No. 8442

Supreme Court of Illinois

Augustus M.L.McBean

---

vs.

Jonathan E.Douglass

71641 7

Be it remembered that at the June Term of the Massac Circuit Court A. D. 1855, held in Metropolis City and County of Massac, State of Illinois, the Hon. William K. Parish, Judge Presiding, The following are the Pleadings and Orders of the Court in a certain Action of Covenant, wherein Angus M. L. McBane is Plaintiff and Jonathan E. Douglass is Defendant.

Praecipe

State of Illinois }
Massac County } Ss.

In the Circuit Court of Said County of The T. of June 1855

Angus M. L. McBane }
vs. } Covenant
Jonathan E. Douglass }

Issue Summons in Covenant returnable to the 1st day of next Term To damage of Pltff in the sum of Two hundred and Seventy-five Dollars

J. Jack atty
Pro Sur. 21st
May 1855

James Elliott Clk

Summons

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Summons

State of Illinois } 2
Massac County } Sct-

The People of the State of Illinois. To the Sheriff of said County Greeting, We command you that you summon Jonathan E. Douglass, if he shall be found in your County, that he be and appear before the Circuit Court in and for said County, on the first day of the next term thereof to be holden at the Court house in Metropolis City, Illinois, on the first Monday of June next, then and there to answer Angus M. L. Mc Bane of a certain plea of a Breach of Covenant to his damage, Two hundred and Seventy-five Dollars as he says, and have you then and there this writ with an endorsement thereon as to how you executed the same

Witness James Elliott Clerk of Said Court and the Judicial Seal thereof this 22nd day of May A.D. 1855
James Elliott Clk, M.C.C.

Endorsement

I Served by reading the within to J. E. Douglass on the 25th of May

W. P. Bruner Sheriff M.C.

Declaration

State of Illinois } ss.
Massac County }

Pleas in the Circuit Court of said County of the Term of June A.D. 1855

Angus M. L. McBane
vs.
Johnathan E. Douglass
} Covenant &c.

Angus M. L. McBane Plaintiff in this suit complains of Jonathan E. Douglass Defendant who was summoned to answer the said plaintiff of a plea of Breach of Covenant,

For that whereas heretofore viz: on the fourth day of November (A. D. 1854) One thousand Eight hundred and fifty-four at the County of Massac and State of Illinois, the said Defendant by a certain writing under seal, then and there made by the said Deft. which said writing under seal and sealed with the seal of said Defendant, the said plaintiff now brings here unto Court. — — — — — — — —

the date whereof is a certain day and year therein written and named viz: the same day and year aforesaid by which the said Deft. did in and by the said writing under seal as aforesaid for himself covenant, promise and agree to and with the said Pltff, amongst other things in manner following, that is to say, that he the said Defendant, should and would from the said fourth day of November A. D. 1854, aforesaid, until good grass comes in the next Spring following; that is to say, in the Spring of A. D. 1855, keep and take good care of by feeding maintaining, and providing suitable winter accommodations for all of Eleven head of Mules, Horses, Mares, and horned Cattle the property of Plaintiff

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viz: One Sorrel Mare, and her Colt, a Mule
One bay mare and her Colt, also one three
year old unaltered horse colt, One reddish Cow
and one heifer with a Calf three months old, and
two young heifers one of which was two & one fourth
years old & the other one of which was two & one
half years old and one Black mare she being
the said Plaintiffs riding mare all and each
of which there being Eleven head, & of the Horse
and mule kind Six head and at all times
during the said winter of 1854-5, and from
the said fourth day of Nov. 1854 aforesaid until the
Spring of 1855 take good care of and feed the said
Stock of the said plaintiff: and deliver said Stock
and all and each head of the same to the said
plaintiff in the spring following the said forth
of Nov. aforesaid in the like good order and
Condition as the said Stock then was in, to wit,
on the fourth day of Nov. aforesaid, (accidents only
excepted) in consideration of a Debt then due
and owing by the said Deft to the plaintiff
evidenced by note, and referred to in the said
writing under Seal as aforesaid of the sd Defendant
the date of which writing under Seal is the day
and year aforesaid and here shewn to the
Court as aforesaid. And the sd Plf in fact saith
that at the time of making the sd writing
under seal by the Deft. as aforesaid, he the
sd ~~Deft.~~ Plff. delivered up to the said Deft, the

said Eleven head of Stock as aforesaid and the Sd.
Deft. became and was possessed of the same & each
and every one of the said Horses, Mules & Cattle for
the purposes aforesaid, that is to say, to be kept
and fed taken care of and wintered by the said
Defendant according to his covenants and agreements
with the Pltff so made as aforesaid. And although
the Sd Pltff hath always from the time of the making
of the said writing under seal as aforesaid by the
Sd. Defendand well & truly performed, fulfilled
and kept all things in the said writing under
Seal as aforesaid contained on his part to be
performed and fulfilled and kept according to the
tenor and effect, true intent and meaning of the same
to wit, at the County of Massac aforesaid, yet pro-
-testing that the Sd. Deft. hath not performed, fulfilled
or kept any thing in the Sd. agreement and writing
under seal, to be performed, fulfilled and kept acco-
-rding to the tenor and effect true intent & meaning
thereof, the Sd Plf. saith that after the making
of the said writing under seal, and after the Sd
Defendant received the Sd. Stock. Horses, Mules,
and Cattle of him the said Pltff. that he the
said Deft. did not keep & take good care of by
feeding wintering & providing suitable winter accom-
modations for the said stock or any part of them
but wholly neglected and refused so to do and
suffered them to run at large without feed
and care, so that the greater part of them died

[8442-3]

and perished throug want of feed and care, to wit, One Black mare, the riding mare of Plff of the value of One hundred and twenty five Dollars, One Bay mare of the value of Seventy five Dollars, One Sorrel mare of the value of twenty five Dollars, One Cow of the value of twenty Dollars and One other of the head of ~~horned~~ Cattle of the value of fifteen Dollars died; and the Plff in fact saith that any part of the Sd Stock which survived was greatly detereorated and dimenished and lessened in value in the consequence of the Deft. breaking his covenants and of the extreme poverty to which they were reduced and as a result of Defendants breaches as aforesaid And the Plff in fact saith that the said Defendant has not delivered any of the Sd horned or neat Cattle cattle to him whatever, according to the true intent and meaning of the Sd writing under seal of the Sd Deft. And so the Sd. plff in fact saith that the said Deft. (although often requested so to do) hath not kept the said covenant so by the Sd Deft. for himself made as aforesaid but hath broken the same; and to keep the same with the said plff, hath hitherto wholly neglected and refused and still doth neglect & refuse to the damage of the Sd. Plff in the sum of two hundred and seventy five Dollars and therefore he sues

J. Jack Pro
Gner 21st
May 1855

Jno Doe &
R. Roe } Pledges &c

To Jonathan E Douglass Deft.

Dr. Sir take notice that the Original writing under Seal declared upon itself; is here unto appended and filed here unto
21st May 1855 — J. Jack for Pl'ff —

Original writing under Seal declared upon,

Rec'd Nov 4th A. D. 1854 from A. M. L. McBane One sorrel mare & her colt a mule also one bay mare and her mule colt, also one 3 year old unaltered horse colt, one Redish cow and one hefer with a calf 3 months old and two young heifers one 2¼ years old and the other 2½ yrs old and one black mare she being said McBanes riding mare all and each of which there being eleven head in all viz Cattle 5 head & horse & mule kind 6 head all of which I promise to keep and take good care of by feeding wintering and providing suitable winter accommodations for all of them until good grass comes in the spring & them safely to keep and carefor and I am to receive as full remuneration and pay for so doing my note now in the hands of said McBane which is to be delivered and given up to me as soon as I have complyed with the above named care of the Cattle & horse & mule kind & delivered the same in like good condition Accidents excepted & as now receive as witness my hand & Seal the day and date above written

Massac County & State of Ills J. E. Douglass (L.S.)

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Black Mare died	value	$125.00
Bay Mare	"	75.00
Sorrel Mare	"	25.00
5 Head Cattle not delivered yet		50.00
		$275.00

Certificate of Judge Parrish

I do hereby certify that the within receipt or agreement is the Identical original paper offered in evedence in the trial of said Cause & referred to in page five of the original bill of exceptions signed therein

William K. Parrish (L.S.)

Demurrer

Jonathan E. Douglass
ats } Covenant.
Angus L. M. McBane

And the said defendant by McKinney & Davis comes and defends the wrong and injury when &c. And says that the plaintiffs declaration and the matters and things therein set forth and pleaded are not sufficient in law for the said plaintiff to have his aforesaid action thereof against the said defendant and this he is ready to verify wherefore he prays judgement if he ought to make other or farther answer to the same

Causes

Special causes of demurrer 1st. Because

the Covenants of the deft. as stated by the Plff in his declaration are stated by him in the present tense –

2nd. The breach as laid in the declaration is insufficient not being as broad as the Covenants

McKenney & Davis
Attys for deft.

Order of Court

The Court ordered that the demurrer to the declaration be overruled &c.

Plff has leave to amend declaration 3

Plea non est factum

Jonathan E. Douglass
ats
Angus M. L. McBane

} Covenant.

And the said defendant by McKenny & Davis his attornies comes and defends the wrong and injury when &c and says that the said deed in the plaintiffs declaration mentioned is not his deed and of this he puts himself upon the County

McKenney & Davis
Attys for deft.

Traverse issue
J. Yucks for Plff.

This affiant Jonathan Douglass defendant in the above plea as above entitled being first duly sworn according to law says the above plea of non est factum is true

J. E. Douglass

Subscribed and sworn to this 6th day of June A.D. 1855

James Elliott. Clk.

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2nd Plea
Actio non

And the said defendant for a further plea in this behalf says Actio non because he says that the execution of the writing under seal in plaintiffs declaration mentioned was obtained by the said plaintiff from the said defendant by substituting the said writing for and in the place of another and differant writing which the said defendant then and there supposed he was executing by signing the same with his name and by then and there fraudulantly causing the said defendant to sign the same writing under seal in plaintiffs declaration mentioned and this the said defendant is ready to verify wherefore he prays Judgment of the said plaintiff to have or retain his aforesaid action thereof against him

Traverse issue
T. Yates for Plf.

Davis & McKenney
Attys for Deft.

3d Plea

And for a further plea in this behalf said defendant says that said plaintiff ought not to have or maintain his aforesaid action against the said defendant because he says that he the said defendant did keep, feed, water, and take good care of said Horses, Mules, and Cattle of said plaintiff in like condition as when received except such of said Horses, Cattle and Mules, as died of disease and other accidents incident to such animals according to the form and effect of the said writing under seal, and of the said covenants of the said defendant by him in that behalf made, as aforesaid, to wit,

at the County of Massac aforesaid, And of this said defendant puts himself upon the Country &c.

Traverse issue &c
T. Tuck for Plff.

Davis & McKenney

4th Plea

And for a further plea in this behalf the said defendant says Actio non because he says that the sorrel mare and her colt a mule the said bay mare and her mule colt, the said 3 year old unaltered horse colt, the said redish cow, the said heifer with a calf three months old and the said two heifers, (One 2 1/4 years old, the other 2 1/2 years old, the said black mare (the riding mare &c) in the plaintiffs declaration mentioned were at the time of the supposed executure by the said defendant of the writing under seal in the plaintiffs declaration mentioned and still are the property of one Peter Willard of the City of New-Orleans in the State of Louisiana and not the property of said plaintiff and this the said defendant is ready to verify wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant

Davis & McKenney

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5th Plea

And the said defendant for a further plea in this behalf says Actio non because he says the said plaintiff at and before the time of the said supposed execution by the said defendant of the said writing in the plaintiffs declaration mentioned, fraudulently and falsely represented to the said defendant that the said sorrel mare and her colt, a mule, the said bay mare and her mule colt, the said three year old unaltered horse colt, the said redish cow; and the said heifer ~~with~~ a calf three months old, and the said two young heifers one two and one fourth years old, the other two and a half years old and the said black mare in the plaintiffs declaration mentioned were and each of these was the proper goods and chattels of the said plaintiff, and the said defendant in fact says that the said sorrel mare and her colt a mule, the said bay mare and he mule colt, the said three year old unaltered horse colt the said redish cow the said heifer with a calf three months old and the said two heifers one two and one fourth years old, the other two and a half years old and the said black mare were and each of them was and still are and each of them still is the proper goods and chattels of one Peter Willard and the said defendant in fact says that the said Peter Willard

claims the same and each of them and insists upon his right and this the said defendant is ready to verify wherefore he prays judgment &c.

Davis & McKinney
Attys for deft.

Demurrer to 4 & 5 pleas of Defendant.

A. M. L. McBane
vs.
Jonathan E. Douglass
} June T. 1855 Covenant Massac Circuit Court

And the Sd. Plff by Jack his atty comes &c. And says that the said Second, fourth, & fifth, Pleas by the S. Deft in this behalf pleaded are not sufficient in law for him the said plff to be called upon to answer and reply to &c. wherefore &c

J. Jack for Plff.

Order of Court

The Court ordered in regard to Demurrer to 2d. 4th. & 5 pleas; Over ruled to 2d plea and sustained to 4th. & 5th. pleas, leave to defendant to ~~answer~~ amend to 4th. & 5th pleas by 2 Oclock of this day &c.

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5th Amended Plea

Jonathan Douglass 14
ats
Angus L. M. McBane

Covenant,

And the said defendant for a further plea in this behalf says that before and at the time of the said execution of the said supposed writing in the plaintiffs declaration mentioned by the said defendant, the said plaintiff contriving and intending to defraud the said defendant of the sum of $250 on the said 4th day of November A. D. 1854 at the County of Massac in the State of Illinois falsely represented to the said defendant that he was the Owner of the mares, mules, colts, horse colt unaltered, cow and calf, two heifers and their calves in his declaration mentioned and thereby then and there fraudulently in consideration of a note for the sum of $22.50 before that time made and delivered by the said defendant to the said plaintiff and payable to the said plaintiff procured and caused the said defendant to sign, seal, and deliver the said writing in the plaintiffs declaration mentioned and the said defendant in fact says that the said mares, mule colts and heifers and their calves in the said plaintiffs declaration mentioned, was on the said 4th day of November A. D. 1854 at the County of Massac

aforesaid the proper goods of One Peter Willard of the City of New Orleans in the State of Louisiana, and the said defendant in fact further says, that the said plaintiff On the said 4th day of November A.D. 1854 wrongfully and unlawfully intending to convert the said goods to his own use delivered the same to the defendant at the County of Massac aforesaid and caused the said defendant then and there to acknowledge the receipt of the same in writing, and the said defendant further avers, that the said delivery of the said goods by the said plaintiff to the said defendant was contrary to the direction and command of the said Peter Willard, who the said defendant avers is still the owner of the said Mares colts horse colt cows heifers and their calves and threatens the said defendant with a law suit if he the said defendant shall deliver the same to the said plaintiff, wherefore the said defendant, says, he ought and did withhold the possession of the said Mares, Mule colts, horse colt cows and heifers and their calves from the said plff and this the said defendant is ready to verify wherefore he prays Judgment if he the said plaintiff ought to have and

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maintain his aforesaid Action against him the said defendant.

Davis & McKenney
Attorneys for Deft.

Affidavit for Continuance

Angus M. L. McBane
v.s.
Johnathan E. Douglass
} M. C. Court Octr 7 1855 Covenant.

Pltff, McBane in this cause on oath saith, that he cannot safely go to trial in this cause at this T. of the Court on account of the absence of his son, Angus McBane who is a material witness that sd witness has been absent from the State since prior to the commencement of the suit in the State of New-York so that he could not have Suppoena served on him to attend, that he expects to prove by said witness that he was present at the time and saw Deft. execute & sign with his own hand the obligation to which non est factum is pleaded verified &c & upon which the suit is brot, that he knows of no other witness by whom he can positavely prove this fact or so fully prove it, that he expects to obtain witnesses attendance by next Term of the Court that this affidavit is not for delay but that justice may be done to the

A. M. L. McBane

Subscribed before me the 1st of Nov 1855
James Elliott Clk.

Angus M. L. McBane
v.s.
Johnathan E. Douglass } Covenant

And now on this day come the Plaintiff in his own proper person and by his attorney, and the defendant by his attorney. When the Plaintiff by his attorney moved the Court to continue this Cause until the next term of this Court, this motion is by the Court sustained and this cause continued at the cost of the plaintiff.

Wherefore it is considered by the Court that the defendant recover against the plaintiff his costs by him in and about this behalf expended

May Term Massac Circuit

Angus M. L. McBane
v.s.
Jonathan E. Douglass } Action in Covenant,

And now on this came the the parties by their attornies, the Plaintiff by J. Jack his attorney and the defendant by Wm. J. Allen his attorney and the parties having joined issue, therefore let a jury come and therefore came a jury, to wit, Harrison Erby 1, John M. Presgrove 2, John Avrison 3, Willis Gurley 4, William Flannary 5 William Boyles 6, Abram Bruner 7, James M. Baker 8, Wilson Taylor 9, Joseph Dupree 10, Benjamin F. Chadwick 11 and Jacob C. Kidd 12, who being elected, tried

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and sworn the truth to speak upon the issue joined, upon their oaths do say,
We the Jury find the issues for the defendant
Whereupon the Plaintiff by his attorney move the Court for a new trial, which motion was by the court overruled — wherefore it is considered by the Court that the defendant recover against the plaintiff his costs by him in and about this behalf by him expended and that he may have Execution therefor &c &c
To which overruling motion by the Court for a new trial, the plaintiff by his attorney excepted —
Note — The bill of exceptions in this cause may be signed & sealed and filed in vacation of this Court.

Reasons for New Trial

A. M. L. McBane
v.s.
Johnathan E. Douglass

May term 1856

Covenant.

Verdict, We the Jury find the issue for Deft.

Plff moves the Court for new trial, on the grounds

1st That the verdict is against the evidence.
2nd The verdict is against the law & the evidence
3rd Error in one of the instructions.
4 One of the Counsel for Deft. occupied the seat of the Judge and performed the functions of the Judge in the adjournment the last day of the trial and in charging the jury to observe the admonitions of the Court in suffering no one to approach them &c without consent of Plff —

Deposition of Intrepid M. Mayon

The Deposition of Intrepid M. Maxon taken at the office of James Elliott Clerk of the Circuit Court in and for Massac County in the State of Illinois agreeably to notice hereunto appended and which deposition is intended to be read in evidence in a suit at Common Law, pending in the said Circuit Court, Wherein Angus M. L. McBane is plaintiff and Jonathan E. Douglass is defendant, in a action on covenant,

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the said deponent being of lawful age and first duly sworn according to law, deposes and says. as follows to the interrogatories propounded –

Interrogatory 1st. Please state whether you are acquainted with Jonathan E. Douglass the defendant and if so how long

Answer – I have been acquainted with Jonathan E. Douglass some three years and a half

That during that time I boarded at his house for two or three months.

I am acquainted with his hand writing I have seen him write and have written with him

Upon the production of the writing obligatory filed in the cause stated in the caption of these depositions and which is attached to the declaration in said cause and which writing obligatory bears the signature of Jonathan E. Douglass, to the deponent, he states upon his oath that from the knowledge he has of the hand writing of said Douglass, he believes the signature aforesaid to have been written with the hand of said Douglass. Said deponant knows of no other facts relatin to the cause at issue between the said Parties

Sworn to & Subscribed before me this 19th day of March A.D. 1856 – } J. M. Maxon

State of Illinois }
Massac County } Sct.

I. James Elliott Clerk of the Circuit Court in and for said County do hereby certify that the foregoing deposition of Intrepid M. Maxon was taken before me at my office at the Court house in Metropolis, Ills. On the 19th day of March A. D. 1856 between the hours of 9 O'Clock A. M. & 6 O'Clock P. M pursuant to notice herein enclosed: that the said deposition was committed to writing by me and in the presence of said deponant and further that the said deponant was first duly sworn according to law, before the said deposition was taken and that the said deponant signed his name to the said deposition in my presence the same being first read to him.

In witness of which I have hereunto set my hand and the seal of said Court at my office at Metropolis Ills. this 19th day of March 1856

James Elliott Clk, M. C. C

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Angus. M. L. McBane
vs
Johnathan E. Douglass

Circuit Court of Massac County May Term 1856

Action of covenant on Articles of agreement

Be it remembered that at the June Term of the circuit court of Massac County A.D. 1856 when this cause came on for trial & was called and after a jury of twelve men were called selected & sworn to well & truly try the issue joined &c. The Plaintiff introduced in support of his action the following persons as witnesses viz

1st. Martin Benson who after being duly sworn said The parties to this suit came into my Grocery together in the Evening about candle lighting They were talking about a written agreement Douglass made some objection to some part of the article He wanted accidents excepted to be put into it. Plaintiff agreed to make the alteration and Deft. said he would sign it. I know of no other alteration being spoken of by Douglass The parties were standing by my counter and I was inside - The Plaintiff asked me for Pen & ink. which I handed to him & the interlineation in the writing "accidents excepted" was written in the agreement with the ink I handed to him by Plaintiff was done with Gold or Steel pen I don't know which. The ink I handed him was pale

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It had been in a bottle which had been thrown down I suppose by the rats and broken and the ink had not all spilled out and had partly dried lying in a large piece of the Broken bottle I had taken it up and put some water in it which made it pale - I think this paper is the paper then before the parties The ink of the interlineation corresponds with the ink used in making it - I do not recollect of any one being present but Plaintiff & Deft at the time I have spoken of After Plaintiff wrote the interlineation he handed to Dunlap to sign & he Dunlap spoke at the time of the writing being blotted

+ On cross examination

witness said This was in the fall short time before Plaintiff started East They were in my house together at the time I have spoken of may be 10 or fifteen minutes maybe not so long Neither of them called upon me to pay particular attention to it. I dont recollect that "till the 25 Dec." was mentioned as the time to which Dunlap was to keep the stock but I think there was nothing said about altering the writing in that respect. I cant say whether they went out of my house together or not. It was at early candle light they came in I lighted a candle and put it on the counter as they came in, or about that time. I think the Plaintiff spoke at the time of the interlineation being blotted since it was spoken of by Dunlap that his name was blotted it came to my mind that it was the

interlineation was blotted & not Douglass name.

Angus McBane was then called & sworn & said I was present in Beusons Grocery at the time spoken of Father and Douglass were standing by the counter & talking about the writing I remember Douglass insisted on "accidents excepted" being put in Father told him he would put that in & did so & handed it to Douglass & Douglass took it to sign as I thought He had just before said that he would sign it if that alteration was made. I saw the top of the paper over Douglasses shoulder lying on the counter before Douglass after the interlineation was made I cannot say that I saw his pen make the letters. They did not remain long at Beusons after it was signed. This is the same paper The body of it is in Fathers hand writing I saw it that night after we went home.
It was admitted by Plaintiff that the debt in writing mentioned was a note of twenty two dollars and fifty cents.

× On cross examination he said I think I went in with them If I recollect I went with Douglass from the House & we met Father at Beusons Douglass told him he would sign it if he would put in "accidents excepted" I think I saw Father at Beusons put in "accidents excepted" on the writing. I was part of the time standing against the counter & sometimes not. I cannot state positively while in the

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House which stood on my right I think I asked Father if he was not ready to go. The same paper had been out at Douglass that day. It had been taken there by my Brother & myself for Douglass to sign and he had objected to do so as it then was untill he would see Father. When we took the writing out to Douglasses we took part of the stock out to him at the same time and when we came into town one of us brot it in. The meeting of Father & Douglass at Briscoe was after that. I am the Plaintiffs son

Charles Russell was then sworne & said I know Jothathan E Douglass ever since boyhood went to school with him learned to write with him at the same schools I know his hand writing well. I believe this signature to the writing in question to be his. I told him I would testify it if it hung them both. I judge of it by my knowledge of his hand writing the shape of his letters & stroke of his pen. He never follows the line from one end of his name to the other but always leaves the line as in this

Isaac Gill was then sworn & said I know the hand writing of Deft two years or more. While clerking for Smith & Means in this place

I was in the habit of receiving orders from him in writing which he acknowledged and afterwards settled my Opinion is that the signature of his name to the writing in question now in my hands is his signature

Saml. H Pfimmer Esq was then called and sworne & said I have seen Douglass the Deft. write My opinion is that the signature in question to this writing is Douglass hand writing

Jesse Masam was then sworn & said I have seen Deft. Douglass write his name twice and his signatures have been in my possession until lately was to school Articles. The signature in question being handed to witness he said This is his signature I say what I said yesterday (in an other case) I think this is his hand writing I judge the hand writing by the stroke of the Pen the turn of the letters and by characteristics of the general hand which I am not able to describe

× On cross examination He said I may be mistaken such a thing may be possible but I think not

Joseph Mears was sworn and said I seen Douglass write once & have received written orders from him which he afterwards acknowledged

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and settled I would take this for his hand writing of sent to me as an order

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Here the writing in question with disputed signature was offered in evidence & went to the jury

Daniel Bowker was then sworn & said I knew some of Plaintiffs stock in the writing mentioned the Black mare The Doctors riding mare & a sorrell mare The Black mare was worth more than any of the others She was worth Seventy-five or Eighty Dollars more or less Sorrell mare was a good old mare worth $40, fifty, or Sixty The other sorrell mare had a mule colt sucking her Same stock mentioned in the writing I think mare and mule both worth 30$ I think these stock were at Douglas a part of the time in the winter Black mare died at McBanes in March I saw her before she died & saw her after she was hulled out. She was in bad order Soon after she was brought in to the Doctors from Douglas she died I knew of one of Plaintiffs cows named in the writing dying in Feb 1855 Died in town here Douglas came up to me & said he wanted to skin one of the Doctors cattle said he supposed a limb had fallen on it I helped to skin it There was no limb lying about the cow I had seen her running about town here some time before she died I helped to skin the cow I saw no limb marks on her

Douglass told me he was to keep the Plaintiffs stock throughout the winter This was a good sized cow In the fall 4 Nov. 1854 was worth twelve Dollars He wanted me to see if a limb or tree had fallen on the cow near the Bayou × on my examination He Douglass said to me he was to winter through the winter I think he was to keep the Doctors stock I would not be apt to be mistaken for I had heard some one say before that it was for six weeks Douglass was to keep Plaintiffs stock & then his coming to me in the winter and saying that he was to keep the Plaintiffs stock through the winter led me to notice it ~~[illegible]~~ particularly —

Thos. Moore was then sworn & said I helped Barker to skin a cow near "Kidds Bayou latter part of Feby. 1855 not over 24 hours after she died she was thin and some what blood shot about shoulders I have seen the same sign where there was no accident happened I have seen ~~heard~~ the Black mare spoken of she was an active animal good trotter

Jesse Maxam was then called and sworn said I knew Plaintiffs Blk riding mare several years before the 4th of Nov. last — & up to that time or a little before she was a fine mare valuable saw her again in the latter part of Feby 1855 She was with a stud

colt of Plaintiff & another animal I think
his Buggy ring & two mule colts one may be
one year old the other may be two years old
dont recollect age I knew the mare & stud colt
to be McBanes they were there frequently when
feeding my stock they appeared to be very
hungry they would eat the stocks I saw the
Blk mare try to eat bark off the fences they
were very poor at that time Blk mare 4th
Nov 5 was worth 80 or one hundred Dollars
may be more Stud colt worth say 40 or
fifty Dollars Buggy mare worth I think
twenty or thirty Dollars The mare that had
the young mule colt was worth about ten
Dollars Her colt worth twenty Dollars more
or less I saw one of the mules here and the
other is or was lately at Jeff Douglass
they were all so poor in April that I
thought they would die of poverty

X on cross examination he said Plaintiff
was out enquiring for the stock I think
I showed or told him where they were
they were not worth so much that spring
as the fall before It would have taken
twenty Dollars each to have restored them
to the condition and value they were in
the fall before that

Daniel Davy

Daniel Deny was then sworn & said In the fall of 1854 I Knew two head of the stock in question The Blk mare & old mare that had a mule colt Blk mare was worth I think 75 or 80 Dollars or may be more the other mare with her colt worth twenty five Dollars I think last time I saw the mule it was in Douglass yard that was last fall or in the winter Plaintiff called & I went for him to git the colt to bring it in to Plaintiff Douglass refused to let me have it I saw the Blk mare in Feby was quite thin some of Douglasses Horses were with her

Charles Russell was then called & said I Knew the Blk Mare was a very good one worth seventy five Dollars or perhaps more Bay mare was old the Buggy nag was worth fifty Dollars had a mule colt sucking ~~her~~ worth twenty five Dolls Bay mare was small & not worth a great deal I offered Plaintiff 20$ for her I think she was worth that 4 Nov 1854 I Knew the young cow & young calf saw her in Plaintiffs possession before Douglass got her was three or four year old first calf was worth 15$

Robert Russell was then called and sworn & said I lived in Metropolis fall of 1854 Knew Pltff Horses seen them nearly every day Black mare was worth 100$ always in good order Buggy mare was old but good worth I think

[8442-16]

60$ Bay stud colt he offered me for 60$ I offered him 40$ Think he was worth 60$ one of the mares was

old & I would not have given any thing for she had a mule colt sucking her worth 25$ The Buggy mare & her mule colt came back to town after the Plaintiff left in the fall but I dont know what time exactly I saw the Blk mare in the winter time in Defts fields & the old mare and mule was there also I saw the Bay horse there in the spring I would not have known the Black mare when I saw her in the winter she was so poor only for the peculiar shape of her head

C. S. Walbright being sworn said there were two head of cattle came to my place in Nov. 1854 they were one year old past each would be two by spring both heiffers they still remained at my premises for some time I then told my boys to feed them with my stock & they did so untill shortly before the circuit court in June following Plaintiff came & enquired for them Deft came same day & enquired for such cattle the cattle came up while we were all talking about it and both the parties said they were two of those taken by Douglass to keep for Plaintiff Douglass said to me he would pay me for wintering them & that they were Plaintiffs Cattle.

× On cross examination witness said I think Douglass told me he was to keep them for Plaintiff six weeks He said nothing about imposition in a writing I took Douglass for the pay of wintering They came to my house about the last of Nov. 1854 He said he had kept them for Plaintiff the time he agreed & then assumed to pay me for wintering them

Noah Warner was then sworn & said I knew the Black mare in question in the fall of 1854 I saw the same mare between the 1st & middle of April 1855 after she was dead I hauled her out of Plaintiffs stable in Metropolis.

Wm. McBane was sworn & said I saw Deft in January or Dec. I think he spoke of the stock in question He called on me at my stable He wanted me to take the stock off his hands This was the second time I saw him When he spoke in reference to the stock and was in the latter part of February or 1st of March He said he was short of provisions think he said his time was out for which he agreed to keep the stock This was the 1st time he spoke to me of taking the stock off his hands

[8442-[?]

J. J. Crittenden Sworn Said The last talk I had 12 with Douglass was about 15th of January 1853 He was enquiring for Plaintiff's Stock; said he was afraid they would stray off or die & that his time for keeping them had expired

X On cross examination witness said he made no definite statement to me as to what time he was to keep the stock

Plaintiff then introduced several signatures proved & acknowledged to be J. E. Douglasses ⊕ to affidavits Sheriffs Bonnes Bond Dockets ⊕ and a lot of orders given by Douglass to stores & acknowledged by Douglass to be his writing numbering twenty five which were offered in evidence & Plaintiff rested the cause Whereupon the Deft. called the following witness — viz —

David Boyles was called & sworn for Deft & said I live ½ mile from Deft. Have seen him write frequently at home & other places I can not say positive whether the signature in question (now in my hand) is his or not The D is like his take all together I cannot say certainly McKenny one of Douglass attys showed me the signature the 1st time I saw it The manner of the letters are like his not following the lines strictly

The rest except the 20's is rather better hand than
I have generally seen him write though it looks
like his It is his manner of forming the letters
I would not like to put on an opinion about
it Here twenty five signatures acknowledged
by Deft, in open Court to be his signatures ~~to~~
to orders receipts &c were handed the witness and
on his examination then he said some of these
look more & some less like Douglass signature
than the one in question

Daniel Brewer Sworn says Have seen Deft write
frequently Have not seen him write for the
last two years From what I know of his ~~[illegible]~~
writing I would not consider the signature in
question his In some respects it is like his
The 'E' & 'J' are like his The end from the '20' is not
like his

Henry Dickerson sworn says I was at Bensons
Grocery in front when the parties came there
The candle was burning I saw no one with
them was in only a minute just got a drink
of Brandy & went off They were standing to left
hand of the counter Eight or ten feet space
unoccupied I might have seen others there
if there and might not I saw no one else
but the parties & Benson If any one had gone
in with ~~them~~ them I think I would have seen
them They were in but a short time before

[3402-18]

Went in They had a piece of paper on the counter between them 44

Richard Peter Sworn says I have known Deft thirteen or fourteen years I have had one order from Deft in 1858 I think Have but little knowledge of the signature & but little recollection of his hand writing I see his name to papers here & his name to a note or two handed me for collection Heard him say nothing of it The notes have been settled I said it was a little to fine a hand I am not a judge of hand writing I give no opinion from hand write I can form no opinion I would say I think it is not his signature I have said all I can say

× on cross examination he says I never saw Deft write his name on a handful of orders & receipts being handed the witness acknowledged by Deft. in Court to be his signature witness said one of these looks like his signature In others I cannot see his—

Thos. Moore sworn says I saw Deft write once only Have had two or three orders from him Some of them have been settled by him This is better executed than I ever saw his name written I would not like to say whether This is his writing or not Am not a judge of writing I would say as my opinion that

the same name would not write the signature in question and the signature in this Docket which is the one I saw Deft write signature in Docket was made 5th July 1855 I never saw him write any but this one signature I am not a judge of hand writing

Robert Benton Sworn says I once heard the parties talk last fall a year ago know not what time I heard them talk some where in front or some where back in town near dark they were talking I could not underst- and them said something about agreement said they were going in to fix an article and Dunlap said as soon as fixed he would go out with me It was about keeping cattle or stock I heard Deft say to McBane something about six weeks McBane contradicted & said he was to keep them longer after they came back Dunlap said he was to keep them over six weeks begining at a certain time & ending at a certain time He said it would be over six weeks Plaintiff said it would be longer they went to sign it Dunlap said Plaintiff had sent out an article that he would not sign that it bound him too hard to keep them too long on cross exam- ination Witness said I dont know what part of town it was in I did think when I started out home that night

[8442-B]

where it was but dont know now I came in to
Town trading some at that time but I dont
know what about I dont know what house
they went in to sign the Article I dont know
what part of town it was in I went in a house
in front & then Douglass & I met I dont know
what house I went in Douglass told me when
he would get the article fixed he would ride
out home with me When he met me after
that he did not say what was done but
rode out with me I recollect I rode a gray
beast but I dont recollect where I hitched
it whether in the front or in the back part
of town

Jesse Simpson Sworn says I was here when
Plaintiff came back from the east but dont
recollect the time Dont know that I saw the
Black mare after Plaintiff came home
Plaintiff asked me after he came home
if I knew what was good for Botts - Think
he said the Black mare was sick but
did not know what ailed her

A. Brewer Sworn said I am a Brother
in law of Deft Douglass I saw Plaintiffs
Horses & Cattle at Defts fall winter of 1854/55
I saw ~~Deft feed~~ fed the stock once in the winter
the night Deft was married I saw the stock at other
times when I passed I know the black mare &
had the Botts or something one day

He drenched her & got her up was ~~riding~~ McBanes riding mare I dont know what ailed the mare

Noah Warner Said I hauled the Back mare away when she died I heard Plaintiff ask Simpson what was good for the Botts

Ann Douglass was sworn & said I am the Defts Mother I ought to know the Stock seen them five head cattle & six head Horses & mules colts were separated from the mares Stock was fed as well as we were able to do it they looked as well till Christmas as they had looked were fed twice a day to my certain knowledge the old mare began to fall away when the Fistlo began to swell I fed them myself I know how it was done

John Axley

John Axley sworn says I know some of the Horses Have seen them often about Mussac the old mare was there & twelve years old when she had her colt was good of her size but had not much size I saw her before Douglass agreed to keep ~~them~~ her that winter I knew the red cow saw her last on the Bank of the Bayou near Kidds She was not dead then men were chopping wood near by saw a tree half cut down at the time I saw the tree next morning after it had been felled

L9443-38

I had seen the car a ^{37} day or two before that going along up the river I am of the impression it was about Christmas
Here the Deft rested
Plaintiff then called witnesses as follows to wit
Jesse Simpson who said I Know the general character of Robert Benton for truth and veracity It is bad
John Asley Robert Bentons general character for truth is not very good rather bad I do not Know that I have heard a multitude of mouths speak of him
B. P. Flowers sworn says I Know the general character of Robert Benton for truth & veracity I have for eight years
It is bad I have heard King & Kenedy & Captn Peck and his neighbors generally speak of him I never heard any body say any thing else of him
Isaac Gill sworn says I Know the general reputation of R Benton for truth & veracity I have heard some speak bad & none good of him

S. H. Primmer Esq says I have Known R. Benton general character for truth from 7 to nine years lived all the time in the neighborhood Have been Justice of The Peace seven years of the time
His character is bad

Reubin King Esq Sworne says I think I Know R. Bentons General Character for truth & veracity: it is bad

Thos Cupp Sworne says I have Known R. Benton & his general Character for truth fifteen years here and in Tennessee It is bad in both places never Knew any good of it

Wm R. J. Dorell Sworne says I have Known Robert Benton since 1844 twelve years I think it is bad not to compare with a good name

Wm Daniels Sworne says I have Known the general Character of Robert Benton over four years If what every body says is general I Know it. It is not good

J. E. Roberts Esq Sworne says I Know the general Character of Robert Benton for truth & veracity It is not good

T. Walton I Know Robert Bentons general Character for five years for truth & It is not good generally bad

R. Davidson Sworne says Robert Bentons general Character is that of a notorious liar

Jacob Bumgardner Sworne says ~~Robert Bentons~~ It is bad never heard but one say he would believe him

Wm Hays Sworne says Robert Bentons general Character for truth is very bad — And this was all the Evidence given in the cause

[8472-21]

Except the deposition of S. N. Mason which was read by Plaintiffs Counsel to the jury

Whereupon the counsel for the respective parties J. Jack Counsel for the Plaintiff then proceeded to address the jury for the Plaintiff after which Wm J. Allen Esq one of the defendants counsel proceeded to address the jury on behalf of the deft and while Mr Allen was addressing the jury the judge (who had been ill for several days) became very ill and was forced to leave the court house for a time. On being thus compelled to retire the judge requested John A Logan Esq a member of the bar (but who was not of counsel to either of the parties) to occupy the judges seat till Mr. Allen closed his address to the jury and then direct the Sheriff to adjourn court to two o'clock P.M. and also to remind the jury of the charge which they had before received from the court not to suffer any person to approach them upon the subject of the trial or to converse with any one about the case which Mr. Logan did as directed to which the plaintiff by his counsel excepted. —

Instructions of the Court

The Court at the instance of the Plaintiff charged the jury as follows viz

1st "The Court instructs the jury that the Plea of Non Est factum in this case only puts the case at issue or helps to do so and it can not be considered by the jury as evidence which the court gave & the Deft. excepted"

2nd "Fraud is so far opposed to honesty as to partake in some measure of the nature of misdemeanor & when fraud is charged by a party the burden lies upon the party so charging it to make satisfactory proof to the jury of its perpetration before he should be allowed to profit by making the charge" which the court gave as asked & the Deft. by his Counsel excepted

3rd "The Court instructs the jury that in this case it is proper for the jury to weigh the evidence and in whosoever favor the evidence preponderates to that party the verdict should be given" — which the Court gave as asked

4th "The court charges the jury that they have a right to compare (and ought so to do) all the signatures in evidence proved or admitted to be Douglass's with a view to

[24HA-22]

deciding the question as to the disputed 22 signatures and consider these together with all the other evidence in the case in making up a verdict as to the issue joined on the plea of non est factum" which the court gave as asked —

5th If you find first issue for Plaintiff then you should find such damages for Plaintiff as he has proved in the opinion of the jury: unless you should be of opinion from the evidence that the covenants in the agreement were performed or that Plaintiff procured the execution of the instrument by fraud (To this the Court added) If the covenant contained in the instrument were performed or in other words if no breach of covenant has been proven or the execution of the instrument was procured by fraud of the Plaintiff as alledged by the Defts plea your verdict in that case should be for the Deft" which was in this form given by the Court
The court then at the instance of Defts atty charged as follows viz

1st The Court instructs the jury that under the plea of non est factum a Defendant may show to the jury that the writing

declared upon is not his act or deed or that the writing declared upon is a different instrument and was substituted for that which Deft. supposed he was executing at the time It is competent for a Deft under such a plea to prove those facts or this state of case but as to whether the Evidence in this case proves this state of case or these facts is for your consideration entirely the question as to what the Evidence proves is for you to determine unless you believe from the Evidence that the Deft. executed the writing declared on, your verdict should be for the Deft." which the court gave

2d "That in this case the jury have a right to weigh all the Evidence positive and circumstantial and if they believe from all the Evidence positive & circumstantial that the instrument in question is not the act & deed of Deft. then the verdict should be for Defendant which the court gave

3d The court instructs the jury that they may weigh the statements of Douglass called out by the plaintiff in his examination of his witnesses in his Douglass behalf ~~and~~ and upon those statements coupled with other Evidence given in the case

[8442-23]

they may return a verdict in favor of Douglass Deft unless you believe that Douglass executed the writing in question In making up your verdict you should view all the evidence before you and decide according to the weight of the evidence which the court gave

4th The Deft by his counsel asks the court to instruct the jury that the Defts plea of non est factum makes it necessary that the Plaintiff shall prove to their satisfaction that the Deft executed the writing sued on and unless they so believe they ought to find for Defendant which the court gave as asked & the Plaintiff by his atty excepted Whereupon the jury retired & afterwards returned a verdict as follows We the jury find the issue for the Deft.

Whereupon the Plaintiff by his Atty J Sack moved the court for a new trial & filed the reasons therefor in writing as follows viz

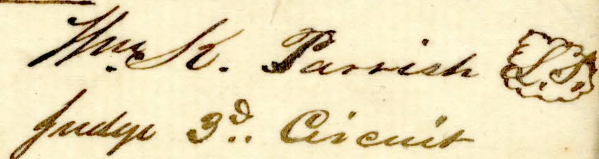
A McS McBane vs Johnathan E Douglass } Covenant verdict "We the jury find the issue for Deft."

Plaintiff moves the Court for a new trial on the grounds (turn over)

1st The Verdict is against the Evidence
2d The Verdict is against the Law and the Evidence
3d Error in one of the instructions given at the instance of Deft.

4th One of the Counsel for Deft occupied the seat of the Judge and performed the functions of the judge in the adjournment the last day of the trial in charging the jury to observe the admonition of the Court in not suffering any one to approach them &c this without consent of Plaintiff and after argument the Court being sufficiently advised in the premises overruled the motion for a new trial & the Plaintiff by his atty excepted and prays that these his exceptions may be signed sealed and made a part of the record in the Cause and accordingly it is done &c

Note As this bill of exceptions is signed in vacation and the instructions not being before me I cannot say that they are copied into this bill verbatim but suppose they are — at least they are copied in substance and are nearly as I recollect verbatim


Wm. K. Parrish (L.S.)
Judge 3d Circuit

[3492-024]

State of Illinois }
Massac County } Set.

I, James Elliott Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing 46 forty six written pages contain a full and complete transcript of the Record and proceedings in the Cause there in entitled as fully and completely as the same appears of Record in my Office

In testimony whereof I have hereunto set my hand and the seal of said Court at my office in Metropolis, Ills, This Twenty eighth day of October in the year of our Lord, One thousand Eight hundred and fifty Seven

James Elliott Clk

Clerks fee for records $ 11.00

Augustus M. S. McBean Pltff in error vs. Jonathan E. Douglass Defendant in error	Error to Mason	Pleas of the November Term of the Supreme Court In the year of Our Lord one thousand eight hun- dred and fifty seven

And the said Plaintiff in error by Cyrus G. Simons his Attorney comes and assigns the following causes of error in the record and proceedings aforesaid

First — That the verdict of the Jury was against the law and the evidence –

Second — That the verdict of the Jury was against the law

Third — That the Court erred in giving the fourth instruction asked for by defendant and also erred in overruling motion for a new trial and in rendering judgment

Cyrus G. Simons
Plaintiffs Attorney

Joinder in Error
W J Allen for Deft in Error

[8442-25]

No 59

Angus M. L. McKane
Pl'ff in error
vs.
Johnathan E. Daugharty
Defendant in error

Filed 25th Nov. 1857.
N. Johnston Clk

Prepaid $5 by C. G. Dunning Esq

Angus McBean
v
Jonathan E Douglass

Appeal to the Supreme Court from Massac ~~County~~ Circuit Court ~~[illegible]~~ May Term 1856

It is hereby agreed between the plaintiff and the Defendant in the above Styled Cause that the agreement & receipt Offered in Evidence in the above Styled cause upon the trial thereof in the said Massac Circuit Court but which has been not Copied into the bill of Exceptions Signed in said Cause may be considered as a part thereof as though inserted therein at the proper ~~time~~ place

Wm J. Allen
Atty for deft

C. G. Simons
Atty for Plaintiff

(.8442-26)

Confidential paper

No 55

Filed 25th Nov. 1857.

N. Johnston CM

STATE OF ILLINOIS, } ss. 1st Grand Division
SUPREME COURT. }

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Sheriff of Massac **County,**

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of Massac County, before the judge thereof, between Angus M. L. McBean plaintiff - and Jonathan E Douglass

defendant, it is said that manifest error hath intervened to the injury of said Angus M. L. McBean — — — — as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mt. Vernon, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Jonathan E. Douglass

that he be and appear before the Justices of our said Supreme Court, on the first day of the next term of said Court, to be holden at Mount Vernon, in said State, on the first Tuesday after the Second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Jonathan E. Douglass notice, together with this writ.

Witness, the Hon. ~~Samuel H. Treat,~~ John D Caton Chief Justice of our said Court, and the seal thereof, at Mount Vernon, this Sixteenth day of January in the year of our Lord, one thousand eight hundred and fifty- eight.

Noah Johnston
Clerk of Supreme Court.

[8442-27]

Served by Reading and delivering a true Coppy of the within to Jonathan. E. Douglass this February 13th AD 1858

J. F. Meares Sheriff of Massac County

	Cts
Servis of Copy	50
Milage 4 mile	20
Return	10
	80

Augustus M. Lee McBean
vs Sci fa
Jonathan E. Douglass

Filed 19th Feby 1858
A. J. Lowery Clk

Feb 13

ANGUS M. L. McBANE, vs. JONATHAN E. DOUGLAS.	Error to Massac.	In the Supreme Court of Illinois, November Term, A. D. 1857.

Page 1 of Record.

This was an action of covenant instituted by Angus M. L. McBane, plaintiff in error, against Jonathan E. Douglas, defendant in error, in the Massac County Circuit Court, on the 22d day of May. A. D. 1855.

Page 3.

The declaration contained one count, alleging that, on the fourth day of November, A. D. 1854, the defendant, by an agreement under seal, covenanted with the plaintiff that he would, from the said fourth day of November, A. D. 1854, until good grass should come in the next Spring following, keep and take care of, by feeding, maintaining, and providing suitable Winter accomodations for all of eleven head of mules, horses, mares and horned cattle, the property of the plaintiff, said stock being specified; and that defendant would deliver said stock to the plaintiff in the Spring following said fourth day of November, A. D. 1854, in the like good order and condition as the said stock then was in, to-wit: on the 4th day of November aforesaid, (accidents only excepted,) said covenant being in consideration of a debt then due and owing by the defendant to the plaintiff, evidenced by note, and referred to in the said writing under seal, that the said plaintiff, at the time of making said writing under seal, delivered up to the said defendant the said eleven head of stock, to be so kept and taken care of as aforesaid; but that the defendant did not perform his said agreement or writing under seal, and did not keep and take good care of said stock by feeding, wintering and providing suitable winter accomodations for the same, but suffered the said stock to run at large without feed or care, so that the greater part perished therefrom, and those which survived were greatly deteriorated in value thereby; and that the defendant did not deliver any part of said stock to the plaintiff, according to said writing under seal, whereby the said plaintiff was damaged in the sum of two hundred and seventy-five dollars, wherefore he brought suit, &c.

Page 4.

Page 5.

Page 6.

Page 9.

Page 10.

To the foregoing declaration of the plaintiff, the defendant, by McKenny & Davis, his attorneys, pleaded *non est factum*, and for a second plea, that the execution of the writing under seal in the declaration mentioned, was obtained by the plaintiff from the defendant by substituting the said writing for another and different writing, and fraudulently inducing the defendant to execute the same; and for a third plea, that the defendant did perform his covenant, and did return all of said stock in good condition, except such as died of disease and other accidents incident to such animals; and for a fourth plea, that certain of said stock, specified in the plea, were not the property of the plaintiff, but of one Peter Willard, of New Orleans, in the State of Louisiana; and for a fifth plea, that the plaintiff fraudulently and falsely represented the said stock to be his property, while in fact the same was the property of one Peter Willard aforesaid, who claimed the same; and the said fifth plea, after demurrer, was amended so as to charge the plaintiff with contriving and intending to defraud the defendant out of the sum of $250, and wrongfully and unlawfully intending to convert the said stock to his use, when in fact the said stock was the property of one Peter Willard aforesaid.

Page 11.

Page 12.

Page 17.

Page 20.

Upon the trial of said cause at the May Term of the Massac Circuit Court, A. D, 1856, before William K. Parrish, Judge, and a jury, the plaintiff read in evidence the deposition of Intrepid M. Maxon, who deposed that he "was acquainted with the handwriting of the defendant;" and upon production of the writing obligatory filed in the cause, deposed that from his knowledge of the hand-

[8442-28]

writing of the defendant he believed the signature to said writing obligatory to be in his handwriting.

Page 22.

Martin Beeson was then produced and sworn as a witness on the part of the plaintiff, who testified that the "parties to this suit came into his grocery in the evening. They were talking about a written agreement. Defendant made objection to some part of the article; he wanted 'accidents excepted' to be put in it. Plaintiff agreed to make the alteration, and the defendant said he would sign it. Knows of no other alteration spoken of by defendant. Plaintiff then procured pen and ink from witness, and interlined in the article 'accidents excepted.' The ink was pale. Thinks the paper shown him is the one then before the parties. The ink of the interlineation corresponds with the ink used in making it. Does not recollect of any one else being present but plaintiff and defendant at the time spoken of. After plaintiff wrote the interlineation, he handed it to defendant to sign, and defendant spoke at the time of the writing being blotted."

Page 23.

On his cross-examination he testified that this "was in the fall, a short time before plaintiff started East. They were in witness's house maybe ten or fifteen minutes. Neither of them called upon witness to pay any particular attention to it. Don't recollect that 'till the 25th Dec.' was mentioned as the time to which defendant was to keep the stock; think there was nothing said about altering the writing in that respect. Thinks the plaintiff spoke at the time of the interlineation being blotted, since it was spoken of by defendant that his name was blotted; it came to witness's mind that it was the interlineation that was blotted, and not defendant's name."

Page 24.

Angus McBane being called and sworn, testified that "he was present in Beeson's grocery at the time spoken of. Plaintiff and defendant were standing by the counter talking about the writing. Remembers defendant insisted on 'accidents excepted' being put in. Plaintiff said he would put that in, and did so, and handed it to defendant to sign, and defendant took it to sign, as witness thought. He had just before said that he would sign it if that alteration was made. Saw the top of the paper lying on the counter before defendant after the interlineation was made. The paper produced is the same paper. The body of it is in plaintiff's handwriting; witness saw it that night after he went home."

(It was admitted that the debt in the writing mentioned was a note of twenty-two dollars and fifty cents.)

On his cross-examination he testified that "he thought he saw plaintiff at Beeson's put in 'accidents excepted' in the writing. The same paper had been out at defendant's that day. Witness and his brother took it out for defendant to sign, and he had objected to do so as it was then, until he could see plaintiff. Witness is plaintiff's son."

Page 25.

Chas. Russell being called and sworn, testified that "he knew defendant's handwriting well; learned to write at the same school with him; believes the signature to the writing in question to be his; judges by the shape of his letters and the stroke of his pen."

Isaac Gill being called and sworn, testified that "he had been acquainted with the handwriting of defendant two years or more, and was of opinion that the signature of his name to the writing in question was defendant's signature."

Page 26.

Samuel H. Primmer testified that he had "seen defendant write, and was of opinion that the signature in question was defendant's handwriting."

Jesse Maxam testified that he had "seen defendant write his name, and had had his signatures in his possession, and that the signature in question was defendant's."

[8442-29]

On his cross-examination he said it was possible that he might be mistaken.

Joseph Mears testified that he "had seen defendant write once, and had received written orders from him which he afterwards acknowledged. He considered the signature in question to be his hand writing."

Page 27.

(Here the writing in question with disputed signature was offered in evidence, and went to the jury.)

Daniel Bowker being sworn, testified that "he knew some of plaintiff's stock mentioned in the writing; the black riding mare, and a sorrel mare, The black mare was worth $75 or $80. The sorrel mare was worth $40, $50, or $60. The other sorrel mare had a mule colt sucking; thinks mare and colt worth $30. Thinks there stock were at defendant's part of the Winter. Black mare died at McBane's in March. Saw her before she died, and after she was hauled out; she was in bad order; soon after she was brought in to plaintiff from defendants she died. Knows of one of plaintiff's cows named in the writing, dying in town in February, 1854. Helped defendant at his request to skin one of plaintiff's cattle. Defendant said he supposed a limb had fallen on it. There was no limb lying about the cow, nor limb marks on her. She had been running about town some time before she died. Defendant told witness that he was to keep plaintiff's stock through the Winter. This was a good sized cow, worth in the Fall of 1854 $12."

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On his cross examination, he testified that "plaintiff was out inquiring for the stock, and he thought he showed or told him where they were. They were not worth so much that spring as the fall before. It would have taken $20 each to have restored them to the condition and value they were in that fall."

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C. F. Wasbright testified that "in November, 1854, two heifers came to his place, and remained on his premises for some time, being fed with his stock. In June following, plaintiff and defendant both came and inquired for them the same day. The cattle came up, and both parties said they were two of those taken by defendant to keep for plaintiff. Defendant told witness he would pay him for wintering them, and that they were plaintiff's cattle."

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J. J. Crittenden testified that "about January 15th, 1855, defendant was inquiring for plaintiff's stock; said he was afraid they would stray off or die, and that his time for keeping them had expired."

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The defendant here rested his case.

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Jesse Simpson, John Axley, Z. P. Honers, Isaac Gill, S. H. Pfrimmer, Reuben King, Thomas Cupp, William McDonald, William Daniell, J. E. Roberts, V. Walton, R. Davidson, and William Hays, called and sworn as witnesses for the plaintiff, testified to the "character of Reuben Benton for truth and veracity as being bad."

The evidence in the case was here closed.

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The counsel then addressed the jury; and while Mr. Allen, one of defendant's counsel, was addressing the jury, the Judge, being ill, was forced to leave the Court room, and appointed John A. Logan, a member of the bar, not of counsel to either party, to occupy the Judge's seat until Mr. Allen closed, and to direct the Sheriff to adjourn Court; and also to remind the jury of the charge they had received from the Court not to suffer any person to approach them on the subject of the trial, &c. Mr. Logan did as directed, to which the plaintiff, by his counsel, excepted.

Page 42.

The Court, at the instance of the plaintiff, charged the jury as follows:

1st. "The Court instructs the jury that the plea of *non est factum* in this case only puts the case at issue, or helps to do so, and it cannot be considered by the jury as evidence." To which the defendant excepted.

2d. "Fraud is so far opposed to honesty as to partake, in some measure, of the nature of misdemeanors; and when fraud is charged by a party, the burden lies upon the party so charging it to make satisfactory proof to the jury of its perpetration before he should be allowed to profit by making the charge." To which instruction the defendant excepted.

3d. "The Court instructs the jury that, in this case, it is proper for the jury to weigh the evidence; and in whosoever favor the evidence preponderates, to that party the verdict should be given.

Page 43.

4th. "The Court charges the jury that they have a right to compare (and ought so to do,) all the signatures in evidence, proved or admitted to be defendant's, with a view to deciding the question as to the disputed signature, and consider these, together with all the evidence in the case, in making up a verdict as to the issue joined on the plea of *non est factum*."

5th. "If you find first issue for plaintiff, then you should find such damages for plaintiff as he has proved, in the opinion of the jury; unless you should be of opinion, from the evidence, that the covenants in the agreement were performed, or that plaintiff procured the execution of the

[8442-33]

instrument by fraud." To this the Court added: "If the covenants contained in the instrument were performed, or in other words, if no breach of covenant has been proven, or the execution of the instrument was procured by fraud of the plaintiff, as alledged by defendant's plea, your verdict in that case should be for defendant."

The Court, at the instance of defendant, charged the jury as follows:

Page 44.

1st. "The Court instructs the jury that under the plea of *non est factum*, a defendant may show to the jury that the writing declared upon is not his act or deed, or that the writing declared upon is a different instrument, and was substituted for that which defendant supposed he was executing at the time. It is competent for a defendant under such a plea, to prove these facts or this state of case; but as to whether the evidence in this case proves this state of case or these facts, is for your consideration entirely. The question as to what the evidence proves, is for you to determine. Unless you believe from the evidence that the defendant executed the writing declared on, your verdict should be for the defendant.

2d. "That in this case the jury have a right to weigh all the evidence, positive and circumstantial; and if they believe from all the evidence, positive and circumstantial, that the instrument in question is not the act and deed of the defendant, then the verdict should be for the defendant.

Page 45.

3d. "The Court instructs the jury that they may weigh the statements of Douglas, called out by the plaintiff in his examination of his witnesses, in his (Douglas') behalf, and upon those statements, coupled with other evidence given in the case, they may return a verdict in favor of defendant, unless they believe that Douglas executed the writing in question. In making up your verdict, you should view all the evidence before you, and decide according to the weight of the evidence.

4th. "The Court instructs the jury that the defendant's plea of *non est factum* makes it necessary that the plaintiff shall prove to their satisfaction that the defendant executed the writing sued on; and unless they so believe, they ought to find for defendant." To which instruction the plaintiff excepted.

Thereupon, the jury retired; and afterwards returned a verdict as follows: "We, the jury, find the issue for the defendant."

Page 45.

The plaintiff, by his counsel, then moved the Court for a new trial; which motion the Court overruled, and the plaintiff, by his counsel, then and there excepted.

The plaintiff now assigns the following causes of error;

Page 46.

1st. That the verdict was against the law.

2d. That the verdict was against the law and the evidence.

3d. Error in one of the instructions given at the instance of defendant.

CYRUS G. SIMONS,
Attorney for Plaintiff in Error.

[8442-33]

#2

In the Supreme Court
November Term A.D. 1857

Angus Mc L. McBain

vs.

Jonathan E. Douglass

Abstract

C. G. Simons
Plaintiffs Atty

Filed 26. Nov. 1857.
A. Johnston Clk

STATE OF ILLINOIS
SUPREME COURT, } ss. 1st Grand Division

WRIT OF ERROR.

THE PEOPLE OF THE STATE OF ILLINOIS;

To the Clerk of the Circuit Court for the county of Massac GREETING,

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Massac county, before the Judge thereof, between

Angus M. L. McBean

plaintiff , and Jonathan E Douglass

defendant it is said manifest error hath intervened, to the injury of the aforesaid Angus M. L. McBean as we are informed by his complaint, and we being willing that error, should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court, the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Mount Vernon, in the county of jefferson, on the 1st Tuesday after the 2d Monday of November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law:

Witness, the Hon. John D. Caton ~~WALTER B. SCATES~~ Chief Justice of our said court, and the seal thereof, at Mount Vernon this Sixteenth day of January in the year of Our Lord One Thousand Eight Hundred and Fifty-eight -

Noah Johnston
Clerk Supreme Court.

[7442-34]

11

Angus M. L. McBean

vs } Writ of prim

Jonathan E Douglass

Issued & filed Jany. 16. 1858

N. Johnston Clk

Angus M. L. McBean Plaintiff below and Plaintiff here in error vs. Jonathan E. Douglass Deft. here and Deft. below	Error to Mapac	Pleas of the November Term of the Supreme Court In the year of Our Lord one thousand eight hundred and fifty seven

Will the Clerk of the Supreme Court please issue a Scire facias for the Defendants in the above styled Cause (in error and appellee) directed to the Sheriff of Mapac County for service and returnable on the first day of the next term of Court

Agnus G. Simons

Plaintiffs Attorney

[5442-35]

No 59

In the Supreme Court
November Term A.D. 1857

Angus Mc. D. McBean
Plaintiff in error

vs.

Jonathan E. Douglass
Defendant in error

Præcipe

C. H. Simons
Atty for Plaintiff

Filed 25th Nov. 1857.
N. Johnston Clk

ANGUS M. L. McBANE, vs. JONATHAN E. DOUGLAS.	Error to Massac.	In the Supreme Court of Illinois, November Term, A. D. 1857.

Page 1 of Record. This was an action of covenant instituted by Angus M. L. McBane, plaintiff in error, against Jonathan E. Douglas, defendant in error, in the Massac County Circuit Court, on the 22d day of May. A. D. 1855.

Page 3. The declaration contained one count, alleging that, on the fourth day of November, A. D. 1854, the defendant, by an agreement under seal, covenanted with the plaintiff that he would, from the said fourth day of November, A. D. 1854, until good grass should come in the next Spring following, keep and take care of, by feeding, maintaining, and providing suitable Winter accomodations for all of eleven head of mules, horses, mares and horned cattle, the property of the plaintiff, said Page 4. stock being specified ; and that defendant would deliver said stock to the plaintiff in the Spring following said fourth day of November, A. D. 1854, in the like good order and condition as the said stock then was in, to-wit: on the 4th day of November aforesaid, (accidents only excepted,) said covenant being in consideration of a debt then due and owing by the defendant to the plaintiff, evidenced by note, and referred to in the said writing under seal, that the said plaintiff, at the time of Page 5. making said writing under seal, delivered up to the said defendant the said eleven head of stock, to be so kept and taken care of as aforesaid ; but that the defendant did not perform his said agreement or writing under seal, and did not keep and take good care of said stock by feeding, wintering and providing suitable winter accomodations for the same, but suffered the said stock to run at Page 6. large without feed or care, so that the greater part perished therefrom, and those which survived were greatly deteriorated in value thereby ; and that the defendant did not deliver any part of said stock to the plaintiff, according to said writing under seal, whereby the said plaintiff was damaged in the sum of two hundred and seventy-five dollars, wherefore he brought suit, &c.

Page 9. Page 10. To the foregoing declaration of the plaintiff, the defendant, by McKenny & Davis, his attorneys, pleaded *non est factum*, and for a second plea, that the execution of the writing under seal in the declaration mentioned, was obtained by the plaintiff from the defendant by substituting the said writing for another and different writing, and fraudulently inducing the defendant to execute the same ; and for a third plea, that the defendant did perform his covenant, and did return all of Page 11. said stock in good condition, except such as died of disease and other accidents incident to such animals ; and for a fourth plea, that certain of said stock, specified in the plea, were not the property of the plaintiff, but of one Peter Willard, of New Orleans, in the State of Louisiana; and for a Page 12. fifth plea, that the plaintiff fraudulently and falsely represented the said stock to be his property, while in fact the same was the property of one Peter Willard aforesaid, who claimed the same ; and the said fifth plea, after demurrer, was amended so as to charge the plaintiff with contriving and intending to defraud the defendant out of the sum of $250, and wrongfully and unlawfully intending to convert the said stock to his use, when in fact the said stock was the property of one Peter Willard aforesaid.

Page 17. Upon the trial of said cause at the May Term of the Massac Circuit Court, A. D, 1856, before William K. Parrish, Judge, and a jury, the plaintiff read in evidence the deposition of Intrepid M. Page 20. Maxon, who deposed that he "was acquainted with the handwriting of the defendant;" and upon production of the writing obligatory filed in the cause, deposed that from his knowledge of the hand-

[84403-6]

writing of the defendant he believed the signature to said writing obligatory to be in his handwriting.

Page 22.

Martin Beeson was then produced and sworn as a witness on the part of the plaintiff, who testified that the "parties to this suit came into his grocery in the evening. They were talking about a written agreement. Defendant made objection to some part of the article; he wanted 'accidents excepted' to be put in it. Plaintiff agreed to make the alteration, and the defendant said he would sign it. Knows of no other alteration spoken of by defendant. Plaintiff then procured pen and ink from witness, and interlined in the article 'accidents excepted.' The ink was pale. Thinks the paper shown him is the one then before the parties. The ink of the interlineation corresponds with the ink used in making it. Does not recollect of any one else being present but plaintiff and defendant at the time spoken of. After plaintiff wrote the interlineation, he handed it to defendant to sign, and defendant spoke at the time of the writing being blotted."

Page 23.

On his cross-examination he testified that this "was in the fall, a short time before plaintiff started East. They were in witness's house maybe ten or fifteen minutes. Neither of them called upon witness to pay any particular attention to it. Don't recollect that 'till the 25th Dec.' was mentioned as the time to which defendant was to keep the stock; think there was nothing said about altering the writing in that respect. Thinks the plaintiff spoke at the time of the interlineation being blotted, since it was spoken of by defendant that his name was blotted; it came to witness's mind that it was the interlineation that was blotted, and not defendant's name."

Page 24.

Angus McBane being called and sworn, testified that "he was present in Beeson's grocery at the time spoken of. Plaintiff and defendant were standing by the counter talking about the writing. Remembers defendant insisted on 'accidents excepted' being put in. Plaintiff said he would put that in, and did so, and handed it to defendant to sign, and defendant took it to sign, as witness thought. He had just before said that he would sign it if that alteration was made. Saw the top of the paper lying on the counter before defendant after the interlineation was made. The paper produced is the same paper. The body of it is in plaintiff's handwriting; witness saw it that night after he went home."

(It was admitted that the debt in the writing mentioned was a note of twenty-two dollars and fifty cents.)

On his cross-examination he testified that "he thought he saw plaintiff at Beeson's put in 'accidents excepted' in the writing. The same paper had been out at defendant's that day. Witness and his brother took it out for defendant to sign, and he had objected to do so as it was then, until he could see plaintiff. Witness is plaintiff's son."

Page 25.

Chas. Russell being called and sworn, testified that "he knew defendant's handwriting well; learned to write at the same school with him; believes the signature to the writing in question to be his; judges by the shape of his letters and the stroke of his pen."

Isaac Gill being called and sworn, testified that "he had been acquainted with the handwriting of defendant two years or more, and was of opinion that the signature of his name to the writing in question was defendant's signature."

Page 26.

Samuel H. Primmer testified that he had "seen defendant write, and was of opinion that the signature in question was defendant's handwriting."

Jesse Maxam testified that he had "seen defendant write his name, and had had his signatures in his possession, and that the signature in question was defendant's."

On his cross-examination he said it was possible that he might be mistaken.

Joseph Mears testified that he "had seen defendant write once, and had received written orders from him which he afterwards acknowledged. He considered the signature in question to be his hand writing."

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(Here the writing in question with disputed signature was offered in evidence, and went to the jury.)

Daniel Bowker being sworn, testified that "he knew some of plaintiff's stock mentioned in the writing; the black riding mare, and a sorrel mare, The black mare was worth $75 or $80. The sorrel mare was worth $40, $50, or $60. The other sorrel mare had a mule colt sucking; thinks mare and colt worth $30. Thinks there stock were at defendant's part of the Winter. Black mare died at McBane's in March. Saw her before she died, and after she was hauled out; she was in bad order; soon after she was brought in to plaintiff from defendants she died. Knows of one of plaintiff's cows named in the writing, dying in town in February, 1851. Helped defendant at his request to skin one of plaintiff's cattle. Defendant said he supposed a limb had fallen on it. There was no limb lying about the cow, nor limb marks on her. She had been running about town some time before she died. Defendant told witness that he was to keep plaintiff's stock through the Winter. This was a good sized cow, worth in the Fall of 1854 $12."

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The Court, at the instance of defendant, charged the jury as follows:

Page 44.

1st. "The Court instructs the jury that under the plea of *non est factum*, a defendant may show to the jury that the writing declared upon is not his act or deed, or that the writing declared upon is a different instrument, and was substituted for that which defendant supposed he was executing at the time. It is competent for a defendant under such a plea, to prove these facts or this state of case; but as to whether the evidence in this case proves this state of case or these facts, is for your consideration entirely. The question as to what the evidence proves, is for you to determine. Unless you believe from the evidence that the defendant executed the writing declared on, your verdict should be for the defendant.

2d. "That in this case the jury have a right to weigh all the evidence, positive and circumstantial; and if they believe from all the evidence, positive and circumstantial, that the instrument in question is not the act and deed of the defendant, then the verdict should be for the defendant.

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3d. "The Court instructs the jury that they may weigh the statements of Douglas, called out by the plaintiff in his examination of his witnesses, in his (Douglas') behalf, and upon those statements, coupled with other evidence given in the case, they may return a verdict in favor of defendant, unless they believe that Douglas executed the writing in question. In making up your verdict, you should view all the evidence before you, and decide according to the weight of the evidence.

4th. "The Court instructs the jury that the defendant's plea of *non est factum* makes it necessary that the plaintiff shall prove to their satisfaction that the defendant executed the writing sued on; and unless they so believe, they ought to find for defendant." To which instruction the plaintiff excepted.

Thereupon, the jury retired; and afterwards returned a verdict as follows: "We, the jury, find the issue for the defendant."

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The plaintiff, by his counsel, then moved the Court for a new trial; which motion the Court overruled, and the plaintiff, by his counsel, then and there excepted.

The plaintiff now assigns the following causes of error;

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1st. That the verdict was against the law.

2d. That the verdict was against the law and the evidence.

3d. Error in one of the instructions given at the instance of defendant.

CYRUS G. SIMONS,
Attorney for Plaintiff in Error.

[84442-41]

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In the Supreme Court
November Term A.D. 1857

Angus Mc L. McBain

vs.

Jonathan E. Douglass

Abstract

C. W. Simons
Plffs. Attorney

Filed 26. Nov. 1857.
N. Johnston Clk

No 1

November A.D. 1860

McBean
vs
Douglass

8442

Dismissed for want of prosecution – at cost of Pltff in som –

Cost bill on page 433

Cost bill on Page 433