

No. 12909

Supreme Court of Illinois

Springer

vs.

Bontcam et al

71641  7

Wilmington April 21st/89
L. Island Egg
Iowa Ill

Dr Sir

Enclosed please
find Record in appeal. I. E. Springer
as Bouten & Cary. also 5¢ Docket fee
Our Mr Williams will be in your Court
on 1st next week. we send by Express
Yrs truly

Williams & Packard

State of Illinois }
v } In the Supreme Court
April Term AD 1859
Joseph E. Sprunger }
vs } Appeal from
Boutwell & Cary } M. Term —

It is hereby agreed
that the record in the above cause
was not delivered to the counsel for
the Appellant until after 12 o'clock
P.M. - on Thursday the 21st day of
April AD 1859 - and that the train
by which the record was sent
by express left Bloomington
at 4 o'clock and 45 minutes P.M.
of the same day.

It is further agreed that the Appellant
need not print the abstract of
said record ^{and assignment of errors} until the motion to
docket - said cause shall have been
disposed of - and if said ^{cause} is
permitted to be docketed then
we agree, that the said Appellant -
shall have a reasonable time
to file his abstract, and assign
errors -

Hanna Scott
for Appellees -
Williams & Packard
counsel for Appellant

State of Illinois } In the Circuit Court of said County
McLean County } September Term A.D. 1858

Agreement

between
Sims

and
Bourne

3,03
Spring

by

Robinson

+ Gray

Shubert

Filed May 4, 1859

at Deland
Fla

1
Pleas continued and held at the Court House in Bloomington
in the County of McLean. in the Eighth Judicial Circuit of
the State of Illinois before the Hon. David Davis. Judge of said
Court. in a action therein pending. wherein Joseph E. Springer
was plaintiff and Charles Boutcam and Paul Carrey were
Defendants.

Joseph E. Springer

vs

Charles Boutcam & Paul Carrey

In Covenant

Be it remembered that heretofore
to wit. on the 21st day of August. A.D. 1857. came said plaintiff
by Williams & Packard his attorneys and filed in the office of
the Clerk of the Circuit Court of McLean County in the State of
Illinois a Declaration. which said Declaration was in words and
figures as follows to wit.

(1)

State of Illinois. 3 Circuit Court.
McLean County. 3 ^{3rd} Sect. To the Sept. Term. 1857.

Charles Boutcam and Paul Carrey
partners in trade & distillers doing business under the name
style & firm of ^{Boutcam} & Carrey the defendants in this suit were
summoned to answer unto Joseph E. Springer the plaintiff
herein in a plea & Covenant.

And hereupon the plaintiff
by Holmes Williams & Packard his attorneys complains
that whereas heretofore to wit: on the fifth day of May A.D.
Eighteen Hundred and fifty seven at the County aforesaid

the plaintiff on the one part, and the defendants on the other part. under the name & style of Pontcam & Carrey, made a certain article of agreement in writing sealed with the seal of the plaintiff on the one part, and by the seal of the defendants under the said name & style of Pontcam & Carrey on the other part (which article of agreement, sealed with the seal of the plaintiff on the one part, and the seal of the defendants on the other part the plaintiff now brings here into Court,) which article of agreement is in the words & figures following, to wit:

(2) These Articles of Agreement made and entered into on the 5th day of May Eighteen Hundred and fifty seven. Between Pontcam & Carrey of Harnesville on the river Maackinaw in the County of Woodford and State of Illinois of the first part and Joseph C. Springer of the County of McLean and State of Illinois of the second part. Witnesseth that the said party of the first part for and in consideration of the covenants and agreements hereinafter set forth and to be performed by the said party of the second part have leased, rented and sold and by these presents do lease rent and sell unto the said party of the second part or his legal representatives for the term of two years after the Fifteenth of June next all the slop, or residue of the grain after having undergone the process of distillation made and to be made at their distillery situated in Harnesville aforesaid reserving only ten bushels of slop per day for their use. The said party of the first part contract and agree that they will not diminish the size of their house, viz: between two and three hundred bushels of grain per day, and furnish the slop or residue thereof to the said party of the second part. The said party of the first part further

contracts and agrees that they will ready and in good order for the said party of the second part good and sufficient Pens for twelve hundred hogs. The said party of the first part further agrees to have ready and in good order, Tubs sufficient to contain the slop of about Eight hundred Bushels of grain, the slop of a bushel of grain being about forty gallons. In case of unavoidable accidents to the machinery or otherwise to the distillery so as to prevent the running of the same the party of the second part will have no indemnity, what it may be, to ask from the party of the first part for the loss sustained. But should the necessary repairing require and occupy more than eight days. Then the party of the first part will sell to the party of the second part all the corn meal they have on hand at the market price of corn in this place, and the party of the second part for and in Consideration of the covenants and agreements hereinbefore set forth and to be performed by the party of the first part covenants and agrees to and with the said party of the first part their heirs executors and administrators that he will pay or cause to be paid to the said party of the first part for the slop and privileges hereinbefore set forth, at the rate of twenty cents per head per month for all the hogs to feed and kept of said distillery. The amount of hogs not to be less than one thousand. The first payment to be made on the first of October Eighteen Hundred and fifty eight, and the subsequent before any hogs are taken away.

(3)
In testimony whereof the said parties of the first part and second part have hereto set their hands and affixed their seals on the day and year first

the plaintiff on the one part, and the defendants on the other part. under the name & style of Pontcau & Carrey, made a certain article of agreement in writing sealed with the seal of the plaintiff on the one part, and by the seal of the defendants under the said name & style of Pontcau & Carrey on the other part (which article of agreement, sealed with the seal of the plaintiff on the one part, and the seal of the defendants on the other part the plaintiff now brings here into Court,) which article of agreement is in the words & figures following, to wit:

(2) These Articles of Agreement made and entered into on the 5th day of May Eighteen Hundred and fifty seven. Between Pontcau & Carrey of Harnesville on the river Maackinaw in the County of Woodford and State of Illinois of the first part and Joseph C. Springer of the County of McLean and State of Illinois of the second part. Witnesseth that the said party of the first part for and in consideration of the covenants and agreements hereinafter set forth and to be performed by the said party of the second part have leased, rented and sold and by these presents do lease rent and sell unto the said party of the second part or his legal representatives for the term of two years after the Fifteenth of June next all the slop, or residue of the grain, after having undergone the process of distillation made and to be made at their distillery situated in Harnesville aforesaid reserving only ten bushels of slop per day for their use. The said party of the first part contract and agree that they will not diminish the size of their house, viz: between two and three hundred bushels of grain per day, and furnish the slop or residue thereof to the said party of the second part. The said party of the first part further

(b-)

have refused. and still do refuse to furnish and deliver any clap whatever at their distillery aforesaid or otherwise howsoever, by means whereof the plaintiff has been prevented during all that time from all the profit benefit and advantage that might & would have arisen from the fattening & keeping divers to wit: Two Thousand Hogs for each and every space of three months during the time of two years aforesaid and also from all and any future profits and advantages which he might & would have received from said contract and the covenants aforesaid. and plaintiff avers that said clap would have been worth to him during said period of two years a large sum. to wit: The sum of eighty cents per month per hog so fattened, to wit. at the County of Woodford aforesaid.

And whereas also afterwards to wit on the 5th day of May AD 1857 to wit at the Circuit & County aforesaid, the defendants who were then and there partners under the name style & firm of Pontreum & Carrey. in and by a certain writing obligatory sealed with the seals of the said defendants and executed by the said defendants by their copartnership name of Pontreum & Carrey on the one part and by the plaintiff on the other part by the name of J E Springer sealed with his seal the date of which is on the same day and year last aforesaid which writing obligatory sealed with the seals of the said defendants and the said plaintiff. the plaintiff brings here into Court. The said defendants among other things did covenant to and with the Plaintiff that in consideration of the covenants and agreements hereinafter set forth that the defendants had leased, rented

and sold, and by said presents did lease, rent and sell unto
the said plaintiff or his legal representatives for the term of two
years after the Fifteenth day of June then next ensuing, all the
slop, or residue of the grain, after having undergone the process
of distillation made & to be made at their distillery situated in
Farmersville (meaning Farmersville in Woodford County Illinois) reser-
ving only ten bushels of slop per day for their (own) use: and the
defendants further covenanted in said writing obligatory that they
would not diminish the size of their house (meaning thereby
the size & capacity of their distillery) to mix between two and
three hundred bushels of grain per day, and that they would
furnish the slop or residue thereof to the plaintiff, and
the plaintiff on his part in and by said writing obligatory
did covenant to and with the defendants their heirs &c. that
he would pay or cause to be paid to the said defendants
for the slop and privileges in said writing obligatory mentioned
at the rate of twenty cents per head per month for all the hogs
fed & kept (on said slop meaning) at said distillery. The amount
of hogs not to be less than one thousand, the first payment
to be made on the first day of October Eighteen Hundred
and fifty eight and the subsequent (payments meaning) before
any hogs should be taken away. And the plaintiff avers
that from the said fifteenth day of June 1857 and until the
commencement of this suit that the defendants although they
were all that time running their said distillery and making
over and above ten bushels per day enough slop to feed a large
number to mix, two thousand hogs, and although the plaintiff
during all that time was ready and willing to pay and
still is ready and willing to pay the defendants as per said

(6)

(7)

agreement required for the feed of divers to wit: Two thousand hogs at the rate of twenty cents per hog per month for the crop or the residue aforesaid. Yet the defendants during all that time aforesaid did refuse and still do wholly refuse to furnish and deliver to the plaintiff any crop whatever to wit: at the distillery aforesaid, or otherwise howsoever, and plaintiff avers that said crop would have been reasonably worth to him eighty cents per month per hog during the whole of said two years at the distillery to wit at the county of Woodford aforesaid by means whereof the plaintiff has been deprived from and has lost all the profits and advantages which he otherwise might & would have derived from the use of the crop or residue aforesaid, and also the plaintiff will be deprived from all future benefit & advantage which he might & would otherwise derive from the covenants aforesaid which said profits plaintiff avers would have been a large sum to wit 60 cents per month per hog on a large number to wit Two thousand hogs to wit at the county of Woodford aforesaid. And whereas also heretofore to wit on the fifth day of May A.D. 1857 to wit at the Circuit & County aforesaid the defendants who were then and there partners under the name of Pontcam & Carney by a certain other writing obligatory signed by their partnership name of Pontcam & Carney & sealed with the seal of the said defendants on the one part and signed by the plaintiff on the other part by the name of J. E. Springer & sealed with his seal on the other part the date of which is the day and year last aforesaid (which ^{writing} obligatory executed as aforesaid & sealed with the seal of the said defendants on the one part and with the seal of the plaintiff on the other part the plaintiff brings here into Court)

did among other things covenant and agree to and with
the plaintiff that they the defendants had leased rented
sold and by said presents did lease rent and sell unto
the said plaintiff or his legal representative for the term of
two years after the fifteenth day of June then next ensuing
all of the slop or residue of the grain after having undergone
the process of distillation made & to be made at their distillery
situated in Farnesville (meaning Farnesville Woodford
County Illinois) reserving only ten bushels of slop per day
for their use and the defendants further covenanted and
agreed herein that they would not diminish the size of their
house (meaning the size & capacity of their distillery) to wit:
between two and three hundred bushels of grain per day
and that they would furnish the slop or residue thereof from
that quantity of grain per day to the plaintiff for the
period of two years from the said fifteenth day of June
1857 and the plaintiff on his part in and by said writing
obligatory covenanted and agreed to with the defendants
in consideration of the premises that he would pay or cause
to be paid to the defendants for the slop & privileges
secured to him in & by the said writing obligatory at the
rate of twenty cents per head per month for all the hogs
fed & kept on the said slop by him at said distillery
the amount of hogs to be kept by him not to be less
than one thousand during the said period of two years
the first payment to be made on the first day of October
Eighteen Hundred and fifty Eight and the subsequent
payments to be made before any of the hogs so kept by
him should be taken away. And the plaintiff avers

(9) That from and after the said fifteenth day of June 1857 and all of the time until the commencement of his suit the plaintiff has been ready and willing to furnish divers to wit; Two Thousand Hogs and enough to eat up & consume all of the slop or residue made at said distillery and he is still ready and willing to furnish divers to wit; Two Thousand Hogs enough to eat up & consume all the slop or residue which will be made at said distillery during the whole period of two years from and after the said fifteenth day of June A.D. Eighteen Hundred and fifty seven, to wit at the county of Woodford aforesaid and plaintiff avers that the slop made and to be made at said distillery over and above ten bushels per day would feed & fatten sufficient for market a large number to wit Two Thousand hogs for each and every three months during the said period of two years aforesaid to wit at the county of Woodford aforesaid and plaintiff further avers that since the fifteenth day of June 1857 aforesaid he ever has been and still is willing & ready to pay for all such hogs so fed & fattened on said slop or residue or to be fed, at the rate of twenty cents per head per month as by his covenants aforesaid he is and was bound to do.

Yet the defendants have on their part broken their covenants & agreements and have and have wholly neglected & refused to deliver to plaintiff any slop or residue whatever & still do so neglect & refuse and they further give out & refuse to deliver in future any slop or residue according to the terms of their said covenant & agreement by means whereof the plaintiff has lost

all benefit advantage & profit which he otherwise might
would have made received from the use of said slop for
the feeding and fattening of swine to wit two hogs and
hogs from the said fifteenth day of June 1857 until
the commencement of his suit, and the plaintiff will
in future and during the whole period unexpired of
said two years be deprived of whatever benefit profit and
advantage would have accrued to him from the keeping
& fattening of hogs sufficient to consume the slop to be
made at said distillery at the rate of between two & three
hundred bushels of grain per day to be so distilled for
the said unexpired term of two years aforesaid and plaintiff
avows that said profit would have been 60 cents per month
per hog on ^{two} thousand hogs for the said period of two years
to wit: at the County of Woodford aforesaid,

(10)

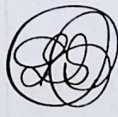
And
the plaintiff saith that by reason of the premises and breach
of covenant aforesaid he is injured and hath sustained
damage in the sum of thirty thousand dollars and there-
fore he brings his suit &c.

Holmes, Williams & Packard-
Plffs. attys.,

And hereupon issued out of said Clerk's office a
writ of Summons which said summons was in words
and figures as follows to wit:

State of Illinois
W' Leeu County }
The People of the State of Illinois
To the Sheriff of Woodford county Greeting: We

Command you to summon Charles Pontearn and Paul Carrey if found in your county personally to appear before the Circuit Court of said County on the first day of the next term hereof to be holden at the Court House in Bloomington on the first Monday in the month of September next to answer unto Joseph Springer in a plea of Covenant to his damage Thirty ¹⁰⁰ thousand dollars as he says and have you then and there his writ and make return thereon in what manner you execute the same.

(11)  Witness Wm McCullough, Clerk of the said Circuit Court and the seal hereof hereto affixed at Bloomington this 21st day of August AD 1857
Wm McCullough Clerk
By H. Barr. Dpty.

Which said Summons was by the Sheriff of said County of Woodford returned into said Clerk's office endorsed as follows, to wit:

Executed the within Summons on 24th day of August 1857 on within named defendants Charles Pontearn and Paul Carrey by reading the same to each of them -
A Minor

Sheriff of Woodford Co.
State of Illinois. U.S.A.

And afterwards at the September term of said Court to wit on the 9th day of September AD 1857

certain proceedings were had in this cause as appears
of record to wit;

Joseph E Springer

^{vs.}
Charles Pontcamp & Paul Carrey.

~~~~~ In Covenant.

(12) This day came  
said Defendants by their Attorneys and move the Court  
here for rule on said Plaintiff to file security for costs  
herein, and the Court having duly considered said  
motion, and being fully advised in the premises doth  
overrule the motion aforesaid, and on motion said  
Defendants are by the Court ruled to plead to said  
Plaintiff Declaration filed herein by Friday next or  
Judgment will be rendered against them by default.

And afterwards, at the December Term of said Court  
to wit on the 23<sup>d</sup> day of December A.D. 1857 further  
proceedings were had herein as appears of record to wit:

Wednesday, December 23<sup>d</sup> 1857.

Joseph E Springer

<sup>vs.</sup>  
Charles Pontcamp & Paul Carrey.

~~~~~ In Covenant,

This day came said
Defendants by their Attorneys and withdraw their
demurrer to said Plaintiff's Declaration and file herein
their plea and notice. And said Defendants by their
Attorneys move the Court to continue this cause and file
herein their affidavit in this behalf, and the Court

Being fully advised in the premises doth overrule the motion aforesaid, Thereupon on motion of said Defendants, it is ordered by the Court that an attachment issue herein for Frederick Henricks and Justin May, returnable forthwith to compel their attendance as witnesses in this cause, they having been duly summonsed.

Which said plea and notice filed herein by said Defendants were in words and figures as follows to wit:

(13) Joseph E Springer.
vs.
Charles Pontam & Paul Barry.

"Accompit."

And the said defendants comes and defend the wrong & injury when &c. and say action now. because they say that they did not promise in manner & form as the said plaintiff hath above alleged against them & of this they put themselves upon the Country -

Hanna Scott.

for Defts -

The said Plaintiff will take notice that under the above plea the defendant will show & insist that said supposed work & labor & materials furnished for the same in the said declaration mentioned, if any such work was done, or materials furnished that the same was done or furnished under a special Contract under seal of said plaintiff & defts, which said contract is hereto attached & made part of the notice as follows,

(14)

These articles of agreement made and entered into the Fifth day of May in the year AD Eighteen Hundred and fifty seven. Between, Pontcamp Carrey of Farneysville on the river Meachinaw in the County of Woodford and State of Illinois of the first part and Joseph Springer of the County of McLean and State of Illinois of the second part. Witnesseth that the said party of the first part for and in consideration of the covenants and agreements hereinafter set forth and to be performed by the said party of the second part have leased, rented sold and by this presents do lease rent and sell unto the said party of the second part or his legal representative for the term of two years after the Fifteenth of June next all of the slop or residue of the grain after having undergone the process of distillation made and to be made at their distillery situated in Farneysville aforesaid reserving only ten bushels of slop per day for their use. The said party of the first part contract and agree that they will not diminish the size of their house, viz: between two or three hundred bushels of grain per day and furnish the slop or residue thereof to the said party of the second part. The said party of the first part further contract and agree that they will have ready and in good order for the said party of the second part good and sufficient pens for Twelve Hundred Dogs. The said party of the first part further agree to have ready and in good order also sufficient to contain the slop of about eight hundred bushels of grain (the slop of a bushel of grain being about forty gallons) In case of unavoidable accidents to the machinery

or otherwise in the distillery so as to prevent the running of
the same the party of the second part or his legal representative
will have no indemnity what it may be to ask from the
party of the first part for the loss sustained -

(15). Ont
should the necessary repairing require and occupy more
than eight days then the party of the first part will sell
to the party of the second part all the corn meal they have
on hand at the market price of corn in his place and the
party of the second part for and in consideration of
the covenants and agreements hereinbefore set forth and
to be performed by the party of the first part covenants
and agrees to and with the said party of the first part
their heirs executors and administrators that he will pay
or cause to be paid to the said party of the first part
for the slop and privileges hereinbefore set forth at the
rate of twenty cents per head per month for all the hogs
to feed and keep at said distillery. The amount to be
not less than one thousand. The first payment to be made
on the first of October Eighteen Hundred and fifty Eight
and the subsequent before any hogs are taken away.

In testimony whereof the said parties of the first
part and second part have hereunto set their hands and
affixed their seals on the day and year first above
written -

Pontam Carney (seal)
J. E. Springer (seal)

The party of the first part to the within contract

agrees in addition to the within agreement that in case
the party of the second part shall wish to feed cattle inste-
ad - of hogs, he may have the privilege of so doing by pay-
ing for them at the same rate in proportion to the amount
consumed by hogs the change of pens if any at the expenses
of the second party.

Pontam & Carney. (seal)
J E Springer. (seal)

(16)
These Articles of Agreement made and entered into
on the Fifth day of May Eighteen Hundred and fifty
seven Between Joseph E Springer of the county of
McLean and State of Illinois of the first part and Pontam
& Carney of Farneyville on the river Machinon in the County
of Woodford and State of Illinois of the second part
Witnesseth

That the said party of the first part agrees
to build and to deliver ready and in good order for the
Fifteenth of June next to the party of the second part
sixteen hog pens large enough to contain Twelve thousand
hogs. The said pens to be made on the North West side of
the distillery of Pontam & Carney Farneyville Illinois
at the place the party of the second part will specify.
The pens to be made according to the plan here annexed
and of the material specified in the said plan, and
the said party of the second part for and in considera-
tion of the agreement herein before set forth will pay or
cause to be paid to the party of the first part Two
Thousand Dollars Worth of Slop according to the

5
agreement made this same day between Pontcom & Carrey of one part and Joseph E Springer of the other for the use of the clasp of the distillery of the second party. In case the pens should not be ready and in good order for the Fifteenth of June next the party of the first shall have to support all the damages and cost resulting from the delay.

In testimony whereof the said parties of the first and second part have hereunto set their hands and affixed their seals on the day and year first above written.

Pontcom & Carrey (S)
J E Springer (S)

(17). That after the 15th day of June 1857 to wit on the 9th day of July 1857 and long after the time for the fulfillment of said contract had expired the said plaintiff had having complied with said contract on his part in this to wit: said plaintiff did not have said one thousand Hogs at the distillery of said defendants at Fairview in Woodford county on the fifteenth of June or any other number of Hogs at that time nor at anytime after that time and did not build and deliver to said defendants in good order sixteen hoppers by the 15th day of June 1857 at the distillery of said defendants aforesaid or any other number of Hoppers on that day nor at any other time and that in consequence of said default of said plaintiff as aforesaid said defendants put an end to said contract as they had a

rights to do, and that they said defendants did not
nor have accepted any of said lumber or materials
or work, or promise or agree to pay for the same or
any part thereof-

And afterwards at said December
term of said Court on the 9th day of January AD 1858
the following order was made in this cause as appears
of record to wit:

Joseph E Springer
vs
Pontam & Carrey. In Covenant.

(18) This day comes said plain-
tiff by his attorney and excepts to the sufficiency
of the notice filed herein by said defendants which excep-
tions being heard by the Court are overruled.

And
thereupon at said December term to wit on the 14th day
of January 1858 the following proceedings were had herein
as appears of record to wit:

Joseph E Springer
vs
Charles Pontam & Paul Carrey. In Covenant.

This day comes said
parties by their attorneys and this cause coming on for
trial thereupon comes a jury twelve good and lawful
men to wit: Perry Hollis. Alexander Fleming. Green

(20)

White, Milton Smith. Washington Henry & Aaron Van. Oster. who being duly tried, elected and sworn to well and truly try his cause and a true verdict render according to the evidence, and having heard the evidence produced and the arguments of Counsel. and the instructions of Court retire to consider of this verdict and again coming into Court upon their oaths do say they find the issue for the Defendants, and now comes said plaintiff by his attorney and moves the Court to set aside the verdict of the Jury aforesaid and to grant a new trial in this cause which motion being heard by the Court is overruled, and thereupon it is ordered by the Court that said Defendants be hereof discharged and that they recover of said Plaintiff their costs herein expended and that they have execution therefor. And now comes said plaintiff and prays an appeal to the Supreme Court of this State which is granted upon condition that within sixty days from this date he file a bond in the penal sum of Four Hundred Dollars conditioned as the law directs with security to be approved by the Clerk of this Court.

And thereupon at said March term to wit on the 8th day of April in the year last aforesaid came said Plaintiff by his attorney and filed herein his Bill of Exceptions to the ruling of the Court in this cause and ask that the same may be signed sealed and made part of this record, which is done, and said Bill of Exceptions

is in words and figures as follows to wit:

Joseph E. Springer.

Charles Pontcam^{2d} and
Paul Carney.

In Covenant.

Be it remembered that on the trial of this cause the plaintiff offered to read in evidence on the first count a written instrument in words and figures following to wit:

(21) These articles of agreement made and entered into this Fifth day of May Eighteen Hundred and fifty seven Between Pontcam & Carney of Farnesville on the river Mackinaw in the County of Woodford State of Illinois of the first part and Joseph E. Springer of the County of McLean and State of Illinois of the second part Witnesseth that the said party of the first part for and in consideration of the covenants and agreements hereinafter set forth and to be performed by the said party of the second part have leased rented and sold and by their presents do lease rent and sell unto the said party of the second part or his legal representatives for the term of two years after the Fifteenth of June next all the crop or residue of the grain after having undergone the process of distillation made & to be made at their distillery situated in Farnesville aforesaid reserving only two bushels of crop per day for their own use. The said party of the first part contract and agree that they will not diminish the size of their horse rig between two three hundred bushels of grain per day furnish the crop or residue

thereof to the said party of the second part. The said party of the first part further contracts and agrees that they will have ready and in good order for the said party of the second part good and sufficient Pens for Twelve Hundred Hogs. The said party of the first part further agrees to have ready and in good order Stubs sufficient to contain the slop of about Eight Hundred bushels of grain. The slop of a bushel of grain being about forty gallons. In case of unavoidable accidents to the machinery or otherwise to the distillery so as to prevent the running of the same the party of the second part or his legal representative will have no indemnity what it may be to ask from the party of the first part for the loss sustained.

(22)

But should the necessary repairing require and occupy more than eight days then the party of the first part will sell to the party of the second part all the corn meal they have on hand at the market price of corn in this place. and the party of the second part for and in consideration of the covenants and agreements hereinbefore set forth and to be performed by the party of the first part covenants and agree to and with the said party of the first part their heirs executor and administrators that he will pay or cause to be paid to the said party of the first part for the slop and privileges hereinbefore set forth at the rate of twenty cents per head per month for all the hogs to feed and kept at said distillery. The amount of hogs not to be less than one thousand. The first payment to be made on the first day of October Eighteen Hundred and fifty eight and the subsequent before any

(23)

Hogs are taken away.

In testimony whereof the said parties of the first part and second part have hereunto set their hands and affixed their seals on the day and year first above written -

Pontcam Carney. (Seal)
J E Springer. (Seal)

(23) The party of the first part to the written contract agrees in addition to the within agreements that in case the party of the second part shall wish to feed cattle instead of Hogs they may have the privilege of so doing by paying for them at the same rate in proportion to amount consumed by Hogs. the charge of pens if any at the expense of the second party.

Pontcam Carney (Seal)
J E Springer (Seal)

Which was objected to by the defendants on the ground of variance: the objection was sustained by the Court and to which ruling of the Court the plaintiff then and there excepted. The plaintiff offered to read in evidence, on the second and third counts the same instrument aforesaid which was objected to by the defendants on the alleged ground that it apparently been mutilated and thereupon a second instrument was produced in words & figures following.

These articles of agreement made and entered into on the 5th day of May Eighteen Hundred and fifty seven. Between Joseph E.

(21)

Springer of the County of McLean and State of Illinois of
the first part and Pontcam Carney of Fairburyville on the
river Mackinow in the County of Woodford and State of
Illinois. that the said party of the first part agrees to
build and to deliver ready and in good order for the fifteenth
of June next to the party of the second part sixteen hog
pens large enough to contain Twelve Hundred Hogs, the
said pens to be made on the North West side of the distillery
of Pontcam Carney Fairburyville Illinois at the place the
party of the second part will specify. The said pens to be
made according to the plan here annexed and of the materials
specified in the said plan. and the party of the second part
for and in consideration of the agreement hereinbefore
set forth will pay or cause to be paid to the said party
of the first part Two Thousand Dollars worth of slop
according to the agreement made this same day between
Pontcam Carney of one part and Joseph E Springer
of the other for the use of the slop of the distillery of the
second party.

In case the pens should not be ready and
in good order for the fifteenth of June next the party of
the first part shall have to support all the damages and
loss resulting from the delay.

In testimony whereof the said
parties of the first and second part have hereto set
their hands and seals on the day and year first above
written

Pontcam Carney. (seal)
J E Springer. (seal)

7.
Schedule of plan of the hog pens to be built by J. E. Springer
for Pontcamp & Carrey according to the agreement of the
Fifth of May 1857 Between J. E. Springer of one part and
Pontcamp & Carrey of the other -

Specification.

(22-) Eight pens twenty
five feet wide sixty feet long, each of them divided in two
by a partition, every pen will be five feet high, the siding
one inch thick of oak or pine every three feet a shed, a sill
six inches by six inches shall be all around the pen, the flooring
of oak one & a half inch thick will be upon scantens of oak
four inches by four & two feet apart. The partition shall be
four feet high of oak or pine. in the center of the trough with
studs every three feet. The roof shall be made with planks
the rafters fourteen feet long shall be two feet apart. they
shall be two inches by four. there shall be a door to every
partition. the trough which goes through every pen shall
be oak two inches thick. it shall be two feet wide at the
top, under this trough shall be a ditch in the ground two
feet wide & two feet deep planked with oak two inches
thick. a leading trough made of one and a half inch
plank shall be made in such way that it will deliver the
slop equally in the trough of every pen. a fence of fencing
board shall be made to constitute an alley to drive
the hogs in the pens.

This Fifth day of May 1857.

J. E. Springer (seal)
Pontcamp & Carrey (seal)

(26)

And it was agreed by the parties that both instruments at the time of their execution were upon the same piece of paper & written on the same day. The Court overruled the objection and admitted the first instrument in evidence on the second and third Counts. and it was read to the Jury. The Plaintiff proved that on some day along from the latter day of June up to the 15th day of July 1857 he called on the defendants at the distillery and demanded that they the defendants should commence delivering the slop, that the defendants refused on the alleged grounds that the plaintiff had not finished the hog pens, nor had any hogs on the ground to feed the slop to, that to this the plaintiff replied that defendants had a few days before stopped plaintiffs hands from working on the hog pens. that defendants had not the slop tubs ready, that the plaintiff then had, six or seven hundred hogs ready to bring and that defendants were bound to deliver the slop, and the the plaintiff to pay for it whether there were any hogs there or not; and the plaintiff proved that he had advanced somewhat with the hog pens and that the defendant stopped his hands, though it appears that the hands were not stopped until after the 15th day of June 1857. one of the hands saying it was about the 9th day of July. Plaintiff also proved that at the time of the demand of the slop aforesaid the defendants told the plaintiff to leave never come on the premises again. The plaintiff also gave evidence tending to prove that at the time of said demand said defendants had not sufficient tubs ready. At the request of the parties to fix a construction

of the instruments in writing aforesaid the Court wrote
only the following to wit:

Joseph E Springer
20.
Counsel & Attorney.

(27) The Court is of opinion that the two writings being made by the same parties on the same subject matter, at the same time and written on the same paper, are in a certain sense one entire contract, but that in as much as nothing in the one nullifies or modifies the one declared on in any part brought in question in the suit the one declared on will not be excluded in evidence because the other part has been separated from it.

The Court is of opinion that the making of the pens by the plaintiff was not a condition precedent to the delivery of the slop by the defendants, that the making of the pens was a condition precedent to them being paid for and to nothing else. The Court is of opinion that by the contract the plaintiff was to have upon the ground ready to eat the slop at least one thousand hogs on the 15th day of June 1857 that on the same day the defendants were to be ready with sufficient tubs and begin delivering slop daily the slop of two or three hundred bushels of grain, and that their obligation of the parties respectively are mutual and defendants and that neither can have an action against the other for not performing, without showing that he has fully performed on his own part or was ready & offered to perform or has been

hindered from doing so by the ^{other} party. To State it in another way the plaintiff might have an action without bringing the hogs on the 15th if he had been previously notified by the defendants that the slop would not be delivered if the hogs were brought. that by the just construction of the contract the hogs were security for the price of the slop that for this reason the defendants were not bound to deliver any of the slop until at least a thousand hogs were on the ground, and that if without fault on the part of defendants the thousand hogs were not there on the 15th this action cannot be maintained -

(28) On the contrary if the defendant did not on the day begin delivering the slop and was not ready to do on request and the thousand hogs were actually there, or the plaintiff had by the defendants been hindered from bringing them then the plaintiff can maintain the action.

To which construction the plaintiff then and there excepted -

The Plaintiff then offered to prove that on the 15th day of June up to the day of the demand aforesaid & at other days & times up to that day & afterwards the defendants had not the slop on hand and were in fact unable to deliver it the distillery then being stopped for repairs to which the defendants objected on the ground that the evidence was not admissible under the declaration in the case which objection was sustained by the Court and to which ruling of the Court the plaintiff then & there excepted -

The Plaintiff then offered to read the 2^d Contract above mentioned with the object of showing that if by the first contract the delivery of the hogs was to be a security for the delivery of the slops that part of the first part was so modified by the 2nd that the building of the pens to the extent of the contract price was to be a security for the delivery of the slops instead of the security furnished by the hogs.

The Court held that the first instrument was not so modified by the second and refused to admit the second in evidence for that object to which ruling of the Court the plaintiff then & there excepted. The plaintiff also gave evidence by the deposition of J. M. Boncher.

Interrogatory 1st.

Was you in the employ of Joseph E. Springer (the plaintiff in this case) between the first and fifteenth days of July last?

Answer - I was -

2nd What was your business while in his employ? answered My business was collecting and driving hogs. we collected hogs at various places in the South and eastern part of Lapeer County.

3^d How many hogs did you help collect for the said Springer.

Ans. Between six and seven hundred.

4th Do you know what Springer did with his hogs.
Ans. Yes he sold them to a man from Peoria, who

met us at Delarain. for five dollars per cwt.
and further the depoments saith nat;

J. M. Poncher.

(30)

Tending to prove that at the time of the demand aforesaid he in fact had six or seven hundred hogs of his own ready to bring which he had provided for that object and one hundred and thirty to be put in by others under the contract. He also offered to prove that there was other hogs on the county which he was able to get and probably would have gotten which evidence was objected to by the defendants and excluded by the Court on the ground of irrelevance and to which the plaintiff then and there excepted. The Plaintiff also proved that in summer time hogs could be fed on slop without loss or inconvenience without the pens and that he had made some preparation for so feeding. He also proved that at the time of the demand aforesaid and thereabouts the slop or feed for hogs was worth much more than the contract price in this cause.

The Defendants gave evidence tending to prove that they had sufficient of huts ready or in such state of forwardness as to be easily set up in very little time. The defendants also gave in evidence the second instrument above mentioned no evidence was given by the plaintiff ever bringing any hogs to the distillery or ever calling for the slop at any other time than as above stated. The foregoing is not all the evidence but it is deemed sufficient to present all the questions intended to be presented.

The Plaintiff asked and the Court refused instructions as follows to wit:

1st That by the contract the defendant was bound to pay for the slops of 1000 hogs from the 15th day of June 1857 whether he had them on the ground or not (unless from some fault on the part of the defendant he was prevented therefrom) & that the covenants to furnish the slops by the defendant & the covenants to furnish hogs independent covenants none is not a security for the performance of the other & either party can maintain an action for a breach on the part of the other.

(31)

2nd That if by a fair construction of the first contract the Plaintiff was bound to keep on the ground 1000 hogs as security for the payment of the slops, yet by a fair construction of the 2^d contract introduced by the defendant the Plaintiff was so far released as to security as the value of the work and materials on the pens was worth at the time the slops were demanded, that is that the work and materials on the pens to the extent of the contract price was substituted as a security for the slops instead of the hogs.

3rd The defendant was bound to be ready on their part before plaintiff was required to take his hogs on the ground that is the covenants on the part of the defendant have the slops and tubs in readiness were conditions precedent to the Plaintiff having his hogs on the ground. and the defendant were not justified in putting on

and to the contract unless they were ready and willing on their part on the 15th of June 1857 to comply and plaintiff was then in default.

4th That by the contract the plaintiff was not bound to give the defendants any security for any hogs fed before the 1st day of Oct. 1858. any more than defendants were bound to give the plaintiff security for the delivery of the slops 5th That the plaintiff was not bound to bring any hogs on the ground until after the defendants had the tubs ready to hold the slops or slops enough to hold feed for the hogs.

6th That if the plaintiff had hogs enough to feed to be reasonable security for the slops of 1000 hogs the Defs ought to have furnished him the slops although the whole of the 1000 hogs was not ready to be fed.

13-1. 14th The Jury are instructed ^{that} by the contract the plaintiff was bound to pay for the slops for 1000 hogs after the 15th of June whether he had them there or not and that the defendants had only the personal security of the plaintiff for the payment of the slop up to October 1858 and the meaning of the contract is not that plaintiff was to have a thousand hogs there from the 15th of June 1857. until October 1858 but the Court instructs the Jury that that part of the contract which speaks of the plaintiff having 1000 hogs there means that the plaintiff was bound to pay for the feed of 1000 hogs whether he had them there or not.

9.
to which refusal by plaintiff then and there excepted.
The Plaintiff asked and the court gave
the following instruction.

Joseph S Springer

vs
Dontam & Carney.
pt

Covenant

183) The Court will please instruct
the jury that by the contract in the plaintiff's declaration
mentioned if Springer was ready on the 15th day of June
1857 to comply with his part of the contract furnish
the 1000 hogs to be fed at the distillery, the defendants
were on their part bound to have ready the necessary
lills & also to furnish the slops to feed the plaintiff's
hogs although the plaintiff's hogs were not actually
on the ground & although a small part of the 1000
hogs was not the property of the plaintiff (provided
they were then furnished the plaintiff to be put in & fed
under the contract-)

The Defendants
asked and the Court gave the following instructions

The Jury are
instructed that in order to entitle the plaintiff
to recover in this action it devolves on him to show by
evidence to the jury that he was ready and willing
to deliver at the distillery of defendants one thousand
hogs or that he had been hindered by defendants from
being so ready on the 15th day of June 1857 and proof of
a readiness to deliver six or seven hundred hogs will

not be sufficient nor will a reading to deliver
the one thousand logs after the 15th day of June 1857
be sufficient to entitle the plaintiff to recover in this
action.

That the question of the Sumner is not to be
considered by the Jury in this case.

to the giving of
which the plaintiff then & there excepted.

(342) The Jury returned
a verdict for the defendants. The Plaintiff moved
for a new trial on the grounds that the Court improperly
excluded the contract from the first count. That the
Court misconstructed the contract; that the Court excluded
proper evidence and admitted improper evidence; that
the Court refused proper instruction to the Jury, asked
by the plaintiff and gave improper instructions asked
by the defendants.

The Court overruled the motion for
a new trial and rendered judgment on the verdict; to
which rulings of the Court, the plaintiff severally then and
there excepted; and now prays that his Bill of excepti-
ons be signed sealed and made part of the record
in the case, which is done accordingly.

David Davis (S)

And thereupon on the Fifth day of June A.D.
1858 came said plaintiff and filed herein his Bond

for an appeal which said Bond was in words
and figures as follows. to wit:

35- Know all men by these Presents, That we Joseph E
Springer & David S Lewis of the county of M'Lean
and State of Illinois are held and firmly bound
unto Charles Pontcam & Paul Carrey in the penal
sum of Four Hundred Dollars for the payments of
which well and truly to be made we and each of us
bind ourselves our heirs executors and administrators
jointly and severally by these presents
Sealed with our seals and dated at Chormington
his Fifth day of June Anno Domini one thousand
Eight Hundred and fifty Eight -

(24)
The Condition of the
above obligation is such: That whereas the above names
Charles Pontcam & Paul Carrey did on the 7th day of
April one thousand eight hundred and fifty Eight
at a term of the Circuit Court then being hold within
and for the county of M'Lean and State of Illinois
obtain a Judgement against the above bounden
Joseph E Springer for the sum of Four Hundred
twenty seven dollars and sixty cents being costs of suit.
for which Judgement the said Joseph E Springer
has prayed for and obtained an appeal to the Supreme
Court of said State -

Now if the said Joseph E
Springer shall duly prosecute said appeal and shall
moreover pay the amount of the judgment costs interest

and damages rendered and to be rendered against him
the said Joseph E Sprunger in case the said judgment
shall be affirmed in the said Supreme Court then the
above obligation to be null and void otherwise to remain
in full force and virtue -

J E Sprunger
D.S. Lewis-

Taken and entered into
before me and approved
this 5th day of June A.D. 1858
Wm McCullough Clerk
for N. Burr. Dpty "

(36)

State of Illinois
McLean County, ss I, Wm McCullough, Clerk of the District
Court in and for said County do hereby certify that the
foregoing is a true transcript of the proceedings of said
Court in the foregoing cause as the same appears on the
files and records of my office



Witness my hand and seal of said Court
this 21st day April A. D. 1859

Wm McCullough, Clerk.

By Luman Burr Deputy.

J. E. Springer

vs

G. Bontam &

P. Barry.

Error to McLean

And comes the said plaintiff by Williams & Packard - V. Scates his counsel, and says that in the record & proceedings, and in the rendition of judgment manifest error intervened - in this viz:

First In excluding the agreement from being read as evidence under the first count.

(371

Second The Court misconstrued the contract - & misinstructed the Jury as to their true intent and meaning of the parties

Third In excluding evidence tending to show an inability of defendants to perform - and a breach of the contract on their part

Fourth The Court erred in holding that the first contract was not so modified by the second part as to substitute the price of the hogs in lieu of the hogs as a security for payment

Fifth The Court refused to give the first ^{of them} seven instructions asked for by the plaintiff & each.

Sixth The Court gave the instructions asked for by defendants

Seventh The Court refused to grant a new trial

Eighth The Court rendered judgment for defendants

Joseph E. Springer

N.

Ponteam & CarneyFiled Apr. 22^d 1859.
L. Deland Clk.J. S. P. L.
Williams & Packard
Plffs atty's

Fees \$14.40 p.a. by O. L. Deland

Wherefore for the sum aforesaid & other apparent
 upon the receipt of his seedlings, the Plaintiff prays judi-
 ment aforesaid be reversed, awarded upon nothing otherwise
 and for his reasonable costs

Williams & Packard & Deaton for Plffs