

No. 658

Supreme Court of Illinois

Cole and Dunn

vs.

Aaron B. Church

(379)  7

Sanson Cole & Ferrel Dunn  
vs  
Aaron B. Church

Assumpsit

In the Circuit Court Bureau  
County July Term A.D. 1839

Copy of Summons

State of Illinois  
Bureau County

The people of the state of Illinois, to the Sheriff of said County  
Greeting

We command you to summon Aaron B. Church  
if to be found in your County personally to be and appear before the  
Circuit Court of said County on the first day of the next term thereof  
to be held at the Court house in Princeton in said County on the  
third Monday in the month of July next, to answer unto Sanson  
Cole & Ferrel Dunn in a plea of trespass on the case on  
promises to the damage of said Plaintiff as they say the sum of  
two hundred dollars; And have you then and there this writ  
with an endorsement thereon of the manner in which you execute  
the same

Seal

In testimony whereof I have hereunto set my hand and  
the seal of said Court at Princeton this sixth day  
of May A.D. 1839 Cyrus Bryant Clerk

On which is the following return - to wit:

Executed this writ by reading to Aaron B. Church May 8. 1839  
C. Langworthy Sheriff

(Copy of Declaration)

Bureau Cir. Ct.

Of the special term of July, A.D. 1839

State of Illinois  
Bureau County

Aaron B. Church defendant in this suit  
was summoned to answer unto Sanson Cole & Ferrel Dunn plain-  
tiff in this suit in a plea of trespass on the case on promises  
and thereupon the said Plaintiff by Murray & Merriam their  
Attorneys complain: For that whereas heretofore to wit on

Sanson Cole & Ferrel Dunn  
vs  
Aaron B. Church

Defendant

In the Circuit Court Bureau  
County July Term A.D. 1839

Copy of summons

State of Illinois  
Bureau County

The people of the state of Illinois, to the Sheriff of said County  
Greeting

We command you to summon Aaron B. Church  
if to be found in your County personally to be and appear before the  
Circuit Court of said County on the first day of the next term thereof  
to be held at the Court house in Princeton in said County on the  
third Monday in the month of July next, to answer unto Sanson  
Cole & Ferrel Dunn in a plea of trespass on the case on  
promises to the damage of said Plaintiff as they say the sum of  
two hundred dollars; And have you then and there this writ  
with an endorsement thereon of the manner in which you execute  
the same

Seal

In testimony whereof I have hereunto set my hand and  
the seal of said Court at Princeton this sixth day  
of May A.D. 1839 Cyrus Bryant Clerk

On which is the following return - to wit -  
Executed this writ by reading to Aaron B. Church May 8. 1839  
C. Langworthy Sheriff

(Copy of Declaration)

Bureau Cir. Ct.

Of the special term of July, A.D. 1839

State of Illinois  
Bureau County

Aaron B. Church defendant in this suit  
was summoned to answer unto Sanson Cole & Ferrel Dunn plain-  
tiff in this suit in a plea of trespass on the case on promises  
and thereupon the said Plaintiff by Murray & Meriman their  
Attorneys complain: For that whereas heretofore to wit on

the United States when he the said defendant should be  
thereunto afterwards requested, whereupon the said Plaintiff  
then & there to wit at the then said County of Putnam now  
County of Bureau on the day and year aforesaid assumed  
upon themselves undertook and faithfully promised the said  
defendant on their part for and in consideration of the said  
sum of one thousand dollars so to be paid & satisfied by said  
defendant that they the said Plaintiff should and would  
within a reasonable time thereafter procure furnish deliver  
& make known to the said defendant at the place first  
aforesaid the number and description of a certain number  
to wit nine eighty acre lots tract or parcels of <sup>said</sup> public  
land so vacant unentered & unpurchased of & belonging to the United  
States and also the said Plaintiff then and there to wit on the  
day and year and at the place first aforesaid [further] assumed  
upon themselves undertook and faithfully promised the said defend-  
ant for the consideration aforesaid that they the said Plaintiff should  
& would within a reasonable time thereafter obtain procure furnish  
& deliver & make known or be ready to deliver & make known  
to the said defendant at the dwelling house of Samson Cole  
one of the said Plaintiff in the then said County of Putnam (now  
said County of Bureau) the number & description of two other certain  
eighty acre lots tract or parcels of Public land belonging to and  
then remaining and being vacant unentered and unpurchased  
of & from the said United States situate in said County of Putnam  
and on which a certain grove of valuable timber known called  
& designated as Devils grove is situated; In consideration of  
which said assumption undertaking promise & agreement by said  
Plaintiff, the said defendant on his part then & there to wit on  
the day & year & at the place <sup>first</sup> aforesaid assumed undertook  
& faithfully promised the said Plaintiff to pay them the said sum  
of one thousand dollars lawful money of the United States when  
he the said defendant should be thereunto afterwards requested  
and the said Plaintiff avow that afterwards and within a  
reasonable time to wit on the day and year and at the place  
first aforesaid they the said Plaintiff did in pursuance & fulfillment of

their said assumption undertaking promise & agreement on their part procure obtain furnish deliver & make known to the said defendant the number and description of nine eighty acre lots tracts or parcels of public land situated in the then County of Putnam then belonging to & then remaining vacant unentered & unpurchased of & from the said United States the number and descriptions whereof are as follows to wit, the south east quarter of section numbered twenty nine the northwest quarter of section numbered twenty two the west half of the southwest quarter of section numbered fifteen the northwest quarter of section numbered twenty and the west half of the south east quarter of section numbered nineteen all in township numbered fifteen north of the base line of range numbered nine east of the fourth principal meridian in the said state of Illinois, also the east half of the south east quarter of section numbered fourteen in township numbered fifteen north of the base line of range numbered eight east of the <sup>36th</sup> fourth principal meridian of the state of Illinois; And the said plaintiffs further aver that in the further fulfillment of their said assumption undertaking promise and agreement on their part afterwards & within a reasonable time to wit on the day & year aforesaid at the dwelling house of the said James Cole one of the said plaintiffs in the said then County of Putnam now said County of Bureau they the said plaintiffs did procure obtain & furnish ready to be delivered & made known and hath always <sup>triflingly</sup> been ready & willing to deliver & make known to the said defendant of which the said defendant then & then had notice the number & description of ~~two~~ other eighty acre lots tracts or parcels of public land situate in said County of Putnam then belonging to, & then remaining vacant unentered & unpurchased of and from the said United States on which a certain grove of valuable timber described designated & known as Devils grove is situated the number & description of which last ~~two~~ mentioned eighty acre lots tracts or parcels of land are as follows to wit the south east quarter of section numbered five and the west half of the southwest quarter of said section numbered five in township numbered sixteen

North of the base line of Range numbered seven East of  
the fourth principal Meridian in the State of Illinois  
whereupon the said defendant became liable to pay to the  
said Plaintiff the said sum of one thousand dollars so by  
him assumed undertaken & promised to be paid as aforesaid  
when he the said defendant should be thereto afterwards  
requested and being so liable he the said defendant in  
consideration thereof afterwards to wit on the day and year  
aforesaid at the then County of Putnam now said County of  
Bryan aforesaid undertook & then & there faithfully promised  
the said Plaintiff to pay them the said sum of one thousand  
dollars when he the said defendant should be thereto  
afterwards requested. Yet the said defendant not regarding  
his said promises & undertakings although often requested so to do  
to wit on the day & year aforesaid & often afterwards, but  
contriving & intending craftily & subtly to deceive and  
defraud the said Plaintiff in this behalf has hitherto wholly  
~~fully~~ neglected & refused & still does neglect & refuse to  
pay to the said Plaintiff the said sum of one thousand dollars  
and every part thereof to wit at the County of Bryan aforesaid.

2 And also for that whereas heretofore to wit: On or  
about the second day of April in the year of our Lord one  
thousand eight hundred and thirty six at the County of Putnam  
the now County of Bryan aforesaid the said Plaintiff of one  
part and the said defendant of the other part held & had a  
certain other conversation of about & concerning several other  
rightly accu lots or parcels or tracts of public land belonging  
to the United States which then remained vacant, unreturned  
and unpurchased of and from the said United States situate  
in the district of public lands subject to sale at the land office  
of the said United States at Galena in said State of Illinois  
and the numbers & descriptions of which lots pieces or parcels  
of Land were then & there procured obtained furnished & made  
known to the said defendant at the special instance and  
request of the said defendant the numbers and description  
whereof are as follows to wit: the southeast quarter of section

No twenty nine the northwest quarter of section No  
twenty two the west half of the southwest quarter of  
section No fifteen the northwest quarter of section No  
nineteen the west half of the southeast quarter of section No  
nine east of the fourth principal meridian, also the  
East half of the southeast quarter of section No fourteen in  
township No fifteen north of range No eight east of the said  
fourth meridian all in said state of Illinois and also of  
about & concerning certain other eighty acre lots parcels  
of such public land of the United States then remaining vacant  
unentered & unpurchased of and from the said United States  
situate in the said district of land subject to sale at the said land  
office at Galena in said state of Illinois the numbers & descrip-  
tion whereof were then and then unknown to the said defendant  
and whenon was situated a certain grove of timber called and  
known as "Devils Grove" in said County of Putnam. The num-  
bers and description whereof are as follows to wit the south  
east quarter and the east half of the southwest quarter of  
section number five in township number sixteen north  
of range number seven east of the said fourth principal  
meridian in said state of Illinois at and during which  
said conversation in consideration that the <sup>said</sup> plaintiffs had  
before that time to wit, on the day & year aforesaid and at  
the County of Putnam now County of Putnam aforesaid procured  
furnished delivered & made known to the said defendant the  
numbers and description of a certain number to wit nine  
vacant unentered & unpurchased eighty acre lots tracts  
or parcels of the public land of the United States the  
numbers & description whereof are first above stated  
in this count of this declaration) at the special instance  
& request of the said defendant and for the further con-  
sideration that the said plaintiffs did then & then aforesaid  
upon themselves undertake promise & agree to and with  
the said defendant that they the said plaintiffs would &  
should within a reasonable time thereafter procure obtain  
furnish & deliver & make known or be ready so to do

at the house of the said Samson Cole one of the said  
plaintiffs in the then County of Putnam now County of  
Bureau aforesaid to the said defendant the number  
and description of three certain other eighty acre lots  
tracts or parcels of public land of the United States  
then belonging to the vacant unincorporated & unpurchased of  
from the said United States when a said Grove called known  
as "Devils Grove" is situated (the number & description whereof  
are recited above stated & set forth in this count of this dec-  
laration) the said defendant the said defendant then & there  
undertook and faithfully promised the said plaintiffs well &  
truly to pay them the just & full sum of one thousand dollars  
lawful money of the United States, when he the said defend-  
ant should be therunto afterwards requested; And the  
said plaintiffs aver that they the said plaintiffs confiding  
in the said undertaking & promise of the said defendant  
did within a reasonable time thereafter to wit on the day  
& year aforesaid at the house of the said Samson  
Cole one of the said plaintiffs in the then County of  
Putnam now County of Bureau aforesaid procure obtain  
and were ready to furnish & deliver to the said defendant  
the number and description of the said three eighty acre  
lots pieces or tracts of land last mentioned on which a  
certain grove of timber known & called "Devils Grove" is  
situated lying and being in the County of Putnam whereup-  
on the said defendant then & there became liable  
to pay the said sum of one thousand dollars to the said  
plaintiffs and being so liable he the said defendant in  
consideration thereof afterwards to wit on the day & year  
aforesaid at the said County of Putnam now County of  
Bureau aforesaid undertook & then & there faithfully  
promised the said plaintiffs to pay them the said sum of  
money when he the said defendant should be therunto  
afterwards requested: Yet the said defendant not regard-  
ing his said promise and undertaking has not paid the  
said sum of one thousand dollars to the said plaintiffs



or any part thereof but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly neglected and refused & still does neglect & refuse so to do (altho' often requested &c) to wit at the County of Putnam now County of Bureau aforesaid —

3

And also for that whereas at and before the time of making the agreement and the promise and undertaking of the said defendant herein after mentioned the said defendant was desirous of entering & purchasing a large quantity of public land then belonging to & vacant unentered & unpurchased of the United States situate in the County of Putnam in the State of Illinois to wit at the then County of Putnam now County of Bureau aforesaid, and thenceforward, to wit at the town of Indian town in the then County of Putnam now County of Bureau aforesaid on or about the second day of April in the year of our Lord 1836 it was virtually agreed by and between the said plaintiffs of the one part and the said defendant of the other part, that the said plaintiffs should and would within a reasonable time thereafter procure furnish & deliver & make known to the said defendant the number & description of a certain number, to wit twelve eighty acre lots tracts or parcels of land then belonging to & vacant unentered & unpurchased of and from the said United States situate in the said then County of Putnam and that for so procuring furnishing delivering and making known to the said defendant the number & description of said number to wit twelve eighty acre lots tracts or parcels of public land then vacant unentered & unpurchased and belonging to the said United States as aforesaid he the said defendant should & should well & truly pay the said plaintiffs the the sum of ~~one~~ one thousand dollars lawful money of the United States when he the said defendant should be thereunto afterwards requested And the said agreement being so made as aforesaid to wit at the town of Indian town aforesaid in consideration thereof afterwards to wit on the day and year last aforesaid at the place last aforesaid & in consideration that the said plaintiffs at the special instance and request of the said defendant had then & there

undertaken and faithfully promised the said defendant to perform and fulfil the said agreement in all things on the part & behalf of the said plaintiffs to be performed and fulfilled, he the said defendant undertook and then & there faithfully promised the said plaintiffs to perform & fulfil the said agreement in all things on the part & behalf of the said defendant to be performed & fulfilled and the said plaintiffs were that after making the said agreement to wit on the day & year and at the place last aforesaid the said plaintiffs did procure furnish deliver & make known to the said defendant the number & description of a certain number to wit more eighty seven lots pieces or parcels of Public land situate in the County of Put. then belonging to & remaining vacant unentered & unpurchased of & from the said United States the number & description whereof are as follows to wit the southwest quarter of section no twenty nine the northwest quarter of section no twenty two the west half of the of the southwest quarter of section no fifteen the northwest quarter of section no twenty the west half of the southeast quarter of section no nineteen all in township no fifteen north of range no nine east of the fourth Principal Meridian in the State of Illinois aforesaid also the east half of the southeast quarter of section no fourteen in township no fifteen north of range no eight East of the fourth said Meridian also the southeast quarter of section no five and the east half of the southwest quarter of said section no five in township numbered sixteen north of range no seven east of the said Meridian, whereupon the said defendant then & there became liable to pay to the said plaintiffs the said sum of one thousand dollars when by the said defendant should be thereunto after wards requested - yet the said defendant not regarding his said agreement nor his said promise and undertaking so by him made as aforesaid but contriving and fraudulently intending craftily & subtly to deceive & defraud the said plaintiffs in this behalf has not yet paid the said sum of one thousand dollars or any part thereof to the said plaintiffs although

often requested so to do but has hitherto wholly neglected  
& refused to still does neglect & refuse so to do to wit at  
the County of Bureau aforesaid

A And also for that whereas heretofore to wit on  
or about the first day of July A.D 1836 at the town of  
Indiantown in the then County of Putnam now County of  
Bureau the said defendant in consideration that the said plain-  
tiff had before that time at the special instance & request of  
the said defendant at the place last aforesaid procured furnished  
delivered & made known to the said defendant the number and  
description of a certain number to wit more than eighty ac-  
res or parcels of land belonging to the said United States  
and then remaining vacant unsold & unpurchased of &  
from the said United States situated in the then said County of  
Putnam the number & description whereof are as follows to wit  
the southeast quarter of section No twenty nine (29) the northwest  
quarter of section No twenty two (22) west half of the south  
west quarter of section No fifteen northwest quarter of section  
No twenty (20) the west half of the southeast quarter of  
section No nineteen (19) all in township No fifteen (15)  
north of the base line of Range No nine (9) east of the fourth  
Principal Meridian and the east half of the southeast quarter of  
section numbered four teen (14) in township No fifteen east of the  
base line of range No eight (8) east of said meridian also  
the southeast quarter & the east half of the southwest quarter  
of section No five (5) in township No sixteen north of the  
base line of Range No seven (7) east of the said merid-  
ian of the state of Illinois for the said defendant assumed upon  
himself undertook and then & there faithfully promised the  
said plaintiff that he the said defendant would not <sup>at any time thereafter</sup> enter or purchase  
the said lots pieces or parcels of land of or any <sup>either of them</sup> of them & from  
the said United States unless he the said defendant  
would & should at the time or before he should so enter  
and purchase the said lots pieces or parcels of land of or  
any of them & from the said United States pay to the said  
plaintiff the sum of one thousand dollars lawful money  
of the United States to wit at the then County of Putnam

now County of Bureau aforesaid and the said Plaintiff aver that afterwards to wit on the day & year last aforesaid at Salina in said state of Illinois to wit at the County of Putnam now County of Bureau aforesaid the said Defendant did enter and purchase of and from the said United States the said tract lots pieces or parcels of land and each and every of them then belonging to & remaining vacant unentered and unpurchased of and from the said United States situate in the then said County of Putnam whereupon the said Defendant then & there became liable to pay to the said Plaintiff the said sum of one thousand dollars lawful money as aforesaid when he the Defendant should be thereunto afterwards requested. (Yet the said Defendant not regarding his said assumption, promise and undertaking so made as aforesaid but continuing and fraudulently intending, subtly & craftily to deceive and defraud the said Plaintiff in this behalf did not nor would (although often requested so to do) on or before the day & year last aforesaid or at any time afterwards pay the said sum of one thousand dollars or any part thereof to the said Plaintiff but has hitherto wholly neglected & refused & still does neglect & refuse so to do to wit at the said County of Putnam that is the present County of Bureau aforesaid, whereby the said Plaintiff have lost & been deprived of the profit & privilege of entering & purchasing the said tract lots pieces or parcels of land or any part thereof of and from the said United States for their own use & benefit to wit at the then County of Putnam now County of Bureau aforesaid.

And also for that whereas hereupon to wit on the first day of April in the year of our Lord 1839 at the County of Bureau <sup>aforesaid</sup> was indebted to the said Plaintiff in the further sum of one thousand dollars like lawful money for the work & labor care diligence & skill by the said Plaintiff before that time done performed bestowed & expended in and about the business of the said Defendant

in and about the procuring obtaining furnishing & delivering  
& making known to the said defendant the numbers & description  
of certain eighty acre lots tracts or parcels of land belonging  
and then remaining vacant, uninclosed and unpurchased of  
from the United States and for the use & benefit of the  
said defendant and at the special instance & request of  
the said defendant and being so indebted to the said defend-  
ant in consideration thereof afterwards to wit on the day  
and year and at the place last aforesaid undertook  
and then and there faithfully promised the said plaintiff to pay to  
the said last mentioned sum of money when by the said  
defendant should be thereto afterwards requested. Yet  
the said defendant not regarding his said promise and  
undertaking so made as aforesaid but continuing & fraudulently  
by intreating craftily & subtly to deceive and defraud the  
said plaintiff in this behalf has not as yet paid the  
said sum of one thousand dollars in this Court mentioned  
or any part thereof to the said plaintiff (although  
often requested so to do) but to pay the same to the  
said plaintiff the said defendant has hitherto wholly neg-  
lected & refused & still does neglect & refuse so to do  
at the County of Bureau aforesaid

Whereupon the said plaintiff say that they are  
injured & have sustained damage to the amount of  
two hundred dollars & therefore they bring their suit  
&c.

Henry Merriman  
plffs attys

Samson Cole &  
Gerrit Dunn

vs  
Aaron B. Church

Circuit Court for Bureau  
County July Special Term 1839

And the said defendant by Peter  
Powell his attorney comes & defends the wrong  
and injury when &c. and says that he did not  
assume or promise in manner & form as the plaintiffs

Have above complained thereof against him & of this  
he puts himself upon the country &c

Peters & Powell  
Attys for Deft

And the said Plaintiff doth the like

A. H. Purple ~~Deft~~ atty

Saturday morning July 30 1839

Sanson Cole &  
Frederic Dunn

vs

Aaron B. Church

Asumpsit

Entry Book page 94  
July Term of Supreme  
Circuit Court A.D. 1839

This day came the parties by  
their attorneys and issue being joined between the parties  
then came a jury to wit. James S. Everett Darius  
Mason Henry E. Howe Horace Winship Enoch Summey  
Thomas Merce Oscar P. Chamberlain Daniel Bryant  
Edward Triplett Roland P. Mosley Samuel Jones  
& A. F. Clarke good & lawful men duly elected  
tried & accepted by the parties & sworn well & truly  
to try the issue joined between the parties upon their oaths  
do say - That the jury find for the Plaintiff and  
assess their damages at five hundred dollars  
and the defendants attorney comes and moves  
the Court for a new trial in this cause -

(Entry Book page 95)

Sanson Cole &  
Frederic Dunn

vs

Aaron B. Church

Asumpsit

This cause came on to be heard upon  
the motion of the defendant to set aside the verdict  
returned herein; after argument by counsel and being  
fully advised in the premises it is considered by

the Court that the motion be overruled - It is further considered by the Court that the said plaintiffs recover of the said defendant the sum of five hundred dollars assessed by the jury aforesaid together with their costs & Charges about this suit expended and that execution issue therefor - It is further considered by the Court that the said defendant have leave to take the necessary papers for drawing up a bill of exceptions from the files of this Court and it is further agreed by the parties that said bill be drawn & signed by the judge and returned on file after the adjournment of this Court.

Copy of the bill of exceptions

State of Illinois  
Bureau County

Samuel H. H. &  
Frank Dunn  
vs  
Aaron H. Church

Circuit Court Special Term  
in July 1839

Be it remembered that on the trial of this cause at this term the plaintiff produced William Cole as a witness on their part who being sworn testified that on or about the second day of April 1836 he was called to witness a contract between said parties, that on going into the room where they were assembled the defendant holding a paper with writing on it in his hand said I have been making two contracts with Cole & Dunn the first one is that Cole & Dunn have furnished me with the numbers of certain lots of Congress land and I have agreed to pay them one thousand dollars therefor or to let them have the land at the end of fifteen months at two dollars & fifty cents per

accu, but this contract is null & void, - The witness further  
said that defendant further stated the second contract  
to be that Cole & Dunn had furnished him with certain  
numbers (reading them from the paper which he held in  
his hand as aforesaid) of unceded land of the government  
of the United States and have agreed to furnish me  
with three other numbers of unceded land at a place  
called the Devils Grove and have agreed to buy the improve-  
ments on the lands of said grove for which improvements  
I am to advance them two hundred dollars and for furnishing  
me with all these numbers and buying the improvements  
I am to pay them one thousand dollars. The numbers  
of the Devils Grove were to be furnished on the second day  
thereafter at Cole's house where the defendant was to  
call for them, that Cole purchased said improvements and  
procured the numbers including said grove and had them  
ready at his house during all the second day after said  
contract but that the defendant failed to call for them  
that defendant at the time of the contract proposed to give  
a draft for the \$1000. but for reasons stated it was agreed  
by all the parties to postpone the payment 10 days or a fort-  
night. Said witness further stated that after Cole had  
been informed that Church had gone to the land office, Cole  
took these same numbers of the Devils Grove and also  
started for the land office stating that if he could find Church  
he would deliver them to him if not he would enter the  
land himself in case he could get the money. Said witness  
further stated that he had a conversation with Church  
about 22nd September A.D. 1837 at New Spain. That  
Church then informed him that he knew the claim of  
Cole & Dunn was a just one that he expected to have it  
to pay, but he intended to keep it off as long as he could  
& give them all the trouble he could. That Church  
then inquired of witness if the numbers of the Devils Grove  
were not included in the contract. Witness replied that  
they were.

John H. Bryant also testified



that he was agent of defendant in relation to the  
numbers and improvements of the Devils Grove that as  
such agent he advanced \$200 to Samson Cole in April  
1836 and took his note therefor in the words & figures  
following —

Fruition May 19 1836

On demand I promise to pay John A. Bryant or  
order two hundred dollars with twelve percent interest  
till paid — The condition of the above note  
of hand is such, that whereas Aaron W. Church of  
Hampshire County Massachusetts has entered a certain  
tract of land which is supposed to cover the Devils  
Grove in Putnam County being the south east quarter  
of section No 5 and the east half of the south west  
quarter of the same section in township No 16 north  
Range No 7 East — Now if upon actual survey the said  
grove is found to be on the lots above named this note  
is to be null & void otherwise to remain in full force  
& effect

Samson Cole drate

that afterwards he gave up the same note to Cole  
because he and Church had both become satisfied that  
Church had entered the said Grove & that said note  
was given up without any money being paid thereon by  
said Cole or any other person. William Cole also testified  
that at the conversation with Church at Haverhill  
aforesaid Church stated that he had entered all the num-  
bers furnished him by the Plaintiff except one or two lots —

On cross examination said William Cole  
stated that a suit had formerly been pending in the County  
of Putnam between the same parties for the same cause of  
action now sued for that during the pendency of that  
suit the witness who then resided in the state of Arkan-  
sas had made a deposition for the Plaintiff to be  
used as evidence on the trial of said cause. The  
witness was then interrogated at length without objec-  
tion on the part of witness or Plaintiff counsel as to

the testimony which he gave in said deposition and which interrogatories were answered by the said witness who also stated in relation to that deposition that he could not read writing himself and that the Justice of the Peace in Arkansas who took his deposition refused to have the same read to witness although witness requested it stating that he, the Justice, considered it improper so that the witness says that he cannot tell what the deposition contains. The said defendant by his counsel then offered to introduce the said former deposition & the declaration in the former suit stating to the Court in the presence & hearing of the jury the object of introducing them to be to show that when the witness first testified he swore to get the declaration then on file and that he now more deliberately to get the declaration in the cause now pending & now on trial with a view of impeaching the said witness which declaration & deposition the Court allowed to be given in evidence to the jury and they were read as follows to wit —

(Declaration)

Samson Cole &	}	Trespass on the Case
Israel Dunn		
vs		
Aaron B. Church	}	

State of Illinois } In the Circuit Court, in and for the  
 Putnam County } County of Putnam of Sept Term A.D. 1837

Aaron B. Church late of said County was summoned to answer Samson Cole & Israel Dunn of a plea of trespass on the Case upon promises &c. whereupon the said Plaintiff by Smith & Braumont their attorneys complain for that whereas on the first day of January in the year of our Lord one thousand eight hundred and thirty six at the County aforesaid and within the jurisdiction of this Court a certain conversation was then and there had by and between the said Plaintiff and the said defendant

of about and concerning several lots and pieces of land  
lying <sup>& being</sup> within the said County of Putnam which remained un-  
entered and unpurchased from the United States the  
numbers & descriptions whereof were then & there as before  
to the defendant at and during which said conversation  
it was mutually agreed by and between the said parties  
that they the said Samson Cole & Emel Dunn should  
and would within a reasonable time procure obtain furnish  
deliver & make known to the said Aaron D. Church  
the numbers and descriptions of a certain number of eighty  
acres lots to wit Eleven eighty acres lots belonging to the  
United States situate lying and being within the said  
County of Putnam which were vacant and unentered and un-  
purchased from the said U. S. and that for the so procur-  
ing obtaining furnishing & delivering & making known by  
the said plaintiffs to the said defendant the numbers & descrip-  
tions of said Eleven eighty acres lots so vacant unentered &  
unpurchased from the said U. S. he the said would well  
and truly pay and content to the said plaintiffs the sum of  
one thousand dollars when thereunto he should be afterwards  
requested whereupon the said Samson Cole & Emel Dunn  
then & there to wit at the day & place aforesaid assumed  
upon themselves undertook & faithfully promised the said  
Aaron D. Church that they the said plaintiffs on their part for the  
consideration of one thousand dollars to be paid & satisfied  
by him the said defendant should & would within a reason-  
able time thereafter furnish obtain procure deliver & make  
known unto the said defendant the numbers & descriptions  
of Eleven eighty acres lots in said County of Putnam belonging  
to the U. S. that remained & were vacant unentered & un-  
purchased from the aforesaid U. S. In consideration of which  
aforesaid assumption undertaking agreement & promise  
by the said plaintiffs on their part he the said defendant at  
the time & place aforesaid assumed upon himself undertook  
and faithfully promised on his part to pay the said sum of  
one thousand dollars lawful money of the United States

When thereto afterwards requested - And the said plaintiffs  
were that afterwards and within a reasonable time to wit at  
the same day & year aforesaid to wit at the County aforesaid  
they the said plaintiffs did in pursuance and fulfillment of  
their said assumption undertaking promise & agreement on their  
part procure obtain furnish & deliver and make known the  
numbers & descriptions of eleven eighty seven lots belonging to  
the said United States in said County of Putnam remaining  
vacant & unrented & unpurchased of the United States to wit  
as follows - The south east quarter of section twenty nine  
the west half of the north west quarter of section twenty two  
the west half of the southwest quarter of section fifteen  
the northwest quarter of section twenty the west half of the  
south east quarter of section nineteen all in township fifteen  
north of the base line of range nine east of the fourth principal  
meridian also the east half of the south east quarter of section  
fourteen in township no fifteen north of the base line of range  
eight east of the fourth principal meridian and also the south  
east quarter of section five & the east half of the southwest  
quarter of the same section five in township no sixteen north  
of the base line of range seven east of the fourth principal  
meridian - Whereupon the said defendant became liable to  
pay & content to the said plaintiffs the said sum of one  
thousand dollars. Nevertheless the said Aaron B. Church  
his said undertaking promise & agreement on his part not regard-  
ing but contriving & fraudulently intending to deceive & defraud  
the said plaintiffs on that behalf though afterwards to wit on  
the twentieth day of January aforesaid on the year aforesaid  
& often afterwards requested, the said sum of one thousand dollars  
or any part thereof hath not paid and still doth refuse  
to pay to the damage of the said plaintiffs fifteen hundred dollars.

And the said plaintiff further complains for that the said de-  
fendant was indebted to the plaintiff in the further sum of one thousand  
dollars for the work & labor ~~and~~ care, diligence & skill of said  
plaintiff done performed & bestowed upon the business of the de-  
fendant and at his special instance & request & being so

indebted to the said Defendant afterwards to wit on the  
fourteenth day of January in the year aforesaid at the County aforesaid  
said undertook & faithfully promised the said Plaintiff to pay  
them the said sum of one thousand dollars when he should  
thereunto be afterwards requested — Yet the said Defendant  
not regarding his said promise but fraudulently intending & contriving  
to deceive the said Plff. hath not yet paid the said sum of money  
or any part thereof tho' often requested so to do which is to the damage  
of the Plaintiff fifteen hundred dollars & therefore they bring  
Suit

Smith & Draumont  
Plffs Attornies

(Deposition)

State of Arkansas  
County of Washington  
In pursuance of a Commission to me  
directed from the Honorable the Circuit Court of Putnam County  
State of Illinois I have on the tenth day of March 1838 at  
my office in the town Fayetteville State of Arkansas (being the  
time & place appointed by me for that purpose) I have caused  
William Cole the witness named in the said Commission to come  
before me and proceed to examine him diligently & faithfully, he  
having been first duly sworn according to law upon the interroga-  
tions accompanying said Commission both on the part of James  
Cole & Frank Duran Plaintiff as well as on the part of Aaron  
B. Church Defendant in a certain suit depending in said Circuit  
Court in the order in which said interrogations stand and  
have caused the same together with the answers of the said  
Witness thereto in the order in which they stand to be com-  
mitted to writing being the order in which they were proposed  
and answered

Interrogatory 1<sup>st</sup> Mr William Cole do you know  
the parties Plaintiff & Defendant in the above entitled cause  
& if so when do they reside or when did they reside when  
you know them?

Answer, I know the parties Plaintiff & Defendant  
in said cause, they reside in Puro County State of  
Illinois it formerly being part of Putnam County in said  
State —

2<sup>nd</sup> Int. - Do you know of a contract entered into between the parties Plaintiff & defendant on or about the second day of April A.D. 1836 respecting the numbers of certain lands of the United States then unreturned, & what was that contract?

Answer, - I know of a contract between the parties entered into as described in the question to which I was called as a witness, the terms of the contract were as follows; the Plaintiff in my presence furnished the defendant Aaron B. Church certain numbers of lands of the United States and the Plaintiff also agreed to procure for said defendant the numbers of certain public lands in a grove called the Devils Grove for which the said defendant agreed to pay the Plaintiff the sum of one thousand dollars together with the further sum of two hundred dollars to pay for two improvements in the Devils Grove which the Plaintiff were to purchase of the occupants Caleb Moore & Peter Conroy provided the defendant returned said lands described in the numbers furnished.

3<sup>rd</sup> Int. Was you one of the witnesses referred to in a writing or certificate of the numbers received executed by Mr Church the defendant on the second day of April aforesaid and was the contract above stated the one referred to in said writing or certificate and was you present at the writing of the same by Mr Church?

Answer, - I was one of the witnesses referred to in the writing or certificate above mentioned & the contract of which I have given the terms in my answer to the second interrogatory is the same contract referred to in said writing or certificate, and I was present at the time of the writing of the same by Mr Church.

4<sup>th</sup> Int. Did Mr Church the defendant in this suit aforesaid promise to pay for the numbers aforesaid one thousand dollars or any other sum, if any other sum what? Have you repeatedly heard the defendant ack-

knowledge that he owed said sum since the making of the contract?

Ans. — Mr. Church promised to pay one thousand dollars upon the conditions which I have stated in giving the terms of the terms of said contract, there was no other sum agreed to be paid except the two hundred dollars which was to be given for the two improvements in the Croix Grove which the Plaintiff was to purchase of the Occupants — The defendant was not to pay the money except he returned the lands and I have since heard him say that he returned all the lands described by the numbers furnished by the Plaintiff according to the above contract with the exception of eighty acres and that he did not have money to return that — I have now heard the defendant acknowledge that he owed said sum since the making of the contract but once, he then said that the debt was just, but that he would put the Plaintiff to as much trouble and expense as he possibly could before they should get.

Q. Do you know any thing further about the above mentioned contract or any thing further which may be essential evidence in the trial of the above Cause?

Ans. I do not.

And further this deponent saith not  
William Cole

State of Arkansas  
County of Washington

I William S. Oldham a Justice of the Peace in and for the County and State aforesaid do hereby certify that the above answers of William Cole to the above interrogations were duly taken by me at my office in the town of Fayetteville in the County and State aforesaid on this day that the said William Cole was first duly sworn by me & that he signed said deposition in my presence at the time and place when

and when the same was taken - Given under my  
hand this 10th day of March A.D. 1838  
W. S. Oldham J.P.

State of Arkansas  
County of Washington

I P. A. Smithson Clerk of the Circuit  
Court and Ex officio Clerk of the County Court of said  
County do hereby certify that Williamson S. Oldham  
whose signature appears to the foregoing Certificate is and  
was at the time of signing the same a Justice of the Peace  
in and for the County and State aforesaid duly Commis-  
sioned and qualified and that full faith & Credit are  
due to all his official acts as such -

In testimony whereof I have hereunto set my hand as  
Clerk and affixed my seal of office at office in Fayette-  
ville this 10th day of March A.D. 1838

P. A. Smithson Clerk  
Ex officio Clerk of the County Court

State of Arkansas  
County of Washington

I John Canton Judge of the County Court  
of said County do hereby certify that P. A. Smithson whose  
signature and seal of office appears to the foregoing Certificate  
is and was at the time of signing and affixing the same  
Clerk of the Circuit Court and Ex officio Clerk of the  
County of said County, duly Commissioned and qualified  
and that full faith and Credit are due to all his  
official acts as such. Given under my hand this 10th day  
of March A.D. 1838

John Canton Judge

The object of introducing this evidence on the part of  
defendant, was stated by his Counsel to show a combination between  
Ditto and said witness and an understanding that said witness  
was to testify to suit their case let it be what it might, but  
the said defendant offered no evidence touching or concerning  
the general character of the said witness for truth; whereupon



the plaintiffs proposed to call witnesses to prove the general good character of William Cole for truth. The defendant objected to the admission of this evidence but the court being of opinion that the evidence of the defendant conducted to prove the said witness guilty of designed false swearing overruled the objection of the said defendant and permitted said plaintiffs by several witnesses to prove the general good character of said witness William Cole for truth and that they from their general knowledge of his general character would believe him on oath, to which decision the defendant excepted.

It was also proved at this trial that at the time of the supposed contract, two of the eighty acre lots of land the numbers of which were furnished by plaintiffs to defendant were not unentered land of the United States but had been previously entered by other persons. And evidence was also introduced strongly conducing to prove that this fact was known to plaintiffs at the time they furnished said numbers - Evidence was also introduced conducing to prove that the defendant had entered the other numbers of said land furnished by plaintiffs.

Whereupon the defendant's counsel asked the court to give the following instructions to the jury "That an entire contract cannot be apportioned and that before the plaintiffs can recover the jury must be satisfied that all the tracts of land named in the declaration were vacant and unentered land of the United States." The court being of opinion that this instruction was not warranted by the evidence refused to give the same, to which refusal defendant excepted.

The defendant then asked the court to instruct the jury that if they believe from the evidence that the witness William Cole has made contradictory and inconsistent declarations, whether from ignorance or otherwise; or if they believe from the evidence that the witness has been otherwise impeached they are bound to discredit his testimony unless it is supported by corroborating circumstances." The court being of opinion that said instruction is not law precisely as asked, refused to give it, to which refusal defendant excepted.

Then upon the Court instructed the jury that if they believe from the evidence that the witness William Cole has made inconsistent and contradictory declarations, or has been otherwise impeached by the testimony of other witnesses that such a state of facts is calculated in point of law to discredit his testimony but that the jury are the sole judges of his credit and the credibility of his testimony.

The Court further instructed the jury, that if they believe from the evidence that there was a contract between the Plaintiff and Defendant that in consideration ~~that in consideration~~ that the Plaintiff had furnished Defendant with certain numbers and descriptions of unrented land of the United States and also that they would thereafter purchase certain improvements and furnish other numbers as aforesaid that then the Defendant would pay them the sum of one thousand dollars therefor and if the jury believe further from the evidence that the Plaintiff performed only part of their contract but not in pursuance thereof; and if they believe that the Defendant was voluntarily benefited by such part performance then the said def. is accountable to the Plaintiff for so much money as such part performance was really worth and the special contract aforesaid is to be taken into consideration by the jury as the measure of damages, so that the Plaintiff shall recover for the part actually performed in proportion to the whole price" to which last instruction the Defendant excepted.

After verdict the Defendant moved for a new trial for following reasons assigned by him -

1<sup>st</sup> Because the Court permitted improper evidence to be given to the jury - 2<sup>nd</sup> Because the Court refused to give the instructions asked for by the Defendant - 3<sup>rd</sup> Because the Judge gave the instruction to last above mentioned - 4<sup>th</sup> Because the verdict was against evidence - 5<sup>th</sup> The Defendant also offered to prove to the Court in support of the motion for a new trial by several of the Jurors who tried the Cause that they materially misconceived and misunderstood the instruction last above given them, and that if they had correctly understood it their verdict

would have been given for the defendant; but the Court was  
of opinion, that the affidavits of jurors <sup>as said</sup> could not be received  
to impeach their verdict, and that their verdict was fully sus-  
tained by the evidence and said instruction and thereupon refused  
to permit the evidence of said jurors to be received and over-  
ruled the motion for a new trial. Whereupon the defend-  
ant excepted and it was agreed by <sup>of the Court</sup> the parties that the Court  
may take such time to sign and seal this bill of exceptions  
as may be convenient to the judge all which is now done.  
Thomas Ford Esq.

State of Illinois  
Bureau County

I Cyrus Bryant Clerk of the Circuit  
Court for said County do hereby certify the foregoing to be a  
true copy of the records of the proceedings of this Court in  
the above entitled Cause so far as the same are required  
by law to be certified to the Supreme Court and so far  
as I have been directed to certify the same either by the  
Court or by the Counsel for either of the Parties

In testimony whereof I have hereunto set my  
hand and affixed the seal of said Court  
at Princeton this twenty seventh day of  
September in the year of our Lord one thou-  
sand eight hundred and thirty nine  
Cyrus Bryant Clerk

Samson Cole &  
Houel Dunaway  
Executors  
Avon F. D. Church

Copy of the records  
of Avon Co. C. C.

affirmed by an equal  
division of the judges

Clats fees	
For copy	\$15. 50
Certificates & seal	50
	<hr/>
	\$16. 00


Filed Dec. 27, 1839

J. M. Dunaway  
per J. R. Matheny

Affirmed & division of  
the Court. Dec. 27, 1839



that Cole & Dunn have furnished me  
with the numbers of certain lots of Conger's  
land and I have agreed to pay them \$1000  
therefor, or to let them have the land &c.  
but this contract is null & void - but neff  
said that Cole & Church said the second  
contract was, that they had furnished  
him with <sup>the numbers of</sup> nine lots, and had agreed  
to furnish him with three others at  
Devil's Grove with improvements thereon,  
for the improvements he was to advance  
\$200, and pay \$1000 for furnishing the  
numbers. - that Cole purchased the im-  
provements & furnished the numbers -  
that Dept. Church offered a draft of \$1000 in  
payment, but which was not rec'd, by  
agreement of all parties, but that Church did  
not call for the other numbers as agreed -  
but neff stated he had further conversations  
with Church at Hornsiper, and Church  
then said the election was just, that he ex-  
pected to have to pay it, but would keep  
it off and give them all the trouble he  
could =



John H. Bryant said he was agent for  
Church, and advanced \$200 for the im-  
provements at Devil's Grove for Church -  
and took a conditional note of Cole for the  
pay. for the same, which he afterwards  
gave up to Cole, on finding the condi-  
tions had been fulfilled =

On Cross-Exam<sup>n</sup> - from Cole stated that  
formerly a suit for the same cause  
between these parties was pending in the  
county of Putnam - that during the pen-  
dency of that suit, he then residing in

Arkansas gave a deposition for the  
Defts. to be used as evidence in that cause,  
witness was examined at length as to the  
contents of the deposition; he also stated that  
he could not read writing and the justice  
refused to read the deposition to him, tel-  
ling him it was improper for him to do so =

Defts. counsel then offered the deposition  
in evidence, stating his object to be to  
impeach the witness; and also the dec-  
laration in the former suit, stating that  
he did it to show that witness swore  
to fit declaration on file whatever it  
might be = and all this to impeach the witness =

The declaration & deposition were  
introduced and read to the jury =

Declaration given in &c.

The first count of this declaration alleged that  
Church agreed to pay Cole & Quinn \$1000 for  
the numbers of Eleven 80 acre lots furnished  
by them to Church =

2<sup>nd</sup> count for labour & services =

Former Deposition =

witness said he knew of contract be-  
tween the parties, which was, that Cole &  
Quinn, in presence of witness, furnished  
Church with certain numbers of land, and  
were to permit others at Devil's Grove  
for which Church was to pay \$1000  
provided he entered them - Church  
was not to pay unless he entered the  
lands, and witness had since heard  
him say he entered all the lands, ex-  
cept 80 acres, which he did not have  
money to enter =

No evidence was offered by Deft. be-  
low to impeach touching or concerning  
general character of the witness for truth =

Puffs below then offered evidence to prove the general good character of the witnesses for truth - Dept. objected, but the evidence was admitted, and several witnesses testified to general good character of witnesses for truth =

It was proved also at the trial that at the time of the supposed contract that two of the eighty acre tracts were then entered by other persons, and that Puffs then knew it, and that Church entered the others =

Counsel for Dept. below asked the court to give following instruction to jury;  
"That an entire contract cannot be apportioned, and that before the Puffs can recover, the jury must be satisfied that all the tracts of land named in the declaration were vacant and were entered land of the United States";

This instruction was refused & Dept. excepted =

Among the jury are to weigh the evidence & give a such verdict as they think it justly entitled to. They are not bound to disbelieve the witness because of contradiction.

Dept. asked the following instruction, "that if the jury believe from the evidence that the witness William Cole has made contradictory and inconsistent statements, whether from ignorance or otherwise, or if they believe from the evidence that the witness has been otherwise impeached, they are bound to discredit his testimony unless it is supported by corroborating circumstances =



Instructions

might

Nothing appearing that the 2 lots were entered was the principal or main part of the evidence or that they are of much value or that any of the other lands entered

If the contract could not be performed in the whole, because the apportion of the lands were personally entered. State of the Defendant. Completed himself by receiving a copy of the information given & actually entered the land & the 2.80 are lots he is bound to pay for that information, for value, and the original price agreed to be given is to be the standard from which to calculate the value of the information \*

The court refused to give these instructions; <sup>to rebut the Dept. of a fact</sup> but to give the following

The court gave the following instruction, viz "if the jury believe from the evidence that the witness William Cole has made inconsistent and contradictory declarations, or has been otherwise impeached by the testimony of other witnesses, that such a state of facts is calculated in point of law to discredit his testimony; but that the jury were the sole judges of the credit and credibility of his testimony"

The court further instructed the jury, "that if they believe from the evidence that there was a contract between the Puffs. and Dept. that in consideration that the Puffs. had furnished Dept. with certain numbers and descriptions of unentered lands of the U.S. and also that they would thereafter purchase certain improvements and furnish other numbers as appraisers, that then the Dept. would pay them the sum of one thousand dollars therefor; and if the jury believe further from the evidence that the Puffs. performed any part of their contract but not in pursuance thereof, and if they believe that the Dept. was voluntarily benefited by such part performance, then the said Dept. is accountable to the Puffs. for so much money as such part performance was really worth; and the special

"contract of insurance is to be taken into con-  
sideration by the jury as the measure  
of damages, so that the Piffs. shall recover  
for the part actually performed in propor-  
tion to the whole price =

Def't. excepted to this instruction =

Def't. moved for new trial.

1. Because the court permitted improper evidence to be given to the jury =
- 2 - Because the court refused to give the instructions asked for by the Def't =
- 3 - Because the judge gave the instructions last above mentioned =
- 4 - Because the verdict is against evidence
- 5 - Def't. offered to prove to the court, in support of motion for new trial, by several of the jurors who tried the cause that they materially misconceived and misunderstood the instructions last above given them; that if they had correctly understood it, their verdict would have been given for the Def't.

The court refused to hear this evidence; and overruled the motion for a new trial =

### Errors assigned =

- 1 - That the judge of the Circuit Court permitted evidence to be given to the jury by the Piffs. below of the general good character of the witness, William Cole for truth, and that from his general character he was to be believed on his oath =

2— The judge's refusal to give the several instructions asked for by the counsel of the said Church —

B— In that the judge gave the several instructions which he did give to the jury —

H— In the judge overruling the motion of the Dept. below for a new trial —

X 5— The judge refusing to receive proof offered by the Dept. below to prove that the jury materially misunderstood & misconceived the last instruction given them by the judge —

## Piffs. Brief

I. A witness may be impeached by cross-examination,  
1 Stark. Co. 145- { by contradicting him by opposite testimony,  
or by general evidence to affect his credit.

1 Stark. Co. 145- { In the case at bar the proper foundation  
was laid for contradiction of witness by the proper  
questions on the cross-examination.

In the present case the enquiry was not  
to establish a collateral fact i.e. the contents  
of the deposition, but to show what the witness  
had before said on the subject, as a test of his  
memory, or veracity, or both.

It is apprehended, the practice has been  
nearly uniform in the courts to admit such

evidence, not to establish a fact material to the issue, but to test the witness.

3 Stark. Ev.

pp. 1745 to 1751

In the absence of adjudged cases directly in point, reference is had to the reasoning of Starkie, which seems to be invincible

II.

When no enquiry is made, nor any evidence given touching or concerning the general character of a witness for truth, but he is impeached on cross-examination by enquiry into particular facts and not his general character, or by contradicting his statements, can the party calling the witness, introduce evidence to prove his general good character for truth?

On principle it would seem not to be admissible because

1. A contradiction does not necessarily involve the character of the witness for truth.
2. The character of a witness is a mere collateral fact, which cannot be tried unless it is directly put in issue by the adverse party.
3. The particular enquiry or contradiction only involves the credit or recollection of the witness in the particular case, and in no way involves his general character.

The authority relied upon by the counsel and by the court at the trial was this; "In all cases where the character

3 Stark. Ev. {  
759-8 "if a witness has been attacked, whether by general questions put upon cross-examination, it seems that the party, who called him is at liberty to support his testimony by general evidence of his good character."

On a close inspection it will be found, that this authority does not sustain the position, it was cited to sustain, tho' the language of Starkie is loose. He should have said "when the character" and not when "the credit of a witness is impeached &c. it would

then come within the general rule of impeachment of character strictly speaking and entitle party calling him to give evidence of good character.

*Re v. Clark* upon by Starkie and cited in the margin. The Eng. Com. Law Rep. 333- witness on cross-examination stated that she had twice been in a house of correction for stealing, but had since been admitted to House of Refuge for the Destitute, and stayed two years and was then discharged and received a box of clothes and a guinea for good behavior; Superintendent of the House of Refuge was then called by the prosecution and testified as to practice of conferring rewards for good conduct &c. and Hobson J. admitted the evidence expressly on the ground, that the cross-examination was to impeach the character of the "witness" viz. by proving her a thief. This of course went to her general character.

*Bishop of Durham*  
*Beaumont*  
*1 Camp. R. 210* } In this case two witnesses contradicted each other, and evidence of the general character of one of them, was not permitted to be given.

A contradiction of a witness by another witness is certainly as much an impeachment of his character as if he has contradicted himself.

*Russell v. Coffin*  
*8 Pick. Rep. 143* } This case in Mass. is in no way distinguishable from the case at Bar, and the reasoning of the court, and the explanation given of the citation last above from Starkie Cr. are entirely satisfactory.

The action was a writ of entry for land. The tenant called on Judge as a witness, who testified to certain facts. He was cross-examined as to the contents of a deposition, which he had

formerly given relative to the same subject matter, not then in evidence, and he having testified differently, counsel were permitted to give the deposition in evidence. The tenant then offered evidence of the witnesses general good character, which evidence was rejected, and the whole court sustained it.

III. The Judge ~~should~~ have given the first instruction asked for by the counsel of Church.

The bill of exceptions shows, that the Judge took upon himself to judge of the facts and refused the instruction, because the proof did not warrant it. Whereas the jury were the exclusive judges of the facts.

If the jury believed there was one entire contract for all of the numbers to be furnished, and the Plffs. below did not and could not perform their part of the contract, the jury would not be warranted in giving any damages.

The law as asked for in the first instruction has been long and well settled. The question here as stated by the court was, whether upon an entire contract for a term of service, for a stipulated sum and a part performance, without any excuse for neglect of its completion, the party guilty of neglect can maintain an action for an appropriation of the price.

Stork v. Parker  
2 Pick. 267.

"on a quantum meruit for the services actually performed" and it was held he could not.

McCullin et al.  
vs  
Vanduship  
12 Johnson 165

In this case plff. agreed to work 10 1/2 months for deft. spinning yarn at 3 cents the pound, but left after 11 or 12 weeks and sued for what he had performed. Held he could not recover.

In these two cases the authorities are extensively reviewed.

Here the bill of exceptions shows that there was evidence of an entire contract, and also that the plffs. below had not performed on their part, and it was proper for the jury to have been instructed in the law and have determined upon the evidence as applicable to the law.

IV. In this connection may be considered the last instruction given by the Judge to the jury.

By this instruction the jury were directed to find for the Plffs. if deft. was voluntarily benefitted by a part-performance not in pursuance of the contract &c.

The Plffs. below relied on their contract as set out in their declaration. They must then prove it as laid, or they cannot recover.



Livingdale  
vs

Livingston  
vs Johnson 36 =

This case is the strongest to support this instruction,  
yet it does not do it.

In this case in Johnson, the suit was for the  
price of logs, which the deft. had taken. A special  
contract had existed between the parties but the  
deft. had prevented the plff. from performing on  
his part; the deft. was in fault and ought not  
to have enriched himself out of his own  
misconduct.

Church did not prevent Cole & Lunn from  
performing on their part, but from the nature  
of the case, the land being then in part entered,  
they could not perform. So far as they did  
perform, it was done in pursuance of the contract.  
In Livingdale v. Livingston, what was done  
was not done in pursuance of the contract.

If the charge to the jury had been, that the  
Plffs. were entitled to recover, if they believed that  
Church was voluntarily benefitted by the part  
performance of Cole and Lunn, after he knew  
that they had been guilty of a breach in their  
undertaking, it would not have been objected to.

As when A. sells goods to B. a part delivered  
at the sale and a part at a future time and  
place certain, and A. refuses to deliver the  
remainder, he cannot recover for those  
delivered, because the contract was entire.

Adm B. Church

vs =

Samson Cole

Ferril Dunn =

Abstract = Error = Brief

Peters & Gale Attys of Plff

Samson Cole vs Adm B. Church

an entire contract.

To answer, the party must show performance of the whole or none was the contract. Disaffirm by either party - where a disaffirmance might be legally made. &c.

12 Wendell 89.

liable for a performance of a portion of the party & must be performance of the complete thing. & Picheury 181.

Boyer's Misc. Cases 179.

with Johnson 35.

7th 181 182

Statute's Evidence when good contracts may be given in Evidence - 1758

4 Johnson - 489

Brown - 444

1 Contract

2 Evidence to support a contract.

3 New Trial

- given why does church enter a portion of the land when a part of the numbers were already entered

State of Illinois - Supreme Court, Dec<sup>r</sup> Term 1839 -

Aaron B. Church, Plaintiff in Error

vs.

Samson Cole and Feril Dunn, Defts. in Error.

And now at said term of the the said court, comes the said Church by Peters and Gale his Attorneys, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid in form aforesaid given, was given for the said Cole and Dunn against the said Church, whereas said judgment ought to have been given for the said Church: And the said Plaintiff in Error also assigns the following errors in the record and proceedings aforesaid, to wit,

- 1- In this, that the judge of the Circuit Court permitted evidence to be given to the jury by the Defts. below of the general good character of the witness William Cole for truth, and that from his general character he was to be believed on his oath. -
- 2- In the said judge refusing to give the jury the several instructions asked for by the counsel of said Church =
- 3- In the said judge giving the several instructions which he did give to the jury =
- 4- In the said judge overruling the motion of the Deft. below for a new trial. =
- 5- In the said judge refusing to receive the proof offered by Deft. below to prove that the jury materially misconceived and misunderstood the last instruction given them by the judge. =

And the said Church prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment &c.

By his Attorneys Peters & Gale -

And the said Defendants by  
McDuffie their attorney comes and  
says that in the Records and  
Proceedings aforesaid there is no  
Error and says that the Judge  
must of the said Circuit Court  
may be affirmed

McDuffie  
Supt. Atty

Baron B. Church -  
vs.  
Cole and Dunn -  
Assignment of Errors:

Filed Dec 16 1811

James M. Duncan