

NORTH CAROLINA, } Superior Court,  
DURHAM COUNTY. } March Term 1891.

THE NCNEAL PIPE AND FOUNDRY CO. }  
VS. }  
A. H. HOWLAND AND THE DURHAM }  
WATER CO. }

STATEMENT OF CASE ON APPEAL.

This was a civil action tried before His Honor Judge Boykin, and a jury, at March Term, 1891, of the Superior Court of Durham county.

The nature of the action is set forth in the complaint, answer of A. H. Howland and reply of the plaintiff, which are sent up with the record, with the exhibits attached to the pleadings.

At October Term, 1888, there was an order of reference to J. S. Manning, Esq., a copy of which will be attached to and sent up with the record.

The Referee heard the case upon the evidence submitted before him in behalf of the plaintiff. The defendant introduced no evidence before the Referee.

Upon the coming in of the report of the Referee the defendant filed exceptions thereto and upon his exceptions to the report of the Referee demanded a jury trial before Armfield, Judge, at January Term, 1890, and the motion of the defendant for a jury trial was granted. Thereupon the plaintiff, at January Term, 1890, tendered issues as is set out in the record of the case at January Term, 1890. His Honor Judge Armfield endorsed the following note on the issues tendered by plaintiff at January Term, 1890, viz:

"I settled the above as the issues and counsel for de-

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defendant moves to submit an issue as to what counter-claim as set out in his exceptions the defendant is entitled to, and this motion is continued to the next term.

(Signed) R. F. ARMFIELD.

At the following term (March Term, 1890) the case was tried before Armfield, Judge, upon the issues appearing of record at that term and sent up as a part of the case now on appeal.

After verdict and upon plaintiff's motion for a new trial at March Term, 1890, was set aside by the Court and a new trial ordered, and the case came on again for trial before Boykin, Judge, at March Term, 1891. At March Term, 1891, the defendant submitted to the Court and tendered as additional issues, the issues marked a, b, c, d, e, f, 1st Exception. The Court refused to submit these issues as separate issues of counter-claim and instead submitted the following:

XII. "What damage, if any, has defendant Howland sustained by reason of the alleged failure of plaintiff to fulfill its contract with him?"

[Ex. 2.]

During the examination of E. J. Parrish, a witness for the plaintiff, he was interrogated by the plaintiff as to the date when the controversy between the Town of Durham and the defendant began about the size of the pipe and in order to refresh his recollection a letter written at the dictation of the witness and purporting to be signed by him was handed to him to read for that purpose. The Court thereupon took the witness and interrogated him as follows:

Judge: "Do you remember, without that letter, when this controversy began?"

Ans. "I could not."

Ques. "What do you mean when you say the diffi-

culty was back there in November 1886 to 1887?"

Ans. "Because there was a controversy all the time."

Ques. "I am speaking of the difficulty in respect to pipe, when did that trouble assert itself?"

Ans. "I could not say without this letter."

Ques. "Could you say after once reading that letter?"

Ans. "No sir."

Judge: "Produce something else gentlemen, (to plaintiff's counsel).

Question by plaintiff's counsel:

"Can you read that letter and tell whether the controversy as to pipe was before or after that letter was written?"

Ans. "It was on when this letter was written."

Ans. "It was going on on the 2d day of February, 1887, and some time before that, how long I do not remember."

Judge: "He said it began in November, 1886, and this is an utter consumption of time."

[Ex. 3.]

The plaintiff during the examination of Wilmur Reed, a witness for the plaintiff, preliminary to offering in evidence certain letters and documentary evidence purporting to be in the handwriting of the defendant asked the witness the following questions:

Ques. "Mr. Reed, have you ever seen Mr. Howland write?"

Ans. "Yes sir."

Ques. "A. H. Howland?"

Ans. "Yes sir."

Ques. "Know his handwriting?"

Ans. "Yes sir."



(Plaintiff's counsel shows witness paper.)

Ques. "Is that Mr. Howland's handwriting?"

Ans. "Yes sir."

Defendant wished to cross-examine on knowledge of Howland's handwriting, and Court permits it.

CROSS-EXAMINATION OF PLAINTIFF'S WITNESS, REED.

Q. "You say you know Howland's handwriting."

A. "Yes sir."

Q. "How do you know it?"

A. "I have seen him write."

Q. "When?"

A. "Three days ago."

Q. "You saw him write three days ago?"

A. "Yes sir,"

Q. "How?"

A. "On the hotel register, at Hotel Claiborn, saw him write his name and Miss Ellis'."

Q. "Ever seen him write before?"

A. "Yes sir."

Q. "Where?"

A. "Some few years ago in Boston."

Q. "How many years ago?"

A. "Probably six or seven years ago."

Q. "What did you see him write?"

A. "I saw him write a memorandum of some kind, I do not remember, at his desk at the United States Hotel in Boston."

Q. "Write a memorandum? Did he sign it?"

A. "I am not sure."

Q. "Can you say you ever saw Mr. Howland write,

in your life, except to write his name on the Hotel register three days ago?"

A. "Yes sir; I saw him write at his desk, in Boston, at the United States Hotel."

Q. "You cannot say you ever saw him sign his name but once, and that was three days ago?"

A. "Yes sir; I happened to be there, came on the same train."

Q. "You swear from having seen him sign his name three days ago, you are willing to swear you know the man's handwriting?"

A. "Yes sir."

Q. "Mr. Reed, I ask you as man to man, do you swear that you know Mr. Howland's handwriting?"

A. "Yes sir, I do."

Defendant's counsel says that he submits that witness cannot know Mr. Howland's handwriting.

Question by plaintiff's counsel:

"Having seen him write on Hotel register, and from having seen him write in Boston, you say you have such a recollection of it that you could recognize his signature?"

Ans. "Yes sir."

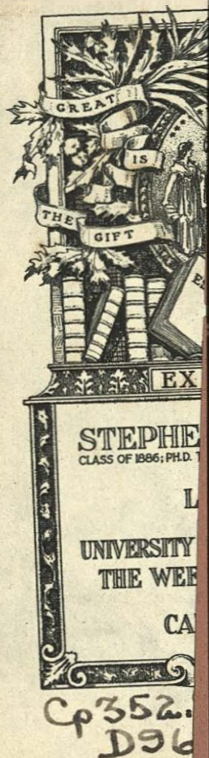
Plaintiff's counsel: "I submit to your Honor that this is competent."

Judge; "You know, gentlemen, that this is largely a question for the witness himself. It goes to the jury."

The defendant excepted to the evidence and the Court overruled the objection. Defendant excepted.

The letters and documentary evidence upon such proof of defendant's handwriting were subsequently introduced in evidence.

[Ex. 4.]





A. S. Lewter, a witness for plaintiff, testified that he is the local depot agent at Durham of the R. & D. R. R. Co., but was not such agent in 1886 and 1887, at the times of delivery of pipes sued for. He moved to Durham and became such agent August 5th, 1888. He produced and identified certain papers, purporting to be way bills of water pipes and delivery books of freight received at Durham between January 1st, 1887, and June 1st, 1887; as being papers and delivery books belonging to the office of the R. & D. R. R. Co., at Durham, N. C. he did not make them out and does not know who did. He found them in the office of the Company when he took charge of it.

Plaintiff did not upon this evidence offer the way bills in evidence, nor were the delivery books admitted in evidence upon this proof. Subsequently and before resting its case the plaintiff introduced John A. Holt, who testified that he was the predecessor of the witness, Lewter, and agent of the R. & D. R. R. Co., at Durham from November 1st, 1886, to August, 1887; that the books and papers (way bills) produced in Court by the witness, Lewter, are recognized by him as a part of the office papers and books belonging to the R. & D. R. R. Co.

Question by plaintiff:

State whether or not all the water pipes referred to on these way bills were delivered and to whom?

Defendant objects because there is no water pipe referred to on these way bills and argues that way bills are not evidence.

Objection overruled.

Defendant excepted.

Q I Asked you if all the cast iron pipe named on those

way bills consigned to the defendant, A. H. Howland and the Durham Water Company, were delivered?

A It was.

The answer of the witness was not objected to.

[Ex. 5.]

The witness, Lewter, was asked by plaintiff without objection on the part of defendant the following questions to which he answered as follows:

Q Did you take receipts from parties?

A Yes sir.

Q The number of car, date of way bill, from what station and the consignee, description of article, to whom delivered and date of delivery. Does the consignee sign this book when he receives these articles?

A Yes sir; consignee or his agent."

Q Is that the rule of the office?

A Yes sir.

After questions had been asked and answered as above defendant objected to any rule or custom of the Company; but further than that did not except nor ask the Court to strike it out.

[Ex. 6.]

W. A. Muse was examined as a witness for the plaintiff and testified that he was chief clerk under John A. Holt, agent at Durham of R. & D. R. R. Co., from 1st November, 1886, until June 20th, 1887; that the way bills were copied into the delivery books, and upon the delivery of the goods the consignee or his agent signed a receipt in the delivery books; that he made some of the entries in the books, and supervised all of them. It was not his business to deliver goods; but Mr. Holt, the agent, did that himself. It was the business of the wit-



ness to receive payment of freights and enter the way bills in the delivery books, and have consignee or his agent receipt in the delivery book for the freight. The witness having the way bills and delivery books before him, was asked as to one of the cars:

Q What does the way bill show was in car No. 9307?

Defendant's counsel objecting, was allowed by the Court to ask a question:

Defendant's counsel; question:

Did you go out and look at the cars and compare that with the way bills?

A I did not.

Question by plaintiff:

What was the contents of the car according to the way bills?

A 112 feet cast iron pipe.

Defendant excepted.

Subsequent to the examination of the witnesses, A. S. Lewter and W. A. Muse, and before resting its case the plaintiff introduced and examined the witness, John A. Holt before referred to, who testified that all the water pipes referred to in the books of delivery were delivered to the defendant or his agents.

And it was also in evidence in behalf of the plaintiff that the plaintiff on August 1st, 1887, had written a letter to the defendant Howland enclosing a statement of account dated July 30th, 1887, a copy of which is hereto annexed and marked Exhibit "A", which letter and statement of account was received by the defendant and the debit side of it admitted to be correct, (a copy of the defendant Howland's letter to the plaintiff dated August 24th, 1887, marked Exhibit "B" is hereto annexed). The defendant Howland when introduced as a witness

on the trial in his own behalf admitted the delivery of all the goods charged against him in Exhibit "A."

[Ex. 8.]

That plaintiff's witness Reed was permitted to testify that he had made out a memorandum from the books of the plaintiff at Burlington, New Jersey; and there ascertained the car numbers and contents of the cars and he had compared the memorandum with the way bills and delivery books in the office of the R. & D. R. R. Co. at Durham and found the same to agree. John A. Holt, the agent, also testified to going over the books of the R. R. office with the witness Reed and using his memorandum in doing so and they agreed.

Defendant excepted.

The witness Holt also testified that the defendant's agent produced in Durham, bills of lading for the goods, which agreed with the office books and way bills.

The memorandum made by the witness Reed was allowed to be introduced in evidence.

Defendant excepted.

[Ex. 9.]

A. H. McNeal, President of the plaintiff corporation, as a witness for plaintiff identified, and plaintiff introduced in evidence the statement of account rendered by plaintiff to defendant Howland dated July 30th, 1887, (Exhibit "A" above).

Whereupon plaintiff's counsel stated that they introduced the same because this statement if received by the defendant and kept without objection by him would constitute an account stated and bind him by its contents or at any rate was competent evidence. And the statement of account was admitted by His Honor in evidence. Upon cross examination of this witness he was asked by defendant's counsel:



Did not Mr. Howland after you had sent the statement of account of July 30th, write you a letter telling you it was incorrect?

To this question plaintiff objected as the letter itself is the best evidence of its contents, and the question was excluded by the Court and the witness was not required to answer it.

Defendant excepted.

The letter referred to (it being Exhibit "B" above) was subsequently introduced by the defendant in evidence and showed upon its face in what particulars the defendant Howland claimed the statement of account to be incorrect, and contained the admission of its correctness as far as it goes.

[Ex. 10.]

At the outset of the trial and before any evidence was offered on either side, the plaintiff contended that inasmuch as the defendant offered no evidence before Mr. Manning as Referee, the defendant had lost the right to have an issue submitted and evidence offered upon his counter-claim, that the case ought to be tried upon the evidence taken before the Referee.

The Court held otherwise, and submitted the issue as to defendant's counter-claim set out in the record. And the defendant Howland being introduced upon the trial as a witness in his own behalf was asked what contract he had made with skilled workmen as to giving them continuous employment and paying for full time whether employed or not, plaintiff objected and the Court sustained the objection.

Defendant excepted.

The defendant Howland was permitted thereafter to introduce evidence tending to show that he was com-

pelled to employ skilled workmen, that he contracted to pay them whether employed or idle, and that they were unemployed many days by reason of the default of the plaintiff, and the amount of his damage.

The evidence in this case is very voluminous, and without consideration of many letters, and telegrams which passed between the parties all of which was submitted to the jury, it would be very difficult to determine whether delay in the delivery of the pipe was caused more by the defendant Howland or the plaintiff. It is not controverted that for a portion of the time the delay was caused by the orders and acts of the defendant Howland, and plaintiff claimed that it was thereby entitled to a corresponding extension of time for delivery.

The correspondence by letters and telegrams was all introduced in evidence and is hereto attached as a part of statement of case on appeal being numbered from 1 to 115 inclusive.

[Ex. 11—same as Ex. 10.]

[Ex. 12.]

The defendant Howland as a witness in his own behalf was asked by his counsel, what interest he had paid or lost on money invested and lying idle while waiting for pipe to be delivered.

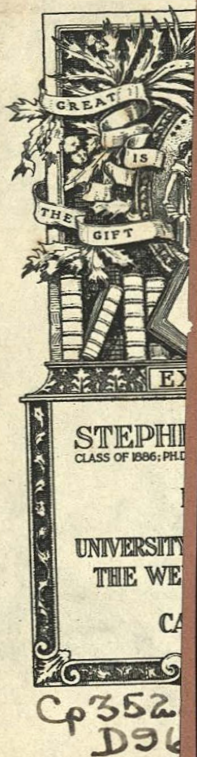
Plaintiff objected that such damage was too remote and the Court excluded the proposed evidence.

Defendant excepted.

[Ex. 13.]

Defendant's counsel then asked the witness Howland:

What amount of money was invested in the water works up to March 1st, 1887?





Plaintiff objected, and the Court sustained the objection.

Defendant excepted.

It was in evidence that the defendant Howland had originally entered into a contract with the Town of Durham on the 12th day of June, 1886, under which he began the construction of the Durham Water Works, and subsequently before the works were completed viz: On January 1st, 1887, he duly assigned this contract and all rights under it to his co-defendant the Durham Water Company, and received pay therefor in mortgage bonds and capital stock of said Durham Water Company. (Copies of contract between defendant Howland and the Town of Durham marked Exhibit "C," and assignment from Howland to Durham Water Company marked Exhibit "D" and acceptance thereof by the Durham Water Company marked Exhibit "E" are hereto annexed.)

[Ex. 14.]

The defendant's counsel shaping his question differently but admitting it was for the purpose of bringing out the same proof above excluded by the Court, asked the witness Howland:

How were you injured by the failure of the plaintiff to make the deliveries at the times fixed in the contract?

His Honor held that the evidence was too remote for that purpose, and had already been excluded and upon objection by plaintiff sustained the objection.

Defendant excepted.

[Ex. 15.]

Defendant's counsel asked the witness Howland if there was any reduction of the rental agreed to be paid by the Town of Durham for the use of the water furnished by the Water Works.

Plaintiff objected, objection sustained.

Defendant excepted.

[There is no 16th Exception in this statement of case.]

[Ex. 17.]

The defendant's counsel asked the witness Howland: What damage, if any, he had sustained in his reputation as a skillful, speedy and efficient builder of water works by reason of plaintiff's breach of contract?

Plaintiff objected. Objection sustained and defendant excepted.

The defendant asked the following instructions:

1. That the jury have the right, in determining the credibility of any witness, to consider his bearing and behavior on the stand, and general conduct as a witness.

(This was not given and defendant excepted.)

[Ex. 18.]

2. That a contract may be made by silence, as well as by words, and that if the conduct or action of a party is such as to reasonably induce another to believe that he assents to a contract or offer, and the other party would suffer by acting on his reasonable belief, if it were not a contract, the party so inducing such belief is estopped to deny existence of such agreement.

(This was not given and defendant excepted.)

[Ex. 19.]

3. That it being testified by plaintiff's witness that plaintiff did not deliver to defendant 720 pieces of 12 inch pipe or 720 pieces of 10 inch pipe and there being no evidence of the cancellation of the original order for 10 inch pipe except in letters wherein a substitution of 12 inch pipe therefor is made defendant is entitled to recover of plaintiff the market value of 720 pieces of pipe, either 12 inch or 10 inch as you shall find, whether the original order was modified or not.



(This was not given and defendant excepted.)

[Ex. 20.]

4. That the defendant is entitled to recover interest at the rate of six per cent per annum upon his capital invested in the water works in Durham, for the time he was delayed in the completion thereof beyond the time within which he could have completed them, if you believe that such failure was caused by plaintiff's unauthorized delay in shipping the pipe, and the only evidence as to amount of capital so invested is that it was One Hundred Thousand Dollars.

(This was not given and defendant excepted.)

[Ex. 21.]

5. That defendant is entitled to recover of plaintiff the difference between the market value, at the time of purchase of pipe by defendant of parties other than plaintiff and the plaintiff's contract price therefor, if such purchase was made necessary by plaintiff's failure to deliver any of the pipe according to the contract, and that the only evidence as to such difference in value is that it was \$3710.00.

(This was not given and defendant excepted.)

[Ex. 22.]

6. That defendant is entitled to recover the reasonable value of his own time given necessarily to the works at Durham beyond the time it would have been required, if plaintiff's unauthorized delay in shipping pipe was the cause of such additional time being taken.

(This was not given and defendant excepted.)

[Ex. 23.]

7. That defendant had a right to have all stipulations of the contract performed, and plaintiff could not omit any of them without consent of defendant, and if

it did so omit any of them it must pay for such omission.

(This was not given and defendant excepted.)

[Ex. 24th.]

8. If the jury shall find from the testimony that the pipes and special castings which plaintiff contracted to furnish defendant Howland, were to be coated with Angus Smith's patent coal tar varnish, and that each shipment was to be accompanied by certificates of inspectors of successful tests of all such pipe, and that such pipe was to have a number on it, and the plaintiff failed to comply with all or any of these provisions of the contract, then the defendant is entitled to recover of plaintiff such damages as the jury may believe defendant thereby sustained.

(This was not given and defendant accepted.)

[Ex. 25th.]

His Honor's charge was as follows, this being all his charge.

Gentlemen of the jury, I have not had opportunity to give the attention to the presenting of this charge, which the importance of this case would seem to require, because I have been engaged, every spare moment when away from the Court House in attending upon duties in connection with other judicial affairs. I shall endeavor to present this case as it appears to the Court.

It appears that on the 12th day of June, defendant Howland entered into a contract with the town of Durham, by which he undertook to construct a certain system of Water Works to supply the town of Durham with this necessity for various purposes. It further appears, from his own testimony, that immediately, or soon thereafter, he began the discharge of the necessary duties in order to insure the speedy completion of his contract, and contracted to obtain the necessary pipes



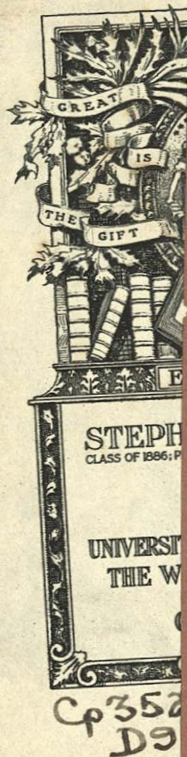
and castings, made surveys, and looked after other preliminary matters.

It appears that some time in the month of October, the contract was entered into between the defendant Howland and the plaintiff, the McNeal Pipe & Foundry Company, by the terms and stipulations of which the plaintiff agreed to furnish to the defendant certain cast iron pipe, possessing certain qualities, of certain dimensions, and capable of performing certain things. It appears from inspection of the contract that the defendant Howland agreed to satisfy the demands of the plaintiff therefor by the payment of certain monies, at certain specified times. It appears furthermore from the contract, that the delivery of the pipe was to begin on a certain specified date, and that its delivery should be completed at the time, which is specifically mentioned in the contract.

There is evidence tending to establish the fact on the part of the plaintiff, and I believe it is not denied upon the part of the defendant Howland, that the system was completed, and that it was delivered according to the terms of the contract. Howland, in the mean time, had assigned his interest in the Water Works to the Durham Water Company. Now, it is asserted upon the part of the plaintiff, that having delivered, according to the stipulations of the contract, to which I have referred, these cast iron pipes to the defendant Howland, which possess the qualities required by the terms of the said contract and which were capable of performing the duties which were required of them, that the defendant Howland has neglected and refused to pay a certain balance due of the purchase money therefor. He asserts that the defendant is indebted to him in the sum of \$23,306.59; and he has instituted this action that we have been engaged in hearing for some five days for the

purpose of recovering the sum, which I have already mentioned, to wit : \$23,306.59.

It is asserted upon the part of the defendant Howland that the plaintiff is not entitled to recover the full amount of his demand. He seeks to establish this allegation, by introducing testimony tending to establish the facts that the pipe, which he received by virtue of his contract with the plaintiff, was defective in quality and inferior to that contracted for and which the plaintiff had agreed to deliver, and that thereby he has been damaged, and that therefore he is entitled to recover certain sums of money by way of indemnity for the loss which he has sustained. He asserts furthermore, in the counter-claim, which he has set up, that for a considerable time during the performance of this contract, to wit : during the construction of the system of Water Works, to which frequent reference has been made, he was compelled to maintain at a great loss a large number of skilled laborers, that he was required to pay for them for such a period of time as they were in his employ, whether they were actually engaged in the construction of this system or whether they were idle by reason of the failure of plaintiff to keep up to the contract made between the plain plaintiff and defendant. He furthermore alleges that by reason of such delays in the shipment he was detained with these laborers for a considerable time when he might have been otherwise engaged, and that for the enlarged period of time when he was so detained that he is entitled to damages in the sum of \$1,500. He insists furthermore that he himself was required to be personally present in the city of Durham, by reason of the breach of contract between himself and the plaintiff, and that by reason of such required presence in this city he was prevented from attending to other affairs and that thereby he has





been injured to the extent of \$1,500, and he insists that this demand should be offset by the allowing of this counter-claim, which I have referred to.

You will understand that the plaintiff contradicts these allegations, which are relied upon by the defendant Howland for the purpose of maintaining his counter-claim against the demand of the plaintiff.

There are several issues which have been eliminated by the Court from the pleadings. Four of them have been answered, by consent of counsel, by the Court. The remaining issues still to be submitted to the jury, to be determined, as they may discover from the testimony to be true or false, as they understand the evidence, which the plaintiff relies upon, or as they may understand the testimony, which the defendant relies upon.

The first inquiry, gentlemen, which presents itself to your determination, is, what was the contract between the parties, which has been referred to in the arguments of counsel in the examination of the witnesses and in the pleadings. It appears from inspection of the correspondence, which has been introduced in testimony, that certain pipe of the length of 12 ft., (and perhaps 3 or 4 in. over) capable of sustaining a hydraulic pressure of 300 lbs. to the square inch, of good and sufficient cast iron, free from blemishes and defects, which would render them unfit for the transmission of water under the pressure of this system, should be manufactured by this plaintiff and delivered by this plaintiff at the times named in the stipulations of the contract.

The controversy which is of more doubtful tenor in respect to the construction of this contract, arises from the contention of the parties as to the manner the pipes shall be coated. It is in respect of the quality, not the quantity, of pipe which were to be delivered. It is insisted upon the part of the plaintiff that by the terms of

the contract, as developed in this letter which has been exhibited in evidence, that the plaintiff was not required to coat with Dr. Angus Smith's preparation these cast iron pipes, which he has agreed to deliver to defendant Howland; the plaintiff contending that in this letter of Dec. 10th, I believe, he stipulated to furnish pipe coated in the usual way; whereas the defendant insists that in accordance with a letter dated Oct. 22nd, (and which is referred to in a letter of subsequent date by the defendant Howland), in which certain statements are contained concerning the quantity and quality of pipe, that the intent of the contract was that the pipe should be varnished with the preparation, to which I have referred, a patent preparation, which was employed upon some occasions for the varnishing of pipe.

The Court conceives it to be a matter of law, which it is constrained upon consideration of this testimony, in connection with the evidence of the plaintiff who has testified that the usual process of coating was that referred to in the evidence as Dr. Angus Smith's, to declare to the jury that the intent and meaning of this contract is that the pipe should be coated with the preparation known as Dr. Angus Smith's patent process.

This, therefore, leads us to consider the first issue. Did the plaintiff contract with the defendant Howland as set out in the complaint? The complaint alleges that the plaintiff agreed and stipulated to furnish these pipe, at its own charge and expense, for the sum of \$34. F. O. B. at Durham, and that the pipe should possess certain qualities and that certain payments should be made on certain dates, to-wit: eighty-five per cent paid on the 15th of each month for the pipe delivered in the month preceding. Now the inquiry is, gentlemen, whether or not the complaint specifies the contract existing between the parties, or whether or not, if that be



true, the defendant Howland agreed to and accepted the same. The first issue is as I have already indicated, "Did the plaintiff contract with the defendant Howland as set out in the complaint?" The complaint declares that he was to furnish certain castings of special quality at the rate of 2 and  $\frac{1}{2}$  cts. per pound and also furnish certain pipe weighing so much to the piece, and that they should possess certain qualities, which I have already named to the jury, and according to the construction of the Court, coated with Angus Smith's preparation. Now was the pipe, which he contracted to deliver, pipe possessing these qualities, capable of discharging these requirements, of which I have spoken, possessing the required length, tested with the required hydraulic pressure, and coated, as I have indicated by my previous remarks to the jury, with Dr. Angus Smith's preparation. If so, gentlemen, it is your duty to answer that issue "Yes." If, on the examination and analysis of the testimony, you should be so satisfied, that they have not so contracted, it should be your duty to answer "No."

Proceeding to the second issue, that is this: "Did the plaintiff deliver to the defendant Howland the materials contracted to be furnished according to the contract?" I take it, gentlemen, that there is no contention on the part of the defendant that certain cast iron pipes and castings were delivered by this plaintiff to the defendant in the town of Durham. This inquiry, which presents itself to your consideration, under this issue is whether or not they are of the quality which were stipulated for and demanded in the contract and whether or not they were delivered within the time specified in the contract, and if not delivered within the time therein named whether or not it was the plaintiff's or defendant's fault. These are matters, which you are to deter-

mine with respect to this issue, and whether or not they were prepared in the manner which the contract required.

Now, gentlemen, the contract under which both parties have introduced testimony, under which plaintiff has asserted his cause of action, and under which defendant has undertaken to maintain his counter-claim, requires that 5000 pieces of these various articles shall be delivered. The first contract, of which we have any knowledge, in so far as this testimony discloses it, develops the fact that 1860 pieces of this cast iron pipe, 12 in: in diameter should be delivered. There is evidence tending to establish the fact that by oral agreement this amount thereafter was increased to 2,000 of 12 in. Now it is asserted on the part of the plaintiff that this is all the pipe of this character that he agreed, at any time during the pendency of the construction of this system of water works, to deliver to defendant Howland. That is contradicted by defendant Howland. So it becomes very material for the jury to ascertain whether or not there was any subsequent contract upon the part of the plaintiff to deliver the 720 pieces additional of 12 in. pipe to defendant Howland. Howland asserts that he had given his order for 840 pieces of 10 in. That thereafter he amended his contract, by consent of the plaintiff, so as to reduce the order for the 10 in. to 120 pieces, and increase the order for the 12 in. from 2,000 to 2,720 pieces. How is that, gentlemen? Because that is the amount of the contention in respect to the quantity of the articles delivered, which was presented to the Court and the jury.

In order for you to determine that, it is necessary for you to take into consideration the correspondence between the parties, because it is by this that the issue is to be settled, the issue in respect to the quantity agreed to





be delivered by this plaintiff. We find a letter of the 4th of December from Hawxhurst, who is the selling agent of this plaintiff in the City of New York, to the defendant Howland, in which it appears that he specifies the contract, which existed between them as he understands it, as being 2,000 of 12 in. weighing 885 lbs. to the piece; 840 pieces of 10 in.; 516 pieces of 8 in.; 2,500 pieces of 6 in.; 175 pieces of 4 in. Then it appears that subsequently an additional order was made for five pieces of 16 in. I believe that nothing appears until the letter of Dec. 4th, in respect to that article. It appears furthermore incumbent upon the plaintiff to deliver certain castings at a price of 2 and  $\frac{1}{2}$  cts. per pound. It appears in this letter that the pipe is to be coated according to the usual form, and the Court has intimated, upon consideration of the correspondence and certain remarks as offered (referring now to the testimony of the plaintiff) that his usual form was by Dr. Angus Smith's preparation.

It appears furthermore that there had been some mention of a desired change in respect to the first two articles in the order for this pipe. That is that the defendant Howland desired to change his order in respect to the 10 in., limiting the number to 120 pieces and increasing the order for 12 in. from 2,000 to 2,720 pieces. In the letter of Dec. 4th, 1886, it appears that Hawxhurst says he will consult with his principal and he would thereafter notify the defendant Howland as to the conclusion, which they had arrived at. Now, gentlemen, we are considering the question as to whether or not this order was amended, whether the contract was changed by mutual agreement and consent of these parties. There is a letter dated Dec. 11th, 1886, from the plaintiff or its agent to defendant Howland, in which it is declared that he was shipping good merchantable pipe, in which

he is notified that the pipe is being freighted in Burlington and that the cars go straight through to Durham, in which he declares that he had already made in the month of November some 400 pieces of 12 in. and he was at this time making on an average some 36 pieces of 12 in. per day. On December 10th, 1886, we have a letter written by defendant Howland to the plaintiff, in which he expresses his purpose to cancel his order for the 840 pieces of 10 in. and increase his order for the 12 in. to 2,720, and leave the order for the 10 in. at 120 pieces. On the 11th of December, we have a letter from Hawxhurst, the agent of the plaintiff, to the defendant Howland, in which it is stated that the concern has cancelled his order for 840 pieces of 10 in.; in which it is stated that they have made some pieces of pipe 12 in. in diameter, for a certain party in New York. That they would consult him, and if he would agree to a postponement of the delivery as stipulated in his contract with them, the 12 in. made for that party would be shipped to the defendant Howland; and that the two orders, which had been made, that is the order of the defendant Howland and the pipe for New York would carry them in their operations to the 1st of May, and that it would take an additional month to manufacture the 720 pieces of 12 in. which the increased demand of the defendant Howland required. It is furthermore inquired, in that letter of December 11th, 1886, whether or not the defendant Howland, if the pipe could be made for him in the time stipulated, if they could be prepared in the works in the time required, would be willing to pay \$38 a ton, it being asserted on the part of the plaintiff that the pipes required for the purposes of a water system had increased in value since their contract was made, and he could not afford to manufacture the same at \$34 a ton. It is suggested that this letter





is offered for the purpose of showing the jury that they had not agreed at that time to increase the contract in respect to 12 in., because they would not have mentioned an increased price if that was so. There is a letter from Howland to the plaintiff of the 15th of December, in which he expresses himself as being disappointed at the terms of the letter of Dec. 11th, and declares that he will be subjected to some inconvenience if the modification of the contract is not provided for, and he will be greatly disappointed if the change which he requests is not made. Again, on the 16th, there is a letter from Hawxhurst to defendant Howland, in which he states that it is a possibility to prepare and ship the additional pieces (720 pieces) of 12 in., but that they could not afford to do it for less than \$36. They would not do it for the sum of \$34 a ton. It would not be to their advantage to manufacture these 12 in. then at \$34 a ton, but that they would do it to accommodate him, if he would pay the sum of \$36 a ton. We have next a letter dated December 17th, 1886, from Howland to plaintiff, in which he says that if you can furnish 720 pieces of 12 in. at \$35 a ton, you may enter my order for them for the excess in weight; the excess in weight in the contract on the 20th of December, 1886, we have a letter from Hawxhurst to the defendant Howland, in which he renews his offer and agreement to manufacture these 12 in. pipe. 720 pieces, at \$36 a ton, per gross ton, in which he refers to the offer of the defendant to accept the same at the rate of \$35 for the excess of weight. In the same letter he declares that he would not duplicate the order in Durham for \$38; and he also expresses a hope that there will be a speedy reply on the part of Howland as they cannot leave that offer to manufacture this 12 in pipe for \$36 per gross ton, open for any great length of time. On December 21st there is a letter

from Howland to the plaintiff, in which he notifies the plaintiff that he may enter the order for 720 pieces at \$36 for the excess. It seems that there was a difference between them, the one contending for the gross ton, the other \$36 for the excess. On the 22d day of December, Hawxhurst writes to defendant Howland that he cannot enter the order for 720 pieces at \$36 per ton for the excess, that he would enter it as a separate order at \$36 for the gross ton. Then he proceeds to recapitulate the contract as he understands it, in which it appears that there was 2,000 pieces of 12 in.; 120 pieces of 10 in.; 516 pieces of 8 in.; 2,500 pieces of 6 in.; 175 pieces of 4 in.; 5 pieces of 16 in.; He says that in addition to that he wants him to increase his order to 2,720 pieces of 12 in. at \$36 per gross ton F. O. B. cars at Durham, N. C., as already stated, to be shipped in February and March, 1887." On the same day, according to the evidence, there is a telegram, in which he is instructed to change order to 14 in. On December 24th, Howland writes to the plaintiff, "Let the 12 in. rest a day or so, until the commissioners of the town of Durham meet and decide between 12 and 14 in. pipe." I believe the testimony discloses the fact that they were to meet on the following Monday night. Again, on January 7th, there is a letter which is introduced in which defendant is instructed that whenever he is ready to talk about the 12 and 14 in., that the plaintiff will meet him and they will do what they can to accommodate him, and the price will then be fixed. On the 28th of February Howland writes to the plaintiff that he desires him to send 12 in. at once, that he needs it. He also increased his order by requesting him to forward 8 pieces of 10 in., 5 pieces of 8 in.; and 25 pieces of 6 in., and according to his recapitulation makes the orders as follows: (or what he contends is the amended or modified contract)



5 pieces of 16 in.; 2, 20 pieces of 12 in.; 125 pieces of 10 in.; 521 pieces of 8 in.; 2,525 pieces of 6 in.; 175 pieces of 4 in.; he contending at that time, that the order called for 2,720 pieces of 12 in.

On the 2nd of March, 1887, plaintiff writes to defendant Howland in reply to above letter on February 28th, that he has begun "shipping his 12 in. pipe at once, that he sent 6 car loads on Monday, and 6 on the day before, (that is on the 1st of March) and he will continue to ship them as they may be needed, and in this letter of March 2nd, which is to Howland, he stated that "we have had the 12 in. done a long time and piled in our yard." He says, "We entered your order for the few additional pipes you name, also the special castings you want in addition for the same price we charged you on the original order."

It is contended that this letter serves to a great extent to disclose the contract between the parties in regard to 12 in. pipe. It is contended upon the part of plaintiff that these letters up to this period of time indicate that the plaintiff refused to accept the modification of the contract enlarging the order for 12 in. to 2,720 pieces, unless the defendant Howland shall agree to pay therefor the sum of \$36 per ton gross. Howland contends that when the plaintiff has asserted in the letter of the 2nd of March, 1887, that he begins to ship his 12 in. pipe at once, he having recapitulated in the order in which as he understands it 2,720 pieces are required, that he himself thereby implied that he accepted the amended and modified contract. But the defendant Howland insists that the subsequent correspondence between the parties developed the fact that there had been no agreement between the plaintiff and defendant that the contract should be altered.

Mr. Guthrie: "You do not mean the defendant Howland?"

I mean the plaintiff. On the 24th of December, there is a letter written by Howland to Hawxhurst, in which it appears that he states the town is considering the laying of 14 in. pipe, that the town has expressed a wish that he (Howland) should desist in the laying of the 12 in. pipe, asserting that the pipe of this dimension would not be sufficient for the demands of the corporation. In the same letter as it was read to the Court and jury, Howland expresses the wish that the shipment of 12 in. be stopped for the present, "for a day or so," I believe is the language of the letter; that he could gain the information, which he desired within a short time, in respect to the dimension of pipe which the town would require, and he would then furnish plaintiff with the information. On January 8th, 1887, Howland writes to Hawxhurst, as I have it entered upon my memorandum: Need not ship the 12 in. to Durham any longer, want 14 in. pipe, weighing 1088 lbs. to the length, at the same price per ton. On the 26th of January, 1887, Hawxhurst writes to Howland and inquires whether or not they were to cancel order for 12 in., desires to know at once, asserts works are blocked with pieces of 12 in. pipe, that there is nothing more to say as to the 14 in., that they declined to consider it; that they have in the yard at that time over 700 pieces of 12 in. ready for shipment. On February 8th, 1887, a telegram is sent by McNeal Pipe & Foundry Company to Howland, inquiring whether or not it shall continue to ship the 12 in. Declares he desires to know at once, and would like to meet him on Wednesday to arrange terms, by which he could continue to the agreement and mutual satisfaction of all parties. On the 24th of March, there is a letter sent by Howland to the plaintiff urging on the order for the shipment of the 6 in. and the 12 in. On the 25th of March, a telegram is sent by the plain-



thermore that McNeal, president of the corporation, had accepted the amended contract. On the 5th of May, 1887, Sturgis writes to Howland that he has consulted his correspondence and that he is unable to see that the offer of plaintiff to him to deliver the additional 12 in. at \$36 a ton has ever been accepted by him. On the 6th of May, 1887, Howland writes to Sturgis that he has received his correspondence, letters, etc., from Durham and that it strengthens his view of the acceptance by McNeal of the modified contract: "They are stronger in support of McNeal's having accepted the order than I thought from recollection." On the 7th of May, 1887, Sturgis writes to Howland again and declares that they will send him the additional 720 pieces of 12 in. at \$36 per ton gross, and requesting him to wire plaintiff at once whether or not the contract is accepted. On the 9th of May, defendant Howland writes to Sturgis and informs him that he will soon notify him whether he will take 130 pieces of 12 in. or not. On the 9th of May again, Sturgis writes to Howland and inquires will you take 130 pieces of 12 in., and informs him in the letter that they will not be able to furnish him any more 12 in. until the month of September of that year. On the 13th, Sturgis writes to Howland and says: You intimate that we owe you 720 pieces of 12 in. at \$34 at Durham, but we have delivered all the 12 in. we made and all that we undertook to deliver. As you have not ordered the 130 pieces of pipe you spoke of, we have sent them to another customer, for whom they were made.

Now that terminates the correspondence in respect to the quantity of material which was furnished between these parties. It is for you to determine whether or not this plaintiff at any time accepted any order whatever, or any contract had ever existed between himself and

Howland whereby he agreed to deliver to the defendant the 720 pieces of 12 in. pipe. You will consider all this testimony. The plaintiff insists that the correspondence develops the fact that up to the 13th of May the plaintiff was contending that the additional 720 pieces of 12 in. should be delivered at the sum of \$36 gross. The plaintiff furthermore insists that there is no evidence showing that the defendant ever accepted that contract, in which the defendant has entered an order at \$36 for 720 pieces excess weight, whereas the plaintiff demands \$36 gross. Defendant insists that by construction of letter February 28th, in which additional orders were made, and to which plaintiff declares that plaintiff has begun to ship 12 in., that the jury should imply that that had been accepted as a feature of the amended contract.

If you shall believe that this plaintiff delivered all of the 12 in. pipe, which he contracted and agreed to deliver to the defendant, you will answer this issue "Yes." In other words, if you believe (because it is admitted that 2,000 were received) that this plaintiff refused to accept the modified contract as proposed by Howland, whereby the order should be increased to 2,720 pieces, then you will answer this "Yes." If on weighing of this testimony, you find that he accepted the proposed change, whereby the order was increased to 2,720 pieces, you will answer it "No."

There is another feature expressed in this issue, that is as to the quality of the material furnished. That necessarily implies a somewhat prolonged presentation of the contention of the parties to this action. It is asserted by the plaintiff that the pipe, which he has furnished to this defendant is a good, serviceable, merchantable pipe, which conforms in every material respect to the terms of the contract subsisting between McNeal and



the defendant. There is evidence upon the part of the plaintiff tending to establish the fact that the Manager and President, A. H. McNeal, has since boyhood been engaged in the manufacture of cast iron pipes. There is evidence tending to establish the fact that he has personally been employed in the manufacture of this pipe. He has been introduced as a witness. He has explained to the jury the nature and the method of the manufacture of this material. He has informed the jury that the iron from which the pipe is constructed is subjected to a test for the purpose of ascertaining its tensile strength. The witness Reed, who is examined on behalf of the plaintiff, has declared that the iron of which the pipes manufactured for the Durham Water Works were made, was subjected to a pressure of 18,000 lbs. to the square in. for the purpose of ascertaining the strength in this respect. There is evidence on the part of the plaintiff tending to establish the fact that the plaintiff has employed skilled laborers, and his testimony would authorize the jury to infer that his plant is supplied with all necessary appliances and conveniences for the manufacture of this pipe. He testifies that after the iron is melted and emptied into the mould and the shape is obtained, then the core is withdrawn, and the pipe is left to cool, then taken to an oven and subjected to a heat of 300 degrees, then left to cool, then placed upon skidways, at which time a partial test is made to ascertain whether or not the pipe be concentric, that is if it was heavier on one side than on the other, that thereafter when it is cooled, it is placed in a vat, into which a preparation is deposited for the purpose of coating it. There is testimony tending to establish the fact that this coating is for the purpose of protecting and strengthening the pipe. Now this witness who is introduced on the part of the plaintiff (and he seems to be corroborated, if the jury

believes his testimony, by Reed,) testifies that within his personal knowledge certain pipe, not all, that were shipped to the town of Durham were subjected to certain tests. That is, in the first place, the iron was tested before it was melted, and in the next place it was tested at the time it was placed upon the skidway, and it was subjected to a pressure of three hundred pounds to the square inch, by the application of water under pressure, by the application of hydraulic power, and at the same time the hammer was employed for the purpose of ascertaining from the ringing sound, the condition of the pipe at the time it was made, whether there was any defects, blow holes, scabs, etc. There is evidence, also tending to establish the fact that these pipe were subjected to a test at the time they were deposited in the trench by the defendant. The witness introduced upon the part of the defendant testifies that at the time the pipe remained suspended upon the derrick, when they were undertaking to deposit it in the trench, it was struck with a hammer, and that the blow, when the pipe was so suspended, would develop any defects, by peculiar noise of the iron in response to the blow of the hammer, which might exist.

Now, gentlemen, there is also evidence, upon the part of the plaintiff, tending to establish the fact, the plaintiff and Reed testified thereto, that the pipe introduced here, bearing the name A. H. McN., date '87, came from his works, that the two bell ends came from his works, that this pipe, which is shorter than an entire length, came from his works. They both declare, from their observation and experience, that the pipe exhibited to the jury is merchantable pipe and would accomplish the purpose for which it is intended. There is evidence likewise upon the part of the plaintiff that since or from the time succeeding, or for 4 years, this plant



has been in operation night and day, that it has satisfied the demands of the town and citizens and that so far as is discovered no complaint has been made. There is although evidence that the pipe exhibited is not exactly concentric and circular, yet it is not so disproportionate as to render it unfit for the purpose intended. I believe, gentlemen, that these are the main contentions upon the part of the plaintiff in respect to the quality of the iron casting and pipe, which he sent to the defendant in the town of Durham.

What are the contentions of the defendant in this respect. The defendant insists, in the first place, that the contention of the plaintiff that certain of these defects, which had been referred to by the witnesses, could perhaps have been obtained in transportation, in the progress of transfer from the city of Burlington to the city of Durham, cannot be maintained by the testimony of the witnesses introduced by the defendant, any crack or defect received in progress of shipment would be detected by the test, to which all pipe was submitted at the time it was suspended in the air, hanging upon the derrick and the witness testifies that no pipe with a defect in that respect was deposited in the trench by them, and the argument is deduced that no pipe was injured in the manner contended for by the plaintiff. At least, if injured, not put onto the trenches. The defendant further insists, as the evidence discloses that during the construction of this system it became necessary upon certain and divers occasions to cut certain pieces of pipe for the purpose of making connections with side streets, and in certain instances it became necessary to tap certain pipe at the bead end for the purpose of connecting with houses by smaller arteries of pipe and during this period of time while so employed the servants of the

defendant discovered numbers of defective pipe. Pipe which contained scabs, pipe which contained pin holes, and upon certain occasions pipe which were not concentric; that is as contended for on the part of the defendant, pipes that were thicker on one side than on the other. It is asserted upon the part of the defendant, through his witnesses, that during the progress of the process of cutting of pipe that non-concentricity existed in very many of them. It is alleged upon the part of the defendant that if these pipe had been tested, and then at the time of the completion of the water works could not sustain the pressure of 125 lbs. to the square inch, to which they were subjected, they did not comply with the terms of the contract, which required that they should be subjected to a pressure of 300 lbs. to the square inch in order to be merchantable and serviceable pipe. There is testimony introduced upon the part of the defendant tending to establish the fact that at the time of the first test some one or two pipes failed to perform the required duty. There is also evidence, as I recollect it introduced by the defendant, or perhaps by the plaintiff, which defendant elicited upon cross-examination, tending to establish the fact that after the water system was completed a certain one of the pipes began to leak and it was necessary to remove it. The witness introduced by the defendant had testified that some 300 of these pipes were cut. One witness testified that one-tenth of the entire number was cut. The witness who testified that 300 were cut, testified that about sixty of these cut pipe was defective in respect to concentricity. The defendant also insists that by reason of the peculiar coating to which the pipe was subjected, it was rendered less serviceable, less valuable than it would otherwise have been. There is evidence upon the part of the defendant tending to establish the fact that this pipe is



not coated with the preparation known as Dr. Angus Smith's preparation, that it is coated with another preparation, a different one entirely. That the preparation, with which these are coated, imparts color to the water, that it is not deodorized, because the witness testifies that there was a peculiar taste to the water after the first construction of the works, and furthermore that by reason of the soft and pasty condition of the coating it becomes difficult to properly join the pipes, inasmuch as the peculiar coating employed in this instance oozed up and prevented the foremen from joining the pipes properly and correctly.

As I understand it, gentlemen, these are the main contentions of the defendant in respect to his allegation that these pipes are defective. Now you are to ascertain, having recalled the terms of the contract, which have been very often recited to you both by counsel and Court, whether or not in respect to quality of pipe this plaintiff has complied with his contract. He asserts he has. The defendant denies it. It is for you to determine from the testimony in the case.

Now, Gentlemen, the only remaining matter in respect to this, which is to be considered, is whether or not the plaintiff has delivered it within the time required under the terms of the contract, and if he has not so delivered it, was the fault of the defendant? As a matter of course, if he has not delivered it within the time required, and if it be his own fault, he would be answerable for damages. Equally, as a matter of course, if there was delay in the shipments of pipe, and if that delay was produced by any fault on the part of the defendant in respect to any material requirements of the contract, then the defendant would not be entitled to recover damages from that view. Now, Gentlemen, I believe the plaintiff began to deliver pipe in November,

1886, the 5th if I remember correctly, and the delivery of the pipe was completed about the 7th of May, 1887. Was that the exact time?

Mr. Guthrie:—"The 4th."

It is stated that by the terms of the contract he was required to deliver the entire order by the 1st of March, so that I do not know that there is any contention between them on this. Whose fault was it that it was not completed? It is asserted by the plaintiff that it was the fault of Howland for two reasons. In the first place, it is asserted that Howland prevented the manufacture and shipment of this pipe at uniform and regular dates by reason of certain desired changes in his order. It is asserted by the plaintiff that a considerable period of time was required for an adjustment of the contention between Howland and the plaintiff in respect to the terms of the contract, Howland insisting that the contract had been modified and the plaintiff denying it. It is insisted furthermore that this modification was intended to embrace the allegations in respect to 12 in. pipe—the 720 pieces. You will remember the various features of this view of the case, which have already been presented to you in another part of this issue and recall from the testimony in the case what was the nature of the issue respecting it. It is insisted furthermore, Gentlemen, that this delay was produced by reason of the fact that the defendant failed and neglected to make his payments as required by the terms of the contract. Now it appears from the contract as I understand it, that these pipe were to be shipped within a certain specified time and that certain payments were to be made on certain specific dates, to-wit, upon the 15th of each month. It appears from the testimony that in February 1887, according to the statements of the plain-



tiff, Howland had overpaid his account some \$1400. On the statement of Howland, which has been made to the jury, the over-payment aggregated some \$5,000 or \$6,000. There is testimony upon the part of the plaintiff tending to establish the fact that no payment was made in the month of March, and at that time there was a default on the part of Howland to the extent of some \$6,000, and he testifies that so far as he remembers no payments were made on that date, although he says that he is not certain or absolutely sure of that fact. Howland insists that any payments, which he neglected to make occurred by reason of the failures to which your attention has been called. If you find that the failure to pay this monthly amount prevented the plaintiff from shipping this pipe according to the terms of the contract, then the Court charges you that the defendant would not be allowed to recover under his counter-claim by reason therefor. If you find that it was a just excuse, and that the defendant neglected and refused to make his monthly payments according to the terms of the contract, the plaintiff had a legal right to desist from further manufacture and shipment of the pipe, because there were mutual stipulations between the parties, the performance of one depending upon the performance of the other, the one being in the nature of a condition precedent to the performance of the other. Gentlemen, if upon the consideration of all the testimony you are satisfied that the plaintiff delivered to this defendant the material, according to the terms of the contract, then it becomes your duty to answer it "Yes". That is if you believe he delivered the quantity and quality required, and that within the times required (and if not, he was delayed by default of Howland) then you are answer it for the plaintiff. If you believe that the quality and quantity agreed on was not delivered, and it was not de-

livered within the times required in the contract (Howland not being in default), then you will answer it "No."

The third issue, gentlemen, is answered.

The fourth issue requires you to determine "What was the reasonable value of the material furnished to the defendant Howland by the plaintiff after deducting all payments and credits." Now, gentlemen, the evidence of the plaintiff in respect to the value of this property, is the testimony of the plaintiff himself or the plaintiff's agent Reed. Both of these witnesses, upon their examination, testify that the material of this cast iron pipe and these specials, which were received by this defendant, were worth in the market \$34 per ton and 2 and ½ cts. per pound respectively. If that testimony is to be believed, you will answer this issue \$23,306.79. The defendant insists that this pipe was defective in quality and that he is entitled to have the true market value of the property furnished to him by the plaintiff decreased, by subtracting therefrom the difference between the article contracted for and the article delivered, and that he asserts amounts to some \$8,800. Now it is for you to determine. I have been over this testimony in regard to the quality, it is for you to determine if it was the iron stipulated for in the contract. If of an inferior grade and character, it is for you to ascertain the difference in value between the article which was actually furnished, and deduct the amount from the \$23,306.79, and that will be your answer to the fourth issue.

Do you understand it? In order that you may be fully advised as to your duties in respect to the fourth issue, I will repeat. If you believe that the quality of the pipe furnished by the plaintiff to Howland conformed to the requirements of the contract then you will



answer this \$23,306.79. If you believe that it was an inferior quality, ascertain the difference in value between that which he agreed to deliver and that which he actually did deliver, and subtract that from the \$23,306.79, and that will be your answer to the fourth issue.

The fifth issue is answered. The sixth is answered. The seventh is answered.

The eighth is, "Did the plaintiff contract with the defendant Howland on or about October 22nd, 1886, to furnish to him pipes and special castings, made, tested, inspected and certified as alleged in the answer?" Let me have letter of Oct. 22nd. There is evidence tending to establish the fact that this plaintiff agreed at the time of shipment of the pipe that he would stamp the same with certain numbers, that he would also certify through his inspectors as to the quality of the iron, and also to the pressures and tests to which they have been subjected, and that he would also furnish certain pipe and castings at certain rates and of certain quality. Now, gentlemen, the inquiry, which presents itself to your determination is, did the plaintiff conform to that demand. There is evidence tending to establish the fact that these pipe were not numbered. There is evidence tending to establish the fact that the certificates were not sent, and that monthly statements were not forwarded. The plaintiff insists that these are immaterial matters, that he did accept the pipe, and that he accepted it without demanding these requirements should be performed. It is for you to say, from the testimony, whether or not the order of the 22d of October has been complied with.

In the tenth ' "Did the plaintiff on or about February 28th, 1887, contract to furnish to the defendant Howland 720 pieces 12 inch additional pipes and special castings, subject to the same terms as contained in pre-

vious contracts?" Gentlemen, you will remember that I have already discussed at great length the testimony of the witnesses in respect to alleged modification of the contract, whereby the number of pieces of 12 in. should be increased by 720 and the order for the 10 in. be decreased proportionately, so as to decrease it to 120 pieces. I shall not weary you, gentlemen, by a repetition of the contentions of the parties in respect to this view of the case. You will recall the testimony of the witnesses, you will remember the instructions of the Court, it is not necessary that I should spend time upon it.

The eleventh issue requires you to determine whether or not this plaintiff has complied with that contract which was made.

Gentlemen, I congratulate you that there is only one other issue for your consideration (there are thirteen in all) "What damage, if any, has defendant Howland sustained by reason of the alleged failure of plaintiff to fulfill its contract with him?" The defendant insists that he is entitled to recover by way of recoupment certain damages on account of the failure of the plaintiff to comply with his contract to deliver pipe according to the terms of agreement. You will determine what the contract was, you will ascertain its several facts as demonstrated by the Court; you will ascertain its requirements as explained to you by the Court; you will enquire from the testimony in the case whether or not this pipe, which has been furnished, conformed to the demands of the agreement subsisting between the plaintiff and the defendant Howland. If it does not conform in respect to the quality of the iron, the defendant would not be entitled to recover upon his counter-claim. If there be any defect in the iron, which prevents it from conforming to the demands of the contract subsisting between the plaintiff and defendant, then the Court



is constrained to instruct the jury that the defendant Howland is entitled to maintain his counter-claim in that respect. He would be permitted by the law, as the Court views it, to recover the difference in value between the pipe, which plaintiff had agreed to deliver and the pipe which he actually as a matter of fact did deliver, if such difference existed. Now, gentlemen, it is not necessary for me to direct your attention to the testimony as to the quality of the iron. It is not needful that I should do so. It is insisted upon the part of the defendant that this difference in value aggregates some \$8,800. He assumes he is entitled to recover that sum. This plaintiff asserts that he has furnished this defendant with merchantable iron, that it has stood the tests, and proved that it is adapted to the purposes for which it is intended, and he asserts that is impossible to procure perfect pipe. If this be so, the defendant is not entitled to recover upon this feature of the case. It is for you to determine.

Again, gentlemen, he asserts that he is entitled to recover, by way of counter-claim from this plaintiff, the sum of \$3,307, which he has suffered as an injury by reason of the delay in the completion of the works. If you find that he ordered 720 pieces, he is entitled to recover the amount, which he charged against them in the abstract. How is that, gentlemen, are they charged against them in the abstract, that brings us to this consideration. He bought it from these parties, and it amounts to \$3,710. It is insisted upon the part of Howland that he was required to pay some \$3,710 in excess of that, which he would have been called upon to pay in case he had received the pipe he had stipulated for. The rule of law, as I understand it is this, if the defendant Howland was compelled by virtue of any default of the plaintiff to forward the pipe at the time stip-

ulated, or if the shipment was not made at all, to go into the markets and purchase pipe for the purpose of completing the pipe system here, and did go into the markets and did purchase pipe, and was compelled by virtue of an increased rate to pay a price in excess of that stipulated for in the contract, he would be entitled to recover from the plaintiff the difference between the contract price, or what he agreed to pay plaintiff, and the price which he was required to pay in the market, that is the actual market price itself, or the value of the pipe in the market at the time of purchasing. It is stated that he contracted to furnish it at \$34 a ton. Suppose by default, McNeal did not furnish it at all. If he was compelled to enter the market and was required to purchase pipe at an advanced rate, say \$35, then the would be entitled to recover from McNeal one dollar per ton; the difference in excess of the contract price. That involves the inquiry, whether or not the defendant could have purchased, in the market this pipe at the price called for in the contract, or at a price lower than that mentioned in the contract. If he could and did not do so; he would not be entitled to recover on his counter-claim in this respect. It was his duty to exercise reasonable precaution for the purpose of obtaining this pipe at the reasonable market price. That is the inquiry, which presents itself upon this view of the case. The plaintiff insists that this is an inferior iron, that it is not equal in value to that which has been furnished by them. That is contradicted by the defendant. If you find that he had to pay an advanced price in the market, he is entitled to it. If he could have procured it at a reduced price, it is his duty to do so; if he neglected to do so, he is not entitled to recover. If he could not have done so, he is entitled to the difference. The jury will understand that if he never ordered it, he cannot recover.



He insists that he is entitled to recover \$3,370 by reason of the fact that certain skilled laborers were paid, and that they remained in idleness for a considerable period on account of the failure of the plaintiff to make shipments as required by contract. There is evidence upon the part of the defendant tending to establish the fact that it was necessary to pay these skilled laborers considerable wages, that he had so stipulated and could not employ them otherwise; that they had to be paid whether employed or not, and that according to the terms of the contract with them, he was obliged to pay them during the times of idleness, when the pipes were not delivered, the sum of \$3,370. Now, you will remember that the plaintiff replies to that, by saying that this delay is his own fault, and I have already explained that to you, you will remember. The Court instructs you, as a matter of law, if the defendant was in default himself, if because of any act of his to perform his, then he would not be permitted to recover by way of counter-claim the \$3,370. But if these periods of idleness were necessitated by the default of plaintiff in shipping of the pipe, then the Court instructs the jury that the defendant would be entitled to recover such sums of money as their services were worth, which he testifies is \$3,370. You can ascertain if he is entitled to recover in that view of the case.

He claims \$1,500 for his own services. He was here in all about ten days in each month. He claims that he was detained from his other engagements and that he was injured thereby. In reply to that plaintiff says that he was employed in numbers of works, that he had some five or six different contracts in the State of Massachusetts, and some two or three in other States, and that his engagements would require his attending there, and and that he could not have lost by reason of his presence

here, that he did not superintend the entire construction of the works. And as a matter of fact he remained here only a small portion of his time. These are the contentions. It is your duty to take this into consideration and to determine whether or not the defendant is entitled to recover upon this view of his counter-claim.

There is furthermore this feature of the case presented in the special instructions asked by the defendant. I am requested to instruct you that if you believe that this pipe was not properly coated in the manner described in the contract, and if you believe the defendant has been endamaged thereby, he is entitled to indemnity. The Court instructs you that if that be true, the defendant is entitled to recover damages. If you believe, that the contract had been complied with, that the pipes were coated according to the terms of the contract, according to the intent and tenor of the contract, then the plaintiff would be entitled to your verdict from this view of the case, and the defendant would not be entitled to recover.

This I believe disposes of all matters, as to which I desire to instruct you upon questions of law arising in this contention. There is only one other matter, which I will direct your attention to, and then I will discharge you to consider and determine it.

Defendant's Counsel : If your Honor pardon me, did not you mean to charge the jury as to weight ?

The defendant also claims by way of counter-claim the sum of \$72.56 in excess of weight. It appears from the testimony that there were certain pipe, which overweighed. That he expected plaintiff to furnish pipe of a certain weight and the plaintiff forwarded and shipped material weighing in excess of that provided for in the contract, and that plaintiff was charging defendant for the excess. Now the defendant insists that he is enti-



tled to recover the sum of \$ 2.00 for the excess charged against him in the statement of account presented by the plaintiff. If you believe the testimony to be (and I believe it to be in the contract) that the pieces of iron casting were to be of a certain weight, and that they exceeded that weight, and that at the rate agreed upon would have amounted to \$72.56 according to the testimony of the defendant, then the defendant would be entitled to have the balance due the plaintiff from him decreased by that amount. In other words, he would be entitled to recover on his counter-claim \$72.56.

Then he insists further that he was charged for certain pipe not delivered, the sum of \$8.50, and that he is entitled to credit for it. If that testimony be true, he is entitled to receive the amount of \$8.50.

Now, gentlemen, there is another matter. It relates to the credibility of the witnesses. It is insisted, gentlemen, on the part of the plaintiff that you should not credit the witness Howland. It is so insisted because it appears that he has been engaged at various times in litigation in various parts of the country, and further because there is testimony tending to establish the fact that he has been accused of divers violations of the law. There is evidence also upon the part of the defendant tending to establish the fact that there has been certain contradictions upon the part of the witness Reed, and that there has been one at least upon the part of the witness McNeal, in respect to the iron pipe which he brought here to the Court House. From his explanation of that, he brought only 6 in., and thought that was all desired.

Now in respect to these charges, which have been produced both against and in behalf of this defendant Howland the Court charges you that you may consider them in connection with the charges, which have been made, as circumstances for the purpose of ascertaining if they are to be credited by the jury as witnesses. That is all it is insisted upon by the plaintiff himself. And

that you may consider the fact that he has been engaged in numerous suits, as a circumstance also for the purpose of affecting his bias as a witness in this respect. Now he is entitled to his explanation. He has produced what he conceives to be a satisfactory explanation. He declares that he is not guilty of any of the offenses enumerated in that article read from the paper. He declares it to be a libel, and that he has instituted proceeding against those who have repeated it. He insists that the parties who furnished this information have appeared in Court and have denied it. He declares that he has instituted suits and that settlements have been offered him, which he has declined. He asserts that in the suit in Chattanooga, concerning the Water Works, he has been offered a compromise, which he has declined.

Further, gentlemen, In this connection I neglected to call your attention to the Weymouth pipe system. It is in evidence that the Weymouth system was laid by Inman, and at a test only one of these pipe burst, and it burst not from an inherent defect but because of some operation of the machinery. And there is testimony tending to establish the fact that this pipe was manufactured at the works of this plaintiff. You will remember that the defendant insists that because one system built by plaintiff is of a superior quality, it does not follow that every one should be. It is argued on the part of the plaintiff that he testified on the arbitration between himself and the town of Durham that he was getting pipe of a superior quality.

Now it is insisted upon the part of the defendant Howland that you should not credit the witness McNeal, because he has at least contradicted himself in one respect, as I have already intimated. Plaintiff went to the yard and brought all of the pipe manufactured by himself. Being recalled by the plaintiff, he testifies



that he meant all the 6 in., did not know any other was in controversy, that is his explanation of this testimony. You may attach such importance as you see fit and proper to this.

Defendant also insists that Reed has contradicted himself in three several respects in the lien, which has been filed, and from various articles in regard to the sum of money which he alleges defendant owes the plaintiff. Now, gentleman, you are to ascertain whether or not there is any contradiction, and what it is the testimony established. You are to determine.

These are the issues which you are required to determine. You take the case, gentlemen, you give it that consideration, which its magnitude and importance demands. It is of such character as to require the thoughtful attention, devoted and careful study of the testimony, and is one that would tax the capability, honesty and integrity of any twelve men that ever constituted a panel in the Court House. These parties, gentlemen, desire a careful investigation of this matter. They are entitled to it. Consider it conscientiously. If the plaintiff is entitled to recover, then let him receive the sum of \$23,306.79. If he is not entitled to it, ascertain wherein he has failed, ascertain the extent of the injury, which defendant has received and deduct it from the \$23,306.79 and the difference is the amount the plaintiff should receive from the jury.

There was no exception to the charge of the Court to the jury, save as appears above.

There was a judgment in favor of the plaintiff against the defendant Howland as set out in the record. From which judgment Howland appealed to the Supreme Court. Notice of appeal given. Appeal bond fixed at \$100. Appellant allowed sixty days to serve statement of case on appeal, and appellee allowed thirty days thereafter to except thereto and serve counter-statement.

August 24th, 1891.

The Clerk will certify the foregoing as the case on appeal

E. T. BOYKIN.

SECTION