No. 14734

Supreme Court of Illinois

Wolf

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vs.

Willitts

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 16

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

Wolf
vs
Millett
1864

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

WASHINGTON WOLF, *Pl'ff in Error*,
vs.
WELLS WILLITTS, *Def't in Error*.

BRIEF OF DEFENDANT IN ERROR.

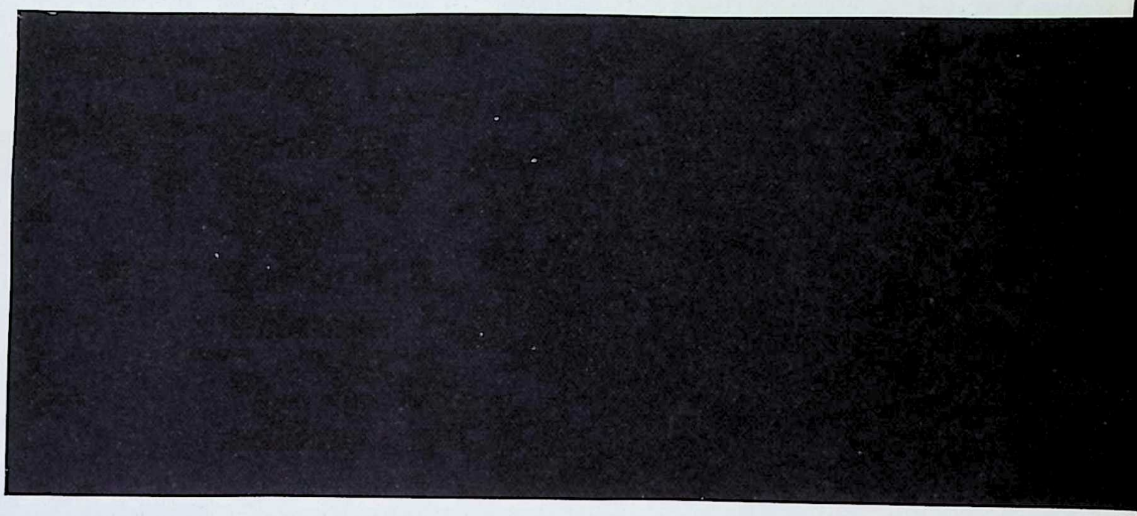
1. As to the pleadings. The counts in the declaration adjudged good by the court below, and there answered by the pl'ff in error, are now healed by the verdict, even though a demurrer thereto ought to have been sustained. But those counts I think will be found unassailable at any stage of the proceedings. The pl'ff in error interposes no motion in arrest of judgment.

2. The contract. It reads thus:

"Washington Wolf, 170 to 200 good fat hogs, delivered next packing season, at four dollars per hundred pounds, net weight, and to have five hundred dollars on above contract between this and the first of August next.

"May 28, 1856.

"WASHINGTON WOLF.
"WELLS WILLITTS."



Vide testimony of Geo. W. Warner, abstract page 2; also the testimony of Thomas Wolf, one of the defendant's witnesses in court below, ab. p. 4. From the bill of exceptions it does not appear at what stage of the proceedings the contract was objected to as evidence; neither does it show for what reason objection was made. Abstract page 2.

3. Let us consider the questions propounded to the witness Gale by the def't below, and numbered 1, 2, 3 and 4, on pages 4 and 5 of Abstract.

These questions being objected to by the pl'ff below, the witness was not permitted to answer. They all hinge upon one idea, namely: Was Wolf at any time within the period limited by the contract, indebted to one Levi Willitts?

Our answer is, it is wholly immaterial whether he was or not. It was a matter in which Willitts, the party to this suit, had no interest. If payment of the five hundred dollars was made to Levi Willitts by direction of Wolf, or thus to his acceptance and satisfaction, the plaintiff below performed his duty, in such a way as estops Wolf from complaining.

The record does not show at what stage of the proceedings, exception was taken to the ruling of the court in regard to these questions, and this court will not now presume it was made in apt time.

4. Complaint is made that the five hundred dollars was not paid within the time limited by the contract. Upon this point the proof is somewhat indefinite, and if there were no evidence of a waiver as to time, the finding of the jury would be conclusive. But we are not compelled to urge this point; the record shows conclusively that the five hundred

dollars was paid to the acceptance of Wolf long before the delivery of the hogs was contemplated, and before the packing season commenced. This, then, healed the breach of the contract on the part of the party Willitts, if any breach in this respect even in fact occurred. It may in this connexion be remarked that the charge of five hundred dollars in the account attached to the declaration, has no necessary relation to the five hundred dollars to be advanced on the contract. On this subject proof is silent.

5. The instructions asked and granted for plaintiff below.

We can discover no error in these instructions; we think they all contain sound, legal propositions that cannot be successfully assailed; we will not cite authorities to illustrate familiar law.

6. The instructions for defendant in the court below.

It must be confessed that the party Wolf enjoyed large latitude in this respect; but he complains that instructions No. 10, 11 and 12 were refused.

These instructions are substantially the same. They are based upon the assumption that Wolf could not extend the time within which, by the terms of the contract, the advance money was to be paid.

We think this objection sufficiently answered by asserting that such is not the law.

7. After what has been remarked it seems unnecessary to review the causes assigned for a new trial.

8. The question of damages.

It is complained that the damages were excessive. This is not a cause assigned in the court below, for a new trial, and this court will not now entertain the question.

But on examination of the record it will be found that the evidence thou various, fully sustains the finding of the jury.

J. J. BEARDSLEY,
Attorney for Def't in Error.

The abstract is wrong — the amended declaration alledges the time of payt. of the five hundred dollars after the time limited by contract, to wit: on the 1st of Aug. —

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Defts Brief

Wolf

v

Willetts

Filed April 20. 1864

L. Leland

Clk.

State of Illinois }
County of Peoria }

I C. M. Harris after
first being duly sworn upon oath
state that Pettis Finch of the County
Mercer and State aforesaid is as I
believe worth more than Ten Thousand
Dollars

C. M. Harris

Subscribed and sworn to
this 6th day of May 1865
Bernard Daily N.P.

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Washington Wolf

16 vs.

Wm. Willetts

Affidavit of C. R. Harris

Filed May 25th 1861

L. Leland
Clerk

Washington Wolff
vs
Wells Willitts

In the Supreme Court
April Term 1862

The Clerk will please issue a Summons to Mercer County for Wells Willitts the defendant in Error, returnable to the next Term of this Court & hand to

H. M. Reed Attorney
for plaintiff.

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Wolf
vs
Willetts

Precipe

Filed April 24, 1862
L. Leland
Clerk

Washington Wolf
vs
Wells Willits

Supreme Court
April Term 1863
Error to Rock Island

In this case it is agreed that defendants appearance is to be entered at this term, & it now entered by J J Brownlee his atty & that the case is to be continued & defendant may have until next term to join in error

Atty for Defts

May 5, 1863.

Atty for Pltff

L. L. Brownlee
atty for Defts in Error

H. Mellen atty
for Pltff in Error

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Washington Wolf

vs

Wells Willits

Agreement

Filed May 6. 1863.

Leland

Clk.



Here he avers a *strict* performance of the condition, and only this.

The first question to be considered is:

Can he, under the averment of strict performance, introduce testimony going to show that, though he did not strictly perform, to-wit: pay the five hundred dollars on the 1st day of August, yet after that date he paid the money, which was accepted by plaintiff in full discharge of the condition? We think not.

The pleadings are not broad enough to admit of this issue. If plaintiff accepted the five hundred dollars from the defendant *after* the 1st day of August, this was a parol *enlargement* of the contract as to the *time* for the performance of defendant's condition. It was a waiver by the plaintiff of the condition, and as such became as essential a part of the contract, as the time specified in the contract for the payment of the money was before the waiver.

A contract should be correctly stated in the pleadings. If the evidence differ from the statement, the contract as evidence will be rejected.

21 Ills. 598.

And in 16 Ills. 501, the court say:

"Where performance is alleged at the day, proof of performance under parol enlargement is not sufficient."

We also refer the court to:

8 Johns. 891.
3 Term Rep. 592.
24 Ver. 501.

We therefore insist that, under the pleadings in this case, defendant could not show the payment of the five hundred dollars at a time subsequent to the 1st day of August, 1856.

And hence defendant's third and fifth instructions should not have been given by the court; and plaintiff's ninth, tenth and eleventh instructions should not have been refused.

Defendant's fourth instruction was also wrong:

An admission by the plaintiff that defendant had paid him $500 on the contract, raises no presumption whatever that such payment was made within the time limited by the contract.

The *time* when the money was paid is to be proved as any other fact, and is a question for the jury alone to determine.

Defendant's sixth instruction should not have been given:

While we may admit that "slight evidence is sufficient to show that defendant was ready and willing to receive the hogs mentioned in the contract," we deny the conclusion that, because defendant was a pork buyer and packer at New Boston during the packing season of 1856–7, and that he bought and packed *several hundred hogs* during that season, it is any evidence at all tending to show that he was ready and willing to receive and pay for plaintiff's hogs. It by no means follows that because he packed a *few* hundred hogs, bought from third parties, that he was any way disposed to receive and pay for plaintiff's hogs on delivery.

But, aside from the objections above urged for the reversal of this judgment, we do not see how, upon the evidence in this case, the jury were warranted in finding a verdict for defendant.

We will admit, for the sake of the argument, that defendant, under his declaration in this case, could show payment of the five hundred dollars after the 1st day of August.

We suppose it is conceded that, before he can recover at all, he must show payment of the five hundred dollars at some time or other, either before or after the 1st of August.

Is there anything in the record of the evidence in this case going to show *conclusively* that this payment was made?

Certainly not by the testimony of Warner! Instead of stating facts, which he knew of his own knowledge, he reports a "talk" with plaintiff, and this is all.

"*As near as he can recollect* * * * Wolf said he had sold his hogs to Willits, and that Willits *was* to *pay and had paid* Levi Willits $500 for him on hog contract."

Truly there is nothing positive and certain in all this! *Was to pay and had paid!* Which was it? Testimony to be conclusive against a party ought, at least, to be intelligible. This is not so.

But, does the testimony of Jacob Kerlin throw any light upon the payment of the five hundred dollars to plaintiff?

He also testifies concerning a conversation had with plaintiff, in which plaintiff told him that he had got $500 on his pork. This is all. The

witness does not state that plaintiff said that *defendant* had paid him the five hundred dollars. From all we can infer from this statement plaintiff may have received the five hundred dollars from Gayle, or somebody else other than the defendant. And, moreover, the expression "had got $500 on his pork," may not mean that he had actually received any money; for in ordinary conversation it is as often employed to mean that he *was to get* or had *bargained to get* $500 on his hogs, as that he had already obtained it. He may have had other hog contracts with other persons. It ought at least to be shown that the conversation related to *this* contract.

Besides the uncertain character of the testimony of these witnesses, (one of whom, by the way, was contradicted by Marlett,) they swore simply to *admissions* made by plaintiff—a very unsatisfactory and inconclusive sort of evidence, and which courts and juries should be cautious in receiving as true against a party, unless accompanied by such clear, positive and unequivocal statements as to leave no shadow of a doubt in their minds as to its truthfulness.

12 Ills. 398.
2 Green. Ev., sects. 45 and 200.

Even if the witness testifies truthfully as to certain admissions made to him by a party, still, in point of fact, those admissions may not be true, and can be contradicted. In no sense are they *conclusive* against him.

WEAD & COCHRAN,
For Plaintiff in Error.

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Washington Wolf

vs

Wells Willits

Plaintiffs Brief

Filed Apr 22 1864

L Leland Clk

PLEAS before the Honorable J. Wilson Drury, Judge of the Sixth Judicial District, of the State of Illinois, at a Term of the Circuit Court begun and held at the Court House within and for the county of Rock Island and State aforesaid, on the Second Monday, the Twenty day of January in the year of our Lord one thousand eight hundred and sixty

Present, Honorable J. Wilson Drury *Judge.*
Moses D Merrill *Sheriff.*
Lewis McNeil *Clerk.*

Wells Willets
vs
Washington Wolf. } Assumpsit

Be it remembered that heretofore. viz. on the 25th day of April AD 1857 the above named Plaintiff filed out of the Clerks Office of the Circuit Court of Mercer County and State aforesaid a certain Summons in Assumpsit which is as follows to wit.

State of Illinois } The People of the State of
Mercer County } Illinois

To the Sheriff of Mercer County
Greeting

We Command you to Summons
Washington Wolf.

if to be found in your County personally to be and appear before the Circuit Court of said County on the first day of the next term thereof to be holden at the Court House in Bethlehem on the second day of May next then and there to answer unto Wells Willits in a plea of Assumpsit damages in the sum two thousand Dollars $2000 as the says and have you then and there this writ and make return in what manner you execute the same

Seal

Witness P Carvey S Senter Clerk of our Circuit Court and the Seal thereof at Bethlehem this 20th day of April in the year of our Lord one thousand Eight Hundred and fifty Seven

P Carvey S. Senter. Clerk.

And afterwards to wit. on the 1st day of May A.D. 1857. the said plaintiff by Louis W Thompson his Attorney filed in the Clerks Office of the Court last aforesaid his declaration in assumpsit which is as follows to wit

State of Illinois } Mercer County Court
Mercer County } Special May Term A. D. 1857.

Washington Wolf the Defendant in this suit was summoned to answer Wells Willits the Plaintiff in this suit in a plea of Assumpsit and thereupon the said Plaintiff by Louis P. Thompson his attorney complains for that whereas heretofore to wit on the twenty Eighth day of May in the One thousand Eight hundred and fifty six at the County of Mercer in the State of Illinois the said Washington Wolf defendant by his certain contract in writing bearing date a certain day and year therein mentioned to wit the day and year last aforesaid contracted to with the said Plaintiff in and by the writing aforesaid the parties to this suit Contracted that the said defendant had on that day sold to this Plaintiff four one hundred and seventy to two hundred good fat hogs to be delivered by the said defendant to the said plaintiff in the season for packing pork next then ensuing and the said Plaintiff saith that the said packing season aforesaid in the said Contract by and between

this plaintiff and the said defendant on or about the 25th day of November in the year One thousand Eight Hundred and fifty six and that the said packing Season aforesaid closed on or about the first day of February in the year one thousand Eight Hundred and fifty seven for which the said plaintiff was to pay for net weight per and each and every Hundred weight of said Hogs the sum of four Dollars according to the terms of the said Contract aforesaid and the said defendant by the terms of said Contract made by and between this plaintiff and said the defendant was to have the sum of Five Hundred Dollars to be paid by this plaintiff to the said Defendant any time between the Date of the said contract aforesaid and the first of August then next Ensuing and this plaintiff further saith that

1 by the terms of said Contract made by this plaintiff and said defendant the residue of the purchase money was to be paid by this plaintiff to the said defendant for the said lot of Hogs sold by the terms of the contract aforesaid by the said defendant to this plaintiff

when the the said Defendant should deliver to this plaintiff in accordance with the terms of said Contract which said Contract in writing then and there the said parties to this signed and delivered to plaintiff and the said plaintiff in fact saith that he complying in the said premises and undertakings herein before referred to and shown did afterwards to wit on the first day of August in the year one thousand Eight hundred and fifty six at the County of Mercer State of Illinois pay unto the said Defendant the said sum of five hundred Dollars on and in accordance with the stipulations of said Contract so made as aforesaid and although the 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 said hogs and to pay the balance on same ~~in that~~ at the price stipulated and in the manner stated in said written Contract in the manner aforesaid to wit. at the County of Mercer in the State of Illinois aforesaid whereof the said defendant had notice yet the said Defendant not regarding his said promise and undertaking

2d Count

but contrarily and intending to injure and deceive the said plaintiff in this behalf hath not although often requested to deliver the said hogs as aforesaid to the said plaintiff or any part thereof but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do to wit at the County of Mercer State aforesaid for that whereas heretofore to wit. on the 28th day of May in the one thousand Eight hundred and fifty six at the County of Mercer in the State of Illinois 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 this ~~the~~ plaintiff a certain other large quantity of good fat hogs to wit from one hundred and seventy to two hundred ~~and~~ good fat hogs to be delivered by the said defendant to the said plaintiff between the twenty fifth day of November in the year one thousand Eight hundred and fifty six and the first of February in the year One thousand Eight hundred and Fifty seven of the County aforesaid for which this plaintiff was to pay to said defendant the price of four Dollars per

hundred weight and it was further agreed by and between this plaintiff and the said defendant that this plaintiff should pay to said defendant on said lot of hops sold by them to this plaintiff by the first of August in the year one thousand Eight hundred and fifty five the sum of Five hundred Dollars and that this said plaintiff was to pay said Defendant the residue of the purchase money on the delivery of said hops by the said Defendant to the said plaintiff ~~by the~~ between the times last aforesaid and the said plaintiff in fact saith that confiding in the promises and undertakings herein before in this court referred to and shown did afterwards to wit by the first August in the year One thousand Eight hundred and fifty five at the the County and State last aforesaid pay unto the said Defendant the said sum of Five hundred Dollars in accordance with said promises and undertakings aforesaid and although the time for the delivery of said hops last aforesaid hath by the terms of said agreement long since Elapsed and the said plaintiff

in fact sayth that he has always been
ready and willing within the time
last last aforesaid to accept and receive
said hoys and to pay the ballance due on
the same at the price and by the time
of said agreement last aforesaid at the
County and State aforesaid whereof
the said Defendant then and there
had notice yet the the said defendant
not regarding his said promise and
undertakings but contriving intending
to injure and deceive the said plaintiff
in this behalf sayth not ~~otherwise to offer~~
~~required so to do~~ as aforesaid delivered the said hoys
to the said plaintiff or any part thereof
but hath hitherto wholely
refused and neglected and still doth
neglect and refuse so to do to wit at
the County of Mercer & State of Illinois.
For that whereas heretofore to wit
on the 28th day of may in the year
one thousand Eight Hundred and
fifty six at the County of Mercer State
of Illinois the said plaintiff at the special
instance and request of the said Defen
ant bargained with the said defendant
to buy of the said defendant and the
said defendant then and there
sold unto the said plaintiff

other large quantity of good fat hogs to wit from One Hundred and Seventy to two two hundred head of ~~good fat~~ hogs to be delivered by the said defendant with said ~~defendant~~ plaintiff in the Season for packing pork next then Ensuing at the County of McDeer State aforesaid for which this plaintiff was to pay to the said defendant the price of four Dollars per Hundred Weight for said hogs cleaned and delivered and it was further agreed by and between this plaintiff and the said Defendant that this plaintiff should pay to the said ~~plaintiff~~ defendant on said lot of Hogs so sold ~~by~~ by this plaintiff by the first day of August in the year one thousand Eight Hundred and fifty six the sum of Two Hundred dollars and and that the said plaintiff was to pay the said Defendant the residue of the purchase money on the delivery of said Hogs by the said Defendant to the said plaintiff at the time last aforesaid and the said plaintiff in fact saith that he Confiding in said promises and undertakings herein before in this Court opened to and showed it afterwards to wit by the First day of August in the year One thousand Eight hundred and fifty six at the County

and State aforesaid pay unto the said defendant the sum of five hundred dollars in accordance with said premises and undertakings as aforesaid and although the the packing season for the time specified the delivery of the said hogs last aforesaid hath by the time of said agreement long since elapsed and that said plaintiff in fact saith that he has always been ready and willing at the time last aforesaid ~~mentioned~~ to accept and receive said hogs and to pay the ballence due on ~~them~~ the same at the price and by the time of said agreement last aforesaid at the County and State aforesaid whereof the said defendant then and there had notice yet the said Defendant not regarding his said promises and undertakings but contriving and intending to deceive and defraud the said plaintiff therein this behalf did not nor would at the time aforesaid or at any time afterwards deliver the said lot of hogs in this count mentioned or any part thereof to the said plaintiff but wholly neglected and refused so to do wherefore the said plaintiff hath lost and

been deprived of divers great gains
and profits which might and otherwise would have arisen and accrued
to him from the delivery of said hogs
to the said plaintiff as aforesaid to wit
at the County aforesaid For that whereas
heretofore to wit on the Twenty Eighth
day of in the year one thousand
Eight hundred and Fifty six at the
County and State aforesaid the said
Washington Wolf Defend by his
certain contract in writing bearing
date a certain day and year therein
mentioned to wit the day and year
last aforesaid contracted to and with the
said plaintiff in and by the writing
aforesaid the Parties to this suit
Contracted that the said Defendant
Shall on the day last aforesaid to the
plaintiff a certain short lot of hogs
to wit from one hundred and
seventy to two hundred good fat
hogs to be delivered by the said Defendant
to the said plaintiff in the season for
packing pork last past for which
the plaintiff was to pay according
to the terms of said Contract to the
said defendant for net weight
for said hogs delivered as aforesaid

the sum of four Dollars for Each and Every Hundred weight thereof and said plaintiff further saith that said Defendant was to have on said Contract made by and between them as aforesaid the sum of Five Hundred Dollars to be paid by the said plaintiff to the said defendant at any time between the date of said Contract last aforesaid and the first of August then next Ensuing and the plaintiff saith that by the terms of the said Contract made by this plaintiff and said defendant the residue of the purchase money was to be paid by this Plaintiff to the said defendant for the said lot of Hogs sold as aforesaid by the said defendant to the said plaintiff when he the said Defendant should Deliver said Hogs to the said plaintiff at the time and in accordance with the terms of the Contract aforesaid which said Contract in writing was then and there by the parties to this signed and delivered to plaintiff and the said plaintiff in fact saith that he confiding in the said promises and undertakings herein before reposed to and shown

and aforesaid to wit by the First of August in the year One thousand Eight Hundred and fifty six at the County and State aforesaid pay unto the said Defendant the sum of Five Hundred Dollars in and in accordance with the Stipulations of said Contract so made last aforesaid and although the 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 said Hogs last aforesaid and to pay the ballence due on the same at the price stipulated in the manner and in accordance with the terms of said Written Contract to wit at the last mentioned County and State aforesaid whereof the said defendant then and there had notice yet the said defendant not regarding his said promises & undertakings but contriving and intending to injure and deceive the said Plaintiff in this behalf hath not although often requested so to do delivered the said Hogs as aforesaid to the said plaintiff or any part thereof but both hereto wholly neglected and refused so to do to wit at the County & State aforesaid

5th and whereas also the said defendant afterwards to wit on the day and year at the County aforesaid was indebted to the said Plaintiff in the sum of two Thousand Dollars for goods wares and Merchandise by the said Plaintiff before that time sold and delivered by the said Plaintiff before that time sold and delivered to the said defendant at at his special instance and request and in the further sum of two Two thousand Dollars of like lawful money for so much money by the said Defendant before that time had and received to and for the use of the said Plaintiff and being so indebted to the said defendant in Consideration thereof afterwards to wit on the day and year last aforesaid at the County aforesaid undertook then and there faithfully promised the said Plaintiff to pay him the said several sums of money in this Count mentioned when he the said defendant should be thereunto afterwards requested Nevertheless the said defendant not regarding his said several promises and undertakings but contriving and craftily ~~undertaking~~

A

intending fraudulently to deceive and injure said Plaintiff hath not as yet paid the said several sums of money or any or either of them or any part thereof but to pay the same or either of them to the said Plaintiff the said Defendant hath hitherto wholly neglected and refused and still doth refuse to the damages of the said Plaintiff the sum of two Thousand Dollars and therefore brings suit

Geo W Thompson
Atty for Plff

Copy of account sued on

Washington Wolf

To Wells Willits

To goods wares and Merchandize by Plaintiff sold to Defendant and at his request ... $200,00

To money by Plff before that time had and received for the use of Plaintiff ... $200,00

Washington Wolf &c. with W. Willits

1834							
Oct 7	To 1 pr Mules and Shoes			1.	75		
"	" 1 " " Blacksmiths				50	1.	25
1835							
Jany 20	" 1 Arithmatic				50		50

Feby 10"	1	Spelling		13		13
April 20	1	Yankey Doc		90		91
May 5	1	Plug Tobacco		25		25
" 15	2	Back Combs		5		15
August 4	3	Boys Wool Hats	3	00		
" "	1	Fan " 1 pr white silk Gloves 25		65		65
" 11	15	Mackerel			1	00
Dec 6	10	Stoddard Arithmetics	1	25		
"	1	Mitchels Geography	1	85	2	60
1856						
Jany 19"	1	Bible & Pins		10		10
May 24	1	Spring Rake		50		50
August 14	5/8 yds	Gingham 25 1 yd Lace 20		33		
" "	2 "	Linen Table Diaper	2	00		
" "	4 "	Cotton " "	1	40		
" "	2	B Boots " 1 pr Glass sweetmeats 100	1	70		
" "	7½ lbs	Sugar		94	6	89
October 6		Cash Paid Levi Willets			300	00
					~~8~~ 818	12
					1481	88
		To Merchandize & Sundry articles			~~8~~ 2000.	00

And afterwards to wit at said term of Court on the 26th day of January A.D. 1858 the following order was made to wit.

Wells Willets
vs
Washington Wolf

Assumpsit

This day again came

on the cause for hearing on the Defendants Demurrer to the Plaintiffs Declaration and after being sufficiently advised in the premises it is ordered by the Court that the Demurrer be sustained thereupon on motion of the plaintiffs attourney leave is given him to amend his Declaration filed herein and this Cause is Continued ~~with~~ the next Term of this Court at the Plaintiffs Costs Therefore it is Considered by the Court that the defendant Have and recover of the plaintiff his Costs by him in this suit at this term of this Court expended and may have execution therefor

and afterwards to wit on the 26th day Feby A.D 1838. the said plaintiff filed his amended Declaration in the Clerks Office of the Circuit Court of Mercer County aforesaid which is as follows to wit

State of Illinois } In the Circuit Court of said
Mercer County } County at the Special January term A.D. 1838

Wells Wilcox Ply by leave of Court first have and obtained Vs Dons against Washington Woolf Defendant in a plea of trespass on the Case on promises where-

upon said plaintiffs declare and says that heretofore to wit on the 28th day of may A D 1856 to wit at the County aforesaid the said defendant made and executed his certain instrument in writing in the words and figures following to wit

Washington Wolf 170 to 200 good fat hogs D Elwood next packing season at 3 fine dollars per one hundred pounds for net weight and to have Five hundred Dollars on above Contract between this and the first of August next

May 28/1856
Washington Wolf
Wells Willetts

and then and there for value received delivered said instrument in writing to said plaintiffs and the said plaintiffs say that afterwards to wit between the 28th day May aforesaid and first day of August in said instrument in writing he said said Defendant Five Hundred Dollars upon said Contract or instrument in aforesaid and to the satisfaction of said defendant and agreeable to his direction and request and said plaintiffs in fact saith that said Defendant did not after the making of said instrument in writing deliver

the said Hogs in said instrument in writing specified to Plaintiff or any part thereof within the time in said instrument in writing limited or at any time before or since although said Plaintiff was there and there and during all the period of time was ready and willing to receive said Hogs and pay & pay Defendant therefor at the time stipulated and agreed in said Contract. by means whereof said Plaintiff lost and was then and there deprived of large profits by reason of the ~~undertaking~~ nondelivery of said Hogs to him to him the Plaintiff by said Defendant according to the terms of said instrument in writing to wit. the sum of one thousand dollars and whereas also heretofore to wit on the 28" day of May 1836 to wit at the County aforesaid the said defendant in consideration that said Plaintiff would buy of him the Defendant from one hundred and seventy. to two hundred good fat hogs to be delivered to said Plaintiff by said Defendant the next packing season thereafter following at four dollars per one hundred pounds net weight and that said plaintiff should after the date last aforesaid and the first day of august the next

following pay said Defendant the sum of five Hundred Dollars said defendant then and there promised and agreed to & with said Plaintiff to sell him from one Hundred and seventy to two Hundred good fat hogs deliverable to him the Plaintiff at the price and with the time and upon the terms aforesaid and said Plaintiff sais that afterwards to wit on the 21st day of July A D 1836 he said said sum Defendant said sum of Five Hundred dollars in this satisfaction and acceptation and agreable to his request and direction and was afterward willing and ready through the packing season then next following ready and willing to receive from said defendant the said hogs and pay him therefor the said sum of four dollars per one Hundred pounds net weight to wit at the County aforesaid and said plaintiff further avers that the packing season the next following Viz the 28th day of May began on or about the first day of November and Ended on or about the first day of February next thereafter of all which said defendant then and there had due notice

and said plaintiff in fact in fact
says that said Defendant after said
28th day of May A/D and after the
making of said Contract in this Count
mentioned wholly neglected and
refused to deliver to said Plaintiff
the hogs aforesaid during the packing
season the next following or at any
other time before or since or any
part thereof by reason whereof said
plaintiff was then and there deprived
of and lost large profits that he might
and otherwise would have made upon
the hogs aforesaid to wit the sum of
one thousand dollars

2 Whereas heretofore to wit on the second
day of August in the Year of Our Lord
one thousand Eight hundred and
Fifty six at the County aforesaid
was indebted to the said plaintiff
in the further sum of two thousand
dollars for divers goods wares and
Merchandize by the said plaintiff before
that time sold and delivered to the said
defendant and at his special request
and instance and being so indebted
he the said defendant in Consideration
thereof afterwards to wit on the day
and Year aforesaid at the County

aforesaid undertook and then and there faithfully promised the ~~said~~ plaintiff to pay him the said last mentioned sum of money when he the said defendant should be thereunto afterwards requested and whereas afterward to wit on the day and year last aforesaid at the County aforesaid was indebted to the said plaintiff in the further sum of two thousand dollars for so much money by the said defendant ~~before~~ ~~said time~~ before that time had and received to and for the use of said Plaintiff and at his special instance and request and being so indebted the said defendant in consideration thereof afterwards to wit on the day and year last aforesaid at the County aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of money when he the said defendant should be thereunto afterwards requested Nevertheless said Defendant not regarding his said several promises and undertakings but contriving and fraudulently intending craftily and deceitfully to deceive and defraud

the said Plaintiff in this behalf Hath
not as yet paid the said several sums of
money or any or either of them or any
part thereof to the said Plaintiff
although often requested so to do by
the said Plaintiff but the said defend-
ant to pay him the same hath hitherto
wholely neglected and refused and
still doth refuse and neglect to the
damages of the said Plaintiff of two
thousand dollars and therefore the
brings his suit &c

By Beardsley & Thompson
his Attys.

Copy of account sued on

Washington Feby

To Wells Willits

To goods wares and merchandise
by the said Plaintiff sold and delivered
to the Defendant and at his request $200.00

To money by the said Defendant
had and received and for the $200,00
use of the said Plaintiff

And afterwards towit. at said term
of Court on the 13th day of March
1858 The following order was made
to wit.

Wells Willetts } 25
" } Assumpsit
Washington Wolf }

This day came the plaintiff by his attorney leave is given to amend the declaration filed herein, and by consent of parties it is ordered by the court that this cause be continued generally

And afterwards towit the plaintiff filed his amended declaration which amendment is as follows towit

And now by leave of the court first had and obtained the said Wells Willetts further complains against Washington Wolf for that whereas heretofore towit on the 28th day of May A.D. 1856 the said defendant being desirous of contracting to sell to the plaintiff a quantity of good fat hogs to be there afterwards delivered to the plaintiff, the said defendant and the said plaintiff thereupon in consideration of the premises then and there made and entered into a ~~contract~~ agreement in writing in the words and figures following towit

"Washington Wolf 170 to 200 good fat
"hogs delivered next packing season at
"four dollars per 100 lbs net weight, and to
"have five hundred ~~dollars~~ on above contract
"between this and the first of August next.
"May 28/1856 "Washington Wolf"
"Wells Willetts"

which said agreement in writing after the execution thereof as aforesaid was then and there delivered and placed in the hands of said plaintiff

And said plaintiff avers that afterwards to wit between said 28th day of May aforesaid and the first day of August next following to wit on the first day of August A. D. 1856 at the county of Mercer aforesaid the said plaintiff on the agreement aforesaid paid the said defendant the said sum of five hundred dollars to his full satisfaction and acceptance and agreeable to his direction and request.

And said plaintiff in fact says that the packing season then next following said 28th day of May A. D. 1856 began on or about the first day of November next thereafter and ended on or about the first day of February next thereafter to wit at the county of Mercer aforesaid, of all of which the said defendant then and there had notice

And said plaintiff further says that the said defendant did not between said first day of November and the first day of February then next following the said 28th day of May 1856 or at any time whatever deliver the said hogs in said

agreement mentioned to said plaintiff or any part thereof, although the said plaintiff was then and there and during all the period of time aforesaid ready and willing to receive the said hogs and pay said defendant therefor at the price stipulated therefor in said agreement.

By means whereof the said plaintiff lost, and was then and there defrauded of large profit by reason of the non delivery of said Hogs to him by said defendant according to the terms of said agreement; and was then and there defrauded of large gains that he might, and otherwise would have made upon the hogs aforesaid, to the sum of fifteen hundred dollars.

And afterwards to wit on the Eighth day September 1858 at at term of the Macon County Circuit Court then being held the following proceeding was had to wit

Wells Willetts
v
Washington Wolf } Assumpsit

This day came defendant by his attorney and on his motion it is ordered by the Court that he have leave to plead to plaintiffs

amended declaration filed herein

And afterwards to wit on the 9th day of September at the same term of the Court last aforesaid the following proceeding was had to wit

Wells Willetts
v
Washington Wolf } Assumpsit

This day came the plaintiff by his attorney and enters his motion for a change of venue herein.

And afterwards to wit on the 10th day of September and at the term of the court above named the following proceeding was had to wit

Wells Willetts
v
Washington Wolf } Assumpsit

This day again came on this cause for hearing on the plaintiffs motion for a change of venue herein and after being advised as to the merits of said motion it is ordered by the court that the motion be sustained and that the venue hereof be changed in this cause to Rock Island County and that

the clerk of this court make out and transmit to the clerk of the circuit court of Rock Island County together with all the accompanying papers a copy of the Record herein under his hand and Seal

And afterwards to wit on the 24th day of January 1859 the defendant filed his demurrer to the plaintiffs amended declaration which is as follows to wit

Wells Willetts
v
Washington Wolf
} Trespass on the case &c

And said Washington Wolf by his attorney comes and defends the wrong and injury when &c and said that the first and third count of said Wells Willetts declaration and each of them and the matters in each of them contained as the the same are above and therein stated and set forth are not sufficient in law for said Wells Willetts to have and maintain his aforesaid action thereof against the said Washington Wolf, and that he said Washington Wolf is not bound by law to answer the same or any thing of them and this he is ready to verify, Wherefore by reason of the insufficiency of each

of said court said Wolf prays judgment and that said Willetts may be barred from having or maintaining his aforesaid action thereof against him

C. M. Harris
atty for deft

And afterwards to wit at the January Term 1859 of the Circuit Court of Rock Island County. it being a Special term of said Court and on the 28th day of January aforesaid the following proceeding was had to wit

Wells Willetts
&
Washington Wolf
} Assumpsit

This day came the parties by their attorneys and plaintiff confesses the demurrer to the third count of the amended declaration and obtains leave of the court to amend the same

And afterwards to wit on the 19th day of February 1859 at the same term of the court last aforesaid the following proceedings was had to wit

Wells Willetts
v
Washington Wolf
} Assumpsit

This day came the parties by their attorneys and this cause coming on to be heard on defendants demurrer to plaintiffs third count, and the court being sufficiently advised in the premises overules the said demurrer

And afterwards toit on the first day of November 1857 the said plaintiff filed his amended declaration in the clerks office of the circuit court of Rock Island county aforesaid which amended is as follows toit

And now by leave of the court first had and obtained the said Wells Willetts for the complains of against the said Washington Wolf for that Whereas heretofore toit on the 28th day of May A. D. 1856 at the county of Mercer aforesaid the said defendant being desirous of contracting to sell to the plaintiff a quantity of good fat hogs to be thereafterwards delivered to the plaintiff, the said plaintiff defendant and the said defendant plaintiff thereupon in consideration of the premises then and there made and entered into a certain agreement in writing in the words and figures following toit

"Washington Wolf 170 to 200
"good fat hogs delivered next packing season
"at four dollars per 100 lbs. net weight and
"to have five thousand dollars on above
"contract between this and the first of August
"next. May 28. / 1856

"Washington Wolfe
"Wells Willetts"

which said agreement in writing after the execution thereof as aforesaid was then and there delivered and placed in the hands of the said Plaintiff

And the said Plaintiff says that afterwards and between the said 28th day of May aforesaid and the first day of August next thereafter following to wit on the first day of August A.D. 1856 at the county of Macon aforesaid, the said Plaintiff in the agreement aforesaid paid the said defendant the sum of Five hundred dollars to his satisfaction and acceptance and agreeable to his direction and request

And said Plaintiff in fact says that the packing season then next following said 28th day of May A.D. 1856 began on or about the first day of November then next thereafter and ended on or about the first day of February next thereafter to wit at the county of Macon aforesaid of all

of all

of which said defendant then and then had notice.

And the said plaintiff further says that the said defendant did not between the said first day of February then next following said 28th day of May 1856. or at any time afterwards deliver the said hogs in said agreement mentioned to the said plaintiff or any part thereof although the said plaintiff was then and there and during all the period of time aforesaid ready and willing to receive the said hogs and pay said defendant therefor, at the price stipulated in said agreement

By means whereof the said plaintiff lost and was then and there defrauded of large profits by reason of the wondering of said hogs to him by said defendant according to the terms of said agreement and was then and there defrauded of large gains that he might and otherwise would have made upon the hogs aforesaid, to the sum of fifteen hundred dollars

And afterwards to wit at the January term of the Rock Island County Circuit Court A.D. 1860 and on the thirty first day of January 1860. afterwards the following proceedings was had to wit

Wells Willetts
v
Washington Wolf
} Assumpsit

This day came the parties by their attorneys and defendants files his demurrer to the first amended count of plaintiffs declaration and the court having heard the argument of counsel and being fully advised in the premises sustains the demurrer. Thereupon issue being joined came a jury of Jurors to wit, W. C. Tyrrell, Andrew Bates John V. Cook, William A Kelly, William A Norris, Rimah Wells, William T. Norris C. V. Swan, Ernst Zeis, William McNutt, John McCandless and William Williams who were each & severally sworn to well and truly try the issue joined and having heard a part of the evidence and the hour of adjournment having arrived the court instructed the jury and permitted them to separate to meet the court tomorrow morning

and afterwards Court on the first day of February 1860 at the January term of the Court last aforesaid the following proceeding was had Court

Wells Willetts
v
Washington Wolf } Assumpsit

This day again came the parties by their attorneys and the jury herein impannelled and the jury having heard all the evidence retired to consider of their verdict and the hour of adjournment having arrived it is agreed by the parties that should the jury agree upon their verdict they may seal the same and meet the Court tomorrow morning

And afterwards Court on the second day of February at the term of the Court aforesaid the following proceeding was had Court -

Wells Willetts
v
Washington Wolf } Assumpsit

This day again came the parties by their attorneys and the jury heretofore impannelled returned their verdict which

is as follows viz "We the jury find for the plaintiff and assess his damages at the sum of Seven hundred and ninety Seven dollars and fifty Cents" Thereupon defendant enters his motion for a new trial and in arrest of Judgment.

And afterwards viz on the fourth day of February 1860 at the term of the court aforesaid the following proceeding was had viz

Wells Wickes
v
Washington Wolf } Assumpsit

This day again came the parties by their attorneys and this cause coming on to be heard upon defendants motion for new trial and in arrest of Judgment is argued to the court and the court being sufficiently advised in the premises overrules the said motion and enters that plaintiff have and recover of the defendant the said sum of Seven hundred and ninety Seven dollars and fifty Cents together with his costs in this suit expended and that he have execution

thereupon. Thereupon defendant prayed an appeal to the Supreme Court which is allowed upon defendant filing his bond in the penal sum of fifteen hundred dollars with security to be approved by the clerk of this court which bond is to be filed in the clerks office by the fifteenth day of ~~February~~ March. and the bill of exceptions to be signed during this month.

And afterwards to wit on the thirtieth day of March 1860. the said defendant filed in the clerks office of the court aforesaid his said bond in appeal which bond was on the said day filed and approved by the clerk aforesaid and is as follows to wit.

Know all men by these presents that we Washington Wolfe Solomon Wolfe and Thomas Merlatt of the County of Macon and State of Illinois are held and firmly bound unto Wells Willetts of said County in the penal sum of Fifteen hundred dollars for the payment of which well and truly to be made we do by these presents jointly and severally bind ourselves our heirs executors and administrators Sealed with our seals and dated this

12th day of March A.D. 1860

The condition of the above obligation is such that whereas the said Washington Wolfe has obtained an order for and taken an appeal to the Supreme Court of the state aforesaid held at Ottawa and in the third Grand Division ~~thereof~~ to said appeal upon a certain judgment rendered in the Circuit Court within and for the county of Rock Island in the state aforesaid at the January term thereof A.D. 1860. in favor of Wells Willetts and against said Washington Wolfe for the sum of Seven hundred and ninety Seven dollars and fifty cents damages and costs of suit.

Now if the said Washington Wolfe shall pay the judgment Costs interest and damages in said suit in case judgment shall be affirmed and shall also duly prosecute his said appeal then the above obligation shall be void otherwise in full force

Washington Wolfe (Seal)
Solomon Wolfe (Seal)
Thomas Medcalf (Seal)

State of Illinois } January term A.D. 1860 of the
County of Rock Island } Circuit Court of said County

Wells Willits } Trespass on the Case
vs } on premises
Washington Wolf } damages $ 200.

Be it remembered that on the trial of said cause at said term of said Court said plaintiff offered in evidence the following so called contract in writing between said parties ~~Contract~~ Washington Wolf. agrees to deliver 200 good Fat Hogs next packing season at Four Dollars per hundred lbs for net weight and to have Forehundred Dollars on above Contract between this and the first of August next May 28th 1856

Washington Wolf

Wells Willits.

To the introduction of which as evidence said defendant then and there objected which objection the Court overruled and permitted it to be read and given to the jury as evidence for said plaintiff in said Cause to which ruling of the Court said defendant then and there excepted no objection being made to said Contract on account of variance as set forth in the

George W Warner a witness a witness of said plaintiff on his examination in Chief testified as follows in behalf of said plaintiff To wit That as near as he can recollect in September A D 1836 I on part I think Wolf told me he had sold his hogs to Walls Willits as near as I can recollect he told me that plaintiff was to pay & had paid Levi Willets Five hundred Dollars for him on hog Contract I think I recollect he said Levi Willits had given him credit for Five hundred dollars on a note held by Levi Willits against him defendant But I am not certain but Defendant said to me at sametime and in same ~~time~~ conversation that plaintiff ~~had~~ had not paid it according to the contract

In January afterwards I had another conversation with defendant but I cannot remember much about it I think he said he had sold his Hogs to Boyle and paid and paid Levi Willits one ~~hundred~~ ~~Dollars~~ Thousand Dollars in first Conversation he alledged as a reason for not delivering the hogs that plaintiff had not advanced money to buy Stock hogs with according to his agreement to do so Levi Willits died on March A. D. 1838

I live in new Britton have for last

Eight years plaintiff was in the Pork packing busness then
That Jacob Corbin another witness of plaintiff on his Examnation in chief testafied as follows for said plaintiff towit in the last of August or first of September A.D 1826 I was talking with defendant about Hogs Asked him if he had sold and he had and told what he got I told him I thought there was no object in selling at that price he said he was owing Levi Willits some and wanted the money and the object was that he had got Five Hundred Dollars on his pork said he was to have four Dollars per Hundred pounds for his pork. Packing season commences from 20th November to 1st of December and Ends first of February ~~had~~ saw plaintiff receiving pork at New Boston that season dont know much about the price of pork" and on Cross examnation as follows to wit there has not been for a few years any thing very serious between defendant and myself there never there never was much love between defendant and myself to lose I brought up plaintiffs witnesses to this ~~Term~~ term of this Court I do not remember saying any thing about

August last term I think this ~~I think~~
the Conversation was in the first half of
September A.D. 1836 I did not I did not
swore at last term that defendant told me
he had got or was to have five hundred
dollars this Conversation with defendant
was on the rode to Berths burgh no body
Else present defendant did not say
anything as to the time he got the
Five Hundred dollars I have talked
this over with plaintiff several times
I did not tell Thomas Marlett on our
way to court as a witness in this case at
the last term it was in Mercer County
when this Case was spoken of that I
did not know what in the Hell
Willets wanted with me for I did not
know any thing about it nor tell
him that I did not know whether
plaintiff had paid any thing or not
That Benjamine F Bremer is another
witness of plaintiffs on his Examination
in chief testafies on behalf of Plaintiff
as follows to wit I have lived in New
Boston for last several years plaintiff
has to plaintiff packed pork
there in the winter of 1836 and 1837
packing season is from 1st of November to
to 1st of February or later

there was strife between plaintiff and us in purchasing pork that season better Excitement and rivalry
Fine Orleans was an average price the ruling price for that season only very few lots were sold higher than that average weight of 170 to 200 good fat Hogs that year was from 170 to 200 pounds dont know how many plaintiff packed that season he packed a good many hundred hogs
And on cross Examination as follows to wit.
I dont know how many plaintiff packed that season dont know of Plaintiffs paying any money for pork; He was a buyer in the market that Season — We bought on Credit and for cash.

+ What John Donable a witness of said defendant on his examination in Chief testified on behalf of said Defendant as follows to wit
I have lived in Mercer County Illinois four years I know the parties to this suit in the First of December A D 1856 I was in Niles Willits the plaintiffs Store in New Boston Illinois plaintiff asked me the reason why defendant did not let him have the hogs in controversy

in this suit I told him defendant said it was because he had not paid the money according to the agreement of the two parties he said he did not think it ought to make any difference with him his not paying the money according to the Contract so as he did no loze any thing by it

And on Cross Examination as follows to wit this was sometime in the first of the month of December A D 1836

That Daniel Finch a witness of said defendant on his Cross Examination in Chief testified on behalf of said defendant as follows. to wit. I have known the parties to the suit ten or fifteen years and have lived in mercer County Illinois Twenty odd years Wells Willets the plaintiff came to my house in the forepart of the month of December A D 1836 he then lived in New Boston Illinois I then lived two or three miles from there he wanted to know when I was going to drive my hogs to the Slaughter yard to have them butchered I heard he was on his way to Washington Wolfs the Defendants that he understood that the defendant was not going to let him have the hogs

that he had Contracted for and that he was going down to make them a certain of money over the Contract and that if he did not let him have them he should Commence a suit against him he then started in the direction of the defendants Wolfs House And on Cross Examination as follows to wit. I sold my hogs to Thompson that season Thomas Wolf a witness of said Defendant on his Examination in Chief testifies as follows in behalf of said defendant To wit. in four part of the Month of December A D 1866 Wells Millets the plaintiff was at my Fathers the Defendant four miles from New Boston. Deems I have been acquainted with the ~~Defendant~~ plaintiff ever since before that time plaintiff Came from the direction of David Finches House who was just been arrest plaintiff told Father he had Come out to see them about the hogs Father told him he had not paid according to the ~~agreement~~ Contract Plaintiff said if Father Could show him he had sustained damages by his plaintiff not paying the money according to Contract that he would not Contend for the hogs Father told him he had

sustained damages from his not paying the money as he had agreed and refused to let him have the hogs and on Cross Examination as follows To wit. This was in the Evening before Sunset I had been down to the yard feeding hogs and we were returning Father and I towards the stable I went on and left Father and plaintiff talking to feed the stock hogs Father sold the hogs to Bailey of ~~X~~ Hechsburgh that season

William Boyle a witness of said Defendant on his Examination in Chief Testified on behalf of said defendant as follows to wit. I have known the parties to this suit for ~~over~~ many years Levi Willets was plaintiffs Uncle Levi Willets died about last March was a year ago I was a pork Cooper and packed in Rockfisburg during the years A.D 1856 & 1857 and more Extensively ~~Engaged~~ I believe Engaged in the business than any other person in Mercer County Illinois Rockfisburg is in that County about six Miles below New Boston on the Mississippi River I believe higher prices were then paid for pork there than any where Else in ~~Mercer~~ that County

It has a good landing for steam boats. I paid from
from to five Dollars per hundred pounds
for the entrance during the pork packing season
of year A.D. 1856 and 1857 at Keithsburg in the
Commencement of the packing season of 1856. pork was
only worth from Dollar per hundred pounds. Hogs
weighing one hundred & Eighty pounds worth twenty
five cents less per hundred pounds —
That said Defendants Counsel while said
~~said~~ Goyle was testifying as aforesaid read to him
the Contract in Controversy in said suit and
asked him on behalf of said Defendant: What
the kind of hogs in said contract mentioned
should average in weight to give it. To which
said Goyle testifying as aforesaid answered one
hundred and twenty five pounds, which said
answer the Court then & there Excluded from the
Consideration of the Jury. And said Defendant
then & there Excepted to the Exclusion of said
answer from the consideration of the Jury.
That said Defendant while said Goyle was
testifying as aforesaid in said cause on behalf
of said Defendant propounded to him the following
Four questions towit:
1st State whether you ever paid to Levi
Willis any Money due him from the Defen-
-dant. If so State when how much and
what the debt or demand was on which it
was paid if you know

2nd Did you ever pay Levi Willits for the Defendant and at the Defendants request any money. If so when & how much

3rd State what you know if any thing about indebtedness existing between Defendant and Levi Willits on 1st of September A.D. 1856 or before or after that time and whether any payments were then or about that time made by either of them to the other. If so by whom and when were such payments so made and how much was so paid

4th State whether on the 27th day of May A.D. 1856 or at any time between then and the first part of the month of September thereafter there existed between Defendant and Levi Willits an indebtedness from the one to the other, and if so to which of them it was so owing, the amount thereof and whether during that time any payment was made thereon by one of them to the other If so state by whom, to whom and when and what amount was so paid.

That Plaintiff objected to the propounding of each of said four questions, and the Court at the time and place of the making of each of said four objections sustained each of said objections, & ruled that each of said questions were inadmissible and refused to let said Boyle answer any of said four questions. That the Defendant excepted to each of the rulings of the Court in sustaining

said from objections, deciding each of said from questions inadmissible and refusing to let said Boyle answer said from questions and at the respective time & place they were respectively made by the court.

That Thomas Mantell a witness of said defendant testifies as follows on behalf of said defendant to wit: I have known the parties to this suit some thirty years have resided in Huron County since the fall of A.D. 1849, have known the witness Kerlin for several years. In going to the Huron County Court the last Term this case was in that Court. Kerlin & I went together and on our way were talking about both being witness in this case. Kerlin said he had been to the Plaintiff to let him off. He said he did not know what the Devil or what in the Hell Willets wanted with him for he did not know any thing about it.—

And on the cross examination as follows to wit: I am the defendants brother-in-law and live from half to three fourths of a mile from him. I am farming most of the time, but am engaged a portion of the time in the ministry. I am sure I have correctly stated Kerlins testimony & conversation he used the words "Devil" or "Hell" I am not certain which; he used one

or the other, That said Kerlin on re-examination testifies as follows "I did not tell Merlatt I Knew anything about the case, &c and I were talking about Paines deciding that parol testimony could not be admitted to explain the contract and I told him — Merlatt — that as Paine had so decided I did not Know what the plaintiff wanted with me, I may have said I did not Know what in the Hell or devil he wanted with me as I am sometimes in the habit of using such words. This was as Merlatt and I were going to Adels to court, the day after Paine made the decision.

And on Re-cross-examination testifies as follows to wit "I did not at either time that I before testified in this case say anything about parol testimony or Paines decision, because I did not think of it. The other times I was sworn in this case I testified that I never told Merlatt that I did not Know what in hell or devil Willetts wanted with me or that I Knew nothing about the case or anything of that kind.

That said Merlatt on his re-examination testified as follows to wit. "I Know that Kerlin did not say anything about parol evidence having been excluded, He did not say that he did not Know anything about the case

I had no conversation with him about the matter the day after Paine made the decision, I did not go with him - Merlin - at all to Aledo that court that Paine made the decision, That was the Spring term of the court that he made it; And no conversation took place going to Aledo to fall term of the court after the Spring term of the court. - This was all the evidence in the case

The court then gave the following instruction to the jury upon the part of said plaintiff

1 In this case the jury in behalf of plaintiff are instructed, That the contract offered in evidence is a valid and binding contract that thereby the defendant agreed to deliver to plaintiff 170 to 200 good fat hogs at the packing season next following the date of said contract. at four dollars per hundred pounds net weight; and that by said contract the plaintiff agreed to receive said hogs at the time aforesaid and pay the price aforesaid therefor, to defendant; And that plaintiff was to pay the defendant on said contract the sum of five hundred dollars between its date and the first of August next thereafter

2 If from the evidence ~~the~~ in this case the jury believe that the plaintiff made such a payment upon the written contract as entitled him to receive the hogs mentioned in said contract; it was not necessary, in order to lay the foundation for a recovery for the wondelining of the hogs, that the plaintiff should tender to defendant any of the money which he might be entitled to receive upon the delivery of the hogs; and if the plaintiff made such a tender, or asserted his intention to do so, under a belief that it was necessary for him to do so, in order to perfect his right of action on said contract, such tender or asserted intention to make such tender, will in no wise impair or strengthen the right of the plaintiff to recover in this suit.

3 If from the evidence in this case the jury believe that the plaintiff after the execution of the contract read in evidence, and before the packing season then next following began, paid the defendant the sum of five hundred dollars on such contract, and that the defendant accepted such money as and for a payment thereon, then such ~~payment~~ acceptance of said sum, if after the last day of July A.D. 1856, would be a waiver by the defendant of the provisions of the

contract, in regard to the time in which said sum of five hundred dollars was to have been paid, and said contract under such circumstances would be as binding on the parties thereto as though such payment had been made within the time limited by the contract

4 If from the evidence in this case, the jury believe that the defendant in August or September A.D. 1856. admitted that the plaintiff had advanced or paid to him the sum of five hundred dollars on the contract read in evidence in this case; then the legal presumption is (unless limited or qualified by such admission in respect to time) that such advance or prepayment was made within the time limited and fixed in said contract.

5 If from the evidence in this case the jury should come to the conclusion that the five hundred dollars mentioned in the contract given in evidence in this case, was not paid to the defendant between the date of the contract and the first day of August thereafter; still if from the evidence the jury believe that said sum of five hundred dollars was afterwards, and before the bringing of this suit, paid by

plaintiff to defendant on said contract, then the plaintiff under the pleadings in this case would be entitled to recover of defendant said sum of five hundred dollars, without regard to other damages that the plaintiff claims in this case

6 If this case slight evidence is sufficient to show that the plaintiff was ready and willing to receive the hogs mentioned in the contract at the time provided for their delivery; and if from the evidence in this case the jury believe that the plaintiff at New Boston during the packing season of 1866-7 was a pork buyer and packer, and that he did buy and pack several hundred hogs during that packing season, such evidence tends to show that the plaintiff ~~that the plaintiff~~ was during that packing season, ready and willing to receive and pay for the hogs mentioned in the contract

7 If from the evidence in this case the jury believe that the defendant during the packing season mentioned in the contract informed and notified the plaintiff that he would not deliver the ~~contract~~ hogs specified in said contract, such refusal and notice by defendant would dispense with any proof on the part of plaintiff that he was

was

56

during said packing season ready and willing to receive and pay for said hogs

8 It is not the law that because a witness is contradicted by another witness, that the contradicted witness is thereby impeached, but in all cases of contradictory statements, ~~it is~~ or seeming contradictory statements, it is a question for the jury to determine how far they effect or impair the testimony of the witness sought to be impeached, and if on the whole the jury believe that such contradictions or seeming contradictions do not impair the credit of the witness, it is the duty of the jury to give his testimony full weight as that of any other witness.

To the giving of which said several instructions the defendant by his attorney then and there excepted.

The defendant then asked the Court to give to the to the jury on his part the following instruction

9 That should they not believe from the evidence that defendant admitted in September 1856 or at any time or any time thereafter that he did receive $ 500. from the plaintiff

9 But alex that he did receive it, such testimony even if so believed is not of itself evidence that it was paid before the 1st day of August A.D. 1856. and that unless they believe from the evidence and nothing else, that is was paid before that day they are bound under any circumstances to find for the defendant on the contract.

Refused

10 That. unless they believe from the evidence and nothing else to the full satisfaction and clearly, that ~~the~~ $800. was before the 1st day of ~~August~~ A.D. 1856 paid by plaintiff to defendant on the contract ~~paid anything~~ they cannot on the contract find anything for the plaintiff though they might from the evidence believe that that amount was so paid on that day or thereafter

Refused

11 The Court will instruct the jury that they are under any circumstances bound to find for the defendant unless they believe from the evidence that plaintiff paid him $800. on the contract between the 28th day of May A.D. 1856 and the 1st day of August thereafter and before ~~the~~ said first day of August

which the court refused to but gave

Given

1 That testimony is one thing and evidence may be different and something else. That the testimony in this case is that to which the witness swear, and the evidence is the convictions produced upon their minds by the whole testimony in the case, whenever should their convictions from such testimony differ from the testimony in the case they should make their verdict from such convictions, though differing from the testimony, as such convictions are the evidence in the case and they have been sworn to try it by the evidence and not the testimony

Given

2 That they are the sole judges of the credibility of the testimony of witness and are not bound to take as evidence that of any witness though not formally impeached by the testimony of any other that his character in his neighborhood for truth and veracity is such and so bad that the impeaching witness would not believe him under oath,

If they believe from either any or all of the following causes that his testimony is untrue trust

His conduct on the stand

His statements when testifying

His desire to serve one party to the detriment

of the other.

His provocation hesitation or reluctance in answering the questions of one party

His eagerness or desire to answer questions more favorably for one party than the other

Or because his testimony has been contradicted by another witness in the case

Or because his testimony is considered as improbable by other evidence in the case

Or because they believe from the evidence in the case that such witness has testified differently from statements formerly made by him or denying having made such statements.

3 That even though they should believe from the evidence that defendant made admissions yet if they from the whole testimony in the case or the facts and circumstances thereby proven disbelieve such admissions they should disregard them in making their verdict though made by defendant.

Given

So should they believe from the evidence that defendant admitted that he had received $500. on the contract yet if they from the testimony of Venable, Finch, Thomas Wolf, William Gayle and the other witnesses in the case or from that of

that of

either or any of them or from the facts or circumstances proven in the case do not believe that he received the $500. they are under such circumstances bound to find a verdict for the defendant

Given

4 The court will instruct the jury that even should they believe from the evidence that Wells Willetts paid Levi Willetts $500 and Levi Willetts gave Washington Wolf a credit therefor without the assent of Washington Wolf said Wolf is in no way responsible therefor.

Given

5 That if the evidence as to the alleged payment of $500. by plaintiff to defendant. is so unsatisfactory uncertain or contradictory that they cannot from the evidence in this case alone determine fully clearly and to their full satisfaction that it was so paid they are bound under such circumstances to find for the defendant as they will be, if the evidence in relation to such alleged payment be so balanced that they cannot therefrom alone say upon their oaths that it clearly, fully and satisfactorily preponderates in favor of plaintiff

6 the court will instruct the jury that if they believe from the evidence and nothing else to their full satisfaction that the plaintiff was during the whole time from on or about the 1st day of November A. D. 1856 until on or about the 1st day of February A. D. 1857 at New Boston willing and able to receive and pay for the hogs when when so tendered they are under such circumstances bound to find a verdict for the defendant, unless they believe from the evidence that the contract was terminated by the acts or declarations of defendant before that time.

Given

7 That it is incumbent on the plaintiff to fully and clearly and to their satisfaction by the evidence and witness sworn in the case, and nothing else, prove his case and every material part thereof and not on the defendant to disprove it or any part thereof and that if the plaintiff has not in such manner proven every such part of his case, they are bound in such circumstances to find for the defendant

Given

8 That if they believe from the evidence that plaintiff made the admissions or performed acts with regard to the alleged payment of $500. such admissions and acts are proper evidence for their consideration in making their verdict in this case and that if they believe from the evidence therefrom that he had not when so acting and speaking relative thereto paid said $500. they will be bound under such circumstances to find for the defendant

Given

which the court refused to do but gave those marked and numbered 1. 2. 3. 4. 5. 6. 7. 8 and refused to give those marked refused being numbers 9. 10 & 11.

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

The Jury returned a verdict for the said plaintiff for Seven hundred and ninety Seven dollars and fifty cents.

The defendant then filed his motion for a new trial the following motion and reasons

State of Illinois } January Term A. D. 1860
Rock Island County } of the Circuit court of said County

Wells Willcox
Washington Wolf } Trespass on the case on promises

Said defendant moves the court to arrest the judgment in said cause

And for the reasons following for a new trial to wit

1 That the verdict of the jury is contrary to the evidence in the case

2 That it is contrary to law

3 That it contrary to the instructions of the court.

4. That the court on behalf of plaintiff gave to the jury its erroneous instruction

5 That the court erroneously refused to give the jury instructions asked by the defendants and erroneously modified materially instructions of the defendant, and erroneously gave them to modified to the jury

6 That the court erroneously rejected proper questions and evidence by the defendant offered to the jury.

7 That the court erroneously permitted the plaintiff to put illegal and improper questions to the witness in the case and to give to the jury in the case illegal testimony

8 That the verdict of the jury should have been for the defendant

Knox Reed Webster & Harris
attorneys for defendant

which motion the court overruled and refused to grant a new trial, to which decision of the court said defendant then and there excepted.

Said defendant then filed the following motion in arrest of judgment.

Wells Wilcots
v
Washington Wolff } Trespass on the cases premises

Said defendant moves the court to arrest the judgment in this case

Knox Reed Webster & Harris
attorneys for defendant

which motion the court overruled and refused to arrest the judgment. To which decision of the court said defendant then and there excepted. Whereupon judgment was rendered upon said verdict for the plaintiff by the court for Seven hundred and ninety Seven dollars and fifty cents, all exceptions were taken and all objections made in open court on the trial of said cause Whereupon it is ordered that the matters aforesaid

be made a part of the Record in said cause and the bill of exceptions signed and sealed Witness my hand and seal

J. W. Denny Seal

State of Illinois
Rock Island County } ss I Edward H Bowman
Clerk of the Circuit Court within and for said
County do hereby certify that the foregoing
pages contain a full true and perfect copy
of the original files and records in the above
entitled cause, as the same appear of file
& record in my said office

In witness whereof I hereunto set
my hand and the seal of said
Court at office in the City of Rock
Island this tenth day May A.D.
One thousand eight hundred sixty one.

Edward H Bowman Clerk.

Washington Wolf

vs

Wells Willetts

in

Record

Washington Wolf } In the Supreme Court of
v } Illinois 3rd Grand Division
Wells Willetts } April Term A.D. 1861

Error to Rock Island

And now comes the said Washington Wolf by his Attorneys C M Harris & A McWood & says that in the record & proceedings aforesaid and in the judgment aforesaid manifest error hath intervened to his injury in this

1st The Court below erred in overruling the motion for a new trial made by said Wolf

2d The Court below erred in admitting improper evidence on the part of the plaintiff below & in excluding proper evidence offered on the part of the defendant below

3. The Court below erred in giving improper instructions to the Jury on the part of the plaintiff

4. The Court below erred in refusing ~~to~~ = proper instructions asked for on the part

of the defendant below

5. The declaration is insufficient

For all which reasons, and for others apparent on the face of the record the said plaintiff asks that said judgment may be reversed set aside and for naught held

By C M Harris &
H M Mead
his Attorneys

State of Illinois } ss In the Sup. Court
Third Grand Division } at Ottawa in & for
said Division & Apl. Term A.D. 1864

And now comes the said Miles Willetts by J. J. Bowdry his atty and say, that there is no error in the record & proceedings of the court below and he thereupon says, that the said judgt of the court below be affirmed with costs &c by

J. J. Bowdry
atty for Deft in Error

Washington Wolf

vs

Wells Willetts

Record

Filed May 15. 1861

L. Leland

Clerk