INDEX.

TESTIMONY.

FOR PLAINTIFF.

Notice of Appeal. 10

(Filed, June 17, 1913.)

New Jersey Supreme Court.

MACK MANUFACTURING COMPANY, *Plaintiff,* *vs.* DANIEL DONOVAN, *Defendant.*	On Contract. Notice of Appeal. 20

To Roberson & Demarest,
Attys. for plaintiff.

Sirs:

Please take notice that the defendant appeals from the judgment rendered in the above entitled cause to the Court of Errors and Appeals in the last resort in all causes. 30

MERRITT LANE.
Attorney for Defendant.

Dated, June, 17-13.

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Grounds of Appeal.

(Filed, October 2, 1913 by Consent.)

The appellant specifies the following grounds for appeal in the above entitled matter:

1. That the Court permitted the suit to proceed upon an amended declaration which was permitted to be filed by an oral order made by the Hon. Benjamin A. Vail, a Circuit Court Judge, prior to the commencement of the trial, upon notice to the defendant over the objection of the defendant, whereas the said Circuit Judge had no power or authority to, at the time and under the circumstances, grant the order to amend that right resting with the Supreme Court or a Supreme Court Justice.

2. The Court permitted the plaintiff to, during the course of the trial, strike out the ammended declaration and the contract therein set forth and stand upon the original declaration.

3. The Court permitted testimony with respect to an oral contract when it appeared that the goods were furnished under a contract in writing.

4. That the Court permitted answers to the following questions over the objection of the defendant, the testimony of R. T. Hutchins:

> "Q. What did the card say? Mr. Lane: I object. You have not shown that the card is in our possession and that you cannot find it. The Court: I will allow it. A. Twenty-six dollars and twenty-five cents was the quotation on the card."

5. The Court refused the motion to non-suit upon the ground stated by the defendant when a non-suit should have been granted.

6. The Court refused to permit testimony offered by the defendant to show that the goods were not in accordance with the contract under

which they were furnished and that the defendant suffered damage by reason thereof.

7. The Court refused to permit exhibits D. 1 and D. 2, for identification to be offered in evidence.

8. The Court refused to permit in the testimony of the witness Michael Donovan an answer to the following question: "Q. What kind of brick was it stated should be furnished." 10

9. The Court refused to permit an answer to the question in the testimony of Michael Donovan: "Q. What test was it stated that the brick should meet."

10. The Court refused to permit in the testimony of R. T. Hutchins an answer to the question: "Q. Did you Mr. Hutchins, in order to get this properly on the record, prior to the awarding of this contract to Donovan, got the 20 city of Bayonne to specify in its proposals the Mack brick?"

11. The Court refused to permit an answer to the following question in the testimony of Mr. Hutchins: " 'Q. After you have had your talks with the various purchasers, or persons who are to be purchasers, what do you do with respect to your company? What steps do you take?' 'Q. Did you make report what you had 30 told Mr. Donovan, to your company, and the details of the contract that was to be entered into between your company and Mr. Donovan?' 'Q. What did you report to your company? A. I reported that Daniel Donovan had been awarded the contract. (By the Court) What contract? A. For paving 24th Street.' 'Q. (By the Court) By the City? Mr. Demarest. I move to strike out the answer. The Court: We have nothing to do with the city contract whatever. Mr. Lane: 40

You will allow me an exception? The Court: Yes. Q. Is your company in the habit of entering into written contracts with people to whom you sell bricks? Q. I show you Exhibit D 1 and Exhibit D 2 for identification, and ask you whether these are forms of contract that your company enters into? Q. Did you know, at the time you had the talk with Donovan, what city inspection your brick would have to pass?' 'Q. Did you not tell Mr. Donovan that the brick would pass the city inspection?' 'Q. Did you tell Mr. Daniel Donovan that the brick would stand a test of eighteen on compression, and two per cent absorption?' "

12. Because the Court overruled the offer of Exhibit D 1 and Exhibit D 2.

13. Because the Court overruled the answers to the questions propounded to Michael Donovan as follows: "Q. I show you Exhibit D 1 and D 2 for identification, and ask you where you received those two papers from?" "Q. Did you receive these two papers at the office of your father on or about the day of their date?"

14. Because the Court directed a verdict in favor of the plaintiff and against the defendant for the sum of $1415.90 which said direction was erroneous:

(a) Because there was no proof before the Court from which the Court could determine the amount of brick that was shipped and the value of the brick shipped.

(b) Because there was no evidence before the Court as to the contract under which the brick was shipped.

(c) Because there was a question for the jury.

(d) Because the verdict, if directed at all, should have been directed in favor of the defendant.

MERRITT LANE,
Attorney for and of counsel with Appellant.

Transcript Declaration.

New Jersey Supreme Court.

As yet of the Term of December, in the year of Our Lord One Thousand Nine Hundred and twelve.

Hudson County, ss.:

DANIEL DONOVAN, the defendant in this suit was summoned to answer unto Mack Manufacturing Company, a corporation of the State of West Virginia, the plaintiff therein in an action upon contract; and thereupon the said plaintiff by Philip F. Botzong, its Attorney complains for that whereas the said defendant on the eighth day of March, in the year of Our Lord One Thousand Nine Hundred and twelve, at the City of Bayonne in the County of Hudson, aforesaid to wit, at the City of Jersey City County and State aforesaid, was indebted to the plaintiff in Three thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendant at his request; and in the like sum of money for money lent by the plaintiff to the defendant at his request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at his request; and in the like sum of money for interest due from the de-

fendant to the plaintiff for the plaintiffs having forborne moneys due from the defendant to the plaintiff at the defendants request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit) on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded his promises, and has not paid any of the said moneys or any part thereof; to the plaintiffs damage Three thousand dollars, and thereupon it brings its suit, &c.

PHILIP F. BOTZONG,
Attorney of Plaintiff.

The following is a bill of particulars of the demand and copy of the
whereon the annexed declaration is founded.

Transcript Declaration.

DANIEL DONOVAN,
TO MACK MANUFACTURING CO., DR.

Date 1911	Car Initial	Number	Material	Quantity in Car	Quantity on Invoice	Price	Freight	Amount
May 3,	L. & M.	14465	Mack Block		7000	25.25	81.50	176.75
4,	P. R. R.	130485	" "	6000			68.38	
	P. Co.	559141	" "	9000	15000		104.00	378.75
June 10,	N. C. R.	350568	" "		11000		126.00	277.75
12,	P. R. R.	287073	" "	11000			198.50	
	P. R. R.	63791	" "	6500	17500			441.88
14,	P. Co.	578658	" "	6500			174.00	
	P. R. R.	51689	" "	9000	15500			391.38
19,	P. R. R.	10075	" "		11000		121,13	277.75
21,	P. L.	858414	" "		11000		121.37	277.75
23,	P. F. & C.	528949	" "	6500			203.25	
	P. Co.	559443	" "	11000	17500			441.88
24,	P. R. R.	276762	" "		11000			277.75
22,	P. L.	839189	" "	11000			124.63	
	P. R. R.	276946	" "	11000	22000		250.90	555.50
27,	P. L.	858928	" "		11000		128.13	277.75
28,	P. R. R.	85580	" "		9000		100.50	227.25
29,	P. R. R.	18538	" "		11000			505.00
	P. Co.	575581	" "		9000		406.00	
30,	P. R. R.	5978	" "	6500				
	P. R. R.	54808	" "	9000	15500			391.38
July 3,	P. R. R.	350355	" "		11000		124.75	277.75
5,	P. R. R.	285789	" "		11000		126.50	277.75
12,	P. L.	577555	" "	6500			197.50	
	P. R. R.	281594	" "	11000	17500			441.88
14,	P. R. R.	65573	" "		6500		73.50	164.13
17,	C. of N. J.	84753	" "		11000		124.25	277.75
18,	P. R. R.	277031	" "		11000		127.25	277.75
19,	W. N. Y. P.	6854	" "	6500			80.38	
	N. Y. P. & N.	632	" "	6500			147.21	
	P. R. R.	72479	" "	6500	19500			492.38
21,	P. L.	550358	" "		9000		104.25	227.25
22,	P. R. R.	12712	" "		11000		125.00	277.75
24,	P. R. R.	59808	" "	6500			200.00	
	P. R. R.	22387	" "	11000	17500			441.88
25,	C. of N. J.	80016	" "	9000			201.37	
	C. of N. J.	81860	" "	9000	18000			454.50
28,	P. C. C. & St. L.	552317	" "	6500			72.38	
	P. R. R.	50810	" "	9000	15500		101.92	391.38
29,	P. R. R.	7602	" "		9000		100.00	227.25
31,	U. L.	577739	" "	6500			147.38	
	P. L.	527790	" "	6500	13000			328.25
Aug. 1,	P. R. R.	280313	" "	11000				
	P. C. C. & St. L.	550970	" "	6500			272.26	606.00
	P. C. C. & St. L.	658524	" "	6500	24000	25.25		
3,	P. C. C. & St. L.	553730	" "		6500		75.63	164.13
4,	N. C. R.	7706	" "		9000		101.25	227.25
7,	P.C.C. & St. L.	553912	" "		6500		74.63	164.13
8,	P. R. R.	278635	" "		11000		125.13	277.75
9,	H. & G.	1010	" "		11000		126.50	277.75
10,	C. H. & S.	46341	" "	6500			74.50	
	G. S. & F.	2443	" "	4750	11250		56.25	284.06

Transcript Declaration.

11,	P. R. R.	286551	"	"	5500		64.00	
	N. & S.	4653	"	"	6250	11750	70.00	296.69
2,	P. F. & C.	527053	"	"		6500	164.13	164.13
								$11918.06

Cr.

July 24/11	Cash	$1500.00	
Aug. 30,	6500 Mack Block, 25/25	164.13	
Dec. 1,	Freight 9	5375.95	
Dec. 19,	Cash	3600.00	10640.08
			$ 1277.98

Dr.

Aug. 18,	Discount on note $3500 40 days	$ 22.75	
	Protest fee on above	1.58	
Sept. 27,	Discount on note $3500 60 days	32.08	
	Protest fee on above	1.58	57.99
			$1335.97

Judgment will be claimed for the sum of $1335.97, with interest thereon from the eleventh day of August, Nineteen hundred and eleven, besides costs.

PHILIP F. BOTZONG,
Attorney of Plaintiff.

Notice of Recoupement and Set-off.

Please take notice that the defendant will recoupe damages and set-off against the claim of the plaintiff upon the following state of facts:

The goods furnished for use on 24th Street in the City of Bayonne for $450,000 were furnished under an agreement that they should answer all specifications of the City of Bayonne and that they should also be subject to inspection by the City Engineer; that when such goods were delivered they did not answer the specifications of the City of Bayonne and did not pass the inspection by the City Engineer of the City of Bayonne and that they were defective in that, the absorption exceeded that specified with the result that after said brick had been furnished and inspected and found not to comply with the specifications and inspection, the contractor was held up from the 28th day of August, nineteen hundred and eleven at the time said brick was delivered until the 6th day of September, nineteen hundred and eleven, during which time the Contractor was prevented from working by reason of the defect in the brick and was endeavoring to get the City Authorities to amend the specifications so as to accept the said brick and did not succeed in so doing until the 6th day of September, nineteen hundred and eleven; that because of the inability to use said brick between the 28th day of August nineteen hundred and eleven and the 6th day of September A. D. nineteen hundred and eleven, the said Contractor was put to the following loss:

His teams and workmen being idle during that time upon that account, to wit

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Notice of Recoupement and Set-off.

Aug. 28th	$57.50
Aug. 29th	57.50
Aug. 30th	57.50
Aug. 31st	57.50
Sept. 1st	57.50
Sept. 2nd	57.50
Sept. 4th	57.50
Sept. 5th	57.50
Sept. 6th	57.50
Demurrage	48.00
Aug. 28th Foley	10.00
Aug. 28th Road Bed Man	4.00
Three brick men	15.00
7 Helpers at $ 2.00 a day	14.00
Damage by reason of the inferiority of the brick, the contractor being under a Bond to Maintain the road and loss which will be occasioned to the Contractor by reason of the additional amount necessary for maintainance	500.00
Total	$1108.50

And the Contractor will ask damages against the plaintiff for any amount in excess of what may be recovered by the Contractor.

MERRITT LANE,
Atty. for Defendant.

New Jersey Supreme Court.

MACK MANUFACTURING COMPANY, a corporation, *Plaintiff,* *vs.* DANIEL DONOVAN, *Defendant.*	On contract. Notice.

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To MERRITT LANE, ESQ., Attorney of Defendant.

PLEASE TAKE NOTICE that at the trial of the above entitled cause, I will move to amend the declaration heretofore filed in this cause in conformity to the declaration, a copy of which is herewith served upon you.

Dated January 23rd, 1913.

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PHILIP T. BOTZUNG,
Attorney of Plaintiff.

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Specification of Defenses.

In accordance with a notice heretofore served upon the defendant he specifies the following defense to the above entitled action.

1st. The goods mentioned in the Bill of Particulars annexed to the Declaration were never delivered to the Defendant.

2nd. The defendant did not contract the debts sued on. 10

3rd. There was no contract made between the plaintiff and the Defendant.

4th. The goods were not contracted for at the prices referred to in the bill of particulars.

5th. The goods were of inferior quality and not in accordance with the terms of the contract under which they were furnished.

6th. The goods were of inferior quality and not in accordance with the terms of the contract under which they were furnished and caused loss and damage as set forth in the annexed Notice of Recoupment and Set-off. 20

7th. The goods were furnished under expressed contract and there can be no recovery under the common count, there being no implied contract.

MERRITT LANE.

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Amended Declaration.

New Jersey Supreme Court.

As yet of the Term of December, in the year of Our Lord One Thousand Nine Hundred and Twelve.

HUDSON COUNTY, SS:

Daniel Donovan, the defendant in this suit was
10 summoned to answer unto Mack Manufacturing Company, a corporation of the State of West Virginia, the plaintiff therein in an action upon contract; and thereupon the said plaintiff by Philip F. Botzong, its attorney, complains for that whereas heretofore, to-wit on the Second day of March, Nineteen hundred and eleven the plaintiff and defendant, to wit, at the City of Bayonne, in this State did enter into a certain written contract a copy of which is hereto annexed and
20 made a part hereof, whereby the said plaintiff did agree to sell and the said defendant agreed to purchase approximately twenty-three thousand paving blocks for use by the defendant in the Town of Westfield in this State at the rate of Twenty-five dollars and twenty-five cents a thousand, and the said plaintiff avers that it did thereupon sell and deliver thirty thousand bricks to said defendant as provided in said contract and
30 has performed and fulfilled said contract on its part yet the said defendant has neglected and refuse to perform said contract and pay the sum due to the said plaintiff. And for that whereas, heretofore, to-wit, on the second day of March, Nineteen hundred and eleven, the plaintiff and defendant, to-wit, at the City of Bayonne, in this State did enter into a certain written contract, a copy of which is hereto annexed and made a part hereof, whereby the said plaintiff did agree
40 to purchase approximately four hundred and fifty

thousand paving blocks for use by the defendant in the City of Bayonne in this State at the rate of Twenty-five dollars and twenty-five cents a thousand, and the said plaintiff avers that it did thereupon sell and deliver five hundred thousand bricks to said defendant as provided in said contract and has performed and fulfilled said contract on its part yet the said defendant has neglected and refused to perform said contract and pay the sum due to the said plaintiff. And for that the said defendant on the eighth day of March, Nineteen hundred and twelve, at the City of Bayonne, in the County of Hudson and State of New Jersey, to-wit at the City of Jersey City, County and State aforesaid, was indebted to the plaintiff in the sum of Three thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendant at his request; and in the like sum of money for money lent by the plaintiff to the defendant at his request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff's having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit) on the day and year last aforesaid, in the county aforesaid, in con-

sideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded his promises, and has not paid any of the said moneys or any part thereof; to the plaintiff's damage Three thousand dollars, and thereupon it brings its suit, &c.

PHILIP BOTZONG,
Attorney of Plaintiff.

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This Agreement Amended to Amended Complaint is Exhibit D-1 for Identification.

AGREEMENT made in duplicate on March 2nd, 1911, between the Mack Manufacturing Company, a West Virginia corporation, with its general office in Philadelphia, Pennsylvania, hereinafter called the Seller, and Daniel Donovan, of Bayonne, New Jersey, hereinafter called the Purchaser, WITNESSETH, that it is mutually agreed between the parties hereto as follows, to-wit:

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First: The Seller agreed to sell and the Purchaser to purchase approximately Twenty-three Thousand (23,000) Paving block for use in paving The Gutters of North Avenue in the Town of Westfield, State of New Jersey, the said Paving Block to be delivered in car load lots at Westfield.

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Second: The Purchaser agreed to pay the Seller for each Thousand of said paving block so delivered the sum of Twenty-five dollars and 25/100 ($25.25); said payments to be made in cash on the fifteenth day of each calendar month for all paving block delivered during the preceding calendar month, and should the Purchaser fail to make payemnts as above the Seller may discontinue shipment until payment is made as above.

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Agreement.

Third: The Purchaser agreed to pay the freight on paving block delivered as aforesaid and to send promptly the receipted freight bills to the Seller to be credited as so much cash paid on account of the respective invoices, but no credit is to be allowed by the Seller for switching or demurrage charges incurred at the point of delivery, and the Purchaser hereby agreed to pay the same.

Fourth: The Purchaser agreed, within six days from the time of arrival of any shipment, to notify the Seller by notice mailed to its Philadelphia office of any defects, breakage or shortage in such shipment, and should the Purchaser fail to mail such notice within such time, the invoice accompanying the bills of lading will be conclusive evidence as to the quality, quantity and good condition of the paving block delivered in any such shipment; but in no event shall the Seller be held liable for any damage which may be caused or done in unloading or hauling at or from the point of delivery as above set forth.

Fifth: The Seller agreed to commence shipments of the aforesaid paving block as soon hereafter as directed by the Purchaser, and will continue shipments thereafter without unreasonable delay, but the Seller is not to be held liable for delay where the same is occasioned by acts of God, labor troubles, car shortages, fires, floods, or any other cause beyond its control.

Sixth: The Seller agreed that the paving block delivered under this agreement shall be subject to the inspection of the Town Engineer of the Town of Westfield, N. J. or his duly authorized inspectors.

Seventh: The Seller guarantees that forty-two paving block are sufficient to lay one square

yard of pavement, but in no case is the total yardage laid, as determined by the Town Engineer's measurement, to be used as a basis for determining whether this guarantee has been fulfilled.

Eighth: It is understood that this agreement binds the heirs, executors, administrators and the successors and assigns of the parties hereto as well as the parties themselves.

IN WITNESS WHEREOF, the Seller and Purchaser have duly executed this agreement under their respective seals.

Attest:

E. H. GOODRICH,
Assistant Secretary,

Purchaser,
Daniel Donovan.

MACK MANUFACTURING COMPANY,
By James M. J. Mack.

This Agreement Amended to Amended Declaration is Exhibit D-2 for Identification.

AGREEMENT made in duplicate on March 2nd, 1911, between the Mack Manufacturing Company, a West Virginia corporation, with its general office in Philadelphia, Pennsylvania, hereinafter called the Seller, and Daniel Donovan, of Bayonne, New Jersey, hereinafter called the Purchaser, WITNESSETH, that it is mutually agreed between the parties hereto as follows, to-wit: 10

First: The Seller agreed to sell and the Purchaser to purchase approximately Four hundred and Fifty thousand (450,000) paving block for use in paving Twenty-fourth Street in the City of Bayonne, State of New Jersey, the said paving block to be delivered in carload lots at Bayonne.

Second: The Purchaser agreed to pay the Seller for each Thousand of said paving block so delivered the sum of Twenty-five Dollars and 25/100 ($25.25); said payment to be made in cash on the fifteenth day of each calendar month for all paving block delivered during the preceding calendar month, and should the Purchaser fail to make payments as above the Seller may discontinue shipment, until payment is made as above. 20

Third: The Purchaser agreed to pay the freight on paving block delivered as aforesaid and to send promptly the receipted freight bills to the Seller to be credited as so much cash paid on account of the respective invoices, but not credit is to be allowed by the Seller for switching or demurrage charges incurred at the point of delivery, and the Purchaser hereby agrees to pay the same. 30

Fourth: The Purchaser agreed, within six days from the time of arrival of any shipment, to notify the Seller by notice mailed to its Philadelphia office of any defects, breakage, or shortage in such shipment, and should the Purchaser fail to mail such notice within such time, the invoice 40

accompanying the bills of lading will be conclusive evidence as to the quality, quantity and good condition of the paving block delivered in any such shipment; but in no event shall the Seller be held liable for any damage which may be caused or done in unloading or hauling at or from the point of delivery as above set forth.

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Fifth: The Seller agreed to commence shipments of the aforesaid paving block as soon hereafter as directed by the Purchaser, and will continue shipments thereafter without unreasonable delay, but the Seller is not to be held liable for delay where the same is occasioned by acts of God, labor troubles, car shortage, fire, floods, or any other cause or causes beyond its control.

Sixth: The Seller agreed that the paving block

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delivered under this agreement shall be subject to the inspection of the City Engineer of the City of Bayonne, N. J., or his duly authorized inspectors.

Seventh: The Seller guarantees that forty-two paving block are sufficient to pay one square yard of pavement, but in no case is the total yardage laid, as determined by the City Engineer's measurement, to be used as a basis for determining whether this guarantee has been fulfilled.

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Eighth: It is understood that this agreement binds the heirs, executors, administrators and the successors and assigns of the parties hereto as well as the parties themselves.

In witness whereof, the Seller and Purchaser have duly executed this agreement under their respective seals.

Attest:

E. H. Goodrich,

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Assistant Secretary,

Mack Manufacturing Company,

Purchaser,

Daniel Donovan.

By James M. Mack,

President.

Testimony.

New Jersey Supreme Court.
Hudson Circuit.

MACK MANUFACTURING COMPANY, a corporation of West Virginia, *vs.* DANIEL DONOVAN.	No. 103. Action at Law. April Term, 1913.

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Trial of the above entitled case, April 21, 1913, before Hon. Benjamin A. Vail, and a jury.

APPEARANCES:

MR. ELMER DEMAREST (Roberson & Demarest) for the Plaintiff.

MR. MERRITT LANE, for the Defendant.

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MR. DEMAREST: Your Honor will remember that this case was on for trial at the last term, when Mr. Harry Lane appeared. At that time a motion was made to amend the pleadings, so that the action would be upon contract. It is for bricks sold by a brick manufacturing concern in West Virginia, to the contractor, to be used in paving a certain street in Bayonne and another in Westfield. The action is brought for bricks sold to the contractor who laid these two streets. At that time your Honor made an order we might amend, and Mr. Lane took the position your Honor had no right or jurisdiction to make that order. The difficulty with the case is here:—that there is a contract signed in the name of the defendant, but it is impossible for us

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to tell—and we imagine it was not signed by the defendant himself; for that reason interrogatories were propounded and served upon the other side, and the time for answering them expired the middle of last week. When this case was on before, your Honor laid it over to this week because the interrogatories had not been answered. They have not yet been answered. In view of the circumstances, and in view of what the refusal of the defendant amounts to in this case to answer those interrogatories, I move for the penalty prescribed by the statute, namely, the suppression of the defense, and inasmuch as there has been a set-off filed or recoupment on the part of the defendant, that the proceedings upon the recoupment be dismissed. I am ready to go on to trial.

MR. LANE: I should think you would be.

MR. DEMAREST: My friend has been so technical in this case that I do not feel abashed to make that motion.

MR. LANE: The matter had escaped my mind until it was brought to my attention a few days ago, when the case was on the list for trial. I did not know that the interrogatories had been served upon me. I have endeavored to get Mr. Donovan, to get these interrogatories answered. I have talked to Mr. Demarest and told him substantially what the answers to the interrogatories would be. They have been prepared after consultation with him and have been sent to Bayonne to be sworn to. They do not help the other side very much. He asks us to prove a written contract which

we have never seen. We simply answer we do not know whether our name is there or not. We have not seen it. We have not got it. The penalty prescribed by the statute ought not to be visited upon the defendant in this case, because if it is anybody's fault, the fault is in my office.

THE COURT: I don't think I would penalize counsel under the circumstances, especially when the interrogatories will be here during the day. 10

MR. LANE: Yes.

MR. DEMAREST: Then I will ask this. This question is coming before the court. We sued for goods sold and delivered, and we demanded a specification of defenses. They came back with a specification of defenses, in which they set up a written contract. That was the first I had ever been apprised of a written contract. Now, when I came to examine that contract, it is not in the handwriting of the defendant. If it is necessary to move during the trial for an amendment from the present state of the declaration to a declaration founded upon contract I want it done without the suit being delayed by an adjournment. 20 30

MR. LANE: I shall not plead surprise, or anything of that kind.

THE COURT: If you want to amend, I will allow you to do so. The other side say they will not ask for a postponement.

MR. DEMREST: If there is a written contract produced, as a condition to permitting that to go in, the defendant should admit the execution of that contract, because I 40

have had a subpoena served out for the defendant, aand he is absenting himself and cannot be brought here this morning; that is, not to put me to the necessity of going over the term in order to subpoena that man.

MR. LANE: Mr. Donovan is in court. The son is in court, the man whom you say signed the contract.

MR. DEMAREST: I don't know if he signed it or not.

THE COURT: What are you going to do with the case?

MR. DEMAREST: I am ready to go on.

THE COURT: You may go on.

The jury was called and sworn.

Mr. Demarest opened to the jury, and Mr. Lane followed with an opening for the defense, the case being tried under the new practice.

R. T. HUTCHINS, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Where do you live? A. Philadelphia.

Q. Do you know the Mack Manufacturing Company? A. Yes.

Q. Employed by it? A. Yes. 10

Q. In what capacity? A. Salesman in the eastern States.

Q. Speak up a little louder. I don't think the jury can hear you. A. I am salesman for the Mack Manufacturing Company in the Eastern States.

Q. Is the Mack Manufacturing Company a partnership or a corporation? A. A corporation.

Q. Of what State? A. West Virginia. 20

Q. Do you know Mr. Daniel Donovan? A. Yes.

Q. Did you see Mr. Daniel Donovan in the month of March, 1911? A. March, 1911? I think I did; I don't remember, positively, whether it was March or not.

Q. Did you see him around March, 1911? A. Yes, about the time we started to ship. I think I got shipping orders from him about that time, yes. 30

Q. Did you have a conversation with him about the sale of Mack block? A. Not at that time. Yes, when we got the order. It was in 1910 the contract was awarded by the city of Bayonne to Donovan, and Mack block adopted for the work.

Q. When did you have your conversation with Donovan about the sale of the block for use in the city of Bayonne? A. When bids were received I quoted Donovan on our brick. 40

Q. Verbally? A. Well, I quoted him on my card.

Q. At what price?

MR. LANE: I object. It is immaterial.

THE COURT: There is a written contract. I will sustain the objection.

10 MR. DEMAREST: We want to offer the card and all the papers. Will you produce them?

THE COURT: How would it be material? By your declaration there was a written contract to furnish the brick at $25.25?

MR. DEMAREST: I am not standing upon the written contract, but upon the cost as it was at the time it was called for.

20 THE COURT: You set up in your declaration a written contract. Then you cannot go back and sue on your verbal contract.

MR. DEMAREST: My declaration doesn't show it.

THE COURT: I have the amended declaration.

MR. DEMAREST: This is the one we stand on (indicating).

30 THE COURT: But you cannot stand on the first one with your declaration amended.

MR. DEMAREST: Then, your Honor overrules me. I will withdraw this witness for the present.

40

MICHAEL J. DONOVAN, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Where do you live? A. 949 Avenue C, Bayonne.

Q. Do you know Daniel Donovan? A. I do. 10

Q. Is he any relation to you? A. Father.

Q. Is that your signature in writing? (indicating) A. Yes.

Q. The written portion at the bottom of those two papers I show you; are they in your handwriting? A. Part of it, yes.

Q. Where the name of Daniel Donovan appears? A. Yes.

Q. Were you the agent of your father? A. In 20 some respects.

Q. What authority, if any, had your father given you to sign the two papers just shown you? A. I was handling the affairs of Father at that time, and I understood that the contract price for the bricks to be delivered at 24th Street——

THE COURT: That is not the question.

Q. What authority, if any had your father 30 given you to sign the two papers just shown you? A. Why, he didn't give me any authority.

Q. Did he tell you to sign them? A. Why, no; I acted on my own say-so.

Q. Did you show him the papers before you signed them? A. I simply signed them, and sent them off, I believe, the next day. I don't believe he was at home at the time.

Q. Did you show him the papers before you 40

signed them? A. No; they came in the afternoon mail. I signed them the same night and sent them back. I suppose they had them in Virginia the next day.

Q. Did your father give them to you, or did you get them in the mail? A. I receive all mail. I get all mail.

10 Q. And act for him, to sign contracts? A. Why, I have, the last year.

Q. Did you, at the time you signed those contracts, act for him? A. My power of attorney is only from the last year, I believe.

Q. Did you have a power of attorney at that time from him? A. Not in this respect, no.

Q. How soon after—did you tell your father you had signed those contracts? A. I suppose
20 possibly within the next couple of days.

Q. What did he say? A. He told me I had made a mistake, that the price agreed upon was twenty-five dollars. I immediately wrote that letter to the company.

Q. Did you tell your father you had signed those papers? A. I told him I had signed the papers.

Q. What did he say when you told him that?
30 A. He told me he was buying the bricks at twenty-five dollars a thousand.

Q. Then did you write this letter next shown you? A. I wrote that letter, yes.

Q. At whose request? A. Why, when he told me the bricks were twenty-five dollars I simply went to work and explained the matter to the cimpany, told them I had made a mistake, and wanted to rectify it by that letter.

40 Q. Did your father at any other time authorize you, in advance of signing that contract, to sign

contracts for him in his name? A. Do you mean at what——

Q. Authorize you to sign contracts for him in his name? A. Why, he was away at the time this contract was awarded, and my power of attorney ceased just as soon as he came back; no, I didn't have any power of——

Q. Did you work for your father on the 24th Street job in Bayonne? A. Part of the time. 10

Q. Did you work for your father on the Westfield job? A. Part of the time.

Q. Were Mack block used in either of these jobs? A. On both jobs.

Q. Brick from the Mack Manufacturing Company, the plaintiff in this case? A. From the Mack Manufacturing Company, yes.

Q. What was your connection with those two street improvements, if any? A. Why, I was simply an employe of my father. 20

Q. What did you do in the course of your employment? A. Why, I looked after things in general, and saw that everything was carried out as it should be.

Q. Checking up the work? A. Why, I was there only part of the time. When I was there I did check it up, yes. 30

Q. You didn't check up the brick on either of these two jobs to know how many brick had been used on them? A. No, I didn't check them all up; part of them.

Q. Did you have a power of attorney in March I think it is, 1912, to fix prices for brick to be used by your father? A. No, my power of attorney was withdrawn about the latter part of 1911. 40

Q. Did you have a power of attorney——

THE COURT: You said "1912." It is 1911.

Q. 1911, I should have said. Did you have a power of attorney in March, 1911, from your father? A. No.

Q. You did not have? A. No; father was home at that time. He went away in July, 1910, and returned about September, 1910. I had a power of attorney during those three months from July to September, 1910.

Q. July to September, 1910. Were you, about March, 1911, doing business generally for your father? A. Wy, I don't really—grasp just what you mean. I was going around and seeing that everything was done proper.

Q. Were you signing contracts for him at that time? A. March, 1911, no.

Q. Do you remember whether you signed contracts for your father for the improvement of 24th Street, where these blocks were used? A. No, I didn't sign it.

Q. I show you a written contract for the improvement of 24th Street, between the city of Bayonne and Daniel Donovan and ask you whether the name "Daniel Donovan" is igned by you? A. It looks that way.

MR. LANE: That is dated when?

MR. DEMAREST: September 15, 1910.

MR. LANE: Signed by him as attorney.

Q. Did your authority to sign contracts extend up to the second day of March, 1911? A. No.

MR. DEMAREST: Inasmuch as it is developed by this witness that there is another

contract, apparently, than that set up by the pleading, I move to strike out the contract set up in the pleading in the amended declaration, and to stand upon the original declaration.

THE COURT: I suppose you have a right to do that.

MR. LANE: I object to that being done. The plaintiff furnished their goods under a written contract. 10

MR. DEMAREST: I call upon you to produce the written contract. You say you have none.

MR. LANE: I don't say anything of the kind. You produce it.

MR. DEMAREST: I produce the contract. It is expressly disallowed. I understand that the amendment is permitted. 20

THE COURT: Yes.

MR. LANE: Over my objection.

THE COURT: Yes. You amended your declaration setting up a contract. The papers produced were signed by somebody purporting to be signed by the defendant. It appears now that the person who signed them was not the defendant and was not authorized to sign them. So, if the goods were sold and delivered and received, I suppose the defendant would be liable to pay for them. 30

MR. DEMAREST: I expect to show there was a verbal contract now.

THE COURT: I will allow the amendment, subject to Mr. Lane's objection. 40

R. T. HUTCHINS, recalled.

BY MR. DEMAREST:

Q. At what price——

MR. LANE: I object to the witness testifying. The contract was in writing.

10

MR. DEMAREST: I called upon you by written demand to produce any and all writings, including that card. Produce it.

MR. LANE: I didn't see the demand. Where is it?

Q. What did you do with the card? A. I gave it to either Donovan or Benson. They were both together. I don't remember which one took the card.

20

Q. What did that card say?

THE COURT: Was Donovan the defendant or his son?

Q. Do you mean Daniel Donovan, the defendant?

MR. LANE: Let us find out what he means without leading questions.

30

Q. The defendant, Mr. Donovan, did you hand it to? A. Either Daniel Donovan or Mr. Benson, who was at that time a partner.

Q. What did the card say?

MR. LANE: I object. You have not shown that the card is in our possession, and that you cannot find it.

40

THE COURT: I will allow it.

A. Twenty-six dollars and twenty-five cents was the quotation on the card.

Q. On the card? A. Yes.

Q. What was your conversation at that time with Mr. Donovan? Were there any witnesses to this?

MR. LANE: I object unless a time and place is fixed.

Q. Where did the conversation take place? A. That conversation took place at a corner saloon. 10

Q. Whose saloon? A. A saloon on the corner, I don't remember the name of the place,—Hendrickson's, I think.

Q. About when? A. About noon of the day of the letting.

Q. When was that? About what month? A. That was in 1910. (Witness takes a book from his pocket) I don't know whether I have the date or not. That was in July or August. 20

Q. Of 1910? A. Yes.

Q. What did that card say? What was written on it? A. Why, I always put the date, and "Mack Roberts block, guaranteed to lay forty-two to the square yard," and then the price per thousand, f. o. b. car's destination.

Q. Was the price named? A. The price was named on that card, yes. 30

Q. Have you that card in your possession now? A. No.

Q. Have you ever seen it since then? A. No, sir.

Q. And the price on that card was $26.25 per thousand? A. Yes.

Q. Where were those blocks to be used? A. 24th treet.

Q. Bayonne? A. Yes. 40

Q. Anywhere else? A. No, sir.

Q. Did you have any subsequent conversation with Mr. Donovan? A. Why, I after reduced my price one dollar per thousand.

MR. LANE: I object and move to have the answer struck out. It is not an answer.

10 MR. DEMAREST: Perhaps it is not responsive.

THE COURT: It is not responsive.

Q. Did you have a subsequent conversation with Mr. Donovan, after the card incident? A. No, regarding the price, I don't think I met Mr. Donovan after that; that is, Daniel Donovan. I met his son.

Q. His son, Michael, who is now in court?
20 A. His son, Michael.

Q. Was Daniel present on that occasion? A. I think not.

Q. You never afterward had any conversation with Daniel Donovan regarding the price of the brick, after you gave him the card? A. No sir.

Q. Did you deliver any brick subsequently to them? A. No sir.

Q. Didn't you deliver the brick you sold him
30 in— A. Oh, yes, yes; I thought you—the brick was shipped according to the contract, according to the yardage.

MR. LANE: I object, unless the witness knows something about it. Answer yes or no.

THE WITNESS: Yes.

Q. Where were those bricks sent; do you know?
A. Twenty-second Street station, Bayonne.

40 Q. Anywhere else? A. Westfield, New Jersey.

Q. To Donovan? A. Daniel Donovan.

Q. At both places? A. Yes.

Q. Did you then after that time examine the 24th Street Bayonne job, to see whether your brick were laid? A. I was over there, yes, after they were laid.

Q. Were they on the street? A. Some were on the street, and others were laid in the street. 10

Q. Have you seen that job since it was completed? A. Yes.

Q. What brick were used in that job? A. Mack.

Q. Have you been to Westfield? A. Not since the work.

Q. Were you there when the work was being carried on? A. No.

Q. You have never seen any of your block at Westfield? A. Not laid down by Donovan. 20

Q. How many blocks were delivered in these two places?

MR. LANE: I object, unless I have an opportunity to cross examine first.

THE COURT: Does he know?

Q. Do you know? Did he ever measure them up? A. No, not by measure. 30

Q. By your own knowledge? A. No sir.

Q. Did Mr. Donovan ever make any payment? A. Yes.

Q. How much money has been paid on account? A. Well, I would have to have the statement. I cannot recall now from memory.

Q. Did you ever render Mr. Donovan any statement? A. A great many.

Q. Did you ever see him about the payment of this bill? A. Yes, a number of times. 40

THE COURT: Do you admit the payments they give you credit for?

MR. LANE: Yes.

THE COURT: It is worth while to prove this. The declaration shows credits of four payments. Do you admit them?

MR. LANE: We admit the payments are correctly set forth.

10

THE COURT: Then don't spend any time on that.

Q. How often have you seen Mr. Donovan since the brick for these two jobs were furnished? A. Oh, probably twenty-five times.

Q. What did you see him for? What purpose? A. To make collections.

Q. Do you know what the amount of the collection you attempted to make was? A. Why, it amounted to something over five thousand dollars.

20

Q. You mean when you started to— A. Only that I tried to collect myself.

Q. Did he make payments on account of that five thousand dollars? A. Why, I got a note.

Q. Did he meet the payments? A. Part.

Q. What is the balance you claim to be due on this account? A. I think it is correct—$1335.97.

30

Q. At what price did you bill these brick when they were furnished—delivered to Mr. Donovan? A. $26.25 per thousand.

Q. How long have you been in the brick business? A. Well—in the Mack Company?

Q. No, in the brick business in general? A. Well, I have been in it six years.

Q. Is the Mack brick a patented brick? A. No sir.

40

Q. Is the brick well known to the trade? A. Very well known, sir.

Q. Is $25.25 per thousand a reasonable price for Mack brick? A. That is considered very low price for Mack brick.

Q. Did you see Mr. Donovan during the course of the work in Westfield and Bayonne? A. In Bayonne. 10

Q. Talk with him? A. Yes.

Q. About the brick? A. I don't remember any conversation particular about the brick.

Q. Anything said at that time about the price? A. No sir.

Q. How did you first come to send the brick to Westfield and Bayonne? A. We didn't send any until we had the contract which we supposed was—— 20

Q. Never mind. Who ordered you to send the brick there? A. Mr. Donovan.

Q. Daniel Donovan? A. Daniel Donovan.

Q. Verbally? A. Verbally, yes.

Q. Was that after you had quoted the price upon that card? A. Yes.

Q. And at the time he verbally ordered you to send the brick to Bayonne and Westfield was there anything said about the price? A. No sir. 30

CROSS EXAMINATION BY MR. LANE.

Q. I show you a paper writing, dated March 2, 1911, and ask you whether that is the signature of the Mack Manufacturing Company, by James M. Mack, President. A. That is James M. Mack's signature, yes.

Q. Do you know the assistant secretary? A. Yes. 40

Q. Is this his signature? (indicating) A. Yes.

Q. That is the seal of the corporation? (indicating) A. Yes.

MR. LANE: I offer this for identification. (It is marked Exhibit D1 for identification).

Q. I show you another paper, March 2, 1911, and ask you whether the signature of James M. Mack is his signature. A. Yes.

10

Q. Mr. Goodrich's signature? (indicating) A. Yes.

Q. That is the seal of the corporation? (indicating) A. I am not sure about the seal, but it looks as though it was,—as far as I know about seals.

Q. You have seen hundreds of contracts of your corporation? A. Contracts——

20

Q. You have seen them signed? A. Yes.

Q. That is the seal that is always on them, isn't it? A. I don't know. I cannot swear it is the seal.

MR. LANE: I offer it for identification. (It is marked Exhibit D2 for identification.)

MR. DEMAREST: Are you admitting those are contracts between the parties?

30

MR. LANE: I am admitting nothing.

Q. As I understand it, you had no conversation with Mr. Donovan, Mr. Daniel Donovan, at which the price of $25.25 was fixed; is that right? A. I think that is correct.

Q. After the brick was shipped to Bayonne it was found that it didn't stand up to the city engineer's test? A. No.

40

Q. Isn't that so?

MR. DEMAREST: I object. It is not proper cross-examination.

THE COURT: It is not proper cross-examination, is it?

MR. LANE: I guess not.

RE-DIRECT EXAMINATION BY MR. DEMAREST.

Q. Did Mr. Donovan at any time—you say that the balance due you is thirteen hundred and some odd dollars? A. Yes. 10

Q. Did he ever raise any objection to the payment of that amount? A. Never until—well, the last time I went to see him about it, he did.

Q. How many times before that had you gone to see him about the payment of that balance of thirteen hundred dollors? A. I have been over there a number of times, maybe twenty-five. 20

Q. How many times did you see him about the collection of this bill after the balance due from him to the company had been reduced to thirteen hundred and some odd dollars? A. A number of times.

Q. Did he ever promise to pay it? A. He did.

Q. Upon how many occasions did he promise to pay that amount? A. Well, several times.

Q. Has that sum ever been paid? A. No sir. 30

RE-CROSS EXAMINATION BY MR. LANE.

Q. When was the first time he promised to pay it? A. I cannot remember the dates. I was over there very many times. He promised to pay as soon as he got money from the Westfield contract. It seems he had some money tied up there at that time. Just as soon as he got the money he would pay us the balance due. 40

Q. Did you have this statement of the account with you? A. I didn't have that statement.

MR. DEMAREST: That is my statement.

Q. How did you figure the $1335? When Mr. Demarest asked you how much it was you asked to see the statement. A. From the balance on our books.

Q. You asked to see the statement on the desk here. A. No, I didn't ask for it.

Q. You asked to see the statement. Didn't you testify that the statement was correct, it was $1135? A. Yes.

Q. Is that the statement you had? A. No sir.

Q. This is not the one you had? A. No sir.

Q. Where is the one you had? A. I guess it is there.

Q. Is that the statement you gave to Mr. Daniel Donovan, when you asked him to pay? A. I don't think I had any statement.

Q. Didn't have any statement. What did you ask him to pay? A. Mr. Donovan knew the balance.

Q. I didn't ask you that. What did you ask him to pay? A. The balance due us.

Q. Yes. When was it he objected to paying? A. Why, a short time before we brought suit.

Q. You brought suit in March, 1912, didn't you? A. I don't remember the date.

Q. And the delivery of these bricks extended over a period of how long? A. Several months.

Q. And the contract was entered into March, 1911, was it? A. The time the contract was signed.

Q. He refused to pay, didn't he, before you brought suit? A. Said he didn't have it.

Q. He objected to paying, didn't he? A. Why, I guess he probably did object, yes.

Q. What did he say? A. The only thing he objected to at that time—he wanted us to furnish a maintenance bond for his work.

Q. That was all he said? A. That was all. I agreed to furnish a maintenance bond for our material, a five year maintenance bond for our material, but we wouldn't guarantee his work. We would guarantee our material, but not his work.

Q. You agreed to furnish a five year maintenance bond? A. We did, yes.

Q. Did you furnish it? A. No, he didn't agree. He didn't want it.

Q. What did he say? A. He wanted us to furnish a maintenance bond to the city for his work.

Q. Of course he did; but you wouldn't do that? A. Certainly not.

Q. And you agree to furnish a five year maintenance bond for your material? A. Yes.

Q. That you have not done? A. We are willing to do it. I told him at the time, any time, we were perfectly willing to do it, but he wasn't satisfied with that.

Q. (By Mr. Demarest) Was this talk about this maintenance bond before you sold the goods to him or after? A. After the street was completed.

CHARLES A. WEHRLY, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST.

Q. Where are you employed? A. The Central Railroad Company.

10 Q. In what capacity? A. General agent.

Q. Freight department? A. Freight, yes.

Q. At what station? A. Well, I have charge of West 8th Street and 22nd Street both.

Q. Were you there in the year 1911? A. No sir.

Q. You are subpoenaed to produce the records of the Central Railroad of New Jersey, from the 22nd Street freight station, to show the delivery 20 of goods, brick, to Daniel Donovan; have you produced them? A. I have not, no sir.

Q. Why not? A. They were destroyed by fire.

Q. When? A. October 12, 1912.

Q. And were all these records that were—that I have asked you about—destroyed at that time? A. They were all destroyed in the fire, yes.

Q. How long have you been in charge of freight there? A. Since December 26, 1912.

30 Q. Do you know Mr. Waterhouse, who preceded you? A. Yes.

Q. Did he hold the position you now have? A. Yes, he did.

Q. Where is he now? A. I believe he is still in Bayonne, but I am not positive.

Q. You don't know whether the goods were delivered at the 22nd Street station or not, do you, 40 personally? A. No sir, not personally, I don't.

MR. DEMAREST: I didn't know of this until this morning.

Q. Can you identify the papers I show you? A. Yes.

Q. What are they? A. Paid freight bills.

Q. From the Central Railroad of New Jersey? A. Yes.

Q. Do you know the signature upon them? A. I do, yes.

MR. LANE: What signature? 10

MR. DEMAREST: Here. (indicating)

MR. LANE: You mean "Do you know the stamp?"

MR. DEMAREST: Stamp is the signature. I offer it in evidence.

MR. LANE: I object. It is not connected with this case in any way.

THE COURT: I don't see the connection. 20

Q. Is there any record in your possession or elsewhere, that you know of, that will show the shipping of shipments of brick to Daniel Donovan, the defendant in this case, during the year 1911? A. No sir, I know of no records.

Q. No records with the Central Railroad Company? A. None, so far as the Central Railroad is concerned, no sir.

30

40

ERNEST W. BARRETT, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST.

Q. Where do you live? A. 304 Central Avenue, Plainfield.

10 Q. Where are you employed? A. Central Railroad, Westfield.

Q. Have you any records of the Central Railroad of New Jersey, showing the shipment of brick from the Mack Manufacturing Company, to Daniel Donovan, at Westfield, in the year 1911? A. I have (producing papers).

Q. Are these all? A. That is all I can recall, those three carloads.

20 Q. What are these papers you show here? A. Delivery receipts.

Q. Have you any other records showing the shipment of brick to Donovan besides these? A. No sir, those are all I can recall. You mean those three cars?

Q. Yes. A. I have the way-bills.

Q. Have you them here? A. No.

30 MR. DEMAREST: I offer in evidence these papers.

MR. LANE: I object, as not being connected with the defendant, and not being any proof of delivery.

THE COURT: Do these bills show who the consignee was?

MR. DEMAREST: I think so, in the corner, on the top.

40 THE COURT: This pencil memorandum?

Q. (By the Court.) Do these way-bills show who the consignee was? A. No; at the time of billing the original shipping point was New Cumberland. We billed to Pittsburg transfer, and our way-bills show from Pittsburg transfer to Westfield.

Q. Can you tell from looking at those papers who sent the goods? A. I can, from the memorandum that has been made. 10

Q. You made it? A. I did personally, yes.

Q. Where did you get the information to make it? A. From the original way-bills.

Q. Where are they? A. On file in the office.

THE COURT: I suppose that is the best evidence, if Mr. Lane insists upon it.

(Witness withdrawn.)

20

SOLOMON J. HARWI, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Where do you live? A. Bayonne.

Q. What office do you hold? A. City surveyor, Bayonne. 30

Q. Have been city surveyor how long? A. About three and one-half years.

Q. Were you city surveyor on the 24th Street improvement? A. I was.

Q. Who was the contractor? A. Daniel Donovan.

Q. What brick were used in that street? A. Mack block.

Q. And the work was done under your supervision? A. Yes. 40

Q. Is the improvement completed? A. Yes.

Q. Did you measure up the number of yards of brick laid in the street? A. I did.

Q. Have you your records here showing the measurements? A. I have.

Q. Will you produce them, please? A. (Witness produces papers.)

10 Q. What is the size of Mack block? A. About nine by four by three.

Q. Which way are they laid? A. Longwise, across the street.

Q. I mean which surface to the top? A. The four inches deep.

Q. Four inches deep? A. Yes.

Q. How many block were there in a square yard? A. I didn't have occasion to measure up,
20 but I should say, from measuring the yardage, about forty-two; something in that neighborhood. It doesn't enter into my calculations at all.

Q. You say you have your records here of the yardage? Will you refer to them? A. Yes. Do you mean the original figures?

Q. Yes; Mr. Lane may be technical, and I want to get back to that. A. The block from Avenue E to Broadway; the block from Broadway
30 to Avenue C; the block from Avenue C to the Boulevard; the block from the Boulevard to Avenue A. Those measurements were taken October 6, 1911, by myself and Sweeney.

Q. How many blocks on the improvement? A. From Avenue E to Newark Bay.

Q. How many blocks is that? A. From Avenue E to Broadway, one; Broadway to Avenue C, two; Avenue C to the Boulevard, three; Boule-
40 vard to Avenue A, four; Avenue A to Newark Bay, five.

Q. Five blocks? A. Yes.

Q. Have you the measurements of the number of yards laid in those five blocks, each of the five? A. I have the total measurements, yes.

Q. Will you read them off? A. 10,738.6 square yards.

Q. —of Mack block were laid in that street? A. Yes. 10

Q. You say they run forty-two to the square yard? A. No, I didn't, because I have no occasion—that is approximately what they will run. The manufacturer can tell better than I can on that.

Q. What was the purpose of your making these measurements? A. To get a final estimate, to give the final certificate of the work after it was finished. 20

Q. Have you your certificates or copies of your certificates here? A. Yes.

Q. You certified the number of square yards to the city council for the purpose of having Mr. Donovan paid for this work? A. Yes, that is right, according to my own measure.

Q. Have you those certificates here? A. I have copies of them.

Q. The originals are with— A. The city clerk. 30

MR. DEMAREST: I offer in evidence the copies; otherwise I will send for Mr. Lee to bring them up.

MR. LANE: I don't object to the copies as copies. I don't see the relevancy or materiality.

THE COURT: You don't object to them as copies?

MR. LANE: No. 40

THE COURT: This witness can only testify there were about so many bricks, because he said "approximately forty-two." That does not fix the amount.

MR. DEMAREST: I will have to go a little further. I am offering the copies of the certificates which he gave to the city council to entitle this man to his payments.

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THE COURT: It doesn't make any difference about that if you furnished the brick to him.

MR. DEMAREST: I offer them.

Q. You have a small book from which you stated your measurements? A. Yes.

MR. DEMAREST: I offer it to show the number of square yards.

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CROSS EXAMINATION BY MR. LANE:

Q. Have you got the contract there? A. I just handed it to Mr. Demarest.

Q. Contract between the City of Bayonne and Donovan?

MR. DEMAREST: I had it a few minutes ago.

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Q. It is a contract, as a matter of fact, not between the City of Bayonne and Mr. Daniel Donovan at all? Wasn't it by and between the City and Daniel Donovan and E. S. Benson?

MR. DEMAREST: I object. It is not proper cross-examination.

MR. LANE: You asked him who the contractor was, and he said Daniel Donovan. I am asking whether the contract was be-

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tween the City of Bayonne and two people, instead of one.

MR. DEMAREST: I am trying to be certain about it. Do you remember about it?

MR. LANE: Yes.

MR. DEMAREST: I still renew my objection to the relevancy of the question as cross-examination. 10

THE COURT: If it is for the purpose of showing his statement on direct examination was not correct, it is relevant. I don't think the fact would be relevant in this case, if the bricks were furnished to this defendant; and it makes no difference whether he put them in the street or not. I will allow it. 20

Q. Wasn't the contract by and between the City of Bayonne and Daniel Donovan and E. S. Benson? A. I don't know the relation Benson had with Donovan. I am not familiar with that.

Q. I didn't ask you that. I asked you whether the contract for this improvement was between the City of Bayonne and Donovan and Benson.

THE COURT: The best evidence is the contract. 30

MR. LANE: I offer it.

MR. DEMAREST: I object.

THE COURT: I will allow the question.

MR. DEMAREST: I ask an exception.

A. I presume it is correct, that I made a mistake; I didn't think of Benson at the moment.

Q. You didn't think of Benson at the moment when Mr. Demarest asked you, or you would not 40

have answered him as you did? A. I would have said Donovan and Benson.

Q. These measurements you have given us, do they include every brick laid in the street? A. Well, I measured up the entire contract.

Q. The measurements you have given us— A. The brick only.

Q. Is there a curb on that street? A. Curbing is not brick. It is measured up separate.

Q. And the figures you have given us apply only to the brick surface? A. Brick surface, that is correct.

ALEXANDER W. VARS, a witness produced on behalf of the plaintiff, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

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

Q. What official position do you occupy? A. I am town surveyor of the Town of Westfield.

Q. Do you know Mr. Donovan, Daniel Donovan? A. Yes.

Q. Did he have charge of any work that was done in Westfield? A. He had a street improvement contract there, yes.

Q. What street? A. He had East Broad Street and North Avenue.

Q. Do you know what sort of an improvement was made in North Avenue? A. Straightening and resetting old curb, setting new curb, paving gutters with brick on concrete base, and macadamizing the intervening spaces with bituminous macadam.

Q. What brick was used there? A. Mack brick.

Q. Do you know by whom the Mack brick was made? A. Sold by the Mack Manufacturing Company.

Q. Of what place? A. Our business was done with the Philadelphia office. I don't know where they were incorporated.

Q. Have you measured up the amount of it, that is, the area of the improvement in North Avenue, to find out how many yards were put in, in block? A. Yes. 10

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

Q. How many blocks were in that improvement? A. There was one block intersected on one side by a couple of streets—might call it one block, I should say.

Q. How many square yards of brick surface were laid? A. Our pavements were made per lineal foot of gutter. The entire surface of the street was not paved with brick. His contract price was so much per lineal foot of gutter; that is the way the measurement was made, consequently. 20

Q. How many lineal feet of gutter were there? A. Altogether, or just on North Avenue?

Q. Was there more than one street where this Mack block was used? A. Yes. 30

Q. Used on both? A. Yes.

Q. Give us the figures, please. A. There were 880 lineal feet of gutter lain on North Avenue, and 549 lineal feet of brick laid on Broad Street, making a total of 1429 lineal feet.

Q. How wide? A. The gutters were three feet in width.

Q. Every three lineal foot would represent a square yard? A. Yes. 40

Q. Have you measured these Mack block to find out how many they go to a square yard? A. I haven't measured the block; I have measured a section of the gutter, and measured the block in that connection.

Q. How did you lay each brick? A. The block were approximately 3 by 4 by 9 inches. They were laid on the long axis of the block parallel with the curb, and the four-inch dimension vertical, making the surface three by nine. Along the edge of the gutter, on the outside next the macadam, is what they call the motor course. There the block were set perpendicularly, with the three-by-four end exposed, and the shortest axis parallel with the curb.

Q. Then they were set end-wise in one place? A. Yes. In this fashion (indicating).

Q. How many brick did you find, ran to the square yard? A. It would run approximately fifty to the square yard. It ran 16.7 brick to the lineal foot.

Q. Laid, some of them, end-wise, and others, on the side? A. Yes.

Q. Have you figured out—can you figure out in just a minute the number of brick that would be, according to those measurements, in the entire yardage you had? A. Twenty-three thousand eight hundred.

NO CROSS EXAMINATION.

R. T. HUTCHINS, recalled.

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Laid in the manner that your company's brick were laid, how many brick are there to the square yard? A. We guarantee that forty-two will lay one square yard.

Q. Is that the number of brick that goes in a square yard, irrespective of your guarantee? A. Yes, forty-two. 10

Q. So that forty-two times the yardage total, that is, the square yardage, shows the number of bricks— A. Approximately.

Q. —that go into a given space? A. Approximately, yes.

CROSS EXAMINATION BY MR. LANE: 20

Q. You know, as a matter of fact, don't you, that Mr. Donovan had to buy Mack brick from another concern, for the Westfield job?

MR. DEMAREST: I object.

THE COURT: He may ask him if he knows.

MR. DEMAREST: If he knows.

A. No, I don't. 30

RE-DIRECT EXAMINATION BY MR. DEMAREST:

Q. Will you take your statements and tell us how many brick have been charged to Donovan for the Bayonne job, and how many for the Westfield job? A. Well, the number on this statement is in the total; there were twenty-two thousand shipped to Westfield.

Q. How many to Bayonne? A. About four 40

New Jersey State Library

hundred and fifty thousand—I am not sure, though, till I total this statement up.

Q. Twenty-two thousand to Westfield, and four hundred and fifty thousand to Bayonne? A. Yes.

Q. That is at the rate of twenty-five-twenty-five a thousand? A. That is the price, yes.

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RE-CROSS EXAMINATION BY MR. LANE:

Q. That is what is charged? A. Four hundred and fifty?

Q. Yes. A. I am not sure of that. I am totalling this up.

Q. Then what are you testifying for?

Q. (By Mr. Demarest) Have you any way of checking this up? A. Yes, add these figures up.

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Q. (By Mr. Demarest) Add them up, then. We have added them up. That is what they are.

MR. LANE: That is not what they are.

MR. DEMAREST: What do you mean?

MR. LANE: I haven't figured it up, but I know it isn't that.

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SOLOMON J. HARWI, recalled.

DIRECT EXAMINATION BY MR. DEMAREST:

Q. At forty-two brick to the square yard, how much brick would have to be laid in the yardage which you certified to, in Twenty-fourth Street, Bayonne? A. 451,021.

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CROSS EXAMINATION BY MR. LANE:

Q. Is it a fact that the intersection between Avenue A and 24th Street was paved with this brick? A. As far as I know, they were Mack blocks.

Q. What? A. As far as I know, they were Mack blocks.

Q. Do you know? A. I say, I am of the opinion they were Mack blocks.

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Q. Don't you remember that Metropolitan block was laid there? A. I don't recall, no sir.

Q. You don't know then? A. I don't recall.

Q. Then you don't know, do you? A. How can I know if I don't recall?

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R. T. HUTCHINS, recalled.

DIRECT EXAMINATION BY MR. DEMAREST:

Q. How many thousand blocks have you charged Mr. Donovan with, for the Bayonne job? A. I have made a charge for four hundred and fifty thousand, gave him a credit for sixty-five hundred, the car he didn't receive. They refused—

Q. That is included in the credit you just testified to here, this morning? A. Yes. That leaves it 443,500. They were received for the Bayonne work.

MR. LANE: I object, and ask that it be struck out. He has shown no knowledge whether they were received or not.

THE COURT: That is so.

THE WITNESS: The number shipped.

MR. LANE: I ask that that he stricken out. He is not asked that; he is asked the question—what was charged for?

BY THE COURT:

Q. Do you know what number were shipped? A. The amount.

Q. How do you know? A. From our records.

Q. Did you ship them from Philadelphia or West Virginia? A. From West Virginia.

Q. Then you don't know? A. I know, because we have a copy of every car.

BY MR. DEMAREST:

Q. He has been charged for twenty-two thousand brick for Westfield and 450,000 for Bayonne? A. That is right.

MR. DEMAREST: I close my case.

THE COURT: He says four hundred and fifty thousand less six thousand?

MR. DEMAREST: He says that was taken off—I mean a credit was given.

MR. LANE: I move for a non-suit on the ground that there is no proof from which the jury can find the amount of the brick that was shipped, and the value of the brick shipped. The only evidence that is in the case at all with respect to the amount of brick is the evidence of the engineers who measured the sidewalks and the street, and there is no evidence that all of those streets were laid with Mack brick. The engineer of Bayonne says he doesn't know. Also on the ground that the plaintiff has not proven the contract under which the brick was delivered, if delivered at all.

THE COURT: I will deny your motion.

MR. LANE: I ask an exception.

DEFENSE.

MICHAEL DONOVAN, a witness produced on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. LANE:

Q. Did you have trouble with this Mack brick when it was furnished? A. Yes.

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Q. Were you held upon your work at any time by reason of that trouble? A. Yes.

MR. DEMAREST: I object. He has laid no foundation for any examination of that character.

THE COURT: This is under your recoupment?

MR. LANE: Yes.

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THE COURT: I will allow the question.

MR. DEMAREST: I ask an exception.

Q. (Question repeated). A. Well, I don't know what you mean by "held up."

Q. Was the work stopped by reason of the—A. Yes.

MR. DEMAREST: There is no foundation for this witness to qualify to the extent that Mr. Lane is examining him. On his direct examination he said he was not the agent; he happened to be around there.

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Q. In the gradual performance of this work did you supervise it? A. Yes.

Q. During the performance of all the work? A. Yes.

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Q. Now, I ask you whether the work was stopped by reason of the trouble you had with respect to this brick? A. Yes.

Q. When? A. I believe, in August. I am not positive of the date; but whatever time Mr. Harwi notified us to cease work there. I don't know the date.

MR. DEMAREST: I suppose the answer is in under objection, but how is it relevant? Here is a mere sale of goods. Now they are attempting to get in charge— charging us with delay. There is nothing in the case at the present time that would offer a basis for any such offset as this.

THE COURT: This is an action for goods sold and delivered under a verbal contract; consequently there is nothing before us other than the mere fact of the claim for goods sold and delivered. There is nothing to show that there is any guarantee under the contract that the goods should answer the purpose for which they were sold. How do you make it relevant?

MR. LANE: I offer the two papers which have been marked D-1 and D-2 for identification, as statements by the plaintiff corporation, that it guaranteed this brick in certain particulars.

These agreements are annexed to plaintiffs amended declaration and are printed with it.

THE COURT: Then they ought to go in.

MR. DEMAREST: You make that as an offer?

MR. LANE: Yes.

MR. DEMAREST: Then I make objection.

This witness has testified that he signed such a paper; of course it was not offered on the part of the plaintiff because it was not the contract, this witness and not his father having assented to it. If it was not the contract it cannot go in evidence.

10 MR. LANE: The papers are papers which have been proven in the case to have been signed by the Mack Manufacturing Company.

THE COURT: But a contract must be a meeting of the minds of the parties. If the other party did not sign, then it is not the contract.

MR. LANE: It is a paper signed by the Mack Manufacturing Company, and whether or not it is the contract between the parties, so far as the price is concerned—and their only objection to it was as to price—whether or not it is the contract under which the goods were furnished, it is a written statement of the plaintiff that the goods would meet certain standard size. Irrespective of whether it is the contract, it is a guarantee by them.

30 THE COURT: This paper is either in or out. It is shown that it is signed by somebody without authority, consequently it is no contract. If the goods were sold and delivered it seems to me that eliminates that paper. I may consider it after recess.

RECESS.

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Q. Did you have a conversation with Mr. Hutchins, prior to any of these bricks being furnished, with respect to the test the bricks should stand?

MR. DEMAREST: I object, on the ground that the witness has testified to the entire absence of authority from his father, who was the defendant in the suit; and also because it must be shown, in order to make this testimony relevant, that the statement, if made to him, was communicated to his father at a time when it would be acted upon; that is, before the contract was entered into with either Bayonne or Westfield.

THE COURT: It seems to me that there is a more pointed objection than that. It is not proven that this witness was authorized by the defendant to make any statements; it does not appear that Mr. Hutchins was authorized by the plaintiff to make any statements, nor to act as their agent for anything else but to make sales. But you had better put the question in such shape that you can get a ruling on it.

A. Yes.

Q. Was your father present? A. Yes, on one occasion.

Q. When was it, with respect to the contract being entered into? A. I believe some time about October, 1910.

Q. Was that conversation with respect to the kind of brick that was to be furnished?

MR. DEMAREST: I object.

A. Yes.

THE COURT: The kind of brick—well, that might allow two or three different answers. The question is pretty broad. You may answer that question.

A. Yes.

Q. What kind of brick was it stated should be furnished?

MR. DEMAREST: I object.

THE COURT: I will sustain the objection.

MR. LANE: I ask an exception.

Q. Was there a talk at that time with respect to the test the brick should stand?

MR. DEMAREST: I object.

A. Yes.

MR. DEMAREST: I withdraw my objection.

Q. What test was it stated that the brick should mee?

MR. DEMAREST: I object, on the ground that there is lack of authority shown in the agent.

THE COURT: I will overrule the question. It is not proved that the sales agent was authorized to make any statements as to the quality of the brick.

R. T. HUTCHINS, recalled in behalf of the defendant.

DIRECT EXAMINATION BY MR. LANE:

Q. You testified you were eastern agent of the Mack Company? A. Yes.

Q. Covering what states? A. Northern New Jersey, Eastern Pennsylvania, Delaware and part of New York State. 10

Q. General sales agent? A. Yes.

Q. Power to make contracts? A. I never made any contracts.

Q. I didn't ask you that. Have you power to make contracts? A. No, sir.

Q. What do you do when you make contracts? A. I don't make contracts.

MR. DEMAREST: He has answered he doesn't make them. 20

Q. What do you go through to get a contract entered into? What different steps do you take? A. Why, I argue to get the Mack material adopted by the city that is going to use brick. That is my business.

Q. "By the city"? A. Yes.

Q. Did you do that in this case? A. Yes. 30

MR. DEMAREST: I move to strike that out as immaterial and incompetent.

THE COURT: How is it any part of this transaction? I will overrule it.

MR. LANE: I ask an exception.

Q. Did you, Mr. —, in order to get this properly on the record, prior to the awarding of this contract to Donovan, get the city of Bayonne to specify in its proposals, the Mack brick? 40

MR. DEMAREST: I object.

THE COURT: Objection sustained.

MR. LANE: I ask an exception.

Q. You sold this brick to Donovan, didn't you? A. Yes.

Q. What steps did you take to sell it to him? What did you do? A. I talked the quality of our material.

Q. You what? A. I talked the quality of our material.

Q. What else? A. Mack block was adopted by—

MR. DEMAREST: One moment, I object.

THE COURT: Just answer the question.

THE WITNESS: I think I did answer it.

MR. DEMAREST: Speak up a little bit.

THE WITNESS: They never used any of our material in Bayonne—

MR. DEMAREST: I object. It is not responsive.

A. I talked the good qualities of our material.

Q. Then there were contracts entered into, weren't there, between the person you sell to, and the Mack Company? A. Yes.

Q. What steps did these contracts take? How did they come to be entered into?

MR. DEMAREST: I object. There is nothing in this case to support that question. The case stands, upon the testimony of the defendant's own witnesses, for goods sold and delivered. We are not upon the written contract.

THE COURT: There is no evidence to show there was a written contract.

MR. LANE: I am not asking about a written contract. There was a contract. They proved a contract, an express contract to sell these bricks at $26.25.

MR. DEMAREST: That was a contract as to price; that was all. 10

THE COURT: You must show that this witness was authorized to make representations as to quality. A mere sales agent is not ordinarily authorized.

MR. LANE: I am trying to show what general steps were taken—whether he reported back or not.

THE COURT: You must show this action was reported to his principal, and adopted 20 and accepted by them; otherwise it could not bind them.

MR. LANE: I think I have the right to show the course of business.

THE COURT: You want to show his course of business; but his course of business is not the company's course of business, necessarily.

MR. LANE: I am asking him, after he 30 sees the buyer, what he does then, so far as the principal is concerned.

THE COURT: That you may answer.

Q. After you have had your talks with the various purchasers, or persons who are to be purchasers, what do you do with respect to your company? What steps do you take?

THE COURT: Not what he generally 40 does; "what did you do in this case?"

MR. LANE: I am trying to show his course of business.

THE COURT: You cannot show his course of business. Only what he does in this particular case, whether he reported to his company, whether they acted upon it or not; I think that is as far as you can go.

10 MR. LANE: You overrule my question?

THE COURT: I will overrule your question.

MR. LANE: I ask an exception.

Q. In this instance, did you report your action to your company?

MR. DEMAREST: I object to the question. He can show what he did report, but not his action as a conclusion.

20 THE COURT: I think you can show what he did report to the claimants in this case. I will overrule the question.

MR. LANE: The question was whether he made any report to his principal.

Q. Did you make a report to your company? A. I did.

Q. In writing? A. I think not.

30 Q. What did you report? A. I reported the contract had been awarded on Mack block.

MR. DEMAREST: I move to strike out the answer. It is immaterial. He refers to the city contract. He is being asked about his contract with the defendant.

THE COURT: We have nothing to do with the city contract.

Q. Did you report what you had told Mr. Dono-
40 van, to your company, and the details of the contract that was to be entered into between your company and Mr. Donovan?

MR. DEMAREST: I object on the ground there is nothing upon which to predicate the question, as to the details of the contract that was to be entered into.

THE COURT: I hink the only proper way to do is to let him say what he did report to his company, then see whether it is something they are chargeable with. The question, I think, is too general. I will overrule it. 10

MR. LANE: I ask an exception.

Q. What did you report to your company? A. I reported that Daniel Donovan had been awarded the contract.

Q. (By the Court) What contract? A. For paving 24th Street.

Q. (By the Court) By the city? 20

MR. DEMAREST: I move to strike out the answer.

THE COURT: We have nothing to do with the city contract whatever.

MR. LANE: You will allow me an exception?

THE COURT: Yes.

Q. What did you report with respect to Donovan's contract with the Mack Company? A. I cannot—I did not report any more than I have stated. 30

Q. Then your company never knew the price you fixed with Donovan? A. Yes, they did.

Q. How? A. By my report.

Q. Then what did you report? You have just told us your report was with respect to the city contract. A. I reported the city had awarded the contract to Daniel Donovan, and adopted Mack block, and the price of our block. 40

MR. DEMAREST: I move to strike out the first two portions of the answer.

THE COURT: It may stand.

Q. What else did you report? A. I reported the amount of the contract, the amount of square yards, the price per thousand.

Q. What else? A. That was all.

10 Q. What? A. That is all I recall, regarding that contract.

Q. Did you report anything with respect to the brick passing the city inspection?

MR. DEMAREST: I object. It is leading. This is his witness.

THE COURT: I will allow it.

MR. DEMAREST: I ask an exception.

20 A. No, sir.

Q. Is your company in the habit of entering into written contract with people to whom you sell bricks?

MR. DEMAREST: I object.

THE COURT: Question overruled.

MR. LANE: I ask an exception.

Q. I show you Exhibit D-1 and Exhibit D-2 for 30 identification, and ask you whether those are forms of contract that your company enters into.

MR. DEMAREST: I object.

THE COURT: Objection sustained.

MR. LANE: I ask an exception.

Q. Did you know, at the time you had the talk with Donovan, what city inspection your brick would have to pass?

40 MR. DEMAREST: I object.

THE COURT: Objection sustained.

MR. LANE: I ask an exception.

Q. Did you not tell Mr. Donovan that the brick would pass the city inspection?

MR. DEMAREST: I object, on two grounds; first, it is leading; second, it is immaterial.

THE COURT: When you refer to Mr. Donovan, you refer to the father? 10

MR. LANE: The father, Daniel.

THE COURT: I will overrule the question.

MR. LANE: I ask an exception.

Q. Did you tell Mr. Daniel Donovan that the brick would stand a test of eighteen on compression, and two per cent. absorption?

MR. DEMAREST: I object on the ground 20 that the witness has stated (he is Mr. Lane's witness) the whole conversation, it is a leading question, and it is improper cross examination, and it is immaterial and irrelevant.

THE COURT: I don't think it appears that this witness is authorized to make any representations as to the goods, so far. I overrule it on that ground.

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MR. LANE: I offer, if your Honor please, now, the two papers which have been marked D-1 and D-2 for identification, not only for the reason and purpose I offered them this morning, but because it shows that the Mack Company subsequently acted upon the representations made by this witness, and in these two papers guaranteed that the brick would pass the city inspection and would meet the tests which 40 I haver referred to; to show the ratifica-

tion by them of whatever he said to Mr. Daniel Donovan.

MR. DEMAREST: I object on the grounds urged this morning, and on the further ground that it is shown by the defendant and admitted by him, I think, that the brick were used in both instances; therefore it would not make a particle of difference whether they came up to the test or not. Further, there is no contract whatever between the parties, because Mr. Donovan's own testimony is he signed his name to it, but that he had not authority to do so, and that it was afterward disavowed by his father, because he said the price was wrong.

THE COURT: I will overrule the question.

MR. LANE: I ask an exception.

MICHAEL DONOVAN, recalled, on behalf of the defendant.

DIRECT EXAMINATION BY MR. LANE:

Q. I show you Exhibit D-1 and D-2 for identification, and ask you where you received those two papers from.

MR. DEMAREST: I object, inasmuch as they are copies of papers shown to the witness this morning, and he stated at that time he signed them without any authority. 10

THE COURT: I will overrule the question.

MR. LANE: I ask an exception.

Q. Did you receive those two papers at the office of your father on or about the day of their date? 20

MR. DEMAREST: I make the same objection.

THE COURT: Question overruled.

MR. LANE: I ask an exception.

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MR. LANE: I close the defendant's case.

MR. DEMAREST: I ask your Honor to direct a verdict. There is no issue at all.

(The Court directs the jury to render a verdict for plaintiff for $1415.90, to which action of the Court defendant asks an exception. Exception is allowed.)

10 The Jury returns a verdict for the plaintiff for $1415.90.

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Postea.

Afterwards, to-wit at a Circuit Court holden in and for the County of Hudson, before his Honor, Benjamin A. Vail, a Justice of the Circuit Court sitting for the Supreme Court on the 21st day of April, in the year 1913, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the defendant by their respective attorneys within mentioned, and jurors of the jury between the parties aforesaid, in the plea aforesaid, being also summoned, come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath, that the defendant was indebted to the plaintiff in the sum of One thousand four hundred and fifteen dollars and ninety cents, the debt within mentioned in manner and form, as in the plaintiff's declaration alleged, and they assess the damages of the plaintiff on occasion of the detaining of the within debt over and above his costs and charges by him about this suit in this behalf expended to the said sum of One thousand four hundred and fifteen dollars and ninety cents and for these costs and charges.

B. A. Vail.
Judge.

Judgment.

Judgment actually entered in accordance with foregoing Postea for $1415.90.

New Jersey Court of Errors and Appeals.

MACK MANUFACTURING COMPANY, *Appellee,* *vs.* DANIEL DONOVAN, *Appellant.*	On Appeal from Supreme Court; action at law tried at Hudson Circuit. VAIL, J.

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BRIEF OF APPELLANT.

Pleadings and Proofs.

This suit was started by the issuance of a summons upon the 8th day of March, 1912. The declaration contained the common counts and an nexed thereto was a bill of particulars indicating that the action was brought to recover for brick delivered by the plaintiff to the defendant at the price of $25.25 a thousand and the balance claimed to be due was the sum of $1335.97 (p. 5 to 8).

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The defendant pleaded the general isssue and upon demand specified as defenses that the goods were not delivered; that such of the goods as were delivered were delivered under an express contract; that they were all of inferior quality and not in accordance with the terms of the contract and that by reason of this fact the defendant had suffered loss and damage as set forth in the notice of recoupment and set off also filed (p. 11, p. 9). The notice of recoupment and set off set up the express contract under which it was claimed part of the goods were delivered and that in such contract there was an agreement that they should answer all specifications of the City of Bayonne

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and should be subject to inspection by the City Engineer. That when the goods were delivered they did not answer the specifications of the City of Bayonne and did not pass the inspection by the City Engineer and that they were defective in that the absorption exceeded that specified. That the result was that the defendant suffered loss or damage to the extent of $1108.50 (p. 9).

Subsequently and prior to the trial application was made to one of the Circuit Judges for leave to amend the declaration and set up the express contract; that leave was granted over the objection of the defendant who claimed that the Circuit Judge had no jurisdiction to grant leave to amend except only in the cause of a trial (p. 19). An amended declaration was filed (p. 12) setting up the express contracts which are known in the case as Exhibits D-1 and D-2 for identification (pp. 14 to 18), under which contracts the plaintiff agreed to deliver to the defendant brick at the price of $25.25 a thousand and also agreed that the brick should be subject to inspection by the Engineer respectively of the town of Westfield, New Jersey, and of the City of Bayonne, New Jersey, or their duly authorized inspectors.

Upon the trial the plaintiff first endeavored to prove the express contracts and then without offering the written contracts in evidence conceiving that he had failed to prove them applied for leave to re-amend his declaration and go back to the common counts and to stand as counsel put it "upon the original declaration" (p. 29). This was over the objection of the defendant, who was given no opportunity to plead to the new declaration. Originally brought into court to answer to the common counts an amendment had been permitted before the trial so that the case stood upon the express contract and then during the course of the trial it was changed back to the common counts without giving the defendant an opportunity to meet the new issue.

Upon the trial by the rulings of the trial court the defendant was precluded from showing that the goods delivered were not in accordance either (1) with the agreement made orally or (2) in accordance with the written contracts; was precluded from showing that there was a failure of consideration; was precluded from showing damage which he had suffered by reason of the failure of the goods to come up to the specifications.

At the conclusion of the trial, the court directed a verdict in favor of the plaintiff and against the defendant for the sum of $1415.90 (p. 70).

All of the proceedings up to the actual trial were under the old procedure; the trial and subsequent proceedings are under the new practice act.

GROUNDS OF APPEAL.

I.

The Court erred with respect to the amendments.

The suit was originally brought on the common counts alone. Before the trial a notice was given, which is printed in the record (p. 11-a), of an application to a Circuit Judge for leave to amend and set up the special written contracts. This amendment was allowed over the objection of the defendant (p. 19, l. 25) and thereupon the amended declaration was filed (p. 12).

This was error. The power to amend is derived from section 124, 3 Compiled Statutes of New Jersey, p. 4091, which is as follows: "If either party amend his pleading after the pleading in answer thereto has been filed, the adverse party shall have twenty days to plead to the amended pleading, but all such amendments shall be made by leave of the court or a judge and upon terms."

This section is not changed by sections 23 and

24 of the new practice act. Furthermore, the procedure with respect to the pleadings are all under the old act. The Circuit Judge had no power to permit the amendment.

Den v. Hall, 9 N. J. L. 283.

That is a power granted to the court or a judge of the court in which the action is pending.

10 It cannot be claimed that this original amendment was made under section 125 of the Practice Act, whether plaintiff insists that the amendment was made pursuant to the order of the judge made before the trial opened, upon notice, or whether he insists it was made at the opening of the trial.

Section 125 of the Practice Act provides "If at trial of an action there appears a variance between any pleading and the proof thereunder which would not mislead the adverse party to his pre-
20 judice, the court may order an immediate amendment of the pleading to avoid such variance; if the variance be one that might mislead the adverse party, the court may order the pleading to be amended upon terms."

When the order was made permitting the filing of the amended pleading, whether it be assumed to have been made before the day fixed for the trial, or at the time of the hearing of the notice
30 of application for leave to amend, or whether it be assumed to have been made on the day of the trial, at the opening of the trial, no evidence had been offered. There was no "variance between any pleading and the proof thereunder." The plaintiff had discovered before the trial opened, not that there was a variance between the pleading and the proof, but that he desired to in opening his case, stand upon a different cause of action than that specified in his original declaration.
40 The amendment must have been allowed, if at all, under section 124 of the act and if allowed under section 124 of the act, then it should have been

allowed by an order of the Supreme Court, or a justice thereof, and if allowed, the defendant had as an absolute right, twenty days to plead.

After the plaintiff had opened his case upon the amended declaration setting up the express contracts and when he had conceived that he could not prove the express contracts, another amendment was permitted presumptively under the provisions of section 125 of the Act and because of a variance between the pleading and proof.

But this court has held in *Jordon v. Read,* 77 N. J. L. 584a "under the Practive Act, section 125, there can be permitted no substantial veriance between the case declared upon and the case proven but a recovery must be secundum allegata et probata."

There certainly was a substantial variance in the case at bar. As will be hereafter discussed if the plaintiff brought his suit upon the express contracts there is no doubt but that the defendant might recoup and off set damages. If on the other hand he brought his suit upon the common counts then the defendant under the case of *Winter v. Schoenfeld,* 78 N. J. L. 92 might not recoup, but could only under the cases of

Marshall v. Hann, 17 N. J. L. 428,
Bouker v. Randles, 31 N. J. L. 338;
Smalley v. Hendrickson, 29 N. J. L. 372;

show failure of consideration.

It is submitted that there was error in the rulings of the trial court with respect to the amendments.

II.

A non-suit should have been granted and it was error to direct a verdict for the plaintiff.

Neither at the close of the plaintiff's proofs nor at the close of the case was there any evidence from which the court could find the amount of brick delivered.

10 The plaintiff produced no evidence of the amount of brick shipped nor as to the amount of brick received. Brick was shipped from West Virginia and no evidence whatever was produced as to the shipment. The plaintiff endeavored to fill in the gap (1) by calling an employee of the Central Railroad Company (p. 40) Charles A. Wehrly, to show the shipment received at Bayonne. All the records had been destroyed by 20 fire. He produced the witness Ernest W. Barrett (p. 42) to show the brick received at Plainfield. No testimony went in.

The plaintiff then endeavored to show the number of bricks by producing the City Engineers of the respective places.

Solomon H. Harwi (43) was produced and testified that he was the City Engineer of Bayonne; that he had his records showing the measurement of the yards of brick laid in the 24th Street im- 30 provement. That the size of the Mack brick was about 9 by 4 by 3. That they were laid long wise across the street and four inches deep and then:

> "Q. How many blocks were there in a square yard? A. I didn't have occasion to measure up, but I should say from measuring the yardage about 42; something in that neighborhood. It doesn't enter into my calculation at all." (p. 44).

40

He then testified that there 10,738.6 square yards of Mack brick laid in the street. And then:

"Q. You say they laid 42 to the square yard? A. No, I didn't because I have no occasion—that is approximately what they will lay. The manufacturer can tell better than I can on that." (p. 45).

Alexander W. Vars (p. 48) the Town Engineer of Plainfield, was produced and he testified (p. 49):

"Q. How many square yards of brick surface were laid? A. Our pavements were made per lineal foot of gutters; the entire surface of the street was not paved with brick. His contract price was so much per lineal foot of gutter; that is the way the measurement was made, consequently."

He then testified as to how many lineal feet of gutter there was and then testified (p. 50):

"Q. How did you lay each brick? A. The blocks were approximately 3 by 4 by 9 inches. They were laid on the long axis of the block parallel with the curb, and the four inch dimension vertical, making the surface three by nine. Along the edge of the gutter, on the outside next the macadam, is what they call the motor course. There the blocks were set perpendicularly with the three by four end exposed and the shortest axis parallel with the curb.

"Q. Then they were set end wise in one place. A. Yes. In this fashion.

"Q. How many brick did you find, ran to the square yard? A. It would run approximately fifty to the square yard. It ran 16.7 brick to the lineal foot.

"Q. Laid, some of them endwise, and others on the side? A. Yes.

"Q. Have you figured out—can you figure out in just a minute the number of brick that would be, according to those measurements, in the entire yardage you have? A. 23,800."

Solomon J. Harwi, the City Engineer of Bayonne, recalled (p. 53) testified that at 42 bricks to the square yard, there were laid in the yardage which he certified to in 24th Street, 451,020 brick.

Hutchins (p. 54) testified that his company only claimed to have shipped for the Bayonne job 443,500 bricks, being the 450,000 referred to in the written contract, less 6,500 "the car he didn't receive" and for the Westfield job 22,000 bricks, or a total of 465,000 bricks as against a total of 474,821, according to the estimates of the engineers.

Hutchins, the agent of the plaintiff, refused to say that 42 bricks went in a square yard. He testified:

> "Q. So that forty-two times the yardage total, that is, the square yardage, shows the number of bricks— A. Approximately.
>
> "Q. That go into a given space? A. Approximately, yes."

(p. 51).

According to their own figures there was a difference of approximately 11,000 bricks.

This indicates that it is improper to rely on the testimony of the engineers as to the number of bricks that went in the street. There was no evidence that the brick which went in the street, although Mack brick, which is not patented and can be bought elsewhere, came from the Mack Mfg. Co.

Nor is there any evidence that all of the brick in the streets was Mack brick.

The City Engineer of Bayonne testified (p. 53):

> "Q. Is it a fact that the intersection between Avenue A and 24th Street was paved with this brick? A. As far as I know, they were Mack blocks.
>
> "Q. What? A. As far as I know, they were Mack blocks.
>
> "Q. Do you know? A. I say, I am of the opinion they were Mack blocks.
>
> "Q. Don't you remember that Metropolitan block was laid there? A. I don't recall, no, sir.

"Q. You don't know then? A. I don't recall

"Q. Then you don't know, do you? A. How can I know if I don't recall."

This evidence was entirely too indefinite to show the amount of brick shipped by the plaintiff and received by the defendant. The plaintiff had within its control the records showing exactly how much brick was shipped from its factory consigned to the defendant. It did not produce them. If it had done so this would not have proved delivery to the defendant, but an argument might have been made that it put the burden, because of the loss of the railroad records, upon the defendant, to explain if he did not receive them. But there was no evidence whatever of the amount of bricks shipped from the plaintiff's plant.

The burden was upon the plaintiff under his declaration to prove delivery.

Perdicaris v. Trenton City Bridge Co., 29 N. J. L., 370.

The plaintiff, therefore, having failed to prove by competent proof the number of bricks shipped and received by the defendant should have been non-suited. In fact, he failed to prove that any brick had been received by defendant from plaintiff.

It was clearly erroneous to direct a verdict in favor of the plaintiff, because upon the proofs it appeared that the plaintiff only claimed to have shipped 465,000 of brick, whereas the estimates of the engineers showed that there were 484,821 of brick in the street. All of the estimates were approximate, and it is to be recalled that so far as the Bayonne job is concerned the witness testified that he could not recall whether Metropolitan bricks had been used.

It therefore, with the best view of the case from the plaintiff's stanpoint, was a question for the jury. How the Court figured out the verdict of $1,415.90 I did not know at the time and do not know now and cannot figure it upon any

III.

The Court erred in refusing to admit in evidence exhibits D. 1 and D. 2 for identification and in excluding all evidence offered by the defenant to show that the bricks furnished were not in accordance with the contract; that there was a failure of consideration and the evidence upon the recoupment and notice of set off.

10

It appeared in the case that the brick were furnished under written contracts, D. 1 and D. 2. These contracts were not offered in evidence by the plaintiff, although they were proven in its case. They were offered in evidence by the defendant and objected to by the plaintiff and overruled by the Court upon the ground seemingly of the plaintiff's objection (p. 68):

20

> "I object on the grounds urged this morning and on the further ground that it is shown by the defendant and admitted by him, I think, that the brick were used in both instances; therefore it cannot make a particle of difference whether they came up to the test or not. Further, there is no contract whatever between the parties, because Mr. Donovan's own testimony is he signed his name to it, but that he had not authority to do so, and that it was afterward disavowed by his father, because he said the price was wrong."

30

And further Mr. Demarest had said (p. 57):

> "Then I make objection. This witness has testified that he signed such a paper; of course it was not offered on the part of the plaintiff, because it was not the contract, this witness and not his father having assented to it. If it was not the contract it cannot go in evidence."
>
> "The Court: This paper is either in or out. It is shown that it is signed by somebody without authority, consequently it is no con-

40

tract. If the goods were sold and delivered it seems to me that eliminates that paper."

The testimony had been that prior to the delivery of the bricks the plaintiff's representative, R. T. Hutchins, had a conversation with the defendant, Daniel Donovan, at which conversation (which was objected to by the defendant upon the ground that there was a written contract) the price of the Mack brick was quoted and Hutchins said that at this conversation that was all that was done. Exhibits D. 1 and D. 2 were then proven to have been executed by the Mack Mfg. Company. (P. 23, 30, 35, 36.)

Michael J. Donovan (p. 25), the son of the defendant, was then called to prove the signature by Daniel Donovan, the defendant. He testified that he signed the name Daniel Donovan:

"Q. What authority, if any, had your father given you to sign the two papers just shown you? A. I was handling the affairs of father at that time, and I understood that the contract price for the bricks to be delivered at 24th Street—

"Q. * * * * * (p. 26) Did your father give them to you or did you get them in the mail? A. I receive all mail; I get all mail.

"Q. And act for him to sign contracts? A. Why, I have the last year. * * *

"Q. How soon after—did you tell your father you had signed those contracts? A. I suppose possibly within the next couple of days.

"Q. What did he say? A. He told me I made a mistake; that the price agreed upon was twenty-five dollars. I immediately wrote that letter to the company.

"Q. Did you tell your father you had signed those papers? A. I told him I had signed the papers.

"Q. What did he say when you told him that? A. He told me he was buying the bricks at twenty-five dollars a thousand.

"Q. Then did you write this letter next shown you? A. I wrote that letter, yes.

"Q. At whose request? A. Why, when he told me the bricks were twenty-five dollars I simply went to work and explained the matter to the company, told them I had made a mistake, and wanted to rectify it by that letter."

After the contracts were signed such of the brick as were delivered, were received by the defendant and payments made on account, the written contracts signed by the Mack Manufacturing Company and Donovan being retained by the defendant.

The plaintiff improperly conceived that the written contracts had not been proven.

In any event it was a question for the jury as to whether the goods were furnished under the written contracts and the plaintiff was bound thereby.

In *Marshall v. Hann,* 17 N. J. L., page 425, it was held that parties may without signing a written contract be bound by its terms if they recognize and adopt its stipulations and that it is error for the Court to refuse to charge the jury that if both parties recognize and act under such agreement as valid and subsisting between them they are bound by the terms of the stipulation.

In the case at bar it had been proven that subsequent to the conversation between Hutchins, the representative of the plaintiff and the defendant the written contracts had been executed and were in the possession of the parties during all the time the brick were being delivered and it was upon the faith of these contracts that the defendant took the brick and paid on account of the purchase price as bills were rendered. The defense was that the brick did not come up to the specifications and did not in the language of the contract meet the inspection of the City Engineer of Bayonne. The defendant was entitled to set up even if the action were to be considered one

upon the common counts that the goods did not conform to the special contract.

In the case of *Marshall v. Hann,* 17 N. J. L., 425, the Court said:

> "If so, it became very material on the trial for the jury to know whether they were to consider that agreement in any respect as binding between the parties because although an action of indebtedtatus assumpsit will lie for services performed under a special agreement, where, by the terms of that agreement the services are to be rendered for a money consideration, yet it is competent for the defendant in such an action to show that the services have not been performed in the manner specified in the agreement."

In *Bouker v. Randles,* 31 N. J. L., at page 338, the Supreme Court said:

> "This adjudication I conceive establishes in this State the rule that when an action is on the common counts in assumpsit the defense that the work or the materials did not correspond to the special agreement is admissible."

The Court excluded all evidence offered by the defendant to show that the brick furnished did not come up to the contract and by the refusal of the Court to permit the written contracts to be offered in evidence the defendant was precluded from showing this failure of consideration.

Inasmuch as the parties may have become bound by the written contracts other than by signing them the question depending upon all the circumstances surrounding the transaction, whether the contracts between the parties were the written contracts or not was a question for the jury.

In the case of *Smalley v. Hendrickson,* 29 N. J. L., 373, the Supreme Court said:

> "Whether a contract of sale has been made between the vendor and vendee or not and if

> it has, what are its terms, are always questions of fact to be settled by a jury. Where the acceptance and terms of a contract have been established its construction is matter of law for the court."

Here the question was whether the brick had been furnished under the oral contracts attempted to be proven by the witness Hutchins or whether they were furnished under the written contracts expressed in Exhibits D-1 and D-2 and this at least was a question for the jury.

Mr. Hutchins testified:

> "Q. How did you first come to send brick to Westfield and Bayonne? A. We didn't send, didn't deliver. We had a contract which we supposed was—" (p. 35).

But whether the written contracts expressed in Exhibits D-1 and D-2 could be considered as contracts of the parties these papers were evidentiary for two purposes, first, to show representations made by the plaintiff to the defendant with respect to the quality of the brick and upon the faith of which representations the defendant took the brick. Second, to show the authority that Mr. Hutchins had to make the oral contracts with respect to quality which the defendant insisted he made and the adoption of his course by the plaintiff.

IV.

The Court erred in excluding testimony as to representations made by the agent of the plaintiff as to quality at the time the oral contracts are alleged to have been made and erred in excluding proof that the brick did not come up to such representations and proof of failure of consideration and erred in excluding testimony of the general course of business between plaintiff and its agent to show that the agent had implied authority to make representations as to quality and erred in excluding testimony tending to show that plaintiff through its agent secured the adoption of the Mack brick by the City of Bayonne and was responsible for the specifications contained in that contract, which specifications required a quality similar to that represented by plaintiff's agent, and that the brick did not comply therewith.

The witness R. T. Hutchins testified that he was the Eastern Manager of the Mack Mfg. Company covering Northern New Jersey, Eastern Pennsylvania and Delaware, and part of New York State; that he was the general sales agent (p. 61); that his business is to first argue that in any city which is about to let a contract to secure the adoption by the City of the Mack brick and then to sell the brick to the contractors. That among other things he does *he talks the quality of his material.*

Counsel for the defendant then attempted to show what was the general course of business between this sales agent and the plaintiff was so

as to show the authority that the witness had to make the contract with respect to quality which it was insisted he did.

The Court excluded this line of testimony and held that the defendant must show that in this particular case that the representations were communicated to the plaintiff and adopted by it. This was error.

In *Cooley vs. Perrine,* 41 N. J. L., 330, the
10 Supreme Court said:

> "Undoubtedly there are many cases where it is held that a general agent to sell may warrant the quality. A general agent, Mr. Russell, in his treatise on Factors and Brokers, p. 75, defines to be either, first, a person who is appointed by the principal to transact all his business of a particular kind; or, secondly, an agent who is himself engaged in a particular trade or business, and who is employed by his principal to do certain acts
20 for him in the course of that trade or business. Such agencies extend, it is said, to whatever is fairly included among the dealings of that branch of business in which the agent is employed. But their scope arises not out of the instructions given, but out of those implied powers which the law confers, even in spite of instructions, because of which these are often called implied agencies in contradistinction from special agencies, which are express."

30 This was affirmed by the Court of Appeals in 42 N. J. L., 623.

It was certainly proper for the defendant to show the general course of business between the plaintiff and the witness Hutchins, who termed himself a general agent, a general sales agent, so as to show whether he did have implied authority to make the representations with respect to quality.

40 The case above cited expressly holds that the defendant is not bound to show specific adoption

of the agent's act by the principal, as the court below in this case held was necessary.

The Court held (p. 64):

> "You cannot show his course of business. Only what he does in this particular case. Whether he reported to his company; whether they acted upon it or not. I think that is as far as you can go."

And he overruled the question.

That this question was then asked (p. 67): 10

> "Q. Did you not tell Mr. Donovan that the brick would pass the city inspection?"

And the question was overruled.

> "Q. Did you tell Mr. Daniel Donovan that the brick would stand a test of eighteen on compression and two per cent. on absorption?"

And the question was overruled. Both questions were overruled because of a lack of authority 20 shown in the agent.

The papers D-1 and D-2 were then offered

> "not only for the reason and purpose I offered them this morning, but because it shows that the Mack Company subsequently acted upon the representations made by this witness, and in these two papers guaranteed that the brick would pass the city inspection and would meet the tests which I have referred to; to show the ratification by them of whatever he 30 said to Mr. Daniel Donovan."

The offer was overruled. The plaintiff endeavored to show by the witness Michael Donovan what the conversation was between the parties with respect to what tests the brick would stand.

After testifying that his father was present, the witness said (p. 59):

> "Q. Was that conversation with respect to the kind of brick that was to be furnished? 40 A. Yes.
>
> "THE COURT: The kind of brick—well,

that might allow two or three different answers. The question is pretty broad. You may answer that question.

"A. Yes.

"Q. What kind of brick was it stated should be furnished?

"MR. DEMAREST: I object.

"THE COURT: I will sustain the objection.

"MR. LANE: I ask an exception.

10 "Q. Was there a talk at that time with respect to the test the brick should stand?

"MR. DEMAREST: I object.

"A. Yes.

"MR. DEMAREST: I withdraw my objection.

"Q. What test was it stated that the brick should meet?

"MR. DEMAREST: I object on the ground that there is lack of authority shown in the agent.

20 "THE COURT: I will overrule the question. It is not proved that the sales agent was authorized to make any statements as to the quality of the brick."

Defendant tried to show by the agent, Hutchins, that plaintiff was responsible for the adaption by the City of Bayonne of the Mack brick and was responsible for the specification as to the brick (pp. 61, 62, 65, 66). He had al-
30 ready testified that this was part of his business. This would have shown that the specification as to the quality of the brick was exactly as plaintiff's agent represented to defendant that the quality of the brick would be. It was at least evidential as bearing upon the authority of the agent but all was overruled.

The result of the action of the trial court was to prevent the defendant from showing the spe-
40 cial contracts made between the general sales agent of the plaintiff and the defendant with respect to

the quality of the brick at the time the oral contracts were made; was prevented from laying before the jury all the facts and circumstances from which the jury might infer and it was the province of the jury so to do or not, that the plaintiff and the defendant had entered into the special contracts, that these circumstances were first, what the general course of business between the plaintiff and its sales agent was, and second, Exhibits D-1 and D-2 which would indicate that in this specific case the plaintiff had adopted the special contracts made by its agent. From the general course of the plaintiff's business and the written contracts signed by the plaintiff and from the evidence of the agent who, among other things, testified that it was his business to talk the quality of the brick; and from the practice of the plaintiff in having this agent secure the adaption of this brick by the municipalities as was done in this case; the jury might properly infer that the general sales agent had authority to enter into the special contracts with respect to the quality. The defendant was also prevented from endeavoring to prove his notice of set-off and recoupment.

If there were express contracts between the parties, evidenced either by the writings or by the oral arrangement made between Hutchins, the agent of the plaintiff, and the defendant, it is by those contracts that the rights of the parties must be judged.

In *Voorhees v. Executors of Woodhull,* 4 Vr., 496, it is held:

> "The doctrine upon which the plaintiff rests her case is contrary to the well settled rule that an express contract excludes an implied one. An implied contract cannot exist when there is an existing express contract about the identical subject. The parties are bound by their agreement and there is no ground for implying a promise."

While it is remembered that the Supreme Court has held in *Winter v. Schoenfeld,* 78 N. J. L., 92, that in an action based only upon the common counts the defendant cannot by plea or notice of recoupment claim damage by reason of any cause of action arising out of the contracts upon which the assumpsit is based, yet under the cases above cited of *Marshall v. Hann* and *Bouker v. Randles* the defendant was entitled to show that the goods did not conform to the special contracts for the purpose of reducing damages. The corallary of the doctrine of the Supreme Court in *Winters v. Shoenfeld* is that to maintain his action in assumpsit plaintiff must prove that the goods were all delivered in exact accordance with the terms of the special contract, for only in that event does the assumpsit arise. If he fails so to do he must be non-suit.

It also must be borne in mind that this case was tried under the new practice act which provides that the defendant may counterclaim or set off *any* cause of action. This would seem to have done away with the effect of *Winter v. Schoenfeld.*

It is respectfully submitted that the court clearly erred in refusing to admit the testimony from which the jury might have inferred that special contracts had been made between the parties with respect to the quality of this brick and that the brick did not conform to the special contracts; that whether special contracts had been made was clearly a jury question.

It is submitted that the judgment should be reversed and a venire de nova issued.

Respectfully submitted,

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New Jersey Court of Errors and Appeals.

MACK MANUFACTURING COMPANY, Appellee, *v.* DANIEL DONOVAN, Appellant.	On Appeal. Action at Law.

BRIEF OF RESPONDENT.

Statement of Facts.

This action was brought by the plaintiff, a West Virginia corporation, manufacturing and selling a street paving brick known as "Mack block," against the defendant, a public contractor, for certain block sold by the plaintiff to the defendant and used by him in the improvement of a street in the City of Bayonne and two streets in the Town of Westfield. The action was brought under the old practice, and, as appears by the declaration (p. 5), was for goods sold and delivered, with a bill of particulars. The defendant filed a notice of recoupment and set-off (p. 9), and in reply to a demand for specification of defenses, gave notice (p. 11) that the goods were furnished under an express contract.

Although it does not appear in the appellant's printed state of case, the case was called for trial on January 28th, 1913, when the plaintiff moved to amend its declaration and declare upon the writ-

ten contract. The motion being granted by the Trial Judge, the defendant insisted upon an adjournment, declining to then plead to the amended declaration and proceed to trial. The admission of this situation appears in the colloquy between counsel and Court at the trial (pp. 19-22). No new plea was ever filed by the defendant to the amended declaration. The plaintiff served the defendant with interrogatories demanding detailed information as to the date, character, and execution of the written contract alleged by the defendant in his specification of defenses and notice of recoupment to which the defendant did not reply.

When the case was called for trial therefore, April 21st, 1913, the defendant had not pleaded to the amended declaration nor answered the interrogatories propounded by the plaintiff, and to avoid the statutory penalty moved by the plaintiff (p. 20) to suppress the defense, when plaintiff's counsel stated it might be necessary to amend the declaration, defendant's counsel replied: "I shall not plead surprise, or anything of that kind" (p. 21). It appears (p. 21) that the plaintiff proceeded to trial with the understanding as stated by counsel, "If it is necessary to move during the trial for an amendment from the present state of the declaration to a declaration founded upon contract I want it done without the suit being delayed by an adjournment." From the examination of R. T. Hutchins (p. 23) and Michael J. Donovan (p. 25) it would appear that the plaintiff at the outset of the trial amended his declaration and proceeded upon the original declaration for goods sold and delivered.

POINT I.

The Court did not err with respect to the amendment nor was the defendant harmed by the Court's action.

It is unnecessary to quote authorities upon this point, it was one of common sense and not law. Notwithstanding the fact that the Trial Judge had permitted the original declaration to be amended, the case was tried upon the original declaration of the plaintiff for goods sold and delivered, to which the defendant had pleaded there was no issue upon any other principle. The defendant had failed to plead to the amended declaration and he had also failed to answer the interrogatories. He was subject to the penalty that both his defense and set off be suppressed. He, in open Court, assented to an amendment should one become necessary. Therefore, if the Trial Judge were without authority to permit an amendment of the original declaration at the trial, such permission did not become harmful to the defendant because the pleadings and issue were at the beginning of the trial reinstated to the original form to which the defendant had pleaded, and this with his consent. In order to ascertain whether a valid written contract existed between the parties, the plaintiff called the defendant's son, who, at page 25, testifies as follows:

> "Q. Do you know Daniel Donovan? A. I do.
>
> "Q. Is he any relation to you? A. Father.
>
> "Q. Is that your signature (indicating)? A. Yes.
>
> "Q. Where the name of Daniel Donovan appears? A. Yes.
>
> "Q. What authority, if any, had your father given you to sign the two papers just shown? A. Why, he didn't give me any authority.

"Q. Did you have a power of attorney at that time from him? A. Not in this respect, no.

"Q. How soon after did you tell your father you had signed those contracts? A. I suppose possibly within the next couple of days."

A perusal of the testimony of this witness will show that although he signed the written contract with the name of his father he had no authority to do so at the time of signing; that his act was not ratified by his father and that he wrote the plaintiff and "told them I had made a mistake and wanted to rectify it by that letter." The witness Hutchins then testified (p. 31) that he verbally fixed the price of the brick at a conversation with the defendant, and later, in a conversation with the defendant's son, reduced this price one dollar per thousand.

The theory, therefore, upon which the case was tried, and the proof which supported the verdict, was in accord with the plaintiff's original declaration, to which the defendant had pleaded, and no matter what had preceded the actual trial of the case, the defendant can not have been harmed.

POINT II.

A non-suit should not have been granted to the defendant.

The appellant advances as an argument that a non-suit should have been granted, that there was no evidence of an actual count of the brick sold by the plaintiff to the defendant for the improvement of the two streets. The testimony of the City Engineer of Bayonne is that there were five city blocks of pavement laid covering 10,738.6 square yards (p. 45) and that they were laid of

Mack block. The testimony of the Westfield Engineer (p. 49) is that the bricks were laid on North Avenue and Broad Street in gutters three feet wide, making a total of 1,429 lineal feet or 478 1/3 square yards. The bricks are not sold by the dozen but in large quantities. The City Engineer of Bayonne testified that estimating forty-two bricks to the square yard the amount of paving laid would require 451,021 bricks (p. 53). The engineer of Westfield testified that the work in that town would require 23,800 (p. 50). The latter also testified that, from actual measurement, the brick used for the gutters run 16.7 to the lineal foot or 50 to the square yard. The Engineer of Bayonne, where the bricks were laid in different manner, testified they ran approximately 42 to the square yard. Hutchins testified, page 51, they laid 42 to the square yard in the manner in which they were laid in Bayonne. The bill of particulars show that these streets in both Bayonne and Westfield were completely laid with the plaintiff's brick and that the plaintiff charged for 443,500 bricks and for the Westfield job 22,000 bricks, or approximately 11,000 less than were required by the Engineer's measurements. The plaintiff's representation, page 31, was that 42 bricks were guaranteed to cover a square yard in the manner they were laid in Bayonne, therefore, it was the defendant who benefited by a less number of bricks being used to lay the required number of square yards.

Not only Hutchins, the agent of the plaintiff, and the two City Engineers, but also the defendant's son, Michael J. Donovan, testified that the plaintiff's blocks were used for the paving of the three streets and Hutchins testified to cash payments made by the defendant and credits amounting to $10,640.08 (pp. 8, 34 and 37 and 54).

The testimony of experts or "practical men" to measurements of this class is not unusual or improper.

Read *v.* Barker, 1 Vr., 378, affirmed 3 Vr., 477.

17 Cyc., pages 105, 228 and cases cited.

POINT III.

The Court did not err in refusing to admit in evidence Exhibits D1 and D2 for the reason that they were not the contracts between the parties, and for the further reason there had not been laid a proper foundation for their admission.

The Exhibits D1 and D2 which the appellant contends should have been admitted are found at pages 14 and 17 of the printed case. Both are identically similar in form except that one refers to the Westfield and the other to the Bayonne job. These are the contracts referred to in the plaintiff's amended declaration, which as before observed, was induced by the defendant's notice of recoupment.

The testimony of Michael J. Donovan, the defendant's son, when called by the plaintiff, was that he received the contracts by mail from the plaintiff and signed his father's name to them but that he had no authority to do so at the time he signed them, that his father disavowed the signature and that the witness then advised the plaintiff that he had made a mistake. The contracts therefore were not in evidence and could not have been offered in the face of Michal Donovan's testimony unless the defendant, the father, had shown their proper execution either by the authority of the son to sign them, or his subsequent ratification.

This he might have done *but the defendant although he might have testified was never called as a witness.*

The theory of the defense appears to be that the exhibits were not to be considered the contracts between the parties but contained statements upon which the defendant relied; that they were inducements so held out by the plaintiff to the defendant as to become a part of the verbal contract.

There can be no merit in this contention. The verbal contract between Hutchins, the plaintiff's agent, and the defendant, Donovan, had preceded the receipt of the written documents (p. 35). Hutchins had quoted a price and endeavored to have "Mack Blocks" adopted and the City of Bayonne had subsequently adopted this block for the work. The written documents received some time later had not been an inducement for Donovan to purchase the blocks, for the reason that the contract between the parties had been consummated and he, moreover, had expressly disavowed the act of the son and refused to assent to the contents of the papers. There is no question the blocks were received and used by the defendant in the prosecution of the work. It does not appear that either party adopted or recognized any stipulations in the document but, to the contrary, that they relied entirely upon their previous oral contract. The principle of Marshall *v.* Hann, therefore, does not apply.

The defendant had the opportunity of making this testimony relevant by calling the defendant and showing either that the defendant adopted the papers as his contract with the plaintiff or that the stipulations contained in the documents were brought to his attention *before* the bargain was made and that he relied upon them in making the contract and that the statements were knowingly

false. All these elements are necessary to make the defense availing.

Curtiss *v.* Howell, 39 N. Y., 211.
Pulsford *v.* Richards, 17 Beav., 87.

The expression of the Roman law that it must be a representation *dans locum contractui* still prevails.

The admission of these documents rested entirely upon a proper foundation first being laid. The evidence before the Court was that they did not embody the agreement of the parties. They therefore were not admissible without proof to support the defendant's contention. Instead of proceeding regularly by proper evidence defendant's counsel attempted to try the case by implications drawn from the testimony already in which rebutted the theory of the attempted inferences.

The Trial Judge therefore committed no error.

POINT IV.

The Court did not exclude any proper evidence offered by the defendant.

As before noted defendant's counsel attempted to defend his case without offering the evidence he might have offered to sustain his contention.

R. T. Hutchins, the plaintiff's sales agent, who had already testified for the plaintiff, was called by the defendant as his witness. He testifies he had no power to make contracts. He further testified (p. 66) to all he had reported to his principal. No attempt was made to elicit from the witness what his authority was. The examination was rather in the nature of a cross examination by the party who produced the witness. The witness' testimony is direct that he made no representations to his company concerning the particulars of the contract between the City of Bayonne and Donovan.

There was no testimony of the witness Hutchins from which the jury might infer any general agency powers beyond those testified to, *i. e.,* that he was general sales agent, possessing no power to make contracts, that he reported to his principal that Donovan had the contract with the City, that the plaintiff's block had been selected, the price he had quoted Donovan and the number of square yards (p. 66). This was the result of his direct examination. It could not be impeached by the witness. The defendant might have been called to prove the contrary and shown that there were agreements between him and the plaintiff respecting tests, time of delivery and any other matter admissible as a defense but he chose not to do so. The result was the defendant had no right to impeach the testimony of Hutchins by a cross examination and had laid no foundation for the defenses he sought to inject into the case by inference.

While the pleadings in this case were under the old practice the trial was conducted under the new Practice Act. This is conceded (Appellant's Brief, p. 3).

The case is one falling within Section 27 of the New Practice Act. It does not appear upon an examination of the whole case that there is any error injuriously affecting the substantial rights of the defendant. If he had a defense he was amply able to properly present it. Instead of doing so he chose to withhold it from the jury and for this he cannot complain.

We therefore submit that the evidence warranted only what the Court did—to direct a verdict for the plaintiff—and that the jury could have come to no other conclusion than that reached.

Respectfully submitted,

PHILIP F. BOTZONG,
ROBERSON & DEMAREST,
Of Counsel with Respondent.

New Jersey Court of Errors and Appeals.

MACK MANUFACTURING COMPANY,
Appellee,
vs.
DANIEL DONOVAN,
Appellant.

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REPLY BRIEF OF APPELLANT.

In his opening statement counsel for the respondent refers to Interrogatories that had been served and had not been answered when the trial opened. Cousel had no right either to refer to the Interrogatories or to the Answers. He did not offer them in evidence as was his right.

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I.

The case was opened upon the Declaration amended by virtue of an order of the trial judge made illegally as set forth on page 3 of the original brief. Subsequently and after two witnesses had been examined not with the consent of the defendant, but over his objection, (page 29) the Court permitted an amendment back to the original form of the declaration. This under *Jordan v. Reed,* 77 N. J. L., 584, could not be done. Under the case of *Winters v. Schoenfeld,* 78 N. J. L., 92, it made a considerable difference to the defendant so far as his recoupment was concerned whether the action was upon the express contract or whether it was in assumpsit upon the common counts.

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It is not true that the evidence supported the plaintiff's original declaration because it is apparent from a consideration of the testimony that the brick was delivered under a written contract and it is not necessary under the case of *Marshall v. Hahn,* 17 N. J. L., 425, that a person must sign the written contract in order to be bound thereby. It is true that the witness, Michael Donovan, testified as stated under Point II., but it is also true that he testified, page 25, as stated on page 11 of the original brief and it clearly appeared, or at least it was a question for the jury, whether these contracts had been signed in such a way as to be binding upon the defendant. Counsel for the plaintiff did not offer the written contracts in evidence; did not ask the defendant to admit their execution, but on the other hand when offered by the defendant, objected and succeeded in inducing the trial court to exclude them.

II.

Counsel endeavors to avoid the effect of his failure to produce evidence showing the shipment of this brick by depending upon the evidence referred to from pages 6 to 9 of appellant's original brief. The witnesses did not testify as indicated by counsel. Hutchins, on page 51, did not say that laid in the manner they were laid in Bayonne they would lay 42 to the square yard. He was careful to say "approximately." The Bill of Particulars which counsel says shows that both of these streets were completely laid with plaintiff's brick is not evidence. There is no testimony that both of the streets were paved with plaintiff's brick. The City Engineer of Bayonne testified (p. 53), that he didn't know. The Mack brick is not a patented brick and can be bought anywhere. If both streets were paved with Mack brick it does not follow that they came from the

Mack Mfg. Company. The mere fact that plaintiff does not claim to have delivered within 11,000 brick, which according to the computations of the Engineer actually went into this street, shows how utterly unreliable the testimony is. It is not as if it was impossible for the plaintiff to prove its case. It might have produced evidence of the actual shipments.

The cases cited by counsel, *Reed v. Barker,* and 17 Cyc., have absolutely no application to the point under which they are cited. 10

III.

Counsel misses the point made by the defendant in the offer of the papers D-1 and D-2, page 67 and page 57. Even if the papers had not been proven to such an extent as was necessary to get them to the jury as the contracts of the parties (and it is submitted that under the case of *Marshall v. Hahn,* 17 N. J. L., 425, it was a question for the jury to determine whether they were or were not the contracts) they were certainly evidentiary for the purpose of showing the adoption by the plaintiff of the oral representations made by its agent at the time of the sale of the brick, and it was for that purpose that they were offered on page 67. 20

We will all admit that statements to be made the basis of relief must have been made at the time the bargain was made, but counsel overlooks the fact that the defendant had attempted to prove by the witness Hutchins and by the witness Donovan that the statements were made by Hutchins as the agent of the plaintiff with respect to the quality of this brick at the time of the bargain and all such questions had been overruled upon the ground that there was lack of authority in the agent, improperly overruled it is submitted. In order to meet the objections of the plaintiff the 30 40

papers D. 1 and D. 2 were offered for the purpose of showing that the Mack Company acted upon the representations made by the witness Hutchins at the time the bargain was made and ratified what he had said. The papers if competent for no other purpose were certainly competent for this.

IV.

10 Having succeeded in getting the trial judge to exclude all evidence of any representations made to the defendant at the time the bargain was made by the agent Hutchins and in excluding all evidence to show the general course of business between the plaintiff and its agent so that the jury might determine whether the agent had the authority to make the representations or not, it is impossible to fathom what counsel means when he says "The defendant might have been called to 20 prove the contrary and shown that there were agreements between him and the plaintiff respecting tests, time of delivery and any other matter admissible as a defense but he chose not to do so."

If the witness Hutchins cannot be permitted to testify as to what representations he as the agent of the plaintiff made to the defendant, I cannot conceive how the defendant would have been permitted to testify what representations Hutchins 30 made to him. It is submitted that the Court clearly erred in refusing to permit the defendant to show the general course of business between the plaintiff and its agent so that the jury might find that the agent had authority to make the representations it was claimed he made and clearly erred in holding upon the testimony already in that the agent had no such authority the question being one for the jury even upon the testimony in.

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Finally.

Counsel for the respondents pleads that even if there was legal error in the case there was no error committed injuriously affecting the substantial rights of the defendant. He says "If he had a defense he was amply able to properly present it. Instead of doing so he withheld it from the jury and for this he cannot complain."

Having been met at each stage of his attempt to present a defense and to prove the damages indicated in his notice of recoupment by the objection of the plaintiff, the very questions designed to lay the foundation of the defense having been overruled by the trial court, it is hard to conceive what counsel means when he says "if he had a defense he was amply able to properly present it."

It is respectfully submitted that the judgment should be reversed and a venire de nova issued.

Respectfully submitted,

MERRITT LANE,
Attorney for Appellant.