No. 12552

Supreme Court of Illinois

Dunshee

---

vs.

Hill

Dunshee
v.
Hee

199

Dunshee

1252

1858

Refused

1—

State of Illinois
County of Winnebago } ss—

Pleas before the Honorable Anson S. Miller Judge of the County and of Said Winnebago County, At a regular Term of Said County Court begun and holden at the Court House in the City of Rockford, on the first Monday, being the first day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty-Eight, and of the Independence of the United States the Eighty-Second:

In the Matter of
Harmon Hill
vs
Francis K Dunshee } Appeal by Dunshee:

Be it Remembered that on the Fifteenth day of February in the year of our Lord one Thousand Eight Hundred and Fifty-Eight, this cause came up to the Said County Court on the appeal of said Defendant Francis K Dunshee from the Judgment of James S Manlove a Justice of the Peace for Said County

L12550-B

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Whereupon the Said Justice returned into this Court the following papers and transcript of Proceedings in Said Cause before him – Viz

Summons.

State of Illinois Winnebago County ss.

The people of the State of Illinois to any Constable of Said County Greeting You are hereby commanded to Summon F K Bunshee to appear before me at my Office in Rockford on the 19 day of December 1857 at 10 oclock A.M. to answer the Complaint of Harmon Dill for a failure to pay him a certain Sum of not Exceeding one Hundred Dollars, and Have of make due return as the Law directs

Given under my hand & Seal this 12th day of December A.D. 1857 James S Moulton J.P.

Justice of the Peace

Upon the back of which Summons is indorsed.

Damages $100. Costs ,31 Pro Cost 25–

Served Dec 16/57 by reading to the within named dft. – Scire ,25 Mileage ,05 – ,30. E B Ricker Const.

Plaintiffs Account –

F K Bunshee

To Harmon Dill Dr

For 30 1/3 Cord of Stone at $4.50		$136.50
Cr		40.00
By amt pd Upton on Bunsh & Co order		$96.50

[10550-2]

3-

Defts Defense—

F K Dmshee
ad
Hamon Hill

And the defendant Comes & says he did not promise as the Plaintiff has complained against him &c

And deft will insist upon as an Off Set in this cause. an order accepted & taken to Chas O Upton for $40 drawn by Pmock Sterling & Co.

And that the Stone for which this action was brought have been bought of said Pmock Sterling & Co:

Transcript of Justice

Justices Court.

Before J S Moulton a Justice of the Peace in & for Winnebago County Ills

Hamon Hill
vs
Francis K Dmshee } Rockford Dec 12 1857.
Assumpsit Damages $100
Summons issued Cond. & Chicken returnable on the 19 inst at 10 o'clock A.M. Subp for Off to J Allen B Kilbourn & A Skinning

Summons Returned Served Dec 16/57 Reading to the within named deft. E S Chicken Const. Subp for deft. to J Peacock & to Ford rtd "Served &c"

Subp for Plff retd Served by reading &c E G Licker Const.

4 Dec 19 And now comes this cause &c parties appear and by consent Con until the 24 inst at 10 oclock AM.

Subp for Plff ~~retd~~ to Orlando Clark Retd Served &c Albert Const.

Subp for Plff & Deft Served by reading &c E G Licker Const.

Dec 24 And now comes this cause &c parties appear. W Johnson Esqr for Plff & W Lathrup Esqr for Deft. Deft asks for a Jury Venire is returned served on the above named persons P A Hartwell Charles Leighton C J Roberts W Roberts J K Bingham & H O Kellogg who appeared were duly empanneled & sworn Plff declares for 30 1/3 cord of Stone at $4.50 per cord $136.50 Cr $40 $96.50 Deft. Plead in writing Genl issue set off & bal on note of Bemock Sterling &Co. Wits for Plff W L Bemock A J Bemock W Ford & Peacock & J Allen B Kilbourn A Swarring & C D Upton for Deft sworn &c. after hearing the Evidence &c the jury retire & return a verdict for Plff for $17.— the Court considers that on said verdict Plff do have judgment against Deft for Seventy Seven dollars damages & Eight 88/100 dollars costs (not including $1.50 jury fee paid by Deft. have execution therefor J G Manton J.P.

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Jan 13/58 And now comes defendant and prays an appeal to the County Court & having filed his bond &c Appeal granted & papers sent up to County Court J S Manlove J.P.

Judgment	$77—
Costs	8 88
Jurors fee	1,50
Appeal	1.00

I hereby Certify that the above is a true & Correct Transcript of the proceedings & judgment in this cause as appears of my docket

J S Manlove J.P.

Appeal Bond.

Know all men by these presents that we Francis K Kinsloe and ——— of the County of Winnebago in the State of Illinois are held and firmly bound unto Harmon Dille in the penal sum of One Hundred and Seventy five Dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs Executors and Administrators jointly severally and firmly by these presents; Witness our hands and Seals this 13th day of January A D 1858—

The Condition of the above obligation is

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such that Whereas the Said Stevenson Hill
did on the 24th day of December AD 1857.
before James S Maulson a justice of the Peace
for the Said County of Winnebago recover
a judgment against the above bounden
Francis K Donahue for the sum of Sixty Seven
Dollars January eight & 8/100 Dollars costs. From
which judgment the Said Francis K Donahue
has taken an appeal to the County Court
of the County of Winnebago aforesaid and
State of Illinois; Now if the Said Francis
K Donahue Shall prosecute his appeal
with Effect and Shall pay Whatever
judgment may be rendered by the Court
upon the dismissal or trial of Said appeal
then the above obligation to be void;
Otherwise to remain in full force and
effect.

Approved by me at my office F K Donahue [seal]
this 13 day of January 1858. E Hill [seal]
James S Maulson
Justice of the Peace

Whereupon and on the day and year
aforesaid the Proper Writ of Summons
issued out of the office of the Clerk of Said
Court to Said Stevenson Hill appellee. in the
words following to wit:

51858-4

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State of Illinois } ss
Winnebago County }

The People of the State of Illinois
To the Sheriff of Said County Greeting

Whereas in a certain cause lately pending before James L Mansfield Esquire one of the Justices of the Peace within and for Said County wherein Harmon Hill is Plaintiff and Francis K Drinkhouse is defendant judgment was rendered by Said Justice against the Said Drinkhouse from which Judgment the Said Drinkhouse has appealed to the County Court of Said County: We therefore Command you that you Summon the Said Harmon Hill to be and appear before Said Court on the first day of the next term thereof, to be held at the Court house in Rockford on the first Monday in March A.D. 1858: at ten O'clock in the forenoon, and abide by and perform the judgment of of Said Court in the premises: Witness

William Hulin
Clerk of Said Court and the Seal thereof
At his office in the City of Rockford in Said Winnebago County this Fifteenth day of February
A.D. 1858.

William Hulin
Clerk

Seal

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which Said Writ was duly returned to the office of ~~Said~~ the Clerk of Said County Court by the Sheriff of Said County with the following indorsement thereon to wit:

State of Illinois
Winnebago County ss.

I duly Served this Writ by reading the Same to the within named Defft. Harmon Hill this 15th day of February A.D. 1858.

Samuel D Church Sheriff
By James Dame Dep—

Fees—Service, 50 Mileage, 5 Return 10 = $. 65=

And that Said cause coming on for hearing at Said March Term the following proceedings were had, as by the records of Said Court will appear: of which records as to Said Cause, and of all the Entries & Orders in Said Court in relation thereto the following are full and true Copies to-wit

Harmon Hill
vs
Francis K Brunker } Appeal by Brunker

Wednesday March 10. 1858

This day came the Said parties by their Attorneys and issue being duly joined it is ordered that a jury come: And thereupon come a jury of good and lawful men

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who being duly Empannelled tried and Sworn, and having heard the Evidence and Arguments of Counsel until the hour of adjournment arrived. by agreement of the parties and being fully Charged by the Court, leave is granted them to Seperate and Meet the Court at the hour of nine Oclock tomorrow morning:

Thursday March 11- 1858—

Harmon Hill

vs

Francis K Donohue

This day again came the said parties by their Attorneys, and also come the jurors Empannelled and Sworn to try the issue Joined herein, and the said jurors having heard the Evidence and Arguments of Counsel retired to Consider of their Verdict And thereafter the said jurors returned into Court. with the following Verdict to wit: We the Jury find the issue for the Plaintiff and Ass his damages against the defendant at the Sum of ($95.34) Ninty five dollars and thirty four cents. And thereupon the said defendant moves for a new trial, and in arrest of judgment:

Saturday March 13. 1858.

Hannon Bill
vs
Francis K Wenshe
} appeal by Deft.

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This day again come the said parties by their Attorys and the Court having heard and maturely considered the arguments of Counsel upon the motion heretofore submitted by said defendant for a new trial herein, and being fully advised thereon, overules said Motion; To which ruling of the Court said Defendant excepts.

It is therefore considered and ordered by the Court that said Plaintiff have and recover of said defendant the Sum of ($95.34) Ninety five Dollars and thirty four cents. his damages by the jury herein assessed against said defendant. as also his costs and charges herein expended, and that he have Execution therefor;

And thereupon the said defendant prays an appeal to the Supreme Court of the State of Illinois. which is allowed provided said defendant within ten days from the rising of the Court file his appeal Bond, and bill of Exceptions, duly executed and completed, in the office of the Clerk of this Court: Said Bond to be in the form

S 10552-b

Required by Law in such case in the penal Sum of ($300.00) Three Hundred Dollars and Signed and Sealed by Said Francis K Donohue as principal and by Edward F W Ellis & Charles H Spofford as Securities Either of whom is hereby approved and accepted as such Security

And thereupon the Said defendant Donohue tendered his Bill of Exceptions in this Cause. Which was Signed and Sealed by the Court and Made a part of the record in this cause, and is in the words and figures following Viz:

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In County Court of Winnebago County Ill.
Of the March Term 1858.

Francis K. Dunshee
ads
Harmon Hill

Be it remembered that upon this Tenth day of March. of the March Term of the County Court of Winnebago County for the year 1858 = this cause coming on to be tried before the Hon. Anson S. Miller Judge of said Court. and a Jury - the Cause being an appeal into this Court from a Justice of the Peace. And the action founded upon the following account or claim. filed by said Plaintiff. before the Justice to wit:

"F. K. Dunshee

"To Harmon Hill Dr

"For 30⅓ cords of Stone at $4.50 $136.50

Cr

"By Amt. fc Upton on Promissory Note & Order $41.00

$96.50"

To which action the said defendants before the justice pleaded the General issue and gave notice in said action as follows -

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That defendant would insist upon as an
13 offset in said cause, an Order, accepted
and paid to Charles O Upton for $40.00
Drawn by Pennock Sterling & Co:

And that the
Stone for which the action was brought,
was bought of said Pennock Sterling & Co.

Upon which Statement of the claim
of the Plaintiff, and the defence of said
defendant the said parties went to trial.

The Plaintiff then introduced William P
Pennock who testified as followeth:

I know the parties Plaintiff
and defendant in this cause, I am
one of the firm of Pennock Sterling & Co.
Composed of myself, my brother Andrew
J Pennock and James Sterling.

I know of a contract to deliver
Stone to Dunshee;

Mr (Pennock Sterling & Co) made a verbal
contract with Dunshee to let him have
Stone; There was no time specified definite
when Stone was to be delivered - And no
Amount to be delivered - Was to be delivered
as ordered by Dunshee.

Dunshee was to pay $4.50 per Cord
to be measured on the Cars and delivered on

the Bank of the River;

14 After the making of the Contract, we delivered Dunshee some of the Stone on the bank of the River, We received our pay pretty much for the Stone we delivered, Our Company delivered a little over Eight Cords of the Stone — That is we delivered 420 feet and 672 feet.

I have no interest in the event of this suit, we have received our pay for all the Stone delivered by us.

Our Company sold out to Hill the Plaintiff Our Coal quarry &c,

We sold out to Hill about the time we delivered the last of the Eight-Cords; I know of Hill delivering Stone to Dunshee about two weeks before the trial before the Justice. I heard a conversation between Hill and Dunshee in relation to the Stone in question.

I was with Hill at the time and he asked Dunshee for the pay for the Stone —

Dunshee said that he would pay him that he supposed he owed him for about 18 or 19 Cords of Stone. Hill said it was more; Hill then said to Dunshee, "You know how you agreed to pay me $4.50 per Cord for the Stone I delivered to you.

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And also for the balance the Company had
15 drlivrd afor the 40.$ Ordrs.

And that I told you I was to have the pay for all the Stone drlivrd by me and the Company except the 40$ ordrs.

And if the Stone drlivrd ~~did~~ by the Company did not amount to as much as the 40$ Ordrs. J. Hill, was to make it up to you. (Danshr) Mr Danshee said he did so agree.

After we sold out to Riff. Hill I was employed as a hand on the boat by Hill — I kept an account of all the Stone drlivrd — I measurd the Stone and set all down on Memorandum book — (Witns produces pass book and keys)

There are my figures — They were set down at the time with pencil first, and since I have been over them with a pen and ink —

Witns then states that the whole amount of Stone drlivrd to Danshr was a little over 20 Cords; by the Company and Hill both — The whole number of feet drlivrd was 3978 feet. Amounting to 31 Cords & 5 feet —

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This was the whole amount of Stone
16 delivered by Pennock Sterling & Co to Hill=

We sold out to Hill early in October
1865.— Don't Cant State the day.—
We towed these Stone down the River
— Most of the Stone for Denshee
was delivered above the Stone-Bridge.

Cross Examined by Defft.

+ Pennock Sterling & Co own the boat
from about June 1- 1865 until we sold
to Hill About 1st of October 1865.—

I offered to give J. B. Skinner an order
on Denshee for pay for Stone— Can't
State the date— It was before the date
of the order to Upton.— About Same time.

— Skinner here shown the order given to
Upton dated October 24th 1865.—
Witness says the Order shown him was
given at the date thereof.—
That he had not then informed
Denshee, that they (the Company) had sold
out to Hill— Does not know that he ever
informed Denshee of the fact, does not

know that he ever ~~[illegible]~~ said
17 any thing to Dunshee about it:- That
if he had given the Order to Skinner
he should not have given the Order to
Upton —

I Cannot remember the date
of the delivery of the last of the Stone
by the Company to Dunshee,— Think it
was last of September —

Most of the Stone for Dunshee were
delivered from 4 to 6 rods above Street
bridge.- Some delivered about same
distance below,— 5 boat loads above
and 2 or 3 boat loads below.—

I do not recollect of any other person
to whom we were delivering Stone, at the
same place, while we were delivering
Stone for Dunshee —

We sold About 5 Cords to another
person, at or about that time, which
were delivered about the same time, but
we kept the Stone for Dunshee Seperate
The 5 Cords were delivered below the
bridge; I think two Car loads of
Stone were delivered above the bridge for
Mr Blakeman.— Mr Colburn did not
have any Stone from there — Mr delivered

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his abov Slaughter house Some ways
18 abov Dunshees Stone —

Mr Hill had not been
connected with us in business before the
~~Labor~~ to him, He had been upon the boats
~~Some~~ ~~Some~~

Pennock Sterling &c had talked
with Dunshee about Stone for 1 year.

Along in September 1859 we made a
bargain with Dunshee for Stone: There
had been talk but there was nothing
binding on the parties until Said
September —

The Agreement then was: that
Dunshee was to have the Stone at $4.50 per
Cord, on the bank of the River, was
to have them as he wanted them, We
agreed to deliver the Stone: No binding
bargain before.

(Witness requested again
to state what was said at Conversation between
Hill & Dunshee)

"Hill said he wanted Dunshee to settle
for those Stone: Dunshee said he would
pay him for them — Dunshee said he
was owing him (Hill) for 18 or 19 Cords of Stone
Mr Hill said it was more:

19

Mr Dunshee said the wall was 7½ feet in height — length and breadth could not say: —

(Hill said) "You know Mr Dunshee, that I spoke to you often I bought the boat, that you were to pay me for what stone you had often that time — (Dunshee said) The boys had given an order — Hill said he would allow that —

The price of the stone was spoken of before — Dunshee consented to pay Hill for the stone — Dunshee spoke of measuring in the wall — Hill claimed to have them measured on the cars — Dunshee said he would pay him for the stone — Hill calculated to see him in the County or Circuit Court — if he did not pay him; but he put Hill off until after the last day of service. The conversation commenced in the street near Skinners Shop and we then all went up to the cellar.

The Agreement, between the Company and Hill in relation to Dunshee, was, that Mr. Hill was to fill the Contract with Dunshee — That was the agreement of Mr Hill and the Company —

[10552.14]

(By a Juror) — Was Dunshee to take these
20 Stone at your measurement on the cars?
(To which witness answered) — "Nothing
was said about who was to measure the
Stone" — Stone were to be measured
on the cars; Dunshee was not present
when any of the Stone were measured —

Direct Resumed:

Witness asked the market value of
Stone; — Did not state, Witness went on
to state at what price the Company
sold Stone; Which was objected to by
Deft. and objection sustained by the
Court;

Dunshee Stone were delivered sep-
erate; Dunshee designated place
where Stone were to be delivered;
he left the Stone there — Contract was
that Stone were to be delivered on bank
of River — he had nothing more to do
with Stone after they were delivered
on the bank —

Witness Again requested to state the final
Contract between Pennock Sterling &
Dunshee in September 1867.

(Witness said) Dunshee sometime in September
last came to the boat, and Dunshee then said

Pennock I am going to digging my
91- Cellar and want some stone: I told
him the price would be $4½ per cord
for the stone delivered on the bank—
Dunshee said Cant I have the stone for
left. I told him no; Dunshee said
he would take the stone; I told him
he could have them. & Dunshee assented.

(Witness afterwards said that by the agreement,
stone were to be measured on the cars-
used in conveying the stone from the
quarry on to the boats)

Cross Exd. —

We told Mr Hill what we were
letting Dunshee have the stone for. —

"The Plaintiff then introduced Andrew
J. Pennock as a Witness who testified
as follows —

I am one of the Company of Pennock
Sterling & Co. The Company let Dunshee
have Stone. I met Mr Dunshee at
the End of Bridge. he said he should
want some Stone. Cannot state
the date but it was before we sold
to Hill.

We sold out to Hill. latter part of
22 Summer or in the fall. Cant state
the time! It is in writing. And could tell
date from papers. —

After we sold out, Mr Hill delivered
Stone for Sunshee — Delivered at same
place we had delivered. —

Heard a conversation between
Hill and Sunshee in relation to
the stone.

Hill wanted Sunshee to settle
up for the stone, conversation com-
menced near Skinners shop in the
Street. Myself my brother Wm D. and
Mr Hill & Mr Sunshee were present.
No others present. There was a consid-
erable conversation and after a while
we all went up to the Cellar.

Cannot remember
all that occured.

Sunshee said he supposed
he owed Hill for 18 or 19 cords of Stone
Hill said it was more.

Sunshee said they might measure
the wall or get some one to.

Sunshee said the wall was 7½ feet high
Hill measured and found it 8 feet
four inches

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high. Hill said he would leave it out to any two men Dunshee might pick, that he did not want any trouble.

Hill said to Dunshee. You Remember I told you I had bought the boat and fixtures, and what Stone were delivered after that date, you were to pay me for. Something said about the price. Hill said he was to deliver the Stone the same as the company were; & Dunshee said that was so: Hill was to take the contract off from the Company hands & deliver the Stone and have the pay;

At this time in the conversation Something was said about the Order of Upton — Hill was to have pay for all the Stone and to give Dunshee Or. for the $40. Order;

Dunshee said he would pay him for the Stone — would pay him, then at his (Dunshees) own measurement;

Dunshee said he would not pay him for any more Stone than he himself made; and that he would not pay for any more Stone than he made by his measurement; Dunshee said he did not care what others made it if it was double what he made it, he would only pay according to his own measurement

Cross Examined

Our Company let Hill have
24 the Contract- At the same terms we
had it & Hill was to have the pay for
the balance of Stone to be delivered by
him, And balance overpaid of Stone
delivered by Company over the 40$ Order-

Jonathan Peacock was called as a Witness
on the part of the Plaintiff and testified
as follows;

Witness was asked market price
of Stone Last Fall, Said he bought
Stone of Pennock Sterling & Co last
Summer, Particulars of bargain related
out; Could not get Stone of Others
for less than $ 5.50 per Cord-
delivered at the building & measured
in the wall;

Plaintiff here rested his proof, and
the defendant then introduced the
following testimony to wit;

Defts Testimony.

John Allen, was then Sworn on the part
of the defendant, who testified as follows
25; to wit.

I am a Stone Mason by trade
I have been engaged for Several
years in Drawing Stone & Selling the
Same in town; I Know the Cellar
of Mr Dunshee where the Stone in
question were used.

Stone such as were used in that
Cellar, were at that time worth
$ 6,50 per Cord, delivered at the Cellar
and measured in the wall; Could
have been furnished at that price.

I Know where the Street Bridge
is; I think it would be worth One
Dollar per Cord, to deliver loose Stone
from where the Stone in question
were delivered on bank of River to
the Cellar of Defendant; or $1 25 per
Cord if Stone measured in the wall.

I have measured the walls of the Cellar
of the Defts— The Walls Contain 19 Cords
and forty feet of Stone— I was at
the Cellar two or three times while
the walls were being built—

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By agreement of parties. Following Order
Was introduced by Dft. Viz:

"Rockford October 24th 1859

"F K Dunshee, Sir

Please pay Charles A
"Upton or Bearer Forty Dollars and
"Charge the same to my a/c.

"Pennock Sterling & Co"

(Indorsed) Accepted

F K Dunshee

Crap Examined

My Stone quarry is about one
26 mile from Town:

Pennock Stirling's quarry was
four or five miles from Town:

I drew Stone from my quarry with
teams -

I was at Dept's Cellar two or three
times while the walls were being
built. I then noticed the thickness
of the wall: When I measured the walls
when finished I could not tell the thick-
ness of ~~the wall~~:

We measured all of our Stone in
the wall:

One Cord of loose Stone will meas-
ure about 100 feet in the wall -

I charged more for Stone where I
hauled them over the River the dis-
tance made the difference in the price
charged.

John Barnes, for Deft. Sworn: Says I am
a well digger -
Dug the well at Mr Dunshees Cellar -
The well is 27 feet & 6 inches Deep:
Myself & Carpenter Stoned the well.

[12552-21]

The quantity of Stone used was 2
27 Cords & 90 feet.

Defendant then introduced Almeron S. Bassing as a Witness who testified as follows. To wit:

I am a Builder by trade, am the brother in Law of Defts Dunshee Know the Cellar of Defts I drew the plan and superintended the Building the Cellar walls. The walls were built by John Hays under my direction.

The quantity of Stone in the walls of the Cellar was 19 Cords & 15 feet.

I know where Mr Dunshee got the Stone for Cellar & Well. I did not know of Dunshee having Stone for any other purpose than the Cellar & Well I think I should have known the fact, if he had used Stone for any other purpose.

Part of Stone were drawn from a pile above Street Bridge & a part from a pile below Bridge;

When Mr Dunshee was drawing
28 from the pile below the Bridge a.
Mr Reed was drawing from the
same pile to a Mr Burns across
the River.

At the time the stone in question
were delivered, the market price of
stone on West side of River was
$6.50 per cord measured in the
wall.

I performed considerable labor
& furnished materials, for Pennock
Sterling & Co in building their boat in
Spring of 1859. I had stone of the
Company more or less during the
season; I got 1½ cords of stone from
the pile that Dunshee was drawing
from, below the bridge.
This was about the time Dunshee
got the last of his stone.

I had not at this time heared
that Pennock Sterling & Co had sold
out, or that Hill claimed any interest
in the boat or stone,

Cross Examined

Have no recollection of telling
either of the Pennocks or Hill, that

I borrowed 1½ cords of Stone from
29 Dunshee

Defendant here rested his case —

William D. Pennock recalled by the Plaintiff,
who testified as follows

Mr. Myself Hill & Andrew
J. Pennock: Went to see Waring to see
what Stone he had got.

Waring said He borrowed 1½ cords
of Stone of Dunshee —

Which he got below the Bridge — We
went to Dunshee & he said he had
not loaned Waring Stone. We then
went back to Waring and told him
what ~~he~~ (Dunshee) had said. But
he still insisted that he (Dunshee) did lend
the Stone to him —

The pile of Stone for Dunshee
was below the pile from which
Burns took Stone.

Andrew J. Pennock, Recalled by Plaintiff
Says,

Mr Waring said he borrowed
Stone of Dunshee. This was after-

[12553-24]

all the Stone had been delivered.

Mr Manning had been Drawing Stone from the other Side of the River.

Burns did not Draw Stone from the Pile we let Demuhee have as stated by Manning in his testimony. But from a pile nearer the Bridge a pile we had delivered for the City of which we sold a part to Burns.

Plaintiff then Called James Sterling as a witness who testified as follows.

I was one of the firm of Pennock Sterling & Co. I know of a Contract to deliver Demuhee Stone. I met Mr Demuhee once; he wanted to know if he could have the Stone. He also wanted to know if he could not have the Stone for less than $4.50 per cord. I told him we could not let him have them for less. He wished to know whether the Stone he could depend on having the stone when he wanted them. I told him he could.

Dunshee got most of his stone
31 above the bridge, got stone below
bridge —

Cross Examined —

Mr Dunshee was out of stone above the bridge, and we had a pile below the bridge and told Mr Dunshee he could go and draw from there —

And the foregoing was all the evidence introduced by the parties upon the trial of this cause —

After hearing the arguments of the Counsel for the respective parties,

The Plaintiffs Counsel then asked the Court to instruct the Jury as follows — Which instructions were given by the Court to wit:

Plaintiffs Instructions

32

1st given

If the jury believe from the evidence that Pennock Sterling & Co. made a Special Contract with the defendant wherein the said Pennock Sterling & Co. were to deliver the defendant, what stone he might want on the bank of the River as ordered by the defendant at the rate of $4.50 per cord, to be measured on the cars, and afterwards the said defendant agreed to take the stone from the Plaintiff herein on the same terms that he agreed with Pennock Sterling & Co. then the jury are to estimate the Plaintiffs damages, from the measurement on the cars.

2d given

If the jury believe from the evidence that there was a special contract between Plaintiff & defendant - that the Plaintiff performed the contract on his part, then the jury are to estimate the damages from the terms of the contract.

[12552-27]

3d

If the jury believe from the evidence that Pennock Sterling & Co made a Special contract with the defendant, and that afterwards Pennock Sterling & Co Sold out to the Plaintiff all the right and interest in the contract, and that the defendant had notice of this and continued to receive the Stone from the Plaintiff Hill in his (Hills) own right on the terms of the original contract: the Plaintiff Hill has a right to recover of the defendant for the Stone delivered by him on the terms of the original Contract;

33

Given

4th

If the jury believe from the evidence, that the Plaintiff, Hill, agreed to pay the forty Dollar order drawn by Pennock Sterling & Co and that the Plaintiff Hill was in that case to be allowed, for all the Stone that had been delivered, as well as what should be delivered, then the jury will allow the Plaintiff for all the Stone delivered to the defendant by Pennock Sterling & Co. and also by the Plaintiff (Hill— Qualified by the court as follows) Provided the jurors believe that there was an arrangement between all the parties, by which

Given

[illegible]

the defendant Sunshee was to pay the Plaintiff Hill for the Stone delivered by Pennock Sterling & Co in lieu of payment to the latter —

34

5th Granted. If the jury believe from the evidence that the defendant agreed to pay the Plaintiff for the Stone delivered to & by him by Plaintiff & Pennock Sterling & Co; then the Plaintiff is entitled to recover from the defendant in this action (Qualified by the Judge as follows) Provided the jurors believe from the evidence that there was a communication of, and arrangement between all the parties so that the claims of Pennock Sterling & Co on the Defts Sunshee were extinguished & that the defts should pay the Plaintiff Hill:

To the opinion of the Court in giving said instructions as asked by the Plaintiff, and each and every of them, the said defendant then and there Excepted —

[1252-29]

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The defendants counsel, then asked the Court to give the Jury the following instructions marked Defendants instructions & numbered 1st & 2nd — And the Court then wrote upon the margin of said instruction numbered 1st as follows, "Given subject to provision in Plaintiffs 6th instruction as to duty of Jurors relative to arrangement of parties, subsequent to original Contract between Dept Dunshee & Renwick Sterling & Co".

And the Court then wrote upon ~~the~~ margin of said instruction number 2. as follows "Given subject to proviso in 6th instruction refered to", Which instructions and each of them so modified by the Court, were then and there read by the Court to the Jury, And to the opinion of the Court in so modifying said instructions and each of them the defendant by his Counsel, then and there excepted.

Whereupon the Court stated to the defendants counsel that he understood him to Consent, that the modifications be made by the Court — but that if the Court

Over

misunderstood him, he would pass upon the instructions as first given asked, and thereupon the modifications and the words "Given" were stricken out. and the words "Refused" marked on the instructions.)

And the said defendant then and there excepted to the opinion of the Court in refusing said instructions so asked by him and each of them

Defendants Instructions

36 That if the jury believe from the evidence that William D. Pennock Andrew J Pennock & James Sterling Entered into a contract with defendant Dunshee for the sale and 1st delivery to him of the stone in question in this cause, and commenced the delivery thereof, and before the completion of the contract assigned the same to Plaintiff Hill. And that said Hill, completed the delivery of the stone under such contract, that then this suit should have been brought in the names of the said William D Pennock, Andrew J Pennock and James Sterling; And the Plaintiff cannot maintain an action thereon in his own name, And the jury will find for the defendant in this action;

Refused

2nd That if the jury believe from the evidence that William D. Pennock Andrew J Pennock and James Sterling Entered into a contract with defendant Dunshee for the sale and delivery to him of the stone in question, And commenced the delivery thereof, ~~and before~~

5125a-3D

and before the completion of the de-
37 livery of the stone, assigned the con-
tract to the Plaintiff Hill; And said
2nd Hill completed the delivery of the stone
in question; And should also believe
from the evidence, that said Dunshee
promised said Hill afterwards, to pay
him, (said Hill) for the stone he
had delivered under said contract
and also for the balance unpaid on
the stone delivered by said Pennocks
and Sterling, on said Contract,
that such agreement would not
support this action unless the jury
also find from the evidence that
there was some other and new
consideration for said promise;
Or unless the jury find from the evi-
dence that there was a communication
between all of said parties to wit;
said Pennocks & Sterling, Dunshee and Hill,
and a new arrangement between all said
parties entered into, by which said Pennocks
and Sterlings claim upon Dunshee for stone delivered
was released; And by which said Hill also
released all of his claims upon said Pennocks
& Sterling upon the assignment of said Contract

Refused

(1552-32)

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And the said cause was thereafter submitted to a jury, who returned into Court with a verdict for the Plaintiff for the sum of Ninety five & 34/100 Dollars.

And thereupon the defendant by his counsel moved the Court for a New Trial, for the following reasons.

1st — That the verdict is against evidence

2nd — That the verdict is against Law.

3 — That the Court erred in refusing the instructions asked by the defendant and each and every of them;

4 — That the Court erred in giving the instructions asked by the Plaintiff and each and every of them;

And the Court having heard the argument of Counsel thereon overrules the motion and denies the same, and renders judgment on the verdict of the jury to which decision of the Court in overruling and denying said motion for a new trial, the said defendant by his Counsel excepts & prays that this his bill of exceptions may be signed and sealed by the Court & made a part of the record in this cause. And it is done accordingly.

Amos S Miller

S 12552-35

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and the said defendant Dunshee afterwards to wit on the 22d day of March 1858. filed in this court his appeal Bond in the words & figures following to wit-

"Know all men by these presents. that We Francis K Dunshee as principal and Edward F W Ellis as Surety, are held and firmly bound unto Harmon Hill of Winnebago County Illinois in the sum of Three Hundred Dollars lawful money of the United States, to be paid to the said Harmon Hill, his executors administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, and every of them firmly by these presents=
Dated at Rockford Ill. and Sealed with our Seals this 20th day of March A.D. 1858.=

Whereas, at the March Term 1858. of the County Court of Winnebago County Illinois, the said Harmon Hill (in a certain cause then depending in said court in which said Harmon Hill was Plaintiff and said Francis K Dunshee was defendant) recovered a judgment against the above bounden Francis K. Dunshee

for the sum of Ninety five 37/100 Dollars
besides costs of suit: from which judgment
the said Francis R Sunshee then and
there Appealed prayed an Appeal to the
Supreme Court of the State of Illinois, which
was granted;

Now the condition of this
obligation is such that if the said Francis
R. Sunshee shall duly prosecute his said
Appeal, and shall pay the said Judg-
ment, Costs, interest and damages in
case said Judgment shall be affirmed;
the above obligation shall be null
and void, otherwise to remain in full
force and effect—

In presence of F. R. Sunshee (Seal)

Edwd F. Ellis (Seal)

State of Illinois,
County of Winnebago, } ss:

I, William Austin, Clerk of the
County Court for said County, do certify,
that the foregoing is a true and full
copy of the records, papers and proceed-
-ings in said County Court in the above
entitled cause.

Given under my hand and
the Seal of said Court at my office
in the City of Rockford, this fifth
day of April A. D. 1858.

William Hulin Clerk.

[12562-35]

In the Supreme Court of the State of Illinois of the April Term AD 1858.

Francis R Dunshee
vs
Harmon Hill
} Appeal =

And the said appellant by Lathrop & Brown his Attorneys comes & says, that in the Record and proceedings in this cause, there is manifest Error, in this towit:

That the Court erred in giving the first, third, fourth, & fifth, instructions asked by the appellee, and in giving each and every of said instructions;

That the Court erred in modifying the instructions (marked 1st & 2d) asked by the appellant, and erred in modifying each of them;

That the Court erred in refusing the the instructions asked by appellant

(Numbered 1st to 2d) And in refusing Each and Every of them;

That the Court Erred in overruling the Appellant Motion for a New Trial and Entering Judgment upon the Verdict of the Jury=

And the Said Appellant prays that the Said Judgment & proceedings may be Vacated, Reversed, Annulled Set aside and for naught held & Esteemed

Lathrop & Brown
Atty's for Appellant

Supr. Court

Francis K Hanshew

vs

Hannon Hill

Assignment of Errors

Sattuck & Brown
Atts for Appellant

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Thaddeus R Bunshee
appellant.

vs

Hannon Bill
appellee

Transcript

Filed April 2d 1858
L Leland
C C R,

[12552-38]

In Supreme Court.

Francis K Drushee
Appellant
vs
Harmon Hill
Appellee

Hill sued Drushee before a justice to recover the balance due for certain Stone delivered to Drushee, by the firm of Pennock Sterling & Co. and by Hill Ainsley:

Drushee appealed to County Court of Winnebago County, where cause was tried at March term 1858. and judgment against Drushee for $95-34 & Costs
Drushee appealed to this Court:

The Ordinance is all preserved in bill of Exceptions & instructions asked: & printed Entire in Abstract

Drushee before the Justice & in the Co. Court. Pleaded Set. off & gave notice of Set off & that Stone were bought of Pennock Sterling & Co.

The Principal Errors Assigned are:
1- The Courts Refusal to Grant a New Trial;

2 In giving the Instructions asked by the Plaintiff below.

3d In refusing the Instructions asked by the defendant below —

The testimony in substance shows that in September 1857. Winshee made a Contract with Pennock Sterling & Co. to deliver him Stone; that after the Stone were part delivered Pennock Sterling & Co. assigned the Contract to Hill, and Hill Completed the delivery of the Stone;

Pennock for Hill swears, that at a Conversation between Winshee and Hill, about 2. weeks before the trial before the justice; Winshee then acknowledged, that Hill had at some previous time, told him, that he Hill was to have the pay

for all the Stone delivered by Hill and by the Company (Pennock Sterling & Co.) Except the 40$ order, And that Dunshee agreed to pay him —

That the agreement between Pennock Sterling & Co. and ~~Dunshee~~ Hill was, that Hill was to take the Contract off from the Company, and deliver the balance of the Stone & have all the pay for the Stone, and allow the Amount of the 40$ order drawn by Pennock Sterling & Co. & accepted by Dunshee —

— The testimony no where shows or attempts to show, that Hill ever promised to deliver the Stone to Dunshee; or in any manner to perform the Contract made between Pennock Sterling & Co. and Dunshee —

There is no testimony tending to show, that any Communication was had between Pennock Sterling & Co. and Dunshee, in reference to Hill's taking the Contract; On the Contrary Wm D Pennock swears, that he never informed Dunshee of the Sale to Hill; And Wm Le

[12552-40]

Pennock also swears, that they sold to Hill
prior part of October 1857. And that on
24th of October Pennock Sterling & Co drew the
40% order on Drusher, And that he had
not then informed Drusher of the
assignment of the Contract:

The Plaintiff in Error insist that the
Evidence, does not support the action in
Hills name; That the action should have been
brought in the name of Pennock Sterling
& Co: And that the Court should
have granted a new trial

McKinny vs Alvis 14. Ills 33. 3 Hill 88
Parsons on Contracts Vol. 1. Title Novation page. 187.

The only other point Controverted in
the Court below was. the Amount of Stone
delivered & price

The Plaintiff below. Claiming to recover
for the Stone as Measured on the Car, by
Wm D Pennock: And the Defendant
below Claiming. he was not Bound by
Pennocks Measurement on the car. and if
liable at all. was only liable for the quantity
actually ~~[illegible]~~ delivered:

Wm D Pennock for the Plaintiff below, swears that he measured on the car, all the Stone delivered for Brunshee, both by Pennock Sterling & Co, & by Hill: that the quantity was 31 Cords & 5 feet; and he also say. that it was, agreed in the Contract between Pennock Sterling & Co; and Brunshee that the Stone should be measured on the car; but, that it was not agreed, who should measure them

Brunshee, proved by two or three witness the Amount of Stone Received, (by measurement of the Walls) which showed Several Cords less, than made by the testimony of Wm D Pennock, of Measurt on cars

It is in reference to this 2d point that the Plff in Error complains of the first instruction, asked, and given for the Plaintiff below—

That the Jury were thereby in effect instructed, to offset the Plaintiffs damages from the Measurmt of said Wm D Pennock on the cars; And that the Jury do understood the instruction & so did:

[1853-41]

Upon the Point, that Hill could not Maintain the action in his own name, the Plaintiff in Error Complains of the Court below refusing the instructions and Each of them asked by him & the giving the instructions asked by Plaintiff below:

The 3d instruction given for the Plaintiff below was clearly not the Law:

It Shows no new Contract between Donohue & Hill: It Shows no discharge of the Contract between Pomroy Sterling & Co. and Donohue: And it Shows no promise or undertaking on the part of Hill to deliver the Stone, or perform the Contract on the part of Pomroy Sterling & Co:

The rights of the parties under the Contract must be mutual; And if Donohue was liable to Hill, on the Contract for the Stone delivered; then Hill must have been liable to Donohue, for their non delivery: And there is no pretence of any promise, on the part of Hill; to deliver the Stone; or of any relation between Hill

and Dunshee, by which Hill would have been liable to Dunshee for non delivery; Dunshee's remedy for failure was against Pennock Sterling & Co. & no one else;

The first instruction asked by defendant below and refused by the Court, was the Law & applicable;

It in substance submitted the question whether Hill delivered the Stone on the Contract with Pennock Sterling & Co; and if so; and the action brought on that Contract the action should have been, in the name of said Pennock Sterling & Co. & not in Hill's;

The Second instruction asked by defendant, was Clearly the Law, and as asked was within the principle of the doctrine ~~of~~ decided in — McKinney v Alvis 14. Ill 33.

That the Court also Erred, in refusing said instructions so asked by the defendant below; after the Court had Modified said instructions and read them to the jury —

That the practice is unfair and

operates to mislead the jury & refusing instruction after they have been read to the jury, and should not be done unless the instructions as read are not the Law.

The evidence does not bring this case within the doctrine of the case of McCarty vs Osborne 1. Blackford 326. In that case the first Contract was abandoned & a new ~~Contract~~ one made, upon the exact terms of the first. The three parties being present and assenting thereto.

In this case there is no pretense that the contract between Pennock Sterling & Co, and Donohue, was ever abandoned, but Hill claims as assignee thereof, and Saunders subsequent promise to pay Hill for the stone delivered by Pennock Sterling & Co & Hill. both.

And in this case there is no evidence or pretense that Hill ever promised Donohue that he would deliver the stone; or became liable for their non delivery.

Hill never became liable to Donohue on the Contract. Nor were Pennock Sterling & Co. ever discharged

Returned by Dunshee

Lathrop v Brown
for Pff in Error

In Supreme Court

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Francis K Wisner

v

Harmon Hill

Points & Authorities
of Plff. Counsel

Dalton & Brown
for Appellant

In the Supreme Court.

FRANCIS K. DUNSHEE, Appellant,
ads.
HARMON HILL, Appellee.

Appeal from the County Court of Winnebago County.

ABSTRACT OF THE RECORD.

Justice Summons, Page 2 — Action commenced before a Justice of the Peace of Winnebago County, December 12, 1857.

Page 2 & 3 — Plaintiff claimed pay for 30½ cords of stone, at $4,50 per cord, and gave credit by $40 order on Pennock, Sterling & Co.

" 3 — Defendant pleaded General Issue, gave notice of Set-off, and that stone was bought of Pennock, Sterling & Co.

Transcript from Justice, 3 & 4 — Trial before Justice, December 24, 1857; both parties appeared, and Judgment for Plaintiff for $77 and costs.

5 & 6 — Defendant, Dunshee, appealed to County Court of said Winnebago County, January 13, 1858, and filed his Appeal Bond with Justice, of that date.

Page 7 — Justice's Transcript and papers upon Appeal filed in Office of said County Court, January 13, 1858, and on same day summons issued to Hill, Appellee, out of said County Court, and returned served by reading to Hill, February 15, 1858.

Page 8 & 9 — March Term, 1858.—Parties appeared and the cause was submitted to Honorable ANSON S. MILLER, Judge, and a Jury, for trial.

" — 9 The Jury found the issues for Plaintiff, Hill, and assessed his damages at $95,34.

9 & 10 — Defendant, Dunshee, moved the Court for a new trial, which was heard and denied by the Court, and

10 — Judgment entered against the Defendant, Dunshee, upon the verdict of the Jury, and for costs of suit.

Bond Page 39 — Bill of Exceptions taken to the ruling of the Court on said motion for a new trial; and Appeal taken to Supreme Court by Defendant, Dunshee, and Bond filed.

COPY OF BILL OF EXCEPTIONS.

In County Court of Winnebago County, Illinois,

OF THE MARCH TERM, 1858.

Copy of Bill of Exceptions Entire

FRANCIS K. DUNSHEE,
ads.
HARMON HILL.

Be it remembered that upon this tenth day of March, of the March Term of the County Court of Winnebago County, for the year 1858, this cause coming on to be tried before the Honorable Anson S. Miller, Judge of said Court, and a Jury, the cause being an Appeal into this Court from a Justice of the Peace, and the action founded upon the following account or claim, filed by said Plaintiff before the Justice, to wit:

"F. K. DUNSHEE,

To HARMON HILL Dr.,

For 30½ Cords of Stone, at $4,50,	$136,50
CR.	
By amount paid Upton on Pennock & Co's Order,	40,00
	$96,50"

To which action the said defendant before the Justice, pleaded the general issue and gave notice in said action as follows: That defendant would insist upon, as an offset in said cause, an order, accepted and paid to Charles O. Upton for $40,00 drawn by Pennock, Sterling & Co.

And that the Stone for which the action was brought, were bought of said Pennock, Sterling & Co. Upon which statement of the claim of the Plaintiff, and the defense of said defendant, the said parties went to trial.

The Plaintiff then introduced William D. Pennock, who testified as follows, to wit:

I know the parties, Plaintiff, and Defendant, in this cause. I am one of this firm of Pennock, Sterling & Co., composed of myself, my brother Andrew J. Pennock and James Sterling.

I know of a contract to deliver stone to Dunshee.

[12552-44]

(We, Pennock, Sterling & Co.,) made a verbal contract with Dunshee to let him have Stone, There was no time specified when stone were to be delivered, and no definite amount to be delivered—were to be delivered as ordered by Dunshee.

Dunshee was to pay $4,50 per cord, to be measured on the cars, and delivered on the bank of the River.

After the making of the contract, we delivered Dunshee some of the stone on the bank of the River. We received our pay pretty much for the stone we delivered. Our Company delivered a trifle over eight cords of the stone—that is, we delivered 420 feet and 672 feet.

I have no interest in the event of this suit; we have received our pay for all the stone delivered by us.

Our Company sold out to Hill, the Plaintiff, our boats, quarry, &c.

We sold out to Hill about the time we delivered the last of the eight cords ; I know of Hill delivering stone to Dunshee about two weeks before the trial before the Justice. I heard a conversation between Hill and Dunshee in relation to the stone in question.

I was with Hill at the time, and he asked Dunshee for the pay for the stone.

Dunshee said that he would pay him—that he supposed he owed him for about 18 or 19 cords of stone. Hill said it was more. Hill then said to Dunshee, "You know you agreed to pay me $4,50 per cord for the stone I delivered to you, and also for the balance the Company had delivered above the $40,00 order.

And that I told you I was to have the pay for all the stone delivered by me and the Company, except the $40 order.

And if the stone delivered by the Company did not amount to as much as the $40 order, I (Hill) was to make it up to you, (Dunshee.) Mr. Dunshee said he did so agree.

After we sold out to Pltff., Hill, I was employed as a hand on the boat by Hill—I kept an account of all the stone delivered—I measured the stone, and set all down on memorandum book—(Witness produces pass-book, and says :) These are my figures, they were set down at the time with pencil first, and since, I have been over them with a pen and ink.

Witness then states that the whole amount of stone delivered to Dunshee, was a little over 30 cords, by the Company and Hill both. The whole number of feet delivered was 3973 feet, amounting to 31 cords and 5 feet.

This was the whole amount of stone delivered by Pennock, Sterling & Co., & Hill.

We sold out to Hill, in October, 1857—fore part—can't state the day. We boated these stone down the river —most of the stone for Dunshee were delivered above the street bridge.

Cross Examined by Deft.—Pennock, Sterling & Co., ran the boat from about January 1st, 1857, until we sold out to Hill about 1st of October, 1857.

I offered to give J. B. Skinner an order on Dunshee for pay for stone—can't state the date. It was before the date of the order to Upton—about same time.

Witness here shown the order given to Upton, dated October 24th, 1857.

Witness says the order shown him, was given at the date thereof.

That he had not then informed Dunshee, that they (the Company) had sold out to Hill. Does not know that he ever informed Dunshee of the fact, does not know that he ever said any thing to Dunshee about it. That if he had given the order to Skinner, he should not have given the order to Upton.

I cannot remember the date of the delivery of the last of the stone by the Company to Dunshee. Think it was last of September.

Most of the stone for Dunshee were delivered from 4 to 6 rods above street bridge. Some delivered about same distance below. 5 boat loads above and 2 or 3 boat loads below.

I do not reccollet of any other person to whom we were delivering stone at the same place, while we were delivering stone for Dunshee.

We sold about 5 cords to another person, at or about that time, which were delivered about the same time, but we kept the stone for Dunshee seperate.

The 5 cords were delivered below the bridge. I think two car loads of stone were delivered above the bridge, for Mr. Blakeman. Mr. Colburn did not have any stone from there. We delivered his above Slaughter house, some ways above Dunshee's stone.

Mr. Hill had not been connected with us in business before we sold to him. He had been upon the boat some.

Pennock, Sterling & Co., had talked with Dunshee about stone for one year.

Along in September 1857, we made a bargain with Dunshee for stone. There had been talk, but there was nothing binding on the parties until said September.

The agreement then was, that Dunshee was to have the stone at $4,50 per cord, on the bank of the river; was to have them as he wanted them. We agreed to deliver the stone. No binding bargain before.

(Witness requested again to state what was said at conversation between Hill and Dunshee.)

"Hill said he wanted Dunshee to settle for those stone. Dunshee said he would pay him for them. Dunshee said he was owing him (Hill) for 18 or 19 cords of stone. Mr. Hill said it was more.

Mr. Dunshee said the wall was 7½ feet in height—length and breadth could not say.

(Hill said,) "You know Mr. Dunshee, that I spoke to you after I bought the boat, that you were to pay me for what stone you had after that time. (Dunshee said,) "The boys had given an order." Hill said he would allow that.

The price of the stone was spoken of before, and Dunshee consented to pay Hill for the stone. Dunshee spoke of measuring in the wall. Hill claimed to have them measured on the cars. Dunshee said he would pay him for the stone. Hill calculated to sue him in the County or Circuit Court, if he did not pay him; but he put Hill off until the last day of service. The conversation commenced in the street near Skinner's shop, and we then all went up to the cellar.

The agreement between the Company and Hill, in relation to Dunshee, was, that Mr. Hill was to fill the contract with Dunshee. That was the agreement of Mr. Hill and the Company.

(By a Juror.) Was Dunshee to take these stone at your measurement on the car? (To which witness answered.) "Nothing was said about who was to measure the stone." Stone were to be measured on the car. Dunshee was not present when any of the stone were measured.

Direct Resumed.—Witness asked the market value of stone. Did not state. Witness went on to state at what price the Company sold stone, which was objected to by Deft., and objection sustained by the Court.

Dunshee's stone were delivered separate. Dunshee designated place where stone were to be delivered; we left the stone there. Contract was, that stone were to be delivered on bank of river. We had nothing more to do with stone after they were delivered on the bank.

Witness again requested to state the final contract between Pennock, Sterling & Co., and Dunshee, in September, 1857.

(Witness said,) Dunshee, sometime in September last, came to the boat, and Dunshee then said, Pennock, I am going to digging my cellar, and want some stone. I told him the price would be $4,50 per cord, for the stone delivered on the bank. Dunshee said, can't I have the stone for less. I told him no. Dunshee said he would take the stone. I told him he could have them, and Dunshee assented.

(Witness afterwards said, that by the agreement, stone were to be measured on the cars used in conveying the stone from the quarry on to the boats.)

Cross Examined:—We told Mr. Hill, what we were letting Dunshee have the stone for.

The Plaintiff then introduced Andrew J. Pennock, as a witness, who testified as follows: I am one of the Company of Pennock, Sterling & Co. The Company let Dunshee have stone. I met Mr. Dunshee at the end of the bridge, he said he should want some stone. Cannot state the date, but it was before we sold to Hill. We sold out to Hill, latter part of summer, or in the fall. Can't state the time; it is in writing; could tell date from papers. After we sold out, Mr Hill delivered stone for Dunshee—delivered at same place we had delivered. Heard a conversation between Hill and Dunshee in relation to the stone. Hill wanted Dunshee to settle up for the stone; conversation commenced near Skinner's shop in the street. Myself, my brother Wm. D., and Mr. Hill, and Mr. Dunshee, were present; no others present. There was a considerable conversation, and after a while we all went up to the cellar. Cannot remember all that occurred. Dunshee said, he supposed he owed Hill, for 18 or 19 cords of stone. Hill said it was more. Dunshee said they might measure the wall, or get some one to. Dunshee said the wall was 7½ feet high. Hill measured, and found it 8 feet four inches high. Hill said he would leave it out to any two men Dunshee might pick. That he did not wan any trouble. Hill said to Dunshee, you remember I told you I had bought the boat and fixtures, and what stone were delivered after that date, you were to pay me for. Something said about the price; Hill said he was to deliver the stone the same as the Company were; and Dunshee said that was so; Hill was to take the contract off from the Company's hands, and deliver the stone and have the pay. At this time, in the conversation, something was said about the order to Upton. Hill was to have pay for all the stone, and to give Dunshee credit for the $40 order. Dunshee said he would pay him for the stone—would pay him then, at his (Dunshee's) own measurement. Dunshee said he would not pay him for any more stone than he, himself made; and that he would not pay for any more stone than he made by his measurement. Dunshee said he did not care what others made it, if it was double what he made it, he would only pay according to his own measurement.

Cross Examined:—Our Company let Hill have the contract at the same terms we had it, and Hill was to have the pay for the balance of stone to be delivered by him, and balance unpaid of stone delivered by Company over the $40 order.

Jonathan Peacock, was called as a witness on the part of the Plaintiff, and testified as follows:—Witness was asked market price of stone, last fall. Said he bought stone of Pennock, Sterling & Co., last summer. Particulars of bargain ruled out. Could not get stone of others for less than $5,50 per cord, delivered at the building and measured in the wall.

Plaintiff here rested his proof, and the defendant then introduced the following testimony, to wit:

PLAINTIFF'S TESTIMONY.

By agreement of Parties, the following Order was introduced by Defendant, viz.:

"ROCKFORD, October 24th, 1857.

"F. K. DUNSHEE—*Sir:* Please pay Charles O. Upton, or bearer, Forty Dollars, and charge the same to my account.

PENNOCK, STERLING & CO.

(Endorsed,) Accepted—F. K. DUNSHEE."

John Allen was then sworn, on the part of the Defendant, who testified as follows, to wit: I am a stone mason by trade; I have been engaged for several years in drawing stone, and selling the same in town; I know the cellar of Mr. Dunshee, where the stone in question were used; Stone, such as were used in that cellar, were at that time worth $5,50 per cord, delivered at the cellar and measured in the wall; could have been furnished at that price. I know where the street bridge is; I think it would be worth one dollar per cord to deliver loose stone, from where the stone in question were delivered on bank of River, to the cellar of Defendant, or $1,25 per cord, if stone were measured in the wall. I have measured the walls of the cellar of Defendant; the walls contain 19 cords and 40 feet of stone. I was at the cellar two or three times while the walls were being built.

Cross-Examined: My stone quarry is about one mile from town; Pennock Sterling & Co's quarry was four or five miles from town. Drew stone from my quarry with teams. I was at Defendant's cellar two or three times while the walls were being built; I then noticed the thickness of the wall; when I measured the walls when finished I could not tell the thickness. We measured all of our stone in the wall. One cord of loose stone will measure about 100 feet in the wall. I charged more for stone where I hauled them over the River; the distance made the difference in the price charged.

John Burns, for Defendant, sworn—says: I am a well-digger; dug the well at Mr. Dunshee's cellar; the well is 27 feet and 6 inches deep; myself and co-partner stoned the well; the quantity of stone used was 2 cords and 90 feet.

Defendant then introduced Almeron S. Warring as a witness, who testified as follows, to wit: I am a builder by trade; am the brother-in-law of Defendant, Dunshee; know the cellar of Defendant; drew the plan, and superintended the building the cellar walls; the walls were built by Mr. John Hays, under my direction. The quantity of stone in the walls of the cellar was 19 cords and 15 feet. I know where Mr. Dunshee got the stone for cellar and well. I did not know of Dunshee's having stone for any other purpose than the cellar and well. I think I should have known the fact, if he had used stone for any other purpose. Part of the stone were drawn from a pile above street bridge, and a part from a pile below the bridge. When Mr. Dunshee was drawing from the pile below the bridge, a Mr. Reed was drawing from the same pile to a Mr. Burns, across the River. At the time the stone in question was delivered the market price of stone, on west side of River, was $5,50 per cord, measured in the wall. I performed considerable labor and furnished materials for Pennock, Sterling & Co., in building their boat, in Spring of 1857, and had stone of the Company, more or less during the season; I got 1½ cords of stone from the pile that Dunshee was drawing from, below the bridge. This was about the time Dunshee got the last of his stone. I had not at this time heard that Pennock, Sterling & Co. had sold out, or that Hill claimed any interest in the boat or stone.

Cross-Examined: Have no recollection of telling either of the Pennocks or Hill that I borrowed 1½ cords of stone from Dunshee.

Defendant here rested his case.

William D. Pennock recalled by the Plaintiff, who testified as follows: We, myself, Hill and Andrew J. Pennock, went to see Warring, to see what stone he had got. Warring said he borrowed 1½ cords of stone of Dunshee, which he got below the bridge. We went to Dunshee, and he said he had not loaned Warring stone; we then went back to Warring, and told him what Dunshee had said, but he still insisted that he, (Dunshee,) did lend the stone to him. The pile of stone for Dunshee was below the pile from which Burns took stone.

Andrew J, Pennock recalled by Plaintiff, says; Mr. Warring said he borrowed stone of Mr. Dunshee. This was after all the stone had been delivered. Mr. Warring had been drawing stone from the other side of the river. Burns did not draw stone from the pile we let Dunshee have, as stated by Warring, in his testimony, but from a pile nearer the bridge—a pile we had delivered for the city, of which we sold a part to Burns.

James Sterling called as a witness by Plaintiff, says: I was one of the firm of Pennock, Sterling & Co. I know of a contract to deliver Dunshee stone. I met Mr. Dunshee once; he wanted to know if he could not have the stone. He also wanted to know if he could not have the stone for less than $4,50 per cord. I told him we could not let him have them for less. He wished to know whether he could depend on having the stone when he wanted them. I told him he could. Dunshee got most of his stone above the bridge; got stone below bridge.

Cross Examined:—Mr. Dunshee was out of stone above the bridge, and we had a pile below the bridge, and told Mr. Dunshee, he could go and draw from there.

And the foregoing was all the evidence introduced by the parties upon the trial of this cause.

After hearing the aguments of the Counsel for the respective parties, the Plaintiff's counsel then asked the Court to instruct the Jury as follows—which instructions were given by the Court, to wit:

PLAINTIFFS' INSTRUCTIONS.

1st. If the Jury believe from the evidence, that Pennock, Sterling & Co., made a Special Contract with the defendant, wherein the said Pennock, Sterling& Co., were to deliver the defendant what stone he might
(Given.) want on the bank of the river, as ordered by the defendant, at the rate of $4,50 per cord, to be measured on the cars, and afterwards, the said defendant agreed to take the stone from the Plaintiff, herein, on the same terms that he agreed with Pennock, Sterling & Co., then the Jury are to estimate the Plaintiff's damages from the measurement on the cars.

2d. If the Jury believe from the evidence that there was a special contract between Plaintiff and
(Given.) Defendant, and that the Plaintiff performed the contract on his part, then the Jury are to estimate the damages from the terms of the contract.

3d. If the Jury believe from the evidence, that Pennock, Sterling & Co., made a special contract with the Defendant, and that afterwards Pennock, Sterling & Co., sold out to the Plaintiff, all the right and inter-
(Given.) est in the contract, and that the Defendant had notice of this, and continued to receive the stone from the Plaintiff, Hill, in his (Hill) own right, on the terms of the original contract, the Plaintiff, Hill, has a right to recover of the Defendant, for the stone delivered by him, on the terms of the original contract.

4th. If the Jury believe from the evidence, that the Plaintiff, Hill, agreed to pay the Forty Dollar order, drawn by Pennock, Sterling & Co., and that the Plaintiff, Hill, was in that case to be allowed for all the stone that had been delivered, as well as what should be delivered, then the Jury will allow the Plaintiff for all
(Given.) the stone delivered to the Defendant, by Pennock, Sterling & Co., and also by the Plaintiff, Hill—(*Qualified by the Court as follows:*) "Provided the Jurors believe that there there was an arrangement between all the parties, by which the Defendant, Dunshee, was to pay the Plaintiff, Hill, for the stone delivered by Pennock, Sterling & Co., in lieu of payment to the latter."

5th. If the Jury believe from the evidence, that the defendant agreed to pay the Plaintiff for the stone delivered to him by Plaintiff, and Pennock, Sterling & Co., then the Plaintiff is entitled to recover from
(Given.) the Defendant, in this action, (*Qualified by the Judge as follows:*) "Provided the Jurors believe from the evidence that there was a communication of, and arrangement between all the parties, so that the claims of Pennock, Sterling & Co., on the Defendant, Dunshee, were extinguished, and that the Defendant should pay the Plaintiff, Hill."

To the opinion of the Court, in giving said instructions, so asked by the Plaintiff, and each and every of them, the said Defendant then and there excepted.

The Defendant's Counsel, then asked the Court to give the Jury the following instructions, marked Defendant's Instructions, and numbered, 1st and 2d.

And the Court then wrote upon the margin of said instruction, number 1 as follows: "Given, subject to provision in Plaintiff's 5th instruction, as to belief of Jurors relative to arrangement of parties, subsequent to original contract between Defendant, Dunshee, and Pennock, Sterling & Co." And the Court then wrote upon margin of said instruction, number 2, as follows: "Given, subject to proviso in 1st instruction referred to." Which instructions, and each of them so modified by the Court, were then and there read by the Court to the Jury; and to the opinion of the Court, in so modifying said instructions, and each of them, the Defendant, by his Counsel, then and there excepted.

(Whereupon the Court stated to the Defendant's Counsel, that he understood him to consent, that the modifications be made by the Court; but that if the Court misunderstood him, he would pass upon the instrcctions, as first asked, and thereupon the modifications, and the words "Given" were stricken out, and the words "Refused" marked on the instructions.)

And the said Defendant, then and there excepted to the opinion of the Court, in refusing said instructions so asked by him, and each of them.

DEFENDANT'S INSTRUCTIONS.

1st. That if the Jury believe from the evidence, that William D. Pennock, Andrew J. Pennock
(Refused.) and James Sterling, entered into a contract with Defendant, Dunshee, for the sale and delivery to him of the stone in question in this cause, and commenced the delivery thereof; and before the completion of the contract, assigned the same to Plaintiff, Hill, and that said Hill completed the delivery of the stone un-

[12552-48]

der such contract, that then this suit should have been brought in the names of the said William D. Pennock, Andrew J. Pennock and James Sterling; and the Plaintiff connot maintain an action thereon in his own name, and the Jury will find for the defendant in this action.

2d. That if the Jury believe from the evidence, that William D. Pennock, Andrew J. Pennock and James Sterling, entered into contract with Defendant Dunshee, for the sale and delivery to him of the stone in question, and commenced the delivery thereof, and before the completion of the delivery of the stone assigned the contract to the Plaintiff, Hill, and said Hill completed the delivery of the stone in question; and should also believe from the evidence, that said Dunshee promised said Hill afterwards, to pay him (said Hill), for the stone he had delivered under said contract, and also for the balance unpaid on the stone delivered by said Pennocks and Sterling, on said contract; that such agreement would not support this action, unless the Jury also find from the evidence that there was some other and new consideration for said promise ; or unless the Jury find from the evidence that there was a communication between all of said parties to wit: said Pennocks and Sterling, Dunshee and Hill ; and a new arrangement between all of said parties entered into, by which said Pennocks' and Sterling's claim upon Dunshee for stone delivered was released; and by which said Hill also released all of his claims upon said Pennocks and Sterling, upon the assignment of said contract; and the cause was thereafter submitted to a Jury, who returned into Court with a verdict for the Plaintiff, for the sum of ninety-five dollars and thirty-four one hundredths dollars.

(Refused.)

And thereupon the Defendant, by his counsel, moved the Court for a new trial, for the following reasons :

1st. That the verdict is against evidence.

2d. That the verdict is against law.

3d. That the Court erred in refusing the instructions asked by the Defendant, and each and every of them.

4th. That the Court erred in giving the instructions asked by the Plaintiff, and each and every of them.

And the Court, having heard the argument of counsel thereon, overrules the motion and denies the same, and renders Judgment on the verdict of the Jury, to which decision of the Court in overruling and denying said motion for a new trial, the said Defendant, by his counsel, excepts and prays that this, his bill of exceptions, may be signed and sealed by the Court, and made a part of the record in this cause—and it is done accordingly.

ANSON S. MILLER, [L. S.]

ERRORS ASSIGNED.

1st. That the Court erred in overruling and denying the motion of the Defendant for a new trial, and entering Judgment on the verdict.

2d. Court erred in refusing to grant a new trial upon motion of Defendant.

3d. That the Court erred in refusing the instructions asked by the Defendant, and each of them.

4th. That the Court erred in giving the instructions so asked by the Plaintiff, and each of them.

5th. That the Court erred in modifying the instructions so asked by the Defendant, and each of them. And also erred (after such instructions had been modified and read to the Jury) in refusing the same and each of them.

Sattin & Brown
Attys for Appellant

197.20

Francis K. Saunders

vs

Truman Hill

Abstract

Filed April 22. 1858

Leonard

Clerk

Brewer

Letter for Brown

Atty for Appellant

Harmon Hill Appellee
ads
Francis K Dunshee Appellant

State of Illinois Supreme
Court April Term 1858

Appeal from Winnebago County

Come L. F. Warner atty for Appellee
and represents and insists That there
is no error in the record in this cause
as assigned
And shows the Court That the record in
this cause shows this suit to have been
brought to recover the price & value of
Stone sold & delivered by Appellee to
appellant at $42c per cord, commen
ced before a Justice of the Peace and an
appeal taken to Co Court of Winnebago Co
where a trial was had and resulted in
a verdict for appellant from which
the appellant took his appeal to this
court, and assigns for Errors.
1st That the court erred in giving instructions asked by appellee
2d That the court erred in modifying
the instructions asked by Appellant

[12552-50]

3d. That the Court erred in not giving the instructions asked by Appellant.

4th That the Court erred in overruling Appellants motion for a new trial

And First

Did the evidence support the cause and ~~support~~ the verdict of the jury

The evidence shews these facts. that sometime in the summer of 1857. Pennock Sterlin & Co. Agreed to let Dunshee have some stone at at $4 50/100 per cord to be measured on the cars & delivered on the Bank of the River as required by Dunshee, and that after Pennock sterling had delivered to Dunshee Eight cords and some few feet in all ten hundred & ninety two feet, that Pennock Sterling & Co sold out the Boat Stone quarry &c to Appellee Hill about the first of October 1857,

That some time after the time not shewn Appellant Hill informed Dunshee that he had bought out the Boat & Stone quarry of Pennock sterling & Co. and that ~~what stone was delivered~~ by him ~~that~~ he Dunshee must pay him for.

And that it was then agreed between Hill & Dunshee that the stone delivered by Pennock Sterling & Co and such as might be delivered by him that Dunshee should pay him for after taking out the forty dollars order of Pennock Sterling & Co. as shown by the admission of Dunshee, on same terms as he was to pay Penn & Co

That after Hill had delivered all of something over thirty cords of stone to Dunshee, except the eight cords and 6/10 cords previously delivered by Pennock Sterling & Co, that He acknowledges the indebtedness as above but insist that he only owes him per 18 or 19 cords.

The whole evidence shows the promise on the part of Dunshee to pay Hill for the stone to be delivered by hill and per what was delivered by Pennock Sterling & Co over the amount of the forty dollar order, and in case they had not delivered enough to come to the forty dollar order that Hill was to make up the amount in stone, And the finding of the jury being therefore fully supported by the evidence under the Law of the case it was not error in the

[illegible]

nor to grant a new trial as for the
verdict being contrary to the evidence
2 ly The verdict was in conformity
to the Law of the case under the evidence
introduced on the trial and shown
in the record It was a good and
sufficient promise on the part
of Dunsher to pay Hill for stone
delivered to Sterling Pennock & Co and
for what he Hill should deliver
after that date and the consider-
ation for which Hill was to deliver stone
in future on the same terms that
Sterling Pennock & Co was, that he should
also have the benefit of the stone
formerly delivered & thereafter
subsequently to be delivered by him
which was amply sufficient to
Law to support the verdict

Another Error assigned
is That the Court erred in giving out
of the instructions asked by Appellee

But we insist that each of said
instructions are the Law of the
case under the evidence and that
even without the qualification
by the Court to the ~~Court~~ fourth &

fifth, that they are based upon the
evidence of the case & on the Law under the facts of the case

To the assignment of error that
the court modified the instructions
asked by appellant, the appellant
can take no exception thereto, for
the reason that the same was made
by the court with the understanding
that it was by his consent,

That the court passed upon the
instructions as originally asked
by appellant,

That neither of the instructions
asked by appellant were relevant
to the case under the evidence, that
they are each of them based upon
the supposition that Hill
furnished stone to Donohue with
out any arrangement in regard to
the same and that after they were
delivered by Hill that the promise
was made by Donohue to pay Hill
therefor without any consideration
therefore they were properly refused
as having no relevancy to the case
under the evidence the promise
was made by Donohue before Hill

[12552-52]

furnished any of the twenty two or three cords purchased by Hill.
Hill did not after he bought out Starling & Penrock Starling & Co go on & continued to deliver stone under the contract with Penrock Starling & Co, but before he delivered any himself he made a contract with Dunshee as shown by evidence
That the case, in ~~Hunt~~ The 14 Ill Rep
Pg 33 has no bearing in this case, in that case no consideration was shown for the promise. But in this case a full and complete consideration is shown
In the case in the 3 Hill Reports, page 88, is an action brought by the assignee of a ~~person~~ policy of insurance and undoubtedly the law is similar cases but is applicable to the present case, 1 Blatchford 326.
And the doctrine appears to be that an assignee of a chose in action in some of the state may maintain, but in his own on a promise of Debtor to pay the assignee But neither of the above are similar to present

case where the promise was to pay
in consideration of something to be
done by the appellee

Therefore the verdict of the
jury was fully sustained And the
instructions asked by appellee had
they been given could not affect
the verdict of the jury.

Therefore the judgment
ought to be confirmed

L. F. Warner
Atty for Appellee
Hill

Y. K. Dunshee
vs 129
Harmon Hill

Defts
Brief & Points

Filed May 14. 1858
L. Leland
Clk

L. F. Warner

In Supreme Court:

Francis K Drinkhouse
Appellant:
vs
Hannon Hill
Appellee

Hill sued Drinkhouse before a justice to recover the balance due for certain Stone delivered to Drinkhouse, by the firm of Pennock Sterling & Co. and by Hill himself =

Drinkhouse appealed to County Court of Winnebago County; where cause was tried at March Term 1858: and judgment against Drinkhouse for $95 34/100 & Costs: Drinkhouse appealed to this Court:

The Evidence is all preserved in Bill of Exceptions, & instructions asked & printed Entire in Abstract

Drinkhouse before the Justice & in the Co Court pleaded, Set off, & gave notice of Set off & that Stone were bought of Pennock Sterling & Co.

The principal Errors assigned are —

512 550-54

1- The Court ~~refused~~ refusal to grant a New trial, upon motion of Defft. below:

2 ~~2~~. In giving the instructions asked by the Plaintiff below:

3- In refusing the instructions asked by the defendant below:

The testimony in substance shows that in September 1857. Wmoshee made a Contract, with Pinnock Sterling & Co to deliver him Stone; That after the Stone were part delivered, Pinnock Sterling & Co assigned the Contract to Hill, and Hill completed the delivery of the Stone:

Pinnock, for Hill swears, that at a conversation, between Wmoshee and Hill, about 2 weeks, before the trial before the Justice, Wmoshee then acknowledged that Hill had at some previous time told him, that he Hill was to have the pay for all the Stone delivered by Hill, and by ~~Pinnock~~ the Company Pinnock Sterling & Co. Except the 40$ order, and that Wmoshee agreed to pay him:

That the agreement between Rimock Sterling & Co. and Hill was, that Hill was to take the Contract off from the Company's hands — deliver the balance of the Stone, & have all the pay for the Stone — and allow the amount of the 40$ order drawn by Rimock Sterling & Co & accepted by Dunshee;

The Testimony no where shows or attempts to show; that Hill ever promised to deliver the Stone to Dunshee or in any manner to perform the Contract made between Rimock Sterling & Co. and Dunshee —

There is no testimony tending to show that any Communication, was had between Rimock Sterling & Co: and Dunshee in reference to Hill: taking the Contract: On the Contrary, Wm D Rimock swears, that he never informed Dunshee of the sale to Hill: And Wm D Rimock, also swears that they sold to Hill, fore part of October 1857. and that on 24th of October, Rimock

[12552-55]

Sterling & Co. drew the 40 ₵ order on Brimshire, and that he had not then informed Brimshire of the assignment of the Contract:

The Plaintiff in Error insists that the Evidence does not support the action in Hill's name: That the action should have been brought in the name of Pennock Sterling & Co.: And that the Court below should have granted a new trial =

Mc Kinney vs Alvis 14 Ill. 33. = 3 Hill 88:
Parsons on Contracts Vol. 1. Title Novation. pg. 187.

The only other point Controverted in the Court below was, the amount of Stone delivered & price:

The Plaintiff below, claiming to recover, for the Stone, as measured on the car by Wm L. Pennock: And the defendant claiming, he was not bound by Pennock's Measurement on the car and if liable at all, was only liable for the quantity actualy delivered:

Wm L. Pennock, for the Plaintiff below.
Sworn. That he measured on the car, all the Stone delivered for Brushes, both by Pennock Sterling & Co & by Hill; That the Quantity was 31 Cords & 5 feet; And he also says that it was agreed in the Contract between Pennock Sterling & Co and Brushes, that the Stone should be measured on the Cars; but that it was not agreed Who should measure them

Brushes proved by two or three witnesses the amount of Stone Ruined (by measurement of the Walls) which showed several Cords less, than made by the testimony of Wm L. Pennock, of measurement on the Cars;

It is in reference to this 2d point that the Plaintiff in Error complains of the first instruction, asked & given for the Plaintiff below;

That the Jury were wrongly in effect instructed to asses the Plaintiffs damages from the measurement of Lewis Wm L. Pennock on the Cars; And that the Jury do understand the instruction; and do find;

[12552-5b]

Upon the Point, that Hill could not Maintain the action in his own name; The Plaintiff in Error complains of the Court below, in refusing the Instructions, and Each of them asked by him, and in giving the Instructions asked by Plaintiff below:

The 3d Instruction given for the Plaintiff below, was clearly not the Law:

It Shows no new Contract between Winslow and Hill: It Shows no discharge of the Contract between Renwick Sterling & Co. and Winslow: And it Shows no promise or undertaking on the part of Hill to deliver the Stone, or perform the Contract on the part of Renwick Sterling & Co:

The rights of the parties under the Contract must be mutual; And if Winslow was liable to Hill on the Contract for the Stone delivered; then Hill must have been liable to Winslow for their non delivery: And there is no pretense of any promise on the part of Hill, to deliver the Stone

or of any relation between Hill and Dunshee, by which Hill would have been liable to Dunshee for non delivery:

Dunshee's remedy for failure was against Pennock Sterling & Co. & no one else:

The first instruction asked by Defendant below, and refused by the Court was the law and applicable:

It in substance submitted the question, whether Hill delivered the Stone on the Contract with Pennock Sterling & Co: and if so, and the action brought on the Contract, the action should have been in the name of Pennock Sterling & Co. & not in Hills —

The Second instruction asked by Defendant, was already the law; and as asked was within the principle of the doctrine decided in McKinney vs Alvis 14 Ill 33 —

That the Court also erred in refusing said instructions so asked by the defendant below, after the Court had modified said instructions and

read them to the Jury:

That the practice is unfair & operates to mislead the Jury, of refusing instructions after they have been read to the Jury, and should not be done, until the instructions as read, are not the Law:

The Evidence does not bring the case within the doctrine of the case of McCarty vs Osborne 1. Blackford 326. In that case the first Contract was abandoned, and a new one made upon the exact terms of the first: The three parties being present and assenting thereto:

In this case there is no pretense, that the Contract between Pennock Sterling & Co. and Donohue, was ever abandoned; but Hill claims as the assignee thereof, and Donohue subsequent promise to pay Hill for the Stone delivered by Pennock Sterling & Co & Hill both:

And in this case there is no Evidence or pretense, that Hill ever promised Donohue, that he would deliver the Stone -

or become ~~delivery~~ liable for their non delivery;

Hill never became liable to Dunshee on the Contract; nor were Pinnock Sterling & Co. ever discharged therefrom by Dunshee —

Lathrop & Brown
for Pff in Error

In Supreme Court

199

Francis K Brinsmade

vs

Harmon Hill

Points & authorities
of Pltffs Counsel

Latting for Brown
for Appellant

In Supreme Court.

Francis K Drusha
Appellant
vs
Hannon Hill
Appellee

Hill sued Drusha before a Justice, to recover the balance due for certain Stone delivered to Drusha by the firm of Prince & Stiles & Co, and by Hill thereafter;
Drusha appealed to County Court of Winnebago County. Where cause was tried at March term 1858, and judgment against Drusha for $95.34 & costs
Drusha appealed to this Court;

The Evidence is all preserved in the bill of Exceptions; & instructions asked & printed entire in abstract;

Drusha before the Justice & in the Co. Court pleaded the General Issue & gave notice of Set off, & that Stone were bought of Prince & Stiles & Co

[12552-59]

1. The principal errors, appeared are: the Court's refusal to grant a new trial;

2. In giving the instructions asked by the Plaintiff below—

3. In refusing the instructions asked by the defendant below——

The testimony in this case shows that in September 1857, Donohue, made a Contract with Pennock Sterling & Co. to deliver him, Stone, that after the Stone were part delivered, Pennock Sterling & Co. assigned the contract to Hill, and that Hill, Completed the delivery of the Stone;

Pennock, for Hill, swears, that at a Conversation between Donohue & Hill about 2 weeks, before Suit, before the Justice; said Donohue then acknowledged that Hill had at some previous time, told, him, that he Hill was to

have the pay for all the Stone
delivered by Hill, and by the Company
(Pennock Sterling & Co) & except the 40# order
And that Donohue agreed to pay him.

That the agreement between Pennock
Sterling & Co. and Hill was: that Hill was
to take
the Contract off from the Company's
hands & deliver the balance of the
Stone, & have all the pay for the Stone,
and allow the amount of the 40# order
drawn by Pennock Sterling & Co. & accepted by
Donohue—

The testimony, no where shows or attempts
to show, that Hill ever promised to
deliver the Stone to Donohue, or in
any manner, to perform the Contract
made between Pennock Sterling & Co. and
Donohue

There is no testimony tending to show
that any communication was had between
Pennock Sterling & Co. and Donohue, in reference
to Hill's taking the Contract; On the Contrary
Wm D Pennock swears, that he never
informed Donohue of the sale to Hill &
Wm D Pennock also swears that they

[12553-60]

Sold to Hill for part of October 1857.
And that on 24th of October Pennock
Sterling & Co drew the 40 ₰ order on Dunbar
And that he had not then informed
Dunbar of the assignment of the Contract

The Plaintiff in Error insists. That
the Evidence does not support the
action in Hills name. That the action
should have been brought in the
name of Pennock Sterling & Co. And that
the Court. should have granted a new
trial.

McKinney vs Alvis 14 Ill. 33 — 3. Hill. 88 —
Parsons on Contracts Vol. 1 — Title Novation Page 187 —

The only other point Controverted
in the Court below was. the Amount
of Stone delivered & price.
The Plaintiff claiming to recover
for the Amount as measured on the
Car. by Wm D Pennock. And the
Defendant claiming he was not bound
by Pennocks Measurement on the Car.
and if liable at all; was only liable
for the quantity actually [illegible] Received

Wm D. Pennock for the Plaintiff below sworn: That he measured on the Car, all the Stone delivered for Winsor, both by Pennock Sterling & Co & by Hill, that the Quantity was 31 cords & 5 feet. And he also says that it was agreed in the Contract between Pennock Sterling & Co. and Winsor, that the Stone should be measured on the Car, but that it was not agreed, Who should measure them:

Winsor proved by two or three witnesses, by means of the public, the Amount of Stone Received, which should several cords less than made by the testimony of Wm D. Pennock, of measurement on Car:

It is in reference to this 2d point that the Plff. in Error complains of the first instruction asked and given for the Plaintiff below.

That the Jury were wrong in Effect. in structed, to assess the Plaintiff damages from the measurement of said Wm D. Pennock on the Car. And that the Jury so understood the instruction & so did:

[1265246]

upon the Point that Hill could not Maintain the action in his own name!

The Plaintiff also Complains of the Court below refusing the instructions and Each of them asked by Defendant & the giving the Instructions asked by Plaintiff below:

The 3d Instruction given for the Pff below is Clearly not the law.

It Shows no ~~agreement~~ New Contract between Dunshee & Hill: It Shows no discharge of the Contract between Pennock Sterling & Co. & Dunshee: And it Shows no promise or undertaking on the part of Hill to deliver the Stone, or perform the Contract on the part of Pennock Sterling & Co.

The rights of the parties under the Contract must be mutual: And if Dunshee was liable to Hill, on the Contract for the Stone delivered; then Hill must have been liable to Dunshee for their non delivery: And there is no pretense of any promise on the part of Hill

to deliver the Stone, or of any relation between Hill, and Brunshen, by which Hill would have been liable to Brunshen for non delivery; Brunshen's remedy for failure was against Primrose Sterling & Co. & no one else.

The first instruction asked by defendant below and refused by the Court, was the law. It in substance submitted the question to the Jury whether Hill delivered the Stone on the Contract with Primrose Sterling & Co. and if so, and the action brought on that Contract, the action should have been in the names of said Primrose Sterling & Co. & not in Hills

The second instruction asked by defendant was clearly the law; and as asked was within the principles of the doctrine of decided in McKinney vs Allen 14 Pet. 33.

That the Court also erred, in refusing said instructions so asked by the defendant below: after the Court had modified said instructions, and read them

[1255262]

to the jury: That the practice is unfair, and operates to mislead the jury by refusing instructions, after they have been read to the jury, and should not be done, unless the instructions as read, are not law:

The evidence does not bring this case within the doctrine of the case of McCarty vs Osborne. 1 Blackford. 326. In that case the first Contract was abandoned & a New one made upon the dead terms of the first. the Three parties being present and all assenting thereto -

In this case there is no pretense that the Contract between Pennock Sterling & Co. and Donohue was ever abandoned; but Hill claims as assignee thereof. And Donohue subsequent promise to pay Hill, for the stone delivered by Pennock Sterling & Co. & Hill both: And in this case there is no evidence or pretense that Hill ever promised Donohue that he would deliver the Stone:

Hill never became liable to Donohue on the Contract; Nor were Pennock Sterling & Co ever discharged therefrom by Donohue

Lathrop Brown
for Pfft in Error

In Supreme Court

197

Francis K Brushee

vs

Hannon Hill

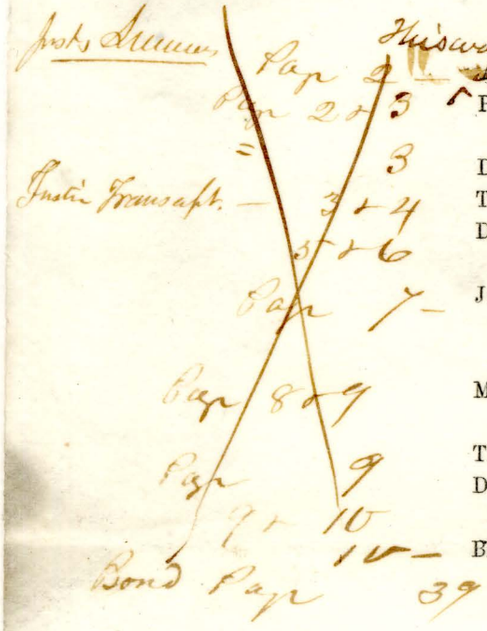
Points & Authorities
of Plffs. Counsel

Baltzell & Brown
for Appellant

In the Supreme Court.

FRANCIS K. DUNSHEE, Appellant,
ads.
HARMON HILL, Appellee.

Appeal from the County Court of Winnebago County.



ABSTRACT OF THE RECORD.

Action commenced before a Justice of the Peace of Winnebago County, ~~December~~ 12, 1857.

Plaintiff claimed pay for 30½ cords of stone, at $4,50 per cord, and gave credit by $40 order on Pennock, Sterling & Co.

Defendant pleaded General Issue, gave notice of Set-off, and that stone was bought of Pennock, Sterling & Co.

Trial before Justice, December 24, 1857; both parties appeared, and Judgment for Plaintiff for $77 and costs.

Defendant, Dunshee, appealed to County Court of said Winnebago County, January 13, 1858, and filed his Appeal Bond with Justice, of that date.

Justice's Transcript and papers upon Appeal filed in Office of said County Court, January 13, 1858, and on same day summons issued to Hill, Appellee, out of said County Court, and returned served by reading to Hill, February 15, 1858.

March Term, 1858.—Parties appeared and the cause was submitted to Honorable ANSON S. MILLER, Judge, and a Jury, for trial.

The Jury found the issues for Plaintiff, Hill, and assessed his damages at $95,34.

Defendant, Dunshee, moved the Court for a new trial, which was heard and denied by the Court, and Judgment entered against the Defendant, Dunshee, upon the verdict of the Jury, and for costs of suit.

Bill of Exceptions taken to the ruling of the Court on said motion for a new trial; and Appeal taken to Supreme Court by Defendant, Dunshee, and Bond filed.

COPY OF BILL OF EXCEPTIONS.

In County Court of Winnebago County, Illinois,
OF THE MARCH TERM, 1858.

FRANCIS K. DUNSHEE,
ads.
HARMON HILL.

Be it remembered that upon this tenth day of March, of the March Term of the County Court of Winnebago County, for the year 1858, this cause coming on to be tried before the Honorable Anson S. Miller, Judge of said Court, and a Jury, the cause being an Appeal into this Court from a Justice of the Peace, and the action founded upon the following account or claim, filed by said Plaintiff before the Justice, to wit:

"F. K. DUNSHEE,

To HARMON HILL Dr.,

For 30½ Cords of Stone, at $4,50,	$136,50
CR.	
By amount paid Upton on Pennock & Co's Order,	40,00
	$96,50"

To which action the said defendant before the Justice, pleaded the general issue and gave notice in said action as follows: That defendant would insist upon, as an offset in said cause, an order, accepted and paid to Charles O. Upton for $40,00 drawn by Pennock, Sterling & Co.

And that the Stone for which the action was brought, were bought of said Pennock, Sterling & Co. Upon which statement of the claim of the Plaintiff, and the defense of said defendant, the said parties went to trial.

The Plaintiff then introduced William D. Pennock, who testified as follows, to wit:

I know the parties, Plaintiff, and Defendant, in this cause. I am one of this firm of Pennock, Sterling & Co., composed of myself, my brother Andrew J. Pennock and James Sterling.

I know of a contract to deliver stone to Dunshee.

(We, Pennock, Sterling & Co.,) made a verbal contract with Dunshee to let him have Stone, There was no time specified when stone were to be delivered, and no definite amount to be delivered—were to be delivered as ordered by Dunshee.

Dunshee was to pay $4,50 per cord, to be measured on the cars, and delivered on the bank of the River.

After the making of the contract, we delivered Dunshee some of the stone on the bank of the River. We received our pay pretty much for the stone we delivered. Our Company delivered a trifle over eight cords of the stone—that is, we delivered 420 feet and 672 feet.

I have no interest in the event of this suit; we have received our pay for all the stone delivered by us.

Our Company sold out to Hill, the Plaintiff, our boats, quarry, &c.

We sold out to Hill about the time we delivered the last of the eight cords ; I know of Hill delivering stone to Dunshee about two weeks before the trial before the Justice. I heard a conversation between Hill and Dunshee in relation to the stone in question.

I was with Hill at the time, and he asked Dunshee for the pay for the stone.

Dunshee said that he would pay him—that he supposed he owed him for about 18 or 19 cords of stone. Hill said it was more. Hill then said to Dunshee, " You know you agreed to pay me $4,50 per cord for the stone I delivered to you, and also for the balance the Company had delivered above the $40,00 order.

And that I told you I was to have the pay for all the stone delivered by me and the Company, except the $40 order.

And if the stone delivered by the Company did not amount to as much as the $40 order, I (Hill) was to make it up to you, (Dunshee.) Mr. Dunshee said he did so agree.

After we sold out to Pltff., Hill, I was employed as a hand on the boat by Hill—I kept an account of all the stone delivered—I measured the stone, and set all down on memorandum book—(Witness produces pass book, and says :) These are my figures, they were set down at the time with pencil first, and since, I have been over them with a pen and ink.

Witness then states that the whole amount of stone delivered to Dunshee, was a little over 30 cords, by the Company and Hill both. The whole number of feet delivered was 3973 feet, amounting to 31 cords and 5 feet.

This was the whole amount of stone delivered by Pennock, Sterling & Co., & Hill.

We sold out to Hill, in October, 1857—fore part—can't state the day. We boated these stone down the river —most of the stone for Dunshee were delivered above the street bridge.

Cross Examined by Deft.—Pennock, Sterling & Co., ran the boat from about January 1st, 1857, until we sold out to Hill about 1st of October, 1857.

I offered to give J. B. Skinner an order on Dunshee for pay for stone—can't state the date. It was before the date of the order to Upton—about same time.

Witness here shown the order given to Upton, dated October 24th, 1857.

Witness says the order shown him, was given at the date thereof.

That he had not then informed Dunshee, that they (the Company) had sold out to Hill. Does not know that he ever informed Dunshee of the fact, does not know that he ever said any thing to Dunshee about it. That if he had given the order to Skinner, he should not have given the order to Upton.

I cannot remember the date of the delivery of the last of the stone by the Company to Dunshee. Think it was last of September.

Most of the stone for Dunshee were delivered from 4 to 6 rods above street bridge. Some delivered about same distance below. 5 boat loads above and 2 or 3 boat loads below.

I do not reccollet of any other person to whom we were delivering stone at the same place, while we were delivering stone for Dunshee.

We sold about 5 cords to another person, at or about that time, which were delivered about the same time, but we kept the stone for Dunshee seperate.

The 5 cords were delivered below the bridge. I think two car loads of stone were delivered above the bridge, for Mr. Blakeman. Mr. Colburn did not have any stone from there. We delivered his above Slaughter house, some ways above Dunshee's stone.

Mr. Hill had not been connected with us in business before we sold to him. He had been upon the boat some.

Pennock, Sterling & Co., had talked with Dunshee about stone for one year.

Along in September 1857, we made a bargain with Dunshee for stone. There had been talk, but there was nothing binding on the parties until said September.

The agreement then was, that Dunshee was to have the stone at $4,50 per cord, on the bank of the river; was to have them as he wanted them. We agreed to deliver the stone. No binding bargain before.

(Witness requested again to state what was said at conversation between Hill and Dunshee.)

"Hill said he wanted Dunshee to settle for those stone. Dunshee said he would pay him for them. Dunshee said he was owing him (Hill) for 18 or 19 cords of stone. Mr. Hill said it was more.

Mr. Dunshee said the wall was 7½ feet in height—length and breadth could not say.

(Hill said,) "You know Mr. Dunshee, that I spoke to you after I bought the boat, that you were to pay me for what stone you had after that time. (Dunshee said,) "The boys had given an order." Hill said he would allow that.

The price of the stone was spoken of before, and Dunshee consented to pay Hill for the stone. Dunshee spoke of measuring in the wall. Hill claimed to have them measured on the cars. Dunshee said he would pay him for the stone. Hill calculated to sue him in the County or Circuit Court, if he did not pay him; but he put Hill off until the last day of service. The conversation commenced in the street near Skinner's shop, and we then all went up to the cellar.

The agreement between the Company and Hill, in relation to Dunshee, was, that Mr. Hill was to fill the contract with Dunshee. That was the agreement of Mr. Hill and the Company.

(By a Juror.) Was Dunshee to take these stone at your measurement on the car? (To which witness answered.) "Nothing was said about who was to measure the stone." Stone were to be measured on the car. Dunshee was not present when any of the stone were measured.

Direct Resumed.—Witness asked the market value of stone. Did not state. Witness went on to state at what price the Company sold stone, which was objected to by Deft., and objection sustained by the Court.

Dunshee's stone were delivered separate. Dunshee designated place where stone were to be delivered; we left the stone there. Contract was, that stone were to be delivered on bank of river. We had nothing more to do with stone after they were delivered on the bank.

Witness again requested to state the final contract between Pennock, Sterling & Co., and Dunshee, in September, 1857.

(Witness said,) Dunshee, sometime in September last, came to the boat, and Dunshee then said, Pennock, I am going to digging my cellar, and want some stone. I told him the price would be $4,50 per cord, for the stone delivered on the bank. Dunshee said, can't I have the stone for less. I told him no. Dunshee said he would take the stone. I told him he could have them, and Dunshee assented.

(Witness afterwards said, that by the agreement, stone were to be measured on the cars used in conveying the stone from the quarry on to the boats.)

Cross Examined:—We told Mr. Hill, what we were letting Dunshee have the stone for.

The Plaintiff then introduced Andrew J. Pennock, as a witness, who testified as follows: I am one of the Company of Pennock, Sterling & Co. The Company let Dunshee have stone. I met Mr. Dunshee at the end of the bridge, he said he should want some stone. Cannot state the date, but it was before we sold to Hill. We sold out to Hill, latter part of summer, or in the fall. Can't state the time; it is in writing; could tell date from papers. After we sold out, Mr Hill delivered stone for Dunshee—delivered at same place we had delivered. Heard a conversation between Hill and Dunshee in relation to the stone. Hill wanted Dunshee to settle up for the stone; conversation commenced near Skinner's shop in the street. Myself, my brother Wm. D., and Mr. Hill, and Mr. Dunshee, were present; no others present. There was a considerable conversation, and after a while we all went up to the cellar. Cannot remember all that occurred. Dunshee said, he supposed he owed Hill, for 18 or 19 cords of stone. Hill said it was more. Dunshee said they might measure the wall, or get some one to. Dunshee said the wall was 7½ feet high. Hill measured, and found it 8 feet four inches high. Hill said he would leave it out to any two men Dunshee might pick. That he did not wan any trouble. Hill said to Dunshee, you remember I told you I had bought the boat and fixtures, and what stone were delivered after that date, you were to pay me for. Something said about the price; Hill said he was to deliver the stone the same as the Company were; and Dunshee said that was so; Hill was to take the contract off from the Company's hands, and deliver the stone and have the pay. At this time, in the conversation, something was said about the order to Upton. Hill was to have pay for all the stone, and to give Dunshee credit for the $40 order. Dunshee said he would pay him for the stone—would pay him then, at his (Dunshee's) own measurement. Dunshee said he would not pay him for any more stone than he, himself made; and that he would not pay for any more stone than he made by his measurement. Dunshee said he did not care what others made it, if it was double what he made it, he would only pay according to his own measurement.

Cross Examined:—Our Company let Hill have the contract at the same terms we had it, and Hill was to have the pay for the balance of stone to be delivered by him, and balance unpaid of stone delivered by Company over the $40 order.

Jonathan Peacock, was called as a witness on the part of the Plaintiff, and testified as follows:—Witness was asked market price of stone, last fall. Said he bought stone of Pennock, Sterling & Co., last summer. Particulars of bargain ruled out. Could not get stone of others for less than $5,50 per cord, delivered at the building and measured in the wall.

Plaintiff here rested his proof, and the defendant then introduced the following testimony, to wit:

PLAINTIFF'S TESTIMONY.

By agreement of Parties, the following Order was introduced by Defendant, viz.:

"ROCKFORD, October 24th, 1857.

"F. K. DUNSHEE—*Sir:* Please pay Charles O. Upton, or bearer, Forty Dollars, and charge the same to my account. PENNOCK, STERLING & CO.

(Endorsed,) Accepted—F. K. DUNSHEE."

John Allen was then sworn, on the part of the Defendant, who testified as follows, to wit: I am a stone mason by trade; I have been engaged for several years in drawing stone, and selling the same in town; I know the cellar of Mr. Dunshee, where the stone in question were used; Stone, such as were used in that cellar, were at that time worth $5,50 per cord, delivered at the cellar and measured in the wall; could have been furnished at that price. I know where the street bridge is; I think it would be worth one dollar per cord to deliver loose stone, from where the stone in question were delivered on bank of River, to the cellar of Defendant, or $1,25 per cord, if stone were measured in the wall. I have measured the walls of the cellar of Defendant; the walls contain 19 cords and 40 feet of stone. I was at the cellar two or three times while the walls were being built.

Cross-Examined: My stone quarry is about one mile from town; Pennock, Sterling & Co's quarry was four or five miles from town. Drew stone from my quarry with teams. I was at Defendant's cellar two or three times while the walls were being built; I then noticed the thickness of the wall; when I measured the walls when finished I could not tell the thickness. We measured all of our stone in the wall. One cord of loose stone will measure about 100 feet in the wall. I charged more for stone where I hauled them over the River; the distance made the difference in the price charged.

John Burns, for Defendant, sworn—says: I am a well-digger; dug the well at Mr. Dunshee's cellar; the well is 27 feet and 6 inches deep; myself and co-partner stoned the well; the quantity of stone used was 2 cords and 90 feet.

Defendant then introduced Almeron S. Warring as a witness, who testified as follows, to wit: I am a builder by trade; am the brother-in-law of Defendant, Dunshee; know the cellar of Defendant; drew the plan, and superintended the building the cellar walls; the walls were built by Mr. John Hays, under my direction. The quantity of stone in the walls of the cellar was 19 cords and 15 feet. I know where Mr. Dunshee got the stone for cellar and well. I did not know of Dunshee's having stone for any other purpose than the cellar and well. I think I should have known the fact, if he had used stone for any other purpose. Part of the stone were drawn from a pile above street bridge, and a part from a pile below the bridge. When Mr. Dunshee was drawing from the pile below the bridge, a Mr. Reed was drawing from the same pile to a Mr. Burns, across the River. At the time the stone in question was delivered the market price of stone, on west side of River, was $5,50 per cord, measured in the wall. I performed considerable labor and furnished materials for Pennock, Sterling & Co., in building their boat, in Spring of 1857, and had stone of the Company, more or less during the season; I got 1½ cords of stone from the pile that Dunshee was drawing from, below the bridge. This was about the time Dunshee got the last of his stone. I had not at this time heard that Pennock, Sterling & Co. had sold out, or that Hill claimed any interest in the boat or stone.

Cross-Examined: Have no recollection of telling either of the Pennocks or Hill that I borrowed 1½ cords of stone from Dunshee.

Defendant here rested his case.

William D. Pennock recalled by the Plaintiff, who testified as follows: We, myself, Hill and Andrew J. Pennock, went to see Warring, to see what stone he had got. Warring said he borrowed 1½ cords of stone of Dunshee, which he got below the bridge. We went to Dunshee, and he said he had not loaned Warring stone; we then went back to Warring, and told him what Dunshee had said, but he still insisted that he, (Dunshee,) did lend the stone to him. The pile of stone for Dunshee was below the pile from which Burns took stone.

Andrew J, Pennock recalled by Plaintiff, says; Mr. Warring said he borrowed stone of Mr. Dunshee. This was after all the stone had been delivered. Mr. Warring had been drawing stone from the other side of the river. Burns did not draw stone from the pile we let Dunshee have, as stated by Warring, in his testimony, but from a pile nearer the bridge—a pile we had delivered for the city, of which we sold a part to Burns.

James Sterling called as a witness by Plaintiff, says: I was one of the firm of Pennock, Sterling & Co. I know of a contract to deliver Dunshee stone. I met Mr. Dunshee once; he wanted to know if he could not have the stone. He also wanted to know if he could not have the stone for less than $4,50 per cord. I told him we could not let him have them for less. He wished to know whether he could depend on having the stone when he wanted them. I told him he could. Dunshee got most of his stone above the bridge; got stone below bridge.

Cross Examined:—Mr. Dunshee was out of stone above the bridge, and we had a pile below the bridge, and told Mr. Dunshee, he could go and draw from there.

And the foregoing was all the evidence introduced by the parties upon the trial of this cause.

After hearing the aguments of the Counsel for the respective parties, the Plaintiff's counsel then asked the Court to instruct the Jury as follows—which instructions were given by the Court, to wit:

PLAINTIFFS' INSTRUCTIONS.

1st. If the Jury believe from the evidence, that Pennock, Sterling & Co., made a Special Contract with the defendant, wherein the said Pennock, Sterling& Co., were to deliver the defendant what stone he might
(Given.) want on the bank of the river, as ordered by the defendant, at the rate of $4,50 per cord, to be measured on the cars, and afterwards, the said defendant agreed to take the stone from the Plaintiff, herein, on the same terms that he agreed with Pennock, Sterling & Co., then the Jury are to estimate the Plaintiff's damages from the measurement on the cars.

2d. If the Jury believe from the evidence that there was a special contract between Plaintiff and
(Given.) Defendant, and that the Plaintiff performed the contract on his part, then the Jury are to estimate the damages from the terms of the contract.

3d. If the Jury believe from the evidence, that Pennock, Sterling & Co., made a special contract with the Defendant, and that afterwards Pennock, Sterling & Co., sold out to the Plaintiff, all the right and inter-
(Given.) est in the contract, and that the Defendant had notice of this, and continued to receive the stone from the Plaintiff, Hill, in his (Hill) own right, on the terms of the original contract, the Plaintiff, Hill, has a right to recover of the Defendant, for the stone delivered by him, on the terms of the original contract.

4th. If the Jury believe from the evidence, that the Plaintiff, Hill, agreed to pay the Forty Dollar order, drawn by Pennock, Sterling & Co., and that the Plaintiff, Hill, was in that case to be allowed for all the stone that had been delivered, as well as what should be delivered, then the Jury will allow the Plaintiff for all
(Given.) the stone delivered to the Defendant, by Pennock, Sterling & Co., and also by the Plaintiff, Hill—(*Qualified by the Court as follows:*) "Provided the Jurors believe that there there was an arrangement between all the parties, by which the Defendant, Dunshee, was to pay the Plaintiff, Hill, for the stone delivered by Pennock, Sterling & Co., in lieu of payment to the latter."

5th. If the Jury believe from the evidence, that the defendant agreed to pay the Plaintiff for the stone delivered to him by Plaintiff, and Pennock, Sterling & Co., then the Plaintiff is entitled to recover from
(Given.) the Defendant, in this action, (*Qualified by the Judge as follows:*) "Provided the Jurors believe from the evidence that there was a communication of, and arrangement between all the parties, so that the claims of Pennock, Sterling & Co., on the Defendant, Dunshee, were extinguished, and that the Defendant should pay the Plaintiff, Hill."

To the opinion of the Court, in giving said instructions, so asked by the Plaintiff, and each and every of them, the said Defendant then and there excepted.

The Defendant's Counsel, then asked the Court to give the Jury the following instructions, marked Defendant's Instructions, and numbered, 1st and 2d.

And the Court then wrote upon the margin of said instruction, number 1 as follows: "Given, subject to provision in Plaintiff's 5th instruction, as to belief of Jurors relative to arrangement of parties, subsequent to original contract between Defendant, Dunshee, and Pennock, Sterling & Co." And the Court then wrote upon margin of said instruction, number 2, as follows: "Given, subject to proviso in 1st instruction referred to." Which instructions, and each of them so modified by the Court, were then and there read by the Court to the Jury; and to the opinion of the Court, in so modifying said instructions, and each of them, the Defendant, by his Counsel, then and there excepted.

(Whereupon the Court stated to the Defendant's Counsel, that he understood him to consent, that the modifications be made by the Court; but that if the Court misunderstood him, he would pass upon the instructions, as first asked, and thereupon the modifications, and the words "Given" were stricken out, and the words "Refused" marked on the instructions.)

And the said Defendant, then and there excepted to the opinion of the Court, in refusing said instructions so asked by him, and each of them.

DEFENDANT'S INSTRUCTIONS.

1st. That if the Jury believe from the evidence, that William D. Pennock, Andrew J. Pennock
(Refused.) and James Sterling, entered into a contract with Defendant, Dunshee, for the sale and delivery to him of the stone in question in this cause, and commenced the delivery thereof; and before the completion of the contract, assigned the same to Plaintiff, Hill, and that said Hill completed the delivery of the stone un-

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der such contract, that then this suit should have been brought in the names of the said William D. Pennock, Andrew J. Pennock and James Sterling; and the Plaintiff connot maintain an action thereon in his own name, and the Jury will find for the defendant in this action.

2d. That if the Jury believe from the evidence, that William D. Pennock, Andrew J. Pennock and James Sterling, entered into contract with Defendant Dunshee, for the sale and delivery to him of the stone in question, and commenced the delivery thereof, and before the completion of the delivery of the stone assigned the contract to the Plaintiff, Hill, and said Hill completed the delivery of the stone in question; and should also believe from the evidence, that said Dunshee promised said Hill afterwards, to pay him (said Hill), for the stone he had delivered under said contract, and also for the balance unpaid on the stone delivered by said Pennocks and Sterling, on said contract; that such agreement would not support this action, unless the Jury also find from the evidence that there was some other and new consideration for said promise ; or unless the Jury find from the evidence that there was a communication between all of said parties to wit: said Pennocks and Sterling, Dunshee and Hill ; and a new arrangement between all of said parties entered into, by which said Pennocks' and Sterling's claim upon Dunshee for stone delivered was released; and by which said Hill also released all of his claims upon said Pennocks and Sterling, upon the assignment of said contract; and the cause was thereafter submitted to a Jury, who returned into Court with a verdict for the Plaintiff, for the sum of ninety-five dollars and thirty-four one hundredths dollars.

(Refused.)

And thereupon the Defendant, by his counsel, moved the Court for a new trial, for the following reasons :

1st. That the verdict is against evidence.

2d. That the verdict is against law.

3d. That the Court erred in refusing the instructions asked by the Defendant, and each and every of them.

4th. That the Court erred in giving the instructions asked by the Plaintiff, and each and every of them.

And the Court, having heard the argument of counsel thereon, overrules the motion and denies the same, and renders Judgment on the verdict of the Jury, to which decision of the Court in overruling and denying said motion for a new trial, the said Defendant, by his counsel, excepts and prays that this, his bill of exceptions, may be signed and sealed by the Court, and made a part of the record in this cause—and it is done accordingly.

ANSON S. MILLER, [L. S.]

ERRORS ASSIGNED.

1st. That the Court erred in overruling and denying the motion of the Defendant for a new trial, and entering Judgment on the verdict.

2d. Court erred in refusing to grant a new trial upon motion of Defendant.

3d. That the Court erred in refusing the instructions asked by the Defendant, and each of them.

4th. That the Court erred in giving the instructions so asked by the Plaintiff, and each of them.

5th. That the Court erred in modifying the instructions so asked by the Defendant, and each of them. And also erred (after such instructions had been modified and read to the Jury) in refusing the same and each of them.

Sattley & Brown
Atty. for Def[illegible]

[12552-68]

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Francis R Dunshee

vs.

Harmon Hill

Abstract

Filed April 22, 1858
L Leland
Clerk

Lathrop L Brown
Atty for Appellant

Francis K Dunshee
vs
Harmon Hill

In Supreme Court
State of Illinois April
Term A.D 1858

It is agreed between the attorneys for the respective parties that the above cause when called in order, may be submitted upon written arguments to be filed

Lathrop W Brown
atty for Appellant
L F Warner atty for defts

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Francis K Dunshee

vs

Harmon Hill

Substitution

Harman Hill
ads
Francis K Dunshee

In Supreme Court
State of Illinois April
Term A.D. 1858

The Defendant Harman Hill by L
F Warner, ~~for Joinder in Error~~
his Attorney for a Joinder to the
Errors assigned in above cause
says that there is no error in the
record ~~as said appellant has alledged~~
& prays that the Judgment
may be confirmed

L. F. Warner
Atty for Defts

[12552-70]

Hermon Dell
and
F. K. Dunbar

London in Espn

D. Y. Morris