New Jersey Court of Errors and Appeals

NEW JERSEY SCHOOL and CHURCH FURNITURE CO.,
Plaintiff in Error,

vs.

THE BOARD OF EDUCATION OF SOMERVILLE,
Defendant in Error.

In Error.

Brief of JAMES J. BERGEN, of Counsel with the defendant.

This suit was brought by the plaintiff in error against the defendant in error to recover upon a contract between them, found on page 30 of the printed case, and bears date the 23d day of July, 1894; by it the defendant agreed to purchase of the plaintiff certain school desks described as Adjustable Single Novelty Desks, Grammar size, two teachers' desks described as number 71 and 74 respectively; the articles were to be made in a good, workmanlike manner and delivered and put up in the school house at Somerville by the plaintiff not later than September 25, 1894, for which the defendant was to pay five hundred and ten dollars. The desks were never put up.

On the trial of the cause, it appeared that the plaintiff was not ready to comply with its contract by the 25th of September, 1894, and afterward and about the 13th day of October, 1894, it sent to the defendant, to be used until the desks contracted for were ready, a different kind of desk which it called "New Era;" the desk contracted for was then to be ready in a few weeks. The desks sent were very unsatisfactory, and afterward and about the mouth of February, 1895, the plaintiff removed the "New

Era" desks, and, without the authority or consent of the Board, put into the school building another and different kind of desk, but not the one contracted for. The defendant, as soon as it discovered this, was dissatisfied and insisted that the plaintiff should comply with its contract; and on the 14th day of March, 1895, its representative met with the defendant and then agreed that the desks which had been contracted for would be put in, on Friday and Saturday, the 12th and 13th days of April, 1895. This positive arrangement was not complied with, and on the 19th day of April, 1895, by a letter mailed on that day, Exhibit P 5, the plaintiff was notified to furnish what it had agreed to, at once. In reply to that demand and on the 22d day of April, 1895, the plaintiff wrote that it would proceed at once to supply the same, but that it would require a few days to get it ready. To this no response was made by the defendant. The demand of the defendant for a prompt fulfillment of the contract not being complied with, the defendant procured other desks, and the first notification it had that the plaintiff was ready to deliver was on the 13th day of May, 1895, after it had purchased other desks.

At the close of the plaintiff's case, the defendant asked for a non-suit upon the ground that the case showed that the plaintiff had not complied with its contract, which motion was for that, and for another reason, namely, that the plaintiff, still having the goods in stock, had not shown that it was in any way injured, granted.

There are two assignments of error: First, that there was an extension of time, and that time had ceased to be of the essence of the contract; and, second, that the true measure of damages was the contract price for said goods.

As to the first, the contract by its terms was to be performed on the 25th day of September, 1894. Its performance consisted in making, delivering and putting up the desks ready for use by that date, being a short time after the opening of the school year. The non-compliance caused the defendant great inconvenience and annoyance, owing to the fact there was no suitable seating capacity for the children in the public school. It is claimed that the defendant by its acts has waived a performance of the

contract according to its terms, but it does not appear that there was any extension granted to any definite time, and defendant had the right at any time to call upon the plaintiff to perform its contract. The case shows that in March, 1895, the plaintiff fixed a distinct time for the performance of its contract, and that was the 12th and 13th days of April, 1895, the Easter holidays. (There is no pretense that there was any other agreement as to extension.) When the time fixed by the plaintiff arrived, it had not as yet complied with its contract, and on the 19th of April, 1895, it was notified in writing by the defendant to *at once* comply with its agreement. This was not done, and the neglect warranted the defendant in annulling the contract and making such arrangements in the way of procuring desks as the public necessities required. It did so, and it was not until the 13th day of May, 1895, that it had any notification from the plaintiff that it was ready to comply, nearly a month after it had been notified to fulfill its contract *at once*. The previous conduct of the plaintiff justified the defendant in the belief that it did not intend to fulfill its contract. It was then nearly a year after the contract was made, and in the meantime it had sent two lots of desks which were not according to the contract, and it neglected and refused to furnish the articles contracted for, and after the positive promise to comply by the 13th day of April, 1895, had been violated, the Board of Education held it had the right to consider the contract abandoned for want of non-performance by the plaintiff, and to act as it did in procuring the furniture elsewhere. The notification of the 19th of April to comply at once is not an extension of time to the 13th of May. It meant immediately, and the refusal on the part of the plaintiff to comply immediately constituted a breach of its contract.

As to the second assignment: Under the contract, the plaintiff was to make, in a good, workmanlike manner, not an extraordinary or unusual thing, but a class of goods recognized by the plaintiff as a staple article, called Adjustable Single Novelty Desk. It was an executory contract, and no title passed until the goods were completed and delivered.

Under the contract for the building of a vessel or other thing, no property is vested in the person for whom it is agreed to be built until it is so finished and delivered.

Edwards vs. Elliot, 7 Vroom, page 453.

Parker vs. Pettit, 14 Vroom, page 512.

The rule of damages in an action for non-performance is ordinarily the difference between the price agreed to be paid and the value of the articles sold. It is only where the property is utterly worthless in the hands of the vendor that the whole price agreed should be paid.

Allen vs. Jarvis, 20 Conn., pages 37 and 48.

In the case last referred to, the article contracted to be made was patented. The patent was held by the defendant, consequently the manufactured article could not be sold without defendant's consent, and was, therefore, valueless in the hands of the maker.

The case of Bement vs. Smith, 15 Wendell, page 493, holds that where a carriage was built for a customer and tendered and acceptance refused, and the carriage left with third party for defendant, the damages were the contract price, but this does not seem to be the rule in this State, and is not generally approved. (See Sedgwick on Damages, 7 Edition, Vol. 1, page 596.)

The rule seems to be that where the manufactured article is unusual and not readily marketable, that the maker would be entitled to have his damages estimated by the contract price; but where the article was staple, as in this case, being made by the plaintiff for its regular business and capable of ready sale, there being nothing in the case which shows to the contrary—that in such a case, having the goods in hand, capable of sale, he would only be entitled to recover as his damages, in case of proper tender, and refusal to comply, the difference between their value and the contract price, which in the case under consideration does not appear.

There was no delivery proved; where the place of delivery is fixed by the contract, as in this case (they were to be delivered at Somerville), that controls.

J. J. BERGEN,

Of Counsel with Defendant in Error.

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

The New Jersey School and Church Furniture Company
Plaintiff in Error,
vs.
The Board of Education of Somerville,
Defendant in Error.

Upon Contract.
On Error.

Points Made by Linton Satterthwait, Attorney of Plaintiff in Error.

I.

The plaintiff agreed to manufacture and deliver certain desks on or before September 25th, 1894. (*Ex. P 1*, p. 30.)

The desks were not ready for delivery at the time named and defendant acquiesced in the delay (p. 12, lines 10–30, p. 19, lines 10–40, *Ex. P 2*, p. 31, pp. 205, 212, 213 and 219, of Book of Minutes of defendant, pp. 35 and 36 of printed case).

This acquiescence in delay, this recognition of the contract as existing after September 25th, this manifesta-

tion of an intention to claim the benefits of the contract after that date, removed time from the contract as an essential element and changed it into the legal similitude of a contract which contains no stipulation as to time, and which, therefore, must be and may be performed within a reasonable time after notice to perform.

Time had thus ceased to be of the essence of the contract.

By accepting the use of other desks temporarily, the defendant's express conduct shows that it considered the contract as binding and in force, notwithstanding the delay in performance.

The defendant continued to be bound until by a positive demand for performance it should restore time as an element in the contract. And after such demand, the plaintiff must have a reasonable time in which to perform, for a contract with time indefinitely extended is as if no time had originally been named.

In *Thorne* v. *French*, *24 N. Y. Sup. 694*, the plaintiff sold to the defendant the right to produce a certain opera and was to furnish materials by September 1st, 1891, the defendant agreeing to pay $2,000 as compensation if he should not produce the opera by February 1st, 1892. Plaintiff did not deliver the materials by the time named. The unexpected popularity of an opera then being produced led to delay, and the defendant wrote Mr. Thorne five days after the alleged default: "Your favor of September 3d at hand. I shall be glad to see you when you get here, which will be in ample time for the band parts." Other conversations were had as late as January, 1892, in which the defendant alluded to the contract as still in existence. "By electing to continue this contract in force," says the Court, " the defendant retained his rights under it until September 1st, 1893. He evidently intended to regard the contract as a subsisting obligation and one which might ultimately prove beneficial to him. A defendant is not bound to take advantage of a delay or forfeiture, and there may be a waiver of these by conduct indicating an intention to waive a condition as to time

'although there are no new considerations and although there may be no technical estoppel.' (Citing cases.)

"Where time is waived, a party is not put in default until he has demanded performance and thus restored time as an element of the contract. (Citing cases.) * * * When the defendant finally announced that he would not produce the opera at any time, the plaintiffs were absolved from any formal tender or offer of performance on their part. * * * Time was not, therefore, recognized by either party as of the essence of the contract."

In *Bunty* v. *Tibbets*, *7 Greenleaf (Me.) 70*, defendant bargained for the purchase of land, of which he was in possession, giving his notes for the purchase-money, the owner stipulating in writing to give a deed, at no stipulated time. Two years elapsed, and in an action on the notes, the court said: " * * * When the agent of the defendant called for the deed and could not obtain it, the defendant might at once have resisted the payment of the notes though Pitts declined to deliver them up, and have considered himself as completely absolved from his engagements. But though the defendant's agent notified him of his fruitless endeavor to obtain the deed or notes, still the defendant gave no evidence of any disposition to rescind the bargain and reclaim the notes. * * * It was in his power to waive all legal objection to the non-procurement of the deed in a reasonable time; and if he did so he cannot now be permitted to urge it as a defense against the action. The deed is ready for him and has been offered to him in court."

The furniture in this case was ready for the defendant, and was practically offered to it in court (p. 16, lines 1-10).

In *Maline Malleable Iron Co.* v. *McDonald*, *38 Ill. App. (1890) 590*, appellant by contract entered into with appellee agreed to cast 1,000 pounds, castings to be made according to a certain model furnished by appellee, and to be delivered to him in Keokuk, Iowa, on or before March 12, 1889.

It was alleged that the work was not done according to the model and not in proper time, and appellee refused to accept the castings when they were complete and placed on board the cars at Rock Island, and sued for damages. The jury found for the appellee, and assessed his damages at $191, for which sum judgment was entered in the court below.

In reversing, the Appellate Court said: "The first contention by the appellee is that the castings were not delivered in the time required.

"While there is a very serious controversy about the agreement to deliver by the 12th of March, 1889, as appellee claims (the appellant denying such agreement), we think even if there was such the appellee, after the 12th of March, 1889, waived the time of performance by insisting that the appellant should do the work 'as soon as possible.' This will be seen by his letter of May 14th, 1889. The appellant after this time had then time in which to finish the work that would be reasonable under the circumstances, and there is no evidence going to show an unreasonable delay after that. The castings were all delivered by July 1, 1889. The whole dealings and correspondence between the parties show that the time of completion of the work was not regarded as of the essence of the contract."

In the case at bar, the defendant, by its letter of April 19th (*Ex. P 5*, p. 32), and by page 219 of its Book of Minutes (p. 36), "waived the time of performance by insisting that" the plaintiff "should do the work as soon as possible," for this is what the term "at once" really means. It could not mean literally on the instant. Any reasonable construction of the words would give the plaintiff in this case, as the appellant in the case last above cited, after the receipt of the letter of April 19th, 1895, "time in which to finish the work that would be reasonable under the circumstances."

In *Lindsey* v. *Gorden*, *13 Me. 63*, defendants had compacted for the purchase of a schooner, for which they gave three notes and agreed to deliver to the plaintiff, within thirty days, a load of good hard wood, with the

stipulation that if they should fail to deliver the wood as agreed or to pay the notes when due they would redeliver the vessel to the plaintiff. The wood was not delivered, and after forty days a small payment was made on the first note. The vessel was accidentally lost before the maturity of any of the notes.

Plaintiff sued defendants for damages for non-delivery of vessel.

The Court said :

"There was a promise absolutely to deliver a load of wood in thirty days. If the defendants failed to do so, they were to redeliver the vessel. They did neither at the end of that time, although the vessel was then in existence and in their power. They are, therefore, liable to pay the wood and have no excuse for their failure to do so. By accepting a partial payment after the thirty days, we consider the plaintiff to have waived his right to the immediate return of the vessel, and to have assented to the continuance of the contract and that the vessel should still continue in the possession of the defendants. It remained there at the plaintiff's risk ; and being lost without the default of the defendants, redelivery by them is excused and no action lies against them therefor."

In *Barry* v. *Palmer*, *19 Me. 308*, plaintiff was to deliver paper hangings at a certain place and time, and to receive paper in return. "The plaintiff," said the Court, "failed to perform on his part in two particulars. He did not send the paper at one time as he agreed, nor did he send it in April in the steamer's first trip, according to contract. But his rights will remain unaffected if performance in these respects was waived or excused by the defendant. And this, in our judgment, is fairly deducible from the evidence. The plaintiff having failed to send on the steamer's first trip, the defendant in his letter to the plaintiff of April 17th, 1838, desires to be informed when he will send the paper hangings, adding, 'the paper you are to have is ready.' This clearly waives strict performance, and manifests a willingness to receive the hangings subsequently ; that

is, as must be understood, if shipped within a reasonable time, * * * and the correspondence and acts of the parties are evidence that the defendant waived his right to require that the entire quantity he had agreed to purchase should be shipped at one time, and that on the first trip of the steamer in the month of April."

"Mere delay in the execution of a contract whose terms would be satisfied by performance within a reasonable time does not, of itself, entitle the other party to rescind. To have this effect the implication arising from the non-performance of the contract must be inconsistent with its being still in force. The damage resulting from an unreasonable delay may be recovered in action on the contract." *Sea Isle City* v. *McTague, 28 Vr. 428, 31 A. Rep. 727.*

The plaintiff in this case insists that by the acquiescence of the defendant in delay this contract became as one in which time could not be regarded as of the essence. Certainly it was assimilated to a contract in which there are no express stipulations that performance at the time named is to be a condition precedent to its enforcement.

In *Beck Pauli Lithographic Co.* v. *Colorado Milling Co., 52 Fed. Rep.* (Circuit Court of Appeals), the Court said: "It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case, from the express stipulations of the contract, or of the nature of its subject-matter, that the parties intended performance within the time fixed in the contract to be a condition precedent to its performance, and where the intention of the parties does not so appear performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counter-claim for the damages he has sustained from the breach of the stipulations. * * *

" * * * In contracts for work or skill and the materials upon which it is to be bestowed a statement

fixing the time of performance of the contract is not ordinarily of the essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation" (citing cases).

This case is in point. If it be claimed that the subject matter—school desks—shows that the parties contemplated performance before the opening of the school year, the answer is that the defendant assented to the delay and then *accepted other desks to be used free of charge until the desks contracted for* should be delivered. (P. 12, lines 10–30, *Exhibit P 2*, p. 31.) From the time of the delivery and acceptance of these temporary desks, the "nature of the subject-matter" did not imply any fixed or arbitrary time for performance. From that time on it was not essential for the interests of the defendant under the contract—and the defendant clearly did not so regard it—that performance should be on any specific day.

In *Stryker* v. *Vanderbilt*, *1 Dutch. 495*, the Court said: "The weight of authority is that a parol agreement, enlarging the time for performing a contract under seal, may avail as an excuse for non-performance at the day specified in the original agreement."

3 Addison on Contracts (*Abbott and Wood, ed. 1888*), *p. 827*, (**p. 1218*): "Thus if a written contract for the sale of goods provides for the transmission of the goods to the purchaser on a particular day, and the purchaser subsequently gives a verbal order for them to be sent a day later, performance of the original contract as to the time of delivering is thereby dispensed with."

Assuredly on this authority the defendant in error by its arrangements with plaintiff's agents, and by its letter of April 19th, 1895, dispensed with the performance of the original contract as to September 25th, 1894—the date originally named for performance. Any right to rescind on its part, any justification for refusal

to receive the desks when tendered, must arise out of something subsequent to April 19th, 1895. There can be no escape from this conclusion if authorities are to be considered at all.

II.

The letter of April 19th, 1895 (*Ex. P. 5*, p. 32), and the minutes of the defendant of April 18th, 1895 (p. 36), show beyond the possibility of controversy that up to April 19th, 1895, no rescission had taken place, that the defendant regarded the contract as still in force, and contemplated receiving benefits from its performance by the plaintiff. This much must be conceded.

The letter of April 19th was not a rescission. There is not a syllable which by any power of distortion can be construed as a rescission.

A rescission must be distinct, must give the other party positive warning not to go on with performance. One party cannot lawfully lay a trap for the other by a mental resolution to rescind and afterward announce his earlier intention. There can be no *ex post facto* rescission. Nor can a contract be at the same time rescinded as to one party and unrescinded as to the other.

The party having a right to rescind must not delay for an unreasonable time in asserting that right.

Clark v. *Wheeling Steel Works*, Circuit Court of Appeals, Third District, Judge Wales (1893). *53 F. Rep. 494.*

In *Weeks* v. *Robie*, *42 N. H. 320*, the Court said:

"It is well settled that whenever one party to a contract refuses to execute any substantial part of his agreement, he thereby gives to the other party the option to rescind the entire contract. * * *

"But the party who would take this ground must do so distinctly and unequivocally. He cannot treat the contract as binding and rescinded at the same time. Where a party who may be entitled to repudiate a contract, either because it has not been performed within a reasonable time or because the other party refuses to

execute any essential or substantial part of his agreement, does any act which amounts to an admission of the existence of the contract, or a ratification of it, after a full knowledge of all the facts and circumstances connected with it, he cannot afterward elect to treat it as void and rescind it" (citing cases).

In *Mullin* v. *Bloomer*, *11 Iowa, p. 365*, respondent had contracted for the purchase of some real estate and gave to complainant his promissory note and took a bond for a deed to be made on the payment of the note. "The note was not paid nor was the deed made. Each party remained inactive for ten years; complainant then sought his purchase-money, and in doing so tendered a deed, as required by his bond."

In the court below complainant's bill was dismissed, because he had failed to tender a deed within the time required by his bond.

The Court above in reversing held following: *Walters* v. *Miller*, *10 Iowa 427*, that "to rescind a contract requires some positive act by the party who would rescind, which shall manifest such intention and put the opposite party on his guard, and it then gives him a reasonable time to comply," and that "respondent could not, by merely remaining silent, treat the contract as at an end and avoid the payment of purchase-money."

In *Carney* v. *Newberry*, *24 Ill. 205*, plaintiff contracted for the delivery of good merchantable hops for several successive years. Those tendered in 1856 were not merchantable and were declined. The Court said:

"Here was a failure to fulfill the contract for the delivery of the spring of 1856, as total and complete as if no hops at all had been tendered. * * * This was, then, a substantial breach of the contract, for which we think the defendant would have been justified in repudiating or abandoning it, and refusing to receive any more under it. * * * The simple failure of itself did not rescind the contract and absolve one party from tendering and the other from receiving the hops in future, but it authorized the party to rescind it. To avail herself of this right, a positive affirmative act

was required—a notice to the other party not to deliver any more hops, for she had rescinded the contract—and this, too, within a reasonable time after the failure. She could not lie by till the next lot was actually tendered and then repudiate the contract and refuse to receive them. Whether she did rescind the contract, as she had a right to do, is not for us now to inquire. That will be for the jury to determine upon another trial."

The defendant in the letter of April 19th says that it will "take the responsibility of any dissatisfaction, provided you furnish what you agreed to, which we expect you to do at once. Please advise."

There is no intimation or suggestion that on failure to perform "at once" the defendant would consider the contract at an end. So far from being an ultimatum or notice, the letter ends with a request, to wit, "Please advise." Advise what? Manifestly, whether or not the desks would be furnished as requested.

The plaintiff did "advise" the defendant by letter of April 22d (*Ex. P. 3*, p. 32) that it would proceed "at once" to get the desks ready; that it would take a few days to get them in readiness, and further asked the defendant to say what size "14 extra desks should be."

To this letter *no reply was sent by the defendant*, no dissent was made manifest (p. 11, lines 35–40; p. 12, lines 1–5). Failure to express, within a reasonable time, any disapproval of plaintiff's statement that a short time would be required to get the desks ready must be taken as assenting to performance in the manner indicated by the plaintiff in its letter of April 22d, 1895.

Absence of expression of dissent is sufficient evidence of assent. *Columbia Rolling Mill Co.* v. *Beckett & Co.*, *26 A. Rep. 888, 56 N. J. L. 714.*

III.

It the defendant wished to rescind the contract on receipt of plaintiff's letter of April 19th, it was bound to do so within a reasonable time thereafter. It could

not wait until the plaintiff, relying on defendant's failure to express dissent to plaintiff's letter of April 22d, had completed the desks, and then rescind because the goods were not delivered "at once."

"Whichever *party* has the right to rescind must do it within the time specified, if there be such a time, or otherwise within a reasonable time." *2 Parsons on Contracts (8th ed.), *p. 677, p. 793.*

"It is a general rule that a party having a right of rescission, because of the fault or act of the other, should make known his rescission as soon as may be after he knows his right to rescind." *Ibid, *p. 681, p. 797.*

In *Roemer* v. *Conlan, 18 A. Rep. 858, 52 N. J. L. 53,* the court held that the party having a right to rescind on account of fraud "must rescind as soon as circumstances permit, and must not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily caused to the fraudulent party by the rescission."

In *Clough* v. *London & N. W. R'w'y Co., Law Rep. 7 Exch., 26, 35,* the court said with reference to a right to rescind: "And the lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."

2 Story on Contracts (5th ed.), section 1337, says: "But the party who is guilty of no default or violation of the contract is alone entitled to rescind it; and he must exercise that right within a reasonable time. So also if after default of the other party he do any act recognizing the contract, he cannot afterward rescind it."

IV.

If, then, the plaintiff had a reasonable time within which to perform after April 19th, 1895, did it fail in this respect? Surely not. Reasonableness or unreasonableness as to time depends on circumstances.

After the contract had been executed, by some ar-

rangement 14 more desks than the contract called for were shipped to the defendant to be used until the kind contracted for should be delivered (p. 12, lines 10–20). Evidently the expectation of both parties was that 160 desks were to be sent instead of the 146 contracted for, but on the same terms. The plaintiff, in its letter of April 22d, 1895, expressly asks the defendant to inform it what sizes the 14 extra desks should be. It was natural, it was reasonable, for the plaintiff to await a reply to that inquiry before shipping the desks. No reply coming, the plaintiff again writes on May 13th, 1895 (*Ex. P. 4*, p. 33), and expressly asks what sizes the 14 extra desks should be, stating that it is on the point of shipping the desks.

This was not an unreasonable delay under the circumstances. The testimony is that the desks were completed about April 28, not certainly by that date (p. 17 lines 30-40), and there is no evidence that this was an unreasonable time for completing them after April 19. Since a specific request for information had been sent to the defendant concerning an extra number of desks—a number already in use by the defendant—and it was the duty of the defendant to make response, it was not an unreasonable time for the plaintiff to wait for that response until May 13.

But whether an unreasonable delay or not, defendant did not avail itself of the delay to rescind, and it could not rescind after the goods were completed ready for delivery and it had been notified of the fact. It was then too late.

After the receipt of the letter of May 13—on May 15—(*Ex. P. 6*, p. 33), the defendant attempts to rescind the contract. But the desks were already completed, the defendant was informed of the fact and delivery was tendered. Moreover, in this letter of May 15th, the defendant recites reasons for the attempted rescission, but *does not mention failure to perform on receipt of the letter of April 19th*, nor anything occurring after that date. The learned Judge was in error, therefore, when he said (p. 29 lines 20-30) that the defendant

rescinded for the alleged reason that, "You [the plaintiff] did not perform at once, as you were notified to do, and we have made another contract." In fact the plaintiff never was notified to perform "at once." At the most it was *requested* to perform "at once," and there was no notification or implication that rescission would be the result of failure so to perform.

But the defendant, in its letter of May 15th, confines itself to a recital of reasons for its attempted rescission, based on alleged failures as to time *prior* to April 19th. All these alleged defaults were waived by the direction given April 19th to proceed to perform the contract. These alleged defaults are, therefore, out of the consideration of the case, and failure of the defendant, even to mention the neglect to perform "at once," after April 19th, shows conclusively that they who acted for the defendant had at the time of the attempted rescission no thought that the plaintiff was in default *after* April 19th, 1895.

The only substantial grievance they mention is the quality of the sample desks, and that was a question for the jury. The plaintiff claims they were all right.

V.

The plaintiff made all the tender necessary under the circumstances. *Holloway* v. *Griffith, 32 Ia. 412.*

Ætna Life Ins. Co. v. *Nexen, Ind. 347.*
Burtis v. *Thompson, 42 N. Y. 246.*
Howard v. *Daly, 61 N. Y. 370.*
3 Am. & Eng. Encyc. of Law, 903, note to, 904.
Bement v. *Smith, 15 Wend. 493.*
Smith et al. v. *Wheeler et al., 7 Oregon 49.*

As to the first ground for the nonsuit, therefore, the Court below manifestly erred. While, as he says (p. 29, line 10) the defendant had a right to fix a limit for the performance of the contract "at any time after September 25th," the defendant *never did* so fix a limit. It

waited until it was notified that the desks were ready for delivery and then refused to receive them.

The judgment of nonsuit should, therefore, be reversed.

VI.

The plaintiff is entitled to recover the contract price as the measure of damages for the breach on the part of the defendant.

There is much authority for the claim that in the case of the ordinary sale of goods, where the vendee refuses to receive them, on delivery tendered, that the measure of damages is the difference, if any, between the contract price and the market value at the time of the breach of the contract. But there is a distinction where the goods agreed to be sold by the vendor and to be bought by the vendee are specific goods, not in existence when the contract is made, and which, by the terms of the contract, are to be manufactured expressly for the vendee by the vendor. In the latter case the vendor may, if he chooses, hold the goods for the vendee and sue for the contract price.

There is good authority even for holding that in the ordinary sale of goods and chattels the vendor may exercise the option of holding the goods as bailee of the vendee and may sue for the contract price.

In *Pearson* v. *Mason*, *120 Mass. Rep., p. 53*, the Court held that upon a contract of the defendant to purchase stock then owned by the plaintiff, at his request, for an agreed price, and a tender of the stock before action brought and a renewal of the tender at the trial, the plaintiff is entitled to recover as his damages the whole price which the defendant agreed to pay.

In *Bridgeford* v. *Crocker*, *60 N. Y. Rep. 627*, an action was brought for damages for defendant's refusal to receive 126 head of cattle, according to contract, and the Court held at the trial, and the Court of Appeal sustained the ruling, "that plaintiff had the election either to tender the cattle and recover the contract price or to keep the cattle as his own and recover his damages."

In *Bagley* v. *Findlay, 82 Ill. Rep. 525*, the Court held that: "When a vendee of goods sold at a specific price refuses to take and pay for the goods, the vendor may store the goods for the vendee, give him notice that he has done so and then recover the contract price, or he may keep the goods and recover the contract price over and above the market price of the goods at the time and place of delivery.

In *Dunstan* v. *McAndrew, 44 N. Y. 72*, the Court holds that the vendor has his choice of three remedies. He may retain the goods and sue for the difference between the contract price and the market value, he may, on notice to the vendee, sell the goods as his agent, and sue for the difference between the contract price and the proceeds of the sale, or he may retain the goods as bailee of the vendee and sue for the contract price.

The reason underlying the decisions to the effect that the vendor is confined to the difference between the contract price and the market value as the measure of his damages, will on inspection be found to be the alleged fact that the title to the goods has not passed to the vendee. This, however, will not hold in New Jersey, according to *Hoagland* ads. *Hall, 9 Vr. 357*, where Chief Justice Beasley held that "the right of payment of money arising from a sale can exist only when the title to the property sold has been or can be passed to the vendee; and after the vendee has refused to execute any part of the bargain, the vendor's whole claim to payment consists in his still being willing that such title shall pass. * * * On the breach of the contract of sale by the vendee, the vendor has the choice of two courses; he may claim the price agreed upon, retaining the article sold as bailee for the vendee, under his lien for the price; or, he can sell the article, treating the agreement as at an end, and sue for indemnification for the loss of his bargain." This agrees with the New York rule. According to the New Jersey Supreme Court, therefore, *ability* and *willingness*, on the part of the vendor, to pass title to the vendee, is all that is necessary to enable the vendor to sue for the contract

price. This is in accordance with reason. To hold otherwise would be to permit the vendee to take advantage of his own wrong.

Middlesex Company v. *Osgood 4, Gray* (*Mass.*) *447*, was an action brought for the contract price of all the waste made at plaintiff's mill for one year. The defense was that the plaintiff had not delivered the waste and therefore an action for goods sold could not be maintained. The Court held that the property, as between the parties, passed to the defendant as soon as the same was gathered and placed by itself ready for delivery. "All that the plaintiffs were bound to do was to be in readiness to deliver the waste when called for by the defendants. * * * Proof, theref re, that waste was made at the mill, that it was placed in a barn after being collected together and that there was no refusal to permit defendants to take it away, was amply sufficient to show a performance of the contract by the plaintiffs and was equivalent to an offer by them to deliver the waste to the defendants."

The desks in the case at bar were gathered and placed by themselves for delivery, and property must have passed as in the case of the waste above referred to.

In *Reed* v. *Hoyt* (*N. Y. Court of Appeals*), *17 N. E. Rep. 419–421*, defendant had contracted with the plaintiff for the purchase of certain shares of stock, to be deposited with a certain trust company, for which the defendant was to pay the price to the trust company for the plaintiff on performance by the plaintiff of certain covenants.

The Court said:

"The last position to be noted is that the true measure of damages was the difference between the market value of the stock and the price named in the agreement. This implies that the plaintiff, upon breach of the contract, had taken the stock and appropriated it to himself, and did not hold it for the defendant. The facts do not show such an implication. The testimony did not prove that the plaintiff held the stock otherwise

than for the defendant," and the contract price was, therefore, held to be the true measure of damages.

*3 Parsons on Contracts, 8th ed. (p. 223, *p. 209):*

"If a vendor sues the vendee, he demands, by way of damages, the price the vendee should have paid. * * * If the goods remain in the vendor's hands it may be said that now all his damage is the difference between their value and the price to be paid, which may be nothing. This would be true if the vendor chose to consider the articles as his own, or it the law obliged him to consider them as his own. But it does not seem that the law lays upon him any such obligation. He may consider them as his own if there has been no delivery, or he may consider them as the vendee's and sell them, with due precaution, to satisfy his lien on them for the price, and then he may sue and recover only for the unpaid balance of the price, or he may consider them as the property of the vendee, subject to his call or order, and then he recovers the whole of the price which the vendee should pay. As the action in either case proceeds upon the breach of the contract by the vendee, it seems reasonable that this election should be given to the vendor, and no part of it to the vendee. But if the vendor has not the goods himself, but contracts with a third party for them (but not as we think, for good reasons) that he now recovers only the difference between the market value and the contract price. But if this contract to buy was absolute and obligatory and he had the goods under his control, so that the vendee might have them on demand, it might not be easy to discriminate this case from the other on principle."

In a note to page 225, (*p. 210) the editor says: "But we think this distinction is without foundation."

In *Graham* v. *Jackson, 14 Easts' Rep. 498 (1811)*, the defendant contracted to purchase, and the plaintiff to sell, a certain quantity of Campeachy logwood. The defendant refused to accept any part of the logwood because, as he alleged, the whole was not Campeachy logwood. Action was brought by the plaintiff, and Lord

Ellenborough having been of opinion at the trial that the defendant was bound to take what portion was Campeachy it was agreed to refer to an arbitrator to decide how much should be received by the defendant and the amount he should pay the plaintiff therefor. The arbitrator awarded the plaintiff the contract price for the quantity found by him to be Campeachy wood. The attorney-general moved to set aside the award because the arbitrator ought not to have allowed the full contract price for that which was Campeachy, but only the difference between the contract price and what the article would have sold for at the time when the true quantity to be paid for was ascertained.

But the Court was of opinion that the arbitrator, who was put in the place of the jury, had done right in giving the contract price for the quantity found to be Campeachy; the defendant having repudiated the whole contract, and refused to accept any part of the logwood when it was first offered to him; and that the plaintiff had a right to stand upon the contract.

While the authorities are divided as to the true measure of damages in the case of the ordinary sale of goods where the vendee refuses to receive the goods, the weight of authority seems to be, for New Jersey, in favor of the New York rule, that the vendor may elect to sue for the contract price if he has completed his part of the contract, or stands ready to complete it, and tenders performance when the breach occurs.

It is respectfully submitted that courts have fallen into error in this particular, by losing sight of the reason for the rule that the "measure of damages is the difference between the contract price and the market value." This rule, it is manifest, must have been established for the benefit of the vendor, to relieve him from the necessity of retaining the goods as the property of the vendee and running the risk of the vendee's insolvency.

Sand & Crumpy, Taylor & Lovet, 4 Johnson's Rep. 411.

Bement v. *Smith, 15 Wend. 497.*

In strange disregard of the reason of the rule many courts have perverted it into a protection for the vendee by whose fault the damages have been occasioned and have sought to deprive the vendor of his right to elect his remedy.

VII.

But the case of this plaintiff in error does not rest on the right of the vendor in the ordinary sale of chattels to elect to sue for the contract price. It is stronger than that. The desks mentioned in the contract were to be manufactured for the defendant (p. 13, line 40). They were to be made according to their order as to size and style (p. 14, lines 1-10). They were so made and set apart and held subject to the order of the defendant (p. 16, lines 1-10).

This, therefore, is a case of specific goods made to order according to a prescribed pattern and delivery tendered before breach of the contract by the vendee. There is abundant authority for holding that such a case will be distinguished from the case of an ordinary sale of goods even by the courts which hold to the rule, in the latter case, of the difference between the contract price and the market value.

In *Black River Lumber Co.* v. *Warner et al.* (*Mo. 1887*), *6 S. W. Rep. 210*, suit was brought on an alleged contract between the plaintiff, a corporation engaged in manufacturing lumber, and the defendants, whereby it was alleged the plaintiff was to manufacture and deliver to the defendants between 4,000 and 5,000 feet of lumber. The second count was for the price of a portion which was sawed, but not received by the defendants.

As to the measure of damages on this count the Court said: "For the lumber sawed, but which the defendants refused to have inspected at the mill, and refused to accept, there is a want of uniformity in the rulings of different courts. As a general rule, in actions by the vendor against the vendee, for the non-acceptance of property sold or contracted for, the measure of damages is the difference between the price agreed upon and the

market value of the property at the time and place of delivery. The vendor may re-sell at the time and place or within a reasonable time, and the price at the re-sale will be taken as determining the market value. Some cases hold that there can be no recovery of the contract price of articles to be manufactured or produced until the vendee has accepted the property, and this on the ground, it is said, that the title will not vest in the vendee against his will, and that the title must vest in him before he can be made liable for the contract price. On the other hand, many authorities and text-books assert quite broadly the proposition that the vendor having tendered the goods and done all that the contract required him to do, may treat them as the property of the vendee, hold them for him and subject to his order, and recover the contract price. *3 Pars. Cont. (5th ed.) 209. Field Dam., § 299; Sedg. Dam. 6th Ed. 337.* "This rule, in its broad sense, has not met the approval of some courts, nor are we prepared to say that it should be applied in cases of ordinary sales of goods, wares and merchandise. This case does not call for an expression of an opinion on that question. Where, however, the subject-matter of the contract is a specific article to be manufactured by the vendor for the vendee, and the vendor has completed his contract and performed all that the contract requires him to do, it is but just and fair that his damages, in case of a refusal of the vendee to accept the article, should be the contract price. The vendor will, of course, in such a case, hold the property for the vendee, and so it has been held in a number of cases. * * *

"In the class of cases supposed there is often no market value for the manufactured article. The rule will be less disastrous to the purchaser than a sale in the open market."

In *Bement* v. *Smith, 15 Wend. 493*, the defendant employed the plaintiff, a carriagemaker, to build a sulky for him for $80.00. The sulky was built and delivery tendered to the defendant, who refused to receive it. The sulky was then left with a third person for the defendant and

the defendant notified, and suit brought for the contract price. On the question of damages, Chief Justice Savage said: "Upon principle, I may ask what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it; is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. * * * Here was a valid contract to make and deliver the sulky. The defendant refused to receive the sulky. * * * If after tender or notice, whichever may be necessary, the vendor chooses to run the risk (of the buyer's insolvency) and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict."

Field on Damages, sec. 299 p. 279, quotes the rule as to a choice of three methods by the vendor when the vendee refuses to receive the goods, as laid down in *Dunstan* v. *McAndrews, 44 N. Y. 72*, and referring to the distinction made in *Gordon* v. *Norris, 49 N. H. 376*, between the ordering sale of goods and chattels, and when "there is an agreement for the sale of property not in existence at the time of the contract, but is to be manufactured by the vendor for the vendee in a particular way," adopts the rule that—

"In such a case, when the article is made according to the contract and delivered or duly tendered to the vendee, and he declines to receive or pay for it," the vendor may recover as damages the full contract price, although he retained possession of the manufactured article.

In *Smith et al.* v. *Wheeler et al., 7 Oregon 49*, suit was brought for the contract price for a steam boiler, engine and other machinery manufactured by the plaintiffs for

the defendants. The machinery was not delivered, the defendants not having furnished cars to receive it, and the plaintiffs therefore refraining from the useless work of carting the machinery to the depot and thence back to their shop. The Court held, therefore that delivery was excused, and as to the insistment of the appellants (the defendants below) that even if the respondents have a cause of action it can only be for damages for breach of the contract, and that they were not entitled to recover the stipulated price because they still owned the machinery, inasmuch as there had been no actual delivery of it, the Court said: "There is a diversity among the decisions of different courts upon this subject, where the property sold still remains in the possession of the vendor. Mr. Sedgwick, treating of it, says: 'If the possession of the goods has not been changed it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time of the delivery. It seems to be well settled in such cases that the vendor can re-sell them if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale. But if the vendor does not pursue this course, and without re-selling the goods sues the vendee for his breach of the contract, the question arises which we have already stated, whether the vendor can recover the contract price or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract price in full.' *Sedg. Dam. 6th ed. 337.*"

The Court cites *Moody* v. *Brown, 34 Me. 107.* in holding that the contract price cannot be recovered without delivery, but cites *Hayden* v. *Demets, 53 N. Y. 426,* and *Dunstan* v. *McAndrew, 44 N. Y. 72,* and *Ballentine* v. *Robinson, 46 Pa. St. 177,* as showing the rule in New York and Pennsylvania to be the same as stated by Mr. Sedgwick.

"When," says the Court, "a vendee refuses to receive and pay for ordinary goods, wares and merchandise

which he has contracted to purchase, the measure of damages which the vendor is entitled to recover usually is the difference between the contract and the market price of the goods at the time when the contract was broken. Yet when the subject of the sale is a specific article of sale to be manufactured by the vendor for the vendee, and the former has completed the contract and performed all that he is required to do under it, there seems to be no good reason why he should not be entitled to recover the price agreed upon in the contract. Here it is not strictly a sale of merchandise. The respondent agreed to make certain machinery according to the directions of the appellants and to furnish the necessary materials for it. * * * There is no just reason why the respondents should be compelled to accept the machinery in part payment of their demand and sue for the balance. Nor is there any reason why they should be subjected to the risk and trouble of a re-sale for the benefit of the appellants. The just rule in such cases is that when the vendor of an article has manufactured it according to the order and offers to deliver it to the vendee in accordance with the agreement, who refuses to accept it, the vendor should be entitled to sue for and recover the contract price."

In *Shawhan* v. *Van Nest, 25 Ohio St. Rep. 490,* the plaintiff, a carriagemaker, agreed for a certain price to furnish the materials and make for the defendant and deliver by a certain time, a carriage in accordance with the directions of the defendant. The carriage was completed, delivery tendered, and defendant was asked to accept and pay for it, but refused; suit was brought for the contract price with interest. The defendant requested the Court to charge that the plaintiff could recover only the difference between the agreed price and the actual value. This request was refused and exception taken, and the true measure of damages was the question before the Supreme Court. The Court on review recognize the distinction between a contract to sell goods then in existence and an agreement to furnish materials and manufacture an article to order, which

is not yet in existence, and which furnishes an exception to the general rule which is to be applied in the sale of ordinary goods and merchandise having a fixed market value, and said:

"When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he agreed to do, there is no question but that he would have been liable to pay the full contract price for it, and he cannot be permitted to place the plaintiff in a worse position by breaking than by performing the contract, according to its terms, on his part. When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it, at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price with interest, as damages for the breach of the contract by the defendant; or, at his election, he could have sold the carriage for what it would have brought at a fair sale and have recovered from the defendant the difference between the contract price and what it sold for.

In *Bookwalter* v. *Clark*, *11 Bissels Rep.* (*U. S. Circuit Ct. W. District of Wis.*), the plaintiff contracted with the defendant for the manufacture and sale of a water-wheel of specified size and style. Defendant refused to receive the wheel when ready or pay the purchase price. Action was brought "to recover the amount of the contract price of the machinery either as upon the sale and delivery of the goods manufactured, or as damages for non-performance of the contract on defendant's part."

"The defendants," said the court, "insist that the plaintiffs are not entitled to recover the full value of the machinery, but only the difference between the contract price and the market price, leaving the wheel for the plaintiffs to dispose of as best they may, and that they are not entitled to recover at all in this suit.

"But whether or not that rule be more properly applicable in cases of stocks or ordinary merchandise already

in existence when the contract is made, and which has some certain market value, it seems quite clear to me that it is not the one which metes out the most exact justice between the contracting parties in a case of this kind, or which is best sustained by reason or authority.

"In the first class of cases the authorities are divided. * * *

"But where a person orders an article to be manufactured according to a certain measure, pattern or style, as a suit of clothes, or a carriage, or a steam engine, here, I think, the weight of authority and the best reason concur that the manufacturer, after he has conpleted his contract and tendered the article, is entitled to recover the contract price.

"The reason for the distinction is that in such a case there is presumably no certain market for the goods made according to such specific order, and that the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot with any certainty have this full benefit in any other way. If he was required to re-sell an article of this kind before he could maintain his action, he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value, or no appreciable value at all, for any other person except the one ordering. In such a case, it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and taking the chances of finding a purchaser should fall upon the party who is in fault in not fulfilling his contract, rather than upon the party who is not in fault, and is claiming nothing but just what the other party has agreed to do. * * *

"And the case does not turn, in my judgment, upon the question as to whether the title to the goods has passed from plaintiffs to defendants. If the plaintiffs have fulfilled their contract, and delivered or tendered delivery, this is all they can do, and if defendants refuse to accept the goods, and being made to order they are pre-

sumably not marketable, I think the plaintiffs are entitled to recover, as their true measure of damages for non-fulfillment, the contract price of the article, though it be conceded that no title has passed. The title, I think, in such cases would pass upon the rendition of judgment."

In *Thomas* v. *Alger*, *12 Metcalf* (*Mass.*) *429*, *443*, the defendant had contracted with the plaintiff to purchase some railroad shares at a stipulated price. The plaintiff subsequently caused the shares to be transferred to the defendant, who refused to receive them. On suit being brought for the contract price, the defendant insisted that the measure of damages should be only the difference between the market value of the stock on the day of the refusal of the defendant to accept it and the sum he agreed to pay therefor.

The plaintiff contended that the measure of damages was the sum stipulated for.

The Court held with the plaintiff that he was "entitled to recover the whole amount stipulated to be paid for the stock," giving as a reason for its conclusion, that the stock had been transferred by the plaintiff before repudiation of the contract by the defendant and that the relation of the parties had thus been changed.

In the case now before this Court, the desks had been completed and made ready for delivery to the defendant before repudiation of the contract, and "the relation of the parties had thus been changed."

In *Thorndike* v. *Locke*, *98 Mass. Rep. 342*, the defendant had sold shares of stock to the plaintiff, stipulating to re-purchase all that the plaintiff might have on hand at a specified time for a specified price. At the expiration of the time plaintiff offered to transfer the stock to the defendant and asked for the price agreed upon. Plaintiff also offered in court to transfer the stock to the defendant. The trial judge ruled that "an offer by the plaintiff to fulfill the contract on his part, and to transfer the property, coupled with a present ability to do so, was a sufficient tender without the actual execu-

tion and production of a written transfer; and that if the plaintiff had properly tendered performance on his part, and renewed the offer at the trial, and expressly disclaimed any right or intent to hold the property as against the defendant, he would be entitled, if he should prevail, to recover the amount of his payments with interest, deducting such sums as he had received on the bonds."

The court above, in sustaining the ruling of the trial court, said: "The original relation of the parties at the time the contract was made had changed."

In principle, *Thorndike* v. *Locke* is like the case at bar. "The original relation of the parties at the time the contract was made" have "changed." On the faith of the defendant's promise the plaintiff has expended money and labor in the manufacture of the desks. There was "an offer by the plaintiff to fulfill the contract on its part, and to transfer the property, coupled with a present ability to do so. This "was a sufficient tender."

In *Gordon* v. *Norris et al., 49 N. H. Rep. (1 Shirley) 376,* the Court held that where an artist prepares a statue or picture of a particular person, or a mechanic makes a specific article in his line, to order, and after a particular measure, pattern or style, or for a particular use or purpose, when he has fully performed his part of the contract, and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages, in an action against the vendee for breach of the contract, the full contract price of the manufactured article.

In *Ballantine* v. *Robinson, 46 Pa. St. Rep.*, the parties entered into a contract by the terms of which the plaintiff was to furnish the materials and construct for the defendants, a steam engine of a described fashion for which the defendants agreed to pay a stated sum on its completion. The engine was completed, notice was given to the defendants, but they refused to pay the stipulated price.

The matter in dispute before the court was the measure of damages, the defendant insisting that it was "the difference between the price contracted to be paid for the engine and the market price at the time the contract was broken." The Court, by Justice Strong, held that the measure of damages was the contract price.

Of cases seeming to hold that the measure of damages when a manufacturer has sold goods which the vendee declines to receive is the difference between the contract price and market value; in *Geiss* v. *Wyeth Hardware & M'f'g Co.*, *14 P. Rep.* (*Kan.*) *463*, the question of contract price as a measure of damages was not raised and it does not appear that the goods were manufactured for the vender.

In *Springfield Iron Co.* v. *Kelly*, *1 N. Y. Sup. 351*, the question was not raised, the real issue being defendant's right to a counter-claim for non-delivery on another contract. So far as the report shows, plaintiff may have elected to keep the goods.

In *Todd* v. *Gamble*, *21 N. Y., Supplement* (*1893*) *739*, the plaintiff did not complete the manufacture and delivery of part of the goods because of defendant's announced intention not to receive them. The Court, holding that plaintiff was entitled to recover for breach of the contract without such manufacturing and tendering, said: "In such a case the vendor is not entitled to elect between several remedies, as in the case of a sale of goods in existence and identified, or in case goods are manufactured before the contract is rescinded for their delivery."

In *Cherry Valley Iron Works* v. *Florence Iron River Co.*, *64 Fed. Rep. 569*, the vendor, after breach of the contract by the vendee, sold the undelivered ore, giving the vendee notice that he would hold him responsible for the difference between the price realized and the contract price. The ore had not at the time of the breach been separated from the bulk, and the question was whether the vendor might thus elect to sell and fix a measure of damages, or whether he was controlled by

the market value at the time of the breach. The Court (Circuit Court of Appeals of the Sixth Circuit) said: "If the subject-matter is identified when the contract is made, the title passes to the vendee, in the absence of controlling stipulations. When the subject-matter is subsequently identified by its appropriation to the contract, the title passes at the time of such appropriation. But when there has at no time been identification of the subject, the title remains in the vendor." The right to sue for the contract price when goods have been manufactured and delivery tendered was not involved in this case.

In *Thomas* v. *Cauldwell*, *26 N. Y. Sup. 783*, the machine ordered had not been completed by the manufacturer at the time of the breach nor before suit brought.

In *Tufts* v. *Weinfeld*, *60 N. W.* (*Wis.*) *992*, the plaintiff had done nothing towards the manufacture of the soda fountain ordered when the order was countermanded.

In *Unexcelled Fire Works Co.* v. *Polites*, *18 A. Rep. 1058* (*Pa.*), the Court said: "The manifest tendency of the cases in the American courts now is to the doctrine that when the vendor stands in the position of a complete performance on his part he is entitled to recover the contract price as his measure of damages."

The weight of authority is, therefore, in favor of the rule that where specific articles are agreed to be manufactured, the vendor on completion of the articles may tender delivery and recover the contract price.

Of the cases cited in *5 Am. & Eng. Encyc. of Law.* to sustain the statement of the text that the difference between the market value and contract price is the measure of value for the seller on the breach of an executory contract of sale, *Clement &c. Co. v. Meserole*, *107 Mass. 362*, in no wise sustains the text, but fixes the measure of damages for the vendee for non-delivery.

In *Danforth* v. *Walker*, *37 Vt. 239*, the contract which was not for the manufacture of goods was broken by the defendant before the plaintiff had completed his part;

Young v. *Merton*, *27 Md. 114*, was an action in trover and in no sense applicable;

In *Nixon* v. *Nixon*, *21 Ohio St. 114*, the contract price was not claimed;

In *Gibbons* v. *United States*, *8 Wallace 269*, the vendor claimed *more* than the contract price; the Court held him to the contract price. This case does not apply.

In *Hayden* v. *Demets*, *53 N. Y. Rep. 426*, defendants contracted for a certain quantity of copper at a certain price. Plaintiff tendered warehouse receipts for the copper, which defendant declined to accept. On appeal it was claimed by defendant that plaintiff was not entitled to recover the value of the property, but only the difference between the contract and actual price. The Court said: "Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee at whose risk it is retained by the vendor. The same consequence results from a valid tender upon an executory contract. Upon the refusal of the vendee to accept and pay the price, the vendor, upon proper notice, may sell the property, * * * or he may recover the contract price, in which case he holds the property as trustee for the vendee, and is bound to deliver it, whenever demanded, upon receiving payment of the price. In selling the property after tender and refusal, the vendor acts as the agent and trustee of the vendee to whom the title is deemed to have passed by the vendor. The right of the vendor to recover the price of the goods, if he chooses to risk the solvency of the vendee, necessarily results."

This case is a direct authority against the position taken in the text to support which it is cited, and sustains the claim that the contract price is the measure of damages where delivery has been *tendered.*

In *Rand* v. *White Mountain R. Co.*, *40 N. H. 79*, suit was brought for the breach of an executory contract to purchase railroad stock.

In *Laubach* v. *Laubach*, *73 Pa. St. 387*, the point was not decided.

In *Harris M'f'g Co.* v. *Marsh*, *49 Ia. 11*, the Court held that plaintiff could not recover the contract price for wheat which defendant had agreed to buy at $1.00 per bushel, since it did not appear that he had retained the wheat until the time of trial, so that the defendant if required to pay the contract price might possess himself of the wheat.

This case does not sustain the text.

Whelan v. *Lynch* was a suit by the consignor against his consignee for damages for neglect to sell some wool when so directed by the consignor.

In *Nortrup* v. *Cook et al.*, *39 Mo. 208*, action was brought by the *vendee* against the *vendor*.

The measure of damages for breach of contract of sale in New Jersey must, therefore, be the contract price, where the vendor has performed his part excepting delivery, and delivery has been offered or tendered before repudiation of the contract by the defendant.

For this court to hold othewise and sustain the trial judge in this case, it must overrule the Chief Justice and the Supreme Court in *Hoagland ads. Hall, supra.*

A fortiori must the contract price be the measure of damages where the goods contracted to be bought and sold were to be manufactured, as in this case, by the vendor for the vendee, of a particular size and style, on the express order and for the express use of the vendee, and where the goods were so manufactured and delivery offered before the defendant gave any notice of repudiation or rescission of the contract.

VIII.

If the measure of damages is the difference between the market value and the contract price, then the plaintiff was entitled to nominal damages for the breach of the contract by the defendant, and the plaintiff should not have been nonsuited.

On both grounds, therefore, the trial judge erred in granting the motion to nonsuit, and judgment should be reversed and a new trial ordered.

Respectfully submitted,

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NEW JERSEY

Court of Errors and Appeals.

New Jersey School and Church Furniture Company
vs.
The Board of Education of Somerville.

Upon Contract.
On Error.

WRIT.

(Returnable January 15th, 1896.)

New Jersey, *ss.*—The State of New Jersey to our Justices of Supreme Court, Greeting:

[L. S.]

For as much as in the record and proceedings and also in the giving of judgment in a certain plaint, which was in our said Supreme Court before the Justice holding the Circuit Court in and for the county of Mercer, between the New Jersey School and Church Furniture Company, plaintiff, and the Board of Education of Somerville, defendant, in an action upon contract, manifest error hath intervened to the great damage of the said New Jersey School and Church Furniture Company as by its complaint we are informed. We being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if the judgment be thereupon given, then you send to our Chancellor and Justices and Judges of our Court of Errors and Appeals,

at Trenton, on the fifteenth day of January, instant, distinctly and openly, under your seal, the record and proceedings and the plaint aforesaid, with all things touching and concerning the same, together with this writ, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of the state of New Jersey ought to be done.

Witness, Alexander T. McGill, Esquire, Chancellor and President of our said Court of Errors and Appeals, at Trenton aforesaid, the tenth day of January, eighteen hundred and ninety-six.

HARRY C. KELSEY,
Clerk.

LINTON SATTERTHWAIT,
Attorney.

The answer of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof mention is within made, with all things touching and concerning the same, we certify to the Court of Errors and Appeals in a certain schedule to this writ annexed as within we are commanded.

M. BEASLEY, *C. J.*

NEW JERSEY SUPREME COURT.

THE BOARD OF EDUCATION OF SOMERVILLE, N. J., *ads.* THE NEW JERSEY SCHOOL AND CHURCH FURNITURE COMPANY. } *On Contract. On Postea, &c.*

J. J. Bergen, Attorney.

As yet of the Tenth day of July, A. D. eighteen hundred and ninety-five.

Witness, MERCER BEASLEY, Esquire, *Chief Justice.*
BENJ. F. LEE, *Clerk.*

MERCER COUNTY, *ss.*—The Board of Education of Somerville, New Jersey, the defendant in this suit, was summoned to answer unto the New Jersey School and Church Furniture Company, the plaintiff therein, in an action upon contract; and thereupon the said plaintiff, by Linton Satterthwait, its attorney, complains, for that whereas the said defendant, on the first day of June, in the year of our Lord one thousand eight hundred and ninety-five, at Trenton, in the county of Mercer aforesaid, became and was indebted to the plaintiff in the sum of one thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at its request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at its request; and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiff for the defendant at its request; and in the like sum of money for money lent by the plaintiff to the defendant at its request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at its request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiffs having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several last-mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded its promises and has not paid any of the said moneys or any part thereof, to the plaintiff's damage, one thousand dollars, and thereupon it brings its suit, &c.

And for that whereas, heretofore, to wit, on or about the twenty third day of July, eighteen hundred and ninety-four, in consideration that the plaintiff, at the request of the defendant, would manufacture and make for it certain

chattels, to wit, one hundred and forty-six adjustable single novelty desks, grammar size; two teachers' desks, No. 71, and one teachers' desk, No. 74, and for a certain price, to wit, the sum of five hundred and ten dollars, and would deliver them, when completed, in the public school-house at Somerville, put up ready for use, not later than September 25th, 1894, and as much earlier as possible; the defendant then promised the plaintiff to accept the said chattels of the plaintiff when so manufactured and made and to pay it for the same, the price thereof, as aforesaid, on the delivery thereof; and the plaintiff avers that, confiding in the said promise of the defendant, it did, afterwards, to wit, on the day and year aforesaid, manufacture and make the said chattels for the said price, to wit, at and for the sum of five hundred and ten dollars, in accordance with the terms of said undertaking by the plaintiff, excepting that the plaintiff was not ready to deliver the said chattels by the said twenty-fifth day of September, and the plaintiff avers that the defendant agreed and promised to accept and pay for the said chattels when they should be manufactured, made and delivered by the plaintiff at a day later than the said twenty-fifth day of September, and that on or about the nineteenth day of April, eighteen hundred and ninety-five, the defendant agreed and promised to accept and pay for the said chattels according to the terms of the said undertaking of the twenty-third day of July, eighteen hundred and ninety-four, as to the manufacture of said chattels and the price thereof, within a reasonable time thereafter; and the plaintiff further avers, that afterwards, to wit, on the day and year aforesaid, it was ready and willing to deliver the said chattels to the defendant, and requested it to accept the same, and of all which said premises the defendant had notice; yet the defendant, not regarding its promise, did not, nor would then, or at any time, accept the said chattels of the plaintiff, or pay it the said price thereof, or any part thereof, but it so to do hath hitherto wholly neglected and refused and still neglects and refuses.

And for that whereas the plaintiff, on or about the twenty-third day of July, eighteen hundred and ninety four, by a certain agreement or contract in writing, a true copy whereof

is hereto annexed and forms part of this declaration, agreed and promised to and with the defendant that the plaintiff would manufacture and make one hundred and forty-six adjustable single novelty desks, grammar size, two teachers' desks, No. 71, and one teachers' desk, No. 74, and would deliver the same in the public school-house at Somerville, put up ready for use, not later than September twenty-fifth, eighteen hundred and ninety-four, and as much earlier as possible, in and by which agreement or contract in writing the said defendant did promise to accept the said desks when so manufactured and delivered, and to pay the plaintiff therefor the sum of five hundred and ten dollars; and the plaintiff avers that it performed its part of the said agreement or contract in writing, and did manufacture and make the said desks in accordance with the terms thereof, excepting that it was not ready to deliver the said desks by the said twenty-fifth day of September, eighteen hundred and ninety-four, and the plaintiff further avers that the defendants afterwards, to wit, on the day and year aforesaid, promised and agreed to accept and to pay for the said desks at a later day, when they should be manufactured and made by the plaintiff and delivered as aforesaid, and that on or about the nineteenth day of April, eighteen hundred and ninety-five, the defendant again promised and agreed to accept any pay for the said desks the price named in said agreement or contract in writing when they should be made and delivered by the plaintiff within a reasonable time thereafter; and the plaintiff further avers that afterwards, to wit, on the day and year last aforesaid, it was ready and willing to deliver the said chattels to the defendant and requested it to accept the same, and of all which premises the defendant had notice; yet the defendant, not regarding its said promise, did not, nor would then, or at any other time, accept the said chattels of the plaintiff or pay it the price thereof, or any part thereof, but it has hitherto neglected and refused, and still neglects and refuses, by reason of which disregard of its said several promises by the said defendant the plaintiff hath sustained damage to the amount of one thousand dollars, and therefore it brings suit, &c.

The following is a copy of the contract or agreement referred to in the foregoing declaration:

Memorandum, of agreement made this 23rd day of July, A. D. eighteen hundred and ninety-four, between, The Board of Education of Somerville, New Jersey, and New Jersey School and Church Furniture Co., of Trenton, New Jersey, witnesseth that the said The Board of Education agrees to purchase of said The New Jersey School and Church Furniture Co., one hundred and forty six (146) adjustable single Novelty desks, grammar size; two (2) teachers' desks, No. 71; one (1) teachers' desk, No. 74.

The said articles are to be made in good workmanlike manner, of good material, and to be delivered by said New Jersey School and Church Furniture Co., in the public school-house in Somerville, put up ready for use, not later than September 25th, 1894, and as much earlier as possible, and the said Board of Education agrees to pay to the order of said New Jersey School and Church Furniture Co., therefor, the sum of $510.00.

Signed for New Jersey School Furniture Co., by L H. McKee, Sec'y and Genl. Manager.

A. G. Anderson, President of the Board of Education, Somerville, N. J.

Judgment will be entered for five hundred and ten dollars, with interest from the first day of June, eighteen hundred and ninety five, besides costs of suit.

And the said defendant, by James J. Bergen, its attorney, comes and defends the wrong and injury when, &c, and says that it did not undertake and promise in manner and form as the said defendant hath above thereof complained against, it and of this it puts itself upon the country. And the plaintiff doth the like.

Therefore let a jury thereupon come before the Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court holden at Trenton, in and for the county of Mercer, on the second Tuesday of October, A. D. eighteen hundred and ninety-five, by whom, &c.

And now at this day, to wit, the sixth day of November, A. D. eighteen hundred and ninety-five, before the Supreme Court of the State of New Jersey, comes the said plaintiff by its attorney and the Justice before whom, &c., having sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, at a Circuit Court holden at Trenton, in and for the county of Mercer, by his Honor William S. Gummere, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, comes as well the within-named plaintiff as the within-named defendant, and the jurors of that jury, being summoned, also come, whom to speak the truth of the matters within contained, were tried and sworn, and after evidence being given to them, they thereupon went from the bar of this court to consider their verdict to be given of and upon the premises, and after the said jury had considered thereof, and agreed among themselves, they returned to the said bar to give their verdict in this behalf, upon which the said, The New Jersey School and Church Furniture Company, by their attorney, moved that the said jury should give their verdict.

Whereupon for certain causes moving the said Justice, he directed that the said plaintiff be called; upon which the said The New Jersey School and Church Furniture Company being solemnly called, comes not, nor does it further prosecute its suit against the said The Board of Education of Somerville.

Therefore it is considered that the said New Jersey School and Church Furniture Company take nothing by its said writ, and that the said The Board of Education of Somerville do go thereof without day, &c.

And it is further considered that the said The Board of Education of Somerville, New Jersey, do recover against the said The New Jersey School and Church Furniture Company the sum of fifty-one dollars and thirty-two cents for its costs and charges by it about its defense in this behalf expended by the court now here adjudged to the said The Board of Education of Somerville, New Jersey, and

with its assent, according to the form of the statute in such case made and provided, and that the said The Board of Education of Somerville, New Jersey, have execution thereof.

Judgment signed this sixth day of November, A. D. eighteen hundred and ninety-five.

M. BEASLEY, *C. J.*

I, Benjamin F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

In testimony whereof, I have hereto set my hand and the seal of said Court, at Trenton, [SEAL.] this seventeenth day of January, A. D. eighteen hundred and ninety-six.

BILL OF EXCEPTIONS.

(Filed January 9th, 1896.)

NEW JERSEY SUPREME COURT.

NEW JERSEY SCHOOL AND CHURCH FURNITURE COMPANY
v.
THE BOARD OF EDUCATION OF SOMERVILLE.
} Mercer Circuit. Upon Contract.

Linton Satterthwait, attorney of plaintiff; J. J. Bergen and G. D. W. Vroom, attorneys of defendant.

Be it remembered, that on the sixteenth day of October, eighteen hundred and ninety-five, at the city of Trenton, before his Honor William S. Gummere, a justice of the New Jersey Supreme Court, holding the Circuit Court in and for the county of Mercer, on the issue joined between the parties (*pro ut* the pleadings), came on to be tried by a jury for that purpose duly empanneled, and thereupon the attorney of the said New Jersey School and Church Furniture Company, the plaintiff, to maintain the said issue on his part, offered the following witness, who, having been duly sworn, testified as follows, viz.:

Henry P. Mason, sworn for the plaintiff.

Direct examination (by Mr. Satterthwait)—

Q. Where do you reside?

A. Somerville, N. J.

Q. Are you the Secretary of the Somerville Board of Education?

A. I am.

Q. How long have you been?

A. This is the third year.

Q. Have you minutes of the Board with you? 10

A. Yes, sir.

Q. Will you produce them?

A. (Witness produces book of minutes.)

Q. Have you any record of the proceedings of that Board with reference to making a contract with the New Jersey School and Church Furniture Company about July, 1894, or thereabouts?

A. July 23d, 1894.

By Mr. Bergen—

Q. What is the page, please? 20

A. Page 198.

Mr. Satterthwait—I would like to have this page marked. The number identifies it sufficiently, I suppose.

Q. Are there any other minutes in there with reference to the contract with the plaintiff?

A. There is an item (indicating).

Q. That is on page 205?

A. Page 205, October 8th, 1894.

Q. Is there anything further in there with reference 30 to it?

A. The next is page 209 and 210.

Q. Anything further?

A. 212.

Q. That is under date of——

A. March 7th, 1895.

Q. Anything further?

A. Page 213, under date of March 14th, 1895.

Q. Is there anything there showing any proceedings on April 18th?

A. This year?

Q. Yes, this year, 1895.

A. April 18th, page 219.

Q. I hand you a paper which purports to be the contract between the plaintiff and the defendant. Do you know the signature on the bottom of that?

A. A. G. Anderson—yes, sir.

Q. That was made in your presence?

A. No, sir.

Q. It is his signature, is it?

A. Yes, sir.

Q. And the making of that contract was authorized by the Board?

Mr. Vroom—One minute. They have the minutes there; they called for the minutes. You haven't asked him whether the minutes show any authorization.

Q. Do the minutes show any authorization for the making of the contract?

A. Yes, sir.

The Court—The minutes speak for themselves.

Q. This is his signature?

A. Yes, sir.

Mr. Satterthwait—I would like to have that marked for identification.

Said paper marked "1," for identification.

The Court—Is this Board a corporation?

Mr. Bergen—Yes, sir; under a special charter passed about twenty years ago.

The Court—Can you give me a reference to the charter that creates the corporation?

Mr. Bergen—I am told that it was passed in 1866, but I can't give the page.

Q. Mr. Mason, I hand you what purports to be a letter from this defendant, signed by H. P. Mason, Secretary; is that your signature?

A. It is.

Q. Well, you wrote that, did you?

A. I wrote that letter; yes, sir.

Said letter marked "2," for identification.

Q. I hand you a letter which purports to be written to you as Secretary of the Board of Education by the plaintiff in this case; did you receive that letter?

A. Yes, sir.

Q. And did you turn it over to the defendant—what did you do with the letter, did you turn it over to the members of the board?

A. I referred that to one of the members of the board, the chairman of the building committee.

Q. Was it laid before the board by you?

A. No, sir.

Q. Have you any knowledge whether that came to the knowledge of the board?

A. Whether this letter was presented to the board?

Q. Yes?

A. I don't remember that it was, although the substance of it was a matter of conversation.

Q. Never mind that?

A. That is all.

Q. You say the substance of it was a matter of conversation—between whom?

A. Members of the board.

Q. In your presence?

A. Yes.

Said letter marked "4," for identification.

Q. I hand you another addressed to H. P. Mason, as Secretary; did you receive that letter, dated May 13th, 1895?

A. Yes, sir.

Q. And was that turned over to the Board?

A. I believe it was.

Q. By you?

A. Yes, sir.

Said letter marked "5," for identification.

Q. Was any reply to your knowledge sent to this letter of April 22d, which has been marked?

A. No, sir.

Q. There was none?

A. As far as I know there was none.

Q. You were the regular channel of correspondence between this plaintiff and the Board?

A. Yes, sir.

Q. Mr. Mason, the desks that were contracted for—these desks that were mentioned in the—

Mr. Satterthwaite—I want to offer that contract so I can have the right to question about it.

Said contract offered in evidence and marked *Exhibit P 1.*

Q. These desks mentioned in the contract were, as a matter of fact, not delivered on the 25th of September, as called for there?

A. No, sir.

Q. Do you remember any meeting of the Board in which a representative of the New Jersey School and Church Furniture Company was present, and had any conversation with regard to sending other desks?

A. Yes, sir.

Q. And the other desks came there, did they not?

A. They did.

Q. One hundred and sixty of them, I think?

A. I don't remember the number.

Q. Well, more than were called for in this contract?

A. Yes, sir.

Q. And they were put up by this plaintiff?

A. Yes, sir.

Q. About what time did they come there?

A. Well, my recollection is that it was in October, 1894.

Q. Was that as soon as the building was ready for them?

A. No, sir.

Q. How long had the building been ready for them?

A. Well, I should think about three weeks.

Q. And there had been no communication as—they were put in there; how long were they used?

A. The first desks they put in?

Q. Yes.

A. Until early in this year, I don't remember the exact date.

Q. Was it in February?

A. It might have been.

Q. And then they were removed and other desks were placed there?

A. Yes, sir.

Q. Now, those desks remained there in use how long?

A. The first lot or the second lot?

Q. The second lot?

A. Well, until the present seats were put in that we bought from another party.

Q. And when were they put in?

A. Might have been September this year, I don't know exactly the date.

Q. Well, you used the desks until the close of the school year, didn't you?

A. Yes, sir.

Q. And no charge was made for them?

A. No, sir.

Not cross-examined.

Louis H. McKee, sworn for the plaintiff.

Direct examination (by Mr. Satterthwait)—

Q. Mr. McKee, what is your business?

A. Manager of the New Jersey School and Church Furniture Company.

Q. The plaintiff in this case?

A. Yes, sir.

Q. How long have you been in the furniture business or been manager of that?

A. Manager something over—about nine years.

Q. Is this your signature on the contract here on behalf of the plaintiff?

A. It is.

Q. Where was that contract prepared?

A. At Somerville, I presume.

Q. Received by you through the mail?

A. Yes, sir.

Q. After a visit by your agent to Somerville?

A. Yes, sir.

Q. It calls for the manufacture of 146 adjustable, single, novelty desks, grammar size; were they manufactured?

A. Yes, sir.

Q. Also calls for one teacher's desk No. 71, and one teacher's desk No. 74; were those manufactured?

A. Yes, sir.

Q. Those numbers indicate difference in size, I presume?

A. In style and size, yes, sir.

Q. "The said articles are to be made in a good workmanlike manner, of good material;" were they so made?

A. They were.

Q. Were they delivered at the public school house, Somerville?

A. No.

Q. Were any of them?

A. Two were.

Q. Which two?

A. Two of the pattern that they ordered.

Q. Well, apart from that, were there any delivered there?

A. Substitute desks were delivered there.

Q. Were the teachers' desks delivered?

A. Oh, yes, they were delivered there.

Q. And are in use there now, so far as you know?

A. So far as we know.

Q. Have you ever received any any complaint about them?

A. No.

Q. No communication in regard to them?

A. No.

Q. Were other desks shipped, to your knowledge, to Somerville early in the fall of 1894?

A. Yes.

Q. You yourself, personally, had nothing to do with any arrangements as to why they were shipped?

A. Yes.

Q. Well, do you know anything personally, or except what was told you?

A. Except what was told me.

Q. And those desks were what?

A. They were adjustable desks. The first lot were our regular.

Q. Were they sent up there and sold under the contract?

A. No.

Q. And when were they returned?

A. I think in the spring.

Q. And then new desks were sent after that?

A. Yes.

Q. How came they to be sent?

A. They were sent at our suggestion.

Q. To whom?

A. And by an arrangement with one of the member of the Board.

Q. With whom; with which one?

A. Mr. Betts.

Q. Did you send up other desks there?

A. Yes, we did, different from that.

Q. And those desks remained there until what time—that we have in evidence, though. What did you do with regard to that second lot of desks, if anything, after you had sent them there; were they put in place by your men?

A. Yes, the second lot were; you mean the third lot, probably.

Q. No, second lot; did you receive any communication in regard to that second lot?

A. Yes.

Q. Do you remember what that was?

A. I think it is in that letter of 19th of April.

Q. You received that letter?

A. Yes, sir.

Mr. Satterthwait—That is the letter marked marked "2" for identification April 19th.

Q. Prior to April 19th, were the desks mentioned in the original contract sent up there?

A. Yes, sir.

Q. How many?

A. Two.

Q. Were they the kind of desks mentioned in the original contract?

A. Yes, sir.

Q. Same material and style?

A. Yes, sir.

Q. Have the 146 desks mentioned in this contract been manufactured by these people?

A. Yes.

Q. And where are they now?

A. At the factory, except those two.

Q. And how are they held there?

A. Subject to the order of the board?

Q. Has anything been paid on this contract?

A. No.

Cross examination (by Mr. Vroom)—

Q. Mr. McKee, you said that you presume this contract was sent to you from Somerville?

A. Yes.

Q. Don't you know that that is the form of contract which your company has?

A. The printed form, I do, but not the typewritten form; it wasn't filled in by us.

Q. Well, this contract is a contract of the form used by your company, and it was filled up, executed there, and sent to Trenton, and you executed it here?

A. Yes.

Q. Under the terms of this contract you were to furnish 146 adjustable single novelty desks, grammar size, and two teachers' desks, No. 71, and one teachers' desk, No. 74, to be put up at Somerville ready for use not later than September 25th, 1894, and as much earlier as possible? You did not furnish the 146 and the two desks within the time named in this contract, did you?

A. No.

Q. And they never have been delivered under the contract?

A. No.

The Court—I understand him to say the two teachers' desks have been, but none of the others.

Mr. Vroom—Of course, I understood that.

Q. When were they furnished?

A. Near about the time required in the contract, I don't remember the exact date.

Q. Well, I want to get it as near as possible.

A. I can't tell, except I look at it.

Q. You can't tell?

A. Not by memory.

Q. You said you had manufactured the 146 adjustable, single novelty desks, of the size mentioned in this contract; when did you make them?

A. Before the expiration of the contract, and after that.

Q. Had you completed them prior to the 25th of September, 1894?

A. No.

Q. How many had you made?

A. None completed.

Q. You had none completed?

A. None completed.

Q. At all?

A. No.

Q. And when were they completed?

A. About the Easter holidays.

Q. Well, I want a little more definite time than that.

A. I don't know how I can help you very well.

Q. Well, try to, please; 1895, about the Easter holidays; what day was Easter?

A. The 14th of April, I think.

Q. And about that time you say you had completed them?

A. Yes.

Q. Why didn't you then put them up?

A. Well, we hadn't them all done at that time.

Q. Well, now, when did you get them all done?

A. I think within a couple of weeks after the Easter holidays.

Q. Easter was the 14th, that would be the 28th of April?

A. Yes, sir.

Q. That was the time by which you had completed the desks under this contract?

A. I think I am right; I am not sure.

Q. You say they are all ready, completed now, and stored here?

A. Yes, sir.

Q. The 146 desks?

A. 144, and the two in Somerville.

Q. New, are they all finished and stored at the present time?

A. Yes, sir.

Q. At your factory here in Trenton?

A. Yes, sir.

Percy B. Moyer, sworn for the plaintiff.

Direct-examination (by Mr. Satterthwait)—

Q. What is your position?

A. Agent for the New Jersey School and Church Furniture Comyany.

Q. Salesman, isn't it?

A. Yes.

Q. How long have you been engaged with them?

A. In the neighborhood of two years.

Q. Were you a salesman for them in July, 1894?

A. Yes, sir.

Q. As such did you visit the Board of Education at Somerville?

A. I did.

Q. And did you take an order from them for any desks?

A. I did, sir.

Q. Well, what desks—the desks mentioned in this written contract?

A. Yes, the desks of which that is the model. (Referring to model on table.)

Q. Well, the desks mentioned, the one 146 adjustable single novelty desks?

A. Yes, sir.

Q. Did you have the model with you?

A. I had both the model and a sample desk.

Q. What do you mean by sample, full-sized desk?

A. Full-sized desk.

Q. And who were present?

A. Well, to the best of my knowledge, the entire board.

Q. Well, was the entire board present?

A. I have no means of recalling that, unless the minutes show it.

Q. Can you recall how many were present?

A. Well, I personally remember of six; I couldn't go beyond that, as far as my memory is concerned.

Q. Did you appear before a meeting of the board?

A. A regular meeting of the board.

Q. And did the members examine this desk?

A. Yes, sir.

Q. Before the vote was taken?

A. Yes, sir.

Q. You were present when the vote was taken?

A. Yes, sir.

Q. Did you visit the Board at Somerville subsequent to that time with reference to these desks?

A. Yes, sir.

Q. When was that?

A. I can't give you the date; it is some time after my first visit.

Q. Well, how long do you think?

A. Well, I should think six weeks, perhaps.

Q. And what was the occasion of that visit?

A. I went there to make the suggestion to them that we put them in other desks in order to tide them over until the desks they originally ordered could be furnished.

Q. Did you meet the entire Board then?

A. I don't know how many were present.

Q. Did you meet at a meeting? Did you meet the Board at its meeting?

A. I met the Board at its meeting, yes, sir.

Q. And was the arrangement agreed to?

Objected to.

The Court—State what was done.

Q. What was done after you made your suggestion?

A. I made this suggestion, to which they agreed.

Q. And then what was done after that, that you know of?

A. Nothing, except that they—I left them with the understanding that they accepted my proposition to put in other desks.

Q. And were those desks sent?

A. Yes, sir.

Q. Now, you say you had a sample there when you visited the Board with reference to making the contract.

Have you examined the desks which are now at the storehouse of the furniture company?

A. Yes, sir.

Q. Are or are they not like the sample?

A. They are exactly like the sample.

Q. How are they for workmanship and material?

A. As we represented.

Q. Well, you say as you represented; how are they as to quality?

A. They are exactly what we represented them to be—first class in workmanship and quality.

Q. And the two desks that are up there, have you seen them?

A. Yes, sir.

Q. When?

A. On Monday last.

Q. And how are they as to workmanship and quality?

A. They are exactly like the others.

Q. Are they like the sample?

A. They are like the sample, yes, sir.

Cross examination (by Mr. Bergen)—

Q. Your second visit to the Board of Education was to ask a favor of them in behalf of your company, was it not?

A. No, I think not.

Q. It was after the 25th of September, wasn't it?

A. I don't remember the date of my second visit, Mr. Bergen.

Q. What was the purpose of your coming to Somerville?

A. To make the proposition to the Board of Education that we put in other desks than those that they ordered temporarily, with the understanding that after using them, if they didn't like them and wished the other ones they would be taken out again.

Q. You mean that at that time you had abandoned your idea of complying with the contract, and wanted this Board to accept something else?

A. No, sir.

Q. Didn't you say to the Board at that meeting that you came instead of Mr. Case, because he was ashamed to come there?

A. I certainly did not, to my recollection.

Q. What was the reason that you wanted the Board of Education, at Somerville, to take these other desks in place of what they bought?

A. Because the desks they had bought were not yet completed.

Q. Had any of them yet been made?

A. Well, not remembering the date of my visit, I can't answer that.

Q. Did you tell the Board at that time that none of the desks that they had ordered were made?

A. Not to my knowledge.

Q. Did you tell them that they were under construction, and would be ready in a very short time?

A. I don't remember saying—I remember saying, I think, that they were under construction, not that they would be ready in a very short time.

Q. Did you know then that they were not under construction?

A. I did not.

Q. Did you know anything about it?

A. I did; yes, sir.

Q. What did you know about it—were they under construction?

A. Parts of them.

Q. What parts?

A. The castings.

Q. How far had the construction proceeded?

A. That I can't tell.

Q. Did you see any work being done on those desks at that time?

A. Yes, sir.

Q. What?

A. I saw some castings in stock.

Q. In stock? Well, those were on hand, were they not?

A. No, sir; they had just been made.

Q. Well, was that the cause of the delay, making the castings?

A. No; I don't think there was any question of delay at that time.

Q. At the time you were there, don't you recollect that it was?

A. I don't recollect the date; if I did I could speak more intelligently.

Q. Had you anything to do with the shipping of the second lot of desks?

A. No, sir.

Louis H. McKee, recalled for the plaintiff.

Direct examination (by Mr. Satterthwait)—

Q. I hand you a letter that has been marked "5" for identification dated May 13th, 1895—was that letter sent by you?

A. Yes?

Q. I hand you also a letter dated May 17th, signed "L. H. McKee, secretary"—did you send that?

A. Yes, sir.

Q. I have a letter here that has not yet been marked dated May 22d—did you write that?

A. I wrote that.

Mr. Satterthwait—I wish to offer this letter of May 13th.

Q. Did you write that letter of October 13th, 1894?

A. I wrote that.

Said letter marked "6," for identification.

Mr. Satterthwait—We offer the letter dated October 13th, 1894, from the New Jersey School Church Furniture Company to A. G. Anderson.

Said letter marked *Exhibit P 2,* and annexed to this bill of exception.

Mr. Satterthwait—We also offer letter dated April 22d, 1895, written to Henry P. Mason, Secretary.

Same marked *Exhibit P 3,* and annexed to this bill of exception.

Mr. Sarterthwait—Also letter dated May 13th, 1895, to H. P. Mason, Secretary.

Same marked *Exhibit P 4,* and annexed to this bill of exception.

Mr. Satterthwait—I wish to offer the minutes of the Board, pages 198, 205, 212, 213, 219, which are annexed to this bill of exception.

Also the contract; marked *Exhibit P 1*, and annexed to this bill of exception.

Also letter of April 19th, 1895, to the New Jersey School and Church Furniture Company, signed H. P. Mason, Secretary Board of Education.

Same marked *Exhibit P 5*, and annexed to this bill of exception.

Witness withdrawn.

Henry P. Mason, recalled by the plaintiff.

Direct examination (by Mr. Satterthwait)—

Q. Was page 219 the last of any reference to this contract made in the minutes?

A. No, sir, 221.

Q. Is there anything else?

A. 223; that is the last.

Mr. Satterthwait—I wish to offer this page 223.

The Court—Not 221?

Mr. Satterthwait—No, sir; 223, and I suppose it will be admitted that the Board declined to take these desks.

Mr. Bergen—We have not received them, and we decline to pay for what we have not received.

Mr. Satterthwait—What I mean is, will it be admitted that the Board—what is the date of that page 223?

Mr. Bergen—June 6th.

Q. You stated when you were on the stand before that you wrote this letter, dated May 15th, 1895?

A. Yes, sir.

Q. Is there any reference in the minutes to—

A. I am not sure whether there is or not. I think not, though.

Q. You think not; how came you to write that?

Objected to.

The Court—He can state whether he was instructed by the Board; if he was not, of course, it is immaterial.

Q. Were you instructed by the Board to write that letter?

A. I think not; not if the minutes don't show it. I think it was on the authority of the building committee.

Q. Were you instructed by the building committee?

A. The building committee wrote that letter.

Q. And you signed it?

A. I signed it.

Not cross-examined.

Louis H. McKee, recalled for the plaintiff.

Direct examination (by Mr. Satterthwait)—

Q. Why were these goods not shipped to Somerville after they were manufactured, as you say they were?

A. Because the Board declined to receive them.

Q. Did you present a bill for them?

A. No.

Q. You say the Board declined to receive them; in what way?

A. That they had bought other desks, and that the two desks sent there as—

Mr. Bergen—One minute, are you speaking from hearsay or communication from the Board?

The witness — Why, communications of the Board?

Mr. Bergen—Yes, but the letter has not been offered in evidence yet, and I object to proving the letter in this way.

The Court—Was it by correspondence?

Mr. Satterthwait—Yes.

The Court—The letter must speak for itself, then.

Mr. Satterthwait—The trouble is, I tried to get the letter in.

Mr. Vroom—Which letter is that?

Mr. Satterthwait—That is the letter from H. P. Mason, dated May 15th, signed H. P. Mason, Secretary Board of Education.

Mr. Bergen—Well, if the Court please, I object to undertaking to prove the letter by this witness when they cannot get the letter in evidence.

Mr. Satterthwait—The testimony is, the building committee had this letter sent, and the building committee is the agent of the board.

The Court—I don't know that the building committee are the agents of the Board in this matter; I said if there were rules and regulations they would speak for themselves.

Henry P. Mason, recalled for plaintiff.

Direct examination (by Mr. Satterthwait—)

Q. Mr. Mason, you say this rule—this paragraph 1 in the 4th section, under the head of "committees," is the only printed rule with regard to the committee on school buildings and grounds; is that the committee you referred to?

A. Yes, sir; I think that is the only one.

Q. Now, were there any powers given to the building committee apart from—

Mr. Bergen—I object, unless it is in the minutes.

Q. Is there anything in the minutes instructing the building committee regarding this contract?

A. I think there is in one place.

Q. Just turn to it, please?

A. That is the only thing under date of January 17th.

Q. Was there anything here conferring any authority upon them regarding the desks agreed to be purchased—can you find anything in the minutes with reference to power of the building committee with reference to desks agreed to be furnished by the New Jersey Church and School Furniture Company?

A. There is nothing in the minntes.

Q. Now, regarding this letter that you wrote by authority of the building committee, was that letter ever communicated to the board?

A. After it was written?

Q. Yes.

A. I am not sure; the minutes will show if it was.

Q. I don't mean merely at the meeting of the board, but was it shown to the members of the board?

A. Yes, sir; it was shown to one member.

Q. Which one?

A. Mr. Bergen.

Q. Any other?

A. I don't recollect any outside of the building committee.

Q. Did you hand it to Mr. Bergen itself or a copy of it?

A. It was the correspondence, a copy of it; he didn't see the original letter.

Q. He was informed through you, then, that this letter had been written?

A. He had copies of all the correspondence.

By Mr. Bergen—

Q. That was about the time the suit was being brought;

A. Yes, sir.

Further direct.

Q. Before that time did you speak to any of the members of the Board about it?

A. No, sir.

Q. Before you wrote it, did you have any conversation with members of the Board?

A. No, sir.

Q. You wrote it, then, on your own responsibility?

A. Only the committee.

Q. Has it been brought to any members of the Board of Education?

A. Only as the correspondence was handed to Mr. Bergen.

Q. Has the correspondence been presented to the Board?

A. As a whole?

Q. Yes.

A. No, sir.

Q. Has any part of it been presented to the Board?

Mr. Bergen—Are you trying to introduce the letter in evidence?

Mr. Satterthwait—Yes, sir.

Mr. Bergen—Well, offer it, and we won't object to it.

Mr. Satterthwait—I offer the letter in evidence, then, dated May 15th, 1895.

Said letter maked *Exhibit 6*, and annexed to this bill of exception.

Louis H. McKee, recalled for the plaintiff.

Direct examination by Mr. (Satterthwait)—

Q. I asked you a moment ago why those desks were not shipped when they were manufactured, and you said it was in consequence of a refusal by the board to take them; is that the letter you referred to?

A. This is the letter; yes.

Not cross-examined.

Mr. Satterthwaite—Offering these letters, we rest.

And thereupon the plaintiff rested its case.

And thereupon the defendant, by its attorney, Mr. Vroom, moved the court for a non-suit in this case, on the ground that the plaintiff had not performed or tendered performance of the contract sued on within the time prescribed in the contract, and that the time had not been extended by agreement between the parties.

The Court—I have not heard what is in the minutes.

(Mr. Bergen reads from the minutes that have been offered in evidence.)

The Court—Mr. Satterthwait, I will hear you on the question raised by counsel, and also on this question, which seems to me to be an important one in the case. As I construe this contract, it is an executory contract; it is not a bargain and sale by which the property passed to the vendee, but it is for the future delivery of something, of a specific chattel, which was not at the time of the contract in a deliverable state. Now I understand that the distinction in the vendor's remedy in those two cases is this: where there has been a bargain and sale, even if there has not been an actual delivery of the thing contracted for, the property passes to the vendee; the vendor has a right to sue for the contract price, if he sees fit;

or he may, as the agent of the vendee, sell the thing contracted for, and recover from the vendee the difference between what the goods brought and the contract price; or he may keep the goods and sue and recover the difference between the market value and the contract price. He has these three remedies But where the contract is executory, the property does not pass, and the only remedy that the vendor has is in an action for the damages which he has received by the non acceptance of the thing contracted for. Now that is this case; and it seems to me, admitting that the contract has been broken, that the only action that you have is the action set up in your special count for non acceptance. But you have not shown the value of these desks, and how can this jury say what the damages are which the plaintiffs have received by the refusal of the defendants to accept them, unless they know what they were actually worth? It may be that in stead of being injured by the non-acceptance, they have been benefited; there is no evidence at all to warrant the jury in saying that the contract price was higher than the actual value of the desks. I would like to hear you on both points, on the question whether or not this contract is executory; and, if it is, then whether the proofs would warrant the recovering of anything but nominal damages.

Mr. Satterthwait replies, and Mr. Bergen closes the argument for the defence.

The Court—It seems to me that as this contract was originally made between the parties, the time of its execution was essence of the contract. It was not performed within the time limited by its terms. There was no extension of the contract for a definite time by the Board of Education, but by implication it was extended from time to time up to the 19th day of April, some six months after

it ought to have been performed by the plaintiffs in this case, and it seems to me that the Board of Education had a right, at any time after the expiration of the original period, to cease the performance of what was a courtesy to the plaintiff; that is, cease waiting for the plaintiff to perform this contract at any time that it saw fit. The time for performances had gone by, and although the act of the board was, as I say, an extension of the time for performance, yet they had a right to fix, at any time after September 25th, the limit within which the contract should be performed, or after which they would cease to consider the contract operative. I do not think that after the Board notified the plaintiffs in this case they expected and insisted that this contract should be performed at once, the plaintiffs could, notwithstanding that notification, further extend the time for performance without the consent of the defendants. Instead of performing at once upon receiving such notice, they delayed another month before they were ready to perform, and then when they notified the Board they were ready, the Board said, "You did not perform at once, as you were notified by us to do, and we have now made another contract." It seems to me, in this condition of affairs, there can be no recovery by the plaintiffs, for the breach of the contract was by them and not by the defendants. And I think, too, that there can be no recovery for the reason which I mentioned before hearing argument. The rule in New Jersey is not as it is in some States, that the damages recovered for the non-performance of an executory contract is the contract price, but it is as I have suggested, that where there is an actual passing of the property to the vendee by the contract, the vendor has his choice of the three remedies which I mentioned, but where the contract is executory, where the articles are not in a deliverable state at the time of making the contract, then

the property does not pass, and, as there has never been a passing of the property, the only remedy is an action on the case for breach of the contract, or failure to accept; and the measure of damages in the latter case is the difference between what the plaintiff would have received if he had been paid the contract price and the market value of the goods sold. As there has been nothing in this case to show the value of these goods, there is nothing for the jury to base their verdict upon, for the contract price and the market value may in this case be one and the same thing, and consequently no injury done to the plaintiffs.

For both these reasons it seems to me there can be no recovery in this case, and I grant the motion of the defendants to nonsuit. Of course, the plaintiffs may have an exception.

Thereupon the counsel for plaintiff made his exception to the said ruling of His Honor, the said Justice, granting the motion to nonsuit, as aforesaid, and prayed that His Honor, the said Justice, granting the motion to nonsuit, as aforesaid, and prayed that His Honor, the said Justice, would set his hand and seal to this bill of exception; and it is sealed accordingly.

WM. S. GUMMERE, [L. S.]
J. S. C.

EXHIBIT P 1.

Memorandum of agreement, made this 23d day of July, A. D eighteen hundred and ninety-four, between The Board of Education of Somerville, New Jersey, and New Jersey School and Church Furniture Co., of Trenton, New Jersey.

Witnesseth, That the said The Board of Education agrees to purchase of said New Jersey School and Church Furniture Co.:

One hundred and forty-six (146) adjustable single Novelty desks, grammar size; two (2) teachers' desks, No. 71; one (1) teachers' desk, No. 74.

The said articles are to be made in good, workmanlike manner, of good material, and to be delivered by said New Jersey School and Church Furniture Co., in the public school-house at Somerville, put up ready for use, not later than September 25th, 1894, and as much earlier as possible.

And the said Board of Education agrees to pay to the order of said New Jersey School and Church Furniture Co. therefor, the sum of $510.00.

(Signed) A. G. ANDERSON,
President of the Board of Education, Somerville, N. J.

Signed for NEW JERSEY SCHOOL AND CHURCH FURNITURE CO., by

L. H. MCKEE,
Secretary and General Manager.

EXHIBIT P 2.

TRENTON, N. J., Oct. 13, 1894.

Mr. A. G. Anderson, Pres.,
Somerville, N. J.

DEAR SIR—We have made a shipment of "New Era" Single Desks in place of the adjustable ones called for in our written agreement of July 23. Our understanding with your committee is that we place the desks ready for use in the school building till we have completed the new desks, which we hope to do in a few weeks. We propose to make no charge for the use of these desks while you are waiting for the new ones. Our man will be there on Monday to put the desks up.

Most respectfully,
NEW JERSEY SCHOOL AND CHURCH FUNITURE CO.,
L. H. MCKEE,
Secretary.

Dictated.

EXHIBIT P 5.

SOMERVILLE, N. J., April 19, 1895.

New Jersey School and Church Furniture Co , Trenton, N. J.

DEAR SIRS—At a meeting of the Board of Education, held last evening, I was directed to write you concerning the adjustable desks which we purchased from your company in July, 1894, and which you agreed to have put up in the school house at Somerville not later than September 25th, 1894, but which have not yet been put in.

After repeated promises your Mr. Case met the Board at Somerville on March 14th, 1895, and agreed positively that the desks would be furnished and put in place on Friday and Saturday, April 12th and 13th, 1895.

Your people seem to be determined that we shall accept some other desk than that we purchased for the reason that you think the adjustable desk will not be satisfactory. The Board desires to say very emphatically that we will take the responsibility of any dissatisfaction, provided you furnish what you agreed to, which we expect you to do at once. Please advise. Yours truly,

H. P. MASON,
Secretary Board of Education.

EXHIBIT P 3.

TRENTON, N. J., April 22, 1895.

Mr. Henry P. Mason, Sec'y B. E., Somerville, N. J.

DEAR SIR—In reply to your favor of the 19th inst., concerning our furnishing the original adjustable desk, permit us to say that we will proceed at once to supply the same. We will require a few days to get them in readiness; and as we learn that you desire the desks darker in color than the last ones, we will have to go over the stock we have again. The original order calls for 146 desks, while we have

supplied you altogether with 160. Would you please inform us your desire as to what style and size the 14 extra desks should be?

Most respectfully,
NEW JERSEY SCHOOL AND CHURCH FURNITURE CO.
L. H. McKEE,
Secretary.

EXHIBIT P 4.

TRENTON, N. J., May 13th, 1895.

Mr. H. P. Mason, Sec. B. E.,
Somerville, N. J.

DEAR SIR:—We are now on the point of shipping the desks, and ask that you kindly let us know about the 14 desks referred to in our last letter. The desks we are shipping according to contract, and are like the two we sent to you some time ago.

Kindly let us hear from you as soon as possible, and oblige.

Most respectfully,
Dictated, L. H. M. NEW JERSEY SCHOOL AND CHURCH FURNITURE CO.

EXHIBIT P 6.

SOMERVILLE, N. J., May 15th, 1895.

New Jersey School Church Furniture Co.,
Trenton, N. J.

GENTLEMEN:—In July last we gave you an order for 146 single adjustable desks for our new high school building, which desks were to be exactly like the sample which your representative exhibited to our Board of Education at that time. You entered into a contract to furnish these desks and have them delivered and set up ready for use not later than September 25th, 1894. About the time they

should have been placed you advised us that it would be impossible for you to furnish them by the time specified, but that you would place other desks in our school building free of charge, temporarily. This you did, and we have repeatedly urged you to fill the contract, but up to the present date you have failed to do so.

Your Mr. Case met the Board at Somerville on March 14th, 1895, and agreed positively that the desks originally ordered, and which would be the same as those in the Easton High School, would be furnished and placed in our school-house on Friday and Saturday, April 12th and 13th. About that time you sent us two sample adjustable desks. These were not like the sample your man showed us in July, 1894, but were very much lighter and inferior in every respect, and the Board declines to accept them.

You have failed to keep your part of the agreement and we are therefore under the necessity of cancelling the order with you and placing it with other parties.

Owing to the inconvenience you have caused us, we will ask as a favor that you will allow the desks to remain that you have now in our building, until such time as our other desks arrive, which will not be later than two weeks. You will certainly agree with us that the treatment we have received has not been just or right.

Yours respectfully,

H. P. MASON,

Sect'y Bd. Educa.

EXTRACT FROM THE BOOK OF MINUTES OF THE BOARD OF EDUCATION OF SOMERVILLE.

Page 198, July 23, 1894:

A representative of The New Jersey School and Church Furniture Company was present with sample desk, which he exhibited. After considerable discussion, it was decided to purchase ninety-six single desks for the new school-house on High street, and fifty single desks for one of the rooms in the old school house, to replace double desks which will be needed in the colored school building. The agent offered

to furnish one hundred and forty-six adjustable single, revolving desks, grammar size, two teachers' desks No. 71, and one teachers' desk No. 74, all to be furnished and put in the school house not later than September 25, 1894, and as much earlier as possible, for the sum of five hundred and ten dollars; on motion the offer was accepted and the contract ordered drawn up.

Page 205, October 4, 1894:

The agent for The Trenton Furniture Company was present and stating that to their inability to procure the necessary castings for the adjustable desks, there was no telling how soon they would be able to fill our order for furniture for the new school-house; they had only forty-five or fifty of these desks completed; he promised to put in the New Era desk, either permanently or temporarily; it was the sense of the Board that we wanted that desk previously ordered. On motion, the furniture company was requested to ship at once as many of the adjustable desks as they had and fill in the balance of the order with the New Era desks, the same to be replaced with the adjustable desk as soon as possible.

Page 212, March 7, 1895:

The matter of desks for the new school building was then brought up and freely discussed; it seemed to be the opinion of the board that the desks lately furnished by the Trenton Company were not suitable; they are not strong enough and are not what we ordered, and will not be accepted. On motion of Mr. Bergen, Mr. Betts was requested to see the furniture company and have them send a representative at the Board at a special meeting to be held on Thursday evening, March 14, 1895, and see if some satisfactory arrangement cannot be made.

Page 213, March 14, 1895:

Mr. Case, of the Trenton Furniture Company, was present and stated that he understood that the seats lately put into the school-house were satisfactory to the Board, and if this was not so and the Board wanted the desks originally ordered they could have them. The members present indi-

cated that this was what they desired, and Mr. Case agreed to have them put in on Friday and Saturday, April 12th and 13th.

Page 219, April 18, 1895:

Inquiry was then made by Mr. Hoffman as to why the new seats had not been put in the school room as agreed by Mr. Case, of the Trenton Company, and a motion was made and carried that the secretary be directed to write the Trenton Company that we expect them to carry out their contract at once.

Page 223, June 6, 1895:

A communication was received from the Trenton Company to the effect that the desks were ready for delivery, and unless we took them they will commence suit against the board. On motion, the correspondence on the subject was referred to Mr. J. J. Bergen, with request that he answer the Trenton Company. The Committee on Buildings and Grounds reported that the desks for the new school-house furnished by The Hygienic School Furniture Company, of New York, have been put in and are now in use.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

NEW JERSEY SCHOOL AND CHURCH FURNITURE COMPANY,
Plaintiff in Error,
v.
THE BOARD OF EDUCATION OF SOMERVILLE,
Defendant in Error.

Upon Contract.
On Writ of Error.

ASSIGNMENT OF ERRORS.

(Filed January 20th, 1896.)

Afterwards, that is to say, on the sixth day of January, eighteen hundred and ninety-six, in the Court of Errors and Appeals of the State of New Jersey, comes the said New Jersey School and Church Furniture Company, by its attorney, Linton Satterthwait, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exception, and also in the granting of the motion for nonsuit and judgment there is manifest error in this, to wit:

First—That the said judge before whom, etc., at and upon the aforesaid trial of the said issue, so joined between the parties aforesaid, after the said plaintiff had rested its cause, called the plaintiff at the request of the defendant, on the ground that it appeared that the plaintiff had not performed its part of the contract sued on within the time specified in said contract, that time was of the essence of said contract and that there had not been an extension of the time for performance of said contract, whereas there was an extension of time and time had ceased to be of the essence of said contract, and on the further ground that it did not appear what was the value of the goods for the price of which suit was brought, at the time of the alleged breach of said contract by the defendant, and that the measure of damages must be the difference between the contract price and the value of said goods at the time of the alleged breach of said contract by the defendant, whereas, the true measure of damages was the contract price for said goods, and on

both questions the plaintiff should have been permitted to go before the jury and should not have been nonsuited.

There is also error in this, to wit: That by the record aforesaid, it appears that judgment in form aforesaid was given for the said The Board of Education of Somerville and against the said New Jersey School and Church Furniture Company, whereas, by the law of the land, judgment ought to have been given for the said New Jersey School and Church Furniture Company against the said the Board of Education of Somerville. Therefore, the said New Jersey School and Church Furniture Company prays that the judgment aforesaid, by reason of the aforesaid error, and of other errors appearing in the record and proceedings, be reversed, annulled and held for nothing, and that the said New Jersey School and Church Furniture Company may be restored to all things which it hath lost by reason of the said judgment, etc.

LINTON SATTERTHWAIT,
Attorney for and of Counsel with the Plaintiff in Error.

Service of a copy of the foregoing assignment of errors acknowledged this 17th day of January, eighteen hundred and ninety-six.

J. J. BERGEN,
Attorney of Defendant in Error.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

NEW JERSEY SCHOOL AND CHURCH FURNITURE COMPANY,
Plaintiff in Error,
v.
THE BOARD OF EDUCATION OF SOMERVILLE,
Defendant in Error.

On Contract.
On Writ of Error.

JOINDER IN ERROR.

(Filed January 20th, 1896.)

And hereupon afterwards, to wit, on the seventeenth day of January, eighteen hundred and ninety-six, the said The

Board of Education of Somerville, defendant in error, by James J. Bergen, its attorney, comes into court and says that there is no error, either in the record and proceedings aforesaid or in giving the judgment aforesaid, and it prays here that the court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid for error, and that the judgment aforesaid, in manner and form aforesaid given, may in all things be affirmed, &c.

J. J. BERGEN,
Attorney of Defendant in Error. 10