

dollars each for all casks to contain eighty gallons or upwards, made from fine eighth staves in stock for that purpose; to be paid for in cash by the defendants to the plaintiff in full once a week, or as soon as delivered by the plaintiff; the defendants having the privilege of taking all the barrels, up to one hundred per week, that might be manufactured by the plaintiff. The defendants duly agreed with the plaintiff to permit him to do and complete the said works during the said year on the terms aforesaid, and to take and purchase from the plaintiff at the respective rates aforesaid at least fifty barrels per week, of forty gallons each, or their equivalent in casks of eighty gallons each, to be manufactured by the plaintiff during the term of one year from the date of said last mentioned agreement as aforesaid.—**Averment:** That plaintiff did accordingly commence, and did in part perform the said last mentioned works on the terms aforesaid, and furnished all the materials, and manufactured certain (to wit, 900) barrels of forty gallons each, of the quality and description aforesaid, and delivered the same in the storehouse of the defendants in the quantities and in all respects in strict accordance with the terms aforesaid, during the period (to wit, eighteen weeks) from said last mentioned agreement, and was always ready and willing to do and complete the whole of said works of the qualities and in the quantities aforesaid during the remainder of the said year, and to allow the defendants the privilege of taking all the barrels, up to one hundred per week, that might be manufactured by the plaintiff according to the said last mentioned agreement, and laid out large sums of money and incurred heavy liabilities in procuring materials and in hiring workmen fully to carry out and complete the said last mentioned agreement; of all which the defendants have always had notice.—**Breach:** That defendants would not permit the plaintiff to proceed with or complete the performance of the said last mentioned agreement, and the manufacture and delivery of the barrels and casks for the defendants thereby stipulated for, but wrongfully refused to take or purchase from the plaintiff or a him to deliver any more or further barrels or casks, other than aforesaid (to wit, eighteen weeks of the said year), as provided in said last mentioned agreement, and thereby wrongfully discharged and prevented the plaintiff from completing and performing the same; *per quod* the plaintiff lost not only the price of the said barrels and casks so manufactured and delivered by him as aforesaid, and the profits which would otherwise have accrued to him from the completion of the said last mentioned agreement, but has also lost a large sum of money, laid out by him as aforesaid, in providing materials for the completion thereof as aforesaid, and has sustained damage by reason of the said liabilities so incurred as last aforesaid.

The declaration also contained the common counts for goods bargained and sold, for goods sold and delivered, for work and materials, for money paid, and for money had and received.

The defendants' summons was for leave to plead:

1. As to the first count, that they did not agree as in that count is alleged.
2. As to all the barrels in the said first count alleged to have been delivered to the defendants, that before action they satisfied and discharged the plaintiff's claim by payment.
3. As to so much of the said first count as charges that the defendants would not permit the plaintiff to proceed with the said contract, and manufacture and delivery of the residue of the said barrels, but wrongfully discharged and prevented the plaintiff from doing and completing the same, that they did not so discharge or prevent the plaintiff.
4. As to so much of the said first count as charges the defendants with refusing to take or receive barrels from the plaintiff, that they did not so refuse, but accepted all the barrels which the plaintiff delivered or offered to deliver, in pursuance of the said agreement.
5. As to the second count, that they did not agree as therein alleged.
6. As to all the barrels in the said second count alleged to have been delivered, that before action they satisfied and discharged the plaintiff's claim by payment.
7. As to the alleged breach of the agreement in the said second count mentioned, that they did not refuse to take or purchase from

the plaintiff any barrels made and delivered by the plaintiff in pursuance of the said contract.

8. And for a further plea to the first and second counts, that after the making of the several agreements in those counts mentioned, and before any breach thereof by the defendants, it was mutually agreed between the plaintiff and the defendants, that in consideration of the defendants agreeing to pay the plaintiff for one hundred barrels then not completed, but which the plaintiff then promised to complete and deliver to the defendants, and further agreeing that when they (the defendants) should require more barrels for use they should purchase them from the plaintiff on the terms of the agreement in the said second count mentioned, which the plaintiff promised that when thereto required by the defendants he would act upon and complete, and further agreeing that until they should so require the plaintiff to proceed they would not procure or purchase barrels from any person other than the plaintiff, he (the plaintiff) should waive the said agreements in the said first and second counts mentioned, and discharge and release the defendants from further performance thereof; and the defendants then paid the plaintiff for the said one hundred barrels so to be completed by the plaintiff, and agreed that when they should require more barrels for use they would purchase them from the plaintiff on the terms of the agreement in the said second count mentioned; and that until they should require the plaintiff to act upon and complete that agreement, they should not procure or purchase barrels from any person other than the plaintiff; and the defendants have not yet required more barrels for use, and have not purchased barrels from any person other than plaintiff.

9. And for a plea to the common counts, never indebted.

10. And for a further plea to the common counts, payment.

Robert A. Harrison showed cause. He objected to the first plea, because two agreements made by defendants were alleged in the first count, and according to the plea it was uncertain which of them the defendants intended to deny. He objected to the second plea, because it was pleaded to damages only, the count being for the recovery of unliquidated damages, for breach of an agreement, and the plea answering only a part of what plaintiff would be entitled to recover as a portion of his damages, viz., for delivery of barrels before breach of the agreement. He objected to the sixth for the same reason that he objected to the second plea. He had no objection to the seventh plea, but objected to the eighth, because the alleged waiver was not shown to have been in writing. He cited *Gass v. Lord Nugent*, 5 B. & Ad. 58; *Harvey v. Graham*, 5 A. & E. 61, 73.

James Beaty, in support of the summons, admitted his first plea was uncertain, but applied to sever it, so as to traverse each of the agreements mentioned in the first count. He contended that he ought to be allowed to plead the remaining pleas.

Robert A. Harrison objected to the first plea being amended. He said his only instructions were to show cause why it should not be allowed; that he had shown sufficient cause, and it ought therefore to be disallowed. He was not called upon to show cause why it should not be severed, and the two pleas proposed to be substituted for it allowed. He argued that defendants should, if they desired to sever their first plea, take out a second summons, and that in the meantime so much of their summons as asked to have the first plea in its present form allowed should be discharged.

DRAPER, C. J.—Strictly speaking, Mr. Harrison is correct. If he insists upon it, I must refuse leave to plead the first plea as originally proposed to be pleaded. I shall, however, grant defendants, if they desire it, a summons for leave to plead two pleas in lieu of the first plea as now framed, and in the meantime enlarge the summons now pending.

Defendants accordingly took out a second summons, calling upon plaintiff to show cause why defendants should not have leave to deny both the agreements alleged in the first count to have been made by defendants, and had the first summons enlarged.

Robert A. Harrison showed cause. He said he was not authorized to make any objection to the two pleas in the form now proposed to be pleaded, but submitted, as the second application was made necessary by the fault of defendants, who should in the first instance have asked what they now ask, the second application should only be granted on payment of costs.