

No. 12772

Supreme Court of Illinois

~~A~~
Falliott

vs.

Hunt

71641  7

35-8

Bradley Pollitt
vs
Carlton v. Hunt

35

1859

1859

12772✓

Prepared

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

BRADLEY FOLLIOTT,
vs.
CARLTON C. HUNT.

} APPEAL FROM PEORIA CIRCUIT COURT.

BRIEF OF APPELLANT.

1. The *contract was entire*,—a failure on the part of Folliott, the defendant, would not have authorized Hunt, the plaintiff, to quit. His remedy would have been by action. But no failure on the part of the defendant was proved, yet if any had occurred the sending of the orders by the Government to him might have been positively proved by the proper clerk. The instructions are not law, but are calculated to mislead the jury, the verdict is unwarranted and the judgment erroneous.

Selby v. Hutchinson, 4 Gil R. 319.
Badgley v. Heald, 4 Gil. R. 67.
Taylor v. Beck, 13 Ill. R. 386.
11 Parsons Contracts, 193.
Sedgwick Damages 215, note and cases cited.

2. The plaintiff below could not be authorized to abandon this contract, except by *the consent of the appellant, either express or implied*: no such consent is shown by the evidence, and hence the verdict ought to have been set aside, and a new trial awarded.

Christian Co. v. Overholt, 18 Ill. R. 223.
2 Parsons Contracts, 190, et seq. and cases cited.

3. The plaintiff below could not be entitled to recover, without showing "*readiness, willingness, an offer to perform*:" this was not shown, wherefore the judgment below ought to be reversed.

Beard and al. v. Evans and al., 20 Ill. R. 32.
Hungate v. Rankin and al., 20 Ill. R. 641, citing 3 Gil. R. 213. 1 Saund. R. 33.
Hough v. Rawson, 17 Ill. R. 591 and cases cited.

CHARLES C. BONNEY,
of Counsel for Appellant.

35
In the Supreme Court

Bradley Folliott

vs.

Carlton C. Hunt.

Appeal from Peoria Circuit Court.

Brief of Plaintiff

Filed April 18, 1859
L. Leland
Clerk

BRADLEY FOLLIOTT,
APPELLANT,
versus
CARLTON C. HUNT,
APPELLEE.

} STATE OF ILLINOIS, SCT.
IN THE
SUPREME COURT AT OTTAWA.
A P P E A L
FROM PEORIA CIRCUIT COURT.

ABSTRACT.

- Page. 2 Transcript from Thomas Cottingham, Justice of the Peace. Account.
Summons demanding \$126 66.
3. Subpoena. Appeal-bond to Circuit Court.
4. Circuit Court summons and service.
5. Trial by jury. Verdict for plaintiff of \$102 20.
6. Motion for new trial. Argued and submitted. Motion overruled and judgment on verdict.
7. Leave to file bill of exceptions in vacation. Appeal prayed and allowed on filing bond in \$300, with Atkinson Horn surety, in 30 days.
8. Appeal-bond to Supreme Court.

9, 10, 11.

EVIDENCE.

JOHN W. RUSSELL, P. M. at Farmington. Defendant had contract to carry mail to Burlington, and gave order to let plaintiff take mail, &c. Plaintiff carried mail four months less two trips.

ALEX. SERJEANT: After plaintiff quit, witness talked with defendant about carrying mail; could not agree.

WM. SULTZER: Talked with defendant, before plaintiff commenced, about carrying the mail. Made no contract.

— HUNT: Just before plaintiff commenced carrying mail, heard contract between him and defendant. Understood defendant was to pay once in three months. Can't tell all that was said, or who was present.

WM. TYLER: About 1st July, 1856, plaintiff and defendant agreed that

plaintiff should take defendant's contract with government off his hands, and carry mail from Farmington to Burlington FOR THE ENTIRE TERM OF TWO YEARS from said 1st July; that *defendant was not to pay plaintiff any money therefor*, but should indorse and transfer to plaintiff, in full compensation therefor, the post-office orders & treasury orders which defendant expected to receive from Government from time to time thereafter to amount of \$380 per annum. *No time for the delivery, &c., of the orders, &c., was fixed*—they were to be delivered *whenever they should come*. The orders on post-offices *usually* came once in three months. Had known treasury drafts delayed till end of 2d quarter. Plaintiff carried mail for four months. Meanwhile defendant received sealed communications from *the proper* department, similar in appearance to those defendant had previously received, containing orders. After plaintiff quit, defendant engaged other parties to carry mail over same route.

This was all the evidence.

12. Plaintiff's instructions, excepted to by defendant :

- Given. 1. If the jury find from the evidence that the plaintiff rendered the services for the defendant, as charged, for an agreed price, they will render a verdict for such amount.
- Given. 2. If the jury find the services charged were rendered upon a contract for a longer time, and the defendant was to make quarterly payments for such services as a part of said contract, and failed to make such payment as stipulated, the plaintiff would then have a right to abandon the service, and collect of the defendant what his services rendered were really worth.
- Given. 3. If the jury find it was the duty of the defendant under the contract when he received the orders or drafts to pay them over to the plaintiff, then the plaintiff would be excused from making any demand for the same, upon the PLAINTIFF.

Verdict. Motion for a new trial.

14.

ERRORS.

1. The Court gave improper instructions at the instance of the plaintiff.
2. The verdict is contrary to law.
3. The verdict is clearly against the evidence.

35
In the Supreme Court

Bradley Folliott
vs.

Carlton O. Hunt—

Appeal from Poria Circuit
Court—

Abstract—

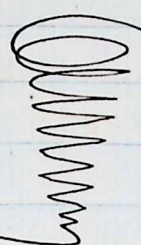
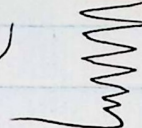
4. The Court erred in overruling the motion for a new trial.
5. The Court erred in giving judgment for the plaintiff.

AUTHORITIES, &c.

The case is too clear for argument. The contract was entire,—a failure on the part of the defendant would not have authorized the plaintiff to quit. His only remedy would have been by action. No failure on the part of the defendant was proved, yet if any had occurred the sending of the orders by the Government to him might have been positively proved by the proper clerk. The instructions are not law, the verdict is unwarranted, and the judgment erroneous.—1 Freeman's Digest, 508, No. 15, and cases cited; Selby v. Hutchinson, 4 Gil. 319; Badgley v. Heald, 4 Gil. 67.

State of Illinois

In the Supreme Court at Ottawa
Of the April Term A.D. 1859-

Bradley Holliott  Appeal from
v. Barton C. Hunt  Peoria Circuit
Court-

Suggestions of Appellant upon
the points made in his printed
brief, and against the points
presented in the printed argument
of the appellee -

- 1 In Selby v. Hutchinson &c. 4 Gil.
R. 332 - 3. The court among other
things say

"In order to justify an abandon-
=ment of the contract, and of the
proper remedy growing out of it,
the failure of the opposite
party must be a total one. the
object of the contract must have
been defeated, or rendered unattainable
by his misconduct or default.

- 2 The case of Badgley v. Heald,
4 Gil. R. 66. 67, citing
Lantry v. Parks 8 Cowen 63
McMillan v. Vanderlip 12 Johnson 165
Jennings v. Camp 13 do 24

Spani v. Arnott 2 Stark. 256.
 De Camp v. Stevens 4 Blackf. 214.
 Ripley v. Chipman 13 Term. 268.
 Morford v. Martin 6 Monroe 609.
 Hayer v. Hadsworth 19 Pick. 349.
 Eldridge v. Rowe 2 Gil. 98.
 is directly in point. It fully
 sustains the position of the ap=
 pellant, and pointedly answers
 the usual objection of "the hardness
of the rule".

3 In ~~a~~ Parsons Contracts 193 it is said
 that

"If the thing to be done on the one
 side as the consideration of the agree=
 =ment on the other side, is to be
 done at several times, a failure
 at one time, will not generally
 authorize the other party to treat
 the whole contract as rescinded."

In the case at bar, there
 was no proof of any failure;
 and if there had been such proof
 as the appellee attempted to
 make, still he would have shown
 no sufficient cause for his aban=
 =donment of the service of the
 appellant, and could not lawfully
 recover.

4 The appellee should have proved
 by the proper officer of the gov=
 =ernment (if such was the

fact) that the orders and drafts were actually forwarded to the appellant in time for delivery according to the agreement.

1 Greenleaf Evidence Sec. 82 Chapt. 4. "When it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that if offered, his design would be frustrated."

The appellee did not produce "the best evidence of ~~the~~ which the case in its nature was susceptible," and was not entitled to a verdict.

5 In 2 Parsons Contracts 190 it is said that

"Generally, as a contract can be made only by the consent of all the contracting parties, it can be rescinded only by the consent of all."

6 The present Chief Justice in Palm & al. v. Ohio & Miss R. R. Co. 18 Ill. R. 220, says,

"Nowhere have I found a case, where the failure to pay the consideration for the work as it progresses, according to the terms of the agreement, has been held such an act or omission, on the part

of the defendant as to prevent the other party from completing the contract".

And again in the case of Christian County v. Overholt & al. 18 Ill. R. 226, this court hold that unless otherwise expressly and positively provided, an under-taking to render service on the one part, and to make payment therefor on the other, will be held independent undertakings, and that the proper remedy on a failure to make payment according to the contract, is by action for the money which may be due.

7 In Beard & al. v. Evans 20 Ill. R. 32, the court say:
"The law is well settled, that before a party can recover on a contract, he must have performed his part of the contract, or have been ready and willing to perform or have been prevented or excused from its performance by the other party."

8 The case of Huygate v. Rankin & al. use &c. 20 Ill. is directly in point. The appellee could not resist upon a breach of the contract, unless he was ready

and willing, and offered to per-
=form on his part."

There was no attempt to make
such proof in the present
case.

To the same effect is the case
of *Hough v. Rawson* 17 Ell.
R. 591.

9 The appellee objects that the ab-
=stract "does not correctly
present the case". The testimony
is not voluminous, and the
court will see on looking into
it, that it is correctly abstracted.

10 The larger part of the argument
of the appellee is devoted to the
elucidation of the proposition
that the verdict should not
be set aside, because the
jury were satisfied that they ought
to find it. "This will not do."
The question is, not whether
the jurors were "satisfied", but
whether the verdict they returned
is supported by the evidence.

11 It is not true that substantial
justice has been done. The appel-
=lant was never bound to
pay the appellee any money.
The appellant simply trans-
=ferred his contract to the

appellee. The appellee did not show, neither did he produce any evidence, tending to show that the appellant had received any orders or drafts from the government and had withheld them from the appellee in violation of the contract. The appellee abandoned the undertaking, without cause, without notice, without consent, and left the appellee to make other arrangements to carry out the provisions of his contract with the government, and protect himself from a forfeiture and damages for non-performance. This was a contract for the transportation of the mail. A contract of which time is the essence. A contract indeed, which nothing could warrant the appellee in abandoning as he did, without reasonable notice, or plausible excuse.

12) It is true that the appellee was not bound to perform two years service without payment &c. The appellee could at any time, learn from the Post Office Department, whether any orders or drafts had been

sent to the appellant and if
so could maintain his action
therefor.

13 The cases cited by the appellee
do not sustain his doctrine.
The appellant has examined
them, but finds nothing which
seems to require particular
comment.

14 The instructions given for the
appellee are manifestly contrary
to the law, and mislead the
jury to render the verdict which
the court below sustained.

15 The law which demands the
reversal of the judgment below,
is sanctioned and approved
by that public policy, which the
court will always somewhat
regard, and which requires
that those who on some flimsy=
=lous pretence would abandon
their contracts, and bring suit
against the party left to suffer
by their neglect, should meet with
no encouragement from the courts
of justice.

Charles C. Donney
attorney for
appellant
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Bradley Folliott

Cartton C. Hunt

Suggestions of
appellant on points
in printed briefs.

Filed May 6. 1889 -
T. Leland
Clerk

Bonner

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

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CHARLES C. BONNEY,
of Counsel for Appellant.

In the Supreme Court.

Bradley & Folliott.

vs.
Carlton C. Hunt.

Appeal from Peoria Circuit
Court

Brief of Plaintiff

Filed April 18. 1859

L. Leland
clerk

BRADLEY FOLLIOTT,
APPELLANT,
versus
CARLTON C. HUNT,
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Verdict. Motion for a new trial.

14. ERRORS.

1. The Court gave improper instructions at the instance of the plaintiff.
2. The verdict is contrary to law.
3. The verdict is clearly against the evidence.

4. The Court erred in overruling the motion for a new trial.
5. The Court erred in giving judgment for the plaintiff.

AUTHORITIES, &c.

The case is too clear for argument. The contract was entire,—a failure on the part of the defendant would not have authorized the plaintiff to quit. His only remedy would have been by action. No failure on the part of the defendant was proved, yet if any had occurred the sending of the orders by the Government to him might have been positively proved by the proper clerk. The instructions are not law, the verdict is unwarranted, and the judgment erroneous.—1 Freeman's Digest, 508, No. 15, and cases cited; Selby v. Hutchinson, 4 Gil. 319; Badgley v. Heald, 4 Gil. 67.

Charles C. Bonney
for appellant

135-

Holliott & Hunt

abstract-

Filed Apr 20, 1858

J. Seland
Clerk

Appellants Reply

The abstract presents every fact in the record, material to the case here presented. All the evidence is set out in the bill of Exceptions, and fully sustains the points made by the appellant, and printed in the abstract below the assignment of errors. The argument for the appellants is irrelevant, and the cases cited in his behalf are not in point.

With this, the appellant submits his case here to the judgment of the Court &c.

Charles B. Dorney
attorney for
Appellant

It is agreed to submit this case on written arguments
E. J. Dorney

Bradley Fallioth
Appellant 138
vs

Leahon Co. Hous
Appellee

Filed Apr. 27. 1858.
L. Deland
Clk.

Johnson

Be it remembered that heretofore to wit: on the fifth day of May in the year of our Lord one thousand eight hundred and fifty seven there was filed in the office of the clerk of the Circuit Court in the county of Bond in the State of Illinois a Transcript, account sued on, summons, subpoena and appeal bond in the words and figures following to wit:

[Transcript.]

"trial

set on the

2 day

of May

1857

at one

o'clock

P.M.

Process

issued

April

28 day

1857

for Debt

Carlton C. Hunt Demand \$126. 66

vs

Bradley Follett

its ordered that the plaintiff have a judgment against the Defendant for one hundred and twenty six dollars & 66 cents Debt & \$4.52

Cost this 2 day of May A.D. 1857

(Wm. Collingham J.)

Justice Court	sumon	18 3/4
Docking suit		12 1/2
one sub.		18 3/4
Serving 2 witnesses		12 1/2
En judgment		25
transcript		25
En appeal		25
taken Bond		25
Constable cost Samuel Craig		\$11.50
Witness fees		
W. Tyler		" 50
A. Thargan		" 50
J. Tubear		" 50
W. Tubear		" 50
J. W. Russell		" 50

\$4.12 1/2

2
State of Illinois
Peoria County I Tho^s Cottingham one of the Justice of
the Peace within and for said county do hereby certify
that the foregoing transcript and judgment of C. C. Hunt
vs Bradley Follett is truly copied from the files and
books of my office given under my hand and seal at
Logan this 4 day of May A. D. 1857
Tho^s Cottingham J. P.

[Account sued over]

to Mrur hure + bgyy curry mill fur Forway to to Burlingtas
sixteen trips at eight dollar pr trip 1858
Fur July forth 1856 to Oct in 1856:
\$128.

Domoge Down by forlun on part of plaintiff to fulfil contract
made fr curing said moil \$150.00

[Summons]

State of Illinois Peoria County, ss. The People of the State
of Illinois to any Constable of said county Greeting: You
are hereby Commanded to Summon Bradley Follett to
appear before me at my office in Logan on the 2^d day of Mar
1857 at one o'clock a.m., to answer the complaint of Carlton
C Hunt for a failure to pay him a certain demand not ex-
ceeding \$300; and hereof make due return as the law di-
rects. Given under my hand and seal this 18 day of April
1857 Tho^s Cottingham J. P.

[Endorsed]

C. C. Hunt

104
B. Follett

Demand \$126.66

Cost " 50

Const. fee 25

Mileage 90

Served on the within defendant by reading April the

29/57

Samuel Loring Const

[Subpoena]

"State of Illinois, Peoria County, ss. The People of the State of Illinois to W. Taylor Isaac Elve Wm Guller Elie Sargent You are hereby Commanded to appear before me at my office in Logan on the 2 day of May 1857 at 10 o'clock A.M. then and there to testify the truth in a matter in suit, wherein C.B. Hunt is plaintiff and B. Jellist is defendant, and this you are not to omit under the penalty of the law. Given under my hand and seal, this 18 day of April 1857

Thos Cottingham J.P."

[Affirmation Bond]

Know all Men by these presents that we Edward Jellist Bradley Jellist are held and firmly bound unto Carlton Hunt in the penal sum of three hundred dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, firmly by these presents. Witness our hands and seals this 2 day of May A.D. 1857.

The Condition of the above obligation is such, that whereas the said Carlton Hunt did on the 2^d day of May 1857 before Thomas Cottingham a Justice of the Peace for the County of Peoria recover a judgment against the above bounden Bradley Jellist for the sum of one hundred twenty six ²⁶/₁₀₀ dollars from which judgment the said Bradley Jellist has taken an appeal to the circuit court of the county of Peoria aforesaid, and State of Illinois. Now if the said Bradley Jellist shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

[Approved before me, at my office, this 2^d day of May 1857]

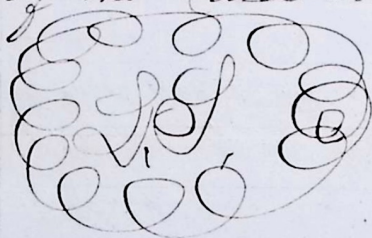
Thos Cottingham J.P.

Bradley Jellist sub
W E Jellist sub
H. Bunn sub

X
And on the same day to wit: on the fifth day of May
in the Year of our Lord one thousand eight hundred and
fifty seven there was issued out of the office of the clerk
of said Court under the Seal of said Court a Summons
in the words following, to wit:

"The People of the State of Illinois

To the Sheriff of Peoria County, Greeting,
We Command You to Summon Carlton B. Hunt if he
may be found in Your County, to appear before our Circuit
Court on the first day of the term thereof, to be held at Peoria,
within and for the said County of Peoria on the Second
Monday of May instant, then and there, in our said
Court, to prosecute his suit against Bradley Pollett
lately appeared from before Thomas Cottingham a Justice of the
Peace of the said County of Peoria and make return of this
writ with an endorsement of the time and manner
of serving the same, on or before the first day of the term
of the said Court to be held as aforesaid



Witness, Enoch S. Sloan, Clerk of our said
Court, and the Seal thereof, at Peoria, this
fifth day of May in the Year of our Lord
one thousand eight hundred and fifty seven.
Enoch S. Sloan, Clerk,

Which said Summons was returned endorsed as follows
"Served on Carlton B. Hunt by reading to him this writ
May 8th 1857
J. W. Smith Sheriff
by J. F. Dixon Deft."

Proceedings in the Circuit Court at a term thereof began and
held in the Court house in the City and County of Peoria,
in and for said County and State of Illinois on the
third Monday of November in the Year of our Lord one
thousand eight hundred and fifty seven, it being the
sixteenth day of said month, Present the Honorable Charles
N. Powell, Judge of the 16th Judicial Circuit in the State of
Illinois, Thomas W. Smith, Sheriff and Enoch S. Sloan
Clerk, to wit,

Saturday December 13th 1857
Carlton C. Hunt
vs
Dudley Follett
Appeal from S.P.

This day Came the Plaintiff by Johnson his attorney and the defendant by Dorney his attorney and it is ordered by the Court that a jury be empanelled to try the issues in this Cause, whereupon Came a jury of twelve good and lawful men to wit: Jacob Littleton, Edward D. Cutler, Harrison Crach, Melton Macbride, Ebenezer Masson, James Hazzard, Louis Aubin, Ephraim Morrison, Henry Keach, David Maxwell, Andrew Lindsey, and O. F. Garrett, who being duly chosen tried and sworn to well and truly try the issues joined in this Cause, and a true verdict give according to the evidence, and having heard the evidence in the case, retired to consider of their verdict. And it is agreed by the parties that the said jury may seal up their verdict and deliver the same to the Sheriff, directed to the clerk of this court to be read on the opening of Court Monday Morning.

Monday December 14th 1857
Carlton C. Hunt
vs
Dudley Follett
Appeal from S.P.

This day Came the parties by their attorneys and the Court opened and read the verdict of the jury sworn to try the issues in this Cause, and a true verdict give according to the evidence as follows to wit: We the jury find the issues for the Plaintiff, and assess his damages at the sum of one hundred and two dollars and twenty cents, And thereupon Comes the defendant by Wm Dorney his attorney and enters his motion for a new trial in this Cause.

And on the same day to wit: on the fourteenth day of December A.D. 1857 there was filed in said Cause the defendants Motion for a new trial in the words and figures following, to wit:

6
"State of Illinois
County of Peoria" } In the Circuit Court
November Term 1857

Hunt
w
Follett
Appeal

The defendant moves the Court here to award a new trial of this Cause, for that the Court gave improper instructions to the jury; and for that the verdict of the jury is contrary to the law and for that the verdict of the jury is contrary to the evidence.

Charles C. Finney
Attorney for Defendant.

Thursday December 17th A.D. 1857
Carlton C. Hunt

w
Bradley Follett
Appeal from I.P.

This day came the defendant by E. Finney his attorney and having entered his motion for a new trial in this Cause and the Court having heard the argument of Counsel took time to consider.

Monday December 21st A.D. 1857
Carlton C. Hunt

w
Bradley Follett
Appeal from I.P.

This day came the parties by their respective attorneys and the Court here now being fully satisfied in the premises does Overrule the Motion for new trial made in this Cause. Therefore it is considered by the Court that the said Carlton C. Hunt have and recover of the said Bradley Follett, the sum of one hundred and two dollars and twenty cents his damages aforesaid and also his costs and charges by him about his suit in this behalf expended in this Court as well as in the Court below and that he have execution therefor.

Monday December 18th 1857
Carlton C. Hunt

vs
Bradley Follett

Appeal from I. P.

On Motion of defendant attorney
Wm Donney leave is given him to file
his bill of exceptions in this cause by the
first day of February next, the plaintiff
by his attorney agreeing thereto.

Tuesday December 30th 1857
Carlton C. Hunt

vs
Bradley Follett

Appeal from I. P.

This day came the defendant
by Donney his attorney and prayed an ap-
peal of this cause to the Supreme Court
of this State, which is allowed on his
filing a bond in the penal sum of three
thousand dollars with Atkinson Horne
as ~~security~~ ^{surety} in the office of the clerk of this
Court in thirty days.

And afterwards to wit: on the four-
teenth day of January in the year of our
Lord one thousand eight hundred and
fifty eight there was filed in the office
of the clerk of said Circuit Court of Peoria
County in said State of Illinois in said
cause the defendant's Appeal bond in
the words and figures following, to wit:

"Know all men by these presents that
we Bradley ~~Follett~~ ^{Follett} as principal and
Atkinson Horne as surety are held
and firmly bound unto Carlton C. Hunt
in the penal sum of two thousand dollars,

For the Payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents, Witness our Hands and Seals this day of January A. D. 1858.

The Condition of the above obligation is such that whereas the above named Edw. C. Hunt did at the November Term A. D. 1857 of the Circuit Court within and for the County of Peoria in the State of Illinois, recover by the consideration of said Court a judgment against the above named Bradley Tollett for the sum of one hundred and two dollars and twenty cent damages, besides costs of suit, from which said judgment the said Bradley Tollett has taken an appeal to the Supreme Court of said State of Illinois.

Now if the said Bradley Tollett has taken shall duly prosecute his said appeal and shall well and truly pay the judgment aforesaid, and all costs, interest and damages in case the said judgment shall be affirmed by said Supreme Court then this obligation shall be void otherwise to remain in full force and effect.

Bradley Tollett Seal
Atkinson Corn Seal

And afterwards to wit, on the eighteenth day of January in the year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the Clerk of said Circuit Court of Peoria County in said State of Illinois

in said Cause the defendant Dil
of Exceptions in the words and figures
following, to wit;

State of Illinois
County of Peoria

In the Circuit Court
of the November Term
1857.

Carlton C. Hunt

Bradley Follett

vs
No 210

Appellant vs
Respondent

Be it remembered that
on the trial of this Cause before the
Hon. Clerk N. Powell Judge, and
a jury

John H Russell testified that he is Post
Master at Farmington that defendant
had contract with Government and had
been carrying the Mail from Farmington
to Burlington that about the 1st of July 1856
defendant sent or gave him an order to
let plaintiff have mail to carry over same
route that plaintiff carried such mail
for four months less 2 trip commencing
July 1st.

Alexander Seizeant testified that after
plaintiff quit carrying mail & tried
to make contract with defendant to carry

10
Same mail, but they could not agree
offered to pay once in three months

William Fuller testified that he
and defendant talked of making con-
tract shortly before plaintiff commenced
carrying the mail - the witness asked
defendant how ^{he would} pay and defendant said
he would pay him quarterly

Hunt testified that just before
plaintiff commenced carrying the mail
he heard the contract between plaintiff
and defendant in which he understood
that def^t was to pay plaintiff once in three
months for carrying the mail, witness
could not tell all that was said between
the parties but understood this much,
could not tell who else was present
nor all that was said by or to him

William Tyler testified that he was
present about the first of July 1856
and heard the plaintiff and defendant
make an agreement that plaintiff
should take defendant's contract with
the government off his hands, and carry
the mail for and instead of defendant
from Farmington to Burlington for the entire
term of two years from the said first day
of July, that defendant was not to pay
plaintiff any money for so carrying the
mail, but that defendant should
indorse and transfer to plaintiff
as they came in full compensation there-
for the post office orders and treasury
orders which defendant expected to

received from time to time thereafter to the amount of three hundred and eighty dollars per annum from the Government for such carrying of the Mail. No time for the delivery and indorsement of the orders and drafts was fixed, but it was agreed that whenever they should come, defendant should indorse and deliver them to plaintiff, witness had carried the Mail over the same route. The orders on Post Offices usually came ^{once and just before or just after each quarter} once in two months, but had known; the treasury drafts never came regularly, were ^{sometimes} delayed till the last end of the next quarter after they were due.

The said Russell was then recalled who testified that the Plaintiff did carry the Mail from Farmington to Burlington from the first of the quarter commencing July 1 1858 and continued to carry it for a month after the expiration of the quarter. That the orders upon Post Offices usually came near the end of the quarter - directed to the contractor - that defendant was contractor on that route and that about the time of the expiration of the quarter after defendant commenced carrying the Mail - communications were received at the Post Office Farmington from the proper department directed to the defendant and were delivered to defendant - and that they were similar in appearance to the communications from the department to the Post which had previously been received containing post office orders.

The said Russell also testified that after the said stopped carrying said Mail - the defendant procured other parties to carry the said Mail and continued to do so then afterwards and prayed that his bill of exceptions may be signed which is accordingly done &c.

" This was all the evidence

" The Court at the instance of the Plaintiff gave the following instructions to which the defendant then and there excepted, to wit:

"Carlton Hunt

vs

Bradley Follett

Instructions for plaintiff

- 1 If the jury find from the evidence that the plaintiff rendered the services for the debt as charged for an agreed price they will render a verdict for such amount
- 2 If the jury find the services, ^{charged} were rendered upon a contract for a longer time and that defendant was to make quarterly payments for such services as a part of said contract and failed to make such payment as stipulated the plaintiff would then have a right to abandon the services and collect of defendant what services his services already ~~rendered~~ ^{rendered} were reasonably worth.
- 3 If the jury find it was the duty of the defendant under the contract when he received the orders or drafts to pay them over to the plaintiff then the plaintiff would be excused from making any demand for the same upon the plaintiff.

The jury returned the following verdict to wit:

"We the jury find the issues for the plaintiff and assess his damages at the sum of one hundred and ten dollars and twenty cents."

The defendant entered the following motion for a new trial, to wit:

"State of Illinois vs.

County of Cook

In the Circuit Court
November Term 1857

Hunt

vs

Follett

Appeal

The defendant moves the Court to grant a new trial of this cause for that the court gave improper instructions to the jury and for that the verdict of the jury is contrary to the law and for that the verdict of the jury is contrary to the evidence. Charles C. Perry
Attorney for defendant.

The Court overruled the Motion for a new trial and gave judgment for the plaintiff to which ruling of the Court the defendant then and there excepted and prayed the Court to sign and Seal the bill of exceptions which is accordingly done

E. O. Powell Seal

State of Illinois, 3^d Dist.
County of Peoria, 3^d J. Enock P. Sloan, Clerk
of the Circuit Court in and for the County of Peoria
in said State of Illinois do hereby certify that
the foregoing is a correct transcript from the files
and Records of my Office in a certain cause
wherein Carlton Stuart is Plaintiff and Bradley
F. Elliott is defendant

In Witness Whereof I here to set
my hand and affix the Seal of
said Court this twelfth day of
April in the year of our Lord one
thousand eight hundred and
fifty eight.

Enock P. Sloan, Clerk

And the said Bradley Follitt
by Charles B. Bourney his attorney comes
and says that in the record and proceed-
ings aforesaid, and also in the
condition of the judgment aforesaid
there is manifest error in this to-wit:
that the said Circuit Court gave ~~in proper~~
instructions to the jury; ~~and in this that~~
at the instance of the plaintiff below;
and in this ^{to-wit} that the verdict of the jury
is contrary to the Law of the land;
and in this to-wit, that the verdict of the
jury is at first blush clearly against
the evidence; and in this to-wit, that the
^{said Circuit} Court erred in overruling the motion of the defendant
below for a new trial; and in this to-wit, that
the said Circuit Court erred in giving
judgment for the plaintiff below upon
the verdict aforesaid. Wherefore the said
Bradley Follitt prays that the said Supreme
Court here may proceed to examine
as well the record and proceedings aforesaid
as the matters aforesaid above-assigned
for error, and that the judgment aforesaid,
in form aforesaid given may be
reversed annulled and altogether held
for nothing and that he the said
Bradley Follitt may be restored to all
and whatsoever he hath lost by occasion
of the judgment aforesaid &c.

Charles B. Bourney
Attorney for

Appellant

And the said Carlton C Hunt comes and
says that there is no error in the record.
Proceedings nor in the rendition of this Judge's
ment in this case & that he pres may be
enquired of by the Court here

E G Johnson

Atty Gen Dept in
Error

Bradley F. Elliott
appellant
— versus —
Carlton B. Hunt
appellee

Record &
assignment
of errors

Filed April 17, 1858
Leland B. K.

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

BRADLEY FALLMUTT, Appellant, }
vs. } Appeal from
CARLTON C. HUNT, Appellee. } Peoria County Circuit Court.

The abstract in this case does not correctly present the case, as will be seen by inspection of the bill of exceptions.

The testimony of Russell is understood. He was recalled and his testimony is more full and pertinent than appears in the abstract. The testimony of Hunt is also understood, and not fairly presented, while the testimony of Tyler on the part of the defendant below is overstated.

A reference to the bill of exceptions will correct the defect in the abstract.

The plaintiff below rendered the services charged, and has received nothing. The defendant below, received the pay for the same, and has not paid or offered to pay the plaintiff. The plaintiff below, had a right to recover for (meritorious) services rendered, unless there be some inflexible rule of law (operating inequitably in this case) to prevent.

The questions made at the trial below, were :

- 1st. The amount and value of the services rendered.
- 2d. Whether defendant contracted with plaintiff to carry the mail, and to pay him once in three months for such services, and plaintiff proved the amount and value of the services, and that defendant contracted to pay for the same, once in three months; but failed to perform his part of the contract, and that plaintiff rescinded or abandoned the contract.

The defendant below, attempted to prove by one witness, that he was only bound by the contract to endorse and deliver to the plaintiff, the Post Office orders and treasury drafts as they should come to hand; but he failed to prove this, to the satisfaction of the jury. It was proven to the satisfaction of the jury, that he did receive and did not endorse and deliver the post office orders when they came to hand, nor did he pretend to have done so.

The testimony as offered to the jury, cannot be placed upon paper, and the appearance, intelligence, candor and manner of the witnesses, have much to do in fixing the weight and effect to be given to their testimony, and it is unsafe to set aside the conclusion of a jury upon matters of fact, when that conclusion is the effect of the testimony of witnesses,

produced before them. The jury found for the plaintiff below, and their verdict does no violence to the facts proven—and substantial justice has been done.

The cases cited by the defendant below, are not in point. Payment was to be made once in three months, and no payment was made.

Failure to pay according to the contract, was legal cause for rescission of the contract. The contrary doctrine would work great injustice; would compel the plaintiff below, to perform his part of the contract without means, and trust to the contingency of ultimate recovery for his pay.

Bannister vs. Read, 1 *Gil.* 100, and the cases there cited.
4 *Pick.* 114; 5 *Johnson* 85.

The defendant below, treated the contract as rescinded, and procured other parties to perform the services. No such defence as is insisted upon now, was set up at the trial below, and it is too late now to urge it, if ever tenable.

1 *Caines R.* 47; *Chitty on contracts*, 249.

The plaintiff below was neither compelled to perform two years service without payment, or to wait two years for payment, for the service he had rendered.

The instructions asked and given were law, as applied to the facts proven at the trial, if the jury believed the plaintiff's witnesses.

There is no legal or equitable reason why the verdict should be set aside.

E. G. JOHNSON,
Counsel for Appellee.