No. 8826

Supreme Court of Illinois

Cunningham

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vs.

R. C. Wren, et al,

ABSTRACT.

JOHN CUNNINGHAM, — **APPELLORS.**
vs.
RICHARD C. WRENN,
SOLOMON P. NAVE, — **ERROR TO MARION,**
RUFUS P. McELWAIN. — **APPELEE.**

1st. Bond dated 29th May, 1858. Penalty one thousand dollars.

2nd. Condition of Bond that WRENN, would make and deliver two hundred thousand Bricks for CUNNINGHAM, according to his undertaking and agreements in his certain contract or articles of agreement made with CUNNINGHAM, dated same day of Bond Article of agreement.

WRENN agrees to make for CUNNINGHAM two hundred thousand good Merchantable Brick taking St. Louis Brick as a standard—the first one thousand to be delivered on 1st August next (1858.) The second one hundred thousand to be delivered in thirty-five days from above date if the weather would admit of their being made.

CUNNINGHAM agrees to pay WRENN Seven dollars per thousand for the brick—five hundred dollars to be paid in one week from date—two hundred dollars when the first one hundred thousand Brick are delivered—two hundred dollars on the 18th day of August next, and the remainder in thirty days after last lot of Brick are delivered. First brick made by WRENN to be delivered on contract.

Declaration as Amended on Bond 1st Count—Recites making Bond and the condition (*hec vorba.*)

General performance of the conditions in this article of agreement and also Specific performance as to the payment of this five hundred dollars by CUNNINGHAM as a condition precedent to making and delivering Brick. Assignment of Breaches of the condition of the Bond.

1st. Said WRENN did not make and deliver to said Plaintiff one hundred thousand good, merchantable brick on or before the 1st day of August 1858.

2nd. Said WRENN did not make for or deliver to said Plaintiff on or before the 1st day of August 1858 or at any subsequent time one hundred thousand or any number of good Merchantable Brick, taking St. Louis brick as a standard.

Forfeiture of Bond, an action hath accrued. Damages claimed one thousand dollars.

SECOND COUNT, Recites making of Bond, sets out conditions of Bond *verbatim.*

Avers general performance of conditions of Bond and Articles of agreement, and special performance as to the payment of five hundred dollars within one week of date of said Bond &c., that Plaintiff was ready and willing and offered to pay to said WRENN the balance of the purchase money of said two hundred thousand brick upon the delivery of the Brick, as stipulated in said Bond and Articles of agreement or any reasonable time after the times they stipulated Breaches.

1st. Breach same as first Breach in 1st Count.

2nd. Said WRENN did not make and deliver to said Plaintiff one hundred thousand good, merchantable brick taking St. Louis brick as a standard, within thirty-five days after 1st August, 1858.

3rd. Same as 2nd, Breach to 1st Count.

4th. Said WRENN did not nor would make and deliver to said Plaintiff one hundred thousand or any number of good merchantable brick, taking St. Louis Brick as a standard, within thirty-five days of 1st of August, 1858 or at any subsequent time.

Forfeiture of Bond, action accrued, Damages claimed one thousand dollars.

Demurrer to Declaration—General, and special Causes assigned.

Demurrer overruled August, 1859.

Pleas of Defendant No. 1. to No. 17. Inclusive.

Demurrer to Pleas from No. 2 to No. 17.

Demurrer sustained to pleas No. 10 and 13 and overruled as to other pleas.

1st *Plea.* *Non est factum* as to Bond or writing obligatory.

Common *similiter* by Plaintiff's Attorneys.

2nd *Plea.* *Non est factum* as to Articles of Agreement.

Common *similiter* by Plaintiff's Attorneys.

3rd *Plea.* A very general performance by Defendant WRENN.

General replication and denial by Plaintiff's Attorneys.

Avers readiness and willingness and an offer to perform by Defendant WRENN and a discharge by Plaintiff except as to five hundred dollars worth of brick.

Replication by Plaintiff by his Attorneys deneying readiness, willingness and offer to perform and discharge by Plt'ff.

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5th *Plea.* Sets up a new contract between Plaintiff and Defendant WRENN in discharge of original contract without the knowledge or consent of Defendants NAVE and MCELWAIN.

Replication—denial of facts set up in 5th plea generally and specially, by Plaintiff, by his Attorneys.

6th *Plea.* Avers a readiness and to deliver brick by Defendent WRENN and a discharge by Plaintiff.

General Replication and denial by Plaintiff by his Attorneys.

7th *Plea.* Is a general denial of the truth of the breaches as assigned in Plaintiff's Declaration and concludes to the County.

Common *similiter* by Plaintiffs Attorneys.

8th *Plea.* Avers a readiness &c., by Defendent WRENN to deliver brick &c., and a request by Plaintiff not to deliver them.

Replication and denial by Plaintiff by his Attorneys.

9th *Plea.* Avers a new contract between Plaintiff and Defendent WRENN in discharge of Defendent's liability on said Bond.

Replication and denial by Plaintiff by his Attorneys.

10th *Plea.* A plea of general performance.

A general Replication by Plaintiff by his Attorneys

13th *Plea.* General performance as to 1st and 2nd Breaches in 1st Count and non-readiness by Plaintiff to receive the same.

A general replication by Plaintiff by his Attorneys.

14th *Plea.* General performance.

General Replication by Plaintiff, by his Attorney's.

15th *Plea.* General performance as the 2nd and 4th Breaches in 2nd Count of Declaration mentioned.

General Replication by Plaintiff, by his Attorney's.

16th *Plea.* Avers readiness to perform by Defendant WRENN, and unwillingness to receive by Plaintiff.

General denial by Plaintiff, by his Attorney's.

17th *Plea.* Avers that by mutual and valid agreements by and between Plaintiff and Defendant WRENN, they dispensed with the performance of the agreement in said Bond referred to and discharged Defendants NAVE and MCELWAIN from liability.

General denial by Plaintiff, by his Attorney's.

August Term, 1859. Issue—Jury and trial.

The Plaintiff called JAMES S. MARTIN, who being sworn, testified that he was employed to draw the Articles of Agreement between Plaintiff and Defendant WRENN, that he drew it and thinks, he read it over to them after it was written.—That he made a mistake in the first lot of bricks which were to be delivered, August 1st, 1858. That it ought to have read "one hundred thousand," instead of "one thousand." Thinks he read it to them "one hundred thousand," and did not notice the mistake until his attention was called to it in connection with this suit, that he has had possession of said articles of agreement ever since he drew it up.

Defendant objected to said evidence of witness MARTIN. Objection overruled and excepted to by Defendants Attorney.

Plaintiff offered said articles of agreement in evidence.

Defendant objected—objection overruled—articles read in evidence in connection with said Bond and parol testimony.

Plaintiff introduced Receipts D. and E. as evidence.

Defendant objected—objection overruled, and receipts read,

Plaintiff offered Receipts A. B. and C., in evidence.

Defendant objected—objection sustained by the Court, to which ruling of the Court, Plaintiff at the time excepted.

The Plaintiff offering no further testimony. The Court orally instructed the Jury to find in their seats for the Defendants.

Jury rendered a verdict for Defendant for Cost, whereupon Plaintiff made a motion for New Trial, and in arrest of Judgement. Motion overruled by the Court. Excepted to by Plaintiff's Attorneys at the time.

The Court entered Judgement for Costs against Plaintiff.

Plaintiff excepts. Bill of exceptions signed.

ERRORS ASSIGNED.

1st. The Court erred in refusing proper testimony to go to the Jury.

2nd. The Court erred in overruling motion for a New Trial.

3rd. The Court erred in entering Judgement for Defendants on the Verdict of the Jury.

Advocate Print, Salem, Ill.

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SOLOMON P. NAVE,
RUFUS P. McELWAIN. } **Appelee.**

1st. Bond dated 29th May, 1858. Penalty one thousand dollars.

2nd. Condition of Bond that Wrenn, would make and deliver two hundred thousand Bricks for Cunningham, according to his undertaking and agreements in his certain contract or articles of agreement made with Cunningham, dated same day of Bond Article of agreement.

Wrenn agrees to make for Cunningham two hundred thousand good Merchantable Brick taking St. Louis Brick as a standard—the first one thousand to be delivered on 1st August next (1858.) The second one hundred thousand to be delivered in thirty-five days from above date if the weather would admit of their being made.

Cunningham agrees to pay Wrenn Seven dollars per thousand for the brick—five hundred dollars to be paid in one week from date—two hundred dollars when the first one hundred thousand Brick are delivered—two hundred dollars on the 18th day of August next, and the remainder in thirty days after last lot of Brick are delivered. First brick made by Wrenn to be delivered on contract.

Declaration as Amended on Bond 1st Count—Recites making Bond and the condition (*hec vorba.*)

General performance of the conditions in this article of agreement and also Specific performance as to the payment of this five hundred dollars by Cunningham as a condition precedent to making and delivering Brick. Assignment of Breaches of the condition of the Bond.

1st. Said Wrenn did not make and deliver to said Plaintiff one hundred thousand good, merchantable brick on or before the 1st day of August 1858.

2nd. Said Wrenn did not make for or deliver to said Plaintiff on or before the 1st day of August 1858 or at any subsequent time one hundred thousand or any number of good Merchantable Brick, taking St. Louis brick as a standard.

Forfeiture of Bond, an action hath accrued. Damages claimed one thousand dollars.

Second Count, Recites making of Bond, sets out conditions of Bond *verbatim.*

Avers general performance of conditions of Bond and Articles of agreement, and special performance as to the payment of five hundred dollars within one week of date of said Bond &c., that Plaintiff was ready and willing and offered to pay to said Wrenn the balance of the purchase money of said two hundred thousand brick upon the delivery of the Brick, as stipulated in said Bond and Articles of agreement or any reasonable time after the times they stipulated Breaches.

1st. Breach same as first Breach in 1st Count.

2nd. Said Wrenn did not make and deliver to said Plaintiff one hundred thousand good, merchantable brick taking St. Louis brick as a standard, within thirty-five days after 1st August, 1858.

3rd. Same as 2nd, Breach to 1st Count.

4th. Said Wrenn did not nor would make and deliver to said Plaintiff one hundred thousand or any number of good merchantable brick, taking St. Louis Brick as a standard, within thirty-five days of 1st of August, 1858 or at any subsequent time.

Forfeiture of Bond, action accrued, Damages claimed one thousand dollars.

Demurrer to Declaration—General, and special Causes assigned.

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18 6th *Plea.* Avers a readiness and to deliver brick by Defendent WRENN and a discharge by Plaintiff.

General Replication and denial by Plaintiff by his Attorneys.

7th *Plea.* Is a general denial of the truth of the breaches as assigned in Plaintiff's Declaration and concludes to the

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16th *Plea.* Avers readiness to perform by Defendant WRENN, and unwillingness to receive by Plaintiff.

General denial by Plaintiff, by his Attorney's.

23 17th *Plea.* Avers that by mutual and valid agreements by and between Plaintiff and Defendant WRENN, they dispensed with the performance of the agreement in said Bond referred to and discharged Defendants NAVE and MCELWAIN from liability.

General denial by Plaintiff, by his Attorney's.

August Term, 1859. Issue—Jury and trial.

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Advocate Print, Salem, Ill.

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