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New Jersey Court of Errors and Appeals

WILLIAM E. DECKER, *Plaintiff-Respondent,* *vs.* GEORGE W. SMITH & CO., a corporation, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

See answering brief of Appellant to Respondent's brief, attached hereto.

Brief of Defendant-Appellant.

FACTS.

The plaintiff, William E. Decker (who it is admitted stands as plaintiff for the Kennedy Co. as a matter of convenience only), as assignee of David E. Kennedy Company, Inc., sues for three hundred and fifty-seven dollars and sixty cents ($357.60) as the balance claimed to be due for work and labor performed by Kennedy Company under a contract with defendant. The contract was executed on April 2, 1912, for the interior finish of Proctor Hall, Thompson College and Cleveland Memorial Tower, Princeton University, Princeton, N. J., which consisted in the installation of cork tile and base for the amount of thirty-six hundred dollars ($3,600). In State of Case, page 93, the contract is marked Exhibit P. 1, and in paragraph 3 of the said contract plans and specifications were spoken of and admitted in the evidence as Exhibit P. 2. Defendant claimed that subsequent to this contract with the assignor of the plaintiff that there was a supplemental contract made in the following term: That if the Kennedy Company were not under obligations to cover the entire floor space with the cork tiling, then the defendant was

to have an allowance from the Kennedy Company for the part of the floor not so covered. In fact, there were parts of the floor under the counters and dressers that the Kennedy Company was not obliged to tile, which said parts were required to be tiled by the plans and specifications. The defendant under this supplemental agreement claimed an allowance and set off of three hundred and seventeen dollars and sixty cents ($317.60). The defendant also claimed an allowance of forty dollars ($40.00) for labor made necessary to put the floor back in condition, cost of damage done to the dressers in the kitchen from the dampness of wet concrete due to the fault of the Kennedy Company in their work, and defendant also claimed three dollars and twenty-seven cents ($3.27) for labor furnished to unload the cork tile, which last item the plaintiff admits. The full claim of credits made by the defendant set out in Exhibit A of their answer (Case, page 9), and in Exhibit D. 1 (Case, page 106), is as follows:

Terms:

a/c Graduate College, Princeton University.

9x909	Labor furnished to unload cork tile at Graduate College		$3.27
9x995	Damage to Dressers in kitchen by wet concrete.....		40.00
9x998	Cork tile floor and cove base omitted on account of not being used under dressers, viz:		
	285 sq. ft. cork tile fl. @ 77c. $219.45		
	151 lin. ft. cove base @ 65c.	98.15	317.60
			$360.87

The matter of these allowances was the subject of dispute as shown by the correspondence between the Kennedy Company and defendant for some time (see the letters, Exhibit D. 1, Case, page 97, &c.). There were also other occasions when the disputed accounts were the subject of conferences between the officers of the Kennedy Company and defendant.

The defendant having already paid on account to the Kennedy Company fifteen hundred dollars ($1,500) and claiming an allowance of three hundred and sixty dollars and eighty-seven cents ($360.87) and the full amount of the contract being thirty-six hundred dollars ($3,600) would leave a balance, according to the defendant's claim, of seventeen hundred and thirty-nine dollars and thirteen cents ($1,739.13), and on November 21, 1913, the defendant sent the above memorandum of credits due defendant (Exhibit D. 1, Case, page 106) and the following check to Kennedy Company which was endorsed as herein set out Exhibit D. 2, Case, page 111).

No. 8891— Philadelphia, Nov. 21, 1913.

THIRD NATIONAL BANK 3-21

Pay to the order of David E. Kennedy, seventeen hundred thirty nine dollars 13/xx

$1739.13/xx

GEORGE W. SMITH & CO., Inc.
ARTHUR D. SMITH, *Treasurer.*

Endorsed as follows:

The payee by endorsement accepts this Voucher check in full payment of the following account. No other receipt necessary.

In full of all claims for contract 7104

10/6	Cash	.....	$1500.00
11/21	"	.....	1739.13
	~~Chg.~~	.....	~~360.87~~
			~~$3600.00~~

DAVID E. KENNEDY,
Per R. J.

Pay to the order of First Nat. Bank,

DAVID E. KENNEDY, Inc.

Pay any Nat. Bank, State Bank or Trust Co. or order endorsements guaranteed,

First Nat. Bank, N. Y., 1-65

Paid 11/29/1913, First Nat. Bank, New York.

Franklin Nat. Bank, Phila. Dec. 1, Rec'd payment. Clearing house.

The defendant sent an additional check on December 31, 1913, for eighteen dollars and sixty-six cents ($18.66) marked Exhibit D. 3, Case, page 112, with endorsement as follows:

No. 11365 Philadelphia, Dec. 31, 1913.

FIRST NATIONAL BANK.

Pay to the order of David E. Kennedy Eighteen 66/xx ..... Dollars

GEORGE W. SMITH & CO., Inc.

Arthur D. Smith,

$18.66/xx *Treasurer.*

Endorsed as follows:

The payee by endorsement accepts this voucher check in full payment of the following account no other receipt necessary

Nov. 8/13 $18.66

In full of claims to date Jan. 2/13

DAVID E. KENNEDY,

Per R. J.

Pay any Nat. Bank, State Bank or Trust Co., or order

Endorsements guaranteed

FIRST NAT. BANK, N. Y. 1-65

Both checks were endorsed and cashed by the Kennedy Company. The first mentioned check of November 21, 1913 (Exhibit D. 2, Case, page 111), was endorsed and cashed by the Kennedy Company **after**

Mr. Kennedy had crossed out the item "Chg. $360.87," and also crossed out the total "$3,600.00." The plaintiff's claim now is there is due and owing to the plaintiff by the defendant at the time suit was started the credit amount of three hundred and sixty dollars and eighty-seven cents ($360.87) less the small credit of $3.27, which item the plaintiff does not contest, thus bringing the plaintiff's claim to three hundred fifty-seven dollars and sixty cents ($357.60). **The defendant's claim is that this item of three hundred and sixty dollars and eighty seven cents was a disputed item and that the acceptance by the Kennedy Company of the check in full for all claims was an accord and satisfaction, and thus nothing was due the Kennedy Company or its assignee, the plaintiff.**

LAW AND ARGUMENT.

POINT I.

In arguing, the defendant's attorneys desire to take in the first place points fifth, seventh and eighth, and argue them together.

Fifth. The court erred in its ruling as follows:

> "I think, however, there is considerable force in his position that the question as to whether or not there was a dispute between these parties must be submitted to the jury" (Case, page 85, line 22).

Seventh. The court erred because it refused to direct a verdict in favor of the defendant on the ground that there was an accord and satisfaction (Case, page 85, lines 10-31).

Eighth. The court erred because it submitted to the jury the question as to whether or not there was a dispute between the parties as to the amount due (Case, page 85, lines 27, etc.).

There was a dispute between the Kennedy Company and the Smith Company, and while there was this dispute, Smith & Company sent a check endorsed as payment in full, and the said check was accepted by Kennedy Company. This was an accord and satisfaction. The law is clear. That there was a dispute cannot be doubted and therefore there was no question for the jury at all. There was no conflict in the testimony, that there was a dispute and later an acceptance of the check. Therefore there was nothing to submit to the jury. **There was a complete accord and satisfaction, and the court should have so decided and should have directed a verdict in favor of the defendant.** It is a question of law that when a claim is disputed and a check is offered as full payment with such words as:

The payee by endorsement accepts this voucher check in full payment of the following account. No other receipt necessary. In full of all claims for contract 7104.

10/6	Cash	$1500.00
11/21	"	1739.13
	Chg.	360.87
		$3,600.00

and the said payee accepts the check, endorses and deposits same in his bank account, that this will act as an accord and satisfaction, even though the amount of the check is less than the amount the payee claimed. *Rose* vs. *American Paper Co.,* 83 N. J. L., 707, at 709, where the court says:

> "Now, of course, the rule of law is that where the claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed in satisfaction, operates as an accord and satisfaction."

And in 1 Cyc., pages 329, 330, 331, the law is stated as follows:

> "Where a claim is unliquidated or in dispute, the payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction, is a rule that the receiving of a part of the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply where the plaintiff's claim is disputed or unliquidated. In such case a concession made by one is a good consideration for the concession made by the other. The fact that the creditor was not legally bound to make any abatement of his claim, or that the amount accepted was much less than the creditor was entitled to receive and would have recovered had he brought action, does not in any way affect the rule."

And in 1 Cyc., 349:

> **"Where the facts in respect to an accord and satisfaction have been ascertained, their effect is purely a question of law and is not to be submitted to the jury."**

1 Cyc., 349, and cases cited.

"A"

There clearly was a dispute in this case. This is shown by the entire evidence—both that of the plaintiff as well as that of the defendant, and also by the letters written by both parties. The testimony of defendant, Arthur D. Smith (Case, page 36, line 14), is as follows:

> "Q You remember there was a controversy between yourselves and the Kennedy Company as to whether there was any balance due or not?
>
> A Yes, sir.

Q I show you a letter that has been marked D. 1 for identification, and ask if that is correspondence between yourselves and the Kennedy Company affecting the question in controversy?

A Yes.

Q The amount in dispute was the amount sued for less the three dollars and some cents which they have allowed you?

A Yes.

Q And forty dollars which you claim for some injury to the woodwork?

A Yes; that was in the amount.

Q That was in the amount in dispute?

A Forty dollars plus $317.60 making $357.60, was the amount in dispute; then this three dollars and twenty-seven—

Q That they admit?

A That they admit.

Q Now, tell us about the forty dollars; what is that for?

Mr. Walscheid. I object. I would like to cross examine this witness as to his personal knowledge."

The testimony of David E. Kennedy (witness for plaintiff), and who is the real plaintiff (Case, page 33, line 4), is as follows:

"Q Now you had received and written various letters to the Kennedy Company about this check and balance due?

A Wrote to whom?

Q You have received and have written to—I said the Kennedy; I mean to Smith—various letters about the question of the amount due on the contract?

A You mean I personally?

Q Oh, no. Your company, the Kennedy Company.

A Yes, the company."

Also the further testimony of David E. Kennedy (Case, page 66, line 3):

"Q Mr. Kennedy, did the Kennedy Co. ever accept or intend to accept the check for $1,739.13 (objected to, interruptions) question continuing (Case, page 66, line 32).

Q State in detail just what you did when you received that check.

A This—(interruptions).

A Our bookkeeper brought me this check and called my attention to this endorsement and asked me whether—he called my attention also to the fact that it was not in full, **that there was a disputed item**—(interruptions) (Case, page 67, line 29), answer continuing.

A The bookkeeper explained that this item of $360 was in dispute—

The Court. You have already told us that.

A (continuing)— and asked me whether I thought that the endorsement of this check would bind us on this disputed item of $360."

Mr. Grange, witness for the plaintiff testified (Case, page 26, line 27) as follows:

"Q Now go ahead and tell us what you were going to tell us?

A I went out to see Mr. Smith regarding a claim that he had against us and discussed it with him.

Q I do not care anything about other claims. in relation to this contract?

A I practically had no conversation with him regarding the contract or the completion—

Q — When was the last conversation you had with him in relation to this contract—(interruption) and the performance of the contract?

A As I say, it was about a year ago last February.

Q Tell us what the conversation was in relation to this contract and performance of the work—(interruption). Will you tell us what the conversation was?

A I had had a number of talks with Mr. Smith regarding a bill which he had rendered to the company in settlement and it was along those lines we discussed rather than any completion of the work or whether the contract had been completed in our part."

This also shows clearly there was a dispute. And (Case, page 30, line 28) on cross examination Mr. Grange was asked:

"Q And you did have some conversation with the defendant company when they objected to paying any more than the amount represented by the check dated November 21, 1913?

A Yes, sir."

Note.—The check of November 21, 1913, was for $1,739.13, and accepted by plaintiff. See page 3 of this brief.

The letters in evidence, marked **Exhibit D. 1.** Case, page 97 etc., containing the correspondence between Kennedy Company and Smith & Company **also show there was a dispute** before this check was sent to the Kennedy Company. The two letters of Smith & Company to Kennedy Company (Case, page 104), are as follows:

"August 28, 1913.

David E. Kennedy,
48 W. 38th Street,
New York.

Dear Sir:—

We have received word from Princeton that you are ripping up the under-flooring throughout the kitchen where cork tiling is called for and replacing it with a new under-flooring. You are

creating considerable dampness which will, of course, affect the stability of our work which is already installed. We beg to advise you that **we will hold you responsible for any damage done to our work by reason of this dampness.**

As you advised us that it was necessary for us to have our Cabinet Work installed before you could lay your cork tile flooring we considered that it was incumbent upon you to see that the under-flooring was properly installed as the work progressed and not wait until this late date to correct errors by other contractors.

Yours very truly,

George W. Smith & Co., Inc.,
President."

A. D. S. FB

"Nov. 14th, 1913.

Re Graduate College Princeton.

David E. Kennedy Co.,
48 W. 38th Street,
New York City.

Gentlemen:—

We have your letter of the 13th at hand in which you refer to an invoice for fixing concrete of the above building.

We beg to advise you that we never have received such an invoice, and we do not see any reason why you should send it to us, as we certainly gave you no order for fixing concrete, **but we do know that in fixing the concrete you caused damage to our Dressers to the amount of $43.27, which we propose to charge to your account.**

Yours very truly,

George W. Smith & Co., Inc.
President."

A. D. S. /E.B.

And the answer of the Kennedy Company, Case, page 105 is as follows:

"DAVID E. KENNEDY
Incorporated.
General Offices:
48-56 West 38th Street
New York

November 17, 1913.

George W. Smith & Co.,
3907 Powelton Ave.,
Philadelphia, Pa.

Gentlemen:—

re Graduate College, Princeton.

We have your favor of the 14th inst. which calls our attention to a clerical error in referring you to an invoice for installing concrete backing. This, as you know, was done on the order of the architect and the bill was so made out. We apologize for having bothered you with this matter.

As to the damage which you claim the dressers suffered when the concrete was being laid, we of course had not heard of this before. We cannot understand how damage to any such amount could have been possible. We will take this matter up with Mr. Perham at once and shall further be glad to have a detailed memorandum of such damage submitted by you as soon as possible.

Very truly yours,

David E. Kennedy, Inc.,
By C. S. Shields."

C. S. S.: RC

The memorandum of credits claimed by defendant and sent to Kennedy Company with the check of November 21, 1913, was as follows (Case, page 106):

Established 1877 Incorporated 1902

GEORGE W. SMITH & COMPANY, INC.
Cabinet Wood Work.
39th Street and Powelton Avenue

Philadelphia, November 21st, 1913.

David E. Kennedy,
420 Fifth Avenue,
New York City.

Terms:

a/c Graduate College, Princeton University.

9x909—Labor furnished to unload cork tile at Graduate College		$3.27
9x995—Damage to Dressers in Kitchen by wet concrete		40.00
9x998—Cork tile floor and cove base omitted on account of not being used under dressers viz.:		
285 sq. ft. cork tile fl. @ 77c.	$219.45	
151 lin. ft. cove base @ 65c.	98.15	
		317.60
		$360.87

This memorandum and also the checks shows the nature of the dispute between the Kennedy Company and Smith & Company. The later letter of Kennedy Company to Smith & Company (Case, page 110), more clearly states **that there is a dispute in the very wording of the letter.**

DAVID E. KENNEDY
Incorporated

General Offices:
48-56 West 38th Street
New York

December 6, 1913

George W. Smith & Company, Inc.,
39th Street & Powelton Ave.,
Philadelphia, Pa.

Gentlemen:

re Graduate College.

Replying to your letter of December 5th, we beg to state that in our opinion the acceptance of your check and endorsement of same does not naturally form a receipt and complete the transaction. This check was accepted on account, as we advised you in our letter of November 26th. Before endorsing the check we crossed out **the item in dispute**. There is no dispute whatever as far as the amount covered by the check is concerned, and we fail to see any reason why you should want it back pending the settlement of the balance. If there is any good reason that you should have this money back, please advise us what it is and we will send you our check for it. **We do not believe you intend to intimate that you think we would make the disputed allowance merely because** you were holding up our payment, nor do we believe you would hold up our payment for this purpose.

Yours very truly,

David E. Kennedy, Inc.,
By D. E. K."

DEK:CR
ENCL.
C. C. Philadelphia.

"B"

There clearly was an acceptance in this case. The checks sent by Smith & Company to Kennedy Company were endorsed by the Kennedy Company and cashed. It was both printed and written on the checks that they were to be payment in full, and the Kennedy Company endorsed these checks with full knowledge of these conditions. The law is clear that such an act upon the part of the Kennedy Company amounts to an acceptance, and thus constitutes an accord and satisfaction.

> "Where, however, a sum of money is tendered in satisfaction of a claim, and the tender is accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction. This is true although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of his claim. Where the tender or offer is thus made, the party to whom it is made, has no alternative but to refuse it or accept it upon such condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary."
>
> 1 *Cyc.*, pages 333-334.

The law in New Jersey is laid down in the case of *Rose* vs. *American Paper Co.*, 83 N. J. L., 707, at page 709.

> "To constitute an accord and satisfaction in law, dependent upon the offer of the payment of a less sum than that claimed, it is necessary that the money should be offered in full satisfaction

of the demand and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such a character that the creditor is bound to understand such offer. 1 *Cyc.*, 333."

"The party seeking to settle for a less sum than is claimed to be due must, by his words or conduct when making the offer, clearly inform the other of what is sought and expected. The transaction must be such that the condition is as plain as the tender, so that the acceptance of the tender will involve the acceptance of the condition. In other words, the tender and the condition must be incapable of severance, for otherwise the inference will not be drawn that the acceptance of the tender involves the acceptance of the condition. Lang *vs.* Lang, 83 Ill. App., 543; approved Reid *vs.* McMillan, 189 Ill., 411."

"The condition may be expressed in the check itself (Kerr *vs.* Sanders, 122 N. C., 635), or in the letter or account (Whitaker *vs.* Eilenberg, 70 App. Div. (N. Y.), 489), or receipt accompanying the remittance (Nassoiy *vs.* Tomlinson, 148 N. Y. 326), or even orally in conversation (Cole *vs.* Champlain Transportation Co., 26 Vt., 87)."

"Whether a tender is accompanied by such acts and declarations as are necessary on its acceptance to constitute an accord and satisfaction must, of course, be determined from the facts of each particular case. **If the evidence is conflicting, the question is to be determined by a jury.** Bahrenburg *vs.* Conrad Schopp Fruit Co., 128 Mo. App., 526; Day *vs.* McLea (1889) L. R., 22 Q. B., 610; Nathan *vs.* Ogden, 93 L. T. (N. S.), 553; Johnson *vs.* Collins, 20 Ala., 435; Mayo *vs.* Leighton, 101 Me., 63; Singer Sewing Machine Co. *vs.* Lee, 105 Md., 663; Walsh *vs.*

Lunney, 75 Neb., 337; Jones *vs.* Johnson, 3 W. & S. (Penna.), 276."

Note.—But in the case at bar there was not any conflict of evidence as to the fact there was a dispute.

The check which was sent by the defendant, Smith & Company, to Kennedy Company, Exhibit D. 2 (Case, page 111) was sent with the condition endorsed on the check that the payment by the check was to be full payment of the account. The endorsement was as follows: "The payee by endorsement accepts this voucher check in full payment of the following account. No other receipt necessary. In full of all claims for contract 7104.

10/6	Cash	$1,500.00
11/21	"	1,739.13
~~Chg.~~	.....	~~360.87~~
		~~$3,600.00~~

David E. Kennedy,
Per R. J.

Pay to the order of First Nat. Bank
David E. Kennedy, Inc.

Pay any Nat. Bank, State Bank or Trust Co. or order.

Endorsement guaranteed.

First Nat. Bank N. Y.
1-65

PAID 11/29/1913

First Nat. Bank New York.
Franklin Nat. Bank Phila.
Dec. 1 Rec'd payment Clearing House."

And with the check was sent the memorandum of credits claimed by the defendant (Exhibit D. 1, Case, page 106).

It appears beyond question that from this endorsement there had been a dispute and the check was offered as payment in full and thus endorsed, and this would be a clear accord and satisfaction under the law, but the testimony of the witnesses shows this even more clearly.

The testimony of Arthur D. Smith (Case, page 40, line 7), shows under what circumstances the check was sent to the Kennedy Company and the fact that it was sent with a condition that it should be payment in full of the disputed claim.

"Q I show you a check marked D. 2 for identification, and ask you what you know about that check?

A This was a check that was sent on the twenty-first of November to David E. Kennedy in full payment of all claims on the existing contract.

Q Who wrote that endorsement on the back of that check?

A This (indicating)?

Q No, the top there.

A Our bookkeeper.

Q Did she do it at your direction?

A Yes.

Q That (indicating) is your signature on the check dated November 21, 1913, D. 2 for identification?

A Yes, sir.

Q Whose signature is on the check of December 31, 1913?

A Mine.

Q By whose direction was the endorsement put on the back?

A Mine.

Q You mean with the exception of the endorsement "David E. Kennedy"?

A Yes.

Q Did those checks go through your bank account and was the money taken from your bank account?

A It was.

Q At the time you sent the check for $1,739 and immediately before and afterwards you had certain correspondence with Kennedy Company, did you not?

A Yes."

And also on (Case, page 58, line 17), the same witness testified:

"Q When you put this endorsement on the check of November 21st, being D. 2 "in full of all claims," did you do that personally?

A No.

Q It was done at your office?

A Yes.

Q It was done under your supervision and direction?

A Surely."

This testimony, together with the check and its endorsement shows that the check was sent as payment in full of all claims and was sent solely with that condition attached to it, and the endorsement of Kennedy and his testimony shows that this check was accepted and must necessarily have been accepted with the condition thereto attached. The testimony of David E. Kennedy, witness for plaintiff, and the real plaintiff, on the question of his endorsement of the check is as follows (Case, page 32, line 16):

"Q (*By Mr. Peirce.*) I show you a check dated November 21, 1913, and ask if that is the credit represented by $1,738.13.

A This check is for $1,739.13.

Q Well, you made a mistake of a dollar?

A Yes, that is the check.

Q Did David E. Kennedy receive the money on that check?

A Yes.

Q Who signed 'David E. Kennedy, per R. J."?

A It must have been Mr. Jacobus, an assistant bookkeeper in the New York office.

Q But it did go through the Kennedy Company bank account?

A It went through the First National Bank, yes.

Q Why did you cross off on the back of that check the words 'Chg. $360.87'?

A I scratched it off myself.

Q Why?

A Because we didn't admit the claim.

Q You had read what was on the back of the check?

A I had.

Q And on the back of the check are these words: 'In full of all claims for contract 1704, 10/6 Cash $1,500; 11/21 Cash $1,739.13; Chg. $360.87, added up $3,600.00.' Are there not?

A It is."

Case, page 66, line 33, David E. Kennedy testifies in rebuttal:

"Q State in detail just what you did when you received that check (referring to check for $1,739.13).

A (After interruptions.) Our bookkeeper brought me this check and called my attention to this endorsement and asked me whether * * * he called my attention also to the fact that it was not in full, that there was a disputed item * * * (interruptions).

A (Continuing.) The bookkeeper explained that this item of $360 was in dispute * * *

A (Continuing.) * * * and asked me whether I thought that the endorsement of this check would bind us on this disputed item of $360.

A I decided to take this check in payment on account * * * The face value of the check, and I crossed out this item.

Q What item?

A For $360.87—meaning thereby to indicate that I did not accept this check in payment for that item, but simply for the face value of the check.

Q And did you also cross out the addition?

A And I crossed out the total sum of $3,600 which this endorsement was intended to show that this payment was the balance of."

This is an accord and satisfaction. The law is that when a payment less in amount than claimed, offered with condition that if accepted it is to be accepted in full and if it is accepted, it is accord and satisfaction, if there is a dispute between the parties. The dispute has been shown and check was offered and so accepted. **The question of the intention of the one receiving the payment makes absolutely no difference. If he accepts the check, he accepts it with the condition attached. He cannot separate the condition and the payment. If he accepts the payment, he accepts the condition with it.**

"If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary."

1 Cyc., page 334.

It is a clear question for the court. It is only when the evidence is conflicting that the question should be submitted to the jury. When there is no conflict of evidence as in this case the court should direct a verdict.

"Where the facts in respect to an accord and satisfaction have been ascertained, their effect is purely a question of law and is not to be submitted to the jury."

1 Cyc., 349, and cases cited.

See *Rose* vs. *Amer. Paper Co.,* 83 N. J. L., 707, at page 710.

POINT II.

A

In the second place, the defendant's attorneys desire to argue the first, third and fourth points together.

FIRST. The court erred in refusing to allow defendant to show that the contract between Kennedy Company and defendant of April 2, 1912, was modified in a supplemental contract entered into by the Kennedy Company and the defendant subsequently (Case, pages 16, 20 and 39).

THIRD. The court erred because it charged the jury "that defendant did perform its contract" (Case, page 87, line 34).

FOURTH. The court erred because it ruled "Now I am prepared to hold this contract means that that room was to be furnished in wood, etc." (Case, page 70, line 35).

Under the first point the defendant was claiming an allowance from Kennedy Company. The plans and specifications under the contract of April 2, 1912, called for cork tiling in the entire rooms, but in various rooms there were dressers and counters, and Smith & Company claim that under the supplemental contract they were to be allowed on the contract price to be paid to Kennedy Company the amount it would cost to tile these various places. The allowance claimed by the defendant was as follows:

285 feet of flooring @ 77c. per sq. ft...	$219.45
100 lineal feet of base @ 65c. per 1 ft..	98.15
Total	$317.60

The defendant endeavored to show the supplemental agreement concerning this allowance but the

court overruled the following questions in this endeavor:

1. Q Do you remember at that time talking with Mr. Smith as to whether or not the cork flooring extends over the entire surface of the floor, or only a portion of it (Case, page 16, line 36)?

2. Q And wasn't this clause put in the contract by reason of the conversation that you had mentioned: "Further, it is agreed that this contract includes all the floor space in the various rooms in which this cork tiling occurs" (Case, page 20, line 20).

3. Q You also claim $317.60; you claim that by reason of the dressers which has been explained? A Yes. Q Just explain it. A The original plans of the kitchen equipment called for cork tiling on floors. There were dressers and cupboards included * * * their general location" (Case, page 39, line 12).

And the court thus refusing to allow these questions committed error.

(Case, page 17, line 31), Mr. Peirce said:

"My associate explains to me that this agreement I am attempting to prove which was a supplemental agreement, which was to be executed afterwards, that before the agreement between" * * * (the court interrupts) "if it never was executed then it had no existence."

Mr. Peirce. "It was after the paper writing—it would control it."

It will be observed that the court was laboring under a misapprehension when it said: "If the agreement was not executed then it had no existence." Counsel meant when he used the word "executed" in the sense of having the work performed. The court

used the word "executed" in the sense that there was no supplemental agreement made.

(On page 18, line 1), the court says, speaking of the counsel's attempt to show this supplemental agreement, as follows:

> *The Court.* But that is not what you were asking about. What you were asking about is a talk that was antecedent to this.
>
> *Mr. Peirce.* I had not really got started.

The court was under a misapprehension that the talk concerning the supplemental agreement was antecedent to the agreement of April 2, 1912, but there was no evidence upon which the court could base this impression. If the court had allowed this supplemental agreement to have been proven it would have been directly in point to show that the defendant was entitled to considerable credits as shown on (page 39, line 12) when Mr. Smith was asked:

> "Q You also claim $317.60? You claim that by reason of the dressers" * * * "which has been explained?
>
> A Yes.
>
> Q Just explain it, etc."

B

The court also charged the jury that Kennedy & Company had performed its contract (Case, page 39, line 12). The court says (Case, page 87, line 34):

> "There is not any question in the case at all, but that the plaintiff did perform its contract" * * * "or the plaintiff's assignor did perform its contract."

And on (Case, page 39, line 34):

> "I will rule right now, and put it on the record so that you may have your objections noted to it, and have the point properly raised, that the construction of that contract being for me as a court,

> I am perfectly satisfied that the correct construction of the contract includes recovery for not doing the work of cork tiling on the floor and under the dressers. I will hold that distinctly."

The court will see that the trial court absolutely prevented the attorney for the defendant from proving the supplemental contract made subsequent to the execution of the written contract wherein and whereby it was agreed that an allowance should be made to the defendant for that portion of the floor not covered by cork tiling, namely under the cupboards and dressers, and whereas the written contract of April 2, 1912, provided for cork tiling to be put over the entire surface of the floors.

Whatever horn of the dilemma the court takes, it is apparent that the trial court has committed error. Either the Kennedy Company has performed its contract or has not performed its contract. **The contract calls for tiling on the entire surface. This the Kennedy Company did not do.** It can only be relieved from this performance by an agreement with the defendant, and the defendant endeavored to show that such agreement was made whereby the Kennedy Company was not obliged to tile the entire surface of the floor, but was, in lieu thereof, to make an allowance of credits to the amount of floor space not covered with the tiles. So if the Kennedy Company does not depend upon this supplemental contract of credits as an excuse for not covering the entire surface of the floors, **then the Kennedy Company has surely not performed its contract.**

The trial court seems to get into greater confusion later in the case when it allows the plaintiff's attorney to show that the defendant waived certain provisions of the contract, namely that the defendant waived the right to insist upon Kennedy Company covering the entire surface of the floors with the tiling according to the contract. At one point the court says that

Kennedy Company had performed its contract, and at this later point says that they are excused from performing their contract because of the waiver of the defendant as seen (Case, page 48, line 29), testimony of A. D. Smith, by plaintiff's attorney.

"Q Then you never intended at the time this contract was signed to include—

Mr. Peirce. I object to that. The contract speaks for itself.

Mr. Walscheid. Won't you allow me to finish the question?

Q You never intended to include in the contract to be performed this 405 square feet in the service room?

Mr. Peirce. I object to that. The contract speaks for itself.

The Court. The contract does speak for itself.

Mr. Peirce. Now the intention was merged in the contract, so that it seems to me is beyond the legal line.

The Witness. I am perfectly willing to answer it if I may.

Mr. Peirce. But the court has not ruled.

The Court. How do you expect to get anywhere, Mr. Walscheid? Even though it was a mistake this court cannot correct it.

Mr. Walscheid. I know this court could not correct errors. We would have to go into the Court of Chancery. I have no doubt about that; but there is nothing to prevent this man from waiving something which is in this contract and which was not supposed to be in this contract and which formed no part of the consideration for the contract.

The Court. There is no question about that.

Mr. Walscheid. And there is nothing to prevent me from presenting a situation here on which I can go to the jury on the question of waiver of this particular portion of that contract on the ground there was no consideration. That was my idea.

The Court. That is true.

The Witness. You waive your end and I will waive mine.

Mr. Peirce. That is just the difficulty.

The Court. No; that is not the difficulty. Either party may waive any part of a contract that is intended for his own benefit. You will find the whole doctrine laid down in Byrne *vs.* The Sisters of St. Elizabeth, 15 Vroom, and all the other cases.

Mr. Peirce. But this was entirely apart from the written contract.

The Court. I do not understand him to talk about the intention of waiving the contract. The object now is to show the intention, to show that afterwards he waived that intention.

Mr. Peirce. I object to that.

The Court. I will permit it.

Mr. Peirce. I ask that my exception be noted."

The trial court committed error in refusing to allow defendant to show its supplemental contract.

The court erred in holding that the contract had been performed (Case, page 87, line 34) **and then further allowing plaintiff to testify that performance in part had been waived** (Case, page 48, line 29). Then subsequently holding the contract had been waived (Case, page 71, line 30). That there was no waiver is shown from the fact that any seeming acquiescence on part of defendant, was because of the so-called supplemental agreement in which plaintiff was to allow

defendant for the cork *not laid*. The court will please refer to page 71 of the case, line 28, in which the court holds there was a waiver on the part of the defendant as to plaintiff laying the balance of the cork flooring. The court falling into the error of ruling out the supplemental agreement as to the defendant being allowed for the cork not laid. Then saying because the defendant relied upon the supplemental agreement (which was ruled out) when he did not insist upon plaintiff covering the entire floor with cork.

POINT III.

The sixth point in defendant's appeal is as follows: The court erred because a letter dated January 21st, 1914, written by Wm. G. Grange to David E. Kenkedy Co. was admitted into evidence (Case, page 73, line 14). (Exhibit P. 6, Case, page 95, line 15.) The letter which attorney for the defendant called upon plaintiff's attorney to produce was a letter dated April, 1912, and in response plaintiff's attorney produced the letter dated January, 1914. The letter that was wanted was the letter which accompanied the contract when it was sent to the Kennedy Company by the company's representative Grange. This letter of January, 1914, should not have been admitted into evidence as no foundation was laid for it. To be sure the defendant's attorney looked at the letter (to see what letter it was) and asked questions concerning it but only in his endeavor to discover the letter of April, 1912, the one the production of which he had asked. In no way did he adopt the letter of January, 1914. We submit that such a use does not open the way for the letter of January, 1914, to be admitted into evidence and in so admitting it the court committed error.

The rule as followed in *Ellison* vs. *Cruser*, 40 N. J. L., 444, that a party calling for the production of a

paper by the other side, on notice to produce, and inspecting it, is obliged to put it in evidence, if it is material to the issue, does not apply in the case **where the paper produced was not the paper called for.**

Reed vs. *Anderson,* 12 Cush. (Mass.), 481:

"The rule, which allows a party to read in evidence a paper produced by himself on notice, after the same has been taken and inspected, but not used by the party calling for it. To render a paper competent, under such circumstances, it must appear that it was the identical paper called for; otherwise a party might foist into the case documents not sought for by the adverse party, and thus manufacture evidence in his own favor. In the present case, the testimony clearly showed that the paper produced by the defendant was not the bill of sale which the plaintiff had notified the defendant to produce. It was not, therefore competent for the defendant to use it for any purpose."

Harper vs. *Ely,* 70 Ill., 581:

"Appellees were notified by appellants to produce their books. They produced the ledger, but the books of original entry were not produced. Upon the production of the ledger, appellants contended that was not the book appellees were notified to produce. They, however, examined it with a view to determine whether they would offer it in evidence, and appellees insist that the ledger became and was competent evidence, because it was examined by appellants. We are of

opinion the ledger was not competent evidence, for the reason it was not the book appellees were noticed to produce."

The points in notice and grounds of appeal not herein referred to **are not** abandoned.

Respectfully submitted,

PEIRCE & HOOVER,

Attorneys and of Counsel for Defendant Appellant.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM E. DECKER, *Plaintiff-Respondent,* *vs.* GEORGE W. SMITH & COMPANY, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

Supplemental Brief of Defendant-Appellant Answering the Brief of Plaintiff-Respondent.

In answering the brief of the plaintiff-respondent, the defendant-appellant desires to call attention to the following points:

I. The plaintiff (in its brief, page 8) states that the second check dated December 31, 1913, for $18.66, sent by Smith & Co. in full of all claims, was received by the plaintiff, but did not come to the attention of any of the officers of the Company and was endorsed by an assistant bookkeeper. The assistant bookkeeper, Miss Jacobson, handled the check of $1,739.13, Exhibit D-2 by direction of the plaintiff, and was the agent of the plaintiff to whom the duty was entrusted to receive and deposit checks, and thus must necessarily have had the power to endorse the checks and bind the Company. But whether this is so or not, the acceptance of the check of $1,739.13, Exhibit D-2, binds the plaintiff. (See case, pages 31, 32, 33, 34, 67 and 68).

II. Plaintiff (brief, pages 8-9) states that defendant cannot succeed because there were two items making up the amount which the defendant alleges was in dispute, and that unless the consideration of both items ought to have been withdrawn from the

jury, the ruling of the Court was correct. In fact, the amount claimed by the plaintiff was in dispute, no matter of how many items it consisted. One of the items was in dispute without a doubt, and was so found by the jury, and also the real plaintiff, David E. Kennedy, says (pages 66, 67 and 68 of case) as follows:

Q State in detail just what you did when you received that check?

A This—

Mr. Peirce. I think, if the court please, that is not a proper question. The witness has already stated that this endorsement was put on there at his direction and he said the portion crossed out he directed to be crossed out. Now then the check speaks for itself. If he did something on it or said something in the office it does not bind us. I do not think he ought to be permitted to say just what he did.

The Court. I do not see that your objection yet goes to anything that would be legal. He is not asked what he said; he is asked what he did. If he did anything else he can show that.

A Our bookkeeper brought me this check and called my attention to this endorsement and asked me whether—he called my attention also to the fact that it was not in full, that there was a disputed item—

Mr. Peirce. I object to what the witness told his bookkeeper.

The Court. He is not telling that; he is telling what the bookkeeper said to him when the check was brought to him.

Mr. Peirce. I object to what the bookkeeper said to him.

The Court. I think I will permit it to stand because it tends to show the facts that were in his possession at the time he crossed off the item on the back and to characterize the act; it is part of the *res gestae* of the transaction.

Mr. Peirce. Objection noted.

A *The bookkeeper explained that this item of $360 was in dispute—*

The Court. You have already told us that.

A (*Continuing*) *—and asked me whether I thought that the endorsement of this check would bind us on this disputed item of $360.*

Mr. Peirce. I object and move to strike this out on the same ground, that it does not bind us.

The Court. I do not think that part is of any consequence, Mr. Walscheid, where the bookkeeper asked him what he thought about it.

Mr. Walscheid. It is part of the *res gestae.*

Mr. Peirce. That is a self-serving statement.

The Court. I will permit it. You may take your chance on it.

Mr. Peirce. I would like an objection noted.

A I decided to take this check in payment on account—the face value of the check, and I crossed out this item.

Q What item?

A For $367.87—meaning thereby to indicate that I did not accept this check in payment for that item but simply for the face value of the check.

Q And did you also cross out the addition?

A And I crossed out the total sum of $3,600 which this endorsement was intended to show that this payment was the balance of.

Q *I show you another check for eighteen dollars*—

(Witness confers in an undertone with Mr. Walscheid.)

The Court. Don't let's have a private talk; let's have a question and answer.

See also pages 31, 32, 33 and 34.

Yet the plaintiff's lawyer does not admit this to be so, and this item, together with the other of $317.60, made up the amount in dispute. The plaintiff claimed the entire amount consisting of both items was owing, the defendant insisted neither item was owing, thus the amount as a whole was disputed.

III. The plaintiff admits (brief, page 9) as a correct statement of law the defendant's contention that where the facts in respect to an Accord and Satisfaction have been ascertained, their effect is purely a question of law, *and is not to be submitted to the jury*, but claims that it had no application to the present case so long as reasonable mind may draw different inferences from the evidence even though it is uncontradicted. Not only is the evidence of the defendant uncontradicted in the present case, but the plaintiff admits in its testimony that there was a dispute (see case, pages 31, 32, 33, 34, 66, 67, 68) when the bookkeeper brought the check to Mr. Kennedy and stated to him that the item of $360.87 was in dispute. *When both sides admit there is a dispute*, there is no question as to whether or not there was a dispute or a question for the jury. When a dispute is shown by testimony of both parties, there is no conflict and no question for the jury. There is no question of credibility of witnesses when both parties testify to the

same facts, otherwise no question could ever be taken from the jury and decided by the Court. It is absurd to say there was *not* a dispute.

IV. Consideration is necessary in order to have an accord and satisfaction as stated by the plaintiff (brief, page 11), but the *concession* made by each party in accepting a stated amount when there is a dispute is consideration. That is the present case.

V. The plaintiff has cited a number of New Jersey cases (brief, page 11) as to the law when a debt is liquidated or certain, there can be no accord and satisfaction. There is no question in the defendant's mind as to this, but this is not the present case. In the present case there is a dispute, and where there is a dispute the law is different as the plaintiff so states (brief, page 13) of its brief, and there can be an accord and satisfaction.

VI. The plaintiff sets out (on pages 13 and 14) that there must be a *bona fide* dispute or controversy as to the amount due. This existed in the present case (see case, pages 31, 32, 33, 34, 67, 68). *It is not necessary, as the plaintiff himself says* (brief, page 14) *that the dispute should be well founded so long as it is in good faith.* In fact, the jury also has so found that $40 of the dispute was not only *bona fide* but was well founded and existed in fact.

VII. The remedy of the plaintiff was very clear. If there was any doubt in his mind as to what to do at the time he accepted the checks, he could have sent them back to the plaintiff without accepting them.

VIII. The plaintiff states (brief, pages 14 and 15) that in order to have an accord and satisfaction there must be complete extinguishment of the debt, and that where part of the debt remains there can be no accord and satisfaction. This is true, but the defendant alleges that the whole amount was in dis-

pute, and the accord was accepted and therefore the entire debt was extinguished.

IX. The plaintiff (brief, page 15) alleges that the claim of the plaintiff was liquidated or past due and not disputed. This the defendant denies and alleged on the contrary that there was a *bona fide* dispute and accord and acceptance of the accord, which satisfied the claim. (See 31, 32, 33, 34, 67, 68 of case.)

X. The plaintiff alleges (brief, page 15) that even though the alleged supplemental agreement was made, there was no evidence, or not such evidence as would enable the court to find either that the plaintiff had knowledge of the agreement, or that it had sanctioned or ratified it, or that there was any consideration for the same. It is not necessary that all this should exist in order to have an accord and satisfaction, but what is necessary is that there shall be a *bona fide* dispute and an accord and satisfaction. On page 16 of brief, the plaintiff says

> "that the bookkeeper spoke about a disputed item which was evidence, but in its final analysis was merely statement of conclusions and opinion of witnesses. That it is not fact-evidence, and even though it be, it is not dispositive of the case, for the honesty and good faith of the defendant must be inquired into and this can only be done by jury."

The fact is that there is no other evidence that can be had except what was done and said by the parties. The bookkeeper presented the check to Kennedy and said that the item was in dispute. Kennedy crossed out the item and had the check endorsed. What other evidence can there be except what was done and said by the parties? If in every case of accord and satisfaction the honesty and good faith of the parties must be inquired into by the jury, then there never could exist a case where the court could decide it by taking it from the jury.

XI. The plaintiff (brief, page 17) speaks of letters and conversation after the check was accepted. The defendant relies upon two checks, the one dated November 21, 1913, and also upon a second check of $18.66 which was accepted December 31, 1913. There was a dispute before the first check was sent. The dispute was continued and emphasized after the first check was sent and before the second check was sent, and the second check was made "paid in full" and endorsed by the Kennedy Company.

XII. The plaintiff (brief, page 17) says that the verdict of the jury must be understood to mean that there was no *bona fide* dispute. That has no relevancy at this time because now the question is whether or not the case should have been submitted to the jury. It is not a question as to what the jury did find, but what the court should have done. The question is whether or not twelve reasonable men should have found and not whether they did find a certain verdict.

XIII. The plaintiff (brief, page 18) states that making of an alleged agreement with the agent is hardly sufficient to establish a basis for a dispute as to the amount due plaintiff upon his claim because notice is necessary. There was sufficient notice as is shown by the evidence in both the check and in the bill sent with the first check and in the letters sent at different times before and after the first check was sent, all of which have been admitted in evidence.

The remaining points raised by the plaintiff in its brief are fully covered by the defendant in defendant's main brief.

Respectfully submitted,

PEIRCE & HOOVER,

Attorneys and of Counsel
for Defendant-Appellant.

New Jersey Court of Errors and Appeals

WILLIAM E. DECKER, *Plaintiff-Respondent,* vs. GEORGE W. SMITH & Co., *Defendant-Appellant.*	Action at Law On Appeal from Supreme Court.

Brief for Plaintiff-Respondent.
Statement of Facts.

The case was tried before Judge William A. Speer and a jury.

On April 2nd, 1912, David E. Kennedy, Inc., entered into a written contract with George W. Smith & Co., a corporation, "*to furnish all the cork tiling required under George W. Smith & Company's, Inc., contract with the Trustees of Princeton University, in accordance with the plans and specifications of Cram, Goodhue & Ferguson, architects, for the sum of thirty-six hundred ($3600.00) dollars.*"

(Case p. 93, folio 10).

This agreement between the Kennedy and Smith Companies provided that:

> "III. The specifications and plans governing this contract between George W. Smith & Company, Inc., and David E. Ken-

nedy, Inc., have been initialed by William G. Grange, Manager for David E. Kennedy, Inc., and his authority is hereby acknowledged. The drawings referred to are numbered as follows: 18." (Case p. 93, fol. 20.)

"IV. It is the intent of this contract that David E. Kennedy, Inc., assumes the responsibility for the exact quantity of cork flooring that has been assumed by George W. Smith & Co., Inc., in their contract with the Trustees of Princeton University, etc." (Case p. 93, folio 30.)

"IX. Further, it is agreed that this contract includes all the *floor* space in the various rooms in which this cork tiling occurs."

The contract was admitted in evidence as *P-1.*

Accompanying this contract was "The drawing referred to as follows: 18." It was admitted in evidence as *P-2.* A photographic copy of P-2 is attached to the cover page of the state of the case. The original has written upon it in indelible pencil the words "no cork here" in a space marked upon the plan "Service Rm. 405 sq. ft.," and under these lead pencil words a waving line also in indelible pencil, running through the space marked "Service Rm." In the lower right-hand corner are the further words in indelible pencil, "Contractors' Drawing" and "Keep with Kennedy Contract." In the copies of this photograph furnished to plaintiff the words "No cork here," "Contractors' Drawing" and the waving line are retraced with pencil over the photographic reproductions of the same. The words

"Keep with Kennedy Contract" are not thus traced and therefore appear in *white*.

The plan was made by George W. Smith & Co., Inc.,—it is dated March 20th, 1912—thirteen days before date of contract; it plainly shows the amount of cork tiling which George W. Smith & Co., Inc., intended to have laid *before* and *at the time* of the making of the contract. This is indicated by the words *"Cross lines indicate Cork Tile Floor"* and by the cross lines in the plan. And while this plan is being examined it should be noted that it shows so-called "Dressers & Counters" and that none of the cross lines on the plan run through the spaces indicated as "Dressers & Counters."

The contract was signed on behalf of plaintiff by William G. Grange, the Philadelphia Manager of plaintiff at the office of defendant (Case p. 14), folio 30). He had power to enter into *this* contract (Case p. 28, folio 40; p. 29, folio 1-10), but he had nothing further to do with the matter (Case p. 30, folio 20) and Arthur D. Smith, President and representative of defendant in the dealings between the companies, *never saw Grange from the time the contract was made until after the check* (D-2 hereinafter to be referred to) *had been sent out*. (Case p. 60, folio 30; case p. 61, folio 10-20).

After the contract was signed it was *completely* performed by the plaintiff, was accepted by the architects and by Princeton University and defendant was paid for the floors. This appears by mutual admission suggested by counsel for appellant. (Case p. 13, folio 20-30); by the *uncontradicted* admission made by the president of defendant to Grange, the representative of plaintiff, after the check D-2 had been cashed (Case p. 27, folio 30) and by the testimony of Smith

himself when he testified that the University had acceptd the cork floors (Case p. 51, folio 10-20); that he was paid by Princeton University when the work was completed (Case p. 50, folio 30-40) and that defendant was not required to make any allowances to Princeton University on its contract by reason of any work done by the Kennedy Company (Case p. 63, folio 20-30).

Defendant made two payments on account of this contract, i. e., October 6, 1913, $1500; November 21, 1913, $1739.13, leaving a balance unpaid of $360.87. Defendant by plaintiff's admission was entitled to a further credit of $3.27, leaving net balance unpaid of $357.60, for which sum with interest this action was brought.

There is no evidence in the case to show that during the progress of the work performed by the Kennedy Company the defendant ever claimed that the Kennedy Company *was not* performing their agreement strictly to the letter, although Mr. Smith inspected the work from time to time as it progressed (Case p. 50, folio 10-20). The correspondence between the parties was offered in evidence by defendant (Case p. 44, folio 20-30) and shows that no claim was made against the Kennedy Company for *anything*—except a claim for $40.00 damages, to be dealt with hereafter—until *after* the work was completed when defendant mailed to the plaintiff a check (D-2) for $1739.13 together with a bill setting up a claim for $3.27—admitted by plaintiff—a claim for the $40.00 item and a claim for *"Cork tile floor and cove base omitted on account of not being used under dressers, $317.60."* Total, $360.87. (Case p. 106, folio 30-40).

The check (D-2) for $1739.13 had an endorsement as follows: "The payee by endorsement ac-

cepts this voucher check in full payment of the following account. No other receipt necessary.

In full of all claims for contract 7104.	
10/6 Cash	$1500.00
11/21 Cash	1739.13
Chg.	360.87
	$3600.00

No explanation accompanied the check and bill, and plaintiff had not agreed to the bill before it left defendant (Case p. 58, folio 20-40).

The plaintiff crossed out the words and figures "Chg. $360.87" and the figures "$3600," endorsed and banked the check, and wrote defendant that it had accepted the check on account but could not allow the $40 or the $317.60 claimed (Case p. 107, folio 10-30).

Thereafter some correspondence ensued between the parties in which the *right* of plaintiff thus to change the endorsement was disputed because it "naturally formed a receipt and completed the transaction," but not one word was said about the *merits* of the claim either for the $40.00 or for the $317.60. (Case p. 107, 110). The claim for $40.00 however had been dealt with between the parties in three letters preceding the sending of the bill and check (Case p. 104-104).

Plaintiff, not being able to collect the balance, claimed to be due, thereupon instituted this suit for $357.60 and interest from March 1st, 1914.

Defendant filed an answer in which it counterclaimed for $40.00 damage done by plaintiff in the performance of the contract and for $317.60 upon an alleged agreement for an allowance for cork tiling and cork flooring *not required* under the dressers and counters aforesaid (Case p. 7) and further claimed that the acceptance of the check for $1739.13 by plaintiff after altering the en-

dorsement constituted an accord and satisfaction between the parties and barred recovery of the balance claimed by the plaintiff (Case p. 6, folio 20). Plaintiff replied denying the $40.00 of damage claimed and among other things denied the making of the agreement for the allowance (Case p. 11, folio 10-40).

At the trial, defendant, through its President Smith, submitted evidence in support of the counter-claim for $40.00 which was not contradicted by plaintiff and this witness also said that Grange, after the contract was signed, in April, 1912, agreed to allow for the tile *under the dressers* and gave to defendant a price per foot that he would allow for it (Case p. 59, folio 1-20), and that he knew Grange had informed the Kennedy Company about this allowance because he had written a letter to them which said "Take up the question of omission of cork tile under the dressers with the architect and see if they can be omitted. Smith and Company *expect to have an allowance for the work, although I do not think we will have to give it to them.* (Case p. 59, folio 20-40; p. 60, folio 1-10). Having testified that Grange had agreed to the allowance in April, 1912, Smith immediately thereafter said, "I never saw Grange from the time the contract was made —he never did anything with the contract; *he never even came to see us;* he never went to Princeton; *he had nothing whatsoever to do with it except to get the order;* and then I saw him after this check (D-2) was sent to him." Case p. 60, folio 30). (The check was sent November 21, 1913). "Then he came back and he brought out his office correspondence; I do not think he intended I should see it; but I did see it." (Case p. 61, folio 1-10).

Grange being called in rebuttal absolutely denied the making of any agreement for an allowance for work not done under the dressers (Case p. 73, folio 1-10), or that he showed to or that Smith saw a letter written by him to the Kennedy Company as Smith had described, or that he had written such a letter (Case p. 73-74).

In addition to the two defences above outlined defendant also showed that plaintiff had not laid cork tile in the service room hereinbefore referred to. This evidence was introduced to show that plaintiff had not performed its contract (Case p. 35, folio 30-40), but in sending the check (D-2) defendant made no deduction for this omission and never expected to make any because they had indicated cork tile in this room by mistake when they drew up that plan (P-2) and it was not required there; and therefore defendant never required it from plaintiff, but put down the work that *was* required (Case p. 47, folio 20-40). The original plan did not include cork tile for this room (Case p. 48, folio 1-10) the plan that was a part of the contract between Princeton University and GeorgeW. Smith & Co. does not require cork for this room; it says "wood floor" (Case p. 52, folio 10-40) and Smith & Co. under their contract with the University were required to lay a wood floor (Case p. 53, folio 1-10).

As additional evidence of accord and satisfaction defendant also showed that on December 31, 1913, it had given to plaintiff a check for $18.66 bearing the following endorsement: The payee by endoresment accepts this voucher check in full payment of the following account, no other receipt necessary.

Nov. 8/13 $18.66

In full of all claims to date Jan. 2/13

This check was received by plaintiff, but did not come to the attention of any of the officers of the company; it was endorsed by an assistant bookkeeper (Case p. 68, folio 20-40) and banked. At that time there was owing to plaintiff from defendant the sum of $18.66 for work performed on another job. (Case p. 69, folio 1-10); Case p. 55, folio 1-10, also folio 30-40).

Upon this evidence the case was allowed to go to the jury, the court instructing them that the full claim of plaintiff with interest was $381.63. The jury found for the plaintiff for $341.63, being forty dollars less than the full amount claimed.

ARGUMENT.

Point I.

The court did not err in refusing to direct a verdict in favor of the defendant or in submitting the case to the jury.

The defendant moved the court for a direction in its favor on the ground that there was an accord and satisfaction. (Case p. 85, folio 10).

The court sent the case to the jury on the question as to whether or not there was a dispute between these parties (Case p. 85, folio 20).

The defendant by its pleadings and proofs claimed two separate and distinct disputes and counter-claims, one for $40.00 damages arising out of negligent performance of the work done by plaintiff, the other for $317.60, arising out of an agreement alleged to have been made by Grange, agent of plaintiff, for an allowance for cork tile not laid under dressers.

The defendant did not ask for the withdrawal

from consideration by the jury of the $40.00 item or for withdrawal from consideration by the jury of the $317.60 item, and unless the consideration of *both* items ought to have been withdrawn from the jury the ruling was correct.

The court instructed the jury that if they found for plaintiff on *both* items of alleged dispute that then their verdict should be against defendant for $381.63 (Case p. 87, folio 1-10). The jury found for plaintiff for $341.63—forty dollars less than the total claim of plaintiff.

The defendant now claims that the court erred because "where the facts in respect to an accord and satisfaction have been ascertained, their effect is purely a question of law, and is not to be submitted to the jury," citing 1 Cyc. 349 and cases cited.

It is our contention that the statement of law just quoted is correct, but that it cannot apply to this case, because even conceding that *the evidence* of defendant is uncontradicted, yet *the facts* remain in dispute so long as *reasonable minds may draw different inferences from the evidence.*

When fair-minded men might honestly differ as to the conclusions to be drawn from facts, *whether controverted or uncontroverted,* the question at issue should go to the jury.

More-Junes Glass Co. vs. *W. J., etc., R. R. Co.*, 47 Vroom, 708.

McCarthy vs. *Metropolitan Life Ins. Co.*, 46 Vroom, 887.

Weston vs. *P. R. R. Co.*, 45 Vroom, 484.

Hummer vs. *Lehigh V. R. R.*, 45 Vroom, 196.

Mumma vs. *Easton, etc., R. R.*, 44 Vroom, 653.

Where facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact *does* exist, and another, that it *does not exist,* there is a question of fact for the jury.

38 Cyc. 1540.

And in all cases where the defense of accord and satisfaction is set up the question whether or not there was an honest or bona fide dispute is ordinarily a question for the jury.

1 C. J., 583.
Carlton vs. *Western, etc., R. R.,* 81 Ga., 531.
Beaver vs. *Potter,* 129 Ia., 41.
Greenlee vs. *Mosnot,* 116 Ia., 535.
Larve vs. *Sugar Loaf Dairy Co.,* 180 N. Y., 367.
Cornell vs. *Taylor,* 137 App. Div. (N. Y.), 496.

So also the *credibility* of the witnesses is a question for the jury.

Kearns vs. *Waldron,* 47 Vroom, 370.

An accord is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim liquidated or in dispute, something other than or different from what he is, or considers himself, entitled to; and a satisfaction is the execution of that agreement.

1 C. J., 523.
1 Cyc., 307.

A consideration is necessary to render the accord and satisfaction valid. The consideration may present itself in many different shapes, but in some form or other it must be found. There must be some advantage, or presumed or assumed advantage, accruing to the party who yields his claim, or some detriment to the other party.

1 C. J., 528.
Daniel vs. *Hatch,* 1 Zab., 391.

To constitute a valid accord and satisfaction it is essential that the creditor shall have accepted it *with the intention* that it should operate as a satisfaction. Both the giving *and the acceptance* in satisfaction are essential elements, and if they be lacking there can be no accord and satisfaction. The intention of the parties, which is of course controlling, must be determined from all the circumstances attending the transaction.

1 C. J., 529-530.

Where the debt or demand is *liquidated or certain* and *is due,* payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given.

1 C. J., 539.
Roberts vs. *Bause,* 49 Vroom, 57.
Gussow vs. *Betheson,* 47 Vroom, 209.
Eckert vs. *Wallace,* 46 Vroom, 171.
Chambers vs. *Niagara Fire Ins., Co.,* 29 Vroom, 216.
Lime vs. *Nelson,* 9 Vroom, 358.

Daniels vs. *Hatch,* 1 Zab., 391.
Murphy vs. *Kastner,* 9 Dick, 214.
Day vs. *Gardner,* 15 Stew., 199.
Watts vs. *Frenche,* 4 C. S. Green, 407.

In such case payment of a less amount than due operates only as a discharge of the amount paid, leaving the balance still due, *and the creditor may sue therefore, notwithstanding the agreement.*

1 C. J., 540.

And where a debtor *owing a liquidated sum* sent to the creditor his check for a part of the demand, reciting in the check that it was in full of all obligations to date, for which the creditor gave credit and acknowledged receipt as "on account," *it was held that such acceptance did not discharge the entire debt.*

Hodge vs. *Truax,* 19 Ind., Ap., 651.

So also the acceptance of a check declared to be in full payment of *a liquidated debt* does not constitute an accord and satisfaction, *and this is true whether or not the acceptance of the check may be construed as an acceptance of the condition on which it was given.*

Specialty Glass Co. vs. *Daly,* 172 Mass., 460.
Jennings vs. *Duflinger,* 23 Ind. Ap., 673.
Meyer vs. *Greer,* 21 Ind. Ap., 138.
Cunningham vs. *Standard Const. Co.,* 134 Ky., 198.

But where a claim is *unliquidated or in dispute,* payment *and acceptance* of a less sum than

claimed *in satisfaction,* operates as an accord and satisfaction. * * *

1 C. J., 551-552.

Under these circumstances there is a sufficient consideration. * * * Where a claim is *unliquidated* or *in dispute,* and less than the amount claimed is given and *accepted* in full satisfaction thereof, the concession made by one of the parties is a good consideration for the concession made by the other, or as otherwise expressed, the fact of the uncertainty of the claim, or an *honest* difference as to what is due on an unliquidated demand furnishes the consideration.

1 C. J., 553.

But it must also be considered that the dispute must be honest and in good faith, for the payment of an amount less than that for which the debtor is liable, does not constitute a valid accord and satisfaction *unless* there is a *bona fide dispute* or controversy *as to the debtor's liability,* or *as to the amount due from him.*

1 C. J., 554.

And it is only in cases where a dispute *has arisen* between the parties as to the amount due and a check is tendered on one side in full satisfaction of the matter in controversy, *that the other party will be deemed to have acquiesced in the amount offered by an acceptance and a retention of the check.*

1 C. J., 562.

Eames Vacuum Brake Co. vs. *Prosser,* 157 N. Y., 289.

While it is not necessary that the dispute or controversy should be well founded, it is necessary that it should be *in good faith.* Without an *honest* dispute, an agreement to take a lesser amount in payment of a liquidated claim is without consideration and void. A dispute cannot be raised for the mere purpose of extorting money. And an arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule.

1 C. J., 555.

And in the case at bar there could be no accord and satisfaction unless the defendant established the fact of an *honest, bona fide dispute* as to *both* of the claims advanced, for it tendered the check in extinguishment of plaintiff's claim by reason of the alleged existence of *both* of its claims. The forty dollar item was not sufficient to extinguish the claim of the plaintiff, although allowed in full and the same is true of the $317.60 item. Defendant realized this and therefore intended to and did tender a release of the two *added* accounts or claims in accord and satisfaction of the balance for like amount then indisputably due to plaintiff. If for any reason he could *not* thus tender *both* claims; if *one* of the claims *did not exist,* or if it was *not* based upon an honest bona fide dispute the whole defense of accord and satisfaction was bound to fall, because an accord and satisfaction must be a satisfaction of the *entire* debt, so as completely to extinguish it.

Where part of the debt remains there can be no accord and satisfaction. Courts will not so construe an agreement so as to give it the effect

to bar a claim, where such a result is inconsistent with the declared intents of the parties.

Lime vs. *Nelson*, 9 Vroom, 358.
At bottom p. 361.

That the claim of the plaintiff was for a sum certain; that it was liquidated, and that is was past due is not disputed. Under the circumstances it was the duty of the defendant in order to prevail in its defense of accord and satisfaction to show by a fair preponderance of evidence—as to *both* of the claims which it tendered for release in return for the extinguishment of the plaintiff's claim—*that there was at least an honest, bona fide dispute as to the amount due plaintiff on his claim* by reason of the *existence* of the two claims of the defendant. The defendant attempted to do this; it produced testimony as to the existence of the forty dollar claim which was not contradicted by the plaintiff, and it attempted to show the existence of the $317.60 claim by showing an alleged supplemental agreement with the agent of plaintiff, one Grange, providing for the allowance claimed. (Case p. 58-59). The making of this agreement was denied by Grange (Case p. 73) and a jury question was thereby imported into the case. So also conceding for argument that Grange did make the supplemental agreement, there was no evidence, at least there was not such evidence as would enable the court to find either that plaintiff had knowledge of the agreement or that it had sanctioned or ratified it, or that there was any consideration for it to give it validity. In fact, the more *reasonable* inference from Mr. Smith's evidence in relation to the letter he claims to have seen is that plaintiff *never did make the agreement* or that it did not ratify the agreement,

and even *that Grange never made the agreement.* (See Case p. 59, folio 30-40, etc.). Then, again, the fact that Smith in his correspondence with the plaintiff never mentioned this claim for $317.60 until he sent the check (D-2) with the statement on November 21, 1913, *and never once made a demand upon the company directly for the allowance,* coupled with the fact that the plan which defendant itself prepared and gave to plaintiff to work by (Ex. P-2) *plainly showed that defendant was not entitled to any allowance for cork tile omitted under dressers,* is evidence from which a jury would have the right to infer that defendant knew it was not entitled to make the claim, and that it did not make it honestly or in good faith, but merely for the purpose of extorting a concession from the plaintiff by trickery and device. And if a juror has the right to infer that defendant was asserting a false and dishonest claim for $317.60, does it not also follow that the jury—always the judges of the credibility of witnesses—would have the right to infer and say that the testimony of Smith in reference to the $40.00 claim was not true, and that there also was a dishonest and false claim?

Defendant in its brief attempts to prove a dispute by showing that the witness Smith talked about a dispute and *called* the resulting situation a *dispute* that the bookkeeper of the plaintiff spoke about a disputed item. All this is undoubtedly evidence; but in its final analysis it is merely the statement of conclusion and opinions of these witnesses—it is not *fact evidence,* and even tho it be, it is not dispositive of the case, for the *honesty* and good faith of defendant must be inquired into, and this can only be done by a jury.

So also defendant relies upon the letters written *after* the receipt of the $1739.13 check and the

fact that they deal with the propriety of plaintiff's action and that there is a dispute *about that.* But this evidence is of no value first, because it is after the alleged accord and satisfaction; and secondly, because it does not deal with the material dispute, i. e., the dispute about the balance due between the parties by reason of the claim for $317.60 arising out of the alleged agreement with Grange.

Then again appellant in its brief calls attention to the conversation with Grange *after receipt of the check* when the dispute is discussed. Smith said he never saw Grange till after he had sent this check, and since this view supports the verdict we must assume that the jury believed this testimony. Any conversation between Grange and Smith then had about the dispute which undoubtedly *then* existed can have no bearing upon the action of plaintiff in accepting the check (D-2) on November 21, 1913.

The verdict of the jury must be understood to mean that there was no *bona fide honest dispute* as to the balance due plaintiff by reason of the existence of the alleged $317.60 claim. That was the question submitted to it. This being so, there could be no accord and satisfaction arising out of the acceptance of the check (D-2) "on account." And this being so, the *fact* that plaintiff altered the endorsement *is immaterial* first, because even though the endorsement had not been altered and the receipt had gone out as in full payment of the claim, plaintiff would have been entitled to recover in spite of the receipt, and second, treating the endorsement as a condition, defendant only had the right to impose the condition by reason of *the existence of a dispute* and plaintiff had the right to treat the condition as a nullity in the absence of an honest, bona fide dispute.

So also—in the absence of an honest, bona fide dispute arising out of the claim for $317.60—does the acceptance of the check for $18.66, endorsed "in full of all claims to date" (Ex. D-3) (Case p. 112), fail to operate as an accord and satisfaction.

The question whether the acceptance of *this* check operated as an accord and satisfaction was properly a jury question. It was given in payment for other work (Case p. 54-55). The intent with which it was given and received was for the jury.

Castetti vs. *Jereissate,* 51 Vroom, 295.

Then again, the making of the alleged agreement with the agent of the plaintiff is hardly sufficient to establish a basis for a dispute as to the amount due plaintiff upon his claim.

For it has been held that a dispute as to the amount due with the creditor's agent does not satisfy the requirement of the rule where the debtor sends a check for a less amount than claimed to the creditor without any imputation of notice of such dispute. Under these circumstances, it is said that the debtor is "met with the plain principle merely of tendering a less sum for a greater debt."

Bergmann Produce Co. vs. *Brown,* Tex. Cir. A. 156, S. W. R. 1102.

Whether a tender is accompanied by such acts and declarations as are necessary on its acceptance to constitute an accord and satisfaction must, of course, be determined by the facts of each particular case. If the *evidence* is conflicting or the

inferences are conflicting, the question is to be determined by a jury.

> *Rose* vs. *American Paper Co.*, 54 Vroom, 707, at bottom of p. 709 and cases therein cited.

For these reasons do we submit that it was proper to submit this case to the jury.

Point II.

The court did not refuse to allow defendant to show that the contract between the Kennedy Company and defendant, of April 2nd, 1912, was modified by a supplemental contract.

The contrary proposition is advanced in defendant's Point II.

An examination of pages 16 and 17, and particularly of page 18, of the case will disclose that defendant *was* permitted to show any existing supplemental contract; that the court *distinctly* permitted it and that counsel for plaintiff acquiesced in the ruling. Besides, the alleged supplemental contract fully came out upon cross-examination of witness Smith, as will appear from pages 58 and 59 of the case, and counsel for defendant at that time was urging the witness to go ahead in his statement of the alleged supplemental contract as will appear from the top of page 50 of the case.

No claim was at any time made during the trial of the cause that the trial court had refused to allow defendant to show a supplemental contract, nor do the grounds of appeal state any such alleged error as a reason for review.

Point III.

The court did not err when it charged the jury that defendant did perform its contract.

The performance of the contract was admitted by the defendant's only witness, Smith. It was admitted by the stipulation of defendant's counsel. It was proved by the uncontradicted testimony of the witness, Grange, as will appear from an examination of the statement of facts preceding this argument where the exact points of reference to the testimony and admissions can readily be found.

Point IV.

The court did not err when it ruled that it was prepared to hold that this contract means that that room was to be furnished in wood, etc.

The construction of the contract was for the court. The opinion and reasoning of the court in holding that the room in question was to be furnished in wood and that plaintiffs were not to place cork tile thereon is lucid, and we subscribe thereto. We could not add anything to strengthen the reasoning advanced. The finding is found upon pages 71 and 72 of the case.

Point V.

The court did not err in overruling the question "Do you remember at that time talking with Mr. Smith as to whether or not the cork flooring extends over the entire surface of the floor, or only

a portion of it?'' (Case p. 16, folio 30). This question was overruled because of its immateriality. The words "at that time" in the question refer back to the time of the making of the contract, and the court held that what was talked about at that time is a matter of inconsequence. We contend that it was immaterial.

Point VI.

The court did not err in refusing to allow the question "And wasn't this clause put in the contract by reason of the conversation that you had mentioned: 'Further, it is agreed that this contract includes all the floor space in the various rooms in which this cork tiling occurs.'" (Case p. 20, folio 20). We submit that the reasons advanced by the court are valid and that the question was immaterial and irrelevant.

Point VII.

The court did not overrule the question "You also claim $317.60; you claim that by reason of the dressers which has been explained," because the answer immediately follows the question. (Case p. 39, folio 10).

What counsel for defendant undoubtedly desired to get at was the ruling of the court at the bottom of page 39 of the case, folios 30-40, where it held "I will rule right now and put it on the record so that you may have your objection noted to it and have the point properly raised, that the construction of that contract being for me as a

court I am perfectly satisfied that the correct construction of the contract *precludes* recovery for not doing the work of cork tiling on the floor under the dressers. I will hold that distinctly." We are satisfied that this ruling is correct, since the plan (P-2) distinctly shows that no cork tiling was to go under these dressers.

Point VIII.

The court did not err in allowing the letter dated January 21, 1914, written by William G. Grange to David E. Kennedy, Inc., to be admitted in evidence. (Case p. 74).

Counsel for defendant is in error when he states that he did not distinctly call for the letter in question. Upon page 74 the following colloquy appears:

A. I did not write the letter.

Q. And you never showed any such letter to Mr. Smith, did you?

A. No, sir.

Q. Now didn't you write a letter *with the contract?*

A. To the company?

Q. Yes.

A. Yes, sir.

Q. Produce *that letter.*

MR. WALSCHEID: Here it is. (Presenting letter).

Q. Don't you know that the letter was April 2nd, 1912?

A. I do not.

The letter having thus been produced, was taken by counsel for defendant. The witness was cross-examined upon it, as the court said (Case p. 83), "You called for the letter which accompanied the contract and Mr. Walscheid said, 'Here it is; this is the letter'; and then you took it and used it. That is what happened; you will find it on the record." The admission of the letter was therefore not error, since it was the paper called for.

Ellison vs. *Kruse,* 11 Vroom, 444.

Besides, no judgment will be reversed on the ground of misdirection or the improper admission or rejection of evidence unless after examination of the whole case it shall appear that the error injuriously affected *the substantial rights* of the party.

Kargman vs. *Carlow,* 56 Vroom, 633.
Practice Act of 1912, p. 382, Sec. 27.

And counsel for defendant conceded that the alleged error was immaterial when he said, "I do not think it makes much difference (Case p. 83, folio 20).

Point IX.

Counsel for defendant claims that the points in notice and grounds of appeal not herein referred to are not abandoned. It is our contention that under the rules of the Court of Errors requiring service of points that any points not served must of necessity be abandoned.

Point X.

In conclusion we beg to submit that no error injuriously affecting the substantial rights of the defendant are to be found in this record, and that the judgment below should be affirmed.

November Term, 1915.

Respectfully submitted,

J. EMIL WALSCHEID,
Attorney for and of Counsel with Plaintiff-Respondent.

INDEX.

TESTIMONY FOR PLAINTIFF.

TESTIMONY FOR DEFENDANT.

Notice and Grounds of Appeal.

Filed August 5, 1915.

New Jersey Supreme Court.

WILLIAM E. DECKER, *Plaintiff-Respondent,* *vs.* GEORGE W. SMITH & COMPANY, a corporation, *Defendant-Appellant.*	*Notice of Appeal and Grounds of Appeal.* (*Served July 12, 1915.*)

To Emil Walscheid, Esq.,
Attorney of Plaintiff.

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

First. Because the following questions were overruled:

I. Q Do you remember at that time talking to Mr. Smith as to whether or not the cork flooring extended over the entire surface of the floor, or only a portion of it?

II. Q And was that clause put in the contract by reason of the conversation that you have mentioned; "further it is agreed that this contract includes all the floor space in the various rooms in which this cork tiling occurs"?

III. Q You also claim $317.60; you claim that by reason of the dressers which has been explained? A Yes. Q Just explain it. A The original plans of kitchen equipment called for cork tiling on floors. There were dressers and cupboards included—their general location.

Second. Because the following questions were admitted:

I. Q You never intended to include in the contract to be performed this 405. square feet in the service room?

II. Q State in detail just what you did when you received that check. A This—our bookkeeper brought me the check and called my attention to this endorsement and asked me whether—he called my attention also to the fact that it was not in full, that there was disputed item.

III. Q Did you ever intend to accept the $18.66 check either in settlement of the Princeton University balance or on account of the Princeton University balance.

Third. Because the court charged the jury:

"That the plaintiff did perform its contract."

Fourth. Because the court ruled:

The Court. Now, I am prepared to hold that this contract means that that room was to be furnished in wood because it seems to me to be perfectly plain when you read this contract that is now in suit—&c., &c.

Fifth. Because the court ruled:

The Court. I think however there is some considerable force in his position that the question as to whether or not there was a dispute between these parties must be submitted to the jury.

Sixth. Because a letter dated January 21st, 1914, written by Wm. G. Grange to David E. Kennedy Co. was admitted in evidence.

Seventh. Because the court refused to direct a verdict in favor of the defendant on the ground that there was an accord and satisfaction.

Eighth. Because the court submitted to the jury the question as to whether or not there was a dispute between the parties as to the amount due.

Respectfully submitted,

PEIRCE & HOOVER,
Defendant's Attorneys.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

WILLIAM E. DECKER, *Plaintiff,* vs. GEORGE W. SMITH & COMPANY, a corporation of New Jersey, *Defendant.*	*Judgment Record.*

George W. Smith & Co., a corporation, the defendant in this cause was summoned to answer unto William E. Decker, the plaintiff therein in an action at law upon the following complaint:

Complaint.

Filed December 1, 1914.

Plaintiff, who resides at 29 Madison avenue, Jersey City, New Jersey, says:

1. Defendant and one David E. Kennedy, Inc., a corporation of New York, entered into an agreement dated April 2nd, 1912 (a true copy of which is hereto attached marked "Schedule No. 1") whereby said David E. Kennedy, Inc., agreed to furnish all cork tiling required under the terms of a contract between the defendant and the trustees of Princeton University, for the sum of $3,600.00 which defendant agreed to pay to David E. Kennedy, Inc. Said David E. Kennedy, Inc., did and performed all things required to be done and performed by it and was paid by the defendant the sum of $3,242.40, leaving a balance due on March 1st, 1914, of $357.60.

2. David E. Kennedy, Inc., assigned by instrument in writing (a true copy of which is hereto at-

tached marked "Schedule No. 2") its right, title and interest in said sum.

Plaintiff demands judgment for $357.60 and interest from March 1, 1914.

J. EMIL WALSCHEID,
Attorney of Plaintiff.

(Schedule No. 1 is the same as Exhibit P. 1 shown at page 93.)

(Schedule No. 2 is the same as Exhibit P. 3 shown at page 95.)

New York Boston Chicago Philadelphia Cleveland St. Louis San Francisco Montreal, Can.

STATEMENT.

New York, March 1, 1914.

Messrs. Geo. W. Smith & Co.,
3907 Powelton Ave., Philadelphia, Pa.

In account with

DAVID E. KENNEDY, INC.,
48 West Thirty-eighth Street,
New York.

Make all payments by New York Draft, payable to New York Office.

GRADUATE COLLEGE PRINCETON UNIVERSITY.

1913				
Oct.	3	Bill		$3600.00
		Credits.		
July	1	Hauling cases	3.27	
Oct.	8	By cash	1500.00	
Nov.	26	" "	1738.13	3242.40
		Balance due		$357.60

Answer.

Filed December 15, 1914.

The defendant, George W. Smith & Company, a corporation, of the City of Philadelphia, County of Philadelphia and State of Pennsylvania, authorized by the Laws of the State of New Jersey to transact business in New Jersey, says:

FIRST DEFENSE.

That the plaintiff is not authorized to maintain this action in this State.

Defendant says that plaintiff's assignor, David E. Kennedy, Inc., is a corporation of the State of New York, and is not authorized by the Laws of the State of New Jersey to transact business in the State of New Jersey.

(2) Defendant says that the contract entered into between the defendant and the plaintiff's assignor, David E. Kennedy, Inc., was entered into in the State of New Jersey and constitutes a doing business by the plaintiff's assignor in the State of New Jersey contrary to the statute in such case made and provided.

(3) Defendant further says that the plaintiff named herein, William E. Decker, is simply a nominal plaintiff; that the said William E. Decker paid nothing for the alleged assignment of this claim to him by David E. Kennedy, Inc.; that the said William E. Decker took the said assignment of this alleged claim subject to all the defenses which existed between the said defendant and said David E. Kennedy, Inc.

SECOND DEFENSE.

This defendant, George W. Smith & Company, a corporation, denies the first paragraph of the complaint.

(2) This defendant has no knowledge of the facts alleged in the second paragraph of the complaint and requires strict proof of same.

THIRD DEFENSE.

Defendant says that it is not indebted to the plaintiff in any amount; that there was no money due from the defendant to the plaintiff's assignor at the time of the alleged assignment by the said David E. Kennedy, Inc., to the plaintiff herein.

FOURTH DEFENSE.

Defendant says that it has fully paid and satisfied all of its obligations to the plaintiff's assignor, David E. Kennedy, Inc., and has fully paid and satisfied all of its obligations to the plaintiff herein.

FIFTH DEFENSE.

This defendant further says that the plaintiff and the plaintiff's assignor are estopped from setting up this claim against the defendant on the ground that on November 21st, 1913, defendant sent the plaintiff's assignor a written statement of the account between the defendant and the plaintiff's assignor, a true and correct copy of which is herto attached and made a part hereof, exhibiting the balance due the plaintiff's assignor from the defendant in the sum of one thousand seven hundred and thirty-nine dollars and thirteen cents ($1,739.13); that accompanying said statement of the account the defendant forwarded to the plaintiff it's check to the order of the said plaintiff in the aforesaid sum of one thousand seven hundred and thirty-nine dollars and thirteen cents ($1,739.13), a true and correct copy of which said check being likewise hereto attached and made a part hereof.

Defendant says that at the time of sending this check and statement, it informed the plaintiff's as-

signor that the same was sent in full satisfaction for the balance due from the defendant, and so caused the same to be endorsed on the check.

Defendant further says that the plaintiff's assignor accepted the said check and cashed the same and received the money thereof, which actions on the part of the said plaintiff's assignor amount in law to an accord and satisfaction.

COUNTER CLAIM.

The defendant, George W. Smith & Company, a corporation, by way of counterclaim against the said plaintiff, says that on the second day of April, 1912, it entered into a written contract with the plaintiff's assignor, David E. Kennedy, Inc., through its manager, Mr. Wm. G. Grange, for the furnishing of all the cork tiling required for the interior finish of Proctor Hall, Thomson College and Cleveland Memorial Tower at Princeton University, Princeton, New Jersey, for a lump sum of thirty-six hundred dollars ($3,600).

(2) Defendant further says that subsequently a question arose between the defendant and the plaintiff's assignor, through its manager, Mr. Grange, as to whether said cork tiling and base was required under the specifications in certain portions of some of the rooms in the aforesaid buildings, viz, under the dressers and counters; that this question was discussed between the defendant and the plaintiff's assignor and it was finally agreed upon between the defendant and the plaintiff's assignor that the defendant should have a suitable allowance for such cork tiling and cork flooring as was not required on this area, to wit, the defendant was to receive $.77 per square foot for flooring and $.65 per lineal foot for base.

Defendant further says that it was subsequently found that cork tiling and cork flooring was not re-

quired under the dressers and counters aforesaid; that the area which was was thus required amounted to 285 square feet of flooring and 151 lineal feet of base, and that this area was covered by the defendant with ordinary flooring and was not covered by the plaintiff's assignor.

Defendant says that it was therefore entitled to a credit from the plaintiff's assignor on the aforesaid contract price of thirty-six hundred dollars ($3,600) as follows:

285 ft. of floring at 17c. per square foot	$219.45
151 lineal ft. of base at 65c. per lineal foot	98.15
Total	$317.60

Defendant further counterclaims against the said plaintiff in the sum of forty dollars ($40.00), being sixty-six and two thirds hours (66 2/3) carpenter work on dresser doors and drawers at 60 cents per hour, which work defendant was obliged to do by reason of the fact that plaintiff's assignor employed someone to do cement work under the cork flooring laid by plaintiff's assignor, after the defendant had finished its woodwork and the moisture from this cement caused the defendant's woodwork to swell and bulge and necessitated the defendant's repairing this woodwork.

The defendant further counterclaims the sum of three dollars and twenty-seven cents ($3.27), being the amount of labor furnished by the defendant for unloading cork tiling for the plaintiff's assignor at Princeton, New Jersey.

Defendant, therefore, counterclaims damages against the plaintiff in the sum of three hundred and sixty dollars and eighty-seven cents ($360.87).

PEIRCE & HOOVER,
Attorneys for Defendant.

Exhibit "A" of Answer.

Established 1877. Incorporated 1902.

GEORGE W. SMITH & COMPANY, INC.

Cabinet Wood Work

39th Street and Powelton Avenue

Philadelphia.

November 21st, 1913.

David E. Kennedy,
420 Fifth Avenue,
New York City.

Terms:

a/c Graduate College, Princeton University.

9x909	Labor furnished to unload cork tile at Graduate College.....	$3.27	
9x995	Damage to Dressers in Kitchen by wet concrete	40.00	
9x998	Cork tile floor and cove base omitted on account of not being used under dressers, viz:		
	285 sq. ft. cork tile fl @ 77c.....$219.45		
	151 lin. ft. cove base @ 65c..... 98.15	317.60	
		$360.87	

(Exhibit AA as contained in answer is same as Exhibit D-2 shown on page 11.)

Reply.

Filed January 8, 1915.

The plaintiff, replying to the answer of the defendant, says:

REPLY TO FIRST DEFENSE.

1. Plaintiff denies that the making of the contract in question constitutes a doing of business in the State of New Jersey contrary to the laws of the State of New Jersey.

2. Plaintiff denies that the contract was entered into in the State of New Jersey.

3. Plaintiff denies that he is a nominal plaintiff and that he paid nothing for the assignment of said claim to him by David E. Kennedy, Inc.

REPLY TO FOURTH DEFENSE.

Plaintiff denies the truth of the fourth defense.

REPLY TO FIFTH DEFENSE.

1. Plaintiff will object that the facts alleged in said fifth defense do not constitute a legal defense to the cause of action set up by plaintiff in his complaint.

2. Plaintiff denies that he is estopped from prosecuting his said action by any of the matters and things set up in the said fifth defense.

3. Plaintiff denies that the defendant, on November 21st, 1913, sent to plaintiff's assignor a written statement of the account between the defendant and the plaintiff's assignor exhibiting the balance due to plaintiff's assignor from the defendant in the sum of one thousand seven hundred thirty-nine and 13/100 ($1,739.13) dollars.

4. Plaintiff denies that defendant forwarded to plaintiff its check to the order of plaintiff in the sum of $1,739.13 in full satisfaction of the balance due from the defendant to plaintiff's assignor as in said fifth defense it is set out.

Reply.

5. Plaintiff denies that plaintiff's assignor accepted a check for $1,739.13 and cashed the same and received the money thereon, or any other check in full satisfaction of the balance due and owing to plaintiff's assignor upon the account upon which the above entitled action is founded.

6. Plaintiff denies that plaintiff's assignor at any time adjusted or settled the claim upon which the above entitled action is founded with the defendant in any manner whatsoever.

ANSWER TO COUNTER-CLAIM.

1. Plaintiff denies that at any time a question arose between the defendant and plaintiff's assignor as to whether cork tiling and base was required as set out in paragraph 2 of the counter-claim.

2. Plaintiff denies that the plaintiff's assignor and defendant agreed that defendant should have a suitable allowance or any allowance whatsoever for cork tiling and cork flooring as alleged in paragraph 2 of said counter-claim.

3. Plaintiff denies that it was at any time found that cork tiling and cork flooring was not required under the dressers and counters as set out in paragraph 2 of said counter-claim.

4. Plaintiff denies that Mr. Grange at any time had authority from plaintiff's assignor to modify, change, or in any way vary the written contract entered into between the defendant and plaintiff's assignor on the second day of April, 1912.

5. Plaintiff denies that the defendant was or is entitled to the credit of three hundred seventeen and 60/100 ($317.60) dollars set out in paragraph 2 of the counter-claim or any part thereof.

6. Plaintiff denies that the defendant is entitled to counter-claim against the plaintiff's assignor and against the plaintiff in the sum of forty ($40.00) dollars for carpenter work on dresser doors and drawers as set out in paragraph 2 of said counter-claim.

Reply.

7. Plaintiff denies that the work alleged to have been done concerning carpenter work on dresser doors and drawers at sixty cents per hour, amounting to the sum of forty ($40.00) dollars was done by defendant.

8. Plaintiff denies that the work alleged to have been done concerning carpenter work on dresser doors and drawers at sixty cents per hour, amounting to the sum of forty ($40.00) dollars had to be done by defendant by reason of the fact that plaintiff's assignor employed some one to do cement work under the cork flooring laid by plaintiff's assignor after defendant had finished its woodwork.

9. Plaintiff denies that the carpenter work on dresser doors and drawers, amounting to the sum of $40.00, at the rate of sixty cents per hour, had to be done by defendant by reason of the fact that plaintiff's assignor laid cement after defendant had finished its woodwork and that moisture from the cement caused defendant's woodwork to swell and bulge.

10. Plaintiff denies that the carpenter work on dresser doors and drawers, amounting to the sum of $40.00 had to be done by defendant by reason of any act of omission on the part of plaintiff's assignor.

11. Plaintiff denies that the defendant expended for the plaintiff's assignor the sum of three and 20/100 ($3.20) dollars for labor in unloading for plaintiff's assignor cork tiling at Princeton, New Jersey.

12. Plaintiff denies that plaintiff's assignor ever requested or authorized defendant to unload for it cork tiling at Princeton, New Jersey.

13. Plaintiff denies that defendant, as a matter of law, has any right to counter-claim against plaintiff in this action.

14. Plaintiff will object at the trial that defendant has no right to set up any counter-claim against plaintiff or to counter-claim for any of the matters or things set out in said counter-claim against plaintiff in the above entitled action.

J. EMIL WALSCHEID,
Attorney for Plaintiff.

NEW JERSEY SUPREME COURT.

WILLIAM E. DECKER, *Plaintiff,* *vs.* GEORGE W. SMITH & Co., a Corp., *Defendant.*	*Action at Law.*

Transcript of shorthand notes of testimony taken on the 15th day of April, 1915, before Speer, *J.*, and a jury in the above stated cause upon the trial thereof at the Court House, Jersey City, N. J.

J. Emil Walsheid for the plaintiff.

Peirce & Hoover for the defendant.

WILLIAM G. GRANGE, sworn.

Mr. Peirce. We can shorten the case by some admissions.

Mr. Walscheid. It is admitted by the plaintiff and the defendant that all of the work included in this contract has been performed; that it has been accepted by the architects in charge of the work and that payment for the same has been received by George W. Smith & Co., Incorporated.

It is admitted by the David E. Kennedy that they are not authorized to do business in the State of New Jersey under the corporation act; in other words, that they have not filed a certificate as required by the corporation act.

Mr. Peirce. It is admitted as to any letters written by the defendant to David E. Kennedy, in event of the originals not being produced, that copies may be used.

Direct examination by Mr. Walscheid.

Q Mr. Grange, where do you live?

A Philadelphia.

Q What is your business or occupation?

A District manager for David E. Kennedy, Incorporated.

Q And their home offices are where?

A New York City.

Q Were you such district manager in the years 1911 and 1912?

A Yes, sir.

Q And have continued in that capacity to date?

A Yes, sir.

Q Did you negotiate with George W. Smith and Company a contract for the installation of cork tile and base at Princeton University?

A I did.

Q I show you a paper and ask you whether that is the contract?

A Yes, sir.

Q Did you see it executed by George W. Smith and Company?

A I did.

Q Who executed it on behalf of the David E. Kennedy Company?

A I did.

Q And where was it executed?

A In the Smith office in Philadelphia.

Q Who signed for George W. Smith, Incorporated?

A A. D. Smith, president.

Q And who signed for David E. Kennedy?

A I did, as manager.

(Contract offered in evidence and marked P-1.)

Q Now that contract speaks in paragraph three of the specifications and plans covering this contract between George W. Smith & Co. Incorporated, and David E. Kennedy, Incorporated, have been initialed

by Wm. G. Grange, manager for David E. Kennedy, Incorporated, and his authority is hereby acknowledged. Were any plans and specifications initialed at that time?

A They were.

Q Where were they left?

A In the Smith's possession.

Mr. Walscheid. Have you those initialed papers?

Mr. Peirce. You have a copy there. You may put that in.

Q Then it further says in this same section, "The drawings referred to are numbered as follows: 18." Did you receive such drawings from Mr. Smith at that time?

A I did.

Q Are these (indicating) the drawings which you received?

A Yes, sir.

Q Did you also initial a drawing such as that for Mr. Smith and leave it with him?

A I think I did, yes.

Q This is the copy that he handed you?

A This is the copy that I have.

(Paper offered in evidence and marked P-2.)

Q Did you know anything about the actual performance of the work?

A Nothing whatever.

Cross examination by Mr. Peirce.

Q Mr. Grange, you acted for the Kennedy Company in this contract?

A Yes.

Q Do you remember with whom you had the talk, connected with the defendant?

A Mr. A. D. Smith.

Q The gentleman that is sitting at the table?

A Yes, sir.

Q When did you first talk with him?

Mr. Walscheid. I object as immaterial. The contract was reduced to writing. Unless there is some special reason for it on the face of it I think it is immaterial.

The Court. What is the materiality of it as you see it?

Mr. Peirce. It is simply a starting point, that is all.

The Court. Well, the only thing is all the original negotiations are merged in a written contract. I do not see what good it would do to prove where the negotiations took place. I do not see what relevancy it has.

Mr. Peirce. There is a portion of the contract I want to ask the gentleman about the meaning of—the construction of it—not the legal meaning of it, but as to "workmanship" and what it embraced.

The Court. He cannot construe the contract as to what it embraced. If there is any word that is ambiguous or any phrase that has a technical trade meaning that you want to elucidate, you may do it.

Mr. Peirce. That is just what I am doing. This is ambiguous, and it is on the face of it.

The Court. I do not see that the geographical location of the man has anything to do with the meaning of the word.

Mr. Peirce. It is only a starting point.

The Court. I will overrule it then.

Q You did have a talk with Mr. Smith?

A Yes.

Q Do you remember at that time talking with Mr. Smith as to whether or not the cork flooring extended over the entire surface of the floor or only a portion of it?

Mr. Walscheid. I object as immaterial.

The Court. What they talked about is a matter of inconsequence.

Mr. Peirce. The contract is not a complete contract on that point. There is an ambiguity on the face of it.

The Court. What is the ambiguity of it?

Mr. Peirce. "It is further agreed that this contract includes all the floor space in the various rooms in which this cork tiling occurs." I want to show that at that time it was agreed that if cork tiling should not extend over the entire floor then the defendants were to have an allowance for such portions as were not covered.

The Court. You cannot show that. That contract is the expositor of what the parties agreed and not what they contemporaneously said. All the cases are clear authority for the proposition that when the parties have reduced their intentions to writing that the writing itself is the best and the only evidence of that matter. You cannot go on and show that they made an agreement at the same time orally that covered something that is not in there unless it is manifest on the face of the thing that that is left out.

Mr. Peirce. It is.

The Court. I do not think it is. I think it is manifest it is in there.

Mr. Peirce. My associate explains to me that this agreement I am attempting to bring out was a supplemental agreement which was to be executed afterward, that it was the agreement between—

The Court. If it never was executed then it has no existence.

Mr. Peirce. If it was after the paper writing it would control it; it would be an additional and supplemental agreement.

The Court. But that is not what you are asking about. What you are asking about now is a talk that was antecedent to this agreement.

Mr. Peirce. I had not really got started.

The Court. I am only ruling on what you have got started on.

I will overrule the question as being one of those things that was antecedent to the contract, which is the contract in suit in this case, and that therefore whatever agreement was made at that time with respect to that matter must be held to have been embodied in the contract itself.

Mr. Pierce. Exception.

Q Do you remember subsequent to the time that the contract was signed between Kennedy Company and Smith that the question came up immediately afterwards as to whether or not the entire surface of the floor was to be covered by the flooring or whether a portion of it was to be covered—

Mr. Walscheid. I object.

Q (Continuing)—and that the contract's plans did not show it?

Mr. Walscheid. I object to that, first, on the ground that the contract and the plans which went with it which were handed to us at that time distinctly showed what floor space was to be covered, and it is governed by the contract.

The Court. The difficulty with the situation is that your argument has nothing whatever to do with the effort that is being made by Mr. Peirce. Mr. Peirce says that he purposes to show that a supplemental contract was entered into.

Mr. Walsheid. I withdraw any objection to showing any supplemental contract.

The Court. That is what he says he is trying to show. That I will permit.

Mr. Walsheid. Oh, yes; I have no objection to his showing that, reserving my right as to this district manager's authority.

The Court. Oh, that is all right.

A My talk with Mr. Smith was that the area to be covered was covered by the plans and specifications.

Mr. Peirce (to the stenographer). Will you read the question?

(Question repeated).

Q Now will you answer that, please? A Yes.

Q That conversation was at several intervals, was it not, numerous occasions to the same effect?

Mr. Walscheid. I object to these conversations as immaterial unless a subsequent contract is shown.

The Court. I am only admitting this, Mr. Walscheid—I have no doubt about the rule that governs the proposition at all—I am simply admitting this evidence upon the representation that they are about to show that there was a supplemental contract. Now that contract must be just as much a contract as this instrument itself; it must be based upon a consideration, it must have all those various elements that a contract is required to have, and unless that is shown, why these talks are matters of utter inconsequence and whatever this man said in reference to the matter afterwards, unless he is shown to have had authority to say it or to in some way modify the contract, is absolutely no modification whatever and is not binding upon the defendant company.

(Question repeated.)

The Court. I will overrule that question if you ask me to.

Mr. Walsheid. I was asking you.

The Court. Not on the ground that you asked at all, but because there isn't anything yet at all to show what the effect was. You (addressing Mr. Peirce) had that stricken out yourself. He tried to tell you what the effect of the conversation was and now you say "you had this conversation to the same effect."

Mr. Peirce. I stand corrected.

Q You did talk about how much of the surface of the floor was to be covered with cork tiling?

A Yes.

Q Now that subject matter was discussed on a number of occasions, was it not?

A Previous to the signing of the contract or afterwards?

Q Both?

A Yes, sir.

Q And wasn't this clause put in the contract by reason of the conversation that you have mentioned: "Further, it is agreed that this contract includes all the floor space in the various rooms in which this cork tiling occurs"?

Mr. Walsheid. I object as immaterial and irrelevant.

The Court. I will sustain the objection on the ground it is immaterial, and secondly on the ground that it calls for a conclusion as to the motives that influenced the insertion of that particular thing in the contract.

Mr. Peirce. May I have an exception?

The Court. I do not think it is possible to have an exception any more. There are no such things. They are abolished by the statute. You may have an objection entered.

Mr. Peirce (after discussion). As long as I have my status maintained I do not care about the words.

The Court. You may enter your objection in the nature of an exception.

Q At the time this contract was signed you say there were conversations about the extent of the flooring to be covered by the cork tiling?

A There was a discussion of the plans.

Q There were discussions of the plans. Now do you remember having a conversation in the—

The Court (interrupting). We will adjourn to quarter after two.

(RECESS.)

Afternoon session:

Mr. Peirce. If your honor please, the admission that was made in the first part of this case was made by reason of the suggestion of counsel on the other side that he had under subpoena the authorities from Princeton University and at his request I agreed to admit that the contract with Princeton University—that he need not produce the authorities from Princeton University, and that that contract had been completed. When he said "this contract" I understood it to be the contract with the University of Princeton; and now there seems to be some misunderstanding as to whether it means the contract with Princeton University or whether it means the one in contention. Of course we do not admit the contract here; that is what we are litigating; but what we admit is the contract having been performed with Princeton University and we are paid for it. That is what the gentleman asked me to admit and that is what I did admit.

The Court. What was the relevancy of the question as to whether or not the contract with Princeton University had been performed?

Mr. Peirce. This question refers back to the contract with Princeton University.

The Court. I do not see what difference it makes whether the contract with the University of Princeton was completed or incomplete, or whether you made money or lost money by it. The question is whether or not this contract which is in suit here was fully performed.

Mr. Peirce. Under this contract in suit here it provides that the final payment shall be made within thirty-three days after completion and acceptance by the architect—

Mr. Walsheid. And I read that to these—

Mr. Peirce. Wait a minute—meaning the contract with the Princeton University.

The Court. What contract is that provision in?

Mr. Peirce. That is the provision in the contract on which suit is brought.

The Court. Well, if the architect accepted this work what difference does it make then whether the Princeton University contract was completed or not?

Mr. Peirce. Only my admission was for that particular purpose alone.

The Court. My query is what relevancy the fact has, even assuming it is admitted.

Mr. Walsheid. There is a provision in this contract that final payment shall be made within thirty-three days after the completion and acceptance by the architects of all work included in this contract and the payment for same received by George W. Smith & Company, Incorporated. I asked these gentlemen to admit that, and when the admission was made upon the record I held this paper up and showed it to your honor to show the relevancy of the admission. I did not desire to bring the architects here and the people from Princeton University to show performance

and acceptance. I did not think it was necessary; and that was the admission that I asked for and that was given.

Mr. Peirce. The admission was just along that line, that he had subpoenaed the people from Princeton and it was not necessary to produce them.

The Court. Are you embarrassed by that fact?

Mr. Peirce. Yes, I am; I am not going to admit myself out of court.

Mr. Walsheid. Allow me to open up my direct examination of this witness and I think I will very soon get over any embarrassment that may arise out of this admission.

The Court. Go ahead.

Further direct examination by Mr. Walsheid.

Q Did you in January or in December, 1913, have any conversation with Mr. Smith here relative to the completion and acceptance of the work done by the Kennedy Company under its contract with the Smith Company?

A Nothing at all.

Q Didn't you have a conversation with them in which the queston of acceptance and completion came up?

A I understood the work had been completed—

The Court. No; did you have a conversation?

A Yes.

Q What was the conversation?

A The conversation as I remember—

Mr. Peirce. Will you fix the time?

A I cannot recall the time at all.

Q Can you recall it approximately?

A About a year ago.

Q And where was the conversation?

A In Smith's office.

Mr. Peirce. I object to that. It is too remote. Two years after the contract was finished he had this conversation, when the contract was paid for.

The Court. I think you cannot ask what that conversation was until you have established the fact that at that time and under the circumstances, when the conversation was held, Mr. Smith was authorized to speak for the defendant company with respect to the matter and make that admission.

Q Do you know Mr. Smith personally?

A Yes, sir.

Q Do you know what office he holds in the company?

A Yes, sir.

Q What office does he hold?

A President.

Q Had you dealt with this company through Mr. Smith before this time?

A Yes, sir.

Q How long has he been president—

Mr. Peirce. I object to that.

Q (Continuing)—to your knowledge?

The Court. The witness cannot state how long he has been president, but he can state how long he has acted as president. You will find that laid down in *Ritchie* vs. *Widdemer.*

Q Acted as president, to your knowledge.

A I have no definite information as to how long he has been president of the company. My dealings with him in such capacity date back about four years.

Q Have you had any dealings with anybody else in the company?

Mr. Peirce. There is no doubt Mr. Smith has a right to bind the company. We admit that.

Q Do you remember the time when a check was sent on by the Smith Company to the Kennedy Company in payment of some $1,739.13; do you remember that time?

A Yes, sir.

Q Can you from your memory fix approximately the time when that check transaction took place?

Mr. Peirce. Show him the check. We will not raise that question. Show him the check.

(Mr. Walscheid shows witness check.)

Q November 21, 1913.

A That's right.

Q Subsequent to that time did you have any conversation with Mr. Smith in relation to the completion and performance of the Kennedy contract?

A Nothing whatever.

Q Didn't you have any talk with him in which that matter came up?

Mr. Peirce. The witness has answered that and said "nothing whatever."

The Court. I will permit him to answer it.

Mr. Walscheid. Because the witness has told me differently.

Mr. Peirce. I object to that.

Mr. Walscheid. I will strike that out.

Q Didn't you have—strike that out.

The Court. Don't try to indicate what the conversation was. If he had one let him say it.

Q When was it that you had your last conversation with Mr. Smith?

A About a year ago in February.

Q Was it about this contract?

A It was.

Q What was said at that time about this contract and its performance, if anything?

Mr. Peirce. I object to that as too late.

The Court. He simply wants to show by this witness, I suppose, that Mr. Smith did admit to him that the contract had been completed and accepted by the architect.

Mr. Walscheid. And had been paid for.

Mr. Peirce. Our admission would go to the point that the architect—

The Court. Mr. Walscheid wants to show that he can establish by facts all the facts your admission covers and therefore he does not want the admission.

Mr. Walscheid. I am trying to relieve Mr. Peirce of his embarrassment.

The Court. I will permit the question.

A My last conversation with Mr. Smith in regard to this contract—

Mr. Peirce. Did you fix the time?

Mr. Walscheid. Yes, February—

A It was approximately a year ago. It may have been a year ago in March or February—

Mr. Peirce. Where?

A In Mr. Smith's office.

Q In Philadelphia?

A In Philadelphia.

Q Now go ahead and tell us what you were going to tell us.

A I went out to see Mr. Smith regarding a claim that he had against us and discussed it with him.

Q I do not care anything about other claims. In relation to this contract.

A I practically had no conversation with him regarding the contract or the completion—

Q When was the last conversation you had with him with relation to this contract—

Mr. Peirce. I object to that. That is suggesting the answer. I think counsel has gone as far as he ought to.

The Court. He is simply asking for a date.

Q (Continuing)—and the performance of the contract?

A As I say, it was about a year ago last February.

Q Tell us what the conversation was in relation to this contract and the performance of the work.

Mr. Peirce. The witness has said he had no conversation regarding that.

The Court. I do not remember his admitting he had any conversation with respect to the performance of the work.

Q Will you tell us what the conversation was?

A I had had a number of talks with Mr. Smith regarding a bill which he had rendered to the company in settlement and it was along those lines we discussed rather than any completion of the work or whether the contract had been completed in our part.

Q Was anything said at any of these conversations—

Mr. Peirce. I object to the leading question. The conversation was asked for, and I suppose he gave it all.

Q Was anything said at any of these conversations by Mr. Smith about the completion of this work, the acceptance of same by the architect, and that the Smith Company had received payment therefor?

Mr. Peirce. I object to that, if the court please—

Q Answer that question yes or no without giving the conversation.

Mr. Peirce (Continuing)—because it is leading. He has already said it did not occur.

The Court. I will permit it to be answered.

A Mr. Smith told me that the architects had accepted the work and he had received the payment for it.

Q Now when was that? That was what I wanted.

A That was previous to the last conversation I had with Mr. Smith.

Q Previous to the last conversation?

A Yes.

Q Now fix the date of that.

A Mr. Smith told me that in December or January of 1913.

Cross examination by Mr. Peirce.

Q Why did you say then there had been no conversation with Mr. Smith affecting the completion of the work?

A I just do not understand the question.

(Question repeated.)

A Mr. Smith made the statement to me—

Q Answer that. Why did you say that? Now you say there was a conversation.

The Court. You do not mean affecting; you mean respecting.

Q Respecting, I should say.

A I am in error.

Q That is your explanation, is it?

A Yes, sir.

Q Didn't you understand the several questions that your counsel put to you?

A Yes, sir.

Q And yet, understanding that, you said there had been no conversation with Mr. Smith respecting the contract, didn't you?

A Yes, sir.

Q And as to the completion of the contract; didn't you?

A I think I did.

Q Now you acted in Philadelphia for the Kennedy Company, you say?

A Yes, sir.

Q And you had power to bind them by the contract which you signed?

A By that contract, yes, sir.

Q You were the representative or the agent for the Kennedy people in the dealings with Smith in Philadelphia?

A Yes, sir.

Q And you had sole charge of that?

A Yes, sir.

Q And the Kennedy Company gave you authority so to do?

A Yes, sir.

Mr. Walscheid. I object to that—"so to do." If that is limited to the making of this specific contract I have no objection to it, but if counsel desires to broaden his authority beyond that he ought to ask the question specifically.

The Court. I will permit this question. I think it refers clearly to what he had previously said.

Mr. Peirce. I am not talking about any concontract with John Wanamaker or anybody else; this particular contract.

Q I show you a check which you referred to in your direct testimony—is that the check?

A I have never seen the check before except when it was handed me here in court.

Q Oh! I thought you testified about it in your direct examination.

Mr. Walscheid. He testified to the time of the check.

A To the date. You (addressing Mr. Walscheid) showed it to me to establish the date of the check.

Q Do you know the signature on the back there; whose signature is that?

A I can only testify as far as I see it was written there "David E. Kennedy, per R. J."

Q Who is R. J.?

A An employee of the New York office.

Q What is his full name?

A I could not tell you.

Q Mr. Kennedy is in the room, is he not?

A Yes.

Mr. Peirce. Will you stand up, Mr. Kennedy? Oh! I beg your pardon. I was looking at the tall man. Do you want me to call Mr. Kennedy, or shall I go on without him?

Mr. Walscheid. Go on with your cross examination.

Q Did you have anything to do with the payments on this contract?

A No, sir.

Q You did not have anything to do with them?

(No answer.)

Q Did you have anything to do with attendance on the work at Princeton to see if your contract was fulfilled?

A No, sir.

Q Did you ever go there to inspect the work to see if you had completed your contract?

A No, sir.

Q Then all you had to do with this was to enter into the contract in Philadelphia, is that all?

A Yes, sir.

Q And you did have some conversations with the defendant company when they objected to paying any more than the amount represented by the check dated November 21, 1913?

A Yes, sir.

DAVID E. KENNEDY, sworn.

Direct examination by Mr. Walscheid.

Q Where do you reside?

A 353 West 84th street, New York.

Q Are you connected with the David E. Kennedy Company?

A Yes.

Q In what capacity?

A President.

Q How long have you been president?

A Since 1907.

Q Did your company enter into a contract with George W. Smith and Company, Incorporated?

A Yes.

Q I show you Exhibit P. 1; is that the contract?

A Yes.

Q Has that work been fully paid for?

A No.

Q What is the balance due? Can you tell offhand?

A I think it is three hundred and fifty dollars and odd cents; I am not sure of the exact amount.

Mr. Peirce. $357.60 you claim.

A $357.60, yes.

Q Did you for the company execute that assignment (handing witness a paper)?

A Yes.

Q By authority of the company?

A Yes.

(Paper offered in evidence and marked P-3.)

Q And is that the seal of the company attached thereto?

A Yes.

Cross examination by Mr. Peirce.

Q The assignment you produce to William E. Decker, was made for your convenience in order that suit might be brought over in Jersey?

A Yes.

Q You claim $357.60 balance?

A Yes.

Q The contract was for $3,600?

A Yes.

Q And you give credit for the claim of $3.27 which we show in our setoff?

A Yes, sir.

Q And then you give credit for cash, $1,500?

A Right.

Q Then you give credit for $1,738.13 ($1,739.13); total $3,242.40; balance $357.60?

A Correct.

Q I show you a check dated November 21, 1913, and ask if that is the credit represented by $1,738.13.

A This check is for $1,739.13.

Q Well, you made a mistake of a dollar?

A Yes. That is the check.

Q The David E. Kennedy received the money on that check?

A Yes.

Q Who signed "David E. Kennedy, per R. J."?

A It must have been Mr. Jacobson, an assistant bookkeeper in the New York office.

Q But it did go through the Kennedy Company bank account?

A It went through the First National Bank, yes.

Q Why did you cross off on the back of that check the words "Chg. $360.87"?

A I scratched it off myself.

Q Why?

A Because we did not admit the claim.

Q You had read what was on the back of the check?

A I had.

Q And on the back of the check are these words: "In full of all claims for contract 7104, 10/6, cash

$1,500, 11/21, cash $1,739.13; chg. $360.87"; added up, $3,600"; are there not?

A It is.

Q Now you had received and written various letters to the Kennedy Company about this check and the balance due?

A Wrote to whom?

Q You have received and have written to—I said the Kennedy; I mean to Smith—various letters about the question of the amount due on the contract?

A You mean I personally?

Q Oh, no; your company, the Kennedy Company.

A Yes, the company.

Mr. Peirce. I might call for the letters from the other side. We have given notice to the other side to produce a letter dated August 15, 1913, addressed to David E. Kennedy Company, by George W. Smith Company. Will you give us that letter, please?

Mr. Walscheid. Do you want the original?

Mr. Peirce. I have my copy.

Mr. Walscheid. You may use your copy.

Mr. Peirce. We will offer in evidence the letter addressed to—

Mr. Walscheid. You are not going to offer anything in evidence now, are you?

Mr. Peirce. We can have them marked for identification if that is the ruling.

The Court. My practice is in accordance with the universal practice, that when the plaintiff is putting in his case the defendant hasn't any right to put any evidence in.

Q I will ask you to identify the copies of letters, and letters, and ask you whether or not you have received and written those letters.

A All these letters?

Q Yes.

A And the originals here?
Q Yes.
A What do you want me to do, compare them?
Q Yes.

Mr. Walscheid. Some of those are left out here. I suppose you do not want those that you have left out.

Mr. Peirce. Any that I have there I would like to have marked. I do not know of any others, Mr. Walscheid.

A All right.

Mr. Peirce. I ask that those be marked for identification.

(Letters marked D-1 for identification.)

Mr. Peirce. Also check dated November 21, 1913.

(Marked D-2 for identification.)

Q I show witness check dated December 31, 1913, and ask if the Kennedy Company got the money represented by that check.
A Well, the endorsement would indicate that it did.
Q Whose signature is on the back of that?
A Miss Jacobson.
Q Miss Jacobson, your employee?
A Yes.
Q She is in your office in New York?
A Yes.

Mr. Peirce. I ask that that be marked for identification.

(Check marked D-3 for identification.)

Q Did you inspect the work at Princeton to see whether or not you had completed your contract?
A No, sir.
Q Who did?
A I think our Mr. Shields, superintendent of the company.

Q Were you ever at Princeton?
A I have been there.
Q But not about this work?
A No, sir.
Q Perhaps you attended college there?
A No, sir.

PLAINTIFF RESTS.

DEFENDANT'S CASE.

ARTHUR D. SMITH, sworn.

Direct examination by Mr. Peirce.

Q You are the president of the defendant company?

A Yes.

Q I show you Exhibit P-2 and ask you if the cork tiling was laid in the service room, so marked there, 405 square feet, by the plaintiff.

Mr. Walscheid. I object. I would like to inquire as to the witness's knowledge on the subject.

Q Do you know whether or not it was laid? Answer yes or no.

Mr. Walscheid. What was the other question?

(Question repeated.)

Mr. Walscheid. I object to that as immaterial. Has your honor seen these plans?

The Court. No; I have not seen them.

The Court. (After side-bar discussion.) Now, there is an objection pending on this question, and of course in order to pass upon that objection intelligently I have to know if the number of feet you have included in there includes the space occupied by the dressers.

Mr. Peirce. No; it does not. It is a question of performance of the contract.

The Witness. There is no dresser there, sir.

The Court. Oh; there is no dresser in that room?

Mr. Peirce. No.

The Court. I will permit that question.

A No.

Q Now, the cork tiling was also not laid under where the dressers are shown on this plan 18?

Mr. Walscheid. I object as immaterial.

A No.

Mr. Peirce. It is answered.

Q You remember there was a controversy between yourselves and the Kennedy Company as to whether there was any balance due or not?

A Yes, sir.

Q I show you a letter that has been marked D-1 for identification, and ask if that is correspondence between yourselves and the Kennedy Company affecting the question in controversy?

A Yes.

Q The amount in dispute was the amount sued for less the three dollars and some cents which they have allowed you?

A Yes.

Q And forty dollars which you claim for some injury to the woodwork?

A Yes; that was in the amount.

Q That was in the amount in dispute?

A Forty dollars plus $317.60, making $357.60, was the amount in dispute; then this three dollars and twenty-seven—

Q That they admit.

A That they admit.

Q Now tell us about the forty dollars; what is that for?

Mr. Walsheid. I object. I would like to cross examine this witness as to his personal knowledge.

The Court. You may do that.

Arthur D. Smith, cross.

Cross examination by Mr. Walsheid.

Q You are president of the Kennedy Company?

A No; not the Kennedy Company.

Q I beg your pardon. Of the Smith Company?

A Yes, sir.

Q And your offices are in Philadelphia?

A Yes, sir.

Q And I suppose you are also general manager of the company?

A I am the general manager and everything else.

Q And the work which is done by your company in the various places where it is performed is done under the guidance of superintendents?

A Of superintendents, yes.

Q And you yourself take no personal part in the superintendence of specific pieces of work?

A You are very much mistaken there; I take an active part.

Q I am looking for information.

A That is the answer.

Q Did you on this Princeton job take an active part?

A Yes, sir.

Q Tell me just exactly what you did on the Princeton job.

A I went up there and saw that the work was carried on and carried through on time—

A Juror. Talk up.

A (Continuing)—and that the work was done satisfactorily in accordance with the instructions that were given our men.

Q And was it in charge of a superintendent?

A Yes.

Q What was his name?

A Whitney.

Q Is he here?

A No.

Q Was it in charge of anybody besides Mr. Whitney?

A No one but myself.

Q How often would you be on this job?

A I would go up there once a month always and sometimes twice a week.

Q Do you know when the Kennedy work was started?

A Yes; we can tell by the correspondence.

Q I mean do you know of your own knowledge?

A Yes.

Q Were you there to see it started?

A I was not there to see it started.

Q Then you do not know of your own knowledge when it was started?

A I can imagine—

Q I understand. What I want to get from you is your distinct personal knowledge—

Mr. Peirce. Hasn't the counsel gone as far as this cross examination ought to go?

The Court. He has gone far enough it seems to me to find out Mr. Smith knows enough about the particular matter you are inquiring about to answer that question.

Direct examination by Mr. Peirce resumed.

Q Tell us what the forty dollars is charged for.

A Forty dollars is the time it took to rectify the defects in the dresser caused by the dampness of the under-flooring to receive the cork tile.

Q Who put the damp floor down?

Mr. Walshied. I object unless he was personally present and saw it put down.

Q How do you know?

A It is in the correspondence itself.

Q Was that a portion of the contract of the Kennedy Company, putting that floor—

A It was a direct contract that they got with the architects to fix the floor. They inadvertently sent

the bill to us and afterwards apologized and took it up, so that I know from that that they put the floor in.

Q You say that forty dollars was for damage to what?

A Damage to the dresser work.

Q By the dresser what do you mean?

A The cupboards and kitchen equipment.

Q Is that forty dollars a reasonable charge?

A Yes, sir.

Q You also claim $317.60; you claim that by reason of the dressers—which has been explained?

A Yes.

Q Just explain it.

Mr. Walsheid. He has.

Mr. Peirce. We want it on the record.

A The original plans of the kitchen equipment called for cork tile on the floors. There were dressers and cupboards included—their general location.

Mr. Walshied. I object to the witness explaining anything that is set out and explained in the main contract. I understood he was to explain about the forty dollar item.

The Court. He is only stating what his claim is and his claim is I think a violation of the construction of the contract. He is about to tell us that there were certain dressers that rested on parts of the floor and that the claim he is now making is for those parts of the floor.

Mr. Peirce. That was my object, to bring the question up.

The Court. I will rule right now and put it on the record so that you may have your objection noted to it and have the point properly raised, that the construction of that contract being for me as a court I am perfectly satisfied that the correct construction of the contract precludes recovery for not doing the work of cork tiling on

the floor under the dressers. I will hold that distinctly.

Mr. Peirce. That will shorten the case.

The Court. That shortens it up.

Mr. Peirce. Then I may enter the exception?

The Court. Yes; I want you to have that.

Q I show you a check marked D-2 for identification and ask you what you know about that check.

A This was a check that was sent on the 21st of November to David E. Kennedy in full payment of all claims on the existing contract.

Q Who wrote that endorsement on the back of that check?

A This (indicating)?

Q No; the top there.

A Our bookkeeper.

Q Did she do it at your direction?

A Yes.

Q That (indicating) is your signature on the check dated November 21, 1913, D-2 for identification?

A Yes, sir.

Q Whose signature is on the check of December 31, 1913?

A Mine.

Q By whose direction was the endorsement put on the back?

A Mine.

Q You mean with the exception of the endorsement: "David E. Kennedy"?

A Yes.

Q Did those checks go through your bank account and was the money taken from your bank account?

A It was.

Q At the time you sent the check for $1,739 and immediately before and afterwards, you had certain correspondence with the Kennedy Company, did you not?

A Yes.

Q And the letters represented by D-1 for identification are the correspondence in question?

A Yes.

Mr. Peirce. We offer these letters marked D-1 for identification.

Mr. Walsheid. I do not think they all ought to be admitted because some of them may be material and others may not be material. Here is a long series of correspondence.

Mr. Peirce. It is all on the question of the controversy.

Mr. Walsheid. There are some questions raised there that are not in controversy.

Mr. Peirce. Tell me what ones you object to.

Mr. Walsheid. I object to all of them now. What do you want to offer?

Mr. Peirce. I made my offer. I will put them in in the regular way if you object to them.

I offer in evidence a letter of August 15, 1913, marked for identification, from George W. Smith Company to David E. Kennedy.

Mr. Walsheid. I object to that letter as immaterial and irrelevant to the issues in this case. (Mr. Peirce reads letter.)

The Court. How do you think that is relevant?

Mr. Peirce. That affects the forty dollar item as to putting in the cement floor.

Mr. Walsheid. No, it doesn't. Your claim on the forty dollar item is that we did certain work, that that certain work caused you certain damage and that that damage amounts to forty dollars. Prove that without proving all this unnecessary correspondence.

Mr. Peirce. The offer is made, if the court please.

The Court. I will admit it.

(Letter marked Exhibit D-1.)

Mr. Peirce. We offer letter from Kennedy to Smith Company, dated August 6, 1913.

(Mr. Peirce reads letter.)

Mr. Peirce. That refers to the authority to do the forty dollar's worth of work.

Mr. Walscheid. I object on the same grounds.

The Court. I will allow it.

Mr. Peirce. Do you want me to read these all the way through?

Mr. Walscheid. I do not know what you want to do.

Mr. Peirce. I have offered them.

Mr. Walscheid. I will object to them and allow the court to rule them in as the others were ruled in. I do not know if that is the proper thing to do or not.

The Court. I do not know whether it is or not. You have to take the chance of it. I am perfectly willing to "rule them in as the others were ruled in," whatever that means.

Mr. Walscheid. My objection is that they go to matters that are not relevant to this issue.

Mr. Peirce. All of these letters are pertinent.

The Court. I can readily see this, that if there was a question between these two parties with respect to the propriety of a certain piece of work that was done or required to be done, and if there was any correspondence relating to that in which the parties recognized that there was a proper dispute in which one admitted or in some way recognized a liability to pay for making it correct, or a letter that bore in any way relevantly or materially upon that point, that that is a relevant letter. That is the ground upon which I admitted those previous letters. What the others are I do not know and I cannot rule on them.

Mr. Walscheid. They are all in this same controversy back and forth.

The Court. Do they all relate to the forty dollar item?

Mr. Peirce. They do not, no, sir. They go into the controversy very much in detail later.

The Court. I can readily see this too, Mr. Walscheid, and that is I suppose that with respect to this matter of this check that was sent for the last payment on which there was an endorsement, if there actually did exist between these parties an honest dispute with respect to the proper construction of this contract, and one party contended that the contract meant as Mr. Peirce contended it did mean, and the other party contended it meant what you contend it meant and what I think it did mean, and those parties in the light of that honest controversy saw fit the one to make a payment and the other to receive it in full discharge of the obligation, that that would in all likelihood amount to what you might call an accord and satisfaction and that that would be a defense to the action; and I can see this, that if a check is sent upon the back of which—and I cannot see how it could be endorsed anywhere else—there appeared an endorsement to the effect that it was in full payment, and that check was retained and not sent back to the person who sent it, even though a part of the endorsement was scratched off, it might be that under the authority of Rose *vs.* American Paper Co., in 54 Vroom, I would be under obligation to submit such a question to the jury because I understand the law to be quite well settled that the acceptance of a less sum in payment of a greater sum, even though it be taken in satisfaction of it, where no dispute or no honest controversy exists, is not an accord and satisfaction; but I understand also that it is just as well settled that if there is an honest dispute between the parties about the amount,

even though the dispute be baseless, that the parties in order to compromise that dispute may enter into an accord which when satisfied by payment amounts to an accord and satisfaction; and if these letters bear upon that issue I can see that they are relevant pieces of testimony.

Mr. Peirce. Every one of them bears on this controversy. We have the cases in mind, and that is our precise theory of the case.

The Court. Of course I have only stated what I conceive to be the law. I have not seen the letters. If those letters bear on what I conceive the law to be I am obliged to let them in evidence.

Mr. Peirce. The next one, dated August 19, does affect the question that way. I offer it.

The Court. The forty dollar item?

Mr. Peirce. Yes. The next letter, August 19, in reference to concrete—

The Court. These are letters from the other side to you?

Mr. Walscheid. Letters back and forth.

The Court. All right.

(Mr. Peirce reads extracts from various letters in batch marked D-1 for identification.)

Mr. Walscheid. I have no objection to the whole set.

The Court. They will be received.

(Letters marked as one exhibit, D-1.)

Mr. Peirce. I offer in evidence check of November 21, 1913, marked D-2 for identification.

(Marked Exhibit D-2.)

Mr. Peirce. And also the check of December 31, 1913, marked D-3 for identification.

(Marked Exhibit D-3.)

Q What would be the reasonable price for the cork tiling not done on the service room R. N., 405 square feet?

A I could tell you what he would charge for it; I do not know if it would be reasonable.

Q What was his price?

A His price would be about $360 for that room, exclusive of the—

Q How do you arrive at it?

A About ninety cents a foot. You see the total footage that he put down was less than three thousand feet and he charged us $3,600.

Q Give me the exact figures, will you?

A Of what?

Q Four hundred and five square feet, and the price?

The Court. It would be $364.50.

Cross examination by Mr. Walscheid.

Q There is no claim for that $364.50 in your pleadings, is there?

Mr. Peirce. I object to that. Counsel is responsible for the pleadings.

Q You have not claimed this $364 in this case, have you?

Mr. Peirce. I object to that. This has come out during the trial. I never heard of it before, but it shows this, that the contract on the part of the other side was never completed. There cannot be a recovery unless there is substantial performance.

The Court. What is your answer to that, Mr. Walscheid? Mr. Peirce says his offering the evidence is not to show that he is entitled to that allowance under these pleadings but to show that your contract has never been substantially completed, and he has a right to show the amount that the work not performed would cost and its proportion to the entire work agreed to be done to indicate that there is not substantial performance.

Mr. Walscheid. My answer to that is that if there is any claim in this case that this company did not lay that amount it comes to me as a complete surprise. We assume that the work had been performed on that stipulation and relieved our witnesses from coming here to testify.

The Court. Let's see what the answer is.

Mr. Peirce. We denied that they performed it.

The Court. You have got to be prepared to meet it.

Mr. Walscheid. And I would have been if I had not made this arrangement with Mr. Peirce.

Mr. Peirce. That is not fair, because I have gone out of my way to oblige him, and I won't be misinterpreted. He told me that he had under subpœna the authorities from Princeton and they were complaining and he asked me if I would consent and admit the mother contract, so to speak, and I said yes. Now I did not go into this portion of it; of course I didn't; and it was only because I was afraid of a misinterpretation of that that I raised the question I did.

Mr. Walscheid. And the work has been done and we are able to prove it. I am not able to prove it this afternoon—

The Court. What do you want to do?

Mr. Walscheid. We have not reached the rebuttal point yet, and the chances are that at the time this comes up—

The Court. All I am obliged to handle is what is before me, and I think the testimony is permissible because it tends to show that the contract was not completed.

Q Do you wish us to understand that no cork tiling has been laid in that service room?

A I certainly do.

Q None whatever?

A None whatsoever, not a whisker.

Q What is laid in there?

A Wood. I laid it.

Q When did you see it last?

A I saw it at the last Yale football game at Princeton.

Q When was that?

A I cannot remember the date.

Q This last fall you mean?

A No; I guess it was two falls ago.

Q Was that prior to the time when you sent this check?

A No; that was after.

Q Did you make an inspection of the work before you sent that check?

A No; I made an inspection of the work all the time, before and afterwards.

Q And when you sent that check you had not made any deduction for failure to lay this floor in this room, had you?

A No.

Q Why didn't you make the deduction then?

A Because we never expected to make a deduction for that when we drew up that plan.

Q Why didn't you make—

A Listen.

Q Why didn't you make a deduction for the non-performance in this room?

A Well, when we drew up that plan which made the contract we made a mistake—

Q You made a mistake?

A (Continuing)—and indicated cork tile in that room, and it was not required there; we never required it of them, and we put down the wood that was required, but the plan, which formed the contract—

Q And you—

Mr. Peirce. Let him answer it.

A The plan which formed the contract called for it. I take it if we had wanted to insist on Kennedy fur-

nishing it there we could have insisted that they should furnish it.

Q Then I now understand you that the original contract was not to include cork tile in this service room, but you did include it on this plan by mistake; is that right?

A That is right.

Q And you—

A I might go on further and say—

Q That will do. Answer my question.

Mr. Peirce. Go ahead.

Q That is right, you say?

Mr. Peirce. The witness did answer it fully. He is going beyond the legal ground now, because the contracts speak for themselves.

The Court. He is not varying the contract. He is simply telling why he did not make the deduction.

Mr. Peirce. This contract stands for that and it is a legal contract.

The Court. I do not think anybody is contending that it does not. I am simply saying he has a right to give the reason, and he has a right to get the reason why the deduction was not made. That is legal evidence.

Mr. Peirce. Yes.

Q Then you never intended at the time this contract was signed to include—

Mr. Peirce. I object to that. The contract speaks for itself.

Mr. Walscheid. Won't you allow me to finish the question?

Q You never intended to include in the contract to be performed this 405 square feet in the service room?

Mr. Peirce. I object to that. The contract speaks for itself.

The Court. The contract does speak for itself.

Mr. Peirce. Now the intention was merged in the contract, so that it seems to me is beyond the legal line.

The Witness. I am perfectly willing to answer it if I may.

Mr. Peirce. But the court has not ruled.

The Court. How do you expect to get anywhere, Mr. Walscheid? Even though it was a mistake this court cannot correct it.

Mr. Walscheid. I know this court could not correct errors. We would have to go into the Court of Chancery. I have no doubt about that; but there is nothing to prevent this man from waiving something which is in this contract and which was not supposed to be in this contract and which formed no part of the consideration for the contract.

The Court. There is no question about that.

Mr. Walscheid. And there is nothing to prevent me from presenting a situation here on which I can go to the jury on the question of waiver of this particular portion of that contract on the ground there was no consideration. That was my idea.

The Court. That is true.

The Witness. You waive your end and I will waive mine.

Mr. Peirce. That is just the difficulty.

The Court. No; that is not the difficulty. Either party may waive any part of a contract that is intended for his own benefit. You will find the whole doctrine laid down in Byrne *vs.* The Sisters of St. Elizabeth, 15 Vroom, and all the other cases.

Mr. Peirce. But this was entirely apart from the written contract.

The Court. I do not understand him to talk about the intention of waiving the contract. The

object now is to show the intention, to show that afterwards he waived that intention.

Mr. Peirce. I object to that.

The Court. I will permit.

Mr. Peirce. I ask that my exception be noted.

A I certainly intended it to be included.

Q When did you intend it to be included?

A When the contract was made and I thought I was getting that, when I made my contract for $3,600. It was not until the contract had gone on that I found we had made a mistake, and I said, "Let it go."

Q And then you said, "Let it go"?

A To myself.

Q To yourself; and as the work progressed you went down and inspected this work from time to time, didn't you?

A Yes.

Q And you saw that they were not laying this particular room; you saw that, didn't you?

A Oh, yes.

Q And because you had decided to let it go you did not call their attention to it, isn't that so?

A I asumed that the materials that were to be left out under the dresser would be an offset against that.

Q That is what you were assuming?

A M-m-m m-m-m.

Q But because you had decided to let it go you did not call the attention of the Kennedy Company to the fact that that room was not laid?

A I do not think we ever called their attention to it at all.

Q When the work was completed you were paid by Princeton University, weren't you?

A We paid them before we had our money. We have eventually been paid.

Q You have been paid; you have been paid in full for the contract work covered by this Kennedy contract, haven't you?

A We have not been paid in full by the university; there is still a balance due us now.

Q You mean there is a retained percentage due you?

A No, I do not mean the retained percentage; I mean we have not been paid our full contract.

Q But the full performance of this Kennedy contract has been accepted by the university?

A No; they had nothing to do with Kennedy's contract.

Q Have they accepted the building from you?

A We had nothing to do with the building. We were simply sub-contractors.

Q Have they accepted your work?

A They have accepted a portion of our work. They have not paid up the whole thing.

Q Have they accepted these cork floors?

A Yes, sir.

Q And how long is it since they accepted these cork floors; over a year, isn't it?

A They do not make a specific acceptance of cork floors.

Q I know that.

A They accept or decline our contract, and I suppose it has been two years.

Q And you have been paid in full for the cork floor work, haven't you?

A How can they separate it? We have not been paid in full for all the contract. How can you say that we have been paid in full for the cork tile? They do not separate our contract. Our contract is for so much money.

Q Is your contract directly with them?

A With the university.

Q Why are you a sub-contractor?

A Our contract is directly with the university. These contracts were made by the individual contract, and each contractor—each main contractor—

Q Have you your contract with you?

A Yes.

Q May I take it?

By the Court.

Q Mr. Smith, this plan that Mr. Walscheid just showed you, is that a plan that was a part of the contract between Princeton University and George W. Smith & Company?

A No, sir.

Q What was the plan there?

A Would you like to see it?

Q Well, if you have them. What does that show with respect to the cork tile?

A That is just the point that I would like to mention.

Q I would like to see it.

(Plan handed to the court.)

Q Now what I want to see on this is that room on this plan, with respect to whether or not it requires cork flooring or not—cork tiling.

A No, sir.

Q It does not require it?

A No, sir.

Q I will ask you this: Does this plan show whether that room does require cork tiling?

A I can't find it myself now.

(After a further examination the witness finds it and indicates.)

Q What does that say on the plan there?

A It says "Wood floor." Now on the question of these dressers—you see "cork tile" in through here (indicating). Now there is nothing here to show whether those dressers go to the floor or not.

Q I understand that there is nothing there on that plan to show that; I understand that.

A And therefore it was necessary for us to assume that the cork went there.

By Mr. Walscheid.

Q The room which upon this sketch is shown as the service room is shown upon the Princeton plans as being laid with a wooden floor?

A Yes.

Q So that you in your contract with Princeton University contracted and assumed the responsibility for a wooden floor?

Mr. Peirce. I object to that. This contract governs us now. That is what was urged on the plaintiff's side, and if we have to live up to it we ought to tie by it.

The Court. True, but this contract has a provision with respect to that question. It says that the Kennedy Company agree with the Smith Company to furnish all the cork flooring required under the contract of George W. Smith, Incorporated, with the Princeton University in accordance with certain plans and specifications. Those are those plans, are they not, we have just been looking at?

The Witness. Yes, sir.

The Court. That is the first proposition; and the second one is that it is the intent of this contract that David E. Kennedy, Incorporated, assumed the responsibility for the exact quantity of cork flooring that has been assumed by the George W. Smith Company, Incorporated, in their contract with the trustees of Princeton University and that George W. Smith & Co., Incorporated, agrees to pay David E. Kennedy, Incorporated, for the faithful performance of this contract in the same manner as outlined in their contract.

Mr. Peirce. Yes; that brings us down to the question of the dressers.

The Court. Yes. I am simply saying that this contract incorporates so much of the contract be-

tween Princeton University and George W. Smith & Co. as shows the obligation of George W. Smith & Co. under the contract with respect to the amount of cork tiling that is to be laid. That is what I wanted to direct attention to.

Mr. Peirce. All right, sir.

By Mr. Walsheid.

Q And is this (indicating) the plan that was initialed by Mr. Kennedy?

A No, I think not.

Q Did Mr. Kennedy initial a duplicate of this?

A No; this is the only one we had. While he said he initialed it in his contract I do not think he did.

Mr. Walshied. I desire to have marked for identification, that I may offer it in evidence, this particular big plan.

(Designated P-4 for identification.)

Q Have you the specifications?

A Yes.

The Court. Under which contract?

Mr. Walsheid. Under the main contract.

Q Is this (indicating) the specification?

Mr. Peirce. We admit it.

Q Is that the specification which was initialed by Mr. Kennedy?

A Yes.

(Marked P-5 for identification.)

Q Now this check for $18.66, which has endorsed upon it "In full of all claims to date;" when that was sent to the David E. Kennedy Company had you contracted for any additional work with them?

A Oh, yes.

Q Outside of this Princeton University?

A Yes.

Q And you at that time owed them the exact sum of $18.66 for this other work, didn't you?

A What?

Q You at that time owed them the exact sum of $18.66 for this other work?

A At the time the check was sent?

Q At the time the check was sent?

A Yes.

Q So that when you sent them this check for $18.66 you were paying them that check, $18.66, which you owed them for other work?

A Yes.

Q And you endorsed on that, "In full of all claims to date"?

A Yes.

Q Did you in any particular notify them before sending them this $18 check that you expected them to accept it in full settlement of the dispute then existing between you and the Kennedy Company on the Princeton University job?

A There would be no dispute on the other thing if the other thing was settled.

Q How many pieces of work did you have with the Kennedy Company at that time?

A This was the only one then.

Q This eighteen dollar proposition then was the only one, wasn't it; and the only other one that you had was this Princeton University job?

A Oh, my! No. Lots of them. We had one for fifteen thousand dollars on the Curtis Building, Philadelphia.

Q That is some time ago?

A I do not think it was so very long ago.

Q Immediately preceding the time when you gave this $18.66 check, the job immediately preceding that had been this Princeton University job?

A No; I think not.

Q What other job had there been in between?

A There was another job for Black, Starr & Frost of New York, and there was one for Wanamaker.

Q Isn't this the Wanamaker job?

A I guess it is.

Q $18.66?

A Yes.

Q Wasn't the Black, Starr & Frost job prior to 1912?

A No.

Q When was it?

A I can find out for you if you want the exact date; I have the correspondence here.

Q Was there any dispute as to the amounts due on the Black, Starr & Frost job?

Mr. Peirce. I object as irrelevant.

The Court. What is the point about that?

Mr. Walsheid. As I understood it, the only thing that was pending between these two people when this second receipt was taken again with the endorsement "Paid in full" was this Princeton proposition, and they again send through a check with the same endorsement, "In full of all claims to date," and again the bookkeeper endorses it and puts it in the bank account, and I wanted to know—well, I will ask the question:

Q What did you think to cover with the words, "In full of all claims to date" on this check of December 31, 1913, for $18.66?

A Just what it says, "In full of all claims to date."

Q Did Kennedy have any claims against you at that time excepting that $18.66?

A Why, he claims to have $360.

Q At that time he claimed to have $360, didn't he?

A He seems to.

Q You knew at that time that he was claiming it?

(Witness examines check.)

A Yes; that is right.

Q Yes; you knew when you sent him this second check for $18.66 that Kennedy was claiming $360 on

the Princeton University job and that he also claimed this $18.66?

A Yes.

Q And in sending him this check for $18.66 you intended by this endorsement to protect yourself against the Kennedy claim for the $360, didn't you?

A Well, we expected to have—if he accepted the check we expected to have everything cleaned up. We do it in all our transactions; that is a form we use in all our transactions.

Q You expected if this check went through and you got it back with an endorsement on it that that would relieve you from paying $360, didn't you?

A No; we did not believe we owed him $360.

Q But you knew he claimed it?

A Yes; we knew he claimed it.

Q And you thought that by getting this check endorsed in this fashion you would preclude his claim and estop him from claiming it?

A We never thought anything about that because we knew we did not owe it.

Q Then why did you put on that check of December 31, 1913, this endorsement, "In full of all claims to date"?

A It is our usual form whenever we pay our bills to say it is in full to date. Why, if there was anything he was not paid for, back would come the check. Then we would straighten it out and send him another one.

Q Then if you are making payments on a long series of payments you always put that on, "In full payment to date"?

A When it is full we do; when we do not think it is we do not put it on; we put on, "On account."

Q At this time you thought you only owed him $18.66?

A We knew we only owed him that.

Q And you knew that by sending him a check for $18.66 that that would pay that claim?

A Yes.

Q Isn't that right?

A Yes.

Q And you did not have to protect yourself with such an endorsement against the $18.66, did you?

A Well, if that does protect us that is all right.

Q And you have been putting it on as a matter of precaution on all your checks?

Mr. Peirce. I object to the other checks. He has said repeatedly if it is in full he puts it on; if it is not he does not.

The Court. I will let him answer it.

Q When you put this endorsement on the check of November 21, being D-2, "In full of all claims," did you do that personally?

A No.

Q It was done at your office?

A Yes.

Q It was done under your supervision and direction?

A Surely.

Q It had not been agreed to before doing so by Mr. Kennedy, had it?

(No answer.)

Q Mr. Kennedy, at the time this check was issued and before it left your office had not agreed to any such settlement, had he?

A He has never agreed to it, so he says.

Q And you just did this on your own motion and without having consulted him in advance upon the matter?

A No; there was a consultation on the thing—the forty dollar item—and the item of the tile that was omitted under the dressers they agreed to allow us for.

Q They agreed to allow you for what?
A For the tile that was omitted there.
Q Who agreed to allow you for that?
A Grange.
Q When did Grange agree to allow you for that?
A After the contract was signed.
Q When?
A In April, 1912.
Q Grange agreed to allow you—
A Sure.
Q (Continuing)—for the tile under the dressers?
A Yes; and gave us the price per foot that he would allow for it.
Q And then when you presented that proposition to the Kennedy Company they did not agree to such an allowance, did they?
A They accepted the check. I do not think that they ever had any—I do not think that they ever had the amount—or knew the amount until they got the check. At that time they got it and used it.
Q You mean that up to that time the Kennedy Company did not know anything about this allowance?
A I do not know about that, because Grange evidently informed them.
Q That is your opinion.
A That is not my opinion. I know he informed them because I had the letter he wrote to them.
Q What letter did you see?
A I saw the letter he wrote to them immediately after he sent them the contract.
Q Do you remember when that was?
A I do not remember when I saw it.
Q Did he show you the letter?
A He did.
Q What did it say in the letter?
A It said, "Take up the question of omission of cork tile under the dressers with the architect and see if they cannot be omitted—

Q And what—

Mr. Peirce. Wait a minute—go ahead.

A (Continuing)—"Smith & Company expect to have an allowance for this work although I do not think we will have to give it to them."

Q Then that does not quite agree with your statement that Grange had made you this allowance.

A He made it to me, but when he writes to his concern then he tells them something different.

Q Oh; then you saw the letter that Grange wrote to his concern?

A Yes.

Q In which he advises them that they do not have to make you the allowance—

A He didn't—

Q (Continuing)—immediately after Grange has made you the allowance; is that right?

Mr. Peirce. I object to that; that is not what the witness has said.

Mr. Walscheid. It is cross examination.

The Court. He is asking him if that is right.

A No; that is not. I never saw—

Q Would that letter—

Mr. Peirce. Wait a minute. Let him answer.

Mr. Walscheid. I object to counsel interfering with my cross examination.

The Court. Counsel has a right to interfere if he has not finished his answer.

A I never saw Grange from the time the contract was made—he never did anything with the contract; he never even came to see us; he never went to Princeton; he had nothing whatsoever to do with it except to get the order, and then I saw him after this check was sent to him; then he came—

Q And you did not—

Mr. Peirce. Let him finish.

A (Continuing)—back and he brought out his office correspondence; I do not think he intended I should see it, but I did see it.

Q Go ahead.

A That is all.

Q Then you did not see Mr. Grange until after November 21, 1913?

A Oh, I saw Mr. Grange very frequently.

Q In relation to this contract?

A I say to you that he had nothing whatever to do with the continuation and completion of the contract. He may have been out there occasionally, but the carrying on of the contract was done through their New York office and through the Philadelphia office.

By the Court.

Q When was it you said that Grange made this agreement with you to except from the charges against you the spaces occupied by the dressers?

A That was immediately—he came out before the contract was signed, and then he came out there af—when the contract was signed, and possibly a day or two after that, and the question came up as to whether the tiling could be omitted under these dressers—we did not know and he did not know. I asked him if he had included it, and he said yes, that he had.

Mr. Walscheid. I object to this statement. The court only asked you when.

Q I asked you when you had this talk with him.

Mr. Peirce. You have answered that.

A I have answered it.

By Mr. Walscheid.

Q When did you have the talk with Mr. Grange in which he agreed to allow you for the dressers under this contract?

The Court. Not for the dressers.

Q For the space under the dressers?

A I should say a few days or a week after the contract was signed.

Q Was it then that you saw this letter?

A No; I told you I did not see that until this dispute came up.

Mr. Peirce. Won't you talk up?

A I never saw the letter until he was sent there by the New York office after he received this check. He brought his office correspondence out with him.

Q Now you are talking about this check of November 21, 1913?

A Yes, sir.

Q Do you remember whether there was anything else in that letter that you saw at that time? Did it refer to sending in the contract and plans?

A I do not remember that part of it. It might have.

Q Did it refer to any persons; did it refer to Mr. Thompson, for instance?

A I do not know who Mr. Thompson is.

Q Was it in January, 1914, that you saw this correspondence?

A It was after that check went in.

Mr. Peirce. You mean after November?

Q It was after November, 1913?

A Yes.

Q Did it say anything about sending the prints in question which show the dressers?

A I do not remember.

Q Is this (indicating) the letter that you saw.

(Witness examines letter.)

A I should say not. I do not remember that I ever saw a letter in which Mr. Grange said I was an awful bully and ugly at times. I would have remembered that.

Q You did not see that portion of it?

A Evidently not.

Q How about the rest of it?

A I do not remember ever seeing that letter.

Mr. Walscheid. I ask that that be marked for identification.

Mr. Peirce. I object to it. It has not been identified in any way.

The Court. He identified it as the letter he showed to this witness.

(Letter marked P-6 for identification.)

Mr. Peirce. I gave notice for him to produce it and he told me in this court room there was no such letter.

Mr. Walscheid. There is no such letter as you asked for. I said the letter you asked for is not in existence.

Mr. Peirce. We will see.

Q You were not required to make any allowances to Princeton University by reason of any work done by this company?

A H'm?

Q You were not required to make any allowances to Princeton University on your contract by reason of any work done by the Kennedy Company?

A No.

Q Mr. Grange or the Kennedy Company offered to return to you the $1,700 check, did they not?

A They certainly did not.

Q Didn't they?

A No.

Q Didn't Mr. Grange come in and tell you that if there was any dispute about whether this check was to go as part payment that they would return it to you?

A No; they could not return it to us.

Q I mean their check for the money represented by the check?

A Oh! That is different. I told Grange it was not the money we wanted; it was the check; that if the account was not satisfactory we wanted the check back. It was not a question of the $1,700.

Q At that time you knew that the check had been deposited and cashed?

A No; I did not know it; I only know what they tell us in their correspondence.

Q Didn't Mr. Grange at that time tell you after this check had been deposited by them and after they had cashed it—didn't he tell you that if there was any dispute as to whether that check should be accepted on account, that the Kennedy Company would return to you their check for a like amount so that you would not be prejudiced and so that you could fight out the proposition?

A No; he never went into any such legal detail as that; he said that they would send us back—I think this is in the correspondence—that they would send us back a check for so much money; but that was some weeks afterwards.

Q And Grange told you that too, didn't he?

A H'm?

Q Grange told you that?

A That was possibly a month afterward. I never saw him until two or three weeks at least after this discussion came up.

Q And then you told him you did not want to send their check over?

A No; I did not say that.

Q What did you say?

A I said we wanted our check. If it was not satisfactory we wanted the check back.

Q And you did not want their cash?

A I never tell anybody I don't want cash.

Q You didn't tell them you did not want their check for the like amount?

A I said I wanted that check.

Q Didn't you tell them you did not want their check for a like amount?

A I told them I wanted that check.

Q That particular check?

A That's the boy.

Q At that time when you had this conversation with Grange you already had that check in your possession, didn't you?

A I don't think so.

Q You say it was a month afterwards. In the ordinary course of business wouldn't you have it in your possession?

A No; we do not balance our books every month.

Q Oh, you mean it would still be at the bank?

A At the bank.

Q Did you keep any time account of this forty dollars?

A No, sir.

Q You didn't keep it?

A No.

Q What does the forty dollars represent?

A Labor.

Q Labor purely?

A I guess so.

Q Who kept it?

A The superintendent.

Q He is not here?

A I have his report.

Re-direct examination by Mr. Peirce.

Q Did you in any way affect or alter or change the wording of the correspondence appertaining to the seventeen hundred dollar check, at any time?

A Change it?

Q Yes?

A Never. You mean the correspondence?

Q Yes. (No further answer.)

DEFENDANT RESTS.

DAVID E. KENNEDY, recalled in rebuttal.

Direct examination by Mr. Walscheid.

Q Mr. Kennedy, did the Kennedy Company ever accept or intend to accept the check for $1,739.13 —

Mr. Peirce. I object to that.

Q (Continuing)—in accord and satisfaction—

Mr. Peirce. I object to that.

Q (Continuing)—or the claim of the Kennedy Company against Smith, Incorporated—

Mr. Peirce. I object to it—

Q (Continuing)—arising out of the work—

Mr. Peirce (Continuing)—as a legal conclusion.

Q (Concluding)—done at Princeton University?

A No.

The Court. I will strike that answer out, and the objection is sustained. It calls for a legal conclusion.

Mr. Walscheid. Isn't accord and satisfaction primarily a question of intent, and can he not testify as to the intent?

The Court. He cannot answer the question you have asked him now without testifying to the very point this jury is obliged to pass upon, a conclusion of law and fact which the jury is obliged to arrive at. He can state what he did when he got the check.

Q State in detail just what you did when you received that check?

A This—

Mr. Peirce. I think, if the court please, that is not a proper question. The witness has already stated that this endorsement was put on there at his direction and he said the portion crossed out he directed to be crossed out. Now then the check

speaks for itself. If he did something on it or said something in the office it does not bind us. I do not think he ought to be permitted to say just what he did.

The Court. I do not see that your objection yet goes to anything that would be legal. He is not asked what he said; he is asked what he did. If he did anything else he can show that.

A Our bookkeeper brought me this check and called my attention to this endorsement and asked me whether—he called my attention also to the fact that it was not in full, that there was a disputed item—

Mr. Peirce. I object to what the witness told his bookkeeper.

The Court. He is not telling that; he is telling what the bookkeeper said to him when the check was brought to him.

Mr. Peirce. I object to what the bookkeeper said to him.

The Court. I think I will permit it to stand because it tends to show the facts that were in his possession at the time he crossed off the item on the back and to characterize the act; it is part of the *res gestae* of the transaction.

Mr. Peirce. Objection noted.

A The bookkeeper explained that this item of $360 was in dispute—

The Court. You have already told us that.

A (Continuing)—and asked me whether I thought that the endorsement of this check would bind us on this disputed item of $360.

Mr. Peirce. I object and move to strike this out on the same ground, that it does not bind us.

The Court. I do not think that part is of any consequence, Mr. Walscheid, where the bookkeeper asked him what he thought about it.

Mr. Walscheid. It is part of the *res gestae.*

Mr. Peirce. That is a self-serving statement.

The Court. I will permit it. You may take your chance on it.

Mr. Peirce. I would like an objection noted.

A I decided to take this check in payment on account—the face value of the check, and I crossed out this item.

Q What item?

A For $367.87—meaning thereby to indicate that I did not accept this check in payment for that item but simply for the face value of the check.

Q And did you also cross out the addition?

A And I crossed out the total sum of $3,600 which this endorsement was intended to show that this payment was the balance of.

Q I show you another check for eighteen dollars—

(Witness confers in an undertone with Mr. Walscheid.)

The Court. Don't let's have a private talk; let's have a question and answer.

Q When you received this $18.66 check did you see that check at all?

A I never saw that check.

Q You never saw that check?

A No, sir.

Q Did it come to the attention of any of the officers of the company, to your knowledge?

A Nobody but the bookkeeper—assistant bookkeeper.

Q Is that her endorsement on there?

A That is her endorsement.

Q And at that time was there owing—

Mr. Peirce. That is all leading.

Mr. Walscheid. Oh, yes; it is leading.

Mr. Peirce. The witness before has testified to the contrary. He said it was put there by his bookkeeper at his direction.

The Court. All right then; if he now contradicts himself it helps you.

Mr. Peirce. All right, sir.

Q At that time was there anything owing to Kennedy Company from Smith Company?

A There was this $18.66 for work performed in the Wanamaker job, and there was this balance which we claimed on the Princeton University job.

Q Those were the two items that you then claimed?

A Those were two items which we then claimed.

Q Did you ever intend to accept—

Mr. Peirce. I object to the intention.

Q Did you ever intend to accept the $18.66 check either in settlement of the Princeton University balance or on account of the Princeton University balance—

Mr. Peirce. Objected to.

Q (Continuing)—or any check in relation to the University job?

Mr. Peirce. Objected to.

The Court. I think that the witness has the right to testify what his intention was with respect to an act at the time he did the act. I think you will find the whole doctrine with respect to this matter laid down in Schlemmer *vs.* The State, 22 Vroom, where the court deals with the proposition as to the proof of intent, and it goes on to show how there are two means of ascertaining what a person's intent is; one means is by an act—that probably is very much the more believable means—and the other way is by having him tell what was in his mind at the time he did the act, because surely nobody knows any better what the person's intent is than the person who indulges it; and I think all the cases are that way; so under the circumstances, and inasmuch as accord and satisfaction is a contract, the essence of

which is intent, I think that the party may testify what his intent was at the time he did that act.

Mr. Peirce. It occurs to me, subject to your Honor's better judgment, that he actually did cross it off and actually did accept it. Now it would seem—

The Court. The question he was asked was whether when he crossed off that part of the endorsement he intended to accept the check in full payment.

Mr. Peirce. His letter says he did not intend that.

The Witness. He is asking me about another check.

The Court. I will permit it.

(Question repeated.)

The Court. I will permit the question.

Mr. Peirce. I would like to have my objection noted.

The Court. You may have it.

A No.

(No cross examination.)

Mr. Walscheid. I am ready to rest with the exception that I would like an opportunity to prove the completion of this work within the lines of this contract, although I understand that Mr. Peirce was ready to waive that proposition a moment ago.

The Court. The only question that has been raised with respect to the completion of the work, as I understand it, is the question with respect to that room.

Mr. Peirce. Yes, sir.

The Court. Now I am prepared to hold that that contract means that that room was to be furnished in wood; that your client had a right to assume that it was to be furnished in wood because it seems to me to be perfectly plain when

you read this contract that is now in suit, etc., etc., * * * It contains these words: "David E. Kennedy, Incorporated agrees with George W. Smith & Company, Incorporated to furnish all the cork tiling required under George W. Smith & Company's (Incorporated) contract with the Trustees of Princeton University, in accordance with the plans and specifications of Cram, Goodhue & Ferguson, architects, for the sum of $3,600;" and in the fourth paragraph it provides: "It is the intent of this contract that David E. Kennedy, Incorporated assumes the responsibility for the exact quantity of cork flooring that has been assumed by George W. Smith & Company, Incorporated in their contract with the Trustees of Princeton University." Now the contract of Princeton University, according to the testimony of Mr. Smith himself, according to the plans, in accordance with which the work is to be done, drawn up by Cram, Goodhue & Ferguson, architects, distinctly provides in so many words that the flooring of that room is to be wood, and the exact amount of responsibility of the Kennedy Company is the responsibility to do the work in accordance with the plans and specifications and that contract. Now I do not see any reason why there is any necessity to go any further, and if there were any necessity to go any further I haven't any doubt at all but that the evidence is plenary to establish the fact that Mr. Smith's corporation waived that provision of the contract, because the evidence is quite clear that he never intended to enforce that portion of that contract, that he was present while all the work was being done on numerous occasions and that he saw the work progressing and never objected in any way to the work being done with respect to that room as it was done, and that the payment that

he subsequently made by the check on which the endorsement is erased in part—the large check of $1,700—that is a payment which simply eliminated from the amount of work done that portion of the work which is particularly in dispute in this suit and does not in any way touch the other part; so I think whether we put the decision of that question upon the construction of the contract itself and the right that the Kennedy Company had to proceed in laying the work without doing that work in cork, or whether we look at it as being a matter that was at least doubtful, or even if it was a matter that seemed to be plain, but rest it upon the question of waiver upon the part of the Smith Company, I have no doubt that the waiver is completely made out, because waiver, like accord and satisfaction, is a question purely of intent, and we can have absolutely no better evidence of intent to waive than the express testimony of Mr. Smith himself that he never intended to enforce performance of the contract and actually did waive it in effect. That is what the testimony amounts to. So, so far as that is concerned I see no need of going any further into a dispute on that point.

Mr. Peirce. Will your honor give me an objection or exception?

The Court. Yes; I want you to have an objection. If I am wrong about that I will be quite happy if you reverse me. I want to get the thing right.

WILLIAM G. GRANGE, recalled.

Direct examination by Mr. Walsheid.

Q Did you ever at any time agree or offer to agree with Mr. Smith to make him any allowance for work left out under the dressers?

A I did not.

Q Did Mr. Smith ever see any of the private correspondence between you and the Kennedy Company?

A I had it in his office. I did not hand it to him to read. He may have seen it.

Q Did you have this letter in his office—showing you Exhibit P-6 for identification?

A This letter was with the other correspondence. I was out of Smith's office when I was there. I cannot say whether he saw it or not.

Q Did you ever show to Mr. Smith or did Mr. Smith ever see a letter written by you to the David E. Kennedy Company requesting Mr. Kennedy or some one in his office to see the architect to see if the cork could be omitted under the dressers or cupboards or kitchen equipment?

A No.

Q Was there ever such a letter written by you?

A I do not recall ever writing such a letter.

Cross examination by Mr. Peirce.

Q Why did you just say you never showed Mr. Smith any letters in his office in Philadelphia?

A I never did show him. I had—

Q And you are quite sure of that, aren't you?

Mr. Walsheid. Let him finish his answer.

Mr. Peirce. I am cross examining.

Q You are quite sure of that?

A Yes.

Q So when Mr. Smith says there was a letter of a character purporting to be this: a letter sent by William E. Grange—that is you?

A Yes.

Q —with a contract, to David E. Kennedy, requesting Kennedy or some one in his office to see the architect and see if the cork could be omitted under the dressers, cupboards or kitchen equipment, that is wholly fictitious, isn't it, and untrue?

A I never remember writing the letter.

Q Why do you say you never remember writing the letter? Why do you qualify it at all?

A I didn't write the letter.

Q And you never showed any such letter to Mr. Smith, did you?

A No, sir.

Q Now didn't you write a letter with the contract?

A To the company?

Q Yes.

A Yes, sir.

Q Produce that letter.

Mr. Walshied. Here it is (producing letter).

Q Don't you know that the letter was April the second, 1912?

A I do not.

Q Suppose you take a look at the contract and find out. You might put your glasses on when you do.

A That is the date of the contract.

Q I am asking about the letter you sent with that contract, and you understood me so. Now where is the letter you sent with this contract dated April, 1912?

A I do not know where it is. That is supposed to be—

Q Oh! Now do you mean to say you produce a letter of January 21, 1914, in answer to my question?

A I have no letter.

Q Is that the best answer you will give to my question?

A You have asked me to produce a letter.

Q Yes, and you produce a letter dated January 21, 1914. I have asked you why you do not produce the letter that I ask for, which is in April, 1912.

Mr. Walshied. I object to that. You did not say—

Mr. Peirce. That is what I did—"with the contract," and there was no mistake about it.

Q What is your answer to that?

A That is the letter (indicating).

Mr. Walshied. "That is the letter" is the answer.

Q I show you a letter dated January 21, 1914, and I show you a contract dated April 2, 1912, and I ask you where the letter is that you sent to your firm with the contract in question.

Mr. Walshied. He says that is it.

Mr. Peirce. Will you make your objection in the regular way?

Mr. Walshied. Yes; I do object because the witness has just answered that that is the letter.

The Court. Let me hear what he said.

(Testimony repeated.)

Mr. Walshied. Now if you will ask him—

Mr. Peirce. I will examine him.

Q Where is the letter?

A I haven't got my correspondence here. I presume that is the letter.

Q Why do you say "presume"? Didn't you send the contract dated April 2nd, 1912, to your firm?

A Yes.

Q And they approved it?

A Yes, sir.

Q And you sent that in April, 1912?

A Yes, sir.

Q Now where is the letter you sent in April, 1912, with the contract?

A I presume this is the letter.

Q I object to what you presume. I want the letter in question.

A I haven't any letter files here.

Q Oh! Where are your letter files?

A I presume the correspondence is—

Q Aren't the letter files in the desk in this room?

A Some files are here.

Q Isn't there a letter dated April, 1912, in those files.

Mr. Walshied. Do you want to look at them (offering files to counsel)?

Mr. Peirce. I am asking the question.

A I cannot tell until I see the files.

Q Well, look at them.

(Mr. Walshied looks through files.)

Mr. Peirce. Suppose you let the witness look.

Mr. Walshied. I will offer you the whole batch.

Mr. Peirce. I will get out the facts without your assistance.

Mr. Walshied. There is no such letter in there.

Mr. Peirce. We will find out why there is not.

(Witness examines files.)

A I do not see any letter.

Q Do you say you did not write such a letter in April, 1912?

A I cannot recall.

Q Your office is in Philadelphia, isn't it?

A Yes, sir.

Q And you have your letter files in Philadelphia?

A Yes.

Q And any letter sent you by your home office is filed in Philadelphia?

A Supposedly so.

Q You did not bring your file with you?

A No, sir.

Q After you had sent the contract of April, 1912, to your firm in Philadelphia you got some communication or letter from them, didn't you?

A I suppose so.

Q Have you that letter with you?

A I have no letters with me.

Q Are there any letters in the file which you have produced from you to the Kennedy Company?

A I do not see any.

Q Isn't it a fact that that file contains only letters between Kennedy Company and Smith and not between you and your employer?

A It looks so.

Q Where is the file between you and your employer?

A I do not know.

Q You do not want to know—

Q Mr. Walscheid. I ask that that be stricken out.

Q (Continuing)—do you?

A I do not know anything about the New York correspondence.

Q You know about the correspondence in Philadelphia; why didn't you bring that?

A I did not know about this case until I arrived in New York.

Q When?

A Last evening.

Q You did not know the case was to be tried until last night?

A No, sir.

Re-direct examination by Mr. Walscheid.

Q You said a moment ago that you sent this contract on in April, 1912. You wrote this letter (indicating), didn't you?

Mr. Peirce. I object to the leading question.

Q You wrote this letter, didn't you?

A Yes, sir.

Q Will you read the first paragraph of it—

Mr. Peirce. I object.

Q (Continuing)—and tell me when you sent the contract on?

A "I have your letter"—

Q Not out loud. The jury is not supposed to hear it.

A I evidently sent the—

Q Read the first paragraph of that letter to yourself and see if you can tell when you sent the contract to the home office.

A Attached to that letter of January 21.

Q Of what year?

A 1914.

Q So that your testimony now is that you sent this contract—

Mr. Peirce. I object to what his testimony is.

Q When now do you say you sent the contract on to the home office?

A January 21, 1914.

Q Is that the letter which accompanied it?

A It is.

Mr. Walscheid. I now offer this letter in evidence.

Mr. Peirce. I would like to cross examine.

The Court. You may cross examine.

Further cross examination by Mr. Peirce.

Q Isn't it a fact that there was correspondence about this contract as shown by the files of the Kennedy Company, starting—

Mr. Walscheid. One moment.

Q (contining)—March 12, 1913?

Mr. Walscheid. I object to the use by you of these papers.

Mr. Pearce. You want the facts, don't you?

Mr. Walscheid. They are not in evidence.

Mr. Peirce. They have been referred to. It is hurting him and he does not want me to use them.

Mr. Walscheid. Do you want to offer this file in evidence? I have no objection to your using the file and putting it in evidence.

The Court. If he calls for your file and uses it it makes it evidence.

Mr. Pearce. I am going to refer to particular letters.

Mr. Walscheid. You will take the whole file.

Mr. Pearce. Perhaps I will and perhaps I will not.

Mr. Walsheid. Go ahead; go ahead; I withdraw the objection.

Q Isn't it a fact that on March 12, 1913, you wrote a letter that Kennedy & Co. had a copy of the contract as to the cork tile at Princeton?

A Oh—

Mr. Walscheid. I object to that on the ground that this witness cannot know what the main office had.

Mr. Peirce. The witness can testify of his own accord without suggestion.

The Court. I will permit the question.

Mr. Walscheid. That he received a letter; is that the question?

The Court. Yes.

A A copy of the letter is before me in the file—I know about it. My recollection does not go to any such letter on that particular date.

Q Isn't it a fact that you did send the contract of April 2, 1912, to the home office for approval?

A Yes.

Q And isn't it a fact that after it was approved it was sent to you so that you could carry out the contract?

A No, sir.

Q When did you get it back after you sent it in April, 1912?

Mr. Walscheid. I object. The witness has not said he sent it in 1912. The witness now distinctly, after refreshing his memory by this letter, says he sent it as an enclosure with this letter of January 21, 1914.

Mr. Pearce. He said under cross examination he sent it in April, 1912, and this is a proper question.

The Court. I will permit the question.

A After returning it to my house I never saw the contact.

Q After what?

A After sending it to New York I never had it.

Q When did your house approve of the contract of April, 1912?

Mr. Walscheid. I object as immaterial and not proper cross examination and not proper rebuttal.

The Court. I think I will permit it.

A I do not know when they approved of it.

Q Did they not approve of it before January, 1914?

A I do not know when they approved of it.

Q Answer the question.

The Court. He has; he says he does not know.

Q Didn't you say you had sent this contract in April, 1912, and that your house approved of it then?

A My letter of January—

Q Answer the question.

(Question repeated.)

A If I said so I did it merely from recollection, but my letter with the date, which is now in my hand, I have read; I evidently sent it in January, the 21st, 1914.

Q Then you mean to say that your house did not approve of the contract of April, 1912, is that right?

and they did not know what was in it, is that right—until January, 1914?

A I do not know what action they took on the contract.

Q Did they know what was in the contract before January, 1914?

A Not if they did not have the contract.

Q Then what part did you take in executing it? You did not have anything to do with executing it?

A Nothing at all.

Q Then tell me how they executed that contract if they did not have a copy of it?

A I cannot exactly answer the question. I had nothing to do with it.

Q Suppose you give us your best answer on that; how did they execute it if they did not know what was in the contract and you had it all the time in your possession?

A I do not know how they did it.

Q Is that the best answer you can give?

A I cannot tell you—

Q You did not have anything to do with the work?

A No, sir.

Q And the work was done through the New York office?

A Yes, sir.

Q And they must have had that contract in order to do the work, didn't they?

A I do not know whether they did or not.

Q How could they perform the contract if they did not know what was in it?

A I may have sent details of it.

Q Oh! You may have sent something; you may have sent the contract in April, 1912, too?

A I couldn't—

Q What?

A I could not say so from memory.

Q You couldn't say so from memory. Well, they are not mind readers. You know that the New York office was writing for payments to the defendants, for payments in accordance with the contract, didn't you?

A Not without I received a copy of the letter.

Q Well, you knew such communications were sent —one or more?

A I could presume they were sent; I do not know it.

Q Didn't you go around to see Mr. Smith and ask him for payments in accordance with the contract, according to the direction received by you from New York?

A I may have; I do not recall.

Q Well, don't you know?

A I do not know.

Q Didn't you testify that you did go there?

A To collect payments?

Q Yes.

A Not until after our final bill was rendered.

Q When was that?

A I do not know.

Q All right; that is enough.

Mr. Walscheid. I desire to offer in evidence this letter of January 21, 1914. Any objection to it?

Mr. Peirce. I think it is my duty to object to that because it has not been properly proved. The case as it now stands certainly must demonstrate—the contract must have been sent to New York and executed. Now the letter in question which we called for is not this one. This is a self-serving letter; it is a letter between their own employees and it is not admissible on the line that we have used it or called for it.

The Court. The difficulty with the situation is that you in court called for a letter which the other side possessed and they produced that letter and you took it and inspected it and used it. Now if you do that

the law is perfectly settled in this State that that makes it evidence.

Mr. Peirce. I did not touch it until after the other side had used it.

The Court. You first refused to touch it and then you subsequently called for it and it was handed to you and then you used it.

Mr. Peirce. I was careful, you honor, not to touch that letter until after the other side had used it; then I was careful not to cross examine until after he had used it.

The Court. But you did not cross examine on it. You called for the letter which accompanied the contract and Mr. Walscheid said, "Here it is; this is the letter"; and then you took it and used it. That is what happened; you will find it on the record.

Mr. Peirce. May I have an exception?

The Court. Yes.

Mr. Peirce. I do not think it makes much difference.

Mr. Walscheid. I offer the letter in evidence.

(Letter marked P-7.)

The Court. Is there any thing else you have?

Mr. Walscheid. Just one little thing, to get the matter clear. I just want to recall Mr. Kennedy as to the time when he first received the contract and how he was able to perform his work prior to that time—as to which there might be some question in the argument before the jury. I might at this time, if your honor will listen to some motions, make them as if we were at the conclusion of the case.

The Court. All right; go ahead.

Mr. Walscheid. I ask you to strike out the counterclaim of forty dollars on the ground that it is not established; the counterclaim for forty dollars is for damage done to work installed by the Smith Company. The only evidence before the court is the fact that Mr. Smith received bills from the superintendent.

We haven't the items of it; the items of damage are not sworn to, nor is there any evidence before the court to show just how the damage arose or in what manner it arose; in other words, there is not sufficient evidence to send that claim to the jury. I would like to make that motion. Then I would also as a separate motion ask that the other counterclaim for the material involved in the dressers—I suppose that will sufficiently identify it—that that counterclaim be stricken out on the ground that there is no contract or agreement to support it or to support any right to that reduction. There is evidence that Mr. Smith had Mr. Grange agree with him after the making of the contract to make an allowance, but there is no evidence that Mr. Grange had any authority to make any such allowance. Mr. Grange, of course, denies that allowance. That in itself would not prevent it from going to the jury, but I think that the fact that there is no subsequent agreement or no subsequent authoritative agreement, and that there is no ground for making the reduction, is sufficient to strike out that counterclaim.

The Court. The question that appeals to me more than the one you have raised is what is the consideration for any such agreement?

Mr. Walscheid. Perhaps I ought to have stated that. If there were such an agreement that would be the consideration for it? But I rested on the fact that there was no authority to make that new agreement.

The Court. I will hear the other side on these two motions.

Mr. Peirce. Referring to the item of forty dollars, that has been clearly proved. It has been proved that there was a defect or damage done in the performance of this contract by the Kennedy Company, in their letters and by the word of the witness, Mr. Smith, who certainly connected that up and shows

that and proves the amount. He was asked if he had the time checks and he said "Yes." He does not have to produce them.

The Court. No; he does not.

Mr. Peirce. And that is sufficient to prove it. Now on the second motion—that does not come in, I presume, logically until we have made our motion.

The Court. I will hear your motion.

Mr. Peirce. I move in this matter that there be a direction in favor of the defendant on the ground that there was accord and satisfaction.

The Court. (After argument.) Well, we will not have any more discussion in this matter. I have arrived at what I am going to do. I will hold in the first place there is absolutely nothing at all in Mr. Walscheid's argument to the effect that they had a right to wipe out this condition. They had absolutely no such right. There is no case in this country that I have been able to find here in Cyc that even bears in that direction the slightest degree. I think, however, there is some considerable force in his position that the question as to whether or not there was a dispute between these parties must be submitted to the jury, and it is that question I am going to submit to them. If there was such a dispute between these parties then the acceptance of this check amounted to an accord and satisfaction. If there was not, it didn't; and that is the issue that will be submitted.

Mr. Peirce. May I have an exception, sir?

The Court. No; you may not. You may have an objection in the nature of an exception. That is what it is.

Mr. Walscheid. What does your honor do with the forty dollar item?

The Court. I have not the slightest idea in the world but that I have to submit that question to the jury. There was evidence that the work was done; there was evidence that the work was damaged, and

there is evidence that Mr. Smith kept the time on these matters and that he did not have the slips now, and that the charge amounted to forty dollars, and I am going to submit that to the jury as to whether or not that is a proper charge against the defendant.

(Counsel sum up.)

Charge to the Jury.

Gentlemen of the Jury:

There is not very much to be said by the court or necessary to be said by the court in instructing you what line your inquiry in this case is to pursue. The suit is brought by William E. Decker, who is the assignee of the claim of David E. Kennedy & Company against George W. Smith & Company, a corporation of the State of New Jersey, and the object of the suit is to recover on a contract between David E. Kennedy, Incorporated, and the George W. Smith Company, for the furnishing of all the cork tiling required under the terms of a contract between the defendant and the trustees of Princeton University, for the sum of $3,600, which the defendant, the Smith Company, agreed to pay to David E. Kennedy, Incorporated.

Now, the statement of the plaintiff's claim is as follows: He claims that he was entitled to recover $3,600 on his contract; that he has received by way of credits, on July 1st, for hauling cases, $3.27; on October 8th, by cash $1,500; on November 26th, by cash $1,738.13, making in all an amount of credits amounting to $3,242.40, and he claims the difference or balance between those two sums, amounting to $357.60, with interest from the 1st day of March, 1914. I have figured the interest on that sum and the claim, therefore, in full of the plaintiff is this $357.60 with interest for thirteen and a half months, amount-

ing in all to $381.63. That is the claim made by the plaintiff.

The claim made by the defendant is that it is entitled to receive a sum of forty dollars which it says arose out of the fact, claimed to be a fact by it, that there was damage done to the dressers in the kitchen by wet concrete due to defective work on the part of the Kennedy Company in performing its contract in this building.

Now the rules, gentlemen, that will govern you in determining these questions raised on these issues between these parties are these—and I have stated simply at the start the issues with respect to the sums of money claimed. There is another defense yet which the defendant interposes, which I intend to talk about later more fully, but I am talking now merely about the figures—each party which claims an allowance from you for money due either under the contract or due because of money expended on account of the defective workmanship in order to make good the injury caused by reason of that defective workmanship has the burden cast on it of making out by the greater weight of the evidence the claim that is put forward by it; in other words, the plaintiff is obliged to show by the greater weight of the evidence that there is a sum of $357.60 with interest from March 1st, 1914, due, and it would do that by showing that it had fully performed its contract.

Now in this case, gentlemen, I charge you that outside of the contest raised by the defendant over the question of the forty dollar item for damage done, there is not any question in the case at all but that the plaintiff did perform its contract—or the plaintiff's assignor did perform its contract—and the defendant on its side is obliged to make out by the greater weight of the evidence that there was a damage done due proximately to the defective workmanship of the plaintiff in the performance of his contract and that

that damage was repaired at a reasonable cost or charge of forty dollars. If the defendant makes that claim out he is entitled to have that subtracted from any sum that may be found for the plaintiff, and if no sum is found for the plaintiff then the defendant would be entitled to have a verdict in his behalf with his damages assessed at the sum of forty dollars.

Now that brings us then to the last and a very important question in the case. The defendant in this case contends that there was what is known in the law as an accord and satisfaction between the parties to this case; in other words, the defendant claims that even though the plaintiff did contend that $357.60 was due to it, nevertheless a dispute existed between these parties, the assignor of the plaintiff and the defendant, with respect to that sum of money, and that they agreed upon a settlement of that dispute and carried that settlement out by satisfying it by making a payment which was given on the one hand in discharge of the claim and accepted on the other hand in discharge of it.

Now as to the rules which govern in a case of accord and satisfaction, they are these:

It is a general principle of law that a lesser sum paid in satisfaction of a greater sum, where there is no dispute between the parties, and where the amount is liquidated, is not a satisfaction of the claim between the parties; but if there is a dispute existing betweeen the parties and then one party offers something in settlement of that claim which the other party accepts in settlement of that claim, that amounts to an accord and satisfaction between the parties and bars any right of action for any other sum of money on account of that claim.

Now our cases have laid down that rule which I have stated to you in popular language, in these words:

> "When a claim is unliquidated or in dispute a payment and acceptance of a less sum than that

claimed in satisfaction will operate as an accord and satisfaction, but the receiving of a part of a debt which is due under an agreement that the sum shall be in full satisfaction is generally considered to be no bar to an action for the residue."

Another case has laid down the rule in these words:

"Now of course the rule of law is that where a claim is unliquidated or in dispute payment and acceptance of a less sum than claimed in satisfaction operates as an accord and satisfaction. To constitute an accord and satisfaction in law dependent upon the offer of the payment of a sum less than that claimed, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts or declaration as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such character that the creditor is bound to understand such offer."

Now to apply those principles, gentlemen, to the facts in this case, it is obvious from what I have read that the burden rests upon the defendant which sets forth this defense of accord and satisfaction to establish to your satisfaction the elements which are included in these definitions which I have read, by the greater weight of the evidence. They have got to show that there was a dispute at the time that this alleged accord was entered into, existing between these parties, and that this sum of money, whatever it was, which was paid at that time, was offered in full settlement of that disputed claim and was accepted by the plaintiff as such settlement.

Now in this case a check is offered in evidence for seventeen hundred dollars, and on the back of that check there appears a statement that it is in full of all claims of the plaintiff, or whatever his name was at that time, to date, or words to that effect. You

will have the check and see what those words are. The plaintiff's assignor kept that check and put it through his bank, and before he put it through his bank he either ran his pen or caused a pen to be run through the words that it was in full settlement of the claims. Now as touching upon such a conjecture of circumstances the law also is in no manner of doubt and is as follows:

> "Where, however, a sum of money is tendered in satisfaction of the claim and the tender is accompanied with such acts and declarations as amount to an admission that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction. This is true although the creditor protests at the time that the amount paid is not all that is due or that he does not accept it in full satisfaction of his claim. Where the tender or offer is thus made the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he accepts it he accepts the condition also notwithstanding any protest he may make to the contrary."

Now that all makes it perfectly plain, gentlemen, that if there was a dispute existing between these parties at the time this check was accepted by Mr. Kennedy and put through the account of the plaintiff's assignor, that there was an accord and satisfaction, and with respect to the plaintiff's claim the verdict under such circumstances would have to be for the defendant. If on the other hand the defendant has not made out by the greater weight of the evidence, as the defendant is obliged to make out if he would prevail on this defense, that there was a dispute at that time existing between the parties, why

then the acceptance of that check by the plaintiff with that condition written on it is utterly inconsequential so far as any defense is concerned, and the plaintiff would be entitled to accept it and credit it on account and to bring this action to recover the balance. So you will see the real vital question in this case with respect to that defense is whether or not the defendant has made out by the greater weight of the evidence that there was a dispute existing at that time between the plaintiff's assignor and the defendant. If there was such dispute, why then of course the plaintiff has no claim here and the verdict must be for the defendant. If there was no such dispute established by the defendant by the greater weight of the evidence, why then of course the plaintiff has a claim here, and if he has made out that claim by the greater weight of the evidence he is entitled to your verdict for the amount of that claim.

Now you will take the case under these rules and decide it.

Mr. Peirce. I ask an objection in the nature of an exception to the statement of the court that the plaintiff did perform its contract.

The Court. What is your point about that?

Mr. Peirce. You stated to the jury, from the standpoint of the judge, that the plaintiff had performed his contract.

The Court. You do not allege that he had not performed his contract.

Mr. Peirce. We set up a defence and proved that this room was not done.

The Court. Then your point with respect to the statement is that the evidence with respect to the room not having been done is something which I should have submitted to the jury, as to whether that militated against a full performance of the contract?

Mr. Peirce. Yes.

The Court. And my answer, of course, is that I have dealt with that in the body of the case and have

held that the construction of the contract clearly indicates that that room was not to be finished in cork and was finished in wood as was evidenced by the contract between the parties. I only want to get it written on here what we are talking about so that the court above can see just what the point was.

Postea.

This action was tried before Hon. William H. Speer, with a jury, in the presence of the counsel of the respective parties at the Hudson Circuit, April 15, 1915.

The cause having been heard and submitted to the jury, they returned their verdict as follows:

That they find in favor of the plaintiff and assess damages against the defendant at the sum of three hundred forty-one dollars and sixty-three cents ($341.63).

Judgment.

Whereupon it is adjudged that the plaintiff William E. Decker recover of the defendant the sum of three hundred forty-one dollars and sixty-three cents ($341.63) and his costs which are taxed at the sum of forty-seven dollars and twenty-five cents ($47.25), making in the whole the sum of three hundred eighty-eight dollars and eighty-eight cents ($388.88).

Judgment entered April 21, 1915.

Exhibit P. 1.

EXHIBIT P-1.

CONTRACT between DAVID E. KENNEDY, Inc., and GEO. W. SMITH & CO., Inc.

April 2, 1912.

I. WHEREAS, GEO. W. SMITH & CO., INC., have entered into a Contract with the TRUSTEES OF PRINCETON UNIVERSITY, Princeton, New Jersey, for the INTERIOR FINISH of Proctor Hall, Thomson College and the Cleveland Memorial Tower, which contract has been read and signed by William G. Grange, Manager for David E. Kennedy, Inc., and the full contents thereof are known.

II. This contract contains certain cork flooring. David E. Kennedy, Inc., agrees with George W. Smith & Company, Inc., to furnish all the cork tiling required under Geo. W. Smith & Company's, Inc., contract with the Trustees of Princeton University, in accordance with the plans and specifications of Cram, Goodhue & Ferguson, architects, for the sum of THIRTY-SIX HUNDRED DOLLARS ($3600.00).

III. The specifications and plans governing this contract between Geo. S. Smith & Company, Inc., and David E. Kennedy, Inc., have been initialed by William G. Grange, Manager for David E. Kennedy, Inc., and his authority is hereby acknowledged. The drawings referred to are numbered as follows: 18.

IV. It is the intent of this contract that David E. Kennedy, Inc., assumes the responsibility for the exact quantity of cork flooring that has been assumed by Geo. W. Smith & Co., Inc., in their contract with the Trustees of Princeton University, and that Geo. W. Smith & Company, Inc., agrees to pay David E. Kennedy, Inc., for the faithful performance of this contract in the same manner as outlined in their contract, which is as follows: On the fifteenth day of each month, the contractor shall submit a statement of the amounts

Exhibit P. 1.

that he has paid for materials placed in permanent position and work performed in connection therewith during the previous thirty days. Upon approval by the architects, this amount shall be paid to the contractor, minus fifteen per cent. of the sum of said statement, on or before the last day of the month in which such statement is made, provided that the sum of all payments at any time shall not exceed an amount which bears the same ratio to the total contract price, less fifteen per cent., as the amount of work performed bears to the whole construction. The final payment shall be made within thirty-three days after the completion and acceptance, by the architects, of all work included in this contract, and the payment for same received by Geo. W. Smith & Company, Inc.

V. It is agreed that the specifications for the rough floors to receive cork flooring is satisfactory to David E. Kennedy, Inc., and that David E. Kennedy, Inc., will assume all responsibility of having the contractor for this underflooring leave it in proper condition to receive their work. In other words, no responsibility for this under-flooring will rest with Geo. W. Smith & Co., Inc.

VI. David E. Kennedy, Inc., agrees that they will keep pace with the condition of the building, and complete their work, so that no question of delay is attributable to them on completion of the cork tile flooring.

VII. David E. Kennedy, Inc., assumes all accident liability for their men and the public occurring under this contract.

IX. Further, it is agreed that this contract includes all the floor space in the various rooms in which this cork tiling occurs.

X. It is further agreed that such storage of materials at the building as is required by David E. Kennedy, Inc., will be provided by David E. Kennedy, Inc.

Exhibits P. 3, P. 6.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the day and year first above written.

GEORGE W. SMITH & CO., INC. (SEAL)
A. D. SMITH, Pres.

DAVID E. KENNEDY, INC.
WM. G. GRANGE, Mgr.

EXHIBIT P-3.

(NOTE: Exhibit P-3 is the assignment by David E. Kennedy, Inc., to William E. Decker, of the claim which is the subject of the present suit.

EXHIBIT P-6.

DAVID E. KENNEDY
Incorporated
Philadelphia Office.

To New York.
In Ans. to D. E. K. Date Jan. 21, 1914.

Subject Princeton University.

I have your letter to Smith on the above and thought that you might heed the contract when discussing this matter with Smith. I am therefore, returning same.

Mr. Thompson has told you of my various conversations and as I say we could not agree on any matters. I recall one matter that Smith discussed and that was that the prints that he furnished us showed the dressers to be laid. I told him it did not but he said he knew it did. I send you this print in question which shows the dressers were omitted by Smith and I should think it would be a point in our favor to show that even at the time of making his contract with us he had in mind omitting the dressers, and we can interpret the print to mean exactly what it shows. Another point that he has harped on has been the allowance of $150. 00. He takes the stand that I agreed to allow him this as the interpretation of his clause nine. I have no

Exhibit P. 16.

recollection of ever discussing such a phase of the contract. Smith is an awful bully and can be very ugly at times so you want to handle him with a little care—when he gets ugly he is mighty ugly.

PHILADELPHIA OFFICE.
WM. G. GRANGE.

EXHIBIT P-16.

Purchase Order No. 7012.
Requisition No. 480x106.
Date 10/30/13.

GEORGE W. SMITH, & COMPANY, Inc.

3907-19 Powelton Avenue.
Philadelphia, Pa.

David E. Kennedy,
1825 Market Street,
Philadelphia, Pa.

Ship to Factory.
Routed as follows
To be shipped 1 week.

Terms: Unless specially stated previous terms apply to this order.

The following goods at prices named, mailing Invoice and Bill of Lading to us on day of shipment.

Quan.	Description	Price	Total Price
2	Cork Tile Tops for fixtures 15″ x 59¼ x ½	⅜″	
2	Cork Tile Tops for fixtures 15″ x 56⅞ x ½	⅜″	
	Sizes are correct. Bill in duplicate.	.70 sq. ft.	

GEORGE W. SMITH & CO., INC.
Per Fisley
A. D. SMITH.

Exhibit D. 1.

EXHIBIT D-1.

August 15, 1913.

GRADUATE COLLEGE, Princeton.

David E. Kennedy, Inc.,
No. 2, W. 45th St.,
New York, N. Y.

Gentlemen:

We are informed that you have not started as yet to lay your cork tiles on the above contract. We are straining every energy to complete our contract by September 1st, and we wish to advise you that if you delay us by reason of noncompletion of your contract we shall hold you responsible for any losses entailed to us.

We understand that some weeks ago you complained of the condition of the cement floor receiving your work, and that you had arranged with the architects' representative to have this fixed to your satisfaction. Your contract is with George W. Smith & Co., not Cram, Goodhue & Ferguson, and while George W. Smith & Company are pleased to be relieved of any responsibility by your taking this matter up with Cram, Goodhue & Ferguson direct, at the same time, if you do not advise Smith & Co. wherein the work of other contractors is not satisfactory or complete in accordance with the specifications, then Smith & Co. assume that all work preceding yours is to your satisfaction, and Smith & Co. will not be responsible or suffer by reason of the non-completion of your contract by September 1st.

Kindly govern yourselves accordingly.

Yours truly,

GEORGE W. SMITH & CO., INC.

By

AD/S

President.

Exhibit D. 1.

DAVID E. KENNEDY

INCORPORATED

General Offices:
48-56 West 38th Street
New York.

August 16, 1913

George W. Smith & Company,
3907 Powelton Avenue,
Philadelphia, Pa.

Gentlemen:—

Re: Graduate College, Princeton University.

This is to acknowledge the receipt of your letter of the 15th inst. Your information is correct. We have not installed our cork tile in the above building yet for the simple reason that your backing is not in a condition to receive it. Several days ago we received instructions from Mr. A. C. Perry of Cram, Goodhue & Ferguson's office, that the work would be ready for us on Wednesday, the 13th. We immediately sent our superintendent to ascertain if conditions were proper for us to proceed and on his arrival at the job he found that the concrete backing was anything but satisfactory, much of it was uneven and a large proportion of it would not hold a nail, crumbling just as soon as the brad was driven into it. He, of course, advised Mr. Perham, the Architects' Superintendent, that we could not under any circumstances lay our material to this backing and be responsible for the result. Mr. Perham stated that you would do no more work on this backing and that he would consider the matter and advise us. We are today in receipt of a letter from him which we quote in full as follows:

> "Your Mr. Taylor visited the building today and inspected the floors which have been prepared for your cork tile. He states that, with very few exceptions, they are not in proper condition to receive the tile.

Exhibit D. 1.

The general contractor will do no more work on them so we consider it best for you to do the work in accordance with the arrangement made by Mr. Perry and your Mr. Shields. You are therefore authorized to furnish labor and material to put the floors in proper condition to receive your work. Mr. Taylor states that he will have men here Monday morning ready to start work."

You will note that this authorizes us to put these floors in proper condition. We are now making arrangements to do so and hope to have sufficient men and material on the site by Monday noon to begin work. Under these circumstances we assume absolutely no responsibility for any delays. We are and have been prepared to proceed with the work just as soon as a satisfactory backing was supplied us. It has not been our purpose to avoid consultation with you or go over your head. We have been forced to accept instructions from the only source inclined to listen to our complaints.

Yours very truly,

DAVID E. KENNEDY, INC.

By C. A. WHITNEY.

CAW:CR

August 19, 1913.

David E. Kennedy, Inc.,
38W. 38th St.,
New York.

Gentlemen:—

In response to your communication of the 16th which was received by us today at 4.30, would say that you are evidently laboring under the apprehension that George W. Smith & Company are at fault in not supplying you with proper back-ground for

Exhibit D. 1.

your Cork Tiling. George W. Smith & Company are not the general contractors and if you will refer to your contract, clause five you will note that you assume the responsibility of having the contractor for the under flooring leaving him in proper condition to receive your work. If you are unable to have this done it is then incumbent upon you to refer the matter to us and give us an opportunity to have the work pushed along promptly. You understand that Smith & Company are not at fault in not having this under floor to your satisfaction and have never been notified by you that it was not satisfactory.

You have taken this matter up directly yourself and, therefore, you will have to assume the responsibility of any delay.

Yours truly,

GEORGE W. SMITH & CO., INC.,
President.

August 19, 1913.

David E. Kennedy, Inc.,
48 W. 38th St.,
New York.

Gentlemen:—

We acknowledge the copy of the following letter directed to Mr. Perham:

Mr. W. L. Perham, Supt.,
Cram, Goodhue & Ferguson,
66 Nassau St.,
Princeton, N. J.

Re: Graduate College, Princeton.

Dear Sir:

This is to acknowledge receipt of your letter of the 15th inst. The remarks therein relative to the concrete backing in the above job are confirmed by our Assistant Superintendent, Mr. H.

Exhibit D. 1.

F. Taylor, who visited the building and carefully instructed the job.

In accordance with your instruction, we are making arrangements to send two first class men to Princeton to put these floors in the proper condition to receive our work. We are in hopes that these men will be able to report on the site tomorrow, Tuesday, morning, and we shall rush the work through as rapidly as is consistent with proper workmanship.

Yours very truly,

DAVID E. KENNEDY, INC.

CAW:HM.

Commenting upon this letter would say that it is entirely satisfactory to us for you to take up directly with Cram, Goodhue & Ferguson any items pertaining to your work, but it is also incumbent upon you to inform us of any reasons why you cannot complete your contract.

Your failure to do so throws the responsibility and liability for delay upon yourself. There is absolutely no reason in the world why the Cork Tile Floors should not be completed at the present writing.

Any delays, penalty or expenses for which we will be liable will be charged to your account.

Yours truly,

GEORGE W. SMITH & CO., INC.

A. D. SMITH,

President.

Exhibit D. 1.

DAVID E. KENNEDY

INCORPORATED

GENERAL OFFICES:
48-56 West 38th Street
New York

August 22nd, 1913.

Geo. W. Smith & Co. Inc.,
Philadelphia, Pa.

Re: Graduate College, Princeton.

Gentlemen:

Replying to your two favors of the 19th inst. relative to improper backing laid to receive our Cork Tiling, and the replacement of said backing with new material, we beg to advise, that we now have men doing this work in accordance with an order covering same from the architects.

As to the responsibility of this work, we do not know who is to blame, but inasmuch as our work is now being done under the architects order without attaching blame to this firm, we will contend that we are in no way responsible for this delay, and therefore cannot resume any liability for this delay.

Your statement that there is absolutely no reason why Cork Tile should not be completed at the present writing is absurd, in view of the fact that the concrete backing was never laid properly to receive same.

Very truly yours,

DAVID E. KENNEDY, INC.,

BY C. S. SHIELDS,

Supt.

CSS:KT

Exhibit D. 1.

August 23rd, 1913.

David E. Kennedy, Inc.
48 West 38th Street,
New York City.

Gentlemen:

In response to your communication of the 22nd, would say that:—

1. We do not hold you responsible for the improper backing to receive your material.

2. It is entirely satisfactory to us for you to do any work that the Architect gives you a direct order for. Smith & Company are not responsible in any way for the condition of this under-flooring.

3. As your contract was with Smith & Company, we do hold you responsible for the fact that you did not inform us in any way, when we advised you to proceed with your work, that the conditions of the under-flooring was not to your satisfaction, and in this regard you are responsible for any delay.

If you had advised Smith & Company that the backing was not prepared in accordance with the specifications the responsibility of the delay would then be with Smith & Company; but as you have given us no opportunity to have this prepared we shall hold you responsible for any delay by reason of this oversight.

Yours truly,

GEO. W. SMITH & CO., INC.

President.

ADS/R.

Exhibit D. 1.

August 28, 1913.

David E. Kennedy,
48 W. 38th Street,
New York.

Dear Sir:—

We have received word from Princeton that you are ripping up the under-flooring throughout the kitchen where cork tiling is called for and replacing it with a new under-flooring. You are creating considerable dampness which will, of course, affect the stability of our work which is already installed. We beg to advise you that we will hold you responsible for any damage done to our work by reason of this dampness.

As you advised us that it was necessary for us to have our Cabinet Work installed before you could lay your cork tile folloring we considered that it was incumbent upon you to see that the under-flooring was properly installed as the work progressed and not wait until this late date to correct errors by other contractors.

Yours very truly,
GEORGE W. SMITH & CO., INC.

President.

ADS.FB

Nov. 14th, 1913.

Re: Graduate College Princeton.

David E. Kennedy Co.,
48 West 38th St.,
New York City.

Gentlemen:—

We have your letter of the 13th at hand in which you refer to an invoice for fixing concrete of the above building.

Exhibit D. 1.

We beg to advise you that we never have received such an invoice, and we do not see any reason why you should send it to us, as we certainly gave you no order for fixing concrete, but we do know that in fixing the concrete you caused damage to our Dressers to the amount of $43.27, which we propose to charge to your account.

Yours very truly,

GEORGE W. SMITH & CO., INC.,

President.

ADS/EB

DAVID E. KENNEDY

INCORPORATED

GENERAL OFFICES:
48-56 West 38th Street
New York

November 17, 1913.

Geo. W. Smith & Co.,
3907 Powelton Ave.,
Philadelphia, Pa.

Gentlemen:—

Re: Graduate College, Princeton.

We have your favor of the 14th inst. which calls our attention to a clerical error in referring you to an invoice for installing concrete backing. This, as you know, was done on the order of the architect and the bill was so made out. We apologize for having bothered you with this matter.

As to the damage which you claim the dressers suffered when the concrete was being laid, we of course had not heard of this before. We cannot understand how damage to any such amount could have been possible. We will take this matter up with Mr. Perham

Exhibit D. 1.

at once and shall further be glad to have a detailed memorandum of such damage submitted by you as soon as possible.

Very truly yours,
DAVID E. KENNEDY, INC.
BY C. S. SHIELDS,

CSS:RC

Established 1877 Incorporated 1902

GEORGE W. SMITH & COMPANY, INC.

CABINET WOOD WORK

39th Street and Powelton Avenue

Philadelphia, November 21st, 1913.

David E. Kennedy,
420 Fifth Avenue,
New York City.

Terms:

a/c Graduate College, Princeton University.

9x909—Labor furnished to unload cork tile at Graduate College..		$3.27
9x995—Damage to Dressers in Kitchen by wet concrete		40.00
9x998—Cork tile floor and cove Base omitted on account of not being used under dressers viz;		
285 sq. ft. cork tile fl. @ 77c..	219.45	
151 lin. ft cove base @ 65c. ...	98.15	317.60
		$360.87

Exhibit D. 1.

DAVID E. KENNEDY

INCORPORATED

General Offices:
48-56 West 38th Street,
New York

November 26, 1913

George W. Smith & Company, Inc.,
3907 Powelton Avenue,
Philadelphia, Pa.

Gentlemen:—

Re: Graduate College, Princeton University

We have your statement of November 21st enclosing your check for $1,739.13, which we have credited to our account on the Cork Floor Tiling done for you in the above building. Please understand that we are accepting this check only as a payment on account and not in full settlement. We cannot allow your charge of $40.00 for damage to dressers, nor your charge of $317.60 for the omission of Floor and Cove Base under dressers. We have written our Philadelphia Manager and asked him to call upon you in reference to same, as he can probably explain it more shortly than we could by correspondence. Your charge for labor furnished to unload Cork Tile is proper and we have credited your account with same.

Yours very truly,

DAVID E. KENNEDY, INC.

By D. E. K.

DEK:CR
C. C. Phila.

Exhibit D. 1.

December 3rd, 1913.

Re: Graduate College.

David E. Kennedy,
48 West 38th St.,
New York City.

Gentlemen:—

Referring to your communication of the 26th, would say that we have not received a visit from your Philadelphia Representative regarding the settlement of the above building.

We would advise you that if our settlement is not to your satisfaction kindly return us the check.

Yours very truly,

GEORGE W. SMITH & CO., INC.,
President.

ADS/EB

DAVID E. KENNEDY
Incorporated
Distributors for the Armstrong Cork Company
Nonpareil Cork Tiling—The Ideal Floor
Arrowlock Elastic Tiling
New York
48-56 West 38th Street
Boston, Philadelphia, Atlanta, Cleveland. Chicago, St. Louis, San Francisco, Montreal, Can.

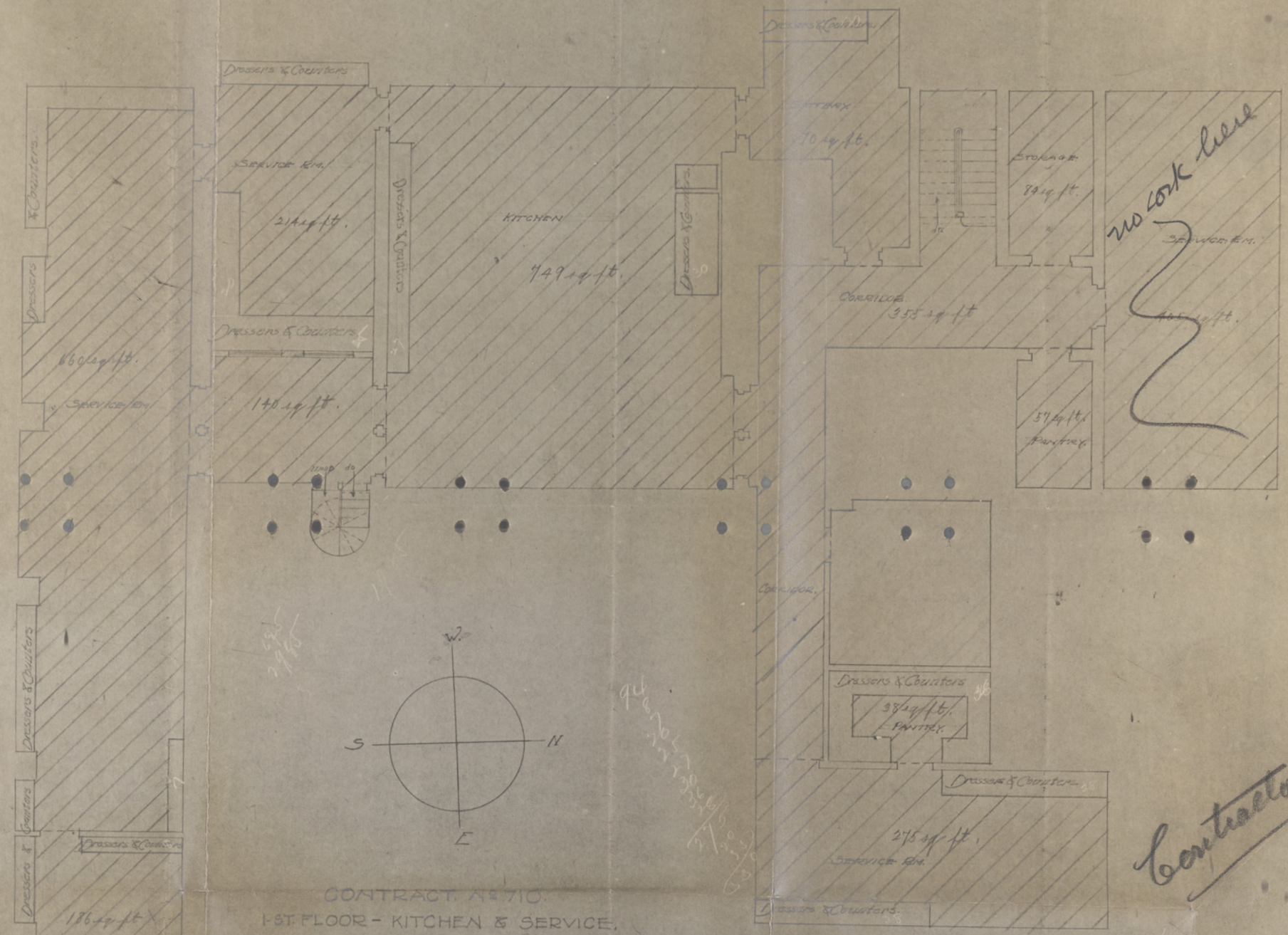
Dec. 4, 1913

Messrs. George W. Smith & Company,
39th Street & Powelton Ave.,
Philadelphia, Pa.

Gentlemen:—

RE: GRADUATE COLLEGE

We have your letter of December 3rd and are writing our Philadelphia representative to see you at once



CONTRACT. No 710.

1-ST. FLOOR - KITCHEN & SERVICE.

cross lines indicate Cork Tile Floor.

7/8"-0" Base.

Total. 3483 sq ft.

GEO. W. SMITH & Co. INC.

PHILA. PA.

March. 20. 1912. Scale 1/4"=1'-0"

Contractors Drawing

SHEET. No 18.

P2

Exhibit D. 1.

in regard to this matter. As we advised you in our letter of November 26th, we accepted your check as a payment on account and deposited it in our bank.

Yours very truly,

DAVID E. KENNEDY, INC.

By D. E. K.

DEK:CR

C. C.—Philadelphia

December 5th, 1913.

David E. Kennedy,
48 West 38th St.,
New York City.

Gentlemen:—

In response to your communication of the 4th instant, would say that we assumed that you would not use the check which we sent you until any matters in settlement were adjusted to your satisfaction.

The acceptance of the check, and the endorsement of same would naturally form a receipt and complete the transaction.

Yours very truly,

GEORGE W. SMITH & CO., INC.

President.

ADS/EB

Exhibit D. 1.

DAVID E. KENNEDY
Incorporated
General Offices:
48-56 West 38th Street
New York

December 6, 1913.

George W. Smith & Company, Inc.,
39th Street & Powelton Ave.,
Philadelphia, Pa.

Gentlemen:

RE: GRADUATE COLLEGE

Replying to your letter of December 5th, we beg to state that in our opinion the acceptance of your check and endorsement of same does not naturally form a receipt and complete the transaction. This check was accepted on account, as we advised you in our letter of November 26th. Before endorsing the check we crossed out the item in dispute. There is no dispute whatever as far as the amount covered by the check is concerned, and we fail to see any reason why you should want it back pending the settlement of the balance. If there is any good reason that you should have this money back, please advise us what it is and we will send you our check for it. We do not believe you intend to intimate that you think we would make the disputed allowance merely because you were holding up our payment, nor do we believe you would hold up our payment for this purpose.

Yours very truly,

DAVID E. KENNEDY, INC.
By D. E. K.

DEK:CR
ENCL.
C. C. Philadelphia

Exhibit D. 2.

EXHIBIT D-2.

No. 8891 Philadelphia, Nov. 21, 1913.

THIRD NATIONAL BANK 3-21

Pay to the order of David E. Kennedy
Seventeen Hundred thirty-nine 13/xx Dollars
$1739.13/xx

GEORGE W. SMITH & CO., INC.
ARTHUR D. SMITH,
Treasurer.

Endorsed as follows:

The payee by endorsement accepts this voucher check in full payment of the following account. No other receipt necessary.
In full of all claims for contract 7104
10/6 cash 1500.00
11/21 " 1739.13
~~chg~~ ~~260.87~~
~~1500~~

David E. Kennedy,
per R. J.

Pay to the order of
FIRST NAT. BANK,
David E. Kennedy, Inc.
Pay to any Nat. Bank, State Bank
or Trust Co. or order

Endorsements guaranteed
FIRST NAT. BANK N. Y. 1-65
Paid 11-29-1913
FIRST NAT BANK NEW YORK
FRANKLIN NAT BANK, Phila
Dec. 1
Rec'd payment Clearing House.

Exhibit D. 3.

EXHIBIT D-3.

No. 11365 Philadelphia, Dec. 31, 1913.

FIRST NATIONAL BANK

Pay to the order of David E. Kennedy,
Eighteen 66/xx Dollars

George W. Smith & Co., Inc.

18 66/xx Arthur D. Smith, Treasurer.

Endorsed as follows:

The Payee by endorsement accepts this voucher check in full payment of the following account no other receipt necessary

Nov. 8/13 18.66

In full of all claims to date
Jan. 2/13

David E. Kennedy
per R. J.

Pay any Nat Bank, State Bank or Trust Co, or order

Endorsements guaranteed
FIRST NAT BANK, N. Y. 1-65