

No. 12400

# Supreme Court of Illinois

Dalton, et al.

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vs.

Bentley, Admr.

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Gas. Galton et al.

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Cyrus Bentley adm.

64

1864

1864



United States of America  
State of Illinois ) S.S.  
County of Cook )

Pleas before the Honorable  
John M Wilson Judge of the Cook County Court of  
Common Pleas within and for the County of Cook and  
State aforesaid at a Special term of the Cook County  
Court of Common Pleas. begun and held at the Court  
House in the City of Chicago in said County in pursuance  
of an order of the Judge thereof, and to public notice  
given in accordance with the Statute in such case  
made and provided. on the third Monday being  
the sixteenth day of May in the year of Our  
Lord One thousand Eight hundred and fifty three  
and of the Independence of the United States the  
Seventy Seventh

Present the Honorable John M Wilson Judge  
Levi M. Dwyer Prosecuting Attorney  
Cyrus P. Bradley Sheriff  
Walter Kimball Clerk

Attest

Be it Remembered that hereofore to wit: On  
the fifteenth day of June in the year of Our Lord  
One thousand Eight hundred and fifty two came  
William W. Beatty Surviving partner of John M. Carr  
deceased by Lewis Beatty his attorney. and filed in  
the Office of the Clerk of the Cook County Court of  
Common Pleas. a precept which said precept is in  
words and figures as follows to wit:  
Cook County Court of Common Pleas September Term  
A.D. 1852.



William A Bently  
Surviving Partner of  
John M Orr dec'd

Cook County Court of Common  
Pleas September Term 1852

James Dalton Senior  
James Dalton Junior

Assumpsit  
Damages \$200.

The Clerk will please issue  
Summons to Defendants in above entitled cause & Oblige

Yours &c  
W Bently  
Atty for Plaintiff

And Thereupon Summons issued out of the Clerk's  
Office aforesaid in said Cause, which said Summons  
is in words and Figures as follows to wit:

State of Illinois  
Cook County / S.S.

The People of the State of Illinois  
to the Sheriff of said County, Greeting

We command you that you Summon James  
Dalton Senior and James Dalton Junior if they shall  
be found in your County personally to be and appear  
before the Cook County Court of Common Pleas of said  
County on the first day of the next term thereof, to be  
held at the Court House in the City of Chicago in  
said County on the first Monday of September  
next, to answer unto William A Bently Surviving  
Partner of John M Orr deceased in a plea of trespass  
on the Case on promises, to the damage of the said  
plaintiff as he says in the sum of Two Hundred  
Dollars.

And have you then and there  
this writ with you endorsement thereon, in what  
manner you shall have executed the same.





Witness Walter Kimball Clerk of our said  
Court and the Seal thereof at the City of Chicago  
in said County this 15<sup>th</sup> day of June AD 1852  
Walter Kimball Clerk

Which said Summons was afterwards returned into  
the Clerk Office aforesaid with the following  
Endorsement thereon

"Served by reading to the within named  
defendants June 22<sup>d</sup> 1852.

Wm J Church Sheriff  
By W. A. Lester Deput

And on the same day there was filed in the Clerk  
Office aforesaid in said Cause a declaration  
which said declaration is in words and figures  
as follows to wit

State of Illinois ) Of the September Term of the  
Cook County ) S. S. Cook County Court of Common Pleas  
1852.

William A Bently Surviving partner of John M Orr  
deceased Plaintiff in this Suit by C. J. Bently his Attorney  
Complains of James Walton Senior and James Walton  
Junior Defendants in this Suit who are Summoned  
in a plea of trespass on the Case upon promises.

For that whereas the said defendants  
heretofore in the life time of the said John M  
Orr partner of the said John M Orr late partner doing  
business in the City of Chicago County & State aforesaid  
in the Sum of One Hundred and Five Dollars for  
so much money by the said defendants before that



time had and received for the use of said Plaintiff and the said John M Orr. and being so indebted they the said defendants in consideration thereof in the life time of the said John M Orr then and thereunder took and promised to pay the same to said plaintiff and said John M Orr. when they the said defendants should be therunto afterwards requested.

And whereas also, the said defendants afterwards and in the life time of the said John M Orr. deceased to wit: On the day and year aforesaid at Chicago aforesaid were indebted to the said plaintiff and the said John M. Orr in the further Sum of Two Hundred Dollars. for the work and labor, care and diligence of the said plaintiff and the said John M. Orr. by them before that time done performed and bestowed for the said defendants, and at their Special instance and request, and also in the further sum of Two Hundred Dollars of like lawful money for divers goods, merchandising and Chatties, by the said Plaintiff and the said John M. Orr. before that time sold and delivered to the said defendants, and at their like Special instance and request, and also in the like sum for money by the said plaintiff and the said John M. Orr. before that time lent and advanced to and paid laid out and Expended for the said defendants and at their like Special instance and request, and also in the like sum by the said defendants before that time had and received by and for the use of the said plaintiff and the said John M. Orr.

And the said defendants being so indebted, and the said several Sums of money in this Count mentioned being and remaining wholly due unpaid and unsatisfied, they the said defendants in consideration



thereof. Afterwards to wit: on the day and year aforesaid in the life time of the said John Mc Orr undertook and promised to pay the same to said plaintiff and said John Mc Orr when they the said defendants should be thereto. Afterwards requested

Yet the said defendants not regarding their said several promises and undertakings but contriving &c. Although after requested so to do have not paid the said sums of money or any part thereof but so to do have hitherto wholly neglected and refused to pay the same to the said plaintiff or the said John Mc Orr in his life time or to the said plaintiff since the death of the said John Mc Orr and still doth refuse to pay the same to the said plaintiff to the damage of the said plaintiff of Two Hundred and all ans. and therefore he the said Plaintiff brings Suit by C. Bently his attorney

Copy of a/c  
James Walton Senior To Wm H Bently Esq  
James Walton Junior  
A money had and received \$ 100.  
" Work & Labor. Care & Diligence 200.  
" Goods Merchandise & Chattels 200.  
" Money lent and advanced 200.  
" Money had & received 200.

And Afterwards to wit: On the Eighth day of September in the year of Our Lord One Thousand Eight Hundred and fifty three said day being one of the days of the September Term of the Court of Common Pleas in the year aforesaid the following proceedings were had and entered of record to wit:



William A Bently Surviving  
partner of John M Crodeceased

James Datton Senior &  
James Datton Junior

Applicant

And now at this day comes  
C Bently and suggests to the Court the death of William  
W Bently plaintiff in this suit and on his motion it is  
Ordered that Cyrus Bently the legal representative of  
the said deceased William W Bently be made party  
to this suit

And afterwards to wit: On the same day came  
the said defendants by Hays their attorney and  
filed in the Clerk's Office a plea and notice  
which said plea and notice is in words and figures  
as follows to wit:

James Hays  
James Datton Jr

Answered Notice

Wm M Bently &  
Cyrus Bently

And said defendants come by  
Hays their attorney & defend the wrong & injury  
when & C and say that they did not undertake &  
promise in manner & form as said plffs have alleged  
and of this they put themselves upon the Country

And the plaintiffs do the like

Hays for Defs  
Bently Plff Atty

To W M Bently

Plff Atty / Please take notice that we shall  
insist upon and give in Evidence under the general



f

issue that the Subject Matter of the Claims Sued upon in a former trial had in the Cook Co Court and a former recovery had thereupon of which said Plffs had due notice

Hayne.

And on the Twenty fifth day of May in the year of Our Lord One Thousand Eight Hundred and fifty three, <sup>by leave of the court given</sup> there was filed in said Court with the clerk of said Court an amended notice, which said amended notice is in words and figures as follows to wit:

James Dalton &  
James Dalton Jr.

vs  
Bentley & Orr.

Amended Notice

To William C. Bentley adm'r  
& attorney in above Entitled Suit:

You will please to take notice that we shall insist upon and give in Evidence under the general issue in the above Entitled Cause, that said Plaintiff heretofore and in the life time of said William C. Bentley & John M. Orr to wit: at a term of the Cook County Court of Common Pleas begun & held at Chicago in said County in October A.D. 1857. known as the October Term of said Court in said year 1857. before the Judge of said Court implicated said defendants for the fact performing the very same identical promises and undertakings for the same money paid out advanced expended and for the same money had received to the alleged use of said Plaintiff, as is above in said Declaration mentioned and that such proceedings were thereupon had in the said Court that at said term to wit: On 25<sup>th</sup> day of November



1851, being one of the days of said term, the said plaintiff  
renewed a judgment by the consideration of the cause  
in said Plea, mentioning against said defendants for  
the sum of three hundred dollars damages for the  
X but performing the very same identical promises and  
undertakings in the said declaration mentioned as  
well as their costs and charges about their said suit  
in that behalf expended. whereof said defendants were then Con-  
victed, as by the Record and proceedings of said  
Court will more fully appear, and further the  
said defendant will give in Evidence & insist upon  
the said judgment as a full bar & satisfaction  
in the above entitled Suit, and as a former recovery  
upon the same identical Cause of action in  
said declaration alleged & which said judgment  
is in this case reversed set aside, but remains in  
full force & effect as between said defendants  
and the legal representatives of said Wm M Bently  
& John M Carr deceased

Thos Haynes.  
Atty. left.

And Afterwards on the same day, said day being one  
of the days of the May Special Term of said Court in  
the year aforesaid, the following proceedings were  
had and Entered of Record in said Cause to wit:  
Cyrrus Bently Administrator of  
William M Bently Surviving  
partner of John M Carr deceased

James Halton Senior &  
James Halton Junior

Apt

And Saw at this day



Comes the said plaintiff in his own proper person  
and the said defendants by Thomas Hogue their  
Attorney also comes, and thus being joined herein  
by agreement of said parties the Cause is Submited  
to the Court for trial without the intervention of  
a jury, and the Court after hearing the testimony and  
proofs, and argument of Counsel not being now  
fully advised in the premises states the matter under  
adjudgment.

And Afterwards to wit, On the third day of June  
in the year aforesaid. Said day being one of the days  
after aforesaid September Term of said Court  
the following proceedings were had and Entered of  
Record in said Cause. To wit  
legally Present administrators  
of William M. Bently Surviving  
partners of John M. Bently deceased

James Dalton Senior and  
James Dalton Junior

Apt

And now at this day comes  
the said plaintiff & defendants by their said Attorneys  
and the Court after mature deliberation of this Cause  
finds the issues for the plaintiff and assesses their damages  
to the sum of One hundred and thirty two dollars and  
Seventy five Cents.

Therefore it is considered that the  
said plaintiff have and recover of the said  
defendants their damages of One hundred and  
thirty two dollars and Seventy five Cents, in full  
as assessed by the Court here assessed, and also  
their Costs and Charges by them about their Suit.



in his behalf Expended and have Execution therefor  
And thereupon the said defendants  
enter their Motion herein for a new trial in this cause  
which after being heard by the Court is overruled to which  
decision of the Court the said defendants enter their  
exceptions and pray appeal to the Supreme Court, which  
is allowed on the defendants filing appeal bond  
within thirty days to be approved by the Court and  
term is given the defendants to file a Bill of Exceptions  
herein untill Saturday of the second week in June  
instant

And Afterwards to wit: On the Eleventh day  
of June in the year aforesaid there was filed  
in the Clerk's Office of the Clerk of said Court a  
Bill of Exceptions which said Bill of Exceptions  
is in record and signs as follows to wit:  
William N. Bently Surrogate | Capt. C. C. Chapman  
partner of John M. Cordeiro | Attest May 1st 1853

James Dalton Senior & | Appraisers  
James Dalton Junior | Be it Remembered  
that on the twelfth day of May AD 1853  
being one of the days of the May Special Term  
AD 1853. the said parties by their attorneys Garnier  
waived a trial by jury Submitted said cause  
to the Court for trial. and thereupon the said  
plaintiffs called as a Witness One Charles  
Wesley who being duly sworn deposed and  
testified as follows that he was present at  
the conveyance between Mr. M. Bentley deceased  
and James Dalton Senior One of the Defendants



Page 2 Not recollect the time, it was while said  
Bentley and Carr were in partnership Mr Bentley  
Offered to pay Mr Dalton \$500. on a contract between  
Bentley and Carr. and the defendants in relation  
to the delivery of lumber. By the defendants to  
Bentley & Carr Walton refused to accept the money & Dalton  
also admitted at the same time that he had  
received \$100. and upwards on the contract when it  
was made. and refused to pay it back. he said he  
meant to keep it as damages for Bentley & Carr  
not having paid him money.

Being Cross Examined the said witness stated that he  
had been a witness in a former action in this court  
between said parties. that it was brought by plaintiff  
against Defendant for failure to perform the  
contract spoken of and the non delivery of lumber  
and that the said witness had substantiated  
to the same facts as a boy stated by  
him. and thereupon the said plaintiff having  
declined that their case was closed.

The defence introduced the Records  
of said Court and offered the judgment and  
proceedings of a former judgment and recovery  
had between the same parties. in a case pending  
in said Court at the Term thereof of 1855  
between said William A Bentley & John W Carr were  
Plaintiff and said James Dalton Senior and James  
Dalton Junior were defendants in an action of  
assumpsit. and also a certain contract of Writing  
a copy whereof, was declared upon in said  
Case filed with the papers. as evidence in said  
Case. and also the instructions given & pleadings  
filed in said Cause. being the declaration & Pleas.



aforsaid plaintiffs & defendants therein which  
Contract in writing. Declaration & Pleas & Instructions  
on the part of Said plaintiffs in Said Cause are  
as follows Namely.

Articles of agreement entered into  
made and this 16 day of Dec 1847. between James Davidson  
& Jas Davidson Jun of White Lake of the first part and Burtly & Co  
of Chicago of the Second part. Witnesseth that the said party  
of the first part do hereby agree to deliver to the said party  
of the Second part, at the most convenient place for loading  
Vessels at the mouth of White Lake all the Merchantable  
Lumber said party of the first part shall make at their  
Saw Mill at White Lake untill the 1st day of November  
1848. Said Lumber to be at least One fifth part, Clear  
Stuff, Clear Stuff to be free from Knots and Shakes, and  
not to have more than two inches sap wood on the  
edge said party of the first part to have two Scur boats  
Constantly landed for the vessels of the said party of the  
Second part, and to allow said party of the Second part  
the use of said Scur boats for loading their Vessels, said  
lumber to be tallied at Chicago by some competent  
person appointed by both the above mentioned parties,  
at their joint Expense, and that the said party of the  
Second part, on the faithful fulfillment of this agreement  
by the said party of the first part, do hereby agree  
to pay to said party of the first part the Sum of \$5.50  
for every 1000 feet of lumber made and delivered by them  
at the appointed place above mentioned, untill the first  
day of November 1848, viz \$100. on the signing of this  
agreement, \$500. on the 10th day of May 1848. \$500 on the  
10th day of June 1848. and that the said party of the first  
part will give the said party of the Second part three  
Months Credit on a like sum, and the remainder



to be paid One half of the lumber being tatted  
 at Chicago the Other half in three months Excepting  
 Such lumber as shall remain at White Lake and all  
 accounts are to be settled between said parties on  
 the first day of Decr 1848. The above mentioned  
 lumber to be Culled and the price of culls to be  
 \$ 2.75 pr 1000 feet and no lumber to be put among the culls  
 that is not cull lumber and that said lumber shall be  
 drawn as near as possible to the order of the said party  
 of the Second part. If said parties cannot agree about  
 the culls they are to abide by the decision of some competent  
 person who is to be chosen by Mr Dalton. Whatever  
 lumber remains at White Lake shall be tatted there  
 and settled for on the 1<sup>st</sup> day of Decr 1848 said parties  
 after the first part being accountable for said lumber  
 Witness Peter Dalton James Dalton Senior  
 James Dalton Junior  
 Bently & Co.

What is understood by the Seven boats being constan-  
 -tly loaded is that they are to be once fully loaded  
 for each vessel after the Second party

State of Illinois  
 Cook County } S S Cook County Court of the  
 Chicago Term October 1844  
 William W Bently and John M Orr  
 late partners under the firm of Bently & Orr of said  
 Chicago plaintiffs in this suit by David W Bently their  
 attorneys complain of James Dalton Senior & James  
 Dalton Junior defendants in this suit in a plea of  
 trespass on the case upon promises  
 For that whereas the said defendants on the 16<sup>th</sup> day



of December in the year of Our Lord One Thousand  
Eight Hundred & forty Seven made & entered into a certain  
agreement in writing with the said plaintiff, at White  
Lake as at <sup>said</sup> Chicago in sd county & which said agree-  
ment is in writing in the words terms and figures follow-  
ing Viz.

Articles of Agreement Made & entered  
into this 16<sup>th</sup> day of Sep 1847 between James Dalton  
Sen & Jas Dalton Jun of White Lake, of the first part  
and Peunity & Co of Chicago of the second part  
Witnesseth that the said party of the first part do hereby  
agree to deliver to the said party of the second part at the  
most convenient place for loading vessels at the mouth of  
White Lake all the merchantable lumber said party of  
the first part shall make at their Saw Mill at White  
Lake untill the first day of November 1848  
Said lumber to be at least one fifth part clear  
stuff clear stuff to be free from knots and shakes &  
not to have more than two inches sap wood on the  
edge said party of the first part to have two scow boats  
constantly loaded for the vessels of the said party of the  
second part and to allow said party of the second part  
the use of the said scow boats for loading their vessels  
Said lumber to be loaded at Chicago by some competent  
persons appointed by both the above mentioned parties  
at their joint Expense. and that the said party of the second  
part on the faithful fulfillment of this agreement by the  
said party of the first part do hereby agree to pay to  
said party of the first part the sum of \$5.50 for every  
1000 feet of lumber made & delivered by them  
at the appointed place above mentioned untill the  
1<sup>st</sup> day of November 1848 viz \$100 on the signing of  
this agreement \$500 on the 10<sup>th</sup> of May 1848. \$500.



On the 10<sup>th</sup> day of June 1848, and that the said parties  
of the first part, will give the said party of the second  
part three months credit on a like sum, and the remainder  
to be paid. One half of the lumber being tallied at Chicago  
the other half in three months. Excepting such lumber  
as shall remain at White Lake and all accounts are  
to be settled between said parties on the first day of  
December A.D. 1848. The above mentioned lumber to be  
Culled, and the price of culls be \$2.75 per Thousand feet  
and no lumber to be put among the culls that is not  
Cull lumber, and that said lumber shall be run  
as near as possible to the Order of the said party of  
the second part. If said parties can not agree about  
the culls they are to abide by the decision of some com-  
petent person who is to be chosen by Mr Dalton. What  
ever lumber remains at White Lake shall be tallied  
there and settled for on the first day of December  
1848. Said party of the first part being accountable  
for said lumber.

James Dalton Senior  
James Dalton Junior  
Bentley & Co.

What is understood by the Sloop boats being constant-  
ly loaded is that they are to be on a fully loaded  
for each Vessel of the second party.

And the said plaintiffs aver that  
in pursuance of the terms of the said agreement, above  
set forth on their part to be done & performed they the  
said plaintiffs paid the said defendants the sum of One  
hundred dollars, on the said 16<sup>th</sup> day of Dec 1847, at  
the time of the execution of the said agreement, in acqui-  
sition whereof what the said plaintiffs then and there  
promised the said defendants to perform all the said



Agreement on their part to be performed.. the defendants then and there faithfully promised the said plaintiff to perform all of the said agreement aforesaid set forth on their the said defendants part to be performed. that is to say. to deliver to the said plaintiff, at the most convenient place for loading vessels at White Lake all the merchantable lumber & cills the said defendants should make at their Saw Mill at White Lake. between the Sixteenth day of December AD 1847 and the first day of November AD 1848. said lumber to be of the kind & quantity in said agreement described & to keep two Saw Boats constantly loaded with said lumber for plaintiff's vessels.

And the said plaintiffs aver that the said defendants did make at their said Saw Mill on White Lake between the said 16<sup>th</sup> day of December 1847 & the said 1<sup>st</sup> day of November 1848 a large quantity of lumber viz. 800,000 feet of lumber & 100,000 ft of Cills.

And the said plaintiffs in fact say that altho they on their part kept and performed all of the said agreement on their part to be performed, and altho they said plaintiff paid to said defendants the said sum of one hundred dollars as aforesaid and altho they afterwards to wit: on divers days & times between the said last mentioned dates requested the said defendants to deliver to them said plaintiffs the said lumber or any part thereof & especially on the 20. day of May AD 1848. at said Chicago and altho they the said plaintiffs were then and there present at the said White Lake (to wit: at said Chicago ready to receive the said lumber or any part thereof) and altho they the said plaintiffs were then and there



ready & willing and offering to pay said debts for the  
said lumber according to the terms of the said agreement  
yet the said defendants not regarding their said last  
mentioned promises and undertakings did not when requested  
as aforesaid or at any time before or since deliver to the  
plaintiff the said last mentioned 800,000 feet of lumber  
and 100,000 feet of culls at said White Lake at the most  
convenient place for loading vessels at the mouth of said  
White Lake for any part thereof nor at any other place  
but have hitherto wholly refused, and still do refuse  
to deliver the same or any part thereof to said plaintiffs  
nor did the said defendants keep two seasons continually  
loaded with said lumber or any part thereof at said White  
Lake for the said plaintiffs vessels.

Whereby and by reason of the promises  
aforesaid the said plaintiffs have suffered a great loss  
by reason of a rise in the market since of lumber  
and have lost & been deprived of divers great gains and  
profits which might and would otherwise have arisen  
& accrued to them said plaintiffs from the delivery of the  
said lumber & culls to the said plaintiffs as aforesaid. <sup>which</sup>  
at Chicago aforesaid.

2d Count

And also for that whereas heretofore to-wit: on  
the 16<sup>th</sup> day of December A.D. 1847 (at White Lake <sup>Wash</sup>) at  
Chicago aforesaid, the said plaintiffs at the special  
instance & request of the said defendants, bargained  
with the said defendants and the said defendants  
then and there sold to the said plaintiffs all the merchant  
able lumber & culls the said defendants should make at  
their saw mill at White Lake from the said 16<sup>th</sup> day of  
December A.D. 1847 to the <sup>said</sup> first of January A.D. 1848  
said lumber to be at least one fifth part clear stuff to be  
free from knots and shakes, and not to have more than



Two inches Sap Wood on the Edge to be delivered  
at the first convenient place for loading vessels at the  
mouth of White Lake and to be paid for by the said plaintiff  
at the rate or price of \$5.50 for every 1000 feet of lumber  
delivered by them at the above mentioned place in manner  
as follows. viz \$100 on the day of the purchase aforesaid  
\$500 on the 10<sup>th</sup> day of May 1848 \$500 on the 10<sup>th</sup> day of  
June 1848. and three months credit on a like sum, and  
the remainder to be paid one half on the lumber being  
tallied at Chicago the other half in three months excepting  
such lumber as should remain at White Lake. and  
all accounts to be settled between the parties on the  
first day of December 1848. Said lumber to be cut  
at the price of cutting to be \$2.25 per thousand & to be shared  
between said parties.

And in consideration thereof, and in  
further consideration of the sum of One hundred dollars  
to the said defendants paid by the said plaintiff on  
the day of purchase aforesaid and that the said plaintiff  
at the like special instance requested of the said defen-  
dants. had then and there undertaken and faithfully  
promised the said defendants to accept and receive  
the said lumber & cuts at the first convenient place  
for loading vessels at the mouth of White Lake aforesaid  
and to pay for the said lumber & cuts so delivered  
at the rate & price aforesaid and in the manner aforesaid  
said they the said defendants undertook and then  
and there faithfully promised the said plaintiff  
to deliver to them said plaintiff at the first convenient  
place for loading vessels at the mouth of said White  
Lake all the merchantable lumber & cuts the said  
defendants should make at their saw mill at said  
White Lake between the 16<sup>th</sup> December 1847 and the 1<sup>st</sup>



day of November 1848. a large quantity of lumber  
viz Eight Hundred Thousand 800,000 feet of  
lumber & One Hundred Thousand feet of Culls and  
altho the time for the delivery of the said lumber at  
said White Lake as aforesaid has long since passed  
and altho the said plaintiffs have always been  
ready and willing to accept & receive the said lumber  
& Culls or any part thereof at the place & in the manner  
aforesaid as in said agreement specified and have  
often requested the said defendants to deliver the  
said lumber to them at said White Lake according  
to the terms of said contract and especially requested  
of them said defendants to deliver to them said plaintiffs  
the said lumber or any part thereof. On the 20<sup>th</sup> day of  
May. AD 1848. and altho the said plaintiffs have always  
been ready & willing to pay for the said lumber at the  
rate & price and in the manner aforesaid viz at Chicago  
aforesaid and altho the said plaintiffs were they are  
they are ready & willing & offered to accept and receive  
the said last mentioned lumber of & from the said  
defendants at the place and in the manner aforesaid  
& altho the said plaintiffs had on their part done and  
performed all things on their part to be done and performed  
according to the terms and provisions of the said agreement  
yet the said defendants not regarding their said promises  
and undertakings but contriving, devising to deceive  
and defraud the said plaintiffs in this behalf did  
not nor would within the time aforesaid or at any  
time afterwards deliver to said plaintiffs at the right  
convenient place for loading vessels at the mouth of  
White Lake or at any other place all or any portion  
of the merchantable lumber made at the said defendants  
Saw Mill. at said White Lake. between the 16<sup>th</sup> day



of December 1847. The first day of November 1848. and  
which the said plaintiffs aver. amounted to 800,000 feet  
of lumber & 100,000 feet of Culls. Nor did they have and  
keep two Sloop boats constantly loaded for the vessels  
of the said plaintiffs at White Lake aforesaid at the  
time aforesaid nor at any time during the time of said  
Contract, but wholly neglected & refused so to do whereby  
the said plaintiffs have suffered a great loss by reason  
of a rise in the market price of lumber, and have  
lost and been deprived of divers great gains and  
profits which might & otherwise would have arisen  
& accrued to them said plaintiffs from the delivery  
of the said lumber to the said plaintiffs as aforesaid  
to wit: At Chicago aforesaid.

I Certify For that whereas the said defendants  
on the 16<sup>th</sup> day of December AD 1847. made and  
Entered into a certain agreement in writing which  
said agreement was in substance as follows viz  
Articles of agreement made and Entered  
into this 16<sup>th</sup> day of Dec 1847. between James Dalton  
Sen & James Walton Jr of White Lake of the first part  
and Dentty & Co of Chicago of the second part  
Witnesseth that the said party of the first part do hereby  
agree to deliver to the said party of the second part  
at the first convenient place for loading vessels at  
the mouth of White Lake all the merchantable lumber  
said party of the first part shall make at their Saw  
mill at White Lake until the first day of November  
AD 1848. said Lumber to be at least one fifth part  
Clear Stuff Clear Stuff to be free from knots and  
Shakes & not to have more than two inches sap wood  
on the Edge said party of the first part to have two Sloop  
boats constantly loaded for the vessels of the said party of



the Second part, and to allow said party of the  
Second part, the use of the said Sloop boats for loading  
their vessels, said lumber, to be tallied at Chicago,  
by some competent person appointed by both the  
above mentioned parties, at their joint expense, and  
that the said party of the Second part, on the faithful  
fulfillment of this agreement, by the said party  
of the first part, do hereby agree to pay to said party  
of the first part the sum of \$5.50 for every wagon  
of lumber made and delivered by them, at the app-  
ointed place above mentioned, untill the 1st day of  
November 1848. \$100. on the signing of this agree-  
ment \$500. on the 10th of May 1848 \$500. on the 10th  
day of June 1848, and that the said party of the first  
part will give the said party of the second part three months  
credit on a like sum and remainder to be paid one  
half on the lumber being tallied at Chicago the  
other half in three months. Excepting such lumber  
as shall remain at White Lake, and all accounts  
are to be settled between said parties on the first day  
of December 1848. The above mentioned lumber  
to be Cull, and the price of Cull, be \$2.75 per  
thousand feet, and no lumber to be put among  
the Cull. That is that Cull lumber, and that said  
lumber shall be sawn as near as possible to the  
order of said party of the second part. If said parties  
cannot agree about the Cull they are to abide by  
the decision of some competent person who is to be chosen  
by Mr Dalton, whatever lumber remains at White Lake  
shall be tallied there & settled for on first day  
December 1848. Said party of the first part being  
accountable for said lumber.

James Dalton Senr  
James Dalton Junior  
Scenty & Orr



that is understood by the Saw boats being constantly loaded is that they are to be once fully loaded for each vessel of the second party.

And the said plaintiffs aver that in pursuance of the terms of the said agreement in said first contract set forth on their part to be done and performed. They the said plaintiffs paid the said defendant the sum of One Hundred Dollars on the said 16<sup>th</sup> day of December 1847 at the time of the execution of the said agreement in consideration whereof and that the said plaintiffs they and there promised the said defendants to perform all the said agreement on their part to be performed. The said defendants they there faithfully promised the said plaintiffs to perform all the said agreement above set forth on their the said defendants part to be performed. That is to say to deliver for the said plaintiffs at the most convenient place for loading vessels at White Lake all the merchantable lumber & Cuts the said defendants should make at any Saw mill at White Lake between the said 16<sup>th</sup> day of December 1847 & the said first day of November 1848. Said lumber to be of the kind & quality in said agreement described.

And the said plaintiffs aver that they on their part kept & performed all of the said agreement on their part to be performed and the said plaintiffs aver that they paid to said defendant the sum of One Hundred Dollars as aforesaid that they the said plaintiffs were ready & willing to receive the said lumber & Cuts at said White Lake at the most convenient place for loading vessels or to receive any portion of the same. That they said plaintiffs were then



and there to wit: At Said Chicago ready willing to pay  
for the said lumber & Culls or any part thereof according  
to the terms of the said agreement. And the said  
plaintiffs aver that the said plaintiffs afterwards  
to wit: On divers days & times after making of said  
agreement and more particularly on the 18<sup>th</sup> day of May  
AD 1848 viz at Said Chicago requested the said  
defendants to deliver to them said plaintiffs the  
said lumber & Culls manufactured by them the  
said defendants at their said Saw Mill at White  
Lake. After the said 16<sup>th</sup> day of Dec 1847 & prior  
to the said first day of November 1848. And the  
said plaintiffs aver that the said defendants did  
make at their said Saw Mill between the said last  
mentioned days a large quantity of Lumber viz  
80000 feet of Lumber & 10000 feet of Culls.

And the said plaintiffs aver that after  
-wards to wit: On the 18<sup>th</sup> day of May AD 1848 and  
before any of the above lumber had been delivered  
to the said defendants they said plaintiffs tendered to  
the said defendants the sum of Nine Hundred &  
Dollars in good and lawful Money.

And the said plaintiffs aver that they were  
ready & willing to pay to the said defendants at Said Chicago  
the sum of Nine Hundred dollars on the said 18<sup>th</sup> day  
of June AD 1848 and also to make all the other pay-  
ments specified in the said Contract by them to be made  
upon the faithful fulfillment of the said agreement  
by the said defendants.

Yet the said defendants not regarding  
their said last mentioned promises and undertakings  
did not when requested as aforesaid or at any  
time before or since deliver to the plaintiffs the



Said last mentioned 800,000 feet of lumber & 100,000 feet of Culls, at said White Lake, at the most convenient place for loading vessels, at the mouth of said Lake nor any part thereof, nor at any other place but have hitherto wholly refused & still do refuse to deliver the same or any part thereof to said plaintiffs. Nor did said defendants keep two saw boats constantly loaded with said lumber or with any part thereof at said White Lake for the said plaintiffs vessels.

Whereby and by reason of the premises aforesaid the said plaintiffs have suffered a great loss by reason of a rise in the market price of lumber and have been deprived of divers great gains & profits which might & would otherwise have accrued to them said plaintiffs from the delivery of the said lumber to the said plaintiffs at aforesaid Vix at Chicago aforesaid.

4 Canal

And also for that Whereas the Chicago Vix on the 16<sup>th</sup> day of December AD 1847 at White Lake Vix at said Chicago, the said plaintiffs at the Special instance and request of the said defendants then there sold to the said plaintiff all the merchantable lumber the said defendants should make at their saw mill at White Lake from the said 16<sup>th</sup> day of Decr AD 1847 to the first day of September AD 1848 said lumber to be at least one fifth part clear stuff to be free from knots & shakes and not to have more than two inches Sap Wood on the edge to be delivered at the most convenient place for loading vessels at the mouth of White Lake, and to be paid for by the said plaintiffs at the rate of \$5.50 for every thousand feet of lumber delivered by them at



The Above Mentioned place in Manner as follows.  
viz. \$100. On the day of the purchase aforesaid \$500.  
on the 16<sup>th</sup> day of May 1848. \$500. on the 16<sup>th</sup> day  
of June 1848, and three months credit on a like  
sum. and the remainder to be paid One half  
of the lumber being hauled at Chicago. the other  
half in three months accepting such lumber as  
should remain at White Lake. Said lumber to  
be Culled and the price of Culling to be \$2.<sup>75</sup>/<sub>100</sub>  
per thousand feet to be paid Equally by the parties

And the Said Plaintiff avers  
that the said James Dutton Senior at the time of  
the making the said Contract resided and did  
business at said Chicago and that it was understood  
and agreed by and between the said parties that the lumber  
when the same became due and payable should be  
paid to the said defendants by said plaintiffs at said Chicago  
viz. upon the faithful performance of the said agreement  
aforesaid on the first part. after said defendants that is to  
say \$5.50 for every thousand feet of lumber delivered to  
said defendants at said White Lake in conformity with  
the <sup>provisions of the said</sup> Contract of Sale

And in Consideration thereof and in  
further Consideration of the sum of One hundred  
Dollars. to the said defendants paid by the said  
plaintiffs on the day of purchase aforesaid and  
that the said plaintiffs at the like special instance &  
request of the said defendants had then and there  
indented and faithfully promised the said  
defendants to accept and receive the said lumber  
at the first convenient place for loading vessels  
at the mouth of White Lake aforesaid and to pay  
the said defendants for the said lumber so delivered



at the rate or price aforesaid and in the manner aforesaid they the said defendants, undertook and then and there faithfully promised the said plaintiffs to deliver to them said plaintiffs at the port, wharfe or place for loading vessels at the mouth of said White Lake all the merchantable lumber they said defendants should make at their saw mill at said White Lake. From the 16<sup>th</sup> day of December AD 1847, to the first day of November AD 1848, and to have two saw boats constantly loaded with said lumber for the vessels of the said plaintiffs as aforesaid & also all the Cuts.

And the said plaintiffs aver that the said defendants did make at their said saw mill at said White Lake between the said 16<sup>th</sup> day of December 1847 & the 1<sup>st</sup> day of November 1848 a large quantity of lumber, viz 80000 feet of lumber And altho the time for the delivery of the said lumber at said White Lake, aforesaid has long since passed and altho the said plaintiffs have always been ready and willing to accept and receive the said lumber or any part thereof at the place and in the manner aforesaid and altho the said plaintiffs have on divers days & times between the said 16<sup>th</sup> of December 1847 & said 1<sup>st</sup> day of November 1848, & since said last mentioned day, and especially on the 18<sup>th</sup> day of May AD 1848, requested the said defendants to deliver to them said plaintiffs the said lumber or any part thereof - And altho the said plaintiffs have always been ready and willing to pay said fees for said lumber at the rate and price and in the manner aforesaid. And altho the said plaintiffs were ready, willing and offered to accept and receive the said last mentioned lumber of & from the said defendants at the place in the manner aforesaid - And altho



The said Plaintiffs have paid the said sum of One hundred Dollars. as aforesaid. And altho the said Plaintiffs tendered to the said Defendants. the sum of five hundred Dollars. at said Chicago on the 18<sup>th</sup> day of May. AD 1848. and before the delivery of any of the said lumber. to said plaintiffs at said White Lake. And altho the said Defendants had kept open for sale all of the said Agreement & Contract of sale on their part to be kept and performed.

Yet the said Defendants had regarding their said promises and undertakings. put contrivances and intending to deceive and defraud. the said plaintiffs On this behalf did not nor would within the time aforesaid. or at any time afterwards, deliver to said plaintiffs at the most convenient place for loading Vessels at the Mouth of White Lake. or at any other place all or any portion of the Merchantable lumber made at the said Defendants saw mill at said White Lake between the 16<sup>th</sup> day of December AD 1847. & the first day of November AD 1848. and which the said plaintiffs aver amounted to 800,000 feet of lumber. nor did they have and keep two Sloop boats constantly loaded for the Vessels of the said plaintiffs at White Lake aforesaid. at the time aforesaid. nor at any time aforesaid during the continuance of said Contract but wholly neglected and refused so to do whereby the said plaintiffs have suffered a great loss by reason of a rise in the market price of lumber. and have lost and been deprived of divers great gains and profits. which might and would otherwise have accrued to them said plaintiffs from the delivery of the said lumber to the said plaintiffs at aforesaid viz at Chicago aforesaid.

And also for that Whereas. On the 16<sup>th</sup> day of



December AD 1847 at White Lake viz at Chicago the  
Said plaintiffs bought of the Said defendants all the  
merchantable lumber & culls which the Said defendants  
should make at their Saw Mill at White Lake between  
the 16<sup>th</sup> day of Dec. AD 1847 & the first day of November  
AD 1848 of the kind and quantity and at the prices  
rate specified in a certain Contract in writing Execu-  
ted between Said parties bearing date the said 16<sup>th</sup> day  
of December AD 1847 which said Contract was in  
Substance as follows to wit;

Articles of agreement made and Entered  
into this 16<sup>th</sup> day of Dec. 1847 between James Dalton  
Snr & James Dalton Junior of White Lake of the  
first part and Bergety & Cnr of Chicago of the  
second part. Witnesseth that the Said party of the first  
part do hereby agree to deliver to the Said party of  
the second part at the first convenient place for loading  
Vessels at the mouth of White Lake all the merchantable  
lumber Said party of the first part shall make at their  
Saw Mill at White Lake untill the first day of  
November AD 1848. Said lumber to be at least  
any fifth part Clear Stuff Clear Stuff to be free from  
Knots and Shakes. That to have more than two inches  
Sap wood and the Edge Said party of the first part to  
have two Scow boats constantly loaded for the vessels of  
the Said party of the second part and to allow Said party  
of the second part the use of Said Scow boats for  
loading their Vessels Said lumber to be tallied at Chicago  
by some competent person by both the above mentioned  
parties at their joint Expense and that the Said party of  
the second part on the faithful fulfillment of this agree-  
ment by the Said party of the first part do hereby agree  
to pay to Said party of the first part the Sum \$550



for every 1000 feet of lumber made and delivered by  
them at the appointed place above mentioned until  
the 1<sup>st</sup> day of December 1848 viz \$100. on the signing  
of this agreement \$500. on the 10<sup>th</sup> of May 1848. \$500. on the  
1<sup>st</sup> day of June 1848. and that the said party of the first  
part will give the said party of the second part three months  
credit on a like sum and the remainder to be paid One  
half On the lumber being landed at Chicago the  
Other half in three months excepting such lumber as  
shall remain at White Lake. and all accounts are to  
be settled between said parties on the first day of  
December 1848. The above mentioned lumber  
to be celled and the price of culls to be \$2.75 per  
thousand feet. And no lumber to be put among the  
Culls that is not Cull lumber. and that said lumber  
shall be sawn as near as possible to the Order of said  
party of the second part. If said parties cannot agree  
about the Culls they are to abide by the decision of some  
Competent person who is to be chosen by Mr Dalton  
whatever lumber remains at White Lake shall be  
landed there & settled for on the first day of Dec-  
ember 1848. said party of the first part being accom-  
-table for said lumber.

James Dalton Sen.  
James Dalton Junior  
Dentley & Co.

What is understood by the Sloop boats being constantly  
loaded is that they are to be once fully loaded for each  
trip of the second party.

In this said contract it was agreed other things  
agreed that the said defendants should deliver to the said  
plaintiffs at the most convenient place for loading & trips



at the Mouth of White Lake, all the Merchantable lumber  
the Said Defendants Shoged make at their Said Saw Mill  
at White Lake between the Said last Mentioned dates and  
that the Said plaintiffs should pay for all Said lumber  
so made & delivered as aforesaid at the rate of \$5<sup>00</sup>/<sub>100</sub> a thousand  
Feet as by said written agreement Specified.

In Consideration whereof and that the plaintiffs  
then & there promised the Said Defendants to perform all  
the Said agreement, and their part to be performed  
by the Said Defendants then & there promised the Said plaintiffs  
to perform all the Said agreement on their Said Defendants  
part to be performed. And the plaintiffs aver that the Said  
Defendants did between the Said last mentioned dates  
make a large quantity of lumber, viz Eight hundred  
thousand feet of lumber, and 100,000 feet of Culls  
and shavings the Said plaintiffs always known they  
knew the Said lumber was so made as aforesaid have  
been ready to receive Said lumber at the rate and  
upon the terms & Conditions of said agreement viz at  
Said White Lake and to pay for the same at Said  
Chicago, on the delivery thereof at Said White Lake according  
to the terms of the Said agreement, and have often requested  
the Said Defendants to deliver the same to the Said plaintiffs  
according to said agreement, yet the Said Defendants  
though requested on the 20<sup>th</sup> of May A.D. 1848. viz at said  
Chicago have not delivered the Said lumber or any  
part thereof to the plaintiffs but wholly refused and  
still refuse so to do.

Whereby & in consequence thereof the Said  
plaintiffs have been deprived of sundry great gains  
& profits which they might have obtained otherwise had they  
to themselves by reselling the Said goods at much higher  
and advanced prices. At wit at Said Chicago aforesaid



To the plaintiffs damage two thousand Dollars.  
Wherefore they bring Suit by their Attorneys  
Larned & Beatty

James Dalton Senr  
James Dalton Jr

vs  
Beatty & Coors

Appraisers

And the said defendants come & for  
plea to the third & fifth counts of said declaration as  
Amended say that they did not undertake or promise  
in manner & form as the said plaintiffs have above  
thereof complained against them. and of this they  
put themselves upon the country &c

2d

And the said defendants for  
further plea to said amended counts say ad hoc now  
because they say that they in pursuance of said agreement  
in said counts mentioned they caused to be sawed a  
large part of the lumber & culls in said agreement mentioned  
to wit: 100,000 feet thereof and put the same into two Sloop  
Boats and had the same ready for delivery to said plaintiffs  
at the most convenient place for loading vessels at the  
mouth of White Lake in said agreement mentioned on or  
before the 10<sup>th</sup> day of May A.D. 1848. according to the terms of  
said agreement in said counts mentioned. and there & there  
kept & continued the said Boats loaded for a number  
of days to wit: five days of all which the said plaintiffs then  
there had due notice. and requested to receive the same. but  
they Deft. aver. that neither the said plaintiffs or any one  
for them could then and there receive the said Lumber  
& Culls. as pay to said defendants the sum of five hundred  
Dollars. then due to them to wit: on the 10<sup>th</sup> day of May  
last aforesaid. but then and there said plaintiffs neglected  
& refused to receive said Lumber & Culls. at White Lake



aforsaid. and also neglected and refused to pay the money therefor which was, <sup>then due to defts.</sup> according to the terms of said Agreement in said County mentioned. and this the said Defendants are ready to verify wherefore they pray judgment.

3 And the said Defs for further plea to said amended County Say Actio Non because they say they had saved a large part of said lumber & Culls in the agreement in the said County mentioned on or before the 10 day of May A.D. 1848. to wit: Some 200,000 feet thereof which they caused to be loaded up into two Sloop Boats. at the most convenient place for loading of vessels at the Mouth of White Lake in said agreement mentioned ready for delivery to said plaintiffs of which the said plaintiffs then & there had due notice and were requested to receive the same and then & there to pay the Sum of Five Hundred dollars. then & there due & payable to the said Defendants. but the said plffs then & there neglected and refused to receive said lumber & Culls and also neglected and refused to pay said Sum of Money so due & payable as said agreement which said lumber & Culls the said Defs then & there tendered & offered to deliver to said plaintiffs but which they did not nor would receive the same or pay the money due thereon as aforsaid. where upon said Defs declared to the Plffs their intention to sell & dispose of the same to some other person & accordingly did sell & dispose of the same as they lawfully might for the reasons aforsaid. and this they are ready to verify wherefore they pray judgment &c.

4 And said Defendants for further plea to said County Say Actio Non because they say. that said plaintiffs never demanded said lumber & Culls at White Lake when said defendants were always ready and willing to have delivered the same. that the said



plaintiffs or any one for them being then ready to receive the same prior to the 14<sup>th</sup> day of May A.D. 1848. and to pay the debt the sum of Five Hundred Dollars then due thereon, but altho the said lumber was there tendered to said plaintiffs. Yet the said would not receive the same. & pay said sum of Five Hundred Dollars. Therefore to said debt & this they are ready to verify wherefore they pray judgment &c.

5. And said debt for further, plea to said County said Actio non because they say that they were hindered & prevented from performing their said agreement in said County mentioned by the said plaintiffs refusing to receive said lumber & cels. at the said place of delivery in said contract mentioned on the 10<sup>th</sup> day of May A.D. 1848. and by their refusing to pay over to said debt the sum of Five Hundred Dollars then due & payable on said contract to said defendants. Altho said plaintiffs were then & there urged & requested by said debt to pay over said sum of money, & receive said lumber & cels. according to the terms of said agreement which they refused to do. & this the debt are ready to verify wherefore they pray judgment &c.

6. And said defendants for further, plea to said County said Actio non. because they say that on & prior to the 10<sup>th</sup> day of May A.D. 1848, said debt filled two Sloop Boats with the lumber in said contract mentioned and had the same at the most convenient place for delivery to vessels at White Lake in accordance with said agreement, which the said plaintiffs were then and there requested to receive & pay the Five Hundred Dollars then due the debt, according to said agreement, but the said plaintiffs did not. nor would receive said lumber or pay said sum of money. So due & owing



to Defts. and thereupon the said defendants afterwards  
torn it: on the 12<sup>th</sup> day of May 1848. Said & disposed of said  
lumber to another person, as he lawfully might for the cause  
aforesaid, and this he is ready to verify whenever they pray  
judgment &c.

By Morris & Wagne their attys

The plffs will take notice that the Defts will give in evidence  
on the trial of this cause under the general issue that the said  
plaintiffs before and at the time this suit was brought were  
indebted to the <sup>defendants</sup> a large sum of money to wit, in a sum  
of five thousand dollars for damages sustained  
by them by reason of the plaintiffs non performance  
of the Contract in said plaintiffs declaration mentioned  
in refusing to receive the lumber therein mentioned  
for neglecting & refusing to pay the Defts the \$500.  
then due & payable. - and in the further sum to wit,  
of five thousand dollars for lumber & Cattle goods  
& Chattels then and there bargained & sold by the plffs.  
to the said plaintiffs at their request which said several  
sums of money will set off on said trial against any sum  
the plffs may prove, upon the trial hereof, they pray judgment  
for the balance that may be found due, thereon

Morris & Wagne for Defts

Beatty & Co

James Dalton Sen / 1 Apt.  
Jas Dalton Junr. / Chap. C Court Com Pleas  
Special Oct Term 1851.

And the said plffs say that by reason  
of any thing in the said Defts second plea alleged  
precludi<sup>g</sup> them because they say that they the said Defts  
did not in the Season of 1848 have a large



account of Sawd lumber named in the said  
Contract in the said Declaration set forth & all that  
had been saved by them said depts up to that time  
placed in the Sloop Boats of the said plffs. ready to  
deliver to the said plffs. at the time when & C as mentioned  
in said plea. & did not keep & continue said Sloop  
Boats at said place constantly loaded for the vessels  
of the plffs ready for delivery to them said plaintiffs  
pursuant to the terms of said written agreement  
at all times up to the month of July 1848. and  
that they the said plffs were not from time to time  
or at any time duly notified & requested to take  
said lumber away and that they the said plaintiffs  
did not neglect or refuse to send for & receive the  
same & that they the said plffs did not refuse to  
pay the said sum of five hundred dollars to said  
depts. On the 16<sup>th</sup> day of May A.D. 1848. but on  
the contrary they were ready & willing & offered  
to pay them the said sum. and that the said depts  
did not notify said plaintiffs that they would  
breach the said Contract as recited. And this they  
pray may be required of by the Court.

By their Attys.  
Lanner & Bently

And the said plffs further say that by reason of  
anything in the said depts third plea alleged precludes  
them because they say that the said defendants did  
not put all the lumber they had saved up to the 16<sup>th</sup>  
day of May 1848. on the Sloop Boats of the depts and  
had the same on that day <sup>ready</sup> for delivery to said plffs  
at the most convenient place for landing vessels  
at the mouth of White Lake or at any other place at  
the time when & C at & C as in said plea mentioned



and that the Said plaintiffs did not have notice  
of the same. and that the Said plaintiffs did not  
neglect & refuse to receive the Said lumber. and  
that the Said Defs. did not then and there satisfy the Said  
plaintiffs that unless they the Said plffs would  
pay the sum of \$500. then due & payable they the  
Said Defs. would treat the Said Contract as ended  
that the Said plaintiff did not then & there refuse  
to pay the Said sum of money. And this they pray  
may be inquired of by the Country

By their  
Atty Larned & Bently

And the Said plaintiffs further say that by reason of  
anything in the Said Defendants further plea preclude them  
because they say that the Said defendants were not  
always ready to deliver the Said lumber in the Said  
Contract in Said first Count mentioned, and that  
the Said plaintiffs did not neglect & refuse to receive  
the same at the time when & at the place in Said  
Contract mentioned. And this they pray may be Enquir-  
ed of by the Country

By their Atty Larned & Bently

And the Said plaintiffs further say that by reason  
of any thing in the Said Defs fifth plea to the  
2d 3d 4th & 5th Counts of said Declaration alleged  
preclude them. because they say that the Said Defs  
did not have the lumber in Said Contract in  
Said County mentioned always ready to deliver to  
them Said plaintiffs in the terms in Said Contract  
mentioned. and did not give notice thereof to  
the Said plff and that the Said plff did not refuse  
to receive the same. And this they pray may be Enquired



after the Country, By their Attys James W Bently  
Plaintiffs Instructions

1 If the jury believe from the Evidence that the  
Plaintiffs & Defendants Entered into a Contract  
for the delivery of lumber during the season  
of 1848. as charged in the declaration & that the  
Defendants refused to deliver the lumber according  
to the terms of the Contract, then the plaintiffs are  
entitled to recover. & the measure of damages is the  
difference between the Contract price & the value  
of the lumber, at White Lake.

Given

2 If the jury believe from the Evidence, that  
there was such Contract as stated in the declaration  
there was a failure & refusal to deliver the lumber  
under the Contract, a failure on the part of  
Plaintiffs, to pay, to Defendants the sum of \$500.  
On the 10<sup>th</sup> day of May 1848. constitutes no defense  
to the plaintiffs, recovering of damages for a  
failure to deliver such lumber.

Given

3 If the jury believe from the Evidence  
that the parties in this cause Entered into a contract  
as alleged in the declaration & that Defendants  
failed to comply with the Contract in the delivery  
of the lumber. but refused to do. If they  
further believe from the Evidence, that plaintiffs  
paid to Defendants the sum of \$505 in part payment  
of said lumber then the plaintiffs are entitled  
to recover whether they paid the \$500 on 10<sup>th</sup> day  
of May or not.

Given

4. In Case the jury should believe from  
the Evidence that there was any fact proven



tending to Show a rescinding of the Contract. Still  
unless the Jury believe from the Evidence that the  
Defendants, unconditionally offered & tendered  
back the Sum of \$100, the Defendants could not rescind  
the Contract, and no tender by Defendants of \$100, for the  
purpose of rescinding the Contract, on their part  
would be valid, unless it was an absolute uncon-

ditional tender. If the Jury believe from the Evidence  
that Joseph W. Dalton Swarey, falsely & corruptly  
in a matter material to the issue in this case that  
the Jury should disregard his Evidence altogether  
unless his testimony is corroborated by other Evidence  
in the Cause.

If the Jury believe from the Evidence  
that the Defendants forbade the plaintiffs from  
going for the lumber & refused to deliver to them  
the Contract. Such refusal was a breach of the  
Contract, and it was necessary for the plaintiffs to prove  
their demand of the lumber as to send to White Lake  
for it in order to their right of recovery in this suit.

The Counsel for the Plaintiffs then offered  
as supporting testimony a certain stipulation filed  
in the former Suit, a Settlement of the former Suit  
signed by the Counsel for the Plaintiffs & Defendants,  
which not being objected to was read to the Court  
and which is in the words and figures following  
to-wit:

"Whereas a Contract was made between  
Bentley & Orr and James Dalton of Chicago on  
the 1st of 1847 for the Sale and delivery by said  
Dalton to said Bentley & Orr of all the lumber



which the said Dalton should manufacture at his mill at White Lake in the State of Michigan, during the Season of 1848: and for which Lumber the said Bently & Orr were to pay the said Dalton, according to the terms expressed in said Contract, and the said Bently & Orr at the time of the Execution of said Contract, paid said Dalton One Hundred and Nine dollars (\$109) to be applied on said Contract, and the said Dalton in the Season of 1848, refused to deliver to said Bently & Orr the Lumber Manufactured at his mill in pursuance of said Contract, because as he alleged the said Bently & Orr had failed to comply with said Contract on their part, and whereas the said Bently & Orr afterwards brought Suit against the said Dalton in an action on the Case for Breach of said Contract, in the Cook County Court of Common Pleas and in said Suit, recovered a verdict of Three Hundred dollars damages, at the October Term of said Court A.D. 1851, from which the said Dalton has taken an appeal to the Supreme Court.

And Whereas the said Bently & Orr did on the fourth day of August 1848 replevy from the possession of the said Dalton a cargo of Lumber and saws, Replevin Bond with Charles Walker, as their Security, to Esq. Cook, then Sheriff, with the usual Condition of Replevin Bonds, and said Bently & Orr failed to prosecute their Replevin Suit and a Judgment of Retorno Habendo was awarded against them in favor of said Dalton, by the Cook County Circuit Court, at the May Term thereof 1850, and a writ of Retorno Habendo for said property was issued out of said Court to said Bently & Orr, and returned unsatisfied.



And Whereas afterwards a Suit was brought upon said Replevin Bond against said Bently & Carr and Charles Walker in favor of said Isaac Cook late Sheriff, which Suit is still pending in the said Cook County Circuit Court.

Now it is hereby Stipulated and Agreed between the said Bently & Carr by James Dalton and Isaac Cook late Sheriff by Magnus & Ragne their Attorneys of the One part and James Dalton and Isaac Cook late Sheriff by Magnus & Ragne their Attorneys of the Other part that the said Bently & Carr hereby acknowledge full Satisfaction of the said Judgment of Three Hundred Dollars and interest thereon from the rendition of the same and the said Dalton hereby acknowledges receipt in full for the Sum of Six hundred by said Bently & Carr. and acquits to the said Bently & Carr all Claim and Demand for or on account of the same.

And the said James Dalton and the said Isaac Cook late Sheriff hereby agree to dismiss said Suit upon said Replevin Bond now pending in said Circuit Court, and this agreement is to be a perpetual bar to any further Suit or action upon said Bond.

And it is further agreed that the said Bently & Carr are to pay all the Costs of said Suit upon said Bond now pending as aforesaid except the fees of Witnesses on the part of the plaintiff in said Suit. And that said Dalton is to pay all the Costs of said Suit in which said Judgment of Three Hundred Dollars was obtained by said Bently & Carr in said Cook County Court of Common Pleas. appeal, whereof has been prayed to the Supreme Court. and said Dalton is further



to dismiss said Appeal to the Supreme Court

But is understood that this agreement is in no wise to Effect the Claim of Said Bently & Orr Against the said Dalton. for the One Hundred and five Dollars. paid to said Dalton by said Bently & Orr. upon said Contract for Lumber at the time of the Execution thereof in the Fall of 1847. but the same remains an open question to be settled according to the legal rights of the parties. whatever the same may be at the date of this Agreement.

In Witness Whereof the Said parties by their attorneys have hereto Subscribed their names this twelfth day of May A.D. 1853.

James Dalton & Isaac Cook Shipiff by

J. H. Wayne atty

& Alonzo P. S. Morris jiffs atty

Bently & Orr. by James V. Bently their attys

And thereupon the Court after hearing the Evidence also offered ground for the said Plaintiff and asked their Damages at the Sum of One Hundred and thirty two Dollars and Seventy five cents.

And thereupon said defendants by their Counsel Come & Move the Court for a new trial upon the following grounds

1<sup>st</sup> The Verdict is against the Evidence

2<sup>d</sup> The Verdict is against the Law & Evidence there having been a former recovery on same identical Cause of action

3<sup>d</sup> The Verdict Should have been for Defendants on the ground that the item now Sued upon Should have been included in the former Suit.



And that the Contract was. an entire One. & in direct & into separate & distinct Causes of action

Which said Motion of Defendants the said Court overrules. & renders a judgment for said Plaintiffs for \$132,75

To which said decision and judgment in overruling said Motion the said Defendants by their Counsel Except. and pray that this their Exceptions be allowed & signed by said Court. and thereupon pray an appeal which is granted upon the conditions named in the records of this Court.

John M. Wilson

And Afterwards, to wit: On the Twenty first day of June in the year aforesaid. there was filed in said Cause in the Clerk's Office aforesaid an Appeal Bond Which said Appeal Bond is in words and figures as follows. to wit:

Know all men by these presents that we James Dalton Senior James Dalton Junior and Charles M<sup>c</sup> Donnell of the County of Cook and State of Illinois are held and firmly bound unto Cyrus Bently Administrator of William W Bently Surviving Partner of John M Cox. deceased of the same County and State in the penal Sum of Three Hundred, Dollars. lawful money of the United States for the payment of which said Sum well and truly to be made we bind ourselves our heirs Executors and administrators. jointly severally and jointly by these presents. Witness Our hands and Seals this 20<sup>th</sup> day of June A<sup>d</sup> 1853.



The Condition of the above Obligation  
is Such, That Whereas, the Said Cyrus Beatty Adminis-  
-trator of William H Beatty Surviving partner of  
John M Orr, deceased, did at the May Special Term  
of the Cook County Court of Common Pleas, of said County  
A.D. 1853. recover a judgment against the above named  
James Dalton Senior and James Dalton Junior for  
the sum of One Hundred and thirty two dollars, and  
Seventy five cents damages, besides Cost of Suit from which  
said judgment the above named James Dalton Senior  
and James Dalton Junior has taken an appeal to the  
Supreme Court, of the State of Illinois. Now if the said  
James Dalton Senior & James Dalton Junior shall duly  
prosecute their said appeal with Effect, and shall  
pay the amount of the judgment, Costs interests &  
damages rendered in said judgment and to be rendered  
against them in case the said judgment shall  
be affirmed in the Supreme Court of the State of  
Illinois then the above Obligation to be void Other-  
wise to remain in full force and Effect.

Approved June 21<sup>st</sup> 1853. James Dalton Senior  
James Dalton Junior  
John M. Hill  
C. M. Hannell  
Judge of Cook Co Ct.  
of Common Pleas.

Seal  
Seal  
Seal

State of Illinois  
Cook County  
I Walter Kimball Clerk  
of the Cook County Court of Common Pleas within  
and for the County and State aforesaid do



Hereby Certify that the foregoing is a full  
true and correct Transcript of the papers  
on file in my office in the case of Cyrus Bentley  
Administration of the Estate of William A Bentley  
Surviving partner of John M Carr deceased  
Plaintiff and James Dalton Senior and James  
Dalton Junior Defendants, and also of all the  
orders and proceedings had and entered of  
Record in said Court in said cause, as ap-  
pear from said Records and papers now  
on file in my office.



In Testimony whereof I have  
hereunto set my hand and affixed  
the seal of said Court at the City of  
Chicago in said County this 12<sup>th</sup> day  
of May A D 1854.

Walter Kimball, Clerk



64

Transcript

2. *Hesperis* *prosp.* *in* *Enna*

Filed June 13. 1854  
L. Seland Clk.

Dear Sir,

Σ12400-237



Se. Rectory, Adm<sup>r</sup> &c  
15  
Dalton & Dalton }

This was an action for money  
had and received. Defence was that plaintiff  
had already recovered for same identical  
cause of action. Plaintiff had used Defen-  
dant on written contract to deliver Lumber  
and recovered damages. There was no count  
except on special contract. Question presented  
is whether that suit is a bar to an  
action for money paid by Plaintiff to  
Defendant on account of Lumber and  
which the law creates obligation to repay back.

The Defts offered the Record of  
a former suit. The court are bound by  
the record itself & cannot infer that a  
matter was submitted to the jury, which could  
not have been legally upon the pleadings.

The rule that a former  
recovery is a bar to a subsequent action  
applies only to that which was directly in  
issue. It is only by the material allegations  
of one party that the other can be called  
to answer, it is only upon such that an  
issue can be properly formed. To such  
alone can testimony be regularly adduced,  
and upon such an issue only is judgment to  
be rendered."



• Quote from / Transcript on Evidence § 528,  
see also § 529 & following.

If it appears from the  
record offered in evidence, that the demand  
suff. has not been in issue, it can now  
be prosecuted.

Webster vs Lee 5 Mass 334.

Where demands are separate and distinct,  
although there is a resemblance between  
the cause of action, and they belong  
to the same family, still if there is not an  
identity, the creditor may bring several  
actions for their recovery.

Terens vs Lockwood  
13 Wend 644.

Where it appears, as it does from this  
Record, that the demand was not taken  
into account by the jury, the record of  
former recovery is no bar.

• Miller & Van Vleeten vs Crox  
2 John. 227.

The Record of a former recovery is only  
prima facie evidence, that the demand  
has been <sup>once</sup> tried, and if it appears that  
the demand now sued upon is independent  
and distinct, it is no bar.

Phillips vs Borwick

16 John 136

Cyrus Bentley atty for appellee



Mr Arnold will add to the above.

That, the question of a variance of the action was not made below and could not be made under the pleadings.

The Plea avowed, that the Plaintiff had sued for the same identical cause of action & recovered upon this. There was an issue of fact made. It is clear from the case that Plaintiff did not nor could he recover in the said first action for the same cause for which this suit was brought.

That action was for damages for breach of express contract, to deliver Lumber. This was for money had and received, and Plaintiff recovered on an implied contract or obligation to pay.  
15 Pickering 409



Betty Adam

is

Alton + Dalton

Brief



Supreme Court.

James Dalton Sen.

James Dalton Jr

Cyrus Bentley adw.

of William Bentley dec?

Error Appeal.

from the Cook County Court  
of Common Pleas.

And now comes the said  
Plaintiff by Thomas Hays his Attorney and says  
that in the record proceeding in said Court in the  
Cook Co Court of Common Pleas there is manifest  
error to his prejudice and that said judgment  
ought to be set aside and reversed - and this  
they are ready to deny, wherefore they pray  
judgment be

And for causes of Error sheweth -

- 1<sup>st</sup> The Judgment ought to have been in  
favor of defendants below for costs
- 2<sup>nd</sup> The said Court of Common Pleas erred  
in rendering judgment for said Plaintiff  
below on the verdict.
- 3<sup>rd</sup> The Court erred in overruling a motion  
for new trial entered in said Court of



Common Pleas, by said Plaintiffs, in error -  
and the Court erred in not setting aside  
said verdict as against Law & evidence

4<sup>th</sup> The Court of Common Pleas, erred in  
overruling said motion for a new  
trial below - entered by said Plffs  
in error - because the evidence showed  
that there had been a former recovery

5<sup>th</sup> Court below erred in overruling said  
motion for a new trial - because the  
evidence showed that said claim  
tried upon could have been, and  
should have been <sup>by law</sup> included in a  
former suit & recovery had  
between same parties, in which  
said Defendant recovered as  
against said Plaintiffs in  
error -

6<sup>th</sup> The Court below erred in rendering  
Judgment on the verdict below -

Th. H. Hynes  
att'y for Plffs  
nullo etc. Sprys first  
error for <sup>in error</sup> ~~verdict~~ in error



Supreme Court Ill.

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James Ballou Sen  
James Ballou Jr

vs.

Weyner Bentley Adm  
of Wm A Bentley decd.

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Applicant of  
Error

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Filed June 19<sup>th</sup> 1854.  
S. Leland Clk.



Supreme Court -

James Patton Sen

James Patton Jr

vs.

Brief -

Cyrus Bently, Adm'r  
of William B. Bently, dec'd.

In this case the record and Bill of Exceptions shows, that there was a former suit and recovery between same parties upon the same contract - and a judgment was rendered upon that contract for the sum of \$300 & costs -

not on  
same  
contract

The present suit was instituted below to recover money had and received upon the same identical contract & ~~upon the~~ Pleadings and <sup>and</sup> instructions show, that that payment was made a subject of investigation before the Jury -

We make 2 points on the record -  
1st That the judgment recovered in the former suit was recovered upon the same cause of action, viz, The contract on which was made its foundation - and which was the evidence <sup>in the former suit and</sup> in this suit offered to show the payment of the money viz, \$112. for which the suit below was instituted to recover, - and that judgment once recovered upon that contract - when all causes of action arising out of it was, or might have been submitted at the same time, is a conclusive bar upon Defendant in error - either as a former recovery upon same cause of action - or because it was not admissible for plaintiff to split up & separate an entire demand into separate suits or causes -



— of action, —

1<sup>st</sup> — We rely upon the fact, that the cause in writing in the first suit, upon which a recovery was had, was the same cause of action in the last suit, and that the claim for the amount last recovered, might have been recovered, and included in the former suit —

Miller - W. Court.

1 Mendell. 487 -

It is perfectly settled say the Court that if a party brings a suit for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to another suit for another part of the same demand —

A Plaintiff cannot split up, and separate an entire demand into several suits. The Policy and settled rules of this Court as well as the decisions of the Courts of all other States, avoid, prevent & multiplication of suits —

Smith v. Jones. 15 Whitt. 229

Taunton v. Smith & Payne 15 ibid. 431 -

Willard v. Sperry 16. Id. 121 -

Guernsey v. Leaver. 8 Mendell. 492.

Where a party has several demands, or existing causes of action growing out of the same contract, or resting in matter of account which may be joined and if the demands or causes of action be split up —



and a suit be brought for part only, and  
subsequently a second suit for the residue;  
the first suit may be pleaded in bar  
of the second action —

Pendleton v. Crooks —

19 Wendell - 207.

In this last case - was a suit upon  
an instrument claiming a breach of several  
distinct covenants, and a suit for some  
breaches, and subsequently a suit for other  
breaches, all of the causes of action having  
accrued at the time of bringing the first  
suit, held that the first action could  
be plead in abatement or bar of the second  
action.

{ opinion by Justice Levens  
is very full & conclusive -  
with citation of all the  
authorities -

The case cited by Defts Counsel does not apply  
Phelps v. Perick - 16 Whitt - 136 -

That case showed that the former matter  
was an entirely distinct and unconnected  
transaction with the claim sued upon, -  
But it affirms the general principle that if  
it had grown out of same instrument or same  
transaction, or if it had been submitted to  
a jury and they saw fit to disallow it, or  
for any other cause a verdict & judgment had  
passed it would have been conclusive  
upon the party -



2<sup>d</sup> Upon the general rule of Law - that a former recovery has been had upon the same cause of action, between the same parties - the Record and proceedings showing the former suit and a recovery once had upon the same Contract in writing - and that the evidence in both the suits <sup>was</sup> similar and substantially the same, the Defendant ~~was~~ <sup>is</sup> concluded:-

His objection below was, that he could not recover because he had not filed his recovery Counts with the Declaration in support upon the breach of the Contract.

A defect of pleading can never be used to help a party in maintaining a second suit unless he had taken a non suit. If he proceeded to take judgment, he must abide of the results & consequences of a verdict.

He cannot now take advantage of his laches or wrong - to violate a well settled rule or principle of Law & continue to be in with new suits for the same cause of action which were once submitted for trial. It does not appear but that the amount of his recovery in the former suit was enhanced, and but that it included



the sum now used for and again made the subject of litigation and recovery.

It was made the subject of argument to the Jury. The good sense of the rule that prevents a party bringing separate suits for <sup>several</sup> causes of action arising out of the same contract or transaction is shown here in the fact that the aggregate of the damages below is enhanced and that the money paid on the contract went to swell the sum of damages allowed by the Jury in the former suit. They have had the benefit of this claim at least collaterally. The same evidence was before them in the former suit, as upon the last recovery. And the verdict and judgment was recovered upon the same contract and breach of contract all arose out of same contract and all might have been joined and recovered in said action.

It is unnecessary I apprehend to cite authorities to show that where the evidence shows a matter has been once litigated between the same parties, ~~upon~~ and a judgment has gone upon the verdict, that the Court will not ~~allow~~ permit a second litigation of them by between those parties.

Chicago July 1. 1834

W. H. Dwyer Counsel for  
Puffer & Co



Supreme Court

JAMES CALTON SR  
JAMES CALTON JR

-H.

Legon Bently adu  
of Wm Bently -

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Brief of Pff  
Argument on  
Error -

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