

U. S. Rep.]

COBB V. PRELL.

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over-look the rules as to counter-claims. . . The contention for the present plaintiff is that whenever the claim of a plaintiff is admitted, he is entitled to have the money paid into court. I cannot agree to that argument ; a plaintiff is not entitled to have the money paid into court unless the counter-claim is frivolous and unsubstantial.

### UNITED STATES.

### CIRCUIT COURT—DISTRICT OF KANSAS.

COBB V. PRELL.

#### *Contract for future or non-delivery.*

When it is the intention of the parties to contracts for the sale of commodities that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void.

It is the duty of the courts to scrutinize very closely contracts for future delivery, 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 the delivery and receipt of the commodity.

As the evidence in this case establishes the fact 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 defendant upon the basis of the prices of grain on the 3rd of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void, the plaintiff cannot recover.

[Am. Law Reg.—Sep.

Action at law for breach of contract.

The opinion of the court was delivered by

MCCLEARY, J.—In this case a jury was waived and the cause was tried by the court. It is an action at law in which the plaintiff claims damages for breach of contract. The complaint alleges that during the months of February, March and April, 1881, the defendant, who is a grain dealer, residing at Columbus, Kansas, authorized the plaintiff, who is a commission merchant at St. Louis, Missouri, to sell for him certain quantities of corn to be delivered to the party or parties to whom the plaintiff might sell the same, at the option of defendant, during the month of May, 1881. The complaint further alleges that the plaintiff contracted for the sale of said corn, to be delivered during said month of May ; but that defendant failing to deliver said

corn, the plaintiff having contracted to sell the same in his own name, was obliged to and did pay the damages resulting from such failure, to wit : the difference between the price of corn at the place of delivery on the 31st day of May, and the price at which defendant had agreed to sell and deliver the same, amounting in the aggregate to \$2945.25, for which, with interest, he prays judgment.

The answer alleges that the contracts set out in the complaint were option or marginal contracts, and that said plaintiff well knew them to be such, and so made the contracts of sale of said corn, not expecting to receive of the defendant any portion of the amounts of corn for delivery, but expecting to pay any losses or receive any gains that might accrue for or against said defendant ; that said contracts were made for the purpose of speculating on the rise and fall of prices, the plaintiff to receive commissions for such transactions ; and that said contracts were mere wagers on the fluctuating of the prices of grain in the market of the city of St. Louis.

The case therefore turns upon the question whether or not it was the intention of the parties that the corn should be delivered. If such was the *bona fide* intention, then the plaintiff is entitled to recover ; but if, on the other hand, it was understood that the defendant was not required to deliver the corn, and that the transactions should be adjusted and settled by the payment of differences, then the contracts were void and the plaintiff cannot recover. Upon this controlling element in the case, as might reasonably be expected, the testimony of the plaintiff and defendant is in conflict. Under such circumstances we are obliged to determine the controversy by reference to the actions of the parties in connection with the transactions and their contemporaneous declarations, especially those in writing, having a bearing upon the subject. If we can learn from these what interpretation the parties themselves have put upon their own contract, we shall find a satisfactory guide in determining the case.

The evidence satisfactorily shows that the plaintiff was largely engaged at and about the time of these transactions in dealing in options. He was also largely engaged in buying and selling grain for actual delivery. It appears that he adopted and had in use two blank forms upon which statements of account were rendered