

12313

No. _____

Supreme Court of Illinois

Lowe

vs.

Getty

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William W. Lorr

vs.

William J. Getty

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1857

~~123/3~~

123/3

X

William W. Low, vs. William J. Getty.

Plaus before the Hon - Circuit Court of
Marshall County in the State of Illinois
at a term thereof began and holden
at the Court house in the City of Laramie
in and for said County on the 14th
day of April A.D. 1856.

Present the Hon - Madison C Hollister
Judge of the 9th Judicial Circuit Court of the
State of Illinois.

Wm H L Wallace States Attorney and
Al Gardner Sheriff & G L Holt Clerk &
by Jos L C Boul his deputy -

Be it remembered that in the case
of Wm W. Low vs. Wm J. Getty pending in
said Court the following proceedings
were had upon the papers herein after
set out and Transcribed, -
So Wit

Declaration

In the State of Illinois

Marshall County — Circuit Court —

October Term in the year
one thousand eight hundred
and forty nine

Marshall County ss—

Wm W Low complains of
William Fatta in a plea of assumpsit for
that whereas heretofore to wit on the 2^d
day June 1849. at the County of Marshall
of and said the said plaintiff at the
special instance and request of the said
defendant bargained with the said defendant
to buy of him the said defendant. and the
said defendant there and there sold to the said
~~defendant~~ Plaintiff a large quantity of Corn
to wit— Three Hundred bushels more or less
at the rate and price of twenty five cents
per bushel, ~~the~~ to be delivered by the said
Plaintiff at the mouth of Sandy opposite
Henry. or at the ware house of William
Lyon in Laron if anything should
happen that said Low could not get a
boat to take it from opposite Henry
by the first day of August then next
and to be paid for by the said plaintiff
to the said defendant on the delivery

thereof as aforesaid; and in consideration thereof, and that that the said plaintiff at the like special instance and request of the said defendant had then and there undertaken and faithfully promised the said defendant to accept and receive the said corn and to pay him for the same at the rate or price aforesaid he the said ~~defendant~~ defendant undertook and then and there faithfully promised the said plaintiff to deliver the said corn to him the said Plaintiff as aforesaid, and the Plaintiff avers that it did so happen that he could not get a Boat to take it at the mouth of Sandy opposite Henry. And although the said time for the delivery of the said corn as aforesaid hath long since elapsed, and the said plaintiff hath always been ready and willing to accept and receive the said corn and to pay for the same at the rate or price aforesaid. So wit at the Warehouse of William Ferris in Lacon aforesaid So wit at the County of Marshall aforesaid And hath paid to the defendant towards the same at the time of sale as a part of the

price thereof the sum of ten dollars
yet the said defendant not regarding his
said promise and undertaking, did
not nor would within the time aforesaid
or at any other time afterwards
deliver said corn or any part thereof
for the said plaintiff at the warehouse of
William Penn. in Lacon aforesaid
or at the mouth of Sandy aforesaid or
elsewhere. but wholly neglected and
refused so to do whereby the said Plaintiff
has lost & been deprived of divers
great gains and profits which might and
otherwise would have arisen from the
delivery of said corn to him the said
plaintiff according to his said promise
and undertaking.

And whereas also. afterwards
to wit on the second day of June
AD 1849. to wit at the county of
Marshall aforesaid the said defendant
made his certain contract or agreement
in writing with the said Plaintiff for
the sale and delivery to him the said
Plaintiff by the said defendant of
certain other corn which said writing
is in the words and figures following
to wit. —

11
" I W^m J Getty has this day sold to W^m
" M Low (300) Three hundred bushels of
" Corn more or less for (25^c) Twenty five
" Cents per bushel. To be delivered at the
" mouth of Sandy opposite of Henry (or at
" William Ferns Warehouse in Laron,
" if any thing should happen that said
" Low could not get a boat to take it from
" opposite of Henry.) to be delivered by the first
" of August next in merchantable good order
" at the customary weights per bushel
" Received on this contract one Dollar and
" the balance of the money to be paid when
" all of the aforesaid W^m Corn is delivered—
" June 2^d 1849. W^m J Getty "

And in consideration thereof the said
defendant undertook and then and there faith-
fully promised the plaintiff to deliver the
said last mentioned corn to him as aforesaid
at the time & place aforesaid.

And although the said time for delivery of
the said last mentioned corn hath long since
elapsed and the said Plaintiff has
always been ready and willing to accept
and receive, and pay for the same at the
price stipulated in the agreement in
writing aforesaid to wit at the warehouse
of William Ferns in Laron aforesaid

at the county of Marshall aforesaid according to the term and stipulation of the agreement in writing aforesaid, and hath paid one dollar to the defendant part of the price of said corn. Yet the said defendant not regarding his said promise and undertaking contained in the agreement in writing aforesaid but continuing to deceive and defraud the said Plaintiff in this behalf. did not nor would within the time in said agreement in writing specified or at any time afterwards deliver the said last mentioned corn or any part thereof for the said Plaintiff at the warehouse of William Fern in Lacon aforesaid or elsewhere but wholly neglected and refused so to do.

And whereas also afterwards to wit on the first day of August AD 1849, at the county of Marshall, aforesaid, the said defendant was indebted to the said Plaintiff in the sum of sixty dollars for money before that time held & received by the defendant & for the use of the Plaintiff, and sixty dollars for money found to be due from the defendant to the plaintiff on an account then and there stated between them. And whereas the said defendant afterward on the day & year last aforesaid in consideration of the Premises then

& there promised to pay the said last mentioned sum of money to the plaintiff on request. But he hath disregarded his promises and hath not paid the same nor any part thereof. To the damage of the plaintiff sixty dollars & therefore he sues.

By Ira S. Fenn his Attorney

William W Low

2^d amended
Declaration.

vs

William J Getty } Assumpsit Attachment
} Stark Circuit Court
2nd Amended Declaration

4. And for that whereas also on the second day of June AD 1849 at the County of Marshall aforesaid the said defendant made their certain contract or agreement in writing by him subscribed in substance as follows to wit
- " I William J Getty has this day sold to Mr W Low (309) three hundred bushels of corn more or less for (25) twenty five cents per bushel to be delivered at the mouth of Sandy opposite of Henry (or at William Fenn's warehouse in Lacon if any thing should happen that said

Low could not get about to take it from opposite of Henry) to be delivered by the first of August next in merchantable good order at Customary weights per bushel Received ~~on~~ ~~on the within~~ on this Contract one dollar and the balance of the money to be paid when all the corn is delivered June 2nd 1849. —

William J. Getta.

And the said Plaintiff avers that the said Wm W. Low in the said contract mentioned is the plaintiff in this suit and the said William J. Getta who signed the said contract is the defendant in this suit. —

In consideration of the premises the the said defendant then and there undertook and promised the Plaintiff to deliver to the said Plaintiff the said corn in the said contract mentioned according to the terms and conditions of the said contract.

And the said Plaintiff further avers that although he was at all times ready able and willing to pay for said corn according to the terms and conditions of said Contract, yet the said defendant did not nor would deliver the same according to the

Terms and Conditions of said
contract either at the Mouth of Sandy
opposite Henry or at William Ferris
Ware-house or elsewhere, but the same
to do wholly refused and still refuses

By reason whereof the said Plaintiff
hath lost and been deprived of the said
sum of One dollar which was by him
advanced and paid to said defendant
on said Contract, and has lost and been
deprived of a large sum of money which
he might & would have made by the ad-
vance in price on said Corn if the
same had been delivered on said Con-
tract according to the Terms and Con-
ditions of said Contract and the promise
and agreement of the said defendant -
(To wit the sum of Sixty dollars -
To wit at the County of Marshall
aforesaid)

Ferris & Purper for
Plaintiff

Endorsed. Filed May 20 1850.

O Whitaker Clk

Wm M Low
vs
Wm J Getta } Starts Cir Ct May 9/50

Plea

And the said Deft as to the
third Count in the Plaintiffs Declaration
says he did not promise in manner &
form as the Plff in said count hath
alleged against him & of this he puts
himself on the Country

By his Atty Peters & Ramsey
Plff doth the like
Gemm & Purple for
Plff

Indorsed filed May 20 1850
O Whitaker Clk

Low vs Getta.

Starts C C. March 1. 1850.

- 1 And the said defendant comes & defends
vs When vs & says that he never promised
in manner & form as the Plff in his
declaration hath alleged against him
& of this he puts himself upon the
Country.

By his Atty
Plff doth the like } Peters & Ramsey -
Gemm & Purple for Plff }

Wm W Low }
vs } State Circuit Court No
William Petty } L. 1850.

1st And the said Deft says actio non because he says that after making the supposed contract in the declaration mentioned for a good & valid consideration it was verbally agreed by & between the said Plaintiff & this deft that the deft. need not & should not be required to deliver the said corn either at the mouth of Sandy, or at the warehouse of William Ferris in Lacon until he the plaintiff should furnish sacks for sucking the said corn. that the Plff would direct when ~~and~~ said corn should be delivered, and did not direct it to be delivered either at the mouth of Sandy or at William Ferris warehouse in Lacon - and afterwards the said deft sold & delivered the said corn to other persons to wit on the fifth day of August 1849, as he might lawfully do by reason of the failure & neglect of the said Plaintiff to perform & fulfil his contract & agreement aforesaid =

2^d And for further plea said defendant says actio non because he says that after the making of the supposed

Contract in the declaration mention-
ed ^{the said Plff} for a good & valid consideration agreed
with the Deft that he the deft need not &
should not be required to deliver the corn in
the supposed contract in the declaration
mentioned until the Plaintiff should
furnish and deliver to the deft sacks
for the sacking of said corn and direct
him the deft where to deliver said corn
who so sacked and that he would so
furnish said sacks & direct where to
deliver said corn on or before the first
day of August 1849; and the deft avers
that he was ever ready & willing to deliver
the said corn before the said first of August
when the said Plff should so furnish the
said sacks and direct where to deliver
the said corn. - & the deft further
avers that the said Plff did not before
the said first day of August nor at any
time furnish the said sacks or any
part thereof nor direct the deft where to
deliver the said corn & this the deft is
ready to verify wherefore he prays judgment
&c

3.

And for further plea deft says
action non because he says that
after making the said supposed a
greement in the Plaintiffs declaration

mentioned the Plaintiff for a good &
valia consideration agreed with this
deft that he Deft need not: & should
not deliver the said corn untill he the
Plaintiff should furnish sacks in
which to put said corn. and that he
the Plaintiff would furnish & deliver
said sacks to the Deft at Marshall County
& direct said deft where to deliver said
corn in season & long before the first of
August then next - as to enable Deft
to sack & deliver said corn to the Plff
before said first day of August & Deft
avows that he was ready & willing to deliver
said corn at the mouth of Sandy or
at William Ferris Warehouse at any
& at all times before the said first of
August - & would have so delivered
it if the Plff had furnished said sacks
according to his agreement aforesaid
But the Plaintiff neglected & refused to
deliver said sacks as aforesaid or at any
time before the said first day of August
or at any other time to the Plff or to di-
rect where said Deft should deliver said
corn & this the Deft is ready to verify wherefore
Deft prays judgt &c

By his Atty Peter & Ramsey

Demurrer to Wm W Low
 1. 2. 3 pleas vs
 filed Jan 20 William J Getty } In the Circuit Court of
 1854 Marshall County
 Assumpsit

And the said Plaintiff Comes and
 says that the defendants pleas numbered
 1. 2. & 3 filed January 20th 1854. and
 the matters & things therein contained
 are not sufficient in Law nor are either
 of them sufficient in Law to bar or
 preclude the said Plaintiff from main-
 taining his said action against the
 said defendant and that he is not
 bound in Law to answer the said
 pleas nor either of them & this he is
 ready to verify wherefore he prays judgment
 &c. —

Purple & Fern
 for Plff

Demurrer Wm W Low
 vs William J Getty } In the Circuit Court
 of Marshall County
 Assumpsit

And the said Plaintiff Comes and
 says that the said defendants plea
 by him secondly thirdly & fourthly

above pleaded And the matters and
things therein contained are not sufficient
in law to bar or preclude the said
Plaintiff from having & maintaining
his action aforesaid against the said
defendant & that he is not bound ~~to~~
in law to answer the same & this he is
ready to verify. Wherefore he prays judgment
&c —

Purple & Fleming for
Plff

Endorsed — Filed Oct-18-1854 G L Fort clerk

Replication W^m W Low — In Circuit Court of
vs J Marshall County
W^m J Letta Assumpsit

And the said Plaintiff for
replication to said defendants Pleas by
him ~~Left~~ firstly secondly & thirdly above
pleaded. filed January 20th 1856.

Says Preclude non because he says
that he did not make the said contracts
nor any of nor either of them in said
pleas or either of them mentioned, and of
this he puts himself upon the Country
&c

Purple & Tenn for

Endorsed Filed Feb 12 1856. The Plff
G L Fort clerk

The jury having heard the
evidence adduced adduced
by the parties and the argument
of counsel retire to consider of their
verdict and after due deliberation
return into Court and say:

We the jury find the issue for
and in favor of the defendant

Whereupon comes again the
said Plaintiff and moves
the court for a new trial herein
which which motion is overruled
by the court It is therefore
considered by the court that
the defendant have and recover
of the Plaintiff his costs and
charges by him about his de-
fence in this behalf expended &
ordered that execution issue
therefor

Be it remembered that on this the
22^d day of April A.D. 1856. it
being one of the days of the April Term
of the Circuit Court of Marshall
County State of Illinois for the year
A.D. 1856. That among other
things the following proceedings
were had therein to wit

William W Low

vs

William G. Getta

} Attachment

} Be it remembered

That on this day this

cause coming on to be heard and tried
The Plaintiff comes by Ferns & Stipp
his Attorneys and the defendant
~~also~~ also comes by Ramsey and Hem
ing and Louisa Pratt his Attorneys
and the issue being joined herein
a jury comes to try the same

To wit. Norman Hurd Thomas
Ellis Zera P. Beckwith Daniel Hollenback
John W. Hoist William D. Lowden John
Stewart William Garrison Joseph Ray
Samuel Gilson James Callen &
John W. Burton, twelve good and
lawful men chosen empanelled

Bill of Exceptions William M Low
vs
William Getty } In the Circuit Court
of Marshall County &
State of Illinois of the
April Term AD 1856.
In Assumpsit

Be it remembered that on the Trial of the
above named cause at the said Term
the plaintiff to maintain the issue on
his part gave in evidence to the jury
a written Contract in the words & figures
following to wit:—

I Wm J Getty has this day sold to
Wm M Low (300) three hundred Bushels
corn more or less — for (\$25) Twenty five cents
per bushel to be delivered at the mouth of
Sandy opposite of Henry (or at Wm Fenns
Ware house in Lacon if any thing should
happen that said Low could not get a Boat
to take it from opposite of Henry). to be de-
livered by the first of August Next
in merchantable good order at the cus-
tomary weights per bushel.

Received on this contract one dollar and
the balance of the money to be paid when all
of the is delivered
June 2^d 1849. Wm J Getty

(+) And the said plaintiff then and further gave evidence to the jury by testimony of William Fenn a witness produced and sworn on the part of said Plaintiff that on the 3^d day of August 1849, Corn was worth at Lacon at his warehouse 28 cents per bushel. ~~that for upwards there was very little difference between the price on the first & third of August 1849 the Plaintiff had made arrangements with the witness that on the expiration of said witness Fenn to receive Corn for him at his Warehouse in Lacon~~

That in July 1849, the Plaintiff had made arrangements with witness Fenn to receive Corn for him at his Warehouse in Lacon. And that the said witness had a warehouse in Lacon at that time, and that defendant delivered no Corn at his warehouse, and did not offer to do so.

On cross examination said witness further stated that there were ~~to be~~ sales of Corn at Lacon about the first day of August AD 1849 at from 25 to 26 cents per bushel & that for some days after the 3^d day of August Corn did not advance above 28 cents per bushel and that the Plaintiff had no money deposited with him to pay:

for corn. Said Person further testified that he did not know of any sales of corn until the 3^d of August. That he did not know ~~of any sales of corn~~ that it was worth more than 25 cts until the 3^d of August. And that he did not know of Low being in Lacon from about 4th July 1849 till sometime in August.

Said Plaintiff then and there further gave in evidence to the jury aforesaid by the Testimony of Abraham Fishburn, a witness called and sworn on the part of the said plaintiff that on the 3^d day of August 1849, Corn was worth 28 Cents per bushel at Lacon, that on the 9th August it was worth 33 Cents per bushel that in his opinion it was worth on the 1st as much as it was on the 3^d of said August. Said Witness further stated on cross examination that he could not say that corn was worth more than 25 Cents per bushel at Lacon on the 1st first of day of August 1849. That he thought there were sales from first to 3^d of August at 25 & to 26 cts. And thereupon the defendant to maintain the issue on his part gave in evidence to the jury aforesaid by the testimony of one

Peter Forbes a Witness produced and sworn within part of said defendant that witness also had a corn contract with Low that on the 4th of July 1849. the plaintiff overtook witness and Getty on the road going home from Lacon that plaintiff rode up and asked witness how about that corn - that witness replied -

" I told him it was a busy time Harvest was just coming in; that I would deliver my corn at any time before the first of August if he would furnish sacks. He asked how it would be with Freemans. I told him I did not know how it would be with Freemans. he must see them. - He then said he did not want any of our team there that he did not want to deliver at Ferns Warehouse because he did not want to pay storage; he said he would be back in two weeks if life lasted and would furnish sacks, for all of us. And then he wanted the corn delivered at the mouth of Sandy if he had not a boat to deliver it in on. he wanted it piled upon the Bank and he would have an oil cloth or tar paper to cover it with and a man to watch it till such times as he could get a boat. I consented to

such arrangement and when Low said he would be back ~~in~~ in two weeks Getty said that would suit him Low said he did not want the corn shelled till he brought the sacks, that it would keep better in the ear, said Witness Forbes further stated that Low had before that time told him that he had bought corn of Freemans & Getty said Forbes further said that he lived within half a mile of Getty and that if Low was in the neighbourhood at or after said 4th day of July, until some time in August he did know it & had not heard of it. The witness said he had sold corn to Low and was to deliver it by the first of August, on the day Low bought the witness corn he told the witness that he had that day purchased Freemans and Gettys corn.

The said Witness Forbes further states on cross examination that he had himself been engaged in troublesome lawsuits with the Plaintiff on a corn contract, that all the conversation of the Plaintiff was addressed to him the witness & that the defendant Getty never said a word except that if the plaintiff returned in two weeks it would suit him.

The said defendant Getty then and there further gave in evidence to said jury by the testimony of Henry Benson a witness produced and sworn by said defendant, that he was present at the conversation spoken of by the said Forbes that the Plaintiff there said to Forbes how about that corn that Forbes replied that it was a busy time with him that harvest was just coming on, but that if Plaintiff would furnish sacks he would deliver his corn at any time between then and the first day of August. That Plaintiff said he would be back in two weeks from the time of the conversation & would buy sacks for all the corn, when he would have the corn delivered at the mouth of Sandy, that when Plaintiff came up to where Forbes was Forbes was in our wagon and Getty in another, that he witness thinks that when the conversation commenced Getty got out of his wagon & came & got into the wagon of Forbes but does not know positively whether he did or not, that if Getty said any thing during said conversation he witness did not hear him; that he witness did not hear Getty say that if plaintiff got back in two weeks it would suit him

Which was all the testimony given upon the trial of said Cause. - X

The said Court thereupon then and there instructed the jury on the part of said Plaintiff as follows To-wit

Wm W Low

Plaintiffs

vs

Instructions

Getty

Although the jury may believe from the evidence that Low had a contract about the 1st day of July AD 1849, at which Getty was present, it was understood that Low would within two weeks from that time furnish Getty with sacks, and direct where the corn should be delivered, and that Low did not furnish said sacks nor give such directions within said two weeks or at any time afterwards. Yet Getty would still be bound by the written contract in evidence to deliver the corn either at Ferris Warehouse in Lacon or at the mouth of Sandy and if he has not done so or tendered the corn at one of said places the jury must find for the Plaintiff -

Given

2

Given

The Plaintiff in this case is not bound to prove that he was ready & willing to receive & pay for the corn either at Ferris Warehouse or at Sandy

3

Given

That although the jury should believe that after the making of the written contract the plaintiff said he would furnish sacks, this would not excuse the defendant from complying with his contract and delivering the corn according to the terms of the written contract

4

Given

That even should jury believe from the evidence that after the written contract was made there was a valid agreement between the parties that the Plaintiff should furnish sacks in which the defendant should put the corn, his failure to do so would not excuse the defendant from delivering the corn to the contract in writing introduced in evidence & the jury will find for the Plaintiff - and the rule of damages is the difference between the contract price and the price at the time & place of ~~delivering~~ delivery, and the amount paid by the plaintiff on the contract,

And thereupon the said defendant by his counsel asked the court to instruct the jury on the part of the defendant as follows To wit -

Depts { + Wm W Low
vs
William Getty Instructions for
Instructions Defendant
1st)

Given

If the jury believe from the evidence that there was an agreement made between Low and Getty after the making of the written agreement, that Getty should not be required to deliver the corn until the Plaintiff Low should furnish the said Getty sacks for sacking the corn. Such agreement was binding on Low and it would exonerate the defendant Getty from sacking and delivering the corn until Low should so furnish the sacks, if the jury further believe that the original contract was rescinded by the parties.

Given

2nd) If the jury believe from the evidence that after the making of the written contract the said Low and Getty made another agreement such as is set up in the second plea of the Defendant, and that the Plaintiff Low has not fulfilled that agreement on his part but has neglected so to do - and the said defendant has not violated said last mentioned agreement on his part the jury will find a verdict for the Defendant.

3^d
Given

An injury to one party & a benefit to the other party is a sufficient consideration for a contract or for an agreement to vary the written contract

4th

Given

If the jury believe from the evidence that an agreement was made between Low and Getty after the making of the written agreement that Getty need not deliver the corn mentioned in said contract till he had furnished him sacks for sacking the corn and that Low agreed to furnish said sacks by a fixed time and the defendant acted upon such subsequent contract and further that Low has failed to fulfil such subsequent agreement on his part without any violation there of on the part of the defendant the jury will find for the defendant that if such agreement was made at the request and for the benefit of Low, and to enable him to save expense of storing the corn or for any benefit to result to him that was a sufficient consideration for the agreement to make it binding on both parties. —

5

In order to make the verbal contract binding on the parties it is not necessary

Given that there be an assent in express terms but when a proposition for an agreement is made the assent thereto may be implied from the whole conversation between the parties and their acts and conduct at the time but there must be an assent to such subsequent contract.

Given C. That if the Plaintiff failed to fulfil the contract on his part and by such failure on his part prevented the Defendant Letty from performing the contract as finally agreed upon between the parties. The Plaintiff will not be entitled to recover the one Dollar paid by him to Letty.

To the giving of which instructions the said Plaintiff by his Counsel then and there objected whereupon the said Court then and there overruled the objections of said Plaintiff and gave each of the said instructions asked by the defendant to the jury to which decision of the said Court in overruling said objections of said Plaintiff and giving the said instructions on the part of the said Plaintiff by his Counsel then and there excepted. And then and there

prayed the said Court to sign
and seal this his bill of exceptions
which is done accordingly

M. E. Hollister *Seal* X

State of Illinois, } ss.
Marshall County, } J. G. L. Fort, Clerk of the
Circuit Court in and for said
County, do certify, that the foregoing Record is a
true transcript of the papers on file, and the pro-
ceedings had, in the case of William W. Low vs.
William J. Getty, in said Court.



Witness my hand, and the Seal
of said Court, at Lacon, this
9th day of June, A. D. 1856.

J. G. L. Fort, Clerk.

By Jas. St. C. Boal, Deputy.

Low vs

et al vs

Transcript & \$11.25

One now comes the said Plaintiff
in Error and says that in the record
and proceedings aforesaid and
in the rendition of the Judgment
aforesaid there is manifest Error
in this to wit

1st Said Court Error in rendering Judg-
ment in favor of the Defendant

2 In giving the Instructions asked by the
Said Defendant,

3 In Overruling Plaintiffs Motion for
a new trial.

For these and other Errors
the Plaintiff prays that the said
Judgment may be reversed

A. J. P. Pyle
Ctly for Plff in Error

85
William W. Howe
vs
William J. Getty

Transcript

Filed March 24. 57.
L. Leland
Clerk.

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,
TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF *Marshall* GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Marshall* County, before the Judge thereof, between *William W. Bow* —

plaintiff, and *William J. Getty* —

defendant it is said manifest error hath intervened, to the injury of the aforesaid

plaintiff — as we are informed by *his* complaint, and we being willing that error should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the *first Tuesday after the third Monday in April* next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *24th* day of *March* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*seven*

L. Leland
Clerk of the Supreme Court.

By J. B. Rice depy

vs
William J. Getty
Writ of Error

Filed March 24/57
S. Leland
VLR

The cases of McKee vs Rutter, 5 Blw 315 and
Low vs Forbes 14 Ill 423 cited by pliffs are
entirely different from these - In those cases
the court say "admitting that Low had agreed
to furnish the sacks and that the
only effect of the non-delivery of the sacks
was to excuse the seller from ^{sacking} ~~delivering~~
the wheat as he had agreed ^{not} ~~although~~ ^{delivering}
it would excuse him from ~~sacking~~ it."

But in these cases the question regards
the time of delivery, was it not compe-
tent for the parties to contract that the
corn should be delivered upon a given
day - was it not competent for them
to contract that the delivery should be
contingent upon the performance of cer-
tain acts by the pliff? - They did so
contract the pleas are true for the purpo-
ses of this case and the pleas aver that it
was agreed that depts need not and should
not deliver the corn until sacks were
furnished and they were directed where
to put the corn - They had power so to
contract and a rule that would make
depts liable for not delivering the corn
before the sacks were furnished and be-
fore directions were given where the
corn was to be delivered, would make
a new contract for the parties

I submit that the declarations in each of these cases are bad, because there is no averment that the plaintiff ever gave notice to the defts when to deliver the corn, or that he had a boat from Sandy - The place of delivery was to be delivery was to be determined by the act of pliff and defts should have had notice so as to know when to haul the corn, he avers in the 1st Count that he could not get a boat, but he does not say that deft had notice - The 2^d Count is clearly bad, it only avers a readiness to receive in Ferns warehouse, and the contract shows that the corn was to be ~~admitted~~ delivered at the mouth of Sandy unless Low should fail to get a boat which is not averred in that Count -

In the other case (Setty) the questions arise in a different way, the pleas are not questioned, but issues of fact are joined, now whether the pleas present a defense or not is a question not fairly arising on this record, the party had a right to join issue on the plea, this was the act of the party and if erroneous not the error of the Court, there was no motion for judgment "non obstante veredicto" -

The merits of the pleas are not then in question, and I submit that the Court after the party had formed the issue as he chose to have it, had no power to exclude evidence which manifestly tended to prove the issue joined, and no power to instruct the jury to find the issue for the plaintiff when the evidence proved the facts stated in the pleas upon which issue was joined.

But the pleas were good for the reasons above given. The Instructions given are clearly right, and the evidence sustains the plea: see the testimony of Peter Forbes.

The same objections apply to this declaration as to the others, and there is this further fact in this case. The place of delivery was uncertain, to be determined by act of Law, he gave no notice whether he could get a boat or not, and the only request to deliver the corn at either place is what Forbes testifies to in relation to Dow's saying he would have it delivered at Sandy & not at Ferris, as he could not pay storage, but this delivery was to be in sacks furnished by him as he said he had no boat & the grain was to be laid

on the ground & covered with a tar-
paulin, it could not have been deliv-
ered then.

But the plaintiff should have
failed in this case, because he absolutely
failed to prove that he was ready &
willing to receive the corn either at Fern
or at Sandy & to pay for the same. There
was no pretence that there was any one
at Sandy to receive the corn or pay for
it, and no averment in ^{decla}ration of
any such readiness at that place.

Fern swears that no money was left
with him to pay for the corn at Sacon
Low did not live there, and was not
there at all till long after. This aver-
ment of readiness & willingness to pay
is essential in the declaration, and
some proof must be offered to sustain
it.

Bleak asks

of Counsel for
Defts in Error

Mr W. Low

vs
Mr J. G. G. G.

Same

vs
Peter Forbes

- Same
vs

Thomas & Freeman

argument

Booby -

William M. Lowe }
William J. Getty } Supreme Court.

The Plaintiff contends that the
plea filed in this case presents no
defense to the suit.

The substance of all the Plea
is that after the written contract was
made, there was a subsequent one
made by parol that Defendant need
not deliver the corn unless the Plaintiff
furnished Sacks to put it in, and
that he did not furnish the Sacks.

The only consideration set up for
this alleged subsequent agreement is
the undertaking of the Defendant to deliver
the corn.

This is no consideration.
The Defendant was already bound to do
this by his written contract, so that
if there was any such subsequent
parol agreement, it was wholly void
for the want of a consideration.

It is precisely the same question
as is decided by this Court, in
the case of McKee v Ritter 5 Gil. 515
and Lowe against Forbes W.M. 423.
Even admitting that the subsequent
contract was made & that the
consideration is sufficient.

Had the same alleged Contract
by parol, been incorporated into the
written agreements under the decision
before referred to it would have afforded
no sufficient excuse for the non-delivery
of the Corn that the Sacks were not
furnished.

For the same Reason all
the instructions given at the defendants
request are wrong. They assume that
the non-delivery of the Sacks excuse
the defendants from the delivery of
the Corn.

But in fact the Evidence
fails wholly to prove any new or
Subsequent Contract either with
or without Consideration.

There was a casual
conversation between the parties about
Sacks and where the Corn should
be delivered, But there is not a
single word that it was intended or
designed to vary or alter the written
Contract of the parties.

A. M. Pople

The same questions being involved in
the Cases of Gould vs. Forbes and
Gould vs. Simmons, the Court will
please consider these few remarks
applicable to those Cases also.

A. M. Pople

⁸⁵
William M Low
²⁴
Mr. J^r Getty.

Some

²⁴
Peter Forber

Some

²⁴
Freeman & Freeman

Argument.

Purple—