No. 12552

Supreme Court of Illinois

Dunshee

VS.

Hill

71641

Dunshee Hice 199 1858

State of Illinois for-

Thus before the Honoroble Mison S.

Winnebugo County, at a neglest term of Said County Court brynn and holden at the Court House in the City of Rockford, on the first Monday, tring the first day of March in the Greer of Our Lord One Thousand right Studied and Jiffy Right, and of the Independence of the United States the Eighty-Second:

An the Matter of Harmon Hill 3 Francis K brushee 3

The tenth day of February in the grand our Sour Sour Sour the Sight Account and fifty Eight, this cause came up to the Said County Court on the appeal of Said Defends and Araires K homohie from the properties of James & Mandon a pistien of Said Street of James & Mandon a pistien of the Prace of James & Mandon a pistien of the Prace for Said County

When for the Sain postice relieved neto this Court the following papers and Transcript of Proceedings in Same Cause before bin - lig Stale of Illinois Minnebuye County 8. The people of the State of Illmois to any Cons. table of Said County builting you are heary communded to Summon of It Bunsher to appear before me at my office in Rockford on the 19 day of breenbu 1857 at 10 Odock AM, to answer the Complaint of Human Bill for a failme to My how a certain dum of not speculing one hundred bollens, and hereof make due volum as the Law directs Grown mide my hund rocal this 12"day of Greenbu A.D. 1867 James & Mendon & Whom the back of Which Summon is indoned. Danueys \$100. Costs , 31 Am Costs 25-Sevore Dec 16 457 by rading to the laction newed del. - Sevice, 28 milian, 05 -, 30, Esticker Const. Plaintiff account -I K brisher To Aumon Sill br For 30/3 Cord of Stone at \$4,50 \$136,30 [12550-2] 96.50 By and po apton on Promost & cordis

Dufts Drymse-Accuron Hill and the defendant Coneis of days he did not promise as the Placentiff has Complain against him to and deft will maist repor as an off Ist in this cause, an order ac-Ceptul Maine to Chas O Uplan for \$40 wrawn by Procest Sterling .C. and that the Stone for which this action was brought love bought of Said Firmock Sterling &Co: Franscupt of postice Justien, Court. Brown & & Mundow a pistien of the Prace Aannon Hill 3 Rockford brer 12 1837.

Francis K Dunshu 3 Assumpit Dancy \$100 c. Summons if I handred Couch obhicker Ortunable on the 19 wish at 10 oclock AM. Suth for Plf to fallen B Rilboun & A Straning Sunamous Returned Sawed Brev 16/37 By nading to the William Manuel dift. Els Ricker Const. Subp for buft to f Fracock I to Ford out I Second & "

Luth for Pof vito brown by meeding Ic i's hicken Court. Die 19 and now Comes this Cause of peutins appear and by Cousant Con mutil the 24 mit at 10 oclock Am. Subp for Plf + De to breened Cleuk Reta Ssion Ic Albut Coust. Luth for Pof I Dift Second by Mading IC Is & Ricken Court. Die 24 and now Comes this Cause & C putis appear, Wyohnson men for Pof de Latterf Esyr for duft. Wift asks for a pury Venin is Plund Fried on the above named Jun PA Hentwell Chenter Reighter to frotis W Robits of K Bringham I HO Killagy who appeared whe dry Impamiled of wome the declares for 30/3 Cord of Stone at \$4.80 pucero \$136.50 a \$44 \$ 96 2 buft. Show on buting Saul ifor Ist off voul on note of somock Studing &Co. Lords for Pof to 2 Promoch Af Brinock to Ford & Fracock + & allen B Kilboum & Sloaning & C D aplan for deft Soon Ic, after heeing the Soidmend the Jung Ortun & Mitum a vided for Poff for \$1/2 the Court Consider that on daid british Plf do hear programent against buft for Scome Scom Doller Jamagos Pight 8 hos dollar costs (not moluding \$1.50 pay for paint by deft, have some how therefor Il maulon & P.

5 fry 13/38 and now Comes defindant and prays an appeal to the Count Court having filled his bound & appeal manted of paper deat up to County Count & & mentoon for. mormul 77 Cests 888 puras fres 1,50 append 1.00 I hereby cutify that the abour is a true Comest Franscrift of The proceedings & proposed in this cause as appears of my books. The Maulow J.F. appeal Bond. Francis K hushu and of the Bount of Heinneburgs in the State of Allinon are held and fining bound meto Heremon brill in the person Sum of One Hundred and Scoul, from bollans lawful mong of the Monted States for the payment of tohich will and truly to be made we binel duston our heirs forcutars and adumestratos fontly Storrally and finely by these persents; Withup our hands and Seals this 13 day of January AD1858= The Conclinon of the above obligation is

Luch their Whuras the Saine Beenen Hile dree on the De day of Dreember AP 185%. before faces to mandow a postier of the France for the Saine County of tom nebago recover a programme a gainst the about bounder Fralicis K Dunshur, for the duce of Souly Seon Heleus Tamay dright o Egios Helais costs. from Which programmet the Saine Francis K brushu hersterken are appeal to the Court Court of the County of Winnebayer afoured and State of Illmois; Now if the Said Francis K brushu Shall prosecute his appeal with Effect, and Shall pey Wheteron profrmut may be Brelevel by the tout whom the descripal or had of Saw appeal then the about obligation to be bond; Otherwise to ormain in full force and 7 Romohn 25 Approved by me at my office E bile Is this 13' day of January 1838. James to maulour Justice of the Frace

Shewapon and on the day and year aprescive the Proples Write of Sommons fred out of the office of the Cent of Said Court to Said Secunow Hile appeller. in the boards following wint:

State of Illinois & Ss /-The Proph of the State of Delimois To the Sheriff of Said County Sucting Whereas in a certain cause lately pending byfore James & Muulove Esquire ou of the Justiers of the frace Coultin and for Said County Whein Aumon Hill is fluidiff and Francis K Dunshu is defendant profiment lows vindered by Jail Justice against The Jaid Dom Shee, from which preforment The Sain Winshe has appealed to the County Court of Said County: for therefore Commend you that you Sum mon the daire Humon Hill to be and appear Fifore Said Court on the first day of the next term thereof, to be held at the Court house in Rockford on the fish monday in murch Ar. 1858: at ten Octock in the forenoon, and abide Court in the peines: Portruf William Atulin Clark of faire Court and the Seal strongat his office in the city of hookford in Said him ne bago County this Thinteenthe day of February AD1838-William Anline Grul Cluky

Which Pain wit was duly notund to the office of trains Clark of sain County Court by the Sheiff of Said County with the following moors ment Thenou lowit: Stute of Illinois Binnety County 8. I duly Groved this with by Muding The Same to the bottom named off. Humon Hill this 15 day of February AD. 1858. Samuel Church Shiff By fames Warne Drh -Fers - Service, 50 Miliago, 5 Return 10 = \$, 65 = And That Dail Cause Coming on for Aruning at Pail Murch From the following moculings home had, as by the moords Adaid Court will appear: of Whien revole as to Jain Cause, and of all the Entires of Godes in Paul Court in relation thereto the following are full and here Copies ton Hannon Hill Eapprul by Francis Khunsher & Winsher Commenday March 10.1838 This day came the Said parties by there altorgios and force bring duy formed it is bothered that a fun Come; And theurpon Come a funy of good and Lawful men

212552-37

Swom, and having heard the Evidence and arguments of Counsel milit the hour of adjournment arrival by africant of the parties and bring fully Changed by the Court, heave is granted them to Separate and meet the Court of the honrof sine odock tomorrow morning;

Thursday March 11-1858-Humon Hill 3 Formies Klomohn

Shis day again came the said hurts by this lumin, and also come the pinos surpennelled and Sover to try pure found herein, and the Said pures having heard the rindence and arguments of Council or Consider of this brish And therafter the Said persons returned into Court. with the following or relationsh: but the Jung find the ifere for the Blain iff and apply his damages against the different dollars and thing four cents, And there afond the Said survey for a new trial, and in anest of programs.

Saturdy murch 13, 1858. Hannon Bill 3 appully buff. Francis The Brancher 3 This day again Come the Saw putis by thin altings and the court raing heard and maturely Considered the agreements of Cuust apon the motion heretofore Submitted & Said defendant for a new trul their, and bring fully advised there on, ourner daine motion; To which miling of the Court Said Difind. and rocepts. It is therefore considered and ordered of the Court, that daid Plaintiff heror and occoun of dain defendant the Sum of (\$95.39) Annel five bollows and thing four cents. This duringes by the prey heim apolard against Juil defendant as also his costs and charges heime depended, and that he hear desoution Therefor; And Thumpon the Said defendant mayo an appeal to the Supreme Court of the State of Illmon, which is allowed from. due Said defendant within ten days from the vising of the Court file his appeal Bond, and till of no ceptions, duly ho central and completed, in the office of the class. of this count: david Bond to be in the form

Ryund by Law in Such case in the // penal dim of (\$300.00) There Aundered Wolling and Lynice and Stuliel by Said Fouris K Dunshu as pricipal and by Edward & Willis or Chentes It Spuffer as drewy, Tithen of whom is hearly appround and acceptul as Such and Theunfou the Said defendant brushie, tenden his till of Eceptions me this cause. Which has signed and truled by the Court. and mude a purt of the encound in this aure, and is on the loved and figures following towns Hely advised there on, bonder dair motion; definitional from their therein, and bring when the mation theretope dutiente of dute by their altering and the court being him This dry again come the dain partir Astarby Murch 13, 1558.

In County Court of Ministage County St. 12 Francis R. Tunshee Harmon Hill The it remembered that apon this Fruth day of March, of The march From of the County Count of humbago County for the year 1858 = This Cause coming on to be tried before the Aon lenson S. miller Judge of Said Court, and a Jusy - the Cause being an appeal outo this count from a joustise of the Peace. and the action founded whom the following account on Claim, filed by said Plaintiff before the pastice towit; F. K. Turns hee For 30/3 cords of Stone at \$ 450 \$ 13650 By ant po aplon on Permodis of order To which action the Raid defendants before the furtice pleaded the General ifsue and gave notice in faid action as follow-

[12553-7]

That defendant would insist repor as an offset in Laid Course, On Order, acerpted and paid to beharbs O lepton for \$4000 Drawn by Fennock Starling & Co; Cend that the Store for which the action was brought, won fought of Said Pennock Stroling ofo. Waon which Statement of the claim of the Plaintiff, and the definise of Laid defendant the Said parties went to trial. The Plaintiff thru introduced Williams. Frances who testified as followstouis; I know the parties Recentiff and defendant in this cause, & am our of the firm of Finnack Starling Ho. Composed of myself, my Frother andno & Franck and James Stroling. I know of a contract to deliver Store to Sunshing) Mr (Pennock Starling ofo) made arrobal Contract - with Dunshu to let him have Stour; Three was no time & preified where slow were to be delined - and no amount to be delivered - here to be delivered as ordered by Durshu. Denshu was to pay of 4.50 persond to be measund on the case and delurned on 12552-8]

the Bank of the Kinn! 14 after the making of the contract, he delivend Denishee Some of the Stone on the tank of the River, Me nound our pay buty much for the Slover we deliend, Our Company delivered a Fifte our Eight Cords of the Stone - That is ar delivered 420 firt and 672 firt. I have no cutinet in the sout of this duit, Ur have received our pay for all the stone delime by us. Our Company Lold out to Hell the Plaintiff Our Loals quarry of, In Lold out to Hill about the time we delivered the last of the Eight-Cords; I know of Hill delierring Stown to Dunshee about two arrks before the trial before the justice. I hrand a coursation Istern Hill and Junsher in relation to the slow in gurstion. I was with Hill at the Cime and he asked Durshee for the kay for the Store -Durshu Said that he would kay himthat he Supposed he ourd him forabout-18 or 19 Cords of Stone, Hill Laid it was mon! Will then Said to Durshee, you know for you agreed to key me \$ 450 per Cord for the Stone & delivered to you. 312552-9]

and also for the balance the Company had deliand about the 40. & Order. and that I told you I was to have the pay for all the Store deliv-End by one and the Company except the 40\$ orden. and if the Store delivended by the Company did not amount to asmuch as the 40 f Order & Hill, was to make inake to you, Junshin) I'm Junsher Daid he did so agrees Cefter un sold out to Plf. Hill. & was Employed as a hand on the toat by Hill - & terfet an account of all cheston delivered - I masund the store and Ist all down on mismorandum took-(Miting producers pass book and Rays-Thrse an my figure - Thyun Sit down at the time with pricelfinst, and Levier & have burn over them with a Ken and out -Bitup then States that the whole amount of Stone delivered to Deurshin was a little our 20 Cords; by the

Withing them States Chat the Whole amount of Stone delivered to Denshur was a little over 20 Cords; by the Company and Hill both - the whole munder of feet delivered was 3978.

fut. amounting to 31. Cords & fut

512552-107

This was the whole amount of stone 16 delivered by Remoch Strating of a Hill = It Lold out to Hill Early in Octobers 185%, - for part, Cant State the day, -Me Loaked this Slow down the River Must of the Store for Decishee, were delivered about the Street- Bridge. Coop Examused by Deft. from about pens 1-1887, until un Sold, to Hill about 1867, actober 1867, I offend to give &. B. Skimmer an order one Demskee for pay for Stone - Caus-State the date - It was before the date of the order to wplon. - about - Samutines - humb him shown the order given to aplon Satra October 24th 5-9, -Motures Lay Ohn Grear Shown him was ginn at the date things -That he had not the on jound Dunshee, that they (the Company) had sold out to Hill - Lars not know that he som

informed Sunsher of the fact, does not

know that he ever exposed said arry thing to Dunshee about it - That if he had given the order to skimmer he should not have given the Order to alplon -I Cannot ormander the date of the delivery of the last of the stone by the Company to Dunshee, - Think is was last of Septimber -Most of the Store for Denshee un delivered from 4 to 6 rock about Street Gridge, - Some delivend about same distance below, - 5 boats loads abour, and 2 or I boat Loads From, I do not reollist of any other prison to whom we were deliving flow, atthe Lames place, while we were delivering Stom for Junshee -He fold about 5 Cords to anothing proson, at or about that time, which win designed about the same time, but we kept the Stone for Dunshee Superates The for Cords were delivened below the Frielys; I think two Car loads of Slow um delivered about the ondge for Mr Klakeman - mr Colburn diel not have any Stom from thin - In delivered 112552-12

his abour Slaughter house Lone ways abour Junshus Store -Am Hill had not from Connected with us in dusiness offer the Igher to him, He had been upon the boats Losano Same Franck Striling do had Colkres with Sunshee about Ston for 1 year, along in Septimon 1859, au madia Largain with Dunshee for Stone: Then had from falk fut thin was nothing Linding on the parties until Raid Se plumber-The agreement then was ; that Dunshee was to have the Stone at \$ 46 open Cord, on the bank of the turn, was to han them as he wanted them, he agreed to deliver the Stone; no binding fargain before, (Witness requested, again to state what was said at Commention between Hill & Dansheer Hell Said he counted Junsher to Settle for those, Stone; Dunshu said he would pay him for them - Demokee Said he was owing him (Hill) for 18 or 19 cords of Stone; Im Hill said it was more; 510552-13

In Sunsher said the wall was 1/2 feetin hight - length and breadth could not say: (Hill Laid) you know mr Sunsher, that I spoke to you after I sought the toat; that you were to kay me for what stone gon had often that time - (Demshee Laid The boys had given an order - Hill said he would alow that -The price of the Stone was Rpoken of before, Demakee Consented to pay Hell firste Stone; Sunsher Spoke of measuring on the wall - Hell Claimed to have their measured on the can - Demohel said he would, pay him for the Stone - Hill calculated to See him in the County or Cercuit Court if he did not pay him; but he put Hell off centil after the lastday of Lervice. The conversation commenced in the Street mear & Rimers Shop, and we Then all went up to the cellan, The agreement, between the Company and Hill in relation to Dunsher, was, That On. Hell was to fell the Contract-

with Sunshee , That was the agreement of mo Hell and the companyLove at your measurement on the case?

(To which writiness answered) - "Rothing was said about who was, to measure the slove" - Slove were to be measured on the car; Denasher was not presund when any of the Stone were measured -

Direct Resumed!

Stone; - Did not Blate, Intriess went on State at what price the Company Lold Stone; Which was objected, Coty Deft, and Offiction Sustained by the Court

erate: Dunsha designated place where Stone were to be delivered; the left the Stone there— Contractwas, that Stone were to be delivered, on bank of River— he had nothing to do with Stone after they were delivered on the bank

Witness again orguested to state the final. Contract believen Pennick Sterling Ver Dounshee in September 1869. (Witness Said) Deurshee Sometime in September

(Itilines Said Vernshee, Some time on september last came to the Soat, and Durshee theusaid

K. C.

Tennock & am going to Ligging ony 31 - Cellar and want some Stone: Atotel him the price would be \$4/2 per cord for the stone delivered on the bank -Iconshee Said Cant I have these Stone for lefe, I told him no; Junshee Said he would take the stone; I told him he could have them, o Sinsher assented, Pritries afterwards said that by the agreement, Stone were to be measured on the cansased in conveying the stone from the quany on to the boats) Crop Exo, -The Cold Am Hill what we were.

letting Dunshee have the Stone for .-The Plaintiff then introduced and with be resulted as a witness who testified as follows -I am one of the Company of Buck Sterling to - The Company let Dunsha have Stone - I met Im Densher at the End of Pridge, he said he should vant some Stone, Cannot-State the date but in was before we hold to Hill.

We sold out to thele latter partof Summer or in the fall, Conf State the time! It is in writing, and could tell date from papers, after we dold out, for Hill delivered Stone for Teusher - Delivered at Same place we had delivered; -Heand a conversation between Hill and Dunsher on velation to the stone. Hill wanted Teenshee to settle ap for the stone, conversation commenced near Skinner Shop in the Street, Chryself my Frother from I. and mos Hill & hor Seenshee were present, No other present. There was a consider Erable conversation and after a while we all went-up to the Cellar, Carriotsemmer all that occurred, Tunshee Said he Supposed he owed thill for 18 or 19. cords of stone. Hell Daia I was more! Dansher Sauce they might-measure the wall or get some one to: Durshee Said the Wall was 7/2 feet high Hill measured and found its feet-512552-17

high. Hill said he would leave irour to any two men Sursher might pick. That he did not want any trouble. Hell Said to Juns her. you Remainer I Cold you I had bought the toat and fixtures, and what Stone were delivered after that date, you were to pay one for, Something said about the price, Hill Lard he coas to deliver the Stone The same as the company were it Durshy Said that was so: Hill was to take the Contract off from the Company hands & deliver the stone and have the pay; Ut this time in the conversation-Something was Raid about the Order afo apton - Hill was to have por for the stone and to give Sunsher Or, for the \$40, order: Sunsher said he would pay him for the stone - would pay him, then at his (Denshees) own measurement; Durisher Said the would not pay fin for any more Stone than hefundelf made; and that he would not pay for any more stone than he made by his measurement; Durcher Laid he did not case what others made in if I was double what he made it, he would Only pay according to his own measurement JI3223-18]

Crop Examind

Our Company let Itell have

24 The Contract - at the Lame terms we hade in & Hill was to have the pay for the balance of Stone to be delivered by him, and balance appeared of stone delivered by Company over the 40% Order.

Donathan Pecock. was called as a Princep

Sonathan Pecock. mas Called, as a Nitrely on the past of the Plaintiff and Certified as fallows;

Nitres was asked market price of Stone Last fall, Said he hought Stone of Permock Sterling of last Summer, Rarticulars of bangain much out, Could not get stone of Others for lef than \$ 550 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;

Deft Testimony.

John allen, was then Swow on the part of the defendant, who testified as follows 23, tours, I am a stone mason, by trade I have been Engaged for Deveral grans in Frawing Stone & Selling the Same on town! I know the Cellar of for Junsher Where the stone in question were used, Stone Luch as were used in that-Cellar, mere 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; & think it would be worth one Tollar per cord, to deliver love Stone from where the stone on question were delivered on bank of River to the Cellar of Defendant, or \$125 per Cord if Stone measured on the wall. I have measured the walls of the Cellar of the Seft - The Walls Contain 19 cores and forty feet of Stone - Devas asthe Cellar two or three times while the walls were being built-

Mas introduced by Ift. Mig: "Reckford Colober 24, 1869. "I Decushe, Sir Please per Charles Co Apton or beaser Forty sollars and Charge the same to my ap. Pennoch Stesling of d's (Indersed) accepted I I Deurshee

My a granul of parties, gollowing oder Weller A to Heaven The to South is truck ' (Hederice) Generalist Simbol on make //

Crafs Examined mile from Town: Pennick Stirling old quary has Jour or five miles from Town: Drew, Stone from my quarry with Ceans -I was at Septo Cellar two or three Cimes white the walls were being fuilt. I then noticed the thicking the of the wall! When I measuried the walls when finished & could not tell the thicknep of the wall; De measured all af our stone in the wall! One Cord of loose Stone Will mens are about 100 feet in the wall -A Charged more for stone where I hauled them over the River the dis-Cance made the difference in the price Charged. John Burnes, for Deft, Sworn; Lay Dam a well digger -Duy the well at modernshees Cellan-The well is 27 feet & 6 wiches deep. Omyself & Capastner Slowed the Well. 212552-217

27 Cords 490 feet. Infordant then introduced almeron &. Marring as a Wetness who testified as follower to wit! I am a builder by trade, am the brother in Law of Seft Duseshee-Trow the Cellar of Jeth Iren the plan and Superintended The Fuilding the Cellar balls, -The walls were built my John Hays ander ony disection, The quantity of Stone on the males of the Cellar was 19 cords 4/3- feet: A Know where your Dunsher gut the Stone for Cellar & sell; & die not Know of Demoders having Stone Jorany Other purpose than the Cellor & Well I think & Should have known the fact, if he had used stone for any Other purpose -Past of Stone were drawn from a pile above Street- Fridge ; 4 a part from a pile Bridge ;

When mr Junsher was drawing from the pile below the Bridge a. 28 for freed was drawing from the Lame pile to a this Burns veraf the oriver let the time the slove on question were delivered, the market price of Stone on brist side of River was \$ 5,50 per cord measured in the mall. I performed considerable lasor I furnished materials, for Pennock Sterling No in building their boat in Spring of 185%, I had stone of the Company more or les during the Leason; I got 1/2 covels of Stone from The pile that Dunshee was I vaury from below the bridge, This was about the time denshee. got the last of his stone, I had not at this time heared that fermock sterling blo had Dold Out, or that Will Claimed any interest on the baut or Stone, Grap Examina Have no occollection of telling wither of the Permocks or Hill, that

I borrowed 1/2 cords of Stone from. 29 Denishee Infrudant here rested his case -William I. Pennick or called by the Plantiff, who teatified as follows Dr. any self Hill & andrew J. Pennock: Went to See Warring to see what stone he had got. Warring Said He forrowed 1/2 cores of Stone of Durisher which he got below the bridge- We went to Dunshee the Laid he had not loaned Marring Stone, he their went fack to Waning and told him What he Deurshee had Raid , but he still crisisted that he Dunshees die lend the Stone to him -The pile of Stone for Dunsher was below the pile from which Burns took stone! Condrew f. Pennock Recalled by Plaintiff Says, Am Marring Daier the borrowed Stone of Deunshee, This was after

all the Stone had been delivered.

Im harring had been Irawing Stone from the other side of the River:

Burns did not Iraw Stone from the Pele we let Iemshe have as stated by Marring in his testimony. Out from a pile mearer the Bridge a file we had delivered for the City of which we sold a past to Burns.

plaintiff then Called James Sterling as a follows.

I was one of the firm of Pennoch Stirling & Co. I know of a Contractto deliver Deinsher Stone. I met Om Devisher Ence; he wanted to Servow if he Could have the Stone I He also wanted to know if he Could not have the Stone for lef than \$460 per cord. I told him we could not let pisco have them for left — He wished to know whether the stone he could depend on having the stone when he wanted them Dunsher got must of his Stone below bridge -

Crap Examined~

Im Sunshee was out of Stone above the bridge, and we had a pile below the bridge and told Im Densher he could go and draw from there -

Evidence introduced by the parties apor the trial of this cause -

of the Coursel for the respective asked the Court-to instruct-the fury as follows - which instructions were given by the court towit.

Plaintiffs Dustructions If the pury believe from the Evidence that Pennick Sterling Ho, made a Special Contract- with the defendant Wherein the said vermock Sterling of were to deliver the defendant -, what-Stone de omight-want-on the bank of the River as ordered by the defendant at the vate of \$450 per cord, to be measured on the cars, and afterwards the Said defendant, agreed to take the stone from the plaintiff horein on the same times that agreed with Lennoch Sterling , lo, then the pury are to Estimate the Plainty so dariages, from the measurement on the cars, If the Juny believe from the evidence 20 Chat there was a Special contractbetween Plaintiff relegen dant - that the Plaintiff performed the contraston his pant, then the fury are to Estimate The classages from the terms of the contract,

De the pury believe from the Evidence that Starting Contract -Bo with the defendant, and that afterwards Pennoch Sterling alo Dold out to the 33 Plaintiff all the night and interest in the contract, and that the defendant had notice of this and continued to seceive the Stone from the Plaintiff Hill on his Hills own right - on the terms of the original contract- the Plaintiff Hill fras a right-to recover of the defendant of the stone delivered by him on the terms of the original Contract, If the pury believe from the Evidence. 4th that the Plaintiff, Hill, agreed to pay the Forty Dollar order Irava by Permock Sterling Ho and that - the Rainty Will was in that case to be alowed, 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 Pennick Sterling & Co, and also by the Plaintiff Still - Qualified by the court as follows) Roveded the Jungos believe that there, was on arrangement between all the parties, by which 112550-23

the defendant Dunshee was to pay the Plaintiff Hill for the Stone, delivered by Sterling & Co in buliew of fay ment to the latter -

Ithe If the pury believe from the condense

That the defendant agreed to pay the

Plaintiff for the Stone delivered, by

him by Plaintiff is Prinock Sterlingsto;

Then the Plaintiff is sutitled to seaver

from the defendant in this actions

(Qualified by the Judge as follows) Borieved

the purors believe from the Evidence

that there was a communication of,

and arrangement between, all the parties

So that the claims of Pennock Sterling of

on the Sept Denshee weere Extinguished

& that the deft Should pay the Plaintiff

Hill:

For the opinion of the Court in giving said instructions to as keel by the Plain tiff, and Each and Every of them, the said defendant then and there Excepted -

The defendants counsel, then asked the Court to give the pury the following instruction 35 marked Defendants instructions & rumbered The and the Const-then wrate upon The margin of said instruction humbered 1st as follows, "Seven Revoyet to provision in Plaintiffs & instruction as to biling of Junors relation, to arrange ment of parties, Dechsequent to original Contract - between Deft Dens he Nemock Sterling ofe" lind the Court then wrote whom anna margin of Laid instruction mumber 2. as followes "Siven Subject to proviso in to custraction orfend to", which instructions and Each of them so modified by the Court, were then and there rul by the Court to the Juny, and a the opinion of the Count in to modifyong said instructions and Each of them the defendant by his Coursel, then and there Excepted. (Whereleson the Court Stated to the defendants coursel that he ander stood him to consent that the modifications be made by the Count but that if the Count \$12552-307

Amsunderstood him, he would, pass copou the instructions as first govern asked, and thereupon the Modifications and the words Twen't were Stricken out and the words "Kefused" marked on the motions,) Und the Said defendant then and there Excepties to the opinion of the Count in refusing Laid instructions so asked by him and Each of them December 2. 60 folders " Seven the mention of soils entirement have 18 - Could the Constitution of fifteen From fell Officiant beatend wheremone the definerable second, then asked too.

Infrudants dustructions : That if the pury believe from the Evidence that William I, Kunock 36 andrew & Francik & pames Sterling Entered into a Contract with defendon't Sunsher for the sale and delivery to him of the slove in question on this cause, and commenced the delivery thereof, and before the completion of the contract assigned the same to Plaintiff Hill, and that - Quiel. Hill, completed the delivery of the stone cender such contract, that then this suit-should have been brought on the names of the Daid William & fermoch, Andrew & Permock and panies Sterling; and the Plaintiff countr maintain an action therrow in his own name, and the pury will fine for the defindant in this action; Ind That if the gun believe from I the Evidence that William J. Pennoch and pames Storling Entered out a contract-with defendant. Icenshee for the Sale and delivery to him of the stone on question; and commericed the delivery thereof, and refore 2/2552-31)

and before the completion of the delivery of the stone, assigned the con-37 tract to the Plaintiff Hill; and Raid Hill completed the delivery of the stone 2 m in question; and Should also believe from the Evidence, that - Said Dinshee promised faid Hill afterwards, to pay him, Said Hill for the stone he had delivered under Daviel Contractand also for the balance un paidon the stone delivered by said Pennock and Sterling, on Laire Contract, that such agreement wereles not Support this action unless the Jung also find from the Evidence Charlthere was some other and new Consideration for Duice promise: Or coules the pury find from the Eve= dence that there was a communication between all of Raid parties towit? Said Pennocks & Sterling, Dunsher and Hill, and a new arrangement between all said parties Entered into, by which Suice Permocks, and Sterlings claim upon Dunshee for Stone delivered was veleased; and by which said Hill also released all of his claims upon said Penweks A Sterling upon the apignment of Love Contract

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Und the Such Cause was thereafter Submitted to a funy, who returned outo count 38 with a virilies for the Plaintiff for the Rum of hunely fine & 34/100 Dollars. Und thempon the defendant by his council moved the Count-for a how Frial, for the following reasons. 1 st - That the verdict is against Evidence 2 nd - That the verdiet is against - Law. In That the count smed in refusing the custometions asked by the defendant and Each and Every of Chem; 4 - That the court Erred in geing the cristmetions asked by the Hamiliff and Euch and Every of them; and the count exect having heard the agument of coursel thereon overrules the motion and deries the fame, and renders pudyment on the vendier of The grong to which decision of the Countan overseling and denying said motion for a new trial, the faid defendant by his Coursel excepts oprays that this his bill of Exceptions may be signed and Lealed by the count-truede a pant-of the seedingly: This cause, and it is done accordingly: Mon & Miller of \$ 12552-33

aftenound towit on the 22 by of much 1858, filed in this court his appeal oring in the boods ofiguess following towirt

Throw all men by these presents, that Mr Francis & Sunskee as principal and Edward & W Ellis as Surety are held and firmly bound auto Harmon Hill of Minutery of Circuity Blinois in the Lune of Three Handard and shollars lawful money of the Minter Slates, to be paid to the Paid Harmon Hill, his resecutors administrators or assigns. Which payment well and truly to be made we beard ourselves, our hims, Exceptions and dolarinistrators, and may of them finnly by these present = Dated at Rockford Bll, and Staled with our Stale this Do day of March & 1854-

Whenas at the March From 1858, of the County Country Gluis, of the Country Ellinois, the Laid Hamon Hill (in a centain Course them depending in Lain count-in which Laid Lumion Hill was Plaintiff and Laid Francis of Dunshee was de-fundant of troovered a fuelyment against the above bounder Francis R. Junshee

for the dern of Ninety five 3/100 Dollars fraceles costs of Seior: from which Judgment the faid Francis It Durshee then and these oppraled prayed an appeal to the Supreme court of the State of Allinois, which was granted; Now the ciridition of this bound Obligation is Luch that if the Said Francis It. Dunskee Shall duly prosecule his daid appeal, and Shall pay the Said Judyment, Costo, interest and damages in Case Said Judgment Shall be affirmed; The above obligation shall be rules and void, otherwise to remain infull In presence of F. K. Yunsher Can Edwo Th. Ellis En State of Minnels, County of Winnelson, I, Willia Hulin, (lash of the County (unt for said lounty, do certify, Unt the foregoing is a time and full copy of the records, prapers and proceed-- ings in said (ounty fourt in the whome entitled ande.

the Scal of Said Court at my office in the fity of Asolford, this fifth day of a spiril, at the 1838.

In the Superne Court of the State of The affice Illinois of the affice Francis K humshee! Sappral = and the Said appellant by Dathrof & Brown his altornize Comes Days, that me the Record and proceedings me this cause, there is maniful Error, In this towns! That the Court Erred ne groing the frist, three, youth, Spifth, misting ctions asked by the appeller, and in groing Each and Eon of Said, m-Shuglions, that The Couch Erred no modifying The mohuctions (marked 12 12) asked by the appellant, and Emd no modifying Ruch of Them; That The Court Ened on refusing the the motinations asked by applant

(munted 1" +2°) and in refusing East and Roy of them; That the Court Erred on overreling the appellant motion for a new the order of the July-Und the Sauce appellant prays that the Saine Indement I proceedings may be vacated, rounded accounted Ist offir and for nought held I Esteemed alt for appellant

Super Court Francis TV Danshe Hannon Hill apriment of Swars Sattruf of Brown

199 appellant. Drushee Hannon Hill Transcript-Filed April 21.105'8 Leland, Och,

In Supreme Court: Francis K Donohue appellant Dumon Hill till Sund Drusher before a putien to recorn the balance due for culain Stone delround to Wanshee, by the from of Franck Sterling to. and & Hill himself: bunsher appealed to County Court of Winnebugo County, When Cause lows tried at march term 1858. and granmentagainst Durshue for \$ 95-34 & Costs Doushu appealed to this count; The Evidence is all preserved in bile of Exceptions o instructions, askere; Comb. Phadue brul. forme or gave notice of for off or that Stone were bought of Promock Studing I Co.

The Private fall Errors Spieuce me:

1- The Counts' refusal to grant a

New First;

2 h giving the instructions asked by the
Plaintiff below,

3° hi refusing the instructions asked by the cliftened and below -

The testmony in Substance Shoros. That in Siptember 1857. Dunshe Made a Contract- with Primook Stevling I Co. to deliver him Stone; That after the Stone love part-delived Primook Stevling I Co. afrigued the Contract to Aile, mul Hill Completed the delivery of the Stone?

Promock for Hill Moran, that at a Con-Onsation between brusher and Hill, about 2. boreks, before the trick before the pusher; Donshar then acknowledged, that Hill had at Lome pervious time, told him, that he Hill was to have the pay for all the Stone delioned, by tile and by
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Amount of the 40 p order Drawn by
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Smoot also Swans, that they Sold to thill forepeat of Soloher 1857; And that one 24 of Botom Runsher, and that he had 40 f order on Drusher, and that he had not their informed brusher of the aprinment of the Contract;

The Plaintiff in Firor maist That the Findence, does not Support the action in Aill's Mame; that the action Should have been brought in the name of Promoch Steeling I Co: And that the Court Should have frank that the Court Should have granted a new trial Mc Kinny is alvis 14.21, 33, 3 Hile 88 Parsons on Contract bol. 1. Fitte Sovetim page 187.

The buly the point Controvaled in the Court below was. The amount of stone delioned of price The Plunckiff below Claiming to recovery for the Stone of Measured on the Car, by from 20 Permook; And the befordant below Claiming, he was not bound by Permooks Measurement on the car, and if hiable at all, loss only liable, for the quantity actually rice of the learned; Am do Princell for the Plaintiff below, Surus that the Measured on the Car, all the Stone delivered for homshee, both by Princell Sterling ICo, Ity Hill: that the quantity loas 31. Cords I of fast; and he deed days. that It loas, oqued in the Contract - br-thorn from ook studing ICo; and brusher that the Stone Should be measured on the Car; but, that I. was not apred, who Should measure them.

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It Shows no new Contract between bourshie I Hill; It shows no discharge of the Contract between Promoch Stating I Co, and bourshie; and it Shows no promise or moderations on the part of Hill to deliver the Stone, to perform the Contract on the part of Promoch Sterling of Promoch Sterling of Promoch Sterling of Co;

The rights of the parties moder the Contract or must be much; and if some hable to Hill, on the Contract for the Stone delivered; then till much theor been hable to Demake, for their now delivery; and there is no puteres of any promise, on the part of till; to deliver the Stone; or of any plation between the

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In the Supreme Court.

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

Appeal from the County Court of Winnebago County.

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

Plaintiff claimed pay for 30\frac{1}{3} 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.

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 30\frac{1}{3} Cords of Stone, at \$4,50, \$136,50 By amount paid Upton on Pennock & Co's Order, \$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:

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(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 receollet 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 $7\frac{1}{2}$ 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 Percock, Soring & 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. Durshee 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 want on the bank of the river, as ordered by the defendant, at the rate of \$4,50 per cord, to be measured on (Given.) 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 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 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 provise 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 mo lifying 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-

(Given.)

(Given.)

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der such contract, that then this suit should have been brought in the names of the said William D. Pernock. 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.

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.

(Refused.)

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.]

attinf 18 rou

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.

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Satter for Brown

Harmon Will appeller
ands
Francis It Demobre Appellant

State of Allinois Supremo Court April Form 185-8

Appeal from Unneways County

Come L. J. Hamin alty for appeller and represents und inserts Thut Mere is no error in the record in this cause as arrigned Und Theur the Court that the recent in this cause theres this suit to have been brought to recover the price + value of of Stone sold & delived by Jephelle to appellent at \$ 420 per cont, commen cel before a Justin of the Pener and an appeal to Ken to Co Court of Munichago Co Where a tried was had and usutted in a verilect for appellant from which The appelleent look his appeal to this for that the instructions asked by appella I That the court erred in modefyry The untructions asked of appellant

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I. That the Court erred in not giving the instructions asked by appellent 4 m That the Court erred in overruling liphellants motion for a new trial and Funt Diel the evidence support the Cause and supposed the virded of the The evidence shows there fuets. that some time in the summer of 1857, Pennock Sterlin & Co, agreed to let Sunsher have some stow at at \$4,50 to be measured on the curs & delivered on the Bunk of The Rever as required by Dunsher, and Unit after Pennock stirling had delivered to Dunche Eight cords and some Juo feet in all lew hundred & muely two feet, Thut Pennock Stirling to sold out The Bout Stone quarry of to the peller Hell about the first of belother 1857, Thut some time after the time not shewn leftpellant Hall Enformed Dunshu That he head bought out the Bout & Stone querry of Pennoch stirling + Po, level Hant What stone were delivered of him Plant In Durcher Smert puy him for,

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Je JE Dunshu Harmon Hill Brief & Rounts File May 14.1858 L. Leland Elk AJ Murner

In Superne Court: Francis K brunshie

appellent:

Annow Hill Hannon Hill Uppellee Hile Lund brusher, before a justice to neover, the balance due for Certain Stone delivered to Dunshie, by the fine of Francek Sterling I Co, and by Hill himself = Mushee appealed to County Court of winmbaga Comy, where cause was tried at March From 1858: and prefronch against brushee for \$ 95 to & Costs: Wurshie appealed to this Court; The Evidina is all persuad in bill of Roceptions, or mistructions asked of mittee Entir in abstract Brusher before the Justice in the Co Court. Phadul bent ifne a gave notice of Ist off o that Stone love bought of Permock Study The pricipal Errors aprince I the Courts refrescol refusal to grant. a New trial, upon motion of bift below:

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

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Sterling I Co. dew the 40 f brdu on withher, and that he had not then my ment of the apign ment of the Contract:

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Amse Promood, for the Plaintiff below.

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Mon the Print, that Hill Could not maintain the action in his brown mame; The Plaintiff in Error Complains, of the Court below, in refusing the motivations, and Each of them asked by hime, and the giving the nistuations asked by Pleantiff below;

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br of any Mation behoven Hill and Durshir, by which Hill looned have bern hable to blusher for non delivery! Dursher remedy for failure was vigainst Permisch Stertings Ho. I ho One Else;

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he Superin Cont Francis Khrushre Human Kill Points rem houting of Plfs Court Lattrof Brown

Me Lupence Court. Francis Kl brushne & Cappellant Hannon Hill Uppeller Brimber & H. I. Hill Luck brusher before a Justier, to Reover the balance due for certain Stone delivered to Dursher by the fine of Puncock Stuly I Co, and & Hill himself; Durshu appealed to County Count. of winnebugo County, When Cause was mid at murch term 1858, and propriet against Dansher, for, 95.24 rests Dunsher appealed to This Court's The Evidence is all personed on the bile of he ceptions; I mistructions as hed I printed, Entir in abstract; Dushu before the pesties on the Co. Court Headed the General four I gave notice of Och off, I that Stone wire bought of Penned's Steeling & Con [12552-59]

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The only other point Contravilled in the Court below ovas, the amount. of Stone Orlived I price, The Planitiff, Claiming to recover for the amount as measured on the Car. by Am & Francock; and The Hambaut Claiming he was not bound by Permock's meas mement, on the Car. and if liable st. all; was only high for the Guantif, actually hims. Recover

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Shut the Court also Grad, in refusing Said mostructions So asked by the Orfushand below: after the Court had modified Said mostructions, and made them

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and operates to mislead the pury by refusing methods, after they have been raid to the pury, and Should not be done, mult the methous as read, are not law;

The Evidence does not bring this case lostin the Doction of the case of Mc Casty is Osbome. I Blockford. 326, In that care the first Contract was abandoned I a More one made, whom the Soach terms of the first, the Flore parties bring persent and all assenting thereto.

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In Supreme Court 199 Francis K brushee Humon Hill Ponts rauthoute, of 13fs. Comme. Saltnot Brown for appellant

In the Supreme Court.

FRANCIS K. DUNSHEE, Appellant, ads.

HARMON HILL, Appellee.

Appeal from the County Court of Winnebago County.

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ABSTRACT OF THE RECORD.

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

Plaintiff claimed pay for 30\frac{1}{3} 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,

	HARMON HILL Dr.,	
For 30 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.

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(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 ears, 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 loosestone, 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 $1\frac{1}{2}$ cords of stone from Dnnshee.

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 Per tock, Soring & 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 Durshee got mo tof 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 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 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 interest 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 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 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 provise 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 modified by the Court, 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.

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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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(Given.)

(Given.)

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 count 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 (Refused.) 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.

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.

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