

12740

No. \_\_\_\_\_

# Supreme Court of Illinois

Fish & Lee

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vs.

Rosebury

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71641  7

Myron H. Fisher et al  
vs 100

Oliver W. Rose et al

101

12740

1859

State of Illinois  
Macou County

August Term 1851

Now before the Honorable  
John S. Thompson, Judge of the Circuit Court  
in the State of Illinois, sitting and  
held at the Court House in the Town of  
Vandalia, in said County, on the last  
Monday in the month of August, in the  
year of our Lord, One thousand eight  
hundred and fifty seven, being the thirty  
first day of said month.

I, the Honorable John S. Thompson, Judge

James G. Smith, Clerk

Wm. Lloyd Garrison, Attorney

Wm. D. Smith, Clerk

Elijah H. Roseberry

Myron H. Fisk

Wm. Lee

vs  
as  
Respondent

Be it remembered that  
heretofore to wit: On the twenty ninth day  
of August in the year of our Lord one  
thousand eight hundred and fifty seven  
the manuscript of the proceedings in this case  
entitled as above, and the accompanying  
papers filed in said cause, were removed from  
the Circuit Clerk of Cook Island County

William, having been brought to this Court  
on a Change of Venue from Cook County  
County, and were filed in this Court, and  
are in the words and figures following, to wit:

"Filed before the Hon. J. Wilson May, Judge  
of the Sixth Judicial Circuit of the State of Illinois  
at a term of the Circuit Court begun and  
held at the Court House within & for the County  
of Cook, Illinois, and held at Chicago, Ill. on the  
Third Monday the 16<sup>th</sup> day of March A.D. 1871.  
Present Hon. J. Wilson May, Judge  
Ezra W. Stansbury, Sheriff  
John W. Hawley, State Attorney  
Lucius W. Neil, Clerk,

And on the Eighth day of said term and 24<sup>th</sup>  
day of said month the following proceedings were  
had to wit: -

Elijah Rosburg }  
vs. } Accused.  
Nathan K. Fish & Lytle Lee

This day came the parties  
by their attorneys and issue being joined was  
a jury of seven to wit: Gadsoch Katschke  
H. C. Pratt, Robt Kirkman, W. M. Pierce, J. L. Smith  
J. W. Rogers, Jas. W. Brown, Thomas Kirkman.



J. Madison, J. Parker, J. H. Brown, H. A. Phil-  
lips, who were each and severally sworn  
to well and truly try the issue joined, and the hour  
of adjournment having arrived before the  
conclusion of the evidence, the Court instructed  
the Jury not to converse with any person upon  
the subject of this trial and permitted them to  
disperse to meet the Court to-morrow morning.

And afterwards to wit: On the 10th  
day of said term, being the 25th day of March  
A.D. 1877, the following proceedings were had,  
to wit:

20	Elijah Rosebury	3
	vs	3 Assumpsit
	Myron H. Rich & Mylo Lee	3

This day again came  
the parties by their attorneys and the jury  
heretofore sworn and sworn, and having  
heard a part of the evidence, and the hour  
of adjournment having arrived, the Court  
instructed the jury as on yesterday and  
permitted them to disperse to meet the Court  
to-morrow morning.

And afterwards to wit: On the 11th day  
of said term, being the 26th day of March

Dec. 1857. the following proceedings were had to wit:

29      Elijah Roseberry }  
  } Defendant  
  }      vs  
Myr. W. Rich & Lytle & Co. } Plaintiff

This day again came the parties by their attorneys and the jury hereinafore empaneled, and they having heard the evidence returned their verdict into Court which is as follows,

"We the jury find for the Plaintiff and assess to Damages of Seven Hundred Dollars" Whereupon Defendant enter their Motion for a new trial.

State of Illinois      June Term A.D. 1858.  
Rock Island County.

Came before the Hon. John H. Wilson Judge of the Sixth Judicial Circuit of the State of Illinois at a term of the Circuit Court begun and held at the Court House within and for the County of Rock Island and State aforesaid on the first Monday the first day of June 1858.

Present Hon. J. Wilson Judge  
John R. Hawley Attorney  
Ezra M. Beardsley Sheriff  
Leroy McNeil Clerk



And on the fifteenth day of said Term being  
the 17<sup>th</sup> day of June 1857, the following persons  
were had, to wit:

17. Elijah Roseburg 3  
vs 3 Assumpsit.  
Thompson & Taylor 4

This day came the parties  
by their attorneys, and defendants by their  
attorneys enter their Motion supported by  
affidavit for a rule upon plaintiffs to give  
security for costs. Thompson came plaintiff by  
his attorney and enter his motion supported  
by affidavit for a change of venue herein.  
And the Court being sufficiently advised in  
the premises sustained the said motion and  
ordered the venue hereof be and the same is  
hereby changed to the County of Mercer, and  
that the Clerk of this Court make a Transcript  
of the Record in this case and transmit the  
same to the Clerk of the said Circuit Court  
of Mercer County.

State of Illinois  
Rock Island County

I, Quincy M. Neil Clerk  
of the Circuit Court of said County, do  
hereby certify that the foregoing is a true

Copy of the Record in this Cause. And the accompanying papers are all the papers in said Cause on file in my office.

Witness my hand and the Seal of said Court at Rock Island this 1st day of August A.D. 1857.  
 Quincy McNeil, Clerk

(Copy of Summons)

State of Illinois } The People of the State of Illinois,  
 Rock Island County } To the Sheriff of Rock Island County, Greeting:  
 We command you to summon William H. Fish & Miss Lee, late partners doing business under the name and style of Fish & Lee, if to be found in your County, personally to be and appear before the Circuit Court of the County of Rock Island, on the first day of the next term thereof, to be holden at the Court House in Rock Island, on the 2nd Monday in the month of June A.D. 1856, to answer the Complaint of Elijah H. Keiburg of a Plea of Trespass on the Case on Services to his damage, the sum of Five Hundred dollars as he says; and have you there that Day, and make return thereon in what manner you require the same.

Witness my hand and Seal of said Circuit Court at Rock



Island this 10 day of May in  
the year of our Lord one thousand  
eight hundred and fifty six.  
Myson Wilson, Clerk.

On the Lack of which I am now appear  
the following return made by the Sheriff to wit:

I have served this writ by reading the  
same to Myson M. Fish & Myles Lee this  
17<sup>th</sup> day of May A.D. 1856. J.D. Thornton, Sheriff  
per Extra Deputy &c

State of Missouri, Rock Island Circuit Court  
Rock Island County, June Term A.D. 1856.

Myson M. Fish & Myles Lee late partners  
doing business under the name and style of  
Fish & Lee, Defendants in this suit were  
summoned to answer Elijah M. Keasbey,  
Plaintiff in this suit, in a plea of trespass  
on the case, on promises, and thereupon the  
said plaintiff complains &c.

For that whereas heretofore to wit on  
the twentieth day of May, A.D. 1856, at Rock  
Island to wit: at the County of Rock Island  
aforesaid, the said defendants were indebted to  
the plaintiff in nine hundred dollars for  
the price and value of eight hundred bushels

of Wheat then and there sold and delivered by the said Plaintiff to the defendant at their special instance and request, by reason whereof and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said Plaintiff the said sum of money above specified, and being so liable the said defendant, in consideration thereof, afterwards, to wit: On the same day and year, and at the place aforesaid, witness and then and there faithfully promised the said Plaintiff the said sum of money above specified.

And whereas also the said defendant afterwards, to wit: on the fourth day of May A.D. 1861, at the County aforesaid, were indebted to the said Plaintiff in the sum of One thousand dollars for the price and value of goods and chattels then and there sold and delivered by the said Plaintiff to the defendant at their request: And in One thousand dollars for the price and value of work then and there done and materials for the same furnished by the Plaintiff for the defendant at their request: And in the sum of One thousand dollars for money then and there lent by the Plaintiff to the defendant at their request: And in One thousand dollars for money then



and there paid by the Plaintiff for the use of the  
defendants, at their request: And in one  
thousand dollars for money then and there  
received by the defendants for the use of the plaintiff  
And in One thousand dollars for money found  
to be due from the defendants to the Plaintiff  
on an account then and there stated between them

And whereas the defendants afterwards  
sue: On the day and year last aforesaid in  
the County aforesaid, in consideration of the  
premises respectively promised to pay the said  
several last mentioned moneys respectively to  
the plaintiff, on request. Yet they have  
disregarded their promises, and have not paid  
any of the said moneys, or any part thereof,  
to the Plaintiff George Parker Howard  
Hobbs, and therefore he brings suit.

Know all Men,  
That the said

Copy of Dec. given.

Rich. G. Lee

To Esq. R. B. R. L. R.

1854

To 800 bushels Wheat delivered to for  
at a deduction of \$1.12 per bushel - \$896.00

Filed May 24th 1856 Mayor William Clark

Plea

State of Illinois  
Rock Island County.Of the June Term Ad. Ct.,  
of the Rock Island County  
Circuit Court.Elijah M. Rosburg }  
vs }  
Myron H. Fish & }  
Mylo Lee late }  
Partners &c }  
Partners &c }And Myron H. Fish and  
Mylo Lee late partners &c  
Defendants in this suit  
being summoned to answer  
Elijah M. Rosburg Plaintiffin a plea of Justices on the case upon promises  
by Marshall & Ball their attorneys to sue and  
defend the wrong and injury when he said  
say that they did not undertake and promise  
in manner and form as the said plaintiff  
both above things complained against them  
and of this they put themselves upon the County  
&c.

Marshall &amp; Ball

And Myself  
the like by

Knox &amp; Wilkinson

Bransley &amp; Smith his attys.

Att. for Defs.

Find for the Defs.

J. J. H. H. H.

Elijah M. Rosburg

Awarded  
Declarationvs  
Fish & LeeAwarded Declaration filed  
by leave of Court March  
Term A.D. 1877.And now said My further  
dellares against said Myself in a plea of



I profess on the Case on firmness, for that whereas  
heretofore to wit: On the 13<sup>th</sup> day of May A.D. 1857.  
to wit at said Court, of Rock Island in Con-  
sideration that the Plaintiff at the special instance  
and request of said defts, had before that time  
sold & delivered to said defts. to wit: O & C. Thompson  
and bunches of Wheat, that the defendants in this  
took and faithfully procured the said Plt to pay  
him so much money as said one thousand  
bushels of Wheat at the time of the said sale &  
delivery thereof was reasonably worth.

And the Plt avers that the said Wheat at  
the time of the said sale & delivery thereof was  
reasonably worth the sum of twelve hundred  
dollars of which said defts. on the day & year  
aforesaid had notice.

Yet said defts. notwithstanding  
their said promise & undertaking so by them  
made as aforesaid should have neglected & re-  
fused to take the said Wheat and refuse to pay said  
Plt said sum of money, or any part thereof  
that often demanded to wit: on the day & year  
last aforesaid at the County of &  
Filed May 21. 1857. Quincy Mo. s. i. c. k.

Attest for State of Illinois, of Rock Island County  
County Clerk of Rock Island County. Circuit Court  
June Term A.D. 1857.

12 Elijah W. Rosbury }  
vs }  
Myron B. Fish & Mylo Lee }

The affiant Mylo Lee being first duly sworn according to law, deposes and says that he is one of the defendants in the above entitled suit, and that Elijah W. Rosbury Plaintiff in said suit is unable to pay the costs of said suit as said affiant believes, and is informed, and the officers of this Court will be in danger of losing their legal demands in case said suit is determined against said Rosbury.

Sworn and subscribed to

(Signed) Mylo Lee

Before me this 17<sup>th</sup>

day of June 1877.

Witness June 17, 1877.

Lucy McNeil Clerk

Lucy McNeil Clerk

Affidavit of E. W. Rosbury, in the Circuit Court of Rock  
County, Iowa, June Term  
Fish & Lee vs Rosbury, 1877.

Elijah W. Rosbury being  
sworn deposes and says that he believes and  
feels he cannot have a fair and impar-  
tial trial in the above named suit on account  
that the judge of this Court is prejudiced against  
his affiant, and his cause of action



embodied in said suit, the same having  
been once tried before him. This affiant  
also says that he fears & believes that he can  
not have a fair and impartial trial of  
said suit for the further reason that the  
adverse party (namely Fish & Lee, said A. G. & I  
have an undue influence over the mind  
of the inhabitants of said Rock Island  
County. This affiant further says that  
the reasons above set forth, upon which the  
application for change of venue is based,  
only came to his knowledge yesterday.  
That up to that time it was his intention  
to wage war the trial of said cause at the  
present term of this Court, and to this  
end had made all necessary preparation.  
Affiant further says that early this morning  
before the coming <sup>of the Court one</sup> of his Counsel, viz  
• Robert Wilkinson Esq. and A. G. Counsel  
Julius Manning, Esq. of his intention to  
apply for a change of venue for the trial  
of said suit. Affiant therefore prays a  
change of venue for the trial of said cause  
to some distant County where the above named  
obstacles to a fair and impartial trial do not  
exist. Witness my hand this 11<sup>th</sup> day of June  
1871. Signed & sealed the foregoing  
Subscribed & sworn to before me this 11<sup>th</sup> day of June  
1871. James M. Baird Clerk.  
Filed for me 17<sup>th</sup> 1871.  
James M. Baird Clerk.

## Copy of Contract.

Contract

Rock Island Co. October 18<sup>th</sup> 1857.

I have this day agreed to deliver Fish & Lee  
at the Ware house of Samuel Kenworthy in  
Andalusia Eight Hundred Bushels of  
Spring Wheat within one month if possible  
for which I am to receive one dollar  
and twelve and one half cents per  
Bushel (Signed) E. M. Rosenberg.

And afterwards to wit: On the 16<sup>th</sup> day of  
said August Term of the Superior County Circuit  
Court 1857, to wit: on the 9<sup>th</sup> day of September  
1857, the following order was made to wit:

Elijah W. Rosenberg

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vs. } Adversely Change of name  
Wagon R. Fish & Anglo Co. } from Rock Island County  
This day came the parties  
herein by their attorneys, and made their  
agreement in open Court to continue this  
suit generally. Therefore it is ordered by the  
Court that the case be continued in all  
cases with said agreement.



A portion of the proceedings having been omitted in the transcript first sent in this case, the following was subsequently obtained and used in said court in the progress of said suit to wit:

Thus before the Hon. J. Wilson Strong Judge of the Sixth Judicial Circuit of the State of Illinois is a term of the Circuit Court begun and held at the Court House within and for the County of Rock Island and State aforesaid. On the Third Monday the 16th day of March A.D. 1877.

Present Hon. J. Wilson Strong, Judge.  
E. M. Beardsley, Sheriff.  
John R. Hawley, Attorney.  
Samuel M. Hall, Clerk.

And on the Eighth day of said term and 24th day of said month the following proceedings were had, to wit:

Elijah Kirby	}	Plaintiff
vs		
Myron H. Pickens	}	Defendant
Wyle Lee		

This day came the parties by their attorneys, and issue being joined came a jury of jurors, to wit: Gustav

Kearney, H. C. West, Robert Kirkman, W. H. Lince, S. S. Stuart, Thomas Sagar, James H. Morris, Thomas R. Birmingham, J. Robinson, James Fisher, Noah Bowen, David Phillips. Who were each and separately sworn to well and truly try the issue joined, and the hour of adjournment having arrived before the conclusion of the evidence the Court instructed the Jury not to converse with any person upon the subject of this trial and permitted them to disperse to meet the Court to-morrow morning.

And afterwards to wit: On the 9th day of said term being the 25th day of March 1852, The following proceedings were had to wit:

Elijah Roseburg }  
 W } Assumpsit.  
 My wife, Pish }  
 Myls Lee }

This day again came the parties by their attorneys, and the jury had been impeached herein, and having heard a part of the evidence and the hour of adjournment having arrived the Court instructed the Jury as on yesterday, and permitted them to disperse to meet the Court to-morrow morning.

And afterwards, to wit: On the 11<sup>th</sup> day of  
said Term, being the 24<sup>th</sup> day of March 1871.  
The following proceedings were had, to wit:

Elijah Rosenberg }  
vs. } Assumpsit.  
Migron H. Fish }  
and Mylo Lee }

This day again came the  
parties by their attorneys, and the jury heretofore  
impaneled, and they having heard the  
evidence returned their verdict into Court  
which is as follows:

"We the jury find for the Plaintiff and assess  
the damages at Seven Hundred Dollars." Thereupon  
Defendants enter their motion for a new trial.

And afterwards, to wit: On the Twenty  
Third day of the Term, being the 10<sup>th</sup> day of  
April, the following proceedings were had  
to wit:

Elijah Rosenberg }  
vs. } Assumpsit.  
Migron H. Fish }  
and Mylo Lee }

This day again came the  
parties by their attorneys, and defendants en-



their Motion for a new trial herein; and the Court having considered of said Motion sustains the same; and orders that the verdict of the Jury entered herein be set aside, and that a new trial be granted herein, and that the costs abide the final result of the suit. And on Motion of Plaintiff's Attorney, it is ordered by the Court that Plaintiff have leave to amend the declaration filed herein, and that the same be amended ten days before the next term hereof.

Deas before the Hon. J. Wilson May, Judge of the Sixth Judicial Circuit of the State of Illinois, at a Term of the Circuit Court begun and held at the Court House within and for the County of Cook Island and State of said, On the first Monday, the first day of June A.D. 1877.

Present

Hon. J. Wilson May Judge

John D. Harby, District Attorney

Ezra M. Beach, Sheriff

Lawrence M. C. C. C.

And on the fifteenth day of said term, being the 17th day of June A.D. 1877, the following proceedings were had to wit:



1) Elijah Roseburg }  
 W } Assumpsit  
 Myron K. With }  
 Myer Lee }

This day came the parties  
 by their attorneys, and defendant by their  
 attorneys enter their motion supported by  
 affidavit for a rule upon Plaintiff to  
 give security for costs. Thereupon came  
 Plaintiff by his attorney and enters his motion  
 supported by affidavit for change of venue  
 herein, and the Court being sufficiently ad-  
 vised in the premises, sustained the said  
 motion and ordered that the venue hereof be  
 and the same is hereby changed to the  
 County of Menard and that the Clerk of the  
 Court make transcript of the Record in  
 this case and transmit the same to the Clerk  
 of the said Circuit Court of Menard County.

State of Illinois.

Be it remembered that I, James M. Blair Clerk of  
 the Circuit Court of said County,  
 do hereby certify that the foregoing is a true copy  
 of the Record in this case, and the accompan-  
 ying papers are all the papers in said cause  
 on file in my office.

Witness my hand and seal

O O O of said Court at Rock  
 Island this 1<sup>st</sup> day of  
 November A.D. 1857.  
 Lamey McNeil Clerk

State of Illinois  
 Mercer County.

I am before the Honorable John  
 S. Thompson Judge of the tenth Judicial Circuit  
 of said State at a Special Term of the Circuit  
 Court within and for said County, for the  
 trial of Civil and Criminal Causes, begun  
 and held at the Court House in the Town  
 of Rock Island said County, on the second Monday  
 in the Month of January (being the 6<sup>th</sup> day  
 of said Month) in the year of our Lord  
 One thousand eight hundred and fifty seven  
 (1857) in pursuance of the following Order and  
 Writ filed with the Clerk of said Court on the  
 thirtieth day of October 1857 by the Judge of said  
 Circuit Court, and which is in these words  
 to wit:

State of Illinois

Tenth Judicial Circuit for

To Harvey S. Senter, Esq. Clerk of  
 the Circuit Court within and for the County  
 of Mercer in said State.

You are hereby informed that a Special



Term of the Circuit Court in and for said County, for the trial of civil and criminal causes, will be held at the Court House in the Town of Abbe, commencing on the second Monday (2<sup>nd</sup> Monday) in the month of January next ensuing. You will give the notice required by law to the Sheriff in such cases; I Make all writs and process, hereafter to be issued, returnable accordingly.

Signed John S. Thompson, Judge of  
And notice thereof having been given by the Clerk of said Court, to the Sheriff of said County, and it satisfactorily appearing to the Court that due notice of said Special Session has been given by said Sheriff of said County, by posting up five notices thereof in five of the most public places in said County, It is ordered that the same be opened for the trial of causes as aforesaid.

When Present the

Honorable John S. Thompson Judge  
Francis S. Stewart Esq. Attorney  
Wm. Lloyd Esq. Sheriff.  
Henry S. Scott, Clerk.

And on the 10<sup>th</sup> day of said Term and 1<sup>st</sup> day of said Month, the following proceedings were had, to wit:



Elijah W. Perkins &

vs

Chas. W. Davis.

My son H. Fish &

My son Lee,

This day again came on  
his cause for hearing on the defendants  
Motion for a rule on the Plaintiff to file secu-  
rity for costs after being advised as to the merits  
of said Motion, it is ordered by the Court that  
the Motion be overruled.

And now come the parties and their  
attorneys, and standing joined for trial put  
themselves upon the Country: thereupon came  
a jury to wit: Humphrey Liddle, Henry Wardwell,  
J. L. Payton, John E. Hamer, John J. Woodford,  
William J. Stevens, Jonathan Richman, Joseph  
Morse, Benjamin Webster, E. M. Graham,  
Washington Wolf and E. S. Morris, who being  
called tried and sworn, shall and lawfully  
try the issue joined herein, after hearing part  
of the evidence, were permitted to retire under  
charge of the Court and adjourned to meet the  
Court at 10 o'clock the morning following.

And it is ordered to wit: On the 14th day  
of said term & 15th day of said month the  
following proceedings were had to wit:

Elijah H. Rosbury }  
vs } Defendant  
Wm. H. Fish & Wm. L. Lee }

This day again came on this cause for a hearing, and the jury after hearing the conclusion of the evidence and the arguments of Counsel, upon their oath do say, "We the jury find the issues for the Plaintiff, and assess his damages at the sum of Nine Hundred dollars." Whereupon came the defendants by their attorney and entered their motion for a new trial herein.

And at the same time the said Defendants by their attorney filed their reasons for a new trial herein, which are in these words:

Elijah H. Rosbury }  
vs }  
Fish & Lee }

Said defendants move the Court for a new trial in this case for the reasons,

1<sup>st</sup> That the Court gave to the jury in the case on behalf of and for the plaintiff erroneous instructions.

2<sup>nd</sup> That the verdict of the jury was against



3<sup>d</sup> Instructions of the Court in the case.

3<sup>d</sup> That the verdict of the jury was  
Contrary to the evidence in the case.

4<sup>th</sup> That William F. Stevens one of the  
jury men who tried the case, was when  
said case was tried, over 10 years of age.

Ball & Howard

Attys. for defendants.

Filed 26 July 1858.

Wm. F. Stevens Clerk.

And afterwards to wit: On the 22<sup>d</sup>  
day of said Term, being the 4<sup>th</sup> day of Febru-  
ary 1858, the following orders were  
made by said Court to wit:

110- Elyah W. Rosebury }  
vs } Assn. paid. Change of name  
Myron H. Fish } from Rock Island County.  
Mylo Lee }

This day this cause came  
on to be heard on Defendants motion made  
before him for a new trial; And the  
Court having considered said motions, and  
being duly advised in the premises, the  
Court that the same be overruled, and that



a judgment be rendered on the verdict of  
the Jury. It is therefore ordered by the  
Court that Plaintiffs have and recover  
of and from the said Defendants the sum  
of Nine Hundred (900) dollars, his  
costs so found by the Jury as aforesaid  
and that he may have execution for the same.

Elijah W. Rumbold

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vs } His wife, Charge of  
Myron H. Rumbold } versus plaintiff Rumbold  
and Mylo Lee }

And the defendants herein  
having excepted to the ruling of the Court  
in overruling their motion for a mistrial  
and in rendering a judgment on the  
verdict of the Jury, It is ordered by the Court  
that ninety days be allowed them to file their  
Bill of Exceptions herein. And the said  
Defendants having prayed an appeal to the  
Supreme Court, the Court ordered that there be  
allowed, and that ninety days be given  
to file their bond in the penal sum of two  
thousand dollars, with Henry Lee as surety  
to be approved by the Court.

And after a recess of court: On the 27<sup>th</sup>  
day of April A.D. 1884, came the defendants

their attorney and filed their appeal Bond, in accordance with the order of Court, with Henry Lee as security, which was approved, and the Copy is sent with this transcript.

And afterwards, to wit: On the 29<sup>th</sup> day of April A.D. 1858, came the Defendants, their attorney and filed their Bill of Exceptions in this case, which is in the words and figures following, to wit:

State of Illinois of Mercer County Circuit Court,  
 Mercer County, Special January Term, 1858.  
 Elijah M. Pearson

vs.  
 Myron H. Fish & Phylis Lee Partners &c under  
 the name & style of Fish & Lee

Be it remembered that on the trial of this cause Martin Reising was called as the first witness on part of Plaintiff and testified as follows - "I am the son of the plaintiff - My father contracted to deliver to Fish & Lee the defendants eight hundred bushels of Spring Wheat by the first of December A.D. 1857 if possible or as soon thereafter as it could be threshed and delivered. My father counsel then objected to proof of contract by



Witnesses for the reason that it was reduced to writing, and thereupon drafts produced the same, which was in the words and figures following to wit:

Shark Island Co. October 18<sup>th</sup> 1855.

"I have this day agreed to deliver to rights be  
"at the Warehouse of Samuel Kenworthy in Andover  
"Eight hundred bushels of spring Wheat within  
"one month if possible for which I am to  
"receive one dollar and twelve and one  
"half cents per bushel. E. W. Rosburg."

and the same having been presented to & examined  
by the witness he said: I don't know whether  
this is the paper, referring to the written con-  
tract between the parties.

To which objection fifth counsel stated that said  
Contract was obtained by drafts from plaintiff by fraud  
and proposed to prove such fraud by witnesses  
showing that draft was misread the said contract  
to plaintiff being at the time of transcription from  
deedable to read the same, whereupon witness  
was further allowed to submit to testify in  
relation to said Contract as follows, to wit:

I did not read the paper. That is father  
by notes (referring to the signature attached to  
the above written Contract) Mr. Lee one of the  
Defendants was present. I don't know why  
I refused to reduce the Contract to writing.



When I came into the house, they were writing, the defendant Mr. Lee sat down to write, after writing he handed the Contract to father to sign, he (father) said he could not read it & looked for his spectacles, could not find them, and would trust to Mr. Lee's honor to read it. Lee then read it over, father refused to sign it, it specified a particular time for delivery - to which father objected, and Lee wrote another Contract and read it to father. By its terms as Mr. Lee read it, father was to deliver Eight hundred bushels of Wheat at Andalusia, by the first of November if possible, or as soon after as it could be threshed and delivered - In November this Contract was made - think it was in November middle of October I should have said - in 1855. Mr. Lee put that paper in his pocket at that time. When Lee came to buy father's Wheat, they (Mr. Lee & father) went out to the stacks, I did not go with them to the stacks. When they came back to the stacks, Mr. Lee had wheat heads in his hands - they then went to the house. I went also. When I went in they had bargained for the wheat. Mr. Lee was to pay one dollar twelve and one half cents

per bushel for Eight Hundred bushels of  
Wheat - the wheat was to be delivered at  
Kenworthy's warehouse situated on the  
Mississippi River about nine miles from  
my father's house. There was no specified time  
for ~~the~~ delivery, but to be delivered as soon  
as possible. I did not hear him (Mr. Lee)  
say anything about whether satisfied with  
the wheat or not. Mr. Lee said that  
he wanted to purchase the wheat that was  
in the stacks. My Mr. Lee father was  
not above an hour at the stacks. I went  
directly to procure a thrashing machine,  
and could get none under three or four  
weeks - I was out one day hunting for  
a machine, and Mr. Robert Whitaker  
came and took the job. Mr. Powers  
came on the last day of December with  
the machine to thresh the wheat - at the  
machine and commenced thrashing on  
New Year's day 1856. They had many  
break downs, consumed a good deal  
of time, and were obliged to stop a  
good while on account of cold weather  
the cold to work, the house doing  
work on that account. don't know  
how long they stopped work on account  
of cold weather, whether a week or a day.



It was some days, I think, the cold weather commenced about the first of January - I think about the second week in January, they continued threshing off and on during February. They kept us in suspense on account of Machine breaking - did not haul any wheat till about first of April; finished threshing all of father's wheat last of February or first March. Hauled with two wagons, with cattle, and got stuck in the mud then quit hauling till the roads improved. Have never again seen as the roads would permit and hauled till seeding time, then quit about two weeks, then recommenced & finished hauling it somewhere about the first of June, delivered 801 bushels and some pounds wheat did not suffer any after we commenced threshing till delivered. The wheat was an average quality of the wheat threshed from the stacks & was as good when delivered as it was when first threshed. Father did not to my knowledge receive notice not to deliver the wheat.

Cross Examined,

First saw Van in about the middle of the day - he was talking with father



About the wheat—perhaps an hour before  
going to the stacks. Mr. Lee was in his  
buggy. I was there part of the time—the  
balance of the time I was at the stable close  
by—about three rods off—don't know what  
I was doing in the stable—was attending  
to the horses. I was there at the buggy  
and down to the stable, did not go to  
the buggy but once, was not there fifteen  
minutes; father and Mr. Lee were talking  
about the wheat—differed about the price,  
did not agree about anything—I did  
not hear any contract till they went to  
the stacks—I heard or knew of no con-  
tract till they returned from the stacks to  
the house. They were not over an hour  
at the stacks—which were about twenty rods  
off. I don't remember what I was doing  
in the mean time. I was close by the  
stable when they came back—I saw them  
come back. They did not stop at the stable—  
heard nothing till I got into the house—  
went in soon after them. They were about  
to write when I got in, don't know but  
they had commenced writing, father said he  
had sold his wheat and what he had sold  
it for. Then Mr. Lee the defendant wrote  
it. father went to find his glasses—come

not find them and then Mr. Lee read it.  
 father refused to sign it, because he would  
 not bind himself to deliver by a fixed time,  
 first agreement written was to deliver by first  
 of November — the Contract was to deliver  
 Eight hundred bushels of wheat by first Novem-  
 ber 1855. at Kenworthy's Warehouse. Mr. Lee  
 then wrote another — the second Contract as  
 Lee read it was to deliver by the first day  
 of November 1855, if possible, if not as soon  
 as it could be thrashed and delivered, there  
 was no difference between the Contract as  
 read by Mr. Lee, and the written Contract  
 except as to the time of the delivery of the wheat.  
 The written Contract was the Contract be-  
 tween the parties, but was misread by  
 Mr. Lee as to ~~the~~ time of delivery only. I  
 paid particular attention to the time, Mr.  
 Lee read it that way — my father can  
 not read writing without spectacles — I  
 could have read it — had no business to do  
 so, they were about reducing the Contract  
 to writing when I went into the house —  
 I don't remember that my father told Mr.  
 Lee that the wheat was good. It was hard  
 getting machines that year — I don't know  
 of any machine that could have been had  
 within a month from the date of the



Contract— The machine that we got was the only one we could have got— Could have got a machine from Holiday for a larger price— he wanted one and more per bushel. I don't know how soon he could have been got— he offered to come if we would give his price six cents. In December he would have come— he had threshed between 18<sup>th</sup> October and that time— he threshed for some of our neighbors. I don't know whether his machine was idle. Don't know how much he threshed. I was out looking for a machine in December. I went out first afternoon. See was there. Next time I was out, was soon after that— next time was in December. I did not see Holiday at all— his machine was not at home any day I was out. Did not go to see Holiday. It was sometime in the middle of December that I first learned he asked six cents— had hunted a machine before— I would not know that I know his machine was not at home any day I was out for machines. Machine broke first day it was repaired in two or three hours then went on to work— looking in



in one half a day or in a day - took  
 about one half a day to mend it -  
 took again - repaired it in one day -  
 went to work next day -  
 don't know how long it worked then  
 stopped for cold weather - cold weather  
 second week in January - Machine  
 was ready but had some trouble about  
 the hands - sometimes the machine  
 was ready when father was not -  
 stopped three or four days on account of  
 cold weather - don't know how long  
 we thrashed then - was not stopped by  
 cold weather, after third week in  
 January - the horse power breaking  
 was another cause of stopping - took  
 about three weeks to repair it - don't  
 know how much was thrashed by  
 the last week in January - might  
 have had one half of the crop thrashed -  
 he had sixteen hundred bushels - guess  
 he had about one half thrashed.

James, [unclear] being next called  
 as a witness on the part of plaintiff test-  
 ified as follows: -

I am a son of the plaintiff,  
 reside with my father - [unclear] came  
 to our house about the middle of  
 October - said he was contracting for

wheat, would like to purchase what  
we had to sell — he said they were  
giving one dollar and ten cents per  
bushel at Rock Island. Father wanted  
one dollar and fifteen cents per bushel.  
Mr. Lee said he would go to the stacks  
and look at it — he went down, and  
agreed to give one dollar twelve and  
one half cents per bushel for it — Mr.  
Lee said he thought it was very good  
wheat and he would be able to give  
that for it — he first wrote an  
agreement, read it and father was  
not willing to sign it, because he  
did not like the time for delivery —  
father said he could not read — told  
Mr. Lee to read it — Mr. Lee took a  
paper and wrote another — read it  
and father signed it — he was to  
deliver the wheat by the first of  
November if possible — or as soon after  
as he could truck and deliver it —  
I cannot say whether the paper written  
upon by Mr. Lee was better or poorer.  
It was blue paper like this, referring to  
the written contract that Mrs. Lee wrote  
upon — I think that was about the size,  
referring to the written contract aforesaid



her with filed marked "Exhibit A.")

"Rock Island Co. October 1<sup>st</sup> 1855.

"I have this day agreed to deliver to Pish &  
"Lee at the warehouse of Samuel Kernutt  
"in Andalusia Eight Hundred Bushels  
"of Spring wheat within one month if  
"possible; for which I am to receive one  
"dollar and twelve and one half cents  
"per bushel. E. M. Kernburg."

I don't know whether it was torn off  
by Mr. Lee before or after writing it, I  
heard Mr. Lee read it - father tried to  
find his glasses, could not and  
Mr. Lee read it - father wore glasses  
to read and could not see to read with-  
out them. It was the wheat in  
Hastings that Mr. Lee wished to purchase  
that was the same wheat delivered  
father completed the delivery of his wheat  
about the first of May - none as late as  
June. After the wheat was threshed  
the roads were bad very bad - we  
drew loads with two yokes of oxen  
had to off each other over bad places  
we completed threshing all our wheat  
about the first of March - cleaned & re-  
drew it away at the same time. did



not clean it till after finished thresh-  
ing - the wheat was threshed out of  
doors - there was bad rainy weather  
in March - it would have hurt the  
wheat to have run it through the sep-  
arator - I did not go expressly for  
a machine - the machine we got did  
not separate very well - the machine  
broke down frequently - sometimes it would  
require a week, sometimes three or four  
days to repair it.

Cross Examined, -

When Mrs. Lee went from  
the stacks, I was at the house - I went  
with my father to the buggy and heard  
the bargaining there - they were bargain-  
ing when they came to the house - all  
I heard before they came into the house  
was an offer of one dollar ten and  
per bushel, and one dollar and fifteen  
cents was offered to be taken - he said  
when he came into the house - he would  
give one dollar twelve and one half  
cents per bushel for the wheat that was  
in the stacks - my brother was present  
father agreed to take it, he said machines  
were scarce around the country - and  
he did not know how soon he should

get it out - and that he did not want  
 the time set exactly on account of the  
 difficulty in getting machines - if  
 the time was short he did not want it  
 set exactly - that is all that I remem-  
 ber that was said till father signed  
 the second contract - he Lee said it  
 was good wheat, but thought there was  
 some oats in it - I supposed perhaps  
 it was good wheat. I think I heard  
 him say it. I believe he said it while  
 making out the paper in the house -  
 I remember after thinking of the matter  
 it might have been said out of doors.  
 I was in the house all the time, when  
 they were talking, and therefore think  
 the above remark was made there -  
 the first agreement stipulated that it  
 should be delivered by a fixed time - Don't  
 remember the time - I know while  
 he (Mr. Lee) was writing the last contract  
 that it would give us more time - the first  
 contract was thrown away, and was  
 of no importance - Don't know the  
 reason why I can't remember one better than  
 another. father looked for his glasses  
 in several places - he gave me keys then  
 in his pocket - I could have used the



agreement - Mr. Lee read it that  
Fisher should deliver the wheat and de-  
liver by the first of November if possible,  
or as soon after as he could get it  
threshed and delivered. The only difference  
in the written Contract as aforesaid (to wit:

"Rock Island Co. October 15<sup>th</sup> 1855.

"I have this day agreed to deliver to Fish & Lee  
"at the ware house of Samuel Kenworthy in  
"Andalusia Eight Hundred bushels of Spring  
"Wheat within one month if possible, for  
"which I am to receive one dollar and  
"Twelve and one half cents per bushel.  
(Signed) "E. W. Raspberry."

And the Contract as read by Mr. Lee was  
in the time of delivery only - I saw  
that Mr. Lee wanted to purchase the wheat  
that was in the stacks - he said he  
wanted to purchase the wheat that was  
in the stacks - he said that at the  
baggery he bought eight hundred bushels  
out of the stacks - I recollect now  
that it was in the house that he  
said, he wanted to purchase the wheat that  
was in the stacks. I have a part of the wheat to  
Andalusia. I helped thresh the wheat - there  
was about sixteen hundred bushels of wheat  
threshed - one half of it was threshed by the



latter part of January— There was a break  
up in the weather the latter part of February  
— in the latter part of that month the roads  
were bad— not very good at any time—  
were muddy the latter part of February—  
the weather would not allow the roads  
to be good— it thawed in the day time  
and froze in the night— I inquired  
for threshing machine the latter part of  
October and first of November— inquired  
of several but don't remember who con-  
-ced it mention any one of whom I  
inquired. I saw a machine at Holliday's  
I believe I know Holliday had a machine.

Samuel Newberry was then called as  
a witness on part of plaintiff and testi-  
fied as follows:

Thos. Fish & Son the dispat-  
-ants engaged room in my warehouse  
for storing wheat in September 1855—  
I saw Thos. Fish in January 1856— early  
in January— he told me in the fall  
that he expected to buy a good deal of  
wheat— Mrs. Kenbury delivered a little  
over eight hundred bushels of wheat for  
Fish & Son. The first of the wheat was  
delivered in April about that time the  
balance in May— after Mr. Kenbury

began to deliver the wheat I had no conversation with Fish & Lee - In January I said to John Lee, that the wheat had not come in as he expected, and think he told me that he expected Mr. Rosenberg to deliver some wheat - said nothing more. Saw him in Rock Island - he sent no sacks - I don't remember that I sent word to him to send sacks for that wheat - I offered one dollar and thirty cents in October for wheat and could not buy - may have been after the 20th October - In April and May it was worth eighty cents.

Cross Examined. - The wheat delivered by Rosenberg was damp and musty - was not merchantable wheat - don't think millers would have paid over sixty or sixty five cents per bushel for it - I am accustomed to handling and dealing in wheat - I supposed I received the wheat as warehouseman would have received the wheat, as I did, if John Lee had never spoken to me about it - The oldest son Mordecai Rosenberg said the wheat was his - and I gave him receipt in his name for the wheat & it - I delivered it upon my book as his - I want to



Fish & Lee, and informed them of the  
 condition of the wheat and they assumed  
 that they would not have it - I think  
 I did not receive their letter until  
 after all the wheat was delivered &  
 until some fourteen days after I wrote -  
 Mail facilities were poor between Antigua  
 and Rock Island where Fish & Lee resided  
 any letter have been as long on the route.  
 Wheat raised in the month of October 1855.  
 Some twenty or thirty cents per bushel in  
 the space of a week or two - I think the  
 raise was after the 20th October - this wheat  
 was not in a condition to keep without  
 extraordinary care and expense -  
 I specified this in the receipt. Mr.  
 Rosebury the plaintiff afterwards told me to  
 dispose of it and do the best I could with  
 it. I am acquainted with the region  
 of country from Rosebury's to Andalusie  
 the fore part of February the roads were good -  
 the latter part were rather soft - there might  
 have been some three days that it would  
 have been bad hauling wheat - In  
 March the roads were not so good.  
 We received more wheat in April than  
 any other month - it was a very  
 good <sup>business for</sup> business up to the middle of May



A good deal of Wheat was coming in.  
I think on the 6<sup>th</sup> of May the last of this  
wheat come in. Mr. Rosbury the  
Plaintiff said that he would not  
take the wheat - and I told him the  
wheat would not keep without much  
trouble and he told me to do the  
best I could with it. Coratio  
Rasbury claimed all the wheat, and  
the receipts were given in his name,  
and that he delivered it for himself  
he did not say where it was raised -  
Old Mr. Rosbury the Plaintiff knew none  
of the wheat.

Coratio Rasbury was then called on  
the part of the plaintiff and testified as follows:  
The wheat I delivered at Andalusia did  
not belong to me - It was father's wheat -  
I lived with father - worked on his farm -  
had no wheat that season - I might have  
said to Knowlton that it was my wheat -  
if I had a load of wheat to town I  
call it my wheat - Then Knowlton said  
he would have to give receipts in my name  
I think I said it was my father's wheat -  
am that certain. It was in May.  
I might have paid more attention to  
what took place in October than in May.

I think I said it was my father's  
wheat - have no recollection of calling it  
mine.

The Family then called Alexander  
Wingson who testified as follows:

In March and April 1866 I hauled  
off considerable wheat - sometime in January  
there was a good deal of snow, and it  
was very cold - very severe cold weather  
so that people did not do anything. I  
hauled some wheat during this time -  
think the snow was on in February. I  
know we had bad weather but can't say when.  
Cross Examined.

I think the snow in  
January affected the roads in March -  
I don't say that wheat couldn't be  
hauled in March - I suppose I  
could have hauled as much as I wished  
to the land - I think I got off twice three  
hundred bushels in February - One day  
the team could haul no more than an  
empty sled. In February, March and  
April the roads were not sufficiently good  
to deliver wheat - The first thaw of any  
account was in March - By that  
time there was nothing to hinder  
hauling that I know except snow



Cold and Snow

Which was all the testimony offered  
by the Plaintiff

The Defendants then introduced E. R. Haines  
as a witness who testified as follows

I testified for plaintiff in last term  
commenced thrashing January first thrashed  
through the month of January & part  
of the month - but latter in February  
thrashed on first day one hundred and  
fifty bushels - three hundred bushels in  
the first week - about the twentieth of  
January we had Eleven hundred seven  
six and one half bushels of wheat threshed -  
we were hindered by plaintiff - many  
days we had to run half handed -  
Machine hands had to fill the place of  
Hainbury's hands - we had three small  
breaks that required about three hours  
each to repair - was not hindered  
any for three weeks up to the twentieth  
If plaintiff had furnished the hands he  
ought to have done we could have threshed  
at the rate of one hundred and fifty bushels  
per day - near the commencement of  
our thrashing some of the horses would  
not work on account of the cold



we were home a few days hauling  
 fencing from the Mississippi river.  
 I know the country about Roseburg - there  
 is a main traveled road from And-  
 -alusia which Roseburg would strike  
 about four miles from Andalusia -  
 I should not consider the roads very  
 bad in the latter part of January -  
 My teams were on the road then, and  
 there was nothing to prevent hauling -  
 My teams were on the road for about  
 four weeks - the day we quit stretching  
 the roads were sloppy, but the ground was  
 frozen underneath - the first obstruction  
 to hauling was after the fourteenth of March -  
 I told Mr. Roseburg that if he did not get  
 away his wheat, that probably Fishville  
 would not take it - he said he was  
 not particular whether they took the  
 wheat or not - he thought he could get  
 a better price - that there was no danger  
 of the Russian war ceasing - that wheat  
 would come up before harvest and  
 he had no doubt would be worth  
 one dollar and fifty cents - I was  
 hauling rails from within three  
 miles of Andalusia - as far as I am  
 acquainted with the roads, Roseburg's road

was about the same as that I was hauling  
over. Roseburg had some good wheat and  
some very poor - it had been wet and  
badly frozen - out of the sixteen hundred  
bushels I should think there might have  
been fourteen hundred damaged - as we  
threshed the wheat wagons hauled the wheat  
away the good to one place and the  
bad to another.

Cross. Examined. - I don't know of  
any hands except Roseburgs sons who worked,  
on account of cold - I had the coldest  
place about the work.

Robert Whittaker was then called on  
as part of defendant and testified as follows: -

We took the threshing machine to  
plaintiffs the last day of December - and  
began threshing January first - the  
stacks of wheat had taken considerable  
wet and was wet and frozen outside  
there were several threshing machines in  
the neighborhood - that job was our  
first threshing that winter - we could  
have threshed it in November or December  
if weathered long enough beforehand so that  
it would not have interfused with any  
other engagements - I had two ma-  
chines that winter the last I bought



the poor wheat through the windmill—had taken out what ice they could and then mixed it with the good wheat. — The bad wheat would spoil the good.

Cross Examined— I had this conversation with Horatio Roseburg, Robert Herrington and third person; I do not know precisely what Horatio said — I presume he was talking about mixing the wheat — Mr. Roseburg Plaintiff was not present — There was between five hundred and one thousand bushels of wheat there for some

Samuel Kenworthy next called on behalf of defendants testified as follows —

I do not know certainly whether I showed the wheat in question to H. E. Moore. Horatio told me it was his, and I don't remember that he said it was his father's.

L. A. Chobot was then called by defendant and testified as follows —

I am acquainted with the parties to this suit — I have been in the wheat business for three years — I saw this wheat in 1871 was not merchantable — would not have been worth more than one fourth of the price of good wheat — Don't think the water would reach the wheat in the ware house.

Defendants then called Josiah D. Boyer, who testified as follows —

I assisted in threshing this wheat should suppose at least one fourth was in bad condition — I should suppose one thousand bushels were threshed by the 20th January — We were hindered by Mr. Rosbury the plaintiff in threshing the wheat — Could have threshed from one hundred and fifty to two hundred bushels per day with full hands — they said they separated the good from the bad — I live about four miles from the plaintiff — no difficulty in getting machines in the fall of 1855 — Rosbury's sons refused to work on account of cold weather — don't know of any one else who did — I believe the roads were frozen — when not threshing that winter I was hauling — the roads were not such as to obstruct my hauling —

Cross Examined —

In March the roads were thawed some — It was cold in January I froze my finger on account of a hole in my glove —

E. A. Chabot recalled by depts.

It was in May 1856 that I first saw



this wheat - It was musty and dirty  
and was not merchantable.

William Wait was then introduced  
as a witness on behalf of defendants and  
testified as follows -

I live some three fourths of a mile  
from the plaintiff. I recollect wheat being  
hauled by my house in February about  
the first of March. I hauled say wheat  
about six hundred bushels to Collieries about  
one mile below Hennock's - When I  
commenced hauling it would thaw  
days and in the middle of the day the  
water would run, but the roads were  
good. Along the last of February and  
first of March the roads were still better.  
Several times the snow would beat into  
the roads, but the travel would wear it  
down - In the fall I had no difficulty  
in getting a machine to thresh my  
wheat - I threshed in November and  
December - Don't know whether Mr.  
Halliday was busy or not with his  
machine - he offered to thresh my  
wheat in November - I hauled 4  
hundred bushels in ten or twelve days -  
we hauled forty bushels to the land - I don't  
know that the roads were materially better

about the first March. Then in May  
it was about the same.

Defendants then called Nelson  
Sherwood who testified as follows—

I have known Mr. Lee and Mrs.  
Rueberg for four years— had a conver-  
sation with the plaintiff about the 12<sup>th</sup> of  
May 1866. he said that he had eight  
hundred bushels of wheat in Leavenworth's  
warehouse to sell, that he had once sold  
it to Fish & Lee, but did not deliver  
it when he contracted to, and that  
they would not have it, and he wanted  
to sell to some one else— I am a harness  
maker by trade— he wanted to buy a  
set of harness and he wanted me to  
wait on him till he could sell his  
wheat— he said that Mrs. Lee had  
scratched out part of the contract and  
added a proviso as to alter it— that he  
plaintiff was going down to Leavenworth  
to sell the wheat, and wanted me to  
go with him— said that if he sold the  
wheat to Whipple he would pay the money  
then for a harness, if not he wanted me  
to wait till he sold it—

Now Examined, — This was about  
the 12<sup>th</sup> of May. I don't know where plaintiff had been—



Defendant then introduced in evidence the written Contract aforesaid, and of which the following is a true copy:

Rock Island Co. October 18<sup>th</sup> 1851.

"I have this day agreed to deliver to Fish & Lee at the Ware house of Samuel Kenworthy in Andalusia Eight hundred bushels of Spring Wheat within one month if possible for which I am to receive one dollar and twelve and one half cents per bushel."

"E. W. Rosebury."

which was all the testimony given on the trial of this cause on behalf of defendants and which together with that given by the plaintiff as aforesaid, was all of the testimony given on the trial of this cause.

The testimony in the cause being then closed — after which, and before the rendition of the verdict in the cause the following Instructions at the instance of and on behalf of plaintiff — were given by the Court to the jury — to wit: Instructions No. one, two, three, four, five and six:

Elijah W. Rosebury,

Fish & Lee

Instructions for Plaintiff.

1. If from the evidence in this case the

Jury believe that on or about the 18<sup>th</sup> day of October A.D. 1855 the Plaintiff in this Suit Contracted to sell to the Def<sup>t</sup> 800 bushels of wheat out of which then in the stack upon the Plaintiff's premises, and unthreshed, and that by the terms of said Contract said Def<sup>t</sup> was to deliver such wheat at Andalusia at the warehouse of Samuel Keworth by the first day of November then next & following if possible or as soon thereafter as said Def<sup>t</sup> could thresh and deliver said wheat, and that the Plaintiff after such 18<sup>th</sup> day of October made reasonable and proper effort to deliver such wheat at Andalusia as aforesaid, and did within a reasonable time thereafter deliver said 800 bushels at the place provided for in the Contract, then the defendants are liable to pay said Def<sup>t</sup> the price agreed upon by said parties as the price of said wheat, provided the Def<sup>t</sup> used proper care in preserving said wheat from harm before delivery, and delivered said Def<sup>t</sup> an average quality of wheat threshed from Def<sup>t</sup> stacks mentioned at the time said Contract was made.

L. If from the evidence in this case the jury believe that the Def<sup>t</sup> Contracted to



sell and the Defts agreed to buy 800 bushels of wheat, which wheat was to be thrashed from and out of stacks of wheat that Plf then had on hand. Then the law would imply that such wheat was to be of an average quality as compared with the entire quantity in such stacks, and it would make no difference whether such wheat was merchantable or not, as the Defts under such circumstances would receive the precise article they contracted for; and would have no right to complain, unless the Plf did or permitted some act or thing by which the average quality of said wheat was impaired.

3. If from the evidence the jury believe that the Plf was induced by the Defts or either of them, to sign the written contract offered in evidence by the fraud and circumvention of either of said Defendants, then the plaintiff in this case is permitted to prove the true contract between the parties by parol, and if under such circumstances the jury believe from the evidence that the Plf has reasonably performed such parol contract.

if found to exist, in respect to the sale and delivery of said 800 bushels of wheat at Andalusia, then the Plf is entitled to recover in this suit, provided that in other respects the Plf has performed his part of said parol contract.

4. If from the evidence the jury believe that the parties to this suit extended the time for the delivery of said wheat, they might lawfully do so, whether such contract was in parol or in writing, and the evidence of such extension may be inferred from circumstances proven to exist. — Thus, if from the evidence the jury believe that Lee one of the Dfs in January 1856 expressed a willingness to receive said wheat from the Plf, or directed his warehouse man to do so, it is proof tending to show that the time for the delivery of said wheat was extended beyond the time mentioned in the written contract.

5. If from the evidence in this case the jury believe that the Defendants or either of them, on or about the 18<sup>th</sup> day of October 1855 by fraud and circumvention induced the Plf to sign a written contract for the sale and delivery to the



of 800 bushels of wheat, then the jury are bound by the law of the land to disregard such written contract utterly and entirely, when offered in evidence as proof of such contract — and if in this case the jury from the evidence believe that the defendants or either of them when reading to the Plf (he at the time being unable to read) the written contract offered in evidence, and misread the same in any material part, and thus induced the Plf to sign said contract, then such contract is not binding upon the Plf and is wholly void as to him.

6. If from the evidence in this case the jury believe that Lee one of the defendants in reading to the Plf the contract offered in evidence (he the Plf being then unable to read the same) materially misread the said written contract as to the time of the delivery of the wheat spoken of in said contract and thus induced the Plf to sign the same, such an action on the part of Lee would vitiate and render void such contract as to the Plf in this suit.

To the giving of each and all which

56 instructions the defendants then and there excepted which exceptions the Court overruled and gave said instructions to the jury.

The Defendants then and there after the testimony in the cause was closed and before the rendition of the verdict asked the Court to give to the jury the following instructions on their behalf, to wit: Not one, two, three, four, five, six, seven, eight, nine and ten:

1. The Court will instruct the jury that they are the sole judges of the credibility and the testimony of all witnesses testifying before them, and are not bound to believe that of any witness whom they believe unworthy of credit notwithstanding the character of such witness for truth and veracity has not been formally impeached by the testimony of any other witness.

2. A witness who makes knowingly contradictory statements in regard to any material fact in issue before them is unworthy the credit of a jury.

3. The Court will instruct the jury that if they believe from the evidence that Plaintiff admitted that he had sold the



wheat to Defendants, but that he had not delivered it when he agreed to, that Defendants were not bound to receive it, they will find for the defendants.

4. The Court will instruct the jury that the admissions of the Plaintiff are evidence against him.

4. The Court will instruct the jury that in no event was the defendants bound to receive merchantable wheat of the Plaintiff.

The Court will instruct the jury that if they believe from the evidence & by the admissions of the Plaintiff that he had not delivered the wheat in the time required by the contract they will find for the defendants.

5. If the jury believe from the evidence that the Plaintiff contracted to deliver 10 bushels of wheat within one month from the 15<sup>th</sup> day of October 1855 at his warehouse in Ladolusia if possible, and that it was reasonably possible to do so, and that Plaintiff did not deliver said wheat within that time, then the jury must find a verdict for the defendants, unless they find that defendants afterwards accepted.

the said wheat under same contract.

6. If the jury believe from the evidence that Plaintiff contracted to deliver 800 bushels of spring wheat at Andalusia at Keweenaw's warehouse by the first day of November A.D. 1855 if possible, if not, as soon after as it could be thrashed and delivered, & that it was not possible to deliver said wheat by the said first day of November - then the jury must believe that the plaintiffs used all diligence and exertion in getting the same thrashed and delivered as soon after said first day of November A.D. 1855 as possible, or the plaintiffs cannot recover.

7. The law is that the wheat to be delivered on a contract to deliver a certain number of bushels of wheat is to be of a fair merchantable quality - and therefore if the plaintiff under the contract only delivered wheat which was not of a fair merchantable quality - he cannot recover upon the said contract.

8. Wheat of a fair merchantable quality means good fair wheat in market without reference to whether the season has generally damaged wheat or not.

9. A contract for the purchase of 800



bushels of wheat to be threshed and delivered by the seller is not a purchase of the un-threshed wheat, and such wheat would remain the property of the seller until the same was delivered under and according to the contract.

11. If the jury believe from the evidence that there was an extension of the time for the delivery of said wheat by the said defendants - then the jury must further believe from the evidence that the wheat was delivered in strict compliance with the terms of said extension, otherwise the jury must find for defendants - and further the mere statement of defendant to Kenworthy that he expected Lombard would deliver some wheat is not of itself evidence of such extension."

And the Court then gave all said instructions as asked by the left except the 3<sup>rd</sup> 4<sup>th</sup> & 6<sup>th</sup> and then and there refused to give the said third, fourth and sixth instructions as asked, but modified the same. (Which instructions as modified are in the words and figures following:)

3. The Court will instruct the jury that if they believe from the evidence that Plaintiff admitted that he had sold the

wheat to Defendants, but that he had not delivered it when he agreed to, that Defendants were not bound to receive it and that defendants did not receive it & if from all the evidence they believe such to be the fact they will find for the defendants.

4. The Court will instruct the jury that the admissions of the Plaintiff are evidence against him, but that all the admissions of a party made at the same time & in the same conversation both for and against himself must be considered & weighed by the jury.

4. The Court will instruct the jury that in no event was the defendant bound to receive defendant's wheat of the Plaintiff unless they believe from the evidence that the defendants purchased certain wheat of plaintiff of a different quality after a fair examination of its quality or purchased certain wheat then in stacks, with a fair opportunity of examining its quality.

The Court will instruct the jury that if they believe from the evidence by the admissions of Plaintiff or otherwise that he had not delivered the wheat to



the time required by the Contract they will find for the defendants.

6. If the Jury believe from the evidence that Plaintiff contracted to deliver 800 bushels of Spring wheat at Andalusia at Kenworthy's warehouse by the first day of November A.D. 1855 if possible, if not, as soon after as it could be thrashed and delivered, so that it was not possible to deliver said wheat by the said first day of November - then the Jury must believe that the Plaintiff used all reasonable diligence and exertion in getting the same thrashed and delivered as soon after said first day of November A.D. 1855 as was reasonably possible, or the Plaintiff cannot recover."

So the modification of the said third, fourth and sixth instructions by the Court as aforesaid, the defendants then and there excepted, which exceptions the Court overruled and gave the said third fourth and sixth instructions as modified by the Court aforesaid to the Jury.

After which the Jury returned a verdict for the Plaintiff, and assessed his damages at nine hundred dollars. The defendants then and there entered their Motion

to the Court for a new trial, for the following reasons:

First. That the Court gave to the jury in the case on behalf of and for the plaintiff erroneous instructions.

Second. - That the verdict of the jury was against the instructions of the Court in the case.

Third. - That the verdict of the jury was contrary to the evidence in the case.

Fourth. - That William Perkins one of the jurors who tried the case, was when said case was tried over sixty years of age.

Which motion the Court overruled, and rendered judgment on the verdict. <sup>of which last mentioned motion</sup> At the concluding the said Defendants then and there excepted: And to the condition of the judgment on said verdict the defendants then and there excepted and prayed an appeal to the Supreme Court of this State - which said appeal was allowed by the Court, upon defendants filing their Bill of Exceptions within ninety days, together with an appeal bond in the penal sum of Two thousand dollars with Henry Du as security to be approved by the Clerk of this Court - And



the defendants pray that their writ of  
Exception may be allowed signed and  
sealed by the Court. John S. Thompson Esq

The official bond in this cause upon return  
is in the words and figures following  
to wit:

Know all men by these presents,  
that we, Myron H. Fish and Mylo Lee  
of the County of Rock Island and  
Henry Lee of Mercer County, State  
of Illinois, are held and firmly bound  
unto Elijah H. Renshaw of said Mercer  
County same State in the penal sum  
of Two Thousand Dollars for the  
payment of which well and truly  
to be made, we bind ourselves our  
heirs, executors and administrators  
jointly, severally and firmly by these  
presents.

Witness our hands and seals this 27<sup>th</sup>  
day of April A.D. 1866.

The Condition of the above obligation  
is such, that whereas the above named  
Elijah H. Renshaw recovered a judgment  
against the above bounden Mylo Lee and  
Henry Lee for the sum of one hundred  
dollars at the special term of said

66

Of the said Mercer County Circuit Court, held at said Mercer County in January 1858 - from which said judgment the said Wagon M. Fish and Mylo Lee aforesaid hereby appeal to the Supreme Court of the State of Illinois. Now therefore if the said Wagon M. Fish and Mylo Lee shall prosecute this said appeal without delay and shall well and truly pay the judgments, costs, interests and damages that shall be rendered against them in case said judgment be affirmed by the said Supreme Court, then the above obligation to be void, otherwise to be and remain good and valid.

Approved & paid me this }  
27<sup>th</sup> April 1858. }  
J. S. Thompson }

Wagon M. Fish }  
Mylo Lee }  
Henry Lee }

Approved & paid 27<sup>th</sup> April 1858.

H. S. Senter, Clerk



State of Illinois  
Mercer County,

I, Harvey S. Senter, Clerk of  
the Circuit Court of said County do certify  
that the foregoing is a full and complete  
transcript of the Summons, the Pleading  
of the Parties respectively, the Verdict of the  
Jury, the Judgment, all orders made  
by the Court in said Cause, the Bill of  
Exceptions and the Appeal Bond filed  
in said Cause, as appears from the  
records and files in my office.

In testimony whereof I have  
hereto signed my name, and  
affixed the seal of said Court at  
my office in Illinois this 5th day of  
August A.D. 1858.

Harvey S. Senter, Clerk

And now comes the said appellant and says  
that in the record & proceedings aforesaid  
there is manifest error in this to wit

- 1<sup>st</sup> The court erred in giving each of the  
instructions asked for by the plaintiffs  
in the Court below.
- 2 The court erred in modifying the aforesaid  
instructions
- 3 The court erred in annulling the verdict

See for transcript 17512<sup>50</sup> for new trial



The Court erred in surrendering the Judgment  
aforesaid in manner of form aforesaid  
& the pray since said judgment is reversed  
Be leave

for appeal

Myron H. Fisk &  
Hyde See - 101

Elijah W. Rowbury  
Manuscript of  
Record

~~Filed Aug. 18<sup>th</sup> 1858~~  
~~S. Leland~~

Filed August 18<sup>th</sup> 1858  
S. Leland  
clerk





## APPELLEE'S BRIEF.

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FISH & LEE, Appellants,  
vs.  
ELIJAH W. ROSEBURY, Appellee. } *In the Supreme Court at Ottawa,  
April Term, A. D. 1859.*

**BEARDSLEY & SMITH, for Rosebury, Appellee.**

The main question involved in this case, is, does the evidence embodied in the record, sustain the verdict of the jury?

In this, as in most other litigated cases, the evidence is conflicting, and different juries might arrive at different results, as the weight of evidence, in their opinions, might incline to one side or the other.

There can be no doubt that the jury, were at liberty to disregard the written contract for the sale of wheat, if from the evidence they believed the appellants practiced a fraud in obtaining it. That such fraud was practiced is fully shown by the evidence. The contract then, for the sale of the wheat, rested in parol, and the question arises, did the plaintiff below reasonably perform that contract.

He agreed to deliver the 800 bushels of wheat, the product of his stacks, by the first of November if possible, or as soon after as it could be threshed and delivered at Andalusia.

The question of reasonable diligence,—almost always depending upon a variety of circumstances—is a question peculiarly proper to be left to a jury. In this case, as shown by the bill of exceptions, it was a leading point in the defence;—involving an inquiry as to plaintiff's ability to obtain threshing machines, the condition of the roads and the weather, from the time the contract for the sale of the wheat was made, to the time of its delivery; and about which several witnesses were examined on both sides. It cannot be claimed that the jury misunderstood the evidence or disregarded the instructions of the Court.

As to the instructions themselves, on the part of the plaintiff, we fail to discover any semblance of error.

Prep <sup>101-172</sup>

Wish & See

4

Rosebury

for Sept

Filed April 22, 1859

A. Leland

Clerk

Prep



# SUPREME COURT OF ILLINOIS,

*Third Division—April Term, 1859.*

MYRON H. FISH and  
MYLO LEE,

*vs.*

ELIJAH M. ROSEBERRY.)

} *Appeal from Mercer County Circuit  
Court.*

<sup>1</sup> This was an action of assumpsit brought by appellee vs. appellant in the Rock Island Circuit court, and taken to Mercer by a change of venue, to recover the price of 1000 bushels of wheat.

<sup>7</sup> Declaration alleges that the defendants were indebted to plaintiff in the sum of \$900, the price of 800 bushels of wheat sold, &c.; declaration also contained the common counts.

<sup>10</sup> Amended declaration quantum meruit pro 1000 bushels of wheat.  
Plea, general issue.

<sup>25</sup> The plaintiff to maintain the issue on his part, called as a witness, Horatio Roseberry, who testified as follows :

I am the son of the plaintiff; my father contracted to deliver to Fish & Lee, the defendants, eight hundred bushels of spring wheat, by the first of November, A. D., 1855, if possible, or as soon thereafter as it could be threshed and delivered. Defendant, by his counsel objected to proof of contract by witness, for the reason that it was reduced to writing, and thereupon defendant produced the same, which was in the words and figures following, to wit :

"Rock Island County, Oct. 18th, 1855. I have this day agreed to deliver to Fish & Lee, at the warehouse of Samuel Kenworthy in Andalusia, eight hundred bushels of spring wheat, within one month if possible, for which I am to receive one dollar and twelve and one-half cents per bushels. E. W. Roseberry." And the same having been presented to and examined by the witness he said: I don't know whether this is the paper," referring to the written contract between the parties.

To which objection plaintiff's counsel stated that said contract was obtained by defendant's from plaintiff's by fraud and proposed to prove such fraud by witnesses, showing that defendant, Lee, misread the said contract to plaintiff, he being at the time of the execution thereof, unable to read the same, whereupon witness was further allowed by the court to testify in relation to said contract, as follows, to wit: I did not read the paper; that is father's signature, (referring to the signature attached to the above written contract;) Mr. Lee, one of the defendants, was present;



dont know who proposed to reduce the contract to writing. When I came into the house, they were writing; the defendant, Mr. Lee, sat down to write; after writing, he handed the contract to father to sign; he (father) said he could not read it, and looked for his spectacles; could not find them, and would trust to Mr. Lee's honor to read it; Lee then read it over; father refused to sign it; it specified a particular time for delivery, to which father objected, and Lee wrote another contract and read it to father; by its terms, as Mr. Lee read it, father was to deliver eight hundred bushels of wheat at Andalusia, by the first of November if possible, or as soon after as it could be threshed and delivered. In November this contract was made, think it was in November—middle of October I should have said, in 1855. Mr. Lee put the paper in his pocket at that time; Mr. Lee came to buy father's wheat; they (Mr. Lee and father) went out to the stacks; I did not go with them to the stacks; Mr. Lee had wheat heads in his hand when they came back to the stable; they then went to the house, I went also; when I went in they had bargained for the wheat; Mr. Lee was to pay one dollar twelve and one-half cents per bushel, for eight hundred bushels of wheat. The wheat was to be delivered at Kenworthy's warehouse situated on the Mississippi River, about nine miles from my father's house; there was no specified time for the delivery, but to be delivered as soon as possible. I did not hear him (Mr. Lee,) say anything about whether satisfied with the wheat or not; he said he wanted to purchase the wheat that was in the stacks; they were about an hour at the stacks; I went immediately to procure a threshing machine; could get none within three or four weeks; one Powers came on the last day of December to thrash the wheat; commenced New Years' day, 1856; they had many break downs which consumed a good deal of time; they were obliged to stop on account of cold weather, as the hands refused to work on that account; dont know how long this stop was; it was some days I think; the cold weather commenced about the second week in January; they continued threshing off and on during February; they kept us in suspense on account of the machine breaking. Finished threshing all the wheat the last of February or first of March; we did not haul any wheat in till about the first of April; hauled with two wagons with cattle; got stuck in the mud then quit till the roads improved; as soon as the roads would permit, commenced again and hauled until seeding time then quit; in about two weeks commenced again and finished hauling about the first of June; delivered eight hundred and one bushels and some pounds; the wheat did not suffer any from the time we commenced thrashing till delivered; the wheat was an average quality of that threshed from the stacks and it was as good when delivered as when threshed; father received no notice to my knowledge, not to deliver the wheat.

*Cross-examined.*—Saw Mr. Lee talking with father about the wheat, perhaps about an hour before going to the stacks; Lee was in his buggy; I was there part of the time, only once about fifteen minutes; they differed about the price; I heard or knew of no contract until they returned from the stacks to the house; they were not over an hour at the stacks; I went into the house soon after them; they were about to write when I got in; dont know but they had commenced writing; father said he had sold his wheat, and Lee wrote; father went for his glasses and could not find them; Lee read it and father refused to sign it, because he would not bind himself to deliver by a fixed time; first agreement written was to deliver eight hundred bushels of wheat by the first of November, 1855, at Kenworthy's warehouse; the second contract as Lee read it, was to



deliver by the first day of November, 1855, if possible, if not, as soon as it could be threshed and delivered; there was no difference in the two contracts, except as to the time of delivery; the written contract was the contract between the parties, but was misread by Lee, as to time of delivery only. I paid particular attention at the time Lee read it that way; Father cannot read writing without spectacles; I could have read it; dont remember that my father told Lee that the wheat was good; it was hard getting machines that year; dont know of any machines that could have been had within a month from the date of the contract; could have got a machine from Holliday for a larger price, one cent per bushel; he offered to come in December, if we would give him his price, six cents; he thrashed for some of our neighbors; I was out looking for a machine just after Lee was there; did not go to see Holliday at all; the machine we got, broke the first day; 'twas repaired in two or three hours, then went to work again; it broke again in half a day or a day; it took about a half a day to mend it; it broke again, repaired it in one day—went to work the next day; dont know how long it worked; we then stopped for cold weather, this was the second week in January; the machine was ready then, but we had some trouble about the hands, sometimes the machine was ready when father was not; we stopped three or four days on account of the cold weather; dont know how long we threshed then; cold weather did not stop us after the third week in January; the horse-power breaking, was another cause of stoppage; it took about three weeks to repair it. The crop was about sixteen hundred bushels; I guess we had about half of it thrashed by the last week in January.

James Roseberry testified:

- 35 I am son of the plaintiff; reside with him; Lee came to the house about the middle of October; said he would like to purchase wheat; said they were giving one dollar and ten cents per bushel at Rock Island; father wanted one dollar and fifteen cents per bushel; Lee said he would go down to the stacks and look at it; went down and agreed to give \$1.12½ for it; said he thought it was very good wheat, and that he would be able to give that for it; he wrote an agreement and read it over to father; Father was not willing to sign it because he did not like the time for delivery; Lee took paper and wrote another, read it, and father signed it. He was to deliver the wheat by the first of November if possible, or as soon after as he could thresh and deliver it; contract was written upon blue paper like this, (referring to contract offered in evidence,) and was
- 36 about the same size. I heard Lee read it; father tried to find his glasses but could not; he could not see to read it without them; 'twas the wheat in the stacks that Lee wished to purchase; this was the wheat delivered. Delivery completed about the first of May; completed threshing all our wheat about the first of March; the roads were bad; after this we drew loads with two yoke of oxen; had to help each other over the bad places;
- 37 did not clean the wheat till after we finished threshing. I did not go expressly for a machine; the one we got did not separate very well; it broke down frequently and sometimes would require a week, and sometimes three or four days to repair it.

38 *Cross-examined.*—I went with my father to the buggy and heard the bargain there; all I heard was, Lee offered a dollar ten, father said he would take a dollar fifteen; after they came back to the house, Lee offered one dollar twelve and one-half; father agreed to take it. My brother was present; father said machines were scarce around the country, that he did not know how soon he could get it out, and that he did not want the time exactly, on that account; that's all I remember that was



said till father signed the second contract. Lee said it was good wheat; thought there was some oats in it; perhaps this was said out of doors; the first agreement stipulated that delivery should be by a fixed time. I know while Lee was writing the last contract, that it would give us more time; I do not remember about one contract any better than about  
 39 the other; I could have read the agreement; Lee read it, that father should deliver the wheat at Andalusia by the first of November if possible, or as soon thereafter as he could get it thrashed and delivered, the only difference between the contract offered in evidence, and the way it was read by Lee, was in the time of delivery; Lee said he wanted to purchase the wheat that was in the stacks; he bought eight hundred bushels of it. I helped thresh the wheat and hauled part of it to Andalusia; there was sixteen hundred bushels in all, one-half of it was threshed  
 40 by the latter part of January; there was a break up in the weather the latter part of February, and the roads were bad; it froze in the night and thawed in the day. I inquired for thrashing machines of several persons during the latter part of October and first of November; I saw a machine at Holliday's.

Samuel Kenworthy testified.

Fish & Lee, the defendants, engaged room in my warehouse in September 1855, for storing wheat. Roseberry delivered a little over eight hundred bushels of wheat for Fish & Lee, about three loads were delivered in  
 41 April, and the balance in May. In January, I think, Mr. Lee told me that he expected Roseberry to deliver some wheat; I offered one dollar and thirty cents in October for wheat and could not buy it; it may have been after the twentieth; in April and May it was worth eighty cents.

*Cross-examined.*—The wheat delivered by Roseberry was damp and musty; it was not merchantable, don't think millers would have paid over sixty or sixty-five cents for it; I supposed I received the wheat as warehousemen would have received it, just as I did, if Lee had never spoken to me about it. The oldest son, Horatio Roseberry, said the wheat was his; I gave him receipts in his own name for the whole of it, and entered  
 42 it upon my book as his. I wrote to Fish & Lee and informed them of the condition of the wheat; they answered that they would not have it. I think I did not receive their letter until after all the wheat was delivered, and some fourteen days after I wrote. Mail facilities were poor between Andalusia and Rock Island; my letters have been as long on the route. Wheat raised some twenty or thirty cents per bushel in the space of a week or two in the month of October, 1855, I think after the twentieth; this wheat was not in a condition to keep without extraordinary care and attention; I specified this in the receipts. Roseberry, the plaintiff, afterwards told me to dispose of it the best way I could; the forepart of Feb. the roads were good, the latter part they were rather soft, from Andalusia to Roseberry's; there might have been three days that it would have been bad hauling wheat. In March the roads were not so good. We received more wheat in April than any other month; it was a very good  
 43 winter for business; I think the last of this wheat came in on the 6th of May; Roseberry, the plaintiff, said Mr. Lee would not take the wheat; I told him it would not keep without much trouble; he told me to do the best I could with it; Horatio Roseberry claimed all the wheat; the receipts were given in his name; old Roseberry drew none of it.

Horatio Roseberry re-called.

The wheat I delivered did not belong to me, it was my father's; I



lived with him and worked on his farm. I might have said to Kenworthy that it was my wheat; if I haul a load to town, I call it mine; I think I said it was father's wheat, but I am not certain.

44 Alexander Thompson testified.

In March and April, 1856, I hauled considerable wheat; sometime in January there was a good deal of snow, and very severe cold weather so that people did not do anything; I hauled some wheat during the time, think the snow was on in February.

*Cross-examined.*—Think the snow in January affected the roads in March; think I could have hauled as much as ten bushels to the load in March; I got off two or three thousand bushels in February; in February, March and April the roads were not sufficiently good to deliver wheat; the first thaw of any account was in March, before that time, there was nothing to hinder hauling, except severe cold and snow.

45 Defendants then called E. R. Powers.

I thrashed for plaintiff in fifty-six; thrashed through the month of January, and but little in February; thrashed three hundred bushels the first week; about the twentieth of January we had 1176  $\frac{1}{2}$  bushels threshed; we were hindered by plaintiff many days; we had to run half handed: machine hands had to fill the place of Roseberry; we had three small breaks that required about three hours each to repair were not hindered any for two weeks up to the twentieth; if plaintiff had furnished the hands they ought to have furnished, we could have threshed at the rate of one hundred and fifty bushels per day; know the country about Roseberry's; there is a main traveled road to Andalusia, which Roseberry would strike about four miles from there; I should not consider the roads very bad the latter part of January: my teams were on the roads then for about four weeks, and there was nothing to prevent hauling; that when we quit threshing the roads were sloppy, but the ground was frozen underneath; the first obstruction to hauling was after the fourteenth of March; I told Roseberry that if he did not get away his wheat, that probably Fish & Lee would not take it; said he was not particular whether they did or not; thought that he could get better price, that there was no danger of the Russian war ceasing, and that wheat would come up before harvest, and he had no doubt would be worth one dollar and fifty cents. I was hauling rails from within three miles of Andalusia, and as far as I am

47 acquainted with the roads, Roseberry's was about the same as that I was hauling upon: he had some very good wheat, and some very poor wheat: it had been wet and badly frozen; out of 1600 bushels, I should think there might have been fourteen hundred that was damaged; as we thrashed the wheat wagons hauled it away, the good to one place and the bad to another.

*Cross-examined.*—I don't know of any hands except Roseberry's sons that rebelled on account of the cold.

Robert Whittaker testified.

We commenced threshing the first day of January; the stacks of wheat had taken considerable wet and were frozen on the outside; there were several threshing machines in that neighborhood; this job was our first that winter; we could have threshed the wheat in November or December, if notified long enough beforehand. I lived about four miles from Roseberry's. Holliday had a threshing machine; he lived about a mile and a half from plaintiff's.



David E. Morse testified.

I assisted in thrashing plaintiff's wheat; some was in good condition, some badly frozen; I was there two days; think teams were hauling wheat from that neighborhood to Andalusia in February and March; think I delivered some in February; there were a number of machines around there; I saw this wheat at Andalusia; it was musty and unmerchantable; was at Roseberry's house about the first of May; Horatio Roseberry and Robert Harrington were there; I examined the wheat and said it was damp; they answered, yes; I asked if they had mixed the wheat, they said they had run the poor wheat through the wind mill, and taken out what ice they could, then mixed it with the good wheat; the bad would spoil the good.

Samuel Kenworthy testified.

Dont know certainly whether I showed the wheat in question to D. E. Morse. Horatio told me it was his.

L. A. Chabat testified.

I have been in the wheat business for three years; I saw this wheat in 1857, it would not have been worth more than the price of good wheat.

50 Joseph T. Cooper testified.

I assisted in thrashing this wheat, about one-fourth of it was in bad condition; about one thousand bushels was thrashed by the twentieth of January; we were hindered by Roseberry; could have thrashed from one hundred and fifty to two hundred bushels per day with full hands; there was no difficulty in getting machines in the fall of 1855. Roseberry's sons refused to work on account of the cold; dont know of any one else who did; when not threshing that winter, I was hauling; the roads were not such as to obstruct me.

L. A. Chabat re-called.

It was in May, 1856, that I first saw this wheat; it was musty, damp and unmerchantable.

51 William Wait testified.

I live three-quarters of a mile from plaintiff; I hauled about six hundred bushels of wheat to Cobledicks, about one mile below Kenworthy's, when I commenced hauling it would thaw in middle of the day, the water would run but the roads were good; along the last of February and first of March, the roads were still better; I threshed my wheat in November and December; had no difficulty in getting a machine; Holliday offered to thresh for me in November; I hauled six hundred bushels in ten or twelve days, forty bushels to the load; dont know that the roads were any better then than in February.

52 Nelson Sherwood testified.

I have known Lee and Roseberry for four years; about the 12th of May, 1856; plaintiff said he had eight hundred bushels of wheat in Kenworthy's warehouse to sell, that he had once sold it to Fish & Lee, but did not deliver it when he contracted to, and they would not have it, and that he wanted to sell to some one else; he said that Lee had scratched  
53 out part of the contract and added a part so as to alter it. Defendants then introduced in evidence the written contract, which is hereinbefore set out.

This was all the evidence.



The court gave the following instructions for the plaintiff :

- 51 1. If from the evidence in this case, the jury believe that, on or about the 18th day of October, A. D., 1855, the plaintiff in this suit contracted to sell to the defendants, 800 bushels of wheat, out of wheat then in the stack upon plaintiff's premises and unthrashed, and that by the terms of such contract, said plaintiff was to deliver such wheat at Andalusia, at the warehouse of Samuel Kenworthy, by the first day of November, then next and following, if possible, or as soon thereafter as said plaintiff could thresh and deliver said wheat, and that the plaintiff, after such 18th day of October, made reasonable and proper effort to deliver such wheat at Andalusia as aforesaid, and did within a reasonable time thereafter, deliver said 800 bushels at the place provided for in the contract, then the defendants are liable to pay said plaintiff the price agreed upon by said parties as the price of said wheat, provided the plaintiff used proper care in preserving said wheat from harm before delivery, and delivered said defendants an average quality of wheat threshed from plaintiff's stacks, mentioned at the time said contract was made.
- 55 2. If from the evidence in this case, the jury believe, that the plaintiff contracted to sell, and the defendants agreed to buy, 800 bushels of wheat, which wheat was to be threshed from and out of stacks of wheat that plaintiff then had on hand, then the law would imply that such wheat was to be of an average quality, as compared with the entire quantity in such stacks, and it would make no difference whether such wheat was merchantable or not, as the defendants' under such circumstances, would receive the precise article they contracted for, and would have no right to complain, unless the plaintiff did or permitted some act or thing by which the average quality of said wheat was impaired.
3. If from the evidence the jury believe that the plaintiff was induced by the defendants or either of them, to sign the written contract offered in evidence, by the fraud and circumvention of either of said defendants, then the plaintiff in this case is permitted to prove the true contract between the parties by parol, and if under such circumstances the jury believe from the evidence that the plaintiff has reasonably performed such parol contract, if found to exist in respect to the sale and delivery of 50 said 800 bushels wheat at Andalusia, then the plaintiff is entitled to recover in this suit, provided that in other respects the plaintiff has performed his part of said parol contract.
4. If from the evidence the jury believe that the parties to this suit extended the time for the delivery of said wheat, they might lawfully do so whether such contract was in parol or in writing, and the evidence of such extension may be inferred from circumstances proven to exist. Thus, if from the evidence the jury believe that Lee, one of the defendants, in January, 1856, expressed a willingness to receive said wheat from the plaintiff, or directed his warehouseman to do so, it is proof tending to show that the time of the delivery was extended beyond the time mentioned in the written contract.
5. If from the evidence in this case, the jury believe that the defendants' or either of them, on or about the 18th day of October, 1855, by fraud and circumvention, induced the plaintiff to sign a written contract 57 for the sale and delivery to them of 800 bushels of wheat, then the jury are bound by the law of the land to disregard such written contract, utterly and entirely, when offered in evidence as proof of such contract; and if, in this case, the jury from the evidence believe that the defendants or either of them, when reading to the plaintiff that the time (being una-



ble to read) the written contract offered in evidence and misread the same in any material part, and thus induced the plaintiff to sign said contract, then such contract is not binding upon the plaintiff, and is wholly void as to him.

6. If, from the evidence in this case, the jury believe that Lee, one of the defendants, in reading to the plaintiff the contract offered in evidence (he, the plaintiff, being then unable to read the same) materially misread such written contract as to the time of the delivery of the wheat spoken of in said contract, and thus induced the plaintiff to sign the same, such an act on the part of Lee would vitiate and render void such contract as to the plaintiff in this suit.

15 To the giving of each and all which instructions the defendants then and there excepted, which exceptions the court overruled and gave said instructions.

The defendants then requested the court to instruct the jury as follows :

19 1. The court will instruct the jury that they are the sole judges of the credibility due the testimony of all witnesses testifying before them, and are not bound to believe that of any witness whom they believe unworthy of credit, notwithstanding the character of such witness for truth and veracity, has not been formally impeached by the testimony of any other witness.

2. A witness who makes knowingly contradictory statements in regard to any material fact in issue before them, is unworthy the credit of a jury.

29 3. The court will instruct the jury that if they believe from the evidence that plaintiff admitted that he had sold the wheat to defendants, but that he had not delivered it when he agreed to, that defendants were not bound to receive it, they will find for the defendants.

4. The court will instruct the jury that the admissions of the plaintiff are evidence against him.

The court will instruct the jury that in no event was the defendants bound to receive unmerchantable wheat of the plaintiff.

The court will instruct the jury that if they believe from the evidence by the admissions of plaintiff that he had not delivered the wheat in the time required by the contract, they will find for the defendants.

✓ 5. If the jury believe from the evidence that the plaintiff contracted to deliver 800 bushels of wheat within one month from the 18th day of October, 1855, at Kenworthy's warehouse in Andalusia, if possible, and that it was reasonably possible to do so, and that plaintiff did not deliver said wheat within that time, then the jury must find a verdict for the defendants, unless they find that defendants afterwards accepted the said  
60 wheat under same contract.

6. If the jury believe from the evidence that plaintiff contracted to deliver 800 bushels of spring wheat at Andalusia, at Kenworthy's warehouse, by the first day of November, A. D. 1855, if possible, if not, as soon after as it could be threshed and delivered, and that it was not possible to deliver said wheat by the said first of November, then the jury must believe that the plaintiff used all diligence and exertion in getting the same threshed and delivered as soon after said first day of November, A. D. 1855, as possible or the plaintiff cannot recover.

7. The law is, that the wheat to be delivered on a contract to deliver



✓ a certain number of bushels of wheat, is to be of a fair, merchantable quality, and therefore if the plaintiff under the contract only delivered wheat which was not of a fair, merchantable quality, he cannot recover upon the said contract.

✓ 8. Wheat of a fair, merchantable quality means good fair wheat in market, without reference to whether the season has generally damaged wheat or not.

✓ 9. A contract for the purchase of 800 bushels of wheat to be threshed and delivered by the seller, is not a purchase of the unthreshed wheat, and such wheat would remain the property of the seller until the same was delivered under and according to the contract.

✓ 10. If the jury believe from the evidence that there was an extension of the time for the delivery of said wheat, by the said defendants, then the jury must further believe from the evidence that the wheat was delivered in strict compliance with the terms of said extension, otherwise the jury must find for defendants.

And further; the mere statement of defendant to Kenworthy, that he expected Roseberry would deliver some wheat, is not of itself evidence of such extension.

And the court then gave all said instructions as asked by the defendant, except the 3d, 4th and 6th, and then and there refused to give the said 3d, fourth and sixth instructions as above asked, but modified the same. (Which instructions as modified are in the words and figures following).

Right 61 3. The court will instruct the jury that if they believe from the evidence, that plaintiff admitted that he had sold the wheat to defendants, but that he had not delivered it when he agreed to, that defendants were not bound to receive it, and that defendants did not receive it, and if from the evidence they believe such to be the fact, they will find for the defendants.

11 4. The court will instruct the jury that the admissions of the plaintiff are evidence against him; but that all the admissions of a party made at the same time and in the same conversation, both for and against himself, must be considered and weighed by the jury.

11 4. The court will instruct the jury, that in no event was the defendants bound to receive unmerchantable wheat of the plaintiff, unless they believe from the evidence that the defendants purchased certain wheat of plaintiff of a different quality after a fair examination of its quality, or purchased certain wheat then in stacks, with a fair opportunity of examining its quality. The court will instruct the jury that if they believe from the evidence by the admissions of plaintiff or otherwise, that he had not delivered the wheat in the time required by the contract, they will find for the defendants.

11 6. If the jury believe from the evidence, that plaintiff contracted to deliver 800 bushels of spring wheat at Andalusia, at Kenworthy's warehouse, by the first day of November, A. D. 1855, if possible, if not, as soon after as it could be threshed and delivered, and that it was not possible to deliver said wheat by the said first day of November, then the jury must believe that the plaintiff used all reasonable diligence and exertion in getting the same threshed and delivered as soon after said first day of November, A. D. 1855, as was reasonably possible, or the plaintiff cannot recover.



To the modification of each of said instructions, the defendant then and there excepted, which exceptions the court overruled, and gave the said instructions, as modified as aforesaid, to the jury.

After which the jury returned a verdict for the plaintiff, and assessed his damages at nine hundred dollars. The defendants then and there entered their motion to the court for a new trial, for the following reasons:

1st. That the court gave to the jury in the case, on behalf of and for the plaintiff, erroneous instructions.

2d. That the verdict of the jury was against the instructions of the court in the cause.

3d. That the verdict of the jury was contrary to the evidence in the case.

4th. That William I. Nevins, one of the jurymen who tried the cause, was, when said case was tried, over sixty years of age.

Which motion the court overruled and rendered judgment on the verdict. To the overruling of which last mentioned motion, the said defendants then and there excepted, and to the rendition of judgment on said verdict, the defendants then and there excepted, and prayed an appeal.

#### ERRORS ASSIGNED.

1. The court erred in giving each of the instructions asked for by defendant.

2. The court erred in modifying defendants' instructions.

3. The court erred in overruling motion for a new trial.

4. The court erred in rendering the judgment.

#### POINTS AND AUTHORITIES.

There can be no pretence that the contract was complied with, either as it was written or as it was testified to by plaintiff's son. The contract was made in October; wheat was to be delivered by 1st November, if possible, or as the boy stated, as soon thereafter as it could be threshed and delivered. There is no proof that it was not possible to deliver the wheat by November 1st. It appears affirmatively that the wheat could have been delivered much earlier than it was. Horatio swears that a machine could have been had earlier by paying 1 cent per bushel more.

11th Illinois, 571.

2d Gilman, 96.

13th Illinois, 386.

2d Scammon, 446.

2d. The wheat being in stack, there was an implied warranty that it was merchantable wheat, and the proof shows this was not merchantable wheat.

Misner vs. Granger, 4th Gilman, 69.

3d. The wheat was not received by Fish & Lee.

4th. Roseberry, as late as the 12th of May, and after the wheat was put in Kenworthy's warehouse, claimed to own the wheat; offered to sell it, and said he had not performed his contract with Fish & Lee. See testimony of Kenworthy and Sherwood.

5 Shepley, 299.

1 Gilman, 100.

17 Maine, 5.

4th Scammon, 40.

5th. The 1st instruction changes entirely the effect of the contract between the parties. If that be law, plaintiff was not bound to try to deliver the wheat by first of November. The contract provides for the highest degree of diligence, the instruction for only ordinary diligence. The instruction holds, that, if the wheat was damaged in plaintiff's hands, without the negligence of plaintiff, after the contract was made, and be-



fore the delivery, the loss would be the loss of Fish & Lee; this is an outrageous proposition. The contract was an executory one; the wheat was not at the risk of Fish & Lee until it was delivered. If it was damaged by accident in the meantime, the loss is Roseberry's.

12 Illinois, 288; 15 Illinois, 57.

2d Instruction. This instruction was wrong for two reasons. 1st, because it told the jury that they might find a contract to exist different and variant from the written contract. 2d. That after Roseberry contracted to deliver wheat out of those stacks, then if the wheat was afterwards damaged before delivery, the loss would be the loss of Fish & Lee.

3d Instruction. Under the circumstances assumed in this instruction, the written contract could only have been changed so as to read according to the understanding of the parties at the time. All the witnesses state that the parol contract and the written contract were alike, except as to the time of the delivery of the wheat.

The 6th instruction is wrong; a mis-reading of the contract would not vitiate it, unless fraudulently done.

B. C. COOK,  
*For Appellant.*

101-172  
Fish & Lee

vs

Roseberry

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Abstracts & Points

Filed May 10, 1859

L. Leland  
Clerk



## APPELLEE'S BRIEF.

FISH & LEE, Appellants,  
vs.  
ELIJAH W. ROSEBURY, Appellee. } *In the Supreme Court at Ottawa,  
April Term, A. D. 1859.*

**BEARDSLEY & SMITH, for Rosebury, Appellee.**

The main question involved in this case, is, does the evidence embodied in the record, sustain the verdict of the jury?

In this, as in most other litigated cases, the evidence is conflicting, and different juries might arrive at different results, as the weight of evidence, in their opinions, might incline to one side or the other.

There can be no doubt that the jury, were at liberty to disregard the written contract for the sale of wheat, if from the evidence they believed the appellants practiced a fraud in obtaining it. That such fraud was practiced is fully shown by the evidence. The contract then, for the sale of the wheat, rested in parol, and the question arises, did the plaintiff below reasonably perform that contract.

He agreed to deliver the 800 bushels of wheat, the product of his stacks, by the first of November if possible, or as soon after as it could be threshed and delivered at Andalusia.

The question of reasonable diligence,—almost always depending upon a variety of circumstances—is a question peculiarly proper to be left to a jury. In this case, as shown by the bill of exceptions, it was a leading point in the defence;—involving an inquiry as to plaintiff's ability to obtain threshing machines, the condition of the roads and the weather, from the time the contract for the sale of the wheat was made, to the time of its delivery; and about which several witnesses were examined on both sides. It cannot be claimed that the jury misunderstood the evidence or disregarded the instructions of the Court.

As to the instructions themselves, on the part of the plaintiff, we fail to discover any semblance of error.

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As to the instructions themselves, on the part of the plaintiff, we fail to discover any semblance of error.



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Raschumy  
for Dept

Filed April 22, 1859  
L. Leland  
clerk