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New Jersey Supreme Court.

UNION COUNTY CIRCUIT.

BOUND BROOK STOVE WORKS, a
corporation,
Plaintiff,

v.

HERMAN ELLIS and HERMAN EL-
LIS, INC.,
Defendants.

10

Notice of Appeal.

20

(Filed July 7, 1921.)

To Stamler & Stamler, Esqs., Attorneys of Plaintiff.

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

WIGHT, WIGHT & GOLENBOCK,
Attorneys of Defendant.

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Summons.

(Filed Dec. 15, 1919.)

THE STATE OF NEW JERSEY

To HERMAN ELLIS and HERMAN ELLIS INC., a corporation.

10

(L.S.) You are summoned to answer the annexed complaint of Bound Brook Stove Works, a corporation, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of said Supreme Court at Trenton, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, William S. Gummere, Judge of the said Court, at Trenton, this 26th day of November, nineteen hundred and nineteen.

ENOCH L. JOHNSON,
Clerk.

Stamler & Stamler,
Attorneys.

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Complaint.NEW JERSEY SUPREME COURT,
UNION COUNTY CIRCUIT.

BOUND BROOK STOVE WORKS, a
corporation,
Plaintiff,

v.

HERMAN ELLIS and HERMAN EL-
LIS, INC., a corporation,
Defendants.

10

Action at Law.

The plaintiff is a corporation of the State of New Jersey with a principal office at #207 Broad Street, Elizabeth, New Jersey, and the defendant Herman Ellis, resides in the City of Perth Amboy, County of Middlesex, New Jersey, and the defendant, Herman Ellis, Inc., is a corporation of the State of New Jersey with a principal office in the City of Perth Amboy.

20

FIRST COUNT.

2. That prior to the 4th day of April, 1917, the defendant, Herman Ellis, was engaged in the metal and iron business in the City of Perth Amboy and on said date entered into a written contract with the plaintiff whereby the plaintiff was to sell and the defendant was to purchase seventeen hundred and fifty (1750) tons of pig iron at Thirty-nine (\$39) dollars per ton. f. o. b. Bound Brook, N. J., a copy of said contract and documents mentioned in said contract are hereto annexed and marked Exhibit "A."

30

40

Complaint.

3. In pursuance to the terms of said contract, the plaintiff did ship to the defendant, Herman Ellis, twelve hundred eighty-six (1286) tons of pig iron which the defendant accepted and paid for.

10 4. That in pursuance to the terms of the contract the said plaintiff did ship to the defendant on or about November 30th, 1917, two cars of pig iron of the quality and kind mentioned in the contract, weighing seventy-eight tons, which the defendant refused to accept and by reason thereof the plaintiff was damaged to the extent of one thousand (\$1000) dollars.

20 5. That after the making of the said contract the said defendant, Herman Ellis, sold all of his right, title and interest in and to the contract Exhibit "A," to Herman Ellis, Inc., and that the said Herman Ellis, Inc., assumed the contract of the plaintiff (Exhibit "A").

Judgment will be claimed on the first count for the sum of one thousand (\$1000) dollars.

SECOND COUNT.

6. The plaintiff repeats the allegations contained in Paragraphs 1, 2, 3 and 5 of the complaint.

30 7. That the plaintiff was always ready and willing to complete its contract and deliver to the defendant the three hundred eighty-six (386) tons of pig iron in accordance with the terms of the contract, which have remained undelivered under the terms of the contract, but the defendant refused to accept the same.

40 8. That by reason of the failure of the said defendant to accept the pig iron under the terms of the said contract the plaintiff sustained a further loss of five thousand (\$5000) dollars.

Complaint.

Judgment will be claimed on this count in the sum of five thousand (\$5000) dollars, together with interest and costs of suit to be taxed.

STAMLER & STAMLER,
Attorneys of Plaintiff.

STATEMENT OF DAMAGES THAT PLAINTIFF
WILL CLAIM AT THE TRIAL
OF SAID CAUSE.

10

FIRST COUNT:

Defendant refused to accept 78 tons of Pig Iron
On the shipment of November 30th,

1917, demurrage and freight charges	\$251.79	
Contract price (per ton)	\$39.00 per ton	
Market price at the time		
of the failure to receive	33.00	“ “

20

Damage	6.00	“ “
Less freight to Bound Brook	.90	

Actual damage to plaintiff	\$ 5.10	“ “
----------------------------	---------	-----

Damage	397.80
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SECOND COUNT:

Defendant refused to accept 386 tons
of Pig Iron

30

Contract price per ton	\$39.00
Market price “ “	\$33.00
Freight “ “	.90 33.90

Actual damage to plaintiff	
per ton	5.10

Damage	1,968.60
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40

Amended Answer of Defendant Herman Ellis.

Entire damage to plaintiff on both counts \$2,618.19
Together with interest from November 30th, 1917.

STAMLER & STAMLER,
Attorneys for Plaintiff.

10

**Amended Answer of Defendant Herman
Ellis.**

(Filed January 3, 1920.)

NEW JERSEY SUPREME COURT,
UNION COUNTY CIRCUIT.

20

<p>BOUND BROOK STOVE WORKS, a corporation, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p>HERMAN ELLIS, and HERMAN ELLIS, INC., a corporation, Defendants.</p>	}	Action at Law.
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Defendant, Herman Ellis, residing in the City
of Perth Amboy, in the County of Middlesex, and
State of New Jersey, for his amended answer to
the complaint of the plaintiff in the above entitled
action, says:

FIRST COUNT.

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1. He admits Paragraph 2 of said complaint.
2. He admits Paragraph 3 of said complaint.
3. He denies having knowledge or information
sufficient to form a belief as to Paragraph 4 of said
complaint.

Amended Answer of Defendant Herman Ellis.

4. He denies Paragraph 5 of said complaint.

SECOND COUNT.

1. He reiterates the allegations in Paragraphs 1, 2, 3 and 4 of the first count of the amended answer, in answer to Paragraph 6 of the complaint.

2. He denies Paragraph 7 of said complaint. 10

3. He denies Paragraph 8 of said complaint.

FIRST DEFENSE TO FIRST COUNT.

1. While the contract between the parties, and marked Exhibit "A" in the complaint, states that the amount of the tonnage of the pig iron aggregated approximately 1,750 tons, the exact number of the tonnage then due on the contracts, which the plaintiff had with the various mills, and which contracts were attached and made part of Exhibit "A," was only approximately 1,250 tons. 20

2. On or about November 30, 1917, or thereafter, there was no pig iron due on the said contract, and said contract had been fully completed and exhausted.

SECOND DEFENSE TO FIRST COUNT.

3. The installment contract for the month of November, 1917, was fully completed, and there was no pig iron due on the month of November shipments, and, therefore, there was no breach of said contract, as the contract for the month of November was exhausted prior to the two cars of pig iron shipped, as mentioned in Paragraph 4 of the complaint. 30

Amended Answer of Defendant Herman Ellis.

FIRST DEFENSE TO SECOND COUNT.

1. Defendant repeats the allegations contained in Paragraphs 1 and 2 of the first defense to first count herein.

10 2. The said plaintiff has failed to comply with the terms and conditions of said agreement, and did not present any invoice of the re-consigned bill of lading at the office of the defendant, nor did the plaintiff consign the said pig iron to the defendants at Perth Amboy, N. J.

SECOND DEFENSE TO SECOND COUNT.

3. Defendant repeats and reiterates Paragraph 2 of the first defense to second count.

20 4. Defendant will object to the second count of the complaint at the trial of the above action on the ground that it does not set up a cause of action.

WIGHT, WIGHT & GOLENBOCK,
Attorneys for Defendant,
Herman Ellis.

30

40

Memorandum.

(Filed December 11, 1920.)

NEW JERSEY SUPREME COURT,
UNION COUNTY CIRCUIT.BOUND BROOK STOVE WORKS,
v.

HERMAN ELLIS.

10

APPEARANCES :

MESSRS. STAMLER & STAMLER, Attorneys for
Plaintiff.MESSRS. WIGHT, WIGHT & GOLENBOCK, At-
torneys for Defendant.

20

The plaintiff held several contracts for the purchase of iron. The defendant, desiring to secure this iron, entered into a contract, dated April 4th, 1917, for the purchase thereof from plaintiff.

Thereafter the iron under these contracts was sent either to defendant or his consignee.

There was no difficulty about the matter, until two shipments were made on November 13th, 1917, two days after the armistice. These shipments, of thirty-nine tons each, as well as later shipments aggregating three hundred and forty-seven tons, were refused.

30

Plaintiff now sues to recover the loss it claims it sustained, by reason of defendant's failure to accept these shipments.

Plaintiff contends (p. 31) that the contracts called for the delivery of 1,750 tons of iron, that all

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Memorandum.

were delivered, except 425 tons; that there were later offered to defendant, and were refused. That while the shipments were not made in the order or manner called for by the contracts that this arrangement was acquiesced in by all the parties, and that defendant was obliged to take the remainder of the iron called for by the contracts.

Defendant, on the other hand, contends that the contracts did not call for 1,750 tons, but called for only 1,225 tons; that defendant had accepted 1,314 tons, and so was not obliged to take more.

He further contends (p. 31) that when an installment called for to be delivered at a certain time, was not delivered, that defendant could not be called upon to take same at a subsequent time; that it thereby was eliminated from further consideration. That in 1917, by this process of elimination, all contracts had been closed, except N-220 which called for 500 tons, to be delivered from July to December, 1917, on which 643 tons were actually shipped between July and November, so that this contract was complete.

It is quite apparent that while the war lasted all the parties were anxious to get as much of the iron delivered as possible, and did not insist upon their strict legal rights; when, however, the armistice was declared and it appeared that the price of iron might decline there came a change in the attitude of the parties. All then began to insist upon their legal rights, at least as they thought them to be.

It is essential, therefore, to ascertain what the legal rights of the parties were. This is governed by their contract of April 4th, 1917. By this contract, "Ellis desires to purchase the pig iron to be delivered pursuant to said contracts." This

Memorandum.

means, not such as the mills might choose to deliver, but such as the mills were obliged to deliver under the contract.

The contract further provides:

“The seller agrees to turn over and deliver to the buyer at said price, all pig iron delivered to it under said contracts, as and when delivered to it under said contracts.”

10

This does not mean, that if the mills fail to deliver the iron called for under its contracts, that plaintiff may sit by, and do nothing. It does not mean that he can say, “Well, I have not received the iron, so I cannot deliver it.” But it does mean that plaintiff must insist upon its rights under the mill contract, and having so insisted, when it receives the iron must deliver it to defendants, otherwise the contract would mean practically nothing.

20

The contract further provides that the deliveries are subject to the conditions of the mill contracts, referring to strikes, etc. It is further provided “that failure to deliver any installments for any cause not within seller’s control, including the failure of the mills to make delivery under the contracts, shall not result in liability of seller to buyer; and shall not release the buyer from obligation to take subsequent installments.” This simply means that if the mills, for good and sufficient reasons, do not deliver, then plaintiff cannot deliver, and hence plaintiff shall not be responsible for failure to so deliver. And further, if for good reasons one installment is dropped, the whole contract is not to be void, but that buyer must take subsequent installments. No question, however, arises under these provisions, for no claim is made for failure to deliver an installment, neither is any

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Memorandum.

claim made that the buyer refused to take a subsequent installment because of non-delivery of a former.

The first question submitted is the number of tons to be delivered under the contracts. The contract says "aggregating approximately 1,750 tons."

10 Mr. Baum testifies as follows:

"Q. Mr. Baum, don't you know that at the time you made the contract with Mr. Ellis for the pig iron, that there was only approximately 1,250 tons due on these contracts from the mills? A. No.

"Q. Can you, from any of your records, ascertain that fact? A. No.

20 "Q. Can't you ascertain from the contracts which you had with the mills how much was due on these contracts at the time you made the contract with Ellis? A. Yes, sir"

Mr. Baum does not, however, get this information, or testify to it.

30 On the other hand, an examination of the contracts shows that upon a strict compliance 1,225 tons were due on April 4th, 1917. It is evident that the parties did not intend a strict count on the face of the contracts, if they had they would have said 1,225 as that was easily ascertained. What they expected and hoped for was the delivery of some of the deferred installments, undelivered no doubt by reason of war conditions. So I do not believe there was a limitation of 1,225 tons, and find that the parties desired and expected as much more approximately 1,750 tons as they might be able to get from the mills.

40 Defendant refused to take two cars totalling 78 tons, and later shipments aggregating 347 tons.

Memorandum.

The former shipped in November, 1917, the latter over a period from March, 1918, to October, 1918.

Under the mill contract the mills were obliged to ship as per contract, so much each month. Failure to send might be due to causes which extend them from liability, or they might be due to deliberate breach on their part. There is no testimony showing why these 425 tons were not shipped as per contract. The contract does not excuse the mills for failure to deliver the amount contracted for. If they fail they are responsible for such failure. They are excused only for delay, and then only if the delay is such as is provided for by the contract, such as strikes, accidents, etc.

I cannot presume that the mills deliberately delayed shipments, and in the absence of proof must assume that the delays were justifiable. It is quite probable that the war conditions then existing created a justifiable delay. If, then, these were shipments justifiably delayed, and hence were such as, the mills were permitted to make later, and were such as, under the contract, they were obliged to make, then the plaintiff was bound to take them and deliver them to defendant, and defendant was bound to receive them, at such later period. Evidently neither of the parties attempted to protect itself against the changed conditions due to the ending of the war. It would seem as if all the parties took this view of the shipments, for they exceeded the 1,225 tons contended for by defendant, and accepted shipments made at irregular intervals, and at times different from these provided for. This delay was recognized by defendant who, in the letter of September 6th, 1918, recognized the delay, and ask that the shipment be hurried. On September 10th, 1917, Mr. Ellis was

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Memorandum.

advised by R. D. Wood that there was a shortage of 505 tons, and this letter was sent to plaintiff by defendant. Mr. Ellis, in his letter to Wood of October 20th, 1917, points out that the shipments apparently are such as can rightfully be made by the mills. On November 17th, 1917, Ellis wrote
10 Wood that the car with 39 tons was on the way, thus recognizing the property of the mill's shipment. Likewise as to the other 39 tons, in letter of November 20th, 1917. In the letter to Wood, of November 23rd, 1917, Ellis again reiterates this view: He says:

“We did not guarantee in any manner to deliver same in a specified time.”

And further:

20 “We would suggest that you very kindly peruse our contract with you, and you will find that you must accept all the material that the mills shipped, irrespective of when they shipped it.”

The Wood contract is not before us, but it is evident that Ellis construed his contract with plaintiff to mean that he would have to accept the deferred shipments.

30 What Wood's obligations were cannot be decided here, because their contract is not before us, nor is that necessary for the determination of this suit. It does appear, however, that Ellis, by letter of November 26th, 1917, advised Wood that he would ho'd him to the contract. It was only after Wood refused to take the goods that Ellis took the position with plaintiff that he, Ellis, was not bound to take them; before then he had apparent-

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Memorandum.

ly assumed that the delay in shipment was justified under the contract. It is true that on November 30th, 1917, Ellis wrote to plaintiff that he, Ellis, was not obliged under the contract to take the further shipments, for failure to deliver on time. It is quite evident, however, that this was done, not in the belief that such was the case, but for prudential reasons. With Wood he was insisting that the delivery was justified; with plaintiff that the deliveries were not justified. If Wood was right, then Ellis would hold the plaintiff; if the plaintiff was right, then Ellis would hold Wood.

10

I must look to the conduct of the parties for light, especially their conduct before they began to try to save themselves from loss. The plaintiff, on the other hand consistently acted as if the shipments were justifiably delayed; and as Ellis did likewise, until Wood demurred, I am of opinion that the unaccepted shipments, in the absence of other proof, were shipments due under the contracts, and shipped after a delay justified by circumstances provided for in the contracts. Being due, the mills had a right to make the shipments and plaintiff was bound to take them. It also follows that it was the duty of Ellis to take them. If Ellis could have shown or if he had shown by evidence that the delayed shipments were delayed without just cause or excuse, or had been deliberately withheld, when they should have been shipped, and were then forwarded later, to take advantage of post-war conditions, he would have been justified in refusing to accept the shipments.

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For failure to accept the cars defendant is liable in damages. Plaintiff contends that he suffered a loss on this iron; defendant claims he sold it at a gain, to-wit, for \$40.00 a ton. The evidence ad-

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Findings of Fact.

his Honor James J. Bergen, Justice of the Supreme Court, holding for Union County Circuit, without a jury and was submitted upon brief.

1. This case is brought by seller against the buyer, upon a written contract dated April 4th, 1917, a copy of which is annexed to the complaint and marked "Exhibit A." 10

The plaintiff claims damages by reason of defendant's failure to accept shipments hereinafter mentioned.

2. The Court finds that by contract "Exhibit A," the plaintiff agreed to sell and the defendant agreed to purchase from the plaintiff seventeen hundred and fifty (1750) gross tons of pig iron at thirty-nine dollars (\$39.00) per gross ton, f. o. b. Bound Brook, New Jersey, and that the plaintiff was obliged to pay the freight from the mines to Bound Brook, New Jersey, at the rate of three dollars (\$3.00) per gross ton. (See contracts annexed to "Exhibit A.") 20

3. The Court finds as a fact, that on or about the 13th day of November, 1917, the plaintiff was obliged, under said contract, to deliver to the defendant and that the defendant was obliged to purchase and receive from the plaintiff four hundred and twenty-five (425) gross tons of pig iron, being the unfulfilled portion of the contract at that time. 30

4. The Court finds from the examination of the correspondence offered in evidence, that the plaintiff made an honest and *bona fide* attempt to compel the mines to deliver the pig iron promptly, and that the plaintiff delivered to the defendant all of the pig iron that the mines shipped as speedily as possible. 40

Findings of Fact.

5. The Court finds that the plaintiff by his conduct, waived any and all claims, if any, by reason of the plaintiff's inability to deliver the pig iron more speedily to the defendant.

10 6. The Court finds and rules, that the plaintiff properly shipped to the defendant on November 12th, 1917, and on November 13th, 1917, two cars, containing seventy-eight (78) gross tons of pig iron (see Exhibit P-2 and Exhibit P-3), and that the defendant was obliged to accept the same, and that the defendant refused to accept delivery of the same and therefore the defendant breached the contract and the plaintiff is entitled to recover damages it sustained.

20 7. The Court finds that the plaintiff did not sell any portion of the pig iron refused by the defendant to the Federal Metal Bed Company, but on the contrary, that the plaintiff consumed the pig iron in its own business.

8. The Court finds that the market price of the pig iron at the time of the defendant's breach was thirty-three dollars (\$33.00) per ton.

30 9. The Court finds that by reason of the defendant's refusing to accept delivery of the two cars of pig iron sent to him by the plaintiff on November 12th and 13th, 1917, from Bound Brook, New Jersey, to Perth Amboy, New Jersey, that thereby the plaintiff was obliged to expend the sum of two hundred and fifty-one dollars and seventy-nine cents (\$251.79) in freight and demurrage charges.

40 10. The Court finds that the two cars of pig iron shipped by the plaintiff to the defendant on

Findings of Fact.

November 12th and 13th, 1917, was in pursuance to instructions heretofore given to the plaintiff by the defendant.

11. That on November 30th, 1917, the defendant breached the entire unfulfilled portion of the contract and refused to accept from the plaintiff the remaining three hundred and forty-seven (347) gross tons of pig iron.

10

12. The Court finds that the plaintiff elected to treat the entire unfulfilled portion of the contract as violated on November 30th, 1917, and the Court rules that thereupon the rights of the parties became fixed. The Court finds that the plaintiff has not waived or relinquished its rights as acquired and established, and that the only remaining question is that of damages.

20

13. The Court finds that the plaintiff did not sell any of the three hundred and forty-seven (347) gross tons of pig iron to the Federal Metal Bed Company, or to any other concern, but consumed it in its own business.

14. The Court finds that the market price of pig iron, of the quality and kind provided for in the contract on November 30th, 1917 was thirty-three (\$33.00) dollars per gross ton, and that the freight from the mines to Bound Brook, New Jersey, was three (\$3.00) dollars, per gross ton.

30

15. The Court rules that the damages recoverable by the plaintiff against the defendant, are as follows:

40

Findings of Fact.

FIRST COUNT:

Defendant refused to accept 78 tons of Pig Iron

On shipment of November 13th, 1917 de-
murrage and freight charges \$251.79

Contract price (per ton) \$39.00 per ton

10 Market price at the time
of the breach 33.00 " "

Damage 6.00 " "

Less freight to Bound
Brook 3.00 " "

Actual damage to plain-
tiff per ton \$ 3.00

Damage 78 tons x \$3.00 \$234.00

20 Total damage on First Count \$485.79

SECOND COUNT:

Defendant refused to accept 347 tons of Pig Iron

Contract price per ton \$39.00

Market Price at the time
of breach \$33.00

Freight Price at the time
of breach 3.00 36.00

30 Actual damage to plain-
tiff per ton \$ 3.00

Damages 347 tons x \$3.00—Total damage
on Second Count. \$1041.00

Damage to plaintiff on both counts \$1526.79

16. The Court finds that there is due from the
defendant to the plaintiff the sum of fifteen hun-

Postea.

dred twenty-six dollars and seventy-nine cents (\$1526.79).

GEORGE S. SILZER,
Circuit Court Judge.

Postea.

(Filed Dec. 11, 1920.)

10

NEW JERSEY SUPREME COURT,
UNION COUNTY CIRCUIT.

BOUND BROOK STOVE WORKS, a
corporation,
Plaintiff,

v.

HERMAN ELLIS,
Defendant.

20

The above entitled cause was tried before Hon. George S. Silzer without a jury, by the consent of the parties thereto, at the Union County Circuit, on 1920.

The Court, after considering the testimony in the case together with the exhibits offered, and the briefs of counsel, filed a Finding of Facts and found a verdict in favor of the plaintiff and against the defendant Herman Ellis in the sum of fifteen hundred twenty-six dollars and seventy-nine cents (\$1526.79), together with the costs of suit to be taxed and ordered that the Clerk in taxing the costs should include the sum of thirty-six (\$36)

30

40

Grounds for Appeal.

dollars, paid by the plaintiff to the stenographer for transcribing the testimony taken at the trial.

GEO. S. SILZER,
Judge.

Grounds for Appeal.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

BOUND BROOK STOVE WORKS, a
corporation,

Plaintiff,

v.

HERMAN ELLIS and HERMAN EL-
LIS, INC., a corporation,

Defendant.

Action at Law.

To Stamler & Stamler, Attorneys for Plaintiff-
Respondent:

Sirs:

Take notice that the following are the grounds
upon which the defendant, Herman Ellis, appeals
from the judgment heretofore entered in this cause
against him:

1. That said judgment was given for the plain-
tiff, Bound Brook Stove Works and against the
defendant, Herman Ellis, whereas by law of the
land, judgment ought to have been given for the
said Herman Ellis and against Bound Brook Stove
Works.

Grounds for Appeal.

2. The judge before whom the trial of the issues joined between the parties was had, erroneously found that the contract Exhibit "A" the tonnage amounted to 1750 tons, whereas and in accordance with the terms and conditions of said contract the true and correct amount of the tonnage is 1225 tons.

10

3. The Judge erroneously found that on or about the 13th day of November, 1917, the defendant was obliged under the contract to purchase and receive from the plaintiff 425 gross tons of pig iron, whereas on said date only 78 tons were tendered by the plaintiff to the defendant.

4. The Judge erroneously found that on November 13, 1920, there was due 425 tons, whereas the only part of the contract then in force and effect was the one known as N220 calling for deliveries of 500 tons, "Equal monthly, July to December, 1920" and which was fully completed. Plaintiff shipped and defendant accepted 643 tons between July and November 13, 1920.

20

5. The Judge erred as a matter of law that plaintiff was required to accept iron after December 1, 1920, as the time for the delivery according to the time of the contract expired December 1, 1920.

30

6. The Judge erred as a matter of law that the plaintiff's endeavor to have the mines make prompt delivery had any bearing upon the issues, whether deliveries could be forced upon the defendant after December 1st, 1920, when the contract had expired.

7. The Judge erred as a matter of law that the defendant waived any and all claims on account

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Grounds for Appeal.

of plaintiff's inability to deliver to the defendant the pig iron more promptly.

8. The Judge erred in finding that the defendant waived any and all claims on account of plaintiff's inability to deliver pig iron in accordance to the time and conditions of the said contract.

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9. The Court erroneously found that the plaintiff did not sell to Federal Metal Bed Company all the pig iron refused by the defendant.

10. The Judge erred in finding that on November 30, 1917, the defendant breached the entire unfulfilled portion of the contract, and refused to accept from the plaintiff the remaining 347 gross tons of pig iron as the evidence by it until March, June, July, August and September of 1918, being many months after the expiration date of the contract.

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11. The Court erred in failing to find:

(a) That the contract calls for certain specified amounts and times and on April 4, 1917, at the time when the contract between the plaintiff and the defendant was made, there was due 1225 tons; the plaintiff having delivered to the defendant 1414 tons, the contract was completed and the defendant was not obliged to take any more iron.

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(b) That even though it be said that the contract was for 1700 tons the time for the deliveries were certain and positive, and unless delivered within time, the defendant could not be compelled to accept the same.

(c) That the only contract alive July, 1917, was the one indicated as Contract N220, for

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Grounds for Appeal.

500 tons, to be shipped in equal monthly installments, July to December, 1917; that contract necessarily was completed prior to the tender of the two cars alleged in the first count of the complaint.

(d) That even though the last two cars should have been accepted by the defendant, in view of the undisputed fact, that the plaintiff resold the two cars at a profit, therefore, it results itself in a case of *injuria absque damno*.

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(e) That as to the 347 tons, in spite of its definite time of delivery, the defendant should have accepted the same after December, 1917, on the theory of delivery within a reasonable time, it cannot be said that March, April, May, June, August and September of 1918, was within such time.

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(f) That the plaintiff, having sold the iron to Federal Metal Bed Company, at a profit, is not entitled to damages.

12. The Court erred in allowing the introduction in evidence of the contract between the defendant and R. D. Wood & Company and the letters passed between them, being contrary to law, as it has not been shown that they, in any way, have any bearing on the issues in the case at bar, and also most objectionable because in introducing the same, counsel for the plaintiff stated that it is for the purpose of showing the defendant's conception of the contract with the plaintiff being contrary to its language, in that it is an attempt

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to vary the terms of the written contract, which terms are neither uncertain or ambiguous.

WIGHT, WIGHT & GOLENBOCK,
Attorneys for Defendants.

NEW JERSEY SUPREME COURT,

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UNION COUNTY CIRCUIT.

January Term, 1920.

BOUND BROOK STOVE WORKS

v.

HERMAN ELLIS and HERMAN
ELLIS, Incorporated.

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Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. George S. Silzer, Circuit Court Judge, and a jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the fifth day of February, A. D. 1920, at 11:00 A. M.

APPEARANCES:

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Messrs. STAMLER & STAMLER, JOHN STAMLER, Esq. (Present), Attorneys for the Plaintiff.

WIGHT, WIGHT & GOLENBOCK, HENRY GOLENBOCK, Esq. (Present), WELCOME W. BENDER, Esq. (Present), Attorneys for the Defendant.

A jury being empanelled and found satisfactory, they were sworn.

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Mr. Stamler: We agree to go on with eleven jurors.

PLAINTIFF'S OPENING.

Mr. Stamler: May it please your Honor and gentlemen of the jury:

The plaintiff in this suit, the Bound Brook Stove Works, is a corporation and had a business at Bound Brook, New Jersey, where they were manufacturing stoves, and in connection with that business, during the years 1916 and 1917, they acquired a large number of contracts for the purchase of pig iron from various concerns. On April 4th, 1917, the plaintiff resold to the defendant the balance of the pig iron contracts they then had, and we will show you that contract and it will be read to you. Immediately after the signing of the contract the plaintiff continued to make shipments to the defendant of the pig iron as they received it from the mines, and in all they shipped one thousand three hundred and fourteen tons of pig iron; and they commenced their shipments on April 9th and continued to ship up to October 29th, 1917. On November 13th, 1917, or thereabout, is where our dispute starts. The plaintiff received notice from the mines that two cars of pig iron en route, and pursuant to the custom, notice was given to the defendant that the pig iron is en route. I might state, also, incidentally, that the defendant, Herman Ellis, after he made the contract with us, resold that pig iron to another concern, known as R. D. Wood & Company. And therefore each time a shipment was en route we notified the defendant Ellis, and Ellis would give his instructions where to ship the iron. He first delivered to Bound Brook, New Jersey, and from Bound Brook we were to transport it, at their cost, wherever they direct. So on Novem-

Case.

ber 13th, when we received notice that the two cars in question were en route, we notified Mr. Ellis, and Ellis & Company on November 30th, 1917, advised us that they are not going to receive the pig iron in question, and will not continue to receive any future shipments. And there is where we
10 broke. We contend that it was the duty of Ellis & Company to take the balance of the pig iron, including the shipment of November the 13th.

The Court: Do you mean more than the two cars?

Mr. Stamler: More than two cars.

The Court: Still more to come?

Mr. Stamler: Yes. And we contend that they were obliged to take it. The two cars in question weighed seventy-eight tons, and after that time,
20 we were obliged, under our contract with the mine, to take an additional tonnage of three hundred and forty-seven tons. It is admitted in this case that the three hundred and forty-seven tons of pig iron were shipped to us after November 30th, 1917, and as a matter of fact the completed shipments were made in May or June of 1918, until all these cars were delivered. When the defendant refused to accept the two cars, we re-
30 sold them at the open market, which we will show you what it was; there was a fixed rate at that time by the Government as to what pig iron was to be sold for, which was thirty-three dollars per ton f. o. b. mines, and three dollars was freight from the mines to Bound Brook, made it thirty-six; the contract in our case was three dollars per ton profit; in other words, we were entitled to a profit of three dollars a ton; so we actually sus-
40 tained a loss of three dollars a ton on the seventy-eight tons of iron, in addition thereto a demurrage

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bill amounting to two hundred and fifty-one dollars and seventy-nine cents. We had to pay demurrage for this car until we could get the thing adjusted and sold. As to the remaining three hundred and forty-seven tons, we from time to time insisted that the defendant take them and the defendant from time to time insisted that he is not obliged to take them. We were all the time ready to deliver these goods in accordance with the terms of the contract, and they refused it. If we prove these facts to you we will ask you for damages on two separate propositions:

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First.—The actual damage that we sustained by reason of the defendant's failure and refusing to accept the shipment of November 13th, 1917, which was three dollars per ton on the seventy-eight tons, together with the demurrage bill of two hundred fifty-one dollars and seventy-nine cents. And on the remaining three hundred and forty-seven tons we claim that we were entitled to damage or judgment of three dollars per ton, which was our actual loss.

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DEFENDANT'S OPENING.

Mr Golenbock: May it please your Honor and gentlemen of the jury:

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The defendant, Herman Ellis—

Mr. Stamler: I ask to discontinue against the Herman Ellis Company. There are two defendants.

Mr. Golenbock: The defendant did, on the day alleged, enter into an agreement with the plaintiff, and the agreement will be introduced in evidence, you can see the contracts and hear what the conditions of the agreement were. However, in order

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to understand our defense I wanted to call the attention of you gentlemen to the wording of the contracts which the Bound Brook people had with the mills. I want you to understand that the original contracts with the mills were made by the Bound Brook people. The Bound Brook people then in turn assigned these contracts they had with the mill to Herman Ellis. There are four separate contracts with the mills and Bound Brook, all of which are with one mill, and two others with a different mill. The original date of these contracts with the mills was October 24th, 1916, and they each provide that shipments are to be made during certain months. Now, there is one contract, as will appear in evidence, numbered N-205, with the Virginia Iron, Coal & Coke Company, shipments one hundred tons equally monthly November to December, 1916; three hundred tons equally monthly January to June, inclusive, 1917. It also provided that the installments were each to be considered a separate contract, and that the failure on the part of the mill to deliver any one monthly installment that shall not vitiate the contracts for the subsequent monthly installments. So that we find that on April 4th, 1917, a part of these contracts had expired, either by way of having filled the orders, or by way of the time having expired for its delivery. In other words, in April the March shipment had expired, because they had either delivered the March shipment, or had not made it. So, according to these four contracts with the mill, there were only on April 4th, 1917, due one thousand two hundred twenty-five tons altogether to be delivered according to the terms of this contract, and we will show you that during

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the time of the life of the balance of the contracts, that is, from April 4th, 1917, to the time he refused to take any more iron, we had received one thousand three hundred and forty odd tons. So our contention is that we had accepted more than the tonnage that we contracted for. And as to the two cars which we specifically refused to accept, and he did refuse to accept them because there was only one contract which had not expired in November, 1917, and that was the one from the Virginia Iron & Coal Company, N-220, which says this: "Said shipments equal monthly July to December, 1917, and the entire quantity is five hundred tons." So that you have a proportionate share of eighty-three tons a month. In other words, there was to be approximately eighty-three tons to be shipped from July to December, 1917, and we will show you gentlemen that in October we had received approximately two hundred and ninety odd tons. So that we had received during the month of October more than was required for October and November. In other words, they over-shipped, they shipped ahead in October for the period which they should have shipped for November. And they compelled us to take the two extra cars, instead of having accepted one hundred and sixty odd tons, we would have had to accept three hundred and fifty tons. We will also show you that during June, July and August we received no shipments and we will show you that during those months prices on pig iron were away higher than the prices we had agreed to pay for them. And because in November it had decreased in price they wanted to apply the whole contract on us and we refused to take that.

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10 In November, after the two cars were refused, which amount to sixty odd tons, I believe, the two cars, or seventy odd tons, they had not sent any iron until March of next year, and we had told them in November that we were not going to take any more iron. But in spite of that, as the testimony will show, they had never offered to deliver the pig iron in March of 1918, although I don't now say that even if they had we might have taken it and we might not. But our contract expired December the 1st, 1917. From December the 1st, 1917, they had not received any iron until March and we contend we had no reason to take it and we didn't want it and, therefore, they were not damaged.

20 Mr. Stamler: I offer in evidence the contract between the plaintiff and defendant, together with the five contracts constituting the entire contract between the parties, and ask it be marked Exhibit No. 1.

Contract entered in evidence and marked Exhibit P-1.

The Court: I suppose also, gentlemen, that you agree as to the number of tons that were afterward shipped and refused?

30 Mr. Golenbock: Practically agree to everything.

Mr. Stamler: We will agree to all the facts. In fact, I will make a statement to the Court now. I might state to the Court that the contract provides—

The Court: Suppose you read those contracts?

40 Mr. Stamler: There is only one contract for construction. This is the one from the Bound Brook Stove Works to Mr. Ellis. That is the only one that really requires construction.

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"MEMORANDUM OF SALE, by Bound Brook Stove Works, a New Jersey corporation, seller, of Bound Brook, N. J., to Herman Ellis, of the City of Perth Amboy, State of New Jersey, buyer,

"WHEREAS, the seller Bound Brook Stove Works, has contracts for the purchase of pig iron with various mills upon the terms and conditions, etc., stated in the accompanying memoranda from said contracts, and the said buyer, Herman Ellis, desires to purchase the pig iron to be delivered pursuant to the said contracts, subject to the terms thereof, as to quality and deliveries, and as and when the said pig iron is delivered under the said contracts, and at the price hereinafter stated, NOW THEREFORE it is agreed that Herman Ellis, the buyer, hereby purchases all pig iron covered by the said contracts, aggregating approximately 1,750 tons, for which the buyer agrees to pay the seller \$39.00 per ton, f. o. b. Bound Brook, N. J., payment to be made as follows:

"Cash upon presentation of invoice and re-consigned bill of lading as per buyer's direction, at office of Herman Ellis, Perth Amboy, N. J.; if within five (5) days after arrival at Bound Brook, N. J., buyer fails to give directions for re-consigned bill of lading, seller may consign to buyer at Perth Amboy, N. J., all demurrage to be paid by buyer.

"The seller agrees to turn over and deliver to the buyer at said prices, all pig iron

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delivered to it under the said contracts, as and when deliveries are made thereunder, and delivery is subject to the conditions in the said contracts or any other causes not within the control of the seller.

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"The failure to deliver any installment of iron for any cause not within the control of the seller, including the failure of the said mills to make delivery under the said contracts, shall not result in liability by the seller to the buyer, and shall not release the buyer from obligation to take subsequent installments.

"Dated, New York, April 4th, 1917.

"In the presence of:

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.....
 "BOUND BROOK STOVE WORKS.

"by B. Sauterstein, V-Pres.

"H. ELLIS

(L.S.)"

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Mr. Stamler: Now, it is admitted in this case that the plaintiff shipped to the defendant, commencing April 9th, 1917, to October 29th, 1917, one thousand three hundred and fourteen tons of iron. That on November 13th, 1917, the plaintiff received notice from the mines that two cars of pig iron were in transit amounting to seventy-eight tons. That the said cars arrived at Bound Brook on the 27th of November, 1917. That the defendant on the 30th day of November, 1917, refused to accept the shipment of the two cars last mentioned.

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That after November 30th, 1917, the plaintiff received three hundred and forty-seven tons of iron under said contract.

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Mr. Golenbock: And there is another thing I concede, and that is this: that between October 6th and October 29th you delivered to the defendant during that month of October, three hundred and forty-seven tons.

Mr. Stamler: That is all right.

The Court: Are there any of these contracts of these five that you have here that you agree were completely carried out and do not figure in the case? Or were these shipments that were made afterward, the one thousand seven hundred and fifty tons, did some of them relate to each contract? 10

Mr. Golenbock: Our contention is that they all relate to one contract.

The Court: Which one is that?

Mr. Golenbock: That is N-220. 20

Mr. Stamler: N-205 you mean?

Mr. Golenbock: N-220, which amounts to five hundred tons monthly equally July to December, 1917.

The Court: What have you to say to that?

Mr. Stamler: I am not in a position to dispute that. In other words, we say this:—

The Court: That only calls for five hundred tons.

Mr. Stamler: We got only three hundred and fifty some odd. 30

The Court: Three hundred and fifty you are suing for?

Mr. Stamler: Three hundred forty-seven tons.

The Court: That is what you are suing for?

Mr. Stamler: Yes.

The Court: They did not take three hundred forty-seven tons? 40

Case.

Mr. Stamler: Yes, they did not take, plus the seventy-eight tons.

The Court: That is four hundred twenty-five tons?

10 Mr. Stamler: But we are only in a position to say this: that all the merchandise that we received after November 13th, 1917, were from the Virginia Iron, Coal & Coke Company, as against those contracts, which contract we cannot say. You see, there are four contracts.

The Court: All from the same company.

Mr. Golenbock: There is only one contract which calls for shipments from July to December of that year.

The Court: Yes, but I understand there were these contracts which—

20 Mr. Stamler: Your Honor has four contracts before you with the same company.

Mr. Golenbock: No, there are only three.

Mr. Stamler: Or three. Whatever they are.

The Court: Do you claim, Mr. Stamler, that where the contract calls for equal monthly—I am speaking now of N-220, which apparently is the one you are working under—

Mr. Stamler: Yes, sir.

30 The Court: Shipments are to be equal monthly from July to December calling for five hundred tons, that is one hundred tons a month?

Mr. Golenbock: Eighty-three and one-third.

The Court: July to December. Not including December.

Mr. Golenbock: Not including December; no, sir.

The Court: That is five tons. That is one hundred tons a month.

40 Mr. Golenbock: That is right.

The Court: You claim, Mr. Golenbock, that

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there were none shipped in July, August and September and October?

Mr. Golenbock: My contention is that we have shipped all told under this contract from July to October over six hundred tons. And that the contract was completed before the last two cars were delivered to us.

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The Court: And your further contention is that the surplus that these companies shipped to Mr. Stamler's company, and after shipped to you, were deferred shipments on these contracts, which they had failed to send on time?

Mr. Golenbock: My contention is not exactly that. My contention is that from July to the end of October we had taken in over six hundred odd tons, but we were not obliged to take any more than four hundred. Now, because we accepted six hundred that doesn't say that he could force us to take more. Because the only contract that was then alive from July was N-220, which called for five hundred tons.

20

Mr. Stamler: I am going to offer in evidence a statement of the shipments as were made.

The Court: What do you say about that contention?

Mr. Stamler: We don't care as far as we are concerned, we are not interested when the mines shipped this pig iron to us.

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The Court: No, but I understand Mr. Golenbock's contention is that you agreed to take five hundred tons under this N-204 and you sold them to them, and his contention is that you were not obliged to take more than five hundred from the Virginia Coal and Iron, and they were not obliged to take it from you.

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Case.

Mr. Stamler: We say we didn't take any more than the contract called for. In other words, we cannot prove, and I don't believe that Mr. Golenbock can prove in this case, the destination of each shipment. We had three contracts with the Virginia Coal Company, laying there before you, not one of the shipments were made as against the three contracts, until they were completed.

The Court: You claim the total you have there corresponds with the total number of tons called for by all these contracts?

Mr. Stamler: Yes. That is the very object of this litigation. We further contend it don't make any difference when we got it or how the mines shipped it to us, they were obliged to take it whenever we got it, under the terms of their contract with us.

The Court: They were obliged to take whatever was called for by the contract.

Mr. Stamler: That is correct. Whenever we got it.

The Court: What Mr. Golenbock claims is that it was not called for by the contract.

Mr. Stamler: I do not think he means—

Mr. Golenbock: Yes, I do. As long as we are discussing this point just now, in order to save further time, for your Honor to pass upon the contract at this time. Just what your Honor has in mind, the construction of it. Our contention is that N-220, calling for a shipment of five hundred tons from July to December, and there is on record already that we have received over six hundred tons during that period of time.

The Court: Mr. Stamler takes issue with that as a matter of fact. He claims that some of those

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shipments during that period were chargeable to the earlier contracts and were so accepted.

Mr. Stamler: That is true.

Mr. Golenbock: That is his theory. But now it is for your Honor to determine whether the preceding contract, whether they had been delivered or not prior to that time, or eliminated on July 1st, 1917, as far as we were concerned and that any shipment made between July and November were shipments on this one contract, which was the only one alive.

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The Court: Unless the parties themselves accepted shipments on the other contracts.

Mr. Golenbock: Yes. They have to show that.

The Court: So that your issue really is whether the shipments that are now in dispute, the so-called surplus, whether that is strictly chargeable to this contract of N-220, and that is what you say it is, and that only; and you claim, on the other hand, that shipments were chargeable to the entire contract, and that there was this balance to be delivered under N-220. Is that it?

20

Mr. Stamler: No. We contend this way: we contend that we had coming to us one thousand seven hundred fifty tons of pig iron against the five contracts annexed to our contract. And that we sold to them approximately the one thousand seven hundred and fifty tons as and when we may get them.

30

Mr. Golenbock: That is not according to the conditions in the contract. That is what the contract says.

The Court: It goes further than that.

Mr. Stamler: I am just trying to get my point, and after I get through you can argue it.

The Court: "The seller agrees to turn over and

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deliver to the buyer at such price, all pig iron delivered to it under the said contracts."

Mr. Stamler: That is correct.

The Court: "As and when deliveries are made thereunder."

Mr. Stamler: That is right.

10 The Court: But it must be made under the contract.

Mr. Stamler: Right.

The Court: Mr. Golenbock claims that they were not obliged to take deliveries unless those deliveries were in accordance with the contract.

Mr. Bender: If your Honor will take that provision in the original recital, put those two together, and it tells the story.

20 The Court: Why do you say that that is not so? You didn't sell them anything but the contract, did you?

Mr. Stamler: We did not ship them any goods except under the contract.

The Court: You claim you got them under the contract, under these contracts?

Mr. Stamler: Absolutely nothing else.

30 The Court: And that they were charged from time to time from one contract to the other, and that there was this balance due which they were obliged to take?

Mr. Stamler: That is the testimony in this case.

The Court: Now, Mr. Golenbock says that the others were forfeited, or waived, and that he was just—

Mr. Stamler: I do not understand Mr. Golenbock—

40 The Court: If what Mr. Stamler says is so, what do you claim because of the shipments that were dropped out?

Case.

Mr. Golenbock: It was up to them to say whether they would take it or not under our statute. Under the installment act, Section 45, they could take it if they wanted to. They could even have broken the first contract, if the first installment was not lived up to.

The Court: No, they could not do that in this case. 10

Mr. Golenbock: No, not in this case. They stipulated except that any violation of any one installment should not vitiate the subsequent. But that does not say that they could compel them to take the preceding month's deliveries if they had failed to take them. However, it was beneficial, as will appear from the contract, for the Bound Brook to take them any time. Because their prices are very much lower than the market price at the time they were delivered. So they could waive, if they wanted to, their right to refuse to take them. But they could not force them on us to take them because we had the same rights as the consignees under those contracts. They saw fit to waive them by accepting them because it was profitable to them. We had no compulsion to take them. 20

The Court: In other words, there came a time when it was profitable to take them? 30

Mr. Golenbock: For them it was, and for us it was not.

The Court: I mean the time made a difference?

Mr. Golenbock: The time did not make any difference to them, because their price was less than half of what the market price at that time was. Their original purchase. It did not make any difference if they got them ten years from that date, if the mills saw fit to ship them. They 40

Case.

did not have to. If the mill did not want to ship them they did not have to. But, however, they wanted to have the good-will and the friendly relations of the Bound Brook, they saw fit to lose money and shipped the iron, and the Bound Brook, because of their profit in accepting them, did
10 waive their right to refuse.

Mr. Stamler: May I ask you this question, so we will have it settled in our minds definitely: you do not contend that the three hundred and forty-seven tons shipped to us after November 13th, 1919, were delivered to us under any other contracts excepting those annexed to the contract between the plaintiff and the defendant:

Mr. Golenbock: No. We do not deny that. Shipped under N-220, which should have been delivered. I would not admit that.
20

The Court: Anything but these five contracts?

Mr. Golenbock: There is only one specific contract out of the five, under which these shipments were made.

The Court: Do you mean it could have no application to any other contracts possibly except these five?

Mr. Golenbock: One of the five.

Mr. Stamler: One of the five.

The Court: It could not go beyond the five?
30

Mr. Golenbock: If you were under a misconception as to Mr. Stamler's request for my concessions—

The Court: No. It could not possibly refer to anything else except these five, and you contend it only refers to one of the five.

Mr. Golenbock: One of the five.

The Court: Now, this clause: "In case of any
40 default whatever of the seller in regard to install-

Case.

ments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to other installments," now, I understand Mr. Golenbock's contention is that when the shipper failed to deliver one of these installments, that the buyer was not obliged to take that installment that was delayed, but he was obliged to take any subsequent installments, for instance—

10

Mr. Stamler: I understand his position.

The Court: If there was any failure to deliver July, and the delivery was made in August, he had to take the August shipment. If they then sent July along in October, they were not obliged to take it. Do you agree to that?

Mr. Stamler: No, I do not. Because the doctrine of *Blackburn v. Reilly* is contrary to that very proposition. These are installment contracts, and they may be carried on between the parties, one party cannot rescind the contract. Both must rescind them. Whatever the case may be. That is the very case I want your Honor to read in order to get the distinction of the law. *Blackburn v. Reilly*, 47 Law, 290. (Reading case.)

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The Court: They are not contending to abrogate the contract.

Mr. Stamler: This rule is true "unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms."

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The Court: Mr. Golenbock does not contend that. He simply says you drop that one delivery.

Mr. Stamler: We do not drop any. We deliver the goods as and when we receive them.

The Court: No, but he drops them. He says you did not deliver them at a certain time called for, he declines to take them later on.

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Case.

Mr. Stamler: He has not any right to do so.

10 The Court: What do you think this contract means when it says—the seller could drop it, couldn't he: "In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to other installments"? In other words, if one company, by reason of a strike or anything else, finds that it cannot deliver a particular installment it does not have to. Now, then, the contract says in that case that that shall not prevent other party from insisting on the next shipment. Because each is treated as a separate contract.

20 Mr. Stamler: I get your Honor's thought, but I might say, as this case will develop, the construction of this contract—this contract has been construed by the parties themselves, and that construction the Court is bound to follow. I follow that in a series of letters. That is my contention, although we are relying on *Blackburn v. Reilly* as the proposition of law controlling this case. As I recall the *Reilly-Blackburn* case—

The Court: Is that what you just read the syllabus of?

Mr. Stamler: Yes.

30 The Court: That only holds it does not break the contract.

Mr. Stamler: They sue for the whole thing in this case. They sued for the breach of the entire thing. And recover damage for all of it, for the entire undelivered portion of it. That is what I am referring to. He said I won't take this. The Court says you will have to take it, you will have to pay the damage for it if you don't take it, be-

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Case.

cause you have accepted shipments at different times.

The Court: Let me see if I understand your issue: you claim that there were five contracts which called for the delivery of one thousand seven hundred and fifty tons of iron?

Mr. Stamler: On April the 4th, 1917.

10

The Court: Now, that all of those were delivered except the last four hundred and twenty-five tons. That the others you offered to deliver to the defendant and he refused to take them.

Mr. Stamler: That is right.

The Court: You say further that that would have completed all of the iron called for by these contracts?

Mr. Stamler: Yes, sir.

The Court: And that while some of them were shipped out of order it was done by the agreement of the parties, and their own construction of what the contract meant?

20

Mr. Stamler: That is right.

The Court: Mr. Golenbock, on the other hand, claims that when an installment dropped out that so far as they were concerned that ended it.

Mr. Golenbock: Exactly.

The Court: And that when it came to the time for this to be delivered there was no contract outstanding, except this one of N-220, and that on that you had received your full quota of shipments, so that you are not obliged to take these others, which were really delayed installments on previous contracts which they had defaulted on. That is the situation, isn't it?

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Mr. Golenbock: Yes, sir.

The Court: All right, gentlemen, I think we have it straight now.

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Frederick Spitalny, direct.

FREDERICK SPITALNY, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Stamler:

10 Q. You are engaged in the iron business in the City of Elizabeth? A. Yes, sir.

Q. And were so engaged in the years 1917 and 1918? A. Yes, sir.

Q. Do you know what was the prevailing market price of pig iron during the months of November and December, 1917? A. The price was thirty-three dollars a gross ton f. o. b. shipping point.

Q. Who fixed that price? A. It was fixed by the Government.

20 Q. How long did that price continue? A. The price continued around that figure until June or July of 1919.

Q. What was the freight from the Virginia Mines to Bound Brook, do you know?

Mr. Golenbock: I object to that.

Mr. Stamler: I will withdraw that. It is fixed by the contract. That is right. We do not need that.

30 Q. Do you know whether during the months of April, May, June, July, August, September, October and November, 1917, that any embargo existed for the shipment of merchandise? A. There was an embargo on all iron of every description.

Q. And who was obliged to procure the orders for the shipment of that merchandise?

40 Mr. Golenbock: I object to that as having nothing to do with the issues in this case as to any permits or any obligations to procure permits.

Frederick Spitalny, cross.

The Court: That may become relevant. If your party secured it, it shows that you consented to it. Is that the purpose?

Mr. Stamler: Yes.

The Court: I will allow the question.

A. The consignee always procured the permit.

Q. In other words, the person to whom the goods were to be delivered was obliged to procure a permit from the Government for the shipment of this material? A. Yes, sir.

Q. And without such permits the material could not be shipped? A. No, sir.

Mr. Stamler: That is all.

Cross examination by Mr. Golenbock:

Q. Are you related to Mr. Baum of the Bound Brook Iron Works? A. Yes, sir.

Q. What relation are you? A. Son-in-law.

Q. Are you in any way connected with the Bound Brook Iron Works? A. No, sir.

Q. Do you remember the market price of pig iron in October 1916? A. I don't remember the exact price.

Q. Could you give us approximately the price of pig iron in November of 1916? A. I could secure that from the books.

Q. Would your answer be the same as to the prices in the month of October, 1916? A. 1916?

Q. Yes. A. I can secure that information.

Mr. Stamler: It is right in there.

The Court: 1916 or '17?

Mr. Golenbock: 1916.

A. The price was twenty dollars and thirty cents a gross ton.

Frederick Spitalny, cross.

The Court: That is all.

Mr. Stamler: Now I want to get those letters in evidence.

Adjourned until 1:40 P. M.

AFTERNOON SESSION.

10

1:40 P. M.

Mr. Stamler: I offer in evidence a statement showing the delivery of the merchandise by the plaintiff to the defendant on the contract in question and ask it be marked as an exhibit.

Statement entered in evidence and marked Exhibit P-2.

20

Mr. Stamler: I will now read the testimony of Mr. Michael Baum.

Testimony read by Mr. Stamler.

Mr. Golenbock: That I objected to the question on the ground that that would be hearsay and unless it would be shown what Burkowitz said to this witness was communicated and acquiesced in by the defendant.

The Court: You renew the objection now? What do you say?

30

Mr. Stamler: The question was not answered.

Mr. Golenbock: It might not have been answered in the same way, but the question afterward is directed to bringing out the same thing, that was the intention of that question. Of course, it was simply informal.

The Court: If the question was not an-

40

Frederick Spitalny, cross.

swered the objection was apparently considered well taken to that question.

Mr. Golenbock: Does your Honor rule on my prior objection in which I objected to him telling it and putting the answers to be given, that I have waived because I did not repeat the objection?

10

The Court: You must object to each question.

Mr. Golenbock: Well, it does not make any difference. That is not really the issue at all here.

Q. "I show you a letter bearing date November seventeenth" (reading)—do you remember what the market was?

Mr. Golenbock: I object to the question unless it is shown that he at that time was in the market for that class of goods.

20

Mr. Stamler: I will withdraw the question.

Q. (reading)—"for more than Government fixed prices"?

Mr. Stamler: Mr. Golenbock objects and I will withdraw the question. That concludes my testimony.

30

Cross examination read by Mr. Golenbock.

Mr. Golenbock: I ask that the record show Mr. Stamler concedes that the price of pig iron during the month of June, 1917, was forty-nine dollars and fourteen cents plus per ton. That during the month of July, 1917, the price of pig iron was fifty-two dollars and eighty-four cents plus per ton. And that the price of pig iron during the month

40

Frederick Spitalny, cross.

of August, 1917, was forty-nine dollars and forty-two cents per ton. And that in September the price was forty-one dollars and thirty-four cents plus per ton, and thereafter it became thirty-three dollars per ton.

10 Mr. Golenbock: It is conceded by Mr. Stamler that Mr. Benjamin Lauterstein, to whom this letter was sent, was vice-president and one of the directors of the Bound Brook Stove Works. It is also conceded that Leon Lauterstein was one of the directors of the same company, as well as its attorney, and that he got up the contract which was entered into and signed between the plaintiff and the defendant.

20 Mr. Golenbock: I want to show who framed the letter. It was conceded it was framed by Leon Lauterstein.

Exhibit D-3, letter of September 25th.

Mr. Golenbock: D-5 is in effect a concession made by Mr. Stamler that this D-3 was written and gotten up by Mr. Lauterstein attorney and director for the company and sent to Mr. Ellis and returned with this letter which I cannot find at the moment.

30 The Court: Is that the bill for the cost of the particular shipment?

Mr. Golenbock: Yes.

Mr. Stamler: No. The goods came from that particular concern.

The Court: The bills you refer to are the bills for the cost—

Mr. Golenbock: No. The bills showing the contract they relate to.

40 The Court: I thought the costs might be important because I noticed these various

Frederick Spitalny, cross.

contracts, one contract, October, 1916, cost is seventeen dollars and fifty cents a ton; another one is twenty dollars a ton; another twenty dollars and fifty cents; another twenty-one dollars; the one of N-220 is twenty-one dollars; and N-205 is twenty-two dollars and fifty cents, so that you could tell at least on which contract the seller shipped these goods; if he charged twenty-one dollars it was— 10

Mr. Stamler: We identify that by contract by N-220.

The Court: Does the bill show that?

Mr. Golenbock: Shows that.

The Court: Then the shipments that are in dispute now, were they all billed to you as under N-220? 20

Mr. Golenbock: Yes, sir.

Mr. Stamler: From March 1st, 1918.

The Court: I do not know anything about March 1st.

Mr. Stamler: On the second count in the complaint, yes.

The Court: The shipments you claim they did not take, and the ones you are suing for, are they all held by the Virginia Company to be on the N-220? 30

Mr. Stamler: Yes, sir. And they are set forth only in the second count of the complaint.

Mr. Golenbock: You do not distinguish that between two and one, Mr. Stamler. They are all under N-220.

Mr. Stamler: I can't admit that because 40

Frederick Spitalny, cross.

I don't know. I am only saying I know the fact is we know definitely it came—

Mr. Golenbock: You have the bills for the two cars.

Mr. Stamler: Here they are. All we have you examined before.

10 The Court: But you claim, Mr. Golenbock, that all these surplus shipments you claim you were not obliged to take were all shipped by the Virginia Company and designated on the bills as part of N-220?

Mr. Golenbock: Exactly.

The Court: And that you say you don't know, Mr. Stamler?

20 Mr. Stamler: I admit that all shipments that arrived after March 1st, 1918, are set forth in the second count.

The Court: Do not let us get away from the question. All these shipments you are now suing on—

Mr. Stamler: Not all. All excepting seventy-eight tons which arrived here in November.

The Court: All except those?

Mr. Stamler: That is right. I admit that.

30 Mr. Golenbock: He is in a position to show it. He has all the bills.

The Court: He says all but seventy-eight tons.

Mr. Golenbock: That is mere guess work. He does not say that as a matter of fact for record.

The Court: I understand that is what he was saying.

40 Mr. Stamler: I say that I positively know that all goods excepting the seventy-eight

Frederick Spitalny, cross.

tons, which were delivered to us on the 13th of November, had arrived after November 30th, 1917, were under contract N-220. As to the others I have not got the information. I don't know.

Mr. Golenbock: Supposing we have the five bills for these cars, anyway. . .

10

Mr. Stamler: Oh, yes, I have them here. I will give them to you in a minute. They don't show that.

Mr. Golenbock: They all indicate that they were charged on order number N-220. And it is also conceded—

The Court: How were the two cars of the seventy-eight tons, how were they charged?

Mr. Stamler: I am not in the position to give the facts to the Court: I can't get the record of it. I don't know.

20

The Court: There must have been some—

Mr. Stamler: I can't find the record of it. That is all.

Mr. Golenbock: And you will concede that the two cars in question shipped during November were the two last cars prior to the March shipment?

Mr. Stamler: Correct.

30

Q. (Reading.) "In July and August, 1917, pig iron was very high in price and scarce."

Mr. Golenbock: P-2 will show by their own admission, will show two cars in July and one in August, which covers that question, and which he said they could get a lot of it.

40

Frederick Spitalny, cross.

10 Mr. Golenbock: I now offer in evidence a statement from the Federal Metal Bed Company to the Bound Brook Stove Works, dated May Seventh, 1919, showing a statement of pig iron account between Federal Metal Bed Company and Bound Brook Stove Works.

Statement entered in evidence and marked Exhibit D-1.

Mr. Golenbock: I also offer in evidence another statement from the Federal Metal Bed Company to Bound Brook Stove Works dated May 7th, 1919, pertaining to the two cars alleged in the first count, showing that the agreed prices was forty dollars.

20 Statement entered in evidence and marked Exhibit D-2.

Mr. Stamler: I demand the production of the contract between Herman Ellis and R. E. Wood and Company. On cross examination the whole thing was brought out by Mr. Golenbock in questioning Mr. Baum as to what that contract was, whether it was assigned or whether it was transferred, whether he knew all about it, and he said he did. Then there was an order given by Mr. Ellis to the plaintiff to ship the merchandise to R. E. Wood and Company. I think the jury ought to have that contract before it now.

30
40 Mr. Golenbock: Ordinarily I would not object to the introduction in evidence, but the situation is somewhat peculiar in this case, and I make the formal objection of introducing this in evidence, or the delivery, which is in my possession, of this contract,

Frederick Spitalny, cross.

because any testimony relating to R. E. Wood and Company, which was brought out in cross examination, was because during the statement questions were asked by the plaintiff's attorney in the direct examination as to R. D. Wood and Company. Furthermore, I object to it on the further ground that any contract made between the defendant and R. D. Wood and Company, or anybody else, is not in anywise connected with this case, unless it is shown that this contract has some specific connection with the issues between Bound Brook and Herman Ellis, I object to it. 10

The Court: How do you claim that it is part of your affirmative case? What do you expect to show by it? Recognition of some of these contracts? 20

Mr. Stamler: Yes. Mr. Golenbock has now offered a letter from R. D. Wood and Company to Herman Ellis complaining about shipments and so forth. I think we ought to know what that contract was.

The Court: If it is simply to find out something, then—

Mr. Stamler: No. The jury ought to have it. 30

The Court: You claim that this contract will show that the shipments are to come from the last two hundred and twenty?

Mr. Stamler: Were to come what?

The Court: You claim that the Wood contract will show that these deliveries were under 220, or under these contracts?

Mr. Stamler: No. They were a part of this whole transaction. 40

Frederick Spitalny, cross.

The Court: Do you claim that these contracts with Mr. Wood will show that?

Mr. Stamler: Yes. In other words, the correspondence and contracts altogether will show that, I say.

Mr. Golenbock: Show what?

10 The Court: That the contract with R. D. Wood and Company contemplates shipments under these earlier contracts.

Mr. Golenbock: The contract shows that?

Mr. Stamler: Yes.

20 The Court: In other words, Mr. Golenbock, if you said to Mr. Wood we have five or six contracts here and we will ship you these goods when we get them, and if they are late or not it makes no difference we will ship them.

Mr. Stamler: That is the position I take exactly.

Mr. Golenbock: Suppose your Honor reads that contract. And I am going to say this, that the contract is identical word for word, with punctuation and all, the same as your Honor has before you.

The Court: That cannot do any harm to either side.

30 Mr. Golenbock: If it would not in a way have some effect to confuse the issues, I would not have any objection. If there is any specific thing that Mr. Stamler wants me to concede—

40 The Court: Mr. Stamler seems to think it will throw some light on your actions that could be construed as being an admission that these shipments were to be applied to the other contract.

Frederick Spitalny, cross.

Mr. Golenbock: I am perfectly willing to have your Honor read the contract and pass on that.

The Court: All right. Have you any witnesses besides this documentary evidence?

Mr. Stamler: That is all.

Mr. Golenbock: I have not any at all. 10

The Court Does not this resolve itself into a question of law?

Conference between both counsel and the Court at the side bar and not within the hearing of the stenographer.

The Court: There is so much correspondence to be gone over here, and other matters, that in order to reach a just decision in this case it will require somebody to sit right down and study the facts and figures in the case, and although usually that is your job, I am going to undertake it in this case, and counsel have agreed to have the case submitted to the Court without a jury. So you will be excused then, gentlemen, until to-morrow morning. 20

The Court: I think this contract is admissible in evidence.

Mr. Golenbock: Prays exception.

Exception allowed; sealed accordingly. 30

Contract entered in evidence and marked Exhibit P-3.

Mr. Golenbock: I object on the ground it is an apparent attempt to vary the terms of a written instrument by implication. That is inadmissible because here there is nothing ambiguous that needs any explanation and, therefore, this attempt to introduce other papers in evidence by which 40

Frederick Spitalny, cross.

some light is attempted to be thrown on the contract and vary the terms of this particular contract, the subject matter of this suit, I think it is contrary to law.

10 The Court: Yes. In other words, that is practically your complete answer to Mr. Stamler's suggestion that he can show the conception of the party to the contract.

Mr. Golenbock: Yes, sir.

The Court: I will allow you an exception to that.

Mr. Golenbock: I have objected to these letters on the examination of Mr. Baum and if they have been marked they were marked subject to my objection. Practically on the same grounds.

20 Mr. Stamler: I offer in evidence a letter which was in the possession of the defendant, bearing date August 10th, 1917, written by the plaintiff to the defendant.

Mr. Golenbock: No objection.

The Court: It will be admitted.

Mr. Stamler: That had been heretofore marked Exhibit P-5, and I ask that the same number be retained.

30 Letter entered in evidence and marked Exhibit P-5.

Mr. Stamler: I offer in evidence a letter written by R. D. Wood and Company to the Bound Brook Stove Works dated September 15th, 1917.

Mr. Golenbock: I object to that.

The Court: On what theory do you think that is admissible?

40 Mr. Stamler: On the theory that Exhibit

Frederick Spitalny, cross.

Number D-3, authorized correspondence with R. D. Wood and Company.

Mr. Golenbock: No, that is not so.

The Court: I will allow it subject to Mr. Golenbock's objection. I do not at present see how they can be bound by it.

Letter entered in evidence and marked Exhibit P-4. 10

Mr. Stamler: I offer in evidence a letter dated October 20th, 1917, written by Herman Ellis to R. D. Wood and Company.

Mr. Golenbock: I object to it.

The Court: That is admissible, of course. Anything you have said which might throw any light on it, anything you said to anybody. For instance, suppose you said in this letter that it was under this contract. Anything you say is relevant. 20

Mr. Stamler: We contend this construes the contract.

The Court: I think the letter is admissible. It depends upon what effect it has, whether it is relevant.

Mr. Stamler: You admit this letter is in relation to this contract? I do not want to put in something that you may think afterward is something different. 30

Mr. Golenbock: I am not saying it is pertaining to the contract, but I am not saying it is admissible.

The Court: I will allow it.

Mr. Golenbock: Prays exception.

Exception allowed; sealed accordingly.

Letter entered in evidence and marked Exhibit P-6.

Mr. Stamler: I offer in evidence letter 40

Frederick Spitalny, cross.

November 3rd, 1917, written by R. D. Wood and Company to Herman Ellis.

The Court: That is in answer to that?

Mr. Stamler: In connection with the same thing.

10

Mr. Golenbock : I object to all these letters.

The Court: I will allow the letter in evidence.

Exception allowed; sealed accordingly.

Mr. Stamler: Mr. Wood construes the contract that it includes the word "December" when it says the word "December."

The Court: I do not know that that binds the other party. I will allow it in for the present.

20

Letter entered in evidence and marked Exhibit P-7.

Mr. Stamler: I offer in evidence letter dated November 10th, 1917, written to R. D. Wood and Company by Herman Ellis.

Letter entered in evidence and marked Exhibit P-8.

Mr. Stamler: I offer in evidence a letter dated December 6th, 1917, written by R. D. Wood and Company to Herman Ellis:

30

Letter entered in evidence and marked Exhibit P-9.

Mr. Golenbock: This letter was offered in evidence, written November the 6th, in which Wood says to us: "We find according to our record there is now due ninety tons to be shipped on the contracts."

Mr. Stamler: I offer in evidence letter dated November 8th, 1917, written by R. D. Wood and Company to Herman Ellis.

40

Frederick Spitalny, cross.

Letter entered in evidence and marked Exhibit P-10.

Mr. Stamler: I offer in evidence copy of letter dated November 7th, 1917, from Herman Ellis to R. D. Wood and Company.

Letter entered in evidence and marked Exhibit P-11. 10

Mr. Stamler: I offer in evidence two bills, one dated November 12th, 1917, and one dated November 13th, 1917.

Bill dated November 12th, 1917, entered in evidence and marked Exhibit P-12.

Bill dated November 13th, 1917, entered in evidence and marked Exhibit P-13.

Mr. Golenbock: Some of these letters were written by myself and some of them written at my suggestion. The one particularly to R. D. Wood where we indicated that we would hold them responsible for any damage we sustained, at the time this was done for the purpose of having the R. D. Wood and Company stand the expense of a loss of defending, and thereby indicated in our letter that there might be some weight to the claim of the Bound Brook that the unshipped goods—that the contract was good as to the balance of the goods undelivered. I can show that by my own handwriting— 20 30

Mr. Stamler: You do not have to. You are making the statement that you did that.

Mr. Golenbock: I did that.

Mr. Stamler: That is all right.

Mr. Golenbock: And that the letters to the Bound Brook people, this letter, letter Exhibit P-22 and this Exhibit P-7, was writ- 40

Frederick Spitalny, cross.

10 ten at my dictation and correction. As a matter of fact, of the letters to R. D. Wood and Company from the latter part of October, 1917, up to date, whether written by Herman Ellis' office, or from the firm of Wight, Wight & Golenbock, were written and phrased by me. There is one I want to particularly refer to, written to the Bound Brook Stove Works.

I also want to introduce in evidence a letter taken from the possession of the plaintiff, and signed by Leon Lauterstein, who was a director and attorney for the plaintiff corporation, which shows, page 2 of a certain letter, sent to the Virginia Iron, Coal and Coke Company, pertaining to these contracts, which letter was written during October, 1917.

Mr. Stamler: No objection.

Second page of letter entered in evidence and marked Exhibit D-3.

30 Mr. Golenbock: I do not want to be put in the peculiar position—there are a couple of letters which Mr. Stamler picked out from my file which he did not introduce in evidence, and I do not feel like being placed in a position where I objected to them and then introduced other letters myself.

The Court: You can do that yourself. You are forced to do it after the Court permits his letters to go in. That is perfectly consistent.

Mr. Golenbock: I offer in evidence these letters.

40 Mr. Stamler: I want on the record the following fact, that the cash book of the

Frederick Spitalny, cross.

plaintiff shows that they received for the two rejected cars one thousand three hundred and thirty-five dollars and seventy-five cents for each of the cars, and that the freight to Hoboken was ninety-seven dollars and fifty cents.

The Court: From Bound Brook to Hoboken? 10

Mr. Stamler: From Bound Brook to Hoboken.

Mr. Golenbock: We object to that because we are not bound by anything that is marked in the books here, because it is already in evidence.

The Court: That is true. The book itself is not affirmative evidence.

Mr. Stamler: I do not say that it is affirmative evidence. 20

The Court: He objects on that ground.

Mr. Stamler: As I understood we were not to make strict proof of this book.

Mr. Golenbock: That is not the point. Even if he had brought somebody—

The Court: You do not object to the books, that the book itself is not evidence?

Mr. Golenbock: No, sir.

The Court: The book itself is not affirmative evidence. 30

Mr. Stamler: It is some evidence.

The Court: No. It would not be admissible in evidence.

Mr. Golenbock: This shows some transaction with the Federal Metal Company and not with Herman Ellis. I did object on the ground—

Mr. Stamler: They claim we sold the 40

Frederick Spitalny, cross.

two cars to the Federal Metal Bed Company and received for it one thousand three hundred and thirty-five dollars and seventy-five cents for each car, and in addition, out of that sum we spent the ninety-seven dollars and fifty cents for freight from Bound Brook to Hoboken.

10

Mr. Golenbock: I object to that on the first ground that Mr. Baum has testified that he is the plaintiff himself for all purposes or a witness for the plaintiff, because he shows he is the president in that he has already testified that they have received from the Federal Metal Bed Company a certain price, which differs from this, and they cannot contradict or impeach one of their own witnesses.

20

The Court: It is not impeaching a witness. You can contradict but you cannot impeach. You do not object to the form of the proof do you?

Mr. Golenbock: I do.

The Court: Do you mean he has to bring somebody here to prove that?

Mr. Golenbock: Even if he brought somebody—

30

The Court: You object that it has no force or effect, but not to the form.

Mr. Golenbock: Yes, exactly. Not to the form.

The Court: Objection will be entered and exception allowed.

Exception allowed—sealed accordingly.

40

Mr. Stamler: And I want another admission on the record that the armistice was signed on November eleventh, 1917.

Michael Baum, direct.

The Court: The Court will take judicial notice of that.

Mr. Stamler: That covers our case.

Mr. Golenbock: I offer in evidence letter dated September the fifth, 1917 written from R. D. Wood and Company to Herman Ellis?

Letter entered in evidence and marked Exhibit D-4. 10

Mr. Golenbock: I offer in evidence letter dated November nineteenth, 1917, written from R. D. Wood and Company to Herman Ellis.

Letter entered in evidence and marked Exhibit D-5.

Mr. Golenbock: I offer in evidence letter dated October twenty-third, 1917, written from R. D. Wood and Company to Herman Ellis. 20

Letter entered in evidence and marked Exhibit D-6.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

January Term—1920.

BOUND BROOK STOVE WORKS

v.

HERMAN ELLIS, and HERMAN ELLIS INC.

30

Transcript of stenographer's notes of deposition of Michael Baum, taken in the above entitled cause in the City of Elizabeth, New Jersey, on the third day of February, A. D., 1920, at 4:00 P. M. 40

Michael Baum, direct.

APPEARANCES:

JOHN J. STAMLER, Esq., Representing the Plaintiff.

HENRY K. GOLENBOCK, Esq., Representing the Defendant.

10 MICHAEL BAUM, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Stamler:

Q. Mr. Baum, you are the President of the Bound Brook Stove Works? A. Yes, sir.

Q. And were you the president of the Bound Brook Stove Works on April 4th, 1917? A. Yes, sir.

Q. The Bound Brook Stove Works are suing Herman Ellis? A. Yes, sir.

20 Q. And they are suing Herman Ellis on a contract that your company made with Mr. Ellis on the fourth day of April 1917? A. Yes, sir.

Q. Did your company continue to ship pig iron to Herman Ellis under the contract of April 4th, 1917? A. Yes, sir.

Q. Where would you ship the pig iron to A. To Florence, New Jersey, by Mr. Ellis' orders.

Q. How would the goods come to you? A. In bulk, in carloads.

30 Q. From where? A. From Virginia, from the furnaces.

Q. Where was your factory? A. Bound Brook, New Jersey.

Q. Where would the furnaces ship the goods to? A. To Bound Brook, New Jersey.

Q. How would you notify Mr. Ellis that the goods were arriving? A. By 'phone.

40 Q. And then you would get shipping instructions from him? A. Yes, sir.

Michael Baum, direct.

Q. Would you get shipping instructions from him before the goods arrived, or when the goods actually arrived at Bound Brook? A. Well, often times we had a standing order to ship to Florence, New Jersey, when the goods get there.

Q. In other words, sometimes you would get your orders for the shipment of goods before the goods actually arrived at Bound Brook, New Jersey? A. Yes, sir. 10

Q. And at other times you would wait until the goods actually arrived? A. Arrive, yes.

Q. And get your shipping instructions? A. And get my shipping instructions from Mr. Ellis.

Q. In the latter part of November of 1917, a shipment of two cars arrived? A. Yes.

Q. Did you notify Mr. Ellis of the arrival of that shipment? A. Yes, sir. By 'phone. 20

Q. Did you get instructions from him where to ship these goods? A. One Mr. Berkowitz answered the 'phone, in the employ of Mr. Ellis, and said he would not take any more pig iron on this contract.

Q. Did you know Mr. Berkowitz? A. Yes, sir.

Q. What position did he hold with Mr. Ellis? A. He was bookkeeper of Mr. Ellis.

Q. Did he tell you who told him to tell you that? 30

Mr. Golenbock: I object to the question on the ground that that would be hearsay. And unless it be shown that what Berkowitz said to this witness was brought to the attention of the defendant Ellis.

Q. Did you prior to that time talk to Mr. Berkowitz about shipping this various merchandise? A. Why, yes. 40

Michael Baum, direct.

Q. Who would actually give the shipping instructions for this merchandise? A. Mr. Berkowitz.

Q. On behalf of Mr. Ellis? A. On behalf of Mr. Ellis.

10 Q. I show you a letter bearing date November 30th, 1917, and ask you whether you received that letter? A. Yes, sir.

Mr. Golenbock: It is conceded it was sent and received.

Q. After you got this letter of November 30th, 1917, did you again call up the Herman Ellis people in Perth Amboy? A. Yes, sir.

Q. And to whom did you speak? A. To Mr. Ellis.

20 Q. Personally? A. Personally.

Q. What did he tell you? A. I told him every time there was pig iron on the way and for him to take it, and he refused.

Q. What did he say? A. He said, our contract is filled. I have no more pig iron to get.

Q. And what did you tell him? A. I told him your contract is still standing for those goods until the order is filled.

30 Q. What did Mr. Ellis then say? A. Mr. Ellis said I should not ship any. They all go to storage. He has no room and would not take any in.

Q. To whom were these goods shipped on Mr. Ellis's instructions to Florence, New Jersey? A. R. D. Wood & Company.

Q. During that conversation that you had with Mr. Ellis after November 30th, 1917, was the question of R. D. Wood & Company discussed by you with him? A. No, sir. We didn't have no deal-

Michael Baum, direct.

ings with R. D. Wood. We had dealings with Ellis.

Q. What happened with these two cars of pig iron that Mr. Ellis refused to accept? A. We sold them to Hoboken, New Jersey.

Q. Do you remember the name of the concern?

A. Federal Metal Bed Company.

Q. And your books will show for what price? 10

A. Yes, sir.

Q. Do you remember paying a freight bill on that and demurrage bill? A. Yes, sir. Two hundred and eighty-one dollars.

Q. \$251.79, is that correct? A. \$251.79, yes.

Q. Why didn't you ship the balance of the goods to Mr. Ellis? A. He refused to take them. He said, they all go to storage if you ship them that way.

Q. Do you remember what the market was for pig iron of the quality mentioned in the contract, during the month of December, 1917? 20

Mr. Golenbock: I object to the question unless it is shown that he at that time was in the market for that class of goods.

Q. Do you know? Yes or no. A. Yes, sir.

Q. You do know? A. Yes, sir.

Q. Did you at that time deal and trade in pig iron? A. We were close to the market. 30

Mr. Golenbock: I move to strike the answer out as not responsive.

Q. What do you mean were close to the market?

A. We got the quotation every week by metal reports.

Q. Was there at that time a Government set price for it? A. Yes, sir.

Q. And what was that price? A. Thirty-three dollars. 40

Michael Baum, direct.

Q. Or \$33.50? A. \$33. or \$33.50.

Q. In making sale of pig iron during the months of November and December of 1917, you were guided by the Government fixed price? A. Government fixed price.

10 Q. Were you permitted during those months of November and December of 1917, to sell the pig iron for more money than fixed by the Government?

Mr. Golenbock: I object to the question on the ground it is incompetent, irrelevant and immaterial, and not binding upon the defendant.

Question repeated by stenographer.

A. Yes, sir.

20 Q. What was the object of fixing the price by the Government?

Mr. Golenbock: I object to the question on the ground it is incompetent, immaterial and irrelevant.

Mr. Stamler: I will withdraw the question.

Q. You say that during the month of November and December of 1917, the Government fixed a price on pig iron at \$33 or \$33.50 per ton? A. Yes.

30 Q. What did that mean?

Mr. Golenbock: I object to that as calling for a conclusion, unless the witness is qualified to give an opinion. And on the further ground that this witness is not an expert, or has not in any way attempted to qualify as an expert along those lines.

40 Q. Do you understand me? A. Yes.

Michael Baum, cross.

Question repeated by stenographer.

A. That means to give everybody a chance to get pig iron at a certain figure.

Q. At a fixed price? A. At a fixed price, yes.

Mr. Stamler: Cross examine.

Cross examination by Mr. Golenbock:

10

Q. Do you know a man by the name of Pear?

A. No, sir. I never met the man.

Q. Do you know that there was a man by the name of Pear who was connected with Herman Ellis in the office? A. No, sir. I don't know the man. Never met him.

Q. Did you ever meet Berkowitz? A. Yes, sir.

Q. How many times have you been at Mr. Ellis' office? A. Several times.

20

Q. Whom did you see there, A. Mr. Berkowitz, Mr. Ellis and Mr. Baum.

Q. This Mr. Baum was a son of yours? A. Yes, sir.

Mr. Stamler: He has since died.

Q. Wasn't there another young man there by the name of Pear that you met? A. I don't know him. I never met him.

Q. You would not say that at the time that you dealt with Mr. Ellis there was not another man in the office by the name of Pear, would you? A. There was a young assistant to Mr. Berkowitz.

30

Q. You would not say that there was not another man by the name of Pear connected with the office? A. There was a young man.

Q. At the time you received the letter of November 30th from Mr. Ellis you knew then that Mr. Ellis had a contract for the same pig iron with R. D. Wood & Company? A. Did I know?

40

Michael Baum, cross.

Q. Yes. A. Yes.

Q. You had known that for a long time, didn't you? A. Yes.

Q. You knew that the entire contract which you made with Mr. Ellis was assigned to R. D. Wood & Company?

10

Mr. Stamler: Not assigned.

Q. You knew that the entire amount of the pig iron of the contract which you made with Mr. Ellis was sold to R. D. Wood & Company? A. Yes, sir.

Q. Don't you remember that in your conversations with Mr. Ellis, or his office, you were told that R. D. Wood & Company would not take any more pig iron? A. I don't remember.

20

Q. Do you remember whether you received letters from Mr. Ellis pertaining to shipments of pig iron during August and September?

Mr. Stamler: Let me see the letters. I will admit in evidence, for the purpose of this case, the letter of September 11th, 1917, written by Herman Ellis to the plaintiff, and a copy of a letter from R. D. Wood & Company, dated September 10th, 1917, was thereto annexed, and the same is marked Exhibit D-1.

30

Mr. Stamler: Letter of August 7th, 1917, from Herman Ellis to the Bound Brook Company is offered in evidence. Also letter of August 18th, 1917. Also letter of September 6th, 1917.

Three letters entered in evidence as one exhibit and marked Exhibit D-2.

40

Letter from Herman Ellis, dated Septem-

Michael Baum, cross.

ber 25th, 1917, to Bound Brook Stove Works, entered in evidence and marked Exhibit D-3.

Q. Mr. Baum, on September 25th, 1917, there was a letter sent by Mr. Ellis to your company, authorizing them to re-consign the cars from Bound Brook to Florence to R. D. Wood and Company, as shown by letter Exhibit D-3. This letter was actually written in your office and sent to Ellis to be signed and to be returned by him to you, isn't that right? A. I don't remember.

10

Mr. Stamler: Letter of September 25th, 1917, written by the plaintiff to the defendant, is offered in evidence.

Letter entered in evidence and marked Exhibit D-4.

20

Q. Who is Mr. Benjamin Lauterstein? What connection did he have with the Bound Brook Stove Works? A. He was secretary at the time.

Q. Of the company? A. Yes, sir.

Q. Who was vice-president? A. Mr. Monroe Golding.

Q. You know, as a matter of fact, that Mr. Lauterstein signed the contract between Mr. Ellis and your company, on behalf of your company? A. Yes, sir.

30

Q. Did your company receive a letter from R. D. Wood & Company dated September 10th, 1917, in reference to the iron which is the subject matter of the contract which your company made with Mr. Ellis? A. Never saw the letter.

Q. Do you know whether a reply was sent to R. D. Wood & Company, in answer to that letter, or to the letter of September 11th, from Mr. Ellis to

40

Michael Baum, cross.

you, in which a copy of the letter from R. D. Wood & Company, dated September 10th, was sent to you? A. Never saw it.

By Mr. Stamler:

10 Q. You mean by that you don't know? A. I don't know.

By Mr. Golenbock:

Q. How much of an interest do you hold in the Federal Metal Bed Company? How much interest have you in the Federal Metal Bed Company? A. None whatever.

Q. How much interest has Mr. Benjamin Lauterstein in the Federal Metal Bed Company? A. I don't know.

20 Q. You don't mean to say that you don't know how much interest Mr. Lauterstein has in that concern? A. I am not connected with that concern.

Q. Mr. Lauterstein is your son-in-law? A. Not Benjamin.

Q. Which Lauterstein is your son-in-law? A. Harry W.

Q. Is he a brother to Benjamin? A. Yes, sir.

Q. Is Harry Lauterstein anyway interested with you? A. Son-in-law.

30 Q. In business? A. None whatever.

Q. Was he ever interested with you in business? A. No, sir.

Q. Wasn't the Federal Metal Bed Company interested in the Bound Brook Stove Works? A. Yes, sir.

Q. To what extent? A. One share of stock.

40 Q. To what extent was the Bound Brook Stove Works interested in the Federal Metal Bed Company? A. None whatever.

Q. Who else beside yourself connected with the

Michael Baum, cross.

Bound Brook Stove Works were interested in the Federal Metal Bed Company? A. Who else besides myself was connected?

Q. Who were connected with the Bound Brook Stove Works who were also interested in the Federal Metal Bed Company? A. Benjamin Lauterstein and Monroe Golding. 10

Q. Who were the directors of the Bound Brook Stove Works? A. Benjamin Lauterstein, Monroe Golding and myself.

Q. These directors controlled the stock of the Bound Brook Stove Works? A. Yes, sir.

Mr. Stamler: What do you mean by control?

Mr. Golenbock: Control as to ownership of it. 20

Q. Were not Mr. Golding and Mr. Benjamin Lauterstein and Hyman Lauterstein directors or stockholders of the Federal Metal Bed Company?

A. I don't know Hyman.

Q. What is your son-in-law's name? A. Harry W.

Q. I meant to say Harry instead of Hyman? A. Were they directors of what?

Q. Of the Federal Metal Bed Company? A. Not Monroe Golding, that I know of. 30

Q. Will you name, if you can, all of the directors of the Federal Metal Bed Company? A. Isadore Lauterstein, Benjamin Lauterstein, Leon Lauterstein, Harry W. Lauterstein. That is all I know.

Q. Did you sell the two cars to the Federal Metal Bed Company that you say you had on the way during the last part of November, 1917, and which 40

Michael Baum, cross.

Mr. Ellis refused to accept? A. I sold these two cars to the Federal Metal Bed Company, that I had on a side track in Bound Brook.

Q. When did you sell these two cars?

Mr. Stamler: We will show that by the books.

10

Q. Did you have those cars at Bound Brook before November 30th, 1917?

Mr. Stamler: November 13th.

Q. When did these two cars for which you are suing in the first count of the complaint arrive at Bound Brook? A. I don't remember the date.

Mr. Stamler: It must have been prior to November 30th.

20

Mr. Golenbock: I don't know about that. I want to know when they arrived. Could you tell by your records?

Mr. Stamler: No. We can show when they were sold. November 13th is the last shipment.

Q. Do you know whether the two cars had arrived at Bound Brook at the time Mr. Ellis wrote you the letter of November 30th, 1917? A. Yes, sir.

30

Q. When had they arrived? A. They were there a couple of weeks before we got this letter.

Q. Have you any record by which you could be certain about that? Have you any data or records by which you could be certain when they arrived at Bound Brook? A. No, sir.

Q. So that your answer that they had is merely guesswork? A. No, sir.

40

Q. Have you got the freight bills or freight receipts for these two cars showing when they arrived at Bound Brook? A. I can look them up.

Q. All right.

Michael Baum, cross.

Mr. Stamler: I expect to find that, if we find the file.

Q. Did you at any time deliver a bill of lading at the office of Herman Ellis, Perth Amboy, or re-consign two cars from Bound Brook to the order of Herman Ellis, Perth Amboy New Jersey? A. I don't remember.

10

Q. Isn't it a fact that you never had?

Mr. Stamler: Evidently not from the correspondence. It is a fact that was not done.

Mr. Golenbock: It is conceded that the plaintiff at no time presented a bill of lading at the office of Herman Ellis at Perth Amboy, or re-consigned the two cars in question to the order of Herman Ellis, Perth Amboy.

Mr. Stamler: That is correct. It is evident the correspondence shows that.

20

A. The notice on these two cars you must have there and that will show when they arrived.

Q. Do you know anything about the balance of the cars that you say Mr. Ellis refused to take?

A. Yes, sir.

Q. Did he ever refuse to accept any bill of lading from you at his office? A. Ever refuse to accept any bill of lading?

Q. Yes. After November 30th, 1917? A. He refused all shipments after November 30th.

30

Q. Did you ever present a bill of lading and demand for money at the office of Herman Ellis for any car of pig iron after November 30th, 1917? A. Yes, sir.

Q. When? A. After November 30th.

Q. When? Do you know? A. In December, 1917.

40

Michael Baum, cross.

Q. Who brought the bills of lading to the office of Mr. Herman Ellis?

By Mr. Stamler:

Q. Did you do it yourself, Mr. Baum? A. No, sir.

10 *By Mr. Golenbock:*

Q. Who did it? A. That was sent by mail.

Q. Who sent it? A. The office force.

Q. Who had charge of sending the bills of lading from your office to Mr. Ellis? A. I don't know whether there was any bills of lading.

20

Mr. Stamler: I will concede, for the purpose of this record, after November 30th, 1917, and after the conversation Mr. Baum had with Mr. Ellis, he did not send to Herman Ellis any bills of lading, nor make any demand for payment of cars as they arrived.

Mr. Golenbock: Neither did he re-consign these cars, when they arrived at Bound Brook, to the order of Herman Ellis, Perth Amboy?

Mr. Stamler: Yes, sir.

30

Mr. Golenbock: Neither did he give Herman Ellis any other notice of their arrival?

A. Oh, yes.

Mr. Stamler: Wait a minute.

Mr. Golenbock: Neither did he give Herman Ellis any other notice of the arrival of any cars after November 30th, 1917?

40

A. Yes, we did. We give notice to Herman Ellis

Michael Baum, cross.

about the shipments as they come in and he refused to accept them.

Q. How did you give these notices? A. Over the 'phone.

Q. Did you ever follow it up by a mail notice, by mailing him a notice? A. I don't remember.

Q. Wasn't it customary with you, prior to November 30th, 1917, to send written notice of the arrival of cars, regardless of telephone conversations? A. Yes, it was. 10

Q. And you now say that after November 30th you only called him on the 'phone? A. Yes, sir.

Q. How many times in all did you call Mr. Ellis, or his office, on the 'phone, to advise him of arrival of cars of pig iron? A. Half a dozen times.

Q. Will you give us the months and days, if you can, of these notices? A. I can't do it. 20

Q. Was that during the month of December of 1917? A. During the month of March.

Q. During the month of March of what year? A. 1918.

Q. March, 1918? A. Yes, sir.

Q. So that that was the notice that you had given him after November 30th, 1917? A. Yes, sir. That is the first shipment we got from the furnace.

Q. You are sure of that? A. Yes, sir. March 1st, March 5th we give notice to Mr. Ellis shipments of pig iron. 30

Q. You didn't receive any correspondence from Mr. Ellis, through mail, during March, 1918, pertaining to the cars, did you?

Mr. Stamler: No.

A. I don't remember.

Mr. Stamler: Oh, yes, we didn't get any. 40

Michael Baum, cross.

A. That was only told to us by Mr. Baum that he will not accept any more pig iron.

Q. This Mr. Baum was your own son? A. Yes, sir.

Q. Who did you sell the balance of the pig iron to? A. I consumed it myself.

10 Q. What price did you get from the Federal Metal Bed Company? A. \$33. \$33.50. I don't remember. I believe it was \$33.25 or \$34.28.

Q. Which is it? A. \$34.25.

Q. Did you get payment by check? A. Yes, sir.

Mr. Stamler: He got \$34.40. That includes freight.

Mr. Golenbock: How much was the freight?

Mr. Stamler: Ninety cents.

20

Q. Mr. Baum, don't you know that at the time you made the contract with Mr. Ellis for the pig iron, that there was only approximately twelve hundred and fifty tons due on these contracts to you from the mills? A. No.

Q. Can you, from any of your records, ascertain that fact? A. No.

30

Q. Can't you ascertain that from the contracts which you had with the mills how much was due on those contracts at the time you made the contract with Mr. Ellis? A. Yes, sir.

Q. Can you give us approximately the number of tons, or number of cars of pig iron that you received during the months of July, August and September on these contracts which you had with the mills, that you turned over to Mr. Ellis? A. That we sold to Mr. Ellis?

40

Q. No. How many tons did you receive from the mills on the contracts? A. Yes, sir.

Michael Baum, cross.

Q. From the same mills with whom you had contracts, turned over to Ellis, during the months of June, July and August? A. You mean the balance of the irons?

Q. Yes. How many tons altogether did you receive during 1917, I am talking about? Not 1918.

By Mr. Stamler:

10

Q. Can you tell that without your books? A. No.

By Mr. Golenbock:

Q. You did not try to sell or dispose of the two cars shipped in November to anybody other than the Federal Metal Bed Company? A. Did we try to sell them to anybody else?

Q. Yes. A. No, sir.

20

Q. After March 1st or 2nd, how long a time did it take for the mills to complete the balance of the shipments? A. What year?

Q. 1918? A. March 5th we got a car.

Q. How long did it take the mill to complete the contract, after November 30th, 1917? How many months, if it did take months? A. Nine months.

Q. Nine months? A. Yes, sir.

Q. And how many tons in all did the mill ship during the nine months? A. Three hundred and forty or fifty odd tons.

30

Mr. Stamler: Nine months after November 30th.

Mr. Golenbock: No. He was talking about 386 tons which you claim a balance.

Mr. Stamler: The record shows now as to the entire contract, I think.

40

Michael Baum, cross.

Q. You mean nine months after March, 1918?
A. March, 1918.

By Mr. Stamler:

Q. March, 1918, or November, 1917? A. March, 1918.

10 Letter dated November 30th, 1917, from Herman Ellis to Bound Brook Stove Works entered in evidence and marked Exhibit P-1.

Mr. Stamler: I offer in evidence a document in the possession of the defendant, bearing date November 12th, 1917.

Document entered in evidence and marked Exhibit P-2.

Mr. Golenbock: Reading from memorandum witness says:

20 A. March 1st, March 5th, two cars. March 1st, 29 tons; March 5th, 30 tons; June 11th, 29 tons; June 26th, 29 tons; June 29th, 29 tons; July 5th, 37 tons; July 13th, 36 tons; July 29th, 39 tons; August 8th, 40 tons; September 27th, 49 tons.

By Mr. Stamler:

Q. How many tons in all? A. 347 tons. Wait a minute. We have more tonnage. There was two cars sold to the Federal Metal Bed Company, 65
30 tons.

By Mr. Golenbock:

Q. All these shipments which you just read from your memorandum as having been made are the same as these bills which I now show you, and all have reference to the contract which you originally had with Reed, Fears and Miller, the contract number N 220? A. Yes, sir.

40

Michael Baum, cross.

Mr. Golenbock: I offer these in evidence as one Exhibit.

Seven sheets entered in evidence as one exhibit and marked Exhibit D-5.

Q. In July and August, 1917, pig iron was very high in price, and scarce? A. No. In July we got lots of pig iron.

10

Q. I don't mean 1918. I mean in 1917, during the war? A. We didn't have no trouble in getting it.

Q. Can you tell from your memorandums that you have now, and which you have just looked at, how many tons the mills shipped you during the months of July and August, 1917?

Mr. Stamler: He has not got that before him.

20

A. I have not got any record at all.

Q. Do you know whether you got any pig iron during July and August of 1917? A. Yes, sir. Wait a minute. We got one or two cars.

Q. The memorandum that you are now looking at is only a memorandum of the particular iron that was shipped to Herman Ellis, or to R. D. Wood for Herman Ellis? A. Yes, sir.

Q. I want to know what other pig iron you received, which was shipped elsewhere, or used by yourself, during the months of July and August, 1917? A. None.

30

Q. So that you want us to understand that all the pig iron which you received during the months of July and August, 1917, was shipped either to Herman Ellis, or to R. D. Wood and Company for Herman Ellis? A. Yes, sir.

Q. And none shipped to anybody else? A. No, sir.

40

Michael Baum, cross.

Q. Or used by yourself? A. No, sir.

Mr. Stamler: That is what I understood him to say originally.

10 Q. On the shipments which you made, isn't it a fact, Mr. Baum, that you sold 347 tons to the Federal Metal Bed Company for forty dollars a ton?
A. No, sir.

Q. I show you a statement which you produced, dated May 7th, 1919, from the Federal Metal Bed Company to the Bound Brook Stove Works, for the particular tons referred to. A. This iron we sold—we did not sell. Consumed ourselves. The Federal Metal Bed Company had an interest in this pig iron, didn't they?

20 Q. Yes, sir. A. Mr. Golding, for the Federal Metal Bed Company, went out of business and left me with this contract, but they still had an interest in this contract for pig iron. Do you understand me?

Q. Yes. A. This pig iron that come in, and we made a division between us.

Q. Didn't you take this iron in at forty dollars?
A. Yes, sir.

30 Mr. Stamler: Freight was thirteen dollars and some odd cents.

Q. Do you know whether the freight rate changed in 1917? A. Yes, sir.

Q. 1917 or '18? A. '17.

Q. What part of 1917? A. Latter part of 1917.

Q. After November 30th, 1917? A. Before.

Q. How long before?

40 Mr. Stamler: This will give you the story. You can figure it out on here. We only gave

Michael Baum, cross.

him an allowance of three dollars on freight, and Ellis had to pay the difference. Whatever the freight was.

Q. Will you explain this statement with reference to the freight, showing you a statement from the Federal Metal Bed Company dated May 7th, 1917, and marked number three? A. It was demurrage and freight charges on those two cars, that were refused by Mr. Ellis. You know those two cars were refused.

10

Q. I notice that there was a credit? A. A credit of ninety-two dollars. That was back.

Q. Refund? A. Yes.

Q. There was a refund of that amount of \$92.03? A. Yes.

Mr. Stamler: And we only charged you with the difference.

20

Mr. Golenbock: Do you know that as a fact?

Mr. Stamler: I went over these figures.

Mr. Golenbock: That is all.

By Mr. Golenbock:

Q. Are these the car numbers as appear on the same statement? A. Yes, sir.

Q. The two cars which you say Mr. Ellis refused to accept in November, 1917? A. These are the cars.

30

By Mr. Stamler:

Q. What are the numbers? A. Erie 107,403 and P. & R. 11,808.

Bill dated November 13th, 1917, to Herman Ellis, entered in evidence and marked Exhibit P-3.

40

Michael Baum, cross.

Mr. Stamler: I offer in evidence letters as follows: From the Bound Brook Stove Works to Herman, Ellis, dated August 29th, 1917, November 16th, 1917, November 19th, 1917, as one exhibit.

10 Three letters entered in evidence as one exhibit and marked Exhibit P-4.

Mr. Stamler: I offer in evidence letter of August 10th, 1917, addressed from the Bound Brook Stove Works to Herman Ellis.

Letter entered in evidence and marked Exhibit P-5.

Mr. Stamler: I offer in evidence letters written by R. D. Wood & Company to Herman Ellis, bearing date November 22nd, 1917, and November 24th, 1917.

20 Mr. Golenbock: I object, unless the replies to these letters are made part of the record.

Mr. Stamler: I am going to put them in.

Mr. Golenbock: I also object to them on the further ground that they have no bearing on this case. Not relevant or competent or having any bearing upon the issues in this case.

30 Two letters entered in evidence as one exhibit and marked Exhibit P-6.

Mr. Stamler: I offer copies of letters addressed from Herman Ellis to R. D. Wood and Company, bearing date November 23rd, 1917, November 26th, 1917, and December 13th, 1917, and another letter of December 13th, 1917.

Four letters entered in evidence as one exhibit and marked Exhibit P-7.

40 Mr. Golenbock: I object on the ground

Exhibits.

that they are immaterial and not affecting the issues in this case.

Exhibit P-1—Feb. 5, 1920.

MEMORANDUM OF SALE, by Bound Brook Stove Works, a New Jersey corporation, seller, of Bound Brook, N. J., to Herman Ellis, of the City of Perth Amboy, State of New Jersey, buyer,

10

WHEREAS, the seller, Bound Brook Stove Works, has contracts for the purchase of pig iron with various mills upon the terms and conditions, &c., stated in the accompanying memoranda from said contracts, and the said buyer, Herman Ellis, desires to purchase the pig iron to be delivered pursuant to the said contracts, subject to the terms thereof, as to quality and deliveries, and as and when the said pig iron is delivered under the said contracts, and at the price hereinafter stated, NOW THEREFORE it is agreed that Herman Ellis, the buyer, hereby purchases all pig iron covered by the said contracts, aggregating approximately 1750 tons, for which the buyer agrees to pay the seller \$39.00 per ton, f. o. b. Bound Brook, N. J., payment to be made as follows:

20

Cash upon presentation of invoice and re-consigned bill of lading as per buyer's direction, at office of Herman Ellis, Perth Amboy, N. J.; if within five (5) days after arrival at Bound Brook, N. J., buyer fails to give directions for re-consigned bill of lading, seller may consign to buyer at Perth Amboy, N. J., all demurrage to be paid by buyer.

30

The seller agrees to turn over and deliver to the buyer at said price, all pig iron delivered to it under the said contracts, as and when deliveries

40

Exhibits.

are made thereunder, and delivery is subject to the conditions in the said contracts or any other causes not within the control of the seller.

10 The failure to deliver any installment of iron for any cause not within the control of the seller, including the failure of the said mills to make delivery under the said contracts, shall not result in liability by the seller to the buyer, and shall not release the buyer from obligation to take subsequent installments.

Dated, New York, April 4th, 1917.

In the Presence of:
Chas. Finkelstein.

20 BOUND BROOK STOVE WORKS,
by B. Santerstein, V.Pres.
H. ELLIS, (L. S.)

REED, FEARS & MILLER

PIG IRON—COKE

Sales Agents.

VIRGINIA IRON, COAL AND COKE CO.

30 Offices Agent's No.
Boston
New York Contract No. N-205.
Dubois, Pa.

New York, October 11, 1916.

CONTRACT COVERING SALE OF CROZER PIG IRON.

To Bound Brook Stove Works, Inc.

Bound Brook, N. J.

Exhibits.

QUANTITY	400 tons.	
GRADE	2-X.	
SPECIFICATIONS	Sil. 2.50 to 3.00	
	Sul. .05 Maximum	
	Phos. .40 to .80	
	Mang. .50 to .90	
PRICE	\$20.50 Per Ton of 2240 lbs.	10
	Delivered f. o. b. cars Bound Brook, N. J.	
TERMS	Freight, cash. Balance cash 30 days from average date of monthly shipments.	
	Accounts not paid when due bear interest at the rate of 6% per annum from the date of maturity. This price is based on present tariff freight rate of \$3.00 per ton.	20
	In case the tariff freight rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance.	
	To be made in N. Y. or Boston Exchange to REED, FEARS & MILLER.	30
SHIPMENT	100 tons equal monthly No- vember and December, 1916.	
	300 tons equal monthly Janu- ary to June, inclusive 1917.	
ROUTE	Via CRR of N. J.	
REMARKS	Seller shall not be respon- sible for delays caused by strikes, differences with workmen, accidents at works,	40

Exhibits.

delays in transportation, or other causes not under his control; each month's delivery to be treated as a separate contract independent of contracts for deliveries during other months. In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to other installments. If the buyer fails to make any payment when due the seller shall have the right to cancel the contract, or at seller's option to postpone shipment of future installments until prior shipments are paid for. The seller will not be liable for any overcharge in freight when the correct rate is expressed in bill of lading.

ACCEPTED

VIRGINIA IRON, COAL AND COKE
COMPANY,

Reed, Fears & Miller,

Sales Agents.

Bound Brook Stove Works,
Michael Baum, Pres.

Exhibits.

REED, FEARS & MILLER

PIG IRON—COKE

Sales Agents

VIRGINIA IRON, COAL AND COKE CO.

Offices Agent's No. 10

Boston

New York

Contract No. N-201

Dubois, Pa.

New York, October 10, 1916.

CONTRACT COVERING SALE OF CROZER PIG
IRON.

To Bound Brook Stove Works, Inc.,

Bound Brook, N. J.

QUANTITY 600 tons. 20

GRADE 2-X.

SPECIFICATIONS Sil. 2.50 to 3.00

Sul. .05 Maximum

Phos. .40 to .80

Mang. .50 to .90

PRICE \$20.50 Per Ton of 2240 lbs.
Delivered f. o. b. cars. Bound
Brook, N. J.TERMS Freight, cash. Balance, cash
30 days from average date of
monthly shipments. 30Accounts not paid when due
bear interest at the rate of
6% per annum from the date
of maturity.This price is based on present
tariff freight rate of \$3.00 per
ton.

40

Exhibits.

10	SHIPMENT	In case the tariff freight rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance. To be made in N. Y. or Boston Exchange to REED, FEARS & MILLER.
		150 tons, car Weekly, beginning November 1, 1916.
		450 tons, equal monthly January to June inc., 1917.
	ROUTE	Via CRR of N. J.
	REMARKS	Seller shall not be responsible for delays caused by strikes, differences with workmen, accidents at works, delays in transportation, or other causes not under his control; each month's delivery to be treated as a separate contract independent of contracts for deliveries during other months. In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to other installments. If the buyer fails to make any payment when due the seller shall have the right to cancel the contract, or at seller's option to postpone shipment of future installments until prior
20		
30		
40		

Exhibits.

shipments are paid for. The seller will not be liable for any overcharge in freight when the correct rate is expressed in bill of lading.

ACCEPTED

VIRGINIA IRON, COAL AND COKE
COMPANY,
Reed, Fears & Miller,
Sales Agents.

10

Bound Brook Stove Works.

REED, FEARS & MILLER

PIG IRON—COKE

Sales Agents

VIRGINIA IRON, COAL AND COKE CO.

20

Offices	Agent's No.
Boston	
New York	Contract No. N-220.
Dubois, Pa.	New York, October 24, 1916.

CONTRACT COVERING SALE OF CROZER PIG
IRON.

To Bound Brook Stove Works, Inc.,

Bound Brook, N. J.

30

QUANTITY	500 tons.
GRADE	2-X.
SPECIFICATIONS	Sil. 2.50 to 3.00
	Sul. .05 Maximum
	Phos. .40 to .80
	Mang. .40 to .90
PRICE	\$21.00 Per Ton 2240 lbs. De- livered f. o. b. cars Bound Brook, N. J.

40

Exhibits.

TERMS	Freight, cash. Balance, cash 30 days from average date of monthly shipments.
10	Accounts not paid when due bear interest at the rate of 6% per annum from the date of maturity. This price is based on present tariff freight rate of \$3.00 per ton.
	In case the tariff freight rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance.
20	To be made in N. Y. or Boston Exchange to REED, FEARS & MILLER.
SHIPMENT	Equal monthly July to December, 1917.
ROUTE	Via CRR of N. J.
REMARKS	Seller shall not be responsible for delays caused by strikes, differences with workmen, accidents at works, delays in transportation, or other causes not under his control; each month's delivery to be treated as a separate contract independent of contracts for deliveries during other months. In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall
30	
40	

Exhibits.

not by reason thereof be excused or released from any obligation in regard to other installments. If the buyer fails to make any payment when due the seller shall have the right to cancel the contract, or at seller's option to postpone shipment of future installments until prior shipments are paid for. The seller will not be liable for any overcharge in freight when the correct rate is expressed in bill of lading. 10

ACCEPTED
 VIRGINIA IRON, COAL AND COKE, 20
 COMPANY,
 Reed, Fears & Miller,
 Sales Agents.

Bound Brook Stove Wks.
 M. Baum.

CONTRACT IN DUPLICATE

Philadelphia, Pa., October 17th, 1916.

THE PULASKI IRON COMPANY of PULASKI, VIRGINIA.....agrees to sell and THE BOUND BROOK STOVE WORKS of BOUND BROOK, NEW JERSEYagree to buy 30

MATERIAL "Pulaski" 2X Pig Iron

QUANTITY Five hundred (500) tons (Gross)

PERIOD Over the first six months of 1917 in equal monthly installments.

PRICE \$17.50 per gross ton FOB cars 40
 Furnaces, Pulaski, Va.

Exhibits.

TERMS $\frac{1}{2}$ of 1% discount cash 10 days, or
30 days net from date of invoices.
ROUTE via CRR of NJ delivery.
SHIP TO above
NOTE Payments on this contract are guar-
anteed according to terms of same
by the Federal Metal Bed Company
of Hoboken, N. J.

10

RAILROAD SCALE WEIGHTS at
point of shipment to govern settle-
ment.

20

Every effort will be made for the
prompt and faithful fulfillment of
contract, but seller will not be re-
sponsible for the delivery of the
same if prevented by strikes or com-
binations of miners or laborers, ac-
cidents in the mines, or interrup-
tions of transportation, or by in-
ability to secure the necessary cars
or from any other cause or occur-
rence beyond seller's control. In
such cases obligations to deliver iron
under this contract are limited and
qualified to such extent as deliveries
shall be prevented thereby, and no
liability shall be incurred by the sel-
ler for damages resulting therefrom.

30

It is understood and agreed that if
there should be a shortage of cars
the shipper will endeavor to appor-
tion shipments equitably and uni-
formly on all orders.

40

Buyers will not be under obliga-
tions to receive iron under this con-
tract providing works are not in

Exhibits.

operation, and due notice thereof is given to seller.

Each month's delivery is to be treated and considered as a separate and independent contract.

ACCEPTED:

10

Agent:

Buyer BOUND BROOK STOVE WORKS.

Seller THE PULASKI IRON CO.

Willard W. Wright,
Agent.

ORIGINAL.

(Buyer retains this copy)

PIG IRON CONTRACT No. October 11, 1916. 20
issued from the Office of

Buyer's No.

ROGERS, BROWN & COMPANY,

Furnace Agents

PIG IRON-COKE

Cerro Manganese—Fluor Spar—Ferro Silicon

30 Church Street, New York, October 11, 1916

Buyer BOUND BROOK STOVE WORKS BOUND 30
BROOK, N. J.,

Seller Crane Iron Works

Quantity Four Hundred (400) Tons

Silicon 2.50 to 3.00%

Grade Crane Pig Iron Sulphur .05 or less

Price Per ton 2240 lbs. \$—\$0.00—f. o. b. cars
furnace.

Payment Freight cash by buyer. Cash against
b/1. Invoice will be sent and collec- 40

Exhibits.

- tions made by Rogers, Brown & Co., Cincinnati, O. If the buyer fails to make any payment when due, the seller shall have the right to cancel the contract or to postpone shipment of future installments until prior shipments are paid for.
- 10 Shipment 50 tons per month commencing November, 1916, to June, 1917.
- Route Via
- Rate of freight per gross ton from to Rogers, Brown & Company assume no liability on freight rate.
- 20 If shipment is to be made in installments this contract for all purposes shall be treated as separate for each installment.
- The seller shall not be liable in damages for failure to deliver caused by strikes, accidents or other causes beyond its reasonable control.
- The contract is completely set forth herein.
- ACCEPTED Bound Brook Stove Wks. CRANE IRON WORKS.
- 30 (Buyer please sign here) Michael Baum, Pres.

ROGERS, BROWN & COMPANY, Agents.
By J. A. Claussen.

Exhibit F-2—Feb. 5, 1920.

1917						
Apr.	9	SB- 85	Herman Ellis	40 tons		\$1560.
"	19	" 86	" "	49 "		1911.00
"	23	" 88	" "	37 "	}	1443.00
"	25	" 89	" "	48 "		1872.00
"	27	" 89	" "	56 "		2184.00
"	30	" 89	" "	49 "		1911.00
May	4	" 89	" "	35 "		1365.00
"	14	" 90	" "	25 "		975.00
"	14	" 91	" "	49 "		1911.00
"	14	" 91	" "	49 "		1911.00
"	14	" 91	" "	49 "		1911.00
June	19	" 91	" "	48 "		1872.00
"	22	CR- 18	R. D. Wood & Co.	26 "		993.00
"	25	" 18	" " "	30 "		1161.50
"	19	" 18	" " "	81 "		3260.50
July	6	" 20	Herman Ellis	79 "		2916.00
"	7	" 20	R. D. Wood & Co.	48 "		1861.75
Aug.	11	" 22	R. D. Wood & Co.	41 "		1628.66
Sept.	5	" 22	R. D. Wood & Co.	38 "		1461.50
"	29	SB-105	Herman Ellis	41 "		1476.00
"	29	SB-105	" "	49 "		1764.00
Oct.	6	SB-104	" "	39 "		1404.00
"	6	SB-104	" "	49 "		1764.00
"	8	SB-104	" "	39 "		1404.00
"	11	SB-104	" "	39 "		1404.00
"	13	SB-104	" "	41 "		1476.00
"	20	CR- 20	" "	49 "		1764.00
"	20	SB-105	" "	42 "		1512.00
"	29	SB-104	" "	49 "		1764.00

1314 "

Exhibit P-3—Feb. 5, 1920.

MEMORANDUM OF SALE, by Herman Ellis, seller of Perth Amboy, N. J. to R. D. Wood & Company, of the City of Philadelphia, State of Penna., buyer.

10 WHEREAS, the seller, Herman Ellis, has contracts for the purchase of pig iron with various mills upon the terms and conditions, etc. stated in the accompanying memoranda from said contracts, and the said buyer, R. D. Wood & Company, desires to purchase the pig iron to be delivered pursuant to the said contracts, subject to the terms thereof, as to quality and deliveries, and as and when the said pig iron is delivered under the said contracts, and at the price hereinafter stated, NOW THEREFORE it is agreed that R. D. Wood & Company, the buyer, hereby purchases all pig
20 iron covered by the said contracts, aggregating approximately 1521 tons, for which the buyer agrees to pay the seller \$40.50 per ton f. o. b. Bound Brook, N. J., payment to be made as follows:

Net Cash upon presentation of invoice and re-consigned bill of lading as per buyer's direction, at office of R. D. Wood & Company, 400 Chestnut St., Philadelphia, Pa.

30 The seller agrees to turn over and deliver to the buyer at said price, all pig iron delivered to it under the said contracts, as and when deliveries are made thereunder, and delivery is subject to the conditions in the said contracts or any other causes not within the control of the seller.

The failure to deliver any instalment of iron for any cause not within the control of the seller, including the failure of the said mills to make delivery under the said contracts, shall not result in
40

Exhibits.

liability by the seller to the buyer, and shall not release the buyer from obligation to take subsequent instalments.

Dated, Philadelphia, Apr. 30, 1917.

R. D. WOOD & CO.

In the Presence of:

ARTHUR M. ROSHOLM.

10

Exhibit P-4—Feb. 5, 1920.

LETTERHEAD OF
R. D. WOOD & CO.
400 Chestnut Street.

Philadelphia, Pa., Sept. 15th, 1917.

Bound Brook Stove Works,
Bound Brook,
N. J.

20

Gentlemen: Subject: PIG IRON

Referring to your advices to Mr. Walter Wood to the effect that the Virginia Iron, Coal & Coke Co. had shipped 90 tons of Crozer Iron account of our contract on the 12th inst., and that another car would go forward on the 13th.

Will you kindly see that the bills of lading covering these cars are forwarded to us as soon as possible, so that we can facilitate delivery of the metal, and oblige

30

Yours very truly,

R. D. WOOD & CO.,
Purchasing Dept.

MHF/EB

40

Exhibit P-5—Feb. 5, 1920.

LETTERHEAD OF
 BOUND BROOK STOVE WORKS, INC.
 Bound Brook, N. J.

August 10, 1917.

10 Herman Ellis,
 Perth Amboy, N. J.

Dear Sir:—

Enclosed find check covering amount due you on
 ear of Crane iron containing 41 tons shipped to
 R. D. Wood & Co.

For your information beg to advise that the
 Crane people promised to complete the balance,
 which is approximately 59 tons some time during
 this month.

20 In reference to shipment of other iron, beg to
 advise that same has been held up owing to rail-
 road embargo.

Very truly yours,

BOUND BROOK STOVE WORKS, INC.,
 By M. M. Golding.

MMG/RBB.

Enc.

30 **Exhibit P-6—Feb. 5, 1920.**

October 20, 1917.

Messrs. R. D. Wood & Co.,
 400 Chestnut Street,
 Philadelphia, Pa.

Gentlemen:

40 Your letter of the 19th. It is useless for you to
 say that you will not accept any more shipments

Exhibits.

until after January 1st, if we ship you more than 132 tons by that time inasmuch as if you will refer to our contract *you will find that we sold you the material as governed by the furnace's shipping orders, consequently we have no right to tell the furnace when to ship and when not to ship.*

We shall therefore expect you to accept all the material just as the furnace ships it, 10

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

(Matter in italics underscored in original.)

Exhibit P-7—Feb. 5, 1920.

LETTERHEAD OF
R. D. WOOD & CO.
400 Chestnut Street.

20

Philadelphia, Pa. November 3d, 1917.

File: R. D. W. & Co.
Subj: Iron.

Herman Ellis,
Perth Amboy, N. J.

Dear Sir:—

30

Do not overlook the fact that there are 100 tons of Iron to be shipped *during November and 100 tons in December, against which there has been 68 tons shipped.*

We are writing to call your attention to this matter, so that you *can use all your efforts to have the iron come forward regularly.*

It will be just as convenient to us to have it come forward at an earlier date.

40

Exhibits.

If, in any way, we can help you towards securing the prompt forwarding of the metal, advise us. Whether by "modification" or otherwise.

Yours truly,

WW:F

R. D. WOOD.

10 (Matter in italics underscored in original.)

Exhibit P-8—Feb. 5, 1920.

November 5, 1917.

Messrs. R. D. Wood & Co.,
400 Chestnut Street,
Philadelphia, Pa.

20 *We are in receipt of your letter of November 3rd regarding the pig iron and beg to advise that we have referred this matter to our principals, the Bound Brook Stove Works, Bound Brook, N. J.*

Yours very truly,

HERMAN ELLIS.

IB/RF.

By

(Matter in italics underscored in original.)

Exhibit P-9—Feb. 5, 1920.

30

LETTERHEAD OF
R. D. WOOD & CO.
400 Chestnut Street.

Philadelphia, Pa., Nov. 6th, 1917.

Herman Ellis,
Perth Amboy,
N. J.

Dear Sir: Subject: CROZER PIG IRON

40 Supplementing our last letter to you, regarding shipments of Crozer Pig Iron.

Exhibits.

We find that according to our records there is now due 90 tons to be shipped on the contracts.

Please adjust your records accordingly.

Yours very truly,

R. D. WOOD & CO.,

(Copy of other name illegible.)

10

MHF/EB

Purchasing Dept.

Exhibit P-10—Feb. 5, 1920.

LETTERHEAD OF
R. D. WOOD & CO.
400 Chestnut Street.

Philadelphia, Pa., Nov. 8th, 1917.

Herman Ellis,
Perth Amboy,
N. J.

20

Dear Sir:

Your telegram of the 7th inst., came to the writer's attention upon his arrival at the office, late Wednesday afternoon, but it was too late to take up with the transportation company the question of modification of embargo.

The understanding between us was that you were to notify us of cars in transit to Bound Brook, so that we could make the necessary arrangement in advance with the railroad companies for their handling. You have failed in all but one or two cases to do this.

30

As to the writer's nonchalance when speaking on the telephone; it is because he is never in the humor early in the morning to receive instructions from someone who apparently is not conversant

40

Exhibits.

10 with all details to work in with the issuance of
modifications through the railroad company, and
also because he does not feel like having someone
voice their charges, etc., of which we have no re-
sponsibility. In other words, if there is any de-
murrage on car P. L. 852901 it is due to no fault
of R. D. Wood & Co. We have no jurisdiction
whatsoever over this car. You have not presented
a bill of lading to us for it. Until you do so,
whether it be a week or six weeks it stands at your
expense. If you will stop to consider for a min-
ute you will realize this; also that it is no fault
of ours that you load a car, offer it to the railroad
company, and then, because, there is an embargo,
of which you were fully aware, you complain
about demurrage charges. So far as we can see
20 this is placing the horse in back of the cart, instead
of asking him to pull it.

We have asked the railroad company to issue
the necessary modification for the movement of
this car. We are also instructing them that any
demurrage accruing at Bound Brook is to be col-
lected from the shipper before movement of the
car.

Yours very truly,

30 MHF/EB

R. D. WOOD & CO.,

(Copy of other name indistinct.)

40

*Exhibits.***Exhibit P-11—Feb. 5, 1920.**

November 7, 1917.

Messrs. R. D. Wood & Co.,
400 Chestnut Street,
Philadelphia, Pa.

Gentlemen: *Attention of Mr. M. H. Felty.* 10

We confirm having wired you this morning as follows:

“Car pig iron PL-852901 at Bound Brook embargoes to Florence. Have permit issued immediately.”

We were somewhat surprised at your apparent nonchalance when the writer spoke to you this morning on this matter. The car is on the track and in the event of any demurrage we will insist upon your paying same, so please have the permit issued as soon as possible, and oblige, 20

Yours very truly,

HERMAN ELLIS,

By,

HB/RF.

Exhibit P-14.

November 13, 1917. 30

Messrs. R. D. Wood & Co.,
400 Chestnut St.,
Philadelphia, Pa.

Gentlemen:

We spoke to the C. R. R. at Bound Brook today and they advise us that they had not received permit covering the carload of pig iron which has now been on the track about a week accruing de- 40

Exhibits.

10 murrage. Permit should have been issued for this
car long ago and we cannot understand why Mr.
Fisher did not issue same. We are very sorry to
say that unless a permit is issued immediately, we
will consign the car to yourselves at Bound Brook,
N. J., and send the bill of lading to you and in-
sist upon settlement being made inasmuch as we
sold the material to you f. o. b. cars Bound Brook,
N. J. as distinctly specified in our contract. In
this connection demurrage is also entirely up to
you. We spent several dollars telegraphing and
have done all in our power to secure permits.

20 The car of cast is also loaded and is under de-
murrage, as we have already written you several
times. Please make an effort tomorrow to have
the necessary permits issued for the pig iron and
the cast iron and let us close the matter as it ought
not to be necessary for us to write you so many
times.

We trust you will give these matters your im-
mediate attention in the morning.

Yours very truly,

HERMAN ELLIS,

HB/RF.

By

30

40

*Exhibits.***Exhibit P-15.**

LETTERHEAD OF
BOUND BROOK STOVE WORKS, INC.
Bound Brook, N. J.

Nov. 16, 1917.

Mr. Herman Ellis,
Perth Amboy, N. J.

10

Dear Sir:—

Enclosed find invoice covering 39 tons of iron,
CAR #N.Y.C. & St. L. 25348.

Kindly furnish us with disposition so that there
will be no delay upon arrival of the car at Bound
Brook.

Very truly yours,

20

BOUND BROOK STOVE WORKS, INC.
BL/EW. By B. Saunerstein.
Enc. 1.

Exhibit P-17.

November 20, 1917.

Messrs. R. D. Wood & Co.,
Philadelphia, Pa.

Gentlemen:

30

Car E. R. R. 107403 containing 39 tons of pig
iron is now en route to Bound Brook, N. J. Please
have the necessary instructions issued so that the
car can be immediately billed us when it arrives
at Bound Brook.

40

Exhibits.

Thanking you in advance for your kindness, we
are,

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

10

Exhibit P-18.

November 17, 1917.

Messrs. R. D. Wood & Co.,
400 Chestnut Street,
Philadelphia, Pa.

Gentlemen:

20 Car N. Y. C. & St. L. 25348 was shipped from the
furnace with 39 tons of pig iron and is at present
en route to Bound Brook. Please endeavor to
secure permit for this car just as soon as possible,
and oblige,

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

Exhibit P-19.

Exhibit P-6—Feb. 3, 1920.

30

LETTERHEAD OF

R. D. WOOD & CO.

400 Chestnut Street,

Philadelphia Pa., November 22d, 1917.

In reply please refer
to initials of writer.
File: R. D. W. & Co.
Subj: Iron.

40

Exhibits.

Herman Ellis,
Perth Amboy, N. J.

Dear Sir:—

We beg to acknowledge yours of November 20th, regarding car E. R. R. 107403.

We are awaiting a reply to our previous letter as to how far you desire this excess tonnage turned into us on the Government basis, plus direct freight from the furnace to our Foundries.

If this is satisfactory, we will proceed at once, to have the modification issued.

Awaiting your reply, we are

Yours truly,

R. D. WOOD & CO.

WW:F

10

20

Exhibit P-20.

(4 letters)

November 23, 1917.

Messrs. R. D. Wood & Co.,
400 Chestnut Street,
Philadelphia, Pa.

Gentlemen:

30

We have on hand your favors of the 19th and 22nd instant and have carefully digested the contents of same. To be perfectly frank and candid with you, we do not know what can be your aim in saying in reference to Car NYC&StL-25348 and Car ERR-107403 containing 39 pigs each of pig iron: "This tonnage is in excess of our contract with you so it is impossible for us to send you any modification order for it or accept its delivery

40

Exhibits.

except on the present basis of government prices delivered at Florence direct from the furnace."

10 We beg to call your attention to our contract entered into under date of April 30th, 1917 in the second paragraph you will find that we sold to you the material specified on contracts for the purpose of pig iron with various mills and that we did not guarantee in any manner to deliver same in a specified time, as you intimate. Our contract further states in the last paragraph that the "failure to deliver any iron for any cause not within the control of the seller including the failure of the said mills to make delivery under the said contracts shall not result in liability by the seller to the buyer AND SHALL NOT RELEASE THE BUYER FROM OBLIGATION TO TAKE

20 SUBSEQUENT INSTALLMENTS.

We would therefore suggest that you very kindly peruse our contract with you *and you will find that you must accept all the material that the mills shipped irrespective of when they shipped it.* We have already written you there are two cars en route which will no doubt arrive any moment namely N. Y. C. & St. L. 26348 and if you will recall the trouble and expense, etc. that we had on the last car, we assure you that we would appreciate very much if you would please get in touch at once with Mr. Armstrong of J. B. Fisher's office, Pennsylvania Railroad and secure the necessary modifications.

30

We trust that this simplifies the matter to you and that you will act at once to secure the necessary permits, for which we thank you in advance.

Yours very truly,

40

HB/RF.

By

HERMAN ELLIS.

(Matter in italics is underscored in original.)

Exhibits.

December 13, 1917.

Messrs. R. D. Wood & Co.,
400 Chestnut Street,
Philadelphia, Pa.

Gentlemen:

I have received notice from the Bound Brook
Central Railroad, that an embargo has been
placed on pig iron shipped from Bound Brook to
your Company, at Philadelphia. 10

I have also received word from the Attorneys
for the Bound Brook Stove Company, from whom
I received the contract, which I, in turn, sold to
you, that they will hold us to the contract, and
will bring suit on same.

I hereby advise, that I will hold you responsible
and look to you for redress for any damage, which
I will sustain by reason of your refusal to take
balance of pig on the contract. 20

Would you furnish me with an attorney to de-
fend the action, which will be brought against me
by the Bound Brook Stove Company, so that you
can have your Attorney endeavor to defeat the
action, which will, as far as we are concerned,
close the matter? I shall be pleased to arrange to
have my Attorney assist your Attorney in the de-
fense of said suit. 30

I am sending this letter registered to make sure
same is received by you.

Yours very truly,

HERMAN ELLIS.

HE/RF.

By

40

Exhibits.

November 26, 1917.

Messrs. R. D. Wood & Co.,
400 Chestnut Street,
Philadelphia, Pa.

Gentlemen:

10 Replying to your letter of the 24th instant, we
beg to advise you that we will hold you to the
contract.

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

Exhibit P-21.

20 LETTERHEAD OF
R. D. WOOD & CO.

Philadelphia, Pa., November 24th, 1917.

In reply please refer
to initials of writer.
File: R. D. W. & Co.
Subj: Iron.

Herman Ellis,
Perth Amboy, N. J.

30 Dear Sir:—

We have carefully read yours of November 23d.
We beg to say that we are making no claims
against you for failure of delivering the iron.
Nor are we bound to take the metal, irrespective
of the time that it is shipped.

Yours truly,

R. D. WOOD & CO.

40

WW:F

*Exhibits.***Exhibit P-22.**

December 17, 1919.

R. D. Wood & Co.,
400 Chestnut St.,
Philadelphia, Pa.

Gentlemen:

10

You will recall that in 1917 you entered into an agreement for the purchase of pig iron according to certain agreement made between Herman Ellis and Bound Brook Stove Works.

By reason of your failure to accept the iron a summons has been served on Mr. Ellis out of the New Jersey Supreme Court, Union Circuit, for the sum of \$5,000. He looks to you to retain counsel and to defend him in the suit, and, upon your failure so to do, he will hold you to any damage that he may sustain, or any judgment procured against him by reason of your breach and failure to take the iron.

20

Awaiting to hear from you, we are

Very truly yours,

HKC/HL

Exhibit P-23.

30

November 30, 1917.

Mr. Herman Ellis,
Perth Amboy, N. J.

re: Bound Brook Stove Works.

Dear Sir:

My client Bound Brook Stove Works advise me that you have failed to make remittance for car

40

Exhibits.

of pig iron arriving at Bound Brook Oct. 6, and forwarded in accordance with your instructions. The amount due is \$1764.

10 I am also advised that upon arrival of two cars on November 27th, you were promptly notified, and shipping instructions were requested, and that you failed to give directions for reconsigned bill of lading and were advised that in accordance with your contract cars would be sent to Perth Amboy; that you thereupon stated your refusal to receive these cars. Your attitude in failing to make payment for car delivered and in giving notice of your refusal to accept cars arrived is an absolute and inexcusable breach and repudiation of your contract of April 4th.

20 In behalf of my client, you are notified that unless, before Monday next, at 4 PM you pay the full amount for car delivered to you, together with the purchase price of the iron now at Bound Brook, with accrued charges for demurrage and otherwise, the iron at Bound Brook will be sold for your account, and any loss charged to you. You are also requested to advise me immediately as to payment on the car delivered.

Yours truly,

30 (signed) LEON LAUTERSTEIN.
LL FS

(Mailed November 30th, at 51 William Street.)

*Exhibits.***Exhibit P-24.**

Dec. 6, 1917.

Mr. Herman Ellis,
Perth Amboy, N. J.

re: Bound Brook Stove Works.

Dear Sir:

10

Your letter of the 30th inst. addressed to Bound Brook Stove Works relating to pig iron contract, has been forwarded to me. I understand that this letter confirms your previous oral refusal to accept iron under your contract, and your repudiation of further liability thereunder.

In reply, I beg to state that your interpretation of the contract is in direct contravention to its plain terms, which expressly provide that deliveries to you are to be made "as and when deliveries are made thereunder, and delivery is subject to the conditions in such contracts or other causes not within the control of the seller" and further that the failure to deliver any instalment shall "not release the buyer from obligation to take subsequent instalments.

20

All deliveries have been made, except delivery under contract, with the Virginia Iron Coal & Coke Co. dated October 24, 1916, under which the last delivery is not due until December 30th, 1917, to which must be added any further time for "delays in transportation or other causes not under seller's control". As you know, the Government demands and embargoes have delayed the mill's shipments, and aside from the fact that my client's delivery to you was to be made only as and when delivery was received from the mills, even under my

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Exhibits.

client's contract with the mills the time for delivery has not expired.

10 Since you have assume to repudiate the contract prior to expiration, I have advised my client that you will be liable for the difference between the contract price with you and the market price. Accordingly my client will look to you for any damages sustained by reason of your breach.

Yours truly,

(signed) LEON LAUTERSTEIN.

LL FS

Top of Letterhead destroyed.

Exhibit P-1—Feb. 3, 1920.

20 Perth Amboy, N. J., November 30, 1917.

Bound Brook Stove Works,
Bound Brook, N. J.

Gentlemen:

You informed us that there are two cars of pig iron on the way. According to the contract we are not bound to take same by reason of your failure to deliver the iron within the contract time. You will therefore govern yourselves accordingly.

30 Yours very truly,

HG/RF.

HERMAN ELLIS.

*Exhibits.***Exhibit D-1—Feb. 5, 1920.**

LETTERHEAD OF

FEDERAL METAL BED CO.

Manufacturers of

BRASS AND IRON BEDSTEADS

Hoboken, N. J., May 7, 1919. 10

M Bound Brook Stove Works,
Statement of Settlement for Pig Iron

Due us on 347 tons received as
per schedule 1 attached 3730.25

Due us on 2 cars for which pay-
ment on account was made
schedule 2 attached 194.53

3924.78 20

Due you for refund of freight
Schedule 3 attached 46.02

Balance due us 3878.76

Less error on
Invoice Sept 27 234.00

only 23 tons shipped 3644.76
Interest 54.68

3699.44 30

699.44

\$3000.00

Due Dec. 1000.00

2000.00

Paid by note.

Due Sept. 1, 1919. 40

F. M. B. Co.

H. Lauterstein.

*Exhibits.*LETTERHEAD OF
FEDERAL METAL BED CO.Manufacturers of
BRASS AND IRON BEDSTEADS

Hoboken, N. J., May 7 1919

10

M Bound Brook Stove Works,

Statement of pig iron received not settled for:

Date	Shipped	Tons
1918		
Mar.	1 1 car	29
	5 1 "	30
June	11 1 "	29
	26 1 "	29
	29 1 "	29
20 July	5 1 "	37
	13 1 "	36
	29 1 "	39
Aug.	8 1 "	40
Sep.	27 1 "	49
		<hr/>
		347 Tons

20

30

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*Exhibits.***Exhibit D-2—Feb. 5, 1920.**

LETTERHEAD OF

FEDERAL METAL BED CO.

Manufacturers of
BRASS AND IRON BEDSTEADS

Hoboken, N. J., May 7 1919

10

M Bound Brook Stove Works,

Statement of 2 cars partly paid by check of
June 1st

April 1	Received	April 12	1 car	36 tons
May 7	"	May 17	1 car	29 "

65 tons

Agreed price 40.00

Contract price 18.50

20

price difference 21.50

\$1397.50

50% 698.75

June 1 Your Check on a/c 479.22

Allowance for

legal fees 25.00 504.22

30

due us 194.53

40

*Exhibits.***Exhibit D-3—Feb. 5, 1920.**

Oct. 2, 1917.

Virginia Iron, Coal and Coke Co.,
Roanoke, Va.

Attention of Mr. O. B. Newton, General Sales Agent.

10

Re: Bound Brook Stove Works.

Gentlemen:

I beg to acknowledge receipt of your letter of the 27th ult. and telegram of the same date, the latter advising that a car containing 39 tons was shipped to my client September 26th.

20

While I appreciate your prompt reply to my communication, and your optimistic statement that you "hope and believe that shipments of pig iron for the next thirty days will considerably improve and will promise Bound Brook Stove Works a liberal portion of our shipments," for the reasons stated in my letter to you of the 25th ult. my client is exceedingly concerned about the situation, and particularly the statement in your letter to the effect that it is impossible for you to give me any definite assurances as to the time and quantity of further deliveries. The situation presented is not one of entering into future obligations, but of

30

contracts already made by my client, based upon your contracts made in October, 1916, and you can readily appreciate that the occasional shipment of a single car of iron under present conditions will not materially help the situation.

An analysis of the contracts and deliveries to date shows the following contracts:

40

1. By your contract dated October 10, 1916, you agreed to ship 600 tons to be delivered 150 tons

Exhibits.

before December 31, 1916, and 450 tons by June 30, 1917.

2. By your contract dated October 11, 1916, you agreed to ship 400 tons in equal monthly shipments up to June 30th, 1917.

3. By your contract of October 24, 1916, you agreed to ship 500 tons in equal monthly shipments from July to December, 1917. 10

Against these contracts, aggregating 1500 tons, you have only shipped 740 tons, which is less than one-half of the contracted tonnage, leaving 760 tons remaining undelivered, and the time for delivery under the last contract expiring within three months. There was a shortage of 260 tons on the first half-year's delivery, which deficit, instead of decreasing, has increased so that on October 1st there was a shortage of 510 tons. In view of this constantly increasing shortage and my client's contract obligations, made in reliance upon our contracts, a situation of the utmost gravity and embarrassment to the Bound Brook Stove Works has resulted. 20

When the matter was first placed before me, I advised my client that, instead of going into the open market at this late date, and buying at the present market price and charging you with the difference between the contract price and the price in the present market (which would be its undoubted right) it would be more advisable to present the situation to you in an endeavor to avoid complications, and in the hope that you would give such assurances as would justify the belief that the balance of the iron undelivered under the contracts, would be delivered before the end of 30 40

Exhibits.

December, 1917, and that in the meantime you would make up the past deficit by promptly increasing shipments.

10 My client is ready, able and willing to receive and promptly pay for, in accordance with the contracts, the balance of this iron, and must obtain it either from you, or if it cannot obtain it within the contract period, from such other sources and upon such prices and terms as it may be able to arrange.

20 In any event, it is imperative that the Bound Brook Stove Works reach an immediate conclusion as to taking care of their iron requirements, and I will thank you to please advise me just what shipments on these contracts you can make within the next ten days, and by what date at the latest the balance of tonnage stipulated in the contracts will be cleaned up.

I will be obliged for a prompt, definite, and, I trust, satisfactory response.

Yours very truly,

LEON LAUTERSTEIN.

LL/FS.

1059

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*Exhibits.***Exhibit D-4—Feb. 5, 1920.**

LETTERHEAD OF

R. D. WOOD & CO.

400 Chestnut Street.

Philadelphia, Pa. Sept. 5, 1917.

File: R. D. W. & Co.

Subj: Iron

10

Herman Ellis,
Perth Amboy, N. J.

Dear Sir:—

We beg to call to your attention the failure of the Virginia Iron, Coal and Coke Co. to deliver the Iron according to contract.

In order to make up the shortage, it will be essential to ship not less than two cars per week.

20

We wish you to see that this is done and the bills of lading reach our hands with promptness.

Yours very truly,

R. D. WOOD & CO.

WW:CO

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*Exhibits.***Exhibit D-6—Feb. 5, 1920.**

LETTERHEAD OF

R. D. WOOD & CO.

400 Chestnut Street.

Philadelphia, Pa. October 23d, 1917.

10

File: R. D. W. & Co.

Subj: Iron.

Herman Ellis,
Perth Amboy, N. J.

Dear Sir:—

Yours of the 20th, duly at hand, referring to the shipment of iron (sold by the furnace) in months prior to July 1st, of this year.

20

The sales-notes fix the dates for shipment.

Yours truly,

R. D. WOOD & CO.

WW:H

Exhibit D-1—Feb. 3, 1920.

(2 letters)

September 11, 1917.

30 Bound Brook Stove Works,
Bound Brook, N. J.

Gentlemen:

Attached hereto please find copy of letter sent to R. D. Wood & Co. today, which is self-explanatory. We understand that the letter we received from them dated September 10th, you also received a copy of it.

40

Will you kindly favor us with a reply by return mail, letting us know if you have heard anything

Exhibits.

favorable about shipments from the furnaces, as we stated in our letter to R. D. Wood & Co.

Awaiting to hear from you, we are,

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

10

LETTERHEAD OF

R. D. WOOD & CO.

400 Chestnut Street.

Philadelphia, Pa. September 10th, 1917.

File: R. D. W. & Co.

Subj: Iron.

Herman Ellis,

Perth Amboy, N. J.

20

Dear Sir:—

Referring to the letters written Mr. Ellis and Mr. Lauterstein on the fifth of September (to which we have not, as yet, received a reply) as to the shipments you are making, we beg to call your attention to the fact that up to date, you are short 505 tons upon shipments.

It will be essential in order to have this metal come in satisfactorily to have not less than two cars weekly beginning the week of September 5th.

30

You will recall that we previously wrote you in August, asking for cars to come in at the rate of one car a week.

The delay in forwarding these, makes it essential for us to call for two cars weekly.

Even at this rate, the iron will hardly arrive in time for the close of the season.

40

Exhibits.

We will look for your prompt acknowledgment and reply to this letter and definite action as to the forwarding of this metal.

Yours truly,

R. D. WOOD & CO.

10 WW:H

Copy to
Benjamin Lauferstein,
C/O Bound Brook Stove Works,
Hoboken, N. J.

Dear Sir:—

We have sent the original of this letter to Mr. Ellis. We request that you help him out.

Yours truly,

20

R. D. WOOD & CO.

Exhibit D-2—Feb. 3, 1920.

(3 letters)

September 6, 1917.

Bound Brook Stove Works,
Bound Brook, N. J.

30 Gentlemen:

We are this day in receipt of a letter from R. D. Wood & Co. requesting us to hurry shipment on Forging Iron and Coal Co. contract.

According to our records, this furnace is considerably behind in the fulfillment of their contract. You will therefore prevail upon the furnace to hurry the shipment to make up the short-

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Exhibits.

age. We believe that by hammering them you will obtain some results.

Yours very truly,

HERMAN ELLIS.

IB/RF.

By

August 18, 1917.

10

Bound Brook Stove Works,
Bound Brook, N. J.

Gentlemen:

Will you kindly urge your mills to make sooner shipments of pig iron? At the rate they are going now, they never will complete the contract.

Assuring you that your kindness will be appreciated, we are,

20

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

August 7th, 1917.

Bound Brook Stove Works,
Bound Brook, N. J.

Gentlemen:

We have your settlement of the 3rd covering one car of pig iron and thank you very kindly for same. However, we are very much surprised that your people should make shipment of only one car since the last settlement, which is some time ago. It seems as if your people are not very anxious to move the material as usual.

30

Please write them that our people want shipments to move more quickly.

40

Exhibits.

Awaiting to hear from you by return mail,

Yours very truly,

HERMAN ELLIS.

HB/RF.

By

10

Exhibit D-3—Feb. 3, 1920.

Sept. 25, 1917.

Bound Brook Stove Works,
Bound Brook, N. J.

Gentlemen:—

20

In accordance with contract for sale of iron to me dated April 4, 1917, I request that upon arrival of iron at Bound Brook, N. J., that the iron be reconsigned to R. D. Wood & Co., Florence, N. J., until further notice, accompanied by draft for the amount of their purchase price of the iron from me, making allowance for freight.

On our settlement you are to credit me with the difference between your price to me and my price to R. D. Wood & Co.

30

It is understood that compliance with this request is a matter of accommodation to me and is not to effect or modify the existing contract between us.

Very truly yours,

40

*Exhibits.***Exhibit D-4—Feb. 3, 1920.**

LETTERHEAD OF
 BOUND BROOK STOVE WORKS, INC.
 Bound Brook, N. J.

September 25, 1917.

Mr. Herman Ellis,
 Perth Amboy, N. J.

10

Dear Sir:

Confirming oral request enclosed find letter of authorization for us to make shipment of iron from Bound Brook direct to R. D. Wood & Co., Florence, N. J.

We are forwarding you this letter in view of the fact that previous written instructions covered only Crane and Pulaski iron, shipment of which has been completed.

20

Will you kindly sign this letter personally, and return same to us promptly as there is a car of iron now on the way of 49 tons which will arrive at Bound Brook almost any day.

Very truly yours,

BOUND BROOK STOVE WORKS, INC.,
 By M. M. *Golding.

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[6572]

40

October 25, 1911

THE BOSTON TRADING COMPANY
BOSTON, MASS.
October 25, 1911

Mr. [Name] [Address]

Dear Sir:

Enclosed you will find a copy of the report of the committee on the subject of the proposed amendment to the charter of the City of Boston, which was adopted by the City Council on October 10, 1911. The report contains a full and complete statement of the facts and circumstances which led to the adoption of the amendment, and also a full and complete statement of the reasons for the adoption of the amendment. It is believed that the report will be of great interest to you, and that it will also be of great interest to the public.

Very respectfully,
[Signature]

100

RULE FOR JUDGMENT.
NEW JERSEY SUPREME COURT.

BOUND BROOK STOVE WORKS,
Plaintiff,

vs.

HERMAN ELLIS,
Defendant.

The above entitled cause was tried before Hon. George S. Silzer without a jury, by the consent of the parties thereto, at the Union County Circuit, on
1920.

The Court after considering the testimony in the case together with the exhibits offered, and the briefs of counsel, filed a Finding of Facts and found a verdict in favor of the plaintiff and against the defendant Herman Ellis in the sum of Fifteen Hundred twenty-six dollars and seventy-nine cents (\$1526.79) together with the costs of suit to be taxed and ordered that the Clerk in taxing the costs should include the sum of Thirty-six dollars (\$36) paid by the plaintiff to the Stenographer for transcribing the testimony taken at the trial.

<p>\$1526.79 92.75 <hr/>\$1619.54</p>	<p>Whereupon it is adjudged that the plaintiff Bound Brook Stove Works do recover of the said defendant Herman Ellis the sum of Fifteen Hundred twenty-six dollars and seventy-nine cents damages and its costs which have been taxed at the sum of ninety two dollars and seventy five cents, making in the whole the sum of sixteen hundred and nineteen dollars and fifty four cents.</p>
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Judgment entered December 11, 1920.

Wm. S. Gummere, C. J.

RULE FOR JUDGMENT
NEW JERSEY SUPREME COURT

}	BOYD-BROOK STOVE WORKS
	Plaintiff
}	HERMAN HILLS
	Defendant

The above entitled cause was tried before Hon. George S. Silzer without a jury, by the consent of the parties thereto, at the Union County Circuit, on

1920.

The Court after considering the testimony in the case together with the exhibits offered, and the briefs of counsel, filed a finding of facts and found a verdict in favor of the plaintiff and against the defendant Herman Hills in the sum of fifteen hundred twenty-six dollars and seventy-nine cents (\$1526.79) together with the costs of suit to be taxed and ordered that the Clerk in taxing the costs should include the sum of thirty-six dollars (\$36) paid by the plaintiff to the Stenographer for transcribing the testimony taken at the trial.

Whereupon it is adjudged that the plaintiff Boyd-Brook Stove Works do recover of the said defendant Herman Hills the sum of fifteen hundred twenty-six dollars and seventy-nine cents damages and its costs which have been taxed at the sum of ninety-two dollars and seventy-five cents making in the whole the sum of sixteen hundred and ninety-four dollars and fifty-four cents.

\$1526.79
92.75
\$1619.54

Judgment entered December 11, 1920.

Wm. S. Gunnice, C. J.

New Jersey Court of Errors and Appeals

BOUNDBROOK STOVE WORKS, a corpora- tion, <i>Plaintiff-Respondent,</i>	}	<i>On Appeal.</i>
<i>vs.</i>		
HERMAN ELLIS, <i>Defendant-Appellant.</i>		

BRIEF FOR RESPONDENT.

This action is founded upon a contract made between the parties on April 4, 1917. Prior to the making of that contract, respondent had five separate contracts for the sale to it of 2,400 tons of pig iron (C., pp. 88 to 99, inclusive). The contract of April 4 provides "Ellis, the buyer, hereby purchases all pig iron covered by said contracts aggregating approximately 1,750 tons" (C., p. 87, l. 24).

The case was tried before his Honor, George S. Silzer, then Circuit Court Judge, without a jury, and decided in favor of the plaintiff, who was given a verdict for the full amount claimed. The learned Trial Judge made a written finding of fact, pages 16 to 21, inclusive, and the grounds of appeal specified attack the 2nd, 4th, 5th, 7th and 11th findings. Those findings are substantially:

2. That the contract called for 1,750 tons.
3. That plaintiff was obliged to deliver and defendant to receive on or about November 13, 1917, 425 tons, being the unfulfilled portion of the contract.
4. Plaintiff attempted to compel the mines to deliver pig iron promptly and the plaintiff delivered to the defendant all iron shipped from the mines as speedily as possible.

5. That defendant waived the more speedy delivery by plaintiff.

7. That the pig iron refused by defendant was not sold by plaintiff to the Federal Metal Bed Company, but was consumed by plaintiff in his own business.

11. That on November 30, 1917, defendant refused the entire unfulfilled portion of the contract.

The reference to the evidence as hereinafter contained will show conclusively that each and every finding of the Trial Judge, to which objection is made by the appellant in the grounds of appeal, was well founded. That there was evidence in the case ample to support every finding and that in view of the entire case, the Trial Judge could hardly have come to any other conclusion.

The appellant also assigns that the Court should have found various matters in favor of the defendant instead of in favor of the plaintiff and that there was error in permitting to be introduced as evidence the contract and letters between the defendant and R. D. Wood & Co. The only answer that need be made to these additional grounds of appeal is that if the findings in favor of the plaintiff are sustained, then it necessarily follows that the Court could not have found as appellant now contends; the writings passing from Ellis, the appellant, to R. D. Wood & Co. are admissions against interest and are therefore evidential as against the defendant-appellant.

POINT I.

The construction of the contract.

A mathematical calculation will conclusively show that had the mines strictly carried out the provisions of their contracts, on April 1st there would have only remained 1,275 tons of pig iron to be shipped under the five contracts which are correctly set forth in appellant's brief on pages 2 and 3; the reference, however, on page 4 of appellant's brief, to the Roger Brown contract is in-

correct, because according to its strict terms 150 tons were to be delivered and not 100 tons.

The contract between the parties dated April 4, 1917, by way of recital refers to the five contracts and then in express language says that the iron sold is approximately 1,750 tons. In the language 1,750 tons there can be no ambiguity and that express quantity is not limited by the preceding recital. Those 1,750 tons are covered by the five contracts. The parties contracted on April 4th with reference to the situation as they both then knew it to be. If there is anything in the contract of April 4th, which casts doubt that the quantity sold was 1,750 tons, then this preceding recital causes an ambiguity and the Court will then follow that construction of the contract which the parties themselves have placed upon it.

United Boxboard & Paper Co. v. McEwan Co.,
76 Atlantic 55;

Reed v. Inhabitants of Trenton, 80 N. J. Equity
503.

Where a dispute arises as to the meaning of a contract, the construction which the parties have placed upon it as between themselves is the one to be adopted by the courts.

Van Dyke v. Anderson, 83 N. J. Equity 568.

Now what was the conduct of the parties? Ellis on April 4, 1917, having a contract for 1,750 tons between that date and April 30th, actually had shipped to him 230 tons, which would leave a balance of 1520 tons. What did Ellis do on April 30th? He entered into a contract with R. D. Wood & Co. (C., p. 100) by which he agreed to sell iron aggregating approximately 1,521 tons.

Ellis at the trial and by his pleadings claimed his contract called for only 1,250 tons and that having received that amount of iron and an excess, he was no longer in November obliged to accept any iron (see

amended answer on p. 7, also letter of November 30, 1917, p. 118), but if we turn to his correspondence before the declaration of the armistice, we find a different situation. On page 102 in his letter to Wood he says:

“It is useless for you to say that you will not accept any more shipments until January 1st, if we ship you more than 132 tons by that time inasmuch as if you will refer to our contract you will find that we sold you the material as governed by the furnace’s shipping orders, consequently we have no right to tell the furnace when to ship and when not to ship.”

And Wood’s answer: “*Do not overlook the fact that there are 100 tons of iron to be shipped during November and 100 tons in December, against which there has been 68 tons shipped.*” That letter to Ellis was dated November 3rd, and then communications of November 6th, 7th, 8th, 13th, 16th and 20th, on pages 104 to 110, inclusive, show the efforts of both Ellis and Wood regarding the placement and the shipment forward of the two cars each containing 39 tons each, when suddenly on November 22nd Wood writes Ellis a letter containing this phrase, “how far you desire this excess tonnage turned into us,” and from then on we find Ellis making the most strenuous efforts to assert that he has fully carried out his contract.

The entire situation shows an acquiescence by Ellis in the delayed deliveries. Exhibit P. 2, on page 99, is all important. It shows the actual receipt by Ellis under the contract of 1,314 tons. This is contained in the admission made by counsel on the bottom of page 34 and top of page 35. At the trial of the cause the defendant’s counsel contended that after July 1st, the only contract existing was N-220, which called for delivery of 500 tons after July 1st, and that inasmuch as Ellis had received in excess of 500 tons after July 1st, that the contract was completed and exhausted. Once more inspecting Exhibit P. 2, on page 99, we find that between July 6th and October 29th, Ellis received 643 tons of iron. If

his contention is correct and his only contractual right was to receive 500 tons after July 1st, then from what source did the 643 tons come, and, again, if his contention that N-220 was the only contract in existence is correct, then it provides for either five deliveries of 100 tons each or six deliveries of $83\frac{1}{3}$ tons each. In the one case 100 tons would have been delivered in November and in the other case $83\frac{1}{3}$ tons in November and the like amount in December. Again Exhibit P. 2, on page 99, shows that Ellis got no iron in November, so that his contention that N-220 was the only contract and that it was fully completed by the iron delivered, is defeated in both cases. The iron which Ellis received must have come from the other contract, because the defendant accepts the admission made by plaintiff's counsel that the 347 tons of iron disclosed by Exhibit on page 120 were applicable to the contract N-220 (C., top of p. 53). It therefore follows that the refusal of Ellis to accept the two cars of 39 tons each in November was wholly unjustified, that his letter, Exhibit P. 1, dated November 30, 1917, at page 118, is a repudiation of the entire contract entitling plaintiff to his full damage.

On the other hand, the appellant contends that the shipments of iron after July 1st are chargeable to contract N-220 and if he offers this as a defense he must sustain it by evidence in the case. None of the evidence offered shows from what source the iron came, except the admission as to the 347 tons offered for delivery subsequent to December 1st, 1917. The burden of proof to establish as a defense that contract N-220 was fulfilled by the delivery of iron under that contract is upon the defendant. The only conclusion to which the Court could come from the evidence offered, was that both the plaintiff and the defendant acquiesced in the mines shipping the iron after the times intimated for deliveries by the five contracts. As a matter of fact, while the war was on Ellis and Wood were more than happy to get the iron and it was not until after the declaration of the armistice that first Wood

turned around and then Ellis gave the order "About face." Even counsel in the brief submitted to the Court, in the middle of page 18 of his brief, shows that Ellis' attitude was dependent upon what Wood was doing.

This is not a case where time was of the essence of the contract. It was a case where the parties were more than glad, on account of war conditions, to procure the iron when they could. They acquiesced in the delay by receiving shipment after shipment. If we were to reiterate the letter of Ellis to Wood of October 20th, we can find there that Wood was not refusing to take iron after January 1st, but that Wood claimed that all he was obliged to take up to that date was 132 tons. That letter further clearly shows that Wood understood he was to take 100 tons in December, and as Ellis was selling Wood what he was getting from the plaintiff, Ellis must have expected to get 100 tons in December, although after he got into court he claimed he was not even to take iron in November. The evidence shows a clear breach of contract and repudiation of the offer of delivery of the two cars in November and of the balance of the contract by Ellis' letter of November 30th.

II. Reasonableness of delivery.

The testimony of Fred Spitalny shows that during November and December, 1917, the price of pig iron was \$33.00 a gross ton, F. O. B. shipping point; that the price was fixed by the government and that all the time during the months of April to November, 1917, inclusive, there was an embargo on the shipment of merchandise (C., p. 46), also that during the embargo the consignee obtained a permit and without such permit the material could not be shipped (C., p. 47).

This testimony explains the situation and shows that business during these months was not transacted in the same manner as heretofore and that there must necessarily be continued delays.

The Court decided, as a question of fact, that the deliveries offered were within a reasonable time and as there was evidence before the Court, the question is one of facts decided by the Court sitting as a jury and is not reviewable. Furthermore, the letter of November 30, 1917, was an absolute repudiation by Ellis and tender of delivery was not at all necessary.

III. Damages.

Damages were calculated by the Court and found as a question of fact, that the sum of \$1,526.79 was due (C., p. 20). The defendant offered no evidence as to the measure of damages, but contended that by reason of a certain statement which plaintiff had received from the Federal Metal Bed Company that there was a sale of this particular metal to the Federal Metal Bed Company at a price which showed no loss. The defendant offered no evidence to sustain such contention, but, on the contrary, Mr. Michael Baum, the president of the plaintiff company, testified that he consumed the iron himself in his business (C., p. 80). He further identified a list of car shipments totaling 347 tons and stated they referred to the contract of Reed, Fears and Miller (p. 82) and that all of the pig iron received during the months of July and August, 1917, was shipped to Herman Ellis or R. D. Wood & Co. for Ellis and none was shipped to anyone else (p. 83). He did not sell any of the 347 tons to the Federal Metal Bed Company (p. 84). Therefore it is respectfully submitted that the findings of fact of the Trial Judge was not only justified by the evidence in the cause, but that the Court could have come to no other conclusion and that therefore the judgment in favor of the plaintiff should be wholly sustained with costs.

Conclusion.

The examination of the entire case discloses that the plaintiff had five contracts for the purchase of pig iron and that on April 4th, 1917, it was entitled to receive thereunder 1,750 tons and made a contract with the defendant to sell him that amount and attempted by the clauses in the contract to relieve itself of liability in the event of failure of the mills to carry out the contract.

Shipments were made from time to time without any regard to the times as specified in the original contracts and were always accepted by Ellis or Wood without any question as to the time of delivery or as to which contract the shipment applied. During the time these contracts were being fulfilled, the government had placed an embargo on shipments of all merchandise and the purchaser or consignee always procured a permit on which goods were shipped forward (C., p. 47). As late as November 17, 1917, Ellis requested Wood to get a permit on one car of 39 tons and again on November 20, 1917, he requested Wood to have the necessary instructions issued on the other car of 39 tons (C., p. 121). It was only after the effect was realized by these people on November 22nd of the signing of the armistice that they endeavored to rid themselves of the contracts for the iron.

The learned Trial Judge understood this situation, correctly constructed the contract as calling for 1,750 tons, correctly constructed the letter of Ellis written on November 30th as a repudiation of any further liability on the part of Ellis and accordingly gave judgment in favor of the plaintiff for the full damages proven by the plaintiff.

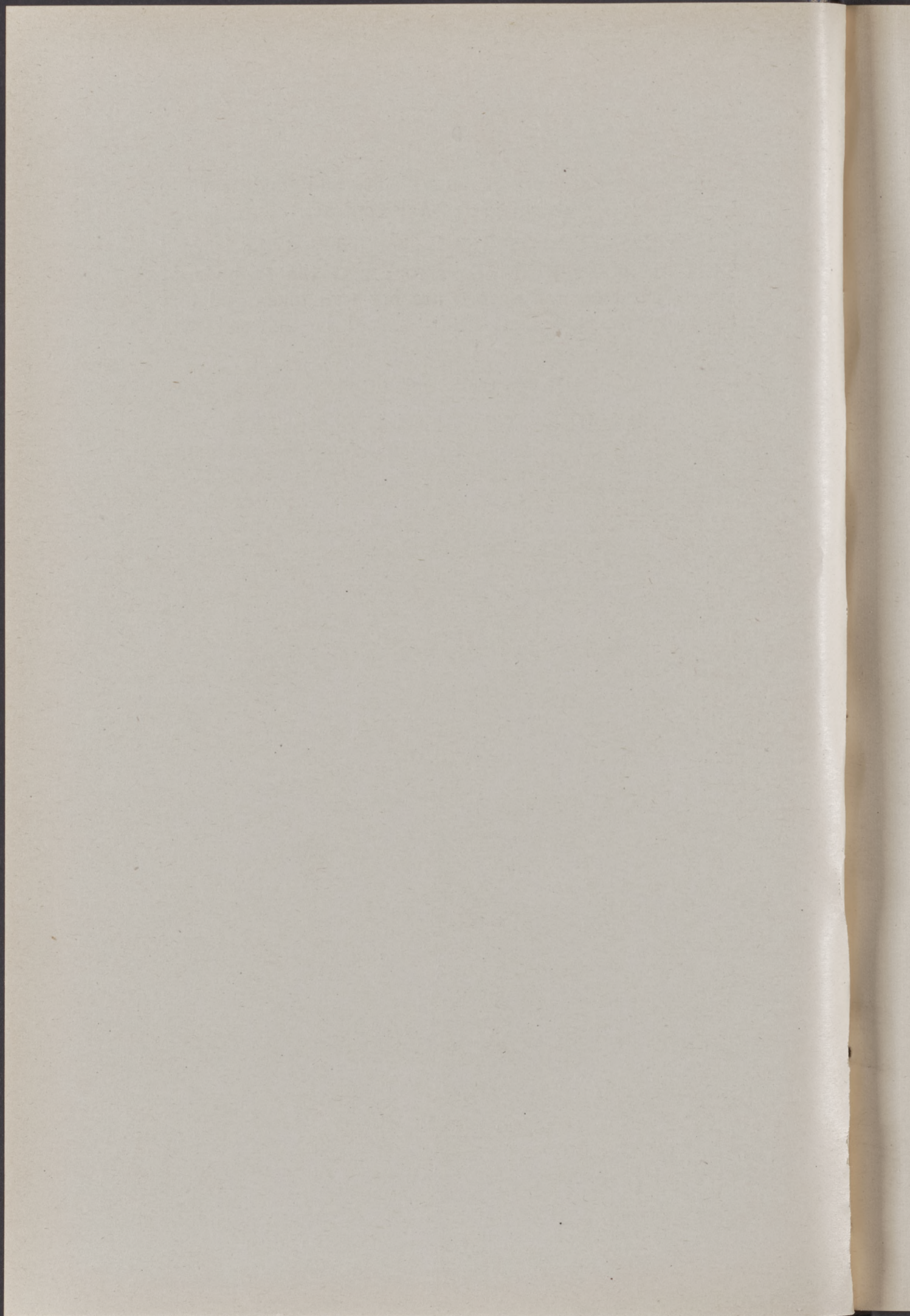
The case did not really involve the questions of law attempted to be injected into it. It is simply a case of where the parties by their conduct and actions all along waive a strict performance of the terms and deliveries under the contract and only after they saw a loss coming

their way, did they change about and endeavor to have a strict construction of the contract.

It is therefore respectfully submitted that the learned Trial Judge committed no error; that the grounds of appeal assigned and argued are not well taken and that therefore the judgment below should be affirmed with costs.

Respectfully submitted,

STAMLER, STAMLER & KOESTLER,
Of Counsel for Respondent.



ant for \$1,526.79 and from that judgment this appeal was taken (grounds of appeal printed, p. 22).

The contract sued upon (p. 87) recites: that the seller (the Bound Brook Stove Works) "has contracts for the purchase of pig iron with various mills upon the terms and conditions, etc., stated in the accompanying memoranda from said contracts, and the said buyer, Herman Ellis, desires to purchase the pig iron to be delivered pursuant to the said contracts, subject to the terms thereof, as to quality and deliveries, and as and when the said pig iron is delivered under the said contracts." It provides: "Now, therefore, it is agreed that Herman Ellis, the buyer, hereby purchases all pig iron covered by the said contracts, aggregating approximately 1,750 tons, for which the buyer agrees to pay the seller \$39.00 per ton, f. o. b. Bound Brook, N. J., payment to be made as follows:"

It contains a further provision: "The seller agrees to turn over and deliver to the buyer at said price, all pig iron delivered to it under the said contracts, as and when deliveries are made thereunder, and delivery is subject to the conditions in the said contracts or any other causes not within the control of the seller."

The contract further provides: "The failure to deliver any installment of iron for any cause not within the control of the seller, including the failure of the said mills to make delivery under the said contracts, shall not result in liability by the seller to the buyer, and shall not release the buyer from obligation to take *subsequent installments*."

The memoranda annexed to the contract shows that plaintiff had five separate contracts for the purchase of pig iron, three with the Virginia Iron, Coal and Coke Company as follows (p. 88):

First: Contract No. N-205, dated October 11, 1916, for the delivery of 400 tons at a price of \$20.50 per ton shipment to be made "100 tons equal monthly November and December, 1916, 300 tons equal monthly January to June, inclusive, 1917."

The contract contained the following provision: "Seller shall not be responsible for delays caused by strikes, differences with workmen, accidents at works, delays in transportation, or other causes not under his control; *each month's delivery to be treated as a separate contract independent of contracts for deliveries during other months. In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to other installments.*"

Second: Contract No. N-201, dated October 10th, 1916, for 600 tons, shipment 150 tons, car weekly, beginning November 1, 1916; 450 tons, equal monthly January to June inc., 1917."

The clause heretofore referred to as being in Contract No. N-205 is likewise in this contract.

Third: Contract No. N-220, dated October 24, 1916, for 500 tons, shipment equal monthly July to December, 1917.

The clause heretofore referred to as in Contract No. N-205 is likewise contained in this contract.

Fourth: Contract October 17, 1916, with the Pulaski Iron Company for 500 tons, shipment period over the first six months of 1917 in equal monthly installments. This contract contains the following provision: "Each month's delivery is to be treated and considered as a separate and independent contract."

Fifth: Contract dated October 11th, 1916, with Rogers, Brown & Company for 400 tons, shipment 50 tons per month, commencing November, 1916, to June, 1917.

This contract contains the following provision: "If shipment is to be made in installments this contract for all purposes shall be treated as separate for each installment."

Construing these five contracts strictly, at the time of the making of the contract between plaintiff and defendant, Ellis, there was due on the five contracts to plain-

tiff, Bound Brook Stove Works, 1,225 tons and not 1,750 tons.

There was due on contract No. N-205 on April 4th, 1917, the date of the contract between the plaintiff and defendant 150 tons; on Contract No. N-201, 225 tons; on Contract No. N-220, 500 tons; on the Pulaski contract, 250 tons; on the Rogers Brown contract, 100 tons.

This amount due is arrived at by giving force to the words (or equivalent words) contained in each of the contracts—"each month's delivery is to be treated as a separate contract independent of contracts for deliveries during other months. In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to *other installments*."

Considering that, with respect to installments due and not delivered, each installment being treated as a separate contract, the seller was under no obligation to deliver and the buyer was under no obligation to accept delivery, but the seller was under the obligation to deliver and the buyer was under obligation to accept future installments, this amount of 1,225 tons was the correct amount due on the contracts on April 4th, 1917, at the time of the making of the contract between plaintiff and defendant, Ellis.

The Court so found (p. 12).

It is conceded that defendant took from plaintiff, up to November, 1917, a total of 1,314 tons (p. 27). It is also conceded that on November 13th, 1917, the two carloads aggregating 78 tons mentioned in the first count was tendered and rejected. The 347 tons referred to in the second count came to the possession of plaintiff in the following months: March, 1918, 59 tons; June, 1918, 87 tons; July, 1918, 112 tons; August, 1918, 40 tons; September, 1918, 49 tons (p. 120).

By the time the two cars referred to in the first count containing 78 tons were tendered in November, 1917, the time for delivery under all of the contracts had expired

except Contract No. N-220 (p. 23), which provided for the delivery of 500 tons equal monthly July to December, 1917, and which contained the language heretofore quoted: "Each month's delivery to be treated as a separate contract independent of contracts for deliveries during other months. In case of any default whatsoever of the seller in regard to installments herein mentioned, the buyer shall not by reason thereof be excused or released from any obligation in regard to *other* installments."

But at the time these two carloads were tendered defendant had already accepted 1,314 tons, which was an amount in excess of the amount due upon the entire five contracts on April 4th, 1917, and upon Contract No. N-220 which had not expired 643 tons had been shipped to defendant upon this contract between July and December, 1917 (Exhibit P. 2), so that defendant had accepted on Contract No. N-220 143 tons more than the contract called for.

The deliveries tendered from March, 1918, to September, 1918, aggregating the 347 tons referred to in the second count of the complaint, are conceded to have been tendered under Contract No. N-220 (p. 53). And although counsel for plaintiff at page 52 refuses to make the same concession as to the 78 tons contained in the two cars tendered in November, 1917, the testimony of Baum shows that this also was delivered on Contract N-220 (p. 82).

But defendant had already accepted under that contract more than the contract called for and the date for deliveries under the contract had long since expired, before the tender of the 347 tons, the last date for delivery being November, 1917.

A comparison of the language of the other contracts with this same company and Contract N-220 indicates that November is the last date, although the contract says to December not being included, because in the other contracts where it is intended to include the last month mentioned the word "inclusive" is used.

The Court held (p. 12) that plaintiff and defendant did not have in contemplation a strict compliance with the five contracts between plaintiff and the producers, but intended that defendant should take 1,750 tons irrespective of what amount of iron might be due, at the time of the making of the contract between plaintiff and defendant, upon the contracts between plaintiff and the producers and that the parties likewise intended, that, if the producers did not deliver in accordance with the installment provision at the times fixed in the contracts between plaintiff and the producers, nevertheless, if they subsequently delivered the overdue installments, defendant would be obliged to take the overdue installments from plaintiff.

In this we urge the Court erred in view of the fact that the contract between plaintiff and defendant (p. 33) specifically provides that defendant "desires to purchase the pig iron *to be delivered pursuant to the said contracts* (that is, contracts between plaintiff and the producers), subject to the terms thereof, as to quality and deliveries, and as and when the said pig iron is delivered under the said contracts" and likewise provides (p. 34): "The failure to deliver any installment of iron for any cause not within the control of the seller, including the failure of the said mills to make delivery under the said contracts, shall not result in liability by the seller to the buyer, and shall not release the buyer from obligation *to take subsequent installments.*" "Subsequent installments" does not mean past due installments. The specific provision for liability in case of *subsequent* installments would seem to exclude liability for *past due* installments.

It is the contention of defendant that the terms of the contracts between plaintiff and the producers as to deliveries became part and parcel of the contract between plaintiff and defendant and each one of those contracts provided specifically that *each installment* should be treated as a separate contract.

The effect of the ruling of the Court upon this subject is to compel defendant to take 347 tons tendered under Contract No. N-220, although the deliveries were not ten-

dered until a period beginning with March, 1918, and ending September, 1918, whereas the contract provides for *equal monthly* deliveries between June and December, 1917, and although the contract between plaintiff and defendant places *the* liability upon defendant to take "*subsequent installments.*"

With respect to the 78 tons tendered in November, 1917, the judgment of the Court has the effect of compelling defendant to take these 78 tons, although there had been already delivered under Contract No. N-220 more than that contract called for, and although more than 100 tons had already been accepted by defendant in excess of the aggregate amount due upon *all* of the contracts between plaintiff and the producers as of April 4th, 1917, the date of the contract between plaintiff and defendant.

We urge that the Court erred in taking this view of the case.

Upon the matter of damage the Court allowed plaintiff the difference between the contract price and the market price, although we urge it appeared that plaintiff had resold the identical iron to the Federal Metal Bed Company and at an advance price (p. 119).

The Court says in its memorandum:

"It is quite apparent that while the war lasted all the parties were anxious to get as much of the iron delivered as possible, and did not insist upon their strict legal rights; when however, the armistice was declared, and it appeared that the price of iron might decline there came a change in the attitude of the parties."

And the Court refers to the fact that before the armistice defendant was endeavoring to get more iron and correspondence between Wood and defendant is referred to (p. 101), etc. This correspondence took place because defendant had resold to Wood the iron which he purchased from plaintiff (Exhibit P. 3, p. 100). Wood was calling for deliveries and of course Ellis was calling for deliveries. Wood declined to take from Ellis, and of

course Ellis declined to take from plaintiff. It made little difference to Ellis whether he took more iron or less if Wood would continue to take. But Wood was not obliged to take from Ellis unless Ellis was obliged to take from plaintiff, so that when Wood refused to take from Ellis, Ellis was obliged to refuse to take from plaintiff. No heavier inference can be made against Ellis for his desire to take before the armistice and his desire not to take after the armistice than should be made against plaintiff for its failure to deliver prior to the armistice and its desire to deliver after the armistice.

The case is one which we submit should be determined upon the legal rights of the parties as appears from a construction of the contract between plaintiff and defendant having regard to the documents which are a part of it, to wit, the contracts between plaintiff and the producers, and without regard to the attitude of the parties either before or after the armistice or the communications between Wood and Ellis. Ellis took the position on November 30th, 1917, that he was not obliged to take any more iron and that position he has held until the present time (Exhibit P. 1, p. 118).

ARGUMENT.

I.

Prior to the tender of the two cars of pig iron which arrived at Bound Brook on November 27, 1917, the contract had been completed.

As already pointed out, the contract of April 4th, 1917, between plaintiff and defendant Ellis recited contracts between plaintiff and the producers and stated that the iron referred to in said mill contracts was sold to defendant "subject to the terms thereof as to quality and deliveries and as and when the said pig iron is delivered under the said contracts," and there was contained in the contract the provision that failure to deliver one installment

“shall not release the buyer from the obligation to take *subsequent* installments.”

Each one of the contracts between plaintiff and the producers contained a provision that each installment should be considered *a separate contract* and that default in one of the installments should not excuse the purchaser from taking other installments. There is no provision in any one of the contracts that the buyer is obliged to take an installment *past due*. The liability being to take *other* installments excludes any such idea.

While the contract between plaintiff and defendant provides for approximately 1,750 tons, there was actually due upon the contracts between plaintiff and the producers at the time of the making of the contract on April 4th, 1917, between plaintiff and defendant, 1,225 tons. Prior to November, 1917, defendant had accepted from plaintiff 1,314 tons.

There was, therefore, no obligation upon the part of defendant to accept the two carloads.

II.

Time was of the essence of the contract and defendant was not under the obligation to accept deliveries after the date fixed in the contract.

Each one of the contracts between plaintiff and the producers contained the provision that each month's delivery should be treated as a separate contract independent of contracts for deliveries during other months, and that if there was any default of the seller with respect to one installment the buyer should not by reason thereof be excused or released from any obligation in regard to *other* installments.

These contracts were made a part of the contract between plaintiff and defendant under which the iron was sold (p. 87) and that contract specifically provided that the failure to deliver one installment should not release

the buyer from obligation to "take *subsequent* installments."

Under the terms of that contract the deliveries were to be as under the terms of the contracts between plaintiff and the producers. Each one of the contracts between the plaintiff and the producers provided for deliveries in installments covering a certain period of time, and in July, 1917, the only contract, the time for which deliveries under which had not expired, was Contract No. N-220 between plaintiff and the Virginia Iron, Coal and Coke Company (p. 93), providing for the sale of five hundred tons and for delivery *equal monthly February to December, 1917*. That contract also contained the provision that each month's delivery should be treated as a separate contract independent of contracts for deliveries during other months and that in case of any default in regard to installments the buyer should not be by reason thereof *be excused from any obligation in regard to other installments*.

This contract does not include the month of December. The provision is equal monthly July to December, 1917. Reference to other contracts made between the same parties indicates that where the parties intended to include the last month mentioned they use the term "inclusive." (See contract No. N-201.)

Time was of the essence.

In *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 365, Mr. Justice Gray, speaking for the Supreme Court of the United States, said:

"In the contracts of merchants, time is of the essence."

Connell Bros. v. H. Diederichsen & Co., 213 Fed. 741;

Clark v. Fey, 121 N. Y. 470;

Hill v. Blake, 97 N. Y. 216.

Blackburn v. Riley, 47 N. J. L. 290, and *Cerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, are cited as authority

for the proposition that where goods are deliverable in installments failure to deliver one installment will not breach the entire contract. This principle has no application in the case at bar. The question here is not whether failure to deliver one installment breaches the entire contract but whether the buyer is obliged to accept deliveries supposed to be made on a certain day at a certain other day.

The contract itself specifically provides what the effect of a failure to deliver one installment shall not be and by inference what it shall be. It states that the failure to deliver one installment shall not excuse the buyer from "obligation to take *subsequent* installments," and this clearly by inference says that the buyer shall not be under the obligation to take the defaulted installment.

And the contracts between plaintiff and the producers, made a part of the contract between plaintiff and defendant, provides that each installment shall be considered as a separate contract.

Nor does section 45 of the Sales of Goods Act, 4 C. S., p. 4657, apply. That section provides that where there is a contract to sell goods by fixed installments the failure to deliver or the failure to accept one installment is to be considered in connection with the terms of the contracts and the circumstances of the case in order to ascertain whether the breach is so material as to justify the injured party in refusing to proceed further and sue for damages for breach of the entire contract.

The question here is not whether either party has the right to treat *the entire contract* as abrogated but whether defendant is obliged to accept installments after the time fixed for their delivery and this situation is not covered by the statute.

Contract No. N-220 provides for equal monthly shipments July to December, and that each month's delivery shall be treated as a separate contract and the buyer shall not in case of default in delivering any one installment be released from any obligation in regard to *other* install-

ments (p. 94). The contract between plaintiff and defendant provides for the delivery of the iron "as and when deliveries are made thereunder (that is, under the contracts between plaintiff and the producers) and delivery is subject to the conditions in the said contracts or any other causes not within the control of the seller." And the contract then provides that failure to deliver any installment of iron for any cause not within the control of the seller "including the failure of the said mills to make delivery under the said contracts, shall not result in liability by the seller to the buyer, and shall not release the buyer from obligation to take *subsequent* installments." The contract had recited that the sale was "subject to the terms thereof," that is, the contracts between the producers and plaintiff, as to equality and deliveries. The contract is unintelligible unless it be considered that the dates of the shipments, that is the dates of the installments provided for in the contracts between plaintiff and the producers, shall be imported into the contract between plaintiff and defendant because it is only by reference to these contracts that the installments can be arrived at.

Under Contract No. N-220 prior to the tender of delivery of the two carloads there had already been delivered 643 tons or 143 tons more than the defendant was obliged to accept (Exhibit P. 2). No attempt was made to deliver under this contract or under any other contract between November, 1917, and March, 1918. From March to September, 1918, tender was made of the 347 tons alleged in the second count. These 347 tons were tendered long after the expiration of the date fixed in the contract for delivery.

We urge that the time of delivery was fixed and certain; that the right of plaintiff to deliver under contract No. N-220 expired in November, 1917, and that it could not enforce delivery six months later.

There is no testimony as to why the delivery was delayed. The Court in its memorandum said:

"There is no testimony showing why these 425 tons were not shipped as per contract. The con-

tract does not excuse the mills for failure to deliver the amount contracted for. If they fail they are responsible for such failure. They are excused only for delay, and then only if the delay is such as is provided for by the contract, such as strikes, accidents, etc.”

And the Court then says:

“I cannot presume that the mills deliberately delayed shipments, and in the absence of proof must assume that the delays were justifiable. It is quite probable that the war conditions then existing created a justifiable delay. If, then, these were shipments justifiably delayed, and hence were such as, the mills were permitted to make later, and were such as, under the contract, they were obliged to make, then the plaintiff was bound to take them and deliver them to defendant, and defendant was bound to receive them, at such later period.”

It is submitted that where a contract calls for delivery at a certain time and also provides that in a certain event delivery shall be excused within that time, when it is shown that delivery was not made at the time stated the burden is on the defaulting party to justify the default.

The learned Trial Court has taken an opposite view, and, notwithstanding the fact that the deliveries were not made as stated in the contract, has presumed that the delay was justified, although there was no proof upon the subject. It says that it is *quite probable* that war conditions then existing created a justifiable delay. It is just as probable that, inasmuch as this iron was sold at a very low price and the market price was much higher, plaintiff was sending its iron elsewhere.

Time is of the essence.

Shinn v. Roberts, 20 N. J. L. 436;

23 R. C. L. Title Sales, sec. 196, p. 1373.

Not only is defendant justified in refusing to accept late deliveries, but he might have accepted and sued for damages for the delay.

Williston on Contracts, sec. 704.

III.

Even if the contract is not definite with respect to time of delivery, delivery six months after the time stated in the contract was unreasonable.

If the contract does not provide for a definite time then the statute applies, sec. 43, 4 C. S. of N. J. 4657, "where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

With respect to what is a reasonable time we have the right to look at the situation of the parties and the contract.

Reference to the contracts between plaintiff and the producers shows that the time of delivery fixed in the last producer's contract as (No. N-220, p. 94) equal monthly July to December, 1917. No shipments were made from November to March. No excuse is given for failure to ship. It is shown that defendant resold the iron covered by the contract of April 4th, 1917, to Wood. He was called upon to complete this contract. He could not. In the meantime the market price of iron decreased.

Was this six months without the shipment of any iron reasonable?

IV.**Damages.**

No damage was shown.

The Court permitted plaintiff to recover the difference between the contract price and the price fixed by the Government for pig iron (p. 70) notwithstanding that the iron in question was, it is contended, resold by plaintiff to the Federal Metal Bed Company for \$40 per ton, or a profit (Exhibit D. 1, pp. 119, 120, 121).

Although Baum for plaintiff swore in his testimony (p. 80) that he got \$33 or \$33.50 (which was the price

fixed by the Government), when the documents were produced showing the statement between the Federal Metal Bed Company and plaintiff it showed that the iron was taken over at \$40 per ton. The only explanation made by Baum with respect to these statements is, as stated by the Trial Court on page 16, that the iron was not sold to the Federal Bed Company at \$40, and that they consumed it themselves and that the statement was just an accounting between the parties for the interest they had in the iron (p. 84).

However, this may be the situation disclosed was that plaintiff got credit in some way or another from the Federal Bed Company for this iron at the price of \$40 per ton.

It is immaterial whether it got cash or whether it got credit by reason of an adjustment. It received a *quid pro quo* for this iron at the rate of \$40 per ton.

The plaintiff having resold or disposed of the iron at the rate of \$40 a ton, it cannot recover damages against defendant based upon the difference between the contract price and the price fixed by the Government.

There was in fact no proper proof of the market price. It appeared that the Government arbitrarily fixed the figure at \$33 (p. 70). How well that figure was observed is indicated by the fact that plaintiff disposed of the identical iron at \$40.

The first, second and third matters heretofore argued are covered by the second, third, fourth, fifth, sixth, seventh, eighth, tenth and eleventh grounds of appeal.

The fourth matter heretofore argued dealing with the question of damages, is covered by the tenth ground of appeal, and sub-sections D and F of the eleventh ground of appeal.

V.

The Court erred in permitting in evidence the contract and letters between defendant and R. D. Wood, the purpose being to vary the terms of a written instrument (Ground of Appeal 12).

The contract between defendant and Wood was offered in evidence (p. 57). It was objected to. The letters between R. D. Wood & Company and defendant were admitted in evidence over objection.

Exhibit P. 6, a letter from Ellis to Wood (p. 102); Exhibit P. 7, letter from Wood to Ellis; Exhibit P. 8 (p. 104), letter from Ellis to Wood; Exhibit P. 9, letter from Wood to Ellis; Exhibit P. 10, letter from Wood to Ellis; Exhibit P. 11, letter from Ellis to Wood; Exhibit P. 14, letter from Ellis to Wood; Exhibit P. 17, letter from Ellis to Wood; Exhibit P. 18, letter from Ellis to Wood; Exhibit P. 19, letter from Wood to Ellis; Exhibit P. 20, four letters, Ellis to Wood; Exhibit P. 21, letter from Wood to Ellis; Exhibit P. 22, letter from Ellis to Wood; there was also admitted in evidence, over objection, Exhibit P. 4, which is a letter from Wood to plaintiff.

The theory upon which these letters were offered was (p. 59): "We contend this construes the contract."

It is impossible to tell of course what influence these letters had on the mind of the Court in reaching a conclusion with respect to the proper construction of the contract. On pages 14 and 15 it refers to the letters and it says, after referring thereto: "I must look to the conduct of the parties for light, especially their conduct before they began to try to save themselves from loss."

But the language of the contract is not ambiguous and the parties having reduced the contract to writing it must be construed as embodying their complete understanding.

Suffern v. Butler, 21 N. J. E. 410;

Chetwood v. Britton, 2 N. J. E. 438;

Huffman v. Hummer, 17 N. J. E. 269;

Deweese v. Manhattan Insurance Co., 35 N. J. L. 366, 375.

The Court erred in admitting plaintiff's file of correspondence and in considering it, as unquestionably it did, as bearing upon the construction to be put upon the contract.

Reference to the correspondence in connection with Exhibit D. 3 (p. 122), which is a letter written by counsel for plaintiff to Virginia Iron, Coal and Coke Co., and dated October 2nd, 1917, will indicate that within the contemplation of plaintiff's attorney the contract should be construed as contended for by defendant here.

The letter was dated October 2nd, 1917, and complained of the failure of the Virginia Iron, Coal and Coke Co. to deliver. It referred to the three contracts which plaintiff had with the Virginia Iron, Coal and Coke Co. It referred to the contract dated October 24th, 1916, which was the Contract No. N-220, and stated that under that contract the Virginia Iron, Coal and Coke Co. had agreed to ship 500 tons in equal monthly shipments from July to December, 1917. The letter says, among other things:

“Against these contracts, aggregating 1,500 tons, you have only shipped 740 tons, which is less than one-half of the contracted tonnage, leaving 760 tons remaining undelivered, *and the time for delivery under the last contract expiring within three months.*”

This is a clear statement on the part of counsel for plaintiff that the time for delivery under this contract expired in December, 1917. Nevertheless, plaintiff is now attempting to force the iron upon defendant under this contract tendered for delivery between March, 1918, and September, 1918.

The letters between Wood and defendant clearly indicate the unreasonableness of the delay, and show that the delivery in March, 1918, was not within a reasonable time if the contract was in anywise indefinite.

In a letter written by Wood to defendant, dated September 10th, 1917, and sent by defendant to plaintiff with Exhibit D. 1 (p. 126), Wood says to defendant: “The delay in forwarding these makes it essential for us to call

for two cars weekly. Even at this rate, the iron will hardly arrive in time for the close of the season."

The correspondence between Wood and Ellis shows that Wood construed the contract as calling for delivery in accordance with the terms of the contracts between plaintiff and the producers. Wood wrote a letter November 19th, 1917, to defendant, stating (Exhibit D. 5):

"This tonnage is in excess of our contract with you. * * * We beg to call your attention to the fact that the last car that was shipped us over-ran the contract some tons."

Wood wrote Ellis October 23rd, 1917 (Exhibit D. 6, p. 126): "The sales-notes fix the dates for shipment."

Defendant wrote plaintiff on November 30th, 1917 (Exhibit P. 1, p. 118):

"You informed us that there are two cars of pig iron on the way. According to the contract we are not bound to take same by reason of your failure to deliver the iron within the contract time."

In considering the letters written by defendant to Wood the position taken by plaintiff with respect to defendant must be kept in mind. Defendant had sold the iron to Wood. Defendant was insisting with the plaintiff that he was not obliged to take the iron because of the expiration of the contract time. Plaintiff was insisting that he was obliged to take the iron. On the other hand, Wood was insisting that he was not obliged to take the iron from defendant. Assuming that plaintiff would be able to force defendant to take the iron, then, of course, defendant desired that Wood should comply with his contract. This accounts for whatever statements there are in the letters from defendant to Wood insisting that Wood should carry out the provisions of the contract.

By the concession of counsel and the testimony of Baum it appears that all of the iron now sued for was delivered under Contract N. 220 (p. 82). By the express terms of the contract of N-220 the time for delivery expired in December, 1917. The contract was construed in this way by counsel for plaintiff in his letter to the Virginia Iron,

Coal and Coke Company (Exhibit D. 3) in which letter written October 2nd, 1917, he said, "and the time for delivery under the last contract expiring within three months."

The present attempt is to force the defendant to accept iron under this contract tendered during a period from March and September, 1918, when the last time for delivery fixed in the contract was December, 1917.

Time was of the essence of these war contracts. When the iron would do any good to defendant plaintiff did not deliver in accordance with the terms of the contract. No excuse is given for failure to deliver. The Court says it presumes that there was a good excuse (p. 13). Of course, during that period of time defendant was anxious to get deliveries. The time for delivery expired and coincident with the expiration of the time for delivery the armistice was declared and iron dropped in price. Beginning at a period four months later and when conditions had completely changed plaintiff offers material which it should have offered prior to the declaration of the armistice and without explanation of the delay and according to the judgment of the Trial Court defendant is obliged to accept the offer.

It is respectfully submitted that the judgment should be reversed and *venire de novo* issued.

Respectfully submitted,

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WIGHT, WIGHT & GOLENBOCK,
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