

12151

No. \_\_\_\_\_

Supreme Court of Illinois

McCormick

vs.

Elston, et al

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C. H. McCormick

D. Elston et al.

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12151

1854

1.  
State of Illinois  
County of Cook

Pleas before the  
Honorable Hugh J. Dickey Judge  
of the seventh Judicial Circuit Court  
of the State of Illinois & sole presiding Judge  
of the County of Cook in said State  
and circuit, at a term thereof  
begun and held at the Court  
House in the city of Chicago in said  
State and Circuit, at a term  
thereof begun and held at the Court  
House in the city of Chicago in said  
County on the first Monday (it being the  
first day) of December in the year of  
our Lord One Thousand Eight Hundred  
and fifty one and of the independence  
of the United States the twenty sixth

Present: Hon. Hugh J. Dickey Judge of said Court  
Daniel McTearney State atty pro tem  
Wm S. Church Sheriff of Cook County

Attest Louis D. Howard  
Clerk of said Court,

Be it remembered that on the sixth day of  
December in the year of our Lord One thousand  
eight hundred and fifty one there was issued  
out of the office of the Clerk of the Cook County  
Circuit Court the Peoples Book of Summons

2.  
which said writ is in the words and figures following, to wit:

State of Illinois  
Cook County.

The People of the State of Illinois to the Sheriff of Cook County, Greeting:

We command you that you, summon Cyrus H. McCormick if he shall be found in your county, personally to be and appear before the Circuit Court of said County, on the first day of the next term thereof, to be holden at the Court House, <sup>in Chicago</sup> in said county, on the first Monday of December next, to answer unto Daniel Elston & John Slight in a plea of trespass on the case on promises to the damage of said plaintiffs as they say, in the sum of five hundred dollars,

and have you there and there this writ, with an endorsement thereon in what manner you executed the same,

Witness Louis D. Hoard, Clerk of our said Court, and the Seal thereof, at Chicago this sixth day of December Anno Domini 1851.

L. D. Hoard, Clerk

Which said writ was afterwards returned into the office of the Clerk of the said Circuit Court

with the following endorsement thereon to wit,

Served by reading to the within named C, 14,  
McCormick Nov. 17, 1851,

1 Service .50

1 Mile Tra .05

Return .10      .65

Wm S. Church Sheriff By A. A. Dexter, Deft,

And afterwards, to wit, on the seventeenth  
day of November A. D. 1851, there was filed in  
the office of the clerk of the said circuit court  
a declaration in said cause which said declaration  
is in the words and figures following, to wit;

In the Circuit Court of Cook County,

State of Illinois

Cook County, Ditch } of the December Term A. D. 1851

Daniel Elston and John Slight  
the plaintiffs in this suit by Edward Martin  
their attorney, complains of Cyrus M McCormick  
the defendant ~~the defendant~~ in this suit who  
has been summoned to answer the said plaintiffs  
in a plea of trespass on the case on premises  
For that whereas heretofore to wit, on the sixth  
day of August one thousand eight hundred and  
fifty one to wit at Cook County aforesaid  
in consideration that the said plaintiffs  
at the special instance and request of the

said defendant would sell and deliver to him the said defendant at his Factory as fast as required by the said defendant not exceeding twenty thousand per week. after the then present week a certain quantity of goods to wit one hundred thousand of exclusively good sound hard and red bricks or less at a certain rate or price then and there agreed upon between the said plaintiffs and the said defendant to wit four dollars and fifty cents per thousand amounting in the whole to a large sum of money to wit five hundred dollars. he the said defendant undertook and then and there faithfully promised the said plaintiffs to pay them for the said goods in cash after the whole of the said goods should be delivered and the said plaintiffs in fact say that they confiding in the said promise & undertaking of the said defendant did afterwards heretofore to wit from time to time as fast as they were required by the said defendant not exceeding twenty thousand per week next after the then present week in which the said undertaking and promise of the said defendant were made as aforesaid to wit next after the said sixth day of August as aforesaid deliver the said quantity of goods to wit one hundred thousand of

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exclusively good, sound, hard, and red  
bricks to the said defendant at his Factory  
aforesaid upon the terms as aforesaid and  
the said <sup>to wit</sup> plaintiffs afterwards, <sup>on the first day of November One thousand Eight Hundred</sup> to wit at Cook  
County aforesaid requested the said defendant  
to pay the said Plaintiffs the price of the said  
goods. Yet the said defendant not regarding  
his said promise and undertaking but  
contriving and wrongfully and unjustly  
intending craftily and subtly to deceive &  
defraud the said plaintiffs in that behalf  
did not nor would when he was so requested  
as aforesaid or at any time before or after-  
wards pay the said plaintiffs the price of  
the said goods or any part thereof but  
hath hitherto wholly neglected and refused  
and still neglects and refuses so to do by  
reason whereof the said Plaintiffs hath sustained  
damage to the amount of five hundred dollars  
and whereas heretofore to wit on the sixth  
day of August one thousand eight hundred  
and fifty one to wit at Cook County  
aforesaid in consideration that the said  
Plaintiffs at the special instance and request  
of the said defendant would sell and  
deliver to him the said defendant a certain  
quantity of Goods to wit one hundred thousand  
or less of exclusively good sound hard and red

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bricks at a certain rate or price then and there agreed upon between the said Plaintiffs and the said defendant to wit four thousand dollars and fifty cents for every thousand amounting in the whole to a large sum of money to wit five hundred dollars he the said defendant undertook and then and there faithfully promised to the said plaintiffs to pay them for the said goods after the whole of the said goods should be delivered and the said plaintiffs in fact say that they confiding in the said promise and undertaking of the said defendant did afterwards to wit on the first day of November one thousand eight hundred and fifty one in Cook County aforesaid deliver the said quantity of goods to wit one hundred thousand of exclusively good sound hard and red bricks, to the said defendant upon the terms aforesaid, and the said plaintiffs then and there to wit on the day & year last aforesaid at Cook County aforesaid requested the said defendant to pay the said plaintiffs the price of the said goods yet the said defendant not regarding his said promise and undertaking but contriving and wrongfully and unjustly intending craftily and subtly to deceive and defraud the said Plaintiffs in that behalf did not, nor would when he was so requested

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as aforesaid or at any time before or afterwards  
pay the said Plaintiffs the price of the said  
goods or any part thereof but hath hitherto  
wholly neglected and refused so to do by  
reason whereof the said Plaintiffs hath sus-  
tained damage to the amount of five hundred  
dollars and whereas the said defendant  
heretofore to wit, on the first day of November  
one thousand eight hundred and fifty one to  
wit at Cook County aforesaid was indebted to  
to the said Plaintiffs in five hundred dollars  
for the price and value of goods then and  
there<sup>sold and</sup> delivered by the said plaintiffs to the  
said defendant at his request, and whereas  
the said defendant afterwards on the day and  
at the place last aforesaid being so indebted  
as aforesaid in consideration of the several  
promises respectively then and there promised  
to pay the said several monies respectively to  
the said Plaintiffs on request yet he hath  
disregarded his promises and hath not paid  
any of the said monies or any part thereof  
to the said Plaintiffs damage of five hundred  
dollars and thereupon they bring their suit vs  
David Martin  
Plffs Atty

And afterwards, to wit, on the seventeenth day  
of December A. D. 1851 there was filed in the



clerk's office of the said circuit court court  
aforesaid, a certain Plea which said Plea is  
in the words and figures following that is to  
say,

Cook Circuit Court

Cyrus H. McCormick

vs

Daniel Elston who sues  
by the name of Daniel  
Elston + John Slight

December Term A.D. 1854

And the said defendant  
in his own proper person comes & defends the  
wrong and injury when he & prays judgment  
of the declaration because he says that the  
said Daniel Elston one of the plaintiffs in  
this suit now is and before and at the time  
of the filing of the declaration aforesaid was  
called and known by the Surname of Daniel  
to wit, at the County of Cook aforesaid, without  
this that he the said Elston now is or before  
or at the time of the filing of the said  
declaration was called or known by the sur-  
name of David as in & by the said declara-  
tion is supposed & this the said defendant  
is ready to verify wherefore he prays judg-  
ment of the said declaration and that the  
same may be quashed &c

Cyrus H. McCormick

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And filed with said Plea and attached thereto, was an affidavit, said affidavit being in the words and figures following that is to say.

State of Illinois  
County of Cook

Erastus S. Williams the attorney of the defendant maketh oath and saith that the above Plea is true in substance and in fact - Erastus S. Williams

Subscribed and sworn to }  
before me this 17<sup>th</sup> day of }  
December A.D. 1851. }  
L. A. Hoard, clk

And afterwards, to wit: on the Thirtieth day of December A.D. 1851 there was filed in the office of the clerk of the said circuit court a certain Plea and notice, said Plea & notice being in the words and figures following, that is to say.

Circuit Court  
Cyrus W. McCormick

vs  
Daniel Elston &  
John Slight

December Term A.D. 1851

And the said defendant by Collins & Williams his attorneys comes and defends the wrong and injury when

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& oath that he did not undertake  
 & promise in manner and form as the said  
 plaintiffs have above therein complained  
 against him &c and of this he puts himself  
 upon the country &c.

Collins & Williams  
 Depts attys

To the above named Defendants,

Gent,

You will please  
 take notice that upon the trial of the  
 above cause the said defendant will give  
 in evidence and insist that the bricks  
 in the said plaintiffs declaration mentioned  
 were delivered under and in pursuance  
 of a written contract with Daniel  
 Eleton one of the above named Defendants  
 a copy of which is hereto annexed, in  
 and by which contract said Eleton bound  
 himself to deliver to said defendant at his  
 Factory One hundred thousand or less exclu-  
 sively good sound, hard, and red bricks  
 as fast as they should be required by said  
 McCormick not exceeding 20,000 per week  
 after the then present week which contract  
 was dated on the 6<sup>th</sup> day of August A. D.  
 1851, & after the whole of said bricks had  
 been delivered said McCormick was to

pay in cash four dollars and fifty cents per thousand. That the Bricks delivered by said Elston under said contract were not exclusively good sound hard and red bricks but on the contrary were soft & yellow & were a very poor & inferior quality of brick & not such Brick as the said Elston had covenanted & agreed to deliver. That the bricks above mentioned were not delivered as fast as they were required by the said Mc Cormick. That by reason of the non delivery of said bricks at the times when required by said McCormick & by reason of the inferior quality of the brick delivered by the said Elston the said defendant has been and is greatly damaged & injured & has sustained great loss to wit, Five hundred dollars. That the said Elston although often urged & requested by the agents of the said defendant did not deliver the said bricks as fast as required by the defendant but neglected and refused to deliver the same as in and by his said contract he was bound to do, and this defendant will set off the damages above mentioned in the action aforesaid. And this defendant avers that

all the bricks in the said plaintiffs declaration mentioned were delivered under & by virtue of the contract aforesaid, and the defendant will also give in evidence and will insist that said plaintiffs are justly indebted to the said defendant in the full sum of one hundred dollars for money paid laid out and expended by the said defendant to and for the said plaintiffs & at their special instance and request, and also in the sum of one hundred dollars for work and labor and services done performed and rendered by himself and by his servants & agents to and for the said plaintiffs & at their instance & request, and also in the sum of one hundred dollars for money paid by the said defendant for the hire of certain horses men boats & waggons employed by said plaintiffs in and about the business of the said plaintiffs at their instance and request.

Collins Williams  
Deft Atty

Elston & Slight

To Cash	McCormick	Dr
To money paid laid out & expended		\$ 100.
" work & labor & services		100.
" money paid for hire of horses &c		100.

Filed with said plea & notice was a copy of contract in words & figures following to-wit:

By contract this sixth August 1851 between C. A. McCormick & Dan<sup>l</sup> Elston, said Elston agrees and obligates himself to deliver at s<sup>d</sup> McCormick's Factory 100,000 brick or up as s<sup>d</sup> McCormick may require & to deliver as fast as required by McCormick not exceeding 20,000 per week after the present week. s<sup>d</sup> Elston obligates himself to deliver exclusively good sound hard & red brick & after the whole has been delivered s<sup>d</sup> McCormick agrees to pay in cash four dollars and fifty cents per thousand.

Daniel Elston  
C. A. McCormick  
per H. M. S.

And afterwards to-wit: on the second day of January A. D. 1852 there was filed in the office of the clerk of the said circuit court the plaintiffs said Replication which said Replication is in the words & figures following to-wit:

Court Circuit Court

Daniel Elston &  
John Slight

vs  
Cyrus H. McCormick

December Term A. D. 1851

And the said plaintiffs as to the Plea of the said defendant by him above

pleaded and whereas he hath put himself upon  
the county, do the like.

Davis & Martin  
Plffs attys

And afterwards to wit; on the twenty sixth day  
of May A. D. 1852, it being one of the days of  
the May Term of said Circuit Court the following  
among other proceedings were had and entered of  
record in this cause, to wit;

Daniel Elston	}	a plaintiff
John Slight		
By your H. McCormick		

This day come the said  
parties by their attorneys and issue being joined  
It is ordered that a jury come thereupon come  
the Jurors of a Jury of good and lawful men to  
wit; Robert Haganan, N. H. Blop, N. H. Wells,  
C. K. Anderson, Henry Meyer, William Kennedy,  
John Breen, Asa Howe, C. C. Dents, J. K. Hilcox,  
E. S. Clarke, & Michael Burns, who being duly  
elected, tried & sworn well and truly to try the  
issue joined according to laws & the evidence,  
and they hearing the testimony adduced as  
well on the part of the plaintiffs as on  
the part of the defendants, arguments  
of counsel and instructions of the court

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retire to consider of their verdict and afterwards come into court and say we of the Jury find the issue for the defendant under the instructions of the court.

Whereupon the plaintiffs by their attorney excepts to the said instructions of the court and moves the court for a new trial herein.

And afterwards to wit; on the 29<sup>th</sup> day of May A. D. 1852. it being one of the days of the May Term of the said circuit court the following among other proceedings were had and entered of record in this cause to wit;

Daniel Elston + John Slight	} a pumpset
"	
Cyrus A. McComick	

This day again come the said parties by their attorneys and the court having heard the arguments of counsel upon the motion for a new trial herein. order that the same be overruled.

Therefore it is considered that the said defendant do have & recover of the said plaintiffs his costs & charges by him about his defence herein expended and have execution therefor.

And afterwards to wit; on the 23<sup>d</sup> day of December A. D. 1852 it being one of the days of the December Term of said circuit court the following among other



proceedings were had and entered of record in this cause, to wit;

Daniel Elston, & John Slight	} apumpet's
Cyrus H. McCormick	

This day come the said plaintiffs by their attorney, and on this motion It is ordered that a new trial of this cause be granted to the said plaintiffs.

And afterwards, to wit; on the 19<sup>th</sup> day of December A. D. 1853 it being one of the days of the November Term of said Circuit Court, the following among other proceedings were had and entered of record in this cause, to wit;

Daniel Elston, & John Slight	} apumpet's.
Cyrus H. McCormick	

This day come the said parties by their attorneys and issue being joined herein it is ordered that a Jury come and thereupon come the Jurors of a Jury of good and lawful men to wit; Michael Ford, Charles Sweet, William Barnard, Ira Reynolds, John Casey, William Rowley, Thomas Hill, Elijah Gifford, William Sawyer, Elou Crane, Edward Savlin, and Harlowe Rizer, who being duly sworn elicited tried and sworn well and truly to try the issue joined between the parties according to law and the evidence and they having first of the testimony of witnesses

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are allowed to separate and the further hearing of this cause is postponed to tomorrow morning -

Cook Circuit Court  
Cyrus H. McCormick  
vs  
Daniel Elston and  
John Slight

State of Illinois

Be it remembered that upon the 19<sup>th</sup> day of December A.D. 1853 in the Cook Circuit Court at a term thereof then being held, before the Honorable Buckner S. Morris Judge of said Court and a jury duly impanelled to try the issue in the above cause said cause came on for trial and on the trial of said suit & to sustain the issue upon their part & the said plaintiffs introduced as a witness -

Edward Martin who being duly sworn deposed that he was the attorney of the said plaintiffs in the above cause, that previous to the former trial of this suit he called upon E. S. Williams one of the attorneys of the defendant to ascertain whether the said Williams would admit upon the trial of this cause the delivery of one hundred

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thousand brick to the defendant & dispense with proof of such delivery.

The plaintiffs then offered to prove by said Martin that at said time said Martin called upon said Williams he promised to admit upon the trial that one hundred thousand brick had been delivered to the defendant by Daniel Elston one of the above named plaintiffs, to the admission of which testimony the defendant then objected, & the objection being overruled by the court the defendant then and there excepted - and thereupon said Martin testified, that some time prior to the former trial he called upon the said Williams and said Williams as attorney for defendant agreed to admit upon the trial of this cause that the defendant had received from the plaintiff Daniel Elston one hundred thousand brick for the recovery of which this action was brought and waived the necessity of proof of the delivery thereof, on the trial of this cause;

The plaintiffs then introduced as a witness Robert Slight, who being duly sworn deposed as follows.

That he was the son of the plaintiff, that his father and Elston have been partners since the year 1849, that they kept

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no clerk or book-keeper in the year 1851,  
Elston kept the Ledger & his father the  
day-book.

Cross-examined by the defendant,

The charges in the ledger of bricks deli-  
vered to McCormick's are not in my  
father's hand writing. They are in Elston's.  
My father was usually present at the deli-  
very of bricks, sometimes Jacob Hagersman  
delivered them & then reported them to my  
father, the entries of the delivery of the loads  
were made in the day book by my father,  
He usually reported the night after bricks  
were delivered. I was not employed about  
brickyard, - I do not know that my father  
was at the brickyard every day while these  
bricks were being delivered, I did not  
see him go to brickyard every day, He  
went away from our house which was 2<sup>1</sup>/<sub>2</sub>  
Block from the yard and I think went to  
brick yard every day, I saw him leave  
the house and go that way, I did not  
see Hagersman report to my father every day  
I saw him do so several times - The accounts  
of bricks delivered my father always made  
up every night.

Charles O Conner Sworn.

Elston & Slight did not keep any clerk

in fall of 1851. I settled my account with them by the Ledger & found it correct. My account in that Ledger and also the account of the defendant in same Ledger is in the hand writing of plaintiff Paul Elston,

Crop-exd. I did not examine book of original entries, only looked at the Ledger. Thought my account in that was correct.

The plaintiffs then offered in evidence the same Ledger of the plaintiffs the admission of which was objected to by the defendant & the objection <sup>overruled</sup> by the ~~court~~ and the Ledger admitted in evidence, to which decision of the court in overruling said objection and admitting said Ledger the said defendant by his counsel then and there excepted.

The plaintiffs then read in evidence the following account from said Ledger

1851	From M <sup>c</sup> Cormick		
Sept 4 <sup>th</sup>	42,400 Bricks @ 4 1/2		190.80
16	36,260 " "		163.17
Oct. 8	22,100 " "		99.15
			<u>453.12</u>
	Per Contra		
Sept. 16.	14,460 carriage @ 6		6.32
Balance on Brick			\$447.10

Charles O'Connor, Re-examined -

I paid \$4.75 & \$4.75 for bricks from September to December 1851, in fall of 1851 I was purchasing brick from the Plaintiffs probably much worse than those I saw, in McCormick's wall at 475, I examined walls of McCormick's Factory, out side and inside all I saw were good hard bricks & worth \$4<sup>50</sup> per M,

Re-crop-examined. Any bricks fit for use were worth \$4.50 in September 1851, I could not see the bricks of the inside wall. From 1/4 to 1/3 of brick were in the interior of Wall where I could not see them & do not know what their quality was - but if the walls are standing now in that building the bricks must have been worth \$4.50 per M,

Harmon Borford Sworn

Was teamster for Elston and Slight in the fall of 1851. I hauled 20,000 brick to McCormick, all that I hauled were hard except first load which were soft & H. G. Hubbard for McCormick sent them back to yard. I carried 1000. bricks to a load - the other bricks I hauled were good hard brick all picked for that purpose & hard and sound.

Crop-examined - Aug 21<sup>st</sup> 1851 I hauled to McCormick from Papp's yard 3000 bricks, Aug 22<sup>nd</sup> 1000, Aug 23<sup>rd</sup> 1000, Aug 26<sup>th</sup> 1000, Aug 27<sup>th</sup> 2000.

28<sup>th</sup> 1000. 29<sup>th</sup> 1000. Sept 4<sup>th</sup> 1000. Sept 6<sup>th</sup> 3000.  
 Sept 8<sup>th</sup> 2000. Sept 30<sup>th</sup> 2000. Oct 1<sup>st</sup> 1000. Oct 2<sup>nd</sup>  
 1000. Almedinger, Roseoff & 2 brothers named  
 Schmidt also hauled, all live in town, -

John H Daveman, Iron -

Was engaged in the year 1851 in hauling bricks  
 from the Pts Elston & Slight from their yard to  
 W<sup>m</sup> McCormick, I hauled 28,000 all good hard red  
 bricks from 21<sup>st</sup> August during the month of  
 September I think I hauled more the first part  
 of time than the last. - Should think I hauled  
 some in October, not many. I put down  
 every brick I hauled from the pnts to dept. the  
 Bricks refused in the first load were not soft  
 but they were not quite as red - there were  
 only a few refused in the load about a wheel  
 barrow full we were required to pick out the  
 best that were taken to dept. P<sup>ly</sup> Slight always  
 told us he had promised dept good hard brick  
 we always picked them.

Crop-examined - I might have hauled 2 or 3  
 loads in October, Part of one load I put  
 according to his order, and we always delivered good  
 hard Bricks to dept.

Defence

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The counsel for the defendant then requested the plaintiffs to introduce in evidence the original written contract between Daniel Elston and C. A. McCormick under which the bricks sued for were delivered. Due notice having been served upon them to produce the same upon trial. In default of such production on the part of the plaintiffs the defendant then introduced a copy of said contract, which said contract was read in evidence in the words & figures following.

By contract this sixth August 1851 between C. A. McCormick & Daniel Elston said Elston agrees & obligates himself to deliver at sd McCormick's Factory 100,000 brick or less as sd McCormick may require & to deliver as fast as required by McCormick not exceeding 20,000 per week after the present week.

Said Elston obligates himself to deliver exclusively good sound hard red brick & after the whole has been delivered sd McCormick agrees to pay in cash four dollars and fifty cents per thousand.

Daniel Elston

C. A. McCormick

per me,

The defendant then introduced William J. Hanna, who being duly sworn testified that he delivered to Mr Elston a letter from the defendant dated <sup>signed for the defendant by W. S. McCormick</sup> on the 16<sup>th</sup> Sept 1851. The letter was delivered on or about the day in bore date. The letter was



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The letter was then produced by the plaintiffs under a notice from the defendants & read in evidence, as follows,

Chicago Sept 16<sup>th</sup> 1831

Mr. Eaton

Dear Sir,

I am surprised to learn from Mr. Hanna that you now refuse to furnish me brick though I have a written contract with you for my brick & for good hard brick. I have as you know been much troubled & disappointed when finally you assured Mr. Hanna that the brick should be furnished if I would find conveyance & even that I have done. So surely its but fair that I should get the brick - Being first on the ground with my team hands & the means of getting them furthermore with the agreement that I should get all the brick I wanted my men have partly loaded the boat with inferior brick in order to get at the good brick & here they are <sup>this is out of the question</sup> stopped. I have before me a winters business & fall of \$150,000. to \$200,000. & this business in a great measure hangs upon the early completion of my building & I cant get the brick elsewhere & now that I am at the kiln with my hands I must say that unless you

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do let me have the brick I cannot pay for  
any I have received but must hold you  
responsible for the disappointment, I presume  
my contract is before him who has me stopped  
& if not I am before him with the means of getting  
the brick & ought to get them & can receive  
no excuse under these circumstances -

In much haste Yours truly,

C. H. McCormick  
By Wm S. McCormick

I was in the employ of McCormick most of  
the time while bricks were being delivered, Hubbard  
was there when brick began to be delivered,  
I was then sick for two weeks, The last  
four weeks of the time while bricks were being  
delivered I noticed them particularly, The  
bricks were in the yard around the build-  
ing. There are more than 100,000 bricks in  
the walls of McCormick's Factory, I had gener-  
al superintend<sup>in</sup>ce of McCormick's business  
around the factory, <sup>I was his head clerk.</sup> Part of the bricks deliv-  
ered were good hard red brick, a large  
quantity were yellow & soft & crumpled right off,  
one third part or more, about 1/3 were very poor  
indeed fit for nothing should be afraid any wall  
would fall down with them, We threw 4000  
loads into dock for rubbish, they were soft &

much broken. The bricks after they were un-  
 loaded had all to be culled by masons to get choice  
 bricks for the out side - I have <sup>not</sup> had a great deal  
 to do with Brick generally. About 18<sup>th</sup> Sept I  
 saw Elston for McCormick about delivering the brick  
 He wanted me to get some conveyance & take  
 them away. He could not get them away he  
 said. Dependant hired a scow soon after & sent  
 it up to Elston yard - We were delayed a good  
 deal in getting the brick. Alexander and five  
 or six others were employed, we towed the boat  
 by hand from McCormick's factory up to the brick  
 yard - Had drays & men to haul bricks from kiln  
 to scows - Alexander was paid for his work  
 about factory \$2.00 per day, the others \$1.75 per  
 day. —

Crop examined - I am a clerk was never  
 engaged practically as a Builder - we bought  
 brick of other persons to finish up the building.  
 Part of the soft brick delivered by Elston were used  
 to make a road & part put in the dock - The  
 brick from the walls of the Old factory which was  
 burned, were put into the inside of the walls of  
 the new factory. I do not recollect the exact num-  
 ber of loads of soft brick thrown into the dock,  
 There might not have been more than two  
 or three loads of these soft & broken bricks  
 but

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put into dock - There were large piles of  
 bricks ready to be put into the building. It  
 took some time to put them in, but putting  
 them in would not delay the laying of brick  
 more than from 1/2 an hour to an hour I  
 reckon not half a day - When I talked to  
 Elston about furnishing defendant with brick  
 Elston said he could not get any one to  
 burn out the kilns because of the cholera  
 he might have said 16 of the hands were  
 lying dead with the cholera at that time  
 When I was at Elstons yard I did not see  
 more than eight or nine men at work  
 in the yard - Several of his hands had died  
 of cholera - There was a good deal of  
 cholera there at the time -

Re-examined - I went up to Elstons to get  
 brick with the scow & several hands. We  
 got a few thousand from the out side  
 of kiln & pliff Slight then refused to let us  
 have more brick - He said that they  
 wanted brick for school house & defendant  
 could not have more than his share - we  
 were employed from two to four days at  
 work in going and coming from yard with  
 scow loading brick &c - Had two drays  
 & our own team at work one day - I

knew H. G. Hubbard in his lifetime. He died in summer of 1852 he was agent for McCormick in the year 1857. Had my position <sup>as agent</sup> for McCormick while I was sick in 1857. - He was a witness upon the former trial of this cause. I recollect the substance of his testimony. He said that while he was about McCormick's building about half the bricks were bad - They were so bad that when he saw one that in his estimation answered the contract he sent it to Mr. Elston as a sample. Hubbard said on the trial he thought the poor bricks were not worth anything.

Re cross-examined - Hubbard received \$1200. a year for the time he was employed by McCormick. He was not I think employed by McCormick at the time of the last trial, but am not certain. I recollect what he said about the quality of the brick -

J. S. Alexander being duly sworn, saith that he is a brick layer and has been a brick maker - I am now H. G. and have been in the business of brick laying

29.

brick making ever since I was 17 years old - was in the employ of defendant in the summer and fall of 1857. a portion of the brick were pale light colored & would not stand exposure to the weather. some of the bricks round there were not used in the building. It is my impression that about one third part were not fit to be layed in the outside wall. That portion by themselves would not stand - If put in an outside wall they would crumble - we had to pick over the whole brick for the purpose of procuring good brick to put in outside wall. When we first commenced the work upon the factory there was quite a pile of brick we had enough for the first week - after that week we were delayed in our work for the want of brick more or less until the walls were finished, we were delayed about two weeks during the progress of the work on account of wanting brick. Defendant had four or five bricklayers & five or six carriers in his employ about the building. I went up to Elston brick yard with the carriers - we were detained about two days - we loaded about 15,000 or 18,000 bricks - In all there were ten or twelve men employed & three teams. They could not get load because Elston would not let us

30-

have more. The score would carry 10,000 or 50,000 bricks. We loaded from the top of a kiln which are always the poorest brick in the kiln - We were stopped about the time we were getting down to the good brick in the kiln. Mr Elston came up & said they were not good & were hardly equal to what he agreed to furnish us - There was another kiln open in the yard & in my judgment they were better brick. Elston would not let us have any brick from that. - Elston stopped our loading, said he had other contracts to fulfil, said something about brick for a school house. About one half of the brick furnished to McCormick under the contract were good red brick, the balance were not first rate. From  $\frac{1}{2}$  to  $\frac{1}{2}$  of the brick were not worth more than  $\frac{1}{2}$  price in this market in my judgment - I should think I was employed four or five days in picking over the brick delivered by Elston - About one third of the brick were in middle wall out of sight,

Crop-examined - McCormick's Factory took 160,000 to 170,000 bricks, about 50,000 or 60,000 perhaps more were used <sup>in the inside of the walls</sup> from the old building, all the outside of the bricks were our brick.

The last delivery of brick was made from 3<sup>d</sup> to the 6<sup>th</sup> of October, we were short of brick about the

31,

the first of September—

Harvey A. Blakesley, being duly sworn saith that he was in the employ of the defendant, <sup>as Bookkeeper</sup> at the time of the delivery of the bricks. The building was delayed for want of bricks and hands had to stop work for some time days— Sometimes part of a day at a time— Defendant hired a scow, several men and some drays to go to Elston Brick yard for brick some time in September 1851. We paid \$20.00 for scow & crew for drays \$5.00 don't know what it was worth other labor \$10.55 making in all \$35.55— I paid the men they were not at work full weeks I only paid them for the time they did work—

Crop examined— I know that men stopped work by the amount which we paid. We deducted from their wages the time which was lost by them on account of the delay of the building

Voyce being duly sworn saith,

That he is a carpenter and joiner & worked upon McCormick's factory superintended the carpenter work. — I noticed the brick as they were delivered, some were good & some poor. One third of the bricks were poor soft



brick, some them were so soft that you could crumble them with your fingers. They were pressed on the waggons. Not accustomed to buy or sell brick, don't know the market value of poor bricks -

Alexander recalled - He did not pile the bricks on the scows but dumped them in -

The defence having closed their testimony the plaintiff then introduced as witnesses to rebut the evidence of defendant -

Jacob Hagenman who being duly sworn said, That he was foreman of the plaintiff in 1857. That the delivery of brick to McCormick was commenced on the 21<sup>st</sup> Aug. I went to McCormick's factory with Eleton to ask them if they were ready to receive the bricks - They were not ready then but would be in two or three days - He were ordered by the Plt. to send the softest the best bricks in the yard I saw some of those bricks delivered. I am sure that I saw 70,000 delivered all that I saw were good brick.

I examined - I had no charge of delivery of brick except in the absence of slight. I loaded about 5 of the loads sent to McCormick - I was present

on the loading of 60 loads for Sept, I did not see the brick delivered, all that I know was that teamsters were ordered to go to certain places, they were often ordered to go to Mr McCormicks, Carried 1000 at a load - I do not recollect where else the teamsters were ordered to go, at this time, we were hauling to several other places - About the 1<sup>st</sup> Sept I went with Jett Elston to Sept, they then showed us a pile of about 500 Bricks they were bad, Jett Elston said he would take them away he did not wish them to use them

Samuel Duffey, being duly sworn said, that he was a hand in Elstons yard, I know a good brick when I see it, I saw bricks that went from yard Teamsters were often ordered to go to McCormicks the bricks that I saw leave the yard for Mr McCormicks were good bricks - I saw brick put into the scow when McCormicks men came with it they were tumbled in, & in being tumbled in many were broken - I helped load 20 or 30 loads of McCormicks Bricks they were all the best good bricks, I recollect it because particular instructions were given as to McCormicks brick -

Frederick Wheeler being duly sworn said,

That he hauled from Elston yard to McCormick's factory 3 or 4000 brick, all that I hauled were good hard red brick —

Daniel Armitage being duly sworn saith,  
That he was a brick maker & had a yard near Elston in 1851. He paid 50 cents per thousand for bringing his brick from his yard to town in a scow. It was worth about the same to bring them from Elston to McCormick's —

The contract between Elston & McCormick was here shown to witness by plffs counsel & ~~there~~ the following questions were put to the witness by plffs counsel —

Question. — What kind of brick in this market would answer the description in the contract of "exclusively good sound hard red Brick"?

Question objected to by defts atty, and objection overruled by court, to which decision the defendant then and there excepted — Answer, Hard Salmon colored brick with some soft brick mingled together would answer the description of the contract — The brick would have to be something more than merchantable, but need not be all hard or all red —

Sherman who being duly sworn saith,  
That he is a brickmaker in the City of  
Chicago

35-

Chicago. —

Question to witness by plffs counsel —

What are meant by red brick in this market & will or will not salmon colored brick or yellow brick answer the description of red brick? question objected to by defts counsel, objection overruled by the court & exceptions taken by defts counsel to the overruling of the objection. — Answer, salmon colored brick are considered red brick in this market. Any shade of brick above clay color would be red. —

X Examined —

Soft brick would not answer the contract —

Robert Duncan being duly sworn Saith,

O'Conner recalled

This was all the testimony introduced in this case either on the part of the Plaintiffs or the defendants.

The plaintiff then asked the court to give the Jury the following instructions.

1st  
37.

Given

If the jury believe from the evidence that if the defendant received any bricks of the Plaintiffs which were not according to contract and used them, he is bound to pay for them at their market value, not exceeding the contract price,

2nd

Although the Jury may be of opinion from the evidence that the quality of the bricks delivered might have been inferior to that described by the contract yet if the defendant received and used them for any purpose whatever the plaintiffs are entitled to recover the price of such bricks not exceeding the contract price according to their market value at the time, with interest thereon to this trial, subject to the credit thereon of thirty five dollars paid for boating brick at plaintiffs request, with such other sum which the defendant shall have proved he paid out & lost by any failure to deliver the bricks in due time and manner required,

Given

30  
38

Given

If the jury believe from the evidence that the defendant received, and used the plaintiffs 100,000 of Bricks, under the contract on which this action is brought, the plaintiffs are entitled to recover the contract price of such Bricks so received and used with interest on the same from the time the same was payable by the contract, ~~as in & under~~ subject however to the deductions named in the 2<sup>nd</sup> instruction.

14<sup>th</sup>

Given

If the Jury should be of opinion from the evidence that the plaintiffs contracted to deliver the Bricks as fast as required by defendant not exceeding 20,000 in any one week, it was the defendants duty under that contract, to notify the plaintiffs when, and in what quantities, not exceeding 20,000 a week he required them to be delivered; and therefore before the defendant can charge the Plaintiffs with failing to deliver in due time he must show the Jury that he notified the plaintiffs to deliver a given quantity, not exceeding 20,000 in some one week, and that after such notice Plaintiffs did not deliver the required quantity within the period allowed by the contract.

5<sup>th</sup>  
39

E

Given

Although the Jury may be of opinion from the evidence that the defendant duly notified the plaintiffs to deliver the Bricks, and in such notice specified the quantity required & the time in which they were to be delivered, and that the plaintiffs afterwards made default and failed to deliver the same in due time, yet the defendant cannot avail himself now, of that default or failure, unless at the time it occurred, he declared the contract broken, and refused to receive any more bricks from the plaintiffs under it.

6<sup>th</sup>

E

Given

If the Jury believe by the evidence the defendant received and accepted part of ~~and~~ the bricks in due time but the remaining part were not delivered until after the time specified in their contract or notice given, then if the Jury shall further believe from the evidence, that the same were received and accepted or used by defendant such receipt and acceptance or use thereof amounts to a waiver of such default, and it entitles the plaintiffs to recover the full contract price of their bricks so received, that were of the quality described by the contract, and the



market value of the rock below the contract price as proved in this cause.

And said instructions were each given by the court, In the giving of each & every one of which instructions by the court the said defendant by his counsel then and there excepted.

The defendant then asked the court to give the Jury the following instructions.

1<sup>st</sup> If the Jury shall believe from the evidence, <sup>that the Bricks</sup> for the price of which this action was brought were delivered to the defendant under and by virtue of a written contract with Daniel Elston alone, & that the defendant never contracted with said Slight & did not know either at the time of making the contract or while the brick were being delivered that said Slight had any interest in the contract or in the brick which were delivered under it to the defendant then the right of action in this case is in Elston alone and the plaintiffs cannot recover in this action.

Refused

2<sup>nd</sup> If the Jury believe from the evidence that the contract for the bricks in the declaration mentioned was a written contract with Elston alone & that the defendant had <sup>no</sup> notice at the time

41.

Refused

time of the execution of the contract or at any time while the bricks were being delivered that Slight had or claimed any interest in the bricks or under the contract, then the plaintiffs cannot recover in this ~~contract~~ <sup>action</sup>.

Refused

3<sup>d</sup> If the Jury believe from the evidence that the contract for the delivery of the bricks was a written contract made with Elston alone & that no contract was made between the defendant & Slight in reference to the bricks & that the defendant never knew previous to the commencement of this suit that Slight had or claimed any interest under the contract or in the bricks delivered then the plaintiffs cannot recover in this action.

Refused

4<sup>th</sup> If the Jury believe from the evidence that the bricks in the declaration mentioned were delivered under and in pursuance of a written contract with Elston alone and that no contract ever existed between Slight and the defendant, then the right of action under the contract is in Elston alone & the plaintiffs

42.

cannot recover even though the bricks might have been the property of the firm of Elton & Slight.

5<sup>th</sup>

If the Jury believe from the evidence that the contract for the brick in controversy was entered into between Daniel Elton and Cyrus H. McCormick alone, and that the plaintiff Slight was no party to ~~the~~ <sup>such</sup> contract and that the performance of said contract by said Elton was not prevented by the act of said McCormick, then Elton alone is entitled to sue for the price of said brick and the plaintiff cannot recover in this action.

Refused

6<sup>th</sup>

If the Jury believe from the evidence that these brick were delivered under a written contract between the defendant and Daniel Elton for the delivery of exclusively good sound, hard, and red brick and that the brick delivered were not such brick as the contract called for, then the Jury should allow to the defendant an ample allowance for all such damages as the defendant has sustained by the departure from the contract.

Refused

7<sup>th</sup> If the Jury believe from the evidence that the bricks in controversy were delivered under a special contract but not in accordance therewith and that the defendant has sustained damages in consequence of a non-compliance with the contract, then in estimating these damages the Jury may take into account the delay occasioned to the defendant's business in consequence of such non-compliance, the loss of time to the men in his employ, the inferior quality of the brick & the time employed in picking over the bricks.

Refused

Refused

8<sup>th</sup> If the Jury believe from the evidence that the bricks were delivered under a written contract, but not in conformity with it either as to the time or manner of execution, and there has been no fault on the part of the defendant it is the duty of the Jury to see that an ample allowance is made for all such damages as the defendant has sustained by the departure from the contract.

9<sup>th</sup> If the Jury shall believe from the evidence that the bricks in controversy were delivered under a written contract, but not in accordance therewith either as to quality or within the time specified in the contract, it is the duty of the Jury to allow the defendant full compensation for all damages which he has sustained even though the consequence might be that the plaintiffs should receive but a small sum for their materials.

Refused

Each and every of of which instructions were refused to be given by the court, to which decision of the Court in refusing to give each & every one of said instructions the said defendant by his Counsel then & there excepted, -

And afterwards, to wit: on the twenty first day of December it being one of the days of the said November Term of said Court aforesaid, the following among other proceedings were had, to wit:

Daniel Elston +  
John Slight

vs

Cyrus H. McCormick

} Appellant

This day again came the said parties by their attorneys and the Jurors of the Jury, <sup>also</sup> come and they having heard the arguments of Counsel and instructions of the court, retire under charge of an officer of the court to consider of their verdict, and afterwards come into court and say we of the Jury find the issue for the plaintiff & assess their damages at the sum of four Hundred and sixty nine dollars and seventy one cents. Whereupon the said defendant by his Attorney aforesaid moves the court for a new trial of this cause and in arrest of Judgment & signs therefor the following reasons -

Court Circuit Court  
Cyrus H. McCormick

vs

Daniel Elston + John Slight

And now comes the said defendant and moves the court for a new trial in

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in the above case for the following reasons,

1<sup>st</sup> That the verdict is against the law and the evidence in the case —

2<sup>nd</sup> That the court erred in admitting evidence on the part of the plaintiffs, —

3<sup>d</sup> That the Court erred in excluding evidence on the part of the defendants, —

4<sup>th</sup> That the Court erred in refusing the instructions of the defendant, —

5<sup>th</sup> That the Court erred in giving the instructions on the part of the plaintiffs, —

6<sup>th</sup> That the Court erred in giving the instructions of the defendant in the form they were given after being altered by the Court, —

Collins Williams

Atty for Deft

Which motion for a new trial after argument had was overruled by the court to the overruling of which motion the said defendant then and there excepted & prayed the court to sign and seal this their bill of exceptions which is done,

P. S. Morris

(Seal)

Judge 7<sup>th</sup> Cir Ill.

This is to certify that the substance of the foregoing bill was made out and filed with the Clerk without my signature on 30<sup>th</sup> day of January 1853 and without being first submitted to the plaintiffs attorney for amendment or

approval; I being sick at my house on that day never saw this bill of exceptions till the 4<sup>th</sup> Monday of March 1854. It was then handed to plaintiffs attorney who amended it & I have since signed the same with this explanation - and do now state that I have forgotten the details of the evidence but sign what the counsel have made up in the form above stated.

Given under my hand this 17<sup>th</sup> day of April A.D. 1854, -

R. S. Morris Seal  
Judge of Circ. Ct.

And afterwards to wit on the 21<sup>st</sup> day of December A. D. 1853 it being one of the days of the said November Term of said circuit court the following among other proceedings were had to wit:

Daniel Elston &  
John Slight

vs  
Cyrus A. McCornick } Defendants

This day again come the said parties by their attorneys and the court having heard the argument of counsel upon the motion for a new trial heretofore entered in this cause orders that the same

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be overruled. Therefore it is considered by the court that the said plaintiff do have and recover of the said defendant their damages of four hundred and sixty nine dollars and seventy one cents as aforesaid together with their costs and charges by them about their suit, <sup>herein</sup> expended and have execution therefor.

Wherefore the said defendant prays an appeal to the Supreme court of this State, which is allowed by the court on the said defendant's filing his bill of exceptions and a Bond in the penal sum of six hundred dollars with Wm. S. McCormick as security within thirty days from the date hereof.

And afterwards to wit on the thirtieth day of January A.D. 1854 there was filed in the clerk's office of said court a certain Bond which said Bond is in the words of figures, to wit:

Know all men by these presents that we Cyrus A. McCormick as principal and William S. McCormick as surety are held and firmly bound unto Daniel Elton <sup>in the penal sum of six hundred dollars to be paid to the said Daniel Elton</sup> ~~and John Slight~~ or to their certain attorney, executor, administrator or assigns for which payment well and truly to be made we



do bind ourselves, successors heirs executors and administrators and each and every of them jointly and severally firmly by these presents,

Sealed with our seals this twentieth day of January A.D. 1854.

Whereas at the November Term of the Cook County Court of Common Pleas A.D. 1853 judgment was rendered by the said court in favor of the above named Daniel Elston and John Slight for the sum of four hundred and sixty nine dollars and seventy one cents damages besides costs of suit and whereas the said Cyrus H. McCormick has prayed an appeal from the said Judgment to the Supreme Court,

Now therefore the consideration of the above obligation is such that if the above bounden Cyrus H. McCormick shall duly prosecute the said appeal and will pay or cause to be paid the said judgment, <sup>costs</sup> interest and damages in case the said judgment shall be affirmed then the above obligation to be void otherwise to remain in full force and virtue.

Signed Sealed &  
delivered

C. H. McCormick Seal  
By Wm. S. McCormick his atty in fact  
Wm. S. McCormick Seal

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State of Illinois  
Cook County

I Louis A. Hoard clerk  
of the Circuit Court in and <sup>for</sup> said County, do  
hereby certify that the foregoing contains a full  
true and perfect transcript of all the proceedings  
and papers filed in my office in the case wherein  
the said Daniel Elston and John Slight are plaintiffs  
and Cyrus W. McCormick is defendant so far as  
the same appears to have been had and entered  
of Record.

Witness my hand and the seal  
of said Court at Chicago in the  
County aforesaid this 9<sup>th</sup> day of  
June A. D. 1854.

L. A. Hoard  
Clerk



Fees for this transcript \$14<sup>75</sup>

Supreme Court -

vs. H. McCormick  
vs

Amie Ellston &  
John Wright

State of Illinois  
June Term A. D. 1854,

In Error from Cook County,

And now comes the said Col. C. C. Williams  
H. McCormick Plaintiff in Error by Col.  
C. C. Williams his attorney and says  
that in the record & proceeding aforesaid  
and in the entering up of judgment aforesaid  
said there is manifest error in this writ.

First, That the Court erred in admitting improper evidence on the part of the plaintiffs upon the trial of this cause,

Second - The Court erred in rejecting evidence offered upon the part of the defendant on the trial -

Third The Court erred in giving the instructions asked for by the plaintiffs in the court below -

Fourth The Court erred in refusing the instructions asked for by the said McCormick -

Fifth The Court erred in overruling the motion for a new trial made by the said McCormick

C. C. Williams  
att'y for plaintiff

Supreme Court -  
Cyrus H. McCormick  
vs  
Daniel Elliston  
and  
John Knight

Assignment of Errors

Supreme Court.  
C. H. McCormick  
Appellant

vs  
Daniel Colston  
John Leigh  
appellees.

"Record to signment  
of errors."

William of Williams  
Attorney for App. & App.

Filed June 13, 1854  
L. Deland Clerk  
Filed Jan 10<sup>th</sup> 1853  
Wm. Williams  
Clerk

Supreme Court  
Cyrus H. McCormick  
Appellant

vs  
Daniel Elston & John  
Slight, appellees

E. S. Williams & for  
plffs in error

This was an action of assumpsit brought by Elston & Slight in the Cook Circuit Court against McCormick for 100,000 Brick pledged by plffs to have been delivered to Deft in the year 1857.

The plffs declared upon a promise by the deft to pay them for the brick & in the first count set forth the substance of the written contract afterwards introduced by deft in evidence, & in the 2<sup>d</sup> count for the delivery of 100,000 Brick without specifying particularly the terms of the contract, no copy of contract being attached to plea. vide, Record pages

3, 4, 5, 6 & 7.

Plea, General issue, with notice that defendant would introduce in evidence a contract with Elston alone, & that defendant would recoup & set off to the

vide Record pages 10, 11, 12 & 13.

Upon the trial the Defendant introduced in evidence the written contract made between Daniel Elston & C. H. McCormick for the

delivery of 100,000 exclusively good bound  
hard red Brick or left as said Mr  
Council might require,

Vide Record Page 23.

The Plaintiff in Error relies upon the  
following points -

1<sup>st</sup> The Court erred in admitting the  
Ledger of the Plffs in evidence, offered  
by them to prove the amount of bricks deliv-  
ered & the time when delivered -

(Vide Record pages 19, 20)

for the following among other reasons -

1. The Ledger did not contain the origi-  
nal entries, there being a day book which  
was not introduced in evidence -

2<sup>d</sup> The entries in the Ledger were mere  
aggregate amounts, the original entries being made  
in the day book by loads of 1000 each (see page  
19 of record) & carried into the Ledger in three ~~at~~ char-  
ges only, under 3 dates, while Rowford alone testifies  
to 13 deliveries of brick upon 13 different days -

3<sup>a</sup> The Day Book was in Slights hand-  
writing & the ledger in Calston's, Slights' entries be-  
ing made from the reports of witnesses who might have  
been introduced -

4<sup>th</sup> The correctness of the books was proven  
by only proven by one witness who did not ex-  
amine the original entries & settled only by the  
Ledger

The time at which the Bricks were delivered was a material point, directly in issue & the admission of the Ledger to prove this could not but have killed the Case -

Before the Books of the Party can be admitted it must appear that they contain a register of the daily business of the Party, they must be original entries even though kept in Ledger form -

1<sup>st</sup> Green Ev note to page 144, 2<sup>d</sup> Id Ev 683, 686, 696, 697, 698,  
3<sup>d</sup> N. Hamp 156, 4 Seng & Rawls 3, 4<sup>th</sup> Mass 455,

II<sup>a</sup> The Court erred in admitting evidence that shows that Salmon Colored, yellow, & soft brick would answer the description in contract, Vide Record pages 34 & 35 -

1<sup>st</sup> Ev 327, 329, note to page 353 -

Usage is only to be resorted to where the meaning is equivocal & obscure, not to explain what is plain

14<sup>th</sup> Jces 324, 14<sup>th</sup> Dick 141, 15<sup>th</sup> Wend 562.

III<sup>a</sup> The Court erred in giving the 3<sup>d</sup> instruction of the plffs that the Deft if he used the brick is bound to pay the plffs the contract price, whether the Bricks were of any value or not, See also the 1<sup>st</sup> 2<sup>d</sup> & 6<sup>th</sup> instructions of plffs & the discrepancy between them & the 3<sup>d</sup> instruction -



The Court also erred in refusing the  
1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> instructions as to damages  
asked for by the Defendant

Where work is done under a special Contract  
but not in the stipulated time or manner &  
yet it is beneficial to Deft or has been accepted  
by him, Plff can only recover the value of the  
benefit which the Deft has derived & it is  
the duty of Courts to see that an ample al-  
lowance is made for all damages Deft has sus-  
tained by the departure from the Contract  
24<sup>th</sup> Wend 60, 61. Cadue vs Shipman

As to damages see 2<sup>d</sup> Hill 288, 3<sup>d</sup> Hill 17, 4<sup>th</sup> Hill 25.

IV<sup>th</sup> The Court erred in giving the 2<sup>d</sup> & 3<sup>d</sup> in-  
structions, so far as the question of interest was  
involved in them -

It is an unliquidated sum (recompent being a sort  
of irregular <sup>undisputed</sup> set off) & interest is not to be calculated  
even upon a written contract where the principal  
stands open for liquidation.

Idgon Dam 461, 399, 11<sup>th</sup> Wend 479, Fretin vs Keate  
20. Wend 37. Still vs Hall.

But these instructions affirm that the interest  
is to be calculated upon the whole value of the  
Brick up to the time of trial & from the amount  
the set off & damages are to be deducted -

While (admitting that it should be calculated at all) the true rule would be that from the value of the Wick the damages should be deducted & the set off & interest calculated upon the balance, The sum due can't be ascertained until the damages are recouped & set off deducted -

V<sup>th</sup> The court erred in giving the 4<sup>th</sup> and 5<sup>th</sup> instructions of the plaintiffs as to the notification which the defendant was to give the plaintiffs -

Was plffs 4 & 5 instructions & compare them with contract -

X

VI The court erred in refusing the 1, 2, 3, 4, & 5<sup>th</sup> instructions of Drift as to the right of the plffs to bring suit

The contract is an express one made with Elston alone, & there is no proof in the record that McCormick ever knew Slight had anything to do with it, There is no proof that Slight ever regarded the contract as his, the only proof being that Elston & Slight were in partnership, & that the

rick came from their yard,  
McCormick never dealt with Slight  
or had anything to do with him during  
the execution of the contract as appears  
by the record, & for aught that appears in  
the record this was Elton's private con-  
tract & was so considered by the partners,

The general rule is that the action must  
be brought in the name of the party having  
the legal interest (1<sup>st</sup> Chitry, plead, page 204)  
& though it has been held that partners  
may sue upon a contract made in  
the name of one for the benefit of all  
yet it should clearly appear that the  
contract was regarded & treated by the  
parties as the contract of the firm -  
This does not so appear in the record,  
The contract seems to have been acted  
upon as the contract of Elton alone -

Where the action is brought by partners upon  
a contract made with one partner (a  
special contract with him) the plffs must  
clearly prove that the contract was  
a copartnership one & that one partner  
acted as the agent of the firm & the  
presumption is that it is the contract of  
the single partner. Brown on actions 100 (134)

The cases cited by the plffs, (so far as I have been able to examine them) in which partners have been allowed to recover upon a contract made with one of them, have been cases brought upon verbal contracts or upon written ones where it clearly appeared in evidence that the contract was treated by all the parties as the contract of the firm & the contracting partner was considered as the agent of the others -

Lastly -

The verdict of the jury was clearly against the evidence -

The bricks were to be exclusively good sound hard & red brick & after the whole were delivered Elston was to receive the contract price

vide contract -

The evidence of Hanna, Hubbard, Alexander & Poyce shows that a large proportion of the brick were soft & poor (from  $\frac{1}{4}$  to  $\frac{1}{2}$ ) & of comparatively little value.

The testimony on the part of the

Plaintiffs does not necessarily conflict  
with this for the witnesses only testify to the  
quality of the Brick delivered by them  
& they only testify positively to the delivery  
of 70 loads at the utmost -

So far as Connor's testimony is concern-  
ed - he never saw the brick in the mid-  
dle of the wall, which was the source of  
the brick, there about  $\frac{1}{3}$  of the whole -  
(Boxford hauled 20,000 Brick, Donnam  
28,000 Wheeler 3000, or 4000, McLinnick  
took away with Saw 15 to 18,000)

Hanna, Alexander & Blackley  
testify as to the damage to defendant  
by the decay & they are not contradicted  
by plffs witnesses -

Hanna & Alexander testify as  
to an absolute refusal to let off have  
brick even after Dept at Elston's re-  
quest had sent to the Mill for them  
because Elston had other contracts  
& their testimony is uncontradicted &  
Blackley testifies to a let off -

It was therefore a clear case where  
damages should have been allowed

Feb 10, 1833 -

E. J. Miligan

for Plaintiff

Supreme Court

C. H. McClain  
appellant  
vs

Elton & Knight  
appellee

Proctor of  
plaintiff in error

E. S. Williams  
for plaintiff in error

Supreme Court  
of the State of Illinois

Cyrus H. McCormick

vs.

Eleston S. Slight

Brief in Error.

The action is brought for the delivery of a quantity of Bricks upon a quantum meruit, and is in form *Indebitatus Quampruit*.

The admission of the Book of P<sup>l</sup>ff in evidence was proper. The P<sup>l</sup>ff Slight kept a Blotter during the day from which the amount of Bricks delivered during the day were transcribed at night into the Ledger - thus making the Ledger introduced the record of each days transactions & contemporaneous with the days of delivery of the different items of the account in the P<sup>l</sup>ff Book introduced.

All the prerequisites requisite to the introduction of a party's Book of Account in evidence are shown to have been proven in this case.

1<sup>st</sup>. That the Party kept no clerk at the time the account was made.

2<sup>nd</sup>. That the book introduced was the P<sup>l</sup>ff's Book of Account, and that the entries were in his own hand writing.

3<sup>rd</sup>. That parties with whom the P<sup>l</sup>ffs had dealt had settled with P<sup>l</sup>ff on that Book of Account, & found the sum was kept fair & correct.

4<sup>th</sup>. That some of the articles charged had been delivered.

Under the circumstances they seem proper evidence to be left to the jury - they are only presumptive evidence and as such liable to be rebutted.

Vide Boyer vs. Stuart - 3 Scam 120  
Vorburgh vs. Hayes - 12 Johns 462  
Sickles vs. Mather & Wendell 74  
2 Corning Treatise - 953.

In Sickles vs. Mather & Wendell, 74, several cases are cited where it is shown that the practice had been to make entries on a slate and sometimes with pencil during the day by a person in Plffs employ - where such entries were not transcribed until several days afterwards, yet the Court held the Books admissible - and this upon the principle that such was found to be in the ordinary course of business of the party.

In the case at Bar there was in addition to the Books of the Party the testimony of several witnesses showing the delivery of most of the items charged, besides the admission of the Attorney on Record that the amount of 100,000 Bricks called for in contract had been delivered.

**II.** The questions put to the witnesses Sherman and Armitage proper for the purpose of showing that according to the usage of the trade in ~~brick~~ Brick making at Chicago - that hard salmon colored brick with some soft bricks mingled together answered the description of "exclusively good sound hard and red Bricks" the local & technical terms of art as used in the contract.

In regard to words which have a local or technical meaning and which are employed



in a particular district or in a particular science or trade parol evidence is always receivable to define and explain their meaning among those who use them, and the principle is the same with regard to words which have two meanings, the one common & universal, and the other peculiar technical or local, parol evidence being admissible to show that they were used in the latter sense and to ascertain their technical or local meaning" — 1 Greenleaf Ev. Sec. 295.

2 Starkie Ev. 566

Gray vs. Harper, 1 Story Rep. 574

Seldon vs. Williams, 7 Watts 9.

Kemble vs. Full 3 McLean 272

Greenleaf Ev. Sec. 295 The object in all cases being that the Court may be placed in regard to the surrounding circumstances as nearly as possible in the situation of the party whose written language is to be interpreted —

III. The Court did not err in instructing the jury that if the Defendant received any bricks, although such as were not of the quality described in the contract and that he was benefited thereby he was bound to pay for them at their market value not to exceed the contract price —

This is the whole substance of the instructions given by the Court on the part of Plaintiff —

The law is that when one makes a special agreement to perform work or furnish materials and the work is done and materials furnished but not in the manner stipulated in the contract.

Yet if the materials are of any value or benefit to the other party he is answerable to the amount which he is benefited.

*Stons vs. School District*, 3 Fairf. 293

*Holmsted vs. Mactier* 13 Wend. 276

Although a party may be precluded from recovering upon the special contract because he has not performed according to its terms, yet he may recover upon a quantum meruit.

*Nadler vs. Sutton*

6. New Hamp. 15.

*Leggett vs. Smith* 3. Watts. 331

The written contract is a guide to a jury in ascertaining damages, especially when as in this case it was introduced in evidence by the other party. — *Jenett vs. Weston* 2 Fairf. 346.

When a special contract for labor has been rescinded by agreement of parties or performed differently from its terms a recovery may be had on a quantum meruit. — *Crossner vs. Graham* 1 Black 406.

The rule is of universal application and held generally by all courts that on a contract for the performance of labor if a party actually receives useful services and thereby derives a benefit and advantage over and above the damage sustained by breach of the contract, the labor actually done and benefit received furnish a new consideration and the law thereupon raises a promise.

to pay to the extent of the reasonable worth of the excess. *Borton vs. Turner, C. New Hamp 481.*

Also if under an Entire contract for the delivery of a number of specific articles at a certain time and place, though the vendor is not bound to receive a part yet if he accept a part he thereby disaffirms the entirety of the Contract and will be obliged to pay for as many articles as are furnished under the Contract.

*Roberts vs. Bentley 2 Penn. 63*

The instructions all in this case are not that the Plaintiff shall recover the Contract price but that they shall recover the price of the Brick actually received by Defendant not exceeding the Contract price - under which wording the defendant had the entire benefit of the Contract of Plffs which he introduced in evidence in the cause - and which Instructions also the Court qualified by stating that that price was subject to the setoff proven by the defence in buying the Brick.

IV, The question of interest fairly arose upon the account and was properly left to the jury for computation. Even if wrong it is not ground for a new trial.

V, The objection to the 4th & 5th instructions of Plffs is not well taken. The Contract introduced requires Plaintiff to deliver the Brick as fast as required but the Plffs were not to be required to deliver more than 20,000 a week. They

might deliver less, without a violation of the Contract unless there was evidence showing that the Defendant, by notice of to Plaintiff's specific some required quantity within the limit of the maximum named in the contract, as otherwise it would not appear but that all the Bricks the Defendant required were actually delivered. But at all events, if the Defendant received the Bricks even after such a notice had been given & failure made to deliver a required quantity it is not now competent for him to object paying upon a quantum meruit to the extent of the benefit which he received without objection made or notice given to the Plaintiff that advantage was to be taken of the supposed failure.

VI. The Court properly refused the instructions of the Defendant to the effect that because the contract introduced in evidence by the Defendant himself appeared to have been made with Elston alone that then Plaintiff could not recover. Such was in substance the 1, 2, 3, 4, & 5, instructions refused on part of Defendant and did not contain the Law of the Case, because 1<sup>st</sup> There was evidence showing a joint interest as Copartners in the property delivered at time such contract was made. And 2<sup>d</sup> The Suit was not brought upon such Contract but upon a quantum meruit.

It is the rule well established that an action may be maintained by the several partners of a firm upon a Contract made in the name of one of them if there be

evidence that it was made for the benefit of all - *11 Bammell & Curmill. 664.*  
*1 Chittys Pleadings - Page 6 -*

The rule says Story on Partnership Sec 241. is that Partners in their collective or Social Capacity may bring any suit which it would be competent for any of them individual to bring. It is also the rule that in all such suits at Law the Partners should join -

Thus it is said in Sec 243, Story on Partnership that if a contract of guaranty should be entered into apparently with one Partner but in reality it should be intended to be for the indemnity of the firm for advances by the Firm an action may be maintained by all, as upon a joint Contract, although the written papers should be in the name of one Partner

Story on Partnership Sec 243 -  
Law on P. 121. to 133.

See Note D at bottom of Page in Story on Partnership Sec 243 - when the whole question is disposed of by authorities cited in full from English decisions -

VII - As to the last point that the Verdict was against the evidence and that the judge erred in overruling a motion for a new trial. It is hardly of importance sufficient for a citation of authorities -  
The evidence showed the delivery of a large amount of Bricks of different qualities & its use by Defendants. There was a great mass of conflicting testimony.

in the value & quantity of the Brick - but  
as to the quantity used there could scarcely  
be any doubt when the admission of the  
Council and the Books of Plaintiffs and  
the testimony of the different witnesses  
who did the ~~hauling~~ <sup>hauling</sup> are taken into consid-  
eration - The whole was a question of fact  
when there was some conflicting testimony  
and in such cases the Courts do not disturb  
the Verdicts

The whole matter was entirely within  
their province and fairly submitted to  
their consideration upon the evidence -

13. Ills. 699

2 Gil 618

5 Gil 72

1 ibid 475

Graham on new trials p. 388-9

Douglas & Maiten

atys

The Hoyle  
Council

Supreme Court

Elton v. Elton

vs

C. H. McConick

Brief of

Elton in Error

Thos. Hoynes

Counsel

Supreme Court -  
Cyrus H. McCormick  
appellant -

vs  
Daniel Elston &  
John Slight  
appellees

State of Illinois

It is hereby stipu-  
lated and agreed by & between the  
parties hereto that the above cause  
may be transferred to the next term of  
the Supreme Court to be holden at Springfield  
in this State to be argued at said term -  
July 17, 1857.

E. S. Williams for the  
late firm of Collins & Williams  
attys for appellant -

J. H. Hogue for appellees -



<sup>62</sup>  
Supreme Court

C. H. McCormick  
vs  
Daniel Elliott  
and  
John Slight

"Stipulation  
Removal Case"

62

Filed July 21. 1854.  
C. Ireland Clk.

~~12150~~  
12151

Supreme Court of Illinois  
Elston & Sleight

vs  
Cyrus H. McCormick )  
Plaintiff in Error.

And said defendants in Error come by Thomas Hoyne their Attorney and move to strike from the files the Bill of Exceptions filed herein. for the reason that the said Bill of Exceptions was not signed & sealed during the progress of the Trial nor by any consent of Counsel, or order entered upon the Record, that it might be signed in vacation.

Thomas Hoyne  
for depts in Error

McCombs &

Electro Gal

Filed Jan 11<sup>th</sup> 1855

Wm P. Warden

Clerk

Supreme Court

Cyrus H. McCormick

Appellant

vs

Daniel Elston &

John Slight

Appellants

}  
}  
}

And now comes  
the said Appellant by

Mariene Micians his attorney & moves  
the Court to reinstate this cause upon  
the docket & to set aside the order striking  
the Bill of Exceptions from the files & the  
order for the issuing of the proceedings upon  
affidavit herewith filed

Jan'y 19, 1835

Mariene Micians  
attys for Appellant

[10151-43]

Supreme Court

C. H. McCormick  
Appellant

vs  
Daniel Elston  
and  
John Slight  
appellees

Motion

Filed Jan 19<sup>th</sup> 55

Am. Starnes

*[Signature]*

In the Supreme Court

Cyrus H Mc Cormick Plaintiff in error

vs

Daniel Elston and John Slight Defendants  
in error

It is hereby stipulated and agreed  
that by consent of Parties the Record  
in the Bill of Exceptions and transcript  
shall be ~~be~~ amended by adding ~  
thereto the words following that is to  
say "the following Instructions also  
were asked for by the counsel of the  
Defendant and given by the Court

" If the Jury believe from the  
evidence that the Defendant employed  
persons, Drays, and Boat for the  
purpose of procuring a delivery of  
the Bricks in controversy and at the  
request of the Plaintiff Elston then  
the Defendant is entitled to an offset  
against said Plaintiffs claim for the  
amount paid in good faith to procure  
such delivery

" If the Jury believe from the evidence  
<sup>that</sup> the Defendant employed persons, Drays, or  
a Scow for the purpose of procuring a  
delivery of the Bricks in controversy and  
at the request of the Plaintiff Elston then  
the Defendant is entitled to an offset ~  
against said Plaintiffs claim for the  
whole value of the services of said persons  
and the hire of said Drays and Scow

"and the Jury are to judge from the  
"evidence what is a proper consideration  
"therefor

If the Jury believe from the  
"evidence that the Defendant has  
"sustained damage by reason of the  
"failure of the Plaintiff to perform their  
"contract either as to time or as to the  
"quality of the Brick furnished such  
"damage constitutes a good claim  
"of set-off on behalf of the Defendant  
"in this action Provided the Defendant  
"has proved any damages to the  
"satisfaction of the Jury"

And it is further agreed that the  
above stipulations and instructions  
may be taken ~~read~~ <sup>read</sup> as part of  
the Record on the ~~matter~~ <sup>trial</sup> of the appeal  
in this cause - Dated this 3<sup>rd</sup> day  
of July 1854

Collins & Williams  
attys for ~~the~~ Plaintiff  
in error

Davis & Martin

attys for ~~the~~ Defendant  
in error

62  
McCormick  
Elston et al.  
~~~~~  
"Stipulation"

Filed July 15. 1854.  
H. Keland Clk.