New Jersey Court of Errors and Appeals

KELLY CONSTRUCTION COMPANY, a corporation, *Plaintiff-Respondent,*	On Appeal from the Supreme Court.
vs.	
HACKENSACK BRICK COMPANY, *Defendant-Appellant.*	

BRIEF FOR PLAINTIF-RESPONDENT.

The plaintiff brought action to recover damages for the refusal of the defendant to perform a written contract to deliver all the common hard brick required by the plans and specifications for the erection of the Englewood High School, at $7.00 per thousand.

Plaintiff pleaded and proved the contract consisting of a written order for the brick (Complaint, p. 4, line 22; Ex. P-1, p. 13, line 20), and a written acceptance thereof by the defendant (Complaint, p. 5, line 10; Ex. P-2, p. 14, line 10). Plaintiff also pleaded a part performance of the contract by the delivery of 69,750 brick (p. 3, line 32), and proved a demand upon defendant for the delivery of more brick, pursuant to the contract (Ex. P-3, p. 15, line 22; Ex. P-6, p. 17, line 5), and the neglect and refusal of defendant to comply with this agreement (Ex. P-4, p. 16, line 20; p. 17, line 32).

Failing to induce defendant to deliver brick according to the contract plaintiff went into the market and bought brick at $9.50 per thousand, to complete the job (Ex. P-6, p. 19, line 10).

741,500 brick were required and the cost above the contract price was $2.50 per thousand, or $1853.75 (Ex. P-6, p. 19, line 10 to p. 21, line 10).

Defendant's answer admitted plaintiff's order and defendant's acceptance thereof (Answer, pars. 1 and 2, p. 5), but set up as a defence to the action—

(1) That Schedule 1 and Schedule 2 annexed to the complaint (Ex. P-1 and Ex. P-2, pp. 13 and 14) contained but part of the contract.

(2) That in addition to the written contract it was *expressly agreed* that "all brick delivered were to be paid for promptly, not later than the 10th day of the following month".

(3) That in case plaintiff failed to make such payment the contract should be at an end.

(4) That defendant made certain deliveries of brick which plaintiff failed to pay for in accordance with the alleged additional agreement, and that after several demands for payment defendant issued an attachment against plaintiff's property and thereby collected the price of the brick delivered.

(5) That by reason of planitiff's failure to pay in accordance with the alleged additional agreement, the contract between the parties terminated.

(Answer, par. 6, p. 6.)

On the pleadings and proofs the trial judge directed a verdict in favor of the plaintiff for the sum of $1853.75.

The question presented is whether plaintiff was entitled to a directed verdict.

No question is raised as to the amount of the verdict, provided that, on the case presented, the trial judge was warranted in directing a verdict.

POINTS.

I.

The contract (Ex. P-1 and P-2) is entire, and payment of the purchase price became due only upon full performance by the defendant.

The contract arises out of plaintiff's letter of October 19, 1915 (Ex. P-1, p. 13, line 15) and defendant's reply thereto, of October 21, 1915 (Ex. P-2, p. 14, line 12).

The contract requires defendant to furnish "all the common hard brick required by the plans and specifications for the Englewood High School, at $7. per M."

The provisions respecting delivery are:

> "Brick to be delivered *as required by us,* and sufficient brick to be kept on the job, so that we will always have approximately 50,000 brick stacked, until the completion of the job."

Defendant accepted this order without qualification.

In *Williston on Sales* (p. 803, Sec. 466), the author says:

> "Where by the terms of a contract the goods are to be paid for at a certain rate so that the price for a portion of them can readily be calculated, though the contract becomes divisible if a portion of the goods are delivered, and a debt arises for them, *yet without special agreement it is not payable until all the goods have been received.* It is essential to recovery, not only that the price for a part can be calculated, *but that expressly or impliedly there is a promise to pay for a part.*"

In support of this rule the author cites *Baker* v. *Higgins,* 21 N. Y. 397.

In that case the plaintiff sued to recover for brick sold and delivered. He testified to an oral contract between himself and the defendant, for a sale of brick by the plaintiff to the defendant, the brick to be paid for as delivered. He also testified that at the close of the conversation the plaintiff wrote something on a piece of paper and handed it to the defendant, whereupon the parties separated. None of the plaintiff's witnesses were able to state what the writing contained.

The defendant produced and identified the paper writing, which turned out to be as follows:

> "I will deliver John Higgins 25,000 pale brick on the dock at East Troy for $3. per M; and 50,000 hard brick at the same place, at $4. per M, cash, E. W. Baker, Coxsackie."

Upon the production of this writing, the defendant moved to strike out the parol evidence on the ground that the writing expressed the agreement of the parties. This motion was refused and exception taken. Speaking of the above agreement, the Court of Appeals says:

> "This, I think, was a valid agreement, and must be deemed and taken as the agreement then made between the parties in relation to the brick, and under which a part was afterwards delivered.
>
> "Not long after this agreement, the plaintiff delivered to the defendant, at Troy, under the written contract, a cargo of brick, consist- of 10,500 hard and 10,500 pale bricks, and demanded payment for that quantity, which the defendant refused until the whole was delivered. This, I think, he had the right to do. The contract was entire, to deliver 75,000 bricks; and the plaintiff was not entitled to pay for any part until the whole was deliv-

ered, or until he was ready and offered to deliver the balance, which the plaintiff has not done. The action was brought for the contract price of the 21,000 bricks delivered; *and the referee found, contrary to the legal import of the written agreement, that the brick was payable on delivery, as the same should be delivered.* For this error the judgment should be reversed and a new trial directed in the court below, with costs to abide the event."

In *Mount* v. *Lyon, et al.* 49 N. Y. 552, the facts are stated as follows:

"The action was brought to recover damages for the breach of a contract for the delivery of a quantity of brick. On the 19th day of August, 1867, by contract in writing, defendants agreed to furnish to plaintiff, delivered at the corner of Fifth Avenue and Twelfth Street, Brooklyn, within three months, 400,000 North River hard brick; price, delivered, $10.50 per M. Defendants delivered, under the contract, 213,500, and refused to deliver the balance. Plaintiff paid for those delivered about December 28, 1867. The referee gave judgment for the difference between the market value and the contract price at the expiration of the time for delivery, i. e., November 19, 1867."

The Court said:

"There was a conflict of evidence upon the allegation of the defendants that the plaintiff had waived the performance of the contract by requesting the defendant not to deliver more brick under it, and the referee has found that issue against the defendants.

"The contract was entire and indivisible for the delivery of a given quantity of brick,

at a place specified, and within a limited time, to wit, within three months from the making of the agreement. The delivery of the entire quantity was a condition precedent to the right of the seller to demand payment for any part. *No time of payment being fixed by the contract, the law makes the price payable upon the delivery of all the brick, and not before.* (Baker v. Higgins, 21 N. Y. 397; Husted v. Craig, 36 id., 221.) The fact, therefore, that the plaintiff had not paid for those delivered prior to October, when the defendants discontinued the delivery under the contract, does not excuse the delivery of the residue. The plaintiff was not in default, and the defendants had no legal claim for payment for any part until the whole should be delivered."

In *Delehanty* v. *Dunn,* 136 N. Y. Supp. 193, (App. Div., First Dept., 1912), the contract was as follows:

"Messrs. Dunne & Company:

I agree to pay you one & 10/100 Dolls. (1.10) per cubic yard for mold furnished and spread, and one and one half (.01½) cents per square foot for sod furnished and laid, for all required under my contract at Thomas Jefferson Park, and to the satisfaction of the Landscape Architect of the Department of Parks, Engineer's measurements to determine quantities. It being fully agreed that deliveries will be prompt as required and all to be completed before August 1st, 1903.

"Accepted.

"DUNNE & CO."

It appears from the opinion that work was performed under this agreement amounting at the stipulated price to $1699.16 more than was paid,

when plaintiff's assignor refused to continue the work unless that sum was paid. Defendant refused to pay and action was brought to recover that sum.

Plaintiff was allowed over defendant's objection, to give evidence of a parol agreement that he should be paid each week for the work done. The Court said:

> "There can be no doubt that the writing constituted a complete and enforcible contract. The time of payment not having been specified, the law fixes it, and the legal effect of the instrument must be considered as the contract which the parties made. In legal contemplation, the plaintiff contracted upon the completion of the work to pay the stipulated price. The time of payment was as much a part of the contract as though it had been expressly stated in the writing, and to permit one of the parties to show an oral agreement, specifying a different time of payment, is a plain violation of the rule that written contracts may not be varied by proof of a verbal agreement.
>
> *Baker* v. *Higgins,* 21 N. Y. 397, is directly in point."

To the same effect, see,—

Chester Rolling Mills v. *The Hopatcong,* 6 N. Y. Supp. 215.

Munsey v. *Tadella Pen Co.,* 38 N. Y. Supp. 159.

In *Shinn* v. *Bodine,* 60 Penn. State, 182, S. C. 100, American Decisions 560, there was a contract for delivery of 800 tons of coal at a certain price per ton delivery to be made during August and September on board vessels to be provided therefor. If the whole quantity of coal were not delivered

during the specified time, a certain amount was to be delivered at a later period. The Court said:

> "The contract for the delivery of 800 tons of coal, at a stated price per ton, is in language clearly denoting an entire contract for that much coal, *the price measured by the ton not indicating any intent to sever in payment.* Nor does the provision for delivery on board vessels, sent for the coal during August and September indicate an intent to sever the payment, for delivery by the vessel load was a necessity growing out of the quantity to be delivered and the distance of transportation. And the last clause was but a provision against inability to send for all the coal in the prescribed time, and fails to indicate any intent to sever the payment. No part of the agreement disclosing an intent to sever in payment, *the legal presumption drawn from the entire contract to deliver eight hundred tons of coal remains,—that it was to be paid for on delivery.*"

Analogous to the present case are cases of employment for a specified time at a certain rate per week or month. In such cases it is held that unless there is an express agreement for weekly or monthly payment of wages, no payments become due the employee until the end of the term.

In *Davis* v. *Maxwell,* 12 Metcalf 286, plaintiff agreed to work for the defendant for a period of seven months at twelve dollars per month. He abandoned his employment before the expiration of the term and sued for wages at the agreed rate for the time of service actually performed, giving credit for some payments on account. The Court said:

> "In regard to the contract itself, which was an agreement to work for the defendant for

seven months at twelve dollars per month, we are of opinion that it was an entire one, and that the plaintiff, having left the defendant's service before the time expired, cannot recover for the partial service performed. * *

"The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But however reasonable such a contract might be, it is not, we think, the contract which is proved. There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other; and not part performance and full payment for the part performed. The rate per month is stated, as is common in such contracts, as fixing the rate of payment in case the contract should be given up by consent, or death, or other casualty should determine it before its expiration, without affecting the right of the party."

In *Jennings* v. *Camp,* 13 Johns. Report 95, plaintiff "agreed to log up, burn and clear, fit for sowing, ten acres of land on a certain lot belonging to the defendant below, the plaintiff-in-error, in good farmerlike manner, by the twentieth of September, and to fence the said ten acres with a good rail fence by the first of October next; and the defendant below agreed to pay the plaintiff at a rate of eight dollars per acre."

Plaintiff quit before completing the job.

Speaking as to the right of the plaintiff below to recover for part performance, the court said:

"The contract being entire, performance by the plaintiff-below was a condition precedent and he was bound to show a full and substantial performance of his part of the contract."

Held, therefore, that plaintiff could not recover.

The rule laid down by the foregoing authorities is applicable to the case at bar. Hence, there was no default on the part of the plaintiff, and defendant was required to deliver the brick pursuant to plaintiff's order.

II.

Defendant wholly failed to show any additional or supplemental contract with respect to the time of payment.

Defendant pleaded that the order and acceptance were but part of the original contract, and that in addition to the written contract there was an agreement that the brick were to be paid for promptly, not later than the tenth of the month following delivery, and that in default of such payment the contract should terminate (Answer, p. 6, par. 6).

At the trial this defence was abandoned and in place thereof an attempt was made to prove that subsequent to the date of the acceptance of plaintiff's order (Oct. 21, 1916), an additional or supplemental agreement was entered into modifying the original contract and fixing the time of payment and terminating the contract in case of default by the plaintiff in making payments according to such alleged supplemental agreement (p. 52, line 20 to p. 53, line 10).

When objection was made to the introduction of evidence relating to a subsequent agreement, defendant sought and obtained leave to amend its answer (p. 53, line 10 to p. 54, line 35).

The substance of the proposed amendment was stated on the record and the defendant was di-

rected to draft and submit to the trial judge the amendment as allowed, and after his approval to file it (p. 54, line 35 to p. 57, line 40; p. 70, line 12).

No amendment was filed, but defendant was permitted to introduce evidence in support of the alleged supplemental or additional agreement.

Counsel stated on the record that the alleged agreement was made on the job at Englewood by Mr. O'Keefe, acting for the plaintiff, and Mr. M. B. Gardner acting for the defendant (p. 55, line 8 to p. 56, line 30).

The alleged supplemental or additional agreement is claimed to have been made after plaintiff's order had been accepted (p. 58, line 22).

There was complete failure to show any agreement with respect to modifying or adding to the original contract or to show any authority on the part of O'Keefe to bind the plaintiff with respect to any such matter.

On cross examination Mr. Kelly, the Treasurer of the plaintiff, was asked who was in charge of the job (meaning the Englewood High School), and he replied, "Mr. O'Keefe" (p. 51, line 4).

Further testimony relative to Mr. O'Keefe's relations to the plaintiff and the scope of his employment was given by Mr. M. B. Gardner, defendant's Treasurer, and by Mr. Kelly, who was recalled as defendant's witness.

Mr. Gardner's testimony is found on page 59, line 38 to p. 60, line 15. That of Mr. Kelly is found on page 61, line 30 to page 66, line 38.

The testimony of these two witnesses is all there is on this subject.

It is evident from this testimony that O'Keefe was merely a foreman on the job to supervise the work of the mechanics and laborers, and that he was accustomed to buy some trivial things needed in an emergency. He clearly had no shadow of authority to make contracts for the plaintiff, nor to modify a contract already entered into by the responsible officials of the corporation.

On this evidence defendant offered to prove "the conversation—the agreement between Mr. Gardner and Mr. O'Keefe, so as to show that payments were to be made not later than the 10th of each month" &c. (p. 67, line 1).

The offered evidence was properly overruled and the attempt to show a supplemental agreement covering payments and the effect of a default failed completely. Thus, the contract consisted simply of the order and the acceptance thereof. On this contract payment was due when deliveries had been completed.

III.

This contract does not come within the provisions of Section 45 of the Sales Act (Comp. Stat., p. 4657).

The above section relates only to those contracts in which two conditions exist, namely:

(1) The goods are to be delivered by stated instalments.

(2) *The instalments are to be separately paid for.*

It is not pretended that the brick were to be paid for load by load as they were delivered. On the contrary, the contention as set up in the pleadings, is:

> "All brick delivered were to be paid for promptly not later than the 10th day of the following month. That, in case of failure on the part of the plaintiff to make such payment, then the agreement between the parties should cease, determine and be at an end."

As shown under Point II of this Brief, the at-

tempt to support this defence by proof of a supplemental contract completely failed, because of the entire absence of evidence to show authority in O'Keefe to bind the plaintiff company in this respect.

Defendant nowhere claimed that payment for the brick was due as each load was delivered. That point not having been raised in the pleadings, nor presented to the trial court for determination, cannot be raised in this court.

The rights of the parties thus being prescribed by the written contract, the cases cited under Point I of this brief control as to time of payment, and the plaintiff was not in default. Hence, there was no legal excuse for the refusal of the defendant to deliver the remainder of the brick covered by the contract.

Since the provisions of Section 45 of the Sales Act do not apply, the principle underlying the decision in *Empire Rubber &c., Co.* v. *Morris*, 77 N. J. L. 498, and the cases therein cited, is also applicable, and defendant is left without legal excuse for failure to perform its contract. There is nothing in the case to indicate an intention on the part of plaintiff to abondon the contract.

IV.

If this case should be held to be within the provisions of Section 45 of the Sales Act, still the plaintiff was entitled to a directed verdict.

(1) Defendant's pleadings and its offer of proof at the trial go no further than to show a mere failure to make payment in accordance with the defendant's contention as to the time payment became due.

No case in this state, either before the enact-

ment of the Sales Act or subsequent thereto, goes so far as to hold that the mere failure to make payment for an instalment when due warrants the other contracting party to rescind the contract and refuse to make further performance thereof. By the very terms of the statute the right of the injured party is dependent upon the materiality of the alleged breach. This materiality must be pleaded and proved.

In *Corey Co.* v. *Minch,* 82 N. J. L. 223, the case came before the Supreme Court on demurrer to pleas. The declaration in substance alleges that the defendants bought and the plaintiff sold 5000 bags of potatoes to be shipped *and paid for* in car load lots on the defendants' order; that certain car loads were shipped, accepted and paid for in 1910; that other car loads were shipped in the spring of 1911 and were rejected because of a failure to comply with a warranty. That thereupon the defendants rescinded the contract and refused to accept further deliveries. Plaintiffs then sold the balance of the potatoes at a loss which they sued to recover.

Defendants pleaded defective deliveries setting out in detail the nature of the defects. These defects were such *as to raise an inference that they were material, but there was no allegation of materiality in the pleas.* The Supreme Court said:

> "This recital is enough to show that the point raised is the right of the defendants to rescind a contract for the delivery of goods in installments, where some of the installments fail to comply with the contract. The case is governed by the sale of goods act of 1907. C. S. 4645. Section 45 provides that, where there is a contract to sell goods, to be delivered by stated installments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, it depends upon the

terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken. The question turns upon the materiality of the breach under the circumstances of the case, and this is a question of fact. Williston on Sales, Par. 467, p. 810. The pleas fail to aver that the breach of contract was material, although they aver facts from which that inference might be drawn. This is not sufficient as against the demurrer. The plaintiff is therefore entitled to judgment upon these pleas."

Since the pleadings in the case at bar fail to set up the materiality of the alleged breach and no effort or offer having been made to prove its materiality, defendant has failed to establish a defence even though the case should be held to be governed by the Sales Act.

(2) The brick were to be delivered as required by the plaintiff. (Ex. P-1, p. 13, line 32.)

Plaintiff struck rock in the excavation and was not ready for the brick until April 1916. (P. 14 line 35.)

On April 6, 1916, plaintiff sent to defendant their first request for the delivery of brick (p. 15, lin 8).

In defendant's letter of acceptance of the order (Ex. P-2), plaintiff is asked when defendant may begin making deliveries (p. 14, line 22).

As an accommodation to the defendant some deliveries of brick were permitted before plaintiff was ready for or required them. No order was given for the delivery of these brick (p. 25, line 10).

This evidence is not disputed. Under any view of the case plaintiff would not be required to pay for brick which it had allowed the defendant to deliver for its own accommodation, and before plaintiff required them in the construction of the building.

(3) The conduct of the defendant evidenced a determination not to rescind the contract, but to regard the alleged breach as severable, giving rise to a claim for compensation but not to a right to treat the whole contract as broken.

Defendant never notified plaintiff that it intended to rescind the contract or that it declined to be further bound thereby. On the contrary it assumed the right to collect for the brick delivered, and on March 16, (not March 1, as shown the printed case, p. 8, line 10), it issued a writ of attachment to enforce payment. Even the letter of defendants' attorneys of April 11, 1916, does not directly aver that the contract had been rescinded by the defendant (p. 17, line 20).

Under the circumstances existing at the time the writ of attachment was issued, the plaintiff had a right to assume that the only claim made by the defendant was that it was then entitled to be paid for the brick already on the job. Plaintiff disputed that right, but assuming that defendant would make further deliveries, and desiring to avoid litigation it settled the attachment suit.

Undoubtedly the purpose of the plaintiff was not only to avoid litigation but to make sure of preserving the contract in full force.

Under these circumstances defendant was estopped on April 20, 1916, from declaring that the contract had been rescinded.

On the whole case the trial judge was required to direct a verdict for the plaintiff, and the judgment entered thereon should be affirmed.

Respectfully submitted,

VREDENBURGH, WALL & COREY,
Attorneys for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals.

KELLY CONSTRUCTION COMPANY,
a corporation,
Plaintiff-Appellee,

v.

HACKENSACK BRICK COMPANY, a
corporation,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This was an action brought by the plaintiff-appellee against the defendant for the recovery of damages for an alleged breach of contract. The contract on which the plaintiff relied consisted of two letters as set forth in the state of the case on pages 4 and 5 respectively. The defendant contended that the two letters did not comprise the complete contract between the parties and as shown by their answer (State of the Case, pp. 5, 6 and 7) alleged that the two letters were only a part of the agreement entered into by the parties and that in addition to the letters the plaintiff agreed to pay for all brick delivered promptly and not later than the 10th day of the following month after each delivery, and upon failure to pay for any delivery the agreement should cease. The Trial Judge refused to consider the evidence introduced on the

part of the defendant showing the failure of the plaintiff to pay for the brick delivered, and directed a verdict for the plaintiff on the grounds that the two letters comprised the entire contract and that even though the plaintiff did agree to pay for the brick not later than the 10th of each month that this would not be a sufficient default on the plaintiff's part to warrant the defendant in treating the contract as abandoned and refusing to deliver any more brick. The defendant also offered to introduce testimony tending to show that the defendant was obliged to issue a writ of attachment in March, 1916, for the recovery of the amount for brick delivered in the months of October, November and December, 1915, and also that the plaintiff settled the attachment without objection by paying the amount due with interest and costs, which evidence the Court refused to admit and directed a verdict for the plaintiff.

POINT I.

The Court erred in refusing to permit the defendant to introduce evidence for the purpose of showing that the plaintiff had on several occasions refused to pay the defendant for the brick delivered in accordance with the agreement between the parties.

The complaint sets out the two letters aforementioned and alleges that they comprise the contract of the parties.

The answer of the defendant alleges that the true contract of the parties is not contained in the letters and that the letters are only a part

of the original understanding or agreement between the parties and that the plaintiff further agreed to pay for all brick delivered promptly on or before the 10th day of each month after the deliveries. Nowhere in the two letters is there any mention as to when payment was to be made. In the absence of any agreement, Section 42 of the Sales Act (C. S., p. 4657), controls:

> "Unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods" (C. S., 4657, Section 42).

The defendant in its answer alleged that there was an agreement on the part of the plaintiff to pay for the deliveries on or before the 10th of each month (State of the Case, p. 6). Evidence, therefore, tending to show the refusal of the defendant to pay was very material on the question as to whether the plaintiff by refusing to pay had not evinced an intention to abandon the contract and no longer be bound by its terms; and that if such evidence had been admitted it would have immediately raised a question for the jury to pass upon. And assuming for the sake of argument that the two letters in question did contain the complete agreement of the parties, where is there anything in the letters indicating when payment was to be made and even though conversations as to when the payments were to be made were not admissible for the purpose of varying the terms of the written contract, still, under Section 42 of the Sales Act aforesaid the *plaintiff was under a duty* to

pay for the deliveries immediately upon receiving the same as the Statute says:

> "And the buyer must be ready and willing to pay the price in exchange for possession of the goods."

All of the cases cited by counsel for the plaintiff at the trial in the Bergen Circuit are no longer applicable by reason of the Sales Act aforesaid. And even without the Sales Act the evidence offered by the defendant was admissible because it did not add to or vary the contract as contained in the letters, but would have only been given for the purpose of supplying a missing element, viz.: the time when payment was to be made. Counsel for the plaintiff in his argument before the Court in citing the law said (State of the Case, p. 30, fol. 10):

> "Now upon this subject of evidence to add to or vary a written contract there is, of course, abundant authority in this State, and the part of the rule which has been adopted in this State to which I wish to call the attention of the Court is this: That the contract itself, if it constitutes a complete obligation, that is, if the parties are bound by the written contract, then, unless on the face of the contract itself *there is a missing* element so that it may be said upon reading the contract that it is not complete, then no evidence can be admitted."

This, undoubtedly, is the law, but we want to call attention to the part of the above citation which says: "Unless on the face of the contract itself there is a missing element so that it may be said on reading the contract that it is not complete, then no oral evidence can be admitted." Refer to the letters, read them carefully, and see if there is anything in them which shows when or

how the payment was to be made. There certainly is nothing, and in the absence of such a provision the intention of the parties as to when the payments were to be made must control. This is only used as matter of argument to offset the plaintiff's contention that no evidence could be admitted on the question of payment, but irrespective of the soundness of his argument Section 42 of the Sales Act imposes upon the buyer duty to be ready and willing to pay immediately or as the statute says: "In exchange" for possession of the goods.

POINT II.

The Court erred in refusing to permit evidence to prove that it was compelled to issue an attachment against plaintiff for moneys due for brick delivered under their agreement.

What was the purpose of the defendant in trying to prove that it was obliged to resort to legal proceedings for the recovery of moneys due for brick delivered under the contract, when the brick were delivered in October, November and December, 1915, and payment was demanded from time to time until March, 1916, a period of nearly three months, unless it was to have the jury say, whether the plaintiff by their failure to meet the demand for payment and their further failure not to order any brick between said dates did not evince an intention on their part to be no longer bound by the contract and thus relieve the defendant from any further performance.

The rule in New Jersey used to be in cases of this kind as follows:

> "Whether the circumstances would warrant an inference by the jury that the plaintiff proposed to abandon the contract or no longer be bound by its terms."
>
> Blackburn *v.* Reilly, 47 N. J. L., 290, at page 309, about half way down the page.

Counsel for the plaintiff cited this case at the trial in the Circuit Court and also cited the case of the Empire Rubber Mfg. Co. *v.* Morris *et al.*, 72 Atl. Rep., page 1009. In which opinion Chief Justice Gummere speaking for the Court of Errors and Appeals cited with approval the case of Blackburn *v.* Reilly, *supra*, which case of the Empire Rubber Company was decided by the Court of Appeals in 1909. The litigation, however, commenced sometime in 1905, which was prior to the enactment of the Sales Act and was, therefore, not decided or controlled by any section of the act.

The rule as laid down by the Court of Appeals in the case of Blackburn *v.* Reilly and other cases has been changed in respect to contracts similar to the one involved in this action by Section 45 of the Sales Act, Subdivision 2:

> "Where there is a contract to sell goods to be delivered by stated installments which was to be separately paid and the seller makes defective deliveries in respect to one or more installments or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and in suing for damages for breach of the entire contract, or whether the breach is

several giving rise to a claim for compensation, but not the right to treat the whole contract as broken."

C. S., 46, 57, Section 45, Subdivision 2.
E. I. Dupont DeNemours Powder Co. *v.* United Zinc and Chemical Co., 89 Atl. Rep., 992.

By the above section of the Sales Act the whole question to be considered was whether the contract by its incompleteness and the circumstances of the case, namely, the deliveries being made in October, November and December and repeated requests for payment being made by the defendant and the plaintiff's refusal to make any payment until after it was compelled by writ of attachment to pay for the brick delivered and also the length of time elapsing from the completion of the deliveries and the enforcement of payment, did not create a circumstance in the case which should have gone to the jury for the purpose of letting them pass on the question whether the breach of contract was so material as to justify the defendant in refusing to proceed further and to treat the whole contract as broken or whether the breach was severable giving rise to a claim for compensation. We think that if the Court had allowed the evidence of the issuing of the writ of attachment the circumstances leading up to it, undoubtedly, a question would have been raised for the jury to pass upon. It seems that the question at the present time for the Court and jury to consider is not only the terms of the contract, but also the circumstances of each particular case, thereby changing the rule as formerly adopted by our courts, in Blackburn *v.* Reilly, *supra,* and Empire Rubber Mfg. Co. *v.* Morris *supra.*

POINT III.

The case should have been submitted to the jury.

Under the pleadings it is shown that the plaintiff relied on two letters hereinbefore referred to and set out in the state of the case, page 4 and 5, as their contract upon which they were entitled to recover. The answer denies that the two letters comprise the whole contract and alleges that the agreement between the parties was that the plaintiff would pay for all brick delivered promptly not later than the 10th of each month and upon failure to make such payments the agreement should cease, determine and be at an end. The plaintiff replied to this admitting that the defendant demanded payment and admitted the payment after the writ of attachment had been issued and contended that the deliveries were made as a matter of convenience to the defendant. The defendant filed a rejoiner denying all the allegations contained in the reply of the plaintiff.

Taking all these pleadings together it appears that enough circumstances had arisen showing clearly that there was a disputed question of fact as to what the intention of the parties to the agreement amounted to. Again taking the answer of the defendant there is sufficient in it to show that the plaintiff after meeting the defendant and making all necessary arrangements for a special price for the brick, by a subterfuge tried to construe the letter written by it on October 19, 1915, as a complete offer which was accepted by the deefndant and binding on the defendant as an entire contract, but fortunately Section 45 of the Sales Act aforesaid steps in and says: that not only the terms of the contract are to be

considered *but also the circumstances of each case* must be considered in ascertaining whether a breach is so material as to justify the injured party in refusing to proceed, etc.

We contend that the circumstances surrounding the contract are set forth in the pleadings and were offered to be proved, and had they been proved, or had an attempt been allowed to prove them, a disputed question of fact as to the justification of the defendant refusing to make any further deliveries would have arisen sufficient to allow the case to go to the jury and have the jury say whether the plaintiff by its own acts did not abandon or evince an intention to abandon sufficient to relieve the defendant from any further performance. The mere fact that the plaintiff did not order any brick between December and March coupled with the fact that after repeated requests on the part of the defendant for payment and their refusal to pay until a writ of attachment was issued and then voluntarily paying the amount due with interest and costs was sufficient in itself to raise a jury question.

Defendant had a right to assume under its agreement that the plaintiff would request deliveries of brick at reasonable intervals and the question as to what was a reasonable interval under the circumstances of this case would be a question for the jury. The mere fact that their letter says that the brick was to be delivered as required by the plaintiff would not justify the plaintiff in waiting an unreasonable length of time before requesting deliveries, on account of the market conditions. It may be possible that had not the defendant demanded payment and compelled the plaintiff by attachment to pay for the brick delivered that no demand for further

deliveries would have been made by the plaintiff and it appears from the evidence that no demand was made for deliveries between December, 1915, and April 6, 1916. Whether this was a reasonable time or not was a question for the jury. The Sales Act provides:

> "The seller is bound to send the goods to buyer but no time for sending them is fixed; the seller is bound to send them within a reasonable time."
>
> C. S., page 4657, Section 43, Subdivision 2.

It is clear by the above section that when the agreement between the parties is not specific as to the time when a delivery is to be made, that the law presumes a reasonable time and a reasonable time always depends upon the circumstances of each particular case. And in the case under consideration we submit that the circumstances under the present suit, namely, the failure of the plaintiff to request any deliveries until after he had been compelled to pay for what had previously been delivered was a circumstance which the jury should have passed on.

The question whether the breach in failing to deliver monthly installments under a contract is so material as to justify the plaintiff in refusing to proceed further and sue for damages or whether the breach is severable giving rise to a claim by compensation but not to a right to treat the whole contract as broken is ordinarily a question for the jury but as in other cases may be so clear that the Court may decide it. (See E. I. Dupont DeNemours Powder Co. *v.* United Zinc and Chemical Co., 899 Atl. Rep., 992, *ubi supra.*)

"A non-suit should not be granted nor a

verdict ordered for defendant if the evidence is conflicting and leaves the mind in a state of some doubt. The credibility of witnesses is a question for the jury."

Baumann *v.* Hamburg American Packet Co., 67 N. J. L., 250.

Matthew F. Kelly, called by the plaintiff, testified on cross examination (State of the Case, p. 48):

"Q. And how often in the month of January and the month of February did you see either of the Gardners? A. The month of January or February?

"Q. Yes, 1916. A. Possibly three or four times.

"Q. Converse with them? A. Yes, every time I saw them.

"Q. Have conversation with them relative to delivery of brick? A. About the delivery of brick?

"Q. Yes. A. Spoke about the brick that was on the job.

"Q. Making objection of some kind? A. Yes.

"Q. You did personally? A. Yes.

"Q. To which Mr. Gardner? A. I met him, this gentleman here, down at the yard and I believe I met the both of them down at the yard.

"Q. In the month of January I am speaking about. A. I cannot say what month that was.

"Q. Can you give us any idea? A. I would not—I could not say positively.

"Q. Would not say? A. No."

Milburn B. Gardner, a witness for the defendant, testified (State of the Case, p. 58):

"Q. Don't know Mr. Levy. Do you know Mr. O'Keefe? A. On the high school job of Englewood.

"Q. I see, and at this job in question for which this brick was wanted, was it? A. Yes.

"Q. And after the signing of P1 and P2 on October 19 and 21, did you see Mr. O'Keefe shortly after the 21st of October? A. Yes.

"Q. Where did you see him? A. On the job.

"Q. On the job? Talk a little louder. A. On the job at Englewood.

"Q. And did you make any arrangements with him as to the payment of the brick that was agreed upon after P1 and P2?"

This question was objected to and then the question was asked (State of the Case, p. 59, fol. 40):

"Q. Well, did you know, Mr. Gardner, in what capacity Mr. O'Keefe was acting over there?

"Mr. Carey: I object.

"The Court: Answer, yes or no.

"Q. Do you know? A. I should say yes, I do know.

"The Court: Upon what is your knowledge based? What is your knowledge based on? A. I asked him what he was doing. He said he had charge of the job.

"Q. Asking him what he had to do? A. I asked, who has charge of the job and he says: 'I have.' I think he gave me his card or where he lived, if I recall, Jersey City, or Hoboken or around Union Hill; I have forgotten.

"The Court: You asked him who had charge of the job?

"The Witness: Yes.

"The Court: He said he did?

"A. Yes."

Matthew F. Kelly was called as a witness for the defendant and testified (State of the Case, p. 63, line 32):

"Q. What work did O'Keefe actually do on the job? A. Foreman.

"Q. Of what? A. Foreman off laborers, *bricklayers* and hod carriers.

"Q. Did he pay them? A. No, sir.

"Q. Who paid them? A. I paid them.

"Q. Did Mr. O'Keefe own any stock in the company? A. No.

"Q. None at all? A. Absolutely not.

"Q. No interest in it at all? A. No interest in it at all.

"Q. And how long did he continue to be foreman of this Englewood job? A. From '15 to around July, '16. July, I think. I would not say exactly July.

"Q. And was he in full charge of that work over there? A. At the beginning of the work there was only laborers there—*bricklayers.*

"Q. You didn't understand my question? A. I was answering as I was going along and the carpenter he had full charge of the job.

"Q. O'Keefe had full charge of the job? A. No, this carpenter, Washington.

"Q. What day did O'Keefe first go there on the job? A. He was back and forth from West Hoboken and I think he went in around October; I would have to look up the record to see.

"Q. And when he took charge of the job, he was foreman? A. Yes.

"Q. In October? A. Yes.

"Q. And as foreman he had complete charge of the work?"

This question was objected to on the ground that it was not definite enough for the witness to answer and the Court suggested that it was a leading quesion and sustained the objection. (The State of Case, p. 66, line 22):

"Q. When you put O'Keefe on you put O'Keefe on as foreman? A. We had him in Hoboken and he came up there.

"Q. To act as foreman on the Englewood

job? A. To act as foreman on the Englewood job *and oversee everything that was being done properly.*

"Q. And to receive the goods and materials? A. Yes.

"Q. And to give orders and instructions?

"Mr. Carey: In respect to what?

"Q. In respect to the work and the obtaining of materials? A. Of the digging. Outside of that he had nothing to do with any ordering, *only what came in.*"

This evidence coupled with the testimony of Mr. Gardner to the effect that he had spoken to Mr. O'Keefe, the foreman of the plaintiff, raised a sufficient conflict in the evidence to go to the jury on the question of credibility and also on the question as to whether or not the jury believed that O'Keefe was held out by the plaintiff in such a respect that the defendants were justified in believing he had authority to bind the plaintiff and was acting for them. We contend that the Court was in error in taking upon itself to pass upon credibility of the witnesses without submitting it to the jury:

> "The duty of the Court is to settle the law of the case, the province of the jury is to settle disputed facts."

In Central Railroad Co. *v.* Moore, 4 Jab., 824-830, this Court formulated the true rule as follows:

> "But if the facts be controverted or not manifest it is the duty of the Judge to submit these to the jury under proper instructions, thus leaving to that branch of the Court the exercise of its peculiar functions and affording to the parties the right of trial by jury which the Constitution has declared shall remain inviolate."

In N. J. Express Co. *v.* Nichols, 3 Vroom, 166, the Supreme Court adhered to the rule that

> "where the evidence is doubtful and the inferences to be drawn from the facts uncertain, it is the province of the jury to decide."

In N. J. Railroad Co. *v.* West, 4 Vroom, 430, this Court re-affirmed the rule laid down in Central Railroad Co. *v.* Moore, *supra*.

Again, this Court in Delaware, Lackawanna & Western Railroad Co. *v.* Toffey, 9 Vroom, 525, declared:

> "If the evidence is open to fair debate and leaves the mind in a state of some doubt on this subject the case should not be withdrawn from the jury."

The Court further said that there were:

> "No conceded or undisputed facts that showed the plaintiff's testimony could not be true and therefore the non-suit was properly denied."
>
> "In my judgment this case recognizes the true distinction and will serve as a correct guide in determining whether a non-suit should be granted or a verdict directed" (Baumann *v.* Hamburg-American Packet Co., *supra*).

In this same case Justice Van Sickel speaking for the Court of Errors at the bottom of page 253, said:

In the still later case in this Court, Delaware, Lackawanna and Western Railroad Co. *v.* Shelton, 26 Vroom, 342, the declaration is,

> "A Trial Court cannot direct a verdict when any facts the parties have been permitted to introduce in evidence, material to the verdict, in favor of one party or the other are in dispute."

And we respectfully submit that the question whether the plaintiff held out its foreman O'Keefe to the defendant in such a manner as to lead the defendant to believe that O'Keefe was acting for and had authority to act for the plaintiff, under the evidence introduced in the case raises a sufficient dispute and contradiction to allow the case to go to the jury and we respectfully request that the judgment of the Bergen Circuit Court be reversed and a new trial ordered, with costs.

Respectfully submitted,
MACKAY & MACKAY,
Of Counsel with the
Defendant-Appellant.

INDEX.

TESTIMONY.

Notice of Appeal.

(Filed May 18, 1917.)

New Jersey Supreme Court.

KELLY CONSTRUCTION COMPANY, a corporation, Plaintiff-Appellee, v. HACKENSACK BRICK COMPANY, a corporation, Defendant-Appellant.	Action at Law.

To Messrs. Vredenburgh, Wall & Carey, Attorneys for Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey on the whole of the judgment entered in this cause on the following ground:

1. The Court erred in directing a verdict for the plaintiff and against the defendant at the close of the case.

2. The Court erred in refusing to permit the defendant to introduce evidence for the purpose of showing that the plaintiff had on several occasions refused to pay the defendant for the brick that had been delivered by it to the plaintiff under the contract mentioned in this action.

3. The Court erred in refusing to permit the defendant to prove that it was compelled to issue a writ of attachment against the plaintiff for moneys due for brick delivered under the contract mentioned in this cause.

4. The Court erred in directing a verdict for the plaintiff and against the defendant because it evinced an intention on the part of the plaintiff to abandon the contract which was the subject matter of this action.

5. The Court erred in taking the case away from the jury and refusing to permit the jury to hear all of the defendant's evidence.

6. The Court erred in refusing to permit the jury to decide the matters involved in this action.

MACKAY & MACKAY,
Attorneys of Appellant.

Judgment Record.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

KELLY CONSTRUCTION CO., INC.	
v.	Action at Law, On Postea.
HACKENSACK BRICK COMPANY.	

Vredenburgh, Wall & Carey, Attorneys.

Hackensack Brick Company, the defendant in this cause, was summoned to answer unto Kelly

Construction Co., Inc., the plaintiff therein, in an action at law upon the following complaint:

(Summons issued July 20, 1916.)

The plaintiff, a body corporate of the State of New York, duly authorized to transact business in the State of New Jersey, pursuant to the statute in such case made and provided, having its principal office in New Jersey, at 915 Violet Street, West Hoboken, complaining against the defendant, a body corporate of the State of New Jersey, says that:

(1) On the 19th day of October, 1915, plaintiff, ordered of the defendant all the common, first quality, hard brick which plaintiff would require according to the plans and specifications for the erection of the Englewood High School Building, at Englewood, New Jersey, which brick were to be furnished and delivered and stacked on the job by the defendant for the price of seven ($7) dollars per thousand. A true copy of said order is hereto annexed, marked "Schedule 1" and made a part hereof.

(2) Said defendant accepted said order on the 21st day of October, 1915, and a true copy of said acceptance is hereto annexed, marked "Schedule 2" and made a part hereof.

(3) Thereafter and in part performance of its agreement, the defendant furnished and delivered to the plaintiff for 69,750 brick, which plaintiff received and paid for.

(4) On the 11th day of April, 1916, and at all times since, the defendant has wrongfully refused to furnish further brick to the plaintiff for the erection of said building.

(5) Because of the refusal of the defendant to furnish brick to the plaintiff, pursuant to its agreement, plaintiff has been obliged to purchase elsewhere one million common, first quality, hard brick to complete said building, and to pay therefor nine dollars and fifty cents ($9.50) per thousand.

(6) By reason of the refusal of the defendant to perform its said contract plaintiff has suffered damages in the sum of three thousand, five hundred ($3,500) dollars.

Wherefore, plaintiff demands judgment against the defendant for three thousand, five hundred ($3,500) dollars.

VREDENBURGH, WALL & CAREY,
Plaintiff's Attorneys.

"Schedule 1."

October 19-15.

Messrs. M. B. & F. B. Gardner,
Hackensack Brick Co.,
Hackensack, N. J.

Gentlemen:

Please enter our order for furnishing and delivering and stacking on the job all the common hard brick required by the plans and specifications for the Englewood High School at seven dollars ($7.00) per M.

All brick to be strictly first quality hard brick, subject to the approval of the architects. Brick to be delivered as required by us and sufficient brick to be kept on the job so that we will al-

ways have approximately 50,000 brick stacked until the completion of the job.

Please acknowledge acceptance of this order,

Yours truly,

KELLY CONSTRUCTION CO.

"Schedule 2."

October 21, 1915.

Kelly Construction Co.,

Dear Sir:—

Your order for brick to be delivered to Englewood High School received, we accept the same and thank you.

Please let us know how soon we can begin making deliveries, you of course will have a place to get in so we can get some ahead.

Yours truly,

HACKENSACK BRICK CO.

Per M. B. Gardner.

Filed July 26, 1916.

The defendant, a body corporate of the state of New Jersey, having its principal office and place of business at Hackensack, Bergen County, New Jersey, answering the plaintiff's complaint, says that:

1. Defendant admits Paragraph One of the complaint.

2. Defendant admits Paragraph Two of the complaint.

3. Defendant denies Paragraph Three of the complaint.

4. Defendant denies Paragraph four of the complaint.

5. Defendant has no knowledge sufficient to form a belief as to the allegations in Paragraph Five of the complaint, and, therefore, denies the same.

6. Defendant denies Paragraph Six of the complaint.

First defense:

For the first defense to said action this defendant answering says: That the exhibits marked "Schedule 1" and "Schedule 2" are only parts or fragments of the contract that was entered into between the plaintiff and defendant herein. It was expressly understood and agreed by and between the plaintiff, its agents and servants or lawfully authorized representative, and the defendant its lawfully authorized representative, that all brick delivered were to be paid for promptly, not later than the tenth day of the following month. That in case of failure on the part of the plaintiff to make such payments, then the agreement between the parties should cease, determine and be at an end.

That in pursuance of the agreement of the parties, the defendant delivered a certain number of brick to the plaintiff, and on the tenth of the following month made demand for payment as required by the agreement but the plaintiff did not pay the amount due to the defendant, to wit: the sum of dollars; but the defendant wrote again making demand for payment and sent another bill, and the said moneys were not paid, and finally on the sixteenth day of March, nineteen hundred and sixteen, the defendant caused a writ of attachment

to be issued out of the District Court of the Third Judicial District of the County of Bergen which writ was duly served, and by virtue of said writ, the goods and chattels of the plaintiff were attached as by reference to said writ and proceedings had thereunder will more fully appear, to which the defendant begs leave to refer, if necessary so to do. After the issuing of said writ of attachment and the levy under the same, the proceedings were continued and on the fifth day of April, nineteen hundred and sixteen, the amount due under the attachment, to wit: the sum of four hundred ninety-five dollars and fifty-seven cents, plus four dollars and eighty-five cents costs, and forty-eight cents mileage, were duly paid. That by reason of the breach of the contract on the part of the plaintiff, the agreement of the parties ceased and was at an end, and the defendant was relieved from all liability thereunder.

MACKAY & MACKAY,
Attorneys of Defendant.

Filed Aug. 10, 1915.

Replying to defendant's first defence, the plaintiff says that:

(1) It admits that defendant demanded payment from the plaintiff for 69,750 brick claimed by the defendant to have been delivered in the months of October, November and December 1, 1915, pursuant to the contract set out in the complaint. Plaintiff had not requested the delivery of said brick and was not ready to receive or use the same when they were delivered, but at the request of defendant plaintiff permitted defendant for its convenience to deliver said brick upon the building site. Thereafter in

March, 1916, and before plaintiff was ready for or able to use the brick so delivered, the defendant demanded payment therefor. When said demand was made payment for said brick was not due. Yet, on March 15, 1916, plaintiff, in order to avoid controversy, tendered to defendant a check for $488.25, being the full purchase price for the brick delivered up to that time. Defendant refused said check and on March 1, 1916, caused to be issued a writ of attachment out of the District Court of the Third Judicial District of Bergen County, against the goods, chattels, rights and credits of the plaintiff for the contract price of the brick claimed to have been delivered by defendant to the plaintiff. That at the time said writ of attachment was issued, payment for said brick was not due, but in order to adjust the matter amicably and to avoid litigation plaintiff paid the amount claimed in said attachment suit, together with costs.

(2) Plaintiff denies all other allegations of said defence.

VREDENBURGH, WALL & CAREY,
Plaintiff's Attorneys.

Filed September 8, 1916.

Defendant says, by way of rejoinder that it denies that the plaintiff had ever requested the defendant to deliver the brick mentioned in the complaint, and denies that the plaintiff was not ready to receive or use same when they were delivered, and denies that the bricks were delivered at the request of the defendant or for the convenience of the defendant as stated in the reply.

Defendant admits that it demanded payment

for the bricks delivered in March, 1916, but denies that the demand was made before the plaintiff was ready for or able to use the brick so delivered. Defendant also denies that the plaintiff tendered a check to the defendant for four hundred eighty-eight dollars and twenty-five cents on March 15th, 1916, but says that the check was received by defendant after the defendant had issued a writ of attachment out of the District Court of the Third Judicial District of the County of Bergen; that the same was not a proper tender, and was duly returned.

Defendant also denies that payment for said brick was not due and denies that the plaintiff paid the amount of the attachment suit together with costs, in order to adjust the matter amicably and to avoid litigation.

MACKAY & MACKAY,
Attorneys for Defendant.

Filed September 22, 1916.

This case was tried before Hon. Luther A. Campbell, Circuit Judge, to whom the same had been regularly referred for trial, and a jury, at the Bergen Circuit, on Friday the 13th day of April, 1917.

By direction of said Judge, the jury returned a verdict against the defendant and in favor of the plaintiff, for the sum of $1,873.75.

Whereupon it is adjudged that the plaintiff recover of the defendant, the sum of one thousand eight hundred and fifty-three dollars and seventy-five cents, and its costs, which are taxed at the sum of fifty-five dollars and thirty-four cents, making in the whole the sum of one

thousand nine hundred and nine dollars and nine cents.

Damages	$1,853.75
Costs	55.34
	$1,909.09

Judgment entered April 18, 1917.

WM. S. GUMMERE,
C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof, I have set my hand and the seal of said Court at Trenton, this eighteenth day of May, A. D. nineteen hundred and seventeen.

[SEAL.]

WM. C. GEBHARDT,
Clerk.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

Before—Hon. LUTHER CAMPBELL, Judge and a Jury.

KELLY CONSTRUCTION COMPANY,
Plaintiff,

against

HACKENSACK BRICK COMPANY,
Defendant.

Hackensack, N. J.,
April 13, 1917.

APPEARANCES:

Messrs. VREDENBURGH, WALL & CARY, Attorneys for Plaintiff. By Mr. CARY, of Counsel.

Messrs. MACKAY & MACKAY, Attorneys for Defendant. By WILLIAM B. MACKAY, JR., Esq., of Counsel.

A jury was duly impaneled and sworn.

Mr. Carey opens to the jury in behalf of the plaintiff.

Mr. Mackay opens to the jury in behalf of the defendant.

MATTHEW F. KELLY, a witness called in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Carey:

Q. In 1915 you were connected with the Kelly Construction Company? A. Yes, sir.

Q. In what capacity? A. Treasurer of the company; outside man.

Q. And at that time did you have a contract for the erection of a school building; that is, did the Kelly Construction Company have the contract for the erection of a school building at Englewood, New Jersey? A. Yes.

Q. Speak a little louder, and talk so the jury can hear you. In connection with procuring the brick for the company, did you enter into negotiations with the Hackensack Brick Company? A. Yes.

Q. And who connected with the Hackensack Brick Company did you meet in those negotiations? A. Both Gardners.

Q. One gentleman who sits here next me? A. Yes.

Q. And those negotiations, to begin with, were interviews between you and the Messrs. Gardner? A. Yes.

Q. And subsequent to those interviews, did you write a letter to the Hackensack Brick Company, ordering brick from them for the construction of this building? A. No.

Q. What is it? A. Subsequent to the order?

The Court: Subsequent to the conversations.

The Witness: We asked them for a price.

Q. Subsequent to the conversations you had with the Gardners with respect to furnishing brick for the Englewood school building, did you write them an order for brick? A. Write them an order? No—if I get that question clearly in my mind what you mean.

Q. You first had some interviews with them

about furnishing brick, didn't you? A. Yes. We made a contract with them first.

Q. You had your talk with them first, didn't you? A. Yes.

Q. Yes. After you had the talk with them, did you send them any writing? A. Yes.

Q. That is the point I want.

Mr. Carey: I call for the letter of October 19th, from the Kelly Construction Company to the Hackensack Brick Company.

I want letter of October 19, 1915, to the Hackensack Brick Company.

Letter produced.

Mr. Carey: Letter is produced by the defendant and I ask that it be marked in evidence.

The Court: Admitted by the pleadings also.

Mr. Carey: Yes, sir.

Letter referred to is received in evidence and marked Exhibit P1.

Mr. Carey: This letter which has been marked Exhibit P1, is on the letterhead of the Kelly Construction Company, the plaintiff, and addressed to Messrs. M. B. and F. B. Gardner, Hackensack Brick Company, Hackensack, N. J., dated October 19, 1915.

"Gentlemen: Please enter our order for furnishing and delivering and stacking on the job all the common hard brick required by the plans and specifications for the Englewood High School at Seven Dollars ($7.00) per M.

"All brick to be strictly first quality hard brick, subject to the approval of

the architects. Brick to be delivered as required by us and sufficient brick to be kept on the job so that we will always have approximately 50,000 brick stacked until the completion of the job.

"Please acknowledge acceptance of this order.

"Yours truly,
"KELLY CONSTRUCTION CO.,
"H. Levy, Pres."

The reply is dated October 21, 1915, and is offered in evidence.

Letter referred to is received in evidence and marked Exhibit P2.

Mr. Carey: This letter is on the letterhead of the Hackensack Brick Company, Hackensack, New Jersey, October 21, 1915.

"Kelly Construction Co.,

"Dear Sir: Your order for brick to be delivered to Englewood High School received. We accept the same and thank you. Please let us know how soon we can begin making deliveries. You of course will have a place to get in so as we can get some ahead.

"Yours truly,
"HACKENSACK BRICK CO.,
"Per M. B. Gardner."

Q. Mr. Kelly, did you meet with any delay in connection with preparing this building for the reception of brick? A. Yes; we struck rock.

Q. And what time were you ready for the delivery of brick on the job? A. We first began laying brick in April. We were ready approximately the 15th of April.

Q. About the 15th of April?

The Court: That was 1916.

The Witness: 1916.

Mr. Carey: I call for the letter of April 6th, 1916.

Q. By the time you were ready for the delivery of brick, did you make any request for delivery to the Hackensack Brick Company? A. Yes, sir.

Mr. Carey: Letter dated April 6, 1916, produced by the defendant. I offer it in evidence.

Letter referred to received in evidence and marked Exhibit P3.

Mr. Carey: Letter on the letterhead of the Kelly Construction Company, dated April 6, 1916:

"Hackensack Brick Co., Hackensack, N. J.

"Gentlemen: Please deliver Twenty (20) thousand brick on our contract to the Englewood High School. We would like these to be delivered within the next three days, and to satisfy you as to the time of payment, we will pay for this before the 10th of May.

"Yours truly,

"KELLY CONSTRUCTION CO.,

"H. Levy."

Q. Did you receive any reply to that letter? A. No, sir.

Q. Did you receive a—that is, not from the defendants. Did you receive a reply from their attorneys? A. I don't think we did unless there is one in evidence.

Q. I show you a letter? A. Oh, yes; that is right.

Q. Did you receive this letter which I have shown you from the attorneys of the defendant company? A. Yes, sir.

Mr. Mackay: What date?

Mr. Carey: April 11. I offer this letter in evidence.

Letter referred to received in evidence and marked Exhibit P4.

Mr. Carey: Dated April 11, 1916. Letter on the letterhead of Mackay & Mackay, Counsellors at Law, Hackensack, N. J.

"April 11, 1916.

"Kelly Construction Company,
Warburton Building,
Yonkers, N. Y.

"Gentlemen: Your letter of the 6th inst. addressed to the Hackensack Brick Company was duly received. Some time ago you broke this contract by your own acts, and we so informed you. We took attachment proceedings to collect the amount on goods which had previously been delivered while the contract was in force.

"Very truly yours,
"MACKAY & MACKAY,
"B."

I call for the letter of April 18, 1916.

Mr. Mackay: April 18th?

Mr. Carey: 18th, yes.

Letter produced.

Mr. Carey: Letter produced by the defendant dated April 18, 1916, is offered in evidence.

Letter referred to received in evidence and marked Exhibit P5.

Mr. Carey: Letter on the letterhead of the Kelly Construction Company, dated April 18, 1916.

"Hackensack Brick Co.,
Hackensack, N. J.

"Gentlemen:

"Please deliver within the next three (3) days twenty thousand (20,000) brick, pursuant to our contract with you for furnishing the common brick for the Englewood High School job.

"If you fail to make the delivery as above requested, without showing adequate reason for such failure, we hereby notify you that we shall purchase these brick for your acount, and shall hold you liable for any excess cost above our contract price.

"We have received a letter from Messrs. Mackay & Mackay, your attorneys, in which they state that we have broken the contract. This we deny, and beg to advise you that we intend to hold you to the performance of the contract.

"Yours respectfully,
"KELLY CONSTRUCTION CO.,
"Harold Levy, Pres."

Q. Did you receive any reply to this letter of April 18, 1916? A. Unless there is one there. I don't remember it.

Q. Were any brick delivered subsequent to your order of April 6th and the order of April 18th? A. No, sir.

Q. Did you receive any word from the Hackensack Brick Company with respect to making further deliveries? A. No.

Q. Did they at any time refer you to their attorneys with respect to making further deliveries? A. Yes.

Q. But they never made any further delivery? A. No.

Q. Failing to receive brick from the Hackensack Brick Company, under the contract, what did you do? A. Purchased them from the Mehrhoff Brick Company, Little Ferry.

Q. Did you open negotiations with other brick manufacturing concerns besides the Mehrhoff Brick Company from which you ultimately made the purchase? A. We sent for quotations and received some verbal quotations.

Q. Verbal quotations? A. Yes.

Q. And from whom did you receive verbal quotations? A. Treviranus & Gardner are there at Hackensack. Frank there. They said they had brick to sell, but they would have to be taken all at one time. They were going out of business, something to that effect. Didn't pay much attention to it, due to the fact they didn't confirm it.

Q. And did you make inquiries from any other parties besides? A. Yes; Mehrhoff Brick Company, Little Ferry, lower yard. They didn't care to deliver—in fact, they were too busy.

Q. Didn't care to deliver at Englewood? A. Englewood.

Q. And you finally purchased from the Mehrhoff Company, brick manufacturers? A. Yes.

Q. At what price? A. $9.50 a thousand.

Q. I show you a letter dated April 20, 1916, from N. Mehrhoff & Company, addressed to the Kelly Construction Company and ask if that is a quotation received from that company in reply to your inquiries? A. That is it. Yes, sir.

Mr. Carey: Letter dated April 20, 1916, from N. Mehrhoff & Company to the Kelly Construction Company is offered in evidence.

Letter referred to received in evidence and marked Exhibit P6.

Mr. Carey: Letter on the letterhead of N. Mehrhof & Company, brick manufacturers, Little Ferry, N. J.,

"Kelly Construction Co.,

"Yonkers, N. Y.

"Dear Sirs:

"Replying to yours of 17th and 19th, we quote you a price of nine dollars and fifty cents per thousand for approximately one million hard brick delivered to the site of Englewood, N. J., School.

"The above quotation to hold good up to April 27th, 1916.

"Yours very truly,

"N. MEHRHOF & CO., INC.,

"E. N. Mehrhof, Sec."

Q. The Kelly Construction Company accepted this offer of the Mehrhof Company for the brick? A. Yes, sir.

Q. Now, how did the brick which you got of the Mehrhof Company compare with the brick you had ordered of the Hackensack Brick Company, in quality? A. Same brick; practically the same brick.

Q. Did you get any better quotation for deliveries at Englewood than $9.50? A. No, sir.

Q. Is that the best quotation you received? A. Yes, sir.

Q. How many brick did you buy from Mehrhof Company to complete the job? A. 741,500 at the present time.

Q. And has that quantity of brick been delivered? A. Yes, sir.

Q. Is that sufficient to complete the job? A. Practically, yes, with the exception of possibly a thousand or fifteen hundred either way.

Q. Yes. Might run a little—you might require a few more and possibly you might have a few left; is that the idea? A. (Nods head.)

Q. That is practically what would be required? A. Practically what we will use, yes.

Q. Have you bills of Mehrhof Brick Company for these brick? A. Yes, sir.

Q. (Hands papers to witness.) Those are the bills, are they? A. Yes, sir.

Mr. Carey: I offer these bills in evidence.

The Court: For the purpose of substantiating the amount or quantity of deliveries?

Mr. Carey: Yes, sir.

Mr. Mackay: I don't know that—these aren't paid, are they?

The Court: Not for the purpose of showing payment; for the purpose of substantiating the present witness's testimony as to the quantity delivered; is that the purpose?

Mr. Carey: The quantity delivered and the price at which they were delivered.

Mr. Mackay: I don't think that is the best evidence of which the case is susceptible on that point. Note my objection.

The Court: I suppose we have the primary evidence now. This is simply intended to be corroborative of that primary evidence. I will overrule the objection.

Mr. Mackay: Note my objection.

The Court: Have them marked, Mr. Carey.

Mr. Carey: Mark these all as one exhibit.

Bills referred to received in evidence and marked Exhibit P7.

Q. Is the brickwork on this job now completed? A. Practically completed.

Mr. Carey: Cross examine.

Cross examination by Mr. Mackay:

Q. Did you buy brick from anybody else other than the Mehrhof Company? A. No, not common brick.

Q. Not common brick. You had some brick from Brewster, did you? A. Brewster, he possibly delivered one load or so.

Q. I see. A. And that was an understanding between the superintendent on the job and Mr. Brewster.

Q. That is paid for, is it?

Mr. Carey: I object, as immaterial.

The Court: I don't see the materiality of it, Senator. It is not an item that he has to be recovered for in his action.

Mr. Mackay: It is not that. But it goes to substantiate our defense that the main point for the breaking of the contract which was justifiable was the theory that they would not pay the money.

The Court: I don't know that we are concerned about the persons not paying. If your contract was to be a certain thing and that was not done, I don't know we are concerned about pay. I don't see the relevancy at this time. I sustain the objection.

Q. You were not on the job much, were you, Mr. Kelly? A. Practically every day.

Q. Every day? A. Not exactly every day; practically every day.

Q. Well, what—when was the first day you were there? A. The first day I was there?

Q. Yes. A. Right after the signing of the contract.

Q. And what date was that? A. Back in September. I can't just exactly recall the exact date.

Q. You mean by the signing of the contract, the letter you wrote to Gardner Brothers? A. No; I meant the original contract of the School Board.

Q. That was in September? A. September.

Q. And as soon as that was signed, you immediately went on this job? A. Yes, sir.

Q. And you continued on that job, working there steadily every day? A. No, sir. I would come there occasionally and spend a few hours there and go to another job.

Q. Well, were you there every day?

Mr. Carey: If the Court please, I don't want to interrupt any line of testimony relevant to the issue. It seems to me this is entirely immaterial whether this man was on the job or somewhere else.

The Court: I don't see the materiality.

Mr. Mackay: It is material in this case. Here was a job and the claim that they could not take these brick because they struck rock. That was the evidence of the plaintiff.

The Court: As I understand this issue —as I have heard it outlined to the jury and as far as the evidence shows, what

the evidence is and the pleadings is, there was a contract between the plaintiff and the defendant companies for a quantity of brick at a certain price; that the defendant company failed to make the deliveries, and upon that the plaintiff was advised to go to the market and purchase. You say that your reason for not delivering was because the plaintiff company had breached the contract itself and you were relieved from further performance. I do not understand the issue to be that there was not a diligent and proper delivery—that is, deliveries fast enough—but as I understand it, it is that there was a total cessation of deliveries after a particular period. If the question was as to whether or not the brick were delivered with reasonable dispatch from time to time, well, I can see how possibly your examination would be of value. I don't understand that is the case. The brick already delivered were in accordance with the contract, and the contract was brought to an end.

Mr. Mackay: I might call your Honor's attention to the reply: "It admits the defendants demanded payment from the plaintiff for 69,750 brick claimed by the defendant to have been delivered in the months of October, November and December, 1915, pursuant to the contract set out in the complaint. Plaintiff had not requested the delivery of said brick and was not ready to receive or use the same when they were delivered, but at the request of defendant, plaintiff permitted defendant for its convenience to deliver

said brick upon the building site. Thereafter, in March, 1916, and before the plaintiff was ready for or able to use brick so delivered, the defendant demanded payment therefor." That, of course, goes to show the conditions were such they were not able to use the brick and were not able to have any on the premises. That is what the plaintiff says. Now, I want to know, inasmuch as that reply has been put in, what this man, as Vice-President and Treasurer of the company, knows about the job, and how he knows they were not ready, and what time he spent on the job. I have a right.

The Court: What is the question?

The question was read by the stenographer, as follows: "Q. Well, were you there every day?"

The Court: I will overrule the objection.

A. Practically every day.

Q. And what day did you strike rock? A. Rock was in evidence around possibly the first or the 10th of October.

Q. The 1st or 10th of October? A. Somewheres around in there.

Q. So that you had struck rock before you wrote this letter, P1, for the brick? A. The rock that was in evidence.

Q. Answer my question. A. If that date—could I ask for the date of that letter?

The Court: October 19th.

A. October 19th, the letter was—and we struck rock previous to that?

Q. Yes. A. Yes.

Q. So that when you ordered the brick by your letter, you had struck the rock? That is so, isn't it? A. Yes.

Q. And then knowing that you had struck rock, you also knew that brick was delivered on the job? A. Brick were to be delivered on the job.

Q. After you knew and before you knew that rock—before you—when you had in mind that there was rock there, you made the contract P1, received the reply, and then had the brick sent there? A. Didn't order the brick; a matter of accommodation.

Q. Didn't you tell Mr. Gardner that you would take five or six hundred thousand of the brick and have a place for it? A. Didn't I tell him that?

The Court: Yes; that is the question.

A. I don't remember of telling him that. Made a contract for the amount of brick.

Q. You remember you talked with Mr. Gardner about the delivery of the brick after the contract was signed? A. He wrote us a letter asking us when he could put brick on the job; and the letter we answered later from our office saying to meet me on the job.

Q. Did you meet him on the job? A. I met him on the job.

Mr. Carey: If the Court please, I think the evidence has developed along lines sufficiently that we are able to see its tendency; and I object to the continuation of this line of cross examination, first because it is not cross examination; and, second, because it is opening up the defense which the defendant, by its pleadings, has interposed in this case; and, furthermore, because the contract which is now in evidence is a contract in writing and it appears from the terms of the con-

tract that the contract is entire. It is for the delivery of all the brick at a certain specified price per thousand—all the brick needed.

The Court: Yes, but it is to be delivered as required.

Mr. Carey: To be delivered as required, yes. Now, that does not make the contract a severable contract, however. The contract is for all of the brick at a certain price; deliveries to be made as required by the plaintiff. Now, under the terms of that contract, payment—we might as well open that subject now—payment for the brick became due when the contract had been performed and all the brick furnished.

The Court: Why do you say that, Mr. Carey?

Mr. Carey: I say that because of the character of the contract, which is, deliver all the brick at seven dollars per thousand; make deliveries as we call for them. Now, a contract of that kind is an entire contract and has been so held in a number of cases. Now, in this State is the case of Larkin against Hecksher, where there was a contract of hiring for one year with the payment of wages monthly. The Supreme Court held that was an entire contract, notwithstanding the fact that the wages were payable monthly. That is reported in 51 New Jersey Law, 133.

The Court: All right.

Mr. Carey: Then an analogous case in this State is also the case of the School Trustees against Bennett, 27 N. J. Law, 513. That was a contract for the erection of a building, for a fixed sum, $2,610.

$2,200 of the price was payable in instalments—practically the same situation as this. During the course of the erection of the building there came a violent wind and the building was blown down. It was rebuilt by the contractor, and subsequently it fell again, by reason, as the contractor claimed, of defective soil. And the Court held that, notwithstanding the contract price was payable in instalments, it was yet an entire contract. Now, the case—first, the principle is laid down by Williston on Sales, in which this question is discussed. He says: "By agreement, however, either the goods may be deliverable in instalments or the price payable in instalments, and this agreement need not be in express words. But this does not create a divisible or severable contract. The essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the goods and made payable for that portion so that when part of the goods have been delivered a debt for that part immediately arises. Where by the terms of a contract the goods are to be paid for at a certain rate"—which is precisely this case—"so that the price for a portion of them can readily be calculated, though the contract becomes divisible if a portion of the goods are delivered, and a debt arises from them, yet without special agreement it is not payable until all the goods have been received. It is essential to recover not only that the price for a part can be calculated, but that ex

pressly or impliedly there is a promise to pay for a part."

The authority which Williston cites in support of this proposition is the case of Baker against Higgins, 21 N. Y., 397. The case is directly in point. The plaintiff sued to recover for brick sold and delivered. Plaintiff testified to conversations between himself and the defendant, relative to the purchase of brick, and that the agreement was for a sale by the plaintiff to the defendant, the brick to be paid for as delivered. That is the plaintiff's case. He also testified that at the close of the conversation the plaintiff wrote something on a piece of paper and handed it to the defendant, upon which the parties separated. None of the plaintiff's witnesses were able to state what the writing contained. The defendant produced and identified the paper, which turned out to be as follows: "I will deliver John Higgins 25,000 pale brick on the dock at East Troy for $3 per M., and 50,000 hard brick at the same place at $4 per M., cash. E. W. Baker, Coxsackie."

Upon the production of this writing, the defendant moved to strike out the oral testimony which had been as to the terms of the contract. It was before a Referee and the Referee declined to strike out the oral testimony. The plaintiff recovered and the case was taken to the Court of Appeals in New York. Speaking for the above agreement, the Court of Appeals said: "This, I think, was a valid agreement, and must be deemed and taken as the agreement then made between the

parties in relation to the brick, and under which a part was afterward delivered. Not long after this agreement, the plaintiff delivered to the defendant at Troy, under the written contract, a cargo of brick, consisting of 10,500 hard and 10,500 pale bricks, and demanded payment for that quantity, which the defendant refused until the whole was delivered." Your Honor will recall that the terms of this contract were cash. "The defendant refused until the whole was delivered. This, I think he had a right to do. The contract was entire, to deliver 75,000 bricks; and the plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance, which the plaintiff has not done. The action was brought for the contract price of the 21,000 bricks delivered; and the Referee found, contrary to the legal import of the written agreement, that the brick was payable on delivery, as the same should be delivered. For this error the judgment should be reversed, a new trial directed in the Court below, with costs to abide the event."

Now, here is a contract which is in itself complete. It is said by counsel on his opening that a very material element of the contract is omitted. Not so. Because the law completes the contract. The contract being entire, the consideration is to be paid at the end of the contract and when it has been performed, and until that time the defendant in this case had no right to call for a payment, whether or not these brick had been ordered on the job by

the plaintiff. Of course, our contention is that they had not been ordered, they were not ready for them. It was a matter of accommodation. Then, the contract being entire, was—the purchase price was payable when the brick had been delivered.

Now, upon this subject of oral evidence to add to or vary a written contract, there is, of course, abundant authority in this State, and the party of the rule which has been adopted in this State to which I wish to call the attention of the Court is this: That the contract itself, if it constitutes a complete obligation—that is, if the parties are bound by the written contract, then unless on the fact of the contract itself there is a missing element, so that it may be said upon reading the contract that it is not complete, then no oral evidence can be admitted. On this subject, in Naumberg against Young, 44 N. J. Law, 331, the Court of Errors and Appeals, as I recall it—either the Supreme or Court of Errors and Appeals—I think the Court of Errors and Appeals—Justice Depue says at page 335: "The general rule that parol evidence will not be received to add to or alter the terms of a contract in writing, applies to leases as well as other instruments in writing. Except where fraud or illegibility has been set up, parol evidence of an agreement not expressed in the writing, it is competent only where the writing contains only a part of the contract, or the evidence is admitted to apply the written contract to its subject matter, or to establish a parol contemporaneous agree-

ment between the parties, with respect to the manner in which the rent reserved should be paid, which both parties have acted upon and carried into execution, and, therefore, have given the agreement the force and effect of an accord executed. Oliver against Phelps, Spencer, 180; S. C. 1 Zab., 597, is an example of the latter class of cases."

On page 339, Justice Depue says: "It cannot be assumed that the written contract was designed as an imperfect expression of the parties' agreement, from the mere fact that the written agreement contains nothing on the subject to which the parol evidence is directed. On that assumption that part of the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. And to permit the parties to lay the foundation for such parol evidence by oral testimony that they agreed that that part only of their contract should be included in the written agreement, would open the door to the very evil against which the rule was designed to protect. The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement, is the contract itself. When parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material termed circumstances; and, consequently, all parol testimony of conversations held

between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected (2 Taylor on Ev., Sec. 1035). If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied by intrinsic evidence, parol evidence to vary or add to its terms is not admissible."

So its being an entire contract, a contract which is a valid engagement between the parties, parol evidence with respect to anything relating to the terms of payment is inadmissible. So, whether or not ordered upon the job by the plaintiff, the contract does not provide for payment at any specified time.

The Court: Your contention is this, as I understand it: That this contract that has been made out is a complete contract, is an entire contract, and therefore a refusal or neglect to make payments before the complete performance upon the part of the defendants did not warrant legally the defendants in considering that to be a breach of the contract upon the part of the plaintiffs, so as to relieve the defendants from further performance of their contract?

Mr. Carey: That is it.

The Court: And if that is the law, that left the defendants in that position where they had no legal excuse for declining or refusing to continue the deliveries under their contract. And if that is so—if that is so, then we are practically not concerned any further with the question, except pos-

sibly the question of the amount of damages. Do I get it?

Mr. Carey: Yes, sir.

The Court: What I have said is what you are endeavoring to place before the Court now?

Mr. Carey: Yes, sir; and as further authorities upon that subject, we have in this State a long line of cases, beginning with Blackburn against Reilly, reported in 47 N. J. Law, at page 290, and followed in Gerli against Poidebard Co., 57 N. J. Law, 432, Otis against Adams, 56 N. J. Law, 38; and Empire Rubber Company against Morris, 77 N. J. Law, 498.

The Court: What is in 77 Law?

Mr. Carey: Empire Rubber Company *v.* Morris, 77 New Jersey Law, 498. That was a case in which the defendant claimed right along the same line as this. Now, the substance of that case—

The Court: Let me say this to Mr. Carey. Do I understand you right when I do understand you to say that even if this contract, as we now have it before us—that is, the two writings, offer and acceptance—contain an express provision that payment should be made upon delivery, for instance, or a specific time fixed for payment. You use this expression, that payment was to be made within ten days of each delivery, and yet the contract remained in all respects in the same form as now before us; that still made for an entire contract, and that failure to make payments in accordance with the provision would not work a breach of the contract, permitting the defendants to refuse delivery short of

the full delivery called for by the contract. Do I understand you correctly as to that?

Mr. Carey: The mere failure to make the payments in installments, according to a provision of the contract, if embodied in the contract, would not, under the rule laid down in Blackburn *v.* Reilly and in these cases.

The Court: So, if that is the rule, then we cannot be concerned whether it would be proper to show a subsequent contract or addition to this contract, or anything subsequent to the making of this contract, which is P-1 and P-2, because even though it were permissible now for the defendant to show that subsequent to the making or execution of P-1 and P-2, they did enter into a contract which definitely and specifically provided for instalment payment as the deliveries were made, yet under the line of cases the contract would still be an entire contract, and that that provision, even though made a part of the contract before us, would not excuse the defendants from delivering to the full extent of their contract.

Mr. Carey: Except the conduct of the party in default should evidence an intention on his part to abandon the contract, throw it out. Now, the case of Empire Rubber Company against Morris, 77 N. J. Law, was a suit brought to recover damages for the failure to deliver goods pursuant to a contract of purchase and sale. The contract provided for the sale and delivery by defendants to the plaintiff, of 646 rolls of duck, at seventeen cents per pound, three per cent. 10

days, the delivery to be at the rate of 30 to 40 rolls per month during July and August, and at the rate of 60 rolls per month thereafter, upon requisitions to be furnished by the plaintiff to the defendant. Payments for the deliveries made were usually at periods from twelve days to six months after delivery. The defendants were constantly insisting that the provisions of the contract relating to payments required the settlement of each bill within ten days after delivery, and were constantly protesting against the plaintiff's permitting more than that period to elapse without making payments. On the other hand, the plaintiff was constantly complaining at the failure of defendants to fill its requisitions, as provided by the contract, and was continually calling on them for more deliveries. Finally the defendants refused to make further deliveries, because of plaintiff's failure to pay within ten days. Thereupon plaintiff announced that it would go upon the market and buy the balance of 518 rolls of duck, and charge the defendants with any excess price, and this it did. The suit was brought to recover the difference between the contract price and the price paid by the plaintiff. The Court of Errors, Chief Justice Gummere reading the opinion, said:

"Moreover, the claim of the defendants that the repeated defaults in payment by the plaintiff (if such defaults had been conclusively proved) would have justified the jury in finding that the plaintiff thereby evinced an intention no longer to be

bound by the terms of the contract, and so released the defendants from any obligation of further performance on their part, is unsound. The rule adopted by our courts with relation to contracts like the present is that 'when the seller has agreed to deliver the goods in instalments, and the buyer has agreed to pay the price in instalments which are proportioned to and payable on the delivery of each instalment of goods, then the default by either party with reference to any one instalment will not, ordinarily, entitle the other party to abrogate the contract.' Gerli *v.* Poidebard Silk Manufacturing Co., 28 Vroom, 436, 437; Blackburn *v.* Reilly, 18 *id.*, 290; Trotter *v.* Hecksher, 13 Stew. Eq., 612; Otis *v.* Adams, 27 Vroom, 38. This rule is controlling unless the conduct of the party in default be such as to evince an intention to abandon the contract and no longer be bound by its terms. No such intention on the part of the plaintiff can be gathered from the proofs in the present case. On the contrary, its continual demands on the defendant to make deliveries called for by the contract, its threat to go on the market and purchase the quantity of such which yet remained undelivered if the defendants refused to make those deliveries, and its execution of that threat as soon as the defendants announced that they would make no more deliveries, show conclusively that its intention, from the first to last, was to hold to the contract, and require its performance by the defendants. Otis *v.* Adams, *supra.*"

The Court: Mr. Mackay, what have

you to say to that? It seems to me that the case very clearly matches up with the one before us.

Mr. Mackay: Of course, we must—

The Court: Of course, Senator, I suppose you understand Mr. Carey as I have expressed myself as understanding him, and that is it is of no materiality at all as to whether you are permitted to show or whether you are not permitted to show any subsequent arrangement to that evidenced by P1 and P2, because even if you were, and you were able to show that that arrangement as taken was that payments were to be in instalments, and even though those payments were to be exactly commensurate with the value or contract price of the goods delivered, yet the contract is nevertheless an entire contract and a failure upon the part of plaintiffs in this action to pay in accordance with the term of the contract, that is, in instalments, as provided by the contract, would not warrant the rescission or the breaking off of the contractual relations on the part of the defendants because thereof.

Mr. Mackay: My contention, if your Honor please, is this: That this contract of course is not complete. The terms are not specified. The terms were orally agreed upon so that first so far as the case of Naumberg against Young is concerned, this evidence is admissible to complete the contract. As to the second point, where your Honor says that even assuming that we introduce that and complete it—say it is admissible and we complete

it, and we say: "Well, suppose you do complete it, you have not any redress anyway." But I, this: In that case, as in other cases, the Courts have always held that where there is some evidence of an intention on the party of the plaintiff to abandon, then there is no liability and that would be the question for the jury, so that first we must be permitted to complete our contract, and secondly, we must be permitted to show the endeavors made to get this money, the neglect of these people, the bringing of a suit, the fact they have apparently abandoned—all this evidence I say evinces any intention such as the Chief Justice speaks of which gives us the right to go to the jury.

The Court: I am wondering whether it does or not, having in mind this language of the Chief Justice in the case of the Empire Rubber Company against Morris, which Mr. Carey has just cited.

"The claim of the defendants that the repeated defaults in payment by the plaintiff (if such defaults had been conclusively proved) would have justified the jury in finding that the plaintiff thereby evinced an intention no longer to be bound by the terms of the contract, and so released the defendants from any obligation of further performance on their part, is unsound." He says, as to that sort of a contract, the rule is "when the seller has agreed to deliver the goods in instalments"—which is your case—"and the buyer has agreed to pay the price in instalments"—which is what you are trying to show—"which are proportioned to and

payable on the delivery of each instalment of goods"—which is probably rather better than you are expecting to be able to show—"then the default by either party with reference to any one instalment will not, ordinarily, entitle the other party to abrogate the contract," citing these cases. He goes on and says: "This rule is controlling unless the conduct of the party in default be such as to evince an intention to abandon the contract and no longer be bound by its terms. No such intention on the part of the plaintiff can be gathered from the proofs in the present case." Those that we cited were that the defendants were continually requiring of the plaintiffs that they make the payments under their contract as they should make them, that is at the times and periods fixed. "On the contrary, its continual demands on the defendant to make the deliveries called for by the contract, its threat to go on the market and purchase the quantity of duck which yet remained undelivered if the defendants refused to make those deliveries, and its execution of that threat as soon as the defendants announced that they would make no more deliveries, show conclusively that its intention, from first to last, was to hold to the contract, and require its performance by the defendants."

Now, the thought in my mind is, as near as I can express it, this: Suppose I should hold, and do hold that you may proceed to show what you can as to a more complete contract than has so far been shown; that, as I understood in your

opening to the jury, was that a method and time of payment has been agreed upon; in other words, you had agreed upon some instalment plan of paying.

Mr. Mackay: Yes.

The Court: Suppose I do permit that. And then it is shown also that that part of the agreement was not kept by the plaintiffs and they did not pay those instalments in the amounts or at the times when they agreed to pay them. Under the rule laid down in the Court of Errors, does that change the situation? Does that relieve you from your breach?

Mr. Mackay: Yes, because the evidence they permitted these people to go there continually without getting satisfaction. If they make this apparent false claim of an allowance on the seven thousand brick which they settled for under the attachment proceeding without contest; if we show an evidence on the part of the plaintiff's to abandon the contract, that is for the jury to say.

The Court: Could that be said to evince an intention upon their part to abandon the contract—if they, the plaintiffs, had refused to accept deliveries of brick, if the defendants, upon urging them to be permitted to deliver the brick had been advised by the plaintiffs continuously not to do so, or if attempt had been made to deliver the brick and a refusal had come from the plaintiffs to accept, it seems to me testimony of that sort could reasonably be said to evince an intention upon the part of the plaintiffs to abrogate its contract; but mere neglect or refusal to

pay the installments followed by what there is in the case so far, a written demand for further deliveries, and when replied to, still a second demand for deliveries and a threat to go into the market, puts us practically as this case I have had cited to me.

Mr. Mackay: Yes. You see that was not a threat. You see here a bill in December. Here is the whole month of December goes by. Here are these people going over there endeavoring to get some satisfaction.

Mr. Carey: We have not got to that yet.

Mr. Mackay: I am showing now intention on the part of them to abandon the contract, and that the whole month of January goes by with these people still following them up and getting no satisfaction, and the foreman who says he doesn't know what is going to be done or what is going to happen. And then along goes February, and Gardner goes to Yonkers. Do you see?

The last two questions and answers were read by the stenographer as follows: "Q. You remember you talked with Mr. Gardner about the delivery of the brick after the contract was signed? A. He wrote us a letter asking us when he could put brick on the job; and the letter was answered later from our office saying to meet me on the job. Q. Did you meet him on the job? A. I met him on the job."

The Court: I will overrule the objection at the present time, and I may finally

treat it in this manner, Mr. Carey. I may strike it all out. I may strike the whole of it out. At present, however, I will overrule the objection.

Mr. Carey: I ask an objection be noted to this line of evidence.

The Court: Which line is at least apparently going into some further provisions or attempted further provisions of the contract, as I understand.

Mr. Carey: Which is an effort to introduce parole evidence to add to or vary the written contract, and also apparently to introduce evidence tending to show that these brick which were delivered upon the job had been delivered upon the order or request of the plaintiff, and that a payment—a failure to make payment on the 10th of the following month was a breach of the contract in this case.

The Court: My ruling is as I have stated. Read the question to me.

Mr. Carey: An objection will be noted, if the Court please.

The Court: Yes.

The last question and answer was read by the stenographer, as follows: "Q. Did you meet him on the job? A. I met him on the job."

Q. And when did you meet him on the job? A. Right after that letter was written.

Q. What date was it that you met him? A. If you could tell me the date of the letter that is written.

Mr. Carey: I object, further, on the ground it is not proper cross examination. I introduced no evidence about a meeting

upon the job, nor with respect to an order for delivery of brick.

The Court: No, but you have evidence as to what purports to be the contract. I suppose anything going to that point would be, of course, proper cross examination. I think, though, Senator, as far as the other portion is concerned, it is outside of cross examination because it is outside any line covered by direct examination.

Mr. Mackay: In the case that Mr. Carey speaks of, it was held the right of cross examination could not be abridged where it was in reference to the matter of dispute. That is what we are on now.

The Court: Now, you are citing that case, Mr. Carey. The right of cross examination could not be abridged.

Mr. Carey: This is not cross examination. That is the point of my objection.

The last question was read by the stenographer.

The Court: I will overrule the objection.

Mr. Carey: Exception noted.

The Court: What was the date?

The Witness: Whatever date is after that letter was written.

Q. October 19. A. If that was the date of the letter, I was to meet him on a Monday or Tuesday on the job. I met him on that date.

Q. Did you have a conversation? A. Yes.

Q. That I could not absolutely say. I met both of them at different times. I think it was the other Mr. Gardner at that time.

Q. And did you have a conversation with him that day relevant to this brick? A. Yes; he asked me—

Mr. Carey: I object to that.

The question was read by the stenographer.

The Court: Why did you object?

Mr. Carey: Not proper cross examination; and in the second place it is immaterial whatever the conversation may have been with respect to the brick or to the delivery of the brick.

The Court: For the same reason, I will overrule.

Mr. Carey: Exception.

The Court: In your objection, you said to all that line of testimony.

Mr. Carey: Objection noted.

Q. The question was read by the stenographer: A. Yes.

Q. What was that conversation? A. He asked me when they could make deliveries of the brick, and I showed him the condition of the cellar, and I didn't know when we would be able to use brick.

Q. You knew then you had struck rock? A. Yes; rock was in evidence.

Q. You say, Mr. Kelly, that you endeavored to get quotations from other companies? A. Yes.

Q. And outside of the Mehrhof Company, whom did you go to? A. The Lower Mehrhof Company, in the lower yard.

Q. Who were they? A. I am not sure—Mehrhof Brothers. They are in the lower yard in Little Ferry.

Q. Could you get any quotations from them? A. They said they were busy.

Q. So you didn't get anything from them at all? A. No.

Q. And this Treviranus & Gardner, did you

get a quotation from them? A. They gave me, not in writing, but they were there going out of business, but they had so much brick there. I am not just positive about whether they could make deliveries at that time or not.

Q. So you didn't get any price from them? A. Not in writing; no.

Q. Did you get any price from any other concern? A. That was the only concern, only by rail.

Q. Only by rail? A. Verbally.

Q. Who was that? A. John G. King Company.

Q. From where? A. New York.

Q. Whereabouts in New York? A. 42nd Street.

Q. And where are they located? A. Haverstraw Brick Yards.

Q. What price did they give you? A. That I think was—

Q. I want to know. A. I didn't get it in writing, but Mehrhof's price was better than that —10 or 10 1-2 on the cars. We had to get that on the cars.

Q. You said you were ready for 20,000 brick on April 15th; is that right? A. Yes, sir.

Q. But you wrote a letter on April 6th, asking for 20,000? A. Yes.

Q. So you are wrong about that date, are you? A. No.

Q. It was April 6th? A. April the 6th, if that was the date the letter was written.

Q. When you say April 15th on the stand a little while ago, you don't know? You are governed by the letter? A. Governed by the letter.

Q. Entirely? A. Yes.

Q. And you are governed by all your letters, are you? A. Yes, sir.

Q. Is that your signature, Mr. Kelly? A. Yes, sir.

Q. That is your handwriting, is it?

Mr. Mackay: I will have that marked for identification.

Paper referred to marked Exhibit D1 for identification.

Q. Who was Mr. Levy? What connection did he have with the company? A. President.

Q. And how often was he on the job over at Englewood? A. Well, he was—possibly on days of requisition—once a month.

Q. What was that? A. Possibly once or twice a month.

Q. And how often was Mr. Levy there in October? A. In October?

Mr. Carey: I object.

Q. 1915.

Mr. Carey: As immaterial and irrelevant to the issues we are trying.

The Court: Do I understand the answer is Mr. Levy was an officer of your company, Mr. Kelly?

The Witness: Yes.

The Court: Well, Mr. Mackay, how is that now cross examination? How can it possibly be?

Mr. Mackay: If he knows whether Mr. Levy was on the job or not, I think that is proper to test his memory, credibility.

The Court: If it is for that purpose, to test his recollection, his certainty as to other things he has testified to, well and good, but I cannot see any relevency for any other purpose.

Mr. Mackay: I think it is proper cross examination in that respect.

The Court: If you limit its use to that purpose, all right; for the purpose of testing the recollection of this witness.

Mr. Carey: No testimony has been introduced with respect to Mr. Levy at all.

The Court: I understand that. The Senator says he is only using it to test his recollection.

Mr. Mackay: Yes, and he is a member of the company, of the corporation.

The Court: I will overrule the objection. Answer the question.

The question was read by the stenographer as follows: "And how often was Mr. Levy there in October, 1915?"

A. Possibly there around the first, of whatever day the requisition went in, once or twice a month.

Q. Do I understand you to say you were there in the month of October almost every day? A. Yes, sir.

Q. And in the month of November? A. Yes, sir.

Q. Almost every day? A. (Nods head.)

Q. And in the month of December, 1915, most every day? A. With the exception of Christmas week.

Q. Outside of Christmas week? A. Christmas week till after the first of the year.

Q. And in the month of January? A. Possibly after the 5th or 6th, with the exception of bad days.

Q. With the exception of bad days, you were on the job every day? A. Practically every day.

Q. In the month of January, 1916? A. The

month of January, with the exception of up to the 10th, from Christmas up to the 10th.

Q. What do you mean; January up to the 10th? A. Yes.

Q. What do you mean up to the 10th? A. I mean I was away during Christmas week and possibly some time of January.

Q. Up to the 10th of January? A. I would not say exactly the 10th, but in the first part of January.

Q. And how about the month of February? A. Month of February, I was on the job.

Q. Every day? A. Just the same; approximately every day.

Q. And how often in the month of January and the month of February did you see either of the Gardners? A. The month of January or February?

Q. Yes, 1916. A. Possibly three or four times.

Q. Converse with them? A. Yes, every time I saw them.

Q. Have conversation with them relative to delivery of brick? A. About the delivery of brick?

Q. Yes. A. Spoke about the brick that was on the job.

Q. Making objection of some kind? A. Yes.

Q. You did personally? A. Yes.

Q. To which Mr. Gardner? A. I met him, this gentleman here, down at the yard, and I believe I met the both of them down at the yard.

Q. In the month of January I am speaking about? A. I could not say what month that was.

Q. Can you give us any idea? A. I would not—I could not say positively.

Q. Would not say? A. No.

Mr. Mackay: That is all.

The Court: Anything further?

Redirect examination by Mr. Carey:

Q. You say you received the quotation from the John B. Rose Company for brick? A. John B. King.

Q. Kane? A. King Company. Verbal quotation.

Q. Which was better, the Mehrhof quotation or his? A. Mehrhof; the fact that he had to get it in on the cars.

Q. When you began laying brick on this job, did you have many or few bricklayers? A. Few bricklayers.

Q. And was it necessary for you to have a considerable quantity of brick there on the job before setting bricklayers at work? A. Well, necessary to have a few thousand.

Q. You had other jobs going at the same time as this one, did you not?

Mr. Mackay: I object, as irrelevant.

The Court: I don't see the relevancy.

Mr. Carey: He has been asking this witness about his attendance on this job, and whether he was there every day or not. I want to show he had other jobs at the same time, and he was at this job and went from this job from time to time to the other jobs.

The Court: All right, if that is the view of it. I have not seen the relevancy of any of that testimony.

Mr. Carey: I have not, either.

The Court: All right.

Q. You had other jobs on hand at this time? A. Yes.

Q. And you were exercising supervision over these different jobs? A. Yes.

Q. So that you were taken from this job to the other jobs? A. Yes.

Q. Going to the other jobs every day or so? A. Yes, sir.

Mr. Carey: That is all.

Mr. Mackay: That is all.

Mr. Carey: If the Court please, I expected my witness here to testify to time as to when the brick work begun on this building. It will be very short, and, reserving the privilege to call him if it is found to be necessary, I will now rest.

The Court: Any objection to that, Mr. Mackay?

Mr. Mackay: I would suggest we might take a recess at this time, because I would like to look over that case more thoroughly at this time, if the Court has no objection.

The Court: Personally I have not, as long as it does not disarrange everything; that is all.

Mr. Carey: I don't know that I shall call this witness. It will depend upon the situation. Whether the Court takes a recess now or at a later time I would like the privilege of calling this witness—

The Court: Oh, yes. Quite likely your witness will be here at that time, and if not we will try and take care of it.

Mr. Mackay: I wanted to ask Mr. Kelly a question or two, your Honor, if I might.

Recross examination by Mr. Mackay:

Q. Mr. Kelly, who was in your employ between October 19th, the date of the signing of this contract, and April 6th? A. On the job?

Q. On the job and in the office.

Mr. Carey: I object to that question and—it is not cross examination, in the first place, and in the second place, it is immaterial.

The question was read by the stenographer.

The Court: I will sustain the objection.

Q. Who was in charge of the job, Mr. Kelly?

Mr. Carey: Objected to, for the same reason.

The Court: I will overrule that.

Mr. Carey: In charge of the job I take it means in charge of the construction work. How it can have any relevancy to a matter of delivering of brick or—

The Court: That is just the reason why I overruled your objection, Mr. Carey. An answer to that question, of course, may not reach anywhere unless he follows it up. That question merely says that person in charge had some duty to perform in respect to delivery of brick, which I take to be relevant.

Mr. Carey: Objection noted.

The Court: You may have it.

Q. Who was in charge? A. Mr. O'Keefe.

Q. Mr. O'Keefe. And who was in charge of the office on February 24th when you and Mr. Levy were away?

Mr. Carey: Same objection to that question.

Mr. Mackay: I asked who was in charge of their office the day that Mr. Gardner and Mr. Kelly called—

The Court: I will overrule the objection for the same reason.

Mr. Carey: Exception noted.

The Court: Indicating it may be of no value to have the answer.

A. You say when Mr. Levy and myself was away?

Q. Yes. A. That was around February 24th. Mr. Levy was away. A person by the name of Miss Dixon.

Q. Miss Dixon. And anyone else there—a man? A. If there was a man there, it was Mr. Brainard.

Q. Mr. Brainard; I see.

The Court: We will take our recess at this time, until twenty minutes after one.

Whereupon at 12:20 o'clock P. M., a recess was taken to 1:20 o'clock P. M.

Hackensack, N. J.,
April 13, 1917.
1:20 P. M.

AFTER RECESS.

The Court: What about this case, Mr. Mackay?

Mr. Mackay: The defendants say their understanding of the agreement was that it was agreed that these payments for the brick should be made on the 10th of each month. That is their understanding.

The Court: That is as far as the agreement went?

Mr. Mackay: Yes.

The Court: Then, Senator, the difficulty seems to be—

Mr. Mackay: With this exception, that they stated that if the money was not paid on the 10th, they would not deliver any more brick.

The Court: Now, you are going further. If there is anything important in such an

arrangement, it is what you have just stated.

Mr. Mackay: Mr. Gardner said if the money is not paid on the 10th—on or before the 10th of each month, no further brick would be delivered. That is the whole thing. I cannot add anything.

The Court: If there is anything of importance at all about any further agreement, it is that one thing you are now last speaking of. The mere fact that payments were to be made in installments, it seems to me, is fully covered by the case cited to me. Now the difficulty is just that we were in before recess. There has been pleaded and there has been shown a contract which is in writing, and unquestionably the contract upon its face is a complete contract. There is every essential there that is necessary, either expressed or becomes expressed. You have the offer in definite form and the acceptance to the letter as the offer was made, without any exceptions. If it be silent as to when the payments are to be made, certainly the law steps in there and supplies, if there be deficiency, because it is supplied by the Sales Act. Therefore, the essential part is the question of your pleadings. You have not pleaded a subsequent agreement which added to the contract or altered the contract, or made a new contract in some respect, but you have simply said this contract which has been pleaded was not a complete contract, and suppose to show some parole agreement on an agreement which appears to be a concrete agreement in

writing. Mr. Carey will then say under the pleadings you have you should not be permitted to show this parol agreement; that if you are entitled to show it at all, it would have to be that there was a contract subsequent to P1 and P2, by parole, if it were, by which the terms of P1 and P2 were enlarged, changed, altered, varied and rescinded, or what not. And he says you are in a position that you cannot show this agreement. So that your only remedy would be to move an amendment of your pleadings, so as to fully complete what you are trying to show.

Mr. Mackay: I make that motion.

Mr. Carey: I do not understand the Senator now says this arrangement with respect to the time of payment was a subsequent—subsequent to these writings.

The Court: There is another thing. If it were—if it antedated P1 and P2, of of course, it cannot be available.

Mr. Mackay: No.

The Court: If it was a part of the preliminary arrangement, not incorporated in the offer and acceptance, it cannot be used, and so it would have to be subsequent to the entering P1 and P2.

Mr. Mackay: That is what I intend to plead. It is subsequent to the 21st of October, 1915, that this agreement was reached.

The Court: What do you say, Mr. Carey? If that amendment is allowed, are you in a position to proceed?

Mr. Carey: I should want to have the amendment stated so that I know what

the situation is with respect to these particulars. First, the time of this alleged subsequent agreement; the place where it was entered into; the parties with whom the agreement was made. It may be when I have those details I may be in a position to say I will go on to-day.

The Court: Can't you formulate your amendment immediately so that that is brought to the immediate notice of Mr. Carey?

Mr. Mackay: The agreement took place at Englewood, New Jersey; I cannot give the exact date, but it was between the 21st of October and the 28th of October, 1915.

The Court: And the parties to it were—

Mr. Mackay: And the parties to it were the Gardners who were members of the Hackensack Brick Company, and there was Mr. Kelly—(to Mr. Gardner). Was it Mr. Kelly or Mr. O'Keefe? Mr. Kelly and Mr. O'Keefe, both. That is the reason I asked him what was the name of the foreman in charge. Mr. Kelly and Mr. O'Keefe.

The Court: And it was generally to the purport that you have already told us of?

Mr. Mackay: What I have already told you.

The Court: The thing Mr. Carey is concerned with is the time and the place and the parties who were present at the time of the making alleged.

Mr. Mackay: That is it.

Mr. Carey: Now, I understand that this was between the 21st and the 28th of October?

Mr. Mackay: Yes.

Mr. Carey: And it took place at Englewood?

Mr. Mackay: Yes.

Mr. Carey: Where? On the job?

Mr. Mackay: On the job.

Mr. Carey: Between Mr. Kelly and—

Mr. Mackay: Mr. Gardner.

Mr. Carey: Mr. Gardner. Mr. Kelly and Mr. O'Keefe on the one hand, and Mr. Gardner—

Mr. Mackay: On the other.

Mr. Carey: Which Mr. Gardner?

Mr. Mackay: Mr. O'Keefe and Mr. Milburn B. Gardner.

Mr. Carey: Not Mr. Kelly?

Mr. Mackay: Not Mr. Kelly.

Mr. Carey: What was the substance of the agreement then made?

Mr. Mackay: That the payments were to be made not later than the 10th of each month and that in the case of failure to pay on the 10th of each month, that no further deliveries were to be made.

Mr. Carey: I would like to confer with Mr. Kelly.

The Court: All right.

Mr. Carey: And in the meantime, I think the Senator—

Mr. Mackay: Have you Mr. O'Keefe here?

Mr. Carey: No. I want to see who Mr. O'Keefe is, what his relation was with the company. I should like to have the Senator dictate to the stenographer his amendment, so that we may have it on record.

The Court: She has already taken everything he has stated. His formal plead-

ing I am holding to what he has pleaded here.

Mr. Mackay: I will get a copy of that from the stenographer and draw it up in proper form.

Mr. Carey: On the basis of the statement made by Mr.—by Senator Mackay, to the effect that this supplemental agreement took place at Englewood, New Jersey, between the 21st and 28th of October, 1915, between Mr. O'Keefe on the one hand and the Gardners on the other, and that the agreement consisted in an arrangement to the effect that payments were to be made for brick delivered not later than the 10th of the month following delivery, I am prepared to go on with the trial of the case this afternoon, and I wish it understood that this is an amendment which stands and that I am not to be met with—

The Court: Mr. Carey, you did not fully state what the Senator did state: Not only the payments were to be made not later than the 10th of each month following the delivery, but that in the event of non-payment, at such time there were to be no future or further deliveries of brick under the contract. You had that in mind?

Mr. Carey: I had that in mind. I am prepared to go on with the trial of the case with the understanding that parties defendant, although the amendment has not been actually reduced to writing, are to be held to that statement of the amendment.

MILBURN B. GARDNER, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Mackay:

Q. Where do you live, Mr. Gardner? A. Hackensack.

Q. Are you a member of the Hackensack Brick Company? A. Yes.

Q. That is a New Jersey corporation, is it not? A. Yes.

Q. What office do you hold? A. I am the Treasurer, and you might say the manager.

Q. You had some dealings, did you not, with the Kelly Construction Company? A. Yes, sir.

Q. And you know Mr. Kelly? A. Yes; I have met him.

Q. Do you know Mr. Levy? A. Never met him.

Q. Don't know Mr. Levy. Do you know Mr. O'Keefe? A. On the high school job at Englewood.

Q. I see, and at this job in question, for which this brick was wanted, was it? A. Yes.

Q. And after the signing of P1 and P2, on October 19 and 21, did you see Mr. O'Keefe shortly after the 21st of October? A. Yes.

Q. Where did you see him? A. On the job.

Q. On the job. Talk a little louder. A. On the job at Englewood.

Q. And did you make any arrangement with him as to the payment of the brick that was agreed upon, after P1 and P2?

Mr. Carey: I object to that question on the ground that no authority on the part of Mr. O'Keefe has been shown to bind the corporation.

The Court: I think that is so, Senator. I don't remember anything in the case mentioning Mr. O'Keefe's name as to position or authority he had to act for the plaintiff company.

Mr. Mackay: I asked Mr. Kelly if he was—O'Keefe was—or who was in charge of the job over in Englewood.

The Court: Well, that is true, but at the same time it was over the objection of Mr. Carey; and you also asked as to other persons, and again over objections. At the time I said unless it was followed up as shown what authority they had, it would not be of any value to you. The objection of Mr. Carey was explicit at the time, that he might have been there in any capacity at all. Your burden is to show he was in the capacity which permitted him to contract for and bind the plaintiff company.

Mr. Mackay: Well, if Mr. O'Keefe was in charge of the work over there—

The Court: Not necessarily. He might have been in charge of a gang of bricklayers or men excavating. He might have been in charge of a gang of men having some other particular work to perform. You would have to show he had that relation toward the plaintiff company as would warrant him in contracting for, or by which his acts would bind the plaintiff company.

Q. Well, did you know, Mr. Gardner, in what capacity Mr. O'Keefe was acting over there?

Mr. Carey: I object.

The Court: Answer yes or no.

Q. Do you know? A. I should say yes, I do know.

The Court: Upon what is your knowledge based?

Q. What is your knowledge based on? A. I asked him what he was doing. He said he had charge of the job.

Q. Asking him what he had to do? A. I asked who has charge of the job, and he says, "I have." I think he gave me his card or where he lived, if I recall, in Jersey City or Hoboken, or around Union Hill; I have forgotten.

The Court: You asked him who had charge of the job?

The Witness: Yes.

The Court: He said he did?

The Witness: Yes.

Witness' answer read by the stenographer, as follows: "I asked who has charge of the job, and he says, 'I have.' I think he gave me his card and where he lived, if I recall, in Jersey City or Hoboken, or around Union Hill; I have forgotten."

Mr. Carey: I move to strike that out; shows no authority on the part of this man.

The Court: I have in mind—I won't strike it out, but it is not a sufficient showing to warrant the making of a contract. The mere fact he was in charge of the job conveys to my mind and to the jury everything and yet nothing definite. The burden of the defendant now is to make that showing such as will show that he acting in the line of his employment, was acting in his employment to bind his em-

ployer. He being in charge of a job doesn't convey that. That is why I am not striking it out, because I don't think it is sufficient to show anything. That is why I don't strike out.

Q. Whom did you go to see at Englewood, Mr. Gardner? A. Why, I suppose I went to see Mr. Kelly or Mr. Levy, or whoever had charge of the job.

Q. For what purpose did you go there?

Mr. Carey: I object. Let him say what took place with anybody who had authority to bind the company.

The Court: I don't imagine his purpose in going there has any relevancy.

Mr. Mackay: I will withdraw Mr. Gardner for a minute. If Mr. O'Keefe had no power to bind the company, why—

The Court: That is the important point.

MATTHEW F. KELLY, called as a witness in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination by Mr. Mackay:

Q. Who were the members of the Kelly Construction Company? A. Mr. Levy and myself and both our wives.

Q. Both your wives. And was Mr. O'Keefe in your employ? A. Yes, sir.

Q. In the employ of the company? A. Yes, sir.

Q. And had been how long? A. Up to that time possibly six to eight months.

Q. I see. And had Mr. O'Keefe ever acted for you in the making of contracts? A. Absolutely no.

Q. Not on any occasion? A. Absolutely not.

Q. And never bought any things for you at all,

for the company? A. With the exception of a few miscellaneous pails or such as that—few pounds of nails.

Q. He had that power, did he?

Mr. Carey: I object to that. It calls for a conclusion; and in the second place it has no bearing upon this question of modifying a contract which had been already entered into by the responsible heads of the company.

The Court: That is true, but the question, if answered—I am going to let him answer broadly, because he can probably answer it so that it ought to be perfectly satisfactory.

The question was read by the stenographer.

A. He had no power to buy anything. Anything that he ever bought, or made any kind of dealings with anything, was paid in cash and never amounted to possibly more than a dollar.

Q. How do you know that? A. We have a daily report.

Q. From him? A. From our timekeeper on the job.

Q. And you say he never bought anything more than a dollar's worth? A. In relation to this Englewood school job—in relation to any job, yes.

Q. Where did he buy the dollar's worth? A. May have been in Hoboken where he was previously engaged.

Q. Are you giving me testimony of something you know about? A. No.

Q. You just saying a dollar for the sake of talking? A. That is all.

Q. For the sake of talking? A. Not for the

sake of talking. That is as far as I know there was anything necessary to buy.

Q. What was there he bought, that you know he bought, as you said a moment ago? What was there? A. Pails.

Q. When and where? A. He bought pails in Hoboken.

Q. For what job? A. The West Hoboken High School.

Q. And what did he buy for the Englewood job, if anything? A. I cannot recall anything.

Q. Do you know whether he did or not? A. I would not say; couldn't say.

The Court: Let me ask you. In these cases where you have spoken of as buying pails and nails, did I understand you to say they were cash?

The Witness: If we had no account in that place it was cash.

Q. And where he had charge of a job, if he wanted to buy pails or nails, he bought them and charged them and you paid for them; is that correct? A. Yes.

Q. And that was the same way with this Englewood job? If he needed anything and bought it and paid for it, and you ratified it? A. Yes; to that amount. I never objected to a man buying a pail, if it was necessary.

Q. What work did O'Keefe actually do on the job? A. Foreman.

Q. Of what? A. Foreman of laborers, bricklayers, hod-carriers.

Q. Did he pay them? A. No, sir.

Q. Who paid them? A. I paid them.

Q. Did Mr. O'Keefe own any stock in the company? A. No.

Q. None at all? A. Absolutely not.

Q. No interest in it at all? A. No interest in it at all.

Q. And how long did he continue to be foreman of this Englewood job? A. From '15 to around July, '16. July, I think. I would not say exactly July.

Q. And was he in full charge of that work over there? A. At the beginning of the work there was only laborers there—bricklayers.

Q. You didn't understand my question. A. I was answering as I was going along; and the carpenter, he had full charge of the job.

Q. O'Keefe had full charge of the job? A. No, this carpenter, Wahington.

Q. What day did O'Keefe first go there on the job? A. He was back and forth from West Hoboken, and I think he went in around October; I would have to look up the record to see.

Q. And when he took charge of the job, he was foreman? A. Yes.

Q. In October. A. Yes.

Q. And as foreman, he had complete charge, did he, of the work?

Mr. Carey: I object to that question as not definite enough for the witness to answer.

The Court: I will either sustain the objection, or otherwise the witness shall have absolute latitude in his answer. The proper question would have been what his duties were and what he did. You see, you have probably overlooked the fact this is your witness. This is not cross examination.

Mr. Mackay: I suppose the Court realizes that while it is a leading question and may be objectionable, it is not reversible error.

The Court: Yes.

Mr. Mackay: When you have a hostile witness.

The Court: I cannot say yet Mr. Kelly is hostile.

Mr. Mackay: You cannot say he is friendly.

The Court: An interested witness is different from a hostile witness.

Mr. Mackay: You cannot say he is a friendly witness.

The Court: I would not care if you were not right up to the very important question in the case—I would not stop you from using a leading question.

Mr. Mackay: Repeat the question.

The stenographer read the question as follows: "Q. And as foreman, he had complete charge, did he, of the work?"

Mr. Mackay: Has your Honor ruled?

The Court: I will sustain the objection to that.

Mr. Mackay: My objection will be noted.

The Court: You may have it.

Q. I understand you to say, Mr.— I believe you were there every day, mostly? A. Practically.

Q. What did you see Mr. O'Keefe doing during the time you were there? A. Act as foreman.

Q. And as foreman, what did he do? A. Had charge of the men, to see that they were working.

Q. And he had entire charge of that, did he? A. The early part.

Q. That is, in the month of October? A. Yes. We had a subcontractor on the job at that time.

Mr. Mackay: I move to strike that out.

The Court: Well, I don't know whether I should. It might be going toward completing his answer, because you have asked him practically whether or not he was in complete charge of the work. He said the first part, and then they had a subcontractor.

The Witness: Yes.

Q. In October? A. Yes.

Q. What date? A. Excavation from the beginning.

Q. What date was that? A. Right there until he finished his excavation.

Q. When did he start? A. I would have to look up the records, but he had started previous to the latter part of September. I can get the exact date.

Q. When you put O'Keefe on, you put O'Keefe on as foreman? A. We had him in Hoboken, and he came up there.

Q. To act as foreman on the Englewood job? A. To act as foreman on the Englewood job and oversee everything was being done properly.

Q. And to receive the goods and materials? A. Yes.

Q. And give orders and instructions?

Mr. Carey: With respect to what?

Q. With respect to the work and the obtaining of materials? A. Of the digging. Outside of that he had nothing to do with any ordering, only what came in.

Mr. Mackay: That is all.

The Court: Any cross?

Mr. Carey: No cross.

Mr. Mackay: Now, if your Honor please,—I don't know if you are going to take the evidence.

I want to make the offer at this time so as to complete my part of the case. And I want to introduce in evidence the conversation, the agreement between Mr. Gardner and Mr. O'Keefe, so as to show that the payments were to be made not later than the 10th of each month, and in case the payments were not made, that no further deliveries were to be made.

The Court: You want to show that such a conversation took place as between Mr. Milburn B. Gardner and Mr. O'Keefe, and that that constituted the contract which bound the plaintiff company?

Mr. Mackay: Yes. I also want to proceed further and offer in evidence the evidence of the attachment suit, and the evidence of—

The Court: Take one thing at a time. If I don't allow you to do one, the other will be of no interest.

Mr. Mackay: I want it in the record.

The Court: And then you will proceed to give evidence as to the non-payment.

Mr. Mackay: Non-payments. Different times demands were made. What was said.

The Court: And proceeding by way of attachment to force collection. What do you say, Mr. Carey?

Mr. Carey: I would say there is nothing in the record to show Mr. O'Keefe had any authority to make any contract of the character it is proposed to show he did make. His duties were simply as foreman to oversee the laborers; that incidentally he may have bought a pail or some tools needed for present purposes, for use on the job; but so far as ordering or entering into any contract on behalf of the defendant, he neither had the authority nor does the evidence

show he was held out to have had that authority on any occasion. There is a vast difference between buying a pail and a pick and a shovel to meet present emergencies, and a contract involving a million of brick and the payment of the same. Moreover, so far as has been open to the Court, even if a conversation had taken place between Mr. Kelly and Mr. Gardner with respect to the payment, that conversation would not have amounted to a contract, because it would have been entirely without consideration. Here was a contract between the corporation—between the two corporations, a contract which is expressed in writing and, as the Court has ruled, was a complete obligation in itself. Now, in order to add a term to that contract, which will be binding between the parties, that must constitute a subsequent contract. The subsequent contract as well as the original contract must have a consideration to support it. Furthermore, this contract with which we are dealing is a contract within the Statute of Frauds. It must be in writing. A modification of a contract which must be in writing within the Statute of Frauds must itself be in writing.

The Court: You are speaking of that section of the statute which provides for a contract for more than a specified sum?

Mr. Mackay: More than $30, I suppose?

The Court: More than $30.

Mr. Carey: Yes. I think it is $300, now.

The Court: Is it?

Mr. Carey: It has been changed.

The Court: The amount involved is beyond either one of them.

Mr. Carey: The evidence clearly is he was not a member of the corporation; that he was not

authorized and had never entered into contracts except these little, petty affairs to meet present emergencies; and furthermore, there is no evidence, nor any offer to prove that Mr. Gardner knew of these occasions when he had ordered these things. So that it was not a holding out to him. A holding out must be that which misleads or puts the person in a position which he would not otherwise have been put in, except for this wrongful and improper holding up.

The Court: The situation is Mr. Mackay has made the offer and you are standing objecting to the allowance of his offer?

Mr. Carey: Yes, sir.

The Court: I will sustain the objection.

Mr. Mackay: Then we have nothing further.

The Court: Defendant rests, then?

Mr. Carey: Defendant rests?

Mr. Mackay: Defendants rests.

Mr. Carey: Plaintiff rests, with the statement that I have made a computation of the amount which the plaintiff was obliged to pay for 741,000 brick, in addition to the contract price—$2.50 per thousand, in addition to the contract price. I compute it to be $1,853.75.

The Court: I make it the same. Is there anything to go to the jury then, at all? Do you conceive of anything, Senator, at all?

Mr. Mackay: No, under your Honor's ruling.

The Court: If you can see anything under dispute, under the ruling I have made, then it should go to the jury. I don't recall anything, myself.

Mr. Mackay: No.

The Court: As I understand the testimony.

Mr. Carey: I understand the motion will be to direct a verdict.

The Court: For $1,853.75.

Mr. Carey: That is my motion, sir.

The Court: Hearing nothing further, Senator, as to any matter of fact, the Court will direct the jury to find in favor of the plaintiff and against the defendant in the sum of $1,853.75.

Verdict rendered as directed.

Mr. Mackay: My exception is entered to the direction of verdict.

The Court: You will formulate your amended answer, and you are to get a memorandum from the stenographer as to just what was on the record as to it.

Mr. Mackay: Yes; what was said.

The Court: Yes. And will you hand that to me on Monday morning, with the transcript you get from the stenographer? It should be filed now, and is a part of the case, you see.

[9819]