

N. J. Court of Errors and Appeals.

PATRICK REILLY,	}	10
vs.		
JOHN R. BLACKBURN.		

Pleas before the Judge of the Circuit Court, holden at Newark, in and for the County of Essex, of the twenty-third day of January, A.D. eighteen hundred and eighty-three.

J. WARREN VANDERVEER, *Clerk.*

ESSEX COUNTY, ss: 20

Patrick Reilly, the defendant in this suit, was summoned to answer unto John R. Blackburn, the plaintiff therein, of a plea of trespass on the case, whereupon the said plaintiff, by Coult & Howell, his attorneys, complains. For that whereas, heretofore, to wit, on the thirteenth day of May, eighteen hundred and eighty-two, at Newark, in said county, the defendant bargained for and bought of the plaintiff, and the plaintiff at the special instance and request of the defendant, then and there sold to the defendant a large quantity of goods, to wit, fifty-two car loads of oak bark, at the rate or price of eighteen dollars for each and every ton thereof, to be delivered by the plaintiff to the defendant in cars at the freight depot of the Pennsylvania Railroad in Newark, aforesaid, at the rate of one car load during each and every week until the whole should have been delivered: each car load to be paid for at the price aforesaid by the defendant to the plaintiff on the delivery thereof aforesaid, and in consideration thereof the defendant undertook and promised to accept the said bark from the 40

plaintiff and pay him for the same on the delivery thereof as aforesaid.

And the plaintiff says that immediately thereupon he began to ship and deliver to the defendant the said bark under the said contract, at the rate of one car load a week thereafter, and so continued to do for a long time, to wit, until the fifteenth day of July, eighteen hundred and eighty-two, and that the same was duly accepted and paid for by the defendant; and although
 10 the plaintiff afterwards, on the day and year last above named, was ready and willing, and then and there tendered and offered to deliver a car load of said bark to the defendant, and then and there requested the defendant to accept and pay for the same in accordance with the said contract, yet the defendant not regarding his said promise and undertaking, did not nor would at any time before or afterwards, accept the said bark or any part thereof from the plaintiff in accordance with the
 20 said contract, nor pay him for the same as aforesaid, but wholly neglected and refused so to do; and although the plaintiff was ready and willing and offered to deliver other car loads of the said bark, and to complete and carry out his said contract, yet the defendant would not accept or pay for the same or any part thereof, but wholly refused and neglected so to do, by reason whereof the plaintiff incurred a large expense, to wit, the sum of one thousand dollars, in and about the keeping and taking care of the said bark for a long time, to wit, from
 30 the time when the bark ought to have been so accepted by the defendant hitherto, and in and about the transportation of the said car loads of bark which the defendant refused to accept as aforesaid, and paying freight, and other transportation charges on the same.

For that whereas also, heretofore, to wit, on the day and year first above mentioned, at Newark aforesaid, the defendant by an agreement in writing, bargained for and bought of the plaintiff a certain other large quantity of goods and chattels, to wit, fifty-two car loads of oak bark, at the price of eighteen dollars for each and every ton
 40 thereof, to be delivered to him by the plaintiff at the

rate of one car load a week thereafter, to be paid for by him upon delivery; and although the plaintiff immediately after the making of said bargain and for a long time, to wit, ten weeks thereafter, did deliver during each week to the defendant a car load of said bark, which was accepted by the defendant and paid for by him, yet the defendant thereafter refused to accept and pay for certain other car loads of said bark, which the plaintiff in pursuance of said contract tendered to him, and did not nor would at any time afterwards accept or pay for the same 10 or any part thereof, but wholly neglected and refused so to do; and the plaintiff says that at the time when the defendant so refused to accept and pay for said bark, and broke the said contract in that behalf and for a long time afterwards, to wit, from that time until the time of the commencement of this suit, the market price of bark of the quality and description which the plaintiff had so as aforesaid bargained to sell and deliver to the defendant, had fallen from eighteen dollars per ton to a very low price, to wit, to twelve dollars per ton, and the plaintiff 20 thereof lost the benefit of the bargain which he had so made with the defendant and the profits thereon, which he otherwise would have had.

For that whereas also, heretofore, to wit, on the day and year first above mentioned, at Newark aforesaid, the defendant was indebted to the plaintiff in the sum of two thousand dollars for divers, to wit, fifty car loads of oak bark by the plaintiff before that time bargained, sold and delivered to the defendant at his special instance and request, and being so indebted, the defendant in consid- 30 eration thereof afterwards, to wit, on the day and year aforesaid, undertook and faithfully promised the plaintiff to pay him the said money upon request; and the plaintiff says that the defendant, although often requested so to do, hath not paid the said sum of money or any part thereof, wherefore the plaintiff says that he is injured and hath sustained damage to the amount of two thousand dollars, and therefore he brings his suit, &c.

COULT & HOWELL,

Attorneys of Plaintiff.

And the said defendant, by Thomas S. Henry, his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

And now at this day, that is to say, on the twenty-sixth day of September, eighteen hundred and eighty-three, at Newark, in said county of Essex, comes the
 10 said Patrick Reilly, by Thomas S. Henry, his attorney, and saith that the said plaintiff ought not further to maintain his action against the said defendant, because he saith that after the making of the said several supposed promises and undertakings in the said declaration mentioned, and after the last pleadings pleaded in this suit, that is to say, that after the twenty-third day of
 20 January last past, at Newark aforesaid, to wit, on the fourth day of April, in the year of our Lord one thousand eight hundred and eighty-three, by a certain agreement in writing bearing date on the twenty-seventh day of March, eighteen hundred and eighty-three, signed and executed by said plaintiff and said defendant, and which was intended to be and was a full and complete settlement and adjustment of the matters in dispute between said plaintiff and said defendant in this suit, it was, in consideration of the stipulations therein contained, mutually to be performed by the said plaintiff and the said defendant, agreed as follows :

30 "Essex Circuit Court. John R. Blackburn *vs.* Patrick Reilly. In Case. For the purpose of settling amicably the questions in controversy in the above entitled cause, the parties thereto agree as follows :

"1. That the contract, for the breach of which this suit was brought, shall be completed by the delivery by Blackburn and accepted by Reilly, of a sufficient number of car loads of bark to make, with what has already been delivered under the contract sued on, fifty-two car loads, the same shall be delivered on board at Newark *via*
 40 the Pennsylvania Railroad.

"2. The quality of the bark shall be the same as is now furnished by Blackburn to S. Halsey & Son and to Blanchard Bros. & Lane, and be free from black oak bark.

"3. The price shall be seventeen dollars per ton of twenty-two hundred and forty pounds, payable on delivery of each car load. Reilly may have three days after arrival of the cars at the freight station in which to inspect the car load.

"4. One car load only shall be delivered during each week after shipments shall begin, and said shipments shall begin on the first day of April next, or within ten days thereafter, and invoices shall be mailed on each day of shipment. 10

"5. The sacks in which the bark is shipped shall be returned forthwith.

"6. This suit shall not be discontinued or non-prosced until the final completion of this contract, the plaintiff shall then discontinue it without costs; but in case of a breach of this contract by said Reilly, the plaintiff may proceed in the suit by ruling the defendant to plead, and the suit shall proceed thereon to trial, and the damages to be recovered shall be measured by the original contract sued on; said Reilly shall on the execution hereof pay the taxed costs of the plaintiff. It is understood that this suit is not settled unless the terms of this contract are faithfully carried out by said Reilly. 20

"JOHN R. BLACKBURN,
"PATRICK REILLY. 30

"Dated March 27, 1883."

And the said defendant avers that the said agreement so entered into by said plaintiff with said defendant was, on said fourth day of April, delivered by said defendant to said plaintiff, and was accepted and received by said plaintiff of and from said defendant in full satisfaction and discharge of the said several promises and undertakings in said declaration mentioned, and of all damages and sums of money thereupon due and owing or accrued. 40

And the defendant further avers that although the said plaintiff failed to make any shipments of bark within ten days after the said first day of April then next ensuing, as in said agreement it was stipulated, or at any time subsequent thereto; and although the said plaintiff failed to deliver this defendant a bill of costs in said action taxed by the clerk of this Court, this defendant did, to wit, on the twenty-third day of April, eighteen hundred and eighty-three, at Newark aforesaid, 10 tender and offer to pay to the plaintiff or his attorney the sum of twenty-eight dollars as and for his costs, in full satisfaction of the costs to be paid by him under said agreement, which sum of twenty-eight dollars was sufficient to pay and satisfy all the costs of said plaintiff which had up to that time accrued in said suit, to receive which of said defendant the said plaintiff then and there refused; and the said defendant in fact further saith, that he, the said defendant, always from the time of the making of said agreement hereinbefore set forth, 20 has been ready to pay, and still is ready to pay to said plaintiff said sum of twenty-eight dollars, to wit, at Newark aforesaid, and he now brings the same into Court there ready to be paid to the said plaintiff if he will accept the same; and this defendant has always been ready and willing to perform all the stipulations and agreements in said agreement contained to be performed on his part, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action 30 thereof against him.

And for a further plea in this behalf the said defendant, by leave of the Court for this purpose first had and obtained, according to the form of the statute in such case made and provided, at this day, that is to say, the twenty-sixth day of September, eighteen hundred and eighty-three, at Newark aforesaid, comes by his attorney, Thomas S. Henry, and says that the said plaintiff ought not further to maintain his action against the said defendant, because he saith that after the making of the said several 40 supposed promises and undertakings in the said declara-

tion mentioned, the making whereof was at or prior to the commencement of this suit, and ever since that time denied by this defendant; and after the last pleading pleaded herein, that is to say, after the twenty-third day of January last past, at Newark aforesaid, to wit, on the fourth day of April, eighteen hundred and eighty-three, the said plaintiff in consideration of this defendant agreeing in writing to purchase of said plaintiff as many car loads of bark as would with the car loads of bark already delivered by the plaintiff to the defendant and 10
in said declaration mentioned, make fifty-two car loads, and to pay the sum of seventeen dollars for each and every ton thereof, said bark to be of a certain quality, and to be delivered at the times and in the manner in said agreement specified, and in consideration of the defendant further agreeing to pay to the plaintiff his taxed costs of this suit then accrued to said plaintiff, stipulated and agreed in writing on his part to sell to said plaintiff the said bark of the quality aforesaid, at the price aforesaid, and to deliver the same at the times 20
in said agreement mentioned; and for the consideration aforesaid the said plaintiff further stipulated and agreed in the same writings to stay all further proceedings in this suit until the final completion of said agreement, and then to discontinue the same without further costs to the defendant, a copy of which agreement is hereto annexed and made part hereof.

And the defendant in fact saith, that he has been always ready and willing to perform said agreement on his part, and to receive and pay for the said bark at the 30
times and in the manner in said agreement specified, and that he did on the twenty-first day of April, to wit, at Newark aforesaid, tender and offer to pay to the plaintiff or his attorney the sum of twenty-eight dollars as and for his costs and in full satisfaction of the costs to be paid by him under said agreement, which sum of twenty-eight dollars was sufficient to pay and satisfy all the costs of the said plaintiff which had up to that time accrued in said suit, to receive which of said defendant the said 40
plaintiff then and there refused; and the said defendant

in fact further saith, that he, the said defendant, always from the time of the making of the said agreement hereinbefore set forth has been ready to pay, and still is ready to pay to said plaintiff the sum of twenty-eight dollars, to wit, at Newark aforesaid, and he now brings the same into Court there ready to be paid to the said plaintiff if he will accept the same; yet the said plaintiff, disregarding his said several agreements and undertakings hereinbefore specified, neglected and refused to deliver said car loads or any of them within the time specified in said agreement, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him.

THOMAS S. HENRY,

Attorney of Defendant.

And the plaintiff as to the plea by the defendant first above pleaded, whereof he hath put himself upon the country, doth the like.

And as to the plea by the defendant secondly and thirdly above pleaded, the plaintiff says that the same and the matters therein contained in manner and form as the same are therein pleaded, is insufficient in law to preclude the plaintiff from maintaining his said action, and that he is not bound to answer the same, and this the plaintiff is ready to verify; wherefore the plaintiff prays judgment and his damages for the non-performance of the promises and undertakings in said declaration mentioned to be adjudged to him, &c.

COULT & HOWELL,

Plaintiff's Attorneys.

And the said defendant saith that his said plea by him secondly and thirdly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof against him, the said defendant, and the said defendant is ready to verify and prove the same, when, where and in such manner as the said

Court here shall direct and award ; wherefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendant, &c.

THOMAS S. HENRY,
Attorney of Defendant.

And because the Judge here will advise himself of and upon the plea pleaded, *puis darrein continuance*, before he gives his judgment thereon, a day is therefore given to the parties aforesaid here until the first day of March, Anno Domini eighteen hundred and eighty-four, to hear judgment thereon, for that the said Judge is not yet advised thereof, &c. At which day come here as well the said plaintiff as the said defendant by their respective attorneys aforesaid, and the sheriff hath not sent the writ in that behalf directed to him nor done anything thereon. Whereupon all and singular the premises aforesaid, whereof the said parties have put themselves upon the judgment of the Court, being seen and by said Judge fully understood, and mature deliberation had thereon, it appears to said Judge here that the said plea *puis darrein continuance*, pleaded by said defendant, and the matters therein contained, are not sufficient in law to bar or preclude the said John R. Blackburn from having or maintaining his aforesaid action thereof against the said Patrick Reilly, Therefore let the giving of judgment against said defendant be stayed until the said issue above joined between the parties, wherein the said parties have put themselves upon the country, shall have been tried and determined.

Which said issue, in manner aforesaid joined between said plaintiff and said defendant, afterwards, to wit, at the April term of said Circuit Court, holden in the year 1884, before his Honor, DAVID A. DEPUE, Esq., Judge of said Court, on the sixteenth day of said month, came on to be tried, at which day before the said Court came

as well the said John R. Blackburn and the said Patrick Reilly, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issue. And thereupon, to maintain the said issue on his part, the said John R. Blackburn then and there called the following witnesses, whose testimony was given in evidence to the jury so empaneled and sworn.

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JOHN R. BLACKBURN, plaintiff, sworn on his own behalf.

Direct examination, by plaintiff's counsel :

Q Where do you reside?

A In Nelson county, Va., at present I reside; I have mills in Albemarle and Nelson; and a part of my time is spent in Albemarle county.

Q What is your business?

A My business is grinding and shipping bark.

20 Q How long have you been in that business?

A Since 1875.

Q Where do you market your bark?

A In Newark and Baltimore; and I ship to foreign markets.

Q Do you know the defendant, Mr. Patrick Reilly?

A Yes, sir; I know Mr. Reilly.

Q Did you know him before you entered into this contract?

A No, sir; only by correspondence.

30 Q You knew about him—you had heard of him?

A I had heard of him—yes, sir.

Q You had dealt with Newark manufacturers before that time?

A Yes, sir; I have sold Blanchard Bros. & Lane, since 1876; I am selling them regularly; and Messrs. S. Halsey & Son.

Q Did you have any correspondence in the spring of 1882, with Patrick Reilly?

A Yes, sir.

40 Q In relation to bark?

A Yes, sir; Mr. Reilly addressed a letter to me, asking for a quotation.

Q Letter dated when?

A May 3, 1882.

Plaintiff's counsel reads and offers in evidence letter addressed to Johnson & Blackburn; and signed Patrick Reilly; dated May 3, 1882.

Also, letter addressed to Patrick Reilly, and signed John R. Blackburn; dated May 5, 1882.

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Also, letter addressed to John R. Blackburn, and signed Patrick Reilly; dated May 13, 1882.

Also, letter addressed to Patrick Reilly, and signed John R. Blackburn; dated May 15, 1882.

Also, postal card addressed to John R. Blackburn, and signed Patrick Reilly; dated May 17, 1882.

Q What did you do then in consequence of this correspondence, after receiving this?

A I commenced to ship the bark.

20

Q Do you recollect when?

A The first shipment was made about May 19.

Q One car load?

A Yes, sir; the next shipment was made on May 26.

Q How much?

A One car load; the next on June 3; the next on June 13.

Q Each, one car load?

A Yes, sir.

Q How many tons per car load—what was the first shipment?

30

A (Producing memorandum.) This was copied from one of my books; 26,880, I think; I am not sure about that; I think it was the first; the second was 26,750; and the third shipment, 29,400; and the fourth shipment, 23,300.

Q Do you know what is about the average of a car?

A The average is from ten to twelve tons, and up as high as thirteen, and thirteen and a half; the average, I should say, is about eleven tons and a half.

40

Q During the time, or while you were shipping this bark, did you have any other letters from or correspondence with Mr. Reilly?

A I am not sure that I had, except to write him and urge him to receive the bark.

Q Have you got that letter?

A I have no copies of them.

Q You have had communications from him?

A Yes, sir; a telegram.

10 Q Is that the first you received?

A Yes, sir; (producing paper.)

Q The date?

A The 14th.

Q That is from him?

A Yes, sir.

Plaintiff's counsel reads and offers in evidence paper purporting to be telegram addressed to John R. Blackburn, Lynchburg, Va., signed Patrick Reilly, and dated Newark, N. J., June 14, 1882.

20 Q You are not directly on the line of that telegraph?

A I was on the line of the Richmond and Alleghany telegraph.

Q Do you remember whether you wrote in reply to that telegram?

A I think I did, sir.

Q Was it by mail or telegram?

A It was by mail, I think, sir; I am not quite sure

30 Plaintiff's counsel calls on defendant's counsel to produce any correspondence in their possession between the parties, dated in June, 1882.

Defendant's counsel produce letter dated June 21, 1882, addressed to Patrick Reilly, and signed John R. Blackburn, which plaintiff's counsel reads and offers in evidence.

By the Court:

Q Did you get also a communication by mail from Mr. Reilly in addition to the telegram?

40 A I don't remember.

Q Do you recollect the letter referred to?

A I am not sure; I think there was a letter written confirming the telegram.

Q Did you act upon the telegram; did you stop the shipment?

A I think I stopped the shipments of bark; yes, sir.

Q Did you ship any at all afterward?

A I shipped a car load on the 15th of July, yes, sir; that Mr. Reilly refused to take.

Plaintiff's counsel reads and offers in evidence 10
copy of letter dated June 19, from Reilly to Blackburn; also copy of letter dated June 23, from Reilly to Blackburn.

Q You received those?

A Yes, sir.

Plaintiff's counsel also reads and offers in evidence letter from Blackburn to Reilly containing statement of account.

Q You recollect that? 20

A Yes, sir.

Cross-examination, by defendant's counsel:

Defendant's counsel reads and offers in evidence letter from Blackburn to Reilly, dated July 1, 1882; also letter from Blackburn to Reilly, dated July 14, 1882.

Q Have you got the postal referred to?

A No, sir. 30

Defendant's counsel also reads and offers in evidence letter from Blackburn to Reilly, dated July 15, 1882.

Q That is the invoice, I suppose?

A Yes, sir.

Defendant's counsel also reads and offers in evidence letter from Reilly to Blackburn, dated July 18, 1882; also postal card from Reilly to Blackburn, dated July 24, 1882; also letter from Blackburn to 40

Reilly, dated July 29, 1882; also letter from Reilly to Blackburn, dated July 29, 1882; also letter from Blackburn to Reilly, dated July 30, 1882.

Re-direct examination, by plaintiff's counsel:

Q Did you come to Newark the next week?

A I am not sure that I did; I was in Newark, I think, the next week, or within a few weeks after that time.

10 Q Did you have any subsequent interview or correspondence?

A I called to see Mr. Reilly.

Q When was it, with reference to the date of this last letter, the 29th?

A It was after that time; I am not sure of the date; I also called to see Messrs. Halsey & Son, and the Messrs. Blanchard at the same time; I called to see Mr. Reilly and he said he would not receive any more of it; he didn't assign any reason that I know of; he simply
20 stated that he wouldn't receive any more.

Q (Paper shown witness.) Here is a letter dated August 21; by looking at that letter can you tell whether the interview was after or before the writing of this last letter?

A I don't know whether this letter was written previous or after the interview.

Q (Reading letter from Blackburn to Reilly, dated August 21, 1882.) Do you recollect what the letter of the 14th referred to?

30 A No; I do not, sir.

Q You may state any subsequent interview that you had with him, if you had any other than the one you have already stated?

A No, sir; it was the only time I ever met him.

Q Something is said about a settlement by referring to mutual friends in Newark?

Objected to.

The Court: There may be one point of view in which that will be competent; if that should prove to be the
40 case, you may offer it again.

Q (Reading letter from Reilly to Blackburn, dated August 23, 1882.) It is evident from that letter that you did not call until after the date of his last letter; you saw Mr. Reilly at his factory?

A Yes, sir; at his office.

Q At that time had you been paid for the entire shipments you had furnished?

A I had not; he refused to receive the last shipment.

Q Was that paid for? 10

A That was not paid for by him; that was turned over to my other friends here.

Q That he absolutely refused to pay for or receive?

A Yes, sir.

Q What he did pay for was what had been previously sent?

A Yes, sir; up to that time.

Q You suspended sending, under his directions and his request?

A Yes, sir. 20

Q After the suspension you sent on this car load, which he refused to receive or pay for?

A Yes, sir.

Q All he got, he paid for?

A Yes, sir; I think I sent it on at the expiration of the three weeks.

Q And he got how many car loads altogether?

A I think he received altogether five car loads.

Q He took the five?

A Yes, sir. 30

Q And there were forty-seven due?

A Yes, sir; Mr. Reilly complained of not having invoices; well, I ship largely to the Messrs. Blanchard; it is my custom in shipping to Messrs. Blanchard Bros. & Lane, hardly ever to make an invoice.

Q Was there any change in the market value after the time that you made this contract with Mr. Reilly?

A Yes, sir; in the winter and spring of 1882 there was a short supply of bark, and consequently prices went higher; and the high prices induced a large peel, and 40

consequently prices dropped down; there was a large amount of bark gathered—a large amount of it cut.

Q What was the change in the price from April and the first of May, down to the first of August and September?

A Well, about \$2.50 a ton, I think, sir; \$2.50 to \$3.

Q That diminution in price of tonnage?

A Yes, sir.

Q How long?

10 *A* Well, in January following, I contracted to deliver a year's supply to Messrs. Blanchard Bros. & Lane, at \$16.

Q That is, for the next following year?

A Yes, sir; the bark was offered at even a less price than that.

Q Is there a large supply of bark from Virginia, or is the trade limited to some extent?

A It is limited to some extent.

Q Not many people in it?

20 *A* No, sir.

Q How many dealers are there in bark there?

A Well, there are several small operators.

Q Are you the largest?

A I guess I am one of the largest—myself and Heale, at Lynchburg.

Q Is there any peculiarity about Virginia bark?

A Virginia bark sells for a higher price than Pennsylvania bark and Jersey bark.

Q Any difference in the quantity of pounds in a
30 ton; when you speak of a ton what do you mean?

A I mean 2,240 pounds; I think the Jersey bark is sold at 2,000 pounds; there is some difference in the price.

Q There is some difference in the price, aside from the fact that the tons differ in pounds?

A Yes, sir.

Q Then you say the average falling off during the year, was what?

A Well, in January, I sold to Messrs. Blanchard at
40 \$16, a year's supply.

Q What was the market value then by the ton or by the car load, without regard to the year's supply ahead?

Objected to.

Q You speak of prices in Newark?

A Yes, sir; well, at about that time, Mr. Gay, who is the bark man at Mr. Blanchard's—

Objected to as hearsay.

My own knowledge is that Virginia had been offered here in January, 1883, at \$15 a ton.

10

Q What was it from the 21st of August, down to the 1st of January?

A Well, I can't safely state.

Q Had there been any change?

A The price was lower, of course.

Q The price was lower which way; do you know what the price of bark in Newark was in August—Virginia bark?

A Well, I had sold bark—as I stated before—I had been selling bark to Blanchard Bros. & Lane, since 1876, 20 and Messrs. S. Halsey & Son; I sold to Blanchard at \$17.50, in January, 1882, and to Halsey & Son, in January, 1882.

Q That was on a contract for a year?

A Yes, sir.

Q You made this contract with him for \$18, in the spring?

A Yes, sir.

Q Now, after that, state if there was any change in the spring—what the current price of bark was in the city—not under contracts, but delivered here and purchased by the car load?

30

A Well, there isn't very much Virginia bark marketed here; and I don't know that any bark, or if any, it is a very small quantity, that is sent here and thrown on the market.

Q Was there a general falling off in the bark market?

Objected to.

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The Court: I don't think it is necessary to pass upon that question at all; this gentleman can say what fluctuations there were in other barks.

Cross-examination, by defendant's counsel:

Q You said there was a falling off of from \$2.50 to \$3.00 a ton in the price of bark?

A Yes, sir.

Q What bark do you refer to?

10 *A* I refer to Virginia bark and to Jersey bark.

Q Do you refer to both?

A No, sir; I mean this—that, from the information I got when I came on here, that Jersey bark was worth much less than it was offered at in the spring.

Q In what time?

A I think it was in August; I am not sure.

Q Now you are speaking of Jersey bark?

A I am speaking of Jersey bark; yes, sir.

20 *Q* I am asking you what you meant when you said that there was a falling off of from \$2.50 to \$3.00 a ton in the price of bark; do you refer to Jersey bark or Virginia bark?

A I referred to Virginia bark; I sold to Blanchard Bros. & Lane, and I sold to Halsey & Son at \$16 a ton; other Virginia bark was offered here—

Q Do you know of your own knowledge, not what other people told you?

A Well, I only know this, that a Lynchburg man stated to me—

30 *Q* That won't do; now, I want to know whether, when you said there was a falling off in the price of bark from \$2.50 to \$3.00 a ton, what you referred to was your contracts with Blanchard Bros. & Lane and with S. Halsey & Son, made in January, 1883?

Witness: Let me understand you.

By direction of the Court, the question is read by the stenographer.

A Yes, and to the Philadelphia market.

Q Did you sell bark in Philadelphia?

40 *A* I have sold large quantities there.

Q Did you sell there during the years 1882 and 1883?

A No; but I had offers from Philadelphia.

Q When did you have offers from Philadelphia men?

A Well, during 1882.

Q What time in 1882?

A I think, as well as I can recollect, along in the fall.

Q How many offers did you have? 10

A I had only one offer?

Q Then, when you fix your price by reference to the Philadelphia market as well as to the Newark market, you refer to one offer you had from Philadelphia during the fall of 1882?

A Yes, sir.

Q And that is the only criterion you go by?

A Yes, sir.

Q Did you accept that offer?

A No, sir. 20

Q How many times were you in Newark between the first of June, 1882, and the first of January, 1883?

A I am not quite sure, but I think I was here only once.

Q And that was when?

A I can't recollect.

Q Was it not in July or August?

A I think, possibly, it was in the latter part of August; I am not sure.

Q Did you at that time sell any bark? 30

A I am not sure that I did.

Q Did you sell any bark between the first of July, 1882, and the first of January, 1883?

A Well, I was shipping regularly to S. Halsey & Son.

Q Not what you delivered under contracts made before that time, but whether you effected any sales?

A I am not sure.

Q Do you keep books?

A Yes, sir. 40

Q Have you those books here ?

A No, sir.

Q Where are they ?

A They are at Hardwicksville.

Q Would they show the rates at which you had sold your bark ?

A They would show the rates at which I sold Blanchard Bros., and Halsey & Son.

10 Q Would they show the rates at which you sold to other customers ?

A I am not sure.

Q Why didn't you bring those books with you ?

A I didn't consider that it had any bearing on this case.

Q You say you have dealt with Blanchard Bros. & Lane since 1876 ?

A Yes, sir.

Q You have been selling them Virginia oak bark ?

A Yes, sir.

20 Q And in January, 1882, you made a contract by which you sold them bark at the rate of \$17.50 a ton ?

A Yes, sir.

Q How much bark did you sell them during that year ?

A Well, I sold them considerable.

Q As near as you can tell ?

A Quite a big lot.

Q Can't you come any nearer to it than that ?

A Well, yes ; I had a contract for 600 tons at \$17.50.

30 Q With S. Halsey & Son ?

A No, sir ; with Blanchard Bros. & Lane.

Q That was to be delivered during the year 1882 ?

A Yes, sir.

Q Did you continue to deliver that bark all through the year 1882.

A I think so ; I have delivered to Blanchard Bros. & Lane as they wanted it.

40 Q Didn't you make them some reduction from the rate that you would have made to other firms because of

their being such good customers, and taking so large an amount of bark?

Objected to as immaterial.

The Court: It is competent to show that the prices he was getting from Blanchard & Co. were not a fair indication of the market price.

By direction of the Court the question was read by the stenographer.

A After filling the contract for 600 tons, I shipped 10 them at \$17.

Q I didn't ask you that question; didn't you sell to Blanchard, Bro. & Lane a little below your usual rate, because they bought of you so largely and were such good customers?

A I made a contract in—

Q Answer the question, yes, or no; did you take a less price for your bark of them than you would take from others?

A Well, I made the price less to them and to S. 20 Halsey & Son than I sold to Mr. Reilly.

Q My question is whether you didn't sell them at reduced rates because they were such good customers?

A Well, I may have been induced to sell to them at a less price than I would sell to a small dealer, because they have given me their trade since 1876, and S. Halsey & Son, since 1878, regularly.

Q And that was the same in the case of S. Halsey & Son, was it not?

A Yes, sir. 30

Q How long have you had their custom?

A Since 1878.

Q Now, when did you make that contract with Blanchard, Bro. & Lane?

A I think it was made in January, 1882, sir.

Q What time in January, 1882?

A Well, about the first.

Q Don't you remember any more closely than that?

A Well, I think about the seventh or eighth.

Q Are you sure? 40

A It was during that week.

Q How did you make it—personally or by correspondence?

Objected to as immaterial. Excluded.

Q What is the date of your contract?

A The seventh of January, I think, sir.

Q What year?

A 1882.

Q I am speaking of your subsequent contract?

10 A I am not sure about the subsequent contract; I know that Mr. Halsey, when I came on in January, was in Washington; and we talked the matter over, and I simply continued to ship him as I had done before, at \$16.

Q And the same with Blanchard, Bro. & Lane?

A Yes, sir.

Q But in the previous year your contracts had been at \$17.50?

A Yes, sir.

20 Q The letter to which your letter of June 21, 1882, was an answer, you say you haven't got—where is it?

A I don't know where it is—I take it you have copies.

Q No; we haven't; you speak of having received a letter, in your letter of June 21—"your favor of the 19th inst., received"?

A I don't suppose that was preserved.

Q Don't you preserve the letters you receive?

A Some I do and some I do not.

30 Q And so with reference to the postal card that is missing—where is that?

A There are two postal cards—[indicating.]

Q There is another one—have you got that?

A No, sir; all that I have is there.

Q In your letter of May 5, you refer to your bark as having been in use by Blanchard, Bro. & Lane?

A Yes, sir.

Q I want to know how your bark compares with other Virginia bark—is it as good?

40 Objected to as immaterial.

Q Who was present at the conversation between you and Mr. Reilly?

A When I was in, two gentlemen from Cincinnati came in at the same time.

Q Anybody else?

A I think Mr. Reilly's clerk was in—I am not sure.

Q This gentleman, sitting here?—[indicating.]

A I am sure that I don't know his face; it may have been him, but I think that Mr. Reilly's clerk was in.

10

MATTHEW T. GAY, sworn on behalf of the plaintiff,
as to value

JOHN D. HARRISON, sworn on behalf of the plaintiff,
as to value.

JOHN PERRY, sworn on behalf of plaintiff, as to value.

JOHN R. BLACKBURN, plaintiff, recalled in his own
behalf: 20

Direct examination, by plaintiff's counsel:

Q Can bark prepared for the market be held without delivery, without loss?

A No, sir; it cannot—it loses in weight.

Objected to as immaterial.

Q In preparation for this contract, did you lay in a supply?

A Yes, sir. 30

Q Were you able to dispose of it?

A No, sir; I had to sell it in the stick.

Q What do you mean by that?

A Unground.

Q At what place?

A In Virginia.

Q Did that occasion a loss?

A Yes, sir.

Q Will you explain that to the jury?

A Yes, sir; I take bark from customers; I have 40

stores and take in bark ; and then I have men go into the woods and peel it ; in consequence of having made this contract with Mr. Reilly, I peeled and bought a larger quantity of bark than I otherwise would have done ; and failing to get this bark off—failing to find a market for the ground bark, I had to sell it in the stick.

Q Is this bark ground ?

A Yes, sir.

Q Then your contract called for ground bark ?

10 A Yes, sir.

Q That was understood between you ?

A Yes, sir.

Q You grind it and send it on in bags ?

A Yes, sir ; the profit I make is the difference between the stick bark and—

Q Did that method of sale entail an additional loss ?

A Of course.

Q For what reason ?

A Because the price down there is lower, generally,
20 later on ; stick bark is worth less along in the fall than it is during the summer months, when it is first taken from the trees.

Q Is there any actual price for what you call stick bark ; does it have a fixed value ?

A Well, yes.

Q At what rate ?

A Well, the market depends upon the supply and demand.

Q During that year, do you recollect anything about
30 it ?

A Well, yes ; we sell it down there, not by the ton, but by the cord, and the usual price is about \$9 a cord ; and considerable of this bark was sold at \$8.

Q A cord will make how much ?

A Well, it varies ; it depends upon the bark altogether.

Q Can you tell what amount of ground bark you would get out of a cord on the average ?

A It depends on whether it is thick or thin bark ;
40 some is very thin and light, and doesn't weigh at all ; and

then we have thick bark that is heavy, and gets from 2,000, I might say 2,700 to the cord.

Q Pounds?

A Yes, sir; to the cord.

Q Is that an ordinary cord or a double cord; how do you rank that which you call a cord?

A Well, that is more than 128 feet.

Q Wood wouldn't weigh as much as that, would it?

A Yes, sir; I think wood is estimated at 4,000.

Q Did that method of sale entail additional loss? 10

A Of course.

Q Can you tell to what extent?

Defendant's counsel: There is no loss shown if there was only a fall of \$1.00 a ton in Virginia.

The Court: He is entitled to the benefit of the contract; if you regard this evidence as a claim for additional damages over and above that which the law furnishes, I will exclude this evidence; because the transactions which give rise to suits of this character, 20 and consequently give rise to the construction and establishment of a rule of damages, are very considerable, and it will be almost impossible to conduct the traffic in different articles that are made matters of merchandise, and to adjust the losses and the damages arising from a breach of a contract, unless there was some general rule that should be applied to all cases where there has been an actual loss, and to cases where the loss arose simply from the failure to realize the advantage of the contract; and consequently the law has adopted a rule of damages 30 applied to all these cases. For instance, suppose it is to manufacture an article, and deliver that article during the whole of a year every month, month by month; there is a breach of contract if he failed to supply them every month, and he would have them thrown back upon his hands. The result would be ruinous in both points of view; a man might not have the means of procuring the capital to make an outlay that would provide all these articles from month to month. There would be a disastrous loss upon the other side if the article 40

happened to be worthless except to the man who ordered it; and the law, therefore, adopts a rule that where there is a refusal to receive, that amounts to a breach of the contract, and that the vendor shall be placed in the same position in which he would have been if the contract had been performed; and consequently the measure of damages would be the difference between what he would have got for the article if it had been taken under the contract, and what he would have got if he had had the article and had been compelled to sell it from day to day.

10 *Q* You say that you were obliged to sell some of this bark in the stick; how many cords of bark did you sell in the stick in the summer of 1882?

Witness; In the fall, you mean?

Defendant's counsel: In the summer or fall, whenever you sold it?

A I can't say, sir; I haven't any date with me to show the exact number.

Q Can't you give us any idea?

A Well, I think about 350 cords.

Q Did you sell any bark in the stick in the summer or fall of 1881?

Excluded.

Q Don't you always have to sell bark in the stick after the active part of the season is over?

A No, sir.

Q Don't you do it very often?

30

Excluded.

A No, sir.

Q How do you purchase this bark; do you purchase it absolutely in the beginning of the season?

A I purchase it in the woods, and peel it with my own men, and then buy it of other parties already peeled.

Q What proportion do you peel yourself, and what proportion do you buy of other parties?

40 *A* I aim to peel the most of it myself.

Q Well, I want to know what you did in 1882; did you peel the greater part of it yourself, or buy the greater part of it from other parties?

A I peeled the greater part of it myself.

Q What proportion did you peel yourself?

A It would be a hard matter for me to come very near to it.

Q Two-thirds?

A Yes, sir; more than three-quarters.

Q How many tons of bark did you sell during the 10 year?

A Well, I have contracted to furnish this year—

Q No; I am speaking now—

A Well, I have sold over 5,000 tons this year.

Q How many tons did you sell in 1883?

A Not so much.

Q About how much?

A About 4,000 tons.

Q And in 1882?

Witness: Including this contract?

20

Defendant's counsel: Yes.

A About 3,000 tons.

Q And in 1881?

A I can't say.

Q As much, or less?

A Less, I think.

Q You sell it, you say, in Newark and Baltimore, and you also ship it abroad?

A Yes, sir.

30

Q When did you buy your bark from other parties, in 1882?

Objected to as immaterial.

A Well, all along from January till the peeling season was nearly over.

Q When was that peeling season over?

A About the first of June.

Q Do you grind up the bark which is peeled that year, for sale in that year, or do you keep it a year?

A I keep it.

40

Q When you buy bark of other parties, do you buy it out and out?

A Yes, sir.

Q Don't you reserve the privilege of taking it as occasion may require?

A No, sir; I buy it out and out.

Q Don't you buy on commission, to sell for other parties?

A No, sir.

10 Q Do I understand you to say that the bark peeled this year isn't sold till next year?

A The bark I now peel I furnish to my customers this year and the next year; it is sent as soon as it is fit.

Q How long is that?

A It depends upon the weather, altogether.

Q Well, in good weather?

A I have ground it within a month.

Q Of the time it is peeled?

A Yes, sir.

20 Q And you stack it and go on and peel then until the next year?

A Yes, sir.

Q Why didn't you grind this bark you had bought in 1882, in anticipation of this contract and use it for the next year?

A Because I couldn't replace it; because I had at that time as much bark as my customers would receive that year.

30 Q Didn't you expect to sell any the next year?

A Of course.

Q You say you grind during the whole year for the purpose of supplying your customers the next year.

A No, sir; I didn't say that; I peel this spring for the purpose of supplying my customers through this year, and the first part of the next year.

Q Down to the next peeling time?

A Yes, sir.

40 Q Well, why didn't you grind up this bark that you say you had too much of, for the purpose of supplying

the customers that you would have in the early part of the next year, and in the latter part of the year 1882?

A I only grind it as fast as my customers want it, and I contract to sell them bark peeled during this year; for instance, I contract to sell Blanchard, Bro. & Lane, bark peeled during 1884.

Q When did you sell this bark in the stick?

A Along in the latter part—well, the fall and winter of 1882.

Q Then you kept some of it on hand until the 10 winter?

A Yes, sir.

Q When did you commence to buy for the next year?

A I commenced to buy—I buy the bark privilege, you understand, in the woods.

Q What is that bark privilege?

A That is the right—the barking rights.

Plaintiff rests.

20

PATRICK REILLY, defendant, sworn in his own behalf.

Direct examination, by defendant's counsel:

Q You are the defendant in this case?

A I believe so, sir.

Q And a member of the present grand jury, I believe.

30

A Yes, sir.

Q What is your business?

A I am a manufacturer of patent and enameled leather.

Q Where do you carry on business?

A Corner of Lexington and Ferry, part, and another part on the river at the foot of Lexington.

Q Is your business large, or otherwise?

A Well, some consider it large, and others don't consider it large.

40

Q About how many sides a year?

A About 726 a day; that is my business.

Q How many men do you employ?

A That my bookkeeper, I think, would be better able to answer; from 100 to 150, perhaps, more or less.

Q How many buildings do you have down there?

A My tannery is 50 by 150; the building across the way from where my office is, is 30 by 100, three stories high.

16 Q How many vats have you?

A I think in all it is 105.

Q You had this correspondence which has been read, with the plaintiff, Mr. Blackburn?

A Yes, sir.

Q The bark was ordered, as appears by that correspondence?

A Yes, sir, I think so.

Q (Book shown to witness.) I want to show you this book for the purpose of showing when the bark came—
20 just as a memorandum. When did the first lot of bark come?

A Well, by this book it says—

Q No, by your memory?

A I couldn't tell you; it came May 23d.

Q The second lot?

A May 29.

Q Next?

A June 6.

Q Next?

30 A I think it is the 15th—"by check," and June 18.

Q Those represent, according to this book, the freight paid to the Pennsylvania R. R. Co.?

A I suppose so— yes, sir.

Q And you paid the freight at the time of the arrival of the cars?

A Well, sometimes the Pennsylvania Railroad Co. clerks—I suppose when the car arrives, present their bill—sometimes we don't get the bark for a week or two afterwards.

Q The time indicated on that ledger represents the dates of the payment of the freight charges?

A Yes, sir.

By the Court:

Q Can you say how many tons those cars averaged?

A Well, I think as a rule they average about 11 to 11½ tons.

By defendant's counsel:

Q The last freight item paid was on June 18, 1882; 10
now what became of the bark when it was received by you?

A It was put in a loft that is over my tannery.

Q Was it received by you immediately after you had been notified by the Pennsylvania Railroad Co. that it was there?

A Well, I couldn't say when it was received, because sometimes we get the freight bill to pay for the bark, when it is a week or two afterwards when we receive the bark. 20

Q When the bark comes you get notice?

A Yes, sir.

Q And you removed it from the depot soon after you got notice?

A As soon as the freight agent placed the cars so that our wagons could get at it.

Q Sometimes it would be a week or two?

A Sometimes on the Pennsylvania Railroad.

Q You stored this bark where?

A In the loft over the tannery. 30

Q At the time you were buying this bark did you buy from others also?

A Yes, sir.

Q Who were they?

A Of Hall, De Long & Co. or J. De Long, or De Long & Hall, I forget which; and from Rink & Son.

Q Where are those two firms?

A In Pennsylvania.

Q Anybody else?

A From McAtee Brothers. 40

Q Where do they come from?

A From Virginia.

Q Did you buy of them at the same time that you were buying of Mr. Blackburn?

A Yes, sir.

Q How did you happen to make so many purchases?

A Well, during the months of March and April, I found it very difficult to get bark, and I started down to Pennsylvania in search of bark, and wherever I could
 10 purchase I done it, because it is necessary that we always should have a supply of bark on hand to take care of the leather.

Q Did you obtain from these various sources as much or more bark than you needed?

A Oh, yes; I bought so as to guard against coming short again; I bought very extensively of those parties; more than I usually do.

Q Did you buy more than you usually use in your business?

20 A Oh, yes.

Q What did you do with the bark you bought?

A I stored it.

Q Then you commenced to use it?

A Yes, sir.

Q When did you begin to use Blackburn's bark?

A Well, it was after I used the other parties' bark.

Q About what time was it?

A I think it was sometime in July.

Q With what result?

30 A Well, very unfavorable; when they commenced using Mr. Blackburn's bark in my tannery—(my tannery is not quite quarter of a mile a way from the patent leather factory, and currying shop)—my foreman reported to me that the bark wasn't good; I went down myself and examined the bark; I found the bark was musty and damp.

Q What else?

A Then I got there the next day to put it in and try leaching it, so that I could try the strength of the liquor
 40 that came off of the leach.

Q How do you test the liquor ?

A By a barkometer, so that there would be no doubt about it ; that is one of them—[shown.]

Q Explain to the jury how you use that ?

A The top part is when it is watered—when that settles down in the water there—[illustrating.]

Q It is laid in the bottom ?

A Yes, sir ; then as you strengthen the water up for days, these raise up ; that is, by extracting the strength out of bark or by taking the extract of bark ; we 10 have got another test by what we called japonica.

Q As the specific gravity of the liquid increases, this naturally rises ?

A Yes, sir.

Q You tested this liquid, you say, with that bark ?

A Yes, sir.

Q Suppose you take Virginia bark and put it in the leach, and you draw off the liquid after it has been there a proper time, what will the strength of the liquor obtained from good Virginia bark be? 20

A Good liquor from what we call good Virginia bark, which is considered the best bark we have got, there is more strength to it ; we have always found it so when we have got the real bark.

Q And how much difference ?

A Well, from 15 degrees to 16 degrees.

Q How much did you find this to be ?

A To be candid, I think it was 6, that I examined.

Q Will 6 degrees give a liquor of sufficient strength to tan leather? 30

A Well, in its infancy it might, but not when leather gets any way advanced in tannage ; then it wants a stronger liquor.

Q Could you obtain from Blackburn's bark a liquor of the requisite degree of strength to tan the leather in its later stages ?

A No ; without I strengthened it up with some other thing.

Q Were you obliged to do anything with this liquor ?

A I think we had to strengthen it up with japonica. 40

Q Then you say that you found the bark was musty; did you give it a careful examination?

A I did; I looked through his bark and had them try the strength, and found it so all along; when it is musty the strength leaves it, and it is apt to sour liquors, which is very injurious to leather.

Q Would musty bark be a safe thing to use in your business?

A Not in hot weather; I wouldn't want to use it at
10 all if I could help it; we are compelled to do a great many things.

Q Did it have an effect on the leather you tanned?

A I couldn't answer that.

Q Was that leather as good as the other leather you had been in the habit of making?

A I wouldn't wish to say anything about that; we may have had some of our customers finding fault; whether it was the fault of that bark or not, I didn't know; I didn't know of any other way except that it
20 was musty, and made my liquor sour.

Q How many car loads of bark did you use in your business during a month, at that time?

A Well, perhaps six—five or six a month.

Q Will you describe very shortly the process of putting this bark in soak, so that you may have the liquor for use?

A Yes, sir; if you will please give me a glass I will describe it to these gentlemen. [Glass tumbler handed to witness.] I have what we call in the trade, leaches;
30 that is understood by the trade; they are large tanks; I think my tanks are from ten to twelve feet, and seven and one-half feet deep; here we have got what we call a false bottom, with boards laid down and holes in them, so as that the liquid will float in the bottom, and in running out will not be stopped in the pipe that it runs out through.

Q How many of these leaches have you?

A Ten.

Q Is it in them you make your liquor?

40 *A* Yes, sir.

Q Hot or cold?

A Cold, until we have nearly all the strength out of the bark; then we boil it to get all the strength out of it.

Q How are your leaches arranged?

A There is five on each side adjoining each other.

Q And the pipe flows through these different leaches?

A Yes, sir.

Q Go on and state, in a very general way, how you renew these leaches? 10

A We make what we call a fresh leach every day; that fresh leach is intended for the advanced packs in the vats, that had gone to the packs further advanced; and then the one made the day before is for the one following, and then on till the ones we have just got.

Q So that the leather that is in the completest stage of process is used in the strongest liquor?

A Yes, sir.

Q And is used in the freshest liquor?

A Yes, sir. 20

Q And after it is used for that purpose, you use this liquor that is weakened for leather that is not quite so much tanned?

A Exactly; well, I will tell you; the process of tanning leather is something on the same principle as a man being sick in bed for a month or two; he is very much reduced, and, as a rule, when he begins to recover the doctor gives him gruel, or some light soup or another, until he gets strength enough to eat good food, so as to strengthen him. 30

Q Is there any difficulty in distinguishing the packs?

A O, no; the name is on them.

Q When you make this test with the barkometer, on which one of these lots do you make it?

A On the advanced one—the new ones that is made to-day.

Q Where the fresh liquor is?

A Yes, sir.

Q There is where you made the test in this case?

A Yes, sir. 40

Q This is one of Mr. Blackburn's packs?—[shown.]

A Yes, sir.

Q It has his name on it, hasn't it?

A Yes, sir.

Q In one of you letters, written, I think, in the latter part of June—you sent a telegram June 14th, requesting Mr. Blackburn to stop shipping; what was the accident that you referred to in that telegram?

10 A Well, I don't know as there was really an accident, but I had so much bark at that time that I had to brace my floor up, and store it outside and cover it with boards and slabs; what we call the junior split—that is taken off the hide—I had to take up one of my lofts in the carriers' shop and store it there; and the structure commenced to give way, and I didn't want to get any more on hand.

Q So you sent that telegram?

A Yes, sir.

20 Q What did you do when you found that this bark was unfit for your purposes?

A Why, we used it.

Q You had to add japonica?

A Well, we had to strengthen it up with japonica, or something else; that is, for the advanced packs.

Q Did you write to him, or notify him in any way that this bark was poor?

A Well, he promised to come on and see us.

Q Why didn't you notify him?

30 A Because I thought the less writing in this matter the better till he came on, and I would talk to him myself.

Q Did he come on?

A Yes, sir.

Q Did you have any conversation?

A Yes, sir.

Q When was that?

A The latter part of July or the first of August; I couldn't say, exactly.

Q What was the conversation?

40 A When he came in I didn't know who he was; I

think there was two or three gentlemen there from Cincinnati to buy leather ; as a rule we generally attend to those people first ; and those who come to sell, who can stay, we leave to the last ; well, " wait," he says, " till you are through ;" after we got through, he says, " I want to talk to you ;" we both went into the private office and he says, " what are you going to do about this bark ?" Says I, " I can't pay you no \$18 for an inferior article—I would be almost afraid to use it ;" " I have got your contract," he says, " and you have got to take it ;" 10
 I says, " it is strange if I have ; I can't send out leather or goods that is not merchantable and make people take them, and I don't see why I could be compelled to take yours that isn't merchantable ;" he says, " well, I have got your contract ; you look out for yourself ; I will fix you ;" I says, " I have always been trying to do that and I guess I can do that now." That is about the conversation that took place between us.

Q Did you take any more bark ?

A No, sir.

20

Q He sent you some more ?

A Yes, sir ; but when we found how his bark was, and the way the man acted, we thought we would quit the man and have nothing to do with him.

Q And you refused to take it ?

A Yes, sir.

Q You say there was a report made to you that this bark was not yielding the proper sort of liquor—who made the report ?

30

A My foreman.

Q What was his name ?

A His name was, I think, Julius Rensse.

Q Where is he now ?

A He is West, I believe.

Q Do you know in what part of the West ?

A I tried to find out, where he was from several men in my tan-yard, but none of them are able to tell me where he is.

Q How long has he been gone ?

40

A He left shortly after this; him and his whole family went West.

Q Did you ever make any subsequent bargain with Blackburn in regard to this matter?

A Yes, sir.

Q In writing?

A Yes, sir.

Q [Paper shown to witness.] Is that it?

A Yes, sir; that is my signature.

10 Q And the signature of Mr. Blackburn, also?

A It is supposed to be—I don't know.

Q Dated March 27, 1883?

A Yes, sir.

Defendant's counsel offers the paper in evidence for the purpose of showing that the parties rescinded the agreement at issue, and substituted in its stead a new agreement.

Objected to on the ground that the offer has already been overruled on demurrer.

20

The Court: What else do you offer to show in connection with this paper?

Defendant's counsel: I offer to show that at the time that this agreement was delivered to us, a bill of costs was made out by the plaintiff's counsel; that that bill of costs is erroneous—very considerably exceeding the lawful costs; that as soon as that bill of costs was tendered to us, or very soon afterwards, we called attention to it; that on their failure to modify it or change it in any way,
30 we tendered them what we considered to be more than the costs actually due, and that we have always been ready, as far as the other parts of the agreement are concerned, to perform them on our part.

The Court: And nothing has been done under that agreement?

Defendant's counsel: Nothing has been done under the agreement except that the costs were prepared but never taxed, and we disputed the amount, but tendered
40 the correct amount; the agreement was delivered on the

4th of April, 1883, and the payment was tendered on the 20th or 21st of April, making an interval of only seventeen days.

Plaintiff's counsel: Hadn't you notified us that you wouldn't fulfill at that time on your part?

Defendant's counsel: Yes; the agreement provides that the shipments of bark shall begin on the first of April, or within ten days thereafter; we waited until the twenty-first, I think, or twentieth, I have forgotten which, and then we notified the plaintiff that inasmuch as he had failed to deliver within the terms of this agreement, we couldn't receive it, and at the same time, I think, we tendered the costs; we offer this agreement in evidence. 10

Plaintiff's counsel renews his objection.

The Court: I don't think it is competent evidence; it is an effort made to compromise a suit—this suit, and it is an effort made to compromise pending the suit; and the agreement provides specially that unless that agreement is carried out it shall not affect the prosecution of this cause; the agreement had annexed a certain condition on the part of the defendant, and another condition on the part of the plaintiff; the condition on the part of the defendant being precedent, and that was that he was to pay the costs on the execution of the agreement, and the plaintiff was to make the first delivery of the bark on the first of April; no tender was made of the amount of the costs, and no effort made to obtain the taxation of the costs until the twenty-first of April, when the money was tendered, and with that tender, notice on the part of this defendant of his unwillingness to go on with that agreement; it is very manifest from the fact itself that one of two results follow—either that the agreement became null because of the failure of the defendant to comply with this condition on the payment of the costs, or, if that condition could be dispensed with in its literal performance by the tender of the amount of the costs actually due, which was made on the twenty-first of April, that then the agreement was repudiated by the notice that was given at that time; this matter was 30 40

before me as a question of pleading, and I excluded the defence on these grounds, substantially, I think, as I have stated them; I still think that that agreement is no defence to this suit.

To which ruling and decision of the Court defendant's counsel excepts, on the ground that the testimony is competent testimony for defendant, and prays a bill of exceptions, which is allowed and sealed accordingly.

10 Q You are acquainted with the prices of Virginia bark, are you not?

A Yes, sir.

Q How long have you been engaged in tanning?

A Since 1879; before that Mr. Lindburg used to tan for me; I commenced my own tanning in 1879, I think.

Q And how long have you been engaged in the leather business; a great many years, haven't you?

A Yes, sir.

20 Q What was the market price of Virginia bark in 1882, between the first of May and the first of January, 1883?

A I think our books will show that we have been paying \$17 for Virginia bark.

Q During all that time?

A I am not positive, but I think that is about it.

Q Have you any recollection of the price of bark during that season, independent of your books?

A Well, that was about the price, I think, that was ruling.

30

Cross-examination, by plaintiff's counsel:

Q Did bark take a fall in July, 1882?

A I couldn't answer that question.

Q You don't know?

A No.

Q Do you know, in 1882, whether it was down?

A I think bark was pretty high in 1882.

Q What time of the year?

A I think all through the year.

40 Q Just as high in July as it was in May?

A I think it was more plentiful in July than it was in May.

Q Was it as high in the market?

A I had to pay as much for it.

Q To whom did you pay as much for it?

A McAtee Brothers; the only one in Virginia that I was buying of.

Q How much did you buy of McAtee Brothers?

A I have bought from them three or four years.

Q Oh, no; in July, 1882, did you buy from them? 10

A I don't know; my bookkeeper will answer that.

Q Do you know?

A No, sir; they have been sending me all along; whether they shipped in July, I don't know.

Q When did you make your contract with them?

A I didn't make no contract with them.

Q What were you paying them?

A \$17; we told them to ship us so much bark.

Q When did you do that?

A It might be in the beginning of the year. 20

Q Did you make any contract with them, or get any bark from them on any new contract in July, 1882?

A I don't know that we got any in July, 1882.

Q Did you buy any Jersey bark that year?

A I don't think we bought any Jersey bark at all.

Q Any Pennsylvania bark?

A Yes, sir.

Q What part of Pennsylvania?

A Well, around Milltown.

Q Is that in the northern or southern part? 30

A I don't know.

Q Is there any difference between the northern and southern bark?

A Well, they say the bark that is bordering on Virginia is the best.

Q Do you know what you paid for Virginia bark in 1882?

A I think we were paying \$15.

Q Do you know?

- A No; well, we have got the means here of telling you.
- Q I am asking for your memory?
- A Well, as a rule, I don't look after these little details.
- Q Do you know whether bark generally fell off after May, 1882, and during the months of July and August?
- A I couldn't answer that; I don't know.
- Q You made this contract with Mr. Blackburn?
- A I think not.
- 10 Q It was made for you?
- A Well, will you allow me to repeat it, how I think it was done?
- Q It was done by correspondence?
- A Yes.
- Q And the correspondence was all right?
- A My bookkeeper can tell the way the goods were ordered; they wasn't ordered in a business way.
- Q Did you make a contract with him?
- A We wrote to him.
- 20 Q Did you deny that there was any contract between you and Mr. Blackburn?
- A I don't know whether I have or not; where would I deny it?
- Q Did you deny it?
- A In the first place, Mr. Walling came to see me; I think it was about that.
- Q Did you deny to Mr. Blackburn or Mr. Blackburn's attorney that you made a contract?
- A I, myself, personally, did not.
- 30 Q Did you authorize others to do it for you?
- A Not to make a contract; I don't think I did.
- Q Did you deny having made a contract?
- A I didn't know there was a contract till I seen the correspondence.
- Q Did you deny that there was a contract made?
- A I don't know whether I have or not.
- Q Didn't you give that as a reason why you wouldn't take the bark—that you hadn't made a contract?
- A I don't know the reason I gave; I may have said
- 40 a great many things.

Q Some of this bark was received?

A Yes.

Q And paid for?

A Yes.

Q Did you know about it?

A I have to sign all checks.

Q At the time when you paid for it, had you used any part of it?

A I don't think we had.

Q Do you know?

10

A I don't think we had, because we used the other bark that came in first.

Q Can you tell when you first used any part of the bark that came from Blackburn?

A When they began to complain about it, I did in the latter part of July or first of August.

Q Are you sure about the date?

A I don't think I took a note of it, but I know the bark was paid for before we commenced using it.

Q You think the first time you used any was in the latter part of July or the first part of August?

20

A I think it was thereabout.

Q Did you do anything thereupon on finding out that the bark wasn't good?

A I went and examined it.

Q Did you send him any word?

A No; we waited till he came there.

Q You never said a word or wrote a word?

A We thought we would do it by word of mouth better than by letter.

30

Q You did not by letter?

A Not to my knowledge.

Q Was Mr. Blackburn at your place at any time during the month of July?

A I couldn't say the time; he was there, I know, either in July or August.

Q Do you know when it was?

A I couldn't say the exact time; we ain't much lawyers down there; we don't take note of all these things.

40

Q You didn't know it until you had tested it?

A No; not till we came to see and examine it.

Q [Paper shown to witness.] Will you read that letter?

A [After reading.] Well, I thought that we would wait—

Q Had you tested the bark before that?

A I couldn't say.

Q What is your recollection about it?

10 A I couldn't say.

Q Refreshing your memory from that letter, what do you say?

A That wouldn't refresh it at all.

Q You don't know?

A No.

Q If you had tested it—

A We would write more positive than that, I think.

Q So you are satisfied from the tenor of that letter, that the test was made afterwards?

20 A I think it must have been, because when we write we try to write intelligently, sometimes.

Q You hadn't tested the bark, and didn't know but what it was perfectly good?

A Yes, sir.

Q Then why did you refuse to take the bark he sent?

A I don't know what happened, but he commenced shipping before we needed it.

Q You had agreed to take one car load a week, hadn't you?

30 A Yes.

Q Had he sent you any faster than that?

A Well, we were in a position that we couldn't take it at that time, until we would be ready to take it.

Q Although you agreed to take it at the rate of one car load a week?

A By the correspondence I seen afterwards, I saw that it was so; I didn't know anything about them letters then.

40 Q What did you mean by saying this bark was at the depot, subject to his disposal?

A Because we wouldn't take it.

Q Because it wasn't good?

A I don't know; because we had no place to put it.

Q [Reading.] "I will not receive this bark at \$18;"
what did you mean by that?

A I don't know.

Q What is the reason you said you wouldn't pay
\$18 a ton for it?

A I don't know.

Q You say that Blackburn came to see you? 10

A Yes, sir.

Q And you took him in your private office?

A I think he invited me inside in the private office;
there was two or three gentlemen there at the time, out-
side of the railing.

Q Was there anybody in your private office, but you
and Blackburn?

A No, sir.

Q And the conversation that you have repeated took
place between you and him alone? 20

A I should suppose so.

Q What did he say?

A He asked me if I was going to take the balance of
the bark; I said, "no, I thought it was an inferior
article, and that I would not pay that price for such an
article as it was;" and he said, "didn't you know you
have a written contract with me?" I said, "suppose
there was; am I obliged to take unmerchanted goods
from you?" Says he, "I think I will compel you to
take it." "Well," I says, "I can't do anything like 30
that; I can't send out goods unless they are merchant-
able." "Well," he says, "I have your written contract,
and I want you to look out for yourself; I will fix
you."

Q You had paid for every car of bark before that?

A Well, we always pay our bills prompt.

Q You had used it all up?

A I know that it wasn't used at the time we paid
for it.

Q At the time he was there had it all been used ?

A I couldn't say.

Q Did you take him down to look at any of this bark ?

A I did not ; I thought he was in rather a hurry ; he wanted to tell me what a contract he had, and that he would compel me to take it ; I told him it was an inferior article.

Q Did you tell him you had tested it ?

10 *A* No, sir ; I told him it was an inferior article ; I think that's about the words I said.

Q Aside from that observation, which you say you made to Mr. Blackburn, did you mention to anybody at any time, in any correspondence or conversation, that the reason you wouldn't take the bark was because it was bad bark ?

A I think that when it was first reported to me about the quality of the bark, that I came out to my book-keeper and says, " Here, you stop them from sending any
20 more bark ; it is not what we are in the habit of getting," or something like that ; " it is an inferior article."

Q When was that ?

A After it was first reported to me that the bark was not up to the standard.

Q Have you ever said to Blackburn or his attorneys, or anybody representing him, that the reason you didn't take the bark of him was because it was bad bark ?

A I did to himself in my office ; I mayn't use them words:

30 *Q* At any other time ?

A I never seen him before or after, I think, until to-day.

Q Subsequently to this, you attempted to settle this suit ?

A Well, yes ; the papers there shows that.

Q Did you, in the course of that negotiation for a settlement, intimate that the bark which you had contracted to take was bad ?

40 *A* I think, if you read that contract, I had certain

things specified there so that I would get bark that would be right.

Q Did you say the reason why you hadn't fulfilled your contract, or did you intimate in any of the interviews that the contract on his part hadn't been fulfilled according to the letter?

A I don't think I have been present at any of those interviews.

Q Did you give anybody to understand that that was the reason? 10

A I think my bookkeeper will answer that question when you put him on the stand.

Q I want to ask you whether in any of those interviews, you have denied that you had made any contract with him?

Witness: You mean I, personally?

Plaintiff's counsel: Yes, sir.

A I don't think I made any contract myself, and you will find that none of that writing belongs to me. 20

Q Will you answer another question: didn't you give that as a reason why you wouldn't fulfill it—that you hadn't made any contract?

A I don't know as I said that.

Re-direct examination, by defendant's counsel:

Q When did you first know of the existence of that postal card, in which it is stated that you would take 52 car loads, one every week?

A When that gentleman [the plaintiff,] told me in my private office; I didn't know it was in existence. 30

Q What gentleman?

A Mr. Blackburn.

Q Had you authorized your bookkeeper to make the contract?

A Not in that way—no, sir.

Objected to. Objection overruled.

Q Then, as I understand, you first learned from Mr. Blackburn, that that order had been given for 52 car loads?

A Yes, sir. 40

Q Did you know it before then?

A No, sir.

Q You say that you tested this bark in the latter part of July or August?

A Yes, sir.

Q You can't fix the date precisely?

A No, sir.

Q You can't fix the date with reference to the letter to which counsel referred?

10 A No, sir.

Q It may have been before and it may have been after?

A Yes, sir.

Re-cross-examination, by plaintiff's counsel:

Q All this correspondence is in the handwriting of your clerk, isn't it?

A I wouldn't swear to that, sir.

Q Will you look and see?

20 A [After examining letters.] Well, sir, it looks very much like his writing, and that certainly is my letter-heads.

Q He was in the habit of conducting correspondence of that kind?

A No, sir; he was with me only about a week or two when this correspondence took place.

Q See if they are all his?

A [After examining.] I think they are.

30

CHARLES L. WOEHNNING, sworn on behalf of defendant:

Direct examination, by defendant's counsel:

Q You are Mr. Reilly's bookkeeper?

A I act in a general capacity.

Q How long have you been such?

A Since April 15th, 1882.

Q How long had you been, with reference to the writing of this correspondence; just state generally; only a few weeks?

40 A Yes, sir; that is all.

Q You were the person who conducted this correspondence?

A I am.

Q Did you write these letters under Mr. Reilly's express directions, or did you write them in your own way, without consulting him as to details?

A I wrote 'em in my own way, that is, the first letter, the very first letter that I wrote to Johnson & Blackburn, I wrote of my own accord.

Q What letter is that that you refer to? 10

A I refer to the question there to Johnson & Blackburn, what they would furnish us chestnut oak bark; I think I have enumerated there—how much they would charge us per ton of 2,240 pounds.

Q Merely to ascertain the price?

A Yes, sir.

Q That is the letter of the third of May?—(shown to witness.)

A Yes, sir.

Q Now, the postal card; who signed that postal card?—(shown to witness.) 20

A I did, sir.

Q Do you remember whether you wrote that under specific instructions, or whether you wrote it conceiving that you had authority to make the order?

A Well, now, really, that is so long ago—I hardly think that Mr. Reilly gave me specific instructions to word that postal as I did.

Q You had general instructions on the subject? 30

A Merely general; that is all, sir.

Q Were you as careful about this correspondence as—

Objected to. Excluded.

Q Was your attention ever called to the condition of this bark furnished by Mr. Blackburn?

A It was, sir.

Q Can you state the date when you made the last payment of Mr. Blackburn's bill?

A I can; July 3d, 1882.

Q At what time was your attention first called to the 40

defects in this bark, with reference to the date of that payment?

A Possibly it may have been the fifteenth; somewhere around the fifteenth of July.

Q It was after the date of the payment?

A Yes, sir.

Q Are you sure of that?

A Yes, sir; I am fairly positive of it.

Q Did you examine the bark yourself?

10 A I did, sir.

Q In connection with Mr. Reilly or separately?

A No, sir; separately.

Q How did you examine it?

A By taking up a handful and smelling of it; I went, in fact, through quite a number of bags.

Q How did you select those bags?

A Well, the only way we can tell which was Blackburn's bark, was by the fact of the bags being marked.

20 Q How did you make the selection in order to make the examination of the quality of the bark?

A Well, I had various bags opened and took handfuls out.

Q How did you find the bark to be?

A Well, it smelt musty—and lumpy, some of it.

Q Did you see the test with the barkometer?

A I did not, sir.

Q Do you remember where this bark of Mr. Blackburn's was stored?

A Yes, sir.

30 Q Where was it stored?

A The majority of that was stored in the upper loft of our tannery, under quite a number of other bags.

Q And you remember when it was used, with reference to the other bags that you had derived from other sources?

A Well, I couldn't give you dates there.

Q You have had no conversation, I suppose, with Mr. Blackburn?

40 A None, whatever; I have never had the pleasure of

meeting the gentleman, other than seeing him in the office.

Q Did you hear what he said in the conversation between him and Mr. Reilly?

A I heard a portion of it.

Q Where were Mr. Reilly and Mr. Blackburn?

A Mr. Reilly was in the private office, with Mr. Blackburn, close to the door; my desk at that time adjoined this door, so that when I stood at my desk I was within, perhaps, two feet and a half of the private office door; the private office has a depth of probably six feet, by a width of possibly ten. 10

Q Go on and tell us what conversation you heard?

A As I entered and took my place at the desk—

Q Did you come there while they were engaged in the conversation?

A They had been in conversation previous to my coming there.

Q Did you see Mr. Blackburn come in the office?

A I think not. 20

Q State what you heard?

A I heard Mr. Reilly distinctly say to him that the bark was not in a merchantable condition; and Mr. Blackburn then referred to the postal card which he held; and said, "I have the contract and I shall hold you; look out for yourself; I will fix you." Those were the words; with that Mr. Blackburn bowed himself out of the office.

Witness testifies further as to value.

Q What other parties were you buying Virginia bark of? 30

A McAtee & Bro., of Front Royal, Virginia.

Q What months did you buy of him?

A We bought of him—I can, by referring to my books. (After examining book.) We received bark from them in April and May, 1882.

Q Was there anybody else?

A There may have been bark come in; I think there was, sir. 40

Q Do you know under what arrangement Mr. Reilly obtained this bark from McAtee?

A In a general way, I do—yes, sir.

Q Did you make a contract with McAtee; I am speaking now, not of the fall of 1882, but of the spring and summer of 1882, when Mr. Reilly was getting the bark at \$16 a ton?

A That was prior to my employment.

10 *Cross-examination*, by plaintiff's counsel:

Q All you know is, that when you came to Mr. Reilly's, he was getting bark from McAtee's?

A Yes, sir; I knew that.

Q Didn't you understand from him that he was getting it on a previous contract he had made with them?

A I did not.

Q It came along regularly at that price, and so continued for most all the season?

A It came along until November 17th.

20 *Q* You conducted this correspondence?

A I did, sir.

Q You wrote this letter of the 29th of July?

A I did, sir.

Q Did you write that on your own responsibility?

A I wrote that in a general way—under general instructions.

Q What do you mean by a general way?

A Mr. Reilly frequently comes in and gives instructions in this wise: "Write to so and so, and tell him we
30 want this; and to so and so, and tell him we don't want that."

Q You had been conducting that correspondence in your general way?

A No, sir; in the way in which I framed the letters.

Q On general instructions?

A That's all.

Q Did you write any one of these letters without Mr. Reilly's knowing that fact, that you were going to write it?

40 *A* Yes, sir.

Q Mr. Reilly was away, sometimes?

A Yes, sir.

Q And while he was away you had to conduct and carry on the correspondence?

A Yes, sir.

Q He was away to Europe that summer, wasn't he?

A He was not; I think he wants to go there.

Q He was away part of the time?

A Rarely.

Q What did you mean by saying that, "I will not 10 receive that bark at \$18 a ton"?

A Mr. Reilly gave me positive information that that bark was no good.

Q That was the reason you wrote it?

A Yes, sir.

Q Why didn't you say so in your letter?

A Had I known it was coming up in this form, perhaps I might have.

Q What you overheard Mr. Blackburn say to Mr. Reilly was, "I have got your contract; I will fix you; 20 look out for me"?

Witness: Look out for me?

Plaintiff's counsel: Umph.

A No, sir.

Q What did he say?

A "Look out for yourself; I will fix you."

Q That was what you heard him say?

A I did, sir.

Q Were you listening to find out what was said 30 between these men?

A I was not.

Q Attending to your own business?

A I was, sir; this was not said in the private office; it was a space two feet from where I was standing, so that I could not help but overhear it.

Q They had come out of the private office, by you?

A Yes, sir.

Q Then the conversation did not take place in the private office?

A Not these final remarks.

Q Was there anything else said in the private office, that you didn't hear?

A Possibly there might have been, and may not; I can't tell.

10 PATRICK REILLY, defendant, recalled on his own behalf.
Direct examination, by defendant's counsel:

Q Your bookkeeper has given us certain figures with reference to the prices that you were paying for Virginia bark in 1881 and 1882; he says that you were paying McAtee \$16 per ton; will you please state under what circumstances you came to pay that sum?

A Well, it must have been ordered in 1881, I suppose.

Q Was there any contract?

20 A Well, there was what we call a contract in a general way; we ordered, I think it was, 300 tons.

Q At how much a ton?

A \$16.

Q That was in 1881?

A I think so.

Q Do you remember in what part of 1881?

A I could not; he only sent the bark to me when he had it; he wrote to me that he didn't send bark to any body else; just as he had it he sent it.

30 *By the Court:*

Q I understand from you that you bought from him what he might happen to get, to the amount of 300 tons, in 1881?

A This was bought in 1881.

Q And then it was delivered during that year and the following year?

A Yes, sir.

Q Did you use other bark that year besides the McAtee bark?

40 A Oh, we always do, sir.

Q What kind did you use?

A Hemlock.

By defendant's counsel;

Q Do you use more or less hemlock bark than oak?

A At the present time we are using nothing but hemlock.

MAX LAUCH, testifies as to value, for defendant.

WILLIAM S. SQUIER, testifies as to value, for defendant.

WILLIAM L. ROSS, testifies as to value, for defendant.

Direct examination, by defendant's counsel:

Q Suppose a bark is mouldy and lumpy when it reaches your establishment, is it, in your opinion, merchantable?

A I think not, sir.

By the Court:

Q Do you know anything about the quality of bark? 20

A I have made considerable tests of it; yes, sir.

Q You have made tests of it yourself?

A I have; yes, sir.

Q Suppose the bark is mouldy and lumpy, is it, in your opinion, fit for use in a tanning establishment?

A No, sir.

Q What makes it mouldy or lumpy, do you know?

A I think I do, sir; I will endeavor to explain my theory; that is, that the bark has not been properly cured; it has been left exposed to the weather in the woods before being ground, or, perhaps, exposed to the weather and rain after having been ground, and placed in the bags. 30

Q What ought to be the strength of liquor got from bark?

Witness: According to the barkometer?

The Court: Yes.

A The strongest liquor we could run from the best Virginia bark was 16.

Q As to Jersey bark ?

A Jersey bark would be 14 and sometimes 15.

Q Suppose that the strength of the liquor, as shown on the barkometer, is 6, would that be a liquor sufficiently strong for tanning ?

A If that was gotten from clear water I should say it would be a very weak liquor; but in the method of tanning, the oldest liquor is run on the new bark, and according to the barkometer, the old liquor possesses
10 about 6 degrees of strength.

Q I am speaking now about the new liquor ?

A I shouldn't like to state; I am not expert enough to determine that, sir.

JAMES H. HALSEY, testifies as to value, for defendant:

20 Q Suppose that bark be mouldy and lumpy when it reaches your establishment, in your opinion, is it a merchantable bark, fit for the purpose of tanning ?

A No; I don't think it is; if it comes damaged it destroys the strength of the bark.

Q And what is its effect upon the liquor ?

A Well, it doesn't give that strength; the strength of the liquor is destroyed, or the bark is destroyed; it won't produce the tanning qualities, and that damage is
30 occasioned often times by exposure to the weather.

Cross-examination, by plaintiff's counsel:

Q How long can you store it—fresh ground bark ?

A Well, if it is dry it will keep a good while; it is better to use it very soon after grinding.

Q You receive it from the mills fresh, and get it in quantities to suit you ?

A Yes, sir; as fresh as we can.

Defendant rests.

JOHN R. BLACKBURN, plaintiff, recalled in his own behalf in rebuttal:

Direct examination, by plaintiff's counsel:

Q Of the bark that you sent did you send all the bark out of the same lot to Mr. Reilly, or did you send some of it to others?

A I shipped it along to Mr. Reilly, as I shipped it to S. Halsey & Son, and the Messrs. Blanchard, the same lot of bark.

Q Ground at the same place? 10

A Yes, sir.

Q And at the same time?

A Yes, sir.

Q And out of the same bark?

A Yes, sir; and one of the cars—the car that Mr. Reilly refused to receive, was turned over, I believe, to Blanchard, Bro. & Lane—the last car that I shipped.

Q On the contract you had made with them?

A Yes, sir.

Q When did you first hear that there was any fault found with your bark? 20

A Not till to-day.

Q Ever before?

A No, sir.

Q In any way?

A In no way.

Q Was there any such intimation conveyed to you during the time you were trying to settle this matter?

A None, whatever.

Q Mr. Reilly says that you were in his office—you were there in August? 30

A Yes, sir.

Q That was after all this correspondence had ceased?

A Yes, sir.

Q And he says that in that conversation he told you that the bark he had received from you wasn't merchantable bark?

A There wasn't one word mentioned about the quality of the bark.

40

Q What did he say as a reason why he didn't take it?

A He couldn't give any reason; he simply said that he wouldn't receive it at the price.

Q He said that you produced there for the first time the postal card, showing that he was to take 52 car loads?

A Well, I am not sure that I produced that postal card, but I told him that he had agreed to received 52 car loads.

10 Q What did he say in regard to the contract?

A As I have stated before, it is the first customer that ever I had that I couldn't get some explanation from; I wanted an explanation and he would give none; I said, "all right; I will go to my lawyers."

Q Was anything said about a compromise?

A I proposed to compromise the matter; to select my man and let him select another, and he wouldn't agree to that; my recollection is I said, "You go and make your statement before George A. Halsey, and I will
20 make mine, and whatever Mr. Halsey says about that matter I will agree to."

Q Did he say anything about having tested your bark?

A Not one word.

Q Anything about its being mouldy or lumpy?

A Not a word; the quality of the bark was not mentioned in any shape.

Cross-examination, by defendant's counsel:

30 Q Did you likewise furnish, out of the same lot of bark which you furnished to Mr. Reilly, bark to Halsey & Smith?

A I shipped Halsey & Smith, later on.

Q Didn't you ship them at that time during the summer?

A I did; yes, sir.

Q And did you ship it out of the same lot of bark that you shipped to Reilly and to Blanchard Bro. & Lane?

A I shipped it out of bark that came in after that
40 time.

Q When did you commence to ship bark to Halsey & Smith?

A I think it was along in April or May; I am not quite sure of that, but I know this—

Q Answer my question; you commenced to ship to Halsey & Smith in April and May?

A I think so.

Q And you didn't commence to ship to Reilly until the latter part of May?

A Yes, sir.

10

Q Did you ship to Halsey & Smith and to Reilly, out of the same lot?

A I can't say that I did.

Q Did you make any distinction between the two in reference to the quality of bark that you sent them?

A I shipped it as it came in.

Q Did you make any distinction as to the quality of bark that you sent to Halsey & Smith, and the quality you sent to Reilly?

A It was certainly not my intention to do so; I don't 20 think that I did.

Q You think that you shipped out of the same lot?

A I think so.

Q Didn't you have very many complaints from Halsey & Smith, with reference to the quality of the bark that you shipped at that time?

A Later on, I did.

Q Just then?

A I think not, sir.

Q Didn't they complain that the bark you shipped 30 to them was of inferior quality, and they wouldn't pay the full price?

A Yes; my recollection is that was after I had stopped shipping to Mr. Reilly.

Q Won't you state when they began to complain?

A I cannot; they have their books here, and their books can show.

Q Well, they did have a good deal of trouble?

A None, whatever; they demanded a reduction and I granted it.

10

Q Didn't they say that the bark was a bark not capable of supplying a strong liquor?

A They made this complaint, that the bark didn't produce a strong liquor as it should; I said, "all right; go ahead and make your deductions."

Q Didn't they claim that you were incapable of sending them suitable bark?

A They made the reductions, and I consented to it; I never fought against a reduction in my life; I have
10 said to my customers, "make your reduction."

Q Do you mean to say these complaints were not made until after you had ceased to ship to Mr. Reilly?

A That's my recollection; their books will show; Halsey & Smith's books will show.

Q Do you mean to say that you got an inferior kind of bark after you had ceased to ship to Mr. Reilly?

A In this way; we had several rains during the summer, and I think this bark that was shipped to J. S.
20 Halsey & Smith, and that they claimed was poor, came in after we had rains, and the quality of the bark was injured in that way.

Q Do you mean to say it was injured before or after it was ground?

A It likely may have been damaged slightly before it was ground, not afterwards.

Q How long does it take to grind it?

A A very little while.

Q When did those rains occur?

A I can't give you the exact dates.
30

Q And the bark at the time of the occurrence of the rains was unground?

A Yes sir.

Q And you ground the wet bark?

A That bark was in the woods and not brought in.

Q It was wet when it came in?

A I am not sure about that.

Q Did you examine it when it came in?

A I have a foreman to do that.

Q I want to know how it was that you came to ship
40

damp bark to Halsey & Smith; did you examine the bark in the woods as it came in to be ground?

A No, sir; the bark is not examined in the woods.

Q Did you examine the bark before you sent it to Halsey & Smith?

A I, or my foreman did.

Q You don't remember which?

A No, sir.

Q You have no recollection now of examining it?

A Well, not of all of it. 10

Q That part that you did examine, was it good or was it poor?

A I thought it was good, or else I would not have shipped it.

Q You shipped it as first-class bark, didn't you?

A Well, I thought it was good bark.

Q It was such a price as was given for first-class bark, wasn't it?

Objected to as argumentative.

Q Didn't they on a number of occasions, all through the summer of 1882, complain of the inferior quality of the bark you sent them? 20

A I think the complaints were during the fall months—in the latter part of the summer; I don't think I had any complaints from Halsey & Smith during April, May and June.

Q How about July?

A Well, I don't think I had any complaints from them during July; I am not sure of that; their books will show; I know this, that I granted them every reduction that they asked for. 30

MATTHEW T. GAY, recalled on behalf of plaintiff, in rebuttal:

Direct examination, by plaintiff's counsel:

Q One car load of this bark that was sent and not received by Mr. Reilly, was turned over to Blanchard, Bro. & Lane? 40

A I think it was; we have had it turned over at different times from Halsey & Smith.

Q Do you know what the quality of the bark was?

A We never heard any complaint of it; I don't know what the quality of that car was; our tanner complains if the quality of the bark ain't all right; if we hear none, the supposition is it was all right; before I was down there, which was before the first of April, we had had five cars which were not right, and I told
10 Mr. Blackburn so when I was there, and claimed a reduction on them, and he allowed it; that is the only reduction we ever asked from him.

Q In all the time you have dealt with him?

A In all the time we have dealt with him.

Cross-examination, by defendant's counsel:

Q When was the complaint made, with reference to the car loads?

A About the first of April, 1882.

20

WILLIAM L. ROSS, recalled on behalf of defendant, for further examination:

Direct examination, by defendant's counsel:

Q Mr. Blackburn says he doesn't think your firm made any complaint about this bark in July; how was that?

A To the best of my recollection we did make complaint in July.

30 Q What was that complaint?

A That complaint was about three car loads of bark delivered by him at the end of June or the first of July.

Q Well, was the bark poor?

A It was inferior in quality, yes, sir.

Q Was any reduction made on account of it?

A \$2.50 a ton.

Q You made this complaint in July?

A I think it was.

Q After that time did he send you any more bark?

40 A Yes, sir; considerable.

Q What was the quality of that bark?

A Some was very good, and part of it was very poor.

Q What was the matter with it?

A The bark that had not been exposed to the weather seemed to be all right; that exposed to the rain seemed to be musty, and to have lost a great deal of strength.

Q Did you complain more than once after July?

A I think we made three complaints during that year.

Q And in each case, what was done? 10

A In the second case, there was a reduction of 30 per cent. from the price, and in the third case, a reduction of 20 per cent.

Q The complaint in the third case was made how long after the second complaint?

A The complaint in the second case was made, as near as I can recollect, about the first of September, and the third case, along the third or fourth of November.

Q Did that third complaint apply to bark sent you after September? 20

A Bark delivered, I believe, in October.

Q How did you compromise with him on the last complaint?

A Our claim was for 30 per cent.; we compromised on 20 per cent.

Q How did you get your pay?

A We were paid in bark.

Cross-examination, by plaintiff's counsel:

Q Are you sure about the dates? 30

A To the best of my recollection.

Q Have you looked to see?

A Yes, sir.

Q Have you anything to go by?

A I have our letter books.

Q They would give the exact dates?

A It would if I had it here.

Q You have nothing here?

A Nothing except my recollection.

Q When did you last refer to your letter book? 40

A Yesterday ; I can remember November 3d or 4th ; I didn't look particularly ; and I think the July complaint was the 7th ; I didn't attempt to memorize the exact dates.

Q Are you sure there was any complaint in July ?

A I am quite positive of that, sir.

Adjourned.

THURSDAY, April 17, 1884.

10

WILLIAM L. ROSS resumes the stand on behalf of the defendant, for further

Cross-examination, by plaintiff's counsel :

Q You testified yesterday afternoon to some facts in relation to the quality of the bark that you had received from Mr. Blackburn ; have you made any effort to look over and see whether your statements were according to the facts ?

A Yes, sir.

20

Q Did you find any misrecollection in regard to it ?

A I found some minor misrecollections in regard to dates.

Q What were they ?

A One letter which I stated was dated July 7th, I found referred to another matter.

Q And when was the first that you had any reason to complain of any bark that you had received of Mr. Blackburn ?

A I will tell you by referring to our letter book.
30 [Referring to book.] Our first complaint to Mr. Blackburn was made on June 15th, in which we wrote him as follows—[reading from book.]

Q That was in regard to the grinding only, wasn't it ?

A Yes, sir ; our next letter to Mr. Blackburn was on July 7th, in which we sent him a statement of three cars received ; Mr. Blackburn never found any invoices and we were obliged to make out his bills for him ; our next letter to him was on July 17th, in which we reported—

Q We only want to know about letters finding fault
40 with the bark ?

A On August 15th, we wrote Mr. Blackburn to this effect: "The bark that you are now sending us is very inferior in quality—some of it being quite musty; please be careful that we get no more like this and oblige, yours, respectfully."

Q That was the first that you had made any complaint, was it?

A In that regard, yes, sir; on August 16th, if I remember correctly, Mr. Blackburn came in our office; on September 13th, the first reduction was made; that was on account of bark shipped August 19th and 25th. 10

Q That was September, what time?

A The letter was written September 13th.

Q Do you know whether there was any test of that bark made?

A I do not think we tested that with the barkometer; it was only a matter of judgment—testing the liquor made from the bark; Mr. Blackburn came in our office somewhere near that time, and we made an agreement with him that he should make a reduction of \$2.50 a ton on those two cars. 20

Re-direct examination, by defendant's counsel:

Q You say that on the 16th of August, I think it was, you wrote to him stating that the bark that he had sent was very musty?

A Yes, sir.

Q And you requested him to send no more of that some sort?

A Yes, sir. 30

Q Do you remember when the bark about which you thus wrote arrived at your place?

A We paid him in full for that bark, although we made complaint on the 16th of August; we got a reduction on bark shipped after the 16th—on August 15th and 19th; but we complained about bark—about five cars of bark; the shipments were June 26th, July 7th, July 15th, July 31st and August 2d; we reported to Mr. Blackburn the weight, &c., of that car on August 16th. 40

Re-cross-examination, by plaintiff's counsel:

Q The complaint which you made in July, was simply in regard to the manner of grinding?

A Yes, sir.

Q Not in regard to the quality of the bark?

A No, sir.

Q And the first complaint of the quality of the bark was some time in August?

A August 15th.

10 Q But there was no deduction made on that?

A Not on that—no, sir.

Q Did that apply to anything more than the last shipment?

A To the shipments I just mentioned to Mr. Stevens; the shipments of June 26th, July 7th, July 15th, July 31st and August 2d.

Q Didn't you write to Mr. Blackburn that the bark you received previous to that was all right?

A We wrote him later that the bark was all right,
20 but not previous to this time.

Q When was that?

A In December of that year we wrote him as follows—
[witness reads from letter book.] It was in regard to a claim we made November 27th, making complaints.

Q That was written when?

A November 27th; Mr. Blackburn wrote saying that he didn't think that we should make so large a claim, and we wrote him as follows—[reading further from book.]

30

JAMES E. HOWELL, sworn on behalf of plaintiff, in rebuttal:

Direct examination, by plaintiff's counsel:

Q You had the principal management of the matter of Mr. Blackburn, when it was put into the hands of an attorney?

A Yes, sir.

Q There was considerable negotiation in regard to
40 the matter before suit brought?

A Yes, sir; I saw Mr. Reilly's counsel a number of times, and I think he saw me a number of times about it; I went to his office, and he came to my office.

Q Did you subsequently see Mr. Reilly?

A I saw Mr. Reilly some time after the suit was brought.

Q And when an attempt was made to settle it?

A When an attempt was being made to settle it Mr. Reilly came to my office.

Q State, if up to that time or at any time, from Mr. 10
Reilly or from any other source, you learned that there was any fault found with the quality of the bark?

A Not a word.

Objected to as not rebuttal. Objection over-ruled.

By defendant's counsel:

Q There is a clause in that agreement which states that the bark to be furnished to Mr. Reilly under the new agreement, shall be equal to that which was furnished 20
to Blanchard, Bro. & Lane?

A Yes.

Q That was in the spring of 1883?

A Yes.

Q Don't you remember that we were strenuous about having that clause inserted in the agreement?

A I remember that Mr. Reilly spoke of it himself at my office.

Q And you know that he was anxious to have that provision inserted in the agreement, and was very particular about it? 30

A He said he didn't want any black oak bark in the bark that was furnished to him; I have a memorandum at the office made by Mr. Reilly, in which that very same thing appears.

By the Court:

Q That is the agreement offered in evidence, in reference to a settlement?

A The agreement made March 27, 1883.

By defendant's counsel:

Q You say he was strenuous that there should be no black oak bark?

A Yes, sir.

Q Don't you know that he was likewise strenuous to have this clause inserted: "The quality of the bark shall be the same as is now furnished to Halsey & Son, and Blanchard, Bro. & Lane?"

A My impression is that that portion of the contract
10 which refers to Blanchard, Bro. & Lane, and S. Halsey & Son, was put in at my suggestion; he was very anxious to have something about the quality of the bark put in, and I suggested to him that, inasmuch as it was furnished to Blanchard and Halsey, he ought to be satisfied with as good bark as they were getting.

Plaintiff rests.

Defendant rests.

Plaintiff's counsel moves to overrule that
20 portion of the defence whereby defendant seeks to show that there was a rescission of the contract by plaintiff.

After argument the Court said:

DEPUE, J. I supposed that this question would be reached at an earlier stage of the trial, and that it would be discussed on a motion to overrule the defence as it came in. It is made now at the close of the case on a motion to overrule a certain portion of the defence; and
30 it is probably the more convenient for counsel and will enable the jury to relieve themselves from considering the details of a case which, at its close, may be found to be foreign to this issue, if the Court should dispose of the question now. Counsel have a right to have it considered—to have it presented and disposed of in this way. The question is one of great importance, more especially in a community like this, where continuing contracts and contracts to be performed from time to time are usual; and the question is one in relation to which there has
40 been a greatly inconsistent course of decision; but it is

one which, in my judgment, at the present time, is entirely settled, and settled by a line of decision and upon a principle that seems to be infrangible. And it is better that I should dispose of this question here at this time as a question of law, in order that the counsel against whom the decision shall be made may have an opportunity of reviewing it, which I will give him either by a rule to show cause, or which he has a right to have, by a writ of error, disembarassed from any of the complications that sometimes arise from the fact that 10
a case is sent to the jury, or from the difficulty of always precisely putting your finger on the terms of a charge, or an instruction to the jury.

I shall assume, in disposing of this case, that it presents, to be found by the jury, precisely the condition of affairs that is relied upon by the defendant—that, and nothing more.

The contract is a continuing contract. Its performance is stipulated to be made from time to time, involving the full period of a year. This fact gives character 20
to the nature of this issue; and it is a failure sometimes to discriminate between a contract of this character, and a contract for the purchase of a single article, in the application of the rule with regard to conditions precedent, that has given rise to some doubt in the earlier cases on this subject. It is undoubtedly the rule that a vendor who agrees to deliver an article as a condition precedent to his right to recover is bound to show performance, and he is bound to deliver an article of the quality stipulated; and if he does not 30
deliver the article he has no right to bring his action to recover damages, if the other party refuses to accept it on that ground. But that rule is wholly inapplicable to contracts which are not to be performed at one time, and which are contracts where the parties stipulated for performance during a considerable interval of time, for the reason that *non constat*, that if one of the deliveries be of articles that are defective in quality, others will be of the same character. Parties who enter into a contract extending over a period of time are entitled to the 40

benefits and advantages of the whole contract; and the measure of damages for the delivery of an article that is inferior in quality is the difference between the article as delivered and the article as it should have been, generally amounting to a very considerable sum. But the question with regard to a contract which is not a continuing contract, where the one party refuses to go on with the performance of it, is a question whether there be evidence in the cause tending to show, either that the contract

10 has been rescinded by mutual consent, or has been repudiated by the other party. In looking through the cases, I find that without exception that language is used in characterizing the distinction that may be made in a case of this kind to an action brought to recover damages for the refusal to perform a continuing contract; that a single breach, or any number of simple breaches, will not be sufficient to accomplish that purpose; and it is only where the evidence is such as to show that the party bringing suit has himself repudiated the contract, that

20 the other party, unless he makes the precise performance of it a condition precedent by express terms, can defend.

An examination of a very few of the cases that I have looked at will, I think, show that the law on this subject is well settled. I will take, as a case nearer in point than most of the others, the case of *Jonassohn vs. Young*, which is found in 4 Best & Smith, an action of the same kind as the suit which is now before the Court, and one which is nearer in point than most of the others. The

30 declaration in that case was on an agreement of the plaintiff to sell and deliver to the defendant, and by the defendant to purchase, as many of the plaintiff's (Nettle-smith,) gas coals, of equal quality to a cargo before shipped on trial, as one steam vessel to be sent by the defendant could fetch in nine months from Sunderland to London. It is a contract for the delivery of a specially designated article, in which the law implies that the article to be delivered shall be of that designation. It is a contract in which there is an express agreement with regard to the quality of the cargo, and to be received by

40 the defendant and delivered by the plaintiff at intervals

in a stated period of time. The breach was that the defendant refused to send a steam vessel to fetch divers cargoes of coal. There the defendant repudiated, and he set up, as a justification for the refusal to go on with the contract, a defence which is stated in two pleas. One, that "before any breach by the defendant the plaintiff broke the contract," (that is the language of the plea,) "by delivering coal which was no part thereof gas coal equal in quality to the cargo shipped for trial," (distinctly and pointedly showing a breach of the express 10 undertaking on the part of the vendor,) "but was inferior thereto, and wholly unfit for the defendant's purposes, as the plaintiff well knew;" not only charging that there was a breach, but charging in the pleading that the plaintiff himself, the vendor, when he delivered that coal, knew that it was of an inferior quality to the coal specified. The next plea is, that "before any breach by the defendant, the plaintiff broke the contract by detain- ing an unreasonable time, and beyond the time permitted by the contract, the vessel sent by the defendant to 20 receive the coal."

Now, either of these pleas sets up breaches of contracts of warranty on which the purchaser would be entitled to sue and recover damages. The question was presented, as it is presented in this case, whether the breach of a contract of this character would amount to a repudiation of the contract and excuse the party from going on with the completion of the contract. The Court held that, either of these pleas was an answer to the declaration; and in the remarks of the Court the grounds of the judg- 30 ment are clearly expressed. One of the judges says:

"The argument for the defendant must go this length: that the supply of one chaldron of coal of an inferior quality, or the detention of the defendant's vessel for an hour, would entitle him to put an end to the contract; because, if a breach of the contract be compensated for, no damages can in any case justify the repudiation of the contract. That right to repudiate must arise when there is a breach of the implied undertaking on the part of the vendor." 40

I intended also to refer to the opinion of the Court in a case which has been referred to by counsel, but I need not take the trouble now to refer to it—the case of *Waitwood vs. Sessions*.

I ought to remark, with regard to the case in 2 Barn. & Ald., 882, *Withers vs. Reynolds*, which has been very much commented on, and has been approved by the later English cases—not on the ground of the refusal to pay for one delivery, but it has been vindicated on the
 10 ground that the purchaser had avowed his intention to wholly repudiate the contract, and not pay for any of the loads of straw that were delivered in the future, but to hold back the contract price for one load.

Now, the case that I have referred to, and the prior cases on this subject, have undergone a thorough discussion and examination in the English courts, the latest of which cases is the case of *The Mersey Steel and Iron Co. vs. Naylor*, 9 Q. B. Div., 648. That was an agree-
 20 ment to purchase a large quantity of steel to be delivered in five monthly installments. The payment was to be made within three days after each installment. Financial difficulties in that case intervened. Part of one installment was delivered and payment of it was refused by the defendant. He broke his contract, as counsel had advised him that because of the pendency of certain bankruptcy proceedings he couldn't pay; and the Court in that case held that a refusal to pay was no defence, and that the purchaser, who had refused to pay, had a right
 30 to sue the seller and recover damages because he did not go on and offer to complete the contract; and the ground of decision in that case was that the refusal to pay was not a renunciation of the contract, and the party was held liable for damages for non-delivery. The case stands as an illustration of the principle I have referred to—on the very uttermost verge of the doctrine that has been settled by these cases.

Other cases will be found in the Law Reports, 8 Q. B. 14, and 7 Q. B. Div. 92. A case seemingly to the contrary,
 40 and very much commented upon, will be found in

5 Hurlstone & Norman, 19; and the American cases, which probably cannot be said to be wholly in one line or wholly consistent, are found to be very fully stated in the notes to Mr. Kirby's edition of *Benjamin on Sales*.

The condition of the law on this subject, I think, is entirely settled, and it is manifest, when you come to consider the cases and apply them to continuing contracts instead of to a single contract, that this law is settled on the most substantial principle of justice. I can mention some cases that have been familiar to me in my own practice. I can mention others that persons who are, perhaps, more familiar with the details of business in this community than I am, will be able readily to apply. 10

*Take the case of an iron manufacturer who enters into a contract to supply a railroad company with rails for the construction of its railroad, the rails to be furnished at stated times as the work of building the railroad progresses. That is a contract the obligation and value of which are confined, not to a single transaction, but to the whole period of time. Suppose he delivers one cargo of his rails that are not of the quality stipulated. The law says that if he does that the purchaser need not accept; or, if he accepts, he may bring his action to recover damages for the deficiency in the quality. That is the legal measure of damages the law fixes. Now, to visit upon him a forfeiture of all his rights under that contract would be imposing a penalty upon him for a breach of his contract that the law doesn't recognize; and it would place him then in this position. The company, if iron had gone up, could receive the shipment, and insist upon the continuance of the performance of the contract, and sue him for damages for the defective quality. If iron had gone down, they could repudiate, and put the contract at an end. 20 30

Take another instance, (which is in the country not at all an unusual case,) of a nail manufacturer agreeing to deliver nails from time to time to a person engaged in dealing in them. Suppose a keg of those nails happens 40

to be, without his knowledge, below the quality stipulated for. The law says if you do a thing of this kind you must pay damages; but the constraint would be that he would be compelled not only to pay the damages the law adjudges, but that he would be involved in a forfeiture of his contract.

Other cases will suggest themselves to persons that are at all familiar with the course of business in this community. Take the case of the supply of malt for beer.

10 I presume that arrangements are made for the furnishing of this article extending over a period of time—malt especially, because it is a thing you cannot go into the market and pick up in proper quantity on any particular day. A man engages to supply malt for the brewing of a whole season, and he supplies malt of an inferior quality in one shipment. He is liable in damages. The person to whom it is sent need not receive it; and if he does, he can sue and recover damages. But it would be putting upon the vendor a burden that the law does not

20 recognize if the buyer should seek, not by legal means to sue for damages, but the forfeiture of the vendor's rights under the continuing contract.

Take another case of a man undertaking to tan hides for a leather dealer. He agrees to tan him so many hides every month or every week; and, whether by his own default or by accident, one batch of hides comes out improperly tanned, the law says, if you do that, you must pay damages. But, to maintain such a defence as

30 this, the contention must be that he not only must pay damages, but that he must forfeit his rights under the contract. And throughout all these later cases, especially, that distinction is brought out in direct prominence—the distinction between the right to refuse to accept a defective article, or the right to sue for damages for the deficiency, and the right to repudiate the contract entirely. And in the last case that I referred to, the case in 9 Q. B., the opinion of the Master goes over all the cases, and he holds that there may be such a contin-

40 uous and wilful and persistent breach of contract on the

part of the one party as shows a determination not to perform it, so as to be equivalent to repudiation. But the Court of Appeals affirms the doctrine that before the right to put an end to the continuing contract is established, the facts must show that the party repudiated it.

I have now stated the law on this subject as I understand it to be established, and as I think it is applicable to this case; and now, in a few words, I will endeavor to show in what respect I think it applies to the defence.

The contract in this case, both counsel admit, is a continuing contract. It is a contract in which the law implies that the bark was to be merchantable, and it is a contract that will involve the plaintiff in damages for the delivery of a deficient quality of such bark. That would give the right to the defendant from time to time, if defective bark was delivered, to refuse to receive it, and to sue the plaintiff for damages for not delivering merchantable bark from time to time as called for in the contract. I have no doubt, whatever, on that subject.

Now, the evidence in the case, I must assume for the purposes of this motion, shows that all the bark that was delivered during the two months that the plaintiff continued to deliver bark, was deficient in quality. Then the question arises whether there be any evidence of a repudiation of this contract by the plaintiff. The evidence on that subject relates to the correspondence between these parties with respect to the postponement of shipments to suit the convenience of the defendant, and more especially the letter of July 29th, and the further transaction which I will presently refer to. That letter says: (The Court reads letter and continues.)

The next fact that is important in this case is that the bark that was delivered, was paid for on the third of July; and I shall assume, for such is the evidence—that it was paid for before the discovery of the defective quality of the bark. But there is no evidence—(and the evidence is the other way)—that the defendant ever gave the plaintiff any notice of the defective quality of the bark until the interview that took place, as I gather

from the evidence, some time in the month of August. This is Mr. Reilly's testimony :

“The first conversation I had with Mr. Blackburn was in the latter part of July or the first of August. . . . We went into the private office, and he says, ‘What are you going to do about this bark?’ Says I, ‘I can’t pay you no \$18 for an inferior article. I would be almost afraid to use it.’ He says, ‘I have got your contract, and you have got to take it.’ Says I, ‘It’s strange if I have.
 10 I can’t send out leather or goods that is not merchantable, and I don’t see why I could be compelled to take yours that is not merchantable.’ He says, ‘Well, I have got your contract. You look out for yourself; I’ll fix you.’ Says I, ‘I have always been able to do that, and I guess I can do it now.’”

That is all the evidence there is on the subject. There is evidence of complaint on the part of Mr. Reilly, of his refusal to go on and complete the contract, and of the
 20 plaintiff’s insisting on his right to enforce the contract, but no evidence of a repudiation of this contract by the plaintiff; and, on looking at the cases throughout, that is made a test of the right of a party to a continuing contract to put an end to it. If the contract is not performed, the law gives him his legal remedy to recover damages for the non-performance, and it allows him to make an express condition in his contract giving him a right to end the contract, if the goods are not in compliance with it. But it gives him no right to repudiate
 30 the contract, unless it can be made to appear that it has been repudiated by the other side.

Now, I have gone into this question very fully, and have given it a good deal of attention, for the reason that the question is of so much importance in this community, and is applicable to this case; and while the cases are by no means all on one side, yet I feel confident that the law will be found to be as I have stated; and I therefore shall hold in this case that under the evidence the defendant is not absolved from
 40 the continuing obligation of this contract, by the evi-

dence which has been offered by him in regard to the quality of the bark. I will give counsel either a rule to show cause—(because it is a question that ought to be settled, and can be settled in this cause—there is enough in the case to make it worth while to settle it)—I will give the counsel either a rule to show cause or will allow him a writ of error.

The remarks that I have made now will be taken to be part of the instructions to the jury.

10

Defendant's counsel prays an exception to the ruling of the Court.

The Court: You may consider this as an exception taken to the charge, if you think that you will have the advantage of it better by taking it there.

Defendant's counsel: I suppose it ought to appear on the record with my exception.

The Court: Certainly,

20

Defendant's counsel: I desire to call attention to the question of the damage done to Mr. Reilly. I presume it is before the jury; and, while there is no formal notice on the record, it seems to me that this question had better be settled here and now; more particularly, as Mr. Blackburn is a non-resident.

The Court: If you had evidence that would enable the defendant to recoup in this case, I would allow an amendment; but the evidence is not here, and I can accomplish that probably a little better in another way. I will hold the judgment in this case until the plaintiff enters an appearance to any suit that you may commence. I think that will simplify the matter and will save this case from any sort of embarrassment.

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Plaintiff's counsel: Then, if he does that, we will be willing to accept service; but, if he does that, he must abandon his rule to show cause.

The Court: I would not even compel him to do that.

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The Court will put the matter in such a shape as that neither side will be unfairly dealt with.

After argument the Court charged the jury, as follows:

10 DEPUE, *J.*: This action, gentlemen, is brought by the plaintiff to recover damages for the defendant's refusal to accept bark under what is known in law as a continuing contract—a contract extending from the middle of May, 1882, to the middle of May, 1883. The evidence shows that the contract was made by correspondence, commenced by a letter written by the defendant's agent to Johnson & Blackburn, dated May 3, 1882, asking simply for a statement of the lowest cash price of bark. To that letter an answer was sent by the plaintiff as follows: (The Court reads letter and continues.) To that letter the defendant's clerk responded by a postal card that is dated May 17, 1882: "Will take fifty two car loads, one weekly." The result of this correspondence was the concluding between these parties of a contract of the character I have mentioned, whereby the plaintiff agreed to deliver to the defendant, and the defendant agreed to accept, one car load per week of bark, to be delivered in the city of Newark, extending over the period of one year. The evidence further shows that under that contract the plaintiff made delivery of bark on the 19th of May, the 26th of May, and the 3d and 13th of June. That bark was received, accepted and paid for. The evidence further shows that another car load of bark was forwarded to Newark under this contract, and that the defendant refused to receive it. By a letter which is dated on the 29th of July, 1882, he said:

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"The bark for which you have drawn on me is at the freight depot awaiting your disposal. I telegraphed to you, and also wrote to you not to ship any bark until further orders—instructions you have failed to observe. I will not receive this bark at \$18.00 a ton."

The evidence further shows that the parties had an interview, and the result of that interview was the refusal

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on the part of this defendant to receive any other bark on this contract. So that, at this stage of the cause, the situation of the parties was this: The plaintiff had a contract for the term of one year, under which he had a right to require the acceptance by the defendant of bark, at the rate of one car load per week, at the contract price, \$18.00; and the defendant had refused, after the interview of August 1st, to receive bark after that time.

Now, on the proof of the facts I have mentioned, the plaintiff shows a *prima facie* cause of action, and a right 10 to recover damages for the breach of it. To this *prima facie* cause of action the defendant interposed a defence that the bark that had been delivered by the plaintiff under the contract was of an inferior quality. That defence I have disposed of. I considered that it was no excuse or justification for the defendant in refusing to go on with the continuance of the contract; that it gave the defendant a right merely to sue and recover damages. That defence I therefore overrule, leaving the parties to 20 review the judgment of the Court in that respect in the Supreme Court or elsewhere; and, making such an arrangement as that, the defendant would be placed in a position to bring his action to recover damages for the non-performance of the contract. With that ruling of the Court, this case, then, was left without defence, and the only question that remains to be considered is the amount of damages to be awarded. Other matters must be left for other times, or other suits between these parties.

The situation of these parties at the time this transac- 30 tion took place, was this: Of the fifty-two car loads of bark that were contracted for, four had been delivered and received, and forty-seven car loads still remained to be delivered under the contract. The evidence further shows that each one of these car loads of bark contains about $11\frac{1}{2}$ tons; so that, according to my calculation, there were $545\frac{1}{2}$ tons of the bark contracted for still to be delivered, and the plaintiff's right, under the original contract, was to have that bark delivered, accepted and paid 40 for at \$18 a ton.

Now, when the defendant repudiated his contract and refused to go on, the plaintiff then became entitled to bring his action at once, and to recover damages, which should be admeasured by a jury in such a manner as to give him, as nearly as possible, the advantage that he would have had if the contract had been performed as it was agreed upon—in other words, to make him compensation, as far as practicable, for the loss that he may have suffered because of his inability to supply this bark

10 in the weekly installments at the price of \$18 a ton—to make him compensation on the basis of the difference between the contract price—\$18 a ton—and the current monthly price of this bark from month to month during the continuance of the contract. Because, gentlemen, he was placed in this position. If the contract had gone on he would then have had the advantage of delivering this bark from month to month under this contract until the fifty-two car loads were delivered at the expiration of the year. By the repudiation of this contract he was

20 deprived of the advantage of this continued monthly contract, and would have been driven to the sale of his bark from month to month as the market fluctuated from time to time, and the law is adapted for the admeasurement of damages in a case such as the one I have mentioned.

I read from an authority which will express this matter with more clearness and directness than I can hope to express it myself. The Court say that: “When a defendant has contracted to sell goods to be delivered at

30 various times, if he repudiates at the date of an early transaction, the plaintiff may treat that as a breach of the whole contract, and sue accordingly; and the measure of damages will be the difference between the contract price”—(that is, the \$18 a ton)—“and the prices at the different times of the intended delivery”—(that is, the difference between the \$18 and the market price of that commodity in the market at the several times when the bark was to be delivered)—“because that rule, and that rule alone, can make the plaintiff good for the loss he

40 has sustained.”

So that that will be the problem for the consideration of this jury: First. Whether the plaintiff lost anything by the breach of this contract. If bark had remained at \$18 a ton, or if it had gone up to \$19 or \$20, so that he could have turned around and sold to A, B, C, D and E for as much as he would have got under the contract, he would have no standing in this Court to maintain this action; because he would not have been injured. On the other hand, if there was such a depreciation in the prices of bark, from time to time, during the continuance of this contract, as that, if the plaintiff had put his commodity on the market at those times, he would have been required to accept a less price, then he is injured, and he is entitled to what, under the evidence, in your judgment, would represent the difference between the \$18 specified in this contract and the market price of bark, from month to month, during the continuance of this contract. 10

In this proposition to be considered by the jury, 20 there are these facts that are almost undisputed: In the first place, the evidence shows quite clearly that it is the habit of persons engaged in this business to make and have continuing contracts for the delivery of bark, which are usually made early in the season. The evidence further shows that during the spring of 1882, when this contract was made, there was a great scarcity of bark in the market. Some of the witnesses have said that they have scoured the country, gone into Pennsylvania and down the Susquehanna river, for the purpose of getting 30 a supply of bark. The evidence further is, that when the new crop came in, which is along about July or August, there was a diminution in the price of bark. Some of the witnesses have spoken of it as the result of an over production induced by the higher prices. Other of the witnesses have spoken of it simply as the result of the incoming of a new crop, the high prices being due to the fact that the former crop was deficient. But the witnesses all seem to agree that after the new crop came in there was a diminution in the price of bark in this 40

market; and you are to determine from the evidence how much, as near as you can tell, that diminution of price was during the months in which the contract remained unperformed.

Now, with a very few observations, directing your attention more to the evidence that counsel have discussed with a view of putting you in possession of what their evidence is than anything else, I will refer to the testimony of some of the witnesses.

10 Mr. Blackburn says there was a fall in the market price, speaking generally, of \$2.50 or \$3.00 a ton.

Mr. Gay speaks of the purchase of bark at \$13 a ton; Virginia bark at \$16; and of the purchase of one lot from a man, whose name I can't now recall, in the month of January, for \$15 a ton, which he describes as exceptionally low.

Mr. Harrison speaks of a fall of from \$1 to \$1.50 a ton. In January, he says, the decline had been \$2.00.

20 I will read what Mr. Gay said on that subject: "Blanchard, Bro. & Lane contracted January 5, for 600 tons, at \$17.50. After July 1, we bought Pennsylvania, Delaware and Jersey bark at \$13 a ton; some little at \$12. In July we bought Virginia at \$16.50, and in September at \$16; later in the year at \$15." My recollection is, he spoke of that purchase at \$15 as being in January, and rather an exceptional transaction.

30 The next witness, Mr. Harrison, said: "Virginia bark was quoted early in the year as high as \$18. About the middle of July, Jersey bark fell off about \$1 a ton. I bought some in September at \$13; in January at \$13. In May, 1883, it rose about 50c. again."

Mr. Perry, a witness whose testimony has been the subject matter of some little misunderstanding, said: "There was a scarcity from January until peeling time, which was about May, in this State. I bought Jersey early in the season at \$14; in the latter part at \$11.50; we contracted in 1882, at \$17.50; in 1883, at \$16.50.

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That is my impression. I could tell by looking at the book. Mr. Blackburn ought to know if I am mistaken."

Then there is, in addition to that, the testimony of Mr. Woehning, the defendant's clerk, with regard to purchases made by the defendant. His books will be before you, and it may be useful for you to make an inspection of them. I will state what appears in my notes on that subject. He says:

"From August 30, 1881, to November 17, 1882, the price of Virginia bark was \$16. From November to 10
May it was \$17. From April, 1882, till October, 1882, the price was \$16. In December the price was \$17." He was offered bark, he says, in January, 1883, for \$16.

Defendant's counsel: It appears that Mr. Woehning's testimony was founded, probably, on the dealings with McAtee; and that was a contract made in 1881.

The Court: The testimony of Mr. Squires, all of it, ought to be considered by the jury, from the fact that 20
Mr. Squires is neither a purchaser of bark nor is he a tanner. He is what is known as a dealer; and it is that class in the community that know more about the ruling prices than almost any other class of persons. He speaks of the price remaining as it was until October, and he says that after October the price of bark fell off \$1 or \$1.50 a ton; in November and December \$1.50; and then, he says, it was \$16 in January, and that it was \$16 in May.

Now, I have referred to the principal points in the 30
evidence. You probably will be able to recall the testimony of other witnesses. My object in referring to the testimony is simply to refresh your recollection on the subject. And when you have determined what, under the evidence, would fairly represent the diminution in the market price of bark during the year, commencing in July, when the last delivery was made, and ending in May, 1883, that you should give the plaintiff as his damages in this case—because that will make him whole, and that is what the rule of law requires. Then you 40

will take the $545\frac{1}{2}$ tons undelivered under this contract, and multiply by the sum that you ascertain to be the diminution in the market price, and let that be your verdict, with interest calculated from the 15th of May, 1883, down to the present time.

And thereupon, the jury having withdrawn, defendant's counsel excepts to all that part of the aforesaid charge to the jury which overrules so much of the defence as is based upon proof that the carloads of bark delivered did not comply with the terms of the contract, and that the plaintiff having failed to perform the contract on his part, the defendant was nevertheless under an obligation to comply with the terms of the contract on his part.

Exception allowed.

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Defendant's counsel also excepts to all that part of the Court's charge to the jury which gives to the plaintiff the benefit of the fluctuations of the market from week to week and does not fix the date of the market value of the bark, in respect of which the plaintiff claims damages as of the date of the breach of the contract, which occurred in July, 1882.

Exception allowed.

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And the jury who, to speak the truth of the matter within contained, being chosen, tried and sworn as aforesaid, upon their oaths say that they find for the plaintiff, and assess his damages against the defendant at the sum of eleven hundred and forty dollars and forty-three cents (\$1,140.43), so they say all.

Whereupon it is considered that the said plaintiff do recover against the said defendant his damages in form aforesaid found, and also the sum of fifty-four dollars and fifty-eight cents (\$54.58) as for his costs and charges by him about his suit in this behalf expended, by the Court now here adjudged to him of increase with his assent, which damages, cost and charges in the whole amount to eleven hundred and ninety-five dollars and one cent, (\$1,195.01.)

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Judgment signed April 17, 1884.

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EXHIBITS.

Newark, N. J., May 3, 1882.

Messrs. Johnson & Blackburn, Hardwicksville, Va.

10 Gents: Please quote me on receipt of this, your very
lowest cash price for a car load of oak bark, weekly, and
oblige,

Very truly yours,

PATRICK REILLY.

Hardwicksville, Va., May 5, 1882.

Mr. Patrick Reilly.

Dear Sir: Your valued favor of the third instant
received. Eighteen dollars per ton, of 2,240 pounds,
delivered in Newark. Do you wish me to supply you
20 during this year? Messrs. S. Halsey & Son, and Blanch-
ard Bro. & L. use my bark.

Yours truly,

J. R. BLACKBURN.

Newark, N. J., May 13, 1882.

Mr. J. R. Blackburn, Hardwicksville, Va.

Dear Sir: Yours duly reached here; please excuse
delay in answering, which was caused by my absence
from town.

You can ship me one (1) car load oak bark, weekly,
30 @ eighteen dollars per gross ton, (2,240 lbs.)

Very truly yours,

PATRICK REILLY.

Hardswicksville, Va., May 15, 1882.

Mr. Patrick Reilly.

Dear Sir: Your favor of the thirteenth instant re-
ceived and noted. I have booked you for one car load
weekly, at eighteen dollars per gross ton, delivered at
Newark. *How many cars will you take?*

Yours truly,

J. R. BLACKBURN.

Newark, May 17, 1882.

Dear Sir: Will take 52 car loads—one weekly.

Very truly yours, PATRICK REILLY.

Newark, N. J., June 14, 1882.

To J. R. Blackburn:

Hardwicksville, Va. Mail Lynchburg, Va. Stop shipment bark three weeks on account of accident.

P. REILLY.

Hardwicksville, Va., June 21, 1882. 10

Mr. Patrick Reilly, Newark, N. J.

Dear Sir: Your favor of the 19th inst. rec'd. I do not want you to pay for bark faster than you receive it. I have had to spend a large amount of money securing a stock of bark, consequently I have had to make close collections. I trust you will pardon me if I have to draw on you too closely. Hereafter you can pay me as you receive the bark, or 30 days afterwards. Please remit, if entirely convenient, balance due me on acct. As to my desire to please my customers, I can refer you to your 20 neighbors, Messrs. S. Halsey & Son, and Blanchard, Bro. & Lane, with whom I have been dealing for 6 years, and never any unpleasantness between us. I trust your works are again all right, and that you will be ready to receive bark in a short time. Will you then want it faster than one car a week? Hoping to hear from you soon, I remain

Yours respectfully,

J. R. BLACKBURN.

Newark, N. J., June 19th, 1882. 30

Mr. J. R. Blackburn.

Dear Sir: On Saturday last your dft. was presented for two hundred and fifty dollars, with bills for bark, payment of which I refused. I do not feel as if I care to buy a cat in the bag, and previously wrote you respecting the necessity of forwarding invoices so that I could compare your shipments with same, to which *you have paid no heed*; on the other hand, if there was any question in your mind respecting my responsibility, etc., you could easily have satisfied yourself by inquiry at the 40

bank. However, I will say this: I have never yet allowed myself to be drawn upon, and do not care to pave the way for it. You were no doubt told, when I placed my order with you for bark, that when same was inspected and passed, that a check in settlement of same would be forwarded you. If this is not satisfactory to you, I can offer you no other terms.

Yours, &c., P. REILLY.

Newark, N. J., June 23, 1882.

10 Mr. J. R. Blackburn.

Dear Sir: Yours of the 21st, at hand and noted. Be kind enough to send invoices for the bark you have sent me and I will remit on receipt of same.

Very truly yours,
PATRICK REILLY.

Hardwicksville, Va., June 15, 1882.

Mr. Patrick Reilly.

To J. R. Blackburn.

20	For 138,198 lbs. bark @ \$18.00,	\$1,110.52
	By check,	\$250
	“ dft. City Nat. Bk.,	250
		<u>500.00</u>
		\$610.52

Dear Sir: I did not receive your telegram till to-day, after having shipped you a car of bark; will hold up for three weeks.

Yours truly,
J. R. BLACKBURN.

30 Hardwicksville, Va., July 1, 1882.

Mr. Patrick Reilly.

Dear Sir: Please do me this favor to remit balance due on account. Will you want bark in a few days?

Yours truly,
J. R. BLACKBURN.

Hardwicksville, Va., July 14, 1882.

Mr. Patrick Reilly,

40 Dear Sir: P. C. of 12th inst received. Your valued favor of 30th inst., handing check in full of account to

date, was duly received and credited. I will ship you a car of bark this week. Can't you take two cars per week for three or four weeks to make up for non-shipment during last three weeks?

Awaiting your reply, I remain yours very truly,
J. R. BLACKBURN.

Newark, N. J., July 18, 1882.

Mr. J. R. Blackburn.

Sir: Ship no more bark until further instructions, as per postal sent you some days since. I am overcrowded and have no room left for storage.

Yours, &c.,
P. REILLY.

Newark, 7, 24, 1882.

Dear Sir: Please withhold shipments of bark until you receive contrary instructions.

Yours, &c.,
P. REILLY.

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Hardwicksville, Va, July 29, 1882.

Mr. Patrick Reilly.

Dear Sir: Your P. C. received; the delay is a great inconvenience to me; I counted on your taking one car per week as per agreement. How soon will you be ready for it?

At sixty days, I have drawn on you for \$250. Please honor the draft.

Yours truly,
J. R. BLACKBURN.

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Newark, N. J., July 29, 1882.

Mr. J. R. Blackburn.

Dear Sir: The bark for which you have drawn on me is at the freight depot here awaiting your disposal. I telegraphed you and as well wrote to you, not to ship any bark until further orders—instructions you have failed to observe; I will not receive this bark at \$18 per ton.

Yours, &c.,
P. REILLY.

40

Hardwicksville, Va., July 31, 1882.

Mr. Patrick Reilly, Newark.

Dear Sir: Your favor twenty-ninth instant received, contents carefully noted.

How is it that you refuse to take bark after having contracted to take one car per week for twelve months? You are the first customer I have ever had to refuse my bark after having contracted to take it. I will be in Newark next week and will give you a call. Hoping to
10 hear from you at once, I remain,

Yours truly,

J. R. BLACKBURN.

Hardwicksville, Va., August 21st, 1882.

Mr. Patrick Reilly.

Dear Sir: Your letter of the 14th rec'd. I am willing to refer the matter to mutual friends in Newark. If the above proposition is not acceded to by you, I shall institute suit against you immediaetly. I will be in
20 Newark next week.

If you are willing to referee the matter, my Newark friend is ready. You are no doubt aware that I hold your obligation to take fifty-two car loads of bark.

Yours truly,

J. R. BLACKBURN.

Newark, N. J., August 23, 1884.

Mr. J. R. Blackburn, Hardwicksville, Va.

Dear Sir: Yours of the twenty-first duly received, and would say in reply that I will be happy to have you
30 call on me when you are in Newark, in reference to the matter of which you write. I expected you to have called on me in conformity with yours of July 31st, but you did not. Hoping you will make it convenient, I remain,

Very truly, yours,

P. REILLY.

N. J. Court of Errors and Appeals.

PATRICK REILLY, <i>vs.</i> JOHN R. BLACKBURN.	}	<i>In Case. Assignment of Errors.</i>	10
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And the said Patrick Reilly by Frederic W. Stevens, his attorney, comes and says that in the record and proceedings aforesaid, and also in the giving of judgment, there is manifest error in this.

1st. For that the said Circuit Court adjudged that the said pleas, *puis darrein continuance*, pleaded by him and the matters therein contained, are not sufficient in law to bar or preclude the said Blackburn from having or maintaining his aforesaid action thereof against him, the said Reilly. 20

2d. For that the said Court overruled the offer of the said Reilly, to show that after the agreement entered into between the plaintiff and the defendant, set forth in the plaintiff's declaration, a new agreement, bearing date on the twenty-seventh day of March, in the year eighteen hundred and eighty-three, was made between the same parties in discharge of and in substitution for their aforesaid former agreement, which agreement is in the words following: 30

[Here the agreement set forth in full on pages 4 and 5 of printed record is inserted.] And that the said Reilly offered and was willing to perform the agreement on his part, but that the said Blackburn wholly failed and refused to perform the agreement on his part.

3d. For that the said Court overruled the offer of the said Reilly to show that after the agreement between the 40

plaintiff and defendant, set forth in the plaintiff's declaration, was entered into, a new agreement, bearing date on the twenty-seventh day of March, in the year eighteen hundred and eighty-three, was made between the same parties in discharge of or in substitution for their aforesaid former agreement, which new agreement is the same agreement set forth in the foregoing second assignment of errors; that said new agreement was actually delivered to the respective parties thereto, on the fourth day of
 16 April of the same year; that at the same time when said agreement was delivered, an erroneous and excessive bill of costs was likewise delivered by said Blackburn to said Reilly, and the errors contained therein were never rectified; that the full amount of costs due said Blackburn was actually tendered to him by said Reilly on the twentieth day of April, in the same year, which tender was refused; and that the said Blackburn failed and refused to deliver the car loads of bark mentioned in said agreement, or any of them, within the time specified in said
 20 agreement, or at any other time, although the said Reilly was always ready to perform the agreement on his part.

4th. For that the said Circuit Court overruled all that part of the evidence offered in defence of said action, which showed that the said Reilly had failed to perform, on his part, the agreement mentioned in the plaintiff's said declaration, in that the plaintiff had failed to deliver merchantable bark as he had agreed to do.
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5th. For that the said Court overruled said last mentioned evidence, although the same tended to show such a continuous disregard by the plaintiff below of the terms of said last mentioned agreement, as justified the defendant below in refusing to perform it on his part.

6th. For that the said Court overruled said last mentioned evidence, although the same tended to show such a continuous disregard by the plaintiff below of the terms
 40 of said last mentioned agreement, as amounted to a re-

nunciation or repudiation of it on his part, and so excused the said Reilly from performance of it on his part.

7th. For that the said Court charged the jury that notwithstanding that they should be of opinion that the plaintiff below had failed to perform the agreement on his part, the defendant was nevertheless under an obligation to comply with the terms of the agreement on his part.

8th. For that the Court charged the jury that the plaintiff below was entitled to the benefit of the fluctuations of the market from month to month, or week to week, during the time the contract would, by its terms have continued, had both parties performed it, and that the damages were not to be computed with reference to the time when the breach of the contract occurred. 10

9th. In that the Court charged the jury that the plaintiff below was entitled to the benefit of the fluctuations of the market from month to month, or week to week, during the continuance of the contract, and so permitted the jury to consider the state of the market after the commencement of this suit. 20

10th. And there is also error in this, that the judgment was given against the said Reilly, whereas it should have been given in his favor, wherefore the said Reilly prays judgment, and that the judgment aforesaid, for the errors aforesaid, and other errors found and being in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that the said Reilly may be restored to all things he hath lost by occasion of said judgment, and that the Court here may proceed to examine the record and proceedings aforesaid. 30

FREDERIC W. STEVENS,
Att'y for Plaintiff in Error.

The defendant in error files the usual joinder.

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WILLIAM W. STAYLEY

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N. J. Court of Errors and Appeals.

PATRICK REILLY,

vs.

JOHN R. BLACKBURN,

} *In Case.* 10
} *In Error to the*
} *Essex Circuit*
} *Court.*

STATE OF THE CASE.

Blackburn, the plaintiff below, a Virginia dealer in bark, entered into a contract on May 13, 1882, to sell to the defendant below, Reilly, a Newark tanner, for use in his business, 52 car loads of bark at the price of \$18 per ton, to be delivered at the rate of one car load per week until the whole should have been delivered; under this contract, five car loads were actually delivered, (p. 30.) This was stored by Reilly in a loft over his tannery (p. 31) with other bark, (p. 50, l. 30.) It was all paid for at the contract price by July 3, 1882, (p. 49, l. 39,) but none of it was used until July 15, and not until the last payment had been made. (p. 50, l. 3.) It was then found to be musty, lumpy and unfit for the purpose for which it had been bought, (p. 50, l. 23; p. 32, l. 30,) and shortly after, Reilly notified Blackburn not to send any more, first by mail, alleging that he was overcrowded, (p. 89,) and shortly afterward in a personal interview, alleging its unmerchantable condition, (p. 5, l. 23; p. 37, l. 1, *et seq.*)

In January, 1883, and before the expiration of the year within which the bark was to have been delivered, Blackburn brought suit, setting forth the above contract and the breach of it. The defendant pleaded the general

issue. Before trial, however, the parties came to an understanding and made an agreement in writing, dated March 27, 1883, which was delivered on April 4, 1883. The agreement appears on p. 4 of the printed case. By its terms it was stipulated that the contract, for the breach of which suit had been brought, should be completed by the delivery by Blackburn of a sufficient number of car loads of bark to make, with what had already been delivered, 52 car loads, at the price of \$17
 10 per ton, payable on delivery of each car load. This new agreement then went on to provide as follows :

“ 4. One car load only shall be delivered during each week after shipments shall begin, and said shipments *shall* begin on the first day of April next, or within ten days thereafter.

“ 6. This suit shall not be discontinued or *non proessed* until the final completion of this contract. The plaintiff shall then discontinue it without costs ; but in case
 20 “ of a breach of this contract by said Reilly, the plaintiff may proceed in this suit by requiring the defendant to plead, and the suit shall proceed thereon to trial, and the damages to be recovered shall be measured by the original contract sued on. Said Reilly shall, on the execution hereof, pay the taxed costs of the plaintiff. It is understood that this suit is not settled unless the terms of this contract are faithfully carried out by said
 “ Reilly.”

Blackburn failed to deliver any bark within the ten
 30 days stipulated, or subsequently, (p. 6, l. 3 ; p. 8, l. 10) ; but Reilly on his part tendered the costs on April 21, (p. 6, l. 8 ; p. 7, l. 32.) The tender was refused, and Blackburn insisted on proceeding in the original suit. Reilly then pleaded *puis darrein continuance*, two additional pleas setting forth the new agreement, Blackburn's failure to deliver under it, and Reilly's tender of costs (p. 4), to which Blackburn demurred, and judgment was given in favor of the demurrant. The case then went to trial on the general issue as originally pleaded, the dam-
 40 ages claimed being damages for the breach of the first

agreement, and a verdict was rendered on this issue in plaintiff's favor for \$1,140.43.

The plaintiff in error assigns errors on the judgment overruling his pleas (p. 9) on the action of the Court in overruling the defense, so far as it went to show that the bark furnished the defendant was unmerchantable (p. 68), and on the charge to the jury (p. 78).

POINT I.

10

The Court erred in charging the jury that the true test of the right of a party to a continuing contract to put an end to it, is its repudiation by the other party; that in the case in hand there was no evidence of such repudiation by Blackburn (p. 76, l. 16, *et seq.*) and that, therefore, though Blackburn for two months continued to furnish unmerchantable bark, the quality of which was not discovered till after payment (p. 75, l. 20 to 40), Reilly was not at liberty to put an end to the agreement, (p. 76, l. 29.)

20

This ruling involves the consideration of two distinct questions: (1) When can a party to a continuing contract put an end to it by reason of the failure of the other party to perform his part of it? (2) Is it true that there was no evidence of any repudiation of this contract by Blackburn?

These questions will be discussed in their order.

The general rule unquestionably is that in executing ^{only} agreements for the sale of goods the obligation of the vendor to deliver, and of the buyer to pay, are concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, or an offer to perform, or averring readiness or willingness to perform his own promise. (*Benj. on Sales*, Corbin's Ed., Vol. II., § 897.) So that if the agreement in this case had stipulated for the delivery at one time of 52 carloads of merchantable bark, instead of stipulating for 52 weekly deliveries of the same amount, proof that five of the

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carloads sought to be delivered were unmerchantable, would justify the repudiation of the entire contract, Reilly would not have been obliged to accept 47 carloads of merchantable and 5 carloads of unmerchantable bark.

But, it is said, if delivery is to be made at intervals, the contract then becomes a continuing contract, and the rule is otherwise.

- 10 That the authorities on this subject are conflicting is conceded, but that the weight of authority, either in this country or in England, accords with the ruling in the Court below, is denied.

The first case bearing directly upon the point at issue, is *Withers vs. Reynolds*, 2 B. and Ad., 882. Defendant agreed to furnish plaintiff with straw from October to June, at the rate of three loads in a fortnight, and plaintiff agreed to pay defendant "33s. per load for each load of straw so delivered on his premises to June 24th."

- 20 The straw was regularly sent till the end of January, when, plaintiff being in arrears in his payments, called upon defendant and tendered the price of all the straw delivered except the last load, saying that he would always keep one load on hand. To this defendant objected, and after accepting the money tendered refused to send any more straw unless it was paid for on delivery, and no more was sent. It was held that plaintiff could not sue for this failure to send.

- 30 Here the only breach was a failure to pay for the last load sent, and a verbal statement "that he (plaintiff) should always keep one load on hand."

The next case is *Hoare vs. Rennie*, 5 Hurl. & N. 19, where the plaintiff, failing to ship the amount of iron he had agreed to ship in the first of the three successive months during which he was to send it, was not permitted to recover damages for the refusal of the defendant to accept in the subsequent months.

- 40 The case is directly in point, and while it has been criticized by some of the English Judges, in cases to be

hereafter mentioned, it has been as strongly approved by other Judges of equal reputation, one of whom (Lord Bramwell,) is now sitting in the House of Lords.

In *Bloomer vs. Bernstein*, L. Rep. 9 C. P. 588, Lord Coleridge based his decision upon the authority of *Withers vs. Reynolds*, *supra*, and so directly affirmed it.

Bradford vs. Williams, L. R. 7 Exch. 258, was decided upon the authority of *Withers vs. Reynolds*, and *Hoare vs. Rennie*, and is likewise in my favor.

Poussard vs. Spiers, 12 Q. B. Div. L. R. 410, the case 10
of an opera singer who failed (through sickness,) to appear on the first night of her engagement, seems to rest substantially on the same foundation.

One of the last cases on this side of the question, decided, too, in the Court of Appeals, is *Honck vs. Muller*, 7 Q. B. Div. 92, where the prior cases are reviewed. *Hoare vs. Rennie*, is followed, and *Simpson vs. Crippin*, (*infra*), disapproved, by a majority of the Court.

And finally, in the case of the *Mercy Steel and Iron 20*
Company vs. Naylor, relied upon by the Court below, when the case got into the House of Lords, *L. R. Appeal Cas.* Vol. 9, 434, (which was after the verdict in this case,) Lord Bramwell declared that he still adhered to the views expressed by him in *Honck vs. Muller*, and dissented from the views of Jessel, M. R., in the case then under review. This is the latest case on the subject.

The cases cited as authorities on the other side, are *Weaver vs. Lessions*, 6 Taun. 154; *Jonassohn vs. Young*, 4 B. & S. 296; *Simpson vs. Crippin*, L. R. 8 Q. B. 14; 30
Roper vs. Johnson, L. R. 8 C. P. 167; *Brandt vs. Lawrence*, 1 Q. B. Div. 344; *Freeth vs. Burr*, L. R. 9, C. P. 208, and *Mercy Steel and Iron Company vs. Naylor*, 9 Q. B. Div. 648, in the Court of Appeals. They do not all hold the same doctrine. In *Simpson vs. Crippin*, plaintiff's agreement was to take "from 6,000 to 8,000 tons of * * * coal * * * in equal monthly quantities during the period of twelve months." He took only 158 tons during the first month, and for this breach defendant canceled the contract. Held, that he was not justified 40

in so doing, by a majority of the Court, against the opinion of Mellor, *J.*, who thought *Hoare vs. Rennie* was undistinguishable from the case then in hand. In *Roper vs. Johnson*, which came up immediately after *Simpson vs. Crippin*, and which was exactly similar, there was no argument on the point, counsel conceding that the decision of a co-ordinate division of the Court would be followed, and that the proper tribunal in which to argue the question was the Appellate Court.

- 10 *Simpson vs. Crippin*, goes farther than any other case, and holds that the failure, (no matter how inexcusable,) on the part of the vendee to comply at the outset with the terms of his contract, will not justify the vendor in rescinding it. The case is directly opposed to *Honck vs. Muller*, afterwards decided in the Appellate Court, and is not sustained by *Freeth vs. Burr*, and the *Mercy Steel and Iron Co. vs. Naylor*, *supra*, which merely hold, in the language of Lord Coleridge, that "In cases of this
- 20 "sort, where the question is whether the one party is "set free by the action of the other, the real matter for "consideration is whether the acts and conduct of the "one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of "the contract, * * * * the true question is, whether the acts and conduct of the party "evinced an intention no longer to be bound by the contract."

It is respectfully submitted that the rule, as laid down in *Simpson vs. Crippin*, even as modified by *Freeth*

30 *vs. Burr*, is opposed to the weight of authority, to analogy, and to reason. The last named case is a compromise between *Hoare vs. Rennie* and *Simpson vs. Crippin*, and is opposed to the course of decision on analogous questions. It makes the question one of *intent*, to be settled by a jury, rather than of *law*, to be decided by the Court. It is as if in *Smith vs. Brady*, 17 N. Y. 174, the Court had left it to the jury to say whether, when the plaintiff put the joists in the cottages he was building, sixteen inches apart, instead of twelve, as the contract

40 called for, he *intended* to violate his contract.

Again, on principle, why should not the parties to a continuing contract be held as strictly to their engagements as they are on any other species of contract? The cases of *Tamvaco vs. Lucas*, 1 El. and El. 581, and *Smith vs. Brady*, 17 N. Y. 174, illustrate how strictly parties are held to their agreement, and in the case of *Bozarth vs. Dudley*, 15 Vr. 304, our own courts have preferred to adhere to that line of decision which compels a strict performance, rather than resort to the so-called equitable rule prevailing in Massachusetts, which allows 10 a recovery without performance.

The true distinction is that suggested by the Court in *Honck vs. Muller*, that, "where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him."

And all the cases relied upon by the defendant in error, except *Simpson vs. Crippin*, can be reconciled on this 20 distinction. Thus, in *Weaver vs. Sessions*, the breach of the covenant occurred sometime after the lease had gone into effect; when, is not stated in the plea, and the same remark applies to *Jonassohn vs. Young*, and *Brandt vs. Lawrence*. If, before a breach, a considerable part of the contract has been performed by both parties to it, it seems impossible to assert that the covenant afterward broken will go to the whole of the consideration. In such a position of affairs, the Court does not relieve the party from the consequences of his breach, from any desire 30 to excuse it, but because of the impossibility of undoing what has already been done; the contract has been in part performed, and the Court must deal with it accordingly; to give a cross action for damages is all that is practicable; and this is in strict accordance with the third rule given by Sergeant Williams, in his note to *Portage vs. Cole*, 1 Williams' Sanders, p. 320, (b); but where the first act of one of the parties to an agreement is a palpable violation of it, in a term, too, which is seen to be of the essence of it, why should he be permitted to assert— 40

"I admit that I have broken my agreement from the outset—that I have not as yet performed a single term of it—and yet I call upon you, who have sought to rescind it because of my breach, to pay me damages, because of such rescission?"

The case in hand is a strong illustration of the evils that would attend the rule as enunciated in the Court below. A bark manufacturer makes a *continuing* contract, in order that he may have a regular supply of good bark the year round. The tanning of hides must go on without interruption, (as the evidence in this case shows,) if it did not hundreds of skins costing thousands of dollars would be spoiled. The process is absolutely dependent upon a constant supply of the liquor which the bark yields. His covenant to pay is made only because of the covenant of the vendor to furnish a regular supply of the bark at the times agreed upon. If the bark be unfit for use, or be not delivered at the times agreed upon, the principal, if not the only consideration, for the buyer's contract, is gone. Why the vendor should, at the outset, be allowed to violate a fundamental part of his agreement, and yet the vendee be without power to put an end to it, and so secure himself against loss, is hard to perceive. Even if the question *were* one of fact—was it necessary to the defendant's business that this bark should be regularly furnished and be merchantable? That, at least, ought to have been left for the consideration of the jury.

2. But it is contended, further, that even if this Court should adopt the rule as declared in *Freeth vs. Burr* and the *Mercy Steel and Iron Company vs. Nayler*, then it ought to have been submitted to the jury as a question of fact, whether the continued failure to deliver merchantable bark for nearly two months was not evidence from which a jury would be at liberty to infer an intention wholly to abandon the contract. In considering this question, the jury would naturally have more regard to the acts of the plaintiff, than to his words. Will it be said, that five unequivocal acts in violation

of the contract, and none in pursuance of it, were an insufficient foundation for this inference. How many acts, then, must the plaintiff do, in order to justify the Court in submitting them to the jury—twenty, thirty or forty? Is their precise number a question of law for the Court? It is submitted, that even if the Court should adopt the rule in *Freeth vs. Burr*, the Court below erred in not submitting to the jury, on the question of intent to abandon or disregard the contract in its entirety, the plaintiff's acts in violation of it. 10

The American cases are all stated in Mr. Corbin's note to *Benjamin on Sales*, Vol. II., § 909. He comes to the conclusion that the weight of American authority is opposed to *Simpson vs. Crippin*. A perusal of those generally cited in this connection, shows that most of them touch but slightly the point under consideration; of those that do, the majority are in accord with *Hoare vs. Rennie*. The following cases are in point:

King Philip Mills vs. Slater, 12 Rhode Island, 82. 20

Stewart vs. Mary, 7 Ill. App. 508.

Bradley vs. King, 44 Ill., 339.

Norrington vs. Wright, U. S. Cir. Ct., 11 L. Reporter, 287.

POINT II.

The Circuit Court erred in adjudging that the facts stated in defendant's pleas *puis darrein continuance*, were insufficient in law to bar the plaintiff's action. 30

The agreement set forth in the pleas, if not broken by the defendant, is a complete answer to the plaintiff's declaration. *Good vs. Cheesman*, 2 B. and Ad. 328; *Cartwright vs. Cook*, 3 B. and Ad. 701; *Babcock vs. Hawkins*, 23 Vt. 561; *Evans vs. Powis*, 1 Exch. 602.

It is respectfully insisted, (1) that the agreement was not broken by the defendant; (2) if it was, that such breach went only to an insignificant part of the consideration, and was not, therefore, such an one as justified the 40

plaintiff in rescinding the new contract and continuing his suit on the original one.

1. The defendant, Reilly, did not break the agreement set out in the plea. The only breach pretended is his failure to pay the taxed costs before April 21. The agreement was delivered April 4. (p. 5, l. 35.) It stipulated that "said Reilly shall, on the execution thereof, pay the taxed costs of the plaintiff," and these costs were actually tendered, April 21. (p. 6, l. 8; p. 7, l. 32,) 10 (April 23, in the printed copies, is a mistake.) It is quite manifest that the costs were not to be paid contemporaneously with the delivery of the agreement. Had that been the intention, the plaintiff would not have accepted it without such payment, but the allegation of the plea is that it *was* accepted and received. But if they were to be paid after delivery, the defendant had a reasonable time in which to tax and pay them. The plaintiff (so the allegation of the plea is,) failed to deliver a taxed bill of costs, and so the defendant was 20 obliged to tax them. Considering that the issue was one pending in the Supreme Court, and that the defendant and the attorneys of both parties resided and had their offices in Newark, can it be said, *as a matter of law*, that seventeen days was an unreasonable time in which to do this, when the statute allows thirty days' time in which to file so simple a plea as that of the general issue, and yet the Court held the plea bad on this ground alone.

2. But even if the tender came too late, the agree- 30 ment to pay costs went only to a very insignificant part of the consideration. The Court below was very inconsistent in holding that five successive failures of the plaintiff to furnish merchantable bark, did not go to the root of the matter, so as to justify the defendant in rescinding the first agreement, and yet that the failure of the defendant to pay costs—a thing collateral—which, according to all the cases, went only to a part of the consideration—justified the plaintiff in rescinding the second agreement. In *Boone vs. Eyre*, (1 H. Blackstone, 40 273, n.) it was held that if A covenant with B, that for

a gross sum of money and for an annuity, he will convey a plantation, and also the negroes upon it, and he conveys the plantation, but not the negroes, a plea setting up a failure of title to the negroes is no answer to an action brought for non-payment of the annuity, for, say the Court, failure of title to a single negro would otherwise bar the action. This case is stated fully in the note to *Pordage vs. Cole*, 1 Wms. Sanders, 320, b, and is directly in point.

If it be said that the agreement provided that in case 10
of a breach of it by Reilly, the plaintiff might proceed in the original suit, on this point, also, *Boone vs. Eyre* is in point, for B there covenanted "that A, well and truly
"performing all and everything therein contained on his
"part, he would pay the annuity," thus providing for the consequences of a breach in language far stronger than that used in the agreement between *Reilly and Blackburn*. The breach here contemplated, is manifestly such a breach as would justify a rescission of the contract. It was a breach of the contract as a whole; such a breach 20
as went to the root of the matter, and would have justified Blackburn in bringing a suit to recover damages for refusal on the part of Reilly to receive not one particular car load of bark, but all the car loads which Reilly had agreed to take; and this is the more apparent from the consequence which was to follow, viz: "The damages to be recovered shall be measured by the original contract sued on," that suit having been brought, and brought only for refusal to receive the bark.

The concluding clause, "it is understood that this suit 30
is not settled unless the terms of this contract are faithfully carried out by said Reilly," is mere repetition, and adds nothing to what has been already said.

It is probable that the glaring inconsistency of holding Reilly to the rule laid down in *Simpson vs. Crippin*, in respect of the original agreement, and yet entirely disregarding it in the case of Blackburn, in the construction of the new agreement set out in the pleas, escaped the attention of the Court below, for the reason that the de- 40

murrer to the pleas was argued some time before the case came to trial, when all the cases bearing on the subject were more carefully considered by Court and counsel.

In nearly every contract, the provision express or implied is, that one party shall be liable to perform only in case the other party performs, or that the performance by one party shall be dependent upon performance by the other, but in the case of continuing contracts, the Court, in the cases cited by the other side, thought
 10 it necessary to make a distinction, and wherever a breach by one party did not, to use their expression, go to the root of the matter, the other party was not justified in rescinding, and this, though the mutual covenants seemed to be dependent, and performance by one party seemed to be dependent upon performance by the other. The plaintiff is in this dilemma. If the Court adopts the rule laid down in *Honck vs. Muller*, then clearly the charge to the jury is wrong. If it adopt that laid down
 20 in *Simpson vs. Crippin*, then the judgment overruling the pleas is wrong, for that rule does not permit rescission, unless the act relied upon go to the root of the matter—viz., to the whole consideration—while here the payment of costs went only to an inconsiderable part of it, and was merely collateral, according to all the decisions.

There is this further difficulty about the plaintiff's case: By his demurrer he admits, in the language of the plea, "that he failed to make any shipments of bark
 "within the ten days after the said first day of April
 "then next ensuing, as in said agreement it was stip-
 30 "ulated, or at any time subsequent thereto,"—the first breach on his part occurring April 10, before it could be claimed that the defendant was in default as to costs, (if he was in default at all.) The plaintiff having broken the agreement himself, and that too in a vital point, does it lie with him to complain of the defendant?

FREDERIC W. STEVENS,

Attorney.

N. J. Court of Errors and Appeals.

JOHN R. BLACKBURN,

Defendant in Error,

vs.

PATRICK REILLY,

Plaintiff in Error.

*On Error from the
Essex Circuit.* 10

THE FIRST QUESTION.

The first question arises on demurrer to second and third pleas, which was sustained.

The suit was on a contract for sale of bark. Blackburn claimed damages for breach. 20

After declaration was filed a settlement was agreed on, and reduced to writing, a copy of which is in the record, p. 4.

This settlement agreement was not carried out, and the defendant was ruled to plead.

The pleas filed were:

1. General issue.
2. (By way of pleas, *puis darrein continuance*), accord and satisfaction. 30
3. Same plea in another form.

The demurrer was to the second and third pleas, and the objection was that they set out only an accord, and no satisfaction.

THE SECOND PLEA.

I.

This plea sets out the agreement of settlement *in his verbis*, it says that it was delivered on April 4th, and 40

that it " Was delivered by said defendant and accepted
 "and received by said plaintiff, of and from said defend-
 "ant, in full satisfaction and discharge of the said sev-
 "eral promises in said declaration mentioned, and of all
 "damages and sums of money thereupon due and owing
 "or accrued."

There is then an averment that plaintiff did not carry
 out the agreement, but that defendant tendered costs and
 was ready to carry out the agreement on his part.

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The demurrer to this plea raised the question as to
 whether an unexecuted agreement, (and this one appears
 on the face of the plea to be unexecuted,) could be
 pleaded as an accord and satisfaction.

Blackstone says that an *accord* is a satisfaction agreed
 on between the parties, which, *when performed*, is a bar
 to all actions on this account. This is a definition which
 seems to be accepted by all the courts as a true exposition
 of the law.

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"An accord is one thing, a satisfaction another, but
 "an accord executed is one entire thing, and is a com-
 "plete bar."

This point arose in New Jersey in the case of

Oliver vs. Phelps, Spencer, 180. (1843.)

The question arose in this way: Phelps, a landlord, took
 the goods of Oliver, his tenant, by distress for rent, and
 the tenant brought an action of trespass *de bonis*, alleg-
 ing that the rent had been satisfied by an agreement that
 the landlord's daughter should be educated at a seminary
 which the tenant proposed to establish on the leased
 premises. The Supreme Court held that the *agreement*
 was inadmissible, and in disposing of the question,
 HORNBLOWER, *C. J.*, says:

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"The difficulty is created in the mind of counsel by
 considering an accord and satisfaction as one entire
 thing. It is so when executed, but an accord is one
 thing, and satisfaction, or the execution of it, is another.
 An accord executory, that is, an agreement that the
 debtor shall give and that the creditor shall receive a

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hawk or a horse in satisfaction of the debt, is no bar, but an accord executed, that is, the agreement carried into effect, is a complete bar."

The case went to the Court of Errors, and was affirmed on this and other points.

Oliver vs. Phelps, 1 Zab. 597.

The law on the subject of accord and satisfaction is fully discussed in

1 *Smith's L. Cas.* 445,

where it is laid down that three things are necessary to make an accord and satisfaction. 10

1. The matter agreed to be received in satisfaction of the debt must be something of legal value, to which the creditor was not before entitled.

2. Every part of the matter must be effectual.

3. The accord must be executed. A mere executory agreement by a debtor can never be pleaded as an accord and satisfaction. 20

A plea of an accord and a readiness on the part of the defendant to perform it, or of a tender of performance, is bad on demurrer.

Russell vs. Lytle, 6 Wend. 390.

Hawley vs. Foote, 19 Wend. 516.

It may be objected that the ruling in

Morris Canal Company vs. Van Voorst, 1 Zab. 100,

militates against this doctrine. 30

There the third plea was that the principal named in a bond, who had defaulted, had given his *note* in full satisfaction of the condition of the bond, and that it was accepted by the plaintiff in full satisfaction, and this plea was held good on demurrer.

The question was not whether a promissory note could be pleaded as an accord and satisfaction, but whether an accord and satisfaction could be pleaded to a suit on a bond, and this is the only question discussed in the opinion on that plea. 40

The equally important question as to whether the note was a satisfaction receives no attention, and we submit that the case is not well considered.

The case is founded on *Strang vs. Holmes*, 7 Wend. 223, where the point was whether a deed of conveyance *accepted*, could be alleged by way of accord and satisfaction to a suit on a bond.

In the old case of

10 *Cock vs. Honychurch*, T. Raymond, 203, 2
 Keble, 690, cited in 2 *Parson's Cont.* 681.

The case was trespass for an assault. The plea was a *concord* between the parties that the defendant should pay plaintiff £3 and his attorney's bill; that he had paid the £3, and was ready to pay the attorney's bill, but he never showed him any. Held, no defence, because not wholly executed.

A tender of performance is no bar.

20 *Brooklyn Bank vs. De Graw*, 22 Wend. 342.
 In *Noe vs. Christie*, 51 N. Y. 270, (1873,) the accord was that the defendant should pay \$70, and costs.

LOTT, *Ch. J.* says:

"It is conceded that the costs required to be paid under the agreement set up were never, in fact, paid, and assuming that they were tendered, that fact was not equivalent to its (the accord's,) execution. It was, nevertheless, at most, a simple unexecuted accord and was not satisfaction."

30 Citing *Day vs. Roth*, 18 N. Y. 448.

II.

A comparison of the contract set out in the declaration, with the settlement contract set out in the plea, shows that the two are identical in all material points excepting the price. The price in the original contract was
40 \$18 per ton; in the settlement agreement, \$17 per ton.

The quantity to be delivered was the same, the place of delivery was the same. Nothing is said about the quality of the bark in the original contract, but it must be understood to be good merchantable bark.

Now, the original contract is broken, and the parties come together to settle a suit brought to recover damages for the breach; they enter into a contract similar to the original one, and the defendant claims that not having executed the second one, he may avoid the first one.

The contracts are so similar that one ought not to be taken as a satisfaction of the other. 10

It is a promise for a promise.

An open account is not extinguished by a note which is not paid at maturity, and suit will lie on the account.

The matter given must be something to which the creditor theretofore had no right. Here the plaintiff had a legal right to everything which he got under the second agreement. The defendant got what he had no legal right to—a reduction in the price, and he ought not to allege that as a reason for abrogation of the original contract. 20

See 1 *Smith L. C.* 456, Sec. 3.

THE THIRD PLEA.

I.

This plea is accord and *tender*, and is liable to all the objections made to the second plea. 30

Besides, it shows that the tender was made after refusal to perform, April 21.

We submit that there is no error in this part of the record.

THE SECOND QUESTION.

The second most important question which we have to consider, is whether the direction of the Court on the trial overruling the defence interposed by the defendant, was correct.

As has already been stated, the action was for a breach of contract. The breach complained of was a refusal of the defendant to receive the bark which he had contracted to take and pay for. He sought on the trial to excuse himself by showing, or offering evidence tending to prove
 10 that the bark which he had received under the contract and paid for, was of an inferior quality, not merchantable bark.

The precise question is this: In a contract for successive deliveries, each delivery to be paid for when received, will a failure on the part of one party to make one of the deliveries according to the terms of the contract, authorize the other to rescind the contract entirely, and refuse to accept any further deliveries when tendered,
 20 according to the terms of the contract?

This question has recently received much attention from the Courts, and is of very great importance to the mercantile community.

It does not seem needful or proper that we should make an abstract of the cases in our brief; they have been carefully collected and compared in the second volume of *Benjamin on Sales*, 4th American edition, section 901, page 782, and in the elaborate notes of the American editor at page 787; also in the still more
 30 complete notes of Mr. Landreth of the Philadelphia bar, to the case of *Norrington vs. Wright*, reported in 21st American Law Register, N. S., page 395. These cases show that this subject has been forced upon the attention of the Courts by the constantly increasing number and importance of the questions of this class, which have arisen as the business of the country has progressed and becomes more complicated. In the case under consideration, an examination of the evidence clearly shows that the plaintiff, if in fault at all, was
 40 without any information from the defendant at the time.

when he terminated the contract, and refused to accept the bark, of the fact. Correspondence between the parties, given on pages 86, 87, 88, 89 and 90 of the record, shows that he was at the time anxious to proceed with the contract on his part according to its terms. There is nothing in this case to show that the plaintiff wilfully or intentionally failed to perform the contract on his part. If the bark delivered, or any part of it, was not of good quality, it is not shown that this fact was within his knowledge or brought to his attention. All the bark delivered was paid for by the defendant, according to the contract, except the last car load, which he refused to receive. The refusal to receive this or any other bark under the contract was not placed upon the ground that the bark delivered and paid for was not of a merchantable quality. From the correspondence it would seem that all the bark received and paid for had been accepted and passed upon; and that the reason for the refusal was that the defendant wanted no more bark at \$18 per ton. 10

If the doctrine—which seems now to be well established—is “that in contracts where a breach by the party suing is a breach of only a part of the consideration moving from him, and such breach can be compensated in damages without any necessity of annulling the whole contract, that a true construction of such a contract is, that it is not a condition precedent to the obligation to tender or accept a part; and that the other party should have been or should be always ready, willing and able to accept or tender the whole,” then it applies to this case with great force. The circumstances brings this case clearly within the reasoning of the Court in *Jonasohn vs. Young*, *Simpson vs. Crippon*, *Freeth vs. Burr*, *Houch vs. Miller*, and *The Mersey Steel and Iron Co. vs. Naylor*. 20

Scott vs. Kittanning Coal Company, 89th Penna. 231, 237, is very much in point. 30

We mention this case because it is cited with approval by Mr. Corbin, although he doubts the correctness of the doctrine when applied to cases where the circumstances are not similar. We cite this case to show that even though he doubts the correctness of the main proposi- 40

tion he admits that in cases similar to ours, no reason exists why the contract should be deemed at an end.

It cannot be possible that a slight defect in one of many deliveries, each of which is independent of the other, and each of which may well form a separate and distinct contract between the parties, should be held to authorize the other party to put an end to the entire series of contracts; the consequence of such a contract would be very disastrous. It would enable one party
 10 to take advantage of a good contract and hold the other to a strict performance of the same, and yet repudiate it entirely as if it should become to his interest to do so, if he could find the slightest defect in a portion of the goods received by him, although the other party was entirely ignorant of the defect and willing to make good any loss suffered thereby.

The comments of Sir WILLIAM BRETT, in his opinion in the case of *Renter vs. Sala*, 4th Common Pleas Division L. R., at page 256, seems to cover the points very
 20 fully. He says: "It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfill his part in any one or more of those deliveries, does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the
 30 "contract was for the purchase and sale of a specified quality of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfill his undertaking to accept or deliver the whole of the specified quality. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction
 40 "of such contracts is, that it is not a condition pre-

"cedent to the obligation to tender or accept a part ;
 "that the other party should have been, or should be
 "always ready and willing, and able to accept or tender
 "the whole. A consideration of the mercantile conse-
 "quences of otherwise construing such contracts seems
 "to me to fortify the one construction and to condemn
 "the other. Suppose, in the case of shipments, the sel-
 "ler has, by contracts made abroad, provided for all the
 "successive shipments, and has taken up ships to pro-
 "ceed and call for the successive cargoes, and the first 10
 "seller to him fails to fulfill his contracts, so that the
 "first shipment fails, the purchaser, under the main
 "contract we are discussing, may, upon one con-
 "struction suggested, throw up the whole contract,
 "although he could be amply recompensed for the par-
 "tial failure, and throw the loss of all the other pur-
 "chases and charters upon the seller without any com-
 "pensation. So, if the purchaser has made contracts,
 "and fails to take delivery of one parcel, the seller,
 "although he might be amply compensated for the par- 20
 "tial failure, would be entitled to ruin the buyer with
 "regard to his forward contracts without any compensa-
 "tion. Again, suppose any one of the ships lost, after
 "a perfectly good shipment by several ships, either
 "buyer or seller might at once cancel the whole con-
 "tract, to the irreparable loss of the other party, although
 "he himself might be amply compensated by a payment in
 "damages ; or suppose a seller to send all the stipulated
 "quantity in one ship, and a jettison to have become
 "inevitable on the voyage, he is to have the whole of 39
 "the remainder of the cargo left on his hands without
 "compensation, although the buyer might easily be com-
 "pensated for the short delivery. These considerations
 "show that the rule of construction adopted by the
 "Courts is as sound on mercantile as it is on legal
 "considerations, and all the considerations, both mercan-
 "tile and legal, apply as much and as fully to the pres-
 "ent contract as to those cited. The question of the
 "time, or mode of payment, has nothing to do with the
 "reasoning for or against either view ; moreover, it is 40

“most important, in my opinion, that the construction
“of mercantile contracts should be broad and large, and
“should not depend on refined logical deductions, or on
“slight variations, either in the terms or the conditions
“of each particular contract.”

We feel certain that the doctrine contended for by the
plaintiff in error, which does not seem to be sustained by
either reason or authority, will never receive the sanction
of this Court.

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JOSEPH COULT,
of Counsel with Defendant in Error.