No. 14799

Supreme Court of Illinois

Doane

vs.

Bartlett

71641

STATE OF ILLINOIS,

SUPREME COURT,

GRAND DIVISION.

No. 10

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

Doane

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The answer to this is that the ONUS PROBANDI was on the plaintiff below, and it may well be that we could not prove affirmatively that the causes of action did not arise in Rock Island county. It was not our place to do so. If the ONUS were on us, the point might be well taken for then the matters which we expected to prove by the witness, Corbin, would not avail us in any event, if we were not prepared also to prove the other branch of the issues, as it was, it could have been avoided by plaintiff waving that issue.

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"The number of skins actually contained in the 289 bales being un- "certain, the plaintiff had failed to show that he was authorized by the "terms of the contract to draw bills which the defendant had refused to accept.

"Plaintiff Non-suited."

Again, Mr. Story, in his work on contracts, page 308, says: "When "the terms of the contract were that the seller was to carry the chattel "to a certain place, and there, if upon admeasurement, it was found to "contain a larger quantity than what it had been assumed to contain, an "additional price was to be paid at a fixed rate for surplus, it was held "that, until admeasurement and actual delivery, the sale was incom- "plete, and the loss must be bourne by the vendor," and quotes

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Filed Apr 16 1861

A Leland

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195

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Argument for appellants

Filed Apr 16. 1861

E. Delano Clerk

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On both of the said replications issue was joined.

February 2d, defendants below moved for a continuance, and filed an affidavit.

The court over-ruled the motion, and defendants excepted. (See Abstract, p. 1.)

Did the court err in over-ruling the motion?

The affidavit was attacked on three grounds:

1st. That it did not show due diligence in the attempt to procure the witness' attendance.

The bill of exceptions shows that, by a rule of the court, no civil causes were to be tried by jury until the third week of the term. (See Abstract, p. 2.)

Monday, January 28th, was the commencement of the trial week.—The affidavit shows that, on the 19th day of January, and as soon as he knew that the witness would be necessary, (See Abstract, p. 1,) the de-

fendant, Doane, did all in his power to obtain the presence of the witness.

It will be remembered that the defendants resided one hundred and eighty miles from the place where the trial was to be had; that the summons was served but twelve days, and the declaration filed but ten days before the term of the of the court, on the fourth day of the issue week, although the issues were not made up or offered by the plaintiff below, and although, by the rule above mentioned, the trial could not take place for nine days thereafter. The defendants made every exertion to procure the attendance of the witness, and, on the thirty-first day of January, which was before replications were filed, caused subpœna to issue to Cook county, which was returned, as shown by the affidavit, "not found." We submit that reasonable diligence, on the part of defendants below, was shown.

2d. That the matters stated in the affidavit were not sufficient to authorize a continuance, because not shown to be material. They go but to one branch of the issues, viz: that the contracts were not specifically made payable in Rock Island county, and if the causes of action accrued to the plaintiff in Rock Island county, those facts would be immaterial; it was contended that the affidavit should have stated that the defendants expected to prove by other witnesses that the causes of action did not arise in Rock Island county.

The answer to this is that the ONUS PROBANDI was on the plaintiff below, and it may well be that we could not prove affirmatively that the causes of action did not arise in Rock Island county. It was not our place to do so. If the ONUS were on us, the point might be well taken for then the matters which we expected to prove by the witness, Corbin, would not avail us in any event, if we were not prepared also to prove the other branch of the issues, as it was, it could have been avoided by plaintiff waving that issue.

We think that in all cases where an affidavit for continuance has been held insufficient because it did not show a perfect defence, it will be found that the facts relied on were in the nature of confession and avoidance, and therefore the onus of proof was on the party presenting the affidavit, and did not, as in this case, go to answer directly the opposing case—

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It is difficult to conceive of a statement of FACT covering the issue, if this is not one.

The court erred in over-ruling the first motion for a new trial.

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

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The evidence is briefly this: Dudele, the witness, while in Chicago, made a contract with appellants that he and his neighbors would send melons of a specific weight to Doane & Co., and, on their receipt, Doane & Co. were to count them out, select those which were within the terms of the contract, throw out those broken on the way, and small ones, and mail to whoever sent them their (appellants') check on their Chicago banker for the money due, at five cents each. The issues are:

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Argument for appellants.

Filed Apr 16. 1861
A. Leland
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John W Dorne Wm D Manchester & Thos W Anderson appellants

vs.

Michael Bartlett appellee

argument for appellants

Filed April 16. 1861
D. Kellum
Clerk

SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D., 1861.

JOHN W. DOANE, WILLIAM D. MANCHESTER, & THOS. W. ANDERSON, — Appellants.

vs.

MICHAEL BARTLETT. — Appellee.

Appeal from Rock Island County.

ARGUMENT FOR APPELLANTS BY CHARLES M. OSBORN, ATTORNEY.

This was an action of assumpsit on common counts. Summons issued Dec. 31, 1860, to Cook county, served January 2d, 1861, by sheriff of Cook county. Declaration filed January 4th, 1861.

Court commenced January 14th, 1861.

Appellants, who were defendants below, resided in Chicago, and, on the 16th day of January, filed their plea to the jurisdiction of the court. February 1st, plaintiff below replied double, as follows:

1st. The causes of action accrued to the plaintiff in the county of Rock Island, and not in the county of Cook.

2d. The contracts were specifically made payable in the county of Rock Island, and not in the county of Cook.

On both of the said replications issue was joined.

February 2d, defendants below moved for a continuance, and filed an affidavit.

The court over-ruled the motion, and defendants excepted. (See Abstract, p. 1.)

Did the court err in over-ruling the motion?

The affidavit was attacked on three grounds:

1st. That it did not show due diligence in the attempt to procure the witness' attendance.

The bill of exceptions shows that, by a rule of the court, no civil causes were to be tried by jury until the third week of the term. (See Abstract, p. 2.)

Monday, January 28th, was the commencement of the trial week.—The affidavit shows that, on the 19th day of January, and as soon as he knew that the witness would be necessary, (See Abstract, p. 1,) the de-

fendant, Doane, did all in his power to obtain the presence of the witness.

It will be remembered that the defendants resided one hundred and eighty miles from the place where the trial was to be had; that the summons was served but twelve days, and the declaration filed but ten days before the term of the of the court, on the fourth day of the issue week, although the issues were not made up or offered by the plaintiff below, and although, by the rule above mentioned, the trial could not take place for nine days thereafter. The defendants made every exertion to procure the attendance of the witness, and, on the thirty-first day of January, which was before replications were filed, caused subpœna to issue to Cook county, which was returned, as shown by the affidavit, "not found." We submit that reasonable diligence, on the part of defendants below, was shown.

2d. That the matters stated in the affidavit were not sufficient to authorize a continuance, because not shown to be material. They go but to one branch of the issues, viz: that the contracts were not specifically made payable in Rock Island county, and if the causes of action accrued to the plaintiff in Rock Island county, those facts would be immaterial; it was contended that the affidavit should have stated that the defendants expected to prove by other witnesses that the causes of action did not arise in Rock Island county.

The answer to this is that the ONUS PROBANDI was on the plaintiff below, and it may well be that we could not prove affirmatively that the causes of action did not arise in Rock Island county. It was not our place to do so. If the ONUS were on us, the point might be well taken for then the matters which we expected to prove by the witness, Corbin, would not avail us in any event, if we were not prepared also to prove the other branch of the issues, as it was, it could have been avoided by plaintiff waving that issue.

We think that in all cases where an affidavit for continuance has been held insufficient because it did not show a perfect defence, it will be found that the facts relied on were in the nature of confession and avoidance, and therefore the onus of proof was on the party presenting the affidavit, and did not, as in this case, go to answer directly the opposing case—

As, for instance, in Bailey vs. Hardy, XII Ills., p. 429.

3d. The matters stated in the affidavit are conclusions of law, and not facts.

This objection can scarcely be tenable; the words of the affidavit are:

"Affiant further states that he expects to be able to prove by the said Corbin that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island."

It is difficult to conceive of a statement of FACT covering the issue, if this is not one.

The court erred in over-ruling the first motion for a new trial.

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

The evidence is briefly this: Dudele, the witness, while in Chicago, made a contract with appellants that he and his neighbors would send melons of a specific weight to Doane & Co., and, on their receipt, Doane & Co. were to count them out, select those which were within the terms of the contract, throw out those broken on the way, and small ones, and mail to whoever sent them their (appellants') check on their Chicago banker for the money due, at five cents each. The issues are:

1st. Did the cause of action accrue to the plaintiff below in Rock Island county.

If the place where the contract is made is where the cause of action accrues, then certainly it was not in Rock Island county, and if otherwise, the place where the sale is complete, is where the action accrued:

It therefore becomes important to enquire where the sale was complete.

Chancellor Kent's Commentaries, vol. II, p. 650, says: "The rule, "as drawn from the case of Whitehouse vs. Frost, in 12 East. 613, by "Mr. Selwyn, is that, when goods are sold, if anything remains to be "done on the part of the seller, as between him and the buyer, to ascer- "tain the price, quantity or individuality of the goods before delivery, a "right of property does not attach in the buyer."

Here an act remained to be done after the arrival of the melons in Chicago to determine the quantity sold, and therefore the melons were at the risk of the seller, until that was done.

Whitehouse vs. Frost, 12 East, 614.
Law vs. Andrews, 1 Story R., 38.

It was the duty of the seller to separate those coming within the terms of the contract from the others, and tender those which were within the contract to the purchaser.

Clark vs. Baker, 11 Metcalf's R., 186.

In this case the buyer had commenced taking the cargo of corn from the vessel, and afterward stopped and returned the vessel to the seller, because, as he alleged, the corn was not as good as he had bargained for —the court held that the seller should have separated that within the terms of the contract from the other, and tendered it to the purchaser.

The case of Zagury vs Furnwell & another, 2 Campbell, 239, is almost in point. It was assumpsit for not accepting bills of exchange, together with counts for goods bargained and sold, and goods sold and delivered.

The bought note was:

"Bought of S. Zagury 289 bales of goat skins from Mogadore pr. "commerce Capt J. Horswell, containg five dozen in each bale, at the "rate of 57s. 6d. per dozen, to be taken as they now lay with all faults, "paid for by good bills at 5 months. 14 days prompt.

"London, 27 April, 1809."

It appeared that, by the usuage of trade, it is the duty of the seller of goat skins by bales, to count them over, that it may be seen whether each bale contains the number specified in the contract; and before any were counted, the whole were destroyed by fire at the wharf. "Lord "Ellenborough held, as enumeration was necessary to ascertain the "price, this was an act for the benefit of the seller, and as the act remain- "ed to be done by him when the fire happened, there was not a complete "transfer to the purchaser, and the skins continued at the seller's risk.

"The number of skins actually contained in the 289 bales being un- "certain, the plaintiff had failed to show that he was authorized by the "terms of the contract to draw bills which the defendant had refused to accept.

"Plaintiff Non-suited."

Again, Mr. Story, in his work on contracts, page 308, says: "When "the terms of the contract were that the seller was to carry the chattel "to a certain place, and there, if upon admeasurement, it was found to "contain a larger quantity than what it had been assumed to contain, an "additional price was to be paid at a fixed rate for surplus, it was held "that, until admeasurement and actual delivery, the sale was incom- "plete, and the loss must be bourne by the vendor," and quotes

Logan vs. Le. Mesurier, 11 Jurist, (Eng.,) 1061.

We concede that, usually, the delivery takes place when the goods are delivered to the carrier, but we contend that, in this case, the special agreement governed the case, and this special agreement is inconsistent with the idea of the sale being complete in Rock Island county; it was that an act should be done in Chicago, which was necessary to be done at some time, to determine the number of melons sold, and though this act was to be done by the buyer, it was an act in the absence of a special agreement, to be done by the seller, and the property did not change until this was done.

Mr. Story says, in relation to such a case, "If goods be sent to the consignee, subject to his approval, the property remains at the risk of the seller during the carriage, and he must sue for it if lost." Story on Contracts, Vol. I, p. 306.

2d. Were the contracts specifically made payable in Rock Island county?

If the appellants had agreed to deliver their check in Rock Island county, on a Chicago banker, would that be paying in Rock Island county? The check is the means of paying, and is not payment, so that payment was to be made in Chicago, where the check was to be made payable.

But in this case there was no agreement to deliver the check in Rock Island county.

The check was to be mailed at Chicago, Cook county, to Carbon Cliff, in Rock Island county, and even if it had been money which had been sent, the mailing of the letter with the money in it, would have been payment of that money, whether it was ever received or not.

Kingston vs. Kingston, 11 Meeson & Welsby R, 233.
Warwick vs. Noahes Peake, 67.

So that, in any view, the payment was to be made in Cook county.

There is another reason why the court should have granted a new trial, not enumerated in the reasons specified in the motion, and should have ordered it, without a motion, and that is, that the verdict did not find the damages, and therefore the trial was but partial, and no judgment could properly be rendered on the verdict, which was simply in these words, viz:

"We, the Jury, find the issue for the plaintiff."

The court erred in entering a judgment on the first verdict.

Because it was partial, not finding the amount of damages, and no interlocutory judgment should in such case be entered; the damages should be assessed at the time of the trial of the issues; and because that was not done, the cause should have been recommitted to the jury entire.

Hollingsworth vs. Duane, Wallace, U. S. Ct. Ct. R., p. 56.

It is true that the court ordered the same jury who had tried the issues to be sworn to assess the damages, but the effect is the same as if a new jury had been called and sworn to assess the damages.

The court erred in not striking out from before the jury the evidence of Edmund E. Seaman, as to whom the three car loads of melons, part of the eight car loads in the testimony mentioned, were sent, as it appeared that all his knowledge thereof was derived from the railroad receipts in the possession of the plaintiff below. (See Abstract, p. 3.)

If this evidence was not mere hearsay, then the receipts referred to are better evidence, and these are, in no manner accounted for; in either view, thecourt erred.

The court erred in not striking out the evidence of Seaman as to whom five of the eight car loads of melons were sent, as it appeared that all

his knowledge thereof was derived from the statements of the plaintiff. (See abstract, p. 4.)

The court erred in not granting a new assessment of damages and trial,

For the verdict of the jury is excessive; there were but eight car loads sent J. W. Doane & Co. (See Abstract, p. 3.) One of these Dudele was interested in, and Bartlett received his pay for that one. (See Abstract, p. 3.) Seaman testifies that he counted all the cars—one had a trifle less than twenty-three hundred in it; another a trifle less than sixteen hundred in it ; the rest were from sixteen to nineteen hundred each. The jury, to make up the number, have allowed for 2300 in one car, 1600 in another, and 1750 the average between 1900 and 1600 in each of the others. This makes, in all, 12,650 melons, which, at five cents each, makes $632 50-100; deducting from this $50, acknowledged to have been received, leaves $582 50-100 the amount of the verdict, but the testimony shows that there were not quite 2300 in one, and not quite 1600 in another, and therefore the verdict was excessive.

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John W Deane Exr
Manchester & Thos W
Anderson appellants

vs.

Michael Bartlett
appellee

Argument for appellants

Filed Apr 16. 1861
L. Leland
Clerk

SUPREME COURT.

April Term, A. D., 1861.

JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON, — Appellants.

vs.

MICHAEL BARTLETT. — Appellee.

Appeal from Rock Island County.

Abstract of Record.

1 On the 31st of December, A. D., 1860., suit was commenced by Michael Bartlett, plaintiff below, and summons issued in the usual form, directed to the Sheriff of Cook county, returnable to the next January Term of the Rock Island County Circuit Court.

2 Which was duly served by the Sheriff of Cook county, on the second day of January, A. D., 1861, and returned.

2 On the 4th day of January, A. D., 1861, plaintiff below filed his declaration in the cause, containing the common counts only.

4 On the 16th day of January, A. D., 1861, defendants below filed their plea to the jurisdiction of the court, wherein it is set out, among other things, that the causes of action arose and accrued in the county of Cook, in the State of Illinois, and not in the county of Rock Island, and were made payable in Chicago, in said county of Cook, and were not specifically made payable in the county of Rock Island.

6 On the 1st day of February, A. D., 1861, the plaintiff below filed two replications; the first setting forth that the causes of action in the declaration sued on, arose and accrued to the plaintiff in the county of Cook, and the second setting forth that the contracts in the declaration mentioned, were specifically made payable in the county of Rock Island, and not in the county of Cook.

On each of which replications issue was joined.

7 On the second day of February, A. D., 1861, the defendants below made a motion for a continuance, and read an affidavit in support of the motion, which motion the court over-ruled.

On the 8th day of February, the issues were tried by a jury.

7 Verdict for the plaintiff below.

8 Motion for new trial made, and over-ruled.

8 Interlocutory judgment of quod recupenet entered, and the same jury ordered to assess the damages.

The jury re-sworn to assesss the damages, and

8 Damages assessed at $582 50-100.

8 Motion for new assessment of damages and trial made and over-ruled.

8 Final judgment entered.

8 Defendants below prayed an appeal.

Thirty days given to file bond and bill of exceptions.

9 Bond, in usual form, duly approved, and filed.

BILL OF EXCEPTIONS—Duly Filed.

11 By a rule of the circuit court of said county, civil cases should not be called to be tried by jury until the third week of this, January, term of said court.

11 Defendants below, on the second day of February, A. D., 1861, made a motion for a continuance, and filed and read to the court their affidavit as follows, to-wit:

STATE OF ILLINOIS, } ss
Rock Island County. }

Of the January Term, A. D., 1861, of the Circuit Court of said County.

MICHAEL BARTLETT.
vs.
JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON,

John W. Doane, one of the defendants in the above entitled cause, being first duly sworn, deposes and says that the above named defendants
12 cannot safely proceed to the trial of this cause at this term of the said court on account of the absence of Calvin R. Corbin, a material witness for the defendants.

Affiant further states that the said Corbin resides in the city of Chicago, in the state of Illinois; that, on the nineteenth day of January, A. D., 1861, and as soon as he knew that the testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin, in the said city of Chicago, and learned that the said Corbin was absent from the said city of Chicago, and was travelling in the states of Iowa, Wisconsin or Minnesota, and that he was not expected to return for several weeks, and this affiant states the fact to be that the said Corbin was so absent from the city of Chicago, and that he has not returned to his said home in Chicago at this time, and that this affiant, although he has diligently sought to do so, has not been able to find the said Corbin. Affiant further states that he expects to be able to prove, by the said Corbin, that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island.

Affiant further states that he knows of no other witness by whom the defendant can prove the above facts, and that he expects to be able to procure his (said Corbin's) attendance at the next term of this court, or
13 his deposition, to be used as evidence in the trial of this cause, and this application is not made for the purpose of delay, but that justice may be done.

This affiant further states that, on the thirty-first day of January, A. D., 1861, he caused to be issued, from the office of the clerk of this court, and under the seal of this court, a subpœna directed to the Sheriff of Cook county for service upon said Corbin, and that the said Sheriff has been unable to find said Corbin, and has returned the said subpœna with an endorsement as follows, to-wit: "I cannot find the within named Calvin R. Corbin," in substance.

This affidavit was duly sworn to.

13 The court over-ruled the motion, and defendants below excepted.

13 On the 8th day of February, A. D., 1861, the issues were tried by jury. Plaintiff below introduced evidence as follows:

14 Gustave Dodele, sworn, says: In August, 1859, I was in Chicago, and made a contract with J. W. Doane & Co., for myself and such of
9 my neighbors as should agree to it; that we would send melons to J. W. Doane & Co., and they should count out the melons, and throw out the broken ones and those which would not weigh eight pounds, and pay five cent each for the remainder. Doane & Co., agreed to send to Carbon Cliff in Rock Island county, by mail, their check on a Chicago bank for the amount due.

I was interested in the first load of melons sent to J. W. Doane & Co. Bartlett told me that he got his pay for that car load.

16 Both parties rested.

16 The plaintiff below asked two instructions, as follows, to-wit:

1. "If the jury believe, from the evidence, that the plaintiff agreed to sell and deliver, on the cars, at Carbon Cliff, in Rock Island county, melons, the freight on which was to be paid by the defendants, then the jury will find the issue for the plaintiff, notwithstanding the jury should believe that, by contract between the parties, the defendants should have the liberty of throwing out any melons not within the terms of the contract, if any such should be put in the cars by the plaintiff."

17 2. "If the jury believe, from the evidence, that the parties agreed that the melons should be paid for by defendants' check at Carbon Cliff, in Rock Island county, the jury will find the issue for the plaintiff."

These instructions were given, and the defendants below excepted to each separately.

20 The jury returned their verdict in the these words:

"We, the jury, find the issue for the plaintiff.

CHAS. M. KNOX, Foreman."

21 Motion for new trial by defendants below, for the following, among other reaeons, to-wit:

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

3rd. Because the court erred in granting the instruction numbered two, offered by the said plaintiff.

4th. Because the court erred in granting tbe instruction numbered one, offered by the said plaintiff.

23 Motion over-ruled, and defendants excepted.

23 Defendants ask leave to plead over.

Leave refused, and exception taken.

24 Interlocutory judgment of quod recuperet entered by the court.

24 The same jury who tried the issues sworn to assess the damages by the plaintiff sustained.

24 Edward E. Seaman, sworn on the part of plaintiff below, says: Knew of the shipment of eight car loads of melons to J. W. Doane & Co.; two others were sent, but not to J. W. Doane & Co.; helped to count all the melons; one car load lacked a trifle of sixteen hundred melons, and another lacked a trifle of twenty-three hundred; the rest were from sixteen to nineteen hundred each; the first car of the eight car loads Dodele was interested in.

Upon cross-examination, Seaman testified that he knows who the melons were shipped to only by the railroad receipts which he saw in Bartlett's hands, as to three of the eight cars, and as to the other five, he knew only by Bartlett's declaration, made at the time, that they were for J. W. Doane & Co.

25 The defendants then moved to strike out from the jury the testimony of the witness as to who three of the eight cars referred to were sent, because his evidence was from hearsay, and because the railroad receipts, from which he derived his knowledge, would be better evidence, and their absence was not explained, though they were shown to be in the plaintiff's possession, which motion the court over-ruled, and defendants excepted.

The defendants then moved to strike out from before the jury the tes-

timony of the witness as to who the five cars, part of the said eight cars, were sent to, because all of the witness' knowledge in relation thereto was derived from the declarations of the plaintiff, which declarations were not evidence.

The court over-ruled the motion, and defendants excepted.

26 The plaintiff then introduced Gustave Dodele, who was sworn, and testified that Doane & Co. were to pay the freight on the melons, and five cents each for all, except broken melons and small ones under eight pounds. No melons were returned.

27 The counsel then admitted that plaintiff had received $50, in part payment of the demands in the declaration alleged.

27 The above was all the evidence offered by the parties.

27 Jury returned their verdict as follows, to-wit:

"We, the Jury, assess the damages at Five Hundred Eighty-Two "50-100 dollars.

CHAS. M. KNOX, Foreman."

24 Defendants below moved for new trial and assessment of damages, among other reasons, for the following:

1st. That the amount of the verdict rendered by the jury in this case is not warranted by the law and the evidence.

2d. That the assessment of damages, returned as a verdict by the jury in this case, is excessive.

31 Motion over-ruled, defendants below excepted.

ERRORS ASSIGNED.

The court erred in over-ruling the motion for a continuance.

The court erred in granting the instruction offered by the plaintiff numbered one.

The court erred in granting the instuction offered by the plaintiff numbered two.

The court erred in over-ruling the first motion for a new trial.

The court erred in not setting aside the first verdict.

The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict.

The court erred in entering interlocutory judgment on the first verdict.

The court erred in causing the jury to be re-sworn to assess the damages.

The court erred in not striking out evidence as asked by the defendants below.

The court erred in over-ruling the motion for a new assessment of damages and trial.

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John W Drane & Manchester & Thos W Anderson appellants

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Abstract of Record.

Filed April 16. 1861
A. Edmond
Clerk

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On the 8th day of February, the issues were tried by a jury.

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8 Damages assessed at $582 50-100.

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8 Defendants below prayed an appeal.

Thirty days given to file bond and bill of exceptions.

9 Bond, in usual form, duly approved, and filed.

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vs.
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John W. Doane, one of the defendants in the above entitled cause, being first duly sworn, deposes and says that the above named defendants

12 cannot safely proceed to the trial of this cause at this term of the said court on account of the absence of Calvin R. Corbin, a material witness for the defendants.

Affiant further states that the said Corbin resides in the city of Chicago, in the state of Illinois; that, on the nineteenth day of January, A. D., 1861, and as soon as he knew that the testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin, in the said city of Chicago, and learned that the said Corbin was absent from the said city of Chicago, and was travelling in the states of Iowa, Wisconsin or Minnesota, and that he was not expected to return for several weeks, and this affiant states the fact to be that the said Corbin was so absent from the city of Chicago, and that he has not returned to his said home in Chicago at this time, and that this affiant, although he has diligently sought to do so, has not been able to find the said Corbin. Affiant further states that he expects to be able to prove, by the said Corbin, that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island.

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This affidavit was duly sworn to.

13 The court over-ruled the motion, and defendants below excepted.

13 On the 8th day of February, A. D., 1861, the issues were tried by jury. Plaintiff below introduced evidence as follows:

Gustave Dodele, sworn, says: In August, 1859, I was in Chicago, and made a contract with J. W. Doane & Co., for myself and such of my neighbors as should agree to it; that we would send melons to J. W. Doane & Co., and they should count out the melons, and throw out the broken ones and those which would not weigh eight pounds, and pay five cent each for the remainder. Doane & Co., agreed to send to Carbon Cliff in Rock Island county, by mail, their check on a Chicago bank for the amount due.

I was interested in the first load of melons sent to J. W. Doane & Co. Bartlett told me that he got his pay for that car load.

Both parties rested.

The plaintiff below asked two instructions, as follows, to-wit:

1. "If the jury believe, from the evidence, that the plaintiff agreed to sell and deliver, on the cars, at Carbon Cliff, in Rock Island county, melons, the freight on which was to be paid by the defendants, then the jury will find the issue for the plaintiff, notwithstanding the jury should believe that, by contract between the parties, the defendants should have the liberty of throwing out any melons not within the terms of the contract, if any such should be put in the cars by the plaintiff."

2. "If the jury believe, from the evidence, that the parties agreed that the melons should be paid for by defendants' check at Carbon Cliff, in Rock Island county, the jury will find the issue for the plaintiff."

These instructions were given, and the defendants below excepted to each separately.

The jury returned their verdict in the these words:

"We, the jury, find the issue for the plaintiff.

CHAS. M. KNOX, Foreman."

Motion for new trial by defendants below, for the following, among other reaeons, to-wit:

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

3rd. Because the court erred in granting the instruction numbered two, offered by the said plaintiff.

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Motion over-ruled, and defendants excepted.

Defendants ask leave to plead over.

Leave refused, and exception taken.

Interlocutory judgment of quod recuperet entered by the court.

The same jury who tried the issues sworn to assess the damages by the plaintiff sustained.

Edward E. Seaman, sworn on the part of plaintiff below, says: Knew of the shipment of eight car loads of melons to J. W. Doane & Co.; two others were sent, but not to J. W. Doane & Co.; helped to count all the melons; one car load lacked a trifle of sixteen hundred melons, and another lacked a trifle of twenty-three hundred; the rest were from sixteen to nineteen hundred each; the first car of the eight car loads Dodele was interested in.

Upon cross-examination, Seaman testified that he knows who the melons were shipped to only by the railroad receipts which he saw in Bartlett's hands, as to three of the eight cars, and as to the other five, he knew only by Bartlett's declaration, made at the time, that they were for J. W. Doane & Co.

The defendants then moved to strike out from the jury the testimony of the witness as to who three of the eight cars referred to were sent, because his evidence was from hearsay, and because the railroad receipts, from which he derived his knowledge, would be better evidence, and their absence was not explained, though they were shown to be in the plaintiff's possession, which motion the court over-ruled, and defendants excepted.

The defendants then moved to strike out from before the jury the tes-

timony of the witness as to who the five cars, part of the said eight cars, were sent to, because all of the witness' knowledge in relation thereto was derived from the declarations of the plaintiff, which declarations were not evidence.

The court over-ruled the motion, and defendants excepted.

26 The plaintiff then introduced Gustave Dodele, who was sworn, and testified that Doane & Co. were to pay the freight on the melons, and five cents each for all, except broken melons and small ones under eight pounds. No melons were returned.

27 The counsel then admitted that plaintiff had received $50, in part payment of the demands in the declaration alleged.

27 The above was all the evidence offered by the parties.

27 Jury returned their verdict as follows, to-wit:

"We, the Jury, assess the damages at Five Hundred Eighty-Two "50-100 dollars.

CHAS. M. KNOX, Foreman."

24 Defendants below moved for new trial and assessment of damages, among other reasons, for the following:

1st. That the amount of the verdict rendered by the jury in this case is not warranted by the law and the evidence.

2d. That the assessment of damages, returned as a verdict by the jury in this case, is excessive.

31 Motion over-ruled, defendants below excepted.

ERRORS ASSIGNED.

The court erred in over-ruling the motion for a continuance.

The court erred in granting the instruction offered by the plaintiff numbered one.

The court erred in granting the instuction offered by the plaintiff numbered two.

The court erred in over-ruling the first motion for a new trial.

The court erred in not setting aside the first verdict.

The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict.

The court erred in entering interlocutory judgment on the first verdict.

The court erred in causing the jury to be re-sworn to assess the damages.

The court erred in not striking out evidence as asked by the defendants below.

The court erred in over-ruling the motion for a new assessment of damages and trial.

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John W Prince, Wm S Manchester & Thos H Andrews appellants

vs.

Michael Bartlett appellee

Abstract of Record

Filed April 16 1861
L. Leland
Clerk

SUPREME COURT.

April Term, A. D., 1861.

JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON, — Appellants.

vs.

MICHAEL BARTLETT, — Appellee.

Appeal from Rock Island County.

Abstract of Record.

1 On the 31st of December, A. D., 1860., suit was commenced by Michael Bartlett, plaintiff below, and summons issued in the usual form, directed to the Sheriff of Cook county, returnable to the next January Term of the Rock Island County Circuit Court.

2 Which was duly served by the Sheriff of Cook county, on the second day of January, A. D., 1861, and returned.

2 On the 4th day of January, A. D., 1861, plaintiff below filed his declaration in the cause, containing the common counts only.

4 On the 16th day of January, A. D., 1861, defendants below filed their plea to the jurisdiction of the court, wherein it is set out, among other things, that the causes of action arose and accrued in the county of Cook, in the State of Illinois, and not in the county of Rock Island, and were made payable in Chicago, in said county of Cook, and were not specifically made payable in the county of Rock Island.

6 On the 1st day of February, A. D., 1861, the plaintiff below filed two replications; the first setting forth that the causes of action in the declaration sued on, arose and accrued to the plaintiff in the county of Cook, and the second setting forth that the contracts in the declaration mentioned, were specifically made payable in the county of Rock Island, and not in the county of Cook.

On each of which replications issue was joined.

7 On the second day of February, A. D., 1861, the defendants below made a motion for a continuance, and read an affidavit in support of the motion, which motion the court over-ruled.

On the 8th day of February, the issues were tried by a jury.

7 Verdict for the plaintiff below.

8 Motion for new trial made, and over-ruled.

8 Interlocutory judgment of quod recupenet entered, and the same jury ordered to assess the damages.

The jury re-sworn to assesss the damages, and

8 Damages assessed at $582 50-100.

8 Motion for new assessment of damages and trial made and over-ruled.

8 Final judgment entered.

8 Defendants below prayed an appeal.

Thirty days given to file bond and bill of exceptions.

9 Bond, in usual form, duly approved, and filed.

BILL OF EXCEPTIONS—DULY FILED.

11 By a verbal rule of the circuit court of said county, civil cases should not be called to be tried by jury until the third week of this, January, term of said court.

11 Defendants below, on the second day of February, A. D., 1861, made a motion for a continuance, and filed and read to the court their affidavit as follows, to-wit:

STATE OF ILLINOIS, } ss
Rock Island County. }

Of the January Term, A. D., 1861, of the Circuit Court of said County.

MICHAEL BARTLETT.
vs.
JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON,

John W. Doane, one of the defendants in the above entitled cause, being first duly sworn, deposes and says that the above named defendants
12 cannot safely proceed to the trial of this cause at this term of the said court on account of the absence of Calvin R. Corbin, a material witness for the defendants.

Affiant further states that the said Corbin resides in the city of Chicago, in the state of Illinois; that, on the nineteenth day of January, A. D., 1861, and as soon as he knew that the testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin, in the said city of Chicago, and learned that the said Corbin was absent from the said city of Chicago, and was travelling in the states of Iowa, Wisconsin or Minnesota, and that he was not expected to return for several weeks, and this affiant states the fact to be that the said Corbin was so absent from the city of Chicago, and that he has not returned to his said home in Chicago at this time, and that this affiant, although he has diligently sought to do so, has not been able to find the said Corbin. Affiant further states that he expects to be able to prove, by the said Corbin, that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island.

Affiant further states that he knows of no other witness by whom the defendant can prove the above facts, and that he expects to be able to procure his (said Corbin's) attendance at the next term of this court, or
13 his deposition, to be used as evidence in the trial of this cause, and this application is not made for the purpose of delay, but that justice may be done.

This affiant further states that, on the thirty-first day of January, A. D., 1861, he caused to be issued, from the office of the clerk of this court, and under the seal of this court, a subpœna directed to the Sheriff of Cook county for service upon said Corbin, and that the said Sheriff has been unable to find said Corbin, and has returned the said subpœna with an endorsement as follows, to-wit: "I cannot find the within named Calvin R. Corbin," in substance.

This affidavit was duly sworn to.

13 The court over-ruled the motion, and defendants below excepted.

13 On the 8th day of February, A. D., 1861, the issues were tried by jury. Plaintiff below introduced evidence as follows:

Gustave Dodele, sworn, says: In August, 1859, I was in Chicago, and made a contract with J. W. Doane & Co., for myself and such of my neighbors as should agree to it; that we would send melons to J. W. Doane & Co., and they should count out the melons, and throw out the broken ones and those which would not weigh eight pounds, and pay five cent each for the remainder. Doane & Co., agreed to send to Carbon Cliff in Rock Island county, by mail, their check on a Chicago bank for the amount due.

I was interested in the first load of melons sent to J. W. Doane & Co. Bartlett told me that he got his pay for that car load.

Both parties rested.

The plaintiff below asked two instructions, as follows, to-wit:

1. "If the jury believe, from the evidence, that the plaintiff agreed to sell and deliver, on the cars, at Carbon Cliff, in Rock Island county, melons, the freight on which was to be paid by the defendants, then the jury will find the issue for the plaintiff, notwithstanding the jury should believe that, by contract between the parties, the defendants should have the liberty of throwing out any melons not within the terms of the contract, if any such should be put in the cars by the plaintiff."

2. "If the jury believe, from the evidence, that the parties agreed that the melons should be paid for by defendants' check at Carbon Cliff, in Rock Island county, the jury will find the issue for the plaintiff."

These instructions were given, and the defendants below excepted to each separately.

The jury returned their verdict in the these words:

"We, the jury, find the issue for the plaintiff.

CHAS. M. KNOX, Foreman."

Motion for new trial by defendants below, for the following, among other reaeons, to-wit:

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

3rd. Because the court erred in granting the instruction numbered two, offered by the said plaintiff.

4th. Because the court erred in granting tbe instruction numbered one, offered by the said plaintiff.

Motion over-ruled, and defendants excepted.

Defendants ask leave to plead over.

Leave refused, and exception taken.

Interlocutory judgment of quod recuperet entered by the court.

The same jury who tried the issues sworn to assess the damages by the plaintiff sustained.

Edward E. Seaman, sworn on the part of plaintiff below, says: Knew of the shipment of eight car loads of melons to J. W. Doane & Co.; two others were sent, but not to J. W. Doane & Co.; helped to count all the melons; one car load lacked a trifle of sixteen hundred melons, and another lacked a trifle of twenty-three hundred; the rest were from sixteen to nineteen hundred each; the first car of the eight car loads Dodele was interested in.

Upon cross-examination, Seaman testified that he knows who the melons were shipped to only by the railroad receipts which he saw in Bartlett's hands, as to three of the eight cars, and as to the other five, he knew only by Bartlett's declaration, made at the time, that they were for J. W. Doane & Co.

The defendants then moved to strike out from the jury the testimony of the witness as to who three of the eight cars referred to were sent, because his evidence was from hearsay, and because the railroad receipts, from which he derived his knowledge, would be better evidence, and their absence was not explained, though they were shown to be in the plaintiff's possession, which motion the court over-ruled, and defendants excepted.

The defendants then moved to strike out from before the jury the tes-

timony of the witness as to who the five cars, part of the said eight cars, were sent to, because all of the witness' knowledge in relation thereto was derived from the declarations of the plaintiff, which declarations were not evidence.

The court over-ruled the motion, and defendants excepted.

26 The plaintiff then introduced Gustave Dodele, who was sworn, and testified that Doane & Co. were to pay the freight on the melons, and five cents each for all, except broken melons and small ones under eight pounds. No melons were returned.

27 The counsel then admitted that plaintiff had received $50, in part payment of the demands in the declaration alleged.

27 The above was all the evidence offered by the parties.

27 Jury returned their verdict as follows, to-wit :

"We, the Jury, assess the damages at Five Hundred Eighty-Two "50-100 dollars.

CHAS. M. KNOX, Foreman."

24 Defendants below moved for new trial and assessment of damages, among other reasons, for the following :

1st. That the amount of the verdict rendered by the jury in this case is not warranted by the law and the evidence.

2d. That the assessment of damages, returned as a verdict by the jury in this case, is excessive.

31 Motion over-ruled, defendants below excepted.

ERRORS ASSIGNED.

The court erred in over-ruling the motion for a continuance.

The court erred in granting the instruction offered by the plaintiff numbered one.

The court erred in granting the instuction offered by the plaintiff numbered two.

The court erred in over-ruling the first motion for a new trial.

The court erred in not setting aside the first verdict.

The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict.

The court erred in entering interlocutory judgment on the first verdict.

The court erred in causing the jury to be re-sworn to assess the damages.

The court erred in not striking out evidence as asked by the defendants below.

The court erred in over-ruling the motion for a new assessment of damages and trial.

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Mutual Benefit Life Ins Co
Manchester & Thos W
Andrews appellants

vs.

Michael Bartell
appellee

Abstract of Record

Filed April 16. 1861
L. Leland
Clerk

SUPREME COURT.

April Term, A. D., 1861.

JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON, — Appellants.

vs.

MICHAEL BARTLETT, — Appellee.

Appeal from Rock Island County.

Abstract of Record.

1 On the 31st of December, A. D., 1860., suit was commenced by Michael Bartlett, plaintiff below, and summons issued in the usual form, directed to the Sheriff of Cook county, returnable to the next January Term of the Rock Island County Circuit Court.

2 Which was duly served by the Sheriff of Cook county, on the second day of January, A. D., 1861, and returned.

2 On the 4th day of January, A. D., 1861, plaintiff below filed his declaration in the cause, containing the common counts only.

4 On the 16th day of January, A. D., 1861, defendants below filed their plea to the jurisdiction of the court, wherein it is set out, among other things, that the causes of action arose and accrued in the county of Cook, in the State of Illinois, and not in the county of Rock Island, and were made payable in Chicago, in said county of Cook, and were not specifically made payable in the county of Rock Island.

6 On the 1st day of February, A. D., 1861, the plaintiff below filed two replications; the first setting forth that the causes of action in the declaration sued on, arose and accrued to the plaintiff in the county of Cook, and the second setting forth that the contracts in the declaration mentioned, were specifically made payable in the county of Rock Island, and not in the county of Cook.

On each of which replicatiens issue was joined.

7 On the second day of February, A. D., 1861, the defendants below made a motion for a continuance, and read an affidavit in support of the motion, which motion the court over-ruled.

On the 8th day of February, the issues were tried by a jury.

7 Verdict for the plaintiff below.

8 Motion for new trial made, and over-ruled.

8 Interlocutory judgment of quod recupenet entered, and the same jury ordered to assess the damages.

The jury re-sworn to assesss the damages, and

8 Damages assessed at $582 50-100.

8 Motion for new assessment of damages and trial made and over-ruled.

8 Final judgment entered.

8 Defendants below prayed an appeal.

Thirty days given to file bond and bill of exceptions.

9 Bond, in usual form, duly approved, and filed.

BILL OF EXCEPTIONS—DULY FILED.

11 By a rule of the circuit court of said county, civil cases should not be called to be tried by jury until the third week of this, January, term of said court.

11 Defendants below, on the second day of February, A. D., 1861, made a motion for a continuance, and filed and read to the court their affidavit as follows, to-wit:

STATE OF ILLINOIS, } ss
Rock Island County. }

Of the January Term, A. D., 1861, of the Circuit Court of said County.

MICHAEL BARTLETT.
vs.
JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON,

John W. Doane, one of the defendants in the above entitled cause, being first duly sworn, deposes and says that the above named defendants
12 cannot safely proceed to the trial of this cause at this term of the said court on account of the absence of Calvin R. Corbin, a material witness for the defendants.

Affiant further states that the said Corbin resides in the city of Chicago, in the state of Illinois; that, on the nineteenth day of January, A. D., 1861, and as soon as he knew that the testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin, in the said city of Chicago, and learned that the said Corbin was absent from the said city of Chicago, and was travelling in the states of Iowa, Wisconsin or Minnesota, and that he was not expected to return for several weeks, and this affiant states the fact to be that the said Corbin was so absent from the city of Chicago, and that he has not returned to his said home in Chicago at this time, and that this affiant, although he has diligently sought to do so, has not been able to find the said Corbin. Affiant further states that he expects to be able to prove, by the said Corbin, that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island.

Affiant further states that he knows of no other witness by whom the defendant can prove the above facts, and that he expects to be able to procure his (said Corbin's) attendance at the next term of this court, or
13 his deposition, to be used as evidence in the trial of this cause, and this application is not made for the purpose of delay, but that justice may be done.

This affiant further states that, on the thirty-first day of January, A. D., 1861, he caused to be issued, from the office of the clerk of this court, and under the seal of this court, a subpœna directed to the Sheriff of Cook county for service upon said Corbin, and that the said Sheriff has been unable to find said Corbin, and has returned the said subpœna with an endorsement as follows, to-wit: "I cannot find the within named Calvin R. Corbin," in substance.

This affidavit was duly sworn to.

13 The court over-ruled the motion, and defendants below excepted.

13 On the 8th day of February, A. D., 1861, the issues were tried by jury. Plaintiff below introduced evidence as follows:

14 Gustave Dodele, sworn, says: In August, 1859, I was in Chicago, and made a contract with J. W. Doane & Co., for myself and such of
9 my neighbors as should agree to it; that we would send melons to J. W. Doane & Co., and they should count out the melons, and throw out the broken ones and those which would not weigh eight pounds, and pay five cent each for the remainder. Doane & Co., agreed to send to Carbon Cliff in Rock Island county, by mail, their check on a Chicago bank for the amount due.

I was interested in the first load of melons sent to J. W. Doane & Co. Bartlett told me that he got his pay for that car load.

16 Both parties rested.

16 The plaintiff below asked two instructions, as follows, to-wit:

1. "If the jury believe, from the evidence, that the plaintiff agreed to sell and deliver, on the cars, at Carbon Cliff, in Rock Island county, melons, the freight on which was to be paid by the defendants, then the jury will find the issue for the plaintiff, notwithstanding the jury should believe that, by contract between the parties, the defendants should have the liberty of throwing out any melons not within the terms of the contract, if any such should be put in the cars by the plaintiff."

17 2. "If the jury believe, from the evidence, that the parties agreed that the melons should be paid for by defendants' check at Carbon Cliff, in Rock Island county, the jury will find the issue for the plaintiff."

These instructions were given, and the defendants below excepted to each separately.

20 The jury returned their verdict in the these words:

"We, the jury, find the issue for the plaintiff.

CHAS. M. KNOX, Foreman."

21 Motion for new trial by defendants below, for the following, among other reaeons, to-wit:

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

3rd. Because the court erred in granting the instruction numbered two, offered by the said plaintiff.

4th. Because the court erred in granting tbe instruction numbered one, offered by the said plaintiff.

23 Motion over-ruled, and defendants excepted.

23 Defendants ask leave to plead over.

Leave refused, and exception taken.

24 Interlocutory judgment of quod recuperet entered by the court.

24 The same jury who tried the issues sworn to assess the damages by the plaintiff sustained.

24 Edward E. Seaman, sworn on the part of plaintiff below, says: Knew of the shipment of eight car loads of melons to J. W. Doane & Co.; two others were sent, but not to J. W. Doane & Co.; helped to count all the melons; one car load lacked a trifle of sixteen hundred melons, and another lacked a trifle of twenty-three hundred; the rest were from sixteen to nineteen hundred each; the first car of the eight car loads Dodele was interested in.

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25 The defendants then moved to strike out from the jury the testimony of the witness as to who three of the eight cars referred to were sent, because his evidence was from hearsay, and because the railroad receipts, from which he derived his knowledge, would be better evidence, and their absence was not explained, though they were shown to be in the plaintiff's possession, which motion the court over-ruled, and defendants excepted.

The defendants then moved to strike out from before the jury the tes-

timony of the witness as to who the five cars, part of the said eight cars, were sent to, because all of the witness' knowledge in relation thereto was derived from the declarations of the plaintiff, which declarations were not evidence.

The court over-ruled the motion, and defendants excepted.

26 The plaintiff then introduced Gustave Dodele, who was sworn, and testified that Doane & Co. were to pay the freight on the melons, and five cents each for all, except broken melons and small ones under eight pounds. No melons were returned.

27 The counsel then admitted that plaintiff had received $50, in part payment of the demands in the declaration alleged.

27 The above was all the evidence offered by the parties.

27 Jury returned their verdict as follows, to-wit:

"We, the Jury, assess the damages at Five Hundred Eighty-Two "50-100 dollars.

CHAS. M. KNOX, Foreman."

24 Defendants below moved for new trial and assessment of damages, among other reasons, for the following:

1st. That the amount of the verdict rendered by the jury in this case is not warranted by the law and the evidence.

2d. That the assessment of damages, returned as a verdict by the jury in this case, is excessive.

31 Motion over-ruled, defendants below excepted.

ERRORS ASSIGNED.

The court erred in over-ruling the motion for a continuance.

The court erred in granting the instruction offered by the plaintiff numbered one.

The court erred in granting the instuction offered by the plaintiff numbered two.

The court erred in over-ruling the first motion for a new trial.

The court erred in not setting aside the first verdict.

The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict.

The court erred in entering interlocutory judgment on the first verdict.

The court erred in causing the jury to be re-sworn to assess the damages.

The court erred in not striking out evidence as asked by the defendants below.

The court erred in over-ruling the motion for a new assessment of damages and trial.

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John W Drane Wm D
Manchester & Thos W
Andrews appellants

vs.

Michael Bartlett
appellee

abstract pres

Filed Apr 26. 1861
L. Leland
Clerk

SUPREME COURT.

April Term, A. D., 1861.

JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON, — Appellants.

vs.

MICHAEL BARTLETT. — Appellee.

Appeal from Rock Island County.

Abstract of Record.

1 On the 31st of December, A. D., 1860., suit was commenced by Michael Bartlett, plaintiff below, and summons issued in the usual form, directed to the Sheriff of Cook county, returnable to the next January Term of the Rock Island County Circuit Court.

2 Which was duly served by the Sheriff of Cook county, on the second day of January, A. D., 1861, and returned.

2 On the 4th day of January, A. D., 1861, plaintiff below filed his declaration in the cause, containing the common counts only.

4 On the 16th day of January, A. D., 1861, defendants below filed their plea to the jurisdiction of the court, wherein it is set out, among other things, that the causes of action arose and accrued in the county of Cook, in the State of Illinois, and not in the county of Rock Island, and were made payable in Chicago, in said county of Cook, and were not specifically made payable in the county of Rock Island.

6 On the 1st day of February, A. D., 1861, the plaintiff below filed two replications; the first setting forth that the causes of action in the declaration sued on, arose and accrued to the plaintiff in the county of Cook, and the second setting forth that the contracts in the declaration mentioned, were specifically made payable in the county of Rock Island, and not in the county of Cook.

On each of which replicatiens issue was joined.

7 On the second day of February, A. D., 1861, the defendants below made a motion for a continuance, and read an affidavit in support of the motion, which motion the court over-ruled.

On the 8th day of February, the issues were tried by a jury.

7 Verdict for the plaintiff below.

8 Motion for new trial made, and over-ruled.

8 Interlocutory judgment of quod recupenet entered, and the same jury ordered to assess the damages.

The jury re-sworn to assesss the damages, and

8 Damages assessed at $582 50-100.

8 Motion for new assessment of damages and trial made and over-ruled.

8 Final judgment entered.

8 Defendants below prayed an appeal.

Thirty days given to file bond and bill of exceptions.

9 Bond, in usual form, duly approved, and filed.

BILL OF EXCEPTIONS—Duly Filed.

11 By a rule (verbal) of the circuit court of said county, civil cases should not be called to be tried by jury until the third week of this, January, term of said court.

11 Defendants below, on the second day of February, A. D., 1861, made a motion for a continuance, and filed and read to the court their affidavit as follows, to-wit:

STATE OF ILLINOIS, } ss
Rock Island County. }

Of the January Term, A. D., 1861, of the Circuit Court of said County.

MICHAEL BARTLETT.
vs.
JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON,

John W. Doane, one of the defendants in the above entitled cause, being first duly sworn, deposes and says that the above named defendants
12 cannot safely proceed to the trial of this cause at this term of the said court on account of the absence of Calvin R. Corbin, a material witness for the defendants.

Affiant further states that the said Corbin resides in the city of Chicago, in the state of Illinois; that, on the nineteenth day of January, A. D., 1861, and as soon as he knew that the testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin, in the said city of Chicago, and learned that the said Corbin was absent from the said city of Chicago, and was travelling in the states of Iowa, Wisconsin or Minnesota, and that he was not expected to return for several weeks, and this affiant states the fact to be that the said Corbin was so absent from the city of Chicago, and that he has not returned to his said home in Chicago at this time, and that this affiant, although he has diligently sought to do so, has not been able to find the said Corbin. Affiant further states that he expects to be able to prove, by the said Corbin, that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island.

Affiant further states that he knows of no other witness by whom the defendant can prove the above facts, and that he expects to be able to procure his (said Corbin's) attendance at the next term of this court, or
13 his deposition, to be used as evidence in the trial of this cause, and this application is not made for the purpose of delay, but that justice may be done.

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This affidavit was duly sworn to.

13 The court over-ruled the motion, and defendants below excepted.

13 On the 8th day of February, A. D., 1861, the issues were tried by jury. Plaintiff below introduced evidence as follows:

14 Gustave Dodele, sworn, says: In August, 1859, I was in Chicago, and made a contract with J. W. Doane & Co., for myself and such of
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I was interested in the first load of melons sent to J. W. Doane & Co. Bartlett told me that he got his pay for that car load.

16 Both parties rested.

16 The plaintiff below asked two instructions, as follows, to-wit:

1. "If the jury believe, from the evidence, that the plaintiff agreed to sell and deliver, on the cars, at Carbon Cliff, in Rock Island county, melons, the freight on which was to be paid by the defendants, then the jury will find the issue for the plaintiff, notwithstanding the jury should believe that, by contract between the parties, the defendants should have the liberty of throwing out any melons not within the terms of the contract, if any such should be put in the cars by the plaintiff."

17 2. "If the jury believe, from the evidence, that the parties agreed that the melons should be paid for by defendants' check at Carbon Cliff, in Rock Island county, the jury will find the issue for the plaintiff."

These instructions were given, and the defendants below excepted to each separately.

20 The jury returned their verdict in the these words:

"We, the jury, find the issue for the plaintiff.

CHAS. M. KNOX, Foreman."

21 Motion for new trial by defendants below, for the following, among other reaeons, to-wit:

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

3rd. Because the court erred in granting the instruction numbered two, offered by the said plaintiff.

4th. Because the court erred in granting tbe instruction numbered one, offered by the said plaintiff.

23 Motion over-ruled, and defendants excepted.

23 Defendants ask leave to plead over.

Leave refused, and exception taken.

24 Interlocutory judgment of quod recuperet entered by the court.

24 The same jury who tried the issues sworn to assess the damages by the plaintiff sustained.

24 Edward E. Seaman, sworn on the part of plaintiff below, says: Knew of the shipment of eight car loads of melons to J. W. Doane & Co.; two others were sent, but not to J. W. Doane & Co.; helped to count all the melons; one car load lacked a trifle of sixteen hundred melons, and another lacked a trifle of twenty-three hundred; the rest were from sixteen to nineteen hundred each; the first car of the eight car loads Dodele was interested in.

Upon cross-examination, Seaman testified that he knows who the melons were shipped to only by the railroad receipts which he saw in Bartlett's hands, as to three of the eight cars, and as to the other five, he knew only by Bartlett's declaration, made at the time, that they were for J. W. Doane & Co.

25 The defendants then moved to strike out from the jury the testimony of the witness as to who three of the eight cars referred to were sent, because his evidence was from hearsay, and because the railroad receipts, from which he derived his knowledge, would be better evidence, and their absence was not explained, though they were shown to be in the plaintiff's possession, which motion the court over-ruled, and defendants excepted.

The defendants then moved to strike out from before the jury the tes-

timony of the witness as to who the five cars, part of the said eight cars, were sent to, because all of the witness' knowledge in relation thereto was derived from the declarations of the plaintiff, which declarations were not evidence.

The court over-ruled the motion, and defendants excepted.

26 The plaintiff then introduced Gustave Dodele, who was sworn, and testified that Doane & Co. were to pay the freight on the melons, and five cents each for all, except broken melons and small ones under eight pounds. No melons were returned.

27 The counsel then admitted that plaintiff had received $50, in part payment of the demands in the declaration alleged.

27 The above was all the evidence offered by the parties.

27 Jury returned their verdict as follows, to-wit:

"We, the Jury, assess the damages at Five Hundred Eighty-Two "50-100 dollars.

CHAS. M. KNOX, Foreman."

24 Defendants below moved for new trial and assessment of damages, among other reasons, for the following:

1st. That the amount of the verdict rendered by the jury in this case is not warranted by the law and the evidence.

2d. That the assessment of damages, returned as a verdict by the jury in this case, is excessive.

31 Motion over-ruled, defendants below excepted.

ERRORS ASSIGNED.

The court erred in over-ruling the motion for a continuance.

The court erred in granting the instruction offered by the plaintiff numbered one.

The court erred in granting the instuction offered by the plaintiff numbered two.

The court erred in over-ruling the first motion for a new trial.

The court erred in not setting aside the first verdict.

The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict.

The court erred in entering interlocutory judgment on the first verdict.

The court erred in causing the jury to be re-sworn to assess the damages.

The court erred in not striking out evidence as asked by the defendants below.

The court erred in over-ruling the motion for a new assessment of damages and trial.

~~50~~ ~~44~~ 65

~~44~~ 10

Wm W Doane Wm L
Manchester Thos W
Dunn - appellants

vs.

Michael Ball
appellee

---

abstract spec

Filed April 16. 1861
A. Leland
Clerk

1. **PLEAS** before the Honorable J H Howe, Judge of the SIXTH DISTRICT, of the State of Illinois, at a Term of the CIRCUIT COURT begun and held at the Court House within and for the county of Rock Island and State aforesaid, on the Second Monday, the 14th day of January in the year of our Lord one thousand eight hundred and sixty one

Present, Honorable J H Howe *Judge.*
Daniel Hewes *Sheriff.*
Edward H. Bowman *Clerk.*

Be it Remembered that at the January Term of the Circuit Court of Rock Island County in the State aforesaid The following Proceedings were had in a certain matter then therein pending wherein Michael Bartlett is Plaintiff and John W Doane William D Manchester & Thomas W Anderson are defendants

On the 21st day of December in the Year of Our Lord One Thousand Eight Hundred and Sixty the following writ of Summons was issued out of the Office of the Clerk of the Circuit Court of said County and directed to the Sheriff of Cook County to Execute. which said Summons was and is in words and figures as follows to wit

State of Illinois }
Rock Island County } ss. The People of the State of Illinois
To the Sheriff of Cook County Greeting.

We Command you to Summon John W Doane William D Manchester and Thomas W Anderson if to be found in your County, personally to be and

2. appear before the Circuit Court of said County of Rock Island on the first day of the next term thereof to be holden at the Court House in Rock Island, on the Second Monday of January next then and there to answer unto Michael Bentell of a plea of trespass on the case upon promises to his damage in the sum of One Thousand Dollars as he says; and have you then and there this writ and make due return thereon in what manner you execute the same

Witness E H Bowman Clerk of our Circuit Court and the Seal thereof affixed at Rock Island this 31st day of December in the year of our Lord One Thousand Eight hundred and Sixty

Seal

E H Bowman Clerk

On which writ of Summons was indorsed the following

"I have served the within writ by reading the same to the within named defendants Doane Manchester & Anderson

This 2nd day of January 1861

A C Hesing Sheriff of Cook County

By John A Nelson Deputy

And afterwards, to wit, on the 4th day of January 1861 The following Declaration and account were filed in the Office of the Clerk of the Circuit Court in the County and State aforesaid which said declaration and account

3. were and are in words and figures as follows to wit

State of Illinois } ss. Rock Island County Circuit Court
Rock Island County } of the January Term AD 1861

Michael Bartlett plaintiff in this suit by Wilkinson & Pleasants his Attorneys Complain of John W Doane, William D Manchester, and Thomas W Anderson late Partners in business under the name and style of J W Doane and Co. Defendants in this suit, Summoned &c of a plea of Trespass on the Case on promises. For that Whereas the Defendants on the first day of December in the year of Our Lord One Thousand Eight Hundred and Sixty at the County of Rock Island aforesaid were indebted to the plaintiff in the sum of One Thousand dollars for goods bargained and sold by the Plaintiff to the defendants at their request. And in one Thousand dollars for work done and materials provided for the same provided by the Plaintiff for the Defendants at their Request. And in One Thousand dollars for money lent by the Plaintiff to the Defendants at their request And in One Thousand dollars for Money paid by the Plaintiff for the use of the defendants at their request. And in One Thousand dollars for money received by the Defendants for the use of the Plaintiff. And in one Thousand dollars for money due from the Defendants to the Plaintiff on an account stated between them

And Whereas The defendants afterwards to wit on the day and year and at the place last aforesaid in consideration promised the plaintiff to pay to him the said ~~sum~~ sevral monies respectively mentioned of the premises respectively, on request. Yet the defendants

4. have disregarded their promises and have not paid to the Plaintiffs any of the aforesaid moneys or any part thereof To the Plaintiffs damage of One Thousand Dollars and thereupon he brings Suit &c

Wilkinson & Pleasants
Plaintiffs Attorneys

(Copy of Account Sued on)

J & W Doane & Co
To Michael Bartlett Dr

1859.

Aug 18.	To	one car load of Melons	(2000 lbs each)	100,00
" 19	"	" " "	(2200 lbs " ")	110,00
" 21	"	" " "	(2000 " ")	100,00
" 23	2 car loads	" " "	(4000 " " ")	200,00
" 24	2 "	" " "	(4000 " " ")	200,00
				$710,00

And afterwards to wit on the 16th day of January AD 1861 at the January Term of the said Circuit Court on the 3rd day thereof The defendants in the above entitled cause filed or caused to be filed by the clerk of the Court aforesaid their certain Plea to the Declaration and account of the Plaintiff and in answer thereto. which plea and answer were and are in words and figures as follows to wit

State of Illinois }
Rock Island County } ss

John W. Doane }
William D Manchester } In the Circuit Court of Rock Island
& Thomas W Anderson } County Of the January Term AD 1861
ats }
Michael Bartlett }

5th And the said defendants in their own proper persons Come and say that this court ought not to have or take further Cognizance of the action aforesaid because they say that the said supposed causes of action and each and every of them (if any such has accrued to said plaintiff) accrued or arose in the County of Cook in the State of Illinois and not in the County of Rock Island in the State aforesaid. and were made payable in Chicago in the County of Cook aforesaid. and were not specifically made payable in the County of Rock Island aforesaid. and that they the said defendants all and each of them reside in the said County of Cook and not within the County of Rock Island aforesaid. And that process in this Cause was served on them and on each of them in the said County of Cook and not in said county of Rock Island. And this the said defendants are ready to verify. Wherefore they pray judgment whether this Court can or will take further Cognizance of the action aforesaid.

Chas M Osborn
Counsel for Def

John W Doane
Thos W Anderson
Wm D Manchester

State of Illinois }
County of Cook } ss

John W. Doane
William D Manchester
Thomas W Anderson
ats
Michael Bartlett

6. Said defendants John W Doane Thomas W Anderson & William D Manchester being duly sworn doth depose and say that the above plea by them pleaded in said case is true in substance and matter of fact.

Sworn to & Subscribed before me
This 15th day of January AD 1861
George A Meech
Notary Public

Jno W Doane
Thos W Anderson
Wm D Manchester

And afterwards to wit on the 1st day of February AD 1861 of the January term aforesaid of the Court aforesaid The Plaintiff by his Attorneys Wilkinson & Pleasants appeared and filed with the Clerk of the said circuit Court certain other papers or Replications to the Plea of said Defendants. which Replications were in words and figures as follows to wit

State of Illinois } ss
Rock Island County }

Of the Jany T. 1861 of the Circuit Court for said County

Michael Bartlett
vs
John W Doane et al

} Replications

And the said Plaintiff comes and says that the said Court ought not to be ousted of their jurisdiction because he says that the causes of action in the said declaration set forth & each & every of them arose or accrued to the said Plaintiff in the said County of Rock Island & not in the County of Cook as the said defendants in their plea have

7. Above alledged & this the Said Plff prays may be enquired of by the Country &c Wilkinson & Pleasants Attys for Plff

And the Said Defendants doth the like

And for a further Replication in this behalf by leave of the Court here for this purpose first Specially had the Said Plff Says that the Said Court ought not to be ousted of their jurisdiction because he says that the Said Several Contracts in the Said declaration mentioned were Specifically made payable in the Said County of Rock Island and not in the County of Cook as in Said Plea alledged. And this the Said Plaintiff prays may be enquired of by the Country &c Wilkinson & Pleasants Attys for Plff

And the Said Defendants doth the like

And now at this Second day of February AD 1861 this Cause Coming on to be heard upon the motion of the defendants for a Continuance of this cause to the next term of this Court. The Court here after hearing the affidavit on the part of the defendants filed herein overrule the Said motion and order that the Said parties proceed to trial herein

And afterwards to wit on the 7th day of February & of the Jany Term AD 1861 the 22nd day of the Term, Came the parties by their Attorneys and issue being joined Came a jury of Jurors to wit, William Huey, John Skinner, George Copp, Wm H Fairclough, George W Swiler, Alfred H Mead Thomas Plummer, James Scoby, James Edgington, Chas M Knox D H Wells & L B Mapes, who being each and Severally Sworn to well and truly try the issues joined and having heard the evidence & having the instructions of the Court in writing, the jury aforesaid rendered their verdict for the Plaintiff which verdict was in words as follows, "We the jury find the issue for the Plaintiff" Chas M Knox Foreman "

8. And thereupon at the Time of the rendering of said verdict the said defendants by their Counsel Chas M Osborn suggested to the Court and filed with the Clerk thereof a motion in writing for a new trial of said issues which said motion after being heard by the Court was overruled by the Court and thereupon it is considered by the Court that the Plaintiff have and recover of and from the Defendants his damages by him sustained. And the damages being unknown to the Court here it is ordered that the same jury who tried the issues herein be sworn to assess damages by the Plaintiff sustained in this behalf. And the said William Huey, John Skinner, George Cobb, W^m H Fairclough, George W Snider, Alfred H Mead, Thomas Plummer, James Scoby, James Pelgington, Chas M Knox, D H Wells, & L B Mapes. The jurors of the jury aforesaid being each and severally sworn to assess the damages by the Plaintiff sustained, after hearing the Evidence offered by the Plaintiff reported their verdict, which was & is in the words and figures following to wit. "We the jury assess the damages at Five Hundred and Eighty two $\frac{50}{100}$ dollars". "Chas M Knox Foreman"

And thereupon The Defendants by their counsel in open Court made a motion for a new assessment of damages and Trial which motion was by the Court overruled

It is therefore ordered by the Court that the Plaintiff have and recover of the said Defendants the said Sum of Five hundred and Eighty-two $\frac{50}{100}$ dollars damages assessed as aforesaid together with his costs and that he have execution therefor

And to this ruling and decisions and judgment of the Court the Defendants by their counsel then and there in Open Court excepted. And prayed an appeal from the decisions and judgment of this Court to the Supreme Court of the State of Illinois. Whereupon the Court aforesaid

9. ordered that the Defendants have Thirty days in which to file with the Clerk of this Court their bill of Exceptions and Bond to be approved by the Clerk in the Sum of Eight Hundred dollars.

And afterwards to wit on the 2nd day of March A.D 1861 The Defendants in the above entitled cause by their Attorney Chas M Osborn caused to be filed with the Clerk of the Circuit Court aforesaid their certain Bond which was and is in words and figures as follows to wit

" Know all men by these presents that John W Doane William D Manchester & Thomas W Anderson as principals and Albert G Pearson & John Wright as securities are held and firmly bound unto Michael Bartlett in the penal Sum of Eight Hundred dollars lawful money of the united States for the payment of which well and truly to be made the said John W Doane, William D Manchester and Thomas W Anderson, Albert G Pearson & John Wright do hereby bind themselves their heirs Executors and administrators jointly and severally firmly by these Presents. Witness the hands and Seals of the said Doane Manchester Anderson Pearson and Wright hereunto affixed This 28th day of February A.D 1861

The Condition of this obligation is such That whereas at the January Term A.D 1861 of the Circuit Court for the County of Rock Island and State of Illinois the said Michael Bartlett recovered a judgment against the said above bounden John W Doane William D Manchester

10. & Thomas W Anderson for the Sum of Five Hundred and Eighty two ~~Hundred~~ Dollars from Which said judgment the John W Doane William D Manchester and Thomas W Anderson have prayed an appeal to the Supreme Court of the said State of Illinois now if the said John W Doane William D Manchester and Thomas W Anderson shall duly prosecute said appeal and shall pay the judgments costs interest and damages in case the judgment of said court shall be affirmed, Then the said obligation to be void otherwise in full force and virtue to remain

In Witness whereof the said John W Doane William D Manchester & Thomas W Anderson. Albert G Pearson and John Wright have hereunto set their hands and seals this day and year above written

John W Doane (Seal)
Wm D Manchester (Seal)
Thos W Anderson (Seal)
Albert G Pearson (Seal)
John Wright (Seal)

Approved This 2nd day of March AD 1861
E H Bowman Clerk

And afterwards to wit on the 7th day of March AD 1861 the Defendants herein appeared by their Counsel Chas M. Osborn and caused to be filed with the Clerk of the Court aforesaid their certain Bill of Exceptions which was and is in words and figures as follows to wit

11

State of Illinois } ss
Rock Island County }

In the Circuit Court of said County
Of the January Term AD 1861

Michael Bartlett
vs
John W Doane
William D Manchester
& Thomas W Anderson

Be it Remembered that by a rule of the circuit court of said County No civil Case should be called for trial by jury during the first two weeks of the said January Term AD 1861 The first week By said rule being devoted to the settling of Issues and the second week to the trial of Criminal cases, and

that on the second day of February AD 1861 at the above mentioned term of said Court the above entitled cause coming on to be heard upon the motion of the said defendants for a Continuance of said Cause, in support of which the said defendant [illegible] to the Court the following affidavit theretofore filed herein and which affidavit is in the words and figures following to wit

State of Illinois } ss
Rock Island County }

of the January term AD 1861 of the Circuit Court of said County.

Michael Bartlett
vs
John W Doane
William D Manchester
& Thomas W Anderson

John W Doane one of the Defendants in the above entitled Cause being first duly sworn deposes and says that the above named defendants Cannot Safely Proceed to the Trial of this Cause at this

12 term of this said Court on account of the absence of Calvin R Corbin a material witness for the Defendant

Affiant further states that the said Corbin resides in the City of Chicago in the State of Illinois. That on the 19th day of January A.D. 1861. and as soon as he knew that the Testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin in said city of Chicago and learned That the said Corbin was then absent from the said city of Chicago and was Travelling in the States of Iowa Minnesota or Wisconsin and that he was not expected to Return for Several weeks, and this affiant states the fact to be that the said Corbin was so absent from the City of Chicago and that he has not Returned to his said home in Chicago at this time and that this affiant although he has diligently sought to do so has not been able to find the said Corbin. Affiant further states that he expects to be able to prove by the said Corbin that Each and every of the said Contracts in the said declaration mentioned were specifically made payable in the County of cook in the State of Illinois and were not specifically made payable in the said County of Rock Island.

Affiant further states that he knows of no other witness by whom the defendant can prove the above facts and that he expects to be able to procure his said Corbins attendance at the next term of this Court or his deposition to be used as evidence in the trial of

13 this Cause and this application is not made for the purpose of delay but that justice may be done

This affiant further states that on the Thirty first day of January A.D 1861 he caused to be issued from the Office of the Clerk of this Court and under the seal of this Court, a Subpoena directed to the Sheriff of Cook County for service upon said Corbin and that the said Sheriff has been unable to find said Corbin and has returned the said subpoena with an endorsement as follows to wit "I cannot find the within named Calvin R Corbin" in substance.

and further this affiant saith not

John W Doane

Subscribed & sworn to
at Chicago this 7th day
of February A.D 1861 before me
George A Meech
Notary Public

Whereupon the said Court at the instance of said Plaintiff overruled the said defendants said motion for a continuance of said Cause to which decision of said Court the said defendants then there and at the time thereof excepted

And afterwards and on the said Eighth day of February A.D 1861 at the said term of the said Court came on to be tried by a jury of the body of said County the issues heretofore joined by the parties to the above entitled

14 Cause, and the said plaintiff, and as well the said defendants by their respective Counsel being now here in Court and the said jury being duly empannelled Chosen and Sworn well and truly to try the issues aforesaid. The said plaintiff by his Counsel to maintain and prove the said issues on his part Produced as a witness Gustave Doelle. who being duly Sworn testified as follows upon direct examination I know the parties to this suit. I made a bargain for melons with the defendants. I went to Chicago in the middle part of August AD 1859. and took a car load of melons which I sold to Messrs Doane & Co. Doane paid me a Check on a bank in Chicago. I forget what Bank. I went to the Bank and got my pay. Two days after I got another load and sold them to Mr Doane. he gave me a Check on the same bank as before. I went and got pay. I knew more melons were to come. asked Doane if he would buy any more melons to be shipped from my and my neighbors places. (The two first Car loads belonged to Bartlett and me) I told Doane that the Melons belonged to me and that he could have more melons. I asked if he could take all the melons at a certain price. he said yes. I made the Contract for myself and such of my Neighbors as should agree to it he would give five Cents each but did not want melons which he could not sell in town. He took two or three for a Sample and said about that Size would do. We agreed that Doane should not take any which weighed under Eight pounds each They weighed Seven or Eight pounds Each. I found that the biggest melons did not always weigh the most

15 For payment Doane agreed that he would send his check on a Chicago Bank to Carbon Cliff in Rock Island County So that I should not have to go to Chicago. I was in Chicago five or six days left for home after making that agreement when I arrived at home there was a car nearly loaded. Part of the melons in this car I owned about 300 of them the rest were Bartletts we took out the small ones and sold them here. That car left the same day. Bartlett afterward and said that J W Doane & Co had paid him for that car load of melons paid me part of the money due on them about $13. They were all sent in Bartletts name. Doane & Co were to pay the freight and to send their check on a Chicago Bank for all that was due to me or my neighbors to the Post Office Carbon Cliff in this County.

Upon Cross examination by said defendants Counsel witness testified as follows.

Doane was to send a check to me or to my neighbors and pay so much for each good melon. The first check which he gave me in Chicago was made to my order, the bank refused to pay it because they did not know me. I went back to Doane and he gave me a new one to me or bearer and then they paid it. The agreement was that Doane & Co should send their check on a Chicago Bank to Carbon Cliff by mail. I paid freight on the first car. Doane paid me seven or Eight cents each for these melons. I had not sold them when I paid the freight. Doane paid the freight on the decond Car. he paid 4¼ or 4¾ cents each and the freight which was $33. He paid 5 cents each for the melons in all in that ~~in that~~ Car. We made no special agreement as to who

16. Should loose the melons if any car loads were lost. But Doane was not to pay for any melons which did not weigh Eight pounds nor for broken ones. Doanes ~~man~~ took the melons out of the cars I sold him, I was in the Cars and counted them. Those that were broken we threw out and the boys in the Street took them After I went home he was to count those that came and to throw out the bad ones and those under weight and send a check on a Chicago bank to me to Carbon Cliff. five cents for Each good melon which he took The Agreement was not to send more than one car load a day for we could not find more than that ripe. Doane was to write when he had Enough.

And thereupon the said Plaintiff rested his Case

And thereupon ~~the~~ said Defendants also rested their Case

The foregoing was all the evidence produced offered or given on the trial of ~~the~~ said Cause and after argument of the said cause by Counsel on the part of the said Plaintiff and said defendants respectively.

The said plaintiff by his Counsel Prayed the Court to give to the jury the following instructions

Bartlett vs Doane

The Plff asks the Court to instruct the Jury

" the jury believe from the Evidence that the Plff agreed to sell and deliver on the Cars at Carbon Cliff in Rock Island County melons the freight on which was to be paid by the dft then the jury will find the Issue for the plaintiff notwithstanding the Jury should believe that by contract between the parties the dft should

17. have the Liberty of throwing out any melons not within the Terms of the Contract if any such should be put in the Cars by the Plff

2. If the jury believe from the evidence that the parties agreed that the melons should be paid for by defts check to Plff at Carbon Cliff in Rock Island County the jury will find the issue for the Plff

all of which Several instructions so prayed by the said plaintiff were marked "given" by the Court and in open Court read to the jury and to the giving of Each and Every of the said instructions so prayed on the part of said plaintiff and the whole thereof, the said Defendants by their Counsel then and there excepted

The said defendants by their Counsel also prayed the Court to give to the jury the following instructions on their part

1st If the jury believe from the evidence that the Contract (if any was made between the parties to this suit) was made in Cook County and that the melons were ~~to be~~ delivered to the defendants in Cook County and that the Contracts were not Specifically made payable in Rock Island County they must find for the defendant

2d

If a Creditor direct his Debtors to send money by mail to him addressing the letter to a particular place and the debtor promises to do so, that does not of itself make the money Specifically payable at that place, in such case the money is considered paid on the mailing of the letter properly directed, with the money in it

18.

3rd If the jury believe from the Evidence that the melons were delivered by the Plaintiff in the City of Chicago without any specific Contract between the parties in relation to them or payment for them, then the jury must find for the defendants.

4th An agreement to send the parties check on his Chicago Bankers by mail or otherwise to Rock Island County for any money is not making that money specifically payable in Rock Island County

5th Where any act remains to be done by either party in order to determine the number of articles sold and thereby the amount of the money to be paid, the sale is not complete until that act is done

6th If from the Evidence the jury believe that in order to determine the number of melons to be paid for. The good melons were to be separated from the bad melons on the arrival of the melons at Chicago, then the sale was not complete until that act was done

7 If the sale of the melons was not complete within the County of Rock Island and the Contracts were not specifically made payable in Rock Island County then the issues must be found for the defendants

8th Giving a Check on a banker is not payment unless the person receiving it especially contracts that it shall be absolute payment

The instructions marked respectively "1st" "2nd" "3rd" "5th" & "7th" were severally marked by the Court "Given" and were read to the jury as offered. The instruction marked "4th" was altered and added to by the Court. So as to make it read as follows. "4th an agreement to send the parties check on his Chicago Bankers by mail or otherwise to Rock Island County for any money due for melons sued for is not making that money Specifically payable in Rock Island County Unless the agreement of the parties was that payment in this case should be made in that way.

The Instruction marked "6th" was altered ~~to~~ as to read as follows. "6th" "If from the Evidence the jury believe that in order to determine the number of melons sold, the good melons were to be Separated from the bad melons on the arrival of the melons at Chicago then the Sale was not complete until that was done"

The Instruction marked "8th" was altered by the Court by Erasing the word Especial making it read as follows "8th" Giving a check on a banker is not a payment unless the person receiving it Contracts that it shall be absolute payment

And the said instructions marked respectively "4th" "6th" & "8th" so as aforesaid altered Changed and added to by the Court were each marked Given and were read to the jury in open Court

And to the aforesaid rulings and opinions of the Court in altering & Changing & adding to the said instructions and reading the Same to the jury as altered Changed and added to, and to Each and Every of the said Changes

alterations and additions and to the reading of Each and Every of them as altered changed and added to by the Court to the jury the said Defendants by their Counsel then and there Excepted

And the jury having heard and Considered the Evidence aforesaid and the arguments of Counsel in the matter and the aforesaid instructions so given by the said Court thereupon returned into Court their verdict as follows

"We the jury find the Issue for the Plaintiff" "Chas M Knox Foreman"

And Thereupon and at the time of the rendering of said verdict the said defendants by their Counsel suggested to the Court and filed with the Clerk said Court in writing a motion for a new Trial of said cause which said motion is in the following words and figures to wit

State of Illinois } ss
Rock Island County }

In Jany Term AD 1861
Rock Island County Circuit Court

Michael Bartlett
vs
Chas W Doane
W. D Anderson
& William D Manchester

And now Come the said defendants and move the Court here for a new assessment of damages & Trial in this Cause & for Cause Shows

Michael Bartlett
vs
John W Doane
William D Manchester
Thomas W Anderson partners &c

To the January Term
A D 1861
of Rock Island County
Circuit Court of the State
of Illinois

And now come the said defendants and move the Court here to grant to them a new trial in the above entitled cause for the following reasons To wit

1st Because the Court here improperly overruled the application of the said defendants for a Continuance of this Cause

2d Because the verdict is against the law and the evidence

3th Because the Court erred in granting the instructions numbered two offered by the said Plaintiff

4th Because the Court erred in granting the instruction numbered one offered by the said plaintiff

5th Because the Court erred in Changing the instructions of the defendants numbered Eight without the concurrence of the defendants

6th Because the Court erred in Changing the instructions asked by the defendants numbered Four in adding thereto the following words to wit "unless the agreement of the parties was that payment in this case should be made in that way"

7th For that the Court here refused to grant to the defendants leave to plead over after the determination of the issues against them upon the issues herein made

By C M Osborn
Counsel for Defendants

Jno W Doane
Wm D Manchester
Thos W Anderson

1st That the Amount of the verdict rendered by the jury in this Cause is not warranted by the law & the Evidence

2nd That the Assessment of damages returned as a verdict by the jury in this Cause is excessive

3rd That the Court here stood adjourned & was not properly in session when this Cause was finally submitted to the jury

4th That the Court here was not properly in Session at the time when the Cause was finally submitted to the jury for the assessment of damages. For that the said Court then stood adjourned

5th That the Court here refused to grant to the defendants leave to plead over after determination of the issues against them upon the issues theretofore made.

By C M Osborn
Counsel for Defendants

John W Doane
Thos W Anderson
Wm D Manchester

And the said Defendants motion for a new trial coming on to be heard by the Court was overruled and to this decision of the said court overruling the said motion for a new trial the said defendants by their Counsel then and there and at the time thereof excepted

And thereupon and at the time of the overruling of said last mentioned motion the said defendants by their Counsel asked leave of the Court to plead over and to file their pleas denying the right of the Plaintiff to have or demand anything against the said defendants and to file their plea

24

Commonly known as the general issue denying that they the defendants promised in manner and form as the said plaintiffs in their said declaration had alledged, and the Court refused to allow them the defendants to plead over or to file any plea or pleas therein, To which ruling and opinion of the Court the said defendants by their Counsel then and there excepted.

And thereupon the said Court proceeded to Enter judgment of Quod Recuperet against the said defendants and in favor of the said plaintiff upon the verdict of the jury aforesaid. To the entry of which judgment the said defendants then and there objected Because the verdict is and was irregular, and if any judgment should be entered thereon it should be a judgment of Respondeat Ouster and not of Quod Recuperet, and the Court Overruled the said defendants' objection and entered the said judgment of Quod Recuperet

Whereupon the said defendants by their Counsel then and there Excepted to the ruling of the Court and to the entry of said judgment And thereupon and after the Entry of the judgment last aforesaid the same jury who tried the issues aforesaid were sworn to assess the plaintiffs damages in the said Cause

And the said Plaintiff by his Counsel to prove the damages by him in the said matter sustained produced as a witness

William C Seaman who being duly Sworn testified as follows upon direct examination

I Know of the Shipment of Eight car loads of Melons by Bartlett to Doane & Co from Carbon Cliff. There were two others Shipped but they were not sent to Doane & Co. Gustave Dodele had an interest in

three car loads out of the ten. I helped to count all of the first mentioned Eight Car loads of Melons sent. One car load lacked a trifle of sixteen hundred and one car load lacked a trifle of Twenty three Hundred. Those were the lowest and the highest the rest were from Sixteen to Nineteen hundred Each The first Car of the ten was shipped on the Thirteenth day of August or within one or two days of that time. There were shipped not quite one car per day after that

Upon Crofs Examination by Defendants Counsel witnefs testified as follows

The first three Cars Doelele was interested in, dont know whether the other melons came from Bartletts place or not.

I saw the Rail Road Receipts for three cars in Bartletts hands the Melons were sent to J W Doane & Co. Bartlett was there when the most of the melons were put in the Cars. Only know that they were sent to J W Doane & Co by Bartletts declarations at the time as to the five cars and from seeing the Rail Road Receipts for the three cars. Plaintiffs men hauled the melons.

And the defendants then and there and at the time of the Crofs Examination of this witnefs. Moved the Court to strike out from before the jury all of the evidence of this said Witnefs as to who the said three three Cars, part of the Eight Cars as aforesaid were sent to to wit "I know of the shipment of Eight car loads of melons by Bartlett to Doane & Co" and for Cause Shews. That it appears upon the Crofs examination that all of the knowledge of the witnefs as to who the said three car loads of melons were shipped to, was derived from three receipts given by the Rail Road Company to the said

26

Plaintiff therefor That the said Receipts were in the possession of the said Plaintiff. and the said Receipts were better evidence of the Shipments than the recollections of this witness derived therefrom

And Because the said Receipts are not produced or in any way accounted for the said defendants make this motion

And the Court overruled the said motion of the said defendants and the said defendants then and there excepted to the said Opinion and ruling of the said Court

And the said defendants then and there at the time of the said Cross examination aforesaid by their Counsel moved the Court to Strike out from before the jury all of the evidence of the said witness as to who five of the said carloads of melons part of the Eight carloads aforesaid were sent to Because it appeared upon the Cross examination of the said witness that all of his knowledge relation thereto was derived from the statements of the said Plaintiff. which statements were not and could not be evidence in this cause

And the Court Overruled the said motion of the said defendants and the said defendants then there and at the time thereof excepted to the ruling and opinion of the said Court

And the said Plaintiff further to prove the damages by him sustained in the above entitled cause produced as a witness

Gustave Dodele who being duly sworn testified as follows upon direct examination

J W Doane & Co were to pay the freight and five cents Each for the melons they were to pay

five cents for all except the broken ones and small ones under Eight pounds, which they were not to take

No melons were sent back to my knowledge

And the said plaintiff by his counsel then and there admitted to the jury that the plaintiff had received the sum of Fifty dollars in part payment of the demands in the said declaration alledged

Whereupon the said plaintiff closed his case the foregoing was all the testimony produced offered or given on the trial of the above entitled cause. And the jury having heard and considered the evidence aforesaid and the arguments of the Counsel in the matter thereupon returned into court their verdict as follows

"We the jury asses the damages at Five Hundred and Eighty two $\frac{50}{100}$ Dollars

Chas M Knox Foreman

And thereupon and at the time of the rendering of said verdict the said defendants by their Counsel suggested to the Court and filed with the Clerk of said court in writing a motion for a new trial and a new assessment of damages which motion is in the following words and figures to wit

Michael Bartlett
vs
John W Doane
William D Manchester
Thomas W Anderson partners &c

To the January Term AD 1861
of Rock Island County Circuit
Court of the State of Illinois

And now comes the said defend-

-ants and move the Court here to grant to them a new trial in the above entitled cause for the following reasons to wit

1st Because the Court here improperly overruled the application of the said defendants for a continuance of this cause

2nd Because the verdict is against the Law & Evidence

3rd Because the Court erred in granting the instructions numbered two offered by the said plaintiff

4th Because the Court erred in granting the instructions numbered one offered by the said plaintiff

5th Because the Court erred in changing the instructions of the defendants numbered Eight without the concurrence of the defendants

6th Because the Court erred in changing the instructions asked by the defendants numbered Four in adding thereto the following words to wit "unless the agreement of the parties was that payment in this case should be made in that way."

7th That the Court here refused to grant to the defendants leave to plead over after the determination of the issues against them upon the issues herein made.

Geo W Doane
Wm D Manchester
Thos W Anderson

By C M Osborn
Counsel for Defendants

State of Illinois } ss
Rock Island County }

Michael Bartlett
vs
Jno W Doane
Thos W Anderson
William D Manchester

To Jany Term AD 1861
Rock Island County
Circuit Court

And now come the said defendants and move the Court here for a new assessment of damages & Trial in this case & for cause shows That the Amount of the verdict rendered ~~in this~~ by the jury in this cause is not warranted by the Law and the evidence

1st

2d That the assessment of damages returned as a verdict by the jury in this case is excessive

3d That the Court h[illegible]tood adjourned & was not properly in session when this [illegible] was finally submitted to the jury

4th That the Court here was not properly in session at the time when the Cause was finally submitted to the jury for the assessment of damages. For that the said Court then stood adjourned

5th That the Court here refused to grant to the defendants leave to to plead over after the determination of the issues against them upon the issues thereon made

Jno W Doane
Thos W Anderson
Wm D Manchester

By C M Osborn
Counsel for Defendants

(Assignment of Errors in Supreme Court)

Wm W Doane Ward Manchester. }
Thos W. Anderson appellants }

vs.

Michael Bartlett. appellee

In the Supreme Court for the 3d Grand Div of Illinois at the April Term thereof AD 1861.
appeal from Rock Island Co.

And now comes the said appellants by C.M. Osborn their attorney, and says and suggests to the Court now here that in the record, proceedings and judgment aforesaid there is manifest error in this, viz. -

1. The court erred in overruling the motion for a continuance
2. The court erred in granting the several instructions numbered one and two, asked by the plaintiff below -
3. The court erred in overruling the first motion of defts below for a new trial
4. The court erred in not setting aside the first verdict -
5. The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict -
6. The court erred in entering interlocutory judgment on the first verdict
7. The court erred in causing the jury to be returned to assess the damages.
8. The court erred in not striking out evidence as asked by defts below.
9. The court erred in overruling the motion for a new assessment of damages and trial -

and for the said errors as also the other errors appearing upon the face of the said record, the said appellants pray that the said judgment may be reversed and that they may recover their costs herein

C M Osborn
Atty for appellants.

And the said Motion coming on to be heard by the Court was overruled, and to this decision of the said Court overruling said last mentioned Motion the said defendants by their Counsel then and there and at the time thereof excepted.

And because these several matters do not appear by the record in said cause the said defendants propose this their bill of Exceptions and prays his Honor the Judge of said Court to Sign and seal the same and make it part of the record herein. And it is done

J H Howe
Judge &c

State of Illinois
Rock Island County } ss I, Edward H Bowman Clerk of the Circuit Court in and for the County & State aforesaid hereby Certify that the foregoing pages Contain a full and complete Transcript of the records and proceedings of said Court in the Cause of Michael Bartlett vs Jno W. Doane, Wm D. Manchester & Thos W Anderson partners &c as fully and completely as the same appears of Record in my said Office

In Witness Whereof I have hereunto set my hand and affixed the Seal of the said Court at my Office in Rock Island this 28th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty One

Edward H Bowman Clerk

State of Illinois. Supreme Court. 3d Grand Div April T 1861

John W Downe et al appellants. } appeal from Rock Island
vs } County.
Michael Bartlett appellee

And now comes the said appellee by Wilkinson & Pleasants his attorneys and says that neither the record, proceedings or judgment aforesaid is there any error. and therefore the said appellee prays that the said judgment be affirmed and that he may recover his costs herein.

Wilkinson & Pleasants
attys for appellee.

John W Downe et al
Appellants
vs
Michael Bartlett
appellee

Record on
appeal from Rock Island
Co.

Filed April 10th 1861
L. Allerton
Clerk

C. M. Osborn atty for
appellants.
Wilkinson & Pleasants
attys for appellee.

SUPREME COURT.

April Term, A. D., 1861.

JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON, — Appellants.

vs.

MICHAEL BARTLETT. — Appellee.

Appeal from Rock Island County.

Abstract of Record.

1 On the 31st of December, A. D., 1860., suit was commenced by Michael Bartlett, plaintiff below, and summons issued in the usual form, directed to the Sheriff of Cook county, returnable to the next January Term of the Rock Island County Circuit Court.

2 Which was duly served by the Sheriff of Cook county, on the second day of January, A. D., 1861, and returned.

2 On the 4th day of January, A. D., 1861, plaintiff below filed his declaration in the cause, containing the common counts only.

4 On the 16th day of January, A. D., 1861, defendants below filed their plea to the jurisdiction of the court, wherein it is set out, among other things, that the causes of action arose and accrued in the county of Cook, in the State of Illinois, and not in the county of Rock Island, and were made payable in Chicago, in said county of Cook, and were not specifically made payable in the county of Rock Island.

6 On the 1st day of February, A. D., 1861, the plaintiff below filed two replications; the first setting forth that the causes of action in the declaration sued on, arose and accrued to the plaintiff in the county of Cook, and the second setting forth that the contracts in the declaration mentioned, were specifically made payable in the county of Rock Island, and not in the county of Cook.

On each of which replicatens issue was joined.

7 On the second day of February, A. D., 1861, the defendants below made a motion for a continuance, and read an affidavit in support of the motion, which motion the court over-ruled.

On the 8th day of February, the issues were tried by a jury.

7 Verdict for the plaintiff below.

8 Motion for new trial made, and over-ruled.

8 Interlocutory judgment of quod recupenet entered, and the same jury ordered to assess the damages.

The jury re-sworn to assesss the damages, and

8 Damages assessed at $582 50-100.

8 Motion for new assessment of damages and trial made and over-ruled.

8 Final judgment entered.

8 Defendants below prayed an appeal.

Thirty days given to file bond and bill of exceptions.

9 Bond, in usual form, duly approved, and filed.

BILL OF EXCEPTIONS—DULY FILED.

11 By a verbal rule of the circuit court of said county, civil cases should not be called to be tried by jury until the third week of this, January, term of said court.

11 Defendants below, on the second day of February, A. D., 1861, made a motion for a continuance, and filed and read to the court their affidavit as follows, to-wit:

STATE OF ILLINOIS, } ss
Rock Island County. }

Of the January Term, A. D., 1861, of the Circuit Court of said County.

MICHAEL BARTLETT.
vs.
JOHN W. DOANE, WILLIAM D. MANCHETER, & THOS. W. ANDERSON,

John W. Doane, one of the defendants in the above entitled cause, being first duly sworn, deposes and says that the above named defendants
12 cannot safely proceed to the trial of this cause at this term of the said court on account of the absence of Calvin R. Corbin, a material witness for the defendants.

Affiant further states that the said Corbin resides in the city of Chicago, in the state of Illinois; that, on the nineteenth day of January, A. D., 1861, and as soon as he knew that the testimony of the said Corbin would be material or necessary for this defendant, he called at the place of business of the said Corbin, in the said city of Chicago, and learned that the said Corbin was absent from the said city of Chicago, and was travelling in the states of Iowa, Wisconsin or Minnesota, and that he was not expected to return for several weeks, and this affiant states the fact to be that the said Corbin was so absent from the city of Chicago, and that he has not returned to his said home in Chicago at this time, and that this affiant, although he has diligently sought to do so, has not been able to find the said Corbin. Affiant further states that he expects to be able to prove, by the said Corbin, that each and every of the said contracts in the said declaration mentioned, were specifically made payable in the county of Cook, in the state of Illinois, and were not specifically made payable in the said county of Rock Island.

Affiant further states that he knows of no other witness by whom the defendant can prove the above facts, and that he expects to be able to procure his (said Corbin's) attendance at the next term of this court, or
13 his deposition, to be used as evidence in the trial of this cause, and this application is not made for the purpose of delay, but that justice may be done.

This affiant further states that, on the thirty-first day of January, A. D., 1861, he caused to be issued, from the office of the clerk of this court, and under the seal of this court, a subpœna directed to the Sheriff of Cook county for service upon said Corbin, and that the said Sheriff has been unable to find said Corbin, and has returned the said subpœna with an endorsement as follows, to-wit: "I cannot find the within named Calvin R. Corbin," in substance.

This affidavit was duly sworn to.

13 The court over-ruled the motion, and defendants below excepted.

13 On the 8th day of February, A. D., 1861, the issues were tried by jury. Plaintiff below introduced evidence as follows:

14 Gustave Dodele, sworn, says: In August, 1859, I was in Chicago, and made a contract with J. W. Doane & Co., for myself and such of
9 my neighbors as should agree to it; that we would send melons to J. W. Doane & Co., and they should count out the melons, and throw out the broken ones and those which would not weigh eight pounds, and pay five cent each for the remainder. Doane & Co., agreed to send to Carbon Cliff in Rock Island county, by mail, their check on a Chicago bank for the amount due.

I was interested in the first load of melons sent to J. W. Doane & Co. Bartlett told me that he got his pay for that car load.

16 Both parties rested.

16 The plaintiff below asked two instructions, as follows, to-wit:

1. "If the jury believe, from the evidence, that the plaintiff agreed to sell and deliver, on the cars, at Carbon Cliff, in Rock Island county, melons, the freight on which was to be paid by the defendants, then the jury will find the issue for the plaintiff, notwithstanding the jury should believe that, by contract between the parties, the defendants should have the liberty of throwing out any melons not within the terms of the contract, if any such should be put in the cars by the plaintiff."

17 2. "If the jury believe, from the evidence, that the parties agreed that the melons should be paid for by defendants' check at Carbon Cliff, in Rock Island county, the jury will find the issue for the plaintiff."

These instructions were given, and the defendants below excepted to each separately.

20 The jury returned their verdict in the these words:

"We, the jury, find the issue for the plaintiff.

CHAS. M. KNOX, Foreman."

21 Motion for new trial by defendants below, for the following, among other reaeons, to-wit:

1st. Because the court improperly over-ruled the application of the said defendants for a continuance.

2d. Because the verdict is against the law and the evidence.

3rd. Because the court erred in granting the instruction numbered two, offered by the said plaintiff.

4th. Because the court erred in granting tbe instruction numbered one, offered by the said plaintiff.

23 Motion over-ruled, and defendants excepted.

23 Defendants ask leave to plead over.

Leave refused, and exception taken.

24 Interlocutory judgment of quod recuperet entered by the court.

24 The same jury who tried the issues sworn to assess the damages by the plaintiff sustained.

24 Edward E. Seaman, sworn on the part of plaintiff below, says: Knew of the shipment of eight car loads of melons to J. W. Doane & Co.; two others were sent, but not to J. W. Doane & Co.; helped to count all the melons; one car load lacked a trifle of sixteen hundred melons, and another lacked a trifle of twenty-three hundred; the rest were from sixteen to nineteen hundred each; the first car of the eight car loads Dodele was interested in.

Upon cross-examination, Seaman testified that he knows who the melons were shipped to only by the railroad receipts which he saw in Bartlett's hands, as to three of the eight cars, and as to the other five, he knew only by Bartlett's declaration, made at the time, that they were for J. W. Doane & Co.

25 The defendants then moved to strike out from the jury the testimony of the witness as to who three of the eight cars referred to were sent, because his evidence was from hearsay, and because the railroad receipts, from which he derived his knowledge, would be better evidence, and their absence was not explained, though they were shown to be in the plaintiff's possession, which motion the court over-ruled, and defendants excepted.

The defendants then moved to strike out from before the jury the tes-

timony of the witness as to who the five cars, part of the said eight cars, were sent to, because all of the witness' knowledge in relation thereto was derived from the declarations of the plaintiff, which declarations were not evidence.

The court over-ruled the motion, and defendants excepted.

26 The plaintiff then introduced Gustave Dodele, who was sworn, and testified that Doane & Co. were to pay the freight on the melons, and five cents each for all, except broken melons and small ones under eight pounds. No melons were returned.

27 The counsel then admitted that plaintiff had received $50, in part payment of the demands in the declaration alleged.

27 The above was all the evidence offered by the parties.

27 Jury returned their verdict as follows, to-wit:

"We, the Jury, assess the damages at Five Hundred Eighty-Two "50-100 dollars.

CHAS. M. KNOX, Foreman."

24 Defendants below moved for new trial and assessment of damages, among other reasons, for the following:

1st. That the amount of the verdict rendered by the jury in this case is not warranted by the law and the evidence.

2d. That the assessment of damages, returned as a verdict by the jury in this case, is excessive.

31 Motion over-ruled, defendants below excepted.

ERRORS ASSIGNED.

The court erred in over-ruling the motion for a continuance.

The court erred in granting the instruction offered by the plaintiff numbered one.

The court erred in granting the instuction offered by the plaintiff numbered two.

The court erred in over-ruling the first motion for a new trial.

The court erred in not setting aside the first verdict.

The court erred in not submitting the determination of the issues as well as the assessment of damages to the jury after the first verdict.

The court erred in entering interlocutory judgment on the first verdict.

The court erred in causing the jury to be re-sworn to assess the damages.

The court erred in not striking out evidence as asked by the defendants below.

The court erred in over-ruling the motion for a new assessment of damages and trial.

10 ft 4

John W Deane. Wm D.
Manchester & Thos W.
Anderson appellants

vs.

Michael Bartlett
appellee

Abstract of Record

Filed April 1[illegible]
A. Lennon
Clerk