mix which would be suitable for the insulating joint.

Q. You are a native of Switzerland?

A. Yes, sir.

By Mr. Skinner:

Q. Do you know whether the foreman did keep a formula?

A. The foreman—that particular foreman seems to have been discharged from the Hemming Manufacturing Company two months ago and he came up to New Freedom to see if he could get a job in my company and I asked him, "How is it, I heard the Hemming Company couldn't make the insulating joint."

Q. I am just asking you, do you know whether the foreman kept a copy of the formula?

A. He told me he wrote the formula down in his book. That is what he told me two months ago in New Freedom.

Q. That is the only knowledge you have, what he told you?

A. That is all.

Q. You don't know that he had a copy?

A. No, but I know he kept records of all the mixes he made. That I know.

Q. But you don't know whether he kept a record of this formula?

A. No, I haven't seen it.

Q. But, I understood you to say a moment ago it was this foreman who made up the mix for the McDowell joint and not yourself?

A. He made it under Mr. Wilde's direction whom I instructed to get this material.

CHARLES WILDE, sworn in rebuttal in behalf of the plaintiff.

Direct Examination by Mr. Skinner:

Q. Mr. Wilde, where do you live?

A. New Freedom.

Q. Are you now associated with Mr. Hemming, just off the stand?

A. I am.

Q. Were you at one time under him in the Hemming Manufacturing Company?

A. I was.

Q. Do you remember when he left?

A. April 18, 1916.

Q. Did you leave at the same time?

A. Day following.

Q. Discharged?

A. Something like that.

Q. Did you go down to Philadelphia to the General Press Metal Company one time with Mr. McDowell?

A. I did.

Q. Was the subject of the specifications for the shells then discussed?

A. It was.

Q. Was there something they wanted that you were to subsequently furnish?

A. There was.

Q. You came away without having furnished it?

A. We did.

Q. Do you know of its having been furnished later?

A. Not entirely.

Q. Go to another thing. It has been stated by one of the witnesses, I think it was Mr. Appleton, that there was trouble at the factory with the inserts, stripping of the threads. Do you know anything about that?

A. Well, I have never seen any of the stripping of the threads, but it is highly possible.

Q. What causes would bring that about?

A. Number of causes.

Q. Name them?

A. Insert itself being imperfect, method of manufacture; that is, the process to which the insert is subject during manufacture.

Q. What do you mean? Just tell us how the press comes down. What do you mean by face?

A. Imperfect fall of the insert onto the piston. It is due to the mold not being correct, not standing so as to make the mold absolutely correct, perfect.

Q. Did you know about this hemit B?

A. I did.

Q. And this white mixture that was put in the McDowell joint?

A. I did.

Q. Was that different from hemit B?

A. Only inasmuch as the asbestos was left uot-

Q. Was there any secret formula for the preparation of that white mixture?

A. There was not.

Q. Was it known to any one but yourself and Mr. Hemming?

A. The foreman of the mixing room and the man that made the mix.

Q. Did that go away with you?

A. No, not with us.

Q. Did you take any formula away with you?

A. I did not, except what I had in my head.

Q. The time you left the factory, what was your place there or work, what did you have to do?

A. Assist Mr. Hemming in the discharge of his duties.

Q. Did you have anything to do with the manufacture of this joint?

A. Considerably.

Q. Was that work of getting the joint ready for delivery prosecuted diligently or was it delayed?

A. Well, it was delayed somewhat.

Q. When you left was the factory in shape to produce for deliveries to Mr. McDowell?

A. Still waiting for two hundred metal parts that had been requested by us from the General Press Metal Company to determine or not the inserts were correct for final production; the only thing lacking.

Q. How about the die?

A. The die had been settled on.

Q. Had it been made?

A. Only the experimental die.

Q. I don't mean that. You had your mind made up, but could you have started in production that day?

A. No. A number of molds are necessary for production.

Q. What do you say about the two hundred metal parts you were waiting for, two hundred metal parts?

A. A letter was written by us to the General Press Metal Company a few days before, I left,

I should say about a week, requesting they ship us two hundred metal parts on Mr. McDowell's order in order that we might determine whether the length or height of the shell was correct.

Q. That was the situation when you left?

A. Yes, sir.

Q. You don't know whether those parts came or not?

A. I do not.

Q. And after they came, then there was something more for your company to determine before the Press Metal Company was to go on with the rest of the work?

A. Exactly.

Cross examination by Mr. Whitehead:

Q. What was that something more?

A. Determine whether the height of the shell was correct for the producing of a properly dimensioned joint and whether the thoughness of the steel was correct in order to allow the proper crimping over of the shell.

Q. The matter of the die wasn't very important?

A. It wasn't. It had previously been settled.

Q. Practically a question of the metal parts, wasn't it?

A. I should not say that exactly.

Q. Why should not you say it exactly?

A. Because a number of dies are necessary for the production of those joints.

Q. You just said the matter of the die was comparatively unimportant?

A. You were speaking, as I take it, of the design, not the number?

Q. I am speaking of the die, the matter of the die being comparatively unimportant, and wasn't

the real point of difficulty at the time you referred to related to the metal parts?

A. I should not say that exactly, no.

Q. If it is not so, exactly how is it?

A. The actual manufacture, as we should have made it, at that time, it would have been necessary for us to have what is called a double cavity die in order to turn the joints out at the price we agreed to make them for.

Q. Now, I just asked you if the matter of the die was comparatively so unimportant?

A. I did say that, but I said in connection with the matter of the design only.

Q. Then, you wish to withdraw that?

A. Yes.

Q. When you left the mill the mill was waiting for shipment of shells and nipples?

A. Not nipples, no, shells.

Q. Had it received any nipples?

A. It had.

Q. How many?

A. About 350, I should say.

Q. Now, you say you went to Philadelphia with Mr. McDowell?

A. I did.

Q. And that the Philadelphia Pressed Steel asked for some instructions with regard to the shells and that you didn't furnish them. Why didn't you furnish them?

A. Because it wasn't entirely said as to what we desired.

Q. With whom did you have to confer?

A. Mr. Martin.

Q. With respect to what happened did you have to confer with Mr. Martin?

A. The proper shape of the shell before it is turned over, before using for manufacture.

Q. That was the only point of uncertainty?

A. That was the only point and the height.

Q. Do you know whether Mr. Martin sent any instructions to the General Press Metal Company on this point?

A. He did not.

Q. How do you knew?

A. Because Mr. Martin reported to me.

Q. Was Mr. Martin your superior or were you his?

A. I was his.

Q. What time did you go to Philadelphia, I mean to say, what day, what time of the day?

A. I can't say exactly.

Q. How long was it before you left the company's employ?

A. I can't say that exactly, either.

Q. Was it three months or more before you left the employ or was it a few weeks?

A. More like a month.

Q. You left the company's employ on April 19th?

A. I did.

Q. You estimate you went to Philadelphia about then, 1916?

A. No, it is before that when the order was placed for metal shells.

Q. Now, the only order in evidence in this case for shells was placed on April 3, 1916?

A. That was the date. We were there then. I am not exactly sure the dates but I was in Philadelphia, because I have no reason for recollecting it.

Q. You are quite sure it was the same day the order was placed?

A. No, I can't say so. Previous to that, subsequent to my visit to Philadelphia a letter was

written by us, that is the Hemming Manufacturing Company, conferring the visits, stating that no further information could be given other than I had given them on that date. You will find that letter.

Q. Who wrote that letter?

A. The secretary of the Company.

Q. At your instruction?

A. At my instruction.

Q. And you had already conferred with Mr. Martin?

A. I had.

Q. And you had conferred with Mr. Martin about the size that the steel company wanted to have for those shells and then you instructed the secretary to write a letter. You couldn't give them that information?

A. At that time.

Q. Why did you write that letter?

A. Because they required a little order of that before ordering a quantity of metal parts which would be unsatisfactory for our use if they were so furnished.

Q. Who was going to do the thing. Wasn't that up to you?

A. It was up to me to settle.

Q. And you didn't settle it?

A. I did not.

Q. Why didn't you settle it?

A. Waiting for further information from Mr. Martin in connection with the proper use of his die.

Q. Mr. Martin was a subordinate of yours, wasn't he?

A. He was.

Q. Why didn't you get the information from him?

A. Why, all things you have to wait for.

Q. Was it a proper delay in the manufacturing process?

A. It certainly was.

Q. You don't feel that the Hemming Manufacturing Company was in any way to blame for what delay occurred in connection with forwarding those instructions to the General Press Metal Company?

Mr. Skinner: Up to the time he left?

Mr. Whitehead: I am talking about this delay he spoke of now.

Q. Do you think that the Hemming Manufacturing Company was creating any delay for which they should be held to blame?

A. Only inasmuch as I was in the employ of the Hemming Manufacturing Company, I was to blame.

Q. You were to blame. Were you discharged, did you say?

A. I said, "Something like that."

Q. Something very like it?

A. Yes.

Q. How long after that did you go into Mr. Hemming's employ?

A. I can't state exactly.

Q. Why not?

A. I don't remember the date.

Q. How long have you been in Mr. Hemming's employ now?

A. About four months.

Q. Then it was about four or five months after you left Garfield that you went into Mr. Hemming's employ?

A. Somewhere around September, August or September.

Q. 1916?
A. 1916.
Q. At whose request are you here to-day?
A. Mr. McDowell.
Q. Are you under subpoena?
A. I am.
Q. Where do you live?
A. New Freedom.
Q. Pennsylvania?
A. Pennsylvania.
Q. Where were you served with a subpoena?
A. In Newark.
Q. Does your business bring you to Newark?
A. It does.
Q. You were served here while on business for your company?
A. I wasn't
Q. You were not?
A. I was served here at the request of Mr. McDowell.
Q. By prearrangement and agreement with Mr. McDowell?
A. Not entirely that; I should not say prearrangement.
Q. How did you happen to be in Newark?
A. I think anyone has a right to be anywhere they please. I don't know as I am responsible for anybody's——I don't know what.
Q. Go ahead.
A. No, I guess I better not.

By Mr. Skinner:

Q. Mr. Wilde, are you married?
A. I am not.
Q. Are you engaged to a girl in Paterson?
A. I am.

EZRA O. McDOWELL, recalled in rebuttal in his own behalf.

Direct examination by Mr. Skinner:

Q. Mr. McDowell, did you have an option with the General Press Metal Company for 500,000 more of those shells?

A. I did.

Q. Was that obtained in April, 1916?

A. It was.

Q. The price, what was the price, do you remember?

A. I will have to refer—I would like to see their letter on that date.

Q. I show you letter of April 24th, General Press Metal Company to you.

A. $14.46 per thousand.

Mr. Skinner: I oer it in evidence.

(Admitted in evidence and marked Ex. P49.)

Q. Is that lower or higher than the price you had on the former bid?

A. It was lower, because I expected to wait for mill delivery.

Q. Mr. Wilde spoke of the company's wanting 200 shells just before he left and having him order them. Do you know whether those shells were furnished.

A. They were so reported to Mr. Howell as having been furnished by a letter in evidence.

Q. Referring to that letter, that showed the list of stuff that Mr. Howell said they had?

A. Yes sir.

Q. Now, I think you gave some estimate or

statement of the cost of these joints, adding together the price you had to pay the Hemming people, the price you had to pay for the shells and the inserts or expenditures for freight or labels and boxes and so on, those figures were given by you as of your earliest orders you had placed for these different materials?

A. I believe the only figures I have testified to was approximately.

Q. I think you said that the total, that they would not exceed six cents?

A. It was. That was my statement.

Q. Six cents apiece?

A. Yes, sir.

Q. By reason of any change in prices at the time when you broke off relations with this company, which was in May, June and July, 1916, down to the commencement of this suit, would the cost to you have exceeded six cents?

A. May I refer to my memorandum? Of course, accurately computing the earlier cost it was a trifle bit lower than the figure I have spoken of.

Q. (Question read.)

A. I think I best answer that question by stating my cost as the orders placed and then as of a later date, stating both costs and averaging them or individually.

Q. When you speak of the orders placed, you mean the orders placed by you for material?

A. I do.

Q. What was the cost per thousand, taking the prices at which you did make purchases or placed orders?

A. $57.52½ cents per thousand.

Q. That is 5¾ cents apiece roughly?

A. Yes, sir.

Q. And taking the later prices, what would it come to?

A. My cost as of July 15th or August 1st would have been $61.19½ cents.

Q. A thousand?

A. Yes, sir.

Q. And how many would you have had to buy at that figure? Supposing now you had 125,000 orders cancelled what would you have had to buy in July or August, 1916, how many?

A. Practically 25,000.

Q. That is, you would have had to have bought the material for 25,000?

A. Yes, sir.

Q. And at the earlier prices you might have gotten the material for 100,000?

A. Yes, sir.

Q. When you tak the figures at 100,000 at $57.52 and 25,000 at $61.19, what would your prices per thousand be averaged?

A. $60.71.

Cross-examination by Mr. Whitehead:

Q. Mr. McDowell, you are talking about what it would have cost you to buy the metal parts and the shells and nipples, aren't you?

A. Yes, sir.

Q. And the cost to you of the metal parts plus the cost of manufacturing would be the total cost of the joints to you; that is, adding in freight?

A. Adding in freight on the shells from Philadelphia to Garfield and on the nipples from Cleveland to Garfield and on the pasteboard box containers, labels and freight on the finish product from Garfield to New York City.

Q. Freight didn't fluctuate and the labels didn't fluctuate, I presume?

A. They did not.

Q. Fluctuation lay in the metal parts?

A. And the pasteboard boxes, the price on those raised as well.

Q. Down to the time when you brought suit against the Hemming Manufacturing Company you had ordered ~~20,000~~ 200.000. inserts, hadn't you?

A. I had.

Q. In order to fill orders which you have produced here in court to your customers you would have had to produce the balance of the inserts?

A. I would.

Q. 200,000 inserts that you had ordered would make 100,000 joints, would they not?

A. They would.

Q. Subject to a percentage or loss or waste in process of manufacture, is that right?

A. I think if there were any metal parts destroyed by the Hemming Manufacturing Company in the course of manufacture that that was their burden and not mine and I have so stated to him.

Q. The metal parts were not exactly uniform?

A. I have never seen the inserts. I can't testify.

Q. If they didn't run exactly uniform?

A. They should have been rejected.

Q. Would it be possible to tell whether they were actually uniform until they were actually put into the press for use?

A. That I can't answer.

Q. We will say your 200,000 inserts would have made up 100,000 joints?

A. Yes, sir.

Q. What were inserts worth in the market at the time you brought your suit, on July 25th?

A. I can tell you as to a comparison of price, about July 25th, as compared to the price that I placed my orders on in February.

Q. I don't want any comparison. I want to know what could you have bought inserts for on July 25, 1916; that is, if you know?

A. I don't know. It was $14.10 for 2000 inserts, for 1000 insulating joints.

Q. Why don't you put that on the thousand basis?

A. Because it takes two inserts to make on insulating joint.

Q. Still on the basis of a thousand joints?

A. Yes, sir.

Q. $14.10 it would have cost for enough to make up a thousand joints?

A. Yes, sir.

Q. What did you contract to pay Grabler?

A. Figured out $9.50 for a thousand.

Q. That would be 2000 inserts. So that that makes a difference of a half a cent or more on the joint, doesn't it?

A. It makes a difference of that, practically that.

Q. You bought 50,000 steel shells?

A. Yes, sir.

Q. From the General Press Metal Company on April 3, 1916, didn't you?

A. I believe that is the date I did place that order.

Q. Those are all the steel shells you purchased?

A. All that I actually contracted for.

Q. Down to the 25th of July, 1916, when you brought this suit, you hadn't got any more steel shells?

A. No, I had not.

Q. When you filled the orders you have put in evidence here to your various customers you would have had to purchase shells? A. Yes, sir.

Q. Can you state what the steel shells were

worth, what you could have bought steel shells for on the 25th of July, 1916?

A. I cannot. I base the price in my later figure on my option from the General Press Metal Company, which I think is entirely fair, namely, a price of $14.46.

Q. That was the contract price of April 3d?

A. It was not.

Q. What do you mean by an option?

A. The option which has just been introduced in evidence. I have identified it. It was made known to Mr. Howell at the time I got it.

By the Court:

Q. Why was it he charged you $16 for 218?

A. Charge of putting in the die. Naturally was more trouble to make up just a few pieces than to put the die in and run it.

Q. You mean to say that this bill you offer in evidence for 218 wasn't any part of your 50,000?

A. I would say that it was part of the 50,000.

Q. Why did they charge you that, at the rate of 7½ cents apiece?

A. They notified me or Mr. Wilde that they would make a little charge, they would make a special charge for running that small lot.

Q. And they charged you for the die as well?

A. Yes, sir.

Q. Do you include that in your price that you fixed for the shells which you bought at that time, the price of the die and this additional price or not?

A. No, I haven't.

Q. How many more of those shells would you have had to pay for at the rate of 7 and a fraction cents apiece?

A. It is entirely according to whether the Hem-

ming Manufacturing Company desired any more small lots for testing purposes.

(Admitted in evidence and marked Ex. P69.)

(Ex. P69 read to the jury.)

By Mr. Whitehead:

Q. You don't call that an option on anything more than $50,000?

A. I think if you look at those figures you will find it 500,000.

Q. Did you notify the General Press Metal Company that you accepted this option of 500,000?

A. I think I asked Mr. Howell if he was prepared to accept the 500,000 if I ordered them and turned out the insulating joint.

Q. So you never accepted the 500,000?

A. I did not.

Q. Then, do you think it was fair to figure 50,000 on the basis of that option when he himself says that the price may increase in a week hence?

A. I do.

Q. And you have done so?

A. I have.

Q. Can you state what the cost would have been or was in the market?

A. There is no market on steel shells other than by special request on a special article of this kind.

Q. Now, Mr. Rosenfeld's testimony that was put in here this morning was that the market price of steel was increasing about ten per cent. a month?

A. Are you willing to accept Mr. Rosenfeld's quotation?

Q. I was just going to ask you if you thought that was a fair estimate?

A. I do.

By Mr. Skinner:

Q. You say you think it is fair for you to figure at this option. Why do you think so?

A. Why, because taking Mr. Rosenfeld's quotation of $12.40, at his percentage per month, I think you will find I have him a little moderate.

Q. You think if you add the ten per cent. a month to Mr. Rosenfeld's figures it would be less than what you have given?

A. I believe so.

Q. When you say you believe that have you made any calculation of that?

A. I am only quoting from my memory on that.

Q. You have made an estimate. The shells would have cost you $57 and some cents earlier and then later they would have cost you something over $60?

A. I have given you credit in those figures for having paid $15.85 for 100,000 shells whereas after the first 50,000 shells, if I had figured very carefully I might have figured but $14.46.

Q. Taking the figure they quoted you, $14.46 on an option of 500,000 you say you think Mr. Rosenfeld's estimate is correct, that steel was going up at the rate of ten per cent. a month?

A. I do.

Q. Would not make the price in July more than $15 a thousand?

A. Mr. Rosenfeld's testimony was that his price went up ten per cent. a month. In the General Press Metal Company's prices, if you recall my order for at least——

Q. I asked you if you memtioned what the shells were worth in July and you said you couldn't, and then in order to arrive at any calculation I asked you whether Mr. Rosenfeld's estimate on the increase in steel of ten per cent., a month was fair and you said it was?

A. I do.

Q. That being true, if these shells were worth $14.46 a thousand in April would they not have been worth more than $15 a thousand in July?

A. I would like to refer to the General Press Metal Company's letter in answering that question. The General Press Company's letter apologizes for offering me such a price and would intimate they are paying a premium for delivery. If the order had been placed for immediate delivery. I imagine I would have gotten a lower figure than the $14.46, from the statement of this letter.

Q. What letter are you referring to?

A. The letter you just read to the jury.

Q. You say you imagine. You don't know?

A. I answered the question to the best of my ability.

TESTIMONY CLOSED.

PLAINTIFF RESTS.

FOURTH DAY.

January 12, 1917.

Mr. Skinner: It is agreed that two additional half sections of joints may go in evidence, both of white material, one whiter than the other.

(Half section having less white marked Ex. P70.)

Mr. Skinner: The other, the bright white comes from the other side.

(Admitted in evidence and marked Ex. D20.)

Counsel summed up.

The Court charges the jury as follows:

CUTLER, J.:

Gentlemen of the Jury. The plaintiff in this case has for some years past been engaged in the sale of electrical appliances. Some time during the summer of 1915 he had a conversation with a friend about an insulating joint and, as a result of that conversation, his friend introduced him to some of the officers of the defendant company. This company was engaged in the manufacture of molded insulating materials. The matter of the manufacture of such joints was discussed on this and other occasions and a number of letters passed between the parties on this subject.

It appears that all joints must have the approval of the Underwriters Laboratories, Incorporated, before they are salable. Some of these joints manufactured by the defendant company as samples for another concern were left with the Underwriters Laboratories for the purpose of securing their approval after they had been tested and a half section of one of these joints was given to the plaintiff. A report was made by the Underwriters Laboratories, which has been offered in evidence, but a further test was demanded by it before an approval would be given. As a result of these negotiations between the plaintiff and the defendant a written contract was entered into on October 13, 1915, between the company and the plaintiff, which has been offered in evidence and can be examined by you in your jury-room.

The plaintiff claims that the defendant company has not carried out its part of this contract and this suit is brought to recover the damages

which the plaintiff claims he has suffered by reason of the failure of the defendant company to perform its part of this particular contract. This is a written contract and binds both the plaintiff and the defendant unless it has been changed or modified by mutual consent. It is therefore, important for you to consider what these parties to this suit agreed to do under the terms of this contract before you can determine whether the contract has been broken.

In the first place, this contract relates to a particular insulating joint, samples of which had been presented to the Underwriters Laboratory for approval in September, 1915. Not some joint, which the plaintiff might afterwards request should be made for him and not to a joint which the defendant company might decide it would rather make but to this particular joint, which was then in existence.

Examining this contract, it will be seen that both the plaintiff and defendant had something to do in order to carry out its terms.

This insulating joint was made up of an outer steel casting, called a shell, two pieces of malleable iron, called nipples or inserts, and an insulating material. The plaintiff in this contract agrees to furnish these metal parts, the paper boxes in which the finished goods were to be packed and the Underwriters labels in sufficient quantities to permit the defendant to manufacture the joints without interruption. If the Underwriters Laboratory labels could not be obtained these joints would be of no value to the plaintiff. If the plaintiff did not fulfill his part of this contract or stand ready to perform this part of his contract, if permitted to do so, he cannot recover against the defendant even if the defendant also fails to carry

out its part of this contract. The defendant in this contract agreed to manufacture these particular joints, to varnish the when they were manufactured, to box, pack, ship, test and label them in accordance with the Underwriters standard specifications; no order to be for less than 25,000 joints and not less than 1000 in any one shipment. This contract also provides that the goods should be delivered at Garfield, New Jersey, and the plaintiff should pay for the goods invoiced the first of the following month at the rate of $30 per thousand. If the defendant did not live up to this contract and the plaintiff did, the plaintiff is entitled to recover damages in this suit.

There has been conflicting testimony and a great number of letters and documents offered in evidence and it is your duty to duly consider them all in arriving at your verdict. You should not take the statements of counsel as to what the evidence has been, neither should you give any greater weight to any evidence that I may call to your attention than to the balance of the testimony, but you are to decide for yourself from this testimony, including the documentary evidence and the other exhibits, what has been established in this case. In considering this evidence you should keep in mind the rule that the plaintiff must eastablished his case by a preponderance of the testimony.

The plaintiff contends that in February, 1916, he ordered 200,000 nipples and the following April, if I recall the date,—the documents will show—he ordered 50,000 shells, but only a comparatively small part of this order was ever delivered to the defendant. He claims that the defendant did not let him or the company he was purchasing from know the character of the shells wanted.

The defendant could not make up the joints without the shells and nipples, and it is important for you to decide whether the plaintiff did his part in furnishing these supplies. He cannot say, "I ordered them and that is all I had to do about it." His contract requires that he should furnish these parts to the defendant and it was his duty to see that they were not only ordered but were delivered to the defendant. If, however, it was necessary for him to know more about these supplies and the defendant would not give him the data, so that he was prevented from furnishing them by the act of the defendant, the defendant cannot charge him with neglect in this respect. You should examine the evidence carefully to see if he ever notified the defendant that he could not proceed unless they gave him further information about the shells and the nipples. In this connection you should also consider when the plaintiff first gave an order for joints to the defendant. The defendant had no way of knowing how many orders the plaintiff was taking except from information the plaintiff gave to it. This company was not responsible under this contract to any one the plaintiff sold these joints to. It was, however, bound to manufacture this particular joint as and when the plaintiff called for it in lots of not less than 25,000. The defendant was nto compelled to accept or file any order for less than 25,000 unless there was a modification in this contract by mutual consent, or to begin work on the joint until the plaintiff had actually ordered 25,000 or more, but must ship the goods in lots of one thousand, if so directed by the plaintiff. There was no obligation on the part of the defendant to make any experiment when requested by the plaintiff and there was no obligation on the part of the defend-

ant to make any other joint except the one called for in the contract unless both parties to this suit agreed that some other joints should be substituted. One party could not make the change, but a change could be made by mutual consent. Was it possible to make a joint such as was called for in the contract and had the parties mutually agreed to a different insulating material in the joint which was to be made? That, gentlemen, is a fact for you to determine from the evidence in this case. There could be no breach of this contract, as claimed in this suit, until after the plaintiff order at least 25,000 joints unless the contract had been modified in this respect and the defendant had failed to manufacture them without reasonable time after having received the necessary metal parts to be used in their manufacture. Under this contract the plaintiff does not directly agree to ever order any joints, although he does agree not to sell or cause to be sold joints not manufactured for him by the defendant or cause joints to be manufactured by others. This contract is not limited by its terms to any time or to any number of joints.

Some time in the latter part of April or the first part of May—you can fix the date from the documents which have been offered in this case—the defendant notified the plaintiff that it wanted more money for the joints and requested a conference. Such a conference was had, and you are to say whether this contract was terminated at that time by mutual consent. If it was, still the plaintiff would be entitled to any damages he had suffered, if the defendant had failed to fulfill its part of the original contract or a contract as modified before the contract was terminated unless some other terms of settlement were then

mentioned and mutually agreed upon. The plaintiff would have been entitled to such damages as he sustained by reason of the defendant's failure to deliver joints actually ordered before that time, not the number of joints the plaintiff had sold or agreed to sell, but the number he had actually ordered, if any, of the defendant in lots of 25,000 or a less number if the contract had been modified by mutual consent. The damage would be the difference between the price the plaintiff was to pay for these joints and the market or current price of like joints at the time they should have been delivered, and here you encounter another difficulty. The contract price was only for the manufacture of these joints and the insulating material used in their manufacture by the defendant. These joints not only would cost the plaintiff what he would have to pay under this contract, but also what he would have to pay for the steel shells, nipples, boxes, and labels, together with the cost of freight and such other expenses as he might have to pay for dies, or other necessary expenses in procuring the shells and nipples used in the manufacture of these joints. All these items enter into the costs of this joint, and you are to say from the evidence what the joints would have cost the plaintiff at that time. You will then have to determine the market price of a similar joint at that time from all this evidence which has been offered and the difference between the market price of a joint at that time and the cost of a joint to be manufactured under this contract will be the daamge per joint the defendant would be liable to pay by way of damages. Determine the number of joints ordered up to that time and that number of joints at that sum, the difference between the cost and market price will be the dam-

ages the plaintiff would be entitled to recover unless there was a settlement or the terms of settlement agreed upon at this meeting by the parties to this suit. If there was such a mutual settlement or a mutual modification of the contract it would be binding on the parties and you will consider it instead of computing the damages as I have just mentioned.

Was there a settlement or a modification of the contract? It is stated that at this conference or a conference held about this time—as I recall it, there were two or three conferences on the subject—the plaintiff claims that he had taken orders for 450,000 joints and wanted a settlement including damages and profits, which the defendant refused. It was suggested that the plaintiff should cancel all the orders he could and that he should take no more orders and that the defendant should either make up sufficient joints to fill the uncancelled orders or shoulr buy enough joints in the open market to fill the orders which were not cancelled. The plaintiff went out and cancelled orders to the extent of 325,000 joints at a cost which has been given to you in the evidence. If I remember right, it was something over $500. You should consider not only what was said on that occasion about the change of the contract or the modification of the contract or settlement of damages, but should also, in that connection, very carefully consider all the correspondence which took place between the plaintiff and defendant after this meeting in the latter part of April or May in order that you can determine exactly the situation of the parties and what they understood the situation was at that time.

The defendant claims that it was allowed until the latter part of July to proceed to make the

joints. In the meantime, the plaintiff had brought this suit. If the plaintiff did agree that the matter should be settled or the contract modified by the plaintiff cancelling such orders as he could and the defendant should either make joints to fill the remaining orders or purchase joints in the open market to fill these orders and no time was agreed upon when this was to be done the defendant would have a reasonable time in which to make the joint or to fill the orders by the purchasing of similar points in the open market. Did it have such a reasonable time before the suit was brought? The plaintiff could not expect the joints to be manufactured by the defendant unless he furnished the shells and nipples and it does not appear that he furnished any after may, and you should also consider whether the defendant demanded of the plaintiff that he should furnish such shells after that date. It does not appear that the plaintiff demanded the delivery of the joints at any particular time after this conference in May. And, you may in that connection, consider whether or not the orders which he had shown or delivered to the defendant calling for deliveries at various times throws any light upon this subject.

If the defendant were using due and proper care and diligence to carry out its settlement or a modification of this contract the plaintiff cannot recover, but if it was not, the plaintiff is entitled to recover damages for the 125,000 joints it had agreed to deliver, computed as I have designated; namely, the difference between the price the plaintiff was to pay for these joints and what he would have to pay in the market for them at the time when they should be delivered. If you decide the plaintiff was directed to cancel

these orders for 325,000 joints and he had to pay something for doing so will then add to this amount the sum he paid to them to have these orders cancelled.

I have been requested by both the parties in this case to charge you on certain principles of law, which I shall dispose of at this time.

The plaintiff's requests to charge are as follows:

"1. That if the jury find that the plaintiff did his part, but defendant company neglected or refused to perform the contract of October 13, 1915, (with such modifications or additions as the jury may find were agreed upon between the parties), the plaintiff is entitled to recover such damages as will compensate him for the breach of the contract."

I so charge you.

The second request I refuse to charge except as I have charged.

The third requests I refuse to charge except as I have charged.

The fourth request I refuse to charge except as I have charged.

"5. In order to entitle the plaintiff to recover it is not necessary that he should show any express refusal to deliver on the part of the defendant. It is sufficient if under all the circumstances of the case as shown by the testimony he was justified in concluding and did conclude that defendant was not going to deliver within a reasonable time."

I so charge you.

"6. There being no time fixed in the contract for delivery, plaintiff was bound to allow the defendant a reasonable time for the manufacture of the joints for which orders were placed with

the defendant by the plaintiff. If such reasonable time expired without such delivery plaintiff was not bound to wait the defendant's pleasure any further and was at liberty to treat the contract as broken by the defendant and to sue for the recovery of the damages caused by such breach."

I so charge you.

"7. Any express declaration on the part of the defendant that it would not or could not perform its part of the contract would excuse the plaintiff from putting in to the defendant any further orders for joints of making any further demand on it for the performance of the contract. In this case, however, the jury should determine whether there was any arrangement between the plaintiff and defendant following any such refusal as amounted to a withdrawal of the refusal by the defendant and recognition by the plaintiff of the contract as still in force and to be performed by the defendant."

I so charge you.

"8. The defendant agreed to furnish the necessary metal parts, paper boxes and certain labels which were to be supplied by the Underwriters Laboratory. The contract did not obligate the plaintiff to furnish any specified number of metal parts, and only to furnish in sufficient quantities to permit the Hemming Manufacturing Company to manufacture said joints without interruption."

I so charge you.

"9. If the jury is satisfied that the plaintiff furnished suffcient metal parts, &c., to keep pace with the progress of manufacture by the defendant, plaintiff had fully performed the duty in that respect."

I so charge you.

10. I refuse to charge except as I have charged.

"11. The defendant cannot set up any failure of the plaintiff to perform his part of the contract, usless such failure by the plaintiff prevented or hindered the defendant in the performance of its part of said contract."

I so charge you.

"12. If there was a breach of the contract by the defendant it was the duty of the plaintiff to do all that an ordinary man of business might do under the circumstances to mitigate the loss; that is, he cannot charge the defendant with such damages as he might have prevented with reasonable endeavor. But the burden rests upon the defendant to show that the damages could have been mitigated by the plaintiff to a greater extent than they were."

I so charge you.

The Thirteenth I refuse to charge except as I have charged.

The requests of the defendant are as follows:

"1. If the jury finds that the plaintiff is entitled to damages, then the measure of his damages is the difference between the market value of the joints actually ordered by the plaintiff from the defendant, at the time or times when those joints should have been delivered; and what those joints would have cost plaintiff if delivered by the defendant, under the contract of October 13, 1915, plus any expenses which plaintiff may have proved to have been actually incurred by him in connection with said contract."

I so charge you.

"2. The jury cannot consider any order or orders placed by plaintiff with defendant except such as comply with that provision of the

contract, which says, 'but at no time shall an order be for less than twenty-five thousand joints,' unless the contract was modified by mutual consent.''

That is so. I do charge you unless you find that the contract had been modified by mutual consent in this respect.

''3. There being no period of duration stated in the contract of October 13, 1915, the defendant had the right to terminate it any time and if the jury finds that defendant did so, then plaintiff can recover nothing for damages suffered subsequent to the date of notice of termination.''

I so charge you.

The fourth request I refuse to charge except as I have charged.

''5. If the jury find that the plaintiff inexcusably failed to perform his part of the agreement in not furnishing the necessary metal parts and boxes, then he is not entitled to recover anything in this action.''

I so charge you.

''6. The plaintiff, in order to be entitled to recover anything, must have shown by a preponderance of the evidence, that the defendant refused or failed for an unreasonable time to comply with the terms of the contract of October 13, 1915.''

I so charge you, unless, gentlemen, the contract was modified in April or May, and then the same rule would apply to the modified contract.

''7. The plaintiff and defendant had the right and power, by subsequent parol agreement, to modify the terms of the written contract of October 13, 1915, and if the jury finds that they did so, and that thereby they extended the defendant's time to perform, then the jury must take such extension of time into account in determining

whether, from all the evidence, the defendant failed for an unreasonable time to fulfill its obligations under the said contract.''

I so charge you.

The eighth I refuse to charge except as I have charged.

''9. The contract of October 13, 1915, did not, by its terms, oblige the defendant to manufacture a joint which would pass the tests of the Underwriters Laboratories but only the joint specified therein, to wit., 'insulating joints, samples of which was presented to the Underwriters Laboratories in the City of New York in the month of September, 1915, under the name of the ''McDowell Insulating Joint.'' ' ''

I so charge you, gentlemen, unless you find that the contract has been modified as to the joints which were to be furnished under the terms of this contract.

Now, gentlemen, to summarize, if you find the plaintiff has kept his part of the contract and the defendant has not done so, your verdict should be for the plaintiff, the damages to be computed in the manner I have designated. If you find the plaintiff has not fulfilled his part of the contract, your verdict should be for the defendant.

If you find there has been no breach of the contract by the defendant, your verdict should be for the defendant.

If, however, you find that the plaintiff has fulfilled his part of the contract and the defendant has not, but that a settlement or modification of the contract was made and the plaintiff consented, the defendant should fill the orders not cancelled and the defendant was not given a reasonable time to carry out its part of the contract before the suit was started, the plaintiff cannot recover

unless you are satisfied by the evidence that the defendant did not intend to furnish these joints within a reasonable time. If you find there was such a settlement or modification of the contract and that the defendant has failed to carry out the same within a reasonable time, the plaintiff is entitled to a recovery at your hands, and you should award damages computed in the way and manner I have designated.

Now, gentlemen, this case has taken considerable time. It has been ably tried by counsel on both sides. The exhibits are numerous and it is now your duty to consider the evidence, consider the exhibits, and then determine from the evidence whether the claim of the plaintiff is correct, whether he has established his case by a preponderance of the evidence. If so, he is entitled to a verdict at your hands. If he has not established his case by a preponderance of the evidence, then your verdict should be for the defendant.

(The jury retires.)

Mr. Skinner: I desire to except to that part of your Honor's charge, first, so far as it limited the consideration of the jury to the contract of October 13, 1915, and the particular joints mentioned in that contract and so far as excluded the later modification contended for where another material was substituted, and I refer to the modification made to the change in the material.

Exception noted as ground of appeal.

Mr. Skinner: I desire to except also to that part of your Honor's charge wherein your Honor said with reference to the defendant being liable only on orders of under 25,000, our contention being that when the defendant received orders amounting to less than 25,000 they were liable

to fill those orders when they totalled 25,000, and could not reject the individual orders because they were each of them less than 25,000.

Exception noted as ground of appeal.

Mr. Skinner: I desire to except also to that part of your Honor's charge in which your Honor said that it does not appear that plaintiff demanded delivery of the joints at any particular time after the middle of May.

Exception noted as ground of appeal.

Mr. Skinner: I wish to except also to so much of your Honor's charge as directed the jury that under the contract the defendant was not bound to manufacture in accordance with the Underwriters Laboratory Association.

Exception noted as ground of appeal.

Mr. Skinner: I wish to except also to that part of your Honor's charge made in the terms of the defendant's first request to charge.

Exception noted as ground of appeal.

Mr. Skinner: I wish to except also to that part of your Honor's charge made in the terms of the defendant's second request to charge.

Exception noted as ground of appeal.

Mr. Skinner: I wish to except also to that part of your Honor's charge made in the terms of the defendant's third request.

Exception noted as ground of appeal.

Mr. Skinner: I wish to except also to that part of your Honor's charge made in the terms of the defendant's ninth request.

Exception noted as ground of appeal.

Mr. Skinner: I take an exception to your Honor's refusal to charge the second request of the plaintiff's request to charge.

Exception noted as ground of appeal.

Mr. Skinner: I take an exception to your Hon-

or's refusing to charge the third request of the plaintiff's request to charge.

Exception noted as ground of appeal.

Mr. Skinner: I take an exception to your Honor's refusal to charge the fourth request of the plaintiff's request to charge.

Exception noted as ground of appeal.

Mr. Skinner: I take an exception to your Honor's refusing to charge the tenth request of the plaintiff's request to charge.

Exception noted as ground of appeal.

Mr. Skinner: I take an exception to your Honor's refusing to charge the thirteenth request of the plaintiff's request to charge.

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS.

(1) That if the jury find that the plaintiff did his part, but defendant company neglected or refused to perform the contract of October 13, 1915 (with such modification or additions as the jury may find were agreed upon between the parties), the plaintiff is entitled to recover such damages as will compensate him for the breach of the contract.

(2) Such compensatory damages will naturally and properly include any money expended by the plaintiff in purchasing the metal parts that by the terms of the contract he was to supply, less the price obtained by him on the resale thereof; together with any sum paid by him in settlement of any liability incurred by him by reason of his undertaking to purchase such metal parts, provided the amount paid by him in such settlement of his liability was such sum as the jury think was reasonable after fair and honest attempt to minimize his damages as much as possible.

(3) If the jury find that the plaintiff did his part but that there was a breach of the contract by the defendant, the plaintiff is entitled to recover such reasonable sum as he may have had to pay his customers (that is, persons to whom he had contracted to sell the insulating joints in question) for the cancellation of their order.

(4) If the jury find that the plaintiff did his part, but that there was a breach of the contract by the defendant, the plaintiff is also entitled as compensatory damages to the difference between the contract price of the insulating joints to be furnished and the market price of similar joints at the time of the breach; this to be computed upon the number of insulating joints for which the plaintiff had orders after the cancellation testified to by him. The following letters: are to be construed by the Court and the Court instructs the jury that these letters amount to an agreement between the plaintiff and the defendant as of the date of June, 1916, that he then had orders for four hundred and fifty thousand of the joints in question, that he was to reduce this number by procuring cancellation of as many orders as possible, and that the defendant was to supply him with enough to fill the orders that were left Under these circumstances the difference between the contract price and the market price of the insulating joints in question as of the time of breach, (if the jury have found that the defendant broke its contract), is to be found in terms of a single joint and then multiplied by the number of joints for which orders remained, after cancellations which the plaintiff was able to procure and did procure.

(5) In order to entitle the plaintiff to recover it is not necessary that he should show an express

refusal to deliver on the part of the defendant. It is sufficient if under all the circumstances of the case as shown by the testimony he was justified in concluding that defendant was not going to deliver within a reasonable time.

(6) There being no time fixed in the contract for delivery, plaintiff was bound to allow the defendant a reasonable time for the manufacture of the joints for which orders were placed with the defendant by the plaintiff. If such reasonable time expired without such delivery plaintiff was not bound to wait the defendant's pleasure any further and was at liberty to treat the contract as broken by the defendant and to sue for the recovery of the damages caused by such breach.

(7) Any express declaration on the part of the defendant that it would not or could not perform its part of the contract would excuse the plaintiff from putting in to the defendant any further orders for joints or making any further demand on it for the performance of the contract. In this case, however, the jury should determine whether there was any arrangement between the plaintiff and defendant following any such refusal as amounted to a withdrawal of the refusal by the defendant and recognition by the plaintiff of the contract as still in force and to be performed by the defendant.

(8) The defendant agreed to furnish the necessary metal parts, paper boxes and certain labels which were to be supplied by the Underwriters Laboratory. The contract did not obligate the plaintiff to furnish any specified number of metal parts, and only to furnish "in sufficient quantities to permit the Hemming Manufacturing Company to manufacture said joints without interruption."

(8) If the jury is satisfied that the plaintiff

furnished sufficient metal parts, &c., to keep pace with the progress of manufacture by the defendant, plaintiff had fully performed his duty in that respect.

(9) The contract provides that, "at no time shall an order be for a less quantity than twenty-five thousand joints." This restriction was for the protection of the defendant and could be waived by it. If the plaintiff sent in orders for less than twenty-five thousand joints and no objection was made thereto on the ground that it was less than twenty-five thousand joints, the jury may consider this failure to object in determining whether there was a waiver of this contract requirement. In determining whether or not the contract requirement that no order should be for less quantity than twenty-five thousand was waived by the defendant, the jury may consider any communication or expression from the defendant to the plaintiff by letter or otherwise, in which the defendant recognized any orders put in by the plaintiff for less quantities than twenty-five thousand joints. If there be in the testimony proof of any such recognition, such recognition would constitute a waiver of the contract requirement, and defendant could not now set it up as to the orders so recognized.

(10) The defendant cannot set up any failure of the plaintiff to perform his part of the contract, unless such failure by the plaintiff prevented or hindered the defendant in the performance of its part of said contract.

(11) If there was a breach of the contract by the defendant it was the duty of the plaintiff to do all that an ordinary man of business might do under the circumstances to mitigate the loss; that is, he cannot charge the defendant with

such damages as he might have presented with reasonable endeavor. But the burden rests upon the defendant to show that the damages could have been mitigated by the plaintiff to a greater extent than they were.

(12) Ordinarily it would be my duty to assist you in the determination of the damages to be awarded the plaintiff, if you found that there had been such breach by the defendant, as under my instructions already given would entitle the plaintiff to damages. I am relieved of the necessity of instructing you as to the difference between a contract for the sale of goods and a contract for work and material in the manufacture of specified articles and the measure of damages applicable thereto by reason of the attitude of the parties. The defendant, in the conferences between Mr. Howell and Mc. McDowell in the latter part of May, 1916, declared its intention to either perform the contract or buy similar joints in the open market. The defendant has also taken the position in the course of this trial that the measure of damages, if damages are to be awarded, is found in the difference between the contract price and the market price of the joints in question. The plaintiff has assented to this position, and I think that the attitude of counsel amounts to an agreement that such measure of damages shall be applied by you. I do not understand that by contract price is meant the price named in the contract of October 13, 1915, but that plus everything else of cost to the plaintiff in the furnishing of the necessary material parts, paper boxes and labels as called for under the contract.

DEFENDANT'S REQUESTS.

(1) If the jury finds that the plaintiff is entitled to damages, then the measure of his damages is the difference between the market value of the joints actually ordered by the plaintiff from the defendant, at the time or times when those joints should have been delivered; and what those joints would have cost plaintiff if delivered by the defendant under the contract of October 13, 1915, plus any expenses which plaintiff may have proved to have been actually incurred by him in connection with said contract.

(2) The jury cannot consider any order or orders placed by plaintiff with defendant except such as comply with that provision of the contract which says "but at no time shall an order be for less than twenty-five thousand joints," unless the contract was modified by mutual consent.

(3) There being no period of duration stated in the contract of October 13, 1915, the defendant had the right to terminate it any time and if the jury finds that defendant did so, then plaintiff can recover nothing for damages suffered subsequent to the date of notice of termination.

(4) The contract of October 13, 1915, bound the defendant to manufacture only the insulating joint specifically mentioned therein, and if the jury finds that that joint was never approved by the Underwriters Laboratories, then the plaintiff, if entitled to damages at all, can recover only nominal damages.

(5) If the jury finds that the plaintiff inexcusably failed to perform his part of the agreement in not furnishing the necessary metal parts and boxes, then he is not entitled to recover anything in this action.

(6) The plaintiff, in order to be entitled to recover anything, must have shown by a preponderance of the evidence, that the defendant refused or failed for an unreasonable time to comply with the terms of the contract of October 13, 1915.

(7) The plaintiff and defendant had the right and power, by subsequent parol agreement, to modify the terms of the written contract of October 13, 1915, and if the jury finds that they did so, and that thereby they extended the defendant's time to perform, then the jury must take such extension of time into account in determining whether, from all the evidence, the defendant failed for an unreasonable time to fulfill its obligations under the said contract.

(8) The plaintiff and defendant had the right and power, by subsequent parol agreement, to rescind the written contract of October 13, 1915, by substituting such subseqeunt parol agreement therefor, and if the jury finds that they did so, then plaintiff can recover nothing in this action.

(9) The contract of October 13, 1915, did not, by its terms, oblige the defendant to manufacture a joint which would pass the tests of the Underwriters Laboratories, but only the joint specified therein, to wit, "insulating joints, samples of which was presented to the Underwriters Laboratories in the City of New York in the month of September, 1915, under the name of the 'McDowell Insulating Joint.' "

Exhibit P1, 1/9/17, F. L. W.

UNDERWRITERS' LABORATORIES, INC.
Under the Direction of the
NATIONAL BOARD OF FIRE UNDERWRITERS
Principal office and testing station
207 East Ohio Street
CHICAGO.
W. H. Merrill Manager

New York office
135 William Street
September 10th, 1916.

Elec. 3778.
Mr. E. O. McDowell,
154 Nassau St., New York.

Dear sir:—

We wish in this letter to go over briefly the various points which we have taken up in conversation with you regarding your Insulating Joints, and to outline our procedure in completing our work on these devices.

A series of preliminary tests were made on a few samples with results which were in general satisfactory, these tests including bending, torsion, heating and breakdown tests. In some instances it was noted after the receipt of our standard that the tests had not been made strictly in accordance with the present methods, notably in the use of a Bunsen burner with the air inlet stopped instead of an ordinary gas flame for the heating tests, and also in the application of the voltage breakdown test to samples which had been subjected to the bending and torsion tests. While as stated above, the results of these tests were in general satisfactory, we feel that it will be neces-

sary to repeat them, using a considerable number of samples, and making them strictly according to the present standards.

Inasmuch as a factory inspection is necessary before labels can be authorized, we believe that this work could be most effectively handled by having one of our engineers visit your factory when you are prepared to have him, to check over these tests under standard methods and on 50 to 75 joints, and at the same time to make the regular factory inspection of the equipment, etc. We shall also wish to make rough tests on the quality of the malleable iron or steel parts, and to pick up a few sample parts, completed joints, and sectional joints for the use in the photographs in our file. At the same we can make the complete set of tests on the combination type of joints if you are prepared to have this done.

We direct attention to the fact that the joints should be marked where it can be plainly seen after installation with your name or trade-mark.

We will await your further advices as to a suitable appointment for the above work at your factory, and in the belief that the matter will not be delayed unduly long, are leaving our files open.

Yours very truly,

UNDERWRITERS' LABORATORIES, INC.,

EDGAR P. SLACK

EPS-W Ass't. Electrical Engineer.

Exhibit P3, /1/9/17, F. L. W.

UNDERWRITERS' LABORATORIES, INC.
Under the Direction of the
NATIONAL BOARD OF FIRE UNDERWRITERS
Principal office and testing station
207 East Ohio Street
CHICAGO.
W. H. Merrill Manager

New York Office
135 William Street
Feb. 9th, 1916.

Elec. 3778.
Mr. E. O. McDowell,
154 Nassau St., New York.

Dear Sir:—

We desire to report to you herewith briefly the results of tests on your Insulating Joints conducted by the undersigned on Feb. 3rd, and witnessed by you.

Out of 20 samples tested for voltage breakdown, two failures were obtained, one on a new sample and one on a sample which we believe was previously tested for torsional strength. Both failures occurred between one screw connection and the exterior metal casing, and it was thought may possibly have been due to some faulty condition of the test apparatus such, for instance, as the close proximity of the large test contact bars to the parts of the joint of opposite polarity, thereby causing an arc to start across between these joints, and later to hold over the surface of the insulation. We believe you should investigate carefully as to whether this is the cause of these

voltage breakdowns or whether the trouble is in the construction of the joint, and that in either case steps be taken to correct this condition.

We would also suggest that the high tension equipment be provided with guards to prevent the possibility of shock to our inspector in connection with our regular factory tests on these devices. We should also judge that such a guard would be found highly desirable for the protection of your own workmen. We would also suggest strongly in this connection the desirability of eliminating absolutely switches in the high tension test circuit or else interlocking such switches mechanically with insulating rods so that they cannot be operated until the primary circuit is opened. The elimination of the bare busses on the high tension circuit and the substitution therefor of short lengths of heavily insulated wire is of course also a logical development. We understand that you have in mind the redesigning of this equipment, and offer these suggestions for what they may be worth.

On the air pressure test one sample was found to leak at 25 lbs., this being one of four samples, three of which had been tested for torsion, and the fourth sample having in some way been placed with these. On account of all the other air pressure tests having been satisfactory, it was thought likely that this one which failed was the fourth sample of which we have no information, and which was therefore presumably faulty. For this reason we are not registering this failure as a specific criticism, but you will of course understand that every sample is supposed to withstand this test when labels are applied to this product.

The heating, torsion and bending tests were completed satisfactorily.

As regards the marking of these devices, we understand that the name "McDowell" is to be stamped in the exterior metal shell, and would state that our labels should not be applied to any of this product which is not so marked.

We have in the course of preparation our report on these joints, which we will forward to our Chicago Office in the regular way within the next few days, following which you may expect to hear from our Label Service Department regarding the authorization of labels. When labels are authorized on this material, they may be obtained from this office, 135 William St., New York, N. Y., when we will make the necessary arrangements for our inspector to visit your factory to make the first regular factory inspection on these insulating joints. We understand that you will attempt to have the test equipment assembled in one room for the convenience of inspection, and should consider this highly desirable as simplifying the work and reducing the time necessarily spent in the factory inspection of this product.

Yours very truly,

UNDERWRITERS' LABORATORIES, INC.,

EDGAR P. SLACK

EPS-W. Asst. Electrical Engineer.

Exhibit P4, 1/9/17, F. L. W.

UNDERWRITERS' LABORATORIES, INC.
Under the Direction of the
NATIONAL BOARD OF FIRE UNDERWRITERS
Principal office and testing station
207 East Ohio Street
CHICAGO.
W. H. Merrill Manager

New York Office
135 William Street
Feb. 18th, 1916.

Elec. 3778.
Mr. E. O. McDowell,
154 Nassau St., New York.

Dear Sir:

Following telephone conversation in reference to your Insulating Joints, we are pleased to advise that we have forwarded our report on these devices and have requested publication of a card listing them under your name with that of Hemming Mfg. Co. added as the actual manufacturer.

We hereby authorize the use of labels on these joints temporarily, subject to our usual factory inspection, and would advise that this authorization will be confirmed and made permanent by our Label Service Department.

UNDERWRITERS' LABORATORIES, INC.,
EDGAR P. SLACK
Asst. Electrical Engineer.

EPS-W.

Exhibit P 5 - 1/19/17 - F. L. W.

Envelope bearing imprint "Underwriters' Laboratories, Inc., 207 East Ohio Street, Chicago," bearing post mark, Chicago, Illinois, April 18, 1916, and addressed to E. O. McDowell, 154 Nassau Street, New York, N. Y. and contents consisting of the following:

UNDERWRITERS' LABORATORIES, INC.
Under the direction of the
National Board of Fire Underwriters
Principal Office and Testing Station
207 East Ohio Street, Chicago,
W. H. Morrell, President.

Dear Sir:-

We enclose herewith for your information a card on which is given summary from our report on an appliance which was received from you for examination and test.

A duplicate of this card has been forwarded to each insurance company, insurance organization and inspection department subscribing to our work.

Respectfully yours,
D. B. Anderson,
Secretary.

3778 - February 23, 1916.

INSULATING JOINTS

McDowell, E. O., Submittor,
154 Nassau Street, New York, N. Y.
Hemming Mfg. Company, Mfr.,
Garfield, New Jersey.

McDowell Insulating Joints.

STANDARD
LABEL SERVICE - Label illustration on reverse side of this card.

Insulating Joints shown by tests and examination conducted by Underwriters' Laboratories to be in accordance with the requirements of the National Board of Fire Underwriters' and examined at factories and passed by Underwriters' Laboratories, have labels attached like illustration on this card.

This manufacturer is equipped to supply these Insulating joints so labeled.

This card is issued by Underwriters' Laboratories.

The labeled illustration on the reverse side of the last card consisted of the photograph of an end of a joint on which was printed "Underwriters' Laboratories, Inc.--Inspected", also the following label:

UNDERWRITERS' LABORATORIES, INC.
Inspected.
(12) INSULATING JOINT (12)
No.

Illustration of Inspected Insulating Joint
Label one-half size.

Exhibit P6 + next page

March 8, 1916.

Mr. E. O. McDowell,
159 Nassau St.,
New York.

Dear Sir:

We are attaching hereto copy of letter written the Underwriters' Laboratories, Inc., in regard to insulating joints.

In connection with the second paragraph, in which it is stipulated that the agreement includes the purchase of Underwriters' Labels, it is, of course, understood that we write this letter on condition that you will take care of the purchase and supply of these labels.

Trusting this is satisfactory,

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly
Sales Manager.

EN/TCC

Exhibit P6. Copy.

February 29th, 1916.

Underwriters' Laboratories, Inc.,
135 William Street,
New York City.

Gentlemen:

Inasmuch as you are to list under the name of E. O. McDowell, of New York City, with our name added as the actual manufacturer, Insulating Joint, marked McDowell.

We hereby agree to arrange for the conduct of your factory inspection and label service on this product, including the purchase of your labels.

We further agree to use your labels only on product made for E. O. McDowell and marked and described in the standard of Underwriters' laboratories, except upon express authorization from Underwriters Laboratories.

We further agree that the above listing of this product may be discontinued at any time on request of E. O. McDowell.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly
Sales Manager.

EN/JE

Exhibit P7, 1/9/17, F. L. W.

UNDERWRITERS' LABORATORIES, INC.
Under the Direction of the
NATIONAL BOARD OF FIRE UNDERWRITERS
Principal office and testing station
207 East Ohio Street
CHICAGO.
W. H. Merrill Manager

Chicago, 9/30/1915

Elec. Report No. 3778
Insulating Joints

Manufactured by E. O. McDowell, Dr.
154 Nassau St.,
New York-N. Y.

The services rendered in examination and test work on above device, cost of materials used, printing and promulgating report, and proportion of fixed charges, less amount paid by insurance companies	12.10
Extras: Freight, Express, Telegraph Telephone, Factory Visit, R. R. Hotel,	
Credit,	10.00
Amount due,	2.10

CP Received payment
UNDERWRITERS-LABORATORIES, INC.
Oct-19-1915
B. F. Hardy, Cashier.

Exhibit P8, 1/9/17, F. L. W.

UNDERWRITERS' LABORATORIES, INC.
Under the Direction of the
NATIONAL BOARD OF FIRE UNDERWRITERS
Principal office and testing station
207 East Ohio Street
CHICAGO.
W. H. Merrill Manager

Chicago, 2/29/16

E Report No. #3778
Insulating joints
Manufactured by E. O. McDowell,
154 Nassau St.,
New York, N. Y.

The services rendered in examination and test work on the above device, cost of materials used, printing and promulgating report, and proportion of fixed charges, less amount paid by insurance companies 28.83

Extras: Freight, Express, Telegraph, Telephone, V
Factory Visit, R. R. .65 Hotel .65

29.48

Credit,
Amount Due 29.48
4.86
1.40

Received payment 35.74
UNDERWRITERS-LABORATORIES, INC.
Apr. 19-1916
R. F. Hardy, Treasurer.

Exhibit P9.

Agreement made this thirteenth day of October, 1915, between the Hemming Manufacturing Company, a corporation of New Jersey, hereinafter called Hemming Company, and Ezra O. McDowell of the City of Newark, Essex County, New Jersey, having his place of business in the City of New York, hereinafter called McDowell.

Whereas, the Hemming Manufacturing Company is a manufacturer of molded insulating materials, and

Whereas, Ezra O. McDowell desires to arrange for the manufacture of certain insulating joints, samples of which was presented to the Underwriters' Laboratory, in the City of New York in the month of September, 1915, under the name of the "McDowell Insulating Joint", hereinafter called Joints.

Now therefore, it is agreed as follows:

1. Hemming Company agrees to manufacture exclusively for McDowell the joints hereinabove described as and when he may call for the same, but at no time shall an order be for a less quantity than twenty-five thousand joints, nor shall less than one thousand joints be included in any one shipment.

2. Hemming Company agrees to manufacture the said joints including varnishing, boxing, packing, shipping, testing and labelling in accordance with the Underwriters' standard specifications for a price of Thirty Dollars per thousand joints delivered at Garfield, New Jersey.

3. McDowell, in consideration of the price and other stipulations hereinabove named, agrees that

he will neither sell nor cause to be sold, joints not manufactured for him by Hemming Company, nor will he cause joints to be manufactured by others.

4. McDowell agrees to furnish to Hemming Company the necessary metal parts, paper boxes and Underwriters' labels in sufficient quantities to permit Hemming Company to manufacture the said joints without interruption.

5. McDowell agrees to pay all invoices for the manufacture of said joints received from Hemming Company during any one month on the first of the month next following, and at the price hereinabove named.

In witness whereof, the Hemming Manufacturing Company has caused this agreement to be duly executed in duplicate by its proper officers thereunto duly authorized, and Ezra O. McDowell has also executed same in duplicate by his hand and seal.

(Seal)

HEMMING MANUFACTURING COMPANY,

Attest By B. H. HOWELL,

A. Meister President.

Secretary.

Witness EZRA O. McDOWELL. (Seal)

A. Meister

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Exhibit P10.

October 23rd, 1915.

E. O. McDowell, Esq.,
New York City.

Dear Sir:

Yours of the 21st at hand regarding outre shell of insulating joint, and in reply would advise that it is necessary to make the shells in accordance with the attached blueprint, and any drawings that you may have not checking exactly with same should be destroyed. 20

The nipple made by the General Pressed Metal Company is no doubt, similar to the sample we are sending you under separate cover, and if such is the case, we would further advise that we have tried out same, and found them useless.

Yours very truly, 30

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly

EN/JE Sales Manager.

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Exhibit P11.

New York, December 24, 1915.

Hemming Manufacturing Co.
Mr. Hemming.
Insulating Joint.
Trenton Plug.

I have devised means to make the Trenton Plug, so that it looks as though we can go ahead. I will advise you further details on this.

In the meantime, I would appreciate hearing from you on the Insulating Joints. It is imperative that we get this thing started at once. Steel and iron deliveries are going to be slow and if we don't get busy and find out exactly what we want in the way of nipples and shells, it will be months before we will be making deliveries.

Very truly yours,

E. O. McDowell.

Exhibit P12.

New York, January 15, 1916.

Hemming Manufacturing Co.
Mr. Hemming.

I am enclosing you herewith copy of a letter to the Grabler Mfg. Co. Of course, it would not do for me to say, "I told you so" but I felt right along we would be up against it in getting raw material.

The same thing is going to effect the Shells and I think it would be wise for you to take this matter up at once.

Very truly yours,

E. O. McDowell.

Exhibit P13.

January 15, 1916.

Grabler Manufacturing Co.
Mr. Rosenfeld.
Insulating Joints.

We finally have gotten the Insulating Joints where we want them and will be in a position to give you a good sized order at an early date. You will facilitate this greatly, however, by hustling up the delivery for the Hemming Mfg. Co. on Nipples, as these Nipples are desired for the final Underwriters' inspection. Please make a special effort to get same off at once.

Thanking you in advance for this courtesy, I remain,

Very truly yours,

E. O. McDowell

Exhibit P14.

New York, January 21, 1916.

Hemming Manufacturing Co.
Mr. Hemming.
Grabler Mfg. Co.

I am enclosing you herewith original letter from the Grabler Manufacturing Co., which I do not understand, as I understood from you that you had ordered through an additional quantity of Nipples from these people.

Please advise me exactly how the situation stands.

Very truly yours,
E. O. McDowell.

Exhibit P15, 1/9/17, F. L. W.

Souare "Gee" (G) Trade Mark
Registered
The Grabler Manufacturing Co.
Cleveland, O.

January 19th, 1916.

Mr. E. O. McDowell,
New York, N. Y.

Dear Sir:—

Replying to yours of the 15th instant in reference to Nipples for the Insulating Joints, beg to advise you according to our records the order from the Hemming Mfg. Company, has been completed and shipped.

Yours very truly,
The Grabler Manufacturing Co.
M. C. Rosenfeld
Treasurer

MCR-C.

Exhibit P16.

New York, February 19, 1916.

Hemming Manufacturing Co.,
Garfield, N. J.
Gentlemen:—

I requested you a few days ago to send me some samples of Insulating Joints. I need these to have some electrotypes made and I am anxious to get in the March issue of the Electrical Record in the newly approved products department. I desire enough Joints so as to determine the size boxes required. Boxes are hard to obtain at the present time to that it will be necessary for me to order at once to have them ready for you in time.

The first sizes of Joints required will be ⅜ x ⅜ Straight Electric Joints and ⅜ x ⅛ Combination.

I have not received a copy of your letter to the Grabler Manufacturing Co. regarding the Shells and would thank you to favor me with same.

Very truly yours,

E. O. McDowell.

Exhibit P17.

February 19th, 1916.

Mr. E. O. McDowell,
New York City.

Dear Sir:

With regard to your favor of the 18th we note you have forwarded a quantity of labels.

Relative to further tests, however, we beg to advise it was our understanding that no further tests would be made until we had actual production under way, and we will be glad to hear from you in this regard immediately.

Yours very truly,
HEMMING MANUFACTURING COMPANY,

By Eugene Kelly
Sales Manager.

EN/JE

Exhibit P18, 1/9/17, F. L. W.

ORDER SHEET.

E. O. McDOWELL, 154 Nassau St., N. Y. City.

April 3, 1916.

Ordered of General Pressed Metal Company.

Salesman	Customer's Order No.
Our No. GP-1	Requis. No.
Charge to E. O. McDowell,	Charge by
Street Address,	
154 Nassau Street,	Date Shipped
Town or City of New York,	Date Charged
State New York,	
	Book Folio
	Ship via
	Freight.

Ship to Hemming Manufacturing Co.
Street Address
Terms: City Garfield, State of New Jersey.

This Order Must be Filled as per Instructions.
Bills Must be Rendered in Duplicate.
Put Order No. on Bills.

Price. Discount

50,000 Steel Shells, .060 strip steel, in accordance with specifications, by Hemming Mfg. Co. 15.85

E. O. McDOWELL,
Per,

Exhibit P19.

March 1st, 1916.

E. O. McDowell, Esq.,
New York City, N. Y.

Dear Sir:

Owing to recent advances in the cost of our raw materials, as also the cost of production, we find all quotations pending with you are too low.

The afore mentioned advances, we estimate will necessitate our increasing our bids by a minimum of ten percent.

We trust, therefore, you will consider this letter in conjunction with propositions we have pending with you, and upon request, we will be glad to submit revised quotation.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly

EN/JE Sales Manager.

Ex. P 19 - 1/9/17 - F. L. W.

HEMMING MANUFACTURING COMPANY
Manufacturers of
HEAT RESISTING INSULATION
Main Office and Works
GARFIELD, NEW JERSEY.

March 1st, 1916.

Ezra O. McDowell, Esq.,
New York City.

Gentlemen:-

Under the present abnormal conditions of the raw material markets, with which you are no doubt familiar, we feel you will appreciate that former prices on the various molded parts we have been furnishing you are very low so that it would be impossible to execute future orders at the same figures without incurring an actual loss.

The advance in the cost of raw materials coupled with the increased cost of production has necessitated our increasing our prices by a minimum of ten per cent.

We trust, however, that same will not inconvenience you and hope to secure your further esteemed orders which we assure you will be accorded our prompt and careful attention.

Yours very truly,

HEMMING MANUFACTURING COMPANY.

Exhibit P20, 1/9/17, F. L. W.

HEMMING MANUFACTURING COMPANY
Manufacturers of
HEAT RESISTING INSULATION
Main office & works
GARFIELD, NEW JERSEY

March 1st, 1916.

E. O. McDowell, Esq.,
New York City, N. Y.

Dear Sir:

Owing to recent advances in the cost of our raw materials, as also the cost of production, we find all quotations pending with you are too low.

The afore mentioned advances, we estimate will necessitate our increasing our bids by a minimum of ten per cent.

We trust, therefore, you will consider this letter in conjunction with propositions we have pending with you, and upon request, we will be glad to submit revised quotation.

Yours very truly,

HEMMING MANUFACTURING COMPANY,
by EUGENE NELLY
Sales Manager.

EN/JF

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Exhibit P21.

New York, March 17, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.
Attention of Mr. Wilde.

Gentlemen:—

Kindly write to the General Pressed Metal Company, Philadelphia, Pa., giving them full details as to how the Shells are to be made, as I have placed the order for steel for same.

Thanking you for giving the above your very prompt attention, I remain,

Very truly yours,
E. O. McDowell.

Exhibit P22.

March 21st, 1916.

E. O. McDowell, Esq.,
New York City.

Dear Sir:

In connection with yours of the 14th regarding samples of insulating joints showing the metal parts in detail, as also cross sections, we beg to say we believe it advisable to wait until we have the mold in regular production.

As soon as we are manufacturing these joints in quantities, we will arrange to take care of furnishing you with these samples, and hope this will be satisfactory.

Yours very truly,
Hemming Manufacturing Company,
By Eugene Kelly
EN/JE Sales Manager.

Exhibit P23.

March 28th, 1916.

E. O. McDowell, Esq.,
154 Nassau Street,
New York City, N. Y.

Dear Sir:

As we have already advised you, due to increased cost of our raw materials and labor, we have been compelled to increase our prices.

On carefully going into our costs on your insulating joint, we find that should we be compelled to execute your order at the price named you, we would, not only deprive ourselves of any profit, but would actually incur a loss.

In order, therefore, to cover ourselves, and be content with even a slight margin of profit, it will be necessary to us to charge you $40.00 per thousand for the first one hundred thousand.

Trusting this price will not inconvenience you in any way,

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly
Sales Manager.

EN/JE

Exhibit P24.

New York, March 29, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.
Gentlemen:—

Your letter of the 28th at hand.

The suggestions contained therein are worthy of consideration but I cannot at this time be put on record as acquiescing to your suggestions. I have certain contracts to fulfill, which I have made on the strength of your contract, and owing to the delay in your getting this article started I have been compelled to pay a large increased price for iron inserts and steel shells and yet will be compelled to make deliveries on the orders accepted based on my old cost of metal parts.

Should you be willing to handle the purchasing of the metal parts for the joints on a basis of contracting for the material in advance in quantities and take a profit for yourself in so doing, it would seem that an amiable adjustment of the contract might be made.

I would thank you to consider this matter over again.

Very truly yours,

E. O. McDowell.

Exhibit P25.

April 1st, 1916.

E. O. McDowell, Esq.,
154 Nassau Street,
New York City.

Dear Sir:

With reference to yours of the 29th ult., in regard to advances in the price of insulating joints, we beg to confirm understanding of even date to the effect that this matter will be held in abeyance until we are producing quantities of these parts.

Yours very truly,
HEMMING MANUFACTURING COMPANY,
By Eugene Kelly
Sales Manager.

EN/JE

Exhibit P26.

New York, April 22, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

Will you kindly mail one of the cast iron insulating joint inserts to the Ellcon Company, 50 Church Street, New York City, as I desire to have these people quote on same.

The Grabler Company have not proved to me they are capable of making the prompt deliveries necessary on this line and I, therefore, thought it advisable to make inquiries elsewhere regarding deliveries on raw material.

General Pressed Metal Company is forwarding you a couple of hundred Steel Shells for you to try out, so I would appreciate your advising them promptly on receipt of this material whether same is satisfactory.

As I have previously advised you, the Grabler Company expect to start an express shipment to you on the 26th of this month. Kindly advise me the amount of expressage on this, so that I may forward my check for same.

It is very possible that within a short while the use of Insulating Joints will be largely decreased or altogether discontinued and it is my desire to "make hay while the sun shines." We have both exerted considerable energy in trying to get this article to where it is to-day and believe we should push the matter as much as we can so as to, in a measure, get out of it some monetary consideration to make up for the energy exerted.

Very truly yours,

E. O. McDowell.

Exhibit P27.

New York, April 25, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

I have experienced some difficulty in securing promise of delivery on Steel Shells owing to the inability of my people to secure the grade and thickness of the steel which is required for this purpose.

Under date of the 24th I have an option on material for 500,000 Shells and I am in a position to dispose of this material providing you are able to turn out the Joints fairly promptly.

I would thank you to advise me as soon as possible on this point, otherwise, I will be compelled to pay a higher price for these Shells which I am, naturally, not anxious to do.

Awaiting your early reply, I reain,

Very truly yours,

E. O. McDowell.

Exhibit P28.

April 26th, 1916.

E. O. McDowell, Esq.,
New York City.

Dear Sir:

We have your valued favors of the 22nd and 25th instants in regard to insulating joint.

We are of the opinion, however, that in view of the fact that this matter has dragged so long, and as Mr. Hemming is no longer with this Com-

New Jersey State Library

pany, it would be well for you to call on us to talk the matter over.

We would suggest you come out to see us tomorrow morning on the Garfield train arriving in Garfield at ten o'clock, when Mr. Howell will be ready to talk the matter over with you.

Should you be unable to arrange to call tomorrow, we will be obliged if you would telephone us.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly
Secretary.

EN/JE

Exhibit P29.

May 3rd, 1916.

Mr. E. O. McDowell,
New York City.

Dear Sir:

When you were here, we understood that you would advise us in a few days as to the standing of your orders for Insulating Joints.

As we would like to get this matter settled as soon as possible, and are held up while waiting to hear from you, we will appreciate your early advice.

Thanking you for your prompt attention,

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Eugene Kelly
Secretary.

EN/JE

Exhibit P30.

May 16th, 1916.

Mr. E. O. McDowell,
#154 Nassau Street,
New York City.

Dear Sir:

We are in receipt of a registered letter typewritten on your letter head, and dated May 12th, but without any signature.

We regret that we do not agree with you.

The joint we contracted to make for you was known as the McDowell joint, a sample of which was submitted to the Underwriters and referred to in the contract for identification.

We find nothing in the contract obligating us either to produce an insulating joint acceptable to the Underwriters, or to procure their acceptance of any joint we might make for you.

On the contrary, the contract explicitly states that we are to manufacture for you, at the price named, a joint known as the McDowell Joint, a sample of which was filed with the Underwriters for the specific purpose of identification.

The Contract was drawn to cover this joint only, and particular care was exercised to define and identify the joint in order to insure us against the possibility of being asked to furnish a joint which would cost more to make or would infringe any of the many existing patents covering insulating joints.

The joint you now want costs more to make than the joint covered by the Contract. It also infringes several patents.

Samples were made for you by employees of

this Company without proper authority or reference to the Contract, and the existing patent situation, to oblige you.

Had you overcome the patent difficulty, we could have made a new contract at a new price to cover this joint, but as you have made no attempt to meet us in the matter, and as you feel that you can oblige us to proceed to make this new joint under the old contract, we must decline to do anything further in the matter.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By B. H. Howell

BHH/JE President.

Exhibit P31.

New York, May 12, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

Your favor of the 11th at hand.

The position which you assume is an evasion of the issue.

This contract between us mentioned in your letter was entered into with the understanding that you could manufacture a Joint on which label service could be secured. This you have done and label service has been secured. The particular type of insulation material is of no interest to me.

The situation, as I advised you, is critical and my customers are demanding deliveries. I have sold considerable of this merchandise and do not intend to be exposed to personal loss by virtue of suits brought for non-delivery, as I have fulfilled my part of the contract which was made with you in good faith, and, unless a different stand is taken by you, I can see no other way out of it than to have the matter submitted to the courts for adjustment.

I would be pleased to have you advise me as to your intentions in this matter.

Very truly yours,

E. O. McDowell

Exhibit P32

October 14, 1915.

Customers Order No. 6893.
Ordered of Hemming Manufacturing Company.
Our No. H-1
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.

Ship to L. D. Bailey,
Street Address, 62 Vesey Street,
City New York, State New York.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

October 14, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-2
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.

Ship to—Instructions to follow.
Specifications to follow.

25,000 Insulating Joints.

E. O. McDowell.

Exhibits.

October 16, 1915.

Ordered of Hemming Manufacturing Company.
Our No. E-3
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.

Ship via Freight.

Ship to G. & G. Electric Company,
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship December first.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

October 16, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-4
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.
Ship via Freight

Ship to G. & G. Electric Company,
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship February 1st, 1916.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

Exhibits.

October 16, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-5
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.

Ship via Freight.

Ship to G. & G. Electric Co.
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship April 1st, 1916.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

October 16, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-6
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.

Ship via Freight.

Ship to G. & G. Electric Company,
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship June First, 1916.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

Exhibits.

October 16, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-7
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City,
State: New York.

Ship via Freight.

Ship to G. & G. Electric Co.
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship August First, 1916.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

October 16, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-8
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship via Freight.

Ship to G. & G. Electric Company,
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship October First, 1916.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

Exhibits.

October 16, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-9
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship via Freight.

Ship to G. & G. Electric Company,
Street Address: 84 East Tenth Street,
City: New York. State: New York.

Ship December First, 1916.

1000 3/8 x 3/8 Straight Electric Joints.

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-10
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street.

Ship December First

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-11
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship January First, 1916.

400	1/8 x 3/8	Combination Insulating Joints.
400	1/4 x 3/8	" " "
100	1/8 x 3/8	Straight Electric " "
100	1/4 x 3/8	" " " "

E. O. McDowell.

October 18, 1916.

Ordered of Hemming Manufacturing Co.
Our No. H-12
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship February First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDOWELL.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-13
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship March 1st, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDOWELL.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-14
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Exhibits.

Ship via Freight

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship April First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-15.
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.

Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship May First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

Exhibits.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-16
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.
Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship June First, 1916.

400	1/8 x 3/8	Combination Insulating Joints.
400	1/4 x 3/8	" " "
100	1/8 x 3/8	Straight Electric " "
100	1/4 x 3/8	" " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-17
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York.
State: New York.
Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Exhibits.

Ship July First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-18
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York City.
State: New York.

Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship August First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-19
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York,
State: New York.
Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship September First, 1916.

400	1/8 x 3/8	Combination Insulating Joints.
400	1/4 x 3/8	" " "
100	1/8 x 3/8	Straight Electric " "
100	1/4 x 3/8	" " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Co.
Our No. H-20
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York,
State: New York.
Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Exhibits.

Ship October First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

October 18, 1915.

Ordered of Hemming Manufacturing Company.
Our No. H-21
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York,
State: New York.

Ship via Freight.

Ship to L. D. Bailey,
Street Address: 62 Vesey Street,
City: New York. State: New York.

Ship November First, 1916.

400 1/8 x 3/8 Combination Insulating Joints.
400 1/4 x 3/8 " " "
100 1/8 x 3/8 Straight Electric " "
100 1/4 x 3/8 " " " "

E. O. McDowell.

February 19, 1916.

Customer's Order No. DS—44982

Ordered of Hemming Manufacturing Company.
Our No. H-5
Charge to E. O. McDowell,
Street Address: 154 Nassau Street,
Town or City: New York,
State: New York.
Ship via Freight.

Ship to Peerless Light Company.

100,000 McDowell Insulating Joints.

Specifications of Sizes to follow with Shipping Instructions.

E. O. McDowell.

Exhibit P33. see opposite

New York, February 19, 1916.

Hemming Manufacturing Co.,
Garfield, N. J.

Gentlemen:—

I have a letter from the Underwriters' Laboratories advising me that cards are being issued for the approval of the Joints and that I am now authorized to use labels on same and permanent authorization will be confirmed by the label service department.

Very truly yours,
E. O. McDowell.

Exhibit P 33 - 1/9/17

February 19, 1916.

Hemming Manufacturing Co.,
Garfield, New Jersey.

Gentlemen:-

I requested you a few days ago to send me some samples of Insulating Joints. I need these to have some electrotypes made and I am anxious to get in the March issue of the Electrical Record in the newly approve products department. I desire enough joints so as to determine the size boxes required. Boxes are hard to obtai at the present time so that it will be necessary for me t order at once to have them ready for you in time.

The first sizes of Joints required will be 3/8 x 3/8 Straight Electric Joints and 3/8 x 1/8 Combination.

I have not received a copy of your letter to the Grabler Manufacturing Co. regarding the Shells and would thank you to favor me with same.

Very truly yours,

Exhibit P34.

New York, June 8, 1916.

Hemming Manufacturing Company,
Garfield, N. J.

Dear Sirs:

Your letter of June 7th has been received Your letter would imply that there has been some understanding between us by which I have consented to a cancellation or modification of the contract of October 13th, 1915. This is not the fact. My only requirement now is the same as it was then, that the joints be made in accordance with the 2nd paragraph of said contract, which requires that they be tested and labeled in accordance with the Underwriters' standard specifications. I have not solicited new business since the difficulty in obtaining the product became apparent, and am now endeavoring to reduce the claims against me for damages because of my inability to deliver orders which were taken in good faith, relying upon the contract. It must be distinctly understood that the joints which you are now preparing to produce are being produced under said contract and without any modification or alteration therein.

As the matter now stands, I have 450,000 joints on order. The first deliveries are to be made to the Peerless Light Co., 125 Chambers Street, New York City. The sizes required by them are 3/8ths x 3/8ths, electric or blind joints, 3/8ths x 1/8th and 3/8ths x 1/4th, combination. You may ship 10,000 of each of these sizes, making in all 30,000.

I cannot, at this time, give you definite shipping directions as to quantities and amounts of

the other orders until I have heard from the various customers as to whether they will accept modified orders, but in order that you may have a record to guide you in making arrangements for production, you may proceed on the basis of 450,000 joints.

I have arranged with the inspector of the Underwriters' Laboratories to call and inspect the materials as soon as you have completed your tests and are satisfied that the product will meet the requirements. I understood from you that you would be ready for this test by the early part of next week and await your definite instruction as to the date.

Kindly advise me as soon as possible when you will want more material. I have 50,000 castings and 50,000 shells on order awaiting shipment and will have them forwarded immediately upon your instruction.

Very truly yours,

E. O. McDowell.

Exhibit P35.

New York, June 16, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

In reply to your favor of the 15th, I beg to advise you the sizes of the joints will all be the same but with various sizes of inserts; namely, 3/8-1/4 and 1/8. These sizes I will require in both straight electric and combination. The greatest number of pieces will be on the 3/8 x 3/8 electric and 3/8 x 1/8 and 3/8 x1/4 combination.

I trust this information is what you desire and if there is anything further you desire, please advise me.

Very truly yours,

E. O. McDowell.

Exhibit P36.

New York, June 28, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

In answer to your favor of the 20th, I take pleasure in reviewing to you the specifications I have already given you for a quantity of Joints on order. They are as follows:

7,000—3/8x3/8 Straight Electric Joints—Shipment to G. & G. Electric Co.

5,200—1/8x3/8 Combination Joints—Shipment to L. D. Bailey.

5,200—1/4x3/8 Combination Joints—Shipment L. D. Bailey.

1,300—1/8x3/8 Straight Electric Joints—Shipment to L. D. Bailey.

1,300—1/4x3/8 Straight Electric Joints—Shipment to L. D. Bailey.

10,000—3/8x3/8 Straight Electric Joints—Shipment to Peerless Light Company.

10,000—3/8x1/8 Combination Joints—Shipment to Peerless Light Company.

10,000—3/8x1/4 Combination Joints—Shipment to Peerless Light Company.

It will be possible for me to give you details on all other orders shortly after you start delivering.

I trust this information will be of service to you and will await to hear from you.

Very truly yours,
E. O. McDowell.

Exhibit P37.

New York, July 6, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

In answer to your letter of the 5th, I beg to advise you my contract with you did not call for any exact sizes of Insulating Joints and I, therefore, did not compel my customers to give me delivery specifications with their orders.

You have asked me to minimize the number of joints which I will necessarily have to deliver and I cannot consistently demand specifications from my customers on one hand and ask them to cut down their orders on the other. I must know the orders will be filled within a reasonable time.

You advised me on or about June 26th that you would give me full information by the end of that week. Now you state you will advise me as soon as tests are made. The situation is not one where a delay of this kind should occur but one where you should take the proper action to clear the matter up.

Prompt advice will be appreciated.

Very truly yours,

E. O. McDowell.

Exhibit P38.

June 7th, 1916.

Mr. E. O. McDowell,
Number Fifty Four Nassau Street,
New York City, N. Y.

Dear Sir:

Confirming your calls of May 31st and June 6th at our office, following our letter of May 27th: It is our understanding that you are taking the necessary steps to bring your obligations down to the lowest possible amount by cancelling contracts in whole or in part to reduce the number of joints you will require, to a minimum.

We further understand that since our first warning you have not accepted any orders nor incurred any liabilities.

It is on the above understanding that we, on our part, have undertaken to make every effort to produce joints in accordance with the samples accepted by the Underwriters which samples, as stated by us in previous correspondence, are not covered by the contract, in quantities sufficient to meet your needs in filling contracts that you may be unable to cancel in whole or in part.

We believe that you fully understand that this undertaking on our part is at your request, and pursuant to our desire as expressed in our previous letters to assist you in every reasonable way in our power, and that our so doing is not to be construed as an acceptance or recognition of any obligations under the contract.

You have not yet advised us as to the quantity of joints you will need to close out contracts you have been unable to cancel, and we would ask that you write us fully in this matter by an early date, giving quantities and sizes of joints re-

quired so that we may have a record to guide us in making arrangements for production.

We will, on our part, advise you when we are able to make deliveries.

We will be glad to have your confirmation of the above before we arrange for deliveries of joints so that there may be no misunderstanding between us.

Yours very truly,
HEMMING MANUFACTURING COMPANY,
By B. H. Howell
BHH/JE President.

Exhibit P39.

June 14th, 1916.

Mr. E. O. McDowell,
No. 154 Nassau Street,
New York City, N. Y.

Dear Sir:—

We acknowledge receipt of your favor of the 8th instant and are pleased to learn that the maximum number of joints you will require will be 450,000.

We understand that you are making every effort to reduce this quantity and that you will advise us as soon as possible of the final result, giving us exact quantities of each size you will want.

Meantime we are proceeding as agreed when you called here and will advise you as soon as we are ready for you to arrange for Underwriter's Inspection.

Yours very truly,
HEMMING MANUFACTURING COMPANY,
By B. H. Howell
BHH/JE President.

Exhibit P40, 1/9/17.

E. O. McDowell
Mfrs' Agent Electrical Supplies,
154 Nassau St.

No. 4352 New York Oct 5 1916

Irving National Bank 1-67
New York

Pay to the order of Peerless Light Co. $150 00/100
One Hundred and Fifty 00/100 Dollars
E. O. McDowell

Endorsements:

Pay to the order of
Greenbaum Sons Bank and Trust Co.
Chicago, Ill.
Peerless Light Co.
Halsted and Adams St.
Pay Citizens Central National Bank,
New York or order
Greenebaum Sons Bank and Trust Company
2-182 Chicago 2-162
Received Payment
Through New York Clearing House
Oct. 11 1916
The Citizens Central National Bank of New York
Mail 36 Endorsements Guaranteed

Exhibit P41, 1/9/17.

E. O. McDowell
154 Nassau St.
New York, October 8, 1915.

To Mr. E. O. McDowell.
Refer to
Subject
Replying to yours of
Gentlemen:

12000

Please enter my order for ~~twenty-five~~ thousand Insulating Joints to be delivered in twelve equal shipments the first of each month, or one year from date.

Discount from the standard list ~~of~~ on this material to be 60-10-10-5% and 5% cash and in the event of a general price reduction you are to give the benefit of a proportionate reduction, or, allow me to cancel the balance of my order.

I am attaching hereto my order showing the assortment for the first shipment, which is to be duplicated for each of the twelve shipments. It is understood I have the privilege of changing the specifications for the various sizes, providing I notify you five days previous to shipment.

Very truly yours,
Baily Electrical Supply Co.
Per L. D. Bailey.

Exhibit P42, 1/9/17.

Holloway, Bentz & Co.
—Dealers in—
Electrical Supplies
78-80 Cortlandt Street New York

Mark This No. 31131 On Invoice

New York, 10-14 1915

M E. O. McDowell
Please deliver to

5000 Insulated joints to be taken in one year. Delivered as per our requirements at 60-10-10-5 & 5 cash.

HOLLOWAY, BENTZ & Co.
Per Bentz

Telephones (1981) Cortlandt
(1982)

Exhibit P42, 1/9/17.

1. We reserve the right to cancel this order if not filled within a reasonable time.
2. This order must not be filled at higher prices than last quoted or charged without advices.
3. No charge allowed for packing or cartage.
4. All bills are payable within 60 days from date of receipt of goods.
5. All 5 per cent. bills discounted on 10th of the month.

Above Conditions Must be Complied With.

Put This No. on Invoice
62 Vesey Street,
No. 6893 New York, 10/14 1915
To E. O. McDowell
Please deliver by us
Hem Mfg. Co.
400 1/8 x 3/8 Combina
400 1/4 x 3/8
100 1/8 x 3/8 Elect.
100 1/4 x 3/8
as per cont.
And charge to account of
BAILY ELECTRICAL SUPPLY CO.
Care of E. O. McDowell Per D.

Exhibit P43, 1/9/17.

E. O. McDowell
154 Nassau St.
New York, October 15, 1915.

To Mr. E. O. McDowell.
Refer to
subject
Replying to yours of

Gentlemen:

Please enter my order for six thousand Insulating Joints to be delivered in ~~twelve~~ six equal shipments the first of each second month, or one year from date.

Discount from the standard list on this material to be 60-10-10-5% and 5% cash ten days or thirty days net. In the event of a general price reduction you are to give me the benefit of a proportionate reduction, or, allow me to cancel the balance of my order.

I am attaching hereto my order showing the assortment for the first shipment, which is to be duplicated for each of the ~~twelve~~ six shipments. Complete delivery to be made within one year after the first shipment.

It is understood I have the privilege of changing the specifications for the various sizes, providing I notify you five days previous to shipment.
First Shipment Dec. 1-1915
1500-3/8-3/8 Elec.

Very truly yours,
G. & G. Electric Supply Co.
G. Soffer

Exhibit P44, 1/9/17.

Phones Private Exchange (Monroe 5636
(Monroe 5637

Office of Peerless Light Co.
Peerless Building, Halsted,
Adams and Green Sts.
Chicago Feb. 16-1916

Down Town Store
174 W. Randolph St.,
Phones (Main 4640
(Main 4641

Order No. DS 44982
Put this order No. on your invoice Ship by (F)
E. O. McDowell
154 Nassau St
New York City

100 M "McDowell" Ins.
Joints as per sample .09½ less 5%—10 days
Sizes will follow in few days. as well as shipping instruction. Acknowledgment to this office—stating you'll take care of any action taken against us on law suits.

Countersigned by
New York Office

Peerless Light Co.
by G. Frankel

Exhibit P45, 1/9/17.

PEERLESS LIGHT COMPANY
82-84 West Broadway
Cor. Warren St.
In Reply please refer to
GF—MS

New York, April 25th, 1916.

Mr. E. O. McDowell,
154 Nassau St.,
New York City.

Dear Sir:

As per conversation, we would ask you to kindly enter our order for 100,000 more of your Insulating Joints, same as purchased from you sometime ago, at the price of 10c. each, less 5% Cash, F. O. B. Chicago or New York, to be put up in cartons with our numbers.

We will give you specifications when you are ready to deliver, in reference to the various sizes which we are in need of.

You also have to guarantee us against any infringements as previous order for the same amount. This order is to be acknowledged by you, and shipments to commence within one month.

Trusting you will give the above your immediate attention, we beg to remain,

Yours very truly,

PEERLESS LIGHT COMPANY
by G. Frankel

CF—Ms

Exhibit P46, 1/9/17.

1. We reserve the right to cancel this order if not filled within a reasonable time.
2. This order must not be filled at higher prices than last quoted or charged without advices.
3. No charge allowed for packing or cartage.
4. All bills are payable within 60 days from date of receipt of goods.
5. All 5 per cent. bills discounted on 10th of the month.

Above Conditions Must be Complied With.

62 Vesey Street,

No. 7579 New York, 5/2/16

To Mr. McDowell
Please deliver by
100,000-Insul joints
10c. each
5% cash

And charge to account of
BAILY ELECTRICAL SUPPLY Co.
Per A. Kobel

Exhibit P47, 1/9/17.

No. 57257

W. R. OSTRANDER & Co.
Manufacturers of
Speaking Tube and Electrical Supplies.
22 Dey Street,

New York, May 2nd 1916

Mr. E. O. McDowell
154 Nassau Street,
New York City.

Please furnish us with the following articles and ship via:
125,000 Assorted Insulating Joints.
CPL/GMD W. R. OSTRANDER & Co.
Per C. P. Lashells

Exhibit P48, 1/10/17.

E. O. McDowell
Mfrs.' Agent Electrical Supplies, 154 Nassau St.
No. 4385 New York, Oct 20 1916

Irving National Bank 1-67
New York

Pay to the order of Grabler Mfr. Co. $380 00/100
Three Hundred and Eighty 00/100 Dollars

E. O. McDowell

Endorsement: in full payment and settlement of account for goods and tools ordered by me for shipment to the Hemming Mfg. Co. the understanding being that I owe the Grabler Mfg. Co. nothing further and they in turn owe no material or tools to me.

460 Pay the Union National Bank,
Cleveland, Ohio, or order
The Grabler Mfg. Co.
Pay to the order of
any Bank or Banker
Prior Endorsements Guaranteed
Oct 23 1916
The Union National Bank,
6-15 Cleveland, Ohio, 6-15
W. C. Saunders, Cashier
Received Payment
Through New York Clearing House
Oct. 25 1916
The Am. Exchange National Bank, N. Y.
Arthur P. Lee,
Cashier

Exhibit P49, 1/10/17.

E. O. McDowell
Mfrs' Agent Electrical Supplies, 154 Nassau St.
No. 4228 New York, June 14, 1916

Irving National Bank
New York

Pay to the order of Grabler Mfg. Co. $23 52/100
Twenty Three 52/100 Dollars

E. O. McDowell.

Endorsements:

460 Pay the Union National Bank,
Cleveland, Ohio, or Order
The Grabler Mfg. Co.
Pay to the Order of
any Bank or Banker
Prior Endorsements Guaranteed
Jun 16 1916
The Union National Bank,
6-15 Cleveland, Ohio 6-15
W. C. Saunders, Cashier

The Grabler Manufacturing Co.
Cleveland, O.

5/2/16

Sold to E. O. McDowell
Terms 30 days net 154 Nassau St New York N Y
Order G 1 Via Exp to Hemming Mfg Co
Garfield N J

2500 3/8 Mall Castings THD as per sample
Submitted with corrections 147# 8 11.76 11.76

THE GRABLER MANUFACTURING CO.
Cleveland, O.

5/4/16

Sold to E O McDowell
Terms 30 days net 154 Nassau St New York N Y
Order G 1 Via Exp to Hemming Mfg Co
Garfield N. J.

2500 3/8 castings 147#	8	11.76	11.76
I Bag			

Exhibit P50, 1/10/16.

E. O. McDOWELL
Manufacturer of
McDOWELL INSULATING JOINTS
General Office
154 Nassau Street

New York, February 17, 1916.

Grabler Manufacturing Co.,
Cleveland, Ohio.

Gentlemen:

I am enclosing you herewith Hemming's letter of the 7th with blue print and would ask that you enter my order for 200,000 pieces of Small Castings and ship 25,000 of the 3/8 size as quickly as possible. On checking these over it can be determined whether any changes are necessary or not.

Hemming is writing you direct giving you the details on the Shell proposition and you are to write and give me the figure on the Shells and send me a bill for the die; the quantity of Shells to be placed at this time is 100,000. Anything you can do to expedite delivery will be much appreciated.

I have considered advisable to have the correspondence as to the details of the correctness of these pieces carried on direct between you and the Hemming Manufacturing Co., as the material has to be used by them and should meet with their approval.

Very truly yours,

E. McDowell.

Order Sheet.

E. O. McDowell, 154 Nassau St., N. Y. City.

February 21, 1916.

Ordered of Grabler Manufacturing Co.

Salesman	Customer's Order No.
Our No. G-1	Requis. No.
Charge to	Charge by
E. O. McDowell,	Date Shipped
Street Address	Date Charged
154 Nassau Street	Book Folio
Town or City New York,	
State New York	
Ship to Hemming Manufacturing Co.	Ship via
Street Address	Freight.

Terms: City Garfield State New Jersey.

This Order Must be Filled as Per Instructions.
Bills Must be Rendered in Duplicate.
Put Order No. on Bills.

Price *Discount*

200,000 Pieces Malleable Castings, threaded, as per sample submitted with corrections specified by Hemming Mfg. Co. at $.08 per lb.

Exhibits.

Kindly rush forward as quickly as possible
35,000 pieces Tapped for 3/8 and 15,000-1/8.
Pattern order Ent 282
1 Plate or gate of each 3/8 & 1/8

E. O. McDowell,
Per
E. O. M.

E. O. McDowell
Manufacturer of
McDowell Insulating Joints
General Office
154 Nassau Street

New York, February 21, 1916.

Grabler Manufacturing Co.
Cleveland, Ohio.

Attention of Mr. M. C. Rosenfeld.

Gentlemen:

I am enclosing you herewith my order for the Malleable Fittings and trust this thoroughly confirms my verbal order to you.

The 1/8 nipples are to be exactly the same as the 3/8 with the exception they are to be tapped differently. My customer is urgently in need of the sizes specified for immediate delivery, so would appreciate your rushing material as quickly as possible.

Please advise me the cost of the die on the Shells and also price on Shells at as early a date as possible.

Thanking you for your kind attention to the above, I remain,

Very truly yours,
E. O. McDowell.

Exhibit P51, 1/10/17.

HARMAN BROTHERS
Stationers H B Printers
62 West Broadway & 65 Murray St.
New York City.

11/13 1915

M E. O. McDowell — 154 Nassau
500 Linen tags printed — 3.75
3.75

PAID

HARMAN BROTHERS
Stationers H B Printers
62 West Broadway & 65 Murray St.
New York City.

12/15/1915.

M E. O. McDowell — 154 Nassau
10,500 Labels with 6 changes — .80M — 8.40 — 8.40

DUPLICATE

PAID
2/19/16
R

Exhibit P52, 1/10/17.

E. O. McDowell,
Mfrs.' Agent Electrical Supplies, 154 Nassau St.
No. 4268 New York, July 28, 1916.

Irving National Bank
New York

Pay to the order of General Pressed Metal Co.
$18.11/100 Eighteen and 11/100 Dollars
E. O. McDowell

Endorsements:

Pay to order of
Girard Trust Company
General Pressed Metal Co.
W. D. Banes, Treas.
Received Payment
Through New York Clearing House,
Mail Department
Aug 3 1916

The Chemical National Bank
of New York
No. 12
Pay to Girard National Bank
Philadelphia or order
Endorsements guaranteed,
Aug 2 1916
Girard Trust Company
Philadelphia, Pa.
George H. Stuart, 3rd, Treasurer.

Pay to the order of
Chemical Nat'l. Bank,
New York City.
All prior endorsements guaranteed
Aug 2 1916
Girard National Bank,
Phila. 3-13
M. Ashton, Cashier

Exhibits.

E. O. McDowell,
Mfrs.' Agent Electrical Supplies, 154 Nassau St.
No. 4253 New York, July 15 1916

Irving National Bank
New York

Pay to the order of General Pressed Metal Co.
$569.25 Five hundred and sixty nine 25/100
Dollars

E. O. McDowell

Endorsement, in full to date

Pay to order of
Girard Trust Company
General Pressed Metal Co.
W. D. Banes, Treas.
Pay National Bank of Commerce
in New York, or order,
All prior endorsements guaranteed
Jul 17 1916
Girard Trust Company,
Philadelphia, Pa.
George H. Etuart, 3rd, Treas 3-43
Received Payment
Through the New York Clearing House,
8 Jul 17 1916 8
Endorsements Guaranteed
Nat'l Bank of Commerce
In New York

Exhibit P53, 1/18/17.

E. O. McDowell,
Mfrs.' Agent Electrical Supplies, 154 Nassau St.
No. 4190 New York, May 18, 1916

Irving National Bank
New York

Pay to the order of General Pressed Metal Co.
$16. 00/100 Sixteen 00/100 Dollars
E. O. McDowell

Endorsed:

Pay to order of
Girard Trust Company
General Pressed Metal Co.
W. D. Banes, Treas.
Pay to The Franklin National Bank,
of Philadelphia, or order
Endorsement guaranteed
Girard Trust Company
Philadelphia, Pa.
George H. Stuart 3rd, Treasurer
May 19 1915
Pay any bank or banker
or order
The Franklin National Bank
of Philadelphia,
Prior endorsements guaranteed
E. P. Passmore, Cashier
Received Payment
Through New York Clearing House,
May 19 1916
Chase National Bank
New York
No. 74

Exhibits.

E. O. McDowell,
Mfrs.' Agent Electrical Supplies, 154 Nassau St.
No. 4122 New York, Mar. 20, 1916

Irving National Bank
New York

Pay to the order of General Pressed Metal Co.
$85 00/100 Eighty Five 00/100 Dollars
E. O. McDowell

Endorsements:

Pay to order of
Girard Trust Company
General Pressed Metal Co.
W. D. Banes, Treas.
Pay to the Franklin National Bank
Philadelphia, Pa.
Endorsements guaranteed
Girard Trust Co.,
Philadelphia, Pa.
George H. Stuart 3rd, Treasurer.
Mar 21, 1916
Pay any bank or banker
or order
The Franklin National Bank
of Philadelphia
Prior endorsements guaranteed.
E. P. Passmore, Cashier.
Received Payment
Through New York Clearing House,
Mar. 21 1916
Mail Teller
N Endorsements guaranteed N
Nat'l Bank of Commerce
in New York

GENERAL PRESSED METAL COMPANY

April 11th 1916

Sold to E. O. McDowell
New York City

Terms net

Dies, as per estimate 85.00

Rec'd. Payment
GENERAL PRESSED METAL Co.
W. D. Bane, Treas.

GENERAL PRESSED METAL COMPANY
Press work of every description
Manufacturers of grease cups and other specialties
American and Diamond Sts., Philadelphia

April 22nd 1916

Sold to E. O. McDowell,
154 Nassau St., New York City Terms net
218 Pressed steel shells 16.00
To Hemming Manufacturing Co.
Garfield, N. J.

Rec'd. payment
5/19/16
L. & M. Co.
W. D. Bane, Treas.

Exhibit P54, 1/10/17.

February 18, 1916.

Underwriters' Laboratories, Inc.,
135 William Street,
New York City.

Gentlemen:

Enclosed please find my check #4081 for twelve dollars and fifty cents ($12.50) in payment for 25,000 Insulating Joint labels.

As I advised you today, it will be satisfactory for you to list same as—E. O. McDowell, Manufacturer—By Hemming Manufacturing Co. I understand this is the way you prefer listing them.

The testing apparatus will be gathered together in the laboratory so as to facilitate a test by your inspector and I will advise you at what date same will be ready.

Very truly yours,
E. O. McDowell

E. O. McDowell
Mfrs.' Agent Eletcrical Supplies,
154 Nassau St.

No. 4081 New York, Feb. 18, 1916

Irving National Bank
New York.

Pay to the order of The Underwriters Laboratories, Inc. $12 50/100
Twelve 50/100 Dollars
E. O. McDowell

Endorsed:

Pay to the order of
Central Trust Company of Illinois
Underwriters Laboratories, Inc.
B. F. Hardy, Treasurer
Pay to the order of
First National Bank,
New York.
Central Trust Company of Illinois,
2-23 Chicago, Ill. 2-23
William R. Dawes, Cashier
Nov. 15 1916
E. Received payment
Through New York Clearing House
Nov 17 1916
First National Bank
New York

Exhibit P55.

July 8th, 1916.

The Hemming Mfg. Co.,
Garfield, N. J.

Gentlemen:—

I have your esteemed favor of the 7th inst. at hand.

The memorandum I sent you were additional specifications on orders received and amounted to thirty-five thousand and not thirty-three thousand.

You are well aware of the fact that the orders I have on hand are very much larger quantities than the detail specifications which I have given you.

Yours very truly,
E. O. McDowell.

Exhibit P56.

May 22nd, 1916.

E. O. McDowell, Esq.,
#154 Nassau Street,
New York City.

Dear Sir:

We acknowledge the receipt of your favors of the 17th and 18th instants.

We can only repeat that we do not find we are under any obligation under contract to furnish joints which shall be acceptable to the Underwriters.

We did not induce you to enter into this contract, but on the contrary, you were anxious to do so, believing that you could do business with

joints, samples of which were shown to you here. The writer clearly recalls that he never made any effort to push the matter or induce you to enter into the contract.

The contract was drawn by you, and the writer refused to sign same in its original form, and therefore, re-drafted it to cover the very points now in controversy. The contract was, therefore, drawn with a view to specifying the joint.

Clause two of the contract to which you refer does not call upon us to produce a joint which will be accepted by the Underwriters Laboratories nor does it oblige us to obtain their acceptance. This clause simply specifies the several operations in connection with the manufacture of the joints which our contract was intended to cover, and which you were to perform for the stipulated price per joint.

We must take exception to your statement that there has been any misrepresentation in this matter, the joint on which the contract was based was shown to you, and you had ample opportunity to examine same or have it tested if you desired, before asking us to enter into a contract.

We cannot accept responsibility for your haste in obtaining orders before you had assured yourself that the joint had been accepted by the Underwriters. It would seem to us that ordinary business caution should have dictated a different course on your part.

The patent difficulty concerning which you disclaim knowledge is referred to in the correspondence. You, yourself, sent us a copy of the Wirt patent, and we believe that other patents such as the Macallen and Layman patents have been referred to from time to time.

We are enclosing herewith a list of material received as requested.

Yours very truly,
HEMMING MANUFACTURING COMPANY,
By B. H. Howell
President.

BHH/JE
Enc.

see opposite page for list of P56 →

Exhibit P57, 1/10/17.

HEMMING MANUFACTURING COMPANY
Manufacturers of
Heat Resisting Insulation
Main office & works
Garfield, New Jersey

July 7th, 1916.

Mr. E. O. McDowell,
No. 154 Nassau Street,
New York City, N. Y.

Dear Sir:

We acknowledge receipt of your valued favor of the 6th instant referring to our letter of the 5th, and note your remarks.

We regret that we have been somewhat delayed in our experiments owing to difficulties which we explained to you at the time, in getting out satisfactory joints.

The samples are now being tested, and we hope to be able to give you satisfactory advice in a day or two.

Yours very truly,
by B. H. Howell
President.

BHH/JE

List of P56

Exhibits.

July 30th, 1915..Generl Pressed Metal Co., 105 steel shells.

Sept. 15th, 1916—General Pressed Metal Co., 98 steel shells.

Oct. 14th, 1915..Grabler Mfg. Co., 130 small iron nipples.

Oct. 19th, 1915..Grabler Mfg. Co., 222 small iron nipples.

Nov. 24th, 1915..General Pressed Metal Co., 432 Steel shells.

April 24th, 1916..General Pressed Metal Co., 216 steel shells.

May 5th, 1916..Grabler Mfg. Co., 2475 Cast Iron Nipples.

May 9th, 1916..Grabler Mfg. Co., 2480 Cast Iron Nipples.

Exhibit P58.

New York, June 13, 1916.

Hemming Manufacturing Co.,
Garfield, New Jersey.

Gentlemen:—

I have expected some word from you as to what progress you are making on my Insulating Joints.

My steel people are demanding that I take delivery on the material and have stated that if I do not, they will sell same at the best price they can obtain for it and charge me for the difference. This is your liability, not mine.

I will expect definite word from you without further delay.

Very truly yours,
E. O. McDowell.

Exhibit 59, 1/10/17.

June 16, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:

In reply to your favor of the 15th, I beg to advise you the sizes of the joints will all be the same but with various sizes of inserts; namely, 3/8-1/4 and 1/8. These sizes I will require in both straight electric and combination. The greatest number of pieces will be on the 3/8 x 3/8 electric and 3/8 x 1/8 and 3/8 x 1/4 combination.

I trust this information is what you desire and if there is anything further you desire, please advise me.

Yours very truly,
E. O. McDowell

Exhibit P60.

July 5th, 1916.

Mr. E. O. McDowell,
154 Nassau Street,
New York City, N. Y.

Dear Sir:

We acknowledge receipt of your favor of the 28th ult., referring to our letter of the 20th and note specifications you give on 50,000 joints.

We regret that you cannot give us details on the other orders at present, but do not understand this inasmuch as we would suppose that your customers in placing orders with you had stated their requirements.

We would ask, therefore, that you give us this information by an early date in order that we may know exactly what we have to do, and lay out our work accordingly.

As matters at present stand, we understand that you definitely have only 50,000 joints on order, and that the further specifications you speak of are for orders not yet fully confirmed, and which could, therefore, be readily cancelled.

In this connection we would say that we have made up a number of samples which are now being cured, and will be tested during this week.

As soon as we have results of these tests we will advise you.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By B. H. Howell

BHH/JE President.

Exhibit P61, 1/10/17.

July 6, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:

I am enclosing you herewith copy of a letter received from the Grabler Manufacturing Company in response to my inquiry as to what they had done on my order and on what basis they would accept cancellation on the balance of the order.

The letter to Grabler was written by me on direct instructions from you.

Very truly yours,

E. O. McDowell

10

Exhibit P62.

New York, July 27, 1916.

Hemming Manufacturing Company,
Garfield, New Jersey.

Gentlemen:—

Your letter of the 25th has been received by me and referred to my attorneys, Pitney, Hardin
20 & Skinner of Newark, N. J. They have entire charge of this matter.

Very truly yours,
E. O. McDowell.

Dictated but not read:

Exhibit P63.

April 13th, 1916.

30 General Pressed Metal Company,
American & Diamond Streets,
Philadelphia, Penn'a.

Gentlemen: Attention Mr. W. D. Barnes.

Replying to your favor of the 11th, we beg to advise that the sample shells appear to be satisfactory.

However, we would like to suggest that you round off the sharp corners of the octagonal
40 punch as indicated by the yellow pencil marks on the interior of the sample, which we are returning to you.

We fear that these sharp corners may cause trouble same as we experienced in the past, such as cracking on the corners, etc.

Exhibits.

Before giving our final approval, we would appreciate your running off one or two hundred shells in order that we may give same a thorough try out particularly as to height.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By a. meister

AM/LDB Secretary.

Exhibit P64.

April 15th, 1916.

General Pressed Metal Co.,
American & Diamond Strs.,
Philadelphia, Pa.

Gentlemen: Attention Mr. W. D. Barnes, Secty.

We acknowledge receipt of your favor of April 14th and note your remarks.

As previously explained to you, we require two hundred more shells before we can give you our final approval, and we trust that you will make a special effort to get these out at the earliest possible date. Kindly advise.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By a meister

AM/LB Secretary.

Exhibit P65, 1/10/17.

GENERAL PRESSED METAL COMPANY
Press Work of Every Description
Manufacturers of Grease Cups
and other Specialties
American and Diamond Streets
Expert Die Makers

Philadelphia, March 29, 1916.

Mr. E. O. McDowell
New York City.

Dear Sir:

We have procured the .060 material referred to in your telegram and letter of the 17th inst.

On the 21st we wrote to the Hemming Manf'g. Co. as follows:

"We understand that the blue print received with your letter of Feb. 7 gives the correct dimensions unless the depth is to be increased to 1 6/32" (Mr. Wilde was not sure of this at the time he was here); that the shells are to be made by the first method mentioned in our letter of Feb. 8th to Mr. McDowell, which is the cheapest method of making them. Please refer to that letter. We also understand that the cover at the base is to be made with a little larger radius."

We have not yet rec'd. an answer to above mentioned letter and we are now at a point when it is necessary for us to have full particulars.

Yours very truly,
GENERAL PRESSED METAL CO.
W. D. Banes, Secy.

Exhibit P66.

March 20th, 1916.

General Pressed Metal Co.,
Philadelphia, Penn'a.

Gentlemen:

Referring to order placed with you recently by Mr. E. O. McDowell for steel shells.

Kindly be informed that at the present time of writing nothing can be added to the verbal information given you by our Mr. Wilde.

Yours very truly,

By A. Muster
AM/LDB Secretary.

Exhibit P67, 1/10/17.

Peerless Light Company
125 Chambers Street
In Reply Please
Refer to
GF-MS

New York, September 20th, 1916.

Mr. E. O. McDowell,
154 Nassau St.,
New York City.

Dear Sir:

In accordance with our conversation, would advise that we are willing to accept $150.00 to take care of us on the Insulating Joint deal made with you.

Although this amount is insufficient to reimburse us for the expense we have gone to, as well as the claims against us for non-delivery of Insulating Joints, nevertheless, upon receipt of it, we will be willing to consider our order for 200,000 Joints cancelled.

Yours very truly,
PEERLESS LIGHT COMPANY,
William Herskowitz,
Vice Pres.

WH MS

Exhibit P68.

May 6, 1916.

E. O. McDowell, Esq.,
154 Nassau Street,
New York, N. Y.

Dear Sir:

We have your letter of the 4th instant, and take this opportunity to state clearly our position.

The agreement of October 13, 1915, binds us to manufacture only the insulating joint specifically referred to in this contract.

We are willing to manufacture this joint, proceeding under that contract, but should imagine that, inasmuch as the product would be worthless on the market, you would not care to have us do so. The manufacture of any other insulating joint will have to become the subject of a new contract between us.

If we can be of service in securing some other insulating joint to assist you to fill any orders

you may have, advise us fully, and we will see what we can do in that direction.

With regard to your frequent request for us to telegraph Grabler: We think, under the circumstances, it is not our place to give them any instructions. We therefore suggest that you take this matter up promptly, both with Grabler and with any other manufacturers from whom you have ordered material.

Yours very truly,
HEMMING MANUFACTURING COMPANY,
By B. H. Howell
TCC President.

Exhibit P69, 1/11/7.

GENERAL PRESSED METAL COMPANY
Press Work of Every Description
Manufacturers of Grease Cups
and other Specialties
American and Diamond Streets

Philadelphia, April 24, 1916.

Mr. E. O. McDowell
New York City.

Dear Sir:

We have just heard from the mill in answer to our inquiry of the 18th inst. They are behind from 6 to 9 months on orders, but if the job will stand the price we can obtain two carloads of the material (enough to make 500,000 shells) and have it here within six or eight wks. May be able to get it with 6 wks.

Made of this material at the price we will have to pay for it, the shell will cost $14.46 per M net f. o. b. Phila. That price is based upon the quotation made us today, & of course we have no means of knowing what it may be a week hence.

Yours very truly,

GENERAL PRESSED METAL CO.
W. D. Banes, Secy.

Exhibit D1.

New York, July 28, 1915.

Hemming Manufacturing Co.
Steel Tube.

I beg to advise you I will have a price from the United States Steel Corporation on the Steel Tube in the sizes we want within a few days and will also have prices on the Malleable Fitting.

From what you have told me, I surmised you would have samples for me in a few days.

Very truly yours,

E. O. McDOWELL.

Exhibit D2.

New York, July 31, 1915.

Hemming Manufacturing Co.
Octagon Steel Tubing.

I have a quotation on regular seamless Octagon Steel Tubing 1-39/64" OD x .055" Wall at a price of $13.02 per 100 ft. net, random lengths, F.O.B. Mill. They can commence shipment in 11 to 12 weeks on receipt of the order at the works.

The nearest they have in stock is 1-3/4" OD x 18 BWG and I have ordered forward a sample of this to see the quality.

Very truly yours,

E. O. McDowell.

Exhibit D3.

New York, August 4, 1915.

Hemming Manufacturing Co.
Insulating Joint.

I am looking forward with pleasure to receiving some definite information from you regarding the developments on the Insulating Joint.

Very truly yours,

E. O. McDowell.

Exhibit D4.

New York City, August 5, 1915.

Hemming Manufacturing Co.
Garfield, N. J.

Gentlemen:—

Replying to your favor of the 4th with reference to the Insulating Joints; I am very pleased to note you will have samples out by next week and also glad you have been able to secure the steel shells.

I was quite surprised to note in the August issue of the Electrical Record that the Trumbull Elec. Co. state they are manufacturing Joints under the Macallen patent. This is quite interesting in view of the information we have on this subject. My opinion is that Macallen is manufacturing the Trumbull Joint, as Trumbull is disposing of old stock which he had on hand.

Very truly yours,
E. O. McDowell.

Exhibit D5.

New York, August 11, 1915.

Hemming Manufacturing Co.
Test on Insulating Joints.

I beg to advise you the Underwriters' Laboratories have a full set of equipment and are prepared to make the test on the Insulating Joint here in New York.

A definite date will be set to make the test the early part of next week.

Very truly yours,
E. O. McDowell.

Exhibit D6.

New York, August 12, 1915.

Hemming Manufacturing Co.
Garfield, N. J.

Gentlemen:—

I am mailing you under separate cover sample of a Steel Tube from the National Tube Co., which is the nearest size as to what you wanted—they had in stock.

Very truly yours,
E. O. McDowell.

Exhibit D7.

New York, August 17, 1915.

Hemming Manufacturing Co.
Garfield, N. J.

Gentlemen:—

I have secured a price of $.08 per pound on the casting for the Insulating Joint, tapped and threaded, from a reputable concern. I have also secured a price of $12.00 per thousand on the Shells and I think when we get down to brass tacks we can get them to lower both of these prices.

I have a lower price on the casting but am not sure if the concern is properly equipped to tap them correctly for us and if we put any Joints out that were not properly tapped, it would make trouble for us.

The concern with the $.08 price is the Grabler Mfg. Co., Cleveland, Ohio. Their manager is here in New York now and would like a sample of the casting only. The Grabler Mfg. Co. have sug-

gested they would like to make up a pattern and turn out some samples for our approval. This would cost about $60. I will endeavor to get you on the 'phone to see what you think of this proposition.

Very truly yours,

E. O. McDowell.

Exhibit D8.

New York, August 19, 1915.

Hemming Mfg. Co.,
Garfield, N. J.

Gentlemen:—

I received the sample of Steel Shell for the Insulating Joint and note this is open on the side. Have you found it necessary to make this open? Kindly advise me also if the cost of the Joint is going to be any lower than what you anticipated.

I am up against the Yost Joint for a fairly decent size order and am having the buyer hold off until I can give him a definite price. I am going to get the order away from them, if I possibly can.

You failed to return the sample of Casting, which I desired and would thank you to let me have same at as early a date as possible.

Very truly yours,

E. O. McDowell.

P. S.

Mr. Noad has just brought in the sample of Casting and I will have further information on it in a day or two. E. O. McD.

Exhibit D9.

(Copy.)

UNDERWRITERS' LABORATORIES, INC.
New York Office,
135 William Street,

September 10th, 1915.

Elec. 3778.

Mr. E. O. McDowell,
154 Nassau St., New York.

Dear Sir:—

We wish in this letter to go over briefly the various points which we have taken up in conversation with you regarding your Insulating Joints, and to outline our procedure in completing our work on these devices.

A series of preliminary tests were made on a few samples with results which were in general satisfactory, these tests including bending, torsion, heating and breakdown tests. In some instances it was noted after the receipt of our standard that the tests had not been made strictly in accordance with the present methods, notably in the use of a Bunsen burner with the air inlet stopped instead of an ordinary gas flame for the heating tests, and also in the application of the voltage breakdown test to samples which had been subjected to the bending and torsion tests. While, as stated above, the results of these tests were in general satisfactory, we feel that it will be necessary to repeat them, using a considerable number of samples, and making them strictly according to the present standards.

Inasmuch as a factory inspection is necessary

before labels can be authorized, we believe that this work could be most effectively handled by having one of our engineers visit your factory when you are prepared to have him, to check over these tests under standard methods and on 50 to 75 joints, and at the same time to make the regular factory inspection of the equipment, etc. We shall also wish to make rough tests on the quality of the malleable iron or steel parts, and to pick up a few sample parts, completed joints, and sectional joints for use in the photographs in our file. At the same we can make the complete set of tests on the combination type of joints if you are prepared to have this done.

We direct attention to the fact that the joints should be marked where it can be plainly seen after installation with your name or trade-mark.

We will await your further advices as to a suitable appointment for the above work at your factory, and in the belief that the matter will not be delayed unduly long, are leaving our files open.

Yours very truly,

UNDERWRITERS' LABORATORIES, INC.
(Signed) Edgar P. Slack,
Ass't. Elec. Engineer.

Exhibit D10.

July 19th, 1915.

E. O. McDowell, Esq.,
154 Nassau Street,
New York City.

Dear Sir:

Referring to our conversation on your recent visit, and to metal parts which are required in manufacturing insulating joints: We enclose herewith six prints each of the nipples and shells which we would like to have quotations in the following quantities.

Nipples—100,000 lots and 500,000 lots.
Shells — 50,000 " " 250,000 "

We are still uncertain if such shells could be made cheaper by obtaining drawn stampings similar to the sample handed you in cutting these down to 1-9/32" in length, or if the shell should be made from tubing. At any rate, the slots in the sides are essential, and we would be very much obliged to you if you would get in touch with your friends to find out where, by which method, and at what price, both the nipples and shells could be obtained.

Thanking you for your trouble in this matter, we remain,

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Emile Hemming

EH/JE Vice-President.

Exhibit D11.

July 20th, 1915.

E. O. McDowell, Esq.,
154 Nassau Street,
New York City.

Dear Sir:

In accordance with our conversation of even date, we are enclosing herewith six additional prints of nipples and shells.

Trusting this will be satisfactory, we are,

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Emile Hemming
Vice-President.

EH/JE

Exhibit D13.

August 20th, 1915.

E. O. McDowell, Esq.,
New York City.

Dear Sir:

Relative to telephone conversation of even date:

Please note that we are today forwarding you, as promised, three sample joints.

You will note upon receipt that same are not varnished or lacquered and would say that they are forwarded you merely to show you the shape, etc.

So that you will receive the same at the earliest possible moment, we have sent the samples by special delivery mail.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Emile Hemming
Vice-President.

EH/MH

Exhibit D14.

New York, March 22, 1916.

Hemming Manufacturing Co.,
Garfield, N. J.

Gentlemen:—

The Grabler Manufacturing Co. advises me they have had to make new patterns for the inserts for the Insulating Joints.

In the meantime, the General Pressed Metal Company advises me it is feasible to make a steel nipple in the size we want. Would you consider it at this time?

Very truly yours,
E. O. McDowell.

Exhibit D15.

New York, March 22, 1916.

Hemming Manufacturing Co.,
Garfield, N. J.

Gentlemen:—

Replying to your favor of the 21st regarding section samples, metal parts of Insulating Joints; possibly I did not advise you I wanted these samples for my patent attorney. Therefore, I would like you to send them to me as soon as you can, so as to see if there are any changes advisable before we go too far.

Very truly yours,
E. O. McDowell.

Exhibit D16.

New York, January 17, 1916.

Hemming Manufacturing Co.
Mr. Hemming.

My attorney advises me to-day that he does not fear the Wirt Patent as he feels the claims in this patent are limited to the specific design shown in the patent.

I would, therefore, suggest that you rush the work on the samples for the Underwriters and advise me as soon as they are ready.

Very truly yours,
E. O. McDowell.

Exhibit D17.

June 15th, 1916.

Mr. E. O. McDowell,
No. 154 Nassau Street,
New York City.

Dear Sir:

Replying to your letter of the 13th instant, we regret the dilema in which your steel people have placed you, but we are not responsible for this.

As we have advised you, we are making every effort to produce these joints but up to the present you have not informed us of the quantities of the various sizes you will require.

Yours very truly,
Hemming Manufacturing Company,
By B. H. Howell
President.
BHH/JE

Exhibit D18.

June ~~30~~ 20th, 1916.

Mr. E. O. McDowell,
154 Nassau Street,
New York City.

Dear Sir:

We acknowledge receipt of your favor of the 16th instant received this morning and would advise that the information given is not all we require.

We want to know how many joints you will need with each size of insert; namely 3/8", 1/4" and 1/8" and also how many you will require straight electric and how many you require combination.

In other words, we require the details of the 450,000 joints you have stated you will require.

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By B. H. Howell
President.

BHH/JE

Exhibit D19.

July 25th, 1916.

Mr. E. O. McDowell,
No. 154 Nassau Street,
New York City, N. Y.

Dear Sir:— Insulating Joints.

We are glad to be able to inform you that we have now succeeded in making up satisfactory samples of joints from the old mold which will stand the required tests.

We sometime ago started work on a new die which is now nearing completion but before placing same in operation there are one or two points on which we would like to consult you.

Could you, therefore, arrange to come out to our plant to make some further tests on these samples and advise with us as to varnishing of joints as we believe the varnish previously used was purchased from you.

We have also found that threads on some of the inserts have stripped under test and you may have to take this up with the manufacturer.

After we have gone into these matters with you here we believe we will be in a position to proceed with production of regular samples to be passed upon by the Underwriters' Laboratory.

Once we have their approval we will be able to commence shipments on your orders.

We are, therefore, now waiting on your advices before proceeding further.

Yours very truly,
HEMMING MANUFACTURING COMPANY,
By Eugene Kelly
EN/ Secretary.

Exhibit D20.

August 4th, 1915.

Mr. E. O. McDowell,
New York City.

Dear Sir:

We received your letters of the 23rd, 28th and 31st ults., in reference to quotations on octagonal steel tubing, and wish to thank you very much for the attention you have given to this matter.

As soon as we receive the sample of tubing you have ordered we will be very glad to try it out and will then take up the question of comparing the cost of the shells made from tubing or the purchase of stampings.

We were able to obtain the stamped shells from the concern that previously made them, and we will be in a position to submit samples next week.

Trusting this will be satisfactory to you, we remain,

Yours very truly,

HEMMING MANUFACTURING COMPANY,

By Emile Hemming
Vice-President.

EH/JE