_{No.} 12740

Supreme Court of Illinois

Fish & Lee

VS.

Rosebury

71641

Myron de Fisher tal 101 12740 1 Mil 250

Mite of Meaning August some har sof The rear County le Here before the Rounnille The s. Throughou, budge of the Center wing Charles at the Court House on the Will some in said to suty on the east Monday is the same the of August, in the Boar of Bur Soft, One Mousant Cept. Dundred and Fifty deven, being the think First day of said promite. I ndert Houseroth John . Berryson from James Go a hard a total oca x hyd for the they are de started ; back My on the Fish & Sumplish My low Lee We it seems beed that histofore to paint: On the drounty result be of August in the year of our lost we the reland eight hundred and fifty to main the a removement of the proceedings in this can entitled as where, and the accompanying forgen tile in laid course, there removed to the bigginst buch of rock toland decenty [2940-1]

Textrois, towing been brought to this bown oura Change of Tome from took beach a suns Eventy, and were find in this court, and are in the shoots and figures following, to wit! That before the bon, J. Huen Doney, full of the light Jusicial Vivenit of the State of Premis of a tim of the birenit bout began and held at the Court House within & for the County of dick Poland and The donesaid On the Third Monday the 16th day of Worth Att 1/16/1 The soul Hour Nieven & rung from Erra This cantsly shrift John vo, Dawley , Dister Mony Luring Marticl Clark And on the Eighth day of Jail Verm and she dry of Said Mouth the following proceedings were had to wit ! Elijah. Redsurg 3 3 decempent. My . K. Bih & Mylo Lee This day come the parties by their allowing and and reductions friend stone a Jung of June 10 1 wit ! If adoch hald one M. b. Dant, Rett Kerkenan, h W. Lunes, and had hat way any late la turning thomas to their grant

Polardiyon, Jal Jaken Joch Bonen, & and Shellets, Who were each and severally town. to were and truly try the ison formed, and the hour of aujournment having arrived before the Conclusion of the evidence, the bourt instruction the Jung wat to come se carthe any futin lefea the darknest of this treal and formitted them to disfurte to much the court to-morrow morning. And ofterwards, to wit: On the get ray of and term, being the 25th day of Tranch A. 107. the following proceedings were had, 20 My son Miss & Mylo Lee Assumptit This day ugain land the parties by their attendings und the long herelofere Ampanuel heren, and hiring heard a fact of the condence, and the hour of adjusternment having arrowd, the long authorized the forget on galedly and premitted them to despend to meet the soul Therewow ming. Chan oftenousas, to wit ! - On the 10th day Flaid Paris, being the 26 th day of theman

to coit; the following projectings were has Elijah Rasebray My with Fish & Taylo Lie day again came the parties by their allowings and the fury huminosper, Orepanneled, and they having heard the evidence returned their Desties with Court which is as follows, The fury find. for the Storichty and assess the Namage as Entir their molini for a new trial Show of Alline's from Form Actilog. Lick Frank County a. · Seas before the Bour Johnson I may Judge of the Sixthe Judicial Ceremit of the State of Minois at a term of the Circuit Court Lyan Ordinal at the Court house within and for the bount of book Astand and State aforesaid on the first thouday the first day of June 15/07. Indend How to Welson A ray frege John in Hawley State attentiones 4 gra The Weardoles where Lung Millert Chile

to 17th day of June 1807, the following process 17 Mignati Still & Mayle Lee & This day corn the parties of their atterneys, and defindants by their attorneys enter their mation defforted by Effectively for a rule refron plaintiffe to give bearity for Costs. Thornfor Cario plainty of his altomy and enter his motion suffered by affectivity for a change of some him. and the bound being sufficiently advised to the premises existerined the faid treates a line ordered the venue hereof be and the same is kness changed to the founts of mores i and that the black of this court make a Francoile of the Read in this case and transmit the dame to the black of the daid ber and bout of Mercer Ecounts Let dead County? In During the will black Spart Selimonias of the Count Count of airt lawrent to hindy ruly that the Jongwing is a love

copy of the Record in this cause. And the actorificating popers are all the fapers are Said Cares on file in may office. of rais front us Rick Vount Chi. I this pet day of August 4.1. 150%. Luncy Mr Acit, blok Stok of Security & But Stople of the Stote of Steensis, Lock Island bounty & To the Shiring of Rock Filled County Section : He command you to Summon Minute. Fish & Mile Lee, loto patiens doing business under the manu and style of Fish & Lee, of to be found in your County, pursually to be and plear before the bireuit lout of the bounty such Island, on the first day of the mest time thereof, to be holden at the bout bouse in rock Viland owthe 2 and Mouday me the mouth of frene Sell 1806, to and wer the Complaint of Olijah H. Nosebury of a Her of Dresposs on the Case on I raises to his damage, the I wan of I well to wordend doceans as he day; and have you then there this thait, and rache return there is what mounes you execute The durine. Hetriss Brug in Million, Clark of our diet bei out bout of hat

Island this 16 day of May in Car. the mand our Line one House Mayier Wisen, Clark. to following Ketron made by the Short to wit: Jane to Any son Ho. Hish & Mayle Lee this 19th day of May A. H. 186. J. B. Sorton, Shariff pro Enter Deadle Ly Hate of Military Kock, Hand Circuit Court Rock Verged County . Fre Bern A.A. 1866. Mison H. Fish & Mile Lee late fatien. Juliantia doing business terriber the manu and thate of Joh & La, Defendants in this wit were I removed to answer Whith the Washing, Hantiff in the South in a per of trespose on the case on promises, and throughou the early plainty complains se. For that wherest heatofore to with one The thertanth day of hear, A.M. 1806, at hock Victorial to wit: at the World of Book Bloom Aforement, the Said defendants over early to the the pleasaff our mine transland doctors for the fire and value of right to it is trul tripleto

by the said Alacatiff to the defendant at the special institute and regards By recessor whose and regards By recessor whose and by force of the Statute in such to see much became liable to pay to the Said Dhantiff, the Said Steen of throng about specified, and being so her ble the said of endants, in Consideration thereof, efterwards, to art: On the same day und year, and at the place of onesaid, aid the said Steen fact fully promised the said Steen fact fully promised the said Steen of the received of the said Steen of the said Steen

Monorche, In wit I to the fourth with day of Iney that the fourth of the land of Ing the said Mainly in the bound of the said Mainly in the bound of the Meridan decent for the free and there sould and decent for the said Mainly to the defendant of their regions for the free and the form of the said the said the form of the said the decent for the said the said the dead the said the said

and there paid by the Searchiff for the rise of the defendants, at their reguest i and in one Thousand doctions for money then and there received by the days don't for the use of the planty. It sal in One thousand down for noney found to be due from the defenduates to the Mountains On an account then and the ester between them I not require the defende att afterwards Doit! I'm the day and year last aforevail in The County Of oresaid, in Consideration of the premises respectively promised, to fay the aid Leveral last new with med moneys respectively to the planning, on regrest. Get the ten disorgand their promises, and have a spain any of the buil herowally or any fruit thereof, to the Searchiff duringe Vivelor Mounted Lockard, and therefore he bring I well Ailes for Steps by of liet , min. 1854 So 800 Rights Wheat Seliman to for at Andrewie . To \$1111 for 5 while - 1700 200 Filed May 24th 1806 Dryan Milion Clark 9/20140-3

Nock Island County. Of the form Verm Sat 1 1.50%. of the Sock Island County Plea Cerent Court. Olijah H. Roseberg 2 and Myron H. Fish ams Myrante. Dise 33 Mylo Lee late patron 30 Migle Lees late Alfendants in this is with being of removement bother in Sustrans & C Olijah H. Nachtry Monthly in a files of trustess on the case refer to revise by Murchall & Ball Kin atterings come and defend the warmy and engine when so and day that they did not undertake and province in near and form as the east promite hoth above hereok Coreplained against home ared of this they fruit therwooders spea the be waty Mischael & Vale " Ally for Juster. and Def date . the lake by Milkinson " Find to me 16 1866 Candley & & mette his att , . . Fragies Winn Hall & Goh H. Rosburg Grunded Delerston files Amended Thick & Lee & France A. 4. 1871 And now said Ity farther dellares against Said Deltin a Dan of

Inspess on the Case on francises, for that relieves perelofore to mit: On the 13th day of Thay had 15%. to wit at said Court of hock Island in Con Sederation that the Muntiff at the special ind love and regret of said clifts, had before that lenne Sold & delivered to said defter to will to he there. Sand busheld of What, they the defendants under look and fait full fromish the said Ill to fa him to much many as said on thousand delivery thereof is at a asomobly worth. - Lod the Hey a very that the said Wheat at the tering the said once I delivery thereof the wasonally worth to seem of levelor hundred dolons of swhich said defte on the day byear left had notice. fet said soft not requiring ther day promises & undertaking to by him made as of waid him to have myterted & - field & the de propert and refuse to forded If their tiers of theren, or any fort thereof the often devianted to wit ! Ou the day to your last all at the loving of t and My Mil. 1. 7. Lung the lest with, Milard, a total of aller in for tack adjust County house frage lock thank bound to come to be a court to out fune vien both toy.

12 Elijah H. Rasebary 3 Mymonthe Dix & Mylo Lee, 3 Officant Myli Lee being fast duly swom according to law, deposes and bays that he is one of the defendants in the above entitled suit, and that Elijah II. Nathary Blankiff in Said duit is unable to pay the Costs of Laid suit Out which office set believed, and is informed, and the offerent this court will be in danger of bostony their legal commands in case said don't is determined against Sail Narthurg. Swem to rebounded to ? Vignal Heyle Lee before mutico 1/the Juney Milie With de of few 10. J. Lucy Michiell Spices 4. M. Contagy In the Circuit Court of Noch trakinged fish & Lee 3 Ad. 180% Tough H. Richery hing By in the above contitud bank, being force duly Javyon defeated and says that he believed and from he cannot have a fair and imported treat in the upon a granust doub on account That the briefs of this court is projudiced against to affiont, and his warme of action

entraced in said don't, to dome having been once trusk before time. This affect Olds days that he fears & believes that he can that have a feir and in partial trial of said fruit for the father reason that the adverse firsty (manuly Fish & Lee, said styl) have are recedil influence over the mind of thour habitants of said Nock Istant County - This officent further days that the ixedown above set forthe, spow which the opplication for the new of being is based. only came to his horoldge waterday. that up to that term it was his intultion to ways on the trial of a will come at the present to my of this Court, and to this end had made all meessery preferation If icus further Sans that early this morning · What Hilkinson Proferred & Its Counsel pleas Manning, Elg, of his intention to Offly for a change of I was for the treat of said wait, Afficient herefore frage a Change of France for the triol of said Court to Jame Girecult / County or here the above would obstacles to a fair and impartial time do not e yest begand to tight the transfer of interisted to wrom to before me this 1) day of fund Tien Juga If 1867.

13

14 Copy of Contract. Rock Offend Co. October 18th 100, Contract I have this day agreed to deliver to Fish & Lee of the Have house of Janual Ken worth y in Andalusia Eight Created Brushels of Spring Wheat within one month of possible for which dans to receive one dollar and tween and one half cents for Suchel Mignet & The Kadeburge And afterwards to mit on the 15th day of taid August Verm of the hour as County loison's Court ASINI, h wit! on the get day of explication -14. 1857, the following order was weak to wit; Elijah II. Rosedony 3 Myron Ar Bih Staylo La Jona Rock Osland County -Mis, itoy came the parties herein by their allowings, and made their agrandent in open bout to le aline this fait generally. Thereafon it is ordered by the Court that the care so continued in acces care with word a greenerst

A fortion of the hor ceedings having been omitted in the transcript first lead in this case, the following was subsequently astrone in resid the south out in the progress of said out How before the How. I the ison of my fude of the Sight federal liverit of the Note of Minosis of a term of the Circuit Court begun and had at the bourt Hause Arthin a red for the brunt of Rock Ithurs and State of praise. On the Their Monday the 16th day of Murch A. J. 15.7. Andread Hoon: I. Milson Amer, James. John 10. Handy otherstoney Laney Michil, Glake And outhe bight day of Joid Firm Way 24th day of said Month to Jollowing forending were had to wit-Elijah Hestory desnoyet My on History Lessenger This day Curry the parties by their allowings, and were being friend Come a Jury of Jurn, to wit: gado of

16 Taconya, N. b. Nort, Robert Kentman, 11 The Fre ice, S. S. Street, Thomas enguy, Jums the Promis, Thomas Britisham, I. W.Dijow, June Faker, Noah Bowen, David Thillips. Who were lack any securacy soons to love and truly by the recu found, and the hour of adjournment having I have before the conclusion of the evidence the Court Instructed the Jury not to converse with any person repor the subject of this trial and for withed them to disperse to meet the Court to-- Morrow morning. And oftenands to wit! On the 9th days daid term being the 25th day of March Addito) The following proceedings were had to wit: Hy words Arish 57 Mylo dec. this day a garn came the parties by their thereeys, and the fary hartofin empon - neled herein, and having heard a fort of the look want od the hour of adjournment hang arrived the bours dustructed the ging as an Austerday and farmetted him to dispuse to meet the Court homorion the meng.

And afterwards to wit i On the 11th day of Said Dermy being the 26th day of March 180%. the following proceedings were had, to wit! Higanole, Fish ? and Maybe Xee his day again com the parties by their attemes, and the fury heretofre unfamiled, and they having heard the Cordena returned their windick into a with Which is as follows: "We the Jung find for the Plainty and was the demages at Sevent worked Dollars." . hory defendants enter this motion for a resolution There day of the Perm, being the 10th day of April, the following proceedings were had Elijah Kasherry 1/4/ The you to Jose in Theyer En tis day again, came the parties by their allowings, and defendants in / farmed

their motion for a new treat herein " and the Court having Considered of maid mation Sustains the Jame, and orders that the Merdiet of the Jury entired herein he detarile, and that a new trial be granted herein, and that the costs while the final event to drite And on mention of Caraly O Horney it is ardend by the Court what plants how leave to arrend the dicharation platinis and that the saine so a mound bey day byou the heart term kereing. Mean him the hour to humaling, holy the Right Indicial Cerewit of the State of Illinois, at a Para of the Circuit Court began and held at the Court Course within and for the Court of Brok Island and State afonsaid, On the hier Monday, the first day of from A.H. 1.7. Mon. J. Milson Dong Judge John D. Hander & Solen Bloms Ofra Ma bearrely Shirt Luina, Mille Chang And on the different by of our forem being the 1/th day of from AM. 10%. to covering proceedings were had to with

Elijah Raseburg 3 Myron M. Mish 53 Ruger Lee 3 This day came the parties by their alterneys, and defendant by their atterneys enter their Horizon supported is effectanit for a mile refron Plaintiff to good hearit for costs. Throupon carne Hearing by his alterney lend enter his motion supported by affectarity for change of line herein, and the court being sufficiently adgreated in the frames us, instrumed the daid motion and ordered that the venue hunt to and the surve is honly changed to be bount of Therange of the the black of the bout make transcript of the Read in this case and transmit the same to the blut of the laid berent to int of Miner to way State of Menors for Buk Dand Bount to I Parking In their find of The Circuit Court of laid brooks do havely cartify that the foregoing is a true of of the chrosol and this course and the as very one - eng paper are all the papers in dail cause on file in the year. net my hand and and tool 19 Same

(1000) of Jaid to not at the Col S. November A. S. 1801. - Luney Martine Clark stated elleroist. Morrer County la How before the Countle offin I Thompson folge of the touth fedicial berenit of said state at a openial form of the Conomit. Court within and for dais County, for the treat of 6 wie and Cuminal Causes, began and held at the Court House in the former of Auds you and County, on the visual handy an the Worth of January thing the Warnett : by of said tribated in the year of our dod. One thousand light hunded and fifty with (1008) in prosummer of the following order and white filed with the black of said bout on the therethe day of October 1207 by the gradge of said beren't bourt, and which is in these words to met ! Vite of Allemia First Judicial Circuit for to Carry . venter, Bon Clark of the birenit Court within and for the boundy of Therees in dail d'ote. you are hereby informed that a speak

Venu of the Circuit Court in and for dand County, for the brial of civil and oriented Causes, will be held of the bourt touse in the Down of Alite, commencing on the second Thornday (2 almosty) in the month of Morning treat enemy: Upon will give the rotice required by law to the shirt in such cases; & make all Shits and process, hereafter to be (Litred, returnable accordingly. Winest There, Hougher, Judgest And notice thereof having sun ginn by the black of said le out, to the charge of said bounds cond it do to factions appearing to the Count that due notice of said oficial disputations bangeren by daid though of said barente, by factoring out five notion thereof in few of the most public places in said lovery, it is. . I record that the same be opened for the treaty Causes as oforesaid. When Fresent the Honesise phase, throupen hidrose Branch, Canard States Many Were Stand In Chaip. Comment, Class. And on the 10th day of our our and 2) day of said thruth, the falls very proceedings were tead, to mix:

ve Elijan It. Wahung I disser pair. My mu H. Fish, h. His day again came on this cause for housing one the defendants. House for a rule on the Harity to file I can Ruty for Coster often being advised as to the said of said mating it is ordered by the Court that The Mustion be overreted. And now come the parties and their atternay, and serveding foined for treat put the susefure upon the Country: Thereupon Cleme a fury to mit; Campberez deidele, Keny hardest folder tour John L. Namez, John J. harded, Melian & Sevins, Jonathan Sichener, Joseph throw, Wergurin & coller, to the Graham, Maskington Holf and S. S. Merne, who dans deated true and some my street and but to by the issue found herein, ofter hearing from of the Circle was were for mother to retire under they of the County and, required to treat the Court at the Order to the mon mening. had at med to wit! On the 10 the Land town & is the of ward breasth with factoring proceedings fore had to wit!

Myout Nish & MytoLa & Mis day again came on this cause for a heaving, and the jung offer hearing the conclusion of the endence and the ary unents of Counsel, whom their water do ear, He the Jung fred the issues for the Maintiff, and assess his damages at the sum of Nine He rendered decears," Thereupon Canutha definidants by their attorney and entered their Tors tion for a new trial herein And, at the Name how the vail defendants by their alloines filed their reasons for a new trial kerin, which are in these words: Olijah M. Kaseberry 3 Fish & Lee Vaid defendants more the the case on behalf of and for the flauntity. 2nd that the hounding of the forey reme against

23

24 to Instructions of the Court in the Case. Contrary to the evidence in the base. July have to he tried the case, was when said course was tried, a ver to part of age. 1600 816 anis attyl for the net and. India 28 Juny 158. Historica Clist. And ylenories, to mil! On the 22 d day of said Verne, being the 4th day of Film = ary At 1808, the following orders were Mide by Said Court to mit: Ho My route. Fish's from Rock Island County. The day this cause garee in to be heard on A fendants weeken made traffix herein for a new trine; and the look having Considered Said notion, and being chily adviced in the promiser, do id. Tat the come be a versuled, and that

a fudgment be rendered on the verdet of the forze it is therefore or level by the bourt that Plaintif have and wor of food from the said Afradants the cum of Sine Kound of 1701 doction, his Marwages so found by the July a of west and that he may have execution for the land Ho Thy ron Ma, Fish Journ for to Builton And The diendart hour having excepted to the rating of the Court in obcarring their matina for a multiple stad in rendering a Judg runt on the restles of the Jury, it is ordered by the Com that minety days be allowed there to the this bill of Exeption herein. In the said Defendante having project in affect to expresse Court, the board order that there be account of and the sering they be more to file their board in the person of the The research dollar, with theres In the Account to be of proved to the constant And after may be said: 6 to the 27 th day of white the 188, came the desirement

26 their allowing and fried their opher Boul, the accordance with the order of Court, with Henry Le as scenerify which to as approved, and the Copy is but with this transcript. And afterward, to wit: On the 29 th dag of April Ad. 1858, Carne the Defendants their attorney and filed their bill of 8 x aptions in this case, which is in the world and Jegures fallowing, to wit: .. State of Illinois of Mercur County Circuit Court, Muster County D. Special Puring derings. 15. Elijah Michilerary My now A. Bik & Thigh See Pritarise render Be it remembered there on the trice of the course Marieti Hackury was and tolific as follows - " Jan twon of the to hish & Lee the dependents & Eight hundred bushers of spring What by the first of bounder A. U. 180 if possible or as some buyler wit Could be thughed and delinered. My hope Counted the objected to find of contract by

Actuses for the reason that it was reduced to coreling, and therefor deft produced the Same, which was in the words and figures following to wit: west I dianet la Colotar 1 1 1 1. I have this day agreed to deliver to transtate "at the Warehouse of Carmel Tenno they in Andrewie "Tought hundred bushes of fring When within one mouth if passible for which same to "receive one doller and today and one "holy contr for bushel. ". H. Koshay." and the same having sun fresented to a examiner by the district to task . I don't have write the this is the frager, referring to the wretten con-= tract between the parties. To which objection pays counsel state that I very Contract was actained to after from full by frame and proposed to prove such fraud & outress Showing that well are misread the Lan Contract It left he being to de time or temporation have Unable to reach the Rance of twheneyou mit were to as frother our we de Syldowet to the high en allos on I deed contact to fallowed, in mit! I did not not the paper that is father dry malor of reporting in the day makine testanted to the debone consider construct then we on ofthe Sufferdands was private don't in wine who frequent action to decitart to made y.

The I came ento the house, they were pareting, the defendant the Lie dat down to write, Ofter writing he handed the Contract to father to degre, he Cather this he could not read it & looked for his spectacles, Could sent fand them, and would trust to How. Leds hower to read it. See then read it overs fille refused to dign it, it specifies a particular-time for delinery - to which father-objected, a red La wrote another Contract and read it to father to the terms as the readily father took to determs Could bremdered fortheld of I heat of Audistracia, is the first of who veriables if possible, once down often contracte through and delivered. In hoursely the contract was made - think it to wire true ruber widdle of Dibber & Should have laid in 1855. The Lee fut the foper on his freket at that time. Hender eleve to beg jaties theaty they I then Lee & fathers! with there to the Stacker. When they care back to the Stake, The Lee had wheat head an his hundle they then sound to the in the I went also. When I went in they had Largained for the wheat. The En de frag one dollar timbre and one holy auty

for bushed for Dight Actendred Sushell of Wheat - the wheat was to be diversed at Convertige wirekouse detacted on the Miss sippe down about wine wites from My father's house, there was the Specified time for the delivery, but to be delivered assoon and possible , I did not hear him Mer. Let day anything about whether both field with the wheat or mot. The Lee said that he swented to purchase the wohear that was in the stacks. They her Lee Hatter were not above an hour at the Stacks. I went directly to procure a throshing machine, and Could get none under three or four weeks- Iwas out one day hunting for a machine, and hin Koled Whiteler Came and took the fort. The Forms Carre on the last day of I content with Machine to thresh the wheat - set the Practice and Commenced the shine on New year day 1856. They had meny Frenk downs Concerned a good deal of serve, and were abliged to stop a good sotile the account of told contin to call to work, the hairs desine work on that account. don't know how forey they deffed with on allowers of bald weather, whether a waker a day,

2 g

I was down day . Think, The bold de atter commence about the first of January - I think about the second week in January, they constinued Treshing off and on during Mitmany They tipe us in surprise on account of marking brakeng - did hat haul any Tokent tile about first of April; finished threshing all of father robert last of Firmers or first March. Landed with two wagons, with cutter and got dank in the made then grif having till the wals improved. Weter months wind from as the sound strained promit and hanced till decling terre then good about too weeks, then recommended foreshed harding it Sommohere about the fil of frine, delined 801 bushels and down frounds wheat did not duffer any after we commenced threshing till delivered. The Noheat was an average greatity of the arheat threshed from the Stacked & was as good when delivered as it was were Knowldly received tooling has to deliver the West saw som to about the

about the wheat - perhaps an hour before going to the Stacks Hen Lee was in his buggy I was the part of the tence the Lucana of the time of rows at the State close by - about three role off - dout leave what I to as doing in the Stable was after sing to the hartes. I was there at the briggy and down to the Stable, did not go to the buggy but once, was mor there fifteen minutes; father and Min Lee machation, about the wheat - difficul about the fice, did Nest agree about any thing I did Not hear any contract lite they went to the Stacks - I heard or knew of no con-= tract till they returned from the strake his the house. They were not over an hour at the & tacks - which were about trend to off. I don't remember what I waster in the ruan time. I was close by the Itable when they came back - I saw them Come hack - They did Not stop at the State heard nothing the I got into the house Avent in soon ofter them - They were about to write when I got in, don't know hat Try had commerced writing, father said he had data his wheat and what he had told it for Then her. In the defendant work A father went to find his glasses - Cours

not find them and the in her. Levelit. fatherrefused to dign 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 were to delive Eight hundred suchels of wheat by fill some ber 1805. 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 fossible, if Not as soon as it could be threshed 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 rokest. The written Contract was the Contract de-- tween the fracties, but was misread by Mr. Lee as to the time of delivery only. I paid particular attention to the line, her. Lee read it that way way father then May read writing without of protected I Could have read it - had no business to do do, they were about reducing the contract or writing when I went into the house-I don't revenuer that my father lost the. Les that the wheat was good. It was had getting machines that your I deat town I any machine that could have bunker within a worth 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 the days for a larger price - he want one and more per bushel. I don't know how down he could have been got - he great to our if we would give his price dix wester, In December he would have come to had thushed between 18th Califor and that time - he threshed for done of our heighten I don't know white his machine was edle. Louis know how worth he thered. I was out tooking for a stranking on According I want out fruit of the ite. Lee was the ment time I next time as in December. I did not see Hallitag at all - his machine was not the home any day it was out. And wil go a de Molieday. It was combine in the width of discussion that I first leaves he added dix cents - had breated to machine, lifere - I would not know that I the now his machine was not at home any day of was only Machines. Bracking broke fill day it was staired in house the king Then ment on to rooth - so tryain

34 are our kalf a day orma day - ark About one half a day to round it went to work next day I have to it worked the Mapped for cold weather - cold realities second week in January - marking How ready but had some trouble about The hands - Sametimes the treaching Mad ready No here father was most topped thee is four days on a count of cold weather don't know how long ove threshed there - wood not stoffed to of Cold weather, ofter third week in - Murrey -. The horse fover breaking was another cause of stoffing - took about three weeks to repair it - don't Know how much iwas threshed by the last week in January , might have had one half of the crop thuskedhe had Sisteen hundred bushels- quest he had about one half thrushed. Minus Nathany hours must would as a witness on the fait of plainty testi-- feed as follows: -I am a son of the fresh, side with my father Then de came to our house of out the middle of Obloter - day he was contrasting for

Anheaty . Would like a purchase what we had to bell - he Said they were growing our dollar could ten cente for bushel at Rock Poland. Latter wanted Our doctor and leften cents for to the Mr. Lee said he avoid go to the stacks and book at it is he went down, and agreed to give our deliver twelve and one half cents for bushel for in- Hon Les daid he Thought to assory good Wheat and he would be able to give that for it - he fish wrote and agreement, is and it could father was not willing to dignerty because he Olin Brot like the derive for delivery father suit he could not read - lott Min The to marit - Mr. Lu hoto a paper and wrote another - read of and father degree it - he was to deliver the wheat by the first of township fossible - ar as down after as in could trusk and deliver it -I cannot day whether the paper water defou by the wee was letter or from y. . It was blue proper the this, refusing to The written contract, that The Lee wrote from - I think that was about thetye, beforeing to the wretten contract aftresaid

3 5

Secont felid marked & thilit d.") the eft of seemed les Ochober 1 15. I have the day agreed to deliver to Find Lee at the warehouse of remul Resouthy In Antalusia Cifet Mundred Wrights of spring wheat within the mouth of possible ; for which I am to be cein one "doctar and toutre and one half cents "per fashe . E. W. Komberg." I don't know whether it was to me of by then Lee before or after writing it, I heard Tunder read it - father tried to find his glasses, so well not and Here Lee road it father wire glass, to read and could not be to read out out them. " It was the robest in the Strokes that He is her to there to further that was the same wheat delivered fatier completed the delivery of the what about the first of May - Those as late a I were the the what was drothed The road but had more take we I were to add with how you he of the your had to keep such other over had places We completed thusking all our wheat sout the party march - dearent and droved away about the lance time ded

not clean it the ofter finished them -ing the wheat was threshed out of doors - there was said raing weather in March . I would have hert the wheat to know run it through the op-- a rator - Odit not go expectly for a muchine - The machine we got did not deparate very well - the markene Froke down progratty - downtimes it want require a week, so extense three or four days to repair it. O rose 6 planeined, -When this, Lew recent from the stacks, I was at the house I want the my father to the bugger and heard: the barquening 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 docenter and per bushel, and one dollar and fiften Cents mas offered to be taken - he daid when he come into the house he would good one dates twelve and one half cents per bushel for the Arteas that was in the Stacker ing trother was present father agreed in tell it, he daid marken word deare around the country and he did not know four doon to though

Samuel S

get it out and that he did hat want the time det exactly on account of the defficiently in getting muchainer - if to time was short he did not want it Set exactly - that is all that I were ber that was said till father syme the hernel Contract - he Lee daid it mad good wheat; but thought there is a Some out in it - I dufford to thought it was port wheat Ithink I hand him day it I believe he said it while. making out the paper in the house I semember ofter Hunking of the mutter at might have been daid cost of down. I was in the house all to le ne, when they were talking, and therefore the ik the above remark was made thee the first agreement stapelated that it Should be delivered by a fixed term - Don't enember the times - I know while he (ner Lee) was freting the last Contrary that it would give res more time - the first Contract was thrown away, and was of the emportance - Down know the reason toh, I can't righter we detter then a wother, father looked for his doches in several fraces - he governow hups the in his proket - I would have read the

agreement - Men Lee read it that he ther should release, the wheaten thatalusia by the first of townshin if possible, or as doon ofter as he could get it threshed and delivered. The only deflicing in the written Contract as aforesaid to mit: Rock Island Co. Ochster 18#1555. I have this day agreed to deliver to thish I Lee at the wave house of Samuel Kennocky in "Andalusia Och Moundred Suchels of Spins "Wheat within one Mouth if possible, for "(which I am to receive one dollar and "Twelve and one half cents for bushel. (dijus) "Ei W. Kasberry.") and the Contract as read by Mr. Lee was In the time of deliving only - . I was Hat hen Lee wanted to purchase the whose tet was in the stacks - he da's he wanted to furchase the Arheat that was in the Stricks - he Said that at the buggy - he bought eight hundred bushess that it was in the house that he Said by wanted & purchase the wheat that was in the startes. I have fact of the world Acedalusia I helped thresh the cheat there wed about sixteen hundred bushes of todas trushed - one hay of it was thinked by the

39

48 father part of January - there was a beak up in the weather the latter port of Frence. - in the latter part of this viery the world free bad - not very good as any timewere muddy the latter part of Hebruary -The weather would had allow the trads to be good it thaned in the day time and from in the night - Organis for thisking weaching the latter fort of October and first of towender - inquired of device but don't remember who wow Chat he when any one of whom inguirid. I dan a makine sthoulest I believe I know Holliday had a machine. anne Commenty was there called as a webrees on fact of plaintiff and titlefied as follows: Theusen Fish & See the defeat = ants engaged soon in vag warehouse for Howing Wheat in Softwaker 1855 I daw then de en flerenary 1856 - carl, in the mery - he took mi in the fall. It is he expected to buy a good deal of Wheet - Then Roseburg delivered a letter our right trumbed bushes of theat for Fish to Keen. The first of the whood was delivered in afril about the loads the balana in May - often Mer Kendury

began to deliver the wheat I had no Conversation with Fish & Lee - In January I suid to Tun Les that the Whiat had not cana in as he expedit, and think he told me that he expected har. Karburg to deliver Some Wheat - Said Waltering more. Saw him in Rock Syland - he sent no sacks - I don't remember that I dent with to him to Send Jacks for that which -Toffered One dolen and there controls Votober for son at and could not beg. may have been after the 20th October In April and may it wood for to Court Gross Examinal. - The whiat dilines by Rosberg was damp and may to as not merchantable wheat don't think Mullers would have fair over the got Sitt five cents for sushe for it - and accustomid to handling and dealing in wheat - I supposed I received the - Anheat as were house raam would been had money of the wheat, as I did, if then the oldest don Monday talebory day the what was his and I gave him souft in his manufer the whole of it - a reliable I report they book as not - I wonther

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Fish thee and informed them of the 42 Condition of the wheat and they and was that they would not have it - I think I did not receive their letter's wintel after all the wheat. Was delivered & until some fourteen days ofter of writemail facilities were four between interior and book Hand when Fish & La reded any letters have been as long on the Touter Wheat raised in the mouth of October 150. Same twenty or thaty cents for 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 expende if could this in the receipter. There hosebory the place by afterwards told but dispose of it and do the best I could with it. I am agranted in the the region of Country from Ratebury's to Andalusie the fore part of behaving the more were goodthe latter purt wire rather day to therework have been some three days that it would have sun bad handing wheat - i'm March the roads was work to good Ave treasured army what in Afril his any ther month it was a vag

a good deal of Wheat was coming in. Whink on the Oth of May the last of this wheat come in. Wer. Ausbury the Harnitt laid Then he would not take the wheat - and I told here the Orkeat would not Keep without wich trouble and he told me to do the hat I could with it. Constion Roseber, claimed all the noteat, and the receptor were given in his rease. and Mata that he believed it for heartiff he did not day where two raids Old Pari Action, the Plantiff dura none of the wheat "Varation . Witness was the westered ou the fix of the plainty and testified as follows; The Askert of delivered at condelusia des not belong to me - It was father what I lived with father - worked on his from had no Asheat that Leaven- I reight him Said to A worthy that it was my wheel - if I have a loud of wheat to town . Cull it my wheat - Hen Known the faid he rould have to six receipts in my men I hink I said it and my father week age that Ortuine. It was in him what took flow in October than in May

44 Which I said it was ing fathers wheat - have the revolution of calling it. the Munty ton called they ander the replace who testified as fallowed: 1 o Thurch and April 186 & Kinget the comparable when I - so weline in famous Then was a good deal of Mount, and it was boy Eld - mag seven all water to that feefle did not do anything. heretof some wheat during this time. then the same was on in Fibring. ? Rower we sed said weather but But day when. Day Ox Animaly I think the drown to Manuary Officted the world in March-I do d' by that wheat could not be , Landed in March - I suffer I Could have harded as much as to bushele to the land - I think I got off two as then hundred bushels in Rebning - One des the town Could have more than in couply sted. In hibrary think and April the word wir not reflicult and a deticing what he first them of car account was in Milerch - Type that Une there was Desting to Kinder Leading that I have a except some

Cold and Spon Which was all the testimony find by the Hearth ! The Defende is then entraduced but, Forms as a motours who testified as fellowed I thinke to plantiff in late com mence & thering January fruit trucket Moongh the Month of flemwars expectof the month - but little in Extrumythreeke on first day one hundred and fifty bushels - Three hourstring bushels in the first week - about the treatiett of January we had Eleven heretelden dry and one half bushels of wheat trible days we had to men half hunded Machine hunds had to feel the place of Nathary's haride we had three & made Freaks that required about three how I each to repair - was not hundred my for the weeks up to the twentite. . If pecentil had turnetted the hearts he ought to have done the could be in the at the rate of one knowed and filly to their per day - occar the communication at of bur threehing down of the humany would not have on account of the cold -

46 no More home a few days handing fencing from the Mussissippi here. 1 know the Country about Rasberry's - There is a main traviled road from suche - Rusia Which Resburg Would Strike about four miles from Andalusia I should not Consider the wads my bud in the later part of January .. My trans were on the road there, and The was wathing to prevent housing My leaves were on the west for about Jour Works - the day we quit thisting the rozar in the flopf is but the ground was frozen se redermeath - the first chatruction to haveling was after the fourteenth of Much-I told her. Rosebury that if he did not get away his wheat, that probably Fishble would not take it - he said he was Last factionlas whether they took the wheat or not - he hought he could get a better price - that there was no danger of the Cussian war occasing - that wheat. would come up byon havest and he had No doubt would be with One dollar and fifty cents and twee harding rails from wethin three

miles of Antalusia - Os far as I am

acquainted with the water, Eastbury's word

was about the Same as that I was harling oper. Roseberry hail Some good rwheat and Some very poor - it had been not and. fally frozen - out of the distantiundred Justile of should think there neight have ben fourteen hundred dumaged - as me threshed the robert way one hand the robert away- the good to one place and the bross. & parained . - I doubt know of any hand except Coschergs Sont who rebelled on account of Cold - I had the coldet place about the work-No fort Whiteaker was then colled an front of defendant and testified as follows: He took the threshing machine to. plantiffs the last day of December - am = over eed threshing farewary first - the In his of wheat had taken Considerable wet and was wet and frozen accountiele There were serial thereting reactions in The neighborhood - that for was our first threshong that wenter we could have thushed if in November or I wisher, if Walted long enough deforchand to the it would lest have write fred with they there may ments I had two her-

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the foor wheat through the wind will - had taken out what ice they could and then mited it with the good wheat, - The Sad wheat would spoil the good -Cross Examined - I had this con-= versation with Carati Rusburg, Robert Merrington and Stird furtou; I do not know precisely what Moratio Said - I presume he was lathing about menting the wheat hen Kasebary Flainty was not present There was between five hundred and one Thousand busheld of wheat there of presumer Samuel Kernothy next carried on behalf of clife reduces testified as fallows I do not know which whether Showed the wheat in question to the brown Moratio told we it was his, and I don't he member that he said it was his fathers. " D. A. Chabat was then called by defendant and testified as fallows Am agrainted with the faction to this Snit - I have been in the wheat business for three years - can this when in 1.1 Twis not Merchantate - would not have been worth more than one fact of the free of good wheat - Soil truck the water would reach the wheat en The ware house.

50 A yendants then called front to books. who testied a fallows -I assisted in threshing this sokent Should drepper at least one fourth was in bad Condition - I should daffer On thousand I while we threshed by the 20th flerwary - We were her weed by Her. Koubery the plaintiff in threshing The wheat - Could have threshed from one hundred and fifty to two hundred Sushely per day with full hands they Said they deparated the good of one the said I live about four miles from the family no difficult in getting machines. in the face of 1800 - Nahury's don't refused to work on account of Cold Accaster don't know of any one else: who did - I bear the words were pounds - when that this thing that wenter it is handeny - the wall wire met duch as to abstruct May handing -Cost Extermend. W Brunch the road were thanked to me et was cold in farming Afry my finger on account of a tre in my glove-C. A. Chebet recalled by differ. It was in may 1 16 that I feet start

this wheat It was musty and during and was not mirchantatte William Wat was then detroluced as a portrees on Scholf of defendants and Whiteil as fallows -I live do no There fourthe of a male from the plainty of recollect wheat sing hauled by my house in Februar that The first of March of hauled way wheat about six hundred bushels to Collectickes about one vuile below Kennothy - There . Coursement harding it to out them days and in the middle of the day the water would rece, but the roads were good. Along the back of February and first of thank the roads were diet better - Several times the I now proved beat into the roads, but the travel would wearest down - In the face I had no difficulty in getting a muchine to thresh my Rokeat - I threshed in to rember and because - fout know whether har. Helliday was busy or not with his machine - he offered to thresh my Wheat in America - I hauled & 4 trendred bushes in ten or tribu down ove hundert fat, bushed it the land - I lout Know that the made were materially better

52 about the first Tranch than in theus it was about the dame Defendants then called heldon Stermond who is this of a Counter I have him a Mr. The and Har. restatory for four relat - had a converse con with the plainty about the Kett of May 186, he suit that he had light hundred further of wheat in Leun with to in-archouse to hele, that he had once her it to Fish & see, but did not deliver it when he contracted to, and that they would not have it, and he weiter to dell to do me one else -. I am a harries maker by trude - he availed to buy's det of hurriess and he wanted me to wait on him bit he could but this wheat he down that then Lee had Sexulated out for tof the Contract and added a part is as to alter it that he filmentill was going down to remails to sell the wheat, and wanter me to go with heme - died that if he dad the wheat it would be would fur the money then for a himself if not be recalled in in worth till to fell it le rout & facility this was about the Contests of I stay I dear the separately last some

I findant then extradured in criding the written Contract oforesaid, and of which the becowing is a true cofy: Noch Island Co. Ochober 15 160. Than this day agreed to deline to Fich & Lie at the wave house of lamuel Kennowling in Andalisia Oight berndred bushels of a freez Wheat within one mouth if passible for which I am to receive one dolear and Tween and overhalf costs for tribe 6 11 Marchany" which was all the Lesterrour give outte trace of this course on behalf of definitions. and arhich together with that ye very by the plainty as aforesaid was all of the Whenong goven on the treat 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 Instruction at the instance of and on Schollof plaintiff - were given by the Count to the Jung - to wit: Instruction for our two, three four, five and I +! Oligan Hi Noseburgh. The boxer 1. If from the evidence in this case the

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54 Jury believe that on or about the 18th day of October A. M. 1805 the Heintiff in this Suit Contracted to see to the 1ift 800 tasked of wheat out of wheat their en the Stack repor the Hainliff's premises, and unthreshed, and that by the terms of Jan Contract said Hy was to deliver Such when at Andalusia at the warehouse of annuel Monworthy by the first day of November then neight & following if possible or as done thereafter as dain diff could thrush and detiver said what, and that the Mainty. after such 18th day of October Minde reasonable Quel proper effect to deliver duch wheat it And case at oforward, and did within a reasonable time thereafter delever dans 800 bushels at the place provided for ex the Contract then the defendants are leable to pay said If the price agreed reports Said parties led the price of said wheat, provided the My used proper care in preserving said wheat from harm before delivery and delivered faid defter an a veriego greatity of wheat threthed form If Street and at the time said Gatrack was made.

the fung believe that the My contracted to

sele and the Soft agreed to buy 800 bushels of Wheat, which wheat was to be threshere from and out of stacks of wheat that Ilf then had on hand, then the law would outly that such wheat was to be of an average quant as compared with the entere quantity in Such Stacks, and it would make no difference whether such wheat was merchantable or mot, as the differ under Juck circumstances would receive the precise article thing con-= tracted for and would have moright to Complain, unless the Py did or junited dome act or thing by which the average quality of said wheat was impacred. . 3. If from the evidence the fire believe that the Il was unduced by the Difts or either of them, to dign the written Contract offered in loudence by the fraud and Occumvention of when of vand Hafendants, then the plainte in this case is permitted to prove the love Contract between the futies by purch, and if tender dark or ourse towns the fer relieve from the condence that he old has reasonably performed duck paral contract

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if found to exect, in respect to the Sale and delivery of said 800 bushels of wheat at Andalusia, then the Ill is entitled to recover in this duit, pro-- vided that in other respects the Ill has performed his part of air parol contract. 4. If from the cridence the from believe that the parties to this driet extend ed the time for the delivery of said wheat, they might be whilly do do, whiterent Contract was in paral or in writing, and the evidence of duck extention may to insured from circumstances from I spirt - Thus, if from the evidence the Jung believe that Lee one of the of fer in formery 1856 expressed a willing mes to weene said wheat from the My, or direction his warehouse man to do to, it is proof Ending to Show that the time for the delivery of land wheat was extended begand the time numbered in the willen Contract. 5. If from the loidence in this can the freez believe that the Agendrate enter of the my on or about the 18 th day of beloke 1800 by frank and signer woon too endred the of to digor a weether Contract for the dule and deliver to the

11 500 bushels of wheat, then the forg are found by the law of the land to disregard such written Contract utterty and entirely, when officed in evidence as proof of such contract and you This case the fury from the evidence believe that the defendants or either of Them when reading to the Hof the at the time being unable to read the witten Contract offered in Evidence, and misread the same in any natural part, and thus incurred the die depre dand contract, them Inch contract is not bearding upon the de and is wholly void as to him. 6. If from the condence in this case the Jury believe that . Lee one of histyle in reading to the of the contract offered in cochence the the Fly being there is eather to read the Same I materially mis and detail written Contract as to the line of the delivery of the Nobeat of then of en Sail Contract and these induced the If to sign the same, such an actor the part of Les words retain and reader word duck contract as to the His an this built To the growing of cash and all which

instructions, the defendants then and there excepted which we eightons the bour overeld and gave said withouter to the fury The Defendants then and the ofter to lettering in the cause hos closed and defor the residetion of the wordist wheel the Court to give to the free the fallowing instructions on their bitally to wit; Not one, two; then, four, fire, differen Cipht, mine and type: 1. The Court will - tustinet the fury heat They are the sale fuelyes of the exclibition due The testimony of all west were testilying before them, and are most bound to believe that of any roitness whom they believe unworthy of bredit notwithstand = ing the Character of Juch witness for truth and veracity has not been for-- mally impeached by the testering of 2, A Witness who makes knowing Contradictory statement in regard & any material fact in usine before them is remorth, the credit of a fury. 3. The Cours will instruct the fire . That if they believe from the decidence Mest Maintiff admitted that he had take the

whout to defendance, but that he had Aut delivered it when he agreed to, that I fordants were not found to revise it, they will find for the defendants. 4. The Court will instruct the jury that The adversions of the Plaintiff are evidence against here. 4. The Court will instruct the for that in no event was the defendant bound to recen timmer chantable wheat of the Steentiff. The Court will enstruct the fury that if they believe from the Evidence of by the admissions of Maintif that he had not delivered the wheat in the terme required by the contract they will find for the defendants: 5. If he pay believe from the continue that the Alaintiff contracted to deliver to bushels of wheat within one two with from the 18th day of Colober 1850 at a worthy whenhouse in adulusia of possible, and that it was a advantal possible to do to, and that Manutiff did not delever fair wheat white the teme, There the fung sound from a construct for the definitions, resided they from that defendants of howards accepted. 59/2000

the Said wheat under Jane Contract. her Franky Coutracted to deliver 800 buthely of ifice no robent at Andalusia at Newvorthy's ware house by the first day of the winder hat, 165 if pass the, if has, as soon after us it could be thoughed and delivere, & that it was that fossible to deliver said wheat by the laid four day of November - then the Jury must believe Hit the plaintills used all deligence and exertion in getting the dame thatlet and delivered as doon ofter daid first day of lovember al, 1850 as passible, or the perenty cannot recours I The law is that the wheat to be delivered on a contract to deliver a Enterin Mumber of bushels of wheat is to leafa fair men Thantable quality - and Merefore if the plainty under the Contract only delivered wheat which was not of a pair mirchantable grouldy - he causes accour refore the said contract. 8. Wheat of a face Murchantatie quality wears good fleer wheat in marker without reference to whether the course has generally demand wheat or not. I I continued for the preschase of It's

60

bushels of wheat to be threshed and delivered by the deller is mat a four chase of the un-= threshed wheat, and I ach wheat would resuce in the propert of the deller wenter the Janu was delivered dender and according to the Coutract, Il, If the fory believe from the sindence that there was an extension of the time for the deline; of ward wheat by the Suit believe from the evidence that the wheat Was delivered in Strict Compliance with the terrisof fait extension, otherwise the Jung must find for differentialty and further the once the west of defendant to Kenworth that he reputed Assbury to ould deliver done wheat is the of itself evidence of such extension." And the bout their gave all said instructions as asked by the All cycles the 3rd 4th & 6th and then and there refused to give the daid third fourth and digth instructions as asked to Madeple the days. (Which entruches a modified the in the words and figures fellowing? 3. The Court will enstruct the Jung that If they believe from the Condense that Marchite and without that he had dead the

wheat it Defendants, but that he had 62 And delivered it when he agreed to, to defendants were not bound to receive it and that difts did not recie it & if from all the Evidence they believe such to be the fact they will find for the defendants, 4. The Court will enstruct the fung that the admissions of the Heartiff are evidence against him, but that all The admission of a party made at the Same time & in the dame conversation both for and against himself much de considered & weighed by this freq. 4. The bout will instruct the fury That in my event was the defendants hound to receive universale Moheat of the Mangliff remless they believe from the evidence that the dift purchase Certain wheat of plf of a different quality ofter a fair examination of it quality or purchased entain when then in stacks, with a fair offertunity gay ameng its quality. The Court will instruct the fury that if they believe from the condense by the advissions of Herentity or attentite that had not beioud the wheat in

the time required by the Contract they will find for the defendants. 6. If the Jung believe from the evidence that Hamiliff Contracted to deliver 800 bashels of spring which at Andalusia at Kenworthy Warehouse by the first day of November Adl, 185 if posselle, if 121, as soon after at it could be tireshed and delevered, to that it was not forsite to deliver daid wheat by the fait first day of toveruber - then the freez toward believe that the Fleundith I ded all reasons deligence and exertion in jetting the Jane Brushil and delivered as Love after Laid first day of November A.D. Boo as Iv as reasonably possible, or the plantity. Cant recover:" To the modification of the Jaid think, fourth and dixth instructions by the Court as aforesaid, the defendants then and there excepted, which exceptions the Court overaled and gave the faid thirt fourth and sight instruction as moderail by the Corn't ofaredaid to the fury The which the Jury returned a verdeit for the Alicality, and assessed his courses I now trunded delicate the defent and then and here walned their weeking

to the Court for a new trial, for the following Wasons! First. That the Court gave to the Jury in The case on behalf of and for the prairies erroneous vistmehous. of could the the werdiet of the fury was against the instructions of the court in the Careso. Think, - That the wentiet of the Juny was Contrary to the evidence I in the case. Fouth, - That William Je tevine one of the furgion who tried the cause, was when doin case was tried over in 11, hand of age Which motion the les with our weed, The overely the Juil A feid and then and there excepted: and to the andition of the fudgment on said windred the defendants him and there excepted and Aruged an appeal to the Supreme Coul of this drote which said appeal was allowed by the Court, upon defined out Fring their will of in preplices within History of logither to the are affect find in the fenal dume of this therman dolland with Allowing Les and Is owing its de The soil by the blick of this bound - and

The defendant from that they their will of Lieghton any be allowed signer and haled by the Court four to Thompson The is in the words and figures pleasing to weit: Nnow all men by this fruit, That ving my wow to, the and my the of the County of Noch osland and Henry Leex of Mercer County the of ellinois are held and firmit, tound Mento Elijah M. Rossery of get them County Same States on the period dum of Two Thousand I dus for the payment of which will and I will to be middle, we bead turned of our Their, executors and Administrates fourty, deverally and finity to these prosentes Witness our hands and leads this 27th day of April Ed. 18.8. The Condition of the later of legition is duck, that who est the above the Olytek the Losseling rice would a mily must against the above someden they will the thed thy to see for the days of the reducities doceans at the special fameur, seems 65

66 the said More downty Circuit Court, held at Said. Miles to ante in January Ado, 1853 - from Which dad fred; ment the said They men to. Fish and High De aforesaid hot and office ? the daprime Court of the doct of Plynois: Now Therefore of the said They rate the and Mylo Lees Shall proceede the dis appeal wethout defen and those and and truly pay the Judy ments, water I votereste and damages that there he be reduced against them in case said Yedgement be aprimed by the Said safrance wourt, then the above obligation to be cried, ettering to be and remain good and good Edward Spie market Mis routh fin delle style freit 1858. 3 Myle Lee & Sold April to Spiel 29th pril 1608.

State of Illmois mercer County po, J. Harvey S. Senter, Clerkey the bircuit Court of Said Wounty do Certific that the foregoing is a full and Complete transcript of the Summons, the Pleasing of the Parties respectively the Ventiet of the egy, the Judgment, all orders made by the Court in Said course, the Bill of ox ceptions and the Affect Bond filed in Said Cause, as affears from the meones and file in my office. In testimony whereof I has hereto signed my mane, and official the deal of daid leour to my office in Aleko this 5th day of August AD, 1838. Harry S. Sentes, Ful and now comes the said appellant and says that in the recover sproceedings oforsing Thuo is manifest error in This to ment 180 The court errice in giving each of the instructions asklu for the plaintiff in the court below. 2 The court irred in modefying the deft metivetions 3 The court erred in omuling the nedly 120 for mus much

Mysouth Fish & Elijah W. Rosebury Record of Filed August 18th 1858

APPELLEE'S BRIEF.

FISH & LEE, Apellants, vs.

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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SUPREME COURT OF ILLINOIS,

Third Division-April Term, 1859.

MYRON H. FISH and MYLO LEE, vs. ELIJAHM. ROSEBERRY. Appeal from Mercer County Circuit Court.

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.

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.

Amended declaration quantum meruit por 1000 bushels of wheat. Plea, general issue.

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 & Lec, 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 dont 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 misrcad 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 daywent 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:

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 \$1.123 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 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; 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.

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 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 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 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, dont 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 spokento 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 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 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.

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 1 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 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

Cross-examined.—I don't know of any hands except Roseberry's sens 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.

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, dampand unmerchantable.

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 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

This was all the evidence.

The court gave the following instructions for the plaintiff:

- 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.
 - 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 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 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

6. If, from the evidence in this case, the jury belive 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.

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:

- 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.
- 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 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).

- 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.
- 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.
- 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.
- 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.

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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. 17 Maine, 5. 1 Gilman, 100. 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 istruction holds, that, if the wheat was damaged in plaintiff's hands, without the negligence of plaintiff, after the contract was made, and be-

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for e 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 varient 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. Loseberry Wesharts & Points

Files May 10, 1859 L. Leland Elik

APPELLEE'S BRIEF.

FISH & LEE, Apellants, Vs. Vs. In the Supreme Court at Ottawa, ELIJAH W. ROSEBURY, Appellee. 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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Filed april 22, 1839 L'Aland Celerk