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No. _____

Supreme Court of Illinois

Wallace

vs.

Wren

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 197

Wallace

vs.

Wren

8981

14546

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

JOHN S. WALLACE,

APPELLANT,

vs.

EDWARD WREN,

APPELLEE.

ABSTRACT OF RECORD.

This cause was originally commenced before C. DeWolf, Esq., a Justice of the peace, in Chicago, entitled

EDWARD WREN

vs.

JOHN S. WALLACE.

The plaintiff declared on a Warrant in the sale of a horse.

The defendant plead the general issue. Judgment rendered July 30th, 1862, for the plaintiff Wren against defendant Wallace, on verdict of the Jury, for \$90 damages besides costs.

Appealed by the defendant to the Superior Court of Chicago.

Trial before a Jury in the Superior Court of Chicago, October 28th, 1862, Van H. Higgins sitting as Judge.

The following is a statement of proceedings in said trial in the Superior Court, including the evidence on both sides, the decisions and rulings of the Court; the points of law given to the Jury or refused; the exceptions; the verdict of the Jury and judgment thereon; motion for new trial, &c., as stated in the bill of exceptions, tendered by the appellant upon which the cause is brought into the Supreme Court by appeal.

18

On said trial, the plaintiff first called as witness, DANIEL J. WREN, who, being sworn, testified in substance as follows :

I know the parties ; am a son of the plaintiff. I made the trade of horses referred to in this case. Don't remember whether I said on the trade, I owned the horse, or not ; think I did not. Afterwards I took the horse back to Wallace, and hitched him in the shed. Don't know but I represented him mine.

I made the trade with Daniel Heath, the man in charge of the stables. He demanded ten dollars to boot. I brought up father's horse to trade off for a cavalry horse.

I came up a second time and took Wallace's horse home and showed him to father and brother. They liked it, and I traded, paying ten dollars to boot.

20 After about two days, I noticed the horse's nose run ; soon after saw two lumps, and finally glanders.

Then I tried to sell him at auction. Sold him to a Jew for thirty dollars. Then I took him back, and sued Wallace.

If the horse I got of Wallace had been all right, as he looked, he would have been worth an hundred dollars.

This was in March, 1862.

Father authorized me to trade.

21 Heath said he would warrant the horse to be all right—would work well, and would warrant sound.

Wallace was not present at the trade. Heath warranted both times ; when I first took the horse to show father, and when I traded.

I noticed the horse running at the nose the next morning after the trade.

The lumps came in three or four weeks, thereafter.

The plaintiff's counsel then proposed to witness this question :

Did the mule which you worked with that horse become diseased ? If so, state the circumstances.

22 Defendant's counsel objected thereto as irrelevant and inadmissible evidence.

The Court overruled the objection ; the defendant's counsel excepted. Witness answers :

The mule which I worked with the horse became diseased, by first showing a lump in the side. The mule became worthless.

23 Wallace refused to take the horse back and I took him to the horse-killer.

CROSS EXAMINED.

Heath said the horse was sound as far as he knew—he said he would warrant the horse sound. I worked the horse six weeks. I did not take him on trial at first, but to show father.

24 I notified Heath of the horse's sickness in July, about a week before I took him back. Heath told me Wallace kept the stables and he worked for Wallace.

I at first thought the horse had a common cold.

24 JOHN HITNER, a witness next sworn for plaintiff testified :

I never saw the horse except in the harness of Wren, about May. He ran at the nose and had the glanders. Horse worth ninety dollars by appearance.

25 EDWARD LYONS, next witness sworn for plaintiff, testified :

The horse in question, if sound, was worth about an hundred dollars.

This was all the plaintiff's opening testimony.

The defendant Wallace then introduced

25 DANIEL HEATH, sworn, testified as follows :

I have resided in Chicago a year before last March. Was foreman for Mix, in the Phoenix Stables, 195, corner of State and Adams streets.

26 I made the trade with young Wren. He brought down his horse lame, but he got well of it. I told Wren he might take the horse and try him; that I expected the horse was perfectly kind. I knew nothing to the contrary. He brought him back after keeping him all day, and said he worked well and nice. I demanded \$10 to boot, but he went off—no trade.

27 After this he came back once or twice, and in three or four days traded, paying the \$10, and taking the horse in exchange for his.

When the trade was made, he wanted to know, he said, if the horse was sound. I answered, that I knew nothing to the contrary. That was all, except I said he was sound as far as I knew. I believed him sound.

Nothing was said about warranting. He did not ask me to warrant.

I made the trade for Wallace. He did not give me any directions or authority to warrant.

Wren said the horse he let me have was his. Wallace was not present at any of the interviews.

Wallace had no interest in the stables. Wallace hired Mix to keep the horses. I am employed by Mix to keep his stables.

I saw the horse every day all the spring and summer when Wren was at the stables. Observed nothing ailing about the horse.

Wren never claimed that anything was the matter, till July.

In June, Wren tried me to trade again—wanted to sell me the mule.

29 I offered him \$100 for the mule—he refused.

I offered him a pair of matched horses for the mule and the horse he had of me. He refused this also.

The horse was perfectly sound as far as I could discover when we traded.

I have been acquainted with horses for 41 years. The horse was perfectly sound.

Wren first notified me of the horse's unsoundness in July. He then bought another of me at that stable. I am familiarly acquainted with the disease of glanders in horses.

29 The disease usually develops in twenty or thirty days after taking.

30 I think it cannot be taken by contagion, except they eat it in the stable from leavings or slobberings of grain or other food of horses which had it.

A horse also takes it by taking cold, during the twenty or thirty days you see the lumps and running at the nose. Last winter was uncommonly bad on horses. They had colds, and many died from colds. There was no curing of them—they were out of the reach of medicine.

CROSS EXAMINED.

I saw five horses die out of that stable, along in the winter, simply by taking cold.

31 We lost one in March. He lived three days. It was so all over the city in all the stables, not in ours particularly.

Wallace had the horse not over a week before the trade. He gave \$85 for him and bought another (his mate) at same time.

I was hired under Mix. He and Wallace went into partnership in buying army horses.

32 I was authorized to buy, but not so much for selling. This horse I was directed to sell. Glanders sometimes run along slowly and sometimes have a shorter course. Government Inspectors had rejected this horse solely on account of his age. He was called ten years old. They would not take any over nine years old.

Recalled by defendant.

The colds were frequently taken by working out in the weather.
The horse never worked out at all while Wallace had him.

32 C. A. TALCOTT, witness for defendant, sworn, testified :

I hold the appointment of Government Inspector of horses, and did so at the time referred to. I was also buying horses at 190 State street. I kept a stable three years, and am acquainted with horses.

I examined and inspected this horse which was sold to Wren. I pronounced him sound, but rejected him solely as eleven or twelve years old, whereas I was allowed only to take those of nine years of age.

I saw the same horse several times afterwards, while Wren was driving him in the street. He still appeared as sound as ever. The horse was frequently brought to me to inspect. I examined him carefully, and once was a good mind to take him.

CROSS EXAMINED.

I was appointed by Quartermaster Potter—paid by the month.

33 I was allowed some discretion, when, for instance, a horse was over nine years, and otherwise extra good.

I don't remember what was said on the trade.

34 Daniel Heath recalled by defendant :

The sale to Wren, was two or three days after the last inspection.

34 WILLIAM NEWTON, a witness for plaintiff, sworn, testified :

I am a horse doctor. Glanders develops differently—might linger about a horse a month, or even three months—some like consumption in men— runs its course from three months to years.

I know Phoenix Stables. I saw glanders there in January or February last.

In my opinion, it is contagious. Symptoms usual running at nose and swelling of jaws.

35 CROSS EXAMINED.

The Phoenix Stables were whitewashed and renovated after I saw glanders there in January or February, as I above stated. I don't know that any horses had it after the renovation.

36 EDWARD LYONS recalled by plaintiff.

I saw at Phoenix Stables a diseased mule, about eleven o'clock at night, as I was going to bed.

CROSS EXAMINED.

I can't tell when it was. There was snow on the ground. In January, this diseased mule was taken off and killed.

36 DANIEL HEATH, recalled by defendant, testified:

The diseased mule referred to, was gone six weeks before the sale of the horse to Wren.

CROSS EXAMINED by plaintiff.

We were not whitewashing when sale of horse to Wren took place.

The above was all the testimony on either side.

The court, by request of plaintiff's counsel, gave the two following instructions to the jury, in writing, to each of which being given the defendant's counsel thereupon excepted.

37

38 Second. A warranty of soundness is broken if the disease or defect exists at the time of the sale, although its existence could not then be detected.

38 The defendant's counsel then submitted to the Court in writing, and requested to be given the Jury the seven several following instructions, numbered 1 to 7 consecutively.

39 The three first of which the Court gave to the jury, but refused to give the four last, numbered 4 to 7 inclusive. Whereupon, the counsel for defendant excepted then and there to Court's said refusal to give each of said four instructions.

The exceptions being drawn out, numbered and marked for the jury in the margin as *given* or *refused*, as follows :

The Court is requested to charge the jury on the part of the defendant.

43 The Jury, after retiring, duly attended, returned into court with a
verdict for the plaintiff for one hundred dollars damages.

 The defendant's counsel thereupon immediately moved said court for
a new trial, upon the grounds following:

44 1. That the court erred in giving the several instructions for the
plaintiff.

44 2. That the court erred in refusing the instructions, numbered re-
spectively 4, 5, 6 and 7, as asked for by the defendant's counsel.

44 3. That the court erred in permitting plaintiff's counsel to put the
following question to the witness Daniel Wren, to wit: Did the mule
which you worked with that horse become diseased? If so, state the
circumstances,"—to the putting of which question the defendant's coun-
sel then and there excepted.

45 4. That the verdict of the jury is contrary to evidence.

45 5. That the verdict of the jury is contrary to law.

46 6. In admitting evidence tending to show that the mule worked
with the horse that plaintiff bought of defendant, sickened and died, to
all which defendant's counsel excepted.

46 The Court, after hearing counsel for and against said motion, over-
ruled the same, and refused to grant a new trial.

 To which decision of the court the counsel for defendant then and
there excepted.

 Judgment was thereupon rendered for the plaintiff for \$100 damages
and costs taxed—all of which appears in a bill of exceptions, signed and
sealed by said Judge Van H. Higgins. The defendant thereupon prayed
an appeal to the Honorable the Supreme Court of the State of Illinois,
and gave his bond, with surety allowed and approved, to prosecute his
said appeal with effect, according to the statute.

ERRORS ASSIGNED, AS FOLLOWS.

First. The court below erred in giving the instructions as asked for by plaintiff's counsel.

Second. The court below erred in refusing to give the instructions numbered respectively 4, 5, 6 and 7, as asked for by defendant's counsel.

Third. That the court below erred in permitting plaintiff's counsel to put the following question to the witness, Daniel J. Wren, to wit: "Did the mule which you worked with the horse become diseased? If so, state the circumstances."

Fourth. That the verdict of the jury was contrary to the evidence in the cause.

Fifth. That the verdict of the jury was contrary to the law.

Sixth. That the court erred in overruling the defendant's motion for a new trial.

Seventh. That the court erred in admitting evidence tending to show that the mule worked with the horse that plaintiff bought of defendant, sickened and died.

Eighth. That judgment was given for plaintiff against defendant, whereas it should have been for defendant against plaintiff.

110 197

John S. Wallace

vs

Edward Wren

abstract

Filed Apr 22, 1863

Leland
ck

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the First day of December in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Eighty Seventh

one folio

Present, The Honorable,

John M Wilson Chief Justice of the
Superior Court of Chicago.

Van H Stiggins

Grant Goodrich

Judges.

Joseph Knopf

Prosecuting Attorney.

Daniel S. Hammond

Sheriff of Cook County.

Thomas O. Carter

Attest,

Clerk.

Be it remembered that heretofore & now on the
Twentieth day of August in the Year of our Lord
Our Thousand Eight Hundred and Sixty Two
This was filed in the office of the Clerk of the
Superior Court of Chicago a Certain Transcript
and Appeal bond in words and figures following
to wit:-

21684	Edward Wren	}	Demand \$100
			July 16/62
2. Fol 2	John S Wallace	}	Summons issued
Intens Trial			
Doc 20			to Pogue Court with July 23 rd 62 at 2 PM
Sum 25			returned not found. al Sum issued to Pogue
Order 25			Court with July 30/62 at P. AM returned
3 Sub 45			Sum by reading to Dft July 25/62 July 30/62 Cmo
al Sum 25			Called. Parties present, not sw. after hearing the
q. Sw 45			evidence judgment rendered in favor Dft and against
Judge 25			the Dft for the amount of Judgment \$90 ⁰⁰
Sally 10			and Costs
Ent appeal 25			

Fol 3.
 Daniel Wren
 Ed Lynd
 Mc Donough
 J. Dr. Donah
 Mc Lewis
 J. Griffith
 D. Heath
 L. T. Patrick
 C. A. Talcott
 Appare Rushed
 Court Pogue
 50
 Fol 4 100.

July 30/62 Left Appeals to Superior
 Court of Chicago and filed Bond with L. T.
 Patrick as Sec

State of Illinois
 Cook County } SS

I Certify the foregoing
 is a true transcript of all the proceedings
 before me in the above entitled Cause from my
 Dictat and the papers herewith transmitted
 to said Court contains a full and perfect statement
 of all the proceedings before me

Witness my hand and Seal this 30th
 day of July A D 1862
 Calvin De Wolf
 Justice of the Peace

2
I know all men by their Parents that are John
S Wallace and L T Patrick of the County of
Cork in the State of Illinois, are held and finally bound
unto Edward Wren in the penal sum of One
hundred and Ninety Dollars, lawful money of the
United States, for the payment of which, full and
truly to be made, are bind ourselves, our heirs,
executors and Administrators, jointly, Severally and
finally by their Parents, Witness our hands and
Seals, this 30th day of July A D 1862.

fol 5
The Condition of the above, Obligation is
such, That whereas the said Edward Wren did
on the 30th day of July A D 1862 before C D May
a Justice of the Peace for the said County of Cork
receive a judgment against the above bound John
S Wallace for the sum of Ninety Dollars and Costs
of Suit from which judgment the said John S Wallace
has taken Appeal to the Superior Court of Chicago
County of Cork aforesaid and State of Illinois
Now if the said John S Wallace shall prosecute
his Appeal with effect, and shall pay whatever
judgment may be rendered by the Court upon
dismissal or trial of said Appeal then the above
obligation to be void, otherwise to remain in full force
and effect

fol 6
Approved by me at my office
this 30th day of July 1862 } John S Wallace Seal
C D May Justice of the Peace } L T Patrick Seal

And afterwards, on the same day and year aforesaid
the clerk out of the office of the Clerk aforesaid
the People's writ of Summons which said writ
with the Sheriff returns thereto endorsed on its
back and signed following to wit:

State of Illinois }
County of Cook } ss.

July 7

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

We Command You that ^{now} Summons Edmund
Wren if he shall be found in Your County, person-
ally to be and appear before the Superior Court of
Chicago of Said Cook County on the first day of the
next term thereof, to be holden at the Court House
in the City of Chicago, on the first Monday of Sept-
ember next, to answer unto John S. Wallace
in an appeal taken on a certain judgment ven-
dored before Calvin De Wolf Esq. a Justice of
the Peace in and for Said County

July 8

And have You then and there this writ with an
endorsement thereon in what manner You shall
have executed the same

(Seal)

Witness My hand and the Seal thereof at the
City of Chicago in Said County, the 20th day
of August A.D. 1862

Thomas O. Carter Clerk

The within named Edward Wren not found in my County
Septbr 1. 1862 Return 10 cts

A. C. Haring Sheriff
W. Lockshin Deputy

fol 9

And afterwards to wit on the fifth day of September
in the Year aforesaid the Appellant in this Cause
by Geo. C. Bates his attorney filed herein his Certain
Affidavit in words and figures following to wit

Superior Court of Chicago
John S. Wallace
vs Appellant
Edward Wren
Appellee

Cook County SS

John S. Wallace Appel-
lant being duly sworn doth depose and Say
that he hath a full and perfect defence to the actions
in the above entitled Cause as he is advised by his
Council to whom he has fully stated all the facts
of the Case. that he will be able on the trial of
said Cause to make a full perfect and absolute
defence in the merits of the Cause and further defendant
saith not

fol 10

Sworn & Subscribed this
6 Sep 1862 Thomas D. Castro Clerk
Geo. C. Bates atty for appellant

John S. Wallace

And afterwards to wit on the Twenty fourth day
of October in the Year aforesaid Said day being
one of the days of the October Term of Said Court
the following Among other proceedings was had in
Said Court and entered of record

Edmund Wren

John S Wallace ^{vs} Appeal

This Cause being this day called
for trial Comes Said Plaintiff by S Mable his attorney
and Said Defendant by Nathan & Taft his attorneys
also Comes and appears being joined herein it is ordered
that a jury Come, Whereupon Comes the jury of good
and lawful men to wit, P. L. Muderwort, A Otto
J. Perry the A W Rood John Long James M. Hubby
Henry Kingle C. C. Holmes, George Cobley Enock
Words L. W. Brewster and John Forts who being duly
elected tried and sworn to try the issues joined herein
as aforesaid. After hearing evidence Arguments of Counsel
and instructions of the Court return to Consider of their
Verdict And afterwards return into Court Submit
their Verdict and Say, "That the jury find issues for
Said Plaintiff and assess his damages herein against
Said Defendants to the Sum of One Hundred Dollars
And Whereupon Said Defendant Submits his
motion herein for a new trial in Said Cause

fol 111

fol 12

And afterwards do wit on the Twenty Seventh day of December in the Year aforesaid Said day being one of the days of the December Term of Said Court the following Among other proceedings was had in Said Court and Intend of Record to wit

Edward Wren

as Pro for New Trial in Appeal
John S Wallace

fol 3

And now at this day again, Comes the parties to this Cause by their attorneys respectively as aforesaid and this Cause coming on now to be heard upon the Motion of Said Defendant heretofore submitted herein on the Twenty fourth day of October of the October Term A.D. 1862. of this Court and for a new trial in Said Cause and Counsel being heard thereon and the Court being fully advised in the premises it is considered by the Court that the Motion of Said defendant be and is hereby overruled and that a new trial be refused to Said defendant in Said Cause, to which ruling of the Court in overruling his Said Motion Said defendant then and there assented, Wherefore Said Plaintiff ought to have judgment entered for his Damages upon the Verdict of the jury rendered herein as aforesaid. Therefore it is considered that Said Plaintiff do have and recover of and from Said defendant his Damages of One hundred dollars in full as assessed by

fol 4

the jury has found and affirmed and also his
Costs and Charges in this behalf expended and have
execution therefor.

15 And therefore said defendant prays an
Appeal herein to the Supreme Court of this State from
the judgment of this Court which is allowed to him
upon Condition that he file his appeal bond in
thirty days in penalty of two hundred and fifty
dollars with Security to be approved by one of the
Judges of this Court and that he be allowed the
like term of thirty days in which to file his bill
of exceptions

16 And afterwards to wit on the Twenty Fifth
day of January in the Year of our Lord One Thousand
Eight hundred and Eighty three the Complainant
herein filed his Petition Bill of Exceptions
in words and figures following to wit —

State of Illinois)
Cook County) ss

Edward When
vs.
John S Wallace)

In the Superior Court of Chicago

Afterwards, to wit, at a term of the Superior Court of Chicago aforesaid holden at the Court House in the city of Chicago on the 28th day of October A.D. 1862 before Van H. Higgins Esq. One of the judges of said Court the issue joined between the parties in the above entitled cause being an appeal cause from a Judgment before C. De Wolf Esquire a justice of the peace in which case the plaintiff below the said, Edward When declared on a warranty in the exchange or sale of a horse and the said defendant John S. Wallace had pleaded the general issue and the justice on trial thereof had rendered a Judgment in favor of said When the plaintiff below against said Wallace the defendant for thirty Dollars damages besides costs. Came on to be tried by a Jury duly empanelled for that purpose, good and lawful men of the said County of Cook and State of Illinois

At which day came as well the said Defendant John S. Wallace by his

Vol 17

18 fol

attorneys Weather & Taft, his attorneys as the said Edward When by S Marble his attorney and the jurors empannelled to try said cause being called also came and were there and there in due manner chosen and sworn to try said issue.

Thereupon the counsel for the plaintiff appelles to maintain the issue on his part called Daniel P. When as a witness who being duly sworn testified in the words following.

19 fol

I know the parties; the plaintiff Edward When is my father. I made the trade of horses referred to in this case; I don't remember whether I said to Weather, that I owned the horse or not, think I did not. I took the horse back & left him hitched in the shed, don't know but I may have represented him mine. I came up to Wallace's stable I asked Weather the man in charge if he wanted to trade for a cavalry horse. I brought up Father's horse for that purpose. Wallace demanded Ten Dollars to boot. I came up afterwards again to Weather and took Wallace's horse home and showed it to Father and brother, they liked it and I traded paying \$10 to boot on the exchange.

20 fol

After about two days I observed the horse nose run, then soon after I saw two lumps & finally glanders. Then I tried to sell him at auction. Sold for Thirty Dollars. A few who bought him brought him back and I.

2
then took the horse back to Wallace and sued Wallace before C. De Wolf Esq. J.P.

If the horse I took of Wallace had been all right as he looked he was worth one Hundred dollars.

This was in March last. Father owned the horse I gave and authorized me to trade.

21 fol

The horse was worth \$100, if sound that was a fair price.

Heath said he would warrant the horse to be all right, would work well and warrant sound.

Wallace was not present at the trade but was in town somewhere. Heath warranted both times when I first took him and when I traded. I noticed the horse running at the nose the next morning after I took him on the trade. The lump came in three or four weeks after the trade.

The plaintiff then proposed to the witness the following question, Did the mule which you worked with that horse become diseased?

22 fol

If, so state the circumstances.

The counsel for the defendant then and there objected to such question and all such testimony as irrelevant and inadmissible.

The Court overruled the objection and admitted the evidence.

The defendant's counsel then & there excepted to the ruling of the Court.

Witness proceeds - The mule which I

worked with the horse became diseased by first showing a lump in the side; then after a while a lump on the other side. The mule became weak. I took the horse back to Wallace on the evening of the constitutional election.

23 fol

Wallace refused to receive the horse, back I hitched him in the shed. He said if I left a diseased horse in the shed he would prosecute me. I took the horse to the Horse Killer at Bridgeport.

Crops examined by Deft. counsel

The trade was in March. Heath said he would warrant. Heath said the horse was sound as far as he knew, he also said he would warrant the horse sound. I worked him six weeks. I did not try the horse I took him to father to show. I did not tell Heath I would take him on trial I didn't have him over half an hour before I traded.

24 fol

I notified Heath the horse was ailing in July about a week before I took him back. Heath told him Wallace kept the stable and that they worked for Wallace.

I at first thought the horse had a common cold. Wallace told me the day I first called to that the horse up and down on the pavement to see if he favoured his feet.

25 fol

John Hitler a witness sworn for the plaintiff testified as follows— I never saw the horse except when he was in the harness of Wren about May, he ran at the nose and had the glanders in nose— Horse worth twenty Dollars by appearance

Edward Lyons a witness sworn for the plaintiff testified The horse in question if sound was worth about One Hundred Dollars

The Defendant Wallace then introduced the following witness to sustain his defence

Daniel Heath who being duly sworn testified in the words following

I have resided in Chicago a year past In March last I was foreman for Wren in the Phenix Stable 175 corner of State & Adams streets.

26 fol

I made the trade with Wren. Wren came there and wanted to get a large horse, said he had a good cavalry horse. He bro't down his name, he got well of it. I told Mr. Wren he might take the horse & try him; I expected he was perfectly kind I knew nothing to the contrary.

When took the horse and kept him all day this was in March. Last he came back and said he worked well & vice.

27 fol

When asked how I would trade, I answered, must have \$10 to best to make Wallace even. He went off - No trade. Afterwards he came back once or twice and, in three or four days after came and paid the \$10 and took the horse. Then wanted to know of me if the horse was sound this was when we traded. I answered him that I knew nothing to the contrary. That was all - except I said he was sound as far as I knew. I believed him to be sound.

Nothing was said about warranting - he did not ask me to warrant - I made the trade for Wallace; he did not give me any directions or authority to warrant.

28 fol

When said the horse he brought was his. Wallace was not present at the trade nor at any of the interviews referred to.

Wallace had no interest in the stables. Wallace hired Chix to keep his horses. I was employed by Chix to keep his stables.

I saw the horse every day all the Spring & Summer when Wren was at the stables.

I never observed anything to be ailing the horse. Wren never claimed anything until the month of July.

29 fol

In June When tried me to trade again and sell me the mule - I offered him a hundred dollars (\$100) for the mule but he refused. I also offered him a pair of matched horses for the mule and the horse he had of me.

The horse was perfectly sound so far as I could discover when traded - I have been acquainted with horses for 41 years - The horse was perfectly sound.

When first notified me of the ^{horses} unsoundness in July. He then b't another of me at that stable.

I am familiarly acquainted with the disease of glanders in horses.

30 fol

The disease develops usually in 20 to 30 days after taking. I think the disease cannot be taken by contagion except they eat it, in the stable from the leavings or ~~leavings~~ ^{scravings} of grain or other food of horses which had it. A horse also takes it by taking cold - During the 20 or 30 days you'd see the lumps & running at the nose - Last Winter was uncommonly bad on horses. They had bad colds and many died from taking cold, there was no curing of them, they were out of reach of doctors.

Crop Examined by plffs. counsel

31 fol

I saw five horses die out of that stable alone in the Winter simply by taking cold. The last one in March, he lived 3 days - It was so all over the city, in all the stables not in one particularly. Wallace had the horse not over one week before

the trade. He gave \$85 for him and bought another (his mate) with him.

I was hired under Mix. Mix & Wallace went into company in buying army horses.

I was authorized to buy but not so much for selling. This horse I was directed to sell — I heard sometimes run along slowly and sometimes have a shorter course.

Government inspectors rejected this horse solely for his age. He was called ten years old. They would not take any over 9 years old.

Recalled by defendant.

The colts were frequently taken by horses working out in the weather.

The horse never worked at all while Wallace had him.

C. A. Talcott a witness introduced by defendant was duly sworn and testified as follows —

I have lived in Chicago six years — I am employed as Government inspector of horses. I was buying horses also at 190 State Street. I kept stable Bays and am acquainted with horses.

I examined & inspected this horse which was sold to Wren. I pronounced him sound but rejected him solely as 11 or 12 years old whereas I was allowed not to take those over 9 years old. I saw the same horse afterwards in the street while Wren had him.

driving several times He still appeared sound as ever The horse was frequently brought to me to inspect. I examined carefully and once was a good mind to take him.

Crops Examined by the plaintiff

I was appointed to inspect horses by Quactumester Potter I am engaged by the month and so paid this was in March. I was allowed some discretion

34 fol

when a horse was 10 years old and extra good otherwise The horse was then at the stable a week or ten days The trade was made at the stable I do not recollect whether Wallace was at the trade or not nor do I remember what was said on the trade

Daniel Heath recalled by defendant

I was present at the inspection the sale was within 2 or 3 days after that

The plaintiff then on his part introduced as a witness

William Newton who was sworn and testified as follows

35 fol

I doctor horses, have seen glanders in horses The disease develops differently. It might linger about a horse weeks or even months even 3 months. Some like consumption in men it runs its course from 3 months to years I know Phoenix Stable spoken of I saw glanders

there in Jan'y or February last - It is in my opinion contagious - The symptoms running at nose swelling of jaws

Crops Examined by defendants counsel
The glanders which I saw at the stable was in January or February The stables were whitewashed and renovated after that - I don't know of any horse that had it or took the disease after that -

36 fol

The plaintiff, next introduced as a witness
Lyon who was duly sworn and testified as follows

I saw at those Phoenix Stables a diseased mule I was going to bed about eleven o'clock when I saw the mule about

Crops Examined by the defendants counsel
I was not present when they bought the horse I think I saw four or five mules then I can't remember the time when I saw the diseased mule there - There was snow then on the ground In January the mule was taken off and killed

Daniel Heath recalled by defendant testified

37 fol

The diseased mule referred to was gone six weeks before the sale of horse to them

Crops Examined by plaintiffs counsel
We were not whitewashing when the sale to them took place

4
The foregoing was all the evidence given or offered on the trial by either party.

The Court thereupon at the request of the plaintiffs Counsel gave to the jury the following instructions in writing to the giving of each of which the Counsel for the defendant then & there excepted.

38 fol
Green
If at the time the trade was made the defendant or the agent of defendant acting by the authority of the defendant warranted the horse that the plaintiff got to be sound when the horse was unsound at the time of such warranty then the plaintiff is entitled to recover, and the measure of damages should be the difference between the value of the horse as he then was and what his value would have been if he had been sound.

Green
A warranty of soundness is broken if the disease or defect existed at the time of the sale although its existence could not then be detected.

39 fol
The defendants Counsel then submitted to the Court in writing & requested the Court to give the jury seven several instructions numbered 1 to 7 consecutively. The three first of which the Court gave to the jury but refused to give the four last numbered 4 to 7 inclusive.

Whereupon the Counsel for Defendant then & there excepted to Courts said refusal to give each

of said four Instructions.

(The Court is requested to charge the jury on the part of the Defendant)

1

40 fol
Given
That on the sale of an article of personal property no action can be maintained for any difference in quality between the thing contracted for & the thing delivered unless, there be an express warranty made by the seller or there be fraud on his part

That without an express warranty by the seller or fraud on his part the buyer must stand all by his

2

40 fol
Given
That in order to constitute a warranty there must be an affirmation as to the quality or condition of the thing sold (not asserted as a matter of opinion or belief) made by the seller at the time of the sale for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase which is so received & relied on by the purchaser & that the purchase money was paid for the undertaking of the seller that the article sold was of a particular quality

3.

That if the seller of an article of personal property

Given

represents what he himself believes as to the qualities or value of an article and leaves the determination to the judgment of the buyer there is no fraud or warranty in the case and the seller would not be liable for any defect in the quality of the thing sold.

4

432 fol

Refused

That if a representation be honestly made & believed at the time to be true by the party making it, though not true in point of fact, this does not amount to fraud in law and the representation does not afford ground of action

5

Refused

That a bare affirmation of soundness of a horse which is then exposed to the purchaser's inspection is not of itself a warranty.

6

A bare false affirmation of the quality of the thing sold does not amount to a fraud.

433 fol

Refused

A knowledge of the falsehood of the representation must rest with the party making it; and he must use some means to deceive to make it a fraud.

7

Refused

The plaintiff in order to sustain an action upon a warranty made by any person other than the

Defendant himself, is bound to show that such other person was authorized by the defendant to make the warranty

The Jury having retired for deliberation under charge of a Sworn Officer returned into Court and delivered in their verdict by which they found for the Plaintiff & assessed his damages at one Hundred Dollars.

44 fol The Defendant by his Counsel thereupon moved the Court for a new trial for the reasons & upon the grounds following which were filed as the basis of the Motion.

And the ^{said} Defendant comes and moves the Court to set aside the verdict & to grant a new trial in the above case, for the following reasons, to wit,

1st-

1st-

The Court erred in giving the instructions for the plaintiff.

2d

The Court erred in refusing to give the instructions numbered respectively 4, 5, 6 & 7 as asked for by Defendants Counsel.

3d

The Court erred in permitting plaintiffs Counsel to put the following question to the witness Daniel J. Kren, to wit, Did the mule which you unked

45 fol with that horse become diseased? If so, state state the circumstances." to the putting of which question the defendants counsel then and there excepted.

4th That the verdict of the Jury is contrary to evidence.

5th That the verdict of the Jury is contrary to law—

6th Admitting evidence tending to show that the Mule worked with the horse that plaintiff bought of defendant sickened and died to all which defendants counsel objected

Mather & Taft
Def^{ts} Attorneys

And the counsel of respective parties having been heard thereon the Court reserved the said motion

46 fol & refused to grant a new trial. To which, decision of the Court the Counsel for defendant then & there excepted—

And for as much as the several matters herein before stated do not otherwise appear the defendant by his counsel hereby prays that this his bill of exceptions may be duly signed & sealed & made a part of the record in the cause which is done accordingly

Wm H. Higgins Esq
Judge

And on the same day and Year aforesaid the
Defendant in this Cause filed herein his Certain
Appeal Bond in Words & Figures following to wit

47 fol Know all men by these Presents, That we,
John S Wallace and Robert H Countess
of the County of Cook and State of Illinois are
held and finally bound unto Edmund Wren also
of the same County and State in the special Sum
of Two Hundred and fifty dollars, lawful money
of the United States, for the payment of which
bill and truly to be made, we bind ourselves, our
heirs, executors and Administrators, jointly, severally
and finally, by these presents
Witness our hands and Seals this Twenty Sixth
day of January A D 1863

48 fol The Conditions of the above obligation is such
That whereas, the said Edmund Wren, did on the
29th day of December A D 1862 in the Superior
Court of Chicago, in and for the County of Cook and
State aforesaid, and of the December Term thereof A D
1862 recover a judgment against the above bounden
John S Wallace for the Sum of One Hundred
dollars and --- Cents, besides Costs of Suit, from
which said judgment of the said Superior Court of
Chicago, the said John S Wallace has prayed for,
and obtained an appeal to the Supreme Court of the
said State

49 fol Now Therefore if the said John S Wallace
shall duly prosecute his said appeal with effect and
answer pay the Amount of the judgment, Costs.

interest and damages rendered, and to be rendered
against him in Case the said judgment shall be
affirmed in said Supreme Court then the above
obligations to be void, otherwise to remain in full
force and Virtue

Tested and entered into before } John S Wallace Esq
me at my office in Chicago. }
the day of } R H Cantif Esq
A D 1863

Chas

Approved the 26th day of Jan'y 1863

in open Court Grant Gralich

Judge of the Supreme Court of Chicago

50 fol

State of Illinois
County of Cook } of

I Thomas O Centro Clerk
of the Superior Court of Chicago Within and
for the County and State aforesaid do hereby
Certify that the foregoing is a full true and
Complete transcript of a Certain Appeal Bond
and Transcript from C De Wolf Justice of the
Peace in and for said County, together with the
Perplex writ of Summons in said said Appeal,
Affidavit of Merits and all orders and judgment
entered of record in said Court with the Bill
of Exceptions on file in a Certain
Case wherein Edward Green is Plaintiff and
John Wallace is defendant

50 fol

In testimony whereof I have
hereunto set my hand and
affixed the Seal of said Court
at the City of Chicago in said
County this fourth day of April
A D 1863

Thomas O Centro
Clerk



John S. Wallace
Appellant
vs
Edward Wron
Appellee

Supreme Court
Third Grand Division
Of the April Term A.D. 1863.

Afterwards, to wit, on the twenty first day of April A.D. 1863 in this same term, before the justices of the Supreme Court of Judicature of the People of the State of Illinois, comes the said John S. Wallace, by Master & Taft his attorneys, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1st

First, that the court below erred in giving the instructions as asked for by plaintiffs counsel.

2nd

Second, that the court below erred in refusing to give the instructions numbered respectively 4, 5, 6 & 7 as asked for by defendants counsel.

3rd

Third, That the court below erred in permitting plaintiffs counsel to put the following question to the witness Daniel J. Wron; to wit: "Did the wheel which you worked with the horse become disarranged? If so state the circumstances."

4th

Fourth, That the verdict of the jury was contrary to the evidence in the case

5th

Fifth, That the verdict of the jury was contrary to the law.

Sixth, That the court erred in overruling the defendants motion for a new trial.

7th

Seventh, That the court erred in admitting evidence tending to show that the mare worked with the horse that plaintiff bought of defendant, sickened and died, there is also error in this to wit: Eighth, that by the record aforesaid it appears, that the judgment aforesaid, in form aforesaid given, was given for the said Edward Wren against the said John S. Wallace, whereas by the law of the land, the said judgment ought to have been given for the said John S. Wallace against the said Edward Wren. And the said John S. Wallace prays, that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment &c

8th

Mather & Taft

Attorneys for appellants

S. Marble
Attorney for appellee

Appellee
vs
John L. Wallace
Appellant

Third Grand Division,
of the April Term A.D. 1863.

And hereupon, afterwards, to wit, on the
twenty first day of April A.D. 1863, in
April term, the said Edward Mene, by
L. Morbee, his attorney, freely comes here
into court, and says, that there is no
error either in the record and pro-
ceedings aforesaid, or in giving
the judgment aforesaid; and he
prays that the said Supreme Court
of Judicature before the aforesaid justices
thereof, now here may proceed
to examine as well the record and
proceedings aforesaid, as the matters
aforesaid above assigned for error;
and that the judgment aforesaid,
in form aforesaid given,
may be in all things affirmed,
&c. L. Morbee attorney
for Appellee

110 197
Supreme Court

John S. Wallon
appellant

Edward Wren
Appellee

Record

Not Errors

Finders

in Error

Filed April 22, 1863

L. Leland
Clerk

Mathis

Tape

for appellants

S. Marble

for appellees

Appeal from
Superior Court
of Chicago

John S. Wallace
Appellant
"
Edmund Wren
Appellee

It is stipulated that
this case be submitted on
printed Briefs & points
with any written
or printed argument either party
may send up to the Court seasonably
Ottawa May 6. 1863

Matheson & Co for
Appellant

Sumner Marble
for appellee

Wallace
my
Kron

Stigma. Catena
to Submitt
Carose

Yr. obedt. Servant
J. L. Latham

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1863.

JOHN S. WALLACE, APPELANT, }

vs. }

EDWARD WREN, APPELEE.

APPELLEE'S POINTS AND AUTHORITIES.

I.

The Court did not err in giving the instructions asked by Plaintiff. For the measure of damages should have been the difference between the horse in his actual condition and his value if he had been sound.

Sedgwick on the Measure of Damages. 290.
Clare vs. Maynard, 7 Carr & Payne. 741.
Voorheers et al vs. Earl et al, 2 Hill. (N. Y.) 288.
Cary vs. Gruman, 4 Hill. (N. Y.) 625.
Greenleaf on Evidence, 2 Vol., Sec. 260.
4 Kernan, (N. Y.) 597. 28 Barbour, 462.
29 Maine, 287. 4 Gray, (Mass.) 157.
Woodworth vs. Woodburn et al., 20 Ills. R., 184.

II.

The Court did not err in permitting the witness, Wren, to state that the mule, which worked with the horse, became diseased. No damage was claimed or recovered on account of the disease of the mule. That the mule became diseased with the glanders, was a circumstance, tending to show that the horse had the glanders, that disease being contagious.

III.

The Court did not err in refusing instructions, numbers 4, 5, 6, and 7, asked by the defendant; for the instructions which were given, presented the law fully, and the instructions refused were inapplicable and misleading.

IV.

There was a conflict of testimony. It was for the Jury to determine as to its weight, and their verdict is not manifestly against its weight.

S. MARBLE,
Attorney for Appellee.

Supreme Court of Illinois,
Third Grand Division.

April Term, A.D. 1863.

John S. Wallace,
vs Appellant,
Edward Wren,
 Appellee. }

Argument of Counsel for Appellee.

I submit that the verdict of the jury is right,
and ought not to be disturbed.

There was a conflict of testimony.

It was for the jury to judge of its weight and of the
credibility of the witnesses.

The plaintiff below contended that the horse
which he got from Wallace had the glanders.

He proved that the glanders were contagious, and
for the purpose of conducing to show that the horse
had the glanders, the court permitted him to show
that a mule which was kept and worked with the
horse, and which had been well theretofore, became
diseased with the glanders.

I submit that it was a circumstance conducing

to show that the horse had the glanders.

But did the court err in instructing the jury that if the horse was warranted sound, when he was in fact unsound, that the measure of damages was the difference in the actual value of the horse in his unsound condition and what his value would have been if he had been sound?

I submit that the court adopted the true rule. If a purchase be made without fraud, the purchaser has a right to the article purchased, however inadequate the price. It is not the province of the seller to return the article sold, and account to the buyer for merely its ~~value~~ the price paid.

If the trade between Wallace and Wren was fairly made and the horse which Wren got was warranted sound, when in fact he was unsound, it is Wren's right to be placed in as good condition as he would have been if the horse had been sound.

If a party break his contract, he should pay what would be equivalent to a performance of it.

A full performance ^(of the contract) in this case would have been the delivery of a sound horse.

If an unsound horse was furnished by Wallace to Wren a full equivalent to Wren is the difference in the value of the horse in his actual condition and what his value would have been if he had been in the

condition contemplated by the trade.

What a party loses by reason of the non-performance of a contract should be the measure of his damages.

Mr. Sedgwick in his work on the measure of damages page 290, says, "It seems originally to have been held that the measure of damages in these cases (false warranties in the sale of chattels) was the difference in the price paid and the actual value; but it is now well settled, that the rule is the difference between the actual value, and the value the article would have possessed if it had conformed to the warranty; the price paid being mere evidence of that value."

There are some dicta among the early English cases not in harmony with this position.

But the rule in England now seems to be firmly established in accordance with the principle stated by Mr. Sedgwick.

In the case of *Clare vs. Maynard* 7th Car & Payne page 741 decided in the year 1837 Lord Denman C. J. at the trial said "As the warranty and unsoundness are admitted on the record, the only question is the amount of damages."

I am of opinion that the amount of damages is what the horse would be worth if sound, deducting the price it sold for after the discovery of the unsoundness, and I think the price at which it was sold.

to the plaintiff is not conclusive as to its value, though I think it very strong evidence.

The fair value of the horse, if sound, is the measure of damages, and the sum the plaintiff gave is only the evidence of the value."

In the case of Voorhees et al vs Earl et al. 2 Hill (N.Y.) page 288. Cowen Justice said "The purchaser is entitled to have the article made equal in quality to what the warranty assured it to be."

Again in another case the same justice said: "The warranty can not be satisfied, except by paying to the vendee such sum, as together with the cash value of the defective article shall amount to what it would have been worth if the defect had not existed."

The rule undoubtedly is that the agreed price is strong evidence of the actual value, and this should never be departed from unless it be clear that such sum be either more or less than the sum at which the parties fixed it."

Cary vs. Gruman 4 Hill (N.Y.) 625
See also the case of Korrekin vs. Bevans 3 Bowles 23.

Mr. Greenleaf in his work on Evidence 2^d vol. Section 268. Says, "In an action for a breach of warranty upon a sale of goods, the measure of damages is the difference of value between the article in a sound and an unsound state without regard to the price given."

I would respectfully refer the court to the following authorities.

Fales vs McKee & Hilton (N.Y. C. B.) 753			
Benauld vs Park		Do	" 137
4 Kernan (N.Y.)	597	4 Cal.	392
28 Barbour	462	17 Do	518
29 Maine	287	4 th Gray (Mass)	157

In the case of *Woodworth vs Woodburn et al* 20 Ill. B. page 184 which was an action upon promissory notes given for waggon spokes and hubs warranted to be of a particular quality, the defense was a part failure ^(of consideration) on account of the breach of the warranty, and the court said "In this case the measure of damages was the difference in the value between the articles as delivered and such articles as they were warranted to be, which was the rule correctly adopted by the court."

In the case of *Morgan vs Byerson* 20 Ill. B. 343 was an action to recover the price paid for a horse that had been sold and warranted sound, and which proving unsound was returned to the vendor and accepted by him.

There was a rescission not an affirmation of the contract, and the vendee had a right to the return of the purchase money.

The court added by way of dicta, that if the horse had not been returned the measure of damages would have been the difference between the real value and the price given and quoted the case of *Caswell vs Coare* 1st Taunton 566 which was afterwards overruled in the case of *Clare vs Maynard* 7th Car & Payne 741.

The case of *Crabbree vs Kile et al.* 21 All. R. 180 was an action upon a promissory note given for cattle warranted sound, but which were unsound, and the real question was the right of the defendants to recoup the damages in that action.

I think there was really no question as to the amount of damages, and the court gave for authority a remark made in *Chitty on Contracts*, based upon the case of *Caswell vs Coare* 1st Taunton 566, which was subsequently overruled in England. If Wren had paid Wallace, twice as much for his horse, as the horse would have been worth had he been sound, it would have been Wren's own folly and a loss chargeable to his foolish trading. But such loss ought not to be made good to him when he sues for a breach of warranty. And although Wallace may ^{not} have got twice as much for his horse as he would have been ~~half~~ worth sound, yet in a suit for a breach of Warranty, he should render an equivalent

Very Respy

S. Murkbe command
for appeller.

119 Decr 157 for appellee

Wallace

Ms
Pis

Uren

Argument for appellee

June May 6. 1863

Deland CWR

John Borden
Committee for
Refugees

Printed by JAMESON & MORSE, 14 La Salle Street.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN S. WALLACE,	}
APPELLANT,	
^{vs.}	
EDWARD WREN,	}
APPELLEE.	

APPELLANT'S POINTS AND AUTHORITIES.

I.

The Court below charged the Jury that "the measure of damages was the difference between the value of the horse as he then was, and what his value would have been if he had been sound," which is manifestly in direct conflict with the decision of the Supreme Court in 21 *Ill.* above cited.

II.

The propriety of this instruction will be seen when it is remembered that this action was originally brought before a Justice of the Peace where there is really no distinction of actions, (the defendant being summoned to answer as to his indebtedness to plaintiff in a certain sum), and on the trial of this suit, both in the Justice's Court and in the Superior Court, evidence was received tending to show fraud as well as a Warranty, and was so argued to the Jury.

In the case of *White vs. Watkins*, 23 Ills., 480, Walker, Justice, says: "The *scienter* has always been regarded as an essential ingredient in the perpetration of a fraud, as well as a reliance on the false statements as true, by a person upon whom the fraud has been committed.

III.

That the Court should have given defendant's fifth and sixth instructions as asked. See 2 *Kent Com.*, 658.

IV.

That the Court erred in admitting evidence tending to show that the mule worked with the horse that plaintiff bought of defendant, sickened and died, is manifest, for the reason, that such evidence was irrelevant, and tended to prejudice the minds of the Jury against the defendant.

V.

The verdict of the Jury is manifestly against the weight of evidence, and the court should have granted a new trial.

MATHER & TAFT,
Attorneys for Appellant.

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Wallace

15

Men

App'ts. & Points

Filed Apr 27. 18

J. G. Lawrence

CM

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A. D., 1863.

JOHN S. WALLACE, APPELANT,)

vs.

EDWARD WREN, APPELLEE.)

APPELLEE'S POINTS AND AUTHORITIES.

I.

The Court did not err in giving the instructions asked by Plaintiff. For the measure of damages should have been the difference between the horse in his actual condition and his value if he had been sound.

II.

The Court did not err in permitting the witness, Wren, to state that the mule, which worked with the horse, became diseased. No damage was claimed or recovered on account of the disease of the mule. That the mule became diseased with the glanders, was a circumstance, tending to show that the horse had the glanders, that disease being contagious.

III.

The Court did not err in refusing instructions, numbers 4, 5, 6, and 7, asked by the defendant; for the instructions which were given, presented the law fully, and the instructions refused were inapplicable and misleading.

IV.

There was a conflict of testimony. It was for the Jury to determine as to its weight, and their verdict is not manifestly against its weight.

S. MARBLE,
Attorney for Appellee.

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Wallace
vs
Wren

Appelle's points & authorities

Filed May 5. 1863
J. Selinger
Clerk