

14647

No. _____

Supreme Court of Illinois

Maher

vs.

Bull

71641  7

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 222

J. W. Middleton & Co., Stationers, 126 Lake St.

Marker

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Deal

1964-7

1964

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1864.

HUGH MAHER, Impleaded with EDWARD KELLEY,
Appellant.

VS.

MARIA BULL, Administratrix of CADWALLADER BULL,
deceased, *Appellee.*

ARGUMENT OF HERVEY, ANTHONY & GALT,

FOR APPELLEE.

Filed May 10. 1864
S. C. C. C. C. C.
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CHICAGO:

BEACH & BARNARD, PRINTERS, NO. 14 SOUTH CLARK STREET.  
1864.

## STATEMENT OF CASE.

This was a suit in chancery for a dissolution of partnership and for an account, filed on the 11th day of October, 1860, by Cadwallader Bull, the intestate, against the defendants, Maher & Kelly.

The bill was filed and the suit commenced at the above date, in the Superior Court of Chicago; and the bill sets forth, that a copartnership was entered into between the complainant in the bill, the late Mr. Bull, and the defendants, Maher & Kelly, for the purpose of carrying on the coal business, in partnership, in the city of Chicago, for the space of two years from the date of the articles which are set forth in the abstract filed in this cause, correctly; a copy of the articles is attached to the bill and will be found on the abstract pages 2, 3, 4, 5 and 6.

By reference to these articles it will appear that Cadwallader Bull was a resident of Buffalo, N. Y., and Maher & Kelley were residents of Chicago, where they had previously been carrying on the coal business under the firm of Kelley & Co. The objects of the new partnership was to carry on a general coal trade in Chicago, and the articles of copartnership witnesseth as follows:

"That said Cadwallader Bull, *Hugh Maher and Edward Kelley*,  
"have agreed, and by those presents do agree, to *become partners*  
"in the coal trade, in the city of Chicago aforesaid, under the name  
"and style of Kelley & Co., as the firm name; the partnership to  
"commence on the 15th of April, A. D. 1860, and to terminate on  
"the 15th day of April, 1862, but by agreement may continue five  
"years longer." It further witnesseth, "for the purpose of carry-  
"ing on the business of said copartnership, the said parties have  
"agreed, and do hereby agree, to observe and fulfill the following  
"covenants and conditions:"



First, Bull agreed to furnish and provide all the coal that should be necessary to carry on the business, at the lowest market cash value, ship it to Chicago, and the same to "*remain the property of said Bull until the same shall be sold in the ordinary course of business sales.*" (Page 2 of abstract.) Maher was to provide a lot of land for a coal yard, and all the fixtures, carts and wagons. Kelley was to give his whole time to the business; the *expenses* to be "*borne in common by the three partners, except the salary of the book-keeper, which was to be paid by Bull.*" Maher & Kelley were "*to bear all losses that shall arise from bad debts created by them, or either of them, by giving credit to irresponsible parties,*" &c.

After providing for keeping of books and accounts, and for the entry of all monies received or paid, all purchases of, and sales of coal, the 11th article provides that :

"After the payment of the expenses of the firm, *all moneys*, the "*proceeds of coal, shall be weekly paid over to the book-keeper furnished by said Bull, for said Bull, to the amount of the cost of the coal furnished by him—said Bull.*"

The bill then shows that this article had been most grossly violated by Maher & Kelley; that he (Bull) had shipped to them nearly seven thousand dollars worth of coal, a large portion of which they had sold, and received the money for, but had not accounted to Bull for, as provided by the articles; that he (Bull) "*could not continue to supply coal without being promptly paid, and to do so would be ruinous to him,*" &c.; that he had requested the defendants to come to a fair and full account with respect to said partnership transaction, and to pay him the money to which he was entitled for cost of coal sold; but that defendants refuse; and that "*they have received, and converted to their own use, a large sum of money to which he (Bull) is entitled, and are proceeding to sell the coal on hand, collect in the partnership debts and moneys, whereby the balance due from them to him will be largely increased, to his great loss, damage and injury.*"



Sometime afterwards, a supplemental agreement was entered into between the late Cadwallader Bull and the appellants, Maher & Kelley, a copy of which is also attached to the bill, by which some unimportant changes are made, and which supplementary agreement will also be found on the abstract, page 1.

The partnership commenced on the 16th day of April, 1860, and the articles provide for the manner in which the profits were to be ascertained and adjusted.

Mr. Bull was to provide a book-keeper, which he did; and the witness, Robert J. Hunt, immediately after the formation of the partnership, entered on the discharge of the duties of that position.

That they did not furnish to Bull the balance sheets which were to have been furnished monthly; and that they did not pay over weekly to the book-keeper, as required by the articles, such sums of money, realized from cash sales of coal, as would be sufficient to defray the cost of the coal sold, at its cost price in Buffalo; but that on the contrary at the time of the filing of the bill, they (Maher & Kelley), had fallen into arrear, *for moneys which they had received for coal sold for cash, \$1,104.*

That they had sold for cash from the commencement of the partnership coal furnished under the articles to the amount of \$5097.32, and had only paid over up to the 11th of October, 1860, the sum of \$3150.06; that the expenses to that day were \$833.16; leaving a balance of \$1104.10 in the hands of Maher and Kelley unaccounted for, and not paid over. That Mr. Bull having come up from Buffalo to Chicago to look after matters, and finding them in this condition, and being unable to get any sort of satisfaction or settlement from Maher and Kelley for the very large amount of coal which he had sold them, or rather furnished to the firm under the articles, the full particulars of which will be given hereafter, was compelled for his own protection from utter ruin, to commence

The court will observe, by reference to the abstract in this case, that after this case had progressed almost to a hearing, Maher suddenly discovered that he had misunderstood his own case; that he had never had anything to do with the partnership in question at all, except to look out for the rent of his coal yard; that if there were any difficulties in regard to the business, they were all with Kelly and Bull; that he was, if there was any loss or damages to be paid, perfectly innocent; that since the suit had been commenced against him he had not suffered any uneasiness at all; that he had been absent from the city a considerable portion of the time, "wholly absorbed in his own business, relying upon Kelley and W. W. Drummond, Esq., who had been employed to protect his rights, &c., that he had all at once discovered that things were going wrong; that Drummond had filed a *joint and separate answer*, when it should have been wholly separate; that Drummond had neglected his business, and in short, that his case had been mismanaged; and that Drummond had proceeded on altogether a *wrong theory*, and that he (Maher) was desirous of changing it, and asked leave of the court to cut loose from Kelley and Drummond and proceed alone.

The affidavit of Maher further shows that he had discharged Drummond and employed the Messrs. Nicholls as his counsel.

Daniel C. Nicholls then files his affidavit, in which he gives it as his opinion that the case had been conducted upon an entirely wrong theory, and proceeds to state that "*he* has seen W. W. Drummond, the *former solicitor* in this cause, but that he was either unable or unwilling to give any information in relation to the facts in said cause. That *from an examination* of the articles of copartnership, and the evidence and facts in the case, so far as *he* has been able to acquire a knowledge of the same, he believes that a proper defense cannot be made for said Maher under the joint answer of said Maher & Kelley, filed in said cause."



See affidavits commencing on page 29 of abstract, and extending to page 35.

The gigantic efforts of the new counsel to master the case are there set forth, and on motion of Maher the time for closing the proofs was extended until the first day of the next term ; and on the further motion of Maher, leave was given to him to file a separate answer, but coupled with this express condition, that it should not be inconsistent with the *sworn answer of Maher* which he had previously filed in this case. The record does not set forth this fact, but it was nevertheless true, and when the attention of the court was, on the hearing afterwards, called to the utter recklessness which characterized this attempt to experiment upon the indulgence of the court, at the expense of all the rules of equity practice, as well as common honesty, the amended answer was stricken from the files.

#### FINAL CLOSING OF PROOFS.

On the 1st of September, 1862, on motion of Maher, the time for closing the proofs was extended until the first day of the next term.

On October 6, 1862, *by agreement of parties*, (see page 53 of abstract,) the time to close proofs in said case was extended until the first day of the next term, and this agreement was entered of record ; and on the 3d day of November, 1862, by agreement of parties, the cause was set for hearing on the 10th day of November, with leave to either party to take further testimony in the meantime.

The proofs being by agreement of counsel and of all parties closed, the case was set for hearing on the 10th of November, and on that day the parties appeared, and the first thing done on the part of the solicitors for the complainant was to call up the motion which had previously been made by them, to strike from the files the separate answer of Maher.

## FINAL HEARING.

Motion to take from the files the separate answer of Maher, filed August 18, 1862, and to dismiss cross bill allowed at hearing, which motion was based upon the fact that the separate answer of Maher, of August 18, 1862, was contradictory to the whole tenor of the sworn joint and *separate* answer filed by him on the 26th of October, 1860, and entirely inconsistent with it. The court, after hearing arguments on this point, sustained the motion, and this answer was stricken from the files.

The cross bill was also at the same time on the hearing, and after full arguments heard, dismissed on the ground that the two common law cases having been disposed of, and all the allegations of said bill having been denied and disproved, there was no affirmative relief whatever to be granted. the same having been filed, as the final decree *shows*, subject to the disposition of the court on the final hearing, as will be seen by reference to the final decree on page 125 of the abstract, which is in these words:

“ This cause coming on this day, to be heard upon the bill, answer, cross-bill and all the pleadings filed, and proofs taken therein, and Messrs. Hervey, Anthony & Galt, of counsel for the complainant, having been heard, and Messrs. Nicholēs Brothers, of counsel for the defendant, Hugh Maher, having been also heard, and *no counsel appearing for said defendant*, Edward Kelly, and the court, upon consideration thereof, and being fully advised in the premises, doth order, adjudge and decree as follows, namely; That *the cross-bill* of the said *Hugh Maher* and Edward Kelly, filed in this cause, be *dismissed* and that the *amended answer of the defendant, Hugh Maher*, filed on the 18th day of August, 1862, be *stricken from the files of this court*, and the same having been filed subject to the objection and to the disposition of the court, to be made on the final hearing of this cause.”

After the proofs had been closed, by agreement of parties, and the final arguments were in progress, Maher desires to offer general



parol testimony, consisting of "residents of the county of Cook, and State of Illinois."

The defendant Kelly, it will be observed, had long since abandoned his defence to the bill, and did not appear at the hearing, and had no counsel or attorney in attendance, whatever, and after the case had been on argument for a day or two, and after all the proofs had been closed by *agreement* of parties (see page 53 of abstract), the solicitors of Maher gravely propose to stop all further proceedings, in order to examine some witnesses, *generally*, for the defense, in support of said Maher's *separate answer* and *cross bill*, which the court had decided to strike from the files.

One of the witnesses, Quigg, whom Maher's solicitors wished to introduce had already been most fully and elaborately examined by Maher, and neither of them were in attendance on court at all, but were all, as the abstract, on page 54, shows, "residents of the county of Cook, and State of Illinois," and they proposed to stop proceedings and send for them, in order to *accumulate testimony* in support of Maher's *amended answer* and *the cross bill*.

"And thereupon the judge presiding inquired of defendant's counsel if they proposed to prove by these witnesses *any particular* facts, to which the counsel replied (without answering the question put to them at all) that they wished to examine *them generally* for the defense, to be sworn and examined in support *of said defendants answer and cross bill*," etc.

On this being announced, the court decided that as the rules of evidence were precisely like those at law—and as the defendant had had extension after extension of time to take testimony—and as *no particular fact* was offered to be proved different from what was before the court, that it would be, in the first place, a breach of good faith to allow counsel to break their own agreement; and in the second place, he did not believe he was bound to hear *merely cumulative* testimony, when it was admitted that they did not pro-

pose to show a single new fact other than was then before the court; nor was it pretended that any fact was proposed to be proved, which had come to Maher's knowledge since the closing of the proofs.

To this Maher, of course excepted, and thought that agreements or no agreements, answer or no answer, cross bill or no cross bill, his witnesses, who were residents "of the County of Cook and "State of Illinois," should be heard.

#### FINAL DECREE.

The testimony produced on the part of the complainant was very short, but showed conclusively that Bull had furnished Maher & Kelley a large quantity of coal, which they had sold and received the money for, but had never rendered any account to Bull at all; in plain violation of the articles of copartnership.

The defendants having conducted their case on every conceivable theory, offered a large mass of testimony, which had been taken on every conceivable point, and which was duly considered by the court; and it appearing to the court that said Cadwallader Bull had, since the commencement of the suit, departed *this life*, decided that the copartnership *had*, for *that cause*, been dissolved; and that Maher & Kelly should pay the complainant the value of the coal which complainant had sent them, and which had been sold by them, amounting in the aggregate—and including some items particularly set forth in the decree—to the full sum of \$6,300.

The decree contains a full summary of the case, and shows the results arrived at by the court, after the most careful examination; specifying particularly the manner of making up the account (see page 125 to 128 of abstract.

In support of the decree as rendered, the counsel for the complainant beg respectfully, to submit the following brief synopsis of the evidence.



## ARGUMENT.

It appeared, that Maher & Kelley had been engaged as partners in the same business of coal dealers at Chicago, the preceding year, 1859, and had made large purchases of coal from Bull, amounting to about \$15,000.

That their firm name was Kelley & Co., and that after the formation of the partnership between Bull and Maher & Kelley, the firm name remained the same.

It further appeared that Kelley & Maher were largely indebted to Bull on the transactions of 1859, and that at the date of the articles of copartnership, 16th of April, 1860, there were several notes of Kelley & Co. outstanding, and which had been carried over by renewals from the previous year—some of which fell due after the formation of the copartnership, and were dishonored by Maher & Kelley, and were subsequently collected from them by suits brought by the parties to whom they had been negotiated.

The quantities of coal furnished by Bull in 1860, as proved and the cost price thereof at Buffalo, as also proved by one of the witnesses (called by Maher & Kelley) are shown to have been as under.

| 1860.       | Tons. | Lbs. |                              |            |
|-------------|-------|------|------------------------------|------------|
| May 8th,    | 119   | 1540 | Blossburg coal, at \$3.90..  | \$467 10   |
| " 24th,     | 83    | 1183 | " " "                        | .. 326 00  |
| June 16th,  | 151   | 1800 | " " "                        | .. 592 40  |
| " 30th,     | 136   | 1320 | " " "                        | .. 532 97  |
| July 17th,  | 152   |      | Lehigh coal at \$5.50 ...    | 836 00     |
| Aug. 4th,   | 48    | 1435 | Blossburgh coal, at \$3.90.. | 189 99     |
| " 6th,      | 158   | 396  | " " "                        | .. 616 97  |
| " 14th,     | 178   | 1128 | Lackawanna coal at \$4.40..  | 785 68     |
| " 20th,     | 99    | 1539 | " " "                        | .. 438 38  |
| " 23d,      | 184   | 238  | " " "                        | .. 810 12  |
| Sept. 28th, | 98    |      | " " "                        | .. 431 20  |
| " "         | 121   | 1268 | Lehigh coal, at \$5.50 ..... | 668 98     |
| TOTAL....   | 1532  | 847  |                              | \$6,695 70 |

On account of which, it is admitted and proved, Bull has  
received from Maher & Kelley ..... \$3,150 06

Balance of cost price unpaid..... 3,545 73

The above sum of \$3,150.06 is composed of the following items  
at the dates given :

|                |                                    |                   |
|----------------|------------------------------------|-------------------|
| June 16, 1860, | Illinois Central Railroad Co. note | \$630 39          |
| Aug. 31,       | " Cash .....                       | 144 67            |
| Sept. 9,       | " Draft on New York.....           | 900 00            |
| " 28,          | " N. S. Bonton's notes .....       | 1,250 00          |
| " "            | " Cash .....                       | 25 00             |
| Oct. 2,        | " Cash.....                        | 200 00            |
|                |                                    | <u>\$3,150 06</u> |

These figures appear in the schedule attached to the bill and are  
admitted to be accurate by the sworn answer.

The expenses of the firm up to the time of filing the bill for  
freight, help, cartage, hoisting, weighing, etc., a detailed statement  
of which is attached to the bill, amounted to \$833.16.



The total amount of the sales of coal by Kelley & Co., which had been received from Bull in 1860, as shown by the testimony of Hunt, who testified to the quantity of each kind remaining on hand, on the 11th of October, 1860, was as follows :

|                              | Tons. | Lbs. |
|------------------------------|-------|------|
| Blossburg received 1860..... | 697   | 1674 |
| On hand 11th of October..... | 94    |      |
| Sold .....                   | 603   | 1674 |
| Lehigh, received .....       | 273   | 1268 |
| On hand 11th of October..... | 235   |      |
| Sold .....                   | 38    | 1268 |
| Lackawanna, received.....    | 561   | 905  |
| On hand 11th of October..... | 359   |      |
| Sold .....                   | 202   | 905  |

The sales of these quantities at the prices received for them would show as follows :

| Tons. | Lbs. |                           |            |
|-------|------|---------------------------|------------|
| 603   | 1674 | Blossburg at \$6.....     | \$3,622 00 |
| 202   | 905  | Lackawanna at \$6.50..... | 1,316 25   |
| 38    | 1268 | Lehigh, at \$8.....       | 307 80     |
|       |      |                           | <hr/>      |
|       |      |                           | \$5,246 50 |

During the period during which these sales were made the selling price of Blossburg coal in Chicago, was \$6 per ton.

It advanced greatly afterwards, during the Fall of 1860 and Winter of 1860-61.

The selling price of Lackawanna during the Summer had been \$6.50, after the 11th of October it, also, greatly advanced, and during the Winter run up to \$12 a ton.

Lehigh coal was selling, during the same time, at \$7.50 to \$8, it also advanced greatly after the close of navigation, ranging as high as \$13 to \$14 per ton.

The evidence shewed that all kinds of hard coal were very scarce that Fall and Winter, and that prices were, in consequence, extremely high.

When the difficulties between Bull and Maher & Kelley commenced, about the 10th of October, 1860, the following quantities of the coal, furnished by Bull during that year, remained in the yard of Kelley & Co. unsold, as proved by the testimony of the witness Hunt.

|                 | Tons.     |
|-----------------|-----------|
| Lackawana,..... | 359       |
| Blossburg,..... | 94        |
| Lehigh,.....    | 235       |
| Total,.....     | tons, 688 |

By adding the above quantity to the quantity of the various kinds already shewn to have been sold, it will be found to make up the precise quantity delivered by Bull in 1860—1,532½ tons.

|                                                                          |         |
|--------------------------------------------------------------------------|---------|
| At \$6 per ton, there was then of Lackawana coal, on hand, in value..... | \$2,154 |
| Of Blossburg, at \$6.....                                                | 564     |
| Of Lehigh, at \$8.....                                                   | 1,880   |
| Total value of coal on hand 11th October, 1860, at above prices.....     | \$4,598 |

It will thus be seen how little of truth or justice there is in the claim set up in the answer, that Bull had failed to supply coal; and the frequency and large amounts of the shipments, show conclusively how earnest Bull was in his endeavors to faithfully perform his part of the agreement.



Now, how had Maher & Kelley performed theirs—as they swear they did—let us examine.

They were to pay over to the book-keeper, *weekly*, an amount equal to the cost price of the coal at Buffalo, out of the cash sales. Did they do so?

The account of payments made by them, excluding the Bouton notes, (an explanation of which will be given hereafter), shows as follows:

|                                                  |                   |
|--------------------------------------------------|-------------------|
| June 16th, Illinois Central R.R. Co.'s Note,.... | \$630.39          |
| August 31st, Cash,.....                          | 144.67            |
| September 4th, Draft on N. Y.....                | 900.00            |
| "    28th, Cash,.....                            | 25.00             |
| October 2d,    "    .....                        | 200.00            |
| Total,.....                                      | <u>\$1,900.06</u> |

The answer admits cash sales to the amount of \$3,607.83. Let us examine how that would leave the account, supposing that sum to be correct, for the sake of argument, and the unfairness and disingenuousness of the answer, and of the conduct of Maher & Kelly, will, we think, be at once apparent.

|                     |                   |
|---------------------|-------------------|
| Cash Sales,.....    | \$3,607.83        |
| Less Expenses,..... | 833.00            |
| Balance,.....       | <u>\$2,774.83</u> |
| Paid on above,..... | <u>1,900.06</u>   |

In arrears on their own showing,..... \$874.77  
and only about \$225 less than we claim they were, for cash received.

Now as to the Bouton notes, the facts are, as proved by Bouton: That on the 28th of September, 1860, Mr. Bull being in Chicago, and, acting for the firm of Kelley & Co., made a sale to Mr. Bouton of a quantity of Lehigh and Blossburg coal, to be delivered as

Bouton required it, at his foundry. Bull gave Bouton an order on Kelley & Co. for the coal, which Kelley & Co accepted; and then Mr. Bouton gave his notes for the amount, \$1,250, which notes were handed over by Kelley & Maher to Bull—were charged to him in account as so much cash, and treated by Kelley & Maher as cash *received* for coal sold by *them*.

But, unfortunately for Mr. Bull, within a few days after this transaction had taken place, the difficulties between Bull and Maher & Kelley culminated in a suit, and the latter gentlemen then refused to deliver to Mr. Bouton the remainder of the coal due to him on the order which Bull had given, and which Kelley & Maher had accepted—Kelley & Maher then pretending that *they had not the coal to deliver*.

At that very time the proof conclusively shows they had in the yard, of coal supplied by Bull in 1860, 94 tons of Blossburg and 235 tons of Lehigh.

All that Mr. Bouton required, of both kinds, was 95 tons 1,650 pounds; being 56 tons 1,715 pounds of Lehigh, and 38 tons 1,935 pounds of Blossburg. And with 94 tons of Blossburg and 235 tons of Lehigh on hand, Maher & Kelley, after charging Bull with Bouton's notes as cash, refused to deliver any more coal to Bouton on the order.

In consequence of this refusal Mr. Bouton refused to pay his notes, which Bull had negotiated, and Bull was obliged to send coal from Buffalo to make up nearly the entire deficiency to Bouton.

Before, however, this coal could arrive at Chicago, Bouton got out of coal and his works were about being stopped, when he was authorized by Bull to purchase what he needed, (to keep him going till the coal, sent by Bull, should arrive), in the market here, and that Bull would pay for it. This he did, as will be shown.



Of the 95 tons that Bouton was short, he purchased, under above arrangement with Bull, 28 tons from Price & Morris and J. S. Newhouse, and Bull paid him for it. Bouton then paid his notes.

Kelley & Maher afterward directed their book-keeper to credit Bull's account with \$591, for short delivery to Bouton, which was done.

This, it is assumed, was the amount at Bouton's contract price; but the testimony of Bouton shows a much heavier loss to Bull than that—a loss, in short, nearly equal to the full amount of Bouton's notes—\$1,250, as will be shown.

Bull had to send the coal to Bouton from Buffalo late in the season; owing to the great scarcity of coal, arising from strikes among the miners, and a great difficulty in getting vessels, and the Lehigh coal which he sent was frozen in at Detroit on its way up.

The coal was transported from Detroit to Chicago by rail, and the freight on it was \$302.29, which Bull paid.

This is the manner in which that transaction foots up, as shown by the testimony :

Bouton was short 95 tons, which he had paid for by his notes; and which 95 tons Maher & Kelley ought to have delivered, as they treated Bouton's notes as a cash sale of coal.

|                                                                                                                                                                              |                   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Bouton bought of Newhouse to amount of.....                                                                                                                                  | \$ 96.47          |
| He bought of Price & Morris.....                                                                                                                                             | 129.88            |
| He charged Bull for short delivery, after all.....                                                                                                                           | 73.50             |
| Railroad freight from Detroit on Lehigh coal. . .                                                                                                                            | 302.29            |
| Cartage.....                                                                                                                                                                 | 33.10             |
| Sixty-seven tons delivered by Bull from Buffalo, including lake freight on Lehigh to Detroit, and railroad freight on Blossburg from Buffalo to Chicago, at \$8 per ton..... | 536.00            |
| Loss.....                                                                                                                                                                    | <u>\$1,171.24</u> |

This loss, it was claimed, ought to have been paid by Maher & Kelley, but the court only decreed against them the \$591, which they themselves had admitted was the amount, in value, short delivered to Bouton, and which they ordered their book-keeper to credit to Bull.

It would, therefore, seem that the Bouton notes ought not to be allowed to Kelley & Maher as a payment.

On the 11th of October, 1860, according to the testimony, Kelley & Maher had on hand in the yard, of coal furnished by Bull in 1860, 688 tons of *hard coal*.

The price of which, almost immediately afterwards, run up \$12, and before Winter was over \$14, per ton—say \$10 per ton all round, and it shows value of coal in yard.....\$6,880.00

Deduct cost, as shown under.... 3,238.70

Shows a profit of.....\$3,641.30

Cost price of the different kinds:

359 tons of Lackawanna at \$4.40 per ton.....\$1,579.60

94 " Blossburg " 3.90 " ..... 366.60

235 " Lehigh " 5.50 " ..... 1,292.50

Total cost.....\$3,238.70

The sales already shown of three kinds up to October 11th, 1860, amounted to.....\$5,246.05

The cost of which, at Buffalo, was..... 3,458.55

Profit.....\$1,787.50

Cost of what was sold as above shown:

603 tons 1,674 pounds, Blossburg, \$3.90.....\$2,355.65

202 " 905 " Lackawanna, 4.40..... 890.80

38 " 1,268 " Lehigh, 5.50..... 212.10

\$3,458.55



The following brief summary will show figures, as given above in detail.

|                                                                             |            |
|-----------------------------------------------------------------------------|------------|
| Total quantity of coal delivered, at<br>cost price.....                     | \$6,695.79 |
| Less paid including Bouton notes.....                                       | 3,150.06   |
| Balance on cost of coal.....                                                | \$3,545.73 |
| Profit on sales of \$5,246.05 before<br>11th of October, 1860, as shown.... | \$1,787.50 |
| Bull's one-third.....                                                       | 595.83     |
| Profit on coal on hand 11th October, as<br>shown.....                       | 3,641.30   |
| Bull's one-third.....                                                       | 1,213.76   |
| Bull's loss on Bouton transaction.....                                      | 1,171 24   |
| Interest from 11th October, 1860, to date of decree.                        |            |

Deduct one-third of all expenses and freights, etc., allowed by court at \$1,500—a large allowance, and it appears that the decree instead of being, as appellant claims, excessive, is not as much as it ought to be by over \$1,000.

An attempt was made on the argument of this case in the court below to claim damages, because Bull did not supply all the coal that Maher & Kelley thought that they could have sold or contracted for, and that in consequence of an insufficient supply, they suffered loss.

The answer given to this claim in the court below and repeated here, in case any such ground is urged for a reversal of this decree, is simply that when Maher & Kelley ceased to pay for what they had sold, with plenty of coal on hand for any *legitimate* operations, it was not surprising that Bull should decline to send more—but more was not required at the time of the difficulties, commencing 10th of October. At that time, as has been shown, Maher & Kelley had on hand, in their yard, 688 tons of *hard* coal, (Blossburg, Lehigh and Lackawanna) which they had got from Bull that season.

It will be observed that the busy coal season had then hardly commenced.

Some time after the commencement of this suit, Maher & Kelley were called upon by Bouton to deliver him coal on his order which they had accepted, and they *refused*, alleging that *they had no coal on hand*.

This was entirely untrue, as has been shown, and if anything further were wanting to show, how systematically Maher & Kelley seem to have gone to work to defraud Bull, it was proved that before the commencement of this suit, some days, and while Bull was in Chicago attending to the business of the settlement of his account with the firm, Maher & Kelley, while pretending to be carrying on the business as usual, had made what they called a sale to a man by the name of Roberts of *all the coal on their yard* for his note of \$2,600.

No entry of this most fraudulent and vile transaction ever appeared on the books of Kelly & Co., except upon an order book, as it was called, which was kept in the office for persons to write orders for coal in, and in that book, and only in that, it was proved that Kelley had directed an entry to be made *by the yard man* a long time after the pretended sale, and after the commencement of this suit, and the service of the injunction.

The coal was never removed from the yard, but was sold afterwards, no entries of the sales were ever made on the books, and no one except Maher & Kelley have ever heard anything of the proceeds.

The whole transaction was a bold and impudent fraud, done for the purpose which has been pretty successfully accomplished, of cheating the late Mr. Bull, their partner, and so well have they succeeded in their efforts, that by every device known to the law, and by resorting to all sorts of fraudulent practices, they have



not only pretty thoroughly ruined him financially, but have actually through sheer excitement and suffering and vexation caused by this and other protracted and harrassing litigation, to which Bull was a party, or in the success of which he was interested as collaterally liable on the paper sued for, worried the poor man into his grave.

The disgraceful Roberts' transaction will stand out in a more repulsive light when it is stated as it was proved, that at the time when Maher & Kelley pretend to have *sold* all the coal on their yard for \$2,600, and for the note of an unknown man, the cash value of the hard coal alone which they had received from Bull, was on that day (2d Oct.) over \$5,000 ; and that was not all. The coal which they got from Bull, and which they pretended to sell in this way, it was provided by the articles of copartnership should remain the property of Bull until it was sold in the *ordinary course of business*.

Will it, can it be pretended, that this sale or pretended sale to Roberts was *in the usual course of business* ?

It will not do for Mr. Maher, the appellant, to claim that he had nothing to do with this matter—that it was all done by Kelley.

When he and Kelley were brought up for contempt for a violation of the injunction in this case, by selling coal, they both excused themselves by setting up this pretended sale to Roberts.

In every aspect the justice and equity of the case is with the complainant, and the decree against the defendants below, even upon their own showing, is not sufficiently large, for, by reference to their Ledger, as corrected and revised by their *eminent* book-keeper (the witness Quigg), it will be found that the balance at Bull's credit is between \$4,000 and \$5,000, and which balance shows no entry to his credit of any profit whatever.

## POINTS OF APPELLEE.

The analysis which has now been made will serve to give the courts, at least a correct outline of the case, as presented by the record.

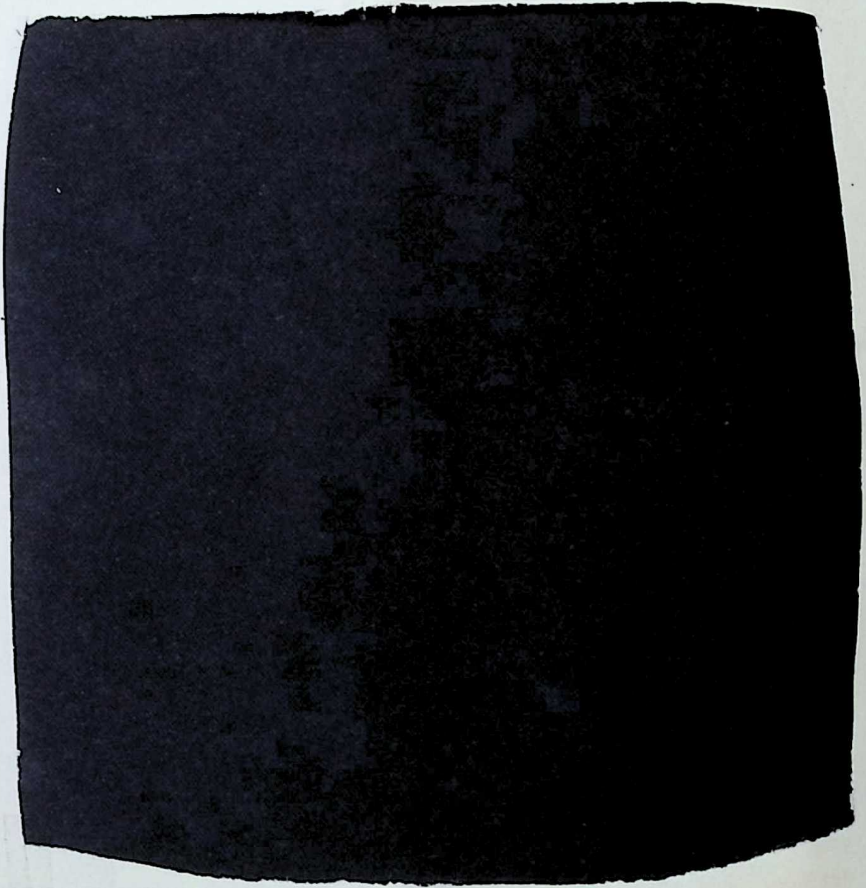


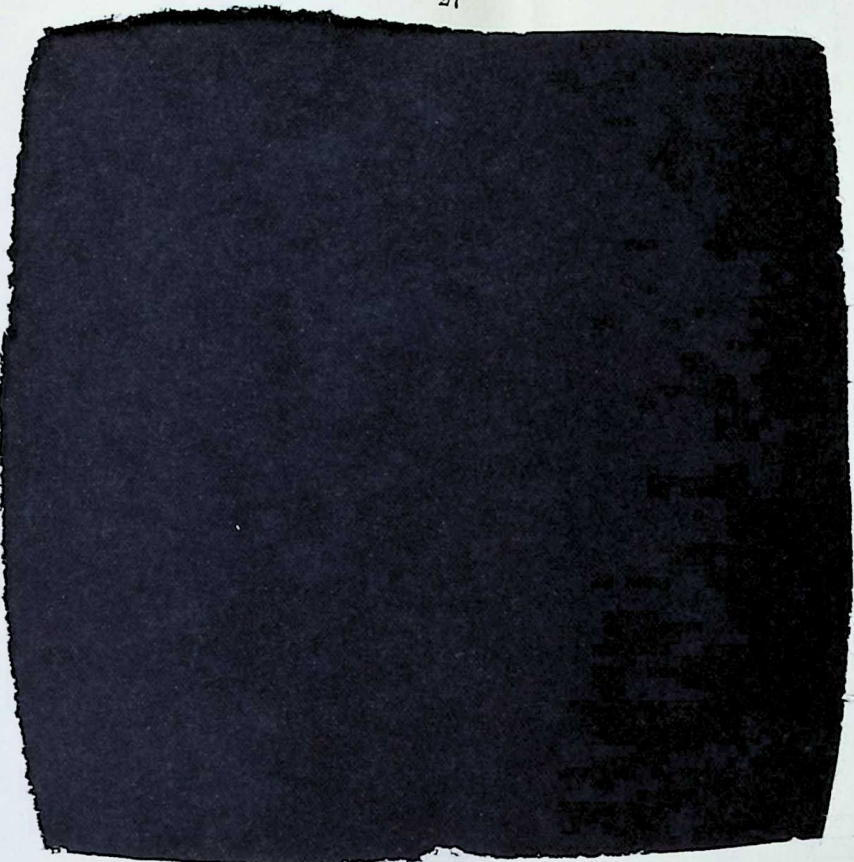
We contend first, that there was no error in dismissing the cross bill, because the record shows that there could be no affirmative



relief whatever that could be granted. The cross bill having been filed to enjoin the two suits at law, of Edward H. Downs, and the Cecil Bank, on the ground that Bull was merely using their names, was answered fully by Bull—Downs and the Cecil Bank—utterly disproving every allegation which the cross bill contained regarding said suits.

## II.

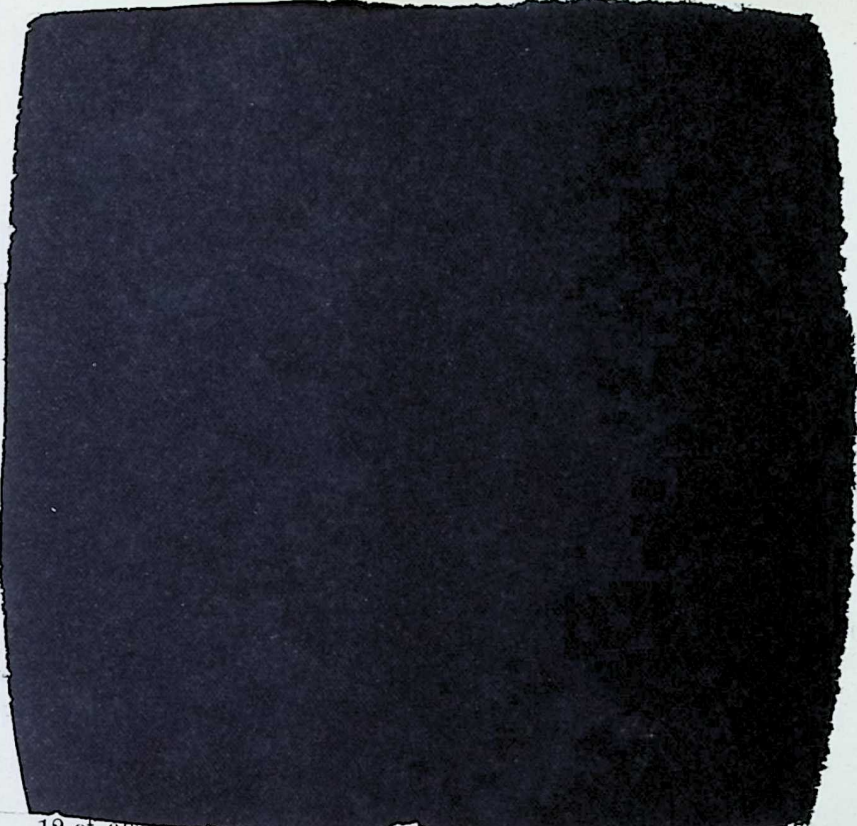




To show that Maher's answer, of August 18, 1862, entirely contradicts his first answer we call attention to the following discrepancies and contradictions:

1st. The joint and separate answer of Kelly and Maher, which was filed on the 26th of October, 1860, and *sworn* to, admits the formation of the copartnership, and the correctness of the articles of copartnership, and supplementary article explanatory of the original ones, of Sept. 6th, 1860, as set forth in complainant's bill—see page 15 of abstract.

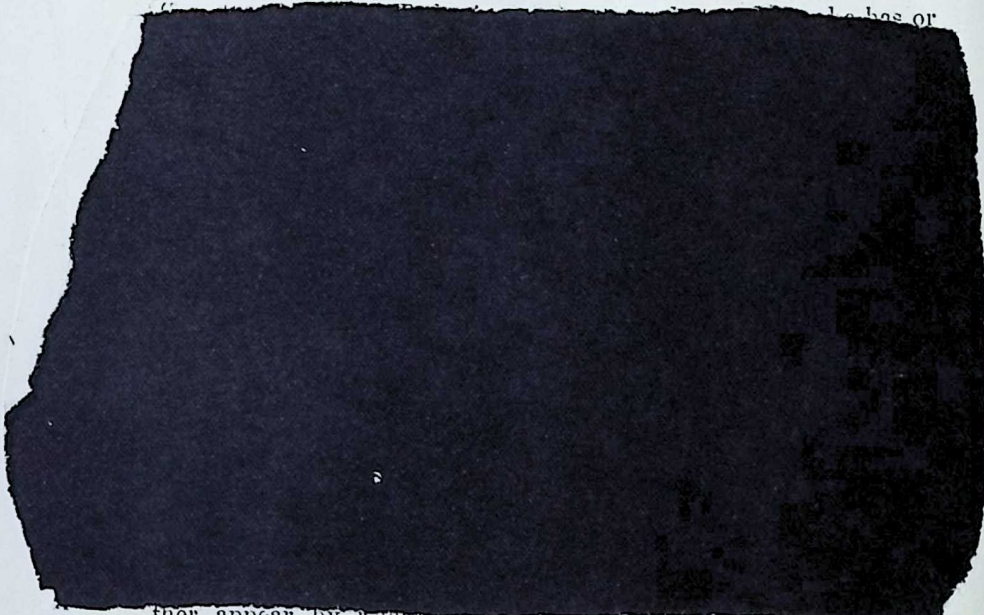




12 of abstract 40.  
" on 29th of September, which instead of 142 and 98 tons, respectively, ought to be 129 7-2000 and 95 157-2000 tons respectively." All this is sweepingly denied in his separate answer.

4th. Maher, in his first answer, admits his joint liability, as a partner in the business, and bound to account for all the coal sent to him and Kelley by Bull. On page 37 of the abstract, Maher, having taken recent counsel upon the subject, denies his liability in the boldest and most peremptory manner, and expressly "denies that there is any provision in said articles that he should take charge of or *in any way control or pay over* any of the proceeds of the sales of coal furnished by said *Bull to said firm.*" See page 37 of abstract.

5th. Maher, as appears by the abstract, commencing at page 38, and from thence on to the close of his answer, denies each and everything that he formally admitted in his joint and separate answer, and denies that he is, "*jointly with said Kelley, or individually*" was liable with said Kelley to pay over to said Bull, under said "articles, said sum of \$1,104 10-100, or *any other sum,*" &c. See page 39 of abstract. On page 40, after reiterating, with marked emphasis, his non-liability, either "*individually or jointly,*" he says, in regard to Kelley, "whether said Kelley has converted said sum, "or any other sum, coming into his hands, in the course of said



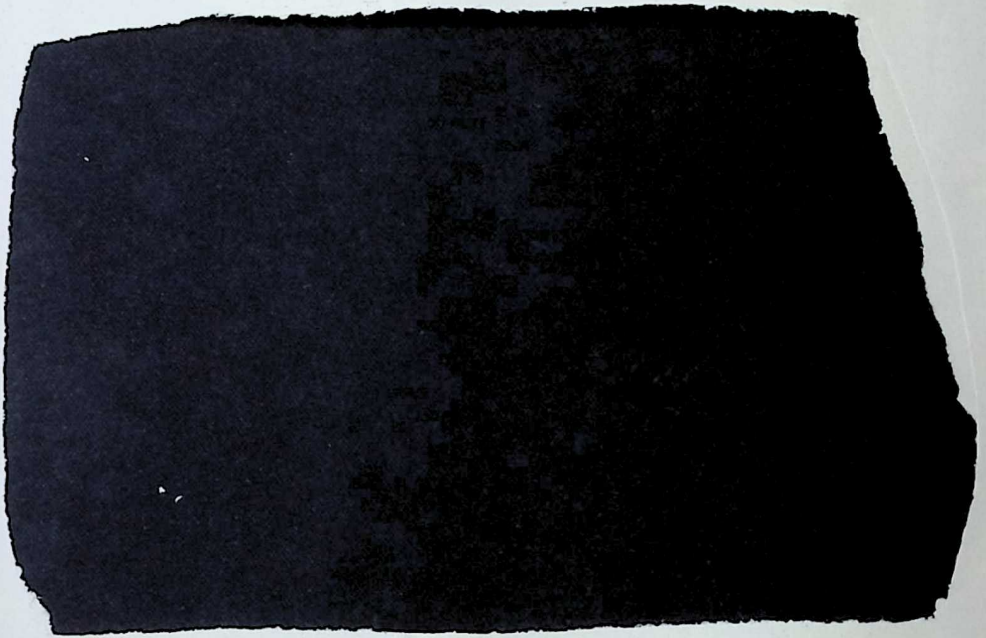
ther appear by reference to page 18 of abstract, in which, Maher has shown that he had utterly neglected the business, and had paid no attention to it whatever, he deliberately "claims that "whatever amount of damages said Maher & Kelley, or either of "them, have been compelled to pay; and the amount of coal delivered for which payment cannot be collected, in consequence of "the failure of said firm to deliver coal, and whatever amount said "firm has become *liable* to pay, *should be charged to said Bull,* in-



"asmuch as the failure of said Bull to keep the covenants in said  
"articles, on his part."

In fine and in short, Maher, in his second answer, attempts to change the whole theory of his case, and contradicts almost every fact and every admission which he made in his sworn answer of October 26th, 1860.

### III.



It is respectfully submitted that there is no error in the record, and that the decree of the court below ought to be affirmed.

HERVEY, ANTHONY & GALT,

*Solicitors for Appellee.*

**SUPREME COURT OF ILLINOIS,**

THIRD GRAND DIVISION,

**April Term, A. D. 1864.**

---

HUGH MAHER, Impleaded with EDWARD KELLEY,  
*Appellant.*

VS.

MARIA BULL, Administratrix of CADWALLADER BULL,  
deceased, *Appellee.*

---

ARGUMENT OF HERVEY, ANTHONY &amp; GALT,

*Filed May 16. 1864*  
FOR APPELLEE.

*J. L. Scand. & Co.*

CHICAGO:

BEACH & BARNARD, PRINTERS, NO. 14 SOUTH CLARK STREET.  
1864.



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CHICAGO:  
BEACH & BARNARD, PRINTERS, NO. 14 SOUTH CLARK STREET.  
1864.

## STATEMENT OF CASE.

This was a suit in chancery for a dissolution of partnership and for an account, filed on the 11th day of October, 1860, by Cadwallader Bull, the intestate, against the defendants, Maher & Kelly.

The bill was filed and the suit commenced at the above date, in the Superior Court of Chicago; and the bill sets forth, that a copartnership was entered into between the complainant in the bill, the late Mr. Bull, and the defendants, Maher & Kelly, for the purpose of carrying on the coal business, in partnership, in the city of Chicago, for the space of two years from the date of the articles which are set forth in the abstract filed in this cause, correctly; a copy of the articles is attached to the bill and will be found on the abstract pages 2, 3, 4, 5 and 6.

By reference to these articles it will appear that Cadwallader Bull was a resident of Buffalo, N. Y., and Maher & Kelley were residents of Chicago, where they had previously been carrying on the coal business under the firm of Kelley & Co. The objects of the new partnership was to carry on a general coal trade in Chicago, and the articles of copartnership witnesseth as follows:

"That said Cadwallader Bull, *Hugh Maher and Edward Kelley*,  
"have agreed, and by those presents do agree, to *become partners*  
"in the coal trade, in the city of Chicago aforesaid, under the name  
"and style of Kelley & Co., as the firm name; the partnership to  
"commence on the 15th of April, A. D. 1860, and to terminate on  
"the 15th day of April, 1862, but by agreement may continue five  
"years longer." It further witnesseth, "for the purpose of carry-  
"ing on the business of said copartnership, the said parties have  
"agreed, and do hereby agree, to observe and fulfill the following  
"covenants and conditions:"



First, Bull agreed to furnish and provide all the coal that should be necessary to carry on the business, at the lowest market cash value, ship it to Chicago, and the same to "*remain the property of said Bull until the same shall be sold in the ordinary course of business sales.*" (Page 2 of abstract.) Maher was to provide a lot of land for a coal yard, and all the fixtures, carts and wagons. Kelley was to give his whole time to the business; the *expenses* to be "*borne in common by the three partners*, except the salary of "the book-keeper, which was to be paid by Bull." Maher & Kelley were "to bear all losses that shall arise from bad debts created by them, or either of them, by giving credit to irresponsible parties," &c.

After providing for keeping of books and accounts, and for the entry of all monies received or paid, all purchases of, and sales of coal, the 11th article provides that :

"After the payment of the expenses of the firm, *all moneys*, the "proceeds of coal, shall be *weekly paid over to the book-keeper furnished by said Bull, for said Bull, to the amount of the cost of the coal furnished by him—said Bull.*"

The bill then shows that this article had been most grossly violated by Maher & Kelley; that he (Bull) had shipped to them nearly seven thousand dollars worth of coal, a large portion of which they had sold, and received the money for, but had not accounted to Bull for, as provided by the articles; that he (Bull) "could not continue to supply coal without being promptly paid, and to do so would be ruinous to him," &c.; that he had requested the defendants to come to a fair and full account with respect to said partnership transaction, and to pay him the money to which he was entitled for cost of coal sold; but that defendants refuse; and that they have received, and converted to their own use, a large sum of money to which he (Bull) is entitled, and are proceeding to sell the coal on hand, collect in the partnership debts and moneys, whereby the balance due from them to him will be largely increased, to his great loss, damage and injury."

Sometime afterwards, a supplemental agreement was entered into between the late Cadwallader Bull and the appellants, Maher & Kelley, a copy of which is also attached to the bill, by which some unimportant changes are made, and which supplementary agreement will also be found on the abstract, page 1.

The partnership commenced on the 16th day of April, 1860, and the articles provide for the manner in which the profits were to be ascertained and adjusted.

Mr. Bull was to provide a book-keeper, which he did; and the witness, Robert J. Hunt, immediately after the formation of the partnership, entered on the discharge of the duties of that position.

That they did not furnish to Bull the balance sheets which were to have been furnished monthly; and that they did not pay over weekly to the book-keeper, as required by the articles, such sums of money, realized from cash sales of coal, as would be sufficient to defray the cost of the coal sold, at its cost price in Buffalo; but that on the contrary at the time of the filing of the bill, they (Maher & Kelley), had fallen into arrear, *for moneys which they had received for coal sold for cash, \$1,104.*

That they had sold for cash from the commencement of the partnership coal furnished under the articles to the amount of \$5097.32, and had only paid over up to the 11th of October, 1860, the sum of \$3150.06; that the expenses to that day were \$833.16; leaving a balance of \$1104.10 in the hands of Maher and Kelley unaccounted for, and not paid over. That Mr. Bull having come up from Buffalo to Chicago to look after matters, and finding them in this condition, and being unable to get any sort of satisfaction or settlement from Maher and Kelley for the very large amount of coal which he had sold them, or rather furnished to the firm under the articles, the full particulars of which will be given hereafter, was compelled for his own protection from utter ruin, to commence



It claims that Maher & Kelley *paid over the proceeds of cash sales according to the agreement*, until, as the answer charges, Bull ceased to furnish coal as he was required to do.

It admits the correctness of the schedules attached, showing the amount of coal furnished, except the last item.

2. The amount of cash paid to Bull, and the dates.
3. The amount of expenses.

It denies that \$1,104 was due and in arrear for coal sold.

It sets forth that since Sept. 29, 1860, Bull had failed to supply coal under the agreement *to the great injury of Maher & Kelley*, and to the utter loss to *them* of all the benefits they expected to derive from the copartnership; and that for that reason Maher & Kelley had ceased to pay Bull any more money.

It sets up that regular monthly statements were furnished to Bull, until he ceased to supply coal as required by the said agreement.

It claims damages to Maher & Kelley, by reason of the failure of Bull to supply coal, to the amount of \$10,000.

And that complainant (Bull) has received from Maher & Kelley all the money that he was entitled to under said articles for coal sold for cash.

This answer is verified by the affidavit of Maher & Kelley.

A replication was filed and proofs were taken.

#### CROSS BILL.

On the 15th of February, 1861, Maher & Kelly came and asked

leave to file a cross bill against Bull and others, which the court granted conditionally, subject to be stricken from the files at the hearing, if it did not show new matters growing out of the partnership transaction requiring affirmative relief.

This cross bill was a meagre recapitulation of their answer, and all the affirmative relief they asked was for the court to enjoin the prosecution of two suits on the common law side of the court, which had been commenced some time previously against Maher & Kelley, on two promissory notes, one by Edward A. Downs, and the other by the Cecil Bank of Maryland, and which notes Maher & Kelley alleged still belonged to Bull, but as this was wholly disproved by the answer of Bull, Downs and the Cecil Bank, in which they showed that the notes had been bona fide negotiated before due, and on this being shown conclusively by the answer of Bull, Downs, and the Cecil Bank of Maryland, filed in that case, the court refused to enjoin these suits.

Motion to strike cross bill from files, 20th of February, 1861.

Bull filed his motion to strike from the files this cross bill, on the grounds that it asked for no affirmative relief whatever, and that all matters in defence could be settled on the hearing of the original bill and answer.

On June 6th, 1862, Kelley & Maher put on file a replication to the answer to the cross bill.

On June 20th, 1862, on motion of Bull, the defendants were ordered to close proofs by first day of next term.

On July 14th, 1862, on motion of said Bull, it was ordered that defendants be required to close their proofs by the 15th day of August.

Affidavits extraordinary of Maher and Daniel C. Nichols.



The court will observe, by reference to the abstract in this case, that after this case had progressed almost to a hearing, Maher suddenly discovered that he had misunderstood his own case; that he had never had anything to do with the partnership in question at all, except to look out for the rent of his coal yard; that if there were any difficulties in regard to the business, they were all with Kelly and Bull; that he was, if there was any loss or damages to be paid, perfectly innocent; that since the suit had been commenced against him he had not suffered any uneasiness at all; that he had been absent from the city a considerable portion of the time, "wholly absorbed in his own business, relying upon Kelley and W. W. Drummond, Esq., who had been employed to protect his rights, &c., that he had all at once discovered that things were going wrong; that Drummond had filed a *joint and separate answer*, when it should have been wholly separate; that Drummond had neglected his business, and in short, that his case had been mismanaged; and that Drummond had proceeded on altogether a *wrong theory*, and that he (Maher) was desirous of changing it, and asked leave of the court to cut loose from Kelley and Drummond and proceed alone.

The affidavit of Maher further shows that he had discharged Drummond and employed the Messrs. Nicholls as his counsel.

Daniel C. Nicholls then files his affidavit, in which he gives it as his opinion that the case had been conducted upon an entirely wrong theory, and proceeds to state that "*he* has seen W. W. Drummond, the *former solicitor* in this cause, but that he was "either unable or unwilling to give any information in relation to "the facts in said cause. That *from an examination* of the articles of copartnership, and the evidence and facts in the case, so "far as *he* has been able to acquire a knowledge of the same, he "believes that a proper defense cannot be made for said Maher "under the joint answer of said Maher & Kelley, filed in said "cause."

See affidavits commencing on page 29 of abstract, and extending to page 35.

The gigantic efforts of the new counsel to master the case are there set forth, and on motion of Maher the time for closing the proofs was extended until the first day of the next term ; and on the further motion of Maher, leave was given to him to file a separate answer, but coupled with this express condition, that it should not be inconsistent with the *sworn answer of Maher* which he had previously filed in this case. The record does not set forth this fact, but it was nevertheless true, and when the attention of the court was, on the hearing afterwards, called to the utter recklessness which characterized this attempt to experiment upon the indulgence of the court, at the expense of all the rules of equity practice, as well as common honesty, the amended answer was stricken from the files.

#### FINAL CLOSING OF PROOFS.

On the 1st of September, 1862, on motion of Maher, the time for closing the proofs was extended until the first day of the next term.

On October 6, 1862, *by agreement of parties*, (see page 53 of abstract,) the time to close proofs in said case was extended until the first day of the next term, and this agreement was entered of record ; and on the 3d day of November, 1862, by agreement of parties, the cause was set for hearing on the 10th day of November, with leave to either party to take further testimony in the meantime.

The proofs being by agreement of counsel and of all parties closed, the case was set for hearing on the 10th of November, and on that day the parties appeared, and the first thing done on the part of the solicitors for the complainant was to call up the motion which had previously been made by them, to strike from the files the separate answer of Maher.



## FINAL HEARING.

Motion to take from the files the separate answer of Maher, filed August 18, 1862, and to dismiss cross bill allowed at hearing, which motion was based upon the fact that the separate answer of Maher, of August 18, 1862, was contradictory to the whole tenor of the sworn joint and *separate* answer filed by him on the 26th of October, 1860, and entirely inconsistent with it. The court, after hearing arguments on this point, sustained the motion, and this answer was stricken from the files.

The cross bill was also at the same time on the hearing, and after full arguments heard, dismissed on the ground that the two common law cases having been disposed of, and all the allegations of said bill having been denied and disproved, there was no affirmative relief whatever to be granted, the same having been filed, as the final decree shows, subject to the disposition of the court on the final hearing, as will be seen by reference to the final decree on page 125 of the abstract, which is in these words:

" This cause coming on this day, to be heard upon the bill, answer, cross-bill and all the pleadings filed, and proofs taken therein, and Messrs. Hervey, Anthony & Galt, of counsel for the complainant, having been heard, and Messrs. Nicholes Brothers, of counsel for the defendant, Hugh Maher, having been also heard, and *no counsel appearing for said defendant*, Edward Kelly, and the court, upon consideration thereof, and being fully advised in the premises, doth order, adjudge and decree as follows, namely; That *the cross-bill* of the said *Hugh Maher* and Edward Kelly, filed in this cause, be *dismissed* and that the *amended answer of the defendant, Hugh Maher*, filed on the 18th day of August, 1862, be *stricken from the files of this court*, and the same having been filed subject to the objection and to the disposition of the court, to be made on the final hearing of this cause."

After the proofs had been closed, by agreement of parties, and the final arguments were in progress, Maher desires to offer general

parol testimony, consisting of "residents of the county of Cook, and State of Illinois."

The defendant Kelly, it will be observed, had long since abandoned his defence to the bill, and did not appear at the hearing, and had no counsel or attorney in attendance, whatever, and after the case had been on argument for a day or two, and after all the proofs had been closed by *agreement* of parties (see page 53 of abstract), the solicitors of Maher gravely propose to stop all further proceedings, in order to examine some witnesses, *generally*, for the defense, in support of said Maher's *separate answer* and *cross bill*, which the court had decided to strike from the files.

One of the witnesses, Quigg, whom Maher's solicitors wished to introduce had already been most fully and elaborately examined by Maher, and neither of them were in attendance on court at all, but were all, as the abstract, on page 54, shows, "residents of the county of Cook, and State of Illinois," and they proposed to stop proceedings and send for them, in order to *accumulate testimony* in support of Maher's *amended answer* and *the cross bill*.

"And thereupon the judge presiding inquired of defendant's counsel if they proposed to prove by these witnesses *any particular* facts, to which the counsel replied (without answering the question put to them at all) that they wished to examine *them generally* for the defense, to be sworn and examined in *support of said defendants answer and cross bill*," etc.

On this being announced, the court decided that as the rules of evidence were precisely like those at law—and as the defendant had had extension after extension of time to take testimony—and as *no particular fact* was offered to be proved different from what was before the court, that it would be, in the first place, a breach of good faith to allow counsel to break their own agreement; and in the second place, he did not believe he was bound to hear *merely cumulative* testimony, when it was admitted that they did not pro-



pose to show a single new fact other than was then before the court; nor was it pretended that any fact was proposed to be proved, which had come to Maher's knowledge since the closing of the proofs.

To this Maher, of course excepted, and thought that agreements or no agreements, answer or no answer, cross bill or no cross bill, his witnesses, who were residents "of the County of Cook and "State of Illinois," should be heard.

#### FINAL DECREE.

The testimony produced on the part of the complainant was very short, but showed conclusively that Bull had furnished Maher & Kelley a large quantity of coal, which they had sold and received the money for, but had never rendered any account to Bull at all; in plain violation of the articles of copartnership.

The defendants having conducted their case on every conceivable theory, offered a large mass of testimony, which had been taken on every conceivable point, and which was duly considered by the court; and it appearing to the court that said Cadwallader Bull had, since the commencement of the suit, departed *this life*, decided that the copartnership *had*, for *that cause*, been dissolved; and that Maher & Kelly should pay the complainant the value of the coal which complainant had sent them, and which had been sold by them, amounting in the aggregate—and including some items particularly set forth in the decree—to the full sum of \$6,300.

The decree contains a full summary of the case, and shows the results arrived at by the court, after the most careful examination; specifying particularly the manner of making up the account (see page 125 to 128 of abstract.

In support of the decree as rendered, the counsel for the complainant beg respectfully, to submit the following brief synopsis of the evidence.

## ARGUMENT.

It appeared, that Maher & Kelley had been engaged as partners in the same business of coal dealers at Chicago, the preceding year, 1859, and had made large purchases of coal from Bull, amounting to about \$15,000.

That their firm name was Kelley & Co., and that after the formation of the partnership between Bull and Maher & Kelley, the firm name remained the same.

It further appeared that Kelley & Maher were largely indebted to Bull on the transactions of 1859, and that at the date of the articles of copartnership, 16th of April, 1860, there were several notes of Kelley & Co. outstanding, and which had been carried over by renewals from the previous year—some of which fell due after the formation of the copartnership, and were dishonored by Maher & Kelley, and were subsequently collected from them by suits brought by the parties to whom they had been negotiated.

The quantities of coal furnished by Bull in 1860, as proved and the cost price thereof at Buffalo, as also proved by one of the witnesses (called by Maher & Kelley) are shown to have been as under.



| 1860.       | Tons. | Lbs. |                              |         |    |
|-------------|-------|------|------------------------------|---------|----|
| May 8th,    | 119   | 1540 | Blossburg coal, at \$3.90..  | \$467   | 10 |
| " 24th,     | 83    | 1183 | " " " ..                     | 326     | 00 |
| June 16th,  | 151   | 1800 | " " " ..                     | 592     | 40 |
| " 30th,     | 136   | 1320 | " " " ..                     | 532     | 97 |
| July 17th,  | 152   |      | Lehigh coal at \$5.50 ...    | 836     | 00 |
| Aug. 4th,   | 48    | 1435 | Blossburgh coal, at \$3.90.. | 189     | 99 |
| " 6th,      | 158   | 396  | " " " ..                     | 616     | 97 |
| " 14th,     | 178   | 1128 | Lackawanna coal at \$4.40..  | 785     | 68 |
| " 20th,     | 99    | 1539 | " " " ..                     | 438     | 38 |
| " 23d,      | 184   | 238  | " " " ..                     | 810     | 12 |
| Sept. 28th, | 98    |      | " " " ..                     | 431     | 20 |
| " "         | 121   | 1268 | Lehigh coal, at \$5.50 ..... | 668     | 98 |
| TOTAL....   | 1532  | 847  |                              | \$6,695 | 70 |

On account of which, it is admitted and proved, Bull has  
received from Maher & Kelley ..... \$3,150 06

Balance of cost price unpaid..... 3,545 73

The above sum of \$3,150.06 is composed of the following items  
at the dates given :

|                |                                    |         |    |
|----------------|------------------------------------|---------|----|
| June 16, 1860, | Illinois Central Railroad Co. note | \$630   | 39 |
| Aug. 31,       | " Cash .....                       | 144     | 67 |
| Sept. 9,       | " Draft on New York.....           | 900     | 00 |
| " 28,          | " N. S. Bonton's notes .....       | 1,250   | 00 |
| " "            | " Cash .....                       | 25      | 00 |
| Oct. 2,        | " Cash.....                        | 200     | 00 |
|                |                                    | \$3,150 | 06 |

These figures appear in the schedule attached to the bill and are  
admitted to be accurate by the sworn answer.

The expenses of the firm up to the time of filing the bill for  
freight, help, cartage, hoisting, weighing, etc., a detailed statement  
of which is attached to the bill, amounted to \$833.16.

The total amount of the sales of coal by Kelley & Co., which had been received from Bull in 1860, as shown by the testimony of Hunt, who testified to the quantity of each kind remaining on hand, on the 11th of October, 1860, was as follows;

|                              | Tons. | Lbs. |
|------------------------------|-------|------|
| Blossburg received 1860..... | 697   | 1674 |
| On hand 11th of October..... | 94    |      |
| Sold .....                   | 603   | 1674 |
| Lehigh, received .....       | 273   | 1268 |
| On hand 11th of October..... | 235   |      |
| Sold .....                   | 38    | 1268 |
| Lackawanna, received.....    | 561   | 905  |
| On hand 11th of October..... | 359   |      |
| Sold .....                   | 202   | 905  |

The sales of these quantities at the prices received for them would show as follows:

| Tons. | Lbs. |                           |                   |
|-------|------|---------------------------|-------------------|
| 603   | 1674 | Blossburg at \$6.....     | \$3,622 00        |
| 202   | 905  | Lackawanna at \$6.50..... | 1,316 25          |
| 38    | 1268 | Lehigh, at \$8.....       | 307 80            |
|       |      |                           | <u>\$5,246 50</u> |

During the period during which these sales were made the selling price of Blossburg coal in Chicago, was \$6 per ton.

It advanced greatly afterwards, during the Fall of 1860 and Winter of 1860-61.

The selling price of Lackawanna during the Summer had been \$6.50, after the 11th of October it, also, greatly advanced, and during the Winter run up to \$12 a ton.



Lehigh coal was selling, during the same time, at \$7.50 to \$8, it also advanced greatly after the close of navigation, ranging as high as \$13 to \$14 per ton.

The evidence shewed that all kinds of hard coal were very scarce that Fall and Winter, and that prices were, in consequence, extremely high.

When the difficulties between Bull and Maher & Kelley commenced, about the 10th of October, 1860, the following quantities of the coal, furnished by Bull during that year, remained in the yard of Kelley & Co. unsold, as proved by the testimony of the witness Hunt.

|                 | Tons.     |
|-----------------|-----------|
| Lackawana,..... | 359       |
| Blossburg,..... | 94        |
| Lehigh,.....    | 235       |
| Total,.....     | tons, 688 |

By adding the above quantity to the quantity of the various kinds already shewn to have been sold, it will be found to make up the precise quantity delivered by Bull in 1860—1,532½ tons.

|                                                                          |         |
|--------------------------------------------------------------------------|---------|
| At \$6 per ton, there was then of Lackawana coal, on hand, in value..... | \$2,154 |
| Of Blossburg, at \$6.....                                                | 564     |
| Of Lehigh, at \$8.....                                                   | 1,880   |
| Total value of coal on hand 11th October, 1860, at above prices.....     | \$4,598 |

It will thus be seen how little of truth or justice there is in the claim set up in the answer, that Bull had failed to supply coal; and the frequency and large amounts of the shipments, show conclusively how earnest Bull was in his endeavors to faithfully perform his part of the agreement.

Now, how had Maher & Kelley performed theirs—as they swear they did—let us examine.

They were to pay over to the book-keeper, *weekly*, an amount equal to the cost price of the coal at Buffalo, out of the cash sales. Did they do so?

The account of payments made by them, excluding the Bouton notes, (an explanation of which will be given hereafter), shows as follows:

|                                                  |                   |
|--------------------------------------------------|-------------------|
| June 16th, Illinois Central R.R. Co.'s Note,.... | \$630.39          |
| August 31st, Cash,.....                          | 144.67            |
| September 4th, Draft on N. Y.....                | 900.00            |
| “ 28th, Cash,.....                               | 25.00             |
| October 2d, “ .....                              | 200.00            |
| Total,.....                                      | <u>\$1,900.06</u> |

The answer admits cash sales to the amount of \$3,607.83. Let us examine how that would leave the account, supposing that sum to be correct, for the sake of argument, and the unfairness and disingenuousness of the answer, and of the conduct of Maher & Kelly, will, we think, be at once apparent.

|                     |                   |
|---------------------|-------------------|
| Cash Sales,.....    | \$3,607.83        |
| Less Expenses,..... | 833.00            |
| Balance,.....       | <u>\$2,774.83</u> |
| Paid on above,..... | <u>1,900.06</u>   |

In arrears on their own showing,..... \$874.77  
and only about \$225 less than we claim they were, for cash received.

Now as to the Bouton notes, the facts are, as proved by Bouton: That on the 28th of September, 1860, Mr. Bull being in Chicago, and, acting for the firm of Kelley & Co., made a sale to Mr. Bouton of a quantity of Lehigh and Blossburg coal, to be delivered as



Bouton required it, at his foundry. Bull gave Bouton an order on Kelley & Co. for the coal, which Kelley & Co accepted; and then Mr. Bouton gave his notes for the amount, \$1,250, which notes were handed over by Kelley & Maher to Bull—were charged to him in account as so much cash, and treated by Kelley & Maher as cash *received* for coal sold by *them*.

But, unfortunately for Mr. Bull, within a few days after this transaction had taken place, the difficulties between Bull and Maher & Kelley culminated in a suit, and the latter gentlemen then refused to deliver to Mr. Bouton the remainder of the coal due to him on the order which Bull had given, and which Kelley & Maher had accepted—Kelley & Maher then pretending that *they had not the coal to deliver*.

At that very time the proof conclusively shows they had in the yard, of coal supplied by Bull in 1860, 94 tons of Blossburg and 235 tons of Lehigh.

All that Mr. Bouton required, of both kinds, was 95 tons 1,650 pounds; being 56 tons 1,715 pounds of Lehigh, and 38 tons 1,935 pounds of Blossburg. And with 94 tons of Blossburg and 235 tons of Lehigh on hand, Maher & Kelley, after charging Bull with Bouton's notes as cash, refused to deliver any more coal to Bouton on the order.

In consequence of this refusal Mr. Bouton refused to pay his notes, which Bull had negotiated, and Bull was obliged to send coal from Buffalo to make up nearly the entire deficiency to Bouton.

Before, however, this coal could arrive at Chicago, Bouton got out of coal and his works were about being stopped, when he was authorized by Bull to purchase what he needed, (to keep him going till the coal, sent by Bull, should arrive), in the market here, and that Bull would pay for it. This he did, as will be shown.

Of the 95 tons that Bouton was short, he purchased, under above arrangement with Bull, 28 tons from Price & Morris and J. S. Newhouse, and Bull paid him for it. Bouton then paid his notes.

Kelley & Maher afterward directed their book-keeper to credit Bull's account with \$591, for short delivery to Bouton, which was done.

This, it is assumed, was the amount at Bouton's contract price; but the testimony of Bouton shows a much heavier loss to Bull than that—a loss, in short, nearly equal to the full amount of Bouton's notes—\$1,250, as will be shown.

Bull had to send the coal to Bouton from Buffalo late in the season; owing to the great scarcity of coal, arising from strikes among the miners, and a great difficulty in getting vessels, and the Lehigh coal which he sent was frozen in at Detroit on its way up.

The coal was transported from Detroit to Chicago by rail, and the freight on it was \$302.29, which Bull paid.

This is the manner in which that transaction foots up, as shown by the testimony :

Bouton was short 95 tons, which he had paid for by his notes, and which 95 tons Maher & Kelley ought to have delivered, as they treated Bouton's notes as a cash sale of coal.

|                                                                                                                                                                              |                   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Bouton bought of Newhouse to amount of.....                                                                                                                                  | \$ 96.47          |
| He bought of Price & Morris.....                                                                                                                                             | 129.88            |
| He charged Bull for short delivery, after all.....                                                                                                                           | 73.50             |
| Railroad freight from Detroit on Lehigh coal. ..                                                                                                                             | 302.29            |
| Cartage.....                                                                                                                                                                 | 33.10             |
| Sixty-seven tons delivered by Bull from Buffalo, including lake freight on Lehigh to Detroit, and railroad freight on Blossburg from Buffalo to Chicago, at \$8 per ton..... | 536.00            |
| Loss.....                                                                                                                                                                    | <u>\$1,171.24</u> |



This loss, it was claimed, ought to have been paid by Maher & Kelley, but the court only decreed against them the \$591, which they themselves had admitted was the amount, in value, short delivered to Bouton, and which they ordered their book-keeper to credit to Bull.

It would, therefore, seem that the Bouton notes ought not to be allowed to Kelley & Maher as a payment.

On the 11th of October, 1860, according to the testimony, Kelley & Maher had on hand in the yard, of coal furnished by Bull in 1860, 688 tons of *hard coal*.

The price of which, almost immediately afterwards, run up \$12, and before Winter was over \$14, per ton—say \$10 per ton all round, and it shows value of coal in yard.....\$6,880.00

Deduct cost, as shown under.... 3,238.70

Shows a profit of.....\$3,641.30

Cost price of the different kinds:

359 tons of Lackawanna at \$4.40 per ton.....\$1,579.60

94 " Blossburg " 3.90 " ..... 366.60

235 " Lehigh " 5.50 " ..... 1,292.50

Total cost.....\$3,238.70

The sales already shown of three kinds up to Oc-

tober 11th, 1860, amounted to.....\$5,246.05

The cost of which, at Buffalo, was..... 3,458.55

Profit.....\$1,787.50

Cost of what was sold as above shown:

603 tons 1,674 pounds, Blossburg, \$3.90.....\$2,355.65

202 " 905 " Lackawanna, 4.40..... 890.80

38 " 1,268 " Lehigh, 5.50..... 212.10

\$3,458.55

The following brief summary will show figures, as given above in detail.

|                                                      |            |
|------------------------------------------------------|------------|
| Total quantity of coal delivered, at                 |            |
| cost price.....                                      | \$6,695.79 |
| Less paid including Bouton notes.....                | 3,150.06   |
|                                                      | <hr/>      |
| Balance on cost of coal.....                         | \$3,545.73 |
| Profit on sales of \$5,246.05 before                 |            |
| 11th of October, 1860, as shown....                  | \$1,787.50 |
| Bull's one-third.....                                | 595.83     |
| Profit on coal on hand 11th October, as              |            |
| shown.....                                           | 3,641.30   |
| Bull's one-third.....                                | 1,213.76   |
| Bull's loss on Bouton transaction.....               | 1,171 24   |
| Interest from 11th October, 1860, to date of decree. |            |

Deduct one-third of all expenses and freights, etc., allowed by court at \$1,500—a large allowance, and it appears that the decree instead of being, as appellant claims, excessive, is not as much as it ought to be by over \$1,000.

An attempt was made on the argument of this case in the court below to claim damages, because Bull did not supply all the coal that Maher & Kelley thought that they could have sold or contracted for, and that in consequence of an insufficient supply, they suffered loss.

The answer given to this claim in the court below and repeated here, in case any such ground is urged for a reversal of this decree, is simply that when Maher & Kelley ceased to pay for what they had sold, with plenty of coal on hand for any *legitimate* operations, it was not surprising that Bull should decline to send more—but more was not required at the time of the difficulties, commencing 10th of October. At that time, as has been shown, Maher & Kelley had on hand, in their yard, 688 tons of *hard* coal, (Blossburg, Lehigh and Lackawanna) which they had got from Bull that season.



It will be observed that the busy coal season had then hardly commenced.

Some time after the commencement of this suit, Maher & Kelley were called upon by Bouton to deliver him coal on his order which they had accepted, and they *refused*, alleging that *they had no coal on hand*.

This was entirely untrue, as has been shown, and if anything further were wanting to show, how systematically Maher & Kelley seem to have gone to work to defraud Bull, it was proved that before the commencement of this suit, some days, and while Bull was in Chicago attending to the business of the settlement of his account with the firm, Maher & Kelley, while pretending to be carrying on the business as usual, had made what they called a sale to a man by the name of Roberts of *all the coal on their yard* for his note of \$2,600.

No entry of this most fraudulent and vile transaction ever appeared on the books of Kelly & Co., except upon an order book, as it was called, which was kept in the office for persons to write orders for coal in, and in that book, and only in that, it was proved that Kelley had directed an entry to be made *by the yard man* a long time after the pretended sale, and after the commencement of this suit, and the service of the injunction.

The coal was never removed from the yard, but was sold afterwards, no entries of the sales were ever made on the books, and no one except Maher & Kelley have ever heard anything of the proceeds.

The whole transaction was a bold and impudent fraud, done for the purpose which has been pretty successfully accomplished, of cheating the late Mr. Bull, their partner, and so well have they succeeded in their efforts, that by every device known to the law, and by resorting to all sorts of fraudulent practices, they have

not only pretty thoroughly ruined him financially, but have actually through sheer excitement and suffering and vexation caused by this and other protracted and harrassing litigation, to which Bull was a party, or in the success of which he was interested as collaterally liable on the paper sued for, worried the poor man into his grave.

The disgraceful Roberts' transaction will stand out in a more repulsive light when it is stated as it was proved, that at the time when Maher & Kelley pretend to have *sold* all the coal on their yard for \$2,600, and for the note of an unknown man, the cash value of the hard coal alone which they had received from Bull, was on that day (2d Oct.) over \$5,000 ; and that was not all. The coal which they got from Bull, and which they pretended to sell in this way, it was provided by the articles of copartnership should remain the property of Bull until it was sold in the *ordinary course of business*.

Will it, can it be pretended, that this sale or pretended sale to Roberts was *in the usual course of business* ?

It will not do for Mr. Maher, the appellant, to claim that he had nothing to do with this matter—that it was all done by Kelley.

When he and Kelley were brought up for contempt for a violation of the injunction in this case, by selling coal, they both excused themselves by setting up this pretended sale to Roberts.

In every aspect the justice and equity of the case is with the complainant, and the decree against the defendants below, even upon their own showing, is not sufficiently large, for, by reference to their Ledger, as corrected and revised by their *eminent* book-keeper (the witness Quigg), it will be found that the balance at Bull's credit is between \$4,000 and \$5,000, and which balance shows no entry to his credit of any profit whatever.



## POINTS OF APPELLEE.

The analysis which has now been made will serve to give the courts, at least a correct outline of the case, as presented by the record.

The appellant Maher has assigned *forty-two* (42) causes of error. We challenge the whole *array*. We are unable to discover but three or four points in the whole case, and those points relate :

- 1st. To the dismissal of the cross bill.
- 2d. The striking from the files the separate answer of Maher, filed by him on the 18th of August, 1862, and,
- 3d. The refusal of the court to hear parol testimony in support of said cross bill and separate answer.

All the other matters which relate to the merits of the case, and the correctness of the decree of the court, ordering a dissolution of the partnership and the payment to Bull of the amount of coal sent to Maher and Kelley, are questions of fact which depend upon the point whether Maher ever was a partner at all of Bull's, and if so, whether he is responsible as such partner, according to the provisions of the articles of copartnership which were made, and entered into by him.

## I.

We contend first, that there was no error in dismissing the cross bill, because the record shows that there could be no affirmative

relief whatever that could be granted. The cross bill having been filed to enjoin the two suits at law, of Edward H. Downs, and the Cecil Bank, on the ground that Bull was merely using their names, was answered fully by Bull—Downs and the Cecil Bank—utterly disproving every allegation which the cross bill contained regarding said suits.

## II.

The separate answer which was filed by Maher on the 18th day of August, 1862, was entirely contradictory of his *sworn* answer of Oct. 26, 1860, and was for that reason correctly stricken from the files, the rule being that a defendant will never be allowed to file a supplemental answer contradicting the statements in the first answer.

*Greenwood v. Atkinson*, 4 Sim., 61.

*Thomas v. Visitors of Frederick Co. School*,  
7 Gill. and Johnson, 389.

1 Ves. and Beam., 149.

2 Ves. and Beam., 163–256.

Especially *Bowen v. Cross*, 4 Johns. Ch., 376,

Sec. 2, Daniels Ch. Prac., 950.

3 Wend., 573.

After an answer has been put in upon oath, the court will not, for obvious reasons, readily suffer any alteration to be made in it.

2 Daniels Ch., 945–6–7.

3 Barb. Ch. Rep., 610.

It is only allowed in matters of form, mistakes of dates, verbal inaccuracies, &c.

Story's Eq. Pl., sec. 896.



An amendment changing the whole ground of defence set up in the first answer will not be allowed.

*Western Reserve B'k v. Stryker*, 1 Clark, 380.

2 Bland, 261.

2 Daniels Ch. Prac., 950.

*Tidswell v. Bowyer*, 7 Sim., 64.

1 Barb. Ch. Prac., 166-7.

A defendant is not allowed to file a supplemental answer for the purpose of setting up an important fact, which has arisen since the filing of the original answer. He should file a bill in the form of a supplemental bill.

*Taylor v. Titus*, 2 Edw., 135.

Story's Eq. Pl., sec. 103.

Where a defendant has obtained permission to file a supplemental answer for the purpose of correcting a mistake in his original answer, he must confine his supplemental answer strictly to the correction of the mistake sworn to. If he goes beyond that, and makes any other alteration in the case than what arises from the correction of such mistake, his supplemental answer will be taken off the file.

2 Daniels Ch. Pr., 950.

2 Ves. and B., 163-167.

To show that Maher's answer, of August 18, 1862, entirely contradicts his first answer we call attention to the following discrepancies and contradictions:

1st. The joint and separate answer of Kelly and Maher, which was filed on the 26th of October, 1860, and *sworn to*, admits the formation of the copartnership, and the correctness of the articles of copartnership, and supplementary article explanatory of the original ones, of Sept. 6th, 1860, as set forth in complainant's bill—see page 15 of abstract.

In Maher's separate answer, of August 18, 1862, admits the formation of the copartnership, but *denies* that the explanatory articles are correctly set forth. See page 35 of abstract.

2d. Maher admits in his *joint* and separate answer that he and Kelly received 1,522 405-200 tons of coal, which Bull charged, at cost price, \$6,879 41-100. "They also admit that, in the regular course of their business, they have sold of said coal, so received, a part thereof, *for which they have received* \$3,607.83, and that a *further quantity of said coal has been sold*, the payment for which "is still outstanding and uncollected"—see page 15 of abstract—but they entirely fail to show *how much*. In his separate answer, of August 18, 1862, he first says that he don't know anything about the coal, except from Bull's statements, but denies that Bull furnished the quantity of coal he agreed to do: then he "expressly denies that he, said Maher, has sold or contracted to sell a large portion, or *any* of said coal, furnished to said firm by Bull & Co." See page 36 of abstract.

3d. Maher in his joint and separate answer, page 16 of abstract, admits that "the amounts of coal furnished by said Bull were according to the statement set forth in exhibit 'B,' appended to said Bull's bill of complaint," as to dates, quantities, &c.—see page 12 of abstract for this exhibit—"except two items of receipt, &c., on 29th of September, which instead of 142 and 98 tons, respectively, ought to be 129 7-2000 and 95 157-2000 tons respectively." All this is sweepingly denied in his separate answer.

4th. Maher, in his first answer, admits his joint liability, as a partner in the business, and bound to account for all the coal sent to him and Kelley by Bull. On page 37 of the abstract, Maher, having taken recent counsel upon the subject, denies his liability in the boldest and most peremptory manner, and expressly "denies that there is any provision in said articles that he should take charge of or *in any* way control or *pay over* any of the proceeds of the sales of coal furnished by said *Bull to said firm*." See page 37 of abstract.



5th. Maher, as appears by the abstract, commencing at page 38, and from thence on to the close of his answer, denies each and everything that he formally admitted in his joint and separate answer, and denies that he is, "*jointly with said Kelley, or individually*" was liable with said Kelley to pay over to said Bull, under said "articles, said sum of \$1,104 10-100, or *any* other sum," &c. See page 39 of abstract. On page 40, after reiterating, with marked emphasis, his non-liability, either "*individually or jointly*," he says, in regard to Kelley, "whether said Kelley has converted said sum, or any other sum, coming into his hands, in the course of said partnership business, he is unable to say, but, whether he has or not, *said Maher* denies that *he* is in any way liable for *such conversion* of said Kelley." See page 40 of abstract.

6. By the eleventh article of the articles of copartnership—found on page eleven of abstract—it was expressly agreed "that the proceeds of the sale of coal, shall be weekly paid over to the book-keeper furnished by Bull, etc.;" on page 40, Maher, to show what close attention he paid to the business, says, "that *he* is unable to say whether weekly payments have been made by said Kelley to said Bull, as was originally contemplated, or not, etc." He then proceeds to show further, that he did not know anything about the business, and paid no attention to it at all, notwithstanding he had, under his own signature, entered into partnership with Bull, who had confided in him as well as Kelley; and Bull was sending on to him thousands of dollars worth of coal.

7. The ostentation with which this defiance is attended, will further appear by reference to page 48 of abstract, in which, after Maher has shown that he had utterly neglected the business, and had paid no attention to it whatever, he deliberately "claims that whatever amount of damages said Maher & Kelley, or either of them, have been compelled to pay; and the amount of coal delivered for which payment cannot be collected, in consequence of the failure of said firm to deliver coal, and whatever amount said firm has become liable to pay, *should be charged to said Bull*, in-

“asmuch as the failure of said Bull to keep the covenants in said articles, on his part.”

In fine and in short, Maher, in his second answer, attempts to change the whole theory of his case, and contradicts almost every fact and every admission which he made in his sworn answer of October 26th, 1860.

### III.

As to the court refusing to permit the defendants to introduce parol testimony at the hearing, we submit that under the circumstances the court decided correctly, for the reason, 1st, That the counsel for the defendants had, by agreement entered of record, agreed to close their proofs, and should be bound by their agreements.

2d. That the evidence offered by Maher was to support the cross bill and separate answer of Maher, which the court decided to strike from the files, and consequently the evidence was on that ground properly rejected.

3d. That even if this were not so, and Maher had desired to introduce witnesses to prove the allegations of his joint and separate answer, the court could, in its discretion, refuse to hear mere cumulative evidence, which the evidence offered at the hearing undoubtedly was.

It is respectfully submitted that there is no error in the record, and that the decree of the court below ought to be affirmed.

HERVEY, ANTHONY & GALT,

*Solicitors for Appellee.*



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# SUPREME COURT,

STATE OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1864.

HUGH MAHER,  
IMPLEADED WITH  
EDWARD KELLY,

vs.

MARIA BULL,  
ADMINISTRATRIX OF  
CADWALLADER BULL,

} *Appellant.*

} *Appellee.*

Appeal from the Superior Court of Chicago.

ARGUMENT AND POINTS FOR APPELLANT.

*Filed May 13, 1864.*  
*S. C. & I. J. Nicholes*

D. C. & I. J. NICHOLLES,

SOLICITORS FOR APPELLANT.

SUPREME COURT OF ILLINOIS.

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vs.

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ADMINISTRATRIX OF  
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*Appellant,*

*Appellee.*

Appeal from the Superior Court of Chicago.

I.

The decree does not pass upon the causes of complaint made in the bill. The articles of co-partnership provided that the co-partnership should extend one year, to May 1st, 1861, and that it might extend two years more if the parties should think it best—that is to May 1st, 1863. The complainant below had agreed to furnish a supply of coal for the firm till May 1st, 1861. And on the 11th day of October, 1860, he filed the bill in this case, to be relieved from his liabilities under the partnership articles, for certain alleged misconduct on the part of the other members of the firm. An issue is formed, and a large amount of proof taken. The complainant either had or had not the right to be relieved from his agreement contained in the articles of co-partnership. If there was cause, the partnership should have



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been dissolved, and the defendants decreed to account to the complainant. The decree recites that the partnership was dissolved by the death of the complainant.

By the terms of the articles of co-partnership, the partnership would have expired long before the death of the complainant. He did not die a partner of the defendants, and therefore his death could not dissolve the partnership. The Court might as well have avoided passing upon the matter in controversy, by decreeing that the partnership had expired by limitation. The death of the complainant was a matter subsequent to the filing of the bill, and if relief could be predicated upon that event at all, it could only have been done by way of a supplemental bill.

## II.

The complainant must recover, if at all, upon the case made by the bill. *Chaffin vs. Heirs of Kimball*, 23 Ill. R. 36; *Rowan vs. Bowles et ux. vs. Kirkpatrick et ux.* 21 Ill. R. 17; *McKay vs. Bissett et al.* 5 Gill R. 499; *Story's Eq. Pl. Sec. 257*; *Crocket vs. Lee*, 7 Wheaton 520; *Tripp vs. Vinceton* 3 Barlow's Ch. R. 613, 10 Wheaton R. 181; *Lingan vs. Henderson*, 1 Bland's Ch. R. 257.

Facts transpiring subsequent to the commencement of the suit will not authorize a recovery upon the original bill. *Lingan vs. Henderson*, 1 Bland's Ch. R. 257; *Tripp vs. Vincent et al.* 3d Bar. Ch. R. 613, 5 Gill R. 499, and cases last cited.

The causes authorizing the Court to decree a dissolution, must exist at the time of the commencement of the suit. *Lingan vs. Henderson*, 1 Bland's Ch. R. 257, 5 Gill R. 499.

The Court will not decree an account between partners without dissolving the partnership. *Glover vs. Tuck*, 24 Wen. 158, *Story on Part. Sec. 229*; 348, N. 4, *Forman vs. Homfray*, 2 V. & Beam. 329; *Gridley vs. Dole*, 4 Comst. R. 486.

The Court will not dissolve a partnership for slight causes. *Story on Part. Sec. 287*, Note 2 and 288; *Story Eq. Juris. Sec. 673*; *Colier*

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on Part. Sec. 296 and 297; Blake vs. Dongan, 1 Iowa (Green) 537; Story on Part. Sec. 274, Note 1.

A co-partnership dissolved by effluxion of time, or by death since the commencement of a suit for dissolution and an account, will not authorize the Court to decree an account, because the causes authorizing an account are not those alleged in the bill.

See authorities above cited.

The causes alleged in the bill to authorize the Court to decree a dissolution of the co-partnership and an account are the following :

FIRST.

That it is provided in the articles of co-partnership that correct books of account should be kept, and be accessible to the parties, and that Kelly had deprived the complainant of the right to examine the books, and directed the book-keeper not to allow the complainant to make examination.

SECOND.

That it is expressly provided that balance-sheets should be furnished to the several partners at the close of each month, that each partner might be informed as to the state of the business, "and that there never has been, since the commencement of the business, any monthly balance statements furnished to your orator," "and that the said Kelly" "has repeatedly directed the book-keeper employed by your orator not to prepare any such monthly statements for your orator."

THIRD.

The complainant, after showing in his bill of complaint a detailed account of the coal furnished by him, and of the cash alleged to have been received, claims that the firm had, at the date of filing the bill, the sum of \$1,104.10 in all, cash on hand, which he claims should be



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paid over to him; and charges that "the defendants have neglected "and refused so to do, and have directed the book-keeper employed "by your orator, as aforesaid under said articles, not to pay over any "money whatever to the complainant, and that the complainant has "been unable to obtain said sum, or any part thereof," and that the defendants have refused to pay the same and converted the same to their own use, and "that weekly payments have not been made at "any time with regularity, as required by said articles, as the dates in "said accounts hereto attached, and before referred to will show."

The above are all the causes alleged by the complainant to authorize the Court to decree a dissolution of said co-partnership and an account, and to release said complainant from his obligations contained in said articles of co-partnership. And the complainant shows by his bill that he had agreed, and was under obligation to the firm of Kelly & Co., to furnish and provide all the coal that should be needed or that should be required for the business of the firm. The firm had entered into large contracts for the delivery of coal during the winter, and the price of coal had commenced rapidly to advance. There was, at the time of filing of the bill, a market for coal. The complainant sought by the bill for the said causes of complaint to be relieved from his contract by means of a dissolution of the firm, and asks as additional relief, that an account of all the partnership dealings and transactions be taken, and that the defendants be decreed to pay over what upon such accounting shall be found due the complainant.

The complainant either is or is not entitled to the relief sought in the bill for the causes alleged. We might concede that if the causes alleged in the bill were all true, they might constitute grounds for the relief sought. But the Court in this case cannot found the relief upon any other or different matters than those that were set out in the bill. The Court below, by the decree in this case, found that the co-partnership had been dissolved by the death of the complainant, without passing upon the causes alleged in the bill to authorize the Court to dissolve the said co-partnership.

And the Court below further found that the said Bull, who shows by his bill that he furnished the coal to the firm of Kelly & Co., composed of Bull, Maher and Kelly, furnished the defendants \$6,695.79 worth of coal. And therefore the Court decreed that the defendants should pay for the coal. This part of the decree, so far from being founded on any of the allegations in the bill, is founded on a fact which the complainant alleges, and the proof shows not to be true, the bill and proof both showing that the coal was furnished to Kelly & Co., composed of Maher, Kelly and Bull.

The same remark might be made as to the selling of the coal. The bill alleges and the evidence shows that it was sold by the firm of Kelly & Co., composed of Bull, Maher and Kelly, while the decree finds it was sold by the defendants. The bill shows that the coal that was in the yard of Kelly & Co. at the time of filing the bill, which had been supplied by Bull, was the property of Bull. And there is no charge in the bill against the defendants for converting this coal, and the decree in the Court below does not find that we have converted the same, but because the coal was in the yard of the firm of Kelly & Co., it is apparently decreed that the defendants shall pay the complainant below the sum of \$1,213.36.

The complainant by his bill shows that upon a dissolution each partner was to refund to the firm the amount drawn out by him, and after paying the liabilities of the firm the stock of the firm was to be divided equally between the partners, and prays that an account may be taken, and that the defendants may be decreed to pay what, upon taking such account, may appear to be due to the complainant. But the Court below in this case, without taking any account of the partnership property, and without compelling the several partners who had withdrawn money from the firm to refund, and without determining how much was coming to each partner, simply decree that defendants should pay the complainant for the complainant's coal that remained unsold, and also for the coal which had been sold on credit, the debts created from the sales of which the defendants had been enjoined from collecting by the complainant.



(6)

If the complainant in this suit was entitled to any relief, it must have been founded upon the causes of complaint alleged in the bill, and in relation to which the evidence had been introduced. The defendants in the Court below were not bound to disprove what the complainant had not alleged. If they had shown by evidence that the allegations in the bill were not true, they had introduced all the evidence that was necessary. The causes of complaint set out in the bill are shown by the evidence not to have existed.

FIRST.

As to the allegation in the bill, that the complainant was excluded from the books: Hunt swears in answer to the 120th and 121st cross interrogatories, on page 416 of record, that he never refused to give Bull any information from the books, and that Bull always had free access to the books, and there is no evidence in support of this allegation.

SECOND.

As to the allegation in the bill, that balance sheets were not furnished: Bull employed Hunt in pursuance of the articles of co-partnership, as his book-keeper. He was his principal witness in this case. In answer to the 122d cross interrogatory, on page 417 of the record, he says that Kelly did not, to his knowledge, direct him not to make out balance sheets.

And in answer to the 133d cross interrogatory, on page 420 of record, he says: "I never had had any experience in keeping books by "double entry, or in any other way, before I commenced keeping the "books of Kelly & Co."

And in answer to the 136th cross interrogatory, on pages 421 and 422 of record, he says that he was directed by Bull to make an account of sales monthly, and report to Bull, and that he "did not follow his "direction as to the making the account of sales, because he did not "know how to make out the account of sales."

So that it plainly appears from the evidence that it was Bull's fault that monthly balance sheets were not made out; for he, under his agreement to furnish a competent book-keeper, furnished a person that swears that he was incompetent. And Mr. Maher has the right to complain, and not Mr. Bull, that the balance sheets were not furnished.

### THIRD.

The third cause of complaint above stated is that the defendants, Maher and Kelly, had converted the money due to the complainant, to the amount of \$1104.10, and refuse to pay it over. The complainant shows by his bill that the whole amount of the cash belonging to the firm on the day of the filing of the bill was \$1104.10, and no more.

The complainant proved by Hunt's answer to the 27th re-direct interrogatory, on page 370 of record, that he had not only the exclusive charge of the books of Kelly & Co., but that Kelly & Co. (that is, Kelly, Maher and Bull) gave him "full power to receive all the money for coal delivered, and also gave him power to sign checks."

And in his answer to the 94th cross interrogatory, on page 405 of record, Hunt testifies: "Most of it (*i. e.* the money) came into my hands from Mr. Kelly. Mr. Maher had nothing whatever to do with receiving the money. Most of the money was deposited in the bank."

And in answer to the 95th cross interrogatory, on page 406 of record, he says he was authorized to draw money from the bank, and that Maher did not draw money from the bank.

And Mr. Fleming, in answer to the 31st direct interrogatory, on page 577 of record, testified: "The book-keeper and Mr. Kelly received it (*i. e.* the money). Mr. Kelly would receive it if the book-keeper was out. If both were in, the book-keeper generally received it."

And in answer to the 32d direct interrogatory, same page of record, he says: "He [*i. e.* the book-keeper] received most all of it [*i. e.* the



"money], I should think. If Mr. Kelly got money when the book-keeper was out, he would give it to the book-keeper when he came in."

Consequently, from the evidence we come to the conclusion that the money belonging to the firm was received by the book-keeper, and was deposited by him in the bank.

In his answer to the 95th cross interrogatory, on page 406 of record, Hunt testified that Maher never drew money from the bank. The Court will not presume, without evidence, that defendants have been guilty of withdrawing funds from the firm. There is no evidence that they, or either of them, have withdrawn any portion of the money; but, on the contrary, the evidence in relation to the money shows that it was in the possession of the firm, under the control of the book-keeper employed by Bull, in the bank, at the time of filing the bill. If the complainant claims that the defendants have withdrawn money from the firm, it is for him to prove it. As to the weekly payments, the complainant shows in his bill that the article had not been acted upon, and the evidence shows the same thing. Not a single weekly payment was made to the book-keeper. The proof fails to show that Bull ever requested payments to be made in that way. But on the contrary, the evidence shows that Bull, without objection, received his payments in a different manner. Nor does the evidence show that he had authorized Hunt, the book-keeper, to take the money for Bull in that manner.

Where an article has not been acted upon, it should be read the same as if expunged. See Story on Part. Sec. 192 and Note 2; also Sec. 349; Collier on Part. Sec. 209 and Sec. 257.

There is no evidence that Bull ever asked for any money of either of the defendants without receiving it. If Bull had wanted this \$1,104.10, and the firm had had that amount on hand, why did he not ask for it or give directions to Hunt, the book-keeper, to pay it over? For Bull had as much and more to do with and control of the partnership affairs as Maher had, and the book-keeper was under his employment and direction. Considering the mode in which the com-

plainant had consented to receive, and had received his money, before he could have claimed that the defendants below were in default, he should have demanded his money.

And the complainant proved by the deposition of H. L. Bull, in his answer to the 3d direct interrogatory, page 291 of Record, and in his answers to his cross interrogatories, pages 303, 305, 307, 308 of the record, that there was an understanding between Kelly and Bull in Buffalo, that the money should be paid on the draft of the said Bull, and the money was thereafter paid on his drafts, and there is no evidence that the complainant ever drew on the firm without receiving his money.

But the evidence shows that it is not true that there was the amount of \$1,104.10 on hand at the time of filing the bill, but on the contrary that Bull had withdrawn from the firm the sum of \$289.07 more than he was entitled to under said articles. The evidence shows that \$843.16, the amount alleged by the complainant, as the expenses of the firm including the salary of the book-keeper, is not the full amount of the expenses of the firm to October 11th, 1860. The Court below found the amount to be \$1500, including the salary of the book-keeper paid by the defendants. Hunt testified that he altered the books by directions of the complainant to the amount of \$3,742.50, and that the defendant Maher never knew of the alterations, but that he showed the alterations to Kelly a long time after the filing of the bill, and that he can not state that Kelly knew it before the bill was filed. See pages 441 and 448 of record.

The complainant claims to have obtained the information upon which he based his bill from the books of account, and if the accounts had not been correctly kept he should have charged it in his bill. Hunt, the book-keeper furnished by Bull, under his special employ, kept the accounts and swears they are correct, and Bull does not pretend or claim in his bill that the accounts of the concern are not correctly kept. Hunt, in his testimony, in his answer to the 142d cross interrogatory and the interrogatories following, pages 424 to 430 of



(10)

record, and in the exhibits attached to his deposition, pages 494 to 509 of record, marked as follows, shows the following accounts of expenses.

EXHIBITS.

|                                          |           |            |
|------------------------------------------|-----------|------------|
| I. David Trimble,                        | - - - - - | \$25.00    |
| K. Samuel O. Eames,                      | - - - - - | 110.12     |
| L. Robert J. Hunt,                       | - - - - - | 247.02     |
| M. James Flemming,                       | - - - - - | 183.85     |
| N. John McAuley,                         | - - - - - | 332.36     |
| O. Daniel Denehy,                        | - - - - - | 28.00      |
| P. John O. Larey,                        | - - - - - | 368.69     |
| R. Lehigh, Lackawana and Blossburg Coal, | - - - - - | 234.50     |
| S. Cash p'd Freight on Hard Coal,        | - - - - - | 195.24     |
| T. Expenses paid for K. & Co.,           | - - - - - | 484.06     |
| U. Profit and Loss,                      | - - - - - | 27.49      |
|                                          |           | <hr/>      |
|                                          |           | \$2,236.33 |

Among the above items are \$234.50 p'd for coal, and \$110.12 paid Eames for soliciting orders which Bull failed to furnish the coal to fill. In all \$344.62 which were extraordinary expenses, leaving the ordinary expenses only \$1,891.71.

The evidence clearly shows the above to be the correct amount of expenses, and there is no conflicting evidence on the subject. Adding the above amount, \$2,236.33 to the \$3,150.06, the amount of cash complainant admits that he has received, and we have the sum of \$5,386.39, which exceeds the \$5,097.32, the amount of cash charged in the bill to have been received by the firm, \$280.07, which amount the complainant had overdrawn at the time of filing his bill of complaint.

The evidence shows that there was a strong reason why the complainant below should desire to be released from the partnership agreement. Coal had begun rapidly to advance in price. Contracts had been taken for the delivery of a large amount of coal, which would have to be filled at a heavy loss to the firm.

(11)

Bull's conduct in the Bouton transaction shows that his object in making the sale to Bouton was to close out the coal on hand with the view of winding up the business of the firm by suit, and thereby procuring his release from the partnership agreement.

The evidence shows that the object of Bull in making the sale was not the legitimate purpose of making profit.

Bouton testifies in answer to his first interrogatory, page 343 of record,—“On or about the 1st of October, 1860, Mr. Bull at my office “sold to me 336,000 pounds of Lehigh, and 100,000 pounds of “Blossburg coal, and gave me an order on Kelly & Co. for the same.”

And Mr. Bouton attaches a copy of the order to his deposition, marked “Exhibit A,” page 348 of record, which bears date “October 1st, 1860.” Here we have the testimony of Mr. Bouton as to the date and also a memorandum made at the time, the copy of the order itself.

It is true that Mr. Bull, in exhibit D, attached to page 26 of record makes the date of the delivery of the coal two days earlier. His account is as follows :

|                                      |   |   |           |
|--------------------------------------|---|---|-----------|
| “Sept. 29, 336,000 Lehigh to Bouton, | - | - | \$1012.50 |
| “ “ “ 100,000 Blossburg to Bouton,   | - | - | 237.50”   |

This account is probably dated two days earlier than the transactions occurred. But at all events it was about the date of the receipt of the coal, for the coal was received on the 28th of Sept., and the order is for about the amount of that cargo, and was undoubtedly intended as a means of disposing of that cargo. Allowing 2000 pounds to the ton and we have here 168 tons of Lehigh coal sold for a little less than \$6.03 per ton, in all \$1012.50. This same coal, in the last part of exhibit B, page 22 of record attached to complainant's bill, it charged as follows :

“Sept. 29, 142 tons Lehigh coal at \$6 per ton, - \$852.”

And in “Exhibit A,” attached to H. L. Bull's deposition, is charged in the same way. This is an advance of only \$00.3 per ton for



freight, hoisting out of the vessel, yarding and hauling some two miles.

50 tons of Blossburg coal sold for \$4.75 per ton—\$237.50,—an advance of \$0.85 over the cost price of the Blossburg coal, in July, as Bull had charged the firm. But Bull charged the firm 50 cts. per ton more for coal in September than he did in July, and probably Blossburg coal should have had the same increase. But none was shipped in September, and from exhibit C, attached to the deposition of H. L. Bull, it seems that on the 3d day of October, only three days after the sale to Bouton, Bull sold to Dewey, Todd & Co. 169 tons and 167 tons of Lehigh at wholesale from Buffalo, at \$6.25 a ton.

In Hunt's letter of August 30th he tells Bull that "We sell Blossburg at \$6, Lehigh at \$7," etc.; and we see from "Exhibit C," attached to Hunt's deposition, that Bouton was purchasing this coal of the firm, and paying about \$7 per ton; and now after coal had advanced, Bull sells all, or nearly all, the firm had to Bouton, at \$6.03 per ton. Before the time of the sale to Bouton all the evidence shows that coal had commenced to advance in price. Bull knew the price of coal had commenced to advance, and why should he sacrifice the interest of the firm? The firm had not a supply; and it was near the close of navigation. And why should Bull desire to use up what coal the firm had? Hunt, after having repeatedly written to Bull for coal, and getting no supply, writes to him on the 18th of September: "Mr. Maher says that you must furnish us with coal. We are taking orders every day, and Mr. Maher says that we must take the orders and charge you with the profits. We delivered all the small egg coal on different orders to secure them. Our neighbors are all busy, and we might be, if we had coal," etc.

Bull, perceiving the advance in the price of coal, and knowing that the firm was under heavy liabilities to deliver coal at the old rates, undoubtedly made this sale to Bouton for the purpose of using up the coal on hand, with the intention of filing this bill for the purpose of avoiding his liability under said copartnership agreement, by which he

had "agreed to furnish and provide all the coal that should be necessary, or that should be required for said business," etc.

Bull, in said articles, had agreed to furnish said firm with all the coal that should be needed or required by the business of said firm, and he should be bound by his undertaking. In relation to the extent of the business, the articles should be construed strictly. See Story on Partnership, Section 193.

The evidence shows that the complainant below wholly failed to perform his agreement in this respect, and that the other partners demanded of him a compliance with the terms of his agreement, and that the failure of the partnership to prove profitable, and the losses incurred, were attributable entirely to the failure of Bull to comply with his agreement to furnish coal. Bull was to furnish the coal on board of vessels in Cleveland and Buffalo, and was to furnish a supply for the entire year. Of course it must be furnished during the season of navigation. The most of the coal would have to be sold in cold weather, the time it is consumed. And this was contemplated in the Articles of Copartnership, for it is provided in the seventh article, that "In case the receipts of the sales for coal shall be insufficient to pay the freights on said coal at any time, said Maher and Kelly agree to pay said freights," etc. See pages 17 and 18 of record, showing that it was anticipated that the sales of coal in the summer would be comparatively light, and might not equal the freights on the coal furnished. It would not be a compliance with his undertaking to keep the firm barely supplied with the requirements from day to day.

But the evidence shows that he did not do this. Hunt's letters to complainant, attached to his deposition, show that the firm was out of coal a large portion of the time. See pages 514 to 528 of the record. On the 30th of May he writes: "We ought to have some hard coal, as we have orders to fill every day, and have to give orders to other coal merchants to get along." On the 2d of June he writes: "Mr. Kelly wishes me to inform you that he would like 120 to 130 tons Blossburg, as he has closed out the Great West lot." On the 21st of June he writes: "Mr. Kelly wishes me to state that he would like



"very much for you to send him some Lehigh coal," etc. And on the 3d of July he writes: "We would like to have you ship us a small cargo of Mineral Ridge coal, as we have calls every day. We have an order now on our books for ten tons of the above coal, and will be obliged to fill it of Price, Morris & Co., on account of not having some." And on the 27th of August he writes: "We are in great need of some good lump Lehigh coal, also of a cargo of Range coal. By not having either we are losing customers every day." And on the 30th of August he writes: "Our not having a supply of Range coal keeps a great many of our customers from purchasing coal. Would like to have you send a cargo immediately," etc. And on the 18th of September he wrote: "Mr. Maher says that you must furnish us with coal. We are losing orders every day; and Mr. Maher says that we must take the orders and charge you with the profits. We have delivered all the small egg on different orders, to secure them. Our neighbors are all busy, and we would be if we had coal."

These letters were written by Hunt, during the existence of the firm, with the supply of coal before him, and undoubtedly present the true state of the case.

Mr. Samuel O. Eames, in his answer to the 30th direct interrogatory, see page 551 of record, testified as to the supply of coal that the firm had on the 11th of October, 1860: that the firm had "a very small supply;—all the different kinds together would not make a respectable supply of one kind." And in his answer to the 39th direct interrogatory, page 555 of record, he states: "I was in the employ of Kelly & Co. in 1859. We had no coal at all in 1860, compared with what we had in 1859."

And James Fleming, who was the foreman in the yard, testifies in answer to the 16th direct interrogatory, page 573 of record: "There was a full supply for what customers there were for a short time—I think till about the latter part of July or 1st of August, 1860. There was not much coal selling up to that time. That is about the time the coal trade commences." And in answer to the 18th direct interrogatory, page 573 of record, as to the supply of coal in the yard

after the last cargo arrived, he testified: "There was none of two kinds. I believe there was a small share of another kind; all that was there was coal used by blacksmiths."

And Jabez Botsford testified that, [see pages 623 and 624 of record,] he went to the yard after his coal in September, "and several times." And in answer to the 8th direct interrogatory, page 624 of record, he says: "I noticed that they (i. e. Kelly & Co.) did not have any hard coal." The testimony shows that Bull did not comply with the agreement on his part. And if he did not he was not in a position to to complain of the other members of the firm for a non-compliance with the terms of the co-partnership agreement on their part. *Bates vs Wheeler*, 1st Scammon, 54. 2 Story Equity Jurisprudence, Sec. 799, a.

The Complainant had no right to dissolve the firm at an unfavorable time for the purpose of avoiding losses or appropriating profits. See Story on Partnership, Sec. 176. The court below finds the expenses of the firm to have been \$1,500.00, which is \$656.84 more than \$843.16, the amount alleged by the complainant below. Taking \$656.84 from \$1,104.06, the amount in which complainant below alleges that defendants below were in arrear, leaves \$447.22. So that under no view of the case could the defendants below be in arrear more than \$447.22 and neither this sum nor any other sum was ever demanded of them. And although the defendants below might have been in arrear in the sum of \$447.22, for that reason the court below should not have decreed a dissolution. The court will not decree a dissolution for slight causes. Story on Partnership Sec. 287, note 2, 288. Story Equity Jurisprudence, 673. Collier on Partnership Sec. 296 and 297. *Blake vs Dorgan*, 1 Iowa (Green) 537. Story on Partnership, Sec. 274 note 6.

### III.

Each partner is liable to account to every other partner for himself, and not for his co-partner; and no two partners are responsible to another partner jointly. See *Portsmouth vs Donaldson et al.*, 32 Pa. S. R. 202. *Murphy vs Crofts* 13 La. An, 519, Story on Partner-



ship, Sec. 169 and Sec. 173, *Pierce vs David et al.*, 25 Ct., 624, Story on Partnership, 348 note 4, *Levi vs Karrick*, 8 Clark, R. Iowa 150, Story on Partnership, sec. 347, last note.

In case of loss without fault of either member of the firm, each partner should bear his portion of the loss. See *Campbell vs Messier et al.* 4 John Ch. R. 333.

By the articles of co-partnership, made a part of the complainant's bill of complaint under which the business of the firm of Kelly & Co. was transacted, the said Maher "agrees to furnish and contribute, as his portion of the common stock of the firm, the use of the lot of land in Chicago aforesaid, and now occupied by Kelly & Co. as a Coal Yard and also the use of all the fixtures, carts, wagons, &c. now used by said Kelly & Co. in the 'Coal Business.' The said Cadwalader Bull agrees to furnish and provide all the coal that shall be necessary or shall be required for said business, (to wit, the business of said firm of Kelly & Co.) at the lowest market cash value, which said coal is to remain the property of said Bull until the same shall be sold in the ordinary course of business sales." And in case of a dissolution of the firm, the coal remaining unsold was to remain the property of said Bull. And said Bull also agrees to furnish a competent person to keep the books and accounts of said firm."

The said Edward Kelly "agrees to contribute as his proportion his whole time and attention to the superintendence and management of the business of the firm for the mutual benefit and advantage of all parties.

Can the appellant, Hugh Maher, under the pleadings and evidence in this case be held jointly liable with Kelly?

Under the partnership articles it was contemplated by the parties that Kelly was to superintend and manage the business of the firm; and the evidence fully establishes that Kelly did, as a member of said firm, superintend and manage the principal part of the business of the firm, and that said Kelly and Bull, as members of said firm, did sell all the coal sold by said firm, and collect in all of the money arising from such sales; and that said Maher neither sold any of said coal, or collected or received any money due or belonging to said firm. The only

joint covenants in said articles on the part of Maher and Kelly were to advance freights in case the receipts from the sales of coal were insufficient, and to bear all losses from bad debts created by them or either of them, by giving credit to irresponsible persons. Maher should not be held jointly liable with said Kelly further than is provided in said articles, the maxim of the law *Expressio unius est exclusio alterius*, prevailing. Story on Part., sec. 209; Collier on Part., sec. 221; and there is no allegation in the bill and no evidence in the case that either of said joint covenants were broken. But on the contrary, it appears from the evidence that said Maher did perform and keep each and every covenant and agreement in said articles, on his part to be kept and performed.

The evidence shows no liabilities on the part of Maher to Bull, and if liable at all, his liability is created by admissions contained in the joint and several answer of said Maher and Kelly.

When the answer is not excepted to it will be held sufficient, and allegations in the bill not admitted or denied in the answer, must be substantiated by proof. *DeWolf vs Long*, 2 Gilm. 679; *Kitchell vs Rurgwin et al*, 21 Ill., 41; *Dooley vs. Stipp*, 26 Ill., 86 and 89.

Admissions in the answer unless put in issue by some charge in the bill will be of no use to the complainant. Story Eq. Pl. sec. 264. The only admissions in the joint and several answer are in relation to the receipt and sale of coal and cash receipts arising from such sales.

Complainant below alleges in the bill that he furnished the coal to the firm of Kelly & Co., [see pages 4 and 5 of record.] And in exhibit "B," annexed to the bill and made a part thereof, the complainant below says that he furnished the coal to Bull, Kelly and Maher, composing the firm of Kelly & Co. [Page 22 of record.]

Defendants below in their joint and several answer, admit the receipt of coal as entered upon the partnership books, amounting to  $1522\frac{105}{100}$  tons and charged by complainant at the sum of \$6,879.41. page 37 of record.

Complainant below alleges in the bill, page 5 of record, that there was received by defendants from the sales of coal, \$5,097.32, and that a large additional amount had been sold by defendants on credit.



Defendants below admit that in the regular course of their business, they have sold a portion of said coal, for which they have received \$3,607.83, see page 38 of record, and that a further portion of said coal has been sold on credit, which is still outstanding and uncollected.

Complainant below admits in his bill, page 6 of record, that he has received from the defendants an account of coal so sold by said defendants the sum of \$3,150.06, and that the expenses of said firm were \$843.16, page 7 of record, which two sums amount to \$3,992.22, which is \$385.39 more than defendants admit that they have received.

Defendants deny any liability to said complainant under said articles or partnership business.

The above are all the admissions on the part of the appellant in the joint and several answer of the defendants below, which in any way tend to show a joint liability of the appellant with defendant below, Kelly; and the admissions in the joint and several answer are not sufficient to fix a liability on the appellant without the allegations of the bill are substantiated by proof. The decree and the allegations of the bill must correspond, 21 Ill., 17; 11 Ill., 200 and 366; 23 Ill., 36; 29 Ill., 519.

The finding of the court, that Bull supplied defendants with coal, is directly at variance with the allegation of the bill, see page 5 of record, that the coal was furnished to the firm; and the allegation in exhibit "B" annexed to the bill and made a part thereof, that the coal was furnished to Bull, Kelly and Maher, composing the firm of Kelly & Co., and also at variance with the evidence in the case, which shows that it was furnished under the articles of co-partnership to the firm of Kelly & Co. See pages 311 and 370 of record. The said finding not being sustained, the conclusion "that there is and remains due from the said defendants to the said complainant on the cost price of said coal the sum of \$3,545.73," does not follow.

The court erred in finding that the appellant was guilty of a violation of the articles of co-partnership, and a fraud in the pretended sale of coal to said Roberts, there being no evidence to show that Maher had any thing to do with said sale. And no allegation in the bill of a conversion of coal or fraud on the part of the defendants be-

low. Griggs et al. vs. Gear, 3rd Gilm. 13; Story on Part. sec. 347 last note; Lingan vs. Henderson, 1 Bland's Ch. R. 256; 1 Mumford's Virginia R. 447.

Without establishing by evidence, a joint liability against defendants below, the complainant below was not entitled to relief against them jointly. In 1 Bland. (Md. Ch. R.) page 257, the court says: "Where the 'cause of action' 'bears upon several defendants in a dis-junctive, separate or limited manner, the relief granted' may be 'granted against all the defendants, or against some of them only, or 'against each pro rata or in different proportions, but in all cases in 'equity as well as at law, the relief is and can only be granted, because 'of its having been admitted or established that there is and was, when 'the suit was instituted, a valid and existing cause of action, and that 'in so far and no further than there is cause of complaint, can there be 'any foundation for relief."

The separable answer of Hugh Maher, filed with leave of the court, should not have been stricken from the files.

On the 4th day of August, 1862, the court ordered without qualification that defendant Maher have leave to file a separate answer in said suit; see page 215 of record. And on the twenty-second day of December, 1863, after all the evidence in the case had been taken, and most the same with reference to said answer, the court ordered said answer to be stricken from the files. The affidavits of Hugh Maher, on pages, 186 to 202 of the record, and of D. C. Nichols on pages 210 to 214 of the record, see also pages 716, 717 and 718 of record, show that said separate answer should not have been stricken from the files. Maher, under the articles of co-partnership, was not jointly liable in this suit with Kelly to Bull. This suit is brought, as appears from the prayer of the bill, for a dissolution of the co-partnership, and for an account, and for the balance that should be found due upon such accounting. Maher, under a misapprehension of his rights, and by the mistaken advice of his solicitor, joined with Kelly in his answer. He should therefore have had the right as was allowed him by the court,



to have filed a separate answer, and the separate answer filed by him should not have been stricken from the files.

9th of Paige Ch. R. 269 and 271; 1st of Simons R. 209; 4th of Simons R. 471.

#### IV.

The amount found by the court is not sustained by the evidence. The finding of the court that there was 688 tons of coal furnished by Bull on hand at the time of filing the bill, is not sustained by the evidence, and in conflict with the allegations of the bill and answer. The allegations of the bill and the testimony of Robert J. Hunt, the book-keeper, showed conclusively and accurately the amount of coal received, and the amount of coal sold up to the 11th day of October, the time of filing the bill. If we subtract the amount of coal sold by the firm from the amount of coal received by the firm, the remainder necessarily must show the amount of coal furnished by the complainant below on hand at the time of filing the bill. The complainant alleges in his bill that he supplied  $1553\frac{3}{4}\frac{7}{8}\frac{9}{16}$  tons to the firm, previous to the filing of his bill. See exhibit "B" on page 22 of the record.

But the defendants deny that this amount was received by the firm in their answer, and complainant proves by Robert J. Hunt that he furnished said firm with  $1532\frac{3}{4}\frac{3}{8}\frac{7}{8}$  tons of coal only. See page 353 of record.

The complainant also proves by said Hunt the amount of coal furnished by complainant sold by said firm previous to the time of filing his bill, to be as follows, to-wit:

|                                                             | TONS. | LBS. |
|-------------------------------------------------------------|-------|------|
| 1st. Blossburg coal sold from May 10th to Sept. 29th, 1860, | 717   | 982  |
| See pages 354, 462, 463, 466 and 467 of record.             |       |      |
| 2nd. Lackawana coal sold from May 10 to Sept. 29, 1860,     | 428   | 005  |
| See pages 356, 470, 471, 472, 473, 474 and 475 of record.   |       |      |
| 3rd. Lehigh coal sold from July 17 to Sept. 27, 1860,...    | 146   | 669  |
| See pages 357, 476, 477 of record.                          |       |      |

|                                                              | TONS. | LBS. |
|--------------------------------------------------------------|-------|------|
| Total amount of coal sold on and previous to Sept. 29, 1860, |       |      |
| by said firm of coal furnished by Bull.....                  | 1,291 | 1656 |

Subtract this amount from the coal furnished by Bull,  
and we have..... 241 191

the amount remaining unsold on the 29th of September, 1860, thirteen days before the commencement of this suit, for Hunt swears to sales of Blossburg and Lackawana to September 29th only, and Lehigh to September 26th only, 1860.

Complainant in his bill alleges that cash sales of coal to October 7th, inclusive, amounted to \$5,097.32; and in exhibit "D" annexed to his bill, the same thing is shown. See pages 5 and 26 of record. Hunt swears that cash sales from May 16 to October 6, inclusive, amount to \$5,097.32, see pages 359 and 478 of record. Exhibit "D," annexed to the bill, page 26, and exhibit "D" annexed to Hunt's deposition, page 478, show that cash sales were made subsequent to September 29, 1860, of Blossburg, and subsequent to Sept. 27, 1860, of Lehigh. The exhibits show that the three last items contained in the account of cash sales are not embraced in the account of sales of coal, amounting as above shown to 1291 tons and 1656 pounds. These three items to wit:

| LBS.    | LBS. | LBS.    | LBS. | TONS.  | LBS.                 |
|---------|------|---------|------|--------|----------------------|
| 336,000 | - -  | 100,000 | - -  | 13,000 | = 449,000 = 224 1000 |

which added to the amount previously sold amount to 1516 tons, 656 pounds. The complainant proves by Bouton that the sale to him was made on or about October 1, 1860, see pages 343 and 344 of record, and shows by exhibit "A" annexed to his deposition, which is a copy of the order for the coal, that the sale was made October 1, 1860, see page 348 of record. Bouton swears that immediately after October 1, 1860, see page 344 of record, that Kelly & Co. delivered him 198,845 pounds of Lehigh, and 22,065 pounds of Blossburg. We are charged with the whole amount sold to Bouton as a cash sale in the bill, and by the decree, with \$591.00 for short delivery of coal to Bouton; and if we are charged by the decree with the amount of coal we failed to deliver to



Bouton, we should not be charged with the same coal on hand at the time of filing the bill. From the foregoing, it follows that there had been received into the yard of Kelly & Co. from Bull at the time of filing the bill, 1,532 tons and 1,847 lbs.; and that coal had been sold and delivered out of said yard, including the short delivery of coal to Bouton, with which defendants are charged in the decree, amounting to 1,516 tons and 656 lbs. And that the amount of coal remaining in the yard, besides the amount not delivered, with which defendants are charged by the decree, at the time of commencing suit was 16 tons and 1191 lbs., and no more.

That there was very little coal on hand at the time of filing the bill is evident from the testimony of the following witnesses.

Hunt's letters referred to above, show that the firm was out of coal a large portion of the time, and on pages 379 and 380 of record, in answer to 45 and 46 cross interrogatories, he says: "In the latter part of the season we were short of coal; we had not a full supply to fill contracts."

On pages 543 and 544 of record, S. O Eames testifies that orders had been taken for quite a large amount. That he took orders to Oct. 9, 1860. That the orders were not filled because they had no coal to fill them. In answer to the 16th direct interrogatory, page 546 of record, he says, that on the 11th day of October, 1860, judging from the looks of the pile, Kelly & Co. had very little coal in the yard, comparatively speaking, none at all.

James Fleming, in answer to the 18th direct interrogatory, on page 573 of record, testifies that there was only a small pile of coal used by blacksmiths in the yard when the last cargo arrived; and the evidence shows that the last cargo was mostly delivered to Bouton, on a contract made by the complainant.

Jabez K. Botsford testified, see pages 623 and 624 of record, that he saw that Kelly & Co. had no hard coal in the yard in September, 1860. And we have also the testimony of the various other witnesses to whom the firm of Kelly & Co. had contracted to deliver coal, that at the time they called for the coal, about the time the complainant filed his bill of complaint, or immediately subsequently thereto, that

Kelly & Co. had no coal in their yard. The coal delivered subsequently, must have been obtained from other sources than from Bull.

The court below has found the amount of coal on hand to be 688 tons, from the testimony of Hunt, contained on page 363 of record. Hunt says, "he cannot state the amount of coal on hand from "memory," but supposes he can from the books. That he should think there was on hand 359 tons Lackawana; 94 tons Blossburg, and 235 tons Lehigh, which make 688 tons. That he would not swear that all of that coal was Bull's coal, but the credit side of the different coal accounts show that there must have been that amount of coal in the yard. This statement unexplained by the balance of his testimony might lead to the conclusion that there was that amount of coal in the yard at the time of filing the bill. But on page 389 of record, he explains by what method of computation he arrives at this result. In answer to the 58th cross interrogatory, on page 389 of record, he fixes the date at which said 688 tons of coal were in the yard, on the 28th of September 1860, 13 days before the commencement of this suit, between which date, and the commencement of this suit, exhibit "D," annexed to his deposition, shows that quite a large amount of coal was sold out of the yard.

But the method of computation is not correct, and the result is in conflict with other portions of his testimony. On page 389 of record he says that the total sales of Blossburg to Sept. 29th, 1860, were \$3311; on pages 354 and from 454 to 467 of record, inclusive, he says the total sales of Blossburg to Sept. 29, 1860, were \$3620.02, showing a difference in the two statements of \$309.02. On said page 389 he says that the total sales of Lackawana coal to Sept. 29, 1860, were \$2067; on pages 356 and from 470 to 475 inclusive, of record, he says the total sales of Lackawana were \$2419.70, making a difference in the two statements of \$352.70. On page 389 of record he says the sales of Lehigh before Sept. 29, 1860, were about \$330. On pages 357, 476, and 478 of record, he says, sales of Lehigh to Sept. 27, 1860 were \$1004.34, making a difference in the two statements of \$674.34. If Hunt's conclusions are correct, as stated on pages 363



and 389 of record, and which were adopted by the Court below, the firm had sold only 844 tons 1847 lbs. before the filing of the bill.

|                                                                                                             | TONS. | LBS. |
|-------------------------------------------------------------------------------------------------------------|-------|------|
| But Hunt swears on pages 354 and 454 to 467 inclusive, of record to sales of Blossburg to Sept. 28, to..... | 717   | 982  |
| On pages 356, 470 to 475 of record to sales of Lacawana to                                                  | 428   | 005  |
| On pages 357, 476 and 477 of record, to sales of Lehigh amounting to.....                                   | 146   | 669  |
| Total amount.....                                                                                           | 1291  | 1656 |
| Deduct the said amount sold, per Hunt's last statement, to wit.....                                         | 844   | 1847 |

The total amount of sales as set out in the schedules, shows the number of pounds to each purchaser delivered and names of purchasers, making a difference in the two statements of..... 446 1809

And by adding to this amount 224 tons and 1000 lbs., the amount of coal sold subsequent to Sept. 29, and before commencement of suit, we have to wit: 446 tons 1809 lbs. added to 224 tons and 1000 lbs., making 671 tons 809 lbs., showing a difference in the amounts of 671 tons 809 lbs.

But not only is this statement of Hunt as to the amount of coal on hand, which has been adopted by the Court below, in conflict with his other testimony, and all the other testimony in the case, but it is also in conflict with the allegations in the bill; for Bull alleges in his bill, on page 5 of record, that the said firm had received from the cash sales of coal received from complainant the sum of \$5097.32, and that a large additional amount had been sold on credit; and on page 7 of record said Bull says, a detailed statement of such cash sales are set out in exhibit "D" annexed to his bill and made a part thereof, and in said exhibit "D" he states the number of pounds of coal sold for cash, which when reduced to tons amount to  $997\frac{1}{2}\frac{6}{10}\frac{0}{10}$  tons, and besides this amount he swears in his bill, on page 5 of record, that a large additional amount had been sold by defendants in the usual

course of their business on credit. Take  $997\frac{1}{2}\frac{6}{10}\frac{9}{10}$  tons, amount sold for cash, from  $1532\frac{1}{2}\frac{8}{10}\frac{1}{10}$  tons, amount furnished by Bull, and the remainder is  $535\frac{1}{2}\frac{5}{10}\frac{7}{10}$  tons, and this amount was embraced in the large additional amount sold on credit, except  $16\frac{1}{2}\frac{1}{10}\frac{1}{10}$  tons, which is shown by the exhibits A, B, C, and D, annexed to Hunt's depositions, to be the only amount of coal furnished by Bull remaining in the yard at the time of filing the bill, except the amount not delivered to Bouton, with which defendants are charged in the bill and by the decree. But Hunt arrives at the amount of coal in the yard, to wit: 688 tons, by subtracting from the total amount of sales found upon the books kept by other book-keepers, of each kind of coal up to the time of giving his testimony, nearly two years after the commencement of this suit, the amount of each kind of coal sold to Sept. 29, 1860, and dividing the several balances by the average price of coal per ton of each kind of coal.

There is no evidence that this coal, sold after Sept. 20th, 1860, was in the yard at the time of the commencement of this suit. Hunt says he does not know as this was all Bull's coal. It might have been, and must have been purchased from other parties than Bull. The evidence all shows that the coal sold late in the fall of 1860, and winter of 1860 and 1861, was sold for a much larger price than \$6.00 for Blossburg and Lackawana, and \$8.00 for Lehigh, and the Court find \$10.00 per ton to be the value in the fall and winter; consequently his divisor must have been too small and his quotient too large. The mode by which Hunt, on page 389 of record, arrived at the amount of coal on hand at the time of the commencement of this suit, and which amount was adopted by the Court below, is uncertain and unreliable, while the amount shown by exhibits A, B, C and D, annexed to his deposition, as his testimony in relation to said exhibits, shows the amount in pounds sold to each purchaser, is without doubt correct, and undoubtedly the more reliable statement. The amounts shown by exhibits A, B, C, and D, were entered in the books of the firm by the agent and book-keeper employed by Bull, while the amounts entered in the books subsequent to the commencement of this suit were entered by other book-keepers.



But if there had been coal in the yard of said firm at the time that complainant filed his bill, the defendants were restrained by the injunction of said Court from selling the same, and said injunction has not been modified or dissolved since, but has remained in full force against the defendants.

It is provided in the articles of co-partnership that "At the expiration of the co-partnership, or earlier termination thereof, an account shall be taken, and stated upon the ledger, and all coal on hand, furnished by said Bull, for which he may not have been paid, shall be delivered back in Chicago to said Bull."

If the partnership terminated by decree of Court upon the case made by the bill, and in pursuance of the prayer thereof, then the Court should have ordered and decreed that the coal should have been delivered back in Chicago to complainant, in pursuance of the articles, and neither charged the defendants with the cost price thereof, or for the profits upon the same.

Story on Part. Sec. 349.

Colier on Part. Sec. 226.

The Court below adjudged and decreed that there was and remained due the complainant below, as administratrix of said Cadwallader Bull, from the said defendants below, on the actual cash cost of coal at Buffolo, the sum of \$3,545.73. The above finding and decree as to the amount due on cost price of coal is erroneous.

The complainant cannot claim that there is more due on cost price of coal than he has alleged in his bill. In his bill he alleges that there is \$1,104.10 due on the cost price of coal. See pages 7 and 8 of record.

But the evidence fails to show that there was that amount due on cost price of coal. The partnership articles under which the business of the firm was transacted, provides, "that after the payment of the expenses of the firm, all moneys, the proceeds of the sales of coal, shall be weekly paid over to the book-keeper furnished by the said Bull, for said Bull, to the amount of the cost of the coal furnished by him the said Bull."

All moneys the proceeds of sales of coal, as alleged in the bill at

the time of the commencement of the suit, were \$5,097.32, see pages 6, 7, and 26 of record, and the evidence fails to show that any more money was received from the sales of coal.

The complainant was only to be paid moneys arising from the proceeds of sales of coal, and was not to be paid for coal sold upon credit. It is true in said articles, the "said Maher & Kelly agree to bear all "losses that shall arise from bad debts created by them, or either of "them by giving credit to irresponsible persons." See Article 5 on page 17 of records.

The defendants are to be held liable for coal sold on credit, by this covenant if at all.

The bill does not allege that any losses have been sustained by giving credit to irresponsible persons, neither does the evidence show that said firm has sustained any losses by giving credit to irresponsible persons.

The complainant alleges in his bill that defendants are proceeding to collect in the partnership debts, and prays that an injunction may issue, restraining the said defendants and their agents from collecting the partnership debts, and on the prayer and motion of complainant the defendants and their agents, &c., were restrained by writ of injunction of the Court below, from collecting in any of the partnership debts; which said writ of injunction has remained in full force since.

At the time of rendering the decree, the defendants were and had been since the commencement of said suit prevented from collecting any of the debts of the firm, and until it is shown by evidence that losses were sustained by giving credit to irresponsible persons, the defendants are not liable for the outstanding debts to the complainant below.

Such was the understanding of the parties as shown by the articles, and such was the understanding of complainant as shown by his bill of complaint.

The complainant below alleges that coal to the amount of \$5,079.-32 was sold for cash; and complainant shows by Hunt's deposition, from pages 454 to 477 of record, that coal was sold by said firm since



the commencement thereof, to September 29, 1860, to the following amounts, to-wit:

| TONS.        | LBS.  |                     |            |
|--------------|-------|---------------------|------------|
| 717          | 982   | Blossburg, for..... | \$3,620.42 |
| 428          | 005   | Lackawana " .....   | 2,419.70   |
| 146          | 669   | Lehigh -- .....     | 1,004.34   |
| <hr/>        |       |                     |            |
| Total, 1,291 | 1,656 | " .....             | \$7,044.16 |

And exhibit "D" of Hunt's deposition, and Bouton's deposition, on pages 343 to 348 of record, show that there was sold to Bouton and others, coal to the amount of  $224\frac{1}{2}\frac{0}{0}\frac{0}{0}$  tons after October 1, 1860, and before the commencement of this suit, part of which was delivered to Bouton, and the balance not delivered the defendants are charged with in said decree.

And that said amount of 224 tons and 1000 pounds of Blossburg and Lehigh, sold for.....\$1,296.00

Total amount of coal sold before the commencement of suit:

| TONS. | LBS. |                                              |            |
|-------|------|----------------------------------------------|------------|
| 1516  | 656  | of Blossburg, Lackawana and Lehigh, for..... | \$8,340.10 |

As complainant swears that there was only up to the commencement of suit  $997\frac{1}{2}\frac{0}{0}\frac{0}{0}$  tons sold for cash amounting to.....\$5,097.32

Taking cash sales from total sales, shows that there must have been coal amounting to  $527\frac{1}{2}\frac{0}{0}\frac{0}{0}$  tons sold upon credit, which was outstanding and uncollected at the time of the commencement of suit for the amount of.....\$3,212.78

The court below has taken the cost price of coal in Buffalo, (see record, page 354).....\$6,695.79  
And subtracted therefrom the money paid Bull, (see record, page 23).....\$3,150.06

Which leaves a balance of.....\$3,545.73

And decreed that there remained due to Bull from the defendants on cost price of coal at Buffalo, the sum of \$3,545.73, thereby charging the defendants with all the coal as above stated sold on credit, whether bad debts had been created by defendants giving credit to irresponsible persons or not, or whether losses had been sustained by said firm from bad debts created by defendants giving credit to irresponsible persons or not. This finding and decree of the court below is not in accordance with the rights of the parties as shown by the articles of co-partnership, nor as the complainant below understood and stated his rights in his bill of complaint.

Bull, in his bill, states that there is due him on cost price of coal \$1,104.10, the balance due after deducting the amount he had received and the expenses of the firm business from the amount of cash received on sales of coal, and he alleges that defendants are proceeding to collect in the partnership debts, and thereby will increase their liabilities, showing that Bull did not pretend or claim that defendants below were liable to him under the articles for partnership debts due the firm until they should collect in such debts; and for the purpose of preventing the defendants from increasing their liabilities, by collecting in the partnership debts, prays that they may be enjoined from so doing; and on his prayer the court below by injunction enjoins the defendants from increasing their liability by collecting partnership debts. Yet the court below on finally rendering a decree, some three years after the commencement of the suit, adjudges and decrees a liability on the part of the defendants, which the court upon the prayer of the complainant below, had enjoined them from creating at the time of filing the bill. The coal was sold on credit, and by collecting in the partnership debts the defendants below would increase their liability to Bull, as he alleges in his bill. They were enjoined by the court below from creating such liability by collecting in partnership debts, still the court adjudges that they are liable without collecting in partnership debts.

The defendants were not liable to pay complainant below for debts due the firm. On rendering a decree, the court should have appointed a receiver for collecting in the debts due the firm. Law vs. Ford, 2



Paige Ch. R. 310; Martin vs. Van Schaick et al. 4 Paige 479; 1 Bar. Cr. Pr. 662.

The court below finds that only \$3,150.32 had been paid complainant at the time of filing the bill, but the evidence shows that in addition to this amount there had been paid exchange on money paid Bull the sum of of \$59.47.

The court below finds that up to the time of filing the bill in this cause, the defendants had sold coal furnished them by Bull in his lifetime under said articles to the amount of \$5,256.05, and that the profits on the same amounted to \$1,787.50. This finding is in direct conflict with the complainant's own showing, and all the testimony in the case.

We have shown that there was sold by said firm by Kelly & Bull, as members thereof, and the agents of said firm, up to the time of filing said bill 1516 tons and 656 pounds for the sum of \$8,340.10, and that there was a profit on the whole amount of sales for cash, and on credit of \$1,644.31 only, and that of the total amount sold to-wit, \$8,340.10 there was sold for cash to the amount of \$5,097.32; and that the balance of said amount sold to-wit, \$3,242.78, was on credit, and was outstanding and uncollected at the time of commencing this suit.

The court finds that there was 688 tons of coal in the yard at the time of filing the bill in this cause, which amount taken from the total amount furnished to-wit, 1,532 tons and 1847 lbs., leaves 844 tons and 1847 lbs., as the amount of coal which the court below finds had been sold at the time of commencing this suit. The court below finds that there had been a profit made on this coal of \$1,787.50, which would be an average profit of \$2.02 per ton of coal sold to the time of filing the bill. But as we have shown at the time of filing the bill there had been sold of Blossburg 773 tons and 1982 lbs., for \$3,903.52, at \$5.04 per ton; of Lackawana, 428 tons and 5 lbs., for \$2,419.70, at \$5.65 per ton; of Lehigh, 314 tons and 669 lbs., for \$2,016.84, at \$6.61 per ton, showing a profit on Blossburg of \$1.14 per ton; on Lackawana of \$1.25 per ton, and on Lehigh of \$0.91 per ton, showing that the court formed a much larger amount of profits on coal sold than was made.

The above facts all appear from the complainant's own showing, contained in exhibits "A," "B," "C" and "D," annexed to Hunt's

deposition, see pages 454 to 478 inclusive of record, which, with the deposition of Bouton, see pages 343 to 348 of record, also shows the coal delivered subsequent to September 29th, 1860, and before October 11th, 1860, with which defendants are charged in said bill and decree. Taking from the total cost of coal furnished by complainant below the cost of 16 tons of Lackawana, which was the amount and kind of coal remaining in the yard, and we have total cost of coal sold \$6,620.99; divide this by 1,516 tons, amount of coal sold, and we have the average cost of the coal sold, \$4.37. By dividing \$8,340.10, the amount for which the coal sold, by 1516 tons, the amount of coal sold, and we have the average price per ton for which the coal was sold, to-wit: \$5.44. Taking the average cost price from the average price for which the coal was sold, and we have the average profits per ton, to-wit, \$1.07.

The complainant shows by his bill that the total cash sales of Blossburg were  $597\frac{3}{4}\frac{6}{10}\frac{6}{10}$  tons for \$2,843.31, at \$4.75 per ton, and that the cost price of the same was \$3.90 per ton, and that the profits per ton upon the same was \$0.85. That the total cash sales of Lackawana were  $203\frac{1}{2}\frac{2}{10}\frac{2}{10}$  tons for \$1,049.46 at \$5.12 per ton, and that the cost price of the same was \$4.40 per ton, and that the profits upon the same were \$0.72 per ton; and that the total cash sales Lehigh were  $196\frac{1}{2}\frac{1}{10}\frac{1}{10}$  for \$1,194.55 at \$6.03 per ton, and that the cost price of the same was \$5.50 per ton, and that the profits upon the same were \$0.53 per ton; and that the the total cash sales of Blossburg, Lackawana and Lehigh coal were  $997\frac{1}{2}\frac{6}{10}\frac{2}{10}$  tons for \$5,097.32 at an average price of \$5.10 per ton, and that the average cost price of the same was \$4.37 per ton, and that the average profits upon the total cash sales were \$0.73 per ton.

But the court below has found that there was an average profit made on coal sold at \$2.02, nearly double the amount of profits that were actually made upon the total sales for cash and upon credit, as shown by complainant's book-keeper, Hunt, and nearly three times the amount of profits shown by complainant in his bill upon cash sales. If we admit that there was coal furnished by Bull in the yard, which defendants sold to Roberts, the court below erroneously found that such coal was worth \$10 per ton, owing to the subsequent advance.



The court below has taken the value of coal, as shown by the evidence, late in the winter of 1860 and 1861, and not at the time of the alleged conversion.

The court should have taken the value of the coal as shown by the evidence, at the time of the alleged conversion of the same by the defendants; 2 Greenleaf on Ev. sec 276. But as we have shown by the evidence, there was only sixteen tons of coal in the yard furnished by Bull at the time of the alleged conversion or filing the bill in this case, except the amount with which defendants were charged by the decree for short delivery to Bouton.

The court below erroneously found that there was only \$1,252.98 expenses to be shared equally by the members of said firm. Exhibits "I," "K," "L," "M," "N," "O," "P," "S," "T" and "U," from page 494 to 501 inclusive, and from page 504 to 509 inclusive of record, and the evidence of Hunt in relation thereto, show that the expenses of said firm up to the time of filing the bill amounted to the following amount, to-wit: \$2,230.33, including the salary of the book-keeper, which was to be paid by Bull, but was paid by defendants for Bull.

The court below erroneously allowed \$1,005 interest from the date of filing the bill to final decree. The court below found that the firm was dissolved by the death of the complainant, and interest should only be allowed from the date of the dissolution of said firm.

Stoughton vs. Lynch, 2 John. Ch. R. 219; Hollister vs. Bakley, 11 N. Hamp. 501, 511 and 512; Colier on Part. sec. 335, note 4; Story on Part., sec. 348, a note 4.

## V.

Before a final decree can be rendered dissolving a partnership, it is necessary that the assets should be converted into money, and each partner's balance ascertained and allotted to him.

Levi vs. Karrick et al. 8 (Clark) Iowa R. 150.

The Court below should have appointed a receiver to collect in the partnership debts.

If the Court below had sustained the bill and found the defendants

below guilty of a breach of partnership duty, and therefore in pursuance of the prayer of the bill, dissolved the co-partnership, a receiver should have been appointed.

Colier on Part. Sec. 354 and note; Law vs. Ford, 2 Page Ch. R. 310; 1 Bland 257.

The complainant in the Court below having caused the defendants below to be enjoined from collecting the co-partnership debts without the appointment of a receiver for that purpose, and the defendants below having been prevented from collecting such debt by such injunction, the complainant below should be held responsible for the amount of such debts.

By the co-partnership articles it is provided that upon a dissolution of the firm, after paying all the expenses and liabilities of the firm, all the assets, stock, property, and everything belonging to the firm, shall be equally divided between said partners. See page 19 of record.

The evidence shows a large amount of losses sustained and liabilities incurred and still existing against said firm. The Court should have provided for the payments of the debts and liabilities of the firm, [see Story vs. Moon & Taylor, 3 Dana R. 331; Hill vs. Beach, 1st Beardsley, N. J. 13, Ala. 769,] and have distributed the assets remaining *pro rata* to each member of the firm. And if the liabilities of the firm were found to exceed the assets of the firm, each member of the firm should have been charged with his *pro rata* share of such liabilities. Portsmouth vs. Donaldson, 32 Penn. State R. 202; Story on Part. sec. 347, last note 1.

## VI.

The Court below should have allowed the defendants below for all losses they have sustained as members of said firm, in consequence of the failure of the complainant below to supply said firm with coal, as he had agreed in said articles. Story on Part. sec. 233; Bury vs. Allen, 2 Colier R. 604; 2 Story Eq. Juris, sec. 799 a; Caldwell vs. Leiber, 7 Page Ch. R. 483.

This suit was brought for the purpose of enforcing rights and avoid-



ing liabilities under the co-partnership articles. The defendants below should therefore be allowed to defeat or diminish the amount of the recovery, by showing a failure on the part of the defendants below to supply said firm with coal in pursuance of said co-partnership agreement. In the case of *Stow vs. Yarwood et al.* 14 Ill. 424, the Court say the principle deducible from the adjudged cases is that mutual demands arising out of the same subject matter, may be adjusted in one action. And in the case of *Reed vs. McAllister*, 8 Wend. R. 115, Chancellor Walworth says: "There is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be received." In this respect equity follows the law.

*Higgins vs. Lee*, 16 Ill. 495.

*Stow vs. Yarwood et al.* 20 Ill. 497.

*Schurckmann vs. Knoebel's Ex'rs et al.* 27 Ill. 175.

*Ives vs. Van Epps*, 22 Wend. 155.

*Batterman vs. Pierce*, 3 Hill 171.

*Story Eq. Juris.* sec. 1434 and sec. 799.

*Walker vs. Sedwick*, 8 Cal. 398.

Damages were sustained and liabilities incurred by the defendants below, as shown by the evidence, to a large amount.

## VII.

The cross bill should have been sustained. A cross bill will lie to sustain and enforce a contract sought to be avoided by the complainant in the original suit. *Hume vs. Long*, 6 Monroe 119.

"The defendants being drawn into court by the complainant in the original bill, may avail themselves of the assistance of the court without being obliged to show a ground of equity to support its jurisdiction." 2 Maddock Ch. 434.

"The connection of the matter of the cross bill, be it it per se legal or equitable, with the subject matter of the original bill, gives the court jurisdiction of the cross bill."

2 Barbour, Ch. Pr. 128, 129; Metford's Eq. Pld. (81) 98; Bur-

gress vs. Wheaton, 1 Eden 190; Story's Eq. Pld. 399 and 393, last clause.

The defendants have the right to recover upon the cross bill the damages they may have sustained from the conduct of the complainant, in commencing this suit and in enjoining the defendants from proceeding with the co-partnership business, and from collecting the partnership debts, and also for his failure to furnish coal since the commencement of this suit.

Head vs. Perry et al. 1 Monroe 258; Story's Eq. Pld. sec. 393.

"The cross bill" is "an adjunct or part of the original suit," "the whole together constituting but one case."

Fleece vs. Russell et al., 13 Ill. 32; Kemp vs. Mackell, 3d Atkins R. 812.

The complainant below in the co-partnership agreement under which the firm of Kelly & Co. sought to be dissolved had been formed, and which controlled the rights and liabilities of the parties, had agreed to furnish and supply the firm with all the coal that should be needed or required in the business of the firm. Contracts had been entered into by the firm with the approbation and consent of the complainant below, for the delivery during the period stipulated for the continuance of the firm of a large amount of coal, and during the fall and winter, subsequent to the commencement of the suit, there was a large advance in the price of coal. The defendants below have been compelled to pay and have paid a portion of the damages. The firm would also have made large profits had the complainant complied with his undertaking in the agreement to furnish coal. The defendants below have, as members of said firm, sustained damages and incurred liabilities to a large amount, and besides been deprived of all the profits that they might and would have made as members of said firm, if a full supply of coal had been furnished. "Of course all losses, injuries and damages sustained by the partnership from the positive breach of the stipulations contained in the articles of co-partnership on the part of any partner are to be borne exclusively by that partner, and he must respond over to them therefor." Story on Partnership, sec. 169.



Have the defendants below a remedy by cross bill to recover the damages they have sustained as members of said firm from the failure of the complainant below to perform his part of the co-partnership agreement. The original bill was founded on the co-partnership articles, and the conduct of the members of the firm under the same. The subject of the cross bill is also the co-partnership agreement and the conduct of the members of the firm under the same.

The cross bill is therefore connected with the subject matter of the original bill, and the court has jurisdiction of the cross bill whether the subject matter of the same is legal or equitable.

The complainant below understood when he signed the co-partnership agreement that he was liable for damages on all contracts that should be made if he failed to supply the firm with coal to fill them; See page 484 of record. The complainant also urged the defendants to be active in making sales of coal; see pages 484, 485 and 493 of record. S. O. Eames was employed to solicit orders for coal, with the consent and approbation of complainant below; see page 545 of record.

At the time the suit was commenced there was from 2,500 to 3,000 tons of coal, which the firm had contracted to deliver, and which the firm was unable to deliver from the failure of Bull to furnish the coal. See pages 575, 576, 552, 560, 561 and 562 of record. It was customary with coal dealers in Chicago to take orders and make contracts to deliver coal subsequent to the time of taking the orders and making the contracts; see page 386 of record. In consequence of the failure of complainant below to furnish the coal, liabilities had been incurred by said firm to a large amount, and damages have been paid by defendants below as members of said firm to a large number of persons; see pages 543 and 544 of record.

The evidence shows the following to be a portion of the liabilities incurred, and of the damages which the defendants below have been compelled to pay from the failure of the complainant below to supply the firm with coal in pursuance of the co-partnership agreement, to-wit: to the following named persons the following amounts:

|                       |                                          |           |
|-----------------------|------------------------------------------|-----------|
| S. Thompson,          | see page 675 of record, amount paid..... | \$ 100.00 |
| E. H. Haddock,        | " " 617 " " " " .....                    | 45.00     |
| J. K. Botsford,       | " " 623 " " " " .....                    | 15.00     |
| C. L. Harmon,         | " " 637 and 647 " " " " .....            | 26.00     |
| I. Marks,             | " " 644 of " " " " .....                 | 8.00      |
| I. N. Harmon,         | " " 646 " " " " .....                    | 9.00      |
| B. Jennings,          | " " 659 " " " " .....                    | 6.00      |
| F. A. Monroe,         | " " 660 " " " " .....                    | 6.00      |
| Evert Van Buren,      | " " 662 " " " " .....                    | 18.00     |
| Rawson & Bartlett,    | " " 665 " " " " .....                    | 56.00     |
| J. Jewett,            | " " 669 " " " " .....                    | 6.25      |
| Harmon, Aiken & Gale, | see page 671 of record, amount paid,     | 6.00      |
| Wm. H. Fuller,        | " " 691 " " " " .....                    | 50.00     |
| Buel, Hill & Granger, | " " 697 " " " " .....                    | 41.50     |
| J. S. Williams,       | " " 276 " " " " .....                    | 229.50    |
| Ryan & Canlan,        | " " 564 " " " " .....                    | 337.50    |
| J. S. Williams,       | " " 276 " " " liability,                 | 270.20    |
| R. I. R. R. Co.,      | " " 699 " " " " .....                    | 1,000.00  |
| Ryan & Canlan,        | " " 564 " " " " .....                    | 663.50    |
| U. S. Ex. Company,    | " " 543 " " " " .....                    | 1,000.00  |

And also small liabilities to a number of other persons, see pages 543, 544, 656 of record.

The above shows in part the damages paid and liabilities incurred from the failure of the complainant below to furnish a supply of coal, as he had contracted to do. If the firm had had a supply of coal, the taking of the contracts would not have interfered with the cash sales, [see page 387 of record,] and the firm would have sold from four to five thousand tons more than was sold, [see pages 555 and 577 of record,] at a profit \$0.50 to \$2.00 per ton. See page 632 of record.

We claim the defendants below are entitled to a decree against the complainant below for the damages paid and liabilities incurred as above stated, amounting to \$3,686.25.

And for their share of the profits that the firm would have made,



if the complainant below had furnished coal as provided in said co-partnership agreement, to \$2,333.33, which added makes \$6,019.53.

### VIII.

The court below erred in refusing to allow the appellant on the hearing to examine Robert Law, T. J. Kinsella, and George W. Quigg, and in refusing to allow said appellant to introduce parol evidence on the hearing, in support of the answer and cross bill of the defendants below. See pages 720, 721, 722 of record, and pages 54 and 133 of abstract.

By the statute passed Feb. 12, 1849, (Scates' Comp. 166), it is provided that on the trial of any suit in Chancery, the evidence on the part of either plaintiff or defendant may be given orally, under the same rules and regulations as evidence in cases of common law; provided, however, that depositions taken in pursuance of law may still be read in evidence, as if this act had not been passed.

The Court below sustained the objection of complainant below to the introduction of parol proof on the hearing, by the said defendant Maher, on the ground that the rule for closing the proofs in said cause had been often extended on the motion of said defendants below and that the last extension of time for closing proof had terminated.

Was the ground assigned sufficient to deprive the defendant below of the benefit of the statute, and had the Court below the right as against the statute to refuse to allow the said defendant below to introduce parol proof on the bearing? The case of Owens vs. Ranstead, 22 Ill, 161, 166 and 171, we think in point. The Court there held that the Court below had no right by rule of court to deprive a suitor of the right to introduce parol proof on the trial. It is a right given by statute, and the Court had no right to nullify the statute by entering a rule that proofs in the case should be closed before the hearing. And although the defendant below had procured an extension of time for the purpose of taking depositions in the case, he still

had the right under the statute to introduce on the trial oral testimony, under the same rule and regulations as evidence is introduced in cases at common law. As the Court say in the above cases, "A party offering parol evidence may not have attained his knowledge of its existence until 'the very day of the trial.'" And because the Court had entered a rule that the proofs in the case should be closed before the hearing, the defendant should not thereby be deprived of the right given him by statute to introduce parol proof on the hearing. If the reason assigned by the Court below is good, then in all cases where a suitor has obtained an extension of time for the purpose of taking a deposition, he may be deprived of the right given him by statute to introduce parol proof on the hearing.

D. C. & I. J. NICHOLAS,

Solicitors for Appellant,

HUGH MAHER.



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**SUPREME COURT,**  
STATE OF ILLINOIS.

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*Select April 20. 1864* **Third Grand Division,** }  
*Leland CM* **APRIL TERM, A. D. 1864.** }

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HUGH MAHER, Impleaded with EDWARD  
KELLY,

vs.

MARIA BULL, Administratrix, &c.,  
of CADWALADER BULL.

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APPEAL FROM THE SUPERIOR  
COURT OF CHICAGO.

**ABSTRACT OF RECORD.**

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} **APPEAL FROM THE SUPERIOR  
COURT OF CHICAGO.**

## ABSTRACT OF RECORD.

1. On the 11th day of October, 1860, in the Superior Court of Chicago, on the chancery side thereof, the late Cadwalader Bull filed his **Bill of Complaint** against the appellant, Hugh Maher and Edward Kelly, in which he alleges that on the sixth day of April, 1860, said Cadwalader Bull entered into an agreement with said Edward Kelly and said
3. appellant, Hugh Maher, to form a co-partnership with them in the business of dealing in coal, in the city of Chicago; that said agreement was reduced to writing, and was in



words and figures following, or to the purport and effect following, that is to say, a true copy of which agreement is attached to said bill and marked, Exhibit "A," and made a part thereof; said Exhibit "A," attached to said bill of complaint, and made by said Bull a part thereof, is in words and figures following, to wit:—

15. " Articles of Agreement, made and entered into this sixth  
 " day of April, A. D. 1860, by and between Cadwalader  
 " Bull, of the city of Buffalo, in the county of Erie, and  
 " State of New York, and Hugh Maher and Edward Kelly,  
 " of the City of Chicago, in the county of Cook, and State  
 " of Illinois, WITNESSETH. The said Cadwalader Bull, Hugh  
 " Maher, and Edward Kelly have agreed, and by these  
 " presents do agree, to become partners in the coal trade, in  
 " the city of Chicago aforesaid, under the name and style of  
 " 'Kelly & Co.,' as the firm name. The partnership to  
 " commence on the fifteenth day of April, A. D. 1860, and  
 " to terminate on the fifteenth day of April, A. D. 1862,  
 " being a period of two years; said partnership may be  
 " continued for a period of five years longer after said fif-  
 " teenth day of April, A. D. 1862, provided all the parties  
 " to this agreement shall be willing to so continue it; and,  
 " for the purpose of carrying on the business of said co-  
 " partnership, the said partners have agreed, and do hereby  
 " agree, to observe and fulfil the following covenants and  
 16. " conditions:—

" **First.**—The said Cadwalader Bull agreed to furnish  
 " and provide all the coal that should be necessary or that  
 " should be required for said business, at the lowest market  
 " cash value, which said coal is to remain the property of  
 " said Bull, until the same shall be sold in the ordinary  
 " course of business sales; and said Bull also agrees to fur-  
 " nish and provide, at his own expense a competent person  
 " to keep the books and accounts of said firm at Chicago;  
 " said coal to be furnished on board the vessels in the ports

" of Buffalo and Cleveland, and at the lowest cash market  
 " value, at these places, when so furnished.

" **Second.**—The said Hugh Maher hereby agrees to  
 " furnish and contribute, as his proportion of the common  
 " stock of the firm, the use of the lot of land in Chicago  
 " aforesaid, and now occupied by Kelly & Co. as a Coal  
 " yard, and also the use of all the fixtures, carts, wagons,  
 " &c., now used by said Kelly & Co. in the coal business.

17. " **Third.**—The said Edward Kelly agrees to contribute,  
 " as his proportion, his whole time and attention to the  
 " superintendence and management of the business of the  
 " firm for the mutual benefit and advantage of all parties.

" **Fourth.**—All the expenses of the business of the firm  
 " are to be borne in common by said three partners, except  
 " the salary of the book-keeper, which is to be paid by said  
 " Bull; and all the profits of the firm business are to be  
 " equally divided between the three partners.

" **Fifth.**—Said Maker and Kelly agree to bear all losses  
 " that shall arise from bad debts created by them or either  
 " of them, by giving credit to irresponsible persons.

" **Sixth.**—Said Bull agrees to fully insure in some re-  
 " sponsible insurance company, all cargoes of coal shipped  
 " for the business of the firm; and any loss that shall arise  
 " in consequence of his neglect to so insure said coal, shall  
 " be borne by said Bull; the expense of such insurance  
 " shall be borne in common by said parties.

18. " **Seventh.**—In case the receipts from the sale of coal  
 " shall be insufficient to pay the freights on said coal at any  
 " time, said Maher and Kelly agree to pay said freights



“ when the same shall be payable; and all monies paid for  
 “ freights shall be considered as expenses of the firm, and  
 “ shall be borne in common by said three partners; said  
 “ Kelly and Maher shall be credited on the firm books for  
 “ all monies advanced by them for freights.

“ **Eighth.**—Said Bull, Maher, and Kelly agree that they  
 “ shall do no act or acts that shall be prejudicial to the busi-  
 “ ness of the firm.

19. “ **Ninth.**—Correct books of account shall be kept, in  
 “ which shall be entered all monies received or paid, all  
 “ purchases and sales of coal, all monies paid for expenses,  
 “ and all matters of account relating to the business of the  
 “ firm, which books shall be in common and accessible to  
 “ all the partners; at the close of each month, the books  
 “ shall be balanced, and each partner shall be furnished  
 “ with a balance-sheet of the ledger; and on the first day of  
 “ May, A. D. 1860, a correct account shall be taken and  
 “ stated on the ledger of all the stock, property, and assets  
 “ of the firm, and of all the liabilities and debts; and each  
 “ partner may draw his share of the profits, after paying all  
 “ expenses, losses, and liabilities, and any partner indebted  
 “ to the firm shall refund to the firm the amount of his in-  
 “ debtedness. At the expiration of this co-partnership or  
 “ the earlier termination thereof, a similar account shall be  
 “ taken and stated on the ledger; and all coal on hand fur-  
 “ nished by said Bull, for which he may not have been paid,  
 “ shall be delivered back in Chicago to said Bull, and the  
 “ possession of said lot used for the coal yard shall be de-  
 “ livered back to said Maher, and all the fixtures, carts,  
 “ wagons, &c., the use of which said Maher shall have given  
 “ to the firm, shall be delivered back to him, provided they  
 “ shall then be in existence; and, after paying all expenses  
 “ and losses and liabilities of the firm, all the assets, stock,  
 “ property, and every thing belonging to the firm shall be  
 “ equally divided between said partners, provided the said

20. "partners shall bear and make good the losses hereinbefore  
 "specially agreed to be assumed and born by them respect-  
 "ively.

"**Tenth.**—It is further mutually agreed that neither  
 "partner shall have power to bind the firm, in any case, as  
 "security; and, in case of any of said partners doing so, he  
 "shall forfeit his interest in the firm; and no notes, drafts,  
 "bonds, or obligations shall be given by said firm without  
 "the written consent of said Hugh Maher, and in case any  
 "such note, draft, bond, or obligation should be given with-  
 "out such consent, said Maher shall not be bound to pay  
 "or discharge the same, and he may declare the co-partner-  
 "ship dissolved.

"**Eleventh.**—It is further agreed that after the pay-  
 "ment of the expenses of the firm, all monies, the proceeds  
 "of the sale of coal, shall be weekly payed over to the  
 "book-keeper furnished by said Bull for said Bull, to the  
 "amount of the cost of the coal furnished by him, said Bull.

21. "**Twelfth.**—It is further agreed that neither partner  
 "is to draw from said firm any money, unless what may be  
 "required for the benefit of the firm, except that said Bull  
 "may draw for the payment of the salary of the book-  
 "keeper; and after paying the said salary and the expenses  
 "above referred to, the balance of the cash on hand shall  
 "be payed to Bull, in the manner above provided for, that  
 "is to say, to the said book-keeper, to the amount of the  
 "cost of the coal furnished by him, said Bull.

"**Thirteenth.**—If, after the expiration of one year from  
 "the date hereof, any one of said partners should be dis-  
 "satisfied with said business, from any cause, such party  
 "may terminate the co-partnership at any time, by giving  
 "the other partners notice of such termination; and, in



"that case, the affairs of the firm shall be settled and adjusted in the same manner as if the co-partnership was terminated by limitation.

"IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals this sixth day of April, A. D. 1860.

CADWALADER BULL, (Seal.)  
 HUGH MAHER, "  
 EDWARD KELLY, "

Said Cadwalader Bull further alleges, in his bill, that said co-partnership business was entered upon and has ever since continued to be carried on between said Bull and said Kelly and Maher, in pursuance of and under the aforesaid agreement.

4.

Said Bull further alleges, in his said bill, that by an explanatory article of agreement, subsequently made between said Bull, of the one part, and said Kelly and Maher, of the other part, it was agreed and declared to be the true intent and meaning of said articles of co-partnership that the partnership thereby formed should only be considered to extend to and include a joint interest in the coal supplied to said firm of Kelly & Co., by said Bull; that said Bull should have no interest or concern with, or be liable for, or have any right to participate in the profits of any coal purchased or procured by said Kelly and Maher from any other person than the said Bull, but that all such transactions should be exclusively the business of said Kelly and Maher; that the intention of said Bull and said Kelly and Maher, by said original articles of co-partnership, was to create a joint interest in the profits or losses arising from coal to be furnished to said firm of Kelly & Co. by said Bull; said Bull further alleges, in said bill, that since the formation of said co-partnership he had furnished, in pursuance of said articles of co-partnership, and supplied to said firm, coal amounting in the aggregate, to \$6,879.51, at cost price in Buffalo, N. Y., from which port said coal was shipped to said firm of Kelly & Co. by said Bull, and that all of which was duly received by said firm of Kelly & Co., and that a large quantity of which has since been sold and controlled by the said Kelly and Maher in the usual course of their said business, that from the sales of which there has been received by said Kelly and Maher, in money, \$5,097.32, and that a large additional quantity has been sold by said Kelly and Maher, payment for which has not been received, but is still outstanding and uncollected.

5.



6. Said Bull further alleges that in and by said articles the said defendants agreed to pay over to him weekly all the proceeds of the sales of coal, after deducting the expenses of said firm, particularly set forth in said articles, or so much of said proceeds as should be necessary to pay said Bull the cost of coal furnished by him to said firm from time to time, and that said payments to said Bull should be made out of said proceeds next in order after the payment of said expenses, and before any money should be drawn from said firm by either of said partners for their respective uses or applied in any other way to any other purpose.

Said Bull further alleges that said coal furnished as aforesaid, in pursuance of said articles, amounting to \$6,878.41, at cost, was furnished in the quantities and at the respective dates set forth in the schedule thereof attached to said bill marked Exhibit "B," and made a part thereof.

7. That he has received out of said cash sales, (amounting as aforesaid to \$5,097.32,) the sum of \$3,150.06 and no more, the dates and several amounts of which payments are set forth in the schedule attached to said bill marked Exhibit "C," and made a part hereof.

That the expenses of said business, from the commencement thereof to the time of filing said bill, as near as said Bull can ascertain the same, and which he believes and charges to be accurate, were \$853.16, which sum deducted from said cash sales shows a balance which ought to have been paid to him, in pursuance of said articles, towards the cost of coal furnished by him of \$4,254.16, out of which he has only received, as above stated, the sum of \$3,150.06, showing the said defendants to be in arrears to him in the sum of \$1,104.10, a detailed statement of which is attached to said bill marked Exhibit "D," and made a part thereof.

8. That said defendants have neglected and refused to pay over said last-mentioned sum, or any part thereof, to him, said Bull, and have totally refused so to do, and have directed the book-keeper employed by said Bull, under said articles, not to pay any money whatsoever to him, said Bull, and that the said Bull has been unable to obtain said sum or any part thereof.

That said defendants, in violation of said articles, have refused to pay said money to said Bull, and have converted the same to their own use.

9. That weekly payments have not been made at any time with regularity, as required by said articles, as the dates in the accounts attached—before referred to—will show; that, by said articles, it is expressly provided that monthly statements or balance sheets, taken from the ledger of said firm, shall be furnished to the several partners at the close of each month, in order that each partner might be informed as to the state of said business; that the said Bull resided at Buffalo, and the business of said firm is carried on at Chicago, where the books of said firm are in the possession of and under the control of said defendants; and that there never were, since the commencement of said business, any monthly statements furnished him, said Bull, as provided in said articles of co-partnership, nor has the said Bull been able to ascertain precisely the state of said business at any given period; that said Kelly, one of said defendants, has repeatedly directed the book-keeper employed by him, said Bull, as provided in said articles, not to prepare any such monthly statements for him, said Bull alleging as a reason, that said firm had no money to pay over to him on account of cost of coal, and, as the said Bull believes and charges, for the purpose of keeping him in ignorance of the actual condition of said business; and that he, the said Bull, has been able only since his arrival in Chicago, within a few
- 10.



days. by personal examination of said books, to ascertain what the true condition of affairs is, which is herein stated.

- ii. Said Bull further alleges that it is provided by said articles that correct books of account of all the partnership transactions shall be kept, which shall be in common and accessible to all the three partners, and that he, said Bull, shall at all times have the right to inspect said books, and that he has exercised that right to the extent of obtaining the information contained in this bill; but that said Kelly has, since he, said Bull, had been making such examination, denied him the right to examine further, and has directed said book-keeper not to allow him, said Bull, to see said books, or make any further examination of said books; that it is provided, by said articles, that neither partner shall, during the year limited by said partnership, draw any money from said firm for his respective use; but that on the 1st day of May, 1861, an account of the assets and liabilities shall be taken, and that then each partner might draw his share of the profits of said firm, and that at the expiration of said partnership, or earlier termination thereof, a similar account shall be taken, and all coal on hand, furnished by said Bull, and then unpaid for, shall then be returned to said Bull; that said defendants, in violation of said articles, have withdrawn, for their own purpose, large sums from said firm, and have not payed over to him, said Bull, what he is entitled to for cost of coal furnished by him to said firm, and which said defendants have sold and received payment for; that large gains and profits have been made on sales of coal by said firm, one-third of which said Bull is entitled to receive, no part of which he has received and that he is apprehensive he will not receive; that said Bull can not continue to supply said firm coal without being promptly paid, and to do so would be ruinous to him, said Bull; that he has requested said defendants to come to a fair and full account in respect to said partnership transactions, and to pay him, said Bull, the amount to
- iii.

12. which he is entitled for cost of coal sold as before stated, which defendants refuse to do; said Bull then charges that said defendants have received and converted to their own use a large sum of money to which he, said Bull is entitled, and are proceeding to sell the coal on hand, collect, in the partnership, debts and monies, whereby the balance due from them to him will be largely increased to the great loss and injury of him, said Bull; he, therefore, charges that the said defendants ought to be restrained, by the order and injunction of said court, from collecting and receiving any of the partnership debts and monies, and that a receiver may be appointed by the court for that purpose, and that the defendants may answer the premises, (waiving the oath of defendants,) and that said partnership may be dissolved by decree of said court, and an account may be taken of all and every the co-partnership dealings and transactions, from the time of the commencement thereof, and that said defendants may be decreed to pay said Bull what, upon taking said account, shall appear to be due to him, and that,
13. in the mean time, the said defendants may be restrained, by the injunction of said court, from selling any of the coal on hand or from collecting or receiving the partnership debts or other monies belonging to the partnership, and that the said Bull may have such further and other relief in the premises as the nature of his case shall require.

Prayer for process of injunction to restrain defendants and each of them, and their counsellors, attorneys, solicitors, and agents from selling any of the coal which they have on hand and in their possession, or from collecting or receiving the partnership debts or other monies belonging to said partnership.

14. Prayer for process of summons in the usual form and bill sworn to before H. Hamlin, Notary Public, Oct. 10, 1860.

15. Schedule "A," copy of articles of co-partnership herein before set out.



## SCHEDULE "B."

22. Quantity of coal furnished by Cadwalader Bull to Edward Kelly, and Hugh Maher, and C. Bull, composing the firm of Kelly & Co. :—

|           |           |           |                                |                   |  |
|-----------|-----------|-----------|--------------------------------|-------------------|--|
| 1860.     |           |           |                                |                   |  |
| May 8,    | 119 tons, | 1540 lbs. | Blossburgh coal, \$3.90,....   | \$467.10          |  |
| " 24,     | 83 "      | 1182 "    | " " " ....                     | 326.00            |  |
| June 16,  | 151 "     | 1800 "    | " " " ....                     | 592.40            |  |
| " 30,     | 136 "     | 1320 "    | " " " ....                     | 532.97            |  |
| July 17,  | 152 "     |           | Lehigh coal, \$5.50,.....      | 836.00            |  |
| Augt. 6,  | 158 "     | 396 "     | Blossburgh coal, \$3.90,....   | 616.97            |  |
| " 4,      | 48 "      | 1435 "    | " " " ....                     | 189.99            |  |
| " 14,     | 178 "     | 1128 "    | Pittston prepared coal, \$4.40 | 785.68            |  |
| " 20,     | 99 "      | 1539 "    | " " " " " ....                 | 438.98            |  |
| " 23,     | 184 "     | 238 "     | " " " " " ....                 | 810.12            |  |
| Sept. 29, | 142 "     |           | Lehigh coal, \$6.00,.....      | 852.00            |  |
| " " 98 "  |           |           | Pittston prepared coal, \$4.40 | 431.20            |  |
|           |           |           |                                | <u>\$6,879.41</u> |  |

## SCHEDULE C.

23. Amount of money paid to C. Bull by Kelly & Co. :—

|          |                                                     |                   |  |
|----------|-----------------------------------------------------|-------------------|--|
| 1860.    |                                                     |                   |  |
| June 16, | To Cash, (Ill. Cent. R. R. note,).....              | \$630.39          |  |
| Aug. 31, | " " .....                                           | 144.67            |  |
| Sept. 4, | " " draft N. Y.,.....                               | 900.00            |  |
| " 28,    | " " .....                                           | 25.00             |  |
| Oct. 2,  | " " draft N. Y.,.....                               | 200.00            |  |
| " " "    | " " N. S. Bouton's note, received as cash, 1,250.00 |                   |  |
|          |                                                     | <u>\$3,150.06</u> |  |

## SCHEDULE D.

26.

Showing cash sales of coal by Kelly &amp; Co.

|                                                        |              |                                                                        |                   |
|--------------------------------------------------------|--------------|------------------------------------------------------------------------|-------------------|
| 1860.                                                  |              |                                                                        |                   |
| May 30,                                                | 32,370 lbs., | sold for,.....                                                         | \$90.71           |
| June 16,                                               | 303,800 "    | Blossburgh, I. C. R. R., (for note<br>taken as cash by C. Bull,) ..... | 630.39            |
| June 30,                                               | 61,647 lbs.  | sold for,.....                                                         | 180.61            |
| July 31,                                               | 379,422 "    | " .....                                                                | 871.99            |
| " "                                                    | 20,000 "     | Lehigh, sold for,.....                                                 | 68.00             |
| Aug. 31,                                               | 164,840 "    | Blossburgh, sold for,.....                                             | 396.85            |
| " "                                                    | 2,000 "      | Lehigh, sold for,.....                                                 | 7.50              |
| " "                                                    | 50,000 "     | Lackawana, sold for,.....                                              | 150.12            |
| Sept. 29,                                              | 139,789 "    | Blossburgh, " .....                                                    | 399.26            |
| " "                                                    | 357,805 "    | Lackawana, " .....                                                     | 899.34            |
| " "                                                    | 35,019 "     | Lehigh, " .....                                                        | 106.55            |
| " "                                                    | 336,000 "    | " N. S. Bouton, (for note<br>taken as cash by C. Bull,) sold for,..... | 1,012.50          |
| " "                                                    | 100,000 lbs. | Blossburgh, N. S. Bouton, sold for,                                    | 237.50            |
| Oct. 6,                                                | 13,000 "     | " .....                                                                | 46.00             |
|                                                        |              |                                                                        | <u>\$5,097.32</u> |
| Paid to C. Bull, as per Schedule C,.....               |              |                                                                        | <u>\$3,150.00</u> |
| Balance,.....                                          |              |                                                                        | \$1,947.26        |
| From this we deduct expenses as shown in detail on the |              |                                                                        |                   |
| next page,.....                                        |              |                                                                        | <u>\$843.16</u>   |
| Net balance,.....                                      |              |                                                                        | <u>\$1,104.10</u> |



## DETAILED ACCOUNT OF EXPENSES.

|     |                       |                                              |       |          |  |  |
|-----|-----------------------|----------------------------------------------|-------|----------|--|--|
| 27. | 1860.                 |                                              |       |          |  |  |
|     | May 31,               | Cartage account on Blossburgh coal,          | ..... | \$12.92  |  |  |
|     | June 30,              | " " " "                                      | ..... | 18.53    |  |  |
|     | July 31,              | " " " "                                      | ..... | 10.49    |  |  |
|     | " " " "               | Lehigh, " "                                  | ..... | 4.25     |  |  |
|     | Aug. 31,              | " " Blossburgh " "                           | ..... | 17.64    |  |  |
|     | " " " "               | Lackawana, " "                               | ..... | 40.20    |  |  |
|     | " " " "               | Lehigh " "                                   | ..... | 25       |  |  |
|     | Sept. 29              | " " Lackawana, " "                           | ..... | 65.54    |  |  |
|     | " " " "               | Blossburgh " "                               | ..... | 32.34    |  |  |
|     | " " " "               | Lehigh " "                                   | ..... | 27.93    |  |  |
|     | " " " "               | Wheeling and discharging coal,               | ..... | 234.12   |  |  |
|     | Aug. 31,              | Freight on Lackawana coal, per bill,         | ..... | 115.75   |  |  |
|     | Sept. 29              | " " Lehigh " "                               | ..... | 61.54    |  |  |
|     | Oct. 6,               | R. J. Hunts, (book-keeper,) wages, from 17th |       |          |  |  |
|     | April, 1860, to date, |                                              | ..... | 143.03   |  |  |
|     | Oct. 6,               | James Fleming's services, wages,             | ..... | 57.00    |  |  |
|     | " " " "               | Cartage on 13,000 lbs. Blossburgh,           | ..... | 1.63     |  |  |
|     |                       | Total expenses,                              | ..... | \$843.16 |  |  |

28. On 11th day of October, 1860, summons issued in said cause and returned ; served on said Maher and Kelly without stating date of service.

29.

30. On the 19th day of October, 1860, on motion of said Bull, and on reading and filing his said bill, it was ordered by said court that a writ of injunction, as prayed for in said bill, issue, and thereupon a writ of injunction was issued in pursuance of said order, restraining said Kelly and Maher, and their attorneys, solicitors, agents, and servants, and each and every of them from selling any of the coal which said Kelly and Maher had on hand or in their possession belonging to the said Bull or Kelly & Co., or any coal in their possession, and from collecting or receiving the partnership

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debts, claims, and demands belonging to the said partnership of Kelly & Co., aforesaid, until said court, in chancery sitting, shall make other order to the contrary; upon which  
 34. said writ of injunction is the following return:—"Served  
 35. this writ upon the within-named Edward Kelly and Hugh Maher, by delivering a copy thereof to them, the 20th day of October, 1860.

"JOHN GRAY, SHERIFF."

October 26th, 1860, Kelly and Maher filed their joint  
 36. and several **Answer** to the bill filed by said Bull, in which they say, after reserving all right of exception, &c., that they admit the formation of a limited co-partnership on or about April 6, 1860, between said Kelly, Maher, and Bull, substantially as set forth by said Bull in said bill of complaint, and that the articles attached to said bill prescribed the terms and conditions upon which said co-partnership was to be managed and conducted, and that the business of the co-partnership thus formed was in accordance with the  
 37. terms of said articles of agreement, entered upon and carried on by the parties thereto up to and until a refusal and failure on the part of the said Bull to comply with and perform his part of the covenants in said articles of agreement; said Kelly and Maher also admit that, September sixth, 1860, an additional and supplementary article to said original articles of agreement was made and adopted as part of said original articles by the parties thereto as alleged by said Bull in his said bill; said Kelly and Maher also admit that there has been received by them at Chicago, in the aggregate, at sundry times, from said Bull, from the 8th of May till the 29th of September, 1860, as appears from the entries upon the books of said firm,  $1522 \frac{405}{2000}$  tons of coal, charged by said Bull at the sum of \$6,879.41, but they do not know and, therefore, do not admit that said  
 38. sum was the cost price at Buffalo, N. Y., of said coal so received. They also admit that in the regular course of their business they have sold of said coal so received a part thereof, for which they have received \$3,607.83, and that a further quantity of said coal has been sold, the payment



- for which is still outstanding and uncollected; defendants allege that they did at all times pay over to said Bull the proportion of proceeds of said sales of said coal as they were received, in the manner provided for by said articles, until the time of the failure and refusal of said Bull further to supply coal according to said articles. Defendants admit the amounts of coal furnished by said Bull were according to the statement set forth in Exhibit "B," appended to said Bull's bill of complaint, as to dates and quantities, except as to two items of receipt on 29th September, which, instead of 142 and 98 tons respectively, ought to be  $129\frac{7}{2000}$  and  $95\frac{157}{2000}$  tons respectively. Defendants admit the payments of \$3,150.50 to said Bull, as set forth in Exhibit "C," appended to bill, and also admit correctness of contingent expenses in and about the business of said firm, as set forth in paper marked "detailed account of expenses," appended to said bill, so far as such accounts reach, but deny the truth and correctness of the allegations in said bill, that there is a balance of \$1,104 due to said Bull from said defendants. Defendants allege that since September 29th, 1860, said Bull, although often requested, has wholly neglected and refused to furnish coal, under said articles, to the great injury of defendants, and to the utter loss of all the advantages which they reasonably expected to derive by the formation of said limited co-partnership, and to their actual and direct damage, therefore, they have declined to pay him any more money since October 2nd, 1860, on which day they payed him \$1,450. Defendants deny that they have converted to their own use any money legally or equitably due and owing to said Bull, but instead thereof have sustained great loss and injury by the failure of said Bull, on his part, to comply with the terms of said articles of co-partnership. Defendants allege that until the afore-said failure and default of said Bull, they complied, in all respects, with said articles, in furnishing statements of the condition of said business; that the books of the concern were in charge of the clerk employed by said Bull, and at all times open to his inspection; and that he did authorize
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41. and employ his brother as his agent, who did inspect and examine the books of said co-partnership during the continuance thereof; and that said Bull was in Chicago on 5th of October, 1860, at which time he had free and unrestricted access to said books, and did, personally and with the assistance of said clerk, who had been employed by and was to be paid by said Bull, thoroughly examine and inspect said books, without let or hinderance on the part of said defendants, or either of them.

42. Defendant Kelly denies that he ever directed said clerk or book-keeper not to prepare monthly statements for the purpose of keeping said Bull in ignorance of the business of said firm, until after the commencement of this suit by Bull against defendants, but alleges that until after the default and failure of said Bull to comply with said agreement, on his part, and until the commencement of this suit, said Bull and his agent had free and unrestricted access to and was kept always advised of the condition of said books of accounts; and that no obstacle was offered to the examination of said books by said Bull, is apparent from the different statements he has appended to his bill as exhibits, which were copies, but defendants deny correct copies from said books of account. Defendants deny that they have ever drawn any money out of the funds of said limited partnership, other than they were authorized to draw under said articles. Defendants allege that large gains might have been realized out of the sales of coal, under said articles creating said limited partnership, but allege that such profits and gains have been cut off and lost by the refusal and neglect of said Bull to comply with his part of said agreement, and allege that defendants have been damnified and have sustained loss through and in consequence of such neglect and refusal, to the amount of, at least ten thousand dollars. Defendants state that said Bull, up to the time of his said breach of said articles, did receive all that he was legally entitled to, both as to prices of coal furnished and



43. profits on sales; defendants are unacquainted with the condition of said Bull's general business, and neither admit or deny his apprehensions of ruin, but allege that such apprehensions are the result of his breach of said contract, and are not chargeable to defendants. Defendants deny all unlawful combination, confederacy, &c., and conclude their answer in the usual form.

48. Defendants entered their **Motion** October 26th, 1860, to dissolve said injunction issued and served in said cause, which motion was never called up or passed upon by said court.

50. December 5, 1860, said Bull filed his **General Replication** to defendants' answer, which is in the usual form.

55. December 18, 1860, on motion of said Bull, defendants were ruled to show cause why they should not be attached for an alleged contempt, in violating the injunction issued in said cause.

106, 107. February 15, 1860, rule on defendants to show cause why they should not be attached for an alleged contempt in violating said injunction; on motion of defendants, discharged.

108. February 15, 1860, defendants file their **Cross-bill** in said cause, against said Bull, in which they allege that, April 6th, 1860, they made and entered into certain articles of co-partnership with said Bull, which were signed, sealed, and delivered by them, to wit, said Maher, Kelly and Bull, whereby they agreed to become partners in the coal business or trade in the said city of Chicago, under the name, style, and firm of Kelly & Co., which co-partnership was to commence on the 15th day of April, 1860, and terminate in two years, from its commencement, with leave to con-

109. tinue the same five years longer, if the respective parties should be willing so to do; and for and with the purpose and view of carrying on said co-partnership business, the said partners covenanted and agreed to observe and perform certain stipulations therein agreed to be performed, in substance, as follows:—

110. Said Bull agreed to furnish and provide all the coal that should be necessary or should be required for carrying on said business, on board of vessels in the ports of Buffalo or Cleveland, at the lowest market value, in cash, at those places, when so furnished; the coal to remain the property of said Bull until it should be sold in the ordinary course of business; it was also understood and agreed that said Bull should furnish and provide, at his own expense, a competent person to keep the books and accounts of said firm at Chicago. Said Maher agreed to furnish, as his proportion of the common stock of said firm, the use of the lot of land in Chicago, at the time of the execution of said articles of co-partnership occupied by said Kelly and Maher, then doing business under the name and style of Kelly & Co., as a coal yard, and also the use of all the fixtures, carts, wagons, &c., used by the said Kelly and Maher, in the coal business. Said Kelly agreed to contribute, as his proportion, the whole of his time and attention to the superintendence and management of the business of said firm, for the mutual benefit and advantage of all the parties thereto.

It was also stipulated that all the expenses of the business of said firm should be borne in common by said three partners, excepting the salary of the book-keeper, which was to be paid by said Bull; and all the profits of the concern were to be equally divided between the three partners; said Maher and Kelly agreed to bear all losses that should arise from bad debts created by them or either of them, by giving credit to irresponsible persons. Said Bull agreed to fully



- insure, in some responsible insurance company, all cargoes shipped by him for the firm; and that any loss that should arise, in consequence of his neglect to insure said coal, should be borne by him; the expense of such insurance to be borne by the parties in common; that, in case the receipts of the sales of the coals should at any time be insufficient to pay freight on said coal, when it should be payable, said Maher and Kelly agree to pay such freights when they should be payable; such freights to be considered expenses of the firm, to be borne in common, and said Maher and Kelly to be credited on the firm books for all monies advanced for freight. Said Bull, Kelly, and Maher severally covenanted and agreed that they would do no act or acts which should be prejudicial to the firm, that correct books of account should be kept, in which should be entered all monies received and paid, all purchases and sales of coal, and all monies paid for expenses, and all matters of account relating to the business of said firm, and that said books were to be, in common, accessible to all three partners, and at the close of each month the books were to be balanced and each partner furnished with a balance-sheet from the ledger; and on May first, in each year, except May 1, 1860, an account should be taken and stated on the ledger, of all the stock, property, and assets of the firm, and of all the liabilities and debts, and that each partner might draw his share of profits, after paying all expenses, losses, and liabilities, and that any partner indebted to the firm should refund to the firm the amount of his indebtedness; and, at the expiration of said co-partnership, or earlier termination thereof, a similar account should be taken and stated on the ledger; and all the coal on hand, furnished by said Bull, for which he had not been paid, delivered back to him in Chicago; and the possession of the lot used for the coal yard delivered back to the said Maher, as well as all fixtures, carts, waggons, &c., furnished by him to the firm, provided they be in existence; and, after paying all the expenses, losses, and liabilities of the firm, all the assets, stocks, property, and every thing belonging to the firm to
- iii.
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- be equally divided between them, provided they should bear and make good the losses by said articles agreed to be assumed and borne respectively. After payment of expenses of firm, the proceeds of sales of coal were weekly to be paid over to the book-keeper for the said Bull, to the amount of cost of coal furnished by him. Neither partner was to withdraw any money, except for benefit of firm, except said Bull might draw to pay salary of book-keeper. After paying said salary and expenses, balance of cash on hand was to be paid to book-keeper for said Bull, to the amount of the cost of coal furnished by Bull. After one year, either partner might terminate said partnership, if dissatisfied, by giving notice of such termination, in which case the affairs of the firm were to be adjusted in the same manner as if terminated by limitation; for greater certainty, complainants in cross-bill ask leave to refer to said articles when produced.

- That after the formation of said co-partnership aforesaid, on the 6th of September, 1860, said partners further covenanted and agreed, by an instrument in writing, signed, sealed, and delivered by them respectively, in substance, that the co-partnership or joint interest of said firm is and was to be confined exclusively to coal furnished to said firm by said Bull, and is not to be extended to any transactions of said Kelly and Maher, theretofore composing the firm of Kelly & Co., in any other coal or in the purchases of the same from any other person or firms, with which transactions said Bull is to have no interest; but the same and all other transactions, outside of coal shipped by Bull, are the separate transactions of Maher and Kelly, and that said articles of co-partnership were to have no reference or connection with the business of that firm; that it was the intention, by said articles, to create a joint interest only in the coal shipped by said Bull to said concern, and that Kelly should pay towards the book-keeper employed by Bull to keep the books and accounts of the concern, \$150 per annum,



116. from the date of said articles of co-partnership, as by reference to said supplementary article, when produced, will more fully appear.

117. Complainants in cross-bill allege that from the formation of said co-partnership the co-partners entered upon and continued in the transaction of said co-partnership business, pursuant to said articles and subsequent modification thereof, until the said Bull failed to perform the several covenants therein, on his part, to be performed; and that they, Kelly and Maher, and each of them, have, on their part, both jointly and severally, done and performed every thing on their part therein covenanted to be done and performed; but that said Bull wholly disregarded the covenants and agreements, on his part, to be performed, and has failed and neglected to furnish and provide the coal that was necessary and requisite to carry on said copartnership business, according to the true intent and meaning of said articles of co-partnership, although said Maher and Kelly have frequently requested him to do so, whereby the benefits, advantages, and profits on the sales of coal to be by him furnished, which would have accrued and been realized, have not, in consequence of said default, accrued or been realized, and the object and purposes of said copartnership have been defeated by the said neglect and refusal of the said Bull, and that by reason thereof said Maher and Kelly have sustained loss and damage on account of their making no profits on the sale of coal, which they otherwise would have been able to make, had the said Bull furnished coal to carry on said partnership business, to the amount of \$15,000, as they verily believe. That it was mutually covenanted by said partners respectively, in said articles, that neither partner should do any act or acts prejudicial to the business of said firm; but that the said Bull, in violation of his said covenants, sold and delivered large quantities of coal to other coal dealers in said city of Chicago, to be disposed of in that market, whereby said Maher and Kelly, in the said

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- of coal under said articles, were brought into direct competition with such parties engaged in the coal trade in said city, and thereby impaired the business of said co-partnership, and said Maher and Kelly sustained great loss and damage thereby. That said Bull is not a resident of this State, but is a resident of the State of New York; that he has property within the jurisdiction of said court, which they are apprehensive he will place beyond the jurisdiction of said court, so as to avoid any decree that may be rendered against him in favor of said Maher and Kelly in this suit, unless he shall be enjoined from so doing; and they believe they shall be able to show, at the hearing, that he is largely indebted to them, for losses and damages which they have sustained by his disregarding the covenants in said articles. That they did, at all times since the formation of said co-partnership until September 29, 1860, and until defendant had broken and disregarded the covenants in said articles as aforesaid, continue to pay over to said Bull, on his draft or otherwise, substantially in accordance with said articles, and in manner apparently satisfactory to said Bull, all sums of money to which he was legally or equitably entitled, and in other respects have performed, on their part, all their stipulations under said articles, and were always ready and willing to perform, on their part, all their stipulations under said articles, and were always ready and willing to perform, on their part, until said Bull made default as aforesaid; that said Bull is combining, &c., and refuses absolutely to comply with said articles, on his part, and falsely sets up various pretences, and has lately filed his bill against them praying for an account and that said articles may be annulled, to which bill they have filed their sufficient answer, and said Bull pretends that they have in their hands large sums of money which ought to be paid over to him, whereas they charge the contrary to be true, and that said Bull has not supplied said firm with coal at the lowest market cash price in the market of Buffalo, where said coal was shipped, and that they have not converted the
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proceeds of sales of coal to their own use, and have not large quantities of said coal on hand, and are not indebted to him for coal furnished to said firm, and that they have always been ready and willing to account and settle amicably with him. That they do not know the precise amount of coal delivered or the lowest cash market price thereof at Buffalo, where shipped; that all the information they have is from the books kept by Bull's book-keeper, from which there appears to have been shipped 1572<sup>405</sup>/<sub>2000</sub> tons, charged for, in gross, at \$6,879.47; that said Maher and Kelly believe that both quantity and price have been greatly exaggerated on said books; that said Bull had never accounted or settled with them, or either of them, and has never paid or compensated them for the damage and loss sustained by them.

123. Said Maher & Kelly then set up facts in relation to the commencement of an action of covenant, by said Bull, upon said articles, and the recovery of a judgment thereon, from which judgment an appeal had been taken, also that  
 124 two other suits had been commenced against them, growing, as they allege, out of said partnership matters, one by Edward H. Downs, upon a note of \$1,525, executed in the name of said firm, and endorsed by said Maher to the said Bull, and one by the Cecil Bank of Maryland, upon two notes, one of \$1,282<sup>27</sup>/<sub>100</sub> and one of \$1,302<sup>6</sup>/<sub>100</sub>, executed in the name of said firm and payable to said Maher, and endorsed  
 132 by said Maher to said Bull, whom they pray may be made  
 133 parties defendants, and that they may answer cross bill without oath, their oaths being waived; that said Bull may  
 134 be compelled, by an order of court, to state a true and correct account of all matters and things appertaining to, or growing out of said partnership from the commencement to filing of cross bill, and to pay and compensate them for any and all losses and damages sustained by them in the premises, and that said articles and subsequent modifications thereof may be annulled and held for naught. That said  
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137 Bull may be restrained from selling, &c., his property within the jurisdiction of said court, and that proceedings in original suit may be stayed until said Bull shall file a sufficient answer to cross bill, and pray for such further relief, or such other relief as may be agreeable to equity; also pray for writ of injunction against said Bull from selling or removing his property and from proceeding in his original suit until he answer said cross bill. Sworn to by Kelly & Maher.

139 February 20, 1861, said Bull enters his motion in said cause to strike from the files said cross bill.

140 June 27, 1861, on motion of said Bull, it is ordered that he have thirty days in which to file affidavits controverting statements in cross bill, and to resist motion for injunction.

141 July 2, 1861, on motion Kelly & Maher, it is ordered, that they have leave to amend their cross bill by making Cecil Bank of Maryland and Edward H. Downs defendants thereto, and also to amend the prayer of said bill, and thereupon file their amendments to prayer of said cross bill as follows, to wit: 1st. The said Maher & Kelley pray that 142 the writ of subpoena may issue against each and every of said defendants, and that they may answer without oath, their oaths being expressly waived, and that each of said 143 defendants may be restrained from prosecuting the suits at law until the coming in of their answers, and until the further order of court and for general relief.

144 July 3, 1861, the said complainants in cross bill, having submitted a motion for the issuing of an injunction, in pursuance of the prayer of said cross bill, the said court, on argument of counsel, overruled said motion and refused said application for an injunction, as asked for in said cross bill.



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Sept. 11, 1861, said Bull filed his **answer** to said cross bill of Maher & Kelly, in which he says that he admits the execution of said articles of co-partnership and subsequent modification thereof, substantially as is alleged in said cross bill, and denies that Maher & Kelly performed all and every matter and thing by them covenanted to be done in and about the partnership business, but on the contrary they did not keep separate books for the joint business of said Kelly, Maher & Bull, but used the same books in said business as were used in the old firm of Kelly & Co., of which said Kelly & Maher were the only members, by which the accounts of the old and new firms were mixed and confused. That said Maher & Kelly did not send Bull monthly balance sheets from the ledger, but refused so to do, although often requested, and by various pretexts endeavored to keep said Bull, then and now residing in Buffalo, New York, in ignorance of the situation of the business.

That Maher & Kelly did not pay over the proceeds of sales of coal to book-keeper for Bull, but refused so to do, although said book-keeper had requested them so to do, and Bull had applied to them by letter so to do.

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That at the time of filing original bill, Maher & Kelly had over \$1,100 which they had not paid over or accounted for. That Kelly & Maher appropriated large sums of money to their own use, which by said articles they were bound to pay over to book-keeper of Bull, thereby embarrassing said Bull.

Bull denies that he violated any of the covenants of articles to be performed by him; that he did not refuse to supply Kelly & Maher with coal to be sold on joint account of Kelly, Maher & Bull, before said Kelly & Maher had neglected to keep separate books for said business, and had refused to send said Bull monthly balance sheets from the



168 ledger, to enable him to ascertain the condition of the business, and had refused to pay over to the book-keeper, for said Bull, the weekly proceeds of the sales of coal, in the manner specified in said articles, to enable him to meet his obligations for coal, but alleges that he regularly supplied said Kelly & Maher with all the coal they could sell until they had made default as above, when he was compelled to stop the supply because said Kelly, refusing to send him any balance sheets, left him without any knowledge of the condition of the firm and business in Chicago, and because said Kelly & Maher, refusing to pay over to the book-keeper for Bull the weekly proceeds of sales for coal, left him without the means of fresh supplies of coal and without the means of paying for coal already purchased and shipped, but he charges that he had supplied all the coal that the business of said Kelly & Co. required, and alleges that said Maher & Kelly, in the beginning of October 1860, had on hand a large amount of coal furnished by Bull, which they pretended to sell in gross to one James Roberts for \$2,800. Said Bull denies that he shipped coal to other parties in Chicago until Kelly & Maher violated the articles as aforesaid, but admits that he did ship coal to other parties in Chicago, after Kelly & Maher had refused to furnish monthly balance sheets and to pay over to the book-keeper the weekly proceeds of sales of coal for Bull.

170 Said Bull denies that he bound himself by said articles to ship coal to no one else in Chicago than said Maher & Kelly, during the continuance of said co-partnership, or that it was so understood when said partnership was formed, but that it was understood when said partnership was formed and articles executed that he, said Bull, might ship coal to other parties in Chicago, provided he sent said Kelly & Maher as much as they could sell, and avers that he did ship them as much coal as they could sell until they refused to perform the covenants of said articles on their part, and avers, that about the time the difficulties commenced they had on hand coal shipped by Bull of the value of \$2,800 and upwards,



171 that he supplied them with the amount stated in original bill of complaint, which amount is entered upon the firm books so that they had means of ascertaining the amount, admits that he resides in Buffalo, but denies he has property within the jurisdiction of the court, unless said Kelly & Maher have secreted or been unable to sell all the coal shipped to them to sell on account of the firm. Denies that he is indebted to said Kelly & Maher for any breach of said articles of co-partnership, but alleges they are indebted to him in a very large amount for coal shipped and not accounted for, and his share of the profits of the business of Kelly & Co., to wit: the sum of \$5,000.

173 That said firm of Kelly & Co. had made a contract with one N. S. Bouton, of Chicago, to furnish him with a large amount of coal, as he, said Bouton, wanted to use the same, for which said Bouton had given his note, payable in several months, and which note was sent to Bull by Kelly & Maher, and charged to him; that after furnishing a part of the coal called for by said contract, said Kelly & Maher refused to furnish said Bouton any more coal under said contract, although they had on hand more than sufficient coal, furnished by said Bull, to fill said contract; that upon said refusal, said Bouton notified said Bull that he would not pay said note when it matured if the coal was not furnished him in the quantity and quality and at the price called for in said contract with Kelly & Co. That said Bull had to buy coal to fill the balance of said contract, inasmuch as he had negotiated said note, and late in the fall, and at greatly increased prices, and shipped the same from Detroit by railroad instead of vessels, and sustained damage thereby to the amount of \$638.

Said Bull admits that May 4, 1860, said Kelly & Maher executed and delivered to him their promisory note for the sum of \$1,525, payable in three months, and executed in the name of said firm, and payable to the order of and en-

174 dorsed by Maher, and delivered to said Bull, but denies  
that said note was given to carry on firm business, but on  
the contrary had nothing to do with the new firm of Kelly  
& Co., of which said Bull was a member, and was endorsed  
by said Bull, before the maturity thereof, to Edwin H.  
176 Downs. Said Bull admits that two notes were executed in  
the name of said firm, one for the sum of \$1,282  $\frac{97}{100}$  and one  
for the sum of \$1,302  $\frac{61}{100}$ , and payable to the order of Maher,  
and endorsed by said Maher to said Bull, but denies that  
said notes grew out of the partnership business, or that the  
same were endorsed to the said Cecil Bank of Maryland  
after their maturity, and concludes his answer to cross bill  
in usual form. Answer sworn to day of Sept., 1861.

181 **Replication** of Kelly & Maher to answer of Bull to  
182 cross bill, filed June 6, 1862, in the usual form.

183 June 20, 1862, ordered on motion of Bull, that defend-  
ants be required to close proofs by first day of next term of  
said court.

184 July 14, 1862, on motion of said Bull it is ordered that  
defendants be required to close taking proofs in said cause  
by the 15th day of August next.

185. July 14, 1862, defendant Hugh Maher filed, in said cause,  
186. the several affidavits of said Maher and Daniel C. Nicholes.

Said Maher, in his affidavit, states that, April 15, 1860,  
he entered into a co-partnership with said Bull and Kelly,  
that the co-partnership articles were in writing, annexing a  
copy to his affidavit, being the same articles hereinbefore  
set out; that the principal object he had in entering into  
said co-partnership was, by means of his share of the profits,  
to receive what would amount to a fair rent for said coal  
yard and fixtures, which belonged to said Maher; that, by  
the terms of the articles, he was to have nothing to do with  
187.



the management of the business of the concern, but was to furnish and contribute, as his share of the capital stock of the concern, the coal yard and fixtures, waggons, carts, &c., used by said concern. That said Kelly, under said articles, was to have the sole control and management of the business of said firm, and said Maher was to give no attention to the business thereof, other than to receive this share of the profits, unless the proceeds of sales of coal should be insufficient to pay the freights on coal as they should be received, in which case he was to contribute towards such freights until the proceeds of sales of coal should be sufficient to pay freights, when he should receive back such advances. That said Bull was to furnish all the coal that should be needed or required by said firm for the business thereof, during the continuance of said co-partnership, and also to furnish a competent book-keeper, at his own expense, to keep the books of said concern, and was to receive the first cost at Cleveland and Buffalo, and one-third of the profits, said Kelly one-third of the profits, and said Maher one-third of the profits of said concern, after paying all expenses of the management of the business of said firm. That the business of said firm was commenced soon after the 15th of April, 1860, and continued till 11th of October, A. D. 1860, when said Bull filed the bill in this cause against said Maher and Kelly, alleging, among other things, that said Maher and Kelly had made default in performing the covenants, on their part, in said articles contained, and praying, among other things, for a dissolution of said partnership and an account and closing up of said concern. That said Maher has made no default, but has kept and performed all of said covenants to be kept and performed on his part, that, if any default has been made by either of defendants, the same has been made by said Kelly and not by said Maher, and that he, said Maher, is not responsible for any defaults of said Kelly, under said articles. That said Bull wholly failed, as he had agreed in said articles, to furnish said firm with all the coal that was required by the business of said firm; that said firm, by its agents, relying

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190. upon said Bull's keeping the covenants on his part, contracted with various parties in the city of Chicago and elsewhere to sell a large amount of coal to be delivered in the fall of 1860 and winter of 1860 and 1861. That the price of coal, in the fall of 1860, largely advanced to the amount of \$2 or \$3 per ton; that as soon as coal began to advance, said Bull refused to furnish any more coal to said firm, and that said Maher lost thereby all the profits that would otherwise have been made by said co-partnership by the default of said Bull.

191. That said Maher, with said Kelly, (the said Bull being a non-resident of this State,) has been compelled to pay a large amount of damages on account of the failure of said firm in fulfilling their contracts to deliver coal, and which said firm were unable to fill on account of the default of said Bull to furnish said firm with coal, as he had agreed in said articles; that said Kelly has informed said Maher that he has kept the covenants in said articles, on his part to be kept, but whether said information is correct or not said Maher is unable to state. That said firm has lost a large amount of money and incurred large liabilities on account of the failure of said Bull to supply coal to said firm, as he had agreed in said articles; that various parties are threatening to bring suits for damages on account of the failure of said firm to deliver coal on the contracts of said firm, made prior to October 11, 1860; that a large portion of the persons to whom coal has been sold and delivered, in pursuance of contracts made previous to October 11, 1860, refuse to pay for coal delivered on account of the inability of said firm to fulfil their contracts, from the failure of Bull to supply said firm with coal, as agreed in said articles.

192. That said Maher has given but little attention to the business of said firm, but has left the same to the management of Kelly, as was contemplated by said articles; that he has received nothing but a very small amount of coal for the use of said coal yard and fixtures and for advances made by him, but has paid out a large amount of money for freight



and other purposes for the use of said firm ; that, if he is made to contribute in any way for the defaults of the said Kelly, he is advised that in equity the said Bull should be made to contribute for the use of his said coal yard and fixtures.

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198. Kelly & Co., relying on said Bull to furnish said firm with a full supply of coal, had, by said Kelly and the agents of said firm, made contracts to deliver coal to various parties previous to October 11, 1860; that said Bull stopped delivering coal about September 28, 1860, that said coal at that time had commenced and continued to rapidly advance in price to the amount of two or three dollars per ton, and that said Maher and Kelly, in consequence of the failure of said Bull to supply said firm with coal as he had agreed, and
199. the great advance in the price of coal, were compelled to pay the parties aforesaid a large amount of damages, and that said Maher knows of no way to prove the facts aforesaid but by the parties with whom said contracts were made:

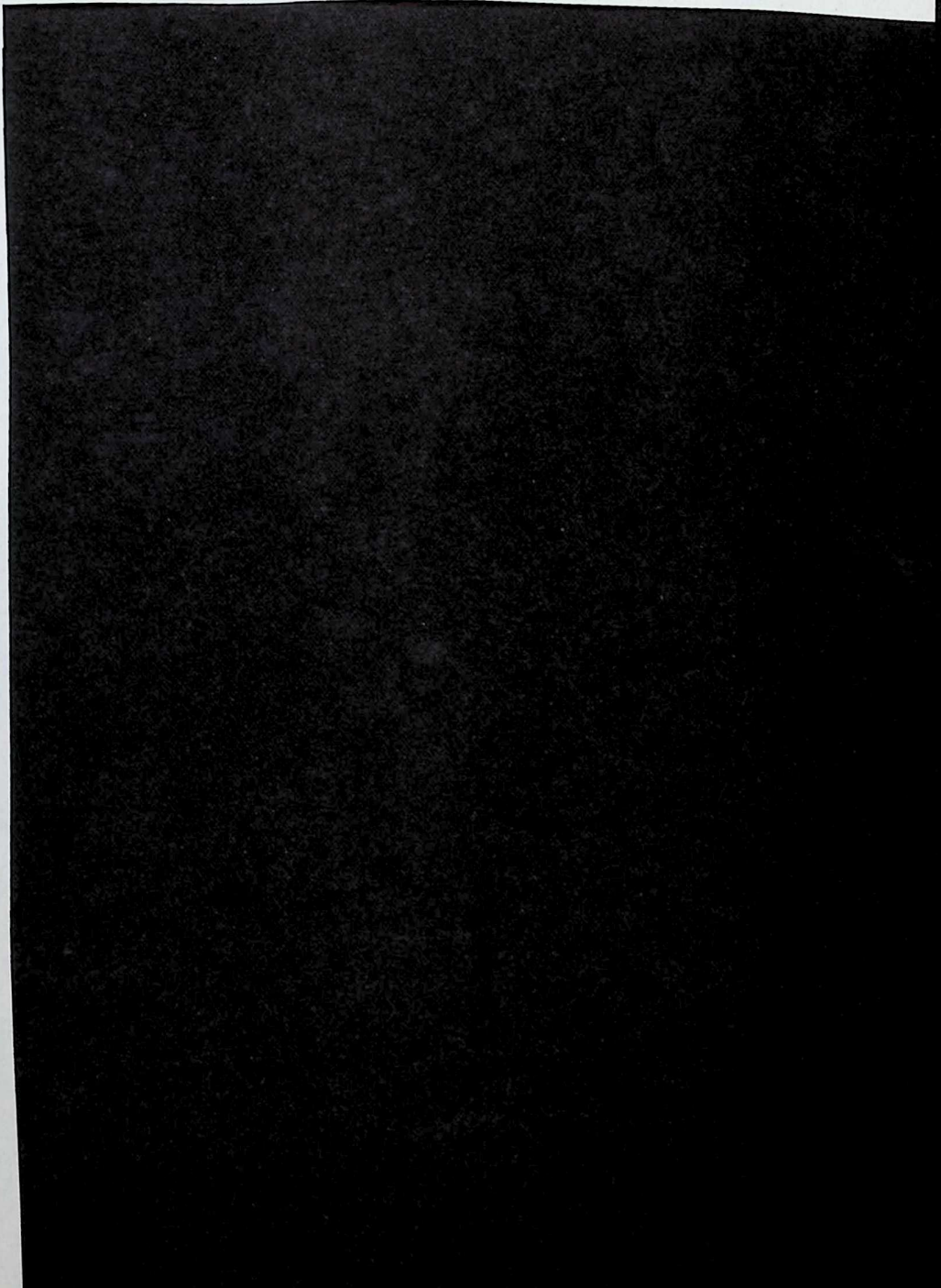
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202      Annexed to said affidavit is a copy of said articles of  
co-partnership.

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215 August 4, 1862, on motion of said Maher, and on reading  
 said affidavits of said Maher and said Nicholes, it was  
 ordered by said court that the rule to close proofs in said  
 cause be further extended from that day until the first day  
 of the next term of said court. And on further motion of  
 said Maher, it was ordered that he have leave to file a separate  
 answer in said cause, and afterwards, to wit: August  
 18, 1862, by D. C. & J. Y. Nicholes, said Maher filed in  
 216 said cause his separate answer, in which he says he admits  
 entering into said co-partnership articles, and that a correct  
 217 copy is annexed to the bill of said Bull. That the business  
 of said co-partnership was entered upon and carried on by  
 the parties constituting said firm of Kelly & Co. till said  
 Bull filed his said bill. That Sept. 6, 1860, explanatory  
 articles of agreement were entered into between the mem-  
 bers of the said firm of Kelly & Co. That in said explana-  
 tory articles, it was agreed and declared to be the true  
 intent and meaning of said articles of co-partnership, that  
 the said co-partnership thereby formed should be confined  
 exclusively to coal, to be furnished to said firm by said  
 Bull, and that the co-partnership or joint business should  
 extend to no transactions of said Maher & Kelly in any  
 other coal, or in the purchase of the same from any other  
 218 person in which Bull had no interest. That said Kelly was  
 to pay towards the salary of the book-keeper employed by  
 said Bull, at the rate of \$150 per annum, from the com-  
 mencement of said co-partnership business. Denies that  
 said explanatory articles are correctly set out in the bill of  
 said Bull, but refers to a copy of the same annexed to the  
 separate answer of said Maher, and asks that the same may  
 be taken as a part thereof. Alleges that said explanatory  
 articles neither increased or diminished the liability of said  
 Maher, nor did they release said Bull from any covenants  
 to be kept on his part in said original articles. That he is  
 219 informed by the book-keeper, employed by said Bull to  
 keep the books of said firm, and by said Kelly, that said  
 Bull did furnish said firm with a quantity of coal, and that  
 exhibit "B" annexed to said Bull's bill shows the amounts



of coal furnished as appears from said books, except the last two amounts received Sept. 28, 1860, which instead of 142 and 98 tons respectively, should be  $129\frac{717}{2010}$  and  $95\frac{87}{2000}$  tons respectively. Denies that said Bull furnished the quantity of coal agreed to be furnished by him under said articles; does not know, and has no means of knowing, except from statements of said Bull, that said coal furnished amounted to \$6,879  $\frac{5}{100}$  at cost prices, as charged by said Bull. Expressly denies that he said Maher has sold, or contracted to sell, or said Maher & Kelly jointly have sold or contracted to sell a large portion or any of said coal furnished to said firm by said Bull, but alleges that the coal furnished by Bull has been sold under the direction of Kelly & Bull. Admits that the books of said firm, as kept by the book-keeper employed by said Bull to keep the books of said firm, show that there has been received by said firm, from the sale of coal furnished by said Bull, the sum of \$2,966  $\frac{07}{100}$ . Denies that the said firm has received from the sale of coal, furnished by the said Bull, the sum of \$5,197  $\frac{89}{100}$  as said Bull has alleged in his bill. That it was provided in said articles of co-partnership that said Kelly was to contribute, as his proportion in said partnership, his whole time and attention to the superintendence and management of the business of said firm, for the mutual benefit of all parties thereto, and that, as was contemplated by said articles, the entire business of said firm has been managed by said Kelly & Bull, and that said Maher has had nothing to do with the management and control of said business further than to furnish the dock, coal yard, carts, wagons, and fixtures, as was provided in said articles; that the entire cash receipts of said firm have been received by said Kelly and said Bull, and no part by said Maher. That it appears from the books kept by said Bull's book-keeper, that payment for a portion of said coal sold by said Kelly and said Bull had not been collected at the time of the commencement of this suit, but was outstanding and uncollected, but is unable to say what portion is uncollected. Admits that



223 it is provided in said articles that all moneys the proceeds of sales of coal should weekly be paid to the book-keeper, furnished by said Bull, to the amount of the cost of coal, after deducting all expenses of the firm and salary of book-keeper, but expressly denies that it was provided in said articles that said Maher & Kelly jointly agreed to pay over proceeds of coal as aforesaid, or that said Maher & Kelly, under said articles, were made jointly liable to pay over said proceeds of sales of coal. Denies that there is any provision in said articles that said Maher should take charge of, or in any way control or pay over, any of the proceeds of the sales of coal, furnished by said Bull to said firm, but avers that it was expressly understood, both before and at the time of the formation of said co-partnership, that said Maher should not be required to devote any time or attention to the business of said firm, nor be responsible for the acts of either member of said firm, nor was it contemplated or designed by said articles that said Maher was to take any part in the control in the business of said firm, but the same was to be managed, controlled and superintended by said Kelly, and that in pursuance of said articles, and the original understanding of the parties thereto, said Kelly has, to a great extent, and with said Bull wholly controlled and managed the business of said firm, and said Kelly & Bull have collected all the moneys the proceeds of the sales of coal. That whether said Kelly paid over to said Bull all the proceeds of sales of coal furnished by him, he is unable to say, except from information derived from said Kelly, and from the books of said firm, and from other papers in the possession of said Kelly, as the managing partner of said firm, and from such information and the books of said firm, it appears that said Kelly and book-keeper paid said Bull, as appears from the cash-book of said firm, while said firm was in existence, and previous to the commencement of this suit, the sum of \$5,276<sup>97</sup>/<sub>100</sub>.

225 That the dates and several amounts paid more fully appear in schedule marked exhibit "B," which said Maher



asks may be taken as a part of his bill of complaint; that it also appears from drafts drawn by said Bull on said firm, and notes of said firm paid to said Bull, now in the possession of said Kelly, that a large amount of money was paid to said Bull by said firm from April 15 to October 11, 1860, and not entered upon the books of said firm, but said Maher is unable to state the exact amount paid to said Bull in pursuance of said articles.

226 Denies that Maher & Kelly paid over the \$3,150<sup>16</sup>/<sub>100</sub> as stated by Bull, but alleges that Kelly and the book-keeper paid the amount that was paid to Bull, and, as the said Maher believes, from the books and papers in the possession of Kelly, the amounts said Bull received on account of coal shipped and to be shipped to said firm, were \$5,279<sup>97</sup>/<sub>100</sub>, and that no portion of said sum was received from sales of coal made by Maher or Maher & Kelly, for Maher had nothing to do with the sales of coal.

227 That he does not know how much money has been paid out on account of expenses of said firm, except from the books of the firm and information derived from Kelly, but denies that the sum of \$843<sup>16</sup>/<sub>100</sub> was all the money that was actually paid out by said firm for expenses of said firm, as is alleged by said Bull. Denies that by deducting the sum paid for expenses from the cash sales of coal leaves a balance, which ought to be paid to said Bull, of \$4,254<sup>16</sup>/<sub>100</sub>, or any other amount, but alleges that all the coal sold by said firm, was sold by said Kelly & Bull, and that all the moneys received from the sales of coal furnished said firm by said Bull, were received by the said Kelly & Bull, and that, as was contemplated by said articles,  
228 no sales of coal were made by said Maher, nor was any money belonging to said firm, arising from the sales of coal or otherwise, received by said Maher. Denies that he is jointly with said Kelly, or individually, in arrears to said Bull in the sum of \$1,104<sup>10</sup>/<sub>100</sub>, or in any other sum whatever;

that he is informed and believes that a much larger amount than the sum of  $\$843\frac{16}{100}$ , as is alleged by said Bull, was paid out as expenses of said firm; that he is unable to state the precise amount, but that it appear from the cash-book of said firm, that said firm paid on account expenses of said business, to David Denehy, for drayage, \$28, for freight on coal,  $\$194\frac{29}{100}$ ; to S. O. Eames, as salesman,  $\$100\frac{12}{100}$ ; various items charged to expense account,  $\$484\frac{60}{100}$ ; to John McAuly, for services,  $\$382\frac{36}{100}$ ; to John O'Leary, for hauling coal,  $\$368\frac{69}{100}$ ; to James Fleming,  $\$183\frac{85}{100}$ ; to David Trimble, \$25; to profit and loss,  $\$27\frac{29}{100}$ ; besides other amounts paid subsequently to Oct. 11, 1860, the precise amount of which said Maher is unable to state.

Denies that said Maher, jointly with said Kelly, or individually, was liable to pay over to the said Bull, under said articles, said sum of  $\$1,104\frac{10}{100}$ , or any other sum, or that he has refused to pay to said Bull any sum of money that he was liable to pay, under said articles, on account of said partnership business. Alleges that said Kelly & Bull have received all the money that has been received by said firm in said partnership business, and that said Maher has received no part of the same; that he is not now, nor was at the time of the commencement of this suit, under any obligation to pay over to said Bull any of the moneys collected by said Kelly or said Bull. Denies that he ever directed the book-keeper not to pay money to said Bull, and is informed that said Kelly never directed the book-keeper not to pay money to said Bull, and denies that he is responsible for the acts or conduct of the said Kelly in said partnership business.

Denies that he has individually, or jointly with Kelly, in violation of said articles, refused to pay said Bull said sum of  $\$1,104\frac{10}{100}$ , or that he individually or jointly with said Kelly has converted said sum to his or their own use, but



231 whether said Kelly has converted said sum, or any other sum coming into his hands, in the course of said partnership business, he is unable to say, but whether he has or not, said Maher denies that he is in any way liable for such conversion of said Kelly.

232. That he is unable to say whether weekly payments have been made by said Kelly to said Bull, as was originally contemplated, or not, but that it appears, from the cash books of said firm and papers in the hands of said Kelly, as shown by exhibits annexed hereto, that various large amounts of money were paid to said Bull, but said Maher denies that, under said articles, it was made a part of his duties either to make sale of coal, collect money due to the firm, or pay the same over to the said Bull, and he denies that he is in any way liable to said Bull for any default or failure of said Kelly in this respect; admits that by said articles it was provided that said Bull should furnish, at his own expense, a competent book-keeper to keep the books and accounts of said firm at Chicago, by which correct books of accounts were to be kept, in which should be entered all monies received or paid out, all purchases and sales of coal, all monies paid for expenses, all matters of account relating to business of firm, which should be in common and accessible to all three partners, and at the close of each month should be balanced by said book-keeper, and each partner furnished with a balance-sheet of the ledger. Admits that said Bull resided in Buffalo, New York, but is informed that he was frequently in Chicago and examined said books. 233. That said Bull always had free access to said books, and did at several times, by himself and brother, examine the same, but whether said Bull, from such examination of said books or otherwise, was able to ascertain precisely the state of said partnership business, at any given period or not, he is unable to say, nor does he know whether said book-keeper sent monthly balance-sheets or not to said Bull. That said Bull wholly failed to furnish and provide, at his own expense, as he had agreed in said



articles, a competent person to keep the books of said firm, but instead sent a young man without any experience in book keeping whatever, and if there was any default in sending balance-sheets to said Bull, it was in consequence of the incompetency of the book-keeper and his inability to make out a balance-sheet from the ledger. Denies, upon information, that Kelly ever directed the book-keeper not to send balance-sheets to said Bull. That the book keeper never furnished said Maher with balance-sheets, and that he has been informed by said Hunt, the book-keeper, since the commencement of this suit, that the reason he failed to furnish said Maher and other members of the firm with balance-sheets was for the reason that he had not sufficient knowledge of book keeping to enable him to make out a balance-sheet from the ledger, showing the condition of the business of said firm; but said Bull was informed almost daily, by letters written by the book-keeper and Kelly, of the affairs, business transactions, and condition of the business of said firm. That said book-keeper was ready and willing at all times to furnish said Bull with any and all information in relation to the business of said firm, that he was able to give, and never has refused to give, any information to said Bull that he was able to give. That Bull had free access to the books, and did at several times examine the same; but is informed that the books were kept in such a manner, in consequence of the incompetency of the book-keeper, that it is very difficult if not wholly impossible, from an examination of the same, to arrive at a correct conclusion as to the rights of the parties.

Denies, upon information and belief, that said Kelly interfered with the examination of the books by Bull, but, if he had, denies that it is his fault or that he is responsible for the acts of Kelly. Admits that under said articles neither party had a right to withdraw any money, unless what might be required for the benefit of said firm; that on the first day of May, in each year, an account of property



and assets, and debts, and liabilities were to be taken and stated on the ledger, and that each partner might draw his share of profits, after paying all expenses, losses and liabilities, and that any partner indebted to said firm should re-fund to said firm such indebtedness; and upon the expiration of said firm, or the earlier termination thereof, said Bull was to receive back the coal furnished by him, which had not been paid for, and said Maher to receive back his yard and fixtures; and, after paying all expenses, losses, and liabilities, all property and assets belonging to said firm were to be equally divided between the three partners, provided said partners should bear and make good the losses agreed to be assumed and borne by them respectively.

Denies that he, individually or jointly with said Kelly, has withdrawn for his or their own use any sums of money from said firm, and he denies that any of the funds of said firm have been used for his benefit or for the joint benefit of said Maher and Kelly; is unable to say whether Kelly has withdrawn funds or not for his individual use, but denies that he is jointly or otherwise responsible for the acts of Kelly. That said Maher neither sold any coal nor received any money of the firm, arising from the sales of coal or otherwise; that Kelly and Bull sold all the coal and received all the money. Denies, upon information and belief, that large gains and profits were made, but alleges that if said Kelly and Bull had kept and performed, on their part, the covenants in said articles contained; large gains and profits might and would have been made, one-third of which would have belonged to said Maher. Denies that he has refused to come to a fair and equitable settlement, or that he has sold any of said coal and converted the proceeds to his own use, or was proceeding to sell any of said coal at the time of the commencement of this suit, or that he has had any connection with said Kelly in selling said coal or converting the proceeds of sales either before or at the time of the commencement of this suit.

That said Maher and Kelly had occupied said yard and

242. had done business under the firm name of Kelly & Co. the year previous to the formation of said firm of Kelly, Maher and Bull; and at the time of the formation of said last mentioned firm, said Maher and Kelly had in said coal yard coal and assets of the value of \$13,246.36, and that the coal in said yard, at the time the same was taken possession of by said Kelly, Maher, and Bull, was, at wholesale price, of the value of \$9,122.84, which said coal was entered in the register of coal of the firm of Kelly, Maher, and Bull, as
243. so much coal furnished said firm by said Kelly and Maher, but said late firm of Kelly & Co. received no credit for said coal in the books of said firm of Kelly, Maher, and Bull.

That said coal furnished by said old firm of Kelly & Co., and entered upon the coal register of said new firm of Kelly & Co., was sold in the same manner by said new firm of Kelly & Co. as coal furnished by said Bull, and the sales and receipts from sales of coal were entered upon the day-book of said new firm, and said new firm received credit for such sales and receipts in the same manner as for sales and receipts of coal furnished by said Bull; but that said old firm in consequence of the incompetency of said book-keeper furnished by said Bull, received no credits on said firm books for the proceeds of the sales of coal furnished by said old firm to said new firm, but should have received credit to the amount of the value thereof, to wit, the amount of \$9,122.84.

244. Alleges that at the time of the formation of the new firm of Kelly & Co., there was due and owing said old firm of Kelly & Co., from various parties for coal sold and delivered before that time, about the sum of \$4,000, a large portion of which was collected by said new firm of Kelly & Co., and used in and about their said business, and that said old firm ought to receive credit for moneys so collected and used by said new firm. That although said new firm has received all, or nearly, all of the assets of said old firm, said Maher



has been compelled to pay, and has paid all, or nearly all, of the liabilities of the old firm of Kelly & Co., with his own individual funds.

245 That in the negotiation which led to the formation of said co-partnership, it was understood that said Bull should furnish all the coal that should be required by said firm; that said Kelly should have the control and management of said business, and should be individually liable for his acts in the management thereof, and that the only part which the said Maher was to have in the business was to furnish said coal yard and fixtures for the use of said firm, and in payment therefor to receive one-third of the profits made by said firm, and that in view thereof it was provided in said articles of co-partnership that this defendant "should furnish  
246 "and contribute, as his portion of the common stock of said "firm the use of the lot of land" for the coal yard of said firm, "and also the use of all the fixtures, carts, wagons, "etc." And that by said articles said Bull "agrees to furnish and provide all the coal that should be necessary or "that should be required for said business, etc.," and also to "furnish and provide, at his own expense, a competent "person to keep the books and accounts of said firm."

And that said "Kelly should contribute, as his proportion  
247 "his whole time and attention to the superintendence and "management of said partnership business, for the mutual "benefit and advantage of all the parties thereto." And "that neither partner should do any act or acts" "prejudicial to the business of said firm."

That the only covenants in said articles of co-partnership, jointly binding on this defendant and said Kelly are, to bear all losses from bad debts, created by them or either of them, from giving credit to irresponsible persons, and to pay freight on coal received from Bull, if cash sales were

not sufficient, in which case they were to be credited for the amount advanced.

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That this defendant has fully complied with the covenants in said articles of co-partnership, and did furnish the use of said coal yard and fixtures, and the same was used by said firm, and that this defendant and said Kelly fully performed all joint covenants in said articles of co-partnership, and did pay all freights when the proceeds from sales were insufficient, and this defendant alleges that said firm had suffered no loss from credit given to irresponsible persons when this suit was commenced, and that he believes that all claims in favor of said firm might have been at that time collected if this defendant and said Kelly had not been restrained from collecting the same by injunction from this court, and if any losses have been sustained, such losses were sustained by the delay in making collections occasioned by said injunction, and this defendant denies that he is liable for any losses from delay occasioned by the injunction issued in this suit.

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Defendant further says that Bull failed to keep the covenants on his part, and wholly failed to furnish the firm with any soft coal, and only furnished a small portion of the hard coals needed and required by said firm in their business. That during the first portion of said partnership business the sales were small and from coal furnished by said old firm of Kelly & Co., said new firm of Kelly & Co. were partly supplied..

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Defendant further says, from information and belief, that Bull, from correspondence with Kelly, was kept well advised as to the control and management of the said business, and appeared well satisfied until coal began to advance in the fall of 1860, that he often requested Kelly to use every possible diligence, and to take orders in advance of other



252 coal dealers and secure a monopoly of the trade, and urged said Kelly to take large orders for coal, yet that said Bull kept said firm supplied only a small portion of the time with any kind of coal, and made various excuses for such failure; that he was waiting for lower freights, and that he figured for lower tolls on the canals. That while said Bull was urging Kelly to secure trade, and failing to supply coal to said firm, and sending said excuses, and said firm was buying coal at retail to fill orders taken, said Bull, as defendant has since learned, in violation of his said agreement, was privately and fraudulently selling large quantities of said coal to other coal dealers in Chicago, thereby attempting to deprive the said firm of the profits that might and otherwise would have been made on the same, and this defendant claims that the profits that might have been made on said coal, shipped to other parties in competition with said firm, ought to be charged to said Bull.

253 That said defendant is informed and believss that during the months of August and September, 1860, Kelly and the agents of said firm, relying on Bull to furnish all the coal that should be needed and required, with the advice and approbation of said Bull, used extraordinary efforts in taking orders and making contracts to deliver coal; that previous to the first day of October 1860, they had taken orders and contracts to deliver Lehigh, Lackawana and Blossburg coal, to various parties in Chicago during the fall and winter of 1860, at least to the amount of three thousand tons and upwards. That notwithstanding said firm had, with the approbation of said Bull, contracted to deliver said large amounts of coal during the following fall and winter, said Bull, during the months of 254 August and September, failed to keep said firm supplied with Lackawana, Lehigh and Blossburg coal, sufficient to supply their daily customers, and September 28, 1860, wholly refused to furnish any more coal.

That said Bull was satisfied with the management and

control of said business by said Kelly till coal began to advance in the fall of 1860. That he was dissatisfied because he was unwilling or unable to supply coal to fill the large orders that had been taken by his advice, and because he was aware that large losses must be sustained by said firm in filling said orders, in consequence of such advance in coal, and because he preferred rather to sell coal to other parties at an advanced price than to deliver coal to said firm, to be used in filling said orders and contracts; and for this reason, became dissatisfied with the business of said firm, and commenced this suit to wind up the business of said concern.

255.

That in consequence of the failure of said Bull to supply said firm with coal, as he had agreed, and the stoppage of said business by injunction, said firm were unable to fill said contracts and orders, and said Maher and Kelly have been compelled to pay to various parties several thousand dollars for damages for the failure of said firm to fill said contracts and orders; and said Maher has been compelled to pay a large amount for the failure of said firm as aforesaid, with his own funds.

256.

That said firm had taken orders and contracts from various parties as aforesaid, previous to the commencement of this suit, and had partly filled the same, and in consequence of the failure of the said Bull to supply coal and the stoppage of said business by injunction, said contracts and orders have been only in part filled, and that numerous parties who have received coal as aforesaid have informed said Maher that they should not pay for the coal received in consequence of the failure of said firm to comply with said contracts on their part.

That said firm has incurred large liabilities for the failure to fill contracts entered into before the commencement



of this suit, and will yet be compelled to pay a large amount of damages for such failures.

257. Said Maher claims that whatever amount of damages said Maher and Kelly, or either of them, have been compelled to pay, and the amount of coal delivered, for which payment cannot be collected in consequence of the failure of said firm to deliver coal, and whatever amount said firm has become liable to pay should be charged to said Bull, inasmuch as the failure of said firm to fill said orders and contracts arose from the failure of said Bull to keep the covenants in said articles, on his part. That said Bull was fully advised as to the amount of orders and contracts taken, and could, if he had desired to act in good faith, have delivered sufficient coal to fill the same, and also sufficient to supply their daily customers; and if, as he had agreed, he had furnished them with sufficient coal in the fall of 1860 to fill said orders and contracts, and sufficient for the fall and winter's business, large gains and profits would have been made, one third part of which would have belonged to said Maher, but in consequence of the violation of said articles by said Bull, in selling coal to other parties in competition with said firm, instead of delivering the same to said firm to enable them to fill said orders and contracts; and in consequence of the further violation of his covenants in failing to supply said firm with coal, said Maher not only lost one third of the profits, but has been compelled to pay a large amount of money on account of the business of said firm and has received nothing therefor, and has been deprived of the use of his coal yard and fixtures, and avers that the coal yard and fixtures were worth \$2,500, and has incurred large liabilities on account of the business of said firm.
- 258.
- 259.

That said Bull wholly failed, as he agreed to provide a competent person to keep the books of said firm, but instead thereof he provided a person wholly incompetent, in conse-

quence of which the business of said firm was thrown into great uncertainty and confusion.

260. That he is informed and believes said Bull is now wholly insolvent and no portion of the liability of said firm can be collected from him.

That this defendant has paid notes given for the benefit of said firm with his individual funds.

261. That it was understood, at the time of the formation of said firm, that each partner should be liable only for his own acts, and it was therefore provided in said articles that neither partner should withdraw money from said firm, except for the use thereof; and, in case a partner should withdraw and become indebted to said firm, he should refund such indebtedness.

262. That it was understood that said Bull should furnish said firm in the fall of 1860, before the close of navigation, a full supply of coal for the fall of 1860 and the winter of 1860 and 1861, and that it was so expressed in said articles and that it was understood and provided in said articles that said coal should not be sold immediately on the receipt thereof, but in the ordinary course of business sales; and that the said Maher and Kelly were to advance the freight on such coal received in the fall for the fall and winter trade; that said coal was to be delivered on board of vessels before the close of navigation; and said Maher avers that the principal part of coal sold in the Chicago market, during the coal season, is sold after the close of navigation. That the price of coal largely advanced in the fall of 1860 and the winter of 1860 and 1861, and that there was a large demand for coal during said fall and winter; and that if said Bull had furnished said firm with a full supply of coal for said coal season, as he had agreed in said articles, said firm could and would

263.



have sold during said fall and winter from seven to ten thousand tons of coal, at a profit of from two to five dollars per ton

That said Bull, instead of furnishing said firm with a supply of coal, for the fall and winter trade, wholly refused to furnish any coal after September 28, 1860, and instead of furnishing said firm with coal, sold large quantities of coal to other dealers in said city in competition with said firm, and by means thereof said firm were deprived of all profits and sustained large losses.

264.

Said Maher claims that all losses said firm have been compelled to pay, all liabilities incurred by said firm, and profits that said firm were deprived of in consequence of the failure of said Bull to perform the covenants in said articles, should be charged to said Bull.

Conclusion of said separate answer is in the usual form  
The explanatory article of co-partnership is in words and  
figures following :—

### EXHIBIT A.

266. Referred to in the foregoing answer.

It is hereby agreed between the parties to the foregoing articles of co-partnership that the same shall be explained and modified as follows, and that the following shall be deemed and taken as a part of the foregoing articles of co-partnership, anything therein contained to the contrary notwithstanding —

267. The co-partnership or joint interest of the three parties in the business of the firm is to be confined exclusively to coal, to be furnished to said firm by said Bull, and not in any manner to extend to any transactions of said Maher and Kelly, heretofore comprising the firm of Kelly & Co., in any other coal or in the purchase of the same from any other person or firm, with which transactions said Bull has no interest whatever; but the same and all other matters, outside of coal shipped by said Bull, are the separate transactions of said Maher and Kelly; and the foregoing articles of co-partnership are hereby declared to have no reference or no connection with the business of that firm. It being the intention of the parties hereto to create, by the foregoing articles, a joint interest only in the coal supplied by said Bull to said concern, It is also understood that said Kelly shall pay towards the salary of the clerk or book-keeper, employed by said Bull to keep the books and accounts of this firm, the sum of one hundred and fifty dollars per annum, from the date of the annexed articles.



Witness our hands and seals this 6th day of September,  
A. D. 1860.

CADWALADER BULL, (Seal.)  
EDWARD KELLY, "  
HUGH MAHER, "

Exhibit "B," referred to in the foregoing answer, is in  
words and figures following:—

### EXHIBIT B.

268. Referred to in the foregoing answer.

1860.

Amount of cash paid Bull from April 15 to October 11, 1860:

|                                                        |          |
|--------------------------------------------------------|----------|
| May 26, paid on draft of \$400—exchange, .....         | \$7.00   |
| " " paid draft, .....                                  | 400.00   |
| " 30, paid draft, .....                                | 140.00   |
| " " paid exchange on same, .....                       | 2.80     |
| June 16, paid check on E. I. Tinkham, .....            | 300.00   |
| July 5, paid draft to C. W. Belden, .....              | 325.00   |
| " paid exchange on same, .....                         | 4.88     |
| " 7, paid Bull, E. I. Tinkham, draft, .....            | 1,600.00 |
| " paid exchange on same, .....                         | 20.00    |
| " 16, paid draft, .....                                | 450.00   |
| " paid exchange on same, .....                         | 5.62     |
| " 17, paid draft, .....                                | 350.00   |
| " paid exchange on same, .....                         | 4.38     |
| " 18, paid A. Smith, for moving screening in yard, ... | 2.50     |
| " 27, paid draft, .....                                | 175.00   |
| " paid exchange on same, .....                         | 2.19     |
| August 2, paid draft, .....                            | 350.00   |
| " paid exchange on same, .....                         | 4.35     |
| September 4, paid draft, .....                         | 900.00   |
| " " paid exchange on same, .....                       | 6.75     |
| " 28, paid him, .....                                  |          |
| October 2, paid draft, .....                           | 200.00   |
| " " paid exchange on same, .....                       | 1.50     |

\$5,276.97

289. September 1, 1862, upon motion of said Maher, it was ordered by said court, that the rule to close proofs in said cause be further extended until the first day of the next term of court.

284. October 6, 1862, by agreement of parties, it is ordered that the time to close proofs in said case be extended until the first day of the next term of said court.

340. November 3rd, 1862, by agreement of parties, said cause is set for hearing on Monday next, the tenth day of November instant, with leave to either party to take further testimony in the meantime.

341. November 3rd, 1862, said Bull, by his solicitors, entered a motion in said cause, to take from the files that certain writing purporting to be an answer on the part of Hugh Maher to said bill of complaint of the said Bull, which said pretended answer was filed in said cause August 18, 1862, for the reason that said answer is contradictory to the statements contained in the first answer filed in said cause by said Maher, and is inconsistent with said first answer, and attempts to charge the whole ground of defense of the first answer, which was filed October 26, 1860, afterwards, to wit: on the hearing of said cause, to wit: November 10, 1862, the said Maher, by D. C. and I. J. Nicholes, his solicitors, read in opposition to said motion the affidavits of said Maher and D. C. Nicholes, filed in said cause, July 14, 1862, the abstract or abridgement of which affidavits are hereinbefore contained from memorial 186 to 214, referring to pages of record abstracted That afterwards, to wit: November 10, 1862, on the hearing of said cause, said court sustained said motion.

Whereupon said Maher, by his solicitors aforesaid, then



720 and there duly excepted. And afterwards, to wit: on the trial of said cause before the Hon. John M. Wilson, one of the judges of said court, to wit: on the 10th day of Nov., 1862, the said Maher, by his said solicitors, offered Robert Law, T. J. Kinsella and George W. Quigg, as witnesses, said witnesses all being residents of the county of Cook and State of Illinois.

721



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deposition of Nathaniel S. Bouton, who testified as follows:  
 That on or about Oct. 1, 1860, said Bull, at the office of  
 344 said Bouton, sold to him 336,000 pounds of Lehigh coal,  
 and 100,000 pounds of Blossburg coal, and gave him an  
 order on Kelly & Co., the same to be delivered in the yard  
 of said Bouton. That he went to Kelly & Co. for the coal  
 with the order; their office at that time was at the foot of  
 Market Street, on the North side. That he produced the  
 order, and directed Kelly & Co. to send forward the coal,  
 that they delivered to him at once, 198,845 pounds of Le-  
 high and 22,065 pounds of Blossburgh coal, when they  
 ceased hauling. This was immediately after the 1st of Oct.  
 1860. Soon after, finding that they did not continue to  
 deliver coal, I called at the office of Kelly & Co. and asked  
 Kelly why the rest of the coal was not forthcoming. He  
 said that the coal they had been delivering was Bull's, and  
 that Bull had no more coal there. That he asked him if  
 he, Kelly, refused to deliver any more coal, the balance of  
 the order. He said yes; that Bull was owing them and  
 had failed to furnish coal as he had agreed, and that they  
 345 had been damaged thereby a number of thousand dollars,  
 for which they had brought suit, or were about to bring  
 suit, I cannot say which, but that it is my impression he  
 said they had brought suit. That he immediately notified  
 Bull that the order was not filled, and, on the advice of  
 Robert Hervey, notified Bull at once to send forward the  
 coal. This was late in the fall, in November 1860, and  
 Bull shipped the coal to him just at the close of navigation,  
 excepting the Blossburg.

The vessel upon which the Lehigh coal was shipped was  
 laid up at Detroit, and was shipped from there to me by  
 rail. The Blossburg was shipped from Buffalo by rail.  
 Don't know who paid the freight on the Blossburg coal.  
 It is my impression that I did not pay it. I did pay freight  
 on Lehigh coal to Railroad Company. \$302.29. I paid



346 cartage on coal, \$33.10. Before I got the coal from Bull, sent by railroad company, the coal previously received from Kelly & Co. was exhausted, and I purchased coal of Price, Morris & Co., to the amount of \$129.88, and charged to Bull; of John S. Newhouse, to the amount of \$96.47. I also charged Bull for  $9\frac{375}{2000}$  tons of Blossburg coal, which was so much short of his contract to deliver, at \$8 per ton, making \$73.50, which was what I had to pay for it here, though that was higher than the contract price. That Bull paid him all the above items.

The order upon Kelly & Co. was in writing, which is annexed as an exhibit hereto, marked "A," which exhibit is as follows:

348 N. S. BOUTON, OFFICE OF UNION FOUNDRY WORKS.

*Chicago October 1st, 1860.*

MESSRS. KELLY & Co.:

Please deliver to N. S. Bouton, or order, at his Foundry, 150 gross tons Lehigh coal, and 50 net tons Blossburg, and oblige yours, &c.,

CADWALADER BULL.

347 The number of pounds furnished by Mr. Bull, after the refusal of Messrs. Kelly & Co. to deliver the balance of the order, was 137,155 pounds of Lehigh, and 77,935 pounds of Blossburg, part of which was bought here by me and paid for by Bull, that I bought it and paid for it and Bull paid me back, which closed the transaction.

On his cross-examination, said N. S. Bouton testified as follows: That the coal amounted to about \$1,250, as near as I can recollect, for which I gave three notes of equal amounts, as I think, at 60, 90 and 120 days from the 15th of October, 1860, to Bull. The first note I paid at matu-

348 turity. The second note I refused to pay for the failure at that time to deliver the coal. Before the third matured the coal was received, and I paid the second and third. I made the contract with Bull to deliver the coal. I think before either of the notes matured, Bull had negotiated them. I paid them to Bull's endorsees. The amount in value of coal received from Kelly & Co., on Bull's order for Lehigh, was \$612, and for Blossburg coal, \$47, or thereabouts. By consent, said Boulton corrected his deposition by stating that said notes were payable in three, four and five months, from 15th September, 1860.

350 Said Bull also read the deposition of Robert J. Hunt, who testified that he was employed as book-keeper with  
353 Kelly & Co., from April 17 to December 15, 1860. That he knew of said Bull furnishing Kelly & Co. with coal as follows:

|                   |                                    |                                   |   |            |
|-------------------|------------------------------------|-----------------------------------|---|------------|
| 18th May, 1860,   | 119 <sup>40</sup> <sub>2000</sub>  | tons Blossburg at \$3.90 per ton, | - | \$467.10   |
| 24th " "          | 83 <sup>80</sup> <sub>2000</sub>   | " " " "                           | - | 326.00     |
| 16th June, "      | 151 <sup>80</sup> <sub>000</sub>   | " " " "                           | - | 5 2.40     |
| 30th " "          | 136 <sup>122</sup> <sub>000</sub>  | " " " "                           | - | 532.97     |
| 6th Aug., "       | 158 <sup>206</sup> <sub>2000</sub> | " " " "                           | - | 616.97     |
| 17th July, "      | 152                                | " Lehigh, at \$5.50 per ton,      | - | 836.00     |
| 14th Aug., "      | 178 <sup>128</sup> <sub>2000</sub> | " Lackawana, at \$4.40 "          | - | 785.68     |
| 4th " "           | 48 <sup>433</sup> <sub>000</sub>   | " Blossburg, at \$3.90 "          | - | 189.99     |
| 20th " "          | 99 <sup>518</sup> <sub>2000</sub>  | " Lackawana, at \$4.40 "          | - | 438.38     |
| 20th " "          | 184 <sup>258</sup> <sub>1000</sub> | " " " "                           | - | 810.12     |
| 28th Sept., "     | 121 <sup>20</sup> <sub>2000</sub>  | " Lehigh, at \$5.50 "             | - | 668.98     |
| 28th " "          | 98                                 | " Lackawana, at \$4.40 "          | - | 431.20     |
| Making a total of |                                    |                                   |   | \$6,695.79 |

That he knew of sales of Blossburg coal, and produced an account of sales of Blossburg coal which was attached to his deposition and marked exhibit "A."



|                                                            |     |                                 |   |   |   |   |            |
|------------------------------------------------------------|-----|---------------------------------|---|---|---|---|------------|
| The amount of Blossburg coal sold from May 10th            |     |                                 |   |   |   |   |            |
| to the 31st was                                            | 51  | <sup>1271</sup> <sub>1000</sub> | - | - | - | - | \$293.21   |
| June 1 to 30th,                                            | 362 | <sup>234</sup> <sub>2000</sub>  | - | - | - | - | 1,640.95   |
| July 6 to 31st,                                            | 41  | <sup>1943</sup> <sub>2000</sub> | - | - | - | - | 234.98     |
| Aug. 3 to 30th,                                            | 123 | <sup>754</sup> <sub>2000</sub>  | - | - | - | - | 622.20     |
| Sept. 1 to 29th,                                           | 137 | <sup>640</sup> <sub>600</sub>   | - | - | - | - | 828.68     |
| Making a total of 717 <sup>361</sup> <sub>2000</sub> tons, |     |                                 |   |   |   |   | \$3,620.02 |

355

That the selling price of Blossburg coal in June, July, August and September, in 1860, was about six dollars per ton. Some sold under and some sold over six dollars; he thinks it averaged about six dollars per ton.

The prices of coal above mentioned were the prices at which defendants sold coal. There was an association, and Kelly endeavored to sell at rates fixed by the association. The sales were made at the current prices.

756

That he had made an account of sales of Lackawana coal sold by defendants from August 17 to 29th of September 1860, which is attached to his deposition, and marked exhibit "B."

357

There was sold from the 17th of August to the 29th of September 1860, 428 tons and 5 pounds of Lackawana coal, for \$2,419.70. A greater portion of the coal was under contract at six and six and a-half dollars per ton. He thought that when they first got the coal, it was 5½ or 6 dollars per ton, and before the end of the season it went up as high as 11½ or 12 dollars per ton, would think it went up as high as seven or eight dollars per ton before the 29th of September, but was not positive. The reason he thought so was, that two or three months after the 29th of Sept., it went up to about eleven or twelve dollars per ton.

That he had made an account of sales of Lehigh coal from July 17th to Sept. 29th, 1860, which was attached to his deposition and marked exhibit "C." From July 17th to 29th of Sept. 1860, there was sold  $146\frac{609}{2000}$  tons of Lehigh coal, for \$1.004.34. Thinks this coal was sold at the market price; it was about \$7.50 to \$8.00.

358. That he thinks that the accounts of sales attached and the amount of coal received are correctly taken from the the books, as far as he knows.

That the contracts to sell Lackawana coal, were made partly by Mr. Kelly, and some by Mr. Eames, and some in the office; Eames was solicitor for contracts, employed by Kelly; that he could not say when the contracts were made. That a great many of them were made by Kelly and Eames, before the coal was received. That no contracts were made for Kelly & Co. by said Maher.

359. Said Hunt further testified that he had made a statement of the amounts of cash sales of coal from May 16th to Oct. 6th, 1860, which is attached to his deposition marked Exhibit "D." The cash sales amounted to \$5.094.32. This is a portion of what is included in the general account of sales, before referred to.

360. Between May 10 and September 29, 1860, there was coal delivered to parties below the market price, on account of its having been previously contracted for; we were obliged to sell a great deal of coal below the market price to fill contracts; we had contracts with different parties, for from five to thirty tons, and had to furnish them coal at the contract price and not at the market price. I could not tell the total amount, in tons, that was delivered to fill contracts. I think the contracts price was from  $5\frac{1}{2}$  to 6 dollars per ton.



Most of the contracts were for Lackawana coal, and known as Pittston prepared coal.

I think all the sales to which I have referred were made by defendants out of coal furnished by Bull and referred to in my answer to fourth interrogatory.

361. I know of a sale of coal to Nathaniel S. Boulton, I think there was about 163 tons of Lehigh and about 50 tons of Blossburg. He gave a note of \$1,012.50, in payment for the Lehigh, and his note of \$237.50 for the Blossburg. It was to be delivered in gross tons of 2,204 pounds to the ton. The account shows the sale was made September 29th, no positive time was set for delivery. It was to be delivered at the yard, and Boulton was to haul it. It was to be weighed by Kelly & Co. Witness desires to say, that Lehigh was sold gross and Blossburg net. This is, as I understand it, from the order book. I think it was written on the order book by Bull himself, but can't remember positively.

362. I think the difficulties commenced between Bull and defendants about October 11, 1860. I cannot state when the suit was commenced. My recollection is that the injunction was served about the 11th October, 1860.

All I know about the amount of coal delivered to Boulton is from a statement copied by me from the bill-book. From September 7th to 27th there was delivered to him  $90\frac{1410}{2000}$  tons of Lehigh, from September 19th to 21st there was delivered to him  $8\frac{1715}{2000}$  tons of Blossburg. The Lehigh at \$6.75 and Blossburg at \$4.75, as per contract.

363. I cannot, from memory, state how much of the coal furnished by Bull remained on hand in the yard at the time

of the service of the injunction. I could, I suppose, by reference to the books, but I cannot swear as to the correctness of the books as they have passed through the hands of other book-keepers; but the following one, the figures as taken from the books: I should think there was about 359 tons of Lackawana, about 94 tons of Blossburg, and about 235 tons of Lehigh. I will not swear that all this coal is Bull's, but the books show, on the credit side of these different accounts, that there must have been that amount of coal in the yard.

364. I do not know of any sales of coal to James Roberts while I was in the employment of the defendants. I never made any such entry of any sale. I know of an entry that was sworn to at the court-house by Mr. Fleming. It was in his own hand-writing, but I did not know of the entry until he was called to swear to it. It was in the order-book. I acquired this knowledge about a year ago, at the time of the trial of a replevin suit between Crawford, Cross, & Co., and Sheriff Hessing.

365. On his cross-examination said witness testified I was employed to keep the books by Mr. Bull, of Buffalo, at a salary of \$450 or \$500. I am not positive as to the amount.

I remained in Mr. Bull's employ from April 17th to December 15th, 1860.

366. While I was in Bull's employ all the contracts for the sale of coal were made by Kelly and Eames, except the contract made with Bouton, which was made by Bull. Bouton paid for the coal in two notes, at least, these are all the notes I know of. On the books I find two notes, one for \$1,012.50, and another for \$237.50, I think they were drawn payable to Bull's order. Bull took the notes, and they were charged up to him in his account. Bull, individu-



ally, received these notes, then they were handed to me by Bull as the book-keeper, and charged by me to Mr. Bull's account, then I gave them back to Mr. Bull.

367. I do not know what subsequently became of these notes. I never saw the notes but at the time they were handed to me by Bull to be entered on the books. I do not know whether they were paid to Bull's endorsees or not. I do not know who made the sale of coal to Roberts. I never heard of such a sale being made while I was there. I never had any conversation with Bull in reference to the differences between him, and Kelly, and Maher, although I was employed as his book-keeper. I have never seen Bull since this suit was commenced, nor have I conversed with his attorney.

368. On the re-direct examination, said witness testified as follows:—

If there had been any such sale made by Kelly or Maher to Roberts, I should have been likely to have known it, if it had been made and entered on the order-book, between the 17th of April and the latter part of November. The sales of coal, as they were made, were entered on the order book, kept for that purpose. There was no memorandum of any sale of coal put upon the order-book to Mr. Roberts while I was there, to my knowledge.

369. It was a part of my daily business to examine the order-book every morning and check off into the day-book.

All orders that were given us were entered into the order-book in pencil or ink first, and from the order book on to the delivery book, which were the tickets given to the cartman, and from the ticket-book they were entered by me or

Fleming into the sales-book, and checked off by me from the sales-book into the day-book, parties being charged and coal credited.

370. I had the sole and exclusive charge of the books of account of Kelly & Co., in their coal business, not only in Kelly & Co.'s accounts but in Bull's accounts. Kelly & Co., that is, Kelly, Maher, and Bull gave me full power to receive all money for coal delivered and also gave me power to sign checks.

During the time I was there, no entry was made by any person upon the books to a person by the name of Roberts, to my knowledge. If there had been an entry of so large a sale as that to Roberts, I think I should have seen it. I did not hear of any such sale being made while I was there.

371. And on the resumption of the cross-examination said witness testified as follows:—

I mean, by saying that I kept the books of Kelly & Co., and also of Mr. Bull, that I opened an account for Kelly & Co. on the books, and all coal that was sold in 1859 and was collected in by our collectors or received by me, instead of its being credited to the different coal accounts, it went to the credit of Kelly & Co. I mean that all the coal received by Kelly and Maher, from the 17th of April, 1860, down to the 28th of September, 1860, was charged to the different coal accounts and credited to Mr. Bull. I also kept an account of the sales made by Mr. Kelly and Mr. Eames. Mr. Bull made the sale to Bouton. I don't know anything about the books of 1859, except about the cash I received on the sales of 1859 and the bills that I paid on Kelly & Co.'s accounts of 1859.

372. I think the accounts between Bull and Kelly & Co., as it



appears on the ledger as kept by me, as the book-keeper of Bull, is correct as to the credits of the different coal accounts I think they were entered wrong on Bull's account.

373. Bull, Kelly, and Maher carried on the business from the time I commenced keeping the books till October 11th, 1860, under the firm name of Kelly & Co., and Kelly had sole charge of the business while I was there.

Maher had nothing to do with nor did he in any manner direct or control the business transactions of said firm from April 17th to October 11th, 1860.

374. If he made any contracts, they were charged to his individual account in the books. I mean, by contracts, small orders for coal that were to be charged to his account by his order.

377. All I know, as book-keeper for Kelly & Co., about the weight of the coal received from Bull is derived from the weighman and other parties. I looked over the figures and compared them with the bills of lading, and it generally came out within two or three or perhaps six tons of the bill of lading. I cannot say whether the sales of coal mentioned in my answer to the fifth direct interrogatory were or were not made on account of the firm of Kelly & Co. and for said firm. I can tell how they were charged up. The Blossburg coal, when it came, was charged to Blossburg coal account, and credited Bull. Sales of Blossburg coal, out of the yard, were charged to parties buying and credited to Blossburg coal account. The same entries were made in regard to other kinds of coal coming from Bull.

383. The coal mentioned in my answer to the 5th direct interrogatory was sold by the firm of Kelly & Co. When coal

was sold out of the yard, receipts were given to parties paying for the same in the name of Kelly & Co., except the sale to Bouton. I cannot say whether that was an individual transaction of said Bull or a firm transaction. The delivery of the coal to Bouton, and the notes taken therefor, were entered upon the books. There were two notes, amounting to \$1.250. Bull received the notes, and was charged with the amount of the notes in the books. For the amount of coal that Kelly & Co. fell short of delivering to Bouton, according to agreement with Bull, there was a credit back to Bull of \$591, October 31, 1860, as appears from the the entry on the ledger made by me by Kelly's direction. The entries of sales of coal received from Bull were made by charging the parties who purchased and crediting the different coal accounts. Every day's transactions were entered separately on the sales-book and copied by me into the day-book.

I did not enter all the sales of coal in the sales-book myself. I checked from the ticket or delivery book the amounts that were copied into the sales-book, before I copied them into the day-book. The following entries were made of sales of coal, before they were copied into the ledger, as coal was delivered from the yard, it was copied into the ticket book by Fleming, some by me, and some by Kelly; from the ticket-book it was copied into the sales-book, this was mostly done by Fleming; from the sales-book into the day book, from the day-book into the journal, and from the journal into the ledger, by me to the different coal accounts. The original entries of the delivery of the coal were mostly made by Fleming, in the sales-book. All I know about the amount of coal delivered is from information derived from the sales-book. I do not remember how much of a supply of the different kinds of coal furnished by Bull, from April 17th to October 11th, 1860, we had on hand, we had not a full supply the latter part of the season. In the fore part of the season, the quantity, compared with other yards in



in Chicago, but in the latter part of the season we were short of coal. I think Kelly & Co. had a supply of coal to fill orders up to the time that the troubles commenced with Bull. That was about the time that Kelly & Co. made large contracts, that Bull stopped delivering coal. I have  
 381. written Bull letters, by Kelly's direction, complaining that he failed to furnish them with a sufficient supply of coal to fill their contracts and orders. Such letters were written before October 11th, 1860. Kelly told me to write to Bull to send on more hard coal before October 11th 1860, and I wrote him accordingly. I cannot recollect the date, but I  
 386. think all my letters were previous to October 1st, 1860. I never was in the coal business before I was with Kelly & Co., but I know it was customary with coal dealers in the city of Chicago, in the summer and fall of 1860, to take orders and make contracts for the delivery of coal at a time subsequent to taking the orders and making the contracts. If Bull had furnished a full supply of coal, we could have  
 387. sold more coal; and if the supply had been full, the taking of contracts and orders for coal would not have interfered with the cash sales from the yard. At the time the troubles commenced, we had contracts out, and Bull failed to furnish coal after September 28, 1860. My belief is, they had a  
 388. supply of coal to fill orders and contracts to September, 28, 1860, but I am not positive.

I cannot swear, but that they had contracts and orders on their order-book on the 28th of September, 1860, to be filled, amounting to 2,000 tons.

I have now no recollection of the amount of coal of the kinds furnished by Bull, that Kelly & Co. had contracted to deliver up to September 28, 1860.

389. It might have been at that date or it might have been a month or eight weeks earlier, that I think they had a supply

of coal to fill orders and contracts. I am not positive that it was the 28th of September, but from memorandums taken from the books, they must have had the following amounts of coal on hand September 28, 1860.

The ledger shows sales of Lackawana to the amount of \$5,153. The total sales of this kind of coal, before Sept. 29, 1860, are \$2,067, which, taken from \$5,153, leave \$3,086. The average price was about \$6 per ton; and the amount on hand, as I made it after seeing papers, less amount received from Meeker, say 81 tons, left a balance in the yard of 359 tons.

350. The sales of Blossburg, on the credit side, was \$3,984. The sales before September 29, 1860, were \$3,311, leaving \$673, at \$6 per ton, the average price, less amount received from Meeker, say \$18 tons, is 94 tons. The sales of Lehigh was \$2,388. Sales before September 29th, 1860, about \$330 leaving a balance of \$2,058; average price of Lehigh was about \$8.00. The amount on hand, after seeing papers, less amount received from Meeker, say 22 tons, was 225 tons, making a total of 688 tons.

The coal received from Meeker was bought by Kelly & Co., and brought into the yard to sell.

391. Kelly & Co. exchanged soft coal with Meeker for hard coal. I can't say positively that the above figures were right, I got them from the books at the time. I can't say whether they purchased of Meeker because they were short, or whether in payment of soft coal delivered to Meeker. The coal bought of Meeker was never brought into the yard of Kelly & Co., our cartmen went to Meeker's yard and Meeker rendered us the account of coal delivered for us. I have not said positively that we had a full supply of coal in our yard.

392.



The only reason that I have made the above statement is, that I took it from the books. Apart from the books I have no recollection whether they had a supply or not.

393 All the sales of coal referred to in my direct interrogatories were made by Kelly and the agents of Kelly & Co., except the sale to Bouton, which was made by Bull. Maher had nothing to do with said sales. The coal mentioned in

394 exhibits A B & C, was delivered to the parties there named, and to each the amounts in such exhibits mentioned. Those exhibits were copied from the register. I did not deliver the coal myself, but saw most of it weighed and delivered. The register is part in my hand writing, part in Kelly's, but most of it in Fleming's hand writing. Fleming was weigh-

395 man in the yard, but when he was busy I weighed the coal. I made entries in the register of coal not weighed by me, most of the cargoes that were received I entered in the back of the register. No entries of sales of coal were entered by me in the register, except such as I weighed myself. I sometimes entered weights from the previous day's tickets made by Fleming. I have not now any knowl-

396 edge of the sales mentioned in exhibits A B and C, except as I have copied them from the register. The whole amount of \$5,097.31, spoken of in my answer to 13th direct interrogatory, I think, was included in said accounts of sales mentioned in said exhibits A B and C. I am pretty certain that said sum was included in said accounts of sales, from the fact that I see, on the account of sales, the names of the parties and the amounts that I received cash. That is my only reason for thinking that said sum of \$5,097.32 was included in said account of sales. I will not swear

397 positively that \$5,097.32 was received in cash from sales of coal furnished by Bull, but I think it was. I made the original entries in the cash-book. The accounts were posted

398 into the ledger once a month, on the 30th of each month. All the sales go into the sales-book. The cash sales go

399 into the cash-book, and through the journal into the ledger. The original entries of cash are in the cash-book. There was a conspicuous notice posted up in the office by me, that

400 no sales were made except for cash, and in number; sales were mostly made for cash. The accounts of cash sales mentioned by me in exhibit "D," in answer to direct interrogatories, contains a full statement of all the cash received by said firm on sales of Lehigh, Blossburgh and Lackawana coal, from April 17 to Oct. 11, 1860.

401 The register contains an account of the sales made by the said firm from April 15 to October 11, 1860, with the exception, I think, of a cargo sold to the Illinois Central, and a cargo to the Rock Island Railroad Co., and I think it contains these sales also. The first entries of sales were made in the register. I do not know any means of determining the amount of coal sold than the entries in the register, unless we refer to the order book. I do not know of any means of determining the amount delivered, except by the register and the cargoes sold to the Illinois Central and Rock Island. If they were not entered in the register, they were copied at once into the journal. The register shows all the coal sold and delivered out of the yard.

402 By comparing the exhibits with the register, I found all but the Rock Island cargo on the register. Neither this nor the Illinois Central was delivered from the yard, but at the two companies' docks. These cargoes contained 288<sup>1120</sup>/<sub>2000</sub> tons. The old firm of Kelly & Co. had on hand Lehigh, Blossburg and Lackawana coal, when I commenced keeping the books of the new firm of Kelly & Co., and I made  
403 an entry of the amounts of each kind of coal then on hand by the old firm of Kelly & Co. in the register of the new firm of Kelly & Co., commencing April 15, 1860.

The amounts were as follows: Erie coal, 2,522.30 pounds; Lackawana, 226,191 pounds; Lehigh, 83,360 pounds; Blossburg, 331,163 pounds.



The witness wished to make an explanation in regard to the weights. Most of the coal fell short of these weights. When I first went with Kelly & Co., according to the register, they ought to have on hand 226,191 pounds of Lackawana, when they actually did not have on hand 50,000 pounds. Lehigh and Blossburg fell short, but not in proportion to Lackawana. There was hard coal purchased of Rena & Little, by Kelly & Co., to supply customers, amounting in value to \$276. The coal which the old firm of Kelly & Co. had on hand on the 16th of April, 1860, and which was entered in the register of the new firm of Kelly & Co., was sold, and the sales entered in the register of the new firm of Kelly & Co., and carried through the books of the new firm of Kelly & Co., in the same manner as coal received from Bull.

I do not know as there is any way of determining how much the coal fell short, which the old firm of Kelly & Co. had on hand April 16, 1860. The cash receipts of the new firm of Kelly & Co. were increased by the sales of the coal which the old firm of Kelly & Co. had on hand when the new firm of Kelly & Co. commenced. The money that was paid into the firm of Kelly & Co., most of it came into my hands from Kelly, and most of it was deposited in bank. Maher had nothing to do with the receiving of the money. Kelly and myself drew the money from the bank. I was authorized by Kelly to draw from the bank, in the name of the firm, Maher drew no money from the bank; most of the money was drawn by me.

The note now shown me, bearing date April 19, 1860, and payable to the order of C. Bull, for \$1,539.50, I have seen, I think, about the date of the note. I think it has been in the possession of Bull from the signature on the back of it, which I recognize as his signature. I don't think the note was paid. I think it came back protested,

but am not sure. I do not see the amount charged to his account of 1860, I think it was given for coal of 1859, if so, I would have nothing to do with it, other than charging it to account of Kelly & Co. instead of C. Bull. On reading over, I think the signature is L. H. Bull, signed for C. Bull. The note is attached to my deposition, and marked exhibit "E." If it had been protested, I think there would have been a notice of protest attached. I think the note was  
 408 taken up and a new note given for it. I know there were new notes given, but cannot say positively that there was a new note given for this one.

I know the signature of C. Bull, and the seven drafts now shown me were drawn by C. Bull on Kelly & Co., the first dated May 19th, 1861, for \$400; second, May 23rd, for \$140; third, June 27th, for \$325; fourth, July 9th, for \$450; fifth, July 9th, for \$350; sixth, July 20th, for \$175, and seventh, July 25th, for \$350. They were all paid by me but two, and these were paid by Kelly, I think. The  
 409 seven drafts are attached hereto, and marked exhibit "F."

I cannot state how the account of Edward Kelly stood with the firm Oct. 11, 1860, the books were posted on the 30th. Kelly collected money due the firm of Kelly & Co., and handed the same to me, and gave me directions to give him credit for the same. I cannot state any particular amounts positively. There were cases when parties were owing the firm and paid Kelly, and Kelly made no report  
 410 to me. In such cases, when they informed me that they had paid Kelly, I charged them to Kelly's account. Kelly received all the proceeds of sales of coal received from Bull, or had the control of them. Kelly, or I for him, received all the money that was received from the sales of coal furnished by Bull, except the Bouton notes and the Illinois Central cargo, which I think was charged directly to Bull.  
 411 Hugh Maher did not receive any of the proceeds of any



kind of coal that was sold while I was with Kelly & Co. If he received any coal it was charged to him just the same as though some other individual had ordered coal for his own use. I cannot tell how the account of Bull stood Oct. 11, 1860, because the balance was never brought down.

412. I think the charges and credits to Bull were entered on the books of said firm at the time the transaction occurred, out of which the credits accrued. There are two separate accounts on the ledger of said firm with Bull, one of which is marked void. I entered the two accounts, except the two last charges on the second account. The accounts were entered by me, the last between the 31st day of August, 1860, and October 21st, 1860. The first account was entered by me between May 31 and August 31, 1860, as it appears on the ledger. I acquired the information from Bull, which induced me to mark the first accounts void. I supposing that the \$3,742.50, which appears to the debit of Bull, being money paid to him, was on account of coal shipped by him in 1860, was the reason for debiting his first account on the account marked void. I afterwards ascertained, from Bull, that these amounts appearing to his debit should have gone on account of coal shipped in 1859, consequently, I made a cross entry, crediting Bull with the following amounts: \$540, \$300, and \$2,902.50, amounting to \$3,742.50, which appears to his credit, and my reason for so doing this was by the order of Bull.
- 413.

414. I did not allow in said Bull's accounts said amounts of \$544, \$300, and \$2,902.50 to stand to the debit side of said Bull, in the account, as credited in the ledger in my handwriting, but it has been brought down by the man that corrected the books, as standing to the debit of Bull's account in figures. There is on the ledger no reference opposite these figures to the day-book or journal, showing for what the figures stand.

415. If the amounts expressed by these figures were on account of coal shipped to Kelly & Co., in 1859, they should not be charged to the debit of Bull, but, if on account of coal shipped to Kelly & Co., in 1860, in my judgment the entry was proper. If Bull's statements to me in regard to the coal were correct, I think I properly corrected the books in the account of Bull in the books on the second account, as entered by me. I think so because if it was on account of coal shipped in 1859, it should have been on the books of 1859. If I had known that the sum of \$3,742.50 belonged to coal of 1859, I should have neither credited or debited Bull's account in those books with the amount, but would have charged it in Kelly & Co.'s old books on account of coal of 1859.

416. I now think said second account of Bull's, entered by me, is correct, with the exception of the item of \$3,742.50, on the credit side of his account, which should have been left out, that is, if it is on account of coal shipped in 1859 and if on account of coal of 1860, it should have been placed to his debit instead of his credit on the books.

417. There never was, to my knowledge, money paid to Bull by said firm, which was not entered on the books. While book-keeper for Kelly & Co., I never refused to give Bull any information in relation to the books of the firm, when requested by him. Bull always had free access to the books of Kelly & Co. whenever he desired to examine the same up to October 11th 1860. Kelly never directed me not to make out balance-sheets from the books of said firm previous to October 11th 1860. I have stated in my answer to 58 cross-interrogatory that I thought there was in the yard of Kelly & Co. 688 tons of hard coal on the 28th of September, 1860, I mean to embrace a portion of the coal sold to Bouton in that amount. There was quite an amount that was sold to Bouton, that should have been delivered to him.



418. I cannot now state from memory the amount that was delivered to Bouton in September. In my answer to 58 cross-interrogatory, I mean to state the amount of hard coal Kelly & Co. had on hand at the time this suit was commenced. The statement made by me in answer to the 58 cross-interrogatory as to the amount of hard coal Kelly & Co. had on hand, is not based upon the statement contained in exhibits annexed to this deposition in answer to direct interrogatories. I arrived at the result by a calculation
419. from a memorandum which I took from the books. I arrived at the amount of coal mentioned in answer to 20th direct interrogatory by a calculation made from the same memorandum. I have stated in answer to 13 cross-interrogatory that the notes of Bouton were entered wrong, and I think they were entered wrong. Mr. Quigg, who corrected the books, told me they were entered wrong, but I am unable to tell in what respect they were entered wrong. The charge made against Kelly & Co., in the ledger, of \$3,742.50, posted on the 31st of August, 1860, is incorrect and should be erased from the account, if the same amount which appears to the credit of Bull is incorrect. If on the
420. account of coal of 1859, it should be left out of these books, if on account of coal of 1860, it should have been on the credit side of Kelly & Co.'s account. I last saw the order-books over a year ago in the circuit court, and have not seen them since. Before I commenced keeping the books of Kelly & Co., I never had had any experience in keeping books by double entry or otherwise, I do not think I understood the business of book keeping. The books were kept by double entry. Mr. Kelly did not understand
421. double entry book-keeping. He did not understand as much as I did. I do not think he was competent to keep books at all. Maher had nothing to do with the books or interfered with them in any way. Mr. Bull told me I was to keep the books and make an account of sales monthly to him. I did not follow his directions in regard to making the monthly statements, because I did not know how to

422. make out an account of sales. I do not recollect any other instructions given me by Bull, except as I have before stated. I know of Kelly's writing letters, and I have written letters by Kelly's direction to Bull, complaining that Kelly & Co. were not supplied with coal previous to October 11, 1860. These letters commenced, as the letter-book shows, August 20. I knew of no difficulty between the parties until Kelly commenced complaining of short supply of coal, nor until the commencement of this suit. I sent a trial balance to Bull, taken from the books, July 24, which showed a statement of the books up to that time.
- 423.

The signatures to the eight letters now shown me are the signatures of C. Bull, and were received by Kelly & Co. and are attached to my deposition and marked Exhibit "G."

424. The signatures to the three letters now handed, are the signatures of H. L. Bull, brother of C. Bull, they were received by Kelly & Co., and are attached to my deposition marked Exhibit "H." H. L. Bull acted as the agent of C. Bull.

David Timble was in the employ of Kelly & Co. in September and October, 1860, as drayman, and, as appears from the the cash-book, from September 15 to October 8, 1860, was paid \$25.

425. The exhibit hereto annexed marked "I," from the cash-book, is correct. Samuel O. Eames was solicitor for orders for coal. The exhibit here produced and attached to my deposition and marked Exhibit "K" I checked from the cash-book of Kelly & Co. I was paid from April 25th to October 8th, 1860, by Kelly & Co., \$247, as will appear from the statement hereto attached, marked Exhibit "L," which I checked from the cash-book of Kelly & Co.



James Fleming was in the employ of Kelly & Co. from April 17th to October 11th, 1860; and the statement now handed me and attached hereto, marked Exhibit "M" is correct, and was checked from the cash-book by me.

426. John McConly was in the employ of Kelly & Co. from June 1st to October 11th 1860, in the capacity of coal lister from vessels, and the statement hereto attached and marked Exhibit "N" was checked by me from the cash-book of Kelly & Co. and is correct.

Daniel Denehy was in the employ of Kelly & Co. as drayman. The account hereto attached, marked Exhibit "O," was checked by me from the cash-book of Kelly & Co., and is correct.

427. John O'Leary was in the employ of Kelly & Co. from April 14th to October 11th, 1860, and the statement handed me, which is attached to this deposition and marked Exhibit "P," was checked from the cash-book of Kelly & Co. and is correct.

428. The paper now handed, which I attach to this deposition, and is marked Exhibit "Q," contains an account of the cash which was paid Bull by drafts and checks, it also contains an account of the exchange. I do not know whether the exchange should be charged to him or not. It does not appear as charged to his account on the cash-book, but it appears on the exchange account. The items paid by checks and drafts were checked off by me from the cash-book as well as other items mentioned in said Exhibit "Q" There was money paid by Kelly & Co, to other parties than Bull, between April 17th and October 11th, 1860. Exhibit "R" contains a correct account of the sum, as checked by me from the cash-book of Kelly & Co. There was money
- 429.

also paid for freight on Lehigh, Lackawana, and Blossburg coal received from Bull. Exhibit "S," hereto attached, contains a correct account of the sums checked by me from the cash-book of Kelly & Co. The items contained in the paper now shown me, and which I attach hereto, as Exhibit "Y," were checked by me from the cash-book, and I think this one is correct. They come under the head of Expense Account. The items contained in the paper which I have annexed hereto, and marked Exhibit "U," I checked from the cash-book, and I think are correct. They appear in the cash-book under the head of Profit and Loss Account. All the exhibits, from "I" to "U," hereto annexed are correct, as they appear under the different heads on the cash-book. All of these amounts were paid by me for Kelly & Co., out of the moneys that had been collected from sales of coal and other sources, and to the best of my knowledge, I think they are all correct. The eight checks now handed me were drawn, seven by me and the other by Edward Kelly, and the seven signed by me, in the name of Kelly & Co., were used to take up the drafts drawn by Bull on Kelly & Co., with exchange added; and the check of \$300, dated June 1860, drawn by Kelly, was handed either to C. Bull or to his brother, H. L. Bull. The said eight checks are hereto attached and marked Exhibit "V." Witness thinks that Kelly went with him to the bank and authorized him to draw checks in the name of Kelly & Co, and that he wrote Kelly & Co. by him on the signature book.

On his further re-direct examination, said Robert H. Hunt testified as follows:—

The original entries of the cash received for coal sold was made on the cash-book by me. I know that such sums as were entered in my hand-writing were received by me. I don't think that there were entries made in the cash-book when I was there by Kelly. They were all made by me.



I was made responsible for the cash. There were instances when I charged myself with small amounts when the cash fell short.

John McAuly was employed in the capacity of coal hoister for Kelly & Co., at so much per ton, ten cents per ton, perhaps twenty cents per ton. The copy-book would show the exact amount he was to get per ton.

434. All the charges in his account I think were paid on account of hoisting coal. I cannot say positively as to the \$100 charge, but I think it was paid on account of hoisting coal. The books ought to show. I think the amount of coal that he had hoisted was not figured up but once by me, and copied into the copy-book, and these several amounts were paid on account. John O'Leary was to be paid by the ton, I think 25 cents per ton. The copy-book ought to show. He used his own horse and cart, but I am not certain. I have been informed by Mr. Maher that he owned the carts and wagons. The horse was the property of O'Leary.
- 435.

- 436 I cannot state, from memory, the quantity of coal hauled by O'Leary, from April 15 to 11th Oct., 1860. The copy book ought to show, at the end of each month I made up a statement of the amount hauled by him, all of which I think appears in the copy book. I dont know that any of of the payments mentioned in exhibit "Q" are properly chargeable to accounts of 1860, but they are so charged as being money paid upon coal purchased of Bull.

On account of 1859 there is, May 26th, \$400; May 30th, \$140; June 16th, \$300; July 5th, \$325; July 7th, \$1,600; July 16th, \$450; July 17th, \$350; July 27th, \$175; July 18th, \$2.50, making a total of \$3,742.50 upon the trans-

actions of 1859. These items I supposed went into accounts of coal shipped Kelly & Co. by Bull in 1860, and I had orders from Mr. Bull to charge said \$3,742.50 back, as being on account of coal shipped in 1859, and I did so. The remaining portion of exhibit "Q" is on account of coal shipped in 1860.

437 It must have been along about the latter part of August, as appear from the account, that Bull directed me to make the changes in the entries referred to, at the office of Kelly & Co., Bull was here at the time. I have made a statement relating to the debits and credits relating to the transactions of 1860, and attach it to this deposition and mark it exhibit "W." I think the cash and coal entries are correct, to the best of my knowledge. The items that were counter-charged by Bull's directions are not included  
438 in this statement. I made the credit to Bull of \$591.29 short delivery to Bouton, by direction of Kelly. The checks that have been produced were given in payment of the drafts, with the exchange. They form a part of the amounts that are said to go on account of 1859 and 1860. Some of these drafts were on account of the \$3,742.50 which was counter-charged.

439 On his further cross-examination said witness testified, as follows: I derived the information contained in exhibit "W" from the books of Kelly & Co. Exhibit "W," I think, is not correctly copied from the books as kept by  
440 me, there are several entries left out. One of the entries is balance brought down from first account marked "void" on the book, which stands to the debit of Bull's account. The other, I think, is an account that is copied twice to the debit of the account of the Illinois Central note of \$660.39. I think it is included in the amount brought down from the first account marked "void." There were several debits and credits left out, which makes the balance of the account



the same as though these debits and credits had been included. The reason they were left out was because Bull said they were on account of coal shipped in 1859. The counter-charges on the books were made by me by Bull's order, along at different times between Aug. 31st and Oct. 31st, 1860. The entry of \$3,742.50, was made August 31st, and of \$350 Oct. 31st. These are the dates on which they appear in the posting; the journal will give the correct dates. Neither Mr. Maher or Kelly were present at the time Bull gave me the directions to make the alteration, and I don't think Maher ever knew anything about it. I think that sometime afterwards I showed the entries to Mr. Kelly. I made the \$591.22 credit to Bull, of the short delivery of coal to Bouton, Oct. 31, 1860, as appears in the accounts.

The coal was not all delivered to Bouton up to the time I left there. While I was with Kelly & Co., more or less money was received by the new firm of Kelly & Co. on account of coal sold by the old firm of Kelly & Co., before I was employd by Bull, and the books show it.

I do not think there is anything in the cash-book by which I can distinguish the receipts of coal which was in the yard from the receipts of coal which was furnished by Bull. The only way that a person can determine the amount of coal that was in the yard when I took charge of the books, would be from the back part of the register book, marked, "amount of coal on hand April 17, 1860." The first sales of coal were made from coal that was received from Bull and thrown on top of coal that was in the yard at the time. A portion of the sales might have been from the coal that was in the yard; there was no coal in the yard but Blossburg and Lehigh, that Bull would have anything to do with Kelly & Co., in regard to mixing up coal of 1859 and 1860. All the Lackawana coal in the yard was sold out before Bull furnished any Lackawana coal. At that time said firm was out of Lackawana coal from April 17th to August 19th 1860.

I have accounts of Lehigh, Lackawana and Blossburg coal taken from the books, which I attach to this deposition and mark them exhibit "X." I think they are correct  
 445 copies from the ledger down to Oct. 11, 1860, but there was an item of \$668.98, which should have been entered on the journal of debit of Lehigh, Sept. 28, instead of October 31, 1860. I don't know whether Bull furnished all the coal that was required by the business of the firm, or not.

There was notice given Bull by letter, that the quantity of coal required by the business was not furnished.

I have copies from the letter book of Kelly & Co. Some  
 446 were written by me and some by Kelly. Those hereto attached, marked exhibit "G," were written by Kelly, and those marked exhibit "Y" were written by me.

I have the account of C. Bull with said firm of Kelly & Co., copied correctly from the ledger. When money was received, I was generally told by Kelly from what sources it was received. I determined from the day book, for what kind of coal the money was received.

I either weighed, or saw the coal weighed. I cannot say  
 447 that Kelly knew anything about said counter charges before  
 448 Oct. 11, 1860. I showed them to him about two or three months ago, when I drew up the accounts. And on his re-direct examination said witness testified as follows: I had made the credit to Bull for short delivery to Bouton by Kelly's direction, after I had made the counter-  
 449 charges by Bull's direction. Kelly had free access to the books. The letters, copies of which I have produced, were some of them mailed by me, and the others were taken from the office of Kelly & Co. by Kelly, for that purpose.



## EXHIBIT "A."

454 Shows that the total amount of sales of Blossburg coal,  
 455 for the month of May 1860, was  $51\frac{1871}{2000}$  tons, at \$5.70 per  
 456 \$90.71 in cash. That for the month of June there was sold  
 457 of Blossburg coal  $362\frac{1834}{2000}$  tons, at \$4.53 per ton, for \$1,640,  
 and that on account of such sales there was received \$180.61  
 in cash.

458 That for the month of July there was sold of Blossburg,  
 456  $41\frac{1938}{2000}$  tons, at \$5.71 per ton, for \$234.98, and that on account  
 460 of sales of Blossburg coal, there was received \$871.99, cash.  
 262 That for the month of August there was sold of Blossburg  
 463  $125\frac{754}{2000}$  tons, at \$5.04 per ton, for \$622.20, and that on  
 account of sales of Blossburg coal there was received  
 464 \$396.85 in cash.

466 That for the month of Sept., up to the 29th of Sept.,  
 467 1860, there was sold of Blossburg,  $137\frac{1640}{2000}$  tons, at \$6.04 per  
 468 ton, for \$828.68, and that there was received on account of  
 sales in said month \$399.26 in cash.

467 That the total amount of sales of Blossburg for the months  
 May, June, July, August, and to 29th of Sept. 1860, was  
 $717\frac{982}{2000}$  tons, at \$5.04 per ton, for \$3,620.02, and that the  
 cash received on said sales was \$1,939.42.

## EXHIBIT "B."

470-1-2-3-4 & 5.

Shows account of sales of Lackawana coal from August  
 17 to Sept. 29, inclusive, of  $428\frac{005}{2000}$  tons, at \$5.65 per ton,  
 for \$2,419.70.

## EXHIBIT "C."

- 476-7 Shows accounts of sales of Lehigh coal from July 17 to Sept. 27, inclusive, of 146<sup>669</sup>/<sub>2000</sub> tons at \$6.86 per ton, for \$1,004.34.

## EXHIBIT "D."

- 478 Shows the cash sales of Blossburg, Lehigh and Lackawana coal, from May 16 to October 6th, inclusive, and that the amount of cash received on account of such sales was \$5,097.32.

## EXHIBIT "E"

- 480 Note made by Kelly & Co., dated Chicago, April 19th, 1860, for \$1,539.50, payable sixty days from date, to the order of C. Bull, at Bank of North Amerisa, N. Y. City.

## EXHIBIT "F."

- 480 Seven drafts drawn by C. Bull, at Buffalo, on Kelly & Co., of Chicago, Ill., the first dated May 13 1860, and payable to the order of himself, at two days sight, for \$400, with exchange on N. Y., and accepted by Kelly & Co., May 22, 1860, endorsed by C. Bull and Southworth & Co. The  
481 second dated May 23rd, 1860, and payable to the order of H. E. Howard at two days sight, for \$140, with exchange on Buffalo, and accepted May 25, 1860, By Kelly & Co., and endorsed by B. H. Gamon. The third, dated June 27, 1860, and payable to the order of himself, at two days sight, for \$325, and accepted by Kelly & Co., June 30th,  
482 1860, endorsed by C. Bull and C. W. Belden. The fourth, dated July 9, 1860, and payable to the order of H. P.



Howard at two days sight, for \$450, with exchange on N. Y., accepted by Kelly & Co., July 11, 1860, and endorsed by G. H. Gamon. The fifth, dated July 9, 1860, and payable at two days sight, to order of himself, for \$350, with exchange on New York and accepted July 12, 1860, by Kelly & Co., and endorsed C. Bull and Southworth & Co. 483 The sixth, dated July 20th 1860, payable to order of himself, at two days sight, for the sum of \$175, with exchange on New York and accepted by Kelly & Co., July 23, 1860, endorsed by C. Bull and Southworth & Co.

The 7th, dated July 25, 1860, and payable to the order of H. E. Howard, at two days' sight, for \$350, with exchange on New York, and accepted by Kelly & Co., August 1, 1860, and endorsed by H. Gamon, and each of said drafts are marked paid.

#### EXHIBIT "G."

484. Is eight letters signed by Bull, directed to Kelly & Co., Chicago. The first, dated Buffalo, April 19, 1860, in which he states that he has signed the agreement, has written Hunt to commence, that he overlooked one thing: that in case of breaks in the canal or strikes at the mines they must not hold him for damages; must be sure and not let Law & Strather get the start in selling to railroad companies.

485. The second, dated Buffalo, May 19, 1860, in which he states he is obliged to draw for \$400. The third, dated Buffalo, June 23, 1860, in which he states that he sends a bill of shipment of 144 tons of Blossburg: that he will ship some Lehigh and prepared coal the first opportunity. To do their utmost to sell to McCormick what Lehigh and Blossburg he wants, and to try to find out from him for what he has had said coal offered.

486. The fifth, dated Buffalo, July 20, 1860, in which he states that he is obliged to draw for \$175. Wants the money for coal sent for Rock Island Railroad. Cannot get a chance to ship unless he pays 30 cents per ton, put it on board and take it out; has thought it best to hold on a while, but if you must have the coal will send it. To let him know if he must ship at that figure if he cannot do better.

487. The sixth, dated Buffalo, July 12, 1860, in which he states, that he received Kelly & Co.'s letter, wanting 200 tons Blossburg shipped. Will ship as soon as he gets an opportunity. Thinks it would be well to figure in 30 cents freight. Can get mineral ridge, as it runs, at \$2.50 or selected at \$3.00. Thinks it would be well to take some soft coal to sell on commission. Supposes it is so low there is not much object to buy it. Can you sell the Illinois Central R. R. Co. their prepared and Lehigh coal.

488. The seventh was dated Buffalo, July 17, 1860, in which he states, has received letter of Kelly & Co. Thinks the proposition to Crawford a good one, both to him and us. It will put us in a position to sell soft coal just as low as any one in Chicago, if not lower. Crawford has the reputation of being a fine man. Thinks it would not be advisable for me to be known in the matter, however, if Crawford insists on knowing all the members of the firm, tell him, but with the understanding that he or his partners are not to tell any one I am connected with the concern. I think I had not better write him. You can warrant all the coal I send you to be just such coal as you represent it to be. Shall I ship the mineral ridge, or had you better wait till you hear from Crawford? Let me see the contract before it is signed.

489.  
490. The eighth, dated Buffalo, August 8, 1860, in which he states, he sends enclosed a bill of shipment for 443<sup>340</sup>/<sub>2000</sub> tons



of coal, will ship more in few days. Wants to know how much Blossburg you have contracted for, how much you will want, also Pittston and Lehigh. Whether the agreement was made with Crawford. Have to draw on you for \$600. Thinks you have the best coal in Chicago. Have you sold to I. C. R. R.?

### EXHIBIT "H."

492. Is three letters signed C. Bull, by H. L. Bull, directed to Kelly & Co.

The first, dated Buffalo, April 25, 1860, in which he states, that he sent B. L. for 20 tons Blossburg coal, which was all he could get. Will send some more soon.

493. The second, dated Buffalo, April 23, 1860, in which he says, he sends order of George Williams, of Peoria, Ill., on you for 20 tons Blossburg coal, price \$6 per ton. Thinks you had better correspond with him, for perhaps he will want more. What success will you have with the Illinois Central Co., in furnishing them with Blossburg and Lehigh.

494. The third, dated Buffalo, April 19, 1860, in which he says, he is shipping, on the Great Western, Blossburg coal. Will try to put on 300 tons. Thinks it would not be safe to figure on Lehigh at less than \$5.50 and lake freight from 40 to 50 cents. Lehigh may be lower in July and August. Hopes you will be successful in securing the R. R. Co's.

Exhibit "I" is an account of cash paid David Trimble by Kelly & Co., from April 15 to October 11, 1860, taken from the cash-book, amounting to \$25.

495. Exhibit "K" is an account of cash paid Samuel O. Eames by Kelly & Co., for the same time, taken from the cash-book, amounts to \$110.12.

496 & 7. Exhibit "L" is an account of cash paid Robert J. Hunt by Kelly & Co., for the same time, taken from the cash-book, amounting to \$247.02.

498. Exhibit "M" is an account of cash paid James Fleming by Kelly & Co., for the same time, taken from the cash-book, amounting to \$183.85.

499. Exhibit "N" is an account of cash paid John McAuly by Kelly & Co., for the same time, taken from the cash-book, amounting to \$332.36.

Exhibit "O" is an account of cash paid Daniel Denehy by Kelly & Co., for the same time, taken from the cash-book, amounting to \$28.00.

500. Exhibit "P" is an account of cash paid John O'Leary by Kelly & Co., for the same time, taken from the cash-book, amounting to \$368.69.

Exhibit "Q" is an account of cash paid C. Bull, from April 15 to October 11, 1860, by Kelly & Co., taken from the cash-book, as follows, to wit:—



## EXHIBIT "Q."

502. Amount of cash paid Bull, from April 15 to October 11, 1860, by Kelly & Co., as taken from the cash-book:—

|                                                       |            |
|-------------------------------------------------------|------------|
| 1860.                                                 |            |
| May 26, paid on draft of \$400—exchange,.....         | \$7.00     |
| “ paid draft,.....                                    | 400.00     |
| “ 30, paid draft,.....                                | 140.00     |
| “ paid exchange on same,.....                         | 2 80       |
| June 16, paid check on E. I. Tinkham,.....            | 300.00     |
| July 5, paid draft to C. W. Belden,.....              | 325.00     |
| “ paid exchange on same,.....                         | 4.88       |
| “ 7, paid Bull, I. E. Tinkham's draft,.....           | 1,600.00   |
| “ paid exchange on same,.....                         | 20.00      |
| “ 11, paid draft,.....                                | 450.00     |
| “ paid exchange on same,.....                         | 5.62       |
| “ 17, paid draft,.....                                | 350.00     |
| “ paid exchange,.....                                 | 4.38       |
| “ 18, paid A. Smith, for moving screenings in yard... | 2.50       |
| “ 27, paid draft,.....                                | 175.00     |
| “ paid exchange on same,.....                         | 2.19       |
| August 2, paid draft,.....                            | 350.00     |
| “ paid exchange on same,.....                         | 4.35       |
| September 4, paid draft,.....                         | 900.00     |
| “ “ exchange on same,.....                            | 6.75       |
| “ 28, paid him,.....                                  | 25.00      |
| October 2, paid draft,.....                           | 200.00     |
| “ paid exchange on same,.....                         | 1.50       |
|                                                       | <hr/>      |
|                                                       | \$5,276.97 |

503 Exhibit "R" is an account of cash paid A. B. Meeker, Price & Morris and John Wilson, for Lehigh, Lackawana and Blossburgh coal, by Kelly & Co., from April 15 to October 11, 1860, as taken from the cash-book, 47 tons, amounting to \$234.50.

504 Exhibit "S" is an account of cash paid freight on Lehigh,

Lackawana and Blossburg coal, by Kelly & Co., from April 15 to Oct. 11, 1860, taken from the cash-book, amounting to \$194.29.

503      Exhibit "T" is an account of cash paid expenses not included in the preceeding expenses, by Kelly & Co., from April 15 to October 11, 1860, as taken from the cash-book, amounting to \$484.06.

509      Exhibit "U" is an account of cash paid for profit and loss, by Kelly & Co., from April 15 to October 11, 1860, taken from the cash-book, amounting to \$27.49.

#### EXHIBIT "V."

510      Is eight checks, drawn by Kelly & Co., and payable to C. Bull, or bearer, on Edward I. Tinkham & Co., the first, June 16, for \$300; the second, July 5th, for \$329.88; the  
511      third, July 7, for \$1,620; the fourth, July 17, for \$354.38; the fifth, July 27, for \$177.19; the sixth, August 2d, for  
512      \$344.55; the seventh, September 4th, for \$906.75; the eighth, Oct. 2d, for \$201.50, and all in the year 1860.



## EXHIBIT "W."

C. BULL, Esq., of Buffalo, New York,

In account with Messrs. KELLY &amp; Co., Chicago, Ill.

|           |                                                             |           |  |
|-----------|-------------------------------------------------------------|-----------|--|
| 1860.     |                                                             |           |  |
| June 18,  | To paid Ill. C. R. Co. note 4 months, accredited.....       | \$ 630 39 |  |
| Aug. 31,  | " " on account coal shipped Kelly & Co. in 1860.....        | 144 67    |  |
| Sept. 28, | " " N. S. Bouton, notes with interest at 7 per cent. for... | 1250 00   |  |
| " 28,     | " " him cash.....                                           | 25 00     |  |
| " 4,      | " " draft on N. Y. for account coal, 1860.....              | 900 00    |  |
| Oct. 2,   | " " for coal shipped, account 1860.....                     | 200 00    |  |
| 1861.     |                                                             |           |  |
| Sept. 12, | " " exchange on sundry drafts drawn on Kelly & Co....       | 59 47     |  |
| 1862.     |                                                             |           |  |
| June 1,   | " balance,.....                                             | 4089 48   |  |

## EXHIBIT "W."

C. BULL, Esq., of Buffalo, New York,

In account with Messrs. KELLY &amp; Co., Chicago, Ill.

|           |                                                                                                                  |           |           |
|-----------|------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| 1860.     |                                                                                                                  |           |           |
| June 8,   | By 119 <sup>60</sup> / <sub>2000</sub> tons Blossburg .....                                                      | at \$3 90 | \$467 10  |
| " 16,     | " 151 <sup>50</sup> / <sub>2000</sub> " " .....                                                                  | at \$3 90 | 592 40    |
| " 24,     | " 83 <sup>50</sup> / <sub>2000</sub> " " .....                                                                   | at \$3 90 | 326 00    |
| " 30,     | " 136 <sup>30</sup> / <sub>2000</sub> " " delivered Kelly & Co per<br>barge Sheppard, 30th inst and sent to..... | at \$3 90 | 532 97    |
| July 17,  | By 152 tons Lehigh coal.....                                                                                     | at \$5 50 | 836 00    |
| Aug. 6,   | " 158 " Blossburg coal.....                                                                                      | at \$3 90 | 616 97    |
| " 14,     | " 178 <sup>1125</sup> / <sub>2000</sub> tons Lackawana " .....                                                   | at \$4 40 | 785 08    |
| " 4,      | " 48 <sup>150</sup> / <sub>2000</sub> " Blossburg " .....                                                        | at \$3 90 | 189 99    |
| " 20,     | " 99 <sup>150</sup> / <sub>2000</sub> " Lackawana " .....                                                        | at \$4 40 | 438 38    |
| " 23,     | " 184 <sup>225</sup> / <sub>2000</sub> " " " .....                                                               | at \$4 40 | 810 12    |
| Sept. 28, | " 121 <sup>1257</sup> / <sub>2000</sub> " Lehigh " .....                                                         | at \$5 50 | 668 98    |
| " 28,     | " 98 " Lackawana " .....                                                                                         | at \$4 40 | 431 20    |
| " 29,     | By loading on 240 tons of coal, paid by C. Bull, Buf-<br>falo, per schr. Yankee Blade,.....                      |           | 12 00     |
| Oct. 31,  | { By amount of notes received of N. S. Bouton,.....\$1250 00 }<br>Less amount of coal delivered..... 658 78 }    |           | 591 22    |
|           |                                                                                                                  |           | \$7299 01 |
| 1862.     |                                                                                                                  |           |           |
| July 1,   | By balance,.....                                                                                                 |           | \$4089 48 |

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## EXHIBIT "X."

| Dr.                            | BLOSSBURG COAL ACCOUNT. | Cr.                                |
|--------------------------------|-------------------------|------------------------------------|
| 1860.                          | 1860.                   |                                    |
| June 16, To C. Bull.....15     | 1385 50                 | Apr. 21, By Cash..... 2 6 00       |
| " 16, " J. S. Williams.15      | 1 56                    | " 28, " Sundries..... 4 123 70     |
| " 30, " Hosmer, F. & Co.....19 | 2 60                    | " 28, " " ..... 18 88              |
| " 30, To C. Bull.....19        | 532 97                  | May 19, " " ..... 7 22 50          |
| July 31, " J. S. Williams.23   | 1 60                    | " 19, " Cash..... 7 91 21          |
| Aug. 31, " C. Bull.....31      | 616 97                  | " 31, " Sundries.....10 134 20     |
| " 31, " " " .....31            | 189 99                  | " 31, " Cash.....11 73 25          |
| " 31, " J. O. Leary...38       | 15 12                   | June 16, " Sundries.....15 819 12  |
| Sept. 30, " Jno. McAuley..51   | 127 10                  | " 16, " John Rolf....15 6 00       |
| " 30, " Cash .....50           | 6 00                    | " 15, " Cash account.16 44 83      |
| " 30, " D. Demehy...52         | 2 75                    | " 15, " " " .....16 61 83          |
| " 30, " J. O. Leary...53       | 23 11                   | " 30, " Sundries.....18 20 30      |
|                                |                         | " 30, " Cash.....20 9 76           |
|                                |                         | July 31, " Sundries.....23 105 06  |
|                                |                         | " 31, " Jno. Leary...24 6 06       |
|                                |                         | " 31, " Cash.....25 530 26         |
|                                |                         | " 31, " Cash.....26 3 26           |
|                                |                         | Aug. 31, " Sundries.....32 236 58  |
|                                |                         | " 31, " Cash.....34 232 74         |
|                                |                         | " 31, " Hugh Maher.38 100 00       |
|                                |                         | Sept. 30, " Sundries.....42 390 89 |
|                                |                         | " 30, " Cash.....44 132 61         |
|                                |                         | " 30, " H. Curtis....38 84 00      |
|                                |                         | " 30, " D. Demehy..52 6 00         |

535

## EXHIBIT "X."

| Dr.                        | LEHIGH COAL ACCOUNT. | Cr.                                 |
|----------------------------|----------------------|-------------------------------------|
| 1860.                      | 1860.                |                                     |
| June 16, To Cash.....17    | 7 00                 | Apr. 28, By R. Prindiville. 4 15 00 |
| July 31, " " .....29       | 17 50                | May 31, " Bemman & L.11 70 00       |
| Aug. 31, " C. Bull.....31  | 836 60               | July 31, " R. Prindiville.24 49 00  |
| " 31, " J. O. Leary..38    | 75                   | " 31, " Cash.....27 68 00           |
| " 31, " Cash.....37        | 47 50                | Aug. 31, " H. Harrington.32 14 00   |
| Sept. 30, " J. McAuley..51 | 30 40                | " 31, " Cash.....35 7 50            |
| " 30, " Cash.....50        | 45 27                | Sept. 30, " " .....45 97 05         |
| " 30, " D. Demehy..52      | 50                   | " 30, " J. S. Williams.43 10 28     |
| " 30, " J. O. Leary..53    | 75                   |                                     |



## EXHIBIT "X."

| DR.       |                     | LACKAWANA COAL ACCOUNT. |        | CR.       |                           |
|-----------|---------------------|-------------------------|--------|-----------|---------------------------|
| 1860.     |                     |                         |        | [1860.    |                           |
| June 16,  | To R. & Little...   | 14                      | 115 50 | Apr. 21,  | By J. Saverton... 2 11 77 |
| July 30,  | " " " ...           | 25                      | 84 39  | " 21,     | " Cash..... 2 7 69        |
| " 30,     | " Cash.....         | 29                      | 57 50  | " 28,     | " J. Saverton... 3 8 43   |
| Aug. 31,  | " C. Bull.....      | 31                      | 785 68 | " 28,     | " Cash..... 5 17 09       |
| " 31,     | " J. O. Leary... 38 | 39 33                   |        | " 30,     | " J. Saverton... 5 18 27  |
| " 31,     | " C. Bull.....      | 32                      | 438 38 | May 19,   | " Tremon Ex.. 6 21 00     |
| " 31,     | " " ".....          | 32                      | 810 12 | " 19,     | " Sundries..... 6 42 00   |
| " 31,     | " Reno & Little..   | 33                      | 55 37  | " 19,     | " Cash..... 7 22 37       |
| " 31,     | " Cash.....         | 37                      | 2 50   | " 31,     | " Sundries..... 10 44 00  |
| " 31,     | " Reno & Little..   | 38                      | 22 32  | " 31,     | " Cash..... 13 12 75      |
| Sept. 30, | " Jno. McAuly..     | 51                      | 42 62  | June 16,  | " Sundries..... 14 25 33  |
| " 30,     | " Cash.....         | 49                      | 38 27  | " 15,     | " Cash..... 16 26 00      |
| " 30,     | " L. McCoubrey      |                         |        | May 31,   | " Sweeney, L. &           |
|           | & Co.....           | 52                      | 6 07   |           | Co..... 15 57 51          |
| " 30,     | To D. Demehy..      | 52                      | 19 95  | June 30,  | By Sundries..... 18 31 00 |
| " 30,     | " J. O. Leary... 52 | 47 29                   |        | " 30,     | " Cash..... 20 20 00      |
|           |                     |                         |        | July 31,  | " Sundries..... 22 42 84  |
|           |                     |                         |        | " 31,     | " Cash..... 26 87 50      |
|           |                     |                         |        | Aug. 31,  | " E. Kelly..... 30 21 00  |
|           |                     |                         |        | " 31,     | " Sundries..... 31 102 76 |
|           |                     |                         |        | " 31,     | " Cash..... 35 158 97     |
|           |                     |                         |        | Sept. 30, | " Sundries..... 41 223 51 |
|           |                     |                         |        | " 30,     | " " "..... 42 28 75       |
|           |                     |                         |        | " 30,     | " Cash..... 44 999 34     |
|           |                     |                         |        | " 30,     | " Hugh Maher.. 52 21 00   |

## EXHIBIT "Y."

514 Is a copy of four letters in the name of Kelly & Co., by Kelly, and sent to Bull. The first dated April 25, 1860, in which he says, in answer to letter of 23d, will see Williams. Is in doubt about Ill. Central; have brought all the influence to bear at our command. Our figures are \$4.30 for Blossburg, \$3.90 for Lehigh, (cash). Give us the price of prepared coal as soon as possible, Mechanical Bakery will want 100 tons soon. Send us some Lehigh as soon as you can, we are getting some orders and have to buy from other yards to fill them. We are figuring hard for the Railroads, and will secure their trade.

515 The second, dated Chicago July 5th, 1860, in which he states: We have lost the best Lehigh customer in Chicago, in consequence of not having the coal. It is Young & Co. They use 20 tons a month, and would have taken of us, but would not contract with us without seeing the coal. Think we will have some delay in settling with R. I. Railroad men. We expect to sell 1000 tons more to the Illinois  
516 Central; you must make calculation on sending us 5000 tons prepared coal this summer, we will want all that and probably more. We are pressing this market well, and some of them will be astonished when they find out where we have headed them off.

The third, dated Chicago, September 13, 1860, in which he says: We are in need of Range coal; we have lost the sale of 120 tons to-day, in consequence of not having it, and are losing orders every day for the same reason. We will want at least, this year before navigation closes, 4000 tons of prepared coal, say 300 tons of range, 1000 tons small egg, the balance large egg. We will want also, 1000 tons of Blossburg and 300 tons of Lehigh. Don't fail to supply



517 us, as we can sell all the above, and perhaps more. You can see by the way we are loosing orders, that it is a great damage to us not having range coal. The Rock Island Railroad will want 200 tons as soon as you can ship it to us.

516 The fourth, dated Chicago, July 22, 1860, in which he says: Don't fail to ship coal as soon as possible. The contracts we have will take ten tons a day all winter, and we think it will take twenty tons a day, after we see all the burners and distillers. There will be hot work after the County this season. They will want 400 tons, 200 prepared and 200 soft; we will put in a low figure and get fair play.

#### EXHIBIT "Z."

519 Is nine letters written by Kelly & Co., by R. J. Hunt, the first, dated Chicago, May 30, 1860, in which he says: Mr. Kelly desires me to write to you not to sell Newhouse Morris Run coal, as we have seen the Master Mechanic of the Illinois Central Railroad, and can sell him that kind of coal. We ought to have some hard coal now, as we have orders to fill every day, and have to give orders on other coal merchants to get along.

520 The second, dated Chicago, June 2, 1860, in which he says: Kelly desires you to send him 120 to 130 tons Blossburg coal as soon as possible, as he has closed out the Great West lot to I. C. R. R. to-day, on time.

521 The third, dated Chicago, June 21, 1860, in which he says: Enclosed find copy of Kelly & Co.'s register. Mr. Kelly would like very much for you to send him the Lehigh coal, as he thinks he can sell a party some here.

The fourth, dated Chicago, July 3, 1860, in which he

522 says: Would like to have you ship us a small cargo of Mineral Ridge coal as soon as possible, as we have calls every day. We have an order now on our book for ten tons, from Williams, of Galena, and will be obliged to fill at Price, Morris & Co.'s, on account of not having some. We have delivered the Blossburg to Rock Island Railroad Co.'s dock, and they think it will not turn out good.

The fifth, dated July 24, 1860, in which he says: Enclosed find my trial balance, taken off from Kelly & Co.'s books, for months of April, May and June.

523 I will try to give you a trial balance monthly after this, now that I have got fairly started.

524 The sixth, dated Chicago, August 17, 1860, in which he says: I shall have off my trial balance for July in a day or two, and will show you how accounts stand. Generally we have a great deal of complaint in regard to Lehigh coal, and parties generally think it good for nothing. The only way we can ever get it off our hands will be for you to send some good lump Lehigh to mix in with what we have. We dare not warrant it, for by so doing we would lose more trade than we care to. Just as soon as we have received a single dollar from coal received from you, we have sent it direct to  
525 you. We have not sold any more of the new Blossburg this year than we had on hand of the old.

The seventh, dated Chicago, August 27, 1860, in which he says: We are in great need of some lump Lehigh coal, also of a cargo of range coal, and by not having either, we are loosing customers every day. Our lump Lehigh we  
526 have on hand parties will not buy. Mr. Warrington, a foundry man, and as good a man as there is in town, came



and looked at our Lehigh, and said he would not pay for it 25 cents per ton.

527 The eighth, dated Chicago, August 30, 1860, in which he says: Our not having a supply of range coal, keeps a great many of our customers from purchasing coal, would like to have you send a cargo immediately. We are trying to sell our part of coal this year, but a great many want coal cheaper than present prices. We sell our egg at \$6.00, Blossburg the same, and Lehigh at \$7.00.

528 The ninth, dated Chicago, Sept. 18, 1860, Maher says: You must furnish us with coal. We are loosing orders every day, and Mr. Maher says we must take orders and charge you with the profits. We have delivered all the small egg on different orders to secure them. Our neighbors are all busy, and we would be if we had coal.

286. And also the said Bull read, on the hearing the deposition of H. L. Bull, who testified as follows:—

502. I have examined exhibit marked "Q," which was a copy  
 289. of exhibit "Q" annexed to Hunt's deposition. I know  
 290. something of the accounts specified in that exhibit. All of  
 the drafts and checks, except the drafts of \$900, \$200,  
 \$146.67, of the August draft of \$350, and the sum of \$25,  
 and \$2.50, for removing screenings, were appropriated to  
 290. transactions between C. Bull and the defendants for 1859,  
 by the orders of defendant Kelly. The amount of coal fur-  
 nished by the complainant to defendants, from May 15 to  
 291. October 11, 1860, is shown by Exhibit "A," annexed hereto,  
 291. from which it appears that the following amounts of coal  
 was shipped:—  
 330.

|                                             |            |
|---------------------------------------------|------------|
| 716 tons Blossburg, at \$3.90 per ton,..... | \$2,972.40 |
| 561 " Pittsburg, at \$4.40 do .....         | 2,464.40   |
| 152 " Lehigh, at \$5.50 do .....            | 836.00     |
| 142 " do \$6.00 do .....                    | 852.00     |
| Paid insurance,.....                        | 74.22      |
| Cash on delivery—loading,.....              | 20.98      |
|                                             | <hr/>      |
|                                             | \$7,059.79 |

292. The defendants sold coal for the complainant on commis-  
 332. sion in the year 1859, to between fifteen and sixteen thou-  
 sand dollars. Exhibit "B," shows the amount of  
 business to be \$15,118.50, up to the 15th day of April,  
 293. 1860; and the said Bull, on his cross-examination, testified:  
 294. I was the clerk and book-keeper of the complainant in 1860,  
 297. and was in Chicago between the 5th and 15th of June of  
 that year, and at that time transacted some business for the  
 complainant with the firm of Kelly & Co. I was present  
 300. when the payment of \$300, mentioned in Exhibit "Q," was  
 made. It was made in Chicago. The monies mentioned  
 in Exhibit "Q" were paid at Chicago, at or near the dates  
 given in said exhibit, except the item of \$1,600 and \$300,



301. which were paid by check of Kelly & Co. I don't know when the drafts were made, or who received payment, or to whom either of them were payable, nor whether they were enclosed to said firm of Kelly & Co., by letter. They were drawn by the complainant. I know to what business transactions the payments were applicable which were made on said drafts, by hearing an agreement made between the defendant Kelly and the complainant, at the city of Buffalo, in my presence, to the effect that as fast as complainant wanted money he should draw upon the firm of Kelly & Co. for it, and that the money drawn, should be first applied to pay the indebtedness of 1859, and each payment made after that was received or drawn for towards the payment of that debt, until a sufficient amount was received to pay it, after that the monies were received upon the accounts of 1860, under the co-partnership articles.
- 302.
- 303.
- 308.
- 309.

My only knowledge of these matters is derived from the statements of the said Kelly and the partnership articles, made in 1860.

308. I know on what account the payments set out in Exhibit "Q" were made, by hearing an arrangement between defendant Kelly and the complainant, in the city of Buffalo. I heard the defendant Kelly direct that as fast as complainant wanted money he should draw upon Kelly & Co. for it, and that the money drawn should be first applied to pay the indebtedness of 1859. The money was first received on the account of 1859, till that was paid, and then upon the account of 1860. I have no knowledge from other sources about the application of said money, other than what I learned from defendant Kelly.
- 309.

311. The coal referred to in the direct interrogatories was all shipped to the firm of Kelly & Co., of Chicago, and was no otherwise shipped to the defendants Hugh Maher and

Edward Kelly. The complainant, Cadwalader Bull, was a member of the firm of Kelly & Co. from April 15 to Oct. 11, 1860.

312. The suit, I understand, is brought to settle the affairs of  
314. said firm. One cargo of coal was delivered, by the direction  
of Kelly, to the Illinois Central R. R. Co. I know of Bull's  
323. drawing the drafts mentioned in Exhibit "Q," and they  
were paid by Kelly & Co. The defendants paid the checks  
and drafts mentioned in Exhibit "Q" between the 15 of  
April and 11 October, 1860. Defendants also, as a firm of  
Kelly & Co., paid a note given by Illinois Central R. R.  
324. Co., for \$630.34. About June 16th, also \$25, which is the  
item of that amount mentioned in the exhibit.

334. Exhibit "C" shows the amount of coal shipped to other  
parties than Kelly & Co., to Chicago, in 1860.

### EXHIBIT "C."

Account coal shipped to Chicago in 1860:—

|          |         |                                            |                          |
|----------|---------|--------------------------------------------|--------------------------|
| 1860.    |         |                                            |                          |
| July 7,  | 65 tons | Blossburg coal, to Reno & Little,          | \$4.00, \$260.00         |
| " 12,    | 190 "   | " " Dewey, Todd & Co.                      | " 760.00                 |
| Aug. 30, | 100 "   | L. E. " T. Slade,                          | \$4.40, . . . . . 440.00 |
| " 50     | "       | gross Lehigh,                              | " 6.00, gross, 300.00    |
| Sept. 1, | 125 "   | L. E. "                                    | 4.40, . . . . . 550.00   |
| " 27,    | 100 "   | Blossburg "                                | 3.85, . . . . . 385.00   |
| Oct. 2,  | 110 "   | " Law & Strother,                          | \$3.85, 423.50           |
| " 100    | "       | L. E. Reno & Little,                       | \$4.50... 450.00         |
| Oct. 3,  | 169 "   | Lehigh, Dewey, Todd & Co.                  | \$6 25                   |
| " 167    | "       | " "                                        | " 1,875.00               |
| " 500    | "       | gross Lehigh,                              | " "                      |
| Nov. 14, | 84 "    | Lehigh coal, to N. S. Bouton, to fill con- |                          |
|          |         | tract of Kelly & Co., they declining       |                          |
|          |         | to fill the same.                          |                          |



538 And the said Maher read, on the hearing of said cause,  
 the deposition of Samuel O. Eames, who testified as follows:  
 I was in the employ of Kelly & Co. after April 15th, 1860,  
 540 employed as soliciting agent for coal orders. During the  
 months of April and June I was collecting mostly, but dur-  
 ing August, September, and October I contracted sales of  
 coal, at the rate of about four hundred tons per month. If  
 I had received a commission of twenty-five cents per ton, as  
 I figured on my book, my wages would have amounted to  
 511 between ninety and one hundred dollars per month. The  
 firm had no other soliciting agent. Sales were made at the  
 yard, and Kelly used to take some very large orders. I  
 think he sold as much as I did. The orders taken were  
 542 filled only to a small extent. My impression is, from the  
 copy from the books that I saw drawn off, that there were  
 from two to three thousand tons contracted that were not  
 delivered. The following orders were taken by me and not  
 543 filled:—An order from the United States Express Co. for  
 250 tons, a small amount only was filled. I think about  
 eighty dollars. They claimed a loss of one thousand dollars.  
 One of S. B. and M. Walker—I think for 25 tons, very  
 little was delivered on it. A large number for about ten  
 tons each were unfilled. I cannot recollect the number of  
 orders taken by me that were not filled. Some of them  
 were as follows:—R. W. Dodd, 6 tons; Gleason, 5 tons;  
 Seneca Wright, from 6 to 10 tons; Doctor Payne, 5 tons;  
 Larabee & North, 12 tons; Ben Jennings, 5 tons; Frank  
 Monroe, 6 tons; A. J. Galloway, 8 tons; J. N. Staples, 14  
 tons; F. E. Palmer, 11 tons; S. C. Benham, 8 tons; Wm.  
 Blair & Co., what they should call for, which was, I think,  
 544 15 or 20 tons; J. H. Spalding, 12 tons; J. Y. Sanque, 10  
 tons; J. E. S. Fuller & Co., 8 tons; Wm. Lock, 5 tons;  
 N. M. Laraway, 9 tons; and a large number of small orders  
 from 2 to 3 tons each, to be delivered during the winter.  
 They were taken between the 20th of August and October  
 9th, 1860, at which date I was told not to take any more  
 orders. They were not filled because we had no coal to fill

545 them. I was introduced to Bull as the soliciting agent, and  
 he seemed to be well pleased with what I had been doing,  
 and made some remark in reference to it which I cannot  
 now exactly remember, and he never, in my presence or to  
 my knowledge, expressed any dissatisfaction as to what I was  
 doing or to the orders I was taking. On the 11th day of  
 October, 1860, judging from the looks of the pile, I would  
 say we had very little coal in the yard, I might say none at  
 546 all, comparatively speaking. We had a small pile of range  
 coal, I think we had no large egg. Some days, when I was  
 in the employ of Kelly & Co., I would take orders for two  
 547 or three hundred tons of coal, other days not more than ten  
 and so on. I am under the impression that I took orders  
 for about two thousand tons. I have looked for my order-  
 548 books of 1860 among the books of Kelly & Co., and inquired  
 of Maher, but could not find them. The orders were in  
 my hand-writing generally. About five-sixths of the orders  
 taken by me were for hard coal, that is, Lehigh and Lacka-  
 549 wana. Blossburg is a soft coal, used by blacksmiths. I was  
 to receive wages at the rate of five hundred dollars per year  
 to July 1st, after August 20, sixty dollars a month. Kelly  
 has paid me in full. I saw our carts coming loaded out of  
 550 Meeker's yard, and learned from Kelly that he was supply-  
 ing coal to fill some orders, we failed to receive coal to fill.  
 I understood that other dealers employed soliciting agents.  
 The last cargo of coal from Bull was in September, it was a  
 551 very small cargo. From April 15th to October 11th, 1860,  
 Kelly & Co. had a small supply of hard coal, all different  
 kinds together would not make a respectable pile of one  
 552 kind. On the first of August and perhaps the first of Sep-  
 tember, we had a supply of coal for the immediate wants of  
 customers. We were taking orders before the coal was  
 wanted, and not filling them as fast as taken. After the  
 first of September I don't think there was coal enough to  
 supply orders taken. From a statement which the book  
 keeper had drawn off I think that we had taken orders for  
 2,500 to 3,000 tons of coal more than we had in the yard  
 to deliver. I can't find my order-book. Between April



15th and October 11th I saw Bull at the yard and office of  
 553 the firm several times. I never heard him make any objections to the manner in which business was being done.  
 554 Edward Kelly had the management of the business of the firm. Maher had nothing more to do with the business of the firm than that he was a reputed partner, and his name was on the firm card. Coal advanced in 1860, but I could not say how much. I was employed in the yard in 1859.  
 555 We had no coal at all in 1860, compared with what we had in 1859. If Kelly & Co. had had a full supply of hard coal, I think they might have sold, in the ordinary course of their business, from April 15th, 1860, to April 15th, 1861, from five to six thousand tons more than was sold with the supply they had, and from two to three thousand tons from April 15th to October 11th. The best months for the sale of coal were August, September, October, and November; and, on his cross-examination, the said Eames testified—

556 I was employed by Kelly. I sought orders for coal and oftentimes wrote out contracts for coal. I took the orders and contracts and put them in the order book, usually in my own hand-writing. I had a memorandum book which I cannot find. It belonged to me, and I think I burned up the memorandum books when I went off to the war. I have looked for the memorandum books, and can't  
 557 find them. I know I burned up several small pass-books. I entered what orders I had on the order book when I went  
 558 to the office once or twice a day. I did not see to the delivery of coal, further than to see that the orders taken by me, requiring immediate delivery, were filled. I sold  
 559 but a small quantity of soft coal. It is a year, perhaps, since I saw the memorandum books referred to; I had a memorandum book with a very small portion of the orders in it, here the other day, which is not with me now, but I will produce it at any time it is wanted. I think I had  
 560 two memorandum books. I sold coal for no other person while selling for Kelly & Co. The statement or memoran-

561 dum I referred to was made out by Mr. Hunt, immediately after we got out of coal, I think about Oct. 1st, 1860. It was made out at the request of Mr. Maher and myself, Mr. Maher wanted to know the full amount that was short, and I wanted to know the amount of my orders that were short. The statement was made to show the full amount of the orders received. The last I saw of it, it was in the office. It laid on the desk for several days, to be referred to, because they could refer to it quicker than they could to the  
562 books. I saw this statement nearly every day, while it lay on the desk, and the last I saw of it was in the month of October, A.D. 1860. And also read the deposition of James Conlan, who testified as follows:—

563 I made a contract with Kelly & Co., for the firm of Ryan & Conlan, in August or September, 1860. We were to have as much coal as we could sell and should call for during that fall and winter, and until the next spring, at \$5.15 per ton, in the yard, for Lackawana, large or small. Only  
564 a small part was furnished. I could have sold, that winter, three or four hundred tons; I consider that I lost a thousand dollars and more by the operation. Mr. Kelly paid me, as part of the damages on said contract, \$325 or \$350, I don't remember which. The price of coal that year rose  
565 from seven in September to ten dollars, I think in Nov. And on his cross-examination the said Conlan testified:—

I was informed, about two months after the contract was made, that Kelly & Co. could not fill the contract. I purchased coal from other parties, but paid more than the  
566 contract price with Kelly & Co. And said Conlan, on his re-direct examination, further testified:—

When I was informed by Kelly & Co. that they could not fulfill their contract with me, they assigned as a reason, that Bull, of Buffalo, had failed on his contract with them.



I paid \$1.50, \$2, \$3 and \$4 per ton higher price for coal than the contract price with Kelly & Co., and part of the time I could not get it at all. By the failure on the part of  
 567 Kelly & Co. to fill the contract, I lost from \$1,500 to \$1,800, but I can't say exactly how much. And also read the deposition of James Fleming, who testified as follows:—

568 I was in the employ of Kelly & Co. from the 15th of April to Oct. 11th, 1860, as weighman and foreman of the yard. I kept a tally of the weight of most of the coal  
 569 received by said firm from Bull during that time, which I furnished to the book-keeper. I cannot state the exact amount without an examination of the tally-book. I saw Bull at the office of Kelly & Co., during that time, I think, from three to five times. I have also seen his brother there once or twice during that time. He talked with Kelly and examined the coal the same as Bull did. I did not hear  
 570 complainant Bull say anything more than to enquire if we were selling much coal, and how the business was getting along,—I never heard him make objections or find fault,—he seemed to me, so far as I could understand, satisfied. As near as I can recollect, Bull was at the office of Kelly &  
 571 Co. about July, the last of August or the first of September, and in October I am sure. As to the previous months, I am not so certain as to the time.

I heard Mr. Kelly tell Bull, as near as I can recollect, next to the last time that he was at the office of Kelly & Co., that he (Bull,) had not furnished the coal according to contract, and that they were losing customers every day that the coal was delayed in coming forward.

572 I have heard Kelly, several times, make complaint to the book-keeper about Bull's not furnishing a supply of coal; I have heard him tell the book-keeper that they did not have coal enough for their customers, and to write to Bull and

tell him to send the coal forward, or that he would make him stand the damage, or words to that effect.

573 Bull furnished Lackawana, Blossburg and Lehigh coal. There was a full supply of these kinds of coal for what customers there were till the latter part of July or first part of August, 1860, there was not much coal selling up to this time. That is about the time the coal trade commenced.

The last cargo of coal from Bull was received the latter part of September, 1860, as near as I can recollect. At that time there was none of two of the kinds of coal furnished by Bull, in the yard. I believe there was a small quantity of the coal used by blacksmiths, in the yard.

574 At the time the cargo was received, there were more orders in the office than this cargo could have filled.

The cargo was delivered to parties that had bought, and from whom there were orders for it.

575 I don't know of any coal being received from Bull after the last of September, 1860, nor of Kelly & Co. bringing any more coal into the yard, if they had done so, I would have known it, for I was at the yard all the time. I know that there were a great many orders for the kinds of coal supplied by Bull, that could not be filled. I would think, as as near as I can remember, that there were about 3000 tons that could not be supplied to parties. The orders were taken in the hand-writing of Mr. Kelly, the book-keeper, and mine, some of them, and Samuel O. Evans. I don't 576 remember that any orders were taken after the 11th day of October, 1860. We did not have any coal after the 11th day of October, 1860, there may have been a little in the



yard, but I don't think there was any for sale after that time. I determine the number of tons for which orders have been taken, from the order-book, and from written orders that were in the office. I was in the employ of Kelly & Co., and have been in the coal trade from June 1, 1859, to September 1st, 1861, and I would be of the opinion, from the knowledge I had of the business of Kelly & Co., that said firm would have sold, of the kinds of coal furnished by Bull, if they had had a full supply, from the 15th day of April, 1860, to April 15, 1861, 4000 or 5000 tons.

Kelly had charge of the business of said firm from the 15th day of April to the 11th day of October, 1860, and the book-keeper and Kelly received the money that was paid for coal during that time. Mr. Kelly received the money if the book-keeper was out, if both were present, the book-keeper received it. The book-keeper got the most of the money, and I would think that if Kelly got money when the book-keeper was out, he would give it to the book-keeper when he came in. If neither was in, I received the money and paid it to the first that came in. I never knew that Maher had anything to do or say about the business of the firm, either in the office or about the yard.

And the said Fleming, on his cross-examination, testified as follows:—I was employed by Mr. Kelly. The firm of Kelly & Co., as I understand, was composed of Mr. Kelly, Mr. Maher, and Mr. Bull. I state this from information. I was paid by Mr. Kelly. My duties, as weighman and foreman of the yard, were to weigh coal delivered from the yard and to receive it into the yard off from vessels and, as foreman, to see to things generally about the yard, to keep the time of men employed, and see to the delivery of coal to customers. I gave tickets to the cartmen that delivered the coal, with the weight and also a copy of the ticket, with the weight upon it, to the book-keeper. My duties were to weigh the coal and keep a memorandum of the weight,

which went to the book-keeper. I knew the amounts of coal received and from whom received, from weighing the coal and from seeing the bills of lading and the tally-book. I think I saw all the bills of lading. It was not my business to take charge of them. We knew who the coal was from, from the bills of lading. The captain sometimes handed them to me, when Kelly and the book-keeper were out. As near as I can remember, Bull was in the office of Kelly & Co. the latter part of June or first of July, 1860, again about the latter part of August or forepart of September, 1860, but am not very positive as to the month he was there the first time. I saw them conversing together each time he was there. I knew that Bull furnished coal to Kelly & Co., and my impression was that he was a member of the firm of Kelly & Co. I could not state the date nor the amount. It was received from May 1st to the last of September or first of October. They received more than one cargo; but I could not say whether they were full, some of them were parts of cargoes, that is, the vessels were not fully loaded. The parts of cargoes were received during the summer and the latter part of September. I saw the vessels were loaded sufficient for ballast. I can't give the names of the vessels, but I think the Yankee Blade brought a part of a cargo. Hunt was the book-keeper. Kelly sold some coal to James Roberts, about the first of October or about that time. I heard him sell it to him. He sold all that was in the yard at that time, of the hard coal. I weighed a portion, and I can't say whether I weighed the whole or not. I took a memorandum of the weight, it is in the office. I don't remember what it was. The consideration, as near as I can remember, was \$2,600.00. I did not hear whether it was to be cash. It was hard coal, and part of it was Blossburg. I don't know whether Blossburg is called hard or soft coal, it is used by blacksmiths, and is of a soft nature. I think this coal was received of Bull. I made an entry of this coal some time after on the order-book. Entries were not always made on



the order-book of large quantities sold by wholesale or by cargo. I neglected to put this down at the time, but seeing that the coal was received into the yard, I thought it was right to put it down in the order-book. This coal was delivered afterwards, as soon as convenient, to different parties, it went to several parties, I think. Some sales at  
591 wholesale were not put on the order-book, but all sales except at wholesale were put on the order book, but not all the same day. Probably it might be a week before some sales were put on the order-book, but I only remember  
592 a few such sales. I think I testified in a case in the circuit court that the sale was made on the second day of October. I don't recollect the exact time that it was put on the order-  
593 book. I think I then testified that it was not by the direction of Mr. Kelly, that I put the order on the order-book. That he may have told me, but if he did so, I did not remember it. This coal was in the yard. Coal sold  
594 afloat, at wholesale, was not entered on the order-book; but  
595 I think that coal received into the yard and delivered out of the yard should be entered on the order-book. I did not  
596 weigh this coal when it was sold, but I think I weighed the most of it afterwards. Other wholesales were delivered to  
597 parties who bought afloat, and were taken to their docks. I could not state the place where this coal was delivered, but  
598 it was delivered, I think, to different places afterwards as soon as convenient, a portion of it was delivered in a few days afterwards, and I think it was all delivered not a great while afterwards. I think I weighed this coal, or a greater  
599 portion of it, at the time it was delivered, and kept the account on the ticket-book. I can recollect three or four sales at wholesale. G. S. Hubbard had a sale from a vessel, and I think the Illinois Central and Rock Island R. R. Co's bought coal afloat. There were some pretty large amounts sold from the yard, whether they were wholesale or retail I cannot say. I cannot state the dates of the sales, but I  
600 think it was in 1860. I forget the names. Colvin bought over 200 tons in 1860, in the summer or fall. When I weighed this coal I think I handed the memorandum to

the book-keeper. I neglected to put the order on the order-book at the time, and as I understood it was delivered to Mr. Roberts. I asked him what I should do with it, and he told me to deliver it to parties the same as before, as near as I can recollect. The coal was, I think, then sold and delivered to parties that came to purchase coal. I cannot say that he said that I should deliver it the same as before, but he told me to deliver it to parties to whom it was sold or might be sold. I occasionally neglected or forgot to put orders on the book. There were a few orders that I did not put on the order-book the same day the sale was made. The tickets that I am speaking of were for the book-keeper to take the account from. Each day's business was entered on the order-book by itself, and I think I entered this order under the date of the second of October, the day the sale was made. I think I did not call the attention of any one to the entry. It was not usual to call the attention of the book-keeper to orders, yet I must have told him of some orders. I think I was accustomed to take orders. I have not seen Mr. Kelly in nearly two months, and never conversed with him about this entry.

And the said Fleming, on his re-direct examination, testified as follows:—I do not recollect exactly what I testified in the circuit court. When coal was sold in large quantities from the yard. I think I entered a portion of the orders in the order-book, but not all. Meeker and Newberry now occupy the yard. I entered sales made by myself on the order-book, and if sales were made by Kelly or the book-keeper, that were not entered, I entered them. I remembered the date of the sale to Roberts, when I put it down. The book-keeper, I think, kept the books the same after as before the sale of the coal to Roberts. It was my understanding that the sales made after that sale of that coal was for Roberts. Roberts told me to deliver the coal to parties that bought the coal or might buy it, and I followed his directions in the delivery. As near as I can recollect, when



610 I found that I had neglected to enter an order, on looking  
 611 over the tickets, I would enter them on the day in which  
 the coal was sold. And, on a further cross-examination,  
 said Fleming testified as follows:—

612 If I recollect rightly, Mr. Kelly told me to take orders,  
 and I think it was a part of my business to take orders  
 when the coal was sold, from customers. There was no  
 book of sales only our order-book and register of coal deliv-  
 ered. It was part of my business to enter the orders and  
 weigh the coal. I kept the men's time. I would some-  
 631 times take orders, but it was my chief business to weigh  
 the coal and take charge of the yard. And also read the  
 615 deposition of Edward H. Haddock, who testifies as follows:

616 In the summer or fall of 1860, it may have been in Sept.,  
 I contracted with Kelly & Co. for something like 10 or 20  
 tons of hard coal, to be delivered to me in the fall of 1860.  
 The contract was not filled by them. Kelly & Co. paid  
 617 me, in the winter of 1860 and 1861, some forty or fifty  
 dollars damages for the failure on their part to deliver said  
 coal. And on his cross-examination said Haddock testifies:

I made the contract with Edward Kelly. I had one ton  
 of coal of him, and then I made a compromise with him,  
 and he paid me forty or fifty dollars in money. He did  
 not pay me as much as the difference. The contract was  
 verbal; the coal was to be delivered in the latter part of  
 618 the summer or fall, I don't recollect the day or month.  
 619 And on his re-direct examination, testified: The contract  
 was made with Kelly & Co. The coal was called for  
 621 repeatedly in the fall. And also read the deposition of  
 Jabez K. Botsford, who testified as follows:

622 I made a contract with Kelly & Co. for hard and soft  
 coal, to be delivered when called for. They failed to de-  
 liver, on the contract, five tons of the hard coal. The

623 reason assigned by Mr. Kelly was, that they had been dis-  
 appointed in the receipt of coal. Fifteen dollars damages  
 were paid me by Kelly & Co., I think in 1861, the differ-  
 624 ance between the price we had to pay for it and the con-  
 tract price. And on his cross-examination, said Botsford  
 testified: I first required the delivery of the coal, I think,  
 in September, and from that time on. And on his re-direct  
 examination said Botsford further testified: I went to the  
 yard of Kelly & Co. myself several times for the coal, and  
 625 noticed that they did not have any hard coal. They might  
 have had some large lumps or pieces, but they did not have  
 such as I required to use in my stove, and such as our con-  
 tract called for, which was egg coal. My impression was  
 that Kelly & Co. went out and bought the hard coal that  
 was delivered to me, from other yards.

626 And also read the deposition of George H. Quigg, who  
 testified as follows: I am an accountant or book-keeper. I  
 have examined the books of the late firm of Kelly & Co.  
 They were kept somewhat irregular. I have no other  
 627 knowledge of Hunt's ability as a book-keeper, except as  
 derived from the books, and when I have pointed out errors  
 in the books, he has acknowledged them to have been  
 errors, and his own admissions, that at the time he took  
 charge of the books, he was incompetent to keep a set of  
 books, and I know that he is still incompetent as a general  
 628 book-keeper. Correct balance sheets could not have been  
 made from the books of Kelly & Co. in 1860, for the books  
 629 were incorrect. And on his cross-examination said Quigg  
 testified: The books of Kelly & Co. came into my hands,  
 I think, the 16th September, 1861, perhaps they contained  
 entries nearly up to that time. Mr. N. P. Payne has ac-  
 knowledged to me that he was the book-keeper after Hunt  
 left, and the books show that he was up to, I think, July  
 or August, 1860.

630

And also read the deposition of John S. Newhouse, who



631 testified as follows: I knew the coal yard used by Kelly  
 & Co.; the rent for the same would have been worth from  
 632 twelve to fifteen hundred dollars a year in 1860. I was in  
 the coal trade during the fall and winter of 1860. The  
 633 price of coal came up from \$5.50 and \$6 to \$10.50 per ton.  
 Coal dealers should have made from 50c to \$2.50 per ton,  
 clear, during that time. I should think it would be worth  
 about \$1 per ton to furnish a yard, receive, weigh, screen  
 and deliver the coal.

634 And on his cross-examination, said Newhouse testified:—  
 Lump Lehigh Hazleton coal was worth in Buffalo, in 1860,  
 \$5 to \$6 per ton, gross; prepared coal, from \$4 to \$5 per  
 ton, net; and Lackawana about the same price. Blossburg  
 was \$4 to \$4.50. Mr. Bull had the best.

635 And on his re-direct examination said Newhouse testified:  
 I think Bull offered me Blossburg coal, in 1859, at \$3.75  
 per ton. I could not tell the lowest value in Buffalo for  
 Lehigh coal.

636 And also read the deposition of Charles L. Harman, who  
 637 testified as follows: Mr. Isaac N. Harman contracted with  
 Kelly & Co. for 20 or 25 tons of coal, I think mostly hard  
 coal. They had delivered four loads, I think, and the bal-  
 ance was not delivered. I called at the coal office twice or  
 three times; I was informed by the clerk that they were  
 out of coal, which was the reason that it was not delivered.  
 638 I had received four or five tons, I think, of hard coal, the  
 bill for which was brought to me receipted in payment for  
 the damages for the non-delivery of the coal. I went to  
 the office to demand the coal, I presume the latter part of  
 September or the first part of October, 1860.

639 And on his cross examination, said Harman testified:—  
 After the failure of Kelly & Co. to deliver coal, I purchased

641 of Walter Rogers, the latter part of September or fore part  
 of October, about twenty tons of hard coal and four tons  
 of soft coal, at an increased price of from \$47 to \$50, that  
 was the same amount, I think, that I contracted with Kelly  
 642 & Co. for. I cannot give the dates that I required the coal  
 of Kelly & Co., it was in the latter part of September or  
 first of October.

643 And also read the deposition of James Marks, who testi-  
 644 fied as follows: I ordered, between, August and Septem-  
 ber, eleven tons of hard coal, of Kelly & Co., I think at  
 \$6 or \$6.50 per ton. They delivered three tons the latter  
 part of September or first part of Oct. I then asked them  
 why they did not deliver the whole amount, and they said  
 they were waiting to get it on. I asked them again, and  
 they told me to buy and they would pay the difference. I  
 bought at a difference of eight dollars, which Kelly & Co.  
 allowed me.

645 And also read the deposition of Isaac N. Harman, who  
 646 testified as follows: I engaged of Mr. Kelly, in 1860, four  
 tons of hard coal for myself, and I thing about seventeen  
 tons of hard coal and three of soft, for C. L. Harman. In  
 Sept. and Oct. I repeatedly called on Kelly and Mr. Hunt,  
 the book-keeper, to deliver me the coal. Kelly & Co. had  
 delivered one ton of hard coal to me, and they afterwards  
 647 gave me a half ton more for the damage on the contract  
 with me, and they receipted their bill against C. L. Harman,  
 for the coal delivered to him, which I think amounted to  
 about \$26, for the damages of their failure to deliver the  
 coal to him.

648 And on his cross-examination, said harman testified:—  
 Kelly & Co. did not refuse to deliver the coal when I called  
 for it, on the last of September or first of October. It was  
 to be delivered for winter use.



And also read the deposition of Thomas Hale, who testified as follows: I reside in Chicago; I was a dealer in coal and salt in 1860. From an examination of my books, I find I purchased of Mr. Bull, on or about Sept. 10, 1860, two hundred and twenty-five tons of prepared hard coal, at \$4.40 per ton, and fifty tons of Lehigh, at \$6 per ton, and on or about October 6th, 1860, one hundred tons of Blossburg coal, the price of which I do not recollect. Kelly & Co., I think, made small purchases of me during that year, but I do not recollect the amount. The transactions were small and principally for cash. I don't think I could tell what profits were made on coal during the winter of 1860 and 1861, without an examination of my books, but I think coal went up and profits were large. If hard coal advanced from \$6 to \$11 per ton, I think the profits on hard coal would have been \$4 per ton. I think coal advanced that year from early in the fall till spring, and went up very high, but am not certain as to the year.

And on his cross-examination, said Hale testified: I think there was a difficulty in getting coal in 1860, growing out of the navigation from the early close of it.

And also read the deposition of Seneca Wright, who testified as follows:—I made a contract with Kelly & Co. for what coal I wanted during the winter, at \$6 per ton. The contract was made in July or August, 1860. It was to be delivered along as I wanted it, two tons at a time. I went after the coal in November, but they failed to furnish me more coal, and Kelly denied the contract, and said they had no coal. It cost me \$16.50 more to buy the coal than the contract price.

And also read the deposition of Benjamin Jennings, who testified as follows:—I made a contract with Mr. Eames, the agent of Kelly & Co., for six tons of hard coal, in the

early fall of 1860. I received on the contract either one or two tons, for which I paid, but when I came to order more, I could not get it for they had none. Kelly & Co. sent me  
 659 a ton of soft coal, which was \$6, which I retained as damages, and for which I have never paid.

And also read the deposition of Frank A. Monroe, who testified as follows:—I made a contract with Mr. Eames, the  
 660 agent of Kelly & Co., for six tons of hard coal, at \$6 a ton, to be delivered as I wanted it, I think near the first of September, 1860. One ton was delivered on the 15th day of October, 1860. I told Mr. Eames I was ready to receive the balance, but he said they were expecting coal. I never got the balance, and refused to pay for the one ton.

And on his cross-examination said Monroe testified:—  
 661 I think I made the demands for the remainder of the coal under the contract in November, 1860.

And also read the deposition of Evert Van Buren, who testified as follows:—In the latter part of the summer or  
 662 forepart of the fall of 1860. I made a contract with Kelly & Co., by which they were to furnish me what coal I wanted during the ensuing winter. I received soft coal but demanded the hard coal frequently, but they did not furnish it except one or perhaps two tons, alleging that they did not have it. When I settled my bill, I deducted \$18 from the  
 663 same for the damages, which was what the hard coal cost me that winter over the contract price.

And on his cross-examination, said Van Buren testified: I demanded the hard coal at various times, the latter part of the fall and during the winter.

And also read the deposition of Walter B. Houghton, who testified as follows:—Mr. Rawson contracted with Kelly  
 664 & Co., in September, 1860, for fourteen tons of hard coal,  
 665



at \$6 per ton, to be called for as required. Kelly & Co. never delivered the coal. We demanded the coal in December, and some one in the office, I think Kelly, told me they could not furnish it, to purchase as best we could and they would pay the difference. Rawson & Bartlett bought the coal of Walter & Rogers, at \$10 per ton, on the 4th of December, 1860. We received from Kelly \$56, that being the difference between the contract price and the price paid.

666 And on his cross-examination this witness testified:—  
This contract was made by K. T. Rawson, who is since dead.  
And all I know in reference to it is what I have heard.

667 And on his re-direct examination testified: The \$56 was  
paid to me. I have heard the contract mentioned by Rawson, but am not positive as to Kelly. Kelly or the book-keeper made the settlement. I think it was Kelly.

668 And also read the deposition of John N. Jewett, who  
testified as follows:—I made the contract with Kelly & Co.,  
for winter's coals, in the fall of 1860, at \$6 per ton. They  
669 delivered a part, and when I applied for the balance they  
said they could not furnish the coal, from the failure of the  
man that had agreed to furnish them with coal. This was  
February or March. I was obliged to pay \$10.50 per ton  
for the balance I wanted—1½ tons—and charge Kelly &  
670 Co. with the difference—6.25—which they allowed me.

671 And also read the deposition of Edward H. Aiken, who  
testified as follows:—D. W. Gale, of the firm of Harmon,  
Aiken and Gale, contracted with Kelly & Co. for 4½ or 5  
tons of hard coal, at \$6 per ton, to be delivered in the fall.  
One ton was delivered about the middle of September. I  
went in the month of October, I should think, to the office  
of Kelly & Co., and called on them for the balance of the

672 coal. They said they had not the coal then, but supposed they would have it before the close of navigation. They thought there was some on the way. I went again, and I think Mr. Kelly told me that they probably should not have it, as the man who had contracted to supply them had failed to furnish the coal. He said I could purchase the coal, and he would pay the difference. I paid, I think, \$10 per ton. My damages would have been about \$15. No bill has been presented for the coal delivered, and I have not settled with them.

And on his cross-examination, said Aiken testified:—  
Gale made the contract with Kelly & Co., I did not.

673 And also read the deposition of Summerville Thomson, who testified as follows:—In August, 1860, Kelly & Co. entered into a contract, in writing, with Thomson & Kenedy, 674 to furnish them all the soft and hard coal they should need until the opening of navigation, 1861. I have seen the contract, and know the signature to be the signature of Kelly. The hard coal agreed to be furnished, was never furnished. 675 I went to the office and demanded the coal, and was told by Kelly and sometimes the book-keeper that they were expecting the coal to come up by the lakes. Mr. Kelly finally agreed to allow \$100 for the damages for the failure to deliver the hard coal. We require about eighty tons for one winter, and the damage was less than the difference in the price of coal we were compelled to pay.

676 And on his cross-examination said witness testified:—  
I made the first demand a month before the close of navigation. Navigation usually closes about the 6th of November.

677 And on his re-direct examination this witness testified:—  
I have looked for the contract and it is not to be found. It



was written in a day-book, and the day-book, I think, has been destroyed.

678 And also read the deposition of Charles A. Reno, who testified as follows:—I am a coal dealer, I reside in Chicago. We sold Kelly & Co., in 1860, the following bills of coal:—

686

## EXHIBIT A.

Messrs. Kelly &amp; Co.,

BOUGHT OF RENO & LITTLE,  
Dealers in Coal.

1860.

|           |                              |       |          |
|-----------|------------------------------|-------|----------|
| April 21, | 1 ton prepared coal, at \$6, | ..... | \$6.00   |
| " 26,     | do do do                     | ..... | 6.00     |
| " 28,     | do do do                     | ..... | 6.00     |
| May 2,    | do do do                     | ..... | 6.00     |
| " 3,      | do do do                     | ..... | 6.00     |
| " 15,     | 10 tons do do                | ..... | 60.00    |
| " 16,     | 1 ton do do                  | ..... | 6.00     |
| " 21,     | 2 tons do do                 | ..... | 12.00    |
| " 1,      | 1 ton do do                  | ..... | 6.00     |
| " 26,     | do do do                     | ..... | 6.00     |
| " 28,     | do do do                     | ..... | 6.00     |
| " 31,     | do do do                     | ..... | 6.00     |
|           |                              |       | <hr/>    |
|           |                              |       | \$132.00 |

## EXHIBIT "B."

687

1860.

|         |                                                     |       |         |
|---------|-----------------------------------------------------|-------|---------|
| June 7, | 1 ton Egg Coal, at \$5.25                           | ..... | \$5.25  |
| " 11,   | 1 do do do do                                       | ..... | 5.25    |
| " 12,   | 1 do do do do                                       | ..... | 5.25    |
| " 18,   | 1 do do do do                                       | ..... | 5.25    |
| " 18,   | 2 do do do do                                       | ..... | 10.50   |
| " 19,   | 6 do do do do                                       | ..... | 31.50   |
| " 20,   | 1 <sup>100</sup> / <sub>200</sub> tons Egg Coal, do | ..... | 5.64    |
| " 23,   | 1 ton Range do do                                   | ..... | 5.25    |
| " 26,   | 1 ton Egg do do                                     | ..... | 5.25    |
| " 26,   | 1 ton Range do do                                   | ..... | 5.25    |
|         |                                                     |       | <hr/>   |
|         |                                                     |       | \$84.59 |

Correct.

R. J. HUNT.

688

## EXHIBIT "C."

1860.

|      |     |                  |     |       |       |    |         |       |         |
|------|-----|------------------|-----|-------|-------|----|---------|-------|---------|
| July | 5,  | 1                | ton | Range | Coal, | at | \$5.25, | ..... | \$5.25  |
| "    | 7,  | $\frac{50}{100}$ | do  | Egg   | do    | do |         | ..... | 3.94    |
| "    | 10, | 1                | do  | Range | do    | do |         | ..... | 5.25    |
| "    | 21, | 1                | do  | Egg   | do    | do |         | ..... | 5.25    |
| "    | 30, | $\frac{1}{2}$    | do  | Range | do    | do |         | ..... | 2.63    |
|      |     |                  |     |       |       |    |         |       | <hr/>   |
|      |     |                  |     |       |       |    |         |       | \$22.32 |



And on his cross-examination said Reno testified:—The  
 683 average passage of a boat from Buffalo to Chicago is about  
 ten days. There is telegraphic communication, and the  
 684 average time for the transmission of a letter is about two  
 days. When Mr. Bull was here he told us to let Kelly have  
 the coal. Mr. Bull paid us Exhibits marked A and D, the  
 other two bills were paid by Kelly & Co. at their office.

And on his re-direct examination said Reno testified:—  
 685 We gave orders on Kelly & Co. to pay Bull Exhibits A  
 and D.

And also read the deposition of Wm. H. Fuller, who  
 690 testified as follows:—I made a contract with Kelly, I think,  
 691 about the first of October, 1860, to furnish what hard coal  
 I should require till spring. The contract, I think was  
 verbal, but written down by Kelly in the order-book. I  
 used about 40 or 45 tons. They furnished me coal only for  
 from 4 to 6 weeks, and in all from 8 to 10 tons. My  
 damages, from their failure to furnish the coal, was about  
 \$100. I had to pay \$10 and \$10.50 per ton to make up the  
 692 deficiency. I have not settled with Kelly & Co.

And also read the deposition of Henry H. Butler, who  
 693 testified as follows:—Buel, Hill, and Granger made a con-  
 695 tract with Kelly & Co. for 40 tons of coal, 35 of hard and  
 5 of soft. The contract was only filled in part. Kelly &  
 Co. paid Buel, Hill, & Granger \$41.50 as damages for the  
 696 non-performance of the contract.

And on his cross-examination said Butler testified:—I  
 697 charged the difference between the contract price and what  
 we had to pay, which was \$41.50, and on the settlement of  
 the account with Kelly & Co. this amount was deducted.

And also read the deposition of George H. Beardesly,  
 698 who testified as follows:—On the 12th day of July, 1860,

Kelly & Co. agreed to deliver to the Chicago & Rock Island R. R. Co. what coal they wanted before the first day of June, 1861. The following is a copy of the contract:—

## EXHIBIT "A."

700

## CHICAGO &amp; ROCK ISLAND RAILROAD.

*Purchaser's Office, Chicago, July 12, 1860.*

CHICAGO & ROCK ISLAND R. R. Co., GENTS.—We hereby agree to furnish you, delivered on board of your cars, at your repair shop in Chicago, what Blossburg coal you may want between this and the first day of June, 1861, at \$4.50 per net ton, the coal to be of the best quality. Lehigh coal, during the same time, to be delivered at \$6.50 per ton.

KELLY & CO.

699

They delivered one cargo. I ordered, as agent of the company, about 500 tons, which was not delivered, and I think we should have wanted about 500 tons more, though I did not order that. The failure of Kelly & Co. to deliver the coal according to the contract, was a damage to the company of not less than \$1.50 a ton, and I think the company paid \$2 per ton over the contract price. There has been no settlement between the Railroad Company and Kelly & Co., as to the amount of the damage.

700

And on his cross-examination, said Beardesly testified:—Kelly & Co. first failed to deliver the coal, I should think, in October or November. Kelly & Co. have never paid any damages.

701

And also read the deposition of Arthur B. Meeker, who testified as follows: I reside in Chicago, and am in the coal and iron business. Kelly & Co. had not a large supply of

702

coal. I was selling them coal all along in the summer and



fall of 1860. I think I sold them coal every month. They had of me about one hundred and fifty tons of coal. The reason they bought of me was, that they were out of the kinds of coal that they purchased of me.

703 And on his cross-examination, said Meeker testified:—  
I think I sold them coal every month during the spring, summer, and fall of 1860. The last I sold them was in November.

273 And the said Maher read, on the hearing, the deposition  
of John S. Williams, who testified as follows: I had a  
275 written contract with the firm of Kelly & Co., given in May 1860, for the delivery, on the cars in Chicago, of all the Blossburg coal I wanted till May 1861, the price not to exceed \$6 per ton. The contract was as follows:—

#### EXHIBIT "A."

282 JOHN S. WILLIAMS, *Galena, Illinois:*

We will sell you Blossburg coal at \$5.50 per ton till further notice. We will guarantee that the price shall not exceed six dollars per ton for one year from the first of May, 1860.

KELLY & CO.

275 They failed to furnish me the Blossburg coal in Nov. or Dec. I made demands for the coal in November and Dec,  
276 1860. They failed after that time to deliver coal. I suffered damages from their failure to comply with the terms of the contract, to the amount of five hundred dollars. The account between myself and Kelly & Co. stands to their credit, on my books, to the amount of \$229.80, but the  
277 same is unsettled, and Kelly & Co. have not allowed me for the damage for their failure to comply with the contract.

When I was in Chicago in November 1860, Kelly & Co. had no Blossburg coal in their yard. The last car load I received, Kelly told me he had purchased of other parties at \$7 per ton. The coal was purchased of A. B. Meeker or of Law & Strother, I am not positive which. I think they purchased more than the one car load, as they were  
 278 desirous to fulfill their contract. In November they had no hard anthracite coal in their yard, to the best of my recollection. And on his cross-examination, said Williams testified: The contract was made in May, and they  
 279 refused to deliver the coal in November.

706 October 6th, 1863, the following proceedings were had in said case, to wit:—

CADWALADER BULL

vs.

HUGH MAHER AND

EDWARD KELLY,

} BILL FOR INJUNCTION.

And now come Hervey, Anthony & Galt, solicitors for the complainant in said cause, and suggest to the court the death of the said Cadwalader Bull, the said complainant in this cause, and it is ordered that the same be and is hereby taken and entered herein of record, and thereupon, on motion of said solicitors, it is further ordered, that Maria Bull, administratrix of the estate of Cadwalader Bull, deceased, be, and she is hereby made, a party complainant in said suit, and that further proceedings in said cause  
 707 be prosecuted in the name of said Maria Bull, Administratrix of said Cadwalader Bull, deceased, as aforesaid.

December 22nd, 1863, the following decree was entered, to wit:



|                                                   |   |         |
|---------------------------------------------------|---|---------|
| MARIA BULL,<br>ADMINISTRATRIX OF CADWALADER BULL, | } | DECREE. |
| vs.                                               |   |         |
| EDWARD KELLY & HUGH MAHER.                        |   |         |

708 This cause coming on this day to be heard upon the bill, answer, cross-bill, and all the pleadings pled and proofs taken therein, and Messrs. Hervey, Anthony & Galt, of counsel for the complainant, having been heard, and Messrs. Nicholes Brothers, of counsel for the defendant, Hugh Maher, having been also heard, and no counsel appearing for the said defendant, Edward Kelly, and the court, upon consideration thereof, and being fully advised in the premises, doth order, adjudge and decree as follows, namely:— That the cross bill of the said Hugh Maher and Edward Kelly, pled in this cause, be dismissed, and that the amended answer of the defendant, Hugh Maher, pled on the 18th day of August, A.D. 1862, be stricken from the files of this court, and the same having been filed subject to the objection and to the disposition of the court, to be made thereof on the final hearing of this cause.

And it further appearing to the court, that the said Cadwalader Bull has departed this life since the commencement of this suit, the partnership heretofore existing between the said Cadwalader Bull and the said defendants, Edward Kelly and Hugh Maher, in the coal business, as set forth in the articles of co-partnership, in evidence in this case, has, by the death of said Cadwalader Bull, been dissolved.

709 And it further appearing to the court, that the said Cadwalader Bull did, in his life time, supply to the said defendants, under said agreement of co-partnership, coal to the value of \$6,695.79, at cost price at Buffalo, the same being the lowest cash price at said place, on account of

which the said defendants have paid to the said Cadwalader Bull, in his life time, the sum of \$3,150, and no more,

It is therefore adjudged and decreed, that there is and remains due to the said complainant, as administratrix of the said Cadwalader Bull, from the said defendants, on the actual cash cost of the said coal at Buffalo, the sum of \$3,445.73.

And it further appearing to the court, that up to the time of filing the bill in this cause, the said defendants had sold of the coal furnished to them by said Cadwalader Bull, in his life time, under the said agreement, to the amount of \$5,246.05, and that the profits on said sales amounted to \$1,787.50, and that the said complainant is entitled to one-third part of said profits, it is ordered, adjudged and decreed, that there is and remains due, from the said defendants to the said complainant, for such profits on such sale, as and for said one-third interest therein, the sum of \$595.83.

And it further appearing to the court that the coal supposed by said Cadwalader Bull, to have been unsold by the defendants, at the time of the filing of the original bill herein, but which was claimed by said defendants to have been sold in gross to one James Roberts, before the filing of said bill amounted to six hundred and eighty-eight tons, which sale to said Roberts the court finds to have been a fraud on complainant and a violation of the articles of co-partnership by the said defendants, and which coal last mentioned, owing to the very great rise in the value thereof in the fall of 1860, the court finds to have been worth ten dollars per ton in the yard of the said defendants in Chicago, and the cost of which was \$3,238.70, leaving a profit thereon of \$3,641.30, of which the said complainant is entitled to one-third part.



It is, therefore, further adjudged, ordered, and decreed that there is and remains due from the said defendants to the said complainant, as and for the said one-third share of said last mentioned profits, the sum of \$1,213.76.

And it further appearing to the court that the said defendants are justly and equitably indebted to the said complainant in the further sum of \$591, for short delivery of coal by the said defendants to one Nathaniel S. Bouton, as shown by the entry of that sum to the credit of the said Cadwalader Bull on the ledger of the said defendants.

712 And it further appearing to the court that the expense of said co-partnership, up to the time of the commencement of this suit, amounted to \$1,500, in which sum is included the salary of the book-keeper, to be paid by said Cadwalader Bull, according to said co-partnership agreement, and which amounted to \$247.02, leaving a balance of \$1,252.98 to be shared in equal proportions between the said complainant and said defendants.

It is, therefore, ordered, adjudged, and decreed that from the amounts herein before found to be due from the said defendants to the said complainant there be deducted the sum of \$247.02, being the wages of the book-keeper and one-third of the remaining expenses.

And it further appearing to the court here that the said complainant is entitled to interest on the amount so found to be due, from the 11th day of October, A. D. 1860, to the day of the entering of this decree.

713 It is, therefore, further ordered, adjudged and decreed that the interest on the sum of \$5,296, from the said 11th day of October, A. D. 1860, to the day of the entry of this

decree, amounting to the sum of \$1,005, to be allowed to the said complainant.

It is, therefore, hereby ordered, adjudged, and decreed by the court that the said defendants, Edward Kelly and Hugh Maher, to forthwith pay to the said complainant the sum of \$6,300, composed of the various items hereinbefore set forth in detail, being the amount found by the court to be justly and equitably due from the said defendants, Hugh Maher and Edward Kelly, to the said complainant with interest thereon from the date of this decree, and that the said defendants do pay the cost of this suit.

And it is further ordered, adjudged, and decreed by the court that the said complainant have execution for the said sum so decreed to be paid by said defendants, and the said costs.

711 And thereupon said defendant, Hugh Maher, appears by D. C. & I. J. Nicholes, his solicitors, and prays an appeal herein to the Supreme Court of this State from the judgment and decree of this court, which is allowed to him on filing bond in the penalty of \$8,000, with security to be approved by one of the judges of this court, and to be filed by the fourth day of the next term of this court.

And thereupon comes said Hugh Maher and presents his appeal bond in the penalty of \$8,000, conditioned as required herein, which bond is approved and ordered to be filed by the court.



## ASSIGNMENT OF ERRORS.

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- I. The Superior Court of Chicago erred in not finding whether there was cause for a dissolution of said copartnership.
- II. The said Superior Court erred in not passing upon the causes of complaint alleged in the bill.
- III. The said Superior Court erred in granting relief upon matters not alleged in the bill.
- IV. The said Superior Court erred in granting relief upon matters transpiring subsequent to the filing of the bill.
- V. The said Superior Court erred in finding said firm of Kelly & Co. had been dissolved by the death of Cadwalader Bull, subsequent to the filing of the bill, and upon such finding, decreeing an account.
- VI. The said Superior Court erred in finding the said firm of Kelly & Co. had been dissolved by the death of Cadwalader Bull, without fixing the date of such dissolution by the death of said Bull.
- VII. The said Superior Court erred in finding the defendants guilty of a fraudulent sale to James Roberts, without any allegation in the bill of such fraudulent sale.
- VIII. The said Superior Court erred in decreeing for the complainants and against the defendants.
- IX. The said Superior Court erred in decreeing for the complainant and against said defendant below, Hugh Maher, impleaded with Edward Kelly.

- X. The said Superior Court erred in rendering a decree against equity and not supported by evidence.
- XI. The said Superior Court erred in finding that the said coal was furnished to defendants below.
- XII. The said Superior Court erred in finding that the defendants below sold the coal furnished to said firm of Kelly & Co. by complainant below.
- XIII. The said Superior Court erred in finding said defendants jointly guilty of a fraud on complainant below in selling coal to James Roberts.
- XIV. The said Superior Court erred in finding that there was due complainant below from defendants below jointly, \$591, for short delivery of coal to N. S. Bouton.
- XV. The said Superior Court erred in decreeing against said defendants jointly, for any violation of said articles of copartnership, or conversion of any partnership property, or any fraud on the rights of complainant below by said Edward Kelly.
- XVI. The said Superior Court erred in rendering a decree against the said Hugh Maher, it appearing from the record aforesaid, that the said Hugh Maher did perform and keep each and every covenant, either joint or several, in said articles of copartnership, on his part to be performed and kept.
- XVII. The said Superior Court erred in decreeing a dissolution of the partnership without converting the assets of said firm into money, and allotting to each partner his share of the same.
- XVIII. The said Superior Court erred in not decreeing an account between each partner and said firm.
- XIX. The said Superior Court erred in not decreeing that the amount withdrawn by each member of said firm be refunded as provided in



said co-partnership articles, and in pursuance of the prayer contained in said bill.

- XX. The said Superior Court erred in not decreeing the amount of loss to be borne by each member of the said firm, for losses sustained in the course of said partnership business.
- XXI. That said Superior Court erred in striking the separate answer of Hugh Maher, defendant below, from the files.
- XXII. The said Superior Court erred in decreeing that there was due from defendants below to complainant below the sum of \$3545.73 on the cost price of coal.
- XXIII. That the said Court erred in finding that there had been sold of the coal furnished by complainant below only to the amount of \$5246.15, at the time of filing the bill.
- XXIV. The Superior Court erred in finding that there were profits upon the sales of coal, found by the court below, to have been made up to the time of filing the bill amounting to \$1787.50.
- XXV. The Superior Court erred in decreeing the payment of the cost price of coal, that was sold upon credit.
- XXVI. The Superior Court erred in finding that there was in the yard of Kelly & Co. at the time of filing the bill 688 tons of the coal furnished by the complainant below, and in finding said coal worth ten dollars per ton.
- XXVII. The Superior Court erred in finding that there was a profit made upon coal remaining in the coal yard of Kelly & Co. at the time of filing the bill of \$3641.30, and in decreeing the payment of one third part thereof to complainant below.
- XXVIII. The Superior Court erred in finding the expenses of said co-partnership up to the filing of the bill, including the salary of the Book-keeper, were only \$1500.

- XXIX. The Superior Court erred in finding that there was due complainant below at the date of the decree the sum of \$6300.
- XXX. The Superior Court erred in allowing interest before dissolution.
- XXXI. The Superior Court erred in not making any provision by said decree for the payment of the debts and liabilities of said firm.
- XXXII. The said Superior Court erred in rendering a final decree without disposing of the debts and moneys due said firm, from the collection of which the defendants below were by the order of said Superior Court at the time of filing the bill and ever since have been enjoined.
- XXXIII. That said Superior Court erred in not charging the complainant below with the debts and moneys due said firm.
- XXXIV. The Superior Court erred in not appointing a receiver.
- XXXV. The Superior Court erred in not disposing of the injunction in the suit below.
- XXXVI. The Superior Court erred in not allowing the defendants below damages for the failure of the complainant below to supply the said firm with coal in pursuance of the co-partnership agreement.
- XXXVII. The Superior Court erred in not charging the said complainant below for loss to said firm arising from his failure to perform his part of the co-partnership agreement.
- XXXVIII. The said Superior Court erred in not providing by said decree for losses sustained by said firm in the course of said co-partnership business.
- XXXIX. The said Superior Court erred in not abating from the amount found against the defendants below for the losses sustained by said firm, in the course of said co-partnership business.



- XL. The said Superior Court erred in not allowing the defendants for the amount paid by them as damages for the failure of the firm to fill the co-partnership contracts.
- XLI. The said Superior Court erred in dismissing the cross bill of the defendants below, and in not sustaining the same.
- XLII. The said Superior Court erred in refusing to allow the defendant below, Maher, to examine on the hearing the said Robert Law, T. J. Kensella and George W. Quigg, and in refusing to allow said defendant to introduce parol evidence on the hearing in support of the answer and cross bill of the defendants below.

D. C. & I. J. NICHOLAS,

*Solicitors for Appellant.*

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Reported