No. 14837

Supreme Court of Illinois

Grosvenor & Co.

vs.

Magill

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 96 - 54

J. W. Middleton & Co., Stationers, 196 Lake St.

Grosvenor & Co.

vs.

Magill

1864

IN THE

SUPREME COURT OF ILLINOIS,

Third Grand Division---April Term, A. D. 1865.

GROSVENOR & CO, PLAINTIFFS IN ERROR.

v.

MAGILL & LATHAM, DEFENDANTS IN ERROR.

ABSTRACT OF RECORD.

1 CAPTION OF RECORD.

3 PRÆCIPE FOR SUMMONS.

4 SUMMONS.

5 SHERIFF'S RETURN OF SERVICE.

7 DECLARATION, IN CASE.

1st. COUNT. The plaintiffs allege that the defendants, on the 9th day of July, 1864, in consideration that the plaintiffs would and did agree to sell and deliver to the defendants, at Chicago, at such time, during the first half of the month of August, 1864, as should

be optional with the plaintiffs, 2,500 barrels of No. 1 Michigan Fine Salt, new and in good barrels, to be delivered on board of some suitable vessel in the port of Chicago, undertook and
8 promised to accept the said 2,500 barrels of salt, and to pay the plaintiffs therefor at the rate of $3.40 per barrel; and the plaintiffs aver that, afterwards, on the 16th of August, 1864, they had the said 2,500 barrels of salt, of such a character as was stipulated for in the said agreement, in the said port of Chicago, ready to be delivered to the defendants, if they would receive it, and then and there offered to deliver the same to the defehdants, who then *and there refused to receive or pay for the same*; and the plaintiffs aver that they were put to great expense, to wit: $1,000, in shipping the said salt from the State of Michigan to the said port of Chicago, and that, between the 9th of July, 1864, and the 16th of August, 1864, the value and price of the said 2,500 barrels of salt declined, in the market of Chicago, to the extent of $1,000;
9 and so the plaintiffs say that they have sustained loss, and been injured, by reason of the premises, to the amount of $2,000, and therefore they sue.

2d Count. The plaintiffs, after alleging the agreement for the sale and purchase of 2,500 barrels of salt, as set forth in the first count, aver that, on the 15th of August, 1864, at Chicago, they
10 were ready and willing, and then and there offered, if the defendants would receive the same, to deliver to the defendants the said 2,500 barrels of salt, and the defendants would not then and there receive the same, but then and there consented, promised and agreed, to and with the plaintiffs, that if the plaintiffs would deliver the said salt on the next ensuing day, to wit: on the 16th of August, 1864, they would then accept and pay for the same; and the plaintiffs aver that, on the 16th of August, 1864, they were ready and willing, and then and there offered, if the defendants would accept the same, to deliver to them the said 2,500 barrels of salt, on board of a suitable vessel in the port of Chicago; but the defendants then and there refused to receive the same, or to pay therefor; by means whereof, and by reason of the premises, the

plaintiffs were greatly injured, and sustained heavy losses in disposing of the said salt, and otherwise; to the damage of the plaintiffs of $2,000, and therefore they sue.

11 PLEA of *non assumpsit.*

12 AFFIDAVIT OF MERITS.

13 STIPULATION for withdrawal of plea of *non assumpsit*, and filing of another.

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15–16 VERDICT and judgment for defendants.

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" CHICAGO, July 9th, 1864.

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" barrels Mich. No. 1 fine salt, at three dollars and forty cents
" ($3.40) per bbl. afloat, sellers' option, first half of August next;
" salt to be new, and in good barrels, payable on delivery at Chi-
" cago.

" MAGILL & LATHAM."

EDWIN VOSE, a witness for the plaintiffs, then testified,

that he was, in July, 1864, and still was, a clerk and book-keeper for the plaintiffs, who were heavily engaged in the salt and commission business in Chicago; that the 2,500 barrels of salt, with which the plaintiffs expected to fill their contract with the defendants, was shipped on a vessel called the " Cascade," which, having had an unusually long voyage, had not arrived at Chicago up to the 15th of August, 1864, on which day, at the request of the plaintiffs, the witness went to the office of the defendants to see them

about it, taking the bill of lading along with him, and saw there the defendant Latham, to whom he showed the bill of lading, and asked him what was to be done in case the "Cascade" should
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The witness further testified, that the plaintiffs could easily have made arrangements to have obtained from other salt dealers in Chicago, on the 15th of August, 2,500 bbls. of such salt as was called for by their contract with the defendants, but no such arrangement was completed, in consequence of the promise of the defendants, which witness reported to the plaintiffs, that they would receive the salt on the next day; that, on the next day, the 16th of August, 1864, the captain of the "Cascade" reported to the plaintiffs, at their office, the arrival of his vessel, with her cargo of salt, in the port of Chicago, at about a quarter past twelve at noon, and witness, within half an hour afterwards, applied at the
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The witness further stated that the market value of No. 1 Michigan fine salt, in the Chicago market, on the 16th day of August, 1864, was $3.25 per bbl., afloat.

Being *Cross-Examined*, the witness testified,

that the plaintiffs still owned the cargo of salt in question, having shipped it to another port; that they did not offer it for sale in

the Chicago market on the 16th of August, or at any time before they shipped it away; that, on the 16th of August, and for some days afterwards, the price of such salt, by the car load, in the Chicago market, was about $3.70 per bbl.; that the expense of making sale by the car load would be, dockage, 8 cents, broker's fee, 5 cents, and switching 2½ cents; that the price of salt by the
21 car-load remained the same until about the 1st of Oct., and perhaps later; that they sold a large quantity by the car-load, and in small lots, that season, on the North Western Railroad—perhaps as much as 25,000 bbls.; that the plaintiffs, about the 16th of August, 1864, made no sales of salt by the cargo, except time sales of salt which was to arrive thereafter; and that the opinion of witness, as to the value of salt in the Chicago market on that day, was based upon his knowledge of offers which were received by the plaintiffs, about that time, for salt, from various parties.

Being *Re-Examined*, the witness testified,

that, when salt is sold by the car load, it is considered, among the large dealers in the article, as a retail business, and a higher price is always demanded for it; and that, moreover, the seller can afford to sell salt considerably cheaper, by the cargo, afloat, than by the car load, because, in the latter case, he must, previously to the sale, have incurred heavy expenses in unloading cargo, dock dues, drayage, storage, etc., and much time may also elapse before he can, in that small way, dispose of a large lot of salt; and
22 witness believed he had as good an opportunity of knowing, as any other person, what was the market value of salt, in Chicago, on the 16th of August, 1864.

There was no other testimony in the cause.

The counsel for the defendants moved the court, as for a non-suit, to instruct the jury to find for the defendants, on the ground that the plaintiffs had not made a case, in that they had shown no breach of contract on the part of the defendants.

The counsel for the plaintiffs asked the court to instruct the jury as follows:

1st. That the law knows no division of a day; and that, where a party contracts to deliver goods by the first half of August, and offers to deliver them at a reasonable hour on the 16th day of August, such offer is in time, and is a sufficient compliance with the contract.

2nd. That if the jury believe, from the evidence, that the defendants, on the 15th day of August, 1864, expressed to the plaintiffs their willingness to receive the 2,500 barrels of salt in question on the following day, and thereby induced the plaintiffs to forego the execution of a purpose, previously formed by them, to de-
23 liver the salt on that day—the 15th—then the law is, that, independently of the terms of the original contract between the parties, the plaintiffs were not in default if they offered to deliver the salt to the defendants at any reasonable hour on the 16th of August, 1864.

The court refused to give those instructions, and the counsel for the plaintiffs then and there excepted.

The jury having found a verdict for the defendants, the counsel for the plaintiffs moved the court to set aside the verdict and grant a new trial, upon the ground that the court had erred in refusing to instruct the jury as requested on the part of the plaintiffs; but the said motion was overruled by the court, and the counsel for the plaintiffs then and there excepted, and tendered their bill of exceptions, which was signed and sealed by the court, and ordered
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versus

MAGILL & LATHAM, DEFENDANTS IN ERROR.

ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

The contract, for the alleged breach of which this action was brought, was couched in the following terms (Abs., p. 3):

"CHICAGO, July 9th, 1864.

"Bought of Grosvenor & Co., 2500 barrels Michigan "No. 1 fine salt, at $3.40 per barrel, afloat, sellers' option, "first half of August next; salt to be new, and in good "barrels, payable on delivery at Chicago.

"MAGILL & LATHAM."

The first count in the declaration, which is in "case," sets forth the contract, and then proceeds to allege that the plaintiffs, on the 16th day of August, 1864, offered to

Filed Sept. 1865
L. Leland Clk

deliver the salt to the defendants, who refused to receive it, and that the plaintiffs were damnified thereby. The defendants pleaded " not guilty."

Upon the trial, below, the plaintiffs proved the contract, as alleged; the offer to deliver the salt on the 16th of August, at about a quarter before one o'clock, P. M.; the refusal of the defendants to receive it; and that the market value of salt, on that day, in Chicago, was $3.25 per barrel, afloat (Abs., pp. 3, 4).

Thereupon the counsel for the plaintiffs asked the court to instruct the jury (Abs., p. 6)—

" That the law knows no division of a day; and that, " where a party contracts to deliver goods by the first half " of August, and offers to deliver them at a reasonable " hour on the 16th day of August, such offer is in time, " and is a sufficient compliance with the contract."

The court refused so to instruct the jury, and that refusal we now assign as error.

We asked that instruction because the legal proposition enunciated in it was denied by the opposing counsel; but we submit that they were precluded from raising the question presented by the instruction. Having taken issue upon the allegation of fact, that the plaintiffs offered to deliver the salt on the 16th day of August, they thereby conceded that if, in point of fact, the plaintiffs offered to deliver the salt at any reasonable hour on that day, it would be sufficient, in law, to entitle them to a recovery.

In order legitimately to raise the question, whether an offer to deliver the salt, after the hour of noon, was in time, the defendants, instead of filing the plea of not guilty, should either have demurred to the first count of the declaration, upon the ground that the plaintiffs did not allege an offer to deliver the salt before the hour of noon on the 16th of August, or they should have filed a special

plea, averring that the plaintiffs did not, in point of fact, offer to deliver the salt until after the hour of noon on that day. But they did neither of these things, and, consequently, the plaintiffs, having established in their favor the issue of fact arising upon the first count, were entitled to a verdict on that count.

It may be said, however, that the legal question to which we have adverted, was raised, not by the defendants, but by the plaintiffs, in the court below. The bill of exceptions does not show, and, in the nature of things, it could not show, how that fact was; but this court, we presume, will take it for granted that the trial was conducted in the ordinary way; that the counsel for the respective parties differed as to the law of the case; that the counsel for the plaintiffs, having been first called on for that purpose, first presented their instruction, which the court refused to give, and that the counsel for the defendants, regarding that refusal as equivalent to an instruction embodying the converse of the proposition contained in the instruction refused, deemed it unnecessary to ask a specific instruction on the same point; and this court, therefore, should regard the present case as though the court below, at the instance of the defendants, had expressly instructed the jury that the plaintiffs, under their contract, were bound to deliver the salt before the hour of noon on the 16th day of August.

But, conceding, for the argument, that the defendants, when the trial took place in the court below, were not precluded from raising the question, whether an offer, on the part of the plaintiffs, to deliver the salt after the hour of noon, on the 16th day of August, 1864, was in time, we have next to ascertain what is the rule of law upon that question.

The language of the contract—"sellers' option, first half "of August next"—is clear and unambiguous. It will

scarcely be controverted, we suppose, that the meaning of this stipulation was, that the plaintiffs, at such time as should be optional with them, during any portion of the first half of August, 1864, should be at liberty to deliver the salt contracted for.

How are we to determine and fix the point of division between the first half and the last half of the month of August?

The plaintiffs contend, that, inasmuch as, when the 16th of August commenced, the first half of the month was still unexpired, and inasmuch as the law knows no divisions of a day, they had a right, under the legal construction of their contract, to deliver the salt at any reasonable hour on that day.

The defendants contend, on the other hand, that the words "first half of August" are to receive an exact and literal interpretation, under which, inasmuch as August contains thirty-one days, the 16th day is to be divided into two equal portions, so that the first half of the month shall expire, while the other half commences, exactly at twelve o'clock, M., on that day.

The court below, in refusing the first instruction asked for on the part of the plaintiffs (Abst. p. 6), recognized the rule contended for by the defendants, and repudiated the other. In this, as we conceive, the court erred.

The general rule is, as we apprehend, that the law regards days as units of time, refusing to divide them into fractions; and we are aware of no instance in which, prior to the decision of the court below, in the present case, that rule was ever departed from by any English or American tribunal, except for the purpose of promoting the ends of justice. There is an unbroken current of decisions, running through all the reports, from the earliest times,

recognizing this rule as existing and established; and, if authority and immemorial usage can settle any legal proposition, it would seem that the rule in question should no longer be regarded as open to debate.

It will be found, upon an examination of the reported cases, that the admitted exceptions to this general rule are all based upon one uniform reason, viz: that the law will not allow a fiction, which was introduced for purposes of mere convenience, to be made the instrument of injustice. Consequently, when it becomes material to inquire at what specific hour in the day a particular act was performed, the courts permit the inquiry to be made.

For example, where the rights of parties depend upon a question of priority, as between different acts performed on the same day, the precise time of the performance of each several act may be proved, but not otherwise. Thus, a *bona fide* purchaser of land, whose conveyance was executed on the same day on which a judgment was rendered against his vendor, but at an earlier hour, may show the very minute when he obtained his deed, and when the judgment was rendered; because, if he were denied this privilege, he might be deprived of his just rights. But the holder of a thirty day promissory note would not be permitted to prove that it was executed before the hour of noon, on the day of its date, so as to allow him to bring an action upon it on the afternoon of the last day of grace; because the ends of justice, in the case supposed, do not require that the day should be divided.

We believe we may safely challenge the citation of any reported case in which it has ever been held that a party to a contract, who was entitled to perform his contract on a particular day, had not the right, in the absence of any stipulation looking to a specific hour for performance, to

perform his contract at any reasonable hour during that day.

From the multitudinous authorities bearing upon the rule under discussion, we cite only the following, which, as we conceive, fully sustain the doctrine we have laid down.

3 Chitty's Prac., 111.
1 Parsons on Contr., 445.
Anonymous, 1 Strange, 503.
Rex v. *Deleval*, 3 Burrough, 1434.
Field v. *Jones*, 9 East., 154.
Thomas v. *Desanges*, 2 Barn. & Ald., 586.
Regina v. *Edwards*, 24 Eng. Law and Eq. Rep., 440.
Edwards v. *Regina*, 25 Eng. Law and Eq. Rep., 519.
Leftley v. *Mills*, 4 Term Rep., 173.
Startup v. *McDonald*, 46 Eng. C. L. Rep., 583.
Lang v. *Phillips*, 27 Ala., 311.
In re Welman, 20 Vt., 653.
Johnson v. *Pennington*, 3 Green (N. J.), 188.
Metts v. *Bright*, 4 Dev. & Bat., 173.
Portland Bank v. *Marine Bank*, 11 Mass., 204.
Jones v. *Planters' Bank*, 5 Humph., 619.
Wiggle v. *Thomason*, 11 Smedes & M., 452.
Osborn v. *Moncure*, 3 Wendell, 170.
Small v. *McChesney*, 3 Cowen, 19.
Clute v. *Clute*, 3 Denio, 263.
Blydenburgh v. *Cotheal*, 4 Comstock, 418.
Walter v. *Kirk*, 14 Ill., 57.
Richardson v. *Ford*, *Ib.*, 333.

Should it be contended, on the other side, that, under the authority of the case reported in 14 Ill., 333, the first instruction asked for by us was erroneous, because it employed the word "*by*," instead of "*during* the first half of "August," our answer would be, that we propose to discuss this case upon its merits, and that we have no taste for merely verbal hypercriticisms. In the hurry of the moment, our instruction may have been a little loosely drawn, but it was intended, and understood, to cover the question arising under the contract in this case, and it was argued, and decided, in the court below, as though the words "by" and "during" were synonymous. Taking the declaration, the contract, the evidence, and the instruction, together into consideration, the meaning of the instruction is unmistakable, and we are slow to believe, in advance, that this court will decide the cause upon a technical afterthought, in palpable evasion of the real question which was manifestly presented to, and decided by, the court below.

The sum involved in the present controversy is trifling in amount, but we would state, for ourselves and our clients, that we are seeking rather the recognition of a legal rule than the recovery of damages. We desire to have it determined, by the authoritative decision of this court in the premises, whether counsel, in Illinois, when they are called upon to advise their clients, may safely follow the beaten path of precedent, or whether all the venerable landmarks of the law are henceforth to be disregarded, so that no lawyer, in advance of an actual adjudication, in the given case, by the court of last resort, can form an opinion touching the rights or obligations of those who ask his professional assistance.

II.

We do not propose to enter upon any extended discussion of the question arising under our second instruction (Abst.; p. 6), which was refused by the court below.

The proof was (Abst., pp. 3, 4), that the defendants told the clerk of the plaintiffs, on the 15th of August, 1864, that they were bound to receive, and would receive, the salt in question on the following day, and that the plaintiffs, in consequence of this promise, omitted to deliver the salt on the 15th, as they might otherwise have done, and that they offered to deliver it on the 16th, when the defendants refused to receive it.

The second instruction was drawn in reference to this state of facts, and was designed to present the question whether, in view of the promise made by the defendants, to receive the salt on the 16th, they were not bound to receive it on that day, even though, according to the terms of the original contract, they might have required the plaintiffs to deliver it on the 15th.

We maintain that this promise was a waiver, on the part of the defendants, of their right to insist that the salt should be delivered before the middle of the 16th day of August, —supposing that they previously possessed such a right. It was a representation of fact which they were bound, in good faith, to make good. Nay, more, it was an agreement which was obligatory upon them. The plaintiffs acted upon it, and were induced by it to change their previously contemplated course of action in reference to the delivery of the salt on the 15th, and this, we conceive, was a sufficient consideration to support the agreement.

It may, perhaps, be said that the second count of the declaration alleges that the plaintiffs "offered" to deliver the salt on the 15th of August, and that the proof does

not sustain the allegation. But, was proof of such an offer indispensable, under the circumstances disclosed by the record? In actions against parties to commercial paper, nothing is more common than for the plaintiff to introduce evidence, under an allegation of notice, to show that notice has been waived, or that the defendant was never entitled to notice. So here, when we show that the defendants, on the 15th of August, promised to receive the salt on the following day, we are thereby relieved from the necessity of proving an offer to deliver it on the 15th, because the promise operated as a waiver of the offer.

Moreover, in an action on the case, the plaintiff may recover, upon proof of facts, consistent with his declaration, constituting a legal ground of action, although he may have failed to establish every averment contained in his declaration. The unproven allegations, in that event, will be regarded as surplusage; and, therefore, if it was not essential to the plaintiffs' right of action that they should have made an offer to deliver the salt on the 15th of August, it was not requisite that such an offer should be proved.

III.

It was urged, below, and it may be urged here, that, inasmuch as it appeared, from the evidence, that the plaintiffs, up to the time of the trial, were still the owners of the salt in question, and inasmuch as it also appeared that, for some days after the 16th of August, 1864, the price of salt, in the Chicago market, was $3.70 per barrel (the contract price having been $3.40 per barrel), it followed thence that the plaintiffs had sustained no injury by the defendants' breach of contract, and were not, therefore, entitled to recover.

The fact that the plaintiffs, when they commenced their action, and even up to the time of the trial, had not sold the salt, we regard as being wholly unimportant. We understand the rule of law to be, that the seller, when the buyer refuses to receive the goods contracted for, may, at his election, either proceed to sell the goods, and thereupon recover from the buyer the difference between the contract price and the price at which the goods were actually sold, or, if he prefer to do so, he may retain the goods at their market value, and hold the buyer responsible for the difference between that value and the contract price. (Sedgwick on the Measure of Damages, 280–286, and cases there cited.) In the case at bar the contract price of the salt was $3.40 per barrel. The market value, at the time fixed by the contract for delivery was $3.25, though it may be said, on the other side, that it was $3.70.

The court will bear in mind the circumstance that the contract in question stipulated for the delivery of a *cargo* of salt, which was to have been received by the defendants "afloat"—on shipboard. The testimony in the cause, as to the value of salt, is all comprised in the statements of a single witness, who swears that the market value of salt, "afloat," was, on the 16th of August, $3.25 per barrel. Upon his cross-examination, he states that salt, "by the "car-load," was worth $3.70 per barrel. Being re-examined, he proceeded to account for the difference between the price of salt by the cargo, afloat, and by the car-load.

We submit, that, in an action for the breach of a contract for the purchase of a cargo of salt, the measure of damages is to be ascertained by inquiring what was the market value of salt, by the cargo, at the time fixed for its delivery. If the defendants, in such a case, for the purpose of reducing the amount of damages, can properly be allowed to enter upon an inquiry as to the value of salt by

the car-load, we are unable to see why they should not be permitted to pursue the inquiry indefinitely, and to prove what salt was worth by the single barrel, or even by the quart or pound. We insist that a wholesale seller cannot be required to enter the market in the character of a petty huckster, and to peddle off, at retail, for the benefit of a wholesale buyer who has violated his contract of purchase, the goods which the latter had agreed to receive in gross.

We ask that the judgment of the court below be reversed.

WALLER, STEARNS & COPELAND,

for Plaintiffs in Error.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of December in the year of our Lord One Thousand Eight Hundred and Sixty Four and of the Independence of the United States of America the Eighty Ninth

Present, The Honorable John M. Nelson Chief Justice of the Superior Court of Chicago.

Van H. Higgins
Joseph E. Gary
} Judges.

Charles H. Reed Prosecuting Attorney.

John A. Nelson Sheriff of Cook County.

Attest, Thomas Hoxie Clerk.

Be it remembered, that heretofore to wit: on the 18th day of August, in the year of our Lord, One thousand Eight Hundred and Sixty four Elisha H. Grosvenor and George H. Rogers, by Waller, Stearns & Copeland their Attorneys, filed in the Office of the Clerk of the Superior Court of Chicago their certain Praecipe for Summons, which is in the words and figures as follows, to wit:

The State of Illinois
County of Cook
City of Chicago
} In the Superior Court. To the September term A.D. 1864

Elisha H. Grosvenor and George H. Rogers, partners under the firm name and style of Grosvenor & Co.

v.

Charles J. Magill, and Andrew J. Sathan, partners under the firm, name and style of Magill & Sathan

} Action of trespass on the case. Damages $2,000.

The Clerk of said Court will issue a summons in this Cause, and direct the same to the Sheriff of said County.

Chicago, August 18th 1864.

Waller, Stearns & Copeland
Attorneys for Plaintiffs

And thereupon on the said Eighteenth day of August in the year aforesaid there issued out of the Office of the Clerk and under the seal of said Court the people's writ of Summons, which said writ with the Sheriff's return thereon is in words and figures to wit;

3

State of Illinois } The People of the
Cook County } ss. State of Illinois.
To the Sheriff of said
County, Greeting:

We command you that you summon Charles J. Magie and Andrew J. Latham Partners under the firm, name and style of Magie and Latham, if they shall be found in your County, personally to be and appear before the Superior Court of Chicago, of said Cook County, on the first day of the term thereof, to be holden at the Court House in Chicago, in said Cook County, on the first Monday of September next to answer unto Elisha H. Gammon, and George A. Root Partners under the firm, name and style of Gammon & Co. in a plea of trespass on the case to the damage of the said Plaintiffs as it is said, in the sum of Two Thousand Dollars. And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

Witness, Thomas B. Carter, Clerk of our said Court, and the seal thereof, at Chicago aforesaid this 18th day of August, A.D. 1861

Seal

Thomas B. Carter Clerk.

2-50 Sheets
Canada

Served this writ by reading to the within
named Charles J. Mayer the 18th day of
August 1864 and by reading to the within
named Andrew J. Latham the 20th day
of August 1864.

David S. Hammond Sheriff
By. John P. Wade. Deputy.

And afterwards to Wit: on the nineteenth
day of August, in the year aforesaid
there was filed in the Office of the
Clerk aforesaid a certain declaration in
said Cause to Wit:

The State of Illinois } In the Superior Court
County of Cook } to the September Term
City of Chicago } A.D. 1864.

Elisha H. Grosvenor, and George H. Rozet, Partners under the Firm Name and Style of Grosvenor & Co. Plaintiffs, by Waller, Stearns & Copeland their Attorneys, complain of Charles J. Magill and Andrew J. Saltonstall, Partners under the firm Name and Style of Magill & Saltonstall Defendants, who have been summoned &c, of a plea of trespass on the Case,

1st Count, For that the said Defendants, as Partners as aforesaid under the said firm name and Style of Magill & Saltonstall, heretofore to wit; on the 9th day of July, A.D. 1864 at Chicago, to wit; at the County of Cook aforesaid, in Consideration that the Plaintiffs as Partners as aforesaid under the said firm name and Style of Grosvenor & Co. would and did agree to sell and deliver to the said defendants, at Chicago to wit; at the County aforesaid during the first half of the month of August then and coming, at such time during the said first half of said month of August, as should be optional with the Plaintiffs, twenty five hundred barrels of Number one Michigan fine salt, new and in good barrels and to be delivered on board of some suitable vessel in the Port of Chicago, in the County aforesaid, undertook and promised to accept the

said twenty five hundred barrels of Salt of and from the Plaintiffs, and to pay the Plaintiffs therefor, upon the delivery thereof, at and after the rate of Three dollars and forty Cents for each and every one of the said twenty five hundred barrels; and the Plaintiffs aver that afterwards, to wit; on the 16th day of August A.D. 1864, at the County aforesaid, they had the said twenty five hundred barrels of Michigan Number one fine salt, new and in good barrels, on board of a suitable vessel in the said Port of Chicago, ready to be delivered to the said Defendants, if they would receive the same, and then and there offered to deliver the same to the said defendants who then and there refused to receive or to pay for the same, or any part thereof; and the Plaintiffs further in fact say that they were put to great expense, to wit; the sum of one thousand dollars, in the matter of shipping the said Salt, to the said Port of Chicago from the State of Michigan, and that, after the said 9th day of July, A.D. 1864 and before and on the said 16th day of August, A.D. 1864, the Market price and Value of the said twenty five hundred barrels of Salt, had declined to wit; at the County aforesaid to the extent of one thousand dollars, below what was its market price and value on the said 9th day of July, A.D. 1864

And so the Plaintiffs say that by reason of the premises, they have sustained loss, and been injured to the extent of two thousand dollars; to the damage of the Plaintiff of Two thousand Dollars, and therefore they sue &c

2nd Count. And for that whereas also heretofore to wit; on the 9th day of July A.D. 1864 at Chicago to wit; at the County aforesaid the said Defendants, in consideration that the Plaintiffs would and did agree to sell, and deliver to the said Defendants on board of some suitable Vessel in the port of Chicago in the County aforesaid at some time afterwards with the Plaintiffs, during the first half of the month of August then next ensuing, twenty five hundred barrels of merchantable Number one Fine salt to be new, and in good barrels undertook and then and there promised and agreed to and with the Plaintiff that they the said defendants would accept the said twenty five hundred barrels of salt, and pay the Plaintiff therefor, upon the delivery thereof, at and after the rate of Three dollars and forty cents, for each and every one of the said twenty five hundred barrels of salt; and the Plaintiffs avers, that afterwards to wit; on the 15th day of August A.D. 1864, at Chicago to wit; at the County aforesaid they were ready able and willing, and then and there

offered if the said defendants would accept the same, to deliver to the said defendants on board of a suitable Vessel in the said Port of Chicago the said twenty five hundred barrels of Michigan Number one fine Salt, new and in good barrels; but the said defendants would not then and there receive the said Salt, but contrary promised and agreed, to and with the said Plaintiffs, that, if the Plaintiffs would deliver the said Salt on the next ensuing day, to wit; on the 16th day of August, A.D. 1864, they the said defendants would then accept and pay for the same, and the Plaintiffs further aver, that afterward, to wit; at the County aforesaid they were ready, able and willing, and then and there offered, if the said defendants would accept the same, to deliver to the said defendants the said twenty five hundred barrels of Michigan number one fine salt, new and in good barrels, on board of a suitable Vessel in the said Port of Chicago, but the said defendants then and there wholly refused to receive the said twenty five hundred barrels of salt, or to pay the Plaintiffs therefor, or for any part thereof by means whereof, and by reason of the premises, the Plaintiffs were greatly injured, and sustained heavy losses, in disposing of said salt, and otherwise; to the advantage of the Plaintiffs, of Two Thousand Dollars, and therefore they sue &c

Waller, Stearns & Copeland
attys for Plffs

* On the 16th day of August AD 1864 at Chicago to Wit

And afterwards to Wit on the 9th day of September, in the year aforesaid, Charles J. Magill & Andrew J. Latham by T. Pulver their Attorney filed in said Cause their Certain Plea and affidavit of Merits, which are in the words and figures to Wit:

State of Illinois
Cook County
City of Chicago. } In Superior Court. To September Term A.D. 1864

Elisha H. Grosvenor
& George H. Rozet.
under the firm name
& Style of Grosvenor & Co.
vs
Charles J. Magill &
Andrew J. Latham
under the firm name
& Style of Magill & Latham

And the said Defendants by T. Pulver their Attorney, come and defend the wrong and injury when &c. and say that they did not undertake and promise in manner and form as the said Plaintiffs have in their declaration thereof complained against them, and of this they put themselves upon the Country &c.

T. Pulver
Defts Atty.

And the Plaintiffs doth the like.
Wolcott Stearns & Copeland, Pffs Atty

11 =

State of Illinois
Cook County
City of Chicago } ss. In Superior Court.
To September term A.D. 1864

Elisha W. Grosvenor
vs
George A. Roget.
under the firm name &
style of Grosvenor & Co.
vs
Charles J. Magill &
Andrew J. Latham
under the firm name and
style of Magill & Latham

Andrew J. Latham being first duly sworn according to law upon oath says that he is one of the defendants above named and is acquainted with the facts constituting the defence in the action, and that the said defendants have a good and substantial defence to said action upon the merits as he verily believes.

Sworn before me this
day of September 1864.

Andrew J. Latham

Sworn & Subscribed to this
5th day of September A.D. 1864
before me.

Orrin Smith Jr
Notary Public

Seal for Stamps Cancelled

And Afterwards to Wit on the tenth day of November in the Year aforesaid the said defendants filed herein a certain Stipulation and Plea in words and figures following to Wit:

State of Illinois
Cook County
City of Chicago } ss. In Superior Court. To the October term 1864

Elisha W. Sprague,
& George H. Rozet.
v.
Charles J. Magie &
Andrew J. Galloway.

It is hereby Stipulated, and agreed by & between the Plaintiffs, and Defendants in the above entitled Cause, that the said defendants shall withdraw their said Pleas now filed and the Plaintiffs withdraw their issue thereto and that the said defendants file another Plea to the declaration herein,
October 3. 1864.

Waller, Stearns & Gilman
Attys for Plffs.
Pulver & Gregory
Attys for Defts

State of Illinois
Cook County
City of Chicago } ss.

In Superior Court
To September Term
1864.

Elisha H. Gregsmes
& George H. Rogers
vs
Charles J. Magill &
Andrew J. Isham.

And the said defendants by Pulver, their attorney come and defend the wrong and injury when &c, and say that they are not guilty of the said supposed grievance, and to their charge, as the said plaintiffs have in their said declarations thereof complained against them, and of this they the said defendants put themselves upon the country &c.

C. Pulver
Defts atty.

And afterwards to Wit on the twenty third day of December, in the year aforesaid, said day being one of the days of the December term of said Court, the following among other proceedings was had entered to Wit:

4 R 16

Elisha M. Grennell
George H. Royal
vs
Charles J. Magell &
Andrew J. LaStaiou

Case

This cause being this day called for trial come the said Plaintiffs by Wallis, Stearns and Copeland their attorneys, and the said defendant by Pickett their attorney, also come, and issues being joined therein it is ordered that a jury come, Whereupon comes the jury of good and lawful men, to Wit: Horace Briggs Thomas Atkinson W. Denton John Crandle, Jacob Wolf, P. Covell, H. Simms, George E. Hinman L. Weise John Lichner, W. Snow, J. Denton, who being duly elected tried and sworn well and truly to try the issues joined herein as aforesaid after hearing the evidence adduced, arguments of Counsel and instructions of the Court retire to consider of their verdict, and afterward, return into Court, submit their verdict and say, We the jury find the defendants not guilty.

And thereupon the said Plaintiffs by their attorneys aforesaid submit to the Court their motion herein for a new trial in said cause, and Counsel being heard, as well in support of said motion as in opposition thereto, and due and careful deliberation being thereupon had by the Court, and being fully advised

15

of and concerning the premises, it is ordered and considered by the Court, that the said motion of the said Plaintiffs for a New trial in said cause be and the same is hereby overruled and that a new trial be and the same is hereby refused to the said Plaintiffs in said cause. To which ruling of the Court, and decision thereof, in overruling their said motion and refusing to grant a new trial in said cause, the said Plaintiffs by their attorneys aforesaid, then and there excepted, and thereupon enter their exceptions herein. Wherefore said defendants ought now to have judgement herein for their costs on the verdict of not guilty of the jury aforesaid.
Therefore it is considered that the said defendants do have and recover of and from the said Plaintiffs their costs and charges, by them in and about their defense in this behalf expended and have execution therefor.
And the said Plaintiffs having entered their exceptions herein, it is ordered by the Court and motion, that the said Plaintiffs have time until the first day of the next term of this Court in which to file their bill of exceptions herein.

And afterwards to Wit; on the Ninth day of January A.D. 1865. said Plaintiffs by their Attorneys filed in the Clerks Office of said Court, a certain Bill of Exceptions, which is in the words and figures following to Wit;

State of Illinois } In the Superior Court
County of Cook. } of Chicago

Elisha S. Gravenor and
George H. Rozet Partners
under the firm name and
Style of Gravenor & Co. Plaintiffs!

-vs-

Charles D. Magill and
Andrew J. Latham Partners
under the firm name and
Style of Magill & Latham Defendants

Be it remembered that the above entitled cause came on to be tried, before the Honorable Joseph E. Geary, one of the Judges of the said Court on the 23rd day of December, A.D. 1864. Being one of the days of the December term 1864. of said Court; and after the pleadings of said cause had been read, and the Counsel of the Parties had opened the case respectively to the jury, the Counsel for the Plaintiffs read to the jury as Evidence in the cause, a, paper in the words and figures following to Wit:

Chicago July 9th 1864.

"Bought of Goodnow & Co. Twenty five
"hundred 2500 Bbls Mich. #1 Fine Salt
"at three dollars and forty cents $3.40/100
"per bbl, afloat, selling option, first half
"of August next; Salt to be new and in
"good bbls. Payable on delivery at Chicago,
(Signed) "Magill & Latham."

Edwin Rose, a Witness on the part of the Plaintiffs, being then called and sworn testified: That he was in July last, and has been up to the present time, in the employment of the Plaintiffs as Book-keeper and Clerk; That the Plaintiffs are engaged in a general Salt and Commission Business in the City of Chicago, and that their transactions in Salt are very heavy; and that the Salt with which the Plaintiffs expected to fill their Contract with the defendants for 2500 bbls Salt to be delivered during the first half of August 1864 had been shipped on a Vessel Called the "Cascade" which having made an unusually long voyage had not arrived at the City of Chicago up to the 15th day of August 1864; That, on that day, at the request of the Plaintiffs, Witness went to the Office of Defendants to see them about it, and took the bill of Lading for the Salt along with him. Witness saw there the Defendant Latham to whom he showed the Bill of lading, and asked him what was to be done in case the "Cascade" should not get

in that day. to which question Woodbridge replied that he knew the "Cascade" would be in, because he had heard, through one of their vessels, that had just come into port. that she – the "Cascade" was just outside, and that moreover. the time for the delivery of the salt had not yet expired and would not expire until the next day. and that they – the defendants were bound to receive, and would receive the salt on the next day.–

The Witness further testified that the Plaintiffs could easily have made arrangements to have obtained from other salt dealers in Chicago on the 15th of August. 2500 bbls. of such salt as was called for by their Contract with the defendants, so as to have delivered it on board of a suitable vessel in the port of Chicago on that day. but no such arrangements was completed in consequence of the promise of the defendants. reported to Plaintiffs by Witness that they would receive the salt on the next day.– That on the next day the 16th day of August 1864. the Captain of the "Cascade" reported at the office of the Plaintiffs, the Arrival of his Vessel with her Cargo of salt, in the port of Chicago at about a quarter past twelve, at Noon, and Witness within half an hour. afterwards, applied at the office of the defendants with the bill of lading of the salt. to inquire when

they would Have the Vessel unloaded at which time Petnuss saw the defendant Mugill, who said he would do nothing about it, as his partner Mr Latham attended to their Salt business, and shortly afterwards defendant Latham told Petnuss that they would not receive the salt from the Plaintiffs because as he alleged, it was not offered before twelve O'Clock Noon of that day.—

The Petnuss further stated that the market value of No 1 Michigan fine salt, in the Chicago Market on the 16th day of August 1864 was three dollars and twenty five cents per barrel afloat.

Upon his Cross examination the Petnuss testified that the Plaintiffs still owned the Cargo of salt in question, having Shipped it to another Port, that they did not offer it for sale in the Chicago Market on the 16th of August 1864, or at any subsequent time, before they Shipped it away;— that on the 16th of August 1864, and for some days afterwards, the price of such salt by the Car load in the Chicago market was about three dollars and seventy Cents per barrel;— that the expense of making sales by the Car load would be deducted eight cents, broken for five cents, and switching two and a half cents;— that the price of salt by the Car load remained the same until about

the first of October and perhaps later;- that they sold a large quantity by the Car load and in small lots that season on the North Western Rail Roads - perhaps as much as 250000 bbls.; that the Plaintiffs, about the 16th of August, 1864, made no sale of salt by the Cargo except time sales of salt which was to arrive thereafter; and that the opinion of Witness, as to the value of salt in the Chicago Market on that day was based upon his knowledge of offers which were received by the Plaintiffs about that time for salt by various parties —

Being re-examined by the Counsel for the Plaintiffs. the Witness testified, that when salt is sold by the Car load, it is considered among the large dealers in the article, as a retail business, and a big rep price is always demanded for it, and that Merchants the seller can afford to sell salt Considerable Cheaper by the Cargo about than by the Car load, because in the latter case, he must personally to the sale. Plaintiffs incurred many expenses in unloading Cargo, dock-dues, drayage Storage &c, and much time may also elapse before he can in that small way dispose of a large lot of salt;- and Witness believed he had as good an opportunity of knowing as any other

Jurors, & that was the Market Value of Salt in Chicago on the 16th day of August 1864 and this was all the testimony that was adduced upon the trial of the said Cause —

Thereupon the Defendants by their Counsel moved the Court as for a non suit to instruct the jury to find for the Defendants on the grounds that the Plaintiffs had not made a Case in that they had shown no breach in the Contract on the part of the Defendants —

Thereupon the Plaintiffs by their Counsel asked the Court to instruct the jury as follows, to Wit;

1st That the law knows no division of a day; and that when a party Contracts to deliver goods, by the first half of August, and offers to deliver them at a reasonable hour on the 16th day of August, such offer is in time, and is a sufficient compliance with the Contract,

2nd That if the jury believe from the Evidence, that the Defendants on the 15th day of August 1864, Expected to the Plaintiffs their Willingness to receive the 2500 barrels of salt in question on the following day, and thereby induced the Plaintiffs to forego the execution of a purpose previously formed by them, to deliver the salt on that day, — the 15 — then the law

is that in defendant of the terms of the original Contract between the parties, the Plaintiffs were not in default, if they offered to deliver the cattle to the defendants at any reasonable Point on the 16th of August 1864. —

But the Court refused to instruct the jury as it was so requested as aforesaid to do on the part of the Plaintiffs; to which opinion and decision of the Court refusing to give the jury the instructions aforesaid the Plaintiffs by their Counsel then and there excepted; and the jury thereupon returned their verdict for the said defendants; whereupon the Plaintiffs by their Counsel moved the Court to set aside the said verdict and grant a new trial in said Cause upon the alleged ground that the Court had erred in refusing to give the jury the instructions asked for as aforesaid. But the Court overruled the said motion and refused to set aside the said verdict and grant a new trial in said Cause, the Plaintiffs by their Counsel excepted then and there, and tender this their Bill of Exceptions in the premises, to the Court praying that the same might be signed and sealed by the Court and ordered to be made a part of the

record in said Cause.; — and the same
is by the Court so done and ordered
accordingly.

Joseph E Gary (Seal)
Judge of the Superior
Court of Chicago

State of Illinois }
County of Cook } ss.

I Thomas B. Carter Clerk of the Superior Court of Chicago within and for the County and State aforesaid do hereby certify the above and foregoing to be a full true and complete transcript of all pleadings on file in my office and the order of Judgement entered of record in said Court. Together with the Bill of Exceptions filed in a certain Cause lately pending therein on the Common law side thereof, wherein Elisha H. Grosvenor and George H. Rogers were Plaintiffs and Charles J. Magill and Andrew J. Latham were defendants

In Testimony Whereof I have hereunto set my hand and Affixed the Seal of said Court at Chicago this 16th day of February A.D. 1865.

Thomas B Carter Clerk





25

State of Illinois: }
Third Grand Division. } ss. Supreme Court.

To the April Term, A. D. 1865.

Elisha W. Grosvenor and George H. Rozet, partners under the firm name and style of Grosvenor Bro., } Plaintiffs in Error,

v.

Charles J. Magill and Andrew J. Latham, partners under the firm name and style of Magill & Latham. } Defendants in Error.

And now the said Grosvenor Bro., Plaintiffs in Error, come and say that, in the the record and proceedings aforesaid, there is manifest error in this, to wit:—

1st. The said Superior Court of Chicago erred in refusing to charge the jury, as the request of the Plaintiffs in Error,

"That the law knows no division of a day, and that where a "party contracts to deliver goods by the first hour of August, and "offers to deliver them at a reasonable hour on the 16th day of August, "such offer is in time, and is a sufficient compliance with the contract."

2nd. The said Superior Court of Chicago erred in refusing to charge the jury, as requested by the Plaintiffs in Error,

"That if the jury believe, from the evidence, that the defendants, on "the 15th day of August, 1864, expressed to the plaintiffs their wil- "lingness to receive the 2500 barrels of salt on the following day, "and thereby induced the plaintiffs to forego the execution of a "purpose, previously formed by them, to deliver the salt on that "day — the 15th — then the law is, that, independently of the terms of "the original contract between the parties, the plaintiffs were not "in default if they offered to deliver the salt to the defendants, "at any reasonable hour on the 16th day of August, 1864."

3rd. The verdict of the jury is manifestly against the evidence in said cause.

4th. The Court erred in overruling said motion for a new trial.

For which reasons, the said Plaintiffs in Error pray that the said judgment may be reversed.

March 16. 1865.

Wallis, Stearns & Copeland,
Atto's for Pl'ffs in Error.

~~Atty for Defts in Error~~

And the said Charles J. Mayell and Andrew J. Latham, defendants in error, now come and say, that there is no error, either in the record and proceedings aforesaid, or in giving judgment aforesaid, in manner and form as above assigned; and therefor they pray that the said judgment may be affirmed and that their costs may be adjudged to them &c

March 16th 1865

Atty for Defts in Error

96 57

Grosvenor & Co.

v. } **Record.** Error & Joinder

Magill & Latham.

Filed March 18. 1885

L. Leland
Clerk

Fees. $5.55

Paid
M Hanlin Clerk

IN THE

SUPREME COURT OF ILLINOIS,

Third Grand Division—April Term, A. D. 1865.

GROSVENOR & CO., PLAINTIFFS IN ERROR.

v.

MAGILL & LATHAM, DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT.

The only question raised on the trial of this cause was, the construction of the contract between the parties upon which the plaintiffs' sought to recover, and which is set up in both counts of their declaration. (Page 18 of abstract.)

The plaintiffs' counsel insisted that the plaintiffs had the whole of the 16th of August, upon which to deliver the salt in question, upon the principle that the law knows no division of a day.

The defendants' counsel insisted that time was of the essence of the contract, and that a definite time had been fixed by the parties within which the salt was to be delivered, and that the first half of August ended at twelve o'clock, M., of the 16th, and that an offer to deliver the salt after that time, was too late, and that the defendants were not bound to receive it

I.

The rule that the law knows no division of a day, can have no application to this case. That rule only applies in cases where a contract is made upon a certain day, to be performed within a certain number of days thereafter, the rule in such cases being to exclude the day of the date, and include the day of performance, for the reason that the law will take no notice of the hour at which the contract was entered into.

But if the parties see fit to fix the precise hour at which the contract shall end, they are certainly competent to do so, and the law cannot and does not interfere and fix some other time.

The first half of August is fifteen days and a half, and ends at noon of the 16th.

There are two halves in a whole thing, which together are equal to the whole, and separately are equal to each other. If the first half of August is sixteen days, the last half must be the same, giving us thirty-two days in August.

By this contract the salt was to be delivered to the defendants during the first half of August, at the sellers' option. Supposing that the defendants had sold this same salt to be delivered during the last half of August, at the buyers' option. If the construction put upon this contract by the plaintiffs is to be the true one, then the buyer in the case supposed would have the whole of the 16th of August within which to demand his purchase, and could place the defendants in default on their contract before the plaintiffs would be in default on theirs, and might be rightly sued for damages before the time expired for the plaintiffs to perform their contract, and this too, when the contracts by their terms were

separated in point of time, the one beginning when the other expired.

The idea that the rule that the law knows no division of a day, is applicable to this case, and construes this contract as the plaintiffs insist, is susceptible of the *reductio ad absurdum.*

Suppose that the contract was to deliver the salt during the first half of the 16th day of August; no one surely would be guilty of the absurdity of insisting that the plaintiffs would have the whole of the 16th.

The terms used in this contract are precise, mathematically so, and the parties must be supposed to have meant exactly what their language indicates.

If the rule insisted on by the plaintiffs is to construe this contract, then the contract should expire at the end of the 15th day, because a month is thirty days, and the first half would generally be considered to be the first fifteen days. But the defendants were willing to be held to a strict construction of the contract. (*Vide* Vose's testimony of what Latham said, page 19, of abstract.)

II.

The question of the extension of the time for the performance of the contract was not raised upon the trial, and the defendants insist that it could not then, and cannot now be raised for the reason that it must be specially averred in the declaration, and there is no such averment therein. And further, there is no evidence whatever tending to show an extension of the time. The only evidence having any possible

bearing upon this point is at P. 19, of abstract, where the witness testified that defendant Latham said, "The time for the delivery of the salt had not yet expired, and would not expire until the next day, and that they, the defendants, were bound to receive, and would receive, the salt on the next day." This was not an extension of the time but simply putting a construction upon the contract, and admitting that the contract did not expire until on the 16th day.

III.

The plaintiffs are not entitled to recover on the merits.

Their witness Vose testifies, on cross-examination, that salt of the kind mentioned in the contract was worth, on the 16th of August, and from that time to the 1st of October following, and perhaps longer, $3.70 by the car load and in small lots, and that the expense of making sale of salt in this way was fifteen and one half cents per barrel, and that the plaintiffs had sold in this way, during the season of 1864, as much as 25,000 barrels, on the North Western Rail Road alone.

Even if the defendants had broken their contract, the plaintiffs were bound to dispose of the salt for the best possible price and to the best possible advantage, and they could more than have made themselves whole by selling the salt by the car load and in small lots.

F. PULVER,

Attorney for Defendants in Error.

96 57

Grosvenor
vs
Magill

Bill of Debt

Filed April 8. 1865
L. Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Supreme Court for the County of Chicago Cook Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Supreme Court of Chicago Cook County, before the Judge thereof, between Elisha W Grosvenor & George H. Rozet partners under the name & style of Grosvenor & Co.

plaintiff, and Charles J. Magill & Andrew J. Latham partners under the firm name & style of Magill & Latham

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

as we are informed by their 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.

Pinckney H Walker

Witness, The Hon. ~~JOHN D. CATON,~~ Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 18th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty five

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

96

Grozmier et al

No. *vs.*

Magill et al

WRIT OF ERROR.

FILED March 18th A. D. 1865

L. Leland

Clerk.

IN THE

SUPREME COURT OF ILLINOIS,

Third Grand Division---April Term, A. D. 1865.

GROSVENOR & CO, PLAINTIFFS IN ERROR.

v.

MAGILL & LATHAM, DEFENDANTS IN ERROR.

ABSTRACT OF RECORD.

1 CAPTION OF RECORD.

3 PRÆCIPE FOR SUMMONS.

4 SUMMONS.

5 SHERIFF'S RETURN OF SERVICE.

7 DECLARATION, IN CASE.

1st. COUNT. The plaintiffs allege that the defendants, on the 9th day of July, 1864, in consideration that the plaintiffs would and did agree to sell and deliver to the defendants, at Chicago, at such time, during the first half of the month of August, 1864, as should

be optional with the plaintiffs, 2,500 barrels of No. 1 Michigan Fine Salt, new and in good barrels, to be delivered on board of some suitable vessel in the port of Chicago, undertook and
8 promised to accept the said 2,500 barrels of salt, and to pay the plaintiffs therefor at the rate of $3.40 per barrel; and the plaintiffs aver that, afterwards, on the 16th of August, 1864, they had the said 2,500 barrels of salt, of such a character as was stipulated for in the said agreement, in the said port of Chicago, ready to be delivered to the defendants, if they would receive it, and then and there offered to deliver the same to the defendants, who then and there refused to receive or pay for the same; and the plaintiffs aver that they were put to great expense, to wit: $1,000, in shipping the said salt from the State of Michigan to the said port of Chicago, and that, between the 9th of July, 1864, and the 16th of August, 1864, the value and price of the said 2,500 barrels of salt declined, in the market of Chicago, to the extent of $1,000;
9 and so the plaintiffs say that they have sustained loss, and been injured, by reason of the premises, to the amount of $2,000, and therefore they sue.

2d Count. The plaintiffs, after alleging the agreement for the sale and purchase of 2,500 barrels of salt, as set forth in the first count, aver that, on the 15th of August, 1864, at Chicago, they
10 were ready and willing, and then and there offered, if the defendants would receive the same, to deliver to the defendants the said 2,500 barrels of salt, and the defendants would not then and there receive the same, but then and there consented, promised and agreed, to and with the plaintiffs, that if the plaintiffs would deliver the said salt on the next ensuing day, to wit: on the 16th of August, 1864, they would then accept and pay for the same; and the plaintiffs aver that, on the 16th of August, 1864, they were ready and willing, and then and there offered, if the defendants would accept the same, to deliver to them the said 2,500 barrels of salt, on board of a suitable vessel in the port of Chicago; but the defendants then and there refused to receive the same, or to pay therefor; by means whereof, and by reason of the premises, the

plaintiffs were greatly injured, and sustained heavy losses in disposing of the said salt, and otherwise; to the damage of the plaintiffs of $2,000, and therefore they sue.

11 Plea of *non assumpsit.*

12 Affidavit of Merits.

13 Stipulation for withdrawal of plea of *non assumpsit*, and filing of another.

14 Plea of *not guilty.*

15–16 Verdict and judgment for defendants.

17 Bill of Exceptions. Sets forth that the plaintiffs, upon the trial, read to the jury, as evidence, the following written agreement:

"Chicago, July 9th, 1864.

18 "Bought of Grosvenor & Co., twenty-five hundred (2,500) "barrels Mich. No. 1 fine salt, at three dollars and forty cents "($3.40) per bbl. afloat, sellers' option, first half of August next; "salt to be new, and in good barrels, payable on delivery at Chi- "cago.

"MAGILL & LATHAM."

EDWIN VOSE, a witness for the plaintiffs, then testified, that he was, in July, 1864, and still was, a clerk and book-keeper for the plaintiffs, who were heavily engaged in the salt and commission business in Chicago; that the 2,500 barrels of salt, with which the plaintiffs expected to fill their contract with the defendants, was shipped on a vessel called the "Cascade," which, having had an unusually long voyage, had not arrived at Chicago up to the 15th of August, 1864, on which day, at the request of the plaintiffs, the witness went to the office of the defendants to see them

about it, taking the bill of lading along with him, and saw there the defendant Latham, to whom he showed the bill of lading, and asked him what was to be done in case the "Cascade" should
19 not get in that day; to which question Latham replied that he knew the "Cascade" would be in, because he had heard, through one of their vessels that had just come into port, that the "Cascade" was just outside, and that, moreover, the time for the delivery of the salt had not yet expired, and would not expire until the next day, and that they—the defendants—were bound to receive, and would receive, the salt on the next day.

The witness further testified, that the plaintiffs could easily have made arrangements to have obtained from other salt dealers in Chicago, on the 15th of August, 2,500 bbls. of such salt as was called for by their contract with the defendants, but no such arrangement was completed, in consequence of the promise of the defendants, which witness reported to the plaintiffs, that they would receive the salt on the next day; that, on the next day, the 16th of August, 1864, the captain of the "Cascade" reported to the plaintiffs, at their office, the arrival of his vessel, with her cargo of salt, in the port of Chicago, at about a quarter past twelve at noon, and witness, within half an hour afterwards, applied at the
20 office of the defendants, with the bill of lading of the salt, to inquire where they would have the vessel unloaded, and defendant Magill, whom he first saw there, said he would do nothing about it, as his partner Latham attended to their salt business; and shortly afterwards defendant Latham told witness that they would not receive the salt from the plaintiffs, because, as he alleged, it was not offered before 12 o'clock, noon, of that day.

The witness further stated that the market value of No. 1 Michigan fine salt, in the Chicago market, on the 16th day of August, 1864, was $3.25 per bbl., afloat.

Being *Cross-Examined*, the witness testified,

that the plaintiffs still owned the cargo of salt in question, having shipped it to another port; that they did not offer it for sale in

the Chicago market on the 16th of August, or at any time before they shipped it away; that, on the 16th of August, and for some days afterwards, the price of such salt, by the car load, in the Chicago market, was about $3.70 per bbl.; that the expense of making sale by the car load would be, dockage, 8 cents, broker's fee, 5 cents, and switching 2½ cents; that the price of salt by the
21 car-load remained the same until about the 1st of Oct., and perhaps later; that they sold a large quantity by the car-load, and in small lots, that season, on the North Western Railroad—perhaps as much as 25,000 bbls.; that the plaintiffs, about the 16th of August, 1864, made no sales of salt by the cargo, except time sales of salt which was to arrive thereafter; and that the opinion of witness, as to the value of salt in the Chicago market on that day, was based upon his knowledge of offers which were received by the plaintiffs, about that time, for salt, from various parties.

Being *Re-Examined*, the witness testified,

that, when salt is sold by the car load, it is considered, among the large dealers in the article, as a retail business, and a higher price is always demanded for it; and that, moreover, the seller can afford to sell salt considerably cheaper, by the cargo, afloat, than by the car load, because, in the latter case, he must, previously to the sale, have incurred heavy expenses in unloading cargo, dock dues, drayage, storage, etc., and much time may also elapse before he can, in that small way, dispose of a large lot of salt; and
22 witness believed he had as good an opportunity of knowing, as any other person, what was the market value of salt, in Chicago, on the 16th of August, 1864.

There was no other testimony in the cause.

The counsel for the defendants moved the court, as for a non-suit, to instruct the jury to find for the defendants, on the ground that the plaintiffs had not made a case, in that they had shown no breach of contract on the part of the defendants.

The counsel for the plaintiffs asked the court to instruct the jury as follows:

1st. That the law knows no division of a day; and that, where a party contracts to deliver goods by the first half of August, and offers to deliver them at a reasonable hour on the 16th day of August, such offer is in time, and is a sufficient compliance with the contract.

2nd. That if the jury believe, from the evidence, that the defendants, on the 15th day of August, 1864, expressed to the plaintiffs their willingness to receive the 2,500 barrels of salt in question on the following day, and thereby induced the plaintiffs to forego the execution of a purpose, previously formed by them, to de-
23 liver the salt on that day—the 15th—then the law is, that, independently of the terms of the original contract between the parties, the plaintiffs were not in default if they offered to deliver the salt to the defendants at any reasonable hour on the 16th of August, 1864.

The court refused to give those instructions, and the counsel for the plaintiffs then and there excepted.

The jury having found a verdict for the defendants, the counsel for the plaintiffs moved the court to set aside the verdict and grant a new trial, upon the ground that the court had erred in refusing to instruct the jury as requested on the part of the plaintiffs; but the said motion was overruled by the court, and the counsel for the plaintiffs then and there excepted, and tendered their bill of exceptions, which was signed and sealed by the court, and ordered
24 to be made a part of the record in the cause.

25 Clerk's Certificate.

WALLER, STEARNS & COPELAND,
Att'ys for Pl'ffs in Error.

State of Illinois:
Third Grand Division. } ss.

In the Supreme Court,
To the April Term, A.D. 1865.

Elisha W. Grosvenor and George N. Rozet, partners under the firm name and style of Grosvenor Bro.,

v.

Charles J. Magill and Andrew J. Latham, partners under the firm name and style of Magill & Latham.

} Error to the Superior Court of Chicago, in Cook County.

Judgment (in an action of trespass on the case) at the December Term, A.D. 1863, in favor of the Defendant, Magill & Latham, for the costs of suit.

Issue a writ of error to the Superior Court of Chicago, in the County of Cook, against Magill & Latham, at the suit of Grosvenor Bro., returnable on the first Monday of April next.

~~Edwin~~ Chicago, March 16. 1865.

Walker, Stearns & Copeland,
Attys for Plff in Error.

To the Clerk of the Supreme Court of the Third Grand Division.

96

Governor's Message
Paupers

Filed March 20. 1865
Sickland
Clk.