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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 6679

In the
Supreme Court of Appeals of Virginia
at Richmond

WORLEY BROTHERS COMPANY, INC.

v.

MARUS MARBLE AND TILE COMPANY, INC.

FROM THE LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6679

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 17th day of April, 1967.

WORLEY BROTHERS COMPANY, INC.,
Plaintiff in error,

against

MARUS MARBLE AND TILE COMPANY, INC.,
Defendant in error.

From the Law and Equity Court of the City of Richmond
Robert Lewis Young, Judge

Upon the petition of Worley Brothers Company, Inc., a writ of error and *supersedeas* is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 25th day of October, 1966, in a certain motion for judgment then therein depending, wherein Marus Marble and Tile Company, Inc., was plaintiff and the petitioner was defendant.

And it appearing from the certificate of the clerk of the said court that a supersedeas bond in the penalty of seventeen thousand five hundred dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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MOTION FOR JUDGMENT

TO: WORLEY BROTHERS COMPANY, INC:

The undersigned, Marus Marble and Tile Company, Inc., move the Law and Equity Court of the City of Richmond for judgment against you for the sum of Fourteen Thousand Seven Hundred Twenty-five and 75/100 Dollars ($14,725.75) with interest thereon from the 4th day of August, 1964, until paid, together with the costs incident to the proceeding, all of which is justly due from you to the undersigned upon open account, as is shown by the itemized statement of said account and the affidavit hereto attached and filed herewith.

MARUS MARBLE AND TILE COMPANY, INC.
By: JACK N. HEROD
Jack N. Herod
901 Mutual Building
Richmond, Virginia
Counsel

Filed in the Clerk's Office the 26th day of January, 1965.

Teste:

LUTHER R. LIBBY, JR., Clerk
By EDW. G. KIDD, D.C.

* * * * *

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* * * * *

AFFIDAVIT

STATE OF NORTH CAROLINA
CITY OF GREENSBORO, to-wit:

This day personally appeared before me Margaret Byrd, a Notary Public in and for the State and City aforesaid, J. P. Marus, who after being duly sworn, deposed and said: That he is president of Marus Marble and Tile Company, Inc. a North Carolina corporation; that he is familiar with all of the accounts and records of said corporation; that he has knowledge of the claim said corporation has against Worley Brothers Company, Inc.; that said corporation is indebted to Marus Marble and Tile Company, Inc. in the sum of Fourteen Thousand Seven Hundred Twenty-five and 75/100 Dollars ($14,725.75), said sum is now due and payable and that no part thereof has been paid; that the said statement hereto attached is true and correct.

J. P. MARUS

Subscribed and sworn to before me this 23rd day of January, 1965.
My commission expires on the 9 day of March, 1966.

MARGARET BYRD
Notary Public

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LAW AND EQUITY COURT
of the
CITY OF RICHMOND
Richmond, Virginia
September 28, 1966

Aubrey R. Bowles, III, Esq.
Attorney at Law
901 Mutual Building
Richmond, Virginia 23219

Peter W. Runkle, Esq.
Attorney at Law
200 Travelers Building
Richmond, Virginia 23219

Re: *Marus Marble and Tile Company, Inc.*
vs.
Worley Brothers Company, Inc.

Gentlemen:

I regard this case as one of greatest hardship, being convinced beyond the slightest doubt that the plaintiff, as subcontractor for the tile work, and the defendant, as general contractor, negotiated and proceeded upon the mistaken belief that the so-called "quarry tile" would be bedded and grouted with a portland cement type of material, Luminite being properly regarded as of this type. It is unthinkable that Mr. Worley would have sat down with Mr. Marus and minutely gone over the figures leading up to the bid aware both of Addendum No. 1 and of the fact that Mr. Marus mistakenly did not contemplate using Black Furnane, a very much more expensive product, for the floors, and yet have remained silent. Had he done so he would have been guilty of the grossest kind of fraud. If, as an experienced contractor, he should have realized that Mr. Marus mistakenly did not contemplate using Black Furnane, the case would be one of constructive fraud. *Hudson etc. Co.* v. *Smith & Rumery Co.*, 110 Me. 123, 85 A. 384, 43 L.R.A. (N.S.) 654, cited in 9 Am. Jur. 7.

The fact remains, however, that the parties were attempting to contract for the tile work called for in the plans and specifications, Addendum No. 1, although overlooked, being

in existence and a part thereof. It was, therefore, a case of mutual mistake of fact as between these parties, the effect of which was that no valid contract came into existence. In this connection, while rather elementary, it might be helpful to note the text in 4 M. J. 358 where it is said as follows:

page 63 } "Nothing is clearer than the doctrine that a contract founded in a mutual mistake of fact constituting the very basis or essence of it will avoid it."

It follows that plaintiff may recover the reasonable value of his work. It may be that Mr. Worley, after the mistake had become discovered, honestly believed that Mr. Marus was contractually bound to make the necessary changes, but the fact is that he was not obligated to do anything. The text in 17A C.J.S. 403 in this connection is, in part, as follows:

"A builder is also entitled to compensation, as under an implied contract, . . . although he (the owner) erroneously believes that it is covered by the original contract."

I cannot speculate as to what the decision of the City would have been had the report of Mr. Chiari been more favorable. Being of the opinion that the amount already paid, plus the amount herein sued for, represent fair compensation for work done at the special instance and request of the defendant, draft of a final judgment order in favor of the plaintiff in said amount may be presented.

Yours very truly,
ROBERT LEWIS YOUNG

RLY:b

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IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, the 25th day of October, 1966.

* * * * *

This day again came the parties, by their attorneys, and the Court having heretofore fully heard the evidence and

argument, and having taken time to consider of its judgment to be rendered herein, and now being advised thereof, it is considered by the Court that the plaintiff recover of the defendant, Worley Brothers Company, Inc., the sum of Fourteen Thousand Seven Hundred Twenty-Five and 75/100 Dollars ($14,725.75), together with interest thereon at the rate of 6% per annum from August 4, 1964, until paid and its reasonable costs in this behalf expended, to all of which actions of the Court the defendant, by its attorney, excepted.

The defendant having indicated its intention to apply to the Supreme Court of Appeals of Virginia for a writ of error from and *supersedeas* to this judgment, it is ordered that execution thereon be suspended for a period of four months from this date, and thereafter, if such petition be filed within said time, until the Supreme Court of Appeals of Virginia shall have acted on said petition provided the defendant, or someone for it, within twenty-one days from this date, enter into a bond in the penalty of $17,500.00, with surety to be approved by the Clerk, conditioned according to Sections 8-465 and 8-477 of the Code of Virginia of 1950, as amended.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To: Luther Libby, Jr., Clerk of the Law and Equity Court of the City of Richmond

Counsel for Worley Brothers Company, Inc., the defendant in the above-styled case, hereby gives Notice of an Appeal from a final judgment entered herein on October 25, 1966.

The said Worley Brothers Company, Inc., the defendant in the above-styled suit, will apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* to said judgment, and herewith sets forth its Assignments of Error as follows:

1. The judgment is contrary to the law and evidence of the case.

2. The amount of the verdict is not supported or justified by the evidence in that part of the award is based upon defective workmanship by the plaintiff which did not conform

to contract requirements and specifications, and the remainder of the award was clearly an inflated and unreasonable amount.

3. The trial court erred in overruling the defendant's objection to the admission of the written contract between the parties in view of the plaintiff's allegations in his pleadings that the action was based on open account.

Dated this the 19th day of December, 1966.

WORLEY BROS. COMPANY, INC.
By PETER N. PENDLETON
Of Counsel

Filed Dec. 20, 1966.

Teste:

LUTHER LIBBY, JR., Clerk

* * * * *

Dep.
page 3 } NOTE: The deposition of Joseph W. Meredith
9/12/66 taken on behalf of the defendant, is begun as follows:

JOSEPH W. MEREDITH, a witness of lawful age, called on behalf of the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Runkle:

Q. Would you state your name, please sir?

A. Joseph W. Meredith.

Q. Where do you reside?

A. R.F.D. 5, Box 352, Varina, Virginia.

Q. What is your occupation?

A. Now or then?

Q. At this time?

A. At this time I am employed by Carneal & Johnston, architects, engineers.

Q. In what capacity are you employed by them?

A. At the present time I am checking shop drawings, doing office work, drafting.

Joseph W. Meredith

Dep. page 4 9/12/66

Q. I believe you had occasion to do certain work in the construction of the jail facility for the city of Richmond?

A. Yes, sir.

Q. I am now directing your attention to that time, and what was your job there?

A. I was Clerk of the Works.

Q. As such by whom were you employed?

A. I was employed by Carneal & Johnston.

Q. Mr. Meredith, can you tell us what were your functions as Clerk of the Works in regard to this job?

A. To keep my daily records of weather, work performed, work rejected and inspect all work.

Q. Were you familiar with the plans and specifications on the job?

A. Yes, sir.

Q. By whom were you employed, that is who paid your salary at this time?

A. Carneal & Johnston wrote the check. To be reimbursed by the city of Richmond.

Q. As Clerk of the Works what was your position with respect to the architect, the owner and the contractor?

A. I worked between all of them. I represent the owner, the architect and the builder.

Q. In doing this did you discuss the progress of construction with representatives of these groups at all times?

Dep. page 5 9/12/66

A. Yes, sir. We had a meeting every Monday morning at my office.

Q. Do you recall when this job was started, or approximately when?

A. I do not remember when the job was started. I started the last week in December of 1962.

Q. Were you the original Clerk of the Works, or did you replace anyone?

A. Original. There wasn't any need for a Clerk of the Works until they actually got into pouring concrete.

Q. At the time then you started your job, what was the site condition generally?

A. Clearing, excavating.

Q. They were still excavating at that time?

A. Yes, sir, and pouring concrete.

Q. Did I ask you whether you had any special training or engineering degrees?

Joseph W. Meredith

A. No.
Q. Do you have any such?
A. No, I came up through the ranks. My main occupation is masonry, but I have had experience in concrete and other phases of construction.
Q. I believe you stated you are familiar with the specifications on the job?
Dep. page 6 9/12/66 A. Yes, sir.
Q. I have here a copy of the specifications, and Mr. Bowles may want to look at these.
A. Yes.

NOTE: Mr. Runkle now handing paper writing to Mr. Bowles for inspection.

Mr. Runkle: This is the contractor's copy.

Q. Mr. Meredith, I want you to look at these specifications and I will ask you, are you familiar with those specifications as you now see them?
A. Yes, sir, I had a copy exactly like this.
Q. What was your copy at the construction site.
A. I had a copy like that at all times.
Q. At all times?
A. Yes, sir.
Q. Did you have the only copy of specifications at the job site?
A. No, sir. General contractor has a copy, too.
Q. Would anyone else have a copy, to your knowledge?
A. Every sub-contractor should have a copy.
Q. Of the specifications?
A. Yes, sir.
Q. I would like if you will to turn to the section on tile work.
Dep. page 7 9/12/66 A. Section 20.
Q. And I will ask you if you will read what are the requirements for tile work in this job.
A. You want a complete section of this specification?
Q. I would like to know what type of tile is specified first of all.
A. "Quarry tile; nine inch by nine inch standard grade extruded square edge. Provide special shapes for curbs and depressions. Color is to be red. Tile is to be factory waxed."

Joseph W. Meredith

Q. Is that the complete requirement for the type of tile to be used?

A. That is the material, quarry tile.

Q. What do the specifications set down as requirements for laying the tile, if any?

A. "Laying out work: Lay out tile on floors and lengthwise on walls so that no tile less than half size occurs."

For heights stated in feet and inches, I think this pertains to ceramic tile. This is ceramic tile.

Q. Just restrict your answers to the quarry tile.

A. I think that should be deleted, because that pertains to ceramic tile (Pointing in pamphlet).

Q. Let's get the record straight. What are you saying to delete?

Dep. page 8 } 9/12/66

A. Lay out tile on floors and lengthwise on walls. This is ceramic tile.

Q. All right.

A. This is for quarry tile.

"Set quarry tile in accordance with Specification No. 3 of American Standard Specifications A 108-1958, except at vertical joints which are to be filled with black Furnane instead of with pointing mortar. Application of black Furnane is to be in strict accordance with manufacturer's recommendations."

Do you want the section about protecting the work from other trades?

Q. No, that will not be necessary. Let me have them back for a moment.

A. Yes (Handing pamphlet of specifications back to counsel).

Q. Mr. Meredith, in opening the specifications, do you see any addendums or additions in that volume?

A. Yes, sir.

Q. What are they, what are they called?

A. Addendum No. 2, and Addendum No. 1.

Q. Are there any dates on any of those addendums?

A. August 10, 1962 on Addendum No. 2. August 7, 1962, on Addendum 1.

Dep. page 9 } 9/12/66

Q. Have you seen those addenda before?

A. Yes, sir.

Q. Were they a part of the specifications that that you had on the job?

A. Yes, sir.

Q. Were they not on the jail site at all times?

Joseph W. Meredith

A. Yes, sir.

Q. Was there any modification of Section 20 in those addenda, if so would you please read them?

A. Yes, sir. Under Section 20—Ceramic and Quarry Tile—and I am quoting from the specifications: "Under setting, grouting and cleaning revise first sentence of second paragraph to read: Set in accordance with specification No. 3 of American Standard Specifications A 108-1958, except fill all joints within the quarry tile with black Furnane instead of with Pointing mortar."

Q. Now, Mr. Meredith, can you tell us who was the subcontractor that did the quarry tile work on this job?

A. Marus Marble and Tile Company, Greensboro.

Q. Greensboro, North Carolina?

A. Yes, sir.

Q. Do you remember approximately when they started on their portion of the job?

A. No, sir, I do not have those dates.

Dep. page 10 9/12/66

Q. In general terms, at what stage would that work be done, if you can remember?

A. The job was well along, because they had installed all of the Terrazo floors.

Q. Would you say it was better than fifty percent complete?

A. Oh, yes.

Q. Better than seventy-five percent complete?

A. I guess seventy-five would be closer right. All that was left of their contract was the quarry tile floor in the mess hall and kitchen.

Q. The quarry tile itself was to be laid in what rooms?

A. Mess hall and kitchen.

Q. Were there any associated rooms connected with those that had quarry tile?

A. No, sir. That is the extent of the quarry tile.

Q. Do you recall when the employees of Marus company first came on the job?

A. Yes, sir.

Q. Approximately how many men did they have at that time?

A. I would say seven or eight.

Q. Would this work force remain fairly constant, or would it change during the period of construction?

Dep.

A. Fairly constant.

Joseph W. Meredith

page 11 } Q. How many is the greatest number of men that
9/12/66 you remember seeing working for the Marus company?

A. Well, I think you should know that it takes more men to lay Terrazzo than it does quarry tile.

Consequently the number was less with the quarry tile installation.

Q. Is the quarry tile *simplier* to install than Terrazzo tile?

A. I think so.

Q. Compare the two, Terrazzo tile and quarry tile, if you will.

Mr. Bowles: I think you might lay a proper foundation as to whether he knows.

Mr. Runkle: I think he stated his work had been in masonry.

Mr. Bowles: That is correct. Before he answers the question, though, I would like to know what his background has been, whether he has ever laid quarry tile or whether he has ever done Terrazzo work.

It is my understanding Terrazzo work is extremely *difficulty* and limited, and very few people can do it.

Dep. I object to the question until you can qualify the witness as to his ability to answer the question.

page 12 } Mr. Runkle: I do not believe we are trying to
9/12/66 qualify him as an expert, but I think we ought to to ask Mr. Meredith those questions as to his background in the tile field.

Q. Have you worked with tile, quarry tile and Terrazzo tile in your career?

A. I have seen it done.

Q. You have never actually installed it yourself?

A. Quarry tile, I have laid quarry tile, but that has been limited.

Q. Did the Marus employees have a foreman?

A. Yes.

Q. At all times that you saw them working there?

A. Yes, sir.

Q. Do you know whether he was a local man or not?

A. He was not a local man.

Q. Do you know his name?

A. I know him only as Joe.

Joseph W. Meredith

Q. Did he ever ask to see your specifications during the progress of the work?

A. No. He asked to see my plans on one occasion.

Q. When did he ask to see your plans, at what stage of the work?

Dep. page 13 } 9/12/66

A. He had just started the quarry tile, and I reminded him that a six by six wire mesh had to be in the setting bed.

Q. Was this called for in the specifications?

A. This was called for in the plans. I do not recall whether they were with the specifications or not.

Q. You pointed this out to him prior to his beginning to work, is that correct?

A. Yes, sir.

Q. Did the Marus company in fact use the reinforced wire?

A. They did after I called it to their attention.

Q. Had they installed any of the tile without using the wire?

A. Yes, sir.

Q. How much of the tile had been installed?

A. Very small amount.

Q. But at that time they were not using reinforcing wire?

A. That is correct.

Q. I believe the specifications call for factory waxed tile. Was the tile they supplied factory waxed?

A. No, sir.

Q. Do you know what had to be done to make this comply with the specifications?

Dep. page 14 } 9/12/66

A. It had to be waxed after the material that they applied was sawed out.

Q. Who applied the wax?

A. They did.

Q. You refer to the material being sawed out. What material was that?

A. The material that they put in in error.

Q. What material was put in?

A. Cement and sand between the joints.

Q. Cement and what?

A. Quarry tile.

Q. Who discovered this situation?

A. Mr. Miles Cary Johnston, Jr.

Q. How did it get brought to light?

A. He came up on the job and realized at once that wrong material had been used.

Joseph W. Meredith

Q. Did he tell you about this?

A. Yes, sir, he also told the superintendent on the job.

Q. How far along was the job at this stage when this discovery was made?

A. I take it your question means how far the quarry tile was along?

Q. That is correct.

A. I would say seventy-five percent complete.

Q. After this discovery what work did you see done there by the Marus people to correct this situation?

Dep. page 15 } 9/12/66

A. They were given a choice of pulling up all of the quarry tile and starting anew, or to saw out the material used in error.

They elected to saw the material.

Q. Was this done by an electric saw?

A. Yes, sir. Actually had a motor saw, run on a Briggs & Stratton motor.

Q. Do you recall how long it took them to saw out all the joints?

A. No, but I made an estimate it was almost five miles.

Q. Of joint space?

A. Yes, sir.

Q. Was it more than a week's time?

A. It was more than three weeks.

Q. Of sawing work?

A. Yes, sir.

Q. After the sawing out, was any other work done then?

A. Next they had to blow out all the loose material, clean it out thoroughly, then wax the tile.

Q. How was this blowing out done?

A. They used an air compressor.

Q. Was there any effect upon the rest of the job by this blowing out of the materials?

Dep. page 16 } 9/12/66

A. I do not think so.

Q. There was no soiling of the surrounding buildings, walls or ceilings?

A. I don't think—of course, it was dusty, but nothing to amount to anything.

Q. Do you know approximately how long it took for them to blow out this material?

A. I would say a couple of days.

Q. That left the joints open?

A. Yes, sir.

Joseph W. Meredith

Q. I would assume?
A. Yes, sir.
Q. The waxing was done next?
A. Yes, sir.
Q. And what was done next?
A. Then the black Furnane was applied.
Q. Do you know how long it took them to apply the black Furnane?
A. I would guess a couple of weeks, and it may have taken longer than that. I do not remember.
Q. After this error was pointed out to the Marus firm, or the employees, did they discuss the matter any further with you?
A. No, sir.

Dep. page 17 } 9/12/66

Q. Did they ask to see the specifications or plans at that time?
A. Yes, sir.
Q. Did you discuss them with them?
A. Just showed them the addendum.
Q. And you said "them." Do you mean the foreman in particular?
A. Yes, sir.
Q. Did you at anytime have a discussion with Mr. Marus?
A. No, sir.
Q. For the Marus company?
A. No, sir.
Q. You had never met him?
A. I know him well. He had been up lots of times.
Q. You had no contact with him concerning this matter, though?
A. He talked to me on the job that he had used black Furnane and he had also used the material that he put in there.
Q. The material that he put in was what?
A. Luminite.
Q. Do you recall the architect discussing the workmanship on the Luminite with you?
A. Yes, sir.

Dep. page 18 } 9/12/66

Q. What was the quality workmanship of the Luminite work.
A. They had some bad joints and bad alignment in that.
Q. Were you there when any of the quarry tile sections were removed?

Joseph W. Meredith

A. Yes, sir.

Q. Did you have occasion to examine the thickness of the joints?

A. Yes, sir.

Q. Would you describe what you saw there?

A. This material they used varied in thickness from, I would say, a minimum of an eighth of an inch to a maximum of three-eighths.

Q. How deep should the grouting have gone?

Mr. Bowles: I object to that question unless the witness knows. Unless he knows of his own knowledge I object.

Q. The specifications call for any depth in this job of grouting?

A. Actually kept samples to show that I don't have now that were taken up of the tile, but I don't have those samples any longer. They were in my office for a good while.

Q. Did you give these samples to Mr. Arthur Worley, by any chance?

Dep.
page 19 }
9/12/66

A. I do not recall giving them to him.

Q. Mr. Meredith, I want to show you now some materials that were removed from the job site and ask you if you can identify these?

Mr. Bowles: I object to this unless Mr. Meredith is able to identify each and every item in Mr. Runkle's hand and in the envelope as being pieces of tile or pieces of grout that came from this particular job and no other job.

I further object to this whole line of questioning of this man unless it can be established that the pieces of tile that Mr. Runkle has were taken from this job by some given individual, then handed to another individual, and unless Mr. Runkle can establish how they came into his possession and account for every minute and second of their existence, and this objection runs to the whole line of questions.

Q. Can you identify that material?

A. I would hate to say that this is it, but I would certainly say that this is similar to the type of work that was removed when the jail quarry tile was lifted from the jail.

Q. You were there when the quarry tile was removed and saw this material?

Dep.

A. Yes, sir.

Joseph W. Meredith

page 20 } Q. Some material, is that correct?
9/12/66 A. Yes, sir, not many pieces had to be removed. It is unfortunate the ones that were removed showed this type of workmanship.

Q. Describe if you will what type of workmanship is shown by that piece of grout you have in your hand.

A. It appears that the Luminite has not been installed to full in depth.

Q. What would appear to be the depth it is installed?

A. Of this piece?

Q. Yes.

A. I would say three-sixteenths of an inch. (Measuring with ruler). That is exactly what it is.

Q. Would you describe the composition of that piece of material if you can from examining it?

A. I know it only as Luminite. I am not familiar with the formula.

Q. Is it all of a uniform color?

A. The Luminite is. The other is from the setting bed.

Q. You speak of the other. The material you hold is composed of two different types of material, is that correct?

Dep. A. That is right.
page 21 } Q. What are they, then?
9/12/66 A. The white is the setting bed.
Q. In which the tile is set?

A. Yes.

Q. What is the other?

A. The black is the grouting mortar.

Q. And did the Marus company set it, put the tile in the setting bed?

A. Yes, sir.

Q. Did the Marus company install that black material that you describe there?

A. Yes, sir. I should have kept my samples.

Q. Mr. Meredith, during the period of time in which the material was cut out and blown out and replaced: Were there other phases of construction that were to proceed in this area?

A. Yes, sir.

Q. What other things had to be done in the mess hall and the kitchen.

A. I would say the glass in the windows, and the tables upon the floor.

Joseph W. Meredith

Q. What had to be done with respect to the tile floors in those rooms to complete the entire building.

A. I do not believe I understand your question.

Dep. page 22 } 9/12/66

Q. Well, were there any installations that had to be made in the kitchen and the dining room that had to do with the flooring?

A. Well, I would say that the quarry tile delayed the installation of the tables and the kitchen equipment.

Q. Was this brought to your attention?

A. Oh, yes.

Q. By whom?

A. By the general contractor.

Q. Did you bring it to the attention of the Marus company?

A. I wouldn't have any occasion to bring it to their attention except in progress meetings, because they were working for the general contractor.

Q. Do you know what method of curing was used on this cement?

A. Are you speaking of the Luminite?

Q. Yes.

A. It was simply exposed to the elements, no wet pack or covering was put upon it.

Q. Was the job under roof at that time?

A. Yes, sir.

Q. Is it your experience that this material needs to be cured?

A. Should be kept wet.

Dep. page 23 } 9/12/66

Q. Do the specifications have any requirements in this regard?

A. No, sir. No more than the general specification of setting quarry tile.

Q. Specifications do not call for the use of Luminite, is that correct?

A. I do not think so.

Q. Have you had occasion to work with a material called black Furnane in the past?

A. This is my first experience.

Q. What is your knowledge of the black Furnane material?

A. It is acid resisting, grease resistant, water resistant.

Q. Would there be any particular reason for the selection of that material in preference of Luminite or Portland cement in this particular area, and if so why?

Joseph W. Meredith

A. That of course is the architect's discretion. His experience has taught him that it has been used in penitentiaries and penal institutions before.

Q. I believe you stated that the architect discovered the error in the cement when the quarry tile was about seventy-five percent completed?

A. Yes, sir.

Q. Was any further work done by the Marus company in the same manner after they were so advised, to your knowledge?

Dep. page 24 9/12/66

A. Yes, they lacked about I would say ten percent of completing the mess hall and they finished that ten percent.

Q. As they had originally started?

A. Yes, sir.

Q. And was this after they had been advised of their error by the architect?

A. Yes, sir.

Mr. Bowles: I object to the word "error."

Q. Were the joints that were installed by the Marus company uniform at the surface of the tile, in all areas?

A. No, sir.

Q. In what way were they not and where?

A. There was some high tiles and some low tiles.

Q. And what was done about that.

A. They were removed.

Q. By whom?

A. Marus.

Q. At whose instruction, if you know?

A. Well, I do not know who instructed them.

Mr. Runkle: Then don't answer the question. I believe that is all.

CROSS EXAMINATION

Dep. page 25 9/12/66

By Mr. Bowles:

Q. Mr. Meredith, how long have you been connected with the construction business?

A. Since 1928.

Joseph W. Meredith

Q. Is this the first time you have worked around or been around where quarry tile setting is being done?

A. No, sir.

Q. You have seen quite a bit of it, I imagine, in your time?

A. Some, yes.

Q. Of the some you have seen, it is not unusual that you have a few tiles that are up higher, and a couple down low in the laying of a quarry tile floor, is it?

A. No, I think where you got a large area as this mess hall you would certainly have some defects.

Q. Generally, it is the practice I gather among most contractors, when they are pointed out to them, that they will get the high tiles and change them?

A. Yes, sir.

Q. And to your knowledge was that done on this job?

A. Yes, sir.

Q. So with regard to the high tiles that you talked about last, it wouldn't be fair to say that Marus' work was unworkmanlike, or his work was not proper with regard to those, would it?

Dep. page 26 9/12/66

A. No, he had some joints out of alignment, too.

Q. Is that something that is abnormal?

A. (Pause) It is certainly not pleasing to the eye.

Q. But he changed those, he fixed them?

A. Yes, sir.

Q. I believe you said that your primary experience had been in the masonry business?

A. That is right.

Q. In laying brick and cinderblock, don't you wind up sometimes with some lines that don't run right straight?

A. Yes, sir.

Q. In other words, nobody is perfect in the construction business. Is it your opinion now from observing what you saw that Mr. Marus was any less perfect with regard to similar joints that weren't straight and some of the high tiles than the average contractor?

A. No, sir.

Q. No different from the average?

A. No, sir.

Q. What was your title?

A. Clerk of the Works.

Q. Clerk of the works?

Dep. A. Yes, sir.

Joseph W. Meredith

page 27 } Q. Does that have any particular significance?
9/12/66 A. No more than it means that I am supposed to be there at all times to check any deliveries, keep records of the weather and the work performed.

Q. When you say check deliveries, are you supposed to look at stuff that is delivered to the job site?

A. Yes, sir.

Q. Did you look at this quarry tile when it was delivered to the job site?

A. I do not recall the quarry tile coming in. I do not know whether it came before I was there or afterwards.

Q. What do you mean before you were there?

A. You see, the job was started I do not know how many months before I was employed.

Q. But I believe you said that when we got around to this quarry tile laying, the job, the whole building was seventy-five percent complete?

A. That is right.

Q. So would it be usual that before they dig the hole to put the building in that they deliver the quarry tile or not, and just let it sit?

A. I don't think so. I don't remember it coming in.

Q. You don't remember it coming in?

Dep. A. That is right.

page 28 } Q. If you had seen it come in, would it have
9/12/66 been part of your job to look at it?

A. Oh, yes.

Q. And make sure it is what is supposed to be there?

A. To the best of my ability, yes.

Q. And you have no recollection of the tile coming?

A. I remember the Terrazzo, because that was piled way high.

Q. If you had gone and looked at this tile, if you had seen it when it came in and you had noticed that it was not factory waxed tile, would you have brought that to somebody's attention?

A. Yes, sir.

Q. In other words, you were familiar enough with these specifications to know that factory waxed tile was required on the job?

A. That is a hard question. I do not know these specifications for anything that you would ask me about it, I mean—

Q. I don't mean to imply that you would, but during the course while you were working as Clerk on the Works, or

Joseph W. Meredith

Dep. page 29 } 9/12/66

Clerk of the Works, I assume that you had the specifications available and if something came in and you had any doubt about whether it was the right thing, all you had to do was to look in the book and see?

A. That is right.

Q. And if you had had an opportunity with regard to the quarry tile, if you had any doubt whether it was the right stuff or not, you would have looked in the book?

A. That is right.

Q. But you just don't remember about the quarry tile?

A. I don't remember it coming in. Some things came in on Saturdays, some things came in after working hours.

I am not saying that this quarry tile did, but I just don't recall it coming in.

Q. It would be fair to say it did not come to your attention?

A. That is true.

Q. That it was not factory waxed?

A. Oh, no.

Q. I believe you said that this operation of laying black Furnane, that that was the first time you had ever seen that done?

A. That is right.

Q. How about the Luminite? Was this the first time you had ever seen Luminite done?

Dep. page 30 } 9/12/66

A. The first time I had ever seen Luminite. All I had ever seen was conventional Portland cement and sand.

* * * * *

Dep. page 31 } 9/12/66

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Q. I believe you said that the foreman's name you only knew him as Joe?

A. Yes.

Q. And he wanted to see your specifications, you showed him I believe the addendum, the addendum that you have referred to, Addendum No. 1?

A. Yes, sir.

Joseph W. Meredith

Q. Section 20, you showed him that?
A. Yes.
Q. Did he appear to be surprised?
A. Yes, sir.
Q. Did he make any comment to you like he had never seen that?
A. The answer he gave me was that it applied only to vertical joints.
Q. He said it applies only to vertical joints?
A. In the kitchen there is one place that has a raised platform, and that was his thinking.
Q. And that raised platform in the kitchen has vertical joints?
A. Yes, sir.

Dep. page 32 9/12/66

Q. I believe when you read the initial specification from Section 20, I believe that says said quarry tile in accordance with Specification No. 3 of American Standard Specifications A 108-1958 except at vertical joints which are to be filled with black Furnane instead of with mortar—
A. Yes, sir.
Q. Are you familiar with Specification No. 3 of American Standard Specifications?
A. No.
Q. And A108-1958?
A. No, sir.
Q. So you do not know what those words mean?
A. No, sir.
Q. But this man Joe, I take it, felt that when he talked about vertical joints that it was this little part in the kitchen.
A. Yes, sir.
Q. And not the main grouting on the floor?
A. That is right.
Q. And I believe you stated when you showed him the Addendum No. 1 to Section 20, which required all joints to be filled with black Furnane, he was surprised?
A. Yes, sir.
Q. Did he claim that is the first time he had ever seen it?
A. He did.

Dep. page 33 9/12/66

Q. Now, how often would you be around the setting of a quarry tile during a day, a normal day?
A. My time was taken up mostly with the pouring of concrete.

Joseph W. Meredith

Q. You have testified to right many conversations when you were around, with regard to this quarry tile, and what you saw.

In an average day while they were working on the quarry tile, how many times would you be near them?

A. That is a hard question to answer, because I am constantly on the move.

I do not stay in any one place long unless I have to count steel or actually witness the pouring of concrete, or the brick work.

Q. Your job really contemplates you are supposed to be everywhere at once?

A. That is right. Thank you, sir.

Q. Well, you said Mr. Miles Cary Johnston, Jr. came in and saw this floor in the mess hall was not according to specifications?

A. That is right.

Q. And in other words he came in and found out there wasn't a black Furnane grout?

A. Yes, sir.

Q. Something else was in there?

Dep. Right.

page 34 } Q. Don't misinterpret my question, but you
9/16/66 being there on the job, why didn't you discover it instead of Mr. Johnston?

A. Well, of course he is more familiar with this type of installation and he wrote the specifications.

Q. Did you notice when they were putting I believe you call it the bed coat in?

A. Setting bed.

Q. Setting bed. Do you know what material was used for that?

A. It looked like cement and sand.

Q. Portland cement and sand.

A. Yes, sir.

Q. Did you notice what material was being used in the grout? Did you see bags of it sitting around or pockets?

A. No, sir, I didn't notice any difference.

Q. I believe you said your job involved checking on supplies as they arrived. Did you see any supplies of Luminite arrive on the job?

A. No, sir.

Q. Did you see anybody using Luminite on the job?

A. No, sir.

Joseph W. Meredith

Q. Before Mr. Johnston came?
Dep. A. No, sir.
page 35 } Q. You didn't see anybody using Luminite?
9/12/66 A. It didn't look any different from Portland cement.

Q. Didn't look any different from Portland cement?
A. No, sir.
Q. And I believe you said you had never had any experience in Luminite before?
A. No, sir.
Q. But you had had a limited experience with laying quarry tile in Portland?
A. Yes, sir.
Q. Both for the grout—
A. And the setting bed.
Q. And setting bed?
A. Yes, sir.
Q. Isn't that a fairly common practice or method of laying quarry tile?
A. Yes.
Q. Now, these pieces of material that Mr. Runkle exhibited to you:
Do you have any way of knowing what job they came off of?
A. No, but I would certainly say they look just
Dep. like the ones that I had in my office.
page 36 } Q. Well, any tile laid on any job the same way
9/12/66 and pulled up would look just like it?
A. If the same materials were used.

Q. If the same materials were used?
A. Yes, sir.
Q. So there is no possible way you could tell whether the tiles and pieces of Luminite that were exhibited to you by Mr. Runkle came off any job or what job they came off?
A. No, sir, the only thing I can tell you is that when these places were taken up I would certainly certify to the depth of the Luminite that I saw at that time.
Q. And I believe you said that was one-eighth to a maximum of three-eighths?
A. That is right.
Q. And that I take it was on top of the setting bed?
A. Yes, sir.
Q. Now, I believe you said that after Mr. Johnston had come on and discovered the black Furnane was not being

Joseph W. Meredith

used, you said that Marus was given a choice as to what to do.

Were you there when he was given a choice?

A. Yes, sir.

Dep. page 37 } 9/12/66

Q. What were the exact words and who said what to him?

A. Mr. Johnston told Mr. Worley—I don't think Mr. Marus was present—that he had a choice of either starting from scratch or he could saw the joints that had been put in with Luminite.

Q. But Mr. Marus was not there?

A. I don't think he was there.

Q. And was this Joe there?

A. This was in Mr. Worley's office. I don't recall whether he was there.

Q. So your statement that Marus was given a choice is not exactly accurate, Marus wasn't given a choice, Worley was given a choice?

A. Well, naturally the general doesn't deal with the subs. I mean, the architect doesn't deal with the sub-contractors. He deals only with the general contractor.

Q. Were you there at any time that Marus and the architect discussed this? Or Marus and Mr. Worley discussed this?

A. I didn't listen in on any of their conversations.

Q. I take it then your answer is if you were there you didn't hear anything?

A. I didn't listen, no, sir.

Dep. page 38 } 9/12/66

Q. So then with regard to this, the only conversation you had was with Joe of Marus' corporation?

A. Yes, sir.

Q. And Joe's position was that he was only supposed to use black Furnane in that one limited area of vertical joints?

A. Yes, sir.

Q. What did he tell you he was supposed to use for the rest of the floor?

A. I do not recall him telling me any particular material.

Q. Did he tell you that the specifications that he had called for using nothing but Portland cement, both as a setting bed and as a grout?

A. I do not recall.

Q. You don't recall?

A. No, sir.

Joseph W. Meredith

Q. But he wanted to see your specifications?
A. Yes, sir.
Q. And you showed him the original specifications and the addendum?
A. Yes, sir.
Q. And he exhibited surprise?
A. Yes, sir.

Dep. page 39 9/12/66

Q. Did he say in your presence "I never have seen this before"?
A. I do not recall him using those actual words, but that was certainly the implication.
Q. Now, you were there when the Luminite was put down, and you were there when the black Furnane was put down?
A. Yes, sir.
Q. Do the two look alike?
A. The black Furnane is darker.
Q. You can tell the difference?
A. You can tell the difference. Any layman could tell the difference as you have seen both.
Q. After you have seen both you couldn't put down Luminite and come in and tell somebody that that was black Furnane if the person had seen those?
A. I don't think so.
Q. Couldn't tell you?
A. Not now. (Laughing). Another thing that would discount that, if black Furnane was applied without the tile being waxed it would give itself away.
Q. Because it would stick to the tile?
A. Anywhere it touched it.
Q. Well, it would not matter though whether the tile was waxed on the job or whether it was factory waxed, just so long as it was waxed?

Dep. page 40 9/12/66

A. As far as black Furnane bonding is concerned, yes.
Q. And as far as using Portland cement or using Luminite, or the fact that the tile is or is not waxed, just being waxed makes it easier to clean than if the tile is not waxed, isn't that correct?
A. That is true. The specifications calls for waxed, factory waxed.
Q. In your experience in laying quarry tile from the standpoint of the end result, is there any difference between tile that is waxed at the factory and tile that is waxed on the job?

Joseph W. Meredith

A. I wouldn't think so.

Q. And I believe you said that when the black Furnane was put in and after the grouts had been cut out that it was waxed on the job?

A. That is right.

Q. And then they put black Furnane down?

A. Yes, sir.

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page 2 }

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Mr. Bowles:

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page 7 }

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It is our position, Your Honor, under at least two theories, that the whole mistake in this case, what brought that about, is the failing of Mr. Worley to give him Addendum Number 1. We would never have put in the bid that was put in if we had Addendum Number 1, putting in black Furnane on the job. We would have lost money on the job.

Secondly, when it got down to the point of saying, do something about the job, we took the position that we will finish the job and we will fix the joints in the part that we already laid, cut the old joints out and put in new joints and lay the kitchen area which had never been laid, with black Furnane, but you are going to pay for it, Mr.
page 8 } Worley. And Mr. Worley never said, oh, no, I am not. He writes back and says, do it.

We take the position that that made a contract at that point, and we have brought a suit for $14,725.75 extra that it cost us to do the job, using black Furnane.

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page 3 }

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JOSEPH P. MARUS, the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bowles:

Q. Mr. Marus, would you state your name, your age and where you live?

A. Joseph P. Marus. I live in Greensboro, North Carolina, 4016 Friendly Road. I am forty-nine years old.

Q. What is your position, Mr. Marus?

A. President of Marus Marble and Tile Company, Incorporated.

Q. How long have you been in the tile business?

A. In Marus Marble and Tile since 1945, August of 1945.

Q. Had you been in the tile and marble business prior to 1945?

page 4 } A. I was reared in it, under my father.

Q. How long had your father been in the marble and tile business?

A. Since 1908.

Q. Did you work with your father for a period of time?

A. Yes, that is where I got my training.

Q. And you are now President of the Marus Marble and Tile Company?

A. Yes, sir.

Q. Mr. Marus, calling your attention to the early fall of 1962. Can you tell His Honor how you got involved with the job in Richmond on the new City Jail?

A. We were contacted and asked if we'd care to bid on it. How we were contacted and how it came about, I don't remember. But we were contacted. So we got the plans and specifications. Mr. Worley sent the plans and specifications to us.

Q. Can you tell me what exactly you received by way of plans and specifications from Mr. Worley?

A. We received the general plans and the specifications.

Q. When you say plans, you mean drawings?

A. Drawings. Plans are the drawings, the layout of the building, to give you the rooms and so forth of the

page 5 } building.

Joseph P. Marus

Q. When you say specifications—

A. They have a general specification.

Q. I hand you a rather large volume, on which it says Jail Facilities for the City of Richmond, Richmond, Virginia, and has Baskervill & Son and Associated Architects. Is that the specification that you received?

A. Yes.

The Court: We better mark these things as we go along. Are you ready for it?

Mr. Bowles: Yes.

The Court: All right, PLAINTIFF'S EXHIBIT NO. 1.

Q. When did you, to the best of your recollection, receive those specifications?

A. I believe it was in November. Around the latter part of November. You can tell by the take-off, I suppose.

Q. When you received those from Mr. Worley, did you receive any addenda?

A. No, sir.

Q. Did you receive any paper marked Addendum Number 1?

A. No.

Q. Or Addendum Number 2?

A. No.

page 6 } Q. What you have there would be the book—Plaintiff's Exhibit Number 1—and the drawings?

A. Yes, sir.

Q. Now, did you take the specifications and the drawings and make an estimate on the job?

A. Yes, sir.

Q. I hand you a number of green pieces of paper, estimate sheets. Does that represent your estimate on this job?

A. Yes, sir. This is our corporation's estimate.

Mr. Bowles: I would like to put that in as Plaintiff's Exhibit Number 2, if we could.

The Court: Right.

NOTE: The above-mentioned estimate sheets are marked PLAINTIFF'S EXHIBIT NO. 2, by the Court and filed in evidence.

Joseph P. Marus

Q. Mr. Marus, I am handing you Plaintiff's Exhibit Number 2. This first sheet there, can you explain to His Honor what that represents?

A. We go through the specifications and we pick out the various places that the work occurs in.

By The Court:

Q. Is that divided into plumbing work and tile work?

A. Yes. They got sections in there, Section 20 or page 7 } 19, whatever section you have in this instance here.

Q. Is all tile work in 20?

A. Ceramic tile and quarry title was in Section 20.

By Mr. Bowles: (Cont'd.)

Q. The first page you come to in Plaintiff's Exhibit Number 2, that is your writing out of what is to be done on the job?

A. Right. Yes, sir.

Q. Now, the second sheet here, can you tell His Honor what the second sheet represents?

A. The second sheet represents the rooms that the various materials are to go in.

Q. Are you talking about quarry tile?

A. Yes. We take them off by room numbers.

Q. There appears on that the abbreviation Q.T. Does that mean quarry tile?

A. Right.

Q. The second page of this represents the square foot area of figuring?

A. The total area.

Q. The total square foot area?

A. Right.

Q. Turning back to the second page of Plaintiff's Exhibit Number 2, what was the total square footage on this job?

page 8 } A. 9468 feet.

Q. There are other numbers there.

A. Then you had 85 feet of base, that is quarry base. That is the vertical piece that goes against the wall, and you had 19 feet of curb, which is two-sided.

By The Court:

Q. What part of the room would that go in?

A. That is in the kitchen part.

Joseph P. Marus

By Mr. Bowles: (Cont'd.)

Q. Turning to the next to last page of this estimate, can you state what the figures there represent?

A. Well, you mean the total figures?

Q. Yes, the total figures. The total figures that you have to the left of the page.

A. The base bid for the quarry tile and the ceramic tile.

Q. Is that then where you figured your cost on the job?

A. Right. In other words, this is the cost along with the anticipated profit and all.

Q. The 9468 feet of tile, what was the cost factor there?

A. $11,835.

Q. Let's put it on the basis of square foot.

A. One dollar and a quarter.

page 9 } Q. Now, on the base tile, what was your cost factor there?

A. $2.50. That is a running foot now.

Q. Lineal foot?

A. Right.

Q. And on your curb, what was your factor there?

A. $5.00, because you have two sides, a running foot; lineal foot.

Q. Why is there, if there is a reason, a difference between $1.25 for the tile on the floor and $2.50 for the tile along the edge, or curb tile?

A. Well, the Furnane. That is what they called for vertical joints, and that is the difference in the cost.

Q. Is Furnane a more expensive product than Portland cement?

A. Oh, yes, definitely.

Q. Now, we are getting a little ahead of ourselves, but these figures on the right, the total figures on the next to the last page, what do they represent?

A. When I went to see Mr. Worley and we negotiated a contract.

Q. They represent your figuring out then how much less you could do it for?

A. I could reduce certain of these figures here and we came to a contract.

page 10 } Q. On the last page of your estimating sheet, could you tell His Honor what those figures represent?

A. I did this in his office, sitting down and scribbling, and when I went back to Greensboro, I verified them on the machine.

Joseph P. Marus

Q. So the last page on this is the checking of the figures you did in your head in Richmond?

A. That is right. That is exactly right.

Q. Following having made these estimates, did you submit a proposal?

A. Yes, sir.

Q. I hand you a piece of paper marked Proposal, dated the 24th of October, 1962 and ask you, is that the proposal you submitted on the job?

A. Yes, sir.

Mr. Bowles: I would like to introduce that as Plaintiff's Exhibit Number 3.

NOTE: The above-mentioned proposal is marked PLAINTIFF'S EXHIBIT NO. 3, and filed in evidence.

Q. Now, Mr. Marus, this proposal sets out the name of the job and the location, and who you are going to do the work for, and then, below in the middle between the typewritten or printed part, it sets out the job there?

A. Yes.

Q. Would you state what the job was and where page 11 } you got this information?

A. We got this information from the plans and specifications, and it says here, "Section 20—ceramic tile and quarry tile. Also, terrazzo as per added Alternate Number 2."

Q. That is Alternate Number 2, not Addendum?

A. Right. That the base bid for the tile and the quarry tile was $17,000.00 and then for the Alternate Number 2, was $68,000.00.

Q. Turning to Plaintiff's Exhibit Number 1—

The Court: Does this represent confirmation?

Mr. Bowles: No, Your Honor, this is his proposal that he made; the bid he made on the job.

Mr. Marus: That is the estimate.

By The Court:

Q. Well, you and the general contractor did not sit down and finally agree on it, you waited until you got your proposal in?

Joseph P. Marus

A. Yes. I have to make that, Your Honor, before I can send him this.

Q. This is just working up to your proposal?

A. Yes, sir.

By Mr. Bowles: (Cont'd.)

Q. So then Plaintiff's Exhibit Number 2 was worked up before you ever sent him Plaintiff's Exhibit Num-
page 12 } ber 3? In other words, the estimate was made before you ever sent him the proposal?

A. Right. Yes, sir.

Q. Turning to Section 20 of these specifications, can you read to the Court what the specifications are with regard to the laying of quarry tile?

A. It says, "Furnish all labor and materials for the complete installation of all ceramic and quarry tile as hereinafter specified and shown on the drawings. See drawings and schedules for details and areas requiring ceramic and quarry tile.

Before setting tile, furnish Architect with Tile Manufacturer's standard form of Master Grade Certificate, signed by the Contractor and Manufacturer, stating grade, kind of tile and identification marks for packages of tile delivered to the job.

Shrinkage Mesh: 6″ by 6″ mesh, No. 10 gauge galvanized welded fabric. Use mesh in floor setting bed. Portland Cement: Waterproof type of standard manufacture, gray or white as required. Sand: Sharp, washed clean and uniformly graded from fine to coarse as follows:"

Then he gives the percentage of one hundred passing Number 30 screen.

Q. That is the size of the screen?

A. Yes.

page 13 } Q. When we get down to the quarry tile, what does it say there?

A. "9″ by 9″ standard grade extruded square edge. Provide special shapes for curbs and depressions. Color is to be red. Tile is to be factory waxed."

Q. Now, the tiles that were supplied on the job, Mr. Marus, that part of the mess hall or dining hall area that was done, was that tile factory waxed that you supplied?

A. No.

Q. Why was it not factory waxed?

A. Well, usually the architects, sometimes they have you

wax the tile, or put a seal on the tile where acid is not permitted on the job. And there was no place where acid was not permitted on the job, so we did not need to wax the tile.

Q. So, does the factory tile waxed or not waxed have to do with the cleaning of the tile?

A. Yes, that makes for good cleaning of the tile.

Q. If you can use acid to clean, you don't need to have waxed tile?

A. That is right. Yes, sir.

Q. What is the difference in cost, if there is any, between factory waxed tile, on a square foot basis, and non-factory waxed tile?

A. It goes from five a foot and on down.

Q. And the approximate total of square footage
page 14 } of tile on this job was in the nine thousand?

A. Ninety-five hundred.

Q. Ninety-five hundred. So, how much would that work out in dollars and cents, with the difference?

A. Well, around $500.00. Four hundred some dollars.

Q. Going back again to Section 20 of Plaintiff's Exhibit Number 1, and omitting the parts that have to do with anything other than quarry tile, would you read to the Court what the rest of the specifications are that you received?

A. It says, "Lay out tile on floors and lengthwise on walls so that all tile less than half-size occurs. For—"

Q. So that no tile—

A. "No tile," that is right. "For height stated in feet and inches maintain full courses to produce nearest attainable heights horizontally."

Mr. Runkle: If Your Honor please, if that is going to be in the record then I think it should be put in.

The Court: It is in the record.

A. "No staggered joints permitted."

Q. Now, the next section refers to exterior tile. Now, the last two paragraphs pertain to the quarry tile. Would you read that?

A. It says, "Set quarry tile in accordance with Specifications Number 3 of American Standard Specifica-
page 15 } tion A108-1958, except at vertical joints—"

Q. Except at vertical joints?

A. "—which are to be filled with black Furnane instead of with pointing mortar.

Joseph P. Marus

Q. How long have you been in the tile business, Mr. Marus?
A. Since '45 in my own business.
Q. And how long of your total time have you been in the tile business?
A. All my life.
Q. What does vertical joints mean to a man that has been in the tile business all of his life?
A. That means on the base side; on the wall side; on joints in the base.
Q. Now, there is reference made to American Standard Specification A108-1958 Number 3. I hand you a yellow book and ask you whether or not that is the American Standard Specification?
A. Yes.
Q. And whether or not Page 23 is the specification there referred to?
A. Yes, that is it.

Mr. Bowles: Now, we would like to file this as Plaintiff's Exhibit Number 4, and the Page 23 of that book.

page 16 } NOTE: The above-mentioned book is marked PLAINTIFF'S EXHIBIT NO. 4, and filed in evidence.

Q. Now, those American Standard Specifications, what do they call for, just briefly reviewing?
A. They call for Portland cement.
Q. Base?
A. Base. Telling you how to mix the sand and cement.
Q. Do they call for any reinforcing wire?
A. Well, it could or it could not.
Q. What does it call for with regard to the joints or the grout?
A. Portland cement joints.
Q. Now, I believe you have already testified that you went to Richmond after you had submitted this proposal and had a conference with Mr. Worley?
A. Yes.

The Court: What page of the American Standard Specifications?
Mr. Bowles: Twenty-three.

Joseph P. Marus

Q. You went to Richmond sometime in December of 1962?
A. Yes, sir.
Q. And you and Mr. Worley made an agreement as to the doing of the job?
page 17 } A. Yes, sir.
Q. I hand you a letter on the Worley Brothers stationery, dated December 6, 1962, and ask you whether or not that is the agreement or contract that you entered into?
A. This is the agreement that we entered into.

Mr. Runkle: If the Court please, I am going to have to interpose an objection to the introduction of this evidence, and to the further discussion of the contract that is involved here.

I would like to point to the Pleadings in the case, and they refer to this suit as being a suit for open account. There is no mention anywhere in the brief memorandum, in the motion for judgment, of a contract. It says $14,725.75, which is justly due upon open account, as is shown by itemized statement, and, therefore, I would object to the introduction of that evidence. It is not being properly before the Court and raised by the Pleadings.

Mr. Bowles: Your Honor, the introduction of this evidence—It is quite evident that this is a building story from the beginning, and the reason for the suit being brought on open account, Your Honor, it was brought on open account—
It was brought on an affidavit. There is also a
page 18 } denial under oath.
Mr. Runkle: Yes, indeed there is, a notarized denial under oath. Yes.

Mr. Bowles: In the opening statement, I stated to Your Honor we had two theories. We were proceeding on a *quantum meruit* in the initial state; that a contract was entered in the agreement to do this on an open account basis.

Mr. Runkle: The pleadings did not properly advise me of this proceeding being based on that contract.

The Court: I don't think it makes too much difference in the rights of the parties. Do you claim he takes you by surprise?

Mr. Runkle: As far as the pleadings themselves, I will have to say, yes, sir, as far as the pleadings.

The Court: As far as the merits of the case, it does not, does it?

Mr. Runkle: I will have to say, no, sir.

The Court: Well, I will have to overrule the objection.

Joseph P. Marus

Mr. Runkle: Note exception.
The Court: Do you want this in evidence?
Mr. Bowles: Yes.
The Court: That will be Plaintiff's Number 5.

NOTE: The above-mentioned letter is marked
page 19 } PLAINTIFF'S EXHIBIT NO. 5, and filed in evidence.

Q. With reference to Plaintiff's Exhibit Number 5, Mr. Marus, this is the contract that you entered into with Mr. Worley?
A. Yes, sir.

By The Court:
Q. Is that correct? Plaintiff's Exhibit Number 2 is your work sheet leading up to make a proposal, isn't it?
A. Yes.
Q. And Plaintiff's Exhibit Number 3, which is this, is your proposal that would be a contract if accepted?
A. If accepted, yes, sir.
Q. Well, now, this further letter which we now have, is what?
A. The contract.
Q. It is not a new proposal, is it?
A. No, it is a contract from Mr. Worley's company.
Q. Oh, you say that this, Plaintiff's Exhibit Number 5, is the general contractor's acceptance of your written proposal?
A. Of our agreement, yes, sir. See, of our agreement.

Mr. Bowles: Your Honor, I think I might interject, the amount is different.
The Court: Well, all right. But anyway, they
page 20 } both signed this, didn't they?
Mr. Bowles: Yes, sir.
The Court: All right, that is Plaintiff's Exhibit Number 5, the letter of December 6.

By Mr. Bowles: (Cont'd.)
Q. Now, Mr. Marus, in the letter of December 6, Plaintiff's Exhibit Number 5, is there any statement or mention of any addenda to these specifications?
A. No, sir.

Joseph P. Marus

Q. Is there any mention of Addendum Number 1 or Addendum Number 2?
A. No, sir. Alternate Number 2.
Q. Does it set out exactly what parts of the specifications and what alternates are to be included in the work you are to do?
A. Yes, sir.
Q. What is it limited to?
A. Limited to Section 20 of the project's specifications, and Alternate Number 2 of the said specifications.
Q. Alternate Number 2, does that have to do with terrazzo?
A. That is the terrazzo.
Q. And has nothing to do with quarry?
A. No, sir.
Q. And there is no mention in this paper of
page 21 } Addendum Number 1 and Addendum Number 2?
A. No, sir.
Q. Now, Mr. Marus, what happened next?

By The Court:
Q. Just for curiosity—I have to try to keep abreast of this, if I can. Were the dates of the addenda subsequent to December 6th, or prior? Were they already in existence at that time?
A. Yes, sir.

Mr. Runkle: We can stipulate the date of the Addendum Number 1 is August 7, 1962, and the date of Addendum Number 2 is August 10, 1962.
Mr. Bowles: And the date of the specifications, Your Honor, is July 2, 1962.

By Mr. Bowles: (Cont'd.)
Q. Now, Mr. Marus, is it the general practice in the business when a contract is made for doing quarry tile work, or tile work, that the contract itself sets out the specific parts of the specifications that apply to the work that is to be done?
A. It is covered in the contract, in his contract to us.
Q. Now, tell me what happened next.
A. What are you referring to?
Q. Well, nothing was done for a period of time
page 22 } from December when you signed the contract.
A. Oh, and then, of course, we submitted samples of terrazzo strips and tile of various kinds, and they were approved or disapproved, and then we started terrazzo in the late summer, I suppose.

Joseph P. Marus

Q. Of '63?

A. Of '63.

Q. When did you get around doing the quarry tile?

A. The quarry tile, I believe, if my memory serves me correctly, was in November. The latter part of November, we started doing the quarry tile.

Q. When did you, as the President of the company or in any other capacity, become aware that there was any difficulty concerning the quarry tile?

A. I got a call that the joints were not the type of joints we were supposed to put in.

Q. Who did you get the call from?

A. From Joe Still.

Q. Who is Joe Still?

A. He is my superintendent, and he was the man in on the job, installing the quarry tile.

Q. When did you receive that call?

A. I received the call the day that Mr. Johnston asked him what type of material he was using in the floors.

page 23 Q. The specifications, as you bid on the job, called for Portland cement base and Portland cement joints except in the vertical joints?

A. Yes.

Q. What were you putting in on the job there at the jail?

A. We were using the Portland cement and on top of the joint we used Lumnite cement, because when you wash Lumnite cement with acid, it does not discolor so you get a light spot here and a dark spot there. It is uniform.

Q. Is Lumnite a Portland cement?

A. Yes, it is a high grade Portland cement. It is an acid resistant cement, which is used quite a bit.

Q. Do you know how this Lumnite was put in? Was it put in with a squeegee or trowel?

A. No, we don't have a squeegee joint, we trowel them in. It was troweled in.

Q. Do you know this of your own knowledge?

A. Yes, that is our common practice.

Q. Other than your common practice, I believe that you participated in digging these joints out?

A. Right.

Q. When you were digging them out, could you tell how they were put in?

A. They were compact. So they had to be pressed in.

Joseph P. Marus

page 24 } Q. Troweled?
A. Yes.

Q. How do you go about setting tile in the bed or mortar, I believe you all call it mud?

A. Screed mud, right.

Q. How do you get the tile at the right level?

A. Well, first you lay your tile and then you have to put what we call sweep-in, which is one part sand and one part cement. You put that in the joints and then you wet it. That is to keep the alignment of the tile. And then you beat it with a beating block, using a two by four beating block and a hammer.

Q. Does that cause any of the screed mud to loosen up?

A. The screed mud has to come up in the joints.

Q. Then the grouting of the joints, is that put in after everything sets up?

A. No, that is put in the same day. That follows right behind the beating.

Q. In other words, you got a man laying tiles and putting them in place, and a man right behind him?

A. Beating in the joints.

Q. And this is all done while the Portland cement is wet?

A. On the same day, yes.

page 25 } Q. Now, in the tile industry, or tile setting industry, is it a general practice that Lumnite is used as a grout where Portland cement is called for?

A. No, sir.

Q. It is not a general practice?

A. It is not a general practice, no, sir.

Q. Why did you use Lumnite on this job rather than Portland cement as you read in the specs?

A. We used it for one simple reason. Because the floors, when you wash with acid, the Portland cement, well, you can bleach it and it will have light spots in the floor. And with Lumnite cement, acid does not faze it. It stays the same color.

Q. Now, Portland cement in contrast to Lumnite cement, which one is better?

A. The Lumnite, of course.

Q. Is it more expensive?

A. Yes, sir.

Q. Is it as expensive as black Furnane?

A. No, sir. In other words, they don't even equal one another.

Joseph P. Marus

By The Court:

Q. Well, is the subject of what you were going to use, covered in any papers up to this point?

A. It is a Portland cement.

page 26 } Q. I know, but is it specifically stated in your proposal or the general specifications?

A. No, sir.

Q. Or anything as to what product you were going to use?

A. No, sir.

Q. Other than Portland cement?

A. It just called for Portland cement.

The Court: I have not even seen that. Is that in 20?

Mr. Bowles: 20 refers to this.

The Court: Let me see where it refers to it. The pointing mortar is the subject covered on Page 23 of Plaintiff's Exhibit Number 4, isn't it? It should be.

Mr. Bowles: Among other things, Page 22 tells how to mix the mortar.

The Court: All right. It just talks about Portland cement.

By Mr. Bowles: (Cont'd.)

Q. Mr. Marus, on a job as far as your company is concerned that calls for Portland cement as a grout, is it your practice, or has it been your practice over the years you have been in business, to use Lumnite, or do you use Portland?

page 27 } A. We use Lumnite cement unless it is called for a specific color. Sometime they call for white cement and sometime they call for cement to match the tile.

Q. Now, after you received this call from Mr. Still, what did you do next?

A. I told him to stop where he was, and I came to Richmond.

Q. When you came to Richmond, who did you talk to and tell me what happened.

A. I talked to Mr. Worley and we discussed about the Addendum Number 1 that was not received.

Q. Did you tell him that you had not received Addendum Number 1?

A. Yes, sir.

Q. What did Mr. Worley say?

A. He did not say one way or the other about it, but he would get me a copy of it.

Joseph P. Marus

Q. Now, were you asked to finish the job?

A. I was asked that the joints— Yes. We were asked that the joints be taken out or removed and Furnane be put in their place.

Q. I take it that all that had been done was the greater portion of the dining hall or mess hall area. You had not begun the kitchen area?

A. Not begun in the kitchen area at all, no, sir.

page 28 } Q. With regard to the dining hall and mess hall area, what did you have to do to meet what the architect wanted?

A. We had to saw the joints out. We had to wax them. We had to find a sealer that the Furnane would not stick to. We had to put several coats of sealer on there, and then proceeded to cut the joints out. And when we cleaned them out and when they dried out, we proceeded to fill them with Furnane.

Q. Now, in the kitchen area?

A. In the kitchen area, we ordered waxed tile and Furnane to put that in with.

Q. I hand you Carlyle Tile Company Order Number 5970 and ask you whether that is the order of this factory waxed tile to do the part of the kitchen area?

A. Yes, sir, that is it. Approximately 3762 square feet.

Mr. Bowles: I would like to introduce that as Plaintiff's Exhibit Number 6.

NOTE: The above-mentioned Invoice is marked PLAINTIFF'S EXHIBIT NO. 6, and filed in evidence.

Q. Now, you have stated that you took the position with Mr. Worley that you had never gotten Addendum 1. What position did you take with Mr. Worley in regard to using black Furnane in the complete work, in the kitchen and fixing the situation in the mess hall?

page 29 } A. It was not our responsibility and we would do it if he said so, but he would have to pay for it.

Q. What was Mr. Worley's position about that?

A. It had to be done. So he wrote us a letter asking when we were going to get started on it. He never did deny it.

Q. Now, I hand you a letter dated December 10, 1963, written by Mr. Worley and addressed to your company. Did you receive that letter?

A. Yes, sir.

Q. Could you explain what the purport of that letter is, just briefly?

A. Well, he wanted me to give him a difference in cost of Atlas cement over the Furnane.

Q. Atlas cement is Lumnite?

A. Yes, sir.

Q. And Atlas Mineral Product Company is the Furnane?

A. Yes.

Q. While we are at this point, Atlas Lumnite is a Portland type of cement?

A. Right.

Q. What kind of product is Furnane?

A. Furnane is not a cement, it is two components. It is a powder and a liquid that fuses together, making an acid resistant joint, like epoxy joint.

page 30 } Q. I believe they also use epoxy joints?

A. In quarries, right.

Q. Is it not a fact that the black Furnane is the best and the most acid resistant joint?

A. Oh, yes, sir. That is the best joint you can have.

Mr. Bowles: I would like to introduce the letter of December 10th, as Plaintiff's Exhibit Number 7.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 7, and filed in evidence.

Q. I hand you a letter, or copy of a letter, dated December 11, 1963, written by you to Worley Brothers?

A. Yes, sir.

Q. Regarding this situation?

A. Yes, sir.

Q. And I ask whether or not in the second paragraph you said, "You know, of course, that this is your responsibility, but we will be very glad to do anything in our power to assist you. Naturally, the cost will be considerably higher to put in the floor in the remaining area with the black Furnane joint. We have already ordered the tile for this in accordance with your verbal order last Friday."

A. Yes, sir.

Q. And you wrote this letter to Mr. Worley?

page 31 } A. Yes, sir.

Joseph P. Marus

Mr. Bowles: I ask that this be introduced as Plaintiff's Exhibit Number 8.

NOTE: The above-mentioned copy of letter is marked PLAINTIFF'S EXHIBIT NO. 8, and filed in evidence.

Q. Now, Mr. Cardene that is referred to in that letter is the representative of the black Furnane people?
A. Yes, sir.
Q. I hand you a letter written by Mr. Worley's company to yours, dated January 8th, and ask you just to state generally what the purport of that letter is.
A. Well, he wrote a letter to Mr. Cardene and wanted to know about the life of the floors with Furnane joints.
Q. Would it be fair to say that that letter is bearing on the life expectancy, or useful life of a Furnane joint as against a Lumnite joint?
A. I would say so, yes, sir.

Mr. Bowles: I would ask that the letter of January 8, 1964 be Plaintiff's Exhibit Number 9.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 9, and filed in evidence.

Q. I hand you a copy of a letter dated January 22, 1964 written by you, Mr. Marus, to Worley Brothers, Inc., and
page 32 } the second paragraph, the first sentence there, does it not read, "The actual difference in the type joints that were installed, and the type joints called for in the addendum which we never received, is 43¢ per square foot, which should be added to our original contract."
A. Yes, sir.
Q. What is the purport of this letter? Why are you writing this letter to Mr. Worley?
A. He asked me to write the letter so he could go to the architect and see if we could not take a credit for, rather than tearing the floor out, or tearing the joints out.
Q. The first sentence of the second paragraph of that letter that I read to you—Has he ever denied to you that you did not get Addendum Number 1?
Q. Has he ever said, I sent it to you, you got it?
A. No, sir.

A. No, sir.

Mr. Bowles: I ask that the letter of January 22nd be introduced as Plaintiff's Exhibit Number 11.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 11, and filed in evidence.

Q. Now I hand you another letter dated January 22, 1964, written by you to Mr. Worley, and ask you what the general purport of that letter is?

A. Well, sending literature on Lumnite cement, page 33 } so he could give it to the Architect. We have used it on a number of jobs, and it was a hundred percent satisfactory.

Q. Would it be fair to say that you pointed out that on such and such a job you used Lumnite and people were happy with it?

A. Yes.

Mr. Bowles: I ask that this be admitted as Plaintiff's Exhibit Number 12.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 12, and filed in evidence.

Q. I hand you another letter dated March 12, 1964, a letter written to Mr. Worley by you, and ask you whether that is not a similar letter setting out that Lumnite had been used on another job and people were happy?

A. Yes, sir.

Mr. Bowles: I ask that this be offered in evidence as Plaintiff's Exhibit Number 13.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 13, and filed in evidence.

Q. Now I hand you a letter dated April 7th from Worley Brothers to you, and an accompanying letter of April 3rd, that was enclosed with that letter, from Miles Cary Johnston to Worley Brothers, Inc. Can you tell me who Miles Cary Johnston is?

A. He is an Architect.

Joseph P. Marus

page 34 } Q. Is he the Architect on this job?
A. Yes, sir, one of the Architects.

Q. This letter of April 7th, can you tell me what the general purport or contents of that letter is?

A. It is about the quarry tile floor, and the Architect has rejected the floor.

Q. On what basis has it been rejected?

A. He would have accepted it in lieu of the specified black Furnane, had the Lumnite cement been deposited in a workmanlike manner and in accordance with the manufacturer's recommendation.

Mr. Bowles: I ask that the letter of April 7, 1964 be filed as Plaintiff's Exhibit 14, and the accompanying letter of April 3rd. I think, Your Honor, if you put them together to make that Number 14, would be fine.

The Court: Was one a reply to the other?

Mr. Bowles: No, sir. The April 3, 1964 letter is the letter of the Architect, and the April 7th letter is the letter following with a copy of the letter of the Architect, to Mr. Marus.

The Court: All right, I will put those together.

NOTE: The above-mentioned letters are marked PLAINTIFF'S EXHIBIT NO. 14, and filed in evidence.

page 35 } Q. Now, Mr. Marus, calling your attention to the April 3 letter, which is Plaintiff's Exhibit Number 14. It is the letter from the Architect to the Worley Brothers Company. It sets out the summary of his findings with regard to this tile?

A. Yes, sir.

Q. Does it not say, "A summary of our findings follows: Joints between the quarry tile have been grouted with Universal Atlas Company Lumnite cement. Specifications call for joints to be filled with black Furnane. This substitution was made without the Architect's approval." I take it it is your position that you never got the Addenda?

Mr. Runkle: I am going to object to the leading question.

The Court: It is in evidence already.

Mr. Runkle: It is argumentary.

Joseph P. Marus

By Mr. Bowles: (Cont'd.)

Q. Did you ever receive Addendum Number 1?

A. No, sir.

Q. And Addendum Number 1, what does that call for as a grout?

A. It calls for an Atlas Mineral Product.

Q. Furnane?

A. Furnane.

Q. Where does it call for that?

A. Everywhere on the floors. All floors.

page 36 } Q. Paragraph b. says, "The quarry tile is set in a conventional cement mortar bed. The Universal Atlas Company recommends use of Lumnite cement in quarry tile joints only when the quarry tile is set in Lumnite cement setting bed."

A. Yes, sir.

Q. Is that your experience in the trade?

A. No, sir. We only use it to grout with.

Q. Is it not a fact that the Atlas Mineral Products people recommend that black Furnane only be used with a red Furnane?

Mr. Runkle: I object to this question as leading.

The Court: We are now on the subject of the Architect being unhappy because the wrong kind of cement was used.

Mr. Bowles: All right, we can come back to that later.

Q. Then, Mr. Marus, you say that you have used Lumnite only as a grout and never as a base?

A. No, sir.

Q. Is that the general practice in using Lumnite in the quarry tile trade?

A. We use it for color. Ninety percent of it for color, so acid won't burn it.

By The Court:

page 37 } Q. The question is, do you ever use the same stuff for the base?

A. No, sir, just for grout.

By Mr. Bowles: (Cont'd.)

Q. Is that the general practice, if you know, in the quarry tile industry?

A. Yes, sir.

Joseph P. Marus

Q. Now, did you use squeegees and brooms?

A. The Universal Atlas Company recommends that their Lumnite cement be troweled.

Q. Were squeegees and brooms used?

A. No. We always trowel all of our joints; the cement joints, always.

A. "Depth of Lumnite cement does not extend for the full thickness of the quarry tile." How thick is the quarry tile?

A. One half an inch.

Q. "Five pieces of quarry tile have been removed. For two of these tiles, depth of Lumnite cement was less than one-eighth of an inch. In no case did the Lumnite cement completely fill the joint. Remainder of joint below surface of the Lumnite was excess mortar from the cement setting bed."

In the process of setting quarry tile, doesn't the setting bed mortar, when you hammer—

The Court: He said it comes up.

A. Yes, sir.

page 38 } Q. And you then trowel in the grout or the joint?

A. Right.

Q. The mortar that comes up and the Lumnite type mortar that you put in and trowel, does that—

A. They adhere to one another.

Q. "The Lumnite cement quarry tile joints have not been cured with water as recommended by the Universal Atlas Company." Were they cured with water?

A. We always water cure them; wet them down every day.

Q. On this job, do you know one way or the other whether they were cured or not?

A. Yes, sir.

Q. They were?

A. Yes, sir.

Q. In your opinion, Mr. Marus, the Lumnite that you put into these joints on top of the Portland cement bed, does that give a better job than a pure Portland bed and a pure Portland grout joint?

Mr. Runkle: I object to the answer of that question, unless he is shown as an authority of the property of cement. I think he is qualified as a contractor in tile. I object to that question.

Joseph P. Marus

The Court: I don't think it takes a laboratory man. I will allow him to answer.

page 39 } Mr. Runkle: Exception.

A. Yes, sir, it is. Yes, sir.
Q. Is Lumnite in any way the equal of black Furnane?
A. No, sir.
Q. Did you intend on this job to substitute—

The Court: Well, he could not have intended to if he did not know about it. He said he was following the plans and specifications.

Q. Can any man that knows about laying quarry tile look at Lumnite joints and look at black Furnane joints and tell the difference?
A. Yes. Yes siree.
Q. Is the color different?
A. It is blacker and more uniform.
Q. I hand you a copy of your letter of April 10, 1964 to Mr. Worley. Doesn't the second paragraph of your letter say, "We take exception to Mr. Johnston's statement concerning our responsibility in connection with Section Number 20 and Addendum Number 1 of the specifications. We never received Addendum Number 1, and this fact was pointed out to you in our letter of January 22nd, and was discussed at length by telephone.

Again, we bring to your attention that on your contract letter dated December 6, 1962, you accepted our proposal for the ceramic tile and quarry tile, and Alternate

page 40 } Number 2. No mention was made of Addendum Number 1. As a matter of fact, we had no knowledge of same."

A. Yes.
Q. It goes on to say, "As discussed with you previously, we would hate to see anyone get hurt, and are quite willing to work with you. However, the responsibility for this mistake is not ours, and we cannot, therefore, assume this loss. If you will forward us an order to remove this quarry tile floor, we would only be too glad to do so at once, and hold this cost to a bare minimum."
A. Yes, sir.

Joseph P. Marus

Mr. Bowles: We would like to introduce this letter as Plaintiff's Exhibit 15.

NOTE: The above-mentioned copy of letter is marked PLAINTIFF'S EXHIBIT NO. 15, and filed in evidence.

Q. Now I hand you the next letter of April 13, 1964 from Mr. Arthur C. Worley to your company, and ask, doesn't this letter say this: "We have received your letter of April 10, 1964"—which is Plaintiff's Exhibit 15—"and do not understand your statement concerning the Addendum No. 1 of the specifications. The Architect has rejected the installation of quarry tile floor in mess hall area simply because it was not deposited in a workmanlike manner and in accordance with the manufacturer's recommendations.

The Architect's letter stated, had the Lumnite
page 41 } cement been deposited properly, they would have been willing to recommend its acceptance to the owners in accordance with their memorandum of December 9, 1963.

We have attempted for over three months, to assist you in getting the approval of the floor as it was installed using the Lumnite cement because your firm did not receive the Addendum Number 1."

A. Yes, sir.

Q. "We did this in good faith until certain areas of the tile floor were removed for inspection by the Universal Atlas Company. Upon their report and inspection of the Architect we were advised of the misuse of the product Lumnite. We will not defend or accept any poor workmanship." And it goes on, and skipping down, "It has now become urgent that this floor be corrected to meet the specifications or removed and replaced to meet the specifications. Please advise by return mail, at once, if your firm will correct the conditions as set forth in the Architect's letter of April 3, 1964. If your firm will not correct this condition at once, we will be forced to have a local subcontractor do so, and all cost deducted from money due you to complete work under our Contractural Agreement of December 6, 1962." Now, did you reply to that letter?

A. Yes, sir.

Mr. Bowles: Can we introduce this as Plaintiff's Exhibit 16?

page 42 } NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 16, and filed in evidence.

Q. I hand you a letter dated April 20, 1964, or a copy of a letter addressed to the Worley Brothers, Attention Mr. Arthur C. Worley, and signed by you as Mr. J. P. Marus. Is this letter the reply to Plaintiff's Exhibit 16?

A. Yes, sir.

Q. And it reads: "We hereby advise you that we have decided to proceed with the removal of the Lumnite cement from the joints of the quarry tile floor in the mess hall of the Richmond City Jail, and to replace this cement with black Furnane, as directed in your letter of April 13, 1964.

We point out again, however, that Addendum Number 1 of the specifications was not in any way a part of our contract with you. The existence of this addendum to the specifications was never brought to our attention, nor was a copy ever furnished to us prior to the time the mess hall floor was laid with Lumnite cement. Consequently, we expect to be paid for the extra cost involved in our complying with a specification that was not a part of our contract with you. Our action in this replacement work is subject to our reservation of all of our rights to require you to pay us for this extra expense and shall not constitute in any regard a waiver of such rights. The extra expense mentioned above will be in addition to our right to additional pay for the use of black
page 43 } Furnane in the kitchen and dish washing area, as set out in our letter to you of January 22, 1964."

A. Yes, sir.

Mr. Bowles: I ask that this be admitted as Plaintiff's Exhibit 17.

NOTE: The above-mentioned copy of letter is marked PLAINTIFF'S EXHIBIT NO. 17, and filed in evidence.

Q. Now, I hand you a letter dated April 22, 1964 from Mr. Worley to your company, and he states: "We have received your letter of April 20, 1964"—which is the letter just introduced in evidence, Plaintiff's Exhibit 17—"stating your firm has decided to proceed with the removal of the Lumnite cement from joints of the quarry tile floor in mess hall area, and to replace this cement with black Furnane as per Archi-

tect's specifications. As of this date nothing has been done to comply with our letter of April 13th, 1964. We feel a reasonable amount of time has elapsed since our notice and this corrected work must be done at once in order that no further delay is encountered. It has now become urgent that this operation be performed in order that other trades may bolt their equipment through the quarry tile." Did you receive this letter?

A. Yes, sir.

Mr. Bowles: I would like this to be admitted as Plaintiff's Exhibit 18.

NOTE: The above-mentioned letter is marked
page 44 } PLAINTIFF'S EXHIBIT NO. 18, and filed in evidence.

Mr. Runkle: If the Court please, we might be able to save time if he simply identifies the letter and not read the contents.

The Court: Well, it would save time, but it would not save me any time. I have to follow this as we go along.

Q. I hand you, Mr. Marus, a letter dated May 8, 1964, from you to Worley Brothers. I will just read you portions of it. You write and say, "One full week has elapsed since the date you promised the writer verbally that you would mail us the addendum pertaining to filling the quarry tile joints with Atlas Mineral Products Company's black Furnane. To date, we have not only failed to receive this addendum from you, but have no further word whatsoever from you.

It is rather ridiculous for you to expect us to proceed with instructions that we have never received." To this point, May 8, 1964, you still did not have Addendum Number 1?

A. Yes, sir.

Q. All right. "I have already advised you verbally, but am writing this in order to go on record with you. We are now cutting the joints out in the quarry tile floor, and we will refill the same with regular Portland cement. This is the only thing we can do with the information we have in our contract, and on our record as of this date.

page 45 } Again, we point out to you, that our work was performed in complete accordance with the contract we now hold."

A. Yes.

Mr. Bowles: I ask that this be admitted as Plaintiff's Exhibit 19.

NOTE: The above-mentioned copy of letter is marked PLAINTIFF'S EXHIBIT NO. 19, and filed in evidence.

By The Court:
Q. Was that what you intended to do?
A. By the original specifications.
Q. I know, but refill with regular Portland cement. In May you were not thinking of doing that, were you?
A. Well, that is what my contract called for.
Q. You wouldn't gain anything by doing that?
A. No, sir. I was going by what the contract called for.

By Mr. Bowles: (Cont'd.)
Q. Mr. Marus, your statement about refilling with Portland cement—does the fact of that mean, if you don't tell me what to put in, I will put in the mortar called for by the specifications?
A. That is right.
Q. Was that a message of urgency to Mr. Worley to send you Addendum Number 1?
page 46 } A. Yes, sir.
Q. I hand you a letter dated May 8, 1964, from Mr. Worley to your company, that enclosed a copy of Addendum Number 1 and Addendum Number 2?
A. Yes, sir.

Mr. Bowles: I ask that that be filed as Plaintiff's Exhibit 20.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 20, and filed in evidence.

Q. I hand you a copy of Addendum Number 1, dated August 7, 1962, and ask you, is that the Addendum Number 1 that was sent you?
A. Yes.
Q. Is that the first Addendum Number 1 that was ever sent you?
A. Right.

Joseph P. Marus

Q. I ask you with regard to Section 20, Ceramic and Quarry Tile, if Addendum Number 1 does not say, under "Setting, Grouting and Cleaning. Set in accordance with Specification Number 3 of American Standard Specification A108-1958, except fill all joints within the quarry tile with black Furnane instead of with pointing mortar."
A. Yes, sir.

Mr. Bowles: I ask that Addendum Number 1 be filed as Plaintiff's Exhibit Number 21.

page 47 } NOTE: The above-mentioned Addendum Number 1 is marked PLAINTIFF'S EXHIBIT NO. 21, and filed in evidence.

Q. I hand you Addendum Number 2, dated August 10th, that was also included with that letter. Is it not a fact that Addendum Number 2 does not alter in any way the quarry tile?
A. It has nothing to do with the quarry tile.
Q. But does delineate an area of the terrazzo?
A. Yes, sir.

By The Court:
Q. You have been paid for the terrazzo, there is no problem?
A. Oh, yes, sir, I have been paid for the terrazzo.

Mr. Bowles: I ask that this be marked Plaintiff's Exhibit 22.

NOTE: The above-mentioned Addendum Number 2 is marked PLAINTIFF'S EXHIBIT NO. 22, and filed in evidence.

Q. I hand you a copy of a letter dated June 15th, from Mr. Worley to your company, and an enclosed letter dated June 10th, from Miles Cary Johnston to Worley Brothers, and ask you whether this does not have to do with the method in which the repairs, or the redoing of the floor joints is to be done?
page 48 } A. Yes, sir.
Q. And it says there, "Before applying Furnane joints in the dining room quarry tile floor, all the old mortar joint material must be removed from the quarry tile."

Joseph P. Marus

How did you go about removing it?

A. We used a saw with diamond wheels on it to cut the joints out.

Q. Did that take a considerable time?

A. Many, many man-hours.

Q. Did you do any of it yourself?

A. I started them off doing it; how to do it.

Q. In the process of that, you tore up all of the joints in the dining hall?

A. We cut all the joints out. We cut them out.

Q. In the process of cutting those out, could you tell about what the total application of Lumnite was?

A. Lumnite, or?

Q. On an average, if you are able to say, how much Lumnite was in the joints?

A. In money or bags?

Q. No, in depth of it.

A. I would say fifty percent of it.

Q. Is that a normal grout?

A. Yes, sir.

page 49 } Q. Now, this letter of June 10th from Mr. Johnston goes on to say, "A considerable number of quarry tiles in the mess hall have been damaged and must be replaced."

A. Naturally, if your saw got off a little bit, and if you get by the wall you got them off by hand.

Q. Did you also have people walking over this?

A. At that time it would not make any difference if you walked over it.

Q. It also says, "Some of the Furnane joints in the kitchen and wash room are too low and not acceptable."

A. Well, that happens. Furnane settles. It is a poured material, it settles.

Q. Is that something normal?

A. Yes, sir.

Q. You don't claim that you are a perfectionist, do you?

A. That type joint has to seek its level and you will probably get a low joint sometimes.

Q. And you replaced the joint?

A. Refilled it. Added more material to it.

Q. Is that something that is done on every job?

A. Yes, sir.

Q. And is necessary?

A. Yes, sir.

Joseph P. Marus

Mr. Bowles: We will file these letters together as Plaintiff's Exhibit Number 23.

page 50 } NOTE: The above-mentioned letters are marked PLAINTIFF'S EXHIBIT NO. 23, and filed in evidence.

Q. Now, I hand you a copy of a letter dated June 17, 1964, written by you to Mr. Worley, acknowledging receipt of Plaintiff's Exhibit Number 23, and then you say, "We are doing all that is humanly possible to complete this job. I believe that you will agree that we have worked diligently to help you out of this mess, which is no responsibiity of ours."

A. Yes.

Q. Did Mr. Worley ever state to you or deny to you that it was his responsibility?

A. No, sir.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NUMBER 24, and filed in evidence.

Q. I hand you a letter dated August 4, 1964, written by you to Worley Brothers, saying, "We are enclosing our invoice for additional work performed on the above project. We trust that we will have your check to cover this invoice promptly as it represents only costs and overhead." Is this the invoice for the Furnane joints?

A. For cutting the joints out and putting Furnane back in the joints and sealing the floor.

Q. The invoice is dated August 4, 1964, and it reads: "Re: Jail Facilities, City of Richmond. Installing Black Furnane Joint in Quarry Tile Floor in Kitchen per your page 51 } order, $4,422.50." Now, the kitchen is the area where you never laid anything?

A. Never. No, sir.

Q. So you did not have to tear up anything in the kitchen?

A. No, sir.

Q. Then you have, "Removing Cement Joint in Mess Hall, $2,658.45."

A. Yes.

Q. Then you have, "Installing Black Furnane Joint in Mess Hall, $7,644.80."

A. Right.

Q. A total amount due of $14,725.75?

Joseph P. Marus

A. Yes, sir.

Mr. Bowles: I ask that this be filed together as Plaintiff's Exhibit Number 25.

NOTE: The above-mentioned letter and invoice are marked PLAINTIFF'S EXHIBIT NO. 25, and filed in evidence.

* * * * *

page 52 } By Mr. Bowles: (Cont'd.)

Q. Mr. Marus, I believe before we recessed, we introduced your invoice, Plaintiff's Exhibit Number 25?

A. Yes, sir.

Q. Now, excluding, using approximations but excluding the $2,658.45 amount for the removal of the cement joints in the mess hall, that would leave an approximate cost, just by the use of Furnane, of approximately $12,000.00. Is Furnane that much more expensive and difficult to install than Portland cement?

A. Yes, about twice.

Q. If you had bid this job on the basis of using Furnane, what would your bid have been?

A. For the quarry tile?

Q. Yes.

A. Around $24,000.00, $25,000.00.

Q. I hand you a letter dated August 5, 1964, from Mr. Worley to your company, in response to the statement that you sent, the bill you sent, and reading the third paragraph, Mr. Worley states: "If you disagree with their interpretation," their being the architects, "or feel your material was installed in accordance with the manufacturer's recommendations and installed in a reasonably good workmanlike manner, I think you should take recourse on the parties that rendered the interpretation to remove the cement and install the black Furnane joints as per your invoices." Now, is it not a fact that you had installed no joints at all in the kitchen area?

page 53 } A. Right.

Q. Has there ever been any claim regarding the workmanship, regarding the Furnane that you installed in the kitchen area?

A. No, sir.

Joseph P. Marus

Q. And doesn't the installation of the Furnane in the kitchen area on your invoice amount to $4,422.50?
A. Yes, sir.
Q. And the remaining portion has to do with removing the Lumnite in the mess hall area and installing Furnane there?
A. Yes, sir.
Q. So, would it be fair to say, Mr. Marus, that if the workmanship of putting in the grout in the mess hall area had been poor and it had to be taken up, that the cost there to you then would have been only $2,658.45?
A. Yes, sir.

Mr. Bowles: I would like to file this letter as Plaintiff's Exhibit 26.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 26, and filed in evidence.

Q. One other question, Mr. Marus. Your bill, Plaintiff's Exhibit Number 25, has not been paid?
A. No, sir.

page 54 }

* * * * *

CROSS EXAMINATION

By Mr. Runkle:
Q. Mr. Marus, I want to show you now your Exhibit Number 3, which is called proposal.
A. Yes, sir.
Q. Which you submitted. This appears to be a carbon copy of a proposal to Worley Brothers on the Jail Facilities for the ceramic and quarry tile and terrazzo. Was this proposal ever accepted by Worley Brothers Company?
A. No, sir.
Q. Number 3 was not?
A. I just sent it to him. He did not sign it and accept it.
Q. Then this did not form any part of the contract, is that correct?
A. Yes, sir.
Q. Referring to your letter dated January 22, 1964 to the Worley Brothers Company, which is Plaintiff's Ex-

page 55 } hibit Number 11, I ask you to look at that. What is that letter all about?

A. This is in answer to the letter that Mr. Worley talked to me about the floor; for me to give him a breakdown, so he can go to the Architect.

Q. The date of that letter is January 22, 1964, is that correct?

A. Right.

Q. And this was after the Architect had discovered that the wrong material had been used, is that right?

A. Evidently so. Yes, sir.

Q. And it was after you had been told to replace the material?

A. I don't think we were told to replace it at this time. Mr. Worley asked me to give him a breakdown so he could give it to the Architect; so he could see if he could not get the Architect to accept the Lumnite joints.

Q. That is to get the Architect to accept the work that you had done at that stage?

A. Yes.

Q. Now, you quoted a figure in there, I think, of so much per square foot. Was that not intended to be a credit? I believe you call it 10¢ per square foot?

A. Right.

Q. That would be a credit to whom?

page 56 } A. To the Owners, or to the Architect.

Q. The City of Richmond?

A. Yes.

Q. Why were you proposing the credit on work that you had done?

A. Well, I was going on what Mr. Worley asked me to do.

Q. Are those Mr. Worley's figures?

A. No, but these are the figures that we derived.

Q. Who?

A. Mr. Worley and myself. And we talked about it. We were going to give him some sort of a credit.

Q. Why were you going to give him a credit?

A. Mr. Worley wanted me to offer him a credit, because we never received the addendum. So he wanted me to offer a credit.

Q. Wasn't the credit to be offered because the work was not as called for in the plans and specifications according to the Architect's ruling?

Joseph P. Marus

A. According to the plans and specifications it was installed.

Q. Didn't the Architect tell you that these were not in accordance with workmanlike conditions and he, therefore, would not consider them?

A. We did not have Addendum Number 1.

page 57 } Q. You are not answering my question. Why the credit?

A. Mr. Worley asked me to write the letter so he could present it to the Architect.

Q. Why was the question of a credit ever brought up, is what I am trying to get at.

A. It came from the Addendum Number 1.

The Court: No, I don't think you understand.

By The Court:

Q. The Architect discovered the mistake and that put the general contractor and you over the barrel, and you were trying to get it straightened out, is that right?

A. Right.

By Mr. Runkle: (Cont'd.)

Q. Do you know whether this was proposed to the Architect, these figures in here?

A. No, sir, I don't.

Q. You sent this to Mr. Worley, Worley Brothers. You don't know what he did with it, or did you discuss it yourself with him, too?

A. No, sir, I just sent it to Mr. Worley.

Q. Did you not offer a credit yourself to the Architect or write anything in this connection?

A. No, sir.

page 58 } Q. Would you refer to the last paragraph. "The above, I have outlined for your own information in order that you can get the picture clearly, and I have omitted this information in the letter which I have enclosed for your submittal to the architects." There was another letter, wasn't there, for the Architect?

A. Yes, but not that letter. That letter did not go to the Architect.

Q. All right. Mr. Marus, I want to ask you about this copy of the letter from Miles Cary Johnston, Jr., dated April 3, 1964, Plaintiff's Exhibit No. 14. This has been read before, but I would like to read it again, if I may. This letter is to

you from Worley Brothers. "Gentlemen: Reference is made to our memorandum of December 9, 1963, concerning substitution of Universal Atlas Lumnite Cement Mortar for the specified black Furnane in quarry tile joints. We have concluded our investigation and have decided that Lumnite Cement quarry tile joints shall be removed and replaced with black Furnane as set forth in Section No. 20 and Addendum No. 1 of the specifications. A summary of our findings follows: Joints between the quarry tile have been grouted with Universal Atlas Company Lumnite cement." Now, there is no question that that was done at this stage in the proceedings, is that right? You used Lumnite cement?

A. Yes, sir.

Q. It goes on to say, "Specifications call for joints to be filled with black Furnane. This substitution was page 59 } made without the Architect's approval." Did you at any time submit to the Architect the fact that you were going to use Lumnite cement instead of what the specifications called for?

A. We were using the Portland cement. We had no idea of using anything but a Portland cement.

Q. I am asking, had you submitted to the Architect the fact that you were going to use Lumnite cement?

A. Lumnite is a Portland cement. It is the same thing as Atlas cement.

By The Court:

Q. Did the subject ever come up?

A. No.

By Mr. Runkle: (Cont'd.)

Q. You never mentioned the word, Lumnite, to the Architect?

A. No, sir.

Q. Did you mention it to Worley Brothers Company?

A. No, sir.

Q. You have used this Lumnite cement many times in the past, I believe you stated?

A. Yes, sir.

Q. You were then familiar with their directions and recommendations for use, I am sure?

A. No, sir. We use it only for color, as I stated page 60 } before. Just for uniformity of color.

Q. Well, you have installed it many times. Don't

you follow their instructions as to use? Is that what you are saying?

A. Right. We use it as color only.

The Court: I don't believe that answers the question. There is a serious doubt in my mind whether he ever agreed to follow the Atlas Company's application instructions.

Mr. Runkle: Well, I will get to that.

The Court: I mean, I am just wondering at this early stage, whether when a man contracts, he is bound by one set of standards. The Architect has a right to be unhappy because he did not follow some of the other standards, which rather appears to be the case from the Architect's letter.

By Mr. Runkle: (Cont'd.)

Q. The next paragraph says, that squeegees and brooms were used to fill the quarry tile joints with Lumnite cement. I believe you testified that the Lumnite cement was troweled in?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Were you there when this job was begun?

page 61 } A. Yes, sir.

Q. You were on the site?

A. Yes, sir.

Q. Did you stay there every day?

A. No, sir.

Q. Do you know from your personal knowledge that a trowel was used to lay each and every—

A. That is the best way to put it in.

Q. Do you know from your personal knowledge?

A. That is our common practice.

Q. All right, you don't know as a fact that each and every piece of quarry tile was laid with a trowel in this case, from your personal knowledge?

A. Are you talking about grouting or laying?

Q. Grouting the tile. You know what the practice is?

A. Yes, sir.

The Court: He said he dug some out and they were compact.

Joseph P. Marus

Q. Mr. Marus, they dug out some of that quarry tile. Were you there when this was done?

A. No, sir.

Q. The Architect in his letter here states that five pieces of quarry tile were removed. For two of these tiles, the depth of the Lumnite cement was less than one-
page 62 } eighth of an inch. In no case did the Lumnite cement completely fill the joint. Now, do you disagree with that finding?

A. No, sir.

Q. He next goes on to say that the Lumnite cement quarry tile joints have not been cured with water as recommended by the Universal Atlas Company, and you testified about the policy that they were cured?

A. We cure all of our joints with water.

Q. Did you cure these joints with water?

A. We wet them every day, yes, sir.

Q. Did you see them wet them every day, personally see this?

A. No, sir.

Q. Then you don't know yourself whether each of these settings, groutings, were cured with water on this job, do you, sir?

A. Well, I have a responsible and reliable superintendent.

Q. Do you know of your personal knowledge that they wet them?

A. It is our practice.

Q. It is your practice, but you don't know in this case, do you, of your personal knowledge?

A. That is right.

Q. Exhibit Number 15, your letter dated April
page 63 } 10, 1964, I would like you to read the last paragraph.

A. "If you would forward us an order to remove this quarry tile floor, we would be only too glad to do so at once, and hold this cost to the bare minimum."

Q. Was an order ever forwarded to you from Worley Brothers Company?

A. No, sir.

Q. Plaintiff's Exhibit Number 20, a letter from Worley Brothers Company to your company, dated May 8, 1964. This letter was put in as Plaintiff's Exhibit but was not read. Would you read it for me, please, sir?

Joseph P. Marus

A. "We are enclosing herewith another copy of Addendum Number 1, dated August 7, 1962 and Addendum Number 2, dated August 10, 1962 which are a part of the specifications for the above project as requested by G. P. Marus."

Q. G. P. Marus is an error, is it? What is it?

A. J. P.

Q. The words, another copy of Addendum Number 1, appear in that letter, do they not?

A. Yes, sir.

Q. Now, Plaintiff's Exhibit Number 23 is a letter from Worley Brothers Company, and attached to it is the letter which I want to question you about, and it is a copy of a letter from the Architect, Miles Cary Johnston. I ask you to read Number 4 from that letter.

page 64 } A. "Some of the Furnane joints in the kitchen and the wash room are too low and are not acceptable."

Q. All right, sir. This letter is dated June 10, 1964. Did you do any additional work to the joints in the kitchen in response to this letter or from anybody else?

A. Yes, sir.

Q. What did you have to do?

A. Just put some more Furnane on top of that joint. You have to, because it settles sometimes.

Q. I believe you testified earlier that the work you had done and had to take up in the mess hall was the only correction or addition you had to make to this job. Didn't you so testify?

A. Sure.

Q. But you are changing your testimony now and saying that you did make a change in the kitchen area by having put more Furnane in the joints?

A. Let me explain that. The Furnane is a joint where it could be that you have one little low place, and you don't have it all over the floor. It probably took in the cleaning process about ten or fifteen minutes to fill those little voids, that is all, where the low places were. The floor wasn't low all over, just a few joints were low.

Q. But you did do additional work there, did you?

A. Certainly. In other words, to do a decent job

page 65 } or workmanlike job.

Q. Plaintiff's Exhibit Number 26, which is a letter from Worley Brothers Company, Incorporated, to your company, dated August 5, 1964. I would like to read the third paragraph.

Joseph P. Marus

"If you disagree with their interpretation"—which is referring to the architects' interpretation of your work— "or feel your material was installed in accordance with the manufacturer's recommendations and installed in a reasonably good workmanlike manner, I think you should take recourse on the parties that rendered the interpretation to remove the cement and install the black Furnane joints as per your invoices."

That is dated August 5, 1964. Prior to this time, had you discussed your workmanship with the Architect, Mr. Johnston?

A. No, sir.

Q. When you first learned that the work was being questioned here in Richmond—and I believe you testified you were called on the telephone and you stated that you told your man to stop work immediately and you came to Richmond, is that correct?

A. Yes, sir.

Q. Did you have a discussion with the Architect at that time?

page 66 } A. No, sir.

Q. About the work?

A. No, sir.

Q. Subsequent to that time, did you ever talk to the Architect or attempt to defend your workmanship as being good workmanship?

A. Well, the workmanship, if I might explain, was the joint he was talking about and it was not the laying of the material.

The Court: Gentlemen, it is no use to discuss the workmanship on the Atlas Company product.

By The Court:

Q. The decision was made to rip it out, I suppose, is that correct?

A. That is right, because the addendum called for black Furnane on this work and we used Portland cement. And that is why it was condemned, as far as the Architect was concerned.

By Mr. Runkle: (Cont'd.)

Q. Isn't it a fact that the Architect and Mr. Worley conferred with the City Officials and attempted to have them

accept the work that had been done, and that credit was proposed for that, isn't that correct?

A. I don't know what they did. I did only—what I did was what Mr. Worley asked me to do. That is what I
page 67 } did it for.

The Court: The letter says he would be willing to make a ten percent concession to the end that it might be accepted.

Mr. Bowles: Your Honor, I think a fair reading of the letter is not that Mr. Marus was willing to make a ten percent concession. He was suggesting that Mr. Worley make a ten percent concession.

Mr. Marus: That is what the gist of the letter was.

By Mr. Runkle: (Cont'd.)

Q. Now, Mr. Marus, can you get the specifications off the Judge's desk there?

A. Yes, sir.

Q. And turn, if you will, to Section Number 20.

A. All right.

Q. Ceramic and quarry tile.

A. Yes, sir.

Q. Now, the contract that has been placed in evidence between your company and Mr. Worley's company, dated December 6, 1962, states that you—in essence I am going to state it to you, correct me if I am wrong—that the Worley Brothers Company accepts your proposal, so much money, to do ceramic and quarry tile in accordance with Section 20 of the project specifications as prepared by the Archi-
page 68 } tect, and Alternate. Complete in accordance with Alternate Number 2 of the said specifications. Is that your understanding of it?

A. Yes, sir.

Q. Do you maintain that your company did do the work in accordance, in strict accordance, with the Section Number 20 of the specifications?

A. Yes, sir.

Q. You do. In the following paragraph of the contract *is* says, "All work enumerated above shall be done in strict accordance with the plans and specifications, and performed so as not to delay the scheduled job progress."

You agree that your company bound itself thereby in those words, do you not?

A. Yes, sir.

Joseph P. Marus

Q. Let's look at Section Number 20, if you will. On behalf of your company you say you have abided by "in strict accordance with the plans and specifications," that is Paragraph 2. Let's look at these specifications. "Materials: Shrinkage Mesh: 6″ by 6″ mesh, No. 10 gauge galvanized welded wire fabric. Use mesh in floor setting bed."

Did your workmen install that wire mesh in the floor?

A. After he was told he didn't put it in, in the first day's work.

page 69 } Q. In the beginning, he did not?

A. That was his oversight.

Q. It was an error, is that right?

A. That is right.

Q. Who are you speaking of?

A. That was the superintendent that was on the job.

Q. What is his name?

A. Still.

Q. Is he here today?

A. Yes.

Q. Who brought it to your attention?

A. To his attention?

Q. To his attention?

A. Mr. Meredith asked him where the wire was, and he is the Architect's representative on the job.

Q. Isn't Mr. Meredith the Clerk of the Works? Is that not his official title?

A. As far as we are concerned, he was Inspector. I don't know what his official title is.

Q. Your superintendent, did he have a set of these specifications with him?

A. Yes, sir.

Q. Did you furnish them to him?

A. Yes, sir.

Q. He did not follow them in this particular case,

page 70 } did he?

A. Well, evidently he made a mistake. He sure didn't.

Q. The next thing in Section 20 says, "Portland Cement: Waterproof type of standard manufacture, gray or white as required."

Did your company install Portland cement, waterproof type of standard manfacture, gray or white?

A. Right.

Q. You did?

Joseph P. Marus

A. Yes, sir.

Q. Is that the material that you used, Lumnite cement, which is dark gray in color, almost black?

A. Black in color.

Q. Doesn't the specification call for Portland cement, gray or white?

A. Well, the gray—in the Portland cement you do go from a light gray to a dark gray or black.

Q. I am asking you now whether your black Lumnite is the same, in strict accordance with the specifications, as we read them, Portland cement, gray or white. Are they the same?

A. Yes, sir.

Q. I must be color-blind. Now, let's go down to quarry tile. The last sentence in quarry tile, would you

page 71 } read that, sir?

A. "Tile is to be factory waxed."

Q. Was the tile factory waxed that you shipped to the job?

A. No, sir.

Q. Did you follow the specifications in that respect?

A. Yes, sir.

By The Court:

Q. Obviously, you didn't.

A. Actually, we submitted samples, but 9″ by 9″ tile was not used, either.

Q. Is that the reason why you did not do it?

A. We submitted samples, right. But 9″ by 9″ tile was not used on the job.

By Mr. Runkle:

Q. Did you obtain the Architect's approval not to use the waxed tile?

A. He approved the sample, and the sample was not waxed.

Q. You know that?

A. Yes.

By The Court:

Q. They approved that and then—

A. Well, the reason for that is that the 9″ by 9″

page 72 } tile, the units are so big, when you run it through the kilns it warps more than a 6″ by 6″. A smaller unit has less warpage to it.

Q. Why do they call it quarry?

Joseph P. Marus

A. It is strictly a clay product, and it is a natural clay, no additives to it. It is a natural clay.

By Mr. Runkle: (Cont'd.)

Q. Turning over to Page 20-2 of Section 20, the second paragraph. Setting, Grouting and Cleaning. Is it your contention that your company complied strictly with the requirements as set forth in this second paragraph?

A. Yes, sir.

Q. See what they are. "Set quarry tile in accordance with Specification Number 3 of American Standard Specification A108-1958." You are familiar with that, are you not, sir?

A. Yes, sir.

Q. I believe they are in evidence, Plaintiff's Exhibit Number 4, Pages 22 and 23. Now, according to Section 3-3.3, Mortars and Mixes, what type of material is specified in the Standard Specification?

A. Portland cement.

Q. Is that what you used?

A. Yes, sir.

Q. You used Lumnite cement, did you not?

page 73 } A. Well, it is a form of Portland cement.

Q. Now, turning to Page 23, 3-3.8, Setting. Number (a). "Place three quarter inch minimum to one and one-half inch maximum thickness of setting bed by dumping it on base, then spread smooth, screed and compact." Did your men do this?

A. Oh, yes.

Q. Did your men set the tile in the cement setting bed or did they use a cement paste of any type?

A. In the cement setting bed, we use a neat cement, what we call poured cement.

Q. No cement paste was used?

A. No. Well, when mixed with water, it becomes a paste when you use it.

Q. But from what you said, your quarry tile, was it not in a cement bed, the setting bed?

A. Well, the bed itself, and then on top of the bed you got a layer of poured cement. That goes to the bed of the tile.

Q. Did you examine the laying of this setting bed, of this cement setting bed?

A. For what reason?

Q. I am asking you whether you did or did not see it done?

A. I saw portions of it done, yes.

Joseph P. Marus

Q. How thick was it put down on the setting bed?

page 74 } A. I don't know how much room they had. It could vary.

Q. Do you know what the specifications—you are familiar with the specifications—what depth is this setting material to be?

A. This setting material can be anywhere from an inch and a quarter up to three or four inches. It does not make too much difference about this; not the bed.

Q. Not the bed, let's say the cement paste.

A. It should be around an eighth of an inch.

Q. An eighth of an inch?

A. Yes.

Q. I want to direct your attention to 3.8 (b) which says, "Total thickness of layer of neat cement between tile and setting bed should not exceed one-sixteenth of an inch."

A. Well—

Q. That is what it says, doesn't it?

A. Yes.

The Court: Is there going to be any evidence that that played any part in this?

Mr. Marus: No.

Mr. Runkle: Judge, it is just another evidence of not following specifications in here, and I think he should have. I think we are entitled to show he did not follow the specifications.

page 75 } The Court: Well, that is very doubtful in my mind, if it has any appropriate value.

Mr. Runkle: I think these specifications are certainly part of the contract.

The Court: Well, I mean to say the depth of the neat cement mortar did not play any part in his taking out and changing it, and anything like that.

Mr. Runkle: Judge, I think it did. It is my understanding that the cement paste bed, let's say, was too thick and came far up between the joints of the tile.

The Court: Well, the Architect says, less than one-eighth inch deep. I think this gentleman has contended that this did not have anything to do with it. I will just have to take the evidence as it comes.

Mr. Runkle: I think what they were speaking of at that time was the grout coming from the top down.

The Court: Yes, but the reason it was shallow—

Joseph P. Marus

Mr. Runkle: It is not following the specifications as set forth in these plans. The setting paste bed should not be over one-sixteenth of an inch, according to (b), which is in evidence here.

Q. Section 3.12, Curing. You testified that your men cured this material, is that right?

A. We wet it every day, yes, sir, with water.

page 76 } Q. Did you see them do it?

A. Well, I was there several times when the floor was wet.

Q. How long did they wet them?

A. They wet them every day.

Q. When were they wet?

A. In the morning when they started working.

Q. And what would they do then? Describe the wetting curing process, if you will.

A. Just flood the floor with water. It is water cured. You bear in mind, this is wintertime, no windows in this area, and there is no heat there. So there is no way for the moisture to dry out of there. It was wet. It was damp in there all the time.

Q. And your testimony is that you witnessed your men curing this tile in the mess hall?

A. Yes, sir.

Q. On many occasions?

A. On the occasions I was there, the floor was wetted down, yes, sir.

Q. Getting back to Section 20. The specifications say, "Set quarry tile in accordance with Specifications Number 3 of American Standard Specification A108-1958, except at vertical joints which are to be filled with black Furnane instead of with pointing mortar." Your definition of vertical joint

page 77 } is what, sir?

A. That would be the base joint.

Q. Base joint?

A. Right.

Q. Which base, where?

A. The base that we had to put in around the dishwash area, I believe, and around the mount of the ranges.

By The Court:

Q. Against the wall?

A. Yes, sir, where it goes up against a wall or partition, yes, sir.

Joseph P. Marus

By Mr. Runkle: (Cont'd.)

Q. Did any quarry tile, according to the plans, go up the wall?

A. No, sir, just the base only.

Q. It was flat and horizontal to the wall where it hit the wall, was it not?

A. It went under the glazed block wall.

Q. But it was level with the rest of the floor, was it not?

A. We met the bottom of the wall, right, the finished wall.

Q. And it was level and flat with the rest of the tile out on the floor?

page 78 } A. No, it wasn't flat, it was against the wall. It was vertical, a base. Just like that wood base there against the wall.

Q. Well now, wasn't it glazed tile that was going vertically up those walls? It wasn't quarry tile that was being based to the wall, was it?

A. Yes, it was. We had about sixty-five or maybe seventy feet of quarry tile based on, in the job.

Q. Where was that?

A. In the kitchen area.

Q. In the kitchen. You are familiar with the term, vertical joints? You have seen it before this job?

A. Yes, sir.

Q. There is no question in your mind as to what it is?

A. No, sir.

Q. If you were told that many other suppliers in this area called the Architect and were not sure just what it was, would you understand that fact?

A. If what? Repeat that please.

Q. If I told you that many other tile installers called the Architect and wanted clarification of vertical joint, would you understand that?

A. Well, I know what a vertical joint meant; that it is on the base part. It is not the floor.

page 79 } Q. There was no misunderstanding on your part, was there?

A. As far as vertical joint, no, sir.

Q. You have used black Furnane before, have you not?

A. Yes, sir.

Q. And you are very familiar with its properties?

A. Yes, sir.

Q. Are you familiar with its instructions for use?

A. Yes, sir.

Q. Have you seen their materials and some of their information concerning its use?

A. Well, what pertains to the tile installation, yes, sir.

Q. I would like to show you this publication, which is a publication from the Atlas Furnane Company, AIA File Number 23, and ask you if you have ever seen this?

A. Not this particular one.

Mr. Bowles: Your Honor, is there any date on this thing; whether this was in existence at the time this happened?

The Court: Well, he just said he has not seen that, but he is familiar with the literature.

By Mr. Runkle: (Cont'd.)

Q. This is some of the literature?

A. This is new. This is 1965.

page 80 } Mr. Bowles: I am going to object to a 1965 book, Judge. All this happened in 1963.

The Court: Well, he said he is familiar with their literature.

Mr. Bowles: I have the 1959 book, if he wants to use that.

Mr. Runkle: Let me see it.

Q. Here is a book dated 1959, from the Atlas Furnane Company. Have you seen this?

A. Yes, sir.

Q. You have?

A. Yes, sir.

Q. I would like for you to look at page—it does not seem to be numbered, but it would be Pages 3 and 4. I show you this drawing in there. Have you seen that?

A. I have not seen it. I see it now.

Q. Do you see here the tile? There is a line to Number 1, vertical joint, going to the interior of the tiles. Is that not the way the drawing presents it?

A. Yes, sir.

Mr. Runkle: We would like to present this as Defendant's Exhibit.

The Court: All right.

NOTE: The above-mentioned literature is marked DEFENDANT'S EXHIBIT NO. 1, and filed in evidence.

Joseph P. Marus

page 81 } Q. Now, Mr. Marus, I think you take the position that Specification Section Number 20 calls for the use of Portland cement, is that right?

A. Yes, sir.

Q. Isn't the material that you used, Lumnite, more expensive than common Portland cement?

A. Oh, yes, sir.

Q. Is it similar in appearance to black Furnane?

A. No, sir.

Q. Is it similar in appearance? Is it like it in any manner?

A. No, sir.

Q. In what way is it different?

A. Well, this has sand mixed with it and you get a rougher texture joint, where with the Furnane you get a smooth glassy joint.

Q. Are they similar in color?

A. No, sir, because you can see the two, they are not equal in color or looks, either one.

Q. What is the color of Lumnite?

A. Lumnite is a dark gray.

Q. I understood you to say Lumnite was a black—

A. Well, dark gray, or some people could call it a black.

Q. What is the color of black Furnane?

page 82 } A. It is jet black. It is shiny black.

Q. You say there is a difference between the degree in the blacks?

A. In other words, it is a jet black and it is just like glass. It is a finish like asphalt, like this joint right here (indicating).

Q. You are familiar with black Furnane. What are the features of black Furnane? Why is it called for sometime when you use it?

A. Black Furnane, when it is put down as it is called for—it has two components. There is a powder and a liquid catalyst. And you have a red Furnane, that is the bond coat; you bond the floor with red Furnane and fill the joints with black Furnane.

Q. Why would an Architect specify black Furnane over any other type of grouting material?

A. Well, for the alkali that is in it, for one thing, plus the greases, plus the acids in the vegetables, I suppose.

Q. In other words, do I understand you to say that the black Furnane is more resistant to these things than is Portland cement?

Joseph P. Marus

A. Oh, certainly so. It is.
Q. It is?
A. Yes, sir.
page 83 } Q. Is Lumnite more resistant to these stains than ordinary Portland cement?
A. Well, they don't show the stains, let's put it that way; where a Portland cement is lighter after you wash it with acid, it will darken if you spill grease on it. You can see the difference.
Q. You elected to use Lumnite cement instead of common Portland cement in this case, which is called for by the specifications, is that right?
A. Just for color.
Q. However, it cost more, does it not?
A. Well, it cost a little more, yes, sir.
Q. You are in business to make money, aren't you, Mr. Marus?
A. I hope so.
Q. You don't generally give anything away on the job unless you have to, do you?
A. Well, let's put it this way: If it makes for a better job, we don't let a hundred, or two hundred dollars, stand in our way.
Q. You go beyond the specifications of requirements?
A. We try to give the man what he called for.
Q. But you didn't give him in this case what he called for?
A. As far as we knew, we did.
page 84 } Q. Did you give him factory waxed tile?
A. No, sir. We did, in the kitchen.
Q. Mr. Marus, I think you testified that you received a set of the specifications in the mail from Worley Brothers Company, is that right?
A. Plans and specifications?
Q. Yes.
A. Yes, sir.
Q. How many sets did you receive from them?
A. One.
Q. One set?
A. Yes, sir.
Q. What use was made of that set by you and your company?
A. What use was made of it?
Q. Yes.
A. We used it to make a take-off.

Joseph P. Marus

Q. You mean your bidding figures?
A. Yes, sir.
Q. Thereafter, what use was made of it?
A. The plans and specifications stayed there.
Q. Stayed in your office?
A. In our office, right. We sent Mr. Worley the proposal.

page 85 } Q. The men who did your job, were they your regular employees or did you hire someone in Richmond, or do you know about that?

A. The mechanics, they were my regular employees.
Q. They came from North Carolina, is that right?
A. Yes.
Q. Did they bring with them a set of plans and specifications?
A. Yes, sir.
Q. Did they bring yours with them?
A. Yes, sir.
Q. I understood you to say they remained in your office?
A. Well, you said after I figured the job. But they remained in our office until the negotiation was made with Mr. Worley.
Q. When the job began, what happened to your plans and specifications?
A. They go with the superintendent.
Q. Who was he?
A. At that time, it was Frank Varternelli, which is the terrazzo, which has no bearing on this. Mr. Still, J. F. Still, was the tile superintendent.
Q. And you had occasion to visit the job site on several occasions and see some of the work going on, did you not?

page 86 } A. Yes, sir.

Q. Did you ever inspect the plans and specifications that were in the possession of Mr. Joseph Meredith, Clerk of the Works?

A. I might have gone to the plans, made reference to the plans about an area for tile that had to be done, something like that.
Q. You don't recall whether you did or did not. Do you think you did?
A. I know we went to him to see about the strips for the terrazzo. We had to find out where the lay-out of the strips were going to be.
Q. So you examined his copy on one occasion at least?

Joseph P. Marus

A. I suppose I did. I looked at his copy for the specific thing I was looking for.

Q. You only had one copy and it was up here on the job when the job was being put in, is that right?

A. Yes, sir.

Q. Is it your practice, Mr. Marus, to proceed to do a job of this size with only one set of plans and specifications?

A. Yes, sir. That is all we usually get, one set.

Q. You never requested any additional sets?

A. If you did, you wouldn't get it.

page 87 } Q. Did you, or your superintendent, ever attend weekly meetings that were held on the job, discussing progress?

A. That, I cannot say.

Q. You have not yourself?

A. I might have been here when one meeting was called, but I wouldn't swear to it. I probably just accidentally came in and they had a meeting. I don't know whether my superintendent attended a meeting or not. If they were told to, I suppose they would.

Mr. Runkle: I think that is all.

RE-DIRECT EXAMINATION

By Mr. Bowles:

Q. With regard to Plaintiff's Exhibit Number 11, Mr. Marus, that you were questioned about, a letter of January 22, discussing these credit items, a ten percent credit. Is that a ten percent credit that you suggested that Mr. Worley himself give the owners, the City?

A. Yes, sir.

Q. Was there any suggestion that you would make any credit?

A. I wouldn't make any concession of credit. I didn't have any to make.

Q. Was this letter of January 22nd written at the request of Mr. Worley?

page 88 } A. Yes, sir.

Q. Why did he want you to write him this letter?

A. Because he wanted to see if he could not get this floor passed.

Q. Get the job accepted as it was?

A. The joints accepted, yes.

Joseph P. Marus

Q. Now, I believe Exhibit 20 was the letter which was read to you by Mr. Runkle, in which Mr. Worley sent forward a copy of Addendum Number 1 and Addendum Number 2 and said, I am sending you another Addendum Number 1 and Addendum Number 2. I hand you a letter which I neglected to mention before, dated May 14, 1964, from you to Mr. Worley.

A. "We hereby acknowledge receipt this date of Addendum Number 1, and Addendum Number 2, which you enclosed with your letter of May 8th to us. This is the first copy of Addendum Number 1 ever received by this office."

Mr. Bowles: Could we file that? Perhaps we could put it in as Plaintiff's Exhibit 20A?

The Court: Well, it will be Number 27.

NOTE: The above-mentioned letter is marked PLAINTIFF'S EXHIBIT NO. 27, and filed in evidence.

Q. You were asked questions concerning the work in the kitchen and the low joints. Is this additional type of work, such as low joints on a job and repairing this, is that something that is normal?

page 89 } A. That is right.

Q. The bill that you sent Mr. Worley, does that include any charge for correcting low joints?

A. No, sir.

Q. The bill which was introduced as Plaintiff's Exhibit Number 25?

A. No, sir.

Q. It does not include any charge for that?

A. No, sir, no low joints.

Q. Now, turning to Plaintiff's Exhibit 14, which is a letter, or part of it is the letter of April 3rd that Mr. Johnston wrote, the Architect, that you were requested to read, by Mr. Runkle. I'll read to you part of the concluding paragraph. This is the letter that set out the things as to why he would not accept the joints in the mess hall area, and it concludes as this:

"As the Lumnite cement has not been installed in accordance with recommendations of the Universal Atlas Company, we have decided that it cannot be accepted in place of the specified black Furnane."

Now, was there any attempt on your part to put this Lumnite in, in place or for black Furnane?

The Court: We have been over that. He did not know about the black Furnane.

By Mr. Bowles: (Cont'd.)

page 90 } Q. The decision, Mr. Marus, to not accept this, was not made on the basis that what was there was not as good as Portland cement, was it?

A. No, sir.

Q. With regard to Defendant's Exhibit Number 1, this brochure from the Atlas Company, and this picture in here that points to vertical joint, from your knowledge of the trade of tile setting, what Atlas calls a vertical joint would everybody else call a vertical joint?

A. No, sir. I don't.

Q. From having looked at this brochure, don't the Atlas people in the use of black Furnane say, use it with a red Furnane?

A. Oh, yes, sir.

Q. Base?

A. Yes, sir.

Q. Now, did Addendum Number 1 specify that you use a red Furnane base?

A. No, sir.

Q. In other words, black Furnane on Portland?

A. Right.

Q. And not in accordance with the recommendation of the people that made Furnane?

A. No, sir.

* * * * *

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JOSEPH F. STILL, a witness, called on behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Vaughan:

Q. Would you state for the Court your name and age, please?

Joseph F. Still

A. Joseph Ferman Still. Age, sixty-two.
Q. Where do you work, Mr. Still?
A. Where?
Q. Where and for whom?
A. Marus Marble and Tile Company, Greensboro.
Q. What is your job for Marus?
A. Well, general superintendent for tile; whatever work is assigned to the job.
Q. Superintendent of tile?
A. Yes.
Q. How long have you been in the tile business?
A. Forty years.
Q. How long have you worked for Mr. Marus?
A. Twenty years.

Q. What does the superintendent on the job
page 92 } usually amount to?

A. Well, he keeps up with the work according to the specifications and plans, and he supervises the men to see if they do the work accordingly with the plans and specifications.
Q. Does the superintendent normally do any work himself?
A. Why sure. Sure.
Q. Do you work along with the men, too?
A. I do.
Q. Were you superintendent on a job up here in Richmond?
A. I was.
Q. The City Jail?
A. In the tile work, yes.
Q. Did you have anything to do with terrazzo?
A. I helped a little with it, but I had nothing to do with the supervision.
Q. Do you recall approximately when you began working on the tile part, the quarry tile part of it?
A. I cannot tell you exactly when it was. It was in winter. It was very cold, but I cannot tell you exactly what part of the year it was.
Q. Could you tell us if any problem arose on that job concerning wire?

A. My attention was called to it after putting in
page 93 } a piece the first day.

By The Court:
Q. Where were you working then?
A. In the mess hall. Then, Speck called my attention to it

that I was supposed to have reinforced wire and I said, I am sorry, but I overlooked it. I said, my mistake. I said, now you tell me what to do. He said well, you got to have reinforced wire underneath the rest of it. I said well, how about that piece I got in, and he said, let that go.

Q. How much had you gotten in?

A. I would say about ten percent, Your Honor. So, I immediately sent out and got the wire.

By Mr. Vaughan: (Cont'd.)

Q. Now, you talked about Speck. What is that man's name?

A. Joe Meredith.

Q. He was the building inspector?

A. He was the building inspector, or he was the only inspector that I looked for.

Q. I hand you a piece of paper. Can you identify this?

A. Yes, sir, that is the wire mesh.

Q. Sir? What do these pieces of paper represent?

page 94 A. It is the purchase order for the wire, this is (indicating). This is—oh, this is for the mesh, too.

Q. That represents the wire that was used in this job?

A. That is right.

Q. I believe these pieces of paper show that it was bought from Massey Builders' Supply here in Richmond?

A. Well, I don't know exactly where they bought it, but they sent one of the men up for the wire, and he came back with the wire. What company he bought it from, I don't know. But we did buy building material from this company. So I presume that is the same company it was bought.

Q. Did he return with an invoice like that?

A. Yes, he did.

Mr. Vaughan: I would like to put this in evidence as Plaintiff's Exhibit Number 28.

NOTE: The above-mentioned invoice is marked PLAINTIFF'S EXHIBIT NO. 28, and filed in evidence.

Q. Now, as you were working on this job, how do you work the mortar into the sections between the blocks?

A. How do I work it?

Q. How do you get it in?

A. You mean after it is laid down?

Joseph F. Still

Q. After the blocks are laid down.

A. Well, you take a rich mixture of sand, cement, say two and one—two sand, one cement—and you sweep a

page 95 } very small portion of it in the joints.

Q. When the joints are empty?

A. That is right. You sweep this very small portion in there, trying not to get over an eighth of an inch down in the joints. Then you wet it. That is to keep the blocks from moving whenever you beat them down, see. Then, after you have them beat down to the surface, or as far as you can get them, you sweep the joints back out as much as you possibly can. Then you fill it with what we call our grout.

And then the grouting. After you trowel it in—you trowel the grout in. After you trowel it in, you take a rich mixture of two to one, two sand and one cement, dry, and you put it on the floor, just a little small piece at a time. Then you rub it off, either with burlap or excelsior, and you keep doing this until you get a smooth, even joint. You don't try to put on enough to dry the whole joint down to the bottom, just enough to dry the top, to get a smooth, even joint.

Q. At a job like this, is there any curing process?

A. Well, we cured the floor, I think, to the extent that every morning when we started to put in a new piece of floor, we wet down the old piece.

Q. You are talking about the City job?

A. Yes. Well, we do that on all of our jobs with

page 96 } quarry tile. And I think the floor was amply kept wet for sufficient time. In fact, it was wintertime anyway, and at that time, it was very cold in there and we did have chances of freezing in the area if we'd leave too much water standing on the floor, because it was cold enough, you could hardly work.

Q. After you began laying this floor and so forth, did any problems come up with the laying of it?

A. With the laying?

Q. Yes.

A. No.

Q. How about with the joints themselves?

A. Not until the last day that I was finishing up.

Q. How much of the floor had you laid at that point, or where were you on the floor at the time?

A. I was complete in the mess hall. I completed the last part in the mess hall, and I was supervising my help filling the joints.

Joseph F. Still

Q. What did you actually do on the job? I mean, besides supervising. You said you did some work.
A. What did I do otherwise?
Q. Besides supervise.

By The Court:
Q. You said you were engaged in work.
A. I work with the rest of the men.

page 97 } By Mr. Vaughan: (Cont'd.)
Q. How was the grouting coming along at this point?
A. We had just a very small portion of the balance of the floor to finish when the Architect came in.
Q. Would you describe for us what happened at that point?
A. Well, when he came in, he came through the kitchen door, and I know Joe Meredith was with him and I think the superintendent was on the job with him, too, and he says, what are you using in the joints? I said, I am using Lumnite.

By The Court:
Q. Is this Mr. Johnston himself?
A. Yes, sir.
Q. You were just finishing the mess hall?
A. Yes, sir. I said, I am using Lumnite. He said well, that is not what you are supposed to be using. I said, what am I supposed to be using? He said, you are supposed to be using black Furnane. I said, I have nothing to show me to use black Furnane. The specifications don't call for it. He said yes, they do. I said well, I have nothing showing me. I said, I have nothing to show that. And he said well, come on, we will go up to the office. We went up to the office and they pulled out addenda of some sort and said here is the addenda, change it to black Furnane. I said well,
page 98 } I don't have that addenda. They said, well, your company has it. I said no, I don't think my company does. If they did, they certainly would not try to be using Lumnite instead of black Furnane.
So I immediately went to the telephone and called up my boss.
Q. Had you seen this addendum before this time?
A. I never have seen it yet.
Q. Did you have any plans and specifications with you on the job?

Joseph F. Still

A. I had the company's plans and specifications.

Q. But there was no addenda?

A. There was no addenda. There was addenda changing the concrete terrazzo, but no addenda changing the tile. There was a certificate of some sort. I wouldn't say addenda, but there was some kind of a certificate, or some form of paper, changing the terrazzo. I wouldn't call it addenda.

Q. The first time you learned of any black Furnane requirement, was that at this point?

A. When the Architect called my attention to it.

Q. Except as to the vertical joints?

A. As to what?

Q. The vertical joints.

page 99 } A. Oh, the vertical joints, yes. The vertical joints I knew, according to my school, the vertical joints were the base joints.

Q. And what do you mean by base joints?

A. Well, the base that is up against the wall. The joint that is going up in there.

Q. Had you ever heard a floor joint called vertical joint?

A. Never have in my life.

Q. Now, what occurred after you called Mr. Marus and told him about the situation?

A. Well, he told me to stop where I was. That is where I stopped.

Q. Do you know what occurred next on the job, the next work that was done?

A. No, I do not. Being that it was closing up my part of the work, I came on back in, because I could not go ahead in the kitchen until something was settled.

Q. Did you at any later time go back on that job?

A. Yes, I went back and did the kitchen later on, with the black Furnane joints.

Q. After the kitchen was originally done, were there any joints in the kitchen, or any tiles in the kitchen, you had to work on after it had been originally done?

page 100 } A. I don't recall any tile in the kitchen, except around one drain. The drain was—I don't know. I don't remember now exactly whether the drain was too low, or a piece of equipment or something that had not set there or something. But I do know the drain was changed and we had to go back and tile around it.

Q. So, you had to replace the tile?

A. Yes.

Joseph F. Still

Q. How about the joints in that tile. Did you have to do additional work after initially laying?

A. No, not on the joints. No.

Q. Did you do any work after this on the mess hall floor?

A. The only work I did on the mess hall floor after that, is after Mr. Marus had a bunch of men up there for a long time taking up the joints, Mr. Marus asked me to go up there and see if I could get a piece of the floor approved to fill it with black Furnane. And I came up and worked on a piece, and I would say about 10 by 20 square—not square, but 10 by 20, and cleaned out the joint thoroughly and everything, and Mr. Meredith called the Architect and he approved that one piece. And the Architect said, if you get the rest of it like that, it will be okay. And that is when I left.

Q. Have you worked with black Furnane yourself?

A. Oh, yes, quite a bit.

Q. I assume that you have worked with Port-
page 101 } land cement yourself?

A. Oh, yes.

Q. Is there a difference in the two products?

A. Oh, there is as much difference as night and day. There is no comparison with black Furnane and Portland cement.

By The Court:

Q. The gentlemen you called inspector, what was his name?

A. Meredith.

Q. Well now, this thing about not putting Portland cement in the joints there in the mess hall you claim came as a bit of a surprise to you?

A. Putting black Furnane in the joints, yes, sir.

Q. Well, did it come as a surprise to him, or did he claim he knew it all the time, or did you ever discuss it?

A. We never discussed it at all. Mr. Meredith never said anything in the world to me about black Furnane.

Q. Did he come by and watch you work every day?

A. Oh, yes.

Q. Just never had any discussion about it?

A. But he never said anything in the world to me about black Furnane.

By Mr. Vaughan: (Cont'd.)

Q. Am I correct, the first time anything was
page 102 } said was when Mr. Johnston came by?

Joseph F. Still

A. When the Architect told me I was using the wrong material.

Mr. Vaughan: That is all we have.

CROSS EXAMINATION

By Mr. Runkle:

Q. Mr. Still, were you the superintendent of the quarry tile work from the beginning of this job?

A. I was.

Q. And no one else helped you. You were the only superintendent for Mr. Marus' employees, is that right?

A. On the quarry tile.

Q. On the quarry tile?

A. Yes.

Q. All right. You said you were familiar with the specifications and plans. I assume you mean a book something like this? (Indicating)

A. Yes.

Q. You have seen this?

A. That is right.

Q. Did you have a set of these on the job?

A. I had a set of the specifications, yes, and the plans.

Q. And the plans?

page 103 } A. Yes, sir.

Q. Did you study these before you started this job?

A. I did, but for some reason or another, when it came to wire mesh I overlooked it; forgot it; too dumb to remember. I don't know exactly which one.

Q. Did you possibly overlook the fact that the quarry tile was not factory waxed, or do you know if it was?

A. Well, under the conditions in the specifications, the quarry did not need to be waxed.

Q. Your specifications did not require it to be waxed?

A. I did not say they did not require it, I said they did not need to be waxed.

Q. Whose opinion is that, that they did not need to be waxed, yours or the Architect's?

A. I took it for granted when they said waxed tile that they meant the base, because the base called for black Furnane joints and they had to be waxed.

Joseph F. Still

Q. If the specification said, tile is to be factory waxed, it does not mean that, is that your contention?

A. No. I said on this one job it didn't need to be. That is why I didn't pay any attention to it. The inspector saw it and didn't say nothing, so why should I.

Q. You had a set of specifications on the job, did you?

page 104 } A. Yes.

Q. But you decided not to follow them?

A. No, I used the materials on the job.

Q. You had nothing to do with getting the order of the tile, you just worked with what you had?

A. No, I did not order the material.

Q. And you did not notice the fact that they did not comply with the specifications? You did not notice the fact that there was supposed to be wire in there until it was called to your attention?

A. I did not.

Q. And then you went and did it. When the Architect, Mr. Johnston, came up and said that the wrong materials were being used, I think you said the mess hall was completed; you had finished laying and grouting all the tile?

A. No, I had not quite finished. I had a little piece left, maybe twenty by twenty, going into the door.

Q. Would you say it was ninety percent completed?

A. Well, ninety percent—I would say over ninety percent.

Q. Over ninety percent?

A. Above ninety.

Q. Over ninety percent was completed with Lumnite at the time you were stopped?

A. That is right.

page 105 } Q. The first time it came to your attention was when Mr. Johnston, the Architect, told you about it?

A. That is right.

Q. And Mr. Meredith was there at the time?

A. That is right.

Q. Mr. Meredith was the Clerk of the Works, I believe. That was his title, or do you recall that?

A. He was what?

Q. Clerk of the Works?

A. He was the inspector on the job as far as I knew.

Q. After they brought this to your attention, did you check your specifications?

A. I went up to the office with Mr. Meredith and the Architect.

Joseph F. Still

Q. Whose office?

A. Mr. Meredith's office. And he pulled out this addenda, and he said here is the addenda showing that it is to be grouted with Furnane. And I said, well, I don't have a copy of it. He said, your office does. I said, well, I don't think so or else we wouldn't be using cement if it calls for Furnane, because there is no comparison in the two. So, that is when I called up Mr. Marus.

Q. And you saw the copies of the addenda there in Mr. Meredith's office, is that right?

A. That is right.

page 106 } Q. That was right on the job site, was it not?

A. That is right.

Q. How far away was it from the area where you were working would you say?

A. Well, I would say maybe a hundred, a hundred and twenty-five feet.

Q. Not far away?

A. No.

Q. Now, you were supervising the installation of this tile work. How was the Lumnite grouting put in, in the joints?

A. It was troweled in.

Q. With a trowel?

A. That is right.

Q. There was no sweeping of the Lumnite in there?

A. You cannot sweep the Lumnite.

Q. Can you squeegee the Lumnite?

A. Well, we don't squeegee Lumnite, we squeegee Furnane.

Q. Your testimony is it was all troweled in?

A. That is right.

Q. How deep were the joint openings, could you guess, or?

A. Oh, they vary. You see, when you beat in the quarry tile, you have a certain amount of the filling that

page 107 } is going to squeeze up through the joints. If it don't, you won't have a bonded floor.

Q. You were there when the cement paste, whatever you call it, the cement paste that the tile is laid into, was put in before the tile was put into?

A. That is right.

Q. Do you recall about how thick this was?

A. On the run between a sixteenth—thirty-second or sixteenth. It doesn't take but very little on the top.

Q. You say they were all troweled in?

A. The joints.

Joseph F. Still

Q. After this was pointed out to you, you were ninety-five percent complete, let's say. Did you continue to lay any more tile on that day?

A. That area was all laid.

Q. I understood about five percent was not in yet?

A. Oh, no. No, five percent wasn't filled with joints.

Q. Did you add any more? Did you fill in any more joints after that?

A. Certainly, I had to do it.

Q. You filled up what you had to?

A. Yes, sir.

Q. That did complete altogether the mess hall?

A. The dining area, yes.

page 108 } Q. This was, however, after you had been told that it was an improper filling, is that right? You had been told this?

A. I was still following my specifications.

Q. Mr. Still, have you ever used this Lumnite before?

A. Quite a bit.

Q. Lumnite cement?

A. Yes, sir.

Q. And I trust you used Portland cement also?

A. Yes.

Q. More frequently than Lumnite?

A. Well, yes, because Portland cement is used for the bed.

Q. Is the Lumnite more expensive than the Portland cement?

A. Yes.

Q. According to your reading of the specifications, where was the black Furnane to be used?

A. In the vertical joints.

Q. And where were the vertical joints?

A. Well, to my education, vertical means up and down.

Q. Was there any quarry tile running up and down?

A. Base, yes. Quarry tile base.

page 109 } Q. Around the walls?

A. No, this was around the base mounds.

Q. Base mounds?

A. Yes, the range mound, where you put the kitchen range.

Q. Have you in your experience ever used two different types of tile grout on the same tile in the same floor?

A. Two?

Q. I think you intended to use black Furnane on part of it,

where there were vertical joints, as you said, and you did use Lumnite on other parts, did you not?

A. Oh, that can be used any time. You can use black Furnane in the base joints or any place, as far as that is concerned. That is a different story. You see, you cannot smooth off base joints, black Furnane, like you can a floor. It is just a regular method when you grout a floor, smoothing it off the floor.

RE-DIRECT EXAMINATION

By Mr. Vaughan:

Q. The question came up, Mr. Johnston said you got the wrong thing in the joints. What was the reason that you kept on and finished that little bit you had to do?

The Court: He already explained it.

page 110 } A. Because my specifications called for cement joints, and I finished my job according to my specifications.

The Court: I believe before, he said you are supposed to do it the same day.

By The Court:

Q. You cannot let the bed and all that get completely dry before you do the joints, can you?

A. Your Honor, you have a very bad situation if you let the bed dry up before you fill the joints, because you might not get the joint bonded to the bed.

* * * * *

Mr. Bowles: That is the plaintiff's case, Your Honor.

Mr. Runkle: If the Court please, I would move the Court to strike the plaintiff's evidence because the motion for judgment filed in this case is based upon open account, and says, there is a certain sum of money due on open account. I think the testimony offered does not show any agreement implied or otherwise, establishing an open account implied contract, that would entitled him to any type of judgment.

We would move that their evidence be struck.

The Court: Well, I overrule the motion. Up page 111 } to this point, the evidence is that the man said he can go ahead and straighten it out, but they have to pay for it. They said well, go ahead and straighten it out. They did not say whether they would pay it or not. That implies—

Mr. Runkle: Note our exception.

BRUNO V. CHIARI, a witness, called on behalf of the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Runkle:

Q. Would you state your name, please, sir?

A. Bruno V. Chiari.

Q. Where do you live, Mr. Chiari?

A. 1421 Rolling Meadow Circle, Bridgeville, Pennsylvania.

Q. By whom are you employed?

A. Universal Atlas Cement Division of United States Steel Corporation.

Q. Does your company make a product called Lumnite cement?

A. Yes, sir.

page 112 } Q. What is your job title with that company?

A. Manager of the Atlas White and Lumnite Sales.

Q. How long have you been with the company?

A. Eighteen years.

Q. Had you had any prior experience in the building business, prior to that eighteen year period?

A. No, sir.

Q. What cement products does your company manufacture?

A. We make a full line of quarry cement. White quarry cement, Lumnite Calcium-Aluminate cement, and in addition, an oil well cement.

Q. Would you compare for us, or describe the properties of Lumnite cement?

A. Essentially, Lumnite has the property of developing its full working strength within twenty-four hours. It is resistant to the course of effects of many industrial chemicals and has the ability to stand temperatures in the area of 2700 or 2800 degrees Farenheit.

Q. How is Lumnite mortar prepared?

Bruno V. Chiari

A. Lumnite mortar is really a mixture of Lumnite cement and a fine aggregate, and then a proportion of coarse aggregate, and mixed with water.

Q. The aggregate is the same?

A. The aggregate can be the same, yes.

page 113 } Q. What color is Lumnite mortar?

A. Basically, Lumnite is approaching a black or a nearly black in color, but it is not a true black, but certainly considerably darker than any Portland cement.

Q. I believe you stated your company makes Portland cement?

A. Yes, sir.

Q. What are generally the properties of Portland cement?

A. Well, Portland cement generally is a binder for sand and coarse aggregates, and the most common use is, of course, for the concrete that is used in building construction, highway pavements, foundations and, well, that is about it.

Q. Is Lumnite cement a trade name?

A. Yes, sir.

Q. For a type of cement that you make?

A. Yes.

Q. Is Lumnite cement a type of Portland cement?

A. No.

Q. For what reason?

A. It is a different material entirely. It is a calcium-aluminate cement made from a different raw material by different processes than Portland cement.

Q. In rough figures, is the Lumnite cement

page 114 } more expensive than the Portland cement?

A. About — well, depending on the market — about three to three and a half times the price of Portland cement.

Q. How is this Lumnite cement to be used in conjunction with quarry tile?

A. Well, if a Lumnite mortar is to be used as the joint material in a quarry tile installation, the Lumnite with a suitable sand aggregate is mixed in the proportion one to two parts per volume to a stiff consistency, and troweled into the joint cavity to the full thickness or depth of the tile.

Q. Should there be any bed cement coming up into it?

A. From the setting bed?

Q. Yes.

A. No, sir.

Bruno V. Chiari

Q. Should there be any cement coming up from the paste in which the tile is set?

A. Well, when the tile is placed, of course, and beat into the floor, why, some of that paste might squeeze out into the joint cavity. But that should be cleaned out prior to the joints being filled with Lumnite mortar.

Q. Cleaned out how?

A. If you catch it at the right time, you can broom it out with a broom.

page 115 } Q. Sweep it out?

A. Yes. If you wait until it starts to hydrate, then you got to use a tool of some kind to scrape it out.

Q. After the Lumnite cement is troweled in place, what is the next step in your recommended procedure?

A. Well, in all Lumnite work, to get complete hydration of this cement, it is imperative—it is a must—that it be properly cured. Otherwise, it will not develop its full strength.

Q. How should Lumnite be properly cured?

A. There are two ways to cure a Lumnite cement job. One is either by water curing, or by the use of a resin-base concrete curing compound.

Q. Would you describe your water cure method?

A. Yes. Generally, depending on the temperature, some six, seven, eight or nine hours after the mortar has been mixed, the Lumnite mortar is ready to receive its first application of curing water, and this is to be kept intermittently wet for a period of twenty-four hours, starting from the time the mortar was first mixed or the water was first added to the mortar in the mixer, so that the duration of curing would be all sixteen, seventeen or eighteen hours, depending on the time that you actually start to cure it.

Q. If Lumnite was sprayed with water in the morning when the job commenced, would this result in a

page 116 } proper cure?

A. In the morning after the job commenced?

Mr. Bowles: I object to this, Your Honor. It sets out other circumstances than what the evidence is. We got to have damp weather, wintertime, wet.

Mr. Runkle: I will be glad to add that.

Q. It was damp. It was cold. The tile had previously been set the evening before, I assume.

Bruno V. Chiari

By The Court: That wasn't entirely clear.

By The Court:

Q. Laying the tile today in pouring down weather, and drying was rather slow. So, the following morning they wet it down, and you say wetting should take place within how many hours of the first mixing?

A. That varies with the temperatures. But on the average, it will run eight to nine hours. In hot weather, six or seven, and in cold weather, eight or nine hours. Now this, of course, the exact time to properly cure Lumnite, can easily be determined by rubbing a moistened finger over the cement. If your finger is soiled by the test, that indicates that you still have fresh cement and curing should be withheld and the test repeated at frequent intervals until such time that your finger is not soiled by the test. Then, the water curing treatment should start.

By Mr. Runkle: (Cont'd.)

page 117 } Q. Then, I understand your testimony to be that it should then be kept wet for a twenty-four hour period?

A. Yes, it should be kept wet for twenty-four hours, from the time that the mortar was first mixed.

Q. Your product, Lumnite, is sold how?

A. By builder's supply dealers.

Q. Are any instructions provided for its use?

A. Yes, on the back of each bag of Lumnite are general instructions printed. In addition, why, we distribute thousands of copies of literature describing its various properties and the application, through dealers, and by actual contact and calls from people that are going to use it.

Q. Do the instructions deal with curing the Lumnite?

A. Yes, sir.

Q. That is on every bag, is that right?

A. Yes, sir.

Q. Did you have occasion to inspect the work on the Richmond City Jail job?

A. Yes, sir.

Q. Would you tell us about that inspection, please?

A. Well, my inspection of the area determined basically two conditions that were prominent.

Bruno V. Chiari

By The Court:

Q. If you could tell me what state the work was in when you came?

page 118 } A. When I came to make the inspection, the work had been completed.

Q. All of the work?

A. All of the work involving my product, yes, sir.

Q. Had the joints between the tile been cut out and the space replaced with this other material?

A. No, sir.

Q. They had not?

A. No, sir. So that I have been able to inspect the joints. That is what I was called in to do.

Q. That would be the mess hall?

A. I did not know what room I was in.

Q. Just one big room?

A. Yes, sir, it was one big room.

By Mr. Runkle: (Cont'd.)

Q. Mr. Chiari, at whose request did you come and examine it?

A. The request originated with the Architect.

Q. On this job?

A. On this job, yes, sir.

Q. When you went there, who else was there with you when you examined these joints?

A. Let me see. In addition to myself, there was our local area salesman, Mr. Hennessee, Mr. Denton was present from Worley Brothers, and Mr. Johnston from the

page 119 } architects' office. If there were one or two other people, I don't recall their name. I don't remember them.

Q. Perhaps this may help. I show you this letter and ask you to look at that letter on your company's stationery, dated April 15, 1964. Is that your signature on that letter?

A. Yes, sir, it is.

Q. Does this reflect your thoughts after the examination was made?

A. Yes.

Q. I would like for you to read into the record then, beginning with Paragraph 3, your findings.

A. "Our inspection on March 31 of the Lumnite mortar placed at the House of Detention clearly indicates that the practice followed in this case is not in accordance with recom-

Bruno V. Chiari

mended practice as described in our literature. It may help to review the more important use recommendations, which apparently were not followed in this case.

1. A mortar which is to be used for grouting quarry tile should be mixed in a mix proportion of 1 bag of Lumnite cement to 2 cubic feet of sand. The mortar should be troweled into the joint as tight as possible so as to insure good compaction and a good bond between the edge of the quarry tile and the mortar itself. Obviously if this practice is to be followed the mortar should be on the stiff side so that the workmen can actually compact the mortar between page 120 } the tile and tool each joint. Now there are cases, of course, where thin joints are called for and here the Lumnite mortar should be prepared in a 1:1 mix by volume having a consistency of heavy cream. The mortar is then squeegeed into the joints. By thin joints we are referring to joints which are on the order of one-eighth of an inch wide. Joints that have a width of three-eighths of an inch or more should be troweled and not squeeged.

2. Lumnite mortar joints for best results must always be properly cured.

My observation, confirmed by conversations with the job inspector and the workmen on the site made it apparent that the mortar joints did not receive any curing. This is substantiated by the fact that each and every joint is soft and dusty. Dusty surfaces are very definitely examples of unhydrated or partially hydrated cement paste. This is a condition which occurs when cement does not receive proper curing. In the case of Lumnite, due to its rapid hardening action, it is imperative that all Lumnite concrete and mortar installations be properly and completely cured. Complete curing instructions are provided in all of our publications as well as in the printed instructions on the back of each bag of Lumnite cement that is shipped. Lumnite cement can be cured by either spraying all exposed surfaces with water or by the use of a membrane curing compound. page 121 } Again, details on these practices are reviewed in our publications.

In order to make as complete an inspection as possible of this job we had one of the workers take up three or four of the tile so that we could look at the cross section of the mortar. It was our understanding that the joints were to be grouted with Lumnite cement; however, an examination of the cross section of the mortar in the areas which we examined,

show that there was very little Lumnite cement in the joint itself. It seems that when a tile placed on the sub-base, the Portland cement which was used to bond the tile to the sub-base was not completely cleaned out of the joints and as a result the joints were not completely grouted with Lumnite cement. When we called at your offices on April 1, we left evidence of this condition with you."

Q. All right, read the next paragraph.

A. "We sincerely regret that you have experienced difficulty in the use of our product but as you can see from the two or three points brought out above, we cannot say that Lumnite in this case was placed with our suggested procedure for grouting quarry tile."

Mr. Runkle: We would like to introduce this letter as Defendant's Exhibit Number 2.

NOTE: The above-mentioned letter is marked DEFENDANT'S EXHIBIT NO. 2. and filed in evidence.

Q. Now, Mr. Chiari, your statement in here page 122 } definitely indicates that it was not properly cured. That is still your statement and you stand by that statement as to your examination?

A. Yes, sir.

By The Court:

Q. There was some talk by one of the witnesses about dusting the tile in the use of Portland cement. Is that ever done, or do you not recommend that?

A. No, sir, it should not be done. We don't recommend it. No.

By Mr. Runkle: (Cont'd.)

Q. Is it a recommended practice that the Lumnite cement ever be swept into the joint?

A. Into a joint of this thickness, no.

Q. I believe you referred to removing some samples. How many samples were taken up from the floor?

A. Well, there were several tiles removed. Some pieces of the tile were carried away along with maybe half a dozen or more strips of the joint materials.

Q. From what areas of the mess hall floor were these sections taken?

Bruno V. Chiari

A. At random areas.

Q. Do you think you covered every representative section of every part of the floor?

A. Yes, I would say so.

page 123 } Q. What did you do with these pieces?

A. I gave the specimens to Mr. Worley.

Q. I show you now this—

Mr. Bowles: If Your Honor please, he has not said if these are the specimen, Your Honor. He said he gave them to Mr. Worley.

The Court: Well, and then Mr. Worley gave them to his attorney.

Mr. Bowles: Well, I don't mind it coming in, I just want him to properly connect it.

By Mr. Runkle: (Cont'd.)

Q. Mr. Chiari, I want to show you this piece of a section and ask you, can you identify this piece as one that was removed from the jail site on that day that you spoke of?

A. I would say that it was.

Q. All right. Examining the side of the tile, would you comment upon what you see there?

A. I don't see any Lumnite cement there.

Q. What do you see attached to the side of the tile?

A. It looks like Portland cement mortar. The residue here on the side of the tile is not Lumnite cement.

Q. In looking at the tile surface, is that a waxed surface or not?

A. No, sir, that is not a waxed surface.

page 124 } Q. Are you familiar with the use of factory waxed tiles?

A. Yes, sir.

Q. What is the purpose of requesting in specifications pre-waxed tile?

A. So that the tile can easily be cleaned after the job is completed.

Q. You are not familiar with the product, black Furnane, in its use, are you?

A. Not really, no.

The Court: May I see that tile?

Witness Chiari: Yes, sir.

Bruno V. Chiari

NOTE: The tile is handed to the Court.

Q. Will the Lumnite cement stick to a non-waxed tile?
A. Yes, sir.
Q. Is it then advisable to use waxed tile for Lumnite application also?

By The Court:
Q. They certainly don't wax anything except the top surface?
A. Yes, Your Honor.

The Court: Well, then I don't think it would affect the sides of the tile.

By Mr. Runkle: (Cont'd.)
page 125 } Q. The purpose is to clean off the surface of the tile?
A. It is really a cleaning aid. When the job is finished, you take a steam cleaner and you remove the wax as well as the debris from the construction, and the mortar that is rubbed on it.
Q. I want to show you another material here and ask if you can identify that?
A. Well, this looks like a piece of the mortar in question between the tile, and this shows the thickness of the Lumnite over the Portland cement between the joint.
Q. Is that thickness of the Lumnite in accordance with your company's recommendations?
A. No, sir.
Q. Why not?
A. It is not the full thickness of the tile.
Q. And that is the recommendation of your company?
A. Yes, sir.

Mr. Runkle: We would like to have both of these exhibits entered as Defendant's 3 and 4.

NOTE: The above-mentioned pieces of tile and material are marked DEFENDANT'S EXHIBIT NO. 3 and 4, and filed in evidence.

Q. Mr. Chiari, are you familiar with the phrase, vertical joint?

Bruno V. Chiari

page 126 } A. Only as it applies to wall tile, vertical joint, going up the wall.

The Court: We already have in the testimony the vertical joint being the part that goes up the wall. In the literature they distinguish it as side joint of the tile and the bottom face of the tile, because they recommend a different product for the bottom face, for it to be laid in, than they do for the grouting. That is what every witness so far has said, that the vertical joint goes up the wall.

By The Court:
Q. Is that your understanding?
A. Yes, sir.

By Mr. Runkle: (Cont'd.)
Q. Is the Lumnite material more resistant to corrosion and cleaning materials than is Portland cement?
A. Yes, sir.
Q. Well, you have stated, I believe, that Portland cement and Lumnite cement are not the same product, is that correct?
A. They are not the same product, that is correct.

CROSS EXAMINATION

By Mr. Bowles:
Q. How do you pronounce your last name, again?
page 127 } A. Chiari.
Q. Chiari?
A. Yes.
Q. Mr. Chiari, the letter that you read from, your report, I gather, that was addressed to the Architect on the job?
A. No, the letter was addressed to A. C. Worley Construction.
Q. Mr. Worley?
A. Yes, sir.
Q. And that letter was dated April 15, 1964?
A. That is correct.
Q. And you made your inspection, I believe, sometime in December of '63?
A. No, it was March 31, 1964.
Q. March 31?
A. Yes, sir.

Mr. Runkle: I think the letter refers to the examination on March 31, on Page 1 of the letter. In that second paragraph.

The Court: February 4, 1964.

Mr. Runkle: The third paragraph, "Our inspection on March 31—"

The Court: Oh, yes.

By Mr. Bowles: (Cont'd.)

page 128 } Q. Well, it refers to an inspection on March 31 that you made?

A. Yes, sir.

Q. Of what year would that have been, Mr. Chiari?

A. That was 1964.

Q. And your report is dated April 15th?

A. Yes, sir.

Q. I believe the concluding paragraph of it is an apology for—

A. The delay.

Q. For the delay?

A. Yes.

Q. And the March 31 inspection you made in 1964. I believe you said you pulled up some tiles and turned them over to Mr. Worley, and you were handed here today a piece of tile and a piece of joint material, and you have testified that they are the pieces of tile that you took up on that job?

A. Yes, sir.

Q. Is there any mark, or anything that you placed on this, that could determine for you that this tile goes with this job, or so that you can positively identify this as the tile that came off the Richmond Jail?

A. No, I am afraid not.

Q. For all you know, it could have come off the Norfolk Jail job?

page 129 } A. Well, yes.

Q. As far as you are concerned, it is a piece of tile and a piece of joint material?

A. No. No, sir.

The Court: He said it looks like it.

Mr. Bowles: It looks like it. Well, I would move that the two exhibits be stricken.

The Court: No, I will keep them.

Bruno V. Chiari

Q. I believe you are the sales manager for your company?
A. Yes, sir.
Q. And your primary responsibility is selling your company's products?
A. Well, my primary responsibility is the promotion and ultimate sale of our Atlas White and Portland cement, and Lumnite cement.
Q. Have you ever laid any quarry tile?
A. Yes, sir.
Q. Have you done a lot of it?
A. No, sir.
Q. How much of it would you say you laid?
A. Oh, I would say I have done an aggregate total of maybe eighty square feet.
Q. Eighty?
A. Eighty.
page 130 } Q. When was that?
A. I think it was in 1956.
Q. Now, you detailed the products that your company makes, and I gather you know right much about the industry of grouting tile since that is what you are in?
A. Fairly so.
Q. Now, would it be fair to say that you divide grouts up into two general categories, cement grouts and resin grouts? Two broad general categories, epoxies against cements?
A. Yes, you could say that. You can divide them into two general classes. A cement grout and a resin grout or an epoxy grout, or whatever you choose to call it.
Q. All of the products that your company makes are in the category of cement grouts, different types of cement grouts?
A. Different types of cements, not cement grouts. Cements.
Q. Cements.
A. Right.
Q. Now, Portland cement, I take it, is one product that your company makes?
A. One of the types, yes.
Q. Of a less good quality than Lumnite?
A. No, sir, they are both of good quality. They
page 131 } are different products for different purposes.
Q. Different products?
A. Yes.
Q. From the standpoint of, let's say, a floor grout with Portland as against a floor grout with Lumnite, Lumnite

produces the better floor from the standpoint of acid resistance and that sort of thing?

A. Yes, sir.

Q. Much more than Portland?

A. Yes, sir.

Q. Now, Lumnite does not compete, does it, say, with black Furnane?

A. No, sir, it does not.

Q. They are not in the same category?

A. No, sir, they are not.

Q. I take it that black Furnane is totally impervious to acid attack, or as near as you can get to it?

A. Well, it is acid proof.

Q. Acid proof?

A. Lumnite is not and never has been sold as being such.

Q. But for grouting now, Lumnite is a better grout than Portland?

A. Lumnite is a better grout?

Q. Than Portland? It makes a better grout
page 132 } than Portland in a kitchen and in a mess hall?

A. Yes, sir.

By The Court:

Q. Why is it that workmen regard your product as a Portland cement? Is it just because in their own mind they think of cement on one side and plastic on the other?

A. I think, Your Honor, it is because they are just used to working—that is right, it is just cement that you add water and sand to, and they are all alike. Unfortunately, that is not true.

Q. The ultimate of your product is better, but the approach is the same?

A. Unfortunately that is true, the approach is. But we spend thousands and thousands of dollars to point out to people that the two products are not alike and not handled in the same way.

By Mr. Bowles: (Cont'd.)

Q. I have never seen any of your literature that you put out, and the thousands of dollars that you spend trying to educate people, it did not get to me. But do you recommend for the best floor you could get utilizing Lumnite, that you use Lumnite as a bed also?

Bruno V. Chiari

A. We recommend that, if we are talking about a corrosion resistant cement mortar, it is our recommendation that we use Lumnite for the setting bed as well as the grout.

page 133 } Q. Both. That is the best you could get, utilizing your product?

A. That is right.

Q. If you had a man that would just insist on having a Portland cement bed and he wanted a Lumnite grout, it is not going to be as good from your standpoint as a Lumnite bed but it will be better, will it not, than all Portland grout and bed?

A. Well, it will be better, providing he gets a good, tight mortar joint.

Q. There is no problem, is there, of Lumnite bonding to Portland?

A. No, sir, there is no problem.

Q. You don't have to worry about the two of them coming apart?

A. No, sir.

Q. I take it in a joint that you would prefer to have your Lumnite running all the way to the bottom of the tile?

A. Yes, the full thickness.

Q. Well, if half the thickness is of Lumnite and half the thickness below the Lumnite is pointing mortar or Portland cement, is that combination better than all Portland from the standpoint of the floor you get?

A. Would you repeat that, I am not sure I

page 134 } understood it.

By The Court:

Q. Well, he said, when you are putting tile down in the bed, the layer that you are using comes halfway up on the tile, but you finish it off with Lumnite, that is still better than all Portland, is that right?

A. If it bonds very, very tightly, it could be better but it does not have to be better.

Q. Anyway, it is not as good as having your stuff going all the way from the bottom to the top?

A. That is right.

By Mr. Bowles: (Cont'd.)

Q. You said it could be better but does not have to be?

A. No.

Q. Well, it is not worse?

A. Worse than what?

Q. Pure Portland, grouting and setting.

A. That would depend somewhat on the condition of the grout.

Q. Well, obviously if you have a quarter inch of corrosion —Well, I don't see any point in pursuing it.

By The Court:

Q. I notice in your letter, you are addressing this to Mr. Worley and I assume you had a good deal of
page 135 } talk with him about it while you were down here.
You say, it is our understanding that the joints were to be grouted with Lumnite cement. Now, I want to know who told you that. Did Mr. Worley tell you that?

A. No, sir.

Q. Who told you that?

A. I had very little conversation with Mr. Worley.

Q. Where did you get this information?

A. Well—

Q. I mean, just people on the job, or?

A. No, that came, as best as I can recall, Your Honor, from the Architect on his initial contact with me, asking that I come down to inspect the Lumnite tile job at the City Jail here in Richmond.

Q. Mr. Johnston probably?

A. Yes, Mr. Johnston telephoned me in New York.

The Court: Anything further, gentlemen?

Mr. Bowles: I have no other question.

By The Court:

Q. Let me ask you: Did you ever see any addendum to this contract saying that they were never supposed to have used your product at all, but that the tile men were supposed to have put black Furnane in it?

A. I have never seen anything on this job at all, Your Honor.

page 136 } Mr. Bowles: One other question.

By Mr. Bowles:

Q. You are familiar with the product, black Furnane?

A. Generally yes, not intimately.

Q. Cost-wise, it is a much more expensive product than Lumnite, is it?

A. Yes. Red Furnane and black Furnane is one of the chemically bonded acid proof products that are on the market. They do an excellent job, but they are awfully costly.

Q. And a lot more difficult to use than your product, too?

A. Well, I don't know.

* * * * *

page 137 } MILES CARY JOHNSTON, JR., a witness, called on behalf of the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Runkle:

Q. State your name, please, sir.

A. Miles Cary Macon Johnston, Jr.

Q. Where do you live, Mr. Johnston?

A. 221 Ross Road, Richmond.

Q. Are you associated with the architectural firm of Carneal and Johnston?

A. Yes, I am.

Q. As such, did your firm participate in the preparation of specifications for the jail facilities for the City of Richmond?

A. We did.

Q. Did you prepare, or have to do with preparing, certain sections of the specifications or all of them?

A. Certain sections.

Q. Did you prepare this section, Section 20, concerning ceramic and quarry tile?

A. To the best of my memory, I did. Two of us worked on it. I cannot remember if I did it myself or not.

page 138 } Q. All right, sir. These specifications are in evidence now. I would like for you to look at these specifications and ask you, would you read it, please, sir, and then interpret what it means?

A. "Set quarry tile in accordance with Specification Number 3 of American Standard Specification A108-1958, except at vertical joints which are to be filled with black Furnane instead of with pointing mortar. Application of black Furnane is to be in strict accordance with manufacturer's recommendations."

Miles Cary Johnston, Jr.

Q. You used the phrase, vertical joints to be filled with black Furnane. What joints do you mean by vertical joints?

A. My meaning of that, I think is expressed in Addendum Number 1. Addendum Number 1 does not seem to be in the specifications. I have them right here. Addendum Number 1 reads as follows: "Set in accordance with Specification Number 3 of American Standard Specification A108-1958, except fill all joints within the quarry tile with black Furnane instead of with pointing mortar."

Q. Going back to Section 20, when you used the expression vertical joints, what again did you mean? All joints?

A. All joints.

Q. Where did you get this language, vertical
page 139 } joints, to use it in such a manner?

A. To the best of my memory, it was extracted from the Furnane catalog.

Q. Do you have such catalog in the material with you today?

A. Yes, I do.

The Court: Well, he can use this.

A. This is probably a later edition, but mine is very similar to this.

Q. This is where you got the expression, vertical joints?

A. Yes.

Q. That goes to the point between the tiles?

A. Yes.

Q. Now, the Addendum Number 1, with reference to vertical joints, is this a change in the vertical joints that you had called for in the original Section 20? Does the addendum change what you had asked for?

A. It clarified it.

Q. It does not revise it, does it?

A. The intention remained the same.

Q. Why was the addendum put in there?

A. When these plans were out for bids, a number of tile contractors called me and questioned the specifications. Because I realized that the intent was not clear, I
page 140 } wrote an addendum.

By The Court:

Q. I know I have not heard the whole case yet, but there is nothing to show that these people ever heard of the addendum. Do you recall if you sent them copies of it?

Miles Cary Johnston, Jr.

A. The addendum is sent to all holders of plans and specifications. We have a list of all plans and specifications obtained from our office, and when we issue an addendum, we send it to all holders.

Q. Do you have your check list here to show who you sent it to?

A. I do not have it here. I have it in my office. I have checked it, and Marus Tile and Marble was not on the list.

Q. Not on the list?

A. No, they were not.

Q. Well, then, do you think they never got the addendum?

A. Quite frequently, subcontractors use plans and specifications from the builders exchange, and this was sent, oh, to a number of exchanges. Associate general contractors, builders exchange, and to avoid the cost of getting plans, subcontractors go to the exchanges. So they could very well have had them and I would not have known.

Q. But there is nothing you can show that they
page 141 } did have them?

A. No.

Mr. Runkle: I don't think he is in a position to say whether they did or did not.

Mr. Bowles: He did not have them on his list.

By Mr. Runkle: (Cont'd.)

Q. From the copy of these plans, can you tell who had them first? Is there any way you can distinguish them from any other set.

A. I can check with the list at my office and tell you.

Q. Is that a set number?

A. Set 16.

Q. And your records would show to whom that was sent?

A. Yes.

Q. Did you send several copies of the plans and specifications to Worley Brothers, the general contractor?

A. During the bidding stage? Is this what you mean?

Q. After the bidding and awarding, did you send several copies—

A. After the bid had been awarded, we gave to Worley Brothers all the plans and specifications which we had available.

Q. What was the date that this bid was

page 142 } awarded? That would be the date of the main contract, I guess. Do you have a copy of that?

A. I do not have a copy of the contract with me.

Q. All right. The ones that you gave to Mr. Worley after the contract was awarded, had you made up those books, put them together, or your company, your firm?

A. Yes, we made these books up.

Q. That you gave to Mr. Worley after the bid had been awarded?

A. Yes.

Q. Did those plans and specifications that you gave him include the addenda, to your knowledge?

A. I cannot say. I am not sure if they contained the addenda or not. The reason I have to answer this way is that the addenda was sent out before the bids were received, and it is up to the people to return the plans and specifications in good condition to us with the addenda and with all the sheets. We check it to a certain extent, but we do not check every page of the specifications or every page of the plans. These plans and specifications which are returned, are then given to the successful contractor after the contract has been awarded.

By The Court:

Q. Of course, he already has a complete set. You know that the original set that he has is complete?

page 143 } A. Yes.

By Mr. Runkle: (Cont'd.)

Q. Mr. Johnston, I would like for you to turn to Page 11 of the General Conditions, Section 49. Would you read the first two paragraphs, please?

A. "The Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents. The Architect's decisions, in matters relating to artisitic effects, shall be final, if within the terms of the Contract Documents."

Q. Now, sir, is it your interpretation of Section 20 of the specifications that you drew, that vertical joints meant all joints?

A. All joints within the tile, or between the tile as stated in Addendum Number 1.

Q. But is it your interpretation of Section 20 as it stood, as you wrote it, is it your interpretation that vertical joints meant all joints?

Miles Cary Johnston, Jr.

A. That was my intention.

Q. I would like you to turn back to Number 48, Page 10, and read for us the second paragraph, Number 48.

A. "The Architect shall be, in the first instance, the interpreter of the conditions of the Contract and the
page 144 } judge of its performance. He shall side neither with the Owner nor with the Contractor, but shall use his powers under the Contract to enforce its faithful performance by both."

Q. I would like you to turn back to the next page, Page 9, and read Paragraph 47, entitled Relations of Contractor and Subcontractor, beginning at, The Subcontractor agrees.

A. The rest of that section?

Q. Yes.

A. (a) "The Subcontractor agrees to be bound to the Contractor by the terms of the Agreement, General Conditions of the Contract, the Supplementary General Conditions, the Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by these documents, assumes toward the Owner."

Q. Now, Mr. Johnston, I am sure you recall the difficulty that arose in the installation of the quarry tile in the mess hall. Would you describe for the Court how far the job had gone when you discovered something was amiss?

A. I kept a daily report. Can I read from that?

Q. I think so.

Mr. Bowles: Your Honor, I might ask whether the witness is to refresh his memory from his notes or whether he has to rely completely, solely, on his notes?

page 145 } A. I would like to read from this, because I feel it is probably more accurate than my memory. The date is December 5, 1963, which reads: "Visited job site. Quarry tile floor in dining area was about two-thirds laid. Noted that Furnane joint compound had not been used. Reviewed situation with Mr. Worley and advised that all joints would have to be raked out and then filled with Furnane." That is all that pertains to the quarry tile.

Q. That is the only note you have at all about that condition?

A. Well, that is on December 5. I have comments on other dates.

The Court: All right, let's go right through them.

Miles Cary Johnston, Jr.

Q. Concerning the quarry tile.

A. On December 9th, we had a meeting to discuss this. Those present: City of Richmond, Messrs. Leo Cantor, Frank Bersch. Excuse me, I passed over one thing. Can I backtrack?

The Court: All right.

A. There is December 6, 1963. "Met with Mr. Worley and Mr. Marus to discuss quarry tile floor in the mess hall. A substitute material has been used in place of the specified Furnane. Both Mr. Marus and Mr. Worley advised that this was an honest error. Mr. Worley intends to enter
page 146 } the hospital on Tuesday for a serious operation and requested prompt action on the matter. Arranged to set up a meeting on Monday with representatives of the City to reach a decision."

On December 9th, "Met with representatives of the City and stayed to discuss the quarry tile situation. Results from this meeting are summarized in memo of this date."

The memo reads: "Those present: City of Richmond, Messrs. Leo Cantor, Frank Bersch, and Frank Cavedo; Commonwealth of Virginia, Department of Welfare and Institutions, Messrs. James M. DiFrancesco and W. S. Brent; Worley Brothers Company, Incorporated, A. C. Worley; Architects, Budina & Freeman, Baskervill & Son, and Carneal & Johnston, Messrs. James A. Johnston and Miles Cary Johnston, Jr. The subject of the meeting was to consider Worley Brothers Company's proposal of December 9, 1963, copy of which is attached, with reference to quarry tile joints in the mess hall. These joints are specified to be filled with black Furnane. A substitute material, black Atlas Lumnite cement has been used without the Architect's approval. Worley Brothers advised that the situation was an honest error on the part of their subcontractor, Marus Marble and Tile Company, Incorporated. The following procedure was agreed upon by all present.

(a) The architects, with the assistance of Worley Brothers, are to investigate the substituted material with respect to life, durability and cost.

page 147 } (b) If the architects find the substituted material to be adequate for use in the mess hall, they will recommend its acceptance to the City of Richmond, provided,

Miles Cary Johnston, Jr.

1. Worley Brothers submits a satisfactory adjustment reflecting difference in cost between the specified material and the substituted material, if any.

2. Expansion joints are provided within the quarry tile if found by the architects to be necessary.

(c) The representatives of the City of Richmond agreed to accept the architects' recommendation."

Then, this letter, December 9th, do you wish me to read this?

A. We may have that in evidence. No, go ahead and read that.

Q. This is this letter that was discussed in the memorandum, or referred to in the memorandum. This is to the architects. "This is to advise—"

Mr. Bowles: From whom?

A. From Worley Brothers. "This is to advise, our subcontractor Marus Marble and Tile Company has used black Atlas Lumnite cement in quarry tile joints in the mess hall area Number 177 in lieu of the specified black Furnane. The above Atlas cement is acid resistant and water proof and is installed in accordance with Specification Number 3 of American Standard Specification A108-1958 as specified.

page 148 } Our subcontractor submitted his bid using Atlas Lumnite in all flat joints and black Furnane only in vertical joints in the range pad located in the kitchen area as interpreted from Section 20.2 in contract specifications.

He, through human error, did not receive or completely overlook Addendum Number 1 as specified, that all joints within the quarry tile should be filled with black Furnane instead of with pointing mortar.

I have had Mr. Marus in my office regarding this error and it is my sincere belief his firm did not include the use of Furnane in their proposal to our office, or had any knowledge that Furnane was to be used any place but at range pads. I have requested Mr. Marus to replace all tile now stored on the job with waxed tile and to proceed with the installation of waxed tile in the kitchen and all areas using specified black Furnane in complete accordance with Addendum Number 1.

This, he has promised to do as quickly as possible. We feel that quarry tile installed thus far using the Lumnite cement certainly was not intended by the subcontractor as an

attempted substitution. After my conversation and close investigation, we feel it was a human error only and request that the tile as installed thus far be allowed to remain and all other tile be installed using the back Furnane."

Q. At this point, Worley Brothers were at-
page 149 } tempting to prevent tearing up of all this tile work that had been done, is that right, see if it could be accepted?

A. Yes.

Q. Did you, in pursuance of that, contact the manufacturer of this Lumnite?

A. Yes.

Q. What were their statements to you concerning the job?

A. I do not have a written statement from them. I have a brochure describing the material and again, in my daily reports, I have some detail which I can read if you wish me to.

Q. That won't be necessary. Let me show you this letter from you, dated April 3, to Worley Brothers Company and ask you if you can identify that letter?

Mr. Bowles: Is that one of the exhibits?

Mr. Runkle: I don't believe it is. It is from Mr. Johnston to Worley Brothers, April 3, 1964. I don't think that is an exhibit.

Mr. Bowles: Exhibit 14. That is Exhibit 14.

Mr. Runkle: Oh, yes, excuse me.

Q. Would this appear to be a copy of that same letter?

A. Yes, it would.

Q. Do you need to compare them or does it
page 150 } appear to be the same?

NOTE: Witness is looking at above-mentioned copy of letter and Exhibit 14.

A. Well, they appear to be the same.

Q. Briefly, without reading all of this possibly, could you go into the summary of findings and would you tell the Court what were your findings in regard to the investigation of the workmanship?

A. Well, we agreed to investigate the material to see if it could be used. First, we requested references which we checked into, and we ascertained that basically it was a good material, and for the application of the mess hall, possibly

it would be suitable. There was some doubt in our mind if the material had been applied properly in accordance with the manufacturer's recommendations. We, through Worley Brothers, in other words, we requested Worley Brothers to have a representative of the manufacturer visit the job site and review it with us.

This was done and Mr. Chiari visited the job site. We reviewed it with him and basically the results of their review was that the material had not been applied in accordance with the manufacturer's recommendations.

Q. Were you there when sections of the tile were taken up from the floor?

A. Yes, I was.

page 151 } Q. Does this letter, this report here, summarize your findings from your examination?

A. It does.

Q. Briefly, would you describe for us what you found?

A. Of course, the letter summarizes about as completely as I can do it. But the first item, (a), says, that the material which is used, of course, was not approved, never submitted, and, of course, it was not the material that was specified.

Q. All right, next.

A. (b), the material was set in a conventional cement mortar bed. The manufacturer does not recommend that Lumnite be used in connection with a conventional cement mortar bed which, of course, was specified.

(c) states—

By The Court:

Q. You say you had specified that?

A. We specified a conventional cement mortar setting bed.

Q. And that is what you got, wasn't it?

A. Yes, but with this particular material that was used, according to the manufacturer, should not have been used with a cement setting bed. This material was used without our approval or knowledge until we went on the job and

page 152 } it was there.

(c) states that squeegees and brooms were used to fill joints between the quarry tile with Lumnite. This, again, is not in accordance with their recommendations. They recommend that the material be troweled into the joints between the quarry tile.

Miles Cary Johnston, Jr.

By Mr. Runkle: (Cont'd.)

Q. How do you know this?

A. Mr. Chiari told it to me.

Q. All right. Next.

A. (d) states that Lumnite cement does not extend to the full thickness of the quarry tile and that five pieces of the quarry tile were removed, and that there were two of the tiles where the depth of the cement was less than one-eighth of an inch. And in no case did the Lumnite completely fill the joint.

And the fifth point, which is (e), the quarry tile joints were not cured with water, which is again recommended by the manufacturer.

On the basis of this information, we did not feel that we could recommend to the owners that the material be accepted.

Q. All right. Now, the specification referred to the American Standard Specification. I think you stated what type of mortar was called for in these American Stan-
page 153 } dard Specifications?

A. A cement mortar.

Q. Well, was it Portland cement, or Lumnite cement, or?

A. Portland cement.

Q. Is anywhere in the specifications the word, Lumnite cement, mentioned to your knowledge?

A. In the contract specifications, no.

Q. Did at any time Marus, or his representatives, tell you or show you that they were going to use a substitute material and get your approval?

A. Not before the material was used.

Q. When you came to the job site and found that the wrong material had been used, how much of the mess hall was done then at that time?

A. In my daily report it says about two-thirds of the floor had been laid.

Q. As a result of this decision that it would not be acceptable, what did the Marus Company do, if you know?

A. The joints were cut out with a saw.

Q. Did anyone from the Marus Company question your decision rejecting their product, their workmanship?

A. I knew that they were doing the work under protest. I received a copy of a letter, which I believe they had written to Worley Brothers, saying that they were doing
page 154 } it under protest. I have forgotten if they sent it to me direct or whether it came through Worley Brothers.

Miles Cary Johnston, Jr.

Q. Was there any credit that was offered to you on this job?

A. In the initial stages, before we really studied it, a credit of 10¢ a square foot was suggested.

Mr. Bowles: I think we might ask by whom.

A. I have some correspondence. I think I can determine that. I have a copy of a letter from Marus Marble and Tile Company to Worley Brothers, dated January 22, 1964. In this letter they suggest a credit of 10¢ a square foot. I can read it if you desire.

Q. That won't be necessary. It is in evidence. Let me clarify one thing, Mr. Johnston, if you will. What is the relationship between the architect and the subcontractor on a job of this sort?

A. Really the architect has no relation with the subcontractor.

Q. There is no contractural relationship with the subcontractor?

A. The architect has no contractural relation with the contractor or subcontractor.

Q. The architect has contractural relation with whom?

A. The owner.

page 155 } Q. To whom does he take questions concerning the workmanship on the job?

A. It is up to the Architect.

Q. After you make a decision and objection, whom do you contact about that?

A. No one.

Q. Well, in this case you found something wrong. Did you notify or take this up with the general contractor, or did you have a discussion with Marus Marble, the subcontractor?

A. Well, sure, Marus was there on some of our discussions, which I cannot remember. Upon discovering this material was not what it had been specified, it was first reviewed with Worley Brothers. I am sure in those discussions that representatives of Marus Marble and Tile were probably present. But I cannot remember. In an effort to save the job, we agreed to make some investigations. The result of those investigations indicated that the material was not satisfactory and we were unable to recommend its acceptance to the City. It definitely was not in accordance with the contract.

If the City—It is up to the City if they want to accept some-

thing that is not in accordance with the contract. But we said we were not able to recommend it under any conditions. It had to be removed.

page 156 } Q. Who was Joseph Meredith on this job?

A. He was employed by the architects as an inspector.

Q. Did he have a title on this job?

A. He may have. In some cases, he is probably Clerk of the Works. If there is any correspondence—there may be some correspondence on it, I am not sure.

Q. Who pays his salary while he is on this job as Clerk of the Works, if you know?

A. The architects.

Q. Were there any other things about this installation that did not comply with the specifications in Section 20, other than the Lumnite installation?

A. Two things. One I was not aware of until recently. The specifications require that the setting bed be reinforced with welded wire mesh. Mr. Meredith informed me that initially, when they started application of the setting bed, this mesh was not included, but that he had it installed.

Second, the tile as installed was not factory waxed. I am speaking of quarry tile only.

Q. Had you ever specified or used black Furnane on a job before?

A. Yes.

Q. I believe you stated that it was the intention of the specifications that black Furnane be used throughout the joints in the floor. Why was this called for, black Furnane?

page 157 }

A. For two reasons. First, it is a good material and second, it was recommended by the Department of Welfare and Institutions who are required to review and approve the plans and specifications of any jail in the State before it is constructed.

Q. Would it not be superior for its resistance qualities to corrosion and liquids and things in the kitchen and mess hall, more resistant than Portland cement; more suitable as grouting between joints?

A. We feel so, yes.

Q. Would there be any point in calling for black Furnane to be placed at what they call vertical joints, around the range pad, would that have any point?

Miles Cary Johnston, Jr.

A. Well, the range pads are probably subjected to more abuse than the remainder of the quarry tile. Yes, there might be some point in doing it.

Q. Would it be sensible, or is normally quarry tile set in a kitchen and mess hall in Portland cement throughout the floor?

A. Oh, it is done lots of ways. Sometimes it is done with Portland cement, sometimes with materials such as Lumnite, and then other materials such as Furnane.

Q. But it was your intention in Section 20, that
page 158 } vertical joints meant all joints, and that was your interpretation?

A. Between the tile.

Q. Between the tile?

A. Yes.

CROSS EXAMINATION

By Mr. Bowles:

Q. Mr. Johnston, you were asked about things that were not according to you quite right. You said two things. The last one you mentioned was, the tiles that were used were not factory waxed. That only applies to the mess hall or dining room area, that does not apply to the kitchen?

A. All quarry tile. The specifications call for all quarry tile to be factory waxed. The tile contractor cut them out and got the correct ones.

Q. For the kitchen and the dish wash area?

A. I misunderstood you, yes.

By The Court:

Q. After the job is cleaned up, the wax comes off. So it is not a really important aspect of the case.

A. Well, the Furnane is almost impossible to remove unless the tile has wax on its surface, because of the way it is applied. It is black material and they trowel over the entire floor. And after it is set up, they come in
page 159 } with a steam jenny and they steam it off. The reason we specified it to be waxed, we did not want the contractor ever to come back and say well, we want you to pay us so much more to have this tile waxed.

Q. The floors were cleaned up before they were turned over in this case, weren't they?

A. Yes.

Miles Cary Johnston, Jr.

By Mr. Bowles: (Cont'd.)

Q. Referring to the letter of Mr. Marus of January 22nd that you mentioned, in which you said a 10¢ credit was suggested. That letter does not suggest that Marus was going to give any credit, does it? It suggests that Mr. Worley should give a 10¢ credit.

A. I suppose all I can do is read the letter. I would not try to interpret Mr. Marus' letter and I would—

The Court: We have discussed that.

Q. But as you interpreted this, any credit would be forthcoming from the general contractor, not from the sub, would it?

By The Court:

Q. To the owner, that is what we are talking about.

A. Yes.

By Mr. Bowles: (Cont'd.)

Q. I believe that you stated that after these several meetings and what not, you undertook to launch an
page 160 } investigation to see whether the material that had been used in the dining room area would be acceptable in lieu of black Furnane. I believe those were the words you used. And that is what you did?

A. Yes.

Q. And your determination was that what was put down was not acceptable in lieu of black Furnane?

A. Primarily because of the way it was applied.

Q. Now, our Exhibit 14, I believe, your letter of April 3, which is a part of Exhibit 14, in the last paragraph you state: "As the Lumnite cement has not been installed in accordance with recommendations of the Universal Atlas Company, we have decided that it cannot be accepted in place of the specified black Furnane."

In other words, you were trying to determine whether what was there would be suitable as a substitute for black Furnane, is that correct?

A. Yes.

Q. Now, would you have accepted quality mortar of Portland cement as a substitute for black Furnane?

A. In other words, you are saying, if they had put in quality mortar, would I have accepted it?

Q. Yes.

Miles Cary Johnston, Jr.

A. We would have considered it. I cannot say whether I would have accepted it.

page 161 } Q. Now, of all the products for grout, wouldn't pointing mortar or Portland cement be the least resistant to acid and corrosion?

A. I cannot answer that question. I don't know.

Q. You don't know?

A. No. Possibly there might be some others that would be less resistant than pointing mortar.

Q. Pointing mortar then is less resistant to corrosion than Lumnite?

A. Yes.

Q. As far as you know?

A. Yes.

Q. And Lumnite is less resistant to corrosion than black Furnane?

A. I did not investigate that far.

Q. But your investigation was whether this was a suitable substitute for black Furnane, not whether it was a suitable substitute for Portland cement, would that be a fair statement?

The Court: No, whether it would be acceptable for the job, I believe.

A. Well, we were attempting to do, say, well now here we got the fact, the floor is in. Can we do anything to salvage the job. We were trying to say well, if we can investigate this thing and see if it can give the owners good

page 162 } service, then we will be willing to go along and go to the owners and say look, here is something that has not been installed in accordance with the specification. We think this has been due to honest error. It would be a lot of *aggrevation* to everybody, including you, to cut these joints out. You would not get the building on time. The contractor has used something that looks to us is suitable and will work and he is offering a credit of so much to reflect the difference of the cost of the Furnane and the Lumnite, if there is any difference in cost.

That is what we were attempting to do.

Q. You have testified that your intent all the way through the original specifications of Section 20, and the Addendum 1, was that every joint in that floor, in the quarry tile, was to be filled with black Furnane?

A. Between the quarry tile.

Q. Between the quarry tile?

A. Yes.

Q. That was your intent. So you obviously felt that the man you designed this job for, that black Furnane gave him something—I mean, you specified and your intent was to specify that product, because it is a better product?

A. I stated before there are two reasons. First, we knew it was a good material and second, we were requested to do so by the Department of Welfare and Institutions, page 163 } who have to approve these plans.

Q. So, Portland would not have done the job as far as what you were trying to give the owner?

A. I cannot say that Portland would not have done the job. There are dozens of mess halls with Portland.

Q. But the owners did not want a Portland floor, they wanted a black Furnane floor?

A. They wanted a floor, as we interpreted it, with a mortar of superior qualities.

Q. Do you understand that black Furnane is a superior mortar to Portland cement?

A. We think it is.

Q. All right. Now, referring to this Addendum Number 1, let me ask you this question: Drawing up specifications on a job, Mr. Johnston, is something that has to be done with a certain degree of care, is that correct?

A. We attempt to do it that way.

Q. You endeavor to be careful to make everything clear so that people understand what you want and there is no confusion about it?

A. We attempt to do so.

Q. The reason you drew up Addendum Number 1, is because telephone calls to you from people in the trade had indicated that there was some confusion with regard to vertical joints, is that correct?

page 164 } A. Yes.

Q. So you drew up Addendum Number 1, and this is Plaintiff's Exhibit Number 21, and it says, "Set in accordance with Specification Number 3 of American Standard Specification A108-1958, except fill all joints within the quarry tile with black Furnane instead of with pointing mortar."

Doesn't "instead" mean in place of?

A. The American Standard Basic Specification calls for pointing mortar. Black Furnane is not what I would call pointing mortar. It is a pointing compound.

Miles Cary Johnston, Jr.

Q. But this says, "Use black Furnane instead of pointing mortar."

A. And you are saying?

Q. That the word "instead" means in place of. In place of what the original specification said. Instead of what the first one said.

A. No.

The Court: I don't know whether that is very important to me. It does not make any difference if the man never saw them.

A. The American Standard Specification calls for Portland cement pointing mortar. So, my intention, what I meant to say—Maybe the addendum was not clear. But, in accordance with American Standard Specification Number 3, A108-1958, except use black Furnane instead of point-
page 165 } ing mortar. It calls for pointing mortar in your basic specification, the American Standard Specification.

By The Court:

Q. Of course, the technique of putting in black Furnane is entirely different from the specification in the American Standard?

A. Yes.

Mr. Bowles: I have no other question.

RE-DIRECT EXAMINATION

By Mr. Runkle:

Q. Mr. Johnston, this addendum in your interpretation does not change your request that black Furnane be put in all joints as originally set out in Section 20, is that a correct statement?

A. In Section 20, our original intention in Section 20 was to fill all the joints between tile with black Furnane. It became obvious there was misunderstanding so we issued the addendum to clarify it.

Q. But your interpretation of that language—you wrote it. You interpreted vertical joints to mean all joints?

A. I can see how it could be misunderstood. I wouldn't have put the addendum out.

Arthur C. Worley

Q. Now, Mr. Johnston, why did you ask for
page 166 } factory waxed tile?
A. That is the way we normally do it.

The Court: He has already answered that. He said that you cover the whole floor when you are grouting, and if you don't use waxed tile, you got trouble.

Q. It stains the tile, is that correct?
A. Yes.
Q. If the Portland cement is used, is there the same effect if you don't have waxed tile?
A. It is not applied the same way. It is just applied in joints and you don't smear the Portland cement. Furthermore, I might be wrong in this, but Portland cement does not have the adhesion to the tile that black Furnane has.
Q. Wouldn't the fact that you had specified waxed tile, factory waxed tile, indicate that you were intending to use black Furnane instead of Portland cement?

Mr. Bowles: I believe the witness has already said he does it all the time.
The Court: The question was, would the mere fact that you specified waxed tile, convey to the average tile subcontractor that you must be planning not to use Portland cement mortar?
Mr. Runkle: Not exactly, Judge. I said, would it be an
indication that you were contemplating to use
page 167 } black Furnane rather than this?
A. In my experience, the only time I ever saw waxed tile used, was in conjunction with black Furnane.

* * * * *

ARTHUR C. WORLEY, the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Runkle:
Q. Would you state your name, please, sir?
A. Arthur C. Worley.
Q. Are you an officer of Worley Brothers Company, Incorporated?

Arthur C. Worley

A. I am.

Q. What is your position?

A. Vice President.

page 168 } Q. Mr. Worley, you have heard all this testimony concerning the specifications. Would you tell the Court how you came to get the specification sets in your hands?

A. The customary procedure is, and this was no exception, you get two sets of plans and specifications, complete with all documents for bidding purposes. Then, whoever is the successful bidder, will get additional sets, of course, furnished by the Architect. This is stipulated in the specifications.

In this instance, we submitted a bid. We were successful, and approximately fifty additional sets of plans and specifications were delivered to us by the Architect. They usually call, where it involves a good quantity like this, they will call our office and we will go by and pick them up or either they will deliver them to our office.

The first thing we do in our office is to roll each set of drawings out and count the numbers of sheets, because where drawings have been in the possession of other bidders like mechanical contractors, sometimes they will remove the mechanical or electrical sheet. We always check the quantity of sheets. We always check the specifications for the conditions in the front and the addenda, and insert them in these specifications, roll them up into form and put a rubber band around it. Then we have a rack for them from which they are dispersed to the prospective bidders, material sup-

page 169 } pliers or subcontractors.

Q. In this case, did you follow that procedure with respect to the specification sets that you had?

A. We did.

By The Court:

Q. Did this particular subcontractor have any plans before you became a successful bidder? You get quotations and proposals from subcontractors before you make your final proposal, don't you?

A. We do, Your Honor. We get several hundreds of quotations from parties that we never heard of; that we don't even know that they had copies of the drawings and specifications, and we make it very clear then as to what section they are quoting on, because they at times will take exceptions.

Arthur C. Worley

For instance, he could have quoted Section 20 excluding all ceramic work, or something of that nature.

Q. This gentleman would not be, or did not in this particular instance make his proposal based on one of these extra sets that you got after becoming a successful bidder, did he?

A. He received a set of drawings and specifications from our office just like every other subcontractor or prospective subcontractor did, yes. There was no difference in the drawings and specifications. Of the hundreds of people

page 170 } that worked on the jail, this is the only complaint I have had in this instance. They all come out of the same rack.

Mr. Runkle: Perhaps I can clear that up, Judge.

By Mr. Runkle: (Cont'd.)

Q. Did the Marus Company make a bid to you on this job prior to you getting awarded the contract?

A. No, the Marus Tile Company did not.

Q. Do you recall how they came to request a set of plans?

A. The general procedure, and quite often on a large job, if the bids are incomplete on certain sections, we will either then at our election complete that, or forfeit it, or drop out of the bid. In this instance, we had a price of—I looked it up, incidentally—of $79,200.00 allowance in there for this, and on this particular job there were two items of construction that were not complete at the time of the bid, which we completed in our office and submitted a bid under that basis. To more completely answer your question, a Mr. Hennessee, a salesman, came in my office and asked me, did we have a quotation covering tile and terrazzo work, and at that time I told him no.

He said well, I have several subcontractors that I supply and I am wondering if you would be interested, and he gave me two names and he said, I will get in touch with, and he called Standard Tile and Marble in Staunton and

page 171 } Marus Tile and Marble in Greensboro. So, he was the one instrumental in having Mr. Marus come into this.

Q. What was the next step? Did they contact you?

A. I don't really recall. I think Mr. Hennessee contacted me and said he had talked to Mr. Marus, and Mr. Marus was interested in it. And then, I believe then the procedure was they requested that we mail them a set of drawings and specifications.

Arthur C. Worley

Q. Mr. Marus testified that he received in the mail from you a set of specifications and plans.

A. Right.

Q. Where would those specifications have come from?

Mr. Bowles: Your Honor, Mr. Marus said he received them, but—

The Court: Well, it was not clear in my mind whether they came from Mr. Worley or from the Architect. Apparently they came from Mr. Worley's office.

Q. Well, do you recall mailing the specifications to Mr. Marus' company?

A. No right off. It has been so long ago. I could not swear that I personally mailed them.

Q. If they were mailed from your office, and he has testified, I think, that they were, from what source would you have gotten that set of plans and specifications that you mailed?

page 172 } A. This, I can personally swear to. They would have come from the master file involving this particular job, of which fifty sets were available.

Q. These fifty sets, were they to your knowledge complete sets?

A. They were. They were at the time that I checked them. How he received them, I cannot say.

Q. Well, you checked them while they were in your office?

A. I checked them on the incoming portion of it and rolled them up on a rubber band and put them into that particular file. This saves us a lot of time if a sub comes in and says, I need my drawings. We do it once and that is final.

Q. And you testify that when you checked all these sets, that all addenda were included?

A. Yes, at the time I checked them when they were incoming, they were there. Had they not been there, we, of course, would have called and gotten a set and made them complete.

Q. Prior to this blowup on the workmanship that came later, did you and Mr. Marus have a discussion about this bid? I believe he came up and discussed it with you?

A. Yes, he drove up and we negotiated this job similar to what we do in quite a few instances.

page 173 } Q. Was there any mention made at that time of the addenda?

Arthur C. Worley

A. No. I don't think he raised, nor did I raise a question pertaining to the plans and specifications.

Q. Was there any question raised by him as to vertical joints, with you?

A. No. No mention was ever made.

Q. Was there any mention ever made by him as to black Furnane or where it should be placed?

A. No.

Q. When did you first know of the difficulty on the job site in connection with the quarry tile?

A. I think we all, concurrently when Mr. Johnston came and asked, what material are you using, and, of course, he was told and to my recollection it was approximately fifty percent through, but I heard testimony saying sixty and seventy-five. But I would say fifty percent through the mess hall area when determined that this was not the specified material, and I think his foreman or superintendent went to the phone and called and came back and got an answer. I think we all knew at one time.

Q. At this stage, what attitude did you take for the workmanship on the job that was done?

A. I took a very positive approach assisting the subcontractor.

page 174 } Q. In what manner did you do this?

A. Well, we always do that. As long as the subcontractor is right and it is being done in accordance with the plans and specifications in a good workmanlike manner, we will defend him to the fullest.

Q. You made an inspection with the Architect and what did you find as to the workmanship, as to the laying of the quarry tile?

A. Well, up until the time that the actual manufacturer came to the job, no one could walk through this area and tell how it was installed; whether it was properly or improperly installed. I do know that there were some comments about the irregularity of the tile. Some tile was raised above the other, but in an area this large, I would say it was average.

Q. You subsequently changed your opinion, I believe, and for what reason?

A. Only after I was notified that it was poor workmanship that was involved—the gentleman that came down from New York was very cooperative, and he said, in all frankness, this is going to cost me thousands of dollars, he said, but my reputation is at stake and as much as I would love to tell

Arthur C. Worley

you that this is perfectly acceptable, I cannot do so. Because all we really needed from him is to say that this was a good workmanlike job and the Architect had pre-
page 175 } viously stated that if this was forthcoming, he would recommend that this be accepted. So, until this point, until I found out that it was faulty in its application, I was strictly assisting in every way possible to get this thing accepted. Not only from the time standpoint, but because I believed the product was equal.

Q. Whose responsibility was it to lay this tile and to lay it properly in accordance with the specifications?

A. The subcontractor's involved, of course.

Q. What other things, if any, did you find in this quarry work that were not according to the specifications?

A. Well, we found several things. One of the main objections I found was Mr. Marus' men never, to my knowledge, ever had a set of plans and specifications on the job. I know he used to use the ones—the general contractor maintained an office for this specific reason of viewing the plans and specifications, and in the front of the specifications there were clipped the addenda.

I know on one other occasion I walked in the front entrance and he was installing ceramic tile over the doors and I said, this is wrong. The specifications call for galvanized lath and he was using black lath. And he took his workmen in there and showed them that, and he immediately switched just like he did on the wax and so forth.

Q. To your knowledge, was a complete set of
page 176 } specifications, including the addenda, on the job site all the time?

A. I can swear to that, yes.

Q. Did Mr. Marus, or the superintendent, or workmen look at it?

A. He did, innumerable times.

Q. What else in relation to the quarry tile was not according to the specifications?

A. Well, the ceramic tile that I just pointed out was the main thing, and the things that you previously pointed out. Obviously, someone, whoever took the job off, just did not supply the men in the field with the required materials. He bought the wire locally. He bought the galvanized lath locally.

Q. Did you to your knowledge supply the Marus Company with more than one set of specifications?

Arthur C. Worley

A. We had twenty-two sets left over from this job, which I still retain. And generally speaking, all subcontractors ask for and receive two to four sets of drawings and specifications.

Q. Had he asked for additional copies of drawings and specifications, would you have given them to him?

A. Absolutely.

Q. Is it customary on a job of this size that they use additional sets?

A. Once he is successful, it is almost always
page 177 } customary that he has additional sets. In fact, the specifications clearly state that one should remain in the office and one in the field.

Q. Now, you have heard all the various letters which have been read out as to Mr. Marus' attitude; that he would reluctantly finally do the job what the specifications have called for, but expected you to pay for it. Did you at any time volunteer or offer or commit your company to pay him any extra or additional charges?

A. No, we did not.

Q. Let me take you back to the letter in which you wrote, I believe, the Architect, in which you used the phrase, "Through human error, the subcontractor either did not get or completely overlooked the specifications." Do you, to your knowledge know whether he had those specifications with addenda or not?

A. This is what he told me. My phraseology was based on what he told me.

Q. Do you to your knowledge know whether he had the addenda or not?

A. No.

Q. If he comes in here today and says he does not have it, is there any way that you can contradict him?

A. No.

Q. Now, the contract price for this subcon-
page 178 } tract was $78,000.00, is that correct?

A. That is correct.

Q. What sum has your firm paid to the Marus Company?

A. Our firm paid the full amount of $78,000.00.

Q. What complications, if any, were there from the Marus Company failing to complete the job in accordance with the specifications?

A. The greater consequences were, we were delayed from December until—you notice there, it was March or April even

Arthur C. Worley

before he got started. That was one of the reasons that in the early offset stages of it, I attempted every way possible; I went to the Architect's office to see if this material that was used was comparable to what was specified, to get it approved. Because of it, I had a two hundred fifty days liquidated damage on this particular project; the delay.

I know I called Mr. Marus' office several times about doing something one way or the other; telling me whether he was not going to correct it or proceeding with it, and it was delayed from December until April something.

Mr. Runkle: That is all.

CROSS EXAMINATION

By Mr. Bowles:

Q. Mr. Worley, you said they were lying around, nothing had been done until March or April, something like that?

page 179 } A. Nothing was done on this particular floor involving the Lumnite.

Q. Isn't it a fact that you did not send him the addenda that he had requested until by letter of May 8, 1964? I refer you to Plaintiff's Exhibit Number 20.

A. He read the addenda on December 6th right in my presence, in my office. In the field office.

Q. On December 6th?

A. When he came to visit the job, he read the addenda. His superintendent had previously read the addenda, the day we stopped it.

Q. But you did not send it to him until May 8th?

A. No, not until he requested an additional one.

Q. I believe you said that the specs called for every sub on the job to have one copy in his home office and one copy in the field?

A. It is customary.

Q. Is that what the specs for that job call for?

A. I cannot recall.

Q. Can you find it in there?

A. I may, if given time.

Q. Do you figure it is in there?

A. I figure that common sense reasoning would tell you that an average workman could not talk to his home office unless both had a set of plans and specifications.

Arthur C. Worley

page 180 } Q. And you had fifty extra?

A. No, a total of fifty. I have twenty-two extra.

Q. You had fifty total?

A. Right.

Q. How many subcontractors did you have on this job?

A. Oh, probably, without going to that—I would have to check it, really. The major contractors, four. That would be the jail, major. Mechanical.

Q. Other contractors involved?

A. Minor contractors, like painting and generally speaking, we perform all other trades. We do our own engineering, concrete, excavation.

Q. Can you give me an estimate how many total contractors?

A. I would say total probably twenty.

Q. Now, I believe you said when Marus came up to your place after he had sent you the proposal and came up to Richmond, back in 1962, that you all did not discuss the specs and anything like that. The only thing you did is work on him to get his price down?

A. No, I don't think I worked on him. I think the phraseology is incorrect. We discussed it.

Q. Well, he certainly did not walk in the door and say, I can do it cheaper then?

page 181 } A. No, nor did I say I want you to do it cheaper. It is a businessmenlike negotiation.

Q. I gather you all sat there and tried to shake one another on the price?

A. We had to determine what ways and means you could save, like storing material in one area, using the elevator.

Q. And you got in there to something that was acceptable to you?

A. I would not use that phraseology. I mean, we reached a mutual agreement.

Q. But the agreement involved that the man did it for less than he offered to do it to begin with. The proposal calls for $85,000.00; the final contract signed is $78,000.00. $78,000.00 is less than $85,000.00.

A. He must have been convinced that he could do the job cheaper.

Q. Well, you wanted him to do the job cheaper.

A. That is human nature, of course.

Q. You said this procedure of checking these addenda with the specifications, the fifty copies you got. Do you yourself personally sit there and check every one?

Arthur C. Worley

A. I do this particular thing like I sign a contract, because this is very important.

Q. On this particular job, did you yourself sit
page 182 } down and check every individual one?

A. I did. I was the project manager.

Q. But this was only done when they came in?

A. That is correct.

Q. You did not check them after that?

A. That is correct.

Q. Now, you mentioned some things about ceramic tile. That does not have anything to do with this case, but you said we put up some laths that were not proper?

A. I merely pointed out that there was a lack of specifications or his familiarity with them.

Q. Isn't it a fact that we, I mean by that, Marus, was paid extra $172.50 for furnishing and installing galvanized metal laths on the ceramic tile as per your quotation of April 6, 1964?

A. I think he extended it to a larger area than what was shown, yes.

Q. So it is not a question he did it wrong. You would not have paid for it if he had done it wrong?

A. The thing that you are referring to is an extra, extending something.

Q. There were a number of extras?

A. That is correct.

Q. Extra for the toilet facilities, I believe?

A. But these were authorized extras, right.

page 183 } Mr. Bowles: I have nothing further.

By The Court:

Q. When Mr. Marus wrote to you and said, we will go ahead and complete this job the way they want it, did you ever answer him or anything?

A. No, I merely referred the Architect's letter to him, Your Honor, because I had clearly stated to him in writing that it was never my intent that he remove this floor, providing it was installed in a good workmanlike manner. So, really and truly, I did not want it removed.

Q. But it was instructions from the Architect that really caused the reworking of the floor, is that right?

A. That is correct, sir. I informed him of the Architect's letter.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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