

No. 12478

Supreme Court of Illinois

^Q
C.B.& ~~X~~.R.R.Co.

vs.

Dunning

Supreme Court -
3^d Division } of the April
} Term 1857 -

Error from Name.

The Chicago Burlington &
I R R Company & Co. v.
John Dunning
app. in error

The only point made by the
Plaintiff in error, is that the Court erred
in not granting the application of the
defendant in the Court below to
retax the costs.

If the Clerk erred in taxing the costs
by reason of having allowed for services
not rendered by the sheriff or for a
charge for which the defendant
was not liable, then the Court
ought to have granted the
application of the defendant
below and corrected such error
of the Clerk.

R. S. Stats. 1845: Chap. 26. Sec. 23.

If the Court erred in refusing
the application to retax the costs
this Court will reverse
such decision see Error.

Miller v. Adams, 4 Scam. 195 -

The Clerk allowed the plaintiff below some \$41.11 for serving subpoenas on his own witnesses. This was certainly wrong - for there is no statute authorizing a private person to serve process of any kind, nor is there any statute fixing the amount or rate of fees to be allowed to a private person - for serving such process -

The Plaintiff below was a mere private person duo more. He was not a deputy - because he was not appointed in the mode prescribed by the statute -

The plaintiff's appointment or designation was not filed in the office of the Clerk of the Circuit Court -

2d It was not entered of record
3d He neither took nor subscribed the oath required to be taken by the sheriff.

R. S. 1845. Ch. 47. Sec. 10.

Not having been appointed in the mode prescribed by law he was not a deputy at all - but a mere private person and as such not entitled to fees.

It is only by statute that the Clerk can take costs for services rendered by any officer or person -

1 Regis. 648 - 3 Series 17384 - 1 Series 658

The plaintiff was not the
agent of the Sheriff, for the
Sheriff can have but one kind
of agents to ~~use~~ - such process-
to wit Deputies - and we
have seen that the plaintiff
was not a deputy -

The Sheriff therefore did
not answer the Subpoena, by his
agent or deputy, the plaintiff,
for the plaintiff was neither
agent or deputy of the
Sheriff and; Consequantly there
for could not be taxed as
belonging to the Sheriff -

Of neither the Sheriff nor the
plaintiff was entitled to these
fines for serving Subpoenas,
the Clerk Erred in allowing
them, and the Court below
erred in referring to taxing
the costs and fees must
excluding this 4th allowed
because -

1st They were fees for which
the Defendant below was
not liable -

2^d They were fees allowed to the
Sheriff for services which
he never rendered -

R.S. of 1845 - Chap 26 - Sec. 23 -

J. W. Walker
Counsel for Plff. in Error

193
Deposits Account

Mr Chas. B. & M. R. Co
Rt in favor

John Drummond
Rt in favor

Paid to order of the
plaintiff in favor

No 193

John Walker
Account for

United States of America
State of Illinois, Kane County } Pleas before the Honorable
Isaac G. Wilson, Judge of the Thirteenth
Judicial Circuit in the State of Illinois
and presiding Judge of the Kane Co
Circuit Court at a term thereof begun
& held at the Court House in Geneva
in said County on the Twelfth day
of May in the year of Our Lord
One Thous and Eight Hundred and fifty six
Present The Hon. Isaac G. Wilson Judge
Lawrence B. Barker Sheriff

Attest
Guthrie Dearborn Clerk

Be it remembered that heretofore to wit
on the 14th day of May 1855 an Agreement
was filed in the office of the Clerk of said
Court, which Agreement is in the words and
figures following to wit:

J. D. Dunning } Kane Circuit Court
v } May Term 1855

Chicago & Aurora
Rail Road Co }

It is agreed by the parties to
this suit that the same be dismissed at the defen-
dants costs, said costs to be taxed by the Court,
the Plaintiff having received full satisfaction for all damages
in said suit

May 14, 1855.

H. B. Plato, Atty of Dist
J. D. Dunning

And afterwards, To Wit on the said 14th day of May A.D. 1855, the same being one of the days of the May Term of said Court in the year 1855, the following among other proceedings were had in said Court and entered of Record, To Wit:

Josiah Q. Dunning }
v } Assumpsit
The Chicago & Aurora }
Rail Road Company }

This day comes the Parties to this suit by their respective attorneys and by their agreement on file this cause is dismissed at the Defts Costs said Costs to be taxed by the Court. It is therefore considered by the Court that the Plaintiffs have and recover from the Defendant his Costs in this behalf expended and that he have Execution therefor.

And afterwards To Wit, on the 26th day of May A.D. 1856, the same being one of the days of the May Term of the said Court in the year 1856 the following among proceedings were had and entered of Record in said Court To Wit:

Josiah B. Cumming

v
The Chicago & Aurora
Rail Road Company

} Motion to relax Bill of Cost
This day comes the Defendant & moves the Court to relax the Bill of Cost in this. After argument of counsel the Court being fully advised overrules said motion, to which ruling of the Court the Defendant excepts.

And afterwards, to-wit, on the 28th day of May A.D. 1856 the same being also one of the days of the said last named May Term of said Court the following among other proceedings were had and entered of record in said Court

Josiah B. Cumming

v
The Chicago & Aurora
Rail Road Company

} This day comes the Defendant & prays an appeal to the Supreme Court which is granted on condition that Defendant enter into Bond in penal sum of Two Hundred Dollars with W. H. Hawkins as security. Bond to be filed in 30 days

And afterward to wit, on the 26th day of June 1856 an appeal Bond was filed in the office of the Clerk of said Court, in the words & figures following to wit:

Know all men by these presents that the Chicago, Burlington & Quincy Railroad Company, formerly the Chicago & Aurora Railroad Company, as principals, and W. H. Hawkins as surety are held and firmly bound unto Josiah C. Cumming in the sum of two hundred Dollars, for the payment of which well and truly to be made we do bind ourselves, our heirs executors, administrators and successors firmly by these presents.

Witness our hands & seals this sixteenth day of June A.D. 1856.

The condition of this above obligation is such that whereas the said Chicago & Aurora Railroad Company did at the May term A.D. 1856 of the Heare County Circuit Court in the State of Illinois, apply to said Court to, repay certain costs according to law, which the said Josiah C. Cumming had before that time recovered against the said Chicago and Aurora Railroad Company for the sum fifty four Dollars and eleven cents (\$54.11) and which said application was

refused by said Court: from which decision and
Judgment of the said Court the said Chicago
Burlington and Quincy Rail Road Company
has taken an Appeal to the Supreme Court
of the State of Illinois. Now if the said
Chicago, Burlington & Quincy Rail Road Company
shall duly prosecute their said Appeal
and shall well and truly pay the judgment
costs, interest and damages in case the said
Judgment shall be affirmed, then the above
obligation to be void, otherwise to remain in
full force and effect

In testimony whereof the Common
Seal of said Corporation is
Corporate Seal } hereunto affixed this 24 day of
June 1856.

Amos C. Nall

Secretary

Wm H. Hawkins (S)
by Plato his atty.

And afterwards, to wit on the 18th day of
April A.D. 1857, a Bill of Exceptions was
filed in said Cause, in the Office of the Clerk
of said Kane County Circuit Court, which
Bill of Exceptions is in the words & figures

following. To Wit:

Orsiah C. Dunning	} Agreement of parties that
Chicago & Aurora	
Rail Road Company	
	Circuit Court Retax costs
	in this case.

Be it remembered that upon the hearing of this motion the defendants introduced the following Bill of costs returned by the Clerk and objected to the fees charged by Plaintiff as deputy Sheriff, and also introduced the following papers which were received as Evidence in the case.

C. C. Dunning	} Have b.c. May Term 1855.
Chicago & Aurora RR Co.	
	Damages paid. Costs to be
	paid Defendant, & to be taxed by
	Court as per stipulation on file.

Defendant objects to costs being taxed for serving Subpoenas, for the reason that the person deputed by the Sheriff to serve the same, was not a regularly appointed deputy Sheriff or sworn officer, & gave no bond as such deputy, and was the plaintiff in the suit. Plaintiff admits the facts above set forth but objects to their being taken into consideration on the taxation of costs, the deputations were made for the reason that the Sheriff was unable to attend to the service in person.

Feb 28. 1855

H. B. Plato, for Dist
G. D. Dunning

Josiah D. Summing

Kane Co. Cin. Court.

The Chicago & Aurora
Rail Road Company

Assumpsit

Plff cost Clerk fee.

May term/54.	Apr 15 doc 10 fil pic & dec 10 sum & fil 10	.75	
	mo con 20 ord 20 mo and dec 20 ord 20. Nov 5/54	.80	
	Dec 10 mo stk narrow pm fil 20 ord 20 fil am mar 5	.53	
	2 Spas 80 mo con 20 ord 20 fil Dec 20	1.40	
May Sp 2/55	dec 10 2spa 80 ord jny 20 call jny 15 oath 1.35	2.80	
	8 aff fil 1.20 spm & fil dep 10 mo remit 20 ord 20	1.70	
	fil 5 pa 25 qnd 25 ent paid Dec 10 sat 15 Feb 1.	.75	
	Dec 10, 1spa 40 mo jny 20 ord 20 call jny 15 oath 1.35	2.40	
	2 mit oath 10 4 mit aff & fil 60 mo dis jny 20 ord 20	1.10	\$12.05
May 2/55	dec 10 2spa 80 mo di 20 ord 20 m & e	1.30	
	cons 30 copy 20 of & seal 25	.85	2.15
	Jury & docket fee		4.35
	Mit fee, S. Davis 1 day 50. M Williams 1 day 80 miles	3.00	
	J. J. Mills 1 day 80 m. C. K. Benton 1 day 80 m. J. Binder 1 day 80 m.	7.00	
	H. C. Hornis 2 days John Bissell 2 days 80 miles	6.00	16.00
	Shiff Bradley 1.15, Shiff Andrews 6.66, Shiff Barker 6.33	14.36	
	" Spalding 5.91 do 5.79 do 5.60	17.30	31.66
			66 11

Defts

altay sp 15 fil pap 5 fil 6 pa 30 mo sup dep 20 ord.	.70	
20 mo sup dep 20 ord 20 exp 20 mo actual 20 ord 20	1.20	
mo cart abide sumt 20 ord 20 fil pap 5 1 spa 40	.85	
cont 20 2 oath 10 exp 20 fil bili 5	.55	3.30

Mit fee A. C. Nick 4 days 10 em 9.80

Shiff Bonker sen Notice

The above is a true copy from my fee book
J. D. Clearborn
clerk

STATE OF ILLINOIS, } ss. { The People of the State of Illinois to the Sheriff of said County, Greeting:
KANE COUNTY.

We command you that you SUMMON

*Matt J. Miller, A. C. Spick
Levi Davis Hugh B. Henning & Slight Dunning*

they shall

if to be found in your County, personally to be, and appear before the Circuit Court of said County, at the Court House, in Geneva, on the *Second* ~~Monday~~ day of *August next*

~~A. D. 1857~~, to testify and the truth to speak in a certain action now depending and undetermined in said Court, wherein *Levi Davis & Slight Dunning is*

Plaintiff, and *The Chicago & Albany Rail Road Company are*

Defendants, on the part of the said *Plaintiff* and this he shall in no wise omit, under the penalty of what the law directs: and have you then and there this Writ, with an endorsement thereon in what manner you executed the same.

WITNESS, ~~PAUL R. WRIGHT~~, Clerk of our said Court, and
the seal thereof, at Geneva, this *twenty first* day
of *July* A. D. 1857.

Arthur Dearborn
CLERK.

Kane County Circuit Court,

August TERM, A. D. 1854

J. D. Dunning

vs.

The Chicago & Aurora
Rail Road Co

Subpoena for

Filed

1854

CLERK.

I hereby depuete J. D. Dunning
to serve the within subpoena
& authorize him to receive
the fees for said service

N. B. Spalding
Shff

Personally served on all
the within named witnesses
the first day of Aug, 1854

N. B. Spalding
Shff of Court
p. J. D. Dunning
Shff

Service \$ 1.00

Mileage \$ 1.50

Return \$ 1.00

\$ 3.50

Saved

(Copy)

STATE OF ILLINOIS, } ss. { *Cook*
KANE COUNTY. } { The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you SUMMON *J. M. Williams. H. C. Barton, M. J. Miller & John Bissell* with all books and papers kept by him or by Defendants relating to the receipt of a quantity of lumber by defendants in the fall or winter of 1853-1854, & transport from Chicago to Plano for Plaintiff

if ^{shall} to be found in your County, personally to be and appear before the Circuit Court of said County, at the Court House, in Geneva, on the ~~on the first day of the next term thereof to be holden~~ *fifteenth* day of *January next* ~~A. D. 1854~~, to testify and the truth to speak in a certain action now depending and undetermined in said Court, wherein *Vosiah DeWanning is* Plaintiff, and *The Chicago & Aurora Rail Road Company are* Defendants, on the part of the said Plaintiff and this they shall in no wise omit, under the penalty of what the law directs: and have you then and there this Writ, with an endorsement thereon in what manner you executed the same.

R. S.

Luther Dearborn
WITNESS, ~~PAUL R. WRIGHT~~, Clerk of our said Court, and the seal thereof, at Geneva, this *26* day of *December* A. D. 185*4*.

Luther Dearborn
CLERK.

Kane County Circuit Court,

Jan 17

Term, A. D. 1855

I hereby deputize G. B. Dunning to serve the within Subpoena & authorize him to receive the fees for such service,

Jan 10 1855

James Andrew
Sheriff

J. B. Dunning

vs.

The Lehigh & Annapolis
Rail Road Company

Subpoena for

Plaintiff

Filed

1855

CLERK.

Personally served on all
the within named witnesses
this 10th day of January 1855

James Andrew
Sheriff

By J. B. Dunning, Dep.

Fee \$1.00

Mileage 5.50

Return 1.00

\$6.66

STATE OF ILLINOIS,
KANE COUNTY.

} ss. { The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you SUMMON

Hugh B. Dunning, Clerk
Davis, Sheldon A. Dunning & S. M. Dunning

they shall
if to be found in your County, personally to be and appear before the Circuit Court of said County, at the Court House, in Geneva, on the *second* ~~second~~ *Monday* day of *February* next ~~A. D. 1857~~, to testify and the truth to speak in a certain action now depending and undetermined in said Court, wherein *Joshua A. Dunning* is Plaintiff, and *The Chicago & Aurora Rail Company* are Defendant, on the part of the said *Plaintiff* and this he shall in no wise omit, under the penalty of what the law directs: and have you then and there this Writ, with an endorsement thereon in what manner you executed the same.

Further Deacons
WITNESS, PAUL R. WRIGHT, Clerk of our said Court, and
the seal thereof, at Geneva, this *twentieth* day
of *January* A. D. 1857.

J. Deacons

CLERK.

Kane County Circuit Court,

H. B. TERM, A. D. 1857.

J. D. Dunning

vs.

*The Chicago & Aurora
Rail Road Co*

Subpoena for

Filed

Plaintiff

1857.

CLERK.

*Service 1.00
104 Mils 5.45
Ret 1.11
6.55*

I hereby depu'te *J. D. Dunning* to serve the within subpoena and authorize him to receive the fees for such service
*W. P. Barker
Shelf*

Personally served on all
the within named returns
the 23 day of Jan'y 1857

W. P. Barker

Shelf
for *J. D. Dunning*
clerk.

*Service \$1.00
Mileage 5.45
Ret 1.10
6.55*

STATE OF ILLINOIS, } ss. { The People of the State of Illinois to the Sheriff of said County, Greeting:
KANE COUNTY.

We command you that you SUMMON

Geo. Davis. Matt. J. Miller
A. C. Guck. S. H. Dunning + Munch

they shall
if to ~~be found~~ in your County, personally to be and appear before the Circuit Court of said County, at the Court House, in Geneva, on the ~~second~~ *second* day of ~~November~~ *November next* ~~A. D. 1857~~, to testify and the truth to speak in a certain action now depending and undetermined in said Court, wherein *S. H. Dunning* Plaintiff, and *The Chicago & Geneva Rail Co are* Defendant ~~s~~, on the part of the said *Plaintiff* and this he shall in no wise omit, under the penalty of what the law directs: and have you then and there this Writ, with an endorsement thereon in what manner you executed the same.

Arthur Dearborn
WITNESS, ~~PAUL R. WRIGHT~~, Clerk of our said Court, and
the seal thereof, at Geneva, this *29* day
of *August* A. D. 1857.

Arthur Dearborn
CLERK.

I have by aforesaid J. D. Don
ing to return the within
sub form & to return the
files for same

N. B. Spalding
" " Staff

personally return again
the within named intmp
to this 2^d Oct-1854

N. B. Spalding
" " Staff

for J. D. Dunning
Fines \$125
Mileage 4.44
Return 10
\$5.79

Kane County Circuit Court,
November TERM, A. D. 1854

J. D. Dunning

vs.
The Chicago & Aurora
Rail Road Co

Subpoena for
Filed

1857.

CLERK.

Speed

STATE OF ILLINOIS, } ss. { The People of the State of Illinois to the Sheriff of said County, Greeting:
KANE COUNTY.

We command you that you SUMMON

Matts J. Miller, John M Williams, H. C. Barton, Hugh B. Hemming, Levi Davis - Ghelden A. Somlin & S. Wright & Emory J. H. Rhodes, William Waterman

they shall
if to be found in your County, personally to be and appear before the Circuit Court of said County, at the Court House, in Geneva, on the *second Monday of May next* ~~A. D. 1857~~, to testify and the truth to speak in a certain action now depending and undetermined in said Court, wherein *W. Hemming is* Plaintiff, and *The Chicago & Aurora Rail Road Co are* Defendants, on the part of the said *Plaintiff* and this he shall in no wise omit, under the penalty of what the law directs: and have you then and there this Writ, with an endorsement thereon in what manner you executed the same.

Arthur Dearborn
WITNESS, ~~PAUL R. WRIGHT~~, Clerk of our said Court, and the seal thereof, at Geneva, this *22nd* day of *February* A. D. 1857.

Arthur Dearborn
CLERK.

Kane County Circuit Court,

May TERM, A. D. 1857

Wm
Dunning

vs.

The Chicago & Aurora
Rail Road Company

Subpoena for

Filed

Plaintiff

1857

CLERK.

No 11

I hereby depose *Wm Dunning*
to serve the within subpoena &
authorize him to receive the
fees for such service

Wm Dunning
Shff

Personally served on all the
within named witnesses
this 8 day of February
1857

J. P. Barker
Shff
for *Wm Dunning*
Dep.

Mileage \$11.50
Service 2.00
Return .10
\$13.60

STATE OF ILLINOIS, }
KANE COUNTY. }

ss. { The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you SUMMON

*Watts J. Miller, A. Snick
Mapes & Leiravos Davis, J. H. Conning*

they shall
if to be found in your County, personally to be and appear before the Circuit Court of said
County, *on the first day of the next term to be holden* at the Court House, in Geneva, on the *second* *mon* day of *May next*
~~A. D. 1857~~, to testify and the truth to speak in a certain action now depending and undeter-
mined in said Court, wherein, *Josiah V. Conning*
Plaintiff, and *The Chicago & Aurora Rail Road Co* are
Defendants, on the part of the said *Plaintiff*
and this he shall in no wise omit, under the penalty of what the law directs: and have you
then and there this Writ, with an endorsement thereon in what manner you executed the
same.

Luther Dearborn
WITNESS, ~~PAUL R. WRIGHT~~, Clerk of our said Court, and
the seal thereof, at Geneva, this *23rd* day
of *April* A. D. 1857.

Luther Dearborn
CLERK.

Kane County Circuit Court,

May
TERM, A. D. 1857.

I hereby depu to J. D. Denning
to serve the within subpoena &
to receive the fees for said
service H. B. Spalding
Shff.

vs.
The Chicago & North
Western Railroad Co
Plaintiff

Subpoena for

Filed

1857.

CLERK.

Personally served on all the
within named witnesses
May 29 1857

H. B. Spalding
Shff.
per J. D. Denning
dep.

Service \$1.25
Mileage 4.56
Return 10
\$5.91

Done

FILED
MAY 30 1857
CLERK

It was also proven that the deposition of J. M. Williams was taken on the 10th day of January 1855 and Hattie J. Miller the 13th October 1854. — The Court affirmed the taxation of the Clerk & refused to strike out the said Plaintiff's fees as deputy Sheriff, to which decision of the Court the defendants by their Counsel at the time excepted and pray this his Bill of Exceptions may be signed &c which is done.

David G. Wilson Seal

State of Illinois)

Kane County)

I Paul R. Knight, Clerk of the Kane County Circuit Court in the State of Illinois do hereby certify that the foregoing ^{contains} is a true & complete copy from the Records and files of my office of the papers therein named & orders entered of Record in the above entitled cause, to wit the "Agreement of parties to dismiss," & "Order of the Court thereon," "Motion to set aside Bill of costs," "order overruling the same," "Order allowing Appeal," "Appeal Bond" and "Bill of Exceptions."

Witness my hand and the Seal of said Court at Geneva in said County, this 20th day of April A.D. 1857.

P. R. Knight
Clerk

Supreme Court }
Third Division }

of the April
Term AD 1837

The Chicago And Aurora
Rail Road Company }
Appellant }

J D Manning }
Appellee }

Attendance & trial on the
2nd day of April in the
same term, before the judges
of the Supreme Court of the
State of Illinois, at the
Court room in Ottawa in
said State, comes the said
Chicago And Aurora Rail
Road Company, by W. B. Platts
its Attorney at Law, that
there is manifest error in
the record and proceedings
aforesaid in this trial,
to wit The Court erred on
the trial of said Cause in
the Court below in giving
judgment for the plain^{off}
in allowing the plain^{iff}
for and Judge for
reversing said judgment

- 2^d The Court Erred in the taxation of Costs in said Cause in the Court below in not including the fees charged by said Plaintiff for Review & Specimen Return -
- 3^d The Court Erred in overruling the Motion of the Defendant in the Court below for a relaxation of the Costs in said Cause -
4. The Court Erred in affirming the taxation of the Costs in said Cause made by the Clerk in the Court below -
- 5 The Court Erred in refusing to tax the Costs in said Cause under the Stipulations therein filed -
- 6 The Court Erred in deciding that the Clerk in the Court below, had authority to tax the Costs therein under said Stipulations and that the same were rightly taxed -
- 7 There is also Error in this Court, that the judgment for Costs in said Cause is contrary to the Law and

The Error in the Case -

And the said Appellant prays
that the judgment and taxation
afforded for the error in the
record and proceedings aforesaid
may be reversed, annulled and
killed for naught and that
the said Appellant may
be restored to all that
which he has lost by
occasion of said errors and
of the judgment and taxation
aforesaid

W. B. Pl. to,
Att. for Appellant

And now comes the said ~~Appellant~~ ~~by~~
defendant in error Dunning - by J. L.
Dixey his attorney & says that there is
no such error or errors as above alleged
and asks that said judgment may
be affirmed in all things -

J. L. Dixey for
def in error

Josiah B. Mumford

v

The Chicago & Aurora
Rail Road Company.

Transcript

Filed April 22, 1857
L. Leland
Clerk

~~44~~ 173

The Chicago, Burlington
& Quincy R.R. Company

vs
Josiah D. Dunning

Opinion

193.

12478

1857

