No. 13277

Supreme Court of Illinois

Dodson

---

vs.

Sears

71641 7

STATE OF ILLINOIS, } ss. KANE COUNTY CIRCUIT COURT.
KANE COUNTY. }

PETER SEARS
vs. } *Assumpsit.*
CHRISTIAN B. DODSON.

ABSTRACT OF RECORD.

PAGE OF RECORD.

2 Summons issued on third day of October, 1859, and returned served, on the fifth of said October, 1859, action assumpsit, damages two thousand dollars.

Declaration filed on the 9th of October, 1859, first count avers that on 1st day of October, 1859, Christian B. Dodson, at Geneva, in Kane County, in the State
3 of Illinois, was indebted to Peter Sears, the Plaintiff, for the use and occupation of certain messuages, tenements, premises, buildings, farm lands, of the said Peter Sears, situated on Section number one and two in the Town of Geneva, in Kane County, and being so indebted, &c., said Dodson in consideration thereof promised said Sears to pay said sum of two thousand dollars upon request, &c.

Second count avers, that said C. B. Dodson, on the first day of October, A. D. 1859, was indebted to said Sears in the sum of two thousand dollars for the price and value of work and labor, journeys and diligence, &c., by said Plaintiff Sears, bestowed as the factor and agent of said Dodson, in and about the renting of the farm and lands of said Dodson, selling grain, goods, wares and merchandise, &c., and then and there promised to pay the Plaintiff upon request.

Third and last count is simply the common counts, with the usual conclusion, and the damages of said Plaintiff of two thousand dollars.

By J. H. MAYBORNE, *Plff's Atty.*

6 COPY OF ACCOUNT.

For use and occupation of land,	$2,000.
Work and labor,	2,000.
Goods, sold and delivered, &c.,	2,000.
Money lent,	2,000.
" paid,	2,000.
" received,	2,000.
Due on interest,	200.
On account stated,	2,000.

Afterwards on the 25th day of November, A. D. 1859, A. M. Herrington, Dodson's Att'y., filed as pleas to said declaration, 1st. the general issue in the
7 usual form; and 2dly, a plea of set-off which in case reference is required will be found on page seven of the Record; and 3rdly, a plea setting up an arbi-
8 tration and award between the parties, which plea will be found on page eight of the Record. And afterwards on the 10th day of December, 1859, a general rep-
9 lication was filed to the second plea. And afterwards on the 16th day of December, 1859, the Defendant Sears, by his att'y Wilcox, filed four Replications to the third plea.

1st Replication avers, that there was no reference or submission in manner and form as averred in said third plea.

2nd Replication avers, that said Sears and Dodson did by agreement refer and submit certain matters in difference between them to arbitrament of Dearborn and Curtis, but he avers that said arbitrators did not make any award in pursuance of said submission.

3rd Replication avers, that said Dodson and Sears did submit certain matters and differences to the arbitrament and award of Dearborn and Curtis, but denies

that the promises and agreements declared upon in the declaration in this case, nor even submitted to said arbitrators.

And afterwards on the 30th day of May, 1860, which was one of the days of the May term for 1860 of said court, a jury was empannelled to try said cause. And afterwards on the 1st day of June, yet being one of the days of the May Term of said court, the Jury found the issues in said cause for the plaintiff Sears, and assessed his damages at the Sum of Seventy Dollars and thirty-three cents.

STATE OF ILLINOIS, } *Kane County Circuit Court,*
KANE COUNTY. } *May Term, A. D.* 1860.

PETER SEARS
vs.
CHRISTIAN B. DODSON.

Be it Remembered that on the trial of the above entitled cause, before the Hon. Isaac G. Wilson, Judge, and a Jury, duly sworn to try the issues joined, the Plaintiff, in order to sustain his cause of action, introduced as a witness Thomas A. Scott, who being sworn, testified as follows:—Was Clerk in Sears' store in 1853 & 1854; began about middle of June '53; (ac't. shown him) have seen this account before, delivered goods out of Plaintiff's store during years 1853 & 1854; he kept on the west side of the river in those years; delivered goods as charged in the bill, groceries, shoes, soap, candles, &c., dry goods, but cannot specify the articles particularly; it is long ago, can't now recollect distinctly, delivered sheetings, recollect generally of delivering him goods during 1853 & 1854, and charging them, similar to that charged in the account, it was my business to sell goods and enter them upon the books, know Defendant's hand writing. (Witness identifies the following as in Defendant's hand writing.)

$21, 17 A. No. 1.

P. Sears, Please pay the bearer, W. C. Wilder, twenty-one dollars and 17-100 and charge C. B. DODSON.

Geneva, Dec. 27th, 1853.

$44,00 A. No. 2.

P. Sears, Please pay the bearer, A. Demonea, Forty-four Doll's. and chg. to C. B. DODSON.

Geneva, January 16th, 1854.

$23,38 A. No. 2,

P. Sears, Please pay the bearer, W. G. Webster, Twenty-three 38-100 Dollars and charge to C. B. DODSON.

Geneva, December 29th, 1853.

$16,99 A. No. 4.

P. Sears, Please pay the bearer, S. Berry, Sixteen 99-100 Dols. and chge. C. B. DODSON.

Geneva, January 16th, 1854.

$14,71 No. 5.

P. Sears, Pay the bearer, Williams and Henry, Fourteen Dollars and 71-100 and charge C. B. DODSON.

Geneva, December 27th, 1853.

$19,00 A. 6.

P. Sears, Pay Mrs. McElwain nineteen Dollars, 19 $, and charge to C. B. DODSON.

Geneva, December 29th, 1853.

14 $32,00 A. 7.

P. Sears, Please pay the bearer, Y. Alexander, Thirty-two Dollars and charge to C. B. DODSON.

Geneva, December 30th, 1853.

$4,43 A. 8.

P. Sears, Please pay the bearer, John Reed, Four 43-100 Dols., and chge. to C. B. DODSON.

Geneva, Jan. 16th, 1854.

15 $28,71 A. 9.

P. Sears, Please pay the bearer, Mrs. A. Clark, Twenty-eight 71-100 Dollars, and charge to C. B. DODSON.

Geneva, December 29th, 1853.

$7,25 A. No. 10.

P. Sears, Please pay the bearer, Cyreno Tilton, Seven and 25-100 Dollars, and charge to C. B. DODSON.

Geneva, January 5th, 1854.

A. No. 11.

Mr. P. Sears, Please pay J. H. Tickner, Twenty-three Dollars, 23$, and chg. to acpt. of C. B. DODSON.

Geneva, July 11th, '54.

A. No. 12. June 22nd, 1854.

Mr. Sears, Please let Peter Smith have One Dollar in goods, and charge the same to Mr. Dodson in the Pass Book. Mrs. H. N. DODSON.

$26,60 A. No. 13.

P. Sears, Please pay the bearer, A. B. Moore, Twenty-six 60-100 Dollars, and charge to C. B. DODSON.

Geneva, December 30th, 1853.

$4,25 A. No. 14.

P. Sears, Please pay the bearer, P. G. Miller, Four Dollars and 25-100, and chge. C. B. DODSON.

Mar. 21st, 1854.

$3,50 A. 15.

Mr. P. Sears, Please pay the bearer, T. Middleton, Three Dollars and 50-100, and chge. to acpt. C. B. DODSON.

Geneva, Feb. 24th, 1854.

The Plaintiff then read in evidence, a note given by Defendant to E. Scott, and by Scott endorsed to Plaintiff.

(Copy of the Note.)

Ten days after date for value Received, I promise to pay to E. Scott, Seventy-two Dollars & Seventy-seven cents. C. B. DODSON.

Geneva, Dec. 5th, 1853.

$72,77

(Copy of Endorsement.)

For value received, I assign the within note to Peter Sears. E. SCOTT.

[Book shown witness.] This is Mr. Sears' Ledger, kept while I was there. [Day book of Plaintiff shown witness.] This is the day book. The following charges are in Mr. Sears' hand writing:—

Page of Record.						
15	1854.					
	Jan.	21		Page 401	$2,00	
	Feb.	7		406	1,60	
		9		407	1,47	
16		15		408	61	
		22		410	75	
		24		"	3,50	
		27		"	63	
	March	6		411	08	
		8		"	93	
		9		412	6,33	
		20		414	2,30	
		23		415	4,25	Phillin's order.
		25		"	63	
		"		"	7,25	C. Tilton's order.
	April	3		418	68	
		14		420	34	
		21		423	06	
		22		"	1,00	
		25		424	10	
		27		425	06	
	May	4		428	80	
		15	Book 2nd	1	1,95	
		16		2	1,56	
		25		5	2,65	
	June	16		12	1,52	
		22		15	1,00	P. Smith's order.
		"		"	63	
		26		"	1,70	
	July	3		18	19	
		"		21	23,00	J. H. Ticknor's order.
		24		26	76	
	Aug.	4		28	38	
		10		"	41	
	Sept.	18		34	81	
		19		35	32	
		29		37	75	
	Oct.	4		"	41	
		9		38	50	
		16		40	60	
					$74,51	

The following charges are in my hand writing :—

	1854.					
	Jan.	28		Page 403	$1,37	
	Feb.	15		408	02	
		22		410	1,00	
		25		"	30	
	March	16		413	04	
		21		414	20	
	April	22		423	1,62	
		26		425	16	
		28		426	58	
	May	1		427	30	
		12		430	1,00	
		"		"	1,75	
		22	Book 2	3	8	
		23		4	69	
17		24		5	40	
		25		"	1,19	
		31		7	2,07	
	June	16		12	60	
		24		15	2,33	
		26		16	1,00	

PAGE OF RECORD.

17

June	30	Page 17	$0,25
July	11	21	2,90
	15	24	44
	24	26	30
Aug.	4	28	70
	18	30	8
	21	"	21
	23	31	20
	31	32	20
Sept.	5	33	56
Oct.	16	40	30
			$22,84

Cannot recollect distinctly, but I delivered about the times of those charges along '53 & '54 goods as there charged, butter, sugar, coffee, tea, soap, candles, &c., &c., dry goods, &c.

Question. State what was your custom while in the store of Sears, (if you had any,) in relation to selling and making charges of goods. To the asking which question the Defendant objected, which objection was overruled by the Court. To the ruling of the Court in allowing such question to be asked and answered, the Defendant then and there excepted.

Ans. The custom was to make the entry on the day book at the time of selling. Think Plaintiff had two clerks in the store in 1854. Mr. Anthony and myself. Mr. Collins was there a short time, but he left in the fall of 1853; it was my particular business to sell goods, and make the entries upon the books. Made the entries at the time of selling. These are the books of account of Plaintiff, (books shown,) kept in his store in the regular course of his business as a merchant. There are entries made in those books in the hand-writing of Sears. Have had an account of my own in these books. Never have had a final settlement, but have looked over the account and found it correct. His books are fairly and honestly kept so far as I know. I think them fair. Anthony was a Clerk part of the time when I was there. Think he was there two or three
18 months. Anthony did not make many entries. Think I and Mr. Sears made most of the entries. Sometmes when we were hurried, we would keep a little memorandum book. Defendant had a pass book, in which we inserted the goods sold to him.

Cross-Examination. Whether Anthony made entries I cannot say. There are some entries, the hand-writing of which I do not know. Mr. Collins was a Clerk a small part of the time. I find charges against other parties not in my hand or Mr. Sears'. Don't know whose writing. It is only during months of March, April, May, & June, 1854, that I find charges that I don't know.

The Plaintiff then introduced J. H. Ticknor, a witness, who being sworn, testified as follows:—Have bought goods of Plaintiff. Settled the account with him. Found the account correct. Think it was in 1853, '54 & '55. It was while he traded, on the east side, and when he was in the stone block on the west side. These are the books out of which we settled. So far as his deal with me, his books correct and fair.

Cross-Examination. My account as it appears here is $26,00, (book shown and is admitted to be the Ledger into which his account is posted—the Day Book not here.) Settled by this book alone.

The Plaintiff then introduced William B. West, a witness, who being sworn, testified as follows:—Was school treasurer of Blackberry some years ago. There was a note of about fifty dollars due to the school fund from Mr. Dodson. It was taken up by Sears about ten years ago. Mr. Sears took the Note. The interest had been paid half-yearly by Dodson for some time. These are Receipts for interest.

18 (Copy of Receipts.)

Geneva, May 21, 1849.

Rec'd of Mr. Sears for C. B. Dodson, $2,94, being the amt due Treas T. 39, N. R. 7 E., for in. up to Mar. 31 last, being six mo's in advance.

WM. B. WEST, Treas.

Blackberry, Dec. 21, 1849.

Rec'd of Mr. P. Sears for C. B. Dodson, two & 74-100, being the amount of interest due the School fund of T. 39, N. R. 7 E., up to Sept. 5th last, by said Dodson. WM. B. WEST, Treasurer.

Geneva, April 10, 1850.

19 Rec'd of Mr. P. Sears two Dollars and 94-100, in payment of the half-yearly interest, due March 4, on a note against C. B. Dodson, in favor of the School fund of T. 39, N. R. 7 E. WM. B. WEST.

Blackberry, Dec. 17, 1850.

Received of Peter Sears, Esq., two Dollars and 93-100, being interest due the School fund from C. B. Dodson, up to September 3d, 1850.

WM. B. WEST, Treas. T. 39, N. R. 7 E.

Geneva, May 6, 1851.

Rec'd of C. B. Dodson, Esq., Two Dollars & 93-100, being for half a year's interest due by C. B. Dodson, on his note due the School fund of Blackberry Township, up to March 3d, 1851, by the hand of P. Sears, Esq.

WM. B. WEST.

Blackberry, Jan. 9, 1852.

Rec'd of Peter Sears, Esq., two Dollars and 93-100, being six months' interest due up to September 3d, 1851, on the note against C. B. Dodson and others, due the School fund of Blackberry Township. WM. B. WEST.

Geneva, May 8, 1852.

Rec'd of Mr. Peter Sears two Dollars & 94-100, for interest due on a note payable to the School fund of Blackberry, by C. B. Dodson and others, due up to Sept. 3d last. WM. B. WEST.

Cross-Examination. The date of the note cannot say exactly. It had been running three or four years. Think Sears gave his note with Acers in 1852 to take up old note. This is the original note.

Copy of the Note.

$48,46 Blackberry, Kane Co., Sep. 23rd, 1843.

We, C. B. Dodson and Amasa White, jointly & severally promise to pay William B. West, treasurer of School fund of T. 39. N. R. 7 E., or his successor in office, the sum of Forty-eight Dollars and 46-100 with twelve per cent Pr. annm, payable half-yearly in advance; we further agree that if additional security be required for the payment of the within note, it shall be forthwith given.

C. B. DODSON.
AMASA WHITE.
JAS. HOTCHKISS.

Direct resumed. The second note has been paid by Mr. Sears.

Cross-Exam. Delivered the old note to Mr. Sears. Dodson was in California at the time.

The Plaintiff then introduced Alphonzo Yates, a witness, who being sworn,
20 testified as follows—Had some deal with Plaintiff. Traded with him at his store on credit. Have settled with him out of his books. So far as I had any account there I found it correct on the book. I settled from this book. I was satisfied with the account.

Cross-Examination. It was some years ago. Seven or eight years ago. Couldn't say that I remember the book. Good while ago. Can't say that this is

20 the book, nor whether there was no other. There was more than one book.

Resumed. At that time Sears was doing business across the river.

Thomas A. Scott recalled. The footing of my charges is $22,84.

The Plaintiff then introduced A. W. Glass, a witness, who being sworn, testified as follows. Knows the Plaintiff. Have had running book account with him while he kept in the Yates' store, on the west side. This is his book in which he kept my account, when he was in the store on the east side of the river. It embraces my account from 1847 to 1851. Think his books always fairly kept. He keeps fair books so far as my knowledge extends. My account is $241.

Cross-Examination. This is the book into which my account is posted from the other books. My best judgment is that this is the hand-writing of Sears. I was clerk for Sears two years or more. When I took articles, I charged to myself in the day book. I think this is the book from which I settled.

Direct Resumed. According to my best recollection and knowledge this book contains all the account I had with Sears. From looking at the Day Book and this Book, I satisfied myself that the account was correct. Sears usually did the posting of the books himself. That was not my part of the business.

Recross-Ex. Don't know that I ever heard any one when settling find any fault with the correctness of the account, or to the correctness of its keeping.

C. B. Wells, a witness on the part of the Plaintiff was called, sworn, and testified as follows:—Have had an account. Can't identify this book, never had any occasion to find fault with the manner in which my account was kept. If it
21 had been wrong think I should have recollected.

Johnson Updike, a witness called on the part of the Plaintiff being sworn, testified as follows:—Have done threshing on Dodson's farm in 1852. Joseph White employed me & paid me for 2-3 of the threshing. He gave me a bill of the other one third, which I took to Mr. Sears, and he gave me credit for it on the books. It was either seven or eight Dollars and some cents. Dodson went to California, and was gone two or three years. Don't know who attended to his business while he was gone.

Cross-Ex. Joseph White raised the grain in 1852, on Dodson's farm.

The Plaintiff then called A. B. Moore, a witness, who being sworn testified as follows:—Had an account with Sears while he was a merchant here. Settled with him. Always found his books correct. (Examines the book.) Have compared his account with my own, and found it to correspond. I believe he keeps fair books from my dealing with him.

Cross-Examination. This book is a ledger. My account is five dollars and thirty cents. This transaction was in 1851. Can't swear that this is the identical book. Don't remember if there was a Clerk in his Store at the time.

The Plaintiff then called William G. Webster, a witness, who being sworn, testified as follows:—Had a running account at the Store of the Plaintiff. Have traded with him from a period as early as 1842. (Examined ledger on page 170.) Have settled with him a number of times. Settled most always from bills. Do not think I ever looked into his books. Bills were rendered and I always paid them. (Various bills exhibited.) Always regarded them correct enough to pay them. This bill was in 1854.

Cross-Examination. Think I began with him in 1842. At that time Cleveland was Clerk. Marshall Clark, Warner and Glass have been Clerks. This bill is Collins' hand-writing. It begins in March and ends in December, 1853. Don't recollect getting the things in the bill myself. Was aware that there was a small account against me. Sears presented another bill, a larger one against me this winter, and I declined to pay it. There was a charge of fifteen dollars' worth of Hay, and interest on the account of six dollars, which I declined to pay.

22 Direct Resumed. The item I objected to was the hay. The facts were that Updike had delivered me the hay, and Sears claimed that he had received an order of fifteen from Updike, but I never got any such order or heard of it.

Recross Ex. My name was used in a suit against Sears. He brought in an account including the charge for hay.

The Plaintiff then called S. H. Todd, a witness, who being sworn, testified as follows: Have had running account with Plaintiff. Have settled with him. Think I have seen this book. My account is in this book. Have settled it with Sears. Found it correct. This account was 1854 and 1855. As far as my knowledge extends Plaintiff keeps fair and correct books.

Cross Ex. This settlement was when Sears kept on the West side. Sometimes Plaintiff had a clerk and sometimes not. Scott, Anthony, Collins, at times were clerks in the store. I think this is the book from which I settled. I think the items in the day book were not looked at. I had in my head about the amount of the account, and the book corresponded. Can't say who was present.

The Plaintiff then called Joseph White, a witness, who being sworn, testified as follows:—Know the parties. Dodson went to California in 1849, and was gone two years the first time. I worked a part of his farm in 1851. I sowed some fall-wheat in the fall of 1851, and harvested it in fall of 1852. Dodson was back in winter of 1851 and 1852. I first spoke to Dodson about renting his farm. He left Mr. Sears in charge of his farm. Sears came to father's with Dodson to talk about renting the farm, and to make out the lease. Sears made out the lease. Sears accepted of the crops and took charge of them for Dodson —Dodson's part of them. I repaired the fences that spring. Mr. Dodson gave directions when he was at home. I consulted with Sears as to the management of the farm after Dodson left. I was to pay $\frac{2}{3}$ and Dodson was to pay $\frac{1}{3}$ for threshing. Updike threshed the fall grain. I gave an order. I gave it upon
23 Sears. Sears had the charge and management of the farm in 1849 and '51. Sears was down to the farm quite often. There was about one hundred acres of tillage land. I did not work all the land. Adams worked a part. I worked from fifty to sixty acres. Mrs. Dodson and family lived at Warrenville at the time.

Cross Examination. Knapp, a brother-in-law of Dodson, worked the farm in 1849. Dodson left early in the spring. Logan worked the farm after Knapp. Logan died on the place. Don't know that he took Knapp's lease. Knapp staid a year. Logan died in the fall of 1850. Think Sears took charge of the grain raised by Logan. Don't know of Dodson selling wheat, raised by Logan, to Derby. I know he sold to Derby wheat raised by me. My impression is that Dodson did not return in the fall of 1850. Upon reflection I think he did return in the fall of 1850, and went back to California in the spring of 1851, and staid until the fall; he was therefore at home in the winter of 1850 and 1851. He was at our house occasionally. I first spoke to Dodson about renting the farm. Dodson was in the habit of attending to and managing his own business. Think I talked twice with Dodson, and the terms of the lease were agreed upon between him and me. I took the oats to father's barn. I kept Dodson's portion of the oats to pay me for repairing the fence. Think there was some grain that Logan raised and which was put into our barn and afterwards took away by Dodson. Can't say who took them there. The corn that I raised was in our barn, and Derby got it from there. Dodson had sold it to him as I understood.

Direct Resumed. Think Sears was there while the harvesting was being done. At the time of the giving of the lease it is spoken about Dodson returned to California. Sears drew the lease.

23 Recross Ex. The lease was drawn at Sears' store. Self, father, Sears, and Dodson present.

Julia Dodson sworn, a witness called on behalf of the Plaintiff being sworn testified as follows:—Daughter of the Defendant. We lived at the farm when father went to California. We moved to Warrenville same spring. Can't say
24 who aided in moving. Think Mr. Sears gave Knapp some directions about the farm. Recollect of Sears keeping store on this side of the river in the Yates' building. Recollect of my father buying a pair of Buffalo overshoes, but don't know where he got them. Can't say what year it was. Recollect occasionally of going and getting soap and candles and other goods during 1853 and 1854. Our family bought goods at Sears' store. Think we had a pass book. I was so young that I cannot remember what was got. Recollect getting similar goods to those charged along during 1853 and 1854.

S. H. Todd recalled for the Plaintiff. Know Dodson's farm. Knew of the time when Dodson went to California. He went spring of 1849 and stayed to fall of 1850, and again returned to California in spring of 1851. Sears had charge of Dodson's farm while Dodson was away. Have seen Sears there. Remember on one occasion when some one was plowing up the road and forbid him. Once on another occasion when threshing, and Sears gave some directions. He paid highway taxes. Worth from fifty to one hundred dollars a year to take charge of the farm and Dodson's business in his absence. My house is a little over a half a mile from the nearest corner of Dodson's farm. I have to pass the farm going to Batavia. Frequently passed it. A leased farm requires some looking after. Amasa White and his son are first class tenants.

Lyman German, a witness on the part of the Plaintiff called and sworn, and testified as follows: In 1852 and 1853 was in the warehouse taking in grain for Sears & Dodson. I think Sears bought some grain. Think some barley, whether for Sears or not I do not know. How much I do not know. (Plaintiff claims for barley, July 20th, 1853, 226½ bush. at 50c and 68 bush. oats.) The Defendant came to me and told me to deliver up key to J. B. Dodson, and I did so. [The Court rejected the Plaintiff's claim for barley and oats and ruled them out on the ground that it was partnership account.]

Amasa White. Know the Dodson farm. Mr. Sears appeared to have the
25 care of the Dodson farm while Dodson was absent in California. Heard Dodson say once at my house that Mr. Sears and his father, who lives at Salt Creek, were to act as agents for him during his absence. Occasionally saw Mr. Sears down there. Don't know that I could fix on any time. Dodson has also a farm in connection with Sears. Five or six hundred acres lying east of the Village. Think Dodson's father was once at my house, with Sears. From what I saw I gathered that Sears had the management and control of Dodson's business during Dodson's absence. It was worth from $50 to $100 dollars per year to do it.

Charles Patten, a witness, produced on the part of the prosecution being sworn, testified as follows:—Always understood that Sears had charge of Dodson's affairs while he Dodson was in California. Dodson when he left for California had considerable property. His home farm might have been worth from eight to ten thousand dollars, more or less; the care and responsibility of taking charge of the business worth fifty to one hundred and fifty per year. Sears paid me five dollars for Dodson.

Cross Ex. Lived near these parties. Know nothing about any particular services of Sears. Had no occasion to do so.

The Plaintiff then introduced B. C. Yates, a witness, who being sworn, testified as follows:—Was Sheriff and Collector of Kane County in 1850. Warner

25 was my deputy. [Witness shown two tax receipts.] This was tax receipt. Knew of Sears settling an execution against Dodson in the Todd case. This is another tax receipt.

Received, March, 1850, by the hand of Peter Sears for C. B. Dodson, the tax on the following property for the year 1849 :—

Personal Property							$,55.
Part of S. E. ¼,	Section 10,	Town 39,	Range 8,	80 acres			5,49.
N. ½ N. W. ¼,	" 11,	"	"	"	33 61-100	acres	2,66.
S. W. ¼	" 11,	"	"	"	33 16-100	"	2,60.
N. W. ¼	" 14,	"	"	"	51 93-100	"	3,57.
N. E. fr.	" 15,	"	"	"	110 13-100	"	7,58.
							$22,45.
Deduct over charge $53.16 acres							5,13.
							$17,14.

Received payment in full on the above,

C. B. YATES, Col.
By J. L. WARNER, Deputy.

Geneva, Kane Co., May 10, 1850.

Received, March, 1850, of Sears & Dodson the tax on the following property, for the year 1849 :—

Part of N. E. ¼,	Section 1,	Town 39,	Range 8,	80 acres			3,92.
S. E. ¼,	" 1,	" 39,	"	"	119 67-100	acres	5,87.
N. W. ¼,	" 1,	"	"	"	40 40-100	"	1,98.
S. E. ¼,	" 1,	"	"	"	143 28-100	"	7,03.
S. E. ¼,	" 2,	"	"	"	72 50-100	"	3,56.
S. W. ¼,	" 2,	"	"	"	24 50-100	"	1,22.
N. ½ S. W. ¼,	" 2,	"	"	"	114 89-100	"	5,64.
							29,22.

Received payment in full on the above,

J. L. WARNER, Deputy Col.

Geneva, Kane Co., May 10, 1850.

C. B. Wells was then recalled by the Plaintiff. Know J. B. Dodson. He
26 read law in my office in 1853. He kept Mr. C. B. Dodson's books and accounts. Dodson was then building the rail road bridge. [Order shown witness.] Think this is his handwriting, but am not familiar with it.

(Copy of Order.)
No. (16.)

P. Sears:

Please pay Mr. Shanlan Thirty-one and 12-100 Dols. and charge to C. B. Dodson.

J. B. DODSON.

Geneva, Sept. 28, '53.

Ordered admitted, Dated Sept. 28, 1853.

Here the Plaintiff enquired of the Defendant if he would produce the pass book that he had been notified to produce the day before and made by the Plaintiff and kept by him during the years 1853 and 1854, and showing what amount of goods he purchased of the Plaintiff during that time, who replied that he could not produce it, and then made and read to the Court the following affidavit.

[The original affidavit to be inserted here is not found on file.

P. R. WRIGHT, Clerk.]

27 And upon the Court's ruling that the affidavit did not show sufficient facts why he did not produce it he asked of the Court and obtained leave to make and file an additional affidavit, to which the Plaintiff objected. The Court overruled such objection, and Plaintiff excepted. The Defendant then made and read the following additional affidavit. [Here Clerk will copy affidavit.]

27 [The affidavit referred to is not found on the file.

P. R. WRIGHT, Clerk.]

Thereupon the Court ruled that this affidavit stated sufficient facts why he did not produce said pass book, and sufficiently accounted for its non-production, to which ruling of the Court the Plaintiff excepted.

28 The books of account of the Plaintiff, identified by the witnesses, consisting of the ledger and two day books, were then offered in evidence, and so much of the account against the Defendant as was in the handwriting of Sears and Scott, as testified to by Scott, was admitted by the Court to go to the Jury. The Defendant by his Counsel objected to the admission of said books and account being admitted to go to the Jury as evidence in the case, which objection was overruled by the Court, and to the ruling of the Court in overruling such objections, and allowing said books and account to be given in evidence to the Jury, the Defendant, by his Counsel, then and there excepted. The amount in Scott's handwriting was $22,84. The amount in Sears' handwriting $

The Plaintiff here rested.

The Defendant then introduced Nathan Dodson, a witness, who being sworn, testified as follows: Am father of the Defendant. My son went to California in 1849. Left March 20. Myself and Mr. Sears were appointed to do certain busi-
29 ness for him. My son-in-law, Albert Knapp, had the farm. Heard Defendant giving him directions as to how he should manage the farm. He remained on the farm until February or March, 1850. Defendant came back from California in the fall of 1850. Don't know who rented the farm in 1850. Sears received one thousand dollars at one time on account belonging to the Defendant. I brought the money over and gave it to Mr. Sears in the spring of 1849. The power of attorney was to execute a deed to Latham for land. I hadn't the most distant idea that we had anything to do with the farm. Knapp was on the farm when I came over to pay the money. Question. What did you hear said between the Defendant and Knapp, while Knapp was in possession of the farm, as to how long Knapp had rented it? To the asking and answering the above question the Plaintiff objected, and the Court sustained such objection. To the ruling of the Court in sustaining such objection, and in not allowing such question to be asked and answered by the witness, the Defendant then and there excepted.

Cross Ex. Don't know what the thousand dollars was paid on. Mr. Dodson paid it to us in Mr. Sears' store. After the money was paid over, I took Mr. Sears in my carriage to Elgin. Don't know for what purpose he went to Elgin. The money was raised for some purpose. We came over and the money was paid to Sears, and we went home again, and sometime after he wrote to me to come over, and we went to Elgin, and he had business with Charles Clark. Think the money was brought over to Sears in May 1849. I know the amount, because I counted it. Nothing was said about what the money was to be paid for. Have no recollection about paying out the money or any talk about it. Sears said they had business with Charles Clark.

Silas W. Curtis, a witness produced and sworn on the part of the Defendant, testified as follows;—Was chosen abitrator by Sears. Mr. Dearborn was acting with me.

30 C. B. Wells, a witness heretofore sworn in this case was called by the Defendant who proved the execution of the following Bond of Arbitration.

Copy of Bond of Arbitration.

Know all men by there presents, that we, Peter Sears and Christian B. Dodson, all of Geneva, Kane County, State of Illinois, are held and firmly bound

30 unto each other, his heirs and assigns, in the penal sum of ten thousand dollars, lawful money of the United States, which sum well and truly to be paid one to the other, in case any of the following conditions are broken, we hereby bind ourselves, our heirs, executors and administrators, severally, jointly and firmly by these presents. Witness our hands and seals this 7th day of October, A. D. 1853.

The condition of this obligation is such, that whereas the said Sears and Dodson are anxious to settle their commercial transactions, and no other in Geneva, and whereas the said Sears and Dodson have mutually selected Luther Dearborn and Silas W. Curtis, and in case they cannot agree, they (Dearborn and Curtis) are to select a third man to whom their commercial transactions as aforesaid are to be referred, who are to ascertain how much money said Dodson has paid in for the transaction of the aforesaid business, how much he is entitled for profits, while so engaged, if any, and how much he has drawn out from said business in cash or goods, or both, and make their award in writing (giving a copy to each party) determining how much one shall pay to the other, how soon, and what the security for such payment, and the award thus signed by any two of said arbitrators shall be binding and conclusive, from which there shall be no appeal. Now if the said Sears or Dodson shall well and truly perform all the conditions for each to perform, and shall stand to, abide by, and perform all the conditions aforesaid, and the award of said arbitrators, then this Bond to be void, otherwise to remain in full force and effect; and that this arbitrament shall commence Saturday morning, Oct. 8th, 1853, at 9 o'clock A. M., and continue unnecessary uninterrupted until disposed of; each party may be sworn and tell his story under oath and introduce such other legal evidence as said arbitrators may determine.

PETER SEARS, { L. S. }

Witness by
C. B. WELLS.

C. B. DODSON, { L. S. }

31 The commencement of the above arbitration is hereby mutually agreed to be postponed until Wednesday morning, Oct. 12th, 1853, at 9 o'clock, A. M.

Witness by
Jas. B. Dodson.

PETER SEARS, [Seal.]
C. B. DODSON, [Seal.]

S. W. Curtis recalled by Defendant. The arbitrators met, and the parties also, on the 12th of October, 1853. We heard the testimony and made this award (paper shown witness) in pursuance of the bond of submission. The award is signed by Mr. Dearborn and myself. This is the award:

Copy of the Award.

To all to whom these presents shall come, we, Silas W. Curtis and Luther Dearborn, send greeting:—Whereas, divers disputes, differences and controversies have arisen and are depending, between Peter Sears of the one part, and Christian B. Dodson of the other part, both of Geneva, Kane County and State of Illinois, in their mercantile transactions, for the ending and determining whereof, the said parties by their bonds of submission, bearing date the 8th day of October, A. D. 1853, have reciprocally bound themselves each to the other, to stand to, abide by, perform and keep the award, order, arbitrament and final determination of us, the said Silas W. Curtis and Luther Dearborn, so as the said award be made under our hands and ready to be delivered to the parties in difference.

Now, therefore, know ye, that we, the said arbitrators, whose names are hereunto subscribed, taking upon ourselves the burthen of said award, and having been first duly sworn according to law, faithfully and fairly to hear and examine the matters of difference between the said parties in question as to their mercan-

31 tile transactions, and none others, and to make a true and just award thereon, according to the best of our skill and understanding, and having fully examined and duly considered the proofs and allegations of both of the said parties, who were duly notified of the time and place, at which the said award would be made, do make and publish this our award between the said parties.

First, We do award and order that all controversies had, moved, arisen and
32 depending between the said parties for any manner of cause touching their mercantile transactions to the day of the date hereof shall cease, and that each of the parties pay the arbitrator chosen by himself their fees for this award.

Secondly, We do award and order that Peter Sears shall pay and discharge all of the debts incurred by the said firm of Sears and Dodson in their mercantile transactions.

Thirdly, We do award and order that Peter Sears shall pay to the said Christian B. Dodson the sum of four hundred and ninety dollars, ($490,) on or before the first day of March, A. D. 1854, said amount is to be secured to be paid to the said Dodson by mortgage or otherwise, as they may agree; but in case the said Peter Sears neglects or refuses to give the necessary security within ten days from the date of this award, at the expiration of that time, the aforesaid sum shall be due and payable.

And lastly, we do award and order that the said Peter Sears and the said Christian B. Dodson shall on the payment of the said sum of four hundred and ninety dollars, execute releases to each other, sufficient for the realizing of all demands connected with their aforesaid mercantile transactions, touching the premises aforesaid.

In testimony whereof we have hereunto set our hands and seals this 15th day of December, A. D. 1853. SILAS W. CURTIS, [Seal.]
LUTHER DEARBORN, [Seal.]

Cross Ex. We acted under this bond of submission, and then made out our award.

James Hotchkiss, a witness produced on the part of the Defendant, being sworn, testified as follows: The Defendant's Counsel asked the following question: (No. 1.) "Do you know of the Defendant Dodson selling to the Plaintiff Sears a wagon, at any time? If yea, state the value." To which question the Plaintiff objected. The Court stated that if the testimony was offered to prove
33 an offset, it was not competent, on the ground that no bill of items was filed with the plea of setoff, but if it was offered to prove payment it was competent. The Counsel for the Defendant declining to state it was offered to prove payment, the testimony was ruled out, to which ruling of the Court the Defendant then and there excepted.

The Defendant's Counsel then asked the witness the following question: (No. 2,) "Do you know whether the Defendant Dodson sold and delivered to Sears, the Plaintiff, in March 1849, one sett of single harness? If yea, state what, if you know, Sears was to pay for the same?" Objected to by Plaintiff's Counsel. The Court overruled the question, and sustained the objection for the same reasons as given for overruling question No. 1, the Defendant's Counsel declining to state that it was offered to prove payment, to which ruling of the Court the Defendant by his Counsel then and there excepted.

The Defendant's Counsel then asked the following question: (No. 3.) "Do you know of Dodson, the Defendant, letting the Plaintiff, Sears, have a twenty dollar County order?" Objected to by Plaintiff, and overruled by the Court for reasons stated by the Court in overruling question No. 1, to which ruling of the Court the Defendant then and there excepted.

Dodson went to California in 1849. His farm was in charge of Knapp, his brother-in-law. He engaged me to overlook his timber land. I did so. I resided here in Geneva, within half or three-quarters of a mile of it.

33 Adolphus Latham, a witness produced on the part of the Defendant, being sworn testified as follows: In the month of December, 1849 or 1850, I paid three hundred and twenty-six or thirty-six dollars to Sears, for which I received a deed for land from C. B. Dodson. Think the deed was executed by Sears as Attorney in fact.

Cross Ex. The money was paid for balance due on land. Sears was acting as agent for Dodson, and I paid the money to him as such agent.

James Hotchkiss recalled by Defendant. Dodson was to give me my firewood for looking after the timber.

Cross Ex. I went down once with Mr. Sears, at his request, with him to look at the plow land, and we talked of the propriety of putting in buckwheat, and I agreed with him. We agreed in opinion.

34 The Defendant then offered in evidence the following note of $48,46-100. The handwriting of Plaintiff was admitted, and note allowed to go to the Jury.

$48,46. Blackberry, Kane Co., Sept. 3d, 1843.

We, C. B. Dodson and Amasa White, jointly and severally promise to pay Wm. B. West, Treasurer of School fund of T. 39, N. R., 7 E., or his successor in office, the sum of forty-eight dollars and 46-100, with twelve per cent. per an'm, payable half yearly in advance. We further agree, that if additional security be required for the payment of the within note it shall be forthwith given.

C. B. DODSON,
AMASA WHITE.
JAS. HOTCHKISS.

The Defendant then offered in evidence the following account for grain had in August 1850, being balance of fifty-five dollars and four cents, which was admitted to the Jury by the Court.

1850. Sale of Winter Wheat for account of C. B. Dodson, Esqr.

Aug. 5,	To Mr. Curtis,	20 bushels c. 75,	15,00.
	" Amasa White,	15 do " 75,	11,25.
	" Charles Walker,	59 11-60 bu. 68,	40,24.
			66,49.

Charges.

To Cash paid Threshing account,	4,80,	
" " " Freight to Chicago,	8,65,	
" My expenses " "	3,00,	16,45.
		$55,04.

Geneva, Aug. 29, 1850. P. SEARS.

The Defendant then offered in evidence the following letter and accompanying account. The same being admitted by Plaintiff's Counsel to be in the handwriting of the Plaintiff, which were ruled out by the Court, and not permitted to be given in evidence to the Jury. To ruling of the Court in refusing said letter and accompanying account, which was a part of said letter, to be given in evidence to the Jury, the Defendant then and there by his Counsel excepted.

Copy of Letter and Account.

Boston, July 21, 1847.

C. B. Dodson, Esqr., Dear Sir:—Since I last wrote you your flour has come to hand. It only arv'd on the 7th inst.,—49 days from Chicago,—all in a damaged condition,—sour, musty and wet. In learning the condition of it I immediately call'd a survey, and the damage apprised by two of our most respectable

34 flour dealers at $1,75c per bbl. as per their certificate annex'd. I have also the inspectory certificate to the same effect. I found also that the only way I could dispose of it would be at public sale, all my friends advising that to be the best
33 course to adopt, which I accordingly did. It was sold on the 14th inst., after advertising for 2 days, and a large company present, for $4,06¼c per bbl., for 95 bbls. superfine, and $3,25 for 14 bbls. fine middlings, which I considered a good price, considering its damaged state. 2 bbls. of your flour was short at Buffalo, and paid for and deducted from bill of charges, say $13. I feel the greatest disappointment in the result of this shipment, particularly when the prospect was so good for a great profit, and had there not been the most gross neglect on the part of the transportation Company it would arrived here and been sold at the highest market ———— —— the whole season. I was offered $10,25 pr bbl. for a part of it, to arrive, predicated upon a reasonable time, and had it come through, as it should certainly in 25 days, I should have sold the whole at that price, for it would then undoubtedly been in a sound state, and I can see no reason why you should not recover not only the damage appraised but for the difference in price which this delay made,—consequent this difference is $4,50, per bbl., and I shall procure all necessary documents to sustain this claim against the Company, and I can see no good reason why it should not be recovered in a few days. I will forward you account of sales. I —— so much engaged in looking after my own affairs that I have only time to say this much to you at this time: Be assured I have and shall give every attention to this business that serves to promote your interest. I have much more difficulty in disposing of my property here than I anticipated, but I hope now soon to accomplish it. The weather is extremely warm here. Thermometer ranging from 90 to 100 degrees.

Respectfully yours,
PETER SEARS.

(Copy of Accounts.)

1847. Sales of 109 bbls. Flour on account of C. B. Dodson.

July 14, John Tyler at auction,

79 bbls.	Flour,	$4,1-16,	$320,94
14 "	Fine Midlings,	3,¼,	45,50
2 "	W. Trueman,	5,75,	11,50
1 "	A. H. Peirce,	" "	5,75
1 "	Damaged,		4,50
1 "	Light weight,		4,00
11 "		5,	55,00
	Dolls.		447,19

36 The Defendant then offered the following accounts which were given to the Jury as evidence in the case.

(Copy of Account.)

Dr. C. B. Dodson, Esqr., in Account with Peter Sears. Cr.

1851. May 5,	To this amount cash,	interest school note	2,93
Apr 28,	" " " "	I. G. Wilson M'rtge	250,00
Jun. 9,	" " " "	Mrs. Dodson	30,00
" 11,	" " " "	Mrs. D. or. Hazeltine	2,00
Jul. 10,	" " " "	Mrs. Dodson	11,00
Aug 31,	" " " "	Mrs. Dodson	13,00
Sept. 8,	" " " "	" "	10,00
1852. Jan. 9,	" interest on school note		2,93
" 30,	" cash paid 25 grain bags		7,50
" "	" " Mrs. Wakefield		2,50
Feb. 7,	" " paid taxes on farm		19,66
" 24,	" " James White, threshing grain		2,81

36

Apr 13,	"	E. Scott for Pork, 262¼ lb.	11,81
" "	"	1 Pork bbl.	1,13
May 8,	"	interest on school note	2,93
			370,20

Cr.

1851. Mar. 19,	By	balance old account	14,01	
Aprl. 28,	"	cash	300,00	
	"	this am't taxes carried to Jan. account	17,80	331,81
		Endorsed on note $38,39		38,39

Settled as above, PETER SEARS.

Dr. C. B. Dodson, Esqr., in Account with N. Dodson & P. Sears.

1849. May 4,	To	cash p'd H. F. Smith, trust deed	1,00
" " "	"	acknowledging deed	,25
" 5,	"	this am't p'd note and in't P. Sears	201,50
" " "	"	" I. G. Wilson, land	627,58
" " "	"	expenses at Elgin on business for him	1,75
" " "	"	this am't p'd C. Patten for rect	5,00
" 21,	"	" W. B. West, in'st sch'l land	2,94
" 28,	"	" B. C. Yates, Todd suit	50,00
" "	"	" medicine, Mrs. Dodson	2,00
" 30,	"	" State and county taxes	22,12
" " "	"	" Jno Barstow witness fees	4,50
Jun 23,	"	" Swarthout recording P. Att'y	,88
" " "	"	" Cash Mrs. D.	6,00
Oct. 17,	"	" " "	5,00
Dec. 21,	"	" W. B. West in't sch'l land	2,94
" 22,	"	" Jas. Stephens on note	350,00
" " "	"	" J. J. Brown, bill	8,66
" 27,	"	" E. Conant, house rent	47,92
1850. Jan. 16,	"	" Jas. Stephens, on note	40,00
" 26,	"	" " " "	17,00
Apr. 9,	"	" W. B. West, in't note S. land	2,94
" 17,	"	" Mrs. Dodson,	12,00
May 10,	"	" Taxes, B. C. Yates	17,14
July 2,	"	" Mrs. D. $8, postage 40c	8,40
Sept 16,	"	" "	25,00
Oct. 19,	"	" "	30,00
Nov 29,	"	" W. B. West in't 2,93, P. 50	3,43

37

1851. Jan. 1,	"	" Postage 93 do 80	1,73
Mar. 1,	"	" Taxes on farm	37,00
" " "	"	" Postage 10 do 10	,20
" 12,	"	" " 2 letters Cal.	,80
		Carried forward,	$1535,68
		Am't brought over	$1535,68
1851. Mar.	To	cash p'd threshing spring wheat	2,55
"	"	" Amasa White, ct. C. Wheat	5,00
"	"	" Working road tax	3,12
"	"	" B. C. Yates on Todd's suit say	22,00
			$1568,35
		Amasa White on wheat	1,08
			1569,43
19	To	bal. to new account	14,01
			$1583,44

Cr.

1849. May 4,	By	cash per receipt	1000,00
" " "	"	County order	20,00
Dec. 22,	"	proceeds Latham's note	330,00
" " "	"	cash Mrs. Dodson	18,25

37

1850. Jan. 16,	" " "	40,00
" 26,	" " "	17,00
Mar. 8,	" A. Knapp	3,15
Aug.	" sales winter wheat	55,04
1851. Jan. 23,	" cash	100,00
		$1583,44
	Am't carried forward	
1851.	By am't forward	1583,44
		1583,44
1851. Mar. 19,	By bal. of old account	14,01

E. E. Settled as above, Geneva, Mar. 19, 1851.

PETER SEARS.

Which was all the evidence either offered or given on the trial of said cause.

The Plaintiff then asked the Court to give the following instructions, three in number, which were marked by the Court on the margin, "given," and by the Court read to the Jury.

(Copy of Instructions.)

Given. That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit, and passed upon by the arbitrators (Curtis & Dearborn) did not include any of the claims or demands which the Plaintiff in this suit, in his declaration and by the proofs, seeks to recover from the Defendant, then the Defendant's special plea that the Plaintiff ought not to recover, because of the said submission and award is not sustained, and the law on that point is for the Plaintiff.

38 Given. If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff, as charged in the declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of the said indebtedness nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff (notwithstanding the award) is entitled to recover the said indebtedness, unless the items of the Pl'ff's claim were intended to apply in payment of the award.

In no event under the issues in the case is the Defendant entitled to recover a verdict against the Plaintiff.

To the ruling of the Court, in giving to the Jury said instructions, the Defendant then and there excepted.

The Defendant then asked the Court to give eight instructions. The Court wrote the word "given" on the margin of five of said instructions, and read to the Jury as law in the case.

(Defendant's Instructions.)

Given. If the Jury believe from the evidence that the parties to this suit on the 7th day of October, 1853, submitted to arbitrators all their commercial transactions, as in the submission bond and award introduced in evidence, is stated, and as described in the third plea of the Defendant, and that the arbitrators awarded as due to the Defendant Dodson the sum of four hundred and ninety dollars. And if the Jury further believe from the evidence that the orders, the Scott note and the book account, given in evidence in this case, by the Plaintiff, were intended as payment of said sum so awarded, and that the sum so awarded, and the interest due thereon, amounts to more than such orders, note and book account, and interest thereon, proven by the Plaintiff, then the Jury will find for the Defendant as to such orders, note and account.

39 If the Jury believe from the evidence that the award of four hundred and ninety dollars, and the interest at 6 per cent. due thereon, exceeds the proven amount of the Plaintiff's demand, the Jury will find the issues for the Defendant, provided the Jury believe from the evidence that such proven demand of the Plaintiff was made in payment of said award and interest. Given.

If the Jury believe from the evidence in this case that Sears the Plaintiff had at the time of the alleged rendering of the services, in attending to the business of the said Defendant Dodson, money belonging to said Defendant, out of which he has paid himself for said services, then the Jury will not allow him anything in this suit for said services. Given.

If the Jury believe from the evidence that said award was rendered in settlement of all the accounts between the parties, and that the Shalor order, dated September 28th, 1853, was prior to said arbitration, the presumption of law is that said order was taken into account by said arbitration, and should be disregarded by the Jury in this case. Given.

That if the Jury believe from all the evidence in this case that the parties to this suit made full settlement of all their accounts in the year 1851, and that no fraud or mistake has been shown in said settlement, then neither party can go behind said settlement, and the Jury must confine their investigations to matters that have accrued between these parties since said settlements. Given.

The Court wrote the word "refused" on the margin of the following three instructions, and refused to give them to the Jury as law in the case.

But if the Jury shall find that the orders and book account, etc., were in payment of the award, and that the award and interest due thereon amounted to more than the said order and book account, the Jury cannot give a ju'gt for the excess, but may then say, We, the Jury, find the issue for the Defendant. Refused.

If the Jury believe from all the evidence that the Plaintiff Sears is really indebted to the Defendant Dodson, they will then ascertain the true amount of said indebtedness, and find a verdict in favor of said Defendant for said indebtedness. Refused.

40 The Jury are instructed that the award given in evidence in this case is offered by way of payment, and if the Jury believe from the evidence that the orders, note and book account proven by the Plaintiff were in payment of said award, and that said award and the interest due thereon amounts to more than the proven demand of the Plaintiff, then the Jury must find for the Defendant. Refused.

To the ruling of the Court in refusing said instructions to be given to the Jury, the Defendant then and there excepted. The Jury then retired and afterwards returned into court with a verdict of seventy dollars and ninety-three cents damages in favor of said Plaintiff, whereupon the Defendant moved the Court for a new trial by written motion filed, in said court, on the second day of June, A. D. 1860, which is in words and figures following:

KANE COUNTY CIRCUIT COURT.

Peter Sears
v.
C. B. Dodson. } May Term, A. D. 1860.

And now comes the said Defendant and moves the Court to set aside the verdict of the Jury herein at the present term of this case rendered against the said Defendant for the following reasons:

First, The Court erred in the admission of evidence offered in favor of the Plaintiff.

Second, The Court erred in refusing to allow the Defendant to give proper and lawful testimony to the Jury.

40 Third, The Court refused to give proper and lawful instructions to the Jury asked for by the Plaintiff.

Fourthly, The verdict as given is contrary to the law and the evidence. All of which is submitted. HERRINGTON & WELLS, for Dodson.

Which was afterwards overruled by the Court.

To the ruling of the Court in overruling said motion for a new trial, the Defendant then and there excepted and prayed, that this his bill of exceptions might be signed and sealed by the Court, which is done.

ISAAC G. WILSON, [Seal.]

Errors assigned:—

The Court erred in admitting as evidence the Books offered by the Plaintiff below.

The Court erred in not allowing the questions to be asked to the witness Hotchkiss, and answered.

The Court erred in giving the instructions as asked for by the Plaintiff.

The Court erred in refusing instructions asked for by the Defendant.

The Court erred in overruling the Defendant's motion for new trial.

The Court erred in permitting the Plaintiff to give in evidence the $48,46 dollar note signed by Dodson, White and Hotchkiss, and dated Sept. 3d, 1843.

A. M. HERRINGTON,
Att'y for Appellant.

225

Dodson

v

Sears

Abstract.

Fld Apl. 17. 1861

L. Leland

Clk.

13277

STATE OF ILLINOIS, } ss. KANE COUNTY CIRCUIT COURT.
KANE COUNTY. }

PETER SEARS
vs.
CHRISTIAN B. DODSON. } *Assumpsit.*

ABSTRACT OF RECORD.

PAGE OF RECORD.

2 Summons issued on third day of October, 1859, and returned served, on the fifth of said October, 1859, action assumpsit, damages two thousand dollars.

Declaration filed on the 9th of October, 1859, first count avers that on 1st day of October, 1859, Christian B. Dodson, at Geneva, in Kane County, in the State
3 of Illinois, was indebted to Peter Sears, the Plaintiff, for the use and occupation of certain messuages, tenements, premises, buildings, farm lands, of the said Peter Sears, situated on Section number one and two in the Town of Geneva, in Kane County, and being so indebted, &c., said Dodson in consideration thereof promised said Sears to pay said sum of two thousand dollars upon request, &c.

Second count avers, that said C. B. Dodson, on the first day of October, A. D. 1859, was indebted to said Sears in the sum of two thousand dollars for the price and value of work and labor, journeys and diligence, &c., by said Plaintiff Sears, bestowed as the factor and agent of said Dodson, in and about the renting of the farm and lands of said Dodson, selling grain, goods, wares and merchandise, &c., and then and there promised to pay the Plaintiff upon request.

Third and last count is simply the common counts, with the usual conclusion, and the damages of said Plaintiff of two thousand dollars.

By J. H. MAYBORNE, *Plff's Atty.*

6 COPY OF ACCOUNT.

For use and occupation of land,	$2,000.
Work and labor,	2,000.
Goods, sold and delivered, &c.,	2,000.
Money lent,	2,000.
" paid,	2,000.
" received,	2,000.
Due on interest,	200.
On account stated,	2,000.

Afterwards on the 25th day of November, A. D. 1859, A. M. Herrington, Dodson's Att'y., filed as pleas to said declaration, 1st. the general issue in the
7 usual form; and 2dly, a plea of set-off which in case reference is required will be found on page seven of the Record; and 3rdly, a plea setting up an arbi-
8 tration and award between the parties, which plea will be found on page eight of the Record. And afterwards on the 10th day of December, 1859, a general rep-
9 lication was filed to the second plea. And afterwards on the 16th day of December, 1859, the Defendant Sears, by his att'y Wilcox, filed four Replications to the third plea.

1st Replication avers, that there was no reference or submission in manner and form as averred in said third plea.

2nd Replication avers, that said Sears and Dodson did by agreement refer and submit certain matters in difference between them to arbitrament of Dearborn and Curtis, but he avers that said arbitrators did not make any award in pursuance of said submission.

3rd Replication avers, that said Dodson and Sears did submit certain matters and differences to the arbitrament and award of Dearborn and Curtis, but denies

10 that the promises and agreements declared upon in the declaration in this case, nor even submitted to said arbitrators.

11 And afterwards on the 30th day of May, 1860, which was one of the days of the May term for 1860 of said court, a jury was empannelled to try said cause. And afterwards on the 1st day of June, yet being one of the days of the May 12 Term of said court, the Jury found the issues in said cause for the plaintiff Sears, and assessed his damages at the Sum of Seventy Dollars and thirty-three cents.

13 STATE OF ILLINOIS, } *Kane County Circuit Court,*
KANE COUNTY. } *May Term, A. D.* 1860.

PETER SEARS }
vs. }
CHRISTIAN B. DODSON. }

Be it Remembered that on the trial of the above entitled cause, before the Hon. Isaac G. Wilson, Judge, and a Jury, duly sworn to try the issues joined, the Plaintiff, in order to 14 sustain his cause of action, introduced as a witness Thomas A. Scott, who being sworn, testified as follows:—Was Clerk in Sears' store in 1853 & 1854; began about middle of June '53; (ac't. shown him) have seen this account before, delivered goods out of Plaintiff's store during years 1853 & 1854; he kept on the west side of the river in those years; delivered goods as charged in the bill, groceries, shoes, soap, candles, &c., dry goods, but cannot specify the articles particularly; it is long ago, can't now recollect distinctly, delivered sheetings, recollect generally of delivering him goods during 1853 & 1854, and charging them, similar to that charged in the account, it was my business to sell goods and enter them upon the books, know Defendant's hand writing. (Witness identifies the following as in Defendant's hand writing.)

$21, 17 A. No. 1.

P. Sears, Please pay the bearer, W. C. Wilder, twenty-one dollars and 17-100 and charge C. B. DODSON.
Geneva, Dec. 27th, 1853.

$44,00 A. No. 2.

P. Sears, Please pay the bearer, A. Demonea, Forty-four Doll's. and chg. to C. B. DODSON.
Geneva, January 16th, 1854.

$23,38 A. No. 2,

P. Sears, Please pay the bearer, W. G. Webster, Twenty-three 38-100 Dollars and charge to C. B. DODSON.
Geneva, December 29th, 1853.

$16,99 A. No. 4.

P. Sears, Please pay the bearer, S. Berry, Sixteen 99-100 Dols. and chge. C. B. DODSON.
Geneva, January 16th, 1854.

$14,71 No. 5.

P. Sears, Pay the bearer, Williams and Henry, Fourteen Dollars and 71-100 and charge C. B. DODSON.
Geneva, December 27th, 1853.

$19,00 A. 6.

P. Sears, Pay Mrs. McElwain nineteen Dollars, 19 $, and charge to
Geneva, December 29th, 1853. C. B. DODSON.

14 $32,00 A. 7.

P. Sears, Please pay the bearer, Y. Alexander, Thirty-two Dollars and charge to C. B. DODSON.

Geneva, December 30th, 1853.

$4,43 A. 8.

P. Sears, Please pay the bearer, John Reed, Four 43-100 Dols., and chge. to C. B. DODSON.

Geneva, Jan. 16th, 1854.

15 $28,71 A. 9.

P. Sears, Please pay the bearer, Mrs. A. Clark, Twenty-eight 71-100 Dollars, and charge to C. B. DODSON.

Geneva, December 29th, 1853.

$7,25 A. No. 10.

P. Sears, Please pay the bearer, Cyreno Tilton, Seven and 25-100 Dollars, and charge to C. B. DODSON.

Geneva, January 5th, 1854.

A. No. 11.

Mr. P. Sears, Please pay J. H. Tickner, Twenty-three Dollars, 23$, and chg. to acpt. of C. B. DODSON.

Geneva, July 11th, '54.

A. No. 12. June 22nd, 1854.

Mr. Sears, Please let Peter Smith have One Dollar in goods, and charge the same to Mr. Dodson in the Pass Book. Mrs. H. N. DODSON.

$26,60 A. No. 13.

P. Sears, Please pay the bearer, A. B. Moore, Twenty-six 60-100 Dollars, and charge to C. B. DODSON.

Geneva, December 30th, 1853.

$4,25 A. No. 14.

P. Sears, Please pay the bearer, P. G. Miller, Four Dollars and 25-100, and chge. C. B. DODSON.

Mar. 21st, 1854.

$3,50 A. 15.

Mr. P. Sears, Please pay the bearer, T. Middleton, Three Dollars and 50-100, and chge. to acpt. C. B. DODSON.

Geneva, Feb. 24th, 1854.

The Plaintiff then read in evidence, a note given by Defendant to E. Scott, and by Scott endorsed to Plaintiff.

(Copy of the Note.)

Ten days after date for value Received, I promise to pay to E. Scott, Seventy-two Dollars & Seventy-seven cents. C. B. DODSON.

Geneva, Dec. 5th, 1853.

$72,77

(Copy of Endorsement.)

For value received, I assign the within note to Peter Sears. E. SCOTT.

[Book shown witness.] This is Mr. Sears' Ledger, kept while I was there. [Day book of Plaintiff shown witness.] This is the day book. The following charges are in Mr. Sears' hand writing :—

Page of Record.

15

1854.					
Jan.	21		Page 401	$2,00	
Feb.	7		406	1,60	
	9		407	1,47	

16

	15		408	61	
	22		410	75	
	24		"	3,50	
	27		"	63	
March	6		411	08	
	8		"	93	
	9		412	6,33	
	20		414	2,30	
	23		415	4,25	Phillin's order.
	25		"	63	
	"		"	7,25	C. Tilton's order.
April	3		418	68	
	14		420	34	
	21		423	06	
	22		"	1,00	
	25		424	10	
	27		425	06	
May	4		428	80	
	15	Book 2nd	1	1,95	
	16		2	1,56	
	25		5	2,05	
June	16		12	1,52	
	22		15	1,00	P. Smith's order.
	"		"	63	
	26		"	1,70	
July	3		18	19	
	"		21	23,00	J. H. Ticknor's order.
	24		26	76	
Aug.	4		28	38	
	10		"	41	
Sept.	18		34	81	
	19		35	32	
	29		37	75	
Oct.	4		"	41	
	9		38	50	
	16		40	60	
				$74,51	

The following charges are in my hand writing :—

1854.					
Jan.	28		Page 403	$1,37	
Feb.	15		408	02	
	22		410	1,00	
	25		"	30	
March	16		413	04	
	21		414	20	
April	22		423	1,62	
	26		425	16	
	28		426	58	
May	1		427	30	
	12		430	1,00	
	"		"	1,75	
	22	Book 2	3	8	
	23		4	69	

17

	24		5	40	
	25		"	1,19	
	31		7	2,07	
June	16		12	60	
	24		15	2,33	
	26		16	1,00	

17

June	30	Page 17	$0,25
July	11	21	2,90
	15	24	44
	24	26	30
Aug.	4	28	70
	18	30	8
	21	"	21
	23	31	20
	31	32	20
Sept.	5	33	56
Oct.	16	40	30
			$22,84

Cannot recollect distinctly, but I delivered about the times of those charges along '53 & '54 goods as there charged, butter, sugar, coffee, tea, soap, candles, &c., &c., dry goods, &c.

Question. State what was your custom while in the store of Sears, (if you had any,) in relation to selling and making charges of goods. To the asking which question the Defendant objected, which objection was overruled by the Court. To the ruling of the Court in allowing such question to be asked and answered, the Defendant then and there excepted.

Ans. The custom was to make the entry on the day book at the time of selling. Think Plaintiff had two clerks in the store in 1854. Mr. Anthony and myself. Mr. Collins was there a short time, but he left in the fall of 1853; it was my particular business to sell goods, and make the entries upon the books. Made the entries at the time of selling. These are the books of account of Plaintiff, (books shown,) kept in his store in the regular course of his business as a merchant. There are entries made in those books in the hand-writing of Sears. Have had an account of my own in these books. Never have had a final settlement, but have looked over the account and found it correct. His books are fairly and honestly kept so far as I know. I think them fair. Anthony was a Clerk part of the time when I was there. Think he was there two or three
18 months. Anthony did not make many entries. Think I and Mr. Sears made most of the entries. Sometmes when we were hurried, we would keep a little memorandum book. Defendant had a pass book, in which we inserted the goods sold to him.

Cross-Examination. Whether Anthony made entries I cannot say. There are some entries, the hand-writing of which I do not know. Mr. Collins was a Clerk a small part of the time. I find charges against other parties not in my hand or Mr. Sears'. Don't know whose writing. It is only during months of March, April, May, & June, 1854, that I find charges that I don't know.

The Plaintiff then introduced J. H. Ticknor, a witness, who being sworn, testified as follows:—Have bought goods of Plaintiff. Settled the account with him. Found the account correct. Think it was in 1853, '54 & '55. It was while he traded, on the east side, and when he was in the stone block on the west side. These are the books out of which we settled. So far as his deal with me, his books correct and fair.

Cross-Examination. My account as it appears here is $26,00, (book shown and is admitted to be the Ledger into which his account is posted—the Day Book not here.) Settled by this book alone.

The Plaintiff then introduced William B. West, a witness, who being sworn, testified as follows:—Was school treasurer of Blackberry some years ago. There was a note of about fifty dollars due to the school fund from Mr. Dodson. It was taken up by Sears about ten years ago. Mr. Sears took the Note. The interest had been paid half-yearly by Dodson for some time. These are Receipts for interest.

18 (Copy of Receipts.)

Geneva, May 21, 1849.

Rec'd of Mr. Sears for C. B. Dodson, $2,94, being the amt due Treas T. 39, N. R. 7 E., for in. up to Mar. 31 last, being six mo's in advance.

WM. B. WEST, Treas.

Blackberry, Dec. 21, 1849.

Rec'd of Mr. P. Sears for C. B. Dodson, two & 74-100, being the amount of interest due the School fund of T. 39, N. R. 7 E., up to Sept. 5th last, by said Dodson.

WM. B. WEST, Treasurer.

Geneva, April 10, 1850.

19 Rec'd of Mr. P. Sears two Dollars and 94-100, in payment of the half-yearly interest, due March 4, on a note against C. B. Dodson, in favor of the School fund of T. 39, N. R. 7 E.

WM. B. WEST.

Blackberry, Dec. 17, 1850.

Received of Peter Sears, Esq., two Dollars and 93-100, being interest due the School fund from C. B. Dodson, up to September 3d, 1850.

WM. B. WEST, Treas. T. 39, N. R. 7 E.

Geneva, May 6, 1851.

Rec'd of C. B. Dodson, Esq., Two Dollars & 93-100, being for half a year's interest due by C. B. Dodson, on his note due the School fund of Blackberry Township, up to March 3d, 1851, by the hand of P. Sears, Esq.

WM. B. WEST.

Blackberry, Jan. 9, 1852.

Rec'd of Peter Sears, Esq., two Dollars and 93-100, being six months' interest due up to September 3d, 1851, on the note against C. B. Dodson and others, due the School fund of Blackberry Township.

WM. B. WEST.

Geneva, May 8, 1852.

Rec'd of Mr. Peter Sears two Dollars & 94-100, for interest due on a note payable to the School fund of Blackberry, by C. B. Dodson and others, due up to Sept. 3d last.

WM. B. WEST.

Cross-Examination. The date of the note cannot say exactly. It had been running three or four years. Think Sears gave his note with Acers in 1852 to take up old note. This is the original note.

Copy of the Note.

$48,46 Blackberry, Kane Co., Sep. 23rd, 1843.

We, C. B. Dodson and Amasa White, jointly & severally promise to pay William B. West, treasurer of School fund of T. 39. N. R. 7 E., or his successor in office, the sum of Forty-eight Dollars and 46-100 with twelve per cent Pr. annm, payable half-yearly in advance; we further agree that if additional security be required for the payment of the within note, it shall be forthwith given.

C. B. DODSON.
AMASA WHITE.
JAS. HOTCHKISS.

Direct resumed. The second note has been paid by Mr. Sears.

Cross-Exam. Delivered the old note to Mr. Sears. Dodson was in California at the time.

The Plaintiff then introduced Alphonzo Yates, a witness, who being sworn,
20 testified as follows—Had some deal with Plaintiff. Traded with him at his store on credit. Have settled with him out of his books. So far as I had any account there I found it correct on the book. I settled from this book. I was satisfied with the account.

Cross-Examination. It was some years ago. Seven or eight years ago. Couldn't say that I remember the book. Good while ago. Can't say that this is

20 the book, nor whether there was no other. There was more than one book.

Resumed. At that time Sears was doing business across the river.

Thomas A. Scott recalled. The footing of my charges is $22,84.

The Plaintiff then introduced A. W. Glass, a witness, who being sworn, testified as follows. Knows the Plaintiff. Have had running book account with him while he kept in the Yates' store, on the west side. This is his book in which he kept my account, when he was in the store on the east side of the river. It embraces my account from 1847 to 1851. Think his books always fairly kept. He keeps fair books so far as my knowledge extends. My account is $241.

Cross-Examination. This is the book into which my account is posted from the other books. My best judgment is that this is the hand-writing of Sears. I was clerk for Sears two years or more. When I took articles, I charged to myself in the day book. I think this is the book from which I settled.

Direct Resumed. According to my best recollection and knowledge this book contains all the account I had with Sears. From looking at the Day Book and this Book, I satisfied myself that the account was correct. Sears usually did the posting of the books himself. That was not my part of the business.

Recross-Ex. Don't know that I ever heard any one when settling find any fault with the correctness of the account, or to the correctness of its keeping.

C. B. Wells, a witness on the part of the Plaintiff was called, sworn, and testified as follows:—Have had an account. Can't identify this book, never had any occasion to find fault with the manner in which my account was kept. If it
21 had been wrong think I should have recollected.

Johnson Updike, a witness called on the part of the Plaintiff being sworn, testified as follows:—Have done threshing on Dodson's farm in 1852. Joseph White employed me & paid me for 2-3 of the threshing. He gave me a bill of the other one third, which I took to Mr. Sears, and he gave me credit for it on the books. It was either seven or eight Dollars and some cents. Dodson went to California, and was gone two or three years. Don't know who attended to his business while he was gone.

Cross-Ex. Joseph White raised the grain in 1852, on Dodson's farm.

The Plaintiff then called A. B. Moore, a witness, who being sworn testified as follows:—Had an account with Sears while he was a merchant here. Settled with him. Always found his books correct. (Examines the book.) Have compared his account with my own, and found it to correspond. I believe he keeps fair books from my dealing with him.

Cross-Examination. This book is a ledger. My account is five dollars and thirty cents. This transaction was in 1851. Can't swear that this is the identical book. Don't remember if there was a Clerk in his Store at the time.

The Plaintiff then called William G. Webster, a witness, who being sworn, testified as follows:—Had a running account at the Store of the Plaintiff. Have traded with him from a period as early as 1842. (Examined ledger on page 170.) Have settled with him a number of times. Settled most always from bills. Do not think I ever looked into his books. Bills were rendered and I always paid them. (Various bills exhibited.) Always regarded them correct enough to pay them. This bill was in 1854.

Cross-Examination. Think I began with him in 1842. At that time Cleveland was Clerk. Marshall Clark, Warner and Glass have been Clerks. This bill is Collins' hand-writing. It begins in March and ends in December, 1853. Don't recollect getting the things in the bill myself. Was aware that there was a small account against me. Sears presented another bill, a larger one against me this winter, and I declined to pay it. There was a charge of fifteen dollars' worth of Hay, and interest on the account of six dollars, which I declined to pay.

22 Direct Resumed. The item I objected to was the hay. The facts were that Updike had delivered me the hay, and Sears claimed that he had received an order of fifteen from Updike, but I never got any such order or heard of it.

Recross Ex. My name was used in a suit against Sears. He brought in an account including the charge for hay.

The Plaintiff then called S. H. Todd, a witness, who being sworn, testified as follows: Have had running account with Plaintiff. Have settled with him. Think I have seen this book. My account is in this book. Have settled it with Sears. Found it correct. This account was 1854 and 1855. As far as my knowledge extends Plaintiff keeps fair and correct books.

Cross Ex. This settlement was when Sears kept on the West side. Sometimes Plaintiff had a clerk and sometimes not. Scott, Anthony, Collins, at times were clerks in the store. I think this is the book from which I settled. I think the items in the day book were not looked at. I had in my head about the amount of the account, and the book corresponded. Can't say who was present.

The Plaintiff then called Joseph White, a witness, who being sworn, testified as follows:—Know the parties. Dodson went to California in 1849, and was gone two years the first time. I worked a part of his farm in 1851. I sowed some fall-wheat in the fall of 1851, and harvested it in fall of 1852. Dodson was back in winter of 1851 and 1852. I first spoke to Dodson about renting his farm. He left Mr. Sears in charge of his farm. Sears came to father's with Dodson to talk about renting the farm, and to make out the lease. Sears made out the lease. Sears accepted of the crops and took charge of them for Dodson —Dodson's part of them. I repaired the fences that spring. Mr. Dodson gave directions when he was at home. I consulted with Sears as to the management of the farm after Dodson left. I was to pay $\frac{2}{3}$ and Dodson was to pay $\frac{1}{3}$ for threshing. Updike threshed the fall grain. I gave an order. I gave it upon
23 Sears. Sears had the charge and management of the farm in 1849 and '51. Sears was down to the farm quite often. There was about one hundred acres of tillage land. I did not work all the land. Adams worked a part. I worked from fifty to sixty acres. Mrs. Dodson and family lived at Warrenville at the time.

Cross Examination. Knapp, a brother-in-law of Dodson, worked the farm in 1849. Dodson left early in the spring. Logan worked the farm after Knapp. Logan died on the place. Don't know that he took Knapp's lease. Knapp staid a year. Logan died in the fall of 1850. Think Sears took charge of the grain raised by Logan. Don't know of Dodson selling wheat, raised by Logan, to Derby. I know he sold to Derby wheat raised by me. My impression is that Dodson did not return in the fall of 1850. Upon reflection I think he did return in the fall of 1850, and went back to California in the spring of 1851, and staid until the fall; he was therefore at home in the winter of 1850 and 1851. He was at our house occasionally. I first spoke to Dodson about renting the farm. Dodson was in the habit of attending to and managing his own business. Think I talked twice with Dodson, and the terms of the lease were agreed upon between him and me. I took the oats to father's barn. I kept Dodson's portion of the oats to pay me for repairing the fence. Think there was some grain that Logan raised and which was put into our barn and afterwards took away by Dodson. Can't say who took them there. The corn that I raised was in our barn, and Derby got it from there. Dodson had sold it to him as I understood.

Direct Resumed. Think Sears was there while the harvesting was being done. At the time of the giving of the lease it is spoken about Dodson returned to California. Sears drew the lease.

23 Recross Ex. The lease was drawn at Sears' store. Self, father, Sears, and Dodson present.

Julia Dodson sworn, a witness called on behalf of the Plaintiff being sworn testified as follows:—Daughter of the Defendant. We lived at the farm when father went to California. We moved to Warrenville same spring. Can't say
24 who aided in moving. Think Mr. Sears gave Knapp some directions about the farm. Recollect of Sears keeping store on this side of the river in the Yates' building. Recollect of my father buying a pair of Buffalo overshoes, but don't know where he got them. Can't say what year it was. Recollect occasionally of going and getting soap and candles and other goods during 1853 and 1854. Our family bought goods at Sears' store. Think we had a pass book. I was so young that I cannot remember what was got. Recollect getting similar goods to those charged along during 1853 and 1854.

S. H. Todd recalled for the Plaintiff. Know Dodson's farm. Knew of the time when Dodson went to California. He went spring of 1849 and stayed to fall of 1850, and again returned to California in spring of 1851. Sears had charge of Dodson's farm while Dodson was away. Have seen Sears there. Remember on one occasion when some one was plowing up the road and forbid him. Once on another occasion when threshing, and Sears gave some directions. He paid highway taxes. Worth from fifty to one hundred dollars a year to take charge of the farm and Dodson's business in his absence. My house is a little over a half a mile from the nearest corner of Dodson's farm. I have to pass the farm going to Batavia. Frequently passed it. A leased farm requires some looking after. Amasa White and his son are first class tenants.

Lyman German, a witness on the part of the Plaintiff called and sworn, and testified as follows: In 1852 and 1853 was in the warehouse taking in grain for Sears & Dodson. I think Sears bought some grain. Think some barley, whether for Sears or not I do not know. How much I do not know. (Plaintiff claims for barley, July 20th, 1853, 226½ bush. at 50c and 68 bush. oats.) The Defendant came to me and told me to deliver up key to J. B. Dodson, and I did so. [The Court rejected the Plaintiff's claim for barley and oats and ruled them out on the ground that it was partnership account.]

Amasa White. Know the Dodson farm. Mr. Sears appeared to have the
25 care of the Dodson farm while Dodson was absent in California. Heard Dodson say once at my house that Mr. Sears and his father, who lives at Salt Creek, were to act as agents for him during his absence. Occasionally saw Mr. Sears down there. Don't know that I could fix on any time. Dodson has also a farm in connection with Sears. Five or six hundred acres lying east of the Village. Think Dodson's father was once at my house, with Sears. From what I saw I gathered that Sears had the management and control of Dodson's business during Dodson's absence. It was worth from $50 to $100 dollars per year to do it.

Charles Patten, a witness, produced on the part of the prosecution being sworn, testified as follows:—Always understood that Sears had charge of Dodson's affairs while he Dodson was in California. Dodson when he left for California had considerable property. His home farm might have been worth from eight to ten thousand dollars, more or less; the care and responsibility of taking charge of the business worth fifty to one hundred and fifty per year. Sears paid me five dollars for Dodson.

Cross Ex. Lived near these parties. Know nothing about any particular services of Sears. Had no occasion to do so.

The Plaintiff then introduced B. C. Yates, a witness, who being sworn, testified as follows:—Was Sheriff and Collector of Kane County in 1850. Warner

25 was my deputy. [Witness shown two tax receipts.] This was tax receipt. Knew of Sears settling an execution against Dodson in the Todd case. This is another tax receipt.

Received, March, 1850, by the hand of Peter Sears for C. B. Dodson, the tax on the following property for the year 1849 :—

Personal Property							$,55.
Part of S. E. ¼, Section 10, Town 39, Range 8, 80 acres							5,49.
N. ½ N. W. ¼,	"	11,	"	"	"	" 33 61-100 acres	2,66.
S. W. ¼	"	11,	"	"	"	" 33 16-100 "	2,60.
N. W. ¼	"	14,	"	"	"	" 51 93-100 "	3,57.
N. E. fr.	"	15,	"	"	"	" 110 13-100 "	7,58.
							$22,45.
Deduct over charge $53.16 acres							5,13.
							$17,14.

Received payment in full on the above,
C. B. YATES, Col.
By J. L. WARNER, Deputy.

Geneva, Kane Co., May 10, 1850.

Received, March, 1850, of Sears & Dodson the tax on the following property, for the year 1849 :—

Part of N. E. ¼, Section 1, Town 39, Range 8,						80 acres	3,92.
S. E. ¼,	"	1,	"	39,	"	" 119 67-100 acres	5,87.
N. W. ¼,	"	1,	"	"	"	" 40 40-100 "	1,98.
S. E. ¼,	"	1,	"	"	"	" 143 28-100 "	7,03.
S. E. ¼,	"	2,	"	"	"	" 72 50-100 "	3,56.
S. W. ¼,	"	2,	"	"	"	" 24 50-100 "	1,22.
N. ½ S. W. ¼,	"	2,	"	"	"	" 114 89-100 "	5,64.
							29,22.

Received payment in full on the above,
J. L. WARNER, Deputy Col.
Geneva, Kane Co., May 10, 1850.

26 C. B. Wells was then recalled by the Plaintiff. Know J. B. Dodson. He read law in my office in 1853. He kept Mr. C. B. Dodson's books and accounts. Dodson was then building the rail road bridge. [Order shown witness.] Think this is his handwriting, but am not familiar with it.

(Copy of Order.)
No. (16.)

P. Sears:

Please pay Mr. Shanlan Thirty-one and 12-100 Dols. and charge to C. B. Dodson.
J. B. DODSON.

Geneva, Sept. 28, '53.

Ordered admitted, Dated Sept. 28, 1853.

Here the Plaintiff enquired of the Defendant if he would produce the pass book that he had been notified to produce the day before and made by the Plaintiff and kept by him during the years 1853 and 1854, and showing what amount of goods he purchased of the Plaintiff during that time, who replied that he could not produce it, and then made and read to the Court the following affidavit.

[The original affidavit to be inserted here is not found on file.
P. R. WRIGHT, Clerk.]

27 And upon the Court's ruling that the affidavit did not show sufficient facts why he did not produce it he asked of the Court and obtained leave to make and file an additional affidavit, to which the Plaintiff objected. The Court overruled such objection, and Plaintiff excepted. The Defendant then made and read the following additional affidavit. [Here Clerk will copy affidavit.]

27 [The affidavit referred to is not found on the file.

P. R. WRIGHT, Clerk.]

Thereupon the Court ruled that this affidavit stated sufficient facts why he did not produce said pass book, and sufficiently accounted for its non-production, to which ruling of the Court the Plaintiff excepted.

28 The books of account of the Plaintiff, identified by the witnesses, consisting of the ledger and two day books, were then offered in evidence, and so much of the account against the Defendant as was in the handwriting of Sears and Scott, as testified to by Scott, was admitted by the Court to go to the Jury. The Defendant by his Counsel objected to the admission of said books and account being admitted to go to the Jury as evidence in the case, which objection was overruled by the Court, and to the ruling of the Court in overruling such objections, and allowing said books and account to be given in evidence to the Jury, the Defendant, by his Counsel, then and there excepted. The amount in Scott's handwriting was $22,84. The amount in Sears' handwriting $

The Plaintiff here rested.

The Defendant then introduced Nathan Dodson, a witness, who being sworn, testified as follows: Am father of the Defendant. My son went to California in 1849. Left March 20. Myself and Mr. Sears were appointed to do certain busi-
29 ness for him. My son-in-law, Albert Knapp, had the farm. Heard Defendant giving him directions as to how he should manage the farm. He remained on the farm until February or March, 1850. Defendant came back from California in the fall of 1850. Don't know who rented the farm in 1850. Sears received one thousand dollars at one time on account belonging to the Defendant. I brought the money over and gave it to Mr. Sears in the spring of 1849. The power of attorney was to execute a deed to Latham for land. I hadn't the most distant idea that we had anything to do with the farm. Knapp was on the farm when I came over to pay the money. Question. What did you hear said between the Defendant and Knapp, while Knapp was in possession of the farm, as to how long Knapp had rented it? To the asking and answering the above question the Plaintiff objected, and the Court sustained such objection. To the ruling of the Court in sustaining such objection, and in not allowing such question to be asked and answered by the witness, the Defendant then and there excepted.

Cross Ex. Don't know what the thousand dollars was paid on. Mr. Dodson paid it to us in Mr. Sears' store. After the money was paid over, I took Mr. Sears in my carriage to Elgin. Don't know for what purpose he went to Elgin. The money was raised for some purpose. We came over and the money was paid to Sears, and we went home again, and sometime after he wrote to me to come over, and we went to Elgin, and he had business with Charles Clark. Think the money was brought over to Sears in May 1849. I know the amount, because I counted it. Nothing was said about what the money was to be paid for. Have no recollection about paying out the money or any talk about it. Sears said they had business with Charles Clark.

Silas W. Curtis, a witness produced and sworn on the part of the Defendant, testified as follows;—Was chosen abitrator by Sears. Mr. Dearborn was acting with me.

30 C. B. Wells, a witness heretofore sworn in this case was called by the Defendant who proved the execution of the following Bond of Arbitration.

Copy of Bond of Arbitration.

Know all men by there presents, that we, Peter Sears and Christian B. Dodson, all of Geneva, Kane County, State of Illinois, are held and firmly bonnd

30 unto each other, his heirs and assigns, in the penal sum of ten thousand dollars, lawful money of the United States, which sum well and truly to be paid one to the other, in case any of the following conditions are broken, we hereby bind ourselves, our heirs, executors and administrators, severally, jointly and firmly by these presents. Witness our hands and seals this 7th day of October, A. D. 1853.

The condition of this obligation is such, that whereas the said Sears and Dodson are anxious to settle their commercial transactions, and no other in Geneva, and whereas the said Sears and Dodson have mutually selected Luther Dearborn and Silas W. Curtis, and in case they cannot agree, they (Dearborn and Curtis) are to select a third man to whom their commercial transactions as aforesaid are to be referred, who are to ascertain how much money said Dodson has paid in for the transaction of the aforesaid business, how much he is entitled for profits, while so engaged, if any, and how much he has drawn out from said business in cash or goods, or both, and make their award in writing (giving a copy to each party) determining how much one shall pay to the other, how soon, and what the security for such payment, and the award thus signed by any two of said arbitrators shall be binding and conclusive, from which there shall be no appeal. Now if the said Sears or Dodson shall well and truly perform all the conditions for each to perform, and shall stand to, abide by, and perform all the conditions aforesaid, and the award of said arbitrators, then this Bond to be void, otherwise to remain in full force and effect; and that this arbitrament shall commence Saturday morning, Oct. 8th, 1853, at 9 o'clock A. M., and continue unnecessary uninterrupted until disposed of; each party may be sworn and tell his story under oath and introduce such other legal evidence as said arbitrators may determine.

PETER SEARS, {L. S.}

Witness by
C. B. WELLS.

C. B. DODSON, {L. S.}

31 The commencement of the above arbitration is hereby mutually agreed to be postponed until Wednesday morning, Oct. 12th, 1853, at 9 o'clock, A. M.

Witness by
Jas. B. Dodson.

PETER SEARS, [Seal.]
C. B. DODSON, [Seal.]

S. W. Curtis recalled by Defendant. The arbitrators met, and the parties also, on the 12th of October, 1853. We heard the testimony and made this award (paper shown witness) in pursuance of the bond of submission. The award is signed by Mr. Dearborn and myself. This is the award:

Copy of the Award.

To all to whom these presents shall come, we, Silas W. Curtis and Luther Dearborn, send greeting:—Whereas, divers disputes, differences and controversies have arisen and are depending, between Peter Sears of the one part, and Christian B. Dodson of the other part, both of Geneva, Kane County and State of Illinois, in their mercantile transactions, for the ending and determining whereof, the said parties by their bonds of submission, bearing date the 8th day of October, A. D. 1853, have reciprocally bound themselves each to the other, to stand to, abide by, perform and keep the award, order, arbitrament and final determination of us, the said Silas W. Curtis and Luther Dearborn, so as the said award be made under our hands and ready to be delivered to the parties in difference.

Now, therefore, know ye, that we, the said arbitrators, whose names are hereunto subscribed, taking upon ourselves the burthen of said award, and having been first duly sworn according to law, faithfully and fairly to hear and examine the matters of difference between the said parties in question as to their mercan-

31 tile transactions, and none others, and to make a true and just award thereon, according to the best of our skill and understanding, and having fully examined and duly considered the proofs and allegations of both of the said parties, who were duly notified of the time and place, at which the said award would be made, do make and publish this our award between the said parties.

First, We do award and order that all controversies had, moved, arisen and
32 depending between the said parties for any manner of cause touching their mercantile transactions to the day of the date hereof shall cease, and that each of the parties pay the arbitrator chosen by himself their fees for this award.

Secondly, We do award and order that Peter Sears shall pay and discharge all of the debts incurred by the said firm of Sears and Dodson in their mercantile transactions.

Thirdly, We do award and order that Peter Sears shall pay to the said Christian B. Dodson the sum of four hundred and ninety dollars, ($490,) on or before the first day of March, A. D. 1854, said amount is to be secured to be paid to the said Dodson by mortgage or otherwise, as they may agree; but in case the said Peter Sears neglects or refuses to give the necessary security within ten days from the date of this award, at the expiration of that time, the aforesaid sum shall be due and payable.

And lastly, we do award and order that the said Peter Sears and the said Christian B. Dodson shall on the payment of the said sum of four hundred and ninety dollars, execute releases to each other, sufficient for the realizing of all demands connected with their aforesaid mercantile transactions, touching the premises aforesaid.

In testimony whereof we have hereunto set our hands and seals this 15th day of December, A. D. 1853. SILAS W. CURTIS, [Seal.]
LUTHER DEARBORN, [Seal.]

Cross Ex. We acted under this bond of submission, and then made out our award.

James Hotchkiss, a witness produced on the part of the Defendant, being sworn, testified as follows: The Defendant's Counsel asked the following question: (No. 1.) "Do you know of the Defendant Dodson selling to the Plaintiff Sears a wagon, at any time? If yea, state the value." To which question the Plaintiff objected. The Court stated that if the testimony was offered to prove
33 an offset, it was not competent, on the ground that no bill of items was filed with the plea of setoff, but if it was offered to prove payment it was competent. The Counsel for the Defendant declining to state it was offered to prove payment, the testimony was ruled out, to which ruling of the Court the Defendant then and there excepted.

The Defendant's Counsel then asked the witness the following question: (No. 2,) "Do you know whether the Defendant Dodson sold and delivered to Sears, the Plaintiff, in March 1849, one sett of single harness? If yea, state what, if you know, Sears was to pay for the same?" Objected to by Plaintiff's Counsel. The Court overruled the question, and sustained the objection for the same reasons as given for overruling question No. 1, the Defendant's Counsel declining to state that it was offered to prove payment, to which ruling of the Court the Defendant by his Counsel then and there excepted.

The Defendant's Counsel then asked the following question: (No. 3.) "Do you know of Dodson, the Defendant, letting the Plaintiff, Sears, have a twenty dollar County order?" Objected to by Plaintiff, and overruled by the Court for reasons stated by the Court in overruling question No. 1, to which ruling of the Court the Defendant then and there excepted.

Dodson went to California in 1849. His farm was in charge of Knapp, his brother-in-law. He engaged me to overlook his timber land. I did so. I resided here in Geneva, within half or three-quarters of a mile of it.

33 Adolphus Latham, a witness produced on the part of the Defendant, being sworn testified as follows: In the month of December, 1849 or 1850, I paid three hundred and twenty-six or thirty-six dollars to Sears, for which I received a deed for land from C. B. Dodson. Think the deed was executed by Sears as Attorney in fact.

Cross Ex. The money was paid for balance due on land. Sears was acting as agent for Dodson, and I paid the money to him as such agent.

James Hotchkiss recalled by Defendant. Dodson was to give me my firewood for looking after the timber.

Cross Ex. I went down once with Mr. Sears, at his request, with him to look at the plow land, and we talked of the propriety of putting in buckwheat, and I agreed with him. We agreed in opinion.

34 The Defendant then offered in evidence the following note of $48,46-100. The handwriting of Plaintiff was admitted, and note allowed to go to the Jury.

$48,46. Blackberry, Kane Co., Sept. 3d, 1843.

We, C. B. Dodson and Amasa White, jointly and severally promise to pay Wm. B. West, Treasurer of School fund of T. 39, N. R., 7 E., or his successor in office, the sum of forty-eight dollars and 46-100, with twelve per cent. per an'm, payable half yearly in advance. We further agree, that if additional security be required for the payment of the within note it shall be forthwith given.

C. B. DODSON,
AMASA WHITE.
JAS. HOTCHKISS.

The Defendant then offered in evidence the following account for grain had in August 1850, being balance of fifty-five dollars and four cents, which was admitted to the Jury by the Court.

1850. Sale of Winter Wheat for account of C. B. Dodson, Esqr.

Aug. 5,	To Mr. Curtis,	20 bushels c. 75,	15,00.
"	Amasa White,	15 do " 75,	11,25.
"	Charles Walker,	59 11-60 bu. 68,	40,24.
			66,49.

Charges.

To Cash paid	Threshing account,	4,80,	
" " "	Freight to Chicago,	8,65,	
" My expenses	" "	3,00,	16,45.
			$55,04.

Geneva, Aug. 29, 1850. P. SEARS.

The Defendant then offered in evidence the following letter and accompanying account. The same being admitted by Plaintiff's Counsel to be in the handwriting of the Plaintiff, which were ruled out by the Court, and not permitted to be given in evidence to the Jury. To ruling of the Court in refusing said letter and accompanying account, which was a part of said letter, to be given in evidence to the Jury, the Defendant then and there by his Counsel excepted.

Copy of Letter and Account.

Boston, July 21, 1847.

C. B. Dodson, Esqr., Dear Sir:—Since I last wrote you your flour has come to hand. It only arv'd on the 7th inst.,—49 days from Chicago,—all in a damaged condition,—sour, musty and wet. In learning the condition of it I immediately call'd a survey, and the damage apprised by two of our most respectable

34 flour dealers at $1,75c per bbl. as per their certificate annex'd. I have also the inspectory certificate to the same effect. I found also that the only way I could dispose of it would be at public sale, all my friends advising that to be the best
33 course to adopt, which I accordingly did. It was sold on the 14th inst., after advertising for 2 days, and a large company present, for $4,06¼c per bbl., for 95 bbls. superfine, and $3,25 for 14 bbls. fine middlings, which I considered a good price, considering its damaged state. 2 bbls. of your flour was short at Buffalo, and paid for and deducted from bill of charges, say $13. I feel the greatest disappointment in the result of this shipment, particularly when the prospect was so good for a great profit, and had there not been the most gross neglect on the part of the transportation Company it would arrived here and been sold at the highest market ———— —— the whole season. I was offered $10,25 pr bbl. for a part of it, to arrive, predicated upon a reasonable time, and had it come through, as it should certainly in 25 days, I should have sold the whole at that price, for it would then undoubtedly been in a sound state, and I can see no reason why you should not recover not only the damage appraised but for the difference in price which this delay made,—consequent this difference is $4,50, per bbl., and I shall procure all necessary documents to sustain this claim against the Company, and I can see no good reason why it should not be recovered in a few days. I will forward you account of sales. I —— so much engaged in looking after my own affairs that I have only time to say this much to you at this time: Be assured I have and shall give every attention to this business that serves to promote your interest. I have much more difficulty in disposing of my property here than I anticipated, but I hope now soon to accomplish it. The weather is extremely warm here. Thermometer ranging from 90 to 100 degrees.

Respectfully yours,
PETER SEARS.

(Copy of Accounts.)

1847. Sales of 109 bbls. Flour on account of C. B. Dodson.

July 14, John Tyler at auction,

79	bbls.	Flour,	$4,1-16,	$320,94
14	"	Fine Midlings,	3,¼,	45,50
2	"	W. Trueman,	5,75,	11,50
1	"	A. H. Peirce,	" "	5,75
1	"	Damaged,		4,50
1	"	Light weight,		4,00
11	"		5,	55,00
		Dolls.		447,19

36 The Defendant then offered the following accounts which were given to the Jury as evidence in the case.

(Copy of Account.)

Dr. C. B. Dodson, Esqr., in Account with Peter Sears. Cr.

1851. May 5,	To this amount cash,	interest school note	2,93
Apr 28,	" " " "	I. G. Wilson M'rtge	250,00
Jun. 9,	" " " "	Mrs. Dodson	30,00
" 11,	" " " "	Mrs. D. or. Hazeltine	2,00
Jul. 10,	" " " "	Mrs. Dodson	11,00
Aug 31,	" " " "	Mrs. Dodson	13,00
Sept. 8,	" " " "	" "	10,00
1852. Jan. 9,	" interest on school note		2,93
" 30,	" cash paid 25 grain bags		7,50
" "	" " Mrs. Wakefield		2,50
Feb. 7,	" " paid taxes on farm		19,66
" 24,	" " James White, threshing grain		2,81

36

Apr 13,	"	E. Scott for Pork, 262½ lb.	11,81
" "	"	1 Pork bbl.	1,13
May 8,	"	interest on school note	2,93
			370,20

Cr.

1851. Mar. 19,	By	balance old account	14,01	
Aprl. 28,	"	cash	300,00	
	"	this am't taxes carried to Jan. account	17,80	331,81
		Endorsed on note $38,39		38,39

Settled as above, PETER SEARS.

Dr. C. B. Dodson, Esqr., in Account with N. Dodson & P. Sears.

1849. May 4,	To	cash p'd H. F. Smith, trust deed	1,00
" " "	"	acknowledging deed	,25
" 5,	"	this am't p'd note and in't P. Sears	201,50
" " "	"	" I. G. Wilson, land	627,58
" " "		expenses at Elgin on business for him	1,75
" " "		this am't p'd C. Patten for rect	5,00
" 21,	"	" W. B. West, in'st sch'l land	2,94
" 28,	"	" B. C. Yates, Todd suit	50,00
" "	"	" medicine, Mrs. Dodson	2,00
" 30,	"	" State and county taxes	22,12
" " "	"	" Jno Barstow witness fees	4,50
Jun 23,	"	" Swarthout recording P. Att'y	,88
" " "	"	" Cash Mrs. D.	6,00
Oct. 17,	"	" " "	5,00
Dec. 21,	"	" W. B. West in't sch'l land	2,94
" 22,	"	" Jas. Stephens on note	350,00
" " "	"	" J. J. Brown, bill	8,66
" 27,	"	" E. Conant, house rent	47,92
1850. Jan. 16,	"	" Jas. Stephens, on note	40,00
" 26,	"	" " " "	17,00
Apr. 9,	"	" W. B. West, in't note S. land	2,94
" 17,	"	" Mrs. Dodson,	12,00
May 10,	"	" Taxes, B. C. Yates	17,14
July 2,	"	" Mrs. D. $8, postage 40c	8,40
Sept 16,	"	" "	25,00
Oct. 19,	"	" "	30,00
Nov 29,	"	" W. B. West in't 2,93, P. 50	3,43

37

1851. Jan. 1,	"	" Postage 93 do 80	1,73
Mar. 1,	"	" Taxes on farm	37,00
" " "	"	" Postage 10 do 10	,20
" 12,	"	" " 2 letters Cal.	,80
		Carried forward,	$1535,68
		Am't brought over	$1535,68
1851. Mar.	To	cash p'd threshing spring wheat	2,55
"	"	" Amasa White, ct. C. Wheat	5,00
"	"	" Working road tax	3,12
"	"	" B. C. Yates on Todd's suit say	22,00
			$1568,35
		Amasa White on wheat	1,08
			1569,43
19	To bal. to new account		14,01
			$1583,44

Cr.

1849. May 4,	By	cash per receipt	1000,00
" " "	"	County order	20,00
Dec. 22,	"	proceeds Latham's note	330,00
" " "	"	cash Mrs. Dodson	18,25

Page of Record.

37	1850. Jan. 16,	" " "	40,00
	" 26,	" " "	17,00
	Mar. 8,	" A. Knapp	3,15
	Aug.	" sales winter wheat	55,04
	1851. Jan. 23,	" cash	100,00
			$1583,44
		Am't carried forward	
	1851.	By am't forward	1583,44
			1583,44
	1851. Mar. 19,	By bal. of old account	14,01

E. E. Settled as above, Geneva, Mar. 19, 1851.

PETER SEARS.

Which was all the evidence either offered or given on the trial of said cause.

The Plaintiff then asked the Court to give the following instructions, three in number, which were marked by the Court on the margin, "given," and by the Court read to the Jury.

(Copy of Instructions.)

Given. That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit, and passed upon by the arbitrators (Curtis & Dearborn) did not include any of the claims or demands which the Plaintiff in this suit, in his declaration and by the proofs, seeks to recover from the Defendant, then the Defendant's special plea that the Plaintiff ought not to recover, because of the said submission and award is not sustained, and the law on that point is for the Plaintiff.

38 Given. If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff, as charged in the declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of the said indebtedness nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff (notwithstanding the award) is entitled to recover the said indebtedness, unless the items of the Pl'ff's claim were intended to apply in payment of the award.

In no event under the issues in the case is the Defendant entitled to recover a verdict against the Plaintiff.

To the ruling of the Court, in giving to the Jury said instructions, the Defendant then and there excepted.

The Defendant then asked the Court to give eight instructions. The Court wrote the word "given" on the margin of five of said instructions, and read to the Jury as law in the case.

(Defendant's Instructions.)

Given. If the Jury believe from the evidence that the parties to this suit on the 7th day of October, 1853, submitted to arbitrators all their commercial transactions, as in the submission bond and award introduced in evidence, is stated, and as described in the third plea of the Defendant, and that the arbitrators awarded as due to the Defendant Dodson the sum of four hundred and ninety dollars. And if the Jury further believe from the evidence that the orders, the Scott note and the book account, given in evidence in this case, by the Plaintiff, were intended as payment of said sum so awarded, and that the sum so awarded, and the interest due thereon, amounts to more than such orders, note and book account, and interest thereon, proven by the Plaintiff, then the Jury will find for the Defendant as to such orders, note and account.

Page of Record.

37	1850. Jan. 16,	" " "	40,00
	" 26,	" " "	17,00
	Mar. 8,	" A. Knapp	3,15
	Aug.	" sales winter wheat	55,04
	1851. Jan. 23,	" cash	100,00
			$1583,44
		Am't carried forward	
	1851.	By am't forward	1583,44
			1583,44
	1851. Mar. 19,	By bal. of old account	14,01

E. E. Settled as above, Geneva, Mar. 19, 1851.

PETER SEARS.

Which was all the evidence either offered or given on the trial of said cause.

The Plaintiff then asked the Court to give the following instructions, three in number, which were marked by the Court on the margin, "given," and by the Court read to the Jury.

(Copy of Instructions.)

Given. That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit, and passed upon by the arbitrators (Curtis & Dearborn) did not include any of the claims or demands which the Plaintiff in this suit, in his declaration and by the proofs, seeks to recover from the Defendant, then the Defendant's special plea that the Plaintiff ought not to recover, because of the said submission and award is not sustained, and the law on that point is for the Plaintiff.

38 Given. If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff, as charged in the declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of the said indebtedness nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff (notwithstanding the award) is entitled to recover the said indebtedness, unless the items of the Pl'ff's claim were intended to apply in payment of the award.

In no event under the issues in the case is the Defendant entitled to recover a verdict against the Plaintiff.

To the ruling of the Court, in giving to the Jury said instructions, the Defendant then and there excepted.

The Defendant then asked the Court to give eight instructions. The Court wrote the word "given" on the margin of five of said instructions, and read to the Jury as law in the case.

(Defendant's Instructions.)

Given. If the Jury believe from the evidence that the parties to this suit on the 7th day of October, 1853, submitted to arbitrators all their commercial transactions, as in the submission bond and award introduced in evidence, is stated, and as described in the third plea of the Defendant, and that the arbitrators awarded as due to the Defendant Dodson the sum of four hundred and ninety dollars. And if the Jury further believe from the evidence that the orders, the Scott note and the book account, given in evidence in this case, by the Plaintiff, were intended as payment of said sum so awarded, and that the sum so awarded, and the interest due thereon, amounts to more than such orders, note and book account, and interest thereon, proven by the Plaintiff, then the Jury will find for the Defendant as to such orders, note and account.

39 If the Jury believe from the evidence that the award of four hundred and ninety dollars, and the interest at 6 per cent. due thereon, exceeds the proven amount of the Plaintiff's demand, the Jury will find the issues for the Defendant, provided the Jury believe from the evidence that such proven demand of the Plaintiff was made in payment of said award and interest. Given.

If the Jury believe from the evidence in this case that Sears the Plaintiff had at the time of the alleged rendering of the services, in attending to the business of the said Defendant Dodson, money belonging to said Defendant, out of which he has paid himself for said services, then the Jury will not allow him anything in this suit for said services. Given.

If the Jury believe from the evidence that said award was rendered in settlement of all the accounts between the parties, and that the Shalor order, dated September 28th, 1853, was prior to said arbitration, the presumption of law is that said order was taken into account by said arbitration, and should be disregarded by the Jury in this case. Given.

That if the Jury believe from all the evidence in this case that the parties to this suit made full settlement of all their accounts in the year 1851, and that no fraud or mistake has been shown in said settlement, then neither party can go behind said settlement, and the Jury must confine their investigations to matters that have accrued between these parties since said settlements. Given.

The Court wrote the word "refused" on the margin of the following three instructions, and refused to give them to the Jury as law in the case.

But if the Jury shall find that the orders and book account, etc., were in payment of the award, and that the award and interest due thereon amounted to more than the said order and book account, the Jury cannot give a ju'gt for the excess, but may then say, We, the Jury, find the issue for the Defendant. Refused.

If the Jury believe from all the evidence that the Plaintiff Sears is really indebted to the Defendant Dodson, they will then ascertain the true amount of said indebtedness, and find a verdict in favor of said Defendant for said indebtedness. Refused.

40 The Jury are instructed that the award given in evidence in this case is offered by way of payment, and if the Jury believe from the evidence that the orders, note and book account proven by the Plaintiff were in payment of said award, and that said award and the interest due thereon amounts to more than the proven demand of the Plaintiff, then the Jury must find for the Defendant. Refused.

To the ruling of the Court in refusing said instructions to be given to the Jury, the Defendant then and there excepted. The Jury then retired and afterwards returned into court with a verdict of seventy dollars and ninety-three cents damages in favor of said Plaintiff, whereupon the Defendant moved the Court for a new trial by written motion filed, in said court, on the second day of June, A. D. 1860, which is in words and figures following:

KANE COUNTY CIRCUIT COURT.

Peter Sears
v.
C. B. Dodson. } May Term, A. D. 1860.

And now comes the said Defendant and moves the Court to set aside the verdict of the Jury herein at the present term of this case rendered against the said Defendant for the following reasons:

First, The Court erred in the admission of evidence offered in favor of the Plaintiff.

Second, The Court erred in refusing to allow the Defendant to give proper and lawful testimony to the Jury.

40 Third, The Court refused to give proper and lawful instructions to the Jury asked for by the Plaintiff.

Fourthly, The verdict as given is contrary to the law and the evidence. All of which is submitted. HERRINGTON & WELLS, for Dodson.

Which was afterwards overruled by the Court.

To the ruling of the Court in overruling said motion for a new trial, the Defendant then and there excepted and prayed, that this his bill of exceptions might be signed and sealed by the Court, which is done.

ISAAC G. WILSON, [Seal.]

Errors assigned:—

The Court erred in admitting as evidence the Books offered by the Plaintiff below.

The Court erred in not allowing the questions to be asked to the witness Hotchkiss, and answered.

The Court erred in giving the instructions as asked for by the Plaintiff.

The Court erred in refusing instructions asked for by the Defendant.

The Court erred in overruling the Defendant's motion for new trial.

The Court erred in permitting the Plaintiff to give in evidence the $48,46 dollar note signed by Dodson, White and Hotchkiss, and dated Sept. 3d, 1843.

A. M. HERRINGTON,
Att'y for Appellant.

Dodson

v

Sears

225

Abstracts

Filed April 18th 1861

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

CHRISTIAN B. DODSON, Appellant,
vs.
PETER SEARS, Appellee.

POINTS AND BRIEF BY THE APPELLANT.

The Bill of Exceptions is printed in *extenso.*

The errors committed by the Court below, are as follows:

The plaintiff below called Thos. A. Scott to make the preliminary proof before giving his books in evidence to the jury, who testified (See pages 14, 15 and 16 of Record,) to items named in the book, amounting to the sum of $74.51, as appearing in the handwriting of Sears, and to charges in his, witness's, handwriting in said book, amounting to the sum of $26.00. It also appears by the evidence in said case, that A. W. Glass, Mr. Anthony, Mr. Cleveland, Mr. Clark, Mr. Collins, and others, were clerks for Sears, all of whom were in the habit of making entries in said books, and whose handwriting appears in said books. All of the witnesses by whom Sears sought to prove a settlement of their accounts in said books, stated that Sears had clerks when they dealt with him. Under this state of case—see Record, page 28—the Court permitted the books to be given in evidence to the jury. See 3 Scam., *Boyer* vs. *Sweet*, page 121. See *Hartnett* vs. *Ball*, 22 Ill., page 43, which must be regarded as decisive of this point. The evidence in this case does not come up to the requirements of the authorities cited.

The second point to which the attention of the Court is arrested, arises upon a construction of the following Statute, at the bottom of page 259 and at the top of page 260 of Scates' Statutes.

"The several Circuit Courts shall have power in any action "pending before them, upon motion and good and sufficient

"cause shown, and reasonable notice thereof given, to require "the parties, or either of them, to produce books or writings "in their possession or power, which contain evidence pertinent "to the issue; and it shall be the duty of the defendant or defend- "ants, in all cases where he, she or they intend to prove, on the "trial, any accounts or demands against the plaintiff or plaintiffs, "to file, with his plea, a bill of the particular items of such "accounts or demands, and no other accounts or demands shall "be suffered to be proved to the jury."

This Statute has been in force for more than twenty years past, and has never, so far as I am able to discover, been construed with such rigor as in this case, by any Court in the State. The profession all, so far as my knowledge extends, agree that the true sense of this Statute is, that the party desiring the same has a right to take a rule upon the party in default. To file a bill of the particular items relied upon on any other construction, would disturb a practice acquiesced in for many years past. No such bill of items was filed with the plea of set-off in this case, and for that reason the Court below would not permit the defendant below to give the proof offered by him on page 33 of the Record. I refer now to the evidence of James Hotchkiss.

I insist that the witness should have been permitted to answer the following questions:—

Q. 1, p. 33. "Do you know of the defendant Dodson selling to "the plaintiff Sears a wagon, at any time? if yea, state the value."

Q. 2. "Do you know whether the defendant Dodson sold and "delivered to Sears, the plaintiff, in March, 1849, one set of single "harness? if yea, state what, if you know, Sears was to pay for "the same."

Q. 3. "Do you know of Dodson the defendant letting the "plaintiff Sears have a twenty-dollar county order?"

Each one of these questions was not permitted to be answered by the Court. Exceptions were properly taken, &c.

It will be seen by the Record that the Court below has inserted in the bill of exceptions that he required of the counsel to state whether the evidence was offered to prove payment or set off; and because the counsel did not state under which plea he offered the same, the evidence was excluded. The evidence was competent under the general issue; and the Court was certainly

acting, to say the least, in great haste when he attempted to thus discriminate. Doing so was an admission that the evidence was, the Court considered, competent as payment. Certainly the county order was payment, if not "*an offset*". Upon the reason of the case the Court erred. The counsel offended him in declining to answer a question that periled the interests of his client before the jury. Nor is this all: on page 34 of the Record is a letter and an attached account which were excluded by the Court from the jury. No reason has yet been given in defence of the excluding of this letter from the jury; nor can any be given. The statute above quoted was not invoked to exclude it, nor did the Court call upon counsel to state under which plea the same was offered.

The remaining question is upon the instructions asked for on the part of the defendant below. I here refer to them, and ask the Court to fully consider them and their applicability to the case. They are to be found upon page 39 of the Record.

A. M. HERRINGTON,
Attorney for Appellant.

Christian B. Dodson

vs

Peter Sears

Points & Brief of Applts

Filed May 9th 1861

L. Leland

Clerk

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

CHRISTIAN B. DODSON,
Appellant,
vs.
PETER SEARS,
Appellee.
} OF THE APRIL TERM OF SAID COURT FOR 1861.

POINTS AND BRIEF MADE BY THE APPELLEE.

This suit was brought by the Appellee against the Appellant, for the purpose of closing up and getting a full and final settlement with him of their old matters and dealings, as there was no other possible way by which the Appellee could effect it, without submitting to what he regarded as gross injustice and wrong by and through the Appellant; in which suit he was desirous of adjusting and settling all matters of deal and monetary transactions then pending between them. With this view, the first count in the Declaration was drawn to cover rent then due and owing from the Appellant to the Appellee, for the occupation and use of several hundred acres of land, owned jointly by them, situated in the town of Geneva, in Kane County, and State of Illinois, which the Appellant had had the full and entire use of for several years, but which was then about being divided, by the order of a Court of Chancery. The Defendant set up the legal objection that it was joint and partnership property, and refused to allow that matter to be investigated, and consequently no evidence was offered under that count in the Declaration. The Court will observe by the evidence that this suit was not instituted by the Appellee only a very few days before the Statute of Limitations would have attached as to most, if not all of his claims against the Appellant, and he had every reason to believe that should he allow such a state of things to occur, that the Appellant would at once take advantage of it. He had already indulged the Appellant in waiting on him with the hope and desire of effecting an amicable adjustment of their matters if possible, until the Statute was about to attach itself to his claim, and he thereby lose his right of recovering; but in addition to this difficulty, in the meantime, two of his most important witnesses had left the State, to-wit: his Clerks Anthony and Collins, one having removed to, and was then residing in Kansas, and the other in Iowa, consequently he had to go to trial without the benefit of their evidence. Their depositions would have been of no benefit or service to him without the books of the Appellant being present, and this was an impossibility. The residence of those Clerks is proved by the witness Scott, as the Court can see by reference to the Record, page No.——. The same was the case in reference to young Dodson, the brother of the Appellant, therefore the Appellee could not prove several Orders which he held and had paid, consequently had to lose them, the young Dodson then being in some one of the Southern States.

The first error assigned by the Appellant is the admitting in evidence the Account Books of the Appellee. In this there was no error. First, because the Court only allowed to be given in evidence such portions of the Appellee's charges made against the Appellant, and contained in said books, as were proven by the witness Scott to be either made in the handwriting of the Appellee or that of witness, all others being rejected, and excluded from the Jury, after the proving of the books. The custom of the Appellee in making entries in his books at the time of sale, and the delivery of a portion of the articles charged at or about the time of making entries in the books, and the correctness and fairness of the same, was established by a score of individuals, who had had dealings with him, and settled from the same account books. In this respect the Appellee fully met

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

CHRISTIAN B. DODSON,
Appellant,
vs.
PETER SEARS,
Appellee.
} OF THE APRIL TERM OF SAID COURT FOR 1861.

POINTS AND BRIEF MADE BY THE APPELLEE.

This suit was brought by the Appellee against the Appellant, for the purpose of closing up and getting a full and final settlement with him of their old matters and dealings, as there was no other possible way by which the Appellee could effect it, without submitting to what he regarded as gross injustice and wrong by and through the Appellant; in which suit he was desirous of adjusting and settling all matters of deal and monetary transactions then pending between them. With this view, the first count in the Declaration was drawn to cover rent then due and owing from the Appellant to the Appellee, for the occupation and use of several hundred acres of land, owned jointly by them, situated in the town of Geneva, in Kane County, and State of Illinois, which the Appellant had had the full and entire use of for several years, but which was then about being divided, by the order of a Court of Chancery. The Defendant set up the legal objection that it was joint and partnership property, and refused to allow that matter to be investigated, and consequently no evidence was offered under that count in the Declaration. The Court will observe by the evidence that this suit was not instituted by the Appellee only a very few days before the Statute of Limitations would have attached as to most, if not all of his claims against the Appellant, and he had every reason to believe that should he allow such a state of things to occur, that the Appellant would at once take advantage of it. He had already indulged the Appellant in waiting on him with the hope and desire of effecting an amicable adjustment of their matters if possible, until the Statute was about to attach itself to his claim, and he thereby lose his right of recovering; but in addition to this difficulty, in the meantime, two of his most important witnesses had left the State, to-wit: his Clerks Anthony and Collins, one having removed to, and was then residing in Kansas, and the other in Iowa, consequently he had to go to trial without the benefit of their evidence. Their depositions would have been of no benefit or service to him without the books of the Appellant being present, and this was an impossibility. The residence of those Clerks is proved by the witness Scott, as the Court can see by reference to the Record, page No.——. The same was the case in reference to young Dodson, the brother of the Appellant, therefore the Appellee could not prove several Orders which he held and had paid, consequently had to lose them, the young Dodson then being in some one of the Southern States.

The first error assigned by the Appellant is the admitting in evidence the Account Books of the Appellee. In this there was no error. First, because the Court only allowed to be given in evidence such portions of the Appellee's charges made against the Appellant, and contained in said books, as were proven by the witness Scott to be either made in the handwriting of the Appellee or that of witness, all others being rejected, and excluded from the Jury, after the proving of the books. The custom of the Appellee in making entries in his books at the time of sale, and the delivery of a portion of the articles charged at or about the time of making entries in the books, and the correctness and fairness of the same, was established by a score of individuals, who had had dealings with him, and settled from the same account books. In this respect the Appellee fully met

each and every requirement in the fullest and most ample manner, Vide 3 Scammon, R page 120, nor does it come in conflict with the principle laid down in the case of Waggemon vs. Peters, in the 22d of Illinois, 42.

Secondly, There was no error in admitting said Books in evidence, because it was proven by witness Scott, Vide page No. ~~10~~ 18 of Record, that the Appellant sent a Pass Book when he purchased goods of the Appellee, and the same were entered on said Pass Book. The same fact was established by the daughter of the Appellant. The Appellant when called upon to produce that book, so that it could be used in evidence, stated that he could not find it, so the Appellee was and is deprived of the use of it.

It is much to be regretted that this affidavit made by the Appellant, attempting to account for the non-production of said Pass Book, and decided by the Court to be insufficient, is not copied in the Record and Abstract, as required, as well as the amended affidavit made on the subject. Had these come up with the Record, the Court must have been impressed with the fact that the Appellant had not manifested any very great degree of zeal, or put forth much industry in making search for it, and had no desire to produce it; and whether these facts were apparent to the Appellant, and had anything to do with their disappearance from among the files in the case, to those who had seen and read them there can be but little question about it; at all events the books and affidavits disappeared very mysteriously, and were absent when most required and needed by the adversary of the Appellant. Whether he, or those managing his suit for him, have any knowledge on that subject or not, the Appellee is deprived of their use. How far these very affidavits may have gone to satisfy the judgment of the Court before whom this suit was tried, that it did lay in the power of the Appellant to have produced said pass book, and brought it forward, and confirmed him and the Jury of the justness and fairness of the Appellee's books and the charges therein made, your Honors of course now have no means of knowing and determining, but it makes the impression on our minds, that it is a strong circumstance in considering and passing on this branch of the case.

The second error assigned by the Appellant is, that the Court erred in not allowing the question asked to the witness Hotchkiss to be answered. In this there was no error committed by the Court, for under the issue in the case, the Appellant had no right to give in evidence matters of setoff, as he had not filed with his plea any bill of the particular items of setoff or demand which he held against the Appellee, as he was required to do by the statute, vide, Scates and Treat's Statute, pages 259 & 260, Sect. 12, in order to avail himself of it on the trial, and having neglected to file with his plea of setoff this bill of particulars, the Court properly excluded the evidence from the Jury. The purpose of the Appellant in not filing with said plea the bill of particulars undoubtedly was, not to apprize the Appellee of the nature of their claims, and thus take him by surprise on the trial, and find him unprepared to prove that the items charged had been paid or settled for, but in this instance, as in many others of such a character, the Appellant in seeking to overreach the Appellee, really overreached himself, thereby receiving no benefit from his craftiness. That the same matters, which he wanted to prove by the witness, and rejected by the Court had been paid and settled for long before, no person can doubt, who carefully investigates the evidence in the case. These items had without a doubt been settled for before the Appellant went to California, as had been the matters mentioned in the letter, dated at Boston, July 21st, 1847, that these were trumpped up, and state claims which had been settled, is supported by the fact that the one thousand dollars sworn to as having been paid to Mr. Sears in his store, on the 4th of May, 1849, by Mrs. Dodson, (not Mr. Dodson as in the printed abstract,) had been and was accounted for in the bill made and rendered by Mr. Sears to Mr. Dodson, March 19th, 1851, as was the County order of $20, also the $325 or $330 Receipt of Lathram, as testified to by Mr. Nathan Dodson, the father of the Appellant.

Why was it that the Appellant wanted to place his father on the stand, an old gentleman of some 75 years of age, to prove the payment to the Appellee of the sum of $1,000, at his store, on the 4th of May, 1849, and the payment of $325,

by Adolphus Lathram, when he held in his hands the account rendered by the Appellee, showing how it had been used and applied. This same bill showed that $201 50–100 of the same one thousand dollars had been used by Sears in the payment of a note of that amount which he held against Dodson, which was probably given for money lent to him when he left in March before for California. Why did Sears hold this note if he had not accounted to and with Dodson for the flour mentioned in said letter and bill?

The Court will find this item of $201 50–100 for note on page 36 of Record. This bill rendered shows and establishes beyond all doubt, that all matters between Sears and Dodson had been settled prior to his going to California in March, 1849, as reasonable, prudent, and business men naturally would have done, and as they no doubt did, and as the proof shows.

The Appellent does not insist or even assert that the verdict is not in accordance with the evidence: nor does he assert that it is wrong or unjust, he seeks no new trial on that ground, and it would have been unavailing if he had with the evidence in this case before the Court; he then admits that substantial justice has been done on the merits but implores the aid of this Honorable Court for a new trial in a case where he admits that he has really been dealt fairly with by the Jury, but insists that by the technicalities of the law he should be granted a new trial, although he has been mercifully dealt with by the Jury on the trial.

The third error assigned by the Appellant is that the Court erred in giving the instruction asked by the Appellee. It seems to us that there is no force in this point. There were but three Instructions given on the part of the Appellee. The first instruction was, "That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit and passed upon by the Arbitrators Curtis & Dearborn did not include any of the claims or demands which the Plaintiff in this suit in his declaration by the proof seeks to recover from the Defendant, then the special plea that the Plaintiff ought not to recover because the said submission and award is not sustained, the law on that point is for the Plaintiff." The proposition of the law here asaerted and given to the Jury is so manifestly right and just, that it seems to us no argument is required in support of it.

The second instruction is in these words, "If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff as charged in the Declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of said indebtedness, nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff, (notwithstanding the award,) is entitled to recover the indebtedness, unless the items of the Plaintiff's claim were intended to apply in payment of the award."

The bond of submission and the award of the arbitrators sufficiently established the fact as to what was submitted to arbitration, and this was only the matters connected with the store or stock of goods, and nothing else, it had nothing to do with their private transactions, but referred exclusively to their interest in the stock of goods then in Geneva, consequently none of the matters or claims which the Appellee brought forward in this suit was included and embraced in the arbitration, and therefore was not affected by it; if not, then there was a subsisting indebtedness against the Appellant, and he had a right to bring them forward and insist on their applying in payment in this suit, on the award, and this is all that is conveyed by this instruction. The other instruction is, "In no event under the issue in this case is the Defendant entitled to recover a verdict against the Plaintiff. On this instruction under the issue in the case, nothing is required from us.

The fourth error assigned by the Appellant is, that the Court erred in refusing to give all the instructions asked by him. The Court did give on the part of the Appellant for instructions, which covered all the legal propositions covered by the instructions refused.

The first instruction given for Appellant instructed "the Jury that if they believed from the evidence that the orders, the Scott note, the book account, &c., of the Plaintiff were intended as payment of the sum or award, &c., then they will find for the Appellant, as to such orders, note, and book account." This instruction covered all that was embraced in the first instruction refused, and therefore the Court committed no error in refusing to give it, saying nothing in regard to the wording of the instruction and the manner in which it was drawn.

The second instruction of the Appellant which was refused by the Court was improper, and the Court committed no error in refusing to give it, because under the issue found in the case, the Appellant did not and could not recover a judgment against the Appellee for any balance due him, the Appellant, from the Appellee, even had the Jury believed such a state of facts to have existed, but their verdict showed that they did not, therefore the Court properly refused to give it, although the Court would have been justified in excluding it on another and different ground, to wit, its form and wording.

The second and fourth instructions given on the behalf of the Appellant cover the same ground, and more correctly lay down the law in the case than the third instruction, asked by the Appellant, and which was refused, therefore the Court was right in refusing to give it, and no error was committed, and no injury could have resulted to the Appellant from such refusal.

The Court also should have excluded the third instruction refused, for the reason that it was ambiguous, as it did not instruct the Jury whether they should find a verdict for the balance due or not, if such a state of facts they believed to exist.

Fifthly, the Appellant insists that the Court erred in permitting the Plaintiff to give in evidence the note of $48 46, made by Dodson, White, and Hotchkiss. We can see no error, as Mr. West testified that this note was given for School money lent to Dodson, and Hotchkiss and White were sureties, and that Sears took up said note for Dodson in 1852. This note is not charged in the account rendered by Sears to Dodson, then by every principle of law this note was competent and legal evidence of money paid by the Appellee for the use of the Appellant, if West's testimony is to be believed, and there is no evidence tending to disapprove it.

The last error assigned by the Appellant is, that the Court erred in not granting a new trial; if so, it must have been for some of the reasons assigned, and are any of them well founded? to us it appears not, for the reasons heretofore given; and that substantial justice was done, and that the Appellant was allowed by the Jury all substantial claims which he held against the Appellee, no one can doubt who makes himself acquainted and familiar with the facts in this case; and when that has been done the Court would not grant a new trial to parties, and most certainly not in cases like this, to gratify the Appellant's desire for litigation.

J. H. MAYBORNE,
Attorney for Appellee.

Supreme Court 1851

C. B. Dodson

v 225

Peter Seuna

Pomeroy Brief

Filed April 22, 1851

L. Leland

Clerk

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

CHRISTIAN B. DODSON, *Appellant,*
vs.
PETER SEARS, *Appellee.*
} OF THE APRIL TERM OF SAID COURT FOR 1861.

POINTS AND BRIEF MADE BY THE APPELLEE.

This suit was brought by the Appellee against the Appellant, for the purpose of closing up and getting a full and final settlement with him of their old matters and dealings, as there was no other possible way by which the Appellee could effect it, without submitting to what he regarded as gross injustice and wrong by and through the Appellant; in which suit he was desirous of adjusting and settling all matters of deal and monetary transactions then pending between them. With this view, the first count in the Declaration was drawn to cover rent then due and owing from the Appellant to the Appellee, for the occupation and use of several hundred acres of land, owned jointly by them, situated in the town of Geneva, in Kane County, and State of Illinois, which the Appellant had had the full and entire use of for several years, but which was then about being divided, by the order of a Court of Chancery. The Defendant set up the legal objection that it was joint and partnership property, and refused to allow that matter to be investigated, and consequently no evidence was offered under that count in the Declaration. The Court will observe by the evidence that this suit was not instituted by the Appellee only a very few days before the Statute of Limitations would have attached as to most, if not all of his claims against the Appellant, and he had every reason to believe that should he allow such a state of things to occur, that the Appellant would at once take advantage of it. He had already indulged the Appellant in waiting on him with the hope and desire of effecting an amicable adjustment of their matters if possible, until the Statute was about to attach itself to his claim, and he thereby lose his right of recovering; but in addition to this difficulty, in the meantime, two of his most important witnesses had left the State, to-wit: his Clerks Anthony and Collins, one having removed to, and was then residing in Kansas, and the other in Iowa, consequently he had to go to trial without the benefit of their evidence. Their depositions would have been of no benefit or service to him without the books of the Appellant being present, and this was an impossibility. The residence of those Clerks is proved by the witness Scott, as the Court can see by reference to the Record, page No.——. The same was the case in reference to young Dodson, the brother of the Appellant, therefore the Appellee could not prove several Orders which he held and had paid, consequently had to lose them, the young Dodson then being in some one of the Southern States.

The first error assigned by the Appellant is the admitting in evidence the Account Books of the Appellee. In this there was no error. First, because the Court only allowed to be given in evidence such portions of the Appellee's charges made against the Appellant, and contained in said books, as were proven by the witness Scott to be either made in the handwriting of the Appellee or that of witness, all others being rejected, and excluded from the Jury, after the proving of the books. The custom of the Appellee in making entries in his books at the time of sale, and the delivery of a portion of the articles charged at or about the time of making entries in the books, and the correctness and fairness of the same, was established by a score of individuals, who had had dealings with him, and settled from the same account books. In this respect the Appellee fully met

each and every requirement in the fullest and most ample manner, Vide 3 Scammon, R page 120, nor does it come in conflict with the principle laid down in the case of Waggemon vs. Peters, in the 22d of Illinois, 42.

Secondly, There was no error in admitting said Books in evidence, because it was proven by witness Scott, Vide page No. ——— of Record, that the Appellant sent a Pass Book when he purchased goods of the Appellee, and the same were entered on said Pass Book. The same fact was established by the daughter of the Appellant. The Appellant when called upon to produce that book, so that it could be used in evidence, stated that he could not find it, so the Appellee was and is deprived of the use of it.

It is much to be regretted that this affidavit made by the Appellant, attempting to account for the non-production of said Pass Book, and decided by the Court to be insufficient, is not copied in the Record and Abstract, as required, as well as the amended affidavit made on the subject. Had these come up with the Record, the Court must have been impressed with the fact that the Appellant had not manifested any very great degree of zeal, or put forth much industry in making search for it, and had no desire to produce it; and whether these facts were apparent to the Appellant, and had anything to do with their disappearance from among the files in the case, to those who had seen and read them there can be but little question about it; at all events the books and affidavits disappeared very mysteriously, and were absent when most required and needed by the adversary of the Appellant. Whether he, or those managing his suit for him, have any knowledge on that subject or not, the Appellee is deprived of their use. How far these very affidavits may have gone to satisfy the judgment of the Court before whom this suit was tried, that it did lay in the power of the Appellant to have produced said pass book, and brought it forward, and confirmed him and the Jury of the justness and fairness of the Appellee's books and the charges therein made, your Honors of course now have no means of knowing and determining, but it makes the impression on our minds, that it is a strong circumstance in considering and passing on this branch of the case.

The second error assigned by the Appellant is, that the Court erred in not allowing the question asked to the witness Hotchkiss to be answered. In this there was no error committed by the Court, for under the issue in the case, the Appellant had no right to give in evidence matters of setoff, as he had not filed with his plea any bill of the particular items of setoff or demand which he held against the Appellee, as he was required to do by the statute, vide, Scates and Treat's Statute, pages 259 & 260, Sect. 12, in order to avail himself of it on the trial, and having neglected to file with his plea of setoff this bill of particulars, the Court properly excluded the evidence from the Jury. The purpose of the Appellant in not filing with said plea the bill of particulars undoubtedly was, not to apprize the Appellee of the nature of their claims, and thus take him by surprise on the trial, and find him unprepared to prove that the items charged had been paid or settled for, but in this instance, as in many others of such a character, the Appellant in seeking to overreach the Appellee, really overreached himself, thereby receiving no benefit from his craftiness. That the same matters, which he wanted to prove by the witness, and rejected by the Court had been paid and settled for long before, no person can doubt, who carefully investigates the evidence in the case. These items had without a doubt been settled for before the Appellant went to California, as had been the matters mentioned in the letter, dated at Boston, July 21st, 1847, that these were trumpped up, and state claims which had been settled, is supported by the fact that the one thousand dollars sworn to as having been paid to Mr. Sears in his store, on the 4th of May, 1849, by Mrs. Dodson, (not Mr. Dodson as in the printed abstract,) had been and was accounted for in the bill made and rendered by Mr. Sears to Mr. Dodson, March 19th, 1851, as was the County order of $20, also the $325 or $330 Receipt of Lathram, as testified to by Mr. Nathan Dodson, the father of the Appellant.

Why was it that the Appellant wanted to place his father on the stand, an old gentleman of some 75 years of age, to prove the payment to the Appellee of the sum of $1,000, at his store, on the 4th of May, 1849, and the payment of $325,

by Adolphus Lathram, when he held in his hands the account rendered by the Appellee, showing how it had been used and applied. This same bill showed that $201 50–100 of the same one thousand dollars had been used by Sears in the payment of a note of that amount which he held against Dodson, which was probably given for money lent to him when he left in March before for California. Why did Sears hold this note if he had not accounted to and with Dodson for the flour mentioned in said letter and bill?

The Court will find this item of $201 50–100 for note on page 36 of Record. This bill rendered shows and establishes beyond all doubt, that all matters between Sears and Dodson had been settled prior to his going to California in March, 1849, as reasonable, prudent, and business men naturally would have done, and as they no doubt did, and as the proof shows.

The Appellent does not insist or even assert that the verdict is not in accordance with the evidence: nor does he assert that it is wrong or unjust, he seeks no new trial on that ground, and it would have been unavailing if he had with the evidence in this case before the Court; he then admits that substantial justice has been done on the merits but implores the aid of this Honorable Court for a new trial in a case where he admits that he has really been dealt fairly with by the Jury, but insists that by the technicalities of the law he should be granted a new trial, although he has been mercifully dealt with by the Jury on the trial.

The third error assigned by the Appellant is that the Court erred in giving the instruction asked by the Appellee. It seems to us that there is no force in this point. There were but three Instructions given on the part of the Appellee. The first instruction was, "That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit and passed upon by the Arbitrators Curtis & Dearborn did not include any of the claims or demands which the Plaintiff in this suit in his declaration by the proof seeks to recover from the Defendant, then the special plea that the Plaintiff ought not to recover because the said submission and award is not sustained, the law on that point is for the Plaintiff." The proposition of the law here asaerted and given to the Jury is so manifestly right and just, that it seems to us no argument is required in support of it.

The second instruction is in these words, "If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff as charged in the Declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of said indebtedness, nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff, (notwithstanding the award,) is entitled to recover the indebtedness, unless the items of the Plaintiff's claim were intended to apply in payment of the award."

The bond of submission and the award of the arbitrators sufficiently established the fact as to what was submitted to arbitration, and this was only the matters connected with the store or stock of goods, and nothing else, it had nothing to do with their private transactions, but referred exclusively to their interest in the stock of goods then in Geneva, consequently none of the matters or claims which the Appellee brought forward in this suit was included and embraced in the arbitration, and therefore was not affected by it; if not, then there was a subsisting indebtedness against the Appellant, and he had a right to bring them forward and insist on their applying in payment in this suit, on the award, and this is all that is conveyed by this instruction. The other instruction is, "In no event under the issue in this case is the Defendant entitled to recover a verdict against the Plaintiff. On this instruction under the issue in the case, nothing is required from us.

The fourth error assigned by the Appellant is, that the Court erred in refusing to give all the instructions asked by him. The Court did give on the part of the Appellant for instructions, which covered all the legal propositions covered by the instructions refused.

The first instruction given for Appellant instructed "the Jury that if they believed from the evidence that the orders, the Scott note, the book account, &c., of the Plaintiff were intended as payment of the sum or award, &c., then they will find for the Appellant, as to such orders, note, and book account." This instruction covered all that was embraced in the first instruction refused, and therefore the Court committed no error in refusing to give it, saying nothing in regard to the wording of the instruction and the manner in which it was drawn.

The second instruction of the Appellant which was refused by the Court was improper, and the Court committed no error in refusing to give it, because under the issue found in the case, the Appellant did not and could not recover a judgment against the Appellee for any balance due him, the Appellant, from the Appellee, even had the Jury believed such a state of facts to have existed, but their verdict showed that they did not, therefore the Court properly refused to give it, although the Court would have been justified in excluding it on another and different ground, to wit, its form and wording.

The second and fourth instructions given on the behalf of the Appellant cover the same ground, and more correctly lay down the law in the case than the third instruction, asked by the Appellant, and which was refused, therefore the Court was right in refusing to give it, and no error was committed, and no injury could have resulted to the Appellant from such refusal.

The Court also should have excluded the third instruction refused, for the reason that it was ambiguous, as it did not instruct the Jury whether they should find a verdict for the balance due or not, if such a state of facts they believed to exist.

Fifthly, the Appellant insists that the Court erred in permitting the Plaintiff to give in evidence the note of $48 46, made by Dodson, White, and Hotchkiss. We can see no error, as Mr. West testified that this note was given for School money lent to Dodson, and Hotchkiss and White were sureties, and that Sears took up said note for Dodson in 1852. This note is not charged in the account rendered by Sears to Dodson, then by every principle of law this note was competent and legal evidence of money paid by the Appellee for the use of the Appellant, if West's testimony is to be believed, and there is no evidence tending to disapprove it.

The last error assigned by the Appellant is, that the Court erred in not granting a new trial; if so, it must have been for some of the reasons assigned, and are any of them well founded? to us it appears not, for the reasons heretofore given; and that substantial justice was done, and that the Appellant was allowed by the Jury all substantial claims which he held against the Appellee, no one can doubt who makes himself acquainted and familiar with the facts in this case; and when that has been done the Court would not grant a new trial to parties, and most certainly not in cases like this, to gratify the Appellant's desire for litigation.

J. H. MAYBORNE,
Attorney for Appellee.

Supreme Court 1854

C. B. Dodson

v.

Peter Sims

Points & Brief

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

CHRISTIAN B. DODSON,
Appellant,
vs.
PETER SEARS,
Appellee.
} OF THE APRIL TERM OF SAID COURT FOR 1861.

POINTS AND BRIEF MADE BY THE APPELLEE.

This suit was brought by the Appellee against the Appellant, for the purpose of closing up and getting a full and final settlement with him of their old matters and dealings, as there was no other possible way by which the Appellee could effect it, without submitting to what he regarded as gross injustice and wrong by and through the Appellant; in which suit he was desirous of adjusting and settling all matters of deal and monetary transactions then pending between them. With this view, the first count in the Declaration was drawn to cover rent then due and owing from the Appellant to the Appellee, for the occupation and use of several hundred acres of land, owned jointly by them, situated in the town of Geneva, in Kane County, and State of Illinois, which the Appellant had had the full and entire use of for several years, but which was then about being divided, by the order of a Court of Chancery. The Defendant set up the legal objection that it was joint and partnership property, and refused to allow that matter to be investigated, and consequently no evidence was offered under that count in the Declaration. The Court will observe by the evidence that this suit was not instituted by the Appellee only a very few days before the Statute of Limitations would have attached as to most, if not all of his claims against the Appellant, and he had every reason to believe that should he allow such a state of things to occur, that the Appellant would at once take advantage of it. He had already indulged the Appellant in waiting on him with the hope and desire of effecting an amicable adjustment of their matters if possible, until the Statute was about to attach itself to his claim, and he thereby lose his right of recovering; but in addition to this difficulty, in the meantime, two of his most important witnesses had left the State, to-wit: his Clerks Anthony and Collins, one having removed to, and was then residing in Kansas, and the other in Iowa, consequently he had to go to trial without the benefit of their evidence. Their depositions would have been of no benefit or service to him without the books of the Appellant being present, and this was an impossibility. The residence of those Clerks is proved by the witness Scott, as the Court can see by reference to the Record, page No. 14. The same was the case in reference to young Dodson, the brother of the Appellant, therefore the Appellee could not prove several Orders which he held and had paid, consequently had to lose them, the young Dodson then being in some one of the Southern States.

The first error assigned by the Appellant is the admitting in evidence the Account Books of the Appellee. In this there was no error. First, because the Court only allowed to be given in evidence such portions of the Appellee's charges made against the Appellant, and contained in said books, as were proven by the witness Scott to be either made in the handwriting of the Appellee or that of witness, all others being rejected, and excluded from the Jury, after the proving of the books. The custom of the Appellee in making entries in his books at the time of sale, and the delivery of a portion of the articles charged at or about the time of making entries in the books, and the correctness and fairness of the same, was established by a score of individuals, who had had dealings with him, and settled from the same account books. In this respect the Appellee fully met

each and every requirement in the fullest and most ample manner, Vide 3 Scammon, R page 120, nor does it come in conflict with the principle laid down in the case of Waggemon vs. Peters, in the 22d of Illinois, 42.

Secondly, There was no error in admitting said Books in evidence, because it was proven by witness Scott, Vide page No. —— of Record, that the Appellant sent a Pass Book when he purchased goods of the Appellee, and the same were entered on said Pass Book. The same fact was established by the daughter of the Appellant. The Appellant when called upon to produce that book, so that it could be used in evidence, stated that he could not find it, so the Appellee was and is deprived of the use of it.

It is much to be regretted that this affidavit made by the Appellant, attempting to account for the non-production of said Pass Book, and decided by the Court to be insufficient, is not copied in the Record and Abstract, as required, as well as the amended affidavit made on the subject. Had these come up with the Record, the Court must have been impressed with the fact that the Appellant had not manifested any very great degree of zeal, or put forth much industry in making search for it, and had no desire to produce it; and whether these facts were apparent to the Appellant, and had anything to do with their disappearance from among the files in the case, to those who had seen and read them there can be but little question about it; at all events the books and affidavits disappeared very mysteriously, and were absent when most required and needed by the adversary of the Appellant. Whether he, or those managing his suit for him, have any knowledge on that subject or not, the Appellee is deprived of their use. How far these very affidavits may have gone to satisfy the judgment of the Court before whom this suit was tried, that it did lay in the power of the Appellant to have produced said pass book, and brought it forward, and confirmed him and the Jury of the justness and fairness of the Appellee's books and the charges therein made, your Honors of course now have no means of knowing and determining, but it makes the impression on our minds, that it is a strong circumstance in considering and passing on this branch of the case.

The second error assigned by the Appellant is, that the Court erred in not allowing the question asked to the witness Hotchkiss to be answered. In this there was no error committed by the Court, for under the issue in the case, the Appellant had no right to give in evidence matters of setoff, as he had not filed with his plea any bill of the particular items of setoff or demand which he held against the Appellee, as he was required to do by the statute, vide, Scates and Treat's Statute, pages 259 & 260, Sect. 12, in order to avail himself of it on the trial, and having neglected to file with his plea of setoff this bill of particulars, the Court properly excluded the evidence from the Jury. The purpose of the Appellant in not filing with said plea the bill of particulars undoubtedly was, not to apprize the Appellee of the nature of their claims, and thus take him by surprise on the trial, and find him unprepared to prove that the items charged had been paid or settled for, but in this instance, as in many others of such a character, the Appellant in seeking to overreach the Appellee, really overreached himself, thereby receiving no benefit from his craftiness. That the same matters, which he wanted to prove by the witness, and rejected by the Court had been paid and settled for long before, no person can doubt, who carefully investigates the evidence in the case. These items had without a doubt been settled for before the Appellant went to California, as had been the matters mentioned in the letter, dated at Boston, July 21st, 1847, that these were trumpped up, and state claims which had been settled, is supported by the fact that the one thousand dollars sworn to as having been paid to Mr. Sears in his store, on the 4th of May, 1849, by Mrs. Dodson, (not Mr. Dodson as in the printed abstract,) had been and was accounted for in the bill made and rendered by Mr. Sears to Mr. Dodson, March 19th, 1851, as was the County order of $20, also the $325 or $330 Receipt of Lathram, as testified to by Mr. Nathan Dodson, the father of the Appellant.

Why was it that the Appellant wanted to place his father on the stand, an old gentleman of some 75 years of age, to prove the payment to the Appellee of the sum of $1,000, at his store, on the 4th of May, 1849, and the payment of $325,

by Adolphus Lathram, when he held in his hands the account rendered by the Appellee, showing how it had been used and applied. This same bill showed that $201 50–100 of the same one thousand dollars had been used by Sears in the payment of a note of that amount which he held against Dodson, which was probably given for money lent to him when he left in March before for California. Why did Sears hold this note if he had not accounted to and with Dodson for the flour mentioned in said letter and bill?

The Court will find this item of $201 50–100 for note on page 36 of Record. This bill rendered shows and establishes beyond all doubt, that all matters between Sears and Dodson had been settled prior to his going to California in March, 1849, as reasonable, prudent, and business men naturally would have done, and as they no doubt did, and as the proof shows.

The Appellent does not insist or even assert that the verdict is not in accordance with the evidence: nor does he assert that it is wrong or unjust, he seeks no new trial on that ground, and it would have been unavailing if he had with the evidence in this case before the Court; he then admits that substantial justice has been done on the merits but implores the aid of this Honorable Court for a new trial in a case where he admits that he has really been dealt fairly with by the Jury, but insists that by the technicalities of the law he should be granted a new trial, although he has been mercifully dealt with by the Jury on the trial.

The third error assigned by the Appellant is that the Court erred in giving the instruction asked by the Appellee. It seems to us that there is no force in this point. There were but three Instructions given on the part of the Appellee. The first instruction was, "That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit and passed upon by the Arbitrators Curtis & Dearborn did not include any of the claims or demands which the Plaintiff in this suit in his declaration by the proof seeks to recover from the Defendant, then the special plea that the Plaintiff ought not to recover because the said submission and award is not sustained, the law on that point is for the Plaintiff." The proposition of the law here asaerted and given to the Jury is so manifestly right and just, that it seems to us no argument is required in support of it.

The second instruction is in these words, "If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff as charged in the Declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of said indebtedness, nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff, (notwithstanding the award,) is entitled to recover the indebtedness, unless the items of the Plaintiff's claim were intended to apply in payment of the award."

The bond of submission and the award of the arbitrators sufficiently established the fact as to what was submitted to arbitration, and this was only the matters connected with the store or stock of goods, and nothing else, it had nothing to do with their private transactions, but referred exclusively to their interest in the stock of goods then in Geneva, consequently none of the matters or claims which the Appellee brought forward in this suit was included and embraced in the arbitration, and therefore was not affected by it; if not, then there was a subsisting indebtedness against the Appellant, and he had a right to bring them forward and insist on their applying in payment in this suit, on the award, and this is all that is conveyed by this instruction. The other instruction is, "In no event under the issue in this case is the Defendant entitled to recover a verdict against the Plaintiff. On this instruction under the issue in the case, nothing is required from us.

The fourth error assigned by the Appellant is, that the Court erred in refusing to give all the instructions asked by him. The Court did give on the part of the Appellant for instructions, which covered all the legal propositions covered by the instructions refused.

The first instruction given for Appellant instructed "the Jury that if they believed from the evidence that the orders, the Scott note, the book account, &c., of the Plaintiff were intended as payment of the sum or award, &c., then they will find for the Appellant, as to such orders, note, and book account." This instruction covered all that was embraced in the first instruction refused, and therefore the Court committed no error in refusing to give it, saying nothing in regard to the wording of the instruction and the manner in which it was drawn.

The second instruction of the Appellant which was refused by the Court was improper, and the Court committed no error in refusing to give it, because under the issue found in the case, the Appellant did not and could not recover a judgment against the Appellee for any balance due him, the Appellant, from the Appellee, even had the Jury believed such a state of facts to have existed, but their verdict showed that they did not, therefore the Court properly refused to give it, although the Court would have been justified in excluding it on another and different ground, to wit, its form and wording.

The second and fourth instructions given on the behalf of the Appellant cover the same ground, and more correctly lay down the law in the case than the third instruction, asked by the Appellant, and which was refused, therefore the Court was right in refusing to give it, and no error was committed, and no injury could have resulted to the Appellant from such refusal.

The Court also should have excluded the third instruction refused, for the reason that it was ambiguous, as it did not instruct the Jury whether they should find a verdict for the balance due or not, if such a state of facts they believed to exist.

Fifthly, the Appellant insists that the Court erred in permitting the Plaintiff to give in evidence the note of $48 46, made by Dodson, White, and Hotchkiss. We can see no error, as Mr. West testified that this note was given for School money lent to Dodson, and Hotchkiss and White were sureties, and that Sears took up said note for Dodson in 1852. This note is not charged in the account rendered by Sears to Dodson, then by every principle of law this note was competent and legal evidence of money paid by the Appellee for the use of the Appellant, if West's testimony is to be believed, and there is no evidence tending to disapprove it.

The last error assigned by the Appellant is, that the Court erred in not granting a new trial; if so, it must have been for some of the reasons assigned, and are any of them well founded? to us it appears not, for the reasons heretofore given; and that substantial justice was done, and that the Appellant was allowed by the Jury all substantial claims which he held against the Appellee, no one can doubt who makes himself acquainted and familiar with the facts in this case; and when that has been done the Court would not grant a new trial to parties, and most certainly not in cases like this, to gratify the Appellant's desire for litigation.

J. H. MAYBORNE,
Attorney for Appellee.

Supreme Court / 1861

C B Dodson

v 2241

Allen Seang

Points & Brief

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

CHRISTIAN B. DODSON, *Appellant,*
vs.
PETER SEARS, *Appellee.*
} OF THE APRIL TERM OF SAID COURT FOR 1861.

POINTS AND BRIEF MADE BY THE APPELLEE.

This suit was brought by the Appellee against the Appellant, for the purpose of closing up and getting a full and final settlement with him of their old matters and dealings, as there was no other possible way by which the Appellee could effect it, without submitting to what he regarded as gross injustice and wrong by and through the Appellant; in which suit he was desirous of adjusting and settling all matters of deal and monetary transactions then pending between them. With this view, the first count in the Declaration was drawn to cover rent then due and owing from the Appellant to the Appellee, for the occupation and use of several hundred acres of land, owned jointly by them, situated in the town of Geneva, in Kane County, and State of Illinois, which the Appellant had had the full and entire use of for several years, but which was then about being divided, by the order of a Court of Chancery. The Defendant set up the legal objection that it was joint and partnership property, and refused to allow that matter to be investigated, and consequently no evidence was offered under that count in the Declaration. The Court will observe by the evidence that this suit was not instituted by the Appellee only a very few days before the Statute of Limitations would have attached as to most, if not all of his claims against the Appellant, and he had every reason to believe that should he allow such a state of things to occur, that the Appellant would at once take advantage of it. He had already indulged the Appellant in waiting on him with the hope and desire of effecting an amicable adjustment of their matters if possible, until the Statute was about to attach itself to his claim, and he thereby lose his right of recovering; but in addition to this difficulty, in the meantime, two of his most important witnesses had left the State, to-wit: his Clerks Anthony and Collins, one having removed to, and was then residing in Kansas, and the other in Iowa, consequently he had to go to trial without the benefit of their evidence. Their depositions would have been of no benefit or service to him without the books of the Appellant being present, and this was an impossibility. The residence of those Clerks is proved by the witness Scott, as the Court can see by reference to the Record, page No. 14. The same was the case in reference to young Dodson, the brother of the Appellant, therefore the Appellee could not prove several Orders which he held and had paid, consequently had to lose them, the young Dodson then being in some one of the Southern States.

The first error assigned by the Appellant is the admitting in evidence the Account Books of the Appellee. In this there was no error. First, because the Court only allowed to be given in evidence such portions of the Appellee's charges made against the Appellant, and contained in said books, as were proven by the witness Scott to be either made in the handwriting of the Appellee or that of witness, all others being rejected, and excluded from the Jury, after the proving of the books. The custom of the Appellee in making entries in his books at the time of sale, and the delivery of a portion of the articles charged at or about the time of making entries in the books, and the correctness and fairness of the same, was established by a score of individuals, who had had dealings with him, and settled from the same account books. In this respect the Appellee fully met

each and every requirement in the fullest and most ample manner, Vide 3 Scammon, R page 120, nor does it come in conflict with the principle laid down in the case of Waggemon vs. Peters, in the 22d of Illinois, 42.

Secondly, There was no error in admitting said Books in evidence, because it was proven by witness Scott, Vide page No. 18 of Record, that the Appellant sent a Pass Book when he purchased goods of the Appellee, and the same were entered on said Pass Book. The same fact was established by the daughter of the Appellant. The Appellant when called upon to produce that book, so that it could be used in evidence, stated that he could not find it, so the Appellee was and is deprived of the use of it.

It is much to be regretted that this affidavit made by the Appellant, attempting to account for the non-production of said Pass Book, and decided by the Court to be insufficient, is not copied in the Record and Abstract, as required, as well as the amended affidavit made on the subject. Had these come up with the Record, the Court must have been impressed with the fact that the Appellant had not manifested any very great degree of zeal, or put forth much industry in making search for it, and had no desire to produce it; and whether these facts were apparent to the Appellant, and had anything to do with their disappearance from among the files in the case, to those who had seen and read them there can be but little question about it; at all events the books and affidavits disappeared very mysteriously, and were absent when most required and needed by the adversary of the Appellant. Whether he, or those managing his suit for him, have any knowledge on that subject or not, the Appellee is deprived of their use. How far these very affidavits may have gone to satisfy the judgment of the Court before whom this suit was tried, that it did lay in the power of the Appellant to have produced said pass book, and brought it forward, and confirmed him and the Jury of the justness and fairness of the Appellee's books and the charges therein made, your Honors of course now have no means of knowing and determining, but it makes the impression on our minds, that it is a strong circumstance in considering and passing on this branch of the case.

The second error assigned by the Appellant is, that the Court erred in not allowing the question asked to the witness Hotchkiss to be answered. In this there was no error committed by the Court, for under the issue in the case, the Appellant had no right to give in evidence matters of setoff, as he had not filed with his plea any bill of the particular items of setoff or demand which he held against the Appellee, as he was required to do by the statute, vide, Scates and Treat's Statute, pages 259 & 260, Sect. 12, in order to avail himself of it on the trial, and having neglected to file with his plea of setoff this bill of particulars, the Court properly excluded the evidence from the Jury. The purpose of the Appellant in not filing with said plea the bill of particulars undoubtedly was, not to apprize the Appellee of the nature of their claims, and thus take him by surprise on the trial, and find him unprepared to prove that the items charged had been paid or settled for, but in this instance, as in many others of such a character, the Appellant in seeking to overreach the Appellee, really overreached himself, thereby receiving no benefit from his craftiness. That the same matters, which he wanted to prove by the witness, and rejected by the Court had been paid and settled for long before, no person can doubt, who carefully investigates the evidence in the case. These items had without a doubt been settled for before the Appellant went to California, as had been the matters mentioned in the letter, dated at Boston, July 21st, 1847, that these were trumpped up, and state claims which had been settled, is supported by the fact that the one thousand dollars sworn to as having been paid to Mr. Sears in his store, on the 4th of May, 1849, by Mrs. Dodson, (not Mr. Dodson as in the printed abstract,) had been and was accounted for in the bill made and rendered by Mr. Sears to Mr. Dodson, March 19th, 1851, as was the County order of $20, also the $325 or $330 Receipt of Lathram, as testified to by Mr. Nathan Dodson, the father of the Appellant.

Why was it that the Appellant wanted to place his father on the stand, an old gentleman of some 75 years of age, to prove the payment to the Appellee of the sum of $1,000, at his store, on the 4th of May, 1849, and the payment of $325,

by Adolphus Lathram, when he held in his hands the account rendered by the Appellee, showing how it had been used and applied. This same bill showed that $201 50–100 of the same one thousand dollars had been used by Sears in the payment of a note of that amount which he held against Dodson, which was probably given for money lent to him when he left in March before for California. Why did Sears hold this note if he had not accounted to and with Dodson for the flour mentioned in said letter and bill?

The Court will find this item of $201 50–100 for note on page 36 of Record. This bill rendered shows and establishes beyond all doubt, that all matters between Sears and Dodson had been settled prior to his going to California in March, 1849, as reasonable, prudent, and business men naturally would have done, and as they no doubt did, and as the proof shows.

The Appellent does not insist or even assert that the verdict is not in accordance with the evidence: nor does he assert that it is wrong or unjust, he seeks no new trial on that ground, and it would have been unavailing if he had with the evidence in this case before the Court; he then admits that substantial justice has been done on the merits but implores the aid of this Honorable Court for a new trial in a case where he admits that he has really been dealt fairly with by the Jury, but insists that by the technicalities of the law he should be granted a new trial, although he has been mercifully dealt with by the Jury on the trial.

The third error assigned by the Appellant is that the Court erred in giving the instruction asked by the Appellee. It seems to us that there is no force in this point. There were but three Instructions given on the part of the Appellee. The first instruction was, "That if the Jury believe from the evidence that the matters submitted to arbitration by the parties to this suit and passed upon by the Arbitrators Curtis & Dearborn did not include any of the claims or demands which the Plaintiff in this suit in his declaration by the proof seeks to recover from the Defendant, then the special plea that the Plaintiff ought not to recover because the said submission and award is not sustained, the law on that point is for the Plaintiff." The proposition of the law here asaerted and given to the Jury is so manifestly right and just, that it seems to us no argument is required in support of it.

The second instruction is in these words, "If the Jury believe from the evidence that the Defendant was indebted to the Plaintiff as charged in the Declaration, then the Plaintiff is entitled to recover in this suit, unless you also believe from the evidence that the Defendant has paid such indebtedness. And if you believe from the evidence that the award made by Curtis and Dearborn was not in payment of said indebtedness, nor any part thereof, then under the general issue it is of no avail to the Defendant, and then under said issue the Plaintiff, (notwithstanding the award,) is entitled to recover the indebtedness, unless the items of the Plaintiff's claim were intended to apply in payment of the award."

The bond of submission and the award of the arbitrators sufficiently established the fact as to what was submitted to arbitration, and this was only the matters connected with the store or stock of goods, and nothing else, it had nothing to do with their private transactions, but referred exclusively to their interest in the stock of goods then in Geneva, consequently none of the matters or claims which the Appellee brought forward in this suit was included and embraced in the arbitration, and therefore was not affected by it; if not, then there was a subsisting indebtedness against the Appellant, and he had a right to bring them forward and insist on their applying in payment in this suit, on the award, and this is all that is conveyed by this instruction. The other instruction is, "In no event under the issue in this case is the Defendant entitled to recover a verdict against the Plaintiff. On this instruction under the issue in the case, nothing is required from us.

The fourth error assigned by the Appellant is, that the Court erred in refusing to give all the instructions asked by him. The Court did give on the part of the Appellant for instructions, which covered all the legal propositions covered by the instructions refused.

The first instruction given for Appellant instructed "the Jury that if they believed from the evidence that the orders, the Scott note, the book account, &c., of the Plaintiff were intended as payment of the sum or award, &c., then they will find for the Appellant, as to such orders, note, and book account." This instruction covered all that was embraced in the first instruction refused, and therefore the Court committed no error in refusing to give it, saying nothing in regard to the wording of the instruction and the manner in which it was drawn.

The second instruction of the Appellant which was refused by the Court was improper, and the Court committed no error in refusing to give it, because under the issue found in the case, the Appellant did not and could not recover a judgment against the Appellee for any balance due him, the Appellant, from the Appellee, even had the Jury believed such a state of facts to have existed, but their verdict showed that they did not, therefore the Court properly refused to give it, although the Court would have been justified in excluding it on another and different ground, to wit, its form and wording.

The second and fourth instructions given on the behalf of the Appellant cover the same ground, and more correctly lay down the law in the case than the third instruction, asked by the Appellant, and which was refused, therefore the Court was right in refusing to give it, and no error was committed, and no injury could have resulted to the Appellant from such refusal.

The Court also should have excluded the third instruction refused, for the reason that it was ambiguous, as it did not instruct the Jury whether they should find a verdict for the balance due or not, if such a state of facts they believed to exist.

Fifthly, the Appellant insists that the Court erred in permitting the Plaintiff to give in evidence the note of $48 46, made by Dodson, White, and Hotchkiss. We can see no error, as Mr. West testified that this note was given for School money lent to Dodson, and Hotchkiss and White were sureties, and that Sears took up said note for Dodson in 1852. This note is not charged in the account rendered by Sears to Dodson, then by every principle of law this note was competent and legal evidence of money paid by the Appellee for the use of the Appellant, if West's testimony is to be believed, and there is no evidence tending to disapprove it.

The last error assigned by the Appellant is, that the Court erred in not granting a new trial; if so, it must have been for some of the reasons assigned, and are any of them well founded? to us it appears not, for the reasons heretofore given; and that substantial justice was done, and that the Appellant was allowed by the Jury all substantial claims which he held against the Appellee, no one can doubt who makes himself acquainted and familiar with the facts in this case; and when that has been done the Court would not grant a new trial to parties, and most certainly not in cases like this, to gratify the Appellant's desire for litigation.

J. H. MAYBORNE,
Attorney for Appellee.

Supreme Court 1861

225

C. B. Dodson

v

Peter Sears

Points & Brief

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

CHRISTIAN B. DODSON, Appellant,
vs.
PETER SEARS, Appellee.

POINTS AND BRIEF BY THE APPELLANT.

The Bill of Exceptions is printed in *extenso.*

The errors committed by the Court below, are as follows:

The plaintiff below called Thos. A. Scott to make the preliminary proof before giving his books in evidence to the jury, who testified (See pages 14, 15 and 16 of Record,) to items named in the book, amounting to the sum of $74.51, as appearing in the handwriting of Sears, and to charges in his, witness's, handwriting in said book, amounting to the sum of $26.00. It also appears by the evidence in said case, that A. W. Glass, Mr. Anthony, Mr. Cleveland, Mr. Clark, Mr. Collins, and others, were clerks for Sears, all of whom were in the habit of making entries in said books, and whose handwriting appears in said books. All of the witnesses by whom Sears sought to prove a settlement of their accounts in said books, stated that Sears had clerks when they dealt with him. Under this state of case—see Record, page 28—the Court permitted the books to be given in evidence to the jury. See 3 Scam., *Boyer* vs. *Sweet*, page 121. See *Hartnett* vs. *Ball*, 22 Ill., page 43, which must be regarded as decisive of this point. The evidence in this case does not come up to the requirements of the authorities cited.

The second point to which the attention of the Court is arrested, arises upon a construction of the following Statute, at the bottom of page 259 and at the top of page 260 of Scates' Statutes.

"The several Circuit Courts shall have power in any action "pending before them, upon motion and good and sufficient

"cause shown, and reasonable notice thereof given, to require "the parties, or either of them, to produce books or writings "in their possession or power, which contain evidence pertinent "to the issue; and it shall be the duty of the defendant or defend- "ants, in all cases where he, she or they intend to prove, on the "trial, any accounts or demands against the plaintiff or plaintiffs, "to file, with his plea, a bill of the particular items of such "accounts or demands, and no other accounts or demands shall "be suffered to be proved to the jury."

This Statute has been in force for more than twenty years past, and has never, so far as I am able to discover, been construed with such rigor as in this case, by any Court in the State. The profession all, so far as my knowledge extends, agree that the true sense of this Statute is, that the party desiring the same has a right to take a rule upon the party in default. To file a bill of the particular items relied upon on any other construction, would disturb a practice acquiesced in for many years past. No such bill of items was filed with the plea of set-off in this case, and for that reason the Court below would not permit the defendant below to give the proof offered by him on page 33 of the Record. I refer now to the evidence of James Hotchkiss.

I insist that the witness should have been permitted to answer the following questions:—

Q. 1, p. 33. "Do you know of the defendant Dodson selling to "the plaintiff Sears a wagon, at any time? if yea, state the value."

Q. 2. "Do you know whether the defendant Dodson sold and "delivered to Sears, the plaintiff, in March, 1849, one set of single "harness? if yea, state what, if you know, Sears was to pay for "the same."

Q. 3. "Do you know of Dodson the defendant letting the "plaintiff Sears have a twenty-dollar county order?"

Each one of these questions was not permitted to be answered by the Court. Exceptions were properly taken, &c.

It will be seen by the Record that the Court below has inserted in the bill of exceptions that he required of the counsel to state whether the evidence was offered to prove payment or set off; and because the counsel did not state under which plea he offered the same, the evidence was excluded. The evidence was competent under the general issue; and the Court was certainly

acting, to say the least, in great haste when he attempted to thus discriminate. Doing so was an admission that the evidence was, the Court considered, competent as payment. Certainly the county order was payment, if not "*an offset*". Upon the reason of the case the Court erred. The counsel offended him in declining to answer a question that periled the interests of his client before the jury. Nor is this all: on page 34 of the Record is a letter and an attached account which were excluded by the Court from the jury. No reason has yet been given in defence of the excluding of this letter from the jury; nor can any be given. The statute above quoted was not invoked to exclude it, nor did the Court call upon counsel to state under which plea the same was offered.

The remaining question is upon the instructions asked for on the part of the defendant below. I here refer to them, and ask the Court to fully consider them and their applicability to the case. They are to be found upon page 39 of the Record.

A. M. HERRINGTON,
Attorney for Appellant.

225

Christian B. Dodson

vs

Peter Sears

Points of Brief of Appellant-

Filed May 9th 1861

L. Leland

Clerk

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Second day of April in the year of our Lord One Thousand Eight Hundred and Sixty and of the Independence of the United States of America the Eighty fourth.

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago.

Van H. Higgins } Judges.
Grant Goodrich }

Carlos Hawes Prosecuting Attorney.

John Gray Sheriff of Cook County.

Attest, Walter Kimball Clerk.

Be it remembered that heretofore to wit on the twentieth day of January (being one of the days of the January term of said Court) in the year of our Lord one thousand eight hundred and sixty the following proceedings were had in the undermentioned Cause and entered of record in said Court to wit—

" Thomas S. Dickinson

—— vs ——

Daniel J. Lake, Charles B. Brown & Eli S. Canfield. } Assumpsit

This day comes said Plaintiff by Lyman Ellmore his attorney and said

defendants by Stanaway Waite & Power their Attorneys and also come and issues being joined herein it is Ordered that a Jury come Whereupon comes the Jury of good and lawful men to wit, A. S. Fay - A. S. Smith Jacob Miller, Mathias Schu - N. Mc Murray. F. B. Bell. Caleb Nixon - Anthony Bebber. Arlin Scanlan Franklin Sull. Carl Exler and Charles Avery who being duly elected tried and sworn to try the issues joined as aforesaid after hearing evidence arguments of Counsel and instructions of the Court retire to consider of their Verdict and afterwards come into Court - submit their Verdict and say Upon the Jury find issues for said plaintiff and assess his damages herein to the sum of Four hundred and eighty five dollars and eleven Cents.

And thereupon plaintiff remits the sum of forty five dollars and fifteen cents from the said Verdict

And thereupon defendants submit their Motion herein for a New trial in this cause.

And afterwards to wit on the fifth day of April (being one of the days of the April term of said Court) A. D. Eighteen hundred and sixty, the following further proceedings were had in said cause and entered of record in said Court to wit,

" Thomas. S. Dickinson
vs
Daniel. J. Lake, Charles. B. Brown & Eli. S. Canfield } Assumpsit

And now again comes the parties to this cause by their respective attorneys as aforesaid and Counsel being heard on the Motion heretofore premitted herein by said defendants for a New trial in this cause and the Court having fully considered overrules said Motion for a New trial Wherefore said plaintiff ought now to have judgment on the Verdict of the Jury herein rendered as aforesaid less the sum remitted by plaintiff as aforesaid.

Therefore it is considered that said plaintiff do have and recover of said defendants his damages of Four hundred and eighty five dollars and eleven cents in form aforesaid, by the Jury here found & assessed less the sum of sixty five dollars and fifteen cents remitted by Plaintiff on the Verdict as aforesaid leaving amount of Judgment at sum of Four hundred and Nineteen dollars and Ninety six cents together with his costs and charges in this behalf expended and have execution therefor.

And thereupon said defendants pray an Appeal herein to the Supreme Court which is allowed on filing Bond in seven hundred dollars conditioned as the law directs, to be approved by a Judge of this Court Bond and Bill of Exceptions to be filed in Twenty days

And afterwards to wit on the twenty fourth day of April A. D Eighteen hundred and Sixty came the said defendants and filed in the Office of the Clerk of said Court their Appeal Bond in said cause; Which said Bond is in the words and figures as follows to wit?

"Know all Men by these Presents That we David J. Lake, Charles B. Brown and Eli S. Canfield Principals and Philip Wadsworth of the County of Cook and State of Illinois are held and firmly bounden unto Thomas S. Dickerson also of the same County & State in the penal sum of Seven hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly severally and firmly by these Presents.

Witness our hands and seals this 20th day of April A. D 1860.

The Condition of the above obligation is such That whereas the said Thomas S. Dickerson did on the fifth day of April A. D. 1860 in the Superior Court of Chicago in and for the County of Cook and State aforesaid and of the April term thereof A. D. 1860 recover a Judgment against the above bounden David J. Lake, Charles B. Brown and Eli S. Canfield for the sum of Four hundred and eighty five dollars and Eleven

and besides costs of suit: from which said judgment of the said Circuit Court, the said David J. Lake Charles B. Brown and Eli S. Canfield for the sum of Four hundred and eighty five dollars and Eleven cents besides Costs of suit from which said Judgment of the said Superior Court—the said David J. Lake Charles B. Brown and Eli S. Canfield have prayed for and obtained an Appeal to the Supreme Court of said State.

Now therefore if the said Lake, Brown and Canfield shall duly prosecute their said appeal with Effect, and moreover, pay the amount of the Judgment costs, interest and damages rendered, and to be rendered against them in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be Void, otherwise to remain in full force and virtue.

David J. Lake (Seal)
Chs B. Brown (Seal)
Eli S. Canfield (Seal)."
Philip Hadsworth (Seal)"

"Approved
Wm. N. Higgins
Judge."

State of Illinois }
Cook County } ss.

A Waller Kimball Clerk of the Superior Court of Chicago within and for the County

of Cook in the State of Illinois do hereby certify the above and foregoing to be a full true and perfect Transcript of the Judgment and Order allowing Appeal Entered of record in said Court in a certain suit therein, wherein Thomas. S. Dickenson was Plaintiff and David. J. Lake, Charles. B. Brown and Eli. S. Canfield were defendants, together with the Appeal Bond now in my office on file in said cause.

And I do hereby further certify that neither the said defendants, or either of them, nor any other person in their or either of their behalf, have taken any record of the proceedings in said cause from my office, for the purpose of prosecuting their said appeal as aforesaid.

In testimony whereof I have here unto set my hand and affixed the Seal of said Superior Court of Chicago in said County, this twenty fourth day of April A. D. 1861.

Walter Kimball Clerk

331

State of Illinois.
Cook County

331

Thomas S. Dickerson

vs

David J. Lake et als

Certificate of
Non Prosecution of Appeal

Filed April 25. 1861
L. Leland
Clerk

1861

Judgment
$419.96/100
05
20,9980

5 per Cent

$ 2.00 Paid W.K.