

12330

No. _____

Supreme Court of Illinois

Babcock

vs.

Trice

71641  7

121

Benjamin Babcock

vs.
Sandy H. Price

129

Babcock
vs.
Price

1857

12330

XX

Filed before the Hon. John S. Thompson
Judge of the tenth Judicial Circuit of
the State of Illinois. At a circuit Court
begun and held at the Court House
in Monmouth, within and for the
County of Warren and State of
Illinois.

On the second Monday in the
Month of April in the year of
our Lord, one thousand Eight
hundred and Fifty Six

Present Hon. John S. Thompson Judge

Hon. A. M. Lerang State Attorney

William Bealings Clerk

James McCoy Sheriff

Sandy H. Linn

by

Benjamin W. Babcock

} Attachment

And after reading

the following record was made in this Court
in the above Entitled Cause, and is as follows
(It being the 15th day of April, 1856.)

" Sandy H. Linn

" by

" Benjamin W. Babcock

} Attachment

This day came the

"defendant by his attorney, & moves the Court to dismiss
"this suit, for want of sufficient affidavit and bond."

And afterwards, on the 19th day of April 1856
the following record was made in the above
cause, and is as follows:

Sandy W. Trice	}	Attachment
vs		
Benjamin W. Babcock		

This day came the
plaintiff by his attorney, and filed his cross
motion to amend the affidavit & Bond
on file. Thereupon it is ordered by the court,
that the defendant's motion made here in
heretofore to dismiss this suit be overruled, and
it is further ordered by the court, that
the plaintiff have leave to file his amended
affidavit and Bond.

And afterwards, on the 23rd day of April 1856
the following record was made in the above cause
and is as follows:

Sandy W. Trice	}	Attachment
vs		
Benjamin W. Babcock		

~~And~~ by his attorney This day came the def
endant by his attorney, and moves the Court,
to continue this cause at the plaintiff's cost.

And afterwards, on the 23rd day of April 1856
The following record was made in this cause.

Sandy W. Trice	}	Attachment
vs		
Benjamin W. Babcock		

This day came the defendant's attorney, and entered
the appearance of the defendant herein. And
by the agreement of parties. It is ordered by the
court that this suit be continued until the
next term of this court, at the plaintiff's cost.
Therefore it is considered by the court, that
the defendant have and recover of the said
plaintiff his costs by him in this suit at
this term of this court expended, And may
have Execution therefor.

Pleas before the Honorable John S Thompson
Judge of the tenth Judicial Circuit of the
State of Illinois. At a circuit court, begun
and held at the Court house in McDonough
within and for the County of Warren
and State of Illinois, on the third
Monday in the month of September
in the year of Our Lord one thousand
Eight hundred and Fifty six

Present Hon. John S Thompson Judge

A Mc Craig State attorney

William Billings Clerk

James Mc Cleary Sheriff

Sandy W Liew

vs

Benjamin W Babcock

}

Attachment

Ordered, that all

causes not otherwise disposed of, be con-
tinued by a general order of this court.

Plen before the Honorable John S Thompson
Hon. Judge of the Tenth Judicial Circuit of the
State of Illinois. At a circuit court
began Special term of the court,
Began and held at the Court House
in Monmouth, within and for
the county of Warren and State
of Illinois. On the fourth Monday
of November. in the Year of our
Lord One thousand Eight hundred
and Fifty Six, It being the 24th
day of said Month of said year.

Present the Hon. John S Thompson Judge

James H Stewart State atty

William Billings Clerk

James M Gay Sheriff

And after heard, On the 26th day of November 1856
the following record was made in this court, in
in the following entitled cause,

Sandy W. Lrice

by

Benjamin W. Babcock

} Attachment

This day came the parties
and their respective counsel, and issuing
Jainia for trial they put themselves upon
the country. Thereupon came a Jury to wit,

Reuben Reeves. W. J. Adcock. Lewis Simmons
William J. S. Wallace. William H Bond, William
Holt. Davis & Riggs, Thompson Brothers

And afterwards on the 27th day of November 1886
the following record was made in the above entitled
cause, and is as follows

Sandy H. Spicer

by

Benjamin W. Babcock

}

Attachment

This day again this
cause coming on for a hearing, and the
jury after hearing the evidence & arguments
of ~~counsel~~ counsel, retired to consider of
their verdict.

And afterwards on the 28th day of November 1886
the following record was made by order of the
Court in the above entitled cause

Sandy H. Spicer

by

Benjamin W. Babcock

}

Attachment

This day again this
cause coming on for a hearing, and the
jury came into Court, with the following
Verdict, to wit, "We the jury find for the
"plaintiff, Two hundred and one dollars,
"and sixty one cents" Whereupon came the
defendant, & enters his motion for a new
trial herein

And afterwards, on the 5th day of December 1856
the following record was made by order of the
Court, in above cause, and is as follows,

Sandy H. Linn

by
Benjamin W. Bulcock

} attachment

This day again
this cause coming on for a hearing, on
the motion heretofore made for a new trial.
After argument of counsel, had there on.
It is ordered, that said motion be overruled.
Then came the plaintiff & remits forty
dollars of the verdict found by the jury
aforesaid. Thereupon it is considered by
the court, that judgment be entered against
the said defendant, for the sum of
one hundred and sixty one dollar &
sixty one cents. Therefore it is considered
by the court, that the said plaintiff
have and recover of and from the said
defendant, the sum of one hundred & sixty
one dollar, & sixty one cents, together
with his costs by him in this suit expended
& may have execution therefor.

Then came the defendant & moves
the court, for an appeal to the Supreme
Court, which is allowed on the condition
that he file his bond in the sum of One
hundred & fifty dollars, with Truman D. Allen
as his security, to be filed by the next term
of this court.

State of Illinois }
Warren County }

Warren Circuit Court
November Term AD 1856

Sandy H Trice
vs

Bill of Exceptions

Benjamin W Babcock

Be it Remembered that on the trial of this case the Plaintiff to maintain the Issue on his part, placed upon the stand George Johnson who Testified That he helped the Plaintiff to shell in July & August the corn bought by him of S. R. Moore and Moran. And the Corn of the Plaintiff raised by him, that the Corn raised by Plaintiff was Extra good, that the Corn bought of Moore and Moran was hurt by standing in open Crib; that much of it was damp. In Moors Crib there was about 200. or 300 bushels. In Morans Crib about 800 bushels. Morans corn was better than Moors. that some of the good corn was shelled with the bad corn. that the Corn bought by Trice of Giddings was good, but was not well shelled through defects in the Corn Sheller being crushed in the Shelling. That some of the Corn that was hurt was thrown off of the top of the Crib, but not all, that there was not a large quantity of bad corn thrown in the Shelling, but if it had been spread out to dry it would have been good, Corn smelt bad but that sometimes arises from the Shuck

W. Green Testified

That he made with the Plaintiff a contract as agent for the Defendant

and delivered it to him or Mr Foote his
Clerk in the Summer of 1856. That the contract
was the instrument which he then held

The Plaintiff then offered in Evidence the
said Original Contract Which was as follows

(Copy of Contract)

This is to Certify that I have bot of
S. H. Price 4000 Bushels of Corn at 50 cts
for every fifty six pounds. Corn to be deliv
ered at the Cameron Depot by the first of
June next. Said Price is to let me have all
over four thousand bushels that he has to
sell at the same rate as above specified.
Said Price has received Five hundred Dollars
on the above Contract which he hereby
Acknowledges. Said Green agrees to receive
up to the amount of Ten thousand bushels
Said Green agrees to furnish sacks to deliver
said corn as many as will hold the
Corn. Floyd Warren County Ill
Wm A Green

Agent for
B. W. Babcock

S. H. Price

J. H. Moore testified

That he thrashed & shelled corn for the plaintiff described by witness J. Johnson, and ~~hauled it~~ ^{hauled it} to Cameron and left it with B. J. Morey, who kept the warehouse on the Railroad at that point; Rice paid him for it; the corn was hurt on top in the crib, threw off & sold a part of the damaged corn at the amount of \$3.; delivered the corn for Rice at Morey's warehouse; corn had a bad smell, but he ^{said} ~~attributed~~ it ^{came from} ~~the~~ ^{fact} ~~part~~ to the Shuck which had been damp & spoiled; the Corn was not examined when I delivered it at the depot, and was paid away in the sacks, there was 232 bushels of the corn, and I received \$116 from plaintiff in full for the corn.

William H. Rice, testified.

That he was acquainted with parties, was
son of Plaintiff; assisted Johnson in threshing
corn; that they thrashed about 4000 bushels
of corn raised by my father, and 2200 bushels
brought by him of More, Moran, Giddings, and others;
that the corn was ~~damaged~~ in his opinion
on the whole good corn, but a part of it
was rather damp; More's corn was damaged
some; that all the corn was delivered on the
contract with Babcock; was present at
a conversation between my father and
defendant; defendant said that a part
of the corn was sold without his order
as damaged corn in Chicago for less than
the corn he was to get ought to bring;
Babcock at the same time gave my father a lot
of money ~~for the corn~~ to buy corn ^{of all kinds} and said
that he my father would not fall out about
the corn; this conversation was in June 1853,
after the More and Moran corn was
delivered.

Our Cross Examination witness testified that he
had not as good an opportunity to judge of the condition of
the corn as Johnson; that he was not present
during the whole of the conversation between the
parties; about a thousand bushels were delivered

after this conversation; there was six
thousand bushels in all of the corn, and
Babcock said the corn was good except a
few car loads.

(Direct & Returned.)

witness testified that Babcock spoke of a
letter he had received from Chicago &
threw it away at the same time of the
conversation, from what I understood the
letter brought information about the damaged
corn; Babcock said he supposed it was More's
corn scattered, but did not know where it was.

He knew - but

Mr. Brown testified

that about April or May 1856 he helped
thresh the corn of Moran; 200 or 300
bushels was thrown off the top of the crib; the
corn was some damaged, but could not tell
how much as he could not well examine
the corn while at his business of taking away

the cobs, does not think the corn was
much injured; the damaged corn was sold
Mr Clayton ^{C.E.} _{1/2} More's corn was damaged some,
did not think it was an average lot, Moran's
corn was poor, but better than More's.

A. Valentine testified.

That he assisted in threshing Moran's corn,
about 200 bushels was thrown away as too
bad to shell; the shelled corn was a little
clumpy.

Crop damaged, witness
said that this was about last May when
he helped thresh; the rain had injured the
corn by running down through the open
cribs.

Wm R. Morey testified that the Plaintiff had loaded at his warehouse at Leavenworth a lot of corn which he said was for B. W. Babcock the defendant in June last; that he received the corn into his warehouse;

J. Giddings brought a part of said corn in			
Argument as weighed	327 bushels & 54 lbs		
J. Giddings	74 5/8 "		
C. Moran brought "	687 "	23 "	
J. P. Goddard	" "	500	
H. S. McKeel	" "	255	22 "
A. R. More	" 232		23 "
H. Giddings	" "	188 4/4	43 1/2
Case	" "	981	21
J. H. Trice	" "	510	43
"	" "	218	
"	" "	344	39
"	" "	566	20
"	" "	509	11
"	" "	<u>395</u>	<u>43</u>

All the corn was delivered for Babcock by Trice; I was keeper of the warehouse at Leavenworth for the Railroad Company; was told by Mr. Foote to receive the corn brought there by Trice; I had no orders about examining it and did not examine it; I knew nothing about the contract between them; I ~~shipper~~ was to receive the corn & ship it ^{as fast as received} ~~directly~~ at once to Chicago; I did ship it as fast I could get cars;

I was Justice of the Peace in Cameron, a
Suit was brought before me by plaintiff in the
name of B. W. L. Babcock against Goddard,
plaintiff attended to the case, Trial lasted a
whole day.

Crop Examined - witness testified

I received & sent off the corn as the
warehouseman; I ^{did} not ^{consider myself} the agent of
+ Babcock to judge of the quality of the corn &
+ whether it came up to his contract; did not
examine corn at all; put it in the storehouse;
Sometimes it was put in by the boys ~~under~~ under me
without my seeing it; I did not see it, ^{to examine it} when it was
shipped, nor when it was received from wagons;
I did not consider that I had anything to do
but to find its place in the warehouse & put it
on the cars; ~~I then~~ received one
package of money handed me by
the conductor which I gave the plaintiff
for the defendant; I think it was \$400.
but I cannot recollect the exact sum.

We counted over the money several times; it fell
\$2. or \$3 short of the sum whatever it was

Col. Croft testified.

That it was worth three dollars to attend to
a case before Justice & examine witnesses in
the case of Babcock & Babcock vs Goddard.

Here the plaintiff rested.

The defendant then introduced to
maintain the issue on his part the
following witnesses & testimony.

W. S. Green testified.

That all the Corn the plaintiff bought
^{all that was} and shipped at Cameron & deposited in
the warehouse for Babcock as testified
by Mosey was delivered under the contract
made by him with Price; Price
delivered a little over 6000 bushels
under that contract.

On Cross Examination witness said
that he was present at a conversation between
the plaintiff & defendant in Galveston in the
fall of 1836, and Price then claimed
that there was a balance due him of
\$200. or \$300. but claimed nothing for
his services in buying ~~the corn~~ and Babcock
insisted that nothing was due him.

B. J. Morey - testified

That two persons named Higgins & Burk
loaded the Corn; that a little bad corn
would damage ~~the~~ the whole
lot; that the Corn was shipped to the care
of Messrs. & Armer to Walter Brownson
& Co. Chicago Illinois; that he did not
consider that he was employed by Bobcock
to judge of the Corn received at the warehouse;
that it was his practice to receive good & bad
Corn as delivered and that he never sorted
it; the boys told me that some of the
Corn was damaged, I told them to Ship it;
~~that is all~~

W. E. Green testified.

That date of Contract was 1 May

W. Foote testified -

that he was agent of Defendant;
that when Corn was received at warehouse
he saw some of it; that the corn was in bad
order; that this was the Giddins' lot; it
was crumpled; he objected to the corn, & said
it would not do; this told him to send
the corn to Chicago and he would stand
the damage upon it; that he did not
send any but good corn and such as they
would receive at Chicago; that he knew
what good corn was and would send
only such as they would receive at the
Elevators in Chicago. This was about the
last of May or first of June, and the
lot about which the conversation was had
was the first that was shelled & received
at Alton. That he was present at a con-
versation between the parties at Babcock's ware-
house in Galesburg. This then told Babcock
that whatever damage there was on the corn
he would stand. Babcock told him that
he would not receive ~~any~~ and pay for under
their contract only, such corn as they would
receive at the Elevators in Chicago, and
this replied that he would only deliver ^{such} corn
as would pass at the Elevators; there
was about 300 bushels of Giddins' corn.

Cross examined witness stated.

that he examined the Giddings' corn
in the warehouse at Cameron and
found it cracked. Rice sent order for money
by Giddings to Babcock, and said he would
^{receive or} not pay for the corn unless Babcock
would receive it, and didn't pay for the
corn until he heard that the Elevators
at Chicago ~~where the quality was to be~~
~~judged of~~ had received the corn.
Rice acknowledged that the money was paid for him
by Babcock to Giddings. Giddings' corn was
among the first corn sent.

~~Direct named - who stated -~~
~~That it was agreed at the Convention held in~~
~~Galveston about the Giddings' corn, that~~
~~the quality of the corn should be judged of~~
~~++ ~~and~~ decided by the Elevators at Chicago,~~
~~and Babcock was not to pay for corn which~~
~~would not pass the Elevators.~~

~~Direct of Convention assumed -~~
Ninth, states that at the Convention held
in Galveston it was said he should not
receive any corn but such as would
pass at the Elevators in Chicago
and should not pay for any corn
that would not pass. Piff said
he would deliver him none but good
corn - such as would pass the elevators
at Chicago.

John Babcock testified -

Knows the parties; and is the son
of the defendant and his agent; was present at
the conversation between his father & Price
at Galesburg testified to by Price; that the
deft. told the Jeff. that he would not receive or pay
for any but good sound corn, such as would pass at
Chicago. And Price ~~the corn~~ ^{the elevators in Chicago} and the Jeff. said that he
Babcock was to receive it under the contract,
should not deliver any but good sound corn such as
and if not then the corn was not to be regarded
would pass at the elevators in Chicago,
as he received; that this was distinctly & explicitly
agreed to at that time by the plaintiff;

That he paid Price
for his father \$300 July 4th 1855, and
\$100. September 15th 1855.

That he kept the account of the plaintiff
with the defendant in an ^{account} Book (which
Book was then produced by witness) and that
he showed the account ~~to the plaintiff~~
~~to the plaintiff~~ to the plaintiff about the last
of September 1856, and that the plaintiff
acknowledged that he had received the
whole amount charged him \$3039
and the account was all right except in one item
of \$300 ~~which~~ paid by Dr Babcock
according to the Book. That he saw Price
afterward in October, when he told witness
that he had found that the item was all right.

On cross examination witness stated
that he made some of the entries in the account

but not all: that some were in the handwriting of Mr Fote who acted as Clerk for my father in his warehouse; that the Plaintiff drew the amount of each charge and that he helped myself draw them off the book. And said all the charges were right except the one item, which he afterward said was also right; Trice never made any claim for agency at this time; he had a conversation with my father at which I was present; the only controversy was as to who should lose the loss sustained on the damaged Corn: Trice said he ought not to lose it, my father said that he ought not to lose it; they talked the matter over and agreed to leave it out to arbitration; my father denied that he owed Trice anything; All the items on the book were just as they are now when Trice examined it; he said they were all right except the one item; the reason why I examined the book with him Trice wanted to look over the account and settle up.

It was here admitted by Plaintiff that the Amount was \$3039 which he received on contract from defendant less the sum of \$2 or \$3, mentioned by Morey.

Dr John Babcock testified -

that he was brother of defendant,
that he paid Trice the \$300, which he
Trice at first thought, was not a right charge;
that Trice called him, about it, that he
explained it to Trice, who went away
saying that it was all right. Trice
also said that he had been endeavoring to
settle about the corn trade and that
the accounts were all right.

J. W. Gorte testified

That he was clerk for defendant & made
some of the entries in the book shown by
John Babcock and in the account of plaintiff
in that book; that the erasure of the
figure 2 and the writing of the figure 3 once
it in the 2nd item of the account was done by him;
that it was done to correct a mistake discovered
by examining the Bank Book a check having
been given Trice for the amount, and that
he first wrote the figure 2 by mistake

C. Warren testified -

That he resides at Chicago, is agent
of Walker, Bronson & Co., that he received
this corn shipped for Babcock from Cameron;
that he received it about June - 21. & 22;

that the class & amounts in each case as follows

Number of car	Bushels on car
151	301.57 lbs
217	297.4 lbs
135	296.8 lbs
207	306.25 lbs

That he examined the corn as soon as received,
and found it had very much damaged, ~~and~~
~~that~~ the Elevators at Chicago declined
to receive it and declared it to be not good
for much suitable corn; the corn was sent to the care
of ^{to} Walker, Bronson & Co for defendant
of Ellinger & Armer; sold the corn for the
highest ^{price} it would bring, at once, - after much
difficulty, to a distillery; it sold for 55 cents
per bushel when good corn was bringing 78 cents;
this was sold at ~~60~~ 60 lbs per bushel; ~~to~~

On cross examination witness said -

That a little bad corn with good corn
would render the whole unmerchantable;
that he examined all the corn in the four cars
& found it bad; the corn was shipped in
the usual way & well secured; he sold
the corn without authority from anyone
to brook; that this was the best disposition
that could be made of the corn on that
date;

~~Alfred Long testified -~~

~~That the corn received at the~~
~~warehouse was of the same quality as the~~
~~corn in the cars, & that it was~~
~~damaged.~~

D. B. Williams testified -

That he was a Grain Dealer in
Chicago; that the corn received of Rice
was unloaded immediately on its arrival
in Chicago; that it was very badly
damaged; that a little bad corn will
in a short time mixed with good corn
spoil the whole -

The Plaintiff then offered as rebuttal testimony
B. J. Money, who testified:

That the money paid by him to
Jice fell short 2 or 3 dollars; that
it might have been \$4.00
might have been ^{C.E.} less; that had
corn would not have been worth
more than half price at Cameron,
that there was no demand for
it there; that the bushels of corn
as ~~estimated~~ ^{of Jice} by him, were
~~not~~ taken at 56 lbs to the bushel.

This was all the evidence offered
on either side in the case - and
all that was received.

The Plaintiff then Asked the Court to
Instruct the Jury as follows

1 If the Jury believe from the Evidence that the
Plaintiff agreed to deliver a lot of Corn at the Depot
in Cameron for the Defendant and that the Defendant
agreed to pay 50 cts per bushel therefor and further
that the Plaintiff has in accordance with his said
agreement delivered the Corn then the Plaintiff
is entitled to recover the pay therefor at the agreed
price unless they believe from the Evidence that
payment has been made or for such part as may
remain ^{impaired} if any

2 When the Plaintiff delivered the Corn at the Depot
in Cameron to any person authorized by the
Defendant to receive the same and the same was
accepted by such person then such delivery and
acceptance is the same as a delivery & acceptance
to & by the Defendant himself and although the
Jury may believe from the Evidence that a part
of the Corn was damaged yet if they further
believe that such injured Corn was accepted by
the Defendant or his agent under the Contract
then the Defendant has waived his right to object
to the payment for the Corn because of the bad
quality

3 The Written Contract offered in Evidence is to
govern the Parties, unless the Jury believe that
there was a subsequent agreement made by
the Parties founded upon a new and good
consideration variant from the Written Contract

4 If the jury believe from the Evidence that the
Conversations of the Parties with reference to the
Corn was merely as to the former Written
Contract, And did not amount to such new
Agreement founded on a new Consideration,
then the Statements made in such Conversa-
tions will not alter the rights or liabilities
of the Parties

5 The Plaintiff is not liable to any Damage occurring
to the Corn caused by mixing bad & good corn
together after it was received by the defendant
or his agent. Nor is he bound to look after
the Corn after it passed into the hands of the
defendant or his Warehouseman & accepted
by him at the place it was by his contract
to be delivered and accepted.

Copy (Which instructions were given by the Court
to the giving of Which instructions & each &
every of them defendant then & then accepted
and still excepts,

The Defendant then asked the Court to give the following instructions to the jury.

11/20 By the Written Contract in this case Price was bound to furnish good and sound Corn of an average quality and if the jury decline from the Evidence that the parties agreed subsequently that the Character of the Corn should be such as would be received at the Elevators at Chicago, to Comply with the Contract. The jury are instructed that such a Modification of the Contract would be binding upon both parties, the promise of one party to submit to such test being a valuable Consideration for the promise of the other.

Which instructions the Court refused to give, to Which Decision & Decisions of the Court in refusing all & each of said instructions the Defendant then & then excepted and still excepts.

The jury then retired and returned into Court with a Verdict as follows

201.61 We the jury find for the Plaintiff, the sum of Two hundred & one Dollars & sixty one cents.

Wm Nash sen

J. Brooks

Wm C Bond

L A Simmons

William Dilly

H J Adcock

Wm J. L. Wallace

S. Hughes

David C Riggs

Joel S Hedgepeth

Josephus May

Rueben Reeves

Price
Bubcock
Abstract

The Defendant then asked the Court to give the Jury the following Instructions

- 1 If the Jury believe from the evidence that the Defendant has fully paid the Plaintiff all that may be due & owing from him to said Plaintiff for the Corn sold by him to said Plaintiff. And that the money paid by said Defendant to said Plaintiff exceeds such amount so due the Jury will find for the Defendant, a verdict for the amount of such excess,
Which the Court gave

The Defendant then asked the Court to give the Jury the following instructions

- 2 If the Jury believe from the Evidence that the Plaintiff was to deliver to the Defendant good Merchantable Corn such as should be received at the Elevators in Chicago and that a part of the Corn delivered by him to said Defendant was not good & Merchantable the Jury are instructed that the Defendant is entitled to have deducted from the Amount payable under the Contract for such Corn the Amount per Bushel which said Damaged Corn is worth at the place of delivery less than sound Merchantable Corn and also to recover of & from the Plaintiff such sum as he has overpaid said Plaintiff
- 3 If the Jury believe from the Evidence that if Price agreed to deliver good Merchantable Corn to be determined at Chicago the Jury will

A And the Amount of the Difference between good
corn & damaged corn from the Amount due him
upon the Contract, And this whether the corn
was received by the Warehouseman at Cameron
for Babcock or not

4 It makes no difference that Money received the
corn for Babcock without making objection
So far as affecting Trice's liability for the loss
on the damaged corn provided that the Agreement
between Trice & Babcock was that the corn
should be such as should pass at the Elevators
in Chicago and its Character to be determined
there

A 5 Under the terms of the Written Contract in this
case Trice was bound to furnish good sound
corn of an Average quality. If some of the corn
was very good, and some very bad, the corn
was not in accordance with the Contract All
the corn delivered must be sound corn in order
to comply with the Contract,

2
Copy

Which the Court refused to give to Which the
Defendant then & then excepted, but the Court
gave said instructions as modified by the Court

6 2 If the jury believe from the Evidence that the
Plaintiff by a Contract made in good Consideration
after the Written Contract was to deliver to the
Defendant at Cameron good Merchantable
corn such as should be received at the Elevators
in Chicago and that a part of the corn delivered
by him to said Defendant was not good and

Merchantable the jury are instructed that the
Defendant is entitled to have deducted from the
Amount payable under the Contract for such
Corn the Amount per Bushel Which said Damaged
Corn is worth at the place of Delivery less than
sound Merchantable Corn and also to recover
of & from the Plaintiff such sum as he has
overpaid said Plaintiff

3. If the Jury believe from the Evidence that if
Price subsequent to the Written Contract upon
good Consideration agreed to deliver good Merch-
antable Corn under the Contract at Cameron
to be determined at Chicago, and failed in whole
or in part to deliver such good Merchantable
Corn the Jury will deduct the amount of the
Difference between good Corn and Damaged
Corn from the Amount due him upon the
Contract and this Whether the Corn was received
by the Warehouseman at Cameron for Babcock
or not

4. It makes no difference that Ebony received the
Corn for Babcock without making objection
so far as affecting Price's liability for the loss
on the Damaged Corn Provided that ^{the} subsequent
agreement between Price & Babcock, if the Jury
believe from the Evidence that such agreement
was made on good Consideration Was that the
Corn should be such as should pass at the Eleva-
tors in Chicago, and its Character to be
determined there

5' under the Terms of the Written Contract in this
Case Price was bound to furnish good sound
6 Corn of an average quality. If some of the Corn
delivered under the Contract was very good and
some very bad the Corn was not in accordance
with the Contract. All the Corn delivered under
such a Contract must be sound Corn in order
to comply with the Contract.

2 Copy (To Which Decision of the Court
the Defendant then & then excepted

The Defendant then moved for a new trial
for the following reasons

State of Illinois } Warren Circuit Court
Warren County } November term A.D. 1856

Sandy H. Price }
vs } Motion for a new
Benjamin W. Babcock } trial is made in this
case for the following reasons

- 1st The Verdict of the Jury is Contrary to the Evidence
- 2^d The Verdict is against the instructions of the Court
- 3^d The Instructions of the Court asked for by the Plaintiff are not in accordance with the law and favour the Plaintiff
- 4th The Court refused to give to the Jury the proper instructions as requested by the Defendant
- 5th The Jury were improperly tampered ^{with} by outsiders
- 6th The Jury made a plain mistake in regard to the Evidence

And the Court overruled his motion to Which
Decision of the Court he then and there excepted
and now excepts

The Court then entered judgment upon the Verdict, and the
Defendant excepted at the time each of said decisions was
made & now excepts and prays that this his bill of Exceptions
be signed sealed and made a part of the record hereof which
is accordingly done

John S. Thompson Esq.

I Benjamin W Babcock do hereby
Authorize & Empower George K Harding
to act as my Attorney in fact, And Sign
any and all bonds, Appeal Bonds or other
papers deemed by him necessary to the Proper
Trial or Management or removal of said
case of Sandy H Trice against me to the
Supreme Court

B W. Babcock

ESAL

Nov 29 1856

I do hereby authorize and Empower George
K. Harding as my Attorney in fact to sign
my name to any and all Appeal Bonds
which he may deem necessary to be used
in the case of S. H. Trice vs B. W. Babcock
to Appeal the same to the Supreme Court
of the State of Illinois

Nov 29. 1856

S. C. Allen ESAL

Copy of Appeal Bond

Know all Men by these presents that We Benjamin
W Babcock and Truman C Allen are held and
firmly bound unto Sandy H Price in the penal
sum of Three Hundred & fifty Dollars for the paym-
ent of which well and truly to be made we
bind ourselves our heirs Executors and Administrators
jointly Severally and firmly by these presents Witnes
our hands and seals this 16th day of March Anno
Domini One thousand Eight hundred & fifty seven
The Condition of the above obligation is such
that Whereas the said Sandy H Price did on
the 5th day of December A.D. 1856 in the Circuit
Court within and for the County of Warren and
State of Illinois recover a judgment against the
above bounden Benjamin W Babcock for the sum
of One hundred & Sixty one Dollars & Sixty one cents
and costs of suit from which judgment of said
Circuit Court the said Benjamin W Babcock
has prayed for and obtained an appeal to the
Supreme Court of said State. Now if the said
Benjamin W Babcock shall duly prosecute his
said appeal with effect and shall moreover pay
the amount of the judgment cost interest & damages
rendered and to be rendered against him in case
the said judgment shall be affirmed in the said
Supreme Court then the above obligation to be
null and void otherwise to remain in full force
and virtue

Benjamin W Babcock *ESB*
by George S Harding his Attorney in fact *ESB*
Truman C Allen *ESB*
by George S Harding his Attorney in fact *ESB*

State of Illinois
Warren County } I William Safety Clerk
of the Circuit Court for said County. Do
hereby Certify that the foregoing Transcript
is a full true and perfect Copy of all the
Records & papers in the foregoing Case now on
file in my office

In testimony Whereof I have
hereunto set my hand and affixed
the Seal of said Court at Elmhurst
this 31st day of March AD 1857
William Safety Clerk

Benjamin W Babcock } Supreme Court April
by } Term AD 1857
Sandy H Frier }

appeal from Warren

And now comes the said plaintiff and says
that manifest error hath intervened in the
proceedings record & Judgment to his injury
in this

1st The court erred in overruling the motion of defendant below
for a new trial

2 The court gave to the jury improper instructions for
the plaintiff

3 The court erred in giving refusing to give the instruc-
tions asked by defendant

4 The court erred in giving defendants instructions as
modified by the court

5 The court erred in rendering judgment for plaintiff
Wherefore he prays that the ^{said} judgment may

be reversed and for nought held
By Geo F Harding &
Hammond Atty for plff

And the Appeller concedes that
there is no such error as above
alleged &c.

Gandy & Pratt
Atty for Appeller

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Price

"

Balance

Price of exceptions

Filed April 21, 1887
L. Leland
Clerk

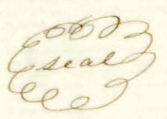
(Copy of Power of Atty)

I Benjamin W Babcock do hereby authorize and
empower George F Harding to act as my attorney in
fact & sign any and all bonds, Appeal Bonds, or
other papers deemed by him necessary to the proper
trial or management or removal of said Case
of Sandy H. Fied against me to the Supreme
Court Nov 29, 1856

B W Babcock 

I do hereby authorize and empower George F Harding
as my attorney in fact to sign my name to any
and all appeal Bonds which he may deem necessary
to be used in the Case of J. H. Fied vs B. W. Babcock
to appeal the same to the Supreme Court of the
State of Illinois

Nov 29, 1856

J. D. Allen 

And on the back of the foregoing Power of Atty is the
following

Fied

vs

Babcock

Power Atty

Filed at Bar 16th 1857
Wm. Lafayette Clark

(Copy of appeal Bond)

Know all men by these presents that we Benjamin W Babcock and Truman D Allen are held and firmly bound unto Sander H. Rice in the penal sum of Three hundred and fifty dollars for the payment of which well and truly to be made we bind ourselves, our heirs, executors and Administrators jointly, severally, and firmly by these presents

Witness our hands and seals this 16th day of March Anno Domini One thousand eight hundred and fifty seven,

The condition of the above obligation is such that Whereas the said Sander H. Rice did on the 5th day of December A.D. 1856, in the Circuit Court within and for the County of Warden and State of Illinois recover a judgment against the above bound Benjamin W Babcock for the sum of One hundred and sixty one dollars and sixty one cents, and costs of suit, from which judgment of said Circuit Court the said Benjamin W Babcock has prayed for and obtained an appeal to the Supreme Court of said State. Now if the said Benjamin W Babcock shall duly prosecute his said appeal with effect, and shall moreover pay the amount of the judgment costs, Interest and Damages, rendered or to be rendered against him in case the said Judgment shall be affirmed in the said Supreme Court then the above obligation to be null and void otherwise to remain in full force and Virtue

Benjamin W Babcock

by George F Harding his attorney in fact

Truman D Allen

by George F Harding his attorney in fact

Seal
Seal
Seal
Seal
Seal

And on the back of the foregoing Bond is the following

Trice
vs
Babcock
Appeal Bond
Filed March 16th 1857
Wm. Saffety Clerk

State of Illinois
Warrick County } I William Saffety, Clerk of Circuit
Court for said County do hereby certify that the foregoing Power of Attorney and Appeal Bond is a true and perfect copy of the Original now on file in my office and that the same was filed by me on the 16th day of March A.D. 1857 by said Defendant.
In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Elkhornville this 7th day of May A.D. 1857

Wm. Saffety Clerk

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Babcock

vs

Trice

Copy of Appeal Bond

Filed May 11. 1857

L. Leland
Clerk

State of Illinois

Supreme Court of Illinois

April Term A.D. 1857

Benjamin W. Babcock & appellant
vs. Appraiser from Warren.
Sandy H. Trice & appellee

George P. Harding being duly sworn
says that issues were duly joined and presented
for trial in the above entitled case in the
Said Court of Warren County, Illinois,
by a declaration, pleas, and replications duly
filed and made before the trial in said case;
by the parties in said case; that
the appeal bond in the record in this case
appears of record by the filing of the
check of said Court written thereon in said Court to
have been filed in said Court by the next
term of said Court after said appeal was prayed
to wit on the day of the date thereof; and
that a full and perfect record of the
papers and records and proceedings in
said case in said Court will when filed
in this Court show that the above facts
as stated by this affiant are true.

George P. Harding

Sworn to and subscribed
before me this 5th day
of May A.D. 1857

L. Leland Clerk of Sup. Court
By J. H. Rice Deput.

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Babcock

True

affidavit

Filed May 5, 1857

L. Leland
Clerk

State of Illinois / Warden Circuit Court
Warden County / April Term AD 1856

Benjamin W Babcock Was attached
to answer Tandy H. Trice of a plea of trespass on
the case upon promises and therefore the said Tandy
H. Trice by Daniel Y. Griffith his Attorneys Complain,

For that whereas the said Defendant hereofore to wit,
On the twenty seventh day of February AD 1856 at the
County of Warden aforesaid was indebted to the said
Plaintiff in the sum of Three thousand five hundred
and thirty dollars for divers goods, wares, Merchandise,
and Chattles to wit, Six thousand four hundred
and sixty one bushels of Corn by the said Plaintiff,
before that time sold and delivered to the said defend
ant, at his special instance and request, and being
so indebted, he the said Defendant, in consideration thereof
afterwards to wit, on the day and year aforesaid undertook
and then and there faithfully promised the said Plaintiff
to pay him the said sum of Money when he the said
Defendant should be thereunto afterwards requested,

For that, whereas the said Defendant hereofore to wit,
on the twenty seventh day of February AD 1856 at the
County aforesaid accounted with the said Plaintiff of
and concerning divers sums of Money from the said
Defendant to the said Plaintiff before that time due
and owing and then in arrear, and unpaid, and upon
such accounting the said Defendant was then and there
found to be in arrear and indebted to the said Plaintiff

in the sum of Three hundred dollar lawful money,
and being so found in arrear and indebted he the said
Defendant undertook and then and there faithfully
promised the said Plaintiff to pay him the said sum of
Money above mentioned, when he the said Defendant
should be thereunto Afterwards requested.

Whereas the Defendant on the Twenty seventh day of
February A.D. 1856 at Waukegan County aforesaid was inde-
bted to the Plaintiff in three hundred dollars for
the price and value of Work then and there done
and Materials for the same provided by the Plaintiff
for the Defendant at his request,

And in \$300. for money then and there paid by the
Plaintiff for the use of the Defendant at his request,

And in \$3530.00 Dollars for money then and there
received by the Defendant for the use of the Plaintiff

Nevertheless the said Defendant notwithstanding
his said several promises and undertakings, but
Contrary and fraudulently intending craftily and
subtly to deceive and defraud the said Plaintiff in
this behalf hath not as yet paid the said several
sums of Money, or any or either of them, or any
part thereof to the said Plaintiff (although often reques-
ted so to do) but the said Defendant to pay him the
said hath hitherto wholly neglected and refused,
and still doth neglect and refuse, to the damage of
the Plaintiff of Three thousand five hundred and thirty
dollars and thereon he brings his suit &c

Paine & Griffith
Attys for Pltff

Copy of Acct. sued upon
State of Illinois } Main Circuit Court
Ward County } To April Term AD 1856

Sandy H. Trice
vs
Benj W Babcock }
Benjamin W Babcock D

To Sandy H. Trice
To 6461 bu 3 lbs Corn 50 ct per bu 3230.00
To services as agent in buying Corn 100.00
To paid for cleaning and Shelling Corn 100.00
To paid hired men for labour 100.00
\$5530.00

And on the back of the foregoing is the following,

Sandy H. Trice
vs
Benj W Babcock
Declaration

Filed March 24th 1856

Wm Billings Clerk

State of Illinois }
Hannibal County }

Hannibal Circuit Court
April Term 1856

J. H. Fied.

vs

B. N. Babcock

And the Defendant by Hammond
& Kellogg his Attorney Comes & defends the wrong and
injury When &c. and says that he did not undertake
and promise in manner and form as the Plaintiff has
in his declaration alleged against him, and of this
he puts himself upon the Country for trial

Hammond & Kellogg
for Defr

And for further plea the Defendant says Action Non
because he says that herefore to Wit. on the first day
of January A.D. 1856. the said Plaintiff at the County
of Hannibal aforesaid. Was indebted to the Defendant
in the sum of Ten thousand Dollars for money before
that time had and received by the said Plaintiff to &
for the use of said Defendant and for money before
that time lent & loaned paid out and expended
to and for the use of said Plaintiff by the Defendant
at the special instance and request of said Plaintiff,
in consideration of which the Plaintiff promised to pay to
the said Defendant the said sum of Ten thousand dollars
aforesaid. When he should thereunto afterwards requested
by the said Plaintiff although often requested so to do

has not paid said sum or any part thereof,
And the said Defendant avers that the damages
arising to the Defendant for the non payment of the
sum of Money aforesaid far exceeds the amount of
damages stated in Plaintiffs Declaration claimed for
the breach of the Contract & undertakings stated in
Plaintiffs Declaration, And which damages so
accruing to the Defendant he is ready and Willing
to set off in said action as provided in the Statute in
such case made and provided,
And this he is ready to verify, Wherefore he prays
Judgment &c

Hammond & Kellogg
for Deft

Aet, on which the above plea is based

Sandy H. Luce D
To B. H. Babcock

To money loaned & advanced to him \$5000,
" " paid out for him 5000,

And as to the said first plea of Defendant the
said Plaintiff doth the like &c

Paine & Griffith
Pltys Attorney

And the Plaintiff as to the second plea of the
Defendant the Plaintiff says precludi non because
he says that he did not promise as in and by said
plea alleged and of this he puts himself on the
Country &c

Paine & Griffith
Plff Attorneys

And the Defendant doth
the like

Hammond Atty
of Defr

And on the back of the foregoing is the following

Taney H. Luce
As

Benj W Babcock

Pleas offer

Filed April 23^d 1856

Wm Billings Clerk

State of Illinois }
Hannu County } p

I Wm Safety Clerk of the Circuit Court for
said County do hereby certify that the foregoing is a true and perfect copy
of the original papers now on file in my office of foregoing case

In testimony whereof I have hereunto set my
hand and affixed the seal of the said circuit

Court at Hannu mouth this 4th day May

1857 Wm Safety Clerk

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Benjamin Babcock
vs

Fanny H. Price

Additional Record

Filed May 6, 1857
L. Leland
Clerk

Benjamin W. Babcock

vs

Lundy H. Rice

I. As to instructions in regard to waiver & acceptance

1. Where the contract of sale is Executory the law raises an implied warranty that the goods sold and delivered under this contract shall be of "fair merchantable quality and condition".

4 Gil. 74. and cases cited.

Whit. on Cont. 391 a.

Part. on Cont. 465. 11. 6. 6.

23 Wend. 350.

2. "Where it appears that the article sold is designed for a particular market or purpose and so created by both parties, as here, there may be great ^{doubt} whether a present sale would not raise a warranty, that the article should answer the end in view?"

23 Wend. 350.

Long on Sales. 204. 205.

3. Where an action is brought for the value of certain goods & chattels upon a quantum valebant, although the contract was for the goods & chattels at a certain price, the defendant may as his defence ^{prove} that the goods and chattels were not worth so much as the plaintiff claims. In this case the plaintiff elects to disregard the Special Contract. 7 East. 479.

Max Ed. vol. 4. p. 227.

10. B. & C. 439.

1 Camp. N.P. 38

9 B. & C. 259

2 Smiths L. C. 20.

4. It is not necessary for the defendant to set up this defence and maintain it to prove either a return of the property or a notice of its defects to the vendor.

2 Smiths L. C. 20, 21, 22. 7 East 479.

1. H. Bl. 17.

23 Wend. 353.

3 Ad. & El. 103

Long on Sales. 224

18 John. R. 140.

5. It is enough in any case to maintain this defence to show that the plaintiff was notified that the article sold was damaged and not in accordance with the contract. In this case plaintiff was notified.

23 Wend. 353.

6. That the mere acceptance or receipt of the corn by the warehouseman of the appellant did not operate as a waiver of his right to recompense for the damaged corn.

Smith's L. C. 21, 22, & 23
Whit. on Cont 400.

7. If the instruction is regarded as laying down the law, "that if the appellant or his agent accepted the goods as such goods, as should be delivered under the contract, such fact constitutes a waiver of his right to recompense", then the instruction was contrary to the law and improper.

8. It was necessary not only that defendant should accept the corn under the contract, but that he should know when he received it that it was partly damaged, to deprive him of his recompense. It is doubtful whether even then he would be deprived if he speedily accepted, and did not design to waive his rights.

9. There was sufficient evidence of a subsequent agreement to entitle the defendant to her last instruction, and to have those asked given without modification.

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Babcock
v
Grice

Agreement

Filed May 6, 1887
L. Seland
Clerk

Harding