the town. Upon the admitted facts of the case, therefore, the plaintiff could have sued for the recovery of his money the very day he received the bonds, and the general rule is that the statute begins to run from the time the party might have brought his suit. But it is not necessary to apply this rule in this case. The town paid the interest on the bonds for two years. Giving to these payments the utmost effect that can be claimed for them, and conceding that the statute did not run as long as the town treated the bonds as valid and paid the annual interest, it ceased to do this after 1872, and from and after that date denied the validity of the bonds, and paid no interest; and, undoubtedly, the statute of limitations would run against an action for the money paid for the bonds from that date. *Furlong* v. *Stone*, 12 R. I. 437; *Bishop* v. *Little*, 3 Greenl. 405; *Bank* v. *Daniel*, 12 Pet. 32, 57; *Bree* v. *Holbech*, 2 Doug. 654; *Cowper* v. *Godmond*, 9 Bing. 748, 23 E. C. L. 788; *Lunt* v. *Wrenn*, 113 Ill. 168; *Jones* v. *School Dist.*, 26 Kan. 490; *Weaver* v. *Leimann*, 52 Md. 709; *Miller* v. *Adams*, 16 Mass. 456; *Palmer* v. *Palmer*, 36 Mich. 488, 494; *Tripley* v. *McPike*, 50 Mo. 591.

The judgment of the circuit court is affirmed.

SCANLAN *et al.* v. HODGES *et al.*

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 20.

1. CONTRACT—EVIDENCE—CONSTRUCTION—PROVINCE OF COURT AND JURY.
   The questions whether certain commercial correspondence constitutes a contract, and, if so, what its proper construction is, are ordinarily for the court, though in exceptional cases, when the alleged contract rests partly in correspondence and partly in oral communications, the question whether there is a contract is for the jury.
2. SAME—BREACH.
   The consignees of shipments of wheat were under contract to collect the bill from the purchaser, a milling company, and then to give an order on the railroad company to deliver the wheat to the milling company, and thereupon to remit the amount to the shippers. *Held* that, if the consignees expressly or impliedly consented to its delivery by the railroad company to the milling company before payment of the bill, they were liable for its price.
3. SAME—PLEADING—REDUNDANCY.
   In an action by the consignors against the consignees to recover the value of the wheat, an allegation that the wheat was delivered to them by the railroad company was redundant, and need not be proved, it appearing that the wheat was in cars on a spur track, and confessedly subject to their order as consignees.
4. SECONDARY EVIDENCE—ADMISSIBILITY.
   Parol evidence by the station master of the contents of a writing given him by the consignees, stating that the railroad was not liable for wheat consigned to them and delivered to the milling company without written orders, was admissible, it having been shown that the paper was lost, and could not be found by diligent search.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Lyman F. Hodges and Samuel Y. Hyde against Michael Scanlan and O. G. Wall to recover the value of 24 car loads of wheat. Verdict and judgment for plaintiffs. Defendants bring error. Affirmed.

Statement by CALDWELL, Circuit Judge:

This suit was brought in the circuit court of the United States for the district of Minnesota by Lyman F. Hodges and Samuel Y. Hyde, the defendants in error, against Michael Scanlan and O. G. Wall, the plaintiffs in error, to recover the value of 24 car loads of wheat, alleged to be of the value of $8,601.90. The defendants in error were dealers in wheat on the Southern Minnesota Railroad, with headquarters at La Crosse, Wis. The plaintiffs in error were bankers, doing business under the name of Bank of Lanesboro, at Lanesboro, a station on the railroad, in Minnesota, about 50 miles west of La Crosse. At Lanesboro there was a firm engaged in operating flour mills under the name of Lanesboro Milling Company.

The complaint alleges "that in the year 1884 the plaintiffs and the defendants entered into an agreement and arrangement whereby the Lanesboro Milling Company, a company doing business as millers in said Lanesboro, were to order from the plaintiffs such wheat as they desired to use in their milling business, and that the plaintiffs would deliver said wheat free on board of cars to said defendants, and the same should be consigned by rail to said defendants under their style of Bank of Lanesboro. That the said bills for said wheat should be mailed by plaintiff to said bank, and the said wheat should be shipped by plaintiffs exclusively to the said Bank of Lanesboro. That said bank would receive said wheat and hold possession thereof until the said Lanesboro Milling Company paid for the same, when the bank was to remit therefor to the plaintiffs; or, in default of so holding possession, defendants agreed to pay for said wheat themselves. That under said agreement and arrangement wheat was shipped by plaintiffs to the Bank of Lanesboro, as ordered by the Lanesboro Milling Company, almost daily from May, 1884, up to April 9, 1889. The wheat was consigned in the same way, and the said defendants have during all of said time, up to March, 1889, paid on presentation the bills for the price of said wheat." That between March 8 and April 9, 1889, plaintiffs, at the request of the milling company, shipped to defendants 24 cars of wheat, which "was all received by the defendants under the agreement above stated. * * * That the said defendants, in violation of their contract with plaintiffs, allowed said Lanesboro Milling Company to take possession of and use said wheat without collecting or receiving the price therefor;" and that the mill company has not paid for the same, and is insolvent; and they demand judgment for the value of the wheat.

In their answer the defendants admit that the plaintiffs sold wheat to the milling company, and shipped it by rail consigned to the defendants; "but the defendants never had, nor was it agreed or understood that they should have, possession of or dominion over or any responsibility for the said wheat, except to give an order for its delivery on payment therefor, and to transmit to the plaintiffs, less exchange, on pay-

ment therefor to them by the said milling company." They deny that they ever authorized delivery to the milling company of any of the wheat shipped under that arrangement until it was demanded and paid for by that company, or that any wheat was delivered to them by the plaintiffs.

Prior to June, 1884, one Easton owned and managed the Bank of Lanesboro, and there existed between him and the defendants in error and the milling company an arrangement by which the wheat sold by the defendants in error to the milling company was consigned to the bank upon the understanding expressed in the following letter:

"LA CROSSE, WIS., May 12th, 1884.

"*Bank of Lanesboro, Lanesboro, Minn.*—GENTS: Hereafter our agent on the railroad will send bill of wheat shipped you for Lanesboro Milling Company, and we shall expect you to collect on those bills, and not wait for a bill from our office, unless you stand in the gap,—that is, become responsible for the wheat. If there are any errors, the mill company and our firm can adjust afterwards. We inclose a list of freights from stations that are liable to ship there. We will advise our agents to put rate of freight on bills.

"Yours, truly, HODGES & HYDE.

"We ship the wheat to you to collect before the wheat is delivered.

"H. & H."

About the 1st of June, 1884, the plaintiffs in error became the owners of Bank of Lanesboro, and succeeded to its business, which they continued to conduct in that name. At their respective dates the defendants in error wrote the plaintiffs in error the following letters:

"HODGES & HYDE.

"*Dealers in Grain and Produce on the Southern Minnesota Division of the C., M. & St. P. Ry.*

"LA CROSSE, WIS., June 6th, 1884.

"*Bank of Lanesboro, Lanesboro, Minn.*—GENTS: Your favor 5th inst., with statement, at hand. If possible, we will examine account before this letter is mailed. We are surprised at your inquiry, how about wheat shipped to Lanesboro Milling Co.? as we supposed you knew all about it, and had been following method as follows: We ship wheat from certain stations to Bank of Lanesboro. At time of shipment, our agent at station shipped from, mails an invoice to Bank of Lanesboro. On arrival of car of wheat, Bank of Lanesboro collects the bill from and delivers the wheat to Lanesboro Milling Co. Bk. of L. then credits our account with the amount collected. Why the inquiry? Has Bk. of L. changed proprietors?

"HODGES & HYDE.

"CLARKE."

"JUNE 18th, 1884.

"*Messrs. Scanlan & Wall, Home Exchange Bank, Lanesboro, Minn.*—GENTLEMEN: We have sold to Lanesboro Milling Company eleven cars of wheat, which will be shipped to you. The price of wheat is 91 cents per bushel, less freight to Chicago. Invoice will be mailed to you from station shipped from. On arrival of each car please collect amount from Lanesboro Milling Company, then deliver wheat, and remit proceeds to us. * * *

"Your friends, HODGES & HYDE.

"CLARKE."

The course of business was this: When a car of wheat was shipped to the bank the defendants in error sent to the bank a bill therefor in the following form:

"WELLS, MINN., March 14th, 1889.

"*Bank of Lanesboro, Lanesboro, Minn., to Hodges & Hyde, Dr., Dealers in Coal, Grain, and Produce:*

"On Southern Minnesota Division, C., M. & St. P. Railroad.

"1 car wheat, No. 5,594, Am't.

"467 bushels, at 85c. $396.95."

At the same time the milling company was advised of the shipment by a notice in the following form·

"LA CROSSE, WIS., March 8th, 1889.

"Wheat shipped to Lanesboro, Minn.

"Bought of Hodges & Hyde,

"Dealers in

"Grain and Produce.

"On the Southern Minnesota Division, C., M. & St. P. Railway.

"DATE.	CAR.	WHERE FROM.	BUSHELS.	GRADE.	PRICE.	AM'T.
		"One (1) car wheat.				
	"5304	Mapleton	462		76c.	
		"Tare	15		4½	
			"447		80½	$359.80."

The defendants in error continued to ship wheat to the bank and the bank continued to collect and remit, less its exchange, for the wheat consigned and billed to it from June, 1884, until May, 1889. The shipments amounted on an average to 6 car loads of wheat per week, averaging in value about $350 per car, making the total value of all shipments for the whole period between $500,000 and $600,000. During this time the business was conducted to the satisfaction of both parties, and without complaint, save in one instance, the occasion and the nature of which is shown by the following correspondence: On the 6th day of January, 1889, the defendants in error wrote the plaintiffs in error the following letter:

"(Confidential.) JAN. 6th.

"*Bank of Lanesboro, Lanesboro, Minn.*—GENTS: There are 34 cars wheat billed to your bank by us that has not been paid for. We understand they have been, or most of them have been, unloaded. Now, will you please tell us just how this matter stands? We are holding you, and we suppose you are holding the R. R. Co. We presume this matter is all right, but it implies a good deal of money, which we want before you give orders to have it unloaded. Have they the wheat on hand that is not paid for? We hope this matter will come out O. K. without trouble; and please consider this letter confidential. Yours, truly, HODGES & HYDE."

To this letter the plaintiffs in error made the following answer:

"M. SCANLAN, President. O. G. WALL, Cashier.

"*Bank of Lanesboro. Sconlan & Wall, Successors to J. C. Easton.*

"LANESBORO, MINN., 1-7-1889.

"*Messrs. Hodges & Hyde, La Crosse*—DEAR SIRS: Yours 6th at hand. The railroad company, through its agent here, had permitted L. M. Co. to

unload cars without orders from us, we exacting payment for all cars delivered by order. The auditor of the road came along one day this week, and checked up agent, and got 'onto' the arrangement, which precipitated a crisis. I delivered the company (its agent) orders for the cars, taking a bill of sale of all wheat, flour, and stock in the mills, and an assignment of all insurance covering the same, ($9,000.) There was, approximately, $9,000 to $10,000 worth of wheat on hand, or in flour ready for shipment, at this time. I have since then remitted you nearly $3,000, and would have been able to have remitted you $2,000 more to-day had it been possible to handle the cars, but the push engine is off bucking snow, and will not be back until to-night, if then. If the stock can be gotten out, I will be able to remit you $2,000 or $3,000 to-morrow. It will be ready for the cars, and I trust we will be able to get them set in where they can be loaded. I have taken every precaution to be on the safe side, and think everything safe, and assure you that it will be looked after with more anxiety on our part than you can feel. If the cars can be handled, the whole matter can be cleaned up by the middle of next week. Car '20 Tyler,' 600 bushels, is not unloaded yet, and will not be until all else is cleaned up. Please send me a statement of all cars charged to us.

"Resp'y, O. G. WALL."

The station agent of the railroad company at Lanesboro testified that, at the request of the auditor of the railroad company, he went to Mr. Wall, to get a writing with reference to the cars which had been delivered without the order of the bank, and that Mr. Wall gave him a paper, the original of which has been lost, and cannot be found, which read as follows:

"The Chicago, Milwaukee & St. Paul Railway Company is not held responsible for wheat, or are not liable for the wheat consigned to the Bank of Lanesboro and delivered to the Lanesboro Milling Company without written orders."

There was evidence tending to show that wheat consigned to the bank was sometimes delivered to the milling company without an order from the bank, and that the bank had knowledge of this fact. The cars loaded with wheat intended for the milling company were placed on a spur track running up to the mill, from which the wheat could be unloaded directly into the mill.

The court below ruled that the letters of the 6th and 18th of June constituted the contract between the parties, and that that contract imposed on the defendants the obligation, upon the arrival of the wheat at Lanesboro, to use reasonable diligence and ordinary care to take possession of the same, and not deliver to the milling company until it was paid for according to the bills of invoice sent the defendants. The court, in the course of a lengthy charge to the jury, told them that—

"These two questions of fact are submitted to you: *First.* Did the defendants receive the wheat in question? *Second.* Did they allow the mill company to take or get possession thereof or of any portion of said wheat, without collecting or receiving the pay for the same? These two facts must be found in favor of the plaintiffs, or they cannot recover. * * * The burden of proof is upon the plaintiffs to show by a preponderance of evidence that the defendants either expressly or knowingly or tacitly assented to or acquiesced in the taking of that wheat by the mill company without their first paying the price for the same. * * * This is an action against the de-

fendants for allowing the mill company to get possession of this wheat after it was delivered to them. If, therefore, the wheat was never delivered to defendants by the railroad company, they cannot be legally held in this action."

And at the request of the plaintiffs in error the court gave the following, with other, instructions to the jury:

"The burden is on the plaintiffs to show by a preponderance of evidence that this wheat in question was delivered to the defendants, and, if the plaintiffs have failed to show this, they are not entitled to recover in this action.

"If the railroad company or its agents or servants delivered this wheat to the mill company without the authority or consent of the defendants, the defendants are not liable therefor.

"There can be no recovery in this action for any wrongful or illegal act of the railroad company unless the defendants authorized such act.

"The burden is on the plaintiffs to show by a preponderance of evidence that the defendants delivered or authorized the delivery of this wheat to the mill company, and, if the plaintiffs have failed to show that fact, the defendants cannot legally be held liable in this action.

"Delivery of cars by the railroad company to the mill company without orders from the defendants cannot make defendants responsible to plaintiffs, unless defendants knew of such delivery, and consented to it.

"These defendants were not bound to guard against the illegal delivery of this wheat to the mill company by the railroad company before it had been delivered to the defendants.

"The transportation of the wheat by the railroad company to the village of Lanesboro, and the notice that such wheat had arrived at Lanesboro, or even the setting of the cars on the side track of Lanesboro, did not constitute a delivery of such cars to these defendants, unless the defendants knowingly consented to accept such acts as a delivery."

There was a verdict and judgment for the plaintiffs, and the defendants sued out this writ of error.

Thomas Wilson and *Lloyd W. Bowers*, for plaintiffs in error.

J. W. Lusk and *C. W. Bunn*, for defendants in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge, (*after stating the facts.*) The plaintiffs in error received the letters of the defendants in error dated, respectively, June 6 and 18, 1884, and January 6, 1889, and it is not controverted that the business was conducted on the part of the defendants in error in the mode outlined in those letters. Exception is taken to the ruling of the lower court that the letters of June 6th and 18th constituted the contract between the parties. The letters, though characterized by that brevity of statement common in commercial correspondence, are not of doubtful meaning. They state succintly and clearly the proposed course of dealing, and make no reference to material extrinsic facts; nor is it necessary to their proper construction to have recourse to any extrinsic facts. Undoubtedly, the general rule is that the question whether given written instruments constitute a contract, as well as the interpretation of such written instruments when it is determined that they do constitute a contract, belongs to the court, and not to the jury; and this rule is as applicable to commercial correspondence as to a formal written

contract. *Brown* v. *McGran*, 14 Pet. 479, 494, 495; *Turner* v. *Yates*, 16 How. 16, 23; *Drakeley* v. *Gregg*, 8 Wall. 242; *Goddard* v. *Foster*, 17 Wall. 123, 142. Exceptional cases arise where the contract rests partly in correspondence and partly in oral communications, in which it is held that the question whether or not there is a contract is a question for the jury; but this is not one of those cases.

In the construction of a written contract the court may consider the relation of the parties to the contract and its subject-matter; in other words, the court is not denied the same light and information the parties enjoyed when the contract was entered into. *Goddard* v. *Foster*, *supra*. Looking at these letters in this light, it is clear they expressed the contract of the parties. But the bill of exceptions puts this question at rest. The bill of exceptions states in terms:

"The evidence also establishes the fact that no wheat was delivered to the L. M. Co. after its failure, April 9, 1889, and that the contract and arrangement between the plaintiffs and defendants were made by letter; and all of the letters tending to show what that contract was are hereto annexed and made a part of this bill of exceptions."

Moreover, the course of business for five years, and the letter of the defendants in error to the plaintiffs in error, dated January 6, 1889, and the reply thereto, show conclusively that the letters of the 6th and 18th of June expressed the arrangement of the parties, and that they agreed perfectly in their understanding of the contract. When the relation of the parties to this arrangement is considered, there is no room for doubt as to the object of the contract, or its proper construction. The defendants in error were wheat dealers, and wanted to sell wheat by the car load to the Lanesboro Milling Company, but were unwilling to ship the wheat in a mode that would enable that company to get possession of it before it had been paid for. Thereupon the plaintiffs in error agreed that the wheat might be consigned and billed to them, and that they would collect the price from the milling company, and then, and not before, give an order upon the railroad company for the delivery of the wheat to the milling company. It is useless and irrelevant to the case to speculate as to what would have been the duty of the plaintiffs in error if the railroad company had tendered the wheat to them, and made a peremptory demand for its cars, before the milling company had paid for and received the wheat. The contract having been proved, the principal and the vital question in the case, after that, was one of fact, and was whether the plaintiffs in error authorized or consented to or knowingly allowed or permitted the delivery of the wheat by the railroad company to the milling company before it was paid for. This issue was very clearly put to the jury in the charge in chief, and in several instructions given at the request of the plaintiffs in error. These instructions are set out in the statement of the case, and need not be here repeated. The jury were told over and over that the defendants were not liable unless they authorized and consented that the railroad company might deliver the wheat to the milling company before it was paid for, and that, if the railroad company delivered it without their consent or authority, they

were not liable. They were also told that the defendants were not liable unless they had received the wheat. Under the instructions, it was not possible for the jury to find a verdict for the plaintiffs in the action without finding that the plaintiffs in error received the wheat, and that the wheat was delivered by the railroad company to the milling company, with the knowledge and consent of the plaintiffs in error, before it was paid for. The finding of the jury on this issue renders extended discussion of the other questions raised unnecessary.

The learned counsel for the plaintiffs in error concedes in his brief that it may be inferred from the letters that the plaintiffs in error "were required, (1) on arrival of the wheat at Lanesboro, to collect the bill from the mill company; (2) thereupon deliver the wheat (*i. e.*, give an order for it) to the mill company; and (3) thereupon credit the plaintiffs' account with, or remit to them, the amount." We think this is a fair statement of the obligations of the plaintiffs in error under the contract, and it is, in substance, what the court below told the jury it meant. It was implied, of course, that in the discharge of these obligations they would act in good faith, and exercise ordinary care and diligence. The contract, as construed by the plaintiffs in error, bound them not to give orders for the delivery of the wheat, or consent, expressly or impliedly, to its delivery by the railroad company to the milling company, until it was paid for. If they gave such orders, or were aware of and assented to such delivery before the wheat was paid for, their liability for the price of the wheat thus delivered to the milling company cannot be disputed. This question of fact was fairly submitted to the jury under instructions certainly as favorable to plaintiffs in error as they had any right to ask. There was evidence from which the jury could rightfully find the fact that they did authorize or consent to the delivery of the wheat to the milling company, and their verdict must therefore be accepted as settling that question.

The complaint alleges that the wheat was delivered to the plaintiffs in error, and because of this allegation, probably, the court below instructed the jury that the plaintiffs could not recover unless the wheat had been delivered to the defendants by the railroad company. We do not think the plaintiffs were bound to prove this fact, notwithstanding it was alleged in the complaint. It was a case of redundancy of allegation. The material question was not whether the railroad company had delivered the wheat to the plaintiffs in error, but whether the plaintiffs in error had such dominion over the wheat that they could control and direct its possession. Confessedly, as consignees, they had that right. While the wheat was in the cars on the spur track at Lanesboro, if it was not technically in their possession, it was there subject to their order; as much so as if there had been a formal surrender of the cars to them by the railroad company. Having the undoubted and exclusive right to control the delivery of the wheat, the jury, by their verdict, have found that they exercised that right, and that they authorized the railroad company to transfer the possession of the wheat to the

milling company before collecting the price. These findings are conclusive against the plaintiffs in error upon their own version of the contract.

These views render it unnecessary to further discuss the exceptions to the giving and refusing of instructions. The exceptions relating to the admission of the letter dated May 12, 1884, written by the defendants in error to the Bank of Lanesboro before the defendants purchased the bank, are unavailing, because the letter was withdrawn from the consideration of the jury, and was not considered by the court. There is an exception to the admission of parol proof of the contents of the written paper or instrument given by Mr. Wall to the railroad company, relating to wheat delivered by the railroad company to the milling company without the written order of the plaintiffs in error; but the proper foundation for the admission of parol proof of the contents of the paper was laid, by showing that the paper was lost, and could not be found after diligent search in the office and places where it ought to be, and where there was any reason to suppose it could be found.

A separate examination of the numerous other exceptions to the ruling of the court in admitting and rejecting evidence is not necessary, as none of them are of any general importance. They have all been examined very carefully, and we are satisfied that none of them have any merit. Finding no error in the record, the judgment below is affirmed.

NEWPORT NEWS & M. V. CO. *v.* HOWE.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1892.)

No. 20.

1. MASTER AND SERVANT—FELLOW SERVANTS—ENGINEER AND BRAKEMAN.
A brakeman who is sent by the conductor from the rear portion of a parted train to signal the forward portion, of which the engineer is, by the rules of the company, the conductor, is a fellow servant of the engineer, and cannot recover from the company for an injury caused by the engineer's negligence. *Railroad Co.* v. *Andrews*, 50 Fed. Rep. 728, 1 C. C. A. 636, followed.

2. SAME—RULE OF DECISION IN FEDERAL COURTS—STATE DECISIONS.
In the absence of statutes, the decision of the courts of Kentucky that a brakeman and an engineer are not fellow servants, so as to prevent recovery from the company by the brakeman for the engineer's negligence, since it is a construction of the general contract of service, and not a rule of property, does not bind federal courts when construing the common law of Kentucky.

3. SAME—NEGLIGENCE—PROXIMATE CAUSE.
An engineer running back at night in search of cars broken from his train owes no duty to keep a sharp lookout with respect to a brakeman who, being sent forward to signal him, has gone to sleep upon the track; and the company is only chargeable with negligence constituting proximate cause in case of want of care by the engineer after discovering the brakeman.

In Error to the Circuit Court of the United States for the District of Kentucky.