

12368

No. _____

Supreme Court of Illinois

O'Keefe.

vs.

Kellogg.

38. 37. 38.
Paul C. Keefe

Ezra B. Kellogg

38

12368.

1854

Be it remembered that on the fifteenth day of December A.D. 1852, there was filed in the office of the Clerk of the Circuit Court in & for Peoria county in the State of Illinois a Transcript of the proceedings of the Circuit Court in and for Woodford county in said State in a certain cause therein, duly certified, which with the accompanying papers forming part of the Record therein are in the words & figures following, to wit:

Transcript from
Woodford Co.

At a circuit court begun and held at Metamora on the 25th day of September A.D. 1852, for the county of Woodford and State of Illinois by the Honorable David Davis Presiding Judge of the eighth Judicial Circuit of said State of Illinois, the following proceedings were had to wit:

Daniel O'Keefe, of Woodford County Circuit Court
vs
Sept^r Term 1852.
Cyrus B. Kellogg. Action of Replevin.

On this day came on this cause to be heard and the plaintiff by Lupton his attorney and the defendant by O'Meara his attorney and on motion of plaintiff's attorney leave is given to amend the declaration, pending which application on affidavit of Daniel O'Keefe venue is changed to Peoria County. It is therefore ordered that the venue be changed to Peoria County.

D. S. J. Croft, clerk of the Circuit Court for said county of Woodford, do certify, that the above is true & correct transcript of the proceedings had

in said Court and the accompanying papers on all that is on file in my office.

(Signature)

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at Metamora, this 25th day of October, A.D. 1852,
S. J. Cross, clerk.

Plffs afft - State of Illinois,
Transcript - Woodford County,)

Personally appeared before the undersigned Clerk of the Circuit Court of the County of Woodford and State of Illinois, Daniel O'Keefe who being by me sworn according to law deposes and ses that he is the lawful owner of the following described property, to wit: about five hundred bushels of wheat in a bin or bins in a granary on the farm of one Ezra B. Kellogg in the county and state aforesaid and also about six hundred bushels of Indian Corn in a granary of the value of four hundred dollars on the farm of the said Kellogg in the said county and state aforesaid and further ses and swears that he is then intitled to the possession thereof and that the same has not been taken for any tax assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of such plaintiff liable to execution.

or attachment and further do and swears that one Ezra
B. Kellogg unlawfully and willfully, knowingly and
unjustly detains the same from this affiant without
any legal right to do contrary to the statute in such
case made and provided and further this affiant do not.

Daniel O'Keefe

Worn to before me the clerk of the
Circuit Court in and for the said county
of Woodford and State of Illinois
this the 19 day of May A. D. 1852
D. J. Croft, clerk.

Declaration
accomplish Transcript

State of Illinois, } In the Woodford Circuit Court
Woodford County, } At the term of Sept. 1852.
Ezra B. Kellogg the defendant in this
suit was summoned to answer Daniel O'Keefe the plain-
tiff in this suit of a plea wherefore he took the five
hundred bushells of wheat and the six hundred bushells
of Indian Corn the property of the said Daniel O'Keefe
and unjustly detained the same against sureties and
pledges and the said plaintiff by John Clark his attorney
complains for that the said defendant on the nineteenth day
of May A. D. 1852. Eighteen hundred and fifty two at
the county and state aforesaid took the said wheat and
Indian Corn the goods and chattels of the plaintiff of

great value, to wit: of the value of four hundred dollars and unjustly detained the same against sureties and pledges until &c. wherefore the said plaintiff saith that he is ^{injured} ~~injured~~ and hath sustained damages to the amount of four hundred dollars and therefore he brings his suit &c. John Clark,

Attorney for Plaintiff.

2nd Count.

And also that Ezra B. Kellogg the defendant in this suit was summoned to answer Daniel O'Keefe, Plaintiff in this suit of a plea wherefore he detained five hundred bushels of wheat and six hundred bushels of Indian Corn the property of the said Daniel O'Keefe, unjustly and against sureties and pledges and the said plaintiff by John Clark his attorney complains for that the said defendant on the nineteenth day of May A.D. 1852, at the county and state aforesaid detained the said Wheat and Indian Corn, the goods, chattels and property of the Plaintiff of great value, to wit: of the value of four hundred dollars and unjustly detained the same against sureties and pledges until &c, wherefore the said plaintiff saith he is injured and hath sustained damages to the amount of four hundred dollars and therefore he brings suit &c.

John Clark, Attorney for Plaintiff.

Writ of Replevin
accompanied by Transcript

State of Illinois, ss.
Woodford County,

The People of the State of Illinois
To the Sheriff of said County, Greeting:

If Daniel O'Keefe of the City of Peoria shall give you bond with good & sufficient security to prosecute his suit to effect without delay and to make return of the following described goods and chattels the property of him the said Daniel O'Keefe, to wit: about five hundred bushels of wheat in a bin on the farm of one E. B. Kellogg in the County & State aforesaid, also about six hundred bushels of Indian Corn in a Granary on the farm of the said Kellogg which the the said said E. B. Kellogg of said Woodford County took & unjustly detains against gages & pledges as he saith, if return thereof shall be awarded and further to save and keep you harmless in replevying said property, then you are to cause the said goods and chattels to be replevied & delivered to the said Daniel O'Keefe without delay and to summon the said E. B. Kellogg personally to be & appear before our Circuit Court in and for said County on the first day of the next term thereof to be holden at the Court House in Metamora on the fourth Thursday of September next, to answer the plaint of the said Daniel O'Keefe for taking & unjustly detaining the goods & chattels aforesaid and make due return of the bond to be taken from the said Plaintiff aforesaid to the Clerk of said Circuit Court, together with this writ

with an endorsement thereon as to the manner in which you may execute the same.

E. J. J.

In Testimony whereof, I have hereunto set my hand & affixed the seal of said court, at Metamora, this 19th day of May A.D. 1852.
S. J. Croft, clerk.

[on which is the following endorsement]

Shiffs return

The within writ duly executed by reading to the within named defendant E. B. Kellogg on the 19th of May 1852. and executed by taking 371½ bu. of wheat and 114½ bushels of Indian corn and delivering the same to the within named claimant Daniel O'Keefe.

George Ray, Sheriff of
Woodford Co.

Replevin Bond
accompt Transcript

Know all Men by these presents, That we Daniel O'Keefe, Luth. L. Kiney & Joseph Morley are held and firmly bound unto George Ray Sheriff of the County of Woodford in the sum of eight hundred dollars, to be paid to the said George Ray, his heirs, executors or administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated this the eighteenth day of May A.D. 1852.
The condition of the above obligation is such, that whereas
the said Daniel O'Keefe did on the 18 day of May A.D.
1852, cause a writ of replevin to be issued from the
office of the clerk of the Circuit Court of Woodford
County, under the seal thereof, against Ezra B. Kellogg,
to recover possession of the following property, to wit: about
five hundred bushels of wheat in a bin or bins in a
granery on the farm of one Ezra B. Kellogg in the
County and State aforesaid and also about six
hundred bushels of Indian corn in a granery, of
the value of four hundred dollars, which said writ
is directed to and placed in the hands of said sheriff
to execute: And he being about to execute the same:
Now if the said Daniel O'Keefe shall prosecute his
suit against the said Ezra B. Kellogg to effect and
without delay, and make return of said property so
about to be replevied, if return thereof shall be award-
ed, and shall save and keep harmless said sheriff
in replevying the said property as aforesaid, then the
above obligation to be void, otherwise to remain in
full force and virtue, this the 19 day of May A.D. 1852.

Signed, sealed and
delivered in presence
of John Clark,



Daniel O'Keefe (Seal)
Luther C. Kinney (Seal)
Joseph Morley (Seal)

afft. for change
of venue account of 21st.

Daniel O'Keefe
vs
Ozra B. Kellogg

In the Circuit Court
of Woodford County.
Replevin.

State of Illinois,
Woodford County.

Daniel O'Keefe, defendant
above named being duly sworn says that he fears
he will not receive a fair trial in the Circuit
Court of Woodford County in which this action is
pending for the reason that the plaintiff has an undue
influence over the minds of the inhabitants of said
County of Woodford in which said action is pending
as he is informed and verily believes and further saith
not.

Daniel O'Keefe.

Sworn to before me this
24th Sept. A. D. 1852.

Wm L. Paynter, J. P.

And afterwards on the 13th of December A. D. 1853 the defendant filed
his pleas in said cause in the words & figures following to wit.

Pleas.

Daniel O'Keefe,

Peoria Circuit Court

Nov. Term A. D. 1853.

Ozra B. Kellogg.

And said defendant as to said first
Count in said declaration, says he did not take the goods

and chattels when &c in manner & form as in said count
specified & of this he puts himself upon the country &c
Manning & Merriman
for deft.

And the plaintiff doth the like
Purple & Powell, atty for Plff.

And as to said second count in said declaration
mentioned defendant says he did not detain the goods &
chattels in manner & form as in said 2^d count mentioned
& of this he puts himself upon the country &c.
Manning & Merriman
for deft.

And the plaintiff doth the like
Purple & Powell for Plff.

And for a further plea in this behalf defendant
says Actio non because he says that the said goods
and chattels in said declaration are the property of
defendant and are not the property of plaintiff and
this he is ready to verify wherefore he prays judgment &c.
Manning & Merriman
for Deft.

And thereupon on the same day, to wit, December 18th 1853
the plaintiff filed a Replication in said cause, which
is in the words & figures following, to wit,

Replication

State of Illinois, } Teona Circuit Court
County of Teona, } Nov. Term A.D. 1853.

Daniel O'Keefe,

vs

Cyra B. Kellogg.

And the said Plaintiff comes and for replication to the said plea of the said defendant thirdly above pleaded says precludi non, because he says that the said goods & chattels in the said declaration mentioned is and was at the same time when &c. the property of the Plaintiff and not the property of the defendant as in said third plea supposed and of this he puts himself upon the country &c.

Purple & Powell
for Plff.

And the said defendant doth the like &c.

Manning & Merriman
for deft.

Proceedings at a term of the Circuit Court begun and held at the Court House in Teona, in and for the county of Teona, in the State of Illinois on the second Monday of May in the year of our Lord one thousand eight hundred and fifty three, it being the ninth day of said month, Present the Honorable Anselm Peters, Judge of the

Sixteenth Judicial Circuit in the State of Illinois,
Leonard B. Cornwell, Sheriff, Albridge S. Johnson,
States attorney, and Jacob Gale, clerk, to wit:

Tuesday May 10th A. D. 1853.

Daniel O'Keefe,

vs

Replevin,

Ezra B. Kellogg,

By agreement of parties this
cause is continued to next term.

Proceedings at a term of the Circuit Court begun and
held at the Court House in and for the county of Peoria,
in the State of Illinois on the second Monday of September
in the Year of our Lord one thousand eight hundred and
fifty three, it being the sixteenth Judicial Circuit in the
State of Illinois, Albridge S. Johnson, States attorney, Leonard
B. Cornwell, Sheriff and Jacob Gale, clerk, to wit:

Saturday September 17th A. D. 1853.

Daniel O'Keefe,

vs

Replevin

Ezra B. Kellogg,

By agreement of parties this cause
is continued to next term of court

Proceedings in the Circuit Court in and for the county of
Peoria in the State of Illinois at a term thereof begun
and held at the Court House in Peoria on the third Monday

in the month of November in the year of our Lord one thousand eight hundred and fifty three,

Thursday December 13th A.D. 1853.

Daniel O'Keefe,

vs

Replevin.

Ezra B. Kellogg,

empannelled jury -

This day came the plaintiff by Purser Sanger his attorneys and the defendant by Shope, Meerman & Manning his attorneys, and it is ordered by the court that a jury be empannelled to try the issues in this cause, whereupon came a jury of twelve good and lawful men, to wit: B. M. Greenman, Jonathan Elson, A. C. Bartholomew, Thomas Teller, Samuel Marshace, Abel Austin, John Waugh, George Rambo, Christopher ^{or} Cross Blifton, Chauncey L. Woods and Daniel Bristol, who being duly chosen, tried and sworn well and truly to try the issues joined, and a true verdict give according to evidence, the evidence not having been fully heard were adjourned to meet the court again to - morrow morning

Wednesday December 14th A.D. 1853

Daniel O'Keefe,

vs

Replevin.

Ezra B. Kellogg.

verdict -

This day came the jury empannelled in this cause on yesterday and on their oaths do say, We of the Jury do find the defendant guilty as to the indian corn mentioned in the declaration, and not

guilty as to the wheat, and we do assess the plaintiffs damages at one cent.

Motion for
new trial

The plaintiff entered a motion for a new trial in this cause, 1st Because the verdict is against law, 2nd Because the verdict is against evidence, 3rd Because the Court gave improper instructions asked by defendant, 4th Because the verdict of the Jury is not responsive to the issues, 5th Because the plaintiff has discovered new and important testimony since the trial.

Saturday December 17th A.D. 1853.

Daniel O'Keefe,

vs

Replevin,

Ezra B. Kellogg.

amend^t verdict.
Judgment.

This day came the parties by their respective attorneys and it being made to appear to the said Court that the verdict returned by the Jury in said cause in these words, "We the Jury find the ownership of the Indian Corn in the plaintiff and the ownership of the wheat in the defendant, D. Bristol Foreman," will remain among the papers in said cause, but has not been filed or recorded by the clerk of said Court, it is ordered that the same be filed by the clerk nunc pro tunc and be by him recorded to constitute a part of the finding of the jury in said cause, and that judgment be rendered upon the same, together with that part of the verdict of the said Jury given upon the suggestion of the Court in the words and figures following "verdict

guilty as to the corn in declaration mentioned and not guilty as to the wheat and damages 1 ct" as constituting the finding of the jury in said cause when taken and considered together. This day came on to be heard the plaintiffs motion for a new trial in this cause, on consideration whereof the court over-ruled said motion; Therefore it is considered that the said Ezra B. Kellogg have return of the wheat in the declaration mentioned, and that a writ of return habendo issue therefor, that he recover of the said plaintiff his costs and charges by him about his defense in this behalf expended and that execution issue therefor. It is further considered that the said Daniel O'Keefe have and recover of the said Ezra B. Kellogg one cent damages and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor. The plaintiff prayed an appeal in this cause to the Supreme Court of this state which is allowed him on his filing an appeal bond in fifty days in the office of the clerk of this court in the penal sum of two hundred dollars with Thomas S. Cobbin or Edward J. Jones as surety payable to the defendant and conditioned according to law.

It is ordered that the bill of exceptions in this cause be settled, signed and sealed in vacation.

On the 18th day of December A.D. 1883 the plaintiff filed an

affidavit in said cause in support of his motion for a new trial, which is in the words & figures following, to wit:

Affid of newly
discovered testimony

State of Illinois, }
County of Peoria, } ss. Peoria Circuit Court
Nov. Term A.D. 1853.
Replevin

Daniel O'Keefe

vs

On a motion for a new trial.

Ezra B. Kellogg

Daniel O'Keefe the plaintiff in the above entitled cause being first duly sworn upon his oath says that subsequent to the trial of this cause he has discovered the following new testimony which will be very material evidence for this affiant on another trial of this cause,

That affiant can prove by the testimony of one John B. Warner of the County of Peoria & State of Illinois, that the said defendant Kellogg some time in the month of March A.D. 1852, told the said Warner that he the said Kellogg had sold his farm and his personal property to George Myers (the person under whom affiant claims title to the property in question) and that the said Myers then had possession of the same.

That affiant can further prove by the testimony of one ——— Garretty (whose given name is unknown to affiant,) who resides in the County of Woodford & State aforesaid — that he the said Garretty

went sometime after the sale of date 27th of Feb 1852 -
by Kellogg to Mayres of the property in question,
to the said Kellogg for the purpose of pur-
chasing a quantity of wheat from the said Kellogg
for seed, and that the said Kellogg then told the
said Garretty that he Kellogg had sold all his wheat,
(the said wheat being a part of the property in question) to
George Mayres and that he Kellogg had nothing to do
with the same but to go to Mayres and that he the said
Kellogg did refuse to sell said Garretty said wheat
for the reason that he had previously sold the same to
said Mayres.

That affiant can further prove by the testi-
mony of one — Ray and John Clark both
of whom reside in Woodford County & State aforesaid,
that at the time when affiant was about to replevy
the property in question from the possession of said
Kellogg that Kellogg told the said Ray & Clark that
the reason why he (said Kellogg) would not give up
possession of said property to affiant was because the
said property had been and then was attached, at the
suit of Curtin & Griswold as the property of said Mayres
to whom he had sold the same and that he Kellogg
had gone security with said Mayres for the delivery
forthcoming of said property in question to said
Curtin & Griswold and for that reason he Kellogg
would not give up the possession of the same, and further

that the said Kellogg at the time last aforesaid told the
the said Ray & Clark that by virtue of his contract
of sale with O'Keefe the Kellogg had reserved 50
bushels of wheat & 50 bush of corn, and that he claimed
the said last named quantities of wheat and corn
and that the said Kellogg did then & there proceed to
separate and measure out the said 50 bush. of wheat
& 50 bush. of corn and that he claimed the said last
~~named~~ so reserved as aforesaid,

And further saith that the foregoing evidence
has never come to the knowledge of this affiant until since
the trial of this cause, that affiant has used all reasonable
diligence for the purpose of finding out evidence to be
used on the trial of this cause but never discovered
the aforesaid facts until since the trial as aforesaid.

Daniel O Keefe

Subscribed & sworn to
before me this 15th day
of December A. D. 1853,
Jacob Hale, Clerk,

And afterwards on the 18th day of January A.D. 1854
there was filed in said clerk's office a Bill of Exceptions
in this cause, duly signed and sealed by the
Judge of said Ponce county Virant Bonst. which is
in the words and figures following, to wit:

Bill of Exceptions State of Illinois, } Peoria Circuit Court,
County of Peoria, } Nov. 5, A.D. 1853.

Daniel O'Steen, Plaintiff }
vs } Replevin.
Ezra B. Kellogg, Deft. }

Be it remembered that upon the coming on of this cause to be heard a jury was empaneled and sworn whereupon the said Plaintiff to maintain the issues on his part produced the following testimony, ^{1st} a written agreement between said Kellogg & one George Mayes as follows, The terms of the following agreement between E. B. Kellogg of the first part & George Mayes of the second part, are as follows, to wit: Ezra B. Kellogg has sold his span of horses to George Mayes for one hundred & sixty dollars, (\$160) his wheat for sixty five cents per bushel, his corn for 25 cents per bushel & his oats for 15 cents per bushel — from the aforementioned wheat & corn the party of the second part reserved 50 bushels of corn & 50 bushels of wheat for his family & is to allow the party of the first part for the corn & wheat what he receives himself receives, the within contract above expressed is to annul what is said in their contract of Feb. 24th, concerning the partial purchase of wheat, corn & oats

All the Payment for the above named Horses, Carriage, wagon, Harness & Grain, (in the Granary) is to be made by the first of June 1852, and the undersigned parties do mutually bind themselves, their heirs & executors to the full and faithful discharge of the above contract under the penalty of one thousand dollars for the non fulfilment thereof, no part of this agreement shall be changed unless by the mutual consent of both the respective parties. In Testimony whereof, we have hereunto set our hands & seals this 27th day of Feb 1852.

Witness Julia Kellogg. 

E. B. Kellogg 
George Meyers 

Which said written agreement was read to the Jury without objection,

Secondly, the said plaintiff by his attorney offered in evidence the following other instrument in writing, to wit:

Know all Men by these Presents, that I, George Meyers of Woodford County have this day sold unto Daniel O'Shea of Peoria, Illinois, all my wheat in my barn on the premises purchased by me of E. B. Kellogg of said county of Woodford, supposed to be about five hundred bushels, also all the corn in said barn supposed to be about six hundred bushels being all the wheat and corn on said premises, except 50 bushels of each reserved by said Kellogg in my purchase of him; said wheat and corn to be delivered upon the premises to said O'Shea or his order, the wheat at sixty and corn at fifteen cents per bushel. The amount of my indebtedness to said O'Shea of \$112.00 & John B. Warner \$25.00

Dobbins & Co. \$36.00 Mr. Bense \$7.00 Mr. Mount
\$4.00, Purple & Stinger \$10.00, assumed by said O'Keefe to be
deducted from the purchase money of said grain and the balance
due to be paid on the delivery of the said corn & wheat at the
price aforesaid, May 10th 1852. George Meyers "
Witness O. H. Purple.

which last named instrument in writing was also read in
evidence to the Jury without objection.

Thirdly, the said plaintiff by his atty next offered in
evidence to the Jury the writ of replevin and the return
thereon which writ and return are as follows,

State of Illinois,

Woodford County, ss.

The People of the State of Illinois,
To the Sheriff of said county, Greeting;

If Daniel O'Keefe of the City of Genia shall give you
bond with good & sufficient security to prosecute his
suit to effect without delay and to make return of the
following described goods and chattels the property of him
the said Daniel O'Keefe, to wit: about five hundred
bushels of wheat in a ^{bin} on the farm of one E. B.
Kellogg, in the county & state aforesaid, also about five
hundred bushels of Indian Corn in a granary on the
farm of the said Kellogg, which the said E. B. Kellogg
of said Woodford County took and unjustly detained
against gages & pledges as he saith, if return ^{thereof} shall
be awarded and further to save and keep you harm
less in replevying said property then you are to cause

the said goods & chattels to be replevied & delivered
to the said Daniel O'Keefe without delay and to
Summon the said E. B. Kellogg personally to be & appear
before our Circuit Court in and for said County on
the first day of the next term thereof to be holden
at the Court house in Metamora on the fourth Thurs-
day of September next to answer to the Plaintiff of the
said Daniel O'Keefe for taking & unjustly detaining the
goods & chattels aforesaid and make due return of
the bond to be taken from the said Plaintiff aforesaid
to the clerk of said Circuit Court, together with this
writ with an endorsement thereon as to the manner
in which you may execute the same. In Testimony



whereof, I have hereunto set my hand & affixed
the seal of said Court at Metamora this
19th day of May A. D. 1852,
J. J. Croft, Clerk.

Upon which said writ is the following return, to wit:
The within writ duly executed by reading to the within
named defendant E. B. Kellogg, on the 19th of May
1852, and executed by taking 371¹/₂ bu. of wheat and
444¹/₂ bushels of indian corn and delivering the same
to the within named claimant Daniel O'Keefe

George Ray, Sheriff of Woodford Co.
which said writ and the return thereon made as above
shown was read to the jury without objection.

The said Plaintiff next called as a witness James
Mc Coy who after being duly sworn stated as follows,
(Contract of Kellogg & Myers shown witness,) I have
seen that contract before, Myers purchased a farm of
Kellogg and was in possession of it & of the barn where
the corn was, and he used from the corn and oats —
had rented the farm out to another man — Mr. Kellogg
reserved the house till June 1st then next, I don't know
as Kellogg used any of the grain himself, Myers
boarded with Kellogg, I lived there (on the place) at
that time, Myers used the corn only for feed for his
^{the corn was in the barn & in the granary, he used out of the barn for feed for his horses}
horses — about 150 bushels in the barn & 475 bushels
in the granary, as we called it, the oats & wheat
were in the granary — I heard nothing of any
separate agreement (of using grain) for feed —
I left then about April 1st do not know that Kellogg
forbid Myers using the grain. Kellogg had his horses
there, but do not know as he used any of the grain,
he did not use the horses as his own, he had reserved
them for use on the Sabbath days — the same horses
mentioned in agreement. A man by the name of
Barnham rented the farm of Myers, I do not know
that the corn was ever paid for, I was not present
at the making of the contract but I was present
afterwards with the parties and at their request made
an estimate of the quantity of grain (corn & oats) My
brother & I — we put the corn up & most of the oats =

Myers was to take them at our estimate - we estimated the corn as before stated - The contract I suppose was present - they said it was, but I did not see it - think this was the same day the contract was made,

Alexander Mc Coy being sworn stated as follows, I heard the written contract (between Myers & Kellogg) they wanted us (my brother & me) to estimate the corn & oats & we did so - we put the corn up & most of the oats - Myers was to take them at our estimate - we made the estimate as stated - (by both witnesses) Myers afterwards took control of it, & Kellogg did not afterwards - it was same grain that was replenished, we told them to have the Threshers estimate the wheat.

On Crop examination. I lived there & left when James did - after the contract Myers claimed it (the grain) as his - I never heard him claim it in presence of Kellogg - they used from the corn before we left - never saw Kellogg get any grain after the estimate - he might have done so - before we left - the house Kelloggs dwelling was about 50 to 100 yds from the granary - the corn replenished was from the granary - Kellogg and the horses on Sunday. Myers hired men generally fed the horses - I never saw Kellogg exercise any acts of ownership over the property after the trade.

Lewis J. Minda being sworn stated as follows, I was present when Kellogg (the deft) introduced Myers to Mr Kellogg of Peoria about the time of the contract; the Counsel for Jelf here offered to prove by this witness & others that in March 1852, the deft Kellogg recommended Myers to certain persons Merchants in Peoria, as worthy of credit, and as the man to whom he had sold his farm - his grain &c, & that Jelf was one of those to whom he was so recommended. Him, this evidence was objected to by deft counsel & the objection was sustained by the Court and the evidence excluded from the Jury. In the decision of the Court in excluding the same the Plaintiff by his attys excepted. - but the Court permitted the Plaintiff to prove that deft said to several persons during the month of March 1852, that he had sold out his farm & personal property to Myers, & this was proven - and which testimony so produced as aforesaid was all the testimony in said cause on the part of the said Plaintiff.

The defendant then called Julia Kellogg who being sworn stated as follows, to wit; I am the daughter of the deft - I remember the contract of sale I was present when it was made - Myers resided at our house then - & boarded there, he left about March or April - Father nailed up the granary about a week before Myers left, but I don't remember the exact date - Myers came in an hour or two after it was

Nailed up and he was very angry about it went off to the other house occupied by a tenant - the horses were still on the farm; Meyers one time took some of the grain the wheat away - when my Father was from home - when Father came back he took him to task about it - The witness was then about to proceed to relate the conversation that took place between Kellogg & Meyers relative to their rights to the grain - when the counsel for the Plaintiff objected to every conversation between Kellogg & Meyers being given evidence - the objection was overruled by the Court & the witness permitted to testify of conversations between Kellogg & Meyers which occurred after the written contract before given in evidence & before the sale to the Plaintiff, so far as the same tended to prove a subsequent & different arrangement between Kellogg & Meyers relative to the property but not to vary the terms of the written contract - to this decision the Plaintiff by his counsel excepted.

The witness then continued - Meyers took the grain off on Sunday when my Father was away he allowed he had no right to take it away and promised not to do so again - Father had heard reports that Meyers had sold or had been trying to sell the property. Meyers said he had no intention of selling it - Father said to him - there is a definite understanding that this property is not to be sold (by Meyers) till it is

paid for and Myers said it was so — This not more than two weeks before Myers left — there were two nearly similar conversations between them — My Father said there was a distinct understanding & agreement that none of the property should be removed till they were paid for and Myers admitted that such was their understanding and agreement between them, I can not recollect the day of any of these conversations — think it might have been in May, it was getting warm weather the first conversation was perhaps three weeks before Myers left & the other perhaps a week after the first — I was there when the officer replevied the grain in this suit; the conversations were before that, but I can't say how long; I suppose it might have been two or three weeks. My Father kept possession of the property from the time he nailed up the granary till the grain was replevied — That Myers left about a week before the grain was replevied,

An Cross-examination. I was present when the written contract was made, it was after its execution that these conversations were had, I do not know as they referred to the written contract — If there is no such thing in the written contract they did not relate to it of course; I know of no other contract, I heard no other, My Father said to Myers (as the conversation)

it is our contract that you shall not have the property
till it is paid for; to which Myers assented.
The hired men usually took care of the horses
Myers hired men - they were fed out of the grain
at the barn - My Father used the horses and
their agreement was that he might - this about
using the horses was said when the written contract
was made, (this evidence was excluded,) nothing was
then said about the grain not being sold till it was paid
for. Myers sold the horses afterwards, the man who
got them thought his title not very good and my
Father compromised with him for less than their value
& got them back - Myers did not bring any goods to
our house except a little brandy & some raisins -

The defendant then read in evidence the deposition of
James North, as follows,

"The deposition of James North taken this 12th day
of April A. D. 1853, on the behalf of the defendant in
a certain cause pending in the Peoria Circuit Court,
wherein Daniel O'Keefe is plaintiff and Ezra Kellogg
is defendant, taken in the office of H. C. & A. L. Merriman,
in the City & County of Peoria, in the State of Illinois,
by agreement of parties, the said A. L. Merriman
appearing for said defendant & N. C. Purple appearing
for said plaintiff, said witness being by me the under-
signed first duly sworn according to law, to well and
truly answer each interrogatory as should be propounded to him, deposes as follows,

Int, 1st

What is your age, residence & occupation,

Ans.

I am thirty four years old & have lately lived in Woodford County, Ills, am now going to Lawrenceburg, Indiana.

Int, 2^d.

Are you acquainted with the parties to this suit?

Ans.

Yes, I am.

Int, 3rd.

Are you acquainted with one George Meyers, if yes, state when and where you became acquainted with him and under what circumstances?

Ans.

I am acquainted with him I became acquainted with him about the last of February 1852, at Mr. Cyrus B. Kellogg one of the parties to this suit. I was living with Mr. Kellogg at the time, Mr. Meyers came there and bought Mr. Kellogg's farm and employed me to work for him, he pretended to be rich; when he bought the farm he told me that he had sent on for ten thousand dollars in Gold and about fifteen thousand in checks.

Int. 4th,
Ans.

Where did you last see Mr. Myers?
I think it was about the last of
May after he bought Kellogg's farm
Mr. Myers told me he had bought another
farm of Mr. Roberts of Magnolia. Mr.
Myers told me he had bought Mr. Kellogg's
personal property, consisting of wheat, corn,
horses & waggon, but was not to dispose of
it until this fall. After the contract about
personal property, Myers took some of the
grain away, one time while Mr. Kellogg
was from home. Mr. Myers got me to
help him put up some wheat and he
had it taken to Washington and sold, he told
me not to say anything to the old man
meaning Mr. Kellogg, as it might make
a fuss. I asked him what difference it
would make if the old man did know it,
he said he had got rather curious lately
and I don't want him to know it and
charged me repeatedly not to tell him, this
was some time about the middle of May
last, after Myers left I continued with Kellogg
as before. He Myers came the last I heard
of Myers he was in jail and I hope he is there yet
as he owes me twenty dollars for work.

Judge Purple appeared for J. O'Keefe and
objected to all the declarations of Meyers in relation
to the transactions James North.

State of Illinois,
County of Peoria, J. J. Thomas Bryant, Judge of
the County Court of said
County do hereby certify that the foregoing depo-
sition was sworn to and signed by James North
the said deponent and that the said deposition
was taken at the office of W. O. & A. L. Merriman,
in the City and County of Peoria and State of Illi-
nois on this 12th day of April A. D. 1853,
Witness my hand and seal this 12th day of
April A. D. 1853.

Thomas Bryant County Judge J. C.
which was all the evidence produced on the part of
the said defendant in said cause and the fore-
going evidence was all the evidence produced by
either party on the trial of said cause.
The evidence in said cause now being closed.

The Counsel for the defendant requested the court to
instruct the jury as follows,

1st

If the facts so warrant if the
jury can find property in the wheat in the
defendant to this suit & the property in the corn
in the plaintiff,

2.

Possession of personal property is prima facie evidence of ownership and such possession ~~ownership~~ is constructive notice to the world of whatever title the person in possession has.

3.

If the Jury believe from the evidence that at the time of the execution of the bill of sale by Myers to O'Keefe, Kellogg was in possession of the property in controversy claiming title thereto such bill of sale conveys no title, unless it is shown by the evidence that Kellogg had no right to the possession.

4.th

If by the terms of a contract of sale of personal property any thing remains to be done by the parties as in case of grain the quantity is yet to be ascertained, the sale is not consummated until the amount of such grain is ascertained and delivery is made.

5.th

A contract for the sale of the personal property is an entirety and the whole must be taken together and if the Jury believe from the evidence that under the contract of sale between Kellogg and Myers that any thing remained to be done after the execution of such contract, such as the adjustment of the amount of any

portion of the grain specified in said bill of sale,
such bill of sale passes no title until such subsequent
act is done.

6. If the Jury believe from the evidence that
the property in controversy was to remain in the posses-
sion of Kellogg until the same should be paid for
by Meyers by reason of an arrangement & agreement
made between them after their written contract was
executed & before O'Keefe acquired any title thereto
and if the jury also believe from the evidence that
the property remained in possession of Kellogg pur-
suant to such subsequent agreement, then Kellogg
had a right to retain the possession until the
same was paid for and the Plaintiff cannot
recover in this case without showing that Meyers
had paid Kellogg therefore.

7. If the Jury believe from the evidence
of Julia Kellogg and the other circumstances
proved that there was a change in the agreement of
27. February 1852, by which Kellogg was to
retain possession of the property until paid
for and Kellogg was in possession of such
property under such changed agreement at the
time of the commencement of this suit, and that
he was not then paid for such grain, they

will find the right of property in the defendant;
provided such agreement between Kellogg & Myers
was made before the sale to O'Keefe.

If the Jury believe from the evidence that
the conversations of Kellogg & Myers testified
to by Valia Kellogg related to the written con-
tract only, the jury will wholly disregard
that portion of the testimony but they may
consider that evidence as tending to show that
there was a subsequent agreement between
Myers & Kellogg that the grain should not
be delivered until paid for.

which instructions were given and the Plaintiff's
Counsel then and there excepted to the giving of the
same).

The Jury returned their verdict as follows,
"We the Jury find the ownership of the Indian Corn
in the Plaintiff and the ownership of the wheat in the
defendant D. Bristol, Foreman."

The Court stated to the jury that the verdict was not
in form & inquired if they intended to find the defend-
ant guilty as to the corn and not guilty as to the wheat.
They said they did: the Court stated that the jury should
find damages and they might find nominal damages of one
cent and the Jury assented thereto and the Court made
the following minute upon its docket,

"Verdict guilty as to the corn in declaration mentioned & not guilty as to the wheat & damages 1st," which last entry was the only entry made by the court or the clerk of any verdict in said cause at that time,

The plaintiff entered a motion for a new trial for the following reasons,

1st Because the verdict is against law,

2nd Because the verdict is against evidence,

3rd Because the court gave improper instructions asked by defendant,

4th Because the verdict of the Jury is not responsive to the issues,

5th Because the plaintiff has discovered new and important testimony since the trial,

Afterwards to wit, on the 17th day of December A.D. 1853, upon the hearing of the motion for a new trial in this cause upon motion of defendant's counsel the Court made the following order,

And afterwards to wit, on the 17th day of December A. D. 1853, upon the motion of the said defendant the following order was made in said cause by the said court,

"And now it being made to appear to the said court that the verdict returned by the jury in said cause in these words "We the Jury find the ownership of the Indian Corn in the plaintiff and the ownership of

the Wheat in the defendant

D. Bristol, Foreman,"

Still remains among the papers in said cause but has not been filed or recorded by the Clk. of said court it is ordered that the same be filed by the said clerk ~~in due time~~, and be by him recorded to constitute a part of the finding of the jury in said cause and that judgment be rendered upon the same together with that part of the verdict of said jury given upon the suggestion of the court in the words and figures following "Verdict guilty as to the corn in declaration mentioned & not guilty as to the wheat & damages 1 ct." in constituting the finding of the jury in said cause when taken and considered together."

To which ruling of the court in making said order the said plaintiff then and there excepted. The court overruled the motion for a new trial and entered Judgment as follows, upon the Verdict, "Therefore it is considered that the said Ezra B. Kellogg have return of the wheat in the declaration mentioned, and that a writ of returno habendo issue therefor that he recover of the said plaintiff his costs and charges by him about his defense in this behalf expended and that execution issue therefor. It is further considered that the said Daniel O'Keefe have and recover of the said Ezra B. Kellogg

one cent damages and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

To the decision of the court in overruling his motion for a new trial & in entering the judgment as aforesaid the plaintiff then and there excepted and requested the court to seal this bill of exceptions, which is now done in action as per order of court made at the last term thereof.

January 12th 1854. Anslow Peters Seal

The defendant January 18th 1854, filed an appeal bond in said cause, as follows, to wit:

Appeal Bond - Now all Men by these presents that we Daniel O'Keefe and Edward Jones of Peoria County, Illinois, are held and firmly bound unto Ezra B. Kellogg of Woodford County in the sum of two hundred dollars lawful money of the United States, to which payment well and truly to be made and done we do bind ourselves, our heirs, executors & administrators, jointly and severally, to the said Ezra B. Kellogg his heirs, executors, & administrators & assigns by these presents. Witness our hands and seals at Peoria, this 17th day of January A.D. 1854.

The condition of the above obligation is this, Whereas at the November Term of the Circuit Court of Peoria County A.D. 1853, to wit: on the 17th day of December A.D. 1853, the above named Ezra B. Kellogg in a certain action of the plain then and there pending in the said court wherein said Ezra B. Kellogg was defendant and the above bounden Daniel O'Keefe was plaintiff, recovered a judgment against

the said Daniel O'Keefe for the return of three Hundred
Seventy one and a half bushels of wheat which the said
plaintiff has replevied from the said defendant and also
for his the said defendants costs in said suit; from which
said judgment the said Daniel O'Keefe has prayed an
appeal to the Supreme Court which has been allowed by
the said Circuit Court; Now of the said Daniel O'Keefe
shall pay the said judgment costs, interests and damages
& shall make return of said property so by him replevied
as aforesaid pursuant to the order & judgment of the said
Circuit Court in case the said judgment of the said
Circuit Court shall be affirmed in the Supreme Court,
and shall duly prosecute his said appeal in the Supreme
Court, then this obligation shall be void, otherwise in force.

Daniel O'Keefe Esq
Edward J. Jones Esq

State of Illinois
Peoria County I Jacob Gale, clerk of the Circuit Court
in and for the county of Peoria in the State of Illinois
do hereby certify, that the foregoing is a full and
correct transcript of the Records and proceedings in
a certain cause in the Circuit Court aforesaid wherein
Daniel O'Keefe is plaintiff and Ezra B. Kellogg
is defendant in an action of Replevin, as the same
remain of Record on file in my office -

In witness whereof I have set my hand
and the seal of said Court this 3rd day of
June A.D. 1854. Jacob Gale, clerk.

Fees of clerk for Transcript eight dollars fifty cents
Received of Plaintiff - Jacob Galt, clerk.

David McKee appellant of Appeals from Iowa
vs
Ezra B. Kellogg appellee

And now comes the said appellant and says that in the Record and proceedings and in the rendition of the Judgment aforesaid there is manifest Error in this to wit:

- 1st Said Court Erred in rejected properly testimony offered by the Appellants
2. In admitting improper testimony offered by Appellee.
3. In giving instructions 1. 3. 4. 5 asked by the Appellee
- 4 In permitting the verdict of the Jury to be amended after the same was delivered and the Jury had dispersed
5. In Overruling Appellants Motion for a new trial
- 6th In rendering Judgment upon the verdict, as rendered.

For these and other Errors in said Record Appellants pray that the same may be reversed annulled and wholly for nothing returned.

Jan 10th 1854.

J. P. McKee
Appellants Atty

Daniel O'Keefe appellant } Supreme Court
" } Appellate Division
Ezra B. Kellogg appellee }

And said Appellee
comes and says that the said
Record & proceedings in said
Circuit Court there is no such error
as is by said appellant above
assigned & that said judgment ought
in all respects to be maintained and
affirmed.

Manning & Munroe
for appellee

47-38.

Daniel O'Keefe

Ezra B. Kellogg -

Record & errors.

Filed June 12th 1854.

L. Ireland Clk.

By F. K. Ireland cly.

O'Keefe v. Kellogg