

No. 14509

Supreme Court of Illinois

Myers

vs.

Walker

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 41

Reported

Myers

Haeker

1863

1869

14504

State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

HENRY MYERS AND STANLEY J. DAWSON

vs.

CHARLES WALKER, SURVIVOR, &C.

OF THE CIRCUIT COURT OF PEORIA, ILLINOIS, IN A CAUSE NO. 10,000

ERROR TO PEORIA.

Abstract of Record.

This was an action of assumpsit brought to the May term, 1858, of the Peoria circuit court, by Charles Walker and William Kellogg, as partners under the name of Walker & Kellogg, against the plaintiffs in error, trading under the name of H. Myers & Co.

Page of Record 3. The declaration contained the usual common counts for goods sold, work and labor, &c.

6 The defendants pleaded general issue, with notice of set off.
7

At the June special term, 1859, there was a trial and judgment for plaintiff, and that judgment was reversed by this court. (See 24 Ills. Rep. 133.)

21 The bill of exceptions taken upon the first trial, and other proceedings, occupy the balance of the record to page 21, and are not necessary to be stated.

22 At the December term, 1860, the judgment of the supreme court was presented to the circuit court, and the cause was ordered to be redocketed for further proceedings, in conformity with the decision.

22 At the March term, 1861, an application was made by defendants below
23 for change of venue, upon the following

NOTICE AND PETITION:

State of Illinois, } ss.
PEORIA COUNTY, }

IN CIRCUIT COURT, MARCH TERM, 1861.

CHARLES WALKER, SURVIVOR OF WALKER & KELLOGG,
vs.
HENRY MYERS AND STANLEY J. DAWSON.

Hon. N. H. Purple will please take notice, that on the 2d day of the March term, 1861, of the circuit court of Peoria county, Illinois, or as soon thereafter as counsel can be heard, an application will be made by the defendants in said cause for a change of venue in said cause, on account of the prejudice of the judge of said court.

Feb. 27th, 1861.

JAMES ROBERTS, Attorney for Defendants."

24 Received a copy.
Feb. 27th, 1861.

N. H. PURPLE, Plaintiffs' Attorney.

The petition was entitled in the same manner as the notice, and was as follows:

"The undersigned, Henry Myers and Stanley J. Dawson, defendants in the above entitled cause, respectfully show unto your honor, that they verily believe they cannot have a fair and impartial trial of the above entitled cause in the Peoria circuit court, where the same is now pending, on account that the judge of said court is prejudiced against them, and said information of said prejudice came to the knowledge of petitioners since the last trial of this cause."

Which was signed and sworn to.

24 The motion for change of venue was overruled, and defendants excepted.

24 At the November term, 1861, the cause came on for trial before Merri-
man, judge, and a jury.

Bill of excep-
tions.

The plaintiff offered in evidence the following papers, marked A, B and C:

28

(A.)

"PEORIA, Feb. 13th, 1854.

"This certifies that we have this day agreed to purchase corn at our warehouse in Spring Lake, the coming season, for Walker & Kellogg, and said corn, when purchased, is to be subject to their order; also, we are to be governed by them as to price to be paid from time to time, and are to receive four cents per bushel for buying, storing and delivering on board their boats, we making up to them the same quantity reported as bought for them.

H. MYERS & CO."

(B.)

This certifies that we have sold and agreed to Walker & Kellogg, on board their boats, during the coming months of April and May, as they may call for the same, ten thousand bushels of sound merchantable corn, of 56 lbs. to the bushel, for which they are to pay us thirty-six cents per bushel. It is understood said corn is now at our warehouse at Spring Lake, upon the Illinois river, and that they are to take it from that point, we putting it on board free of charge to them; and we hereby acknowledge the receipt of one thousand dollars upon said corn, in part payment for the same.

Dated Peoria, February 13th, 1854.

H. MYERS & CO.

(C.)

Received in store from Walker & Kellogg, and subject to their order, and free of all charges on board their boats, or any boats they may send for the same, thirty thousand bushels shelled corn in good order and condition, said corn being stored at the warehouse at Spring Lake, Tazewell county, and occupied by Moore, Pratt & Co., in connection with whom the corn has been bought for Walker & Kellogg, and with their funds.

Peoria, April 15th, 1854.

H. MYERS & CO.

All of which papers, before they were read, were objected to by defendants, because they were not admissible under the pleadings; which objection was overruled and the papers admitted; to which the defendants at the time excepted:

23 The plaintiff then called Henry M. Kellogg, who, after being sworn, was
23 examined by defendants' counsel, and upon said examination, said:

23 "I am a brother of William Kellogg, the deceased partner of Walker &
Kellogg. Said William Kellogg is now dead, and I am his administrator. He never was married, and left no children or descendants of children.
23 The firm of Walker & Kellogg's debts would not exceed one thousand dol-
lars, but no assets and no collections made."

Defendants then objected to said witness being allowed to testify, because he was administrator of William Kellogg, and one of his heirs at law, and would receive a part of whatever was given by verdict to the plaintiff.

23 Thereupon, the plaintiff produced the following release, marked D in the bill of exceptions:

(D.)

CHARLES WALKER
vs.
HENRY MYERS et al.

IN THE CIRCUIT COURT OF PEORIA COUNTY, IN ASSUMPSIT.

For and in consideration of the sum of one dollar to me in hand paid by Charles Walker, the plaintiff above named, I do hereby release and assign to the said Charles Walker aforesaid, all interest, right, title, claim, property and demand which I may have, either as heir or administrator of William Kellogg, deceased, or otherwise howsoever in or to any part or portion of the money or claim sought to be enforced or recovered in this suit. In witness whereof I have hereunto set my hand and seal at Peoria, this 7th day of December, 1861.

HENRY M. KELLOGG. [SEAL.]

But defendants still objected to said Kellogg's being allowed to testify, because if the costs should be adjudged against the plaintiff, it would diminish the fund in which witness had an interest, as heir of William Kellogg, and because the witness had no right to give any such release; but the court permitted the witness to testify, to which the defendants at the time excepted.

The witness then testified that Walker & Kellogg advanced to defendants, after deducting old account of \$109 12, and \$885 05 for sacks returned, to the amount of \$11,783 94. Walker & Kellogg received from defendants 21,347 bushels of corn, ten thousand bushels of which was credited at 36 cents per bushel, and 11,347 at 28 cents, which amounts in all to \$6,777 31. That witness, as the agent of Walker & Kellogg before the commencement of this suit, some time in the spring of 1858, called upon defendant Dawson and showed him the account of Walker & Kellogg, a copy of which is contained in the record, at page 29; that Dawson, in the presence of defendant Myers, admitted the correctness of the debit side of the account, except the interest. Defendant Dawson furnished witness with an account as an off-set, which is contained in record at page 48, 49 and 50. Dawson said nothing at that time about corn in the warehouse that had spoiled. I never heard anything about spoiled corn until after William Kellogg's death. I told Dawson it was necessary for the matter to be fixed up. He requested a delay of one week, until he should see Moore, Pratt & Co. He claimed the account marked "F" as an off-set. Witness also testified that in May, 1854, corn in Spring Lake was worth 32 or 33 cents per bushel. And thereupon plaintiff rested.

Defendants then read in evidence the following contract:

"PEORIA, Feb. 13th, 1854.
 "This certifies that we have agreed to pay H. Myers & Co. four cents per bushel of 56 lbs., for purchasing and delivering corn on board our boats the coming season, they purchasing the same at as low a price as possible; and if, in our opinion, the price should be too high, we are to notify them, and they are to stop buying. It is understood we are to keep them supplied with money as needed for paying for same, and they are to deliver us the same quantity of corn their account shows as being bought for us, and charged to our account. It is understood they are to purchase for us alone, and not for others. It is understood the above refers to corn bought at their warehouse at Spring Lake, upon the Illinois river.
 WALKER & KELLOGG."

Defendants also read in evidence an order for ice, amounting to \$850, which plaintiff admitted to be correct, and that Walker & Kellogg had got the ice.

Defendants then called Timothy W. Pratt, who testified:

I was one of the firm of Moore, Pratt & Co. We commenced business at Spring Lake in the fall of 1853; was a member of the firm of Moore, Pratt & Co. for two years at Spring Lake; our firm bought the corn that Walker & Kellogg got, and presume it is the same mentioned by the contract with Myers & Dawson. We purchased the corn as the agents of H. Myers & Co., at Spring Lake. The warehouse at Spring Lake is about one mile from the Illinois river, on an outlet of the lake. Boats can generally get to the warehouse only in the spring, when the river is up. Sometimes boats can get there in the fall, but we generally depend upon their getting to the warehouse in the spring. The account annexed to the defendant's plea was then shown witness. The number of bushels stated in that account as having been delivered to Walker & Kellogg is correct; ten thousand bushels at 36 cents, 1174 at 35 cents, 16,160 bushels at 34 cents. The account for meat and twine is correct. H. Myers & Co. paid those prices for the corn, and we thought we were buying as low as any one. This corn was actually delivered. H. Myers & Co. had, at the date of the contract, (Feb. 13th, 1854,) at our warehouse in Spring Lake, about ten or twelve thousand bushels of corn. In the latter part of April or early part of May, 1854, I went with defendant Dawson to Peoria to see

Walker & Kellogg, but Walker was not there. Dawson asked Kellogg when he was going to send for the corn. Kellogg said immediately or very soon, one or the other; I think he said immediately. Dawson said he would like a more definite answer. Kellogg said he should have boats—I think he said he looked for boats that night, and would send them down the following day and take corn away. Mr. Dawson told Kellogg the season of the year was coming or was at hand, at which corn would spoil, and that the river was liable to fall, and it would then be impossible to get the corn away except at great expense; that H. Myers & Co. would not consider or hold themselves liable for any damage that might happen to it, or charges that might accrue if the river fell, and it had to be handled. Kellogg said there was no danger of any damage accruing to it, as he would send boats and take it away next day. I don't know the amount advanced by Walker & Kellogg to Myers & Co. At the time we first went up, Myers & Co. had all the corn they ever had for Walker & Kellogg, except what had been delivered. There was in the warehouse at Spring Lake at that time, for Walker & Kellogg, between thirty and forty thousand bushels of corn. The corn of Walker & Kellogg was always kept separate from that of Moore, Pratt & Co. I went up with Dawson again about the last of May or first of June, 1854, and saw Kellogg again. The conversation was very much as it was the first time. The water was then falling, and the corn liable to heat. Dawson asked Kellogg why he had not sent boats, as he agreed to do. Kellogg said because, after he saw Dawson, he heard that a lot of corn he had at Copperas Creek, or Liverpool, was damaging, and he was obliged to send and take that away; and Kellogg also said he had just received a dispatch from above Chillicothe or Lacon; that he had a propeller and fleet of boats on their way down, and that he would send them down and take the corn away. Dawson said the corn was ready for him. Dawson again told Kellogg, in stronger terms than before, that he would not be responsible for damages or charges to the corn. Kellogg told him he did not consider it would be Myers & Co.'s loss. I think only about one boat load had been taken away at the first time we went up to see Kellogg—about four or five thousand bushels. I am not positive that Kellogg said anything the first time we went up, about not holding Myers & Co. responsible, but think he did. No boats came that I know of. Was at Spring Lake almost constantly, attending to the business. If boats had come, I would have known it. The corn was all ready for Kellogg. Was engaged in buying corn in Spring Lake in the spring of 1851 and 1852. Went to Spring Lake in the fall of 1848; lived in that neighborhood nearly all the time until 1858 or 1859. In the spring season we aim to get our corn out early. The season for buying corn depends on the height of the river usually, and usually ends about the middle or first of June; always tried to get our corn out by the first of June. The season depends on the stage of the water. The warehouse is about a mile from the river, on an outlet of the lake. I think the river had fallen before the last of the ten thousand bushels were delivered. There was some extra expense consequent upon hauling to the river, and it had to be sacked. When the river was high the boats could come up to the warehouse and the corn could be put into the boats by a spout, but when the boats could not come up the lake, it had to be sacked and hauled to the river. It costs two cents per bushel to sack and haul it to the river. Myers & Co. paid us two cents per bushel for hauling and sacking this corn for Kellogg. I think there was but one boat load taken away without sacking. The Baltic took away some four or five thousand bushels; the balance was taken away in the fall, and part not taken away until December. The customary and usual price at Spring Lake at that time was one cent a month per bushel for storage. I think defendants' account annexed to the plea for storage is correct. Myers & Co. paid Moore, Pratt & Co. for storage. Considerable of it was injured by heating. Corn loses in weight and in value when it heats. They stored to amount and time charged in defendants' account. A part of the corn was retained by Moore, Pratt & Co. to

pay charges for storage and hauling upon that that was shipped. Enough was retained to pay those charges. Some of the corn spoiled—I suppose four or five thousand bushels. Between thirty and forty thousand bushels was purchased for Walker & Kellogg. I think we expended about ten thousand dollars therefor. I don't think we bought any corn under thirty-four cents; and when it got to be thirty-six, we were ordered to stop buying. After the 1st of June it is not safe to keep corn in store, on account of danger of its heating. Kellogg was at Spring Lake in November or December, 1854, and wanted to know if any more of his corn was there. Witness told him it was delivered, and showed him some corn that was rotted. There is a difference of between 3 and 4 cents in the price of shelled corn and corn in the ear. The corn mentioned in defendants' account is corn that was shipped, and does not include corn that was damaged. Nothing was said about buying any more corn when I went with Dawson to see Kellogg. The warehouse was dry and never leaked; was a safe place to keep corn. When Kellogg came down to Spring Lake he asked me if we were shipping his corn; that he had not got all he should have from the amount of money. I told him some of his corn had heated and spoiled, and showed it to him. He said it was worthless. I also told, as warehouse men generally do, that we retained corn to pay our expense. I don't think he made any reply. Kellogg knew, at the time Dawson and I came to Peoria, that Moore, Pratt & Co. were doing the business.

Cross examination:

Don't recollect that Kellogg was down there more than once. Never had any conversation down there about the corn more than once that I recollect of. Myers & Co. furnished us with the money we bought the corn with. We bought some corn for ourselves before and after we bought for Myers & Co. Commenced buying for them in the month of February, 1854; can't state the time exactly; think towards the last of the month. We had on hand at that time more than ten thousand bushels; might have had double that. Shelled corn was in the warehouse, and the ear corn was in the pens. There was ten thousand bushels sold to Myers & Co., then at Spring Lake. All the shelled corn that was in the warehouse, was considered sold to Walker & Kellogg. My partner sold it, and had in the neighborhood of six thousand bushels in the warehouse on the 13th of February, 1854. That that was in the ear was not set apart to Walker & Kellogg. That in the warehouse was considered theirs. My partner sold the corn when he was up the river, at Pekin or Peoria. Don't know that there was any specific agreement that Myers & Co. were to have that identical corn. Don't know anything more, personally, than that Myers & Co. were to have the ten thousand bushels. Did not shell any more corn at that time; did early in the spring of '54—shelled a great amount more. Put enough in the warehouse to complete the ten thousand bushels sold to Myers & Co., and shipped the balance on our own account. Can't tell how much we shipped. We kept a book in which was set down the amount of corn we bought. Don't know where it is; it was at Havana the last time I saw it. I took it with other books to Havana, when I removed to Havana to do business there. I saw it at Havana after I took it there; can't tell you who has it in possession. It was boxed up with other books and left in a warehouse at Havana. I do not know where the books now are. I could not tell what I paid for each particular lot of corn that season. We must have bought between seventy and eighty thousand bushels. Can't say when we stopped buying; may have bought through the month of May and into June, but can't say. I was a witness upon a former trial of this cause. There was an account presented. (The account marked "F" was here shown witness.) I think Moore, Pratt & Co. made an account to Myers & Co. Could not say this account was the account we made out. I could not say that we made more than one account. I don't think there was any charges after December. Witness was then shown account attached to plea. I don't know whose writing it is; don't think

he ever made one just like it; thinks he made one in the aggregate that was much like it; 27,340 bushels charged in this account; thinks they took away all of that. Don't remember that, on any former examination, I said that Kellogg commenced taking away corn in May and finished in December, 1854. I don't remember whether I stated on my former examination, that we made a bill to Myers & Co. immediately afterwards, and I think it was in items, and amounted in the aggregate to more than nine thousand dollars. I can't say whether the bill present at the former trial was the same bill made to Myers & Co. or not; could not tell very closely how much corn we shelled and put into the warehouse that season. I suppose we had 50,000 bushels of shelled corn in the warehouse that year. We bought more than that, but a part of it never went into the warehouse. It was kept on a separate floor of the warehouse. There were three floors in the large warehouse. Kept our corn in a smaller warehouse. Think there was on first floor of the big warehouse that season over 15,000 bushels. The second floor had more in it—probably 15 or 20,000 bushels. The middle and bottom floors contained the corn we bought for Walker & Kellogg. The lower floor contained 10,000 bushels, more or less. Think the rotten corn was on the bottom floor when Kellogg was there. Could not tell very nearly how much corn Moore, Pratt & Co. had on hand on the 13th of February, 1854, at the warehouse. They might have had twenty or twenty-five thousand bushels at that time. Presume I stated on my former examination that Kellogg was there in November, 1854. I presume I said the parties seemed to understand the terms upon which the corn was bought, handled and shipped. I cannot say that I did not say on my former examination that nothing was said about rotten corn and extra charges. Mr. Bonney appeared to be employed as counsel by Myers & Co. in the former trial, and took down my evidence. I know that I showed Mr. Kellogg a part of the rotten corn. I have no recollection of saying that nothing was said about rotten corn and extra charges. Don't recollect whether account shown me in Bonney's brief was like Myers & Co.'s account; the aggregate, I think, was larger.

Re-examination by defendants:

Storage was one cent per bushel per month. The figure 6 for first item of storage in account annexed to plea is wrong—it should be 4—but the extension of amount is right. On part of the corn we charged no storage. No storage charged on corn taken away in the spring. The next corn was taken away in September; charged storage on that for four months. If it was into September, charged for the whole month.

Cross resumed:

If the books could be produced, they would show the price paid for the corn, and for whom bought, and the rates and prices of the several purchases. That he supposed the books could be found if any exertion was made.

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Samuel S. Porter, sworn for defendants, said: I bought grain from the year 1849 to 1859. I bought corn at Spring Lake in the years 1852, 1853, 1855, 1856 and 1857. Did not buy any in 1854 at Spring Lake. I was governed in buying corn there by the river. It was very unsafe to buy corn there after June. It was worth from one cent and a half to two cents per bushel to haul and sack corn to the river. I never bought corn there in June. Very little corn was ever bought there after first of June. The season for buying corn at Spring Lake would not last longer than the first of June, if we expected to ship it by water. I don't know of any local custom that makes a distinction between Spring Lake and other points on the Illinois river as to the season for buying corn. It would not be safe to buy corn there after the first of June; there would be danger of its spoiling if kept over the summer months.

27 Peter A. Brower sworn. I have been purchasing corn off and on at Pekin and Spring Lake for 15 or 18 years. Don't know what the word season means there. If I were purchasing corn for another I would buy during the season at the risk of the purchaser. The season depends entirely upon the stage of the river—sometimes it continues during the whole of the navigation. River generally falls between the first of June and July. Never bought corn only in the spring there, and always sent my boats and got it away while the river was up. I don't know of any established custom at Spring Lake as to the time for purchasing corn.

28 Joseph W. Cochran called for defendants. Witness was shown the debit side for plaintiff's account marked "E." I have made the calculation of the money advanced as shown by that account prior to April 15th, 1854. It is just six thousand four hundred and twenty dollars.

33 Henry Kellogg was then recalled for plaintiff, and his evidence again objected to, because he was interested. Witness produced drafts drawn by defendants on Walker & Kellogg, and accepted by them, to the amount of \$9,946 90. The date and amount of which said drafts are respectively as follows, to-wit:

DATE.	AMOUNT.
Feb. 21, 1854, - - - -	\$500 00
" 24, - - - -	300 00
" 25, - - - -	1,200 00
March 4, - - - -	3,000 00
" 6, - - - -	120 00
" 15, - - - -	350 00
" 17, - - - -	2,000 00
" 21, - - - -	176 90
April 17, - - - -	2,000 00
	\$9,946 90

All of which drafts were accepted by Walker & Kellogg before the receipt for the thirty thousand bushels was given.

Plaintiff then read to the jury the following letters, marked "I," "J" and "K" in the record:

I. PEKIN, March 22, '54.

Messrs. Walker & Kellogg:

We will see Moore as soon as possible; but we told him some weeks ago not to give over 27 or 28 cents. We are only paying 28 here, and no one cares about buying at that. In fact, there is not one buyer in market at that price. We believe men are here offering 14c for dry hides, and 5c for green.

(Signed,)

Truly yours,

H. MYERS & CO.

J. PEKIN, Sept. 26, '54.

Messrs. Walker & Kellogg:

GENTS: Moore's partner is here, and says that corn at Spring Lake must be taken away as soon as possible, else it will spoil, and they will charge extra storage; and we think it greatly to your interest to take it off; and think to have \$10,000 invested there all the winter in corn is not desirable. Besides, we cannot close our business until it is done. Zimmerman can get a good freight for Havana and points above, and we think you stand very much in your own light not to get it up immediately. Michigan and barges will soon take it up. You have already received nearly 6000 bushels, and you can soon get the balance up. If you cannot come down this trip, let Zim make arrangements to go down next trip without fail, for Canton, Liverpool and Havana, for he can get a full load of goods; for St. Louis boats say they are going no further than Peoria. Zimmerman had better telegraph shippers at LaSalle that he will take goods for those places, that they may freight for him. You can ship your corn on railroad from Peoria, but we cannot at Spring Lake. The bars are not so bad from Peoria to LaSalle. We hope you will not fail to make arrangements to take corn next trip, at least.

(Signed,)

H. MYERS & CO.

K.

PEKIN, May 7, '57.

Messrs. Walker & Kellogg :

Yours requesting us to come up and make a settlement of the Moore & Pratt business was duly received, but was not answered sooner, thinking to hear from them. They have all the papers, and must attend principally to arranging the business. We sent them your letter, but have not heard from them yet. We think Moore will do well with his grain this season, and will soon be able to clear up all old matters. He was like the rest of us last season—lost considerably. Knowing they will do what is right when they think they are in a condition to satisfy all claims, we should regret to see the matter litigated before all parties had tried to settle it amicably. We shall see Moore before long, and will urge him to a settlement.

Respectfully,

H. MYERS & CO.

38 Mr. Eastman called for plaintiffs, and said: I went to Spring Lake in last of November or first of December, 1854; got a load for part of three barges. I got all they had. Pratt was there and delivered the corn to me.

39 Brower recalled for defendants. I was purchasing corn in Tazewell county in 1854; was paying from 28 to 35 cents in March. April and May for shelled corn. In April we paid 32 and 33 cents for the greater part. Don't remember what it was worth in March. Difference between shelled corn and corn in the ear is from three to four cents per bushel.

39 Pratt, recalled for defendants, said: We bought most of the corn in the year 1854, in Spring Lake, in the ear. The price in the letter must mean corn in the ear, as we bought most of the corn in the ear and had it shelled by contract, at three cents a bushel, and boarded the hands of the sheller.

39 Mr. Grier was called for plaintiffs, and testified: I am a dealer in grain in Peoria. The season here and all along the river commences with the opening of navigation, and runs till its close in the winter.

Cross-ex.

I am speaking of season at Peoria. Was never at Spring Lake. Can move corn at any time by railroad from Peoria.

39 Mr. Tyng called for plaintiffs:

The season for buying means whole season. The season for shipping means while boats can run. Can't say when water is so low that boats can't get up to Spring Lake.

The foregoing was all the evidence given in the case.

39 The court was then requested to give for defendants the following instructions:

1. The jury are instructed that the plaintiffs in this cause are not entitled to recover for money they advanced to purchase the corn with, and for the corn also; which instruction the court refused to give, but struck out the word also, and added the following qualification: "purchased with such money," and gave it so qualified; to which refusal to give said instruction as originally written, and qualifying the same, the defendants at the time excepted.

The court then gave for the defendants the following instruction:

40 2. If the jury believe from the evidence, that on the 15th day of April, 1854, the parties got together and defendants then executed the receipt of that date for the 30,000 bushels of corn; and if the jury further believe from the evidence that all the money paid by the plaintiffs to the defendants was paid on and prior to said 15th day of April, 1854, it is for the jury to determine from all the evidence whether the parties at that date agreed among themselves that the 30,000 bushels of corn covered all the advances made by the plaintiffs up to and on said date.

The court gave for the defendants the following instruction :

3. If the jury believe from the evidence, that the receipt for the 30,000 bushels, at its date, covered all the advance up to and on that date; and if the jury believe from the evidence that no further advances were made by plaintiffs to the defendants to purchase corn with, then the plaintiffs cannot recover for any failure of the defendants to purchase corn after the 15th of April, 1854.

The court gave for the defendants the following instruction :

4. The court further instruct the jury, that by the terms of the receipt offered in evidence by the plaintiffs, dated April 15th, 1854, the 30,000 bushels of corn was then the corn and property of Walker & Kellogg, and was then in the warehouse of Moore, Pratt & Co., at Spring Lake.

The defendants asked for the following instruction :

40 5. There is no time specified in the receipt dated April 15, 1854, when
Walker & Kellogg were to send for the corn, and in that case, Walker &
41 Kellogg would be required to send for the corn, and in a reasonable time;
and if Walker & Kellogg failed or neglected to send for the corn in a reasonable time; and if the jury further believe from the evidence, that by reason of such failure and neglect of Walker & Kellogg to send for and take away the corn in a reasonable time, a part of the corn was lost or spoiled, then, unless the defendants were guilty of some negligence, Walker & Kellogg must sustain such loss and damage, and the jury should not allow the plaintiffs for any corn so lost or spoiled.

Which instruction the court refused to give, but added the following qualification :

“Unless the jury believe from the evidence, that the time for the delivery of such corn was changed by some other contract between said parties, or that the corn specified in this receipt was subject to the terms of the contract of February 13, 1854,” and gave it so qualified; to which refusal to give said instruction as originally written, and so qualifying the same, the defendants at the time excepted.

The defendants asked for the following instruction :

41 6. If the jury believe from the evidence, that the defendants had on hand in the warehouse of Moore, Pratt & Co., the 30,000 bushels of corn specified in the receipt dated April 15, 1854, and were then ready to deliver the same at that date; and if the jury further believe from the evidence that the plaintiffs did not, within a reasonable time, call for and take away the corn, and that by reason of the failure of the plaintiffs to remove the corn in a reasonable time, the defendants were subjected to and did pay for the sacking, hauling, and for storage on the corn, in order to take care of and ship the corn, then the jury should allow the defendants a reasonable compensation for such sacking, hauling, and extra storage. Which instruction the court refused to give, but added the following qualification :

“Unless the jury further believe from the evidence, that the time for the delivery of such corn was changed by some other contract between said parties, or that the corn specified in this receipt was subject to the contract of February 13, 1854;” and gave it so qualified. To which refusal to give said instruction as originally written, and so qualifying the same, the defendants at the time excepted.

The court gave for the defendants the following instruction :

42 7. The court instructs the jury, that under the contract in this case dated

February 13, 1854, defendants were to receive four cents per bushel for buying, storing and delivering corn on board the plaintiff's boat. The contract limited the performance of those acts during the then coming season for buying and shipping corn at Spring Lake, and the defendants were not bound to purchase or store corn for them after the expiration of such season; and if the plaintiffs neglected to remove the corn within the time limited, the defendants had the right to charge the usual and customary rates of storage for the time it subsequently remained in store; and the plaintiffs were bound to pay it. The undertaking to purchase and store was not for an indefinite period, but only during the season for purchasing and shipping corn at Spring Lake.

The court gave for the defendants the following instruction :

- ⁴² 8. If the jury believe from the evidence, that the season for buying and shipping corn at Spring Lake expired by the first of June, and that the defendants had the corn ready for delivery before that, and so notified the plaintiffs, and the plaintiffs failed and refused to take it away, the defendants are not responsible for any corn injured by heating or otherwise, unless said damage was caused by negligence of the defendants.

The court gave for the defendants the following instruction :

9. The court instructs the jury, that if they believe from the evidence that the plaintiffs were notified that the corn was ready for delivery, and that the plaintiffs failed to send for it within the time agreed upon by the parties, and before they did send for it the river fell so as to increase the expense of putting it on board the boats, the defendants are entitled to credit for such increased expense.

The court gave for the defendants the following instruction :

- ⁴³ 11. The court instructs the jury, that defendants are entitled to recover four cents per bushel for all the corn purchased under the contract of February 13, 1854, except the 10,000 bushels contract by defendants for plaintiffs; and if the jury believe from the evidence that the defendants purchased for the plaintiffs thirty thousand bushels of corn, the defendants would be entitled to receive four cents for each bushel so purchased, if they further believe such corn was bought under the contract of February 13, 1854.

The court gave for the defendants the following instruction :

- ⁴³ 12. The court instructs the jury, that the defendants, by the terms of the contract given in evidence, were not bound to ship the corn until the plaintiffs sent for it.

The defendants then asked the court to give the jury the following instructions :

- ⁴³ 13. The court instructs the jury, that by the terms of the receipt given by the defendants to the plaintiffs for the thirty thousand bushels of corn, dated April 15th, 1854, the defendants became the bailees of the corn for the plaintiffs, and were only bound to take reasonable care of the same, and have the same ready for delivery for a reasonable time; and if the same was injured without the negligence of the defendants, the defendants are not responsible for such injury, and had a right to charge storage for any neglect to carry it away after a reasonable time, if the jury believe from the evidence, that the plaintiffs failed to take it away in a reasonable time, and were notified to do so.

- ⁴⁴ 14. The court instructs the jury, that under the pleadings in this case, the plaintiffs are not entitled to recover damages for any failure or refusal by the defendants to deliver any corn purchased.

15. The court instructs the jury that the defendants are entitled to have credit for the corn at the price they paid for it at Spring Lake, and if the corn fell in price after it was bought, the plaintiffs would have to sustain such loss.

- “ 16. The court further instructs the jury, that the receipt dated April 15, 1854, is evidence that the defendants purchased for the plaintiffs thirty thousand bushels of corn; and if the jury believe from the evidence, that the defendants did purchase for plaintiffs thirty thousand bushels of corn, then defendants are entitled to receive four cents per bushel upon the whole of said corn, and it makes no difference that the whole of the corn may not have been delivered.

All of which last mentioned instructions the court refused to give; to which refusal to give the same, the defendants at the time excepted.

- “ The court gave for the plaintiffs the following instructions:

1. That the plaintiffs in this cause are entitled to credit for all the money advanced under the contract for the purchase of corn according to the contracts.

2. That by the contracts the corn was to be delivered when called for during the season without charge, except the price to be paid per bushel as stipulated in the contracts, and four cents per bushel commission.

3. If the jury believe from the evidence, that the defendants admitted the correctness of the plaintiffs' account given in evidence, and that the account which the defendants furnished of their claim in 1858 is correct, they will find for the plaintiff the difference between the two accounts; and if they believe from the evidence, that the season mentioned in the contracts extended from the opening to the close of navigation in the spring and fall, they will find for the plaintiff the difference between the two accounts, deducting from defendants' account all charges except for commission, sacks, meat, twine, and labor on boats, and ice.

- 45 4. That by the contract of February 13th, 1854, the defendants were to purchase corn during the season for Walker & Kellogg. That said corn, when purchased, was to be subject to their order, and they were to be governed by them as to price to be paid from time to time; and that they were to receive four cents per bushel for buying, storing and delivering on board their boats, and to make up the quantity, reported by them (Myers & Dawson) as bought, to Walker & Kellogg.

5. That to establish a custom, it is necessary that the party asserting it should prove that the same had existed for a series of years, and that the same had been known and acquiesced in by all persons conversant with the business at the place aforesaid.

To the giving of each of which instructions, the defendants at the time excepted.

The jury found a verdict for the plaintiff, for \$3,323 23.

- 45 A motion for a new trial was entered by the defendants, and the motion
46 overruled, and exceptions taken, and judgment rendered upon the verdict.

Errors assigned:

- 44 1st. The court erred in overruling the motion for a change of venue.

2d. The court erred in admitting the contracts of February 13th, 1854, and the receipt for corn of April 15th, 1854, under the pleadings.

3d. The court erred in allowing the witness Henry M. Kellogg to testify in the case.

4th. The court erred in refusing to give the first instruction asked on the part of the defendants below, as originally written, and in qualifying the same.

5th. The court erred in refusing to give the defendants' fifth instruction as originally written, and in qualifying the same.

6th. The court erred in refusing to give defendants' sixth instruction as originally written, and in qualifying the same.

7th. The court erred in refusing to give the 13th, 14th, 15th and 16th instructions asked by the defendants below.

8th. The court erred in giving the 1st, 2d, 3d, 4th and 5th instructions asked by plaintiff below.

9th. The court erred in refusing to grant a new trial.

ROBERTS & IRELAND,
Attorneys for Plaintiffs in Error.

State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

HENRY MYERS AND STANLEY J. DAWSON

vs.
CHARLES WALKER, SURVIVOR, &C.

Brief for Plaintiffs in Error.

The plaintiff below was not, under the evidence and pleadings in this case, entitled to recover, and the court manifestly erred in admitting the contracts in evidence, and not granting a new trial. The declaration contains only the common counts, and if the plaintiff was entitled to recover under any count, it would be the count for money had and received. But here was a special contract that the defendants below were bound to perform, and there is no dispute that they had performed part, and an acceptance of that part by Walker & Kellogg, and they cannot now rescind the contract after having accepted a part performance; nor have they any right to consider the contract in force for one purpose, and as rescinded for another.

An action for money had and received does not lie if the contract has been in part performed, and the plaintiff has derived some benefit, so that were he to recover a verdict, the parties could not be placed in the same situation in which they respectively stood when the contract was made. *Blackburn vs. Smith*, 2 Exchequer Rep., 783; *Chitty on Contracts*, 691; *Lyon vs. Bertram*, 20 Howard U. S. Rep., 149; *Clark vs. Baker*, 5 Metcalf Rep., 452; *Ehrensperger vs. Anderson*, 3 Exchequer Rep., 148, 149. There was no evidence here that Myers & Co. had money belonging to Walker & Kellogg that they refused to expend in purchasing corn; no evidence that they had refused to deliver the corn purchased; and in addition to this, the receipt of April 15, 1854, showed that after their contract to purchase the corn, Myers & Co. gave a receipt as warehouse-man for the corn so bought, as the receipt upon its face expressly shows; and the evidence of the plaintiff's own witness, Henry M. Kellogg, expressly shows that no money was advanced on the contracts of February 13th, 1854, after April 15th, 1854; nor is there any evidence that Myers & Co. ever refused to deliver this corn, or sold or otherwise disposed of it; and the corn having been bought under the contracts of February 13th, 1854, and Walker & Kellogg having afterwards accepted the receipt of Myers & Co. as warehouse-men, the original contracts were closed up and ended; and by the acceptance of the receipt Walker & Kellogg admitted that the money advanced had been expended in purchase of the corn, and that Myers & Co. only held it as warehouse-men. Then Myers & Co. having, from that time forward, held the corn as bailees only, they could be charged only by a special count, unless they had sold the corn, of which there is not a shadow of evidence. There can be no dispute about this proposition of law, and we insist that the facts and the receipt, to which we invite the particular attention of the court, fully supports the position we assume.

2. Henry M. Kellogg was not a competent witness. He was one of the heirs of William Kellogg, the deceased partner of Walker, who prosecuted this suit as survivor, and who had, together with Walker, originally commenced the suit. The witness, both as heir and administrator, was entitled to a part of whatever judgment might be obtained; and if Walker failed in the suit, he could still call upon the witness, as heir and administrator, to bear his proportion of the costs, and under any circumstances,

after the payment of the partnership debts of Walker & Kellogg, and which he swears were not anything, he would still, as administrator, be entitled to one-half of it to administer upon, and receive his six per cent. for the same. The authorities are full to this point. 3 Phillipps on Evid., 28, (Cowen, Hill & Edwards' edition;) Lowrey *vs.* Summers, 7 Halstead Rep., 240; Bell *vs.* Smith, 7 Dowl. & Ry. Rep., 846; S. C. 5 Barn. & Cress. Rep., 188; Beach *vs.* Swift, 2 Conn. Rep., 269.

The general rule is, that if the effect of the witness' testimony is to increase a fund in which he may be entitled to participate, he is incompetent. Stebbins *vs.* Sackett, 5 Conn. Rep., 262; 6 do., 262; Stewart *vs.* Kip, 5 Johns. Rep., 258; and 3 Phillipps on Evid., page 45, it is said: "Even if the witness release all claim to the debt in question, this will not restore his competency, for he has still an interest in supporting the action, in order that the costs may not be a charge upon the estate;" and refers to the case of Baker *vs.* Tyrwhitt, 4 Campbell Rep., 27; and numerous American and English cases are cited in Cowen, Hill & Edwards' notes. In the case of Shephard *vs.* Ward, 8 Wendell Rep., 542, it was held that a son of one of the parties who had died *pendente lite*, was incompetent, although the death was not suggested on the record, but appeared in evidence on the trial. In the case of Kimball *vs.* Kimball, 3 Rawle Rep., 469, where the son of the intestate had assigned all his interest in the suit, and offered to pay the costs, yet he was held interested, for the father's estate was liable to make good a share of the devastavit. And in the case of Allen *vs.* Blanchard, 9 Cowen Rep., 631, is a case directly in point, and decides this whole question.

The release or assignment offered to restore the competency of the witness, pretends to assign the right of the witness as administrator, but this he could not do; nor was there any way attempted to relieve the witness of his liability to answer for costs.

The 1st instruction asked by defendants below was correct; and when the court bears in mind that Walker had introduced a receipt for 30,000 bushels of corn, it was very material to defendants below to have it in its original shape, that the jury might not be misled by that receipt and find for Walker, both upon the contracts and receipt; and the court, by qualifying it, defeated the very object of the instruction, and the instruction so qualified, must have led the jury to believe they were to find for plaintiff below, both upon the contract and receipt.

The 5th, 6th and 13th instructions asked by defendants below, as originally written, gave a fair and correct interpretation of the receipt of April 13th, 1854. They, by that receipt, became liable as warehouse-men, and liable as such only.

This receipt, when taken in connection with the facts that no funds were advanced by Walker & Kellogg after its date, and that no corn was received by them from defendants until May 26th, as their own account shows; the fact that no corn was in dispute but the corn bought under the contracts of February 13th, 1854; and the language of the receipt itself, that the corn was stored at the warehouse at Spring Lake, and that it had been bought with the funds of Walker & Kellogg, shows as clearly as could well be shown, that the corn mentioned in the receipt of April 15th, 1854, was the same corn bought under the contracts of February 13th, 1854; and that a settlement had been made by the parties; and that, for the amount of over nine thousand dollars advanced by them, Myers & Co. had bought 30,000 bushels of corn, and now held it as the property of Walker & Kellogg.

By this, then, a new contract was made; the parties had mutually rescinded the old one; and from that time on, the receipt was to govern

and to determine the rights and liabilities of the parties. The receipt was an admission on the part of Myers & Co. that, with the funds of Walker & Kellogg, they had bought 30,000 bushels of corn, and that they henceforth held it as warehouse-men.

The fact that Dawson went up to notify Kellogg about the corn; the letter of Sept. 26, '54, all go to show that the parties considered it in store for Walker & Kellogg, and that Myers & Co. were holding it simply as bailees.

They were then bound to due and reasonable care and diligence only, to have it ready for delivery only for a reasonable time; and if Walker & Kellogg neglected, after a reasonable time, to take it away, they were responsible for storage; and if it was injured or lost without the negligence of defendants, Walker & Kellogg must bear the loss.

Myers & Co. were no longer bound to keep it for a season, or for any definite length of time, but only for a reasonable time; and under this view, the question of season has nothing to do with the case whatever.

With due respect and deference for the judge of the circuit court who tried this case, I confess I have not, after the most careful attention, been able to tell what the court meant by the qualification added to the 5th and 6th instructions; but one thing is certain, that the qualification rendered the instructions perfectly nugatory and meaningless, so far as applied to this case.

There is another significant fact about this transaction, that clearly shows that the receipt for 30,000 bushels of corn was a settlement of the whole matter between the parties, including the 10,000 bushels, and that is, that when Dawson went to notify Kellogg, in May or June, nothing was said about buying more corn, or but what Myers & Co. had fulfilled their part of the contract, and that it only remained for Walker & Kellogg to send and get the corn.

The 14th instruction asked by defendants below was a plain proposition, Walker & Kellogg were not entitled to recover damages for a breach of contract under the pleadings in this case.

The 15th instruction also stated the law correctly under the contracts, and should have been given. The court will see that no witness states what corn was worth, when this corn was bought, at Spring Lake, on the part of plaintiffs, while the defendants below showed that 34 cents was the lowest price paid for the corn; and there is no reason why Myers & Co. should not have credit for the corn at that price; and the jury would doubtless have given them credit for it at that price if the 15th instruction had been given.

The 3d instruction given for plaintiffs below violated one of the best settled rules of law.

The plaintiffs below had offered in evidence the account marked "F" in the record, as an admission by defendants that it was the only set-off they had against Walker & Kellogg. When they had thus brought the account before the jury, they had no right to instruct the jury to disregard a part of it; if the plaintiffs introduced it, the defendants had a right to the whole of it. 1 Phillipps on Evid., 408, 409; *Morris vs. Hurst*, 1 Washington C. C. Rep., 433.

ROBERTS & IRELAND,
Attorneys for Plaintiffs in Error.

Jennett

605

delivered the opinion of the Court:

Mr. Justice Waller [#] The application for a change of venue, was based upon an affidavit, that the party feared that he could not obtain a fair trial before the judge then presiding, but whilst the venue was not changed to another circuit, a trial was had before a different judge against whom there was no complaint. This practically accomplished all that was sought by the application for a change of venue. When the reason for a change of venue ceased to exist, the necessity and the right to a change of venue also ceased. The party obtained a trial before an other judge against whom he made no objection, and he has sustained no wrong by a ^{failure} ~~refusal~~ to transfer the cause to a different circuit. We perceive no force in this objection.

361
23 It is insisted, that witness Kellogg was incompetent, to testify in the case. He was the brother, the administrator, and heir of the deceased partner, of defendant in error, with whom

the matters in dispute, in this case
 originated. It is however insisted,
 he was under "compulsion" by a re-
 lease executed by himself, to defend
 -ant in error, of all of his interest,
 as administrator, in the subject mat-
 -ter of this suit. Did this remove his
 interest, and restore his competency?
 This release would, no doubt, prevent
 him from recovering from defend-
 -ant in error, any portion of any
 recovery which might be had in
 this suit, whether claimed as his or
 as administrator, of the estate of his
 brother. If the defendant in error ¹⁰⁷ ~~has~~
 -ever was ~~indignified~~ in the suit, ~~then~~
 he would undeniably have the right
 to pay the costs, out of the assets
 of the late firm, and as a settlement
 with the administrator of his deceased
 partner, he would have a right to
 a credit for the amount. The fund
 would thus be diminished to that ex-
 -tent.

On a final settlement, the vint-
 -ner would be liable to receive ~~the~~
 -plus than if the suit terminated in
 favor of defendant in error. A fi-
 -ne to recover would, therefore, reduce

the fund in the distribution of which the witness has a right to participate. This witness therefore had an interest, in the recovery by plaintiff ~~in~~ defendant in error, to the extent of his liability to account for the costs of this suit. This interest, it seems to us, is as direct as if he were a party to the record as far as the liability for costs is involved. It is more direct than the liability of a surety for cost, and yet he is not competent. In neither case is the party liable to have a judgment rendered against them in the suit, but in both they are ultimately liable.

Whether the plain plaintiff in error had money of the defendant in error, in his hands, unapplied, after deducting all proper costs, was a question for the determination of the jury. We deem it unnecessary to discuss the weight of evidence on this question, as that will be the province of the jury on a future trial of the case.

It is urged, that the court below, erred in modifying defendant's first

instruction, But no objection is
 presented to the instruction as
 given. It informed the jury, that
 plaintiff could not recover back mon-
 -ey paid out in the purchase of corn
 for plaintiff, and also the value of
 the corn thus purchased. If all the
 money furnished by plaintiff was
 expended in the purchase of corn,
 under the ~~terms of the~~ contract, and it had been
 delivered or ~~stood~~ ready for deliv-
 -ery, according to the terms of the
 contract, then all liability of the
 -defendant ceased. If however ~~he~~
 had failed to purchase the corn, to
 the extent of the funds furnished, or
 had purchased the corn and failed to
 deliver, ~~it~~ or ~~stood~~ it, according to
 the agreement, then ~~he~~ he was li-
 -able for the the portion not purchas-
 -ed or delivered to plaintiff in store
 or otherwise. If ~~he~~ ~~the~~ defendant
 furnished the full amount of corn
 it could make no difference, whether
 it was purchased ~~it~~ with the corn
 -meal or other money. This inste-
 -tion does not contain this prin-
 -~~ple~~ ~~ple~~

The Court below modified the

defendants' fifth instruction, which is also assigned for error. As it was drawn, and before it was modified, it asserted that as defendants' receipt for plaintiff's car, specifies no time, within which Wal-
 -ker ~~and~~ Kellogg were to send for the car, they were bound to remove it in a reasonable time, and if loss ~~was~~ result-
 -ed from a failure to do so, the plain-
 -tiffs must sustain the loss, unless de-
 -fendants ~~was~~ ^{were} guilty of negligence. The liability of defendants as bailees, whether the purchase was of car already in store, or was of car received in store, as the receipt specifies that it is to be stored and put aboard of boats free of charge, was that they should use ordinary care and diligence in ~~its~~ ^{its} preservation. The qualification was no doubt intended to make a distinction, that if the car was purchased under the agreement of the 13th of February ~~th~~ and had not been delivered so as to pass the title to plaintiff, then the ~~risk~~ of loss defendants took the risk of loss any loss which might occur. The receipt specifies the status that defendants

had received plaintiff's corn in store
and that corn required no further de-
livery to pass the title, and defend-
ant as to it was only liable for
ordinary diligence in its preserva-
tion.

The sixth instruction asked by
defendants, asserts that upon their
oath, for the thirty thousand bushels
of corn in store, plaintiff was bound
to send for, and remove it in a reasona-
ble time, and if by failing to do so, the
defendants ~~was~~ ^{were} subjected to addition-
al expense in sacking, hauling and
storage, defendants should be allowed
~~to~~ a reasonable compensation there-
for. No objection is perceived to this
instruction, unless it be that it should
have been modified, so as ~~only~~ to give
the right to storage after notice to
remove the corn. Defendants ~~was~~ ^{were} only
bound to store the corn for a reason-
able time free of charge. And only
being bound to deliver it ^{on} ~~about~~ after
beats within that time, and if by fail-
ing to so remove it produced any addi-
tional expense, defendants ~~was~~ ^{were} enti-
tled to compensation for the increased
labor and expense of delivery. It was

so held in this case when previously
in this court. 24 Ill. 133.

Open The principles already announced
warrant a discussion of defendant's
thirteenth instruction unnecessary.
His fourteenth instruction is too gen-
eral in its terms. The defendant ^{were} ~~was~~
only entitled to be allowed for com-
mission on goods delivered to plaintiff in store or other
wise, at the prices authorized to be
paid. If ~~he~~ ^{they} paid higher prices than
was authorized, ~~he~~ ^{they} must sustain
the loss of the excess. The ~~fifteenth~~
~~of defendant's~~ ~~instruction~~ ^{fifteenth} in-
struction is also too general. If de-
fendant purchased corn for the plain-
-tiff under the contract and ^{failed} ~~refused~~
to deliver it, or appropriated it to
~~his~~ ^{their} own use, ~~he~~ ^{they} had no right to the
commission agreed to be paid for
its purchase.

Plaintiff's third instruction, di-
rects the jury to disregard all char-
-ges in ~~plaintiff's~~ ^{defendant's} account, except for
commission, sacks, meat, wine, and
labors on boats and ice. Now there
were charges in his account for
large quantities of corn, delivered
at various times, and there was

evidence tending to establish their
 correctness. These things by this in-
 -struction, were ^{improperly} taken from the
 consideration of the jury. It was
 the province of the jury, and not
 the court, to determine what char-
 -ges were proved. This instruction
 was, therefore, improperly given.

The judgment of the court in
 law, must be reversed, and the
 case remanded.

judgment reversed.

Meyer + Lawson

41 us 12

6 Walter

Opinion by
Walter J.

Henry Myers } Supreme Court
 et al }
 " }
 Walker } Ch 41

Plaintiffs suggestions

The declaration
 contained the Common Counts only
 Pleas of the Defendants & stay
 by Defendants below

At the Dec 1860.
 the case was redirected.

On the 27th
~~March~~ Feb 1861. notice was given
 that an application for a change
 of venue would be made on the
 2^d day of the March Term 1861.

The Petition was in due form
 presented & considered. It is submit-
 ted that in this there was error

See on this point

Clark vs The People	1	Scam	117
Beatty vs Ulken	1	"	164
McGoon vs Little	2	Ed	42
Beatt vs Wellman	11	Ills	356
Seals vs Monson	17	"	561
Mop vs Johnson	22	"	640

The Petition
 The defendant

states that Knowledge of the pre-
dicted came to the petitioners after
the last term.

Notice was given in li-
cation.

The point is respectfully
submitted

On the trial to the jury the plaintiff
put in evidence

1. an agreement of Myers to deliver Feb
13, 1854, to purchase corn for Walker
& Kellogg to be governed by the latter
in the price & to have four cents a bushel
for purchasing
2. A certificate dated Feb 13 1854, sta-
ting that Myers has a note to ~~Walker~~
Walker & Kellogg to be delivered on
their boats in about May 10000 -
bushels corn at 36 cts per bushel
& corn to be taken from warehouse
at Shinghay & acknowledges receipt
of 10000 \$ cash
3. Receipt dated April 15 1854 for
for 30000 bushels shelled corn
all of which was objected to.

Plaintiff below then called Henry

M Kellogg as a witness who states that
he was a brother of William Kellogg
the deceased brother of Walker & Kellogg
That William was dead that he never
was married, left no children witness
was his Administrator That the debts
of the firm would not exceed 10000 \$
but no assets no collections, made

The witness was objected to as incompetent
that when the witness executed a re-
lease to Walker of all his interest in this
suit either as ~~common~~ Administrator
or heir of Wm Kellogg deceased

The witness was also further objected
to objection overruled & exceptions to
Ken

The witness then testified that Walker
& Kellogg advanced to Myers \$10 11, 783.
94 & they had received 21,347 bushels
corn at 36 cts & 11347, but at 28 cts in
all \$6,777.31 That witness saw the
in 1858 ^{Joseph} ~~Joseph~~ ^{Barren} ~~Barren~~ ^{an account}
that Barren admitted the
account to be correct except the inter-
est

This in substance was the case
made by the plaintiffs in

The two receipts amounts in
all to 40,000 bushels at 36 cts
would be 14,400 \$ or if one

Consider the ten thousand receipt
as included in the larger one the 30,000
bushels at 36 cts would amount to the
sum of 10800⁰⁰/₁₀₀¢

Now A must be patent to every one
that this 30,000 bushel receipt shows
at the account between the parties and
that thereafter Meyer No more the Butler
only of Walker & Kellogg.

The account exhibited by the wit-
ness Kellogg to the Jury is calculated
at first sight to mislead, looking at
the dates in the margin it would seem
that Walker and Kellogg made pay-
ments after the date of the 30,000 bushel
receipt. On a more rigid exami-
nation it more distinctly appears to the
contrary. This account shows
the date amt and time the drafts run
and the time of payment.

All these drafts were accepted by Walker
& Kellogg before the receipt for the 30,000
bushels of corn was given. See Kellogg's
testimony record page 38 at x

33 After the receipt was given Walk-
er & Kellogg delivered the bill of lading
thereon

210000 Grains, bags,
and labor

725.44

1036 15-

5-

1766.59

They also credit on the same account as of
Dec 1 1854 8877 Gunning bag 885.05
And Maad 22 1855 100 See Leo
account of what it at foot of Page

Gift of corna ————— 850.00
\$ 17,350.5

Having balances due to Walker
& Kellogg of 31.54 and
when Myers & Co are credited with their
storage labor &c the balance will be
due the other way.

Now the only matter in
controversy is that 30000 bushel of
corn. It is Myers & Company's ac-
count for A. I think they have
it. If they do not they cannot be
held liable in this action.

Now let us see ~~the~~
whether Deussen's assignment to Kellogg
the receipt changes the legal rights
of the parties. Kellogg testifies in
Nov 1861. to a conversation that
took place three years before.

Walker & Kellogg held these corn
accounts. Corn had fallen and
the corn had spoiled not through
any negligence of Myers & Deussen.
Walker & Kellogg desired to throw
the loss on ~~the~~ Myers & Kellogg.

The Witness goes down to see Deacon
and shows him a statement of
the account ~~the~~ Deacon admits
the debit side of the account
except the interest, as Kellogg
states. Subsequently. He
shows to her receipts every dol
lar on that side of the account
They have laid it out in even ex
cept the three last items & has giv
en them Warrington receipt for
the even. The Witness knew that
the receipts were in existence as
well as Deacon. He has acted
as clerk for his brother knew all
about it & can say that he
was not a heavy, fragment
by such a proceeding & evidence

The evidence of Myers do show that
they accounts for all the even.

The Court is referred to the Printed
argument of James Roberts filed
in the case. It being the last of his
efforts here. H. Brown

⁴¹⁻¹²
H. Myers et al
v
Walker No 41

Plapps
argument

Filed April 21-1863
L. Garland
Clark

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Peria Greeting:

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

Charles Walker survivor of Walker & Kellogg —

plaintiff, and

Henry Myers & Stanley J. Dawson

defendants, it is said manifest error hath intervened, to the injury of the aforesaid

Defendants

as we are informed by them

complaints — and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Eaton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 19th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixtytwo.

L. Selma
Clerk of the Supreme Court.

127 711

Henry Elkins vs.

No. 129

vs.

Charles Walker

WRIT OF ERROR.

FILED *Mar. 19.* A. D. 1862

L. Seland

Gleick.



Myers & Dawson

In the Supreme Court

^{vs}
Charles Walker

April 3, 1863

Survivor &c.

The Application for a Change of venue in this case was necessarily overruled because many terms of the Court in which the cause was pending had intervened between the Commencement of the suit and the time the application was made. The cause was redocketed at Nov. J. 1860, ^{instead of Dec. J. 1860} as stated in Jeffs abstract, the

Motion for a change of venue was not made until the March Term 1861, it was the duty of the party succeeding in the Supreme Court to place the cause upon the docket again, Consequently the plaintiff is chargeable with notice that the suit was pending in the Circuit Court at Nov. J. 1860, in fact as soon as the order remanding the cause was made the suit must be considered as pending in the Circuit Court,

Now, One Term has passed after the cause was redocketed before any application for a change of venue was made - the affidavit is wholly insufficient because it does not state that the knowledge of the supposed prejudice was received within ten days prior to the time of the application for the change of venue -

besides (When the motion was made Powell) was Judge, it was tried before Merriman and no objection was taken that he was prejudiced.

Henry M. Kellogg was a competent witness in the case without releasing his interest, he was not a party to the Record, nor interested in the result of the suit -

The interest if any was not in the direct result but remote and depending upon contingencies, in no event could he be liable for any portion of the Costs of the suit -

Walker alone in whose name the suit was prosecuted would be liable for costs and that too in his personal capacity, the judgment when collected would be his and Kellogg's Administrator as such could have no control over it, if as he it he might have a possible interest he certainly could release that

without Examining the instructions particularly I will only say that having Carefully read them all and Compared them with the Record, I can see no error in them -

The abstract in this Case is quite imperfect and the Court must Critically Examine the Record to obtain a proper appreciation of the true merits of the Controversy.

I would take Exceptions to the abstract, but if I were to do so the Court

would have the same trouble and labor to
Compare it with the Record, as it would
to make such Comparison at the time of
the decision.

M. P. Purple
Sefu atty

41-12
Myers & Lawson
(14)

Charles Walker

Argument
by Purple

Filed May 4, 1862,
Ireland
C.H.

STATE OF ILLINOIS,
SUPREME COURT.

ss. The People of the State of Illinois,

To the Sheriff of

Cook

County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the *Circuit* Court of *Peru* County, before the Judge thereof, between *Charles Walker* *Survivor of Walker & Kellogg*

plaintiff, and

Henry Myers & Stanley J. Dawson

defendants, it is said that manifest error hath intervened, to the injury of the said *Myers & Dawson*

as we are informed by *Them*

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

Charles Walker

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

Charles Walker

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *19th* day of *March* in the year of our Lord One Thousand Eight Hundred and Sixty-*two*.

L. Deland

Clerk of the Supreme Court.

439 41 79 129

Henry Myers et al.

No. 129 vs.
Charles Walker

SCIRE FACIAS.

The within named
not found in my County
This 10th Day of April
1862
FILED A. D. 1862

L. L. Lusk Clerk.

A. C. Hefling Sheriff
by Wm. Wayman Deputy
Recd 10



State of Illinois } 3rd Grand Division
Supreme Court } April Term A.D. 1862.

Henry Myers &
Frank J. Dawson
Partners trading under
name & style of
H. Myers & Co. Plaintiffs
in Error

vs
Charles Walker Survivor
of Walker & Kellogg
Defendant in error

Error to Seon'a

The Clerk of the Supreme
Court will please issue Scerifacias to be served
to the Sheriff of Cook County returnable as
above

Robts & Ireland.
for Plaintiffs in error

129 41
H. Myers & Co.

vs.

Charles Walker Junr

Pacific

41

Filed Dec. 19, 1862.
L.eland

Clk.

Page 1.

Pleas before the Circuit Court, within and for the County of
Perry, in the State of Illinois, on the twelfth day of December, in the year
of our Lord one thousand eight hundred and sixty one.

Be it remembered, that heretofore, to wit; on the 18th day
of February, A.D. 1858, there was filed in the office of the Clerk of the
Circuit Court, of said County, a Precept for a Summons was in words
& figures as follows to wit-

Charles Walker	}	In the Circuit Court of Perry County to the March Term A.D. 1858
William Kellogg		
vs.		
Henry Myers	}	Assumpsit Damages \$ 20.000
Stanley J. Dawson		
Issue Summons to Sheriff of Tazewell County & Oblige Purple & Pratt		
Feb. 18/58.		Offs. Utty.

And, afterwards, to wit, on the 18th day of February A.D. 1858 there
was issued from the office of the Clerk of the said Court, a Summons
in words and figures following to wit,

The People of the State of Illinois to the Sheriff of Perry
County greetings. We Command you to summon Henry Myers, Samuel
J. Dawson if they may be found in your County to appear before the Cir-
cuit Court on the first day of the term thereof to be held at Perry within
and for said County of Perry on the 1st Monday of March next then and
there in our said Court to answer unto Charles Walker and William
Kellogg of a Plea of Assumpsit, to their Damage twenty thousand dollars
as they say and make return of this writ with an endorsement of the same

and manner of serving the same on or before the first day of the term of the said court to be held as aforesaid. Witness Enoch P. Sloan Clerk of our said court and the seal thereof, at Peoria this 18th day of February in the year of our Lord one thousand eight hundred and fifty eight

Seal

Enoch P. Sloan Clerk

and afterwards said summons was returned endorsed in words & figures following - to wit: The within named Henry Myers & Samuel J. Dawson is not found in my County. Feby. 28. 1858 — J. W. Smith Sh.

And on the same day there was issued from the clerk's office of the clerk of the said court the following summons in words and figures following, to wit.

The People of the State of Illinois To the Sheriff of Peoria County, Greeting We Command you to summon Henry Myers & Stanley J. Dawson if they may be found in your County to appear before our Circuit Court on the first day of the term thereof to be held at Peoria within and for the said County of Peoria on the first Monday of March next then and there in our said Court to answer unto Charles Walker & William Kellogg of a Plea of Trespas on the case on promises to their damage twenty thousand dollars as they say, and make return of this writ with an endorsement of the time and manner of serving the same on or before the first day of the term of the said court to be held as aforesaid. Witness Enoch P. Sloan Clerk of our said court and the seal thereof at Peoria this eighteenth day of February in the year of our Lord one thousand eight hundred and fifty eight

Seal

Enoch P. Sloan

Clerk

and afterwards said summons was returned endorsed in words & figures following - to wit - Executed this writ this 25th day of February by reading to each one of the within named defendants Henry Myers & Samuel J. Dawson

C. Williamson S. T. C.
by J. C. Reeves Deft.

And afterwards, to wit, on the 1st day of May A.D. 1859 there was filed in the office of the clerk of said Court a Declaration in words and figures following, to wit

In the Circuit Court of Florida County, State of Illinois
May Term A.D. 1858

State of Illinois }
Florida County } ss. Charles Walker and William Kellogg partners in
Trade doing business under the name firm & style
of Walker & Kellogg the Plaintiffs in this suit complain of Henry Myers
and Stanley J. Dawson partners in Trade doing business under the name firm
and style of H. Myers & Co. the Defendants in this suit of a plea of *non assumpsit*
on the case in promises. For that whereas heretofore to wit on the tenth day of
February A.D. 1858 at the County aforesaid the said Defendants were indebted
unto the Plaintiffs in the sum of twenty thousand dollars for goods wares and
Merchandise then and there sold and delivered by the Plaintiffs to the Defendants
at their request. and in the sum of twenty thousand dollars for other goods
wares and merchandize then and there bargained and sold by the Plaintiffs
to the Defendants at their request. And in the sum of twenty thousand
dollars for work and labor then and there done and materials for the same
provided by the Plaintiffs for the Defendants at their request. And in the

sum of twenty thousand dollars for money then and there loaned by the Plaintiffs to the Defendants at their request. And in the sum of twenty thousand dollars for money then and there paid by the Plaintiffs for the use of the Defendants at their request. And in the sum of twenty thousand dollars for money then and there received by the Defendants for the use of the Plaintiffs. And in the sum of twenty thousand ^{for money} dollars then and there found to be due from the Defendants to the Plaintiffs on an account then and there stated between them. And in the sum of twenty thousand dollars for interest money then and there due and owing from the Defendants to the Plaintiffs for the use and forbearance before that time of large sums of money due and owing from the Defendants to the Plaintiffs and for a long space of time forbore by the Plaintiffs for the Defendants and at their request. And in the sum of twenty thousand dollars for corn wheat and grain then and there delivered by the Plaintiffs to the Defendants at their request and by the Defendants sold and disposed of for the use and benefit of the said Defendants. And thereupon afterwards to wit on the day and year and at the County Court aforesaid the said Defendants in consideration of the premises promised to pay the said several sums of money respectively to the Plaintiffs on request. Yet though after requested so to do the Defendants have not paid said several sums of money or any or either of them or any part thereof to the Plaintiffs but have wholly neglected and refused and still neglect and refuse so to do to the Plaintiffs damage twenty thousand dollars therefore they sue &c.

~~~~~  
 Purple & Pratt

Plffs. Atty.

Account sued on

H. Myers & Co. To Walker & Kellogg Dr

To money loaned

\$ 20,000

" money paid

20,000



|                            |        |
|----------------------------|--------|
| To Corn Wheat & Grain sold | 20.000 |
| " Money paid due on a/c    | 20.000 |
| " Money received           | 20.000 |
| " Interest                 | 20.000 |
| Grain received             | 20.000 |

And ~~afterwards~~ ~~to wit~~ On the 10<sup>th</sup> day of May A.D. 1858 there was filed in the office of the Clerk of the Circuit Court of said County a Motion in words & figures following - to wit -

State of Illinois } In the Circuit Court  
County of Poria }  
Henry Myers & }  
Samuel J. Dawson }  
at the suit of }  
Charles Walker & } Assumpsit  
William Kellogg }

The Defendants entering their appearance herein for the purposes of this motion only, and not further or otherwise move the Court here to grant the return made to the Summons served on them herein for the following among other reasons to wit;

- 1 - Said Summons is directed to Sheriff of Poria County but is served by the Sheriff of Izewell County,
- 2 - The time of service of said Summons is not sufficiently shown
- 3 - The place of service of said Summons is not sufficiently alleged

Charles C. Bonney

Atty. for Dfnts.

And afterwards to wit on the 15<sup>th</sup> day of November A.D. 1858. there was filed in the office of the Clerk of the Circuit Court of said County a Motion in words & figures following to wit -

State of Illinois, County of Poria, S. S. In the Circuit Court



5 Charles Walker &  
William Kellogg  
v  
Henry Myers &  
Samuel J. Dawson  
On the Circuit Court  
Assumpsit.

The Defendants move the Court here to make a rule herein upon the Plaintiffs that they do file herein a Bill of particulars and specific account of the items they intend to prove upon the trial hereof by - morning next, and that in default thereof this cause be dismissed.

Charles C. Bonney, Attorney for Defendants

And afterwards to wit on the 12th day of March A.D. 1859 there was filed in the office of the Clerk of the Circuit Court of said County a Bill of Particulars which reads in words and figures as follows - to wit -

Dr. Messrs H. Myers & Co.

in account with

Messrs. Walker & Kellogg

|      |         |                                                                                                     |             |
|------|---------|-----------------------------------------------------------------------------------------------------|-------------|
| 1853 | March 9 | To Balance acct                                                                                     | 109.12      |
| 1854 | Feb 13  | " Cash advanced on corn                                                                             | 1000.00     |
|      | " 27    | " Paid your draft Feb 21 <sup>st</sup> 2 days                                                       | 500.00      |
|      | March 1 | " do " " 24 <sup>th</sup> 4 "                                                                       | 300.00      |
|      | " 4     | " do " " 25 <sup>th</sup> 4 "                                                                       | 1200.00     |
|      | " 7     | " do " order                                                                                        | 120.00      |
|      | " 11    | " do " draft Mch. 4 <sup>th</sup> 4 days                                                            | 3000.00     |
|      | " 23    | " do " " 10 <sup>th</sup> 10 "                                                                      | 300.00      |
|      | Apr. 19 | " do " " 17 <sup>th</sup> 30 "                                                                      | 2000.00     |
|      | " 20    | " do " " 15 <sup>th</sup> 30 "                                                                      | 350.00      |
|      | " 23    | " do " " 21 <sup>st</sup> 30 "                                                                      | 170.90      |
|      | May 5   | " do " " 17 <sup>th</sup> 15 "                                                                      | 2000.00     |
|      | " 23    | " Bill of Lumber                                                                                    | 725.44      |
|      | Aug 18  | " do 10,000 gunny sacks                                                                             | 1030.15     |
|      | Dec 5   | " paid labor at Spring Lake                                                                         | 5.00        |
| 1858 |         |                                                                                                     | \$ 12822.61 |
|      | Feb 9   | " Interest balance from May 1 <sup>st</sup> 1854 to Feb 9 <sup>th</sup> 1858 @ 10 per cent annually | 2024.02     |
| 1858 |         |                                                                                                     | \$ 14846.63 |
|      | Feb 9   | To Balance brot down                                                                                | \$ 6685.87  |

|      |                                                |                                            |         |             |
|------|------------------------------------------------|--------------------------------------------|---------|-------------|
| 1854 | May 26                                         | By 4066 <sup>04</sup> Bush Corn for Baltic |         |             |
|      | Nov 27                                         | " 3903 " " " Midway & Barges               |         |             |
|      | " 28                                           | " 1174 <sup>14</sup> " " " June            |         |             |
|      | Dec 1                                          | " 2104 <sup>42</sup> " " " Ohio            |         |             |
|      | "                                              | " 675 <sup>04</sup> " " " Albion           |         |             |
|      | "                                              | " 1192 <sup>04</sup> " " " Pelen           |         |             |
|      | "                                              | " 1539 <sup>10</sup> " " " Ruby            |         |             |
|      | "                                              | " 1517 <sup>44</sup> " " " Ruby            |         |             |
| 1853 | Sept 20                                        | " Dft. from Leonard & Co.                  | 44.50   |             |
| 1854 | Sept 7                                         | " 1583 Bush Corn for Ill Belle             |         |             |
|      | " 28                                           | " 3188 " " " Ill Belle                     |         |             |
|      | Oct 24                                         | " 325 " " " A.S. Davis                     |         |             |
|      | Dec 1                                          | " 8877 Gunny Sacks ret'd                   | 885.05  |             |
|      | "                                              | " 79 <sup>12</sup> Bush Corn               |         |             |
|      | "                                              | " 21347 <sup>30</sup> Bush Corn            |         |             |
|      | By 10,000 bush as per contract                 | 36¢                                        | 3600.00 |             |
|      | " 11,347 <sup>30</sup> "                       | 28¢                                        | 3177.31 |             |
|      | " Commissions on 11347 <sup>30</sup> bush @ 4¢ |                                            | 453.90  |             |
|      | " By balance carried below                     |                                            | 6685.87 | \$ 14846.63 |



And afterwards to wit on the 14th day of June A.D. 1859 there was filed in the office of the Clerk of the said Court, <sup>Plas of general issue, notice of set-off and account</sup> which was in words & figures as follows, to wit;

State of Illinois }  
County of Peoria } ss.  
Henry Myers  
Stanley S. Dawson

In the Circuit Court  
of the June Term A.D. 1859

In Assumpsit

Charles Walker survivor of  
William Kellogg late comprising  
the firm of Walker & Kellogg

Plas General Issue

And the said Defendants by Charles C. Bonney their attorney come and defend the wrong and injury, when ss. and say that they did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against them, and of this they put themselves upon the country ss.

Charles C. Bonney  
Attorney for Defendants

And the said Plaintiff doth the like ss.

N. H. Purple Attorney for Plaintiff

Notice of set-off

Between } Charles Walker survivor of William Kellogg late comprising  
the firm of Walker & Kellogg plaintiffs, and Henry Myers  
Henry Myers  
Stanley S. Dawson - Defendants

To. Hon. Norman H. Purple Attorney for the above named Plaintiffs

Take notice that the above named defendants on trial of this cause will give in evidence, and insist that the above named Walker & Kellogg before and at the time of the commencement of this suit were and still are indebted



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to the said defendants in the sum of Fifty thousand dollars according to the account and other papers copies whereof are hereto attached marked respectively - Exhibit A - Exhibit B - and Exhibit C - and for the work and labor care diligence and attendance of the said Defendants by the said defendants and their servants before that time done performed and bestowed in and about the business of the said Walker & Kellogg and at their request: and for divers materials and other necessary things by the said defendants before that time found and provided and used and applied in and about the said work and labour for the said Walker & Kellogg and at their like request: and for divers goods wares and merchandize sold and delivered by the said defendants to the said Walker & Kellogg and at their like request: and for money by the said defendants before that time lent and advanced to, and paid, laid out and expended for the said Walker & Kellogg and at their like request: and for money by the said Walker & Kellogg before that time had and received, to and for the use of the said defendants and for money due and owing from the said Walker & Kellogg to the said defendants, for interest upon, and for the forbearance of divers large sums of money due and owing from the said Walker & Kellogg to the said defendants, and by the said defendants foreborne to the said Walker & Kellogg for divers long spaces of time before then elapsed, and for money due and owing from the said Walker & Kellogg to the <sup>said</sup> defendants upon an account stated between them. And the said defendants will set off and allow to the plaintiff on the said trial so much of the said sum of \$ 50,000 as due and owing from the said Walker & Kellogg to the said defendants against any demand of the said plaintiff to be proved on the said trial as will be sufficient to satisfy and discharge such demand &c. And said defendants pray judgment for the balance of said indebtedness &c.

Charles C. Bonney  
Attorney for Defendants.



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And the Plaintiff for Replication to the second Plea says  
 that the Plaintiff is not indebted to the defendants nor was the said Walker  
 & Kellogg at any time indebted to said defendants as stated in said  
 Plea & of this he puts himself upon the Country &c. - *Purple for Plff.*

Exhibit A. ) Mess Walker & Kellogg  
 1854 To. H. Myers & Co.

Dr

|         |                             |      |    |      |       |
|---------|-----------------------------|------|----|------|-------|
| May 30. | To 10,000 Bus. Corn @ 36 c. | 3000 | 00 |      |       |
| "       | Storage on do. 6 months     | 241  | 00 |      |       |
| "       | Sacking & hauling @ 2¢      | 118  | 08 |      |       |
|         |                             |      |    | 3900 | 28    |
| "       | 1174 Bus. Corn @ 35¢        | 410  | 90 |      |       |
| "       | Storage on do 6 mos.        | 70   | 44 |      |       |
| "       | Sacking & hauling @ 2¢      | 23   | 48 |      |       |
| "       | Our Commission @ 4c         | 46   | 90 |      |       |
|         |                             |      |    | 551  | 78    |
| "       | 10,100 Bus. Corn @ 34c      | 5490 | 44 |      |       |
| "       | Storage on do 6 mos.        | 969  | 96 |      |       |
| "       | Sacking & hauling @ 2c      | 323  | 32 |      |       |
| "       | Commission @ 4c.            | 640  | 64 |      |       |
|         |                             |      |    | 7430 | 36    |
| "       | Meat for use of Boat        | 7    | 25 |      |       |
| "       | Paid for labor on Boats     | 5    | 20 |      |       |
| "       | Three bales Tine            | 12   | 00 |      |       |
|         |                             |      |    | 24   | 45    |
| "       | Ice                         | 850  | 00 |      |       |
|         |                             |      |    | 850  | 00    |
|         |                             |      |    | 8128 | 22.87 |



9  
Exhibit  
B

Pekin Feb. 13. 1854

This Certifies that we have agreed to pay H. Myers & Co. four cents per bushel of 56<sup>lb</sup> for purchasing & delivering Corn on board our boats the coming season. They purchasing the same at as low a price as possible & if in our opinion the price should be too high we are to notify them & they are to stop buying.

It is understood we are to keep them supplied with money as needed for paying for same and they are to deliver us the same quantity of corn their account shows as being bought for us & charged to our account.

It is also understood they are to purchase for us alone and not for others. It is also understood the above refers to corn bought at their warehouse at Spring Lake upon the Illinois River.

(Signed) Walker & Kellogg

Exhibit  
C

Mess. Walker & Kellogg will pay H. Myers & Co. eight hundred & fifty dollars for Ice bought on their account.

Pekin March 22 1855

(Signed) C. W. Zimmermann as Agent



And afterwards - to wit - on the 19<sup>th</sup>. day of October A.D. 1859 there  
filed in the office of the clerk of the Circuit Court of said County, a Bill  
of Exceptions in words & figures as follows

State of Illinois }  
County of Peoria } ss.

In the Circuit Court of the  
June Special Term A.D. 1859.

Charles Walker surviving member of the late firm of  
Walkers & Kellogg  
vs.

Bill of Exceptions

Henry Myers & Stanley J Dawson

Be it remembered that on the trial of this cause the Plaintiff intro-  
duced and read in evidence to the jury certain papers whereof copies are hereto  
attached marked "A" "B" "C" "D" & "E" - to wit -

" A "

This certifies that we have sold & agreed to Walker & Kellogg  
on board their Boats during the coming months of April & May as they  
may call for the same ten thousand bushels round merchantable corn of  
56 lb. to the Bushell for which they are to pay us thirty six cents per  
bush. It is understood said corn is now at our warehouse at Spring  
Lake upon the Illinois River, and that they are to take it from that point  
we putting it on board free of charges to them, and we hereby acknowledge  
the receipt of one thousand dollars upon said corn in part payment for same  
Dated Peoria February 13<sup>th</sup>. 1854 (Signed) H. Myers & Co.

B

Peoria Feb 13<sup>th</sup> 1854

This certifies that we have this day, agreed to purchase corn at our ware-  
house at Spring Lake the coming season for Walker & Kellogg & said corn  
when purchased is to be subject to their order. Also we are to be governed by  
them as to price to be paid from time to time, and are to receive four



12

cents per bush. for buying storing & delivering on board their boats, we making up to them the same quantity, reported as bought for them.

(Signed) H. Myers & Co.

"C"

Recd. in Store from Walker & Kellogg, and subject to their order, and free of all charges on board their boats, or any boat they may send for the same thirty thousand bushell shelled corn in good order and condition, said corn being stored at the warehouse at Spring Lake Tazewell Co. and occupied by Moore Pratt & Co. in connexion with whom the corn has been bought for Walker & Kellogg and with their funds

Peria April 15th 1854.

(Signed) H. Myers & Co.

"D"

Pekin Mar 22 / 54

Mess Walker & Kellogg - We will do Moore as soon as possible, but we told him some weeks ago not to give over 27 or 28<sup>c</sup>. We are only paying 28 here and no one cares about buying at that. In fact there is but one buyer in Market at that price. We believe men are here offering 14<sup>c</sup> for dry Hides and 5<sup>c</sup> for Green - Truly yours

(Signed) H. Myers & Co.

This was offered as rebutting Evidence after defendant had closed his defence.

"E"

Pekin Sept. 26 / 54

Mess Walker & Kellogg - Gents. Moores partner is here & says that corn at Spring Lake must be taken away as soon as possible, else it will spoil & they will charge extra storage, & we think it greatly to your interest to take it off and think to have \$10,000 invested there



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all the winter in corn is not desirable, besides we cannot close our business until it is done. Zimmerman can get a good rate for Havanna and points above & we think you stand very much in your own light not to get it up immediately. Michigan & Barges will soon take it up. You have already recd. nearly 6000 bus & you can soon get balance up - if you cannot come down this trip let him make arrangements to go down next trip without fail for Canton, Liverpool, & Havanna for he can get a full load of goods for St Louis boats say they are going no further than Peoria - Zimmerman had better telegraph shippers at La Salle that he will take goods for those places that they may rate for him you can ship your corn on R. Road from Peoria, but we cannot at Spring Lake the bar are not as bad from Peoria to Spring Lake as from Peoria to La Salle. We hope you will not fail to make arrangements to take corn next trip at least

(Signed) H. Myers & Co.

This was also offered as <sup>respective</sup> evidence after the Defendants had closed his evidence

Said Plaintiff then introduced and read in evidence to the Jury certain Bills of Exchange drawn by the Defendants on the firms of Walker & Kellogg and accepted by them ["to the amount of \$9940 90/100 the date and amount of which said Bills of Exchange respectively are as follows, to wit:"]

| date |         | Amount           |
|------|---------|------------------|
| Feb  | 21 1854 | 500.00           |
|      | 24      | 300.00           |
|      | 25      | 1200.00          |
| Mar. | 4       | 3000.00          |
|      | 6       | 120.00           |
|      | 10      | 300.00           |
|      | 15      | 350.00           |
|      | 17      | 2000.00          |
|      | 21      | 175.90           |
| Apr. | 17      | 2000.00          |
|      |         | <u>\$9946.90</u> |



14

The Plaintiff then called Henry Kellogg who testified that before the commencement of the suit, he, as agent of the firm of Walker & Kellogg presented the account sued on, to Stanley J. Dawson one of the Defendants and that said Dawson admitted that the debit side of said account against the Defendants (except the items of interest therein) was correct. Said Henry Kellogg further testified that at the same time said Dawson furnished him with an account of which a copy is hereto attached, marked "E" - to wit:-

"E"

Walker & Kellogg  
To Moore Pratt & Co

Dr

1854

May 29

To Shipped by C. Boat Baltic

|                  |                 |       |    |
|------------------|-----------------|-------|----|
| " 4066 Bush Corn | 36 <sup>c</sup> | 14 63 | 70 |
|------------------|-----------------|-------|----|

Sept 7

" Shipped by M. Belle

|                       |                 |     |    |
|-----------------------|-----------------|-----|----|
| " 766 Sacks 1583 Bush | 30 <sup>c</sup> | 569 | 88 |
|-----------------------|-----------------|-----|----|

|                                                    |  |    |    |
|----------------------------------------------------|--|----|----|
| " Storage on do 3 mos. at 1 <sup>¢</sup> per month |  | 47 | 55 |
|----------------------------------------------------|--|----|----|

Oct. 20

" Shipped by A. S. Davis

|                      |                 |     |    |
|----------------------|-----------------|-----|----|
| " 143 Sacks 325 Bush | 36 <sup>¢</sup> | 117 | 00 |
|----------------------|-----------------|-----|----|

|                                                    |  |    |    |
|----------------------------------------------------|--|----|----|
| " Storage on do 5 mos. at 1 <sup>¢</sup> per month |  | 16 | 25 |
|----------------------------------------------------|--|----|----|

|                                                  |  |   |    |
|--------------------------------------------------|--|---|----|
| " Sacking, & Hauling, at 2 <sup>¢</sup> per bush |  | 6 | 50 |
|--------------------------------------------------|--|---|----|

Sep. 28

" Shipped by M. Belle

|                        |                 |      |    |
|------------------------|-----------------|------|----|
| " 1428 Sacks 3188 Bush | 36 <sup>¢</sup> | 1147 | 68 |
|------------------------|-----------------|------|----|

|                                                   |  |     |    |
|---------------------------------------------------|--|-----|----|
| " Storage on do 4 mos at 1 <sup>¢</sup> per month |  | 127 | 52 |
|---------------------------------------------------|--|-----|----|

|                                                    |  |    |    |
|----------------------------------------------------|--|----|----|
| " Sacking, and Hauling, at 2 <sup>¢</sup> per bush |  | 63 | 76 |
|----------------------------------------------------|--|----|----|

Nov. 28

" Shipped by Geo. &amp; Ruby

|                        |                 |      |    |
|------------------------|-----------------|------|----|
| " 1739 Sacks 3830 Bush | 34 <sup>¢</sup> | 1302 | 20 |
|------------------------|-----------------|------|----|

|                                                    |  |     |    |
|----------------------------------------------------|--|-----|----|
| " Storage on do 6 mos. at 1 <sup>¢</sup> per month |  | 104 | 34 |
|----------------------------------------------------|--|-----|----|



|        |                                                 |     |    |
|--------|-------------------------------------------------|-----|----|
| 15     | " Storage <del>and</del> 6 mos. at 1¢ per month |     |    |
|        | " Sacking & hauling                             | 70  | 60 |
|        | " Our Corns 4¢ per bush                         | 153 | 20 |
| 29     | " Shipped by                                    |     |    |
|        | " 552 Sacks 1174 Bush 35¢                       | 410 | 90 |
|        | " Storage 6 mos at 1¢ per month                 | 70  | 44 |
|        | " Sacking & hauling 2¢ per bush                 | 23  | 48 |
|        | " Our Corns 4¢ per Bush                         | 46  | 90 |
| Dec 1  | " Paid for Freight                              | 8   | 00 |
|        | " Shipped by Bt. Ohio                           |     |    |
|        | " 953 sacks 2104 <sup>42</sup> Bush 34¢         | 715 | 01 |
|        | " Storage 6 mos. at 1¢ per month                | 126 | 25 |
|        | " Sacking & Hauling 2¢ per bush                 | 42  | 10 |
|        | " Our Corns 4¢ per Bush                         | 84  | 20 |
|        | " Shipped by Ruby                               |     |    |
|        | " 739 Sacks 1543 <sup>43</sup> Bush 34¢         | 524 | 87 |
|        | To Storage 6 mos.                               | 92  | 58 |
|        | " Sacking & Hauling at 2¢                       | 30  | 87 |
|        | " Our Corns. at 4¢                              | 61  | 72 |
| Dec. 7 | " Shipped by Pekin & Allion                     |     |    |
|        | " 890 Sacks 1867 <sup>44</sup> Bush 34¢         | 634 | 79 |
|        | " Storage 6 mos.                                | 112 | 02 |
|        | " Sacking & Hauling 2¢ per Bush                 | 37  | 34 |
|        | " Our Corns 4¢ per Bush                         | 74  | 08 |
|        | " Del'd in Warehouse                            |     |    |
|        | " 676 Sacks 1517 <sup>44</sup> Bush 34¢         | 510 | 04 |
|        | " Storage 6 mos                                 | 91  | 02 |
|        | " Sacking & hauling 2¢                          | 30  | 34 |
|        | " Our Corns 4¢                                  | 60  | 68 |



Delv. in Warehouse

" 36 Jacks 79<sup>12</sup> Bush

" Paid for Labor on Boats

" " " Meat " "

" Grine

" 955 Sks Retd.

34<sup>9</sup>

26 93

5 20

7 25

4 00

9034 45

Cr.

By 5 days Labor

5 00

The Plaintiffs then called W. R. Harter who testified that said Dawson admitted said debts as stated by said Henry Kellogg, said Harter further testified that said Dawson refused to settle the account between Defendants and Walker & Kellogg until he Dawson could see Moore Pratt & Co. who acted as agents of Defendants at Spring Lake. Said Harter further testified that at the same time said Dawson and said Henry Kellogg disputed about the storage of the corn in question; and that Dawson complained that Boats did not come for the corn according to contract.

The Plaintiffs here rested and the Defendants introduced and read in evidence the originals of Exhibits "B" and "C" attached to the plea of the Defendants. The order for Dec was admitted to be correct by the Plaintiffs.

The Defendants then called Timothy W. Pratt, who testified as follows - to wit - I was a member of the late firm of Moore Pratt & Co. that firm were the agents of H. Myers & Co. the Defendants at Spring Lake and transacted the business now in controversy in this suit as such agents of said Defendants. I did most of the business myself. About the



17

First of May A.D. 1854 I went with said Dawson to Peria to see Walker & Kellogg about the corn in controversy. We saw said Kellogg, Dawson notified him that all the corn contracted for was then in store at Spring Lake ready for delivery; and also told Kellogg that the corn was liable to spoil if not taken away without delay, and that there was danger that the water would fall so that the boats could not get to the warehouse. Dawson also told Kellogg at the same time that Myers & Co. would not be liable for any damage or charges that should arise by any failure to take away the corn promptly. Kellogg replied that Walker & Kellogg would not hold Myers & Co. responsible for any such damage or charges, and promised to send boats immediately to take away the corn. It was all ready for delivery then. About the last of May same year, I went again to Peria with Dawson and heard a similar conversation with Kellogg. Dawson again told Kellogg the corn would spoil if not taken away, and that the water would fall and require extra expense to deliver the corn; also that Myers & Co. would not be liable for any damage or charges that might occur by the failure to take away the corn. Kellogg again promised Dawson that he would immediately send boats and take away the corn and again stated that they would not look to Myers & Co. for any such damages or charges. Kellogg also gave excuses for not having sent boats for the corn according to his previous promise and said he knew they ought to have done so. Walker & Kellogg commenced taking away corn about the 26<sup>th</sup> of May and finished about the first of December 1854. They took away something over 21,000 bushels all the rest either spoiled because not taken away in season or was used from time to time during the summer and fall to defray the charges that accrued on the corn after the time when it should have been taken. The whole amount of corn contracted by Myers & Co. to Walker & Kellogg



was always ready after the first notice except only what spoiled and what was used to defray charges on it. This corn was purchased for Walker & Kellogg and with their funds. It was not safe to keep corn in store longer than the first of June. Dawson told Kellogg so, when he gave him the notices in May as I have stated. The seasons mentioned in the contracts would expire by the first of June. I have been in this business for more than five years and know the meaning of the term as used, storage was charged on the corn after the first of June. The expenses of hauling in consequence of a fall of the River by which the Warehouse was situated are charged to Walker & Kellogg. The river began to fall about the first of June, and after a few weeks was down to low for boating nearly all summer. The account filed by the Defendants was made out by me, and is correct. I know the amounts are right and that the cost of the corn is correctly stated. Myers & Co. had no account of the business in controversy except on our books of firm of Moore Pratt & Co. The 10,000 bushels of corn was all in hand when the contract was made, and Moore Pratt & Co. had about 25,000 or 30,000 bushels of their <sup>own</sup> corn there besides. The corn of Walker & Kellogg was kept separate from that of Moore Pratt & Co. William Kellogg was at Spring Lake in November 1854. Nothing was then said about the corn having rotted or the extra charges. The parties seemed to understand it. There was considerable corn taken away after the letter of Myers & Co. dated Sept. 20. 1854 was written. The prices mentioned in Myers & Co.'s letter of March 22. 1854 are of corn unshelled. The corn contracted for was shelled corn. We bought much in the ear, had it shelled, and charged Walker & Kellogg the price in the ear and the cost of shelling. We bought corn for them to the amount of all the funds charged by them against Myers & Co. except the amount retained by them for the fee furnished according to the order given in evidence.



19

On Cross Examination this witness made statements in regard to the spoiled corn and other matters in relation to his examination in chief which tended to throw a contradiction in his testimony and his evidence was all before the jury.

The Defendants rested, and the Plaintiff called Henry Cleland who testified against the objection of the Defendants, that in the year 1854 he superintended the boating of Walker & Kellogg; that he sent the boat Gray Eagle to Spring Lake for some corn from Myers & Co. and the boat returned without any; that he knew nothing further about the matter, did not know whether the boat went to Spring Lake or why she did not get corn except that the captain told him that the corn was not ready.

The Plaintiff then called Samuel Easton, who testified that he went to Spring Lake for the Plaintiffs Walker & Kellogg about the first of December and brought away the balance of the corn there for them. <sup>The Plaintiff then proved by H. M. Kellogg that it was worth only - cents per bushel at the time this shelling was done</sup>

The Defendants recalled said witness Pratt who stated that the corn was ready for delivery when the boat Gray Eagle was there as mentioned by witness Cleland, and that the boat might have been loaded at that time. The Captain said he had to go to another port and get some wheat.

This was all the evidence in the case.

The Court, at the instance of the Plaintiff, gave the following instructions to the jury, to which the Defendants then and there excepted - to wit -

Charles Walker

vs.

H. Myers & Co.

Jff. asks the following Instructions

1st. - That the Plaintiff in this case is entitled to credit for all the money advanced



20.

Given

under the Contracts, & to interest upon so much as has not been expended by Defendants under the Contracts from the time the same ought by the Contracts to have been expended

2

Given

- That by the Contracts the corn was to be delivered when called for during the season, without any charges except the price to be paid per bushel as stipulated in the contracts, and 4 cents per bushel commission.

3

Given

- If the Jury believe from the evidence that the Defendants admitted the correctness of the Plaintiffs account given in evidence, and that the account which the Defendants furnished of their claims in 1858 as correct - they will find for the Plaintiff, the difference between the two accounts - deducting from the Defendants account all charges except the commission of 4 cents on the bushel as stipulated in the Contract so far as the charges for Corn are concerned

4<sup>th</sup>

Given

- That under the Contracts in this case the Plaintiff is not liable for any corn spoiled in the hands of the Defendants during the season specified in the contract

5.

Given

- If the Jury believe from the Evidence or from the appearance and conduct of the witness Pratt upon the stand and from his manner of testifying that he is unworthy of credit, they may disregard his whole testimony

The Jury returned a verdict as follows, to wit;

|                |   |                                                           |
|----------------|---|-----------------------------------------------------------|
| Charles Walker | } | We the jury in the above entitled cause find for          |
| H. Myers & Co. |   |                                                           |
|                |   | - the Plaintiff the sum of five thousand five hundred and |
|                |   | fifty eight and twenty cents                              |
|                |   | W. G. Wheaton, Foreman                                    |

The Defendants move the Court to set aside the Verdict and award a new trial, as follows, to wit;

|                   |   |    |                                               |
|-------------------|---|----|-----------------------------------------------|
| State of Illinois | } | ss | In the Circuit Court of the June Special Term |
| County of Peoria  |   |    |                                               |
|                   |   |    | A.D. 1859                                     |



21 Charles Walker  
Survivor of William Kellogg  
vs.

Henry Myers & Stanley J. Dawson

The Defendants move the court to set aside the verdict returned in this cause, and award a new trial thereof for the following, among other reasons, to wit;

- 1 - The Court gave improper instructions to the jury
- 2 - The verdict is manifestly against the evidence
- 3 - The verdict is against the law of the case
- 4 - The damages given by the jury are excessive and impossible
- 5 - The Court admitted improper evidence for the Plaintiff
- 6 - The Verdict is otherwise erroneous, oppressive and absurd

Donney & O'Brien  
for Defendants

The Plaintiff remitted \$ 880  $\frac{3}{4}$ %, and the Court overruled the motion for a new trial and gave judgment upon the verdict. The Defendants having excepted to all and singular the rulings and decisions of the Court against them during the trial, at the time and place when and where the same respectively were made, prayed the Court to sign and seal this Bill of Exceptions which is accordingly done

E. N. Powell (Seal)

Settled and signed in vacation this 19<sup>th</sup> October 1859 by agreement of parties  
E. N. Powell



Proceedings at a Term of the Circuit Court began and held at the Court House in the City and County of Peoria State of Illinois on the nineteenth day of November in the year of our Lord one thousand eight hundred and sixty, it being the third Monday of said month. Present the Honorable Elias N. Powell Judge of the 16th. Judicial Circuit in said State John Bryner Sheriff, and Enoch P. Sloan Clerk. To wit -

Wednesday December 5th A.D. 1860.

Court met pursuant to adjournment

Charles Walker & als

vs.

Henry Myers & als

} From Supreme Court

This day there was presented to the Court the judgment of the Supreme Court herein and on motion it is ordered that this cause be redocketed for further proceedings in conformity with the ruling of said Supreme Court

Proceedings at a Term of the Circuit Court begun and held at the Court House in the City and County of Peoria, State of Illinois on the fourth day of March in the year of our Lord one thousand eight hundred and sixty one it being the first Monday of said month. Present the Honorable



23 Elihu W. Powell Judge of the 10th Judicial Circuit in said State, James  
Stewart, Sheriff, and Enoch P. Sloan, Clerk - to wit -  
Thursday March 7th. A.D. 1861

Charles H. Walker

vs.

Assumpsit

Henry Myers & al

This day came the defendants by Rouse their Attorney and moved  
the Court for a change of venue herein for reasons stated in affidavit and  
the Court being fully advised in the premises overruled said motion

The following is the Bill of Exceptions & the Petition & motion  
for change of venue: the Bill of Exceptions filed March 7th 1861

In the Circuit Court of Peoria County, March Term 1861

Charles Walker survivor of  
Walker & Kellogg

vs.

Henry Myers & Stanley J. Dawson

Assumpsit

And now on this day this cause came on to be heard before  
the Hon. E. W. Powell Judge of the said Court upon the Notice Petition & motion  
of the Defendant herein for a change of venue of this cause -

Mar 4. 1861. Walker et al

vs.

Myers & Co.

The Defendants move the Court for a change of venue  
in the above cause Petition and Affidavit on file - Ingersoll & Bro.

N. H. Purple for Plffs.

atlg. for Defs.

And the said Defendants in support of their said motion introduced and read  
to the Court the notice in words & figures following, to wit:

State of Illinois

Peoria County

vs.

In Circuit Court. March Term 1861.

Charles Walker survivor of  
Walker & Kellogg

vs.

Henry Myers & Stanley J. Dawson

Hon. N. H. Purple will please take notice that on the 2nd day  
of the March Term 1861 of the Circuit Court of Peoria County Illinois or as  
soon thereafter as counsel can be heard, an application will be made by the  
Defendants in said Cause for a change of venue, said cause, on account  
of the prejudice of the Judge of said Court.  
Feb. 27th 1861.

James Roberts  
atlg. for Defs.



Received a copy  
July 27. 1861.

N. H. Purple Plffs. Atty.

They then introduced & read to the Court their said Petition which is in words & figures following, to wit -

State of Illinois }  
Peria County }

In Circuit Court March Term 1861

Charles Walker survivor of  
Walker & Kellogg

vs

Henry Myers & Stanley J. Dawson  
Partners as Myers & Co

To the Hon. E. N. Powell Judge of the Circuit Court of  
Peria County, Illinois

The undersigned Henry Myers and Stanley J. Dawson the  
Defendants in the above entitled cause respectfully shew to your Honor that  
they verily believe that they cannot have a fair and impartial trial of the above  
entitled cause in the Peria Circuit Court where the same is now pending, on  
account that the Judge of said Court is prejudiced against them, and said in-  
formation of said prejudice came to the knowledge of petition since the last  
trial of this cause

A. Myers. S. J. Dawson

State of Illinois }

Tazewell County }

SS. Henry Myers and Stanley J. Dawson being  
duly sworn, say that the matters and things set forth in the above  
petition are true as they verily believe. No Myers  
Sworn to and subscribed before me this S. J. Dawson

second day of March 1861

James Haines, Notary Public.



The Court after considering the motion of the petition held the petition insufficient & overruled the Motion. And the Defendants then & there by James Roberts their attorney excepted and then and there presented this bill of Exceptions & prayed that the Court would read & sign the same which is done

E. N. Porrell (Seal)

Proceedings at a term of the Circuit Court began and held at the Court House in the City and County of Peoria, Illinois, on the first Monday in the month of August in the year of our Lord one thousand eight hundred and sixty one it being the fifth day of said Month. Present the Honorable Amos L. Merriman Judge of the 16th Judicial Circuit in said State, James Stewart, Sheriff, Alexander Mc Coy, States Attorney and Enoch P. Moan, Clerk, to wit: —

Monday August 5th A.D. 1861

Charles H. Walker

vs.

Henry Myers et al

Assumpsit. Redacted from Sup. Ct.

By agreement this cause is continued

Proceedings at a Term of the Circuit Court began and held at the Court House in the City and County of Peoria Illinois on the first Monday in the month of December in the year of our Lord one thousand eight hundred and sixty one, it being the second day of said Month. Present, the Honorable Amos L. Merriman Judge of the 16th Judicial Circuit in



Said State, Alexander McCoy States Attorney, James Stewart, Sheriff  
and Enoch P. Sloan, Clerk - to wit -

Saturday December 7<sup>th</sup> A.D. 1861

Charles Walker

vs.

Assumpsit

Henry Myers

Samuel J. Dawson

This day came the Plaintiff by Purple his attorney and the Defendants by  
Roberts, Grove & House their Attorneys, and it is ordered that a jury be impan-  
-nelled to try this cause, whereupon came a jury of <sup>twelve</sup> good and lawful men, to  
wit - William Baston, David Keigin, Aquilla Moffitt, L. A. Willard  
William Clark, William Baston, Richard Taylor, Samuel Pinkerton, Riley Scott  
John F. Dawson, Jerome H. Case, H. W. Wheeler, who were duly chosen tried and  
sworn to well and truly try the issues joined in this cause and a true verdict  
give according to the evidence. And the said jury not having heard all the  
evidence in the case were adjourned to meet the Court on Monday next at 9  
O'clock

Monday December 9<sup>th</sup> A.D. 1861

Charles Walker

vs.

Assumpsit

Henry Myers

Samuel J. Dawson

This day come the parties to this suit by their respective attorneys and  
also come the jury sworn on Saturday last to try this cause and said jury  
not having heard all the ~~evidence~~ case were adjourned to meet the Court  
at 9 O'clock to-morrow morning

Tuesday December 10<sup>th</sup> A.D. 1861

Charles Walker

vs.

Henry Myers & Samuel J. Dawson } Assumpsit



26 This day come the parties to this suit by their respective Attorneys, and also come the jury sworn to try this cause, and the said jury now having fully heard the case upon their oaths aforesaid do say " We the jury find for the Plaintiff and assess his damages at the sum of three thousand and twenty three dollars and twenty three cents " The Defendants by Attorney, entered a motion for a new Trial

Thursday December 12<sup>th</sup> A.D. 1861

|                  |   |           |
|------------------|---|-----------|
| Charles Walker   | } | Assumpsit |
| vs               |   |           |
| Henry Myers &    |   |           |
| Samuel J. Dawson |   |           |

(This day this cause come on to be heard on the motion of Defendants for a new trial and the Court being fully advised in the premises overruled said motion Therefore it is considered by the Court that the said Charles Walker have and recover of the said Henry Myers and Samuel J. Dawson the said sum of three thousand and twenty three dollars and twenty three cents, his damages aforesaid, and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor



And afterwards, to wit, on the 14<sup>th</sup> day of December A.D. 1861, there was filed in the office of the clerk of the Circuit Court of said County, a bill of Exceptions in word and figures as follows, to wit:



28 State of Illinois s.s. In the Circuit Court of said County  
Florida County December Term 1861-

Charles Walker survivor  
of the firm of Walker & Kellogg  
vs.

Henry Myers & Stanley J.  
Dawson partners as H. Myers & Co.

## Bill of Exceptions

Be it remembered that the Plaintiffs upon the Trial of this Cause offered and read in evidence to the jury, certain papers copies whereof are hereto attached marked "A." "B." "C." and made a part of this bill of Exceptions. All of which papers before they were read were objected to by Defendants because they were not admissible under the pleadings; which objection was overruled and the papers admitted to which the defendants at the time excepted. The Plaintiffs then called Henry M. Kellogg; and who after being sworn was examined by Defendants Counsel and upon said examination, said, I am a brother of William Kellogg the deceased partner of Walker & Kellogg; said William Kellogg is now dead and I am his Administrator. He never was married and left no children or descendants of children. The said firm of Walker & Kellogg's debts would not exceed one thousand dollars but no assets and no collections made, Defendants then objected to said witness being allowed to testify because he was the Administrator of William Kellogg and one of his Heirs-at-Law and would receive a part of whatever was given by a verdict to the Plaintiff. Thereupon the Plaintiff produced and read to the Court a release signed and sealed by said Witness, a copy of which marked "D" is hereto attached and made part of this Bill of Exceptions; But Defendants still objected to said Kellogg being allowed to testify because if the Costs should be adjudged against the Plaintiff it would diminish the funds in which said Witness has an



29

interest as heir of William Kellogg and because witness had no right to give any such release; but the Court permitted said Witness to testify, to which the Defendants at the time excepted. Witness then testified that Walker & Kellogg advanced to Defendants after deducting old amount of \$109.12 and \$885.05 for sacks returned to the amount of \$11783.94. Walker & Kellogg received from Defendants 21.347 Bushels of Corn ten thousand bushels of which was credited at 36 cents per bushel and 11.347 Bushels at 28 cts which amounts in all to \$6777.31. That witness as the agent of Walker & Kellogg before the commencement of this suit sometime in the Spring of 1858 called upon Defendant Dawson and showed him the account of Walker & Kellogg a copy of which is hereto attached and in words and figures following, to wit:



and that said Dawson in the presence of Defendants Myers admitted the correctness of said debit side of said account except the items of interest and that at the same time said Dawson furnished witness with an account of which a copy is hereto attached and made part of this Bill of Exceptions marked "H." as an offset, Dawson said nothing at that time about corn in the Ware house, that had spoiled, I never heard anything about spoiled corn until after Mrs Kelloggs death. I told Dawson that it was necessary for the matter to be fixed up, he requested a delay of one week until he should see Moore, Pratt & Co. he claimed the account marked H. as an off set. said witness also testified that in May 1854 Corn in Spring Lake was worth 32 or 33 cents per bushel, and thereupon Plaintiff rested.

The Defendants then offered and read in evidence a Contract, a copy of which is herewith filed marked "G" and made part of



Dr  
1853  
Mess. H. Myers & Co.

In apt with  
1854

Mess Walker & Kellogg Co.

|            |    |                                                                                                |        |    |
|------------|----|------------------------------------------------------------------------------------------------|--------|----|
| March 1854 | 9  | For Balance apt                                                                                | 109    | 12 |
| Feb        | 13 | " Cash advanced on corn                                                                        | 1000   | 00 |
| "          | 27 | " Paid your Dft. Feby 21 <sup>st</sup> 2 days                                                  | 500    | 00 |
| Mich.      | 1  | " do " " 24 <sup>th</sup> 4 "                                                                  | 300    | 00 |
| "          | 4  | " do " " 25 <sup>th</sup> 4 "                                                                  | 1200   | 00 |
| "          | 7  | " do " order                                                                                   | 120    | 00 |
| "          | 11 | " do " Dft. Mich. 4 <sup>th</sup> 4 days                                                       | 3000   | 00 |
| "          | 23 | " do " " 10 <sup>th</sup> 10 "                                                                 | 300    | 00 |
| April      | 19 | " do " " 17 <sup>th</sup> 30 "                                                                 | 2000   | 00 |
| "          | 20 | " do " " 15 <sup>th</sup> 30 "                                                                 | 350    | 00 |
| "          | 23 | " do " " 21 <sup>st</sup> 30 "                                                                 | 176    | 90 |
| May        | 5  | " do " " Apt 17 <sup>th</sup> 15 "                                                             | 2000   | 00 |
| "          | 23 | " Bill of Lumber                                                                               | 725    | 44 |
| Aug        | 18 | " do " 10.000 Gunny Sacks                                                                      | 1,036  | 15 |
| Dec. 1858  | 5  | " Paid Labor at Spring Lake                                                                    | 5      | 00 |
| Feb 1858   | 9  | " Interest Balance from May 1 <sup>st</sup> 1854 to Feby 9 <sup>th</sup> 1858 at 10 % annually |        |    |
| 1858       |    |                                                                                                |        |    |
| Feby       | 9  | For Balance with Drm                                                                           | \$6685 | 87 |

Genl Feby 9. 1858

|            |                                               |                                            |      |           |
|------------|-----------------------------------------------|--------------------------------------------|------|-----------|
| May        | 26                                            | By 4066 <sup>04</sup> Bush Corn per Baltic |      |           |
| Nov        | 27                                            | " 3903 " " Michigan & Barges               |      |           |
| "          | 28                                            | " 1174 <sup>14</sup> " " " Fine            |      |           |
| Dec        | 1                                             | " 2104 <sup>42</sup> " " " Ohio            |      |           |
| "          |                                               | " 675 <sup>04</sup> " " " Albion           |      |           |
| "          |                                               | " 1192 <sup>04</sup> " " " Pekin           |      |           |
| "          |                                               | " 1539 <sup>18</sup> " " " Ruby            |      |           |
| "          |                                               | " 1517 <sup>44</sup> " " " Ruby            |      |           |
| 1853       | 20                                            | " Dft. Jan. Leonard & Co.                  | 44   | 50        |
| Sept. 1854 | 7                                             | " 15.83 Bush Corn per Ill Belle            |      |           |
| Sept.      | 28                                            | " 3188 " " " Ill Belle                     |      |           |
| "          |                                               | " 325 " " " A.S. Davis                     |      |           |
| Oct.       | 24                                            | " 8877 Gunny Sacks Red                     | 885  | 05        |
| Dec.       | 1                                             | " 79 <sup>12</sup> Bush Corn               |      |           |
| "          |                                               | 21.347 <sup>30</sup> Bush Corn             |      |           |
| By         | 10.000                                        | Bush as per contract                       | 30   | 3000 00   |
| "          | 11.347 <sup>30</sup>                          | "                                          | 28   | 3177 31   |
| "          | Commissions on 11.347 <sup>30</sup> Bush @ 4% |                                            | 4    | 453 90    |
| "          | By Balance carried over                       |                                            | 6685 | 87        |
|            |                                               |                                            |      | 14.846 63 |

2024.02

\$14846 63



this Bill of Exceptions, and also a Receipt for Ice, a copy is hereto attached marked "H" and made part of this Bill of Exceptions amounting to eight hundred and fifty dollars which Plaintiff admitted to be correct and that Walker & Kellogg had got the "Ice"

Defendants then called Timothy W. Pratt who being sworn said I was one of the firm of Moore Pratt & Co, we commenced business at Spring Lake in the fall of the year 1853 and was a member of the firm of Moore Pratt & Co. for two years at Spring Lake, our firm bought the Corn that Walker & Kellogg got and presume it is the same mentioned by the Contract with Myers & Dawson, we purchased the Corn as the Agents of H. Myers & Co at Spring Lake, the Warehouse at Spring Lake is about one mile from the Illinois River on an outlet of the Lake. Boats can generally get to the Warehouse only in the Spring when the River is up, sometimes Boats can get there in the fall, but we generally depend upon their getting to the Warehouse in the Spring of the year. The account annexed to Defendants Plea was then shown witness the number of Bushels in that account stated as having been delivered to Walker & Kellogg is correct, ten thousand bushels at 36 cents, eleven hundred and seventy four at thirty five cents, sixteen thousand one hundred and sixty bushels at thirty four cents. The account for meat and tallow is correct. H. Myers & Co paid those prices for the corn and we thought we were buying as low as any one, this corn was actually delivered H. Myers & Co had at the date of the contract (Feb 13<sup>th</sup> 1854) at our warehouse in Spring Lake about ten or twelve thousand bushels of Corn. In the latter part of April or the early part of May, in the year 1854 I went with the Defendant Dawson to Peoria to see Walker & Kellogg, but Walker was not there, Dawson asked Kellogg when he was going to send for the corn, Kellogg said immediately or very soon, one or the other, I think



immediately, Dawson said he would like a more definite answer. Kellogg said he should have boats, I think he said he looked for boats that night and would send them down the following day and take the corn away. Mr. Dawson told Kellogg the season of the year was coming on at hand at which corn would spoil, and that the river was liable to fall and it would then be impossible to get the corn away except at great expense. That Mr. Myers & Co. would not consider or hold themselves liable for any damage that might happen to it, or charges that might accrue, if the water fell, and it had to be hauled. Kellogg said there was no danger of any damage occurring to it, as he would send boats and take it away the next day. I don't know the amount advanced by Walker & Kellogg to Myers & Co. at the time one went up first Myers & Co. had all the Corn they ever had for Walker & Kellogg except what had been delivered, there was in the Warehouse at Spring Lake at that time for Walker & Kellogg between thirty and forty thousand bushels of Corn, the Corn for Walker & Kellogg was always kept separate from that of Moore, Pratt & Co. I went up with Dawson again about the last of May or first of June 1854 and saw Kellogg again, the conversation was very much as it was the first time. The water was then falling and the corn liable to heat. Dawson asked Kellogg why he had not sent boats as he had agreed to do. Kellogg said because after he saw Dawson he heard that a lot of corn he had at Coparas Creek or Liver-fool was damaging, and he was obliged to send and take that away, and Kellogg also said he had just received a dispatch from above Chitticothe or Lacon that he had a propeller and fleet of boats on their way down and that he would send them down and take the Corn away. Dawson said the Corn was ready for him. Dawson again told Kellogg in stronger terms than before that he would not be responsible for damages or charges to the Corn. Kellogg told him he did not consider it would be Myers & Co's loss.



32. I think only about one boatload had been taken away at the first time we went up to see Kellogg about four or five thousand bushels, I am not positive that Kellogg said anything the first time we went up about not holding Myers & Co. responsible, but think he did. No boats came that I know of, was at Spring Lake almost constantly attending to the business. If boats had come I would have known it. The corn was all ready for Kellogg, was engaged in buying corn in Spring Lake in the spring of 1851 and 1852. Went to Spring Lake in the fall of 1848, lived in that neighborhood nearly all the time until 1858 or 1859. In the spring season we aim to get our corn out early. The season for buying corn depends on the height of the river usually, and usually ends about the first or middle of June, always tried to get our corn out by the first of June. The season depends on the stage of the water. The warehouse is about a mile from the river on an outlet of the Lake. I think the River had fallen before the last of the tenthousand bushels were delivered, there was some extra expense consequent upon hauling it to the River, and it had to be sacked. When the River was high the boats could come up to the Warehouse and the corn could be put into the boats by a spout, but when the boats could not come up the Lake it had to be sacked and hauled to the river. It costs two cents per bushel to sack and haul it to the river. Myers & Co. paid us two cents per bushel for sacking and hauling this corn for Kellogg. I think there was but one boatload taken away without sacking. The Baltic took away some four or five thousand bushels, the balance was taken away in the fall and part not taken away until in December. The customary and usual price at Spring Lake at that time was one cent a month per bushel for storage. I think Defendants account (annexed to plea) for storage correct. Myers & Co. paid Moore, Pratt & Co. for storage. Considerable corn was injured by heating. Corn loses in weight and in value when it is



They stored to amount and time charged in Defendants account. A part of the Corn was retained by Moore Pratt & Co to pay the charges for storage and hauling upon that that was shipped, enough was retained to pay those charges. Some of the Corn spoiled. I suppose four or five thousand bushels. Between thirty and forty thousand bushels was purchased for Walker & Kellogg. I think we expended about ten thousand dollars therefor. Corn fell in price between the first of June and the time it was taken away, but cant tell how much. I dont think we bought any corn under thirty four cents and when it got to be thirty six we were ordered to stop buying. After the first of June it is not safe to keep corn in store on account of danger of its heating. Kellogg was at Spring Lake in November or December 1854 and wanted to know if any more of his corn was there, witness told him it was all delivered and showed him some corn that was rotted. There is a difference of between 3 & 4 cents in the price of shelled Corn and corn in the ear. The Corn mentioned in Defendants account is corn that was shipped and does not include corn that was damaged. The Corn does not include storage upon the corn that was damaged. Nothing was said about buying any more corn when I went with Dawson to see Kellogg. The Warehouse was dry and never leaked, was a safe place to keep corn. When Kellogg came down to Spring Lake he asked me if we were shipping his corn, that he had not got all he should have from the amount of money. I told him some of his corn had heated and spoiled and showed it to him. He said it was worthless. I also told him as Warehousemen generally do that we retained corn to pay our expense. I dont think he made any reply. Kellogg knew at the time Dawson and I came to Peria that Moore, Pratt & Co. were doing the business.

### Cross Examination

Dont recollect that Kellogg was down there more than once never had any corn



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version about the corn down there but once that I recollect of. Myers & Co  
 furnished us with the money we bought the corn with. We bought some  
 corn for ourselves both before and after we bought for Myers & Co. Commen-  
 -ced buying for them in the month of February 1854 - cant state the time  
 exactly (think) towards the last of the month. We had on hand at that time  
 more than the ten thousand bushels which was sold to Walker & Kellogg. We  
 commenced buying as soon as corn would do to put in store we raised some  
 of our own, cant say how much we had in store on 13th. February 1854  
 had more than ten thousand bushels, might have had double that. Shelled corn  
 was in the Warehouse and the ear corn in Pens. There was ten thousand  
 bushels sold to Myers & Co. then at Spring Lake, all the shelled corn  
 was in the warehouse, was considered sold to Walker & Kellogg. My partner  
 sold it & had in the neighborhood of six thousand bushels of shelled corn  
 in the warehouse on the 13th of February 1854 that that was in the ear  
 was not put apart to Walker & Kellogg that in the Warehouse was considered  
 theirs. My partner sold the corn when he was up the river at Peekin or  
 Peoria. Dont know that there was any specific agreement that Myers & Co.  
 were to have that identical corn. Dont know anything more personally than  
 that Myers & Co were to have the ten thousand bushels. Did not shell any  
 more corn at that time. Did early in the Spring of 54 shelled a great amount  
 more. Put enough in the warehouse to complete the ten thousand bushels  
 sold Myers & Co. and shipped the balance on our own account. Cant  
 tell how much we shipped. We kept a Book in which was set down  
 the amount of corn we bought. Dont know where it is, it was at Havana  
 the last I saw of it. I took with other Books to Havana when I re-  
 moved to Havana to do business there. I saw it at Havana after I  
 took it there, cant tell you who has it in possession. It was boxed  
 with other books and left in a warehouse at Havana. I do not know



35- the books now are I could not <sup>tell</sup> what I paid for each particular lot of corn that season we must have bought between seventy and eighty thousand bushels. Cant say when we stopped buying may have bought through the month of May and into June but cant say.

I was a witness upon a former trial of this cause. There was an account presented (the account marked "F" was here shown witness) I think Moore Pratt & Co. made an account to Myers & Co. Could not say this account was the account we made out I could not say that we made more than one account I dont think there was any charges after December

Witness was then shown account attached to the Plea, said I dont know whose writing it is, dont think he ever made one just like it thinks he made one in the aggregate that was much like it, 27,340 bushels charged in this account, thinks they took away all of that. Dont remember that on any former examination that I said that Kellogg commenced taking away corn in May and finished in December 1854 I dont remember whether I stated in my examination that Walker & Kellogg took away 21,000 bushels of corn Dont think I examined the Books since my former examination We made a Bill to Myers & Co. immediately afterwards and I think it was made in items and amounted in the aggregate to more than nine thousand dollars. I cannot say whether the bill present at the former trial was the same Bill we made to Myers & Co. or not. Could not tell very closely how much corn we shelled and put into the Warehouse that season. I suppose we had 50,000 Bushels of Shelled Corn in the Warehouse that year We bought more than that but a part of it never went into the Warehouse it was kept in a separate floor of the Warehouse. There were three floors in the <sup>large</sup> Warehouse, kept our own corn in a smaller Warehouse



Think there was on the 1<sup>st</sup> floor of the Big Warehouse that season over 15,000 bushels, the 2<sup>nd</sup> floor had more in it probably 15 or 20 thousand bushels, the first floor is the upper floor. The middle and bottom floors contained the Corn we bought for Walker & Kellogg the lower floor contained 10,000 bushels more or less. Think the rotten corn was on the bottom floor when Kellogg was there, could not tell very nearly how much corn Moore Pratt & Co. had on hand on 13<sup>th</sup> of February 1854 at the Warehouse, they might have had 20 or 25,000 bushels at that time. Presume I stated on my former examination that Kellogg was there in November 1854. I presume I said the parties seemed to understand the terms upon which the corn was bought, handled and shipped. I cannot say that I did not say on my former examination that nothing was said about rotten corn and extra charges. Mr. Bonney appeared to be employed as counsel by Myers & Co. in the former trial and took down my evidence. I know that I showed Mr. Kellogg a part of the rotten corn. I have no recollection of saying that nothing was said about rotten corn and extra charges. Don't recollect whether account shown me in Bonney's Brief was like Myers & Co's Account, the aggregate I think was larger.

### Re-Examination by Defendants

Storage was one cent per bushel per month, the figure 6 for first item of Storage in account annexed to Plea is wrong, it should be four but the extension of amount is right. Part of the Corn we charged no Storage, no Storage charged on corn taken away in Spring. The next corn was taken away in September, charged Storage on that for four months. If it was into September, charged for the whole month.

### Cross Resumed

If the Books could be produced they would show the prices paid for



37. The corn and for whom bought and the rates & prices of the several purchases & that he supposed the Books could be found if any record was made

Samuel S. Porter sworn for Defendants - said - I bought grain from the year 1849 to 1859. I bought corn at Spring Lake in the years 1852, 1853, 1855, 1856 and 1857 did not buy any in 1854 at Spring Lake. I was governed in buying corn there by the river. It was very unsafe to buy corn there after June. It was worth from one cent and a half to 2 cents per bushel to hand and sack corn to the river. I never bought corn there in June very little corn was ever bought there after first June. The season for buying corn at Spring Lake would not last longer than the first of June if we expected to ship it by water. I don't know of any local custom that makes a distinction between Spring Lake and other points on the Illinois River as to the season for buying corn. It would not be safe to buy corn there after the 1<sup>st</sup> of June, there would be danger of it spoiling if kept over the summer months

Peter A. Brown - sworn - I have been purchasing corn off and on at Pekin and Spring Lake for 15 or 18 years Don't know what the word season means there. If I were purchasing corn for another I would buy during the season at the risk of the purchaser. The season depends entirely upon the stage of the river, sometimes it continues during the whole of the navigation River generally falls between the first of June and July - never bought corn only in the Spring there and always sent my boats and got it away while the river was up. I don't know of any established custom at Spring Lake as to the time for purchasing corn

Joseph W. Cochran called for Defendants -



38 witness was shown the debit side for Plaintiffs account, marked "E". I have made the calculation of the money advanced as shown by that account prior to April 15th 1854 it is just six thousand four hundred and twenty dollars

Henry Kellogg was then recalled for Plaintiff and his evidence again objected to because he was interested. Witness produced Drafts drawn by Defendants on Walker & Kellogg and accepted by them to the amount \$9946.90. The date and amount of which said drafts are respectively as follows - to wit:

| Date          | Amount           |
|---------------|------------------|
| Feb. 21. 1854 | \$ 500.00        |
| " 24          | 300.00           |
| " 25          | 1200.00          |
| March 4       | 3000.00          |
| " 6           | 120.00           |
| " 15          | 350.00           |
| " 17          | 2000.00          |
| " 21          | 176.90           |
| April 17      | 2000.00          |
|               | <hr/> \$ 9946.90 |

+ All of which drafts were accepted by Walker & Kellogg before the receipt for the thirty thousand bushels was given.

Plaintiff then read to the jury the following letters copies of which are hereto attached marked "J", "J" & "K" and made part of this bill of exceptions

Mr Eastman called for Plaintiff, and said I went to Springfield Lake in last of November or first of December 1854 got a load for part of three Barges. I got all they had. Pratt was there and delivered



39 The corn to me

Bromer recalled for Defendants - I was purchasing corn in Tazewell County in 1854 was paying from 28 to 35 cents in March, April and May for shelled corn in April we paid 32 & 33 cents for the quarter part Don't remember what it was worth in March. Difference between shelled corn and corn in the ear is from 3 to 4 cents per bushel

Pratt, re-called for Defendants - said we bought most of the corn in the year 1854 in Spring Lake in the ear the price in the letter must mean corn in the ear as bought most of the corn in the ear and had it shelled by contract at 3 cents a bushel and boarded the hands of the sheller

Mr. Grier was called for Plaintiffs and testified - I am a dealer in grain in Peoria, the season here and all along the River commences with the opening of navigation and runs till its close in the winter  
Cross Ex.

I am speaking of season at Peoria was never at Spring Lake can move corn at anytime by railroad from Peoria

Mr. Tyng called for Plaintiffs -

The season for buying means whole season, the season for shipping means while boats can run. Can't say when water is so low that Boats can't get up to Spring Lake

The foregoing was all the evidence given in the Case  
The Court <sup>was</sup> then asked to give for Defendants the following instructions

1 The Jury are instructed that the Plaintiffs in this cause are not entitled to recover for money they advanced to purchase the corn with and for the corn also " Which instructions the Court refused to give, but struck out the words also and added the following qualification -



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40 "purchased with such money" and gave it or qualified, to which refusal to give said instructions as originally written and qualifying, the defendants at the time excepted.

The Court then gave for the Defendants the following Instruction  
2. If the Jury believe from the evidence that on the 15<sup>th</sup> day of April 1854 the parties got together & defendants then executed the receipt of that date for the 30,000 bushels of corn, and if the Jury further believe from the evidence that all the money paid by the Plaintiffs to the Defendants was paid on and prior to said 15 day of April 1854 it is for the Jury to determine from all the evidence whether the parties at that date agreed among themselves that the 30,000 bushels of corn covered all the advances made by the Plaintiffs up to and on said date.

~~The court gave for the Defendants the following instruction~~  
3. If the Jury believe from the evidence that the receipt for the 30,000 Bushels at its date covered all the advances up to and on that date, and if the Jury believe from the evidence that no further advances were made by Plaintiffs to the Defendants to purchase corn with, then the Plaintiffs cannot recover for any failure of the Defendants to purchase corn after the 15<sup>th</sup> of April 1854.

The Court gave for the Defendants the following Instruction  
4. The Court further instructs the Jury that by the terms of the Receipt offered in evidence by the Plaintiffs dated April 15<sup>th</sup> 1854 the 30,000 Bushels of Corn was then the Corn and property of Walker & Kellogg and was then in the Warehouse of Moore Pratt & Co. at Spring Lake.

The Defendants asked for the following Instruction  
5. There is no time specified in the Receipt dated April 15. 1854 when Walker & Kellogg were to send for the corn, and in that case Walker & Kellogg would be required to send for the corn and in a reasonable



41 time), and if Walker & Kellogg failed or neglected to send for the corn in a reasonable time, and if the Jury further believe from the evidence that by reason of such failure and neglect of Walker & Kellogg to send for and take away the corn in a reasonable time, a part of the corn was lost or spoiled, then unless the Defendants were guilty of some negligence Walker & Kellogg must sustain such loss and damage & the Jury should not allow the Plaintiffs for any corn so lost or spoiled.

Which Instruction the Court refused to give but added the following qualification

" Unless the Jury believe from the evidence that the time for "  
" the delivery of such corn was changed by some other contract between "  
" said parties or that the corn specified in this receipt was subject to the "  
" terms of the contract of February 13. 1854. "

and gave it so qualified, to which refusal to give said instruction as originally written and so qualifying the same the Defendants at the time accepted

The Defendants asked for the following Instruction

D - If the Jury believe from the evidence that the Defendants had on hand in the Warehouse of Moore Pratt & Co the 30,000 Bushels of Corn specified in the Receipt dated April 15. 1854. and were then ready to deliver the same at that date, and if the Jury further believe from the evidence that the Plaintiffs did not within a reasonable time call for and take away the corn, and that by reason of the failure of the Plaintiffs to remove the corn in a reasonable time the Defendants were subjected to and did pay for the sacking hauling and for storage on the corn, in order to take care of & ship the corn, then the Jury should allow the Defendants a reasonable compensation for such sacking hauling and extra storage. Which Instruction the Court refused to give, but added



42 The following qualification

"Unless the jury further believe from the evidence that the time for the delivery of such corn was changed by some other contract between said parties or that the corn specified in this Receipt was subject to the Contract of February 13. 1854." And gave it so qualified. To which refusal to give said Instruction as originally written & to qualifying the same. The Defendants at the time excepted

The Court gave for the Defendants the following Instruction  
7. The Court instructs the jury that under the contract in this case dated Feby 15. 1854 defendants were to receive four cents per bushel for buying storing and delivering corn on board the Plaintiffs boat. The Contract limited the performance of those acts during the then coming season for buying & shipping corn at Spring Lake, and the Defendants were not bound to purchase or store corn for them after the expiration of such season. And if the Plaintiffs neglected to remove the corn within the time limited the Defendants had the right to charge the usual and customary rates of Storage for the time it subsequently remained in store; And the Plaintiffs were bound to pay it, the undertaking to purchase and store was not for an indefinite period, but only during the season for purchasing and shipping corn at Spring Lake.

The Court gave for the Defendants the following Instruction  
8. If the jury believe from the evidence that the season for buying and shipping corn at Spring Lake expired by the first of June, and that the Defendants had the corn ready for delivery before that and so notified the Plaintiffs and the Plaintiffs failed and refused to take it away, the Defendants are not responsible for any corn injured by heating or otherwise unless said damage was caused by negligence of the Defendants

The Court gave for the Defendants the following Instruction



9 - The Court instructs the Jury, that if they believe from the evidence that the Plaintiffs were notified that the corn was ready for delivery and that the Plaintiffs failed to send for it within the time agreed upon by the parties and before they did send for it the river fell so as to increase the expense of putting it on board the boats, the Defendants are entitled to credit for such increased expense.

The Court gave for the Defendants the following Instruction

11. The Court instructs the Jury that Defendants are entitled to recover four cents per bushel for all the corn purchased under the Contract of Feby.

13. 1854 except the 10,000 Bushel Contract by Defendants for Plaintiffs

And if the Jury believe from the evidence that the Defendants purchased for the Plaintiffs thirty thousand bushels of corn the Defendants would be entitled to receive four cents for each bushel so purchased, if they further believe such corn was bought under the contract of Feby 13 1854.

The Court gave for the Defendants the following Instructions

12 The Court instructs the Jury that the Defendants by the terms of the contract given in evidence were not bound to ship the corn until the Plaintiffs sent for it

The Defendants then asked the Court to give the Jury the following Instructions -

The Court instructs the Jury that by the terms of the Receipt given by the Defendants to the Plaintiffs for the thirty thousand bushels of corn dated April 15th 1854. The Defendants became the Bailees of the corn for the Plaintiffs and were only bound to take reasonable care of the same and have the same ready for delivery for a reasonable time and if the same was injured without the negligence of the Defendants, the Defendants are not responsible for such injury and had a right to charge Storage for any neglect to carry it away after a reasonable time. If the



5

44 Jury believe from the evidence that the Plaintiffs failed to take it away, in a reasonable time and were notified to do so.

The Court instructs the Jury that under the pleadings in this case the Plaintiffs are not entitled to recover damages for any failure or refusal by the Defendants to deliver any corn purchased.

The Court instructs the Jury that the Defendants are entitled to have credit for the corn at the price they paid for it at Spring Lake, and if the corn fell in price after it was bought, the Plaintiffs would have to sustain such loss.

The Court further instructs the Jury that the Receipt dated April 15, 1854 is evidence that the Defendants purchased for the Plaintiffs thirty thousand bushels of corn and if the Jury believe from the evidence that the Defendants did purchase for Plaintiffs thirty thousand bushels of corn then Defendants are entitled to recover four cents per bushel upon the whole of said corn and it makes no difference that the whole of the corn may not have been delivered — All of which last mentioned instructions the Court refused to give. To which refusal to give the same the Defendants at the time excepted.

The Court gave for the Plaintiffs the following Instruction

- 1 — That the Plaintiffs in this case is entitled to credit for all the money advanced under the contracts for the purchase of corn according to the Contracts
- 2 — That by the Contracts the corn was to be delivered when called for during the season without charges except the price to be paid per bushel as stipulated in the Contracts and four cents per bushel commission
- 3 — If the Jury believe from the evidence that the Defendants admitted the correctness of the Plaintiffs account given in evidence and that the account which the Defendants furnished of their claims in 1858 is correct



45 They will for the Plaintiff the difference between the two accounts. And if they believe from the evidence that the season mentioned in the Contracts extended from the open to the close of navigation in the Spring and fall they will find for the Plaintiff the difference between the two accounts, deducting from Defendants accounts all charges except for commission Sacks, meat, twine and labor on boats & Ice

4 - That by the contract of Feb. 13<sup>th</sup> 1854 the Defendants were to purchase corn during the season for Walker & Kellogg. That said Corn when purchased was to be subject to their order, and they were to be governed by them as to price to be paid from time to time, and that they were to receive four cents per bushel for buying, storing and delivering on Board their boats and to make up the quantity reported by them (Meyers & Dawson) as bought to Walker & Kellogg

5 That to establish a custom it is necessary that the party asserting it should prove that the same had existed for a series of years and that the same had been known and acquiesced by all persons conversant with the business at the place aforesaid

To the giving of each of which instructions the Defendants at the time excepted.

Whereupon the Jury retired, and found a verdict for Plaintiff for three thousand and twenty three dollars and twenty three cents

And the Defendants then entered the following motion

State of Illinois } ss.  
County of Peoria }

Charles Walker ss.

vs.

Henry Myers et al

And now comes the said Defendants and



46 move the Court to set aside the verdict rendered herein, and for  
a new trial of said cause

~~for because the law is against the instructions asked by the~~

1. Because the verdict is contrary to law the evidence and the  
instructions of the Court

2 - Because the Court refused proper instructions asked by the De-  
fendants

3 - Because the Court gave improper instructions to the jury asked by  
the Plaintiff

4 - Because the Court permitted improper evidence to be given in  
behalf of the Plaintiff - against the objections of the Defendants

Bonney & Rouse et al

Attys for depts.

Which motion the Court overruled, to the overruling of which motion  
the Defendants at the time excepted, and now pray this bill of Excep-  
tions may be signed and sealed which is done

O. L. Merriman (Seal)



"A"<sup>47</sup>

Peoria Feb. 13<sup>th</sup> 1854

This certifies that we have this day agreed to purchase Corn at our warehouse in Spring-Lake the coming season for Walker & Kellogg & said Corn when purchased is to be subject to their order, also we are to be governed by them as to price to be paid from time to time, and are to receive four cents per bush. for buying, storing and delivering on board their boats we making up to them the same quality reported as brought for them

(Signed) H. Myers & Co.

"B"

This certifies that we have sold and agreed to Walker & Kellogg on board their Boats during the coming months of April & May as they may call for the same ten thousand bushels of sound merchantable Corn of 56 lb to the bushel for which they are to pay us thirty six cents per bush. It is understood said Corn is now at our warehouse at Spring Lake upon the Illinois River, and that they are to take it from that point we putting it on board free of charge to them, and we hereby acknowledge the receipt of one thousand dollars upon said corn in part payment for same. Dated. Peoria February 13<sup>th</sup> 1854

(Signed) H. Myers & Co

"C"

Recd in Store from Walker & Kellogg and subject to their order and free of all charges on board their Boats or any boat they may send for the same thirty thousand bushels shelled Corn in good order and condition, said Corn being stored at the Warehouse at Spring Lake Fazelwell Co. and occupied by Moore Pratt & Co in connexion with whom the Corn has been brought for Walker & Kellogg and with their funds. Peoria April 15<sup>th</sup> 1854

Signed — H. Myers & Co



"2"<sup>48</sup>

Charles Walker  
vs.  
Henry Myers & Co.

In the Circuit Court of Peria County  
In Assumpsit

For and in consideration of the sum of one dollar to me in hand paid by Charles Walker the Plaintiff above named I do hereby release and assign to the said Charles Walker Plaintiff aforesaid all interest right title claim property & demand which I may have, either as heir or administrator of William Kellogg deceased or otherwise howsoever in or to any part or portion of the money or claim sought to be enforced or recovered in this suit. In Witness whereof I have hereunto set my hand & seal at Peria this 7<sup>th</sup> day of December 1861.  
Henry M. Kellogg

"May"  
"H"

Walker & Kellogg  
To Morre & Pratt & Co.

Dr

1854

|          |                                      |     |         |
|----------|--------------------------------------|-----|---------|
| May 29   | To Shipped by C Boat Baltic          |     |         |
| "        | 4060 Bush Corn                       | 36¢ | 1463.70 |
| Sept. 7  | " Shipped by Ill. Belle              |     |         |
| "        | 700 Sacks 1583 Bush                  | 36¢ | 569.88  |
| "        | Storage on do 3 mos at 1¢ per month  |     | 47.55   |
| Oct. 20  | " Shipped by A. P. Davis             |     |         |
| "        | 143 Sacks 325 Bush                   | 36¢ | 117.00  |
| "        | Storage on do 5 mos. at 1¢ per month |     | 16.25   |
| "        | Sacking & Hauling at 2¢ per Bush     |     | 6.50    |
| Sept. 28 | " Shipped by Ill. Belle              |     |         |
| "        | 1428 Sacks 3188 Bush                 | 36¢ | 1147.68 |
| "        | Storage on do mos. 1¢ per month      |     | 127.52  |
| "        | Sacking and hauling at 2¢ per bush.  |     | 63.76   |



Nov <sup>49</sup> 28

|                                        |     |         |
|----------------------------------------|-----|---------|
| " Shipped by Gem & Ruby                |     |         |
| " 1139 Sacks 3830 Bush                 | 34¢ | 1302.20 |
| " Storage on do 6 mos. at 1¢ per month |     | 104.34  |
| " Sacking and hauling                  |     | 76.60   |
| " Our Coms. 4¢ per bush                |     | 153.20  |

29

|                                  |     |        |
|----------------------------------|-----|--------|
| " Shipped by                     |     |        |
| " 532 Sacks 1174 Bush            | 35¢ | 410.90 |
| " Storage 6 mos. at 1¢ per month |     | 70.44  |
| " Sacking & Hauling 2¢ per bush  |     | 23.48  |
| " Our Coms. 4¢ per bush          |     | 46.96  |

Dec 1

|                                     |     |        |
|-------------------------------------|-----|--------|
| " Paid for Trine                    |     | 8.00   |
| " Shipped by Pt. Ohio               |     |        |
| " 953 Sacks 2104 <sup>42</sup> Bush | 34¢ | 715.61 |
| " Storage 6 mos. at 1¢ per month    |     | 126.25 |
| " Sacking & hauling 2¢ per bush     |     | 42.10  |
| " Our Coms. 4¢ per bush             |     | 84.20  |
| " Shipped by Ruby                   |     |        |
| " 739 Sacks 1543 <sup>43</sup> Bush | 34¢ | 524.87 |
| " Storage 6 mos.                    |     | 92.58  |
| " Sacking & hauling at 2¢           |     | 30.87  |
| " Our Coms. at 4¢                   |     | 61.72  |

Dec 7

|                                     |     |        |
|-------------------------------------|-----|--------|
| " Shipped by Pekin & Albion         |     |        |
| " 890 Sacks 1867 <sup>44</sup> Bush | 34¢ | 634.79 |
| " Storage 6 mos                     |     | 112.02 |
| " Sacking & hauling 2¢ per bush.    |     | 37.34  |
| " Our Coms 4¢ per bush              |     | 74.68  |
| " deliv. in Warehouse               |     |        |
| " 676 Sacks 1577 <sup>44</sup> Bush | 34¢ | 515.00 |



57.

|                                        |         |
|----------------------------------------|---------|
| " Storage 6 mo.                        | 91.02   |
| " Sacking & Hauling 2 c/               | 30.34   |
| " Our cons.. 4 c/                      | 60.68   |
| 8 " Delvd. in Warehouse                |         |
| " 36 sacks 79 <sup>12</sup> Bush 34 c/ | 26.93   |
| " Paid for Labor on Boats              | 5.20    |
| " " " (meal " "                        | 7.25    |
| " Grine                                | 4.00    |
| " 955 Bks. rtd.                        |         |
|                                        | 9034.45 |

Cor.

by 5 days Labor 5.00

"G"

Penn Feb. 13. 1854

This certifies that we have agreed to pay H. Myers & Co. four cents per bushel of 56<sup>lb</sup> for purchasing and delivering corn on board our Boats the coming season they purchasing the same at as low a price as possible, & if in our opinion the price should be too high we are to notify them & they are to stop buying. It is understood, we are to keep them supplied with money, as needed for paying for same, and they are to deliver us the same quantity of corn their account shows as being bought for us and charged to our account. It is understood they are to purchase for us alone and not for others. It is understood the above refers to corn bought at their warehouse at Spring Lake upon the Illinois River.

Walker & Kellogg

"H"

Miss Walker & Kellogg will pay H. Myers & Co. eight hundred & fifty dollars for Ice bought on their account.  
Pekin - March. 22. 1855.

C. P. Zimmermann as Agent



"J" 51

7  
Pekin Mar 22/54

Mess. Walker & Kellogg

We will see Moore as soon as possible but we told him some week ago not to give over 27 or 28<sup>c</sup>. We are only paying 28 here & no one cares about buying at that. In fact there is but one buyer in Market at that price. We believe men are here offering 14<sup>c</sup>. for dry Hides and 5<sup>c</sup> for green

Truly yours

(Signed) H. Myers & Co.

"J" "

Pekin Sept 26/54

Messrs. Walker & Kellogg

Gents. Moores Partner is here & says that corn at Spring Lake must be taken away as soon as possible else it will spoil & they will charge extra storage & we think it greatly to your interest to take it off and think to have \$10,000 invested there all the Winter in corn is not desirable, besides we cannot close our business until it is done. Zimmermann can get a good freight for Havana and points above & we think you stand very much in your own light not to get it up immediately Michigan & Barges will soon take it up. You have already recd. nearly 6000 Bu. and you can soon get Balance up if you cannot come down down this trip let Jim make arrangements to go down next trip without fail for Canton Liverpool & Havana for he can get a full load of goods for St Louis Bots say they are going on further than Peoria. Zimmermann had better telegraph Shippers at LaSalle that he will take goods for those places that they may freight for him. You can ship your corn on R.R.



52 from Peoria but one can not at Spring Lake. The Bars are not  
so bad from Peoria to Spring Lake as from Peoria to La Salle  
We hope you will not fail to make arrangements to take corn on  
trip at least (Signed) H. Myers & Co.

"JL"

Peoria May 7/57

Miss Walker & Kellogg

Yours requesting us to come up & make  
a settlement of the Moore & Pratt Business was duly received. But  
was not answered sooner, thinking to hear from them. They have all  
the papers & must attend principally to arranging the business. We sent  
them your letter but have not heard from them yet. We think Moore  
will do well with his grain this season & will soon be able to clear up  
all old matters. He was like the rest of us last season, lost considerably.  
Knowing they will do what is right when they think they are in a con-  
-dition to satisfy all claims. We should regret to see the matter litigated  
before all parties had tried to settle it amicably. We shall see Moore before  
long & will urge him to a settlement

Respectfully  
H. Myers & Co.



State of Illinois }  
 Peoria County }

I, Enock J. Sloan, Clerk of the circuit court in and for said county and state, do hereby certify that the foregoing is a full, true and complete transcript of the papers filed in, and of the record of the proceedings of our said court appertaining to the cause wherein Charles Walker is plaintiff and Henry Myers & al are defendants, as the same remains on file and of record in my office.

Given under my hand and seal of said court at Peoria, this 12<sup>th</sup> day of March AD 1862.

Enock J. Sloan, Clerk



State of Illinois } In 3<sup>d</sup> Grand Division  
 Supreme Court } ss April Term 1862

Henry Myers &  
 Stanley J. Dawson  
 partners under the  
 name of H. Myers & Co

vs  
 Charles Walker  
 surviving partner of  
 Charles Walker and  
 William Kellogg  
 late partners under the  
 name & style of Walker  
 & Kellogg —

And now comes the plaintiffs in  
 error by Roberts & Ireland their attor-  
 neys and say that in the record  
 and proceedings aforesaid and  
 in the rendition of the judgment  
 aforesaid manifest error hath  
 intervened in this to wit:

1.<sup>st</sup> The Court erred in overruling  
 the motion of Defendants  
 below for a change of venue.



55 2<sup>d</sup>. The Court erred in admitting  
the contracts of February 13<sup>th</sup> 1854  
and the receipt for corn of April  
15<sup>th</sup> 1854 in evidence under the  
pleadings in this cause.

3. The Court erred in admitting  
the witness Henry W. Kellogg to  
testify in the case.

4<sup>th</sup>. The Court erred in refusing to  
give the first Instruction asked by  
defendants below, as originally  
written and in qualifying the  
same.

5<sup>th</sup> The Court erred in refusing to  
give the ~~5<sup>th</sup>~~ instruction for def-  
endants below as originally  
written, and in qualifying the  
same.

6<sup>th</sup> The Court erred in refusing to  
give defendants 6<sup>th</sup> instruction  
as originally written and in  
qualifying the same.



7<sup>th</sup> The Court erred in refusing to give the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> instructions asked by defendants below,

8<sup>th</sup> The Court erred in giving the 1<sup>st</sup>, 2<sup>d</sup>, 3<sup>d</sup>, 4<sup>th</sup> & 5<sup>th</sup> instructions asked by plaintiff below.

9<sup>th</sup> The Court erred in refusing a new trial on motion of defendants below,

10<sup>th</sup> The Court erred in rendering judgment for plaintiff below and in not rendering judgment for defendants below, for which said errors and divers other errors therein said plaintiffs in error pray that said judgment ~~was~~ rendered by the said Court in favor of said plaintiff below may be reversed and held for nothing!

Robt. Ireland  
Attys for plaintiffs in error



Left in Error Being in Error

M. O. Phelps  
for Left in Error



41 ~~129~~ 9

Henry Myers et al -  
vs.  
Charles Walker

Filed April 23, 1862  
J. L. and  
clock

Clarks fee per Record 1/16 vs.  
Recd of Mr. Dawson - C. P. Hoar et al