

No. 12680

Supreme Court of Illinois

Woodworth

vs.

Woodburn & Scott

71641  7

United States of America
State of Illinois
Kendall County

Now before the Hon. Madison E. Hollister
Judge of the Ninth Judicial Circuit
of the State of Illinois and presiding
Judge of the Kendall County Circuit
Court at a Term thereof begun and
held at the Court House in the Village
of Oswego in said County on
5th day of October in the year of our Lord
one thousand Eight hundred and fifty seven
Present the Hon. M. E. Hollister Judge aforesaid
Washington Bushnell Esq. State Attorney
Jonathan Raymond Sheriff

Attest

George M. Hallenbeck R. Clerk

It is remembered that heretofore, ^{to wit} on
the 30th day of January A.D. 1857 R. B. Fuller
came and filed in the Office of the Clerk of the
Circuit Court of the County of Kane and in
the State aforesaid a ~~certain~~ precept in a certain
Matter and which is particularly referred to in
the Certificate of Record of the Clerk of said
Court hereinafter written as being Marked
"A" in the words and figure following to wit.

Jacob Woodburn
Thomas Scott

vs

Erasmus Woodworth

Alvin Woodworth

} Kane Co. Cir Court
February Term A.D. 1857

} Assumpsit. Damages \$2000.00

}

The Clerk will please
issue a summons in the above entitled cause in—
assumpsit Damages Two Thousand Dollars
(\$2000.00) returnable at the next Term
& oblige Yours &c

A. B. Fuller Atty for Pffs

Filed 30 Jan. 1857

J. R. Wright Clerk

Filed Aug. 24th 1857

Wm Hollenback Clerk

And Afterwards to wit on the same day to wit on
the 30th day of January ^{the Plaintiff by} aforesaid Name, A. B. Fuller
his attorney, and filed in Kane County Circuit Court aforesaid
Security for Costs in said Cause which is particularly
Referred to in the Certificate of Record of the Clerk of
said Court last aforesaid hereafter written and which
is marked "3" in the words and figures following
to wit:

Jacob Woodburn

Thomas Scott

vs

Erasmus Woodworth

Alvin Woodworth

} Kane Co. Cir
Court Feb. Term

A.D. 1857

No 3
3'

I do hereby enter myself security for costs
in this cause and acknowledge myself
bound to pay or cause to be paid all costs which
may accrue in this action either to the opposite
party or to any of the Officers of this Court
in pursuance of the Laws of this State

A.B. Fuller

Filed 30 Jan 1857

McHallenback Clerk

Filed August 24th 1857

McHallenback Clerk

And afterwards on the same day to wit on the day
of January ^{in the year} last aforesaid came the Plaintiff by A.B. Fuller their
attorney and filed in the office of the same County Circuit
the Declaration in said Cause which is more particularly
referred to in the Certificate of Record of the Clerk of said
Court Summarized written as being marked "B" and
is in the words and figures following to wit:

State of Illinois ss
Kane County

Of the February Term
in the Year One thousand eight
hundred and fifty seven

Jacob Woodburn & Thomas Scott Plaintiffs
in this suit by A.B. Fuller their Attorney Complain
of Erasmus Woodworth and Alvin Woodworth
Defendants in this suit who have been summoned
in a plea of Dismiss on the Case upon promises
For that whereas the said defendants heretofore

to wit on the 24th day of July in the year of our Lord one thousand Eight Hundred and fifty six at W. Aurora in the County of Kane, made and signed this certain promissory Note in writing and then and there delivered the same bearing date the same day and year aforesaid to Jacob Woodburn & Thomas Scott in and by which Note said defendants by the name style and description of E. A. Woodworth — promised to pay to the Order of said Plaintiffs by the name style and description of Woodburn & Scott six months after date Eight Hundred & sixty four & 50/100 Dollars for value received with interest

2 And whereas also the said Defendants heretofore to wit on the 7th day of June A.D. 1856 at W. Aurora in the County of Kane made and signed this ~~other~~ certain other promissory in writing & then & there delivered the same bearing date the same day & year last aforesaid Jacob Woodburn & Thomas Scott in and by which said Note the said Defendants by the name style and description of E. A. Woodworth promised to pay to the Order of said Plaintiffs by the name style and description of Woodburn & Scott sixty days after date for value received One Hundred & ninety & 70/100 Dollars with interest

3 And whereas also the said Defendants heretofore to wit on the 7th day of June A.D. 1856 at W. Aurora in the County of Kane made and signed

No 3-

then certain other promissory note in writing
then & then delivers the same bearing date the
same day and year last aforesaid to Jacob
Woodburn & Thomas Scott in and by which said
note said defendants by the same style & description
of E. A. Woodward promised to pay the Order of
said Plaintiff by the same style & description of -
Woodburn & Scott ninety days after date for value
received three hundred and ninety & 7/10 dollars
with interest. By means whereof and by force
of the Statute in such Cases made and provided
the said Defendants became liable to pay said
Plaintiff said sum of Money (mentioned in said notes
and being so liable in consideration thereof then and
then undertook and promised to pay the same to
said Plaintiff according to the tenor and Effect
intent and meaning of said notes to wit, at the
place aforesaid

And whereas also the said Defendants afterwards
to wit on the 30th day of January in the year
of our Lord one thousand Eight Hundred and fifty
seven to wit at Genoa in said County became
indebted unto Plaintiffs in a large sum of money
to wit Two thousand Dollars for money before
that time lent and advanced to and laid out and
Expended for the said Defendants by said Plaintiffs
at said Defendants request and for money before
that time had and received by said Defendants
to and for the use of said Plaintiffs and also

for goods wares and merchandies before that time sold and delivered by said Plaintiffs to said Defendants at like special instances and request and also in the like sum for labor care and diligence of said Plaintiffs before that time done and performed by said Plaintiffs for said Defendants and at the like instances and request of said Defendants; and also for the like sum of money found to be due from the Defendants to the Plaintiffs on an account then and there stated between them and being so indebted said Defendants in consideration thereof then and there undertook and promised to pay said Plaintiffs said last mentioned sum of money when therunto afterwards requested.

Yet the said Defendants notwithstanding their said promises and undertakings but contriving &c although often requested so to do have not paid said Plaintiffs either of said sums of money or any part thereof but so to do have hitherto wholly neglected and refused and still do neglect and refuse to the damage of said Plaintiffs of Two Thousand Dollars and therefore they bring suit &c.

A. B. Tully
Att'y for Plaintiff

(Copy of notes declared upon)

\$90 ^{75/100}

M. Aurora June 7-1836

Ninety days after date we promise to pay to the Order of Woodward & Scott at the Banking House of Hall & Br. of Aurora Two Hundred Ninety ^{75/100} Dollars (Value Received with interest

(Signed) E. A. Woodward

No 7

\$390^{75/100} W. Aurora Jan 7-1856

Sixty days after date we promise to pay to the Order of Woodburn & Scott at the Banking House of Hall & Bro. of Aurora One Hundred & Ninety Seven Dollars Value Received with interest (Signed) E. & A. Woodward

\$861^{55/100} W. Aurora July 24th 1856

Six Months after date we promise to pay to the Order of Woodburn & Scott Eight—Hundred and sixty four 55/100 Dollars Value Received with interest (Signed) E. & A. Woodward

\$ for lumber sold & delivered

\$ 2000⁰⁰

" " goods man &c

\$ 2000⁰⁰

" " Money lent & received

\$ 2000⁰⁰

Filed 30 Jan 1857

J.R. Wright Clerk

Filed Aug. 24th 1857

Wm. H. Allen Clerk

And heretofore to wit on the 7th day of February George E. Corwin Sheriff of the County of Kane in the State of Arizona returned into the Circuit Court of said County last aforesaid a certain writ of summons issued out of said Court last aforesaid in this cause and which is particularly referred to in the Certificate of Record of the Clerk of said Court before mentioned as being marked "C" and which is in the words and

No 8

figures following to wit:

State of Illinois } ss
Kane County }

The People

of the State of Illinois to the Sheriff of said County
Greeting We Command you that you
summon Erasmus Woodworth and Alvin
Woodworth if they shall be found in your
County personally to be and appear before the
Circuit Court of said County on the first
day of the next term thereof to be holden
at the Court House in Genoa in said County
on the second Monday in February next to
answer unto Jacob Woodburn and
Thomas Scott in a plea of Assumpsit
to the damage of said Plaintiff as they say
in the sum of Ten Thousand Dollars

And have you then and then this writ with
an endorsement thereon in what manner you have
Executed the same

Seal of the
Court of Kane
County
Illinois

Witness Paul E. Wright Clerk of our
said Court and the seal thereof at Genoa
in said County this 30th day of January
A.D. 1857

P. E. Wright Clerk

Personally served by reading to the within named
Alvin Woodworth - Erasmus Woodworth not found

in the County January 31st 1857

Geo. E. Corwin Sheriff of Kane Co.

C. J. Pinnery Deft.

No 9

Filed Feb. 7 - 1857

J. R. Wright Clerk - Filed Aug. 24th 1857

Wm. H. Allenbach Clerk

And hereunto to wit on the 25th day of February A.D. 1857 the same being one of the days of the Kane County Circuit Court (as will more fully appear by a certified copy of the Records of Proceedings had in said Court last aforesaid herein after written) the following among other proceedings were had and entered of Record to wit;

Jacob Woodburn

Thomas Scott

or

Erasmus Woodworth

Alvin Woodworth

} Affumpick

This suit is continued with an alias summons to Erasmus Woodworth

And afterwards to wit on the day of April A.D. 1857 George E. Corwin returns ~~in~~ into the Circuit Court of Kane County aforesaid a certain alias summons issued by order of said Court last aforesaid ^{in said cause} and which is particularly referred to in the Certificate of Record before mentioned as being marked "C" and is in the words and

Figures following to wit;

State of Illinois 355
Haw County 8

The
People of the State of Illinois to the Sheriff of said
County Greeting — We command you as heretofore
we Commanded you that you summon Erasmus
Woodworth impleaded with Alvin Woodworth if he shall
be found in your County personally to be and appear
before the Circuit Court of said County on the first
day of the next term thereof to be holden at the Court House
in the Town of Geneva in said County on the second Monday
of May next to answer unto Jacob Woodburn
and Thomas Scott in a plea of Assumpsit to the
damages of said plaintiffs as they say in the sum of
Two Thousand Dollars and here you show and
show this writ with an Endorsement thereon in what
manner you have Executed the same

Done at Geneva in said County
April 21st 1837

Witness Paul R. Wright Clerk of our said
Court and the Seal thereof at Geneva
in said County this second day of
April A.D. 1837

P. R. Wright Clerk

Executed this Writ by Reading to the within named
Erasmus Woodworth

April 9th 1837

G. E. Carwin Sheriff

Filed Aug. 21st 1837

Wm. H. H. H. H. H.
Clerk

No 11

And ^{heretofore} ~~afterwards~~ to wit on the Eighteenth day of May A.D. 1857 the same being one of the days of the Regular May Term of the New County Circuit Circuit Court aforesaid came the Defendants by Parks and Marsh their attorney and filed in said this Plea in said Cause and which are particularly referred to in the Certificate of Record of the Clerk of said Court aforesaid and which are herinafter written as being marked "I" and which are in the words and figures following to wit:

Erasmus Woodward	} New Co. Cir Court May 27. A.D. 1857 Assumpsit.
Alvin Woodward	
at	
Thomas Scott	
Jacob Woodburn	}

And the said —
Defendants by Parks and Marsh their attorney come and defend the wrong and injury when &c and say that they did not undertake and promise in manner & form as the said Plaintiffs have therof complained against them and this they pray may be inquired of by the Country &c
Parks & Marsh

And the Plff doth the like. A.B. Sullen Plffs Atty

And for a further plea in this behalf the said Defendants say aetio non because they say that the said Plaintiffs before and at the time of the Commencement of this suit to wit at Geneva in the County of Hamilton & State aforesaid was and still is indebted to the said Defendants in a large

sum of money to wit the sum of Two Thousand
 Dollars lawful money &c for the work & labor ~~done~~
 Care & diligence & attention of the said Defendants
 before that time done performed bestowed in & about
 the business of the said plaintiffs and for the said
 Plaintiffs and at their request and for diverse goods
 wares & Merchandise sold & delivered by said Defendants
 to the said plaintiffs and at the like request &
 Also for money by the said Defendants before that
 time lent & advanced to paid laid out & Expended
 for the said plaintiffs & at their like request & for
 money by the said plaintiffs before that time had and
 and received to & for the use of the said Defendants
 and also for money due & owing from the said Plaintiffs
 to the said Defendants upon an account stated between
 them which said sums of money so due & owing
 to said Defendant aforesaid Even the Damages sustained
 by the said Plaintiffs by reason of the nonperformance
 by the said Defendants of the said several supposed
 promises and Undertakings in their said declaration
 mentioned & out of which said sums of money so due
 and owing from said plaintiffs to said Defendants
 the said Defendants are ready & willing & hereby
 offer to set off and allow to the said Plaintiffs
 the full amount of said damages according
 to the form of the Statute in such case made
 and provided and thus the said Defendants
 are ready to verify &c

No 13

And for a further plea in this behalf
by leaving the Court for this purpose first
had and obtained the Defendants say actio non
because they say that the said several promissory
Notes in said plaintiffs declaration mentioned were
made and delivered to said plaintiffs under a
special warranty the Carriage Wagon and buggy
spokes being the Consideration upon which said
Notes were given were good spokes and suitable
for nadyas and that if said spokes or any of
them were not good or as said plaintiffs recommended
the said plaintiffs would allow to these Defendants the
value of the same and give them Credit therefor
upon said promissory notes and these Defendants
say that said spokes were not of good quality or
as recommended to them by said plaintiffs but a
large amount of the same to wit one half of
said spokes were of no use or value to the Defendants
And the said Defendants say that one half of the
Consideration for which said notes were given has
failed and Defendants claim that said notes are a
Common Count are for one and the same cause
of action and this they are ready to verify wherefore
they pray Judgment &c. Pasch & March.
Defrs attys

Filed May 18, 1857

J. R. Wright Clerk

Filed Aug. 24 1857

Emt. Hollenbeck
Clerk

And heretofore to wit on the 18th day of May
in the year of Our Lord one thousand Eight Hundred
and fifty seven the same being one of the days of
the Regular May term of the Kane County Circuit
Court the following proceedings among other more has
and extent of Record ~~to wit~~ (and which will fully
appear in a certified copy of the Records of said Court
of the proceedings had in this cause hereafter written)
in the words following to wit

Jacob Woodworth

Thomas Scott

or

Erasmus Woodworth

Alvin Woodworth

Assumpait

This day came the
Plaintiff by Parker his
Attorney and move to strike the Pleas of Defendants
from the files

And afterwards to wit on the 26th day of May
A.D. 1857 the same being still one of the days of the May
Term of said Kane County Circuit Court after said
came the Defendants by Parker his attorney and files in
said Court an affidavit in said cause and which
is particularly referred in the Certificate of Record
hereafter written as being marked "I" and is in
the words and figures following to wit

Jas at Hoboken N.J.) Kane Co. Civ Court

vs

May Term A.D. 1857

No 15-

E & A Woodward

Assumpsit

B. F. Parker being sworn on Oath does depose and say that he is the attorney of the Defendants in the above entitled suit that he resides at Aurora in this County that he believes that on and after Wednesday of the first week no business would be taken up except certain special causes set down to be tried before Judge Wilson. That the Pleas were prepared and ready to be filed as soon as the Court returned the business of the Court on the second Monday of the Term and on week before the Case was reached on the Docket That this Affiant is advised by his Client that he has an effect of some Two Hundred and fifty Dollars and that the notes were given for Spoken ~~and~~ under a special agreement That if such Spoken were not as representatives then the amount of difference should be endorsed upon the notes That said pleas were drawn and placed upon the files in good faith by this Affiant believing that the Defendants had a defense in fact to said notes

Sworn and Subscribed before me

B. F. Parker

This 25th day of May A.D. 1857

J. R. Wright Clerk

Filed May 26th 1857

R. R. Wright Clerk

Filed Aug. 24th 1857

Emil H. H. Clerk

And afterwards to wit on the 27th day of May A.D. 1857 the same being the 11th day of May Term of the said Court, Circuit Court of said came the Defendants again by their then attorney and file in said Court last aforesaid additional pleas in said Cause which additional pleas are attached to the original pleas of Defendants which are particularly referred to in the Certificate of Record hereinbefore mentioned as being marked "D" and are in the words following to wit

And for a further plea in this behalf the said Defendants say Actio Non because they say that the said several Promissory Notes in said plaintiffs Declaration mentioned were made and delivered to the said Plaintiffs under a Special Warrant that the Wagon Hubbs and Spokes which Defendants drew the notes were given in consideration of were of a good quality well seasoned and fit for ready use and if said Spokes and Hubbs or any of them were not so seasoned and fit for ready use and of good quality as plaintiffs had represented that they the said Plaintiffs would make a deduction therefor and Defendants aver that said Spokes and Hubbs were not well seasoned that one third of said Hubbs and Spokes were crooked and shaky and of poor timber and that the Defendants by reason of such deficiency as aforesaid is entitled to a deduction to a large

No 17

amount to wit, one thousand Dollars
and Defendants aver that one thousand Dollars
of the consideration of the said notes has
failed And Defendants aver that said
Special Counts on the promissory notes and common
counts are for one and the same cause of
action Wherefore they pray Judgement of one
thousand Dollars of the said notes &c

Punk & Mark

Filed May 27 1837

J. R. Wrights Clerk

Filed Aug. 24 1837

Mustellbach Clerk

And afterward to wit on the 27th day of May A.D.,
1837 the same being still one of the days of the said
Harris County Circuit Court, The Defendants files
in said Court a petition for a change of venue in
said cause which is particularly referred to in the
Certificate of ^{Record of} the Clerk of said Court last aforesaid
as being marked "J" and is in the words and
figures following to wit

Isaac Woodburn

Thomas Scott

or

Erasmus Woodworth

Alvin Woodworth

Harris County, Cir Court

June 18th, 1837

Assumpit

J. L. Van S. G. Wilson

Now petitioners Erasmus Woodworth and Alvin

No 18

would most respectfully shew unto your Honor
that they are Defendants in the above entitled ^{Suit} ~~Cause~~
that they fear and believe that the minds of the in-
habitants of Kane County, when said Cause is now
pending are so prejudiced against your petitioners
that they cannot have a fair ~~Trial~~ and
impartial Trial in said Cause in said County
of Kane when said Cause is now pending That such
Knowledge has come to your petitioners on the present
day They ask that the Venue ^{may be} Changed to some
County where such Cause of objection does not exist

E. Woodworth

A. Woodworth

State of Illinois
Kane County

Erasmus Woodworth and Alvin
Woodworth being duly sworn
on oath do depose and say that they are
each of them have heard and read the foregoing petition
by them signed read and known the Contents
thereof that the same is True Erasmus Woodworth
Sworn and subscribed before me Alvin Woodworth
this 28th day of May A.D. 1857

L. H. Moore
Notary Public

Filed May 29th 1857

J. H. Wright Clerk

Filed August 24 - 1857

Wm. H. Allen
Clerk

No 19

And afterwards ~~for~~ the same day ~~has~~ to wit on
the day last aforesaid. Said Court last aforesaid
still being open Judicially, for the Transaction
of business ^{where} the following proceedings among
others were had and entered of Record (and
which will more fully appear in the certified copy of
the Records of the proceedings of said Court
hereafter written) to wit

Jacob Woodburn

Thomas Scott

vs

Erasmus Modaworth

Alvin Modaworth

} Assumpit

This day came

The Parties by

their Respective Attorneys and on motion of the Defendants
the venue of this writ is changed from the Circuit
Court of Howard County to the Circuit Court of Kendall
County

And afterwards to wit on the 24th day of August
A.D. 1837 the same being one of the days of vacation
of the Kendall County Circuit Court after the April
Term thereof came Paul R. Wright ~~and filed~~
Clerk of the Circuit Court of the County of Howard in
the State aforesaid and filed in the said Kendall County
Circuit Court a certified copy of the Record
of Proceedings had in said cause and which
is in the words and figures following to wit;

United States of America
 State of Illinois } 20
 Kane County }

Pleas before
 the Honorable Isaac S. Wilson Judge
 and presiding judge of the Kane County Circuit Court, then
 of the Thirtieth Judicial Circuit, of the
 State of Illinois at a Term of said Court
 begun and held at the Court House
 in Geneva in said County on the Eleventh
 day of May in the year of Our Lord one thousand
 Eight Hundred and fifty seven

Present The Hon. Isaac S. Wilson Judge
 " George E. Cowin Sheriff

Met
 Paul R. Wright Clerk

Be it remembered that heretofore to wit on
 the Twenty sixth day of February A.D. 1857 it being
 one of the days of the Regular February Term
 of our said Circuit Court in the year last aforesaid
 the following among other proceedings now had and
 entered of Record to wit:

Erasmus Woodworth
 Thomas Scott

v
 Erasmus Woodworth
 Alvin Woodworth

Assumpit

This suit is continued
 with alias summons to
 Erasmus Woodworth

No 21

And Afterwards to wit on the Eighteenth day
of May in the year last aforesaid it being one
of the days of the Regular May Term ~~of~~
Said Circuit Court the following among
other proceedings were had in said Court even
had and entered of Record in this cause
to wit,

Jacob Woodburn

Thomas Scott

&

Erasmus Woodworth

Alvin Woodworth

} Assumpsit

} This day came
the Plaintiffs by

Miller their Attorney and move to strike the
Pleadings of defendants from the files.

And afterwards to wit on the Twenty ninth
day of May in the year last aforesaid it being at
yet one of the days of the said May Term of said Court
the following among other proceedings were
had in said Court and entered of Record in this
cause to wit

Jacob Woodburn

Thomas Scott

&

Erasmus Woodworth

Alvin Woodworth

} Assumpsit

} This day came

the parties by their Respective Attorneys and
on motion of the Defendants, the venue of this suit
is changed from the Circuit Court of Kane
County to the Circuit Court of Kendall County

State of Illinois }
Kane County }

D. Paul A. Wright Clerk
of Kane County Circuit

Court in the State aforesaid do hereby certify that
the foregoing is a true and complete copy of
all the Proceedings had and entered of Record in our
said Circuit Court in the foregoing entitled
Cause and I do further certify that the accompany-
ing papers marked with red from "A" to "J" inclusive
are all the papers on file in said Court in this suit.



Witness my hand and seal of said
Court this 18th day of August A.D. 1857

P. A. Wright Clerk
11

Filed ~~in~~ Kendall Co. Cir. Court Aug. 24th 1857
George M. Hallenbeck Clerk

And afterwards to wit on the 7th day of
October in the year of Our Lord one thousand eight
Hundred and fifty seven the same being one of the days
of the October Term A.D. 1857 of the Kendall County
Circuit Court, which Court was at that time sitting

at the Court House in the Village of Oswego ~~officially~~
Judicially for the transaction of business. The following among
other proceedings were had in said cause and entered of
No 23 Record & int;

Jacob Mendenham

Thomas Scott

vs

Erasmus Woodworth

Alvin Woodworth

} at Hempstead

} This day came

The Plaintiff by J. Allen their attorney and entered a Demurrer
to the third and fourth pleas of Defendants and thereupon
came the Defendant by Packer their attorney and confessed
the Demurrer as to the fourth plea aforesaid and
upon his motion being in giving to amend, the fourth plea aforesaid and
the Court after hearing the parties in relation to the Plaintiff's
Demurrer to the third plea herein and after being
fully advised in the premises overruled the Plaintiff's
demurrer to Defendant, said third plea herein
and by agreement of parties this cause is set for trial
Friday morning at Nine O'clock

And afterwards on the same day to wit on the day last
aforesaid said Court still being open for the transaction
of business came the Defendant by Packer their attorney
and filed in said Court in said cause their ^{1st} amended
plea and is in the words following to wit;

Scott & Mendenham

vs

E. & A. Woodworth And for a further

plea in this behalf as to fifteen Hundred Dollars
 of ~~Plffs~~ Declaration the said Defendants say a ~~ct~~
 Mon because they say that the said promissory notes
 in said plaintiffs declaration mentioned were made and
 delivered to said plaintiffs under a Special Warranty
 that the wagon Carriage and buggy spokes and hubs
 (said spokes and hubs being then and then being the Con-
 sideration of said notes) were good hubs & spokes
 well seasoned and suitable for ready use and of good
 and of good quality. And these Defendants say that
 said spokes were not of good spokes well seasoned and
 fit for ready use and of good quality that said spokes
 and hubs were so poorly seasoned that they were not
 fit for ready use for a long space of time to wit
 Eight months thereafter that a large part of said
 spokes and hubs were shaky and of ^a poor material
 to wit one half of the same were utterly worthless
 and the Defendants say that by means whereof fifteen
 Hundred Dollars of the Consideration for which said
 notes were given has failed and Defendants
 aver that that said Special Counts in Plaintiffs
 Declaration mentioned and Common Counts
 are for one and the same cause of action
 And this they are ready to verify wherefore they
 pray Judgment as to a large sum of said
 declaration to wit fifteen Hundred Dollars &c

B. F. Parley Sept. 21st

Filed Oct 7th 1857

Spencer & Co. R. C. B.

And returned to writ on the 9th day of October the same being still one of the days of the October Term of said Court last aforesaid Will sitting Judicially for the transaction of Business in the Court House in Oswego in said County came the Plaintiffs by A. B. Dallen their Attorney and filed in said Court their Replication to the pleas of Defendants in the words and figures following to wit:

Jacob Woodburn

Thomas Scott

vs

Erasmus Woodworth

Alon Woodworth

Nunda County

Circuit Court

Adamp's

October Term

Nov. 1837

And the said Plaintiffs to the said plea of the said Defendants by them first above pleaded & whereof they have put themselves upon the Country doth the Clerk ^{and} _{of} And the said Plaintiffs as to the pleas of the said Defendants by them secondly above pleaded with that the said Plaintiffs by reason of anything by the said Defendants alleged ought not to be barred from having and maintaining this aforesaid action against the said Defendants because they say that they are not indebted to the said Defendants in manner and form as alleged said plea and this they pray may be enquired of by the Country & Dallen for Petts
Sigs Clerk the Clerk Pack

No 24

And the said plaintiff, as to the said plea of the
said Defendants by them thirdly above pleaded say precludia
non because they say that ~~they~~ the said notes
in said declaration mentioned were not made
& delivered to said plaintiff under a special Warrant,
that the said hubs & spokes were of good quality, &c
as alleged in said plea and the said plaintiff say
they did not agree to make a deduction on said
Notes as alleged in said plea that the said notes
were made and delivered to said Plaintiff for
goods sold and delivered to said Defendants prior
to the Execution of ^{the} said notes and this they pray
may be enquired of by the Country &c

Prerogative of the Plaintiff

And the like

And the said plaintiff, as to the said plea of the
said Defendants by them fourthly above pleaded
an amended plea say precludia non because
they say that said notes were not made and
delivered to said plaintiff under a special Warrant
that said hubs & spokes were well seasoned &c as
alleged in said plea that there ought to be any deduc-
tion to said notes as alleged in said plea and
this they pray may be enquired of by the Country &c

Prerogative of the Plaintiff

And the like

Prerogative

Given Oct. 9th 1837

Wm. Hollister

Att'y

No 27

And afterward to wit on the same day that to
wit on the day last aforesaid the said Court being still
sitting as aforesaid Came the Plaintiffs by Miller &
Mellon their attorneys and file in said Court Security
for costs in said cause and is in the words and
figures following to wit,

Jacob Woodburn & Thomas Scott	}	Hudall County Circuit Court
Erasmus Woodworth Alvin Woodworth		
	}	Assumpsit

I do hereby enter
myself security for costs in
this cause and acknowledge myself bound to pay
or cause to be paid all costs which have accrued
or may accrue in this action either to the opposite
party or to any of the Officers of this Court in pursuance
of the Laws of this State

Dated October 9th 1837

L. D. Brady

Filed Oct 9th 1837

George McCallister Clerk

And afterward on the same day to
wit on the same day to wit on the 9th day
of October A.D. 1838 said Court still sitting
Judicially for the dispatch of Business as aforesaid
the following among other proceedings were
had and entered of Record in said Court in
said Cause to wit

No 27

Jacob Woodburn
Thomas Scott

vs

Chasms Woodmont
Alvin Woodmont

} Assumpsit

This day came the
Plaintiffs by Fuller
and Hallas their attorneys and the Defendants
by Siddle and Parks their attorneys as in Term
and it is Ordered by the Court that a Jury also
come and therefore came the following named
Jurors of a Jury to wit, J. S. Eldon George V. Miner
James J. Wagner O. E. Anderson William W. Jessup —
William D. Boomer Edward English Thomas Widney
David Cliff William Pearce Matthew Fullerton
and C. H. Munitt who were severally chosen selected
and sworn and after hearing the Evidence and
receiving the instructions of the Court retired in charge
of an officer to consider upon their verdict

And afterwards to wit on the 10th day of
October A. D. 1837 the same being still one of the
days of the Term of said Court last aforesaid the
following among other proceedings were an a Entry
of Record in said cause to wit;

Jacob Woodburn
Thomas Scott

vs

} Assumpsit

Nov 30

Erasmus Woodward

Alvin Woodward

This day came the
Jury before and into
Court and for a Verdict say in the Jury find
the Issues in this Cause joined in favor of the Plaintiffs
and assess their Damages at one thousand seven hundred
Dollars which is ordered to be entered of Record

And thereupon came the Defendants by their
Attorneys and enter his Motion for a new Trial herein
and the Court having heard the Parties in relation
to Defendants Motion and upon Consideration of the
Court the Defendants Motion is overruled. it is therefore
considered by the Court that Plaintiffs receive of
Defendants the sum of One thousand seven hundred
Dollars besides their Costs in this behalf Expended
and that they have Execution therefor And thereupon
comes the Defendants again by their said Attorneys and
pray an Appeal to the Supreme Court of the State
of Illinois. After due Consideration said Appeal is
allowed Conditioned that they enter into bond
in the penal sum of Two thousand Dollars with
Rufus Gray and Lyman Woodward as Sureties
within Thirty days and that Defendants file their
Bill of Exceptions within ten days

And Afterwards to wit on the 7th day of
November the same being one of the days of Vacation
of said Court after the Actum Deno thereof A.D. 1837

Came the Defendants and filed in said Court in said Cause their Appell bond in accordance with the ruling of this Court and which is in the words and figures following to wit.

Woodburn & Scott

E & A Woodworth

Know all men by these presents that we Alvin Woodworth and Erasmus Woodworth as principals and Rufus Gray and Lyman Woodworth as surety and full and final bondants Robert Woodburn & Thomas Scott in the Penal sum of Two thousand dollars lawful money of the United States for the payment of which said bond to be made within our heirs and legal representatives jointly severally and finally by these presents With our hands and seals this second day of November A.D. 1857

The condition of the above obligation is such that when ^{at} as the October Term of the Kendall County Circuit Court began and held at Chicago in said County of Kendall on the first Monday of October A.D. 1857 the said Woodburn and Scott obtained a judgment against the said Alvin and Erasmus Woodworth for Seventeen hundred dollars besides costs from which said judgment the said Woodworths prayed an appeal then and there to the Supreme court of the State of Illinois which appeal was then and there granted as will appear by the Record Now if the said Alvin Woodworth and Erasmus Woodworth shall will and Only prosecute said appeal promptly and without delay and pay

No 32

Said Judgment Costs and Damages in case
the same shall be affirmed then the above obli-
-gation to be void otherwise to be and remain
in full force and Effect

Alvin Woodworth Seal
Cassius Woodworth Seal
Rufus Gray Seal
Lyman Woodworth Seal

Filed Nov. 7th 1857
George W. Wallcut Clerk

And afterwards to wit on the 11th day of
January A.D. 1858 the same being one of the days
of vacation after the October Term of the Mendocino County
Circuit Court A.D. 1857 came the Defendants ^{by agreement & the parties} and filed their
Bills of Exceptions in said Court in said Cause, and
in the words and figures following to wit,

Jacob Woodworth

Thomas Scott

vs
E. & N. Woodworth

Mendocino County
Circ. Court

Oct. Term A.D. 1857

Be it Remembered

that upon the Trial of the above Entitled Cause
the Defendants before the Swearing of the Jury
moved the Court to be permitted to withdraw the
general issue and take the Affirmation of the
issue which Motion was overruled by the Court

to the overruling of which motion the Defendants
then and then Excepted

The Plaintiff to prove the issues on his part
offered the following notes:

\$391 ⁷⁵/₁₀₀ W. Aurora June 7th 1856

Sixty days after date we promise to pay
to the Order of Woodburn & Scott at the Banking House
of Hall & Bros of Aurora Three Hundred Ninety
75/100 Dollars Value Received with interest

E. H. A. Woodworth

\$391 ⁷⁵/₁₀₀ W. Aurora June 7th 1856

Ninety days after date we promise
to pay to the Order of Woodburn & Scott at the
Banking house of Hall & Bros. of Aurora Three
Hundred Ninety ⁷⁵/₁₀₀ Dollars (Value Received with
interest

E. H. A. Woodworth

\$344 ⁵⁵/₁₀₀ W. Aurora July 24 1856

Six Months after date we
promise to pay to the Order of Woodburn & Scott
Eight Hundred ~~and~~ Sixty four 55/100 Dollars
Value Received with interest

E. H. A. Woodworth

— and retted his case

The Defendant to prove the issues on his part introduced John Swain who being sworn said that he knows the parties Defendant and was then Bookkeeper of the Defendants during the month of May June July and August and September A.D. 1836 That he knows the notes introduced by the Plaintiff, he wrote them that the notes were given for Hubs and Spokes that the last note was given the 3^d day of September ~~and~~ ^{but} bears date the 21st day of July That at the time of giving note he had not yet looked at Spokes & Hubs. E. R. Allen who was acting for Plaintiff said if it was not all right he would make it right.

On Cross Examination —

He stated that two different bills of Spokes & Hubs had been received one in the fall of A.D. 1835 the other in the summer of A.D. 1836 The two first notes were given in settlement of the first bill the last note for Eight Hundred and odd Dollars in settlement of the last bill. He had the bills for which notes was given He presented them

Wm. O. A. Woodworth of Aurora Ill
 Bought of Woodburn & Scott

1855

June	16	20 Lbs	No 2 Spokes	1040	& 54	\$ 53.00
		5 "	" 1 "	260	" 54	13.00
		5 "	" 1 5/8 in "	260	" 54	13.00
		20 "	" 1 3/8 " "	12.00	" 54	60.00
		20 "	" 1 1/4 " "	12.00	" 54	60.00
		10 "	" " light	6.00	" 54	30.00
		10 "	" 1 3/4 Spokes	520	" 54	26.00
		5 "	" 1 1/2 "	3.00	" 54	15.00
		5 "	" 1 1/8 "	3.00	" 54	15.00
		15 "	" 5 1/4 in Hubs	140		21.00
		5 "	" 5 " "	125		6.25
		20 "	" 5 1/2 " "	140		28.00
		20 "	" 5 3/4 " "	140		28.00
		5 "	" 6 " "	140		7.00
		5 "	" 6 1/4 " "	150		7.50
		14 "	" 7 " "	120		17.00
		30 "	" 1 1/4 fellows	175		52.00
		20 "	" 1 3/8 "	1,750		35.00
		5 "	" 1 1/8 "	1,750		8.75
		5 "	" 1 1/2 "	27		10.00
		15 "	" 1 3/8 "	225		33.75

337.50 358.25
 358.5

1855

Oct	25	10 Lbs	1 1/4 in Spokes	600	& 54	\$ 20.00
"	"	20 "	" 1 7/8 " "	10,40	" 5	52.00
"	"	20 "	" 2 or 2 1/4 "	10,40	" 54	52.00
"	"	30 "	" No 1 "	26.00	" 54	130.00
"	"	20 "	" " 2 "	10,40	" 54	52.00
"	"	26 "	" " 3 "	13.52	" 54	67.60
"	"	10 "	" " 5 1/2 in Hubs	140		14.00
"	"	10 "	" 6 " "	150		15.00
"	"	10 "	" 7 " "	175		17.50
"	"	10 "	" 1 1/4 fellows	175		17.50

25 Recd Cash & payments
 By notes in full Woodburn & Scott
 358.50
 159.93
 35.88

985.85
 1037.50
 250.65
 358.25
 358.50

Filed Oct. 9th

1857

McHolluback

Clark
#

St Louis Spoke & Wheel Factory

St Louis March 29th 1856

Messrs E. & A. Woodburn & Co. Millersville Ill.
Bought of
Woodburn & Scott.

Proprietors of Blanchard's patent for manufacturing
Spokes Corner of Broadway & Ashley Street

1855

June 16 Do Made per Bill rendered

538.75

Oct 25 " " " " "

447.60

\$986.35

Notes taken by Woodburn & Scott & Co.
with Agent to collect Sum

986.35
280
706.35
353.17

Filed Oct 9th 1857
Wm. H. H. H. H.
Clerk

St Louis Mo July 24 1856

E. A. Woodworth

Bought of Woodburn & Scott

15 Carriage Poles	a	75¢	1350
24 pair of shafts	a	60¢	1440
14 lb & B. Bows	a	75¢	750
10 " No. 2 Spokes	5.20	a 5¢	2600
10 " " 2 in "	5.20	a 5¢	2600
50 " 1 3/4 "	26.00	a 5¢	13000
25 " 1 5/8 "	13.00	a 5¢	6500
50 " 1 1/2 "	30.00	a 5¢	15000
43 " 1 3/8 "	25.80	a 5¢	12900
50 " 7/8 & 7/16 Hubs	a	1.75	8750
25 " 6 1/2 "	a	150¢	3750
50 " 6 in "	a	150¢	7500
43 " 5 3/4 " "	a	140¢	6000
10 " 8 in "	a	175¢	1750
5 " 1 1/4 Fellows	a	1.75	875
5 " 1 3/8 "	a	1.75	875
6 " Seat Pins	a	.25	150
Insurance			645

Received Note due six Months

Woodburn & Scott

By E. R. Allen & Co.

Am. Express Agents

Filed Oct. 17th 1857

with Allen

The Conversation took place in Modurn's Office, all of the last bill of Spokes had not been received at the time of giving note from a quarter to a third were received after the notes were given. The Spokes & Hubbs on being received were housed by Modurn and laid away until used - Direct Resumed -

I know that Griffith used some of the Spokes about first of October A.D. 1856 They came in bundles. They were marked the Hubbs by a stamp in the wood Modurn & Scott St Louis. The Defendants use from Eight to ten thousand Spokes per Month and keep from twenty to Eight Workmen are carrying on wagon business at Aurora.

Peter Payne said he knew the Defendants had seen Modurn two or three times had been in the wagon business for forty years had worked for Defendants making wheels for seven years Allen Modurn one of the Defendants and Modurn came to my bench in May A.D. 1856 Modurn was trying to sell Defendants Spokes & Hubbs - Modurn said he did not want to buy as he would have to lay out of his money so long. Modurn then told him he would guarantee or warrant that his Spokes & Hubbs were good timber well seasoned and fit for ready use. Modurn came to me to get a memorandum of what he wanted Modurn set down in his Memorandum the quantities. The Spokes & Hubbs came on

No 37

I saw them at the time they were received, and afterwards I went to work dressing them some time in the winter. They were not well-seasoned not fit to be put into wagons neither the Spokes nor hubs, one tenth of them were fit ^{only} for ~~use~~ fire wood they were not well seasoned and fit for ready use, but would require a year seasoning to make them so —

Griffith bought from the same lot Woodworth bought them because they were in want of them at the time. The Spokes & Hubs were of no value at the time they were received. I do not know as they was any seasoned Spokes & Hubs in market at that time. If there had been I think I should have known it. I do not know the Market Value of green or seasoned Spokes & Hubs at Aurora but I should think the difference based upon my Appraisal would be one half difference in value. The Spokes & Hubs came in bunches and no man can tell whether they were seasoned or not till he worked them.

The Defendants then put the following Questions. Did you ever put up any wheels from those Spokes & Hubs if you have did they stand and if they came down or fell to pieces what was the reason of their so falling? Objected to by Plaintiff and objection sustained by the Court. To the sustaining of which objection the Defendants

Excepted then and there.

No 38

Do you know of any
Wheels put up out of those Spokes & Hubs -
being returned by the Defendants on account
of the defect of the Timber on account
of want of being seasoned. If you know many
and for what cause state fully? Objected to by
Plaintiff objection sustained and the Defendants then
and then Excepted to such ruling.

From your knowledge of
the Defendants business what damage was it to them
if any thing aside from the difference in the
Value of the Spokes being green or seasoned and
fit for ready use, if you now state to the best
of your Judgement? Objected to by the Plaintiff
and sustained by the Court and the Defendants then
and then Excepted.

We put up several sets of wheels
to give them a trial.

State what you know about
any wagons made from those Spokes & Hubs being
returned to Defendants and why they were so returned
and if in consequence of a defect in the Timber
being seasoned state? Objected to by the Plaintiff
objection sustained and Exception taken by Defendants
then and then the Defendants had to stop making
The Spokes & Hubs came after the bargain
Crap Examined

The Spokes men noting they came down

No 39

up in bunches sixty in a bunch I do not
know how many bunches some a Hundred

The Bunches were done up with Dressed Prunes

I know about the time the Spokes came
On a Hundred lots of Spokes at least sixty in a
bunch The Spokes were put under cover &
rain and snow could not get at them some
would say that Spokes ought to season two
years some a year and a half to be good
could not tell whether they were seasoned or
not until they were worked. They had Spokes
from Michigan and New York

The Direct resumed

Spokes had not been put building in which
they were housed did not leak one tooth of them
were working and ^{fine} fit only for firewood

Edwin Griffith knew Defendants work
know Plaintiffs worked for Defendants during the
Months of September October November December
and until the middle of January A.D. 1836 &
1837 I worked on the Spokes. They were not well season-
ed not fit for machinery ought to be seasoned at
least one year perhaps two years some of the Spokes
were good some poor from two to fifteen poor in
a bunch of sixty I have been fourteen years
in the Carriage business - fourteen years in
the best Shops I quit work for the Defendants
the 3rd of February I did not put them into hubs

as they were unfit

Cross Examined

No 40

I commenced Aug. 1856 in October
I commenced on the Spoke & Hub I could
not tell whether the Spoke and Hub were seasoned
or not until they commenced work on
them

Sep. Court - I knew both Plaintiffs
and Defendants I was in Shop at time Paynes
Spoke of I was working for Defendants Woodburn
& Woodburn passed right by me to go to Paynes
bench. Paid Attention wanted to hear what was
going on Heard Woodburn recommend the Spoke
& Hub said they were fit for nady use and good
Timber Woodworth said he did not want
to buy unless well seasoned and fit for nady
I do not know the value of seasoned or green
timber at the Curran Market But should think
the difference in the value would be one half

Cross Examined

Said Southern Timber was better
timber than Northern my bench was near the
door

Which was all the Evidence offered on
the part of the Defendants and they here rested
their case

Edward R. Allen for Plaintiff presented notes
 to Woodworth had a conversation with Woodworth when
 first note was due called again when second note was
 due and when last note was due ^{made} no objection
 to note said it was hard times and would pay
 as soon as he could he no such conversation as
 sworn testified to Alvin Woodworth was the one of the
 Defendants that had the general charge of def. business
 Was Examined

I think I called within a week after
 last note was due I am quite positive that I
 presented last note I may be mistaken

L. A. Brady had a conversation about
 a mazer not very confident. Could not say when
 he said he got the Timber Could not say as
 he said anything about ~~the~~ Timber

The Plaintiff has offered a paper pertaining
 to be signed by L. A. Brady as security for costs -
 and moved the Court to substitute L. A. Brady
 as security for costs in place of A. B. Pullen. It
 was admitted that Brady was responsible. The Court
 permitted it to be done and the Defendants then
 and there Excepted

A. B. Pullen said he saw Alvin Woodworth
 one of the Defendants the 24th or 25th day of January

No 42 A.D., 1837 He offered to take up the notes and
give Judgments notes - one for one half the gross
amount due in three months & one for the other
half due in six months with interest if I would
do it. I told him I would confer with Mr.
Allen the agent of the Plaintiffs. Mr. Woodward
did not come in. I called on Woodward
several times about the notes he said he would
pay them never made any objection to the amount
nor intimated that he had any defense to any portion
of the notes

On Cross Examination

He said that Mr. Woodward said he did not
want any law about the notes I am the Attorney for
the Plaintiffs I did not get service on Defendants
for the February Term. The Plaintiff here closed
his case

The Defendants then offered John Swain
who stated that Woodward paid freight on Spokes
and Hubbs. Which was all the Evidence offered
in the case on the part of the Plaintiff and Defendant
and no other Evidence being offered

The Court instructed the Jury as follows
For the Plaintiffs

The Jury are instructed that the notes
offered in Evidence by Plaintiffs show a good cause
of action against the Defendants and the Jury
should find a verdict for the Plaintiffs for the
amount of said notes & interest unless the Defendants

"Spokes"
"Hubbs"

have shown by proof some legal defense against the notes

"Given"
The Jury are instructed that the Rule of Damage in case of a Special Warranty is the difference between the ^{value of the} article sold as it was warranted and the value in the Condition in which it was delivered.

In the giving of which instructions and each of them the defendant then and there Excepted

1
The Court gave the following instructions on the part of Defendants and refused a part —
Instructions for Def.

"Given"
If the Jury believe from the Evidence that the notes were given for Spokes & Hubs under a Special Warranty that the Spokes & Hubs were of good quality, well seasoned and fit for ready use and said Spokes & Hubs were not well seasoned fit for ready use and of good quality and by reason of such deficiency they were worth only half as much or any other amount as they would have been had they been as warranted then the Jury should make a deduction to the amount of such diminished value of the same.

2
That a party purchasing goods under

No 24

"Given"

a Special Warranty, has a right to receive the kind and quality of goods as warranted and if they do not answer the Warranty then he may receive or not as he pleases and if he receives the same, he is only bound to pay what the same is reasonably worth and if the purchaser gave his Notes he has a right to show by way of offset or plea that the goods were not as warranted and to have a deduction to the extent of the damages on account of the difference in value of the goods as they were warranted and the value as they were

3

"Given"

That the Defendants were not bound to disclose to the agent or attorney of the Plaintiff that they had a defense and if the Jury believe from the Evidence that the Defendants have a defense to the notes or a part of them then they were not bound to disclose the same to the Lawyer or agent of the Plaintiff

4

"Given"

That if the Jury believe from the Evidence that Plaintiff were engaged in the Manufacture of ^{Spokes &} Hubbs and sold the same to the Defendants then there is an implied Warranty that they are of a fair ordinary quality and that too in the absence of any Express

No particular form of words are necessary to constitute a Warranty, any affirmation as to kind or quality, made by the seller with a view of having the purchases rely upon and acted upon by said purchaser, is sufficient to constitute a Warranty.

That if Woodward gave the notes under a Special warranty that the Spokes & Hubs were of good quality and well seasoned and fit for Ready use, the Defendant is not Estopped from bringing into the consideration of the said notes and if given under a Special Warranty which was broken and the Defendants are damaged thereby by reason of the diminished value of the same then they should deduct from said notes the amount thereof if they believe the same is Established by the proof.

That the Defendants were not bound to return the Spokes & Hubs or to give the Plaintiff notice but the party furnishing goods under a Special Warranty, and they do not answer the Warranty, he furnishes the same at his risk — and the party furnishing has a right to use the same and claim his deduction or to refuse to refuse to receive them entirely.

No 47

If a case is made out which entitles the Defendant to claim a part failure of Consideration of the note by way of -
damages. Then the Jury are the Judges of the Extent of such failure of Consideration by way of damages from all the proofs of the Case.

Qualification to Defendants Instructions

Yet if the Jury believe that Defendants would have been likely to assert this Claim for damages when called upon for payment on the note the fact that they did not assert such Claim is a Circumstance to be considered by the Jury in determining whether Defendants were damaged or not.

"Given"

To the Refusal to give which instructions and each of them the Defendants then are then Excepted. The Jury found a Verdict for the Plaintiff for Seventy Standard Dollars and therefore the Defendants moved for a new Trial for the following reasons; That the Verdict is contrary to the Evidence and also contrary to the Law and Evidence.

Second the Court Erred in refusing to allow the questions to be asked of Witness Payne, and in rejecting a portion of Paynes Testimony and refusing to allow the Testimony

No 48

Should the Court find in giving the instructions
as part of Plaintiff and refusing Defendants with
-actions

The Court overruled said Motion for
a new Trial and gave Judgment on
the verdict to the granting of which Motion
for a new Trial the Defendant then &
then Excepted and prays that this his Bill
of Exceptions may be signed and sealed
by the Court and made a part of the
Record herein which is done

M. E. Wallcut 
Judge &c

Filed Jan 11th 1838

Geo. M. Wallcut
Clerk

No 2, 9

State of Illinois
Kendall County

To George M. Hollenback
Clerk of the Circuit Court

I said County in the State aforesaid a Henry Cutty that
the foregoing is a true and complete ^{Transcript} ~~Copy~~ of all
the papers belonging to, and remaining on file
in said Court and of the Proceedings had and
Entered of Record in said Court and that said
papers appear in in the order in which they were
filed and the proceedings in the order in which
they were had in said Court in said Cause

Witness George M. Hollenback Clerk
of said Court and the seal thereof at
Chicago in said County the first day
of March A.D. 1858

George M. Hollenback

Clerk

State of Illinois - Supreme Court 3^d Division
April Term 1858.

Erasmus Woodworth &
Alvin Woodworth —

vs.

Jacob Woodburn & Thomas Scott } Appeal from
Kendall Co., Ill.

Now come the said
appellants by Leland & Leland, & Parks &
Fridley their attorneys, & say, that in the
record & proceedings herein, there is
manifest error, to wit;

1st The Court below erred in not permitting the
general issue to be withdrawn.

2^d The Court below erred in not permitting
Witness Payne to answer the questions put by
The defendants below.

3^d The Court below erred in giving each of
Plaintiffs instructions in Court below.

4th The Court below erred in refusing to grant a
new trial -

5th The Court below erred in permitting
The bail to be substituted, & in other
respects as appears by the record -

6th The verdict & judgment were
against the law & evidence -

wherefore by reason of these & other errors
apparent on the face of the record, said
appellants pray, that the judgment
of the Court below be reversed,
annulled, set aside & held for nought

Leland & Leland, & Parks & Fridley
for appellants

And now come the said
appellants by W. H. Wallace their
counsel and joins ⁱⁿ the ~~the~~
error and say there is in
the record of the proceedings
aforesaid no such error as
appellants have above asserted
& this they may say inquired
of by the Court - wherefore appellees
pray that said judgment
may be affirmed in all
things &c. W. H. Wallace
for appellees

243
Erasmus Woodworth
+ Alvin Woodworth
vs.

Jacob Woodburn +
Thomas Scott

Appeal from Kendall.

Record & assignment
of errors.

Filed April 24. 1858
L. Leland
clerk.

Jacob M. M. J.
L. L. & Co. for
appeal

4/25/58

STATE OF ILLINOIS, SUPREME COURT,
APRIL TERM, A. D. 1858.

E. & A. WOODWORTH, Appellants, vs. WOODBURN & SCOTT.

Appellant's Brief.

The first point made is: Had the defendants the right to withdraw the general issue before the Jury was sworn. Had the defendants the right to begin and reply. See following authorities. 3 Chilty's General Practice, pages 872, 873, and 874; also 1 Greenlief's Evidence, page 98, 1 Starkie's Evidence page 328, marginal page 369, 2 vol. Phillips' Evidence, Cowen and Hill's Notes, note 370, and page 482. The point made by those authorities is, that when there is nothing for Plaintiff to prove, and the Defendant's evidence sets up matter in confession and evidence, the Defendant has a right to begin and conclude the case.

Second. Was Payne's evidence proper. It was a test, the best that could be given, as regards the quality of the timber. It had been tried, and how did the timber work. That was the question. 1 Scammon 23, Clark vs. Luke. The Court says the rule is, "Does the proposed testimony tend to prove the issue." If it was not competent on the question of damages, yet on the question of quality of timber, it was to the point. Testimony may be incompetant for one purpose, yet for another good. 1 Phillips' Evidence, page 196. Cowen & Hills'

Notes, 330, 2 vol. page 432, also same, note, page 434, 5 Gilman 298. If it tends to prove issue sufficient, 1 Greenlief, page 69, paragraph 51.

Third, Damages. Is the rule as laid down in the second instructions and also in excluding a part of Payne's testimony, the law. 2 Starkie's Evidence, marginal, page 904. Entitled to such damages as are the natural and proximate result of act complained of. 2 Greenlief's Evidence, page 275, paragraph 262, 12 Illinois Reports, 446.

Fourth. The first instructions given for Plaintiffs in Court below. Its language was, the defence must be to the whole of notes or could not recover. In no respect could that be law under the issue of a part failure of consideration.

Fifth. The Court erred in permitting the security for cost to be charged. It is a contract which the law compels the Plaintiff to make, in order to give the Court jurisdiction. Under that contract, the rights of the Defendants attach, and the offices of the Court. Could the Court alter the Contract at will, so as to give Fuller a right to testify. In case the Plaintiffs in the Court

below should be defeated, could not Fuller be sued and be made to respond for the cost. In any event is it not a question of sound legal discretion which may be reviewed. He is interested having signed the bail bond for costs. He is interested in the amount of money recovered by way of percentage. He is liable over to his client for not conducting his case in a proper manner. He does not speak of facts but details, conversations when alone with the Defendant. He is not allowed by Law to detail the conversations he has had with his client in relation to the case. The law will not permit him to tell the whole truth though he is sworn to do so, and this he can object to himself when on the witness stand. The security for costs must be given, to give the Court jurisdiction.

The replication to the Defendants' fourth plea only traverses the fact whether there was a warranty, and it admits the breach as alledged if there was a warranty. The verdict on the question whether there was a warranty is against the evidence.

FRIDLEY & PARKS,

For Plaintiff in Error.

BEACON Printing and Bookbinding House, Aurora, Ills.

243

Woodworth et al.

vs

Woodburn & Scott

Appellants

Brief

Filed May 6, 1858

S. Seland
clerk

STATE OF ILLINOIS, SUPREME COURT,
APRIL TERM, A. D. 1858.

E. & A. WOODWORTH, Appellants, vs. WOODBURN & SCOTT.

Appellant's Brief.

The first point made is: Had the defendants the right to withdraw the general issue before the Jury was sworn. Had the defendants the right to begin and reply. See following authorities. 3 Chilty's General Practice, pages 872, 873, and 874; also 1 Greenlief's Evidence, page 98, 1 Starkie's Evidence page 328, marginal page 369, 2 vol. Phillips' Evidence, Cowen and Hill's Notes, note 370, and page 482. The point made by those authorities is, that when there is nothing for Plaintiff to prove, and the Defendant's evidence sets up matter in confession and evidence, the Defendant has a right to begin and conclude the case.

Second. Was Payne's evidence proper. It was a test, the best that could be given, as regards the quality of the timber. It had been tried, and how did the timber work. That was the question. 1 Scammon 23, Clark vs. Luke. The Court says the rule is, "Does the proposed testimony tend to prove the issue." If it was not competent on the question of damages, yet on the question of quality of timber, it was to the point. Testimony may be incompetant for one purpose, yet for another good. 1 Phillips' Evidence, page 196. Cowen & Hills'

Notes, 330, 2 vol. page 432, also same, note, page 434, 5 Gilman 298. If it tends to prove issue sufficient, 1 Greenlief, page 69, paragraph 51.

Third, Damages. Is the rule as laid down in the second instructions and also in excluding a part of Payne's testimony, the law. 2 Starkie's Evidence, marginal, page 904. Entitled to such damages as are the natural and proximate result of act complained of. 2 Greenlief's Evidence, page 275, paragraph 262, 12 Illinois Reports, 446.

Fourth. The first instructions given for Plaintiffs in Court below. Its language was, the defence must be to the whole of notes or could not recover. In no respect could that be law under the issue of a part failure of consideration.

my

Fifth. The Court erred in permitting the security for cost to be charged. It is a contract which the law compels the Plaintiff to make, in order to give the Court jurisdiction. Under that contract, the rights of the Defendants attach, and the offices of the Court. Could the Court alter the Contract at will, so as to give Fuller a right to testify. In case the Plaintiffs in the Court

OK

below should be defeated, could not Fuller be sued and he made to respond for the cost. In any event is it not a question of sound legal discretion which may be reviewed. He is interested having signed the bail bond for costs. He is interested in the amount of money recovered by way of percentage. He is liable over to his client for not conducting his case in a proper manner. He does not speak of facts but details, conversations when alone with the Defendant. He is not allowed by Law to detail the conversations he has had with his client in relation to the case. The law will not permit him to tell the whole truth though he is sworn to do so, and this he can object to himself when on the witness stand. The security for costs must be given, to give the Court jurisdiction.

The replication to the Defendants' fourth plea only traverses the fact whether there was a warranty, and it admits the breach as alledged if there was a warranty. The verdict on the question whether there was a warranty is against the evidence.

FRIDLEY & PARKS,

For Plaintiff in Error.

243

Dr. Woolbottle & al

vs
Dr. Woolbottle & al

Appellants Brief

Filed May 6, 1838
L. Belmont
Clerk

STATE OF ILLINOIS, SUPREME COURT,
TO APRIL TERM, 1858.

JACOB WOODBURN AND THOMAS SCOTT
vs *ad*
ERASMUS WOODWORTH AND ALVIN WOODWORTH.

APPEAL FROM KENDALL.

ABSTRACT OF THE RECORD.

Page 3. Declaration assumpsit on three promissory notes and common counts filed by appellant, January 30th, 1857, in the Kane Circuit Court.

Page 11. First plea, general issue; second plea, set off; third plea, special warranty; 4th plea, part failure of consideration.
Page 24.

Page 26. General replication to each of said pleas. *The replication to the 4th plea only traverses the fact of warranty - not the breach of it -*

Page 29. Jury sworn, on 9th day of October, 1857, Kendall Circuit Court. Verdict for Plaintiff, \$1700.

Page 30. Motion for new trial over-ruled, Oct. 10th, 1857.

Page 30. Appeal allowed. Bond \$2,000. Rufus Gray and Lyman Woodworth, sureties in thirty days, time given to file bill of exceptions.

Page 31. Appeal bond filed November 7th, 1857.

Page 32. Bill of exceptions. Before jury was sworn, defendants moved to withdraw general issue; take affirmative of issue. Motion over-ruled; exception taken.

Page 33. Plaintiff read in evidence three notes and rests.

Page 34. Defendants introduce John Swaine. Sworn. Knows

* Did you ever put up any wheels from these spokes & hubs?
if yes, how did they stand? & if they came down or fell to
pieces, what was the reason of their so falling?

parties; wrote notes, given for hubs and spokes. Defendants had not seen spokes and hubs. E. R. Allen, Agent for Plaintiff, said should be all right.

On cross examination he stated, the hubs and spokes not all received at time of giving note, and were housed as received. Griffith used some of the spokes, October 1856. Hubs stamped Woodburn & Scott. Defendants use 10,000 spokes per month; keep 70 or 80 men carrying on wagon business in Aurora.

Page 35.

Peter Payne sworn. Knows Defendant, seen Woodburn; been in wagon business 40 years; made wheels seven years for Defendants; May 1856 Woodburn wanted to sell Defendants hubs and spokes; Woodburn guaranteed or warranted spokes and hubs to be well-seasoned, fit for ready use; Defendant set down on his memorandum the quantity to be purchased; spokes and hubs came on; not well-seasoned or fit to be put in wagons for a year; one tenth of spokes fit only for firewood; Griffith worked from same lot. No spokes or hubs in market at that time; spokes and hubs worth half-price.

Page 36.

~~Four~~
~~Three~~ questions put by defendant objected to by Plaintiff; objection sustained by the Court and Defendant excepted; which questions are as follows:

Int. 1.

Int. 2.

Spokes came in bunches, put under cover; rain and sun not get at them; could not tell whether they were seasoned until worked.

Edmund Griffith knows Defendants; do not know Plaintiffs; worked for Defendants; worked on spokes not seasoned; would require at least one year, perhaps, two years to season; from ten to fifteen poor spokes in a bunch of sixty; worked fourteen years on wagons; commenced on the spokes in October, 1856; could not tell whether they were seasoned until I commenced work on them.

Jesse Pruett sworn. Knows Plaintiffs and Defendants; was working for Defendants at the time Payne speaks of Woodburn; Woodworth said he did not want to buy spokes unless well-seasoned, Woodburn said they were well-seasoned and fit for ready use, and good timber; should think the difference in the value of spokes, one-half.

Defendants rested.

Plaintiff introduced E. R. Allen. Sworn. Called on Woodworth; made no objections; would pay as soon as he could; hard times; that was when first note was due: I think I presented last note, may be mistaken.

L. D. Brady sworn, knows nothing.

The Plaintiffs offered a paper purporting to be signed by L. D. Brady as security for costs in place of A. B. Fuller. It was admitted that L. D. Brady was a respon-

sible man; the court permitted to be done, and the Defendants excepted.

Page 41.

A. B. Fuller sworn, Plaintiffs' Attorney. Saw Alvin Woodworth; offered to give judgment note for one half the gross amount; one due in three months and the other in six months; did not want any law about them; and the Plaintiffs rested.

Page 42.

The Defendants offered John Swaine, who stated that Woodworth paid freight on spokes.

Which was all the evidence in the case.

The Court gave two instructions for Plaintiff, to the giving of which the Defendant excepted.

Page 42

First Instructions.—Notes constituted a course of action unless defeated by some legal defence against the notes.

Page 43.

Second.—The jury are instructed that the damage in case of a special warranty is the difference in the value of the article as it was warranted, and the value in the condition in which it was obtained.

The Court also gave the Defendants instructions.

Page 47.

The jury found a verdict for Plaintiff, \$1700. Defendants moved for a new trial. Motion over-ruled and Defendants excepted.

The errors assigned are:—

1st.—The Court erred in not permitting the general issue to be withdrawn.

2nd.—The Court erred in not permitting witness Payne

to answer the questions put by the Defendants below.

3rd—The Court erred in giving each of Plaintiffs instructions in court below.

4th—The Court erred in refusing to grant a new trial.

5th.—The Court erred in permitting the bail to be substituted, and in other respects as appears by the Record.

*6th The verdict & judgment were
against the law & evidence.*

243-103
Woodworth et al.
vs.

Woodburn & Scott

Abstract

Filed Apr 22, 1835

L. S. Leonard

Clk.

X

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1858.

WOODWORTH, *et. als.*,
vs.
WOODBURN AND SCOTT. } *Appeal from Kendall County.*

POINTS AND AUTHORITIES FOR APPELLEES.

I.

THE first point made by appellant's counsel is, that the Court below refused to allow appellants to withdraw the general issue, and take the affirmative of the issue. There is no error in this. After the plea was once filed it was a matter of discretion in the Circuit Court to permit or refuse to allow it to be withdrawn. The authorities cited by appellant's counsel show that it is a matter of discretion, even in cases where the pleadings of the defendant, as originally filed, confess and avoid the plaintiff's cause of action, by setting up a new and affirmative state of facts. In this case the general issue was filed in the first instance, and the issue formed by it remained upon the record until the case was called for trial, and then an attempt was made to change front on the eve of the trial. No case can be presented where the refusal of the court to permit this to be done was ever held to be error.

It is not a question whether, by the pleadings as they stood, the defendant had the affirmative of the issue; but the error complained of is, that the court refused to permit the defendant to change the issue on the cause being called for trial.

II.

The questions put to the witness Paine were objectionable, and were properly refused by the Court.

The first of the three questions put to Paine was objectionable, 1st, on account of its being leading; and 2d, because it was irrelevant and incompetent. The persons who returned the wheels to defendants were the better evidence as to the defects in the wheels; and if Paine had been permitted to answer the question he could only have stated what was assigned as the reasons for returning them by the persons who returned them.

The second question sought to prove damages other than what was legitimate for the jury to consider. *Vide III.*

The third question is objectionable on the same grounds as the first.

III.

What is the true measure of damages on a breach of warranty in the sale of chattels, when no fraud is alleged? The instruction of the court in this case was, that it was the "difference in value of the article as it was warranted to be, and its value in the condition in which it was obtained;" and this we insist is the true rule. Sedgewick on Measure of Damages, 290, 295; 1 H. Black. R. 17; 2 Hill. R. 288; 4 Hill. 625.

No special damage (such as having wagons sent back, &c.) were claimed in defendant's plea, and in order to have recovered them in any event he should have claimed them specifically in the pleadings, so that the plaintiff might have disputed the facts.—Chitty on Contracts, 3 Am. Ed. 345.

IV.

The first instruction given for the plaintiff below is complained of as being calculated to mislead the jury. That instruction is not correctly set out in the abstract, and a forced and false construction is given to it in the argument. The instruction is found on the 42d and 43d pages of the record, and is "that the notes offered in evidence by plaintiffs show a good cause of action against the defendants, and a jury should find a verdict for the plaintiffs for the amount of said notes and interest, unless the defendants have shown by proof some legal defence against the notes." This was not calculated to mislead the jury by its language, especially when taken in connection with the instructions given at the request of the defendants below. It did not preclude the jury from allowing a deduction for a part failure of consideration if any such failure had been shown by the proof.

V.

It is alleged that the Court erred in permitting the security for costs to be changed, and permitting the old security, thus released, to testify in the case.

It might be objected here that there is nothing in the record to show that this is a case wherein security for costs would be required.

But if it were such a case, the change of the security is a matter of discretion in the Court below, and its decision in that behalf cannot be assigned for error. And the security thus released was a competent witness. This point has been decided by this Court.

Breese 218.

4 Scam. 448.

See also 2 Starkie 132.

1 Term R. 164.

1 Tidd's Prac. 259.

1 Bing. 92.

9 Greenlf. 9.

13 Pick. 79.

15 " 51, 53.

The objection that the witness, Fuller, was one of the attorneys of the plaintiffs, goes to his credibility and not to his competency.

The question as to whether there was a warranty of the property sold, was fairly submitted to the jury. There was some evidence tending to show such warranty, and some tending to show that there was no such warranty. The witness, Allen, who was claimed to have made such warranty as agent for the plaintiffs, denies that he made any such warranty, the conversations and conduct of the defendants, as testified to by Allen and Fuller, tending strongly to show that there was no warranty or any cause of complaint on the part of the defendants long after they received the property and used it.

W. H. L. WALLACE,
Counsel for Appellees.

243-103

Woodworth
vs

Woodburn

Appellee
Argument

Filed May 17, 1888

L. Seland
clerk