

No. 13372

Supreme Court of Illinois

^E
Moray et al

vs.

Bemis

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 203.

Bemis
vs
Mansy.

1861

13372

Supreme Court
 Henry V. Kemis }
 appellee } April Term
 vs } A.D. 1861
 Albert G. Mory
 & James N. Smont
Appellants

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

Dornell Smith
 atty for appellee

Williams, Woodbridge & Grant
 atty for appellants

203
Supreme Court of Illinois

Henry C. Bemis

vs
Albert G. Morry
et al

Stipulation

Filed May 8. 1861
L. Leland
Clerk

STATE OF ILLINOIS,
IN THE SUPREME COURT, THIRD GRAND DIVISION.

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

APPELLANTS' POINTS AND AUTHORITIES.

I.

There is a fatal variance between the contract declared on and that offered in evidence. The legal import and effect of the instrument are not truly described in the declaration.

The declaration is for "*Canada*" barley. No other description is given. *Vide Record, pages 2 to 12.*

The contract offered in evidence is for "1500 bush. barley," ("same as 1500 bush. previously delivered"). There is nothing in the declaration to show what is meant by *Canada* barley. We must resort to the evidence for all the information we have upon this point. Downer, a witness for plaintiff in the Court below, said: "*Canada* barley is so 'called because it comes from Canada. One year ago all the good barley 'came from Canada. We usually get our best barley from Canada.'" John Limb, a witness for defendants, said: "I called it [the barley in 'controversy] prime barley. Such barley is sometimes called *Canada* 'barley, and sometimes prime barley."

This is the substance of the testimony on the part of plaintiff and defendants in the Court below, as to what is meant by "*Canada* barley." If the description "*Canada*" barley, in the plaintiff's declaration, means

anything, it means, according to the testimony, "good barley," "prime barley," "the best barley," "barley from Canada."

But the contract introduced in evidence is for barley the same as *that previously delivered*. On this point, plaintiff's witness, Downer, says: "The first lot was not all Canada barley; a part of it was; * * * * part of the first lot was not so good as Canada barley, but we "took it."

Abstract, page 3.

John Brown, a witness for defendants below, said: "I think the "second lot was of the same quality as the first; they were about alike."

Abstract, page 4.

This is the substance of the testimony as to the quality of the first lot delivered to plaintiff by the defendants.

Here, then, according to the plaintiff's own showing, he has sought to recover in his declaration for Canada barley, when the contract he produces is for barley "same as 1500 bush. previously delivered," and when, by his own witness, he shows that the barley previously delivered was not all Canada barley. In other words, the contract described in the declaration is not, even in its legal effect, the same contract offered in evidence, and the variance is fatal.

II.

The plaintiff is bound to state the contract correctly, and if the evidence differ from the statement, the action fails, because the contract is entire, and must be proved as laid.

1 *Chitty's Pleading*, 350, *marginal p.*

Crittenden vs. French, 21 *Ills.*, 598.

Mastin vs. Toncray, 2 *Scam.*, 216.

Baxter vs. Knox, 19 *Ill.*, 598.

Van Court vs. Bushnell, 21 *Ill.*, 624.

Snell vs. Moses, 1 *Johns*, 105.

Obert vs. Whitehead, 6 *Halst.*, 294.

Wheelwright vs. Moore, 1 *Hall*, 201.

III.

It follows that a misstatement of the quality or nature of the defendants' promise will subject the plaintiff to a non-suit.

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Conolly vs. Cottle, Breeze, 286.

Felt vs. Williams, 1 *Scam.*, 206.

Colt vs. Root, 17 *Mass.*, 236.

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Crawford vs. Morrill, 8 *Johns*, 253.

Symmons vs. Knox, 5 *D. & E.*, 67.

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"A declaration for the sale and delivery of *pine* timber is not supported by evidence of the sale and delivery of *spruce* timber; though both kinds are classed under the generic name of *pine* timber."

Robins vs. Otis, 1 *Pick.*, 368.

IV.

The verdict in this case is manifestly against the evidence. The contract presented in evidence demanded barley the same as that previously delivered, the plaintiff describing it in his declaration as "Canada" barley.

Downer, the first witness for plaintiff, said, "as soon as he saw the second lot of barley, he thought it was not like the first," but adds, "it might have been Canada barley." "The first lot was not all Canada barley; a part of it was. Part of the first lot was not so good as Canada barley, but we took it. * * * A part of the last lot was Canada barley. I should call the last lot all old barley."

Abstract, page 2.

Plaintiff's witness, Carden, says that "the second lot 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. 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."

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Dickinson, another witness for plaintiff, said he thought the barley in controversy "was of an inferior quality," but made no comparison of it with the previous delivery.

The above is the substance of that portion of the plaintiff's testimony which establishes any comparison between the two lots of barley sold by defendants to plaintiff. Downer swearing that part of the second lot was Canada barley, while the first lot was only in part Canada; and Carden swearing that he did not know whether the last lot was Canada barley or not, but it might have been; each of the witnesses thinking that the second lot was not so good as the first.

On the other hand, defendants' witness, John Brown, says, "I knew 'the first lot of barley delivered to Bemis by Morey & Smart.'" I think "the second lot was like the first. They were about alike."

Abstract, p. 4.

John Limb, a witness for defendants, said the barley in controversy "was good barley. I called it prime barley."

The testimony further shows that, when the plaintiff complained of the quality of some of the barley; the defendants sent up to his brewery and hauled away the barley until the defendants' maltster refused to allow any more to be taken away.

Abstract, pages 3 & 4.

If the testimony fails to show that the barley actually accepted and retained by the plaintiff was of the best quality, it clearly establishes the fact that both lots were what is called in this market "Canada" barley, and the plaintiff in the Court below failed to establish by sufficient proof that the second lot of barley was inferior to that first delivered.

Respectfully submitted,

WILLIAMS, WOODBRIDGE & GRANT,

Att'ys for Appellants.

203
Supreme Court of Illinois

Albert G. Moray
Et al

^{vs}
Henry Y. Bemis

Appellants' Points &c.

Filed May 11 1861
L. Leland
clerk

Supreme Court
 Henry V. Dennis }
 Appellee } Points
 vs }
 Albert S. Morey & }
 James H. Smart }
 Appellants }

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
 objections to the reading of the
 Contract in evidence. This is not
 sufficient but the ground of
 objection should have been
 specified -

Dennis & Ogawka R.R. Co vs Hill

16 Ill 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 must
 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 ⁱⁿ 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,

(Bidds Practice 824)

DeKey vs Harrison 1 Sed. Raymond 232,
1 Salkeld 77

Lutton vs Bishop, Burrows Reps 283-284-

The evidence offered certainly was no part of the record nor was the copy of the contract filed with the declaration. 1 Leam 63,

III

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, who 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 plaintiffs 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 -

Harrell & Smith
Atty for Appellee

N^o 203
Supreme Court
Henry W. Bennis
appellee
atty

Money & Smoot
appellants
Poult, for
Appellee

Filed Aug 7. 1861
L. Leland
Clerk

Harrell & Smith
attys for
Appellee

Supreme Court -
 Henry C. Bernis
 Appellee
 vs.
 Albert G. Morey &
 James N. Smith
 Appellants
 Plaintiffs
 For
 Appellee.

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No 203

Supreme Court

Henry V. Brown

appellee

vs

Mary & Sonant

appellants

Family for

appellees

Filed May 21, 1861

L. L. Leland

clerk

Farnwell & Smith

attorneys

appellees

finding two small a
pendix

(Farnwell & Smith)
attys for appellees

STATE OF ILLINOIS,
IN THE SUPREME COURT, THIRD GRAND DIVISION.

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The testimony further shows that, when the plaintiff complained of the quality of some of the barley, the defendants sent up to his brewery and hauled away the barley until the defendants' maltster refused to allow any more to be taken away.

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If the testimony fails to show that the barley actually accepted and retained by the plaintiff was of the best quality, it clearly establishes the fact that both lots were what is called in this market "Canada" barley, and the plaintiff in the Court below failed to establish by sufficient proof that the second lot of barley was inferior to that first delivered.

Respectfully submitted,

WILLIAMS, WOODBRIDGE & GRANT,

Att'ys for Appellants.

203
Supreme Court of Illinois

Albert G. Corey
et al

vs
Henry V. Bemis

Forits &c of
Appellants.

Filed May 7. 1861
L. Leland
clerk

United States of America
State of Illinois, County of Cook. ss.

Plas
before the Honorable the Judges of 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 third day of October in the year
of Our Lord. Eighteen Hundred and
fifty nine, and of the Independence
of the United States of America the
Eighty fourth.

Present the Honorable John M. Wilson
Chief Justice of the Superior Court of Chicago
Van A. Higgins and Grant Goodrich Judges.
Charles Harvey Prosecuting Attorney.
John May Sheriff of Cook County.

Attest
Walter Kimball clerk.

Be it remembered, that heretofore,
to wit: On the 27th day of May A.D.
1859. Henry V. Demis by F. B. Stabody
his Attorney filed in the Office of the
Superior Court of Chicago his Certain
Declaration, which is in the words
and figures following, to wit:

State of Illinois ³ The Superior
Cook County ³ ss. Court of Chicago
Of the June Term A.D. 1859.

Henry V. Demis plaintiff in this suit
by F. B. Stabody his attorney, complains
of Albert J. Money and James W. Smart.
Copartners in business under the firm
name of Money & Smart defendants.
who are summoned &c of a plea of
trespass on the case upon promises.
for that whereas the said defendants,
at Chicago in said County of Cook,
on the nineteenth day of February A.D.
1859 in consideration that the plaintiff
would at the special instance &
request of the defendants purchase
of the defendants fifteen hundred
Bushels of Canada Barley at &

for the rate and price of One dollar & thirty cents per Bushel then and there to be paid therefor by the plaintiff the said barley to be delivered free in sacks. then and there bargained and sold to the said plaintiff Fifteen hundred bushels of Canada barley at and for the rate and price of One dollar and thirty cents per bushel then and there to be paid therefor by the plaintiff and then and there agreed with the plaintiff to deliver to the plaintiff said Fifteen Hundred bushels of Canada barley free in sacks within a reasonable time thereafter. And the plaintiff in fact says that in consideration of said bargain sale and agreement to deliver as aforesaid, he the said plaintiff did then and there pay to the said defendants the sum of One dollar and thirty cents per bushel for said Fifteen hundred bushels of Canada Barley, amounting in the whole to the sum of Nineteen Hundred & fifty dollars.

But the plaintiff avers that although a reasonable time for the

4.

Delivery of said barley by said defendants to said plaintiff has long since elapsed and although the plaintiff has oftentimes demanded the said barley of the defendants and has always been ready to accept and receive the said barley to wit. at said County of Cook, yet the said defendants, not regarding their said promise and undertaking, but continuing and intending to deceive and defraud the plaintiff in this behalf did not, nor would within a reasonable time for the delivery of said Barley or at any time afterwards deliver the said barley or any portion thereof free in sacks or in any other manner, to the plaintiff, at the said County of Cook or elsewhere, but have wholly neglected and refused, and still do neglect and refuse so to do - Whereby the said plaintiff hath not only lost said sum of Nineteen hundred and fifty dollars, so paid for said barley as aforesaid but also hath been deprived of great gains and profits, which might & would have accrued to him from the delivering of said barley as aforesaid

57

to wit: at said County of Cook.

Also for that whereas heretofore to wit: on the Nineteenth day of February at 1859 at Chicago in said County of Cook the said Defendants in Consideration that the said plaintiff would at the special instance and request of the Defendants purchase of the Defendants other Fifteen Hundred bushels of Canada barley at and for the rate and price of one dollar and thirty cents per bushel then and there to be paid therefor by the plaintiff, said barley to be delivered free in sacks, then there bargained and sold to the said plaintiff fifteen Hundred bushels of Canada barley at and for the rate and price of One dollar and thirty cents per bushel, then and there to be paid therefor by the plaintiff, and then there agreed with the plaintiff to deliver to the plaintiff said Fifteen hundred bushels of Canada Barley free in sacks, within a reasonable time hereafter - And the plaintiff in fact says that in consideration of said bargain sale and agreement to deliver as aforesaid

6. He the said plaintiff did then and there pay to the said Defendants the sum of One dollar and thirty cents per bushel for said fifteen Hundred bushels of Canada barley, amounting in the whole to the sum of Nineteen Hundred & fifty dollars. But the plaintiff avers that although the defendants have delivered to him, the said plaintiff Five Hundred and fifty three bushels of Barley, which, though of an inferior quality to that contracted to be delivered as aforesaid by the defendants, the plaintiff has accepted as five Hundred & fifty three bushels of Canada Barley, yet although a reasonable time for the delivery of the remaining nine hundred and forty seven bushels of said fifteen hundred bushels of Canada barley by said defendants to the plaintiff has long since elapsed, and although the plaintiff has always been ready to accept and receive said remaining Nine Hundred & forty seven bushels of said barley, of which the defendants had notice, to wit:

7.

at said County of Cook, and although the plaintiff has demanded said remaining nine hundred & forty seven bushels of said fifteen hundred bushels of Canada Barley of the defendants to wit, at Chicago in said County of Cook on the first day of March A.D. 1859 and often times since - Yet the said defendants not regarding their said promise and undertaking but continuing and intending to deceive and defraud the plaintiff in this behalf did not nor would within a reasonable time for the delivery of thereof or at any time afterwards deliver the said remaining nine hundred and forty seven bushels of said fifteen hundred bushels of Canada barley, or any portion thereof, free in sacks or otherwise, to the plaintiff, at the said County of Cook or elsewhere, but has wholly neglected and refused and still do neglect and refuse so to do, - Whereby the plaintiff has not only lost and been deprived of the sum of One dollar.

and thirty cents per bushel paid by him as aforesaid for said Nine Hundred and forty seven bushels parcel of said Fifteen Hundred bushels of Canada barley, amounting in all to the sum of twelve hundred & thirty one & $\frac{10}{100}$ dollars but hath also lost and been deprived of great gains and profits which might and otherwise would have accrued to him from the delivery of the said Nine hundred and forty seven bushels parcel of said fifteen Hundred bushels of Canada barley as aforesaid. to wit at said County of Cook.

And whereas also afterwards to wit on the 19th day of February A.D. 1859 to wit at Chicago in said County, in Consideration that the plaintiff, at the instance and request of the defendants, had then and there bought of the defendants a certain large quantity to wit: other fifteen hundred bushels of Canada barley to be delivered free in sacks, at and for a certain price then and there agreed upon between them the said plaintiff and defendants, to wit the price of

9.

One dollar and thirty cents per bushel and had then and there paid the said defendants the sum of Nineteen hundred and fifty dollars for said barley being at the said price agreed on as aforesaid. of One dollar and thirty cents per bushel, the said defendants undertook and then and there faithfully promised the plaintiff well and truly to deliver to him the said Fifteen Hundred bushels of Canada barley free in sacks whenever the said defendants should be thereunto afterwards requested.

And the plaintiff in fact says that although the defendants afterwards to wit. at Chicago in said County. on the first day of March A.D. 1859 requested the defendants to deliver to him the said Fifteen Hundred bushels of Canada barley free in sacks as aforesaid. and as then and there ready and willing and offered to accept the same. yet the said defendants not regarding their said undertaking & promise did not when requested as aforesaid. or at any time before or since deliver

to the plaintiff said fifteen hundred bushels of Canada barley or any portion thereof, free in sacks or otherwise, but hath hitherto wholly refused and still do refuse so to do -

Whereby the plaintiff has not only lost said sum of Nineteen hundred & fifty dollars paid for said barley as aforesaid, but also hath been deprived of great gains & profits which might & would have accrued to him from the delivery of said barley as aforesaid. to wit at said County of Cook.

Also for that whereas the defendants on the 19th day of February A.D. 1859 at Chicago in said County of Cook became and were indebted to the plaintiff in the sum of two thousand dollars for divers goods, wares & merchandize by the said plaintiff before that time sold & delivered to the defendants at their request & being so indebted, the defendants in consideration hereof afterwards to wit on the same day & year & at the place aforesaid undertook & then & there faithfully promised the plaintiff well & truly to pay the

plaintiff the sum of money last
 mentioned when the said defendants
 should be thereunto afterwards requested.
 And whereas also the said defendants
 afterwards to wit on the same day &
 year & at the place last aforesaid
 became & were indebted to the plaintiff
 in the further sum of two thousand
 dollars for so much money before
 that time had and received to & for
 the use of the plaintiff, & in the like
 sum for other money before that time
~~had~~ ^{lent} & advanced by the plaintiff
 to the defendants at their request, & in
 the like sum for other money before
 that time paid, laid out & expended
 for the defendants, at their request,
 And being so indebted, the said defendants
 in consideration thereof afterwards to wit
 on the same day and year & at
 the place last aforesaid, undertook
 & then and there faithfully promised
 the plaintiff to pay him the several
 sums of money in this count
 mentioned when the said defendants
 should be thereunto afterwards
 requested. — Nevertheless the said
 defendants although often requested

have not yet paid the said several
sums of money above mentioned or
any or either of them, or any part thereof
to the said plaintiff, but to pay the same
or any part thereof to the said plaintiff
the said defendants have hitherto,
altogether refused & still do refuse.

All which is to the damage of
the plaintiff three thousand dollars,
& therefore the plaintiff brings suit &c

J. B. Sturdy
Plff. Atty.

Copy of account sued on.

Mr. H. V. Bemis Bot of Morey & Smart.

1500 Bush Barley delivered free in sacks.

& Same as 1500 Bush previously delivered
at \$1.30

Rec'd & Paid by 1772 $\frac{3}{4}$ Bu Barley Malt free of
Storage & Dr in Ford's Warehouse for twenty
days & delivering free in Sacks at \$1.10

Chicago Feb 19th 1859

(Signed)

Morey & Smart

4
Morey & Smart To N V Dennis Dr
 To Money lent & advanced \$2000.
 " " Spd laid out & Expended 2000.
 " " had & recd 2000.
 " Goods, Wares & Merchdy Sold & held 2000.

And afterwards to wit on the 7th
 day of June AD 1859. the said
 Defendants by William Woodbridge
 & Grant their Attorneys filed in the
 Office of the Clerk of said Court their
 Certain plea & Affidavit which
 are in the words & figures following
 to wit

The Superior Court of Chicago
 June Term AD 1859

Albert S. Morey &
 James N. Smart }
 advs }
 Henry V. Dennis }

And the said
 Defendants by William Woodbridge

& Grant. their attorneys. Come and defend the wrong and injury whereof, and say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them. and of this they put themselves upon the Country, &c.

William Woodbridge & Grant,
attys for Defts.

And for a further plea in this behalf the said Defendants by leave of the Court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that they, the said defendants, after the said Nineteenth day of February A.D. 1859, in the said Declaration mentioned, and before the commencement of this suit, to-wit. on the 26th day of March A.D. 1859, and on divers other days prior to that day & subsequent to the

said 19th day of February at Cook County aforesaid. paid to the said plaintiff the said sum of ^{three} ~~thousand~~ ~~hundred~~ ~~fifty~~ ~~dollars~~ ~~in~~ ~~the~~ ~~said~~ ~~declaration~~ ~~mentioned~~, together with all interest then due thereon.

And thus the said defendants are ready to verify. wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action ^{thereof} against them &c

And for a further plea in this behalf. the said defendants by like leave of the Court here, for this purpose first had and obtained ~~the~~ say action now because they say.

that the said plaintiff before and at the time of the commencement of this suit. to wit, at Cook County aforesaid. was and still is indebted to the said defendants in a large sum of money. to wit. The sum of three thousand dollars of lawful money of the United States for the work and labor, care, diligence and attendance of the said defendants by the said defendants and their

Servants before that time, done,
 performed and bestowed in and
 about the business of the said plain-
 tiff, and for the said plaintiff,
 and at his request, and for divers
 materials, and other necessary
 things by the said defendants before
 that time found and provided,
 and used and applied in and about
 the said work and labor for the
 said plaintiff, and at his like re-
 quest, and for divers goods, wares &
 merchandises sold and delivered
 by the said defendants, to the said
 plaintiff before that time, and at his
 special request, and for money by the
 said defendants before that time lent &
 advanced to, and paid, laid out,
 & expended for the said plaintiff,
 and at his like request, and for money
 by the said plaintiff before that time
 had and received to and for the use
 of the said defendants, and for
 money due and owing from the
 said plaintiff to the said defendants
 upon an account stated between
 them. Which said sums of money
 so due and owing to the said defendants

as aforesaid. Exceed the damages sustained by the said plaintiff, by reason of the nonperformance by the said defendants, of the said several supposed promises, and undertakings in the said declaration mentioned, and out of which said sums of money so due and owing from the said plaintiff to the said defendants, the said defendants are ready and willing, and hereby ^{offer to} set off and allow to the said plaintiff the full amount of the said damages, according to the form of the Statute in such case made and provided, And this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them &c.

And for a further plea in this behalf, the said defendants, by like leave of the Court here, for this purpose first had and obtained, according to the form of the Statute in such case made & provided, say that the said plaintiff

ought not to have or maintain his aforesaid action against them, because they say, that they, the said defendants, before the commencement of this suit, to wit, on the 26th day of March A.D. 1859, and on divers other days both before and subsequent to the ^{to wit of the 25th day of March, & on the 5th day of April} said 26th day of March, did deliver to the said plaintiff, to wit, at the County of Cook aforesaid the said fifteen hundred bushels of Canada ^{& every part thereof} barley in the said declaration mentioned, which was then and there accepted by the said plaintiff, also that the said defendants ^{to wit} at the times ^{last} aforesaid, and at the place aforesaid, delivered to the said plaintiff the said nine hundred & forty seven bushels of Canada barley in said declaration mentioned which said barley was then and there accepted by the said plaintiff.

And ~~this~~ the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them &c.

William Woodbridge & Grant,
attys for Defs,

19.

State of Illinois
County of Cook 3^d James N Smart
being duly sworn doth depose
and say that he is one of the
defendants in the above mentioned
cause. that he has been advised
by Counsel and verily believes that
the said defendants have a good and
sufficient defence to said suit
upon the merits. J N Smart
Subscribed and sworn to before me this 2^d
day of June AD 1859
Walter Kimball Clerk

And afterwards to wit. on the 13th
day of October AD 1859. said day being
one of the days of the October term
thereof. the following among other
proceedings were had and entered
of Record in said Court

Henry V. Dennis }
 Albert E. Morey }
 James N. Smart } Assumpsit.

On motion
 William Woodbridge & Grant defendants
 attorneys. leave is given said defendants
 to amend their second plea herein
 pleaded.

And afterwards to wit: on
 the 27th day of October A.D. 1859 the
 said plaintiff by his attorney aforesaid
 files in the Office of the Clerk
 aforesaid his Certain Replication
 in the words and figures following
 to wit.

State of Illinois
 Cook County ss.

Superior Court of Chicago
 October Term A.D. 1859

Henry V. Dennis vs Albert E. Morey
 and James N. Smart.

And the said plaintiff as to the plea of the said defendants by them first above pleaded & whereof they have put themselves upon the Country, doth the like.

And the said plaintiff as to the said plea of the said defendants by them ^{above} thirdly pleaded, saith that the said plaintiff, by reason of any thing by the said defendants in said plea alleged, ought not to be barred from having & maintaining his aforesaid action thereof against the said defendants, because he saith that he the said plaintiff was not nor is indebted to the said defendants in manner and form as the said defendants have in said third plea in that behalf alleged.

And this the said plaintiff prays may be enquired of by the Country &c.

And the said defendants do likewise

William Woodbridge Esq.
Counsel Atty.

And the said plaintiff as to the

said plea of the said defendants by them fourthly above pleaded. Saith that the said plaintiff by reason of anything by the said defendants in said plea alleged, ought not to be barred from having & maintaining his aforesaid action thereof against the said defendants. because he saith that the said defendants did not nor have they delivered to the plaintiff, nor did the plaintiff accept from the defendants, the said fifteen hundred bushels of Canada barley in said fourth plea mentioned in manner and form as in said plea alleged.

Nor did the defendants deliver to the plaintiff nor did the plaintiff accept from the defendants the said Nine Hundred & forty seven bushels of Canada barley in said fourth plea mentioned in manner and form as in said plea alleged.

And this the said plaintiff prays may be required of by the County.

F. P. Seabrook
Plff atty.

And the said defendant do
likewise
Williams Woodbridge & Grant
Wylt attys

And afterwards to wit. On the 28th
day of October A.D. 1859. said day being
one of the days of the October Term
of said Court, the following among other
proceedings were had and entered
of Record in said Court, to wit

Henry P. Lewis

Albert G. Morey
James N. Smart

assumpsit

This day comes
said plaintiff by F. B. Tabody his
attorney, and said defendant by
Williams Woodbridge & Grant. their attorneys
also come and issues being joined
herein it is ordered that a Jury come
Whereupon comes the Jury of good &
lawful men to wit, Theron Tatter,
N. Mclelland, Michael Curran, A. T. Gage,
C. D. French, A. B. Logan, James M. Carthy,
J. J. Ruby, R. J. Bullis, Isaac Miller.

24.

Charles Walsh, and J M Wells who
being ^{Elected} ^{Grand} ^{Jury} sworn to try issues
joined aforesaid after hearing evidence
allegations and proofs, arguments of
counsel and the instructions of the
Court retire to consider of their
Verdict. and the hour of adjournment
having arrived upon agreement of the
parties it is ordered that when the
Jury shall have agreed upon a
Verdict they shall reduce the
same to writing, sign and seal
the same and afterwards separate
and meet the Court tomorrow
morning.

And afterwards to wit on the 29th
day of October AD 1859. said day
being one of the days of the October
Term of said Court. the following
among other proceedings were had
and entered of Record in said Court
to wit:

Henry W. Dennis
Albert G. Money &
James H. Smart

Assumpsit

And now again comes the parties to this cause by their respective Attorneys as aforesaid, and the jury empanelled herein for the trial of this cause also come and submit their verdict and say, we the jury find issues for said plaintiff and assess his damages herein to the sum of Six Hundred Dollars.

And thereupon said defendants submit their motion herein for a new trial in this cause and in arrest of Judgment

And afterwards to wit: On the 17th day of November A.D. 1880 said day being one of the days of the November Term of said Court. the following among other proceedings were had and entered of Record in said Court to wit.

Being: Dennis

Albert G. Morey &
James N. Smart

assumpsit

And now again comes the said plaintiff by Harwell

Smith & Thomas his attorneys and the said defendants by Williams Woodbridge and Grant their attorneys also come and defendants motion for a new trial herein and in arrest of judgment on the verdict of the jury being heard is hereby overruled and defendants enter Exceptions. Therefore it is considered that said plaintiff do have and recover of the said defendants his damages of Six Hundred dollars in form aforesaid by the Jury here found and assessed, and also his Costs and Charges in this behalf expended and have Execution therefor

And afterwards to wit: On the 20th day of November A.D. 1860. said day being one of the days of November Term of said Court. The following among other proceedings were had and entered of Record in said Court

Nancy Dennis

Robert G. Money &
James H. Smart

Assumpsit

27.

And now comes the said defendants
by William Woodbridge & Grant their
attorneys and having entered their
Exceptions pray an appeal herein
to the supreme Court of this State
which is allowed on filing their
appeal bond in the penalty of
One thousand dollars. to be approved
by a Judge of this Court, and to
be filed, with their bill of Exceptions
within thirty days.

And afterwards to wit on the 20th
day of December A.D. 1860. said day
being one of the days of the December
Term of said Court. the following
among other proceedings were had
and entered of Record in said Court
to wit:

Henry V. Dennis	}	Assumpsit
Albert G. Morey		
James R. Smart		

On motion
William Woodbridge & Grant attorneys
for defendant. It is ordered that

time to file bill of Exceptions and bond on appeal to the Supreme Court, be and is hereby extended thirty days from this date.

And afterwards to wit. On the 18th day of January A.D. 1861. said day being one of the days of the January Term of said Court. the following among other proceedings were had and entered of Record of said Court. to wit:

Henry W. Dennis
 Albert G. Moxey &
 James W. Smart.

Assumpsit

By stipulation of the parties filed herein it is ordered. that the time to file appeal Bond and Bill of Exceptions in this Cause be and is hereby extended twenty days from this date.

29.

And afterwards to wit: On the 6th day of February 1886 said day being one of the days of the February Term of said Court. the following among other proceedings were had and entered of Record in said Court. to wit:

Henry V Denis	3 3 3 3	assumpsit
Albert G Morey &		
James W Sart.		

And now comes the said defendant by Williams Woodbridge & Grant their attorneys and file their appeal bond herein on appeal to the Supreme Court, which appeal bond having been examined is ordered to be approved by the Court.

And afterwards to wit: on the 6th day of February A.D. 1861 there was filed in the Office of the Clerk of said Court a certain Bill of Exceptions which is in the words and figures following to wit.

In the Superior Court of Chicago

Albert J. Money &
James W. Smart

vs
Henry W. Dennis

Be it remembered that heretofore, that is to say, at the October Term of the Superior Court of Chicago held in and for the County of Cook, and State of Illinois at the Court House in Chicago in the month of October A.D. 1859, on the 28th day of said month the above Cause came on for a hearing before Hon. Gust. Higgins, one of the Judges of said Court, and a jury duly empanelled and upon the trial of said Cause and in order to

sustain the issue upon his part.
The Plaintiff introduced as a witness.

Irman Downer,
who being duly sworn, said that
the Contract shown to witness is
the same under which the barley for
the value of which this suit is brought
was delivered.

The Plaintiff then offered
to introduce the said Contract.
to the introduction of which the de-
fendants then and there objected and
the objection being overruled by the
Court the defendants then and there
excepted.

The Plaintiff then read
the Contract as follows:—

Mr H V Bemis
Bot of Morey & Smart
1500 Bush Barley delivered free in
sacks (same as 1500 bush previously
delivered) at \$1.30 ————— \$1950.

Recd Payt by 1772 20/32 Bu
Barley Malt free of storage & Ins in
Ford's Warehouse for twenty days
and delivery free in sacks at

\$1.10 ~~~~~

\$1950.

Chicago Feb 19 1859

Money & Smart.

The witness then said I am a brewer and was in the employ of plaintiff at the time barley was delivered. Have been in the brewing business thirty years. The ale manufactured by plaintiff is called Pilsener Ale. I am familiar with barley of different sorts. Dennis 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 2^d 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 common barley was worth 70 cents and some sold as high as 90 cents. I was present when last bargain was made. Bemis went to Cleveland a day or two before the fire. He was absent 10 days. I was brewer for Bemis. The defendants delivered barley to the amount of 1500 bushels.

It was all 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 maltster had put two hundred or three hundred bushels in steep. I told the defendant that the barley would not malt. One of the defendants went with me & examined the barley. I told him I could show him why it would not grow. They agreed to see about it. I want asked me, what I would charge for malting it. That

was all. I told him I would charge 16 cents. and I then said I should do it for 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 Money & Smart held all the Canada Barley there was in town. A part of the first lot was not like the sample shown me. Money & Smart took away two or three loads 75 to 100 bushels at a load. I went to Money & Smart 4 or 5 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.

Being cross examined by defendants
counsel witness said -

Canada barley
is so called because it comes
from Canada. One year ago
all the good Barley came
from Canada, no good barley
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 Money & Smart had
all the Canada Barley in the
Market. I was not present
when all the barley was de-
livered. It went through my hands
as Malster. The first lot was
not all Canada Barley. A part
of it was Canada Barley. We
generally put in about 175 bushels
of barley to malt at once.

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 Money & Smart's office. The sample which I took was Canada Barley. I found the last of the Barley was not so good as the first. A part of 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. The fire happened on Sunday Morning. It may have been ten days before the fire that they began delivering the barley. As soon as my attention was called to it I went to Money & Smart. I went to them 4 or 5 times. Mr Smart went with me to see the barley.

We made no bargain with me about Malting the barley. Smart agreed to take the barley away. and asked me to go and look at other barley that he had.

37.

Smart sent for about 120 bushels and took it away, and put other in its place. I don't think that brought away was Canada Barley. It was a poor article. I have seen Common Barley sold at all prices from 40 to 90 cents per bush.

John Carden was then sworn as a witness for plaintiff and said that he had been a Malster for 8 years. Lives now at Kenosha, Wisconsin, worked for Donner & Dickinson. I malted some Barley for them. It was the second lot we got from Mory & Smart. We had between 300 & 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 & bad, made poor malt. Was present at an interview between Donner and the

defendants. Smart asked Danner what he would charge to malt the barley. Danner 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. When the brewery was burned there was a good deal of Barley in it.

Cross Examined

I do not know that the last lot sold to Dennis by Moray & Smart was not Canada Barley. It might have been. It was some good & some bad,

The Plaintiff then introduced Mr. Dickinson who, being sworn, said that he was in business with Danner. Knew about the barley coming to the brewery. Is familiar with the quality of barley. Think this barley

39.

was of an inferior quality. I went to Morey & Smart to see about the barley. They said that if the barley was not such as they had agreed to send to the plaintiff he need not have it. I was not there at the time when Morey and Smart removed a part of the barley, and do not know about the removal or how much they removed.

The plaintiff then introduced A. Littlefield as a witness, who being duly sworn said, that he is in business for Mr Ford and is his foreman. I delivered to Morey & Smart the malt mentioned in the contract between them and Bemis. It was delivered at Bemis order some time in February last.

The defendants in order to sustain the issue on their part introduced

John Brown

who being sworn said. That his business is, that of 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, two 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 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 Illinois Central Rail Road on the 31st March. There were 98 Bags. They overran two bushels to a bag. I got the barley from Howard Eckley's Elevator. I have been acquainted with the quality of barley. I have handled a good deal of barley. I knew the first lot of barley delivered to Bemis by Munn & Smart. I think the 2nd lot was of the same quality as the first lot, that they were about alike. The sacks were shipped on the Central Railroad to be returned. I demanded that of the plaintiff they were not delivered. They were worth from 20 to 25 Cents each. They were in all from 200 to 300 bags. When I went to take away the barley Donner said the maltster would give me all that I was to take back - that

42.

The balance of the barley except what the Mattster would give me was satisfactory - that they could make use of it.

Cross-Examined

Have been engaged in hauling grain and buying grain for a long time: It is in this way I know the quality of barley. Pale Barley is the best barley.

The defendant then introduced as a witness

Abel Pond,

who being sworn said that he went with Brown on the 25th and 26th March to bring Barley back. He took 4 or 5 loads on the 25th & 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 came away about noon. Two loads were taken away on the 25th and two on the 26th. These were all that the Matteter allowed us to take away.

The defendants then introduced John Lint who being sworn 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 Dennis 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 How & Eckley's Warehouse. I only inspected the Barley when it was in the Store house. I know when it was delivered to

Pemis,

The plaintiff as rebutting testimony introduced Truman Danner who said that he did not know John Brown except by sight and was not there when he took the barley away. Never had any conversation with him in relation to taking away the barley.

This was all the testimony introduced in the above case either on the part of the plaintiff or of the defendants.

The Plaintiff then asked the Court to give to the Jury the following instructions.

Instructions for Plaintiff
If the Jury find from the evidence that the contract alleged in the declaration is proven and that the defendants failed to deliver the kind of barley called for by

45.

Given.

the Contract. then the Jury will find a verdict for the plaintiff and the damages will be such a sum as the number of bushels which the defendants failed to deliver would amount to at 11.30 per bushel subject to such set off as has been proved.

Given.

If the Jury find from the evidence that the defendants after delivering a quantity of Barley & being told by the plff. 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 -

Given.

If the jury find from the evidence that the defendants, upon being told by the plff. 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 depts that the barley was

poor and not the Kuid called for by the Contract.

Given. If the jury find from the evidence that the Defs after delivering barley to the plff offered to make a contract with the witness Dourner to malt it for them. such an offer to contract is evidence tending to show that they expected to take the barley back again -

To the giving of each and every one of which said instructions the defendants then and there Ex cited.

The defendants then asked the Court to give to the jury the following instructions.

To the refusal to give each and every one of which instructions the defendants then and there Excepted.

The jury thereupon retired & afterwards came into court with the following verdict.

For We the Jurors find for the Plaintiff and assess the damages Six Hundred Dollars.
Chicago Oct 28th 1859.

J. J. Ruby Foreman
W. B. Logan.
H. M. Gulland
M. Burns.
C. Walsh.
J. W. Wells.
R. J. Bullis.
Thos. Miller
James M. Carty.
Sherron Tatter.
A. T. Gage.
E. D. French.

13
49.

The defendants then moved the
the Court for arrest of judgment
and for a new trial as follows.

Superior Court of Chicago
Albert G. Morey & Co. vs. Motion in arrest
James N. Smart & Co. of Judgment
Henry J. Dennis

And now come
the said defendants by William
Woodbridge & Grant their attorneys
and move the Court to arrest
the judgment in this cause for
the following reasons.

First. That the instrument offered
in evidence by the plaintiff upon
which he seeks to recover is al-
together another and different in-
strument 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 defendant for
the delivery of the barley mentioned

in the plaintiffs 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 contract from that mentioned in his declaration

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

Williams Woodbridge & Grant
for defts

Superior Court of Chicago
Albert S. Morgan &
James H. Smart }
ads } Motion for new trial.
Henry V. Dennis }

And now come the defendants by Williams, Woodbridge & Grant. Their attorneys and move the Court for a new trial herein for the following reasons.

1st - That the Court Erred in admitting evidence offered by the

plaintiff.

2^d The Court erred in Excluding evidence offered by the defendants.

3^d The Court erred in giving the instructions asked for by the plaintiff.

4th The Court erred in refusing the instructions asked for by the defendants.

5th The Court erred in modifying the instructions asked for by defendants and in giving them, as modified.

6th The verdict is against the law.

7th The verdict is against the evidence.

Williams Woodbridge & Grant
for Plaintiffs.

Which motions after argument heard were overruled by the Court to the overruling of each of which motions the defendants then and there excepted and moved the Court to sign and

Deal this their bill of Exceptions
which is done
Van N. Higgins 
Judge

And afterwards to wit, On the
6th day of February A.D. 1861
there was filed in the office of
the Clerk of said Court, a certain
appeal bond, which is in the
words and figures following,
to wit:

Know all men by these
presents that we Albert J. Money
and James N. Smart of the County
of Cook and State of Illinois as
principals and C. M. Root of
the same County & State as
surety are held and firmly
bound unto Henry W. Bemis of
the County & State aforesaid
in the penal sum of One
Thousand Dollars to be paid
to the said Henry W. Bemis or to
his Executors, Administrators or
assigns for which payment well

and truly to be made we bind ourselves our heirs executors, and administrators jointly and severally firmly by these presents. Sealed with our seals and dated this 20th day of December AD 1860.

Whereas the above named Henry W. Bemis recovered a judgment against the above bounden Albert G. Morey & James N. Smart in the Superior Court of Chicago at the November Term thereof as the for the sum of Six Hundred dollars & Costs of suit, and the said Morey & Smart have prayed an appeal therefrom to the Supreme Court of the State of Illinois which has been allowed.

Now therefore the Consideration of this obligation is such that if the said Albert G. Morey & James N. Smart shall prosecute their appeal with effect in the Supreme Court and shall pay the judgment, Costs, interests and damages in case the judgment shall be affirmed in said Supreme Court then the above obligation shall

be null and void and of no effect, otherwise to remain in full force and virtue.

Signed Sealed & Delivered
in presence of Albert G. Morey *Seal*
James N. Smart *Seal*
Edgar M. Corlett *Seal*

State of Illinois
Cook County Iss.

I Walter Kimball clerk of the
Superior Court of Chicago within and for the County of
Cook in the State of Illinois, Do hereby Certify the above
and foregoing to be a true and correct Transcript of the
Declaration. Pleas. Replication. Bill of Exceptions. Affirm
Bond now on file in my office. together with all orders
and judgments entered of Record in said Court in a
certain cause therein. wherein Henry V. Bemis was plaintiff
and Albert G. Morey & James N. Smart defendants.

In Testimony whereof I have hereunto
set my hand and affixed the Seal of
said Court at Chicago in said
County the 2nd day of April A.D. 1861.
Walter Kimball Clerk.



State of Illinois

Albert G. Morey &
James St. Smart
v. Appellants
Henry V. Bemis
Appellee.

In the Supreme
Court. Third
Grand Division.
April Term, A.D. 1861.

And now come the appellants by
Williams Woodbridge & Grant their attorneys
& say that in the record ^{and} proceedings herein
and in the judgment rendered herein there is
manifest error in this that the judgment should
have been for the appellants instead of for the
appellee.

And the appellants assign & set forth the
following special causes of 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
for arrest of judgment made by defendants in the
Court below.

Third. The Court erred in overruling the motion
made by defendants in the Court below for a new
trial.

Williams, Woodbridge & Grant,
for appellants.

Supreme Court of Illinois.
Third Grand Division.
April Term. A.D. 1861.

A. G. Money ^{vs}
J. A. Grant
Appellants

v.
Henry V. Bennis
Appellee.

Assignment of Errors.

Williams Woodbridge & Grant.
for Appellants.

Supreme Court
Henry V. Bemis
appellee

vs
Albert G. Morry

James M. Smout
appellant

and now comes
the said Henry V. Bemis
appellee by Darrell Smith
his attorney and says, that
in the record & proceedings
aforesaid and in the result
of the judgment aforesaid
there is no error
and he prays that the judg-
ment aforesaid may be
in all things affirmed
Darrell Smith

att for

Saith Appellee

founder in error
filed April 22, 1861

L. Deland
Clerk

203
Superior Court of
Chicago.

Pemis
^{or}
Morey et al

Transcript.

Filed April 16, 1861
L. Leland
Clerk

Transcript 10.00
Cert & Seal 50
10.50
paid W. Whittall cash