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No. _____

Supreme Court of Illinois

Holmes

vs.

Curtiss

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STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 199

J. W. Middleton & Co., Stationers, 126 Lake St.

1864

Holmes
vs
Carter

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

JOHN S. WALLACE AND
THOMAS W. HOLMES,
vs. DEXTER CURTIS, Appellee.

Appellants, *Appeal from the Superior Court of Chicago.*

ABSTRACT OF THE RECORD.

The plaintiff in the court below declared in covenant.

5 to 19

COPY OF DECLARATION.

STATE OF ILLINOIS, SUPERIOR COURT OF CHICAGO.
January Term, A. D. 1862.

Dexter Curtiss, plaintiff in this suit, by Walker, Van Arman and Dexter, his attorneys, complains of John S. Wallace and L. W. Holmes, defendants, partners doing business under the name, firm and style of Wallace & Holmes, of a plea of breach of covenant.

For that whereas, heretofore, to wit, on the tenth day of April, 1861, at Chicago, in the State of Illinois, the said defendants made and entered into a certain indenture with the plaintiff, sealed with their seals and having the date aforesaid; which indenture is now to the court shown, and by which said indenture the said plaintiffs agreed to deliver at the lumber yard of said defendants at Chicago aforesaid, five hundred thousand feet of white wood lumber, and from forty to fifty thousand feet of white ash lumber, to be cut as follows: The white wood lumber into the following kinds and quantities:

Fifty thousand feet clear flooring, plump $1\frac{1}{2}$ inches thick and 6 inches wide.

Thirty thousand feet scantling, $3\frac{1}{2} \times 3\frac{1}{2}$ inches square.

Thirty thousand feet scantling, 4x4 inches square, fourteen feet long.

Thirty thousand feet clear plank, plump $1\frac{1}{4}$ inches thick.

Thirty thousand feet clear plank, plump $1\frac{1}{2}$ inches thick.

Thirty thousand feet clear plank, plump 2 inches thick.

Sixty thousand feet clear plank, plump $1\frac{3}{4}$ inches thick, and 14 to 16 inches wide.

Two hundred and forty thousand feet boards, plump 1 inch thick.

The ash to be cut into square edged plank from two to four inches thick, as said Wallace & Holmes may direct.

All of the above lumber to be subject to inspection and measurement at Chicago, by some competent inspector to be chosen by both parties. The white wood to be inspected into two qualities, viz: clear and common, and all boards and plank (except chair plank and flooring) that are less than fourteen inches in width are to be classed as common lumber. All of the above lumber to be delivered by said plaintiff to said defendants at their lumber yard in the city of Chicago aforesaid, by the first day of July, A. D. 1861. And the said defendants by the said indenture covenanted to receive said lumber and pay said plaintiff therefor, as follows, to wit: The sum of eleven dollars per thousand feet for the clear white wood lumber, and seven dollars per thousand feet for the common white wood lumber, and twelve dollars per thousand feet for the white ash lumber, and the payment to be made as follows: one-third down on the delivery of each cargo of said lumber, and one-third in forty days, and the remaining one-third in four months after the delivery of each cargo. And after the making of said indenture the said plaintiff entered upon the performance of his covenants therein contained and some time in the month of April, 1861, under the said indenture to said defendants, at their lumber yard at Chicago, a cargo of lumber, which they the said defendants accepted, consisting of the following qualities and quantities of lumber, to wit:

Nineteen thousand seven hundred and eighty-seven feet clear white wood.

Twenty-nine thousand four hundred and fifteen feet common white wood.

Sever thousand five hundred and forty-seven feet culls; also, forty-seven feet of ash lumber.

And afterwards, to wit, on the first day of May, 1861, the said plaintiff offered to deliver to the said defendants at their lumber yard in the city of Chicago aforesaid, another cargo of lumber, according to the covenants of said indenture, which the said defendants refused to receive. And the said plaintiff then and there offered to deliver the lumber as

provided in said indenture, but the said defendants refused to receive any more lumber of the said plaintiff as provided in said indenture, or to pay for that delivered, although often requested so to do.

And although the said plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things therein contained on his part and behalf to be performed, fulfilled and kept according to the tenor and effect thereof. Yet the said defendants hath not kept with him the covenants, or any of them so made between them as aforesaid, but have broken the same, and to keep the same with the said plaintiff the said defendants have hitherto wholly refused and still do refuse, to the damage of the said plaintiff, two thousand dollars, and therefore he brings suit, &c.

For that whereas heretofore, to wit, on the 10th day of April, 1861, at Chicago aforesaid, said defendants made to and with the said plaintiff a certain indenture in the figures and words following, to wit:

"This agreement, made the 10th day of April, 1861, by and between Dexter Curtiss of Lake township, county of Berrien, State of Michigan, and Wallace & Holmes of the city of Chicago, State of Illinois, witnesseth, That the said Dexter Curtiss, in consideration of the agreement herein-after contained, to be performed by Wallace & Holmes, agrees to deliver to the said Wallace & Holmes at their lumber yard in the city of Chicago, on or before the first day of July next, five hundred m feet of white wood, and from forty to fifty thousand feet white ash lumber, all of a good, sound and merchantable quality, the white wood to be cut as follows:

50 m feet of clear flooring, plump $1\frac{1}{2}$ inches thick and 6 inches wide.
 30 m feet scantling, plump $3\frac{1}{2} \times 3\frac{1}{2}$ inches square.
 30 m feet scantling 4×4 inches square, 14 feet long.
 30 m feet clear plank, plump $1\frac{1}{4}$ inches thick.
 30 m feet clear plank, plump $1\frac{1}{2}$ inches thick.
 30 m feet clear plank, plump 2 inches thick.
 60 m feet clear plank, plump $1\frac{3}{4}$ inches thick and 14 to 16 inches wide.
 240 m feet boards, plump one inch thick.

The ash to be cut into square edged plank from two to four inches thick, as said Wallace & Holmes may direct, *all of the above lumber to be subject to inspection and measurement at Chicago, by some competent inspector to be chosen by both parties.* The white wood to be inspected into two qualities, viz: clear and common, and all boards and plank (except chair plank and flooring) that is less than fourteen inches in width is to be classed as common lumber. The ash lumber to be *made merchantable by inspection.*

And the said Wallace & Holmes agree to pay to the said Dexter Curtiss the sum of eleven dollars per m feet for the clear, and seven dollars per m feet for the common white wood lumber. For the white ash the sum of twelve dollars per m feet, to be paid in three equal payments of one-third down on delivery, one-third in forty days and the remaining one-third in four months after the delivery of each cargo.

And it is understood by the parties that the said Dexter Curtiss will immediately begin shipping to Wallace & Holmes the said lumber, and that said Dexter Curtiss will not suffer any other contracts of bills for lumber to interfere in any way to detain him from delivering from one to two cargoes weekly until said contract is filled with Wallace & Holmes.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

DEXTER CURTISS. [L. s.]
WALLACE & HOLMES. [L. s.]

By which indenture said defendants covenanted to and with said plaintiff, to receive of him, said plaintiff, certain lumber therein specified, and to pay him for the same at the times and prices therein mentioned. And the said plaintiff proceeding under said indenture, delivered to said defendants at their lumber yard at Chicago, one cargo of said lumber of great value, to wit, of the value of \$1,000, and offered to deliver the whole amount provided for in said indenture, but that the said defendants, disregarding their said covenants in said indenture contained, refused to pay said plaintiff for the one cargo of lumber delivered by said plaintiff, and received by said defendants, and refused to receive any more lumber of said plaintiff as in said indenture provided, although often requested so to do, as well as to pay for the said cargo delivered. And although the said plaintiff has always, from the time of making said indenture, hitherto well and truly performed and kept all his covenants therein contained, yet the defendants have not kept with him the covenants, or any of them, so made between them, but have broken the same, and to keep the same with the said plaintiff, have hitherto wholly refused and still do refuse (although often requested by the said plaintiff to keep and perform the same), to the damage of the said plaintiff, two thousand dollars, and therefore he brings suit, &c.

WALKER, VAN ARMAN & DEXTER,
Plaintiff's Attorneys.

PLEAS.

- 22 1st. Non est factum.
- 23 (2d.) Demurrer by defendants, but afterwards waived.
- 26 2d. Payment by defendants.
- 27, 32 3d. Set-off.
- 35, 52 *Additional special pleas* at a subsequent date by leave of court.

JOHN S. WALLACE AND
 THOMAS W. HOLMES
ads.
 DEXTER CURTISS. }

And the said defendants for a further plea in this behalf, to the first count of the plaintiff's declaration says, *actio non*, &c., because they say that by the express terms of the contract or indenture in said count mentioned, it was provided that all the lumber specified therein, was to be subject to inspection and measurement at Chicago, by some competent inspector, to be chosen by both parties, and it was further therein and thereby expressly agreed and declared, that the white wood mentioned therein was to be inspected into two qualities, viz: clear and common, and all the boards and plank, (except chair plank and flooring,) that was less than fourteen inches in width, was to be classed as common lumber, and that the ash lumber referred to in said contract, was also to be made merchantable by inspection.

And the said defendants in fact say, that in the pretended delivery of a portion of the lumber mentioned in the said first count, by the plaintiff to the said defendants under said contract, the said plaintiff did not, in conformity with the provisions of said contract, cause the said portions of the lumber to be inspected and measured, as required by said contract, neither did they, the said defendants, accept the same under the contract aforesaid, but objected thereto for want of such inspection and measurement, in which they, the said defendants, were then and there, and at all times ready and willing to join, and offered to join if the said plaintiff would concur, or act with them in selecting and appointing a suitable inspector.

And the said defendants are ready to verify.

Wherefore they pray judgment &c.

MATHER & TAFT,
Att'ys for Defendant.

2d to 1st. And for a further plea in this behalf to said first count, the said defendants say *actio non*, &c., because they say that by the terms of the contract or indenture, in said first count mentioned, it was expressly provided that all the lumber specified in said contract was to be subject to inspection and measurement at Chicago, by some competent inspector to be chosen by both parties, and the said contract further expressly provides for the mode and manner of inspection, and the classification of the different sorts of lumber, and the said defendants in fact say, that in the pretended offer of the said plaintiffs to deliver to the defendants a certain cargo of lumber, on or about the first day of May, 1861, the said offer was not accompanied by any conformity or offer of conformity on the part of the said plaintiff, to the said express provision for inspection and measurement, in said indenture contained, notwithstanding the said defendants were then and there and at all times ready, and offered to join in any suitable and proper inspection and measurement, according to the terms of said indenture, both with respect to lumber offered and lumber yet to be delivered.

And this the said defendants are ready to verify; therefore they pray judgment, &c.

MATHER & TAFT,
Att'ys for Defts.

3d to 1st. And for a further plea in this behalf to said first count, the said defendants say *actio non*, &c., because they say that by the express terms of said indenture, in said first count mentioned, it is provided that all the lumber to be delivered under said indenture, was to be subject to inspection and measurement at Chicago, by some competent inspector, to be chosen by both parties, the particular mode and manner of such inspection being also therein also pointed out, and agreed upon, yet the said defendants in fact say, that the said plaintiff in attempting to proceed under said contract, whether by partial delivery or attempt to deliver lumber, or by offers to deliver at any future time, utterly neglected and refused to comply with said provisions for inspection and measurement, notwithstanding the said defendants were at all times ready and willing and offered to join in selecting and appointing a suitable inspector, for the purposes of said contract, and insisted upon inspection and measurement.

And this the said defendants are ready to verify.

Wherefore they pray judgment, &c.

MATHER & TAFT,
Att'ys for Defts.

1st to 2d count. And the said defendants, for a further plea in this behalf, as to the second count of the plaintiff's declaration, say *actio non*, &c., because they say that the said plaintiff did not, proceeding under and in pursuance of said contract, or indenture, deliver to said defendants one cargo of said lumber, as therein alleged, and offer to deliver the whole amount provided for in said indenture, as stated in said second count.

And of this the said defendants put themselves upon the country, &c.

MATHER & TAFT,
Att'ys for Defendants.

2d to 2d count. And for a further plea in this behalf, to the said second count of the plaintiff's declaration, the said defendants say *actio non*, &c., because they say that by the express terms of said indenture, in said count mentioned, all the lumber contracted for was to be subject to inspection and measurement at Chicago, by some competent inspector, to be chosen by both parties. And the said defendants in fact say that in the pretended delivery of one cargo of lumber under said contract, as mentioned in said indenture, the said plaintiff did not, in conformity with the provisions of said contract, cause the said cargo of lumber to be inspected and measured as required by said indenture, notwithstanding that they, the said defendants, then and there insisted on inspection and measurement on their part, and were ready and willing, and offered then and there to act with the plaintiff in choosing and appointing some suitable person to inspect and measure the lumber, according to the requirements of said indenture.

And this the said defendants are ready to verify.

Wherefore they pray judgment, &c.

MATHER & TAFT,
Att'ys for Defendants.

3d to 2d. And for a further plea in this behalf to said second count, the defendants say *actio non*, &c., because they say that by the express terms of said indenture in said second count mentioned, it was provided that all the lumber therein contracted for, was to be subject to inspection and measurement at Chicago, by some competent inspector, to be chosen by both parties, yet the said defendants in fact say, that the offer of the said plaintiff to deliver lumber on said contract or indenture, as stated in said count, was wholly unaccompanied with any offer of or provision for inspection and measurement, notwithstanding the said plaintiff then and there had notice that the said defendants insisted on

such inspection and measurement, and were ready then and there on their part, to enter upon the joint choosing and appointment of some suitable inspector, for the purposes of said indenture.

And this the said defendants are ready to verify.

Wherefore they pray judgment, &c.

MATHER & TAFT,
Attys for Defendants.

1st to both. And for a further plea in this behalf, to both counts of said plaintiff's declaration, the said defendants say *actio non*, &c., because they say that from the time of making said contract or indenture, in said declaration mentioned, and until the close of the period allowed thereby for the delivery of said lumber, that is to say, the 1st day of July, A. D. 1861, they, the said defendants, were at all times ready and willing to accept the delivery of the lumber contracted for, at the place appointed for such delivery, on due inspection and measurement thereof, as provided in said contract, and to pay for the same when so inspected and measured, at the prices and according to the terms of said contract, if the said plaintiff would have delivered the same inspected and measured, according to the express provisions of said contract, which inspection and measurement they, the said defendants, were always during the said period ready and willing and offered to join in on their part, yet the said plaintiff did not at any time within the period so allowed by said contract for that purpose, deliver the said lumber or any part thereof, inspected and measured according to the terms of said contract, or offer to co-operate with the defendants in selecting and appointing a suitable inspector for the purposes of said contract.

And this the said defendants are ready to verify. Therefore they pray judgment, &c.

MATHER & TAFT,
Attys for Defendants.

2d to both. And for a further plea in this behalf, to both counts of said plaintiffs declaration, the said defendants say, *actio non*, &c., because they say that by the terms and conditions of contract in said indenture set forth, in said declaration contained, it was expressly covenanted by both parties thereto, that all the lumber thereby contracted for, was to be subject to inspection and measurement at Chicago, by some competent inspector, to be appointed or chosen by both parties, which inspection and measurement, the said defendants aver to have been highly important, and of great value to the rights of the several parties, inasmuch as the price to be paid for the said lumber, was by contract graduated by said inspection and measurement. And the said defen-

dants in fact say that during the whole period allowed by said contract for the delivery of said lumber, the said plaintiff wholly neglected and refused to join with the defendants in choosing a suitable person to inspect and measure the lumber under said contract, notwithstanding the said defendants were at all times during the same period, ready and willing to join with said plaintiff in choosing some suitable person as such inspector, of which the plaintiff then and there had notice, and that said defendants insisted on such inspection and measurement.

And this the said defendants are ready to verify. Wherefore they pray judgment, &c.

MATHER & TAFT,
Att'ys for Defts.

REPLICATIONS.

53 1, To the first plea of *non est factum*, the plaintiff adds a *similiter*.

54 2, To 2d plea, (payment) *Precludi non*, because he says defendants did not pay, &c., concludes to the country.

55 3, To plea of set-off, denies the allegation of indebtedness, &c., and concludes to the country.

56 4, As to 1st, 2d and 3d additional pleas to the first count, *precludi non*, "because he says that the said defendants, of their own wrong, and without the cause in their said pleas alleged, broke their said covenants and agreements in the said declaration in that behalf complained against them, and concludes to the country.

58 5, As to 2d and 3d additional pleas to the first count, *same as last*.

59 6, As to 1st and 2d additional pleas to both counts, *same as last*.

60, 61 Issues being thus joined, the cause was brought to trial before the court, and a jury duly empaneled and sworn, at September Term, 1863.

62. The jury aforesaid, after instructions received from the court (Hon. Van H. Higgins, presiding as Judge), retired, and returning into court after consultation, duly attended, rendered their verdict for the plaintiff, and assessed his damages at one thousand dollars.

63

64 The defendants thereupon moved for a new trial, for the reasons which will fully appear in the bill of exceptions.

64, 65 On the same grounds thus stated to the court, and filed in said cause, the counsel for defendants, together with said motion for a new trial, moved the court in arrest of judgment, both of which motions were argued at the same hearing.

72, 73, 74 After the hearing whereof, the court *overruled* both motions so made by defendants, and entered judgment for the plaintiff for the amount found by the jury as damages awarded the plaintiff, besides costs of suit.

76, 77, 78 The defendants thereupon, having entered their exception to the rulings of the court on said motions, prayed an appeal to the Supreme Court of this State, which appeal was allowed them by said court, and said defendants filed their bond with surety approved by said court, in the penal sum of fifteen hundred dollars, which sum was fixed by the court, and the same was ordered to be filed by the first day of the next term of the court (which was done accordingly), and sixty days were allowed to said defendants to file their bill of exceptions, dating from 23d of Sept, 1863.

THE BILL OF EXCEPTIONS

81 to 89 States that on the trial of said cause, the plaintiff introduced as a witness, E. G. GREEN, who, duly sworn, testified that he had lived in Chicago since 1855; was a lumber inspector; that he inspected one cargo of lumber for Wallace & Holmes, at their Yard in April, 1861. Wallace came for him. The lumber inspected belonged to Dexter Curtiss. Wallace came to him and asked him to come to his Yard and inspect this cargo, and also future cargoes of lumber to the amount of four or five hundred thousand feet, to be delivered on a contract between Dexter Curtiss and defendant. Witness proceeded to inspect the first cargo the next morning.

81 to 83 The counsel for defendants raised to the Court an objection to the admission of any evidence showing inspection and measurement of the cargo, or any of the lumber on the ground, that the declaration and other pleadings on the part of said plaintiff contained no averment that the lumber, or any part of it, was inspected or measured according to the condition of the covenant sued upon.

The Court overruled defendants' objection, and allowed the matters aforesaid to be given in evidence.

The defendants' counsel excepted thereto. The witness proceeds: "Mr. Wallace engaged me to inspect the lumber; he said to me at his yard that he had made a contract for four or five hundred thousand feet with Mr. Curtiss, and wanted me to inspect it. He said the parties had agreed to have me inspect it. He showed witness the contract, and the specification following, and told witness to measure the lumber, according to the specification. Witness gives copy of the specification as follows:

"1st quality whitewood boards, 14 in. and over, clear from all defects; 2d quality whitewood boards and scantling, cut $3\frac{1}{2} \times 3\frac{1}{2}$ culls, wood, boards; scantling, and scantling not cut, $3\frac{1}{2} \times 3\frac{1}{2}$, assorted into common culls.

The cargo inspected and measured as follows:

1 Clear whitewood.....	19,787 feet.
2 Common do.	29,415 "
3 Culls do.	7,549 "
4 Clear basswood.....	766 "
5 Common do.	2,067 "
6 Culled do.	1,302 "
7 Common oak.....	7,794 "
8 Culled do.	7,046 "
9 Common ash	47 "
	69,773 "

Wallace informed me it was agreed between him and Curtiss that I was to inspect the lumber under contract; Curtiss the same thing afterwards.

Curtiss and Holmes were present when I was inspecting. Wallace was there before I began, and made no objection.

Cross-Examination. This was on the 23d April, 1861. This lumber was inspected again the next day by regular inspector, McGlade & Brothers, Wallace and Holmes being about. No objection was made by either party to the manner in which I inspected it. He did say that a common piece of lumber was a cull. I finished the cargo and they paid for it. Wallace and Holmes made no objection to the quality of the lumber.

89 The plaintiff then offered in evidence the contract declared upon, being the same whereof a copy is set out in the second count of the declaration.

94 The defendants' counsel objected to said contract being read in evidence, on the ground that by the terms of it, it was a condition precedent to delivery of said lumber, that it should be inspected and measured, and that the declaration and declaration and replications of plaintiff, contained no averment or allegation that the lumber was inspected and measured, and no reason was given by the plaintiff in pleading for the omission of the averment of compliance on the part of the plaintiff, with those conditions precedent, and that plaintiff had no right to prove more than his pleadings set forth.

The Court overruled this objection also, and received the contract offered as evidence.

95 To which decision the defendants' counsel excepted. The contract was read in evidence.

96 MR. HOLBROOK was sworn for the plaintiff, and testified that he was a lumber dealer in Chicago when the price of whitewood (clear whitewood) was worth \$9, and common \$5, from the last of April to July 1, 1861. It came down about the middle of April, and continued so until the next fall of the year.

97 MR. WILDER was sworn for plaintiff, and testified he was a lumber dealer, in hardwood and whitewood; had been such seven years. This kind of lumber declined in April of that year, and continued so into July. Clear whitewood worth \$9; common worth \$5.50, with culls. When we buy in two qualities the culls are included in the common. He had a conversation with Wallace; he said he would not pay over \$8 for clear, and \$4, or \$4.50 for common; that he had a contract with Curtiss, and he was not going to take any more of him, as he could get it for \$4 and \$8. This was in the spring of 1861.

99 MR. ELMES was next sworn by plaintiff, and testified that he went along with plaintiff as a witness to call on Wallace and Holmes (who he never knew before). Curtiss demanded of Wallace and Holmes at their office, that they receive lumber under the contract. They answered they would not receive any more lumber under the contract, giving no reason or excuse for not receiving it. Curtiss then had a cargo at the dock. It was whitewood. I saw it on the vessel.

101 The defendants then moved the Court to exclude and strike out from the consideration of the jury in said issue, all the evidence of the plaintiff tending to show the inspection and measurement of the lumber spe-

cified, the selection and appointment of an inspector or measurer selected according to the covenants in the contract. Because the plaintiff in all his pleadings in the cause, had made no averment that said lumber was so inspected or measured according to his covenants in the contract, nor stated any offer on his part to select or agree upon an inspector or measurer of said lumber, as the contract expressly called for, and because, also, no excuse was offered by plaintiff in his pleadings for such omission or neglect, in pleading and setting out his claim.

103 The Court overruled said motion to exclude, and the defendant's counsel excepted thereto.

104 The defendants offered as a witness, Mr. SMITH, who, sworn, testified he owned the "Ellen Kent," that brought the first cargo in 1861; that one cargo was unloaded and delivered and received by defendants (this, however, on his cross-examination.)

The second cargo lay there half a day. Don't know why not received.

104, 105 MR. McGLADE sworn for defendants, testified that he had been, and was an inspector of lumber in Chicago ever since 1857.

The said defendants now here offered to prove by this witness as to the cargo of lumber delivered and inspected by Green, the witness of plaintiff, that in said inspection said Green did not conform to the conditions of said contract, in discriminating the different qualities of lumber, and that in such inspection said Green did not in any manner conform to, or comply with, the conditions of said contract. Plaintiff's counsel objected to such proof.

106 The judge, thereupon delivered his opinion, and decided that it was incompetent to prove by witness the want of conformity to contract by Green, in the inspection of such lumber, unless the defendants would undertake to show *fraud* on the part of Green in the measurement of the lumber. The defendants not claiming to be able to prove actual fraud, the Court rejected the offered evidence as inadmissible.

107 To which opinion and decision of the Court the defendant's counsel excepted.

107 JOHN KEYES sworn for defendants, testified that he knew when the last cargo arrived. He says: "I was at the office of Wallace & Holmes,

X corrected
by stipulation

14

Last X

about the time of the arrival of the first cargo; heard Mr. Curtiss say to Wallace and Holmes he thought he had the right and privilege of having Green measure the lumber, and if Green was not to measure the lumber he would not deliver any more under the contract. Wallace and Holmes replied that they would not have Green inspect it, because they did not consider Green a competent inspector. Part of the second cargo was bought by Wallace & Holmes afloat, not under the contract, and a part by Mr. Boomer. Was present when Green inspected the first cargo. Other inspectors were there. I am acquainted with the different qualities; know when it has been inspected properly; observed the way and manner in which Green inspected the cargo. I was over with Mr. Doyle; asked Green if he thought that was a clear board, referring to one he was measuring then. Went into the office and told Wallace and Holmes that Green was not competent. Both defendants came, and Wallace asked Green if so and so, (meaning the lumber, pointing to certain pieces,) was clear or culls. I said I did not think he was competent, and they told him they would have it inspected over again. Next day McGlade came.

110 H. N. HOLDEN, a witness on the part of defendants, sworn, testified that, in 1861, in the spring, and as near as he can remember, about the month of April, he examined a lot of lumber, mostly white wood, on Wallace & Holmes' dock, being apparently some thirty or forty thousand feet lying; did not overhaul it, but observed and thought he got a fair idea of it; that it was an inferior grade of lumber, worth, as he thought, without grading, not over eight dollars a thousand feet; that he had been dealing in that kind of lumber with other kinds, in Chicago, seven or eight years.

Cross-examined by plaintiff's counsel: Witness stated the time of his examination was in April or May, 1861. On the first of April, for first quality white wood, witness paid ten dollars and three quarters per thousand, for second quality, seven to eight dollars, and for culls, five dollars. There was no decline in prices of those qualities during the month of April, and no decline until along about July, of that year, though the witness paid the same prices through the season; but witness presumes the lumber of that description was worth and bought for about two dollars less per thousand in July. It did not begin to decline before June, and was dullest in July. Only knows of its being the lumber furnished by plaintiff, from what Wallace said, when he asked me to look at it. There was, perhaps, forty or fifty thousand feet of it. It was white wood, that which I saw. It was scattered along for thirty or forty feet,

and looking at the surface, would give you a pretty good idea of the quality. There might have been thirty thousand clear white wood in the pile, but I think not. I could not say how much clear, but it was a pretty hard looking lot of lumber. Don't know whether it had been inspected. It looked to me as if it had been just run off the vessel. It had not been piled. I could not answer whether it had been removed back.

121 *Re-examined by Defendants' Counsel.*

It must have consisted of clear, common and culled; the general character was inferior. It was what I should call a hard looking lot of lumber.

122 *Cross-examined.* I mean what I saw of it.

123 MR. DOYLE, sworn for defendants, testified that he was dealing in lumber in 1861; was well acquainted therewith; saw the cargo that Green inspected. I was inspecting lumber in the same yard that day; was requested to examine the lumber that Green had inspected, and went and examined it. It was a very hard cargo of lumber; it was of a very inferior quality of lumber.

Cross-examined by Plaintiff's Counsel.

I examined it for half an hour, did not inspect it, but walked around and over it. I turned up a board now and then; I did not inspect any of the cargo; I could not see any second clear among the cargo—not what I should call second clear. I saw that part of it had no clear at all. I looked at that which Wallace showed me, as inspected as first clear by Green. I looked at it and saw no second clear. That which Wallace showed me as put aside for clear, had no clear in it. Green kept his own tally. It is usual to have a tally man, especially on hard wood, but we don't always have a tally man.

125 This was all the evidence.

INSTRUCTIONS TO JURY.

The defendants' counsel requested the judge to deliver to the jury the following instructions:

126 1st, That the inspection and measurement of the lumber described in the covenant declared on, by some competent person to be chosen by both parties, was a precedent condition to the recovery by the plaintiff; and that the plaintiff must aver the performance of the precedent condi-

tion, and prove it, before he can recover; and without such averment and proof, they must find for the defendants.

162½ 2d, That *as* a condition precedent to the defendants' payment for the lumber specified in the contract declared upon, the plaintiff must aver in his declaration, or replication, that the lumber delivered, or offered to be delivered by him, had been inspected and measured at Chicago, by some competent inspector, chosen by both parties, or that the plaintiff had offered to unite with the defendant on the choice of such inspector, which they, the said defendants, had refused; and without such averment and proof thereof, they must find for the defendants.

Refused.
127-8 3d, That the inspection and measurement of said lumber by an inspector to be chosen by both parties, was a preliminary step, and that the defendants could not fulfil their part of the contract without such inspection, and as the declaration and replication, do not aver any such appointment of inspector to have taken place, or any offer on the part of plaintiff, and refusal by defendants, to choose the same; or any inspection or admeasurement of said lumber, there is no cause of action stated in the declaration or replication, and the jury must find for the defendants.

Refused.
128-9 4th, That it is not competent for the plaintiff to prove that the lumber delivered, or offered to be delivered by him, was inspected or measured, or that he offered to unite with defendants in choosing an inspector, which the defendants refused, because there is no allegation or averment in the declaration or replication thereof, and the proofs must be confined to the pleadings.

Refused.
129-30 5th, That there is no averment that the plaintiff was ready and willing to execute and perform the contract, according to the conditions and stipulations thereof, or that he was in a condition to execute and perform the same according to its conditions and stipulations, and therefore shows no right of action or of recovery; and that all the evidence adduced by the plaintiff, to show that the lumber was inspected and measured by an inspector, selected for that purpose, or that such inspector or measurer was selected, must be stricken out, as there are no averments of such inspection or measurement in the plaintiff's pleadings, and the proofs must correspond with the pleadings.

130 6th, That if the jury find for the plaintiff, for any lumber delivered to the defendants, and accepted by them, they must apply the value thereof, at the prices specified in said contract, and not at the market price, at the time of the delivery thereof, or the offer to deliver and refusal.

131 7th, That if the jury believe, from the evidence adduced, that the second cargo of lumber contained no such quantity or quality, so called for by the covenant declared on, then a tender of that cargo was no tender sufficient to charge the defendants. That in order to entitle the plaintiff to recover, he must show a tender of the lumber called for in the covenant, and both a readiness and capacity to deliver, or an excuse for the not making such tender, as in case sixth, *Eng. Law and Equity Reports*, page 231.

Refused. 8th, That if the plaintiff's evidence fails to prove that he has delivered to defendants the kind and quality of lumber called for by the
132 covenant, at the time specified, they must find for defendants; and that a delivery of other kind and qualities of lumber, will not enable him to recover in this action of covenant.

132-3 The judge thereupon, *refused* to give to the jury, the instructions numbered 3, 4, 5, 8, respectively; and also refused to give that part of the other instructions, as follows:

133 " And that the plaintiff must aver the performance of the precedent condition, and prove it, before he can recover; and without such averment and proof, they must find for the defendants."

133 To all which refusals, the counsel for defendants excepted,

134 The jury, after the rulings of the court, retired duly attended, and returned their verdict for the plaintiff, and assessed his damages at one thousand dollars.

135 The defendants thereupon moved the court aforesaid for a *new trial*; and also in arrest of judgment, for the following reasons:

1st. Because the plaintiff, by his declaration and replication, shows no cause of action against the defendants.

2d. Because the plaintiff, in his declaration and replications, does not aver or show a compliance with the condition precedent, set forth in the covenant declared on.

3d. Because the court admitted evidence adduced by the plaintiff, to prove what was not averred in the plaintiff's pleadings.

4. Because the court erred in refusing, at the close of the plaintiff's case, to strike out and exclude from the jury, all the evidence adduced by him, to show his performance of the condition precedent, set forth in the covenant declared on, there being no averment in the pleadings to justify such evidence.

5. Because the charge of the court to the jury, on the points requested by the plaintiff, was erroneous on each and every point so charged for plaintiff.

6th. Because the proofs adduced by the plaintiff, did not correspond with the pleadings.

7th. Because the verdict of the jury was contrary both to law and the evidence adduced.

8th. Because the plaintiff, by his pleading in said cause, shows that he had no legal cause of evidence against the defendants.

9th. Because the plaintiff, by his evidence adduced, did not show that he had ever delivered or was ready and willing to deliver, or tendered to deliver any lumber according to the terms and conditions of the covenant declared on.

138 10th. Because the court refused to allow the defendants to show in evidence, that the inspection by Green of the cargo delivered, and his mode of inspection of the lumber, was not according to the terms of the contract declared upon.

The court overruled the motion in arrest of judgment, and refused to grant a new trial.

The defendants excepted thereto.

ERRORS ASSIGNED BY APPELLANTS.

142 1. The court erred in overruling the motions for new trial, and in arrest of judgment.

2. In allowing plaintiff to give evidence of inspection and measurement of lumber, whereof there were no suitable averments in the pleadings on his part.

3. In suffering the plaintiff to prove the contract copied into his second count, inasmuch as in his pleadings he had made none of the necessary averments or allegations, touching the inspection and measurement of lumber, which by the terms of the contract became a condition precedent to his right to sue, or else he was bound to have stated a sufficient excuse for the omission.

4. In overruling the motion of the defendants counsel, made at the close of the plaintiff's proof, to exclude from the consideration of the jury, the evidence given by the plaintiff, on the subject of inspection and measurement of lumber.

5. In refusing to permit the witness McGlade, a regular inspector, offered by defendants, to testify to the want of conformity to the specifications of the contract, in the inspection by Green, the plaintiff's witness.

6. In regard to defendant's instruction,

1, In striking out or disallowing the substantial part of No. 1 and 2, respecting inspection and measurement.

144

2. In striking out and disallowing instructions No. 3, 4, 5 and 8 asked by defendants.

Quidam in error

In nullis est erratum

¹⁹⁹
Sup. Court of Ill.
3^d Second Division

John S. Wallace &
Thos. W. Holmes
appellants

^{vs}
Dexter Curtis
appellee

Abstract of the
Records

Mathew T. Sapt atty.
for appellants

Walker & Dexter Attys.
for appellee

Filed April 20. 1864
J. Seland CM

STATE OF ILLINOIS.

SUPREME COURT,

APRIL TERM, A. D. 1864.

JOHN S. WALLACE AND
THOMAS W. HOLMES,

Appellants.

vs.

DEXTER CURTIS,

Appellee.

*Appeal from the Superior Court of
Chicago.*

POINTS AND AUTHORITIES,

BY WALKER & DEXTER,

COUNSEL FOR APPELLEE.

CHICAGO:

JAMESON & MORSE, PRINTERS.
1864.

199 1864
1861
Entered May 14 1864
J. G. Laidman

SUPREME COURT,

APRIL TERM, A. D. 1864.

JOHN S. WALLACE AND
THOMAS W. HOLMES,

Appellants.

vs.

DEXTER CURTIS,

Appellee.

*Appeal from the Superior Court of
Chicago.*

This is an action of covenant brought by Dexter Curtis, the appellee, against John S. Wallace and Thomas W. Holmes, the appellants, for the recovery of damages, sustained by reason of a breach of contract for the sale and delivery of lumber, and for the price of lumber delivered. The contract bears date the 10th day of April, A. D. 1861, and is in the words and figures following, to wit:

CONTRACT SUED ON.

"This agreement, made the 10th day of April, 1861, by and between Dexter Curtis, of Lake township, county of Berrien, State of Michigan, and Wallace & Holmes, of the city of Chicago, State of Illinois, witnesseth—

That the said Dexter Curtis, in consideration of the agreements hereinafter contained, to be performed by Wallace & Holmes, agrees to deliver to said Wallace & Holmes, at their lumber yard in the city of Chicago, on or before the first day of July next, five hundred thousand feet of whitewood, and from forty to fifty thou-

sand feet white ash lumber, all of a good, sound and merchantable quality. The whitewood to be as follows:

50 m feet of clear flooring, plump $1\frac{1}{4}$ inches thick and 6 inches wide.

30 m feet scantling plump $3\frac{1}{2} \times 3\frac{1}{2}$ inches square.

30 m " " " 4x4 inches square, and 14 feet long.

30 m " clear plank, plump $1\frac{1}{4}$ inches thick.

30 m " " " " $1\frac{1}{2}$ " "

30 m " " " " 2 " "

60 m " " " " $1\frac{3}{4}$ " "

240 m boards plump one inch thick, and 14 to 16 inches wide.

The ash to be cut into square edged plank from two to four inches thick as said Wallace & Holmes may direct; all of the above lumber to be subject to inspection and measurement at Chicago, by some competent inspector, to be chosen by both parties; the white wood to be inspected into two qualities, viz: clear and common, and all boards and plank (except chair plank and flooring) that is less than fourteen inches wide, is to be classed as common lumber; the ash lumber to be made merchantable by inspection. And the said Wallace & Holmes agree to pay to the said Dexter Curtis, the sum of eleven dollars per m feet for the clear, and seven dollars per m for the common white wood lumber. For the white ash the sum of twelve dollars per m feet, to be paid in three equal payments of one-third down on delivery, one-third in forty days, and the remaining one-third in four months after the delivery of each cargo. And it is understood by the parties that the said Dexter Curtis will immediately begin shipping to Wallace & Holmes the said lumber, and that the said Dexter Curtis will not suffer any other contract of bills for lumber, to interfere in any way to detain him from delivering from one to two cargoes weekly, until said contract is filled with Wallace & Holmes. In witness whereof, the parties have hereunto set their hands and seals the day and year first above written."

DEXTER CURTIS. [SEAL.]

WALLACE & HOLMES. [SEAL.]

ABSTRACT OF PLEADINGS.

The declaration was filed at the January term, A. D. 1862, of the Superior Court of Chicago, and contains two counts.

The first count alleges in substance that on the tenth day of April, A. D. 1861, the defendants, Wallace & Holmes, made a certain indenture with the plaintiff, Curtis, &c., by which Curtis agreed to deliver at the lumber yard of Wallace & Holmes, at Chicago, five hundred thousand feet of white wood lumber, and from forty to fifty thousand feet of white ash lumber, &c., setting out the substance of the contract, and then alleges that Curtis afterwards entered upon the performance of said contract, and sometime in the month of April, A. D. 1861, delivered to Wallace & Holmes, at their lumber yard in Chicago, a cargo of lumber, which they accepted, consisting of the following qualities and quantities, to wit:

"Nineteen thousand seven hundred and eighty-seven feet clear white wood; twenty-nine thousand four hundred and fifteen feet common white wood; seven thousand five hundred and forty nine feet of culls; also, forty-seven feet of ash lumber." That on or about the first day of May, A. D. 1862, Curtis offered to deliver at their said lumber yard another cargo of lumber *"according to the covenants of said indenture, which said defendants refused to receive."*

That Curtis then and there offered to deliver the lumber as provided in said contract, but Wallace & Holmes refused to receive any more lumber of him, or to pay for that already delivered, although requested so to do—stating the breach as follows, to wit:

"And although the said plaintiff hath always from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things therein contained, on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect thereof, yet the said defendants have not kept with him the covenants, or any of them, so made between them as aforesaid, but have broken the same, and to keep the same with the said plaintiff, the said defendants have hitherto wholly refused, and still do refuse, to the damage of the said plaintiff of two thousand dollars."

The second count sets out the contract verbatim, and avers that Curtis, proceeding under it, delivered to Wallace & Holmes, at their lumber yard in Chicago, one cargo of said lumber of the value of, to wit, one thousand dollars, and offered to deliver the whole amount provided for in said indenture. That the defendants, Wallace & Holmes, refused to pay Curtis for the cargo of lumber so delivered to, and received by them, and also refused to receive any more lumber of Curtis under said contract, although often requested so to do.

Stating the breach as in the first count with the addition of the words "although often requested by the said plaintiff to keep and perform the same."

To this declaration Wallace & Holmes filed eleven pleas.

First. Non est factum.

Second. Payment.

Third. Set off.

A plea denying the delivery of one cargo and an offer to deliver the balance, and seven other special pleas setting up in various ways in substance as follows, to wit:

That no inspector was appointed or selected to measure the lumber; as provided for in the contract, and a refusal on the part of Curtis to join with the appellants in such an appointment or selection.

For convenience we here insert the material portions of the special pleas last mentioned.

ADDITIONAL SPECIAL PLEAS.

The following pleas were filed to the first count of the declaration:

First. This plea, after setting forth in substance the provisions of the contract in relation to the inspection and measurement of the lumber, proceeds as follows:

"And the said defendants in fact say that in the pretended delivery of a portion of the lumber mentioned in the said first count by the plaintiff to the said defendants under said contract, the said plaintiff did not, in conformity with the provisions of said contract, cause the said portions of the said lumber to be inspected and measured as required by said contract, neither did they the said defendants accept the same under the contract aforesaid, but objected thereto for want of such inspection and measurement, in which they the said defendants were then and there and at all times ready and willing to join, and offered to join if the said plaintiff would concur or act with them, in selecting and appointing a suitable inspector," concluding with a verification.

Second. This plea, after setting out in substance the provisions of the contract in relation to inspection and measurement of the lumber, proceeds as follows:

"And the said defendants in fact say that in the pretended offer of the said plaintiff to deliver to the defendants a certain cargo of lumber, on or about the first day of May, 1861, the said offer was not accompanied by any conformity or offer of conformity on the part of the said plaintiff to the said express provision for inspection and measurement in said indenture contained, notwithstanding the said defendants were then and there and at all times ready, and offered to join in any suitable and proper inspection and measurement, according to the terms of said indenture, both with respect to lumber offered and lumber yet to be delivered," concluding with a verification.

Third. This plea, after reciting substantially as in above, proceeds: "Yet the said defendants in fact say that the said plaintiff, in attempting to proceed under said contract, whether by partial delivery, or attempt to deliver lumber, or by offer to deliver at a future time, wholly neglected and refused to comply with said provisions for inspection and measurement, notwithstanding the said defendants were at all times ready and willing, and offered to join in selecting and appointing a suitable inspector for the purposes of said contract, and insisted upon inspection and measurement."

First additional plea to second count avers, that Curtis did not deliver to Wallace & Holmes one cargo of said lumber and offer to deliver the whole amount.

The second avers that "in the pretended delivery of one cargo of lumber under said contract as mentioned in said indenture, the said plaintiff did not in conformity with the provisions of said contract, cause the said cargo of lumber to be inspected and measured as required by said indenture, notwithstanding that they, the said defendants, then and there insisted on inspection and measurement on their part, and were ready and willing, and offered then and there to act with the plaintiff in choosing and appointing some suitable person to inspect and measure the lumber according to the requirement of said indenture.

The third avers "that the offer of the said plaintiff to deliver lumber on said contract or indenture as stated in said count, was wholly unaccompanied with any offer of, or provision for inspection and measurement, notwithstanding the said plaintiff then and there had notice that the said defendants insisted on such inspection and measurement, and were ready then and there on their part to enter upon the joint choosing and appointment of some suitable inspector."

The first special plea to both counts avers, that from the time of the making of said contracts until the close of the period allowed thereby for the delivery of said lumber, Wallace & Holmes were at all times ready and willing to accept the delivery of the lumber at the place appointed, on due inspection and measurement as provided in said contract, and to pay for the same when so inspected and measured, if the said Curtis would have delivered the same inspected and measured, according to said contract; yet the said Curtis did not at any time within the period allowed by said contract, deliver said lumber or any part thereof inspected and measured, according to the terms of said contract, or offer to co-operate with Wallace & Holmes, in selecting and appointing a suitable inspector.

The second special plea to both counts, after reciting substantially the terms of the contract, in relation to the inspection and measurement of the lumber, and that such inspection and measurement was highly important to have done, &c., avers "that during the whole period allowed by said contract for the delivery of said lumber, the said plaintiff wholly neglected and refused to join with the defendants in choosing a suitable person to inspect and measure the lumber under said contract, notwithstanding the said defendants were at all times during the same period, ready and willing to join with said plaintiff in choosing some suitable person as such inspector, of which the plaintiff then and there had notice, and that said defendants insisted on such inspection and measurement."

To these pleas Curtis filed replications as follows :

To second plea, replication denying payment.

To third plea, replication denying all indebtedness.

To the first, second and third special pleas to the first count, the second and third to the second count, and the first and second to both counts of said declaration, he filed replications *de injuria*, in substance as follows, to wit :

And the said defendant, &c., saith *precludi non*, because he says that the said defendants, of their own wrong, and without the cause in said pleas alleged, broke their said covenants and agreements in the said declaration, in that behalf complained against them, &c. To which pleas the appellants joined the similiter.

The issues thus presented were tried before the Hon. Van H. Higgins in the court below, by a jury, and verdict found for the plaintiff. A motion for a new trial was made, and overruled by the court, and judgment rendered for the plaintiff upon the verdict, a bill of exceptions reserved, and the cause brought into this court by appeal.

THE ERRORS ASSIGNED ARE AS FOLLOWS :

First. The court below erred in overruling the motion for a new trial, and in arrest of judgment.

Second. In allowing the plaintiff to give evidence of inspection and measurement of lumber, for want of suitable averments of those facts in the pleadings on his part.

Third. In suffering the plaintiff to give in evidence the contract copied into his second count, inasmuch as the plaintiff in his pleading had made none of the necessary allegations touching the inspection or measurement of lumber, which, by the terms of the contract, became a condition precedent to his right to sue, or he was bound to have stated a sufficient excuse for the omission.

Fourth. In overruling the motion of defendant's counsel; made at the close of the plaintiff's proof to exclude from the consideration of the jury, the evidence given by the plaintiff on the subject of inspection and measurement of lumber.

Fifth. In refusing to permit the witness for the defendants, by the name of McGlade, a regular inspector, to show a want of conformity to the specifications of the contract, in the inspection by Green, the plaintiff's witness.

Sixth. In regard to the instructions asked by the defendants, 1st. In striking out or disallowing that part of the defendant's first and second instructions touching inspection and measurement, which was in fact the whole substance of both. 2d. In refusing to give the third, fourth, fifth and eighth instructions asked by the defendants.

POINTS MADE BY THE COUNSEL FOR THE APPELLEE.

I.

We claim that the declaration shows a good cause of action against the appellants, and must have been held sufficient on general demurrer.

II.

That allowing the declaration to be insufficient, and obnoxious to a general demurrer, the defect was cured by the pleas and replications thereto, which put in issue the very fact claimed to have been omitted in the declaration.

III.

That the defects, imperfections or omissions in the pleadings, if any, are cured by the verdict.

IV.

That the evidence offered by the defendants, and rejected by the court, was properly excluded.

V.

That the court committed no error in refusing to give the instructions and portions of instructions refused.

VI.

That the court did not err in overruling the motion for a new trial and in arrest of judgment.

I.

DOES THE DECLARATION SHOW A GOOD CAUSE OF ACTION UPON ITS FACE?

In discussing this question, we make these three points—

First. That the appointment of an inspector is not a condition precedent.

Second. That the averment in the declaration that the defendants refused to receive any more lumber under the contract, dispensed with the necessity of an allegation of performance or offer to perform.

Third. That admitting an allegation of performance of this act to be necessary, the general averment of performance in this declaration is sufficient.

First. It is a general rule of pleading, that matter which should come more properly from the other side, need not be stated. A party is not bound to anticipate every possible exception, answer or objection which may exist, and with which his adversary may intend to oppose him; all that is required is, that he make out by his pleadings a *prima facie* cause of action, and wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso or whatever you will, if it is for the defendant's benefit, it is a matter of defense, and ought to be shown by the pleadings of the opposite party.

1 *Chitty's Pleadings*, 254-255.

1 *Term Reports*, 645-646.

6 *Comyns Dig.*, 681.

1 *Lev*, 88.

2 *B. & C.*, 82.

The case in *Term Reports*, above cited, was an action of covenant on a Charter Party. The covenant was "that no claim should be admitted or allowance made for short tonnage, unless it were found and made to appear on the ship's arrival, on a survey to be

taken by four shipwrights, to be indifferently chosen by both parties." It was held, that it was not necessary for the plaintiff to aver that a survey was made and short tonnage made to appear, but if such a survey was not taken, this was a matter of defense to be taken advantage of by the defendant.

So in this case, if there was no inspector appointed, or if there was a refusal on the part of the plaintiff to join in such an appointment, this, we contend, was a matter to be taken advantage of by the appellants. It is a provision of the contract separate and distinct from the covenants of Curtis, made expressly for the benefit of the appellants, and if not complied with, it was a matter of defense to be pleaded by them.

Second. But admitting this to be a condition precedent, still it does not follow necessarily, that Curtis should have alleged its performance, or an offer to perform on his part; he may have been excused from doing either by the acts of the appellants, and the declaration on its face shows that such was the case; it alleges that one cargo was delivered and accepted under the contract, and another tendered "*according to the covenants of said indenture, which said defendants refused to receive,*" that Curtis then and there offered to deliver the lumber as provided in said contract, but that Wallace & Holmes refused to receive any more lumber of him, or to pay him for that already delivered. Here we have a breach alleged on the part of the appellants, which at once excused Curtis from performing, or offering to perform his covenants, as well that of joining or offering to join with the appellants in the selection of an inspector to measure the lumber, as from all others, also from the necessity of any tender, or offer to deliver the balance of said lumber; one that authorized him to treat the contract as broken, and at an end, and to sue at once for his damages.

Cort vs. The A. & N. R. R. Co., 6 Eng. Law and Eq., 250.

Gough vs. Farr, 14 Eng. Law and Eq., 294.

Hochster vs. DeLatour, 20 Eng. Law and Eq., 157.

Greenop vs. Stoker, 3 Gilman, 213.

The declaration, then, showing this fact, one which wholly excused Curtis from performing or offering to perform his covenants, it became unnecessary for him to allege either a performance, or an offer to perform on his part, the law requiring no allegations to be made but such as a party is required to prove. If, then, the allegation of a sufficient or legal excuse in an action of this kind relieves the party from the necessity of averring performance, or an offer to perform on his part, this declaration must stand, and this is undoubtedly the rule. Here we have alleged an excuse, and that it is a sufficient one and properly alleged, will be seen by reference to the following authorities.

1 *Chitty's Pleadings*, 358-359.

Smith vs. Lewis, 26 Conn., 110.

Clarke vs. Crandall, 27 Barb., 73.

Third. We claim, however, that the declaration does allege sufficiently the performance of this condition, even though it should be determined to be a precedent one. It alleges that Curtis had well and truly kept and performed all his covenants, in general terms. This averment covers and includes all conditions precedent; that in relation to the appointment of an inspector, as well as all others.

The only question, then, to be discussed is, was this act of appointing an inspector, or of offering to join in such an appointment, such an act, as required in this action a specific allegation of performance, or does the allegation that he has performed and kept all his covenants, in general terms, suffice.

The general rule on this subject is, that when the covenant is general in its terms, and the act to be done by the plaintiff is purely a matter of fact, it is not only sufficient, but most proper to aver performance in general terms, without alleging particularly how he has performed, or specially the performance of each particular act by him to be performed. Thus, if the covenant be to pay money, or deliver goods, or to do any other act or acts which are purely matters of fact, an averment that the money has been paid, or the goods delivered, or the acts performed, or even in more general

terms, *that the plaintiff has kept and performed the covenants on his part, will be fully sufficient.*

6 *Comyn's Dig.*, 81-61.

Wright vs. Tuttle, 4 *Day's Cases in Error*, 313.

6 *Binney*, 24.

1 *Salk*, 171.

Sorrell vs. Sorrell, 5 *Ala.*, 576.

1 *Chitty's Pleadings*, 325, note 1.

Byrne vs. McNulty, 2 *Gilman*, 424-427.

The appointment of an inspector was purely a matter of fact, depending upon no contingencies, and the covenant in relation to this particular is definite in its terms; it is neither in the alternative, nor in any manner indefinite or uncertain, but is plain and explicit.

Testing the declaration, then, by the above rule, and admitting that the appointment of an inspector was a condition precedent to the plaintiff's right of recovery, and its performance necessary to be averred, the declaration is sufficient, and not obnoxious to a general demurrer.

The covenants on the part of Curtis were clear and definite, and the acts to be performed by him were purely matters of fact; as much so as the payment of money, or the delivery of corn; whether he performed them according to the terms of the agreement, were simple questions of fact to be determined by the jury from the testimony. See authorities above recited. The declaration may be somewhat informal, but it is too late now to inquire into its defects in this regard; they should have been taken advantage of by demurrer, and as they were not, the only objection that can be urged against it at this stage of the case is, *that it is fatally defective, in failing to allege, in any manner, a material fact, without proof of which there could be no recovery.* This is the only objection we have attempted to controvert, and the authorities above cited fully sustain us in the position we have taken on this question. This brings us to consider the effect of the pleas and replications filed in the case.

II.

But allowing the declaration to be insufficient and obnoxious to a general demurrer, the defect was cured by the pleas and replications thereto, which put in issue the very fact claimed to have been omitted in the declaration.

We take it to be a well settled rule, that where a material fact is omitted in the declaration, the defect is cured, if the pleadings put directly in issue the fact omitted, and so are the following authorities:

Elliott vs. Stewart, 3 *Shep.*, 160.

Stall vs. Ryan, 3 *Brevard*, 238.

Slack vs. Lyon, 9 *Pick.*, 62.

Dorr vs. Fenno, 12 *Pick.*, 521.

1 *Chitty's Pl.*, 710-711.

8 *Alabama*, 606.

5 *Texas*, 87.

And further, that any defect in pleading is aided, if the adverse party plead over to, or answer the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied or rendered intelligible.

1 *Ch. Pl.*, page 710.

Com. Dig. Pleader, C. 85, E. 37.

1 *B. & C.*, 29.

3 *B. & C.*, 192.

The appellants, instead of demurring to the declaration, as they should have done, if it was informal, or in any manner defective, elected to plead to the same, and have set up in their pleas the non-performance by Curtis of the very acts, the performance of which, they claim should have been alleged specifically in the declaration, as an excuse for the non-performance of their covenants; in other words, they set up in their pleas, as a reason why Curtis should not recover, that no inspector was appointed to measure the lumber, and that Curtis refused to join with them in the selection of an inspector. This is the substance of the first, second and third special

pleas to the first count, the second and third to the second count, and the first and second to both counts of the declaration. To these pleas Curtis replied *De Injuria*, "that the said defendants, of their own wrong, and without the cause in said pleas alleged, broke their said covenants and agreements, in the said declaration in that behalf complained against them," &c. To which replications the appellants joined the similiter.

These replications, as we contend, amount to a general traverse of the several pleas to which they were replied, and under the issues thus joined, allowed Curtis to adduce any evidence that tended to disprove any or all the facts alleged in said pleas, and compelled the appellants to prove every material allegation therein contained.

1 *Chitty's Pl.*, 637, 638.

Com. Dig. Pleader, F., 18 to 34.

Ayres vs. Kelley, 11 *Ills.*, 17.

Stickle vs. Richmond, 1 *Hill*, 77.

This being the effect of the several pleas, and the replications thereto, the fact which the appellants claim should have been alleged in the declaration, and the want of which, they insist, rendered the declaration insufficient, was, in fact, put directly in issue. Indeed, it was one of the principal facts presented by the issues in the cause, and proven before the jury.

It is contended, however, by the appellants, that the facts set up in the pleas were not put in issue by these replications, but that special replications should have been filed to said pleas, specifically denying the facts therein set forth; and as such replications were not filed, these facts were not put in issue by the pleadings, and the evidence offered on this point, in the court below, should have been excluded from the jury.

Taking the ground that the replications filed are a mere reaffirmance of the allegations in the declaration, and there being no specific allegation in the declaration that an inspector had been appointed, therefore the facts set forth in said pleas are not denied.

This argument would do very well had the declaration failed to allege, in any manner, the performance of the acts and covenants mentioned in such pleas. But this, we contend, is not the fact. It alleges the performance of *all his covenants*—(in general terms, to be sure;)—but nevertheless the performance of each and every of the covenants and acts, on the part of Curtis to be performed, is alleged and included in the general averment of performance contained in the declaration; and the only question that can possibly be made to it in this regard, is, whether those averments should have been special instead of general. The allegation that an inspector had been appointed, is, we contend, contained in the declaration, in the general averment of performance of all his covenants. This fact the appellants have expressly denied in their pleas. If, then, said pleas had concluded to the contrary, and the similiter had been joined, we should have had this fact directly in issue.

Can it then be said, because said pleas concluded with a verification instead of to the contrary, that replications filed to said pleas in no manner charging or varying the facts already contained in the pleadings, will forever wipe out and destroy an issue already formed? We think not. The only effect it can possibly have, is to extend the technical joinder of issue one stage further off: the facts to be tried remain the same, and if they present an issue capable of being tried in one case, they must in the other; consequently it seems very clear that the question, whether an inspector was appointed or not was one of the issues directly presented by the pleadings in this case.

It is admitted that if Curtis had put in a special traverse denying that an inspector had not been appointed, this fact would have been put directly in issue, but it is said, this general traverse does not have that effect; why it has not the same effect we have been unable to discover; the only difference between the two is, that the special traverse denies some particular fact or facts alleged on the opposite side, while a general one denies all the facts so alleged. Any further argument, then, on this point would be futile.

If the replications *de injuria* were improperly replied, they should have been demurred to; as they were not, it is too late now

to call in question their sufficiency, as will be seen when we come to examine the effect of the verdict.

See Spencer vs. Langdon, 21 Ills., 192.

Ohio R. R. Co. vs. Middleton, 20 Ills., 629.

If either of the positions we have here taken in regard to the pleadings in this cause be correct, then here is an end of all those questions made by the appellants in relation to the admission of evidence to prove the appointment of an inspector, and the measurement of the lumber, and effectually disposes of the second, third fourth and sixth errors assigned by the appellants.

III.

In the next place, we claim that the defects, imperfections or omissions in the pleadings, if any, are cured by the verdict.

It has uniformly been held that after verdict, the court will do what it can to support the declaration and pleadings in a case, and will suppose or presume everything to have been done that ought to be done, unless the contrary appears on the record.

The general principle upon which this doctrine of *intendment after verdict* rests, is, that where there is any defect, imperfection or omission in any pleading, whether in *substance* or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission *is cured by the verdict*.

1 *Chitty's Pl.*, 712.

1 *Saund.*, 228, n. 1.

Gould's Pleading, 498, ch. 10.

Sullivan vs. Dollins, 13 *Illinois*, 88.

This intendment must arise, not merely from the verdict, but from the united effect of the verdict, and the issue upon which such verdict was given, and all facts imperfectly stated or omitted in the pleadings without proof of which the jury could not have found from the evidence, as they have found, the court must presume or intend where duly proven, and support the declaration of every legal intendment if there is nothing in the record to prevent it.

1 *Chitty's Pl.*, 712-713.

Gould's Pleading, 498.

7 *Greenl.*, 63.

1 *Sumner*, 319.

11 *Wend.*, 375.

14 *Vermont*, 14.

1 *Peters*, 24.

26 *Eng. Law and Eq.*, 1.

Before proceeding further upon this point, it may be well to refer briefly to a few of the leading authorities to show to what extent this doctrine has been carried by the courts.

In the case of *Lambert vs. Taylor*, 4 B. & C., 138, which was an action of assumpsit on a promissory note against the executors of the maker, and the plaintiff after setting out the note, &c., alleged that the testator at the time of his death was indebted, &c., and then averred that after the payee's death it was found upon inquest "by the oaths of honest and lawful men" (but without showing how many), that the payee was *felo de se*, whereby the note and the money due thereon, became forfeited to the crown, &c. After verdict for the plaintiff, it was objected in arrest of judgment, among other things, that it was not averred in the declaration that the inquisition had been taken by *twelve men*. But the court, Abbot, C. J., held that it must be intended after verdict that the inquisition in question had been found.

So "where a grant of a reversion or rent charge, adrowsen, or other incorporeal hereditament, which lies in grant, and can only be conveyed by deed, yet if the grant be put in issue and found by a jury, it has been held that the omission is cured by the verdict.

1 *Chitty's Pl.*, 719.

1 *Saund.*, 228.

So an imperfect averment of the performance by the plaintiff of a condition precedent, or matter to be performed by him, or that he gave a proper notice to the defendant, or requested the defendant to perform his promise, have all been held to be cured by verdict, as will be seen by reference to the following authorities.

Chitty's Pl., p. 358, 359.

Bayard vs. Malcom, 2 *John.*, 550.

Colt vs. Root, 17 *Mass.*, 229.

Hoppe vs. Stout, 2 *California*, 460.

Bailey vs. Clay, 4 *Rand.*, 346.

So it has been held in an action of covenant where a particular breach ought to have been assigned, yet if a general breach be assigned, the defect is cured by a verdict for the plaintiff.

Minor vs. The Mechanics' Bank, 1 *Pet.*, 68.

Com. Dig. Plead., 48.

Again, in *Clark vs. Dales*, 20 *Barb. N. Y.*, 42, it was held, that when one agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by a purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues for non-delivery, is indispensably necessary to a good complaint, but the defect is cured by a verdict.

Chitty, in his work on Pleading, lays down the rule in the following language: "In all cases where the general allegations in the declaration, or other pleadings, are such as to require proof of any particular fact, which is not expressly stated, in order to entitle the plaintiff to a verdict, it will be intended after a verdict for him, that such fact was duly proven, and the defect in the particular pleading will be aided.

1 *Chit. Pl.*, 718-719.

In *Addington vs. Allen*, 11 *Wend.*, 374, it was decided in the Court of Errors of New York, on motion in arrest of judgment,

that the facts which will after verdict be presumed to have been proved, are those which, although entirely omitted to be stated in the declaration, are so connected with the facts alleged, that the facts alleged cannot be proven without proving those omitted.

From the above authorities we deduce this general rule : That a verdict cures all mispleadings, insufficient pleadings and misjoining of issues, provided sufficient appear to enable the court to give judgment according to the right of the case. In other words, that a verdict cures everything which was necessary for the plaintiff to prove, in maintenance of his action, and only fails to have this effect where the gist of the action is omitted. This we apprehend to be the true distinction.

Cowper, 826.

Bayard vs. Malcomb, 2 *John*, 555.

The principles here laid down, it seems to us, are conclusive of this case. If the appointment of an inspector was an act which Curtis covenanted he would perform or join in performing, and the performance of it was a condition precedent, and necessary to be alleged in the declaration, then we say it is sufficiently alleged in the averment of general performance of all his covenants and acts to be done by him, as set forth in the declaration ; for although not expressly alleged, its performance is necessarily implied and included in the general allegation of performance of all his covenants. But this action was brought not only for the price of a portion of the lumber delivered, but for damages, for the refusal to receive the balance, and the declaration shows that at the time of the offer to deliver the second cargo, the appellants notified Curtis that they would receive no more lumber under the contract. That Curtis then and there offered to deliver the lumber mentioned in the contract, as provided by the terms of the same, but that appellants refused to receive any more lumber of him ; here certainly we have an excuse alleged as to that portion of the lumber undelivered, which dispenses with the necessity of an averment of performance of this condition, as well as all the other covenants to be performed

by Curtis. He has shown a readiness and willingness, and an offer to deliver the lumber as required by the contract, and this is all that he was required to do. That this fact is sufficiently shown by the declaration to render it good after verdict, was fully decided in the case of *Clark vs. Dales*, 20 Barb., 42, above cited.

But, granting that the appointment of an inspector is a condition precedent, and that the declaration wholly omits to allege its performance in any manner, still it can avail the appellant nothing in this case, as they have pleaded the very fact claimed to have been omitted in the declaration, and the pleadings in the case put this very fact in issue; this being the case, all defects in the declaration, and any informalities or imperfections in the pleadings, or in the issue thus joined, are cured by the verdict. The appellants waived their opportunity of demurring to either the declaration or the replications, and after having led the appellee through every stage of litigation the forms of the court would admit, and after their defense has been decided by a jury, they come to this court and seek to take advantage of defects, which might and should have been taken advantage of, at an earlier stage of the case; for what is good in arrest of judgment, would have been good on demurrer; and we trust that this court will not at this time disturb this verdict and judgment, and compel the plaintiff to bring a new action for the assertion of his claim, when the right of the case and the principles of justice and equity, as the evidence shows, are decidedly in his favor, unless for the most cogent reasons.

The evidence shows most conclusively, that Curtis was entitled to the verdict and judgment rendered in the court below. This in fact, is not denied by the appellants; they do not claim that the verdict was contrary to the evidence, but only that the evidence was improperly admitted under the pleadings in the case.

The contract was produced on the trial and duly proven. E. G. Green, the person chosen by the parties to inspect and measure the lumber under the contract, testified that he was a lumber inspector, that he had inspected one cargo of lumber for Wallace & Holmes, and several for Mr. Wallace; that he inspected a cargo of

lumber for Wallace & Holmes, in April 1861, belonging to Curtis; that Wallace, one of the appellants, came to see him and asked him to come to his (Wallace & Holmes') yard and inspect this cargo, and also to inspect the future cargoes, to the amount of four or five hundred thousand feet, to be delivered on a contract between Dexter Curtis and themselves. That he went the next morning to appellant's lumber yard, found Mr. Wallace, who said that he had made a contract with Dexter Curtis for four or five hundred thousand feet of lumber, and wanted him to inspect it; that the parties had agreed to have him inspect it; that Wallace handed him the following specification and told him to measure the lumber in accordance with it, which he did. Specification—

"1st quality. White wood boards, 14 inches and over, clear from all defects.

2d quality. White wood boards and scantling, cut $3\frac{1}{2} \times 3\frac{1}{2}$. Culls, white wood boards, scantling, and scantling not cut $3\frac{1}{2} \times 3\frac{1}{2}$. Ash into common and culls."

That this cargo measured as follows:

1 Clear Whitewood.....	19,787 feet.
2 Common ".....	29,415 "
3 Culls, ".....	7,549 "
4 Clear Bass Wood.....	766 "
5 Common Bass Wood.....	2,067 "
6 Culled ".....	1,302 "
7 Common Oak.....	7,794 "
8 Culled ".....	1,046 "
9 Common Ash.....	47 "

69,773 "

Says Wallace informed him that it was agreed upon between him and Curtis that he (Green) was to inspect the lumber under the contract. Curtis told me the same thing. That Mr. Curtis and Wallace & Holmes were present whilst he was measuring it. On his cross-examination he says no objection was made by either party to the manner in which he was measuring the lumber; that he finished the cargo and Wallace & Holmes paid him for it; that Wallace & Holmes made no objection to the quality of the lumber.

This testimony was in no manner contradicted, and shows beyond all question a due appointment of Green by the parties to inspect the lumber under the contract, and the delivery and receipt of one cargo by the appellants.

Mr. Elmes testified that he was present at a conversation between the parties in the latter part of April, or fore part of May, 1861, in the office of Wallace & Holmes; went there at the request of Curtis; that Curtis said he was going to ask them if they would receive the lumber under the contract; that Curtis had a cargo of whitewood lying at the dock of defendants; that he went on the vessel and saw the lumber; that Curtis demanded that the defendants receive the lumber under the contract; they replied that they would receive no more lumber under the contract. They made no excuse for not doing so.

Mr. Simmes, the defendants' witness, testified that he brought over one cargo of lumber for Curtis, which was received by the defendants; that the second cargo laid at the dock half a day or more, did not know why; that Curtis told him Mr. Wallace would not receive the lumber on the contract.

Mr. Holbrook testified that he resided in Chicago; was a dealer in whitewood lumber; was acquainted with the prices of that wood in 1861; that from the last of April to July 1st it was worth for clear, nine dollars, and for common, five; that after the opening of navigation about the middle of April it came down and continued so till the fall of that year.

Mr. Wilder testified that he was a dealer in hard wood lumber, including whitewood, in 1861; that there was a decline in the market price of that lumber in April of that year. That the average market price between the middle of April and first of July was six dollars and fifty cents. Nine dollars for clear and six and a half for common, or nine for clear and five and one half for common with culls. That he had a conversation with Mr. Wallace, who said he would not pay over eight for clear; and four or four and one half for common; that he had a contract with Curtis, but

that he was not going to take any more of him; that he could buy for four and eight. This evidence stands uncontradicted, and shows, conclusively, not only that an inspector was appointed, but that Curtis performed all his covenants, or was ready and willing to perform them, but that he was prevented from completing the contract by the refusal of Wallace & Holmes to receive the lumber. Why they refused to receive it the testimony shows very clearly. The price fell two dollars per thousand after the contract was executed, and a breach of contract, or a pecuniary loss became the alternative; they chose the former, and the jury have determined the price of their election. There is no evidence that Curtis did not comply with the terms of the contract in every particular.

IV.

Was the evidence offered by the defendants in the Court below, and rejected by the Court, properly excluded?

The only evidence complained of as having been improperly rejected is that of McGlade. The defendants offered to prove by him that the cargo of lumber delivered and inspected by E. G. Green (the inspector chosen by both parties to inspect and measure the lumber under the contract,) was not inspected in conformity to the conditions of the contract, in discriminating the different qualities of lumber, and that in such inspection he (Green) did not in any manner conform to, or comply with the conditions of said contract. To the admission of this evidence the counsel for the plaintiff objected, and the court ruled that it was incompetent to prove by the witness the want of conformity with the contract by Green, unless the defendants would undertake to show fraud on the part of Green. The defendants not claiming there was any fraud on the part of Green, the court rejected the evidence, and we think correctly. By the terms of the contract, as we have seen, the lumber was to be inspected and measured by some competent inspector to be chosen by both parties.

The evidence shows that Green was the man chosen by both parties to make this inspection and measurement, and that he in-

spected and measured the cargo delivered ; he was the umpire or arbitrator chosen to decide upon the quality and quantity of the lumber ; he has so decided, and his determination, we apprehend, is binding and conclusive upon the parties, and that neither party can now show it to be erroneous, or in any manner impeach it, except for fraud. Upon this point the following authorities are conclusive, and fully sustain the court in rejecting the evidence, no fraud being claimed.

McAvery vs. The Penn. & Ohio Canal Co.,
13 *Ohio*, 79.

Canal Trustees vs. Link, 5 *Gilman*, 521.

Randel vs. Ches. & Del. Canal Co., 1 *Harr*,
233.

Van Courtlandt vs. Underhill, 17 *John*, 405.

V.

The next inquiry relates to the first, third, fourth, fifth and eighth instructions asked by the defendants, and refused or qualified by the court.

The first instruction was asked as follows:

1st. That the inspection and measurement of the lumber described in the covenant declared on, by some competent person to be chosen by both parties, was a precedent condition to the recovery by the plaintiff; *and that the plaintiff must aver the performance of the precedent condition, and prove it, before he can recover ; and without such averment and proof, they must find for the defendants."*

The words italicised in the above instruction, were stricken out by the court, and the balance given. The error complained of is in the striking out of the italicised words.

The instruction as asked was certainly incorrect. It not only tells the jury that they must find the performance of a condition precedent to have been proven, but that they must construe the pleadings and determine upon their sufficiency, and unless they

shall find that the condition precedent was both alleged and proved, they must find for the defendant.

The portion given we also deem incorrect, as instructing the jury that as a condition precedent to his recovery, they must find that all the lumber mentioned in the contract had been inspected and measured by a competent inspector chosen by both parties. If all the lumber had been delivered, and this action had been brought solely for the price, it might perhaps be good, but it has no application to the facts in this case. As given, it is favorable to the appellants, and they ought not to complain of it. As asked, it was certainly erroneous in instructing the jury to construe the pleadings in the case.

The third instruction asked by the defendants and refused is as follows:

"3d. That the inspection and measurement of said lumber by an inspector to be chosen by both parties, was a preliminary step, and that the defendants could not fulfil their part of the contract without such inspection, and as the declaration and replication do not aver any such appointment of inspector to have taken place, or any offer on the part of plaintiff, and refusal by defendants to choose the same, or any inspection or admeasurement of said lumber, there is no cause of action stated in the declaration or replication, and the jury must find for the defendants."

This instruction is certainly anomalous. It tells the jury they have been listening to a mere farce, that although the evidence may show beyond all doubt that the plaintiff is entitled to recover, they must totally disregard it all, find a verdict for the defendant and put the plaintiff beyond the reach of ever asserting his claim again in a court of justice.

But if the position we have taken in discussing the pleadings be correct, this instruction is bad in another respect, and was properly refused, for it strikes at the pleadings and issue in the case and at nothing else, so also with the fourth and fifth, which are in the language following, to wit:

"4th. That it is not competent for the plaintiff to prove that the lumber delivered or offered to be delivered by him was inspected or measured, or that he offered to unite with defendants in choosing an inspector, which the defendants refused, because there is no allegation or averment in the declaration or replication thereof, and the proofs must be confined to the pleadings."

"5th. That there is no averment that the plaintiff was ready and willing to execute and perform the contract, according to the conditions and stipulations thereof, or that he was in a condition to execute and perform the same according to its conditions and stipulations, and therefore shows no right of action or of recovery; and, that all the evidence adduced by the plaintiff to show that the lumber was inspected and measured by an inspector selected for that purpose, or that such inspector or measurer was selected, must be stricken out, as there were no averments of such inspection or measurement in the plaintiff's pleadings, and the proofs must correspond with the pleadings."

These instructions raise simply the questions already discussed in relation to the pleadings and issue joined, and if our position on these questions is correct, they were all properly refused by the court.

The eighth instruction asked by defendants, and refused by the court is in the words following, to wit:

"8th. That if the plaintiff's evidence fails to prove that he has delivered to defendants the kind and quality of lumber called for by the covenant at the time specified, they must find for the defendants; and that a delivery of other kinds and qualities of lumber will not enable him to recover in this action of covenant."

This instruction is not founded upon, or drawn with the slightest reference to the facts in the case. It assumes the action to have been solely for the price of the lumber delivered, and under it, although the jury might find that the kind and quality of the lumber delivered was the same called for by the contract, and that the defendants had received it, still if they should find that it was not

delivered at the exact time required by the contract, they would be obliged to find for the defendants, although they might find that the defendants had waived this objection as to the time of delivery; so that, even allowing this action to be of the nature supposed or assumed in the instruction, it is fatally defective and was properly refused by the court.

The second instruction asked by the defendants, appears by the abstract to have been refused, although the record shows that it was given. (See R. 162½.) This instruction is subject to the same objections we have made to the first, third and fourth and fifth instructions, and if given, it must have been an oversight on the part of the judge. But from the record it appears to have been given, and certainly the appellants ought not to be allowed to complain of the giving of their own instruction.

If the foregoing instructions, or any of them, were improperly refused, still, unless the court can see that injustice has been done, we apprehend they will not disturb the verdict, for if substantial justice has been done, and the jury have found according to the justice and right of the case, these errors must be disregarded and a new trial refused.

Newkirk vs. Cone, 18 Ills. 454.

Dishon vs. Schorr, 19 " 59.

Elam vs. Badger, 23 " 502.

Schwartz vs. Schwartz, 26 Ill., 81.

V.

DID THE COURT, THEN, ERR IN OVERRULING THE MOTION FOR A NEW TRIAL, AND IN ARREST OF JUDGMENT.

Before the appellants can ask this court to set aside a judgment and grant a new trial, either for errors of law committed by the court, or for error in fact made by the jury, they must bring into this court a record and bill of exceptions which shows not only that the errors complained of have been committed, but also that substantial justice has not been done, and that the real merits of

the case require a different verdict. This rule we apprehend to be well settled in this court. See authorities last cited; and the following:

Gillett vs. Sweat, 1 *Gilman*, 475.
Grump vs. Stoker, 3 *Gilman*, 202.
Smith vs. Shults, 1 *Scammon*, 491.
Leigh vs. Hodges, 3 *Scammon*, 17.
Young vs. Silkwood, 11 *Ills.*, 36.

The record in this case, it seems to us, not only fails to show that any injustice has been done, but exhibits such a state of facts that it would seem utterly impossible, that a jury could have found otherwise than they have done.

The declaration alleges in general terms, that the plaintiff had kept and performed all his covenants; the defendants denied by their plea that he had failed to keep and perform certain of them, to wit, that relating to the appointment of an inspector; the plaintiff, in his replication, traversed this plea, and reaffirmed that he had kept all his covenants, including that mentioned in the plea. This replication operated to deny and put in issue every allegation in the plea.

Gould's Pl., p. 384, ch. 7, §§ 17, 27.

Green's testimony, which is in no manner disputed or questioned, shows that this covenant and condition thus put in issue was kept and performed by the plaintiff; that an inspector was appointed; that one cargo was delivered and inspected by him; that the appellants received the lumber thus inspected, and paid him for the inspection; that the appellants made no objection to the inspection or quality of the lumber.

Mr. Elmes, whose testimony stands undisputed, swears that he went with Curtis to Wallace & Holmes' office; that Curtis there demanded of them that they receive the lumber under the contract; that they answered they would receive no more lumber under the contract, and gave no reasons or excuse for not doing so. That Curtis then had a cargo of whitewood lying at their dock, &c.

Mr. Holbrook and Mr. Wilder both swear that there was a decline in the market price of this kind of lumber, from sometime about the last of April up to the first of July, and later, of about two dollars per thousand feet. Mr. Wilder also says that in a conversation with Wallace, one of the appellants, about this time, Wallace said he would not pay over \$8 for clear, and \$4, or \$4.50 for common; that he had a contract with Curtis, and he was not going to take any more of him, as he could get it for \$4 and \$8. There is no evidence in the record that the lumber delivered has ever been paid for. Neither is there any breach of covenant, fault or neglect, on the part of Curtis, any where shown in the record.

It seems to us, therefore, there is no error in the record, and that the judgment of the court below ought to be affirmed.

WALKER & DEXTER,

Counsel for Appellee.

April 16, 1864.

199-

John S. Wallace

& Thomas W. Holmes appellants

vs

Destin Cuntiss appellee

State of Illinois

3d Grand Division

at Ottawa in LaSalle County Ill. Hiram Fidler
 then being duly sworn says that he is attorney
 for appellants in the above cause, that since
 the filing of the records in said cause he has
 ascertained by examination of the original bill
 of exceptions now on file in the office of the
 clerk of the Superior Court of Chicago
 that said clerk has made a mistake in
 copying the bill of exceptions aforesaid
 into the records. The commencement of the
 testimony of ^{John Reggs} in the record aforesaid now reads
 thus at fol. 107 "I was at the office and
 yards of Wallace and Holmes about
 the time of the arrival of the first cargo"

In the original bill of exceptions
 on file as aforesaid the word last is
 plainly & legibly written instead of first
 the mistake being clearly that of the clerk
 in copying into the records. Depoent con-
 sider the testimony as it stands in the original
 of considerable importance to appellants
 in as much as the error if allowed to stand

would introduce confusion & misunderstanding to some extent on a point which is considered material tho' deponent freely admits that the error could be pretty clearly proven by comparing the different parts of the testimony: That is to say: the sense seems to require last instead of first And further deponent saith

J. H. Mather

Subscribed & Sworn to
May 9th 1864 before me
L. Seland
C.D.

199

Wallace & Holmes
appellants

vs
Dexter Curtis
appellee

Affidavit

Matthew & Japt Hlyp

Motion for leave to
Correct Record

vs

to allege diminution
& reset the record
back for correction

Matthew

199-

Wallace & Holmes
appellants

or

Dexter Centiss appellee

Supreme Court of
Maine 3rd Circuit
Division

April Term 1864

It is hereby stipulated & agreed between the
attys & Counsel in the above cause that the
Records in said Cause be considered by the
Court as amended by substituting the word
last in the place of first in the opening
Sentence of Sabin Keyes testimony offered
by the appellants as sworn to by W. H. Matthews
And that said Cause with this correction
be submitted to the Court without argument
on Printed Brief & Points made by the
Counsel & filed

Walker Dexter
attys for Appellee

Kathen & Tapp
Attys for appellant

199- 163

Wallace & Holmes
appellants

^{vs}
Lester Curtis
appellees

Stipulation
to
Correct Record
&
Submit Cause
on Brief & Points

Filed May 10. 1864.
L. Island
Clerk

Jameson & Morse, Printers, Chicago.

IN THE SUPREME COURT,

THIRD GRAND DIVISION, APRIL TERM, A. D. 1864.

JOHN S. WALLACE AND THOMAS W. HOLMES,	}	<i>Appeal from the Superior Court of Chicago.</i>
<i>Appellants,</i>		
vs.		
DEXTER CURTISS,	}	
<i>Appellee.</i>		

POINTS AND BRIEF FOR APPELLANTS.

POINT I.

The court below erred in overruling the defendant's motions for a new trial, and in arrest of judgment.

POINT II.

The court below erred in allowing the plaintiff to give evidence of inspection and measurement of lumber, for want of suitable averments of those facts in the pleadings on his part.

POINT III.

The court below erred in suffering the plaintiff to give in evidence the contract copied into his second count, inasmuch as the plaintiff in his pleadings had made none of the necessary averments or allegations touching the inspection and measurement of lumber, which, by the terms of the contract, became a condition precedent to his right to sue; or else he was bound to have stated a sufficient excuse for the omission.

POINT IV.

The court below erred in overruling the motion of defendant's counsel, made at the close of plaintiff's proofs, to exclude from the consideration of the jury the evidence given by the plaintiff on the subject of inspection and measurement of lumber.

POINT V.

The court below erred in refusing to permit the witness for defendants (by the name of McGlade, a regular inspector,) to show want of conformity to the specifications of the contract in the inspection by Green, the plaintiff's witness.

POINT VI.

The court below erred in regard to the instructions to the jury asked by defendants—

First: In striking out, or refusing to allow that part of the defendant's 1st and 2d instructions touching the subject of inspection and measurement of lumber, which was, in matter of fact, the whole substance of both.

Second: In refusing to give the 3d, 4th, 5th and 8th instructions asked by the defendants.

(As the authorities hereafter cited will be found to apply indiscriminately to nearly all the points, as above stated, it was deemed unnecessary to repeat them under each point separately; besides which, the counsel for defendants wished to consult their own convenience by amplifying a little, by way of argument, under several of the cases cited.)

The provisions of the contract touching *inspection and measurement* of the lumber, constituted as we contend, a *condition precedent* which the plaintiff was bound to have met by corresponding averments in the declaration, showing his compliance therewith, or stating other facts showing a sufficient excuse for the omission.

Instead of this, the declaration avers the delivery of one cargo of lumber which it says the defendants accepted under the contract, and that the plaintiff offered to deliver other quantities of lumber under the contract, which the defendants refused to accept.

The plaintiff's pleadings, it is seen, wholly ignore and refuse to take any notice of the condition precedent, either by averring it as performed or excused.

The defendants (waiving their demurrer,) have therefore set up by several special pleas, the plaintiff's default on the score of compliance with the *condition precedent*, averring their own readiness to receive and

pay for lumber duly inspected and measured according to the *condition precedent* in that behalf.

The plaintiff *replies* to all these pleas, "that the defendants, *of their own wrong and without the cause* in their pleas alleged, *broke their covenants, &c.*

When covenants are independent, performance need not be averred, but otherwise where they are dependent. It is then essential that the plaintiff should aver performance, or an offer to perform his part of the covenants. Per Wilson, C. J., in 3 *Scam. Rep.*, 234, *case of Davis vs. Wiley*.

In this case it will be perceived, the plaintiff had averred in his declaration, that he had kept and performed all his covenants, (and such is the averment of Curtis in the case now appealed.) *But* (say the court) inasmuch as his covenant to do the work was not broken by a failure which was the result of sickness, it cannot be understood from his general averment that he had completed the ditching according to his contract, and as that is essential to his recovery of the price agreed upon, it should have been specially averred, and this not having been done, the omission of a sufficient averment in the plaintiff's declaration, was the first defect in the pleadings, and consequently one reached by the demurrer to the defendant's plea. Judgment reversed, with leave to plaintiff to amend his declaration.

So in the case before us, plaintiff's general averment *in narr*, that he had kept and performed all his covenants, and his replication, that defendants, without the causes alleged, had broken theirs, neither or both of them are equivalent to an averment, that he, the plaintiff, had performed the special condition precedent, by having the lumber inspected and measured by an inspector duly appointed by the parties, or that he had offered to join in an appointment of inspector, and defendants refused to co-operate with him therein. It could not therefore be understood from the plaintiff's general and loose way of averring performance, upon what basis he wished to rest his claim.

In the case of *Graves vs. Legg*, 9 *Excheq. Rep.*, 709, the agreement sued on was for a cargo of wool, to be shipped from Odessa to London or Liverpool, "*and the names of the vessels to be declared, (i. e. announced to the purchaser beforehand,) as soon as shipped.*"

This provision, the court decided unanimously to be a *condition precedent* to the right to recover.

The plaintiff did not aver the condition as performed, in his pleading. The defendant therefore set it up by special pleas (*as we have done in this case*), yet the court gave judgment for the defendant, on the ground that the omission of the plaintiff to aver performance of a condition precedent, or an excuse for it, was a fatal error, bad *on demurrer or in arrest of judgment*.

In the case of *Worsley vs. Wood*, 6 T. R., 710, the failure of plaintiffs to perform a *condition precedent*, was set up by pleas (as in the case in hand), and besides issues were framed by defendant, on the sufficiency of the *excuses* set up in some of the counts by plaintiff, for non-compliance to the full extent of the condition. The cause was tried, and judgment for plaintiff, on all the issues. But the court *reversed the judgment*, declaring the law to be that the parties had a right to make conditions precedent as stringent as they pleased, and that they must be complied with in such cases, or a good and sufficient excuse given, and that *the error was not cured by the verdict of the jury*.

In the case of *Childress vs. Foster*, 3 Pike (Ark.) R., 252, the head note embraces this: "When the right of action depends upon the performance of a condition precedent by the plaintiff, if the declaration does not aver performance, the omission is not cured by verdict.

At page 260 the court say, "If performance, or what is equivalent thereto, be not alleged, the defendant *may plead non-performance of the conditions precedent* in bar of the action, *or take advantage of it on demurrer or in arrest of judgment*, if the omission appears on the record.

In 9 Peters R., 319, *U. S. vs. Robeson*, the court say, "when the parties in the contract fix upon the mode by which the amount to be paid shall be ascertained, the party seeking to enforce the agreement *must show* that he has done every thing on his part which could be done. The contract *is a law* between the parties, and as obligatory as any part of it."

In 8th T. R., 366, *Glazebrook vs. Woodrow*, the rule is laid down with great clearness by Le Blanc, J., page 374, concurred in by all the judges, that "no person shall call upon another to perform his part of a contract, until he himself has performed all that he stipulated to do as

the consideration for the other's promises. Lord Kenyon, C. J., says in this case at page 370. "*The very statement of such a claim* (i. e. a statement, meaning, which omits the averment of plaintiff's performance of a condition precedent entitling him to pay), *is enough to refute it.*"

The case of *Traver vs. Halstead*, 23 *Wend. R.*, 66, will be found to sustain the principles on which our defense rests in this cause. The distinction we note in the case in hand from *Traver vs. Halsted*, is this:

The tender or offer alleged by Traver, on 5th April, was of certain specific securities (to assume payment of a mortgage, and to pay the balance of purchase price by 1st May).

The tender or offer was of certain defined securities, which the contract called for, and to pay balance by 1st May; there was no room for cavil or evasion by Traver. Not exactly such was the case of *Curtiss*. He contracted within a certain time to deliver a certain large quantity of lumber of certain kinds, (requiring of course many different cargoes), but "*all subject to inspection and measurement at Chicago*, by a competent inspector to be chosen by the parties," and payment therefor to be made by that *inspection and measure*, $\frac{1}{3}$ on delivery, $\frac{1}{3}$ in 40 days and $\frac{1}{3}$ in 4 months from the delivery of each cargo."

(By the way, there is no averment in the declaration, that even those terms of credit have expired as to any portion of the lumber.)

Curtis' covenant cannot be satisfied by any offer of lumber, though its kind, quality and quantity, may fully answer the calls of the contract. He was also bound to inspection and measurement, by a mutually chosen inspector. To put the defendants in default, he must not only offer lumber of such and such qualities, but he must offer to join defendants in selecting an inspector; for such is the express demand of the contract, and the cases all show that those items of conformity on his part, must all be properly averred in the declaration, or an excuse given for omitting it, it becomes a part of his title to sue, and he may not sue without stating his whole title. Suppose, for a moment, that plaintiff at this stage of the case had demurred to defendants pleas, and suppose them even to have been bad on demurrer, yet must the plaintiff fail, (as we contend,) because his declaration is defective in not stating performance of the condition precedent at all, (and on demurrer that party fails who committed the first error in pleading, though it be not the pleading demurred to.) The present case however does not come before this

court on demurrer, but on defendants' pleas of conditions precedent, unperformed and not even averred, and on motion for new trial and in arrest of judgment, in all which the law is to be administered precisely as if the question had come up on demurrer, inasmuch as the trial and verdict cannot cure an erroneous or defective pleading. The recovery stands upon a defective *basis*, and according to Noyes' Maxims, "*Debile fundamentum fallit opus.*"

The case of *Morton vs. Lamb*, 7 T. R., 121, is where after plea of general issue only, trial and verdict for plaintiff, the defendant moved an arrest of judgment, because the declaration *omitted to aver performance of a condition precedent*, (tender of the price of corn, or a readiness to pay on delivery). Lord Kenyon, C. J., Grose & Lawrence, justices, unanimously *arrested judgment for that defect*.

It would be an endless task to cite all the cases on the subject.

The general doctrine covering the whole ground, is well expressed by Judge Van Ness in 5 John. R., 179. He says, "A general principle which pervades all the cases is, that when the plaintiff himself is to do an act to entitle him to the action, he must either show the act done, or if not done, at least that he has performed everything that was in his power, and which he was bound to do.

In T. R., 145, *Spiers vs. Parker*, Buller, J., says: "As to its being *intended after verdict*, *nothing is to be presumed* but what is expressly stated in the declaration, or what is necessarily implied from the facts which are stated."

Lord Mansfield, on the same page, says with reference to the same defect in pleading: "As to its being *after verdict*, it is only necessary to prove at the trial what is alleged in the declaration."

The case of *Byrne vs. McNulty*, in 2 Gilm. R., 417, an examination will be found to contain principles to sustain the positions above taken. A general averment of performance, of the description referred to by his honor Judge Treat, would in the present case be precisely such as were made by the plaintiff Curtis, i. e. that he had performed his covenants by delivering and offering to deliver cargoes of lumber such as the contract called for, one of which was accepted and the others offered refused. "But (says Judge Treat) when the act to be done necessarily involves a question of law, *the general allegation will not suffice, but the quo modo must be pointed out,*" and he refers to 3d Scam. R., 234, case

of *Davis vs. Wiley*, (cited above,) as a case in like manner requiring more than an averment of general performance by the plaintiff.

In the present case, the contract required of Curtis not merely the delivery of lumber of certain qualities, but it required a series of acts to be done, involving not merely what was to be done by Curtis himself, but by Wallace & Holmes, the other party in concurrence with him, and not by those several parties only, but by a third person whom they should mutually select, who was to do the most important part of all. Now we ask, is not the *quo modo* of all those *res gestæ*, a special matter involving delicate and important questions of law, such as *what is a legal and sufficient tender or offer* regarding an appointment of inspector and measurer? In case of a refusal by one party to agree upon an inspector, are the reasons given good and valid or evasive? and what also is the true construction of the contract, as to the *quo modo* of inspecting and measuring? We beg leave to suggest that the very difficulties in which the parties found themselves involved on those subjects, when they undertook to try the cause on those informal issues, speaks volumes in answer to the question. In fact, no case can be stated more loudly calling for a special averment by the plaintiff in his declaration as to the performance of the condition precedent, and the *quo modo* of it.

Again: Chitty, vol. 1st, under the heading of "Replications to a special plea," at page 613, says: "The *traverse* should also be on some *affirmative* matter, and not put in issue a *negative allegation* thus, if a plea state a request to deliver an abstract and a refusal, a replication that the plaintiff did not *neglect* and refuse to deliver such abstract, *would be insufficient*.

The burden of Wallace & Holmes' special pleas was, that the plaintiff *did not*, in conformity with the contract (which required inspection and measure so and so), cause the lumber to be inspected, &c., as the contract required, nor did defendants accept as inspected, &c., but objected for want of it. So of all the special pleas; they allege a non-conformity by plaintiff, to the terms of a condition precedent. What, then, is the logic of a general replication, that defendants of their own wrong and without the cause by them alleged in said pleas, broke their covenant?

Is it not the manner of an issue precisely which Mr. Chitty condemns?

Is it not an attempt to get up an issue upon the *negative* attributed to them in the pleas?

It seems to amount to this, *precludi non*, because they say the defendants broke their covenant *without* the plaintiff *being guilty of the neglect* as to inspection, which the pleas attribute to him.

This is also the same defect in pleading which Judge Treat specifies in the case above referred to.

See also 1 *Chitty*, p. 584: "If the plea in effect denied or showed that no valid contract or promise was ever made, or claimed for defendant an interest in the goods stated in the declaration, (and so by analogy if the plea state plaintiff's non-performance of a condition precedent), then a replication *de injuria*, or that defendant broke his promise of his own wrong, without the cause alleged in the plea, would be insufficient, because the plea was in effect that the defendant never undertook, and therefore it is illogical to reply that he broke his promise."

The place for the averments on which the merits of the plaintiff's claim was to turn, was in the declaration.

In that the pleader in this case studiously refuses to show his hand.

When he is shown the difficulty, being reminded by the special pleas, he attempts to prepare for trial by starting issues on the general allegation, *de injuria*, &c., *without* the plaintiff being guilty (negatively) of the neglect of his duty imputed to him by the pleas. It amounts to this, merely: I did not (the plaintiff says,) neglect my duty, as you say I did. This cannot be logically equivalent to a full averment of performance of his duty.

This issue, we submit, is inappropriate to the case in hand. The studied *hiatus* of the declaration cannot be mended by an evasive issue upon the plaintiff's neglect, for, as the law is fairly stated by Judge Treat, and other cases cited, the rules of correct pleading demanded of him, that he should state *affirmatively* the *quo modo* of his compliance with the all important condition precedent touching an inspector, his appointment, and how, or whether in all (and if not, why) he did his duty, to enable the court to adjudge whether he had done all his duty, so as to entitle him to recover.

The nature of the case shows this, for the laboring oar is with the plaintiff; his is the burden of proof, and the *probata* must correspond with the *allegata*, which lays the foundation for them; otherwise pleadings before trial are of no use whatever.

THE FIFTH POINT

in the assignment of errors, is, that the court below erred in refusing to permit the defendant's witness, McGlade, (a regular inspector,) to show a want of conformity to the specifications of the contract, in the inspection by Green, the plaintiff's witness.

Assuming, for the sake of argument, that the questions touching the condition precedent of inspection and measure of lumber could be properly triable without the plaintiff's making the proper averments, on his own part, on those issues, we still insist that the defendants were not bound by Green's inspection, irrespective of the consideration of *capacity* or *incapacity*, *honesty* or *fraud*, correctness or mistake, made by him.

But his honor, the Judge, decided that the defendants could give nothing in evidence to modify, correct, or in any wise affect the inspection and measurement of the plaintiff's witness, Green, except *actual fraud*. From this position we dissent.

The parties may have fallen upon an incompetent inspector; he may have made gross mistakes, short of *fraud*; his condition, as respects mental or bodily capacity or indisposition, might be such, and the errors he would commit in consequence, might be such as to show him unreliable, without imputing fraud, or combination with plaintiff to cheat.

Wallace was manifestly dissatisfied with his inspection, and in one instance interfered on the inspection by saying to Green (fol. 88) that a common piece was a cull. Green, however, does say (in the same folio) that no objection was made to the manner of his inspection. In this he was contradicted by the defendant's witness, Keyes.

Keyes, who witnessed the inspection by Green, states that he observed Green was not following out the specifications in the contract, and he informed Wallace and Holmes thereof on the spot. (See bill of exceptions at fol. 109-110.) Wallace and Holmes came out and declared their dissent, and that they would insist upon its being inspected over again.

Green himself stated, at folio 88, that after he inspected it, the next day it was inspected over again by "*regular inspector*," McGlade & Brother (using witness' own words). This expression seems to imply an admission that he was not a regular inspector, or at least that Mc-

Glade was in some sense, perhaps, his superior. This may be unimportant; we confess we do not clearly understand it. No doubt, however, both parties at first called on Green to inspect the first cargo, and Green says they expected him to do all the inspecting as the cargoes should arrive afterwards.

But we insist that either party could withdraw their consent to Green's appointment *for sufficient cause*, if any such existed; at least to his inspecting the cargoes yet after to arrive.

With this view, to show the true merits or demerits of Green's inspection, and how egregiously, for some cause unknown to defendants, he had overrated the lumber as to quality, quantity and classification, defendants called a regular inspector, McGlade, to go over it again the next day. Green himself says McGlade went over it after him, and that McGlade was a *regular*.

We insist, therefore, inasmuch as the object of a trial is to arrive at the whole truth, the court could not possibly know whether Wallace and Holmes had just cause for their dissent, unless by hearing from McGlade and others a full statement of the *quo modo* in which Green followed out the specifications of the contract.

It certainly does appear that Green's inspection was unusual as to its mode. It was always customary, as witnesses state, for an inspector to be attended by a tally man. This seems intended to guarantee *accuracy*, which is not a small matter in measuring such large quantities of lumber.

But, for causes we know not, Green chooses to keep his own tally. The court rejected McGlade's testimony, wholly because the defendants would not undertake beforehand to confine themselves to proof of *fraud*.

John Keyes, at fol. 107-108, swears that Curtis, the plaintiff, called on Wallace & Holmes, and insisted as his right, that Green should continue to inspect and measure the future cargoes, and announced his determination in advance not to deliver any more lumber under the contract, except on that condition.

Wallace & Holmes then placed their refusal as to the residue squarely upon the ground of Green's demonstrated incapacity.

It being well known that inspectors at commercial towns are as plenteous as coal at New Castle, the very fact of plaintiff's irreversible adherence to Green is a circumstance naturally tending to create suspicion: was he the only trusty man in so great a market?

Any person wishing in good faith to fulfill his contract, could certainly find one more competent inspector, and Green himself certifies McGlade to be a *regular* one.

The court will notice that Green's evidence (fol. 86) gives the measure of the first cargo, footing at 69,773 feet. But only the two first items, 19,787 feet, and 29,415 feet, were of those descriptions of lumber called for and deliverable under the contract.

This shows (and so indeed it would were we to allow the whole bill of 69,773 feet) that the contract prices for the same would only come to a moderate proportion of the thousand dollars damages awarded the plaintiff by the jury.

Hence it is seen that the jury allowed the plaintiff damages for the non-reception by defendants of all the residue contracted for.

The case of *McAvoy vs. Long et al.*, in 13 Ill. R., 151, states a principle applicable to such cases, which fully sustains our claim to introduce McGlade as a witness to show the error of Green in the construction of the contract and the manner of inspection.

The principle referred to is contained in the closing part of the opinion of the court by Trumbull, Just.: "Hodges, in determining the amount of work done, necessarily had to refer to the contract to see how he was to make the measurement. *But his construction of the manner of measuring the work would not be conclusive upon the parties.*"

In that case, Hodges was appointed to the position of measurer, by the contract itself; and therefore the court say, "in the *absence of fraud*, his measure, as to quantity of work done, was conclusive."

But in the case in hand no inspector was appointed by the contract. It was left to the parties mutually to select an inspector as the lumber should arrive.

What defendants offered to prove by McGlade, (and which would have been followed up by others equally well qualified,) was, that he gave a construction to the contract differing from the true and legal construction, so as to admit and pass lumber not allowed by the contract.

We also insist, as he was not an inspector appointed by the contract itself, we had a right to show incapacity, or any erroneous inspection, as a reason for dissenting from his inspection, so far as it proceeded; but still more, as a reason for dissenting from his *continuing to inspect the cargoes yet to arrive*, (which latter point of difference was distinctly the point on which the parties split apart on the execution of the contract).

Wallace and Holmes insisted another inspector should be called in. But the plaintiff insisted on Green only.

With regard to the case of *Hall vs. Nees, 27th Ill., 443*, which was relied upon by the plaintiff's counsel, we would only say, we can see no application of the principles there announced to a case like the present.

In that case the motion in arrest was urged on to argument, and the same being overruled, judgment passively suffered to be entered, while the motion for a new trial was permitted to pass over, without the least attention from the mover, for several terms—but was finally called up. This, the court said, looked very much like a trick. This surely has no application when both motions are argued together at the same time, and at the same term at which the trial occurred.

For these reasons we respectfully submit that the judgment in this case should be reversed.

MATHER & TAFT,
Atty's for Appellants.

199 163

Wallace & Holmes
vs appellants

Dexter Curtis
appellee

Brief & Points
for
appellant

Mathew & Taft

Filed May 2, 1864
J. L. Smith clerk

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, COUNTY OF COOK, SS.

Record 11, page 1
Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within
and for the County of Cook and State of Illinois, at a regular Term of said Superior Court
of Chicago, begun and holden at the Court House, in the City of Chicago, in said County
and State, on the first Monday, being the Seventh day of
December in the year of our Lord One Thousand Eight Hundred
and Sixty Three and of the Independence of the United States of America
the Eighty Eighth.

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Van H. Higgins } Judges.

Joseph E. Gary }

Joseph Knox Prosecuting Attorney.

David L. Hammond Sheriff of Cook County.

Attest, Thomas B. Carter Clerk.

Be it remembered that heretofore, to wit, on the
twenty fifth day of November in the year of our Lord
one thousand eight hundred and sixty one, there
issued out of the office of the Clerk of the Superior
Court of Chicago aforesaid, the Peoples writ of
Summons, which summons with the Sheriffs
Return thereon, is in the words and figures follow-
ing, to wit.

Summons

1
Dec - 2 +

State of Illinois }
County of Cook }
The People of the State of Illinois, to the Sheriff of said County: Greeting)
We Command you that you Summon John S. Wallace and T. W. Holmes if they shall be found in your County, personally to be and appear before the Superior Court of Chicago of said Cook County, on the first day of the next term thereof, to be holden at the Courthouse in the City of Chicago in said Cook County on the first Monday of January next, to answer unto Dexter Curtiss in a plea of covenant to the damage of said Plaintiff as he says in the sum of two thousand dollars. And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

+ Dec. 3

Witness Walter Kimball
Clerk of our said Court, and the Seal thereof
at the City of Chicago this
25th day of November A.D. 1861
Walter Kimball. Clerk



(Return)

Served this writ by reading to the within named defendants, on John S. Wallace on 30th day of November 1861, and on T. W. Holmes on the 4th day of December 1861.

+ Dec 4

A. C. Wesing Sheriff
by Wm Wayman (Deputy)

And afterwards, to wit, on the day and year
aforesaid, Dexter Courtis, by his Attorneys Walker
Van Arman & Dexter, filed in the Office of the
Clerk of Said Court his certain Declaration,
which is in the words and figures following,
to wit,

(State of Illinois }
 Superior Court } January Term A.D. 1862
 of Chicago }

full
 Dexter Laurits, Plaintiff in
 this suit by Walker Van Arman & Dexter his
 attys, Complain of John S. Wallace and J.
 W. Holmes Defendants partners, doing business under
 the name firm & style of Wallace & Holmes of a
 plea of breach of covenant.

+ Vol 5
 For that whereas here-
 tofore, to wit, on the tenth day of April 1861 at
 Chicago in the State of Illinois, the said (Defen-
 dants made and entered into a certain Indenture
 with the plaintiff sealed with their seals and
 having the date aforesaid, which Indenture is
 now to the Court shown and by which said In-
 denture, the said plaintiff agreed to deliver at
 the Lumber Yard of said Defendants at Chicago
 aforesaid five hundred thousand feet of white
 wood lumber and from forty to fifty thousand
 feet of White Ash lumber to be cut as follows
 the White Wood lumber lumber into the following
 kinds and qualities

+ Vol 6
 Fifty thousand feet clear flooring plump 1½ inches
 thick and 6 inches wide.

Thirty thousand feet Scantling 3½ x 3½ inches square
 Thirty thousand feet Scantling 4 x 4 inches square
 fourteen feet long.

Thirty thousand feet Clear plank, plump $1\frac{1}{4}$ inches thick.

Thirty thousand feet Clear plank, plump $1\frac{1}{2}$ inches thick.

Thirty thousand feet Clear plank, plump two inches thick.

+ Par 7

Sixty thousand feet⁺ Clear plank, plump $1\frac{3}{4}$ inches thick and 14 to 16 inches wide.

Two hundred and forty thousand feet boards, plump one inch thick -

The Ash to be Cut into square edged plank from two to four inches thick as said Wallace & Holmes may direct.

All of the above lumber to be subject to inspection and measurement at Chicago by some competent inspector to be chosen by both parties - The White Wood to be inspected into two qualities viz. Clear and Common and all boards and plank (except chair plank and flooring) that are less than fourteen inches in width are to be classed as Common lumber. - All of the above lumber to be delivered by said Plaintiff to said Defendants at their Lumber Yard in the City of Chicago aforesaid by the first day of July A.D. 1861

+ Par 8

And the said Defendants by said indenture covenanted to receive said lumber and pay said plaintiff therefor as follows, to wit, the sum of Eleven dollars per thousand feet for

+ Fol 9

the Clear White Wood lumber, and Seven dollars per thousand feet for the Common white wood lumber and twelve dollars per thousand feet for the white Ash lumber, and the payments to be made as follows: One third down on the delivery of each Cargo of said lumber, and one third in forty days, and the remaining one third in four months after the delivery of each Cargo.

And after the making of said Indenture the said plaintiff entered upon the performance of his Covenants therein contained, and some time in the month of April 1861, under the said indenture to said defendants at their Lumber Yard at Chicago a Cargo of lumber which they the said defendants accepted, consisting of the following qualities⁺ and quantities of lumber, to wit,

+ Fol 10

Nineteen thousand seven hundred and eighty seven feet Clear white wood,

Twenty nine thousand four hundred and fifteen feet Common White Wood

Seven thousand five hundred and forty seven feet Culls, also forty seven feet Ash lumber.

And afterwards, to wit, on the first day of May 1861, the said Plaintiff offered to deliver to the said defendants at their Lumber Yard in the City of Chicago aforesaid another Cargo of lumber according to the Covenants of said indenture which the said⁺ defendants refused

+ Fol 11

to receive).

And the said plaintiffs then and there offered to deliver the lumber as provided in said Indenture, but the said defendants refused to receive any more lumber of the said plaintiff as provided in said indenture or to pay for that delivered although often requested so to do.

+ Vol 12 And although the said plaintiff hath always from the time of making the said indenture hitherto well and truly performed fulfilled and kept all things therein contained on his part and behalf to be performed fulfilled and kept according to the tenor and effect thereof. Yet the^d said Defendants hath not kept with him the covenants or any of them so made between them as aforesaid but have broken the same, and to keep the same with the said plaintiff, the said defendants have hitherto wholly refused and still do refuse to the damage of the said plaintiff Two thousand dollars, and therefore he brings this Suit &c

+ Vol 13 For that whereas heretofore, to wit, on the 10th day of April 1861 at Chicago aforesaid, said defendants made to and with the said plaintiff a certain indenture in the figures and words following^d is to wit
This agreement made the 10th day of April 1861, by and between Dexter Curtiss of Lake

Townships, County of Berrien, State of Michigan
 and Wallace and Holmes of the City of Chi-
 cago, State of Illinois Witnesseth - That
 the said Dexter Courtiss in consideration of
 the agreements hereinafter contained to be per-
 formed by Wallace & Holmes agrees to deliver to
 the said Wallace & Holmes at their Lumber Yard
 in the City of Chicago on or before the first
 day of July next Five hundred ~~M~~ feet of white
 wood and from forty to fifty thousand feet white
 + Dal 14 ash lumber⁺ all of a good sound, and merchant-
 -able quality. the white wood to be cut as follows
 50 ~~M~~ feet of Clear flooring plump $1\frac{1}{2}$ inch thick and
 6 inches wide

30 ~~M~~ feet Scantling plump $3\frac{1}{2} \times 3\frac{1}{2}$ inches square
 30 ~~M~~ feet Scantling 4×4 inches square 14 feet long
 30 ~~M~~ feet Clear plank plump $1\frac{1}{4}$ inches thick
 30 ~~M~~ feet Clear plank plump $1\frac{1}{2}$ inches thick
 30 ~~M~~ feet Clear plank plump 2 inches thick
 60 ~~M~~ feet Clear plank plump $1\frac{1}{4}$ inches thick
 and 14 to 16 inches wide

240 ~~M~~ boards plump one inch thick

+ Dal 15

The Ash to be⁺ cut into square edged plank
 from two to four inches thick, as said Wallace &
 Holmes may direct. - all of the above lumber
 to be subject to inspection and measurement
 at Chicago by some competent inspector to be
 chosen by both parties. The white wood to

be inspected into two qualities Viz. Clear and Common — and all boards and plank (except Chair plank and flooring) that is less than fourteen inches in width is to be classed as Common lumber. The Ash lumber to be made merchantable by inspection —

+ Fol 16 And the said Wallace and Holmes agree to pay to the said Dexter Curtiss the sum of Eleven dollars per ~~M~~ feet for the Clear and seven dollars per ~~M~~ feet for the Common white wood lumber — For the white Ash the sum of twelve dollars per ~~M~~ feet to be paid in three equal payments of one third down on delivery, one third in forty days and the remaining one third in four months after the delivery of each cargo. And it is understood by the parties that the said Dexter Curtiss will immediately begin shipping to Wallace and Holmes the said lumber and that said Dexter ⁺Curtiss will not suffer any other contracts or Bills for lumber to interfere in any way to detain him from delivering from one to ten Cargos Weekly until said Contract is filled with Wallace and Holmes. In Witness whereof the parties have hereunto set their hands and seals the day and year first above written
(Dexter Curtiss Seal)
Wallace & Holmes Seal

Fol 17

Two thousand dollars and therefore he brings
Suit &c

+ Pol 20

Walker Van Arman & Dexter
Pltffs. Attys.

Copy of Instrument sued on in the 2nd Count

And afterwards to wit, on the Eighth day of Jan-
-uary in the Year of our Lord one thousand eight
hundred and ~~six~~ sixtytwo, said day being one of the
days of the January Term of said Court, the follow-
-ing among other proceedings was had and
entered of record in said Court, to wit.

Dexter Curtiss -

10/6

v^s

Covenant

85 10

John S. Wallace & J. W. Holmes

On Motion

Attorneys for said Defendants it is ordered that
the Rule to plead herein⁺ be, and is hereby extended
three days from this day.

1 Pol 21

Record 10 page 236

And afterwards to wit on the day and Year aforesaid said
Defendants by their Attorneys Mathias Bates &raft filed in the
office of the Clerk of said Court, his certain Plea and Demurrer
which are in the words and figures following, to wit:

State of Illinois }
Cook County - } ss Superior Court of Chicago
January Term 1862.

John S. Wallace &
Thomas W. Holmes
ads
Dexter Curtiss - }

1st And the said John S. Wallace and Thomas W. Holmes Defendants in this suit, by Mather, ⁺ Bates and Taft, their Attornies, come and defend the wrong and injury when &c and say that the said Indenture of Covenant in the said Declaration mentioned is not their Deed; and of this they put themselves upon the Country.

not in And the said Defendants by Mather, Bates & Taft, as to the said second Count in the plaintiffs Declaration mentioned, and the matters and things therein set forth, say that the said second Count and the matters and things, therein contained, in manner and form as the same are in ⁺ said second Count above stated, and set forth are not sufficient in law for the said plaintiff to have or maintain his said action thereof against the said Defendants, and that the said Defendants are not bound by law to answer the same.

And this the said

Defendants are ready to verify).

Wherefore by reason of the insufficiency of the said Second Count of the said Declaration mentioned in this behalf the said Defendants pray judgment and that the said plaintiff may be barred from having or + Dec 24 maintaining his aforesaid action in said Second Court mentioned against them.

Mather Bates & Taft
Attys for Defts.

And afterwards to wit on the Ninth day of January in the year aforesaid. Thomas W. Holmes one of said Defendants filed in the Office of the Clerk of said Court his Certain Affidavit of Merits, which Affidavit is in the words and figures following to wit:

Affidavit of Merits

State of Illinois }
Cook County }

Superior Court of Chicago

Dexter Curtiss —

v. s

John S. Wallace

and Thomas W. Holmes.

Thomas W. Holmes

of said County being duly sworn deposes and says that he is one of the Defendants in the above cause, and that he believes the said Defendants in the above cause have a good defense to said suit upon the merits.

Thomas W. Holmes

Subscribed and sworn to
before me this 9th day of
Jan^y 1862.

Thomas B. Carter, Clerk.

And afterwards, to wit, on the Tenth day of
January, in the year aforesaid, said Defend-
-ants by their Attorneys Mather, Bates & Taft
filed in the Office of the Clerk of said Court
their certain Special Pleas, which Special Pleas
are in the words and figures following to wit:

Special Pleas

not in

State of Illinois } ss
Cook County }Superior Court of Chicago
January Term 1862.John S. Wallace &
Thomas W. Holmes
adsm

Dexter Courtiss

2^d

+ Feb 26

And the said defendants for further plea in this behalf say that the said Plaintiff, his action aforesaid against the said Defendants ought not to have or maintain because the said Defendants say after the said supposed breaches of Covenant of the said Defendants and before the commencement of the said action of the said Plaintiff against the said Defendants in this behalf to wit, on the first day of June in the year of our Lord one thousand eight hundred and sixty one, the said Defendants paid to the said Plaintiff the said several sums of money in the Declaration of the said Plaintiff mentioned, and this they are ready to verify.

+ Feb 27

Wherefore they pray judgment if the said Plaintiff ought to have or maintain his aforesaid action thereof against them &c

Mather, Bates & Tapp
Attys. for Defs.

not in

And for a further plea in this behalf, the said Defendants say, that the said Plaintiff ought not to have or maintain his aforesaid action thereof against them, Because, they say, that the said Plaintiff before and at the time of the commencement of this suit, to wit, &c aforesaid, was and still is indebted to them, the said Defendants, in a large sum of money, to wit, the sum of Two thousand and five hundred dollars of lawful money of the United States of America for goods bargained and sold by the Defendants to the plaintiff at his request, for goods sold and delivered by the Defendants to the Plaintiff at his request; ~~for goods sold and delivered by the Defendants to the Plaintiff at his request~~; for money lent and advanced by the Defendants to the Plaintiff at his request; for money paid by the Defendants for the use of the plaintiff at his request; and for money received by the plaintiff for the use of the Defendants.

+ Fol 28

And whereas also the Plaintiff afterwards, to wit, on the day and year aforesaid was indebted to the Defendants in the further sum of Two thousand and five hundred, dollars for work done, and materials for the same provided, by the Defendants for the plaintiff

+ Fol 29

at his request.

And whereas also, the plaintiff afterwards, to wit, on the day and year aforesaid, was indebted to the Defendants in the further sum of Two thousand and five hundred dollars for money found to be due from the plaintiff to the Defendants on an account then stated between them:

+ Pal 30 And being so indebted, the plaintiff in consideration thereof afterwards, on the day and year aforesaid promised the Defendants to pay them the said several sums of money respectively, when thereunto requested.

+ Pal 31 Yet he hath disregarded his promises and hath not paid any of the said several sums of money, or any part thereof; which said sums of money so due and owing from the said plaintiff to the said Defendants as aforesaid exceed the damages sustained by the said plaintiff by reason of the supposed breaches of Covenant by them the said Defendants, in the said plaintiff's Declaration mentioned and out of which sums of money so due and owing from the said plaintiff to the said Defendants, they, the said Defendants are ready and willing and hereby offer to set off and allow to the said plaintiff the full amount of his said

damages, according to the form of the Statute in such case made and provided.

And this they, the said Defendants are ready to verify. Wherefore they pray judgment, if the said Plaintiff ought to have or maintain his aforesaid action thereof, against them &c

Mather, Bates & Taft
Attys. for Defts.

Copy of the Account Set off

M^r. Dexter Curtis

To Wallace & Holmes D^r

1861				
April	12 th	To paid your written order per bears	7 00	
	15	" Our Note @ 4 months payable to your order	200 00	
	22	" paid Capt of Schooner H. Kent in part for freight on Cargo of Lumb	60 00	
	26	" $\frac{1}{2}$ Inspectors Charges measuring 37,977 ft of Lumber @ 1-	2 37	
+ Jul 33	"	" Labor & Inspectors Charges measuring 31,796 ft W. Lumber	5 97	
	27	" paid Thomas Simms in full for freight on Cargo of Lumber \$114.96		
		Less amount paid Capt the 22 nd 60.00	54 96	
				\$ 330 30

And afterwards to wit on the second day of Decem-
ber in the year of our said said day being one of
the days of the Decem^{br} Term of said Court,
the following among other proceedings was had
and entered of record in said Court book

+ Dec 34
472
8570

Dexter Custer +
vs
John S. Wallace
J. H. Holmes

Cornant,

This day came
attorney for Defendants in said cause and on his
motion it is ordered that leave be and is hereby
given to withdraw demands of defendants and
to amend pleas, and also plead further.

And afterwards to wit on the day and year afore-
said the said John S. Wallace & Thomas W.
Holmes by Mathew J. Taft their attorneys filed
in the Clerk's office of said Court the addi-
tional pleas which are in Words and figures

+ Dec 35 following to wit +

in full
1st

John S. Wallace
Thomas W. Holmes

Superior Court of Chicago

Dexter Custer

for a further plea in this behalf to the just Court
of the plaintiffs declaration say unto none

+ Vol 36

+^e because they say that by the express
terms of the Contract, or Indenture in said Count
mentioned it was provided that all the Lumber
specified therein was to be subject to inspection
and measurement at Chicago by some com-
petent inspector to be chosen by both parties
& it was further therein and thereby expressly
agreed & declared, that the White Wood men-
tioned therein was to be inspected into two qua-
lities viz Clear & Common. & all the boards &
plank (except cham plank & flooring) that
was less than fourteen inches in width was to be
classified as common Lumber. & that the use &
lumber. referred to in said Contract, was also
to be measurable by inspection.

+ Vol 37

And the said defendants in fact say that
in the pretended delivery of a portion of the
lumber mentioned in the said first Count by
the plaintiff to the said defendants, under said
Contract, the said Plaintiff did not in-
conformity with the provision of said Contract
cause the said portion of the Lumber to be in-
spected & measured, as required by said Contract.
Neither did they the said defendants accept
the same under the Contract as aforesaid, but
accepted the same for want of such inspection &
measurement in which they the said defendants
were then & there & at all times ready willing

+ Feb 38 to join. and offered to join if the said plaintiffs would concur or act⁺ with them in selecting & appointing a suitable inspector. And thus the said defendants are ready to comply. Wherefore they pray Judgment &c.

Matthew & Laft.
Attys for Defs.

2^d to 1st,
+ Feb 39 And for affirmative plea. in this behalf to said Just Court the said defendants say: actio non. &c. because they say that by the terms of the contract or Indenture in said Just Court mentioned it was expressly provided that all the Lumber specified in said contract was to be subject to inspection & measurement at Chicago by some competent inspector to be chosen by both parties & the said contract further expressly provides for the mode & manner of inspection & the classification of the different sorts of lumber. And the said defendants in fact say that in the pre-cluded offer of the said Plaintiffs to deliver to the defendants a certain cargo of lumber on or about the first day of May 1881 the said offer was not accompanied by any conformity or offer of conformity on the part of the said plaintiff to the said express provision for inspection & measurement in said Indenture contained. notwithstanding the said defendants were then and there and at all times ready and offered to join

in any suitable & proper inspection & measure-
ment according to the terms of said Indenture
both with respect to lumber offered and lumber
yet to be delivered And that the said defend-
ants are ready to verify Wherefore they pray
Judgment &c

Mather & Taft.
Attys for Defs.

3rd 1st

+ Vol 41

And for a further plea in this behalf to said
first Court the said defendants say actio
non. &c because they that by the express terms
of said Indenture⁺ in said first Court men-
tioned it is provided that all the lumber
to be delivered under said Indenture was to
be subject to inspection and measurement at
Chicago by some competent inspectors to be cho-
sen by both parties the particular mode &
manner of such inspection being also therein
pointed out and agreed upon, yet the said
defendants in fact say that the said plaintiff
in attempting to proceed under said Contract
whether by partial delivery or attempt to deliver
lumber or by offer to deliver at a future time

+ Vol 42

utterly neglected, and refused to comply with
said provisions for inspection & measurement at
which standing the said defendants were at all
times ready and willing and offered to furnish

selecting & appointing a suitable inspector
for the purposes of said ~~measures~~ contract &
inserted upon inspection and measurement.

And that the said defendants are ready to satisfy
Wherefore they pray judgment &c

Markes & Laeth
Attys for Defs.

1st to 2nd Count. And the said defendants for a further plea
in their behalf as to the second Count of the
plaintiffs declaration say actis non, &c to
cause they say that that the said plain-
+ Dal 4th tiffs did not proceeding under &c in pursuance
of said contract or Indenture deliver to said
defendants one cargo of said lumber as
therein alleged and offer to deliver the whole
amount provided for in said Indenture
as stated in said second Count. And
of this the said defendants put themselves
upon the Count &c

Markes & Laeth.

Attys for Defs.

And the said Plaintiffs as to the like

Walker & Dexter.

Attys for Plffs.

2nd to 3rd Count. And for a further plea in their behalf to
the said second Count of the plaintiffs
+ Dal 4th declaration the said defendants say actis

non because they say that by the express terms
of said Indenture in said Comt. mentioned
all the lumber contracted for was to be subject
to inspection & measurement at Chicago by
some competent inspector to be chosen by both
parties. And the said defendants in fact say
that in the pretended delivery of one cargo of
lumber under said contract as mentioned
in said Indenture the said plaintiff did
not in conformity with the provision of said
contract, cause the said cargo of lumber
to be inspected & measured as required by
said Indenture notwithstanding that they
the said defendants then and there insisted
on inspection & measurement on their part
and were ready and willing & offered then & there
to act with the plaintiff in choosing and
appointing some suitable person to inspect &
measure the lumber according to the re-
quirement of said Indenture.

And the said defendants are ready to
verify Wherefore they pray judgment &

Matthew & Lafr.

Attys for Defrs

3. 6. 2. Comt. And for a further plea in this behalf to said
Second Comt. the defendants say acts now

+ Dec 46 &c. because they say^t that by the express terms
of said Indenture in said second Count men-
tioned it was provided that all the lumber &
therein contracted was to be subject to inspection
& measurement at Chicago by some competent
inspector to be chosen by both parties & it the
said defendants in fact say that the offer of
the said plaintiff to deliver lumber on said con-
tract, or Indenture as stated in said Count
was wholly unaccompanied with any offer
of, or provision for inspection & measurement
not with standing the said plaintiff knew & there
had notice that the said defendants insisted
on such inspection & measurement and requiring
them & there on their part to enter upon the joint
choosing & appointment of some suitable
person inspect^r for the purpose of said Indenture
And thus the said Defendants are ready to
verify Wherefore they pray Judgment &c.

Mathew & Lof.
Attys for Defs

1st to 10th And for a further plea in this behalf to each Count
of said Plaintiff declaration, the said defen-
dants say actio non. &c. because they say that
from the time of making of said contract, or
Indenture, in said declaration mentioned &
+ Dec 48 until the close of the period allowed thereby

for the delivery of said lumber that or to
say. the 1st day of July. A.D. 1861. that the
said defendants were at all times ready
willing to accept the delivery of the lumber
Contracted for. at the place appointed for
such delivery on due inspection & measurement
thereof, as provided in said Contract; to pay
for the same. when so inspected & measured
at the place & according to the terms of said
Contract of said plaintiff would have deliv-
ered the same. inspected & measured according
to the express provisions of said Contract which
inspection and measurement & that the said
defendants were always during the same period
ready and willing to afford to join on this
part. yet the said plaintiff did not at any
time within the period so allowed by said Con-
tract for that purpose. deliver the said lumber
or any part thereof; inspected & measured accord-
ing to the terms of said Contract; or offer to es-
timate with the defendants in selecting and ap-
pointing a suitable inspector for the purposes
of said Contract.

And that the said defendants are ready to
reify

Therefore they pray judgment &c
Master & Loff.
Atty for Defr

+ Fol 49

+ Fol 50

2 to 1000

And for a further plea in this behalf to both
counts of said plaintiffs declaration the said de-
fendants say. actio non &c. Because they
say. that by the terms and conditions of contract
in said indenture, set forth, in said declara-
tion contained, it was expressly covenanted
by both parties thereto that all the lumber
thence contracted for. was to be subject to in-
spection and measurement at Chicago by some
competent inspector to be appointed or chosen
by both parties which inspection & measurement
the said defendants aver to have been highly
important & of great value to the rights of the
several parties in as much as the price to be
paid for the said Lumber was by contract gra-
duated by said inspection & measurement,
& the said defendants in fact say. that during
the whole period allowed by said contract for
the delivery of said Lumber the said plaintiff
wholly neglected & refused to join with the
defendants in choosing a suitable person to
inspect & measure the Lumber under said con-
tract not with standing, the said defendants
were at all times, during the same period
ready & willing to join with said plaintiff in
choosing some suitable person as such inspection
of which the plaintiffs then & there had notice. and
that said defendants insisted on such in-
spection & measurement.

51

52

And that the said defendants are ready to verify
wherefore they pray Judgment &c;
Matthias Lofth
Attys for Defs.

And afterwards writ on the seventeenth day of
December in the year aforesaid said plain-
tiff by his attorneys Walker & Dexter filed
in the office of the Clerk of said Court
his certain Replications which are in Words
and figures following to-wit: +

File 53

State of Illinois }
County of Cook } ss.
Dexter Curtiss }
vs }
John S. Wallace & }
Thomas W. Holmes }

Superior Court
of Chicago

And the said Plaintiff
as to the plea of the said defendants by them
first above pleaded, and whereof they have put
themselves upon the Country doth the like

Walker & Dexter
Attys. for Pltff.

54

And the said Plaintiff as to the said
plea of the said defendants by them secondly
above pleaded, saith that the said Plaintiff by
reason of any thing by the said defendants
in that plea alleged, ought not to be barred
from having or maintaining his aforesaid ac-
tion thereof against the said defendants
because he says that the said defendants
did not on the said first day of June A.D. 1861
as is alleged in said plea or at any other time
before or since that time, pay to the said Plaintiff
the said several sums of money in said plea alleged
to have been paid or any part thereof, and of this he
the said Plaintiff puts himself upon the Country.

Walker & Dexter
Attys. for Pltff.

55-

And the said plaintiff, as to the said plea of the said defendants by them thirdly above pleaded, saith that the said plaintiff by reason of any thing by the said defendants in that plea alleged ought not to be barred from having and maintaining his, aforesaid action thereof against the said defendants, because he saith that he the said plaintiff was not, nor is he indebted to the said defendants in manner and form, as the said defendants have above in said plea in that behalf alleged against him, and thus he the said plaintiff prays maybe enquired of by the Country &c

Walker & Dexter

Attys for Pltff.

56
in full

(. And the said plaintiff as to the said first second and third additional pleas by the said defendants above pleaded to the first Count of the said declaration and to each of them respectively, saith that the said plaintiff by reason of any thing by the said defendants in said pleas and each of them alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, because, he says, that the said defendants of their own wrong and without the cause in their said pleas alleged broke their

57

~~Where~~ ^{And} said Covenants and agreements in the said Declaration in that behalf complained against them, and this he the said plaintiff prays may be enquired of by the Country &c

Walker & Dexter
Attys for Pltffs

in full

And the said plaintiff as to the said second and third additional pleas, by the said defendants above pleaded to the said second Count of the said Declaration and to each of them respectively saith precludi non because he says that the said defendants of their own wrong and without the cause in said pleas alleged broke their said Covenants and agreements in the said Declaration in that behalf complained against them and this he the said plaintiff prays may be enquired of by the Country &c

58

Walker & Dexter
Attys for Pltffs

in full

And the said plaintiff as to the said first and second additional pleas by the said defendants above pleaded to both counts of the said Declaration, and to each of them respectively saith precludi non, because he says that the said defendants of their own wrong and

59

without the cause in said pleas alleged,
 broke their said covenants and agreements
 in the said declaration in that behalf complain-
 ed against them, and this be the said plain-
 tiff prays may be enquired of by the Countryre
 Walker & Dexter
 Attys. for Pltfs.

And afterwards, to wit, on the Twentysecond
 day of September in the Year of our Lord, one
 thousand eight hundred and Sixty three,
 said day being one of the days of September
 Term of said Court, the following among
 other proceedings was had, and entered of
 record in said Court, to wit:

60 Dexter Courtis - +
 367 V.
 8510 John S. Wallacerd
 J. W. Holmes - } Covenant

This cause being, this
 day called for trial, comes said plaintiff by
 Walker & Dexter his Attorneys and said Defendants
 by Mather, Bates & Taft their Attorneys also comes
 and issues being joined herein it is ordered that

Record 12 page 460

61

a jury come, whereupon comes the jury of good and lawful men, to wit Jacob Snider, John Grandell George Hinman, James Hart, George O'Smith, Clark Holbrook, Joseph Scott, Jonathan Marsh, Michael Arnold, William Sloan, J.H. Bachelder and Charles B. Lowe, who being duly elected tried and sworn to try⁺ the issues joined herein as aforesaid, after hearing evidence, arguments of Counsel and instructions of the Court, retire to consider of their Verdict, and the hour of adjournment having arrived it is ordered upon agreement of parties, that when the jury shall have agreed upon a Verdict, they shall reduce the same to writing, sign and seal the same, and afterwards separate and meet the Court on coming in and opening thereof tomorrow morning:

62

And afterwards, to wit, ⁺ on the twentythird day of September in the year aforesaid, said day being one of the days of the September Term of said Court, the following among other proceedings was had and entered of record in said Court, to wit.

367

8510

Dexter Curtis -
V.^d

John S. Wallace ^{and}
J. W. Holmes -

Covenant

Record 12, page 462

63

And now at this day
again comes the parties to this cause and the
jury empanelled herein on yesterday for the
trial of said cause also come as on yesterday,
and submit their Verdict and say, we the
jury find issues for said plaintiff, and we
assess his damages herein against both said defend-
ants to the sum of one thousand dollars.

And thereupon said defendants submit
their motion herein for a new trial, and in
arrest of judgment on said Verdict in said
cause.

And afterwards, to wit, on the Second day
of October in the year aforesaid. Said Defendants
by Mather and Taft their Attorneys filed
in the Office of the Clerk of said Court their
Motion for New Trial, which Motion is
in the words and figures following, to wit,

64

Superior Court of Chicago } ss
Cook County }

John S. Wallace and
Thomas W. Holmes
admn
Dexter Courtiss

Covenant

And now comes the said Defendants and by their attorneys Mather and Taft and Bates & Towselee; and move the Court for a new trial in ~~the~~ said cause and in arrest of judgment, for the following reasons.

first

65

Because the Plaintiff by his declaration and replication shows no cause of action against the said Defendants.

second

Because said Plaintiff in his declaration and replication does not aver or show a compliance with the condition precedent set forth in the Covenant declared on.

third

Because the Court, admitted evidence adduced by the Plaintiff to prove what was not averred in Plaintiff's pleadings.

fourth

Because the Court erred in refusing at the close of the Plaintiff's case to strike out and exclude from the jury all the evidence adduced by him to show his performance of the condition precedent set forth in the ⁺covenant declared on, there being no averment in the pleadings to justify

66

such evidence,

fifth

Because the charge of the Court to the jury on the points requested by the Plaintiff was erroneous on each and every point so charged for Plaintiff.

sixth

Because, the Proofs adduced by the Plaintiff did not correspond with his pleadings.

seventh

Because, the Verdict of the Jury was contrary both to law and the evidence adduced.

eighth

Because the Plaintiff by his pleadings in said cause shows that he had no legal cause of action against the Defendants.

67

ninth

Because the Plaintiff by his evidence adduced did not show that he had ever delivered or was ready and willing to deliver or tendered to deliver any lumber according to the terms and conditions of the covenant declared on.

Mather & Taft

Bates & Bowles

Atty. for Defts.

of Counsel

tenth

Because the Court refused to allow the Defts. to show by evidence that the inspection by Green of the Cargo delivered and his mode of inspection and measurement of the lumber was not according to the terms of the Contract declared upon. +

68

Mather & Taft

Defts. Atty.

And afterwards to wit, on the Twentyfourth day of October in the year aforesaid, said day being one of the days of the October Term of said Court, the following among other proceedings was had and entered of record in said Court, to wit:

Dexter Curtiss

v.^s

John S. Wallace
and J. W. Holmes

} Mo for New trial in Covenant

69
Record 12 page 535
And now comes the parties to this Cause by their respective Attorneys as aforesaid, and this Cause coming on now to be heard upon the motion heretofore submitted herein on the twenty third day of September of the September of the September Term 1863 of this Court for a new trial in said Cause and by consent of parties it is ordered that the said motion for a new trial in said Cause as aforesaid, be and the same is hereby continued.

70
And afterwards, to wit, on the Nineteenth day of December in the year aforesaid, said day being one of the days of the December Term of

said Court; the following among other proceedings
was had and entered of record in said Court to wit

267
85 10 Dexter Curtiss
v.
John S. Wallace
and J. W. Holmes } Covenant

72 Record 14 page 62
And now at this day come
said parties to this cause by their Attorneys as
aforesaid, and the cause coming on now to be heard
upon the motion of said defendants heretofore sub-
mitted herein, to wit, on the twenty third day of
September of the September Term 1863, last past
of this Court for a new trial in said cause and
also their motion in arrest of judgment and the
counsel being heard on each of said motions for
a new trial as well in arrest of judgment, and
the Court being fully advised in the premises it
is considered by the Court that the motion of
said defendants for a new trial be and the
same is hereby over-ruled and that said
defendants be and they are hereby refused a
new trial in said cause, and in like manner
the Court over-rules the motion of said defend-
ants in arrest of judgment, to which ruling
of the Court, in over-ruling their said motion
for a new trial, as well in over-ruling their said

73

Motion in arrest of judgment on said Verdict of the jury rendered herein as aforesaid, said Defendants then and there excepted;

Wherefore said Plaintiff ought now to have judgment on the Verdict of the jury rendered herein as aforesaid. Therefore it is considered that said Plaintiff do have and recover of said Defendant his damages of One thousand dollars in form aforesaid by the jury here found and assessed together with his and Charges in this behalf expended and thereof have execution &c

And thereupon said Defendants having entered their exceptions pray an appeal herein to the Supreme Court of this State from the judgment of this Court which is allowed to them upon filing bond in the penalty of fifteen hundred dollars with security to be approved by one of the Judges of this Court to be filed by the first day of the next Term of this Court with Bill of exceptions to be filed within sixty days from the date hereof +

And, afterwards, to wit, on the Fourth day of
January, in the year of our Lord one thousand
eight hundred and sixty four, said Defendants,
John S. Wallace & Thomas W. Holmes filed
in the Office of the Clerk of said Court their
Certain Appeal Bond which is in the
words and figures following to wit

Appeal Bond

11

76

Know all men by these presents that we John S. Wallace, Thomas W. Holmes & William M. Derby of the County of Cook and State of Illinois are held and firmly bound unto Dexter Courtiss also of the same County and State in the penal sum of fifteen hundred dollars lawful money of the United States 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 fourth day of January A.D. 1864

77

The condition of the above obligation is such, that whereas, the said Dexter Courtiss did on the 19th day of December A.D. 1863 in the Superior Court of Chicago in and for the County of Cook and State aforesaid, and of the December Term thereof A.D. 1863 recover a judgment against the above bounden John S. Wallace and Thomas W. Holmes for the sum of one thousand dollars & cents, besides costs of suit, from which said judgment of the said Superior Court of Chicago, the said John S. Wallace and Thomas W. Holmes have prayed for and obtained an appeal to the Supreme

Court of this ^{said} State.

78

Now therefore if the said John S. Wallace and Thomas W. Holmes shall duly prosecute their said Appeal with effect, and moreover, pay the amount of the judgment, costs, interest and damages rendered, and to be rendered, against them in case the said judgment shall be affirmed in said Supreme Court, then the above obligations to be void otherwise to remain in full force and virtue.

John S. Wallace *Seal*
Thomas W. Holmes *Seal*
Wm M. Derby *Seal*

Taken, approved and
Open Court, and entered
into, in Chicago this
4th fourth day of January
A. D. 1864.

Van A. Higgins

Judge +

79

And afterwards to wit, on the _____ day of _____
 in the year aforesaid, the said De-
 fendants by Bates and Toulce their attorneys, filed
 in the office of the Clerk of said Court, their Bill of
Exceptions which is in the words and figures as fol-
 lows to wit:

abstract
 this
 John S. Wallace &
 J. W. Holmes

ats

Dexter Curties

Superior Court of
 Chicago

80 Afterwards, to wit, at a
 Superior Court of Chicago, held at the Court-
 house in the City of Chicago, in the County of Cook,
 aforesaid, on the twenty second day of September
 1865, before the Honorable Van H. Higgins, one of
 the judges of said Superior Court of Chicago, the
 aforesaid, issue so⁺ joined between the said parties
 as aforesaid, came on to be tried by a jury of the
 County of Cook aforesaid, for that purpose duly
 impannelled, good and lawful men of the said
 County.

At which day came there as
 well the said plaintiffs as the said defendants,
 by their respective attorneys aforesaid, and the
 jurors of the jury impannelled to try the said
 issue being called, also came, and were then

81

and there in due manner chosen and sworn to try the said issue, and upon the trial of the said issue, the Counsel for the said plaintiff to maintain and prove the said issue on his part called E. G. Green who being duly sworn testified that he lives in this City, came here in 1855, is a lumber inspector, and twenty seven years old; is well acquainted with lumber dealers in Chicago, knows Wallace and Holmes, and their yard, have seen both of them there about their business. Have inspected one Cargo of Lumber for Wallace & Holmes, and several for M^r Wallace; inspected and measured one Cargo of Lumber April 1861.

82

Wallace came for me. The Lumber inspected belonged to Dexter Curtis. Wallace came to see me and asked me^t to come to his yard and inspect this Cargo, also to inspect future Cargoes of Lumber to the amount of four or five hundred thousand feet to be delivered on a Contract between Dexter Curtis and defendants. The next morning I went to work to inspect said Cargo of Lumber.

83

But to the admission of any evidence by the said plaintiff on the trial of said issue to show any inspection and measurement of said Cargo of Lumber, or any part of the Lumber mentioned in the Contract sued upon, the said Counsel for the^t said defendant did

then and there object, for the reason, that there is no averment in the said plaintiffs declaration, or in the replication to said defendants pleas, that the said Cargo of lumber, or any part of the lumber mentioned in said Contract was inspected and measured according to the Conditions of the Covenants in said Contract sued upon. But the said Judge of said Superior Court did over-rule said objection & allow said matters to be given in evidence; to which said opinion and decision of the said Judge of the said Superior Court, the said Counsel for the said defendants did then and there, on behalf of said defendants except. The said witness did then state. "M^r Wallace engaged me to inspect that lumber. I went there and found M^r Wallace, who said that he had made a contract for four or five hundred thousand feet of lumber, with M^r Curties, and wanted me to inspect it. He said (to wit, Wallace) that the parties had agreed to have me inspect it, the lumber. He gave me a note which I have here (produces a paper). Wallace showed me the contract, and after he had shown to me the contract, he showed me this specification, producing it, and told me to measure the lumber in accordance with it, which I did. The following is said specification"

" 1st quality white wood, boards 14 in. & over, clear
 " from all defects. 2nd quality white wood boards
 " and scantling cut $3\frac{1}{2} \times 3\frac{1}{2}$, Culls Wood boards,
 " scantling, and scantling, not cut $3\frac{1}{2} \times 3\frac{1}{2}$ Ass
 " into common and culls".

86

" This cargo of lumber inspected and measured
 as follows" +

1. Clear White Wood	19,787 feet
2. Common do	29,415 "
3. Culls do	7,549 "
4. Clear Bass Wood	766 "
5. Common do	2,067 "
6. Culled do	1,302 "
7. Common Oak	7,794 "
8. Culled do	7,046 "
9. Common Ash	47 "
	69,773 "

87 " Mr Curtis was there about ten minutes, before
 " I commenced, and made no objection. Wallace
 " informed me that it was agreed upon between
 " him and Curtis that I was to inspect the
 " lumber under the Contract. Curtis told me
 " the same thing afterwards. This lumber was
 " on dock of defendants, Mr. Curtis and Mr.
 " Holmes were present while I was inspecting.
 The said witness did further state upon

a Cross-examination by the Counsel for the defendants, that the cargo was on the dock; it was on the 23rd day of April 1861. This lum-

88 "ber was inspected again after I had inspected it. the next day it was inspected by regular inspectors M^{rs} Glade & Brothers. Wallace and Holmes were there about. Something passed between us at that time. No objection was made by either party to the manner in which I inspected it. M^{rs} Wallace did say that a common piece of lumber was a cull. I finished the cargo and they paid me for it. I received the paper, the Certificate I mean from M^{rs} Wallace, but do not know whose hand-writing it is. Wallace and Holmes made no objection to the quality of the lumber."

89 The said plaintiff then offered in evidence a certain contract in writing as follows:
 "This agreement made the 10th day of April 1861 by and between Dexter Burties of Lake Township County (of) Berrien, State of Michigan, and Wallace and Holmes of the City of Chicago State of Illinois. Witnesseth: That the said Dexter Burties in consideration of the agreement hereinafter contained to be performed by Wallace and Holmes agrees to deliver to the said Wallace & Holmes at their lumber yard in the City of Chicago, on or before the first day of July next, Five hundred M feet of white

90

- wood ~~timber~~ and from forty to fifty M of
white ash Lumber: all of good sound and
merchantable quality; the white wood to be
cut as follows.

50 M feet clear flooring plump $1\frac{1}{8}$ inches thick and 6 inches wide

30 M " Scantling $3\frac{1}{2} \times 3\frac{1}{2}$ inches square

30 M " " 4×4 inches square 14 feet long

30 M " clear plank plump $1\frac{1}{4}$ inches thick

30 M " " " $1\frac{1}{2}$ inches thick

30 M " " " plump 2 inches thick

60 M " clear plank $1\frac{3}{4}$ inches thick and 14 to 16 inches wide

91 240 M " Boards plump one inch thick. +

" The ash to be cut into square edged plank from
" two to four inches thick as said Wallace and
" Holmes may direct, all of the above lumber
" to be subject to inspection and measurement
" at Chicago by some competent inspector to
" be chosen by both parties. The white wood
" to be inspected in two quantities viz: Clear
" and Common, and all boards and plank
" (except Chair plank + flooring) that are
" less than fourteen inches in width to be
" classed as Common lumber.

92 " The ash lumber to be made merchantable
" by inspection. +

" And the said Wallace & Holmes agree
" to pay to the said Dexter Curtis the sum

93 of Eleven Dollars per M feet for the Clear
and Seven Dollars per M feet for the Common
White-wood Lumber; for the white ash the
sum of Twelve Dollars per M feet. To be
paid in three equal payments of one third
down on delivery, one third in forty days
and the remaining one third in four months
after the delivery of each cargo and it is
understood by the parties that the said Dexter
Curtis will immediately begin shipping
to Wallace & Holmes the said Lumber &
that said Dexter Curtis will not suffer
any other contracts of Bills for Lumber, to
interfere in any way to detain him from de-
livering from one to two cargoes weekly until
said contract is filled with Wallace and
Holmes. In witness whereof the parties
have hereunto set their hands and seals the
day and year just above written.

Dexter Curtis Seal
Wallace & Holmes Seal

94 But the reading of the same in evidence,
the said Counsel for the said defendants
did then and there object, because, by the
covenants mentioned in said contract it was
made a condition precedent to the delivery of
said Lumber mentioned in said contract

that the said Lumber should be inspected and measured and that by said declaration or by said replication of said plaintiff, plaintiff has not averred or alleged that said Lumber mentioned in said Contract before or after the delivery thereof, was inspected and measured and that said plaintiff in said declaration or replication has not averred any reason why) said Lumber was not inspected and measured and that the said plaintiff should not be allowed to prove more than in his pleadings he has averred. But the said Judge of said Superior Court did then and there declare and deliver his opinion that the said objection is tattered by the said Counsel for the said defendant as aforesaid, ought not to be allowed but that said Contract ought to be admitted in evidence; and did accordingly decide that the same might be read in evidence on the part of the said plaintiff, which was accordingly done, to which said opinion and decision of the said Judge of said Superior Court, the said Counsel for the said defendant did then and there, on behalf of said defendants except.

The said plaintiff to further prove said issue, had a M^r Holbrook sworn as a witness in said Cause, who stated that

97- he resides in Chicago, is a lumber dealer in hard-wood, was acquainted with the price of hard wood lumber in 1861. From the last of April to July 1st 1861, Clear white wood lumber was worth \$9. and common \$5.00. After the opening of navigation about the middle of April, it came down and continued so until the fall of that year.

98- The plaintiff further to prove the issue in said cause offered a M^r Wilder who, being sworn, states, that he lives in Chicago, that he is a dealer in hard wood lumber including white wood; has been engaged in the business about seven years on the river. There was a decline in this kind of lumber in April of that year, and it continued so until some time in July. Clear white wood lumber was worth \$9.⁺ Common \$6. The average market price for this article between the middle of April and the first of July was six dollars and fifty cents, say \$9. for Clear, and \$6.50 for Common, or \$9. for Clear and \$5.50 for Common, with Culls. When we buy in two qualities the Culls are included in the common. Had a conversation with M^r Wallace; he said, he would not pay over \$8. for Clear and \$4. or \$4.50 for common, that he had a contract with Curtis, and that he

99

(Wallace) was not going to take any more of him; that he could buy for \$4. and \$8. This was in the Spring of 1861. +

A M^r Elmes was then sworn, who

stated that he resided in Chicago, is a machinist, has lived here over thirty years,

100 " was present at a conversation between Curtis and Wallace and Holmes at the office of Wallace & Holmes some time in the last of April or first part of May 1861. I went there by request of M^r Curtis. He said he was going there to ask them if they would receive the lumber under the contract. I did not know the defendants or either of them before I went there, M^r Curtiss demanded that the defendants receive the lumber under the contract, they replied that they would receive no more lumber under the contract. They made no excuse for not receiving the lumber. His conversation was addressed to one of the firm. He had a cargo of lumber lying at the dock; it was white wood. That cargo was part of the lumber spoken of. I went on the vessel and saw the lumber. I do not know whether Wallace or Holmes was on the vessel at that time. +

101

And the said defendants did then and there move said judge to exclude and

102

strike out from the Consideration of said jury
 in the said issue, all the evidence adduced
 as above set forth, by the plaintiff, tending
 to show that the lumber specified in
 said Contract was first inspected and mea-
 -sured by an inspector or measurer selected
 according to the Covenants in said Contract,
 for that purpose, or that such inspector or
 measurer was selected, or offered to be selected
 by the plaintiff because in the declaration
 of said plaintiff in this cause, or in the said
 plaintiff's replication, there is no averment
 that the said lumber was inspected and
 measured according to the covenants in
 said Contract, or any offer on the part of
 the plaintiff to select and agree upon an
 inspector or measurer of said lumber
 specified in said Contract, and because no
 excuse or reason is alleged in said declar-
 -ation or replication of said plaintiff for
 not having selected and agreed upon an
 inspector and measurer of said lumber
 But the said judge did then and there
 over-rule the said motion of the Counsel for
 said defendants; to which opinion of the
 said judge, the Counsel for the said de-
 -fendants on behalf of the said defendants
 did then and there except.

103

The defendants, to prove the issue in said cause on their part, called a M^r Simms who was sworn and stated that he resides in Chicago, owns the Ellen Kent that brought the Cargo over in 1861. Upon the cross-examination of said witness he stated

104 "The second Cargo laid there half a day or more. The reason why I cannot say, I do not know any thing more about it. M^r Curtis told me that M^r Wallace would not receive the lumber on the contract"

105 A M^r M^r Glade a witness for the defendants was then sworn, who stated that he resides in Chicago, has been an inspector of lumber in the City of Chicago since the year 1857. The said defendants now, here offered to prove by said witness as to the Cargo of lumber delivered and inspected by the witness Green, that in said inspection, said Green did not conform to the conditions of said Contract in discriminating the different qualities of lumber, and that in such inspection he, Green did not in any manner conform to or comply with the conditions of said Contract to which said offer the counsel for the said

106

plaintiff on behalf of said plaintiff objected
 And thereupon the said Judge declared
 and delivered his opinion that it was in-
 competent to prove by witness the want of confor-
 mity with the contract by Green in the inspec-
 tion of said Lumber unless the defendants would
 undertake to show fraud on the part of Green in
 the measurement of said Lumber. It not being claim-
 ed on the part of the defendants that there was
 any fraud the Court rejected the ^{said} evidence as
 inadmissible, to which opinion and decision
 of the said Judge the said Counsel for the
 said defendants did then and there except.

107

John Meyer a witness for said defendants was
 then sworn, and stated that he knows defendants
 and plaintiff remembers when last cargo
 was received "I was at the office and yard
 of Wallace and Holmes about the time of
 the arrival of the first cargo. Heard Mr. Leutyp
 say to Wallace and Holmes that he thought
 he had the right and privilege of having
 Green measure the Lumber and if Green
 was not to measure the Lumber would
 not deliver any more under the contract
 Wallace & Holmes replied that they would
 not have Green inspect it because they
 did not consider Green a competent inspector
 a part of the second cargo was brought

108

by Wallace and Holmes afloat, not under the
Contract and a part by Mr. Boomer I understood
from Mr. Leitch himself that he had sold
a part to Boomer - the Bridge Builder I
was then when Green inspected the first
cargo of lumber. Other inspection, now done
I am acquainted with the different qualities
know when it has been inspected properly I
observed the way and manner in which
Green inspected this cargo of lumber. I was
over it with Mr. Doyle. I saw Green, asked
him if he thought that was a clear board
referring to one he was measuring then. He
was slipping his own tally. I went into the office
and told my employers, the defendants, that
Green was not competent. Both defendants
Came, and Wallace asked Green if so and
so meaning the lumber pointing to certain
pieces was clear or cull. I said that I
did not doubt he was competent, and they
told him they would have it inspected
over again. The next day Mr. McGrade
came. The handwriting is not of Wallace
or Holmes. In Witness Cross Examination he
stated. "The lumber put on the dock by
Boomer was oak. Some of the cargo was
white wood"

109

110

The defendants then offered the deposition of H. W. Holden, which was read, which is as follows: ^{1st or 2nd} Did you examine a cargo of lumber delivered on the dock of the defendant, by the plaintiff some time in the year 1861, and if so state the time when it was delivered on the dock, and when you examined it
111 Answer. My attention was called to it by Mr. Wallace but the date I cannot state particularly it was some time in 1861. I think it was in April but I am not positive it was in the Spring

2^d Int. What kind of Lumber was it?

Answer. It was White wood, lumber mostly.

3^d Int. How much was there of it?

Ans. I cannot say

4th Int. Where was the Lumber at the time you saw it?

Ans. It was on Wallace & Holmes dock in the City of Chicago

5th Int. What was the grade or quality of that lumber.

(Objected to by Piffs Counsel)

112 - Ans. It was scattered along on the dock 30 or 40 feet. I did not overhaul any of it But I could get as I thought a fair idea of the lumber what I could see of it. I called an inferior

grade of lumber.

6th Int. Was you acquainted with the value of White wood lumber here in the Spring of 1861.

Ans. Yes sir

7th Int. What was that Lumber worth per thousand feet

Ans. I do not set any value on it That par-
ticular lumber on my opinion I should not
consider worth over eight dollars per thousand
Taking it all together without any grade.

113 8th Q^u But how long have you been engaged in the
lumber business in this city?

Ans. Between seven, and eight years

9th Q^u But what kinds of lumber you have dealt in
generally?

Ans. Oak ash. maple. white wood basswood. Bluff
Walnut. Cherry. Black hickory mahogany
cypress

crop Ex

10th Q^u But, what time in April did you look at
that lumber as near as you can recollect
Ans. I could not fix any particular date It
is something I had never thought of since
that time till I was called upon now.

114 2nd Q^u To Int. Was it in the forepart or latter part of April
Ans. I could not tell I should not want to
answer that, it was in April or May. It was
in the spring during one of those two months.

3rd Q^u But, what was the value of that kind of lumber
on the first day of April 1861.

Ans. That kind of lumber viz white wood I was
paying 10 ³/₄ dollars per thousand feet for the best
quality - (the common) from \$10 to \$12.

fifty per thousand feet. Called for dol.
 4th 10th per thousand feet.

115 4th 10th Was there any decline in market value
 of the cargo in that kind and quality of
 Lumber from the first day of April to the first
 of May in that year?
 Ans. I should think not. I paid the same price
 right through.

6th 6th 10th Was there any decline during the months
 of May June, & July, of that year.

Ans. I think along about July there was. I
 cannot say exactly what it was worth in
 July. I paid the same price through the same
 that I had contracted for, but I presume
 I think lumber was made & bought for
 in Dollars per thousand ft in July.

116 (This answer objected to by Dift. Council)

7th 10th 10th When did lumber begin to decline
 during that season

(Objected to by Dift. Council)

Ans. I could not say exactly. It was duller
 in July. I do not think it began to decline
 much before June. By my not being out
 buying cargo (my lumber being all con-
 tracted for) I was not in so good a position
 to judge as others.

8th 10th 10th Did you during the months of May June
 & July of that year purchase any lumber
 by the cargo of the description of the Lumber

Ex amined our Wallace & Holmes dock.

Ans. I don't recollect. I couldn't say now.

9th Q. to Int. Are you sure, and can you swear, that
lumber of that quality had not declined two dol-
lars per thousand in the month of June of that
year.

(Objected to by Deft Counsel)

Ans. I could not say how much it had declined
in the month of June, of that year.

10th Q. to Int. Can you swear that it had not de-
clined two dollars per thousand in the month
of May of that year.

(Objected to by Deft Counsel)

118

Ans. I do not doubt it did.

11th Q. to Int. Do you swear that it had not?
(Objected to)

Ans. I am not able now to say.

12th Q. to Int. How do you know that the Lumber ex-
amined by you on Wallace & Holmes dock
was the Lumber furnished by the plaintiff to
Wallace & Holmes?

Ans. Mr Wallace told me it was.

13th Q. to Int. Is that all you know about it all the
means you had of knowing that that was the
Lumber furnished by the plaintiff?

Ans. It is.

14th Q. to Int. How many thousand feet of Lumber do you
imagine there was on that pile you examined?

119

Ans. I should think there was 40 or 50 thousand feet
there and may be more.

15th Q. What kind of Lumber was it?

Ans. What I saw was white Wood.

16th Q. How big a proportion of that pile of
Lumber did you see & examine sufficiently to
determine its quality?

Ans. It was scattered along a distance of 3 or 40
feet, and looking at the surface of that would
give you a pretty good idea of the quality of
of Lumber.

17th Q. Might there not have been, 3,000 ft.
of clear Lumber that, that you did not see
in that pile +

Ans. There might have been but I don't think there
was 3,000 feet of clear wood.

18th Q. Might there not have been 20,000 feet.

Ans. I could not say, but it was a pretty large
looking lot of Lumber. I could not tell.

19th Q. Will you swear that there was not
3,000 feet of clear Lumber in it?

Ans. I cannot swear but I do not think there
was 3,000 feet of clear Lumber in it.

20th Q. But do you know whether, at the time
you examined that Lumber, it had been inspected
(Objected to because there is no argument
in the declaration of any inspection)

Ans. I do not know whether it had or had
not.

21st to Jan was the lumber lying on the dock
at that time or had it been moved back &
from the front of the dock?

Ans I could not say. I should call it on
the dock. It had not been piled. It looked
to me as if it had just been unloaded there

Re. Direct Ex.

How do ^{you} rank the lumber that you saw, as
to quality? was it 1st or 2^d quality?

(Objected to by J. H. Jones)

122 Ans. It must have consisted of clear. Common
and cull. The general character of the
lumber was inferior. It was what I should
call a hard looking lot of lumber.

Re. Crop Ex.

you mean by that what you saw.

Ans yes

Henry R. Holden

123 At Mr Doyle a Witness for the defendant was
 Allen Green, who said that he was a lumber dealer in 1881. "am well acquainted with lumber
 saw the Chicago Lumber that Green inspected. I
 was inspecting Lumber in the same yard that
 day. Was requested to examine the lumber that
 Green had inspected. I went and examined it.
 It was a very hard cargo of lumber it was
 of a very inferior quality of lumber."

124 Upon a closer Examination by the Court
 for the plaintiff witness stated, "I examined the
 lumber for half an hour. I did not inspect it
 but walked around and over it. I turned up
 a board now and then, did not inspect any of
 the cargo. Could not see any second clear a-
 mong the cargo, not what I called second clear
 I saw that a part of it had no clear at all.
 Wallace asked what I thought of some Green
 inspected as first clear. I looked at it and saw
 no second clear. I saw Green inspecting the Lumber
 and Green kept his own tally. I do not go close
 enough to see Green inspecting this lumber. It
 is usual to keep a tally man particularly on
 hard wood. We do not always keep a tally-
 man. The lumber put aside for clear as shown
 by Wallace had no clear lumber in it."

125 This was all the evidence offered in the case
 Whimpyon do^r said Counsel for the said defend

and did then and there insist before the said
Judge of the said Superior Court that the personal
matter so produced and given in evidence on the
part of the said plaintiff were insufficient for
the said plaintiff to have and maintain the said
said action and that the said Judge aforesaid
ought to find a verdict upon the facts aforesaid
in favor of said defendants, and the said de-
fendants did then and there ask the said Judge
to give in charge and instruct the said Jury
aforesaid as follows.

126
1st That the inspection and measurement of
the lumber + described in the contract declared on
by some competent person to be chosen by both
parties was a precedent condition to the recovery
by the plaintiff, and that the plaintiff must aver
the performance of the precedent condition and pro-
ve it before he can recover and without such +
avermint and proof they must find for defen-
dants.

127
2nd That as a condition precedent to the defen-
dants payment for the lumber specified in the con-
tract declared upon, the plaintiff must aver in
his declaration or replication that the lumber
delivered or agreed to be delivered by him had
been inspected and measured at Chicago by
some competent inspectors chosen by both parties
or that the plaintiff had agreed to units with

said the defendants in the choice of such inspector
which they the said defendants had refused and
without such argument and proof thereof they
must find for defendants.

128 a 3^d That the inspection and and measurement
of said lumber by an inspector to be chosen by both
parties was a preliminary step and that de-
fendants could not justify their part of the con-
tract without such inspection and as the declara-
tion and replication do not aver any such appoint-
ment of inspector to have taken place or any offer
on the part of the plaintiff, and refusal by defend-
ants to choose the same, or any inspection or
ad measurement of said lumber there is no cause
of action stated in the declaration or replication and
the jury must find for the defendants.

129 n 4th That it is not competent for the plaintiff to
prove that the lumber delivered or agreed to be de-
livered by him was inspected or measured or that
he offered to unite with defendants in choosing
an inspector which defendants refused. Because
there is no allegation or argument in the declara-
tion or replication thereof, and the proofs must
be confined to the pleadings.

5th That there is no argument that the plaintiff
was ready and willing to execute and perform
the contract according to the conditions and
covenants thereof or that he was in a condition

130

to execute, and perform the same according to its conditions and stipulations and therefore show. no right of action or of recovery and that all the evidence adduced by the plaintiff to show that the lumber was inspected and measured by an inspector selected for that purpose or that such inspector or measurer was selected must be stricken out as there are no averments of such inspection or measurement in the plaintiff's pleadings and the proofs must correspond with the pleadings

131

6th That if the jury find for the plaintiff for any lumber delivered to the defendants and accepted by them they must apply the value thereof at the prices specified in said Contract and not at the market prices at the time of the delivery thereof or the offer to deliver and refusal +

7th That if the jury believe from the evidence adduced that the second cargo of lumber contained no such quality or quantity of lumber so called for by the contract declared on, then a tender of that cargo was no tender sufficient to charge defendants. That in order to entitle the Plaintiff to recover he must show a tender of the lumber called for in the contract, and both a readiness and a capacity to deliver or an

19
excuse for not making such tender as in case
Sixth Eng. Law. & Equity Reports page 431

132 9th That if the plaintiffs evidence fails to prove
that he has delivered to the defendants the kind
and quality of the lumber called for by the cov-
enant at the time specified they must find
for the defendants and that a delivery of other
kinds and quantities of lumber will not enable
him to recover in this action of covenant

And the said Judge of said Superior Court
did then and there declare and deliver his opi-
nion and refuse to charge the said jury with
that part of said defendants instructions as follows
"And that the plaintiff must aver the per-
formance of the precedent condition and prove
133 it before he can recover and with out such
argument and proof they must find for the
defendants" And the said Judge did then
and there further declare and deliver his opinion
and refuse to charge and deliver to said jury
the instructions asked for by defendants in the
instructions numbered 3, 4, 5, 6, to which
said last mentioned opinion and refusal of
the said Judge the said counsel for the said
defendants did then and there on behalf of
the said defendants except And the said
Judge of the said Superior Court under the
134

Charge of the said instructions and. with said
writings left the said jury and the evidence
so given on the said trial as aforesaid to the
said jury. ^{and the jury} aforesaid then and there gave
their verdict for said plaintiff, and
dollar

and ^{and} damages.

Whereupon the said defendants did then and
there before the said Judge. move the said
Court for a new trial of the case aforesaid
and in arrest of the judgment upon said find-
ing of said jury and for the following reasons:
First Because the plaintiff by his declara-

135

tion and replication show^t no cause of action
against the said defendants:
Second, Because said plaintiff in his declaration
and replication does not aver or show a com-
pliance with the condition precedent set forth
in the covenant declared on.

Third Because the Court admitted evidence ad-
duced by the plaintiff to prove what was not
averred in the plaintiffs pleadings

Fourth Because the Court refused at the
close of the plaintiffs case to strike out and ex-
clude from the jury all the evidence ad-
duced by him to show his performance of the

136

condition precedent. Set forth in the covenant declared on thus bring no argument in the pleadings to justify such evidence.

Sixth. Because the charge of the Court to the jury on the points requested by the plaintiff was erroneous on each and every point so charged for plaintiff.

Seventh. Because the proof adduced by the plaintiff did not correspond with his pleadings.

Eighth. Because the verdict of the jury was contrary both to law and the evidence adduced.

137 Ninth. Because the plaintiff by his pleadings in said cause shows that he had no legal cause of action against the defendants Smith.

Tenth. Because the plaintiff by his evidence adduced did not show that he had been delivered or was ready and willing to deliver or tendered to deliver any lumber according to the terms and conditions of the covenant declared on.

138 Eleventh. Because the Court refused to allow the defendants to show by evidence that the inspection by Green of the cargo delivered and his sale of inspection of the lumber was not according

to the terms of the contract, declared upon.

And the said Judge of the said Superior Court,
then and there declared, and delivered then &
opinion refusing to give to said defendants
a new trial of the issue aforesaid and to
annul the judgment upon the finding of said
jury, for the reasons assigned above. To which
opinion and refusal of said Judge the
said defendants did then and there except

139

And in as much as the said Peral matter,
produced by said plaintiff and by the Counsel
for the defendants, objected to and insisted on,
but admitted by said Judge, and also the
matter offered to be proved by said defendants,
and by the Counsel for the plaintiff, objected
to and insisted on, and refused by the said Judge
and the said charge of said Judge and the said
charge of said Judge and refusal to give the in-
structions to said jury as requested by said defen-
dants, do not appear and by the record of the &
~~record of the~~ verdict aforesaid, the said Counsel
for the said defendants, did then and there propose
then aforesaid exceptions to the opinion of the said
Judge and requested him to put his seal to the
bill of Exceptions containing the said Peral
matter so produced and given in evidence

140

as aforesaid according to the form of the statute
in such case made, and provided,
And thereupon the said Judge at the request
of the counsel for the defendants did put his
seal to the Bill of Exceptions according to the
form of the aforesaid statute, in such case made,
and provided the 2^d day of March A.D. 1864.

Wm H. Higgins *Decd*
Judge.

State of Illinois }
Cook County } ss

I Thomas B. Carter Clerk of
the Superior Court of Chicago, within and for the
County, and State aforesaid do hereby certify, do
above, and foregoing to be true, perfect and complete
transcript of all the papers on file in my office
together with all the orders and judgment made
and entered of record in said Court in a certain
Cause lately pending in said Court, wherein
Dexter Curtis was plaintiff, and John F. Wallace
and J. W. Holmes were defendants,

In Witness Whereof I have here-
unto set my hand, and affixed
the seal of said Court, at
the City of Chicago in the County
aforesaid, this second day of April
A.D. 1864

Thomas B. Carter
Clerk



additional \$2.00,
Paid by W. B. Carter
Jan. "

\$12.75 paid

by Wallace & Holmes

W. B. Carter
Clerk

142

State of Illinois
Third Grand Division

John S. Wallace and
 Thomas W. Holmes appellants

Dexter Curtiss appellee

In Supreme

Court to

April Term

1864

Assignment

of Errors

And

- now the said John S. Wallace & Thomas
 W. Holmes appellants come & say that
 in the record & proceedings aforesaid
 there is manifest error in this to wit
- 1 The court below erred in overruling
 the motion for new trial & in awarding
 judgment
 - 2 The court below erred in allowing the plain-
 tiff to give evidence of inspection & measure-
 ment of lumber for want of suitable
 averments of those facts in the pleadings
 on their part
 - 3 The court below erred in suffering the plaintiff
 to give in evidence the contract copied into
 his second account inasmuch as the plaintiff
 in his pleadings had made none of the
 necessary averments or allegations touching
 the inspection & measurement of lumber
 which by the terms of the contract became
 a condition precedent to his right to sue
 or the law is bound to have stated a sufficient

143

Excuse for the omission

4 The court below erred in ~~refusing~~ ~~the~~ overruling the motion of defendants counsel made at the close of plaintiffs proof to exclude from the consideration of the jury the evidence given by plaintiff on the subject of inspection & measurement of lumber

1444 5 The court below erred in refusing to permit the witness for defendants (by the name of Mr. Glade a regular inspector) to show a want of conformity to the Specifications of the contract in the inspection by Green the plaintiffs witness

6 The court below erred in regard to the instructions asked by Defendants

1 In striking out or disallowing that part of the defendants 1st & 2^d instruction touching inspection & measurement which was in fact the whole substance of both

2 In refusing to give the 3^d, 4th, 5th & 8th instruction asked by the defendants

By reason whereof the ~~defendants~~ appellants ask that the judgment may be reversed and

new trial awarded

Mathew & Tapp
Attys & Counsel
for appellants

In Supreme Court of Illinois
To April Term AD 1864

State of Illinois
Third Grand Division

Dexter Curtis
vs

John S Wallace
et al

Joinder in Error

And the said ~~Att.~~ Dexter
Curtis, Defendant in Error, now comes
and says. That there is no error
either in the record and proceedings
aforesaid, or in giving judgment
aforesaid in manner and form
as above assigned; and therefore
he prays that the said judgment
may be affirmed, and that his
costs may be adjudged to him &c.

By Walker & Dexter
Attys for ~~Defts in Error~~ ^{appellees}

199
Superior Court
of Illinois
3rd Grand Division

John S. Wallace &
Thos. W. Holmes
appellants

vs
Dexter Curtis
appellee

Record

Filed Apr. 20. 1864.

Shelton
Ch.

Mathew T. Taft
for appellant

Walker Dexter
for appellee