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Summons.

THE STATE OF NEW JERSEY:

To GOODMAN WAREHOUSE CORPORATION, a corporation.
tion.

You are summoned to answer the annexed complaint of New Jersey Terra Cotta Company, a corporation, in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Hudson County Circuit Court, at Jersey City, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. (And see notice endorsed hereon.) 10

WITNESS, Honorable Williard W. Cutler, Judge of the Hudson County Circuit Court, at Jersey City, this 24th day of April, nineteen hundred and twenty-four. 20

JOHN J. MCGOVERN,
Clerk.

MCDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

30

40

Complaint.

HUDSON COUNTY CIRCUIT COURT.

NEW JERSEY TERRA COTTA COM-
PANY, a corporation,
Plaintiff,

vs.

GOODMAN WAREHOUSE CORPORATION,
a corporation,
Defendant.

Action
at Law.

10

20

The plaintiff, New Jersey Terra Cotta Company,
a corporation organized and existing under and by
virtue of the laws of the State of New Jersey hav-
ing its principal place of business therein at the
City of Perth Amboy in the County of Middlesex,
complaining against the defendant says that:

30

1. On or about August 4, 1922, the plaintiff and
the defendant, Goodman Warehouse Corporation,
through its agent, Longacre Engineering & Con-
struction Co., Inc., entered into a written contract
whereby the plaintiff agreed to provide all the ma-
terials and perform all the work for the furnish-
ing and delivery, at building site, of all of the
architectural terra cotta required in the construc-
tion and completion of the eight story and base-
ment fireproof warehouse located at 826-830 Bergen
Avenue, Jersey City, N. J. in strict accordance
with the plans and specifications prepared by
Moores & Dunford, Inc. the architect referred to
in said contract, and the defendant agreed to pay
to plaintiff therefor, the sum of \$6,875.

40

2. The plaintiff substantially provided all of the
materials and performed all the work for the fur-

Complaint.

nishing and delivery of and furnished and delivered at building site, substantially all the architectural terra cotta required in the construction and completion of said warehouse in strict accordance with said plans and specifications and the defendant has made payments on account thereof aggregating the sum of \$4781.25.

10

3. After the performing, furnishing and delivery of the aforesaid materials to defendant as aforesaid, the defendant claimed there were certain defects found in some of the said terra cotta.

4. Thereafter, the plaintiff and the defendant entered into a supplemental written contract or agreement consisting of plaintiff's letter to defendant dated February 19, 1923, a copy of which is hereto annexed and made a part hereof and marked Schedule "A" and defendant's letter replying thereto dated March 8, 1925, a copy of which is hereto annexed and made a part hereof and marked Schedule "B", whereby it was agreed between the parties that the defendant should deduct from the original contract price the sum of \$1250 as settlement in full of any and all claims made or to be made by the defendant for alleged defective materials, delays, etc., and the defendant in consideration of such reduction from the contract price, thereby agreed to waive any such claims for defective materials, delays, etc.

20

30

(5. Plaintiff's said letter of February 19, 1923, specifically provides in part as follows:

"You agree to forward us at once, a payment of 85% of the amount of the balance of the contract, as per enclosed statement,

40

Complaint.

\$4781.25, and we will immediately on receipt of this payment deliver to your above mentioned building the balance of the work now stored at our plant.

10 We further agree to replace at your request, and deliver at the building site, as soon as possible, ten pieces of terra cotta as may be designated by you, and which you may want to be replaced.

The above mentioned balance of 15%, or \$843.75 shall be paid us ten days after above mentioned replacements have been furnished by us at the building and no further claims shall be made under this contract of August 4th, 1922 or otherwise by you for damages, delays or any other cause, and all previous
20 agreements whether written or verbal hereby stand cancelled."

and defendant's letter of March 8, 1925, specifically provides in part as follows:

30 "We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of One thousand two hundred and fifty dollars, (\$1250) from the contract price in consideration of our waiving any claims for defective material, delays, etc.,"

6. Upon receipt from the defendant of the said sum of \$4781.25, plaintiff immediately delivered to the aforesaid warehouse building, the balance of work then stored at plaintiff's plant.

7. On or about December 4, 1923, plaintiff replaced at the request of the defendant and delivered
40

Complaint.

ered at the said warehouse building site, the ten pieces of terra cotta as designated by the defendant and referred to in said supplemental contract.

8. Ten days after the furnishing of the afore-said replacements consisting of ten pieces of terra cotta, there became due and owing from defendant to plaintiff, the sum of \$843.75 and plaintiff thereafter at various times, demanded payment of said sum but payment has been refused. 10

9. Plaintiff has performed and furnished all the required work and complied with all of the terms and conditions of said supplemental contract by it to be performed.

Plaintiff demands damages in the sum of \$843.75, together with lawful interest thereon and costs of suit. 20

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

30

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Schedule "A".

THE NEW JERSEY TERRA COTTA Co.

February 19, 1923.

Goodman Warehouse Corp.,
Longacre Eng. & Constr. Co., Agents.

RE: #5504, Warehouse, Jersey City, N. J.

Gentlemen:

10 In accordance with agreement made over the telephone today with your Mr. Nathan Goodman, Attorney, and Mr. Eilinberger, of the Longacre Engineering & Construction Company, we will agree to deduct, as settlement in full of any and all claims made or to be made by you for alleged defective material, delays, etc. the sum of \$1,250 from the amount of our above mentioned contract.

20 You agree to forward us at once, a payment of 85% of the amount of the balance of the contract, as per enclosed statement, \$4,781.25 and we will immediately on receipt of this payment deliver to your above mentioned building the balance of the work now stored at our plant.

We further agree to replace at your request, and deliver at the building site, as soon as possible, ten pieces of terra cotta as may be designated by you, and which you may want to be replaced.

30 The above mentioned balance of 15%, or \$843.75 shall be paid us ten days after above mentioned replacements have been furnished by us at the building and no further claims shall be made under this contract of August 4th, 1922 or otherwise by you for damages, delays or any other cause, and all previous agreements whether written or verbal hereby stand cancelled.

Yours very truly,

40 THE NEW JERSEY TERRA COTTA Co.,

E. V. Eskeson,

President.

EVE/FT

Schedule "B".

GOODMAN WAREHOUSE CORPORATION,
Bayonne, N. J.

March 8th, 1923.

The New Jersey Terra Cotta Co.,
149 Broadway,
New York City.

Gentlemen:

10

We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of One thousand two hundred and fifty dollars (\$1,250) from the contract price in consideration of our waiving any claims for defective material, delays, etc.

We understand that the Architect is preparing a certificate showing the amount due you on your contract after deducting the sum of One thousand two hundred and fifty dollars (\$1,250) herein mentioned, and the retainer of fifteen per cent (15%). Upon receipt of this certificate, we will present to Mr. Harry Eilenberger, of the Longacre Engineering & Construction Company, an order upon the American Bond and Mortgage Company for payment of the same. After delivery by you of the balance of the terra cotta, now ready for shipment, he will be authorized to present the same to you.

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We will advise you as soon as this order is presented to Mr. Eilenberger, so that you can immediately make shipment of the balance of the terra cotta.

Yours very truly,

GOODMAN WAREHOUSE CORPORATION,
Per Nathan L. Goodman,
Sect.

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Second Amended Answer and Counter-claim.

HUDSON COUNTY CIRCUIT COURT,

10	NEW JERSEY TERRA COTTA COM- PANY, a corporation, Plaintiff, vs. GOODMAN WAREHOUSE CORPORATION, a corporation, Defendant.	}	Action at Law.
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20 The defendant, a corporation of New Jersey, having its principal place of business in the City of Jersey City, County of Hudson, State of New Jersey, by way of answer and counter-claim to the complaint of the plaintiff, says:

1. It admits the allegations of the first paragraph of the complaint.

2. It denies the allegations of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th paragraphs of the complaint.

30 **FIRST SEPARATE DEFENSE.**

The letter of the plaintiff dated February 19, 1923 and/or the letter of the defendant dated March 8, 1923, do not in terms or in effect constitute an agreement to abrogate or rescind the agreement of August 4, 1922 referred to in the first paragraph of the complaint, and the defendant did not in

Second Amended Answer and Counterclaim.

said letter of March 8, 1923 intend that said agreement of August 4, 1922 should be abrogated or rescinded.

SECOND SEPARATE DEFENSE.

The plaintiff's letter of February 19, 1923, and the defendant's letter of March 8, 1923, set forth 10
in the complaint, do not constitute an agreement as alleged in the complaint.

THIRD SEPARATE DEFENSE.

The terms of the agreement proposed by the plaintiff in the plaintiff's letter of February 19, 1923, were rejected by the defendant's letter of March 8, 1923, which contained a counter proposal which was accepted and acted upon by the plaintiff, 20
namely, that in consideration of a reduction of \$1250.00 in the contract price stated in the agreement of August 4, 1922 and the agreement of delivery of the balance of the terra cotta required to be delivered under said agreement, the defendant would waive any claims for defective materials, deliveries, etc., and would accept such reduction.

FOURTH SEPARATE DEFENSE.

That the plaintiff failed and neglected to perform the alleged supplemental agreement it claims to have entered into with the defendant by said letters of February 19, 1923 and March 8, 1923, in that the balance of terra cotta delivered thereunder was not of merchantable quality or reasonably fit for the use for which it was intended, the plaintiff knowing the particular purpose for which said

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Second Amended Answer and Counterclaim.

terra cotta was required and the defendant relying upon the plaintiff's skill in the manufacture thereof; and the said plaintiff further failed and neglected to perform said alleged agreement in that the plaintiff did not deliver ten pieces of terra cotta required to be delivered thereunder as soon as possible, or within a reasonable time after
10 the same were designated by the defendant, but failed and neglected to so deliver the same.

FIFTH SEPARATE DEFENSE.

The plaintiff is not entitled to enforce said alleged agreement claimed to have been entered into by the plaintiff and the defendant by said letters of February 19, 1923 and March 8, 1923 or sue
20 thereon or for a breach thereof, for that the plaintiff failed and neglected to perform what it was therein required of it to be performed, namely, to deliver ten pieces of terra cotta as soon as possible after said agreement was entered into or within a reasonable time thereafter, or as soon as possible or within a reasonable time after the same were designated by the defendant, and to deliver the balance of terra cotta due the defendant under
30 said agreement of August 4, 1922, which terra cotta should be of merchantable quality and reasonably fit for the purpose for which it was required; that by reason of such default of the plaintiff, the said agreement of August 4, 1922 continued to be and still is in full force and effect, and the said plaintiff has failed and neglected to perform the said agreement of August 4, 1922 in that the plaintiff did not deliver the terra cotta required to be delivered thereunder.

Second Amended Answer and Counterclaim.

Said agreement of August 4, 1922 provides that

“All terra cotta must be true to shape and profile strictly as to detail, and no warped or damaged terra cotta will be accepted. All terra cotta furnished must be guaranteed against any checking for a period of one year after being installed. All terra cotta must be of ivory white glazed with a mat finish and of a grade equal to that manufactured by the Northwestern Terra Cotta Company of Chicago.” 10

The terra cotta delivered by the plaintiff under said agreement is not true as to shape and profile. It is warped, chipped, stained and discolored and otherwise damaged, and has become checked within less than one year after the installation thereof. 20

NOTICE TO STRIKE OUT COMPLAINT.

PLEASE TAKE NOTICE that at or before the trial of the above entitled action, the defendant will move to strike out the complaint on the ground that it does not set forth a cause of action in that the complaint does not allege that the plaintiff performed said alleged agreement in accordance with its terms, and is so framed as to embarrass the defendant in the trial of the issue between the plaintiff and the defendant. 30

BY WAY OF COUNTERCLAIM against the plaintiff, the defendant alleges:

Second Amended Answer and Counterclaim.

FIRST COUNT.

1. It repeats and reiterates and makes a part hereof all the allegations of the answer and of the separate defenses above set forth.

10 2. The plaintiff delivered part of the terra cotta required to be delivered under the agreement of August 4, 1922, referred to in paragraph 1 of the complaint, which terra cotta was warped, chipped, stained, and otherwise defective and damaged, and was rejected by the Architect named in said agreement as unfit for the use for which it was required, and the plaintiff, in order to induce the defendant to accept the same and waive said defects which then and there existed, and were then and there
20 apparent, and in consideration thereof, agreed to make a reduction of \$1250.00 in the price thereof, and agreed to deliver the balance of terra cotta forthwith.

3. Said agreement of August 4, 1922 referred to in paragraph 1 of the complaint, provides as follows:

30 "All terra cotta must be true to shape and profile strictly as to detail, and no warped or damaged terra cotta will be accepted. All terra cotta furnished must be guaranteed against any checking for a period of one year after being installed. All terra cotta must be of ivory white glazed with a mat finish and of a grade equal to that manufactured by the Northwestern Terra Cotta Company of Chicago."

Second Amended Answer and Counterclaim.

4. That the plaintiff delivered the balance of terra cotta required to be delivered under said agreement, but said terra cotta so delivered is not true to shape and profile. It is warped, stained and otherwise damaged and became checked within the year after being installed, and is not reasonably fit for the purpose for which it was required, to the damage of the defendant in the sum of \$5,000.00, for which the defendant demands judgment. 10

SECOND COUNT.

1. The defendant repeats all the allegations of the first count and makes them a part hereof insofar as same are applicable heerto.

2. The plaintiff has failed and neglected to perform the alleged new or supplemental agreement claimed to have been entered into by the letter of the plaintiff of February 19, 1923 and the letter of the defendant dated March 8, 1923, in that the plaintiff agreed to deliver thereunder certain terra cotta, knowing the particular purpose for which the same were required, and knowing that the defendant relied upon the plaintiff's skill in the manufacture thereof, and the said terra cotta delivered thereunder was not reasonably fit for such purpose, and has become cracked and chipped and unfit for the purpose for which it was required and intended. 20 30

To the damage of the defendant in the sum of \$5,000.00, for which the defendant demands judgment.

Second Amended Answer and Counterclaim.

THIRD COUNT.

1. The defendant repeats the allegations of the first and second counts and makes them a part hereof insofar as the same are applicable hereto.

10 2. The plaintiff failed and neglected to perform said alleged supplemental agreement claimed to have been entered into by the plaintiff's letter of February 19, 1923, and the defendant's letter of March 8, 1923, in that the plaintiff was obliged and required thereby to deliver to the defendant ten pieces of terra cotta as soon as possible after the making of said agreement, or after the designation of the same by the defendant, or within a reasonable time
20 thereafter, but on the contrary, the defendant neglected and failed so to do, and did not deliver the same as soon as possible or within a reasonable time after the making of said alleged agreement, or the designation by the defendant of the pieces of terra cotta to be replaced, to the damage of the defendant in the sum of \$5,000.00, for which the defendant demands damages.

FOURTH COUNT.

30 1. The defendant repeats and makes a part hereof of all the allegations of the preceding counts insofar as the same are applicable hereto.

2. The plaintiff failed and neglected to perform said alleged supplemental agreement claimed to have been entered into by plaintiff's letter of February 19, 1923 and defendant's letter of March 8, 1923, in that the plaintiff was required thereunder to deliver ten pieces of terra cotta as soon as pos-
40

Second Amended Answer and Counterclaim.

sible after the making of said alleged agreement, or after the designation of the same by the defendant, or within a reasonable time thereafter, and was also required to deliver the balance of the terra cotta still to be delivered under the agreement of August 4, 1922, which should be of merchantable quality, and reasonably fit for the purpose for which it was required, and the plaintiff did not deliver said ten pieces of terra cotta as it was obliged to do, and the balance of terra cotta delivered to the defendant under the agreement of August 4, 1922, which was delivered after said alleged supplemental agreement was entered into, was not merchantable and reasonably fit for the purpose for which it was required; by reason of which default on the part of the plaintiff, the agreement of August 4, 1922 remained in full force and effect.

3. That under said agreement of August 4, 1922, it is provided that:

"All terra cotta must be true to shape and profile strictly as to detail, and no warped or damaged terra cotta will be accepted. All terra cotta furnished must be guaranteed against any checking for a period of one year after being installed. All terra cotto must be of ivory white glazed with a mat finish and of a grade equal to that manufactured by the Northwestern Terra Cotta Company of Chicago."

4. That the terra cotta delivered by the plaintiff to the defendant is not true to shape and profile, but is warped, chipped, stained, discolored and

Second Amended Answer and Counterclaim.

otherwise damaged, it is not merchantable, and has become checked in less than one year after the installation thereof.

To the damage of the defendant in the sum of \$5,000.00, for which the defendant demands as judgment.

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NATHAN L. GOODMAN,
Attorney of Defendant.

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**Reply to Second Amended Answer and
Answer to Second Amended Counter-
claim.**

HUDSON COUNTY CIRCUIT COURT.

NEW JERSEY TERRA COTTA COM- PANY, a corporation, Plaintiff, vs. GOODMAN WAREHOUSE CORPORATION, a corporation, Defendant.	}	Action at Law.	10
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The plaintiff, New Jersey Terra Cotta Company,
 replying to the second amended answer of the de-
 fendant, says that:

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1. It denies all the allegations of the second,
 third, fourth and fifth separate defenses, and re-
 serves the right to move to strike out at the trial
 on the ground that each is a conclusion of law and
 not a valid defense, the first, second and third sep-
 arate defenses, or any one of them, and also that
 portion of the fifth separate defense commencing
 with the words—

30

“That by reason of such default of the plain-
 tiff the said agreement of August 4, 1922 con-
 tinued to be and still is in full force and
 effect”

to the end of said fifth separate defense.

By way of answer to the defendant's second
 amended counterclaim, plaintiff says that:

40

*Reply to Second Amended Answer and Answer to
Second Amended Counterclaim.*

1. It denies all the allegations of paragraphs one to four, inclusive, of the first count of defendant's counterclaim, and reserves the right to strike out at the trial paragraph 3 of said count on the ground that the allegations thereof are immaterial and do not constitute a valid defense.

10

2. It denies all the allegations of the second count of defendant's counterclaim.

3. It denies all the allegations of the third count of defendant's counterclaim.

4. It denies all the allegations of the fourth count of defendant's counterclaim.

20

It reserves the right to move to strike out at the trial on the ground that it is a conclusion of law and/or does not state a valid defense, the following part of paragraph two of said fourth count:

"and was also required to deliver the balance of the Terra Cotta still to be delivered under the agreement of August 4, 1922, which should be of merchantable quality, and reasonably fit for the purpose for which it was required"

30

and also to strike out that portion of said paragraph two which reads as follows:

"by reason of which default on the part of plaintiff the agreement of August 4, 1922 remained in full force and effect"

and also to strike out paragraphs three and four of said fourth count.

40

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff.

Case.

NEW JERSEY SUPREME COURT,

NEW JERSEY TERRA COTTA COM-
PANY,

Plaintiff,

vs.

GOODMAN WAREHOUSE CORPORATION,
Defendant.

Before:
Hon. HENRY
E. ACKER-
SON, J. and
a Jury.

10

Jersey City, N. J., Jan. 4, 1926.

APPEARANCES:

MCDERMOTT, ENRIGHT & CARPENTER, Esqs., (by
Mr. Gilmore), for the Plaintiff.

20

AARON A. MELNIKER, Esq., for the Defendant.

Mr. Gilmore: At this time I desire to amend
the reply to the second amended answer and answer
to second amended counterclaim.

The Court: I understood that any amendments
that were to be filed were to be filed on or before
last Thursday. Now it appears that there is an
amended reply filed here setting up a lot of new
matters that the court absolutely has had no op-
portunity whatever to deal with and therefore must
deal with them summarily. With that observation
you may go ahead.

30

Mr. Gilmore: I want to explain to the court
that I did not receive it until the day before New
Years, and it required some study in order to get
it out.

The Court: Proceed.

40

Case.

Mr. Gilmore: I move to strike out the first, second and third separate defenses of the second amended answer and counterclaim on the ground that they are each conclusions of law and do not state a valid defense.

Motion refused.

Mr. Gilmore: Exception.

10 I also ask leave to strike out that portion of the fifth defense commencing with the words "that by reason of such default of the plaintiff and so forth."

The Court: That would be merely surplussage. I will deal with it in the charge, if the case gets that far.

Mr. Gilmore: I move to strike out paragraph three of the first count or the counterclaim on the ground that the allegations are immaterial and do
20 not constitute a valid defense.

The Court: They don't have to.

Mr. Gilmore: I also move to strike out on the ground that it is a conclusion of law and does not state a valid cause of action. Furthermore the action is based upon a supplemental contract which provides for the delivery of the balance then stored at plaintiff's plant and not any balance that might otherwise have been due under the contract of August 4th which was nullified by the supplemental
30 contract.

(After argument.)

I will withdraw that motion.

Mr. Gilmore: I also move to strike out that portion of paragraph two of the fourth count which reads as follows:

"By reason of which default on the part of the plaintiff, the agreement of August 4th, 1922, re-

Eckardt V. Eskesen. Called by Plaintiff. Direct.

mained in full force and effect." That is clearly a conclusion of law, as well as an erroneous conclusion, and I have cases to support that.

The Court: I will allow that to stand. These questions will undoubtedly come up in a more complete way when you come to prove your case, and I will deal with them at the time and if necessary, in the charge.

10

Mr. Gilmore: I move to strike out paragraphs three and four of the fourth count, and I assume your Honor's ruling will be the same?

The Court: The ruling will be the same.

Mr. Gilmore: Exception.

Mr. Gilmore opened to the jury.

Mr. Melniker opened to the jury.

20

ECKARDT V. ESKESSEN, sworn.

DIRECT EXAMINATION BY MR. GILMORE:

Q. What is your business? A. Terra cotta manufacturer, president of the New Jersey Terra Cotta Company.

Q. Are you an officer of the plaintiff company?

A. Yes, sir, I am president.

30

The Court: And you were back in February and March of 1923?

The Witness: I was.

Q, And you are also the treasurer, are you not?

A. Yes, sir.

Q. And you were since 1922 A. Yes, sir.

40

Eckardt V. Eskesen. Called by Plaintiff. Direct.

Mr. Gilmore: I call upon the defendant for the plaintiff's letter of February 19, 1923, and the statement included therein.

(Produced by the defendant.)

10 Q. Mr. Eskeson I show you letter dated February 19, 1923, addressed to the Goodman Warehouse Corporation, Longacre Engineering and Construction Company, Agents, and signed New Jersey Terra Cotta Company, E. V. Eskeson, President; is that your signature? A. Yes, sir.

Q. And did you send that letter to the defendant?
A. Yes, sir.

The Court: There is no denial that it was received.

20 Mr. Melniker: No objection.

The Court: Let it be marked.

Mr. Gilmore: And it is admitted that this statement was enclosed in the letter?

Mr. Melniker: Yes.

Mr. Gilmore: I offer this letter together with the statement included with it, in evidence.

(Marked Exhibit P-1 and P-2.)

30 Mr. Gilmore: I call for plaintiff's letter of February 28, 1923.

Mr. Melniker: We will admit the copy.

Mr. Gilmore: I offer in evidence copy of letter dated February 26, 1923, to the Goodman Warehouse Corporation signed by the New Jersey Terra Cotta Company, having given notice to produce which I desire to file with the Court.

(Marked Exhibit P-3.)

40 Q. I show you letter dated February 27, 1923, addressed to the New Jersey Terra Cotta Company,

Eckardt V. Eskesen. Called by Plaintiff. Direct.

signed Goodman Warehouse Corporation per Nathan L. Goodman; did your company receive that letter? A. Yes, sir.

Mr. Gilmore: I offer this letter in evidence.
(Marked Exhibit P-4.)

Q. I show you letter dated March 8th, 1923, on the letterhead of Goodman Warehouse Corporation, addressed to the plaintiff company signed Goodman Warehouse Corporation, per Nathan L. Goodman, secretary, and ask you if you received that letter. 10
A. Yes, I remember receiving this.

Mr. Gilmore: I offer this letter in evidence.

Mr. Melniker: No objection.

(Marked Exhibit P-5.)

Mr. Gilmore: I call upon the defendant to produce the plaintiff's letter of April 6, 1923, to the defendant. 20

Mr. Melniker: Here it is.

Mr. Gilmore: I offer in evidence plaintiff's letter of April 6th, 1923, addressed to the Goodman Warehouse Corporation, Longacre Engineering and Construction Company agents.

Mr. Melniker: No objection.

(Marked Exhibit P-6.) 30

Q. I show you a letter addressed to the New Jersey Terra Cotta Company on Goodman Warehouse Corporation's letterhead dated April 7, 1923, and signed Goodman Warehouse Corporation by N. L. Goodman, and ask you if you received that letter? A. Yes, I remember receiving this.

Mr. Gilmore: I offer this letter in evidence.
(Marked Exhibit P-7.) 40

Eckardt V. Eskesen. Called by Plaintiff. Direct.

Mr. Gilmore: I call upon the defendant to produce the plaintiff's letter of April 10th.

Mr. Melniker: Here it is.

Mr. Gilmore: I offer in evidence letter of New Jersey Terra Cotta Company to Goodman Warehouse Corporation dated April 10, 1923.
(Marked in evidence Exhibit P-8.)

10

Q. I show you a letter on the Goodman Warehouse Corporation's letterhead dated April 13, 1923, addressed to the plaintiff company and signed Goodman Warehouse Company per Nathan L. Goodman, secretary, and I ask you if you received that letter in the course of the mail? A. Yes.

Mr. Gilmore: I offer this letter in evidence.
(Marked Exhibit P-9.)

20

Mr. Gilmore: I call upon the defendant to produce plaintiff's letter of April 17th and plaintiff's letter of November 28th.

Mr. Melniker: Here is the letter of April 17th.

Q. I show you letter dated April 17th, 1923, addressed to the Goodman Warehouse Corporation signed, New Jersey Terra Cotta Company, is that
30 your signature? A. Yes, sir.

Mr. Gilmore: I offer this letter in evidence.
(Marked Exhibit P-10.)

Mr. Gilmore: I offer in evidence carbon copy of letter dated November 28th, 1923, addressed to the Goodman Warehouse Corporation signed New Jersey Terra Cotta Company, notice to produce having been given and filed.

(Marked Exhibit P-11.)

40

Eckardt V. Eskesen. Called by Plaintiff. Direct.

Q. I show you letter of Goodman Warehouse Corporation dated November 30th, 1923, addressed to the plaintiff company and signed Goodman Warehouse Corporation by N. L. Goodman, secretary; did you receive that letter in the course of the mail?

A. I remember receiving this letter.

Mr. Gilmore: I offer this letter in evidence. 10
(Marked Exhibit P-12.)

(The foregoing letters were thereupon read to the jury.)

Q. After you received the defendant's letter of March 8th, did your company deliver the balance of the material then stored at its plant to the Goodman Warehouse Corporation? A. Yes, I gave orders to have it delivered.

Q. I show you what purports to be a shipping receipt and ask you what it is and what these are. 20
A. These are shipping lists.

Q. Showing shipment under what date? A. Under date of March 15.

Q. Signed by the defendant or by some man at the job? A. Yes, at 126 Bergen Avenue.

Q. And were all of the shipments on these two lists delivered there March 15th, the date the receipt is dated? A. Yes, sir, they were delivered 30
by truck.

Mr. Gilmore: I offer the shipping receipts in evidence.

Mr. Melniker: No objection.
(Marked Exhibit P-13.)

Q. Was the material set forth in these shipping receipts the balance of the material then stored at

Eckardt V. Eskesen. Called by Plaintiff. Direct.

your plant on March 15, 1923, with the exception of the ten replaceemnt pieces? A. Yes, sir.

Q. After the delivery of the terra cotta mentioned in those shipping receipts that I just showed you, Exhibit P-13, did the deefndant give your company a check for \$4,781.25? A. At the same time.

10 Q. After receiving a letter from the defendant designating ten replacement pices to be made and which letter is dated April 13, 1925, did your company proceed to make up those ten replacement pieces? A. Yes, sir; we sent an order to the factory to have these replacements made as soon as possible.

Q. And they were all made, these ten replacement pieces? A. Oh, yes.

Q. And were they made up and delivered as soon as possible? A. Made as soon as possible, yes.

20 Q. And delivered as soon as possible? A. Yes, sir.

Q. I show you what purports to be a shipping receipt dated December 4th, 1923, and signed "nine boxes, Goodman Warehouse Corporation H. Group", is that the shipping receipt for those ten replacement pieces? A. That is the bill went with the shipment.

Q. Look at it again. A. It is a shipping receipt.

30 Q. And were those ten pieces delivered on the day that that is dated, December 4th, 1923? A. I understand they were, yes.

Mr. Gilmore: I offer the shipping receipt in evidence.

(Marked Exhibit P-14.)

Q. After delivery of those replacement pieces mentioned in P-14 did your company receive the
40 balance of \$843.75? A. No.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. Has your company ever been paid that balance? A. No; we demanded it but didn't get it.

Mr. Gilmore: Cross examine.

CROSS EXAMINATION BY MR. MELNIKER:

Mr. Melniker: Before proceeding with my cross examination I would like to ask the court to arrange to permit the jury to make an inspection of this building which is not very far from here. We will provide transportation, and I make that motion so that if your Honor permits this inspection to be made we could do this during the noon recess. 10

The Court: I will deny the motion at this time. If it should become necessary during the course of the trial I will permit an inspection. 20

Q. Now, Mr. Eskeson, who received this check for \$4781 when the balance of this material was delivered and you say that this money was paid at the same time? A. We sent two men with a load and they received payment while it was being delivered.

Q. Do you know which man received the check? A. Our Mr. Duff.

Q. Mr. Duff went with the truck that delivered the stuff? A. No, Mr. Howell went with the truck, our man on buildings. 30

Q. You testified that this check was paid, the money was paid at the same time the stuff was delivered. A. I remember calling up Mr. Eilinberg several times and telling him that the check must be over there when we are delivering the stuff.

Q. That is not answering my question. A. That means I wanted to be sure that the other end of the contract was carried out, that the money was there. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. You testified that the money was paid at the same time that the balance of the material was delivered; did you so testify? A. Yes; we got a check at the time—of course I was not there.

Q. Then you do not know, is that what you mean?

A. I know we got the check; the man I sent over to get the check got it.

10 Q. Where did you send the man to get the check?

A. Over to the building.

Q. You do not know whether he went to the building or not to get it? A. Well I can only say yes.

Q. You do not know that do you? A. I didn't follow him over there, no.

The Court: Did he go with the truck?

20 A. No, that man went from the office. One man went with the truck to see that the stuff was delivered and to see that it was checked off. The other man was sent from the office.

Q. You do not know where this man got the check, do you? A. No.

Q. And you do not know when he got the check, do you? A. Yes.

Q. When? A. He got it that day.

30 Q. You do not know if it was before the material was delivered or after? A. We waited for him—

Q. Will you answer the question please: You do not know if he got the check before the material was delivered or after, do you? A. No.

Q. Do you know whether this is the check or not? A. I could not swear to it.

Q. Can you tell by looking at it? A. I would not swear to it.

40 Q. You would not swear to it? A. No.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. Did you get more than one check for \$4781 on this job?

Mr. Gilmore: I will admit it is the check.

Q. Isn't that your stamp on it? A. That is our stamp, yes.

Q. Are you in any doubt about it? A. I am not 10
in doubt as long as you are not.

Q. This is the check, isn't it? A. It seems so.

Q. Are you afraid to say so? A. We received so many checks in our business that I could not say if that is the exact check or not.

Q. You are quite cautious about saying whether or not this check is the check you got from this company on this contract, but you do not hesitate in saying you got the money at the same time the goods were delivered, do you? A. I remember it, certainly, very clearly. 20

Q. Yet you were not there when the goods were delivered and you do not know when your man got the check and you do not know where he got it? A. He brought the check back.

Q. And on the strength of that you sit there on the stand and under oath testify that the money was paid at the time the goods were delivered, that is so, isn't it? A. Yes. 30

Q. And you know that is not so at all, don't you? A. We got the check back at the same time. I gave orders not to deliver the goods before we were sure the money was there. I wanted to get through with the Goodman Company and have nothing more to do with them.

Q. You were glad to get that stuff delivered over there? A. I was willing to pay the \$1250 and be 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

through and have nothing more to do with the Goodman Company, that was the idea.

Q. You were glad to get that stuff off your hands, weren't you? A. Yes, we were willing to let \$1250 go by to get through with it.

Q. If they had not taken this stuff off your hands what would you have been able to do with it?
10

Mr. Gilmore: I object—I withdraw the objection.

A. I don't exactly know, no.

Q. Had it any value? A. We might have used it or we might not have.

Q. Where would you have been able to use it? A. Well, we might have gotten some architect to draw up a design in which we could have used it.
20

Q. This terra cotta was made to order, according to specifications for this particular building? A. Yes, sir.

Q. It could not be shoved into any building? A. No, sir.

Q. And if you could not have gotten some architect to draw plans for some other building for which you could have used the stuff you would have had to break it up? A. Yes, make it over again.
30

Q. That is, you would have had to grind it up into powder? A. Yes.

Q. It would have been a total loss, wouldn't it? A. It has value to us as grit. One third of the total is grit.

Q. Well, how much value has grit? A. About \$10 a ton.

Q. How many tons were there in this building? A. I don't remember.
40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. About 60 tons, is that right? A. It must have been around there, yes.

Q. So that it would have had a value of about \$600 for grit? A. That is too high.

Q. It would not have been worth that much? A. No.

Q. Then I understand you to say you believe this is the check? A. Yes, I believe so. 10

Mr. Melniker: I will have this marked for identification.

(Marked Exhibit D-1 for identification.)

Q. By the way, you mention Mr. Eilinberger, who is he?

Mr. Gilmore: I didn't hear him mention him. 20

A. He is connected with the Longacre Construction Company.

Q. What did he have to do with the Longacre Construction Company? A. I don't know, Vice-President or some such position.

Q. Who is the Longacre Construction Company? A. They were acting as agents for the Goodman Warehouse Company.

Q. And where is their office? A. Somewhere in Madison Avenue, I don't remember. 30

Q. And is that where you sent your men to get the check from Mr. Eilinberger? A. No, I sent him to the building.

Q. What did you say about Mr. Eilinberger before? A. I called him up when the goods left the factory with the truck and told him the money must be there; that is according to the agreement. I wanted to have his word for it that the money would be there. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. Now, the original agreement between you and the Goodman Company of August 4th, 1922, was also with the Longacre Engineering and Construction Company, wasn't it?

10 Mr. Gilmore: I object on the ground that that contract has been superceded by the supplemental contract.

The Court: Sustain the objection at this time.

Mr. Melniker: Exception.

20 Q. Now, why did you call up Mr. Eilinberger at the time you shipped this material out? A. In all of our transactions in this case we had recognized the Longacre Construction Company up to this time as the contractors building that building for the Goodman Company and acting as agents; we had to recognize them up to this period. We always had been calling up Mr. Eilinberger for anything going on under this contract.

Q. And the reason you called Mr. Eilinberger up then was because you had always dealt with Mr. Eilinberger in connection with this transaction, isn't that so? A. Yes.

30 Q. And Mr. Eilinberger was an officer of the Longacre Construction Company? A. So I understand.

Q. And the Longacre Construction Company was a party to this original contract with the Goodman Warehouse Company, isn't that so?

Mr. Gilmore: I object, that is not the fact.

40 The Court: Of course you must understand that I am laboring at a great disadvantage especially in not knowing the contents of the

Eckardt V. Eskesen. Called by Plaintiff. Cross.

so-called original contract so that I cannot rule intelligently upon whether or not he was a party.

Mr. Gilmore: The new contract, your Honor, is addressed to the Goodman Warehouse Corporation, Longacre Construction Company agents.

The Court: I sustain the objection so far as the question brings in this so-called original contract. 10

Mr. Melniker: Exception.

Q. The only agreement to which your company was a party in which the Longacre Construction Company had anything to do was the agreement of August 4th between you and the Goodman Warehouse Company and the Longacre Company, isn't that so? 20

Mr. Gilmore: I object to the question.

The Court: Sustain the objection.

Mr. Melniker: Exception.

Q. Now, you testified that you delivered these ten replacement pieces as soon as possible after they were designated, is that right? A. Yes.

Q. Now, they were designated on April 13th, weren't they? A. Yes. 30

Q. And delivered December 4th? A. Yes.

Q. And you say that that delivery was made as soon as possible after the designation? A. Yes.

Q. Practically seven months, isn't it? A. Yes.

Q. Now you agreed to deliver all of this stuff within eight weeks after the contract was made, didn't you?

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Mr. Gilmore: I object; there is nothing that appears in the contract to be delivered in eight weeks.

The Court: It will be admitted, not for the purpose of varying this contract in any way but merely for the purpose of effecting his credibility and the jury will so regard it.

10

Q. Didn't you agree to deliver this entire job to the defendant not later than eight weeks after the approval by the architect of your shop drawing?

A. I don't remember.

Mr. Gilmore: I object and I assume your Honor is going to overrule it.

The Court: That has been asked and answered.

20

Q. Is your answer, "I don't remember"? A. Yes, sir.

Q. I show you this paper and ask you if this will refresh your recollection? A. I don't remember.

Q. Do you know what this paper is? A. It is a contract.

Q. A contract between you and the Goodman Warehouse Corporation for this terra cotta? A. Yes.

30

Q. Now, read this part of it and tell us if that does not refresh your recollection as to whether or not you were to deliver this whole contract in eight weeks. A. We were to start delivery, according to this contract—I didn't sign this contract.

Q. Well, you are president of the company? A. Yes.

Q. And you know what the company does, or what its officers do, don't you? A. Most of it.

40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. You haven't got a lot of people running helter skelter around the plant, not knowing what they are doing? A. I don't know the details, I don't know everything. Apparently we agreed in this contract to start delivery in eight weeks after receipt of the drawings and all details.

Q. That means that if you were to start delivery within eight weeks after receiving the drawings, that means that you had the stuff finished within eight weeks? You could not deliver it without having it done? A. No, sir.

10

Mr. Gilmore: I object to the question. I didn't hear any testimony to the effect that there was an agreement to deliver anything in eight weeks.

Mr. Melniker: He just testified to that.

20

Q. You agreed to start deliveries within eight weeks after you received the approval by the architect of your drawings, isn't that correct?

Mr. Gilmore: I object on the ground it is entirely irrelevant and immaterial to this action what he agreed to do; some other contract which has been abrogated and nullified is not material to this action.

30

The Court: Except only as I have already indicated, if it would go to the question of whether or not this could have been done in a less time and the jury will so regard it. It is merely to show whether or not it was true that these materials were furnished as soon as possible under the contract which is in evidence.

40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. See if we understand each other and if the jury understand what we are talking about. You say your arrangements were with the defendant that you were to prepare the shop drawings—

Mr. Gilmore: I object to that.

10 The Court: Sustain the objection. The question is whether or not he could have delivered these materials sooner than he did. Now, if he agreed at any time to deliver the whole amount or he did deliver, as a matter of fact a certain amount within a certain time, all right, that may be shown; it is not necessary to go into the terms of the contract.

20 Mr. Melniker: Except to show the time within which he agreed to deliver this other material, eight weeks after. I want to make that perfectly clear. There may be some question as to when the eight weeks started.

The Court: It seems to me the thing you ought to show is within what time did he deliver this stuff.

30 Mr. Melniker: I think I have a right to go further than that. This man agreed to deliver certain stuff within eight weeks. I have a right to show that this was a reasonable time or he would not have agreed to do it.

Q. Now, your firm prepared the drawings, did they, from which this stuff was made up?

Mr. Gilmore: I object to that, I don't see that that has any bearing on this whatever.

(After argument.)

I will withdraw the objection.

40 A. Yes, sir.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. Then the drawings had to be approved by the architect? A. Yes, sir.

Q. And after the architect approved them then you went ahead and made them up, is that so? A. Went ahead and made the terra cotta.

Q. And as you say your firm agreed to make up this terra cotta and start delivery within eight weeks after the approval of the architect of your drawings, is that right? 10

Mr. Gilmore: I object on the same grounds as to what they agreed to. The question is whether or not his company delivered these ten pieces as soon as possible. Suppose he made an agreement at some other time ^{on} some other job to deliver a piece in one day or ten pieces in one day, that would not be evidential in this case. The way to get at that is to ask him how long it usually takes to make up this terra cotta and if it only takes eight weeks, why did it take longer in this case. It seems to me that is the proper way to get at it. 20

The Court: I will allow it. You may show that this man did at some other time furnish stuff within eight weeks under this contract and that he actually did do it.

Mr. Melniker: That is what my question was meant to be. 30

Q. Didn't you agree, on this very same job, to deliver this terra cotta that you were making up for these defendants within eight weeks after your drawings were approved?

Mr. Gilmore: I object on the same ground, incompetent, irrelevant and immaterial; the 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

letters speak for themselves as to what he agreed to do.

The Court: I will allow it for the purpose of affecting his credibility as to whether what he says was done as soon as possible is true. You may have an exception.

10 A. Apparently, yes.

Q. Well, in this particular case you had to make up the moulds, didn't you? A. Yes.

Q. How long did it take you to make up the moulds? A. That is hard to say, I cannot say.

Q. About how long? A. I could not tell that, first we had to get our models.

20 Mr. Gilmore: I object to this line of questioning.

The Court: He has answered.

Q. First you had to make up the models from the drawings? A. Yes, sir.

Q. Did you make the models of plaster and then make the moulds from those models? A. Yes.

Q. How long have you been in this business? A. About 34 years I guess.

30 Q. And you have a practical knowledge of it? A. Yes.

Q. Right from the ground up, is that right? A. Yes.

Q. How many weeks should it have taken reasonably to make up the moulds for a job like this? A. We were making them up week after week while we were going ahead. If I try to answer that I would be swearing falsely. It takes one day to make a mould and it may take ten days to make ten moulds.

40 There were more than 100 moulds on this job, so

Eckardt V. Eskesen. Called by Plaintiff. Cross.

that I could not tell you how long it takes to make a mould.

Q. Well, it usually takes one day to make a mould? A. To make one mould, yes; it might take three days to make a mould. It might take a week to make a mould.

Q. It only takes a day then to make a mould after you make the model, is that right? A. For one 10
mould, yes; of course it would not take more than one day for one mould.

Q. Well, you could make more than ten moulds at one time, couldn't you, in your plant? A. Oh, yes.

Q. How many could you make in your plant? A. We could make from 50 to 100 in one day.

Q. And the rest of the eight weeks you figured on to make up the material from the moulds, is that 20
right? A. I could not answer that.

Q. You agreed to make up this material and start delivering it within eight weeks? A. Start delivery, yes.

Q. Within eight weeks after your drawings were approved, is that right? A. Yes.

Q. And you say that you figured on taking anywhere from three days to one week to make the model and a day to make the mould? A. I never 30
said that.

Q. What did you say? A. I said I did not know how long it would take to make the models and moulds for this job.

Q. Now, you testified that you were a practical man and that you have been in this business 34 years? A. Yes.

Q. And I ask you now how long should you have reasonably taken to make up the moulds for this kind of work? A. I could not tell you that. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. Why not? A. Because there may be hundreds of moulds and it might take us all of the eight weeks to make all of the moulds.

Q. Didn't you start making deliveries on this job within eight weeks after the plans were approved?
A. Yes, we started first to make the moulds.

10 Mr. Gilmore: I object for the same reason, incompetent, irrelevant and immaterial.

The Court: Yes, apparently you are going quite afield now. Let me ask this question:

How long would it reasonably take to make up ten pieces such as you were required to furnish here, everything being equal and you went right at the work? How long would it reasonably take to do that?

20 The Witness: You mean ten models or ten moulds. We make a model first and then we make the moulds.

The Court: I don't care about moulds or models. I am talking about the completed article. How long would it take you to finish them, everything being ready at the plant, how long would it reasonably take you to make these ten pieces of terra cotta?

30 The Witness: We are making contracts right along, eight weeks, ten weeks, twelve weeks.

The Court: That was not the question. How long would it reasonably take to deliver them?

The Witness: About eight weeks.

Q. And that includes the making of moulds, doesn't it? A. Yes.

Q. From the drawings? A. Yes.

40 Q. Now, when you have the moulds and they are already in your plant, how long should it reasonably take? A. If we have no accident, eight weeks.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. You just testified you made them within eight weeks when you have to make up the mould and then make the terra cotta from the mould, I am asking you if you can do that in eight weeks, then how long should it reasonably take where you have the mould and do not have to make the moulds? A. (No answer.)

Q. Do you mean to testify that it takes you just as long to make up the pieces of terra cotta after the mould is ready as when you do not have the mould? A. About the same.

Q. In other words, you can make a mould in next to nothing. A. I didn't mean that, no.

Q. Then what do you mean? A. You have to send out and get the mould if you have not got that stored out in the yard; there are a good many thousand moulds stored and you have to send out and maybe have to have it repaired, send it to the shop in the regular way to find out if there are any repairs to make. It may have been out of the rain and been split and before it goes into the shop it is examined and that take a little time before you are ready to go ahead with the job. Sometimes it takes as long to make the repairs to the moulds as it would to do the original job so that it does not make much difference whether you have the mould or not.

Q. Well, in this case you had the moulds, the moulds for the ten pieces you had to replace? A. Evidently we had the moulds; they may have been destroyed for all I know.

Q. You had the moulds according to your letter and the pieces were designated on April 17th, were they not? A. May I answer that question?

Q. That is what I want you to do. A. We did not know whether we had the moulds because the pieces

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Eckardt V. Eskesen. Called by Plaintiff. Cross.

had not been designated. The moulds may have been destroyed by that time.

Q. I want you to refer to your letter of April 10th and ask you if that is your signature? A. That is my signature.

10 Q. Now this letter says: "We are in receipt of your letter of April 7th and notice, in regard to the ten pieces which we proposed to remake for you, that you will not be able to advise us at present as to what pieces you want replaced in your above mentioned building, but request that we let the matter stand for another week or two. We wish to say in regard to this that the work on this job has been completed for some time, but we have kept the moulds in case of any replacements. These moulds are now very much in our way, as we are getting
20 busy, and we would like to have same destroyed. We therefore cannot put this matter off much longer but must ask that you advise us in regard to the above mentioned ten pieces not later than one week from today." What does that indicate to you, that you had the moulds or didn't have them? A. We had all the moulds for the old job, yes.

Q. There is no doubt about your having the moulds? A. That does not mean that some of them were not spoiled or destroyed already.
30

Q. And you got the designation of these pieces on April 13th, I believe, didn't you? A. Somewhere in April.

Q. That is the letter isn't it, Exhibit P-9, April 13, designating them and the pieces were delivered some time in December, weren't they? A. Yes.

Q. Now, your plant was working during all that time, wasn't it? A. Yes.

40 Q. In good order? A. Yes.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. You were pretty busy, weren't you? A. I cannot remember. No, we have not been very busy for several years.

Q. You didn't have any trouble in your plant, did you? A. No.

Q. No strikes? A. No.

Q. Everything was running along as smoothly as usual? A. Yes. 10

Q. What do you mean by saying in this letter then that "these moulds are now very much in our way as we are getting busy?" A. Can I explain that?

Q. You just said you were not busy and have not been busy for years; now the letter says, "We are getting busy" what do you mean by that? A. These moulds comprise a big pile of moulds that are always in the way. We wanted to get rid of them as soon as possible. As soon as we have completed a job and delivered it to the building we want to destroy these moulds, that is what I meant, maybe I said I was busy so as to hurry them up and tell us what pieces we were going to remake. 20

Q. Now, after the exchange of these letters between you and the defendant and your letter of February 19th and their letter of March 8th, you continued to send out monthly statements on the balance due you on this job, didn't you? A. I don't remember. 30

Q. I show them to you and ask you if you recognize these papers? A. Yes, sir.

Q. Well, tell us what they are? A. They are regular routine statements, yes.

Q. Routine statements sent out from your office? A. Yes.

Mr. Melniker: I want to have these marked for identification. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

(Marked Exhibit D-2 and D-3 for identification.)

Q. I call your attention to the fact that these statements are made out to the Longacre Construction Company and I ask you why you sent those statements to the Longacre Construction Company?

10 A. They represented the Goodman Warehouse as agents.

Q. Well, the Longacre Construction Company did not owe you any money, did they? A. As agents for the Goodman Warehouse Company they did.

Q. Did the Longacre Construction Company owe you any money?

20 Mr. Gilmore: I object to the question whether the Longacre or the Standard Oil or the Public Service Company owed him the money; that has nothing to do with this case.

The Court: I think that is so; it is immaterial.

Q. Why then did you send the bill for this balance that you are now suing for, \$843. to somebody else.

30 Mr. Gilmore: I object to the question.
The Court: Sustain the objection.
(Recess until 2 P. M.)

AFTER RECESS.

40 Q. I show you this letter of February 19th, Exhibit P-1 and I refer you to your statement there, the second paragraph: "We will immediately on

Eckardt V. Eskesen. Called by Plaintiff. Cross.

receipt of this payment deliver to the above mentioned buildings the balance of the work now stored at our plant". Now, what was there stored at your plant at the time? A. There were a few pieces of terra cotta left which would complete the building.

Q. Complete what? A. Complete the delivery.

Q. What terra cotta was this that you had at your plant? A. It was for the tower of the building. 10

Q. How did you to make it up? A. They had already been made according to the plans of the architect.

Q. And this was terra cotta you had made up under the agreement of August 4th? A. Under our contract, under our original contract.

Q. Under your original contract of August 4th, 1922? A. Yes, I guess that is the date. 20

The Court: How many pieces were there.

The Witness: Around 60.

Q. So that in this letter referring to the balance of the work stored at your plant, you referred to about 60 pieces that had already been made by you under the original agreement of August 4th, 1922? A. Under the original agreement, yes.

Q. Now, had you delivered the other part of this terra cotta under that agreement? A. Yes. 30

Q. When had you done that?

Mr. Gilmore: I object, immaterial whether it has been delivered or not under the old contract.

The Court: According to the view the court takes of this it is immaterial unless it is for some other purpose— 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Mr. Melniker: I submit it on the same theory as the other, to show the actual time it took to make up and deliver the terra cotta under this agreement.

The Court: I will allow it merely for the purposes of showing the time.

10 (Addressing witness.)

How many pieces were there in all?

The Witness: About 1,000, as near as I can remember. We do not go by the number of pieces—

Mr. Gilmore: You go by weight?

The Witness: Yes.

Q. You say there were about 1,000 pieces? A. As far as I recollect, yes.

20

The Court: The purport of the question is when did you finish them all except the 60 pieces?

The Witness: On various dates.

Q. Well, when did you commence delivering and when did you complete delivery? A. I don't know the date.

30 Q. Don't you know about when? A. No.

Q. Would your records show? A. Yes.

Q. Have you the records here? A. Yes.

Q. Have you the delivery slips?

Mr. Gilmore: We have them.

Mr. Melniker: Produce them please.

Mr. Gilmore: I object to their use on the ground that they are immaterial, under the old contract.

40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

The Court: So far as the delivery slips themselves are concerned, if it is for the purpose of fixing a date between which he started to manufacture and finish manufacturing, they might be admissable, in line with the other testimony offered, on the credibility of this witness's testimony.

(Addressing Witness): Can you refer to those and tell us when you started and when you finished? 10

The Witness: Yes. We started delivery the 14th day of December, 1922, and as far as I can see from these records the last delivery previous to the 60 pieces was February 8th, 1923.

Q. So that between December 1922 and February 8th, 1923, you delivered all but 60 pieces under the original agreement, is that correct? A. Yes. 20

Q. And when were your shop plans approved by the architect? A. I don't know.

Q. Have you your records here to show that? A. Yes, I think we have the records, I don't know these details.

Q. Will you refer to your records and give us the date of the approval? 30

Mr. Gilmore: Haven't you the working drawings, Mr. Melniker, and don't they show it?

Q. Can you tell by looking at these drawings when they were approved or tell us when you were advised of their approval?

Mr. Gilmore: I object to that on the same ground, that it is immaterial. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

The Court: I am merely allowing it as I said, for the purpose of affecting the credibility of the witness and merely to show the two dates, the beginning and the end.

10 The Witness: I don't know if I am capable of answering that exactly. It says here, "Received December 12, 1922." The signature seems to show that the drawings were received at the factory on that date, December 12, 1922. That is the first drawings going with Section A-A.

Q. If you wish to consult any other records I have no objection to it. A. Other people can answer better than I can on these details.

20 Q. Do you think Mr. Mathieson can tell us? A. Probably.

Q. You say that they were received December 12th, 1922, that means received in your shop.

The Witness: Evidently—

Mr. Gilmore: Do you know what it means?

The Witness: No, sir.

30 The Court: Did you have any more work in hand going through at that time from December on to February when you were doing the biggest part of this work than you had from April on when you were furnishing the ten pieces, or was it about the same?

The Witness: Well, in the springtime we always naturally are busier, but when it comes towards spring the building trade improves and we always get busier.

The Court: Well, did you have more work at the time or not?

Eckardt V. Eskesen. Called by Plaintiff. Cross.

The Witness: I think we had. I cannot remember, it is three years back, but we always expect to have other work on hand coming in to us in the spring time.

Q. And that runs until when? A. All summer; summer is the business season, from spring on.

Q. Do you know whose writing this is on here? 10

A. No.

Q. Now, have you any records here which would show when the architect approved your shop drawings.

Mr. Gilmore: I don't believe he knows.

The Witness: I should think Mr. Mathieson, our secretary, would have that.

Q. Well, the shop drawings were made up in your plant? A. Yes. 20

Q. And they were forwarded to the architect of this job? A. Yes.

Q. And you had to wait for the Architect to approve them and send them back to you? A. Yes.

Q. Have you any record which shows when they were sent by you to be approved and when they were returned to you by the architect, approved? A. Yes, we kept records of all those things. 30

Q. Will you step down here and see if you can give us those dates?

The Court: What difference does that make? The question is how long did it take him to make them? The question is when did he start to do the work.

Mr. Melniker: I am willing to have it put that way. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

The Court: Have you something there which would show when you started work?

Mr. Mathieson: We submitted on August 16th, drawings and pencil memorandum which was received back on September 12th.

Mr. Melniker: Does your records show when you commenced work on this job?

10

Mr. Mathieson: Yes. We received the drawings on August 2nd and we commenced work immediately and while the drawings were away we were doing what preliminary work we could do.

The Court: This witness is not under oath.

Q. Now, what do your records show as to the time you forwarded the drawings for approval? A.

20 The letter here shows we submitted the first drawings on August the 16th.

Q. And when were they returned? A. According to the notice they were returned to us the 12th of September the same year.

Q. With approval or without approval? A. That I don't know.

Q. Isn't it a fact that it was first returned without approval? A. There may have been corrections.

30

Q. When were they finally returned approved?

A. I would have to go through the whole thing.

Q. You have a very efficient secretary?

The Court: Then we will get that from the secretary later on.

Q. Can't you tell us when work was actually started on this job? A. No, except we always started

40 right away.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. You started as soon as you knew what to start on? A. Yes.

Q. That would be after approval? A. After everything has been approved and all corrections made, and so forth.

Q. Isn't it a fact that after the exchange of these letters, February 19th and March 8th which you consider a new contract, that you made a request on the Longacre Construction Company for payment on this sum of \$842 which you are suing for now? A. After the ten pieces had been delivered, yes. 10

Q. After the ten pieces had been delivered? A. Yes.

Q. I show you a statement dated May 1st, 1923, to the Longacre Construction Company on your bill-head. You sent that statement, didn't you? A. Yes. 20

Q. And that is a statement to the Longacre Construction Company? A. Yes, sir.

Q. And that is dated May 1st, 1923? A. Yes.

Q. And that is five or six months before you delivered the ten pieces, isn't it? A. The bookkeeper is supposed to send out statements for everything shown on the books.

Mr. Melniker: I ask that this be marked for identification. 30

(Marked Exhibit D-4.)

Q. This statement Exhibit D-3 for identification is a statement which your company sent to the Longacre Construction Company? A. Yes, sir.

Q. And that was before the delivery of the ten pieces, wasn't it? A. Yes.

Q. I show you another one dated December 1st, 1923, also to the Longacre Construction Company; 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

that was also sent to them before delivery of the ten pieces, wasn't it? A. Yes.

10 Q. Now then this letter of yours of February 19th which you claim was a supplemental contract contains this statement: "The above mentioned balance, 15% or \$843.75 shall be paid us ten days after the above named replacement has been furnished by us at the building." If this agreement called for payment ten days after replacements were made, which was on December 4th, why did you keep on billing the Longacre Construction Company during the whole intervening period for this balance? A. Because our bookkeepers have orders to send out statements on everything shown on our books.

Q. And your books showed a balance of \$843.75? A. Yes, sir.

20 Q. Which was due on the old contract? A. Which was still due us from the Goodman Warehouse Company.

Q. Under the old contract?

Mr. Gilmore: I object to that.

A. Under the new agreement.

30 Q. But your new agreement didn't call for payment until ten days after replacements were made and the replacements were not made until December 4th; why then were you claiming a balance of \$843 in May and all the rest of the time up to December? A. Our books show the balance.

Q. And that balance was the balance under the old agreement, wasn't it?

Mr. Gilmore: Do you know?

40 The Witness: These statements are subsequent to these two agreements.

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Q. There was nothing due you under the new agreement until ten days after December 4th. A. There was a balance on our books.

Q. A balance of what? A. The balance on our books.

Q. Under this so-called new agreement there was nothing due you until ten days after December 4th. A. The bookkeeper did not know that. 10

Q. Didn't you tell him? A. No, the bookkeeper would send out a statement for everything on the books.

Q. Then your books showed a balance due? A. Yes.

Q. A balance due December 14th, 1923, of \$843, is that so? A. Yes.

Q. It showed it in May, 1923, didn't it? A. It did, yes. 20

Q. And that is the balance you are suing for today, isn't it? A. Yes.

Q. Now, on February 19th, the day on which you wrote and sent this letter marked Exhibit P-1 which you claim was a new agreement, you also included in that the statement marked Exhibit P-2, is that so? A. Yes.

Q. And in that statement you say "T. C. Contract, that is terra contract, \$6,875," is that so? A. Yes. 30

Q. And you say on there 15% retained, \$843.75, is that so? A. Yes.

Q. That is the amount you are suing for now? A. Yes.

Q. And you show that balance as being due then on February 19th, 1923, didn't you, according to this statement? A. That was attached to this statement. 40

Eckardt V. Eskesen. Called by Plaintiff. Cross.

Mr. Gilmore: The paper speaks for itself, I think.

Q. Your books showed a balance due you then of \$843.75, is that so? A. Which would not be due us if the contract was carried out, if we were paid this here.

10 Q. You carried this balance on your books from February 19th right straight up to the present time?

A. No. We had not credited Goodman until we received the check. We did not credit him for \$1250.

Q. After you received the check of March 15th, then your account showed a balance due of \$843.75?

A. After we received the check.

Q. That was on March 15th and you have carried this balance on your books against the Goodman Warehouse Company ever since? A. We credited them with \$1250 and they have a balance left of \$843.75.

Q. And you billed them for that balance on the first of every month, didn't you? A. We sent them a monthly statement.

Q. And you sent a statement to the Longacre Construction Company every month? A. Yes.

Q. Why did you send those statements to the Longacre Construction Company? A. That was the routine business of our bookkeeper. It was his duty to send out statements on the first of every month for all open accounts.

Q. Well, you had a new agreement with the Goodman Warehouse Company, hadn't you, by these two letters? A. Yes.

Q. That is your claim, isn't it? A. Yes.

Q. And in this letter of the Goodman Company, March 8th, which you claim to be an acceptance of

Eckardt V. Eskesen. Called by Plaintiff. Cross.

your proposition, there is nothing about the Longacre Construction Company in that, is there? A. Mr. Eilinberger was mentioned there.

Q. But that paper is not signed by the Longacre Construction Company? A. No.

Q. And they never accepted your proposal of February 19th, as far as you know?

10

Mr. Gilmore: I object, the letters speak for themselves.

The Court: Sustain the objection.

Mr. Melniker: Exception.

Q. This letter of March 8th, signed by the Goodman Warehouse Corporation says that upon receipt of this certificate (referring to the architect's certificate), we will present to Mr. Harry Eilinberger, of the Longacre Engineering and Construction Company, an order upon the American Bond and Mortgage Company for payment of the same." Now, there is nothing in your letter about Mr. Eilinberger or the Longacre Construction Company, is there?

20

Mr. Gilmore: I object to that, the letter speaks for itself. It is addressed to the Goodman Warehouse Corporation, Longacre Engineering and Construction Company, agents.

30

The Court: It refers to it in the first paragraph very expressly.

Q. This letter of the Goodman Warehouse Corporation, March 8th, says: "We understand that the architect is preparing a certificate showing the amount due you on your contract after deducting the sum of \$1250 herein mentioned, and the retainer of 15%. Upon receipt of this certificate, we will

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Eckardt V. Eskesen. Called by Plaintiff. Cross.

present to Mr. Harry Eilinberger, of the Longacre Construction Company, an order upon the American Bond and Mortgage Company for payment of the same." In your letter of February 19th you do not say anything about being paid upon receipt of the certificate, do you?

10 Mr. Gilmore: I object, the letter speaks for itself.

 The Court: Sustain the objection.

 Mr. Melniker: Exception.

 Q. Your letter said that you would deliver the balance of the material upon payment of the balance due you, didn't it? A. Yes.

20 Q. And Goodman's letter said that they would pay you the balance upon delivery of the material, isn't that so? A. Yes, all right.

 Q. Now, as a matter of fact, what was done? Was the payment made before the goods were delivered or were the goods delivered before the payment was made? A. Simultaneously.

 Q. How do you know that? A. Because that was my order. My order was to the men that we sent with the truck to get the check.

 Q. Those were your orders? A. Yes, sir.

30 Q. But you do not know if they were carried out or not? A. I was not there.

 Q. So that you do not know if they were simultaneous or not. A. That was my order and I sat in the office waiting for this check to come back to be sure that the goods were not delivered without getting the money.

 Q. All you know is that you ordered it? A. I know we got the money.

40

Eckardt V. Eskesen. Called by Plaintiff. Redirect.

Q. The same day that the goods were sent? A. The same day.

Q. All you know is that the truck left your place with the material and some time after that somebody came back with a check, is that so? A. Yes.

Q. You do not know what happened when the goods got down here? A. Well, I sent two men there— 10

Q. I am asking you whether you know what happened? A. I was not there myself.

Mr. Melniker: That is all.

REDIRECT EXAMINATION BY MR. GILMORE:

Q. I think you said that sometimes terra cotta could be made in eight weeks? A. Yes. 20

Q. Why is it that it took more than eight weeks to make these replacement pieces, these ten replacement pieces? A. I don't know the reason myself, but it took that long. We had all we could do, in getting them out as soon as possible after we received the designation.

Q. After you received the letter designated the pieces wanted— A. We had to make them all over again, we tried to make nearly perfect pieces. 30

The Court: You had to make them over?

The Witness: Yes, we had to make them over again.

The Court: How many times?

The Witness: I don't know, but I know I went to the factory many times and asked if those ten pieces were ready. We wanted to get through with this. There was always something wrong and we had to do over the ten 40

Eckardt V. Eskesen. Called by Plaintiff. Redirect.

pieces before they were nearly perfect as terra cotta can be made. Working terra cotta is one of the most difficult things to work.

The Court: Tell the jury why it is difficult.

The Witness: There are a hundred things that can happen from the time we start on a job until we finish it.

10

The Court: What was the process, what do you have to go through?

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The Witness: We make plaster models out of clay. The body is clay, shaped by hand, big pieces and small pieces and all sizes, then we have to dry it very slowly. It takes several days to dry. After it dries and the moulds are made, and we have to be very careful with them that they do not crack, the moulds with the terra cotta mixture is put in the kilns. In this case they were ordered with a white glaze and that process has to be done with great care. It takes four days in the kiln. In this case they came out with little pin holes. They would not take them over on the job, we had trouble with them already with that. That you cannot help. In handling them, in taking them out of the kiln, the men may just touch the edges and the edge comes off because they are very brittle.

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If they can be set in the building right they will last a thousand years, because the elements cannot get through the glazed surface, but it is very brittle and in this case we had all kinds of trouble. Something happened from the very beginning and we never seemed to be able to end it up. The same thing happened with these ten pieces. As I said before, I guess we got nervous about this job, because we wanted to

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William H. Griswold. Called by Plaintiff. Direct.

get the ten pieces out as soon as we could possibly get them out.

Q. Do you know of your own knowledge whether any of the ten moulds had to be remade? A. I don't know.

Q. These moulds were stored out in the yard? A. As soon as we finish a job we carry the moulds outside to get ready for the next job. 10

Q. Until you received the letter designating the ten pieces were the moulds for this job stored in the yards or inside in the factory? A. I suppose they were outside in the field.

Mr. Melniker: I object to that.

The Court: Yes, strike it out.

Q. Do you know whether they were out in the yard or in the factory? A. I could not answer that. 20

Q. Do you know of your own knowledge whether any of the moulds for these ten replacement pieces which they selected had to be remade? A. I do not recall.

Mr. Gilmore: That is all.

30

WILLIAM H. GRISWOLD, sworn.

DIRECT EXAMINATION BY MR. GILMORE:

Q. What is your business? A. Lumber business at the present time, manager of a lumber yard.

Q. What company are you working with? A. Kraus and Hanboy. 40

William H. Griswold. Called by Plaintiff. Direct.

Q. During the years 1922 and 1923 and part of 1924 were you with the plaintiff company, the New Jersey Terra Cotta Company? A. Yes.

Q. In their employ? A. Yes.

Q. When did you sever your connection with that company? A. July 3rd, 1924.

10 Q. What was your position with the plaintiff company 1922, 1923, 1924? A. Superintendent of the plant.

Q. At Perth Amboy? A. Yes.

Q. Were you familiar with the ten replacement pieces that were made up in accordance with the defendant's letter of April 13, 1923? A. Yes.

Q. Were those pieces made under your supervision? A. They were.

20 Q. What have you to say as to whether they were made and delivered as soon as possible? A. They were made as soon as possible.

The Court: And delivered as soon as possible?

The Witness: Delivered when called for.

Q. Mr. Eskeson testified that sometimes terra cotta can be made in eight weeks, is that so? A. Some terra cotta can be made in eight weeks.

30 Q. Could these ten pieces which are mentioned in the defendant's letter of April 13th be made in eight weeks? A. It is possible, but we could not do it and make it as required.

Q. Why was it that it took you from April until November 28th to make up these ten pieces? A. Because the Goodman Warehouse Corporation were very exacting in their requirements, more so than is customary in the trade, and our orders were to make

William H. Griswold. Called by Plaintiff. Direct.

these pieces up as nearly perfect as possible before we sent them out.

Q. At the time those ten pieces were ordered by the defendant were the moulds in the factory or stored out in the field? A. Stored out in the field; we have several acres of ground there.

Q. Do you know whether any of the moulds for these ten replacement pieces ordered by the defendant had to be remade or not? A. I know that they had to be repaired, yes. 10

Q. What was the matter with them? A. These are plaster casts with iron bracing inside. They had stood out there, these were some of the first moulds used on the job, very large and they had stood out through the winter, freezing and thawing and plaster moulds will not stand that for any great length of time. Some were out of shape and we had to make new sides or new faces. 20

Q. How long had you been in the employ of the plaintiff company? A. 25 years.

Q. And in your experience with terra cotta would you consider that those ten pieces were made and delivered as soon as possible? A. I do.

Q. Did you inspect them after they were made up? A. I did.

Q. And what was their condition? A. First class. 30

Q. I show you Exhibit P-¹³~~4~~, consisting of two sheets which are the delivery receipts for material delivered on that date. Was that the balance of the material other than the ten replacement pieces which were stored at the plant? A. Yes.

Q. Did you see the material on those two slips? A. I did.

Q. What was the condition of that material? A. First class. 40

William H. Griswold. Called by Plaintiff. Cross.

Q. And reasonably fit for the purpose for which it was to be used? A. Yes.

Q. And that applied to the ten replacement pieces? A. It does.

Mr. Gilmore: That is all.

10 CROSS EXAMINATION BY MR. MELNIKER:

Q. Were you the superintendent of this plant during the entire time involved in this order? A. Yes.

Q. You were there when this stuff was first made up and delivered? A. Yes.

Q. And how long did it take from the time you started work on the terra cotta until you made your first delivery? A. I have been away from there now
20 some time and I would not like to state the exact date. I think the records are here.

Q. Do you know how many pieces were in the whole job? A. I cannot recall at this time.

Q. Would it refresh your recollection if I tell you there were about 1600? A. I don't know if you are right or wrong.

Q. Was it about that?

30 Mr. Gilmore: 1742.

Q. Look at this card; will that refresh your recollection? A. Not very much; this is a card carried in our New York office and we have a progress record at the plant.

Q. Look at this paper and see if that will help you answer the question, approximately how many pieces were there? A. The pieces are stated here,
40 but I don't see that there is any total, it is a matter of computation.

William H. Griswold. Called by Plaintiff. Cross.

Mr. Gilmore: We are perfectly willing to admit that there were approximately 1700 pieces.

Mr. Melniker: It is admitted on the record that there were approximately 1700 pieces.

Q. Now Mr. Griswold, December 14th was the first delivery; how long prior to that was work commenced on this order? 10

Mr. Gilmore: I object to this line of questions. This is all in connection with the original contract.

The Court: I will allow it only for the purpose of testing his credibility.

A. Work was started on this contract as soon as working drawings were furnished to us by the architect. 20

Q. When was that? A. You will have to excuse me for not answering that. I have not been with the company since July 3rd, 1924, and I have not been over their records and I don't see why I should be questioned as to dates that are a matter of record. I suppose the records are here.

The Court: Just say you do not know. 30

Q. You have testified here that these ten pieces were made up as rapidly as it was possible to have them made, didn't you? A. Yes.

Q. And you have a distinct recollection about all that? A. I have.

Q. Now, about the Goodman Company being very exacting in their requirements, you remember all that, do you? A. I do. 40

William H. Griswold. Called by Plaintiff. Cross.

Q. But you do not remember when you started work, you do not remember about how long before you started to deliver this terra cotta that you commenced work on it? A. A question about general conditions regarding a job like that and your other question are two different things.

10 Q. Then you are testifying as to general conditions? A. What I testified was very plainly on the record.

Q. Well, were you testifying as to general conditions or specific recollection? A. The requirements of the Goodman Company is a general condition.

Q. How about making up these ten pieces as soon as possible were you testifying to general conditions when you testified about that? A. From my recollection.

20 Q. That is your recollection is it? A. Yes.

Q. But your recollection fails you when it comes to telling this jury how long before you started to deliver this order you commenced working on it? A. I would have to refer to the records; they will show that.

Q. Can you tell us approximately how long before you commenced deliveries you started working on this job? A. I would say we started September.

30 Q. You started work in September, then October, November and December, December 14th you commenced delivery of these 1700 pieces, is that it? A. That is about right.

Q. In other words within three months after you started work, is that so? A. Yes.

Q. And in that time you had to make up the models and you had to make up the moulds? A. Yes.

40 Q. Now you say that after having made up the models and the moulds and having the moulds at

William H. Griswold. Called by Plaintiff. Cross.

the plant it took you seven months to make up ten pieces, and that was done as soon as possible, is that right? A. Yes, would you like me to tell you why?

Q. Didn't you tell us why? A. I haven't told you the details.

Q. Well, tell us the details. A. The terra cotta business is a peculiar business, and there are many elements which enter into it. These moulds were in the field and they were not in shape to be used when they were taken into the shop for this replacement work. 10

Q. What had to be done with them? A. They had to be repaired.

Q. How long did that take? A. Well, it does not take so very long, that is the—

Q. How long? A. Let us say a week.

Q. About the same time it would take to make a new one, is that right? A. You cannot figure that way. 20

Q. I am talking about these moulds for the ten replacement pieces? A. The moulds for these ten pieces were very difficult, in fact the record will show that the architect held that up somewhat.

Q. Will you tell us this: did it take longer to repair the old moulds than it would take to make new ones? A. It didn't take longer; we would have made new ones if it was necessary. 30

Q. About the same time? A. Yes.

Q. So then having the moulds in your possession and having put them in good shape, good order, within a week you were prepared to go ahead and make the terra cotta? A. Yes.

Q. Then you say it took practically seven months to make these ten pieces of terra cotta? A. I say they were made as soon as possible. 40

William H. Griswold. Called by Plaintiff. Cross.

Q. How long did it take you to make them? A. A letter was written them advising them that the pieces of terra cotta were ready for delivery.

Q. November 28th, is that right? A. If that is the date of the letter.

10 Q. Your testimony now is that it took from approximately April 13th to November 28th to make these ten pieces of terra cotta? A. Yes.

Q. And that was "as soon as possible" is that so? A. Yes.

Q. Do your records show when the ten pieces were completed? A. Our records show when the replacement order went out and when it came through.

20 Q. Therefore it will show when you commenced work on the ten pieces? A. Yes, there are records which are in existence and which will show.

Q. Now, you have progress cards showing when work was commenced on these ten pieces and when work was completed on the ten pieces, is that correct? A. Yes. But in making terra cotta it is not always possible to get perfect pieces out of the kiln. Very often pieces show defects and they have to be thrown away.

30 Q. In this case none of those ten pieces had been rejected by the Goodman Company? A. Their representative ordered these pieces replaced.

Q. But after they ordered the replacement did they ever object to any of these ten pieces? A. No, sir, they apparently never took any interest in them.

Q. They never saw them, did they? A. I don't know.

40 Q. Then it was not because the Goodman Company rejected them that they had to be done over again? A. No.

William H. Griswold. Called by Plaintiff. Cross.

Q. You have testified that conditions arose which made it necessary for you to make them over again; did they ever reject one of these ten pieces? A. Of course not; we rejected them ourselves.

Q. How long would it take to make one of these pieces complete in case you did not have to do them over again? A. Well, it possibly might take eight weeks.

10

Q. What is the process that takes eight weeks?

A. That was just explained a few minutes ago.

Q. Will you be good enough to tell us the process?

A. The process of making terra cotta?

Q. Yes. A. After the mould is ready it is turned over to the presser. There is a mixture of clay which has to be right for the purpose and that is placed into the mould. It is then allowed to dry—

Q. How long does that take? A. According to the size of the piece.

20

Q. Pieces of this size. A. I would say probably three weeks.

Q. It takes three weeks to dry? A. Yes, under the conditions, because we were working under abnormal conditions.

Q. What do you mean by abnormal conditions?

A. Because the Goodman Company wanted something better than standard in the business.

30

Q. They wanted something more than was required in the contract? A. They did.

Q. Why did you undertake to make more than what was called for in the specifications under the contract? Do you mean to testify now that your company was delivering more than what the contract called for? A. No.

Q. You were just delivering what the contract called for? A. Not under standard conditions.

40

William H. Griswold. Called by Plaintiff. Cross.

Q. If you were not delivering anything more than what was called for in the contract, what was there abnormal about that? A. Because they required more than was ordinarily required.

10 Q. Did you ever hear from them from the time you got the letter of April 13th designating the ten pieces? A. So far as I know they never asked about them.

Q. Then why do you say they required more than they were entitled to if you never heard from them? A. From our experience with them.

Q. That was something you imagined they were going to require? A. Maybe I did. I think the company deducted ten or twelve hundred dollars—

20 Q. When you did not have to make these pieces over again, what was the fair and reasonable time for making up one of these ten pieces? A. I should not like to answer that broadly. The difference in terra cotta is so marked between one type of pieces and another that the time varies greatly.

Q. I am talking about these particular ten pieces. I mean not being obliged to make them over again, what would be a fair and reasonable time to make one of those ten pieces? A. As I stated a little while ago, possibly eight weeks.

30 Q. It would not take eight weeks if each step went along without any trouble? A. That is what I say, these are special pieces.

Q. Did you have to make any of those pieces over again? A. We did.

Q. How many of them? A. I would say we made at least 50 per cent of them over again two or three times.

40 Q. You made at least one of them over at least three times? A. No doubt of it.

William H. Griswold. Called by Plaintiff. Cross.

Q. And your records will show that? A. Well, I don't know that they will be very clear on that.

Q. Would your records show the progress of the work? A. It would show if something happened to it in the course of its progress.

Q. You say you had these moulds out in the field? A. Yes.

Q. How far away from the plant? A. We have about two and one half acres running out from the plant and the moulds piled up three and four high. 10

Q. Do you know how far away in the fields they were in the plant? A. No, sir, I do not.

Q. When you put them out in the field you put them there to get them out of the way? A. We have to in order to make room for the work inside.

Q. And that is what you did with these after you finished the job; you put them out of the field to get them out of the way? A. Yes. 20

Q. Then you say you had to go out looking for them? A. Yes.

Q. If that is so, will you please explain this statement in the New Jersey Terra Cotta Company's letter to the Goodman Warehouse of April 10th: "We wish to say in regard to this that the work on this job has been completed for some time, but we have kept the moulds in case of any replacements. These moulds are now very much in our way, as we are getting busy, and we would like to have same destroyed. We therefore cannot put this matter off much longer but must ask that you advise us in regard to the above mentioned ten pieces not later than one week from today." A. They have a big business there, they have a plant and room to do the work. The field is there put the mould in and we were always pressed for room in this field to place 30 40

Eckardt V. Eskesen. Recalled. Direct.

new moulds coming through from the shop. I was constantly at our New York office for permission to destroy moulds and get them out of the way.

Q. You say these were in your way for a long time? A. I don't know that I said a long time.

10 Q. And you kept writing to the New York office to make some arrangements— A. I am not talking particularly about the Goodman moulds, I am talking in general. We had the work and we had to keep them moving.

Q. Then what you have been testifying to has no application to the Goodman moulds, this was just your general practice? A. You have asked me to explain something in Mr. Eskeson's letter, which I have attempted to do.

20 Q. I asked you to reconcile the statement he made with the statement you just made that you put them out in the field to get them out of the way. A. We take the moulds of the shop as soon as we can, to get them out of the way of the workmen in the shop and naturally we have to get them away from there, get the ground cleared so that we can put other moulds coming out of the shop there. It seems to me that is plain enough.

30 Mr. Melniker: That is all.

ECKARDT V. ESKESON, recalled:

DIRECT EXAMINATION BY MR. GILMORE:

Q. I want to ask you whether or not the defendant has ever paid you the \$843.75? A. No.

40 Q. That is the amount you are now suing for? A. Yes, sir.

Eckardt V. Eskesen. Recalled. Cross.

Mr. Gilmore: I want to offer in evidence certified check on the American Bond and Mortgage Company, certified March 15, 1923, being dated March 14, 1923, payable to the New Jersey Terra Cotta Company for exactly \$4781.25 signed American Bond and Mortgage Company by C. C. Moore, and which appears to have through the bank, as it has the bank paid mark on it. 10

(Marked Exhibit P-15.)

Q. Your company received that check on March 14, 1923? A. Yes.

Mr. Gilmore: That is all.

CROSS EXAMINATION BY MR. MELNIKER:

20

Q. Referring to Exhibit P-1, this letter signed by you, February 19, 1923, at the time you wrote this letter had you inspected the material already delivered? A. Yes.

Q. You had inspected it? A. Yes.

Q. What were the defects in the material at the time you saw?

Mr. Gilmore: I object to that; it would not make any difference what they were. 30

The Court: What is the purpose?

Mr. Melniker: I want to show that the defects we are now complaining about were not the defects which were in the material at the time this letter was written. In his opening counsel made a statement about what the defects were and I want to show by this witness that they were not the defects at all. 40

John L. Windas. Called by Defendant. Direct.

The Court: I sustain the objection.

Mr. Melniker: Exception.

Mr. Gilmore: The plaintiff rests.

DEFENSE.

10

JOHN L. WINDAS, sworn:

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Where do you live? A. Maplewood, New Jersey.

Q. What is your occupation? A. Mason foreman, mason superintendent.

20 Q. Were you employed in the erection of the building for the Goodman Warehouse Corporation on Bergen Avenue? A. Yes, sir.

Q. Were you there throughout the entire course of construction? A. Yes, the entire course of construction of the masonry work.

Q. And that included the terra cotta? A. Yes, sir.

Q. Were you a foreman on that job? A. Yes, sir.

30 Q. And when did you get through there? A. Oh, it was the latter part of July, near August, 1923, I don't recall now just the exact date.

Q. And do you know about the ten pieces of defective terra cotta that were to be replaced in that building? A. Yes, sir.

Q. Did you help designate the ten pieces which were to be replaced, did you pick them out? A. Yes.

40 Q. And up to the time you finished work had they been delivered on the job? A. No, sir, not up to the time I left.

John L. Windas. Called by Defendant. Direct.

Q. If they had been delivered before you left were you going to place them? A. The orders I had was to replace it if they came before I left there.

Q. At what cost? A. There was no cost if they came before the men left the job.

Q. What would it cost to replace them now?

Mr. Gilmore: I object. He has not proved 10
that this man knows anything about the cost,
he was simply superintendent for some mason
on the job.

Q. How long have you been engaged in this business? A. Close on to 25 or 26 years.

Q. Have you done many jobs like this? A. I have.

Q. Do you know the cost of setting terra cotta? 20
A. I do.

Q. Do you know what wages are for that kind of work? A. Well, I know that we paid the prevailing rate of wages.

Q. Do you know what the prevailing wages are? A. Yes, sir, today.

Q. And do you know what they were at that time? A. I do.

Q. What would have been the cost of replacing this terra cotta in December, 1923, when the terra cotta was delivered? A. I would have cost us then with the men on the job in the neighborhood of a couple of hundred dollars. 30

Q. Now, this stuff was delivered in December; what would have been a fair or reasonable cost of replacement in December after this stuff was delivered there? A. I had to make an estimate to cut the old material out; I would do it on time and material. 40

John L. Windas. Called by Defendant. Direct.

The Court: What would be the cost.

The Witness: It would to around \$600 plus your percentage for overhead.

Q. How much would that be? A. It would run you between eight and nine hundred dollars.

10 Q. It would cost between eight and nine hundred dollars to cut out these ten pieces and replace them?

A. Yes.

Q. And that is a fair and reasonable charge? A. It would be for the risk you take in damaging the other pieces.

Q. And you say six hundred dollars of that would be actual labor cost? A. Actual.

20 Q. And the balance would represent the overhead and profit? A. Overhead and profit, and the scaffold that you have to take down.

Q. That was your understanding, that if the terra cotta was delivered on the job before the men left it would not cost anything to replace? A. We were to replace it.

Q. Without charge? A. It was to be put in without charge.

Q. Would you do it after you left the job without charge? A. No, I would not care to.

30 Q. When the stuff was delivered there would you have been willing to do it without charge? A. No, sir.

Q. Or now? A. No, sir.

Q. Or any time since December? A. No.

Q. You would want, you say, approximately \$800 for doing that work? A. At least that.

Q. Now, how many years have you been fitting ornamental terra cotta like that? A. I should judge about 16 or 17 years.

John L. Windas. Called by Defendant. Direct.

Q. Have you placed any orders for terra cotta during that period? A. I have never placed the orders for it, no.

Q. Do you know when the orders for the terra cotta on this job were placed? A. No, only through the office telling us that the delivery of terra cotta would be on such a rate, that is all.

Q. In your experience of 16 years in setting terra cotta, how long has it usually taken to make up the terra cotta and deliver it on the job? 10

Mr. Gilmore: I object to the question; he has not qualified him as an expert on terra cotta.

The Court: Sustain the objection.

Q. Did you examine this terra cotta delivered by the plaintiff in this case? A. Every piece was examined as it came off the truck. 20

Q. Did you examine it again before you left the job?

Mr. Gilmore: Which terra cotta do you refer to?

Q. All of it.

Mr. Gilmore: I object to the question. 30

The Court: Sustain the objection.

Mr. Melniker: Exception.

Q. Did you examine this terra cotta within a year after it had been set by you?

Mr. Gilmore: I object.

The Court: Referring now to all of it?

Mr. Melniker: Yes.

John L. Windas. Called by Defendant. Cross.

The Court: Sustain the objection.

Mr. Melniker: Exception.

Q. Can you tell us whether or not this terra cotta checks within a year after being installed?

Mr. Gilmore: I object to that.

10

The Court: Referring to all of it?

Mr. Melniker: Yes.

The Court: Sustain the objection.

Mr. Melniker: Exception.

CROSS EXAMINATION BY MR. GILMORE:

Q. I understood you to say that it would cost about eight or nine hundred dollars to install those ten pieces? A. Yes, sir.

20

Q. And that is what you would charge? A. Yes, sir.

Q. Why is it it would cost that much now while you were willing to do it for nothing before when you were on the job? A. That was the agreement that was made between Mr. Waters and Mr. Goodman, that if the terra cotta came there, it was to be put in free of charge. If I had to go there as a contractor to take the terra cotta out I could not do it for \$800.

30

Q. At that time, if this agreement had not been made to do it for nothing, how much would you have charged? A. With scaffolding and everything hanging in the air it would have cost us around two or three hundred dollars to do it.

Q. Are you familiar with these ten pieces? A. Yes, sir.

40

Q. They were for the first and second floors? A. No, sir, the highest one up was 18 feet, another was up about 15 feet and the majority of them—

John L. Windas. Called by Defendant. Cross.

Q. What floor would you call that on? A. I would call that the mezzanine floor.

Q. Not as high as the second? A. No, and some of them were on the side of the windows, which is the hardest pieces to get in and take out.

Q. You would not need a scaffold for that? A. For everything but about four or possibly five pieces. 10

Q. Were you there during the whole installation of this terra cotta? A. Yes.

Q. About when did you start to place and set the terra cotta? A. Some time in December I believe.

Q. Of what year? A. 1922 I think. We started to set the terra cotta just as soon as it was delivered.

Q. Now, when was all the terra cotta in the building set, do you know the date of that? A. Well, 20 not the exact date. I think part of the tower was completed some time in May.

Q. The tower was way up on the building? A. Yes.

Q. All this terra cotta on the first and second floors I suppose was set first? A. That was installed—I think that was completed the latter part of April or the first part of May. We left off the terra cotta there, went ahead and came back and we were working at the top and the bottom at the same time. 30

Q. You were working at the top and bottom at the same time? A. Yes. We left out the terra cotta when it was objected to and started off on the third floor and went ahead with it.

Q. Is it a fact that on April 13th, which is the date that the defendant picked out these ten pieces, that every one of those ten pieces were actually set? A. Those ten pieces were in the wall. 40

John L. Windas. Called by Defendant. Cross.

Q. Now at that time was your scaffolding still in position so that you could reset those ten pieces?

A. We had a swinging scaffold hanging there and we were cleaning the building down.

Q. How long did you keep the swinging scaffold there? A. That scaffold was on the job at least eight weeks.

10 Q. You say you helped the defendant pick out these ten pieces? A. Yes, sir.

Q. Why did you wait from March 8th, 1923 to April 13th before you made your report on them?

A. I didn't tell anybody until I was requested.

Q. When were you requested? A. Along about the first of April.

Q. The defendant did not ask you to pick them out until around the first of April? A. About the
20 first of April.

Q. Now you say that scaffolding was there until when? A. I should judge it was there up to a week before I left.

Q. When did you leave? A. In the latter part of July.

Q. The terra cotta was all set long before that? A. Yes, we were washing the building down using this patent cable scaffold.

30 Q. I think you testified on your direct examination that one of the reasons which would make it cost eight or nine hundred dollars for resetting those pieces is that there is danger of breaking those pieces next to them? A. Yes.

Q. Would there be any less danger of breaking down the adjoining pieces if these ten pieces had been delivered down there before you left the job?

A. Why, this mortar would not have been as hard along in May as it was in December. It had six
40 months to set in.

John L. Windas. Called by Defendant. Cross.

Q. How long does it take mortar to set? A. It takes its initial set in about five or six hours and then it keeps on getting harder for years to come. The longer it stands the harder it gets. I am not an expert, but some of them say it takes 43 years to set.

Q. That is just what you heard people say? A. Yes.

10

Q. You say you are not an expert? A. I am not an expert, but I say it has been stated that it takes 43 years for cement to set.

Q. So that if the Goodman Warehouse Corporation had started resetting those ten pieces as soon as they were delivered to them they could have done it a good deal cheaper than by waiting three or four years more? A. Yes, then you have to get your men to do it and to-day the prevailing rate of wages is four dollars higher than it was at the time for masons and a dollar more a day for labor. If you went out to get men to work on this terra cotta the chances are you might have to pay them five or ten dollars more than the others.

20

Q. You say the chances are; do you know anything about terra cotta? Do you hire men to set terra cotta? A. I have hired men to set terra cotta, yes.

Q. When was the last one you hired? A. Last summer.

30

Q. Do they charge more than the prevailing rate? A. Yes. You cannot pick up every bricklayer that comes along and put him to setting terra cotta.

Q. How much would it cost to get a patent scaffold back to set these four pieces that are up above the second floor? A. It would cost you \$15 a week for the patent scaffold and the minimum is two weeks.

40

John L. Windas. Called by Defendant. Cross.

Q. \$15 a week and it would take two weeks time, that would be \$30? A. Yes, sir, and the erection.

Q. There is not much work in putting them up?

A. It is not very difficult but it takes time.

Q. How long would it take? You would have to count a half day's time for two men.

10 Q. How much would that be? A. Labor at eight dollars a day.

Q. Sixteen dollars for two men, is that right? A. Yes.

Q. What else would enter into erecting the scaffold? A. That would end the erecting of the scaffold; it is already hung.

Q. After the scaffold was once up would it be any harder now to take those ten pieces out than it would have been last August, or August, 1923?

20 A. You would have to take it out the same way as you would then.

Q. And the fact that the mortar had been setting for a year and a half, would that make it take any longer to take them out now or not? A. It is the care you would have to take not to destroy the pieces next to them. This is glazed terra cotta.

Q. Wouldn't you have had to take that care in doing that originally? A. You would.

30 Q. The other six pieces you would not need a scaffold for, would you? A. You need a scaffold for everything but four pieces on the base or I think it is three.

Q. Now, have you ever inspected these ten pieces?

A. Since they have been delivered?

Q. Yes. A. No, sir.

Mr. Gilmore: That is all.

John L. Windas. Called by Defendant. Redirect.

REDIRECT EXAMINATION BY MR. MELNIKER:

Q. If you had replaced these ten pieces while you were working on the job, before the building was finished, Mr. Waters would have paid you for doing it? A. Sure. We would have gotten our salaries for it, the men would have been paid their wages.

10

Q. And you would have been paid just the same?

A. Yes, sir.

Q. And that all would have been paid by Mr. Waters? A. Yes.

Q. If you did it now you would have to be paid by Mr. Goodman? A. I would have to be paid by somebody.

Q. So that the difference is if you had done it at that time the cost would have been on Mr. Waters and if you did it now it would have to be paid by the Goodman Company? A. Yes.

20

Q. I want to ask you, did you notice this checking on this terra cotta within a year after it had been installed by you?

Mr. Gilmore: I object to the question.

Mr. Melniker: My purpose is this, that even if it is an improper question from the standpoint of the existence of this contract of August 4th, 1922, it is still a proper question from the standpoint of the supplemental contract. Our contention is that if the supplemental contract is pressed by the plaintiff, we have a right to show all our damages which flowed as the consequence of this breach and that part of those damages was the checking of the material delivered under the original contract.

30

40

John L. Windas. Called by Defendant. Recross.

10 The Court: I will have to sustain the objection. In order to take advantage of a breach of a compromise agreement and go back to the original agreement, there has to be such a breach as amounts to a refusal to perform, a refutation of the compromise agreement of such an essential element as to amount to a refusal. It has been held (and there are a number of cases on the subject) that the mere breach of a compromise agreement does not give you the right to revert to the original contract, and that is the reason I am ruling as I am, because there has been no evidence here to show that there has been such a refutation or such a refusal to perform or such a breach of such an element of the contract as would show an intention to abandon. The only evidence we have is that there may have been a failure to supply ten pieces within time. There is nothing to show that there was a breach or refusal to perform.

20

Mr. Gilmore: Exception.

RECROSS EXAMINATION BY MR. GILMORE:

30 Q. Going a little further into the cost, in arriving at this eight or nine thousand dollars, you say \$46 of this would be represented by the cost of scaffolding and rent for its use, is that right? A. Yes.

Q. I want to find out how you make up the \$900. It will take two weeks to erect the scaffold, is that what you said, I mean to complete the job? A. Why, yes.

Q. How long will it take to insert each piece? A. That I don't know. I am making a guess at it.

40

John L. Windas. Called by Defendant. Recross.

Q. Do you say it will take more than two weeks?

A. It may take them four weeks.

Q. It may take them two days? A. That is out of the question.

Q. What would be the least time within which it could be done? A. Figuring there were two men it would be two weeks before they got through, that is if everything went alright.

10

Q. How much do you figure their pay would be for two weeks? A. The least their pay would be, a mason would be \$77 or \$82.50, depending on whether you pay him \$14 a day or \$15 a day; that would be one man.

Q. How much would the other man be? A. \$82.50 a week.

Q. So that for two men for two weeks it would be four times that. A. Four times that, yes.

20

Q. That would be \$300? A. Yes, then you have a laborer at \$44 a week, probably two laborers.

Q. Do you mean you would have to have more than two men to do the job? A. Certainly you would have to have more than two men; you would have to have two laborers if you had two bricklayers on a repair job.

Q. How much would that cost you? A. \$44. a week.

Q. For the two of them? A. Eight dollars a day for each man.

30

Q. How much would that make for labor? A. \$176 for the two weeks.

Q. Now, is there any other item of cost entering into that? A. Just the material which would be the smallest item.

Q. How much for that? A. When I say material I mean cement and sand, such stuff as that, really that is small.

40

John L. Windas. Called by Defendant. Recross.

Q. What do you mean small, a dollar or two?

A. Ten dollars or fifteen dollars, possibly twenty dollars would buy all the material you would need.

10 Q. You think it would cost \$20 to buy enough material to put these pieces in place? A. If you can anchor the pieces in without going into the plaster; if you ruin the plaster on the inside you have to patch it up again.

Q. You would have had that same condition in July, 1923, would you?

Mr. Melniker: I object to that. Of course the same conditions existed but we would not have had to pay for it.

20 Q. Didn't I understand you to say that in July it would cost only \$200 to have this done?

The Court: Two or three hundred dollars.

Q. That is what Waters would have had to pay?

A. Waters would have had to pay for the replacing of this terra cotta had it come there while the men were on the job and I said it would run probably two or three hundred dollars; it might have run him more than that.

30

The Court: Because the scaffold was there and everything.

The Witness: Yes, sir, and we were only

paying ten dollars, the scale at the time.

Q. What is the scale now? A. As high as \$18. a day; now the prevailing rate is \$14. and \$15.

Mr. Gilmore: That is all.

40

John L. Windas. Called by Defendant. Redirect.
Oliver Leonard. Called by Defendant. Direct.

REDIRECT EXAMINATION BY MR. MELNIKER:

Q. What did these pieces weigh, about two or three hundred younds? A. Well, I don't know off-hand just what they did weigh; the biggest of them would not go much over two hundred pounds.

Q. And some of them had to be hoisted? A. No, those that went up in the air would not go that much. 10

Q. These that went up about ten feet? A. Those were small pieces that went up in the air.

Q. Where were the biggest pieces? A. Down into the base.

Q. The base course? A. Yes, sir, outside of the stuff up in the cornice. I am speaking now of the ten pieces. 20

Mr. Melniker: I would like to offer this photograph of the building for the sake of clarity.

Mr. Gilmore: No objection.

(Marked in evidence Exhibit D-5.)

OLIVER LEONARD, SWORN.

30

DIRECT EXAMINATION BY MR. MELNIKER:

Q. What is your business? A. Civil engineer.

Q. Were you the engineer on this warehouse job?
 A. I was the architect.

Q. Are you familiar with the terra cotto required in connection with this building? A. Yes, sir.

Q. How long have you been in the engineering profession? A. 18 years. 40

Oliver Leonard. Called by Defendant. Cross.

Q. Have you had much experience with terra cotta? A. Quite a lot.

Q. For how many years? A. Six years.

Q. And you have had experience with buildings where you have approved the drawings and had the terra cotta made up from the drawings as approved the drawings and had the terra cotta made up from the drawings as approved? A. Yes, sir.

Q. That is the usual course, is it? A. Yes.

Q. That is the usual length of time it takes from the time you approved the drawings until they are delivered on the job.

Mr. Gilmore: I object.

Mr. Melniker: I will withdraw the question.

20 Q. What would be the fair and reasonable time to make up this kind of terra cotta from the time the drawings are approved.

Mr. Gilmore: I object to the question unless he means to ask him what would be the reasonable time to make up ten pieces.

The Court: I think that is what he is asking him.

30 Mr. Gilmore: I would like to cross examine him as to what experience he has had with terra cotta.

Mr. Melniker: Go ahead.

CROSS EXAMINATION BY MR. GILMORE:

40 Q. What experience have you had with terra cotta? A. My experience with terra cotta has been purely from the architect's standpoint, checking drawings, shop drawings against the architectural

Oliver Leonard. Called by Defendant. Redirect.

drawings and the inspection of the terra cotta as furnished at the job.

Q. Well, you have not kept any records of the time it takes to make terra cotta? A. The only way I would base an answer to any of those questions would be on the proposition of like orders. That is the only way I could answer that. Under those conditions I should say that ordinarily seven to ten weeks would be the ordinary time limit placed by the terra cotta company themselves on delivery. 10

The Court: That is if everything goes along smoothly.

A. Yes, sir.

REDIRECT EXAMINATION BY MR. MELNIKER: 20

Q. Is that the usual time? A. That is our experience on buildings of this kind.

Q. From the time drawings are approved until the stuff is delivered. A. From the time the contract is made. Delivery is based upon the approval of the shop drawings.

Q. Seven to ten weeks? A. Yes. Of course the understanding is they have to have the drawings with our corrections before they can start to manufacture. 30

Mr. Melniker: That is all.

Edwin L. Waters. Called by Defendant. Direct.

New Jersey Terra Cotta Company,

vs.

Goodman Warehouse Company.

January 5th, 1926.

10

Counsel on both sides stipulated that they were willing to proceed with eleven jurors in the absence of juror number six.

EDWIN L. WATERS, SWORN.

DIRECT EXAMINATION BY MR. MELNIKER:

20

Q. Where do you live? A. 49 West Eighth Street, Bayonne.

Q. What is your business? A. At the present time administrator of the estate of my father and mother.

Q. You are the son of William F. Waters? A. Yes.

Q. Now deceased, A. Yes.

30

Q. And he is the gentleman who had the contract for the construction of the Goodman Warehouse on Bergen Avenue? A. Yes.

Q. What did you have to do with that job? A. Well, I guess I was general superintendent and several other things.

Q. Do you know about any arrangement about replacing ten pieces of terra cotta that were to be shipped on the job by the New Jersey Terra Cotta Company? A. I know we were to replace them

40

Nathan L. Goodman. Called by Defendant. Direct.

providing they got on the job before we were finished with the job.

Q. And that without any additional cost to the Goodman Warehouse Company? A. Yes, to hurry up the work.

Q. They were to be delivered on the job before you were through and you were to replace them? A. Yes sir, to facilitate our own work. 10

Q. When did you get through with this job? A. Somewhere around July I think.

Q. Were these ten pieces delivered on this job up to the time you finished? A. They were not delivered on the job up to the time we finished. They were delivered considerably later as I understand it.

Mr. Melniker: Cross examine. 20

Mr. Gilmore: No questions.

NATHAN L. GOODMAN, SWORN.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. What is your connection with the Goodman Warehouse Corporation? A. Secretary and treasurer of the corporation. 30

Q. Did you occupy that position during the construction of this warehouse on Bergen Avenue? A. Yes, sir, I did.

Q. There has been offered in evidence here a letter from the New Jersey Terra Cotta Company, dated February 19th, Exhibit P-1, in which a certain proposal is made for the adjustment of the difference between the Goodman Company and the 40

Nathan L. Goodman. Called by Defendant. Direct.

New Jersey Terra Cotta Company regarding defective terra cotta delivered on that job, and your letter of March 8th, marked Exhibit P-5, which is purported to be a reply to that letter and which I believe was written by you, is that correct? A. Yes.

10 Q. Now, in your letter of March 8th, did you intend to agree to cancel the original contract between your company and the New Jersey Terra Cotta Company?

Mr. Gilmore: I object, the letters speak for themselves.

The Court: Sustain the objection.

Mr. Melniker: Exception.

20 Q. Was it in your mind at all at any time before the writing of this letter or at the time of the writing of that letter to entirely abrogate the old contract?

Mr. Gilmore: I object to the question.

The Court: Sustain the objection.

Mr. Melniker: Exception.

30 Q. At the time of the exchange of these letters had there been some defects developed in the terra cotta delivered up to that time?

Mr. Gilmore: I object, the letters speak for themselves, and there is no reason for going behind the letters, it is immaterial.

The Court: Is there any other purpose?

Mr. Melniker: I want to show that the defects that developed at that time were the defects that were referred to in these letters

Nathan L. Goodman. Called by Defendant. Direct.

and they were the defects that were waived; that the defects which subsequently developed were something that had not occurred at the time and there was no reason to believe at the time they would occur; those things were covered by a guarantee for a year which there would be no reason for him to waive.

The Court: I sustain the objection.

10

Mr. Melniker: Exception.

Q. Were there any defects developed in this terra cotta after these letters were exchanged?

Mr. Gilmore: I object to that.

The Court: Referring now to the terra cotta delivered there before these letters??

Mr. Melniker: Yes.

The Court: Sustain the objection.

20

Mr. Melniker: Exception.

Q. Now, Mr. Goodman, the construction of work on this job was done by Mr. William Waters? A. This particular contract is included among other contracts he had. He had one contract including masonry and the terra cotta work and about eight or nine small sub-contract jobs.

Q. When did he get through with that work? A. 30 He got through with the masonry work I would say about the last week in July or the first week in August, that is with the main body of the mason-work, but he kept two or three masons around until October, so that he had two masons during August and September on different little mason jobs.

Q. What arrangement did you have with Mr. Walters about the replacement of the ten defective pieces of terra cotta?

40

Nathan L. Goodman. Called by Defendant. Direct.

10 Mr. Gilmore: I object to the question I don't see that it is important or material one way or the other as to whether he had any agreement or not with Mr. Waters for several reasons: first, the defendant's letter to the plaintiff of November 30th, 1923, telling them where to deliver those extra ten replacement pieces is a waiver of any claim for delay, if there was delay, and it was their duty at that time to say, "No, we refuse to accept these pieces at this time unless you will agree to install them for us" and then at that time to have notified us of their reason for refusing because of this alleged agreement that they are telling us about whereby it was to be installed for nothing. I also urge section 48
20 of the sales Act.

The Court: "This is just in line with all the rest of the testimony that has gone in. It has been testified that there was an arrangement made whereby this was to be put in without cost.

Mr. Gilmore: Yes, but if the court sustains my objection on this question I am going to move to strike out that other testimony.

30 The Court: It is too late now. You cannot sit by and have it go in and then move to strike it out.

Mr. Gilmore: All right, I withdraw my objection.

(Question repeated.)

A. Well, at the time these discussions were going on with the New Jersey Terra Cotta Company in which they were endeavoring to get us to accept
40 some sum and settlement, Mr. Waters was present

Nathan L. Goodman. Called by Defendant. Direct.

at most of the conferences and at one of the conferences at Perth Amboy with Mr. Eskeson they made us an offer—

The Court: Never mind that, what was the agreement with Mr. Waters?

The Witness: The agreement with Mr. Waters arose at that time. He, in order to get us to agree to the \$1250 settlement, agreed to put in this terra cotta with his men, as part of his contract. 10

Q. This was all done in the presence of Mr. Eskeson? A. Mr. Waters was present when they made us an offer of \$1250 and we could not decide it that day. We did not decide it until they wrote us a letter asking as to what our decision was. 20

The Court: Did you discuss at the time who was going to do the replacement?

The Witness: No, that had nothing to do with them.

Q. But on Mr. Water's agreement to replace without cost to you, you accepted their proposition? A. There was one other thing— 30

Mr. Gilmore: I object.

Q. State how it came about. A. That is exactly the reason it came about. That was one of the main reasons why we did accept these replacements, otherwise they would be worthless to us.

The Court: They knew that you went out and consulted with Mr. Waters? 40

Nathan L. Goodman. Called by Defendant. Direct.

The Witness: Yes, sir, and they consulted with Mr. Waters as if he was one of the company, that is, he was the contractor and we were the owners, and we were all in consultation discussing this matter pro and con, advantage and disadvantage.

10 Q. And if you had to replace this terra cotta at your own expense, would this reduction of \$1250 amount to anything?

Mr. Gilmore: I object to that.

Q. Well, tell what benefit you would have derived from this reduction of \$1250 if you had to replace the material at your own expense.

20 Mr. Gilmore: I object to the question.

The Court: Simply state the cost for the whole thing.

Q. Well, these discussions between you and Mr. Waters as to who would bear the cost of these replacements were held in the presence of the representative of the New Jersey Terra Cotta Company. A. The discussion as to the \$1250 offer. Part of
30 our reason for rejecting the offer was, what could we do with the replacements? What good were they to us alone? And Mr. Waters said, "If you will accept the \$1250 I will put those ten pieces in for you at my own cost and as part of my contract. He was anxious to have us go ahead.

Q. Why didn't he put them in? A. Because they came long after he had left the job and he had promised to put them in if his men were still on the job. The main body of his masons left about
40 August 1st.

Nathan L. Goodman. Called by Defendant. Direct.

The Court: And after this tile got there did you notify this plaintiff company that you had difficulty with regard to putting them in and didn't want them?

The Witness: We notified them two or three times regarding the entire thing. The first thing we called to their attention immediately after they sent them—they asked for the money and we told them that for two reasons they would not get their money: the first reason was that the terra cotta had all checked and the second reason was that they delayed seven months in sending them and that is the reason we refused to pay them the money and that is the reason we went into court. 10

The Court: You told them that after the ten pieces had been delivered. 20

The Witness: Within a day or two, because they were to be paid within ten days and they sent their bill along a few days after.

Q. Will you explain this: Why did you order them to deliver the terra cotta after Mr. Waters had left the job?

Mr. Gilmore: I object to that; the fact is he did do it. Why he did it is immaterial. 30

The Court: I will allow it.

A. Well, when I got their letter, the first thing I did, I saw they wanted to send the ten pieces, I still had hopes that they would go in there and when they came we told Mr. Waters to put them in and he said nothing doing now, I only told you I would put them in if they came while we were still on the job. If they had been put in by Mr. 40

Nathan L. Goodman. Called by Defendant. Cross.

Waters we would have been perfectly satisfied. There was every reason for me to try to get them there to see if we could not complete the thing.

Q. Then when you ordered them to deliver these ten pieces, Waters was still going to carry out his agreement? A. I never gave a thought to the contrary.

10 Q. Well, then, he refused to do it? A. He refused to do it.

The Court: And you notified the plaintiff?

The Witness: Yes, sir, that was one of the reasons we gave for refusing to pay their bill, that plus the other reason.

Q. And the other reason was, you say, that this
20 stuff had all checked? A. Yes, the stuff had all checked, that is the other reason we gave.

CROSS EXAMINATION BY MR. GILMORE:

Q. Did you notify the plaintiff by letter? A. No, I don't think I did.

Q. What official of the plaintiff did he notify?
A. Either Mr. Mathiason or Mr. Eskeson.

Q. Did you see them or did you talk to them
30 over the telephone? A. In two ways. I notified the Longacre and the Longacre spoke to them—

Mr. Gilmore: I object to that.

A. (Continuing) and I notified them personally by phone in answer to their telephone conversation to me as to why we would not pay this bill.

Q. I am now talking about the ten pieces. A. Yes, after the ten pieces came they sent us a bill

40

Nathan L. Goodman. Called by Defendant. Cross.

and I refused to pay it and they called me up and wanted to know why we didn't pay it.

Q. Isn't it a fact that as late as February, 1924, you wrote to the plaintiff and said that you had no dispute with the agreement made at the time, that the only thing you were kicking about was because the old terra cotta that went in under the old contract had chipped and cracked subsequent to the making of this agreement. A. No, I don't think I said anything of the kind. That ultimately became the bigger item. That is the item on which we suffered three or four thousand dollars damages whereas on this one we only suffer eight or nine hundred dollars damages. 10

Mr. Gilmore: I ask that that all be struck out as not responsive. 20

The Court: Strike out everything after "No, I don't think I said anything of the kind."

Q. It is a fact that you never made any complaint whosoever to the plaintiff that these ten pieces were not delivered until December, until after this suit was started, isn't it? A. Absolutely not. Absolutely not. There is not a bit of truth in that.

Q. All right. How do you say you complained to the plaintiff about it? A. In answer to their request for the money, they called me up two or three times and asked what the trouble was. They had their New York attorney write to me and in answer to one or two of those conversations that was our answer to them. 30

Q. It was not until they asked you for the balance due that you replied? A. It was within four or five days after the delivery of the terra cotta. 40

Nathan L. Goodman. Called by Defendant. Cross.

Q. You remember the time so well, how is it that you can remember whether it was Mr. Eskeson or Mr. Mathiason that you talked to? A. Well, to be frank it was both. Up to a short while ago I never could tell between Mr. Eskeson and Mr. Mathiason, I knew them, but I never knew which was which.

10 Q. I show you a letter dated February the 25th, 1924; on the Goodman Warehouse Corporation letterhead addressed to the New Jersey Terra Cotta Company and ask you if you signed that letter. A. Yes, sir, that is my signature.

Mr. Gilmore: Merely for the purpose of rebutting on the question of the witness's veracity I offer this letter in evidence.

(Marked in evidence Exhibit P-16.)

20

Q. When was the terra cotta set in the building, all of the terra cotta finally set in the building? A. About a few days before my designation, which I think is April 13.

Q. It was all set? A. It was all set.

Q. And when were the first and second stories all set? A. Well, the first and second stories were set after the others. We started with the brick work when the terra cotta was delayed. Mr.
30 Waters started his brick work in the second floor and went up before he finished the ground floor terra cotta. That was finished after the front brick was all in.

Q. Now you said that Mr. Waters was off the job the latter part of July? A. No, not entirely off the job. Mr. Water's contract—Mr. Waters still had some contractors in there, marble and tile work up to the time he left the building in October.

40

Nathan L. Goodman. Called by Defendant. Cross.

Q. Are they the people who laid the terra cotta, the marble workers? A. No, the masons—the marble was only on the inside of the lobby.

Q. What time did the people who laid the terra cotta go off the job? A. Well, he kept Mr. Windas and Mr. Windas's brother and one of the other expert men there until some time in August, then Mr. Windas the foreman who was on the stand yesterday left and he kept one or two men around to assist the marble men and filling in the tile work which had been chopped out by some of the other sub-contractors for another month or two. 10

Q. At the time you wrote this letter of February the 25th, which is Exhibit P-16, you did not see fit to make any comment about the lateness of the delivery of the ten pieces, did you? A. There was no need for it at the time. 20

Q. I didn't ask you if there was any need for it, I just asked you if you did.

Mr. Nelniker: The letter speaks for itself, if that is the purpose of the question.

Q. You say your agreement with Mr. Waters was the parole agreement or was it written? A. Just his word to induce us to accept your offer. That was all we took; we had to take Mr. Water's word. 30

Q. Do you claim he was working for us? A. No, he was working for both of us in this respect; he was setting your terra cotta in our building and it was his business to get it in there.

Q. We didn't pay him for setting it did we? A. No, not at all.

Q. Did you? A. No, but he had a contract that he wanted to complete and the delivery was holding 40

Carl Juhl. Called in Rebuttal. Direct.

him up and we were paying him for the work and he was anxious to get through with it.

Q. These pieces have never been sent in since, have they? A. No.

Q. They are still lying there? A. Still lying there, yes.

10 Mr. Gilmore: That is all.
(Witness excused.)

Mr. Melniker: I offer Exhibit D-2, D-3, and D-4 for identification in evidence.

Mr. Gilmore: We have no objection.
(The above exhibits marked in evidence.)

REBUTTAL.

20

CARL JUHL, SWORN.

DIRECT EXAMINATION BY MR. GILMORE:

Q. Where do you live? A. Perth Amboy.

Q. What business are you in? A. Inspector of buildings for the New Jersey Terra Cotta Company.

Q. The plaintiff here? A. Yes.

30 Q. How long have you been with the plaintiff corporation? A. Going on 21 years.

Q. What is your position at the present time with them? A. My position is inspector of buildings.

Q. And in the course of your duties inspecting buildings, what do you do? A. Report progress as soon as we get a new operation.

Q. Have you ever done any work in the making of terra cotta; have you ever been in the factory?

40 A. I have, in the setting department.

Carl Juhl. Called in Rebuttal. Direct.

Q. Have you ever done any setting? A. I have.

Q. How many years have you done setting? A. Why, I have been two years in the plant.

Q. Have you ever done any setting outside? A. I have.

Q. Do you still do some of it? A. I do help some times.

Q. About how many years would you say you have been doing setting outside? A. Well, I would say for sixteen or seventeen years. 10

Q. Do you ever supervise the setting of terra cotta? A. Yes, sir.

Q. Have you ever employed men for setting of terra cotta? A. I have got a man now.

Q. Have you ever in your job taken out terra cotta that was set, and replaced it with new pieces? A. We have. 20

Q. More than once? A. Yes, sir.

Q. How often? A. A good many times.

Q. Are you familiar with the defendant warehouse building over here on Bergen Avenue? A. Yes, sir.

Q. Did you act as superintendent in inspecting that building and reporting progress from time to time? A. I did.

Q. Are you familiar with the ten pieces of terra cotta that were required and that the defendant designated? A. Yes, sir. 30

Q. Did you check those up with the drawing? A. I did.

Q. And have you also gone to the building and examined the building and found out just where those pieces were required as replacements? A. I did.

Carl Juhl. Called in Rebuttal. Cross.

Q. Have you made any estimate of the cost of taking out pieces now in the building and inserting these replacement pieces?

10 Mr. Melniker: I object to the question at this time. I want to ask this witness a question as to how recently he has done this sort of work.

Mr. Gilmore: Certainly.

CROSS EXAMINATION BY MR. MELNIKER:

Q. When was the last time you did any replacement work on any building, Mr. Witness? A. I had 20 pieces to put in in a building in Jamaica in the middle of July, if I am not mistaken, last summer.

20 Q. How many? A. About 20 pieces.

Q. Who did you do that for? A. For the builder.

Q. You had to take out 20 pieces? A. I put in 20 pieces, I didn't take any out but I put in 20 pieces.

Q. You did not take any out? A. No, sir, not on that particular job.

Q. When was the last time, if ever, that you took pieces out of a building and put pieces in place of those? A. That has occurred so often that I cannot tell you the exact date and I cannot right now—

The Court: Well, about how long ago.

The Witness: I cannot tell you that exactly, I have done that so often.

Q. You mean it is so long ago or so recent that you do not remember? A. No, it is not so long ago.

40

Carl Juhl. Called in Rebuttal. Cross.

The Court: Do you mean within a year or two?

The Witness: Yes, inside of a year, I am certain of that.

Q. Inside of a year you have removed pieces of terra cotta and replaced them? A. Yes, removed pieces of terra cotta and replaced them. 10

Q. Where did you do that? A. We have removed pieces in Jamaica in less than six months.

Q. And replaced them? A. Yes.

Q. Did you do it? A. My men did it with my help.

Q. Who were you working for at that time? A. For the New Jersey Terra Cotta Company.

Q. Was that done at their expense? A. Yes, sir, at their expense. 20

Q. Where did the men come from, did they come from their plant? A. My man is working for me steadily, he is doing the work and I am helping him.

Q. You have a man doing that kind of work steadily? A. Yes, sir.

Q. Does he work for the Terra Cotta Company? A. Yes, sir.

Q. Employed by them all the year around, is he? A. Yes, sir. 30

Q. And that is the way you have always done this work, by employees of the New Jersey Terra Cotta Company? A. Yes, sir.

Mr. Melniker: Now I submit, I object to this witness testifying because he is in the position of not having to go out in the open market for labor. This man is employed, with another, by

Carl Juhl. Called in Rebuttal. Direct.

the plaintiff company on a regular salary to do the work for the terra cotta company.

The Court: But you were merely asking these questions to test his ability as an expert.

The Court: Are you familiar with the wages that are paid in the open market for such work as you had done?

10 The Witness: Yes, sir.

The Court: And for such work as this?

The Witness: Yes, sir.

The Court: How do you keep in touch that way?

20 The Witness: Why, by being on the building all the time, I heard different conversations about how things are and I can judge by the length of time it takes to do the work and the wages that are paid, what the work should cost.

The Court: Have you had occasion to employ men to do that kind of work at the wages that are prevailing in the open market?

The Witness: Well, the first has released my man from our employ and let him do those things on his own hook.

30 The Court: And does he now do the work at the prevailing rate paid to men engaged in the same business?

The Witness: Yes, sir.

The Court: I will allow it and grant you an exception.

DIRECT EXAMINATION BY MR. GILMORE: (Continued)

40 Q. Have you made an estimate of the most of taking out the pieces now in the building and in-

Carl Juhl. Called in Rebuttal. Direct.

serting these ten replacement pieces? Have you made any calculation as to what the cost would be for doing that? A. Yes sir.

Q. And what would that be? A. \$150 should cover it.

Q. What is the name of the man you have just been speaking about? A. John C. Olsen.

Q. He is a New York man? A. Yes sir.

10

Q. Would he do it for \$150? A. I am satisfied he would.

Mr. Melniker: I object to that and ask to have it struck out.

The Court: Yes, that may be struck out, what he guesses somebody else would do it for. The jury will disregard it.

Q. Would he authorize you as his agent to take the job in his name for \$150?

20

Mr. Melniker: I object to that.

The Court: Objection sustained. The only question is what would be the reasonable cost of doing that work. This man does not say he is going to do the work; this is an expert called to say that the prices given are not right.

30

Q. Now, you say the reasonable cost of doing that would be \$150? A. Yes sir.

Q. In inserting these replacements, how would you go about doing it, would you use a ladder, scaffold or what? A. That depends upon circumstances. In this case there would be two pieces to be set from a ladder, the rest could be set from boxes, the crates the material comes in.

Q. Without a scaffold? A. Yes.

40

Carl Juhl. Called in Rebuttal. Cross.

Q. How much actual time would it take to insert thees ten pieces? A. If we were not bothered by the owner—if we could go right along without any disturbance from the owner we would be able to set them in five days and a half.

Q. How many men would you use? A. Two men.

10 Mr. Gilmore: Cross examine.

CROSS EXAMINATION BY MR. MELNIKER:

Q. You are employed by the New Jersey Terra Cotta Company? A. I am.

Q. For how many years? A. Going on 21.

Q. You have not worked for anybody else during that time? A. No.

20 Q. You work on an annual salary for weekly wages? A. Monthly pay.

Q. Not paid by the day? A. No sir.

Q. Do you know what masons get a day now? A. I do.

Q. How much? A. From 14 to 18 dollars a day.

Q. And this man does the work for you, do you pay him by the day? A. I am paying him by the week.

Q. By the week? A. By the week, yes, sir.

30 Q. How much do you pay him by the week? A. \$15. a day by the week.

Q. And you say it would take two men to do this work? A. Yes sir, him and a laborer.

Q. One mason and one laborer? A. Yes sir.

Q. What do you pay the laborer? A. Six to seven dollars a day.

40 Q. And you say that man at \$15 a day and a laborer at six or seven dollars a day could do this job in a week and a half? A. No, I didn't say that.

Carl Juhl. Called in Rebuttal. Cross.

Q. Five and a half days, was that it? A. Five days or five days and a half, yes.

Q. And you say that the whole job could be done for \$150? A. Yes sir.

Q. Will you do it for \$150? A. Well, I am not in that business personally.

Q. Somebody else would do it for \$150? A. This other man would do it. 10

Q. But you won't? A. No, for the simple reason that I am not in this business.

Q. You have testified that you have been doing that for your company for years. A. For my company I will do anything.

Q. Will you agree to have this work done for \$150? A. No, I will not.

Q. Why not? A. For the simple reason that I have nothing to do with Mr. Olsen in that way, but he would agree to do it. 20

Q. You are perfectly willing to come before the jury and swear that somebody else will do it for \$150? A. Yes.

Q. But you will not agree to do it for that sum? A. I am working for the firm.

Q. It is a little harder to do the job for \$150 that it is to come up here and swear that it could be done for \$150? A. I could do it but I won't do it simply because I am with the firm. 30

Q. Will you point out in this picture where these pieces are? A. Two pieces are in the lower course that were broken by the builder with the scaffolding.

Q. Nobody asked you that, we are just asking you to point to the pieces that are to be taken out.

A. There is one piece broken here on this course, one over here, there is one piece broken here, I 40

Carl Juhl. Called in Rebuttal. Cross.

think those two pieces where the sign is. There are a couple of pieces right in here.

Q. The corner piece? A. Yes, and there is a piece there and two pieces here.

Q. That makes up the ten pieces? A. Yes sir.

Q. Is there any danger of breaking anything there? A. These will come out all right, only we
10 got to be careful in doing it.

Q. You would protect the owner against anything like that? A. Yes.

Q. All for \$150? A. All for the \$150, yes.

Juror Number Seven: How high are these pieces of terra cotta from the ground?

The Witness: Two pieces, 16 feet from the ground and the rest of them are less than seven.

Juror Number Seven: 16 feet is the high-
20 est?

The Witness: Yes. I would figure on using a 20 foot ladder for that purpose.

Juror Number Seven: What is the weight of those pieces?

The Witness: One of them weighs 25 pounds and the others weigh 66 pounds.

Mr. Gilmore: This is a simple operation, replacing these ten pieces, isn't it?

30 The Witness: Yes sir.

Eckardt V. Eskesen. Called in Rebuttal. Direct.
Eckardt V. Eskesen. Called in Rebuttal. Cross.

ECKARDT V. ESKESON, recalled.

DIRECT EXAMINATION BY MR. GILMORE:

Q. Did Nathan Goodman ever call you up and complain to you about the lateness of delivery of these ten deplacement pieces? A. I never heard from him. I personally never heard from the Goodman Company after he had signed this agreement. 10

Q. The agreement, the letter of February 19th?
 A. After we made delivery and received our payment.

Mr. Gilmore: That is all.

CROSS EXAMINATION BY MR. MELNIKER:

Q. Did you ever call the Goodman Company up and ask them for the money? A. No. 20

Q. Then you could not be the man he was talking to, could you?

Mr. Gilmore: Apparently not.

The Witness: How could I call him up about money that was not due and would not be due before deliveries would be made. 30

Q. Did you call him up after delivery had been made? A. I don't think so, I am positively sure not.

Q. You did not? A. No.

Q. Then you are not the man that he spoke to, are you? A. Evidently not.

Karl Mathiason. Called in Rebuttal. Direct.
Karl Mathiason. Called in Rebuttal. Cross.

KARL MATHIASON, SWORN

DIRECT EXAMINATION BY MR. GILMORE:

Q. You are the secretary of the plaintiff company? A. Yes, sir.

10 Q. Do you know Mr. Goodman? A. Yes, sir.

Q. Has he ever called you on the telephone or come to see you and complained of the lateness of the delivery of these ten replacement pieces? A. No, sir.

Mr. Gilmore: That is all.

CROSS EXAMINATION BY MR. MELNIKER:

20 Q. Did you ever call him up about paying the bill? A. After the delivery of the ten pieces?

Q. Yes. A. I may have.

Q. You don't remember? A. I don't remember.

Q. Well, if you do not remember if you called him up or not, you would not be able to remember what he said, isn't that so? A. I know that until the time of the suit I never heard "delivery" of the ten pieces. I never heard of any trouble with
30 the ten pieces.

Q. That was not my question. A. I do know I never talked to Mr. Goodman about the delivery of the ten pieces.

Q. You say you have no recollection of calling him up after the delivery? A. Yes, I said that.

Q. All right, then if you have no recollection of calling him up, you certainly would not have any recollection as to what was said? A. I say that I
40 have no recollection that I ever talked to Mr. Good-

Karl Mathiason. Called in Rebuttal. Cross.

man about the delivery of the ten pieces. I want that understood.

Q. After these ten pieces were delivered you considered that there was some money due your company, did you? A. Yes, sir.

Q. \$840 odd dollars? A. Yes, sir.

Q. That is the amount you are suing for now?
A. Yes, sir. 10

Q. You didn't get your money; didn't you want to know about it? A. Yes.

Q. What did you do about it? A. We wrote letters.

Q. Is that all? A. I say I may have called Mr. Goodman about it, but I doubt it.

Q. Well, you may have? A. Yes.

Q. You would not swear that he was mistaken about that? A. I would not swear he was mistaken about talking to me, but I would swear he was mistaken about ever having talked to me about delivery of the ten pieces. 20

Q. But you are not sure, you cannot swear whether you talked to him or not—how can you swear as to any conversation that took place? A. I know I never had any talk with him about the delivery of the ten pieces.

Q. What did he say to you when you called him up and asked him for the money? A. I doubt that I ever called him up. 30

Q. You do not even remember calling him up?
A. No.

Q. You just wrote a letter once in a while? A. As I remember it, of course it is a long time ago, we got in touch with the Longacre Company about it.

Q. You never called up and said, "Why don't you send us our check or send us our money or some- 40

Karl Mathiason. Called in Rebuttal. Redirect.

thing like that? A. I may have, but I am pretty sure I did not.

Q. You don't remember whether you did or not?

A. No.

Mr. Melniker: That is all.

10 REDIRECT EXAMINATION BY MR. GILMORE:

Mr. Gilmore: May I have the plaintiff's letter to the Goodman Warehouse Corporation dated January 8th and also the 31st, 1924?
(Counsel hands Mr. Gilmore paper.)

Q. I show you letter dated January 8th, 1924, addressed to the Goodman Warehouse Corporation and ask you if your company sent that letter to them? A. Yes, sir.

Q. I also show you letter dated January 31st, 1924 addressed to the Goodman Warehouse Corporation and ask you if your company sent that letter A. Yes, sir.

Mr. Gilmore: I offer these letters in evidence.

(Marked Exhibit P-17 and P-18.)

30

Q. They were letters of that nature that you referred to, in communicating with the Goodman Warehouse Corporation after the delivery? A. Yes, sir.

Mr. Gilmore: That is all.

40

Karl Mathiason. Called in Rebuttal. Cross.

CROSS EXAMINATION BY MR. MELNIKER:

Q. Have you any other letters, Mr. Mathiason?

A. No, I referred to the Longacre Company; we sent copies of those letters to the Longacre Company.

Q. Have you any other letters besides these two?

A. A letter of February 20th.

10

Q. These three? A. Yes, sir.

Q. Have you any others? A. I think not.

Q. Now then, this stuff was delivered on December 4th, was it? A. I could tell from my records, my cards.

Q. That is what your complaint says, so I assume it is correct? A. I beg your pardon?

Q. December 4th was the time this stuff was delivered? A. January 8th and January 31st. I have no record of any other letters.

20

Q. I am talking about delivery; the stuff was delivered on December the 4th, was it? A. Yes.

Q. Ten pieces? A. Yes, sir.

Q. So that under your agreement your money was due on December 14, is that right? A. Yes, sir.

Q. And the first letter you have there is dated January what? A. January 8th.

Q. Now, do you want this jury to believe that from December 14th, when your money was due, to January 8th when you first wrote the letter, that you made no effort to collect this money? A. Yes.

30

Q. That you did not call up to find out why you did not get your money, as Mr. Goodman testified? A. I am pretty certain that I did not call up.

Q. Now, at this time when you delivered these ten pieces, the relations between your company and

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Karl Mathiason. Called in Rebuttal. Cross.

the Goodman Company were in such a condition that, as your President testified, he wanted to wash his hands of the Goodman Company? A. Yes.

Q. Didn't want to have anything more to do with them? A. Yes.

Q. Wanted to close this matter up? A. Yes, sir.

10 Q. You were entitled to your money on December the 14th? A. Yes, sir.

Q. And do you mean to testify that since you were entitled to your money you did not make any effort to collect it? A. Probably I had other things to do.

Q. That was your reason? A. We were very busy at the time, the holidays were coming.

Q. This was wintertime? A. Yes, but the holidays were coming along.

20 Q. Mr. Eskeson also testified that you were busy in the summertime. A. We had some pretty good years. This was one of 35 or 40 accounts and we may have said, "Well, they will send us our check, let's wait a little longer." We didn't want to have any more dealings with them.

Q. Your feelings towards them were such that you wanted to extend this courtesy to them? A. Not courtesy, no.

30 Q. You wanted what was coming to you? A. Yes.

Q. And you were going to have it? A. Yes.

Q. If you were entitled to your money on December the 14th, you say you did not do anything more about collecting it until you wrote this letter on January 8th? A. Yes, I think I would have consulted our attorney before telephoning.

40 Q. Oh, before picking up the telephone and saying, "Send us our money", you would have consulted a lawyer? A. Yes.

Karl Mathiason. Called in Rebuttal. Cross.

Q. You were dealing at arm's length with these people? A. Yes.

Q. In this case you would not even call up on the telephone without consulting a lawyer? A. No.

Q. Did you consult a lawyer when you wrote this letter of January 8th? A. I think we did.

Q. Don't you know? A. I don't know.

Q. Well, if it was such an important thing as that, that you would not even telephone without consulting a lawyer, you mean to say that you did not consult a lawyer before writing this letter? A. I know we consulted a lawyer before the letter of February 20th.

Q. You did not consult a lawyer until sometime in February about this matter?

Mr. Gilmore: I don't want to object, but it seems to me that this is irrelevant whether he consulted a lawyer or not.

The Court: Well, it is cross examination.

The Witness: Of course, this is two years ago. I say I am pretty positive I did not telephone him.

Q. Now, you say you would not even telephone these people without consulting a lawyer, yet you waited from December 14th, when your money was due, until January 8th before you even wrote a letter asking them why they did not send you a check, is that correct? A. Yes, sir.

Mr. Meniker: That is all.

(Witness excused.)

(Both sides summed up to the jury.)

Charge.

The Court thereupon charged the jury as follows:

GENTLEMEN OF THE JURY:

10 The plaintiff, the New Jersey Terra Cotta Company, seeks to recover in this suit a balance alleged to be due from the defendant Goodman Warehouse Company for terra cotta furnished by the plaintiff to the defendant which amount it is claimed is \$843.75 with interest. Now, the plaintiff bases its right to recover this amount upon two letters, one written by this plaintiff to the defendant and dated February 19, 1923, and the other written by the defendant to the plaintiff, dated March 8, 1923, and it is claimed that these two letters constitute a complete contract and that the contract insofar as it
20 pertains to those things which the plaintiff was to do, has been fully performed by the plaintiff, or at least substantially so and that the plaintiff is now entitled to the balance which I have already mentioned.

These letters read as follows:

The letter of February 19, 1923, reads:

30 "In accordance with the agreement made over the telephone today with your Mr. Nathan Goodman, attorney, and Mr. Eilinberger, of the Longacre Engineering and Construction Company, we will agree to deduct as settlement in full of any and all claims made or to be made by you for alleged defective material, delays, etc., the sum of \$1250. from the amount of our above-mentioned contract.

40 "You agreed to forward us at once, a payment of 85% of the amount of the balance of the contract, as per inclosed statement, \$4781.25. and we will immediately on receipt

Charge.

of this payment deliver to your above-mentioned building the balance of the work now stored at our plant.

"We further agree to replace at your request, and deliver at the building site, as soon as possible, ten pieces of terra cotta, as may be designated by you, and which you may want to be replaced.

10

"The above-mentioned balance of 15%, or \$843.75 shall be paid us ten days after above-mentioned replacements have been furnished by us at the building and no further claims shall be made under this contract of August 4th, 1922, or otherwise by you for damages, delays or any other cause, and all previous agreements, whether written or verbal, hereby stand cancelled.

20

Yours very truly,

THE NEW JERSEY TERRA COTTA CO.

E. V. Eskeson, President."

The other letter, of March 8th, 1923, is addressed to the New Jersey Terra Cotta Company and reads as follows:

"We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of one thousand two hundred and fifty dollars (\$1250.) from the contract price in consideration of our waiving any claim for defective material, delays, etc.

30

"We understand that the Architect is preparing a certificate showing the amount due you on your contract after deducting the sum of one thousand two hundred and fifty dollars

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Charge.

10 (\$1250.) herein mentioned, and the retainer of fifteen per cent. (15%). Upon receipt of this certificate, we will present to Mr. Harry Eilinberger, of the Longacre Engineering and Construction Company, an order upon the American Bond and Mortgage Company for payment of the same. After delivery you of the balance of the terra cotta, now ready for shipment, he will be authorized to present the same to you.

"We will advise you as soon as this order is presented to Mr. Eilinberger, so that you can immediately make shipment of the balance of the the terra cotta.

Yours very truly,

20 GOODMAN WAREHOUSE CORPORATION, per
Nathan L. Goodman, Sec'ty."

30 It is these two letters which this plaintiff claims makes a new contract between the parties and you will note that there is a reference made in these letters to a contract of August 4th, 1922 which, from the evidence in the case you may reasonably infer was the contract between these parties as originally entered into for the purpose of furnish-
ing terra cotta for decorative purposes on this building.

40 The defendant claims insofar as their written pleadings are filed in this court that those two letters do not constitute a contract between these parties and that the most that could be said if a supplemental contract was formed at all was that their letter to this plaintiff dated March 8th, 1923, together with the acceptance of that letter by the conduct of the plaintiff formed the real supplemen-

Charge.

tal contract, if there was one, and that therefore there was no waiver of any provision for warranty of the tile or any provision regarding the quality of the material, and so forth. In their answer the defendant also says that even though these letters do constitute a new binding contract between the parties, that nevertheless the plaintiff has not performed such new contracts because it is alleged in the first place that the materials which were thereafter sent (that is the ten replacements) were not delivered as soon as possible and that therefore there was breach of this contract and that therefore the plaintiff cannot recover this balance of \$843.75 which it claims. 10

Now Gentlemen, it is the peculiar province of the court to construe and interpret contracts, and whether you may agree with the court's interpretation of the letters in this case or not, you are obliged to take ~~the~~ ^{them} with respect to the interpretation and construction which the court will now give you, and the court holds that these two letters, that is the letter of February 19th, 1923, written by the plaintiff to the defendant and also addressed to the Long-acre Construction Company as agent, taken in conjunction with the defendant's letter of March 8th and the subsequent conduct of these parties with respect to the delivery of the balance of the tile except the ten pieces and the payment of the four thousand and odd dollars, made a complete new contract between these parties, and that therefore there can be no claim for defective material growing out of any original contract or for any asserted warranty arising out of the original contract, and so insofar as the counterclaim is urged in this case on behalf of this defendant, it is narrowed down to the question of whether or not there was a breach 20 30 40

Charge.

of the so-called new contract between the parties as evidenced by these letters and conduct to which I have already alluded.

10 The case is somewhat simplified, gentlemen, because of the fact that although there is a counter-claim filed by the defendant seeking to obtain an affirmative verdict for damages against this plaintiff, which is based first, insofar as I have now limited it, to defective materials supplied after these
20 two letters and defective materials in the ten pieces supplied thereafter and also a claim for damages because the ten pieces which were to be used for replacement purposes were not delivered as soon as possible, gentlemen, there is not a bit of proof here that the materials which were furnished after these two letters and which refers to the stocks now at
30 hand at the plant, using the language of the plaintiff's letter, were defective or that the ten pieces were defective, and as counsel for the defendant has very properly said, they cannot now under this posture of the case assert any claim for defective materials in that respect, referring now to the materials furnished after the two letters which the court has held (together with the conduct of the parties thereafter in proceeding under these letters), constitute a new contract. So the case gets down, gentlemen, to the question of whether or not the plaintiff made these ten replacement pieces and delivered them at the site of the work as called for by these letters, "as soon as possible". The burden rests upon the plaintiff to prove his case to your satisfaction by a fair preponderance of the evidence and that includes proof that it has performed its contract in accordance with the terms thereof.

40 Preponderance of the evidence does not necessarily mean the greater number of witnesses on one

Charge.

side nor on the other, but it does mean the greater weight of the evidence. It refers to the quality of it rather than to the quantity.

It is not disputed that the balance of the materials except the ten pieces were delivered, nor is it disputed that these ten pieces were delivered (that is the ten pieces which were required for replacement purposes.) You will remember what the testimony was with respect to the designation of the pieces required. I think those pieces were set forth in the letter of April 13th, 1923, or thereabouts and that the final pieces were delivered to the job sometime in December, 1923. With reference to this term "as soon as possible," the courts have construed that language to mean within a reasonable time having due regard to the nature and circumstances of the case, and with regard being had to the manufacturer's ability to produce the articles required; in other words it is such a time as would be considered reasonable under the circumstances of the case.

In considering what would be as soon as possible, gentlemen, you have a right to take into consideration the letter of the defendant which was written to the plaintiff some time, as I recall it, in November of 1923, in which the defendant designates the place where these ten pieces of terra cotta should be delivered, naming the place where other deliveries had been made. You should also take into consideration certain sections of the Sales of Goods Act, which I shall now read to you:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in rela-

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Charge.

tion to them which is inconsistent with the ownership of the seller or when, after the lapse of a reasonable time, he would take the goods without intimating to the seller that he has rejected them."

10

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedies for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

20

These extracts which I have read to you are found in the 48th and 49th section of the Sales of Goods Act, a statute of this state.

30

So, gentlemen, having in mind the rules that I have now given to you, it is for you to determine whether or not the plaintiff in this case did deliver these ten replacement pieces of terra cotta within a reasonable time under all of the circumstances, or as soon as possible using the language of these letters. If not, then whether or not such performance on the part of this plaintiff was waived by either the letters or conduct of the defendant company, because it is recognized in the law that if the performance of a condition is waived by the opposite party, that is tantamount to a performance of it when suit is brought for a recovery of the contract price.

40

There is a further question presented, gentlemen. You will have noted that all of this material has

Charge.

been delivered. The further question is whether or not, (even though you should find that the ten pieces of terra cotta had not been delivered as soon as possible after notification) that failure was such that it could be said that this plaintiff did not substantially complete the contract, even though he may have defaulted in that particular.

^{sixty} You will recall that there were something like ¹⁰ six pieces to be sent from the works after the two letters which it is claimed, and which I charge you, together with the conduct of the plaintiff from the agreement of these parties. There has been some evidence that there were something like 1600 or 1700 pieces that had previously gone into the building. You will remember what the testimony was, gentlemen, and if your recollection disagrees with what the court now states, you will disregard the ²⁰ statement of the court.

So, having in mind those things, it is for you to say whether or not, even though the plaintiff here failed to live up to the contract with respect to the time or the delivery of the ten replacement pieces of terra cotta, he nevertheless in spite of that fact, substantially performed the contract.

Substantial performance, gentlemen, is a somewhat difficult term to define. If a contract has not ³⁰ been half completed nor one third completed, you will very properly say that there has been no substantial completion; but where a contract has been so fully completed that only a few things remain to be done to bring about its complete performance in a case such as this, that is, where the bulk of what was to be done has been done, and what was done has been received by the person for whom the materials were furnished and the work done, ⁴⁰ then you might say that there has been a substan-

Charge.

tial performance. If ther has been a substantial performance than the plaintiff would be entitled to recover the contract price, that is to say \$843.75 less what would be the reasonable cost of completion.

10 So, gentlemen, if after weighing this evidence you come to the conclusion that this plaintiff has not performed its contract or has not substantially performed its contract, then under the pleadings in this case you would not be entitled to give him a nickel because the plaintiff here has based his claim, not upon a statement that it was prevented from performing and that therefore it is entitled to a quantum meritis for as much as these materials are worth, but the plaintiff puts its case squarely upon the proposition that there has been at least
20 a substantial performance of the contract. If they do not prove that to you by the preponderance of the evidence, they cannot get anything under their complaint in this case.

I might say in passing, that there have been statements made in your presence that the breach of this so-called new agreement, which is really a compromised agreement, would give the rights to the defendant to resort to a cause of action growing out of any breach of the original contract, that is
30 the contract referred to in these letters as of the date August 4th, 1922. If there had been any proof in this case that under the supplemental contract or the compromise contract, no performance had been done or that the defendant had refused to perform, showing a repudiation of the contract, then that proposition in law would probably be applicable but there is no question here of any such fact because the plaintiff here show that this contract
40 was partly performed and that there was an effort

Charge.

made to fully perform it, so under such circumstances the defendant in this case, so far as its counterclaim is concerned, would be limited to any damages growing out of a breach of the compromise agreement.

Now gentlemen, as I started out to say a moment ago, if you find that the plaintiff here has not substantially performed his contract, there can be no recovery. If you find that there can be no recovery. If you find that there has been a substantial performance, then it will be entitled to the amount claimed and which I have stated, less a reasonable cost of having the work fully completed, and that would mean putting in this tile, and while there was no agreement to put in the tile, nevertheless it was to have been delivered within a reasonable time and if it was not so delivered, and if it is found that there was nevertheless a substantial delivery, then what it would cost to finish it up at the time should be deducted. But unless that was a substantial completion on the part of the plaintiff, there can be no recovery on this complaint.

If you find that the plaintiff is not entitled to your verdict, then you will have to take up the defendant's counterclaim.

The case as it has developed has eliminated from your consideration any question regarding defective material and the counterclaim is now narrowed down to a claim that the defendant has been damaged because the ten replacement pieces were not delivered at the job as soon as possible. It is unnecessary for me to define that term "as soon as possible" again. You remember what I said about that subject, but if in this case you find that there has been a breach on the part of the plaintiff, of this contract in the respect claimed, that is to say

Charge.

with respect to the delivery of these ten pieces, if you find that they were not delivered as required and that what was done would not amount to a substantial completion and that the performance of that provision 'as soon as possible' was not waived in this case, remembering the provisions of the statute which I read to you, which requires as I
10 have said, notice to the seller of any breach of any promise within a reasonable time after the buyer knows, or ought to know of such breach—if you find that that is the situation, then this defendant is entitled to your verdict on his counterclaim. If the defendant is entitled to a verdict, then you are to remember, gentlemen, that he would be entitled to be compensated for the loss of money naturally and directly resulting from the breach of this contract.

20 It is insisted here that because of such a breach the defendant was required or will be required to pay money to take out the ten rejected pieces and put in the ten replacements. Of course if that is directly and naturally resulting from such a breach of contract, that would be an element of damage. You will remember what the testimony was with respect to that. There has been some testimony that it would cost six or seven hundred dollars.
30 On the other hand the plaintiff has produced proof here that it would cost only \$150; but you must remember, gentlemen, in considering this case, that in the event that you find that what the plaintiff did was a substantial completion of his contract, then of course he would be entitled, as I have said before, to recover \$843.75 with interest of six percent thereon from the date ten days after these replacement pieces were delivered, less what it would reasonably have cost to get those pieces on the job
40 to finish this contract.

Charge.

Now, gentlemen, if you find that there was not such a completion of the contract, and that the defendant has been damaged as I have indicated, then the defendant would be entitled to your verdict. I have been requested to charge certain propositions of law on the part of the defendant. The first I refuse to charge.

10

2. The plaintiff's agreement to deliver the ten replacement pieces "as soon as possible" must be construed to mean delivery "within a reasonable time" after designation. I so charge you.

3. If you find that the ten replacement pieces were not delivered "as soon as possible" or "within a reasonable time" after designation, then the defendant is entitled to damages for breach of that agreement.

20

I so charge you, and I charge you that he would be entitled to an affirmative verdict or to a deduction upon whether you find that the breach was such that it could be said that the plaintiff had not substantially completed his contract.

The fourth request I refuse to charge except as I have already charged.

30

The fifth request I refuse to charge.

Mr. Melniker: I respectfully except to that part of the Court's charge wherein the court charged that the letters of February 19th and March 4th and subsequent constituted a new contract abrogating the original contract.

40

Charge.

Jury returns for further instructions.

The Foreman: We would like to know whether the first paragraph of the letter of February 19th, 1923, applies to the third paragraph of the same letter?

10 The Court: Of course. You have to take all four of these paragraph together. They are all part of that letter and you have to read them as applying to each other. That letter referred to the situation as it existed at the time the letter was written. It could not be presumed by that letter that they intended to waive future performance.

Both sides may have an exception to what I have just said.

20

30

40

Defendant's Requests to Charge.

1. The letter of the plaintiff dated February 19th, 1923 and the letter of the defendant dated March 4, 1923, does not abrogate or rescind the original agreement between the parties dated August 4, 192, particularly insofar as the guarantee for one year is concerned.

2. The plaintiff's agreement to deliver the ten replacement pieces "as soon as possible" must be construed to mean delivery "within a reasonable time" after designation. 10

3. If you find that the ten replacement pieces were not delivered "as soon as possible" or "within a reasonable time" after designation then the defendant is entitled to damages for breach of that agreement. 20

4. If you find that the plaintiff failed to perform its agreement and that consequently the defendant is entitled to damages then you will award the defendant the damages suffered by the defendant because of the failure of the plaintiff to deliver the ten pieces as agreed.

5. If you find that the plaintiff failed to perform its agreement then the defendant is entitled not only to such damages as naturally flowed from such failure but also to damages for breach of the original contract. 30

Plaintiff's Exhibit 1.

(Letterhead)

THE NEW JERSEY TERRA COTTA Co.

New York, February 19, 1923.

Goodman Warehouse Corp.,
Longacre Eng. & Constr. Co., Agents.

Re: #5504, Warehouse, Jersey City, N. J.

10 Gentlemen:

In accordance with agreement made over the telephone today with your Mr. Nathan Goodman, Attorney, and Mr. Eilinberger, of the Longacre Engineering & Construction Company, we will agree to deduct, as settlement in full of any and all claims made or to be made by you for alleged defective material, delays, etc. the sum of \$1250. from the amount of our above mentioned contract.

20 You agree to forward to us at once, a payment of 85% of the amount of the balance of the contract, as per enclosed statement, \$4781.25, and we will immediately on receipt of this payment deliver to your above mentioned building the balance of the work now stored at our plant.

We further agree to replace at your request, and deliver at the building site, as soon as possible, ten pieces of terra cotta as may be designated by you, and which you may want to be replaced.

30 The above mentioned balance of 15%, or \$843.75 shall be paid us ten days after above mentioned replacements have been furnished by us at the building and no further claims shall be made under this contract of August 4th, 1922 or otherwise by you for damages, delays or any other cause, and all previous agreements whether written or verbal hereby stand cancelled.

40

Yours very truly,

THE NEW JERSEY TERRA COTTA Co.,

E. V. ESKESEN,

EVE/FT

President.

Plaintiff's Exhibit 2.

Ord. No. 5504

Monthly Statement.

Perth Amboy, N. J., 2/19/23

LONGACRE ENG. & CONSTR. CO.,
345 Madison Ave., New York City
in account with

THE NEW JERSEY TERRA COTTA CO.

10

Manufacturers of

Architectural Terra Cotta

Division

Office: Singer Building

Seaboard Clay Mfg. Co.

New York

Building: Warehouse, Jersey City, N. J.

	Total		Amount
	Contract	Credits	Due
T. C. Contract	6875.00		
Allowance	1250.00		
Total	5625.00		
15% Retained		843.75	
85%, Amount Due			4781.25

20

Make all checks payable to the New Jersey Terra
Cotta Co.

Plaintiff's Exhibit 3.

30

February 26, 1923.

Goodman Warehouse Corp.,

Longacre Eng. & Constr. Co., Agents.

Re: #5504, Warehouse, Jersey City, N. J.

Gentlemen:

We are as yet without a reply to our letter of
the 19th instant.

Yours very truly,

THE NEW JERSEY TERRA COTTA CO.

40

EVE/FT

Plaintiff's Exhibit 4.

GOODMAN WAREHOUSE CORPORATION
21-23-25 West 20th Street, Bayonne, N. J.
Telephone 269 Bayonne

February 27th, 1923.

10 The New Jersey Terra Cotta Co.,
149 Broadway,
New York City.

Gentlemen:

We are in receipt of your letter of the 26th inst., also your registered letter of last week. Our office force has been disrupted by sickness and I have been forced to give my time to other duties. Furthermore, Mr. Samuel Goodman has been away for his health, and we expect his return in a day or two.

20 As soon as Mr. Samuel Goodman returns, I will take the matter up with him and Mr. Waters, and submit an immediate reply. From present indications, I doubt if there will be any trouble or delay in accepting your proposition. However, this is merely by own personal opinion, and the final reply will be given in a few days.

Hoping this will be satisfactory, I remain

30

Very truly yours,

GOODMAN WAREHOUSE CORPORATION,
Per NATHAN L. GOODMAN.

NLG:LJ

Plaintiff's Exhibit 5.

(Letterhead)

GOODMAN WAREHOUSE CORPORATION

March 8th, 1923. Bayonne, N. J.

The New Jersey Terra Cotta Co.,
 149 Broadway,
 New York City.

10

Gentlemen:

We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of One thousand two hundred and fifty dollars (\$1250) from the contract price in consideration of our waiving any claims for defective material, delays, etc.

We understand that the Architect is preparing a certificate showing the amount due you on your contract after deducting the sum of One thousand two hundred and fifty dollars (\$1250) herein mentioned, and the retainer of fifteen per cent. (15%). Upon receipt of this certificate, we will present to Mr. Harry Eilenberger, of the Longacre Engineering & Construction Company, an order upon the American Bond and Mortgage Company for payment of the same. After delivery by you of the balance of the terra cotta, now ready for shipment, he will be authorized to present the same to you.

20

30

We will advise you as soon as this order is presented to Mr. Eilenberger, so that you can immediately make shipment of the balance of the terra cotta.

Yours very truly,

GOODMAN WAREHOUSE CORPORATION,

Per NATHAN L. GOODMAN,

NLG:LJ

Sect. 40

Plaintiff's Exhibit 6.

(Letterhead)

THE NEW JERSEY TERRA COTTA CO.

New York, April 6, 1923.

Goodman Warehouse Corp.,
Longacre Eng. & Constr. Co., Agents.

10

Re: #5504, Warehouse, Jersey City, N. J.

Gentlemen:

In our letter of February 19th we proposed to remake at your request and deliver at the above mentioned building site, "ten pieces of terra cotta as may be designated by you and which you may want to replace".

20

We understand that all of the terra cotta for this operation has now been set in the building, and inasmuch as we have not heard from you in regard to these replacements we take it for granted you do not wish to replace any of the terra cotta now set in the building.

If you should want us to furnish any of the above mentioned ten pieces we should like to know by return of mail, as we will otherwise destroy the moulds for this work.

30

Kindly let us hear from you by return of mail, and oblige

Yours very truly,

THE NEW JERSEY TERRA COTTA CO.

T. V. ESKESEN,
Pres.

EVE/FT

Plaintiff's Exhibit 7.

(Letterhead)

GOODMAN WAREHOUSE CORPORATION

April 7th, 1923. Bayonne, N. J.

New Jersey Terra Cotta Co.,
Singer Building,
New York City.

10

Gentlemen:

We are in receipt of your letter of April 6th regarding replacements.

We have not yet completed our investigation of pieces to be changed, but will go over the same with our Architect in a few days.

We will advise you shortly thereafter and, therefore request that you let the matter stand as it is for another week or two.

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Yours very truly,

GOODMAN WAREHOUSE CORPORATION,
Per N. L. GOODMAN.

NLG:LJ

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Plaintiff's Exhibit 8.

(Letterhead)

THE NEW JERSEY TERRA COTTA Co.

New York, April 10, 1923.

Goodman Warehouse Corp.,
21 West 20th St.,
10 Bayonne, N. J.

Re: #5504, Warehouse, Jersey City, N. J.

Gentlemen:

We are in receipt of your letter of April 7th and notice, in regard to the ten pieces which we proposed to remake for you, that you will not be able to advise us at present as to what pieces you want replaced in your above mentioned building, but request that we let the matter stand for another week or two.

We wish to say in regard to this that the work on this job has been completed for sometime, but we have kept the moulds in case of any replacements. These moulds are now very much in our way, as we are getting busy, and we would like to have same destroyed. We therefore cannot put this matter off much longer but must ask that you advise us in regard to the above mentioned ten pieces not later than one week from today.

Yours very truly,

THE NEW JERSEY TERRA COTTA Co.

T. V. ESKESEN,

Pres.

EVE/FT

Plaintiff's Exhibit 9.

(Letterhead)

GOODMAN WAREHOUSE CORPORATION

April 13th, 1923. Bayonne, N. J.

New Jersey Terra Cotta Co.,
 Singer Bldg., 149 Broadway,
 New York City.

10

Gentlemen:

In accordance with our agreement, you are to replace 10 pieces of terra cotta which we find in bad condition, and as you desire an immediate statement as to what pieces are to be replaced, we are herewith inclosing a list of the pieces which we desire to have you replace for use at the building.

B B—25	B C—84	20
A B—16	A B—191	
A A—34	A B—224	
A B—70	A D—47	
A A—45	A D—52.	

Will you kindly advise us when you expect to have these pieces ready.

Yours very truly,

30

GOODMAN WAREHOUSE CORPORATION,

Per NATHAN L. GOODMAN,

NLG:LJ

Secretary.

40

Plaintiff's Exhibit 10.

(Letterhead)

THE NEW JERSEY TERRA COTTA CO.

New York, April 17, 1923.

Goodman Warehouse Corp.,
21 West 20th St.,
Bayonne, N. J.

10

Re: #5504, Warehouse, Jersey City, N. J.
Gentlemen:

We are in receipt of your letter of April 13th in which you designate the ten pieces of terra cotta which you want us to remake for your above mentioned building.

We wish to say that we are accordingly going ahead remaking these pieces and will have some delivered to your building as quickly as possible.

20

Yours very truly,

THE NEW JERSEY TERRA COTTA CO.

EVE/FT

T. V. ESKESEN.

30

40

Plaintiff's Exhibit 11.

November 28th, 1923.

Goodman Warehouse Corp.,
21 West 20th St.,
Bayonne, N. J.

Gentlemen:

Re: #5504—Warehouse—Jersey City, N. J. 10

In accordance with agreement with you, we are to make replacement of ten pieces of terra cotta for your above mentioned building operation which were to be designated by you.

We wish to say that we now have these ten pieces ready for delivery and would ask you to advise us to what address you want said pieces delivered.

Kindly let us have your reply, and oblige

Yours very truly, 20

THE NEW JERSEY TERRA COTTA CO.

EVE/FT

30

40

Plaintiff's Exhibit 12.

(Letterhead)

GOODMAN WAREHOUSE CORPORATION.

Nov. 30, 1923.

10 New Jersey Terra Cotta Co.,
Singer Building,
New York City.

Gentlemen:

We are in receipt of your letter of November 28 advising us you have ten replacement pieces of terra cotta ready for delivery to us and that you await our advice as to where we desire delivery.

Kindly make the same at the building in Jersey City just as you did with your past deliveries.

20

Yours very truly,

GOODMAN WAREHOUSE CORP.,

By N. L. GOODMAN,
Secretary.

NLG/EDR

30

40

Plaintiff's Exhibit 13.

NEW JERSEY TERRA COTTA CO.

Perth Amboy, N. J., 3/15/23

Order No.—5504

Builder—Longacre Const. Co.,

Location—826-830 Bergen Ave., Jersey City, N. J.

Delivery—Our Truck.

Car No.—..... Rate.....

10

Sec.	Total	Previous		Shortages	Overs	Remarks
	Pieces	Shipped	Shipments			
AB	2	2			2 = 80	
HH	1	1				
BF	1	1				
		4 = 156			2 = 80	

Recd 6 pcs subject to shortage March 15/23

A. Y. Dempsey

Total Number Pieces, 6—Weight, 236

20

NEW JERSEY TERRA COTTA CO.

Perth Amboy, N. J., 3/15/23

Order No.—5504

Builder—Longacre Const. Co.,

Location—826-830 Bergen Ave., Jersey City, N. J.

Delivery—Our Truck.

Car No.—..... Rate.....

30

Sec.	Total	Previous		Shortages	Overs	Remarks
	Pieces	Shipped	Shipments			
HD	52	1	51		1 = 125	
HJ	120	46	74	ALL		
HK	32	15	17			
		62 = 1848			1 = 125	

Recd 63 pcs subject to shortage March 15/23

A. Y. Dempsey

Total Number Pieces, 63—Weight, 1973

40

Plaintiff's Exhibit 14.

NEW JERSEY TERRA COTTA CO.

Perth Amboy, N. J., 12/4/23

Order No.—5504

Builder—Goodman Warehouse Corp.

Location—826-830 Bergen Ave., Jersey City, N. J.

10 Delivery—Peerless Truck

Car No.—..... Rate.....

Sec.	Total Pieces	Shipped	Previous Shipments	Shortages	Overs	Remarks
AA	2	2		#34, 45		
AB	4	4		70, 16, 191, 224		
AD	2	2		47, 52		
BB	1	1		25		
BC	1	1		84		
20 HB	1	1		8		
		—				
		11 = 982		All		
				Bldg Rept		
				9 Boxes =		

Nine boxes

Goodman Warehouse Corp.

H. Gross (9)

Total Number Pieces, 11—Weight, 982

30**40**

Plaintiff's Exhibit 16.

(Letterhead)

GOODMAN WAREHOUSE CORPORATION.

Feb. 25, 1924.

New Jersey Terra Cotta Co.,
149 Broadway,
New York City.

10

Gentlemen:

We are in receipt of your letter of Feb. 20 but do not agree at all with your version of the agreement made last year.

At the time delivery was made by you of the terra cotta the architect condemned certain pieces of same because of blue spots and chips that were apparent on them. In order to avoid a complete re-making of your terra cotta and delay to our building it was agreed that we would waive the blue spots which existed on the majority of the pieces in consideration of the sum mentioned in our agreement.

20

We are perfectly satisfied with the agreement made at that time and have no complaint to make now of any defect in that terra cotta which was waived by us at the time of the making of the above agreement, but since the terra cotta has been installed and since the making of that agreement, pieces of terra cotta that heretofore looked to be in good condition have crackled so badly that they are a disgrace to the manufacturer and to the building.

30

We certainly, by our agreement of last year, waived no defect in the terra cotta that was not apparent at that time. When the architect condemned the terra cotta a list was made of those

40

pieces which contained the blue spots. That list was presented to you. The pieces now complained of, you will note, are not those mentioned in the original list and therefore were never considered as waived.

We must ask you again to endeavor to remedy the condition which now exists and until something is done in the matter we will refuse to make any further payments.

10

Yours very truly,

GOODMAN WAREHOUSE CORP.,

By NATHAN L. GOODMAN,

NLG/EDR

Secretary.

Defendant's Exhibit 2.

20

Ord. No. 5504

Monthly Statement

Perth Amboy, N. J., 11/1/23

Longacre Constr. Co.—345 Madison Ave., N. Y. C.

In Account With

THE NEW JERSEY TERRA COTTA CO.

Manufacturers of

Architectural Terra Cotta

30

Division

Office: Singer Building

Seaboard Clay Mfg. Co.

New York

Building Warehouse—Jersey City, N. J.

Total Contract Credits Amount due

Amount Due

893.75

Make all checks payable to the New Jersey Terra Cotta Co.

40

Defendant's Exhibit 3.

Ord. No. 5504

Monthly Statement

Perth Amboy, N. J., 2/1/24

Longacre Construction Co., 345 Madison Ave.,	10
New York City	
In Account With	
THE NEW JERSEY TERRA COTTA CO.	
Manufacturers of	
Architectural Terra Cotta	
Division	
Office: Singer Building	
Seaboard Clay Mfg. Co.	
New York	
Building Warehouse—Jersey City, N. J.	
	20
Total Contract Credits	
Amount due	
Amount Due	843.75

Make all checks payable to the New Jersey Terra
Cotta Co.

30

40

Defendant's Exhibit 4.

(Letterhead)

LONGACRE ENGINEERING & CONSTRUCTION Co.

New York, N. Y.

May 23, 1923.

Re: Goodman Warehouse Estimate #56.

10 Moores & Dunford, Inc.,
110 E. 42nd St.,
New York, N. Y.

Dear Sirs:

We respectfully make requisition for payment covering labor and materials furnished in connection with our contract with the Goodman Warehouse Corp., for the construction of the above building, as follows:

20 Voucher #64—N. J. Terra Cotta Co.....\$843.75

Very truly yours,

LONGACRE ENGINEERING & CONSTRUCTION Co.,
Agents for Goodman Warehouse Corp.
By A. RUESER.

30

40

LONGACRE ENGINEERING & CONSTRUCTION CO.

Voucher Distribution Sheet

Goodman Warehouse Building

Payment to N. J. Terra Cotta Co. Est. No. 56

Contractor N. J. Terra Cotta Co. Vr. No. 64

Branch of Work Masonry, etc. Date 5/22/23

Date	Description	Item	Total
	Contract	\$6875.00	
	Adjustment	1250.00	<u>10</u>
		5625.00	
	Paid on a/c	4781.25	
	Contract completed	843.75	
	This Final Payment		\$843.75

Ord. No. 5504 20
 Monthly Statement

Perth Amboy, N. J., 5/1/23

Longacre Construction Co., 345 Madison Ave.,
 New York City.

In Account with
 THE NEW JERSEY TERRA COTTA CO.
 Manufacturers of 30
 Architectural Terra Cotta
 Division Seaboard Mfg. Co.
 Office: Singer Building, New York
 Building: Warehouse, Bergen Ave., Jersey City,
 N. J.

Total Contract	Credits	Amount due
Amount Due		893.75

Make all checks payable to the New Jersey Terra
 Cotta Co. 40

Judgment.

HUDSON COUNTY CIRCUIT COURT.

	NEW JERSEY TERRA COTTA COMPANY, a corporation, Plaintiff,	Judgment entered January 8, 1926. Damages \$947.95 Costs Total
	vs.	
10	GOODMAN WAREHOUSE CORPORATION, a corporation, Defendant.	

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

20 Judgment On Verdict in the above entitled cause was entered in this Court on the 8th day of January in the year of our Lord One thousand nine hundred and 26 in favor of the Plaintiff, New Jersey Cotta Co., a corp., in a plea of Action at Law for the sum of Nine Hundred & Forty-seven Dollars and twenty-five cents damages and costs of suit.

Judgment entered and signed this 8th day of January, 1926.

30 HENRY E. ACKERSON, Jr.,
Judge.

Rule for Judgment.**HUDSON COUNTY CIRCUIT COURT.**

NEW JERSEY TERRA COTTA COM-
PANY, a corporation,
Plaintiff,

vs.

GOODMAN WAREHOUSE CORPORATION,
a corporation,
Defendant.

Action
at Law.

10

This action was tried before Judge Henry E. Ackerson with a jury in the Hudson County Circuit Court on January 4th and 5th, 1925.

The cause having been heard and submitted to the jury they returned a verdict in favor of the Plaintiff and against the Defendant, assessing Plaintiff's damages in the sum of \$843.75 principal with interest in the amount of \$104.20 making the total thereof \$947.95, with costs of suite to be taxed. 20

Rule actually entered Jan. 8, 1925.

On Motion of

MCDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff.

30

40

Notice of Appeal and Grounds.

HUDSON COUNTY CIRCUIT COURT.

NEW JERSEY TERRA COTTA COM-
PANY, a corporation,
Plaintiff,

VS.

10

GOODMAN WAREHOUSE CORPORATION,
a corporation,
Defendant.

To:

McDERMOT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff.

20 TAKE NOTICE THAT the defendant-appellant, the
Goodman Warehouse Corporation, a corporation in
the State of New Jersey, appeals to the Court of
Errors and Appeals in the last resort in all causes
in New Jersey, from the whole of the judgment en-
tered in this cause on the following grounds.

30 1. Because the Trial Court refused to permit
the defendant to introduce any evidence regarding
the contract of August 4th, 1922.

2. Because the Trial Court refused to permit the
defendant to cross examine plaintiff's witnesses on
the contract of August 4th, 1922.

3. Because the Trial Court refused to permit
the defendant to introduce any evidence to show
what the intent of the defendant was in writing
the letter of March 8th.

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Notice of Appeal and Grounds.

4. Because the Trial Court refused to permit the introduction of any evidence tending to show that the letter of March 8th was not an acceptance of plaintiff's letter of February 19th, but on the contrary a rejection thereof.

5. Because the Trial Court refused to permit the defendant to introduce any evidence showing the damages it has suffered by reason of plaintiff's failure to perform the contract of August 4th, 1922. 10

6. Because the Trial Court refused to permit any evidence on defendants counterclaim that arose by breach of the agreement of August 4th, 1922.

7. Because the Trial Court held that the letters of February 19th and March 8th constituted a contract, which contract abrogated the contract of August 4th, 1922. 20

8. Because the Trial Court refused to permit any evidence tending to show that the letters of February 19th and March 8th did not recind the old contract, but merely modified the same in some particulars.

9. Because the Trial Court erred in finding as a matter of law that the letters of February 19th and March 8th constituted a contract instead of holding that the letter of March 8th constituted a new offer and permitting the jury to decide whether or not the acts of the plaintiff constituted an acceptance of the defendant's new offer. 30

10. Because the Trial Court charged the jury that the entire case was based upon the letters of 40

Notice of Appeal and Grounds.

February 19th and March 8th, and that there was nothing further for them to consider.

10 11. Because the Trial Court charged the jury that the letters of February 19th and March 8th plus conduct of the parties, constituted a contract and that it was his duty as judge to determine this as a matter of law.

12. Because the Trial Court charged that these two letters constituted a contract which contract completely recinded the contract of August 4th, 1922.

20 13. Because the Trial Court erred in charging the jury on the subject of substantial performance and calling to the juries attention the number of pieces delivered under the old contract of August 4th, 1922.

14. Because the Trial Court failed to properly charge the jury on the question of substantial performance.

30 15. Because the Trial Court refused to charge the first, fourth and fifth request, the charge given to him by the defendant.

NATHAN L. GOODMAN,
Attorney for Defendant-Appellant.

77

New Jersey Court of Errors and Appeals.

NEW JERSEY TERRA COTTA COMPANY, a
corporation,
Plaintiff-Appellee,

—vs.—

GOODMAN WAREHOUSE CORPORATION, a corporation,
Defendant-Appellant.

**BRIEF ON BEHALF OF PLAINTIFF-
APPELLEE.**

This is an appeal by the defendant from a judgment of the Hudson County Circuit Court in favor of the plaintiff in the sum of \$947.95 and costs, which were taxed at \$66.34.

Statement of Facts.

Pursuant to a written contract dated August 4, 1922, plaintiff agreed to make and furnish defendant for use in construction of its warehouse building, certain terra cotta for the agreed price of \$6,875. This contract provided that the terra cotta should be in strict accordance with the plans and specifications of the architect mentioned therein (Complaint, par. 1, p. 2, ll. 32-39), and defendant in its brief claims that the specifications therein referred to provided for a guarantee against checking for one year after installation, and which, for the purpose of argument, we can assume is the fact. After a substantial part of

the said terra cotta had been delivered, defendant claimed that some of it was defective.

Thereafter, plaintiff and defendant entered into a new contract consisting of the plaintiff's letter of February 19, 1923 (Exhibit P-1, p. 130), and defendant's letter of acceptance dated March 8, 1923 (Exhibit P-5, p. 133), and which letters are as follows:

"THE NEW JERSEY TERRA COTTA CO.

New York, February 19, 1923.

Goodman Warehouse Corp.,
Longacre Eng. & Constr. Co., Agents.

Re: #5504, Warehouse, Jersey City, N. J.

Gentlemen:

In accordance with agreement made over the telephone today with your Mr. Nathan Goodman, Attorney, and Mr. Eilinberger, of the Longacre Engineering & Construction Company, we will agree to deduct, as settlement in full of any and all claims made or to be made by you for alleged defective material, delays, etc., the sum of \$1,250 from the amount of our above mentioned contract.

You agree to forward to us at once, a payment of 85% of the amount of the balance of the contract, as per enclosed statement, \$4,781.25, and we will immediately on receipt of this payment deliver to your above mentioned building the balance of the work now stored at our plant.

We further agree to replace at your request, and deliver at the building site, as soon as possible, ten pieces of terra cotta as may be designated by you, and which you may want to be replaced.

The above mentioned balance of 15%, or \$843.75, shall be paid us ten days after above mentioned replacements have been

furnished by us at the building and no further claims shall be made under this contract of August 4th, 1922, or otherwise by you for damages, delays or any other cause, and all previous agreements whether written or verbal hereby stand cancelled.

Yours very truly,

THE NEW JERSEY TERRA
COTTA CO.,

E. V. ESKESEN,
President."

EVE/FT

"GOODMAN WAREHOUSE
CORPORATION

March 8th, 1923, Bayonne, N. J.

The New Jersey Terra Cotta Co.,
149 Broadway,
New York City.

Gentlemen:

We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of One thousand two hundred and fifty dollars (\$1,250) from the contract price in consideration of our waiving any claims for defective material, delays, etc.

We understand that the Architect is preparing a certificate showing the amount due you on your contract after deducting the sum of One thousand two hundred and fifty dollars (\$1,250) herein mentioned, and the retainer of fifteen per cent. (15%). Upon receipt of this certificate, we will present to Mr. Harry Eilenberger, of the Longacre Engineering & Construction Company, an order upon the American Bond and Mortgage Company for payment of the same. After delivery by you of the balance of the terra cotta, now ready for shipment, he will be authorized to present the same to you.

We will advise you as soon as this order is presented to Mr. Eilenberger, so that you can immediately make shipment of the balance of the terra cotta.

Yours very truly,

GOODMAN WAREHOUSE
CORPORATION,

Sect."

NLG:LJ.

At the time this contract was made, the balance of the work stored at plaintiff's plant consisted of around 60 pieces, the rest of the terra cotta called for under the old agreement, having been already delivered (p. 45, ll. 4-8 and ll. 20-31), approximately 1,700 pieces having been required under the original contract (p. 63, ll. 2-8).

Pursuant to the new contract, plaintiff furnished and delivered to defendant on March 15, 1923, the balance of the material then stored at its plant (p. 25, ll. 20-40; p. 26, ll. 1-3, and Exhibit P-13, p. 141, p. 61, ll. 31-36) and at the same time (p. 26, ll. 4-8) received a check dated March 14, 1923, drawn on the American Bond and Mortgage Company for exactly \$4,781.25 (p. 71, ll. 1-12, Exhibit P-15).

Thereafter, the defendant delayed for over a month, and until after all of the terra cotta had been set, to designate the ten replacement pieces. On April 6, 1923 (Exhibit P-6, p. 134), plaintiff wrote the defendant to the effect that it understood that all of the terra cotta had been set and that should defendant desire any of the ten replacement pieces to advise by return mail. Under date of April 7, 1923, defendant wrote to plaintiff (Exhibit P-7, p. 135) acknowledging receipt of plaintiff's letter of the 6th and stating that they had not completed their investigation of the pieces to be changed and requesting plaintiff to

let the matter stand for another week or two. Thereupon, plaintiff again wrote the defendant on April 10 (Exhibit P-8, p. 136) insisting upon the designation of the ten pieces within a week.

Thereafter, defendant's designation of the ten replacement pieces was finally made by its letter of April 13, 1923 (Exhibit P-9, p. 137).

Upon receipt of the designation, plaintiff started to make the ten replacement pieces and after they had been completed, under date of November 28, 1923, wrote a letter to the defendant (Exhibit P-11, p. 139) stating that the pieces were ready for delivery and asking advice as to where delivery was to be made. Under date of November 30, 1923 (Exhibit P-12, p. 140), defendant acknowledged receipt of the last letter and instructed plaintiff to make delivery at the building in Jersey City, the same as it had done with the past deliveries.

Plaintiff delivered the replacement pieces on December 4, 1923 (p. 26, ll. 30-35, Exhibit P-14, p. 142), but never received the agreed price of \$843.75, for which amount with interest from December 14, 1923, the action was brought below and a verdict in favor of the plaintiff rendered.

Questions Involved.

The questions involved in this case and upon which the appellant's grounds of appeal must stand or fall, are:

(a) Did the plaintiff's letter of February 19, 1923, and defendant's letter of March 8, 1923, alone or taken in conjunction with the subsequent conduct of the parties, constitute a new contract between them?

(b) If not, did the defendant's letter of March 8, 1923, amount to a new offer to waive all

claims for defective material, delays, etc., which became a binding contract upon the plaintiff's delivering the balance of the terra cotta then ready for shipment and allowing the defendant a reduction of \$1,250 from the original contract price?

Argument.

POINT I.

Plaintiffs letter of February 19, 1923, and defendant's letter of March 8, 1923, constituted a new contract between the parties and there can be no claim for defective material or for any asserted warranty arising out of the original contract.

Defendant claims that its letter of March 8th was only a qualified acceptance of plaintiff's offer of February 19th because the time of payment of the \$4,781.25 was designated in plaintiff's letter to precede delivery of the balance of the terra cotta, and that there was no *consensus ad idem* because the reverse order was mentioned in defendant's letter of March 8th.

Defendant secondly contends that if its letter was only a qualified acceptance, it amounted to a new offer which had to be accepted by the plaintiff, and that if the subsequent acts of the parties, including the delivery of the balance of the terra cotta then ready for shipment, and the allowance by the plaintiff of the \$1,250 reduction from the original contract price, and the payment by defendant of the sum of \$4,781.25

after such delivery, established a contract, nevertheless, such new counter offer of the defendant, so accepted through action of the parties, was not broad enough to waive any and all claims made or to be made for defective material under the original contract.

In regard to this latter contention, it is clear that the words "in consideration of our waiving any claims for defective material, delays, etc.", contained in the first paragraph of defendant's letter of March 8th, mean what they say and are broad enough to include all claims made or to be made under the original contract. If there should be any doubt in this regard as to the meaning of "any claims for defective material, delays, etc.", the first paragraph of defendant's said letter specifically says:

"We have taken up your letter of February 19th, and accept your offer of a reduction in the sum of One thousand two hundred and fifty dollars (\$1,250) from the contract price in consideration of our waiving any claims for defective material, delays, etc."

If these words "any claims for defective material, delays, etc." need to be construed, and we submit that they do not for the word "any" means what it says, an examination of the plaintiff's offer of February 19th shows that the offer of reduction, which the defendant specifically accepts, is

"we will agree to deduct, as settlement in full of any and all claims made or to be made by you for alleged defective material, delays, etc., the sum of \$1,250 from the amount of our above mentioned contract."

The word "any" is still further explained through reference to the last paragraph of the plaintiff's offer of a reduction in the sum of \$1,250 where it says:

"no further claims shall be made under this contract of August 4th, 1922, or otherwise by you for damages, delays or any other cause, and all previous agreements whether written or verbal hereby stand cancelled."

We submit that it is patent from either or both of the first and last paragraphs of the plaintiff's letter that the words "any claims for defective material, delays, etc.", used in defendant's letter, include any and all claims made or to be made for defective material, delays, etc., arising out of the original contract.

Under the doctrine of novation the new contract was substituted for the earlier contract of August 4, 1922, and the rights of the parties were controlled by its terms, the earlier contract being thereby extinguished. *Moorecroft v. Allen* (Court of E. and A.), 78 N. J. L. 729.

In analyzing the defendant's first contention that these two letters do not constitute a contract because there was no *consensus ad idem*, an examination of the plaintiff's letter reveals that it wanted assurance of receiving the \$4,781.25 and defendant's letter established that assurance by stating that upon receipt of the architect's certificate showing amount due after the \$1,250 reduction less retainer of 15% (then in course of preparation):

"we will present to Mr. Harry Eilenberger, of the Longacre Engineering & Construction Company, an order upon the American Bond and Mortgage Company for payment of the same"

and that after delivery of the balance of the terra cotta ready for shipment, "*he will be authorized to present the same to you*". Defendant's letter then further states:

"We will advise you as soon as this order is presented to Mr. Eilenberger, so that you can immediately make shipment of the balance of the terra cotta."

According to the testimony, the \$4,781.25 was paid at the time of the delivery of the balance of the terra cotta then stored at the plant ready for shipment (p. 26, ll. 4-8). The important thing, however, is that the said balance of terra cotta was delivered and the said sum paid, and whether before, at, or after such delivery, makes no difference. Either party could waive its requirement as to time, but that would not nullify the other provisions of the contract which was a compromise or settlement agreement intended to be final and as such favored by the courts, *Moorecroft v. Allen* (Court of E. & A.) 78 N. J. L. 729.

In this case, after the writing of the afore-said two letters, both parties treated them and acted upon them as a binding contract. After receipt of the defendant's letter of acceptance dated March 8th, the plaintiff delivered to the defendant the balance of the terra cotta then stored at its plant ready for shipment, and the defendant paid the agreed sum of \$4,781.25, and the plaintiff allowed a reduction of \$1,250 from the original contract price, and the defendant designated the ten replacement pieces to be made and delivered, and after notification that such pieces had been completed, instructed plaintiff where to make delivery and the plaintiff promptly made delivery in accordance with such instructions, all as appears in the state of case and

specific reference to which has hereinabove been made under the heading of statement of facts.

Though the defendant now contends that these two letters do not constitute a new contract, it is interesting to say the least, to note its change of attitude since the commencement of this suit. In its letter of February 25, 1924 (Exhibit P-16, p. 143), which was offered solely to attack the credibility of the witness (p. 98, ll. 9-20), the defendant says:

"We are in receipt of your letter of Feb. 20 but do not agree at all with your version of the agreement made last year."
* * *

"We are perfectly satisfied with the agreement made at that time and have no complaint to make now of any defect in that terra cotta which was waived by us at the time of the making of the above agreement * * *" (p. 143, ll. 10-13 and ll. 26-30).

This letter was written after the plaintiff had been dunning the defendant to pay its bill, but before suit had been started.

A. A CONDITIONAL OR QUALIFIED ACCEPTANCE OF AN OFFER, IF ACCEPTED IN TURN, MAKES A CONTRACT BASED UPON THE OFFER AS MODIFIED, AND ASSENT TO MODIFICATION MAY BE INFERRED FROM THE FACT THAT THE PARTIES CONDUCTED BUSINESS UNDER THE CONDITIONAL ACCEPTANCE.

Though we have found no New Jersey case which directly raises the questions involved in the above rule of law, that rule is well established in other jurisdictions. It is indirectly involved, however, in the case of *Devlan v. Wells*, decided by this Court in 65 N. J. L., page 213. In that

case, Van Syckel, *J.*, delivering the opinion of the Court, at page 218, says:

“The failure to give a bond cannot defeat the plaintiffs’ right to recover. If the contract imposed upon them the duty to give a bond, because a bond was required of Wells & Company in their contract with Kelly which is not conceded, the defendants cannot take advantage of the failure of the plaintiffs in that respect, after permitting them to complete the work without exacting the bond.”

So, in the case at bar, the defendant having accepted the benefit of the \$1,250 reduction in purchase price and having designated, received, accepted and retained the ten replacement pieces, or in other words, having accepted the benefits of the contract formed by the two letters, it cannot now avoid payment of the agreed price thereby fixed. The rule is well established that when a party has accepted the benefits of a contract, he is estopped to question its validity. *Gibbs v. Craig* (Court of E. & A.), 58 N. J. L. 661, and numerous other cases therein cited; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 38 L. Ed. 167.

In the case at bar, it is perfectly patent that the minds of the parties met. Everything has been done except the payment of the balance due ten days after the delivery of the ten replacement pieces, and defendant is estopped to question the validity of the contract from which it received and accepted the benefits.

Where the acceptance of an offer is qualified or imposes new terms, the contract is complete if both parties subsequently treat it as existing in accordance with the acceptance of the new terms thereby imposed.

Under the subject, Contracts, in 6 Ruling Case Law in Section 31, at page 609, the writer says:

"The offeror may, of course, assent to the terms imposed by the offeree, and such assent may be inferred from the fact that the parties conducted business under the conditional acceptance."

In *McKell v. Chesapeake & Ohio Railway Co.* (S. Dist. Ohio C. C. A. 6th Cir. 1910), 175 Fed. 321, paragraph 2 of the syllabus is as follows:

"The fact that, in accepting a proposed contract by letter, a party stipulated for a further minor condition, did not invalidate the contract, although such letter was not replied to, where the parties entered upon performance as though such condition had been accepted, and continued such performance for several years."

The Court at page 328 says:

"Notwithstanding Mr. Ingalls supposed that the letters seemed 'to correspond and clearly express our meaning' and that they 'will form all the contract we shall need'; and the parties conducted the business for years as if they had a contract, counsel for defendant now insist that there never was a contract, and in argument press the fact that there was never any written acceptance of the fresh conditions which they find in McKell's last letter of April 26, 1892. But it is a sufficient answer to this that *the parties proceeded with their contract as if these supposed conditions were a part of it, and this was as effectually an acceptance as if they had been formally accepted.*"

A writ of certiorari was denied by the United States Supreme Court in this case, 220 U. S. 613, 55 L. Ed. 609.

In *American Lumber & Mfg. Co. v. Atlantic Mill & Lumber Co.* (C. C. A. 3rd Cir. 1923), 290 Fed. 632, paragraphs 2, 3, and 4 of the syllabus are as follows:

"2. The meeting of the minds of the parties to a contract may be shown, not only by their words, but by the conduct of either or both.

"3. One who makes an offer and assents to an acceptance not responsive to the proposal enters into a contract on the terms of the acceptance and is bound thereby.

"4. Where the acceptance of an offer imposes new terms, the proposer's assent to such new terms may be inferred from the fact that the parties thereafter proceeded to conduct business under the conditional acceptance."

Woolley, J., at page 634 says:

"If the defendant's written orders and the plaintiff's written acceptances were all there was in the case to indicate the meeting of the minds of the parties, there would be substance in the defendant's contention, for it is elementary law that to make a valid contract the minds of the parties must meet on the same terms in the same sense. *H. & N. H. Co. v. Jackson*, 24 Conn. 514, 517, 63 Am. Dec. 177. But the meeting of minds of contracting parties may occur—and be shown—not by words alone but by conduct. *Hudson v. Columbian Transfer Co.*, 137 Mich. 255, 100 N. W. 402, 109 Am. St. Rep. 679; *Braun v. Hess & Co.*, 187 Ill. 283, 58 N. E. 371, 79 Am. St. Rep. 221. Such conduct may be that of either party, or, indeed, of both parties. In this case, however, the conduct was that of the defendant, raising the question (as we regard it) whether the contracts sued upon were in existence, not because of the plaintiff's conditional acceptances of the

defendant's offers, but because of the defendant's assent to the conditions imposed by the plaintiff in accepting the defendant's offers. Where one makes an offer and assents to an acceptance which is not responsive to the proposal, a contract is made and he is, of course, bound by it. *Iron Works v. Douglas*, 49 Ark. 355, 5 S. W. 585; *Baldwin v. Com.*, 11 Bush (Ky.), 417; *Underhill v. North American K. G. L. Co.*, 36 Barb. (N. Y.), 354; *Tilt v. La Salle Silk Mfg. Co.*, 5 Daly (N. Y.), 19; *Treat v. Ullman*, 34 Misc. Rep. 553, 69 N. Y. Supp. 974; *Gray v. Foster*, 10 Watts (Pa.), 280. The offeror's assent to new terms imposed by the offeree in his acceptance may be inferred from the fact that the parties thereafter proceeded to conduct business under the conditional acceptance. *McKell v. C. & O. Ry. Co.*, 175 Fed. 321, 99 C. C. A. 109, 20 Ann. Cas. 1097."

In *Sloan v. Wolf Co.* (C. C. A. 8th Cir. 1903), 124 Fed. 196, paragraph 1 of the syllabus is as follows:

"An offer of a modification or condition in answer to a proposal for a contract is a rejection of the original proposition, and an acceptance by the first proponent of the counter offer of his respondent concludes the agreement, and makes the modification or condition a part of it."

In *Lubell v. Rome* (Mass. 1922), 136 N. E. 607, which was on appeal upon an action for failure to deliver certain hosiery, Carroll, J., at page 608, says:

"The plaintiffs, in their letter of June 12, 1919, to the defendants, quoted from the defendants' telegram, 'Delivery three weeks one thousand black two thousand white eighteen inch fibers six dollars,' and stated, 'We would be interested in taking

1,000 dozen black, and 700 dozen white, * * * if you wish to make the price \$5.85.' The sizes were specified and the letter continued, 'If this price is satisfactory, kindly send confirmation, and your best terms.' It was agreed that the words 'eighteen inch fiber' when applied to hosiery meant 18 inches from the top of the hose to the bottom of the heel. On June 16, 1919, the defendant wrote the plaintiffs accepting the 'offer of \$5.85' and specified the terms as 1 per cent., 10 days. It was agreed that 1 per cent., 10 days, meant 1 per cent. discount if paid within 10 days. The hosiery was sent to the plaintiffs, and on June 27, 1919, the plaintiffs again wrote the defendants, acknowledging receipt of the merchandise, notifying them that the 18-inch fiber hosiery was not as ordered, but was 16-inch fiber, and saying that their order specifically stated that the goods were to be '18-inch,' and asked, 'If it was impossible to fill the order as requested, why did you accept same?' The 700 dozen white fiber silk hosiery were delivered and accepted by plaintiffs.

The judge instructed the jury that on the evidence there was a contract as matter of law. To this ruling the defendants excepted. Even if it be assumed, without deciding, that the plaintiffs' letter of June 12 and the defendants' reply of June 16, taken together, did not constitute a contract because the defendants' terms (1 per cent., 10 days) were not agreed to by the plaintiffs, and they were at liberty to reject the terms offered, the undisputed evidence showed that these terms were in fact assented to by the plaintiffs. In the letter of June 27, the plaintiffs acknowledged the receipt of the goods. They offered no objection to the defendants' terms of payment. Their only complaint was that the goods were not 18-inch, as ordered. They specifically referred to their letter of June 12, and spoke of it as

an order, and asked the defendants, 'If it was impossible to fill the order as requested, why did you accept same?' Even if the parties were not bound by the letters of June 12 and June 16, the terms asked for and stated by the defendant were agreed to, as shown by the subsequent letter. The minds of the parties met. The plaintiffs' offer was confirmed and the terms given were agreed to. *The construction of the correspondence was a question of law for the Court, and there was no error in ruling that as matter of law there was a contract between the parties.*"

In *Lang v. City of Battle Creek*, 39 Mich. 323, it was held that where a proposition made to a municipality is accepted with modifications which the proponent assents to, he is as much bound by them as if they had been in his original proposition.

In *Talcott v. Freedman*, 140 Mich. 32, 103 N. W. 535, defendants on September 22nd sent plaintiff a written order specifying certain goods, quantities and prices. September 27th plaintiff sent defendants a memorandum of order specifying the goods and prices in accordance with the terms of order except in one instance, and further stating that no cancellation on the order would be accepted and that any corrections must be made at once. The memorandum further stated the terms and date of delivery in technical trade abbreviations, and the change in specifications above referred to was assented to by defendants. On October 13th a commencement was made towards shipping the goods and other shipments followed. Beginning November 22nd a correspondence ensued on the question of credit and payments, in which no definite conclusion seemed to be reached.

The Court held that the *order and memorandum* constituted a contract between the parties, for a

breach of which damages might be recovered, irrespective of the subsequent correspondence as to credit.

In *General Lithographing & Printing Co. v. Washington Rubber Co.*, 55 Wash. 461, the Court held that though plaintiff's acceptance of an offer to pay a certain amount for printing of a catalogue by it was conditional in requiring extra compensation if certain changes were made, the contract was complete if both parties subsequently treated it as existing in accordance with the acceptance.

In *Wheeler v. Klaholt* (Mass. 1901), 59 N. E. page 756, paragraph 2 of the syllabus is as follows:

"2. Plaintiffs sent certain shoes to defendants on a mistaken supposition that a sale had been made. Defendants afterwards made an offer therefor, to which plaintiffs answered that they might keep the goods at the price they offered if they sent cash by return mail; if not, to return the goods immediately—giving shipping directions. Over a month afterwards plaintiffs were notified by the railroad company that the goods had arrived. On opening the cases, plaintiffs found the contents more or less defaced, and some pairs of shoes were gone. Held that, on receipt of plaintiffs' offer, it was defendants' duty to return the goods as directed, unless they wished to retain and pay for them; that mere silence and failure to send the money was not a rejection of the offer, but that *failure to return the goods within a reasonable time was an acceptance, notwithstanding the condition for immediate payment had not been complied with, since, that being solely for plaintiffs' benefit, they could waive it.*"

It is clear from the foregoing authorities that a new contract was made between the parties

consisting of the plaintiff's letter of February 19th and defendant's letter of acceptance dated March 8th and that the trial Court, in each instance, correctly ruled in excluding testimony pertaining to the original contract of August 4th and correctly charged the jury to the effect that these two letters and the subsequent conduct of the parties made a complete new contract between them and that there could be no claim for defective material growing out of any original contract or for any asserted warranty arising out of the original contract.

POINT II.

No exception was taken to the portion of the charge complained of in Point II of appellant's brief.

The only exception taken by the defendant-appellant to the Court's charge to the jury appears at the bottom of page 127 of the record (ll. 31-40). The only exception was to that portion of the Court's charge wherein the Court charged that the letters of February 19th and March 8th and subsequent constituted a new contract abrogating the original contract.

Appellant, however, now attempts to argue that the Court erroneously charged the jury on the question of substantial performance.

We submit that the appellant cannot raise this question in this Court at this time. *Stickle v. Vreeland* (Court of E. & A. 1923), 99 N. J. L. 468.

We respectfully submit that this appeal should be dismissed with costs.

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