In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

JOHN SEIBERT, GEORGE SEIBERT, AND GEGRGE SHAER, PARTNERS IN THE NAME OF SEIBERT & CO.,

vs.

ISADORE BACH AND LEOPOLD MARX, PARTNERS IN THE NAME OF BACH & MARX.

} Appeal from Washington.

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This was an action of assumpsit, August term, 1864, of the Circuit Court of Washington county, State of Illinois, by the appellees, who were plaintiffs below against the appellants on an alleged special contract to sell the appellees a certain quantity of wool and flyings at and for a certain price, &c.

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The Declaration contains 4 counts, viz: 3 special and one common count. The first count avers that appellants sold the appellees a large quantity of goods, to wit: 3000 pounds of wool and 500 pounds of flyings, which defendants had on hand in their factory at Ashley, in said county, at and for a certain price, to wit: 78 cents per pound for wool and 15 cents per pound for the flyings, which were to be delivered by appellants to appellees within a reasonable time thereafter, and to be paid for on delivery, and that appellants paid $50, a part of the purchase money, down, and agreed to pay the balance on delivery of said goods. In consideration whereof the appellants promised to deliver said goods, but have wholly failed so to do, by means whereof appellees had sustained great loss, &c.

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The 2d count declares on a contract to deliver a like quantity of wool and flyings within two weeks at farthest, and that appellees paid appellants $50 down, and the 3d count is substantially the same, and the only difference between the 3d special count is that the 1st counts on a delivery within a reasonable time. The 2d on a delivery within two weeks, and the 3d on a delivery of all the wool appellants had in their factory at Ashley aforesaid on request.

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That the 4th count is on amount stated, and is in the usual form.

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To this declaration appellants pleaded three several pleas. 1st, non assumpsit. 2d, that the contract was only conditional, in this, that the appellants agreed that if they, the appellees, would not buy any wool from the wool growers in the country around Ashley, so as that appellants' supply of wool would not be cut off, they would sell and deliver the wool in plaintiffs' declaration mentioned, but that appellees did buy wool contrary to said contract and cut short appellants' supply.

3d plea is a plea of accord and satisfaction.

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The case was tried before Hon. S. L. Bryan and Jury, and verdict was rendered for the appellees in form as follows: "We, the Jury, find for the plaintiffs, the defendants to return the $50 and $72 damages," upon which verdict, without the consent of the Jury, and after they had retired, a motion was made by appellants in arrest of judgment and for a new trial, but both motions were overruled by the court, and a judgment was rendered for $122 and costs of suit.

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The appellants excepted to the opinion of the court, and tendered their Bill of Exception, which is in substance as follows:

Page 13 Bill of exceptions shows that defts came & said to Voss they wanted to buy the wool Voss had on hand & looked at the wool & defts thought there was 3000 lbs but witness told him he thought there was not over 2500 lbs. & refused defts to Voss

Ernest Voss, a witness for plaintiff in court below, stated that he was in the factory when appellee came to the factory to buy wool, appellants were not there, witness told them he did not know whether they had any to sell or not, that they wanted wool for their own use to run the factory, but for them to call again and they could see defendants themselves. Plaintiffs came again, witness was present, they said to defendants they had come to buy their wool, defendants said they wanted to keep some for

their own use to run their machine; plaintiffs said they would give 78 cents for wool and 15 cents for flyings, and defendants agreed to take it, remarking that they have to keep enough to keep their factory running; plaintiff said, yes, you want to keep 200 or 300 pounds; defendants made no reply. Wool was to be paid for on delivery, and to be called for in two weeks; plaintiffs gave defendants $5 in cash and afterwards paid them $45 more on account of wool.

14] Cross examined, said witness stated that plaintiffs stated they did not want to buy any wool of the wool growers around Ashley or the surrounding country, and that it was on that understanding they agreed to let plaintiffs have what wool they could spare. Witness states positively no particular quantity was sold, nor was all the wool sold they had on hand. They used from 80 to 100 pounds of wool per day in factory; there was from 1200 to 2000 pounds of wool in factory when the above conversation took place, and about 500 pounds of flyings. The next week plaintiffs came with sacks and demanded wool. There was then about 600 pounds of wool and 500 pounds flyings on hand; witness would not like to swear there was over 900 pounds of wool on hand at the time. Defendants were carrying on a factory at the same time, and were engaged in the manufacture of cloth and in consequence of plaintiffs buying up the wool in the country around Ashley, defendants could not buy from wool growers, and run short—they

15] bought wool at 65 cents. When plaintiffs came to demand wool, defendant said he could spare him 100 lbs, at which plaintiff was very indignant, and claimed all but 200 or 300 lbs.

John Yost, another witness for plaintiff, stated that he was present some 10 or 12 days before 4th July last, with plaintiffs; that there was then from 1500 to 3000 lbs of wool on hand, and some 400 or 500 lbs of flyings on hand at that time; not a dealer in wool; judged of the quantity from the bulk like anything else; plaintiff bought witnesses wool crop in July last; he lives 8 or 10 miles from Ashley, in Washington county; wool was worth at St. Louis market from 85 to 110 cents per lb, and the cost of transportation would be about ¾ or 1 cent per lb. Plaintiff also proved that the price and cost of shipment was same as stated by former witness.

Defendants then proved by Mr. Cundiff, another witness on their behalf that the plaintiffs had bought wool of the wool growers in and around Ashley

17] in July last, and that plaintiffs left money with him to buy wool from wool growers in July last; that he bought for plaintiffs 242 pounds, but could not say it was between time of alledged purchase and demand of wool. Defendants proved by another witness that he was a woollen factor and that there was about 900 pounds of wool and 500 pounds of flyings at the time plaintiffs were talking about buying wool from defendants. Wool was then, and up to 4th July last, worth from 85 cents to 110 cents in the St. Louis market; that the quantity did not make much difference in the price, which was all the evidence adduced in the cause on behalf of the defendants. The court was then asked by defendants to instruct the jury, first, that before the plaintiffs can recover, on 1st, 2d and 3d counts of the declaration, they must prove that they bought of defendants some certain quantity of wool and flyings at a certain price. 2d. That if the contract between plaintiffs

18] and defendants was that the defendants were to sell wool to the plaintiffs on condition that the plintiffs were not to buy wool from the wool growers in the country around Ashley, and that plaintiffs failed to comply with their contract on their part, the plaintiffs have no right to recover on the 1st, 2d and 3d counts of their declaration. 3d. That unless the plaintiffs prove that they bought of plaintiffs some quantity of wool, they have no right to recover on the 1st, 2d and 3d counts.

The court refused all but the last, which was given.

The defendants also asked for the 4th instruction as follows that before the plaintiffs can recover in this action they must prove that they complied with the contract on their part, but the court refused to give it, and instructed the jury for the plaintiffs that if they believed, from the evidence that the plaintiffs bought wool of the defendants at 78 cts per lb at Ashley, and that they failed to deliver said wool according to their contract, the plaintiffs have a right to recover the difference between the prices to be paid for the wool and the value of the wool at the time it was demanded to the refusing to give said instruction, 1st, 2d and 4th, for defendant and giving the instruction as asked for by the plaintiffs, the defendants at the time excepted.

The jury returned into court the following verdict: "We, the jury, find for the plaintiffs, the defendants to return the $50 and to pay $72 damages." The verdict was put in form by the court, as he says, without objection on the part of defendant's atty, who, nevertheless, entered a motion in arrest of judgment, and for a new trial, which motion the court overruled and entered judgment for plaintiffs for $122 damages. The defendants excepted. Bills signed and made part of record.

19] The defendants come into this court by appeal and asked the judgment of the Circuit court to be reversed, for the errors assigned, which are briefly as follows:

1st. Because the court refused to arrest the judgment.

2d. Because it refuses a new trial.

3d. Because it refused proper instructions on behalf of defendants and gave improper instrnctions for plaintiffs.

4th. Because they rendered judgment for plaintiffs on verdict of jury In favor of plaintiffs.

5th. Because this court rendered judgment in favor of plaintiffs and against the defendants for $122 and costs.

R. S. NELSON,

For Appellant.

Sickel & Co

36 vs

Buck & Co

abstract

Filed, Nov. 17-1864,

[illegible] Master CM

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

BRIEF.

SEIBERT & CO.
vs.
MARKS & CO.
} Error to Washington.

Brief of Appellants.

1st. Times and sums, if material, must be proved though laid under a videlicet. Vail vs Johnson, 4 Johnson's Reports, 450.

2d. A videlicet will not avoid a variance in a material matter. 1 Chitty's Pleadings, 318, note 1 on page 318 ib.

3d. A verdict cannot be corrected by the Court after the Jury have retired & are separated nor in the Supreme Court. See cases cited by Court in Wilcox vs Roby 3 Gil. 475.

R. S. NELSON,

For Appellants.

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Seibert & Co

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Buck & Mary

Brief of

appellants

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Filed, Nov. 18. 1864.

A. Johnston Clk