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COBB V. PRELL.

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to his dealers, one of which was used when the grain was actually delivered, and the other when it was not delivered, and the settlement was made upon the basis of the differences. In the former statement, as might be expected, we find charges for freight, inspection, insurance, weighing, storage and commissions. These are charges which necessarily entered into the transaction where the grain was shipped and delivered. In the latter statements these items do not appear. They show only the number of bushels of grain bought, the price at which bought and the month of delivery; the price at which the same was sold and the net loss or gain. There are in evidence thirty-four of these last-named bills, used in the settlement of option deals between June 26th, 1881, and July 30th, 1881, all representing transactions between plaintiff and defendant. Of the bills representing actual sales from defendant to plaintiff between September 18th, 1880, and April 19th, 1881, there are fifty-seven; so that it appears that the course of dealing between the plaintiff and defendant was such that sometimes the grain contracted for was to be delivered, and at other times it was not to be delivered, and the transactions were to be settled upon the basis of margins. It only remains to be determined whether the transactions in controversy belong to the former or to the latter class. If the question were to be determined upon the testimony of the parties themselves, conflicting as it is, in connection with the facts already stated, it would probably depend upon the question, upon which party rests the burden of proof? And I am inclined to the opinion that, without reference to other evidence, the plaintiff would fail.

It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain: *Barnard v. Backhaus*, 9 N. W. Rep. 595.

It appearing that the parties were in the habit of dealing in options, and the evidence being equally balanced upon the question whether these were option contracts or not, the court would be obliged, I think, to say that the plaintiff has failed to make out his case by a pre-

ponderance of evidence. But whether this be so or not, a reference to the written evidence, to be found in the correspondence of the parties at and near the time of the transaction, strongly corroborates the defendant. A number of letters, written about the time of these transactions, and evidently referring to them, are in evidence, and an examination of them will show that the plaintiff was constantly insisting, not upon the shipment of the quantity of corn purchased by him, but upon the payment of margins, either in cash or by the shipment of enough corn to cover margins. February 11th plaintiff writes to defendant, referring to the transactions between the parties as "option deals." April 22nd, he writes, "We had to put up over \$2,000 on your deals," &c. May 2nd, he says, "You must ship us some corn as a margin." May 7th, he says, "If you can't ship us any corn to cover margins, please send us \$500." May 18th, he writes, "We draw \$500 on you. This is margins for your corn deals, which we hope you will pay. This will leave you about \$300 behind to make corn deals up to market." May 27th, he says, "We have written you and drawn on you for margins."

Perhaps the most significant letters bearing upon this question are those of May 30th and 31st, the dates on which the time for the delivery of the corn expired. If it was a *bona fide* transaction, and plaintiff was expecting the delivery of the corn, we should expect to hear him, in these letters, complaining or expressing surprise that the time was about expired and the corn had not been delivered. But, on the contrary, a reference to the letters of those dates will show that the only complaint was that defendant had not furnished the margins. Thus, on May 30th, plaintiff writes, "We cannot carry these deals when you not only refuse to give us margins, but seem to pay no attention to our demands." On the 31st plaintiff writes to explain the manner in which he had closed out the May corn, and expressing regret at the serious loss to the defendant, but says nothing to indicate that he expected the corn to be shipped. Upon all of the evidence, I am of the opinion, and therefore find the fact to be, that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market, and to settle the profit or loss of the defendant upon the basis of the prices of the grain on the