

No. 12857

Supreme Court of Illinois

Morton

vs.

McClure

70. ~~75~~ 161

~~Joseph S. Norton~~

~~Allen M. O'Brien~~

70

1859

12857

Pratt

"State of Illinois }
"Carroll County }

At a term of the County
Court begun and holden in and for
the County of Carroll and State of Illinois
on Monday the 1st day of March AD 1858.

"Present Hon. Reuben H. Gray Judge

"Josiah B. Johnson Sheriff

"Rufus S. Bailey Clerk-

Be it remembered that on the 12th day of
February AD 1858 was filed in the Office
of the Clerk of the County Court in and for
the County and State aforesaid a precept
and Declaration as follows-

Precipis-

"State of Illinois } ss.
"Carroll County } County Court of Carroll County

"Allen McGlone } March Term AD 1857
as } Assumpsit

"Japhath J. Morton } Damages \$300

of Carroll County
and with please issue summons against the defendant
in the above entitled cause returnable to the
next term thereof

Miller & Harrington
Petty Attys

Declaration

State of Illinois }
Carroll County } ss County Court of Carroll
County March Term ¹⁸⁸⁸ 1888.
Allen Mc Clure
vs
Japhath S. Morton

Allen Mc Clure by
Miller & Harrington his attorneys complains
of Japhath S. Morton in a plea of assumpsit
for that whereas the said Japhath S. Morton
on the first day of February 1888 at the
said Carroll County was indebted to the
plaintiff in \$300 for the use and occupation
of certain rooms, apartments, and furniture
of the plaintiff before that time used and
enjoyed by Elizabeth Morton the wife of
the said defendant, and Minny Morton,
Albert Morton and Martha Morton child-
ren of the said defendant, at his request and
by the permission of the plaintiff, and for
meat, drink, attendance, and other neces-
saries, and goods by the plaintiff found and
provided for the said Elizabeth Morton, Mrs.
Morton, Albert Morton and Martha Morton
the Wife and Children of the defendant as
aforesaid at his request, and in \$300 for
the price and value of goods then and

that bargained and sold by the plaintiff to the
 defendant at his request, and in \$300 for
 the price and value of goods then and there
 sold and delivered by the plaintiff to the defen-
 dant at his request, And in the sum of \$300
 for the price and value of work then and there
 done and materials for the same furnished
 by the plaintiff for the defendant at his re-
 quest and in \$300 for money lent then and
 there by the plaintiff to the defendant at his
 request, And in \$300 for money then and there
 paid by the plaintiff for the use of the defendant
 at his request, And in \$300 for money then
 and there received by the defendant for the use
 of the plaintiff, And in \$300 for money paid
 to be due from the defendant to the plaintiff
 on an account then and there stated between
 them, And whereas the defendant afterwards
 on the third day of February 1858 in con-
 sideration of the premiums then and there paid
 and to pay the said several sums of money to
 the plaintiff on request, yet he hath dis-
 rejected his premiums and hath not paid the
 said sums of money nor either of them or any
 part thereof to the damage of the plaintiff
 \$300 and thereupon he brings suit &c.

Miller & Harrington
 Plaintiffs attys.

Copy of account sued on.

" Japhath T. Morten.

vs. Allen McClure Dr.

" To the use & occupation of rooms, apartments & land furniture, And for meat drink atten- & dance & other necessaries & goods provided to & wife and children of Morten	\$300-
" To Goods bargained and sold	\$300-
" " Goods sold and delivered	\$300-
" " Work done and materials furnished	\$300-
" " Money lent	\$300-
" " Money paid to use of Morten	\$300-
" " Money had & received	\$300
" " Money found to be due on A/c stated	\$300

4th
Afterwards to wit on the day and year
aforesaid was issued out of the Clerk's Office
a summons as follows—

STATE OF ILLINOIS, CARROLL COUNTY, SS:

" The People of the State of Illinois, To the Sheriff of said
County, Greeting:

WE COMMAND YOU THAT YOU SUMMON

Japheth S Morton

" If he shall be found in your County personally, to be and appear in the County Court, before the
Judge thereof, on the first day of the next term of said Court, to be held at the Court House in Mt. Carroll, on
the first Monday in March next, at ten o'clock in the forenoon, then and there to answer
unto

Allen McBlure

" in a plea Assumpsit
Damages three Hundred Dollars

" And have you then and there this writ and the manner in which you shall have executed the same.

" In Witness Whereof, we have caused the seal of said Court to

be hereto affixed and attested by RUFUS G. BAILEY, Clerk thereof at

Mt. Carroll, this

12th

day of

Feb

A. D. 1858

R G Bailey

Clerk."

And upon said Writ of Summons the Sheriff
of Carroll County endorsed his return as
follows—

" Served the within Summons by
reading it to and within the hearing of the within
named defendant Japheth S Morton this 18th day
of February A D 1858 J. B. Johnson Sheriff

Afterwards to wit on the 1st day of March
A.D. 1858, (the same being the first day of the Term
of said County Court)-was filed a motion that
plaintiff give a bond for costs.
Which motion was as follows to wit

" State of Illinois } ss.
" Carroll County }

" Joseph S. Morton being
" duly sworn on oath states that: " Allen
" McClure who is plaintiff in an action
" assumpsit commenced against affiant
" said suit now pending in this Court,
" he believes to be unable to pay the costs of
" said suit and that he is so unsettled as to
" endanger the officers of the Court with re-
" spect to their legal demands unless the said
" Allen McClure be required to give security
" for the payment of costs in said suit.

" Given under subscribed

" before me this 1st day of
" March, A.D. 1858.

" R. G. Bailey

" Clerk }

" Joseph S. Morton "

5th
And afterwards to wit on the 2nd day
of March A.D. 1858 the Plaintiff filed a bond
as follows

"State of Illinois } ss.
"Carroll County } County Court of Carroll Co.

"Allen Mc Clure }
" vs }
"Gephath J. Morton }

"I do hereby enter myself
4 security for costs in this cause and acknow-
4 ledge myself bound to pay or cause to be paid
4 all costs which may accrue in this action
4 either to the opposite party or to any of the
4 officers of this Court in pursuance of the laws
4 of this State.

"Dated this 2^d day of March 1858.

"Allen Mc Clure,

"Henry Mc Call,

"B. H. Hallett.

And on said 2nd day of March the defendant
by his Atty presented and offered a plea
in abatement, which plea was as follows

County Court

March Term 1858.

Gephth T. Morton said
by the name of Gephth T. Morton,
at

Allen McClure

ss. And Gephth T. Morton
against whom the said Allen McClure hath ex-
hibited his said writ and declaration by the name of
Gephth T. Morton in his own person comes and
says that he is married and called by the name of
Gephth T. Morton and by that name and sur-
name hath always since the time of his noli-vivente
been named and called, without this that he
the said Gephth T. Morton now is or at the time
of exhibiting the said writ and declaration or
ever before has been named or called by the name of
Gephth T. Morton as by the said writ and dec-
laration is supposed. And this he the said Gephth
T. Morton is ready to verify wherefore he prays judg-
ment of the said writ & declaration and that the
same may be quashed &c.

Gephth T. Morton
said by the name of
Gephth T. Morton
at

State of Illinois } ss.
Carroll County }

Allen McClure

Gephth T. Morton, defendant in this cause maketh
oath, and saith, that the plea herunto annexed is
true in substance and fact,
Sworn to & subscribed by me {
this day of March 1858 }

6^u

And on the said day was also filed a
plea by defendant which plea was
was as follows — to wit

Japheth T. Martin } Carroll County Court
at } March Term A.D. 1855.
Allen, McClure }

And the said Japheth T.
Martin by John Wilson his Attorney comes
and defends the wrong and injury, wherein
and saith that he did not undertake or prom-
-ise in manner and form as the said Plaintiff
hath above thereof complained against him, and
if this he puts himself upon the County &c.

John Wilson for det.
And for a further plea in this behalf the
said defendant saith Retrieven Because
he says that the said Plaintiff before and at
the time of the commencement of this suit
to wit at the County of Carroll in the State
of Illinois was and still is indebted to him
the said Japheth T. Martin in a large sum
of money to wit the sum of Two hundred
dollars lawful money, for the work and la-
-bor care and diligence of the said defendant
by the said defendant before that time done
and performed and bestowed in and about the
business of the said Plaintiff and at his
special instance and request and also for
other materials and other necessary things

by the said defendant before that time found and
provided and used and applied in and
about that work and labour for the said
Plaintiff and at his ~~and~~ like special instance
and request, and also in the further sum of
Two hundred dollars of like lawful money
for divers goods wares and merchandize, by
the said defendant before that time sold and
delivered to the said Plaintiff and at his like
special instance and request, and also in
the further sum of Two hundred dollars of like
lawful money for money by the said defend-
ant before that time lent, and advanced
to, and paid laid out and expended for the
said Plaintiff and at his like special instance
and request. And also for that the said
Plaintiff accounted with the said defendant
of and concerning divers other sums of mon-
ey from the said Plaintiff to the said defend-
ant before that time due and owing and
then in arrears and unpaid. And upon
such accounting the said Plaintiff was then
and there found to be in arrears and indebted
to the said defendant in the further sum of
Two hundred dollars of like lawful money, which
said sum of money so due and owing from
the said Plaintiff to the said defendant as
aforesaid exceed the damages sustained by
the said Plaintiff by reason of the non-per-

performance by him the said defendant of the
said several supposed promises and undertakings
in the said declaration mentioned
and out of which said sums of money so
due and owing from the said Plaintiff to the
said defendant he the said defendant is
ready & willing and ready offers to set off and
allow to the said Plaintiff the full amount
of the said damages according to the form
of the statute in such case made and pro-
vided. And this the said defendant is ready to
verify whereon he prays judgement &c.

John Wilson for deft.

Also on said 2nd day of March in the year
aforesaid was filed by the Plaintiff against
the defendant an account or bill -
and also on said day the defendant filed
an account or bill against said Plaintiff
which accounts or bills were as follows
to wit -

to J. S. Norton

To Allen Mc Clure

Dr.

For sewing done by his wife board

" 1857	8 articles furnished &c.	
" Jan 26	To making one dress	\$1.50
" Feb 1	" " " "	\$1.50
" " 15	" " Three ladies caps	\$0.50
" March 23	" Boarding and washing for Albert Morton his son one week	\$2.00
" " 24	" Making three shirts	\$0.75
" April 11	" two yds duffing	\$0.30
" " "	" Making two pair drawers	\$0.35
" " "	" " One Buck & dress	\$0.50
" " "	" Knitting 5 pairs stockings	\$0.50
" " "	" Making two common & picking shirts	\$0.35
" " 18	" four yds Muslin	\$0.40
" " "	" Making 3 Shirts	\$0.35
" " "	" " 2 Bonnets	\$0.50
" " 28	" " 1 Dress	\$0.50
" " "	" One Apron	\$0.15
" " "	" One Dress	\$0.37 1/2
" May 1	" 2 1/2 Rellins	\$0.60
" " "	" Making 1 Cape	\$0.30
" " "	" Medicine for Martha	\$0.30
" " 24	" One Hair for dress	\$0.25
" " "	" 6 Yds Croico	\$1.75
" June 10	" Making 1 Shirt	\$0.50
" " "	" " " "	\$0.25
" " 30	" " " "	\$0.25

960

July 6	To	Making 1 Shirt	\$6.25
" 24	"	" " " Dress	\$6.50
" 28	"	" " " "	\$0.37 1/2
Aug 4	"	" " " "	\$0.37 1/2
Sept 1	"	" " " 3 aprons	\$0.75
Nov 14	"	" " " 1 Bonnet	\$0.25
1857 Aug 1	"	" " " 1 Shirt	\$0.50
Sept 20 1858	"	" " " " "	\$0.50
Jan 4	"	Board of Elizabeth his wife from Nov 12 th 1857 to Jan 4 th 1858 - 7 Weeks and 4 days at \$1.50 per week	\$11.34
" "	"	Board of Manning his son from Nov 12 th 1857 to 1858 Jan 4 7 Weeks & 4 days at \$1.50 per week	\$11.34
" 9	"	Board of Albert his son from Oct 26 th 1857 to Jan 7 th 1858 ten weeks & 4 days at \$1.50 per week	\$15.75
" 22	"	Board of Martha his daughter from April 15 th 1857 to Jan 23 rd 1858 forty weeks & 4 days at \$1.50 per week	\$61.50

In all Amty to \$115.85 1/2 c -

Mount Carroll Ill. July 20th 1858.
Allen McClure.

To Joseph H. Norton Dr.

1857			
March	To Goods of Wm. P. Bairds Store		\$16.10
"	" Muslin		.49
"	" Order to Bairds		3.00
"	" Cash		1.50
May	" Do		2.00
"	" Do		2.00
"	" 1 Gal Molasses.		1.00
"	" Cream Tartar Syrup.		1.00
"	" 2 lb Sugarates		.20
"	" Sugar of Map Wood		1.00
"	" 2 Gal Molasses at Nelsons		2.00
"	" Sugar Map Wood		1.00
"	" 4 lb Candles		.30
June	" 1 lb flour at Mill		6.25
"	" 10 lbs Calico Bairds		.50
"	" Lin yds Plannel Do		3.00
"	" 1 pair Shoes "		1.00
"	" 1/2 lb Tea "		.50
"	" Coffee "		.50
"	" Cash		5.00
"	" Cash		1.00
"	" Do		1.00
"	" Pick 25. Paint 35 - Cash 40 -		1.00
"	" To Wifes services 2 days & nights 3 co - Use of Car 2 months pay	800 400	7.00
"	" Use of Bed & Bedding 10 mo		5.00
1858-2			\$64.09

And on the 3^d day of March in the year
aforesaid the following Replication to Defendants
plea was filed - To wit -

State of Illinois } ss. County Court of Carroll
Carroll County } County March Term 1857

Allen McClure }
vs }
Japheth J. Meador }

And the said plaintiff as
to the plea of the said defendant by him first above
pleaded and whereof he hath put him upon the
County doth the like as

Miller & Harrington Attys for plff.

And the said plaintiff as to the said plea of the
said defendant by him secondly above pleaded saith that
the said plaintiff by reason of anything by the said defen-
dant, in that plea alleged ought not to be barred from pro-
secuting and maintaining his aforesaid action there against
the said defendant because he saith that he the said
plaintiff was not nor is indebted to the said defendant
in manner and form as the said defendant hath al-
leged in his said last plea in that behalf alleged,
And this the plaintiff prays may be inquired of
by the court.

Miller & Harrington Attys for plff.

The following instructions were asked by
defendant. All of which were given
except the marked "Refused"

On the part of the defendant the Court is asked
to instruct the jury.

1st If the jury believe from the evidence that the
defendants son a minor or defendants
wife furnished goods to the Plaintiff either to pay
for board or clothing for the defendants
family it is proper matter of set off to the
Plaintiffs action.

2nd If the jury believe from the evidence that the
son of the defendants a minor took his
own wages and purchased goods to pay the
Plaintiff for necessities furnished the defen-
dants family in his absence the price of
such goods is a matter of set off to the Plaintiff's demand.

3rd If the jury believe from the evidence that the
Plaintiff has not paid his demand what is
just they will find for the defendant.

4th If the jury believe from the evidence that the
charges in the Plaintiffs account were at

9 the time voluntary donations or gifts to the de-
 9 fendant's family the defendant is not charge-
 4 able & they should find for the defendant.

6th If the jury believe from the evidence that the
 4 Plaintiff sent for Albert to come & live at
 4 his house to go to school & work for his board
 9 the defendant cannot be charged for his board

16th If the jury believe from the evidence that the
 9 Plaintiff offered a free home at his house
 4 without charge to the wife & children of the
 4 defendant the defendant cannot be charged
 4 therefor & the jury must find for the defendant.

7th If the jury believe from the evidence that the Plain-
 4 tiff received his wife's sister Martha the defen-
 4 dant's daughter into his family as company
 4 for his wife or to assist in Plaintiff's family
 4 that it is a voluntary undertaking & the de-
 4 fendant is not chargeable & they should
 4 find for the defendant.

8th That the jury are to receive the law through
 4 instructions from the Court and if the jury
 4 refuse to act in accordance with the in-
 4 structions so given their verdict will be set
 4 aside for improper conduct.

Refused

9th That the jury are to receive the law through
14th instructions from the Court, and if the jury
Direct refuse to act upon ~~it~~ is in accordance with
11th the law their verdict will be set aside for im-
12th proper conduct.

Copy of Instructions asked by Plaintiff,
which was given —

9th That an offset to be allowed must be between
7th the same identical parties and in the same char-
4th acter and it is against law to allow any other
1st offset

Copy of Verdict of Jury

¶ We the Jury find for Plaintiff and assess the
¶ damage at one hundred and twenty four
¶ dollars and twenty three cents.

J. G. Dunn Jurman?

Exceptions

¶ Gephth S. Marton } County Court Mich. T. 1858.
¶ ats }
¶ Allen McClure } Motion for new trial
 1st The verdict is against
¶ the law & ^{the} evidence.

¶ 2nd That incompetent testimony was permitted
¶ on the part of the Plaintiff to sustain his action.

¶ 3rd That the Court refused to instruct the jury
¶ as to the law of the case when called for by
¶ the defendant.

John Wilson

Atty for defendant.

& Allen Mc Clure } County Court
 & } March Term. A.D. 1858.
 & Gepheth T. Morton }

& The above named Plaintiff
 & on his oath states that the said defendant
 & is about immediately to leave this State, to-
 & king away with his his property, and further
 & that it is his belief that he will lose the benefit
 & of his judgment against this defendant. re-
 & corded at this term of this Court unless an
 & execution issued immediately on said judgment

& Subscribed & sworn
 & to before me this 8th
 & day of March 1858
 &

Allen Mc Clure

& R. G. Bailey clerk.

& Gepheth T. Morton }
 & at }
 & Allen Mc Clure } The defendant excepts to the
 & ruling of the Court in refusing to grant a new trial -
 & also excepts to the ruling of the Court in granting
 & execution upon the affidavit of the Plaintiff -
 & -and refusing time to the defendant to execute
 & his appeal.

John Wilson

Atty for defendant

Alm M Chas } Monday March
" " } 1st 1858
" Japheth T Horton }

Record And now at this
day came the defendant and cited
his motion based upon Affidavit
to rule the Plaintiff to give security
for costs, And thereupon the Court
ruled that the Plaintiff be required
to give security for costs and that
such security be given by 8 morning
morning at 9 O'clock

Tuesday March 2nd 1858,

And now at this day came the
said Plaintiff and filed his bond
for costs with Henry M Call and
B. H. Wallcut his securities. After
which the defendant filed his Plea
in Abatement, to which the Plaintiff
demurred, The Demurrer sustained by
the Court. Thereupon the Defendant
(leave of the Court being first had)
filed his Plea of General issue
and Set-off.

Wednesday March 3rd 1858,

And now at this day came the Plaintiff
and filed his application to the Plaintiff
defendants Plea &c.

Friday March 5th 1858-

And now at this time the issues
being joined and the parties being
ready for trial it is ordered by the
Court that a jury be called, whereupon
came the following good and lawful
men to try the issues between the parties
to wit, A. H. Ashton, Myron Belknap,
Smith Bennett, John Bushman
Daniel Mifflin, Chauncey Grant
Washington Adams, Samuel S. Allen
Jackson Beavis, Harry Jones, Thomas
Ashmery, William Stouffer who being
duly elected tried and sworn, to well
and truly try the issues joined after
hearing the evidence and arguments
of Counsel retired to consider of their
verdict. And at the Court on Saturday March 6th 1858
came the Court with a verdict as follows
"We the jury find for Plaintiff and
assess the damages at one hundred
and twenty four dollars and twenty three
cents. (Signed) S. S. Allen Foreman"
Thereupon the Counsel for the
defendant entered a motion for
a new trial-

Monday March 8th 1858

And now at this day came the

parties by their counsel And
the Court after hearing the argu-
ment upon the motion for a new
trial overruled said Motion -
Whereupon it is considered And
adjudged by the Court that the
said Plaintiff have And recover
of the said defendant the aforesaid
sum of one hundred and twenty
four dollars and twenty three cents
the Amount of his damages so
as aforesaid as aforesaid together with
his costs and charges in this his
suit by him expended And that
he have execution therefor

Thereupon the defendant by his
counsel prayed an appeal to the
Supreme Court of the State of Illinois
affirming as his securities in such
appeal Duncan McKay William
McKay - Thereupon the Plaintiff filed
an affidavit that defendant is about to
leave the State &c & prays ~~judgment~~
~~and execution~~ - Whereupon the Court
ruled that the defendant should file
his bond immediately or execution
would issue - no bond being filed
immediately, ~~judgment given for~~
~~\$124.23~~ and execution ordered to issue.

State of Illinois } County Court
Cannell County } March Term
Ad 1858

Japheth T. Morton }
Att. }
Allwell Chan }
Cfumpst.

Be it remembered
that on the trial of this cause the
Counsel for the Plaintiff to maintain
and prove the issue on his part put
the following question to the witness
Henry Reynolds a witness produced
and sworn on the part of the Plaintiff
"Did he (meaning the Defendant)
leave the Country? To which question
the Defendant by his Counsel object-
ed as being ^{leading} & incompetent, where-
upon the matter was referred to the
Court who being of opinion that
said question was proper overruled
the objection of the Counsel of the
Defendant and permitted said
question to be asked the witness
who answered as follows "Yes" where
the Counsel for the Plaintiff asked
the witness, "Where did he go?" and
the witness answered, "I suppose to
Missouri, as I received a letter from
there from him." To which question

17
And answer the defendant by his
counsel objects, which objections
were overruled by the Court and the
evidence permitted to go to the jury
to which opinion of the Court on the
above questions and answers the
counsel for the defendant excepted.

To Mary Ann Moon a witness pro-
duced and sworn on the part of the
Plaintiff the Counsel for the Plaintiff
put the following question "What
did Mrs. Norton (meaning the wife of
the defendant) state to you in reference
to her situation and condition?"

Objection by counsel for defendant
as incompetent, objection overruled
by the Court, The witness answered
"She told me she came there (meaning
to the Plaintiffs to stay a few weeks
until she got able to work she said
she wasnt able to work and hadnt
been for some time." which evi-
dence by the Court was permitted
to go to the jury to which opinion
of the Court the Counsel for the de-
fendant excepted -

It was also proven on the
trial of this case by Alexander S

a minor
Morton son of the Defendant, pre-
sented and sworn on the part of
the Defendant to prove the issue on
the part of the Defendant, "That he
needs a minor son of the Defendant
That when Defendant left home
he gave witness his time and told
him to ~~do~~ the best he could for the
family, That Defendant left the
family upon the farm (meaning
the farm of the Defendant about
four miles from Mt Canoll where
the Defendant then resides.) That the
Plaintiff's wife was his sister that
Defendant's wife needs his mother
That Albert & Mary need his young-
er brother & Martha a young
sister, that shortly after his father
left his mother engaged at the
Mount Canoll Seminary taking
charge of the domestic work taking
her child Mary with her that
he himself also went out at the
Seminary, That Albert also went
out, and that Martha went to
live with his sister Plaintiff's wife
That witness and wife of Defendant
while at the Seminary and during the

absence of Defendant, furnished to the Plaintiff, the items charged in the Defendants bill, they were given to the Plaintiff to pay him for what he had done for the family - On the cross examination the witness stated these items were furnished Plaintiff by him and his Mother that such goods as were furnished at the Store he settled for, that he did not see Plaintiff get the goods at the Store but that the Plaintiff acknowledged receiving them, that the Plaintiff upon presenting the Defendants account did not deny any portion of it except \$5 cash charged which he said he thought he did not get. This statement was not rebutted by any other witness.

Albert J. Morton a witness produced and sworn on the part of the Defendant testified, that he was sent for when he was working for wages to come to the Plaintiff, to work for his board and go to school that in pursuance of such message he did at the time charged in the Plaintiffs account go to the Plaintiff, and lived

in his family went to school worked nights and mornings for his board, which testimony was not rebutted by any other witness. - The Plaintiffs account was proven by the testimony of the following named witnesses sworn and sworn on the heat of the Plaintiff & Wit John Rindollar, Nancy Rindollar, Susan Puttemper and Mary Ann Moore. After the evidence had been given to the jury the Counsel asked the Court to instruct the jury as follows -

1st If the jury believe from the evidence that the Defendants saw a minor or Defendants wife furnished goods to the Plaintiff either to pay for board or clothing for the Defendants family it is proper matter of set-off to the Plaintiffs action -

2nd If the jury believe from the evidence that the son of the Defendant a minor took his own wages and purchased goods to pay the Plaintiff for necessaries furnished the Defendants family in his absence, the price of such goods is a matter of set-off to the Plaintiffs demand -

3rd

If the jury believe from the evidence that the Plaintiff has been paid his demand what is just they will find for the Defendant —

4th

If the jury believe from the evidence that the charges in the Plaintiff's account were at the time voluntary donations or gifts to the ~~Plaintiff~~ Defendant's family the Defendant is not chargeable and they should find for the Defendant —

5th

If the jury believe from the evidence that the Plaintiff sent for Albert to come and live at his house to go to school and work for his board the Defendant cannot be charged for his board —

6th

If the jury believe from the evidence that the Plaintiff offered a free home at his house without charge to the wife and children of the Defendant, the Defendant cannot be charged therefor and the jury must find for the Defendant —

7th

If the jury believe from the evidence that the Plaintiff received his wife's sister Martha Defendant's daughter into his family as company for his

wife or to assist in Plaintiff's family
that it is a voluntary undertaking
and the defendant is not chargeable
and they should find for defendant.

8th

"Refused"

That the jury are to receive the law
through instructions from the
Court and if the jury refuse to act
in accordance with the instructions,
so given their verdict will be set
aside for improper conduct.

9th

"Refused"

That the jury are to receive the
law through instructions from the
Court and if the jury refuse to act
upon or in accordance with ^{the} law
their verdict will be set aside for
improper conduct.

The Counsel for the Plaintiff
asked the Court to instruct the jury

"That an off-set to be allowed
must be between the same identical
parties and in the same character
and it is against law to allow any
other off-set."

All the above instructions
were given to the jury except the 8th
but none were marked given or
refused except the 8th & 9th by
defendant. The jury then retired.

(Quoting) the
Court's instructions
"in instructions" &
marking "law" &

to consider of this verdict and returned into Court the following verdict
 "We the jury find for Plaintiff and
 Assess the damage at one hundred
 and twenty four dollars and twenty
 three cents"

(Signed) "S. S. Dunn Foreman"

Whereupon the Counsel for the Defendant entered a motion for a new trial for the following reasons -

- 1st That the verdict is against the law and the evidence
- 2nd That incompetent testimony ^{was} admitted - On the part of the Plaintiff to sustain his action -
- 3rd That the Court refused to instruct the jury as to the law of the case which called for by the Defendant -

Which motion for a new trial ^{was} overruled by the Court. To which opinion of the Court the Counsel for the Defendant excepted. Whereupon the Court ordered judgement to be entered against the Defendant upon said verdict, And thereupon the Defendant by his Counsel prayed an appeal to the Supreme Court of the State of Illinois, And offered as security

on such Appeal William McKay and
Duncan McKay two responsible House-
holders of Carroll County living about
four miles from the County seat of
said County, and asked them to bring
such securities forward to enter as
security on the Appeal bond of the
defendant, When the Court ordered the
Appeal to be executed forthwith and
refused to give time to the defendant
to bring forward his securities and
thereupon upon the Affidavit of the
Plaintiff the Court ordered execution
immediately to issue, And the Clerk in
compliance with said order immediately
by issued said execution before any
record was made of said judgment
and before the expiration of said term
of the Court, to which opinion of the
Court and to all of which proceedings
the Counsel for the defendant excepts

(The following is a copy of the
account of the Plaintiff on file)
J. T. Norton

to Allen McClum Dr.

For sewing done by his wife board
1857. And articles furnished &c —

June 20 To making one dress

\$1.50

2nd

July 1	To making 1 dress	1.50
" 15	" 3 Ladies Capes	.50
March 22	" boarding & washing for Albus Morton his son one week	2.00
" 24	" Making 3 Shirts	.75
April 15	" Two Yds drilling	.30
" "	" Making two pair drawers	.25
" "	" 1 bark & dress	.50
" "	" Knitting 5 pairs stockings	.50
" "	" Making 3 Common or Hickory Shirts	.25
" 18	" four Yds muslin	.40
" "	" Making two shirts	.25
" "	" " two bonnets	.50
" 28	" " 1 dress	.50
" "	" " 1 Apron	.15
" "	" " 1 dress	.37½
May 1	" 2 Yds ribbon	.60
" "	" Making 1 cap	.30
" "	" Medicine for Martha	.30
" 24	" 1 waist for dress	.25
" "	" 6 Yds calico	.75
June 15 th	" Making 1 shirt	.50
" "	" " " "	.25
" 30	" " " "	.25
July 6	" " " "	.25
" 24	" " " Dress	.50
" 28	" " " "	.37½
August 4	" " " "	.37½

Sept 1	"	"	Thru Ceprons	.75
Nov 14	"	"	1 Bonnet	.25
April 1	"	"	1 Shirt	.50
Sept 20	"	"	"	.50
1858 Jan 4	"	"	Board of Elizaletta his wife from Nov 12 th 1857 to 1858. Jan 4 - 7 weeks & 4 days at \$1.50 ⁰⁰ per week —	\$11.34.
"	"	"	Board of Manning his son from Nov 12 th 1857 to 1858 Jan 4 - 7 weeks & 4 days \$1.50 ⁰⁰ per week	\$11.34.
"	9	"	Board of Allen his son from October 26 th 1857 to Jan 9 th 1858, ten weeks & 4 days at \$1.50 ⁰⁰ per week	\$15.75.
"	22	"	Board of Martha his daughter from April 15 th 1857 to Jan 22 nd 1858 forty weeks and 4 days at \$1.50 ⁰⁰ per week (In all Am't to \$115.85 ¹²)	\$60.50 ⁰⁰

The following is a copy
of the account of the Chpfund on file —

1857.		Norml Cancl (M) Feby 20 th 1858	
March		Allen McClun,	
"	"	To Japheth T Morton	Dr.
"	"	To goods at Wm P Bairds Store	\$ 16.00
"	"	Mustin	.49
"	"	Order to Bairds	3.00
"	"	Cash	1.50 ⁰⁰
May		Do	2.00

22nd.

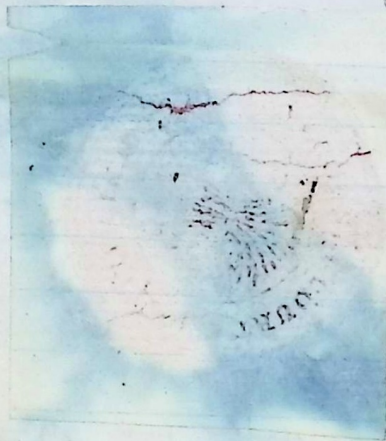
May 1857	To	Cash	\$2.00
"	"	1 Gallon Molasses	1.00
"	"	" Cream Lard at Sundry	1.00
"	"	2 lbs Salaratus	.20
"	"	Sugar of Miss Wood	1.00
"	"	2 Gallons Molasses at Sundry	2.00
"	"	Sugar of Miss Wood	1.00
"	"	4 lbs Candles	.80
June	"	1 bbl flour at Mill	6.25
"	"	10 Yds Calico at Bonds	.80
"	"	6 Yds flannel do	3.00
"	"	1 pair Shoes	1.00
"	"	1/2 lb tea	.50
"	"	Coffee	.50
"	"	Cash	5.00
"	"	do	1.00
"	"	do	1.00
"	"	do	1.00
		Book 25 [¢] Paint 35 [¢] & Cork 45 [¢]	1.05
		To wife's services 2 days & nights	3.00
		Use of cow 2 Months - feeding self	4.00
		Use of beds bedding 10 Mo.	5.00
		(Sent)	\$64.09

The Counsel for the Defendant therefore
 prayed that then his exceptions might
 be signed, sealed and ~~delivered~~ made a
 part of the record pursuant to the Act
 of the Assembly in such case made and
 provided and it is accordingly done
 (Signed) R. H. Gray, Co Judge *RB*

State of Illinois }
Cannell County } Ss.

I Rufus G Bailey
Clerk of the County Court in and
for the County and State aforesaid
do certify that the foregoing twenty two
pages contain a full true and perfect
transcript of the Record, Process and
Proceedings in the foregoing cause
wherein Allen McClure is Plaintiff
and Joseph T. Morton is Defendant as
fully and completely as the same are
of record in my office -

In testimony whereof I have
hereunto signed my name and
caused the Seal of said Court
to be hereunto affixed Done at Mount
Cannell this 15th day of April A.D. 1858.
R. G. Bailey Clerk



Let the writ of Error be made a supersedeas.
Bond in the sum of three hundred
dollars - William M. Kay security
April 19th 1858
L. D. Eaton

State of Illinois }
Carroll County } ss.

William McKay

being duly sworn on oath states
that he is the owner of real and
personal estate to the value of four
thousand dollars after the payment
of all just debts—

Sworn to & Subscribed
to before me this 15th Willm McKay
day of April 1858

R G Bailey Clerk Co. Court

In the Supreme Court
for the State of Illinois—
Joseph T Norton, Writ of Error from
vs. } Carroll County, The
Alvin M. Clark } Plaintiff in error says
there in the record &
proceedings of the County
Court for Carroll County
in this cause there is
manifest error in the
following particulars.

Morton

Worcester

Sealed

to

the Court

Wrote to Wilson

on 2 Sept 1858

sent to station

W. J. P. de la

Filed May 21 1858

de la

all

8th The Court erred in allowing the defendant to open to after plea in abatement

- 1st The Court erred in admitting incompetent and incompetent testimony to go to the jury on the part of the defendant in error
- 2nd The Court erred in rendering judgment against the Plaintiff in error upon the verdict of the jury the verdict being greater than the Plaintiff claimed
- 3rd The verdict was against the evidence the account of the Plaintiff in error although known & not rebutted was rejected by the jury
- 4th The Court erred in refusing to instruct the jury as asked as to the law of the case
- 5th The Court erred in refusing to grant a new Trial -
- 6th The Court erred in refusing an appeal to the Plaintiff in error -
- 7th And in ordering execution vs Plaintiff in error upon record of judgment Wherefore he prays that said judgment be reversed &c -

John Wilson for Plaintiff in Error

Brief

SUPREME COURT OF ILLINOIS,
Third Division—April Term, 1859.

JAPHETH T. MORTON, } Error to
vs. } County Court of Carroll County.
ALLEN McCLURE.

1. The court should have overruled the demurrer to the plea in abatement.—The plea appears to be in proper form, setting up a misnomer of the defendant in the writ and declaration of Japhath for Japheth. The two words have not the same sound.

The cases of Schoonhoven vs. Gott, 20 Ill. 46, and the cases there cited, we deem in point.

Pleading over to the merits, is no waiver of the right to insist upon the error.

Delahay vs. Clement 3 Scam. 201.

Weld vs. Hubbard 11 Ill. 574.

- II. The Plaintiff's bill of particulars or account filed, was for only \$115 85. The verdict and judgment were for \$124 23. In Starkweather vs. Kittle 17 Wend. 20, the object of a bill of particulars is said to be to restrict the party in his proof to it. Authority, however, is hardly necessary on this point.

And the only way the plaintiff could have avoided the difficulty of a verdict for more, was, by remitting the excess after the verdict and before judgment, and that cannot be done in this court.

Steamboat Clarion vs. Moran, 18 Ill. 501.

Fournier vs. Faggott, 2 Scam. 350.

Pickering vs. Pulsever, 4 Gilm. 79.

- III. In order to make the defendant liable for supplies furnished by plaintiff to the defendant's wife and children not living with him, it was necessary to show that they left his home for a good reason, or that he left them under circumstances which would raise an implied promise on his part to pay therefor—and the proof introduced tended to prove the facts that defendant went to Missouri, and that defendant's wife came to plaintiff's house to stay, because she was not able to work, till she should become able to do so. These facts, if proved by competent evidence, would hardly be sufficient—besides, it was proved that when the defendant left home, he left his family on his farm. Under these circumstances, we think there was no liability on the part of defendant to pay for the board and supplies furnished his wife and children by plaintiff.

- IV. The declaration of the wife of the defendant in relation to her reasons for going to plaintiff's house, were not competent evidence against him.

The only means by which plaintiff's witness knew that defendant had gone to Missouri was, that a letter had been received from him from there, and the letter was the best evidence of what it contained.

- V. The account of the defendant against the plaintiff was clearly proved except an item for \$5, and that the articles therein mentioned were delivered to him by members of the family as payment on the plaintiff's account—and this was wholly disallowed by the jury. This was manifestly unjust and the jury were probably misled and induced to do so by the plaintiff's instruction, "That an off-set to be allowed must be between the same identical parties and in the same character—and it is against the law to allow any other off-set. See Record p. 12.

The record not showing that this instruction was excepted to, the giving the instruction cannot be assigned for error—but, that the verdict was clearly against the evidence on the question of payment by defendant, sufficiently appears, and justice requires a new trial.

The refused instruction for plaintiff does not appear by the record to have been excepted to, and the refusal of the court to allow an appeal &c. being matters occurring after judgment, cannot, we suppose, be relied upon as reasons for reversing the judgment.

LELAND & LELAND,
for Plaintiff in Error.

Morton vs McClure
Brief of Plffs.
in error-

ABSTRACT OF PLAINTIFF IN ERROR
IN SUPREME COURT OF ILLINOIS,
Third Division—April Term, 1859.

JAPHETH T. MORTON, Pl'ff in error, }
vs. } *Error to County Court of*
ALLEN McCLURE. } *Carroll County.*

This was an action of assumpsit brought by said McClure vs. said Morton, in said county Court, at March Term, 1858.

Declaration contains a count alleging that on 1st February, 1858, defendant was indebted to plaintiff in \$300 for use and occupation of rooms, apartments and furniture by wife and children of defendant, and for meat, drink, attendance, and other necessities and goods provided for defendant's wife and children, at his request; and also the common counts for goods bargained and sold, goods sold and delivered, work done and materials furnished, money lent, money paid to use of defendant, money had and received, and money found due on account stated:

PLEAS.
Pl' in abatement—Misnomer of def't—Dec'd to, Sustained—

1st. Non assumpsit—(issue joined.)

2d. Set off. General replication.

Plaintiff filed a bill of particulars amounting to \$115 85

Defendant " " " 64 09

On the trial, plaintiff's counsel asked his witness, "Did the defendant leave the country?"—to which defendant objected as being leading and incompetent. Witness answered, "yes." Plaintiff's counsel then asked, "where did he go?" Witness replied, "I suppose to Missouri, as I received a letter from there from him." Defendant objected to said questions and answers, and Court overruled objections, and defendant excepted. Plaintiff's counsel asked his witness "what did defendant's wife state to you in reference to her situation and condition?" Witness answered that she came to the plaintiff's to stay a few weeks until she got able to work—she said she was not able to work and had not been for some time. Defendant objected to this question and answer—Court overruled objection and defendant excepted.

It was proved by a minor son of the defendant that when defendant left home, he gave witness his time and told him to do the best he could for the family—that def't left the family on def't's farm, about four miles from Mount Carroll, where def't then resided—that plaintiff's wife was his sister, and defendant's wife his mother, and that the children in narr. mentioned were his younger brothers and sister—that soon after his father left, his mother engaged at Mount Carroll Seminary, taking charge of the domestic work, taking one child with her, and that he himself also hired out at the Seminary—that another of the children also hired out, and that the other went to live with his sister, plaintiff's wife,—that witness and defendant's wife while at the Seminary and during the absence of defendant, furnished to plaintiff the items charged in defendant's bill, and that they were given to plaintiff to pay him for what he had done for the family.

On cross-examination witness stated that these items were furnished plaintiff, by him and his mother—that such goods as were furnished at the stores he settled for—that he did not see plaintiff get the goods at the store, but that plaintiff admitted receiving them—that plaintiff on presenting defendant's account did not deny any portion of it except \$5.00 cash charged, which, he said, he thought he did not get. This statement was not rebutted by any other witness.

Albert J. Norton (one of the said children and defendant's witness) testified that he was sent for when he was working for wages, to go to plaintiff's, to work for his board and go to school, and did go, at the time charged in plaintiff's account, and lived in plaintiff's family, went to school and worked nights and mornings for his board—which testimony was not rebutted.

18 to 19 The plaintiff's account was proven by the testimony of several witnesses.

20 The jury found for the plaintiff \$124 23. Defendant moved for a new trial—overruled and exception.

The Court ordered judgment to be entered on the verdict, and thereupon defendant prayed an appeal to Supreme Court and offered sufficient security, and asked time to execute an appeal bond—Court refused to give any time, and thereupon, on affidavit of plaintiff, ordered execution to be issued forthwith. Execution was at once issued before any record of said judgment was made, and before said term of said Court expired—to all of which proceedings, defendant excepted.

ERRORS ASSIGNED.

1st. Admitting improper evidence on part of defendant in error.

2d. Rendering judgment on the verdict—verdict being for more than plaintiff's bill of particulars.

3d. Verdict against evidence—the account of plaintiff in error, though proven, was rejected by the jury.

4th. Refusing to instruct as asked, as to the law of the case.

5th. Refusing a new trial.

6th. Refusing an appeal to Supreme Court.

7th. Ordering execution before record of judgment.

8th. Sustaining demurrer to plea in abatement.
WILSON & LELAND & LELAND, for Pl'ff in Error.

To 161
Morton vs McClure
· & brief
Abstract of plff.
in error -

Filed April 20. 1859
R. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT,

ss. The People of the State of Illinois,

To the Clerk of the County

Court for the County Carroll

Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the County Court of Carroll County, before the Judge thereof, between Allen McBride

plaintiff, and Japhet T. Morton

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Japhet T. Morton

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law!

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 1st day of May in the Year of Our Lord one thousand eight hundred and fifty-eight

Clerk of the Supreme Court.

Japhet T. Morton

Allen M. Blane

Writ of Error

This writ of Error is
made a supersedeas
and as such is to
be obeyed by all
concerned.

L. Leland
J. B. Thompson

Filed May 1st 1838

L. Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of Carroll Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the County Court of Carroll County, before the Judge thereof, between Allen McBlure

plaintiff, and Japhet T. Morton

defendant, it is said that manifest error hath intervened, to the injury of the said

Japhet T. Morton

as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Allen McBlure

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Allen McBlure

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice
of our said Court, and the Seal thereof, at Ottawa,
this 21st day of March in the
Year of Our Lord One Thousand Eight Hundred
and Fifty-nine.

212057-29

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

Japhet F. Morton
vs 70
Allen McBlure

Sec for

Served the within
Summons by Reading
the same to ^{the within name of} Allen McBlure
this 29th day of March A.D.
1859 At Base Shing
Barrie Co. Ill

Filed April 13. 1859

Service	L. Leland	
Mileage	20	Clark
Return	100	
Postage	180	
	53	

John Wilson
Atty. for Morton

Know all men by these presents that
we Japheth T. Morton and William McKay
of the County of Carroll and State of Illinois
are held and firmly bound unto Allen
McClure also of the same County and State
in the sum of four hundred dollars
current 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 27th day of April A.D. 1858 —

The condition of the above obligation
is such that whereas the said Allen McClure
did on the 8th day of March A.D. 1858 in
the County Court in and for the County
and State aforesaid recover a judgment
against the above bounden Japheth T.
Morton for the sum of one hundred and
twenty four dollars damages and
dollars costs ^{of suit} from which said judgment
of the said County Court the said Japheth
T. Morton has prayed ^{from the Supreme Court} for and obtained a
^{of the State of Illinois} writ of error for the reversal of said
judgment — Now if the said Japheth T.
Morton shall duly prosecute his said writ
of error with effect and shall more-
over pay the amount of the judgment, costs,
interest and damages, rendered and to
be rendered against him in case
the said judgment shall be affirmed
in the said Supreme Court then the above
obligation to be void otherwise to remain
in full force and virtue —

Japheth T. Morton
William McKay

70

Norton

^{.03}
McBlane

dup'd bond

Filed May 1st 1858
H. Leland
CLK

Brief

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

JAPHETH T. MORTON, } Error to
vs. } County Court of Carroll County.
ALLEN McCLURE.

1. The court should have overruled the demurrer to the plea in abatement.—The plea appears to be in proper form, setting up a misnomer of the defendant in the writ and declaration of Japheth for Japheth. The two words have not the same sound.

The cases of Schoonhoven vs. Gott, 20 Ill. 46, and the cases there cited, we deem in point.

Pleading over to the merits, is no waiver of the right to insist upon the error.

Delahay vs. Clement 3 Scam. 201.

Weld vs. Hubbard 11 Ill. 574.

- II. The Plaintiff's bill of particulars or account filed, was for only \$115 85. The verdict and judgment were for \$124 23. In Starkweather vs. Kittle 17 Wend. 20, the object of a bill of particulars is said to be to restrict the party in his proof to it. Authority, however, is hardly necessary on this point.

And the only way the plaintiff could have avoided the difficulty of a verdict for more, was, by remitting the excess after the verdict and before judgment, and that cannot be done in this court.

Steamboat Clarion vs. Moran, 18 Ill. 501.

Fournier vs. Faggott, 2 Scam. 350.

Pickering vs. Pulsever, 4 Gilm. 79.

- III. In order to make the defendant liable for supplies furnished by plaintiff to the defendant's wife and children not living with him, it was necessary to show that they left his home for a good reason, or that he left them under circumstances which would raise an implied promise on his part to pay therefor—and the proof introduced tended to prove the facts that defendant went to Missouri, and that defendant's wife came to plaintiff's house to stay, because she was not able to work, till she should become able to do so. These facts, if proved by competent evidence, would hardly be sufficient—besides, it was proved that when the defendant left home, he left his family on his farm. Under these circumstances, we think there was no liability on the part of defendant to pay for the board and supplies furnished his wife and children by plaintiff.

- IV. The declaration of the wife of the defendant in relation to her reasons for going to plaintiff's house, were not competent evidence against him.

The only means by which plaintiff's witness knew that defendant had gone to Missouri was, that a letter had been received from him from there, and the letter was the best evidence of what it contained.

- V. The account of the defendant against the plaintiff was clearly proved except an item for \$5, and that the articles therein mentioned were delivered to him by members of the family as payment on the plaintiff's account—and this was wholly disallowed by the jury. This was manifestly unjust and the jury were probably misled and induced to do so by the plaintiff's instruction, "That an off-set to be allowed must be between the same identical parties and in the same character—and it is against the law to allow any other off-set. See Record p. 12.

The record not showing that this instruction was excepted to, the giving the instruction cannot be assigned for error—but, that the verdict was clearly against the evidence on the question of payment by defendant, sufficiently appears, and justice requires a new trial.

The refused instruction for plaintiff does not appear by the record to have been excepted to, and the refusal of the court to allow an appeal &c. being matters occurring after judgment, cannot, we suppose, be relied upon as reasons for reversing the judgment.

LELAND & LELAND,
for Plaintiff in Error.

Morton vs McClure

Brief of App. in
error -

ABSTRACT OF PLAINTIFF IN ERROR
IN SUPREME COURT OF ILLINOIS,
Third Division—April Term, 1859.

JAPHETH T. MORTON, Pl'ff in error, } *Error to County Court of*
vs. } *Carroll County.*
ALLEN McCLURE.

This was an action of assumpsit brought by said McClure vs. said Morton, in said county Court, at March Term, 1858.

Declaration contains a count alleging that on 1st February, 1858, defendant was indebted to plaintiff in \$300 for use and occupation of rooms, apartments and furniture by wife and children of defendant, and for meat, drink, attendance, and other necessities and goods provided for defendant's wife and children, at his request; and also the common counts for goods bargained and sold, goods sold and delivered, work done and materials furnished, money lent, money paid to use of defendant, money had and received, and money found due on account stated.

Plus in abatement—Misnomer of deft.—Drumts; Sustained.

11 1st. Non assumpsit—(issue joined.)

2d. Set off. General replication.

10 Plaintiff filed a bill of particulars amounting to \$115 85,

21 & 22 Defendant " " " 64 09

16 On the trial, plaintiff's counsel asked his witness, "Did the defendant leave the country?"—to which defendant objected as being leading and incompetent. Witness answered, "yes." Plaintiff's counsel then asked, "where did he go?" Witness replied, "I suppose to Missouri, as I received a letter from there from him." Defendant objected to said questions and answers, and Court overruled objections, and defendant excepted.

17 Plaintiff's counsel asked his witness "what did defendant's wife state to you in reference to her situation and condition?" Witness answered that she came to the plaintiff's to stay a few weeks until she got able to work—she said she was not able to work and had not been for some time. Defendant objected to this question and answer—Court overruled objection and defendant excepted.

17 It was proved by a minor son of the defendant that when defendant left home, he gave witness his time and told him to do the best he could for the family—that def't left the family on def't's farm, about four miles from Mount Carroll, where def't then resided—that plaintiff's wife was his sister, and defendant's wife his mother, and that the children in narr. mentioned were his younger brothers and sister—that soon after his father left, his mother engaged at Mount Carroll Seminary, taking charge of the domestic work, taking one child with her, and that he himself also hired out at the Seminary—that another of the children also hired out, and that the other went to live with his sister, plaintiff's wife,—that witness and defendant's wife while at the Seminary and during the absence of defendant, furnished to plaintiff the items charged in defendant's bill, and that they were given to plaintiff to pay him for what he had done for the family.

On cross-examination witness stated that these items were furnished plaintiff, by him and his mother—that such goods as were furnished at the stores he settled for—that he did not see plaintiff get the goods at the store, but that plaintiff admitted receiving them—that plaintiff on presenting defendant's account did not deny any portion of it except \$5.00 cash charged, which, he said, he thought he did not get. This statement was not rebutted by any other witness.

Albert J. Norton (one of the said children and defendant's witness) testified that he was sent for when he was working for wages, to go to plaintiff's, to work for his board and go to school, and did go, at the time charged in plaintiff's account, and lived in plaintiff's family, went to school and worked nights and mornings for his board—which testimony was not rebutted.

18 to 19 The plaintiff's account was proven by the testimony of several witnesses.

20 The jury found for the plaintiff \$124 23. Defendant moved for a new trial—overruled and exception.

20 to 21 The Court ordered judgment to be entered on the verdict, and thereupon defendant prayed an appeal to Supreme Court and offered sufficient security, and asked time to execute an appeal bond—Court refused to give any time, and thereupon, on affidavit of plaintiff, ordered execution to be issued forthwith. Execution was at once issued before any record of said judgment was made, and before said term of said Court expired—to all of which proceedings, defendant excepted.

ERRORS ASSIGNED.

1st. Admitting improper evidence on part of defendant in error.

2d. Rendering judgment on the verdict—verdict being for more than plaintiff's bill of particulars.

3d. Verdict against evidence—the account of plaintiff in error, though proven, was rejected by the jury.

4th. Refusing to instruct as asked, as to the law of the case.

5th. Refusing a new trial.

6th. Refusing an appeal to Supreme Court.

7th. Ordering execution before record of judgment.

8th. Sustaining demurrer to plea in abatement.
WILSON & LELAND & LELAND, for Pl'ff in Error.

70 161
Morton vs McClure
+ brief
Abstract of plff. in
error -

Filed April 20, 1859

A. Keland
clerk

Prepared