No. 13549

Supreme Court of Illinois

Cole

vs.

Tyng & Brotherson.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.—*April Term*, 1860.

ALMIRAN S. COLE, *Appellant.*

vs.

ALEXANDER G. TYNG,
PETER R. K. BROTHERSON. } *Appellees.*

POINTS AND BRIEF FOR APPELLEES.

Tyng & Brotherson brought two suits against Cole before a Justice of the Peace—one for $177 98, in their own right, for wheat sold and delivered and one for $534 93, to the use of their assignees, *for storage on corn*, on which last Cole was credited with $244, for sacks sold to Tyng & Brotherson. On appeal to the County Court, by Cole, the two suits were tried together.

The wheat and sack accounts were mutually admitted. The only controversy was about the storage. If this was found for the defendant, then Cole was to have judgment for the difference between the price of the wheat and his sacks; otherwise judgment was to go for plaintiffs, for so much as the jury should find to be their due, deducting the price of the sacks. The main facts about the storage are these: Curtenius & Griswold held the warehouse receipts of Tyng & Brotherson, for 28,000 bushels of corn *in a particular building*. In February, 1855, and while Curtenius & Griswold still owned the corn, the house where it was stored broke down, and by advice and consent of Curtenius the corn was moved into other buildings. Curtenius & Griswold sold to Kellogg, transferring the receipt. By the terms of this receipt the corn was *subject to storage*, if allowed to remain after June, 1st, 1855.

Kellogg took out some 4,000 or 5,000 bushels, and sold the residue—say 23,500 bushels—to Cole, in the spring of 1855, also transferring the receipt and Cole agreed with Kellogg to pay to Tyng whatever storage should accrue on the corn after the said June 1st, 1855.

Cole took away none of the corn before the middle of July, and the last of it not till in September following.

Tyng & Brotherson became partners and joint owners of the warehouses on the 1st of June, 1855, and, at the usual rates, storage accrued as charged in plaintiffs bill, see Kellogg's statement, page 2 of abstract, King, page 3, Grier page 4, &c.; also, contract signed by Cole, page 3.

Tyng & Brotherson had always on hand during the summer and fall of 1855, plenty of corn to fill Cole's contract, and delivered it when called for, except on one or two occasions, when he either failed to furnish sacks or the hands happened to be at dinner. Test. King, page 3; Harding & Neil, 5; Welch 6.

The corn was stored in places convenient for Cole, and he received it from thence without objection.

On this showing the jury found for plaintiffs the amount of their two accounts together with some interest less the sack account of defendant. Plaintiffs thereupon entered a remittitur of the interest, and judgment was rendered in favor of plaintiffs for $468,91, just the amount of their two accounts, less the $244, due defendant for sacks. The figures in the abstract are inaccurate;

but this is as the record shows. Appellees submit that the judgment is right, and should be affirmed, because,

1st. Justice has been done. The storage was fairly due to the plffs. They had the corn on hand and ready at all times to be delivered to Cole *from the day he made his purchase* · and kept hands constantly there to deliver it when called for. Cole knew when he bought the corn that storage would accrue after said 1st of June, and expressly agreed to pay it. It is simply and grossly dishonest in him now to refuse.

2nd. Cole held the warehouse receipt of Tyng or Tyng & Brotherson for the corn, (Kellogg's statement, page 3 of abstract). By this paper storage was to accrue after June 1st, 1855, if the corn was not taken out before. It was not so taken, and plaintiffs *were bound to have it on hand, and men to deliver it afterwards whenever Cole sent for it.* He could not hold them to the terms of this receipt, *so far as in his favor*, without subjecting himself to liability to them upon the provisions in their favor, and the jury were fully warranted in implying therefrom, if necessary. a promise to *Tyng & Brotherson*, to pay them the storage which he permitted to accrue upon the corn under the receipt.

3d. As warehousemen, Tyng & Brotherson had a *lien on the corn* for storage, and might have refused to deliver it to Cole until the storage was paid—Low et al vs. Martin, 18 Ill. 286. By permitting the corn to be taken by Cole without paying this storage, they lost the benefit of their lien, but did not therefore necessarily lose their right to look to Cole *personally.* The right of plaintiffs to the storage attached to the corn *while it belonged to him, and with his knowledge and consent.* It is submitted that what was, under these circumstances, *a charge upon his property,* was no less legally than equitably, a charge *personally* against him, and that his acceptance of the property without satisfying this incumbrance, only bound him the more strongly to respond personally to the plaintiffs therefor, the more especially as there was no one else who could be holden ; the storage not having accrued *until after the corn became his property.*

4th. Cole's agreement with Kellogg, (page 3 of abstract), bound him to pay the storage to the plaintiffs below: and they might well sue him upon this contract.

"Where one enters into a simple contract with another for the benefit of a third, such third person may maintain an action for the breach, and such contract is not within the statute of frauds"—Brown vs. Strait 19 Ill. 88, Eddy vs. Roberts, 17 Ill. 505.

Nominally, it is true, this contract is for the benefit of Tyng alone. But as the storage actually accrued to the plaintiffs *join'ly*, no question was made below, or is understood now to be made, but that the contract was, in fact, for their *joint* benefit, if anything was found to be due.

While referring to this contract the attention of the Court is directed to a supposed variance between the abstract and record. By the abstract, the contract reads thus : "It is understood some 25,000 bushels of the corn is *to be* stored," &c. In the record (not now before us), the words "to be" do not, or should not, appear. They are not in the original contract, and the correction is deemed material, since, as the contract reads, it is an admission that the corn was *then on hand and in store*, while, according to the abstract, it would be otherwise.

5th. The statement in appellant's brief, (page 2), that plaintiffs had not the corn

to deliver to Kellogg, is not sustained by the proof. Though, if true, it is not seen how this would affect the case *as to Cole*, since they always had the corn to deliver to him, *after he owned it*, as already shown. But, as to Kellogg, the proof is that he called at the warehouse *named in this receipt* and found only a part of the corn *there*, but did not know how much corn plaintiffs then had in other warehouses. He then sent Easton to this same warehouse, who, it would seem, did not find the amount required in that building, but did find forty or fifty thousand bushels, at the same time, in other warehouses of plaintiffs—Kellogg's statement, page 2. Easton page 7, of abstract.

Nor is there any proof that Kellogg did not get all the corn he wanted to take under his contract. He sent his man and got four or five thousand bushels, and could have had fifteen hundred to two thousand bushels more *from the same warehouse*, but did not take it; and might have had it all from the other warehouses if he had wished. Nor is there anything inconsistent with this in Tyng's wishing, *before this*, to borrow the whole 28,000 bushels. By *borrowing* the corn, is simply meant that Kellogg should allow Tyng to pay out the corn which he then had on hand to meet Kellogg's contract, on other contracts which he had engaged to fill as is evident from the proof; and it might have been a convenience if Kellogg had allowed him to do it. As he did not, and Tyng only asked it as a *favor*, not a *right*, the presumption is that he still kept the corn on hand to meet Kellogg's contract.

The fact that it may have been stored in other houses than the one named in the receipt, is not deemed material even as to Kellogg. The proof being that it was moved because that building broke down, and with consent of the person who then owned it. But however this be that could not affect Cole as he never made any objection on this score and afterwards received the corn from the other buildings where stored.

6th. Nor is it true that plaintiffs did not claim to hold Cole personally for this storage. King's testimony, page 3 of abstract, shows that they presented the bill first to Cole, who refused to pay it, not denying the propriety of the charge, but insisting that Kellogg ought to pay it. And it was for this reason that plaintiffs afterwards attempted to get it of Kellogg. The statement of Johnston Cole, that Tyng said ~~that~~ he intended to make Kellogg pay it, because he, Kellogg, had charged him (Tyng) for storage on oats, is not very consistent with other parts of the case, and might well be taken by the jury, with some allowance, for the position of the witness, and entitled to little consideration.

7th. It is not seen how the settlement with Cole, subsequent to the accruing of the storage, affects the case. It was not included in any of these settlements, nor paid for in any way, as the proof expressly shows. And Cole having once distinctly refused to pay it, well explains why plaintiffs did not again include it in other accounts which they had to settle with him. We might add, if not out of place, that any one who knows Cole need not be told how fruitless such second attempt would have been. If he once said he would not pay, he would stand to it, till the crack of doom.

8th. The contract between Kellogg and Cole was properly admitted, for reasons already indicated, as also because it showed *when* the charge for storage was to commence, and was moreover an admission that the corn was then on hand and in store.

9th. So, the offer to prove by Easton that *prior to the sale to Cole*, the corn was not in a particular warehouse, was irrelevant and properly excluded.

10. The suggestion that the jury did not allow defendant's bill of $244, for sacks, is unfounded. The allowance of interest, and statement of the case heretofore made, shows that this credit was given to Cole, and explains the verdict.

11th. No error, certainly none for which this judgment should be ~~rendered~~ reversed, is perceived in the instructions for plaintiffs below. No injustice has been done to Cole by the verdict. Moreover, the instructions given for him, (see additional abstract made by appellees), lay down the law so fully and favorably for him, that he cannot be supposed to have suffered from those given for the plaintiffs. For these reasons we submit the judgment below should be affirmed.

COOPER & GROVE,
For Appellees.

291 S. Ct.

Abraham S. Cole

versus

Wyng & Brothers

Points & Brief for Appellee

Filed May 16. 1860

L. Leland

Clerk

BRIEF OF APPELLANT.

Supreme Court of Ill., April Term, A. D. 1860.

ALMIRON S. COLE
vs.
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This was an action brought on two accounts—one for storage of corn, and the other for wheat sold and delivered. There is no dispute in regard to the wheat.

It appears from the evidence that Cole purchased from Walker & Kellogg a warehouse receipt for twenty-eight thousand bushels of corn, stored in a particular building. That Kellogg, while the holder of the warehouse receipt, called for the corn and it was not there. Kellogg could not get the corn at that time. Kellogg sold the receipt to Cole afterwards, and Tyng told Kellogg that he (Tyng) was glad Kellogg had sold the receipt to Cole, that he (Tyng,) had sent Cole to Kellogg, and that he (Tyng) could deliver the corn to Cole to suit his (Tyng's) convenience. An agreement between Kellogg & Cole at the time of the purchase of the warehouse receipt was offered in evidence (which was objected to as evidence by the defendant below,) which stipulated among other things that Cole should satisfy Tyng & Brotherson for storage after July.

Tyng & Brotherson charged this storage to Kellogg. Kellogg and they had an arbitration in regard to it, and the arbitrators decided in favor of Kellogg upon this charge. This is Kellogg's evidence. Johnson S. Cole certifies that Tyng told him, that he would make Kellogg pay for this storage, for Kellogg had charged him for storing oats.

It appears that at this time Cole was engaged in distilling, and required this corn to supply his distillery. Tyng & Brotherson had warehouse receipts outstanding. They had not the corn to deliver to Kellogg, and it was a matter of convenience to them to have the corn remain, so that they could deliver it in small quantities, as Cole might require it.

Now we think it clear that after they had failed to deliver the corn to Kellogg at his request, that they had no right to charge storage upon the corn, although it remained after the 1st of June. Kellogg would have taken away the corn but they did not have it to deliver. The reason why it remained in store afterwards was because they did not deliver it according to their own contract. They could not charge for this storage; certainly they could not, unless they proved that afterwards they had the corn on hand, and gave the holder of the warehouse receipt notice to take it away. This they did not do. The acceptance of the corn afterwards would be a waiver of their default in not delivering it before, but would not imply a promise to pay for the storage, when the storage was not at the request of the holder of the receipt, nor for his benefit, but only on account of the default of Tyng & Brotherson.

There is no moral obligation, nor inferential liability to pay for such storage on which a promise could be implied. If this be in any view which can be taken of the case, the jury erred in allowing for the storage, and the court below should have granted a new trial.

But there is no contract on the part of Cole to pay for storage. None can be implied. Curtenius & Griswold had stored the corn; whatever contract there was in reference to payment for storage, was their contract with Tyng & Brotherson. If Walker & Kellogg upon their purchase of the receipt, had agreed with Tyng & Brotherson to pay them storage, then Walker & Kellogg might have been liable to pay for such storage; but Cole never contracted with Tyng & Brotherson to pay them storage on this corn.—Cole by his contract with Kellogg might have been liable to Kel-

logg, if Kellogg had been compelled to pay storage, but not otherwise; but in no case could Cole be liable to Tyng & Brotherson to pay storage. Tyng & Brotherson are now suing Cole upon a contract made by them with Curtenius & Griswold, without any pretence of a promise on Coles part to them to perform that contract. The suit must be brought for a breach of a contract against the person who made it with the plaintiff. Cole never contracted for this storage—he never promised Tyng & Brotherson to pay for it. Admitting that Tyng & Brotherson had a lien on the corn for storage, they might have insisted upon it, and exacted a promise from Cole to pay for it, as a condition precedent to its delivery to him, which would have been valid; but they delivered it without doing this so far as the evidence shows, and now they require the law or the jury to presume that they did it. The delivery of the property to Cole was a relinquishment of their lein. Bailey vs. Quint, 22 Vermt., 464, 474. Bigelow vs. Heaton, 6 Hill, 43. Forth vs. Simpson, 13, Q. B., 689. 1 Pars., on cont., 681, Note (A.)

The evidence shows that they did not hold Cole responsible for this storage when the corn was delivered. Nearly a year afterwards they settled their accounts with Cole and made no charge for storage. It was a full settlement. They charged this storage to Walker & Kellogg, or Kellogg. They sought to recover it from Kellogg and failed. This shows that they had a contract with Kellogg, but none with Cole to pay for the storage.

Several of the instructions given for the appellees give it as the law, that where one person stores grain with a warehouse-man for which a warehouse receipt is given, and which is transferred, the holder of the warehouse receipt becomes personally liable to pay the storage to the warehouse-man. We are ignorant of any such rule of law. The warehouse-man has his original contract with the person who stored the grain, and he has a lien on the grain for the storage—but how he can have a personal action against a third person, who never contracted with him, we cannot conceive.

We think it clear, also, from the evidence that the jury never allowed the appellant for the $244 which was proved, and which, indeed, was credited on the account of the appellees. The balance claimed on the storage account was only $290. The jury gave the plaintiff $354 46 on that same account. They must have mistaken or misunderstood the evidence.

The contract between Walker & Kellogg and Cole, was improperly admitted in evidence. That was a seperate agreement in which the appellees had no possible interest. Cole's being liable over to Walker & Kellogg, did not affect the right of the appellees to recover from Cole. It could only prejudice Cole's rights in this action, where he could make no defence to that contract, which he could legally make against Walker & Kellogg.

He had set-offs against that contract in their hands, and he had a legal right to make them against it. He was debarred of this right by its being offered in evidence in favor of the appellees.

MANNING & MERRIMAN,

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Ing & al v Brotherson

Appt. argument

Filed April 27 - 1860

L. Leland

Clerk

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6th. Nor is it true that plaintiffs did not claim to hold Cole personally for this storage. King's testimony, page 3 of abstract, shows that they presented the bill first to Cole, who refused to pay it, not denying the propriety of the charge, but insisting that Kellogg ought to pay it. And it was for this reason that plaintiffs afterwards attempted to get it of Kellogg. The statement of Johnston Cole, that Tyng said ~~that~~ he intended to make Kellogg pay it, because he, Kellogg, had charged him (Tyng) for storage on oats, is not very consistent with other parts of the case, and might well be taken by the jury, with some allowance, for the position of the witness, and entitled to little consideration.

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8th. The contract between Kellogg and Cole was properly admitted, for reasons already indicated, as also because it showed *when* the charge for storage was to commence, and was moreover an admission that the corn was then on hand and in store.

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COOPER & GROVE,
For Appellees.

-291-

Amuriah S. Cole

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Points and Brief for Appellee

Filed May 16. 1860

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It appears that at this time Cole was engaged in distilling, and required this corn to supply his distillery. Tyng & Brotherson had warehouse receipts outstanding. They had not the corn to deliver to Kellogg, and it was a matter of convenience to them to have the corn remain, so that they could deliver it in small quantities, as Cole might require it.

Now we think it clear that after they had failed to deliver the corn to Kellogg at his request, that they had no right to charge storage upon the corn, although it remained after the 1st of June. Kellogg would have taken away the corn but they did not have it to deliver. The reason why it remained in store afterwards was because they did not deliver it according to their own contract. They could not charge for this storage; certainly they could not, unless they proved that afterwards they had the corn on hand, and gave the holder of the warehouse receipt notice to take it away. This they did not do. The acceptance of the corn afterwards would be a waiver of their default in not delivering it before, but would not imply a promise to pay for the storage, when the storage was not at the request of the holder of the receipt, nor for his benefit, but only on account of the default of Tyng & Brotherson.

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logg, if Kellogg had been compelled to pay storage, but not otherwise; but in no case could Cole be liable to Tyng & Brotherson to pay storage. Tyng & Brotherson are now suing Cole upon a contract made by them with Curtenius & Griswold, without any pretence of a promise on Coles part to them to perform that contract. The suit must be brought for a breach of a contract against the person who made it with the plaintiff. Cole never contracted for this storage—he never promised Tyng & Brotherson to pay for it. Admitting that Tyng & Brotherson had a lien on the corn for storage, they might have insisted upon it, and exacted a promise from Cole to pay for it, as a condition precedent to its delivery to him, which would have been valid; but they delivered it without doing this so far as the evidence shows, and now they require the law or the jury to presume that they did it. The delivery of the property to Cole was a relinquishment of their lein. Bailey vs. Quint, 22 Vermt, 464, 474. Bigelow vs. Heaton, 6 Hill, 43. Forth vs. Simpson, 13, Q. B., 689. 1 Pars., on cont., 681, Note (A.)

The evidence shows that they did not hold Cole responsible for this storage when the corn was delivered. Nearly a year afterwards they settled their accounts with Cole and made no charge for storage. It was a full settlement. They charged this storage to Walker & Kellogg, or Kellogg. They sought to recover it from Kellogg and failed. This shows that they had a contract with Kellogg, but none with Cole to pay for the storage.

Several of the instructions given for the appellees give it as the law, that where one person stores grain with a warehouse-man for which a warehouse receipt is given, and which is transferred, the holder of the warehouse receipt becomes personally liable to pay the storage to the warehouse-man. We are ignorant of any such rule of law. The warehouse-man has his original contract with the person who stored the grain, and he has a lien on the grain for the storage—but how he can have a personal action against a third person, who never contracted with him, we cannot conceive.

We think it clear, also, from the evidence that the jury never allowed the appellant for the $244 which was proved, and which, indeed, was credited on the account of the appellees. The balance claimed on the storage account was only $290. The jury gave the plaintiff $354 46 on that same account. They must have mistaken or misunderstood the evidence.

The contract between Walker & Kellogg and Cole, was improperly admitted in evidence. That was a seperate agreement in which the appellees had no possible interest. Cole's being liable over to Walker & Kellogg, did not affect the right of the appellees to recover from Cole. It could only prejudice Cole's rights in this action, where he could make no defence to that contract, which he could legally make against Walker & Kellogg.

He had set-offs against that contract in their hands, and he had a legal right to make them against it. He was debarred of this right by its being offered in evidence in favor of the appellees.

MANNING & MERRIMAN,

Cook 51 429.

to

Inj. & Brotherson

Appts Argument

Filed April 27-1860

L. Leland

Clerk

Be it remembered, That on the 26th of March 1858 there issued from the Office of the Clerk of the County Court of Peoria County, State of Illinois a certain Summons, which is as follows.

To Wit;

State of Illinois }
Peoria County } ss

The People of the State of Illinois to the Sheriff of Peoria County Greeting

We command You that you Summon

Alexander G. Tyng and Peter R. K. Brotherson

if they shall be found in your County, personally to be and appear before the County Court of said Peoria County on the first day of the next Term thereof, to be holden at the Court House in Peoria, in said Peoria County, on the first Monday of April next 1858. to Answer unto

Almiron S. Cole appellant

in a suit lately appealed from J. A. M. Coy, J.P. to the County Court of Peoria County

And have you then and there this Writ, with an endorsement thereon in what manner you shall have executed the Same.

Witness, Charles Kettells, Clerk of our said Court, and the Seal thereof, at Peoria, aforesaid, this 26th day of March A. D. 1858

Charles Kettells Clerk. per Geo. H. Kellogg Dep.

Summons from County Court: Cole (Appellant) vs Tyng & Brotherson

State of Illinois
Peoria County
I have duly served the within by reading the same to the within named
A G Tyng and Peter R K Brotherson
As I am therein commanded
this 30 of March 1858
[illegible] Sheriff
Fees [illegible]

Filed in County Court Clerk's
Office 7 April 1858
[illegible] Clerk
[illegible] Attorney

And also To wit on the 26th March 1858. there issued from the Clerk's office aforesaid a certain Summons which is as follows.

To wit.

State of Illinois,
Peoria County } ss

The People of the State of Illinois to the Sheriff of Peoria County — Greeting:

We command You that you Summon Alexander G Tyng and Peter R K Brotherson for the use of Jonathan K Cooper and Robert C. Grier Assignees of Tyng and Brotherson if they shall be found in your County personally to be and appear before the County Court of said Peoria County on the first day of the next Term thereof, to be holden at the Court House in Peoria, in said Peoria County, on the first Monday of April next 1858, to answer unto Almiron S. Cole, (appellant) in a Suit lately appealed from J. A. McCoy J.P. to the County Court of Peoria County.

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

Witness, Charles Kettelle, Clerk of our said Court, and the Seal thereof, at Peoria, aforesaid this 26th day of March A D 1858.

(Seal)

Charles Kettelle Clerk.
per Geo W Kettelle Dep'y Clerk

Cole appeal to Gyng pr my Copy assign'

State of Illinois }
Peoria County }
I have duly served the within by reading the same to the within named Alex G. Gyng and Peter R K Brotherson
A true ... March 30th 1858
... Sheriff
Fees ...
Filed in County Court the ... day of April 1858
... Clerk

And also, To Wit, on the 26th day of March, 1858. There was filed in the Clerk's office aforesaid a certain Transcript of Judgment from before J A McCoy J.P. which was as follows To wit.

Alexander G. Gyng Peter R K Brotherson vs. Almiron S. Cole.	Suit brought on an account for $ 177.98 on application of Plffs Summons issued to Crouse Const. February 20th 1858, returnable

February 26th at 1 oClock P.M.

Returned duly Served. February 26. 1858 The parties appeared with their Council and went to trial And after hearing the testimony Judgment was rendered against the Defendant for One hundred and seventy seven dollars and ninety eight Cents. debt and costs of Suit.

Debt $ 177.98
Costs 90 1/4

Sum	18 1/4
Dot	12 1/2
Crouse	30
Oath	06 1/4
...	25
	9 1/4

State of Illinois }
Peoria County } ss. I J A McCoy Justice of the Peace in and for said County Do Certify That the foregoing transcript and papers annexed contain a full and perfect Statement of the proceedings had before me in the above entitled cause

Witness my hand & seal this 25 day of March 1858. J A McCoy J.P.

Trans.

Filed March 26, 1858
C. Hess, Clk.
... Dept.

And also To Wit, on the 26th day of March A.D. 1858 there issued from the said office aforesaid a certain Transcript of Judgment from J. A. McCoy J.P.

which is as follows To Wit

Alexander G. Tyng Peter R. K. Brotherson for the use of Jonathan K. Cooper Robert C. Grier Assignees of said Tyng & Brotherson vs. Almiron S. Cole	Suit brought on account for $290.93 on application of Plffs, Summons issued to Crouse Constable February 20 1858 returnable February 26th at 10 o'clk P.M. returned duly served Feb 26 1858 Subp. issued for witnesses given Crouse & ret served February 26th 1858 The parties appeared with their council and went

to trial and after the testimony of the witnesses arguments of council and fully considering the matter, Judgment was rendered against defendant for the sum of Two hundred and ninety dollars and ninety three cents debt and costs of suit

Debt $ 290.93

Costs $ 0.71

Sum	15
Subp	15
Took	12
Crouse	55
5 Oaths	30
Judg	25
	1.71
Bond	50
Trans	25
Cer	25
	2.71

State of Illinois
Peoria County } ss. I, J. A. McCoy Justice of the Peace in and for said County do certify That the above Transcript and the papers annexed contain a full & perfect statement of the proceedings had before me in the above entitled cause Witness my hand & seal this 23 day of March A.D. 1858

J A McCoy J.P.

Filed March 26th 1858
C. Kettelle Clk
M.S.J.

5 And also To Wit. on the 26th day of March A.D. 1858. There was filed in the Clerks office aforesaid a certain Account which is as follows.

To Wit

A S. Cole Esq Peoria October 5th 1857

Bt of Tyng & Brotherson

169 30 Bush Wheat 1 05 $177.98

Filed March 26th 1858 &c &c

And also on above day and date there was filed in the Clerks office aforesaid the following Account.

To Wit.

A S Cole Esq Peoria October 5th 1857.

Dr to J K. Cooper & R. C. Grier.

Assignees Tyng & Brotherson

Storage 23380 Bush of corn June 1st 1855

to July 15th 1½ month 1½ ¢ $ 353.70

" 15265 Bush July 1st 1855 to Aug 15th 1 152.65

5718 " Aug 15th 1855 to Sept. 15th ½ ¢ 28 58.

$ 534.93

1856

Aug. By Bill of Sacks. 244

$ 290.93

Filed March 26th 1858.

Hillette Clk. M S T.

Messrs Tyng & Brotherson Peoria February 26 1858

Bot. of A. S. Cole

1856

Aug 5. 250 Osnaburg Sacks. 10¢ 25.00

" " 2190 " " 11¢ 219.00

$ 244.00

Filed March 26th 1858

And afterwards, to wit on the 8th day of April 1859, there was filed in the Clerks office aforesaid a certain Verdict, which in words &c is as follows.

To Wit

Tyng & Brotherson
vs
Almiran S Cole } We the Jury find for the Plaintiff and assess damages at five Hundred and thirty three Dollars and thirty cents One hundred & seventy eight dollars and Eighty four cents for the Wheat account and three Hundred and fifty four dollars and forty six cents Storage

John Mulhall Foreman
C H Washburn
James Olson
P F Elliott
P M Doyle.
J W Plummer
Anson Adams
H S Wonder
R K Robbinson
John E Winch
G W Morris
Gerard S Crane

Amount $
Fee
Verdict

Filed April 8 1859
Chas Ottemiller
Clerk

7

Proceedings of the County Court of Peoria County State of Illinois began and held at the Court House in the City of Peoria in said County and State on

Monday July the 5th A.D. 1858 for Judicial and other Business

Present: Hon Wellington Leach Judge
" Charles Kellar Clerk and
" Francis W Smith Sheriff

Tuesday July 6th 1858.

A.G. Tyng and P.R.K. Brotherson
Assignees of K Cooper and R C Grier
vs. appeal
Almiron S. Cole.

This cause is ordered to be continued upon agreement of Parties to this Suit, until the August Term 1858.

A.G. Tyng and
P.R.K. Brotherson
vs. appeal
Almiron S. Cole

This cause is ordered to be Continued upon Agreement of Parties to this Suit, until the August Term 1858.

8

Proceedings of the County Court of Peoria County State of Illinois began and held at the Court House in the City of Peoria in said County on Monday August 2d 1858 for Judicial and other Business.

Present. Hon Wellington Lourke Judge
" Charles Kellett Clerk and
" Francis W. Smith Sheriff

Friday August 6th 1858.

Alexander G Tyng.
Peter R K. Brotherson
Exrs of Jonathan K. Cooper dec'd.
vs. appeal
Almiron S Cole.

This cause is ordered to be continued at the Costs of the Defendants.

Alexander G. Tyng.
Peter R. K. Brotherson
vs. appeal
Almiron S. Cole.

This cause is ordered to be continued at the costs of the Defendants.

Proceedings of the County Court of Peoria County, State of Illinois began and held at the Court house in the city of Peoria in said County for Judicial and other business on Monday, September 6th 1858.

Present Hon Wellington Soules Judge
" Charles Kettells Clerk and
" Francis W. Smith Sheriff

Thursday September 9th 1858

Alexander G. Tyng and Peter R. K. Brotherson use of Cooper and Grier
vs.
Almiron S. Cole
Appeal from J.P.

Alexander G. Tyng and P. R. K. Brotherson
vs.
A. S. Cole

On the Motion of the defendant these Causes are ordered to be continued at his costs. Therefor it is considered by the Court that the said Alexander G. Tyng and Peter R. K. Brotherson do have and recover of and from the said Almiron S. Cole his costs and charges by him about this suit in his behalf expended and that they have execution therefor

Proceedings of the County Court of Peoria County, State of Illinois began and held at the Court house in the City of Peoria State of Illinois on

Monday November 1st 1858. for Judicial and other business Present Hon Wellington Soules Judge Charles Kettells Clerk and Francis W. Smith Sheriff

Wednesday November 3d 1858.

Alexander G Tyng and
R R K Brothurson
vs.
Almiron S Cole

Appeal from J P.

Alexander G. Tyng and
R R K Brothurson for Wm Robert & C Lewis Jr
and Jonathan K Cooper assignee
vs
Almiron S Cole

On the motion of the said defendants the above causes are ordered to be continued at his Costs.

Proceedings of the County Court of Peoria County State of Illinois begun and held at the Court House in the City of Peoria in said County under its extended jurisdiction for Judicial and other business on

Monday December 6th 1858.

Present Hon Wellington Loucks Judge.
Charles Kellett Clerk
John Boyner Sheriff.

Alexander G. Tyng
Peter R K Brothurson Wm Cooper &c
vs.
Almiron S Cole

Appeal

This cause is ordered to be Continued until the January Term A D 1859.

Alexander G Tyng
Peter R K Brothurson
vs.
Almiron S Cole. This cause is ordered to be continued until the January Term A D 1859.

11

Proceedings of the County Court of Peoria County State of Illinois began and held at the Court House at Peoria in said County under its extended Jurisdiction for Judicial and other Business on Monday

February 7th A.D. 1859.

Present Hon Wellington Lourtz Judge
" Charles Kellett Clerk and John Bryan Sheriff.

Friday. February 11th 1859

Alex. G Irving and
Peter R Hotchkiss
vs. Appeal
Almiron Scott

On the motion of defendants Attorney this cause is Ordered to be Continued until March Term 1859.

Proceedings of the County Court of Peoria County began and held at the Court House at Peoria under its Extended Jurisdiction for Judicial and other business.

Present Hon Wellington Lourtz Judge
Charles Kellett Clerk and John Bryan Sheff

on Monday. March 7th 1859

12

Alexander G Fyng.
& R K Bothwson use of Coopers
vs. appeal.
Almiron S. Cole

On Motion of Plaintiffs Atty this cause is ordered to be continued until the April Term 1859.

Alexander G Fyng.
Peter R. K. Bothwson
vs. appeal
Almiron S. Cole

On Motion this cause is ordered to be continued until the April Term A.D. 1859

Proceedings of the County Court of Peoria County begun and held at the Court House at Peoria, under its exclusive Jurisdiction for Judicial and other purposes.
Present. Hon Wellington Loucks Judge.
Charles Kellett Clerk and John Boyner Shff.
on Monday March 7th 1859

Thursday April 7th 1859

Alexander G Fyng and
Peter R K Bothwson
vs.
Almiron S. Cole.

appeal from
Justice of Peace.

13 Alexander G. Tyng and
Peter R. K. Brotherson for the use of Jonathan R. Cooper.
and Robert C. Grier assignees
vs. Appeal from J.P.
Almiron S. Cole.

This day came the said Plaintiff Jonathan R. Cooper and Henry Grow their attorneys and the said defendant by Manning and Merriman and Bryan and Stow his attorneys and by agreement of parties the above causes are consolidated and are to be tried as one. Thereupon it is ordered by the Court that a jury be empannelled to try said cause. Whereupon came a jury of twelve good and lawful men To wit. James Elleon, Gerard L. Crane, John E. Winch, C. C. Washburne, John McMillan, A. S. Wonder, P. G. Elliott, Patrick Doyle, George W. Morris, J. W. Plummer, Anson Adams, and R. C. Robinson and having heard the Evidence in the case and arguments of counsel retired to consider of their verdict.

Friday April 8th 1859.

Alexander G. Tyng and
P. R. K. Brotherson
vs. Appeal from J.P.
Almiron S. Cole.

14 This day came the said Plaintiffs and the said defendant by their respective Attorneys and also the Jury empannelled yesterday who returned into court the following Verdict to Wit We the Jury find for the Plaintiff and assess damages at Five Hundred and Thirty three Dollars and Thirty cents, one Hundred and Seventy Eight Dollars and Eighty four Cts for the Wheat account and Three Hundred and Fifty four dollars and Forty Six Cents Storage. Thereupon came the said plffs. by their Atty and entered a remittitur for the Sum of ($ 64.39 sixty four and 39/100 dollars. Thereupon the said Defendant entered his Motion for new trial in this cause for reasons on file, The court being ~~fully~~ Sufficiently advised in the premises doth overrule the said Motion Thereupon it is considered by the Court that the said Alexander G Tyng and Peter R R Brotherson do have and recover of and from the said Almiron S. Cole the sum of ($ 468.91 Four hundred and Sixty Eight and 91/100 dollars, their damages aforesaid and also their costs and charges by them about their suit in their behalf expended in this court. And the Court below and that they have execution therefor. Thereupon the said defendant entered his motion for a appeal of this Cause to the Supreme Court of the State, which is allowed on his entering into bonds in the penal sum of one Thousand Dollars within twenty days. the Security to be approved by the Court.

15

And afterwards. to wit. on the 9th day of April A.D. 1859. there was filed in the said Clerk's Office of said Court a "Bill of Exceptions" which is in words and figures as follows, to wit,

"Alexander G. Tyng et al
use Cooper & Grier assignees
vs.
Almiron S. Cole
&
Alexander G. Tyng et al
vs.
Almiron S. Cole

In the County Court
Peoria County Illinois
April Term A.D. 1859
an appeal from J.P.

Same as above

Be it remembered, that on this day came on these causes to be heard, before the said Court and a jury upon the issues joined, and it was agreed by the parties that the two causes should be Consolidated and tried together by the Court and Jury, which was done; and by agreement of parties the following Statement Containing the substance of the testimony of William Kellogg deceased given as well on the part of the defendant as of the said plaintiff, on the former trial of these suits, was read in evidence to the jury. Which said testimony of said Kellogg as agreed on is in words and figures as follows,

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Tyng & Brotherson
vs
A. S. Cole
&
T & B. vs. Cole

In Co. Court
Testimony of Wm. Kellogg

Wm Kellogg's Statement

I sold corn to Cole in the Spring of 1855, either 25000, or 28000, Bushels, for which I held the Warehouse receipt of Tyng & Brotherson or A. S. Tyng = I purchased of Curtenius & Griswolds & got the receipt of them — By this contract the Corn was to remain in the Warehouse of A. S. Tyng or of Tyng & Brotherson free of storage - until June 1st 1855 = If not taken out before then, (it was to be on storage from that date) = no rate of storage was named = one cent per Bushel per month is a usual charge for storage = We usually store the grain in bulk = I sold the corn before the expiration of the time for its delivery under the receipt, and took a contract from Cole by which he agreed to pay the storage to Tyng after the maturity of the receipt - (Contract of Kellogg with Cole, here offered in evidence) - Witness then said - This is the Contract between Cole & myself referred to - It may have been made the day before it bears date = My receipt calls for shelled corn = I have looked for this

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receipt. but cannot find it = think I handed it to Cole. Upon Warehouse receipts we deliver any sound Corn we may happen to have on hand when called for = The receipt Called for Corn in a particular Building. The old Warehouse where the office is = Tyng & Patterson were receiving and delivering corn during the season = previous to my sale to Cole. I called for the Corn & the Corn was not there. There was then 1500. to 2000. bushels in the warehouse = I sent my man with sacks & got 4000, or 5000. bushels & could have got 1500. to 2000. Bushels more from that Warehouse. Don't know whether they had corn in other places = The same day or within a day or two of the time I sold to Cole, I had Conversation with Tyng, who said he was glad I had sold to Cole. That he had sent him to me. That he could deliver the Corn to Cole to suit his convenience = Before this Tyng had wished to borrow the 28000. Bushels of Corn of me, said he had recently made a good many sales & had not corn enough to fill my receipt & fill all his other contracts = Tyng called on me for my Contract with Cole, said he had no way of showing his claim on Cole for storage except through my Contract = Tyng & I had had arbitration about the storage & the arbitrators

decided he had no claim on me for it=
This was in 1856, in the middle of the season
as I now recollect "

And the plaintiffs to
sustain the issues on their part, offered in
evidence the Contract between said defend-
ant and Walker, Kellogg & Co, referred to
in the testimony of William Kellogg, to the
introduction of which the defendant objected,
on the ground that the same was not
~~completed~~ competent evidence between the
parties to this suit= which objection was
overruled, and the Contract was read in
evidence to the Jury, which Contract is
as follows,

"This certifies that I have this day
purchased of Walker, Kellogg & Co, Twenty Eight Thousand
bushels of corn for which I am to pay them seventy
five cents per bushel of 56 lbs, Payment to be made
as follows, viz Five Thousand dollars on the 15th day
of this month, Five Thousand dollars on the 25th day
of this month, Five Thousand dollars on the 4th day
of June next and six Thousand dollars on the 14th
day of June next, In all Twenty one Thousand dollars
being the amount of said purchase, It is understood
same Twenty five Thousand bushel of the above corn
is to stored & in the Warehouse of A.S. Tyng and
for I am to be responsible for any & all damage by
Fire or other damage & that I am to satisfy said
Tyng for any charge for storage on same that may
accrue after the 1st day of June next coming— &
for I am to receive said corn as it now lies in said
Warehouse— The remaining quantity to make up the
Twenty eight Thousand bushel I am to receive in
the Warehouse of Walker, Kellogg & Co,

Peoria May 5th 1855 A. S. Cole "

Endorsement on the back

"Corn Contract
with
A.S. Cole
1855

Filed March 26. 1858
C. Kellogg Clk
per Mcd. D. "

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To which ruling of the Court and the reading of which Contract to the Jury the defendant then and there excepted,

Plaintiffs then called Frederick King who testified as follows, that he was Clerk for plaintiffs Firm in capacity of Book Keeper, at the time the Contract for this Corn was made and transferred to defendant, there was 23500, bushels remaining on the receipt in Ware house of plaintiffs, at the time of the transfer of said receipt to defendant, plaintiffs became partners June 1st. 1855, in the forwarding and commission and general storage and Ware house business and no portion of said Corn had been taken away by defendant before 1st of June 1855, that defendant commenced taking away said Corn about the middle of July 1855, and took away the last of it in September 1855, I made an estimate of the Corn on hand in Store and averaging the amount on hand from July 15th to August 15, 1855, and from Aug. 15, to Sept. 15. 1855, and the account filed in this Cause is some less than my estimate. Storage on Corn is worth One cent per bushel per month, this is the customary rate of storage on grain. Witness does not know how much Corn plaintiffs then had on hand, but think they had in their

several Warehouses, more than enough of corn to fill said Contract, at all times during the Spring and Summer and fall of 1855, and The Warehouse in which this corn was originally stored broke down in the winter of 1854 & 1855, and the Corn was removed, The bill for the storage of this Corn was presented to defendant before I left plaintiffs employ, perhaps some two or three months or more, I left on the 1st of July 1856, and he (defendant) refused to pay it, saying it belonged to Kellogg to pay, I dont know that it was just the same paper on file in this Cause, but it was for the storage of the same Corn. On Cross examination said witness testified, that he was in the employ of plaintiffs from 1st June 1855 to 1st July 1856, and had been in the employ of A. G. Tyng before, that defendant received ten thousand bushels of Corn from plaintiffs on former Contract no storage was charged on that Contract, That witness knows of no agreement to pay storage on this or any other Contract, that when the bill for storage was presented to defendant he refused to pay it, and said Kellogg was to pay it, think the Warehouse broke down in winter of 1854 & 1855, Witness knows there was a receipt for 28000 bushels of corn given by Tyng to Curtenius and

2.

the corn was ~~to be~~ stored in the Warehouse that broke down, and the corn was put in other warehouses and a part, witness think was shipped to Chicagg. Said receipt was transferred to Kellogg, and is the same sold by Kellogg to Cole, after Cole owned this receipt. he took the corn away in cars, on one or two occasions. I think this teams came for corn and did not get it, One day it was because there was difficulty between Coles teamster and the keeper of the Warehouse, about sacks for the corn, and one day the hands had gone to dinner, dont remember that there was any charge on plffs Books against defendant for storage, The account current dated April 24, 1856. between the parties and shown to witness, is correctly taken from the books of plaintiffs, and is a full statement of all debits and credits on plaintiffs books up to that date, as far as I know, This bill for storage was not charged on the books of plaintiff against defendant. It was often the case that storage was not charged on the books, Mr. Tyng was in the habit of keeping a separate memorandum of storage and collecting it himself, without entering it regularly in the books, Witness further states that he knows of the delivery of this corn to Cole,

2 C

that his business was to keep the books and on the delivery of grain to enter the amounts at each time as given in by the Weighmaster that he received them in this case from John L. Harding the Weighmaster and entered them correctly in the books as given in to him. The weigh scales were in the same room with me and I saw the teams as they took away the corn. Plaintiffs then called John C. Grier who testified that he was engaged in the produce, forwarding and commission business in Peoria, that it was customary for warehousemen, to deliver any sound grain of the same quality upon Warehouse receipts, which the warehouseman might have on hand, also to charge storage on the same, the customary rate of storage as one cent per bushel per month, that the same corn receipted for was never expected to be kept to fill the receipt, and that it could not be so kept in large quantities without damage from heating, that this was the general Custom in Peoria and Co must have known of it. = On Cross examination witness stated that he supposed the holder of the warehouse receipt was not by Custom bound to pay storage after the same had been called for, and the Ware-

2 3

-houseman refused to deliver it. When the lots are large it is usual so to stipulate = In such Cases where the owner is absent, we are in the habit of insuring ourselves and Charging the insurance to the owners, that in order to have the corn insured, it ought to be in a particular building, and have a definite locality. John J. Harding called by plaintiffs testified as follows, that he had been in the employ of Tyng and Tyng & Brotherson for nine years. that since they had given up their lumber busines he had been employed as weigh-master in their Warehouse, his duty was to weigh the grain and give in the weights to the book keeper, that he knows of the corn sold to defendant by Kellogg, for the storage of which this suit is brought, and it was the same called for by the receipt given by Tyng to Curtenius and transferred to Kellogg and by him to defendant, that it was in the Warehouse that broke down, when Curtenius owned it, and was moved about last of February or First of March 1855, that witness did not know whether the Warehouse receipt had been given to Curtenius at the time the Warehouse broke down or not, but it was the same corn, and that Curtenius was the owner of the corn at that time

and consented to the removal of the same from that building, and advised it being put in other Warehouses belonging to Plaintiffs, which was done. Curtenius was sent for at the time, and advised its removal as above, One cent per bushel per month is the usual rate of storage. Witness was weighmaster in Irving & Brotherson's Warehouses, knew of the delivery of the Corn in question to the defendant, attended to the weighing of this and other corn, weighed it accurately and gave in the weights each time carefully and correctly to the Book keeper Frederick King, Defendant received the corn on the Contract from various Warehouses - The Armstrong or Hawthorn House, the old Warehouse which broke down, & a certain Warehouses near Gregg's Distillery &c without objections, all of these places of delivery were convenient and accessable for him. Plaintiffs had not less than fifty thousand bushels of Corn on hand at any time during that season in the opinion of witness in the several Warehouses. Defendant was to furnish sacks to carry off the Corn - on one or two occasions his teams came and did not get corn because they had failed to bring sacks beforehand and would not wait till they were filled, Plaintiffs sometimes loaned defendant sacks to carry it off.

25— There was no time during the Spring and Summer of 1855, that plaintiffs had on hand less than 40 or 50,000 bushels of corn in their several warehouses.

Hugh Neal testified that he had been in the employ of plaintiffs ever since 1851. The corn was delivered to defendant during the summer of 1855 that there was not at any time, in the opinion of witness that the plaintiffs had not on hand in their several warehouses 20,000 bushels of corn & more. Witness was foreman and attended to the receipt and delivery of grain, knows of the delivery of the corn called for by the Curtenius and Kellogg receipt to defendant. It was taken off at different times by defendants teams, The teamsters always got corn when they came for it. except perhaps on two or three occasions, Once when they had not left sacks to be filled, and would not wait to have them filled, and another time when they came, when the hands were at dinner. They never failed to get corn because there was none there.— There was always plenty and hands to fill up and deliver it, when any opportunity was given. That during the Spring and Summer of 1855 Plaintiffs kept six large

2.4 Warehouses, and on the opening of navig-
-tion they had on hand over 200,000 bushels
in their Warehouses, Their Warehouses were
near together in Peoria, None of the
Corn removed from the broken Warehouse was
shipped. It broke down about March,
1st 1855 and navigation was not open,
Plaintiffs kept plenty of help to sack and
deliver the corn and were ready at all times
to deliver the same, Plaintiffs bought and
shipped large quantities of corn during the seas-
-on, Navigation usually opened from about the
27th day of March to the 10th of April,
Cont knows when it opened that year =
John Welch = Stated he was in the em-
-ploy of Tyng & Brotherson during the Spring
and summer of 1855, knew of the delivery
of the Corn to Cole on the Kellogg Contract=
Plaintiffs had large quantities of Corn on
hand in their several Warehouses during
the whole season. Defendant to prove the
issues on his part called Mathew Griswold,
who testified that Curtenius & Griswold
held a Warehouse receipt for Corn given by
Tyng which receipt was transferred to
Kellogg which receipt was for 28000
bushels. That while we (Curtenius &
Griswold) held said receipt, the corn

was insured by us.

27 Johnson Cole testified that he was present at a settlement between plaintiffs and defendant, on or about the 24th of April 1856, that Tyng brought the account & defendant and defendant gave his check for the balance of the account, that this account comprised a full statement of all accounts up to that date between said parties, this was a full settlement up to that date, That no charge was made in said account for storage nor was anything said about storage, and no storage was ever paid in this or any other account that witness knew of, That he is the son of defendant & was in his employ in summer of 1855, that he was driving team for defendant, and called on plaintiffs for corn on this contract twice and could not get it, this happened twice that summer, Once because plaintiffs were loading a boat and could not attend to witness, and witness went to the Warehouse of Kellogg and got his load, dont recollect why I did not get it the other time, Subsequent to said settlement, Tyng came to the office of defendant and said he intended to collect this storage from Kellogg because Kellogg had charged him storage on Oats, Defendant then read

28 in evidence account Current dated April 24th 1856, and refered to in evidence of witness King & Cole, which is as follows.

" A. S. Cole Esq in a/c with Tyng & Brothuson Dr

		To Balance a/c render'd				4055	15
		" 239 31/56 Bush rye (Dec 5)	85¢	203	62		
		" 687 30/35 do Oats	30¢	206	35	409	97
	10	" 560 15/35 do do	"			168	12
		" 88 20/35 do do	28¢			33	65
Feb	2	" 53 07/56 do Rye	85¢			45	15
	16	" 637 do Oats	28¢			178.	36
	23	" 59 40/56 di Rye	90¢			53	75
Mch	4	" 416 do Oats to date	27			112	32
	10	" 239 25/35 do Oats	"			64	73
						5121	20

Contra Cr

Dec	13	By Cash		2000	00		
	24	" Do		1000	00		
		" Bill of Pork Bbls		862	60		
Jan	1	" Amt advanced Ten Brothuson a/c		150	34		
		Balance to Dr		1108	26		
		E & O. E.		5121	20	5121	20

Peoria April 24/56	at Dr A. S. C	$1108.26
907 Bush Rye 65		589.55
Tyng & Brothuson		1697.81
Bill cooperage		277.50
per King		$1420.31
351 Bush corn		93.82
		$1514.13

4439 46/56
3532
907
65
4535
5442
58955

2012120
2801294
1108,26

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On Cross examination Witness stated that Tyng came into the office of defendant and brought the account dated April 24. 1856. some figuring was done on it, and defendant gave check for balance of that account. nothing else was said. no Storage was paid and nothing said about it. Defendant then introduced in evidence the account filed in this cause by him against plaintiffs for $244. which was admitted to be correct, by Plaintiffs. Defendant then called Samuel Easton who was duly sworn, and defendant offered to prove by him that he was agent of Kellogg, and that on or about the first of May 1855, and while Kellogg was then holder of said Warehouse receipt, called on plaintiff Tyng for the corn specified in said Warehouse receipt. at the Warehouse specified ~~in said Warehouse receipt, at~~ in the receipt, and that the corn was not in said Warehouse, and could not be delivered upon the said receipt, which evidence was objected to by plaintiffs, and the said objection was sustained by the Court. to the ruling of the Court in sustaining said objection and refusing to present said evidence to go to the Jury, the defendant then and there excepted. This witness then

30 stated, that there was at the time referred to by him, corn to the amount of 40 or 50,000 bushels in another warehouse of Plaintiffs near the old Warehouse. and known as the Armstrong or Hawthorn Warehouse, Plaintiffs then introduced and read in evidence without objection, the account filed in this case for wheat amounting to $177.98 which was admitted to be correct by the defendant, This was all the evidence in this cause,

The Court then gave on the part of the plaintiffs the following instructions to the jury,

"Tyng & Brotherson } In the County Court=
use &c, }
vs. }
Almiron S. Cole } The Court is asked to
instruct the jury as follows, for
plffs =

That a Warehouseman who receives corn or other grain in store to be delivered at a future day is responsible for its safe delivery to whoever may be authorized to receive it at the time of delivery, whether he were the owner when it was stored or not, and is entitled to a lien upon the

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property stored for any charges he may right-fully have for storage on it in the mean time, and has the right to enforce said lien against said property at or before the delivery of the same unless provided for otherwise by con-tract between the owners, and the fact that the grain stored may have been mixed with other grain, so that the identity of this par-ticular grain is lost, does not affect the right to storage, provided such mixture was made with the consent of the owner, and the warehouseman has on hand during the time a sufficient quantity of grain of like quality to meet the demand & to be delivered when called for ="

2 Siem "That the place where the corn was stored is immaterial as to the question of storage, if the owner receive the corn without objection from the place or places where it is stored"

3 "That where grain on store in a Warehouse, is, by consent of the owner mixed with other grain, though the owner, in such case loses his right of Property in the specific grain stored, he becomes entitled to an aliquot share of the common mass, and the accept-ance by him, without objection, of a like amount from such common mass, and

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with knowledge that it is not the identical grain stored, estops him from ~~beginning~~ refusing to pay storage on that account."

If the jury believe from the evidence that Tyng & Brotherson had grain enough on hand to supply the demand of Cole and were ready & willing to deliver the same at all reasonable hours when called for, it shows a performance of their contract, so far as the question of delivery is concerned=

5 "If the jury believe from the evidence that Kellogg owned a quantity of corn in the Warehouse of Tyng & Brotherson, which was subject to storage or liable to become so, and that he sold said corn to Cole, with the understanding that said corn would become or was subject to storage then Tyng & Brotherson became liable to account to Cole for such corn from the time they knew of his purchase, and had a lien on the corn for any storage that might be due thereon at the time of delivery - and if the jury should further believe from the evidence that other corn was delivered by Tyng & Brotherson to Cole in ~~lieu~~ lieu of that originally purchased and that the same was accepted by Cole with knowledge that it was

33 different corn, and without objection made on that account by Cole, the fact that the Corn delivered was not the same bought, would not devest the lien for storage, or deprive Tyng & Brotherson of any right they might otherwise have to recover for such storage =" Given

6 "If the jury find from the evidence that Cole owned the corn when the storage accrued and purchased the corn of Kellogg with the knowledge that it would be liable to storage if left in the warehouses of the plaintiffs after a certain date, and with the understanding that he was to pay any storage which might accrue, then, if the jury shall further belive from the evidence that storage did rightfully accrue to the Plffs. upon such corn, the jury should find for the plaintiffs the amount of such storage, subject to any set off which may be proved or admitted in the case" =

Given "If the jury belive from the evidence that a Warehouse receipt was given by Tyng & Brotherson for the corn in question, and that the same was assigned to Cole, then all the provisions of ~~that~~ said receipt

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should take effect, as well against as in favor of Cole, and if by such receipt and the proofs in the case storage was properly chargeable on the corn when delivered to Cole, the liability to pay rests on Cole."

8 "If the jury believe from the evidence that Tyng and Batterson during the Spring and Summer of 1855 were engaged in the business of buying and selling corn and storing the same, and if they further believe that the defendant held a a warehouse receipt for corn, this alone would not constitute a delivery of the corn but it would be an acknowledgment by Tyng & Batterson that they had on hand the quantity of corn mentioned in the receipt and an agreement to deliver the quantity of corn mentioned in the receipt to the person entitled to receive the same."

Given

9 "If the jury believe from the evidence that Cole purchased the receipt from Walker, Kellogg & Co. then Cole took the receipt subject to the same conditions and the claim of the plaintiffs for storage in the same way that Kellogg Walker & Co. would have been had they held the same."

10 "If the Jury belive from the evidence that
35 Kellogg was to pay storage on the corn after
June 1. 1855 and that Cole purchased the
corn subject to the same conditions & if they
further belive that the Riffs stored the corn
or any part thereof after June 1. 1855, and
that they delivered the corn from time to time
to Cole as called for by him, the Jury should
allow the plaintiffs a reasonable compensation
for such storage, if the Jury further belive
that the defendant purchased the receipt
& corn of Kellogg & that he took it subject
to the claim of the plaintiff for storage"

11 "That tho' a settlement of acpts is prima
facie evidence of payment of prior demands,
yet it is not conclusive, and is subject
to be rebutted by proof that any particular
acpt. was not paid,"

12 "That an implied contract to pay the storage
in question may arise from facts and cir-
cumstances detailed in evidence, and it
is not necessary to raise such implication
that there should be positive proof"

to the giving of each of which instructions
the defendant then and there excepted.
The Court also gave the following

3½ instructions for the defendant.

1 "The contract offered to the Jury between Kellogg & Cole, is no evidence of an express agreement between plaintiffs and Cole that Cole should pay the plaintiffs for storage."

"Unless the Jury believe from the evidence that there was a contract express or implied between the plaintiff or his agent & Cole or his agent that Cole should pay the plaintiffs for storage, they will find for the defendant,"

3 "If the Jury believe from the evidence that after the alleged storage, the plaintiffs had a full settlement of their accounts against Cole, and made no charge for storage, the presumption is that they had no just account against Cole for storage up to the time of such settlement,"

"If the jury believe from the evidence that the plaintiffs had no contract express or implied with Cole by which Cole was bound to pay for the storage, then, although the plaintiffs had a lien on the corn for storage, yet if they delivered the

7 corn to Cole without insisting upon such lien, they could not afterwards recover of Cole for the storage,"

"If the jury believe from the evidence that the plaintiffs had given a warehouse receipt for the Corn as being in a certain warehouse, then they could not charge the defendant for storing it in any other place, unless the defendant assented to its being stored in another place, or unless some other prior holder of the receipt had assented to it, and Cole had notice of it when he purchased,"

6 "The plaintiffs could not charge for storing the corn, unless they stored this corn or an equal amount of other corn for the defendant to fill his order when demanded,"

"If the jury believe that Cole permitted the Corn to remain in the warehouse at the instance and request of the plaintiffs, and for their benefit, the plaintiffs cannot recover storage for it while it so remained."

388 "If the plaintiffs delivered the corn to Cole without claiming in any manner that they had any right to charge storage, and had no contract with Cole express or implied by which Cole was bound to pay storage, this is prima facie evidence that they had not and have not a right to recover for the storage off Cole."

9 "If the Jury believe from the evidence that there was not sufficient corn in the warehouse of Tyng & Brotherson at any time when called for by Cole the holder of the receipt to fill the demand made by him they will find a verdict in favor of the defendant."

given

10 "If the Jury believe from the evidence that there was no express or implied agreement on the part of Cole with Tyng & Brotherson or their agent or some other person for them to pay them storage they will find a verdict for the defendant."

The Jury brought in a verdict for plaintiffs and against defendants as follows

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"Tyng & Brotherson
vs
Almiron S. Cole

We the Jury find for the Plaintiff and assess damages at five Hundred and thirty three dollars and thirty cents. One hundred & seventy eight dollars and eighty four cents for the wheat account and three Hundred and fifty four dollars and forty six cents Storage.

John Mileham Foreman
C. A. Washburn
James Elson
R. F. Elliott
R. M. Doyle
L. W. Plummer
Anson Adams
A. S. Wonder
R. K. Robbinson
John C. Finch
G. F. Morris
Gerard S. Crane

Endorsed on back

"Tyng & B
vs
Cole

Filed April 8, 1859
Chas. Kellett
Clerk"

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"Tyng & Brotherson } Peoria Ills
vs } June 12th 1858
A. S. Cole }

We the Jury find for the Plaintiff and assess the damages at Thirty three Dollars

Addison Ruby
Daniel Bower
Edwin Matthews
William Vinson
Orilla Dawson

James H. Ross
James Delano
Chas. Standley
G. T. Butler
J. McDonald
A. C. Garrett "

Endorsed on back

"Verdict

Filed June 12, 1858
C. Kellett clk
per Geo. A. Kellett Dpty. "

and thereupon the plaintiffs by their attorneys filed a remittitur in words and figures following viz:

"Alexander G. Tyng & al } In the County Court
use Cooper & Grier assignees } Peoria County Ills
vs. } April Term 1859
Almiron S. Cole } on appeal from J.P.

Alexander G. Tyng
Peter R. K. Brotherson } Same as above
vs
Almiron S. Cole

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The plffs in the above entitled cases come & enter a remititur of sixty four 39/100 dolls. upon the joint verdict rendered by the Jury herein for $63 53/100 of which is to be deducted from the sum allowed in the first Case above named & 86 cents to be deducted from the sum allowed in the last case above named=

Grove & Cooper
for plffs in both cases= "

Endorsed, on back

"Tyng & Anderson
vs
A.S. Cole"
2 cases

Filed April 9th 1859
Chas Kellett
Clerk"

And moved the Court to allow the same to be entered upon said verdict which was granted by the Court and ordered to be entered and deducted from said verdict upon the rendering of which verdict the defendant moved for a new trial for the following reasons as filed in said cause to wit;

"Tyng et al vs Almiron S. Cole

County Court
April Term
A.D. 1859

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Defendant moves for a new trial in above cause for the following reasons,

1st. That the verdict of Jury was contrary to the evidence in the Case,

2d That the Court permitted improper evidence to go to the Jury on the trial of said Cause,

3d That the Court excluded proper evidence from the Jury on the trial of said Cause,

4th That the verdict of the Jury included more damages than were claimed by the Plaintiffs, or proven by the evidence introduced by them on the trial of said Cause,

5th The Court gave improper instructions to the Jury on the part of the Plaintiffs

6th The Court refused proper instructions to the Jury on the part of the defendant,

7th That amount of the damages in the verdict of the Jury was excessive,

Merriman & Stone

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No 5

Endorsed on the back

H. Patterson
vs.
S. S. Cole

Motion for
new trial

Filed April 7, 1859
Chas. Kellett Clerk
per Geo. A. Kellett
Dep'y

which motion the Court overruled, to the overruling of which motion for a new trial in said cause, the defendant then and there excepted, whereupon the Court rendered Judgment in favor of said Plaintiffs and against said defendant for the amount of said verdict less the amount remitted by Plaintiffs, upon which rendering of said Court the defendant ~~Here~~ then and there excepted and prayed the Court to sign and seal his bill of exceptions which is done.

Wellington Loucks (Seal)
County Judge

Endorsed on back

Filed April 9th 1859
Chas. Kellett Clerk
per Geo. A. Kellett
Dep'y.

Appeal Bond

And afterwards, To Wit on the 19th day of April A.D. 1859 there was filed in the office of the Clerk of the County Court a certain Appeal Bond which in words and figures is as follows. To Wit,

Know all men by these Presents, That we Almirian S. Cole and Jacob Davraw held and firmly bound to Alexander G. Tyng and P. R. K. Brotherson in the penal sum of One Thousand Dollars for the payment of which well and truly to be made we bind ourselves, our heirs executors, and administrators, jointly and severally by these presents. Witness our hands and Seals this nineteenth day of April A. D. 1859.

The condition of the above obligation is such that whereas the above named Alexander G. Tyng and P. R. K. Brotherson did at the April Term of the County Court in and for the County of Peoria and State of Illinois recover a judgement in said Court against the above bounden Almirian S. Cole for the sum of Five Hundred Thirty Three Dollars and thirty cents and costs of Suit from which said judgement the said Almirian S. Cole has prayed an appeal to the Supreme Court of the State of Illinois - Now if the said Almirian S. Cole shall prosecute his said appeal with effect and without delay and shall pay and satisfy said judgement, costs interest and

damages in case the said judgement shall be affirmed in the said Supreme Court then the above obligation to be void otherwise to remain in full force and virtue in law,

Given under our hands and Seals the day and year above written,

A. S. Cole (Seal)

Jacob Dash (Seal)

Alexander G. Tyng
et al
vs
Almiron S. Cole
Appeal Bond

Assignment and order filed. W. Lovett. C.J.

Filed April 19th 1859.
Chas Kellett Clk.

State of Illinois
County of Peoria } ss.

I, Charles Kellett, Clerk of the County and of Peoria County in the State of Illinois do hereby certify that the foregoing is a full, true and perfect Transcript from the files and records of my office in a certain cause in said Court wherein Alexander G Tyng and Peter R K Bonthuis are Plaintiffs and Almiron S. Cole, is defendant

Witness my Hand and seal of office this 18th day of April 1860

Chas Kellett Clk

per Geo. K. Kellett Dep.

State of Illinois
Supreme Court
3. Grand Division
April Term A.D. 1866

Almiron S. Cole } Appeal from
Alexander G. Tyng } Peoria County Court
P. K. R. Bracken }

And now comes the said Almiron S. Cole and says that in the record and proceedings of the said County Court there is manifest and manifold error in this:

1 The said County Court erred in overruling said appellants motion for a new trial

2. Said County Court erred in giving improper instructions to the jury at the request of said appellees

3. Said County Court erred in permitting illegal evidence to go to the jury in said cause against the objection of said appellant

4. Said court erred in excluding proper evidence offered by said appellant

5. The said court erred in giving said 10th instruction for the said appellees

6 Said Court erred in giving said 9th instruction for said appellees

7 Said Court erred in giving said 7th instruction for said appellees.

8 Said court erred in giving said 2.
instruction prayed for by said appellees
9. Said court erred in giving each and every
of said instructions prayed by said appellees

And this the said Almiron S.
Cole is ready to verify. Wherefore for
the causes aforesaid he prays that
the said judgment of the said County
Court may be reversed annulled, and
for nothing held or esteemed

Manning & Morriman,
Attys for Appellant.

And now come the said appellees and
say that there is not any Error in this Record
and they pray that said Judgment may
be affirmed —

Iona. K. Cooper
for appellees

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Alminian S. Cole
Appellant
vs
Alexander G. Tyng
Peter R. R. Brotherson
Appellees

Record

Filed April 19, 1860
L. Leland
Clerk