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

# Supreme Court of Illinois

Staat

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vs.

Evans.

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14700

STATE OF ILLINOIS,  
SUPREME COURT,  
THIRD GRAND DIVISION.

No 18674

J. W. Middleton & Co., Stationers, 196 Lake St.

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1868

State  
vs  
Evans

OK

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# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

FRANCIS STAAT  
*vs.*  
JAMES V. EVANS.

} *Error to Warren.*

## ABSTRACT OF THE RECORD.

This was an action of *Assumpsit*, brought by Evans, who was plaintiff below, to recover for a failure of defendant to deliver him twelve head of fat cattle, 16th day of March 1859.

3 The declaration contains one *special* count, founded upon the alledged contract, and also the general counts:

4 1. For divers goods and chattles, wares and merchandise sold and delivered.

2. For money (\$600) had and received for plaintiff's use.

3. For \$600 found to be due on account stated.

*"and defendant so carelessly and negligently behaved and conducted himself with respect to said steers, that the same became wholly lost to the plaintiff."*

*There is no allegation in the declaration that plaintiff was ready and willing to pay for the steers, if they had been delivered, nor is there any allegation as to the place where the steers were to be delivered, or as to where the plaintiff resided.*

6 To this declaration the defendant below filed the general issue at Oct. Term 1859.

9, 10 The case was tried March Term 1861, and a verdict rendered for defendant. The Court, on motion of plaintiff, granted a new trial.

15, 16 The second trial was had on the 19th March 1862, and resulted in a verdict for the plaintiff for \$403.05.

The defendant then filed his motion for a new trial, and in arrest of judgment, which motions were overruled and judgment rendered upon the verdict, and the defendant prayed an appeal to the Supreme Court, and filed his bill of exceptions, which was allowed.

17 The bill of exceptions shows that the plaintiff called one John Woodmaney, who swore that he saw plaintiff and defendant at Abingdon on the 1st Monday of A. D. 1859; that Albert Evans and William Richey were there; that he (witness) sold to plaintiff *eleven head* of fat cattle, which weighed 12,525 pounds. Saw plaintiff and defendant conversing, but did not hear what was said; *understood* Staat to say, he would take the cattle and feed them for Evans. Evans said they would take them down to Staat's that day. They started in the direction of Greenbush. Five or six of the cattle were 5 years old and were good cattle, worth 2½ cents per pound. The plaintiff paid witness for the cattle.

18 To the introduction of this evidence the defendant objected, because it varied materially from the contract set out in the declaration, and because the witness testified, not to what was said, but to his *understanding of it*; but the Court overruled the objection and defendant excepted.

On cross examination this witness stated that *Albert Evans* came to his house for the cattle and helped drive them to Abingdon, to the scales, and also helped drive them towards Greenbush. The witness only saw them go 5 or 6 rods towards Greenbush.

When plaintiff and defendant were talking, they talked so low that he could not hear them. The scales were between him and them. *Albert Evans* passed back and forth from witness to them. Staat said he would take the cattle and feed them; *but I heard no contract between the parties.*



- 19 Plaintiff next offered the deposition of James Evans, to which defendant objected, because it proved a contract materially different from the one declared on, and also to that part or portions of the deposition, as sets forth what he learned from others; but the Court overruled the objection and defendant excepted.

This witness stated that he is a farmer 49 years old, and resident in Virginia. Never saw the defendant but once, and that was in Greenbush, Warren Co., Ill., in March 1859.

On the 9th or 10th of that month, he went with plaintiff to the residence of defendant.

- 27 [The plaintiff stated he was going to defendant's to see a lot of cattle that he had engaged of defendant, and also to get the defendant to keep the cattle a few days longer than the contract called for. The defendant was not at home. We were informed that he had gone to Greenbush.] (This is all hearsay.)

- 28 Plaintiff and witness went into a lot to look at some cattle, and then went to Greenbush. Met defendant at a store in Greenbush, was introduced to him by plaintiff. Plaintiff took defendant out of the store and had a conversation with him in presence of witness, about the cattle. "I learned from the parties that the defendant had got from plaintiff in the fall or early part of winter previous, 12 head of cattle at a certain price per hundred pounds; but do not now recollect at what price. The defendant was to *stall feed* said cattle, and *the plaintiff was to take them back on the 12th day of March 1859, at a fixed price, which I do not now recollect.* The plaintiff was also to take other cattle from the defendant, at a price I do not now recollect. They were to be taken at same time. Plaintiff asked defendant how many cattle there were in the lot that he, defendant, expected plaintiff to take in addition to the 12 head. The defendant answered 23, making in all 35."

Plaintiff then said he had been to defendant's lot and counted 42 head. Defendant replied, that seven head of them belonged to a man named Shores, and he did not expect plaintiff to take them. Defendant described the Shores cattle as being the thinnest, and marked, and described the color.

The plaintiff then desired defendant to keep the cattle till the 16th March, and after a great deal of persuasion defendant agreed to do so, plaintiff agreeing to pay for the corn they would eat from the 12th to 16th March, and defendant to have the benefit of the increase of weight during that time. Plaintiff complained of the price of the corn, and that it was too high, as defendant had the benefit of the increase in weight.

- 29 After they had agreed for the delivery of the cattle on the 16th, instead



of the 12th, they differed *as to the place of delivery*. Plaintiff wanted them weighed at Sheldon's scales in Berwick, and defendant wished to deliver and weigh them at Greenbush. "*They parted without agreeing at what place they should be delivered.*" "Plaintiff said he believed he could compel defendant to deliver them at Abingdon where the 12 cattle that he bought from plaintiff were weighed and delivered the previous fall or winter; but that he did not want them there, and would prefer receiving them at Berwick."

31 On cross examination this witness stated, that, "In the conversation that took place at Greenbush between the parties, defendant told plaintiff, that *he had not made any contract with him, but with his son Albert*, and plaintiff replied that his son Albert had acted as his (plaintiff's) agent, and that defendant was aware of it, and that he (plaintiff) had weighed  
32 and delivered the 12 head of cattle and defendant was to take them back in the spring, together with the other cattle. Defendant also stated that Albert Evans had rented 90 acres of stock field pasture (of him,) but had never brought any cattle to put in as he agreed to do, and complained of this to plaintiff; but said he had afterwards rented 40 acres of the 90 acres to some other person, leaving 50 acres unrented.

35 Plaintiff next offered in evidence the deposition of Lewis Terry, and defendant objected to so much of the answer to the 6th Interrogatory, as expressed the thoughts and ideas of said Terry; and also to the 7th and 8th Interrogatories and the answers thereto, because said answers were of the understanding of the witness and not of facts; but the Court overruled the objection and defendant excepted.

38 He stated that he saw Staat "*onste*" at St. Augustine Depot, in Knox county, Ill. It was in February or March 1859, and he was introduced to him. Plaintiff then asked defendant if he was going to let him have some cattle, or them cattle, and defendant said he would not let him have  
39 them *unless he complied with his contract*. Plaintiff said he was ready to comply with his contract. At the time defendant and some body else were unloading a car of lumber.

INT. 6TH. "Do you know for what purpose defendant was unloading the car?"

ANSWER. "I think defendant said he was going to ship cattle, and conveyed the idea that he was going to use the car for that purpose."

INT. 7. "Did you *understand* from the conversation of the parties or from what the defendant said at the time, what cattle defendant was intending to ship on the cars?"

ANSWER. "I understood from the parties, and particularly from the defendant, he was going to ship the cattle that was then there at St. Augustine Depot."



40 INT. 8. "State whether the cattle you referred to, or any part of them, were claimed by the plaintiff as his property, in the conversation he had with the defendant at that time."

ANSWER. "I did understand from their conversation that a part of the cattle at least were claimed by the plaintiff."

This is the portion of the deposition objected to by defendant on the trial, which objection was overruled.

41 Witness further stated that the plaintiff said the defendant had got 12 or more head of cattle from him; does not recollect the precise number; does not remember how many cattle plaintiff was to have of defendant; thinks plaintiff said he had sold defendant some cattle, and that he had bought some cattle of defendant.

42 Plaintiff next called Samuel Brown, who testified that he was present at St. Augustine, 17th March 1859.

43 He went that day with plaintiff to Staat's house, and from thence to Avon, and from there to St. Augustine, and found the defendant there. Plaintiff made demand of 35 head of cattle, 12 head of which he had let him have to feed and the rest he had bought of him. The defendant answered, "You know damn well your day is past." Plaintiff argued that he had better let him have the cattle and have no difficulty about it. *Staat said he would let him have them if he would pay him for them.* Plaintiff said he was ready to pay him; defendant asked what kind of money he had. Plaintiff told him he had specie and currency; defendant said that was no money. Plaintiff asked for the weights of the cattle. Defendant said that Mr. Shores had the weights. Plaintiff said he was ready to take the cattle and pay for them, and made demand for the 12 head, if he would not let him have the 35 head; does not recollect what defendant replied.

There were 42 head. I understood from defendant that he could not have any unless he took all. Defendant was unloading lumber and fixing cars. He saw a lot of cattle there in the yard; twelve head that he should let him have to feed.

44 Does not recollect that they were doing anything with the cattle. They were getting cars up to the chute. Plaintiff asked Shores for the weights. Shores said the 35 head were all weighed together. Plaintiff and he (witness) went to Meadows; did not see plaintiff get any money. The next day, before we separated, he showed me \$1500, between \$250 and \$300 of which was in specie. To all the testimony of this witness defendant objected, because it showed a different contract from the one declared on, and because it was what Bowen understood; but the Court overruled the objection and plaintiff excepted.



On cross examination this witness stated that plaintiff was his uncle.  
 45 *That defendant told plaintiff he could have the cattle if he would pay for them.* Plaintiff said he had the money; defendant asked what kind of money he had. Plaintiff said he had specie and currency—had specie enough to pay for 12 head. That he (witness) *never heard anything about keeping 12 head of cattle; that he counted 42 head in different yards.* Don't know that they were all defendant's. Plaintiff offered to take 35 head of cattle if defendant would take his money, but said he only had the gold to pay for 12 head of them. *Defendant refused to take his kind of money for all of them.* Next morning plaintiff showed him about \$1500 at his father's, *but he saw no money at St. Augustine.*

On re-examination, this witness stated that cattle were worth from  $4\frac{1}{4}$  to 5 cents at that time. Plaintiff then asked the witness "If the 12 head of cattle of which he had been testifying were or were not the 12 head that defendant was to feed for plaintiff?" To which defendant objected, because the question was leading, and because witness knew nothing about the 12 head plaintiff let defendant have; but the Court overruled the objection and defendant excepted.

46 The witness then answered, "that they were the ones that plaintiff let defendant have to feed."

The plaintiff then called Jesse Weathers, who testified that defendant, in the winter of 1858 or 1859, took some cattle past his house which he said he got of Evans, at Abingdon. Thinks it was in Jan. 1859. He also stated that plaintiff has a son by the name of Albert Evans.

47 James Tucker was next called, who testified that he had been a dealer in cattle 20 years. In March 1859, fat cattle were worth from \$4.00 to \$4.40, and that the customary price was about \$4.25.

That cattle which sold for \$4.40, must be select fat cattle, and if cattle were not good, they were worth about  $\frac{2}{3}$  that price.

Here plaintiff rested.

Defendant then called Henry Staat, who testified that he is a son of defendant. On the 3d Jan. 1859 he and his father went to Abingdon to get some cattle. Waited some time at the scales there, before the cattle came. When they came they were weighed. Did not hear any bargain made. Saw father talking with Albert Evans about the cattle. They weighed the cattle. Plaintiff wanted father to keep the cattle a few days longer. Father said he would not, it was not in the contract. Plaintiff, Albert Evans, and others, brought the cattle to the scales.

48 Father said the contract was, they were to be delivered on the 10th or 12th of March 1859. Plaintiff said he knew it was. Nothing was said as to whom the contract was with. Father told me, "Well, I will not



48 take the cattle, let's go." Henry Albert Evans came after us, and told us to take the cattle away. We were then 4 or 5 rods from plaintiff.

Father went back and got the cattle. Plaintiff was then by the cattle and did not say anything that I recollect of. Albert Evans, father and myself, started the cattle. Don't mind hearing Albert Evans say anything to plaintiff after we returned.

William Clayton was next called by defendant, who swore that in the winter of 1858 and 1859, plaintiff was having cattle fed near his place, and then said he had to go to Berwick and round by defendant's. *I asked him if he had any cattle at defendant's. He said no, but that his son Albert had, and that he wanted to go and see them.*

49 William Shores was next called by defendant, who swore that he had a conversation with plaintiff, in February 1859. He was going to Chicago on the Rail Road. Plaintiff came on board at Abingdon. Witness asked plaintiff if he had any cattle feeding at defendant's. *He replied, that he had not, but his son Albert had.*

Plaintiff then asked what kind of cattle they were, and whether witness wished to buy them.

A. M. Baldwin swore, that he had known defendant 19 years; plaintiff since fall of 1858, and Albert Evans since the winter of 1857 and 1858, and that defendant was feeding cattle in January, February, and March 1859. Defendant then asked the following question :

50 "State whether, on or before the 3d January 1859, any contract was made between Albert Evans and defendant for the sale of twelve of the cattle which defendant had kept from that day to after the middle of March 1859. If so, state it fully, when it was made, and describe the cattle so contracted." Which question the Court refused to allow to be asked, and defendant excepted.

Defendant then asked : "State whether any contract was, on or before the 3d January A. D. 1859, made between Albert Evans and defendant, for the sale of more than 12 head of the cattle that defendant had kept from that day until after the middle of March thereafter, and whether a less number of such cattle than that so contracted, were not sold and delivered by the purchaser of such larger number to the vendor thereof, as part of the purchase money therefor. If so, state it fully, when made, and describe all the cattle so contracted."

Which question the Court refused to allow to be asked, and defendant excepted.

This was all the evidence in the case.

51 The Court then instructed the jury on the part of the plaintiff as follows, to which instructions defendant excepted :



1st. If from the evidence the jury believe that the said defendant took from the plaintiff, by agreement with him, eleven or more head of cattle to feed during the winter, from the 1st day of January A. D. 1859, until the 16th day of March next thereafter; that the same were weighed when so taken, weighing 12,525 lbs.; that they were to be taken by said defendant at a fixed price per lb., and at the expiration of the time defendant was to keep and feed them, they were to be weighed and taken back at a fixed price; that said cattle were so taken by said defendant, and that afterwards, and after the expiration of the 16th day of said March, defendant, after demand made by said plaintiff upon him, and after an offer by plaintiff to pay what might be due on the cattle, and refused to surrender the cattle to him, then the defendant is liable to the plaintiff for the value of the said cattle, when they were to be re-delivered, after deducting a reasonable price for feeding.

52 2d. If the jury believe from the evidence, that the cattle were delivered by plaintiff to defendant under such a contract as stated in the 1st instruction, the title to the cattle did not pass from the plaintiff to the defendant.

3d. If the jury believe from the evidence that the defendant, in January 1859, bought of the plaintiff 11 or 12 head of cattle, at any particular price, was to feed them until March 1859, and then to sell back said cattle to the defendant at an agreed price, and refused to do so, then the plaintiff is entitled to recover the price of the cattle at the time they were delivered to defendant by the plaintiff. And in estimating the damages, if, from all the evidence, the jury may believe that the payment therefor has been unreasonably delayed, interest may be allowed thereon at the rate of six per cent per annum.

53 Defendant then asked the Court to instruct the jury as follows, which the Court refused to do:

1st. If the jury believe from the evidence, that plaintiff admitted he had no cattle at defendant's in the latter part of January or February 1859, and that the cattle in question were then there, they are bound to find for the defendant under any circumstance, and that although there is no proof that the defendant ever paid any person anything for them.

2d. The Court will instruct the jury that there is no evidence of such a contract as that declared upon by the plaintiff in this case, and that he cannot, therefore, recover in this cause.

3. Although the jury may believe from the evidence, that defendant was to deliver to plaintiff twelve head of cattle on the 16th day of March, 1859; yet, unless they believe from the evidence that plaintiff was ready and willing and able to receive and pay for such cattle, and extra feed, at said Greenbush, on said day, they are bound, under any circumstances, to find a verdict for the defendant.



4. That said defendant was not bound to deliver said cattle on the 17th day of March, and is in no way responsible for not so doing.

5. That should they believe from the evidence, that there was a contract between the plaintiff and defendant; yet, if they believe from the evidence, that more than 12 head of cattle were included in such contract, they are bound, under any circumstances, to find for the defendant.

54 6. The Court will instruct the jury that the admissions of the plaintiff are evidence in this case, and that, if they believe from the evidence of Clayton or Shores that plaintiff admitted to said Shores that he had no cattle at defendant's; and that, if they believe from such admissions, and the evidence in the case, that defendant did not buy the cattle of the plaintiff, they are bound to find a verdict for the defendant.

7. That defendant was not bound to receive currency for any part of what might be due him for the cattle.

Which instructions the Court refused to give, but gave in lieu thereof the following, and defendant excepted :

55 The defendant had a right to retain possession of said cattle until he was paid, whatever might be due on them under any contract that he may have made with plaintiff. And unless the jury believe that the plaintiff, when he demanded said cattle, offered to pay the defendant the amount that may have been due him, they will find for the defendant; and the plaintiff had a right to insist on payment in specie; but if he refused wholly to acknowledge the right of the plaintiff to demand the cattle, the plaintiff was released from all obligation to make a tender.

The jury found a verdict for plaintiff for \$403.05. Defendant filed the following motion for a new trial, and in arrest of judgment :

56 1. Because the verdict was against the law and evidence.

2. The Court erroneously refused some, and erroneously modified other instructions of defendant, and gave the jury improper and illegal ones on behalf of the defendant.

3. The Court admitted to the jury, on behalf of plaintiff, illegal and improper testimony, and rejected and excluded from them testimony offered for their consideration, by the defendant, legal and proper.

4. Proof of the only contract on which testimony was adduced, and which was the only subject matter of this suit, varied materially from any contract alleged in the declaration in this case.

Which motions were overruled by the Court, and defendant excepted.

The Court then rendered judgment upon the verdict, and defendant filed his Bill of Exceptions, and appealed to the Supreme Court.

H. M. WEAD,  
*For Plaintiff in Error.*



No 73 62

SUPREME COURT,

Third Grand Division,

APRIL TERM THREBOT, A. D. 1864.

FRANCIS STAAT }  
vs. } Error to Warren.  
JAMES V. EVANS. }

ABSTRACT.

H. M. WEAD,

For Plaintiff in Error.

*Filed April 19, 1864*  
*L. Leland CM*



# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

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FRANCIS STAAT }  
                  *vs.* } *Error to Warren.*  
JAMES. V. EVANS. }

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## BRIEF AND POINTS—BY H. M. WEAD.

This was an action commenced in the court below, to recover for a breach of contract. The plaintiff alleges substantially in his declaration that, on the 10<sup>th</sup> day of January, 1859, he let the defendant have 13 steers to keep until the 16<sup>th</sup> of March, 1859, when they were to be returned by defendant, and he was to receive 4 1-8 cents per pound for each pound of increased weight the cattle might weigh. The alleged breach of this contract is that the defendant did not re-deliver the steers at the time agreed upon, nor any other time, but on the contrary, sold the same, "*and defendant so carelessly and negligently conducted himself with respect to said steers that the same became wholly lost to plaintiff.*"

There is no allegation in the declaration that plaintiff was ready and willing to pay for the increased weight of the steers *if they had been delivered*, nor is there any allegation as to the *place where the steers were to be delivered*, nor where the plaintiff or defendant resided.

The declaration contains two or three general counts in assumption, but as *no sale of the cattle* was proved by plaintiff or defendant, those counts were of no importance.



All the proof shows, taken in its most favorable aspect for the plaintiff below, that he did not *sell the cattle to defendant*, but defendant took them to keep. So is the declaration, so are the instructions on the part of plaintiff. (See plaintiff's 2d instruction, page 17 written abstract.)

There was no proof or pretended proof that *defendant* sold the cattle. All that is shown in that direction is that defendant refused to deliver the cattle on demand; (see testimony of Samuel Brown, page 10 abstract;) and even then expressed a willingness to give them up, *if he could get his pay*.

If the cattle were *not sold to defendant* below, and were not by him converted into money, then there was simply a *wrongful conversion of the cattle* by defendant below, *if he refused to deliver them on demand*.

This action of *assumpsit* will not lie under such a state of facts. The action should have been *trover*, for an unlawful conversion of the plaintiff's property. Until defendant *converted the property by sale and receipt of the money*, no action of *assumpsit* would lie. Either *trover* or *replevin* should have been brought. It is therefore contended,—

1st. That the action is misconceived and will not lie.

The *gist* of the action is for a failure to deliver at the time specified. Now suppose they were to be delivered on the 16th day of March, and were not delivered on that day, but on the 1st day of April thereafter, plaintiff had commenced his suit; what damages would he have suffered by the delay? It must be remembered that the cattle were the plaintiff's cattle. The defendant, by refusing to deliver them up, did not transfer the title to himself; and as they were still the cattle of the plaintiff, all the damage which he could have sustained would be what he had lost by having the time of delivery postponed till the 1st of April.

If he sues on his contract, he cannot recover for the cattle, because they are still his, but for damage occasioned by a refusal to deliver them at the time agreed.



It is submitted that this proves, beyond controversy, that the action should have been Trover or Replevin, because the cattle were still the property of the plaintiff.

II. The *special count* is totally defective and wholly insufficient, and as there was no general count under which the evidence could have been received, the judgment should have been arrested, or the jury instructed to find for the defendant.

The special count fails to show or aver that plaintiff *was ready and willing to pay for the cattle if they had been delivered.*

In this connection it may be observed that the 2d instruction asked for by defendant below and refused (see written abstract, page 18) should have been given, because there was no proof of any such contract.

III. The contract set forth in the declaration was (abstract, page 1) that plaintiff let defendant have 13 steers on the 10th day of January, 1859, to keep until the 16th day of March, 1859, at four and 1-8 cents per pound, for all that the cattle should increase in weight.

The contract proved, was that defendant received *twelve head* of cattle on the *3d day of January*, 1859, to keep till the *12th day of March*, 1859, at a *fixed* price. See evidence of James Evans, Abstract, page five.

The contract *proved* differed from the one set forth in every essential particular.

1st. It was alleged to have been made on the *10th day of January*, 1859; it was proved to have been made on the *1st Monday of A. D. 1859*. See testimony of John Woodmancy, abstract page 3, which another witness (Henry Staat, page 5,) says was the *3d day of January*.

2d. It was alleged to be for *thirteen head* of cattle, whereas all the proof showed it was for *twelve head only*.

3d. It was alleged that the cattle were to be kept until the



16th day of March 1859, whereas the proof shows (see abstract, page 5,) that, by the original contract, they were to be returned on the 12th day of March, 1859, and by a subsequent contract the time was extended to the 16th.

4th. The declaration says that defendant was to receive 4 1-8 cents for all the weight he added to the cattle, whereas the only proof upon that point is, that *he was to receive a fixed price.*

Now here is a variation between the contract declared on and the contract proved, in every essential and material allegation. If it is necessary to set forth and prove a *special contract*, then the plaintiff below has wholly failed to make out his case. The court below was asked to give the following instruction on the part of defendant. See abstract, page 18, 2d instruction.

"The court will instruct the jury that there is no evidence of such a contract as that declared upon by the plaintiff in this case, and that he cannot therefore recover in this cause."

This instruction the court refuse to give, whereas it was precisely what should have been done. The proof did not show such a contract as was declared on, either in the special or general counts. It did not sustain the special count, nor did it sustain the general counts, because, as I have already stated, there was no *sale* of the cattle by plaintiff to defendant, nor by defendant to any one else; and there was no conversion until the demand and refusal to deliver the cattle.

If the plaintiff had any right to recover in this action, it was for the damages sustained by the non delivery of the cattle on the 16th of March, not for a conversion of them; and all the damages he could claim would be, the injury he had received by not delivering them before the commencement of the suit.

One of the reasons alleged for a new trial was, "proof of the only contract on which testimony was adduced, and which was the only subject matter of this suit, varied materially from any contract alleged in the declaration in this case."

Surely the new trial ought to have been granted.



IV. One of the points at issue in the court below was, whether the contract was made with Albert Evans, son of the plaintiff, and whether he or the plaintiff was the owner of them.

No one proved that they were the plaintiff's cattle, except John Woodmancy, who swore that he sold *eleven* head to plaintiff on the first Monday in January, A. D. 1859, (page 3 ab;) but Albert Evans came after the cattle, and helped to drive them, whereas William Clayton and William Shores both testify plainly and unequivocally, (see ab. page 14,) that *plaintiff said the cattle were not his, but his son's, Albert.* In this connection it is to be observed that defendant called A. M. Baldwin, (ab. page 14-15,) and offered to prove by him that the contract was made with Albert Evans, and that he, Albert, had controlled the cattle and had sole them, but the Court refused to permit the evidence to be heard, and in so doing deprived the defendant of the right to show that plaintiff ought not to recover, and committed a great error.

The jury were not warranted in finding a verdict contrary to the positive proof of Clayton and Shores, which proof was not impeached or contradicted. It is true, Woodmancy sold the cattle, as he says, to plaintiff, but notwithstanding they might still belong to Albert Evans, by purchase or gift from his father.

Nor was the Court warranted in refusing to give the 6th instruction asked for defendant. See abstract, page 19.

V. But there is another question in this case, which seems to have created the original difficulty, and brought about the litigation.

Plaintiff, on the 17th day of March, 1859, took a witness, Samuel Brown, (see abstract pages, 43, 44 and 45,) and went with him to St. Augustine, where they found defendant and demanded the cattle. The defendant refused to give them up, unless the plaintiff would pay him for them. Defendant *said he would let him have the cattle if he would pay him for them.* Plaintiff agreed to do this, but when defendant asked what kind of money he had, the plaintiff said it was *gold and currency.*



Defendant objected to the currency. It seems by the proof that plaintiff was to take 23 head of either cattle from defendant, and he does not seem to have *had the money on that day*. *He showed no money. He made no tender.* He did not inform defendant that he would deposit the money in any place, subject to his order. Defendant was willing to give up the cattle if he *could get his pay*, but he could'nt. Plaintiff did not come to time. He could'nt. He did'nt have the money. *The next day after* he visited Meadows he found some money, and showed it to Brown, who was still with him; but on the day he was at St. Augustine he did not show any money, nor offer any, nor deposit any, so that defendant could get it, if he wanted.

The jury were not warranted in finding that plaintiff did offer the money, nor was the court warranted in refusing to give the 7th instruction asked for by defendant; (ab. page 19,) nor the 3d instruction asked by him on page 18 of abstract.

VI. The court also erred in rejecting the evidence offered by defendant, and refusing to let him ask the witnesses proper questions; also, in refusing to strike out hearsay evidence contained in the depositions, and in giving wrong instructions for plaintiff, and refusing to give proper instructions for defendant.

H. M. WEAD,  
*For Plaintiff in Error.*



73  
Francis Staal

vs  
James V. Evans  
Plffs Brief

Filed April 27, 1864  
J. L. Leland Clerk



1

In the Supreme Court of Illinois  
April Term 1863

Francis Stuart

vs

} Error to Writ  
James V Evans } Brief & Points by St M Head

This was an action commenced in the Court below to recover for a breach of contract. The plaintiff alleges substantially in his declaration that on the 10<sup>th</sup> day of Jan'y 1859 he let the defendant have 13 steers to keep until the 16<sup>th</sup> March 1859 when they were to be returned by plaintiff, & the defendant & he was to receive  $4\frac{1}{8}$  cents per pound for each pound of increased weight the cattle might weigh. The <sup>alleged</sup> breach of this contract is that the defendant did not deliver the steers at the time agreed upon nor any other time, but on the contrary sold the same "and defendant so carelessly & negligently conducted himself with respect to said steers that the same became wholly lost to plaintiff"

There is no allegation in the declaration that plaintiff was ready & willing to pay for the increased weight of the steers if they had been delivered, nor is there any allegation as to the place where the steers were to be delivered, nor where the plaintiff or defendant resided.

The declaration contains two or three <sup>general</sup> counts in assumpsit, but as no sale of the cattle was proved by <sup>plaintiff or</sup> defendant, these counts were of no importance.



All the proof shows, taken in its most favorable aspect for the plaintiff below, that he did not sell the cattle to defendant, but defendant took them to keep. So is the declaration, so are the instructions on the part of plaintiff. (see P. 172 2<sup>d</sup> instruction Page 17. written abstract)

There was no proof or pretended proof that defendant sold the cattle. All that is shown in that direction is that defendant refused to deliver the cattle on demand (See testimony of Saul Brown Page 10 Abstract) & even then expressed a willingness to give them up, if he could get his pay.

If the cattle were not sold to defendant below, and were not by him converted into money, then there was simply a wrongful conversion of the cattle, by defendant below, if he refused to deliver them on demand.

This action of assumpsit will not lie under such a state of facts. The action should have been trover, for an unlawful conversion of the plaintiffs property. Until defendant converted the property by sale & receipt of the money, no action of assumpsit would lie. Either Trover or Replevin should have been brought. It is therefore contended

1<sup>st</sup> That the action is misconceived and will not lie.



The gist of the action is for a failure to deliver at the time specified. Now suppose they were to be delivered on the 16th day of March & were not delivered on that day, but on the 1<sup>st</sup> day of April thereafter Plaintiff had commenced his suit; what damages would he have suffered by the delay? It must be remembered that the cattle were the plaintiff's cattle, the defendant by refusing to deliver them up, did not transfer the title to himself, and as they were still the cattle of the plaintiff, all the damage which he could have sustained would be what he had lost by having the time of delivery postponed till the 1<sup>st</sup> of April. If he sues on his contract, he cannot recover for the cattle because they are still his, but for damage occasioned by a refusal to deliver them at the time agreed. ~~These remarks are~~ It is submitted that this proves beyond controversy, that the action should have been Trover or Replevin, because the cattle were still the property of the plaintiff.



II. The ~~Count in~~ Special Count is totally defective and wholly insufficient, and as there was no general count under which the evidence could have been received, the judgment should have been arrested, or the jury instructed to find for the defendant.

The special Count fails to show that or over that plaintiff was ready & willing to pay for the cattle if they had been delivered

In this connection it may be observed that the 2<sup>d</sup> instruction asked for by defendant below & refused (See written abstract Page 18) should have been given, because there was no proof of any such contract.

III. The contract set forth in the declaration was (abstract Page 1) that plaintiff let deft. have 13 Steers on the 10<sup>th</sup> day of January 1859, to keep until the 16<sup>th</sup> day of March 1859 at four & 1/8 cents per pound, for all that the cattle should increase in weight.

The contract proved, was that defendant received Twelve head of cattle, on the 3<sup>d</sup> day of Jan'y 1859, to keep till the 12<sup>th</sup> day of March 1859 at a fixed price. See evidence of James Evans, abstract Page 5.



The contract proved, differed from the one set forth in every essential particular

- 1<sup>st</sup> It was alleged to have been made on the 10<sup>th</sup> day of January 1859 — It was proved to have been made on the 1<sup>st</sup> Monday of Feb., 1859. See testimony of John Woodmansey, abstract Page 3, which another witness (Henry Stuart, Page 5,) says was the 3<sup>d</sup> day of Jan'y —
- 2<sup>d</sup> It was alleged to be for Thirteen head of <sup>all</sup> cattle, whereas, the proof showed it was for Twelve head only
- 3<sup>d</sup> It was alleged that the cattle were to be kept until the 16<sup>th</sup> day of March 1859 whereas the proof shows (see abstract Page 5) that by the original contract they were to be returned on the 12<sup>th</sup> day of March 1859, and by a subsequent contract the time was extended to the 16<sup>th</sup>
4. The declaration says that defendant was to receive 4<sup>1</sup>/<sub>8</sub> cents for all the weight he added to the cattle, whereas the only proof upon that point is, that he was to receive a fixed price

Now here is a variation between the contract declared on, & the contract proved, in every essential and material allegation, If it is necessary to set forth



and prove a special contract, then the plaintiff below has wholly failed to make out his case. The Court below was asked to give the following instruction on the part of plaintiff defendant. See abstract Page 18 2<sup>d</sup> Instruction:

~~"There is no The jury is of" "The court is requested"~~  
 "The court will instruct the jury that there is no  
 " evidence of such a contract as that declared  
 " upon by the plaintiff in this case, and that he  
 " cannot therefore recover in this cause."

This instruction the Court refused to give, whereas it was precisely what should have been done. The proof did not show such a contract as was declared on, either in the special or general counts. It did not sustain the special count, nor did it sustain the general counts, because as I have already stated, there was no sale of the cattle by plaintiff to defendant, nor by defendant to any one else and there was no conversion until the demand & refusal to deliver the cattle.

If the plaintiff had any right to recover in this action it was for the damages sustained by the non delivery of the cattle on the 16th of March, not for a conversion of them, and all the damages he could claim, would be, the injury he had received by not delivering them before the commencement of the suit.



One of the reasons alleged for a new trial was  
that "Proof of the only contract on which testimony  
" was adduced & which was the only subject  
" matter of this suit varied materially from any  
" contract alleged in the declaration in this case.

Surely the new trial ought to have been  
granted.



IV One of the points at issue in the Count below was, whether the contract was made with Albert Evans son of the plaintiff, & whether he or plaintiff was the owner of them. No one proved that they were the plaintiffs cattle except John Woodmaney, who swore that he sold eleven head to plaintiff on the first Monday in <sup>July</sup> A.D. 1859, (Page 3 ab) but Albert Evans came after the cattle & helped to drive them, whereas William Clayton & William Shores, both testifying plainly & unequivocally, (See ab Page 14) that Plaintiff said the cattle ~~were~~ were not his, but his sons Albert. In this connection it is to be observed that Defendant called A M Baldwin (ab Page 14<sup>15</sup>) & offered to prove by him that the ~~had~~ <sup>contract</sup> was made with Albert Evans & that he, <sup>Albert</sup> controlled the cattle & had sold them, but the court refused to permit the evidence to be heard, and in so doing deprived the defendant of the right to show that plaintiff ought not to recover, & committed a great error.

The jury were not warranted <sup>in</sup> finding a verdict contrary to the positive proof Clayton & Shores, which proof was not impeached or contradicted. It is true Woodmaney sold the cattle as he says to, <sup>Plaintiff</sup> ~~Evans~~, but not withstanding they might still belong to Albert Evans, by purchase or gift from his father. Nor was the court warranted in refusing to



7  
gave the 6th instruction asked for defendant  
see abstract Page 19.

V. But there is another question in this case which  
seems to have created the original difficulty, &  
brought about the litigation  
on the 17th day of March 1859  
Plaintiff took a witness, Samuel Brown  
(see Abstract pages 43, 44 & 45) and went with him  
to St Augustine, where they found the defendant  
& demanded the cattle. The defendant refused  
to give them up, unless the plaintiff would pay  
him for them. Plaintiff ~~said he would~~ said  
he would let him have the cattle if he would  
pay him for them. Plaintiff agreed to do this, but  
when defendant asked what kind of money he had, the  
plaintiff said it was gold & currency. Defendant  
objected to the currency. It seems by the proof  
that plaintiff was to take 23 head of other cattle  
from defendant, and he does not seem to have  
had the money on that day. He showed no money.  
He made no tender. He did not inform defendant  
that he would deposit the money in any place;  
subject to his order. Defendant was willing  
to give up the cattle if he could get his pay, but  
he couldn't. Plaintiff did not come to time,  
he couldn't. He didn't have the money. The  
next day after he visited Meadows, he found



some money, and showed it to Brown, who was still with him, but on the day he was at St Augustine he did not show any money, nor offer any, nor deposit any, so that defendant could get it, if he wanted.

The jury were not warranted in finding that plff did offer the money, nor was the court warranted in refusing to give the 7th instruction asked for by deft (At Page 19) nor the 3<sup>d</sup> instruction asked by him on page 18 of abstract



VI The court also erred in rejecting the evidence offered by defendant & refusing to let him ask the witnesses proper ~~in~~ questions -

Also in refusing to strike out hearsay evidence contained in the depositions & in giving wrong instructions for plaintiff refusing to give proper instructions for deft -

Wm Wood  
for R. W. in Am.



73 260 263  
Francis Staad 62

<sup>12</sup>  
James V. Evans

Powells by Spruce Wood

Filed May 7, 1863.  
Leland  
Ch.



# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

---

FRANCIS STAAT }  
                  <sup>vs.</sup>  
JAMES V. EVANS. }

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## BRIEF OF DEFENDANT IN ERROR.

### I.

There is a general count for goods, wares, merchandize and chattels sold and delivered. Also the money counts and account stated. These were all that were necessary. There is ample evidence in the record showing that defendant Staat sold the cattle and converted them into money. At the time of the demand by Evans for the cattle, Staat was in the act of shipping off the cattle by the railroad, having already weighed them off for that purpose.

But it was not even necessary in this case to show that Staat sold the cattle and converted them into money.

“When goods are lent or delivered on the terms of sale or return, and they are retained an unreasonable time, an action for goods sold can be supported.”

Stephens' Nisi, Prius V. 1, p. 286.

Here the cattle were delivered to Staat to be returned upon Evans paying a certain amount for the increased weight of the cattle. Staat never did return them, and Evans, after waiting till 23d day of September 1859, brought suit.



## II.

There was an attempt made, through some loose conversations had by witnesses Clayton and Shores with Evans, to show that his son Albert owned the cattle in controversy. The witnesses do not state with much precision when these conversations took place, and if they ever did take place, it must have been in reference to another lot of cattle than the ones in controversy. There appears to have been other cattle at Staat's in which Evans or his son was interested, because, at the time of the demand, Evans demanded 35 head. But that the cattle in controversy were plaintiff's, there can be no doubt. He bought eleven of them of John Woodmaney, and paid him the money for them. James Evans' testimony shows it also.

When the demand was made of defendant by plaintiff for the cattle at St. Augustine, no claim whatever was set up by defendant that the cattle were Albert Evans'. The evidence of Henry Staat, defendant's witness, shows the same fact. If there was any contract whatever made by defendant with Albert Evans, it must have been in reference to other cattle, and a contract made by defendant with Albert Evans had nothing whatever to do with the case. It was not shown that he was the agent for the plaintiff, or had any authority whatever to make contracts for him.

## III.

The cattle, as appears from the evidence in the case, were to have been delivered to plaintiff at defendant's farm. Plaintiff went there for the purpose of getting the cattle on the 17th day of March 1859. He did not find the defendant there, nor were the cattle there. He next went to Avon, a railroad station, but did not find defendant there, but finally found him at St. Augustine, where he had already weighed off the cattle, and was getting a car up to the cattle yard for the purpose of shipping them off. This shows the whole intention of the defendant. He intended to have secretly shipped off the cattle without the knowledge of Evans. Evans made a demand for the cattle. Staat replied, "you know dam'd well your day is past." But subsequently stated that he would let plaintiff have the cattle if he paid him for them. He asked plaintiff what kind of money he had. Plaintiff replied, specie and currency. Defendant did not object to the currency, but objected generally, by say-

ing that was no money. Evans told defendant that he had enough gold to pay him for the twelve head. (See testimony of S. Bowen, page 45.) Evans demanded the weights. Defendant told him Shores had them. Plaintiff made application to Shores for the weight, who told him that the whole 35 had been weighed together. Staat kept on working, and never stopped during the time Evans was there.

Now, these facts and circumstances show that Staat did not intend to let Evans have the cattle. Else why did he not have the twelve head of cattle weighed, so that Evans could pay him <sup>feeding</sup> for them?

The offer by Staat to Evans that if he would pay him for the cattle he would let him have them, was all a pretense, and Staat took good care that no such offer could be carried into execution.

Evans said he had the gold to pay for the twelve head. Next morning he exhibited from \$250 to \$300 in gold, and \$1,200 in currency, to his companion. Thus showing conclusively that he had the money, as he stated.

## I V.

There was no objection taken to that part of James Evans' testimony on page 3 of abstract included in brackets, which is stated to be hearsay.

There was an objection taken as to what the witness "learned." It is true, he states that he learned from the plaintiff and defendant certain facts. But this was in regard to a conversation between plaintiff and defendant in his presence, and is simply a statement of what they said at the time.

There is also an objection to the deposition of Lewis Terry, because he says: "I understood from the parties."

Now, it will be readily perceived from an examination of his whole testimony, that the witness means by this expression, that he heard the parties state the facts. The same observation can be made as to the expression "conveyed the idea that he (defendant) was going to use the car for that purpose."

Handwritten calculations:

$$\begin{array}{r}
 11) 12525 \\
 \underline{1137} \\
 13662 \\
 \underline{22} \\
 27324 \\
 \underline{6831} \\
 34155 \\
 \underline{6} \\
 204938 \\
 \underline{3} \\
 614790 \\
 \underline{34155} \\
 40304
 \end{array}$$



## V.

The fact still remains, that the defendant obtained twelve head of cattle of plaintiff, to be returned; that at the time of redelivery, defendant had converted them to his own use and was in the act of secretly shipping them off, without any notice to plaintiff. He obtained the plaintiff's cattle, shipped them off to market, got the money for them, and is it not just that he should pay plaintiff for them? Substantial justice has been done, and the verdict and judgment should not be disturbed.

Some objections have been taken to the instructions, but these will be found to be correct.

The motion for a new trial and in arrest of judgment, was made as one motion, and decided as one motion. How can this be done? It is a waiver of the motion for a new trial, and simply a decision as to the motion in arrest of judgment.

A. G. KIRKPATRICK,  
For Def't. in Error.

2.5

73 62  
Staat  
v

Evans

— / —

Depts Ring

Filed April 27 1864

J. L. Leland M



Be it Remembered that on the 14<sup>th</sup> day of  
October 1859 a Process was filed in the office  
of the Clerk of the Circuit Court of Warren County  
Illinois. And upon filing the same a Summons  
issued out of said Court, which is in the words  
and figures following to wit;

State of Illinois  
Warren County } The People of the State of Illinois  
To the Sheriff of Warren County Greeting

He Command  
you to Summon Francis Staal if to be found  
in your County, personally to be and appear  
before the Circuit Court of the County of Warren  
on the first day of the next term thereof to be  
holden at the Court House in Mornmouth  
on the fourth Monday in the month of October  
next, to answer the Complaint of James V Evans  
of a plea of Trespass on the Case on promises  
to his damage the sum of Six Hundred dollars  
as he says; and have you then and there  
this Writ, and make return thereon in what  
manner you execute the same

Witness William Lafayette Clark, of our said  
Circuit Court and the Seal thereof at Mornmouth  
this 23<sup>d</sup> day of September in the Year of Our  
Lord one thousand eight hundred and fifty  
nine

Wm Lafayette Clark

(On the back of said Summons is the following)

1



"I did on the 10<sup>th</sup> day of October AD 1859 serve  
this writ by reading the same to the within  
named Francis Staal - Dated this 10<sup>th</sup> day  
of October AD 1859

Lech Smith Sheriff of Mann County  
By Mr McPierce Deft

Filed Oct 24<sup>th</sup> 1859

W. Safety Clerk

Copy of Declaration  
State of Illinois of Mann County Circuit Court  
Mann County of October Term AD 1859  
James N Evans  
vs J Assumpsit  
Francis Staal

The said James N Evans  
Plaintiff in said suit by A J King his attorney Com-  
-plains of Francis Staal Defendant who is sum-  
-moned to answer said Plaintiff of a Plea of  
Trespass on the Case upon promises. For that  
whereas heretofore to wit on the 10<sup>th</sup> day of January  
AD 1859 at said County of Mann in consideration  
that the said Plaintiff at the special instance &  
request of the said Defendant had then & there  
delivered to the said Defendant certain goods &  
chattels to wit: Thirteen Steers of great value  
to wit, of the value of Five hundred dollars  
to be fed & fattened and kept by the said  
defendant for the said Plaintiff and to be



redelivered by the said defendant to the said Plaintiff to wit on or before the 16<sup>th</sup> day of March AD 1859 at the said County of Maine for four  $\frac{1}{2}$  cents per pound for all said Steers should weigh at the time of redelivering the same to said Plaintiff as aforesaid after deducting therefrom the weight of said Steers at the time said defendant took said Steers from said Plaintiff as aforesaid to wit 13525 pounds at the rate of two and one half cents per pound to be paid said defendant by said Plaintiff. therefor when said Steers should be redelivered as aforesaid to said Plaintiff by the said defendant undertook, and then and then faithfully promised the said Plaintiff in consideration thereof to feed & fatten & keep said Steers for Plaintiff and to redeliver the same to the Plaintiff on or before the said 16<sup>th</sup> day of March AD 1859 at said County. And although the said defendant as aforesaid received the said Steers for the purpose and on the terms aforesaid yet the said defendant not regarding his said promise & undertaking but contriving and intending to deceive & defraud the said Plaintiff in this behalf did not on or before the said 16<sup>th</sup> day of March aforesaid nor at any other time redeliver the said Steers at the said County to the Plaintiff or offer to do the same although often requested so to do. But on the contrary thereof



4

he the said defendant sold the same for a large sum of money to him; the sum of six hundred dollars and the said defendant so carelessly & negligently behaved & conducted himself with respect to said steers that the same became and are wholly lost to this Plaintiff to him; at the County aforesaid; And for that whereas also the said defendant afterwards to him: on the first day of August A.D. 1859 at the County of Hanev and State of Illinois aforesaid was indebted to the said Plaintiff in the further sum of six hundred dollars of like lawful money for divers goods and Chattels wares and Merchandise by the said Plaintiff before that time sold and delivered to the said defendant and at his special instance and request. And also in the further sum of six hundred dollars of like lawful money for money by the said defendant before that time had and received to and for the use of the said Plaintiff. And also in the further sum of six hundred dollars of like lawful money for money found to be due from the said defendant to the said Plaintiff on account then and then stated between them, And whereas the said defendant afterwards to him on the day and year last aforesaid and at the place aforesaid in consideration of the premises respectively then and then promised



to pay the said last mentioned several monies respectively to the said Plaintiff on request. Nevertheless the said defendant although often requested has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said Plaintiff but to pay the same or any part thereof to the said Plaintiff the said defendant has hitherto altogether refused and still does refuse to the damage of the said Plaintiff of six hundred dollars and therefore the said Plaintiff brings suit &c

A J King  
Plffs Atty

Copy of a/c

|                        | Deft to Plff Dr |
|------------------------|-----------------|
| To 13 Steers           | \$600.          |
| " goods chattels & mdc | \$600.          |
| " Money lent           | \$600.          |
| " " paid & expended    | \$600.          |
| " Bal a/c              | \$600.          |

Filed Oct 14-1859

W. Safety Club



State of Illinois }  
 Bureau County }

Pleas before the Honorable John  
 S Thompson Judge of the tenth Judicial Circuit  
 of the State of Illinois. At a Circuit Court began  
 and held at the Court House in Mammouth  
 in the County of Bureau and State of Illinois  
 On the fourth Monday in the month of October  
 in the year of Our Lord one thousand eight  
 hundred and fifty nine. It being the 24<sup>th</sup>  
 day of said month

Present Hon John S Thompson Judge  
 James H Stewart States Atty  
 Seth Smith Sheriff  
 Wm Loferty Clerk

James N Evans  
 vs } Assumpsit  
 Francis Staal }

(Copy of Plea)

State of Illinois } October term AD 1859 of the Circuit  
 County of Bureau } Court of said County.

James N Evans  
 vs } Trespass on the Case on promises  
 Francis Staal }

And said defendant Comes and  
 defends the wrong and injury wher &c And  
 says that he did not undertake or promise in



manner and form as said Plaintiff hath above  
thereof complained against him and of this  
he puts himself upon the Country &c

Holloway & Luce & Harris

And Plff doth the like  
by King, Parie & Burroughs

Atty for deft

Plff Atty

Filed Oct 28<sup>th</sup> 1859

Wm Lafferty Clerk

And Afterwards to wit on the 7<sup>th</sup> day of  
November AD 1859 being at the said October term  
1859 the following order was entered upon the  
records of our said Court which is as follows

James B Evans  
vs  
Francis Stuart } Assumpsit

Ordered by the Court that  
this cause be continued until the next  
term of this Court,



State of Illinois  
Hann County 3

Pleas before the Honorable Aaron Tyler  
Judge of the tenth Judicial Circuit of the State of  
Illinois. At a Circuit Court began and held  
at the Court House in Monmouth in the said  
County of Hann and State of Illinois. On the  
third Monday in the month of March, In the  
year of our Lord One thousand eight hundred  
and Sixty one. It being the 18<sup>th</sup> day of said month

Present Now Aaron Tyler Judge  
James M Stewart States attorney  
David Timbrell Sheriff  
Wm Saferty Clerk

And afterwards to wit on the 22<sup>d</sup> day of March  
AD 1861 the following order was entered upon the  
records of our said Court which is as follows,

James V Evans  
vs  
Francis Staats & Assumpsit

This day came defendant by  
Attorney and entered his motion to suppress  
part of the answer to the third question of the  
Deposition of James Evans, And to suppress  
a part of the Deposition of John Woodmancy and  
Lewis Perry, the seventh question of Lewis  
Perry and the answer to the seventh and  
eighth questions



3

And afterwards to Wit, on the 26<sup>th</sup> day of March  
AD 1861 the following order was entered upon the  
records of our said Court which is as follows,

James V Evans  
vs  
Francis Slater & Assumpsit

This day again this Cause  
Coming on to a hearing on the defendants mot-  
ion to suppress the deposition of Lewis Perry &  
John Woodmancy, And after hearing the same  
it is ordered by the Court that the motion be  
overruled except as to the understanding of  
said Witness - motion sustained, And it is  
further considered by the Court that the motion  
to suppress part of the deposition of James  
Evans filed herein be sustained. Thereupon  
Came the parties and their Attorneys and issue  
being joined for trial they put themselves upon  
the Country. Thereupon Came a Jury to Wit;  
James Hill, William Clayton, James W Morgan  
Clark Shaw, Andrew Livermore, Alexander  
Steiner, John B Black, Almond Ridder,  
Freeman Eldridge, Thomas & Allen Nelson B Carr  
& W Whitnack, who being duly elected tried  
and sworn to well and truly try the issue  
joined herein, And after hearing a part of the evidence  
was permitted under the charge of the Court to separate  
and required to meet the Court at 8 1/2 o'clock tomorrow  
morning



10 And afterwards to wit on the 27<sup>th</sup> day of March A.D. 1861 the following order was entered upon the records of said Court as follows,

James V Evans  
vs } Assumpsit  
Francis Staal }

This day again came the parties and their Attorneys, Also the Jury empaneled herein on Yesterday, And after hearing the Conclusion of the evidence and the arguments of Counsel returned in charge of an officer under the instructions of the Court to consider of their Verdict;

And afterwards to wit on the 28<sup>th</sup> day of March A.D. 1861 the following order was entered upon the records of our said Court which is as follows,

James V Evans  
vs } Assumpsit  
Francis Staal }

This day again came the Jury empaneled herein heretofore and upon their Oaths do say "We the Jury find for the defendant, Thereupon came the Plaintiff by his attorney and enter his motion for a new trial herein,



And afterwards to wit, on the 12<sup>th</sup> day of April  
AD 1861 being at the March Term of Said Court the  
following order was entered upon the records of  
Said Court to wit;

James B Evans  
vs  
Francis Staab & Assumpsit

This day again this Cause  
coming on to a hearing on the Plaintiff's  
motion for a new trial herein. And after  
hearing the same it is ordered by the Court  
that the motion be allowed. Therefore it is  
considered by the Court that the verdict of the  
jury herein be set aside and for naught  
held and that a new trial be granted  
herein. And this Cause is continued until the  
next term of this Court. Thereupon came the  
defendant by his attorney and except to the  
decision of the Court herein. And Bill of Exceptions  
to be filed before the next term of this Court



State of Illinois  
 Hancock County

Pleas before the Honorable Charles B Lawrence Judge of the tenth Judicial Circuit of the State of Illinois, At a Circuit Court began and held at the Court House in Marmouth in Hancock County Illinois On the Fourth Monday in the month of October in the year of our Lord one thousand eight hundred and sixty one It being the 28<sup>th</sup> day of said month

Present Now Charles B Lawrence Judge  
 James W Stewart States atty  
 David Turnbull Sheriff  
 W Lafferty Clerk

And afterwards to Wit, on the 29<sup>th</sup> day of October AD 1861 the following order was entered upon the records of our said Court to Wit:

James N Evans  
 vs  
 Francis Staal & Assumpsit

This day came defendant by his attorney and entered his motion for a rule on Plaintiff to give security for costs. Defendant also moves the Court to suppress the deposition of Albert Evans.



And afterwards to wit on the 30<sup>th</sup> day of October AD  
1861 the following order was entered upon the records  
of our said Court to wit:

James V Evans  
vs Assumpsit  
Francis Streat

This Cause now coming on  
to be heard on defendants motion for a  
rule on Plaintiff to give security for costs  
And the Court having heard and considered said  
motion sustains the same, And orders that  
Plaintiff give security for costs herein by  
Monday Morning next.

And afterward on same day to wit Oct 30 1861  
the following order appears of record to wit:

James V Evans  
vs Assumpsit  
Francis Streat

This Cause now coming on to  
be heard on defendants motion to suppress  
the deposition of Albert Evans the Court after  
being advised in the premises sustains said  
motion. And orders said deposition to be  
suppressed. Thereupon Plaintiff entered his  
motion for a continuance, which is allowed and  
the Case continued at Plaintiff Costs. It is



therefore ordered by the Court that Defendant recover of Plaintiff his Cost herein made at this term of Court and may have Execution therefor

And afterwards to wit on the 5<sup>th</sup> day of November AD 1861 the following order appears of record,

James V Evans  
vs  
Francis Staat } Assumpsit

This day came Plaintiff by Attorney and on his motion leave is given him to withdraw the deposition taken herein for the purpose of having proper Certificate attached to the same.

And afterwards to wit on the 17<sup>th</sup> day of March AD 1862 being at the regular term of our said Circuit Court the following order was entered upon the records thereof to wit;

James V Evans  
vs  
Francis Staat } Assumpsit

This day came Defendant by Attorney and on his motion the said Plaintiff is ruled to justify or give further security for Costs herein by Wednesday morning next. And on defendants motion the Deposition of



Albert Evans taken herein is Suppressed.

And afterwards to Wit: on the 19<sup>th</sup> day of March  
AD 1862 the following order was entered of record,

James V Evans  
vs                      of Assumpsit  
Francis Staat }

This day came the parties  
and their Attorneys and issue being joined for  
trial submit this case to a Jury. Thereupon  
came a Jury to Wit: Henry R Pfeffer, R B Mitchell  
James Martin, J N Bridenbath, Leonard  
Stevens, Winchester Rowe, J N Goster, Thomas  
D Reese, A W Baker, Ira Barnum, Solomon  
Byers & James Shoemaker who being duly em-  
paneled and sworn to well and truly try the  
issue joined herein, After hearing the evidence  
and arguments of Counsel and receiving the  
instructions of the Court retired to consider  
of their Verdict,

And afterwards to Wit: on the 20<sup>th</sup> day of March  
AD 1862 the following order was entered of record,

James V Evans  
vs                      of Assumpsit  
Francis Staat }



parties by their Attorneys And also Came the  
 Jury empaneled herein with their Verdict to wit:  
 "Be the Jury find for Plaintiff. And assess his damages  
 at the sum of (\$403.<sup>00</sup>/<sub>100</sub>) four hundred and three dollars  
 and five cents." Thereupon came defendant and  
 extend his motion for an arrest of judgment and  
 a new trial herein,

Afterwards to wit April 3<sup>rd</sup> 1862 the following order  
 was entered of record to wit

James N Evans  
 vs J Assumpsit  
 Francis Staal

This day again this cause coming on to  
 a hearing on defendants motion for a new trial herein  
 And after hearing said motion the Court overrules the  
 same, And the verdict of the Jury herein is the judg-  
 ment of the Court. It is therefore considered by the Court  
 that the said Plaintiff have and recover of the said defen-  
 -dant the sum of Four hundred and three dollars and  
 five cents being the amount so found by the Jury as  
 aforesaid together with his costs by him in this suit made  
 and may have execution therefor, Thereupon came defen-  
 -ant and prays an appeal to the Supreme Court which is  
 allowed by the Court upon the said defendant entering into  
 bond in the penal sum of Twelve hundred dollars Conditions  
 according to law with security to be approved by the Clerk  
 of this Court by the agreement and consent of the parties, here-  
 By and Bill of Exceptions to be filed in sixty days from this date



State of Illinois } March Term a d 1862  
County of Warren } of the Circuit Court of  
said County.

James V Evans }  
vs } trespass on the case and  
Francis Staatt } promises Damages \$600.

Be it Remembered that on  
the trial of said cause John Woodmansey  
a witness of plaintiff on his Examination  
in Chief testified as follows to wit. That he  
saw defendant in Abingdon, plaintiff  
his son Albert Evans and William Richie  
were present and that it was on the first  
Monday in a d 1859 that he delivered to  
Evans the plaintiff some cattle. He had  
sold him eleven head of fat cattle. They  
weighed them. They weighed twelve  
thousand five hundred and twenty five  
pounds. Had sold them previously, deliv-  
ered them there. heard nothing said  
between the parties. Saw plaintiff and  
defendant conversing. Was not close  
enough to hear what they said. He under-  
stood Staatt to say he would take the  
cattle and feed them for Evans. They started  
together driving the cattle. Evans said they  
would take them down to Staatt. That day  
they started in the direction of Greenbush.  
Five or six of them were five year old, that



he would call them good cattle and worth two and half cents per pound gross, and that plaintiff paid him for them. In the introduction of all which testimony defendant then and there objected for the reasons that it materially varied from the only contract alleged in plaintiffs declaration in said cause and as an additional reason for objecting to so much thereof as was given from the understanding of said Woodmaney. That such testimony so derived is therefore inadmissible. Which objections the Court then and there overruled and permitted the testimony to be given to the Jury to which overruling and permission defendant then and there excepted. That said Woodmaney on his Cross Examination testified as follows to wit that Albert Evans came for the cattle to his house and helped him to drive them from there to the Scales at Abingdon That plaintiff was at the Scales when they got there. Albert Evans helped drive them from the Scales toward Grunkbush and that he saw them drive them five or Six Rods only and then left there. When they had been talking were talking so low that he could not hear them the Scales were between us. Albert Evans



passed backwards and forwards from one to them. Stant said he would take the cattle and feed them, and that he Woodmaney heard no contract between the parties.

Plaintiff then offered as evidence the deposition of James Evans, to the introduction of the third Answer in chief, of which defendant then and there objected and gave as his reason therefor that it varied materially from the only contract in said declaration averred. And to so much thereof as said James Evans states of what he learned, and gave as his reason therefor that testimony of what such Witness had learned was illegal and improper. That the Court then and there overruled such objections and permitted said deposition and such answer to be given to the jury as testimony. To which overruling, <sup>and permission</sup> as to said answer, defendant then and there excepted.

James Evans Deposition



State of Illinois } Circuit Court thereof  
Warren County } From October Term 1859 continued  
To March Term AD 1860

James N Evans  
vs  
Francis Staal } Assumpsit

By Messrs Holloway & Luce  
Deft Atty in above entitled suit

His take notice  
that we will as Attorneys for the Plaintiff in the  
above entitled ~~suit~~ Cause on the tenth day of  
January AD 1860 send out of the office of the  
Circuit Clerk of Warren county & state of Il-  
linois a dedimus potestatem, directed to  
any Justice of the Peace in and for the county  
Monongalia and state of Virginia and au-  
thorizing him at & within said county  
& state to take the deposition of James Ev-  
ans of said County in answer to the fol-  
lowing interrogatories hereto annexed  
and to be read in evidence on the part  
of the Plaintiff on the hearing of the above  
entitled Cause at which said time &  
place you can file cross interrogatories  
to be annexed hereto and go out with  
the said commission if you think  
proper so to do

Respectfully Yours &c

A. King Paine & Burnough  
Plff. Atty



22 Interrogatories to be propounded to the witness in pursuance of the foregoing notice.

Interrogatory 1<sup>st</sup>. State your name, age, occupation and place of residence.

Int. 2<sup>nd</sup>. Do you know the parties plaintiff and defendant in this suit? If yea state when, where, & how long you have known them or either of them

Int 3<sup>rd</sup>. Did you ever hear a conversation between the parties plaintiff and defendant respecting the defendant Francis Staut keeping a lot of cattle for the plaintiff James V. Evans? If yea state fully what that conversation was, where and when it occurred, and who was present at said conversation -

Int. 4<sup>th</sup>. Did you ever have any conversation with the defendant Francis Staut in regard to those cattle? If yea state when & where and what said defendant said - state fully

Int. 5<sup>th</sup>. Did you ever have any interest



in those cattle that defendant was buying for plaintiff.<sup>s</sup>

Int. 6<sup>th</sup> State fully all you know in regard to the matters in issue in this suit that will be of any benefit to the plaintiff.

We acknowledge service of the within notice & interrogatories by the delivery to us of a true copy of the same this 31<sup>st</sup> Dec. 1859

Holloway & Coe  
Depts attys

State of Illinois } Warren Circuit Court  
Warren County } March Term A.D. 1860

James V. Evans }  
vs } Assumpsit  
Francis Stuart }

Cross-Interrogatories  
to be propounded to the witness James Evans in pursuance of notice.

Cross Int. 1<sup>st</sup> Were you or ~~were~~ you not a partner of the plaintiff James V. Evans at any time during the month of December A.D. 1858 in buying and selling cattle.



24 Int. 3<sup>rd</sup> Do you know of any sale of cattle by plaintiff to defendant? if yes, state when and where and how many cattle were sold.

3<sup>rd</sup> Do you know of any sale of cattle by defendant to plaintiff? if yes please state when and where the number of cattle sold at what price, and when and where they were to be delivered.

4 Did you ever hear the plaintiff James V. Evans say that the lot of cattle kept by the defendant Francis Staut belonged to his son Albert Evans? if yes, state when and where

4<sup>th</sup> Did not the defendant tell the plaintiff at the time of the conversation alluded to in Greenbush that the plaintiff never bought any cattle of defendant? answer yes or no - if no what did defendant state to plaintiff state the whole conversation fully

5<sup>th</sup> Did you or did you not hear all the conversation between said parties which took place at said time



2

6<sup>th</sup> Who was present at the time of said conversation between said parties? Give their names in full and if you do not know the names state the fact and state how many persons were present and the appearance of each

7<sup>th</sup> What relation if any do you bear to plaintiff

8<sup>th</sup> Did not defendant state to plaintiff at said time of said conversation that the contract between the plaintiff's son, and defendant in regard to the cattle was, that defendant was to keep them a certain time and deliver them to defendant's son at Greenbush when they were to be weighed, and that the defendant was ready to comply with the agreement and did not plaintiff in reply to this say that he wanted the defendant to keep the cattle 2 days longer & deliver them at Berwick, and that defendant then refused to change the contract as plaintiff requested? Answer this question yes or no; and if no state what was said about this matter between the said parties at said time?



26 Deposition of witness Taken on the 21<sup>st</sup> day of March A.D. 1860 between the hours of one o'clock P.M. & 4 o'clock P.M. at Morgantown in the County of Monongalia and State of Virginia, Lee Roy Kramer a Justice of the said County and upon the inclosed interrogatories and by virtue of the inclosed Commission to be read in evidence in a certain suit now pending in the Circuit Court of Warren County in the State of Illinois described in said Commission and interrogatories wherein James V. Evans is Pltff. and Francis Staats is Defd.

Deposition of James Evans. The said James Evans being first duly sworn doth depose and say in answer to the several interrogatories as follows to wit

Answer to question first propounded  
ed by Pltff

1<sup>st</sup> Aged 49 years, farmer Monongalia Co Va.

2<sup>nd</sup> Know both parties have known Pltff for twenty five or thirty years, until within the last few years he resided in Greene Co. Pa. about 8 miles from where I have resided all my life. Never saw the defd but once that I recollect, that was



at a village called Greenbush Warren Co. Ills in March 1859.

3<sup>d</sup> On the 9<sup>th</sup> or 10<sup>th</sup> March 1859 I went with the Pltff to the residence of the Defd. The plainiff stated that he was going to Defds to see a lot of cattle that he had engaged of Defd. and also as he stated to get Defd to keep the cattle for Pltff a few days longer than the contract required him the defd to keep them. The defd was not at home we were informed by his family that he had gone to Greenbush, where at Defds. Pltff went over in a lot where the cattle were and looked at them. Pltff + myself then went to Greenbush and met with Defd in a store in Greenbush. I was introduced to the Defd by Pltff. there were several persons in the store but were all strangers to me. Pltff took Defd out of the store and had a conversation in my presence about the cattle, in that conversation I learned from the parties that the Defd. had got from the Pltff in the fall or early part of the winter previous 12 head of cattle at a certain price per 100 lbs but do not now recollect at what price, the Defd was to stall feed said cattle and the Pltff was to take them back on the 12<sup>th</sup> day of Mch



28 1859 at a fixed price which I do not now recollect; the pliff was also to take other cattle from the Defd at a price I do not now recollect, they were to be taken at the same time. The Pltff asked the Defd how many cattle there were in <sup>lot</sup> ~~the~~ that he Defd expected Pltff to take in addition to the 12 head, the Defd answered 23 making in all 35. Pltff then told Defd he had been to his lot and counted some 42 head Defd replied that 7 head of those he had seen belonged to a man named Shores, and did not expect Pltff to take them. Pltff asked Defd which were the Shores cattle. Defd. described Shores cattle as being the thinnest and otherwise described them by marks colors &c. Pltff then desired Defd to keep the cattle till 16<sup>th</sup> Mch and after a good deal of persuasion Defd agreed to do so by Pltff agreeing to pay for the corn they must eat from the 12<sup>th</sup> to 16<sup>th</sup> Mch. and the Defd to have the benefit of what they might increase in weight in that time, the Pltff complaining that Defd was charging him too high a price for the corn as he Defd was to have the benefit of the difference in weight. There were persons



passing & repassing during this conversation, and may have heard parts of the conversation, but no persons were standing listening to the conversation but myself so far as I observed. After they had agreed to a delivery of the cattle on the 16<sup>th</sup> instead of 12<sup>th</sup> March they then differed as to the place of delivery the Pctff desiring them to be weighed at Sheldon's Scales at Berwick, and the Defd desired to deliver them and weigh them at Greenbush, they parted without agreeing at what place they should be delivered. The Pctff remarked that he believed he could compel Defd to deliver them at Abingdon where the 12 cattle that he got from Pctff. were weighed and delivered the previous fall or winter but that he Pctff did not want them there, he would prefer receiving them at Berwick.

4<sup>th</sup> Had no conversation with Defd only when he & Pctff. were conversing about the cattle in that conversation. I remarked to Defd that the Pctff & myself had a contract with Mr Alexander to deliver him 220 head of cattle on the 10<sup>th</sup> March but at great inconvenience to us had agreed to accommodate Mr Alexander by



Keeping them till the 16<sup>th</sup> Mch. and I thought he might or ought to accommodate the Pltff so much as to keep his 35 head from the 12<sup>th</sup> to 16<sup>th</sup> Mch. particularly as the Pltff was to pay him for the corn they would eat and we were to get nothing from Alexander for the corn ours would eat, we were only to get the increase in weight.

5<sup>th</sup> I had no interest whatever in the cattle Defd was keeping for Pltff and I so distinctly told the Defd during the conversation above referred to.

### Crop - Interrogatories

Ans to

Quest 1 - In the fall of 1858 Esr. D. Evans of this county & myself furnished the Pltff funds to buy and feed 420 head of cattle. Pltff was to have one third the profits if any, and if any losses were sustained he was to pay one third the losses. Pltff bot. 420 head of cattle & fed them through the winter, during the month of Jan'y 1859 he sold to the Messrs Alexanders the said 420 head of cattle for which the parties entered into a written contract according to which 220 head were to be



delivered in Mch 1859 + 200 in Apl.  
1859 on certain days specified in said  
Article of Agreement, which said cattle  
were delivered to the Messrs Alexanders  
according to agreement. This lot of  
cattle was all the cattle I had any in-  
terest in during that winter & fall. The  
cattle in controversy I never had any  
interest in.

2<sup>nd</sup> I know of no dealings between  
Pltff & Defd except that referred to in  
answer to quest. 3<sup>d</sup> in Pltff's interroga-  
tories, in which I have made a full an-  
swer so far as I recollect.

3<sup>d</sup> I know of no dealings between the par-  
ties except those stated in my answer to  
Pltff's 3<sup>d</sup> Interrogatories

4<sup>th</sup> Never heard the Pltff say that the cat-  
tle in controversy belonged to his son  
but that they belonged to Pltff.

4<sup>th</sup> In the conversation alluded to that  
took place at Erembush between the  
parties to this suit, Defd told plain-  
tiff that he Defd had not made any  
contract with Pltff. but with Pltff's  
son Albert. Pltff replied that his son  
Albert had acted in the matter as his  
Pltff's agent & that he Defd was aware  
of it, and that he Pltff had weighed



32 and delivered the 12 head of cattle before referred to to the Defd and was to take them back in the Spring as before stated together with the other cattle that Defd had the privilege of putting in. Defd also stated that Albert Evans had rented 90 acres of stock field & pasture, but never brought any cattle to put in it as he agreed to do, and complained of this to the Pltff, but said that he Defd had afterwards rented 40 acres of said 90 to some other person leaving on his Defd hands 50 acres unrented.

5- I believe as well as I recollect that I was present during all the conversation between the parties at Greenbush; if they had any other conversation than that in my presence I am not aware of it.

6" In my answer to Pltff Third Interrogatory I have answered all I know about any persons being present.

7" None that I know of

8" In answer to Pltff Third Interrogatory I have answered all I heard in regard to said contract as well as I now recollect

James Evans



4  
State of Virginia

Monongalia County

I Lee Roy Kramer a Justice for the said County and State do hereby certify that the said witness James Evans prior to the taking of said deposition and on the said 21<sup>st</sup> day of March A.D. 1860 was by me duly sworn to testify the truth in relation to the matter in controversy in the said suit mentioned in the caption to this deposition and in the inclosed commission so far as he might be interrogated in relation thereto, and that the said deposition was on the 21<sup>st</sup> day of Mch. A.D. 1860 at Morgantown in said county taken and reduced to writing and signed and sworn to by said witness in my presence.

Given under my hand and seal this 21<sup>st</sup> day of Mch. A.D. 1860

Lee Roy Kramer J.P.

Justices fees \$1.88  
Witness 50  
\$2.38

Teste Lee Roy Kramer J.P.



34

State of Virginia  
 Monongalia County

I Marshall M.

Dent clerk of the County Court of said  
 county in the State of Virginia do hereby  
 certify that Lee Roy Kramer who has  
 taken and certified the foregoing depo-  
 sition was at the date thereof a Justice of  
 the Peace in and for said county of Monon-  
 galia, duly commissioned & qualified  
 and that his signature thereto attached  
 is genuine

Given under my hand and  
 the seal of said Court this 21<sup>st</sup> day of March  
 1860

( Seal )

Marshall M. Dent  
 Clerk

Paid to Clerk for seal &  
 certificate \$1.87<sup>2</sup>

Teste M. M. Dent clk

Filed March 27<sup>th</sup> 1860

W. Laferty clk



Plaintiff then offered in evidence the deposition of Lewis Terry, to the introduction of much of the answer in chief of the Sixth question thereof as was made from what was conveyed to said Terry, defendant then and there objected and gave as his reason therefor that what was conveyed to such Witness was illegal and improper testimony. And to the introduction to the seventh question thereof and the answer thereto and to the Eighth answer of said deposition in chief, defendant then and there objected and gave as his reason therefor that such Witness could not have legally or properly testified as to his understanding, that the Court then and there overruled such objections and permitted such deposition question and answers to be given to the Jury as testimony in the case, to which overruling and permission defendant then and there excepted

Copy of Lewis Terry's Deposition.  
James V Evans } In Circuit Court  
vs } of Warren County, Mo  
Francis Staats }

State of Illinois } vs. A. J. King attorney  
Warren County } for James V Evans the  
Plaintiff in the above entitled case first being duly



Woodhouse says that John Woodmaney and Lewis Terry who are as this affiant is informed & believes important and necessary Witnesses for said plff in the trial of the above Entitled Cause, are not residents of the County of Warren whose said suit is now pending but are residents of the County of Knox and State of Illinois and that he desires to take the depositions of said Woodmaney & Terry to be read on the trial of said suit.

Subscribed and A J King

Shown before me this 2<sup>d</sup> day of February A D 1860. (Seal) William H Gillaspie N.D.

Filed Feby 8<sup>th</sup> 1860.

Wm Laferty c.k. }

James V Evans } In the Circuit Court of  
vs } Warren County & State  
Francis Stuart } of Illinois,

To Francis Stuart defend  
ant in the above entitled Cause & Holloway  
& Luce his attys. Six take Notice that on  
the twenty fourth day of February A D 1860.  
between the hours of Nine O'clock in the  
Morning and Six O'clock in the Evening  
of the same day and continuing from day  
to day if necessary at the Office of  
Samuel H Ritchey Esq in the City of Windsor



County of Knox and State of Illinois and before Samuel  
Hitchey a Justice of the Peace of said County  
We shall proceed to take the depositions of  
John Wordmanney and Lewis Perry of said  
County to be read as evidence in the  
trial of the above entitled cause.  
Dated February 3<sup>rd</sup> A.D. 1860.

Yours &c  
A. J. King & Paine & Burroughs  
Attys for Puff.

Feby 8. 1860

We hereby accept service by  
Receipt of a copy of the above notice.  
Holloway & Luce  
Attys for Deft.

Deposition of Lewis Perry taken in a certain  
cause pending in the Circuit Court of the County  
of Warren and State of Illinois wherein James V  
Evans is Plaintiff and Francis Stuart is defen  
dant and on behalf of the said plaintiff  
and taking in pursuance of a Notice hereto  
attached, and at the time & place therein men  
tioned, the said Lewis Perry of the County of  
Knox & State of Illinois being of lawful age and  
having first been by the undersigned Justice of  
the Peace duly sworn as hereinafter certified  
deposes & says as follows.



Int 1<sup>st</sup> 38 What is your Name age Occupation and where do you reside

Ans 1<sup>st</sup> My Name is Lewis Perry. I was fifty five years old on the fifth day of March 1859. my occupation is that of a Merchant. I Reside in the City of Abingdon, Knox County Illinois.

Int 2<sup>d</sup> Do you know the parties, plaintiff and defendant in this entitled cause, if yea, state how long you have known them or either of of them.

Ans 2<sup>d</sup> I have known the plaintiff about three years. I do not recollect of having seen Mr Stant more than once before that was at Saint Augustine Depot in Knox County Illinois. It was either in February or March in the year a.d 1859 I think I was introduced to him at that time.

Int 3<sup>d</sup> Did you have a Conversation between the plaintiff and defendant at that time if yea, state fully what was said.

Ans 3. The Plaintiff asked the defendant if he was going to let him have some cattle or them cattle. defendant said he would not let him have them unless plaintiff would comply with his Contract. the plaintiff said he was ready to comply with his contract.



Int 4<sup>th</sup> What was the defendant doing at the time of this conversation.

Ans 4<sup>th</sup> He and some body else was unloading a Car of Lumber.

Int 5<sup>th</sup> When the plaintiff told the defendant he was Ready to comply with his contract did the defendant stop his work or not.

Ans 5<sup>th</sup> No he did not, but kept rite at it the hardest kind.

Int 6<sup>th</sup> Do you know for what purpose he defendant was unloading the Car, if yea, State what it was.

Ans 6<sup>th</sup> I think the defendant said he was a going to ship Cattle & conveyed the idea that he was a going to use the Car for that purpose

Int 7<sup>th</sup> Did you understand from the conversation of the parties or from what the defendant said at that time what Cattle the defendant was intending to ship Cattle on the Car,

Ans 7<sup>th</sup> I understood from the parties and particularly from the defendant that he was a going to ship the cattle that was then there at Saint  
39 Augustine Depot.



Int 8<sup>th</sup> State whether the cattle you referred to or  
40 any part of them were claimed by the plaintiff  
as his property in the conversation he had with  
the defendant at that time.

Ans 8<sup>th</sup> I did understand from their conversation  
that a part of the cattle at least was claimed  
by the plaintiff.

Cross Interrogatories by defendants Council

Int 1<sup>st</sup> When plaintiff asked defendant if he was  
going to let him have some cattle or them  
cattle did not the defendant say that if  
they had complied with their contract that  
he would have been ready to comply on  
his part.

Ans 1<sup>st</sup> I do not think defendant said they, but  
if you will comply with the contract then  
he was ready to let Piff have them.

Int 2<sup>d</sup> Did the Plaintiff tell you at any time that he  
had bought those cattle before referred to of  
the defendant.

Ans 2<sup>d</sup> The Plaintiff told me that he let the defend  
ant some cattle and that he had bought  
some from the defendant, I do not know  
whether those were the same cattle or not



this the plaintiff told me on the day before mentioned at Augustine Depot.

Examined by Plaintiffs Counsel.

Int 9th. How many cattle did the plaintiff state he let the defendant have and how many he was to have from the defendant and what was the conditions on which the defendant took the cattle from the plaintiff.

Ans 9th. I think the plaintiff said the defendant got twelve or more head of cattle from him I do not recollect the number precisely; do not recollect how many plaintiff was to have from defendant. It is now my impression that the plaintiff said he had sold the defendant some cattle and that he had bought some cattle from the defendant.

Lewis Perry.

State of Illinois } ss.

Knob County } I the Subscriber a Justice of the of the said County do certify

that the above deposition was taken by me at the time and place mentioned in the Caption thereof that the said Witnesses were first duly sworn and that the said depositions were carefully read to the Witnesses and signed by them respectively. Dated this 24th



day of February a D 1860.

Samuel H Ritchey J P.

State of Illinois } ss.

Knox County } County Clerk's Office.

I John S Winter Clerk of the County Court in and for said County and State do hereby certify that Samuel H Ritchey Esquire whose name is subscribed to the foregoing Certificate was on the day of the date thereof to wit on the 2<sup>d</sup> day of March a D 1860 a Justice of the Peace in and for said County duly elected Commissioned and sworn and as such duly authorized and empowered to administer oaths for general purposes to take the acknowledgements of Deeds and all other instruments in writing and that his signature thereto is genuine. In Testimony Whereof I have herewith subscribed my name and affixed the seal of said County Court at the City of Knoxville this 2<sup>d</sup> day of March a D 1860

John S Winter Clerk

(Seal)

Per John A West Deputy Clerk

Filed April 4<sup>th</sup> 1860

Wm Laferty ckr }

That Samuel Bowen a Witness of Plaintiff testified in chief as follows to wit. That he was present at St Augustine on 17<sup>th</sup> March



ad 1859. He went that day with plaintiff to  
 Staak's House and from there to Aron, and  
 from there to St Augustine and found defend-  
 ant there, plaintiff made demand of thirty  
 five head of cattle. Twelve head of which he  
 had let him have to feed and the rest he  
 had bought of him; that in answer defend-  
 ant he thought said you know damn well  
 your day is past. plaintiff argued that he  
 had better let him have the cattle and have  
 no difficulty about it. Staak said he  
 would let him have them if he would pay  
 him for them. plaintiff said he was ready  
 to pay him. defendant asked what kind  
 of money he had. plaintiff told him he  
 had specie and currency. defendant said  
 that was no money. Plaintiff asked for the  
 weights of the cattle, defendant said that  
 Mr Shores had the weights. plaintiff said  
 he was ready to take the cattle and pay  
 for them and made demand for the  
 twelve head if he would not let him have  
 the thirty five head. Don't recollect what  
 defendant replied. There were forty two head,  
 I understood from defendant that he could  
 not have any unless he took all. defendant  
 was unloading lumber and fixing cars. He  
 saw a lot of cattle there in the yard. Twelve  
 head that he should have let him have to feed



44 Don't recollect that they were doing anything with the cattle. They were getting cars up to the chute, plaintiff asked Shores for the rights. Shores said the thirty five head were all weighed together, plaintiff and he went to Meadows, did not see him get any money. The next day before we separated he Shored me about fifteen hundred dollars, between two hundred and fifty and three hundred of which was in specie. In the introduction of all which testimony of said Borren Defendant then and there objected and then and there gave as his reason therefor that it materially varied from the only contract in said declaration mentioned and as an additional reason for objecting to so much thereof as said Borren gave from what he ~~was~~ understood, that testimony so derived is therefore illegal and inadmissible, which objections the Court then and there overruled and permitted the testimony to be given to the jury, to which overruling and permission defendant then and there excepted,

That said Borren on Cross Examination testified as follows to wit that plaintiff is his Uncle, that defendant told plaintiff he could have the cattle if he would pay



for them. Plaintiff said he had the money defendant asked what kind of money he had. Plaintiff said he had specie and currency said he had specie enough to pay for twelve head. That he Bowen never heard anything about buying twelve head of cattle, that he counted forty two head in different yards. Don't know that they were all defendants, Plaintiff offered to take thirty five head of cattle if defendant would take his money but said he only had the gold to pay for twelve head of them. defendant refused to take his kind of money for all of them, that he next morning saw plaintiff have about fifteen hundred dollars. plaintiff showed me the money at father's. Saw no money at St Augustine. We were together all the time plaintiff was feeding his cattle at Robins and his hands boarded at Meadows.

That said Bowen on his Re Examination testified that cattle were worth from four and fourth to five cents at that time. That on such Examination plaintiff asked said Bowen if the twelve head of cattle of which he had been testifying were or were not the twelve head that defendant was to pay for the plaintiff, to the asking or answering of which defendant stood and there objected and gave as his reason therefor that it was



46 leading. That the Court overruled such objection and permitted said Bowen to answer the question to which overruling and permission defendant then and there excepted, that said Bowen answered said question as follows to wit "That they were the ones that plaintiff let defendant have to feed" that defendant then and there objected to said answer as testimony in the case and gave as his reason therefor that it was suggested by the question then to which was leading that the Court overruled such objection and permitted said answer to go to the jury as evidence, to which overruling and permission defendant then and there excepted.

Jesse Weathers a witness of plaintiff on his Examination in Chief testified that defendant took some cattle past his home that he said he got of Evans at Abingdon in the Winter of 1858 or 1859. He thought January 1<sup>st</sup> a d 1859, and on Cross Examination that defendant said he got them of Evans at Abingdon. Plaintiff has a sow by the name of Albert Evans.

James Tucker a witness of plaintiff on his Examination in Chief testified that he



had been a dealer in cattle twenty years, that in March A.D. 1859 fat cattle were worth from four dollars to four dollars and forty cents and that the customary price was about four dollars and twenty five cents, And on his Cross Examination that the difference in the value of fat cattle that he speaks of good fat cattle, that the lots sold at four dollars and forty cents were selected cattle, that if they are not good they are worth about two thirds as much as good, and that there was not any change in price until last of May or first of June.

That Henry Staart a Witness of defendant testified as follows to wit, that he is a son of defendant, On January 3<sup>rd</sup> A.D. 1859 Father & He went to Abingdon to get some cattle, Was at the scales and waited there sometime before the cattle came, when they came they were weighed at the scales, did not hear any bargain made. Saw father talking with Albert Evans, about the cattle, they weighed the cattle Plaintiff wanted Father to keep the cattle a few days longer. Father said he would not, It was not the contract, Plaintiff, Albert Evans and others brought the cattle to the scales



48 Father said the Contract was that they were to be delivered on the 10th or 12th of March a D 1859. Plaintiff said he knew it was. Nothing was said as to whom the Contract was with. Father told me, well I will not take the cattle lets go. Henry Albert Evans came after us and told us to take the cattle away. We were then three four or five Rods from plaintiff. Father went back and got the cattle. Plaintiff was then by the cattle and did not say anything that I recollect of. Albert Evans father and myself started the cattle. Don't mind hearing Albert Evans saying anything to plaintiff after we returned.

William Clayton a Witness of defendant then on his Examination in Chief testified that in the Winter of a D 1858 and 1859 plaintiff was having cattle fed near his place, and then said he had to go to Bernick and around by defendants. I asked him if he had any cattle at defendants, he said no but that his son Albert had and that he wanted to go by & see them.

William Shores a Witness of defendant on his



Examination in chief testified as follows to wit  
That he had a conversation with plaintiff  
in February a D 1859. He was going to Chicago  
on the Rail Road. plaintiff came on board  
the Cars at Abingdon. He asked him if he  
had cattle feeding at defendant's. He Replied  
that he had not but that his son Albert  
had. I asked him if those cattle were going  
into the Contract with Alexander. He Replied  
that Alexander said he would take them  
on the Contract if they suited him as the  
Young Man had bought them, and he asked  
me what kind of cattle they were, and asked  
him if he wished to buy them, and that he  
the Witness was then dealing in cattle.

A M Baldwin a Witness for defendant on his  
Examination in Chief testified as follows to wit  
That he had known defendant thirteen years  
the plaintiff since fall of a D 1858 and Albert  
Evans since the Winter of a D 1857 and 1858,  
and that defendant was feeding cattle in  
January, February and March a D 1859, defendant  
then and there asked said Baldwin the follow  
ing question to wit, "State whether on or before  
3<sup>d</sup> January a D 1859 any Contract was made  
between said Albert Evans and defendant for  
the sale of twelve of the cattle which defend  
ant had kept from that day to after middle

49



of March A.D. 1859. If so state it fully. When it was made and describe the Cattle & contracted" Which said question the Court would not permit said Baldwin to answer, to which ruling of the Court in not permitting said question to be answered defendant then and there Excepted and asked said Baldwin another question which was as follows to wit. "State whether any contract was made before the 3<sup>d</sup> of January A.D. 1859 made between said Albert Evans and defendant for the sale of more than twelve head of the Cattle that defendant had kept from that day until after the middle of March thereafter and whether a less number of such Cattle than that so Contracted were not sold and delivered by the purchaser of such larger number to the Vendor thereof, as part of the purchase money therefor. If so state it fully when made and describe all the Cattle & Contracted" Which said question the Court would not permit the said Baldwin to answer, to which ruling of the Court in not permitting said question to be answered, defendant then and there Excepted,

This was all the evidence given in the case. It is agreed between the parties to



this suit that no other deposition than that of Albert Evans was suppressed, and such agreement is here stated for the reason that the Record of this case shows that a deposition therein has been suppressed but does not show whose has which is the only agreement made in this case,

The Court then gave for the plaintiff the following Instructions

James V Evans }

vs

Francis Staat }

Peffs instructions

N<sup>o</sup> 1.

If from the evidence, the Jury believe that the said defendant took from the plaintiff by agreement with him Eleven or more head of Cattle, to feed during the Winter from the 1<sup>st</sup> day of January AD 1859 until the 16th day of March next there after: that the same were weighed when so taken, weighing 12525 lbs: that they were to be taken by said defendant at a fixed price per lb, and at the Expiration of the time deft was to keep & feed them. They were to be weighed and taken back at a fixed price: that said Cattle were so taken by said defendant, and that afterwards, and after the Expiration of the 16th day of said March, Deft after demand made by said plaintiff upon him and after an offer by peff to pay what might be due on the Cattle, refused to surrender the Cattle to him, then

Given



52 the defendant is liable to the plaintiff for the value of the said Cattle, when they were to be redelivered, after deducting a reasonable price for feeding them.

Given  
No 2 If the Jury believe from the evidence that the Cattle were delivered by plff to Deft, under such a Contract as stated in the 1<sup>st</sup> Instruction, the title to the cattle did not pass from the plff to the Defendant.

Given  
No 3 If the Jury believe from the evidence that Deft in January 1859 bought of the plff 11 or 12 head of Cattle at any particular price, was to feed them until March 1859 & then to sell back said Cattle to the defendant at an agreed price, and refused to do so, then the plff is entitled to recover, the price of the Cattle at the time they were delivered to deft by the plff. And in estimating the Damage if from all the evidence the Jury may believe that the payment therefor, has been unreasonably delayed, interest may be allowed thereon at the rate of six percent per annum.

To the giving of which defendant then and there Excepted.

Defendant then asked the Court to give the



following to the jury on his part the following Instructions

1 The Court will instruct the Jury that if they believe from the evidence that defendant admitted that he had no cattle at defendant's in the latter part of January or February 1859 and that the cattle in question were then there they are bound to find for the defendant under any circumstances, and that although there is no proof that the defendant ever paid any person any thing for them.

2 The Court will instruct the Jury that there is no evidence of such a contract as that declared upon by the plaintiff in this case and that he cannot therefore recover in this cause.

3 The Court will instruct the Jury that although they might believe from the evidence that defendant was to deliver to plaintiff twelve head of cattle on the 16th day of March 1859. Yet unless they believe from the evidence that Plaintiff was ready and willing and able to receive and pay for such cattle and extra for at said breakfast on said day they are bound under any circumstances to find a verdict for the Defendant.



54 That said defendant was not bound to deliver said cattle on the 17<sup>th</sup> day of March, and is in no way responsible for not so doing.

5 That should they believe from the Evidence that there was a contract between the plaintiff and defendant. Yet if they believe from the Evidence that more than twelve head of Cattle were included in such Contract they are bound under any Circumstances to find a verdict for the defendant.

6 The Court will instruct the jury that the admissions of the plaintiff are evidenced in this case, and that if they believe from the Evidence of Clayton or Shores that plaintiff admitted to said Shores that he had no cattle at defendant's, and <sup>that</sup> if they believe from such admissions and the Evidence in the case that defendant did not buy the cattle of the plaintiff they are bound under any circumstances to find a verdict for the defendant.

7 That the defendant was not bound to receive Currency for any part of what might be due him for the cattle.



which Instructions the Court refused to give, but gave in lieu thereof the following instruction.

The Defendant had a right to retain possession of said Cattle until he was paid whatever might be due on them under any Contract that he may have made with plaintiff, and unless the Jury believe ~~from~~ <sup>that</sup> the plaintiff when he demanded said Cattle offered to pay the defendant the amount that may have been due him they will find for the defendant; and the plaintiff had a right to insist on payment in specie but if he refused wholly to acknowledge the right of the plaintiff to demand the cattle the plaintiff was released from all obligation to make a tender.

To which decisions of the Court refusing the instructions as asked, and to the giving the Instructions of the Court the defendant then & there Excepted.

The Jury found a verdict for the plaintiff for Four Hundred and three dollars and five Cents.

Defendant then filed the following Motion  
55 for a New trial and in arrest of Judgement



56 and his Reasons therefor.

State of Illinois } March term a d 1862  
County of Warren } of the Circuit Court of  
said County.

James V Evans }  
vs } In Assumpsit.

Francis Stuart } Defendant moves the Court  
for a new trial and in  
Arrest of Judgment in this cause.

First Because the verdict of the jury was against  
the law and evidence.

Second That the Court erroneously refused some  
and erroneously modified other instructions  
of defendant, and gave to the jury improper  
and illegal ones on behalf of plaintiff.

Third The Court admitted to the jury on behalf  
of plaintiff illegal and improper testimony  
and rejected and excluded from their tes-  
timony offered for their consideration by  
defendant legal and proper.

Fourth That the ~~Contract~~ proof of the only con-  
tract on which testimony ~~and~~ was adduced  
on which was the only subject matter of  
this suit, varied materially from any  
contract alleged in the declaration  
in this case.

Jamison & Harris attys for Deft.



Which motions the Court overruled and refused to grant a new trial or arrest the judgment, to which decisions of the Court defendant then and there Excepted. Whereupon judgment was rendered by the Court for plaintiff upon the verdict, all the objections and Exceptions aforesaid were made and taken and all reasons given and admissions made in open Court and upon the trial of said cause. Wherefore it is ordered that the matters aforesaid be made a part of the record in this case and that this bill of Exceptions be signed and sealed.

Witness my hand and seal.

L B Lawrence (Seal)

Received this Bill of Exceptions for the first time April 27<sup>th</sup> 1863 at 6, 0' clock PM & by order and direction of the Court filed as of May 31<sup>st</sup> 1862

Wm Laferty Clerk,

Copy of Bond

Know all Men by these presents that we Francis Stuart and Abram N Baldwin are held and firmly bound unto James V Evans in the penal sum of Twelve Hundred Dollars for the payment,



of which well and truly to be made We bind  
ourselves our heirs Executors and Administra-  
tors jointly severally and firmly by these  
presents. Witness our hands and seals this  
27th day of May Anno Domini One thousand  
Eight Hundred and sixty two.

The Condition of the above obligation  
is such that whereas James V Evans did  
on the third day of April 1862 in the Circuit  
Court within and for the County of Warren  
and State of Illinois, recover a judgement  
against the above bounden Francis Staat  
for the sum of Four Hundred and three dollars  
and five cents, and costs of suit from which  
judgment of said Circuit Court the said  
Francis Staat has prayed for and obtained  
an appeal to the Supreme Court of said  
State. Now if the said Francis Staat shall  
duly prosecute his said appeal with effect  
and shall moreover pay the amount of the  
judgment costs interest and damages re-  
versed 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 null and void, otherwise  
to remain in full force and virtue.

Francis Staat. (Ls)

Approved by me Abram H Baldwin (Ls)  
this 31st day of May a D 1862.

Wm Laferty cts.



Filed May 31<sup>st</sup> 1862.

Wm Laferty Clerk

State of Illinois  
Mason County

I Wm Laferty Clerk of the Circuit Court in and for said County do certify that the above and foregoing is true and complete copies of the record and proceedings in the foregoing case as the same appears from the files and records of my office.

In Testimony whereof I have hereunto set my hand and affixed the seal of our said Circuit Court at my office in Monmouth this 28<sup>th</sup> day of April A.D. 1863  
Wm Laferty Clerk



Fees \$13.00



Francis Stagg } In the Supreme Court of Illinois  
James D. Evans } April Term A.D. 1863

And now comes the said Francis  
Stagg by H. M. Mead his attorney says that in the  
record & proceedings aforesaid in the judgment  
aforesaid manifest errors hath intervened to his injury  
and for special cause of error he sets forth & shews  
1 That the verdict of the jury is contrary to the evidence  
2 That the Court erred, in permitting improper evidence  
on the part of plaintiff, & refusing proper evidence  
on the part of defendant  
3. In not granting a new trial  
4. In not arresting the judgment  
5. In refusing proper instructions asked for on  
on the part of defendant  
6. In giving improper instructions on the  
part of plaintiff  
7. In refusing to let the defendant ask  
proper questions of his witnesses  
8. In rendering a judgment upon the verdict  
for which errors & others apparent on the  
record plaintiff prays that said judgment  
may be set aside reversed & for nought  
held

By H. M. Mead  
his Attorney

Let a supersedeas issue Bond \$600  
Approved & Bolleborn surety

J. H. Eaton  
Cf.



And James B. Evans  
defendant in error comes  
to say that there are no  
sub errors alleged in  
the record of said  
cause he therefore prays  
that the said court  
uphold all the  
affirmance

J. B. Kirkpatrick  
Att. for  
Def. in Error



73 260 263  
Francis Staat 62

<sup>m</sup>  
James T. Evans

Record

Filed May 7<sup>th</sup> 1863  
L. Leland  
Clerk