No. 13386

Supreme Court of Illinois

E
Morey

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vs.

Bemis

71641

Jameson & Morse, Printers, 14 La Salle St., Chicago.

STATE OF ILLINOIS,

IN THE SUPREME COURT--THIRD GRAND DIVISION.

April Term, A. D. 1861.

ALBERT G. MOREY and
JAMES N. SMART,
APPELLANTS,
vs.
HENRY V. BEMIS,
APPELLEE.

ABSTRACT OF RECORD.

This was an action of assumpsit brought by Henry V. Bemis, in the Superior Court of Chicago, against the defendants, for the value of 1500 bushels of barley delivered in sacks.

The contract sued upon is as follows:

"Mr. H. V. Bemis, Bo't of Morey & Smart,

12 1500 bush. barley, delivered free in sacks, (same as 1500 bush. previously delivered,) at $1.30, - - - - - - - $1950

Rec'd pay't by 1772 2/32 bu. barley malt, free of storage and ins., in Ford's Warehouse for twenty days, and delivery free in sacks, at $1.10, - - - - - - - - - - - - - $1950

Chicago, Feb'y 19, 1859.

MOREY & SMART."

2 to 5 The declaration contains three special counts upon the contract, and also the common counts. The first count states, that whereas the defendants, in consideration that the plaintiff would purchase of the defendants 1500 bushels of *Canada* barley, at $1.30 per bushel, the barley to be delivered free in sacks, bargained and sold to the plaintiff 1500 bushels of *Canada* barley, at $1.30 per bushel, and agreed to deliver the same; that plaintiff paid for the barley, but defendants would not deliver it.

5 to 8 The second count is like the first, with the exception that it alleges the delivery of 553 bushels of barley to plaintiff, and its acceptance by him as 553 bushels of Canada barley, and the non-delivery of 947 bushels.

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Upon the trial, the plaintiff introduced as a witness

31 TRUMAN DOWNER, who testified that the contract shown to witness is the same under which the barley was delivered. The plaintiff then offered to introduce the contract above set forth, to which the defendants objected, and the objection being overruled by the Court, the defendants excepted.

The contract was then read in the words and figures above set forth. Witness said: I am a brewer, and was in plaintiff's employ when the barley was delivered. Have been brewing 30 years. The ale manufactured by plaintiff is called Downer's Ale. I am familiar with barley of
32 different sorts. Bemis bought two lots of barley of defendants; don't know the exact time the first lot was bought. One lot of about 1000 bushels was delivered about a month before the fire. The fire occurred soon after the purchase of the second lot of barley, the one which is the subject matter of this litigation.

The first lot was bought by sample, and was Canada barley. It was $1.20 per bushel; a good article of common barley could have been bought at the time of the first contract for 60 cents per bushel. At the time of making the last contract, barley was worth 70 cents, and some sold as high as 90 cents. I was present when the last bargain was made.
33 The defendants delivered barley to the amount of 1500 bushels; it was delivered within two or three days. As soon as my attention was called to this second lot of barley, I thought it was not like the first; it might have been Canada barley; a part of it was old barley. Before I had time to examine this lot of Barley, the malster had put 200 or 300 bushels in steep. I told defendants that the barley would not malt. One of defendants went with me and examined the barley. I told him I could show him why the barley would not grow. They agreed to see about it. Smart asked me what I would charge for malting it; I first said I would
34 charge sixteen cents, and then a shilling; Bemis said that if they could not use it they did not want it; Smart said he would take it away, and he did send up 100 bushels afterwards, which was not Canada barley,

but pretty good. They took away some of the barley; such barley as he sent up on the last contract was worth 60 cents; I think Morey & Smart held all the Canada barley there was in town; a part of the first lot was not like the sample shown me; Morey & Smart took away two or three loads, 75 to 100 bushels at a load; I went to Morey & Smart four or five times to tell them about the barley; Smart said he was sorry I could not use it; old barley is a perishable article; it will not germinate; one half of this barley would not germinate; Canada barley is so
35 called because it comes from Canada; one year ago all the good barley came from Canada; none that was good was grown in this region; we usually get our best barley from Canada; it was not necessarily better than other barley; *Old* Canada barley would not malt; I think at the time of making this contract Morey & Smart held all the Canada barley in the Market; I was not present when all the barley was delivered; it went through my hands as maltster; the first lot was not all Canada barley; a part of it was; the barley was delivered about 200 bushels per week; I did not scrutinize the barley closely; part of the first lot was not so good as Canada barley, but we took it; I took a sample of the barley from Morey & Smart's office; the sample which I took was Canada barley; the last of the barley was not so good as the first; a part of
36 the last lot was Canada barley; I should call the last lot all old barley; we began and tumbled it into the steep; we had about 400 or 500 bushels being malted; I don't know how much of the barley was used before the fire broke out.

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JOHN CARDEN, for plaintiff: Have been a maltster for eight years; worked for Downer & Dickinson; I malted some barley for them; it
37 was the second lot we got from Morey & Smart; we had between 300 and 400 bushels malting; it was not as good as the first lot; I don't know whether it was Canada barley or not; it was mixed, good and bad; made poor malt; was present at an interview between Downer and defendants; Smart asked Downer what he would charge to malt the barley; Downer told him; Smart said the price was too high; Smart's team came to the brewery and took away some barley; Smart was there a few days before the brewery was burned; there was a good deal of barley in it; I do not know that the last lot, sold to Bemis by

Morey & Smart, was not Canada barley; it might have been; it was some good and some bad.

Mr. Dickinson, a witness for plaintiff, testified: I was in business with Downer; knew about the barley coming to the brewery; I am familiar with the quality of barley; think this barley was of an inferior quality; I went to Morey & Smart to see about barley; they said that if the barley was not such as they had agreed to send to the plaintiff, he need not have it.

39 I was not there at the time when Morey & Smart removed a part of the barley; I do not know about the removal, or how much they removed.

H. A. Littlefield, a witness for plaintiff, said: I delivered to Morey & Smart the malt mentioned in the contract between them and Bemis; it was delivered at Bemis' order, sometime in February last.

40 The defendants introduced as a witness, John Brown, who said: I am a teamster; I hauled for Morey & Smart about 1500 bushels of barley to the Star Brewery; that was in February or March last; I finished the hauling upon the 25th day of March; I took away from the brewery, at the order of Morey & Smart, 2 loads upon the 25th March, and two on the 26th March; there was over 100 bushels to the load; I took one load back to the brewery the 25th March, about 120 bushels; I went down and told the maltster that I wanted all the barley that he did not want to use; that Morey & Smart had sent me to get all the barley which they did not want; he pointed to the barley in the bags, and said I was to take that and no more; I took all the barley that was in bags; he said I was not to take any other barley; I delivered some barley to Bemis on the Ill. Cent. R. R., on the 13th March; there were 98 bags, and overran two bushels to a bag; I got the barley from Howe
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Cross-examination. I have been engaged in hauling grain and in buying grain a long time; it is in this way I know the quality of barley; pale barley is the best barley.

ABEL BOND, a witness for the defendant, said: I went with Brown on the 25th and 26th of March to bring the barley back. We took four or five loads on the 25th and 26th. There was no more to be taken away, and the last time I came back without a load, there being none for me. I
43 came away about noon; two loads were taken away on the 25th and two on the 26th. These were all that the maltster allowed us to take away.

JOHN LIMB was then examined by the defendants, who said: I am in the grain trade, and am employed to inspect grain. I am familiar with different grades of grain. I know of twelve hundred and twenty-one bushels the last of March delivered to Bemis by Morey & Smart. It was delivered at the Star Brewery. It was good barley. I called it prime barley. Such barley is sometimes called Canada barley and sometimes prime barley. One load was delivered from Howe & Eckley's warehouse. I only inspected the barley when it was in the storehouse. I know when it was delivered to Bemis.

TRUMAN DOWNER was introduced as rebutting witness by the plaintiff, who said: I do not know John Brown except by sight, and was
44 not there when he took the barley away. I never had any conversation with him in relation to taking away the barley.

This was all the testimony introduced, either on the part of the plaintiff or defendants.

The plaintiff then asked the Court to give the jury the following instructions:

If the jury find from the evidence, that the contract, as alleged in the declaration, is proven, and that the defendants failed to deliver the kind of barley called for by the contract, then the jury will find a verdict for the plaintiff, and the damages will be such a sum as the number of
45 bushels which the defendants failed to deliver, would amount to at $1.30 per bushel, subject to such set off as has been proved.

If the jury find from the evidence, that the defendants, after delivering a quantity of barley, and being told by the plaintiff that it was not the kind called for by the contract, commenced to take it away, the jury are instructed that such taking away is evidence tending to show that it was not the kind agreed to be delivered.

If the jury find from evidence, that the defendants upon being told by the plaintiff that the barley was poor, and not the kind called for by the contract, commenced taking it away, such taking away is evidence tending to prove an admission by the defendants that the barley was poor, and not the kind called for by the contract.

If the jury find from the evidence, that the defendants, after delivering barley to the plaintiff, offered to make a contract with the witness' dower to malt it for them, such an offer to contract is evidence tending to show that they expected to take the barley back again.

Which instructions were severally excepted to by defendants.

The jury retired, and afterwards came into court with a verdict of $600 in favor of plaintiff.

49 The defendants moved in arrest of judgment, for the reasons:

First. That the instrument offered in evidence by the plaintiff, upon which he seeks to recover, is altogether another and different instrument from that described by the plaintiff in the different counts of his declaration.

Second. That the plaintiff has shown to the Court that there was a written contract between the plaintiff and defendants for the delivery of the barley mentioned in the plaintiff's declaration, and yet no such contract as that declared on by the plaintiff has been presented to the Court.

Third. That the plaintiff has recovered upon another and different count from that mentioned in his declaration.

Fourth. That there was no contract upon which a verdict could be given.

The defendants also moved for a new trial, for the reasons, among others:

51 That the Court erred in admitting plaintiff's evidence.

The Court erred in giving plaintiff's instructions, and that the verdict was against law and evidence.

26 to 29 The Court overruled each of said motions, and entered judgment on the verdict, and the defendants excepted, and bring the cause to this Court by appeal.

The appellants assigned, in addition to the general cause, the following special causes for error:

First. The Court erred in admitting the evidence offered for the plaintiff in the Court below.

Second. The Court erred in overruling the motion in arrest of judgment.

Third. The Court erred in overruling the motion for new trial.

WILLIAMS, WOODBRIDGE & GRANT,
For Appellant.

203

Supreme Court of Illinois

Albert G. Money
et al
vs
Henry V. Bemis

Abstract

Filed May 1 1861
L. Leland
Clerk

COPY OF STIPULATION.

SUPREME COURT.

HENRY V. BEMIS, APPELLEE,
ADS.
ALBERT G. MOREY AND JAMES N. SMART, APPELLANTS

April Term, A. D. 1861.

It is hereby stipulated that the order dismissing the appeal in this cause, heretofore entered, be set aside, provided said cause can be submitted at this April Term for final disposition, upon printed or written points, with the same effect as though the same had been submitted upon the second call of the docket, but not otherwise.

May 6, 1861.

FARWELL & SMITH,
Att'ys for Appellee.

WILLIAMS, WOODBRIDGE & GRANT,
Att'ys for Appellants.

203

Supreme Court of Illinois

Henry V. Bemis

and

Albert G. Morey

Et al

Stipulation.

Filed May 7, 1861

L. Leland

Clerk

Supreme Court

Henry O. Bemis
Appellee
ads
Albert G. Morey &
James N. Smart
Appellant

Points
for
Appellee

II

The question of variance between the declaration and the contract introduced in evidence was not raised on the Trial in the court below and can not be made for the first time in this court.

There was only a general objection to the reading of the Contract in evidence. This is not sufficient but the ground of objection should have been specified.

Peoria & Oquawka R. R Co vs Nield
16 Ills 269 — 15 John 210
17 Wend 71 — 2 Hill (N. Y.) 603
3 Hill (N. Y.) 237

These authorities are directly to the point and seem conclusive —

Then the Defendants below moved for a new Trial on the ground, "That the court erred in admitting the plaintiffs evidence", this is equally general, Besides if the general objection

did not reach the question of variance the Court did not err.

The Defendants below moved arrest of Judgment on the ground that the instrument offered in evidence was different from the one declared upon. But this was no ground for arresting the Judgment.

Judgment can only be arrested for some defect intrinsic appearing upon the face of the record itself.

Tidds Practice 824

Peckey vs Harrison 1 Ld. Raymond 232

1 Salkeld 77

Sutton vs Bishop, Burrows Reps 283-287.

The evidence offered certainly was no part of the record. nor was the copy of the contract filed with the declaration.

1 Scam 63.

II

But aside from this we insist that there was no substantial variance.

There is no attempt at description of the contract in the declaration but it is merely declared on according to its legal effect. The Defendants were charged in the declaration with an obligation to deliver Canada

barley by the writing they agreed to deliver the same as they had before delivered, and the proof was that they had before delivered Canada barley. This was sufficient,

III

Nor can we perceive any force to the objection that the verdict is against evidence. The defendants below were bound to deliver 1500 bushels of barley which had been paid for at $1.30 - amounting to $1950. They commenced delivering on the contract but of a quality inferior to the contract. The plaintiff refused to accept and directed them to take away what had been delivered. This they assented to and commenced removing the barley. When it was mostly removed the warehouse was burned and the balance if any burned with it. Surely until accepted the barley when burned was at the risk of the defendants. Besides, there was more than enough to amount to the verdict ($600) which was not burned. The only error committed by the jury consisted finding

too small a verdict —

Farwell & Smith
Attys for appellee

203
Supreme Court

H. V. Bemis
app

Money & Bremont

Point for
Appellee

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ABSTRACT OF RECORD.

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The contract sued upon is as follows:

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5 to 8 The second count is like the first, with the exception that it alleges the delivery of 553 bushels of barley to plaintiff, and its acceptance by him as 553 bushels of Canada barley, and the non-delivery of 947 bushels.

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Cross-examination. I have been engaged in hauling grain and in buying grain a long time; it is in this way I know the quality of barley; pale barley is the best barley.

Abel Bond, a witness for the defendant, said: I went with Brown on the 25th and 26th of March to bring the barley back. We took four or five loads on the 25th and 26th. There was no more to be taken away, and the last time I came back without a load, there being none for me. I
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John Limb was then examined by the defendants, who said: I am in the grain trade, and am employed to inspect grain. I am familiar with different grades of grain. I know of twelve hundred and twenty-one bushels the last of March delivered to Bemis by Morey & Smart. It was delivered at the Star Brewery. It was good barley. I called it prime barley. Such barley is sometimes called Canada barley and sometimes prime barley. One load was delivered from Howe & Eckley's warehouse. I only inspected the barley when it was in the storehouse. I know when it was delivered to Bemis.

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This was all the testimony introduced, either on the part of the plaintiff or defendants.

The plaintiff then asked the Court to give the jury the following instructions:

If the jury find from the evidence, that the contract, as alleged in the declaration, is proven, and that the defendants failed to deliver the kind of barley called for by the contract, then the jury will find a verdict for the plaintiff, and the damages will be such a sum as the number of
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WILLIAMS, WOODBRIDGE & GRANT,
For Appellant.

203

Supreme Court of Ill.

Albert G. Morey
et al
vs
Henry C. Bemis

Abstract

Fee May 1 1861
L Leland
Clk

No 3

13386