

8802

No. _____

Supreme Court of Illinois

Christopher Ender

vs.

Phillip Scott

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ferent therefrom, and hath become and is of no use or value to the said Plaintiff; and also by means of the premises he the said Plaintiff hath lost and been deprived of the use of his said mare to wit at the said County; and also the said Plaintiff saith, that the said Defendant on the said exchange falsely and fraudulently deceived and defrauded him the said Plaintiff as aforesaid, to wit at said County, to Plaintiff's damage of \$100. & therefore he sues by

J. L. D. Morrison
his atty.

Demurres And on the 3^d day of April at the term last aforesaid, the said Defendant by Roerner his atty comes and defends the wrong & injury when & says, that the matters & things contained in the said Plaintiffs declaration are not sufficient in law for him to have and maintain his said action, & this he is ready to verify, wherefore he prays judgment &c. G. Roerner for
Def't

and on the first Wednesday of the term (April 4th) the Defendants demurres to Plaintiffs declaration is argued, & after argument is sustained by the Court; and on motion of Scff by N. Niles his attorney, leave is given to him to amend his said declaration, & a rule is entered against him to make his said amendment instantur. And the Plaintiff in compliance with the said rule amends his declaration instantur.

Rea. Whereupon the said Defendant comes and defends the wrong and injury when &c, & says, that he is not guilty in manner & form as the said Scff in his said declaration has complained against him, & of this he puts himself upon issue the Country, & the Scff doth the like.

And on the last Saturday of the term, the issue having been made up, it is ordered by the Court, that a jury be called to try the same; and H. H. Shepard, A. J. Tannehill, Washington Vaughn, Wm Whitesides,

State of Illinois

County of St. Clair

Set.

In the Circuit Court within &
for the County of St. Clair and
State of Illinois, at the April-
term thereof A. D. 1849.

Be it remembered, that on the 23^d day
of March A. D. 1849. Philip Scott filed his declaration ag-
ainst Christopher Ender in words and figures following, to
wit:

Philip Scott Plaintiff in this suit by J. S. Morrison
his attorney complains of Christopher Ender Defendant in
a plea of trespass on the case. For that whereas the said
Defendant heretofore to wit on the first day of January
A. D. 1849, at the County aforesaid, at the special inst-
ance and request of the said Defendant, bargained with the
said Plaintiff, to exchange with the said Defendant a
certain mare of him the said Defendant, for a certain
mare of him the said Plaintiff of great value to wit,
of the value of \$100. And the said Defendant then &
there by falsely warranting his said mare to be affected
with the distemper only, and with no other disease,
then and there fraudulently sold and exchanged the same
mare with the said Plaintiff for the said mare of the
said Plaintiff, And the said Plaintiff confiding in
the said warranting afterwards to wit on the day &
year and at the place aforesaid delivered his said
mare to the said Defendant in exchange for the said
mare of the said Defendant, whereas in truth and in
fact at the time of the making of the said false
warranted and of the said exchange the said mare
of Defendant was affected with another disease
or diseases besides the distemper, and wholly dif-

J. H. Bogatin, Jr. Merrill, Jacob Knoebel, Wm. H. Phillips, Geo. W. Bowler, Asa Neighbours, Isaac N. Shook & R. M. Lacroix are selected as such jury and are sworn to try the issue and a true verdict to render according to law and evidence. And after hearing the evidence and argument of counsel the jury return into Court the following verdict: We the jury find the Defendant guilty and assess Plaintiffs damages at fifteen Dollars.

And the Defendant enters his motion for a new trial, which is denied by the Court. It is therefore considered by the Court, that the Plaintiff recover of the Defendant the sum of fifteen Dollars his damages as aforesaid assessed, and also his proper Costs to be taxed, and that he have execution thereof &c.

And the Defendant files his bill of exceptions in words and figures following, to wit:

Be it remembered, that on the above trial the Plaintiff proved by one Com Penn, that Plaintiff some time on the breaking up of winter brought a bay mare to him for examination; the same was about ten or twelve years old and had the stiff complaint, would have been worth nothing to him, has doctored horses frequently and thinks he understands their diseases; he doth not know from his own knowledge of a case where the distemper turned into a stiff complaint by neglect, doth not believe, that it could have been produced by neglecting a distemper. On account of this disease there was a deformity on the Chest of the mare which was tolerable plain to be seen by me; every body could see, that the mare was stiff and could not move right. The disease of said mare is one which comes on gradually. Parker Adams was present when Ender & Scott. Spropt horses; Scott's mare was worth about \$45.00; if Ender's mare had been well, she would have been worth about \$65.00. Witness believes, that neither of the parties is a Judge of

horses. Ender immediately before the trade said to Scott that the mare had had the distemper, and was not quite over it yet, and that the mare was sound except the distemper. Scott asked no questions at all respecting the soundness. The same mare was taken to Penn for examination about three weeks after the trade. The mare has since been sold for \$25.00. Andrew Meyer was present, when Scott offered to return the mare to Ender, who refused to take her back.

The Defendant proved by Jacob Engelmann, that he had paid \$25.00 for said mare; that she would if well, be worth \$65.00. That she was a very nice looking animal, but that the defect was a very plain one, visible to any body. Scott has an open (log) stable not quite finished, which is airy & & the mare moves as if she walked on ice. Stoltz is a horse doctor, thinks it is a common thing for horses to get stiff in consequence of a neglected distemper; when horses have the distemper they ought to be kept in a warm stable and covered in winter time.

The witness Adams testified, that the ground was slippery with snow and ice, and that witness & Scott rode home in a sled leading the mare, and that they first noticed, that the mare was stiff on the road while traveling, distance from Ender to Scott 6 1/2 miles. Witness first noticed it and called Scott's attention to it.

This evidence, being all of it that was material, having been given, the case was submitted to the jury, and the Plaintiff asked for the following instructions:

The Plaintiff asks the Court to instruct the jury, that no particular form of words is necessary to constitute a warranty; the word warrant need not be used; any words equivalent to "warrant" are sufficient.

If the jury believe from the evidence, that the Defendant represented in positive terms to the Plaintiff at the time of and before the exchange, that the mare was sound except

the distemper, such positive assertion will amount to a warranty; which if false, the Defendant is liable for in this action.

If the Jury believe from the evidence, that the Defendant represented to the Plaintiff before and at the time of the exchange, "My mare is sound except the distemper" and thereby induced Scott to purchase the mare, those words are equivalent to a warranty, that she had no disease but the distemper, and if the mare had any other disease than the distemper, the Defendant is responsible in this action for a false warranty;

That if the Jury find for the Plaintiff, the measure of damages is the difference between the value of the horse, if the warranty were true, and its actual value in point of fact.

which instructions the Court gave, to the giving of which the Defendants counsel at the time excepted; and the Defendants counsel asked for the following instructions, which were also given as follows:

"Unless the Jury believe from the evidence, that Ender at the bargain used the word "warrant," or words of an import equivalent to warrant; and showing an intention of the parties, that there should be a warranty, the Plaintiff can not recover, even if he has shown damage;

and the following part of the said instruction was stricken out:

and that Ender made representations which afterwards were found to be untrue; or even if they should find, that Ender wilfully misrepresented at the time of the sale, and practised fraud to deceive Scott, in as much as this is an action on the false warranty and not for deceit.

to which decision of the Court in refusing the said part of said instruction the Defendant at the time excepted. The Jury having returned a verdict for

fifteen dollars in favor of Plaintiff, the Defendant moved for a new trial, for that the jury found against law, against evidence, against both, and against the instructions of the Court, and for that the Court had given improper instructions, and refused proper ones. Which motion the Court refused to allow, to which decision is disallowing said motion Defendant by his counsel at the time excepted, and now tenders his bill of exceptions for the Court to sign and seal.

Whereupon the Defendant moved in arrest of judgment, which was overruled, to which decision of the Court the Defendant at the time excepted.

Wm H. Underwood *Att. Gen.*

Shedore Engelmann Clerk of the Circuit Court within & for the County of St. Clair hereby certify, the foregoing to be a correct transcript of the pleas, proceedings, Judgment and bill of exceptions in the above entitled cause, as the same appear on file and of Record in my Office.

In testimony whereof I have hereunto signed my name & affixed the seal of said Court this 27th day of April A.D. 1849.

Shedore Engelmann

Supreme Court of Illinois
1st Division

Christopher Enders. plff in error

^{vs}
Philip Scott. def. in error

And now comes the said plff by Koerner,
his attorney and caita. that there is manifest
error in the records and proceedings in the
above entitled cause, and for that

- 1st the Court overruled the motion for a new
trial made by the said plffs Enders
- 2^d That the Court overruled the said plffs
motion in arrest of Judgment
- 3^d That the Court gave improper instructions
- 4th That the Court refused to give proper in-
struction
- 5th That Judgment was entered for plff
below Scott, instead of defendant below
Enders. —

G. Koerner
for plff in error

And now comes the said def. in error
and saith that in the records & proceedings aforesaid
there is no error. VERO —

G. Turnbull
att'y for def. in error

Andrew Hayes offered as security. —

The Clerk of the Sup. Court of the 1st
 Grand Division will cause the writ
 of error to be issued in this case & ap-
 peal as a supersedeas upon the Plain-
 tiff in error filing bond with Andrew
 Meyer security in the penal sum of
 one hundred dollars conditional
 according to law -
 May 4th 1849.

Severin Turnbull
 Justice Sup. Court.

to Enos from H. C. C.

Christopher Corder

Putt in error

"

Philip Scott,

Sept.

Record from H. C. C.

Filed 4th Oct. 1849

H. L. Preston

Att.

8802

Clarke

2200 words - \$ 3.75.

antiquate alone 0.50

\$ 4.25.

49

State of Illinois }
Supreme Court } 3d Sct.

The People of the State of Illinois,
to the Sheriff of ~~St.~~ St. Clair County Greeting:

Because in the record & proceedings & also in
the rendition of the judgment in a suit which was
lately in the Circuit Court of St. Clair County before
the Judge thereof between Philipp Scott Plaintiff and
Christopher Endes Defendant of a plea of trespass on
the case manifest error hath intervened it is said to
the great injury of the said Christopher Endes as is by
his Complaint we are informed; a transcript of the
record & proceedings of which said judgment we have
caused to be brought into Our Supreme Court for
the State of Illinois, before the Justices thereof, to
correct the error on the same, if any there be, in
the form and manner according to law.

We therefore Command you to summon the
said Philipp Scott to be and appear before the
Justices of Our Supreme Court at the next term
thereof to be holden at the Court room in Mt.
Vernon on the second Monday in the month of
November next, to hear the record & proceedings
and errors assigned, if he shall see fit & to show
Cause, if any he can why the said judgment
shall not be reversed for the Causes aforesaid;
and further to do & receive what the said
Court shall adjudge in this behalf. And have
you then return this writ and make return thereof
in what manner you execute the same.

Witness the Honorable Samuel H. Treat Chief
Justice of Our Supreme Court and
the official Seal thereof at Court
room in Mt. Vernon 5th day Oct. 1849
Timothy A. Preston, Clerk

Supreme Court.

Christopher Enders

W
3

Philip Scott

To char. Term. 1849

Sum in error from

St Clair —

Executed by reading
the written summons to
Philip Scott this 24th day
of Oct 1849

W. H. Perkins Sheriff
A. C. Co.

At Henry & Reting, 63
16 miles from \$1.00.