

was essential in order to shew failure of consideration: *Anderson v. Jennings* (1846), 2 U. C. Q. B. 422. For aught that appears the plaintiffs may have been and may still be perfectly ready and willing to deliver him glass of exactly the same quality, sizes and character as that ordered, and probably would have done so long ago if requested, in which case the defendant would have nothing to complain of. It may well be that the plaintiffs (defendant) would not have that right if the title to the goods imported to fill the defendant's order passed. But if the title passed and the plaintiffs were merely holding the goods for him as his agent or bailee they were at his risk and there was no failure of consideration. His conversation with Sterns after the fire shews that he thought the goods and the risk were his.

If the defendant paid the note I do not see why he could not after demand for delivery of the remainder have successfully sued for breach of the contract to deliver which sprang from the circumstances; equally so, upon the mere giving of the note, without payment. A demand would in either case be necessary because I am persuaded there was at least a when and as he ordered and required their delivery, and meantime they were to hold them for him.

The only question calling for determination is, was there a consideration for the note? As to that I find there was. The plaintiffs changed their position and gave him a longer credit and in the transaction a promise was involved to give him the balance of the goods and a liability to pay damages for failure to do so. It cannot be assumed that the plaintiffs accepted his note intending to do neither of these things: *Tradesmens National Bank v. Curtis* (1901), 167 N. Y. 194; *Anderson v. Jennings*, above cited; see also the observations of Parke, B., in *Jones v. Jones* (1840), 6 M. & W. near the foot of page 86. The present case seems to me a much stronger case than that of *Sowerby v. Butcher* (1834), 2 C. & M. 368.

The plaintiffs are entitled to judgment for the amount of the note with interest and costs.