

NEW JERSEY
Court of Errors and Appeals

EMPIRE RUBBER MANUFACTURING
COMPANY,
Plaintiff, and Plaintiff in Error.

vs.

WILLIAM MCK. MORRIS AND EDWIN J.
MORRIS, PARTNERS, &C.,
Defendants, and Defendants in Error.

} On Contract.

Brief of the Defendants.

FIRST ASSIGNMENT.

“That the said Justice before whom the issue joined in said action was tried, at and upon the aforesaid trial of the said issue, refused to charge and instruct the jury that the said plaintiff was not bound to supply itself from the market before the contract date expired, for it had the right to expect that the defendants will fulfill the contract and deliver all unsupplied duck, even up to the last day of the contract period; and the measure of damages for their default is the difference between the contract price and the market price at or within a reasonable time after the expiration of the contract.”

The Justice below was right in refusing to charge as requested.

Because the contract sued upon and known as the September contract was for seven hundred and twenty rolls of duck, at seventeen cents per pound, to be delivered monthly, upon requisition from the plaintiff to the defendants, designating weights of material, in quantities of sixty rolls a month, beginning October first, nineteen hundred and two, and ending October first, nineteen hundred and three. See testimony of parties making this agreement—William H. Skirm, pages 55, 56, 57, 62 and 63; William McK. Morris, pages 72 and 73.

No evidence of any other contract appeared in the case.

After plaintiff had defaulted in nine months out of the twelve, on the tenth of July, nineteen hundred and three, defendant made offer to deliver six hundred and forty-six rolls of duck upon exactly the same terms as the September agreement, being an offer to deliver thirty to forty rolls of duck during the months of July and August, and, after September first, to deliver sixty rolls per month until the above number of rolls were delivered. The plaintiff to send specifications for each sixty rolls as near the first of the month as possible. The plaintiff refused to accept this offer, and insisted upon the delivery of six hundred and forty-six rolls of duck in July, August and September. See *Exhibits P 6* and *P 7*, page 126.

By the first day of July, nineteen hundred and three, the plaintiff, under his agreement, was to have called for five hundred and forty rolls of duck. This would have left one hundred and eighty rolls to be delivered during the months of July, August and September, providing the defendant did not see fit to consider the contract broken by these nine breaches on the part of the plaintiff. The defendant had perfect right to consider the contract off and refuse at any time to deliver goods after July, nineteen hundred and three, or even before.

If the breach is of such a nature as to show an intention on the part of the one committing it to renounce the contract, the other party may deny further performance. *Otis v. Adams*, 27 *Vroom*, page 38, and 28 *Vroom*, page 432.

The breach of an essential term of an installment contract, whether evincing an intention to abandon it or not, gives to the party not in default a right to refuse further performance and to treat it as repudiated. 115 *U. S.* 188; 102 *N. Y.* 366.

There are twelve separate and distinct times of expiration of this installment contract; that is, there are twelve times of delivery and twelve times of payment, and the only measure of damage is the difference between the contract and the market price at each expiration date.

SECOND ASSIGNMENT.

“That said Justice at and upon the aforesaid trial of the said issue before him, refused to charge and instruct the jury that if the said jury find that the time for delivery was by mutual consent extended for an indefinite period of time and until all of the duck contracted for should be delivered, then if the jury believe that the defendants about the middle of January, nineteen hundred and four, arbitrarily refused, which refusal should be without lawful excuse, to deliver the balance of the duck due the plaintiff under contract, the measure of damages would be the difference between the contract price and the market price within a reasonable time after such refusal to deliver, which, under the proofs in this case, would include the market price in February, nineteen hundred and four; because the plaintiff had a right to wait until the contract time to deliver all duck was past, and then go into the market and purchase.”

There was no evidence offered to the jury that the time of delivery was by mutual consent extended for an

indefinite time, nor do the pleadings of the plaintiff set up any such matter, and in the replication of the plaintiff this fact is distinctly denied; nor was there any proof offered that in January the defendants arbitrarily refused, without reasonable excuse, to deliver the balance of the duck due to the plaintiff. The plaintiff might have gone in the market in July, August and September, and bought, each month, as many rolls of duck as would be represented by the difference of the number delivered, and sixty rolls, if the plaintiff still had any rights under a contract which he had so frequently broken by not calling for the number of rolls contracted for each month after October first, nineteen hundred and two.

On June twenty-ninth, nineteen hundred and three, the plaintiff wrote as follows to the defendants: "We had hopes you would be willing to treat us in your usual fair manner and extend, if necessary, time of delivery of goods as covered by agreement, but under the circumstances we will not ask this; we will favor you by considering the smallest estimate of our requirements, which would equal seven hundred and twenty rolls for the year, leaving a balance of six hundred and forty-six rolls. These you can deliver at the rate of two hundred and fifteen per month. This is only in accordance with your contract. Our actual requirements in the next three months will be about sixty to seventy-five rolls per month, and if you would prefer making us shipments of about this amount until completion of contract, it would be agreeable to us."

Plaintiff realized that it had surrendered all its rights under the September contract, and was endeavoring to secure a new one. Cotton was rising, and it desired to get the benefit of it; and it made an entirely new proposition, which was not accepted, as will be seen by the defendants' answer of July 10th. They in turn made a proposition to the plaintiff, which was not accepted by the plaintiff. Defendants wrote: "We have decided to accept your offer in your letter of June

twenty-ninth, and deliver you six hundred and forty-six rolls of belting and hose duck at seventeen cents, three per cent. During this and next month we presume you can get along with thirty and forty rolls per month, as you know cotton is very high. After September first we to deliver you at the rate of sixty rolls per month until the above number of rolls are delivered, you to send us specifications for each sixty rolls as near the first of the month as possible."

The plaintiff did not accept this proposition, but wrote and construed it as a decision to fill the September contract according to the plaintiff's understanding of it, and further says in the letter of July thirteenth: "We shall draw on you within the next two months (July and August) for just as little as we possibly can, with the understanding, however," not that this a new contract or agreement, but "that you do not allow the change to have any bearing whatever upon the terms of the contract," referring to the September contract. This meant that in July and August plaintiff would draw as little as possible upon the defendants, but in September would demand the delivery of the balance of the seven hundred and twenty rolls.

Defendants delivered the sixty rolls in July and August (see *Exhibit P-Sa*, page 127), and on the twenty-first of September plaintiff demanded the balance of the undelivered duck. If plaintiff accepted this offer and considered it an extension of time for performance, why did he not in September specify the kind of goods he needed to make up the sixty rolls which the defendants offered to deliver. If plaintiff regarded this July tenth letter simply as a consent to extend time of delivery, then, according to the terms of that letter, the time for delivery would not expire until the twenty-third day of July, 1904.

The pleading set up no such state of facts. The plaintiff in his declaration (page 4) says that on July tenth plaintiff bought and defendants agreed to deliver six

hundred and forty-six rolls of duck *on or before October first, nineteen hundred and three.*

In another count plaintiff sets up a part of the agreement mentioned in the July tenth letter, but omits the obligation of the plaintiff to send defendants specifications each month of the character of the shipment of the installment of sixty rolls as near the beginning of the month as possible, and in the replication plaintiff denies that he agreed to take six hundred and forty-six rolls, to be paid for in cash, less a discount of three per cent., to be delivered thirty or forty rolls in July and August and sixty rolls each month thereafter until the rolls were delivered. (See pages 12 and 13.) Does plaintiff wish to be understood that he accepted the July offer? If so, defendants would be called upon to deliver up to September first, sixty rolls; to October first, sixty rolls; to November first, sixty rolls; to December first, sixty rolls; to January first, sixty rolls; to February first, sixty rolls; to March first, sixty rolls; to April first, sixty rolls; to May first, sixty rolls; to June first, sixty rolls, and to July twenty-third, forty-six rolls, when, under his present claim, he would be entitled to go into the market to buy, or he might, at the end of each month, charge the defendants with the difference between contract and market prices for whatever shortage of sixty rolls remained undelivered; provided, however, that the plaintiff had in all particulars observed its obligation under the offer of July tenth, viz.:

First.—To specify early in each month the kind of duck, as to weight, that it desired shipped up to sixty rolls.

Second.—To pay for the same in ten days after delivery.

It never sent, in any instance, specifications for sixty rolls per month, yet claims the right to demand at any time whatever quantity it desired.

Plaintiff defaulted as to time of payment in every invoice after July tenth (see page 66), and once sent a

check for six hundred and thirty-seven dollars and thirty cents eight days after the account was due, which check was dishonored by the bank. (See page 67.)

On September first it made no specifications for a sixty-roll shipment, but on the twenty-first of the month called for the balance of the seven hundred and twenty rolls remaining undelivered, to be furnished by October first, "on account of contract," showing clearly that at the time there was in the plaintiff's mind no idea of the extension of time for delivery, nor any other contract save that entered into September, nineteen hundred and two.

On November twenty-third, plaintiff again referred to July tenth letter and realizes its failure to send specifications as called for by the contract, and admits that instead of calling for sixty rolls a month, it requested delivery of two hundred and fifteen per month.

On January eighteenth, after defendants had notified plaintiff that they would send no more duck, because of plaintiff's failure to specify as requested and because of default in payments. Plaintiff asked for assurance that after that date defendants will deliver sixty rolls of duck per month and promising a check on the days of delivery, showing plainly plaintiff's realization that it had not lived up to the requirements of the tender in the July tenth letter, and apologizing for its breaches of the contract in its default in payments.

After October first, nineteen hundred and three, the market price of duck would have no effect whatever upon the measure of damage in this case.

The jury found as a fact that the contract was for the delivery of seven hundred and twenty rolls of duck between October first, nineteen hundred and two, and October first, nineteen hundred and three, at seventeen cents; three per cent. off in ten days, and that the deliveries were to be made monthly at the rate of sixty rolls per month as near as possible, and they assessed damages for the duck remaining undelivered in July,

August and September by deducting the contract price from the market price at the end of each of these months. The plaintiff was bound to protect itself at the end of each month if it desired to hold the defendants for damages.

A party who suffers from a breach of contract must so act as to make the damages as small as he reasonably can. *A. & E. Encyclopedia of Law, 2d Edition, Vol. 8, page 601; A. & E. Encyclopedia of Law, 2d Edition, Vol. 24, page 1156.*

THIRD ASSIGNMENT.

“That the said Justice, at and upon the aforesaid trial of the said issue before him, refused to allow the said plaintiff to prove the amount of duck purchased and delivered to it subsequent to the beginning of this suit, from persons other than the defendants, to replace the duck which the defendants failed to deliver under their contract, and to recover for the difference between the price so paid and the contract price.”

The contract expired September thirtieth, nineteen hundred and three, and the plaintiff had no right to damages in excess of the difference between the contract and market prices after October first, nineteen hundred and three, or a reasonable time thereafter; yet the plaintiff offered evidence of duck bought in January, February and March, nineteen hundred and four, and long after suit had been brought for the recovery of damages against the defendant.

FOURTH ASSIGNMENT.

“That the said Justice, at and upon the aforesaid trial of the said issue before him, ruled that the plaintiff might prove the market value of duck only at the time that the last delivery of duck under the terms of the contract was to be made.”

The Court made no such ruling as above set forth.

FIFTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial of the said issue before him, charged the jury that the plaintiff's right to recover must rest upon the contract made in September, nineteen hundred and two."

No evidence of any other contract than that of September was offered. See the testimony of Skirm and Morris, referred to above, and letters of July tenth and thirteenth.

SIXTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial of the said issue before him, charged the jury that the measure of damages for the breach of the contract sued upon is controlled by the market price at the time of non-delivery."

The Court correctly quoted the law.

The market price is to be estimated as of the time of the delivery. *2 B. & C. 624; 8 Q. B. 604; 8 Taunton 540; 3 Cranch (U. S.) 298; 52 Barber 427.*

When the delivery was to be in instalments, the value is to be estimated as of the time the several instalments should have been delivered. *37 Hun. (N. Y.) 609; 9 B. & C. 145; 56 Amer. Rep. 34.*

SEVENTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial of the said issue before him, charged the jury that the damages to the plaintiff on account of the rolls of duck undelivered in July and August, nineteen hundred and three, should be measured by the difference between

seventeen cents per pound and the market price at the end of those respective months."

The Court was absolutely correct in its charge, as the Justice expressly stated to the jury, that they must, from the evidence, determine whether the contract was for delivery of sixty rolls a month or to be delivered at any time the plaintiff might call for the same. See pages 114 and 115. And if they found the contract to be deliveries of 60 rolls per month, then the damages for ~~the~~ ^{non} delivery in July and August would be the difference between 17 cents and the market price.

EIGHTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial of the said issue before him, allowed William H. Skirm, Jr., to state why the quantities of duck which were to be delivered by the defendants to the plaintiff were not incorporated in the letter of September twenty-ninth, one thousand nine hundred and two."

The evidence referred to in this assignment is immaterial except perhaps to show that Murray, knowing just what the contract was, was desirous of eliminating the question of delivery in this unfair way if possible, and to show that he was dictating a letter in the hopes that the defendant by a reply might make questionable a very essential and vital feature of the contract entered into between the parties. The September twenty-ninth letter was written for no other purpose than to seek to change the contract, if possible, based upon some inadvertent reply of the defendant. This same desire is shown in a letter of June twenty-second, nineteen hundred and three. *Exhibit P 1*, page 120; *Exhibit P 3*, page 121.

NINTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial

of the said issue before him, allowed William H. Skirm, Jr., to testify in reference to plaintiff's factory being actively engaged in business from October, nineteen hundred and two, to May, nineteen hundred and three, and whether the plaintiff company used more than seventy-four rolls of duck during that time."

This is absolutely immaterial.

TENTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial of the said issue before him, allowed William H. Skirm, Jr., to testify what was said by him to William Morris as to the probable number of rolls the plaintiff company would need per month."

The testimony of Mr. Skirm, referred to in this assignment, is a part of the contract. If Mr. Skirm and Mr. Morris had not had this and other conversations, there would have been no contract of any kind. The plaintiff's case rests entirely upon this very conversation and so does the defendants'.

ELEVENTH ASSIGNMENT.

"That the said Justice, at and upon the aforesaid trial of the said issue before him, refused to strike out the testimony of William Morris in reference to his conversation with Mr. Skirm about a maximum and minimum number of rolls to be furnished each month by the defendants to the plaintiff company."

What was said about the tenth assignment may be said about this. It is a part of the contract between the parties and a material part. The contract of September was the result of these conversations between William H. Skirm, Jr., on the part of the plaintiff, and William Morris, on the part of the defendant.

TWELFTH ASSIGNMENT.

“That the said Justice, at and upon the aforesaid trial of the said issue before him, allowed William Morris to testify why the defendants did not deliver to the plaintiff company sixty rolls of duck each month after the first of September.”

This testimony was perfectly proper. Defendants had two reasons for not delivering 60 rolls each month, beginning September 1st, 1903: 1st. It was a condition precedent that plaintiff should specify on the first of the month the kind of duck it needed on each 60 rolls; and, 2d. Plaintiff was to pay for the same in 10 days after delivery, which it neglected to do. The testimony was relevant, and should have been allowed to go to the jury.

THIRTEENTH ASSIGNMENT.

“That the said Justice, at and upon the aforesaid trial of the said issue before him, charged the jury that the damages must be measured by the cost in the market at the time of non-delivery.”

The Justice was correct in his charge to the jury, and there was no error in saying that the damages must be measured by the cost in the market at the time of non-delivery.

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Attorneys for Defendants.

N. J. Court of Errors and Appeals

EMPIRE RUBBER MANUFACTUR-
ING COMPANY,

Plaintiff in Error,

v.

MORRIS & COMPANY,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This was a suit by the Empire Rubber Manufacturing Company against the defendant, Morris & Company, to recover damages for a breach of contract to furnish and deliver the rubber company belting and hose duck. The terms of the contract are expressed in certain letters which passed between the parties, and these letters are supplemented by testimony introduced at the trial in reference to certain conversations which led up to the contract referred to in those letters. An understanding of the agreement can only be gathered from a reading of the letters offered in evidence, and which will be found in the printed case, pages 120 to 136, inclusive. The declaration contains six counts. (Case, page 2 *et seq.*)

In the first count of the declaration the plaintiff set up a contract made in the latter part of September, 1902, by which the defendant agreed to supply the plaintiff with belting and hose duck for the ensuing year, ending

September 3d, 1903, with seven hundred and twenty rolls of duck, at seventeen cents per pound.

The second count sets up a contract made July 10th, 1903, whereby the defendant agreed to furnish the plaintiff with six hundred and forty-six rolls of duck, at seventeen cents a pound, on or before the 1st day of October, 1903.

The third count sets up a contract made July 10th, 1903, whereby the defendant agreed to furnish the plaintiff with six hundred and forty-six rolls of duck, at seventeen cents a pound, to be delivered in quantities of from sixty to seventy-five rolls a month until the whole number of rolls was delivered.

The fourth count sets up a contract made October 1st, 1902, whereby the defendant agreed to furnish the plaintiff with seven hundred and twenty rolls of duck, at seventeen cents a pound, to be delivered at any time, at the request of the plaintiff.

The fifth count sets out that between October 1st, 1902, and the commencement of the suit, the plaintiff purchased from other persons than the defendant three hundred rolls of duck, to take the place of duck not delivered by the defendant, which duck so purchased cost the plaintiff \$3,979.25 more than the contract price of the duck.

The sixth count sets out that between October 1st, 1902, and the time of the commencement of the suit, the plaintiff contracted to purchase from other persons than the defendant two hundred and eighteen rolls of duck, for \$2,885.36 more than the contract price of said duck.

It was considered by the plaintiff necessary to set out the contract in these different counts in order to cover every possible construction which might be put upon it by reason of the various modifications of the original contract.

Up to June, 1903, there had been delivered to the plaintiff only seventy-four rolls of duck, in which last mentioned month the correspondence between the parties offered in evidence began. In the letter of June 24th, 1903 (Case, page 120), Morris & Company asserted that

their understanding with Mr. Skirm, who was then secretary of the plaintiff company, was that it would take between sixty and seventy rolls per month, which was an important element in the contract, and that as the plaintiff, up to June, 1903, had only taken seventy-four rolls of duck, Morris & Company would be obliged to furnish them duck for the remaining three months of the contract period upon a different basis as to deliveries. In the letter of June 29th, 1903 (Case, page 123), the Empire Rubber Company refused to recognize the position taken by Morris & Company, and demanded that the balance of the duck undelivered, amounting to six hundred and forty-six rolls, be delivered at the rate of two hundred and fifteen rolls a month, stating, however, that its actual requirements would be between sixty and seventy-five rolls per month, at which rate it would be willing to accept the duck until the completion of the contract. In the letter of July 10th (Case, page 126), Morris & Company write as follows: "We have decided to accept your offer in your letter of June 29th, and deliver you six hundred and forty-six rolls of belting and hose duck at seventeen cents, three per cent. During this and next month we presume you can get along with thirty or forty rolls per month, as you know cotton is very high." It will be observed, however, that this last letter is not entirely responsive to the letter of June 29th in respect to the number of rolls which Morris & Company agreed to deliver. The letter of July 10th, further requires that specifications be sent Morris & Company for each sixty rolls as near the first of the month as possible. This letter was followed by the letter of July 13th (Case, page 126), acknowledging the receipt of the letter of July 10th, and noting that Morris & Company had decided to fill the contract according to the plaintiff's understanding of it, and in accordance with their letter of June 29th.

Now the plaintiff contends that the original contract made previous to October, 1902, and afterwards referred

to in the letters offered in evidence, was that Morris & Company should deliver to the Empire Company seven hundred and twenty rolls of duck within the year, and that the contract contained no provision as to the time when it should be delivered, and contained no requirement that specifications should be sent to Morris & Company in reference to the duck required. The rubber company further contended that the contract was that the whole number of rolls should be delivered within the year, and that what was said in the various letters in regard to delivering sixty or seventy rolls a month was simply thrown out by the rubber company as a favor to Morris & Company, and in the letter of July 13th (Case, page 126), the rubber company writes that they will draw on Morris & Company within the next two months for just as little as they possibly can, with the understanding, however, that "*you do not allow the change to have any bearing whatever upon the terms of the contract.*"

Mr. Skirm, a witness produced on behalf of the defendant, testified, in reference to the letter of September 29th, 1902 (Case, page 58, line 10 *et seq.*), as follows: "Q. Why didn't you state in that letter the quantities that were to be delivered? Mr. Walker—I object. He cannot state that. The Court—I think he can state why a certain thing was not incorporated in the letter. Mr. Walker—I pray an exception. The Court—Note the exception. A. In order that we could take it as we wanted it. Not to bind ourselves to take a specified amount each and every month. Q. Did any one suggest that to you? A. That was talked over with Mr. Murray. Q. Did Mr. Murray direct you to write that letter? A. Yes. Q. What did he say about it? A. He wanted me to write a letter to confirm the conversation and get the contract on record. Q. What else did he say? A. Why, he didn't want the amount per month specified in the letter. Q. You say he didn't want the amount per month specified in the letter? A. No, he didn't want the amount per month specified in the letter. Q. Did he say why? A. Yes; in order that we would have to take it only when we wanted it."

And again, in reference to the proposition referred to in that letter, Mr. Skirm testifies (Case, page 62) that he had a conversation with Mr. Wm. Morris, and on line ten gives the following testimony: "Q. And they agreed, did they, to furnish you 1,000 rolls at seventeen cents per pound. A. Up to 1,000 rolls. Q. And they were to be delivered within a year, were they not? A. Specified deliveries, yes, sir. Q. You did not say anything about specified deliveries in your letter? A. No. Q. You were to take them all within a year, were you not? A. So many rolls a month within a year. Q. The exact number per month was not arranged? A. It was to be specified. Q. It was never specified, so far as you know? A. No."

And again, in the letter of June 26th, 1903 (Case, page 122), Morris & Company write: "But after some weeks we entered into an agreement that we would protect you in price for sixty or seventy rolls per month, as this was the number Mr. Skirm thought we could count on each month, *although he did not bind himself to take that number.*"

It will be seen therefore from this testimony and from the letter referred to that although the contract may in the first instance have been a verbal one, it was afterwards reduced to writing, and the written contract as afterwards embodied in the letter of September 29th, 1902, contained no reference to specified deliveries.

The ninth assignment of error is based upon an exception (Case, page 59, line 30, and page 60, lines 7 and 15). The following testimony will be found on page 59, line 24 *et seq.*:

"Q. From October, 1902, to May, 1903, when you left, was the factory of the plaintiff actively engaged in business? Mr. Walker—We object to that as immaterial. The Court—The objection is overruled. Mr. Walker—I pray an exception. The Court—Note an exception. A. Yes, sir. Q. There is evidence here that there were seventy-four rolls of duck delivered between October 1st, 1902, and the following July; do you know whether the

plaintiff company used more than that amount of duck in this factory? Mr. Walker—I object upon the same ground. The Court—I overrule the objection. Mr. Walker—I pray an exception. The Court—Take your exception. A. I think so, yes. Q. Do you know where the rest of the duck came from? Mr. Walker—I ask a general exception to this line of examination upon the ground that it is immaterial and irrelevant. May I have an exception? The Court—Yes.”

The witness, Mr. Skirm, then goes on to testify that the Empire Rubber Company bought duck from the Crescent Belting and Packing Company, which was affiliated with the Empire Rubber Company, and that the reason they bought it from that source, and not from Morris & Company, was because they got it at a less price. The obvious purpose of this testimony was to give the impression to the jury that while the Empire Rubber Company knew that under the terms of its contract with Morris & Company it was required to take sixty or seventy rolls per month, it did not take that number or make any large requisitions upon them for duck until June, 1903, because it was able to purchase the duck upon more advantageous terms from another quarter. We submit that this testimony tended to prejudice the minds of the jury, and was irrelevant and immaterial to the point in issue.

The tenth assignment of error is founded upon an exception (Case, page 63, line 1). Mr. Skirm, being on the stand, was asked (Case, page 62, line 32): “Q. Was there anything said by you to Mr. Morris as to the probable number of rolls that the Empire company would need per month of this quantity, not to exceed one thousand rolls? Mr. Walker—Objected to as leading, and also as being an attempt to vary a written contract by parol testimony. The Court—The objection is overruled.”

The plaintiff in error submits that this testimony was inadmissible upon the grounds stated in the objection.

The eleventh assignment of error is based upon an exception (Case, page 72, line 28). Mr. William Morris, being examined as a witness in reference to a conversation with Mr. Skirm, representing the Empire Rubber Company, testified (Case, page 72, line 12):

“Q. State what he said and what you said? A. He said he wanted to place an order for one thousand rolls of duck, and I said, ‘That, Mr. Skirm, is very indefinite; what number of rolls can we count on being taken every month?’ Q. What did he say to that? A. He says, ‘I don’t want to bind myself too closely; just at this time I cannot say how many rolls you can count on per month.’ I said, ‘We have got to have a minimum stated and a maximum, so that we can tell how to apportion the sale of our product to other customers, and in order to protect ourselves in cotton.’ We did not come to any understanding. Mr. Walker—I move that all that be stricken out. The Court—That is competent. Mr. Walker—I pray an exception. The Court—Note an exception.”

From Mr. Morris’ own testimony, he says that they came to no understanding in reference to a minimum and maximum number of rolls, but from the letters offered in evidence it is apparent that some understanding was reached, and in the letter of July 10th (Case, page 126) Morris & Company accepted the offer of the Empire Rubber Company and agreed to deliver six hundred and forty-six rolls of belting and hose duck, at seventeen cents, three per cent. Nothing was said in that letter about a minimum or a maximum number of rolls, and it must be assumed that whatever mention was made of this feature between Mr. Morris and Mr. Skirm it was subsequently abandoned, and the statements contained in the letters must be taken to embody all the essential facts of the contract as finally decided upon.

The twelfth assignment of error is founded upon an exception (Case, page 79, line 11). Mr. Morris testified (line 4 on that page):

“Q. Did you deliver to the Empire Rubber Company

sixty rolls of duck each month after the first of September? A. No, sir. Q. Why? Mr. Walker—I object to that. The Court—Objection overruled. Mr. Walker—I pray an exception. The Court—Note an exception.”

And on line 24 of the same page he further testifies:

“Q. If you didn’t deliver the sixty rolls of duck each month, why didn’t you? A. Because we did not receive the specifications on the first of each. Q. Any other reason? A. The other reason was that they did not pay their bills when due.”

Now, Mr. Skirm testified, as stated above, that no specifications were ever entered into, so that it is obvious that any testimony in reference to specifications not being furnished by the Empire Rubber Company is entirely irrelevant and immaterial; and the other reason assigned why the sixty rolls per month were not delivered, namely, that the Empire Rubber Company did not pay their bills, is also, we submit, irrelevant and immaterial, as the remedy of Morris & Company in such a case was to perform the contract on their part according to its terms and bring suit against the Empire company for failure to pay for the duck in accordance with the terms of the contract. As a matter of fact, however, it was untrue that the rubber company had not paid its indebtedness to Morris & Company. Mr. Morris, being shown invoices and checks purporting to be in payment thereof, testified (Case, page 88, line 20, to page 90, line 16) on cross-examination that all the invoices rendered by Morris & Company to the Empire Rubber Company had been paid.

We will next take up the fifth assignment of error, wherein the trial justice charged the jury that the plaintiff’s right to recover must rest upon the contract made in September, 1902 (Case, page 113, line 3 *et seq.*)

While the plaintiff in its declaration relied mainly upon the contract of September, 1902, it also relied upon the modifications of that contract in respect to the quantities of duck to be delivered and the time of those deliveries as affecting in a very great degree the measure of damages recoverable by the plaintiff. The modifica-

tions of the original contract are covered by the last four counts in the declaration.

The question as to whether the time of delivery of the duck under the original contract was extended by subsequent agreements is important in arriving at the measure of damages, owing to the rise in the price of cotton in the latter part of the year 1903. That the contract price was seventeen cents is not disputed. Mr. Murray testified (Case, page 107, line 5) that in the latter part of September and the first of October, the market price was nineteen to twenty cents a pound. If, therefore, the time of delivery under the contract was not extended, the measure of damages for the undelivered duck would be the difference between seventeen cents and twenty cents a pound, but if the time for delivery was extended by the letters of July 10th and 13th, which would have extended the time for the last delivery of the balance of the undelivered duck to about May 1st, 1904, the measure of damages would have been the difference between the contract price and the market price at that time, which was in the neighborhood of twenty-four or twenty-five cents a pound. The trial court, by ruling that the plaintiff must stand on this contract made in September, 1902, which was to be completed by September, 1903, refused to allow the plaintiff to prove the market price of duck after the time when the original contract should have been terminated.

It is in evidence (Case, pages 25 to 34, inclusive) that the plaintiff purchased duck in place of the duck which should have been delivered under the contract at from twenty-four to twenty-five cents a pound; that the duck was purchased in February, 1904, which was within the time to which the deliveries under the original contract had been extended by mutual agreement, and it is therefore contended that the measure of damages is the difference between the contract price of seventeen cents and the price at which the duck was actually purchased,

that is, twenty-four or twenty-five cents. The first, second, third, fourth, sixth, seventh and thirteenth assignments of error deal with this question of time of delivery and measure of damages.

The Empire Rubber Manufacturing Company did not go into the open market and purchase duck at the end of each and every month subsequent to the making of the contract, for the reason that the contract did not call for the delivery of any specified number of rolls of duck per month. By the letter of July 10th, the time of the delivery of the balance of the duck due under the terms of the contract was extended at the request and for the benefit of Morris & Company, who promised to deliver at the rate of sixty rolls a month after September 1st, which would have postponed the time for the last delivery until May 1st, 1904. It was for this reason that the Empire Rubber Company did not at the end of the original contract period, September 30th, 1903, go into the market and purchase the balance of the duck not delivered, as they had a right to expect that Morris & Company would deliver the duck in accordance with the agreement postponing the time of delivery, and it was not until February, 1904, that the Empire Rubber Company, after repeated requests upon Morris & Company, and the failure to deliver the balance of the duck, went into the open market and purchased it at the rate of twenty-four cents a pound, to which sum it had risen by reason of the advance in cotton. We submit, therefore, that the plaintiff should not have been limited in its measure of damages to the difference between the contract price of seventeen cents and the market price at the end of September, 1903, of twenty cents a pound.

As a general rule, the measure of damages for breach of contract to deliver is the difference between the contract price and the market price at the time and place of delivery.

Benjamin on Sales, § 1305.

Douglass v. McAllister, 3 Cranch 298.

Where delivery has been postponed to a specified date by agreement between the parties and by forbearance of one party at the request of the other, damages must be assessed according to the market price at the postponed date.

Benjamin on Sales, § 1314.

Where the postponement is indefinite the damages must be assessed (a) either according to the market price at the date when the plaintiff calls upon the defendant to accept or give delivery; or (b) according to the market price at a reasonable time after the last request for postponement made by the defendant.

Benjamin on Sales, § 1314.

In the case at bar no specified time for delivery was fixed by the contract; or, if so, it was postponed at the request of the vendors and for their benefit, so that the amount of each installment of cotton duck was uncertain, and also the time when it should be delivered. The plaintiff called upon the defendant repeatedly to make delivery of the cotton duck, and it would seem therefore that the measure of damages in this case should be the market price at a reasonable time after the last request for postponement of delivery.

Where the re-purchase of the goods contracted for by the vendee was delayed for the benefit of the vendor, the market price at the time delivery was to have been made is not the rule.

Tyers v. Rosedale Iron Co., L. R., 10 Ex. 195.

Where the defendant failed to make delivery of five hundred tons of iron according to contract, owing to an accident to his furnaces, the general rule was not applied because the court and jury were of opinion that plaintiff's delay in buying other iron to replace that not delivered had taken place at the defendant's request and for his benefit. The plaintiff was therefore entitled to claim the

largely increased damages caused by the rise in price in the market during the delay.

Ogle v. Earl Vane, L. R., 3 Q. B. 272.

In *Brown v. Muller, L. R., 7 Ex. 319*, the contract was for the delivery of five hundred tons of iron in about equal proportions in September, October and November, and action was brought in December by the buyer. The defendant had given notice soon after the contract that he considered the matter off, and that he regarded the contract as cancelled. It was held that the proper measure of damages was the sum of the difference between the contract and the market price of one-third of five hundred tons on the 20th of September, the 31st of October, and the 30th of November, respectively.

In *Morris & Company v. Supplee, 57 Atl. Rep. 566*, plaintiff agreed to purchase nine hundred bales of cotton from defendant; three hundred bales October shipment, three hundred bales November shipment, three hundred December shipment. The defendants accompanied their first shipment of cotton with a demand of payment in a manner that plaintiff considered at variance with the terms of the contract, and such payment being refused, defendants made no deliveries. After the contract time had expired the plaintiff brought suit for damages. At the trial it appeared that the plaintiff had gone into the market from time to time during the running of the contract period and bought cotton to take the place of that which defendants refused to deliver. The trial judge instructed the jury that the measure of damages was the difference between the contract price and the price at the several dates when the cotton should have been delivered. On appeal, this rule, under circumstances of the case, was held to be erroneous, and the court said: "When the vendor refuses to deliver goods sold, the buyer may wait until the contract time of delivery has passed and then go into the market and purchase, holding the seller liable for any loss. In such case the measure of damages is the difference between the contract price

and any greater market price that the buyer has been compelled to pay. The buyer is not bound to supply himself from the market before the contract date, for it may be that the seller will deliver at the last moment."

Where there is no stated time fixed for the completion of the contract, damages will be calculated from the time at which the defendant refused to perform it.

Williams v. Wood, 16 Md. 221, 259.

Whether or not a contract is divisible with reference to time of payment of consideration, depends upon the facts.

Skillman Hardware Co. v. Davis; 24 Vr. 144.

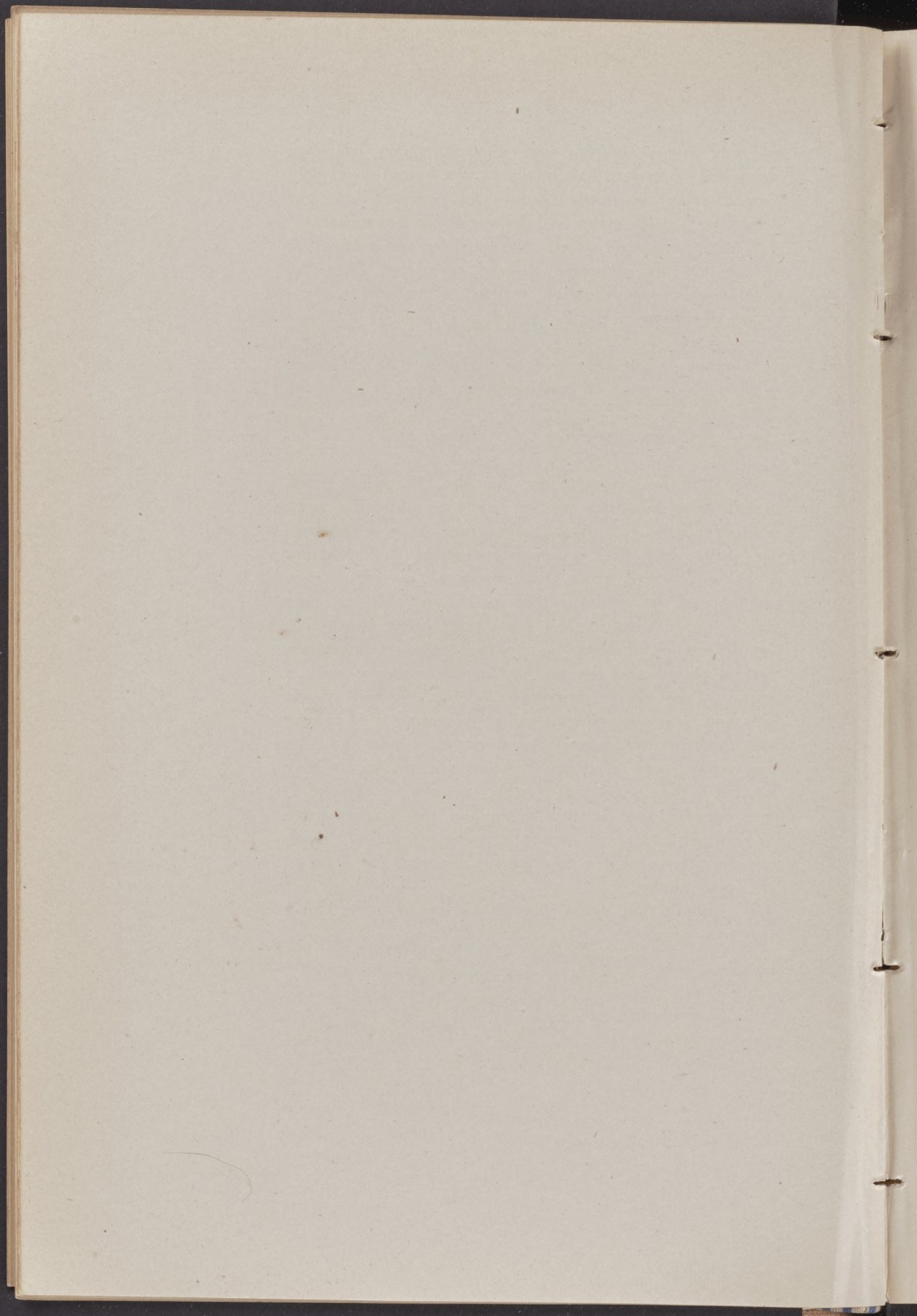
We submit, in conclusion, that the trial court erred in ruling as a matter of law that the plaintiff's right to recover must rest upon the contract made in September, 1902, and that no modification of that contract could be inferred from the subsequent correspondence had between the parties so that consequently the damages which the jury could find were erroneously limited to the difference between the contract price of seventeen cents a pound and the market price of twenty cents a pound in the end of September, 1903; whereas, if the jury had been allowed to consider the contract as having been modified by the subsequent correspondence, and the time of delivery of duck thereunder extended to May 1st, 1904, they could have found damages for the difference between the contract price and the market price in February, 1904, of twenty-four cents a pound, which was the price actually paid by the plaintiff for duck in the open market.

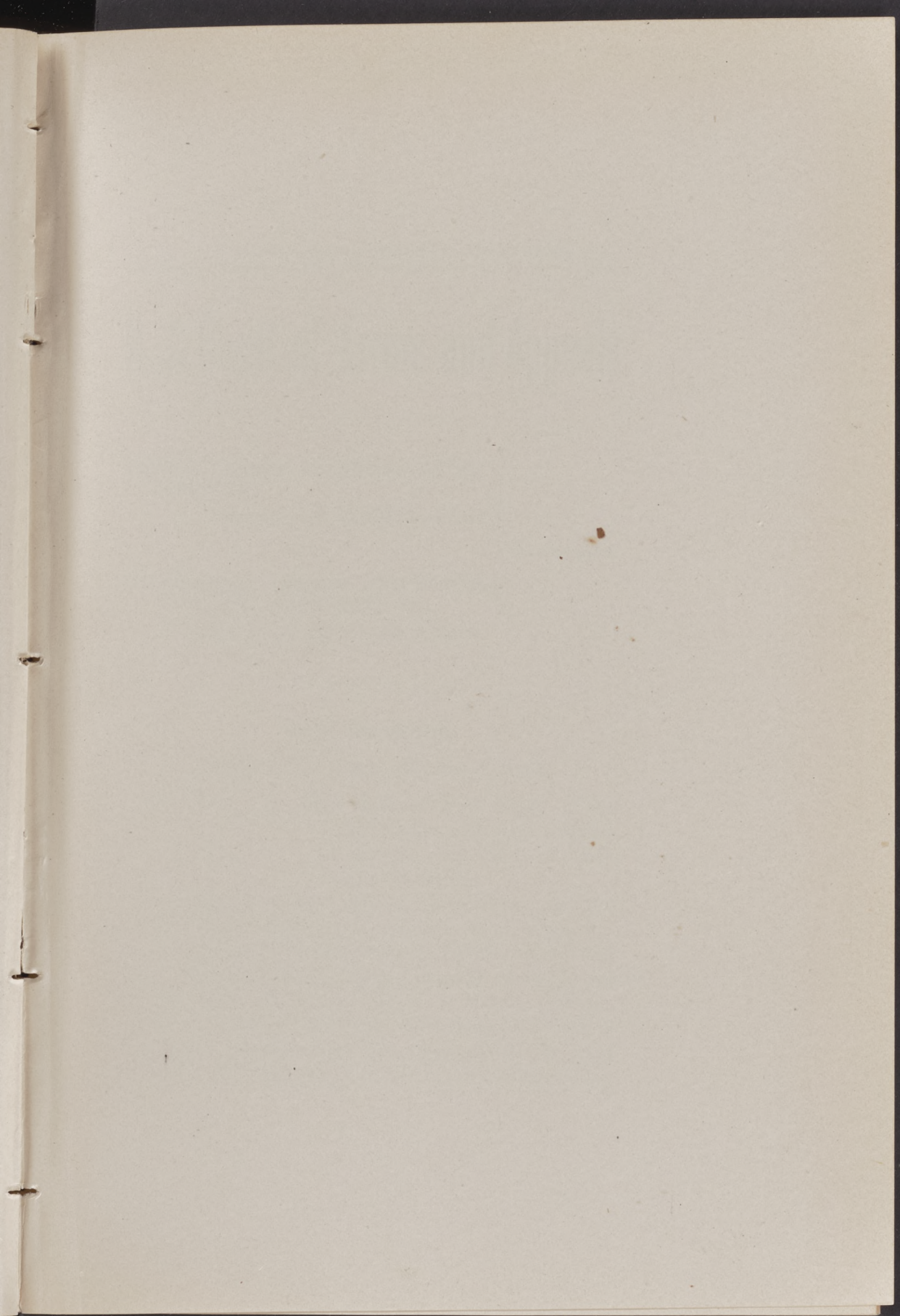
We submit that the verdict should be set aside and a new trial granted.

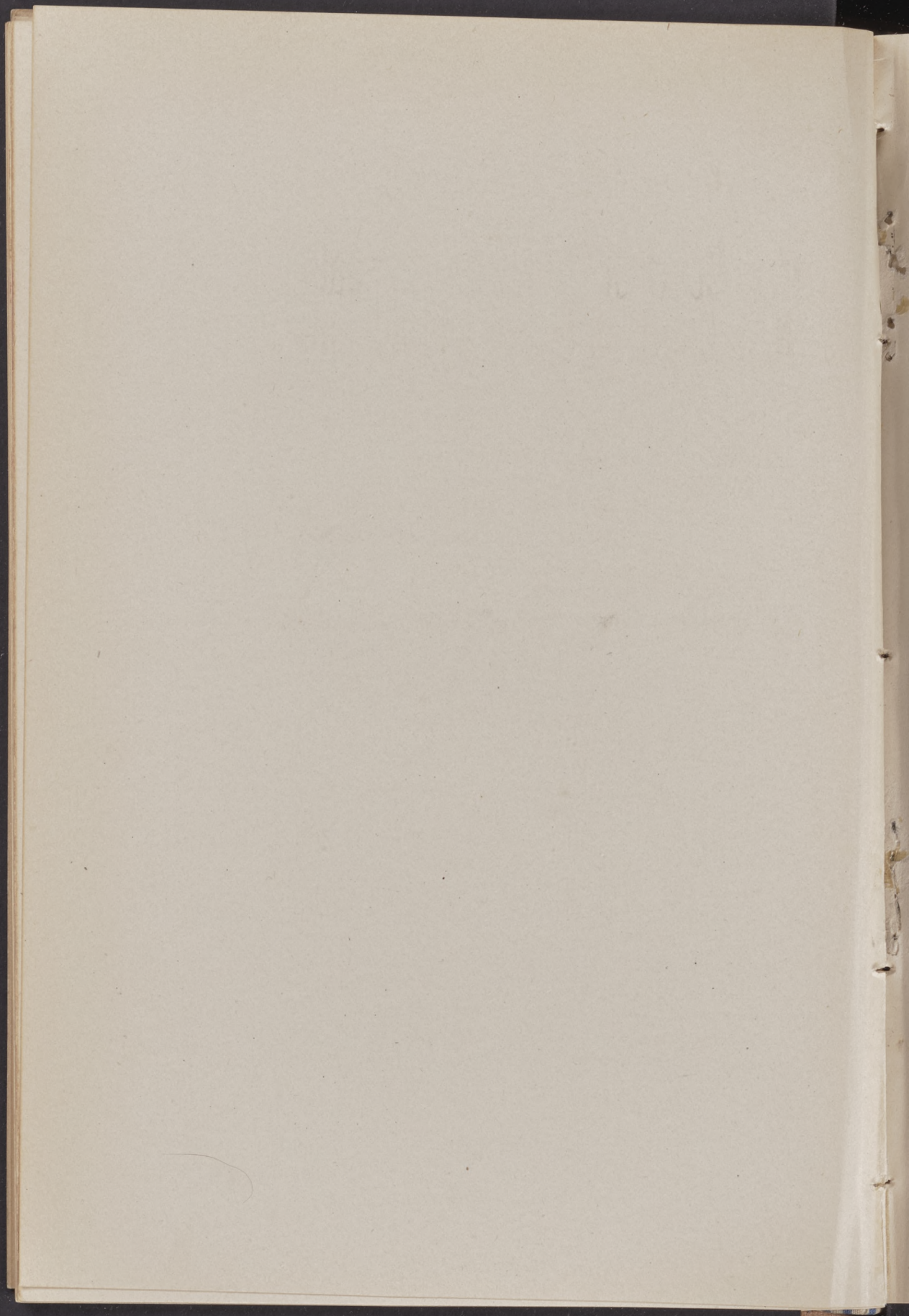
Respectfully,

JOHN M. DICKINSON,
EDWIN ROBERT WALKER,

Counsel for Plaintiff in Error.







N. J. Court of Errors and Appeals

EMPIRE RUBBER MANUFACTURING
COMPANY,

Plaintiff, and Plaintiff in Error,

v.

WILLIAM McK. MORRIS AND EDWIN
J. MORRIS, PARTNERS, &c.,

Defendants, and Defendants in Error.

On Contract.

WRIT OF ERROR.

[Returnable July 10, 1905. Filed June 26 1905.]

New Jersey, ss.—The State of New Jersey to the
Chief Justice and other Justices
[L. s.] of our Supreme Court of Judicature—Greeting:

Forasmuch as in the record and proceedings, and also
in the giving of judgment in a certain plaint, which was
in our Supreme Court of Judicature, before you, between
Empire Rubber Manufacturing Company, plaintiff, and 10
William McK. Morris and Edwin J. Morris, partners,
trading as Morris & Company, defendants, in an action
on contract, manifest error hath intervened to the great
damage of the plaintiff, as it is said; we being willing

that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the tenth day of July next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further
10 done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twentieth day of June, nineteen hundred and five.

S. D. DICKINSON,
Clerk.

J. M. DICKINSON,
Attorney.

20 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, *C. J.* [L. S.]

COPY OF JUDGMENT.

30 Mercer County, ss.—William McK. Morris and Edwin J. Morris, partners, trading as Morris & Company, the defendants in this suit, were summoned to answer unto the Empire Rubber Manufacturing Company, a body corporate, the plaintiff herein, in an action of contract,

and thereupon the said plaintiff, by Vroom, Dickinson & Scammell, its attorneys, complains for that whereas to wit, on or about the first day of October, nineteen hundred and two, at Trenton, in the County of Mercer aforesaid, the said plaintiff, at the special instance and request of the said defendants, bargained with the said defendants to buy of the said defendants, and the said defendants then and there sold to the said plaintiff a large quantity of goods, to wit, seven hundred and twenty rolls of cotton duck, at the rate or price of seventeen 10 cents a pound for each and every pound thereof, to be delivered by the said defendants to the said plaintiff on or before the first day of October, in the year nineteen hundred and three, at Trenton, in the County of Mercer aforesaid; and in consideration thereof, and that the said plaintiff at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to accept and receive the said goods, and to pay them for the same at the rate or price aforesaid, they, the said defendants, 20 undertook and then and there faithfully promised the said plaintiff to deliver the said goods to the said plaintiff as aforesaid, and although said time for the delivery of said goods as aforesaid has long since elapsed, and the said plaintiff has always been ready and willing to accept and receive the said goods, and to pay for the same at the rate or price aforesaid, to wit, at Trenton, in the County of Mercer aforesaid, and although the said plaintiff has often requested the said defendants to deliver said duck, whereof the said defendants have always had 30 notice, yet the said defendants, not regarding their said promises and undertakings, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not, nor would, within the time aforesaid, or at any time afterwards, although often requested so to do, deliver the said goods, or any part thereof for the said plaintiff, at Trenton, in the County of Mercer aforesaid, or elsewhere, except two hundred and two rolls of cotton

duck, but wholly refused and neglected so to do, whereby the said plaintiff has lost and been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to it from the delivery of the said goods to the said plaintiff as aforesaid, to wit, at Trenton, in the County of Mercer aforesaid.

And for that whereas, heretofore, to wit, on the tenth day of July, nineteen hundred and three, at Trenton, in the County of Mercer aforesaid, the said plaintiff, at
10 the special instance and request of the said defendants, bargained with the said defendants to buy of the said defendants, and the said defendants then and there sold and agreed to deliver to the said plaintiff, a large quantity of goods, to wit, six hundred and forty-six rolls of belting and hose duck, at the rate or price of seventeen cents per pound, for each and every pound thereof, at three per cent. discount, to be delivered by the said defendants to the said plaintiff on or before the first day of October then next, at Trenton, in the County of Mercer aforesaid;
20 and in consideration thereof, and that the said plaintiff, at the like special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to accept and receive the said goods and to pay them for the same at the price aforesaid, they, the said defendants, undertook and then and there faithfully promised the said plaintiff to deliver the said goods to the said plaintiff as aforesaid, and although the said time for the delivery of the said goods as aforesaid has long since elapsed, and the said
30 plaintiff has always been ready and willing to accept and receive the said goods, and to pay for the same at the rate or price aforesaid, to wit, at Trenton, in the County of Mercer aforesaid, whereof the said defendants have always had notice, yet the said defendants not regarding their said promises and undertakings, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not, nor would, within the time aforesaid, or at any time afterwards, although often

requested so to do, deliver the said goods, or any part thereof for the said plaintiff, at Trenton, in the County of Mercer aforesaid, or elsewhere, except one hundred and twenty-eight rolls of belting and hose duck, but wholly neglected and refused so to do, whereby the said plaintiff has lost and been deprived of divers great gains and profits which might and otherwise would have arisen and accrued to it from the delivery of the said goods to the said plaintiff as aforesaid, to wit, at Trenton, in the County of Mercer aforesaid. 10

And for that whereas, heretofore, to wit, on the tenth day of July, in the year nineteen hundred and three, at Trenton, in the County of Mercer aforesaid, the said plaintiff, at the special instance and request of the said defendants, bargained with the said defendants to buy of the said defendants, and the said defendants sold and then and there agreed to furnish to the said plaintiff a large quantity of goods, to wit, six hundred and forty-six rolls of belting and hose duck, at the rate or price of seventeen cents per pound for each and every pound 20 thereof, to be delivered by the said defendants to the said plaintiff, in quantities of from sixty to seventy-five rolls per month, in each and every month thereafter, until the completion of the said contract, and until the delivery of the said six hundred and forty-six rolls of belting and hose duck, as aforesaid, at Trenton, in the County of Mercer aforesaid; and in consideration thereof and that the said plaintiff, at the like special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to accept and 30 receive the said goods, and to pay them for the same at the rate or price aforesaid, they, the said defendants, undertook and then and there faithfully promised the said plaintiff to deliver the said goods to the said plaintiff as aforesaid; and although the said time and times for the delivery of the said goods as aforesaid has and have long since elapsed, and the said plaintiff has always been ready and willing to accept and receive the said goods,

and to pay for the same at the rate or price aforesaid, to wit, at Trenton, in the County of Mercer aforesaid, whereof the said defendants have always had notice, yet the said defendants, not regarding their said promises and undertakings, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not, nor would, within the time or times aforesaid, or at any time afterwards, although often requested so to do, deliver the said goods or any part thereof to the said plaintiff, at
10 Trenton, in the County of Mercer aforesaid, or elsewhere, except belting and hose duck to the amount of one hundred and twenty-eight rolls thereof, but wholly neglected and refused so to do, whereby the said plaintiff has lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to it from the delivery of the said goods to the said plaintiff as aforesaid, to wit, at Trenton, in the County of Mercer aforesaid.

And whereas, also, to wit, on the first day of October,
20 nineteen hundred and two, and at divers other times afterwards, to wit, at Trenton, in the County of Mercer aforesaid, in consideration that the plaintiff, at the instance and request of the defendants, had then and there bought of the defendants a certain large quantity, to wit, seven hundred and twenty rolls of cotton duck, at and for a certain price then and there agreed upon between them, they, the said defendants, undertook and then and there faithfully promised the said plaintiff well and truly to deliver to it the said seven hundred
30 and twenty rolls of cotton duck whenever they, the defendants, should be thereunto afterwards requested, and the said plaintiff in fact says, that although afterwards, at divers times, at Trenton, in the County of Mercer aforesaid, the said plaintiff requested the said defendants to deliver to it the said last mentioned seven hundred and twenty rolls of cotton duck, and was then and there ready and willing to pay and satisfy the defendants for the same, according to the terms of the said

sale, and although the plaintiff was then and there ready and willing and offered to accept and receive the said seven hundred and twenty rolls of duck of and from the said defendants, yet the said defendants, not regarding their last mentioned promises, did not, when they were requested as aforesaid, or at any other time, deliver to the said plaintiff the said last mentioned seven hundred and twenty rolls of duck, or any part thereof, except two hundred and two rolls of duck, but have hitherto wholly refused and still do refuse to deliver the same, whereby 10 the said plaintiff has lost and been deprived of divers great gains and profits which might and otherwise would have accrued to it from the delivery of the said goods to the said plaintiff as aforesaid, to wit, at Trenton, in the County of Mercer aforesaid.

And the said plaintiff further says that after the making of the said respective bargains and contracts with the said defendants as aforesaid, to wit, on or about the first day of October, in the year nineteen hundred and two, and on divers other days and times between that day and the commencement of this suit, it, the said plaintiff, confiding in the said promises and undertakings of the said defendants, and *expecting* their performance thereof, to wit, at Trenton, in the County of Mercer aforesaid, did make and enter into divers contracts and agreements with divers persons for the sale to them respectively of divers quantities of hose and other goods manufactured by the said plaintiff, and in the manufacture of which the said plaintiff necessarily uses cotton duck, belting and hose duck similar to that so bargained 20 for and purchased by the said plaintiff from the said defendants as aforesaid; and for want of the said cotton duck, belting and hose duck, which the said defendants ought to have delivered to the said plaintiff as aforesaid, it, the said plaintiff, was forced and obliged to purchase, and did purchase, from divers other persons than the defendants, three hundred rolls of certain other cotton duck, belting and hose duck, of much greater value, to 30

wit, of the value of three thousand nine hundred and seventy-nine dollars and twenty-five cents more than the contract price of the said cotton duck which the said defendants ought to have delivered to the said plaintiff as aforesaid; and thereby the said plaintiff hath sustained great loss, to wit, a loss amounting to the sum of ten thousand dollars, to wit, at Trenton aforesaid.

And the said plaintiff further says that after the making of the said respective bargains and contracts with
10 the said defendants as aforesaid, to wit, on or about the first day of October, nineteen hundred and two, and on divers other days and times between that day and the commencement of this suit, it, the said plaintiff, confiding in the said promises and undertakings of the said defendants, and *expecting* their performance thereof, to wit, at Trenton aforesaid, did make and enter into divers bargains and contracts with divers persons for the sale to them respectively of divers quantities of hose and other goods manufactured by the said plaintiff, and in the
20 manufacture of which the said plaintiff necessarily uses cotton duck, belting and hose duck similar to that so bargained for and purchased by the said plaintiff from the said defendants as aforesaid; and for want of the said cotton duck, belting and hose duck, which the said defendants ought to have delivered to the said plaintiff as aforesaid, and in order to perform the said divers bargains and agreements made by the said plaintiff with said divers persons, as aforesaid, it, the said plaintiff, was forced and obliged to contract and agree to purchase
30 from divers other persons than the defendants two hundred and eighteen rolls of certain other cotton duck, belting and hose duck, of much greater value, to wit, of the value of two thousand eight hundred and eighty-five dollars and thirty-six cents more than the contract price of the said cotton duck which the said defendants ought to have delivered to the said plaintiff as aforesaid; and thereby the plaintiff hath sustained great loss, to wit, a

loss amounting to the sum of ten thousand dollars, to wit, at Trenton aforesaid.

And whereas, also, the said defendants, heretofore, to wit, on the thirtieth day of September, nineteen hundred and two, to wit, at the City of Trenton, in the County of Mercer aforesaid, became and were indebted to the plaintiff in the sum of ten thousand dollars, for goods sold and delivered by the plaintiff to the defendants at their request; and in the like sum for work done and materials furnished by the plaintiff for the defendants at their request; and in like sum for money loaned by the plaintiff to the defendants at their request; and in like sum for money paid by the plaintiff for the use of the defendants at their request; and in the like sum for money received by the defendants for the use of the plaintiff; and in like sum for interest for the forbearance by the plaintiff at the defendants' request of money due and owing from the defendants to the plaintiff; and in the like sum for so much money then and there found to be due from the defendants to the plaintiff on an account stated between them; and being so indebted, the defendants in consideration thereof, then and there promised to pay the plaintiff the said several sums of money on request from it; yet the said defendants, although often requested so to do, have not paid the several sums of money, or any of them, or any part thereof, but to do so has hitherto wholly refused and still refuses, to the damage of the plaintiff ten thousand dollars, and therefore it brings its suit, &c.

And the said defendants, by R. S. Woodruff, their attorney, come and defend the wrong and injury, when, &c., and saith that they did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them, and of this they put themselves upon the country, &c.

And for a further plea in this behalf the said defendants, by leave of the court here for this purpose, first had and obtained, according to the form of the statute in

such case made and provided, say that the said plaintiff ought not to have or maintain its aforesaid action thereof against them, because they say, that on or about the twenty-eighth day of June, A. D. nineteen hundred and three, the said contract or agreement alleged to have been made between the plaintiff and the defendants on the said first day of October, nineteen hundred and two, as set forth in said declaration, was rescinded by mutual consent of both plaintiff and defendants, and the same was
10 for nothing holden; and this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain its aforesaid action against them, &c.

And for a further plea in this behalf as to the second count in the said plaintiff's declaration, the said defendants by like leave say, that on or about the tenth day of July, nineteen hundred and three, said defendants entered into a certain contract or agreement with the said plaintiff, that they, the said defendants, would deliver
20 to the said plaintiff six hundred and forty-six rolls of belting and hose duck, at seventeen cents per pound, to be paid for in cash, in ten days, less a discount of three per centum, the same to be delivered at the rate of thirty or forty rolls during the months of July and August in said last mentioned year, and at the rate of sixty rolls per month during each and every month, commencing on the first day of September, in the said year nineteen hundred and three, until the entire six hundred and forty-six rolls should be delivered, and that the said
30 plaintiff should send to the said defendants specifications for such sixty rolls per month as near the first of the month as possible, in each and every month; and the said plaintiff agreed to take said six hundred and forty-six rolls of belting and hose duck at the prices above set forth, to wit, seventeen cents per pound, and to pay for the same in cash, within ten days after such delivery, less a discount of three per centum. And the said plaintiff, not regarding its said promises and undertakings, contriving

and intending to deceive and defraud the said defendants in this behalf, did not call for and accept said goods in the manner agreed upon, but entirely ignored and disregarded the terms of said agreement.

And the said defendants say that during the months of June, July, August, September, October, November and December, they delivered to said plaintiff, at divers times, upon the order of the said plaintiff, certain rolls of duck as a part fulfillment of said contract; and the said plaintiff wholly refused and neglected to pay for 10 the same in the manner and time in which it had agreed with these defendants, and that the said plaintiff, some time in the month of November, gave to these defendants in payment for the duck so delivered, a certain check or draft, drawn by the plaintiff to the order of these defendants, upon the Mechanics National Bank, of the City of Trenton, for the sum of six hundred and thirty-seven dollars and thirty cents, which check was dishonored by said bank, and the said defendants were greatly annoyed and harassed thereby, and by the failure of 20 the said plaintiff at all times to pay for the materials and merchandise delivered to the said plaintiff, under and by the terms of said agreement; and at divers times between the tenth day of July, nineteen hundred and three, and the thirtieth day of December, in the same year, the defendants gave notice to the plaintiff that they would not deliver the goods to the said plaintiff on account of said contract, unless the said plaintiff would comply with the terms of the said agreement, and pay for such goods in ten days, less the discount of three per centum 30 above referred to; but these defendants say that the said plaintiff wholly failed and refused to perform its part of said agreement, and defaulted in every instance, upon the delivery of the goods and merchandise, in the payment for the same within the time prescribed by the terms and provisions of said agreement, and this the said defendants are ready to verify, wherefore they pray

judgment if the said plaintiff ought to have or maintain its aforesaid action against them, &c.

And the plaintiff, as to the plea of the defendants firstly above pleaded, whereof they have put themselves upon the country, does the like.

And as to the plea of the said defendants by them secondly above pleaded, as to the rescinding of the contract made between the said plaintiff and the said defendants by mutual consent, the said plaintiff says
10 that by reason of anything by the defendants in that plea alleged it ought not to be barred from having or maintaining its aforesaid action against them, because it says that the said contract or agreement alleged to have been made between the plaintiff and the defendants, on or about the first day of October, nineteen hundred and two, as set forth in plaintiff's declaration, was not rescinded by mutual consent by both plaintiff and defendants on the twenty-eighth day of June, nineteen hundred and three, or at any other time, in manner and form as said
20 defendants have above in said second plea in that behalf alleged, and this the said plaintiff prays may be inquired of by the country, &c.

And the said defendants do the like.

And as to the plea of the said defendants by them thirdly above pleaded, as to the contract entered into between the said plaintiff and the said defendants, on or about the tenth day of July, nineteen hundred and three, for the delivery of six hundred and forty-six rolls of belting and hose duck, at seventeen cents a pound, to be
30 delivered at the rate of a certain number of rolls of duck each month, the said plaintiff says that by reason of anything by the said defendants in that plea alleged, it ought not to be barred from having or maintaining its aforesaid action against them, because it says that the said plaintiff did not agree to take six hundred and forty-six rolls of belting and hose duck, to be paid for in cash, in ten days, less a discount of three per cent., to be delivered at the rate of thirty or forty rolls during the

months of July and August in said last mentioned year, and to be delivered at the rate of sixty rolls per month commencing on the first day of September, in the year nineteen hundred and three, until the said six hundred and forty-six rolls should be delivered, and as to the refusal and neglect of the said plaintiff to pay for said duck in the manner and time agreed upon, and as to the delivery by the said plaintiff to the said defendants of a certain check or draft, and as to the failure of the said plaintiff to perform its part of said agreement upon the 10 delivery of said goods, and in respect to the payment for the same, the said plaintiff says that by reason of anything by the said defendants in that plea alleged, it ought not to be barred from having or maintaining its aforesaid action against them, because it says that it did not neglect or refuse to pay for said duck in the manner and time agreed upon, that it did not deliver to the said defendants a check or draft which was dishonored, but that the said draft was duly paid and that the said plaintiff has not wholly failed and refused to perform its part of said 20 agreement, and has not defaulted in every or any instance in the payment for said goods upon the delivery of the same, within the terms and provisions of said contract, and this the said plaintiff prays may be inquired of by the country, &c.

And the said defendants do the like.

Therefore, let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Trenton, in the County of Mercer, on the second 30 Tuesday of May, in the year of our Lord one thousand nine hundred and five, by whom, &c., and the same day is given to the parties aforesaid there, &c.

And now at this day, to wit, the sixth day of June, A. D. nineteen hundred and five, before our said Supreme Court at Trenton, comes the said plaintiff, by its attorneys aforesaid, and the Justice before whom, &c., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court, holden at Trenton, in and for the County of Mercer, before Alfred Reed, Esquire, one of the Justices of the Supreme Court, on the twenty-ninth day of May, nineteen hundred and five, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendants, by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid, in the plea aforesaid, being a struck jury, by
10 an order of the said Justice trying the cause, on the application of defendants, according to the form of the statute in such case made and provided, being also summoned, come, who to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths, that the defendants did undertake and promise in manner and form as the said plaintiff hath in its said declaration alleged; and they assess the damages of the said plaintiff by reason of the not performing said promises and undertakings over and above the costs and
20 charges by it about its suit in this behalf expended, at the sum of two hundred seventeen dollars and eleven cents.

Therefore, it is considered that the said plaintiff do recover against the said defendants its said damages by the jury in form aforesaid found to be two hundred seventeen dollars and eleven cents, and also for its costs and charges aforesaid, by the Court now here adjudged to the said plaintiff and with its assent, which said damages, costs and charges in the whole amount to

Judgment signed the sixth day of June, A. D. nineteen
30 hundred and five.

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

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

In testimony whereof I have set my hand and the seal of said Court, at Trenton, this twenty-first day of June, A. D. nineteen hundred and five.

WM. RIKER, JR.,
Clerk.

TESTIMONY.

[Filed July 28, 1905.]

Stenographer's transcript of testimony, taken on the trial of the above stated cause, at Trenton, May 29th, 10 June 1st and 2d, 1905, before His Honor, Alfred Reed, Justice of the Supreme Court, and a jury.

Appearances—

Edwin B. Walker, Esq., and John M. Dickinson (Vroom, Dickinson & Scammell), for plaintiff.

Robert S. Woodruff, Esq., and John H. Backes, Esq., for defendant.

PLAINTIFF'S CASE.

Mr. Walker—I presume it will be admitted that the defendants are partners, trading as Morris & Company? 20

Mr. Backes—Yes.

Mr. Walker—Will you kindly produce letter from the Empire Rubber Manufacturing Company, dated June 22d, 1903?

[Mr. Backes produces a letter.]

Mr. Walker—Letter from the Empire Rubber Manufacturing Company to Morris & Company, dated June 22d, 1903, is produced and offered in evidence.

Mr. Backes—We object to it at this juncture of the

case, because it does not appear that this letter has any relevancy to the issue.

Mr. Walker—Read in the light of the opening, it manifestly has bearing upon the matter in issue.

The Court—I will admit it, subject to exception.

[Letter is marked *Exhibit P-1*.]

[Letter read to jury.]

Harvey R. Nason, sworn as a witness on the part of the plaintiff, testifies as follows:

10 Direct examination.

By Mr. Walker.

Q. Where do you reside?

A. Trenton.

Q. Are you connected with the Empire Rubber Manufacturing Company?

A. I am.

Q. And have been for how long?

A. The last eight years.

Q. Do you know William H. Skirm, Jr.?

20 A. I do.

Q. Was he an officer of that company at one time?

A. Secretary.

Q. Up to what time?

A. Until May, 1903.

Q. What is your position with the Rubber Company?

A. Why, I am purchasing agent.

Q. How long have you been purchasing agent?

A. Since June, 1903.

30 Q. I show you *Exhibit P-1*, and ask you if you have ever seen that communication?

A. I have.

Q. What are these letters "per H. R. N."?

A. That is my initials; I dictated the letter.

Q. I quote from the letter: "I beg leave to confirm conversation had with you over the telephone by our Mr. Nason." Did you have any telephonic communication

with the defendants just before the writing of that letter?

A. I did.

Q. When?

A. The same day that letter was written.

Q. Tell us what you did.

A. I called Morris & Company, and——

Q. (Interrupting.) Whom did you ask for?

A. I asked for Mr. Morris.

Q. Do you know Mr. Morris? 10

A. Yes, sir.

Q. Which Mr. Morris do you refer to?

A. Mr. William Morris, his name is.

By the Court.

Q. Did you ask for William Morris?

A. I asked for Mr. Morris.

By Mr. Walker.

Q. (Pointing to one of the defendants.) Is that the Mr. Morris that you refer to?

A. No, sir. 20

Q. Do you know Edwin Morris personally?

A. Yes, sir.

Q. Do you know his voice?

A. Yes, sir.

Q. Did you have a talk over the telephone with him?

A. I did.

Q. Did you recognize the voice of the person speaking with you?

A. I took the voice for Mr. Morris' voice.

Q. Which Mr. Morris? 30

A. Mr. William Morris.

Q. William or Edwin, the man you know?

A. The man I know.

Q. Edwin Morris?

A. Edwin Morris.

Q. What conversation did you have with him over the phone?

Mr. Backes—I object, on the ground that he has not

identified Mr. Morris. He says he took it to be Mr. Morris' voice.

By the Court.

Q. Do you know Mr. Morris' voice; have you talked with him over the telephone before?

A. Several times.

Q. Had you conversed with him personally before?

A. Frequently.

Q. Do you say it was or was not his voice on the
10 telephone that day?

A. It was his voice.

By Mr. Walker.

Q. What was the conversation?

A. I requested of Mr. Morris a duplicate memorandum of the contract, as we had mislaid ours.

Q. What contract?

A. The contract for duck.

Q. What did he say?

A. He informed me that it was a verbal contract
20 between him and Mr. Skirm.

Q. What else did he say?

A. And for that reason he could not give me a written copy of it.

Q. Did you have any conversation with him about deliveries; did you say anything to him about deliveries?

Mr. Backes—I object to that at this stage.

The Court—Let him give us the conversation.

By the Court.

Q. Give us the conversation.

30 A. He stated to me that the contract was a verbal contract between him and Mr. Skirm to furnish us with our requirements of duck.

By Mr. Walker.

Q. What else? What did you say to him? Tell us all.

A. Well, I said we would like to have the memorandum for our files, so we would have the thing on record.

Q. What did he say to that? Now, did you have any other conversation?

A. Well, not at this time, no.

Q. Is that all the conversation at that time?

A. At that time, as I recollect it.

Q. Was anything said at that time about the quantity of duck contracted for?

The Court—I understood he said that was all that was said at that time.

Mr. Walker—I think I am entitled now to ask a leading question.

By the Court.

10

Q. Did you have other conversation with him?

A. From time to time; yes, sir.

By Mr. Walker.

Q. Go back of this conversation and tell us when last before that, as near as you can remember, you had a conversation over the 'phone with Morris about duck, and what that conversation was.

A. Mr. Morris called us frequently on the 'phone and asked us for requisitions——

Q. (Interrupting.) He asked you for what? 20

A. For orders, which we gave him from time to time as we required duck.

Q. When last before this conversation of June 22d, 1903, did you have a conversation with him about duck and the deliveries, and what was said?

A. Well, I could not recollect exactly the dates.

Q. You don't have to recollect the exact dates; how soon before that time, as near as you can remember, did you have a conversation with him?

A. Probably two or three weeks.

30

Q. What was that conversation; what did he say to you, and what did you say to him?

A. The conversation prior to that time was simply regarding to deliveries of duck.

Q. What were those conversations; tell us something that was said.

A. For instance, we had requisitions for a certain number of rolls of duck with Morris——

Q. (Interrupting.) What was that?

A. I said we placed orders with Morris——

Mr. Backes—I move to strike that out.

Mr. Walker—Well, strike it out.

Cross-examination.

By Mr. Backes.

Q. How frequently did Mr. Morris ring you up and ask you for requisitions for duck prior to the 23d of June, 1903?

10 A. Well, I recollect a number of times.

Q. You were only in your department as purchasing agent during that month of June, were you not?

A. The month of June?

Q. You say you went there during the month of June, 1903?

A. That is when I took this position.

Q. Where were you before that—in what department were you before?

A. I was employed in the office.

20 Q. In the office; would you know of the purchases that had been made; did you have knowledge of them?

A. Yes, sir.

Q. During the month of June, how often did Mr. Morris ring you up—I mean prior to the 23d—and ask you for requisitions for duck?

A. I should say at least two or three times.

Q. And during the month of May how many times?

A. I don't recollect talking with him any then.

30 Q. During the month of June, when he rang you up two or three times, you say, you informed him on each occasion that you needed no duck because you had a plentiful supply?

A. I recollect stating to him upon one occasion that we had duck sufficient for our present needs.

Q. Was that true?

A. It certainly was.

Q. To your knowledge, from October, 1902, to Oc-

tober, 1903, the Empire Rubber Manufacturing Company had ordered only seventy-four rolls?

A. The records show—I think that is the number—yes.

Q. And did you order all of these?

A. No, I did not.

Q. And during that year you used more than seventy-four rolls, didn't you?

Mr. Walker—I object, as irrelevant and as not being cross-examination.

Mr. Backes—We have shown that— 10

The Court—(interrupting.) The question is how far you can go in cross-examining this witness. He spoke of requisitions and you can cross-examine him with reference to that.

Q. Was that all you used during that period of time, from October, 1902, to June, 1903?

A. I would say not, because it is customary—

Q. (Interrupting.) Wait; you have answered; when you said to Mr. Morris on the 22d of June that you desired a duplicate copy of the contract; that you had mislaid yours, or that your company had mislaid its copy; that was not true? 20

A. Our memorandum, I believe I said.

Q. Had you any memorandum at all?

A. We had a memorandum.

Q. Had you ever seen it?

A. Yes, sir.

Q. Memorandum made by whom?

A. By Mr. Skirm.

Q. Do you remember what date that bore? 30

A. I do not.

Q. When was it that you saw this memorandum with reference to the 23d of June, 1903?

A. I saw it in June.

Q. When did you see it after that?

A. The memorandum was misplaced—mislaid.

Q. When did you, if you did, see it after that; when did you see it again?

A. I could not find it.

Q. Have you been able to find it since?

A. No, sir.

By Mr. Walker.

Q. During this time between October, 1902, and June, 1903, did you have any duck on hand in your storeroom gotten from others except Morris?

A. We had a large stock of duck on hand at the time the contract was made.

10 By Mr. Baekes.

Q. As a fact, between October, 1902, and June, 1903, was not the Empire Rubber Manufacturing Company supplied with duck from the supply which the Crescent Belting and Packing Company had on hand?

Mr. Walker—I object to that as not being cross-examination.

The Court—That is on the same lines as the direct examination.

A. There was some exchange of duck, but I cannot say
20 that we got our supply from the Crescent.

Q. During that time did the Empire deliver any duck to the Crescent; you said there was an exchange?

A. That I cannot say.

Q. Why did you say that there was an exchange if the Empire delivered none to the Crescent?

A. I said there undoubtedly was an exchange.

Q. Don't you know, as a fact, that between October, 1902, and June, 1903, the greater portion of the supply of duck of the Empire Company was procured by the
30 Empire Company from the Crescent Belting and Packing Company?

A. I do not.

Q. Would your books show what quantity you obtained from the Crescent Belting and Packing Company?

A. Undoubtedly; yes.

Q. And are you in charge of those books?

A. I am not the bookkeeper.

Q. Does the bookkeeper get the information from you?

A. He makes his entries from the invoices.

Q. As purchasing agent, do these invoices come under your supervision?

A. Well, they would not at that time, because I was not in that position.

Q. That is all.

Mr. Walker—A letter from the defendants to the plaintiff, dated June 24th, 1903, is offered in evidence.

[Marked *P-2*.]

[Letter is read to jury.]

10

Mr. Walker—Will the defendants please produce our letter of June 25th, 1903, to the defendants?

[Mr. Backes produces letter.]

Mr. Walker—The defendants produce the plaintiff's letter to them under date of June 25th, 1903, and it is offered in evidence.

[Letter is read to jury, and marked *P-3*.]

Mr. Walker—I offer the defendants' letter to the plaintiff, dated June 26th.

[Letter is read to jury, and marked *P-4*.]

20

Mr. Walker—Plaintiff's letter to the defendants is produced on call, and is offered in evidence.

[Letter is read to jury, and marked *P-5*.]

Mr. Walker—Letter from the defendants to the plaintiff is offered in evidence, dated July 10th, 1903.

[Letter is read to jury, and marked *P-6*.]

Mr. Walker—Plaintiff calls upon defendants for the production of the plaintiff's letter of July 13th, 1903, to the defendants. The defendants say that they cannot find the letter, and agree that the plaintiff's letter-press copy of the same be used in evidence.

[The copy is offered. Letter read to jury, and marked *P-7*.]

Mr. Walker—The defendants upon call produce the plaintiff's letter to them of September 21st, 1903, and it is offered in evidence.

[Letter is read to jury, and marked *P-8a*.]

Mr. Walker—The orders of September 21st referred to in the letter of September 21st are offered in evidence.
[Marked *P-8b.*]

Mr. Walker—Letter from the plaintiff to the defendants produced on call and offered in evidence.

[Letter is read to jury, and marked *P-9a.*]

Mr. Walker—The requisitions referred to in letter are offered in evidence.

[Marked *P-9b.*]

10 Mr. Walker—Upon call of the plaintiff the defendants produce plaintiff's letter of July 6th, 1903.

[Letter is read to jury, and marked *P-10a.*]

Mr. Walker—It is consented that letter-press copy of order referred to in letter be used, and same is offered in evidence.

[Marked *P-10b.*]

Mr. Walker—Letter from the plaintiff to the defendants is produced on call, dated October 17th, 1903, and is offered in evidence.

20 [Letter is read, and marked *P-11.*]

Mr. Walker—We call upon defendants for our letter of November 19th, 1903.

[Plaintiff's letter to defendants, dated November 19th, 1903, is produced on call, and is offered in evidence. Letter is read, and marked *P-12.*]

Mr. Walker—Letter to defendants of November 23d, 1903, is produced on call, and offered in evidence.

[Letter is read, and Marked *P-13a.*]

30 Mr. Walker—The requisitions accompanying that letter are offered in evidence. It is admitted that this paper is a letter-press copy of the requisitions.

[Marked *P-13b.*]

Mr. Walker—Plaintiff's letter to defendants, dated December 1st, 1903, is produced on call, and is offered in evidence.

[Letter is read, and marked *P-14.*]

Mr. Walker—Plaintiff's letter to defendants, of De-

cember 16th, 1903, produced on call, and offered in evidence.

[Letter is read, and marked P-15.]

Mr. Walker—Plaintiff's letter to defendants, of January 18th, 1903, produced on call, and offered in evidence.

[Letter is read, and marked P-16.]

The Court—1903?

Mr. Walker—It is agreed that it is 1904 although it bears date 1903. It is one of those errors we make in the beginning of the year. 10

[Plaintiff's letter to defendants, of December 19th, 1903, is produced on call, and offered in evidence. Letter is read, and marked P-17.]

Mr. Walker—Plaintiff's letter to defendants, dated December 31st, 1903, is produced on call, and offered in evidence.

[Letter is read, and marked P-18.]

Mr. Walker—Plaintiff's letter to defendants, dated January 11th, 1904, is produced on call, and offered in evidence. 20

[Letter is read, and marked P-19.]

Mr. Walker—Plaintiff's letter to defendants, dated February 11th, 1904, is produced on call, and offered in evidence.

[Letter is read, and marked P-20.]

Harvey R. Nason, recalled.

Further direct examination.

By Mr. Dickinson.

Q. Subsequent to February 11th, 1904, did you purchase duck from J. H. Lane & Co., of New York? 30

A. We did.

Q. How much did you purchase?

A. The first order was two hundred and twenty-one rolls.

Q. Did you on the 11th of February, or thereabouts, purchase from Lane & Co. duck to take the place of this duck which you failed to get from Morris & Co.?

Mr. Backes—I object to the leading character of the question and the impression which the question seems to convey, not being supported by evidence already in the case.

[Question allowed.]

Counsel for the defendants pray an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

10

A. We purchased from Lane, as I recollect it, two hundred and twenty-one rolls.

Q. I show you an invoice from J. H. Lane & Co., and ask you whether that is the invoice for duck purchased from them on February 9th?

Mr. Woodruff—Let us see that. I object to that. I think there is better proof than that to be had.

The Court—I suppose it is part of the *res gestæ* so far as the purchase goes, but it would not be proof that that
20 was the market price of duck.

Q. I ask you if that is an invoice you received from J. H. Lane & Co. for the duck purchased?

A. That is an acceptance of our order for duck; that is a copy of the order.

Mr. Woodruff—I still object to that paper.

Mr. Dickinson—I ask that it be marked as an exhibit.

Mr. Woodruff—I object.

The Court—It may be marked.

Mr. Woodruff—I pray an exception.

30 Exception allowed and sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

[Exhibit marked P-21.]

Q. At what price per pound did you purchase this duck from J. H. Lane & Co.?

A. Two hundred and twenty-one rolls at twenty-four cents a pound.

Q. Do you know the market price of duck at the time of that purchase from Lane & Co.?

A. I do.

Q. Was twenty-four cents per pound the market price of duck at the time of that purchase?

Mr. Backes—I object.

Q. What was the market price?

Mr. Backes—I object. The witness is not qualified to 10 testify as to the market price.

The Court—No; he does not know.

Q. Do you keep in communication and touch with the market price of duck?

A. I do.

Q. Do you, from time to time, see quotations of the market price of duck?

A. I do.

Q. Did you about this time—

Mr. Woodruff—I will have to interpose an objection at 20 this point, which I think is material. In the bill of particulars served on us there is not a single statement of any duck purchased prior to February 11th, and then eight rolls. Now, I don't know what possible connection that may have. This is entirely a surprise to us.

Mr. Walker—The declaration is general. You did not ask for a bill of particulars. The copies of the invoices are annexed to the declaration. If you will take your invoices and compare them with our invoices, you will see that they are the same.

30

The Court—I don't see anything in the papers that affects this.

Q. Did you know at the time of the purchase from Lane & Co. what the market price of duck was?

A. I did.

Q. What was it?

Mr. Backes—I object. The witness cannot qualify himself by saying that he is qualified.

Mr. Dickinson—He says that he kept in touch with the quotations, and that he is purchasing agent of the plaintiff.

The Court—Can a man by reading the newspaper quotations qualify himself as an expert on those quotations? If you want it I will let it in.

Counsel for the defendants pray an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

10

ALFRED REED, [L. S.]
Justice Supreme Court.

Q. What was the market price of duck at that time?

A. We were quoted twenty-five cents a pound.

Mr. Backes—I object to that, and ask that that be stricken out.

The Court—Yes, I will strike that out. Any man can come into court and swear to that.

Q. What was the market price of duck at that time?

A. Twenty-five cents a pound.

20 Q. I show you an invoice dated February 11th, 1904, which reads "Sold Morris & Co. 18 rolls of duck," and the charge therefor is \$192.09, and I ask you if that is a copy of an invoice sent to Morris & Co.

Mr. Backes—I object. The question is leading. They have no right to put a paper in his hands and ask him if that is a copy of a paper sent to the defendants.

Mr. Dickinson—I call upon the defendants to produce invoice sent them, which is dated February 11th, 1904, and the other invoices.

30 [Mr. Backes produces papers.]

Mr. Dickinson—The defendants produce, upon call, the invoices sent by the plaintiff to the defendants on the following dates: February 11th, 1904, amounting to \$192.09; February 12th, 1904, amounting to \$27.77; February 13th, 1904, amounting to \$192.21; February 15th, 1904, amounting to—

Mr. Backes—I object.

The Court—It is simply the fact that the plaintiff presented a bill to the defendants.

Mr. Walker—It is evidence in the case to show the amount we claim, as being the difference between the market price and the price they named us in the contract. It shows that we put them in possession of the figures upon which we base our claim. It is not conclusive upon them at any time.

The Court—I will let it go in. 10

Counsel for the defendants pray an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

Mr. Dickinson—(continuing list of invoices.) February 15th, 1904, amounting to \$169.89; February 18th, 1904, amounting to \$193.93; February 29th, 1904, amounting to \$38.30; February 29th, 1904, amounting to \$108.14; February 29th, 1904, amounting to \$276.86; 20 March 4th, 1904, amounting to \$449.77; March 5th, 1904, amounting to \$63.89; March 10th, 1904, amounting to \$129.28; March 31st, 1904, amounting to \$2,064.51; March 31st, 1904, amounting to \$172.62; March 31st, 1904, amounting to \$2,885.36. I offer these in evidence.

Mr. Backes—I object.

The Court—What is the purpose?

Mr. Dickinson—To show the charges that the Empire Rubber Manufacturing Company made against Morris & Co. for the difference of price which they were obliged to pay for the duck which they bought, being the duck which Morris & Co. failed to supply according to the contract—to show the difference of price which the plaintiff was obliged to pay.

Mr. Walker—They are offered also for the purpose of showing the quantity.

The Court—For the purposes for which you offer them they are inadmissible.

Mr. Walker—I offer these invoices for the purpose of showing the amount of duck bought by the plaintiff on the open market by reason of the refusal and neglect of the defendants to supply duck under the contract, and incidentally the price at which the duck was bought in the market and the difference due from the defendants to the plaintiff by reason of the plaintiff being compelled
10 to pay a greater price.

The Court—I overrule them. That was not the ground upon which you offered them in the first place. You offered them upon the ground that they are the claim sent to the defendants and retained by the defendants.

Mr. Walker—Well, we offer them upon that ground.

The Court—They are admissible upon that ground I think.

Mr. Backes—I ask leave to strike them out unless they are supported by evidence hereafter.

20 The Court—You may make that motion.

Mr. Backes—Your Honor will grant us an exception to your last ruling?

The Court—Yes.

ALFRED REED, [L. S.]
Justice Supreme Court.

[Package of papers offered in evidence are marked P-22.]

Q. Did you on the 16th day of February, 1904, purchase duck from Catlin & Co.?

30 A. I did.

Q. How much?

A. Seventy-nine rolls.

Q. At what price per pound was this duck purchased?

Mr. Backes—I object to that. That was not the measure of damage, if there was any damage here.

The Court—If it is supplemented by proof that that was the market price, it may be.

Q. At what price was the duck purchased?

A. Twenty-three cents a pound.

Q. Do you know what the market price of duck was at the time of that purchase?

A. I do.

Q. What was it?

A. Twenty-four cents a pound.

Q. (Showing witness.) I ask you whether this is an acceptance of your order for the seventy-nine rolls of duck by Catlin & Company? 10

Mr. Backes—I object.

The Court—Overrule it.

Q. I show you paper dated February 16th, 1904, and ask you whether that is an acceptance of the order of duck by Catlin & Company?

A. Yes.

Mr. Dickinson—I offer this in evidence.

[Paper is marked *Exhibit P-23*.]

[Argument on the pleadings, market price and deliveries of duck, after which the following ruling was 20 made:]

The Court—You can prove what the market value was at the time that you allege that the last delivery was due.

Q. Did the Empire Rubber Manufacturing Company on or about the month of February, 1903, make a contract with Lane & Company to purchase two hundred and eighteen rolls of cotton duck?

Mr. Backes—I object to the form of the question as leading.

The Court—If it is in writing it is admissible to show 30 that such a contract is in existence.

Mr. Backes—Is it in writing?

Mr. Dickinson—We have an acceptance here.

Q. I show you a letter dated March 28th, 1904, signed J. H. Lane & Co. and ask you what that is?

Mr. Backes—I object.

Q. I ask you if you received such a letter?

A. I did; it is addressed to me.

Mr. Backes—I ask that the answer be stricken out.
The question is, did he receive it?

Q. Did you receive such a letter?

A. I did.

Q. Was this in answer to a letter written by you to Lane & Co.?

A. It was.

Q. In reply to what was this an answer?

Mr. Backes—I object.

10 By the Court.

Q. Is it in answer to your letter?

A. It is in answer to a letter of mine.

Q. Where is that letter?

A. That letter is in the correspondence.

By Mr. Woodruff.

Q. The original letter that you sent to Lane & Co.?

A. No.

By Mr. Dickinson.

Q. To what was this letter an answer?

20 Mr. Backes—I object.

The Court—He says it was in answer to a letter sent to Lane & Co.

[Letter is marked for identification P-24, dated March 28th, 1904, addressed by J. H. Lane & Co. to Empire Rubber Manufacturing Company.]

Q. Do you know the market price of duck on March 28th, 1904, the date when that letter was written?

A. I do.

Q. What was the market price of duck?

30 A. Twenty-five cents.

Q. On or about March 28th, 1904, did you receive a quotation of duck from J. H. Lane & Co.?

A. I did.

Q. What was that quotation?

Mr. Backes—I object.

Mr. Dickinson—We want to show that we made a contract to purchase from Lane & Co. at that time two hundred and eighteen rolls of duck at a certain figure—

twenty-four cents a pound I think it was. This is the contract referred to in the declaration.

The Court—That contract was embodied in two letters, I understand; one to them and one from them.

Mr. Dickinson—It is also within the knowledge of the witness.

The Court—If you are going to show a contract resulting from letters, you have got to have the letters here or account for their absence.

Q. Is the information you received contained in the 10 letter marked for identification?

Mr. Backes—I object.

The Court—Overrule it.

Q. Do you know the house of J. H. Lane & Co.?

A. I do.

Q. And what they deal in?

A. Yes.

Q. What do they deal in?

A. They deal in cotton ducks.

Q. Are they large dealers?

20

A. They are.

Q. Do you know whether they sell much duck?

A. Yes.

Q. Would Lane & Company, in the course of their business, know the market price of duck?

Mr. Backes—I object.

The Court—Overruled.

Mr. Dickinson—I think, if your Honor please, that if the witness got from Lane & Company quotations on duck, which are contained in this letter which has been 30 marked for identification, he may state it.

The Court—For what purpose?

Mr. Dickinson—To show the market price of duck.

The Court—Overrule it.

Counsel for the plaintiff pray an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

Cross-examination.

By Mr. Woodruff.

Q. I hand you a paper, being answers to interrogatories served upon the plaintiff, and ask you if that is
10 your signature?

A. That is.

[Paper marked for identification.]

Q. Do you know Mr. Cornell's signature?

A. Yes, sir.

[Mr. Cornell's signature is admitted.]

[Answers to the first interrogatories served upon the plaintiff marked for identification.]

Further direct examination.

By Mr. Dickinson.

20 Q. You said that you bought a certain number of rolls of duck from Catlin & Company; did you receive bills for that from Catlin & Company?

A. We did.

Q. I show you a paper dated January 30th, 1904, addressed to the Empire Rubber Manufacturing Company, and ask you if that is one of the bills received from Catlin & Company?

A. That is.

Q. For how many rolls of duck is that a bill?

30 A. That is for eighteen rolls of duck—nine rolls of sixteen, five rolls of twenty-four, and four rolls of twenty-eight ounce.

Q. At how much per pound?

A. Twenty-four cents.

[Paper is offered in evidence and marked P.]

Q. I show you a bill dated January 30th, 1904, and ask you if that is a bill received from Lane & Company?

A. It is.

Q. For how much duck?

A. Three rolls.

Q. How much per pound?

A. Twenty-four cents.

[Paper is offered in evidence.]

Q. I show you another bill, dated January 30th, 1904, and ask you if that is a bill from Lane & Company? 10

A. That is.

Q. For how much?

A. Seven rolls.

Q. How much per pound?

A. Twenty-four cents.

[Paper is offered in evidence.]

Q. I show you another bill, dated January 31st, 1904, and I ask you if that is a bill from Lane & Company, for duck bought of them?

A. It is. 20

Q. How much duck?

A. Seventeen rolls.

Q. How much per pound?

A. Twenty-four cents.

[Paper is offered in evidence.]

Q. I show you a bill, dated February 10th, 1904, and ask you if that was received from Lane & Company?

A. It is.

Q. For how much duck?

A. Fifteen rolls. 30

Q. How much per pound?

A. Twenty-four cents per pound.

[Paper offered in evidence.]

Q. I show you a bill, dated March 3d, 1904, and ask you if that is a bill for duck bought from Lane & Company?

A. It is.

Q. How much?

A. Five rolls.

Q. How much per pound?

A. Twenty-four cents.

[Paper is offered in evidence.]

Q. I show you a bill, dated March 4th, 1904, and ask you if you received that from Lane & Company?

A. We did.

Q. How much duck?

A. Ten rolls.

10 Q. How much per pound?

A. Twenty-four cents a pound.

[Paper is offered in evidence.]

Q. I show you a bill dated April 4th, 1904, and ask you if that was a bill received from Lane & Co. for duck?

A. Yes.

Q. How much duck?

A. April 4th, ten rolls.

Q. How much?

A. Twenty-four cents a pound.

20 Q. April 5th?

A. Twenty rolls, twenty-four cents a pound.

Q. April 6th?

A. Three rolls, twenty-four cents a pound.

Q. May 10th?

A. Twenty-five rolls.

Q. How much?

A. Twenty-four cents a pound.

Q. June 18th?

A. Seven rolls.

30 Q. How much?

A. Twenty-four cents a pound.

Q. June 10th?—

Mr. Backes—I object. We are now getting into that same proposition that your Honor ruled out before. It is beyond the time of this suit.

The Court—All deliveries subsequent to the beginning of this suit I overrule.

Mr. Walker—I pray an exception.
The Court—Note an exception.

ALFRED REED, [L. S.]
Justice Supreme Court.

Mr. Dickinson—Will the witness go on?

The Court—Not for any deliveries made after the beginning of this suit.

Mr. Dickinson—I offer these bills in evidence.

[Papers marked P-24 to P-31, inclusive.]

Q. I ask you whether on February 26th, 1904, you 10 purchased certain duck from Catlin & Co.?

A. I think it was purchased February 16th, but deliveries were made—

Q. (Interrupting.) I show you a bill, dated February 26th, 1904, and ask you what that is?

A. It is a bill from Catlin & Co. for eight rolls of duck at twenty-three cents per pound.

Q. I show you a paper, dated February 26th, 1904, and ask you what that is?

A. It is a bill from Catlin & Co. for twenty-two rolls 20 of duck at twenty-three cents per pound.

Q. I show you another bill, dated February 26th, 1904, and ask you what that is?

A. It is a bill from Catlin & Co. for three rolls of duck at twenty-three cents per pound.

Q. I show you another bill, dated February 26th, 1904, and ask you what that is?

A. It is a bill from Catlin & Company for thirty-five rolls of duck at twenty-three cents per pound.

Q. I show you another bill, dated April 19th, 1904, 30 and ask you what that is?

A. It is a bill from Catlin & Company for eleven rolls of duck at twenty-three cents per pound.

Q. Are these bills or invoices here which I have shown you all the bills or invoices received from Catlin & Com-

pany, or Lane & Company, or either of them, prior to June, 1904?

A. I suppose so.

[Papers are offered in evidence and marked as *Exhibits* up to P-42.]

Further cross-examination.

By Mr. Woodruff.

Q. I hand you answers to interrogatories—the second set of interrogatories—and I desire to ask you how many
10 rolls of duck, according to that statement, were purchased of Catlin & Company?

A. Well, this reads nine, but there is an error.

Q. That is sworn to by you; you have seen it before, have you not?

A. I evidently seen it, but not that sheet.

Q. Didn't you know the contents of that sheet when you signed it?

A. Well, that I don't say.

Q. Is that incorrect?

20 A. That is incorrect. It is nine instead of seventy-nine.

Q. What?

A. It should be seventy-nine where it reads nine, as the bills show.

Q. That is incorrect, is it?

A. Yes, sir; it is incorrect; it should be seventy-nine.

Q. Have you added up those figures that counsel has just given to you; do they foot up to seventy-nine?

A. I didn't foot them up, except on the memorandum.

30 Q. Does it show seventy-nine on the memorandum?

A. Seventy-nine on the bills.

Q. I hand you answers to the first interrogatories served upon the plaintiff, and ask you to look at that dated February 11th, 1904; that was for eighteen rolls of duck, at twenty-four cents a pound, bought of J. H. Lane & Co.?

A. Yes, sir.

Q. February 12th, were there four rolls of duck bought from J. H. Lane & Co.?

A. Yes.

Q. And on February 13th, were there two rolls of duck bought of J. H. Lane & Co.?

A. Yes.

Q. And on February 15th, 1904, were there seventeen rolls of duck bought of J. H. Lane & Co.?

A. Yes.

Q. February 18th, were there fifteen rolls of duck bought of J. H. Lane & Co.?

A. Yes, sir.

Q. February 28th, were there bought of Catlin & Co. three rolls of duck?

A. Yes, sir.

Q. February 29th, were there eight rolls of duck bought of Catlin & Co.?

A. Yes, sir.

Q. And February 29th, were there twenty-two rolls of duck bought of Catlin & Co.?

20

A. Twenty-two delivered on that day.

Q. On March 4th, were there thirty-five rolls purchased of Catlin & Co.?

A. Yes.

Q. March 31st, were there twelve rolls of duck purchased from Catlin & Co.?

A. Yes.

Q. At twenty-three cents a pound?

A. Yes, sir.

Q. On the 31st of March?

30

A. Yes, sir.

Q. How much does that all amount to of Catlin?

A. Eighty; it stands there.

By Mr. Woodruff.

Q. I show you invoices attached to the declaration served upon the defendants; did you prepare these invoices?

A. That is my recollection; yes, sir.

Q. Just look at each one of them; did you prepare the first one?

A. Yes.

Q. Look through them all; did you prepare them all?

A. I copied all these from our invoice books.

Q. These were copied from your invoice book?

A. Our impression book.

By Mr. Dickinson.

Q. These dates on the invoices which Judge Woodruff
10 just questioned you about, are they the dates of the actual purchases from Lane & Co.?

A. These are the dates of deliveries made, but not the dates of the actual purchases—the dates of the deliveries.

Robert J. Colwell, sworn as a witness on the part of the plaintiff, testifies as follows:

Direct examination.

By Mr. Walker.

Q. Where do you live?

A. My business is in New York City; I am a resident
20 of Montclair, N. J.

Q. What business are you in?

A. Wholesale dry goods.

Q. With what concern are you associated?

A. J. H. Lane & Company.

Q. Do J. H. Lane & Company deal in a fabric known
as cotton hose duck?

A. Yes.

Q. Are they large or small dealers.

A. Large dealers.

30 Q. What position do you hold with that concern?

A. I am associated with them as department manager and salesman.

Q. How long have you been salesman for J. H. Lane & Company?

A. About seven years.

Q. Do you know the Empire Rubber Manufacturing Company?

A. Yes, sir.

Q. Do you know Mr. C. Edward Murray?

A. Yes, sir.

Q. Do you know him to be an officer of that company?

A. Yes, sir.

Q. Do you know Mr. H. R. Nason?

A. Yes, sir.

Q. Whom you see in the court room here?

A. Yes, sir.

Q. Have you been in the habit of selling cotton hose 10 duck?

A. Yes.

Q. Have you sold large or small quantities of cotton hose duck?

A. Large quantities.

Q. Were you engaged in selling cotton hose duck in February, 1904?

A. Yes.

Q. Do you know the market price of cotton hose duck in February, 1904? 20

A. Yes, sir.

Q. What was the market price of cotton hose duck in February, 1904?

Mr. Backes—I object. He has not qualified himself. There is no such thing as a standard by which the market can be measured. He is not qualified nor is anyone else qualified unless it is shown that there is a certain guide or a certain standard in the trade. The burden is on them to show that.

The Court—I will admit it. 30

Counsel for the defendants prays an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

A. From our record it was about twenty-two and one-half cents to twenty-four cents a pound at that time.

Mr. Backes—I object to that. The witness says “From our record.” I ask that it be stricken out.

The Court—I will let it stand.

Counsel for the defendants prays an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

ALFRED REED, [L. S.]

Justice Supreme Court.

10

Q. I show you a letter, dated New York, February 4th, 1904, addressed to the Empire Rubber Manufacturing Company, Trenton, N. J., and signed J. H. Lane & Company, and in the lower left-hand corner I see “Dic. R. J. Colwell,” and I ask you in reference to that letter to tell us what you had to do with that letter?

A. I wrote it—dictated it.

Q. What was done with it?

A. Sent to the Empire Rubber Manufacturing Com-

20 pany.

Mr. Walker—It is produced by the Empire Rubber Manufacturing Company and offered in evidence. It has to do with the price of duck.

Mr. Backes—I object to this, and ask an exception.

Q. I show you a paper, dated New York, February 9th, 1904, and signed J. H. Lane & Company, and ask you if you recognize that paper?

A. Yes.

Q. You do?

30 A. Yes.

Q. What is it?

A. It is a contract.

Q. With whom?

A. With the Empire Rubber Manufacturing Company.

Q. What is it?

A. It is a contract between J. H. Lane & Company and the Empire Rubber Manufacturing Company.

Q. For what?

A. Hose and belt duck.

Mr. Walker—I offer this in evidence.

[Paper is marked P-44.]

Q. Is there any difference between cotton hose duck and hose and belt duck?

A. Repeat the question.

Q. I want to know if there is any difference between 10 cotton hose duck and hose and belt duck?

A. Hose and belt duck means two things; it includes both hose and belt duck.

Q. In February, 1904, what was the market price of hose and belt duck?

A. According to our records it was twenty-three and one-half to twenty-four cents per pound.

Mr. Backes—I object to that and ask an exception.

Cross-examination.

By Mr. Backes.

20

Q. In the letter of February 4th, 1904, you say this: "The 176 rolls yet to come, which are now at the mill, will be delivered to you, freight paid, to Trenton, 3—10, and not net 60."

A. Three per cent., ten days.

Q. That is, if they paid in ten days it is three per cent. discount?

A. Yes.

Q. And that was the contract?

A. Yes.

30

Q. (Reading from letter.) "We are obliged by the terms of this transaction with the mill to settle in ten days, as they want the money to buy cotton, and we are obliged to make our sale on the same basis;" is the payment in this line of goods at ten days' credit, three per cent. off, an important feature in the sale?

A. Well, it is; yes, sir.

Mr. Walker—I object to that as irrelevant and immaterial, and ask that it be stricken out.

The Court—Let it stand.

Counsel for the plaintiff prays an exception to the ruling of the Court, which is allowed, and the same is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

Q. (Reading from letter.) “I presume this statement
10 is unnecessary, as I do not fancy anyone would consider for a moment losing three per cent. discount at the present market rate for cotton, but in order that there may be no misunderstanding on this score it just occurs to me to mention it;” was cotton selling close at that time?

A. Well, I cannot recollect that; that is a matter for the mill; that is not a matter for our end of the business.

Q. Is the time of credit and the discount your end of the business?

A. The mill makes ours and we merely carry it out.

20 Q. You are not manufacturers?

A. No, sir.

Q. Simply dealers?

A. Yes, sir.

Recess until two o'clock.

[After recess.]

Q. In your letter you say, “Now, my good friend Mr. Nason, let us have some shipping directions. The feature that we like least is the four-month delivery that we conceded to Mr. Murray and yourself simply because of
30 your persuasive ways;” what do you mean by the four-month delivery?

A. Well, we would have preferred to have delivered it in a short time.

Q. Is that to the advantage of the shipper or purchaser?

A. The shipper.

Q. I show you what has been marked *Exhibit P-44*, No. A-4291, dated New York, February, 1904, did that have relation to anything contained in this letter of February 4th, 1904?

A. Do you mean this contract?

Q. Did this contract of one hundred and seventy-six rolls of duck have reference to the duck which was to be shipped in four months mentioned by you in that letter of February 4th?

A. This contract covers those one hundred and seventy-six rolls, and some others as well.

Q. The contract only speaks of one hundred and seventy-six rolls, does it not?

A. Two hundred and twenty-one rolls.

Q. Had the contract been made previously for the difference between one hundred and seventy-six and two hundred and twenty-one?

20

A. Well, as I recollect, there was a verbal contract—two verbal contracts, and they were both contained in the one—forty-five and one hundred and seventy-six, which made two hundred and twenty-one.

Q. When were the sales of forty-five made with reference to the date of the contract which bears date of February 9th, 1904?

A. That sale was made about January, 1904.

Q. What have you got there?

A. Simply a memorandum that I got up from the 30 books, showing the exact state of affairs.

Q. It is in the form of an affidavit?

A. Well, it is drawn in that form.

Q. Who drew it for you?

A. One of our men over in the office.

Q. You don't know when these goods were delivered, do you—I mean the goods mentioned in the so-called contract of February 9th, 1904?

A. Well, they were all delivered within about the specified time.

Q. What do you mean by the specified time?

A. I think four months the contract specifies—delivered by May, which is within four months, and they were all delivered within about the time.

Q. Terms 3/10, F.O.B.; is that three per cent. off?

A. Yes.

Q. Ten-days' payment in cash?

10 A. Yes, sir.

Q. Was that an important feature of this contract?

A. It is; it is the terms on which all goods of that character is sold.

Q. Duck?

A. Duck of that character.

Q. That is so in the trade?

A. Yes, sir.

Q. You speak of prevailing prices in the market; is there any standard by which you are governed as to
20 prices?

A. Competition.

Q. It is so absolutely?

A. Competition regulates it; of course there are elements entering into the prices—the law of supply and demand—competition depends on that.

Q. Have you dealers any center in which you meet and fix your prices?

A. No.

Q. Then the prices which you have spoken of are those
30 which Lane & Company were selling their goods at about the time you were speaking of?

A. Yes.

Q. Other dealers in the same line might have been selling for less?

A. Well, it is possible, but not very probable.

Q. Your prices are not governed by what another man sells, are they?

A. Well, others don't make our prices, but naturally we cannot be independent of competitors.

Q. Do you make your prices depending upon the prices of others?

A. Well, to a large extent; yes.

Q. Is there anything else that enters into it?

A. The cost of cotton.

Q. At or about this time was cotton high?

A. Yes, I should say it was.

Q. It had been high for a year, had it not? 10

A. Well, I cannot answer correctly.

Q. Well, about July, 1903, cotton was up high?

A. I cannot recollect.

Q. Do you remember when cotton went high?

A. No.

Q. Do you remember the "bull" movement in the cotton market led by Sully?

A. Yes.

Q. It was about that time, was it not, that cotton went high? 20

Mr. Walker—It is objected to as not being cross-examination.

The Court—He comes here as an expert, for the purpose of fixing the price of cotton during February. Now, Mr. Backes is asking him about the manner in which their prices are regulated.

Q. That "bull" movement in the cotton market was the occasion sending up material of this kind?

A. It had that effect, yes.

Q. Cannot you tell us as near as you can, when it was 30 that cotton began to rise?

A. If you can tell me when Sully failed, it will help me to refresh my memory.

Q. That is when it dropped?

A. It did go down some shortly after that.

Q. Do you remember whether it was six or eight months before the date of this contract that cotton began to rise?

A. There is no use of making a statement that I am not sure of; that is a matter of memory; if I may be permitted to say it, it is foreign to the subject; it is a mere matter of memory and I cannot draw on my memory.

Q. Explain more fully, if you please, what that three per cent. ten days means?

A. Three per cent. cash discount, terms of sale.

Q. If the buyer postpones paying the bill for thirty days, what is the result?

10 A. He loses his discount.

Q. He pays the full inventory price?

A. Yes, sir.

Q. Is there at any time any great variance in price of cotton hose, duck and hose and belt duck on the market, between the price of the parties selling highest and the parties selling lowest?

A. I don't believe I quite understand your question.

Q. What is the market price on a given day, and what constitutes the market price on a given day?

20 A. Well, the selling price, whatever that is.

Q. There are several concerns who sell this duck, are there not?

A. Yes.

Q. Is there a great variance between the one selling highest and the one selling lowest?

A. Not ordinarily.

Q. What is the ordinary variance in the market between the highest and the lowest?

A. It is hard to say; it is pretty likely to be very near
30 the same.

Q. Well, within how much?

A. Well, there is no absolutely known rule, but I would say a half a cent would usually cover it—usually less than that.

Q. It is usually less than half a cent a pound?

A. Yes, as a rule.

Q. Do you know Catlan & Company?

A. Yes.

Q. Are they in the hose duck market?

A. Yes.

Q. Do you know what they were selling hose duck for in February, 1904?

A. Well, I happen to recollect a quotation of theirs—about twenty-seven cents a pound at that time.

Q. Are Catlan & Co. located in New York?

A. Yes, sir.

Q. And you are, too?

A. Yes, sir.

10

Mr. Walker—If your Honor please, with reference to the contract admitted in evidence between J. H. Lane & Company, dated February 9th, 1904, for two hundred and eighteen rolls of duck, some of the deliveries were made subsequent to the bringing of the suit, and when Mr. Nason was identifying the invoice from Catlan & Company to the Empire Rubber Manufacturing Company for these deliveries they were excluded. I don't think that we all fully comprehended them at the time, and so I submit that we are entitled to have in evidence 20 this invoice of deliveries made on this order of February 9th, 1904, some of which we delivered before the time of bringing our suit and some after.

The Court—Does that contract fix the time of delivery?

Mr. Walker—All to be shipped by May, 1904, but they were not shipped until afterwards.

The Court—You don't have to go into the market and buy; all you have to do is to show the difference. I don't understand that you have to go into the market and buy the material. You can do that if you choose. That is the 30 way of fixing the measure of damages.

Charles Edward Murray, sworn as a witness on the part of the plaintiff, testifies as follows:

Direct examination.

By Mr. Walker.

Q. What is your business?

A. I am treasurer for the Empire Rubber Manufacturing Company.

Q. How long have you been treasurer of the Empire Rubber Manufacturing Company?

A. Since August, 1902.

Q. What is the business of that corporation?

A. Manufacture of a general line of belting and carriage goods.

Q. Prior to assuming the treasuryship of the Empire Rubber Manufacturing Company, were you connected with the rubber business?

A. Yes.

Q. For how long?

A. Eighteen years.

Q. What other rubber company, if any, were you connected with before or at the time you were in the rubber company?

A. I was from 1883 to 1887 a member of the firm of Murray & Son; from 1884 to 1901, with Murray, White & Murray, and from 1894 to the present time with the Crescent Belting and Packing Co.

Q. What office do you hold in the Crescent Belting and Packing Co.?

A. Treasurer.

Q. How long have you been treasurer of the Crescent Belting and Packing Co.?

A. Since 1897.

Q. Are you a practical rubber manufacturer?

A. I am.

Q. How long have you been a practical rubber manufacturer?

A. Since 1897—that is in that branch—mechanical.

Q. As a rubber manufacturer since 1897, have you had occasion to buy rubber hose duck and belt duck?

A. I have.

Q. Have you bought in large or small quantities?

A. I have bought in large quantities.

Q. Have you bought your hose and your hose and belt

duck for the Crescent Belting and Packing Co., and for the corporation?

A. I have.

Q. Did you buy for Murray, White & Murray?

A. No.

Q. Then you commenced buying in 1897?

A. 1897, yes.

Q. Have you been familiar with the prices that have prevailed for hose duck and hose and belt duck since 1897?

10

A. I have.

Q. Is there a market price for that duck?

A. There is.

Q. How do you ascertain the market prices?

A. By correspondence with various dealers in such goods and by having their representatives call on us from time to time, and newspaper quotations.

Q. How do you know principally—by correspondence or conversations with representatives.

A. Both.

20

Q. Do you know John H. Lane & Co.

A. I do.

Q. Are they dealers in these ducks?

A. They are.

Q. Large or small dealers?

A. Very large dealers.

Q. Do you know the firm of Catlan & Co.?

A. I do.

Q. Are they dealers in these ducks?

A. Very large dealers.

30

Q. Do you know Mr. Colwell, who just left the stand?

A. I do.

Q. Did you have a conversation with him in or about the month of February last past?

A. I did.

Q. About the price and sale of these ducks?

A. I did.

Q. Where was that?

A. It was in the Methodist Church; it was in the court room; it was in the M. E. Church building—the court house was there at the time.

Q. Was that at the time you were trying a suit?

A. It was.

Q. Did you at that time go over with him then the prevailing prices of hose and duck and hose and belt duck?

A. I did.

Q. What price did he say was prevailing at that time?

10 Mr. Backes—I object.

The Court—I will take it, subject to exception.

A. He offered us duck at twenty-five cents a pound first, and after a good deal of dickering, he finally, after consulting with his people by wire, he quoted as a price twenty-four cents.

Q. About the same time did you have a conversation with any representative of the house of Catlin & Co.?

A. I did.

Q. Who was that representative; do you know?

20 A. Mr. Cooke; I don't recall his first name, but his last name was Cooke.

Q. When was that with reference to having the conversation with Mr. Colwell?

A. That was within a few days or possibly a week of that time.

Q. Prior or subsequent?

A. Prior.

Q. What price did Mr. Cooke quote you for duck?

A. Twenty-five cents.

30 Q. Do you know what price prevailed for duck throughout the month of February, 1903?

A. I have given you about all that I know of the market at that time; I didn't get any quotations from any other than those two houses.

Q. Do you know whether or not duck was selling any cheaper anywhere else at that time?

A. I don't know that it was; no sir.

Q. I show you a letter dated New York, January 26th,

1904, addressed to the Empire Rubber Manufacturing Co., signed "Catlin & Co.;" have you seen that letter?

A. I have.

Q. When did you first see it?

A. Probably a few days after it is dated there.

Q. Have you received other letters from Catlin & Co.?

A. We have.

Mr. Walker—I desire to offer this letter in evidence.

Mr. Woodruff—I object unless it is offered for the single purpose of showing quotations. 10

Mr. Walker—That is all it is offered for.

The Court—It is admitted for that purpose.

[Letter marked P-46.]

Q. Several letters written by you or your company to Morris & Co., concerning duck and the deliveries and non-deliveries have been offered in evidence; did you have any further personal conversation with either of the Messrs. Morris concerning duck, between October 1st, 1902, and the time of the commencement of this suit, that you can recollect? 20

A. I don't recollect now; we might have had some conversation over the 'phone, but I don't recollect now.

Q. Do you know how many rolls of duck were delivered to your company by Morris & Co., after October 1st, 1902?

A. The total of them?

Q. Yes.

A. I haven't them in my mind now.

Q. You don't know the total number?

A. No. 30

Mr. Walker—We now call upon the defendants to produce their books of deliveries of duck to the plaintiff, wherein we receipted for the duck that was delivered.

[A book is produced.]

Mr. Walker—This is not the book we called for, and we are now looking at it to see whether it meets the requirements of the order or not.

Will you admit that only two hundred and two rolls

were delivered from October 1st, 1902, until the time of the commencement of the suit?

Mr. Backes—Between October 1st, 1902, and July 10th, 1903, there were seventy-four rolls delivered, and subsequent to that there was the difference between seventy-four and two hundred and two.

Plaintiff rests.

Mr. Woodruff—We desire at this time to move for a non-suit, upon the ground that no contract has been shown
10 to have been made between these parties.

[Argument.]

The Court—The decision of this matter depends so much upon the consideration to be given to the letters, which I have not had the opportunity to examine at all, that, if the defendants have any testimony to put in, they can go on and put it in, and at the close of the case if there is no evidence to go to the jury, I will direct a verdict for the defendants. If there be a contract, it must
20 be gathered from the writings, and that is a matter for the court, and not the jury, to pass upon. I cannot decide the question until I have an opportunity to go through all these letters.

DEFENDANTS' CASE.

William H. Skirm, Jr., witness sworn on the part of the defendants, testifies as follows:

Direct examination.

By Mr. Backes.

Q. September, 1902, were you connected with the Empire Rubber Manufacturing Co.

30 A. Yes, sir.

Q. In what capacity?

A. Secretary.

Q. How long did you serve the company as secretary?

A. Ever since its organization.

Q. Ten years?

A. About.

Q. And as secretary, were you in the active management of the company?

A. Yes.

Q. Did you buy duck for the Empire Manufacturing Co.?

A. Yes.

Q. Do you know Mr. William McK. Morris, one of the defendants in this case?

10

A. Yes.

Q. I show you a letter, dated September 29th, 1902; that letter has not been offered in evidence yet, although it has been referred to by counsel; and I ask you whether that is your signature?

A. Yes.

[Letter is offered in evidence, and read and marked *Exhibit D-1.*]

Q. About a week or ten days before the writing of this letter did you meet Mr. William McK. Morris?

20

A. I met him some time before the writing of that letter.

Q. Where?

A. I met him at the office of the company.

Q. Was there any conversation between you and Mr. Morris concerning the sale of hose and belting duck at that time?

A. Yes, sir.

Q. What was it?

A. Why, I asked him what his price would be for one thousand rolls of duck taken during the year, and he made the price as mentioned in that letter.

Q. What did he say?

A. He said it was to be specified so many rolls a month.

Q. What did he say?

A. He said we were to specify our requirements per month.

Q. What did you say?

A. I don't remember just what it was, only he said that he wanted us to specify what we would take per month so that they would have that to ship each and every month.

Q. What else was said?

A. I don't know that anything else was said.

Q. When did you see him again?

A. I saw him after that—I don't know how soon—very shortly after that.

10 Q. Was it before or after the writing of this letter that you saw him again?

A. I saw him after I wrote that letter.

Q. Who was present at the time that you had this conversation with him?

A. No one.

Q. Can you give us that conversation any more fully than you have?

A. I don't know that I can; no; my memory does not serve me any better than that at the present time.

20 Q. Was anything said about the total number of rolls?

A. Why, one thousand rolls was in my mind; he talked something about the lowest quantity, with one thousand as the maximum.

Q. What was the minimum?

A. That I could not say.

Q. How were the deliveries to be made?

A. He wanted us to specify the deliveries, with the weights of the rolls, the weights of the duck, each and every month, in the contract.

30 Q. What quantity in pounds or in sheets were you to take each and every month?

Mr. Walker—Objected to as leading.

The Court—He says he does not recollect.

A. The total amount is all that I can recollect about what was specified; I only recollect the total amount; he merely asked for specifications for each and every month.

Q. Did you come to any agreement as to whether you would buy or not?

Mr. Walker—I object to that. That calls for a sweeping conclusion of contract or no contract.

By the Court.

Q. Did anything further take place?

A. He was willing to make a contract for this quantity of duck, conditional upon a specification being entered for the quantity required each and every month.

By Mr. Backes.

Q. On behalf of the Empire Rubber Co., did you enter into any bargain with Morris & Co., as to the quantities 10 of material?

Mr. Walker—I object to that question.

The Court—If you allude to that particular time, I think the question is incompetent.

Q. What did Mr. Morris say to you about quantity as to deliveries?

A. He said he was willing to make a contract with the specification for the amount we required each and every month.

Q. When were the specifications to be delivered? 20

A. Well, he wanted us to specify the amount we took each and every month in the contract, and give the weights as we wanted them before the first of the month.

Q. When you wrote that letter of September 29th, 1902, did you originate that letter?

A. I wrote the letter; I dictated the letter—yes.

Q. Did you read it to anybody before you sent it?

A. It was written after a consultation with Mr. Murray.

Q. The sentiment of that letter; who suggested it? 30

Mr. Walker—I object to that. In the first place, there isn't any sentiment about it.

Q. How did you come to write that letter?

A. Why, at the request of Mr. Murray.

Q. What did he say to you about it?

A. He wanted a letter written to confirm the conversation I had with Mr. Morris, in order to have a record of what the contract would be.

Q. At that time was anything said about the three per cent.—the terms?

A. I could not say whether three per cent., ten days, was correct or not positively; I think it is, but that I would not like to say.

Q. Did you have any conversation with Mr. Morris about that?

A. Yes; the terms and everything were talked about at the same time that the price was talked about.

10 Q. Why didn't you state in that letter the quantities that were to be delivered?

Mr. Walker—I object. He cannot state that.

The Court—I think he can state why a certain thing was not incorporated in the letter.

Mr. Walker—I pray an exception.

The Court—Note an exception.

ALFRED REED, [L. S.]
Justice Supreme Court.

A. In order that we could take it as we wanted it; not
20 to bind ourselves to take a specified amount each and every month.

Q. Did anyone suggest that to you?

A. That was talked over with Mr. Murray.

Q. Did Mr. Murray direct you to write that letter?

A. Yes, sir.

Q. What did he say about it?

A. He wanted me to write the letter to confirm the conversation and get the contract on record.

Q. What else did he say?

30 A. Why, he didn't want the amount per month specified in the letter.

Q. You say he didn't want the amount per month specified in the letter?

A. No, he didn't want the amount per month specified in the letter.

Q. Did he say why?

A. Well, in order that we would have to take it only when we wanted it.

Q. Was there anything said between you and Mr. Murray, at the time of writing that letter, as to the obligation of your company to take it at all?

Mr. Walker—I object to that as leading.

The Court—It is hardly leading.

Mr. Backes—I am directing the witness' attention.

The Court—The objection is overruled.

Mr. Walker—I pray an exception. 10

The Court—Note an exception.

ALFRED REED, [L. S.]
Justice Supreme Court.

A. He wanted to get the contract before them, and the acceptance of it at that price.

Q. How long were you with the company after that?

A. Until May 1st, the following year.

Q. During that period of time, did your company send any requisitions to Morris & Co.?

A. I could not say positively. 20

Q. Didn't that come under your management?

A. It might have been referred to me, but I would not remember at this time whether we ordered any or not.

Q. From October, 1902, to May, 1903, when you left, was the factory of the plaintiff actively engaged in business?

Mr. Walker—We object to that as immaterial.

The Court—The objection is overruled.

Mr. Walker—I pray an exception.

The Court—Note an exception. 30

ALFRED REED, [L. S.]
Justice Supreme Court.

A. Yes, sir.

Q. There is evidence here that there were seventy-four rolls of duck delivered between October 1st, 1902, and

the following July; do you know whether the plaintiff company used more than that amount of duck in this factory?

Mr. Walker—I object upon the same ground.

The Court—I overrule the objection.

Mr. Walker—I pray an exception.

The Court—Take your exception.

ALFRED REED, [L. S.]

Justice Supreme Court.

10 A. I think so; yes.

Q. Do you know where the rest of the duck came from?

Mr. Walker—I ask a general exception to this line of examination upon the ground that it is immaterial and irrelevant. May I have an exception?

The Court—Yes.

ALFRED REED, [L. S.]

Justice Supreme Court.

A. We bought of several parties.

Q. From whom?

20 A. Catlin & Co., New York, and we bought some of the Crescent.

Q. Crescent what?

A. Belting and Packing Co.

Q. Do you know what quantity?

A. No.

Q. The Crescent Belting and Packing Co. is engaged in the same line as the Empire Rubber Co.?

A. Yes.

30 Q. Do you know why they bought of the Crescent Belting and Packing Co.?

A. Yes.

Q. From whom do you know that?

A. From Mr. Murray.

Q. Why did they?

A. Because they had a large stock on hand from an old contract.

Q. Why was it that the Empire Rubber Co., if it had an arrangement to take one thousand rolls of duck between October, 1902, and October, 1903, from Morris & Co., that they did not make requisitions for more than seventy-four rolls between October, 1902, and July, 1903, following, if you know?

A. I think we were buying it at a less price.

Q. What say?

A. I think we were buying at less price.

Cross-examination. 10

By Mr. Walker.

Q. Was this letter of September 29th, 1902, ever copied in the books of the Empire Rubber Co.?

A. I suppose it was.

Q. Don't you know as a fact that it was copied in your personal letter book?

A. No, sir; I do not.

Q. You won't say that it was not?

A. Yes, I will say that it was not.

Q. Not copied in your personal letter book? 20

A. Yes.

Q. Was a copy of that letter left behind you at the Rubber Co.?

A. If there was a copy, it was.

Q. Look at the letter and see if it bears any ear-marks of ever having been copied?

A. Yes, sir; it has been copied.

Q. Letter-press copy?

A. Yes.

Q. It bears the ear-marks of it? 30

A. Yes, sir.

Q. In this letter you say to Morris & Co., "We are pleased to state that we accept your proposition as made to the writer over the telephone, about a week or ten days ago, for furnishing us hose and belting duck up to one thousand rolls, at seventeen cents per pound;" you had a conversation with one of the Morris' about that?

A. Yes, sir.

Q. Over the telephone?

A. As well as in the office.

Q. And you also saw one of them?

A. Yes.

Q. That is William Morris?

A. Yes, sir.

Q. In the office of the Empire Rubber Company?

A. Yes.

10 Q. And they agreed, did they not, to furnish you one thousand rolls, at seventeen cents per pound.

A. Up to one thousand rolls.

Q. And they were to be delivered within a year, were they not?

A. Specified deliveries; yes, sir.

Q. You did not say anything about specified deliveries in your letter?

A. No.

Q. You were to take them all within a year, were you
20 not?

A. So many rolls a month within a year.

Q. The exact number per month was not arranged?

A. It was to be specified.

Q. It was never specified so far as you know?

A. No.

Q. Do you know that Morris & Co. thereafter delivered rolls on order from the Empire Rubber Manufacturing Company while you were there?

A. I could not say positively, but I think they did;
30 yes.

By Mr. Backes.

Q. Was there anything said by you to Mr. Morris as to the probable number of rolls that the Empire Co. would need per month, of this quantity not to exceed one thousand rolls.

Mr. Walker—Objected to as leading, and also as being an attempt to vary a written contract by parol testimony.

The Court—The objection is overruled.

Counsel for the plaintiff prays an exception, which is allowed and the same is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

A. About sixty rolls a month—sixty to seventy rolls a month.

George L. Borden, witness sworn on the part of the defendants, testifies as follows:

Direct examination.

By Mr. Backes.

10

Q. What is your business?

A. Bookkeeper.

Q. For whom?

A. Morris & Co.

Q. Where?

A. Groveville.

Q. And you have been a bookkeeper for how long?

A. I have been with Morris & Co. about a little over eleven years.

Q. Have you got the books of Morris & Co. here with 20 you, showing dealings with the Empire Rubber Company?

A. Yes, sir.

Q. Between September, 1902, and December, 1903?

A. Yes, sir.

Q. Did you make all of the entries in the book; are the books under your charge?

A. Yes, sir.

Q. Have you examined the invoices and books of the company showing shipments of duck to the Empire Rubber Manufacturing Co. during the year beginning De- 30 cember, 1902, and ending December 31st, 1903?

A. Yes, sir.

Q. And have you made any excerpts or records of those shipments as they appear upon your books?

A. I have them posted into the ledger.

Q. Have you made any other record in order to facilitate your testimony here?

A. Yes, I made copies of the invoices, and bills?

Q. I show you a paper in typewriting; who made that?

A. The typewriter.

Q. Are you the typewriter?

A. No.

Q. Who dictated it to the typewriter?

10 A. I did.

Q. After you dictated it did you compare it with anything?

A. I compared it with the ledger.

Q. Where did you get the data or information from that you have on this piece of paper?

A. From our original shipping slips and the ledger.

Q. And that you dictated and afterwards compared with the ledger?

A. Yes.

20 Q. For what purpose?

A. To see whether it is correct.

Q. The first column that you have here indicates what?

A. That indicates the dates.

Q. Dates of what?

A. The dates of shipment to the Empire Rubber Co.

Q. And the next is their balance?

A. The next is their balance.

30 Q. And the next is the word invoices and then amounts?

A. That was the number of rolls delivered on each invoice.

Q. I am now speaking of that which now appears in typewriting?

A. That is the amount of invoice.

Q. That is the cost?

A. Yes.

Q. I also call your attention to some figures in lead pencil; who made those?

A. I did.

Q. From what were they made?

A. From the shipping slips.

Q. What do they indicate?

A. They indicate the number of rolls delivered on each invoice.

Q. What does the next column indicate?

A. That indicates the date that we received the check 10 in payment of this invoice.

Q. And what relation have the dates set opposite the amounts to the amounts?

A. (Indicating.) Here are the dates that the invoices were due.

Q. Take the first—\$98.94?

A. July 22d.

Q. When was that invoice billed?

A. July 6th.

Q. And then you have another line of figures here in 20 lead pencil; in whose handwriting is that?

A. It is mine.

Q. What does that indicate?

A. That indicates that the Empire Rubber Co. took over the ten days in paying our invoices.

Q. Are you familiar with the facts which you covered and from which you made that statement?

A. Yes, sir.

Q. And are you familiar with them otherwise than from your books, or from the actual occurrence at the 30 time?

A. I am familiar with them because the Empire Co. called up several times and called to know why we were not delivering the duck, and I told them we made no deliveries because they were not paying their invoices within the specified ten days.

Q. That was after July 10th, 1903?

A. That was after July 10th, 1903.

Q. Can you state, using that by way of refreshing your memory, as to what shipments were made beginning with July and ending December, 1903, the number of days over the ten days?

A. Invoice, July 6th, 1903, amount \$98.94, paid July 22d, making payment six days overdue; invoice, July 8th, 1903, five rolls, amount \$163.54, paid July 22d, making same four days overdue; invoice, July 10th, 1903, four rolls, amount \$116.62, paid July 22d, two days
10 overdue; invoice, July 14th, 1903, three rolls, \$102, paid July 26th, balance of invoice when invoice fell due; invoice, July 17th, six rolls, \$172.21, paid July 30th, 1903, three days overdue; invoice, July 21st, six rolls, \$203.15, paid August 7th, seven days overdue; invoice, July 24th, four rolls, \$141.94, paid August 7th, four days overdue; invoice, August 1st, two rolls, \$78.37, paid August 24th, thirteen days overdue; invoice, August 4th, two rolls, \$74.80, paid August 24th, eight days overdue; invoice August 5th, one roll, \$33.32, paid August 9th,
20 fourteen days overdue; invoice, August 10th, three rolls, \$107.44, paid August 29th, nine days overdue; invoice, August 12th, fifteen rolls, \$418.88, paid August 29th, seven days overdue; invoice, August 26th, four rolls, \$142.80, paid September 10th, five days overdue; invoice, September 17th, \$77.86, paid October 14th, seventeen days overdue; invoice, September 22d, nine rolls, \$281.18, paid October 14th, twelve days overdue; invoice, September 23d, one roll, \$21.76, paid October 14th, eleven days overdue; invoice, October 20th, four rolls,
30 \$136.51, paid November 13th, fourteen days overdue; invoice, October 21st, five rolls, \$164.05, paid November 13th, thirteen days overdue; invoice, October 23d, five rolls, \$160.26, paid November 13th, eleven days overdue; invoice, October 26th, five rolls, \$190.23, paid November 13th, eight days overdue; invoice, November 5th, three rolls, \$86.53, paid December 7th, twenty-two days overdue; invoice, November 10th, two rolls, \$77.86, paid December 7th, seventeen days overdue; invoice, Novem-

ber 12th, one roll, \$32.44, paid December 7th, fifteen days overdue; invoice, November 19th, \$104.21, paid December 7th, eight days overdue; invoice, November 23d, two rolls, \$55.93, paid December 7th, four days overdue; invoice, November 27th, two rolls, \$57.29, paid with the other invoice of December 2d, was paid just on time; invoice, December 1st, one roll, \$38.08, paid December 16th, five days overdue; invoice, December 2d, two rolls, \$74.12, paid December 16th, four days overdue; invoice, December 4th, two rolls, \$74.97, paid December 16th, two days overdue; invoice, December 7th, three rolls, \$81.94, paid December 21st, four days overdue; invoice, December 15th, two rolls, \$70.72, paid December 29th, four days overdue; invoice, December 17th, six rolls, \$221.17, paid January 26th, 1904, nine days overdue; invoice, December 22d, six rolls, \$216.92, paid January 6th, 1904, four days overdue; invoice, December 30th, four rolls, \$147.39, paid January 19th, 1904, ten days overdue.

Q. I show you a letter from the Mechanics National Bank, of Trenton, W. W. Stelle, cashier, and ask whether you received that at your mill? 20

A. Yes, sir.

Q. Do you remember having such a check as mentioned in that letter, for \$637.30?

A. We received that check on November 13th.

Q. What did you do with it?

A. Deposited it in the Mechanics National Bank.

Q. How soon after you deposited it, did you get this letter? 30

A. We deposited it one night, and the Mechanics Bank got it the next day and mailed us that letter that same day, and we got it the day following.

Q. Did you, after you received this notice, have any conversation with the Empire Rubber Co., or any of its officers concerning this check?

A. No, sir; I had no conversation with the Empire Rubber Co. concerning that check.

Q. Between July, 1903, and December of the same year, did you have any conversation with any of the officers of that company over the telephone?

A. I did.

Q. Do you remember the occasion?

A. I could not give you the exact date; I remember of several different occasions.

Q. Give us the occasions, and then see whether we can get the dates?

10 A. The Empire Rubber Co. called up and wanted to know when they were going to get that duck, and I told them that Mr. Morris gave instructions not to send up any duck until the invoices were paid; they did not pay their invoices, and not to send up any duck until the invoices were paid.

Q. Can you recall when that was?

A. It runs all the way through from about the middle of July up to December.

Q. How often did you make similar statements, if at
20 all, to the officers of the Empire Rubber Manufacturing Co.?

A. At least once a week, and sometimes two or three times in the week.

Q. What did you tell them?

A. They would call up and ask for duck, and I told them we would not send duck up until their overdue invoices were paid—that their invoices were due and had not been paid.

Q. Do you remember on towards the last—December
30 31st—about having a conversation with them concern-
ing—

A. (Interrupting.) Some one in the Empire Rubber Co. called up some time after December 31st and wanted to know why we were not delivering them any more duck, and I told them that Mr. Morris told me to tell them that we were not going to deliver any more duck to them; that all through these months they had not met their invoices, and the bookkeeper had to spend the big

part of his time at the telephone asking for checks, and they got sick and tired of it, and they would not deliver any more duck.

Q. Did you have any conversation with Mr. Nason concerning the report of the financial condition of the Empire Rubber Manufacturing Co. after July and before December?

A. No, sir; I did not.

Adjourned to Thursday morning, June 1st, ten o'clock.

June 1st, 1905. 10

George L. Borden, on the stand.

Cross-examination.

By Mr. Walker.

Q. You were the bookkeeper, were you, for eleven years for Morris & Co.?

A. Yes, sir.

Q. And still are?

A. Yes, sir.

Q. This statement that you have made up shows the payments by the Empire Rubber Manufacturing Co. to 20 Morris & Co. on these various invoices sometimes after the expiration of ten days from the date of the invoice, and once or twice prior to the expiration of ten days, that is right, is it not?

A. Yes, sir.

Q. In each instance, however, three per cent. is deducted from the amount of the invoice in the payment, is it not?

A. It is.

Q. In each instance the three per cent. is deducted? 30

A. Yes.

Q. And the payment made to your company is three per cent. less than the face of the invoice; that is right, is it not?

A. It is right.

Q. I show you *Exhibit D-2*, the notification from the

Mechanics' National Bank, of Trenton, to Morris & Co. under date of November 14th, 1903, that they charged to your account, that is, to Morris & Co.'s account the Empire Rubber Manufacturing Co.'s check \$637.30; I show you also a check from the Empire Rubber Manufacturing Co. to Morris & Co. for \$637.30, dated November —, 1903, endorsed by Morris & Co., and I ask you is not that the same check mentioned in that notice of protest?

10 A. Yes, it is.

Q. And that check was paid, was it not?

A. It was eventually.

Q. That check was paid, was it not?

Mr. Backes—I object to a repetition of the question because it has been answered.

By the Court—Was the check paid?

A. It was as far as I know.

By Mr. Walker.

Q. That is the endorsement of Morris & Co. on the
20 back of it, is it not?

A. It is.

[Check is marked for identification.]

Q. That check was put through the bank in regular course, was it not?

Mr. Backes—I object to that, because it is not cross-examination, and furthermore it is apparent that the witness is only speaking from hearsay.

Mr. Walker—It is certainly cross-examination, for it has to do with this manner of payment that this witness
30 has spoken of.

The Court—Yes, it is cross-examination.

Mr. Walker—It is not fair for counsel to put the suggestion in the mind of the witness that it is hearsay.

Q. I ask you if that check does not bear the ear-marks of having been put through the bank in regular course?

A. Not in regular course, because it was held out of our account; if it was put in regular course, it would have been paid as soon as deposited.

Q. That check was not protested, was it?

Mr. Woodruff—It is not claimed that the check was protested; it is simply dishonored.

Q. Did you say that the column of lead pencil figures after the date of the invoices show the number of rolls that accompanied each invoice?

A. The number of rolls of duck.

William McK. Morris, one of the defendants, sworn as a witness on the part of the defense, testifies as follows:

Direct examination. 10

By Mr. Woodruff.

Q. You are one of the defendants in this suit?

A. I am.

Q. You are one of the partners of Morris & Co.?

A. I am.

Q. And that firm is composed of whom?

A. My brother, E. J. Morris, and myself.

Q. You conduct a business at Yardville?

A. Groveville.

Q. What is that business? 20

A. Manufacturers of cotton duck.

Q. How long have you been in business there?

A. Since the year 1882.

Q. You have had some dealings with the Empire Rubber Co., have you not?

A. Yes, sir.

Q. Coming right down to the transactions in this suit, you had some conversation or some interviews with some member or representative of the Empire Rubber Manufacturing Co., did you not? 30

A. With Mr. Skirm; yes, sir.

Q. You may state in your own way when that was—the first interview that you had?

A. The first interview I had with Mr. Skirm was about the middle of September, 1902.

Q. Where was that?

A. On the street first, and he asked me to call around

to his office; he said he wanted to place an order for one thousand rolls of duck to run from the first of October, '92, to October, '93; we had several interviews before it was finally arranged.

Q. (Interrupting.) 1903, you mean?

A. 1902 and 1903.

Q. You said '92?

A. To run from 1902 to 1903; I had several interviews with him, and it was finally arranged——

10 Mr. Walker—I object to that.

The Court—Let him state what was said.

Q. State what he said and what you said?

A. He said he wanted to place an order for one thousand rolls of duck; and I said, "That, Mr. Skirm, that is very indefinite; what number of rolls can we count on being taken every month?"

Q. What did he say to that?

A. He says, "I don't want to bind myself too closely; just at this time I cannot say how many rolls you can
20 count on per month;" I said, "We have got to have a minimum stated and a maximum so that we can tell how to apportion the sale of our product to other customers, and in order to protect ourselves in cotton," and we did not come to any understanding.

Mr. Walker—I move that that be stricken out.

The Court—That is competent.

Mr. Walker—I pray an exception.

The Court—Note an exception.

ALFRED REED, [L. S.]
Justice Supreme Court.

30

Q. Until when?

A. Until we had another interview.

Q. State that—what he said and what you said?

A. That interview we finally got an understanding that we could count on not less than sixty rolls a month.

Q. What did Mr. Skirm say about sixty rolls a month?

A. Mr. Skirm said, "You can count on our taking not

less than sixty rolls a month, and we hope to make it seventy or eighty rolls;" I said, "Mr. Skirm, why not put it eight hundred rolls, that will probably come nearer to what you want?" he said, "No; I want to make it one thousand rolls because our trade is constantly increasing, and I think we will want over one thousand rolls."

Q. Was the price agreed upon eventually—I don't want any conversation that led up to it?

A. The price was agreed upon.

Q. How much? 10

A. Seventeen cents.

Q. And the number of rolls to be delivered per month?

A. Was to be sixty.

Q. What were the terms?

A. Terms were to be cash.

Q. Or what else?

A. Three per cent. off, ten days.

Q. Is that the same as cash?

A. That was cash.

Q. That is cash? 20

A. That is cash.

Q. What happened next; did the Empire Co. order from you sixty rolls of duck on the 1st of October?

A. No, sir.

Q. Did they order in the month of October?

A. No; as I remember it, they did not order any in October.

Q. I hand you a letter, Mr. Morris, look over it; you received that letter?

A. I did. 30

Q. What did you do in reference to it, if anything?

A. I laid it on the desk, and told my brother—

Q. (Interrupting.) Never mind what you told your brother; did you answer it?

A. Yes, sir.

Mr. Walker—What letter is it?

Mr. Backes—*Exhibit D-1*.

Q. Why didn't you answer that letter?

Mr. Walker—I object. He calls for an undisclosed reason why the defendant did not answer the letter.

Mr. Backes—Question withdrawn.

Q. What next happened; I believe you said that they did not call for duck in the month of October; is that right?

A. As I remember it, they did not.

Q. Did they call for any in November?

A. I don't think they did.

10 Q. Did they call for any in December; do you remember how many rolls were delivered up to the 1st of July?

A. Seventy-four rolls.

Q. Do you remember when you next received any letter from the Empire Rubber Co.?

A. Along in June.

Q. (Showing witness.) Look at that letter and see if that is the letter you next received, to the best of your recollection?

A. That is right.

20 Q. Before that had you had any conversation with the Empire Rubber Co., over the telephone or otherwise?

A. Yes, sir.

Q. And what did you say to them, do you remember, touching this matter?

Mr. Walker—Give us the time and the place and the person with whom had?

Q. Do you remember any particular person you had a conversation with prior to this June letter, between September and June—any conversation that you had?

30 A. Yes.

Q. With whom?

A. Mr. Nason.

Q. What was that conversation?

A. I asked him why he was not taking more duck.

Q. What did he say?

A. He said, "You are getting every roll that we order outside of what weights we want."

Q. Did you have any conversation at any time; did you have more than one conversation with Mr. Nason?

A. If I did, he didn't state his name.

Q. Did you always know with whom you were conversing over the telephone?

A. No.

Q. Would you recognize the voice?

A. No.

Q. Did you have any conversation with Mr. Murray?

A. Not up to July 1st. 10

Q. Did you call more than once over the telephone?

A. Several times.

Q. You answered the 22d day of June letter, did you not?

A. Yes.

Q. (Showing witness.) Is that the answer you sent?

A. That is right.

Q. About the time you wrote this letter, had you had any conversation with any member of the Empire Rubber Co. or any representative of the Empire Rubber Co.?

A. I had not.

Q. (Showing witness P-3.) On the 25th of June, did you receive that letter from the Empire Rubber Co.?

A. That is right.

Q. That letter refers to a memorandum of contract made with you; did you have any memorandum of a contract?

A. No, sir.

Q. Did you give any memorandum of a contract to the Empire Rubber Co.?

30

A. No, sir.

Q. Did you ever receive a memorandum of a contract from the Empire Rubber Co.?

A. No, sir; any other than this letter that you showed me.

Q. You answered that letter, did you not—the letter of June 24th?

A. Yes, sir.

Q. (Showing witness P-4.) See if that is your answer?

A. Yes, sir.

Q. Did you have any telephone or other communication with any member of the Empire Rubber Manufacturing Co., or the representatives of it, just prior to this, or at this time?

A. No, sir.

Q. In October, did you prepare to deliver sixty rolls
10 of duck to the Empire Rubber Manufacturing Co.?

A. No, sir.

Q. Why?

Mr. Walker—I object to that. That is perhaps a conclusion to be drawn by the jury.

Q. Were you prepared to deliver in October, 1902, sixty rolls a month to the plaintiff?

A. Yes, sir.

Q. On the 29th day of June, did you get a letter from the Empire Rubber Co.?

20 A. Yes, sir.

Q. (Showing witness.) Is that the letter?

A. That is right.

Q. Did you have any conversation with anybody over the 'phone at this time?

A. No, sir.

Q. Or they with you?

A. No, sir.

Q. In this letter it states, "We had hoped you would be willing to treat us in your usual fair manner, and if
30 necessary extend the time of delivery of goods as covered by agreement;" did Mr. Murray or anyone else explain that to you, over the telephone, what he meant by extending the time?

Mr. Walker—I object to that. It speaks for itself.

A. No, sir.

Q. Do you remember when you made the last call over the telephone to the Empire Rubber Co.; do you recollect that?

A. Yes, about the middle of January.

Q. I mean prior to June 29th?

A. I didn't have any calls over the telephone that I know anything about.

Q. You have already referred to some calls?

A. I did along in June.

Q. Did you not in June?

A. No, sir.

Q. Did anybody from your office make any calls that you know of? 10

A. Yes.

Q. That you know of?

A. Yes, sir.

Q. Were you present when they called?

A. No, sir.

Q. (Showing witness *P-10*.) July 1st, did you receive that letter?

A. Yes, sir.

Q. (Showing witness *P-9*.) July 7th, did you receive that letter from the Empire Rubber Co.? 20

A. Yes, sir.

Q. (Showing witness *P-6*.) On the 10th of July, did you make that answer to the Empire Rubber Co.?

A. Yes, sir.

Q. (Showing witness *P-7*.) And do you remember getting a letter like that in answer?

A. Yes, sir.

Q. (Showing witness *P-8*.) Did you receive that?

A. Yes, sir.

Q. When this letter of July 10th was received, how many rolls of duck had the plaintiff accepted or ordered from you? 30

A. Seventy-four rolls.

Q. What was the market price of cotton—the selling price of cotton about June 10th?

Mr. Walker—I object. Our contract, whatever it was, was for duck to us at a certain price. We have nothing to do with the price of cotton. They were to buy cotton

for whatever price they could. We have nothing to do with that.

Q. At the time the contract was made, do you remember what the selling price of cotton was?

Mr. Walker—I object to that for the same reason.

The Court—Question overruled.

Mr. Backes—I pray an exception.

The Court—Take an exception.

ALFRED REED, [L. S.]

10

Justice Supreme Court.

Q. Do you remember when you received your first requisition after July, that is, from the Empire Rubber Co. for duck; can you tell by looking at the book?

Mr. Walker—What is that?

Mr. Woodruff—The order book.

Q. Can you, from that book that you have here, determine when the first requisition was from the Empire Rubber Manufacturing Co. after July 10th; can you from any book you have?

20 A. Yes; that is, if we received requisitions from them it was sent out right away.

Q. After July 10th I am talking about?

A. After July 10th.

By the Court.

Q. Was there any requisition between July 7th and September 21st or September 29th?

A. There were requisitions received over the telephone as I remember, saying that they would want three rolls, or five rolls, or so and so, and it would be taken down by
30 the clerk and entered.

Mr. Walker—He says that orders were received and taken down by the clerk. The clerk is the party who ought to speak about that.

By Mr. Woodruff.

Q. Did you ever receive after July 10th a requisition,

in the early part of the month, for sixty rolls of duck, with specifications as to the weights?

A. Never.

Q. Did you deliver to the Empire Rubber Co. sixty rolls of duck each month after the 1st of September?

A. No, sir.

Q. Why?

Mr. Walker—I object to that.

The Court—Objection is overruled.

Mr. Walker—I pray an exception.

10

The Court—Note an exception.

ALFRED REED, [L. S.]
Justice Supreme Court.

Mr. Walker—I would like to state that the ground of my objection is that he cannot give an undisclosed reason.

Q. Why didn't you send the duck?

A. I didn't answer the other question.

[Previous question and answer and the following question read by stenographer as follows:]

“Q. Did you deliver to the Empire Rubber Manufac- 20
turing Co. sixty rolls of duck each month after the 1st
of September?”

“A. No, sir.”

“Q. Why?”

Q. If you didn't deliver the sixty rolls of duck each month, why didn't you?

A. Because we didn't receive the specifications on the first of each month.

Q. Any other reason?

A. The other reason was that they did not pay their 30
bills when due.

Q. Have you gone over the books of your company to know about the payments of your invoices and bills?

A. I have.

Q. Commencing on July 14th, can you tell us what

payments was made to you, that would not be within the ten days?

Mr. Walker—Is it necessary to go through that? The bookkeeper has proved it. We don't dispute the sheet as being a true record.

A Juror—Is not the testimony to the effect that the terms were sixty days and that this three per cent. off was for cash in ten days?

Mr. Walker—The first letter was thirty days. Mr. Skirm's letter says thirty days.

Mr. Backes—Mr. Skirm said he didn't know that the terms, as stated by him, were less or not. He would not say whether it was sixty days or thirty days, and Mr. Morris is the only witness that speaks of that subject, and Mr. Morris says it was ten days off three per cent.

The Court—The question that Mr. Anderson (the juror) asks is, if there is anything said.

The Juror—(Interrupting.) Were there not two distinct terms, cash 60 days or three per cent. off ten days?

20 The Court—It is a question of commercial usage what that term means—whether it means that you can have the three per cent. if paid in ten days, or if not you have sixty days to pay the bill.

The Juror—Mr. Morris says they refused to deliver the goods because they did not pay.

Q. What do you mean by the terms ten days, three per cent.?

A. Three off ten.

By the Court.

30 Q. Not what you mean, but what is meant in the commercial world?

A. I mean if I was making a contract with them, and if I wanted the cash, I would say three per cent. off ten days, not wanting possibly to give him sixty days or thirty days; we would sell a certain bill of goods and we would want the cash in ten days and for that cash we would give off three per cent.

By Mr. Woodruff.

Q. Was there any talk with Mr. Skirm upon any other terms—about any other terms than that?

A. No, sir.

Q. (Showing witness.) Look at that paper, what is that?

A. That is an invoice for duck that they purchased and are going to charge us with the difference.

Q. What do they say the terms are on that?

A. Three off ten days. 10

Q. Is that marked on each and every paper that is sent to you; look over them; is there any mark?

A. Less three off ten days; here is one ten days less three off.

Q. (Showing witness.) Look at that; what is that?

A. Charging us, saying that they would hold us for the difference in price.

Q. (Showing witness *P-16*.) Did you receive that letter from the Empire Rubber Manufacturing Co.?

A. Yes, sir. 20

Q. Did you have a conversation with Mr. Nason over the 'phone?

A. No, sir.

Q. Do you know if any conversation was had—from your own knowledge?

A. Yes, sir.

Q. Who had that conversation?

A. I think Mr. Borden had that conversation.

Q. Did you have any conversation with any officer of the Empire Rubber Co., touching the payment of their 30 bills?

A. Yes, sir.

Q. With whom?

A. I could not state.

Q. What happened in reference to it?

A. We told them that we could not—

Mr. Walker—(Interrupting.) I object.

Q. Did you tell them anything?

Mr. Walker—I am entitled to know whom he told.

Q. Did the Empire Rubber Co. have a telephone?

A. Yes, sir.

Q. Was it over that telephone you were talking?

A. Yes, sir.

Q. And can you recall anything you said touching these bills to anybody who answered the call on that telephone?

The Court—Overruled.

10 Q. Do you recall having a conversation with any person belonging to the Empire Rubber Co., about this matter?

A. I had a conversation with Mr. Murray.

Q. State what that was and when?

A. That was after the check for six and some odd dollars was dishonored at the bank.

Q. I show you *Exhibit D-2*; did you receive that?

A. Six hundred and thirty-seven dollars and thirty cents—we received this notice from the Mechanics National Bank.

20 Q. What is that notice?

A. That notice is a notice that the check—that there were no funds in the bank to meet the check.

Q. When was the check deposited in the bank—do you remember what day of the week?

A. I do not, but we got this immediately; it must have been two or three days previous; long enough to go to the bank and back again.

Q. The check was eventually paid, was it not?

A. The check was paid.

30 Q. Was the talk with Mr. Murray personally or over the telephone?

A. Over the telephone with Mr. Murray; he stated that he had just returned from Chicago, and that reaching his bank he learned that there had been no preparations made at his office to meet that check, and he said it was entirely unnecessary; that if he had been home such a thing would not have happened, and when he went down

to the bank and found out how they had treated him, and there was no necessity for it, he was very angry over the affair; I said, "Look here, Mr. Murray, you must know that that does not increase our confidence in you, to have that check dishonored, especially after it was given for bills long past due;" he said, "I realize that, and that is the reason I called you up."

Q. Was anything else said?

A. Yes, sir; Mr. Murray says, "Now, about duck; you must know you are not delivering us the duck in the quantities we want;" I said, "No, and you are not paying your bills when due and as you promised to;" he says, "You can count on us paying them; there will be no trouble in the future about that;" I said, "All right; in that case what duck do you want?" he specified certain weights of duck that they were in a great hurry for.

Q. Did you send them?

A. I turned around to the bookkeeper and told him—
Mr. Walker—I object.

A. (Continuing.) I turned around to the bookkeeper and told him, "You must be very careful and not let our bills run over \$300 or \$400 with the Empire Rubber Manufacturing Co.; if they run over their period, call them up every time, because it is under your notice, and we will hold you responsible if they go over \$300 or \$400; they have not been paying their bills when due in time past."

Q. What did you say to Mr. Murray after that?

A. That was the conversation over the telephone.

Q. He sent you a specification after that, did he? 30

A. Only as I told him over the telephone.

Q. That is the specification?

A. Yes.

Q. Did you send him any duck?

A. Yes, we sent him some goods.

Q. How were they paid for?

A. They were paid for slowly every time.

Q. What do you mean by slow?

A. Not paid in ten days; they would run from four to nine days over, and we kept calling up over the telephone right along, "Why are you not paying our bill?"

Q. Who was calling up on the telephone?

A. Mr. Borden, with instructions from us.

Mr. Walker—I object to that.

The Court—That may be stricken out.

Q. When was the last shipment of duck to the Empire Rubber Co.; do you remember that?

10 A. I think it was some time in December.

Q. (Showing witness.) Is that the date?

A. December 30th.

Q. How much did that amount to?

A. \$147.39.

Q. Was that paid?

A. It was.

Q. How many days, if any, after it was due?

A. Ten days after the ten, making twenty days.

20 Q. Did you make any further statement to Mr. Murray after that?

A. I did, that is, calling up over the telephone.

Q. What did you tell him?

Mr. Walker—After the 30th of December?

Q. What did you tell him after the 30th of December?

A. Somewhere around the middle of January, as near as I can remember.

Q. Had they, in the meantime, sent orders to you for duck, after December 30th; right after December 30th did you have any conversation with Mr. Murray?

30 A. Along about the middle of January he called up and wanted to know why we were not delivering any more goods, and I told him we were through and we did not intend to deliver any more goods; that he was not paying his bills when due, and that he had broken the agreement in every particular, and that we were through with him; he said, "Do you understand what I am going to do?" he said, "I intend to go on the open market and buy this duck and charge you with the difference;" I said, "All

right;" he said, "Is that final?" I said, "Yes;" he said, "I am going down town to have my lawyer draft a letter and send you a letter and we will abide by it."

Q. Did you get such a letter?

A. No, sir.

Q. Did you have any conversation with Nason about this time or before touching the financial condition of the Empire Rubber Co.?

A. No, sir.

Q. Did anybody in your office, that you know of? 10

A. Yes, sir.

Q. Were you present when such a conversation took place?

A. No, sir.

Q. Who was the person, if you know?

A. E. J. Morris.

Cross-examination.

By Mr. Walker.

Q. You said that you had a conversation with Mr. Skirm along in the middle of September, 1902, in which 20 he said that he wanted to order one thousand rolls of duck from your people for the Empire Rubber Co., to be delivered from October to October, 1902, to 1903, but he did not want to bind himself too closely with reference to the deliveries per month; that is right, is it not?

A. That is right.

Q. That conversation occurred in September, 1902, did it not?

A. That is right.

Q. You had some correspondence, as you have said, 30 with the Empire Rubber Manufacturing Co., and up to the 10th day of July, 1903, they had ordered and you had delivered to them seventy-four rolls of duck; that is right, is it not?

A. Yes, sir.

Q. Then you wrote a letter, or at least your concern

did, on the 20th day of June, 1903, to the Empire company; that is right, is it not?

A. That is right.

Q. (Showing witness.) Whose subscription is that?

A. My own.

Q. That is from Morris & Co.; that is your company?

A. Yes, sir.

Mr. Walker—That is *Exhibit P-4*, dated June 26th, 1903.

10 Q. You say in this letter, "When we first had our talk with Mr. Skirm we refused to talk anything otherwise than a definite contract, but after some weeks, we entered into an agreement that we would protect you in price for sixty or seventy rolls per month; this was the number Mr. Skirm thought we could count on each month though he did not bind himself to take that number;" why did you write that if you had considered that you had a definite contract whereby the Empire Rubber Manufacturing Co. had to call upon you for at least sixty rolls
20 per month?

A. Because we had two or three conversations at two or three different meetings, and I told Mr. Skirm, "We cannot accept a contract so indefinite that we cannot protect ourselves in cotton; we must have some guarantee how many rolls you will take per month."

Q. You did, from October, 1902, to July 10th, 1903, send to the Empire Rubber Manufacturing Co., upon their requisition, much less than sixty rolls per month, namely, seventy-four rolls during the whole time at the
30 agreed price of seventeen cents?

A. That is right, but under protest.

Q. Under what protest?

A. When I would call up over the telephone and ask him why——

Q. Ask whom?

A. I asked Mr. Nason.

Q. Did you have a conversation with Mr. Nason over

the telephone in which you asked him why something; is that right?

A. Yes.

Q. Did you recognize Mr. Nason's voice up there at the time?

A. I asked him who it was, and he said Mr. Nason.

Q. You knew Mr. Nason, did you not?

A. I saw Mr. Nason frequently there in the office.

Q. You had a conversation with him, did you not?

A. We might have talked; I could not say. 10

Q. You had reason to believe it was Mr. Nason on the telephone?

A. He simply stated that fact; that is all I know.

Q. How many times did you speak to Mr. Nason over the telephone about the orders?

A. Only once that I asked who I was talking to; he said Mr. Nason.

Q. And did you then protest to him that they were not ordering fast enough?

A. I asked him why he was not ordering the number 20 of rolls per month.

Q. What number did you state?

A. I stated sixty rolls per month.

Q. What did he say?

A. He said, "We are ordering and filling in just as we want it; as we run out of certain weights you are getting all the order."

Q. What did you say to that; did you make any reply to that at all?

A. Well, I cannot remember; if I did, it was simply, 30 "You are not using very much duck."

Q. You said that they ordered nothing in October, 1902; you remember that, don't you?

A. Well, that was——

Q. Complete your answer.

A. You didn't ask me anything.

[Repeated by stenographer.]

“Q. You said that they ordered nothing in October, 1902; you remember that, don't you?”

Q. Do you or not remember saying that?

A. Yes, sir.

Q. I show you a bill, Morris & Co. to Empire Rubber Manufacturing Co., October 18th, 1902, for two rolls of duck, at seventeen cents, \$41.99; I ask you if that was not for an order given you in October, 1902?

A. That is right.

10 Q. I show you another bill of your company to the Empire Rubber Manufacturing Co., dated October 23d, 1902, for three rolls of duck, at seventeen cents, \$63.75; that was for an October order, too, was it not?

A. That is right.

Q. You were mistaken when you said that they gave you no order in October?

A. It was so little it didn't lay in my mind.

Q. Were you mistaken or not?

A. Yes, sir.

20 Q. Are these invoices?

A. They are invoices, yes.

Q. You rendered a statement for these two invoices on October 31st, 1902, for \$105.74, did you not?

A. I did.

Q. And received on November 10th, the check of the Empire Rubber Manufacturing Co. for \$102.57, being the amount of the invoices less three per cent., did you not?

A. That is right.

30 Q. And that check went through the bank and was paid?

A. That is right.

[Check is marked for identification.]

Q. I show you here four invoices from your company to the Empire Rubber Co. for duck in December, 1902, amounting in all to \$365.67, and a check of the Empire company to your company for \$354.70, which is the amount of the invoices, less three per cent.; the check

is dated January 14th, 1903; I ask you if that was paid to you?

A. For the December bill.

Q. That is right, is it not?

A. That is right.

Q. That was paid to you?

A. Yes.

[Check is marked for identification.]

Mr. Woodruff—I object to this until you show how it is relevant. 10

Mr. Walker—These are invoices from Morris & Co. to the Empire company for goods sold and delivered by Morris & Co. to the Empire company between October, 1902, and July, 1903. They are certainly competent. Counsel on the other side asked about part of the time, and I want to fill the gap between October, 1902, and the time when they commenced to show deliveries and payments.

Mr. Backes—It is not cross-examination.

The Court—Go on. 20

Q. I show you a statement from Morris & Co. to the Empire company, dated February 1st, 1903, for three several shipments of duck during the month of January, 1903, amounting to \$972.74, and the Empire company's check to your order, dated February, 1903, \$943.56; that check is for that bill less three per cent., is it not?

A. That is right.

Q. That check was paid your company?

A. Yes.

Q. I show you an invoice of Morris & Co. to the Em- 30
pire company for \$184.45, dated February 9th, 1903, and a check of the Empire Manufacturing Co. to your company's order for \$178.92, dated March 11th, 1903, which is the amount of your invoice less three per cent., is it not?

A. That is right; that is February 7th.

Q. That is right, is it not?

A. It is.

Q. That was paid?

A. That was paid.

[Check marked for identification.]

Q. I show you statement of Morris & Co. to the Empire Rubber Manufacturing Co., dated May 1st, 1903, for three several shipments of duck during April, 1903, amounting to \$424.83, with the invoices attached, and the Empire Rubber Co.'s check to your company, dated May 12th, 1903, for \$412.01; that check is the amount
10 of that statement less three per cent.?

A. That is right.

Q. That check was paid to you?

A. That is right.

Q. The invoices in each instance are attached to the statements and checked, are they not?

A. Yes.

Q. On direct examination didn't you first say that you did not prepare to deliver sixty rolls to the Empire Rubber Manufacturing Co. in October, 1902, and then say
20 that you were prepared to deliver them?

A. Yes.

Q. Well, which is right?

A. We did not prepare to deliver them, because they did not send in their specifications on the first of the month; we had the duck there to have given them.

Q. It is true, during all the time this contract ran, is it not, you had the duck in and could have delivered it?

A. We had the cotton?

Q. Yes.

30 A. Yes, we had the cotton; we might not have had the different weights as desired.

Q. Didn't you make an excuse to the Empire Rubber Company at one time, that you were out of cotton?

A. That we were out of cotton?

Q. Yes.

A. Never.

Q. And was not your mill shut down for a period during the running of this contract for want of cotton?

A. Never.

Q. Ten days, three per cent. means, does it not, that if the buyer pays his bill within ten days, he is entitled to take three per cent. on the face of the bill?

A. Less three per cent. on the face of the bill.

Q. If he pays it after ten days he has to pay the full bill?

A. That is the rule as it should be.

Redirect examination.

By Mr. Woodruff.

10

Q. I call your attention to this paper and this bill, alleged to have been purchased on October 18th; what is this paper; when were those goods sold on that paper; what is this paper?

A. That is a memorandum of the sale.

Q. What is the date of that paper?

A. October 18th, 1902.

Q. That is delivered; when was the sale made; (showing witness the paper) is this the sale?

A. That is right.

20

Q. What is the date of the sale?

A. September 30th.

Q. Then you were not mistaken about any goods being sold in October?

A. No.

Q. Look at this bill—\$63.75; when was that bill sold to the Empire Rubber Manufacturing Co.?

A. September 30th.

Q. Then you were not mistaken in that statement that these goods were not sold in October?

30

A. No, sir.

Recross-examination.

By Mr. Walker.

Q. What did you say these sheets were that you were speaking about?

A. (Indicating on paper.) Is the date of the order

when it is given; this (indicating) is when it is sent out; it was sent out October 18th.

Q. These sheets show your orders between what dates?

A. It shows here when the orders were taken.

Q. I mean from here to the last, it shows orders between what dates?

A. December 17th.

Q. 1903?

A. 1903.

10 Q. When is the first one?

A. From September 30th, 1903.

[Sheets are marked for identification.]

Q. Tell me how many days it was after the order for the two rolls of duck which you billed—how many days before you billed the two rolls under date of October 18th, 1902, were they ordered?

A. Eighteen days.

Q. Tell me how many days prior to the billing of the three rolls of October 23d, 1903, they were ordered?

20 A. Twenty-three days.

Q. You were not any more prompt in filling orders than they were in giving checks?

Mr. Backes—I object to that, because there does not appear to be any question about the payment of these bills.

Defendants rest.

Rebuttal.

Charles Edward Murray, recalled.

Direct examination.

By Mr. Walker.

30 Q. You know Mr. William McK. Morris, who was on the stand, do you not?

A. I do.

Q. Did you have a conversation with him over the telephone about the middle of January, 1904?

A. I never had but one conversation with Mr. Morris

over the 'phone, and that was in reference to the check; the date I don't just recollect.

Q. I show you *Exhibit D-2*, which is a notice from the Mechanics National Bank to Morris & Co., that the bank had charged to them your company's check for \$637; was it about that check?

A. It was.

Q. What was the conversation you and Mr. Morris had over the telephone; what did he say to you?

A. Upon my return home I learned that—— 10

Mr. Backes—I object.

Mr. Walker—He can state what he learned.

Mr. Backes—He is asked what he said.

A. (Continuing.) I called Mr. Morris up on the telephone and told him that I had just returned from Chicago and I had learned from the Mechanics National Bank that on account of our account being short two or three hundred dollars, that they had laid over the payment of our check for about \$600, and that I had telephoned to the Mechanics National Bank and asked why that was done, and on investigating the matter, I found that our cashier had failed to deposit bills receivable which I had instructed him to do, before leaving, and in that way—— 20

Q. (Interrupting.) Is this what you said to Mr. Morris?

A. I explained this to Mr. Morris and I told him I hoped he would pardon the matter; that the check was paid, and he said, "Very well, I suppose mistakes will happen," and that was the conversation; Mr. Morris never took any exception to the manner in which we paid our bills, nor did I ever hear of any until Mr. Stokes came in the office and told me, during the latter part of the period when he was furnishing us duck; then I wrote to Morris & Co. a letter in which I referred to the mislaid invoices; that is the only time that I ever heard of any exception being taken to the bills, and the bills have been paid and have been met promptly, as fast as under the regime of Mr. Cooke, as the bills will show. 30

Q. I show you *Exhibit P-16*, dated January 18th, 1903; is that the letter you referred to?

A. That is the letter; that is the first time I heard of any exception being taken in the manner of paying our bills.

Q. Mr. Morris testified that at this conversation you said to him that Morris & Co. were not delivering duck in the quantities that you wanted, and that he said, "No, but you are not paying your bills?"

10 A. I never remember any such conversation; I never remember any reference to the quantity they were delivering of duck.

Q. Did he say anything about paying your bill?

A. I never remember that he did; in fact I know that he did not at that time.

Q. Who is the Mr. Stokes to whom you refer?

A. Our receiving clerk, and the man who had charge of following up contracts and goods.

Cross-examination.

20 By Mr. Backes.

Q. You, as a fact, were behind in the payment of your bills at ten days; all through the time from July 10th, 1903, to January, 1904, you were behind in the payment of your bills as per contract—ten days?

A. The bills were behind according to the statement rendered; some five, six, seven or eight days.

Q. According to this statement they were behind?

A. The statement is correct.

Q. You know that they are according to your books?

30 A. According to our payments here—not with our books—that statement is correct.

Q. Why didn't you pay within the ten days, as you promised?

Mr. Walker—Objected to as incompetent.

A. Because they were not rendered.

Q. It was not because there was not plenty of money in the bank?

A. There was always a balance.

Q. You wanted to hold on to it?

A. Not at all; these bills were paid just as promptly as any ten days' bills that we have that come in our office.

Q. On the 18th of January, 1903, you gave us an excuse for not paying your invoice of the 30th of December, because you were informed by your cashier that the cashier had mislaid the bill or invoice?

A. That no doubt was true at that time, or I would not have written it. 10

Q. You don't remember the circumstances; you knew at that time that you bought duck from Morris & Co.?

A. Yes, sir.

Q. You were treasurer of the company?

A. Yes, sir.

Q. And as such you look after the payment of bills?

A. Not directly; the cashier does that.

Q. In December and the latter part of November you gave as an excuse why bills were not paid, because the bank account was a little short; did you give any other reason? 20

A. I didn't give such a reason; you mean in reference to this check?

Q. Yes.

A. I have explained that.

Q. Were you not rung up on other occasions by Morris & Co. and asked about your bills?

A. I never heard of any bills not being paid except that one case and that is when Mr. Stokes called my attention to it, and at that time I wrote that letter. 30

Q. That is January, 1904?

A. That is the only time.

Q. Who was your cashier during that period of time?

A. Mr. Eakings; Mr. Eakings is, at the present time, down with typhoid fever, or I would have had him here.

H. Watson Stokes, sworn as a witness on the part of the plaintiff, in rebuttal, testifies as follows:

Direct examination.

By Mr. Walker.

Q. You are what in connection with the Empire Rubber Manufacturing Company?

A. Receiving clerk.

Q. How long have you been receiving clerk?

A. Ever since I have been connected with the office there, about three years.

Q. Were you such receiving clerk in October, 1902?

10 A. Yes, sir.

Q. As receiving clerk, do the supplies that come into the mill come to you?

A. All of them; I am responsible for everything that comes on the ground.

Q. When you are short of supplies, or want any supplies, does any duty devolve upon you?

A. Yes, sir; I keep a record showing what we receive, and I keep a record of all contracts and deliveries on them, and make requisitions on those contracts.

20 Q. Do you know the concern of Morris & Co.?

A. Yes, sir.

Q. Of Yardville?

A. Yes, sir.

Q. Between October, 1902, and February, 1904, did you ever call up their concern on the telephone with reference to duck?

A. Frequently.

Q. How frequently?

30 A. Well, I should say two or three times a week, and sometimes more—possibly sometimes, and possibly sometimes so frequent.

Q. Would the 'phone be answered?

A. Yes, sir.

Q. Whom would you ask for?

A. I asked for Mr. Morris, supposing that I would get a more definite reply from him.

Q. Was the 'phone always answered?

A. Yes, sir.

Q. And what would you say to Mr. Morris over the telephone?

Mr. Backes—Did he say anything to Mr. Morris?

Q. Did you say anything to Mr. Morris?

A. Yes.

Q. What did you say to him?

A. Usually I would refer to an order of a certain date and ask him why it was not delivered, and when we could expect the same.

Q. What would he say to that? 10

A. Sometimes he would say that they had not a trip down, and other times it was so scarce it was necessary to divide their product among their different customers.

Q. Did he ever say anything to you about the Empire Rubber Manufacturing Co. not paying its bills?

A. No, sir; never—only at one time.

Q. Did he ever say anything to you about not giving orders for sixty rolls per month?

A. No, sir.

Q. What time was it that he said something about 20 non-payment of bills?

A. I think it was about the middle of January, 1904, as near as my recollection serves me.

Q. What did he say?

A. He said, "We cannot deliver your orders if you do not pay your bills."

Q. What did you say?

A. It kind of stunned me a little; I could not say anything; practically, I just hung the 'phone up and communicated the fact— 30

Q. (Interrupting.) What did you do?

A. I communicated the fact to Mr. Murray immediately.

Q. If your concern, the rubber company, was called on the 'phone with reference to duck, who would be the one to answer it?

A. Well, if it was in reference to deliveries or orders, I would.

Q. Were you at the mill daily?

A. Every day.

Cross-examination.

By Mr. Backes.

Q. From October, 1902, to July, 1903, you were at the factory?

A. Yes, sir.

Q. And in the same capacity?

A. In the same capacity, yes.

10 Q. During all that time you did not frequently ring up Morris & Co., three or four times a week?

A. No.

Q. They rang you up two or three times a week?

A. No.

Q. Mr. George R. Cooke was then the manager, was he not?

A. No, sir.

Q. In October?

A. No, sir.

20 Q. How frequently did Morris & Co. ring you up per week, from October to July?

A. I say never, to my knowledge.

Q. You were not buying much material during that time?

A. Well, not the latter part of 1902—no, sir.

Q. And from July, 1902, to July, 1903, you did not buy much, did you?

A. No, sir.

30 Q. Between July, 1903, and January, 1904, which of the Messrs. Morris did you speak to?

A. Well, I don't know; I simply asked for Mr. Morris, and if I didn't state it was the Empire Rubber Co., I usually spoke to Mr. Morris; if I did, why Mr. Morris was sometimes out of town, and sometimes some other excuse.

Q. Would you ask for the office of Morris & Co.?

A. Yes, certainly.

Q. And then ask for Mr. Morris?

A. Yes, sir.

Q. And at no time except in January, 1904, was there anything said about your company's failure to pay its bills?

A. That we were derelict in the payment of our bills.

Q. Did you know that they were not paid?

A. No, sir; not the day of payment.

Q. You did not pay them?

A. No, sir.

10

Q. You would not know when they were paid?

A. No, sir; the cashier paid them, and I frequently heard——

Q. (Interrupting.) Did you ever speak to Borden, the bookkeeper of Morris & Co., of and concerning unpaid bills?

A. No, sir; I never did.

Q. Who answered the 'phone at the Empire Rubber Co.?

A. Our office boy.

20

Q. In what capacity did Mr. Nason serve different from yours?

A. Inasmuch as he is what is called "purchasing agent," and he makes contracts, and after they are made he delivers them to me, and I enter them; I take them and keep records; he tells me the particulars, and when we want anything on these contracts I make requisitions on the parties with whom we have the contract.

Mr. Walker—We offer in evidence the delivery sheets that were marked for identification, showing the deliveries between October, 1902, and January, 1904, and these other exhibits marked for identification, showing the invoices and payments between October, 1902, and July, 1903.

The Court—Now, there was a motion made yesterday——

Mr. Woodruff—(interrupting.) Of course, I made a motion yesterday to non-suit the plaintiff. The Court

refused the motion to non-suit at that time, reserving to the defendants the right to renew the motion or to move to direct a verdict for the defendants. I now renew the motion, and move to direct a verdict for the defendants. We claim that the plaintiff has shown no cause of action against the defendants. We claim that the original contract, whatever it was, was rescinded—

The Court—(interrupting.) How is the original rescinded if there was no contract on July 10th?

10 Mr. Woodruff—I don't mean rescinded. I mean broken—breached—by both parties, the plaintiff by not receiving the rolls that the contract called for, and the defendants perhaps by not tendering the sixty rolls each month.

Mr. Walker—There is a question to be submitted to the jury. It is for the jury to say what contract was made. The plaintiff desires to amend its declaration by averring that the contract made was for one thousand rolls of duck instead of seven hundred and twenty; and we
20 will waive the excess in number between seven hundred and twenty and one thousand.

Mr. Woodruff—I think at this stage we are entitled to know from the plaintiffs just what they think about this contract. We are entitled to know whether they want to recover under a contract made in October or whether they insist that the contract was made in July. I think it is very unfair, if they don't know themselves, to send the case to the jury to determine a question that they do not know themselves. I ask at this time if they won't tell
30 me which contract they rely upon.

Mr. Walker—I have nothing to say unless instructed by the Court.

The Court—Well, I will state my views of the posture of affairs, more for the benefit of the plaintiff than for any other reason. In my judgment, the plaintiff must stand upon the contract made previous to October 1st, 1902. What that contract is will be submitted to the jury, but whether there was a modification of that con-

tract, either a modification in the way of a substituted performance or a new contract in regard to delivery, is a question of law. Now, it depends entirely upon two letters. One is the letter of June 29th to Morris Brothers. In that letter the Empire company asserts that the contract was to deliver seven hundred and twenty rolls, seventy-four of which had been delivered, leaving a balance of six hundred and forty-six; and that there was in that contract no provision as to the time when it should be delivered; and the demand is then made, this being 10 June 29th, and there being July, August and September—three months—left in the year, that Morris Brothers should deliver two hundred and fifteen rolls a month, making up with what had been delivered the entire amount. Then it proceeds to say, "Our actual requirements in the next three months will be about sixty to seventy-five rolls per month, and if you would prefer making us shipments of about this amount until completion of contract, it would be agreeable to us." On July 10th, Morris Brothers write to the Empire Rubber 20 Manufacturing Co. and say, "We have decided to accept your offer in your letter of June 29th to deliver you six hundred and forty-six rolls of belting and hose duck at seventeen cents, three per cent., during this and next month. We presume that you can get along with thirty or forty rolls per month, as you know cotton is very high. After September 1st we to deliver you at the rate of sixty rolls per month until the above number of rolls are delivered. You to send us specifications for each sixty rolls as near to the first of the month as possible." That 30 was not an acceptance of the terms offered by the Empire Rubber Co. because they call for two hundred and fifteen rolls a month for three months, or, if the defendants preferred to make shipments of sixty or seventy rolls per month, they might do so. Now, on July 13th is the crucial letter. The rubber company says in that letter, "We beg to acknowledge receipt of your favor of the 10th instant, and note that you have decided to fill con-

tract according to our understanding of it, and as per our letter of June 29th." That contract, according to the rubber company's understanding of it, was that Morris & Co. should deliver all those rolls within the year. What they said in regard to sixty or seventy rolls a month was simply thrown out as a favor. "We shall draw on you within the next two months for just as little as we possibly can." They do not say that they will draw for the amount named in the previous letter.

10 "With the understanding, however, that you do not allow the change to have any bearing whatever upon the terms of the contract." What are the terms of the contract as construed by the rubber company? That the remainder of these seven hundred and twenty rolls should be delivered within the year, and that no matter what favors are given, the contract stands. This is followed by a requisition on September 21st, and on the very expiring date, October 1st, a requisition for the entire balance of the rolls, showing that they intend to stand upon the

20 original contract. In my opinion, therefore, under that contract, there was not a time when the Empire Rubber Co. was not in a position to call upon Morris Brothers to make delivery of duck under the original contract. If that be so, then they must stand upon the original contract, and the failure to deliver was a breach of that contract, and the damages to be recovered must be under the terms of that contract. Now, whether the terms of that contract are, as we have testimony here, that there should be at least sixty rolls delivered a month, or

30 whether it was that the whole seven hundred and twenty rolls should be delivered at any time during the year, is a question for the jury. But the trouble with the case is that the plaintiff has put in no testimony, as I recollect, in regard to the market value of duck during the months from October, 1902, to October, 1903; and it is its price when that duck was to be delivered under the original contract that will control in the measurement of damages. If counsel want to do that, they are given the privilege of opening the case and doing so.

Mr. Walker—We must show the market price at the end of each month?

The Court—Yes, because that would allow for every contingency.

Mr. Walker—Our theory has been in line with the Supreme Court of Pennsylvania, where they held that where there was a contract for deliveries during a stated time, the plaintiff need not buy in the open market upon each breach of the contract, but could wait until after the expiration of the time for all deliveries. 10

The Court—How long after? If it can be a week, it can be five years.

Case reopened.

Charles S. Cook, sworn as a witness on the part of the plaintiff, testifies as follows:

Direct examination.

By Mr. Walker.

Q. Where do you live?

A. Plainfield, N. J.

Q. What is your business? 20

A. Salesman.

Q. Salesman for whom?

A. Catlin & Co.

Q. Where is their place of business?

A. New York.

Q. Do they deal in cotton duck and hose duck?

A. Yes, sir.

Q. And belt duck?

A. Yes, sir.

Q. When did you go with Catlin & Co.? 30

A. October 20th, 1903.

Q. Before you went with them, with whom were you?

A. Hanna & Co.

Q. What is their line?

A. Cotton goods.

Q. Is there a market price for cotton—for hose duck and belt duck?

A. Yes, sir.

Q. Do you know what was the market price for cotton duck, hose duck and belt duck in September, 1903?

Mr. Backes—I object. The witness does not appear to be qualified at the present time. Hanna & Co. deal in dry goods. This witness' term with Catlin & Co. began in October, 1903. From that there is no qualification
10 shown at the present time. Hanna & Co. do not appear to have been engaged in this line of goods.

Q. You say that Hanna & Co. deal in cotton?

A. Cotton goods.

Q. Do they deal in ducks?

A. No, sir.

Q. What kind of cotton goods do they deal in?

A. Sheeting and drills.

Q. Do drills go into the manufacture of rubber goods?

A. To a small extent.

20 Q. Are these drills and sheeting anything like the duck used in the manufacture of rubber goods?

A. Well, they use sheeting in the manufacture of rubber goods.

Q. While you were with Hanna & Co., were you cognizant of, or did you have knowledge of, sales of cotton duck?

A. No, sir.

Q. You had no knowledge of the sales of duck until what time?

30 A. Until I went to Catlin & Co.

Q. You say you did know the market price of cotton duck in September, 1903?

Mr. Backes—I object.

Q. Did you have knowledge of the market price of cotton duck at the beginning of the month of October, 1903?

A. Yes, sir.

Q. What was that market price?

Mr. Backes—I object.

A. Twenty cents.

Mr. Backes—I ask that the answer be stricken out.

The Court—What is the objection?

Mr. Backes—He is asked the market price of duck at the beginning of the month of October, 1903. He has not shown when that beginning was. He answered after I made my objection, and I ask that the answer be stricken out.

The Court—Yes, strike it out. 10

Q. I ask you if you knew the market price of cotton duck at the end of October, the last of October, 1903?

A. Yes, sir.

Q. Now, I will ask you, what was it at that time?

Mr. Backes—I object.

The Court—Overrule it.

Mr. Walker—I pray an exception.

Mr. Walker—The case has taken a turn and assumed a phase not anticipated by counsel on either side of the case, I think I can say. The proposition now confronting 20 the plaintiff to prove the market value of duck at various periods is one we are hardly prepared to meet satisfactorily to ourselves. We therefore ask your Honor to permit the withdrawal of a juror.

The Court—I won't do that without consent of the other side.

Mr. Backes—We object to that, and ask your Honor to direct a verdict.

Charles Edward Murray, a witness already sworn on the part of the plaintiff, recalled. 30

Direct examination.

By Mr. Walker.

Q. Do you know what was the market price of cotton duck at the end of July, 1903?

A. I do.

Q. What was it?

Mr. Backes—I object.

Mr. Walker—He has already proved his qualification. He is a dealer.

Mr. Backes—He is not a dealer.

The Court—Ask him how he knows.

Q. Mr. Murray, when did you commence to purchase cotton duck?

A. 1897.

Q. And have you or not purchased cotton duck continuously ever since 1897?

10 A. I have.

Q. Does that include hose duck and belt duck?

A. Both.

Q. Did you buy in large or small quantities?

A. Both small and large.

Q. Frequently or infrequently?

A. Quite frequently; I kept well posted on the market from time to time.

Q. Have you been acquainted with the market price of cotton duck during all of that period?

20 A. I have.

Q. Do you know the market price of duck at the close of the month of July, 1903?

A. I did.

Q. What was it?

Mr. Backes—I object.

The Court—Note an exception.

ALFRED REED, [L. S.]
Justice Supreme Court.

A. Seventeen to eighteen cents a pound.

30 Q. Were you acquainted with the market price of duck at the close of the month of August, 1903?

A. I was.

Q. What was it?

A. Seventeen to eighteen cents a pound.

Q. At the close of the month of September, what was it?

A. Seventeen to eighteen cents; early in September it was seventeen; the close of September and first of October it was nineteen to twenty cents.

Q. I refer to the year 1903?

A. 1903; the early part of September it was seventeen cents a pound; the contract period—the latter part of September and early part of October, which is generally the period for making contracts—it was nineteen to twenty cents a pound.

Q. Do you know when the contract was alleged to have been made by the Empire Rubber Manufacturing Co. for a year's supply of duck? 10

A. The first contract or the last contract?

Mr. Backes—That is for the jury to say.

A. (Continuing.) The first contract—it was September 29th, 1902; the first contract was entered into about that time, verbally, and confirmed by us—

Mr. Backes—(interrupting.) I object, and ask that it be stricken out.

The Court—Note the objection where it was made. 20

Q. I direct your attention to the last of September, 1902, and I now take you on a year and direct your attention to the last of September, 1903, and I ask you what was the market price of cotton duck at the end of September, 1903?

Mr. Woodruff—I object on the ground that he has already answered.

The Court—I understood him to say it was nineteen to twenty cents a pound?

Q. What was it at the last part of that month? 30

A. The last part of September and first of October it was nineteen to twenty cents a pound.

Q. 1903?

A. 1903.

By the Court.

Q. And in the first part of September it was eighteen to nineteen cents?

A. Eighteen to nineteen cents; yes, sir.

By Mr. Walker.

Q. What did you say it was one month back?

Mr. Baekes—I object. He said it was seventeen to eighteen cents.

Q. Which was it, seventeen or eighteen cents?

A. It was as near as anybody can come to the market price; the market price depends somewhat on the competition and condition of the mills—that is, there is a variance between one buying and selling; eighteen cents
10 was the top notch, and seventeen cents was the lowest for those months.

Q. These prices that you have given—seventeen, eighteen, nineteen and twenty represent what unit—

A. (Interrupting.) How is that?

Q. What quantity are they the prices for?

A. Per pound.

Q. Do you know what this duck weighs?

A. It is made of different weights; belt duck is from twenty up to thirty-two ounces; hose duck, such as would
20 be included in that contract, is as low as fourteen ounces.

Q. Explain the weights according to the rolls, if you can?

A. I cannot go into that without taking a pencil and paper and figuring it out.

Q. You say fourteen ounces; what does that mean?

A. Fourteen ounces to the yard; when I speak of ounces I speak of ounces to the yard.

Q. I wish you would figure it up on a roll?

A. They vary according to the weights.

30 Q. How many yards in a roll?

A. I cannot recollect that just off-hand; I have not checked up an invoice or bill for some years—for several years past; I don't just recollect; they run two hundred to two hundred and twenty pounds to the roll.

Q. The rolls weigh what?

A. The rolls vary from one hundred and ninety to two hundred and twenty and two hundred and thirty pounds; I cannot say definitely the weights of the rolls; the invoices will give you that.

Q. The invoices give the weights, do they?

A. They give the weights; you can easily figure it, from the ounces designated on the invoices.

Q. How do they run—different shipments of duck—that is to say, is there any variance, and if so, how much variance is there?

A. In belt duck it varies from twenty ounces to the yard to thirty-two ounces to the yard.

Q. What does hose duck vary?

A. Hose duck varies from six ounces up to sixteen 10 ounces or eighteen ounces possibly.

Q. For hose?

A. Yes; but these light weights do not come in under such a contract as we would make with Morris & Co.; they run down to fourteen ounces; it is either fourteen or sixteen ounces; Morris & Co. do not make ducks under that weight; they do not make hose duck under fourteen, except possibly twelve; but we do use in hose as low as six ounces per yard.

Q. What did you say about belting duck? 20

A. From twenty ounces to thirty-two ounces, or possibly thirty-three ounces.

By Mr. Backes.

Q. What is that for, fire hose or garden hose?

A. Garden hose the lightest, and the heavy weights, first quality, are in the fire hose.

By the Court.

Q. Belt duck you say runs what weights?

A. Belt duck runs from twenty ounces to thirty-two ounces, as a rule; sometimes it is made possibly special 30 from thirty-two to thirty-four ounces, but it is very seldom we use higher than thirty-two ounces to the yard.

Q. I show you *Exhibit P-31*, what is that?

A. That is an invoice charge made by the Empire Rubber Manufacturing Co. against Morris & Co., for one hundred and forty-two rolls—

Mr. Backes—(interrupting.) I object to anything further. The statement must speak for itself.

Q. It is an invoice rendered by your company to Morris & Co.?

A. Yes.

Q. I show you *Exhibit P-32*, what is that?

A. That is an invoice rendered to Morris & Co. by the Empire Rubber Manufacturing Co.

Q. And do those invoices show the number of rolls and the number of pounds charged?

A. Yes, and the number of ounces per yard.

10 Q. Are there any other invoices except those contained in these two exhibits from your company to Morris & Co.?

A. I think there are; I am not positive; yes, there must be; this is not all; I see there are several here; I guess that is all; there are several in that pile; I cannot tell definitely whether that is all or not.

Cross-examination.

By Mr. Backes.

Q. Fourteen ounces per yard of duck, how many
20 pounds in a roll?

A. It depends altogether on how many yards in the roll.

Q. Don't you know how many yards are in a roll?

A. It depends altogether on the weight of the roll.

Q. I gave you the weight of the roll—fourteen ounces per yard; how many yards was in the roll?

A. It depends altogether upon how many yards are in the roll; you give me the number of pounds the roll contains and the ounces per yard, and I will tell you how
30 many yards.

Q. When you order a roll of duck weighing fourteen ounces to the yard, do you know how many yards you are going to get in the roll?

A. Not definitely; it varies.

Q. What is the variance?

A. I cannot say off-hand.

Q. You don't know?

A. Not definitely; I would say from one hundred and eighty or one hundred and ninety up to two hundred and twenty pounds.

Q. Is it not a fact that duck weighing fourteen ounces to the yard will not exceed one hundred and fifty pounds to the roll?

A. I cannot say that; I think they go heavier than that.

Q. You don't know?

A. Not positively; I think I said I have not checked 10
up a bill or invoice for several years.

Q. Fourteen ounces to the pound will not exceed one hundred and fifty pounds to the roll?

A. I don't know.

Q. And sixteen ounces to the yard will not exceed one hundred and ninety pounds to the roll?

A. I don't know.

Q. You don't know?

A. It depends on the yardage; more yards, more weight. 20

Q. In telling the jury approximately what number of pounds are in a roll, you are depending entirely upon some charge which you have made against Morris & Co. in certain invoices?

A. It is not based on anything.

By Mr. Walker.

Q. What is it based on?

A. My answer in answer to his question is just as I have said—I am not positive how these rolls go in weight; I have not noticed particularly; the invoices will speak 30
for themselves; if I had been receiving clerk and received the duck, I would know.

William McK. Morris, one of the defendants, already sworn, recalled.

Direct examination.

By Mr. Backes.

Q. What is the average weight per roll of cotton duck?

A. Taking a roll of each weight as we manufacture it, from sixteen ounces up to thirty-two ounces to the yard, and getting a general average, it would run about one hundred and sixty-five pounds to the roll.

Case closed.

TRENTON, N. J., Friday, June 2d, 1905.

Plaintiff's counsel requested the Court to charge the jury:

1. That the plaintiff was not bound to supply itself
10 from the market before the contract date expired, for it had the right to expect that the defendants would fulfill the contract and deliver all unsupplied duck, even up to the last day of the contract period; and the measure of damages for their default is the difference between the contract price and the market price at or within a reasonable time after the expiration of the contract.

2. That if the jury find that the time for delivery was
by mutual consent extended for an indefinite period of time and until all of the duck contracted for should be
20 delivered, then if the jury believe that the defendants, about the middle of January, 1904, arbitrarily refused, which refusal would be without lawful excuse, to deliver the balance of the duck due the plaintiff under the contract, the measure of damages would be the difference between the contract price and the market price within a reasonable time after such refusal to deliver which, under the proofs in this case, would include the market price in February, 1904; because the plaintiff had a right to wait
30 until the contract time to deliver all duck was past, and then go into the market and purchase.

CHARGE.

REED, *S. C. J.*—The case, gentlemen, which I will submit to you is within rather a narrow compass.

I have ruled, as a matter of law, that the plaintiff's rights must rest upon the contract made in September, by which there can be no doubt a certain number of rolls of duck were to be furnished by the Morris Brothers to the Empire Rubber Co. during the year beginning on October 1st, 1902, and ending October 1st, 1903. Whether that contract was to deliver a thousand rolls or seven hundred and sixty-two rolls matters only in respect to the construction you may give to the contract as to whether the defendants had a right of delivery each month upon requisition, or the delivery was to be made whenever called for. As far as this suit is concerned, under the pleadings and the admissions of counsel, it stands as though the contract was for seven hundred and twenty rolls. The principal question, aside from the question of damages, is whether, under the contract which seems to have been made between Mr. Skirm, on behalf of the Empire Rubber Company, and Mr. Morris, on behalf of Morris Brothers, there was a right on the part of Morris Brothers to have a requisition each month of at least sixty rolls. This question, as you will perceive, is important, for its solution will affect the method of arriving at the amount of damages which you may think fit to award. As I have already remarked, in ruling upon points during the progress of the trial, the way damages are to be measured when contracts of this kind are broken—when delivery of goods bargained to be sold is not made according to the terms of the contract—is to inquire what it would cost the party entitled to delivery under the contract to go into the market and buy the same kind of goods at the time he was entitled to delivery, as he was entitled to under his contract.

You perceive at once that is the sensible as well as the legal rule.

If a man can go out and buy the same class of goods for the same price that he is entitled to under his contract, he is not damaged by the breaking of the contract. If he has to pay more for them, he is then injured to the extent that he has to pay over the contract price. That is the rule settled by all of the cases.

Therefore, if the Empire Rubber Co. could have bought
10 at the same price, or a less price than it was to pay under the contract, at the time, it was entitled to the delivery of the rolls, then, under the rule which has been laid down by the Court, it was not injured legally, and it follows as a matter of course that if it could not have got the goods it was entitled to under the contract by paying the contract price, but would have had to pay more, then it was injured; and the amount of the money value of the injury was the amount it would have had to pay for the goods in the market over the contract price. You per-
20 ceive, therefore, it is the market price at the time the vendee is entitled to deliver, that controls the matter of damages. So, you see, whether sixty rolls of these goods were to be delivered each month, or the goods were to be delivered at any time during the year when called for by the vendee, or delivered at any time when the vendor chose to deliver them, are points of importance in arriving at the question of damages.

I think it is too plain to be argued that the contract was not that these goods were to be delivered whenever
30 Morris Brothers chose to make deliveries. There is nothing in the testimony, or in the relation of the parties or in the obvious purpose of the contract to lend countenance to such a view, namely, that Morris Brothers at any time during the year could deliver the whole amount, whether it was one thousand rolls or seven hundred and twenty rolls, to the Empire Rubber Co. It would therefore seem clear that deliveries were to be made either at such times and in such quantities as the Empire Rubber Co. re-

quired, without any limitation as to the time or quantity, or else the deliveries were to be made upon requirement of at least sixty rolls each month.

There is very little in the written evidence to throw light upon this feature of the contract, although there may be portions of the letters which may throw light upon the probability that monthly deliveries was a feature of the contract. The witnesses to the terms of the contract, in respect to deliveries, are Mr. William A. Skirm, Jr., and Mr. Morris. I do not see very much significance in what Mr. Mason says about it. You are to take the testimony of these two witnesses and make up your minds whether from what they say passed over the telephone in regard to it, it was a substantial feature of the contract that when Morris Brothers agreed to deliver the quantity of rolls it was understood that they should have them distributed equally so far as the delivery of at least sixty rolls a month permitted. Of course, if the contract was for one thousand rolls, that would not have been an equal division, but if it were for seven hundred and twenty rolls it would be an equal division for the year; otherwise the arrangement for sixty rolls a month would leave a portion of the rolls to be delivered when the rubber company called for them. As to that, however, it is a question for you to decide. 10

If you find that deliveries were to be required to an amount of at least sixty rolls a month the case stands in this way:

From October 1st, 1902, to July following, nine months of the contract year, there had been no requisitions which had not been filled; there is no testimony to show any default in deliveries of what the Morris Brothers had the right to have called for during the nine months. Assuming you find there was a right of delivery of at least sixty rolls a month these nine months will exhaust five hundred and forty of the rolls; they had delivered all called for, therefore they were not in default in making any delivery during the nine months, for under 30

this view of the contract they were entitled to deliver five hundred and forty rolls. This left one hundred and eighty rolls which Morris Brothers were bound to deliver—sixty in July, sixty in August and sixty in September.

There was a requisition in July; in July thirty-four rolls only were delivered, leaving twenty-six undelivered. I may say this requisition covered enough to include these three months. In August twenty-seven only were delivered, leaving thirty-three undelivered. In September twelve were delivered, leaving forty-eight undelivered, adding the twenty-six, the thirty-three and the forty-eight together you will ascertain what were undelivered during the last three months when a requisition was made, and the defendants are liable for the non-delivery of these undelivered rolls.

Now, for what amount are they liable? They are liable, as I have already charged you, for the difference between seventeen cents a pound and the market price at the time they were entitled to delivery. The only evidence we have on the market price is to be found in the testimony of Mr. Murray, who said, as I understood him, that during July and August, the market price was from seventeen cents to eighteen cents a pound. That would cover the undelivered portions during July and August. He said that the market price the last of September was from nineteen to twenty cents a pound.

The Foreman—Pardon me, Judge. Did not Mr. Murray say eighteen to nineteen the first of September and nineteen to twenty the last of September and the first of October?

The Court—I understood him to say it was eighteen to twenty the first part of September.

Mr. Backes—Eighteen to nineteen the early part of September and nineteen to twenty the latter part of September and the first part of October.

The Court—Yes, eighteen to nineteen the first part of September and nineteen to twenty the last part of Sep-

tember and the first part of October. That, I understand, controls it.

The Foreman—Would that mention of October have any bearing upon it?

The Court—Not at all.

Having arrived at the number of rolls undelivered and the market price, the next question is, how many pounds there were in a roll, because the market price and the contract price have reference to pounds.

Mr. Murray gives his view as to the number of pounds 10 in a roll as varying between one hundred and ninety and two hundred and twenty, but he admits that is not definite, that it is a mere view, while Mr. Morris states the average to be one hundred and sixty-five pounds a roll; he being a manufacturer, that is probably close to the fact.

The Foreman—May I ask another question?

The Court—Yes.

The Foreman—I understood Mr. Morris' testimony to cover duck down to the weight of ten, while the ducks in 20 consideration in this case are none of them below fourteen. I would like to know whether these different weight ducks are put up in different weight rolls.

The Court—I do not know, from the testimony.

The Foreman—I did not find anything in the testimony.

The Court—You will have to take his testimony as it stands.

That covers all I have to say on the question of damages, in case you find Morris Brothers had the right to 30 deliver at least sixty rolls a month on requisition.

If you find the contract was to deliver at any time during the year, on the requirement of the Empire Rubber Co., then the case stands in this way:

Seventy-four rolls had been delivered up to July, all that had been required. On July 6th ten rolls, and on July 7th, I think, one hundred and ninety-two rolls (counsel may correct me if I make a misstatement) were

required. In all the requisition covered two hundred and two rolls; these, under this view of the contract, should have been delivered within a reasonable time after their requisition, say during July. Sixty were delivered up to September 21st, when another requisition of all the remaining undelivered rolls was made. This would leave one hundred and forty rolls undelivered, under the control of the market price of July, which, as I have already stated, has been testified by Mr. Murray to have
 10 been from seventeen to eighteen cents a pound.

The Foreman—I have not got those figures, your Honor.

The Court—Requisitions were made in July for two hundred and two rolls; of these sixty were delivered up to September 21st, leaving one hundred and forty rolls undelivered up to that time, and these would be controlled by the market price of July, with respect to damages.

Under the requisition of September 21st, there are, as I make it, three hundred and sixteen rolls undelivered,
 20 and the damages respecting these rolls are controlled by the late September market price, which was stated by Mr. Murray as being from nineteen to twenty cents a pound.

Now, gentlemen, all the other questions are matters which appeal to you as business men, and I have no further remarks to make.

If you fix upon damages, after you ascertain the amount, the money value, which at that time would have compensated the party, you will add to it interest at six per cent. from that time until Tuesday, June 6th, 1905,
 30 the time of the meeting of the Supreme Court. Strictly that interest should be calculated from the time when the deliveries were to be made.

Mr. Backes—May I suggest one thing about the figures where I think your Honor is in error?

The requisition of July called for two hundred and two rolls, did it not, the 7th of July?

The Court—Yes.

Mr. Backes—And sixty were delivered, leaving one

hundred and forty-two; that leaves one hundred and forty-two, and I understood your Honor to say one hundred and eighty.

The Court—I think not.

Mr. Backes—Then I am in error.

[An examination of the charge disclosed the fact that the Court had stated the number as being 140.]

The Court—I have two requests to charge, which I refuse and grant exceptions.

Mr. Walker—I desire to except to that part of the charge where the Court instructed the jury that the plaintiff's right must rest upon the contract made in September, 1902. 10

Exception allowed. Let it be sealed and it is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

Mr. Walker—Also to that part of the charge which instructs the jury that the damages must be measured by the cost in the market at the time of non-delivery. 20

Exception allowed. Let it be sealed and it is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

Mr. Walker—Also to that part of the charge which says that the undelivered rolls in July and August should be measured by the market at the end of those respective months.

Exception allowed. Let it be sealed and it is sealed accordingly. 30

ALFRED REED, [L. S.]
Justice Supreme Court.

Mr. Walker—I also desire to except to the refusal of the Court to charge as requested.

Exception allowed. Let it be sealed and it is sealed accordingly.

ALFRED REED, [L. S.]
Justice Supreme Court.

EXHIBITS.

EXHIBIT P-1.

EMPIRE RUBBER MFG. CO.

10 TRENTON, N. J., June 22, 1903.

Messrs. Morris & Co., Groveville, N. J.

GENTLEMEN—In order to complete our record, we beg to confirm conversation had with you over 'phone by our Mr. Nason regarding contract placed with you by Mr. Skirm about the latter part of September, last year for our requirements in Cotton Duck, to October 1st, 1903 at 17c. per pound.

Yours truly,
Empire Rubber Mfg. Co.
Per H.R.N.

20
A.

EXHIBIT P-2.

MORRIS & COMPANY.

YARDVILLE, N. J., June 24, 1903.

Empire Rubber Mfg. Co., Trenton, N. J.

GENTLEMEN—Your letter received. Our understanding with Mr. Skirm was that you would use somewhere

between sixty or seventy rolls per month he thought, and we would protect you at seventeen cents per pound, 3% ten days.

Since our understanding you have taken in the nine months just seventy-four rolls in all, or about eight rolls per month. This is so far from the understanding we had with Mr. Skirm that we feel compelled to put it on a little different basis for the remaining three months namely, we will accept orders from you up to 50 rolls of duck at seventeen cents per pound, 3% ten days; but any orders in excess of this amount must be at a new price. 10

Yours very truly,

Morris & Co.

M

EXHIBIT P-3.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., June 25, 1903.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—We beg to acknowledge receipt of your favor of the 24th, inst. and we hardly think your position is in line with your general reputation for being fair in your business dealings. 20

We think you will acknowledge your contract with Mr. Skirm was for our year's supply and if we over-estimated our wants, it only means your gain, as the number of rolls mentioned by Mr. Skirm had nothing whatever to do with the contract itself, but simply a guidance for your protection and as you have not been at a loss on account of the verbal estimate, we do not see how you justify your refusal at this time to accept our requisitions on account of contract, so long as they are within the number of rolls as estimated we would need. 30

We understand you stated to our Mr. Nason over 'phone the contract with us was a verbal one, for the

guidance of our shipping clerk, we have memorandum of contract made with you and we feel quite sure you will find among your files the contract, or at least some reference to it and if you are successful in finding same, we would thank you to furnish us with a copy of it. We remain,

Yours truly,
Empire Rubber Mfg. Co.
C. Edw. Murray, Treas.

10 A.

EXHIBIT P-4.

MORRIS & COMPANY.

YARDVILLE, N. J., June 26, 1903.

Empire Rubber Mfg. Co., Trenton, N. J.

GENTLEMEN—Your letter received this morning. When we first had our talk with Mr. Skirm we refused to talk anything otherwise than a definite contract. But after some weeks we entered into an agreement that we would protect you in price for sixty or seventy rolls per
20 month as this was the number Mr. Skirm thought we could count on each month, although he did not bind himself to take that number. We told him we would have to know in order to protect ourselves in cotton and sales of our goods. Since that understanding you have taken in nine months what Mr. Skirm led us to expect in one month. We have frequently called your company up to see how the duck situation was but always understood you did not need any duck. We have since had to try and sell the quantity we saved for you. We fail to under-
30 stand why we are not treating you right for we feel the “shoe in on the other foot.”

You certainly do not think we would enter into an agreement last September to deliver you all your order in two or three months at the tag end of the year: for you

must appreciate that we could not do business at that rate, for we would not be able to spare the goods owing to our other contracts.

We have not prepared to deliver you duck in the next three months any faster than what you have been taking in the last nine months and you have not led us to expect you would want it any faster, although we have called you over telephone many times.

We now offer you in the next three months almost as many rolls as you have taken in the nine months and you think we are not fair. We think after you come to look into the situation a little closer you will see our position and see that we are acting very liberally.

We are,

Very truly yours,

Morris & Co.

M

EXHIBIT P-5.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., June 29, 1903. 20

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—We beg to acknowledge receipt of your favor of the 26th, inst. and are surprised at the position which you take regarding our contract for Duck. We had hopes you would be willing to treat us in your usual fair manner and extend, if necessary, time of delivery of goods as covered by agreement, but under the circumstances we will not ask this, we will favor you by considering the smallest estimate of our requirements, which would equal 720 rolls for the year deducting 74 30 Rolls delivered, would leave a balance of 646 Rolls, these you can deliver to us at the rate of 215 rolls per month. This is only in accordance with your contract

and we think you will agree with us, there was never any reference as to just what time deliveries must be made.

Our actual requirements in the next three months will be about 60 to 75 rolls per month, and if you would prefer making us shipments of about this amount, until completion of contract, it would be agreeable to us. We remain,

Yours truly,
Empire Rubber Mfg. Co.
C. Edw. Murray, Treas.

10 A.

EXHIBIT P-10a.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., July 6, 1903.

Morris & Company, Yardville, N. J.

GENTLEMEN—In confirmation of our conversation over the phone today, we would ask you to deliver as promptly as possible our order for 28 ounce and ducks of other weights, as we are getting quite a number of belt orders at the present time, and we will have to have this
20 duck promptly, in order to execute the orders in time.

Trusting you will give this your earnest and prompt attention, we remain,

Very truly yours,
Empire Rubber Mfg. Co.,
per H. W. S.

W

EXHIBIT P-10b.

July 6th, 03.

Morris & Company, Yardville, N. J.

30 5 Rolls 12 oz 40" Duck
 5 " 28 " 42" "

Please rush

H. Watson Stokes.

EXHIBIT P-9a.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., July 7, 1903.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—We are without your reply to our favor of the 29th, ult. We herewith enclose you requisitions on account of our contract and unless we have from you prompt delivery, we shall be compelled to purchase on open market and in such case we shall charge you with the difference between our contract price and market 10 price of to-day. We remain,

Yours truly,

Empire Rubber Mfg. Co.

C. Edw. Murray, Treas.

A.

Enclosure.

EXHIBIT P-9b.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., July 7th, 03.

To Morris & Company, Yardville, N. J. 20

Please deliver to us during July not later than Aug the first the following ducks

12 Rolls 40" 10 oz	12 Rolls 42" 22 oz
32 " 40" 12 "	16 " 42" 24 oz
24 " 41" 14 "	8 " 42" 26 "
20 " 41" 16 "	32 " 42" 28 "
8 " 41" 18 "	16 " 42" 30 "
8 " 41" 20 "	4 " 42" 32 "

Act. contract.

C. Edw. Murray, Treas. 30

EXHIBIT P-6.

MORRIS & COMPANY.

YARDVILLE, N. J., July 10, 1903.

Empire Rubber Mfg. Co., Trenton, N. J.

GENTLEMEN—We have decided to accept your offer in your letter of June 29th and deliver you 646 rolls of belting and hose duck at 17 cents, 3%. During this and next month we presume you can get along with 30 or 40 rolls per month, as you know cotton is very high. After
10 September 1st we to deliver you at the rate of 60 rolls per month until the above number of rolls are delivered—you to send us specifications for each 60 rolls as near the first of the month as possible. We are,

Very truly yours,

Morris & Co.

M

EXHIBIT P-7.

July 13, 1903.

Messrs. Morris & Co., Yardville, N. J.

20 GENTLEMEN—We beg to acknowledge receipt of your favor of the 10th inst., and note that you have decided to fill contract according to our understanding of it and as per our letter of June 29th.

We shall draw on you within the next two months for just as little as we possibly can, with the understanding, however, that you do not allow the change to have any bearing whatever upon terms of contract. We remain,

Yours truly,

Empire Rubber Mfg. Co.,

C. Edw. Murray, Treas.

30

EXHIBIT P-8a.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Sept. 21, 1903.

Morris & Company, Yardville, N. J.

GENTLEMEN—We herewith enclose order No. 11469 for balance of order for 646 rolls of belting & hose duck. We beg leave to call your attention to your letter of July 10th and also to our order of July 7th, our order of July 7th calls for delivery during that month of belting and hose duck as follows:

10

Delivered on this as follows:

10 ounce	12 rolls	6 rolls	
12 "	32 "	2 "	
14 "	24 "	4 "	
16 "	20 "	6 "	
18 "	8 "	7 "	
20 "	8 "		
22 "	12 "	7 "	
24 "	16 "	2 "	
26 "	8 "	3 "	20
28 "	32 "	20 "	
30 "	16 "	2 "	
32 "	14 "	1 "	

You will see from the above, that you are very much behind in filling our order of the above date, but knowing the circumstances, we have tried to be patient, even to the point of having cancelled some few belt orders, in which we use heavy weight ducks.

We would now ask you to use every effort in filling the enclosed order, and also balance of our order of July 30 7th. Hoping you will give this your prompt and careful consideration, we remain,

Very truly yours,
 Empire Rubber Mfg. Co.,
 per H. W. S.

Enclosure
 W

EXHIBIT P-8b.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Sept. 21st, 03.

To Morris & Co., Yardville, N. J.

Please deliver to us "(in addition to our order of July 7th)" by Oct 1st or as soon after as possible the following duck on act. of contract @ 17c per lb

	15 Rolls 10 oz 40"	12 Rolls 20 oz 42"
	30 " 12 " 40"	24 " 22 " 42"
10	30 " 14 " 41"	20 " 24 " 42"
	25 " 16 " 41"	10 " 26 " 42"
	10 " 18 " 41"	51 " 28 " 42"
		20 " 30 " 42"
		5 " 32 " 42"

and charge to account of Empire Rubber Mfg. Co.

C. Edw. Murray, Treas.

EXHIBIT P-11.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Oct. 17, 1903.

20 *Messrs. Morris & Co., Yardville, N. J.*

GENTLEMEN—In confirmation of conversation over telephone yesterday, would state we will look to you to deliver Duck 14, oz., 16 oz., and 28 oz. on Tuesday next. We have advised our customer that we would make shipment of Packing and Belting that we are to use this Duck in on the following Wednesday.

Hoping you will not disappoint us in this matter, we remain,

Yours truly,

Empire Rubber Mfg. Co.

30

H. W. S.

A.

EXHIBIT P-12.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Nov. 19, 1903.

Morris & Company, Yardville, N. J.

GENTLEMEN—We beg leave to call your attention to the fact that we *must* have 5 rolls each of the following weight ducks; within the next 10 days: 14 ounce, 16 ounce and 22 ounce. We are holding orders, which are likely to be cancelled unless we can get these weight ducks in order to get them out. 10

Asking you to kindly help us in this matter, we remain,

Very truly yours,

Empire Rubber Mfg. Co.,
per H. W. S.

W

P. S.—Please send us a few of these within the next day or so.

S.

EXHIBIT P-13a.

EMPIRE RUBBER MFG. CO. 20

TRENTON, N. J., Nov. 23, 1903.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—We herewith enclose you specifications for the balance of 646 rolls of Duck, which you promised to deliver to us in your letter of July 10th, you promised us at that time to deliver us after September 1st, at the rate of 60 rolls per month, we to send you specifications on or before the first of each month. We have now sent you three orders which will cover these 646 rolls and would ask that you kindly deliver to us as quickly as 30

possible a few of each weights, especially the heavy weights from now until the total amount is delivered.

Hoping you will comply with this request, we remain,

Yours truly,

Empire Rubber Mfg. Co.

C. Edw. Murray treas.

H.W.S.

A.

EXHIBIT P-13b.

10 EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Nov. 23d, 03.

To Morris & Company, Yardville, New Jersey.

We hereby specify the weights of duck we wish, to make up the balance of 646 Rolls you promised to deliver in your letter of July 10th, 03.

22 oz 45 Rolls	28 oz 51 Rolls
24 " 25 "	30 " 25 "
26 " 43 "	32 " 10 "

C. Edw. Murray

Treas.

20

EXHIBIT P-14.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Dec. 1, 1903.

Messrs. & Co., Yardville, N. J.

GENTLEMEN—Kindly deliver to us in the morning without fail, two rolls each of 14 and 16 ounce Duck, also one roll each of 30 and 32 ounce. We are in urgent need of this for orders in hand and trust you will be able to deliver same. We remain,

30

Yours truly,

Empire Rubber Mfg. Co.

H.R.N.

A.

EXHIBIT P-15.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Dec. 16, 1903.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—After receiving your Mr. Morris' promise to let us have some 28 ounce and 22 ounce Duck, we were very much disappointed in receiving yesterday only one roll of each. In compliance with your request we did not ask you for delivery of these goods until we really needed them, and as stated to you over 'phone we have had quite a little business cancelled on account of not having Duck on hand to fill order promptly. This is becoming a serious matter with us and one about which we must come to a definite understanding. We have on our books to-day orders which will require the following rolls and weights.

20 rolls.....	28 ounce.	
10 rolls.....	24 ounce.	
15 rolls.....	22 ounce.	
6 rolls.....	30 ounce.	20

Kindly let us know by 'phone upon receipt of this tomorrow just when we can expect delivery made of the above lot and confirm same by letter. We remain,

Yours truly,

Empire Rubber Mfg. Co.

C. Edw. Murray, Treas.

per A.B.C.

A.

EXHIBIT P-17.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Dec. 19, 1903.

Morris & Company, Yardville, N. J.

GENTLEMEN—As per conversation over the phone, we herewith enclose you our check for invoice of December 7th, \$81.94. Kindly receipt and return this at your earliest convenience, and oblige,

Very truly yours,

10

Empire Rubber Mfg. Co.,

per C. B. A.

Enclosure

W

EXHIBIT P-18.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Dec. 31, 1903.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—Please deliver to us as quickly as possible after the first of the year, 10 rolls 22 ounce, 5 rolls 20 24 ounce and 10 rolls 28 ounce Duck, as we have orders that will take about this amount and you would oblige us very much by delivering this amount as soon as possible, we remain,

Yours truly

Empire Rubber Mfg. Co.

H.W.S.

A.

S

EXHIBIT P-19.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Jan. 11, 1904.

Morris & Company, Yardville, N. J.

GENTLEMEN—We are badly in need of 22, 24 and 28 ounce duck, and have repeatedly endeavored to get some satisfaction from you as to time of delivery over the phone, today the writer has taken the matter up and without any better success, and we would now ask you to respectfully consider us to the extent of giving us a reply. 10 You are putting us in a very bad light with our trade, and as we have stated before, we have already lost business by your indifference to fill our orders.

Very truly yours,

Empire Rubber Mfg. Co.,
C. Edw. Murray, Treas.

W

EXHIBIT P-16.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Jan. 18, 1903. 20

Morris & Co., Yardville, N. J.

GENTLEMEN—We herewith enclose you check for your December 30th, invoice, this should have been sent you before, but our Cashier informs the writer he mislaid the invoice among some other papers and did not know of any bill being due or unpaid until his attention was called to your conversation with our Mr. Nason over 'phone last week, during the writer's absence.

We consider your excuse for refusing to fulfill your contract with us a very slim one, and we should very 30 much dislike to have any trouble over this matter and in

order that you shall not have cause to make another flimsy excuse, we will say to you, upon receipt of your assurance that you will deliver to us 60 rolls of Duck per month from now on, we will hand you our check the same day the goods are delivered, this, we think, you will agree with us will more than offset any one or two days late which we might have been in sending you checks, and which was only caused by the absence of the writer at times.

10 Since your letter of July 10th, you have delivered 126 rolls of Duck and this only after spending one-half of one's time with you over 'phone. You have made one excuse after another and during the whole time you have been supplying other contracts which no doubt were more profitable to you. We would now ask you to kindly let us know just what we can expect. We remain,

Yours truly,

Empire Rubber Mfg. Co.

C. Edw. Murray, Treas.

20 A.

EXHIBIT P-20.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Feb. 11, 1904.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—In keeping with our position, as stated to your Mr. Morris over 'phone some time ago, to the effect, should you persist in not keeping your contract with us for Cotton Duck as outlined in your letter of July 10th, 1903, we would buy on the open market and
30 charge you with any difference between your contract price to us and the market price, at the time of making purchase.

We enclose you invoice for difference in contract price and price paid for 18 rolls, or 2829 pounds at 7c per

pound, price paid being 24c per pound. We have contracted so far for 221 rolls at 24c per pound and will render you invoices for charges for difference from time to time, as the Duck is delivered to us. You will notice we have deducted from our invoice cash discount 3% and hope to have your check within 10 days. We remain,

Yours truly,

Empire Rubber Mfg. Co.
C. Edw. Murray, Treas.

A.

10

EXHIBIT D-1.

EMPIRE RUBBER MFG. CO.

TRENTON, N. J., Sept. 29, 1902.

Messrs. Morris & Co., Yardville, N. J.

GENTLEMEN—We are pleased to state that we accept your proposition as made the writer over telephone about a week or ten days ago for furnishing us Hose and Belting Duck up to 1000 rolls at 17c per pound. Terms 3% off 30 days, or net 60 day delivered at our works.

Thanking you to acknowledge receipt of same, we 20 remain,

Yours truly,

Empire Rubber Mfg. Co.
W. H. Skirm, Jr., Sec.

EXHIBIT D-2.

THE MECHANICS NATIONAL BANK.

TRENTON, N. J., Nov. 14, 1903.

Messrs. Morris & Co.

DEAR SIR—We charge to your account to-day Ck made by Empire Rubber Mfg Co and endorsed by you for \$637.30, for which please send us your check, and oblige,

Yours respectfully,

Wm. W. Stelle, Cashier,

10

per V

P. S.—We hold this out of your acct until Monday, Mr. Murray out of town today.

Dec. 16, 1904.

Robt. S. Woodruff, Esq., Trenton, N. J.:

MY DEAR JUDGE WOODRUFF—We enclose herewith answers to the last interrogatories which you served upon us.

In our answers to your first interrogatories we have stated that certain duck was purchased from J. H. Lane & Co., from Feb. 11th to Feb. 18th, 1904, and from 20 March 5th to March 31st, 1904, inclusive, from J. H. Lane & Co., and that certain duck was purchased on Feb. 29th and March 31st from Catlin & Co. These dates were taken from the dates of the invoices rendered Morris & Company by the Empire Rubber Mfg. Co., and by error on our part do not express the exact dates on which that duck was purchased. The duck from Lane & Co. was purchased by the Empire Rubber Mfg. Co. on Feb. 9th, 1904, and the duck from Catlin & Co. was purchased by 30 the Empire Rubber Mfg. Co. on Feb. 16th, 1904. You will be kind enough, therefore, to amend the answer to the first interrogatory in that respect. I believe the dates

given in our answer to the first interrogatory indicate the dates of delivery and not the dates of actual purchase. We think, from our answers to your interrogatories, that you now know as much about this transaction as we do, and trusting that we have given you the information desired, we beg to remain,

Yours very truly,

VROOM, DICKINSON & SCAMMELL.

P. S.—Please send us notice of trial, duly acknowledged.

V., D. & S. 10

New Jersey Supreme Court. Empire Rubber Manufacturing Company, plaintiff, *v.* William McK. Morris and Edward J. Morris, partners, trading as Morris & Company, defendants. On contract. Answers to interrogatories.

To Robert S. Woodruff, Esq., Attorney of Defendants:

SIR—Please take notice that the following are answers to the interrogatories served upon us on November 23d, 1904:

Answer to First Interrogatory.—The plaintiff pur- 20
chased the rolls of duck mentioned in the first interroga-
tory as being purchased at 24 cents per pound from J. H.
Lane & Company, through their agent, R. J. Caldwell.
Of the 218 rolls referred to in the latter part of said first
interrogatory, 9 rolls were purchased by the plaintiff com-
pany from Catlin & Company, through their representa-
tive, C. S. Cook, between September 19th and September
28th, 1904, at 19½ cents per pound, and 209 rolls thereof
were purchased from J. H. Lane & Company, through
their agent, R. J. Caldwell, on October 19th, 1904, at 30
19 cents per pound, and said 218 rolls of duck were not
purchased on March 31st, 1904, at 25 cents per pound,
as inadvertently stated in the bill of particulars in the
above-stated cause.

Answer to Second Interrogatory.—H. R. Nason was the representative of the plaintiff company who made the purchases of the rolls of duck from J. H. Lane & Company and from Catlin & Company.

Answer to Third Interrogatory.—The plaintiff company purchased the rolls of duck mentioned in the third interrogatory from Catlin & Company, through their agent, C. S. Cook.

Answer to Fourth Interrogatory.—The plaintiff company, through its agent, H. R. Nason, purchased the rolls of duck mentioned in the third interrogatory from Catlin & Company.

State of New Jersey, County of Mercer, ss.—Harvey R. Nason, being duly sworn according to law, upon his oath says that he is engaged in business with the Empire Rubber Manufacturing Company, the plaintiff in the above-stated cause; that he is familiar with the transactions referred to in the answers to interrogatories annexed hereto, and that the facts set out in the said answers to
10
20 said interrogatories and the statements made therein are true, to the best of his knowledge, information and belief.

HARVEY R. NASON.

Sworn to and subscribed before me, this 16th day of December, A. D. 1904.

J. M. DICKINSON,
M. C. C. of N. J.

New Jersey Supreme Court. Empire Rubber Manufacturing Company *v.* William McK. Morris and Edwin J. Morris, partners, &c. On contract. Answer to interrogatory.

To Robert S. Woodruff, Attorney of Defendants:

SIR—Please take notice that the following is an answer to the interrogatory served upon us on August 1st, 1904:

The plaintiff purchased the bales of duck mentioned in the bill of particulars attached to the declaration in the above-stated cause, on the dates, at the prices per pound, 10 and from the persons hereinafter set forth, viz.:

Feb.	11, 1904,	18	rolls	duck,	at	24c.	per	lb.,	from	J. H. Lane & Co.	
Feb.	12, 1904,	4	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
Feb.	13, 1904,	7	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
Feb.	15, 1904,	17	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
Feb.	18, 1904,	15	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
Feb.	29, 1904,	3	"	"	"	23c.	"	"	"	Catlin & Co.	
Feb.	29, 1904,	8	"	"	"	23c.	"	"	"	Catlin & Co.	
Feb.	29, 1904,	22	"	"	"	23c.	"	"	"	Catlin & Co.	
March	4, 1904,	35	"	"	"	23c.	"	"	"	Catlin & Co.	20
March	5, 1904,	5	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
March	10, 1904,	10	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
March	31, 1904,	142	"	"	"	24c.	"	"	"	J. H. Lane & Co.	
March	31, 1904,	12	"	"	"	23c.	"	"	"	Catlin & Co.	
March	31, 1904.									Contracted to purchase from 218 rolls of duck, at 25c. per pound.	

Dated August—, 1904.

VROOM, DICKINSON & SCAMMELL,
Attorneys of Plaintiff.

State of New Jersey, County of Mercer, ss.—A. Boyd 30
Cornell, being duly sworn according to law, on his oath says that he is the secretary of the Empire Rubber Manufacturing Company, the plaintiff in the above-stated cause, in which the foregoing answer and interrogatory are made; and deponent says that he is familiar with the facts in the case, and that the facts set out in the said answer to said interrogatory and the statements made

therein are true, to the best of his knowledge, information and belief.

A. BOYD CORNELL.

Sworn to and subscribed before me this ——— day of August, 1904.

• There were also introduced in evidence invoices sent Morris & Co. by the Empire Rubber Manufacturing Co. for five hundred and eighteen rolls of duck purchased by it in the open market and in place of the duck not
10 delivered by Morris & Co. on account of the contract sued upon.

These invoices were for the difference between the price of the duck contracted for with Morris & Co., namely, seventeen cents a pound and the price paid by the Empire Rubber Co. in the open market, making a total difference of \$6,864.61, the amount sued for.

ASSIGNMENT OF ERROR.

[Filed August 1, 1905.]

Afterwards, that is to say, on the eighteenth day of
20 August, in the year nineteen hundred and five, in the Court of Errors and Appeals of the State of New Jersey, comes the said Empire Rubber Manufacturing Company, by Vroom, Dickinson and Scammell, its attorneys, and says in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exception, and also in the granting of judgment aforesaid, there is manifest error, in this, to wit:

First. That the said Justice before whom the issue

joined in said action was tried, at and upon the aforesaid trial of the said issue, refused to charge and instruct the jury that the said plaintiff was not bound to supply itself from the market before the contract date expired, for it had the right to expect that the defendants will fulfill the contract and deliver all unsupplied duck, even up to the last day of the contract period; and the measure of damages for their default is the difference between the contract price and the market price at or within a reasonable time after the expiration of the contract. 10

Second. That the said Justice at and upon the aforesaid trial of the said issue before him, refused to charge and instruct the jury that if the said jury find that the time for delivery was by mutual consent extended for an indefinite period of time and until all of the duck contracted for should be delivered, then if the jury believe that the defendants about the middle of January, nineteen hundred and four, arbitrarily refused, which refusal should be without lawful excuse, to deliver the balance of the duck due the plaintiff under the contract, the measure of damages would be the difference between the contract price and the market price within a reasonable time after such refusal to deliver, which, under the proofs in this case, would include the market price in February, nineteen hundred and four; because the plaintiff had a right to wait until the contract time to deliver all duck was past, and then go into the market and purchase. 20

Third. That the said Justice at and upon the aforesaid trial of the said issue before him, refused to allow the said plaintiff to prove the amount of duck purchased and delivered to it subsequent to the beginning of this suit from persons other than the defendants, to replace the duck which the defendants failed to deliver under their contract, and to recover for the difference between the price so paid and the contract price. 30

Fourth. That the said Justice at and upon the aforesaid trial of the said issue before him, ruled that the plaintiff might prove the market value of duck only at

the time that the last delivery of duck under the terms of the contract was to be made.

Fifth. That the said Justice at and upon the aforesaid trial of the said issue before him, charged the jury that the plaintiff's right to recover must rest upon the contract made in September, nineteen hundred and two.

Sixth. That the said Justice at and upon the aforesaid trial of the said issue before him, charged the jury that the measure of damages for the breach of the contract
10 sued upon is controlled by the market price at the time of non-delivery.

Seventh. That the said Justice at and upon the aforesaid trial of the said issue before him, charged the jury that the damages to the plaintiff on account of the rolls of duck undelivered in July and August, nineteen hundred and three, should be measured by the difference between seventeen cents per pound and the market price at the end of those respective months.

Eighth. That the said Justice at and upon the aforesaid
20 said trial of the said issue before him, allowed William H. Skirm, Jr., to state why the quantities of duck which were to be delivered by the defendants to the plaintiff were not incorporated in the letter of September twenty-ninth, one thousand nine hundred and two.

Ninth. That the said Justice at and upon the aforesaid trial of the said issue before him, allowed William H. Skirm, Jr., to testify in reference to plaintiff's factory being actively engaged in business from October, nineteen hundred and two, to May, nineteen hundred and
30 three, and whether the plaintiff company used more than seventy-four rolls of duck during that time.

Tenth. That the said Justice at and upon the aforesaid trial of the said issue before him, allowed William H. Skirm, Jr., to testify what was said by him to William Morris as to the probable number of rolls the plaintiff company would need per month.

Eleventh. That the said Justice at and upon the aforesaid trial of the said issue before him, refused to strike

out the testimony of William Morris in reference to his conversation with Mr. Skirm about a maximum and minimum number of rolls to be furnished each month by the defendants to the plaintiff company.

Twelfth. That the said Justice at and upon the aforesaid trial of the said issue before him, allowed William Morris to testify why the defendants did not deliver to the plaintiff company sixty rolls of duck each month after the first of September.

Thirteenth. That the said Justice at and upon the 10 aforesaid trial of the said issue before him, charged the jury that the damages must be measured by the cost in the market at the time of non-delivery.

Wherefore, the said Empire Rubber Manufacturing Company prays that the judgment aforesaid, by reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, may be set aside, annulled and for nothing holden, and that the said Empire Rubber Manufacturing Company may be restored to all things which it has lost by occasion of the said 20 judgment.

JOHN M. DICKINSON,
EDWIN ROBT. WALKER,

Attorneys for and of Counsel with the Plaintiff in Error.

JOINDER IN ERROR.

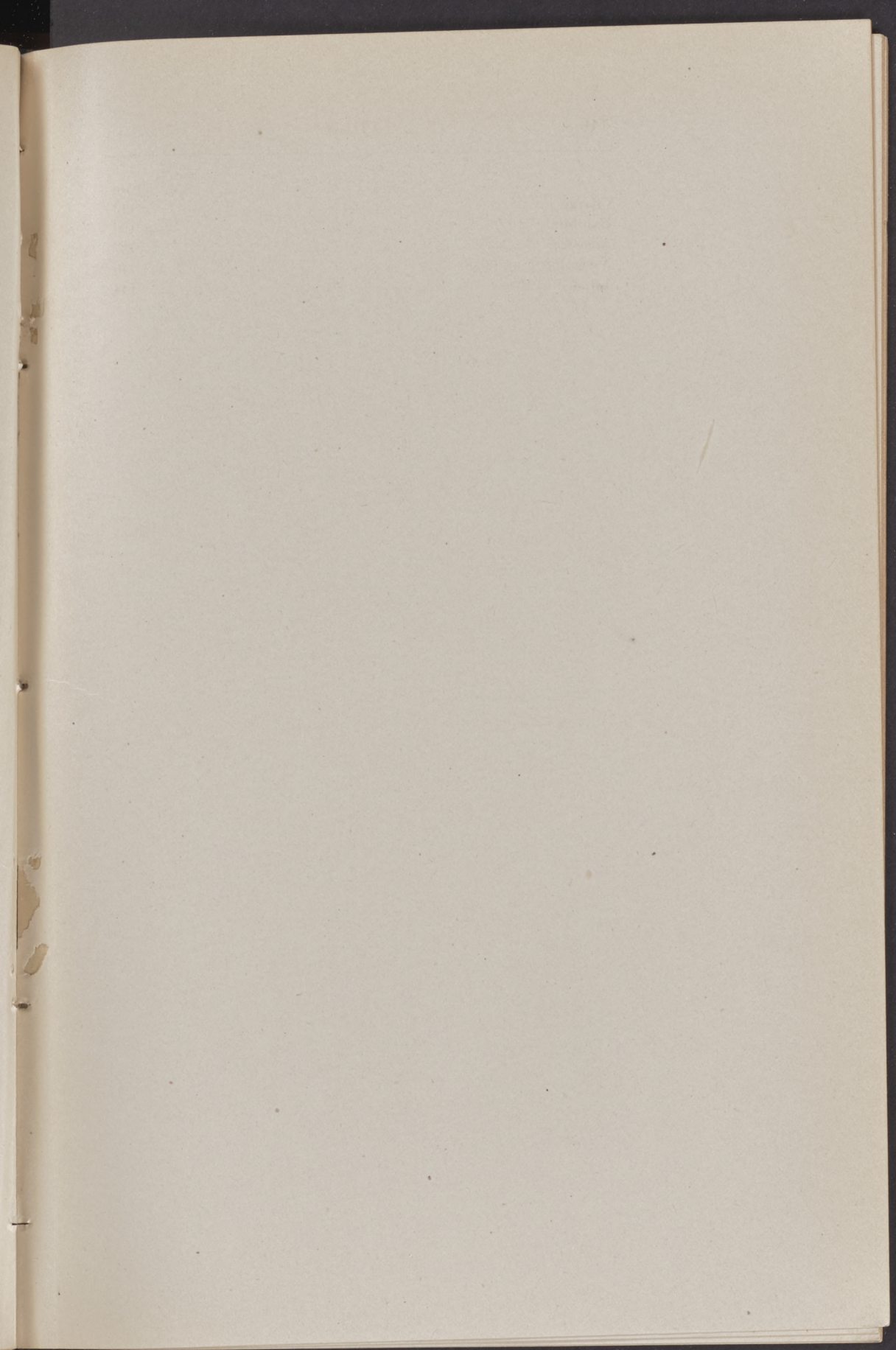
And hereupon, afterwards, to wit, on the first day of September, one thousand nine hundred and five, the said William McK. Morris and Edwin J. Morris, by Robert S. Woodruff, their attorney, come into court and say that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid, and it prays here that the court here may proceed to examine as well the record and proceedings aforesaid as the mat-
10 ters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

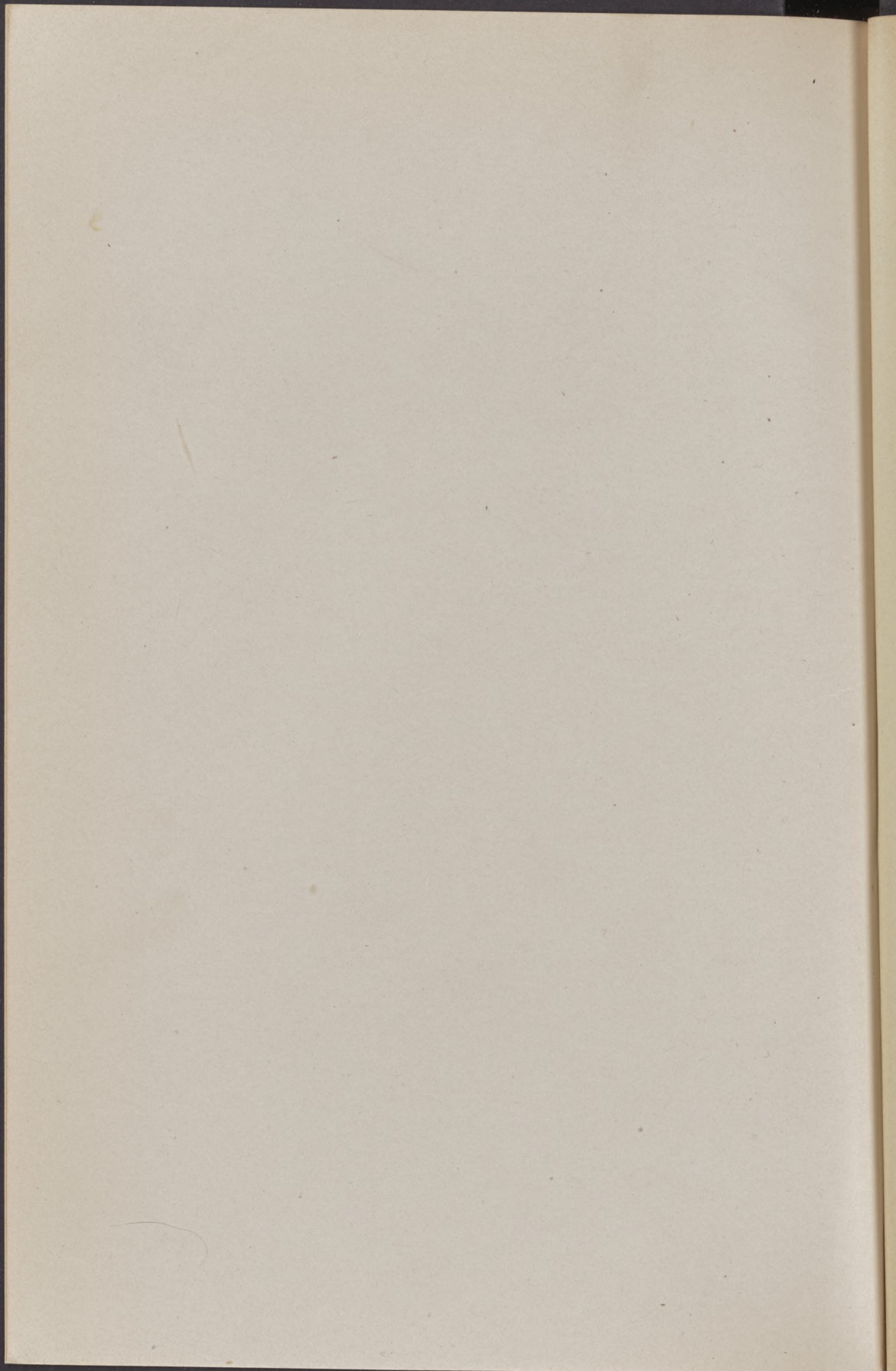
ROBERT S. WOODRUFF,
Attorney for Defendants.
JOHN H. BACKES,
Of Counsel.

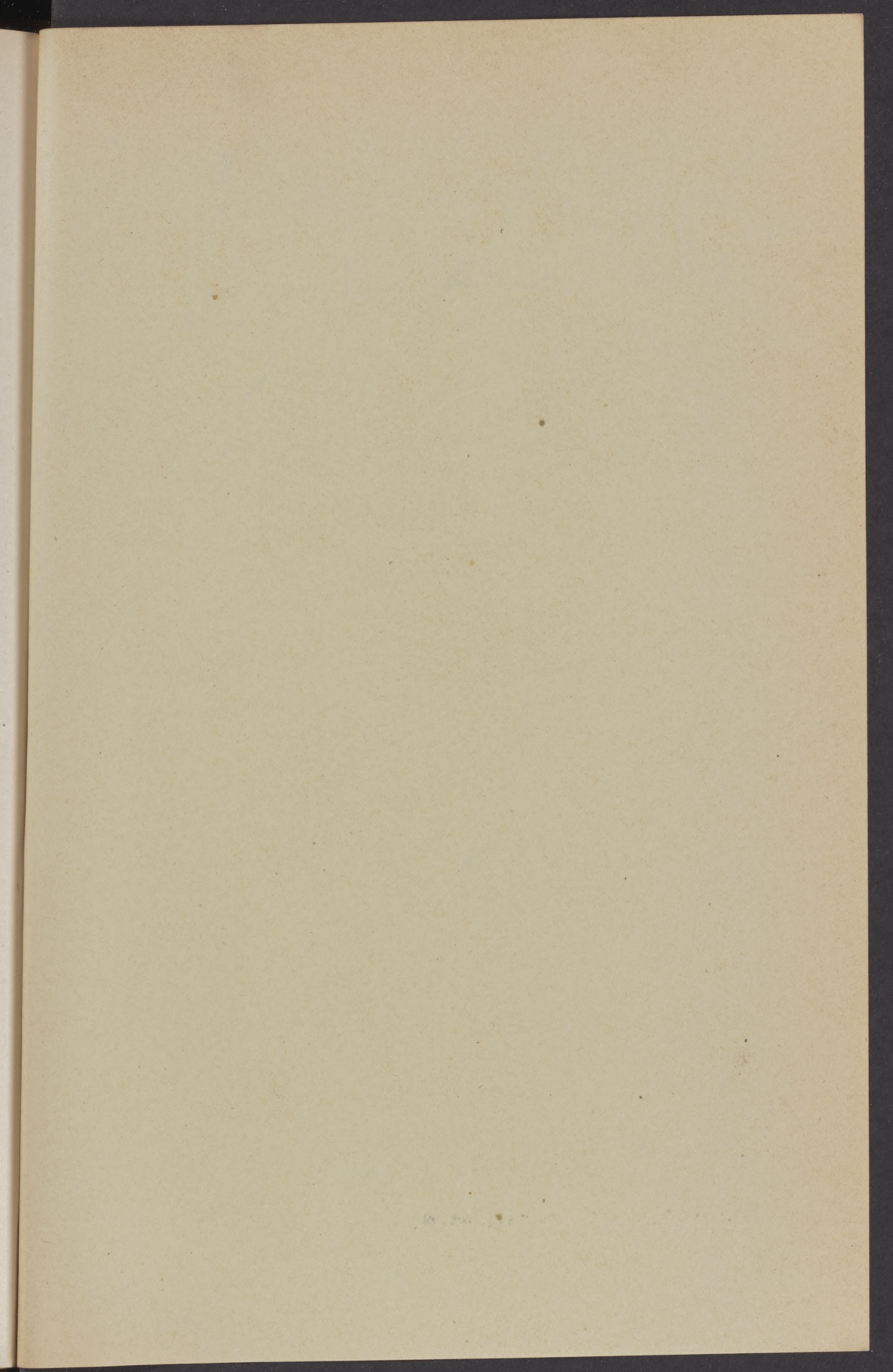
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