

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 202

*2 p. 11/1/1870*

11363

*Sardson*

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*Johnson*

*Handwritten scribble*

~~Subscribed~~

The Court:

Mr. Chief Justice Caton delivered the opinion of

~~Johnson~~

~~Caton~~ We are constrained to say that here is a variance between the declaration and the proof. In describing the contract on which the action is brought, the <sup>second count of</sup> declaration states that the ~~defendant~~ <sup>Plaintiff</sup> agreed to deliver to the defendant, from one hundred, to one hundred and ten, stack bags, at two dollars <sup>and</sup> twenty five cents per hundred pounds, towards the payment for the fat hogs and the <sup>and</sup> third <sup>and</sup> fourth counts. ~~state~~ the number to be one hundred and more stack bags. And these are the only counts which, approximately, set out the contract. The proof is, that he was to deliver one hundred stack bags; - no more and no less. That this is materially variant from the contract set out in the declaration admitted of no question. It is simply self evident and admits of no argument, unless one hundred, and more than one hundred, are the same. The judgment is reversed and the cause remanded. Judgment reversed.

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# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

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FREDERICK DAVIDSON }  
                          *vs.* } *Appeal from Warren.*  
OAKLEY JOHNSON. }

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## ABSTRACT OF RECORD.

THIS was an action of assumpsit brought by the plaintiff below, in the Warren Circuit Court, to recover for a failure to swop hogs according to agreement.

The suit was commenced in March 1858.

13     On the 9th of November 1859, the first trial by jury was had, and a verdict for plaintiff for \$76. The Court, on application of defendant, granted a new trial.

39     On the 8th of April 1861, a second trial by jury was had, and  
40 a verdict rendered for the plaintiff for \$110. The Court granted a new trial.

42     On the 31st of October 1861 a third trial by jury was had, and  
43 a verdict was rendered for the *defendant*. Upon application of plaintiff, the Court granted a new trial.

44     On the 21st of March 1862 a fourth trial by jury was had, and  
45 a verdict rendered in favor of plaintiff for \$50, whereupon defendant filed his motion in arrest of judgment and for a new trial, which motions were overruled by the Court, and judgment rendered in favor of the plaintiff for \$50 and costs.

The defendant appealed to this Court.

45 The declaration as amended contains eight counts. The first six are special, and the two last are general.

1. First count alleges that defendant, on the 11th day of February 1858, sold the plaintiff a number of live hogs, viz. 100, the same that were then following defendant's feeding cattle at Jno. B. Cox's, for \$3.75 per hundred weight gross, and to average 200 weight gross, to be delivered to plaintiff at Ellison, in Warren county, on the 16th and 17th days of February 1858, to be weighed by Samuel Johnson, at his store in Ellison, and to be paid for on delivery. Breach is, that the time has elapsed and defendant failed to deliver the hogs.

2. The second count sets forth the sale of the hogs substantially as in the first count, and states that plaintiff was to deliver to defendant at Ellison on the 16th and 17th days of February 1858, to be weighed by Samuel Johnson, from 100 to 110 stock hogs, which were to be as good as the defendant had just seen at the yard of Samuel Johnson in Ellison, which stock hogs were to be taken by defendant in part payment for the fat hogs, at \$2.25 per cwt. gross.

3. Plaintiff purchased of defendant 100 head of fat hogs to overrun 200 lbs. apiece, to be taken from the hogs of defendant then running at the farm of John Cox with defendant's feeding cattle, and from defendant's home place, at \$3.75 per hundred, to be delivered at the store of Saml. Johnson in Ellison, on the 16th and 17th days of February 1858, to be paid for as follows, viz.: Plaintiff was to deliver to defendant at Ellison 100 stock hogs, or more if he chose, to be as good on an average as those that said defendant had that day seen at the yard of Saml. Johnson in Ellison, at \$3.25 per hundred; the balance, to be paid for in cash. The plaintiff then alleges that he did deliver, on the 16th day of February 1858, at Ellison, 100 and more stock hogs of the kind and description called for by his agreement, yet defendant failed to deliver the fat hogs.

4. Fourth count is substantially like the third, except it alleges that plaintiff's store hogs were ready at Ellison to be delivered.

5. Fifth sets forth a sale of 100 fat hogs by defendant to plain-

*States that*

*one hundred*

*or more*

*stock hogs*

*was to be paid*

*to defendant in the one hundred*

*fat hogs*

*and more*

tiff to be delivered at Ellison, as in the other counts, at \$3.75 per hundred, to be paid for in cash.

6. The sixth count is in all respects like the third count.

7. Seventh count is for money lent, money had and received, money paid, laid out and expended.

8. Eighth count is for money due on account.

Defendant plead the general issue.

47 On the trial, the plaintiff called William D. Johnson as a witness, who testified that on the 11th February, 1858, he was with plaintiff at defendant's, when plaintiff contracted with defendant for 100 fat hogs, to be delivered at Ellison, at Samuel Johnson's store. Can not say the exact amount they were to weigh, but were to average over 200 lbs. They were to be taken from a lot of hogs defendant had on farm of Cox, the balance from the farm of defendant, at \$3.75 per hundred pounds gross, to be delivered on the next Tuesday and Wednesday.

Defendant was to have from plaintiff 100 stock hogs at \$3.25 per hundred pounds as part payment, and the balance was to be paid in money. Something was said about more hogs, which he does not recollect, but it was before the making of the contract and no part of it. By the contract each was to let the other have 100 hogs, no more or less. The stock hogs were to average with some hogs defendant had seen before at Saml. Johnson's. Johnson was to do the weighing of both lots of hogs at his store. He, at the time, made a memorandum of the weights, numbers and prices.

Defendant, by his counsel, here objected to the evidence about the 100 stock hogs, because the declaration called for 100 *or more*, and therefore was not pertinent; but the Court overruled the objection and defendant excepted. Defendant then moved to exclude such testimony, but the court overruled the objection and plaintiff excepted.

The witness then stated that he was the plaintiff's father. He was satisfied the hogs were to be delivered on the 16th and 17th of February 1858. He did not swear on the first trial of this cause that the hogs were to be delivered on the 16th *or* 17th days of February 1858, or the 16th or 17th of any days, but did swear they were to be delivered on both those days.

The contract was closed east of Davidson's house in the pasture field. It was made after we returned from Cox's. The plaintiff offered defendant \$3.75 per hundred pounds gross for his hogs and defendant agreed to take it, provided he could have of plaintiff 100 stock hogs to replace them. Before going to Cox's, plaintiff and defendant were talking about fat hogs, stock hogs, prices and quality. Defendant told plaintiff where the hogs were. He said he would go there and see them, and if they suited him they would come back and let him know.

*The reason for having two days was, that plaintiff said, it would be impossible to weigh all in one day.*

50 The plaintiff next called Samuel Johnson, who testified that on the 16th day of February 1858 he was on his way from Chicago, got to Ellison about 9 o'clock that evening, had \$1000 with him which was to pay balance on hogs. The next day in the morning he went to defendant's house and plaintiff came there soon after. Witness said he came to see why the hogs were not sent up. Defendant said they would have to make a new bargain if they got the hogs.

On that day (17th February, he, witness) had 150 stock hogs at Ellison; 100 of them would average with 40 or 50 that defendant had before seen there.

Some stock hogs were but with these stock hogs on the 17th of February 1858.

He, on the 20th or 21st of February 1858, bought of defendant 100 hogs that averaged 240 pounds or more at \$4.50 per cwt.

He did not deliver the hogs on the 17th of February 1858.

Hogs weighing 250 pounds were worth \$5.00 per hundred; those weighing 240 to 250 pounds were worth from \$4.25 to \$4.50 on the hundred pounds, on the 16th and 17th days of February, 1858, at Ellison.

51 Defendant, so fast as this witness gave testimony to the contract, objected thereto, because of variance from the contract set forth in plaintiff's declaration; but the Court overruled the objection, and plaintiff excepted.

51 The witness then stated that he was a brother of plaintiff; that plaintiff was with him at defendant's when he told defendant that he came to see why he had not sent up the hogs, and when defendant said they would have to make a new contract.

That plaintiff neither then nor while they were at defendants, to his knowledge, said anything about the hogs, nor a contract therefor, nor any violation of any contract, and did not make any demand for the hogs; nor did witness make any demand for them.

52 When defendant said they would have to make a new contract, witness dropped the subject, and went to talking about something else. He went to defendant's that morning to see him about the hogs, and expected to meet the plaintiff there, and did meet him.

Plaintiff next called Lewis Rapalee, who testified: That he was at Ellison on the 16th and 17th of Feb'ry, 1858. He was clerk in a store for Samuel Johnson, but he does not know how many hogs were there on the 16th Feb'ry. On the 17th there were 130 or 140 there, *but defendant did not have any hogs there.*

Davidson was at Ellison about 8 o'clock on the morning of the 16th of Feb'ry, 1858, and he told me if the boys wanted the hogs they must make a new contract. Both he and Cox lived from 2 to 2 1-2 miles from Ellison. One north-east, the other south-east.

Defendant asked if the Johnsons were there. He said he had let them have some hogs.

On *Cross Examination*, this witness testified: That he was a brother-in-law of Samuel Johnson; that the defendant, when he came to Ellison on the morning of the 16th Feb'ry, 1858, came to the store of Samuel Johnson, and said he had come to see about delivering hogs to plaintiff. Witness told defendant that Samuel Johnson was in Chicago, and that plaintiff was in Young America, and defendant after remaining about an hour left.

53 Young America is about six miles from Ellison.

Livermore, a witness for plaintiff, testified, that defendant said he told plaintiff he could have a portion of the hogs he had at home and the balance at Cox's, if he would let him have stock hogs.

Thinks he said he was to let Johnson have 100 hogs at 3 1-4 cents, and Johnson was to let him have 100 stock hogs at 3 3-4 cents. They were to weigh the stock hogs and pay the defendant the balance in cash.

Defendant said he went to Ellison on the morning of the 16th Feb'ry, 1858, and found neither of the Johnsons there, and concluded not to let them have the hogs. He understood that defendant's hogs were to be weighed first. The number of stock hogs was to be a certain number. He does not think it was to be over a hundred.

Defendant excepted to the testimony about 100 store hogs, because it varied from the declaration; but the exception was overruled, and defendant excepted.

Here plaintiff rested.

Defendant then called Thompson Brooks, who testified: That he was one of the jurors who tried this case in this Court the first time. On that trial William D. Johnson swore that the hogs were to be delivered on the 16th *or* 17th day of February, 1858, and not on the 16th *and* 17th of that or any other month.

Smith Shepard testified: That he was one of the jurors on the first trial of this case, and that William D. Johnson swore he knew the time for delivery of the hogs *from a memorandum he then had of it*, and his recollection is that he swore it was one of two days and not two days.

55 Hon. John S. Thompson testified : That he presided as judge  
56 on the first trial of this case, and on that trial William D. Johnson swore that the hogs were to be delivered on the 16th *or*

17th days of February, and not on the 16th *and* 17th days of that or any other month.

57 David Brent testified: That William D. Johnson swore on the first trial of this cause, that the hogs were to have been delivered on the 16th *or* 17th days of February, 1858, and not on both of those days, or any other days. He was a witness on that trial, and paid particular attention to Wm. D. Johnson's testimony.

On the 17th day of February, 1858, he was at Samuel Johnson's store in Ellison, when plaintiff came in and said he had just returned from defendant's house. Plaintiff then said that he did not blame defendant for backing out; that he blamed Samuel Johnson, who was to have got back from Chicago on the morning train (16th Feb'ry.) He did not come. He (plaintiff) waited until noon, and he did not come, and it was then too late to go to weigh hogs.

He said he had left a hole for Davidson to back out, and he was going to back out; it was what any trading man would do. He did not blame him for it. He said Samuel Johnson not being there in time, defendant backed out.

*There were not over 60 or 70 stock hogs at Ellison on the 16th or 17th days of Feb'ry, 1858, that he saw.*

56 Perkins testified: That Shackelford came from Ellison on the 16th Feb'ry, 1858, and informed plaintiff that defendant had been there that morning for the stock hogs he was to let him have. Plaintiff asked Shackelford why the boys did not turn out the hogs. Shackelford said there was not any one there that knew anything about the hogs. Either plaintiff or Shackelford asked why Sam'l Johnson was not there. The reply was, that he was in Chicago. Plaintiff said defendant had been to Ellison after the stock hogs, and the trade had gone over, as defendant had been there for the stock hogs and there was no one there to deliver them to him, and the probability was that defendant would not deliver the fat hogs. Plaintiff said if Samuel Johnson had been there to have delivered Davidson the stock hogs, he should have compelled him to have stood up to the contract.

58 McCartney testified : That there was no more than 80 or 85 stock hogs at Ellison when he left in the afternoon of the 17th Feb'ry, 1858. There was not so many the day before ; some had been put in that day.

He had good opportunity of knowing the number of the hogs. He had hauled corn to them, to feed them, and had noticed and seen them often.

Forty to 45 of them would have weighed from 100 to 140 lbs.; 20 to 25, 60 to 100 lbs., and the remainder from 30 to 60 pounds each.

A. Y. Graham testified : That plaintiff said the hogs were to have been delivered on the 16th or 17th of Feb'ry, 1858. This was between the middle of March and first of April. Said that defendant had made a contract and he was going to hold him to it, as the contract was for a delivery on the 16th or 17th of February, 1858. He was at Davidson's the last of the two days named. He claimed that Davidson was to deliver his hogs first and have them weighed, then Johnson.

59 William Brown testified : That, in the afternoon of 16th February, 1858, he delivered twenty hogs at Samuel Johnson's in Ellison. They averaged from 40 to 60 lbs. ; small ones weighed 35 lbs. ; some 60. Thinks defendant was to have them. He (witness) had to take some of them back afterwards.

Here defendant rested.

Plaintiff then called Jesse Weathers, who testified : That he was one of the jury who tried the case the first time, and that he believed Wm. D. Johnson swore at that time that the hogs were to be delivered in two days.

The Court then gave the following instructions to the jury on the part of the plaintiff :

1st. If the defendant at any time before the time in which this contract was to be completed, refused to deliver his hogs according to his contract, *or that now to the plaintiff that he would not do so*, then the plaintiff might from that time treat

the defendant as in default, and was not bound to hold himself in readiness or make any further preparation to complete the contract on his part, and had a right to bring a suit at any time after such refusal.

2d. If the jury believe from the evidence that Frederick Davidson agreed with Oakley Johnson to deliver to him 100 fat hogs at Ellison, on the 16th and 17th days of February, at the price of \$3.75 per 100 lbs., and Frederick Davidson notified Oakley Johnson on the morning of the 16th that if he wanted the hogs he would have to make a new contract, and repudiated the contract on his part, then that fact released Oakley Johnson from continuing his preparations to be ready to perform his part of the contract, provided at the time of such supposed repudiation the plaintiff would have placed himself in readiness to perform his part of the contract, in the time limited by the contract, if the contract had not been repudiated by the other party in the manner above supposed.

3d The jury are instructed that if they believe from the evidence that the contract was made as alleged in the plaintiff's declaration between the plaintiff and defendant, and that at the time and place of the execution of such contract as agreed upon, the plaintiff was ready and willing to receive and pay for the hogs which the defendant agreed to deliver him, and the defendant failed to perform his part of the same contract according to the terms thereof, then the plaintiff is entitled to recover the difference between the contract price and the value of the hogs at the time and place at which the hogs were to be delivered by the defendant to the plaintiff.

4th. If the jury believe from the evidence that by the terms of the contract between the plaintiff and the defendant, the stock hogs were to be delivered by the plaintiff to the defendant at Ellison, on the 16th and 17th days of February, A. D. 1858, then the plaintiff had the usual business times of both days in order to perform his part of the entire contract.

5th. If the contract in regard to the delivery of the stock hogs, was as stated in said instruction No. 2, and if the jury

62 further believe from the evidence that the defendant was to deliver the fat hogs to the plaintiff on the 16th and 17th days of February, A. D. 1858, at the same place and at the same time of the delivery of the stock hogs, then the defendant had no right to demand and receive the stock hogs and money from the plaintiff until he showed a readiness and willingness to deliver the fat hogs to the plaintiff and offered so to do.

6th. If the jury believe from the evidence that the fat hogs by the terms of said contract between said plaintiff and said defendant, were to be delivered to the plaintiff by the defendant, on the 16th and 17th days of February, A. D. 1858, then the plaintiff had the usual business hours of both days in order to perform his part of the entire contract.

7th. The jury are instructed that slight evidence of a readiness to receive and pay for the hogs on delivery by the plaintiff, would be sufficient.

63 8th. The jury are instructed that it was not necessary for the plaintiff to go to the defendant and make an offer or tender of performance of his part of the contract, but all he was required to do was to be ready and willing at the time and place agreed upon to perform his part of such contract according to its terms.

9. The jury are instructed that the fact that Samuel Johnson was not at his store at Ellison on the morning of the 16th day of February, 1858, does not prevent the plaintiff from recovering in this action, if the jury believe, on the evidence and instructions of the Court, that he is entitled to recover.

10. The jury are instructed that, by the issues in this case, even if the plaintiff did state to witness Brent that he did blame Samuel Johnson and did not blame the defendant for refusing to deliver the hogs, inasmuch as he had a hole to creep out of, this does not of itself prevent the plaintiff from recovering in this action: it is merely testimony to be weighed by the jury with the other testimony in the case.

Which the Court then did, and to the giving of which defendant then excepted.

Defendant then asked the Court to give, on his behalf, the following instructions :

*Copy of Defendant's Instructions asked for.*

64 The Court will instruct the jury, that if they believe, from the  
 21-24 conduct on the stand or manner of testifying, or from all the  
 circumstances proven, that the testimony of any material witness  
 is unreasonable in matter material to the issue, and therefore un-  
 worthy of credit, they should disregard such testimony.

That, if they believe from the evidence in the case, that any  
 witness has intentionally made contradictory statements in re-  
 gard to any matter material in this case, they should place little  
 if any reliance on his testimony, although he has not been im-  
 peached in the manner in the first instruction of defendant in this  
 case, and although he may be seventy or eighty years old, or  
 gray headed.

That, if they believe from the evidence that the plaintiff was  
 not ready to perform his part of the contract in the time requir-  
 ed thereby, he cannot, under any circumstances, recover in this  
 case ; or that, in such case, the defendant was not bound to do  
 anything to prevent a recovery in this case.

65 That the admissions of both plaintiff and defendant are evi-  
 dence in this case for their consideration.

The Court will instruct the jury that the plaintiff, in order to  
 recover, is bound to prove every essential particular of his case  
 by reliable testimony, and that, should he fail to do so in any  
 such particular way, it is as fatal to his recovery as if he had  
 failed in every such particular, and that it is not incumbent on  
 the defendant to disprove any one of such, if the plaintiff fails as  
 aforesaid, in order to succeed in this case.

That, if they believe from the evidence of the admissions of  
 the plaintiff or defendant, or any other evidence in the case, that  
 the plaintiff did not perform his part of the contract, as they may  
 believe from the whole evidence in the case, it was proven, they  
 are bound under any circumstances to find for the defendant.

The Court will instruct the jury that the admissions of the plff.  
 Oakley Johnson are evidence in this case, and that if they be-

lieve from the evidence of such admissions that plaintiff released defendant from said contract, they will under any circumstances find for the defendant.

That neither the declaration nor instructions in this case, nor the records of this Court, are evidence as to what William Johnson swore to on the first trial hereof.

66 That it is not their duty to reconcile evidence which they, from the evidence, believe to be intentionally false, but it is to reject it.

The Court will instruct the jury that the plaintiff was not only bound to be ready on his part to fulfil his contract by having the number and quality of hogs required on his part by the contract and the money to pay the balance required to pay for defendants' hogs, not only within the time fixed for the performance of the contract, but so early in such time that there would be sufficient time to enable each to perform his part of the contract in then the business hours of the day on which the contract is to be performed, and that although they might believe from the evidence 67 that plaintiff had the hogs and money as aforesaid, yet, if not in time, that the contract could be completed in such usual hours, they are bound to find for the defendant.

*Copy of Defendant's Instructions as modified and given by the Court.*

The Court will instruct the jury that if they believe from the conduct on the stand, or manner of testifying, or from all the circumstances proven, that the testimony of any witness is unreasonable in matter material to the issue and therefore unworthy of credit, they may disregard such testimony.

That if they believe from the evidence in the case, that any witness has intentionally made contradictory statements in regard to any matter material in this case, they should place little if any reliance on his unsupported testimony.

That if they believe from the evidence that the plaintiff was not ready to perform his part of the contract in the time required thereby, and that such want of readiness was not caused by any act of the defendant, then he cannot recover in this case.

68 That the admissions of both plaintiff and defendant are testimony in this case for their consideration.

The Court will instruct the jury that the plaintiff, in order to recover, is bound to prove every essential requisite of his case by reliable testimony, and that should he fail to do so in any essential requisite, it is as fatal to his recovery as if he had failed in every such particular, and that it is not incumbent on the defendant to disprove any one of such, if the plaintiff fails as aforesaid, in order to succeed in this case.

That if they believe from the evidence of the admissions of the plaintiff or defendant or any other evidence in the case, that the plaintiff was not ready and willing to perform his part of the contract, as they may believe from the whole evidence in the case it was proven, they are bound to find for the defendant, unless the jury believe from the evidence that it was the fault of the defendant that the plaintiff was not so ready and willing to perform.

69 The Court will instruct the jury that the admissions of the plaintiff Oakley Johnson are evidence in this case, and that if they believe from the evidence of such admissions that plaintiff released defendant from said contract, they will under any circumstances find for the defendant.

That neither the declaration or instructions in this case, nor the records of this Court, are evidence as to what William Johnston swore to on the first trial hereof.

That it is not their duty to reconcile evidence, which they from the evidence believe to be intentionally false, but it is, to reject it.

70 The Court will instruct the jury that the plaintiff was not only bound to be ready on his part to fulfil his contract by having the number and quality of hogs required on his part by the contract, and the money to pay the balance required to pay for defendant's hogs, not only within the time fixed for the performance of the contract, but so early in such time that there would be sufficient time to enable each to perform his part of the contract in then the hours of the day appropriate for such business

on which the contract was to be performed, and that although they might believe from the evidence that plaintiff had the hogs and money as aforesaid, yet, if not in such time that the contract could be completed in such usual hours, they are bound to find for the defendant, unless such failure of plaintiff the to be ready was caused by some act of the defendant.

*Copy of Defendant's Instructions Refused.*

70 The Court will instruct the jury that Samuel Johnson was the only man authorized by the contract to weigh the hogs, and that his not being able to weigh them would not excuse plaintiff from performing his part of the contract.

The Court will instruct the jury that if they from the evidence believe that the price of fat hogs advanced, it is a fact from which they may infer that the price of stock hogs advanced during the same time.

Which the Court refused to do, but gave those marked given and refused those marked refused, and modified those copied first as originally they were, then as modified by the Court.

To which decisions of the Court defendant then excepted.

The jury found a verdict for the plaintiff for fifty dollars. Defendant then filed a motion for a new trial and in arrest of judgment, and his reasons therefor.

OAKLEY JONHSON }  
                   *vs.* } *In Assumpsit.*  
 FREDERICKSON. }

Defendant moves the Court for a new trial of this cause and in arrest of judgment therein :

71 *First*—Because the verdict of the jury was against the law and the evidence.

72 *Second*—That the Court erroneously refused some, and erroneously modified other instructions of defendant, and gave to the jury improper and illegal ones on behalf of plaintiff.

*Third*—That the Court admitted to the jury, on behalf of plaintiff, illegal and improper testimony, and rejected and excluded from them testimony offered for their consideration by defendant, legal and proper.

*Fourth*—That the contract, which was the only alleged subject matter of plaintiff's said suit.

Filed April 3d, 1862.

WM. LAFFERTY, *Clk.*

C. M. HARRIS,  
*Atty. for Deft.*

Which motion was overruled by the Court, who refused to grant a new trial or arrest the judgment. To which decisions of the Court defendant then excepted, and the Court rendered judgment upon the verdict of the jury in favor of plaintiff and against defendant. All the objections and exceptions were made and taken in open Court, and upon the trial of the cause.

H. M. WEAD.

202-71  
Davidson

<sup>1/2</sup>  
Johnson  
Abstract

Filed Apr. 28-1868

L. L. Land

Clerk

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

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FREDERICK DAVIDSON }  
                                  *vs.*  
OAKLEY JOHNSON.        }

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## PLAINTIFF'S BRIEF AND POINTS.

### I.

This is an action brought by plaintiff below, to recover for a failure to deliver some hogs according to contract.

The declaration alleges that the plaintiff below made an agreement with the defendant, by which said defendant was to let plaintiff have 100 fat hogs, at \$3.75 per hundred, to be delivered at Ellison, on the 16th and 17th days of February, 1858, and plaintiff was to let defendant have 100 or more stock hogs in return, at \$3.25 per hundred, and pay the balance in money. The plaintiff below alleges that he was ready and willing to perform, on his part, but that defendant failed to deliver the fat hogs.

It is to be observed, that by the declaration the fat hogs were to be delivered at Ellison, on the 16th and 17th days of February, 1858. A contract so extraordinary and unusual was never before asserted. In this country, men do not occupy two days in delivering 100 hogs, but generally deliver 1000 in one day. Doubtless the hogs were to be

driven to Ellison; and if so, would be driven together and delivered at once. The plaintiff, however, alleged that they were to be delivered on the 16th and 17th; but did he prove it? *By no means.* On the trial, he called Wm. D. Johnson, father of plaintiff, (page 3, Abstract,) who testified they were to be delivered on the 16th and 17th, but he also testified that on a former trial "*he did not swear that the hogs were to be delivered on the 16th or 17th days of February, 1858,*" whereas the following witnesses testified that *he did so swear* on the first trial, viz.:

Thompson Brooks,	Abstract,	page 6
Smith Shepord,	"	" 6
Hon. John S. Thompson,	"	" 6 and 7.
David Brent,	"	" 7.

And A. Y. Graham, (Abstract, page 8,) testified, that plaintiff told him the hogs were to be delivered on the 16th or 17th of February.

Wm. D. Johnson states, (page 4,) "the reason for having two days was that plaintiff said it would be impossible to weigh them all in one day." Such an *excuse* is but mockery. Hogs are weighed on scales, 40 or 50 at a time, and in ten minutes time!!

And this is the only witness who swears to any contract whatever. He is effectually and thoroughly impeached. He is not only contradicted by four reputable witnesses, in a material point, but by the plaintiff himself. How, then, could the jury believe his evidence? And if they did believe it, and find a verdict founded upon it, how could a judge refuse to set aside the verdict and grant a new trial?

## II.

But the defendant did go to Ellison on the morning of the 16th of February, 1858, to deliver his hogs. (See Abstract, page 5.)

Lewis Rapalec testifies, that he came to Ellison to see about delivering hogs. Livermore (page 6) testifies to same.

Davidson, the defendant below, went to Ellison on the morning of the 16th, to see about delivering hogs, but neither Johnson, the plaintiff, nor any one else, was there to receive the fat hogs or turn out the store hogs.

This matter is fully explained by Perkins, in his evidence, page 7 of Abstract.

### 3

The plaintiff then abandoned the contract, saying that if Saml. Johnson (his brother) had been there to deliver the store hogs he would make Davidson stand up to the contract.

David Brent, (page 7,) also testifies, that the plaintiff stated he waited until noon of the 16th for his brother to come from Chicago, but he did not come, and it was then too late.

The plaintiff also stated that he left a hole for Davidson to back out. If Saml. Johnson had been there in time, defendant could not have backed out.

It is obvious from all this, that the hogs were to be delivered at Ellison on the 16th; that defendant below went there on the morning of that day to deliver them, and found no one to receive or pay for them. He then went home, and stated that if plaintiff wanted the hogs he must make a new contract. In this he was entirely right.

### III.

The plaintiff below was the party who was in default. He was not at Ellison on the 16th Feb'ry at all. He had no store hogs there. Saml. Johnson (page 4) had, on the 17th, 150 stock hogs at Ellison; but on the 16th, neither he nor plaintiff below had any thing like 100 stock hogs there. The plaintiff then *was not* prepared, *was not ready and willing* to perform the contract on his part. It was he who was in default and not the defendant.

### IV.

There was a fatal variance between the declaration and proof. The declaration was, that plaintiff was to let the defendant have 100 fat hogs *or more*, whereas the proof is, that he was to let him have *just 100 hogs*, no more and no less.

## V.

The instructions are all grossly erroneous, and not founded upon the evidence.

The 1st instruction assumes there was proof to show that defendant refused to fulfil his contract, *before it was to be performed*, whereas the only refusal was on the 16th day of Feb'ry, (the day when the hogs were to be delivered,) after he went to Ellison, and could not find the plaintiff nor any store hogs, and that he was not bound to hold himself in readiness to perform on his part. This is absurd.

2. The second instruction is placed upon the ground that defendant below notified the plaintiff on the morning of the 16th, that he repudiated the contract, whereas he did not see Davidson until the 17th; never sent him any such word; did not repudiate the contract, but on the contrary went to Ellison on the morning of the 16th to deliver his hogs, but could find no Davidson and no store hogs.

It substantially further says that plaintiff was released from being ready to deliver the store hogs.

3. The 3d instruction assumes that there was proof to show that plaintiff was at Ellison, ready and willing to perform on his part, whereas the proof was exactly the reverse.

5. The 5th instruction was clearly bad. There was no agreement by which either plaintiff or defendant was first to deliver the hogs. That was a question for the jury, which the Court had no right to decide.

7. The 7th instruction was erroneous. The same proof of a readiness to perform on the part of plaintiff is necessary, as would be required to prove any other fact.

## VI.

There is no proof of the value of fat hogs weighing 200 lbs. Samuel Johnson testifies to the value of hogs weighing 240 and 250 lbs., but no one testifies what hogs weighing 200 lbs. are worth. The jury found their verdict without proof. The plaintiff failed to show any damages whatever.

Nor was there any proof as to the value of *stock hogs* on the 16th and 17th days of February, 1858, at Ellison.

The jury, then, had no proof before them upon which to found their verdict, and it should have been set aside.

C. M. HARRIS, and  
H. M. WEAD,  
*For Plaintiff in Error.*

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Davidson

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Johnson

Watts Points

Fri May 1<sup>st</sup> 1860  
L. Leland  
Clerk

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

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FREDERICK DAVIDSON }  
                                  *vs.* }  
OAKLEY JOHNSON.        }

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## BRIEF.

If the day be fixed for delivery or payment, the party has the whole of it; and if one of several days, the whole of all of them. It is said he must do all he can to do the needful act at a convenient hour before midnight,—early enough, for instance, for the other party to count the money or examine the goods and give a receipt.

1 Parsons on Contracts, 444.

In speaking of performance,—

“Whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him.” Nor will a mere readiness to do discharge him from his liability, unless he makes that manifest by tender, or an equivalent act.

1 Parsons on Contracts, 147 and 148.

Tender.

Gilman *vs.* Holt, 4 Pick. 258.  
Southworth *vs.* Smith, 7 Cush. 391.  
Robins *vs.* Luce, 4 Mass. 474.  
Robinson *vs.* Bachelor, 4 N. H. 40.  
Brown *vs.* Berry, 14 N. H. 459.

A plea in bar is requisite when a readiness and willingness to perform is claimed as a defense.

2 Parsons on Contracts, 158 notes.  
 McConnell vs. Hall, Brayton, 223.  
 Downer vs. Sinclair, 15 Ver. 495.  
 Savery vs. Goe, 3 Wash. C. C. 140.

If the contract be in the alternative as to do a thing on one day or another, or in one way or another, the right of election is with the promiser, if there be nothing in the contract to control the presumption.

2 Parsons on Contracts, 168, 169.  
 Smith vs. Sanburn, 11 Johnson, 59.

The plea must aver that the party was there at the time and place with the property, ready and willing to deliver it, and had it set apart to deliver it, and is still ready to deliver.

2 Parsons, 158, note m.

If a party bound to do a thing on a certain day, and therefore having the whole intermediate time, by some act distinctly incapacitates himself from doing that thing on that day, it seems that an action may be commenced at once without waiting for that day.

2 Parsons, 179 and note (t.)  
 Hochster vs. De Latour, 20 Eng. Law and Eq. 157.

An offer or tender of performance on the part of plaintiff was not necessary, the contract contemplating the carrying and delivery by the defendant of the corn to the plaintiff at Chicago. In such a case, a readiness to perform only was required.

17 Ill. 591.  
 Sanders Pl. and Ev. 127, 128.  
 1 Chitty Pl. 297.  
 1 Chitty Pl. 357.

If the legal effect of the language of a contract is the same as the promiser alleges, there can be no material variance in law between the allegation and proof.

17 Ill. 592.  
 1 Chitty Pl. 305, 307, 316.  
 Ferguson vs. —, 7 Cranch 408.  
 Dox vs. Day, 3 Wend. 356.

He must not be in default himself, but must show a readiness to per-

form on his part before he can compel the defendant to show performance or respond in damages.

Dickert *vs.* Darrell, 11 Ill. 72.  
1 Chitty Pl. 297.  
Dox *vs.* Day, 3 Wend. 356.  
Porter *vs.* Rose, 12 Johns. 209.  
Saunders Pl. and Ev. 127, 128.

A contract should be stated according to its legal effect.

Crittenden *vs.* French, 21 Ill. 599.  
1 Chitty, 334.

When no special damages are stated, the plaintiff's damages are limited to such as naturally arise.

Olmstead *vs.* Burke, 25 Ill. 86.

If the exception be distinct from, and not even referred to by the clause creating the debt, it is considered matter of defense, and ought to come from the other side.

1 Saunders Pl. and Ev. 198.  
1 Chitty Pl. 246, 318.

The omission of any part of an entire contract, which affects that part of the contract on which plaintiff proceeds, is fatal.

1 Saunders Pl. and Ev. 179.

No more of the contract need be stated than that which was broken.

1 Saunders Pl. and Ev. 199.  
Clark *vs.* Grey, 6 East, 564.  
Martin *vs.* Smith, 6 East, 563.  
Miles *vs.* Sherward, 8 East, 7.

"It is sufficient to state in the declaration so much of any contract, consisting of several distinct parts and collateral provisions, as contained the entire consideration for the act, and the entire act which is to be done in virtue of such consideration, and that the rest of the contract need not be shown the Court in the first instance on the face of the Record."

Clark *vs.* Gray, 6 East. 564. (531.)

"It is a very different thing whether the plaintiff state truly those parts of a contract, the breach of which he complains of, though other parts not material to the question be not stated, or whether he state any part of it untruly, for then it appears to be a different contract."

Miles *vs.* Sherward, 8 East, 7. (299.)  
7 Johns. 52.

“It is more rational, and more for the benefit of both parties, that after the renunciation of the agreement, by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it.”

*Hochster vs. De Latour*, 161, Eng. L. and Eq., vol. 20.

After a renunciation by the defendant, the plaintiffs were not bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract.

*Hochster vs. De Latour*, Eng. L. and Eq. vol. 20, 162.  
*New Eng. M. F. Ins. Co. vs. Butler*, 34 Me. 451.

In *Ferguson vs. Harwood*, 7 Cranch, 408, Justice Story says:

“In general, courts of law lean against an extension of the principles applied to cases of variance: mistakes of this nature are mere slips of attorney, and do not touch the merits of the case. Lord Mansfield has well observed that it is extremely hard upon the party to be turned round and put to expense from such mistakes of his counsel, and it is hard also upon the profession.

“Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken.”

*Miles vs. Sherward*, 8 East, 7 (N. E. vol. 4, 298.)

GEO. F. HARDING and  
 A. G. KIRKPATRICK,  
*For Appellee.*

Davidson 202-71

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Johnson


Left prints

Filed May 1st 1863  
L. L. Johnson  
GEM

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

 } *Appeal from Warren.*

## ABSTRACT OF RECORD.

THIS was an action of assumpsit brought by the plaintiff below, in the Warren Circuit Court, to recover for a failure to swop hogs according to agreement.

The suit was commenced in March 1858.

13 On the 9th of November 1859, the first trial by jury was had, and a verdict for plaintiff for \$76. The Court, on application of defendant, granted a new trial.

39 On the 8th of April 1861, a second trial by jury was had, and  
40 a verdict rendered for the plaintiff for \$110. The Court granted a new trial.

42 On the 31st of October 1861 a third trial by jury was had, and  
43 a verdict was rendered for the *defendant*. Upon application of plaintiff, the Court granted a new trial.

44 On the 21st of March 1862 a fourth trial by jury was had, and  
45 a verdict rendered in favor of plaintiff for \$50, whereupon defendant filed his motion in arrest of judgment and for a new trial, which motions were overruled by the Court, and judgment rendered in favor of the plaintiff for \$50 and costs.

The defendant appealed to this Court.

45 The declaration as amended contains eight counts. The first six are special, and the two last are general.

tiff to be delivered at Ellison, as in the other counts, at \$3.75 per hundred, to be paid for in cash.

6. The sixth count is in all respects like the third count.

7. Seventh count is for money lent, money had and received, money paid, laid out and expended.

8. Eighth count is for money due on account.

Defendant plead the general issue.

47 On the trial, the plaintiff called William D. Johnson as a witness, who testified that on the 11th February, 1858, he was with plaintiff at defendant's, when plaintiff contracted with defendant for 100 fat hogs, to be delivered at Ellison, at Samuel Johnson's store. Can not say the exact amount they were to weigh, but were to average over 200 lbs. They were to be taken from a lot of hogs defendant had on farm of Cox, the balance from the farm of defendant, at \$3.75 per hundred pounds gross, to be delivered on the next Tuesday and Wednesday.

Defendant was to have from plaintiff 100 stock hogs at \$3.25 per hundred pounds as part payment, and the balance was to be paid in money. Something was said about more hogs, which he does not recollect, but it was before the making of the contract and no part of it. By the contract each was to let the other have 100 hogs, no more or less. The stock hogs were to average with some hogs defendant had seen before at Saml. Johnson's. Johnson was to do the weighing of both lots of hogs at his store. He, at the time, made a memorandum of the weights, numbers and prices.

Defendant, by his counsel, here objected to the evidence about the 100 stock hogs, because the declaration called for 100 *or more*, and therefore was not pertinent; but the Court overruled the objection and defendant excepted. Defendant then moved to exclude such testimony, but the court overruled the objection and plaintiff excepted.

The witness then stated that he was the plaintiff's father. He was satisfied the hogs were to be delivered on the 16th and 17th of February 1858. He did not swear on the first trial of this cause that the hogs were to be delivered on the 16th *or* 17th days of February 1858, or the 16th or 17th of any days, but did swear they were to be delivered on both those days.

The contract was closed east of Davidson's house in the pasture field. It was made after we returned from Cox's. The plaintiff offered defendant \$3.75 per hundred pounds gross for his hogs and defendant agreed to take it, provided he could have of plaintiff 100 stock hogs to replace them. Before going to Cox's, plaintiff and defendant were talking about fat hogs, stock hogs, prices and quality. Defendant told plaintiff where the hogs were. He said he would go there and see them, and if they suited him they would come back and let him know.

*The reason for having two days was, that plaintiff said, it would be impossible to weigh all in one day.*

50 The plaintiff next called Samuel Johnson, who testified that on the 16th day of February 1858 he was on his way from Chicago, got to Ellison about 9 o'clock that evening, had \$1000 with him which was to pay balance on hogs. The next day in the morning he went to defendant's house and plaintiff came there soon after. Witness said he came to see why the hogs were not sent up. Defendant said they would have to make a new bargain if they got the hogs.

On that day (17th February, he, witness) had 150 stock hogs at Ellison; 100 of them would average with 40 or 50 that defendant had before seen there.

Some stock hogs were but with these stock hogs on the 17th of February 1858.

He, on the 20th or 21st of February 1858, bought of defendant 100 hogs that averaged 240 pounds or more at \$4.50 per cwt.

He did not deliver the hogs on the 17th of February 1858.

Hogs weighing 250 pounds were worth \$5.00 per hundred; those weighing 240 to 250 pounds were worth from \$4.25 to \$4.50 on the hundred pounds, on the 16th and 17th days of February, 1858, at Ellison.

51 Defendant, so fast as this witness gave testimony to the contract, objected thereto, because of variance from the contract set forth in plaintiff's declaration; but the Court overruled the objection, and plaintiff excepted.

51 The witness then stated that he was a brother of plaintiff; that plaintiff was with him at defendant's when he told defendant that he came to see why he had not sent up the hogs, and when defendant said they would have to make a new contract.

That plaintiff neither then nor while they were at defendants, to his knowledge, said anything about the hogs, nor a contract therefor, nor any violation of any contract, and did not make any demand for the hogs; nor did witness make any demand for them.

52 When defendant said they would have to make a new contract, witness dropped the subject, and went to talking about something else. He went to defendant's that morning to see him about the hogs, and expected to meet the plaintiff there, and did meet him.

Plaintiff next called Lewis Rapalee, who testified: That he was at Ellison on the 16th and 17th of Feb'ry, 1858. He was clerk in a store for Samuel Johnson, but he does not know how many hogs were there on the 16th Feb'ry. On the 17th there were 130 or 140 there, *but defendant did not have any hogs there.*

Davidson was at Ellison about 8 o'clock on the morning of the 16th of Feb'ry, 1858, and he told me if the boys wanted the hogs they must make a new contract. Both he and Cox lived from 2 to 2 1-2 miles from Ellison. One north-east, the other south-east.

Defendant asked if the Johnsons were there. He said he had let them have some hogs.

On *Cross Examination*, this witness testified: That he was a brother-in-law of Samuel Johnson; that the defendant, when he came to Ellison on the morning of the 16th Feb'ry, 1858, came to the store of Samuel Johnson, and said he had come to see about delivering hogs to plaintiff. Witness told defendant that Samuel Johnson was in Chicago, and that plaintiff was in Young America, and defendant after remaining about an hour left.

53 Young America is about six miles from Ellison.

Livermore, a witness for plaintiff, testified, that defendant said he told plaintiff he could have a portion of the hogs he had at home and the balance at Cox's, if he would let him have stock hogs.

Thinks he said he was to let Johnson have 100 hogs at 3 1-4 cents, and Johnson was to let him have 100 stock hogs at 3 3-4 cents. They were to weigh the stock hogs and pay the defendant the balance in cash.

Defendant said he went to Ellison on the morning of the 16th Feb'y, 1858, and found neither of the Johnsons there, and concluded not to let them have the hogs. He understood that defendant's hogs were to be weighed first. The number of stock hogs was to be a certain number. He does not think it was to be over a hundred.

Defendant excepted to the testimony about 100 store hogs, because it varied from the declaration; but the exception was overruled, and defendant excepted.

Here plaintiff rested.

Defendant then called Thompson Brooks, who testified: That he was one of the jurors who tried this case in this Court the first time. On that trial William D. Johnson swore that the hogs were to be delivered on the 16th *or* 17th day of February, 1858, and not on the 16th *and* 17th of that or any other month.

Smith Shepord testified: That he was one of the jurors on the first trial of this case, and that William D. Johnson swore he knew the time for delivery of the hogs *from a memorandum he then had of it*, and his recollection is that he swore it was one of two days and not two days.

55 Hon. John S. Thompson testified: That he presided as judge  
56 on the first trial of this case, and on that trial William D. Johnson swore that the hogs were to be delivered on the 16th *or*

17th days of February, and not on the 16th *and* 17th days of that or any other month.

57 David Brent testified: That William D. Johnson swore on the first trial of this cause, that the hogs were to have been delivered on the 16th *or* 17th days of February, 1858, and not on both of those days, or any other days. He was a witness on that trial, and paid particular attention to Wm. D. Johnson's testimony.

On the 17th day of February, 1858, he was at Samuel Johnson's store in Ellison, when plaintiff came in and said he had just returned from defendant's house. Plaintiff then said that he did not blame defendant for backing out; that he blamed Samuel Johnson, who was to have got back from Chicago on the morning train (16th Feb'y.) He did not come. He (plaintiff) waited until noon, and he did not come, and it was then too late to go to weigh hogs.

He said he had left a hole for Davidson to back out, and he was going to back out; it was what any trading man would do. He did not blame him for it. He said Samuel Johnson not being there in time, defendant backed out.

*There were not over 60 or 70 stock hogs at Ellison on the 16th or 17th days of Feb'y, 1858, that he saw.*

56 Perkins testified: That Shackelford came from Ellison on the 16th Feb'y, 1858, and informed plaintiff that defendant had been there that morning for the stock hogs he was to let him have. Plaintiff asked Shackelford why the boys did not turn out the hogs. Shackelford said there was not any one there that knew anything about the hogs. Either plaintiff or Shackelford asked why Sam'l Johnson was not there. The reply was, that he was in Chicago. Plaintiff said defendant had been to Ellison after the stock hogs, and the trade had gone over, as defendant had been there for the stock hogs and there was no one there to deliver them to him, and the probability was that defendant would not deliver the fat hogs. Plaintiff said if Samuel Johnson had been there to have delivered Davidson the stock hogs, he should have compelled him to have stood up to the contract.

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58 McCartney testified : That there was no more than 80 or 85 stock hogs at Ellison when he left in the afternoon of the 17th Feb'ry, 1858. There was not so many the day before ; some had been put in that day.

He had good opportunity of knowing the number of the hogs. He had hauled corn to them, to feed them, and had noticed and seen them often.

Forty to 45 of them would have weighed from 100 to 140 lbs.; 20 to 25, 60 to 100 lbs., and the remainder from 30 to 60 pounds each.

A. Y. Graham testified : That plaintiff said the hogs were to have been delivered on the 16th or 17th of Feb'ry, 1858. This was between the middle of March and first of April. Said that defendant had made a contract and he was going to hold him to it, as the contract was for a delivery on the 16th or 17th of February, 1858. He was at Davidson's the last of the two days named. He claimed that Davidson was to deliver his hogs first and have them weighed, then Johnson.

59 William Brown testified : That, in the afternoon of 16th February, 1858, he delivered twenty hogs at Samuel Johnson's in Ellison. They averaged from 40 to 60 lbs. ; small ones weighed 35 lbs. ; some 60. Thinks defendant was to have them. He (witness) had to take some of them back afterwards.

Here defendant rested.

Plaintiff then called Jesse Weathers, who testified : That he was one of the jury who tried the case the first time, and that he believed Wm. D. Johnson swore at that time that the hogs were to be delivered in two days.

The Court then gave the following instructions to the jury on the part of the plaintiff :

1st. If the defendant at any time before the time in which this contract was to be completed, refused to deliver his hogs according to his contract, *or that now to the plaintiff that he would not do so*, then the plaintiff might from that time treat

the defendant as in default, and was not bound to hold himself in readiness or make any further preparation to complete the contract on his part, and had a right to bring a suit at any time after such refusal.

60 2d. If the jury believe from the evidence that Frederick Davidson agreed with Oakley Johnson to deliver to him 100 fat hogs at Ellison, on the 16th and 17th days of February, at the price of \$3.75 per 100 lbs., and Frederick Davidson notified Oakley Johnson on the morning of the 16th that if he wanted the hogs he would have to make a new contract, and repudiated the contract on his part, then that fact released Oakley Johnson from continuing his preparations to be ready to perform his part of the contract, provided at the time of such supposed repudiation the plaintiff would have placed himself in readiness to perform his part of the contract, in the time limited by the contract, if the contract had not been repudiated by the other party in the manner above supposed.

61 3d The jury are instructed that if they believe from the evidence that the contract was made as alleged in the plaintiff's declaration between the plaintiff and defendant, and that at the time and place of the execution of such contract as agreed upon, the plaintiff was ready and willing to receive and pay for the hogs which the defendant agreed to deliver him, and the defendant failed to perform his part of the same contract according to the terms thereof, then the plaintiff is entitled to recover the difference between the contract price and the value of the hogs at the time and place at which the hogs were to be delivered by the defendant to the plaintiff.

4th. If the jury believe from the evidence that by the terms of the contract between the plaintiff and the defendant, the stock hogs were to be delivered by the plaintiff to the defendant at Ellison, on the 16th and 17th days of February, A. D. 1858, then the plaintiff had the usual business times of both days in order to perform his part of the entire contract.

5th. If the contract in regard to the delivery of the stock hogs, was as stated in said instruction No. 2, and if the jury

62 further believe from the evidence that the defendant was to deliver the fat hogs to the plaintiff on the 16th and 17th days of February, A. D. 1858, at the same place and at the same time of the delivery of the stock hogs, then the defendant had no right to demand and receive the stock hogs and money from the plaintiff until he showed a readiness and willingness to deliver the fat hogs to the plaintiff and offered so to do.

6th. If the jury believe from the evidence that the fat hogs by the terms of said contract between said plaintiff and said defendant, were to be delivered to the plaintiff by the defendant, on the 16th and 17th days of February, A. D. 1858, then the plaintiff had the usual business hours of both days in order to perform his part of the entire contract.

7th. The jury are instructed that slight evidence of a readiness to receive and pay for the hogs on delivery by the plaintiff, would be sufficient.

63 8th. The jury are instructed that it was not necessary for the plaintiff to go to the defendant and make an offer or tender of performance of his part of the contract, but all he was required to do was to be ready and willing at the time and place agreed upon to perform his part of such contract according to its terms.

9. The jury are instructed that the fact that Samuel Johnson was not at his store at Ellison on the morning of the 16th day of February, 1858, does not prevent the plaintiff from recovering in this action, if the jury believe, on the evidence and instructions of the Court, that he is entitled to recover.

10. The jury are instructed that, by the issues in this case, even if the plaintiff did state to witness Brent that he did blame Samuel Johnson and did not blame the defendant for refusing to deliver the hogs, inasmuch as he had a hole to creep out of, this does not of itself prevent the plaintiff from recovering in this action: it is merely testimony to be weighed by the jury with the other testimony in the case.

Which the Court then did, and to the giving of which defendant then excepted.

Defendant then asked the Court to give, on his behalf, the following instructions :

*Copy of Defendant's Instructions asked for.*

64 The Court will instruct the jury, that if they believe, from the  
21-24 conduct on the stand or manner of testifying, or from all the  
circumstances proven, that the testimony of any material witness  
is unreasonable in matter material to the issue, and therefore un-  
worthy of credit, they should disregard such testimony.

That, if they believe from the evidence in the case, that any  
witness has intentionally made contradictory statements in re-  
gard to any matter material in this case, they should place little  
if any reliance on his testimony, although he has not been im-  
peached in the manner in the first instruction of defendant in this  
case, and although he may be seventy or eighty years old, or  
gray headed.

That, if they believe from the evidence that the plaintiff was  
not ready to perform his part of the contract in the time requir-  
ed thereby, he cannot, under any circumstances, recover in this  
case ; or that, in such case, the defendant was not bound to do  
anything to prevent a recovery in this case.

65 That the admissions of both plaintiff and defendant are evi-  
dence in this case for their consideration.

The Court will instruct the jury that the plaintiff, in order to  
recover, is bound to prove every essential particular of his case  
by reliable testimony, and that, should he fail to do so in any  
such particular way, it is as fatal to his recovery as if he had  
failed in every such particular, and that it is not incumbent on  
the defendant to disprove any one of such, if the plaintiff fails as  
aforesaid, in order to succeed in this case.

That, if they believe from the evidence of the admissions of  
the plaintiff or defendant, or any other evidence in the case, that  
the plaintiff did not perform his part of the contract, as they may  
believe from the whole evidence in the case, it was proven, they  
are bound under any circumstances to find for the defendant.

The Court will instruct the jury that the admissions of the plff.  
Oakley Johnson are evidence in this case, and that if they be-

lieve from the evidence of such admissions that plaintiff released defendant from said contract, they will under any circumstances find for the defendant.

That neither the declaration nor instructions in this case, nor the records of this Court, are evidence as to what William Johnson swore to on the first trial hereof.

66 That it is not their duty to reconcile evidence which they, from the evidence, believe to be intentionally false, but it is to reject it.

The Court will instruct the jury that the plaintiff was not only bound to be ready on his part to fulfil his contract by having the number and quality of hogs required on his part by the contract and the money to pay the balance required to pay for defendants' hogs, not only within the time fixed for the performance of the contract, but so early in such time that there would be sufficient time to enable each to perform his part of the contract in then the business hours of the day on which the contract is to be performed, and that although they might believe from the evidence 67 that plaintiff had the hogs and money as aforesaid, yet, if not in time, that the contract could be completed in such usual hours, they are bound to find for the defendant.

*Copy of Defendant's Instructions as modified and given by the Court.*

The Court will instruct the jury that if they believe from the conduct on the stand, or manner of testifying, or from all the circumstances proven, that the testimony of any witness is unreasonable in matter material to the issue and therefore unworthy of credit, they may disregard such testimony.

That if they believe from the evidence in the case, that any witness has intentionally made contradictory statements in regard to any matter material in this case, they should place little if any reliance on his unsupported testimony.

That if they believe from the evidence that the plaintiff was not ready to perform his part of the contract in the time required thereby, and that such want of readiness was not caused by any act of the defendant, then he cannot recover in this case.

68 That the admissions of both plaintiff and defendant are testimony in this case for their consideration.

The Court will instruct the jury that the plaintiff, in order to recover, is bound to prove every essential requisite of his case by reliable testimony, and that should he fail to do so in any essential requisite, it is as fatal to his recovery as if he had failed in every such particular, and that it is not incumbent on the defendant to disprove any one of such, if the plaintiff fails as aforesaid, in order to succeed in this case.

That if they believe from the evidence of the admissions of the plaintiff or defendant or any other evidence in the case, that the plaintiff was not ready and willing to perform his part of the contract, as they may believe from the whole evidence in the case it was proven, they are bound to find for the defendant, unless the jury believe from the evidence that it was the fault of the defendant that the plaintiff was not so ready and willing to perform.

69 The Court will instruct the jury that the admissions of the plaintiff Oakley Johnson are evidence in this case, and that if they believe from the evidence of such admissions that plaintiff released defendant from said contract, they will under any circumstances find for the defendant.

That neither the declaration or instructions in this case, nor the records of this Court, are evidence as to what William Johnston swore to on the first trial hereof.

That it is not their duty to reconcile evidence, which they from the evidence believe to be intentionally false, but it is, to reject it.

70 The Court will instruct the jury that the plaintiff was not only bound to be ready on his part to fulfil his contract by having the number and quality of hogs required on his part by the contract, and the money to pay the balance required to pay for defendant's hogs, not only within the time fixed for the performance of the contract, but so early in such time that there would be sufficient time to enable each to perform his part of the contract in then the hours of the day appropriate for such business

on which the contract was to be performed, and that although they might believe from the evidence that plaintiff had the hogs and money as aforesaid, yet, if not in such time that the contract could be completed in such usual hours, they are bound to find for the defendant, unless such failure of plaintiff to be ready was caused by some act of the defendant.

*Copy of Defendant's Instructions Refused.*

70 The Court will instruct the jury that Samuel Johnson was the only man authorized by the contract to weigh the hogs, and that his not being able to weigh them would not excuse plaintiff from performing his part of the contract.

The Court will instruct the jury that if they from the evidence believe that the price of fat hogs advanced, it is a fact from which they may infer that the price of stock hogs advanced during the same time.

Which the Court refused to do, but gave those marked given and refused those marked refused, and modified those copied first as originally they were, then as modified by the Court.

To which decisions of the Court defendant then excepted.

The jury found a verdict for the plaintiff for fifty dollars. Defendant then filed a motion for a new trial and in arrest of judgment, and his reasons therefor.

OAKLEY JONHSON }  
                   *vs.* } *In Assumpsit.*  
 FREDERICKSON. }

Defendant moves the Court for a new trial of this cause and in arrest of judgment therein :

71 *First*—Because the verdict of the jury was against the law and the evidence.

72 *Second*—That the Court erroneously refused some, and erroneously modified other instructions of defendant, and gave to the jury improper and illegal ones on behalf of plaintiff.

*Third*—That the Court admitted to the jury, on behalf of plaintiff, illegal and improper testimony, and rejected and excluded from them testimony offered for their consideration by defendant, legal and proper.

*Fourth*—That the contract, which was the only alleged subject matter of plaintiff's said suit.

Filed April 3d, 1862.

WM. LAFFERTY, *Clk.*

C. M. HARRIS,  
*Atty. for Deft.*

Which motion was overruled by the Court, who refused to grant a new trial or arrest the judgment. To which decisions of the Court defendant then excepted, and the Court rendered judgment upon the verdict of the jury in favor of plaintiff and against defendant. All the objections and exceptions were made and taken in open Court, and upon the trial of the cause.

H. M. WEAD.

202  
Fredk Johnson

vs  
Johnson

Abstract

Filed Apr. 28-1863  
Leland  
Clark

1  
Be it Remembered that on the 24<sup>th</sup> day  
of February a & One Thousand Eight Hundred  
and fifty Eight, a praecipis was filed in  
the office of the clerk of the Circuit Court  
of Warren County State of Illinois, where  
upon a Summons issued out of said Court  
which is in the words & figures following  
that is to say.

State of Illinois } ss. The People of the State of  
Warren County } Illinois, To the Sheriff of  
Warren County Greeting.

We Command you to Summon Frederick B  
Davidson if to be found in your County per-  
sonally to be and appear before the Circuit  
Court of the County of Warren on the first  
day of the next term thereof to be holden  
at the Court House in Monmouth on the  
third Monday in the month of March next  
to answer the Complaint of Oakley Johnson of  
a plea of trespass on the case on promises to  
his damage the sum of One Thousand Dollars  
as he says; and have you there and there this  
writ and make return thereon in what man-  
ner you execute the same.

Witness Myself Clerk of our said  
Circuit Court at Monmouth this 24<sup>th</sup> day of  
February in the year of our Lord One Thousand  
Eight Hundred and fifty Eight.

(Seal)

Wm. Laferty Clerk

I did on the 24th day of February 1858  
serve the writ by reading the same  
to the writor named Frederick Davidson.  
C M Mills Sheriff.

2 Filed Feby 27. 1858. }  
Wm Laferty clk }

Copy of Declaration  
The State of Illinois } In Circuit Court  
Warren County } March Term A D 1858.

of Warren County.  
Oakley Johnson Plaintiff by Harding Reed  
his attorneys complains of Frederick Davidson  
defendant who was summoned to answer of a  
Plea of Trovass on the case on promises.  
For that whereas heretofore to wit on the  
Eleventh day of February A D 1858 at the  
County of Warren & State of Illinois the said  
plaintiffs at the special instance of &  
request of the said defendant bargained  
with the said defendant to buy of said def  
endant and the said defendant then and  
there sold to the said plaintiff a large number  
of Fat Hogs live to wit. One hundred head of  
Hogs the same that were then following said  
defendants feeding cattle, then feeding at  
at the rate or price of three dollars and  
seventy five cents per hundred weight Gross.

3 to be delivered by said defendant to said plaintiff at Ellison in the County & State aforesaid on the Sixteenth & Seventeenth days of February a D 1858, said hogs to be weighed at Ellison aforesaid by Samuel Johnson to be paid for on delivery. And in consideration thereof and that the said Plaintiff at the like special instance & request of the said defendant had shew and there undertook and faithfully promised the said defendant to accept and receive the said hogs, and to pay him for the same at the rate or price aforesaid. And the said defendant undertook and there faithfully promised the said plaintiff to deliver the said hogs to the said plaintiff as aforesaid and although the said time for the delivering of the said hogs as aforesaid hath long since elapsed. And the said plaintiff hath always been ready and willing to accept and receive said hogs and to pay for the same at the rate and price aforesaid to wit at the County & State aforesaid. Whereof the said defendant hath always had notice. Yet the said defendant not regarding his said promise and undertaking but contriving and intending to deceive and defraud the said plaintiff in this behalf did not nor would within the time aforesaid, or at any time thereafter, deliver the said goods or any part thereof for the said plaintiff

at the County & State aforesaid or elsewhere,  
but wholly neglected and refused to do  
whence the said plaintiff hath lost and been  
deprived of divers great gains and profits,  
4 which might otherwise have arisen and  
accrued to him from the delivering of the said  
Hogs to the said plaintiff as aforesaid to wit at  
the County & State aforesaid. For that whereas  
also heretofore to wit on the Eleventh day of Feb  
ruary 1858 at the County of Warren & State of Illinois  
the said plaintiff at the special instance and  
request of the said defendant bargained for  
and agreed to buy of the said defendant  
certain other Hogs to wit One Hundred head of  
fat hogs then running with the defendants  
judging cattle and to be delivered for the said  
plaintiffs within a reasonable time free of expen  
se to him at Ellison in the County of Warren &  
State of Illinois there to be weighed by Samuel  
Johnson & to be paid for by said plaintiff at  
the rate of three dollars and seventy five  
cents per hundred weight gross alive upon  
delivery, and thereupon in consideration  
of the premises and also in consideration  
that the said plaintiff at the like special  
instance and request of the said defendant  
had then and there undertaken and faith  
fully promised the said defendant to accept  
a delivery of said hogs at Ellison in said

County & State aforesaid, and to pay the said  
 defendant for the same at the rate in that  
 behalf aforesaid the said defendant on the  
 5 day and year aforesaid at the County & State  
 aforesaid under too 10 and then and there  
 faithfully promised the said plaintiff that  
 he the said defendant would within a  
 reasonable time then next following come to  
 be delivered for the said plaintiff in manner  
 aforesaid the said hogs to be so delivered and  
 weighed as aforesaid, and although a reason-  
 able time for that purpose hath along time  
 since elapsed and the said plaintiff was al-  
 ways during that time and until the Comm-  
 encement of this action ready and willing  
 to have accepted a delivery of said hogs as  
 aforesaid, and to have paid the said defendant  
 for the same at the rate in that behalf afo-  
 said to wit at Ellison in the County and State  
 aforesaid whereof the said defendant then and  
 there had notice, yet the said defendant not  
 regarding his said promise and undertaking  
 but contriving and intending to deceive and  
 defraud the said plaintiff did not nor would  
 (although often requested so to do) within  
 such reasonable time as aforesaid or at any  
 time since deliver the said hogs for the said  
 plaintiff in manner aforesaid or at the time  
 deliver the said hogs or any other whatsoever

but on the contrary thereof the said defendant  
and hath hitherto wholly refused and still  
refuses to do by means whereof and in  
consequence whereof the said plaintiff hath  
been deprived of sundry great gains and  
profits which he might and would other-  
wise have acquired to himself by reselling  
the said hogs at much higher and advan-  
ced prices to wit at the County & State afores-  
aid, And for that whereas also heretofore  
to wit on the day and year aforesaid at the  
County and State aforesaid the said plaintiff  
at the special instance and request of the  
said defendant bargained with the said  
defendant to buy of the said defendant,  
and the said defendant then and there sold  
to the said plaintiff a large number of  
other Hogs to wit one Hundred Head of live  
Fat Hogs, then running with the said defen-  
dant's feeding cattle, at the rate or price of  
three dollars and seventy five cents per hun-  
dred weight gross, to be delivered at Ellison  
in said County & State & to be weighed by  
Samuel Johnson at said Ellison on the  
Sixteenth or Seventeenth day of February ad  
1858, and to be paid for as follows, to wit the  
said plaintiff was to deliver to said defendant  
at said Ellison on the days aforesaid to be  
weighed by said Samuel Johnson one hundred

7 to One Hundred and ten Stock Hogs which were to be taken by said defendant in part payment for said One Hundred Hogs not acquired & sold by said defendant to said plaintiff at the rate or price of three dollars and twenty five cents per hundred weight gross. And the balance to be paid for by said plaintiff on the delivery of said Hogs by said defendant as aforesaid, and in consideration thereof, and that the said plaintiff at the like special instance and request of the said defendant, had then and there understood and faithfully promised the said defendant to accept and receive the said Fat Hogs and to pay him for the same at the rate and price aforesaid. And in the manner aforesaid, he the said defendant understood and then and there faithfully promised the said plaintiff to deliver the said hogs as aforesaid to the said plaintiff as aforesaid and although the said time for the delivery of the said hogs as aforesaid hath long since elapsed. And the said plaintiff hath always been ready and willing to accept and receive the said hogs, so to be delivered by said defendant and to pay for the same at the rate and price aforesaid and in the manner aforesaid. And although the plaintiff did on the said

sixteenth day of February deliver said One Hundred head of Stock Hogs at Ellisorwaforesaid ready for said defendant to wit at the County and State aforesaid. Whereof the said defendant hath always had notice. Yet the  
8 said defendant not regarding his said promise and undertaking but contriving and intending to cheat and defraud the said plaintiff in this behalf did not nor would within the time aforesaid or at any other time thereafterwards deliver the said hogs or any part thereof for said plaintiffs at Ellisorwa in the County & State aforesaid or elsewhere but wholly refused and neglected so to do. Whereby the said plaintiff hath lost and been deprived of divers great gains and profits which might & therein have accrued to him from the delivery of the said hogs to the said plaintiffs as aforesaid to wit at the County & State aforesaid.

And whereas also the said defendant afterwards to wit on the twentieth day of February a D 1858 at the County & State aforesaid was indebted to the said plaintiff in the sum of Eight Hundred dollars lawful money of the United States of America for so much money before that time lent and advanced by the said plaintiff to the

said defendant at the special instance  
 and request of the said defendant, and for  
 other money by the said defendant before  
 9 that time had received to and for the use  
 of the said plaintiff. And for other money  
 by the said plaintiff before that time paid  
 laid out and expended to and for the said  
 defendant and at the special instance &  
 request of the said defendant.

And being so indebted the said  
 defendant in consideration thereof  
 afterwards to wit on the day and year last  
 aforesaid and at the place aforesaid, and  
 stood and there faithfully promis-  
 ed the said plaintiffs well & truly to pay unto  
 said plaintiff the said sums of money in  
 this Court mentioned when the said def-  
 endent should be thereunto afterwards  
 requested. And whereas also the said defen-  
 dant afterwards to wit on the same day and  
 year last aforesaid and at the place last  
 aforesaid accounted together with the said  
 plaintiff of and concerning divers other  
 sums of money before that time due and  
 owing from the said defendant to the  
 said plaintiff and there and there being in  
 arrears and unpaid, and upon said accou-  
 nting the said defendant there and there  
 was found to be in arrears and indebted to

10 the said plaintiff in the further sum of eight hundred dollars of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiff he the said defendant in consideration thereof afterwards took on the same day and year last aforesaid. And at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be therunto afterwards requested.

Nevertheless the said defendant although often requested so to do took at the place aforesaid has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff but to pay the same or any part thereof the said defendant has hitherto altogether neglected and refused and still does neglect and refuse to the damage of the plaintiff one thousand dollars and therefore the said plaintiff brings suit, &c.

Harding & Reed.

Attys for Plff.

Copy of acct owed en in first account.  
Fredrick Davidson

J. C. Atly Johnson

- 1858 Dr damages for failure to deliver <sup>one</sup> Hogs \$1000  
 Copy of acct sued on in second ct.
- " Dr damages arising from failure to deliver  
 One Hundred Hogs \$1000.  
 Copy of acct sued on in 3<sup>d</sup> ct.
- " Dr damages for a failure to deliver one  
 Hundred hogs \$1000.  
 Copy of acct for 4<sup>th</sup> ct.
- " Dr to money lent and advanced had & rec<sup>d</sup>  
 paid. laid out &c \$800.  
 Copy of acct sued on in 5<sup>th</sup> ct.
- " Dr to money due on an acct stated \$800.  
 Filed Mar 5<sup>th</sup> 1858 }  
 Wm Laferty cler } }

State of Illinois } ss.  
 Warren County } 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 Monmouth within and for the  
 County of Warren and State of Illinois. On the  
 third Monday in the month of March in the  
 year of our Lord One Thousand Eight Hundred  
 and fifty eight. It being the fifteenth day of  
 said month. Present Hon  
 John S Thompson Judge  
 James H Stewart State attorney

William Laferty Clerk  
Charles M Mills Sheriff.

259 Oakley Johnson }  
vs } Assumpsit.  
Fredrick Davidson }

12

And afterwards to wit on the 26th day of  
March a D 1858 the following order was  
entered upon the Records of our said Court  
which reads as follows to wit.

259 Oakley Johnson }  
vs } Assumpsit.

Fredrick Davidson } This day came the def  
endant by his attorney  
and files his Demurres to the plaintiffs dec  
laration herein. and after hearing the same  
the Court overruled the demurres.

(Copy of Demurres)

State of Illinois } March Term a D 1858  
County of Warren } of the Circuit Court of  
said County.

Oakley Johnson }  
vs } Trespass on the Case  
Fredrick Davidson } on premises.

And said Fredrick David  
son comes and says that said plaintiff say  
it not to have his aforesaid action against  
him because he says that the 1, 2, & 3 Counts

try the issue joined herein, after hearing the evidence and argument of counsel, retire to consider of their verdict.

14 And afterwards to wit on the 10<sup>th</sup> day of November A.D. 1859 the following order was entered upon the records of our said Court which is as follows to wit:

38 Cakley Johnson }  
vs } Assumpsit  
Fredrick Davidson } This day <sup>came</sup> again the jury empanelled herein on yesterday and upon their oath do say "We the jury find for the plaintiff and assess his damages at the sum of Seventy six dollars" Thereupon came the defendant by his attorney and moves the Court for a new trial herein.

And afterwards to wit on the 9<sup>th</sup> day of April A.D. 1860, it being at the March Term of said Circuit Court, the following order was entered upon the records thereof, which reads as follows to wit.

282 Cakley Johnson }  
vs } Assumpsit  
Fredrick Davidson } This day again came on this cause for a hearing on the defendants motion for a new trial herein, made at a former term of this Court. And after hearing the same

15 It is ordered by the court that a new trial be granted herein, upon the payment of all costs made herein within sixty days from this date, and leave is given the said plaintiff to amend his declaration filed herein.

State of Illinois } ss.  
Warren County } Pleas before the Honorable  
Aaron Tyler Judge of the  
Tenth Judicial Circuit of the State of Illinois,  
at a circuit court begun and held at the  
Court House in Mornmouth in the said County  
of Warren and State of Illinois on the  
fourth Monday in the month of October  
in the year of our Lord one thousand eight  
hundred and sixty, it being the 22<sup>d</sup> day of  
said month and year.

Present Now Aaron Tyler Judge.  
James H Stewart States attorney  
Seth Smith Sheriff  
Wm Laferty clerk

149. Oakley Johnson }  
vs } Assumpit.  
Fredrick Davidow }

Copy of Amended Declaration  
The State of Illinois } ss.

Warren County } Circuit Court.  
Of October Term A D 1860.

16  
Oakley Johnson }  
vs } Assumpsit  
Fredrick Davidson } Amended Declaration

Oakley Johnson plaintiff  
by Harding Reed & Kirkpatrick his attorneys  
Complains of Fredrick Davidson defendant  
who was summoned to answer unto said  
plaintiff of a Plea of Tropass on the  
Case on promises.

121  
For that whereas heretofore to wit on  
the Eleventh day of February A D 1858 at the  
County of Warren & State of Illinois the said  
plaintiff at the special instance and request  
of the said defendant bargained with  
the said defendant to buy of said defend-  
ant, and the said defendant then and  
there sold to the said plaintiff a large  
number of live fat hogs to wit One Hundred  
head, the same that were then following  
the said defendants feeding cattle at John  
Bleef's at the rate or price of three dollars  
and seventy five cents per hundred weight  
gross, to delivered by said defendant to  
said plaintiff at Ellison in the County of

5

Warren State of Illinois on the sixteenth  
and seventeenth days of February A.D. 1858  
said hogs to be weighed at Samuel Johnson's  
Store in Ellison aforesaid by Samuel Johnson  
& to be paid for, on delivery and in consideration  
17 thereof and that the said plaintiff at the like  
special instance & request of the said defend-  
ant had then and there undertaken & faithfully  
promised the said defendant to accept and  
receive the said hogs and to pay him for the  
same at the rate or price aforesaid, & the  
said defendant undertaken & then & there  
faithfully promised the said plaintiff to  
deliver the said hogs to the said plaintiff  
as aforesaid and although the said time for  
the delivery of the said hogs as aforesaid  
hath long since elapsed, and the said  
plaintiff hath always been ready and  
willing to accept & receive said hogs, and  
to pay for the same at the rate or price  
aforesaid to wit at Ellison in the County &  
State aforesaid, whereof the said defendant  
hath always had notice, yet the said defen-  
dant not regarding his said promise and  
undertaking but contriving and intending  
to deceive and defraud the said plaintiff  
in this behalf did not nor would within  
the time aforesaid or at any other time  
thereafterwards deliver the said hogs or any

part thereof to the said plaintiff at Ellison  
in the County & State aforesaid, or elsewhere  
but wholly neglected and refused & stood,  
whereby the said plaintiff hath lost and been  
deprived of divers great gains and profits  
which might otherwise have arisen and acc-  
rued to him from the delivery of the said  
18 hogs to him the said plaintiff as aforesaid  
to wit at Ellison in the County of Warren & State  
of Illinois aforesaid.

2<sup>nd</sup> Count. For that whereas also heretofore to wit on  
the Eleventh day of February a D 1858 at the  
County of Warren & State of Illinois the said  
plaintiff at the special instance and req-  
uest of the said defendant bargained with  
the said defendant to buy of the said def-  
endant, and the said defendant then &  
there sold to the said plaintiff a large num-  
ber of other live fat hogs, then running with  
the said defendant's feeding cattle at the farm  
of John Cox and at his the said defendant's  
home farm to be weigh on an average over  
two hundred weight gross at the rate or price  
of three dollars and seventy five cents per  
hundred weight gross, to be delivered to  
the said plaintiff at the Store of Samuel  
Johnson in Ellison in the said County of  
Warren & State of Illinois & to be weighed by

Samuel Johnson at said Ellison on the  
sixteenth and seventeenth days of February  
A. D. 1858 and to be paid for as follows to wit  
the said plaintiff was to deliver to the said  
defendant at said Ellison on the days aforesaid  
said to be weighed by said Samuel Johnson  
one hundred to one hundred and ten  
Stock Hogs which were to be as good as  
the hogs the defendant had just seen at  
the yard of Samuel Johnson in Ellison county  
& state aforesaid, which were to be taken by  
said defendant in part payment for said  
one hundred head of ~~stock~~ fat hogs so  
bargained & sold by said defendant to said  
plaintiff at the rate or price of three dollars  
and twenty five cents per hundred weight  
gross and the balance to be paid for by said  
plaintiff on the delivery of said hogs by  
said defendant as aforesaid at the store  
of the said Samuel Johnson in Ellison  
in the county & state aforesaid. And in  
consideration thereof and that the said  
plaintiff at the like special instance and  
request of the said defendant had then  
and then undertaken and faithfully prom-  
ised the said defendant to accept and  
receive the said live fat hogs of & from  
the said defendant and to pay him for  
the same at the rate and price aforesaid

and in the manner aforesaid he the said de-  
fendant undertook and then & there faithfully  
promised the said plaintiff to deliver the said  
hogs as aforesaid, <sup>to the said plaintiff as aforesaid</sup> and although the said  
time for the delivery of said hogs by the said  
20 defendant to said plaintiff at the store of the  
Samuel Johnson in said Ellison in said  
County of Warren & state of Illinois, hath long  
since elapsed and before the commence-  
ment of this suit, and the said plaintiff hath  
always been ready and willing to wit at the  
store of the said Samuel Johnson in Ellison  
in the county and state aforesaid to accept  
and receive the said hogs so to be delivered  
to him by said defendant and to pay for  
the same at the rate and price aforesaid  
and in the manner aforesaid, and although  
the said plaintiff did on the said six-  
teenth & seventeenth day of February A. D. 1853  
have one hundred ten stock hogs at the  
store of the said Samuel Johnson in El-  
lison aforesaid ready to be delivered to  
said defendant whereof the said defend-  
ant hath always had notice: yet the said  
defendant not regarding his said promise  
& undertaking but contriving and in-  
tending to cheat and defraud the said  
plaintiff in this behalf did not nor would

within the time aforesaid or at any other  
 time thereafter deliver the said one hun-  
 dred head of live fat hogs for said plain-  
 tiff at the store of the said Samuel Johnson  
 in Ellison in said county of Warren & state of  
 21 Illinois, but wholly refused and neg-  
 lected so to do. Whereby the said plaintiff  
 hath lost and been deprived of divers great  
 gains and profits which might otherwise  
 have accrued to him from the delivery  
 of the said hogs to him the said plaintiff  
 aforesaid to wit at the store of the said Sam-  
 uel Johnson in Ellison in the county of War-  
 ren & state of Illinois

3<sup>d</sup> count And for that whereas also heretofore to wit:  
 on the day and year aforesaid at the county  
 & state aforesaid the said plaintiff at the  
 special instance and request of the said  
 defendant bargained with the said de-  
 fendant to buy of the said defendant and  
 the said defendant then and there sold  
 to the said plaintiff a large number of  
 other hogs to wit one hundred head of live  
 fat hogs to over run two hundred weight  
 a piece on an average to be taken from the  
 hogs of the defendant then running at the  
 farm of John Cox with the feeding cattle  
 of the defendant then running at the farm

of said Cox and from the home place of the  
said ~~Defendant~~ if there was not enough at  
the farm of said Cox at the rate or price of three  
dollars and seventy five per hundred weight  
gross to be delivered by said defendant at  
22 the store of Samuel Johnson in Ellison in said  
County of Warren and State of Illinois on the  
16<sup>th</sup> or seventeenth days of February A. D. 1858  
and to be weighed by said Samuel Johnson on  
the sixteenth or seventeenth day of February  
A. D. 1858 and to be paid for by said plaintiff  
as follows to wit the said plaintiff was to de-  
liver to said defendant at said Ellison one  
hundred stock hogs and more if he chose  
which were to be as good on an average  
as those that said defendant had that day  
seen at the yard of Samuel Johnson in said  
Ellison which were to be taken by said defend-  
ant in part payment for said one hun-  
dred head of live hogs so bargained and  
sold by said by said defendant to said  
plaintiff at the rate or price of three dollars  
and twenty five cents per hundred weight  
gross and the balance to be paid for by said  
plaintiff on the delivery of said hogs by  
said defendant as aforesaid, and in  
consideration thereof and that the said  
plaintiff at the like special instance and

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request of the said defendant had then & there undertaken and faithfully promised the said defendant to accept and receive the said live fat hogs and pay him for the same at the rate and price aforesaid and in the manner aforesaid he the said defendant undertaken and then & there faithfully promised the said plaintiff to deliver the said one hundred head of live fat hogs to the said plaintiff as aforesaid and although the said time for the delivery of the said hogs as aforesaid hath long since & before the commencement of this suit elapsed and the said plaintiff hath always been ready and willing to accept and receive the said hogs so to be delivered by the said defendant & with at said Samuel Johnson's store in Ellison in the county of Warren & state of Illinois and to pay for them at the rate & price aforesaid and in the manner aforesaid, and although the said plaintiff did on the said sixteenth day of February A.D. 1860 deliver at the store of said Samuel Johnson in said Ellison County & state aforesaid one hundred & more stock hogs as good on an average as those seen by the said defendant at the yard of said Samuel Johnson in said Ellison as aforesaid ready to be weighed

by said Samuel Johnson and delivered  
to said defendant in part-payment for said  
one hundred head of live fat-hogs so to be  
delivered by said defendant - which said  
one hundred head and more of stock hogs  
the said plaintiff avers were ready at the store  
24 of said Samuel Johnson in Ellison + county  
+ state aforesaid to be delivered to said defend-  
ant as aforesaid during all of the 16<sup>th</sup> + 17<sup>th</sup>  
days of February A. D. 1860, whereof the said  
defendant hath always had notice,  
yet the said defendant - not regarding his  
said promise and undertaking but con-  
triving and intending to cheat and defraud  
the said plaintiff in this behalf did not nor  
would within the time aforesaid or at  
any other time thereafter deliver the  
said one hundred live fat-hogs to the said  
plaintiff (or any part thereof) at the store  
of the said Samuel Johnson in said El-  
lison in the county + state aforesaid or else-  
where but wholly refused and neglected  
so to do, whereby the said plaintiff hath  
lost and been deprived of divers great  
gains and profits which might other-  
wise have accrued to him from the  
delivery of the said hogs to the said  
hogs to the said plaintiff as aforesaid

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to wit at the store of the said Samuel Johnson in Ellison in the county & state aforesaid

4<sup>th</sup> count. And for that whereas also hereto:  
fore to wit; on the day and year aforesaid  
25 at the county & state aforesaid the said plaintiff at the special instance and request of the said defendant bargained with the said defendant to buy of the said defendant and the said defendant then and there sold to the said plaintiff a large number of other hogs to wit one hundred head of live fat hogs to be taken from the hogs of the said defendant then at the farm of one John Cox to average over two hundred weight gross and if there was not enough of the hogs of the defendant at said Coxes to take enough from certain hogs then at defendant's residence to make up the one hundred head said one hundred head of hogs to average over two hundred weight gross at the rate or price of three dollars and seventy five cents per hundred weight gross to be delivered at the store of Samuel Johnson in Ellison Warren county Illinois on the sixteenth or seventeenth day of February A. D. 1858 and to be weighed by said Samuel Johnson and to be paid as follows

26

to wit: the said plaintiff was to deliver to said defendant at said Samuel Johnson's store in Ellison county & state aforesaid on the days aforesaid to be weighed by said Samuel Johnson one hundred or more stock hogs to be as good on an average as those the defendant had that day seen at the yard of said Samuel Johnson at Ellison county & state aforesaid which were to be taken by said defendant in part payment for said one hundred head of hogs so bargained and sold by said defendant to said plaintiff at the rate or price of three dollars & twenty five cents per hundred weight gross and the balance to be paid for by said plaintiff on the delivery of said hogs by said defendant as aforesaid; And in consideration thereof and that the said plaintiff at the like special instance & request of the said defendant had then & there undertaken and faithfully promised the said defendant to accept and receive the said one hundred head of fat hogs and to pay him at the rate and price aforesaid and in the manner aforesaid, he the said defendant undertaken and then and there faithfully promised the said plaintiff to deliver the said one hundred head of fat hogs as aforesaid.

27

said to the said plaintiff as aforesaid and although the time for the delivery of the said hogs so to be delivered by the said defendant as aforesaid, hath long since elapsed, and before the commencement of this suit and the said plaintiff hath always been ready & willing to wit at the store of Samuel Johnson in Ellison in the county of state aforesaid to accept and receive the said hogs so to be delivered by the said defendant, and to pay for the same at the rate and price aforesaid, and in the manner aforesaid; and although the said plaintiff did on the said sixteenth & seventeenth days of February A. D. 1858 have more than one hundred head of stock hogs as good on an average as those the said defendant had seen at Samuel Johnson's yard as aforesaid at the store of the said Samuel Johnson in Ellison county & state aforesaid ready to be weighed by said Samuel Johnson and delivered to the said defendant in part-payment for said one hundred head of fat-hogs so to be delivered by said defendant whereof the said defendant hath always had notice. Yet the said defendant notwithstanding his said promise and undertaking but contriving and under-

taking to Cheat and defraud the said  
plaintiff in this behalf did not nor would  
within the time aforesaid or at any other  
time thereafter deliver the said hogs  
or any part thereof for the said plaintiff  
28 at the store of the said Samuel Johnson  
in Ellison in the County & state aforesaid  
or elsewhere but wholly refused and neg-  
lected so to do; whereby the said plaintiff hath  
lost and been deprived of divers great gains  
and profits which might have arisen to  
him from the delivery of said hogs to him  
the said plaintiff as aforesaid to wit: at  
the county & state aforesaid

5<sup>th</sup> Count And for that whereas also heretofore to wit  
on the day and year aforesaid & at the coun-  
ty & state aforesaid, the said plaintiff at  
the special instance and request of the said  
defendant bargained with the said defend-  
ant to buy of the said defendant and the  
said defendant then and then sold to the  
said plaintiff a large number of other in-  
fat hogs to wit: one hundred head of hogs  
to be taken from the hogs of the said de-  
fendant then running after his feeding  
cattle at the farm of Cot and if not  
enough there then enough to be taken

from the defendant's hogs then at the house  
 place of the defendant said hogs to weigh  
 on an average over two hundred weight  
 gross and to be delivered by said defend-  
 ant to said plaintiff at the store of Sam-  
 29 uel Johnson in Ellison in said County of  
 Warren + state of Illinois on the 16<sup>th</sup> + 17<sup>th</sup>  
 days of February A. D. 1857, and to be weigh-  
 ed on the 16<sup>th</sup> or 17<sup>th</sup> day of February A. D.  
 1858 by said Samuel Johnson and to be  
 paid for at the rate or price of three dollars  
 and seventy five cents by the said plain-  
 tiff upon delivery: And in consideration  
 thereof, <sup>and that</sup> the said plaintiff at the like special  
 instance and request of the said defendant  
 had then and there undertaken and faith-  
 fully promised the said defendant to  
 accept and receive the said hogs and  
 to pay the said defendant for the same  
 at the rate or price aforesaid he the said  
 defendant undertook and then and there  
 faithfully promised the said plaintiff  
 to deliver the said hogs to the said plain-  
 tiff as aforesaid and although the said  
 time for the delivery of the said hogs as  
 aforesaid hath long since elapsed  
 And although the said plaintiff hath  
 always been ready and willing to accept and  
 receive said hogs and to pay for them at

30 The rate or price aforesaid and in the mean-  
time aforesaid to wit at the store of ~~Samuel~~  
el Johnson in Ellison in the county & state afo-  
said, whereof the said defendant hath at  
ways had notice. Yet the said defendant  
not regarding his said promise and un-  
dertaking but contriving and intending  
to cheat and defraud the said plaintiff  
in this behalf did not nor would within  
the time aforesaid or at any time thereaf-  
terwards deliver the said hogs or any part  
thereof to the said plaintiff at the store of  
said Samuel Johnson in Ellison, county  
& state aforesaid or elsewhere but wholly  
neglected & refused so to do, whereby the  
said plaintiff hath lost and been depriv-  
ed of divers great gains and profits which  
might have otherwise accrued to him  
from the delivery of the said hogs to the  
said plaintiff as aforesaid to wit at  
the store of Samuel Johnson in Ellison  
in the county & state aforesaid.

6<sup>th</sup> Court And for that whereas also heretofore to  
wit on the eleventh day of February a.d.  
1858 at the county of Warren state of Illi-  
nois the said plaintiff at the special  
instance & request of the said defendant

bargained with the said defendant and  
the said defendant then and there sold to  
the said plaintiff a large number of other  
live fat hogs to wit one hundred head to  
be taken from John Coe's in part and en-  
ough of said defendant's hogs run-  
ning then at his home in addition thereto  
to amount to one hundred head of hogs  
as aforesaid, and to overrun on an aver-  
age two hundred pounds gross weight at  
the rate or price of three dollars and seventy  
five cent per hundred weight gross to be  
delivered to the said plaintiff, by the said  
defendant at the town of Ellison in said  
county of Warren on the 16<sup>th</sup> + 17<sup>th</sup> days  
of February A. D. 1858, and to be weighed  
by said Samuel Johnson at his store in  
Ellison and paid for by the said plain-  
tiff as follows to wit: the said plaintiff  
was to deliver to said defendant - at the same  
time & place to be weighed by the said Sam-  
uel Johnson one hundred or more stock  
hogs, as good as the hogs the defendant  
had just seen running in the yard of  
the said Samuel Johnson which were  
to be taken by said defendant in part-  
payment for said one hundred head  
of hogs so bargained & sold by the said  
defendant to said plaintiff at the rate

32 or price of three dollars and twenty five cents per hundred weight-gross and the balance to be paid by the said plaintiff on the delivery of said hogs by said defendant as aforesaid and in consideration thereof and that the said plaintiff at the like special instance and request of the said defendant had then and there undertaken and faithfully promised the said defendant to accept and receive the said live fat-hogs and to pay him for the same at the rate and price aforesaid and in the manner aforesaid as the said defendant undertook and then and there faithfully promised the said plaintiff to deliver the said hogs to the said plaintiff as aforesaid. And although the said time for the delivery of the said hogs as aforesaid hath long since elapsed and before the commencement of this suit and the said plaintiff hath always to wit at the town of Ellison in said County been ready and willing to accept and receive the said hogs so to be delivered by said defendant and to pay for them at the rate and price aforesaid, and in the manner aforesaid, and although the said

33

plaintiff on the 16<sup>th</sup> + 17<sup>th</sup> days of February A. D. 1858, at the Town of Ellison in said county of Warren was ready + willing to pay for said live fat-hogs in accordance with the terms of said agreement to wit 100 or more of stock hogs at the rate of \$25 per hundred gross weight + the ballance in money. Yet the said defendant not regarding his said promise and undertaking but contriving and intending to cheat and defraud the said plaintiff in this behalf did not nor would within the time aforesaid or at any other time thereafter deliver the said live fat-hogs or any part thereof to the said plaintiff at the Town of Ellison in said county of Warren, or elsewhere but wholly refused and neglected so to do whereby the said plaintiff hath lost and been deprived of divers great gains and profits which might otherwise have arisen and accrued to him from the delivery of the said hogs to the said plaintiff as aforesaid to wit at the county of Warren aforesaid

7 And for that whereas also the said defendant afterwards to wit on the twentieth day of February A. D. 1858 at the county + State aforesaid, was indebted to the said

plaintiff in the sum of Eight-hundred dol-  
lars lawful money of the United States of  
America for so much money before that  
time lent and advanced by the said plain-  
tiff to the said defendant at the special in-  
34 stance request of the said defendant,

And for other money by the said defend-  
ant before that time had and received to  
and for the use of the said plaintiff,

And for other money by the said plaintiff  
before that time paid, laid out and expen-  
ed to and for the said defendant and at the  
special instance request of the said de-  
fendant. And being so indebted the  
said defendant in consideration thereof  
afterwards to wit: on the day & year last afo-  
said and at the place aforesaid undertook  
and then & there faithfully promised the  
said plaintiff well and truly to pay unto  
the said plaintiff the said sum of mon-  
ey in this Court mentioned when the said  
defendant should be thereunto afterward  
requested. And whereas also the said  
defendant afterwards to wit: on the same  
day and year last aforesaid accounted  
together with the said plaintiff of and con-  
cerning divers other sums of money be-  
fore that time due and owing from the said

35  
defendant to the said plaintiff and then  
and there being in arrear and unpaid and  
upon said accounting the said defendant  
then and there was found to be in arrear and  
indebted to the said plaintiff in the further  
sum of eight hundred dollars of like  
lawful money as aforesaid and being so  
found in arrear and indebted to the said  
plaintiff by the said defendant - in considera-  
tion thereof afterwards to wit: on the same  
day and year last aforesaid and at the  
place aforesaid and at the place aforesaid  
said undertook and then & there faithfully  
promised the said plaintiff well and  
truly to pay unto the said plaintiff the said  
sum of money last mentioned when  
the said defendant should be thereunto  
afterwards requested. Nevertheless the  
said defendant although often request-  
ed so to do to wit at the county seat  
aforesaid has not yet paid the said sev-  
eral sums of money above mentioned  
or any or either of them or any part there-  
of to the said plaintiff but to pay the  
same or any part thereof, the said de-  
fendant has hitherto altogether neglect-  
ed and refused and still does neglect  
& refuse. To the damage of the said  
plaintiff one thousand dollars

And therefore the said plaintiff brings  
suit &c

Harding Reed & Kirkpatrick  
Plffs attorneys

36

Copy of account sued on  
Frederick Davidson

to Oatley Johnson Dr

To damage in not-delivering  
100 head of live fat-hogs

\$1000

To money had received \$800

" paid laid out & expended \$800

" " lent & advanced \$800

" " due on account stated \$800

Filed Oct 9th 1860.

Wm Lafaty cler 10



149 Oakley Johnson }  
vs } Assumpsit  
Fredrick Davidow } Ordered by the Court  
that this suit be continued  
until the next term of this Court.

38

And afterwards to wit on the 19th day of  
March A.D. 1861. It being at the March term  
of said Court. the following order was  
entered upon the Records of said Court  
which reads as follows to wit.

75 Oakley Johnson }  
vs } Assumpsit  
Fredrick Davidow } This day came defendant  
by attorney and files his  
return to plaintiffs Declaration herein.

(Copy of Pleas)

State of Illinois }  
County of Warren } March Term A.D. 1861 of  
the Circuit Court of said  
County.

Oakley Johnson }  
vs } Trespass on the  
Fredrick Davidow } Case on promises.

Said defendant comes  
and defends the wrong and injury therein  
and says that he did not undertake  
or promise in manner and form as said  
plaintiff has in his declaration herein

alleged, and of this he puts himself  
upon the country &c.

C. M. Harris  
Atty for Deft.

And said plaintiff doth the like.

39

Reed & Kirkpatrick  
for Deft.

Filed April 6th 1861.

Wm Laferty ctk }

And afterwards on the 8th day of April  
AD 1861 the following order was made in  
said Cause which is as follows to wit.

Oakley Johnson

75

vs  
Fredrick Davidson

} Assumpsit.

This day came the defend-  
ant and withdraws his demurrer herein.

Thereupon came the parties by their  
attornies and issue being joined for trial  
they put themselves upon the Country.

Thereupon came a Jury to wit C. F. Binell.

H. H. Kelly, John Larimer, J. B. Charston, C. W.  
Littleton, Nathaniel Cecil, James W. Morgan,  
R. N. Allen, Charington Coates, Charles Stee,

John G. Norcross & S. J. McBride who being  
elected tried and sworn to well and truly try,  
the issue joined herein, and after hearing  
the evidence and argument of Counsel, and  
receiving the instructions of the Court retired

to consider of their verdict. And returned into Court and upon their oaths do say "We the jury find for the Plaintiff and assess his damages at the sum of One Hundred and ten dollars. Thereupon came the defendant by his attorney and enters his motion for a new trial herein, and in arrest of Judgement.

40

And afterwards Term on the 12<sup>th</sup> day of April A.D. 1861 the following order was entered upon the Records of our said Court which is as follows to wit:

75. Oakley Johnson }  
vs } Assumpsit.

Fredrick Dainsen } This day again this came  
Coming on to a hearing  
on the defendants motion for a new trial  
and in arrest of Judgement herein. And after  
hearing the same it is ordered by the Court  
that the motion be allowed. Therefore it is con-  
sidered by the Court that the verdict of the jury  
herein be set aside and for naught held, and  
a new trial granted herein. And this cause  
is continued until the next term of this  
Court.

And afterwards to wit on the 31<sup>st</sup> day of October A.D. 1861. It being at the

Pleas State of Illinois vs.

Warren County } Pleas before the Honorable  
Charles B Lawrence Judge

of the tenth judicial circuit of the State of Illinois. At a circuit court began and held at the Court House in the city of Monmouth in Warren County and State of Illinois on the fourth Monday in the month of October in the year of our Lord one thousand eight hundred and sixty one. It being the twenty eighth day of said month.

41

Present Hon Charles B Lawrence Judge  
James H Stewart States Attorney  
David Turnbull Sheriff  
Wm Laferty Clerk

And afterwards, to wit, on the 31st day of October a d 1861 the following order was entered upon the Court Records in said cause, which reads as follows to wit.

35. Oakley Johnson }  
vs } Assumpsit  
Frederick Davidow }

This day came the parties and their attorneys and upon being joined for trial put themselves upon the country. Thereupon came a Jury to wit Alfred Hays, Clarkson Goffey, George L Bostwick, Elmore Harris, William Clayton, George M Saylor, Jasper H Riggs, C M Rodgers, Niram Petercow, William H Hopkins, Henry

42 Sigafors and William S. George, who were duly  
impaneled and sworn to well and truly try  
the issue joined, and having heard the evi-  
dence and a part of the argument of the  
Counsel herein, and the hour of adjournment  
having arrived, the jury were permitted to  
separate, to meet the Court at 8 1/2 o'clock to-  
morrow morning.

And afterwards to wit on the 1<sup>st</sup> day of Nov<sup>r</sup>,  
A.D. 1861 the following order was entered upon  
the Records of s<sup>d</sup> Court which reads as follows  
to wit.

35 Oakley Johnson }  
vs } Assumpsit.

Fredrick Davidson } This day again came the par-  
ties and their attorneys, and

also came the jury empannelled herein on  
yesterday, and having heard the conclusion  
of the arguments, and received the instructions  
of the Court as well as the part of the plaintiff  
as of the defendant, retired to consider of  
their verdict.

And afterwards, to wit, on the same day, the  
following additional order was entered upon  
the Records of s<sup>d</sup> Court, which reads as follows to wit.

35 Oakley Johnson }  
vs } Assumpsit.

Fredrick Davidson } And now again come the



Entered upon the Records of our said Court  
which reads as follows to wit.

35 Oakley Johnson }  
vs } Assumpsit.  
Fredrick Davidson }

Ordered by the Court that  
this cause be continued.

44

And afterwards to wit on the 21st day of  
March a d 1862. It being at the March  
Term a d 1862 of said Court, the following  
order was entered upon the Records of  
Court which is as follows to wit.

24 Oakley Johnson }  
vs } Assumpsit.  
Fredrick Davidson }

This day came the parties  
and their attorneys and  
issue being joined for trial put themselves upon  
the Country. Thereupon came a Jury to wit, Wm  
S. Hill, Henry K. Peffer, Leonard Stephens, Wm  
Chester Rowe, Thomas D. Reese, John Lovick,  
William H. Young, John H. Fryniere, N. W. Baker,  
J. M. Cozad, J. W. Bridenbush, & R. K. Mitchell,  
who, being duly elected, tried and sworn to  
well and truly try the issue joined, after hear-  
ing the evidence and argument of Counsel,  
and receiving the instructions of the Court  
retired to consider of their verdict.





by the Jury Aforsaid together with his costs  
by him in this suit made, and may have  
Execution therefor.

46 And afterwards to wit on the 3<sup>d</sup> day of April  
a.d. 1862 the following order was entered  
upon the Records of said Court which read  
as follows to wit.

24                      15                      } Assumpsit.  
Oakley Johnson }  
Fredrick Davidson } This day again came def  
endant and prays an app  
eal to the Supreme Court, which is allowed  
by the Court upon the said defendant ent  
ering into bond in the sum of three hund  
red dollars, with security to be approved by  
the clerk of this Court by consent and agree  
ment of the parties, bond to be filed in sixty  
days and bill of exceptions in Ninety days  
from this date.

### Copy of Bill of Exceptions

State of Illinois } October Term a.d. 1862 of  
County of Warren } the Circuit Court of said  
County.

Oakley Johnson } Trespass on the case  
15 } and promises.  
Fredrick Davidson } Be it Remembered

47 That on the trial of this cause William D Johnson a Witness of plaintiff on his Examination in Chief testified that on 11th February A.D. 1858 he was with plaintiff at defendant's when plaintiff contracted with defendant for One hundred fat hogs to be delivered at Ellsow at Samuel Johnson's store, live. Can not say the exact amount they were to weigh, but they were to average over Two Hundred pounds. They were to be taken from a lot of hogs defendant had on farm of lease, the balance from the farm of defendant, at three dollars and seventy five cents per hundred pounds gross, and to be delivered on the next Tuesday and Wednesday, defendant was to have from plaintiff one hundred red stock hogs at three dollars and twenty five cents per hundred pounds as part payment on the hundred, he was to let plaintiff have, and defendant was to have the balance for his hundred hogs in money from the plaintiff. Some thing was said about more hogs which he don't recollect. But it was before the making of the Contract and was no part of it, by the Contract each of the parties was to let the other have One Hundred red hogs, and no more or less. The Stock Hogs were to average with some hogs Defendant had seen before at Samuel Johnson's

Samuel Johnson was to do the weighing at his store of both lots of hogs. He at the time made a memorandum of the weights numbers and prices.

118 Defendant immediately upon witness testifying as to the hundred stock hogs to be paid by plaintiff to defendant objected to such evidence, and then gave as his reason therefor that it varied materially from any of the counts in plaintiff's declaration, and that the plaintiff could not on the contract of which the witness had testified recover upon the Common Counts of his declaration or any of them, which objection the Court then overruled and permitted such testimony to be given to the Jury. To which ruling and permission of the Court defendant then excepted. Defendant immediately upon the conclusion of the testimony in Chief of the Witness asked the Court to exclude from the consideration of the Jury all such testimony and gave as his reasons therefor those aforesaid which the Court refused to do and permitted that such testimony to remain with the Jury.

To which refusal and permission of the Court defendant then excepted. The Witness then on his cross Examination

49

testified that he was Father of plaintiff,  
 That he was satisfied that the hogs were to  
 be delivered on the 16<sup>th</sup> & 17<sup>th</sup> February a.d.  
 1858. He did not swear on the first trial of  
 this cause in this Court that they were to  
 be delivered on the 16<sup>th</sup> or 17<sup>th</sup> days of Feb-  
 ruary a.d. 1858 or the 16<sup>th</sup> or 17<sup>th</sup> of any days,  
 but did that they were to be delivered on  
 both those days. The Contract was closed out  
 of Davidson's House in the pasture field. It  
 was made after we returned from boxes.  
 Plaintiff offered defendant three & three  
 fourth cents per pound gross for his hogs about  
 red. he offered to take it provided he could  
 have of plaintiff one hundred stock Hogs to  
 replace the hundred he was to sell to plain-  
 tiff to follow his defendant's feeding cattle,  
 plaintiff told him he could have the hund-  
 red stock hogs. Before going to boxes, plaintiff  
 and defendant were talking about fat hogs  
 stock hogs. prices and quality. defendant  
 told plaintiff where the hogs were, he said  
 he would go there and see them, and that  
 if they suited him he would come back &  
 let him know. The Reason for having two  
 days was that plaintiff said it would be  
 impossible to weigh all in one day.

Samuel Johnson a Witness of plaintiff on his

Examination in Chief testified that on 16<sup>th</sup> February a D 1858 he was on his way from Chicago Illinois. had left there that morning, got to Young America about 6 or 7 o'clock and at Ellison about 9 o'clock that evening had one thousand dollars with which to pay 50 ballance on Hogs. On morning of next day went to defendant's house, plaintiff came there from quarters to half hour after he got there. He passed the time a day. He witness said he came down to see why the Hogs were not sent up. defendant said they would have to make a new bargain if they got the hogs. On the 17<sup>th</sup> February he had one hundred and fifty stock Hogs at Ellison, that one hundred of them would average with 40 or 50 that defendant had before seen them, some stock hogs were put with these stock hogs on 17<sup>th</sup> February a D 1858 He on 20 or 21<sup>st</sup> of February bought one hundred hogs of defendant that averaged two hundred and forty pounds or more at \$4.50 cents per hundred pounds. He did not deliver the hogs on 17 February a D 1858, Hogs weighing two hundred pounds were worth five dollars per hundred, those weighing two hundred and forty to fifty pounds from four dollars and twenty five to fifty cents,

per hundred pounds on the 16th & 17th days of  
February 1858 at Ellison, Defendant so far  
as this Witness gave his testimony affirming  
as far as it relates to the alleged Contract  
with plaintiff objected thereto for the reason  
57 that it related only to a contract in which  
plaintiff could not in this case recover as  
such Contract varied materially from  
any set forth in his declaration and is  
not such as would entitle a recovery on  
any of the Common Counts of such declar-  
-ation, which objections the Court overrul-  
ed as they were severally made, and to  
which rulings of the Court the defendant  
severally excepted as soon as they were  
made. That the Witness on his Cross Exam-  
ination testified that he is a brother of pl-  
aintiff. That Plaintiff was present with  
him at defendant's when he told defendant  
that he came to see why he had not sent  
up the hogs, and when defendant said  
they would have to make a new Contract,  
That plaintiff neither then nor while they  
were at defendant's to his knowledge said  
anything about the hogs nor a Contract  
therefor, nor any violation of any Contract,  
therefor, nor did not make any demand  
for them, and that he the Witness did  
not make any demand for them, but

that when defendant said they would have to make a new contract, he Witness dropped the subject and went to talking about something else. That if defendant made any other reply than that he Witness has mentioned he does not recollect about it what it was as he did not pay much attention after the reply. He  
52 defendant may have said more about the boys and the contract therefor. He went to defendant's that morning to see him about the boys and expected to meet the plaintiff there and did.

Louis Rapalee a Witness of plaintiff's testified he was at Ellison on 16th & 17th days of February a.d. 1858. He was then the clerk in a store there for Samuel Johnson, don't know how many boys were there on the 16th. There were 130 or 140 there on 17th defendant did not have any boys there Davidow was there at Ellison about 8 o'clock of the morning of the 16th of February a.d. 1858. as we were parting he told me if the boys wanted the hogs they would have to make a new contract. He lived 2 or 2 1/2 miles from there, less about the same distance, the one in a North East

the other in a South East direction. defendant did not say any thing about when the hogs were to be delivered. He asked if the Johnsons were there. He said he had let them have some Hogs.

53  
 defendant as far as this Witness gave his testimony. Objected thereto for the reason that it related solely and only to a contract in which plaintiff could not in this cause recover, as such contract varies materially from any set forth in his declaration and is not such as will entitle a recovery on any of the common Courts thereof, which objections the Court overruled as they were respectively made and to which rulings of the Court as soon as they were made, defendant Excepted severally.

The Witness upon his Cross Examination testified that he is a brother in law to Samuel Johnson, that defendant when he came to Ellison on the morning of the 16th February A.D. 1858 came to the store of Samuel Johnson and said he had come to see about delivering hogs to plaintiff. He told him that Samuel Johnson was in Chicago, Illinois & that plaintiff was in Young America, that defendant after remaining about one hour left. Chicago is about 200 miles from Ellison, and Young America is about six miles

from Ellison. He the Witness had no instructions or authority to do anything about the Hogs.

54  
Livmore a Witness of plaintiffs testified that defendant said he told plaintiff he could have a portion of the hogs. He had at home and ballance at Coxes if he would let him have 500 Hogs. He thinks he said he was to let Johnson have 100 hogs at  $3\frac{3}{4}$  cents per pound and Johnson was to let him have 100 Stock Hogs at  $3\frac{1}{4}$  cents per pound. They were to weigh the Stock Hogs and pay defendant the ballance in money for his hogs. defendant said he went to Ellison on the morning of the 16th February A.D. 1858 the day on which the hogs were to be delivered and found neither of the Johnsons there and concluded not to let them have the hogs. He understood that defendant's hogs were to be weighed first. The number of stock hogs were to be a certain number he dont think it was over a hundred. Defendant as far as this Witness testified objected to his testimony and gave therefor the reasons which he did for objecting to that of Lewis

Rapala which objections were overruled in the same manner and order as in that case, to which rulings, defendant then excepted in the same manner and order as he did in that case.

53 Thompson Brooks a witness of defendant testified that he was one of the jury who tried this case in this Court the first time, and that he is positive that upon that trial that William D Johnson swore that the hogs were to be delivered on the 16th or 17th of February A D 1858 and not on the 16th and 17th days of that month or any other.

Smith Shepard, a Witness of defendant testified that he was one of the jury that tried the case first in this Court, that William D Johnson swore upon that trial that he knew the time for the delivery of the hogs from a memorandum he then had of it. his recollection is that he swore that it was one of two days and was not two days

Honble John S Thompson a Witness of defendant, testified that this case was tried the first time before him in this Court, as the

Judge thereof. And that his recollection is that upon that trial William D Johnson swore that the Hogs were to be delivered on the 16 or 17 days February and not on the 16 and 17th days of that month or any other.

56 Perkins a Witness of defendant testified that Shackelford came from Ellison on 16th February a D 1858 and informed plaintiff that defendant had been there that morning for the Stock Hogs he was to let him have. Plaintiff asked Shackelford why the boys did not turn out the hogs, Shackelford said there was not any one there that knew anything about the hogs either plaintiff or Shackelford asked why Samuel Johnson was not there the reply was that he was in Chicago, plaintiff said defendant had been to Ellison after the Stock Hogs and the trade had gone over as defendant had been there for the Stock Hogs and there was no one there to deliver them to him, but the probability was that defendant would not deliver the fat hogs, plaintiff said that if Samuel Johnson had been there to have delivered Davidson the Stock Hogs he should have compelled him to have stood up to the contract.

57

David Brent a Witness of defendant testified that William D Johnson on the first trial of this cause in this court testified that the hogs were to have been delivered on the 16th or 17th days of February A D 1858 and not on both of those days, or of any other days. He was a Witness at that trial and paid particular attention to William D Johnsons testimony. He was on 17th day of February A D 1858 in Samuel Johnsons Store in Ellison when plaintiff came in and said that he had just returned from defendant House. He plaintiff then said that he did not blame defendant for backing out. That he blamed Samuel Johnson. He was to have got back from Chicago on the morning train. He did not come. He plaintiff waited until noon he did not come and it was then to late to go to weigh hogs. He said he had left a hole for Davidson to back out and he was a going to back out it, was what any trading man would do. He did not blame him for it. He said Samuel Johnson not being there in time defendant backed out. There were not over 60 or 70 St. 10 Hogs at Ellison on the 16 or 17th days of

February a d 1858 that he saw.

58  
McCartney a witness of defendant testified that there was no more than 80 or 85 st. 10 Hogs at Ellison when he left in the afternoon of the 17 February a d 1858. There were not so many the day before. Some had been put in that day. He had a good opportunity of knowing the number and sizes of them, had hauled Corn to them to feed them, had noticed them and seen them after, 40 to 45 of them would have weighed from 100 to 140 pounds, 20 to 25, 60 to 100 pounds and the remainder from 30 to 60 pounds each.

W. J. Graham a witness of defendant testified that plaintiff said the Hogs were to have been delivered on the 16 or 17 February a d 1858. This was between the middle of March and first of April, that he defendant had made a contract & he was going to hold him to it as the contract was for a delivery on the 16 or 17 of February a d 1858. He was at Davidson's the last of the two days named. He claimed that Davidson was to deliver his Hogs first and have them weighed

then Johnson

59 William Brown a witness of defendant testified that in afternoon of 16th February A.D. 1858 he delivered hogs at Samuel Johnson in Ellison. Twenty, they averaged from 40 to 60 pounds. Smaller ones weighed thirty five pounds, some sixty. He thinks he said defendant was to have them. He had to take some of them back afterwards.

Jesse Matthews a witness of plaintiff testified that he was one of the Jury who tried the case the first time and that he believed that William D. Johnson at that time swore that the hogs were to be delivered in two days.

This is all the evidence given in the case. Plaintiff then asked the court to give to the Jury on his behalf the following instructions

Copy of Pliffs Instructions.

1st If the defendant at any time before the time in which this contract was to be completed refused to deliver his hogs according to his contract, or that now to the plaintiff that he would not do so, then the plaintiff

Given

16.

might from that time treat the defendant as in default & was not bound to hold himself in readiness or make any further preparation to complete the contract on his part. And had a right to bring a suit at any time after such refusal.

2 If the Jury believe from the evidence that  
60 Friedrich Davidson agreed with Oakley Johnson to deliver him 100 fat hogs at Ellison on the 16th and 17th days of February at the price of \$3.25 per 100 lbs. and Friedrich Davidson notified Oakley Johnson on the morning of the 16th. that if he wanted the hogs, he would have to make a new contract, and repudiated the contract on his part, that that fact released Oakley Johnson from continuing his preparations to be ready to perform his part of the contract, provided at the time of such supposed repudiation the plaintiff would have placed himself in readiness to perform his part of the contract in the time limited by the contract, if the contract had not been repudiated by the other party in the manner above supposed.

Given

3 The Jury are instructed that if they believe from the evidence that the contract

was made as alleged in the plaintiff's declaration between the plaintiff and the defendant, and that at the time & place of the Execution of such Contract as agreed upon, the plaintiff was ready and willing to receive & pay for the hogs which the defendant agreed to deliver him, and the defendant failed to perform his part of the same Contract according to the terms thereof, then the plaintiff is entitled to recover the difference between the Contract price and the value of the hogs at the time and place at which the hogs were to be delivered by the defendant to the plaintiff.

Given

4 If the Jury believe from the Evidence that by the terms of the Contract between the plaintiff and the defendant, the Stock hogs were to be delivered by the plaintiff to the defendant at Ellison on the 16th and 17th days of February A D 1858 then the plaintiff had the usual business times of both days in order to perform his part of the entire Contract.

Given

5 If the Contract in regard to the delivery of the Stock hogs, was as stated in said Instructions No 2 and if the Jury further believe from the evidence that the defendant was to deliver the fat hogs to the plaintiff

Given

Given

on the 16th & 17<sup>th</sup> days of February A.D. 1858  
at the same place & at the same time of the  
delivery of the stock Hogs. then the defendant  
had no right to demand and receive the  
stock Hogs & money from the plaintiff  
until he showed a readiness and willing-  
ness to deliver the fat hogs to the plaintiff  
and offered or to do so.

62

Given

6 If the jury believe from the evidence that the  
fat hogs by the terms of said Contract betw  
en said plaintiff and said defendant  
were to be delivered to the plaintiff by the  
defendant on the 16th & 17<sup>th</sup> days of February  
A.D. 1858. then the plaintiff had the usual  
business hours of both days in order to perform  
his part of the entire contract.

Given

7 The jury are instructed that slight eviden-  
ce of a readiness to receive and pay for  
the hogs on delivery by the plaintiff would  
be sufficient.

Given

8 The jury are instructed that it was not  
necessary for the plaintiff to go to the defend-  
ant and make an offer or tender of perform-  
ance of his part of the contract, but all he  
was required to do was to be ready and will-  
ing at the time & place agreed upon to per-  
form

Given

on the 16th & 17<sup>th</sup> days of February A.D. 1858  
at the same place & at the same time of the  
delivery of the stock Hogs. then the defendant  
had no right to demand and receive the  
stock Hogs & money from the plaintiff  
until he showed a readiness and willing-  
ness to deliver the fat hogs to the plaintiff  
and offered so to do so.

62

Given

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were to be delivered to the plaintiff by the  
defendant on the 16th & 17<sup>th</sup> days of February  
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business hours of both days in order to perform  
his part of the entire contract.

Given

7 The jury are instructed that slight eviden-  
ce of a readiness to receive and pay for  
the hogs on delivery by the plaintiff would  
be sufficient.

Given

8 The jury are instructed that it was not  
necessary for the plaintiff to go to the defend-  
ant and make an offer or tender of perform-  
ance of his part of the contract, but all he  
was required to do was to be ready and will-  
ing at the time & place agreed upon to per-  
form

his part of such contract according to its terms.

Given  
63 9 The jury are instructed that the fact that Samuel Johnson was not at his store at Elkhorn on the morning of the 16th day of February A.D. 1858, does not prevent the plaintiff from recovering in this action, if the jury believe on the evidence and instructions of the Court that he is entitled to recover.

Given  
10 The jury are instructed that by the issues in this case even if the plaintiff did state to Witness Brent that he did blame Samuel Johnson, and did not blame the defendant for refusing to deliver the Hogs, inasmuch as he had a hole to creep out of, this does not of itself prevent the plaintiff from recovering in this action. It is merely testimony to be weighed by the jury with the other testimony in the case.

11 Which the Court then did, and to the giving of which defendant then excepted.  
defendant then asked the Court to give on his behalf to the jury the following instructions

asked for

(Copy of Defendants instructions as asked for,  
The Court will instruct the jury that if they believe from the conduct on the stand or manner of testifying or from all the circumstances proven that the testimony of any <sup>material</sup> witness is unreasonable in matter material to the issue, and therefore unworthy of credit they should disregard such testimony.

64

asked for

That if they believe from the evidence in the case that any witness has intentionally made contradictory statements in regard to any matter material in this case, they should place little if any reliance on his testimony, although he has not been impeached in the manner in the first instruction of defendant in this case, and although he may be seventy or eighty years old or grey headed.

asked for

That if they believe from the evidence that the plaintiff was not ready to perform his part of the contract in the time required thereby he cannot under any circumstances recover in this case, or that in such case the defendant was not bound to do anything to prevent a recovery in this case.

That the admissions of both plaintiff and defendant are evidenced in this case for their consideration

Asked for

The Court will instruct the Jury that the plaintiff in order to recover, is bound to prove every essential particular of his case by reliable testimony and that should he fail to do so in any such particular way it is as fatal to his recovery as if he had failed in every such particular and that it is not incumbent on the defendant to disprove any one of such if the plaintiff fails as aforesaid, in order to succeed in this case.

Asked for 65

That if they believe from the evidence of the admissions of the plaintiff or defendant or any other evidence in the case that the plaintiff did not perform his part of the contract, as they may believe from the whole evidence in the case, it was proven, they are bound under any circumstances to find for the defendant

Asked for

The Court will instruct the that the admissions of the plaintiff Oakley Johnson are evidenced in this case, and that if they believe from the evidence of such admissions

Asked for

that plaintiff released defendant from said Contract. They will under any circumstances find for the defendant.

That neither the declaration nor instructions in this case, nor the Records of this Court are evidence as to what William Johnston swore to on the first trial hereof.

66 That it is not their duty to reconcile evidence which they from the evidence believe to be intentionally false, but it is to reject it.

The Court will instruct the Jury that the plaintiff was not only bound to be ready on his part to fulfil his contract by having the number and quality of hogs required on his part by the Contract and the money to pay the balance required to pay for defendant hogs not only within the time fixed for the performance of the Contract but so early in such time as to that there would be sufficient time to enable such to perform his part of the contract in the business hours of the day on which the Contract is to be performed, and that although they might believe from the evidence that plff was had the Hogs and money as aforesaid, yet if not in time, that the

asked for

asked for

asked for.

Contract could be completed in such usual hours they are bound to find for the defendant.

Copy of Defendants Instructions as Modified & given by the Court.

67 The Court will instruct the Jury that if they believe from the conduct or the stand or manner of testifying or from all the circumstances proven, that the testimony of any Witness is unreasonable in matter material to the issue and therefore unworthy of credit they may disregard such testimony.

That if they believe from the evidence in the case that any Witness has intentionally made contradictory statements in regard to any matter material in this case they should place little if any reliance on his unsupported testimony.

That if they believe from the evidence that the plaintiff was not ready to perform his part of the Contract in the time required thereby, and that such want of readiness was not caused by any act of the defendant then he can not recover in this case.

Given

That the admissions of both plaintiff & defendant are testimony in this case for their consideration.

Given

68 The Court will instruct the Jury that the plaintiff in order to recover is bound to prove every essential requisite, of his case by reliable testimony and that should he fail to do so in any essential requisite, it is as fatal to his recovery as if he had failed in every such particular. And that it is not incumbent on the defendant to disprove any one of such, if the plaintiff fails as aforesaid, in order to succeed in this case.

Given

That if they believe from the evidence of the admissions of the plaintiff or defendant or any other evidence in the case that the plaintiff was not ready and willing to perform his part of the contract as they may believe from the whole evidence in the case it was proven, they are bound to find for the defendant. unless the Jury believe from the evidence that it was the fault of the defendant that the plaintiff was not so ready and willing to perform.

Given

The court will instruct the jury that the admissions of the plaintiff Oakley Johnson are evidence in this case and that if they believe from the evidence of such admissions that plaintiff released defendant from said contract, they will under any circumstances find for the defendant.

Given

69 That neither the declaration nor instructions in this case, nor the records of this court are evidence as to what William Johnston swore to on the first trial herof.

Given

That it is not their duty to reconcile evidence, which they from the evidence believe to be intentionally false, but it is, to reject it.

Given

The court will instruct the jury that the plaintiff was not only bound to be ready on his part to fulfil his contract by having the number and quality of hogs required on his part by the contract, and the money to pay the balance required to pay for defendant's hogs, not only within the time fixed for the performance of the contract but so early in such time, that there would be sufficient time to enable each to perform his part of the contract in the hours of

70  
the day appropriate for such business on which the contract was to be performed. And that although they might believe from the evidence that plff had the hogs and money as aforesaid, yet if not in such time that the contract could be completed in such usual hours, they are bound to find for the defendant, unless such failure of the plaintiff to be ready was caused by some act of the defendant.

Copy of Deft's Instruction's Refused.

Refused  
The court will instruct the Jury that Samuel Johnston was the only man authorized by the Contract to weigh the Hogs and that his not being able to weigh them would not excuse plaintiff from performing his part of the Contract.

Refused  
The court will instruct the Jury that if they from the evidence that the price of fat hogs advanced, it is a fact from which they may infer that the price of stock Hogs advanced during the same time.

which the Court refused to do But gave those marked given, refused those marked refused, and modified those copied just as originally they were, then as modified by the Court.

To which decisions of the Court defendant then excepted.

The Jury found a verdict for the plaintiff for fifty dollars, defendant then filed a motion for a New trial and in arrest of Judgment and his reasons therefor.

### Copy of Reasons

State of Illinois } March Term 1862  
County of Warren } of the Circuit Court of  
said County.

Oakley Johnson }  
vs } In Assumpsit.  
Fredrick Davidson }

Defendant moves the Court for a new trial of this cause and in arrest of Judgment therein, First Because the verdict of the Jury therein was against the law and evidence thereof Second.

That the Court erroneously refused some and erroneously modified other instructions of defendant and gave to the jury improper

and illegal ones on behalf of plaintiff  
Third

That the Court admitted to the Jury on behalf of plaintiff illegal and improper testimony and rejected and excluded from their testimony offered for their consideration by defendant, legal and proper.

72 Fourth: That the Contract which was the only alleged subject matter of plaintiff's said suit, varies in matter material with all the allegations thereof in the declaration in said suit.

Le M Harris

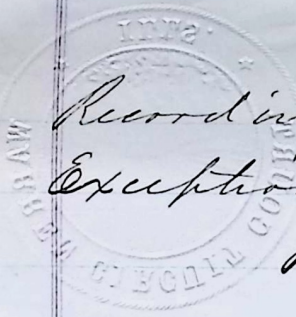
Filed

atty for deft.

April 8<sup>th</sup> 1862 Wm Luferty cct

Which motion was overruled by the Court who refused to grant a new trial or arrest the Judgment, to which decisions of the Court defendant then excepted. And the Court rendered Judgment upon the verdict of the Jury in favor of plaintiff and against defendant, all the objections and exceptions were made and taken in open Court. And upon the trial of the cause.

Therefore it is ordered that the Matters aforesaid be made a part of the



Record in this case and that this bill of Exceptions be signed and sealed.

Witness my Hand and seal.

L B Lawrence (Seal)

Filed July 4<sup>th</sup> 1862

at 8 o'clock PM

Wm Laferty clerk

73

Copy of Bond.

Know all Men by these presents that we Fredrick Davidson & Francis M Davidson are held and firmly bound unto Oakley Johnson in the penal sum of Three Hundred 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 17<sup>th</sup> day of April Anno Domini One thousand eight hundred and sixty two.

The condition of the above obligation is such that whereas Oakley Johnson did on the second day of April 1862 in the Circuit Court within and for the County of Warren and State of Illinois, recover a judgment against the above bounden Fredrick Davidson for the sum of fifty dollars and costs of suit from which judgment of said Circuit Court the said Fredrick Davidson has prayed for and

It obtained an appeal to the Supreme Court of said State. Now if the said Frederick Davidson shall duly prosecute his said appeal with effect, and shall moreover 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 the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and virtue.

Fredrick Davidson (S)

J M Davidson (S)

Approved by me this  
9th day of May a d 1862

Wm Laferty clerk

Filed May 9th 1862

Wm Laferty clerk

State of Illinois } ss. I Wm Laferty clerk of  
Warren County & the Circuit Court in & for said  
County, in the State aforesaid  
do hereby certify that the above foregoing are  
true copies of the Record & proceedings in  
the above entitled suit, as the same appears  
from the records & files of my office.

Witness my Hand & the seal of  
Court at my office in the City  
of Mount Vernon this 11th day of April a d  
1863.

Wm Laferty clerk

By L O Conditellot Deputy



Frederick Davidson

v

Oakley Johnson

} Appeal from Warren

}

And <sup>now</sup> comes the <sup>said</sup> Frederick Davidson and says that in the record and proceedings aforesaid and in the judgment aforesaid manifest error hath intervened to his injury in this

1<sup>st</sup> In permitting improper evidence upon the part of the plaintiff below

2 In giving improper instructions upon the part of plaintiff below & refusing proper instructions asked for defendant below

3. In overruling the motion for a new trial

4. In rendering judgment for Plaintiff

For all which pleaseth reason the Plaintiff in error prays that said judgment may be set aside reversed & for nought held

By Attest

his Attorney

Fredrick Davidson }  
v }  
Oakley Johnson } Superior Court  
of Illinois  
April 1863

And now comes said defendant  
in Error and says that no such error  
appears in said proceedings & record  
as said plaintiff hath above assigned  
& he therefore prays that said judgment  
might affirm.

A. G. Kuffatru  
for Defendant in Error  
Geo. T. Hildes  
for Defendant in Error

75

Feb #16.

*Faint handwritten notes, possibly "Spencer's Dictionary"*

*Faint handwritten notes*

*Faint handwritten notes*



Frederick Davidson  
202 vs  
Oakley Johnson

Record

Filed Apr. 22-1863.

L. Leland

Clerk