Hammer, Charles et al v. Breidenbach, Henry 1860 St. Louis 455/1

612/11
59/060
31M049

Hammer plaintiffs resp
Philipp Hammer
Adam Hammer

contract in German

say def understood contract - was to serve as foreman in brewery "Bavarian brewery"
~~Hamm~~ 'yr
def broke contract
acc to contract, he owes $500/ left early
wm $507.34

B def app
life endangered by having to enter cave
plaintiffs could have fixed cave, but did not
roof was earth "fell

Napton
R v R - not satisfied w/ instruct - court should have allowed proof of cave's danger
how can jury det if cave is dang or not

1. State of Missouri
County of St. Louis } Be it remembered that heretofore, to-wit; on the Twenty fifth day of September, One thousand eight hundred and fifty eight, there was filed in the Office of the Clerk of the St Louis Court of Common Pleas, within and for the County aforesaid, a petition which is in the words and figures following, to-wit.

PETITITION.

Charles Hammer and Philipp Hammer and Adam Hammer, partners doing business under name and style of Charles and Philipp Hammer & Co, plff's.
vs.
Henry Briedenbach, Defendant.

} In the St. Louis Court of Common Pleas October Term 1858 St. Louis County s.s.

Plaintiffs state that they and Defendants made and entered into a certain contract in writing in the german language, dated the 1st day of January 1858. whereby the said defendant undertook and contracted to perform the duties of a Foreman in the Brewery business owned and carried on by them, said plaintiffs, in the City of St. Louis and known and called the Bavarian Brewery of St. Louis, for the term of Sixteen months, that is to say up to and until the 1st day of May 1859, they said plaintiffs contracting to pay him for his services as Foreman as aforesaid the sum of One thousand dollars for said term of one year, which said contract is herewith annexed and is marked Exhibit "A", and a correct translation thereof into the English language is also annexed and marked Exhibit "B" both of which are prayed to be made and taken as a part of this petition. Plaintiff further state that among the stipulations in said contract contained, is the following to-wit: Whoever of the two contracting parties breaks this contract without sufficient cause and which is contained in said contract has to pay to the other party the sum of Five hundred dollars in Cash. Plaintiff's state that they have in all things performed and fulfilled the conditions, covenants, agreements and stipulations in said contract contained on their part to be fulfilled observed and performed. But plaintiffs charge that said defendant has not performed the conditions of said contract on his part to be performed, in this that he, the said defendant did not conduct the said Brewery business as Foreman up to and until the first day of May 1859. as he was bound to do under said contract, but on the contrary thereof the said defendant quit the service of plaintiffs as their Foreman in said Brewery, against their will and consent on the 15th day of August 1858. and has failed and refused to further conduct the said business in

said Brewery as Foreman, although frequently requested so to do and to fulfill his said contract. Wherefore plaintiffs say that he said Defendant is liable to pay to them the said sum of Five hundred dollars mentioned in said contract as penalty for the breach of said Contract as aforesaid and therefore pray Judgment against defendant for the sum.

Joseph Jecko. for plffs.

State of Missouri
County of St. Louis } S. S. Adam Hammer one of the above named plaintiffs makes oath and says he believes the above petition and the matters therein stated are true.

Sworn to and Subscribed before me Adam Hammer
this 25th day of September A.D. 1858.
(S. S) John B. Evens Not. pub.

And thereupon the following Summons was issued on the 25th day of September 1858.

SUMMONS

County of St. Louis. S.S.

The State of Missouri,

To the Sheriff of St. Louis County — Greeting:

We command you to summon Henry Biedenbach to appear before the Judge of our Court of Common Pleas, on the first day of the next Term thereof, to be held in the City of St. Louis, within and for the County of St. Louis, on the Second Monday of October next, then and there to answer the complaint of Charles Hammer, Philipp Hammer & Adam Hammer as set forth in the annexed petition: and have you then and there this writ.

(L. S) Witness Charles W. Hicks, Clerk of our said Court of with the Seal thereof hereto affixed, at Office in the City of St. Louis, this 25th day of September in the year of our Lord eighteen hundred and fifty eight.

C. W. Hicks Clerk.

And thereupon the Sheriff made the following return.

SHERIFFS RETURN.

Executed this writ in the County of St. Louis this 1st day of October 1858. by delivering a copy of the writ and petition as furnished by the Clerk, to Henry Breidenbach or back

M. S. Cerre Sheriff By J. A. Guion Dept.

And thereupon the defendant filed an answer to the foregoing petition, on the 15th day of October 1858, which is in the words and figures following to wit:

ANSWER.

The defendant for answer to plaintiffs petition states that he admits

3.

the execution of said Contract in the German language and that under said contract he served the plaintiffs up to the 15th of August 1858 and then quit. Deft. has no knowledge or information sufficient to form a belief whether or not the translation filed with said petition is correct. Deft. denies that he in any way failed to comply with said contract on his part, but states that he performed his agreement in every particular until it was violated by plaintiff, and he was thus prevented from complying therewith, That by the terms & spirit of said contract plaintiffs were bound to furnish him with a good, cool & substantial Cave to be used in said business. That good Beer could not be made without one. But on the contrary plaintiffs failed & refused to furnish him any sufficient Cave or Cellar for that purpose and he was thereby rendered incapable to comply with said Contract. That the only Cave furnished him by plaintiffs was one so warm and so unsafe that good Beer could not be made in it. And while he was in the employment of plaintiffs at divers times, large portions of said Cave fell in and thereby prevented him from working, and endangering his life. Wherefore defendant states that he had good and sufficient cause for abandoning said employment. Defendant by way of counter claim herein states that plaintiffs are justly indebted to him on account of said contract, in the sum of $225 a correct account of which is here inserted, to-wit:

	Plaintiffs to Deft. Dr.
To services 7½ mos. at $1000 per year . . .	$625.00
Cr by Cash at sundry times . . .	400.00
Bal. due deft. from pltffs . .	$225.00

Wherefore he asks judgment against the plaintiffs for Two hundred & twenty five dollars, with interest from Aug 15th 1858.

McClellan, Moody & Kellyer Attys for deft.

Henry Breidenbach on oath says he believes the foregoing answer and counter claim and the matters therein as stated are true.

Subscribed and sworn to before me Oct. 15th 1858.

Henry Breidenbach.

Sibley Waite Justice of the peace

And thereupon a Reply to the foregoing Counter-claim was filed, by leave, on the 22d. day of December 1858 which is in the words and figures following to-wit:

REPLY TO COUNTER-CLAIM.

plaintiff for their replication to defendants counter-claim, state that they do not owe the defendant Two hundred and twenty five dollars or any other sum of money whatever, either on account of services rendered, or on account of said contract or on any account whatever. The plaintiffs deny

4.

that defendant had good and sufficient cause, or any cause whatever for abandoning his said Contract. The plaintiffs deny that they in any manner violated the terms of said contract, or that they did any thing which could justify said defendant in abandoning his said contract, The plaintiffs deny that they failed to furnish a good, sufficient and proper Cave to be used in said business and that he said defendant was unable to perform his contract by reason of any thing these plaintiffs did or omitted. plaintiffs state that said defendant by reason of of his violation of his contract as in plaintiffs petition set forth is justly indebted to these plaintiffs in the sum of Five hundred dollars, for which they pray Judgment.

Jos Jecko for pltffs

Jos Jecko agent for plaintiffs makes oath and says he believes the foregoing Replication and the matters and things as therein stated are true

Sworn to before me the 22d december 1858 } Jos. Jecko
C. W. Hicks Clk }.

And thereupon the following further proceedings were had at the October term of said Court, to-wit:

Trial & Judgment For Plaintiffs For $507. 34.

Thursday December 23d 1858.

Now come the parties by their Attorneys and a Jury is called, to-wit: R. V. Kennedy, L. C. Preston, Wm Renshaw Jr, J. F. Amebaugh, T. G. Russell, Samuel Finch, Rudolph Gardeman, John Leitch, Sweetheart Miller, Adam Hendricks, H. M. Wissman and John Wolff, twelve good and lawful men who being duly elected tried and sworn, the issues herein joined well and truly to try, the trial progressed, and being finished the Jury aforesaid upon their oaths aforesaid, say they find for the plaintiffs and assess their damages at the sum of Five hundred and seven dollars and thirty four cents; therefore it is considered by the Court that the plaintiffs recover of the defendant the damages aforesaid as assessed and also their costs herein expended and have execution therefor.

And thereupon the following further proceedings were had at the October term of said Court.

Friday January 14th 1859.

Defendants Motion For New Trial And In Arrest Of Judgment Overruled.

The defendants Motion for a new Trial and in arrest of Judgment herein being heard and fully considered by the Court it is ordered that the same be overruled.

And on January 19th Defendant filed a "Bill of Exceptions" which is in the words and figures following, to-wit:

5.

Charles Hammer, Philipp Hammar and Adam Hammar, plaintiffs
vs
Henry Breidenbach, defendant.

St. Louis Court of Common Pleas October Term 1858.

Be it remembered, that on the trial of this cause, the plaintiff read in evidence a written Contract in the words and figures following, to-wit:

Agreement between Charles & Philipp Hammer & Co of the one part, and Henry Breidenbach of the other part, both parties of the City of St. Louis, County of St. Louis, State of Missouri.

(1) The proprietors of the "Bavarian Brewery" of St. Louis, Ch. & Ph. Hammer & Co engage on this date Mr. Henry Breidenbaugh "as foreman of said Brewery. (2) Mr. Henry Breidenbach obligates himself to conduct the said "Brewery Business" conscientiously & with the best ability and guarantees to furnish an excellent article of "Beer and Lager Beer".

(3) Mr Henry Breidenbach also binds himself, to exert himself to sell said "Beer & Lager Beer to good Customers. (4) Mr Henry Breidenbach is bound to consult the Proprietors of the Brewery concerning all matters of importance pertaining to the business and the sale of the Beer, and to obtain their consent thereto. (5) Mr Henry Breidenbach will receive in consideration of his services a Salary of one Thousand dollars per annum.

(6) This salary is to be paid as follows, he shall receive during the first six months of every year only what is absolutely necessary to defray his household expenses (say about 30 to 40 dollars) per month, for the remainder of the year, the balance will be paid in monthly rates. (7) Mr Henry Breidenbach makes himself accountable for every damage, which may result to the business from negligence or careless management on his part in conducting the same. (8) This contract takes effect from this date and will expire on the first day of May 1859.

(9) Whosoever of the two contracting parties breaks this contract without sufficient cause & which is contained in said contract, has to pay to the other party the sum of Five hundred dollars in cash.

(10) In witness whereof both parties have hereto signed their names. St Louis this 1st day of January 1858.

Signatures {

... The plaintiffs further proved that the defendant entered into their service under said contract on the 1st of January 1858 and remained therein until the 15th day of August 1858 when he quit the service of plaintiffs. Plaintiffs here rested their case. Defendant

produced witness whose testimony tended to prove that the only Cave which plaintiffs furnished defendant for storing & fermenting the Beer which he manufactured for them was a Cave dug in the Earth, that the roof of the Cave was the natural earth, that its character was such that large quantities of Earth frequently fell down upon the floor of the Cave from the roof during the time that defendant remained in plaintiffs service that the earth fell in such quantities as in the opinion of the defendants witnesses to make the Cave dangerous to the life or limbs of persons going into the Cave. Defendants witnesses testified that defendant was daily in said Cave superintending the storing and drawing off of said beer, and that it was duty so to do. defendant further offered to prove that the character and condition of said Cave was such that it was impossible to ferment beer properly in it, and that defendant could not in said Cave prepare a good article of Lager Beer, that the Cave was not properly constructed and not of the proper temperature.

Which evidence was objected to by plaintiffs and excluded by the Court to which ruling of the Court the defendant then and there excepted. And this was all the evidence for the defence. Plaintiffs then produced a witness who testified that on the day defendant quit plaintiffs, one of the plaintiffs told him that if he defendant would remain that he need not go in the Cave at all, that the plaintiffs never ordered defendant to work in said Cave whilst in a dangerous condition, that defendant said he would not stay with plaintiffs any longer but would furnish them with a man in his place, which plaintiffs refused to do. and this was all the evidence for plaintiffs. The Court then

PLAINTIFFS INSTRUCTIONS GIVEN

at the request of plaintiffs instructed the Jury in writing as follows.
The condition of the Cave is no defence to this suit unless the Jury shall believe from the evidence that the cave was in a dangerous condition at the time the defendant left and that whilst in a dangerous condition the plaintiffs required the defendant to work in said Cave.
The Court further at the request of plaintiffs instructed the Jury verbally that if they found for the plaintiffs, they might allow interest from the commencement of the suit.
After argument of Counsel the Jury retired and returned a verdict in the words and figures following, to-wit:

VERDICT OF JURY.

We the Jury find for the plaintiffs in the sum of Five hundred dollars & interest from Commencement of suit.

W. Renshaw Jr Foreman.

The Court thereupon instructed the Clerk to compute interest in the finding of the Jury and under judgment according. And afterwards, to-wit

7.

on the 23d day of Decr 1858 the defendant filed the following motion in arrest of Judgment.

MOTION IN ARREST OF JUDGMT.

Comes now the defendant and moves the Court to arrest the judgment herein and assigns the following reasons therefor,
1st That the petition in this cause does not state facts sufficient to constitute a cause of action - Especially in this, that that there is no avermente in said petition that the plaintiffs were damaged by reason of the matters complained of. 2d The verdict of the Jury was informal and incompleto, in this, that 2 issues were submitted to them and they decided but one.

McClellan & c for deft.

. . which motion was overruled by the Court, to which ruling of the Court defendant then and there excepted.

And at the same time, to-wit, 23 Decr 1858 the defendant filed the following motion for a new trial.

MOTION FOR NEW TRIAL

Comes now the defendant & moves the Court for a new trial herein, and states as his reasons therefor, 1st That the verdict was contrary to the evidence. 2d that the verdict was contrary to the weight of evidence, 3d That the verdict was contrary to law. 4th That the Court erred in the instructions given the jury for plaintiff. 5th That the Court erred in excluding legal testimony offered on behalf of defendant.
6th That the Court erred in admitting illegal evidence offered by plaintiffs. 7th That the damages assessed are excessive. 8th That no damage was proved. 10th That the verdict of the Jury was incompetent.

McCullen & c for defs.

which motion was overruled by the Court, to which ruling of the Court the defendant then and there excepted. - and files this his "bill of exceptions" which he prays may be signed & sealed by the Court and made part of the record in this case. which is done.

Sam Reber Judge &c (Seal).

AFFIDAVIT FOR APPEAL.

And thereupon, to-wit on January 19th 1859, the defendant filed an affidavit for appeal, which is in the words & figures following, to-wit,
Defendant on oath says that the appeal prayed for in this case is not made for vexation or delay, but because affiant believes that he is aggrieved by the judgment or decision of said Common Pleas Court.

Subscribed & Sworn to before me this 19th day Jany 1859 — Henry Breudenbach.

C. W. Nicks Clerk.

BOND

And thereupon the Defendant filed a bond on January 19th 1859, which is in the words and figures following, to-wit:

Know all Men by these presents, That we, Henry Breidenbach as principal and August Scusler & Francis Mohrhardt as securities, are indebted to Charles Hammer, Philip Hammer and Adam Hammer in the sum One thousand and fifteen Dollars, for the payment whereof we bind ourselves, our heirs, executors and and administrators jointly and severally, firmly by these presents. Sealed with our seals and dated at St. Louis. this 19 day of January one thousand eight hundred and fifty nine. The condition ~~of this~~ is such, that whereas said Henry Breidenbach has appealed from the judgment rendered against him and in favor of said Charles Hammer, Philip Hammer and Adam Hammer in the St. Louis Court of Common Pleas for the sum of Five hundred ~~and~~ seven dollars and 84 cents, together with costs, Now if said appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given by the Supreme Court, or such as the Supreme Court may direct the St. Louis Court of Common Pleas to give, and if the judgment of such Court, or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against him by the Supreme Court, then this obligation to be void, otherwise to remain in full force.

Approved. Heinrich Breidenbach (Seal)
Attest. Francis Mohrhardt (Seal)
C. W. Hicks Clerk August Scusler (Seal)

And thereupon the following further proceedings were had, to-wit

Wednesday January 19th 1859.

ENTRY OF APPEAL. The defendant files a "Bill of Exceptions" herein and an affidavit for an appeal and on his motion an appeal is allowed him to the Supreme Court from the Judgment of this Court herein, and he thereupon files an appeal bond with Henry Breidenbach as principal and August Scusler and Francis Mohrhardt as securities which bond is approved by the Court.

State of Missouri
County of St Louis } ss. I, Charles W. Hicks Clerk of the Saint Louis Court of Common Pleas within and for the County aforesaid, certify the above and foregoing to be a full true and complete Transcript of the record and proceedings in the above entitled case as fully as the same remain in my Office.

9.

In testimony whereof I have hereto set my hand and affixed the Seal of said Court at Office in the City of St. Louis this fifteenth day of Feby. A.D. 1859.

C. W. Nicks Clerk

SEAL OF THE ST. LOUIS COURT OF COMMON PLEAS, MISSOURI

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(11)

October Term 1860

Charles Hammer, Philip Hammer & Adam Hammer
Respondents

vs } Transcript

Henry Breidenbach
Appellant

Appeal from St Louis Court of Common Pleas

Filed 3rd March 1859.
Wm S. Glanville
Clk.

Joseph Jecko Esq
Atty for Respdts
McClellan Woody & Nittyer
Attys for Appellants

$6.25 paid by [illegible] Exd. 107 93

affigt [illegible] / apts. stat / Submitted /
Reversed & remanded 15 Dec. 1860 / C. p. 105

Charles Hammer & C
vs
Henry Breedenbach

In Supreme Court of Missouri.

The said appellant assigns for error in the record of this cause

1st The said Court of Common Pleas erred in excluding evidence offered by defendant as to the dangerous & unsuitable character of said cave.

2nd said Court erred in overruling defendant's motion in arrest of judgment for the reasons therein stated.

3rd said Court erred in overruling defendant's motion for a new trial for the reasons therein stated.

McClellan Moody & Miller
Attys for Appellant.

No 273

Hammer & al
vs
Breidenbach

Appeal & errors –

Filed 19th March 1859
Wm. S. Glanville
Clk.

McClellan Moody & Miller
attys for appellant

Charles Hammer & C Respondents
vs
Henry Breidenback Appellant

Hammer & his partners sued appellant for breach of a contract for service as foreman in their Brewery. They alledge that by the terms of the contract, which is set forth in the record, either party on violation of the contract was to forfeit to the other $500. And that on the 15th day of August 1858 appellant quit their employment and so forfeited to them $500. They admit his faithful service from January 1858 to Aug. 15th 1858. They do not state that they were in any way damaged by his quitting. But leave us to infer that they were benefitted by the opportunity it gave them to withhold a large balance of his wages.

The $500. mentioned in the contract is not a conclusive measure of damages. It is like the penalty of an official bond. And all respondents could in any event recover is such amount short of $500 as the proof shews they were damaged by the alledged violation of the contract by appellant.

The Court and Jury therefore erred in finding & rendering judgment for said sum & interest as a liquidated debt. And the court below further erred in overruling the motion in arrest of

judgment - And in the instruction to the jury as to interest - thereby plainly intimating that if the jury found for Respondents they must find the $500. as a liquidated sum -

Appellant insists that by the terms of said contract he was bound to make good beer - That the proof shews that to do this it was necessary for him to frequent the only cave furnished him by Respondents - and that good beer could not be made in said cave and his life was endangered by entering it - This the Respondents had it in their power to remedy if they saw proper - They were bound to do so - But they seem to have made no effort in that direction - Appellant had therefore a good & "sufficient cause" for leaving the employment of Respondents and they have no right of action against him -

The Court erred in excluding the proof offered by Appellant as to the temperature & general unfitness of said cave - as a "sufficient cause" for leaving - and in so instructing the jury.

If Appellant had remained the time ~~[illegible]~~ he would have been just as liable to an action every day for not furnishing, with the means given him, "an excellent article of Beer & Sager Beer" which the proof offered

& excluded
with that admitted shews would have
been impossible -
In this cause the Respondents do not
appear upon the record as injured parties -
After neglecting & refusing to provide appellant
with the necessary means to serve them &
withholding a part of his wages, they refuse
to let him substitute a suitable man
in his stead - It is true they offer to release
him from any obligation to enter said cave
while it was dangerous - They of course being
the judges of the time it was dangerous - But
they do not release him from his obligation
to furnish "an excellent article of Bar &
Lager Bar" and the proof shews that to
do this he must go into the cave daily & hourly.
On the trial, if the Court below had been asked to
say to the jury at the close of Pltff's proof that as
no damage had been alleged or proved they
must find for deft the court would have
been in duty bound to do so. The motion in
arrest of judgt raised the same question; &
the Court ought to have sustained it -
In this cause the appellant, a poor & ignorant
young man, served Respondents from Jan-
-ary 1 1858 to August 1st 1858 for but little over
half his stipulated salary, then quits from a ne-
-cessity caused by Respondents - Offers to procure
a substitute which is refused - And the Respond-

-ents, without either pleading or proving any damage done them by him obtain a judgement against him for $507.34 - The verdict & judgements below are, not only not in accordance with the law & the evidence but grossly unjust and ought to be set aside - See Sedgwick on Measure of damages pg 204 & 210. The motion in arrest ought to have been sustained - because the verdict does not respond to all the issues - The issue upon the setoff is not met by the verdict - see 1 Mo 401 & 495 -

Wm Clellan Moody & Hillyer

Attys for Appellant

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Hammer & Co

v

Breidenbach

Appellant's Statement & brief -

Filed 24 March 1860

W J Leonnie Ch

Hammer & others v. Briedenbach

This suit is brought to recover the penalty of five hundred dollars, for the breach of a contract. The contract is as follows: (The Clerk will copy it from the bill of exceptions p. 5)

The breach alleged is, that defendant did not conduct the said Brewery as foreman up to the first day of ~~January~~ May 1859 – but quit the service of plaintiffs as foreman, against their will & consent, on the 15th aug. 1858. They therefore claim the payment of the $500.

On the trial, the defendant proved that the cave or cellar furnished by plaintiffs for storing & fermenting the beer was unsafe; that its roof was the natural earth, which ~~fell in~~ occasionally & frequently fell in such quantities as to render it dangerous; that it was defendant's duty to be in daily employed in the cellar, superintending the storing & drawing of the beer. In addition to this testimony, the defendant offered to prove that the condition of the cave was such that a good article of beer could not be made in it – but this evidence was excluded. The plaintiffs in rebuttal proved, that they had said to defendant the day he left, that if he would remain he need not go into the cave at all – that plaintiffs never ordered defd. to work in said cave whilst in a dangerous condition.

The Court instructed the jury as follows:

= The condition of the car is no defence to this suit unless the jury shall believe that the car was in a dangerous condition ~~to~~ at the time the defendant left & that which in a dangerous condition the plaintiffs required the defendant to work in said car." The verdict was for the penalty.

In the cases of Moore & Hunt v. Platte County (8 Mo. R. 469) & Gower v. Saltmarsh (11 Mo. R. 273) the rule was laid down by this Court, that where an agreement contained several stipulations of various degrees of importance, & the breaches of some would be ~~readily estimated &~~ attended with losses difficult to be estimated & in others the damage would be of easy calculation, the sum specified in the agreement as the ~~damage~~ amount of damages for the breach of any stipulation will be construed as a penalty & not as liquidated damages, even although the parties have in express terms declared the contrary.

The rule was originally laid down in the English case of Kemble v. Farren (6 Bingh. 141.) There the defendant had agreed to act as principal comedian at Covent Garden, for which the plaintiff was to pay him £3.s.6.8d. every night the theatre was opened, & if either party failed to fulfil his agreement, or any part thereof, the party failing

was to pay £100 - which was declared to be liquidated damages & not a penalty. The Court held the agreed damages to be a penalty, because they extended not only to those breaches which were of uncertain injury but to every trivial breach, the damages for which could be easily ascertained. The authority of this case was recognised & followed in Horner v. Flintoff (9 Mee. & Wels. 678.)

When there is but a single stipulation in a contract, & the damages for its breach are plainly of such an uncertain character as to render it almost impracticable to estimate them by any fixed rule, the contract has been literally enforced. As if a proprietor of a newspaper should sell out his establishment, with an agreement not to set up a rival paper within the same town or within a designated period, & the parties should before hand determine the damages which the breach of such an agreement would occasion, the amount thus agreed upon would be binding. And the same principle would apply when there was more than one stipulation, if they were all of the same character. But where a slight deviation as to time or amount is visited with the same penalty as a breach of the most important ~~stipulations~~ terms of a contract, it is evident that the parties do not mean what they say, when they call such penalty stipulated damages. And

as the object of the courts is to ascertain & act upon the real intention of the parties, it is necessary in order to carry out such intentions to disregard their language.

In the present case, however, no such embarrassment is created; - for the contract not only provides for ~~the~~ the performance of several things on both sides, some of which are of a character where a breach could be easily estimated, but it terms declares ~~that~~ the $500 to be a penalty to be ~~forfeited~~ paid in the event of a breach by either party. There was no ground, therefore for referring the jury to their own in their estimate of the damages sustained.

We have been unable to see upon what grounds the evidence offered by the Defendant was excluded. He was under obligations, by his contract, to furnish an excellent article of "Beer & Lager Beer," and such an engagement on his part necessarily implied an obligation on the part of the Proprietors to furnish him with such materials & such a cellar or cave as would be adequate to the ~~manufacture~~ production of the desired quality of Beer. To say, that he could go on & furnish

an inferior article & protect himself against his breach of contract, in so doing, by setting up the deficiency or insufficiency of materials furnished, ~~would be~~ is to throw out of view all consideration of the value of his reputation as a skilful brewer - which may have been & most probably was the principal inducement to his employment & which to him may be more valuable than his salary.

We are not satisfied with the instruction of the Court. How can a jury ascertain the precise time when a cask is dangerous & when not? If dangerous at all, from a liability to fall in, is it not necessarily so at all times, whilst it ~~continues~~ in that condition? - unless indeed the character of the weather, or some other such circumstance, may influence the degree of risk - about which there was no testimony. Nor do we perceive the assent of the proprietors to the defendant's entire absence from the cask, or his omission to enter it except when it was entirely safe, can change the relative rights & duties of the parties to this contract. It appeared in evidence that the defendant, in order to discharge his duties under the agreement, had necessarily to enter this cask every day & at all times of the day. It was totally irreconcilable with this understanding of his duties that he was at liberty to neglect them altogether or employ some substitute. It is, as

though a ship captain should agree to ~~take~~ navigate a vessel from one point to another, & upon examining the vessel should ascertain that she was unseaworthy & that ~~the~~ his life & those of his crew would be endangered by undertaking the voyage. Would it be any answer to such a defence to an action for a breach of this contract on ~~his~~ the part of the Master, that the owners allowed him to employ a substitute & did not require him to go on board the vessel, if in his opinion she was unseaworthy? Such a permission can only be regarded as substantially a discharge from the engagement.

The judgment is reversed & the cause remanded

The other Judges concur

W. B. Napton

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Hammer & others
v.
Briedenbach

Opinion of
the Court

Napton

Rev. A. Rumsey

Filed 15 Dec. 1860.
W. S. Glanville
Ck.