these public purposes to a State, notice is given by the commissioner of the land office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of.

It should be stated, also, in connection with this proviso, that the improvements of this river were in progress at the time of the passage of the act of 1856, and had been for years, but were suspended soon after, on account of the refusal of the Land Department to certify any more sections under the act of 1846; and, as appears from the certificate of the governor of Iowa, the sum of $332,634.04 had already been expended by these defendants under their contract.

JUDGMENT AFFIRMED

NOTE.

At the same time, with the preceding case, was adjudged *Des Moines Navigation and Railroad Company* v. *Burr*, which NELSON, J., delivering the judgment of the court, said, "involved the same questions" decided in it. He referred to the opinion there given as decisive of them. The judgment was reversed with a *venire de novo*.

NASH *v.* TOWNE.

1. Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances; and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are, accordingly, entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. Hence, where flour intended to

be sent to Boston was sold at Neenah, upon Lake Michigan, in mid-winter, and the letter of sale stated that the flour was sold "free on board steamer at Neenah," and was now "stored," the inference would be that the flour was to remain in the storehouse where it was until the navigation opened in the spring, and that it was to be withdrawn and delivered on board a steamer at Neenah, free of charge to the purchasers, before the spring season of navigation closed [which was May 31]. Accordingly a sale, such as above described, will support a declaration (the flour not being delivered), alleging a sale of flour, stored at Neenah, and an agreement to deliver the same, when requested, free of charge, to the purchasers, on board of a steamer to be procured or furnished by the vendors at the place where it was stored, after navigation should open, and a reasonable time before the 31st day of May following, to be conveyed to the purchasers, at Boston, in the ordinary manner of transportation.

2 Proof of a sale, and payment by a sight-draft, duly paid, will support a declaration of a sale for so much "in hand paid."

3. Receiving the price of goods sold and to be delivered, the refusal to deliver, and a conversion of the goods, constitute plenary evidence of an implied promise to refund the price paid for them, and an action for money had and received is an appropriate remedy for the vendee on such refusal to deliver.

4. Where an agent has entered into a written contract in which he appears as principal, parol evidence is inadmissible to show, with a view of exonerating him, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.

5. Where a party pays money on a consideration which fails, and in equity should be refunded—as for goods deliverable *in futuro*, but not delivered—the measure of damages on the recovery back is the sum paid and interest upon it, not as, *ex. gr.* in the case above, the value of the goods sold at the time when by the contract they were to have been delivered.

ERROR to the Circuit Court for Wisconsin; the case being thus:

Towne & Washburne, of Boston, Massachusetts, bought of Nash & Chapin, of Milwaukee, Wisconsin, in February, 1863, a thousand barrels of flour, and paid for them by a *sight draft*. The flour was not delivered, and the purchasers, Towne & Washburne, aforesaid, brought *assumpsit* for the non-delivery. The declaration contained a special count, and also the common counts.

The former set forth:

"That the defendants, on the 5th of February, 1863, at Mil-

waukee, in Wisconsin, in consideration of $5500 dollars to them *in hand paid*, sold to the plaintiffs one thousand barrels of flour, then at Neenah, in the said State, of the value of $5500, and agreed that they, the defendants, on the request of the plaintiffs, *after navigation at Neenah aforesaid should open in the spring of* 1863, *and a reasonable time before the* 31*st day of May*, 1863, *would procure, furnish, or provide a steamer* on which to ship said flour, and ship the same to the plaintiffs at Boston, in the State of Massachusetts, *and deliver the same on such steamer at Neenah*, where said flour then was, *free of charge to said plaintiffs*, and to be transported in the ordinary manner and with necessary and customary transshipments to the plaintiffs at Boston."

Plea, the general issue.

On the trial, the plaintiffs offered in evidence a letter from the defendants to the plaintiffs, dated at Milwaukee, February 5, 1863, as follows:

"Your Mr. W. left here yesterday, and before going off we sold him one thousand barrels round hoop flour, Empire Mills, Iowa, *free, on board steamer at Neenah*, for $5.50, for which find bill inclosed. We have the flour *stored* and insured, ... and will value on you at sight for the amount."

Inclosed in that letter was this bill of sale:

"Messrs. Towne & Washburne,

Bought of Nash & Chapin, general commission merchants, 1000 barrels of flour, Empire Mills, Iowa, round hoop, 5½, $5500.

Received payment, sight draft,

NASH & CHAPIN."

This evidence was objected to by the defendants, because it tended to prove a different contract from the one declared on. The court, however, overruled the objection.

The plaintiffs then offered the sight draft with evidence of its payment, and that it was drawn in payment of this flour. This, too, was objected to as variant from the declaration; but the objection was overruled.

The plaintiffs then read two warehouse receipts, one dated January 31st, 1863, as follows, and the other February 5th, 1863.

"NEENAH, January 31st, 1863.

"Received in store of Nash & Chapin, five hundred barrels Empire, Iowa, r. h. flour, to be delivered, on return of this warehouse receipt, free, on board steamer.

S. G. BURDICK."

"Indorsed: NASH & CHAPIN."

They then brought witnesses who proved that the defendants had allowed this Burdick to take the flour from his storehouse at Neenah, where it was stored, and to sell it to other persons (so to prove a conversion by the defendants to their own use), and that they refused to deliver it; setting up that the plaintiffs at the time of the sale of the flour agreed to take the warehouse receipts of S. G. Burdick, just above referred to, in lieu of the defendants' responsibility for the flour, and had requested the defendants to hold the receipts for them, which they the defendants had done.

In the course of proving this, they asked a witness who had inquired of the defendants, in behalf of the plaintiffs, why the flour was not delivered, &c., this question:

"What was said by the defendants, as to where the flour, described in the letter and bill, was stored; whether it had been delivered, and if not, as to why it had not been delivered?"

To the admission of that question the defendants objected that inasmuch as the plaintiffs had failed to prove the special count in their declaration, and had proved an existing contract to deliver flour to the plaintiffs, it was not competent for the plaintiffs to prove any other contract than the one set out, nor to prove a breach of such other contract under the other counts in the declaration. But the court overruled the objection.

The defendants on their side offered to prove that in selling the flour they had acted as agents for Burdick, above named, and so told the plaintiffs at the time of the sale; and that they paid over the money, the proceeds of the sale, to Burdick. This was objected to by the plaintiffs because it

was conversation prior to or contemporaneous with a written contract (the bill of sale and letter), and would modify or contradict it, and alter the liability of the defendants under that contract. The objection was sustained and the ruling excepted to.

They set up also that the warehouse receipts of Burdick were accepted by the plaintiffs in lieu of their responsibility for the flour; a matter which went to the jury on the evidence.

The court charged:

1. "That if the jury found that the plaintiffs had paid money to the defendants for a consideration which had failed, and which in equity the defendants ought to pay back, their verdict must be for the plaintiffs. And if they found that the defendants executed the bill of sale and letter or contract read in evidence, and the plaintiffs paid them for the flour specified, $5500, and the defendants afterwards failed and refused to deliver the flour when demanded, then their verdict should be for the plaintiffs for the amount paid by them and interest, unless the defendants delivered to, and the plaintiffs accepted the warehouse receipts in evidence in lieu of the flour."

At the request of the defendants below, it also charged:

2. "That the plaintiffs cannot recover in this cause against the defendants damage for the conversion of that flour without proof that the defendants have, after such conversion, sold the flour and received pay for it, and in that case, for only the amount actually sold, and paid for, and only the price paid to them."

And added:

"The converse of such instruction is also true; that if the jury find from the evidence that the defendants had sold said one thousand barrels of flour, or any part of it, and had received the money therefor, or the benefit of such sale and payment thereof, then their verdict should be for the amount so received by said defendants, unless they had delivered to the plaintiffs, and the plaintiffs had accepted, the warehouse receipts as a delivery of the flour."

Argument for the plaintiff in error.

Verdict and judgment having gone for the plaintiffs, the case was now here on exception to the ruling of the court admitting the testimony, and to its instructions to the jury.

Mr. Lynde, for the plaintiff in error:

I. The declaration sets out the time of delivery to have been after the opening of navigation in the spring of 1863 (April 20th, 1863), and before the 31st day of May, 1863. The utmost that can be said of the letter is, that inasmuch as the delivery must be on board steamer, the delivery should be within a reasonable time after the opening of navigation, which is a very different period. This was a variance.

Again, the declaration avers, in effect, that the plaintiff in error agreed to provide a steamer and make the shipment, and pay the charges of the warehouseman for storage and delivery to the steamer, while the letter only agrees to pay the warehouseman's charges for storage and delivery to steamer.

These papers were also inadmissible under the general counts, as they tended to prove an existing agreement to deliver flour which must be counted upon specially.*

II. The declaration alleged a payment in cash. Proof of payment by a bill was immaterial to the issue and variant from the count.

III. The court erred in allowing the question: "What was said by the defendant as to where the flour was stored, &c., and as to why it had not been delivered?"

The plaintiff had averred a contract to deliver flour at a future time. He had proved that a different one than the one he alleged had been made. Proving a breach of that contract would not prove the breach of his first count, nor of any of his counts.

IV. But the great error was in excluding evidence that the defendants were acting as agents in making the sale, and that the plaintiffs knew this, and that the money re-

* Spratt *v.* McKinney, 1 Bibb, 595; Brooks *v.* Scott, 2 Mumford, 344; Burrall *v.* Jacot, 1 Barbour, 165; Cochran *v.* Tatum, 3 Monro, 405.

ceived by the defendants had been paid over to their principals. The court erred also in charging "that if they found from the evidence that the plaintiff had paid money to the defendants for a consideration which had failed, and which in equity the defendants ought to pay back, then their verdict must be for the plaintiff."

The plaintiffs had wholly failed to prove the special count. It was not competent to prove an agreement to deliver flour under the common counts. No other right of recovery is asserted except moneys had and received to recover the consideration paid. There is no contract to pay back that money between the parties. It could only be recovered in a case where the defendant had received money of the plaintiff, which *ex aequo et bono* he should return.*

The evidence was excluded upon the authority of a special class of cases.† But in those cases the action was directly upon the contract; in this case it was not, and the contract here is only valuable in evidence as an admission of a fact, which admission could be contradicted or explained.

Now, when the action is brought, not upon the contract, but upon the facts and the equities growing out of them, why should not all the facts be proved? How could the jury say that the defendants ought, in equity, to pay back this money, without knowing whether the plaintiffs intended to pay and did pay their money to Burdick or the defendants; and whether Burdick or the defendants actually had the benefit of the money?

Again, the court erred in charging "that if they found that the defendants executed and delivered the bill of sale and letter or contract read in evidence, and the plaintiff paid them for the flour specified, $5500, and the defendants afterward failed and refused to deliver the flour when called for, their verdict should be for the plaintiffs for the amount paid by them and interest." This instruction directs *a recovery upon the contract.* The jury were not allowed to inquire

* Straton *v.* Rastall, 2 Term, 366.

† Such as Jones *v.* Littledale, 6 Adolphus & Ellis, 486; and Higgins *v.* Senior, 8 Meeson & Welsby, 844.

whether the contract was rescinded or not. There are two objections to this charge:

1. There is no such contract set out in the declaration, as is evidenced by the letter and bill of parcels; and, the record would not be a bar to a new action on the letter and bill of parcels.

2. The measure of damages is incorrectly stated. The amount of the recovery for a breach of the contract would be the value of the flour at the time when it should have been delivered.

Mr. Waldo, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Controversy in this case grew out of a contract for the purchase, sale, and delivery of one thousand barrels of flour, and the parties concur that the flour was never delivered by the original defendants. Special count, as amended, alleged, in substance and effect, that the defendants, on the fifth day of February, 1863, at Milwaukee, in the State of Wisconsin, in consideration of five thousand five hundred dollars, sold to the plaintiffs one thousand barrels of flour, stored at Neenah, in that State, and agreed to deliver the same, when requested, free of charge, to the plaintiffs, on board of a steamer to be by them procured or furnished at the place where it was stored, after navigation should open, and a reasonable time before the thirty-first day of May following, to be conveyed to the plaintiffs, at Boston, in the ordinary manner of transportation. They also alleged demand and refusal to deliver the flour as agreed, and claimed damages for the non-fulfilment of the contract. Declaration also contained the common counts as set forth in the record.

Plea was the general issue, and the verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error. Exceptions were taken by the defendants to certain rulings of the court during the trial, and to certain instructions of the court as given to the jury after

the testimony was closed, which will be considered in the order they are exhibited in the record.

I. Plaintiffs produced and offered to read in evidence, to prove the issue on their part, a certain letter, dated Milwaukee, February 5, 1863, and written by the defendants to the plaintiffs, and a bill of sale of the flour, executed at the same time and place, and signed by the defendants, and which was inclosed in the letter of the defendants so offered in evidence. Material parts of the letter were as follows: "Your Mr. W. left here yesterday, and before going off we sold him 1000 barrels round hoop flour, Empire Mills, Iowa, free, on board steamer at Neenah, for $5.50, for which find bill inclosed. We have the flour *stored* and insured, . . . and will value on you at sight for the amount." Inclosed in that letter was the following bill of sale, which was also signed by the defendants:

"Messrs. Towne & Washburne,

Bought of Nash & Chapin, general commission merchants, 1000 barrels of flour, Empire Mills, Iowa, round hoop, 5½, $5500.

Received payment, sight draft,

(Signed) NASH & CHAPIN."

Such being all the evidence offered by the plaintiffs, under the special count, the defendants objected that the evidence was not admissible in the case, because it tended to prove a different contract from that set out in the declaration, but the court overruled the objection, and the letter and bill of sale were read in evidence to the jury.

Defendants excepted to the ruling of the court, and that exception raises the first question presented for decision in the record. Obviously, the exception involves the construction of the special count, and of the contract exhibited in the letter and bill of sale offered in evidence.

Argument of the defendants is that the contract offered in evidence varied from the allegations of the special count in two particulars:

1. That it differed from the declaration as to the time when the flour was to be delivered.

2. That it also differed from the declaration as to the shipment of the flour, and because it contained no agreement to furnish a steamer.

Undoubtedly, the rule is that the proofs must correspond with the allegations in the declaration, but the requirement in that behalf is fulfilled, if the substance of the declaration is proved.

1. Allegations of fact in the pleadings, affirmed on one side and denied on the other, must in general be tried by a jury, and the purpose of the rule which requires that the allegations and the proofs must correspond, is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue. Formerly, the rule in that respect was applied with great strictness, but the modern decisions are more liberal and reasonable. Decided cases may be found, unquestionably, where it has been held that very slight differences were sufficient to constitute a fatal variance. Just demands were often defeated by such rulings until the Parliament interfered, in the parent country, to prevent such flagrant injustice.*

Federal courts have possessed the power, from their organization to the present time, to amend such imperfections in the pleadings, except in cases of special demurrer set down for hearing, and are directed to give judgment according to law and the right of the cause.†

Recent statutes in the States also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have superinduced in the course of judicial decision, may be said to have established the general rule in the State tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it, shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defence on the merits.‡

* 1 Taylor on Evidence, § 173, p. 187.

† 1 Stat. at Large, 91.

‡ 3 Phillips on Evidence, 4th Am. ed. 148; Harmony *v.* Bingham, 1 Duer, 210; Catlin *v.* Gunter, 1 Kernan, 368.

Irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond. Contract in this case was executed in midwinter, when the navigation was closed, and both parties knew that the flour could not be transported until the navigation opened in the spring. "Free on board the steamer at Neenah" meant that the defendants should deliver the flour on board the steamer without charge to the plaintiffs. Time of delivery is not specified, but it was to be on board a steamer at Neenah, and it would be unreasonable to suppose that the parties contemplated that it should be withdrawn from the warehouse where it was stored in safety and insured and deposited in a steamer, even if one was there, before the navigation opened in the spring.

Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.*

Applying those rules to the case, it is quite clear that the parties did not contemplate that the flour should be withdrawn from the warehouse, where it was safely stored and insured, until the navigation opened in the spring, because the withdrawal of the same before that time would have been worse than useless, as it could not be earlier transported to the place of destination, and if withdrawn and delivered it would involve unnecessary expense and the necessity of re-warehousing it and procuring a new insurance. Plain inference, therefore, is that it was to remain in the storehouse where it was until the navigation opened in the spring,

* Barreda et al. *v.* Silsbee, 21 Howard, 161; Shore *v.* Wilson, 9 Clark & Finnelly, 569; Addison on Contracts, 846.

but that it was to be withdrawn and delivered on board a steamer at that place, free of charge to the plaintiffs, before the spring season of navigation closed.

Such being the true construction of the contract as to the time the delivery of the flour was to be made, it is evident that the objection that there is a variance in that respect between the proofs offered in evidence and the special count cannot be sustained. Averment of demand and refusal in the count is not unusual in such cases, and, even if not strictly necessary, it certainly can afford no ground to support the present exception.

2. Second objection taken at the argument is that the contract, as proved, does not support the allegation that the defendants agreed to procure or furnish a steamer at the place of delivery, or to ship the flour on board a steamer free of charge to the plaintiffs, as alleged in the special count.

Express words of the contract are, "free on board steamer at Neenah," and the terms of the contract also show that the flour, at the date of the contract, was safely stored in a warehouse at the place where it was to be delivered. Those words necessarily imply that the flour was in the possession and under the control of the defendants, and that the delivery was to be made in the future. Terms of the contract also imply as clearly that the place of delivery was on board a steamer at that port as they do that the delivery was to be made by the defendants. Freight was to be paid by the plaintiffs, but the delivery on board the steamer was to be made by the defendants, and it follows, in the absence of any stipulation to the contrary, that the defendants were to procure or select the steamer to transport the flour down the bay, and to the place of transshipment, over the usual route. Our conclusion is, that the allegations of the special count, and the proofs given in evidence, were substantially the same, or, in other words, that the differences between them, if any, were not of a character which could have misled the defendants at the trial, and therefore the objection must be overruled.

II. Evidence was also introduced by the plaintiffs showing that the defendants drew on them for the whole amount of the purchase-money, in a sight draft, and that they paid the draft, as given in evidence, when it was presented.

Exceptions were taken by the defendants to the rulings of the court in admitting that evidence, but the rulings of the court were so clearly correct that it seems unnecessary to remark further upon the subject.

III. Plaintiffs also proved that the flour, at the date of the contract, was stored in a railroad warehouse at Neenah, and that the defendants had admitted that it had been sold and delivered to a third person prior to the commencement of the suit. They went further, and proved demand and refusal, and showed that the defendants, at the date of the contract, had but one thousand barrels of flour stored in that warehouse, and that the whole of that parcel was sold and delivered prior to the suit, with the defendants' knowledge and consent.

Witnesses were examined on the subject, and in the course of their examination two other exceptions were taken by the defendants to the rulings of the court in admitting testimony. Substance of the testimony objected to and introduced was that the flour was withdrawn from the warehouse where it was stored, at the date of the contract, under the orders of the defendants, and deposited in another place, and finally delivered to other parties, in part fulfilment of a much larger contract. Testimony previously introduced showed that the plaintiffs accepted the sight draft, and paid the same for the purchase-money, and that the defendants refused to deliver the flour; and the evidence objected to was doubtless offered to show that they had converted the flour to their own use, and, in our judgment, it was properly admitted for that purpose. Where the seller of goods received the purchase-money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted the same to his own use, it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been

heard in a court of justice since that decision that there was any doubt of its correctness.*

Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain, and it may be said that it lies in most, if not all, cases where the defendant has moneys of the plaintiff which, *ex equo et bono*, he ought to refund. Counts for money had and received may be joined with special counts; and where, as in this case, the special counts are for damages for the non-delivery of goods, it is perfectly competent for the plaintiff, if the price was paid in money or money's worth, to prove the allegations of the special counts and introduce evidence to support the common counts; and if it appears that the defendant refused to deliver the goods, and that he has converted the same to his own use, the plaintiff, at his election, may have damages for the non-delivery of the goods, or he may have judgment for the price paid and lawful interest. Evidence in this case was clear, not only that the plaintiffs paid the price in money, but that the defendants refused to deliver the flour, and converted the same to their own use, by selling and delivering it to other persons.†

Such a reception of the price, refusal to deliver, and conversion of the goods constitute plenary evidence of an implied promise to refund the price paid, and an action for money had and received is an appropriate remedy for the plaintiffs.

Principal defence was that the flour belonged to one Samuel G. Burdick, and that the defendants, in negotiating the sale, acted merely as the agents of the owner of the flour, and that they, during the negotiation for the sale, informed the plaintiffs of their agency, and gave to them the name of their principal as the owner of the flour. They also claimed that the plaintiffs agreed at the sale of the flour to take the warehouse receipts of their principal for the flour,

* Anonymous, 1 Strange, 407; 2 Greenleaf on Evidence, 124

† Allen *v.* Ford, 19 Pickering, 217; Jones *v.* Hoar, 5 Id. 285.

and that the defendants merely held those receipts at the request of the plaintiffs, and for their benefit, and were therefore under no obligations to deliver the flour.

Such was the theory of the defendants, but there was no proof of any such agreement, except that one of the plaintiffs testified that the defendants, when the demand was made for the delivery of the flour, claimed that such was the understanding of the parties at the date of the contract. Defendants introduced no testimony, but offered to prove that in negotiating the sale they acted as agents, and that they so informed the plaintiffs, and gave them the name of their principal. Plaintiffs objected to the testimony, and it was excluded by the court, and the defendants excepted. They still insist that the ruling of the court in that behalf was erroneous, but they admit the general rule that parol evidence is not admissible to supply, contradict, enlarge, or vary the words of a written contract; and it is equally well settled that when a contract is reduced to writing all matters of negotiation and discussion on the subject antecedent to and *dehors* the writing are excluded as being merged in the instrument.*

Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.†

Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, does not deny that the contract binds those whom on its face it purports to bind, but shows

* 2 Kent's Com., 11th ed. 746; 1 Greenleaf on Evidence, 12th ed., § 275 p. 312.

† Higgins *v.* Senior, 8 Meeson & Welsby, 844.

that it also binds another, and that principle has been fully adopted by this court.*

Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election.†

Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal.‡

Exceptions were also taken to the charge of the court, but they involve, for the most part, the same questions as are presented in the objections taken to the admissibility of the evidence, and therefore do not require to be further answered. Slight as the evidence was to show that the plaintiffs accepted the warehouse receipts in lieu of the flour, still the court left that question to the jury, and their finding upon the subject is conclusive. Complaint is also made that the rule of damages given to the jury was not correct, but the complaint is so clearly without merit that we forbear any further comments upon the subject.

JUDGMENT AFFIRMED, WITH COSTS.

---

* New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 381; Ford *v.* Williams, 21 Id. 289; Oelricks et al. *v.* Ford, 23 Id. 63.

† Thomson *v.* Davenport, 9 Barnewall & Cresswell, 78.

‡ Jones *v.* Littledale, 6 Adolphus & Ellis, 486; 1 Parsons on Contracts, 5th ed. 64; Titus *v.* Kyle, 10 Ohio N. S. 444; 2 Smith's Leading Cases, 6th Am. ed. 421.