No. 13152

Supreme Court of Illinois

Steamer "Delta"

---

vs.

Walker & McIlvaine

71641

Steamer Delta
vs
Walker & McClure

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
No. 164.

Defendant's Abstract

Walker
vs
Delta

1313

Pleas before the circuit court, within and for the county of Peoria, and State of Illinois, on the fifth day of January A.D. 1860. Present- the Honorable Elihu M. Powell, judge of the 16th Judicial circuit, in said state, John Bryner, Sheriff & Enoch D. Sloan, Clerk.

Be it remembered that heretofore to wit on the Seventh day of November A.D. 1859, there were filed in the office of the clerk of said circuit court a transcript from the docket of Bernard Bailey, a justice of the peace in and for said county, together with a copy of account sued on, affidavit, attachment bond, writ of attachment, & return of officer thereon, and appeal bond, which transcript and the several papers accompanying it, are in the words and figures following, to wit

Isaac Walker and
George McElvaine, partners under the style of
Walker & McElvaine
vs
Steamboat "Delta"

In attachment Demand $ 1584 8.

Affidavit filed and attachment issued on the 15th day of September A.D. 1859 returnable on the 23d at 3 o'clock P.M. and returned by George W. Campbell, const

served by attaching said steamboat "Delta" and by reading to Richard Updike and Benjamin Whittington on the 15th
On the return day the parties appeared and by consent the cause was continued until the 4th day of October next at 10 o'clock A.M. On the said day the parties again appeared and by consent the cause was again continued until the 8th at 10 o'clock A.M. the parties again appeared on the return day and by consent was continued until the 10th at 10 o'clock A.M. On the said 10th the parties appeared and after hearing their proofs and allegations it is ordered and adjudged that the plaintiffs recover twenty-four dollars and twenty nine cents damages and the costs of suit.

State of Illinois)
Peoria County) ss

I, Bernard Bailey, one of the acting justices of the peace in and for said county do hereby certify that the aforgoing is a true and correct transcript of the docket kept by me in the above entitled cause
Given under my hand and seal this 4th day of November A.D. 1859.

Bernard Bailey J.P. [Seal]

aff[illegible]
J.P.

State of Illinois)
Peoria County) ss

Isaac Walker & George A. McIlvaine)
v) Before B. Bailey J.P.
Steamboat "Delta")

George A. McIlvaine, one of the above

named plaintiffs being first duly sworn on his oath says that the steamboat "Delta" and owners are justly indebted unto said plaintiffs doing business under the name style and firm of Walker & McIlvaine in the sum of one hundred & fifty eight dollars & forty six cents for materials and supplies furnished in and about the repairing, fitting and furnishing said boat while running upon the navigable waters of this state & whilst being repaired and equipped within the state; that said materials and supplies were furnished at the request of Benjamin M. Whittington then master of said boat, & that according to the terms of the contract for said materials and supplies, a bill of which is hereto attached, the said indebtedness became due on the first day of January A.D. 1859 less than nine months previous to this date & further saith not.

Geo. D. McIlvaine

Subscribed & Sworn to
before me Sept. 16th 1859

account Steamer Delta & owners, In acc with
Walker & McIlvaine

Due Jany 1st 1859

1858		Amt bal old acc		$ 26
Jan	19	To 3 pp Jacks	5	15
	30	" 3 " "	5	15
Feb	16	" 5 lbs Spikes	5	25
	22	" 1 handled axe		1 25
				7 06

7.06

27	27	" 1/2 dz Tacks	50			25
March	1	" 85 lbs 1 1/8 x 3/8 Iron	5		4 25	
		" 63 " 1 Sq " "	4		252	
		" 46 1/2 - 1 1/8 S Iron	5 1/2		255	
		" Iron & Rattle			50	9 82
	6	" 1 bale oakum				6 00
	9	" 20 lbs nails	5			1 00
	10	" 4 " washers	12 1/2			50
	11	" 8 1/2 lbs 3/8 Sq 8 Iron	7 3/4		65	
	"	" 10 1/2 " 1/2 " R. "	7 1/4		76	1 41
	12	" 114 lbs Rope	16 c		18 24	
		" 55 " 3/8 R & S Iron	7 3/4		4 26	
		" 1 14 " B file			90	
		" 2 Scrapers	90		180	
		" 1 12 in S. file			40	25 60
	13	" 1 5 in Taper file			15	
	"	" 1 Hatchet			75	
		" 20 lbs nails	5		100	
		" 3 canal lamps	100		300	
		" Pat cast cwt.			25	
		" 1 Pulley			10	
		" 1 ball twine			30	
		" 10 lbs spikes	5		50	6 15
May	10	" 20 lbs 6d nails	5		100	
		" 20 " 8 "	5		100	200
	13	" 20 " 8 "	5			100
	18	" 30 spikes	5			150
	19	" 1 dz 14 oz tacks			55	62 29

		Bal on do		10	
		40 lbs nails	5	2 00	
		77 lbs 1/2 a RD	5 3/4	4 43	
		67 " 1 1/2 "	3 3/4	2 51	9 55
	20	1 Brush			20
	21	7/12 dz Lath 4 00		2 34	
		1 Gro 1 1/4 in. Screws		45	
		7 pr 3 in cast butts		56	
		9 Latch Strikes	8	72	
		84 lbs 1 1/4 + 3/8 C Iron 4 1/2		3 70	7 85
	24	5 lbs nails	5		25
	25	77 " 1/2 " RD Perm Iron 5 3/4		4 40	
		2 pr. Butts 3 S	12 1/2	35	4 75
	27	1 Gro. 1# F Screws		35	
		20 lbs nails	5	1 00	
		3 bed cords	45	1 35	
		2 sets K[illegible] of Joints	2 25	4 50	
		2 " dest do. do.	1 75	3 50	
		4 lbs twine	10	40	
		3 bales twine	30	90	
		1 1/2 cop twine	65	97	12 97
	28	1 Gro. 1# F Screws		35	
		1 lb Hook Irons &c		10	45
June	2	10 lbs Spikes cut	10	1 00	
		5 " 1 lb nails		25	1 25
	7	68 lbs packing	16		10 88
	10	1 Gro. 1 1/2 # 12 Screws		55	55
	14	20 lbs 8D nails		1 00	
					111.03

						111 03
		20 . 20 "	5		1 00	2 00
	16	1 Mowing wrench				1 15
	19	10 lb 20d Spikes	10			1 00
		5 lb 20d Nails		5		25
		4 " 6d "		5		20
	22	5 " 6d "		5	25	
		1 Gro 1½ screws			55	80
	24	10 lb 8d Nails		5		50
	26	½ R.R. Spikes				60
July	6	2 pr Cards		5	10	
		1 Hammer		5	05	15
	10	10 lb 4" Wrot Spikes			1 00	
		2 " 8 7/4 Spikes	10		20	
		1 pile 14 B.			65	
		10 lb Nails		5	30	2 35
	16	4 " Spikes		5	20	
		1 " 32. Bellows			12 50	
		17 " 1½ x ⅜ Iron 4½			77	13 47
	21	10 lb Lead		10	1 00	
		9¼ " " Pipe		20	95	1 95
	22	8½ Rope		18	1 53	
		1 Rule			25	1 78
	23	5 lb ¾ Screws 12½				63
	24	1 Trowel				50
	26	13½ ¾ Cut Iron 5			68	
		1 Count			1 00	
		1 do			90	
		6 do			60	3 08
						141.84

	29	6¼ lbs rope	18			1 12
	30	10 " rot spikes	10			1 00
Aug	2	1½ lbs Steel hoops			23	
		2 pile taps	10		20	43
	12	8½ lbs rope	18		171	
		13 " Nails	25		325	
		50 ft hose			25	5 21
	21	1 Tunnel			140	
		1 Scarph			80	2 20
	23	25 lbs rot Spikes	10		250	
		10 lbs nails			50	3 00
	25	1 Auger				25
	27	7 cut chain 12½				88
	30	1 Saw (8 & 9)			250	
		10 lbs spikes	5		50	3,00
Peoria, Sept. 13, 1859						158 46
						144,11

Attachment Bond

Know all men by these presents that we Isaac Walker, George H. McElvaine and J. M. Clay Smith are held and firmly bound unto the People of the State of Illinois for the use of the owners of the steamboat Delta, in the sum of three hundred and twenty-five dollars to the payment of which well and truly to be made, we bind ourselves, our heirs executors and administrators firmly by these presents. Witness our hands and seals this fourteenth day of September AD 1859.

The condition of the above obligation

is such that whereas the above bounden Isaac Walker & George A. McElvaine have on the day and date hereof prayed an attachment to be issued at the suit of said Walker & McElvaine against the steamboat "Delta" her rigging, engine, apparel & furniture for the sum of one hundred & sixty eight dollars and forty six cents and the same being about to be sued out returnable on the day of September A.D. 1857 before Bernard Bailey J.P. Now if the said Walker & McElvaine shall prosecute their suit with effect or in case of failure therein shall well and truly satisfy and pay to the owners of said steamboat "Delta" all such cost in said suit and such damages as shall be awarded against the said Walker & McElvaine, their heirs executors or administrators in any suit or suits which may hereafter be brought for wrongfully suing out said attachment then the above obligation to be void otherwise to remain in full force & effect

Isaac Walker [Seal]
Geo. A. McElvaine [Seal]
J. McClay Smith [Seal]

Attachment Writ

State of Illinois }
Peoria County } ss

The People of the state of Illinois to any Constable of said County - Greeting:-

Whereas, George McIlvaine hath complained on his oath before Bernard Bailey a justice of the peace in and for said county that the steamboat Delta is justly indebted Isaac Walker and the said McIlvaine in the sum of one hundred and fifty eight dollars and twenty-six cents for materials and supplies furnished said Steamboat Delta while running in the navigable waters of the state of Illinois at the request of Benjamin Whittington master of said steamboat Delta & And the said Walker & McIlvaine hath given bond pursuant to the statute in such cases made and provided We command you that you attach the said steamboat if found in your county and safely keep the same that the said boat may be liable to further proceedings thereon according to law before the said undersigned justice of the peace and summon Andrew Whittington & Richard S. Updyke to be and appear before me at my office in Peoria on the 22d day of September 1859 at 3 o'clock P. M. then and there to answer whatever may objected against them when and where you have this writ. Given under my hand and seal this 15th day of September 1859.

Bernard Bailey J P [Seal]

Return of Officer

I have served this writ by attaching the steamboat Delta and reading the same to Richard Updike and Benj. Whittington this 15th day of Sept. A.D. 1859 = Geo. W. Campbell, Const.

fees $1.00

Appeal to Circuit Court

Know all men by these Presents, That we John Warner, & Henry Bain, are held and firmly bound unto Isaac Walker & George McElvaine in the penal sum of one hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, and firmly by these presents. Witness our hands and seals, this 24th day of October AD 1859.

The condition of the above obligation is such, That whereas, the said Isaac Walker & George McElvaine partners under the of Walker & McElvaine did on the eighth day of October 1859 before Bernard Baily a justice of the peace for the county of Peoria recover a judgment against the steamboat Delta for the sum of twenty-four 29/100 dollars; for which judgment the said has taken an appeal to the circuit Court of the county of Peoria aforesaid, and State of Illinois; Now if the said shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void otherwise to remain in full force and effect.

Approved before me at my office this 24 day of October 1859. Bernard Baily JP

Jno. Warner [seal]
Henry Bain [seal]

And afterwards to wit- on the day and date of the filing of the foregoing transcript and papers, there was issued from the clerks office aforesaid, a Summons, in words and figures as follows, to wit:-

Summons from Cir. Court

The People of the State of Illinois

To the Sheriff of Peoria County- Greeting:-

We Command You to Summon Isaac Walker and George McElvaine, if they may be found in your County, to appear before our circuit court on the first day of the term thereof to be held at Peoria, within and for the said county of Peoria, on the third Monday of November instant then and there, in our said court, to prosecute their suit against the Steamboat Delta lately brought into our said court by appeal from the Judgment of Bernard Bailey one of the Justices of the peace of Peoria county, and make return of this writ, with an indorsement of the time and manner of serving the same, on or before the first day of the term of the said Court to be held as aforesaid.

Witness, Enoch D Sloan, clerk of our said court, and the seal thereof, at Peoria, this Seventh day of November in the Year of our Lord one thousand eight hundred and fifty nine, Enoch D Sloan, clerk P.C.A.

Seal

which said Summons was afterwards returned into said Clerks office endorsed as follows to-wit:-

State of Illinois
Peoria County

Ret. of Shff on Summons

I have duly served this Summons by reading the same to Isaac Walker and George McIlvaine this 9th day of Nov. 1859.

John Bryner, Shff
by Easley dept

fees 1.20

Proceedings at a term of the circuit court of Peoria county, began and held at the court house in the city of Peoria, in said county and State of Illinois, on the third Monday in the month of November in the year of our Lord one thousand eight hundred and fifty-nine, it being the twenty-first day of said month- Present, the Honorable Elihu M. Powell, judge of the 16th judicial circuit in said state, John Bryner sheriff, and Enoch D Sloan, Clerk, to-wit:-

Monday, December 5th A.D. 1859.

Isaac Walker Pet

vs Appeal from J P

Steamboat Delta

Mot. to dismiss & overruled

This day this cause came on to be heard on the motion of defendant to dismiss this suit for want of the jurisdiction

of the Justice of the peace, and the court being satisfied in the premises overruled said motion.

Friday, December 30th AD 1859

Isaac Walker
George McIlvaine
vs
Steamboat Delta

appeal from JP

verdict for Plaintiffs

This day come the plaintiffs by manning their attorney, and the defendant by Mead its attorney, waive trial by Jury and agree that all matters of law and fact arising in this cause shall be tried by the court, and the court being fully advised in the premises, do find for the plaintiffs and assess their damages at the sum of one hundred and fifty-eight dollars and forty six cents. Whereupon the defendant by attorney, entered its motion for a new trial.

mot. for new trial

Thursday January 5. AD 1860.

Isaac Walker
George McIlvaine
vs
Steamboat Delta

appeal from JP

This day this cause come on to be heard on the motion of defendant for a new trial, and the court being satisfied in the premises, overruled said motion. Therefore it is considered by

mot. for new trial overruled

Judgment for pltfs

the court that the said Isaac Walker and George McElvaine have and recover of the said Steamboat Delta, the said sum of one hundred and fifty-eight dollars and forty-six cents their damages aforesaid, and also their costs and charges by them about their suit in this behalf expended and that special execution issue therefor against said steamboat Delta.

Saturday, January 7th AD 1860

Isaac Walker
George McElvaine
" Appeal from J P
The Steamboat Delta

Appeal to Sup. Court

This day come John Warner, on behalf of said defendant, the Steamboat Delta, and prayed an appeal to the Supreme court of this state, which is allowed on his giving bond in four hundred dollars, with security to be approved by the clerk to be filed in twenty days. By agreement the bill of exceptions is to be signed in vacation.

And afterwards to-wit, on the 16th day of January AD 1860, there was filed in the clerks office aforesaid an appeal bond, in words & figures following to-wit:

Appeal bond

Know all men by these presents that we John

Warner as principal and
as surety are held and firmly bound unto
Isaac Walker and George H. McIlvaine
in the penal sum of four hundred
dollars for the payment of which
well and truly to be made we bind
ourselves, and our heirs jointly and severally firmly by these presents.

The condition of the above obligation is
such that whereas the said Walker & McIlvaine
did by the consideration of the circuit court
in and for the county of Peoria in the
State of Illinois on the 3rd day of Jan-
uary AD 1860 recover a judgment in their
favor against the "Steam Boat Delta" for
the sum of one hundred and fifty eight
dollars and sixty six cents damages and
costs of suit from which judgment the
said John Warner has prayed an appeal
to the Supreme Court of the state of Il-
linois next to be holden at Ottawa in said
state, which prayer has been granted. Now if
the said John Warner shall duly prosecute his
said appeal and shall pay and satisfy said
judgment together with all costs damages
and interest thereon in case said appeal shall
be affirmed then this obligation to be void,
otherwise to remain in full force

Witness our hands and seals

this 13th day of January AD 1860.

John Warren (Seal)

A. Goodheart (Seal)

Approved by me Jany 16, 1860

E. D. Sloan, clk

And afterwards to wit on the 16th day of Febuary AD 1860, there filed in office of the clerk aforesaid, a bill of exceptions in words & figures following to-wit:-

In the circuit court of Peoria County, Illinois. Of the November Term AD 1859.

Walker & McElvaine

v

Steamboat Delta

Bill of Exceptions

Bill of Exceptions

Be it remembered that on the 23d day of November AD 1859 the defendant filed his motion herein to dismiss this suit for want of Jurisdiction by the court of the subject matter, which said motion is as follows:-

Walker & McElvaine

v

Steam Boat Delta

Defendant moves the court to dismiss this suit because the justice of

of the peace before whom this suit was tried in the court below, had no jurisdiction of this suit

A. M. & J. J Weed

For defendant

which motion was overruled by the court, and the defendant then and there in open court excepted to said decision.

And on the trial of this cause the said plaintiffs, to maintain the issues on their part, offered in evidence the account copied in transcript from Justice of peace. Plaintiffs then called Robert D. McClure, who stated that he was the book Keeper in plaintiffs' house, during the period of time, when said goods were purchased by defendant; that said bill of goods was correct; that he knew of no special contract made by the plaintiffs with defendant, in regard to the ~~time~~ terms upon which said goods were purchased - That it was usual with plaintiffs' house to allow accounts against Steamboats to run a year as to the first day of January next succeeding the time the goods were purchased, - That he supposed this custom of plaintiffs house was known to defendant, as there had been dealings between said plaintiffs & defendants

on the same terms previous to that time that plaintiffs were hardware merchants in the city of Peoria, Illinois.

Said witness stated on his cross-examination, that he presented the account offered in evidence herein to defendant, sometime in September or October A.D 1858, and demanded payment of the amount due on it from defendant but that no money was paid on it at that time - That he had never heard any conversation between plaintiffs & defendant, as to what terms said goods were sold on - That it was the custom of plaintiffs to sell goods to steamboats on a years time - That this custom was not uniform with them in all their transactions but that he thinks he may have told defendant what their terms were - at least he thought defendant knew their terms as defendant had dealt with them before the time this account was made, and upon the same terms that this bill was purchased - That he knew of defendant having purchased one bill previous to that time and that bill was made in September or October in 1856 or 1857 and presented to defendant the succeeding January and was paid - That witness called with said bill for the purpose of collecting the whole or a

part of said bill; that plaintiffs could not have sued this account before the first day of January 1859, as the account was not due until that time.

Defendant by his counsel objected to all the testimony of said witness as proof of the existence of a custom regulating the terms of doing business in plaintiffs house-But the court admitted said testimony and to the decision of said court in refusing to reject the same, defendant then and there in open court excepted.

This was all the evidence in the case, and the court found the issues for the plaintiffs and assessed their damages at $158.46. Defendant then and there entered and filed herein, his motion for a new trial- which said motion is as follows:-

Walker & McElvaine
"
Steam Boat Delta
} In the Persia C. C.
Nov. 7. 1859

And now comes the said defendant and moves the court for a new trial herein for the following reasons:
1st- Because the court refused to dismiss the case for want of jurisdiction.

2° Because the court admitted improper evidence on the part of the plaintiff.
3° Because the decision and judgment of the court is against the evidence
4th Because such decision is contrary to law

Whereupon the said defendant prays for a new trial

By W.M. & J.J. Reed
his attorneys

which motion was overruled by the court And after said motion had been overruled by the court and before the entry of final judgment the defendant then and there proposed to dismiss his appeal herein, but the court refused to entertain said motion, and refused to dismiss said appeal and rendered judgment against the said defendant, and in favor of the said plaintiffs for the sum of $158.46, To all which said decisions of the court in overruling said motion for a new trial, and refusing to allow defendant to dismiss his appeal and in rendering final judgment in favor of the plaintiffs the said defendant, by his attorney then and there in open court excepted and objected— defendant therefore prays that this his bill

of exceptions, may be signed sealed and enrolled, and made part of the record herein, which is accordingly done

E. A. Powell

State of Illinois }
Peoria County } ss

I, Enoch D Sloan, clerk of the circuit court in and for said county and state, do certify that the foregoing are full and true transcripts from the files and record of proceedings of said court appertaining to the cause wherein Isaac Walker & George McIlvaine are plaintiffs and Steam Boat Delta is defendant, so far as the same appear of record and on file in my office. Given under my hand and the seal of said court at Peoria, this 1st day of March A D 1860.

Enoch D Sloan, Clerk

The Steam Boat Delta Appellant.
vs Appeal from Peoria.
Walker & McIlvaine Appellees

In the Supreme Court of the State of Illinois. Of the Third Grand Division To the April Term 1865

And now comes the said Appellant, and says: Because in the verdict and judgment aforesaid, and in the record and proceedings aforesaid, manifest error hath intervened to the injury of the said Appellant in this:

1st That the Circuit Court erred in refusing to dismiss this suit for want of jurisdiction in the justice of the Peace

2nd That the Circuit Court erred in ~~passing~~ admitting insufficient and improper evidence of the existence of a custom or usage regulating the terms of trade of Plaintiffs house, to change the legal effect of the contract between the parties to this suit—

3rd That the Circuit Court erred in refusing to allow the Defendant to dismiss his appeal

4th That the Circuit Court erred in rendering judgment in favor of the Plaintiffs for $158 46. when said judgment if rendered at all should have been for only $143 11

5th That the Circuit Court erred in rendering judgment for the Plaintiff when by the law of the land, judgment should have been rendered for the Defendant.

For which and for other errors manifest in the record and proceedings aforesaid, the said Appellant prays, That said judgment may be reversed set aside and for naught taken and Confessed

N. M & D. Steed
Attorneys for Appellant

And the Appellee Comes & say that there is no such error in said Record as Appellant alleges & that the said Judgment ought to be affirmed

Manning & Brown
for Appellee

The Steam Boat "Delta"
vs Appeal from Peoria.
Isaac Walker &
George H McWilliams
Appellees

In the Supreme Court
Third Grand Division
April A.D. 1860.

Clerk of said Court
will issue Sci Fa. against said Defendants directed to Sheriff of Peoria County Illinois returnable to the April Term of said Court A.D. 1860

N.W. & D.J. Read
Attorneys for Appellants

Walker & McWilliams
vs
Steam Boat Delta

Abstract of Assignments of Errors

Filed April 16 1860
L. Leland
Clerk

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

THE STEAM-BOAT "DELTA," APPELLANT, *vs.* WALKER & McILVAINE, APPELLEES.

APPEAL FROM PEORIA.

BRIEF OF APPELLANT.

I. The justice of the peace had not jurisdiction of the subject matter. The act extending the jurisdiction of justices of the peace of Peoria County, did not apply to or include "Attachments against Boats and Vessels."

Purples' Statute, pp. 1260 and 1262.
" " " 107
" " " 662 and 663.

The act extending the jurisdiction of said justices is a special statute and must be construed strictly.

II. The plaintiffs' *lien* against the boat had expired, and could not be enforced. The demand sued upon had been due more than nine months before the commencement of suit.

Purple's Statute, p. 108.

III. There was no special contract proven in this case; nor was there any such *custom or usage* proven as will be deemed sufficient to change the legal effect of the contract between the parties. The office of *custom* or *usage* is simply one of exposition, and can never be received to change the express intention of the parties, nor to do away with the legal effect of the contract.

Greenleaf's Ev. vol. 2, Sect. 251 and 252.
Linsley vs. Lovely, 26 Vt. R. 136.
Hone vs. Mutual Safety Ins. Co., 1 Sandf, Sup. Ct. R. 137.
Beirne vs. Dowd, 1 Selden 95.
Farnsworth vs. Chase, 19 N. H. 534.
Cope vs. Dodd 13 Penn. State R. (1 Harris) 33.

The evidence to establish a custom or usage should show a certain and uniform usage. Where the evidence is uncertain and contradictory, the custom is not established.

Desha vs. Holland 12 Ala. R. 513.
Linsley vs. Lovely 26 Vt. R. 136

IV. The *plaintiff* is *estopped* from saying that the account did not become due until the 1st of January, next succeeding the time when payment thereof had been demanded. The demand of payment of the account is evidence that the plaintiff treated the demand as due; and he will not be permitted to call to his aid a pretended *custom* in order to save his *lien.*

Cowles vs. Bacon, 21, Com. 451.

V. The judgment is for *too* much, and should be corrected. The judgment is for $158,46, and if any judgment should have been rendered it should be for only $143,11.

Courts will correct mistakes when they appear in the record.

VI. The court below should have allowed the defendant to dismiss his appeal. He had a clear right to do this at any time before the rendition of judgment. The court was acting in the capacity of both judge and jury; and the motion for leave to dismiss the appeal was in *apt season.*

Hancock County vs. Marsh, 2 Scam. 492.
Shaffer vs Cusner 13th Ills. Stts. 667.
Howe vs Harrison 67 " 494

VII. The act authorizing the proceeding is *unconstitutional and void,* because the Constitution of the United States has conferred upon the United States District Courts exclusive jurisdiction in all admiralty proceedings.

Const. U. S., Art. 3, Sect. 2.

H. M. & J. J. WEAD,
Attorneys for Appellant.

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Desha vs. Holland 12 Ala. R. 513.
Linsley vs. Lovely 26 Vt. R. 136

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Cowles vs. Bacon, 21, Com. 451.

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Hancock County vs. Marsh, 2 Scam. 492.
Shaffer vs Curner 13th Ills. [illegible] 667.
Howe vs Harrison 17 " 494

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Const. U. S., Art. 3, Sect. 2.

H. M. & J. J. WEAD,
Attorneys for Appellant.

No 164 — 96

Steamer Delta

vs

Walker & McIlvaine

Brief of Appellant.

Filed April 27, 1860
L. Leland
Clerk

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

ISAAC WALKER AND GEORGE H. McILVAINE, Partners as WALKER & McILVAINE, APPELLEES, *vs.* THE STEAM-BOAT "DELTA," APPELLANT.

APPEAL FROM PEORIA CIRCUIT COURT.

ABSTRACT OF RECORD.

This was a suit commenced by Attachment before a Justice of the Peace of
1 Peoria County for the sum of $158,46. Suit commenced September 13th, 1859.
2 Judgment rendered October 18th, 1859, for $24,29. Defendant's Attorney entered motion before Justice of the Peace to dismiss suit, because the Justice had not jurisdiction of the amount sued for, which motion was overruled and judgment rendered as above.

10 Defendant, through the intervention of John Warner, filed his Appeal Bond, and prayed an appeal to the Circuit Court. And afterwards, on the 23d day of
12 November, the Defendant asked the Circuit Court to dismiss the suit for the want of jurisdiction of the Court below, which motion was overruled by the Court, and Defendant then and there excepted. And on the trial of said cause, Plain-
17 tiff called *Robert D. McClure*, who testified that he was book-keeper in Plaintiff's house during the time the bill of goods upon which suit was brought was purchased; that he believed the items of said account to be correct; that there was no specific contract between said Plaintiffs and the agents of Defendant, as to the *terms* upon which said goods were purchased by Defendant; that it was usual with Plaintiffs' house to allow accounts against *steamboats* to run a year, or to the 1st of January, next succeeding the time when the goods were purchased; that he supposed this practice of the Plaintiffs' house was known to the Defendant, as there had been dealings between them upon the same terms previous to the
18 time that the bill sued upon was purchased; that Plaintiffs' were *hardware merchants* in the city of Peoria. Said witness on his cross-examination stated that he presented the account sued on to the Defendant in *September or October*, 1858, and demanded payment of the amount due thereon, but that no money was paid thereon at that time; that he had never heard any conversation between said Plaintiffs and Defendant as to the terms upon which said goods were purchased; that the practice of the Plaintiffs in regard to the time upon which goods were sold by them was not *uniform* with them; that he thought Defendant knew upon what terms the Plaintiffs dealt, as there had been dealings between said parties before that time upon the same terms; that he did not know of Defend-

ant having dealt with them *but once* previous to the time this bill was purchased, and the bill then purchased was bought in September or October, 1856 or 1857, and presented to Defendant the succeeding January and paid; that the bill sued
19 on could not have been collected by suit before January 1st, 1859. This was all the evidence in the case; and Defendant by his attorney then and there objected to all the testimony of said witness as proving a custom regulating the terms of doing business in Plaintiffs house, but the Court overruled the objection, and Defendant excepted. The Court thereupon found the issues for the Plaintiffs, and rendered judgment against the said Defendant for the sum of $158,46. Defendant then and there entered and filed his motion for a new trial, but the Court
20 overruled said motion, and Defendant excepted. Defendant then and there, after the overruling of said motion for a new trial, and, before the entry of judgment therein, proposed to dismiss his appeal herein, but the Court refused to entertain said motion, or to dismiss said appeal, and Defendant excepted. The Court thereupon rendered judgment in favor of the Plaintiff, and Defendant excepted.

ERRORS ASSIGNED.

The Appellant assigns for errors the following:

1st. That the Circuit Court erred in refusing to dismiss this suit for want of jurisdiction in the Justice of the Peace.

2d. That the Circuit Court erred in admitting insufficient and improper evidence of the existence of a custom regulating the terms of trade of Plaintiffs' house, to change the legal effect of the contract between the parties to this suit.

3d. That the Circuit Court erred in refusing to allow the Defendant to dismiss his appeal.

4th. That the Circuit Court erred in rendering judgment in favor of the Plaintiff for $158,46, when said judgment should have been for only $143,11.

5th. That the Circuit Court erred in rendered judgment for the Plaintiff when by the law of the land, judgment should have been rendered for Defendant.

For which, and other errors manifest in the record and proceedings aforesaid, the said Appellant prays that said judgment may be reversed, set aside, and for nought taken and confessed.

H. M. & J. J. WEED,
Attorneys for Appellant.

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Steamboat Delta

vs

Walker et al

Absct & Assgt of Errors.

Filed Apr 16. 1860
L. Leland
Clerk

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

THE STEAM-BOAT "DELTA," APPELLANT, *vs.* WALKER & McILVAINE, APPELLEES.

APPEAL FROM PEORIA.

BRIEF OF APPELLANT.

I. The justice of the peace had not jurisdiction of the subject matter. The act extending the jurisdiction of justices of the peace of Peoria County, did not apply to or include "Attachments against Boats and Vessels."

Purples' Statute, pp. 1260 and 1262.
" " " 107
" " " 662 and 663.

The act extending the jurisdiction of said justices is a special statute and must be construed strictly.

II. The plaintiffs' *lien* against the boat had expired, and could not be enforced. The demand sued upon had been due more than nine months before the commencement of suit.

Purple's Statute, p. 108.

III. There was no special contract proven in this case; nor was there any such *custom or usage* proven as will be deemed sufficient to change the legal effect of the contract between the parties. The office of *custom* or *usage* is simply one of exposition, and can never be received to change the express intention of the parties, nor to do away with the legal effect of the contract.

Greenleaf's Ev. vol. 2, Sect. 251 and 252.
Linsley vs. Lovely, 26 Vt. R. 136.
Hone vs. Mutual Safety Ins. Co., 1 Sandf, Sup. Ct. R. 137.
Beirne vs. Dowd, 1 Selden 95.
Farnsworth vs. Chase, 19 N. H. 534.
Cope vs. Dodd 13 Penn. State R. (1 Harris) 33.

The evidence to establish a custom or usage should show a certain and uniform usage. Where the evidence is uncertain and contradictory, the custom is not established.

Desha vs. Holland 12 Ala. R. 513.
Linsley vs. Lovely 26 Vt. R. 136

IV. The *plaintiff* is *estopped* from saying that the account did not become due until the 1st of January, next succeeding the time when payment thereof had been demanded. The demand of payment of the account is evidence that the plaintiff treated the demand as due; and he will not be permitted to call to his aid a pretended *custom* in order to save his *lien.*

Cowles vs. Bacon, 21, Com. 451.

V. The judgment is for *too* much, and should be corrected. The judgment is for $158,46, and if any judgment should have been rendered it should be for only $143,11.

Courts will correct mistakes when they appear in the record.

VI. The court below should have allowed the defendant to dismiss his appeal. He had a clear right to do this at any time before the rendition of judgment. The court was acting in the capacity of both judge and jury; and the motion for leave to dismiss the appeal was in *apt season.*

Hancock County vs. Marsh, 2 Scam. 492.

Shaffer vs Currier 13th Ills 667.
Howe vs Harmon 17 " 494

VII. The act authorizing the proceeding is *unconstitutional and void*, because the Constitution of the United States has conferred upon the United States District Courts exclusive jurisdiction in all admiralty proceedings.

Const. U. S., Art. 3, Sect. 2.

H. M. & J. J. WEAD,
Attorneys for Appellant.

No 164

Steamer Della

v

Walker & McIlvaine

Brief of
Appellants

Filed Apl 2 1860
L. Leland
Clerk

ARGUMENT FOR APPELLEES.

State of Illinois, Supreme Court, 3d Grand Div.

APRIL TERM, A. D. 1860.

The Steamer Delta,
Appellant.
vs.
Walker & McIlvaine,
Appellees.
} Appeal from Peoria.

This suit was commenced by attachment before a justice of the peace of Peoria county. The sum demanded was $158 46. The appellant made a motion to dismiss the suit, both before the justice and the Circuit Court, which was overruled. The ground alleged is that the justice had no jurisdiction in cases of attachment where the amount claimed exceeded $100.

Jurisdiction in such cases is extended to the amount of $300 to the justices of the peace of Peoria county. Section seventeen of the chapter, "Justices of the Peace and Constables," Purple's Statute, 662, gives justices jurisdiction (div. 4th,) in suits for money claimed to be due on unsettled accounts, in which the balance claimed to be due does not exceed one hundred dollars.—The last clause of the same section provides: "The provisions of this section shall apply as well to proceedings commenced by attachment as to other cases." These provisions expressly cover this case, except as to the amount over which the justice may have jusisdiction.

An act entitled an act to extend the jurisdiction of the justices of the peace and police magistrates of the county of Peoria.—Approved Feb. 14th, 1855, p. 154, Purple's Statute, 334, provides "that the several justices of the peace and police magistrates in the county of Peoria shall have jurisdiction to hear and determine all complaints, suits and prosecutions mentioned and described in section seventeen, of chapter forty-nine, entitled Justices of the Peace and Constables, of the Revised Statutes, in which the amount claimed to be due does not exceed $300."

Clearly jurisdiction was given in the cases enumerated in section seventeen, to Justices of the Peace when the proceeding was by attachment: if so, the jurisdiction was extended by the act of 1855 to the amount of $300.

It is assigned for error that the court improperly admitted evidence of the custom of the plaintiff to give credit on running accounts until the first of January succeeding the time when the credit was given This was not proof of a general or local custom. It was evidence of the extent of credit given by an individual, in cases where no particular term of credit was stipulated. This was the rule of Walker & McIlvaine. This is distinctly proved. Their custom was not invariable in this respect. They made different contracts at times. But this was their general rule. This would not affect those dealing with them, unless such persons had notice of this rule: but if such persons had notice of such rule, PRIMA FACIE, they would be bound by it. In every sale of goods where payment is not immediate, some credit is given. It is to be terminated at the option of the vendor, or there is some term of time during which it is to run. If there is a known limit to such credit between the parties, it is not indispensable to establish it, that it should be expressed at the time of each purchase. If the parties have before dealt with an understanding as to the term of credit, and that credit was governed by a general rule of the vendor, and the vendee knew of such rule: this certainly may raise a presumption that the parties were still dealing under the same understanding. The former dealings of the parties in such cases is always admissible in evidence.

Loring et. al. vs. Gurney, 5 Pick., 15.
Gabay vs. Lloyd, 3 Barn & Cress., 793.
Bartlett vs. Pentland, 10 Barn & Cres., 760.
Bridgeport Bank vs. Dyer, 19 Conn., 136.
Rushforth vs. Hadfield, 7 East., 224.
Syers vs. Bridge, Doug., 509.

It was proved that Walker & McIlvaine, by their agent, attempted to obtain a payment on this account in September or October, 1858. They did not bring suit upon it then—they merely requested a payment upon it. In like manner they might have requested a payment upon a promissory note before its maturity. This scarcely tends to prove that the account was due at that time. Had it been due they would have commenced suit. At most, it is but slight evidence that the debt was then due; which is outweighed by the other evidence in the case, showing that the account was not due until the 1st day of January, succeeding. But if there was conflicting evidence, the court, which, by the agreement of the parties, was clothed with the power of a jury for this purpose, has determined it, and the judgment will not be disturbed, because it was against the weight of evidence

It is said that the damages are excessive. We find no evidence that this was made a ground for a new trial in the court below. If so, it is too late to make it in this court for the first time. Objections which could have been obviated by the opposite party, must have been taken in the court below, and the bill of exceptions must show affirmatively that the grounds of such objections were insisted on in the court below.

Harman vs. Thornton, 2 Scam., 353.
Gilham vs. State Bank, 2 Scam., 247.

If this objection had been made in the court below, it could have been obviated by a remittitur..

But the judgment is not for too great an amount. It is for precisely the amount proved. There is, however, in the account

proved, a charge for $5 26, as a balance of old account from a former year. We submit that there is sufficient evidence to warrant the court in finding that a credit on this was extended to January 1st, 1859. It was included in the account for that year, and all the evidence given was applicable to that item as a part of that account.

If, however, the damages are excessive, that excess is apparent on the face of the record, and this court will render judgment for the proper amount.

Prince vs. Lamb, Breese, 300.
Pearsons vs. Hamilton, 1 Scam., 417.
Guild et. al. vs. Johnson, 1 Scam., 405.
Pearsons vs. Bailey, 1 Scam., 507.

In this case, it is entirely immaterial whether credit was given upon the account proved, or not. The limitation of nine months is only given in favor of creditors, incumbrancers, or purchasers. Purple's Statute, 108, section 6.

Act of February 9th, 1855. Purple's Statute, 108.

As against the boat and its owners, the proceedings are authorized, and they cannot set up any limitation, except, under the general law of the State.

It is assigned for error that the court refused to permit the defendant to dismiss his appeal. The record shows that this motion was not made until after the finding of the court on the merits of the cause, and, also, after the defendant's motion for a new trial had been overruled. This motion came too late. A party plaintiff has not a right to take a voluntary nonsuit after the verdict has been rendered.

Locke vs. Wood, 16 Mass., 317
Taylor vs. Alexander, 6 Ham., 144.
Hendrick vs. Stewart, 1 Overt., 476.

The court will never grant the plaintiff leave to discontinue

after a general verdict. 1 Leon., 48. And see Haskell vs. Whitney, 12 Mass., 49, and note.

For the purpose of bringing the cause before the circuit court, the appellant may be regarded as the actor, but cannot be entitled to any more favorable consideration than a plaintiff in dismissing his matter in court. In any event, it was discretionary with the court to permit, or refuse the plaintiff to dismiss his appeal, and the exercise of that discretion is not subject to review in a court of errors.

The last argument of the appellees' is, that our laws for the collection of debts from boats and vessels is unconstitutional. The constitution of the United States, and the legislation of Congress, having exclusive jurisdiction in such cases, on the courts of the United States. There is no power vested in Congress to control the purely domestic concerns of the different States. The State of Illinois has still the power to provide the manner in which a debt may be collected from a ferry boat, or any other boat navigating the internal waters of the State. There is no conflict between our local laws, and the maratime jurisdiction of the United States.

MANNING & MERRIMAN,
Attorneys for Appellees.

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Steamer Delta

vs

Walker et al

Appellees Brief

Filed Apr 25, 1896

A. Helmcke

Clerk

ARGUMENT FOR APPELLEES.

State of Illinois, Supreme Court, 3d Grand Div.

APRIL TERM, A. D. 1860.

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MANNING & MERRIMAN,
Attorneys for Appellees.

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Steamer Delta

vs

Wadkins et al

Appeals Brief

Filed Apr 25, 1860
L Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT, } ss.

The People of the State of Illinois,

To the Sheriff of the County of Kankakee Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Kankakee County, before the Judge thereof, between William Godfrey

plaintiff, and Robert K. Brush & George H. Leyhearn

defendants, it is said that manifest error hath intervened, to the injury of the said Robert K. Brush

as we are informed by his complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said William Godfrey

that ~~he~~ he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April A.D. 1860 ~~next~~ to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William Godfrey

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 16th day of April in the Year of Our Lord One Thousand Eight Hundred and Sixty.

L. Leland

Clerk of the Supreme Court.

by J. B. Nicholson Deputy

162 Kankakee

Robert K. Brush
vs
Williams Godfrey

No. 162 vs.
Williams Godfrey

SCIRE FACIAS.

Filed April 30 A. D. 1860
L. Leland.
Clerk.

State of Illinois }
Kankakee County } ss.
I have Served this
writ by reading the same to the
within named William Godfrey
this 17th day of April 1860
H K Burbank Sheriff &c
Kankakee County
By James M Burgess Deputy

Service 60
Mileage 3.00
Ret 10
Postage 6
$3.76