

12378

No. _____

Supreme Court of Illinois

Stowe.

vs.

Barrett.

71641  7

State of Illinois }
County of Cook }.

Plas before the Honorable Hugh J. Dickey Judge of the seventh Judicial Circuit Court of the State of Illinois and presiding Judge of the Circuit Court of the County of Cook in said State at a term thereof begun and held at Chicago in said County of Cook on the first Monday, being the fifth day of May in the year of our Lord one thousand eight hundred and fifty one and of the independence of the United States the seventy sixth.

Present. Hon. Hugh J. Dickey, Judge of said Court,
Daniel McIlroy — State Attorney pro tem
William S. Church — Sheriff
Attest, Louis D. Woods. Clerk of the Cook County
Circuit Court.

Be it remembered, that on the 7th day of April in the year of our Lord one thousand eight hundred and fifty one, there issued out of the said Court the peoples writ of summons which is in words and figures, as follows to wit —

State of Illinois } ss.
Cook County } The people of the State
of Illinois to the Sheriff of said County,

Greeting: We command you to summon
Benjamin F. Barrett 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 in Chicago in said County
on the first Monday of May. next to answer
unto William H. Sten who sues for the use
of John Robinson his assignee in a plea of
treppass in the case, on premises to the dam-
age of the said plaintiff as he says in
the sum of one thousand Dollars -

And have you then and there this
Writ. with an endorsement thereon
in what manner you shall have
executed the same -



Witness Louis C. Stoddard Clerk of
our said Court. and the seal
thereof at Chicago. as aforesaid
this 7th day of April A.D. 1851

L. C. Stoddard
Clerk of the Court

On the back of which said summons
appears the following endorsement:

Served by reading to the within named
Benjamin F. Barrett April 14th

1857,

Fees.	1 Service	50
	1 Mile Travel	5
	Return	10
		65

W. S. Church Sheriff
By A. A. Dexter Deft.

And afterward to wit: on the 25th day of April A.D. 1857. came the said plaintiff by C. L. E. D'Wolf, his attorney, and file in said Clerk's office a certain "Declaration", in the words and figures following to wit:

Cook Circuit Court May 5, 1857

State of Illinois }
Cook County ss }

William M. Stone plaintiff
in this suit who sues for the use of John
Robinson his assignee by C. L. E. D'Wolf
his attorney, complains of Benjamin F. Bar-
rett, defendant being in custody &c of a
plea of trespass on the case upon promises

For that whereas, defendant hereto-
fore to wit on the 26th day of July A.D. 1856,
to wit at Chicago in the County of Cook
and state of Illinois by a certain agree-
ment in writing then and there made betw-
een the said plaintiff and defendant
it was agreed that the said defendant

heretofore, to wit on the 26th day of July
A.D. 1854 to wit at Chicago in the County
of Cook and State of Illinois, by a certain
agreement in writing then and there made
between the said plaintiff and defendant
it was agreed that, the said defendant should
put a good composition roof upon in
several of the large custom houses as (Warrens
Composition Roof) upon the building owned
by said plaintiff situate on Randolph
Street Chicago and warrant the same for
the term of five years and that at about
the expiration of one year after the Roof should
be laid, would put upon it a second coat
of the Composition, and the said plaintiff
on his part agreed thereby that he would
pay said defendant for said roofing 6^{cts}
per square foot as follows viz 5^{cts} per
square foot when the roof should be laid
and one cent per square foot after the
second coat should be put on, at the
expiration of the years and although
the said plaintiff hath always been ready
to perform the said agreement on his part
yet the said plaintiff in fact saith that
the said defendant, contriving, neglecting
and intending to injure the said plaintiff
did not nor would perform the said

agreement on his promise and undertaking
but neglected and refused to perform the
same in this to wit. The said defendant
did not put on to said roof a sufficient
quantity of said composition to make the roof
good and also neglected to place the com-
position in a regular and even manner upon
the roof. and left holes in the composition
and put the said roof on in a bad man-
tificial and unworkmanlike manner
contrary to the form and true intent of
the said agreement. and of his promise
and undertaking to wit at Chicago afore-
said.

And whereas also hitherto to wit:
on the day and year aforesaid to wit: at
Chicago in the County of Cook in considera-
tion that the said plaintiff at the speci-
al instance and request of the said defen-
dant had then and there and here return-
ed and employed the said defendant to
put a good composition roof upon the
building of the said plaintiff upon Randolph
Street. Chicago. and although the
said defendant did afterwards before
the commencement of this suit put a com-
position Roof upon the building last
above mentioned to wit at Chicago in
the County of Cook aforesaid. yet the
said defendant not regarding his
agreement and undertaking did not.

he would put a good composition Roof upon said building but wholly neglected and refused so to do and on the contrary thereof he the said defendant put a bad unsoundlike, leaky, roof thereon made of unproper materials contrary to the form and effect of his said agreement to wit at the County of Cook aforesaid —

And whereas, Also afterwards to wit on the seventh day of April. A.D. 1857. the said defendant was indebted to the Plaintiff in one Thousand Dollars, for the price and value of goods then bargained and sold by the Plaintiff to the Defendant at his request And in one Thousand for the price and value of work there done, and materials for the same provided by the plaintiff for the defendant at his request, And in one Thousand Dollars for money then lent by the Plaintiff to the Defendant at his request. And in One Thousand Dollars for money then paid by the Plaintiff for the use of the Defendant at his request, And in one Thousand Dollars for money then received by the Defendant, for the use of of the Plaintiff. And in One Thousand Dollars for money found to be due for the defendant to the Plaintiff on account then stated between them

And whereas the Defendant afterwards
on the day and year last aforesaid in
consideration of the premises respectively
then promised the Plaintiff to pay him
the said several sums of money above
mentioned, respectively on request yet he
hath disregarded his promises and hath
not paid any of the said money, or any part
thereof to the plaintiff's damage of one
Thousand Dollars, and therefore he brings
suit &c

C. S. C. Wolf
Attorney for Plaintiff

Copy of agreement made on

Articles of agreement made this 26th
day of July in the year 1851 between
B. F. Barrett, and Wm. M. Ston.

The said B. F. Barrett does hereby agree
with the said Ston that he will put a
good Composition Roof (Known in some
of the large Western towns) as Warrens Com-
position roof upon the building owned by said
Ston, situate on Randolph Street, Chicago
and warrant the same for the term of
five years, and that at the expiration
of about one year after the roof is laid
he will put upon it a second coat of
the composition, and the said Ston

does hereby agree with the said B. F. Barrett
that he will pay him for said Roofing
 $6\frac{1}{2}$ cents per square foot as follows viz
 $5\frac{1}{2}$ cents per square foot when the roof
is laid and one cent per square foot
after the second coat has been put on at
the expiration of the year

Signed B. F. Barrett
H. W. Stone

And afterwards to wit: on the 8th day of May
A. D. 1854. came the said defendant by
Seamont McCagg, his attorney, and
file in said Clerk's office a Demurrer
which is in words and figures following to wit

And the said defendant comes and defends
and says that the first and second counts
of said declaration of said plaintiff and
the matters and things therein contained as
the same are therein alleged are not suffi-
cient to enable the said plaintiff to
have and maintain his said action against
this defendant. Wherefore he prays judgment.
And as to the residue of said declaration
and the ~~matters~~^{counts} therein contained the said
defendant says actio non because he says
that he did not undertake or promise

in manner form as the said plaintiff
hath above thereof declared against him
and of this he puts himself upon the
country &c

Scammon McCagg
Atty for Deft.

And afterwards. to wit on the thirty first day
of December A.D. 1853 came the said defen
dant and filed in said Clerk's office a certain
Brev of Exceptions which is in words & figures as
follows to wit.

No. 3 William M. Stowe who
sues for the use of John Cook County Circuit
Vs. Benjamin F. Barrett } Court November term A.D. 1853

Be it remembered. that on the 20th day of
Decr. A.D. 1852. the said plaintiff filed
in the cause this his amended declaration,

State of Illinois In the Cook County Circuit
Cook County for Court of the May Term A.D. 1852
William M. Stowe plaintiff
in this suit. who sues for the use of John
Robinson his assignee by Wendell D. Wolf
his attorneys. Complain of Benjamin F.
Barrett. defendant. herein. being in cus
tody &c of a plea of trespass on the case
on premises - For that whereas heretofore to wit

on the twenty sixth day of July A.D.
one thousand eight hundred and fifty
at Chicago in the County & State of Ill.
said, by a certain agreement, then and
there made, by and between the said
plaintiff and the said defendant, it
was agreed, that the said defendant
should put a good Composition Roof
Kum in several of the large Western
towns as Warrens Composition Roof
upon the building owned by said
Ston, situate on Randolph Street
in Chicago and warrant the same
for the term of five years, and that
at the expiration of about one year after
the Roof should be laid, he would
put up on it a second coat of the
Composition and the said plaintiff
on his part, agreed, thereby, that he
would pay said defendants for said
roofing six and one half cents ^{per square foot} by the
as follows to wit, five and one half cents per
square foot when the roof should be laid
and one cent per square foot after the
second coat should be put on, at the
expiration of the year. And the said
agreement, being so made as aforesaid,
afterwards to wit, on the day and year

aforsaid. at the place aforsaid in
consideration. thereof. and that the said
plaintiff at the special instance and
request of the said defendant had
then and then undertaken and faith-
fully. promised said defendant to
perform and fulfill the said agree-
ment. in all things. on the said plaintiffs
part and behalf to be performed and
fulfilled. he the said defendant un-
dertook. and then and then faithfully
promised the said plaintiff to perform
and fulfill the said agreement in all
things. on the said defendant's part
and behalf to be performed and fulfilled.
And although the said plaintiff hath always
been ready to perform the said agreement.
in all things on his part to be performed and
fulfilled. Yet the said plaintiff in fact
saweth that the said defendant. contriving
and wrongfully. and unjustly intending to
injure the said plaintiff did not nor
would perform the said agreement nor
his said promise and undertaking. but
thereby craftily and subtly deceived the
said plaintiff in this to wit: that the said
defendant wholly neglected and omitted
to do and perform. certain things which
were requisite and necessary to be done
and performed under and by virtue

of the said agreement and according to the tenor and effect, true intent and meaning, thereof, that is to say, to put on said roof a good and sufficient quantity of said composition to make the roof good and also neglected to place the composition in a regular and even manner upon the roof as it should have been placed, and left holes in the composition, which he placed upon said roof and put the said Roof on in a bad in artificial and unworkmanlike manner. And the said defendant also unlawfully, craftily and subtly deceived the said plaintiff in this, to wit; that the said defendant afterwards to wit; on or about and on or about the 1st. did and performed certain other works and things which were necessary to be done and performed under and by virtue of the said agreement in a bad in artificial and unworkmanlike manner contrary to the form and effect of the said agreement and of his said ^{promise} ~~promise~~ and undertaking to wit; at Chicago Cook County aforesaid.

And whereas also heretofore to wit; on the day and year aforesaid at Chicago aforesaid in consideration that the

said plaintiff at the special instance
instance and request of the said defendant
had then and there returned and employed
the said defendant to put a good composition
roof upon the building of the said plaintiff
upon Randolph Street, Chicago and
in consideration that the said plaintiff
did then and there promise to pay to the
said defendant a certain reasonable reward
or compensation then and there agreed upon
by and between the plaintiff & said defendant
at the time and in the manner
mentioned in the said agreement a copy
of which is herewith annexed. In the said
defendant undertook and then and there
faithfully promised the said plaintiff
that he would put a good composition
Roof upon in several of the large Western
towns as Warrens Composition Roof upon
a certain other building owned by said
Ston situate on Randolph Street in
Chicago and warrant the same for
the term of five years: and although
the said defendants did afterwards
and before the commencement of this
suit a put a composition roof upon the
building last above mentioned to wit: at
Chicago in the County of Cook aforesaid.
yet the said defendant not regarding
his last mentioned promise and

roof

undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would put a good composition Roof upon said building but, wholly neglected and refused so to do, and on the contrary thereof, he the said, defendant, put a bad workmanlike and leaky roof thereon made of improper materials and in an improper, artificial negligent and workmanlike manner, contrary to the form and effect of the said last mentioned promise, and undertaking to wit, at Chicago aforesaid. And whereas also afterwards to wit: on the twentieth day of July A.D. one thousand eight hundred and fifty, at the County aforesaid the said defendant, was indebted, to the said plaintiff in one thousand dollars for the price and value of goods, then & there bargained and sold to the defendant, at his request, by the plaintiff and in one thousand dollars, for the price and value of work then done, and materials for the same provided by the plaintiff for the defendant at his request; and in one thousand dollars for money, then lent to the defendant at his request.

by the plaintiff. And in one thousand
dollars. for money then paid by the plain-
tiff. for the use of the defendant. at his
request. And in one thousand dollars
for money then received by the defen-
dant for the use of the plaintiff. and
in one thousand Dollars for money
found to be due from the defendant
to the plaintiff. on an account then
stated between them. And the defendant
afterwards to wit: on the day & year last men-
tioned. at the place aforesaid. in consid-
eration of the promises respectively. promised
the plaintiff to pay him the said several
sums of money above mentioned, respectio-
ly on request. Yet he hath disregarded ~~his~~
promises. and hath not paid any of the
said moneys or any part thereof to the
plaintiff. damage of one thousand
dollars. and therefore he brings his suit to

Arthur W. Hindett

J. C. De Wolf

Att'y for P'ty

Copy of the Agreement Said on

Article of agreement made this Twenty
sixth day of July in the year 1850 Between
B. F. Barrett and Wm H. Stow - The said
B. F. Barrett, does hereby agree with

the said Stow, that he will put a good composition Roof known in some of the large Western towns as Warrens Composition Roof upon the building owned by said Stow situated on Randolph St. Chicago and warrant the same for the term of five years and that at the expiration of about one year after the Roof is laid he will put upon it a second coat of the composition, and the said Stow does hereby agree with the said B. F. Barrett that he will pay him for said Roofing 6¢ cents per square foot, as follows viz: 5¢ cents per square foot when the roof is laid and one cent per square foot after the second coat has been put on at the completion of the year

Signed B. F. Barrett
M. H. Stow

To which declaration, the said defendant filed the following plea—

Cook County Circuit Court.
Benjamin F. Barrett,

ad

Wm. M. Stow who sues for the use of
John Robinson his assignee

(May Term 1855)

And the said defendant by Brown & Sturd
his attorneys comes and defends the wrong
injury whereof and says he did not under-
take or promise in manner and form as the
said plaintiff hath above thereof compl-
ained against him and of this he puts
himself upon the Country &c

Brown & Sturd for Deft

And the said plaintiff doth the like
May 8. 1851.

C. L. E. D. Wolf

Plffs Attys

And

And afterwards to wit: at the November
term 1853 of the said court held at the
Court House in the city of Chicago in & for
said county before Buckner S. Morris then
Judge of the said Court issues being upon
the said pleadings, the said cause
came on to be tried by a jury of the said
county for that purpose duly empanelled
At which day came the said plaintiff
by D. Wolf and Windett & the said defen-
dant by Brown & Sturd and upon the trial
of the said cause the said plaintiff
introduced the following testimony to wit
Articles of Agreement made this 26th
day of July in the year 1850 between
B. F. Barrett and Wm H. Stow
The said B. F. Barrett, does hereby

agree with the said Stow. that he will put a good Composition Roof (Known in several of the large Western towns. as Harrens Composition Roof) upon the building owned by the said Stow. situated on Randolph St Chicago. and warrant the same for the term of five years. and that at the expiration of about one year after the roof is laid, he will put on it a second coat of the composition

And the said Stow does hereby agree with ^{the said} B. F. Barrett, that he will pay him for said roofing 6 1/2 cents per square foot as follows viz: 5 1/2 cents per square foot when the roof is laid, and one cent per square foot after the second coat has been put on at the expiration of the year

B. F. Barrett

H. H. Stow

2^d The testimony of Alanson Watson which was as follows to wit: I am acquainted with the parties - know the commercial Hotel, and did the carpenter work on the building in question. The building is eighty feet on Randolph Street contains four stories of Twenty feet each. The main building is thirty six feet deep - has a one story rear port attached Twenty six feet deep. The back part and front -

Building were both built at the same time
The rear part formed a part of the Store
They run through the whole depth of the
two buildings They were one building
Thence there was composition Roof put on
both back & front part of buildings. The
buildings alluded to were the Commercial
buildings East of Canal Street - I went
into the buildings at the request of Mr Stow
the plaintiff to examine the building imm-
ediately after rain had fallen. Went twice
to see it saw good many wet places in
the wall of both buildings. Thence the water
came into the Store - The back part was wet
in a good many places - Three of the
Store had sixteen or eighteen spots in them
There were considerable many wet places
in the main building - I went through
all the rooms. over half the surface of the
ceiling in all the rooms was wet some of
the rooms had 16 to 18 spots in them - The
rooms were wet on side walls & ceilings
I was on the roof of the main part Thence
were some holes on the back part of the
main building in the siding where the
buildings joined - The amount of the
damage to plastering would be from \$300
to \$500 - No plastering had fallen off now
has yet fallen off - to my knowledge - This
damage is in case it had to be plastered

own. The water wetting the timber would damage it about two hundred dollars. did not see the timbers. I think the whole damage would be five hundred dollars. Is not prepared to state, what the damage would be to the wood. did not see it. Knows of no tenants being obliged to leave on account of the leakage. The leaking would make the building very uncomfortable.

And upon the cross examination he testified as follows. I was the carpenter who did the carpenter work on the buildings. When upon the Judge interposed and asked if the carpenter work was done well, the witness answered that it was if the roof had been a good roof. the walls & ceiling would not have been wet. The defendants counsel proceeded and the witness further testified. The leaks in the main building, were over the hall and in the rooms. These were least at the east end of the hall, some ten or fifteen feet from the side of the building. The wall in the hall was considerably wet wet most near the side. There were leaks in two front rooms & two back rooms. The walls in the front rooms a little dampened. The spots in both instances were near the side. In the front rooms the spots were near

the front side & in the back rooms. near the back side of the building. There was a battlement on the north side. and on the east end the battlement. was built with boards jointed together. I called in two or three times after the first time leaks in the back rooms. were in the side walls. I should not think the water could come in through the defect in the building. I was not in during the rain at any time. There was no cave, trath on the south side of the building over where the back building joined on to the front

No 6 3^d The testimony of Samuel McCutcher as follows -
I occupied a store in Stows building went into the store 8th of May 18⁵⁷. The store leaked where the back part joined on. There was no leak in the store except where the back part joined on. The store was accupied as a grocery. There were three stores perhaps more on the block. they all leaked.

The Plaintiff then asked the witness the following question -

Would the building have rented for any thing more if it had not been leaky - which question, the defendant objected to and the objection was overruled, to which overruling, the defendant then & there, excepted. The witness answered as follows. I paid full price for the store. The witness further testified. There was no plastering dropped

off the plastering was soaked. I do not know that I saw any streaks or spots made by the water. I don't know of the amount of the damages.

The Plaintiff then asked said witness the following question. How much less was the building worth per annum in consequence of the leakage from the time it was finished to the time of the commencement of this suit to which question the defendant objected, and the court sustained the objection & the plaintiff then ~~and~~ thus excepted.

4th The testimony of James Gallagher - I don't remember when the roof was put on. It was either in 1850 or 1851 - I know the roof leaked in thirty or forty places. don't know how many places there were. water ^{stood} deep in hall floor - I think the stairs were completely flooded. There were six or eight rooms that there were spots on the ceiling in the third story - some water came into the hall. There would be spots some ten or twelve feet from the sides - Don't know the injury to the building - no plastering has come off.

And upon his cross examination he testified the back building was covered with shingles - The main building was not. The back building was slanting towards

the south, and the roof inclined from where it was attached, to the main building, so that the water running in between the buildings might have made wet places on the ceiling below.

3rd The testimony of Robert Bradford which was as follows - I was in the building once, it leaked when I was there. Can't say how bad - water came down over the floor - there was more than one place where it leaked.

4th The testimony of A. E. Walker which was as follows upon the direct examination.

I was in McCatters Store and others. Don't remember at what time exactly - did not see but one wet spot, that was where the back part and front part were joined. Don't know whether the wall was discolored or came off. Upon cross examination he testified as follows - I think the wind was south at that time so that the rain would strike against the back side of the main building. I occupy a store in the corner building attached to the front building mentioned.

The testimony of Allen Clark as follows upon direct examination.

I worked on the building as a hand for Watson, when it was erected. Saw the men of the defendant

at work putting on the roof of the building - it was the last of July 1850. The back building was a shed, moved up and attached to the back part of the new building. There was a shingle roof on the back building - The roof of back building, was supported by the petitions below columns & braces -

A. Dutchman put on the siding, on the back side of the main building - I saw the building once or twice one year after the work was done & after rains had fallen - Upon cross examination he testified -

I think the plastering was not all finished till the next spring after the roof was put on - some of the plastering was done that fall. The plastering above was not done until the next spring.

And upon direct examination being resumed he testified

If what Watson testified was true the damage might be four hundred dollars, from what I saw, I think it was three hundred dollars. am not a ^{plasterer} ~~fortna~~ cannot tell, three or four hundred yards were damaged and would have to come off. The wet places which I saw were

at the east end of the Hall and on South side of building & in the back end of the stores - There was no other building on the east end of the new port as high as this one

The Plaintiff thereupon closed his testimony.

Defence

The defendant then introduced the following testimony -
1st The testimony of John Poore upon his direct examination, was as, which was as follows

No 7. I am the foreman of the defendant, and superintended the putting on the roof in question was one of the Workmen and worked upon it with my own hands.

I have worked at the business some years. The fit was laid on three thicknesses but that is the usual way - that is the way for first rate roofs. The composition was put on in the usual way. The work was done in a first rate manner. I saw it soon after it was finished, and examined it fully with intention to ascertain its condition.

I did it before Stow said it leaked. I could not find any places where it could leak. think I should have found them if there had been any. I went and examined it two or three days after notice from Stow.

There was no cap on the front corner -

There were rough boards laid on the top of the cornice - I made this examination in the fall. I should suppose the water must have come in through the ^{the cornice} cornice, set back about nine inches over the building so that the composition roof did not come out over the front of the building. The cornice came up about eight inches above the roof. The battlement on the east end was fixed in the same way. While we were doing the main building, Mr. Sten the plaintiff came to me and asked me if we could put on our kind of roofing over shingles. I told him we could but that Mr. Barrett would not warrant a roof so put on.

Whereupon the Plaintiff's attorney objected to above conversation & moved the Court to rule out all the above testimony in regard to such conversation which the Court did and the defendant then ~~and~~ then accepted to the ruling of the Court. The Court then said the defendant might introduce such conversation if he could prove that the same was after the making of the contract, given in evidence by the plaintiff. The witness then testified.

The conversation alluded to was the

Last of July or the first of August of 1850 after we had been some time at work on the main building I do not know when the contract given in evidence was made I was not present At the time we commenced work Mr Barrett was was in Detroit had been there five weeks did not come back till the building was finished, some time after. I was the agent of defendant & had a right to make contracts. All of which testimony the court ruled out, and instructed the jury not to regard, to which ruling of the court the defendant then and there excepted.

The defendant then and there propounded the following questions to the witness -

- Was there any conversation between you and Mr Stow, as to the covering of a roof on which there had been shingles laid after you had been several days at work on the main building? which question was objected to by the plaintiff and the objection sustained. the court and the defendant then and there excepted - Was there any contract made between you and Mr Stow after you had been several days at work on the main building in relation to the putting on of a composition roof on the back building on which there was a

Shingle roof - objected to by the plaintiff and objection sustained, and the defendant then and there excepted - After you had been several day at work putting a roof on the main building, did you have any conversation with Mr Stow in regard to putting of a composition roof upon the rear part before spoken of by the witness, if so state what it was

In which question the plaintiff objected, and the court sustained the objection and the defendant then and there excepted.

The witness further testified - Some three days after Mr Stow, had given me notice that the roof leaked. I went to repair it. I found boards nailed on to the roof of back building, and a clothes line put up on it, and it had the appearance of having been walked on. - I think I can tell when a roof has been walked on and there was holes worn through the composition as felt by the poles that sustained the clothes lines.

Before this the roof was first rate - when the felt & composition are laid on shingles - walking upon the roof moves the shingles and displaces the composition at the ends of the shingles and causes the composition also to slide off - I think that walking upon such roof would cause

it to leak. When I went to fix the roof I laid on three thicknesses of felt, where the roof was said to leak - where the two buildings joined and covered them with composition in such a manner, that it must have stopped the leak, if it had leaked there -

This did not stop the leak - There were holes in the siding of the main front through which the rain might have come, and it is my opinion it did leak through those holes - I went several times to repair the roof, did not find any places where I thought it could leak -

No 8

The testimony of Noble which was as follows - I went with Mr Harris Mr Sheppard & defendant to examine the ppfs building in question - think it was after a rain, was about the time this suit was brought, some time in the Spring - Saw a wet spot in the Hall in the third story east end of the Hall. The spot was largest where the end wall and the ceiling joined and extended out some feet over the hall - Can't say how many, saw some wet spots in the front rooms and back rooms - these spots were near the side walls of the front and back side of the building - Don't remember about ever trough. There was two knot holes in the siding of the back side of the building. did not find any places where

the roof could leak - so long since cannot remember well.

The testimony of Robert Sheppard which was, that he went with Mr Barrett & Mr Harris & Noble to examine the building - went at the request of defendant, examined the same, saw some wet spots in main building - some in the store under the back port or addition - No plastering had come off - Went there about the time this suit was brought in Spring - Think it was after a rain - The ceiling of the hall was wet at the east end - The wet spot, was largest at the side walls, extended out into the hall some six or eight feet - Saw no wet places in rooms of any accounts - Examined the roof but found no place in the roof where I thought, the rain could have come through - I am a carpenter by trade, not now engaged in the business - I examined the building above where the rain had come through, and found holes in the siding just over where the rain comes through - I think there is where the rain comes in - It could come through there and run down in the studs until it came to the plastering and follow the lath out so as to make the

appearance we saw, It is not unusual
for such to be the case - I have known
it to run further in the same way. On the
south side of the main building, the
siding was shaky - Had Knot holes in
and in some places the siding had shrunk
apart and left holes so that the rain
could have come in through, thus and
produced all the wetting testified to
have taken place in the store -

The wet places below were right under
where the buildings join and where the
water would naturally come through if
it leaked, through the siding - Sack clothes
lines, on roof of addition & posts which sus-
tained them, which had made holes
through the roofs

The testimony of Jacob Harris, which
was as follows.

I examined the roofs in ques-
tion - am a carpenter & joiner - was acquaint-
ed with each roof - They were well made
could not find any places in the roof
of the main building where it could
leak - It might have leaked through
the cornice and battlement did not
examine, the east end of the building -
Examined the south side - The siding on
the south side was shaky and had knot
holes in it over the window caps - the siding

had shrunk so as to leave holes large enough to put my fingers in - the water could come through these places so as to produce all the damage in the stue below - My opinion is that it did come in there - There were boards on the roof and holes made through it by studs that supported clothes lines - I think I went there in the fall or spring - it was soon after this suit was brought. I think it was in the fall - don't remember went there a few days ago - the holes in the siding had been stopped -

There was no plastering off up stairs in the main building at either time when I went there - The damage to the upper building could not be ten dollars, I do not know how much the damage to the back building would be - There was some plaster colored - The whole amount damaged below would not be more than one hundred & fifty yards - It costs twenty cents per yard to lath & plaster -

The above was all the testimony introduced before the jury upon either side of the above entitled case -

Whereupon after argument of Counsel the
Court instructed the jury on behalf of
the plaintiff as follows

Ston mason

vs.

Barrett.

Plaintiffs Instructions

1st If the Jury believe from the evidence that
Barrett agreed to put on a good com-
position Roof - and the Roof was not
good - and the building is thereby dam-
aged the plaintiff ought to recover
such damage as *you* think has proved.

2^d If they believe from the evidence that
plaintiff is entitled to recover. They will
allow the whole damage sustained to
the building as the proof may warrant.
3^d And also the loss of rents if any occa-
sioned by the leaking from the time of
the completion of the building till the
commencement of this suit - if any
he has proved he has sustained

To which instructions and the
giving of each of them, the said defen-
dant. then and there duly excepted

The defendant asked the Court to
give the jury the following instructions
1, 2, & 3. except the words included in
Brackets -

Defts Instructions

1. If the jury shall believe from the evidence that the roof of the back building was used by the plaintiff for other purposes than as a roof, and abused the same (and thereby caused the leakage), and the roof leaked the plaintiff cannot recover for the damage occasioned by such leakage, unless the jury shall further believe that the roof would have leaked at all events.

2. If the jury shall believe from the evidence, that the damages proved in this case was occasioned by the joint defects of the Defendant's work, and the ill usage of the roof, and the improper construction of the building, they cannot find for the plaintiff unless it shall further appear what amount of such damage was done by the defendant's fault.

3. The jury are instructed that the words in the contract in regard to warranting the work for the term of 5 years must be construed to mean that the defendant would keep the roof in repair, yet the plaintiff is entitled to recover such damages as he shall prove to the satisfaction of the jury resulting from a leakage or breach of the Warranty.

The first of which instructions the court altered by inserting after the word "same" and before the word "and" the words "and thus caused the leakage" to which alteration and change and the giving of the instructions ^{so altered} ~~the~~ the defendant then and there excepted and to the third of said instruction the said court added all the words after the words "Keep the roof in repair" to wit the words "yet the plaintiff is entitled to recover such damage as he shall prove to the satisfaction of the Jury resulting from a leakage or breach of a Warranty" to which addition and the giving of the same to the jury the defendant then ~~there~~ excepted.

The jury then retired to consider their verdict and afterwards returned into court a verdict in favor of the plaintiff for the sum of one hundred & fifty dollars which was entered of record. Whereupon the defendant moved the court for a new trial on the following grounds:

1st Because the verdict was contrary to law and was not warranted by the evidence.

2^d Because the court erred in not admitting the testimony of John Powell in relation to the putting on of that part of the roof that was laid over shingles.

3^d Because the instructions of the court
were contradictory and must have mis-
led the jury

4th Because the instructions were contrary
to Law.

Which motion was heard, and overruled
by the court to which overruling the defendant
then and there excepted, and prayed the
court to sign & seal this bill of excepti-
ons which is done

B. C. Morris *Pres*
Judge 7th Judicial
Circuit Ill.

The stipulate that this bill may be filed
as of any day within thirty days after the
trial of the cause

H. B. Wood
H. H. Windett

And be it also remembered that on the
10th day of December A.D. 1853 it being one
of the days of the November term of the
Cock. County. Circuit Court, in said year
and this cause having been duly continu-
ed from term to term down to said Novem-
ber term, the following among other proc-
eedings were had to wit:

William H. Stow use
of John Robinson. Assignee

Assumpsit

Ar 11 Benjamin F. Barrett,

This day came the
said parties, by their attorneys, and issue
being joined, it is ordered that a Jury
come, and thereupon come the Jurors
of a Jury of good and lawful men
to wit: William Rowley. John Dewit William
Barnard Daniel Barnard. A Thomas Will-
iam H. Adams. Patrick Gibbons. George H. Cobb.
Isa Reynolds James McKee William Coleman
and C. Gifford, who being duly elected
tried and sworn well and truly to try
the issue joined between the parties accor-
ding to law and the evidence and
they having heard, the testimony of
witnesses, arguments of counsel and
instructions of the Court, retire under
charge of an officer of the Court to

consider of their verdict whereupon by
agreement of parties it is ordered by the
court. that when the Jury shall have agreed
upon their verdict. they may seal the same
and meet the court to render the same
on Monday morning next,

And on the 12th day of December A.D. 1853
as yet of the said November term the follo-
wing proceedings were had. to wit;

William W. Storr whereas
Jesse of John Robinson Assignee
v Assumpsit.

Benjamin F. Barrett.

This day came the said
parties by their Attornies. and the Jurors
of the Jury. also came and render their
verdict and say we of the Jury find the
issue for the Plaintiff and assump. his
damages at the sum of one hundred
and fifty Dollars. Whereupon the said
Defendant. by his Counsel enters his mo-
tion for a new trial in the cause
and in arrest of Judgment.

And on the 14th day of December A.D. 1853
as yet of the said November term the
following proceedings were had to wit;

William M. Ston
vs. Assumpsit
who was for use of John
Robinson Apigne &c.

Benjamin F. Barvett.

This day again come
the said parties by their Attornies and
the Court having heard the arguments
of Counsel upon the motion for a new
trial, heretofore entered herein orders
that the same be overruled. Therefore it is
considered by the Court, that the said
plaintiff, do have and recover of the
said defendant his damages his dam-
ages of one hundred and fifty dollars
together with his costs and charges by
him about his suit herein expended
and have execution therefor.

Whereupon the said Defendant, by his Attor-
ney prays an appeal which is allowed
by the Court on the said defendant's
filing a Bond within thirty days from
the date hereof, in the penal sum of
four hundred dollars with security
to be approved by the Clerk.

And afterwards to wit; on the 12th day of
January A.D. 1854, comes the Defendant
and files his Appeal Bond to wit;

Know all men by these presents that
that we Benjamin F. Barrett principal
and L. C. Sam Frer and Alingo Hamlin
sureties, of the County of Cook, and State
of Illinois are held and firmly bound
unto William H. Stor who sues for John
Robinson Assignee in the penal sum of
Ten Hundred Dollars lawful money of
the United States for the payment of
which well and truly to be made.

We bind ourselves on heirs executors and
administrators jointly, severally and firmly
by these presents

Witness our hands and seals this
eleventh day of January 1854.

The condition of this obligation is such
that whereas on the fourteenth day of
December A. D. 1853. the said William
H. Stor who sues for John Robinson
Assignee. did recover in the circuit
court of Cook County in the State
of Illinois a judgment for one hun-
dred and fifty Dollars and his
costs from which said judgment the
said Benjamin F. Barrett prayed an app-
eal to the Supreme Court of the State of
Illinois which was allowed on the said
Barrett's filing a bond within thirty

days. in the penal sum of seven hundred
Dollars with sureties to be approved by
the clerk.

Now if the said Barrett shall
prosecute his said appeal with effect
and pay whatever judgment cost interest
and damages may be rendered against
him in case said judgment shall be
affirmed in the supreme Court then
this obligation to be void otherwise to
remain in full force and virtue

Approved Jan'y 12/1834

Ld. Ward Clerk B. F. Barrett *Seal*
S. C. Jain Freer *Seal*
H. J. Somlin *Seal*

And afterwards to wit on the twenty fifth day
of January AD 1834 Came the said
defendant by his attorney and filed in
said Clerk's office his assignment of Errors
in this cause which is in words and
figures as follows to wit

William H Stone

for the use &c

vs.

Benjamin F Barrett

Cook County Circuit
Court.

Assignment of Errors

The Defendant assigns the following
Errors

1st The court erred in excluding from the jury
that part of the evidence of Powell in relation
to the conversation between said Powell
and the plaintiff Stone

2^d The court erred in sustaining the objection
of plaintiff to the questions propounded to Powell
in regard to the putting on of the roof of the
back building

3^d The court erred in overruling the objec-
tion of the defendant to the question propoun-
ded by the plaintiff to Samuel McCutcheon

4th The court erred in making the alterations
in the defendants instructions and in giving
them as altered

5th The court erred in giving each of the instructions
of the plaintiff viz 1, 2 & 3

6th The court erred in not granting a new
trial the verdict being against the law and
the evidence

7th The verdict of the Jury was against
the law & the Evidence

H. B. Hurd

Defendants Atty

State of Illinois
Cook County } Sd.

I Louis D. Howard Clerk of the
Circuit Court of Cook County, do hereby Certify
that the foregoing is a true full and perfect
transcript of the Records and proceedings in said
Circuit Court, in the case of William H. Stow who
sues for the of John Robinson his assignee vs
Benjamin J. Barrett.

Certified under my hand and the seal
of said Court at Chicago in said
County this 16th day of February
A.D. 1854.

L. D. Howard Clerk

Fees for this Record \$12.95 paid by Mr Barrett.

27

William H. Stow
use to

ats.

Benjamin F. Barrett

Transcript

Filed May 25. 1884.
L. Keland Clk.

Prepared

27

Benjamin F. Barrett
by
Wm H. Stow for ee.

27.

12378

1854

Prepared