John H. Lyon, Printer, Jersey City.

New Jersey Court of Errors and Appeals.

Edward G. Brown, *Plaintiff in Error,* *vs.* Ai Fitch, *Defendant in Error.*	*Writ of Error to the Supreme Court.*

This is an action of assumpsit brought by the defendant in error in the Supreme Court.

The action was commenced by summons.

The declaration was in assumpsit for goods sold and delivered.

The plea was the general issue.

The cause was tried at the term of October, A. D. 1865, of the Hudson Circuit, and a verdict rendered for the plaintiff and his damages assessed at $4,410.64, for which amount final judgment has been entered.

Judgment was signed November 10, 1865.

On the trial of this cause before his Honor Joseph D. Bedle, one of the Associate Justices of the Supreme Court of the State of New Jersey, the following bills of exceptions were allowed and sealed.

On the return of the writ of error the plaintiff in error assigned errors as follows, viz: Comes in at Page 29 Line 33

The jurors of the jury in the record hereto annexed, mentioned as in said record is set forth, came before the Honor-

able Joseph D. Bedle, an Associate Justice of the Supreme Court, at the day and place therein mentioned, and the parties came also, and the said jurors being so chosen, tried and sworn, as therein mentioned, the plaintiff to maintain and prove the issue on his part, called—

John C. Moore, who testified as follows:

I am book-keeper of Fitch and have been since May, 1864; day-book commences January, 1860; goes to August, 1863; the book is in handwriting of Peter Gordon; he is dead; he died February, 1865, I think; the second day-book continues till present time from August, 1863; some of this is in handwriting of Gordon; the last entry in Gordon's handwriting is 30th April, 1864, then mine commences; I found the books in the office when I went there; these are regular day-books of Mr. Fitch; the entries are originally made in the blotter.

Witness shows ledger and says:

It begins in Gordon's handwriting and continues in mine; I commenced to make entries when I commenced as book-keeper; I understand that Fitch and Boynton are partners; understood it from both; the lumber that is sent down is sold, then an entry made in these books; when we sell any of that timber it is charged to the party who buys it, and is credited to Fitch & Boynton.

And being cross-examined: Only what belongs to Fitch & Boynton is so entered; Fitch deposits timber in basin north of Jersey City. Gordon was clerk; could not say Gordon was interested in timber in basin. I know Boynton, (Jonathan is his first name); he lives at Clearfield, Clearfield county, Pennsylvania; there are entries of Fitch & Boynton in books; that firm is composed of Ai Fitch, the plaintiff, and Jonathan Boynton, and they are engaged in getting out timber, and in timber lands in Pennsylvania; it is sold here; the place of deposit of it is in basin north of Jersey City; Fitch attends to business here, and Boynton in Pennsylvania; the original entries are made in a blotter and copied on day-book; we have check books, bank books, &c.; I have seen

no books of firm of Fitch & Boynton; I have been there in the establishment and have access to the books; the timber deposited in the north basin, when sold, is charged in these books; Boynton sends it here, and when it is sold the sales are entered in these books; when we sell any of Fitch & Boynton's timber, it is charged to party who receive it, and credited to Fitch & Boynton; Fitch has in certain branches other partners; Fitch and Carman have business buying a certain lot of timber; Rogers also. 10

And being re-examined, says: Fitch sells timber of his own; also sells on commission; we credit to Fitch & Boynton only what belongs to them.

Plaintiff offers the books. The defendant objects to the books, on the ground that they are not books of original entries, and do not so appear to be on their face. And the said judge overrules the said objection and admits the said books in evidence, to which ruling of the court the counsel for the defendant excepts, and prays that this, his exception, 20 may be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.]

Witness says: The blotters are in Mr. Fitch's possession and in existance.

The defendant also objects to the day-book especially, as not a book of original entries.

And the said court overrules the said objection; to which ruling of the court the counsel of the defendent excepts and 30 prays that this, his exception, may be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.]

And the books were read in evidence. (Pro ut the same). Witness says; We enter charges in blotter and transfer to day-book every one or two days as we get time; this transfer I speak of since I have been there; Gordon was a week with me. Timber invoiced in Fitch's name. Boynton was interested in finished timber as well as rough timber. 40

The first charge in the account is not on day-book; it is in ledger, p. 162.

April 21, '63, Commissions.....$69 00
Storage..... 50 00

Second entry is not on day-book.

And being re-cross-examined: It appears by books that the 89 sticks, of August, 1863, were bought of Fitch & Boynton; it also appears from the books, that Fitch & Boynton received the following credits:

10 August 12, 1863, 47 sticks of pine and 17 of oak.
" 17, " 41 sticks of pine.
Sept. 5, " 56 sticks of pine.
" 15, " 74 " "

The entry of August 8, 1863, is after the whole month of September, 1863. December 12, 1863; this is a bill of timber sold to Menzies, amounting to $32,000. August, 28, 1863, a sale of 198 sticks, 201 sticks, 1,300 sticks, all sold to Menzies for 20 or 22 cts. per foot.

20 *Ai Fitch*, sworn: I call myself a timber dealer. I sold Brown timber, logs and piles in 1863. The charge of $69 commissions was on sales of timber of Brown's in my basin. I sold it for him—commissions 5 per cent; I sold it in small lots; I sold and guaranteed. Storage was for a lot of timber of Brown's in my basin—a lumping bargain. The 301 piles were delivered from Hoboken; cannot swear to delivery myself.

As to the charge of June 15, 66 sticks, I sold these to Brown; they belonged to me. I think I got them from 30 Graham, Boynton & Co., not certain. I had a good deal of timber, of the size Brown wanted, from that company; they were charged to me by them.

As to the charge of July 28, 469 piles, Gordon must have sold these piles. I don't make all the sales. Gordon was bookkeeper, and he had my prices, and he sold them at my prices; sold to Brown and others; I had but one that could sell, that was Gordon.

As to the charge of August 3, that was the price we were selling it at. Don't recollect of making distinct bargain for 40 this; don't recollect selling it myself.

As to the charge of September 29, 285 piles, these were piles I had from Morgan Lewis. I sold them to Brown on commission, and can show it in books from Lewis; 21 logs also from Mr. Lewis.

As to the charge of October 12, this was Canada pine, 59 piles. I was selling for James Bigler; no one else interested in it but myself.

The charge of October 19, was for Canada pine, and the charge of October 22 was same lot from Bigler, sold on commission. The bill now produced and shown to me being my bill rendered to Brown for this account, is in Gordon's hand writing, (pro ut the same).

Receipt of June 30, 1863, for $800, is in Gordon's handwriting, (pro ut the same). This was paid on account. The receipt of August 11, 1863, for $2000; of October 3, 1863, for $2000, are in Gordon's handwriting, (pro ut the same). I think the $1000 paid June 6, 1863, was received by Gordon for me. Gordon is dead; he was my clerk; he kept these books; these are my day books, the only ones I had; I have sent for the blotter; I have but one set of books, these are they.

And being cross-examined says: I gave Fitch & Boynton credit for the 89 sticks of timber the same day that I charged Brown for them at 25 cents, and they pay me for storage and basin, and I credited the same I got, and Fitch & Boynton gave me one cent per foot for use of basin. Being shown a paper of which the following is a copy:

"*Bill of pine timber for E. G. Brown.*

U. S. I. R. STAMP. 5 CENTS.

47,520 feet long, 15x15 lengths 37½ ft., 50, 62½, 75 and 87½.

422 caps, 34 ft. long, 14x14.

Timber to be straight, and as good as you usually get for me, and about 15,000 feet, 12x12.

I agree to deliver the above timber in April, May and June, 1863, at eighteen cents per foot, at Elizabethport, N. J.

JERSEY CITY, 21 JAN'Y, 1863.

FITCH & BOYNTON."

The witness says: That is Fitch & Boynton's signature made by me; I never performed the contract; I notified him I could not get the timber, was to perform it if I could.

The defendant then offered the said contract in evidence, to which the plaintiff objected, and the counsel for the defendant having produced the said contract, with three receipts and the bill of particulars, in court, on the notice of the plaintiff to produce all papers with reference to this transaction, and the same with other papers having been inspected
10 by the plaintiff's counsel and the other papers having been used by the plaintiff's counsel, the defendant insisted that the defendant was entitled to have the said contract put in evidence; but the court overruled the said contract, as it does not now appear to have a relevancy to the case, to which ruling of the court the counsel for the defendant excepted, and this exception is sealed accordingly.

J. D. BEDLE. [L. S.]

I have known Brown for five years; had considerable
20 dealing with him, but not large amounts, but several thousand dollars prior to this bill; he was building a bridge when this timber was ordered. In the fall of 1862, I had a conversation with Brown about the timber for the Newark Bay Bridge; he then said he would get it himself; I thought Fitch & Boynton could furnish it. Got some timber for Brown of Bigler in July, 1863.

Being shown a letter of which the following is a copy:

J. City, 28th July, '63.

30 Dear Sir:—I met Mr. J. Bigler to-day, and he says his timber was very much broken up and that they are getting it together, and he hoped to be able to have a lot of it here next week, and would do all he could to do so.

Yours, truly,

AI FITCH.

E. G. Brown, Esq.

Witness says: That was relative to the Bigler timber. September, 1863, I bought a raft containing 100,000 feet;
40 Russell, Rogers and myself were interested in it; I did not

have any long timber at Whitehall; it was large timber, from 15 to 20 inches and 30 to 50 feet lengths; it was bought of John Dunlap; Brown met me at Whitehall and told me he had marked it; I told him it was not his and he should not have it; I sold it as follows:

To Menzies, 30 M. feet.

To Anderson, New Haven, 40 M. feet.

To Simus, of Elizabeth, 20 M. feet.

All at 30 cents per foot; C. & R. Poillon had some of it; I never sent Brown to Menzies to buy lumber. These are 10 my blotters. Proved and offered in evidence by plaintiff.

James Murcher, sworn:

I am in employ of Fitch; have been three years and nine months; have charge of timber in the basin in Jersey City; I had charge of timber in basin till twelve months ago. Know Brown; have delivered him timber; it was Fitch's timber I delivered to him; I delivered him white pine piles and spruce piles and Canada timber, and some Susquehannah; not sure as to this. In 1863 I delivered Brown some 20 out of John Brown's basin; July 18 or 28, 1863; it was some piles, at Weehawken, in John Brown's basin; Gordon sent me to deliver some from there to Brown's man; don't remember delivering in June; I delivered some from basin in Jersey City; delivered total in winter; from Jersey City basin I delivered such as Brown selected; a number of piles delivered with 22 logs on top of them.

And being cross-examined, says: I didn't know Carman very well, except by seeing him in the office; same acquaintance with Boynton; Fitch & Boynton's timber kept 30 into basin at Jersey City by itself; Fitch & Boynton had only one raft there that summer.

Whereupon the plaintiff rested his case, and the counsel for the defendant opened to the jury: That the chief items in the account which were disputed were those charged as sticks, June 15, August 3, October 12, 19 and 22; the rest of the account was overpaid by the credits given on the account. The defence to the items of August 3, and of October 12, 19 and 22, was that the plaintiff and Jonathan Boyn- 40

ton were partners, under the name of Fitch & Boynton, and that these articles were delivered under a written contract made between the defendant and Fitch & Boynton, by which Fitch & Boynton agreed to sell and deliver to the defendant a large amount of timber; that the contract was as follows:

"*Bill of Pine Timber for E. G. Brown.*

27,520 feet long, 15x15, lengths 37½ feet, 50, 62½, 75 and 87½ feet.

422 caps, 34 feet long, 14x14.

Timber to be straight and as good as you usually get from me, and about 15,000 feet 12x12.

I agree to deliver the above timber, in April, May and June, 1863, at eighteen cents per foot, at Elizabethport, N. J.

Jersey City, 21 Jan'y, 1863.

FITCH & BOYNTON."

That the contract was made to procure timber of certain specific lengths and measurements to build a bridge across Newark bay, which the defendant had contracted to build and finish in the summer of 1863, of which fact Fitch & Boynton were aware at the time of making the written contract; that they did not perform their contract, and the defendant to fulfil his own contract to build the bridge was obliged to purchase timber at an advance of about twelve cents per foot above the contract price, at a loss to the defendant of about $5000; that he was obliged to buy timber of random lengths, and to cut it to the contract sizes at great waste and loss to at least $5000 more; that a part of the timber so bought by the defendant, the plaintiff, Fitch, requested him to buy of one Menzies until the contract timber came along, and that he, the plaintiff, would make it right; that the defendant bought a large amount of Menzies, as directed by the plaintiff, at an advance of twelve cents per foot above the contract price, and paid Menzies for it, by which he sustained a loss of about $1650; that neither Fitch or Boynton have ever paid or allowed the defendant for this or any part of the loss the defendant suffered

by their non-performance of the contract; that the price charged for the timber delivered under the contract is seven cents per foot beyond that agreed on, being an overcharge of $1400; that it cost the defendant about $5000 more to purchase the requisite timber than it would have cost him by contract prices; that the work of building the bridge to supply the material for which the contract was made was greatly delayed by the non-performance of the contract of Fitch & Boynton, so that the work had to be done at an unseasonable time of the year, at a great advance in the cost of labor and an increase in the amount of labor; that the iron necessary for the bridge rose in price; that ice destroyed the work; large quantities of timber necessary for the work were lost, all on account of the difficulty of keeping it together at the unseasonable time of the year, and that the non-performance of the contract by Fitch & Boynton was wilful and fraudulent; that they could have performed it; that they had the contract timber on hand, but preferred to sell it, and did sell it at higher rates than those mentioned in the contract, and realized a profit exceeding $10,000 by the violation of the contract.

And to sustain the issue on his part, the defendant,

Edward G. Brown, was sworn and testified as follows:

I am the defendant; live at Elizabethport, New Jersey. I am contractor for bridges, wharves and buildings; carpenter by trade. I have been engaged in building mills, wharves and bridges since I was 17, about 30 years. The account sued for here, except piles and logs, I bought of Fitch & Boynton by written contract; and being shown the contract of January 21, 1863, before set forth, the witness says, that is the contract; the contract was signed by Fitch for Fitch & Boynton, about the time of its date; it was drawn by Gordon, the clerk. The timber was to be furnished for Newark Bay bridge.

And the said contract was read in evidence, (pro ut the same).

And the witness being asked by counsel,

Did Mr. Fitch know for what you intended to use the timber contracted for?

The court overruled the said question; to which ruling of the court the counsel for the defendant excepted, and prays that his exception may be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.]

Did Mr. Fitch make this contract, knowing that if it was not fulfilled by him, you would be unable to perform a con-
10 tract into which you had entered?

To which question the court refused to allow the witness to give answer; to which ruling of the court the counsel for the defendant excepted, and prays that his exception may be sealed, and it is sealed accordingly.

J. D. BEDLE, [L. S.]

Did Fitch & Boynton furnish the lumber according to the contract?

No, sir; I called upon them to furnish the timber often; I went there myself to his office as often as twice a week,
20 after the timber, and I had the promise, from day to day, that the timber would be along within a week; he let me have 66 sticks of random length on the dock; then I got a dispatch that a raft would come, and instead of a raft I got only 89 sticks, such as he had agreed to deliver.

(Being shown dispatch). This is the one I received, dated August 4, 1863.

JERSEY CITY, N. J., 4th, 1863.

To E. G. BROWN:

30 Your raft will be up this evening. Stop at the steam mills.

AI FITCH.

Mr. Gordon was clerk of Fitch & Boynton; those 89 sticks were according to contract as to size and place of delivery; Fitch attended to the business for Fitch & Boynton; I had no claim upon Fitch, or Fitch & Boynton, for the delivery of timber, except that specified in the contract; I went to Fitch for the timber and he said he hadn't it, but to go to
40 Menzies; I said he would charge more, and Fitch said he

(Fitch) would make it satisfactory; Menzies bought a great deal of Fitch; I paid Menzies thirty cents per foot for what I bought, and for what, by the contract, I was to pay only eighteen cents per foot.

I expected the whole of the tow when I got the dispatch. I never heard anything to the effect that the contract was to be performed, if they could do it, and not, if they could not.

Mr. Fitch came to my office in last of March, 1863; said he couldn't get all of the timber, the snow was so deep, but could about one-half, and he was going to send Mr. Russell 10 to Canada. Mr. Russell went on to Canada, and went on and bought more than I wanted, according to Fitch's statement and Russell's both.

When this timber didn't come up from New Brunswick, I went and found three lockings of it at Bordentown; it never came to me; it was marked Fitch & Boynton; the size and lengths were different from common timber; this lumber was cut to the dimensions in the contract; I didn't get any more than the 89 sticks, and kept calling on him after that; he said there was a lot of Bigler timber in the 20 basin for me, but I couldn't receive it; he told me to go on and pick out such as would answer; I went on and marked 50 odd sticks, 57 or 59, and afterwards picked out 103, and out of next lot 120; the man who had charge of this Bordentown timber showed it to me; the 66 I picked out were not hewed up to square edge, larger at butt than top; I took the whole locking, I got it at Jersey City; I didn't agree to take it there; I did'nt object; those 66 sticks of timber ran from 12 to 20 inches square, my largest was 15x15; the legths were random, 30, 45, 55, 65 feet; it was not hewed 30 up to a square edge, and not fit to take the place of contract timber; for that purpose I would not give nine cents per foot for it; that timber was selling in market for 23 or 24 cents. Was that timber—66 sticks—worth more than half the timber mentioned in the contract, per foot?

It would be worth three-fourths of that mentioned in the contract, but to fill a contract it wasn't worth more than half as much. The 89 sticks were according to contract, except one stick which lies on the bridge now. The 59 sticks were short Canada timber, from 22 feet to 50 feet 40

long, some sticks might run a little over. I picked out nothing so short as 22 feet, I picked out any thing that would work in the contract; I took some 25 feet, that is less than contract; I would take 14x15 for a stick 15x15, or as near as I could get it, or an inch larger; my lengths were 37½ to 87½, 15x15; caps 34, 14x14 or 16x16. The 59 sticks were near the lengths in the contract, the lengths varied, some within three feet, some four, some just the length, some too large in girth, some an inch too small, some three
10 three inches too large, they worked such in. The 103 sticks were of the same kind, small sized Canada timber. The 120 sticks were of the same kind, small sized Canada timber. The 66 sticks did not cut to so much waste as the others; they were Susquehanna timber. Mr. Fitch directed me to make the selections I made from the Canada and Susquehanna timber, but the 89 sticks were not selected; they were contract sizes. He told me to go in and pick them out until the dimension timber got along; timber according to contract. Mr. Fitch spoke about my going to Ripley's to
20 get timber, and also to Menzies. I went to Whitehall at his direction and marked some timber; this lumber that Russel bought for him. I went to see Fitch, and he said it had got to Whitehall; I told him I would go to Whitehall and mark it. My man was a fortnight in getting the 59, 103 and 120 sticks; in picking it out at Jersey City.

Thereupon the counsel for the defendant offered to prove each and all of the following propositions:

First. That the timber mentioned in the contract was
30 not contracted for by the defendant to sell again, but that it was contracted for to put into a bridge two miles long, which the defendant had agreed with a third party to build, and provide the materials for, and that the object of the defendant was well known to Fitch & Boynton.

Second. That the bridge aforesaid, the defendant had agreed to finish by the first of August, 1863, and this fact was well known to Fitch & Boynton at the time of the making of the contract.

Third—That in consequence of Fitch & Boynton's failing
40 to perform their contract, the defendant expended $10,000 in

the purchase of timber suitable for said bridge over and above the amount he would have had, by the contract, to pay Fitch & Boynton; the timber contracted for being suitable, and, if furnished, the said extra expense of $10,000 would have been avoided.

Fourth—That the defendant was obliged to cut the timber he purchased to build the bridge in such manner that 50,000 feet of timber, which cost him $15,000, was rendered valueless, which cutting would not have been necessary if the contract had been performed, and was occasioned entirely 10 by the failure of Fitch & Boynton to perform.

Fifth—That the contract was never performed by Fitch & Boynton, who furnished but 89 sticks of timber, as in the account charged, though the price is beyond contract, and by the non-furnishing of said timber the defendant was put to the expense of at least $15,000 in rise of wages of his servants who were building the bridge, which he would not have been obliged to pay, if the said Fitch & Boynton had performed the same, in October, 1863, when the last timber was furnished. 20

Sixth—That the non-performance of the contract was willful, and the said Fitch & Boynton had the contract timber on hand at several times during the months of April, May and June, 1863, and deliberately, for gain, sold the same at an advance of from ten to fifteen cents per foot over the price mentioned in the contract, and thereby realized about $8,000 more than they would have realized by performing the contract.

And the said Judge overruled each and all of said offers, and refused to allow the defendant to prove any of the facts 30 in any or all of said propositions, except so far as any of them may have a bearing on the simple fact of the contract having been only partially performed as to the delivery of the timber, and except only as to the soundness of the timber furnished; to which ruling of the Court the counsel for the defendant excepted, and prayed that this, his exception, might be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.]

And at the suggestion of the Court, so as to procure the 40

rulings of the Court upon the defenses without qualification, and to present the same by the bill of exceptions, the counsel for the defendant put to the witness the following questions, and required the judgment and ruling of the Court upon each of the same separately:

1. Had you agreed to have the Newark Bay Bridge finished by a certain time?

2. Were you put to any expense, and if so, what amount, by Fitch & Boynton not furnishing the timber according to
10 contract?

3. Did you suffer loss in the manner you were obliged to cut the timber in consequence of the dimension timber of the contract not being furnished?

4. Did you lose by rise of wages in consequence of the non-performance?

5. Had Fitch & Boynton the contract timber on hand in April, May and June, 1863, and could they have furnished it to you, and did they sell it at an advance over the price stated in the contract with you?

20 Each and all of which questions the Court overruled, and to this ruling of the Court in each case the counsel for the defendant excepted, and prayed that this, his bill of exceptions, might be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.]

Thereupon the examination of the witness proceeded and he further testified:

Fitch & Boynton did not furnish the contract timber in April, May and June, 1863; they never furnished me the
30 timber on that contract.

And in answer to a juror, testified: I notified Fitch I would hold him responsible for the non-performance of the contract before his bill was rendered; Mr. Fitch told me then to go and get the timber of Menzies and he would make it satisfactory; he said that time he would fulfil the contract; this was July 14, 1863; I expected then the timber was coming; I went to see Fitch as often as twice a week and he promised it; I went to Whitehall to see the timber; he told me Russell bought it for me; what I marked of it would
40 fulfil one-half of the contract; I never got it.

And being cross-examined he testified: The contract was made in Fitch's office: Gordon drew it; I had all the pine timber mentioned in the account; I don't complain of short measure; I exacted of Fitch to fulfil the contract; Fitch never mentioned to me that he could not fulfil the contract; I told him I should exact the timber of him, and if I had to pay more I should require him to make it up.

He told me to go to Menzies; I told him what I should have to pay, and he said he would make it satisfactory; he came to my office in March, 1863, and said the snow had hindered him from getting out the timber, and he was going to send to Canada for it, and from time to time he told me he had bought it; I went to Whitehall to get timber, and Fitch told me the timber had got there, and said I should have what lockings I wanted and marked; he didn't say it belonged to Fitch & Boynton; he said he sent Russell to buy it for me to make out the other half of the contract; that timber came nearer the specification than any I saw that year. It was the kind of timber that would answer the specification of the contract; Fitch was at home when I left for Whitehall and Troy; I told him I was going; I identified the timber I marked by Mr. Fitch's description of it. The payments on the contract were for nothing but piles; when the bill was presented I told the clerk it was not made out right.

By the court: Only the 89 sticks were strictly according to dimension timber, rest was random measurement; he told me to take it and allow him what it was worth on the contract, that is all of the pine timber except 89 sticks; I was to allow what it would be in dimension; what it would be when worked down to where I wanted it. The way we worked it in our bridge was twelve and a half feet from centres of bearings; on the sticks I got, except 89 sticks, they worked in to a loss of about nine feet and $\frac{32}{100}$; I made the calculation at time, and have made it since; I could have told within a foot on a stick before suit was brought, how much.

And his examination by counsel being continued, he testified:

I had no rope of Fitch. The piles of September 29 were overcharged 50 cents each. The payments made on account of nothing but piles; my men knew what number of piles there were. When bill was presented, I told Gordon bill was not made out according to contract. There is an overcharge of seven cents per foot on the timber. I refused to pay it. The conversation with Gordon was about the bill. This is the first bill.

10 Did you have any conversation with reference to this bill with Gordon, in Fitch's office, and how did that conversation take place?

I objected to the bill. I went with the bill to Fitch's office; told Gordon it was not made out right.

The witness was asked by the counsel of defendant, if the non-performance was any injury to him? And the court overrules the question, to which ruling of the court the counsel for the defendant excepts, and prays that this, his exception, may be sealed, and it is sealed accordingly.

20 J. D. BEDLE. [L. S.]

The five lots would work up 9 feet and $\frac{32}{100}$ waste in length on each stick on all except 89 sticks. The piles charged September 29 he was to let me have at $6.

And the counsel for defendant asked the witness—

Was the failure to perform a failure in a material point? which question the court overrules as to form, but defendant has a right to ask in what respect there was a failure; and the counsel for the defendant excepts to the ruling of the court and prays that his exception may be sealed, and it 30 is sealed accordingly.

J. D. BEDLE. [L. S.]

In what particular was the failure?

He only furnished 4,400 feet out of 180,000 feet. The timber I had usually got of Fitch was nice square edged and straight timber. I have bought that kind of timber eight or nine years.

After October, 1863, why didn't you continue to importune Fitch & Boynton to perform the contract?

Because I had bought timber instead of that contracted 40 for.

And the counsel for the defendant asked the witness—

Was it of any consequence to you that the 103,600 feet of timber were not furnished? And the court overrules the question, and the counsel for the defendant excepts to the ruling of the court and prays that this, his exception, may be sealed and it is sealed accordingly.

J. D. BEDLE. [L. S.]

And the counsel for the defendant also asked the witness:

Did you pay any more for what you bought than the price mentioned in the contract? 10

I paid from two to twelve cents per foot for random lengths above what I was to have the dimension timber for; some little I paid twenty-two cents for.

Whereupon the judge overruled the question and answer, and the same were overruled accordingly, to which ruling of the court the counsel for the defendant excepted, and prayed that this, his exception, might be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.] 20

Did you do anything in consequence of the non-performance?

Counsel for plaintiff objected, and court allowed the question, and the witness answered,

I did.

What?

I bought timber of other parties.

And the court overruled the said answer, to which ruling of the court the counsel for the defendant excepts, and 30 prays that this, his exception, may be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.]

What else?

I bought 120,000 feet of timber of Mr. Cook.

And the court overruled this answer, to which ruling of the court the counsel for the defendant excepts, and prays that this, his exception, may be sealed, and it is sealed accordingly.

J. D. BEDLE. [L. S.] 40

Did you complain to Fitch, and what, if anything, did he say or promise?

I did complain. He promised me the timber should be along sometimes in two days, sometimes in a week. Fitch never denied that the contract was open. I frequently told him I was suffering from the non-performance. Once he said the raft had been broken up on the Chesapeake.

Till how late a period did you receive promises from Fitch that he would perform the contract?

10 Till about middle of October, 1863.

I had got timber of Fitch & Boynton. I usually bought nice square-edged and straight—what is called bell timber.

I have bought that kind of timber for eight or nine years —the highest priced timber. I had more or less dealings with him every year. The timber I got—the five lots—were not as good as I had usually got. It was pretty crooked, especially the three last lots. I told him the timber was not according to dimensions, either in size or length. He said he knew it was not. He told me to take enough of it and keep 20 my men at work. I didn't refuse to pay this bill on account of my inability to pay it. I am able to pay it, and have been from the beginning. The caps mentioned in the contract are those that go on to piles; the timber could not be worked as advantageously as the dimension. It was not fit for the purpose for which the contract was made. I took it under the contract. It was to be settled for under the contract, at contract prices.

The eighty-nine sticks were worth twenty-five cents per foot at the time I got it; sixty-six sticks worth amount 30 charged at time; fifty-nine sticks worth twenty cents; one hundred and three sticks worth twenty-five cents. That first sixty-six sticks he could have sold for five cents more.

By a Juror. I received the sixty-six sticks and others as a portion of contract. I was to take it and work it in. I didn't ask what price it was.

By Judge. In this contract can you tell how many feet in gross there are?

108,000 and some odd feet.

By Juror. When I took timber as substitute I couldn't 40 get in market so cheap. I couldn't have got anything like

dimension timber at price it would have cost by the contract.

By Judge. Cannot say who made payment of $800. I didn't get timber at extra price, because I was waiting for Fitch.

James Moore sworn. Am engineer of Central railroad. Was in 1863. I knew of fact of Browns building Bay Bridge. I know of fact of contract with Brown by Fitch & Boynton. It was shown to me by Mr. Brown. (Being shown contract), says: That's something like the language. I was told there was such a contract in 1863. I spoke to Fitch on the subject. Mr. Brown requested me to see Mr. Fitch. Brown wasn't pushing work fast as I deemed right as engineer.

What did Brown ask you to see Fitch for? Court overruled question.

What was the conversation between you and Fitch?

Fitch asked me how Brown was getting along with the bridge. I told him very well, but was short of timber, and for want of timber couldn't work as fast as was desirable. Fitch said in answer, Brown shouldn't wait for timber for he would deliver it. It was on the way and in a few days would be here. This was in the spring of 1863. I should think it was April or May — couldn't state exact date. I saw Fitch again and he spoke of Brown's case in regard to manner he was progressing with bridge. I told Fitch that Brown hadn't received the timber yet he expected, and I think he made the remark about some rafts being detained behind hand by some reason. That he was doing all he could to furnish the timber.

This second interview was along in summer of 1863, about midsummer.

Augustus P. Cook, sworn:

I reside at Whitehall, New York; great deal of timber comes there; I am lumber and timber broker; was in that business in 1863; I saw portion of the 100,000 feet marked by Brown; I saw the contract about 1st August, 1863; after marking of timber I saw Fitch; timber marked first

week in September, 1863; I met Fitch at Whitehall; I told him Brown had marked some timber of his, the Dunlap lot; I told him Brown had to mark all similar timber that would answer his purpose that came in; this timber is made up below Whitehall, north of Whitehall, and is brought to the locks in lockings or cribs; I saw Brown mark six cribs; they were at the locks; when I told Fitch that Brown had marked and instructed me to mark other cribs, Fitch said marking wouldn't do any good unless Brown paid the market
10 price, twenty-eight or thirty cents per foot; I told Fitch that Brown wanted the timber hurried forward; that I told him before I said anything about his having marked the timber; I knew of the contract; I don't remember of speaking to Fitch of the contract; Brown showed me the contract; my impression is that Fitch and Brown were at one time at Whitehall together, but my recollection is not distinct.

Archibald Bell, sworn:

I reside at New Brunswick, New Jersey, resided there in
20 1863; I was rafting timber that year, stationed at New Brunswick; I saw Fitch once a week during that year at New Brunswick; he came to see about timber; timber to be sent to different parties, which I had charge of; Mr. Fitch said he had to furnish Brown with a considerable quantity of timber; he said it was for the purpose of building Central Railroad bridge across Newark bay; this was in June; shortly after that, in July, 1863, at New Brunswick, there was a locking of timber rather peculiar lengths and size; I spoke about the locking to Fitch, and he said it was for Brown;
30 after it had been there a few days I told Mr. Fitch I would send that locking on with a float to Mr. Brown; he said no; he said he could get a cent or two a foot more elsewhere; Mr. Brown identified the locking afterwards there; not positive that Fitch was there; I think I told Fitch what Brown said; timber was sent; I suppose the reason it was sent was that Brown saw it there and made known that he had seen it to Fitch.

Stephen Coy sworn:

40 I live at Elizabethport, in New Jersey; was at work with

Brown; I was at Fitch's office a number of times, and was picking timber out of the basin; I was two or three weeks getting it out; this was in October, 1863; Fitch said go in and pick out what timber will answer Brown's contract till his timber comes; he was expecting it every day.

Mr. John Simus, sworn:

I live at Elizabethport; I am treasurer of Elizabethport Steam Manufacturing Company; I told Fitch he had contract with Brown, as I learned so from foreman of our mill. Mr. Fitch said it was a contract based upon contingency; 10 that he could procure the timber; I told Fitch I saw Fitch and Boynton's name to it; Fitch said it was on contingency; then said contract was invalid in other respects, inasmuch as it had no stamp on it.

The defendant being recalled, testified that the stamp was put on February 1, 1865.

And *Ai Fitch* was then recalled by the plaintiff and testified: I understood we took the contract, myself and my partner, Boynton, was made acquainted with contract; I 20 showed it to him when I went out personally; Mr. Boynton knows it was not fulfilled.

Did you give notice to Mr. Brown that you could not fulfil that contract?

I did, within ten days from the time it was made; about 1st February. I told him that the snow had got too deep, and we could not go about in the woods and get this timber; Brown siad you must get it; I told him we could not get it from Pennsylvania; $6.50 was a fair price for the piles. 30

And being cross-examined, says: I know James Moore; I do not recollect of raft being broken up that year; I know Bell; I remember I did not sell timber of that description to any body; I never did tell Bell what he says; I did not know that I know Stephen Coy; I do not remember saying to Coy what he says; Simus said Brown was going to hold us on the contract; I did not consider it any contract at that time; I said to Simus there was no stamp on it; I sent despatch as read, August 4, 1863; that letter of July 28, 1863, relates to timber I was to get for Brown. 40

Edward G. Brown, the defendant, was then called and testified :

Fitch procured timber corresponding with that contract; three locking besides the one I got were at Bordentown; the Russell timber was at Whitehall, and on the way through the canal; it was very near my size and length; Fitch had eighty-seven lockings from Susquehannah; he had thirty lockings more at Bordentown; they were not of exact dimensions; Fitch never gave me notice at any time that he would not fulfil the contract; he did not say the contract was to be binding only on the event of his being able to procure the timber; Fitch was not reluctant to enter into the contract; Fitch told me to mark the Russell timber at Whitehall, and said I should have what I marked; and being cross-examined says: Fitch could not go out West to the Cumberland and get back in ten days.

Mr. Wentworth sworn for defendant:

About 15th to 26th June, 1863, I asked Fitch when Brown's timber would be along; he said once, in two or three days; at another time in a few days; when I went once with Brown he then said he expected Brown's timber every day; I was there twice in June, 1863; I said two or three times when I was there, and once when I was with Brown.

Whereupon the cause was summed up by counsel and the court charged the jury in substance as follows:

Charge

The dispute in this case is chiefly as to the following items of the account—

June 15,	66 sticks pine, &c	$1,433 33
Aug. 3,	89 sticks pine, &c	1,124 56
Oct. 12,	59 sticks pine, &c	883 95
Oct. 19,	103 sticks pine, &c	1,472 67
Oct. 22,	120 sticks pine, &c	1,597 99

The defendant claims that all these were delivered upon a special contract with Fitch & Boynton. That in January 20, 1863, Fitch & Boynton agreed with the defendant, in

writing, as follows: (the court here read the contract) and defendant says that those items were not in fact delivered by plaintiff but by Fitch & Boynton, in part performance of that contract, and that Fitch & Boynton refused to deliver the remaining quantity contained in that agreement without having been in any way released from such delivery. That the contract is an entirety, and if not as to the whole, to the extent of the whole of it, excepting the item of about 15,000 feet. That he received none of the 15,000 feet, but that the timber in those items was delivered upon the other part of 10 the contract and in part performance of it, and that Fitch & Boynton having refused to deliver the other part, he (Fitch) cannot recover for what has been delivered by them upon the contract. This defence involves two material questions —one of law and the other of fact. The question of law—

1. What is the legal construction of the contract?

2. Of fact, was the timber in those items or any part of it delivered upon that contract?

First. As to the question of law, supposing the timber or part of it to have been delivered upon the contract—By 20 that contract Fitch & Boynton were bound to deliver the whole of the 47,500 feet and the 422 caps. The contract was entire, at least, as to those items. Fitch & Boynton could not, after having delivered part of that timber, refuse to deliver the balance, and then recover for the timber so delivered in part performance, and if the timber contained in those items of the account or any part of it was delivered upon that contract in part performance of it, and if Fitch & Boynton have refused to deliver the balance, they could not recover for such timber or part so delivered, and the 30 plaintiff likewise could not recover therefor in this suit.

There is no obscurity about the terms of the contract. It is an agreement to deliver an entire quantity. This construction of the contract absorbs the other questions raised by defendant upon the non-performance of the contract. It is not an offset of damage, but this defence of entirety of contract goes to the foundation of the action and defeats the right of the plaintiff to recover anything.

Secondly. As to the fact of the delivery of the whole or 40

any part of the timber in the items on the account of Ai Fitch, or on the contract?

1. The books of account are offered. Their credit is for you. Before parties were admitted as witnesses they were often the only means of proving an account. In this case the parties contradict each other.

The defendant insist that it was agreed the timber should go upon the contract.

10 Brown says Fitch, "told me to take the sticks and allow what it was worth on the contract. I was not to allow in dimensions as it was, but what it was worked down to."

The plaintiff says within ten days from the time the contract was made he told Brown he could not get the timber, and that "when he came he wanted timber, and I gave him such as I had; never had any conversation with Brown about delivering timber under this contract. I never delivered or calculated to deliver any of this timber under this contract."

20 This is a question of fact purely. In determining it, it is necessary that the parties should have intended at the time that it should be delivered upon the contract; it is purely a question of intention of both parties. The intention of defendant to get it if he could upon the contract is not sufficient.

The plaintiff (Fitch) must have intended it should go upon the contract.

If Fitch intended not to fulfil the contract and intended not to deliver any timber upon the contract, and although 30 he might be liable to an action of damages upon the contract, (in which suit all questions as to legality of contract may be determined,) yet as against such intention of Fitch, the intention of defendnnt, to get the timber upon the contract if he could, is not sufficient.

The delivery must have been understandingly on the part of Fitch, that it was to go upon the contract in part performance. We have nothing to do as to whether Fitch and Boynton ought to have performed that contract or not. If Fitch did not intend to perform, and did not intend that any 40 of the timber should go in part performance of the contract

when it was delivered, then you have no right to hold that it was delivered upon the contract because the defendant may have expected to receive it upon the contract, or because you may think Fitch & Boynton ought to have performed the contract or did wrong in not performing it. To hold that it was delivered upon the contract, the delivery in fact, must have been under the fair intention of both parties that such was the case.

Applying that law, and with the simple honest purpose to see whether the timber or any part was in fact delivered upon the contract or not, you are to look at the facts. 10

The parties contradict each other. Embarrassments will arise from the law admitting parties as witnesses. When there is confusion you must look to the undisputed facts in the case for light.

The acts undisputed of the parties and the papers, refer to the bill of particulars and the receipts also refer to the excess of credits or payments over the other items of the plaintiff's claim not in dispute : 20

3 Bills Piles.....		$1,074 50
		3,071 00
	$69	1,897 60
	50—	119 00
		$6,162 10
Total of credits which are all correct,		7,169 53
		$1,007 43

Here is an excess of $1,007 43 in payments or credits. 30

Again take the payments and credits to Aug. 11, $5,169 53

And debits as follows :

Piles.....		$1,074 50	
	$69	3,071 00	
	50—	119 00	
			4,264 50
			$905 03

Here is an excess of $905 03 in payments or credits.

Brown says he thinks bill of July 28, $3,071.

He also says the payments were all made on account of 40

piles, nothing but piles, also that, "my men kept memorandum of the quantity of piles."

Did he know the quantity of piles?

You will look at the receipts, see how signed and on what account the money was paid?

They were not in full but on account. Deduct from the piles 50 cents, the difference between $6.50 and $6, and the difference or excess of payment would be more.

In answer to a juror, Brown says: "I may have overpaid
10 on piles," but is it probable he would have overpaid as much as he did on piles, to the amount of $6,162.10.

He says: "He had no other claim on Fitch & Boynton for timber, except on contract; I made no other contract for timber.

He claims this timber on the contract—what was the excess paid on?

Remember now that the defendant insists he was seeking to have an entire contract performed, and as late as October 3, 1863, the last payment.

20 In this case he does not claim to recover back the excess.

2. Did the timber answer the description in the contract or not?

None of it so answered, except the eighty-nine sticks. Brown says the rest "was not fit for the purpose; I had to take it under the contract at the amount it would work." The size and lengths were different. Mr. Brown explains why there was a loss of $9\frac{32}{100}$ feet on each stick.

To do away with the effect of it not answering the description in the contract, you must believe Brown's special state-
30 ment over Fitch.

3. The place of delivery was not at Elizabethport. If delivered at Jersey City, there was a cost on towing of $40.

Brown explains, but it needs the explanation to account for the delivery at Jersey City instead of at Elizabethport.

4. Whose timber was this?

All was some one else's besides Fitch & Boynton's, except the eighty-nine sticks. The eighty-nine sticks are credited to Fitch & Boynton on the plaintiff's books. The eighty-nine sticks were delivered August 3, and that needs an explana-
40 tion.

5. The difference between the time of the delivery of the timber in the account and the time in the contract—this has to be explained.

6. The probability of such an agreement as Brown swears to as to the calculation of the price. Look at the evidence upon that, also to the acts of each party as to the account of timber. The plaintiff makes entry in his books; some account has to be taken or kept of it. What did the defendant do? He says, "the timber was to be settled for at what it would work on the bridge." "I had to take it under the contract at the amount it would work." There was a waste of $9\frac{32}{100}$ feet on a stick. The defendant further says, I kept no account of what the timber netted when reduced; I made calculation before suit was commenced; I could tell within a foot on a stick before suit was commenced.

A foot on a stick—the idea should be accuracy. One survey bill is produced, overrunning 90 feet; the defendant says, "I do not know whether this is a correct survey bill or not."

7. The general intention of each party upon the question of performance of the contract as manifested through the acts proved.

The going to Whitehall, Bordentown, &c.; the telegrams, &c., &c.

These several matters to which your attention has been called are suggestions to aid you in determining whether the timber in question, or any part of it, was in fact delivered on the contract or not. If you believe the timber was not delivered upon the contract, the plaintiff will be entitled to recover at the market value for such items as were delivered, but not delivered on the contract.

If you should believe the 89 sticks were delivered on the contract and the rest not, you will deduct the 89 sticks from your verdict.

Immediately after the jury had retired to consider of their verdict, the counsel of the defendant stated that he desired to except to that part of the charge which is as follows: the defendant insists it was agreed "that the timber delivered should go upon the contract. Brown says Fitch told me to take the sticks and allow what it was worth on the contract.

I was not to allow in dimensions as it was, but what it was worked down to."

The plaintiff says, "within ten days from the time the contract was made, he told Brown he could not get the timber, and that when he came he wanted timber and I gave him such as I had. Never had any conversation with Brown about delivering timber under this contract." This is a question of fact purely. In determining it, it is necessary that the parties should have intended at the time that it should be delivered upon the contract. It is purely a question of intention of both parties. The intention of the defendant to get it, if he could upon the contract, is not sufficient. The plaintiff, Fitch, must have intended it should go upon the contract. If Fitch intended not to fulfill the contract, and intended not to deliver any timber upon the contract, and although he might be liable to an action of damages upon the contract (in which suit all questions as to legality of contract may be determined), yet as against such intention of Fitch, the intention of defendant to get the timber upon the contract, if he could, is not sufficient.

The delivery must have been understandingly on part of Fitch that it was to go upon the contract in part performance.

We have nothing to do as to whether Fitch & Boynton ought to have performed that contract or not. If Fitch did not intend to perform it, and did not intend that any of the timber should go in part performance of the contract when it was delivered, then you have no right to hold that it was delivered upon the contract, because the defendant may have expected to receive it upon the contract, or because you may think Fitch & Boynton ought to have performed the contract, or did wrong in not performing it. To hold it was delivered upon the contract, the delivery, in fact, must have been made on fair intention of both parties, that such was the case, unless the court would charge what would be the law if each party did not know the other's intention, and the court thereupon refused to charge further or otherwise than as charged; to which said part of said charge, and the refusal to charge the counsel for defendant, excepted, and the exception is sealed accordingly.

J. D. BEDLE. [L. S.]

The jury after having retired came into court and asked whether if they struck out the item of 66 sticks, (June 15,) it would bar an action for that by Fitch & Boynton?

The court stated that that was an open question to be determined in any suit that Fitch & Boynton might bring, but if the court is right in allowing the plaintiff to recover for any items that may have been furnished by Fitch & Boynton, not upon the contract, if such was the case the result of that opinion would be to bar such recovery by Fitch & 10 Boynton in another suit.

The counsel on each side were absent at this time. After the rendition of the verdict, and when counsel of defendant returned into court he excepted to such additional charge, upon the ground that the court did not explain to the jury that if they struck out the 66 sticks, Fitch & Boynton would be allowed the amount thereof in reduction of damages in any cross action Brown might bring for a breach of the contract, and prayed a bill of exceptions which is signed and sealed accordingly.

And the said judge under the charge and direction afore- 20 said, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid, to the said jury, and the jury aforesaid then and there gave their verdict for the plaintiff for the sum of four thousand four hundred and ten dollars.

And inasmuch as the said several matters hereinbefore stated do not appear by the record of the verdict aforesaid, the counsel of the said defendant prayed that the said judge would set his hand and seal to this bill of exceptions containing the several matters aforesaid according to the statute.

And thereupon the said Joseph D. Bedle, judge as afore- 30 said, hath set his hand and seal hereto.

J. D. BEDLE. [L. S.]

The defendant in error filed the common joinder in error. Comes in at Page 35. Line 33

Afterwards, that is to say, on the second Tuesday in March, in the year eighteen hundred and sixty-seven, before the Judges of the Court of Errors and Appeals of the State of New Jersey, at Trenton, comes the said Edward G. Brown, by Robert Gilchrist, his attorney, and says that in the record and proceedings aforesaid and in giving the judg- 40

ment aforesaid, there is manifest error in this, to wit, that on the trial of said cause the said judge admitted in evidence the books of account of said Ai Fitch, and there is also error in this to wit, that the said judge admitted in evidence the day-book of the said Ai Fitch, and there is also error in this, to wit, that the said judge refused to admit in evidence the contract between Fitch & Boynton on the one part, and the said Edward G. Brown on the other part, when the same was first offered, and there is also error in this, to wit, that
10 the said judge overruled the question propounded by the counsel of said Brown, to the said Brown as a witness. Did Mr. Fitch know for what you intended to use the timber contracted for? and there is also error in this, to wit, that the said judge overruled the question propound by the counsel of said Brown to the said Brown as a witness. Did Mr. Fitch make this contract, knowing that if it was not fulfilled by him, you would be unable to perform a contract into which you had entered.

And there is error also in this, that the said judge over-
20 ruled the offer of the counsel of the said Brown to prove that the timber mentioned in the contract was not contracted for by the defendant to sell again, but that it was contracted for to put into a bridge two miles long, which the said Brown had agreed with a third party to build, and provide the materials for, and that the object of the said Brown was well known to Fitch & Boynton.

And there is also error, in that the said judge overruled the offer of the counsel of said Brown to prove that the bridge aforesaid, the said Brown had agreed to finish by the
30 first day of August, in the year 1863, and this fact was well known to Fitch & Boynton at the time of the making of the contract.

And there is also error in this, that the said judge overruled the said offer of the counsel of said Brown to prove that in consequence of Fitch & Boynton failing to perform their contract, the said Brown expended ten thousand dollars in the purchase of timber suitable for said bridge, over and above the amount he would have had by the contract to pay Fitch & Boynton; the timber contracted for being suitable, and if furnished, the said extra expense of ten
40 thousand dollars would have been avoided.

And there is also error in this, that the said judge overruled the said offer of the counsel of said Brown to prove that the said Brown was obliged to cut the timber he purchased to build the bridge, in such manner that 50,000 feet of timber, which cost him $15,000 was rendered valueless, which cutting would not have been necessary if the contract had been performed, and was occasioned entirely by the failure of Fitch & Boynton to perform.

And there is also error in this, that the said judge overruled the said offer of the counsel of said Brown to prove that the contract was never performed by Fitch & Boynton, who furnished but 89 sticks of timber, as in the account charged, though the price is beyond contract, and by the non-furnishing of said timber the defendant was put to the expense of at least fifteen thousand dollars in rise of wages of his servants who were building the bridge, which he would not have been obliged to pay, if the said Fitch & Boynton had performed the same in October, 1863, when the last timber was furnished.

And there is also error in this, that the said judge overruled the said offer of the said counsel of the said Brown, to prove that the non-performance of the contract was wilful, and the said Fitch & Boynton had the contract timber on hand at several times during the months of April, May and June, in the year 1863, and deliberately, for gain, sold the same at an advance of from ten to fifteen cents per foot over the price mentioned in the contract, and thereby realized about eight thousand dollars more than they would have realized by performing the contract.

And there is also error in this, that the said judge overruled the offer of the counsel of the said Brown, to prove each and all of the following propositions:

First—That the timber mentioned in the contract was not contracted for by the defendant to sell again, but that it was contracted for to put into a bridge, two miles long, which the defendant had agreed with a third party to build, and provide the materials for, and that the object of the defendant was well known to Fitch & Boynton.

Second—That the bridge aforesaid, the defendant had

agreed to finish by the first of August, 1863, and this fact was well known to Fitch & Boynton at the time of making of the contract.

Third—That in consequence of Fitch & Boynton's failing to perform their contract, the defendant expended $10,000 in the purchase of timber suitable for said bridge, over and above the amount he would have had, by the contract, to pay Fitch & Boynton; the timber contracted for being suitable, and if furnished, the said extra expense of $10,000 would have been avoided.

10 *Fourth*—That the defendant was obliged to cut the timber he purchased to build the bridge, in such manner that 50,000 feet of timber, which cost him $15,000, was rendered valueless; which cutting of timber would not have been necessary if the contract had been performed, and was occasioned entirely by the failure of Fitch & Boynton to perform.

Fifth—That the contract was never performed by Fitch & Boynton, who furnished but 89 sticks of timber, as in the account charged, though the price is beyond contract; and 20 by the non-furnishing of said timber the defendant was put to the expense of at least $15,000 in rise of wages of his servants who were building the bridge, which he would not have been obliged to pay if the said Fitch & Boynton had performed the same in October, 1863, when the last timber was furnished.

Sixth—That the non-performance of the contract was willful, and the said Fitch & Boynton had the contract timber on hand at several times during the months of April, May and June, in the year 1863, and deliberately, for gain, 30 sold the same at an advance of from ten to fifteen cents per foot over the price mentioned in the contract, and thereby realized about $8,000 more than they would have realized by performing the contract.

And there is error, also, in this, that the said judge overruled the question to the said Brown, propounded by the counsel of the said Brown, if the non-performance was any injury to him.

And there is also error in this, that the said judge over-
40 ruled the question to the said Brown, propounded by the

counsel of the said Brown: "Was the failure to perform, a failure in a material point?"

And there is also error in this, that the said judge overruled the question to the said Brown, propounded by the counsel of said Brown: "Was it of any consequence to you that the 103,600 feet of timber were not furnished?"

And there is also error in this, that the said judge overruled the question propounded by the counsel of said Brown, to the said Brown: "Did you pay any more for what you bought than the price mentioned in the contract?" and the 10 answer of said Brown thereto, to wit: "I paid from two to twelve cents per foot for random lengths above what I was to have the dimension timber for; some little I paid twenty-two cents for."

And there is error, also, in this, that the said judge overruled the answer of said Brown, to wit: "I bought timber of other parties."

And there is also error in this, that the said judge overruled the answer of said Brown to wit. "I bought one hundred and twenty thousand feet of timber of Mr. Cook." 20

And there is also error in this, that the said judge charged the jury that the defendant insists it was agreed that the timber delivered should go upon the contract. Brown says Fitch told me to take the sticks and allow what it was worth on the contract—I was not to allow in dimensions as it was but what it was worked down to.

The plaintiff says within ten days from the time the contract was made he told Brown he could not get the timber, and that when he came he wanted timber and I give him such as I had. Never had any conversation with Brown 30 about delivering timber under this contract. I never delivered or calculated to deliver any of this timber under this contract.

This is a question of fact purely. In determining it, it is necessary that the parties should have intended at the time that it should be delivered upon the contract. It is purely aquestion of intention of both parties. The intention of the defendant to get it if he could upon the contract is not sufficient. The plaintiff, Fitch, must have intended it should go upon the contract. 40

If Fitch intended not to fulfil the contract and intended not to deliver any timber upon the contract, and although he might be liable to an action for damages upon the contract, (in which suit all questions as to legality of contract may be determined,) yet, as against such intention of Fitch, the intention of defendant to get the timber upon the contract if he could, is not sufficient. The delivery must have been understandingly on part of Fitch, that it was to go upon the contract in part performance. We have nothing to do as to whether Fitch & Boynton ought to have performed that contract or not.

If Fitch did not intend to perform it, and did not intend that any of the timber should go in part performance of the contract when it was delivered, then you have no right to hold that it was delivered upon the contract, or because you may think Fitch & Boynton ought to have performed the contract, or did wrong in not performing it. To hold it was delivered upon the contract, the delivery in fact must have been made on fair intention of both parties that such was the case, and also after the counsel for the said Brown stated his desire to except to that part of the said charge, unless the judge would also charge the jury what would be the law in case each party did not know the others intention, that the said judge refused to charge further or otherwise than he had charged.

And there is also error in this, that the said judge, in the absence of counsel on each side, after the jury had retired and came into court and asked, whether if they struck out the item of sixty-six sticks, (June 15), it would bar an action for that by Fitch & Boynton, instructed the jury that that was an open question to be determined in any suit that Fitch & Boynton might bring; but if the court is right in allowing the plaintiff to recover for any items that may have been furnished by Fitch & Boynton, not upon the contract, if such was the case, the result of that opinion would be to bar such recovery by Fitch & Boynton in another suit, and did not explain to the jury that, if they struck out the sixty-six sticks, Fitch & Boynton would be allowed the amount thereof in reduction of damages in any cross action Brown might bring for a breach of the contract.

And there is also error in this, that on the trial of said cause, the said judge overruled and rejected legal and competent evidence in the cause, which was offered by the said Brown; whereas, by the law of the land, the evidence so offered was legal and competent evidence in the cause, therefore, in this there is manifest error.

And, also, there is error in this, to wit: that the judgment aforesaid of the said Supreme Court, appears to have been given for the said Ai Fitch against the said Edward G. Brown, whereas, by the law of the land, the said judgment 10 ought to have been given for the said Edward G. Brown against the said Ai Fitch, therefore, in this there is manifest error.

And the said Edward G. Brown prays, that the said judgment of the said Supreme Court, for the errors aforesaid, and for other errors in the record and proceedings aforesaid being, may be reversed, annulled and altogether holden for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

ROBERT GILCHRIST, 20

Att'y for and of Counsel with Plaintiff in Error.

The following are the exhibits referred to in the foregoing bill of exceptions:

(EXHIBIT 1.)

Mr. E. G. Brown, *in acc't current with* A. I. Fitch.

Dr.

Commission 69
Storage 50

1863.					
June 2.	To 301 Spruce Piles, 13,120 feet.....7½c	$984 00			
	" 11 Spruce Piles, 444 ft. 5c	22 20			
	" 5 " Refuse, 213 " 4c	8 52			
	" ½ Inspection.....	8 61			a
		$1,023 33		10	
	" 5 per cent Commission..	51 17			
			1,074 50		
15.	" 66 Sticks White Pine, 5,719 feet.....25c	1,429 75			
	" ½ Inspection.....	3 58			d
			1,433 33		
July 28.	" 469 Piles.....$6 50	3,048 50			
	" 10 Logs.....14s.	17 50			a
	" 25 lb. Rope.....20c	5 00			
			3,071 00	20	
Aug. 3.	" 89 Sticks Pine, 4,485 feet.....25c	1,121 25			
	" ½ Measurement and exps.	3 31			d
			1,124 56		
Sept. 29.	" 285 Piles.....$6 50	1,852 50			
	" 21 Logs.....$2 00	42 00			a
	" 20 lb. Rope.....15½	3 10			
			1,897 60		
Oct. 12.	" 59 Sticks Pine, 3,527 feet.....25c	881 75		30	d
	" ½ Measurement.....	2 20			
			883 95		

	19.	" 103 Sticks Pine, 5,876 feet.....25c	1,469 00	
		" ½ Measurement.....	3 67	
				1,472 67
	22.	" 120 Sticks Pine, 6,376 feet.....25c	1,594 00	
		" ½ Measurement.....	3 99	
				1,597 99
		Average due Aug. 24th.		$12,555 60
	Aug. 24.	" Interest to Jan. 21, 1864, 150 days.....		366 20
				$12,921 80
	1864. Jan'y 21.	" Balance.....		$5,483 60

Cr.

	1863. April 11.	By 39 Sticks Pine, 2,619 feet.....25c	$654 75	
		" ½ Measurement.....	1 63	
				656 38
	21.	" 32 Sticks Pine, 2,054 feet.....25c	513 50	
		" ½ Measurement.....	1 28	
				514 78
	29.	" 14 Sticks Pine, 833 ft. 25c	208 25	
		" ½ Measurement.....	52	
				208 77
	June 6.	" Cash.....		1,000 00
	30.	" "		800 00
	Aug. 11.	" "		2,000 00
	Oct. 3.	" "		2,000 00
		Average due July 20th.		$7,179 93

July 20.	"	Interest to January 21, 1864, 185 days.....	258 27
1864.			
Jan'y 21.	"	Balance	5,483 60
			$12,921 80

[EXHIBIT 2.]

10

JERSEY CITY, June 30, '63.

Rec'd from Mr. E. G. Brown, eight hundred dollars, on acc't.

AI FITCH,
Pr. GORDON.

$800.

[EXHIBIT 3.]

JERSEY CITY, Aug. 11, '63.

20

Rec'd from E. G. Brown, pr. Mr. E. H. Sisson, two thousand dollars, on acc't.

AI FITCH,
Pr. GORDON.

$2,000.

[EXHIBIT 4.]

JERSEY CITY, Oct. 3, '63.

Rec'd from Mr. E. G. Brown, two thousand dollars, on acc't.

30

AI FITCH,
Pr. GORDON.

$2,000.