

No. 13152

Supreme Court of Illinois

Steamer "Delta"

vs.

Walker & McI^{LV}~~lv~~aine

Steamer Delta

vs

Walker & McDrain

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 164.

Portland
Walker
vs
Delta

1315

1

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 Elisha N. Powell, judge of the 16th Judi-
cial circuit, in said state, John Pryner, Sheriff &
Enoch Sloan, Clerks.

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 ^{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 at-
tachment, ^{& 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 M. Ilvaine, part-
ners under the style of
Walker & Ilvaine
vs
Steamboat "Delta"

In attachment Demand \$15848.
Affidavit filed and attachment issued on the 15th
day of September A.D. 1859 returnable on the 23^d at 3
o'clock P.M. and returned by George W. Campbell, com

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

I, Bernard Bailey, one of the acting justices of the peace in and for said county do hereby certify that the foregoing 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]*

State of Illinois
Peoria county

Isaac Walker & George A. McIlvaine

Steamboat "Delta"

George A. McIlvaine, one of the above

} Before B. Bailey J.P.

}

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 & McElvaine 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 AD 1859 less than nine months previous to this date & further saith not.

Geo. W. McElvaine

Subscribed & Sworn to
before me Sept. 16th 1859

account

Steamer Delta & Owners, In acce with
Due Jan 1st 1859 Walker & McElvaine

1858		Amt bal old acce		5 26
Jan	19	To 3 pp Lacks	5	15
	30	" 3 " "	5	15
Feb	16	" 5 lbs Spikes	5	25
	22	" 1 handled axe		1 25
				<u>7 06</u>

	27	" 1/2 dz Tacks	50			
Mich	1	" 85 lb 1 1/8 x 3/8 Iron	5	4 25		
		" 63 " 1 1/2 " "	4	2 52		
		" 46 1/2 - 1 3/8 S Iron 3/2		2 55		
		" 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 lb 3/8 x 8 Iron	7 3/4	65		
	"	" 10 1/2 " 1/2 " R. "	7 1/4	76	1 41	
	12	" 114 lb Rope	16 c	18 24		
		" 55 " 3/8 R° S Iron	7 1/4	4 26		
		" 1 14 " B file		90		
		" 2 Scorp S	90	1 80		
		" 1 12 in G. file		40	25 60	
	13	" 1 5 in Tape file		15		
	"	" 1 Hatchet		75		
		" 20 lbs nails	5	1 00		
		" 3 canal lamps	100	3 00		
		" Pat cast covd.		25		
		" 1 Pulley		10		
		" 1 ball twine		30		
		" 10 lb spikes	5	50	6 15	
May	10	" 20 lb 6" nails	5	1 00	5 90	
		" 20 " 8 " "	5	1 00	2 00	
	13	" 20 " 8 " "	5		1 00	
	18	" 30 spikes	5		1 50	
	19	" 1 dz 14 oz tacks		55	62 20	

7.06
25

5-

	Bal on do		10	
	40 lb nails	5	2 00	
	77 lb $\frac{1}{2}$ in RD	5 $\frac{3}{4}$	4 43	
	67" $\frac{1}{2}$ "	3 $\frac{3}{4}$	2 51	9 55
20	1 Brush			20
21	$\frac{7}{12}$ dy Lath 400		2 34	
	1 Ev $\frac{1}{4}$ in. Screws		45	
	7 pr 3 in cut butts		56	
	9 Lath Strikes	8	72	
	84 lb $\frac{1}{4}$ + $\frac{3}{8}$ Penn 4 $\frac{1}{2}$		3 70	7 85
24	5 lb nails	5		25
25	77 " $\frac{1}{2}$ " RD Penn 5 $\frac{3}{4}$		4 40	
	2 pr. Butts 98	12 $\frac{1}{2}$	35	4 75
27	1 Ev. 1# 8 screws		35	
	20 lb nails	5	1 00	
	3 bed cords	45	1 35	
	2 sets Kps Spikes	2 25	4 50	
	2 " deat do. do.	1 75	3 50	
	4 lb wire	10	40	
	3 hales twine	30	90	
	$\frac{1}{2}$ cop wire	65	97	12 97
28	1 Ev. 1# 8 screws		35	
	1 lb Hook Penn &c		10	45
June 2	10 lb Spikes cut	10	1 00	
	5 " 10 lb nails		25	1 25
7	68 lb packing	16		10 88
18	1 Ev. $\frac{1}{2}$ # 12 screws		55	35
14	20 lb 8 ^d nails		1 00	
			111.03	

				11103
	20	20 "	5	100 200
	16	1 mounting wrench		115
	19	10 lb wt spikes 10		100
		5 lb 20 nails	5	25
		4 " 6 ⁰ "	5	20
	22	5 " 6 ⁰ "	5	25
		1 box 1 1/2 screws		55 80
	24	10 lb 8 ⁰ nails	5	30
	26	1/2 R.O. piles		40
July	6	2 pr tacks	5	10
		1 hammer	5	05 15
	10	10 lb 4 in wt spikes		100
		2 " 8 1/4 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	" 1 1/2 + 3/8 Iron 4 1/2		77 13 47
	21	10 lb lead	10	100
		5 1/4 " " pipe	20	95 1 95
	22	8 1/2 Rope	18	1 53
		1 Rule		25 1 78
	23	5 lb 3/4 washes 12 1/2		63
	24	1 Trowel		90
	26	13 1/2 3/4 Ben Iron 5		68
		1 Lamp		100
		1 do		90
		1 do		50 308
				141.84

7.

	29	6 1/4 lb rope	18			112
	30	10 " rot spikes	10			100
Aug	2	1 1/2 lb strap hinges		25		
		2 fire tongs	10	20		45
	12	8 1/2 lb rope	18	171		
		13" mauler	25	325		
		50 ft fence		25	521	
	21	1 Trowell		140		
		1 scork	2	80	220	
	23	25 lb wood spikes	10	250		
		10 lb nails		50	300	
	25	1 Auster			25	
	27	7 coil chain	12 1/2		88	
	30	1 saw (S & J)		250		
		10 lb spikes	5		50	300
					15846	
					14411	

Peoria, Sept. 13, 1859

Attachment Bond

Know all men by these presents that we Isaac Walker, George H. McIlvaine and J. Roblay 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 A.D. 1859.

The condition of the above obligation

is such that whereas the above bounden Isaac Walker & George M. McIlvaine have on the day and date hereof prayed an attachment to be issued at the suit of said Walker & McIlvaine against the steamboat "Delta" her rigging, engine, apparel & furniture for the sum of one hundred & fifty eight dollars and forty six cents and the same being about to be sued out returnable on the

day of September AD 1857 before Bernard Bailey J.P. Now if the said Walker & McIlvaine 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 & McIlvaine, 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 *Co.*

Geo. M. McIlvaine *Co.*

J. Holley Smith *Co.*

Attachment
Writ

State of Illinois }
Peoria County }³

The People of the State of Illinois to
Any Constable of said County - Greeting:-

9

Whereas, George McElvaine 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 McElvaine 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 & McElvaine 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 lawfully 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 J. Updyke to be and appear before me at my office in Peoria on the 22^d day of September 1859 at 3 o'clock P. M. then and there to answer whatever may be 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. C.D.

Return of
officer

I have served this writ by attaching the steamboat Delta and reading the same to Richard Updyke and Benj. Whittington this 15th day of Sept. 1859 ~ Geo. W. Campbell, Cust.
per ¹⁰⁰

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 McIlvaine 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 A.D. 1859.

The condition of the above obligation
is such, That whereas, the said Isaac Walker & George
McIlvaine pastners under the of Walker & Mc-
Ilvaine did on the eighth day of October 1859
before Bernard Bailly a justice of the peace
for the county of Perrie 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 Perrie 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 Bailly JP }

John Warner *Geo*

Henry Bain *Geo*

And afterwards to wit. on the day and date of the filing of the foregoing transcript and papers, there was issued from the clerk's 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 McElwaine, if they may be found in your County, to appear before an 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 an said court, to prosecute their suit against the Steam boat 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,

Seal

Witness, Enoch J. 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 J. Sloan, clerk
R.H.

which said summons was afterwards re-
turned into said clerk's 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

Per 120

per Esley dep't

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 A. Powell, judge
of the 16th judicial circuit in said state, John Bryner
sheriff, and Enos H. Pfloan, clerk, to-wit:-

Monday, December 5th 1859.

Isaac Walker vs

"

Appeal from JP

Steamboat Delta

Not. to dis'mis

+

overruled

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

13.

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

appeal from JP

Steamboat Delta

verdict
for
Plaintiffs

This day come the plaintiffs by
manning their attorney, and the defendant
by Wead 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 premi-
ses, do find for the plaintiffs and assess their
damages at the sum of one hundred and
fifty-eight dollars and forty six cents. There-
upon 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

appeal from JP

Steamboat Delta

Mot. for new trial
overruled

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

Judgment
for profits

the court that the said Isaac Walker and George
McElvaine have and recover of the said Steam-
boat 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 execu-
tion issue therefor against said Steamboat
Delta.

Saturday, January 7th AD 1860

Isaac Walker

George McElvaine

"

Appeal from JP

The Steamboat Delta

Appeal to

Sup. Court

This day came John Warner,
on behalf of said dependant, the Steam-
boat Delta, and prayed an appeal to the
Supreme court of this state, which is allow-
ed on his giving bond in four hundred
dollars, with security to be approved by the
clerk to be filed in twenty days. By agree-
ment 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:
Know all men by these presents that we John

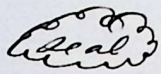
Appeal bond

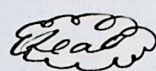
Warner as principal and
 as surety are held and firmly bound unto
 Isaac Walker and George H. McIlwaine
 in the penal sum of four hundred
 dollars for the payment of which
 well and truly to be made we bind
 ourselves ^{and our heirs jointly and severally} firmly by these presents.

The condition of the above obligation is
 such that whereas the said Walker & McIlwaine
 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 forty 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

16
this 13th day of January AD 1860.

John Warner 

A. Goodheart 

Approved by me Jan'y 16, 1860

E. Pfloam, clk

And afterwards to wit on the 16th day of February 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

14

Steamboat Delta

Bill of Exceptions

Bill of
Exceptions

Be it remembered that on the 23^d day of November AD 1859 the dependant 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

14

Steam Boat Delta

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

11

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 ~~price~~^{terms} upon which said goods were purchased - That it was usual with plaintiffs' house to allow accounts against Steamboats to run a year or 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 & defendant.

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 AD 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 steam boats on a year's 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 & McIlvaine	} In the Penia C. C.	
"		
Steam Boat Delta		
		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^d Because the court admitted improper evidence on the part of the plaintiff.

3^d Because the decision and judgment of the court is against the evidence

4th Because such decision is contrary to law

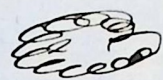
Whereupon the said defendant prays for a new trial

By Wm. J. G. Reed

his attorney

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

21,
of exceptions, may be signed sealed and en-
rolled, 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 McQuinn
are plaintiffs and Steam Boat Delta
is defendant, so far as the same
appears 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 & McIlwaine Appellees.

In the Supreme Court of
The State of Illinois. Of the
Third Grand Division To
the April Term 1860

And now comes the said Appellant;
and says: Because in the verdict and judg-
ment 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 re-
fusing 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 Con-
tract 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 \$143 11¹/₂

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

H. W. + J. J. Keed
Attorneys for Appellant

And the Appellate Court say there is no such error in said Record as appellant alleges & that the said Judgment ought to be affirmed
Manning & Drimmer
for Appellee

The Steam Boat "Delta" } In the Supreme Court
 vs Appeal from Peoria. } Third Grand Division
 Isaac Walker & } April A.D. 1860.
 George H. Williams }
 Appellants } Clerk of said Court
 will issue Sci Fa, against said Defen-
 dants directed to Sheriff of Peoria
 County Illinois returnable to the April
 Term of said Court A.D. 1860

A. M. & J. J. Mead
 Attorneys for Appellants

Mal Kent M. Williams

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Steam Boat Delta

Recapitulation & Assign-
 ment of Errors

Filed April 16. 1860
 L. L. Leonard
 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. Att. 667.
Howe vs Harwood 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.

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.

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

No 164 - 76
 Steamer Bella
 vs
Walker & McIlwaine

Brief of
Appellant.

Filed April 22. 1860
 L. Leland
 Clerk

Attorneys for Appellant
 H. M. & J. J. WEARD

Chief Justice of the United States
 Chief Justice of the United States

VII. The act authorizing the proceeding is unconstitutional and void, because

the Court exclusive jurisdiction in all admiralty proceedings.
 The Constitution of the United States has conferred upon the United States Dis-
 tinct Court of Admiralty and Maritime Jurisdiction in all cases.

The Court was not in the capacity of both Judge and Jury; and the motion for

leave to dismiss the appeal was in vain.

VI. The Court below should have allowed the defendant to dismiss his appeal.

\$118.11

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 \$10. The judgment is for too much, and should be corrected. The judgment is

and a judgment in favor of the plaintiff, and he will not be permitted to call to his

aid. The Court of payment of the account is evidence that the
 list of payments exceeding the time upon payment thereof had

been made from saying that the account did not become

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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, Plaintiff called *Robert D. McClure*, who testified that he was book-keeper in Plaintiff's
17 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 Defendant.

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.

164-75
Steamboat Delta

no

Walsh & Co

Elect & appt of
Wros.

Filed Apr 16. 1860

L. L. Ward
Black

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.

*County of Peoria
Act of April 1859
- amendment of J. H.*

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.

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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*.

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

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

No 164 96
Steamer Delta

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Walker & McIlhenny

Brief of
Appellants

Filed April 22, 1860
L. Leland
Clerk

ARGUMENT FOR APPELLEES.

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

APRIL TERM, A. D. 1860.

The Steamer Delta,
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vs.
Walker & McIlvaine,
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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 jurisdiction.

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.

*had no record
for a long time*

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 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.
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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.

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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.

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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 maritime jurisdiction of the United States.

MANNING & MERRUMAN,
Attorneys for Appellees.

164-96

Steamer Delta

vs

Orvalho et al

Apoplexy Brief

Filed Apr 25, 1860

A. Deland
Clerk

ARGUMENT FOR APPELLEES.

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

APRIL TERM, A. D. 1860.

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vs.
Walker & McIlvaine,
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MANNING & MERRIMAN,
Attorneys for Appellees.

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Steamer Delta

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Apples Brief

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S. Deland
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