

No. 12888

Supreme Court of Illinois

Kelley

vs.

Chicago, St. Charles &
Mississippi Air Line R.R.Co.

STATE OF ILLINOIS,

Kane County, ss,

DANIEL KELLEY,
^{vs.}
THE CHICAGO, ST. CHARLES, AND MISSISSIPPI AIR LINE RAILROAD COMPANY. }

1

Change of venue from the Du Page Circuit Court to that of the Kane Circuit.

Pleas before the Hon. Isaac G. Wilson, of the Kane Circuit at Geneva, Kane county, at the May term of said court, A. D. 1857.

April 1, 1857. Precipae was filed in the said Du Page county circuit court in assumpsit in the sum of \$5,000 to the sheriff of Kane county in the usual form.

2

April 1, 1856. Summons in accordance with the precipae issued from the said Du Page county Circuit Court in due form.

Summons was returned endorsed.

Personally served by reading to Ira Minard, also by delivering the said Ira Minard a true copy of the within summons this 4th day of April, A. D. 1856.

L. P. BARKER, *Sheriff of Kane.*
By S. J. W. MORRILL, *Deputy.*

3

The said plaintiff at the April term of said Du Page county Circuit Court files the following declaration:

Complains of the St. Charles and Mississippi Air Line Railroad Company, (a corporation duly incorporated under and by the laws of the State of Illinois,) defendant, of a plea of trespass on the case upon promises. For that, &c., on or about the first day of September, A. D. 1853, at Du Page county, &c., the said plaintiff, &c., being the owner, &c., of a certain close in said county, to wit: the west half of section 4, township 39, N. R. No. 10 east of 3d p. m., in consideration that the said plaintiff, at the instance and request of said defendant, would permit and request the said defendant to enter upon, and lay out, and cut, embank, and fill, and grade a certain way for a railroad over and through and upon the said close of the said plaintiff. The said defendant then and there agreed to, and with said plaintiff to pay to the said plaintiff whatever and all damages the said plaintiff should thereby sustain, and what the said plaintiff therefor reasonably deserved. And the plaintiff avers that trusting in said agreement, &c., he did permit and suffer the said defendant to enter upon, and lay out and cut, embank, fill, and grade the said way over through, and upon said close, &c.

3 And the said defendant did then and there enter upon and lay out and
4 cut, embank, fill, and grade the said way over, through, and upon the said
close; and the said plaintiff avers that he has sustained damages thereby
to the amount of five thousand dollars, and that he reasonably deserved
therefor the said sum of five thousand dollars, &c. That in considera-
tion of the premises, the defendant afterwards, to wit: on the 1st day of
January, A. D. 1855, at the county aforesaid, undertook and faithfully
promised the said plaintiff to pay him the said sum of five thousand dol-
lars when the said defendant should be thereunto afterwards requested.

4 The second count is for use and occupation of the close mentioned in
said first count on the 1st day of March, A. D. 1856.

5 The third count is for breaking and entering the close mentioned in
said first count by, and with force and arms on fifteenth day of Septem-
ber, A. D. 1853, at Du Page county aforesaid, &c., concluding with the
usual averments, &c.

6 The declaration concludes in the usual form.

(Signed) FARNSWORTH & BURGESS,
Attorneys for Plaintiff.

6 *Copy of Account Declared On.*

The Chicago, St. Charles, and Mississippi Air Line Railroad Company	
To Daniel Kelley, Dr.	
To amount due for account stated in 1st count	\$5,000
To use and occupation and right of way	5,000
To amount of damages and promise, as per statement in 3d	
count	5,000

7 First plea. General issue.

15 The 2, 3, 4, 5 were withdrawn by leave of the court by the defendants.

10 The 6th plea is as follows:

And for a further plea, &c., the said defendant, &c., say that the said
plaintiff ought not to have and maintain his aforesaid action thereof
against the said defendant, because they say that on the nineteenth day
of June, A. D. 1855, the said plaintiff made, executed, and delivered to
Elisha C. Litchfield, (he being one of the stockholders in said company)
his, said plaintiff's receipt or release in writing, in the words and figures
following, to wit:

10 "Received Chicago June 19, 1855, of Elisha C. Litchfield, three hun-
dred dollars in the stock of the Chicago and Mississippi, now Chicago,
Alton, and St. Louis Railroad, in full of all claims of every name and
nature against him, and also in full of all claims against the Chicago,
St. Charles, and Mississippi Air Line Railroad Company for damages

11 "on account of the track of the said railroad of company crossing any
"lands belonging to me, or for any excavation or embankments made by
"said company on any of my lands until such time as said company shall
"complete their said railroad, and lay the same with iron rails across the
14 "said lands, and also in full of all agreements between the said company
"or Ira Minard and myself for fencing any portion of the line of said
"road.

"DANIEL KELLEY, JR.

And the said defendants aver and say that said receipt or release was
given by the said plaintiff, and received by the said Elisha C. Litchfield
for said defendants in full satisfaction, in full of all claims for damages
which the said plaintiff had received by the construction of said railroad,
which are the same supposed causes of action which are alleged and set
forth in said plaintiff's declaration, and this the said defendants are ready
13 to verify, wherefore, &c., the usual conclusion.

W. D. BARRY,
Attorney for Defendants.

11 General replication to said first plea was filed conclusion to the
country.

16 Plaintiff demurs to defendants 6th plea, which is sustained by the
Court. The defendant stands by his plea, and accepts to the ruling of
the Court in sustaining said demurrer.

17 On the 5th day of June, A. D. 1857, it being one of the days of the
May term of the said Kane county Circuit Court, this came on to be
heard. The Hon. Isaac G. Wilson presiding Judge. The parties ap-
pearing, J. F. Farnsworth as attorney for said plaintiff, and the defendant
by Barry and Ferguson his attorneys. And on motion of the plaintiff a
20 jury come, and were duly impannelled to try the issue in said cause.

J. S. Brewer being duly sworn, says :

I am secretary of the Chicago, St. Charles, and Mississippi Air Line
Railroad Company; the book produced in court is the book of the records
of said company.

20 The plaintiff here introduced a chain of title of records to the lands
mentioned in his declaration.

21 George W. Wait sworn for plaintiff.

I was appointed chief engineer of the Chicago, St. Charles, and Mis-
sissippi Air Line Railroad Company in March, A. D. 1853. Don't know
when I went out of office; never heard of any other engineer on this
road; know the premises of Kelley, plaintiff, in Du Page county. The
defendants graded their road across plaintiff's farm, nearly one half mile;
the east line of the farm was near a cut in the cut; at or near the east
line the grade changed from a cut to a fill; it makes a fill of about 800
to 1000 feet long, and nine feet deep; 12 deep in the deepest place; 15

feet wide on the top; slope of one and one-half to one foot; is 42 feet on the bottom where it is 9 feet high; it then enters the cut, continues 900 or 1000 feet long, then strikes a fill to west line 800 or 900 feet, 6 feet wide and 6 feet high; line is straight, passes about 50 of Kelley's house; is a cut there of about 12 feet; cut is between the house and traveled road; house is 150 feet from traveled road; cuts on 56 feet at the top; 20 feet at the bottom; slope $1\frac{1}{2}$ to 1.56 at the top; work was done by defendants. Mr. Jones and myself were sent to Kelley's by Mr. Minard to settle with Kelley; we were unable to agree upon any definite sum; 21 he said we might go on and build the road if that would make no difference; we consented to that agreement; told Mr. Minard of it; Minard 22 was president of the road; he gave us directions to procure the right of way. After this agreement with Kelley we went on and broke ground. We saw Kelley several times, and the conclusion was that his rights should not suffer thereby, and that we should go on. We reported when we went home; Jones was an acting director of said road. Kelley was to have what was right for his damages; was to settle it with Mr. Minard.

Cross Examination.

Kelley preferred to settle with Minard; he consented that we might go on; the embankments on the west end will average two feet from the cut to the burying ground; know where Kelley's west line is; cut is about 12 feet deep from a point on one side to a point on the other; it will average half way; on the east side of the fill, about two-thirds of the way from the cut, it is not graded and low. On the west side, between the cut and road between Kelley's west and east line are about 3 acres. The slough is between 200 and 300 feet wide, the rest is good lands.

Direct Resumed.

Work began at Kelley's in 1853; was suspended the next spring; E. C. & E. B. Litchfield were doing the work at this time; same Litchfield who was a director of the roads.

22 J. G. Vallete, sworn, says:

23 He is a surveyor; is acquainted with plaintiff's premises; have surveyed a part of them; have a sketch with me, shown to the jury; made no actual measurement of his line across the railroad; road took off a portion of the south end of his garden; don't know how much; was a sort of spring slough at the deep fill east of the cut; was water there usually. The plaintiff here asked the witness, what, in your judgment, is the damage to the plaintiff in consequence of the road being there? (Objected by defendant. Sustained.) (Plaintiff excepted.) Kelley has over 500 acres of land there. (Objected to. Sustained.) (Plaintiff excepts.) Question by plaintiff. State whether the plaintiff's farm is, or is not worth less by the railroad track crossing it; and if so, how much? Which said question was objected to by the defendant. *Which objection was overruled by the Court*; to which ruling of the Court before said question was answered, the defendant then and there excepted. The

witness then answered, in my opinion the plaintiff's farm is worth less; on account of the construction of said road, from 5 to 12 dollars per acre; have resided in Du Page county 9 years; been a surveyor 13 years.

Cross Examined.

23: Lands on the prairie then, in 1853, worth from 12 to 20 dollars per acre; 15 per acre would not be an average price for such a farm as Kelley's; Kelley's is one of the best farms in Du Page county; his land in 1853, was worth 20 per acre. Kelley has 380 acres north of the St. Charles road, 130 south of it; all fenced on south of the road; also all fenced on the north side; all of it is prime lands; 160 acres is entirely detached from all land that touches the railroad.

Direct Resumed.

24: Farms in that vicinity are now selling from 40 to 50 dollars per acre.

Cross Examination Resumed.

The farm next to Kelley's was sold for 50 dollars per acre. Bachelor there sold part of his farm for 45 or 50 dollars per acre; Kelley's is worth more than the first one spoken of.

Pierce Driscoll called for plaintiff.

25: Resides three-fourths of a mile west from Kelley's; knows track of the railroad; knows Kelley's farm; knows Kelley had some trees where the track runs; it runs 20 to 25 feet from plaintiff's door. (Question by plaintiff.) State whether the plaintiff's farm is worth less on account of the railroad being cut through the same, if so, how much? (Objected to by defendant.) Overruled by the court. (Defendant excepted.) Kelley's farm is worth less in consequence of the railroad track from 8, 10, or 12 dollars per acre. I refer to the whole farm; there were no bridges or crossings made over the cut; Kelley has to go 30 or 40 rods to get into the road; is either a cut or a fill mostly through his land; the fill through the slough is 40 or 50 rods long, 8 or 9 feet high; was water in the slough before the fill; was covered up by the fill.

Cross Examined.

I believe the 160 acres detached from the farm is damaged from 8 to 12 dollars per acre. Kelley and I are on good terms.

William N. Reese being sworn by the plaintiff says:

Resides about one mile from plaintiff; have been a farmer about ten years; am acquainted with plaintiff's farm: plaintiff had a well where the railroad was put, which was filled up by it.

Question by plaintiff: State whether the plaintiff's farm is worth less in consequence of the road having been cut through the same: if so, state how much? Objected by defendant. Objection overruled by the court. Defendant then and there excepted. Witness answered. Farm is worth less on account of the railroad track \$5,110.

Cross Examined.

26 The well was about 20 feet deep, and stoned up. Damage done to water privilege I estimate at \$500; \$250 for slough; did not see water north of the railroad in the slough; did see water south of it. There may have been a culvert there, did not notice it. The slough is 4 or 5 rods from east to west; damage to garden and fruit trees \$100; don't know how many trees were there. From the cutting on the north side to the St. Charles road the railroad spoiled about nine acres of land; damage to 9 acres \$300; house, shade, barn, beauty of building spots, view, &c., damaged about \$450. The sheds are interfered with; all the land north of the railroad is damaged to the amount of ten dollars per acre. There were 176 acres north of the railroad; Kelley's land is worth \$40 per acre.

The plaintiff then called Alfred Standish, being sworn, says:

27 Reside about one mile from Kelley's; have been a farmer about 10 years; am acquainted with Kelley's farm. It is worth less in consequence of the railroad 11 or 12 dollars per acre. The strip between the railroad and the road is not worth fencing, it cost \$200. Kelley had a watering place for his cattle there before the railroad was built; don't see any now; was a well there, he had some fruit trees there, lost them by the railroad.

Cross Examined.

Kelley has to go 30 or 40 rods from his house to get across the railroad.

27 The plaintiff then called Jesse Wheaton, who being sworn, says:

Am acquainted with Kelley's farm, and the railroad through there.

Question by plaintiff: State whether the farm is worth less, &c. Objected by defendant. Objection overruled. Answer. The farm is worth less in consequence of railroad; the cost to fill up the cut. It injures all the land north of the railroad; all the farm lying north of the railroad is worth less seven or eight dollars per acre.

Cross Examined.

If the cars run over the track it would not injure it so much as it does now.

28 Erastus Gary called by the plaintiff, being sworn, says:

Reside in Du Page county; am a farmer; am acquainted with Kelley's farm and location of railroad.

Question by plaintiff: State whether plaintiff's farm is or is not worth less in consequence of the railroad track crossing it, and if so how much? Objected to by defendant. Objection overruled by Court. Excepted to. Answer. The farm is worth less in consequence of the railroad being

there; would not give so much for farm by 4, 5, 6, or 7000 dollars; believe it is worth \$3000 less.

Cross Examined.

Am not a fancy man; think the railroad injures the land on the south side of the road.

The plaintiff then called W. S. Wheaton, being sworn, says:

Know Kelley and his farm, and the railroad spoken of.

Question by plaintiff. State whether the farm is, or is not worth less by reason of the railroad track crossing; if so, how much? Objected to by defendant. Objection overruled. Defendant excepts.

Answer. I should think the saleability of the farm affected 3 or 4 or 5000 dollars.

Cross Examined.

29 Went there and had some trouble to find the road across the railroad.

The plaintiff then called Luther Chadwick, sworn, says:

Reside at Wheaton; know Kelley and his farm and the road spoken of.

Question by plaintiff. State whether the plaintiff's farm is, or is not worth less by reason of the railroad track crossing it. Objected to by defendant. Objection overruled. Excepted. Answer. Kelley's farm is less in value in consequence of railroad some \$3 or 4000; know very near where the east and west line of Kelley's farm is.

29 The plaintiff then read from the book of records of the Chicago, St. Charles, and Mississippi Air Line Railroad Company. Election of 1853. Ira B. Minard elected president, George W. Wait engineer. Res. That Geo. W. Wait be authorized to procure the right of way.

30 Plaintiff here rested his case.

Defendant then introduced J. G. Vallette, who being sworn, says:

For farming purposes the plaintiff's farm would be worth less if the cars were running on the track, the damage might be from two to one to three to one greater.

Cross Examined.

Railroads may enhance the value of a man's farm, but the digging the ditch would not.

Defendant then called Daniel Fish, who being sworn, says:

Am acquainted with Kelley; am some acquainted with his farm; live about two miles from Kelley; have lived there twenty years; know the

cut and embankment; should think the farm worth less in consequence of the road \$550. Kelley had a well there; saw the slough there; slough plenty of water in wet time, not so much in dry time; railroad goes through my farm 150 rods; deep cut most of the way over 20 feet deep; goes through about the middle of my farm.

Cross Examined.

30 Live sixty or seventy rods from the railroad; the railroad is north of
my house; the traveled road is south of my house; think the cut could
31 be filled so as to cross for \$550. Some of the dirt was carried to a fill
half mile; if the track wasn't there Kelley's farm would be worth \$25
to 30 per acre. Crossed the slough years before the track was built;
don't know whether there was water there or not.

Defendant called Samuel Howorth, who being sworn, says:

Reside three-fourths of a mile from Kelley's; know Kelley's farm; lived
there 13 years; knows something about the slough in a wet time; there
was water in a wet time now. Have been called upon by Kelley to dig
there for water; it was not the same slough spoken of by the other wit-
nesses; the slough I spoke of is a little northwest of the house; don't
know of any water being in any other slough; there was no water
when I dug until I got to the gravel below; where I dug the water was
forty rods from the St. Charles road. Slough spoken of would have
been between me and the St. Charles road. I should have seen it if
there had been any; have crossed the slough often in wet time; there
was water in a dry time; same railroad goes through my farm; am ac-
31 quainted with Kelley's farm, it is worth from 600 to \$650 less in conse-
quence of the railroad in 1853; farms were worth from 15 to \$25 per
acre. Kelley had a house and barn, and some fencing and posts on his
farm. Kelley's farm was, at that time, worth from 15 to \$20 per acre;
farms there now are worth from 30 to \$40 per acre. There is not much
waste land north of the railroad; there is a culvert under the railroad
32 there.

Cross Examined.

Work was done on railroad in part in 1853 and 1854. Barry subpoenaed me, paid me three dollars; dry time when I went to dig well for Kelley, other well was dug before that, did not stone up well I dug; been to the slough all times in the year, don't think it would cost more than \$650 to put the dirt back; if it would be worth \$1000 to put the dirt back it would be worth a \$1000 less; if the dirt couldn't be put back, I still think it would be worth only \$650 less.

Direct Resumed.

Think the cut could be filled for \$650. The well would be dry one-fourth of the summer.

33

Defendant called Adam Glas, sworn, says:

Am acquainted with Kelley's farm, was one of the appraisers of the damage on St. Charles railroad track; know the location of the road across Kelley's farm. Kelley's farm is worth between 6 and \$700 less in consequence of the track.

Cross Examined.

Live about ten miles from Kelley's; was appointed by a justice of the peace; cost \$200 to build bridge across the track, bridges would cost \$600.

Defendant called F. W. Holmes, sworn, says:

Know Kelley, live five-fourths mile from him; know the location of his farm, has lived there 8 or 9 years. Am a farmer, know the location of cut and fill; the farm of Kelley was worth about five dollars less an acre after the work of the railroad was done there than before, I mean the old farm north of the railroad.

Cross Examined.

Farm worth less by five dollars if man wants to sell.

Defendant called A. S. Ransom, sworn, says:

34 Have resided in Milton 15 or 16 years; live a mile from Kelley; railroad went through my farm; Kelley's land is worth between 5 and \$600 less by reason of the cut; know the slough in a wet time plenty of water, in dry time none, cut through my land is six feet deep, 60 or 70 rods.

Cross Examined.

My farm is 120 acres of prairie; cut in front of house is 12 or 15 feet deep.

Defendant called Rolla French, sworn, says:

Am acquainted with Kelley; was clerk in railroad employ in 1853 and 1854; \$80 was paid to plaintiff by defendant at one time, and \$200 at another; \$200 was in money, and the \$80 was an order of the company, order introduced. An order on the company from Kelley to pay \$80; order marked paid.

Cross Examined.

Don't know that the \$200 was paid for fencing, plaintiff borrowed money of Minard; 200 dollars was paid for damages. I was principal clerk for Minard; interest on note was \$40; receipt was 240; receipt introduced, to wit:

35 " \$240. Received from Ira Minard, president of the Chicago, St. Charles, and Mississippi Air Line Railroad Company, two hundred and forty dollars on account of contract for fencing and right of way of said railroad through my farm in said Du Page county. May 1, '55.

(Signed)

" DANIEL KELLEY, JR."

35 Record of election of company here introduced. Ira Minard, Elisha Litchfield, and others, elected directors. Elisha C. Litchfield and others elected executive committee. Litchfield owned in June 19, 1855, one hundred shares stock of the company.

Geo. W. Wait was then recalled, and said :

The cut and fill occupied about three acres of Kelley's land ; between the St. Charles road and the cut and fill there are four acres.

Cross Examined.

There is about 9130 yards of excavation, and 5677 yards of fill.

The Court then stated he should allow the witness, Wait, to testify what it would cost to replace the earth in the same manner it was before the railroad company went on to Kelley's land. Which was objected to by defendant and overruled by the Court. Defendant except.

Witness then said it would cost \$2,130 40, to put the dirt where it was before the excavation and fill, that is, to straighten it as it was before.

36 Defendant then gave in evidence the following writing :

36 " Received, Chicago, June 19, 1855, three hundred dollars in the stock of the Chicago and Mississippi, now Chicago, Alton, and St. Louis Railroad, in full of all claims of every name and nature against him, and also in full of all claims against the Chicago, St. Charles, and Mississippi Air Line Railroad Company, for damages on account of the track of said road of said company crossing any land belonging to me, or for any excavations or embankments made by said company on any of my land, until such time as said company shall complete their road and lay the same with iron rails across said lands. Also in full of all agreements between said company or Ira Minard, or myself, for fencing any portion of the line of said road.

DANIEL KELLEY, JR.

Defendants here rested their case.

The plaintiff then introduced on his part, the articles of union between defendants and Chicago and Galena Railroad Company, resolutions, &c., all of which was objected to by defendants. Overruled by the Court and exceptions taken.

37 Resolutions of forfeiture of stock April 21, 1855, by which said resolution 267 shares of stock were forfeited, and all previous payments made thereon. All of defendant's books of record relating to acts of defendants offered in evidence, to the introduction of which the defendants objected. Overruled, and defendants excepted. The plaintiff then read in evidence to the jury the following list of forfeited stock, to wit: the name of Bliss, Samuel, and 266 more, whose stock was forfeited ; the amount of stock forfeited about \$17,000.

The plaintiff then called Wm. M. Larrabee, who being sworn, says :

47 I am a director of the Chicago, St. Charles, and Mississippi Air Line Railroad Company, and secretary of Galena road. Know Litchfield; saw Griswold in 1855, president of the Central road; learned that there were negotiations in relation to the sale of defendants road to Galena road prior to the 20th June, 1855. Had official notice on the 20th of June, 1855. Griswold claimed to act for Litchfield, Turner for the Galena road.

Question by plaintiff. What do you know of Litchfield making a trade with the Galena road with the railroad, and state from whom you first received propositions. Objected to by defendants. Overruled by the Court. Defendants except.

48 Answer. A committee had been appointed on the part of the Chicago, Galena R. R. to negotiate the transfer of defendants R. R.; a proposition for that same transaction was received from Mr. Griswold, president of the Illinois Central Railroad; don't know whether Litchfield was conferred with.

Question by plaintiff. If you know any thing done or said by Litchfield recognizing the authority of Griswold, state it. Objected to by defendant. Overruled by Court. Defendants except.

48 Answer. Mr. Litchfield acted with me in the examination of stock book to ascertain if a sufficient amount of stock had been obtained in accordance with one of the terms submitted by Mr. Griswold.

Question by plaintiff. Was that done in accordance with proposition made by Griswold? Objected to by defendants. Overruled by Court. Defendants except.

49 Answer. It was in accordance with one of the propositions made by Griswold.

Question by plaintiff. Did Litchfield deliver to you any of the stock of the St. Charles railroad for the Galena company? Objected to by defendants. Overruled by the Court. Defendants except.

Answer. He delivered to me some of the stock, something over three-fourths. State whether any other person than Griswold was treated with until Litchfield came and consummated the trade. Objected to by defendants. Objection overruled by the court. The defendants except.

50 Answer. Have no knowledge of any other person except Griswold being treated with for the purchase of defendant's road by the Galena company. Was in Litchfield's room before the 20th of June counting up the stock of the St. Charles R. R., this was before the resolution of defendant's was passed; on the 21st, resolution passed by Galena company to issue bonds. Also resolution to unite with St. Charles road. Also resolution of June 20, 1855, authorizing executive committee to act relative to defendants.

Copy of the articles of union between the Chicago and Galena Railroad and defendants introduced by plaintiff.

51 On 20th June, 1855, committee made report of settlement with Litchfield. Contract was not made public until annual report; have no recollection of seeing Minard there. Don't think Griswold was the agent of Galena company, if so I should have known it. Griswold was acting as the agent of the Illinois Central Company.

Cross Examined.

The transfer of stock by Litchfield was done by power of attorney, and did not appear upon the stock ledger, as it was not then posted.

52, 53, 54, Plaintiff here introduced stock ledger of defendants; also two bonds, one to the Galena R.R. Company by Minard and Litchfield, dated June 29, 1855, \$1000 each.

55, 56, 57,

58

To the reading of which bonds defendants objected. Objection overruled by the Court and defendants except.

Geo. W. Wait was again called by the plaintiff, says:

58 Was a stockholder in defendants road until April or May, 1855, then sold E. C. Litchfield my stock, and ceased to be a stockholder.

Question by plaintiff. State, if you know, of any negotiations for a sale of the road at the time you sold your stock. Objected to by defendant. Objection overruled by the court. The defendants except.

Answer. Did not know of any negotiations to sell the road of my own knowledge. I applied to Litchfield to know if there were any such negotiations.

Question by plaintiff. What did Litchfield tell you in regard to the negotiations in reply to your questions? Objected to by defendants. Overruled by the Court. The defendants except.

He said he was making arrangements for the Central to build the road; said there was negotiation with the Galena company.

59 Question by plaintiff. Did you apply to the president's company for information on the subject? Objected to by defendants. Objection overruled. Defendants except.

59 Answer. Had a conversation with the president of defendants road on the subject; he said no negotiations were going on to his knowledge; the president was Mr. Minard. Am acquainted with the stocks of the Chicago, Alton, and St. Louis R.R.; have \$11,000 of that stock; received Litchfield's certificate of said stock for \$3,400 6 or 9 months after I received the stock.

Question by plaintiff. What is the value of the stock of that road? Objected to by defendants. Objection overruled by the Court. Defendants except.

Answer. This stock was in June, 1855, not worth five cents on a dollar; do not think it was worth any thing.

Plaintiff then called S. S. Jones, who being sworn, says:

I was one of the directors of St. Charles in 1855.

Question by plaintiff. State whether you were aware of any negotiations with the Galena company for a union of this road with that until the alleged transfer. Objected to by defendants. Objection overruled by the court. Defendants except.

60 Answer. Could not answer unless time was fixed.

Question by plaintiff. State whether you were aware of any negotiations between the St. Charles R.R. and the Galena R.R. for the transfer of the former to the latter prior to June 20, 1855. Objected to by defendants. Objection overruled by the Court. Defendants except.

60 Answer. Had no personal knowledge prior to May 1, 1855; there were vague rumors of such negotiations going on between Litchfield and the Galena company.

Question by plaintiff. Did you take any pains to ascertain the facts, if so, what? Objected to by defendants. Objection overruled by Court. Defendants except.

Answer. Litchfield told me May 1, 1855, that no negotiations were going on with the Galena company in any manner. He said he was making arrangements with the Central company to build the road.

61 Question by plaintiff. When did you first learn that a sale had taken place, if at all? Objected to by defendants. Objection overruled by the Court. Defendants except.

Answer. Have no personal knowledge of a sale taking place; first learned by rumor that a sale had taken place in the summer of 1855.

Question by plaintiff. Did you attend the annual meeting for directors of this company in 1855 at the Tremont House, Chicago? Objected to by defendants. Objection overruled by the Court. Defendants except.

61 Answer. Did not attend; attended no meeting of the board after May 1, 1855. Sold my stock, took no action with the company after that time; it was after May 1 that I heard the rumor of the sale.

Question by plaintiff. How much work had been done on the road prior to May 1, 1855. Objected to by defendants. Objection overruled. Defendants except.

62 Answer. Nearly all the grading between Chicago and St. Charles and nine or ten miles of track laid Chicago end track has been connected with the Chicago and Galena road about ten miles from Chicago. Defendants' road crosses the Galena and Chicago road about ten miles west of Kelley's farm; again east from six to nine miles; the distance between the two roads where defendants' road crosses Kelley's farm is from one to two miles.

Question by plaintiff. Did you apply to the president of this company for information on the subject of the negotiation for the transfer of the road. Objected to by defendants. Objection overruled by the Court. Defendants except.

Answer. I had a conversation with the president of the defendants' company on the same day of the conversation with Litchfield, on the subject of the transfer.

62 Question by plaintiff. What did he tell you? Objected to by defendants. Objection overruled by the Court. Defendants except.

Answer. He told me there were no negotiations going on to his knowledge.

The plaintiff called Henry Stevens, who being sworn, says:

I was a stockholder in the St. Charles road prior to June, 1855. I ceased to be a stockholder some time prior to June, 1855.

Question by plaintiff. State whether you had knowledge prior to June 2, 1855, that any negotiations were going on between the defendants and the Galena road. Objected to; overruled; except.

Answer. I am not able to state.

Question by plaintiff. State whether you took any pains to ascertain.

Answer. I took no pains at that time.

63 Question by plaintiff. Had you heard anything of it? Objected to by defendants. Objection overruled by the Court. Defendants except.

63 Answer. I had heard rumors of it; heard of it after I had sold my stock; own stock in the Chicago, Alton, and St. Louis Railroad; don't know its value; I transferred my stock to Litchfield; some stock was transferred about that time of mine; when I transferred my stock to Litchfield he did not tell me of any transfer of the road.

The plaintiff again called S. S. Jones, who said:

I ceased to be a stockholder by a transfer of my stock to Litchfield.

Cross Examined.

Mr. Wait transferred his stock long before.

James Huls was called by plaintiff, who being sworn, says :

I was a stockholder in the St. Charles road ; ceased to be a stockholder by giving up my certificate of stock to Minard and Litchfield.

64 Question by plaintiff. Had you any knowledge at that time, or that there were any negotiations in relation to selling to the Galena company? Objected to. Overruled. Excepted.

Answer. I had no knowledge at that time of negotiations of a sale of the road to the Galena company. I own stock in the Chicago and Alton railroad ; have eight shares to the amount of \$800 ; never learned they were of any value. I was in Chicago about the 19th of June, 1855 ; went in with Kelley, at the suggestion of Minard ; Kelley went in at my request, at the suggestion of Minard ; went to the Tremont House ; went into private room.

64 Question by plaintiff. For what purpose did Minard request Kelley to go in. Objected to by defendants. Overruled. Excepted.

Answer. It was with reference to the railroad being cut through his farm.

Question by plaintiff. What took place there, and what was said ? Objected to by defendants. Overruled. Defendants except.

65 Answer. The subject was with reference to the road through his farm was talked about, and with reference to the crossing, and ditch ; several plans spoken of with reference to convenience of a bridge ; some plans with reference to Mr. Kelley's present convenience. The talk was about the bridge, with reference to Kelley's present convenience. They said they would give him \$300 in stock of the Chicago and Mississippi Railroad for his inconvenience in waiting until the road should be built.

Question by plaintiff. Was any thing said with reference to their having sold out to the Galena and Chicago Railroad Company ? Objected to. Overruled. Excepted.

Answer. They said they had sold it to no company.

Question by plaintiff. State whether any thing was said by Minard or Litchfield on that occasion ; whether the road was going to be finished ? Objected to. Overruled. Excepted.

65 Answer. Minard said it evidently would be built ; but when, was a question of time ; didn't see stock given to Kelley.

Question by plaintiff. Did Litchfield say any thing, if he had stock ?

Objected to. Overruled. Excepted.

66 Answer. Litchfield proposed giving Kelley a receipt for stock.

Question by plaintiff. During the negotiation was any thing said by

you as to what it was for; if so, what? And if any reply was made by Litchfield or Minard, what was the reply? Objected to. Overruled. Excepted.

Answer. I asked how do we understand ourselves; is this \$300 for right of way or damages? The reply was, no, it was for inconvenience that Kelley suffered until the road should be built.

Cross Examined.

67 Minard told me that he wanted Kelley settled with; I did not understand that the road was to stop only temporarily; didn't tell that the road had got to change hands; had no intimation that the road had got to change hands until we got to Chicago; he wanted me to go to Mr. Kelley's that they might arrange their matter on the road; Litchfield might have been present at the conversation, don't know; we were there from an hour and a half to two hours; left Kelley, Litchfield, and Minard together. When I went they went to writing a receipt; suppose the receipt wasn't written when I left; Litchfield was writing; didn't see what he was writing, not a word; didn't hear them say that the road had got to change hands; couldn't put any such construction on any of Litchfield's language that the road had got to change hands, nor on Minard's; didn't hear Minard tell Kelley the road had got to go into the hands of the Galena road; saw Kelley a little while after I left him in the Tremont; it wasn't an hour afterward. Don't remember of saying to any one when. 68 I came back from Chicago, that the railroad had settled with Kelley, that the road would be built; but never said they had settled with Kelley without further statements.

Direct Resumed.

After the first conversation with Minard I saw Kelley, and he objected to go in, and I told Minard of it; they said in Chicago they wanted to settle with Kelley, in order that the road might change hands, and spoke of the Illinois Central; there was something said about the value of the stock of the Chicago and Alton road.

68 Question by plaintiff. What was said about the worth of that stock? Objected to. Overruled. Defendants except.

Answer. Litchfield said in substance, it was worth from 70 to 75 cents on the dollar; called at Minard's office after stock, called twice; didn't come at the time agreed upon; didn't mention Kelley's name in connection therewith.

69 The plaintiff here introduced a due bill to Kelley payable 60 days after date from Litchfield for stock.

Plaintiff here rested. Defendant resumed.

Defendant called Read Ferson, who being sworn, said:

I heard Huls say the railroad company had settled with Kelley for damages up to that time, and that the road would be built.

Defendants then called Ira Minard, who being sworn, says:

67 I heard the testimony of Dea. Huls; met Huls, and requested him to
see Kelley, and tell him if he would go in to Chicago I would go with
him before Litchfield left, as I was satisfied the road would change hands,
and I thought it would go into the hands of the Galena company; he had
70 some stock of his own; told him he had better go in himself and arrange
it; we went to Chicago; I met Kelley at Wheaton; I saw Huls on the
train; can't say whether they were together or not. Kelley and I were
together; stated to Kelley that the road had got to change hands, and
my opinion was it would go into the hands of the Galena company.
Litchfield told Kelley the road would have to stop for the present; Kel-
ley asked who was to have it; Litchfield said the Illinois Central; Kelley
asked if the Galena company was going to have it. Litchfield said it
would go there if they could do no better; Huls was there about an hour.
There was no agreement concluded with Kelley when Huls left; the
paper was drawn up after Huls left; Kelley left about three-fourths of an
hour after Huls did. After it was written, Kelley looked it over; didn't
hear it read. Litchfield told Kelley he wanted to settle all his damages
up to that time; they figured up the damages and spoke about a bridge.
Litchfield thought he had enough; Litchfield had no stock; gave due
bill for sixty days.

Cross Examined.

71 Rode on the cars with Huls and Kelley the day spoken of; was not at
dinner when Kelley got to Chicago; told Kelley it was my opinion the
road would go into the hands of the Galena company; did not help
Litchfield buy up the stock; did not tell Huls the road would be built;
transferred my stock on the 27th; was chairman of the meeting of the
stockholders of this road; no body there but Litchfield and myself; didn't
get any stock of the Galena company; all my stock in St. Charles road
was assigned but one share; nobody said the road would be built; it was
72 said the probabilities were it would be built. Had a talk with Turner;
didn't tell him the road would go into the hands of the Galena if we
could do no better; didn't read the bonds before I signed them, nor the
articles of union; have employed counsel under the direction of Litch-
field, he gave me directions; he is in New York. I swore to the affi-
davit for change of venue at Du Page county; advised Barry to go to
New York; been into Chicago several times with Kelley; the \$240 that
French swore was not paid for fencing; did not tell Kelley that I had
rather lose a farm than Kelly should be wronged; never heard Litchfield
say to any body that he was short of money.

Direct Resumed.

72 French is Litchfield's agent; due bill was never presented to me; stock
73 has been sent to French, by Litchfield, he said he would send the stock

as soon as he got home, it might be before 60 days; I put \$70,000 in St. Charles road.

Cross Examination Resumed.

I subscribed \$20,000 to the St. Charles road; \$14,000 was a debt due me from the Old Branch railroad; the amount of Litchfield's mortgages on the road was \$200,000; the consideration for the sale of the road to the Galena road was \$540,000; at the time of the forfeiture of the stock I did not know that any negotiations were pending for a sale of the road. There was something over \$17,000 stock forfeited.

Defendants then called Daniel Fish, who being sworn, said:

Saw Kelly after he came home from Chicago; he said he had settled with them, and done better than he expected; we were speaking of the Air Line road.

Cross Examined.

73 Kelly didn't say he had settled with them only for the present, and
74 that when the iron came he would get more; didn't tell Kelly to-day I
remembered he said so. Barry and I did not arrange to-day that I should
swear to some other conversation.

Direct Examination Resumed.

Was subpoenaed here as a witness for defendant. Conversation was two years ago.

Defendants he said.

Plaintiff recalled James Huls, who said:

Minard did not tell me the road would have to go into the hands of the Galena company; if I have to say one way or the other, I should say Minard did not go into Chicago with us; cannot tell with certainty; indistinctly remember shaking hands with him at the Tremont.

Cross Examined.

Have no positive recollection either way.

75 The foregoing was all the testimony offered in the case.

81 The jury thereupon retired to consider of their verdict, and afterwards came into court and returned the following verdict:

"We, the jury, find the issue joined for the plaintiff, and assess the damages at two thousand dollars.

"J. H. MELISON, Foreman."

The plaintiff thereupon remitted one hundred and fifty dollars.

The defendants, by counsel, then moved the Court for a new trial in this cause, and filed in said court the following notice:

Kane County Circuit Court. May Term, A. D. 1857.

THE CHICAGO, ST. CHARLES, AND MISSISSIPPI AIR
LINE RAILROAD COMPANY
vs.
DANIEL KELLEY.

82 And the said defendants, by Barry and Ferguson, attorneys, come and move the Court for a new trial in this cause for the following reasons:

1st. The Court erred in admitting improper and irrelevant testimony on the part of the plaintiff, and overruling the defendants objections to the same.

2d. The Court erred in rejecting proper, pertinent, and material testimony offered by the defendants.

3d. The verdict is contrary to law and the instructions of the Court.

82 4th. The verdict is contrary to the evidence in the case.

5th. The Court erred in refusing instructions by the defendant.

6th. The Court erred in giving each and every instruction given for the plaintiff.

7th. The Court erred in qualifying instructions asked by the defendants.

BARRY & FERGUSON,
Attorney for Defendants.

Which motion was overruled by the Court, in overruling said motion for a new trial the said defendants then, and at the same time by their counsel excepted, and moved the Court to sign and seal this Bill of Exceptions, which is done.

ISAAC G. WILSON, *Judge.* [SEAL.]

Plaintiff's Instructions.

1. The jury are instructed that this is an action of assumpsit brought by the plaintiff against the defendant for an alleged contract to pay him what his damages should be for grading the defendants track across his land. And if the jury believe from the evidence that the agents of the defendants, authorized for that purpose, did promise Kelley that the defendants would pay him his damages if he would let them build the road over his farm, and that in pursuance of such promise they did build their road by his permission, then the law is for the plaintiff so far as that question is concerned.

2. If the jury believe from the evidence that the defendants promised to pay the plaintiff what his damages should be by the building of the railroad across his farm, and that he was damaged thereby as charged in his declaration, then the jury should find for the plaintiff such damages as they believe, from the evidence, he sustained thereby, unless he has

been paid, or has released the same by a release or receipt for it obtained.

3. That it is the duty of the jury in estimating the plaintiff's damages to take into consideration what amount, if any, the plaintiff's farm was lessened in value by the running and working the defendants road across it.

76. 4. If the jury believe from the evidence that the receipt, or paper marked "A," was obtained from the plaintiff by means of fraudulent pretenses or representations, or by suppressing material facts which were known to Litchfield, and not equally known to Kelley, with the design of overreaching him, and defrauding him, and that the plaintiff was imposed upon and defrauded into the making of said receipt, and that the plaintiff did not, in reality, receive any value for the said receipt, then the jury should disregard it in toto.

5. That the credibility of witnesses is a proper question for the jury, and if they believe from all the circumstances in the case, from the position of the witness, Minard, in reference to the case, and his relations to the defendants, his manner of testifying, and the testimony of other witnesses in the case, that his testimony is not worthy of credit, they may disregard it.

6. That although fraud may not be presumed, but should be proved, yet it may be proved by circumstances, and if the jury believe from all the circumstances proved in this case that the receipt was obtained from Kelley by fraud, they should disregard it.

7. That fraud may consist of a suppression of the truth as well as by telling a falsehood.

Instructions for Defendants.

77. 1. The receipt given in evidence, and signed by the plaintiff, is in the nature of a contract, and cannot be extended, restricted, contradicted or explained by verbal evidence to vary its terms or meaning, and that the same constitutes a bar, and a full defence to this action, unless it has been fully proved to the satisfaction of the jury that it was obtained from the plaintiff by fraud.

2. That the evidence given in the case as to what was said by Litchfield and Minard, or either of them, at or before the time the receipt or contract was signed, must not be considered by the jury upon the question of the meaning of the instrument, but the jury must ascertain the meaning from the language of the instrument itself.

78. 3. That in order to impeach the receipt, or written contract for fraud, the jury must believe from the evidence that either Litchfield or Minard, or both of them, at the time the same was made and signed by the plaintiff, wilfully and intentionally concealed from him some material facts, which, if he had known, would have influenced and induced him to have declined making the settlement and signing the receipt, or contract, or

78

that one or both of them wilfully and intentionally asserted the existence of some material fact which influenced and induced the plaintiff to make the settlement and sign said receipt. And if the plaintiff seeks to avoid the same on the ground of any representations made to him, the evidence must also show that such representations were false, and were at the time known to be false by the persons making them, and that the plaintiff had no knowledge of the falsity of such representations.

4. Fraud cannot be presumed, but must be satisfactorily proved, and it is the duty of the jury to consider the transaction fair and honest unless the plaintiff has fully and satisfactorily proved that said receipt or contract was obtained by fraud.

5. The jury must take into consideration the relation of the witness or witnesses who have testified in the case to the parties to the suit, their manner of testifying on the stand, in determining the amount of credit to be given to their testimony.

79

6. The jury will entirely disregard the letter that was read to them from Griswold to J. B. Turner, president of the Galena and Chicago Union Railroad, as said letter is not evidence for the consideration of the jury.

79

7. If the jury believe from the evidence that James Huls made statements contrary to, and at variance with what he has testified to in this case, it is a proper subject for the jury to take into consideration in weighing his evidence in this cause.

Given with Qualification.

8. If the jury believe from the evidence that there was a settlement fairly made for damages between the plaintiff and E. C. Litchfield on the part, and in behalf of said defendants, made on the 19th day of June, 1855, of all damages on account of the track of the railroad crossing the land of the said plaintiff, or on account of excavations or embankments made by said company on said land until such time as said railroad should be completed and laid with iron rails, and if they further believe from the evidence that said railroad has not been completed and laid with iron rails, the law is for the defendants.

80

9. If the jury believe from the evidence that there was a settlement fairly made on the 19th of June, 1855, between the plaintiff and E. C. Litchfield for, and on behalf of said defendants, and that said plaintiff took from said E. C. Litchfield said Litchfield's due bill for three shares of stock of the Chicago, Alton, and St. Louis Railroad in satisfaction of his claim for damages until such time as the road should be completed and laid with iron rails, then the law is for the defendants, unless they further believe from the evidence, that said road has been completed and laid with iron rails.

10. It is the duty to reconcile all the evidence in the case, if possible, upon the principle that all the witnesses have sworn to the truth, and

although two witnesses were present at the same conversation, and one of them testifies that he heard a certain statement which the other testifies he did not hear, still the testimony of both may be true, and it does not necessarily prove that the said statement was not made at the time.

11. If the jury believed from the evidence that the plaintiff stated to Daniel Fish, or any other person, that he had settled with said Railroad Company, it is proper evidence for the consideration of the jury in determining the question of settlement, and if the jury further believe the same to be true, and that a fair settlement was made, the law is for the defendants.

81 12. If the jury believe from the evidence that Ira Minard or E. C. Litchfield, or either of them, told said plaintiff before he gave said receipt, that the railroad had got to stop, or change, this is competent evidence to be considered by the jury, as tending to show that the plaintiff had notice of such contemplated change or stoppage, and then tending to rebut the idea of malice so far as that question is concerned.

72 ~~323~~
Ch. & St Ch. & R. R. Co.

by
Jaml. Kelley
Abstract

Filed May 5. 1858.
L. Ireland
Ch.

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of DuPage

Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Kane County, before the Judge thereof, between Daniel Kelly plaintiff

plaintiff, and The Chicago St. Charles & Mississippi ^{air line} Rail ~~road~~
 Road Company

defendant, it is said that manifest error hath intervened, to the injury of the said

Defendant

as we are informed by the complaint, of said Defendant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Daniel Kelly

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Daniel Kelly

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice
of our said Court, and the Seal thereof, at Ottawa,
this 12th day of June in the
Year of Our Lord One Thousand Eight Hundred
and Fifty- eight .

S. Deland
Clerk of the Supreme Court.
by J. B. Rice Deputy.



323

The Chicago St Charles &
Mississippi Airline R.R. Co
or

Daniel Kelly

De fa

Served the within writ
by recalling the same
to the within named
Daniel Kelly, this
Twenty fourth day of
June 1858.

Jas J. Hunt, Shff

See Page

Fare 1 Service	.50
12 Miles	.60
Return	1.00
	<u>2.10</u>

Filed July 6 1858

L. Leland C. C. P.
by J. B. Miller Deputy

Chicago St Charles &
Mississippi Air line
Rail Road company

vs
Samuel Kelly

Supreme court

And now comes the
said plaintiff by W D
Barry their attorney and asks leave
of the Court to withdraw from the
files of this Court the record and
now on file

W D Barry atty
for the plaintiff

Filed May 1. 1858.
L. Leland O'R.

Know all Men by These Presents, That we the Chicago St. Charles
and Mississippi Air line Rail Road Company

as principal, and Ira Minard
as security, are held and firmly bound unto Daniel Kelly

penal sum of Three thousand dollars in the
and lawful money of the United States, for the payment of which, well and truly to be made, the said
Chicago, St. Charles and Mississippi Rail Road Company binds itself & its
successors and assigns, and the said Ira Minard
binds himself & his heirs, executors, and administrators, jointly, severally, and firmly by
these Presents.

Witness, the Corporate Seal of said Company and the hand of
Ira Minard. President of said Company, and the hand &
seal of said Ira Minard as Secretary this 9th day of June A. D. 1858

The Condition of the above Obligation is such, That, whereas, the above named Daniel
Kelly did, at the May Term of the Circuit Court,
held in and for the County of Kane in the State of Illinois, A. D. 1857, recover a
judgment against the above bounden Chicago St. Charles and Mississippi Air
line Rail Road Company

dollars & costs of suit for the sum of eighteen hundred & fifty (\$1850)
& Mississippi Rail Road Company to reverse which said judgment, the said Chicago, St. Charles
has sued out a Writ of
Error from the Supreme Court, within and for the Third Grand Division of said State. Now if the said
Chicago St. Charles & Mississippi Rail Road Company
shall duly prosecute said Writ of Error, and pay, or cause to be paid, all judgments, costs, interest and
damages which the said Supreme Court shall adjudge against said Chicago St. Charles
and Mississippi Rail Road Company and abide the order and judgment of said
Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

of Chicago St. Charles & Mississippi Rail Road Company
Ira Minard
Jas. Minard
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

attest
J S Brewer
Secy



323
The Chicago & Charles Mississippi
Rail Road Company
vs

Samuel Kelly

Supds. Bond

Filed June 12, 1858
L. Leland
Clerk



STATE OF ILLINOIS, }
SUPREME COURT,

To the Clerk of the } ss. The People of the State of Illinois,
Circuit Court for the County of *Kane*

Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the *Circuit Court* Court of *Kane* County, before the Judge thereof, between *Daniel Kelly*

plaintiff, and *The Chicago St. Charles and Mississippi Air line Rail Road Company*

defendant, it is said manifest error hath intervened, to the injury of the aforesaid *Defendant*

as we are informed by *the* complaint of said *Defendant* and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the *plaint* aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *11th* day of *June* in the Year of Our Lord our thousand eight hundred and fifty-eight.

J. D. Caton
Clerk of the Supreme Court.
J. D. Rice Deputy

The Chicago St Charles and
Mississippi Railroad Company

Daniel Kelly

Writ of Error

This writ of error is made
a supersedeas and as such
is to be obeyed by all concerned

Leland Clerk
by J. B. Davis Deputy

Filed June 12. 1838
L. Leland Clerk



Chicago St. Charles
Mississippi Oil and
R.R. Co. Company
is
Donnie Kelly

In support of the first
Error assigned on pages 10, 11 of the
Record the Court is respectfully referred
to the case Boyd vs Hitchcock 20 of Johnson's
Reports commencing on page 76
& also 14th of Thendell's Reports, commen-
- cing on page 116, Kellogg vs Richards
In support of the second error ass-
- igned the Court is respectfully referred
to the case of Lecon vs Knop 4th of
Seldens Report commencing on page
402. (The last error is assigned on
on page 66- of the Record, which
said error the attention of the Court is
respectfully called to

The Court is also respectfully ~~asked~~
asked to examine ~~pages 36 & 37~~ pages 36 & 37
of the Record -

St Charles
of the River
to
Don't Kelly

Point & outposts

Chicago St Charles &
Mississippi air line
Raile Road company
is

Samuel Kelly

Supreme court

And now comes the
said plaintiff by W D Barry their attorney
and moves the court to grant a writ of
error and supersedeas in the above entitled
cause to the plaintiff

W D Barry atty for
Plaintiff

Filed May 5. 1858
L. Island
Ch.

Chicago & North
Miss air line R.R. Co

20

David Kelley

We move to dismiss the appeal in this
cause because

The Security was not named
by the court or approved by the court
but the appellant was ordered to file
bond with security to be approved by
the clerk which the court had no
power to do

2 There is no evidence on the record
that the Security was approved
by the clerk

W B Plato
B. C. Cook
attys for appellee

Supreme Court Circuit
Grand Division held
at Ottawa May 1858

The Chicago & Rock Island
Mississippi Air Line Rail
Roads Company } Error from 1st
Daniel Kelley }

Points made by Pltffs in
Error on their motion for a
Supersedeas in this cause

The validity of the second plea
presents the first question for the Court
to try:

Is the plea of accord and
satisfaction a good plea when
the general issue is pleaded in answer?

1 Chitty, Pleas	474-5
Bayne & Lydon v Fitchcock	20 Johnson 76
Le Page v McGrew	1 Wendell 164
Keslake v Muzoon	5 Term R. 373
Hughson v Whelan	8 Cowen 79
Booth v Smith	3 Wendell 66

Second What is a good plea of accords
and satisfaction;

Cumler & Weyne	1 Smith	Lucy cres	253
Lower & Butlett	2	Settett	49
Booth & Smith	3	Mendell	66
W.B. Stote Book & Fletcher	5	"	85
Greiner et al & Seound et al	21	"	451
Bullen et al & W. Sullens	2	Down	90
Bank & White	2	Stetevy	283
Boyd et al & Hetchwick	20	Johnson	76
Kellogg et al & Richards	14	Mendell	116
Blin & Chester	3	Doy	359
McKinnin & Stokes	5	Johnson	386
Eaton & Lincoln	13	Map	424
Musgrave & Gibbs	1	Dallas	216
Smith & Brown	3	Hicks	380
Melleken & Brown	1	Howe	391-400, 403

⁴The distinction as to a plea of accords
and satisfaction, is predicated on
liquidated & unliquidated damages,

In case the damages are unliquidated
the acceptance of a smaller sum or
any thing of legal value seems by well
settled authority to be a subject of accords
and satisfaction, and in such cases
such is a good plea,

Cumler & Weyne	1 Smith	Lucy cres	257
Lougbridge & Service	5	B. & A.	117
Wolters & Smith	2	B. & Adell	889
McKinnin & Byes	1	Adell & Ell	106
Allen & Bookhouse	3	Mc & Helsh	657
Down & Rogers	9	Adell & Ell	121

The third & fatal error in the case was the allowing the written release offered in evidence by the pliffs in error to be received or contradicted by parol —

It is a legal proposition that when an instrument contains an acknowledgment of having received a thing, and also an agreement to do another, it is only prima facie evidence so far as the acknowledgment of the thing received, but it cannot be contradicted by parol evidence in any part by which the party engages to perform a contract.

Bowman's Law Dictionary	413
7 Mass Reports	297
1 Bailey "	174
4 Ohio " 546-	534
3 Hawks "	580
1 Phil. & Am. on Evidence	388
Greenleaf " sect	305
1 East Reports	460
1 Comptrell "	532
6 Lergant & Howle "	146
11 Johnson	70
4 Selden "	402
6 Porter "	458
11 Mass " 27.	52
" " "	143
" " " 359.	363
17 " "	357

Evidence of independent or isolated facts must contain in itself or by reference to something else, either already in evidence or which is definitely proposed to be offered, enough to clearly evince the manner in which it is to be operative or legitimately applicable to the issue, else it must be rejected,

19	Mendell		303
8	Cour.		342
11	Sargent & Noble	104, 109,	140
10	<u>Hobson Report</u>		<u>355</u>
21	"	"	277
11	"	"	140
4	"	"	242

The next point of Error is That the Court allowed the admissions of Merrill & Litchfield as testified to by Wm. Jones & Sons & Litchfield

The admissions of a director or stockholder of a corporation are not evidence against a corporation even though they cannot be compelled to testify on account of their interest—

Still less in the admissions of an agent of a corporation bind the stockholders. since he is not their agent but is the agent of the corporation.

Angell on Corporations	sect	309
13	Cour. Refuts	173

3	Sney	(Crown) 16	494
3	Cowen	"	625
15	Moine	"	306
21	"	"	507
1	Hill	"	579
12	Alobound	"	369
4	Sayer - North	" (Rem)	317

Although the verdict is palpably against the evidence of "just black" still we do not deem it necessary to suggest further points than shown. We trust entirely to the law in the end and are so confident in the correctness of the course assigned that further reference would be futile.

We may be permitted to add that some three weeks are enclosed a full brief of points and authorities in this case to the Clerk of the Court - not until a late day did we learn that they had not been used.

Respectfully submitted

Everett - Borey & Co.
for P. J. A. Esq.

Chicago Schools and
Merrill N. N. Co

David Kelley

Prize for Students

E. B.

Supreme Court Third set
The St Charles Chicago Mississippi
River Road Company } & error to
Daniel Kelly } ~~Affidavit~~ Stance
Plaintiff

in error by Bangs Eastman their atty and assign the
following errors from the Records in the case -

- 1st The Court below erred in sustaining summons
to the 6th & last plea by said defendants below
pleaded -
- 2^d The Court erred in admitting improper evidence
to the jury in favor of the plaintiff
- 3^d The Court erred in excluding proper evidence
offered by defendants below -
- 4th The Court erred in its instructions to the jury on
part of the plaintiff below -
- 5th The Court erred in excluding proper instructions
to the jury asked for by defendants below -
- 6th The verdict of the jury was against the
law and the evidence -
- 7th The verdict of the jury was contrary
to the weight of the evidence -

8th

The court erred in refusing the depts. below a new trial -

9th

The court erred generally in its ruling in the case below all of which appear from the records filed in the case

Barry Eastman.
Cathysia affittorato

Copies of the records of the
Ninth Circuit Court
323
Darius Kelley

Assignment of error

Filed May 5, 1884.
J. W. Land Clark.

Barry Eastman

United States of America }
State of Illinois, Kane County } S. S.

Plas before the Honorable
Jesse S. Wilson Judge of the Thirtieth Judicial
Circuit and presiding Judge of Kane County
circuit court in the State of Illinois at a
Term of said court begun and held at the
court house in Geneva in said County
on the Eleventh day of May in the year
of our Lord one thousand eight hundred & fifty seven.

Present The Hon Jesse S. Wilson Judge
" George E. Corwin Sheriff

Attest,
Paul A. Knight
Clerk.

Be it remembered that heretofore to wit, on the
28th day of April A.D. 1857, there was filed in the clerk's
office of our said Kane County circuit court, by change
of name from DuPage County, the following designated
papers to wit, "Petition" "Summons" "Answer" "Plea" "Affidavit"
"Declaratory" & "Copy of Record", which said papers are in the
words and figures following, to wit —

Petition —
State of Illinois — DuPage circuit court
April Term 1856.

Daniel Kelly

The Chicago, St. Louis &
Mississippi Air Line Railroad
Company

Affidavit
Damages \$5000.00

P. Northrup Esq.

Please find a summons in accordance with the above, directed to the Sheriff of Kane County - Yours &c.

March 29/56.

"Filed April 1st 1856

Sanicworth & Bingley
for Plff.

P. Northrup Clerk

Filed April 28th 1857. R. Wright clk

Copy of "summons"

State of Illinois }
Kane County } S. S. The People of the State of Illinois to the
Sheriff of Kane County Greeting.

We command you that you summon the Chicago & North Western Mississippi Air Line Rail Road Company 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 thereof, to be holden at the Court House in Naperville in said County, on the 2nd Monday of April next to answer unto Daniel Kelly in a plea of assumpsit to the damage of the said Plaintiff as he says in the sum of Two thousand Dollars - And have you show and shew this writ with an endorsement thereon in what manner you shall have executed the same.

{ seal } Witness Peter Northrup, Clerk of our said Court
{ at court } and the seal thereof at Naperville aforesaid
this 1st day of April AD 1856.

Peter Northrup, Clerk of the Circuit Court -
Copy of Sheriff's endorsement or Return - Personally served by reading to Ira Minard, also by delivering the said Ira Minard a true copy of the within summons this 11th day of April AD 1856.

L. P. Barker Sheriff of Kane

By S. J. W. Merrill Deputy

Filed April 28th 1857. R. Wright clk

Copy of "Harr."
 State of Illinois. DuPage Circuit Court
 April Term A.D. 1856.

DuPage County S. C.

Daniel Kelly Plaintiff in the
 suit by Francisco & Burgis his attorneys complainants of
 the Chicago, St Charles & Mississippi Air Line Rail Road
 Company (a corporation duly incorporated under and by
 the laws of the State of Illinois) defendant who has been
 summoned &c of a plea of trespass on the case informing

That whereas heretofore to wit, on or about the first
 day of September A.D. 1853 at DuPage County aforesaid,
 the said Plaintiff being then and there the owner and possessor
 of a certain close in said county, to wit the West half of
 Section four in Township No thirty nine North Range No
 Ten East of the third principal meridian, in consideration
 that the said Plaintiff at the special instance and request
 of the said defendant, would permit and request the
 said defendant to enter upon and lay out, and cut,
 embank fill and grade a certain way, for a Rail
 Road, over through and upon the said close of the said
 Plaintiff, the said defendant then and there agreed to
 and with the said Plaintiff to pay to the said Plaintiff
 whatever and all damages the said Plaintiff should
 thereby sustain, and what the said Plaintiff therefor
 reasonably incurred, and the said Plaintiff avers
 that trusting in and relying upon the said agreement
 of the said defendant, he made as aforesaid, he did
 permit and suffer the said defendant to enter upon
 and lay out, and cut, embank, fill and grade the
 said way over through and upon the said close to wit,
 on the day and year aforesaid at the county aforesaid
 and the said defendant did then and there enter

upon & lay out and cut embankment & grade the said way over through & upon the said close - and the said Plaintiff further avers that he sustained damage thereby to the amount of Five thousand dollars, and that he reasonably deserves therefor the said sum of Five thousand dollars, to wit, at the county aforesaid.

And in consideration of the premises the said defendant afterwards to wit on the first day of January A.D. 1855, at the county aforesaid undertook and faithfully promised the said Plaintiff to pay him the said sum of Five thousand dollars, when the said defendant should be therunto afterwards requested -

And also for that the said defendant afterwards to wit, on the first day of March A.D. 1856, at the county aforesaid was indebted to the said Plaintiff in the further sum of Five thousand dollars, for a certain right of way, and the use and occupation thereof, over through and upon a certain close of the said Plaintiff situated in said county and being the West half of section four in Township thirty nine north, Range two East of the third principal meridian, by the said defendant and at his special instance and request, and by the suffering and permission of the said Plaintiff for a long time before then elapsed, had held, used, occupied and enjoyed - and being so indebted the said defendant afterwards to wit, on the day and year last aforesaid at the county aforesaid, in consideration thereof undertook and then and there faithfully promised the said Plaintiff to pay him the said last mentioned sum of money, when the said defendant should be therunto afterwards requested -

And whereas also the said defendant heretofore to wit, on the fifteenth

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day of September A.D. 1853 at the County aforesaid, and on divers other days & times between that day and the 1st of January 1855 with force and arms broke and entered certain close of the said Plaintiff situate in said County, and being upon the West half of Section Number four in Township Number thirty nine North of Range Number Ten East of the Third principal meridian, and then and there with teams, carts, ploughs, spades & shovels trampled down the grass^{and} herbage then growing, and dug up and removed the soil and earth thereof, and piled the same upon the said close and dug & sunk a deep trench in and through the said close, and tore down and removed the fences thereon standing, and other wrongs^{and} damages to the said Plaintiff then and there did. — And afterwards, to wit, on the day and year last aforesaid, at the County aforesaid, the said defendant in consideration of the premises, and of the damage so done by the said defendant to the said Plaintiff as aforesaid, undertook and then^{and} there faithfully promised the said Plaintiff to pay him so much money as the said damages really were, and as the said Plaintiff therefor reasonably deemed to have of the said defendant, when the said defendant should be thereto afterwards requested.

And the said Plaintiff avers that the damages so sustained by him as aforesaid, really were to the amount and of the value of Five thousand dollars, and that he reasonably deemed to have of the said defendant therefor the said sum of Five thousand dollars of other lawful money to wit, at DuPage County aforesaid. — Whereof the said defendant afterwards to wit, on the day and year last aforesaid

there had notice -

Yet the said defendant not regarding their said verbal promises and undertakings, but continuing + intending to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said several sums of money or any or either of them or any part thereof to the said plaintiff (although often requested to do so) but to pay the same hath hitherto wholly neglected and refused and still neglects and refuses to do, To the damage of the said plaintiff of five thousand dollars and therefore brings his suit.

Samuel & Bings
attys for Plff.

Copy of account declared on.
The Chicago, St Charles & Mississippi
Air Line Railroad Company &

To Daniel Kelly Dr.

To amt. due for acct. stated in 1 st comt	\$5000 -
" " occupation & right of way	5000 -
" Amt of damages and promise as per statement in 3 ^d comt	5000 -

Filed April 28th 1857

R. Wright clerk

Copy of "Plff's"
The Chicago, St Charles &
Mississippi Air Line Railroad Company

vs
Daniel Kelly

Supreme Court

And the said defendant by W. D. Barry their attorney come and defend the wrong and injury above and say that they did not undertake or promise in sudener and form.

7 as the said Plaintiff hath at one time complained against them and of this they put themselves upon the country

By W. S. Barry their atty -

And for a further plea in this behalf the said defendant by leave of the court for this purpose first had and obtained say that the said Plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that on the nineteenth day of June AD 1855 at Chicago to wit, at the county of DuPage, Elkhart Co. Sitchfield delivered and paid to the said Plaintiff, three hundred dollars in the stock of the Chicago & Mississippi (thru the Chicago, Alton and St Louis) Rail Road in full satisfaction of all claims of every name and nature which to the said Plaintiff had against the said Elkhart Co. Sitchfield, also in full of all claims against the said Chicago, St Charles & Mississippi air Line Rail Road Company for damages on account of the track of the Rail Road of said company crossing any land belonging to said Plaintiff or for any excavations or embankments made by said company on any of the lands belonging to said Plaintiff until such time as said company shall complete their said Rail Road, and lay the same with Iron rails across the said land; and also in full of all agreements between said company or its assigns and the said Plaintiff for securing any portion of the line of said Road - And the said defendants aver and say that the said Rail Road Company have not completed their said Rail Road nor have they laid the same with Iron Rails across the lands of the said Plaintiff. And the said defendants aver that they have committed none of the grievances mentioned in said Plaintiff's declaration since the eighteenth day of June AD 1855 and this the

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said defendants, are ready to verify, wherefore they pray
judgment if the said Plaintiff ought to have or maintain
his aforesaid action thereof against them —

And for a further plea in this behalf the said defendants
by leave of the court for this purpose first had and obtained say that
the said Plaintiff ought not to have or maintain his aforesaid
action thereof against them, because they say that on the
nineteenth day of June A.D. 1855, at Chicago writ, at
the county of DuPage Eliza C. Litchfield paid and
delivered to the said Plaintiff the sum of Three Hun-
dred Dollars in the stock of the Chicago & Mississippi
(then the Chicago Alton & St Louis) Rail Road which
was received by the said Plaintiff in full satisfaction of
all claims of every name and nature which the said
Plaintiff had against the said defendants — until
such a time as the said defendants should complete
their said Rail Road, and lay the same with Iron
Rails across the said land of the said Plaintiff, and
the said defendants aver and say that they have not
completed the said Rail Road, nor have they laid
the same with Iron Rails, across the said land, and
this they are ready to verify, wherefore they pray judgment
if the said Plaintiff ought to have and maintain his
aforesaid action thereof against them —

And for a further plea in this behalf the said defendants
by the leave of the court for this purpose first had and
obtained, say that the said Plaintiff ought not
to have or maintain his aforesaid action thereof
against them because they say that on the nineteenth
day of June A.D. 1855 at Chicago writ, at the county
of DuPage Eliza C. Litchfield delivered and paid
the said Plaintiff Three Hundred Dollars in the
stock of the Chicago & Mississippi (then Chicago Alton

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and St Louis) Rail Road which be the said Plaintiff received in full satisfaction of all claims of every name and nature which be the said Plaintiff had against the defendants for damages on account of the track of the Rail Road of said defendants crossing any land belonging to said Plaintiff or for any excavations or embankments made by the said defendants on any of the land belonging to the said Plaintiff until such time as the said defendants should complete their said Rail Road and lay the same with Iron Rails across the said land, and the said defendants aver and say, that they have not completed the said Rail Road and that they have not laid the same with Iron Rails, and this they are ready to verify wherefore they pray judgment if the said Plaintiff ought to have maintain his aforesaid action thereof against them —

And for a further plea in this behalf the said defendants by leave of the court for this purpose first had and obtained, say that the said Plaintiff ought not to have and maintain his aforesaid action thereof against them because they say that on the nineteenth day of June AD 1855 at Chicago, Ill., at the County of DuPage, Elisha A. Sitchfield Paid the said Plaintiff the sum of three Hundred Dollars in the Stock of the Chicago & Mississippi (thru the Chicago St Charles Alton & St Louis) Rail Road in full of all claims of every name and nature, which the said Plaintiff had against the said defendants for damages on the account of the track of the Rail Road of said defendants crossing any lands belonging to the said Plaintiff or for any excavations or embankments made by the said defendants on any land belonging to the said Plaintiff until such time

as said Company shall complete their said Rail Road and lay the same with Iron Railz across the said land and the said defendants aver and say the three hundred Dollars in the stock of the Chicago & Mississippi (now Chicago Alton & St Louis) Rail Road, was received by said plaintiff in full satisfaction of all claims for damages as charged in said plaintiff's declaration - And the defendant further aver that they have not completed their said Rail Road and that they have not laid the same with Iron Railz across the said land and this they are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them -

And for a further plea in this behalf the said defendants by leave of the Court for this purpose first had and obtained, say that the said Plaintiff ought not to have and maintain his aforesaid action thereof against the said defendants because they say that on the nineteenth day of June A.D. 1855 the said Plaintiff made, executed and delivered to Elisha C. Sitchfield (he being one of the stock holders in said Company) his (said Plaintiff's) receipt or release in writing in the words and figures following to wit,

"Received Chicago June 19. 1855 of Elisha C. Sitchfield three hundred Dollars in the stock of the Chicago & Mississippi (now Chicago Alton & St Louis) Rail Road in full of all claims of every name and nature against him, and also in full of all claims against the Chicago St Charles & Mississippi air line Rail Road company for damages on account of the ^{tracks} of the said Rail Road of said Company crossing any land belonging to me or for any excavation or embankment made by said company in any

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of my landz until such time as said company shall complete their said Rail Road and lay the same with Iron Railz across the said landz, and also in full of all agreements between the said Company or its assigns and myself for fencing any portion of the line of said Road

Daniel Kelly Jr.

And the said defendants aver and say that said Receipt or release was given by the said Plaintiff and received by the said Abner C. Litchfield for said defendants in full in full satisfaction in full of all claims for damages which the said Plaintiff had received by the construction of said Rail Road, which are the same supposed causes of action which are alleged and set forth in said Plaintiffs declaration, and this the said defendants are ready to verify, wherefore they pray judgment if the said Plaintiff ought to have or maintain his aforesaid action thereof against them

W. J. Barry attorney
for Defendants

Filed April 28th 1857,
R. H. Wright clerk

Copy of Replications &c

Daniel Kelly

The Chicago St Charles
Mississippi Air Line &c

Supreme Circuit Court

April Term AD 1857

And the said Plaintiff as to the said plea of the defendant by it firstly and pleaded and wherein it puts itself upon the country - doth the like &c

By Jamesworth & Burgess attys

And the said Plaintiff as to the said pleas of the said defendant by it secondly, thirdly, fourthly & fifthly also pleaded says preclude now &c because he says that Abner C. Litchfield did not pay this said Plaintiff

would receive from the said Elshu Three hundred dollars in the stock of the Chicago & Mississippi (then the Chicago Alton & St Louis) Rail Road in satisfaction of the said promises & undertakings &c as in said plea alleged and of this he puts himself upon the country &c

And for a further replication to the said plea of the said defendant by it secondly, thirdly, fourthly & fifthly above pleaded (by leave of the court &c) the said Plaintiff says Precludes now &c because he says he did not receive from the said defendant Three hundred dollars in the stock of the Chicago & Mississippi (then the Chicago Alton & St Louis) Rail Road or any other sum in full satisfaction of the said promises and undertakings in the said declaration mentioned - and of this he puts himself upon the country &c

Famsworth & Burgess attys

And the said Plaintiff as to the said plea of the said defendant by it sixthly above pleaded says, that the same and the matter and things therein contained and set forth in manner & form &c is not sufficient in law to Bar the said Plaintiff from having and maintaining his aforesaid action thereof against the said defendant, and of this he puts himself upon the country &c

Famsworth & Burgess attys

Filed April 28th 1858,

R. H. Wright Clerk

"Copy of Record"

United States of America
State of Illinois, DuPage County } Pleas before the Hon. S. H.
Randall Judge of the Eleventh Judicial
Circuit in the State of Illinois at a circuit Court in
and for the county of DuPage in said Judicial Circuit

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begun and held at Naperville in said County on Monday the 14th day of April in the year of our Lord one thousand eight hundred and fifty six, and of the Independence of the United States of America the eighth.

Present the Hon E. M. Randall

Judge

Argueson

State attorney

Amos L. Evans

Sheriff

Attent,

Peter Northrop clerk

And afterwards to wit in the fifteenth day of April at the said Term 1856 aforesaid in the record of proceedings of said court is the following entry writ:

Samuel Kelly

Assumpsit

Chicago & St Charles R.R.

No 31

This day comes the defendant by Remy his attorney and moves the court for a continuance of this cause. And it is therefore ordered by the court that this cause be continued, after the issues herein are made up. And it is also further ordered by the court that the said defendant have leave to file additional pleas by the first day of June next.

United States of America
State of Illinois, DuPage County

Clerk before the Hon Jesse

A. Nelson Presiding Judge of the Eleventh Judicial Circuit in the state of Illinois at a circuit court in and for said County of DuPage in said Judicial Circuit begun and held at Naperville in said County on Monday the

14 Thirtieth day of April AD 1857 and of the Independence
of the United States of America the eight, first -

John O. Norton
Bartleson
James J. Hunt
Clerk,

Judge
State attorney
Sheriff of this county,

John Slop Clerk

And now comes the following entry, to wit,

Daniel Kelly }
vs } Assumpsit
Chicago St Charles }
Nip Air Line R.R. Co }

And now comes the defendant
by Barry his attorney and on his
motion leave is granted to reply double and amend
pleas - And now again come the defendants by Barry
their attorney and enter their motion for a change
of venue ~~here~~ in this cause -

Wednesday April 15th AD 1857.

The court met pursuant to adjournment Present as on
yesterday -

Daniel Kelly }
vs } Assumpsit
Chicago St Charles }
Nip Air Line R.R. Co }

This cause having been brought
on to be heard upon a motion
of the defendant to change the venue from this county
where the same is depending to some county adjoining
And it appearing to the court that there cannot be a
fair and impartial trial of the issue joined between
the parties in this county, It is therefore ordered the
venue in this cause be changed from this county
to the adjoining county of Kane and that that

clerk of the circuit court of the said Co. transmit
to the clerk of the circuit Court of said County of
Kane the original writ, pleadings definitions and
other papers filed in this case

State of Illinois,
Kane County } I John Glop clerk of the circuit
Court in and for said County And
State of said do hereby certify that the foregoing is
a true and copy of said county in a cause therein
pending wherein Daniel Kelly was plaintiff And
the Chicago St Charles & Miss Air Line R. R. Co. defendant
And that the papers and documents annexed And
marked ^{a, b, c, d, e, f, g, h, i, j, k, l, m}
_{n, o, p, q, r, s, t, u, v, w, x, y, z} are all the papers original
files belonging to said suit.

Witness my signature and seal of office
at Naperville this 27th of April A.D. 1857
John Glop Clerk

Filed April 28th 1857

PR Wright clk

And afterwards on
the 20th day of May A.D. 1857 it being one of the days
of the regular May Term of said Court the year last
aforesaid, the following among other proceedings was had
in said Court and entered of Record to wit:

Daniel Kelly

Chicago, St Charles & Miss
Air Line Railroad Company

} Appellant

This day came the defendants
by Barry & Ferguson their
attorneys, and on their motion leave is given the defendants
to introduce 2^d, 3^d, 4th & 5th pleas filed herein

And afterwards to wit, on the 14th day of June in the year last aforesaid it being as yet of said May Term of said court the following further proceedings in said court were had & entered of Record in this cause to wit,

Daniel Kelly	} Affirmavit
Chicago, St Charles & Mississippi Air Line Railroad Company	

This day comes the Plaintiff by Farnsworth his attorney and files his demurrer to the defendants 6th plea, in which the defendants by Barry their attorney join. After argument of counsel the court being fully advised sustains the same. It is therefore considered by the court that the Plaintiff have judgment and execution against the defendants for his costs in this demurrer expended —

And afterwards to wit on the 5th day of June in the year last aforesaid, it being as yet of said May Term of said court the following among other proceedings in said court was had and entered of Record in said cause to wit —

Daniel Kelly	} Affirmavit
Chicago, St Charles & Mississippi Air Line Railroad Company	

This day comes the Plaintiff by Farnsworth his attorney and the defendants by Barry & Ferguson their attorneys also come, and on motion of the Plaintiff it is ordered by the court that a Jury come, whereupon a Jury of good and lawful men to wit:

J. E. Love, George Platt, S. W. Surant
John Kelly, S. Anderson Miller, Charles Sterling

17 John Marker, Eli Barber H. S. W. Gladding
 John Bradley P. P. Davis John H. Madison
 being severally tried elected and sworn also come
 and after hearing a portion of the evidence are
 allowed by the court to disperse and meet the court
 tomorrow morning at 8 1/2 o'clock

And afterwards writ, on the 6th day of June
 in the year last aforesaid, it being as yet of said May
 Term of said Court the following further proceedings
 in said cause were had and entered of Record writ,

Daniel Kelly
 v
 Chicago, St Charles & Mississippi
 Air Line Rail Road Company } Appraiser
 This day came again
 the parties to this writ by
 their respective attorneys and the jury heretofore impanelled
 herein also come, and after hearing further evidence are
 allowed by the court with the consent of the parties to disperse
 and meet the court ~~tomorrow~~ on Monday morning next
 at 10 o'clock

And afterwards, writ, on the 8th day of
 June in the year last aforesaid, it being as yet of
 said May Term of said Court the following further
 proceedings were had in said cause and entered of Record writ,

Daniel Kelly
 v
 Chicago St Charles & Mississippi
 Air Line Rail Road Company } Appraiser
 This day came again the
 parties to this writ by their
 respective attorneys and the jury heretofore impanelled
 herein also come and after hearing the remainder of the

evidence & part of the argument of counsel are allowed by the court to disperse and meet the court tomorrow morning at 8 o'clock —

And afterwards went, on the 9th day of June in the year last aforesaid it being as yet of said May Term of said circuit court, the following among other proceedings in said court was had and entered of Record in said court:

Daniel Kelly

Chicago, St Charles & Mississippi
Air Line Rail Road Company

} Appraiser

This day came again the parties to this suit by their respective attorneys and the jury heretofore empanelled herein also came and after hearing the remainder of the arguments of counsel and instructions of the court, retired under charge of a sworn officer of the court to consider of their verdict

And by agreement of the parties it is ordered by the court that when the jury agree they may reduce their verdict to writing, sign and seal the same and deliver it to the clerk of this court

And afterwards went on the 10th day of June in the year last aforesaid, it being as yet of said May Term of said court, the following further proceedings in said cause were had and entered of Record in our said circuit court to-wit:

Daniel Kelly

Chicago, St Charles & Mississippi
Air Line Rail Road Company

} Appraiser

This day came the parties by their respective attorneys and the jury heretofore empanelled herein also came

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and for a verdict upon their oaths say, as the Jury find the injury done in favor of the Plaintiff and assess his damages at the sum of Two thousand dollars, which is ordered by the court to be entered of record. Whereupon comes the Plaintiff by Darnsworth his attorney and serves the sum of one hundred and fifty dollars from the amount of damages aforesaid. And thereupon the defendants by Barry their attorney move the court for a new trial. After argument of counsel the court being fully advised overrules said motion, To which ruling of the court, in overruling said motion the defendants by their counsel except. It is therefore considered by the court that the Plaintiff have and recover from the defendants the sum of Eighteen hundred and fifty dollars damages together with his costs in this suit expended and have execution therefor.

Afterwards come the defendants by Barry their attorney and pray an appeal to the Supreme Court of the State of Illinois which is allowed by the court on condition that they file an appeal Bond within fifty days, in the sum of Four thousand dollars conditioned as required by law, with security to be approved by the clerk. It is further ordered by the court that the bill of exceptions herein be filed in thirty days.

And afterwards to wit, on the 10th day of July A.D. 1857 a Bill of exceptions was filed in the clerk's office of our said circuit court which is in the words and figures following to wit,

Samuel Kelly

Samuel Kelly Const.

The Chicago, St. Louis and
Mississippi and Gulf
Rail Road Company } Appellant

It is remembered that on the 5th day of June AD 1857 before the Hon Isaac S. Wilson Judge and a jury duly impanelled to try the issue, the above entitled cause came on in the Kanawha County Circuit Court in said state of Illinois for trial of the issue in the said cause: And to sustain the issue on his part the plaintiff introduced as a witness,

J. D. Brewer, who being duly sworn says - I am the Secretary of the Chicago & Mississippi Air Line Rail Road Company - the book produced in court is the book of the Records of said Company -

The Plaintiff then introduced as evidence a patent from the U. S. Government to Daniel Kelly of Lot No 1 of the North West quarter of Section 4, Township 39 Range 10, dated March 1st 1846 - Also a patent of Lot 2 of the North West quarter of Section 4, Township 39, Range 10 to Daniel Kelly dated September 1st AD 1845. - Also a deed ~~from~~ to Daniel Kelly from John J. Black and Patsy Black of the West half of the South West quarter of Section 4, Township 39, Range 10, dated October 27th 1852 - Also a patent from the U. S. Government to Daniel Kelly of the South half of the south West quarter of Section 33, Township 40 Range 10. dated September 1st 1845. - Also a patent to Daniel Kelly of the North West quarter of the South West quarter of Section 33, Township 40 Range 10, dated March 10th AD 1848

To the introduction of the last two mentioned patents the defendant by their counsel objected to their being read in evidence to the jury, which objection was overruled by the court, to which ruling of the defendant by counsel then and there before the same was read excepted -

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The Plaintiff then called George H. Waite who being duly sworn says, — I know the parties to this suit was Chief Engineer of the Chicago, St Charles + Mississippi air line Rail Road Company — It was appointed in March A.D. 1853, never heard of any other Engineer of the Road don't know when I went out of office, — Know the premises of Kelly the Plaintiff in Sub Page County — The defendants graded their road across Plaintiffs farm for nearly a half a mile, — The east line of the farm was near a cut, in the cut, at or near the east line the grade changed from a cut to a fill — It makes a fill of from eight hundred & about 800 to ten hundred feet long and nine feet deep, & 12 deep in the deepest place — each way, fifteen feet wide on the top, slope of one to and one half to one foot — it is forty two feet on the bottom where it is nine feet high, then it enters the cut and continues nine hundred or ten hundred feet long then it strikes a fill to that line about eight hundred or nine hundred feet, 6 feet wide and 6 feet high, the line is straight, passes within about fifty feet of Kellys house, it is a cut there of about twenty feet cut is between the house and travelled road, the house is 150 feet from the travelled road — the cuts are fifty six feet at the top and twenty feet at the bottom — Slope $1\frac{1}{2}$ to 1.5 to feet at the top — the work was done by the defendants — Mr Jones + myself were sent to Kelly by Mr Minard to settle with Kelly, and we were unable to agree with him for any particular sum, but he said we might go on and build the road if that would make no difference — we consented to that agreement and told Mr Minard of it, Mr Minard was President of the road — Mr Minard gave us directions to procure the rights of way, and after

this agreement with Kelly we went on and broke ground, I as chaf. engineer with the others. We saw Mr Kelly several times and the conclusion was that his rights should not suffer thereby, and that we should go on and break ground, and we reported when we went home - Jones was an acting director of the Road at that time - Mr Kelly was to have what was right for his damages, and he was to settle it with Mr Minard.

Crop Examination -

Kelly said that he preferred to settle it with Mr Minard - We asked him if we might go on and he consented - I had no other talk with Kelly - The Embankments on the West End will average two feet from the cut to the bearing ground - Know where Kelly's next line was - the cut is about two feet deep, from a point on one side to a point on the other it will average half way - on the East side of the fill for about $\frac{2}{3}$ of the way from the cut it is wet ground and low, on the West side between the cut and Road between Kelly's Mark and East line there are about three acres, the slough is between 200 or 300 feet wide, the rest is good land -

District Examination resumed -

The Work began at Kellys some time in 1853, it was suspended the next spring E. C. + C. P. Sitchfield were doing the work of the Road at this time - It was the same Sitchfield who was director of the Road - we made our estimate to E. C. + C. P. Sitchfield - The Plaintiff then called J. E. Talbot who being duly sworn says, I reside at Wheaton - am a Surveyor, am acquainted with Plaintiff, promising him surveyed a part of them, have a sketch with me - sketch shown to the Jury - have made no

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actual measurement on his line across the Rail Road, the road took off a portion of the South End of his garden, don't know how much - there was a sort of spring slough at the deep fill East of the cut, there was water there usually, the Plaintiff then asked the Witness the following question - What in your judgment is the damage to the Plaintiff in consequence of the road being there - objected to and objection sustained, and Plaintiff excepted - Kelly has over five thousand acres of land there - Question by the Plaintiff - State whether the Plaintiff's farm is or is not worth less by the Rail Road track crossing it - and if so how much - which said question was objected to by the attorney of the defendant, which objection was overruled by the court, to which ruling of the court before said question was answered the defendant by attorney then and there excepted - the witness then answered, in my opinion the Plaintiff's farm is worth less on account of the construction of said Road - It is worth from 5 to 13 dollars per acre less on that account, I have resided in DuPage County nine years have been a Surveyor thirteen years -

Crop Examination - Land there in the prairie was worth in 1853 from 12 to 20 dollars per acre - fifteen dollars per acre would not be an average price for such a farm as Mr Kelly's, it is one of the best farms in DuPage County - his land in 1853 was worth 20 dollars per acre - Kelly has 300 acres of land north of the St Charles Road and one hundred & thirty acres south of it - it is all fenced on the South of the St Charles Road - and north of the Rail Road it is all fenced - all of it is prairie land - 160 is entirely detached from all land that

touches the Railroad -

Direct Examination Resumed - Farmers in that vicinity are now selling from 40 to 50 Dollars per acre -

Cross Examination Resumed - The gentleman who keeps the Bigg House in Chicago sold the farm adjoining Kellys for 50 Dollars per acre - Mr Bachelor sold a part of his farm there for 45 or 50 Dollars per acre - Kellys farm is worth more than the first farm spoken of -

Perce Driscoll being duly sworn on the part of the Plaintiff says, I know Mr Kelly - reside about $\frac{3}{4}$ of a mile from him - know the tracks of the St Charles Rail Road, know Mr Kellys farm, Mr Kelly had some trees where the tracks run - the track runs 20 or 25 feet from his door - questioned by the Plaintiff - State whether the Plaintiffs farm is worth less on account of the road having been cut through the same, if so state how much - objected to by the Defendant - objection overruled by the Court, to which ruling of the Court before said question was answered the defendant by attorney then and there excepted - The witness then answered, Mr Kellys farm is worth less in consequence of the tracks running through it, it is worth from 8 to 10 or 12 Dollars per acre less, in consequence of the tracks - I refer to his whole farm, have lived there 14 years next December - Kelly came there soon after I did - there were no bridges or crossings made over the cut in front of his house - Kelly has to go 3 or 400 Rods from his house to get out on the Road - there is either cut or fill entirely or nearly through his land - the fill through his Slough is 40 or 50 Rods

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in length, and 8 or 9 feet high - there was water there in the slough before the fill - and it was covered up by the fill - the water from the slough near the ditch on the travelled road -

Crop Examined - I believe the hundred ^{and} fifty acres that is detached from the farm is damaged from 8 to 12 dollars per acre - The Embankment has not dried up the slough - don't know whether there is water north of the Rail Road - don't know as there is any left below - Mr Kelly and I are on good terms - I have lived at Lee Mills fifteen or sixteen miles from Broadus - lived there eighteen months - lived at South Grove - this Rail Road crosses a piece of land -

William A. Rues being sworn by the Plaintiff says - I reside in Milton Township about one mile from Plaintiff - Am a farmer have been a farmer 10 years - am acquainted with Plaintiffs farm - Plaintiff had a mill there when the Rail Road was put there, and it was filled up by it, - Question by the Plaintiff - State whether the Plaintiffs farm is worth less, on account of the road having been cut through the same, if so, state how much? - objected to by defendants - which objection was overruled by the court, to which ruling of the court, before said question was answered, the defendant by attorney then and there excepted - The witness then answered - His farm is worth less on account of the Rail Road track there it is worth five thousand, one hundred and ten dollars less on account of said track -

Crop Examination - The mill was about twenty feet deep, and closed up - Damage done to the Water Privilege I estimate at \$500. One demand fifty

Dollars for the Slough - did not see water north of the Rail Road in the Slough - did see water south of it - There may have been a culvert there, did not minutely notice it - the Slough is four or five Rods wide, from East to West - Before the Rail Road was built - there was a place there where Kelly and Rail Road Constructors wanted their horses - Damage to garden and fruit trees \$100 - Couldnt say how many trees were there - From the cutting on the north side to the St Charles Road - the Rail Road spoiled about nine acres of land - I put the damage of the nine acres at \$300. House, Shade, Barn, beauty of building, spots, river &c I call damaged about \$450 - The Sheds are interfered with - the barn is about 4 Rods from the cut - all the land north of the Rail Road is damaged to the amount of ten Dollars per acre - there were 376 acres north of the Rail Road - it damages the sale of the land - I was there in the Spring of 1853 - Land was then worth from twenty to twenty five Dollars per acre - It is now worth from forty to fifty Dollars per acre - Kellys is worth forty Dollars - would have been worth fifty Dollars per acre if the Rail Road was not there -

The Plaintiff then called Alfred Standish - who being duly sworn as a witness says - I reside about a mile from Kellys, am a farmer - have been a farmer 10 years - am acquainted with Kellys farm - the farm of Kelly ^{is} ^{worth} is up in consequence of the Rail Road - I estimate the land lying north of the Rail Road at Eleven or Twelve Dollars up per acre in consequence of the Rail Road being there - The strip between the Road & Rail Road is not worth fencing - it cost \$200 - Kelly had a watering

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place there for his cattle before the Rail Road was built - don't see any there now - there was a well there - there is none now - he had some choice fruit trees there he lost them by the building of the Road -

Crop Examination -

Whether he wants to go East or West he has to go thirty or forty Rods from his house to get across the Rail Road, the Rail Road injuring the sale of the land -

The Plaintiff then introduced Jesse Wheaton who being sworn as a witness says, I reside in Wheaton - I am acquainted with Mr Kellys farm and the road worked through there - Question by the Plaintiff: State whether the Plaintiffs farm is or is not worth less by the Rail Road tracks crossing it, and if so how much?

Which question was objected to by the attorney for the defendant, which objection was overruled by the Court, to which ruling of the Court before said question was answered the defendant by attorney then and there Excepted - the witness then answered - the farm is less in consequence of the Rail Road there - It is worth the cost to fill the cut there less than it would be if ~~it~~ it was not there - don't know what it would cost to fill the cut - it injures all the land north of the Railroad the land north of the Rail Road is the best for building purposes - All the farm lying north of the Rail Road is worth seven or eight dollars less per acre than it would be without the Rail Road - the piece between the Rail Road is entirely lost -

Crop Examination - If the cars run over the track it would not injure it so much as it does now - I am in favor of Rail Roads myself.

The Plaintiff then called Erastus Gory who being

sworn as a witness, says - I reside in DuPage County, am a farmer - am acquainted with the Plaintiff^{and} his farm and the location of the Rail Road. -

Question by the Plaintiff - State whether the Plaintiff's farm is or is not worth less by the Rail Road track crossing it, and if so, how much? which said question was objected to by the attorney for the defendant which said objection was overruled by the court, to which ruling of the court the defendant by counsel then and there excepted - The witness then answered - Kelly's farm is worth less in consequence of the Rail Road being there than it otherwise would be - Would not give so much for the farm for four or five or six or seven thousand dollars - My judgment is that it is worth three thousand dollars at least less than it would be without the Rail Road -

Cross Examination - Am not a fancy man - a fancy man would make more difference and perhaps not buy it at all - I think the Rail Road injures the land on the south side of the Rail Road

The Plaintiff then called Warren S. Wheaton who being sworn as a witness says - I reside at Wheaton - know Kelly and his farm and the Rail Road spoken of - Question by the Plaintiff - State whether the Plaintiff's farm is or is not worth less by the Rail Road track crossing it, and if so how much?

Which said question was objected to by the attorney for the defendant, which objection was overruled by the Court, to which ruling of the court before said question was answered, the defendant by attorney then and there excepted - The witness then answered - I should think the salability of the farm was affected by the Rail Road some three or four or five thousand dollars.

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Cross Examination - Went there and had some trouble to find the road across the Rail Road.

The Plaintiff then called Luther Chadwick - who being duly sworn as a witness says - Reside at Wheaton, I have lived there three years - have lived in Dupage County Twenty years - know Kelly and his farm and the Road spoken of - Question by the Plaintiff - State whether the Plaintiff's farm is or is not worth less by the Rail Road track crossing it - if so how much? Which question was objected to by the attorney for defendant - which objection was overruled by the Court, to which ruling of the Court before said question was answered, the defendant by attorney then and there excepted - The Witness then answered - Kelly's farm is less in value in consequence of said Road, some three or four thousand dollars less.

Cross Examination - Know where the East and west line of Kelly's farm is nearly - have been a farmer. -

The Plaintiff then read from the books of Records of the Chicago, ^{St. Charles} Mississippi Air Line Rail Road Company, Annual Election of 1853, Dr. P. Minard elected President of the Board of Directors and George W. Waite Engineer - Also a Resolution passed by the Board of Directors that George W. Waite be authorized to procure rights of way for the Road, to wit:

Resolved that George W. Waite Chief Engineer of this company be empowered and hereby authorized to procure the right of way from any one person or persons over whose lands the road of this company may pass, & to receive surveys, deeds and all necessary conveyances for that purpose, and to employ any person he may deem necessary to accomplish said object -

The Plaintiff having stated his case, the defendant then introduced to sustain the issue on their part,

J. D. Vallett who being duly sworn says, For farming purposes the farm of Plaintiff would be worth less if the cars were running on this track than it is now - the damage would be greater - it might be two to one or three to one greater -

Crop Examination - The building of a Rail Road if it is run may enhance the value of a mans farm, but the digging a ditch would not - I meant the farm would be less for farming purposes only - The Defendant then introduced David Fish who having been duly sworn says - I reside at Milton and am acquainted with Kelly, have resided there twenty years, am a farmer - live about two miles from Kellys and am some acquainted with his farm - know the cut and embankment - It is a difficult question to answer as to how much the farm is worth less - never examined it much - should think it worth about five hundred and fifty dollars less - know that Kelly had a well there have seen the slough there - it is like many other sloughs, at wet time plenty of water - at a dry time not so much - this Rail Road goes through my farm for 150 Rods - it is a deep cut the biggest part of the way, over 20 feet deep - goes through about the middle of my farm - doesn't run quite East and west - my farm is broader at one end than at the other -

Crop Examination - I live sixty or seventy Rods from the back of the Road - The Rail Road is north of my house - the travelled road south - need some improvement on the north side of the track - think the cut could be filled so as to crop for \$50.00 some of the dirt of the cut was carried to a fill in

31 half mile - If the track ran into Kelly's farm would be worth twenty five or thirty dollars per acre - Have cropped the slough year by year this track was built - don't recollect whether there was water there or not -

The defendant then called Samuel Housh who being duly sworn says - I reside in Milton, know Kelly's farm, leave $\frac{3}{4}$ of a mile from it have lived there 13 years, recollect something about a slough being there in a wet time there was water, in a dry there was none - Have been called upon by Kelly to dig there for water - It is not the same slough spoken of by the other witnesses - the slough I speak of was a little north west of the house - Don't know of any water being in the other slough - there was no water where I dug until we got to the gravel below - Where I dug for the water it was forty rods from the St Charles Road - The slough spoken of yesterday would have been between where I was and the St Charles Road - If there had been water between me and the St Charles Road I should have seen it - I dug from six to eight feet, Have cropped the St Charles Road to the slough very often - In a wet season there is water there - in a dry one - like other sloughs there is not - This Rail Road goes through my farm for a $\frac{1}{4}$ of a mile and acquainted with the cut on Kelly's farm - live $\frac{3}{4}$ of a mile from there - Kelly's farm is worth from six hundred to six hundred and fifty dollars up in consequence of this Rail Road - it is a difficult question to answer - Farms there in 1853 were worth from fifteen to twenty dollars per acre - Kelly had a house and barn and some fencing and pots on his farm - Kelly's farm was worth at that time from fifteen to twenty dollars per acre - Farms there now are worth from thirty to forty dollars - There is not so

^{much} land north of the Rail Road as south of it -
 South of the Rail Road there is about $\frac{3}{4}$ of an acre of wet
 ground - There is a culvert under the Rail Road thro.
 The land on the north side of the Rail Road track and
 all is worth fifteen to twenty dollars per acre -

Crop Examination - The Rail Road
 Work was done part in 1853 + part in 1854 - Can't tell
 whether the biggest of the work was done in 1853 or
 1854 - Mr Barry subpoenaed me about two weeks ago -
 He met me in the St Charles Road opposite my gate,
 went up to the meeting at the grove - Barry went in
 to see Fisk - I rode in Barry's Buggy - came back
 by the side of the track - We looked at Kelly's land of
 course - Barry paid me my fee - he paid me
 three dollars - Went down to St Charles - saw Barry +
 Munsard there - I went to dig a well for Kelly - it was
 a dry time - the regular well was dug before that -
 did not stone the well up myself - been to this slough
 all winter of the year - can't tell the exact time -
 May be I went to David Kellys across it - I don't think
 it would cost more than six hundred + fifty dollars
 to put the dirt back and that's the reason why I
 said it was not worth more than six hundred +
 fifty dollars less - If it would be worth a thousand
 dollars to put the ~~more~~ dirt back - it would be worth a
 thousand dollars less - If the dirt couldn't be put
 back at all, the farm would still be worth only six
 hundred + fifty dollars less -

Direct Examination Resumed - I think the
 whole cut could be filled up for six hundred +
 fifty dollars - the well would be dry $\frac{3}{4}$ of the summer
 it is the well I dug -

Crop Ex. Resumed. I found water when

I dug the well -

The defendant then called Adam Slope who being duly sworn says - I reside at Cottage Hill - am some acquainted with Kellys farm - was one of the appraisers of damages on the St Charles Railroad track - know the location of the St Charles Road across Ruffs farm - Kellys farm is worth between Six Hundred and Seven Hundred dollars less in consequence of the track - It is a difficult question to answer -

Cross Examination - I live about 10 miles from Kellys - The officers of the company designated me as one of the appraisers - was appointed by a Justice of the Peace - would cost Two Hundred Dollars to build a bridge across the track - bridges would cost six hundred dollars -

The defendant then called J. M. Holmes who being sworn - says - I reside in Milton - know Kelly - live about $\frac{3}{4}$ of a mile from him on the St Charles Road - know the location of his farm - have lived there 8 or 9 years am a farmer - know the location ~~and~~ ~~fill~~ of the cut and fill, lived nearer Kellys in 1853 than now - The farm of Kelly was worth about five dollars per acre less after the work of the Rail Road was done than it was before - I mean the old farm north of the Railroad.

Cross Examination - If a man wanted to sell he could not get so much for the farm as five dollars per acre - could sell that south of the Rail Road for as much as before -

The defendant then called A. S. Ransing who being duly sworn says, I reside in Milton - have lived there fifteen or sixteen years, am acquainted with Kelly - live a mile from him, this Rail Road runs through my farm - I live on the St Charles Road

Kelly's land is 7000th - between five hundred & six hundred dollars up in consequence of the cut - know the slough in a wet time plenty of water there - in a dry time no water - the cut through my land is 6 feet deep for over 70 Rods - not all the way 6 feet but that is the mean depth -

crop Examination - My farm is one
hundred and twenty acres of Prairie - The cut in
front of the house is 12 or fifteen feet deep -

The defendant then called Rollin Truett who being sworn says - I am acquainted with Kelly - I was a clerk in the Rail Road, employing of defendants - in 1853 & 1854 - Eighty dollars was paid to Plaintiff by the defendants at one time and Two Hundred dollars at another - The Two Hundred dollars was in money and the eighty dollars was an order on the company - the order introduced -

the order introduced -
 Mr J. Minard, ^{Sept 1st 1853} Please to let James Kelly
 have (80) eighty dollars to pay in his stock on the
 Chicago, St Charles and Cairo Rail Road and charge
 to me the same Road - "Daniel Kelly Jr."

I know the signature of the Plaintiff - this is his signature.
 I don't know the Examination - I don't know
 that the two hundred dollars was paid for fencing -
 The Plaintiff borrowed money of Minard and gave
 his note for it. Kelly took up the note, am sure of
 it - I think the two hundred dollars was paid for damages.
 I was principal clerk for Minard - Minard was not there
 when Kelly took up the note - I drew a receipt which
 Kelly signed, the interest on the note was forty dollars.
 Something was said about fencing and part of it was
 for fencing - The Receipt was for two hundred and
 forty dollars Receipt Introduced - (to wit)

35- "1240- Received from Ira Minard President of
Chicago, St Charles & Mississippi and Live Railroad
Company Two hundred & forty dollars on account
of contract of fencing and Right of way of said Rail
Road through my farm in DuPage Co.
St Charles May 1st 1855 Daniel Kelly Jr.

Record of Election of Directors of the company
here introduced, dated June 21st 1854 Ira B.
Minard, Elisha B. Sitchfield & others elected directors
also in 1855 Elisha B. Sitchfield and others elected
executive committee - Elisha B. Sitchfield owned
June 19th 1855 one hundred shares of the stock of the
company -

George W. Waite was then recalled who
says, The cut and fill occupied about three acres of Kellys
land - Between the St Charles Road & the cut & fill
there are about four acres -

Crop Examination - There are about nine
thousand one hundred & thirty yards of excavation
and five thousand six hundred & seventy seven yards
of fill - The court then stated that he should permit
the Witness Waite to testify how much it would cost to
fill up the cut and replace the earth again in the same
situation on Kellys farm as it was on Kellys farm before
the Railroad Company went upon the land -
Donkeys decision of said court in admitting said
evidence and before said question was answered the
defendants by their attorney at the time objected -

The witness then said it would cost ninety one hundred
& thirty dollars and forty cents to put the dirt where it
was before the excavation and fill - that is to straighten
it as it was before, except seeding it down -

The defendant then gave in evidence the following writing -
 "Received Chicago June 19th 1855 of Elisha C. Sitchfield
 Three hundred dollars in ~~full~~ the stock of the Chicago ^{and}
 Mississippi, New Chicago Alton + St Louis Rail Road in full
 of all claims of every name and nature against him, and
 also in full of all claims against the Chicago St Charles
 and Mississippi Air Line Rail Road Company for damages
 on account of the tracks of the said Road of said Company
 crossing any land belonging to me or for any encroachments
 or embankments made by said Company on any of
 my lands until such time as said Company shall
 complete their said Rail Road and lay the same with
 Iron Rails across the said lands, and also in full of all
 agreements between the said Company or Ira Winward
 and myself for fencing any portion of the line of said Road.
 Samuel Kelly Jr.

The Defendants here rested their case.

The Plaintiff then introduced to prove the issue on
 his part - The Record of articles of Union between the
 defendants, and the Chicago + Galena Rail Road
 Company, uniting the Rail Road of defendants
 with said Chicago + Galena Rail Road - Also a
 resolution dated June 20th 1855, unit, "Resolved, that
 this Company shall be and become united with
 the Galena + Chicago Union Rail Road Company upon
 the terms, conditions, and obligations set forth in
 the following articles of Union, and the President and
 Secretary of this Board are hereby authorized and
 empowered to execute the same by signing and
 affixing the Seal of this Company thereto"

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37 Antagonizing said contract^{of union} to be entered into and signed, To the introduction of which testimony the defendants by attorney before the same was read objected - which objection was overruled by the court to which ruling of the court the defendants by attorney then and there excepted - Also a Resolution of forfeiture of stock dated April 21st 1855, to wit:

"Whereas in accordance with the terms of subscription to the Capital stock of this company, and with the charter and by-laws also of this company, assessments have heretofore, up to and including the first Monday of February last been made upon the Capital stock of said company amounting in all to 55 per cent to that date due - Whereas the required notice of said assessments or calls has been from time to time duly published and stockholders embraced in the following list from No. one to two hundred & sixty seven have either neglected or refused to pay up the whole of said assessments due on said 1st Monday of February last, and more than sixty days having elapsed since the same were due and payable, Therefore Resolved, that under the power contained in the charter of this company and in accordance with the terms of subscription, the whole of the stock standing on the books of this company, as named in the said list, together with all previous payments made thereon are hereby declared forfeited to this company."

All of defendants Book of Records relating to acts of defendants offered in evidence - To the admission of which the defendant objected - The court overruled the objection and admitted said books in evidence, To which ruling and decision of the court defendant at then and there at the time excepted.

The Plaintiff then read in evidence to the jury the following:

List of forfeited stock referred to in the above resolution
from None to Two hundred and fifty - every -

	Name	Shares	Paid	No. forfeiture
Chicago	Oliph Samuel	1	25 50	1
	Baker William	5	150 .	2
	Lowes R. V. M.	10	75 .	3
	Grey Muz	10	350 .	4
	Green Geo H	20	700 .	5
	Judd A. P.	20	150 .	6
	McArthur C. J.	5	250 .	7
	McArthur E.	5	200 .	8
	McLannan W. W.	5	12 50	9
	Murray A.	10	350 .	10
	Paine W.	20	150 .	11
	Pargo A.	5	12 50	12
	Rankin G. H.	2	15 .	13
	Thomas Wm E.	2	25 .	14
	Hicker C. J.	5	87 50	15
St Charles	Book J. H.	10	200 .	16
	Slaker Valentine	1	5 .	17
	Gammum E. H.	4	120 .	18
	Leavis R. J.	20	1000 .	20
	Leubhard A. G.	3	52 50	21
	King R. G.	10	25 .	22
	Manni Beth	8	216 28	23
	Mathews Charles	1	17 50	24
	Mathews J. R. C.	5	125 .	25
	Purvis S. S.	1	15 .	26
	Richardson J. G.	2	45 .	27
	Swail Francis	4	10 .	28
	Stephens Henry	5	213 22	29
	Swain John E.	5	200 .	30
	Taylor J. C.	2	35 .	31

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Wade W. J.	20	110	1	32
Waples Ruten	10	25	1	33
Walace John M.	2	45	1	34
Brown John H.	1	50	1	35
Brown John C.	3	105	1	36
Brown J. L.	1	50	1	37
Bumgar W.	1	35	1	38
Coffey + Purcott	5	125	1	39
Kunitalo 40 ^{Don}	5	175	1	40
Sutton W. J.	1	50	1	41
Segoe W. W.	1	35	1	42
Sow Round	1	50	1	43
Tucker James	1	25	1	44
Wardham William	5	37	50	45
Waulin ^{Wm.} E.	2	25	1	46
Waulin E. W.	1	12	50	47
Wells G. H.	1	30	1	48
Ware David W.	1	35	1	49
Maxfield G. A.	3	125	88	50
Maxfield J. M.	1	35	1	51
Mayo Emory R.	1	12	50	52
Merrill H. J.	1	40	1	53
Miller W. W.	2	100	1	54
Rowe H. H.	1	50	1	55
Riddle John	1	35	1	56
Rosen Stephen	1	40	1	57
Sewright J. S.	1	35	1	58
Simms J. A.	1	35	1	59
Webb H. H.	1	50	1	60
Clark Marshall	1	50	1	61
Wheeler James	1	35	1	62
Wright Samuel	1	25	1	63
Winnard Chas.	1	50	1	64

Name	Shares		No.
	Shares	Am't Paid	
Wine E. A.	1	25	65
Wager Henry	1	40	66
Walrod David	1	35	67
Wood John	1	27 50	68
Wood Geo. S.	1	30	69
Wigham Ralph	1	30	70
Wright W. W.	1	30	71
Wood Cyrus	8	341 83	72
Avery George	1	2 50	73
Brown S. & A. C.	5	250	74
Brayton & Baker	10	25	75
Blair W. D.	5	87 50	76
Brown Robt	5	62 50	77
Bear John M.	1	2 50	78
Camphill A. C.	5	250	79
Cronell Jeremiah	1	256	80
Cheeny E. W.	5	12 50	81
Cand John R.	1	2 50	82
Clark John	2	5 00	83
Coffman E.	1	7 50	84
Dulcher E. D.	15	37 50	85
Cheeny William	1	7 50	86
Coffman Jno	1	50	87
Dantz David	5	250	88
Emmley John	1	7 50	89
Fellow S. W.	5	37 50	90
Feller A. D.	1	2 50	91
Feltz Simon	1	12 50	92
Ford A. C.	5	12 50	93
Fyson David	4	60	94
Fay J. J.	1	2 50	95

Agile Co.

41	Heston Jno. B	1	12 50	96
	Hoffman A.	3	7 50	97
	Hoffman Daniel	2	5 00	98
	Husted Benj	2	15 .	99
	Hilt S. W.	10	88 .	100
	Hayer John	3	120 .	101
	Heaman John	1	12 50	102
	Heedrick Benj.	1	2 50	103
	Heedrick Alex.	1	2 50	104
	James John	4	30 .	105
	Jewell Jas. W.	5	175	106
	Jacobs S. J.	1	25	107
	Jones Francis C.	1	25 50	108
	Lewis H. S.	4	10 .	109
	Lillibridge A. H.	3	\$ 85 - ⁴⁰	110
	Lichtinger S. S.	5	37 50	111
	Licht E. A.	2	15 .	112
	Lilly J. P.	2	5	113
	Long Samuel	1	7 50	114
	Lonsdale John	1	25 00	115
	Long David	1	25 00	116
	Mayberry Richard	5	12 50	117
	Mantel William	2	5 .	118
	Mumma Jonathan	2	100 .	119
	Mitchell Geo. A.	1	17 50	120
	McLair Rich?	1	12 50	121
	Mitchell Saml?	1	7 50	122
	Marshall Caleb	7	182 50	123
	Marshall J. S.	2	45 .	124
	McAffee Saml?	1	25 .	125
	Marshall Reuben	5	87 50	126
	Morse James	20	150	127
	Myer William	2	5	128

\$17.50

42	Name	Share	and Paid	No
	O'Neil George	1	2 50	129
	Potvin E. H.	10	75 -	130
	Rice Jacob	5	125 -	131
	Quikney D. J.	5	175 -	132
	Parco E. C.	1	22 50	133
	Petry Jacob	1	2 50	134
	Porter R. H.	5	12 50	135
	Robinson David	5	62 50	136
	Saunders Geo	2	5 -	137
	Starger John	2	55 -	138
	Stetlo R. J.	2	35 -	139
	Shaeffer David	2	101 30	140
	Stewart B. J.	10	100 -	141
	Shaffer C. P.	1	25 -	142
	Shaffer Solomon	4	100 -	143
	Spencer Aman	1	2 50	144
	Stutw Isaac	1	2 50	145
	Stutw Isaac	1	2 50	146
	Sautorn A. J.	1	2 50	147
	Shaw Henry	5	12 50	148
	Smith George	1	2 50	149
	Shipman Martha P.	5	37 50	150
	Shonebraker Nick ⁶	2	79 -	151
	Sico H. C.	2	55 -	152
	Thomas Henry	1	42 50	153
	White James	4	170 -	154
	Webb James W.	2	90 -	155
	Wier Thomas	1	2 50	156
	Wagner John W.	1	2 50	157
	Young C. P.	5	215 -	158
Galena	Adams John	5	12 50	159
	Brudell John	2	15 -	160

45	Brakney W.	2	25 -	161
	Bruce William	2	5 -	162
	Blauchard C. H.	2	15 -	163
	Bryan Phillip	5	12 50	164
	Bell Robert	10	125 -	165
	Lebbago William	8	100 ^{\$60}	166
	Cumey James	2	5 -	167
	Crenis H.	2	25 -	168
	Chilton M.	5	37 50	169
	Dowbeny N.	10	125 -	170
	Davis A. C.	30	225 -	171
	Dennis C. P.	2	5 -	172
	Eraus J.	2	5 -	173
	Edgerton A.	5	62 50	174
	Faller Geo H.	5	37 50	175
	Fitch Chuter	10	125 -	176
	Spredthrop W. M.	30	300 ^{\$225}	177
	Griffith Jas E.	5	7 50	178
	Heaghtlett Saml	10	125 ^{\$75}	179
	Heare P. N.	10	500 -	180
	Heaton H. H.	50	375 -	181
	Heavis S. O.	20	50 -	182
	Hearn's Hoo	10	25 -	183
	Howard P. P.	3	7 50	184
	Heuter A.	1	12 50	185
	Holland J. P.	5	12 50	186
	Heare L.	2	5 -	187
	Hale Ann	3	22 50	188
	Johnson M. Y.	5	12 50	189
	Mearfield Henry	5	12 50	190
	Humble S. E.	5	37 50	191
	Miller S. H.	2	5 -	192
	Millard M. P.	10	125 ^{\$75}	193

144	Name	Share	amts Paid	No
	Marble O.	5	12 50	194
	Rawls Thomas	10	125 - ^{\$25}	195
	Stittman A.	10	25 -	196
	Swift S. H.	2	5 -	197
	Steno J. P.	5	12 50	198
	Sealand D. P.	10	75 - ^{\$25}	199
	Shelden O. R.	25	812 50	200
	Shelden H. A.	10	125 -	201
	Shaw Elias	5	62 50	202
	Sart Perry	5	50 -	203
	Wachtum E. P.	75	562 50	204
Galena	Wagner D. A. ^{\$37⁵⁰}	5	62 50	205
	Wench A.	6	45 -	206
	Williams P.	5	175 -	207
	Werner John	3	225 50	208
Blindero	Witt A. Wattenman	6	75 -	209
	Dan Leonard	5	37 50	210
	Selby Leach	3	7 50	211
	McQuinden	2	25 -	212
	H. C. Walker	2	5 -	213
	S. A. Kuhlert	2	5 -	214
	Dan. Leonard	5	39 50	215
	D. P. Lamblin	10	25 -	216
	H. S. Stanton	2	25 -	217
	A. D. Randall	1	2 50	218
	A. C. Mizell	2	5 00	219
	Mr. W. Ryce	5	12 50	220
	Orlando Leutz	10	75 -	221
	John E. White	5	150 -	222
	John S. Derwilliger	5	125 -	223
	Jeremiah Phillips	5	125 -	224

45
Carroll Co
Dactylus
Dora

Fredrick Chamber	5	125 -	225
S. Gillett	5	12 50	226
Silas Keller	5	37 50	227
Robt Richardson	2	5 00	228
S. H. Bowen	20	50 -	229
Aaron Pierce	4	10	230
John Dwyer	4	12 50	231
Philus Pick		88	
J. P. & J. P. Rhodes	5	25 1	232
H. E. Leroy	10	125	233
J. S. Leonard	5	15	234
W. M. Sykes	2	50 -	235
J. O. Baird	4	5 -	236
Wade H. Eldrich	2	250 -	237
E. W. Wood	5	450 -	238
A. Goldman	10	500 -	239
H. Stur	10	-	240
E. J. Egan	5	-	241
O. M. Barra	2	-	242
John Scarabe	1	-	243
H. B. Leupenter	3	-	244
Phil Hunter	1	-	245
John Wilson	1	-	246
H. Puckertbaugh	10	-	247
H. J. Miller	10	-	248
John Emmitt Song	5	-	249
J. J. O'Brien	5	-	250
J. V. Emmert	3	-	251
Chas E. Hawley	10	-	252
J. S. Leach	3	-	253
J. P. Naily	2	-	254
J. P. H. Kallit	2	-	255
Abraham Pierce	10	-	256
John Holow	3	-	257

Names	Shams	ans Paid	No
Dani Barker	5	—	259
M. Daper	10	—	260
Geo. H. Stewart	5	—	261
Chas. Pulfurd	2	—	262
John Cole	1	—	263
Samuel More	0	—	264
Richard Baker	1	—	265
W. D. Blain	5	—	266

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The Plaintiff then called Wm W Larrabee who being sworn says, I am one of the Directors of the Chicago St Charles & Mississippi Rail Road and the Larrabee mentioned in the Records of that Company, I am Secretary of the Chicago & Galena Rail Road Company I know E.C. Litchfield. In the Spring of 1855 saw Griswold President of the Illinois Central Rail Road. I just learned that there were negotiations for the sale of defendant Rail Road to the Chicago & Galena Rail Road prior to the Resolution of the 20th of June 1855. I learned it from the Chairman of the Committee appointed to effect the negotiations. I had Official Notice of the ~~fact~~ on the 20th of June 1855. Turner acted as Chairman of the Committee of Negotiation Mr Griswold claiming to act for Mr E.C. Litchfield and Turner acted for the Chicago & Galena Rail Road Company.

Question by the Plaintiff

What do you know upon the subject of Mr Litchfield making a trade with the Galena Company with regard to ^{the} Rail Road and State from whom you first received propositions?

Which said objection question was objected to by the Attorney for the defendants, which said objection was overruled by the Court to which ruling of the Court before said question was answered, the defendants by their attorney then and there excepted, the Witness then answered.

I know that a Committee had been

48 appointed on the part of the Chicago & Galena
Rail Road to negotiate the transfer of defen-
dants Rail Road. A proposition for that same
transaction was received from Mr Griswold
as President of the Illinois Central Rail
Road. dont know whether or not. The sit-
uation was conferred with he might have
been personally by some of the Committee
Question by the Plaintiff.

If you know anything done or said by
Litchfield recognizing the Authority of Griswold
State it, which said question was objected
to by the Attorney for the defendants which
objection was overruled by the Court to which
ruling of the Court before said question was
answered. The defendants by their Attorney
then and there excepted. The Witness
then answered. Mr Litchfield acted
with me in examination of the Stock
books of the defendants Rail Road to ascertain
if sufficient amount of Stock had been
obtained in accordance with one of the terms
submitted by Mr Griswold. We examined
the number and amount of Stock ready
to be transferred.

Question by the Plaintiff.

Was that done in accordance with the
proposition made by Griswold, which
said question was objected to by the Attorney
for the defendants, which objection was
overruled by the Court to which ruling of
the Court before said question was answered.
The defendants by their Attorney then

and their excepted. The Witness then answered It was in accordance with one of the propositions made by Griswold. It was in the month of June prior to the 20th and might have been on the 19th. After we finished the examination of the Stock and the matter had been settled with our Road, Mr Sitchfield urged me to hurry up and clear the matter that he might go East.

Question by the Plaintiff.

Did Sitchfield deliver to you any of the Stock of the St Charles Rail Road for the Galena Company— Question objected to by defendants counsel— Objection overruled by the Court to which ruling of the Court the defendants by their counsel then and there excepted. The Witness then answered. Mr Sitchfield delivered to me some of the Stock of Deft Road. It was something over $\frac{3}{4}$ of the Stock. The Receipt of the Letter from Griswold was the day of its date on the day after. Letter from Griswold to Turner dated March 6th 1855, was then appeared in evidence by the Plaintiff.

State whether any other Person than Griswold was treated with until Sitchfield came and consummated the trade? which question, was objected to by defendants counsel which objection was overruled by the Court, to which ruling of the Court, before said question was answered the defendants by their Attorney then and there excepted. The witness then answered; I have no knowledge of any other person except Griswold being treated

with for the purchase of defendants Road by the Galena Company. The Sitchfeld went East in a very few days after the contract was executed. Another letter dated March 5th 1855. from Griswold to Sumner was here offered in evidence by the Plaintiff. I was in Sitchfelds Room before the 20th of June counting up the Stock of the Chicago St Charles & Mississippi Air Line Rail Road. This was before the Resolution of the defendants was passed on the 20th 1855 of June is a Record of a Resolution passed by our Road relative to the Chicago St Charles & Mississippi Air Line Rail Road The Record of the Resolution was here introduced by the Plaintiff.

~~I was~~ On the 21st a Resolution passed authorizing to issue Bonds for four Hundred & forty thousand dollars in Bonds not less than twenty five thousand dollars also to unite with the defendants the Record of said Resolution here introduced by Plaintiff The Record of a Resolution of June 21st 1855 of Galena Road Authorizing the Executive Committee to act relative to defendants was here introduced by Plaintiff A copy of the Articles of Union between Chicago & Galena Rail Road and defendants here introduced by Plaintiff.

On the 28th day of June 1855. the executive committee made a Report continuing the settlement with Sitchfeld was five hundred & forty thousand dollars the Record of a Resolution to issue Stock

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to the amount of one hundred thousand dollars to Litchfield dated June 21st 1855 was there introduced by Plaintiff. This contract was not made public until our annual report in June a short time afterwards was made I think I saw Litchfield in our office prior to the execution of these papers. We have no recollection of seeing Minard there. He might or might not have been there. I don't think Mr Griswold was the agent of the Galena Company. If he had been, I should have known it. In fact as I have any knowledge of it Mr Griswold was acting as the agent of the Illinois Central Company - The letter from Griswold to Turner dated March 6th 1855. was there withdrawn from the Jury by the Court.

Corp Examination,

The transfer of the Stock by Litchfield was done ~~prior to~~ by power of Attorney and did not appear from the Stock Ledger at that time as it was not then posted. The Plaintiff here introduced in evidence the Stock Ledger of the defendants, Also two Bonds, one to the Galena & Chicago Rail Road Company from Minard & Litchfield dated June 29th 1855 and ~~one to the Galena & Chicago Rail Road~~ and one to the Chicago St Charles & Mississippi Rail Road Company from Minard & Litchfield dated June 29th 1855. for one hundred thousand dollars each

Know all men by these presents that we Elisha C. Litchfield and John Winward are held and firmly Bound unto the Galena and Chicago Union Rail Road Company of the State of Illinois in the sum of one hundred thousand dollars lawful money of the United States to be paid to the said Galena and Chicago Union Rail Road Company, their certain Attorney Successor or assigns, to which payment well and truly to be made we do bind ourselves and each of us our and each of our heirs, executors and administrators jointly and severally, firmly by these presents sealed with our seals dated the twenty ninth day of June in the year of our Lord one thousand eight hundred and fifty five

Whereas by certain Articles of Union dated the Twentieth day of June in the year of our Lord one thousand eight hundred and fifty five made and executed by and between the said Galena and Chicago Union Rail Road Company and the Chicago St Charles and Mississippi Air line Rail Road Company, it was among other things covenanted and agreed, that the said Chicago St Charles and Mississippi air line Rail Road Company should indemnify and save harmless the said Galena and Chicago Union Rail Road Company of and from all debts, dues, liabilities, contracts actions or causes of action at law or in equity arising out of any obligation or acts of omission or commission of any and every kind or character of the said Chicago St Charles and Mississippi

Air Line Rail Road Company now executed
 transacted omitted incurred or assumed before
 the execution of said Articles of Union and to
 indemnify the said Galena and Chicago Union
 Rail Road Company against all expense of
 operating that part of the said Chicago St Charles
 and Mississippi Air Line Rail Road Company
 known as the St Charles Branch Rail Road
 and against constructing or using or operating
 any more of the said Chicago St Charles and
 Mississippi Air Line Rail Road as surveys
 operated built or constructed by the said last
 named company. Then the said Galena and
 Chicago Union Rail Road Company shall deem
 fit, advisable or profitable. Whereas the said
 Galena and Chicago Union Rail Road Company
 has executed the said Articles of Union and
 has paid a consideration of Two hundred and
 forty thousand dollars to the said Chicago
 St Charles and Mississippi Air Line Rail Road
 Company through Now the condition of this
 obligation is such that if the above bounden
 Elisha C. Litchfield and Ezra Minard their
 or either of their heirs executors or admin-
 istrators shall and do well and truly pay
 and satisfy all debts dues liabilities contracts
 actions or causes of action at law or in equity
 arising out of any obligations or acts of commission
 or omission of any and every kind or character
 now executed transacted omitted incurred
 or assumed before the day of the date thereof by the
 said Chicago St Charles and Mississippi Air Line
 Rail Road Company, and shall indemnify

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and save harmless the said Galena and Chicago Union Rail Road Company therefrom and also against all expense of operating and maintaining the Road known as the St Charles Branch Rail Road now forming a part of the said Chicago St Charles and Mississippi Air line Rail Road as aforesaid then the above obligation to be void otherwise to be and remain in full force and virtue

{ In testimony whereof we have hereunto
 { set our hands and affixed our seals
 { on the day and year first above written

Witness
 Signed E. Beck.

(Signed) Elisha C. Sitchpield and
 Signed Ira Minard and

I, William W. Larrabee Secretary of the Galena and Chicago Union Rail Road Company do hereby certify that the foregoing is a true copy of a bond now on file in the Office of said Company. In Witness whereof I have hereunto signed my name and affixed the corporate seal of said Company this 8th day of July A.D. 1857.

W. W. Larrabee
 Secretary

Now all men by these presents that we Elisha C. Sitchpield and Ira Minard are held and firmly bound unto the Chicago St Charles and Mississippi Air line Rail Road Company in the sum of One hundred thousand dollars lawful money of the United

States to be paid to the said Chicago St Charles
 and Mississippi Air line Rail Road Company
 their Successors or assigns to which payment well
 and truly to be made we and each of us bind
 ourselves and each of our heirs executors or
 administrators jointly and severally jointly by
 these presents, sealed with our seals, dated the
 twenty ninth day of June in the year of our
 Lord one thousand eight hundred and fifty
 five. Whereas, the said Chicago St Charles
 and Mississippi Air line Rail Road Company
 by certain Articles of Union with the Galena
 and Chicago Union Rail Road Company, bearing
 even date herewith has covenanted and agreed
 to pay, save harmless, and indemnify the said
 last named Company of and from all debts
 and liabilities contracts actions causes of
 action, at law or in equity arising out of ~~any~~
 obligations or acts of omission or commission
 of any and every kind or character of the said
 Chicago St Charles and Mississippi Air line
 Rail Road Company now executed transacted
 omitted incurred or assumed ~~to be executed~~
~~transacted~~ before the execution of the said
 Articles of Union and whereas the said
 Elisha C. Litchfield has been Contractor
 for the constructing equipping of the said
 last named Road and has received a
 consideration for the relinquishing of said
 contract and the said John McInnis has
 been President of the said last named
 Road and has had the management and
 control of the same, and is well acquainted

with the business and transactions thereof
 for and in consideration of the sum of one
 dollar to us in hand paid are willing to
 assume this obligation the condition of
 which is that if we the above bounden
 Elisha C. Litchfield and Ira Meinard will
 and do pay and satisfy all debts and liab-
 ilities contracts actions or causes of action at
 law or in equity arising out of any obligation or
 acts of omission or commission of any and every
 kind or character of the said Chicago St Charles
 and Mississippi Air line Rail Road Company
 existing before the execution of these presents and
 will indemnify and save harmless the said
 Chicago St Charles and Mississippi Air line
 Rail Road Company therefrom except what
 may have accrued and become due or which
 may hereafter become due since the sixth
 day of March now last past upon contracts
 and liabilities upon contracts made for Dep't
 Grounds and rights of way between the South
 Branch of the Chicago River and the O'Plain
 River prior to the sixth day of March now
 last past for the use of the said Chicago St.
 Charles and Mississippi Air line Rail Road
 Company, then the above obligation to be void
 otherwise to be and remain in full force
 and virtue. In testimony whereof we have

Witness

(Signed) E. Beck

hereunto set our hands and seals
 affixed our seals on the day and
 year first above written

(Signed) Elisha C. Litchfield Seal

(Signed) Ira Meinard

Seal

57. I, John S. Brewer Secretary of the
Chicago St Charles and Mississippi Air Line
Rail Road Company do hereby certify that
the foregoing is a true copy of a Bond now
on file in the office of said Company
In witness whereof I have
hereunto set my name and
affixed the corporate Seal of
said Company at Chicago this
8th day of July A.D. 1857.

Seal

attest } John S. Brewer
Secretary

In the reading of which bonds the defendants by their Attorney objected which objection was overruled by the court of which decision of said court the defendants by their Attorney then and there excepted

George W Waite was again called by the plaintiff Says I was a stockholder in defendants Rail Road until April or May 1855. I signed away my stock at that time to E C Litchfield and ceased to be a stockholder

Quest State if you know of any negotiations for the sale of this Road at the time you sold your stock Question objected to by defendants objection overruled by the court to which ruling of the Court the defendants by counsel then and there excepted Answer. I did not then know of any negotiations for the sale of the Road of my own knowledge I applied to Mr Litchfield near the first of June when I sold him my stock to know if there were any such negotiations Questions by the plaintiff. What did Mr Litchfield tell you in regard to the negotiation negotiations in reply to your question if anything. Quest objected to by defendants which objection was overruled by the court to which ruling of the court the defendants by counsel then and there excepted. Answer Answer He said he was making arrangements with Mr Griswold for the Illinois Central to build the Road to Forrest town on the Illinois central He told me there were no negotiations going on with the Galena Company in any way whatever Quest by plaintiff. Did you apply to the

59 President of defendants Company for information on the subject. Objected to, overruled and excepted to by defendants. I had a conversation with the president of defendants Road for information on the subject that was previous about four weeks to my signing my stock he told me there were no negotiations going on to his knowledge the president was Mr Minard I am acquainted with the stock of the Chicago Alton and St Louis Rail Road I own stock in that Road to the amount of Eleven thousand Dollars, at the time I transferred my stock I received Eitchfilds Certificate of said stock for thirty four hundred dollars six or nine months after I received the stock on it. Questions by plaintiff what is the value of the stock of that Road objected to by the defendants counsel objection overruled by the court to which ruling of the court the counsel for the defendants then and then excepted Witness answered. This stock was in June 1855 worth not five cents on a dollar I don't think it was worth anything.

The plaintiff then called SS Jones who being sworn says. I was one of the directors of the Chicago St Charles & Mississippi air Line Rail Road in 1855. I had been a director from its first organization under that name. Question by the plaintiff. State whether you were aware of any negotiations with the Galena Road for the union of this Company with that until the alleged transfer. objected to and objection overruled to which ruling the defendants by counsel then & there & at the

same time excepted. Witness says I am not able
 to answer unless you fix the time I am by plff
 state whether you were aware of any negotiations
 between the Chicago St Charles & Mississippi
 Air line Rail Road Company with Galena
 and Chicago Union Rail Road Company
 for the transfer of the former to the latter prior
 to the 20th of June 1855. Which Question was
 objected to by defendants Counsel objection was
 overruled by the court to which ruling of the
 court the counsel for defendants then and there
 and at the same time excepted the Witness then
 answered. I had no personal knowledge prior
 to May 1st 1855 of any negotiations pending
 between the Chicago St Charles Mississippi air
 line Rail Road and the Chicago and Galena
 Rail Road for the transfer of the former to the
 latter there were vague rumors of such
 negotiations going on between Litchfield and
 the Galena Company. I am by plaintiff Did
 you take any pains to ascertain the facts if so
 What objected to by defendants Counsel objection
 overruled by the court to which ruling of the
 court the counsel for the defendants then and
 there and at the same time excepted the Witness
 then answered. I had a conversation with Mr
 Litchfield on the subject on May 1st 1855
 he told me that no negotiations were going on
 with the Galena Company in any manner
 he said he was making an arrangement with
 the Illinois Central to build the Road to Forest
 town and had got it nearly completed
 Question by plaintiff when did you first learn

that a sale had taken place if at all objected
 to by defendants Council objection overruled
 by the Court to wit ruling of the Court the
 Council for defendants then & there and at the
 same time excepted the witness then answered
 Heave no personal knowledge of a sale taking
 place first learned by rumour that a sale had
 taken place some time in the summer of 1855
 Ques by plff did you attend the annual meeting
 for directors of this Company in June 1855 at
 the Tremont house Chicago objected ^{to} by
 defendants overruled by the Court to wit ruling
 of the Court the defendants by Council then there
 and at the same time excepted. I did not attend
 the meeting of the Board of Directors in June 1855
 at the Tremont house Chicago attended no
 meeting of the board after May 1st 1855. Sold
 my stock and took no action with the company
 nor was a stockholder after that time It was
 after May 1st that I heard the rumours of the sale
 Ques By Plff How much work had been done
 on the road prior to May 1st 1855 objected to by
 defendants Council objection overruled to
 wit ruling the defendants Council then there
 and at the same time excepted. The witness
 answered Nearly all the grading between Chicago
 and St Charles had been done up to June
 1855 and nine or ten miles of track laid at
 the Chicago end. The track has been connected
 with the Chicago and Galena Road about
 ten miles from Chicago the defendants Road
 crosses the Galena and Chicago Road from seven
 to ten miles West of Kelly farm and again

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East of his farm six to nine miles the distance between the two Roads at the point where defendants Road crosses Kellys farm is one to two miles. Question by the plff Did you apply to the president of this Company for information on the subject of the negotiations for a transfer of the road objected to objection overruled to which ruling of the court the defendants Counsel then then and at the same time excepted. I had a conversation with the president of defendants Company on the same day of the conversation with Litchfield on the subject of the transfer Question by plff What did he tell you objected to objection overruled to which ruling of the court the defendants Counsel then then and at the same time excepted Witness answered he told me there were no negotiations going on to his knowledge Henry Stephens called as a Witness by the plaintiff being duly sworn says I reside in St Charles I was a stockholder in the Chicago St Charles Mississippi Air Line Rail Road prior to June 1855 I ceased to be a stockholder sometime in the Spring of 1855 think it was prior to June 1855. Question by plff State whether you had knowledge prior to June 20th 1855 that any negotiation was going on between the defendants and the Galena Road objected to and overruled by the court to which ruling of the court the defendants then then and at the same time excepted. Answer I am not able to state whether Question by plaintiff State whether you took any pains to ascertain

if so what objected to and overruled Answer
 I took no pains to ascertain at that time
 Quert by plff had you heard anything of it objected
 to by defendants objection overruled by the Court
 to wish ruling the defendants then and there and
 at the same time excepted Answer. I had
 heard rumors of it cent all till time at what
 time kept no dates I heard of it after I sold my
 stock I own stock in the Chicago Alton &
 Mississippi Rail Road dont know that that
 stock had any Market value in 1855 I trans
 ferred my stock to Litchfield Cross Examination
 then was some stock transferred about the time of
 mine direct resumed. When I transferred to
 Litchfield he did not tell me of any sale of
 the Road. S B Jones recalled by plaintiff says
 I came to be a stockholder by transfer of my
 stock to Elisha C Litchfield. Cross Examination
 I understood Mr Waite transferred his stock
 long before. James Huls called on the
 part of the plaintiff and duly sworn says
 I reside in St Charles I was a stockholder in
 the St Charles Rail Road I recollect when
 I came to be a stockholder but not the exact
 time. I came to be a stockholder by giving
 up my certificate of stock to Munroe & Litchfield
 in Munroes office it was previous a few days ^{to the date}
 of Kelleys Receipt. Quert by plaintiff
 Had you any knowledge whatever at that time
 that the Road had been sold out or that there
 was any negotiations made in relation to
 selling to the Galena Company. objected to
 by defendants and overruled by the Court to

With ruling of the court the defendants then
then and at the same time excepted answer
I had no knowledge at that time of negotiations
of a sale of the road to the Galena Company
I own stock in the Chicago Alton & St Louis
Rail Road I own Eight Shares to the amount
of Eight hundred Dollars. I never learned they
where of any value have enquired about them
I got them from Litchfield I was in Chicago
about the 19th of June 1855 Went in with
Mr Kelley at the suggestion of Mr Minard
Mr Kelley went in at my request - at the
suggestion of Mr Minard to me we went to
the tumont house in Chicago Mr Minard
& Litchfield were there we went into a private
room a good deal said there with I cant
remember. Dunt by plffs - For what purpose
did Mr Minard request Mr Kelley to go in there
if any objected to and objection overruled by the
court to with ruling of the court the defendants
by counsel then then and at the same time
excepted. Witness answered It was with reference
to the rail road being cut through his farm
Dunt by Plff. What took place there and what
was said. Question objected to by defendants
objection overruled by the court to with ruling
of the court the defendants by counsel then then
and at the same time excepted. The
Witness then answered. Mr Minard Litchfield
Kelley and myself went into a room, the
subject with reference to the road through his
farm was talked about and with reference
to the crossing and ditch several plans were

Spoken of with reference to the convenience of his getting across it by bridge. Some plans with reference to Mr Kelley present convenience were spoken of the talk was about the bridge with reference to Kelleys present convenience they said they would give Mr Kelley three hundred dollars in stock of the Chicago & Mississippi Rail Road for his inconvenience in waiting until the road could be built

Question by Peff — Was anything said by Minard or Litchfield as to them having sold out to the Galena and Chicago Rail Road Company

Question objected by defendants counsel, objection overruled by the Court to which ruling of the Court the defendants by counsel then there and at the same time excepted. The Witness

then answered they said they had sold it to no Company. Question by Peff — State whether

anything was said by Minard or Litchfield on that occasion as to whether the road was going to be finished or not. Question objected to by defendants counsel objection overruled by the Court to which ruling the defendants counsel then there and at the same time excepted

The Witness then answered Mr Minard said it evidently would be built but when was

a matter of time didn't ^{see any} ~~get any~~ stock given to Kelley at that time. Question by Peff

Did Mr Litchfield say anything as to whether he had the stock and if so what. objection overruled by the Court, to which ruling of the Court the defendants counsel then there and at the same time excepted

66 Witness answered. Mr Litchfield proposed giving a receipt for stock to be delivered at a certain time the place where is in my mind Dunt by pliffs. During this negotiations was anything said by you as to what it was for if so what. and if any reply was made by Litchfield or Minard. what was the reply with question was objected to by defendants objection overruled by the court to which ruling of the court the defendants by counsel then there and at the same time excepted Witness answered I asked a question at that time. the question I asked was this. How do we understand ourselves. Is this Three Hundred Dollars for right of way or damages the reply was. No. it was for inconvenience that Mr Kelly suffered until the Road should be built.

Cross Examination Minard told me when he sent me to Kellys that he wanted Kelly settled with. I never understood from Mr Minard that the road had got to stop any more than temporarily he didnt tell me at that time that the road had got to change hands. had no intimation that the road would change hands until we got to Chicago He wanted me to go to Mr Kelly that they might arrange their matters on the road the conversation was in Minards office Litchfield was present I think I cant swear Litchfield was present at the conversation he had been there in conversation between Mr Litchfield Minard & Kelly the remark came to me about the road stopping and changing hands I saw Minard just after I got there dont recollect seeing Litchfield until the conversation began one or two

others came in and out of the room while we
 were there. We were there from an hour & a half
 to two hours left Kelley Litchfield and Minard
 together when I went away they went to writing
 the receipt suppose the receipt wasnt written
 when I left Litchfield was writing didnt see
 what he was writing not a word think Minard
 and Litchfield did not say. When, I just went
 into the room. that the road had got to change
 hands. if I was there one hour and a half it
 might have been $\frac{3}{4}$ of an hour after I went in that
 Minard made the remark. I couldnt put
 the construction on Litchfield language that the
 Road had got to change hands nor on Minards
 never to my knowledge did Minard tell Kelley
 that the road was going into the hands of the Galena
 Road. Kelley got aboard the cars at Danby I
 went aboard with him dont remember who
 sat in the seat with him I had paid on my
 stock when I brought it to Minards office—
 about Eight hundred dollars, had paid less
 than fifty per cent. Saw Kelley a little while
 after I left him in the Tremont it wasnt an
 hour afterward dont recollect Mr Litchfield
 refusing to leave my stock in Minards office
 Minard requested me to see Kelley when I saw
 Kelley he objected to going into Chicago. Saw
 Minard after I saw Kelley couldnt say that
 Minard asked me more than once to see Kelley
 It wasnt the day before we went into Chicago
 that Minard requested me to see Kelley at least
 I think so. Think I did not say when I left
 the Tremont house that I would leave my

stock with Minard and he might do the best he could do with it as I think they gave me a receipt for it think I received it after I went to Chicago. if I got one it was out of Minard's office. It may be I never received one. In thinking about I believe I never received a receipt. don't remember saying to any one when I came back from Chicago that the Rail Road had settled with Mr Kelley. I did say I believed the road would be built, but never said that they had settled with Kelley without further statements. Am I ather in law of Plffs
Direct examination resumed

After the first ~~examination~~ conversation with Minard I saw Kelley and he objected to go in but we set a day to go in and I told Minard of it. They said in Chicago that they wanted to settle with Kelley in order that the road might change hands if they got a chance and spoke of the Illinois Central. Then was something said about the value of the stock of the Chicago Alton and St Louis Rail Road. Quert by the plffs - What was said about the worth of that stock objected to by defendants. objection overruled by the Court. To which ruling of the Court the defendant counsel then then and at the same time excepted. The witness answered. Litchfield said in substance it was worth from seventy to seventy five cents. I called at Minard's office after stock called twice as it did not come at the time agreed on. don't remember mentioning Kelley's name in connection therewith. the plaintiff here introduced a due bill to Kelly dated June 19th 1855

69 Payable 60 days from date from Litchfield
for stock. I never heard of Litchfield being in the
state since that time. The plaintiff having rested
here the defendant resumed and introduced Reed
Dunson who being duly sworn says, I know
James Huls. I was in front of Mr Brooks store
and asked Mr Huls after he came from Chicago
if Kelly had settled with the road. He said he
had and the road would be built. he said
that Kelly had settled with them. he said that
they had settled with Kelly for damages up to
that time. The defendants then called Ira Minard
who being sworn says. (Examined by plaintiff
on voir dire) I am president of defendants
Road. I am not a stockholder assigned my
stock away about a week ago.

I was formerly president of this Company
Know Kelly. Heard the testimony of Mr Huls
I met Deacon Huls and requested him to
see Mr Kelly and tell him if he would go
into Chicago I would go with him before
Mr Litchfield left as I was satisfied that the
road would change hands and I thought it
would go in the hands of the Galena Company
he had some stock of his own and I told him
he better go in himself and arrange it. We
went to Chicago the next day or day after
this conversation. I met Kelly at Wheaton
or Danby. I saw deacon Huls on the train
cant say whether they were together or not
Kelly and I were together part of the way
there was some conversation about this Rail
Road we were speaking about the prospects

11
of the Rail Road and his damages I stated
to Kelley that the Road had got to change
lands and my opinion was that it would go
in the hands of the Galena Company. We
were in a room together at the Tremont
house in Chicago. Mr Litchfield told Mr
Kelley that the road would have to stop for
the present. Mr Kelley asked who he was going
to let have it he said the Illinois Central
Mr Kelley asked if he was going to let the
Galena have it he said it would have to
go if they could do no better. Mr Huls was
there about an hour or one hour and a half
Mr Litchfield requested to give Huls a receipt
for his stock nothing particular said after that
Deacon Huls said that he would leave it
altogether with me there was no agreement
had been concluded with Mr Kelley when
Huls left the matter the matter had been
talked up. The paper was drawn up after
Huls left Kelley left about $\frac{3}{4}$ of an hour
after Huls left after it was written Kelley
went up to the table and looked over it
didn't hear them read it Litchfield told
Kelley he wanted to settle all his damages up
to that time they talked mostly to themselves
and I can't tell all they said they figured up
the damages and spoke about a bridge
Mr Litchfield thought he had got enough
Litchfield had no stock at that time but told Kelley
he would send the stock on and gave him
his due bill for 60 days

Cross Examination

71 I am sure I rode on the cars with Huls
& Kelly on the day spoken of am as sure of
that as any thing I have sworn to Was not
at dinner when Kelly got into Chicago
I rode part of the way with Kelly and Huls
to Chicago. Told Kelly and Huls that it was my
opinion that the road should go into the hands of
the Galena Company. I advised the people along
the road to let Litchfield have their stock. Did
not help Litchfield buy up the stock Did not
tell Huls the road would be built. I got very
little Mississippi stock. I bought some of
Mr Gloss that was all I had. Went in Chicago
on the 19th of June to close the trade with the
Galena Company I transferred my stock on
the 27th. Was present and chairman of a meeting
of the stockholders of this road in June Nobody
there but Litchfield and me Nobody there
at the next meeting but Litchfield and I
and Stryker There were no stockholders there
but us two at any meeting didn't get
any stock of the Galena Company got some
bonds. There were two bonds of Twenty five
Thousand Dollars Each got nothing else all
my stock in the St Charles Road were assign-
ed but one kept one share that I might
be a stockholder. Noboday said that the road
should be built. It was said that the
probabilities were that it should be built
Larrabee was there before the time of the settlement
with Kelly counting up the stock of the
St Charles Road. Had talked with Mr
Turner. Didn't tell him that the Road

would go into the hands of the Galena if we could do no better I might have said in May to Geo W Waite that there were no negotiations pending with the Galena Company didn't read the Bonds before I signed them didn't read the articles of union before I signed them Have employed Counsel and managed the defense of this suit under the direction of Mr Litchfield. Litchfield has not been in this state since he left for New York Mr Litchfield gave me these directions before he left. Have had no directions from him since. Went over to Du page County for the purpose of trying this suit was not released then from the bonds. Swore to the affidavits for change of venue after swearing to the change of venue. I advised Mr Barry to go to New York did not get a change of venue for the purpose of gaining time to get a release in order to be a witness. been into Chicago several times with Kelly. The two Hundred and forty Dollars that French swore to was not for fencing. Did not tell Kelly that the receipt was right. Did not tell Kelly that I had rather lose a farm than that Kelly should be wronged. If I saw Kelly I probably told him that I would do the best I could for him. Never heard Litchfield say to anybody that he was short of money. The stock on Litchfield's due Bill never came to me. Direct Examination resumed Mr Litchfield French is Litchfield's agent the due bill has never been presented to me for payment. The stock has been sent to French

By Litchfield. Litchfield said he would send Kelly the stock as soon as he got home it might be before 60 days I put seventy thousand dollars in the St Charles Road, had sixty six thousand when it went down

Cross Examination — I subscribed twenty thousand dollars of stock to the St Charles Road fourteen thousand dollars was a debt due me from the old St Charles Branch Rail Road I left it to Litchfield's generosity what I should have for my share of the road. The amount of Litchfield's mortgage on the Road was two hundred thousand dollars. The consideration of the sale of the Road to the Galena Company was five hundred and forty thousand dollars at the time of the forfeiture of the stock — I did not know that any negotiations were pending with the Galena Road for the sale of our Road there was something over seventeen thousand dollars of stock forfeited.

The defendants then called Daniel Fish who who being sworn says. I saw Mr Kelly after he came home from Chicago can't say how many days after he came home he said he had settled with them and done better than he expected we were speaking of the air line Road It was near my home think it was along in June sometimes

Cross Examination

Kelly didn't say that he settled with them only for the present and that when the money for the Road should come on he would get more I didn't tell Kelly to day that I —

74

remembered he said so. I have been staying here to swear to this conversation Barry and I did not arrange to day after talking with Kelly that I should swear to some other conversation. Had another conversation about two weeks afterwards. Direct examination resumed. Had an unsettled matter with this Rail Road was subpoenaed here as a Witness for Defendants. The conversation was two years ago.

The defendants here retted, and the plaintiff then recalled James Huls and asked him whether Mr Minard told witness previous to going to Chicago that the road would probably go into the hands of the Galena Company. Witness answered: "No" If I have to say one way or the other I should say Minard did not go into Chicago with us but I cannot tell with certainty. We waited for him some time at the Fremont House. I indistinctly remember shaking hand with him at the Fremont. If he was on the cars with me I should not have done so. Cross Examination have no positive recollection either way whether Minard was in the car or not.

The foregoing was all the testimony offered in the case either on the part of the plaintiff or defendants and was all the testimony given in the cause. The plaintiff then asked the court to give and the court gave the following instructions

Plaintiffs. Instructions

1

Given

The jury are instructed that this is an action of assumpsit brought by the plaintiff against the defendants upon an alleged contract to pay him what his damages should be for grading the defendants track across his land and if the jury believe from the evidence that the agents of the defendants authorized for that purpose did promise Kelly that the defendants would pay him his damages if he would let them build the road over his farm and that in pursuance of such promise they did build their road by his permission then the law is for the plaintiff so far as that question is concerned

2

Given

If the jury find from the evidence that the defendants promised to pay the plaintiff what his damages should be by the building of the Rail Road across his farm and that he was damaged thereby as charged in his declaration then the jury should find for the plaintiff such damages as they believe from the evidence he sustained thereby unless he has been paid or has released the same by a release or receipt fairly obtained

3

Given

That it is the duty of the jury in Estimating the plaintiffs damages to take into consideration what amount if any the plaintiff's farm was lessened in value by the running & working the Defendants Road across it

4 If the jury believe from the evidence that the receipt or paper marked [A] was obtained from the plaintiff by means of fraudulent pretences or representations or by suppressing material facts which were known to Litchfield & not equally known to Kelly with the design of overreaching and defrauding him and that the plaintiff was imposed upon & defrauded into the making of said receipt and that the plaintiff in reality did not receive any value for the said receipt. then the jury should disregard it in toto

5 That the credibility of witness is a proper question for the jury and if they believe from all the circumstances in the case, from the position of the witness Minard in reference to the case & his relations to the defendants his manner of testifying & the testimony of other witness in the case that his testimony is not worthy of credit they may disregard it

6 That although fraud may not be presumed but should be proved yet it may be proved by circumstances. and if the jury believe from all the circumstances proved in this case that the receipt was obtained from Kelly by fraud they should disregard it

7 That fraud may consist of a suppression of the truth as well as by telling a falsehood

77 To the giving of said instructions by the court on the part of the plaintiff the defendants then there and at the same time excepted.

The defendants then asked the court to give the following instructions. a part of which the court gave a part of which the court refused and a part of which the court qualified

Instructions

1 The receipt given in evidence and signed by the plaintiff is in the nature of a contract and cannot be extended restricted contradicted or explained by verbal evidence to vary its terms or meaning and that the same constitutes a bar and a full defence to this action unless it has been fully proved to the satisfaction of the jury that it was obtained from the plaintiff by fraud

2 That the evidence given in the case as to what was said by Litchfield and Minard or either of them at or before the time the receipt or contract was signed must not be considered by the jury upon the question of the meaning of the instrument but the jury must ascertain the meaning from the Language of the instrument itself

3. That in order to impeach the receipt or written contract for fraud the jury must believe from the evidence that either Litchfield or Minard or both of them at the time the same was made & signed by the plaintiff

wilfully and intentionally concealed from him
 some material facts which if he had known
 would have influenced and induced him to
 have declined making the settlement & signing
 the receipt or contract or that one or both of them
 wilfully and intentionally asserted the existence
 of some material fact which influenced and
 induced the plaintiff to make the settlement
 and sign said receipt. And if the plaintiff
 seeks to avoid the same on the ground of any
 representations made to him the evidence must
 also show that such representations were
 false and were at the time known to be false
 by the person making them and that the plaintiff
 had no knowledge of the falsity of such representations.

4 Fraud cannot be presumed but must be
 satisfactorily proved. And it is the duty of the
 jury to consider the transaction fair and
 honest unless the plaintiff has fully and
 satisfactorily proved that said Receipt or
 contract was obtained by fraud.

5 The jury should take into consideration the
 relation of the witness or witnesses who have
 testified in the case to the parties to the suit.
 their manner of testifying on the stand in
 determining the amount of credit to be given to
 their testimony.

79

Given
 4 The jury will entirely disregard the letter that was read to them from Ennold to J.B. Turner President of the Galena and Chicago Union Rail Road as said letter is not evidence for the consideration of the jury

7

Given
 If the jury believe from the evidence that James Hells made statements contrary to and at variance with what he has testified to in this case it is a proper subject for the jury to take into consideration in weighing his evidence in this case

8

Given
 Given with qualification If the jury believe from the evidence that there was a settlement fairly made for damages between the plaintiff and E.C. Litchfield on the part and in behalf of said defendants made on the 19th day of June 1855 of all damages on account of the track of the Rail Road Company crossing the land of the said plaintiff or on account of excavations or embankments made by said Company in said land until such time as said Rail Road should be completed and laid with Iron Rail and if they further believe from the evidence that said Rail Road has not been completed and laid with Iron Rail the law is for the defendants

9

Given
 If the jury believe from the evidence that there was a settlement fairly made on the 19th day of June 1855 between the plaintiff and E.C. Litchfield for and on behalf of said

80

defendants and that said plaintiff took from the said E C Litchfield said Litchfields due Bill for their shares of stock of the Chicago Alton St Louis Rail Road in satisfaction of his claim for damages until such time as said Rail Road should be complete and laid with Iron Rails then the law is for the Defendants unless they further believe from the evidence that said Rail Road has been complete and laid with Iron rails

10

It is the duty of the jury to reconcile all the evidence in the case if possible upon the principle that all the witness have sworn to the truth and although two witnesses were present at the same conversation and one of them testifies that he heard a certain statement which the other testifies he did not hear still the testimony of both may be true and it does not necessarily prove that said statement was not made at the time

11

If the jury believe from the evidence that the plaintiff stated to Daniel Dick or any other person that he had settled with said Rail Road Company it is proper evidence for the consideration of the jury in determining the question of settlement and if the jury further believe the same to be true and that a fair settlement was made then the law is for the defendants

81 12 If the jury believe from the evidence that
Ira Minard or E C Litchfield or either of
them told said plaintiff before he gave
said receipt that the Rail Road had got to
stop or change this is competent evidence
to be considered by the jury as tending to show
that the plaintiff had notice of such contem-
plated change or stoppage and then tending to rebut
the idea of malice so far as that question
is concerned

To the decision of the court in refusing said
instructions. Do

And qualifying said instructions no 5, 6, 7, 10 12,
said Defendant then and there except

The jury thereupon retired to consider their verdict
and afterwards came into court and returned
the following verdict

We the jury find the issues joined for the
plaintiff and assess the damages at two
Thousand (\$2000.) Dollars

J H Madison Foreman,
The plaintiff thereupon remitted one hundred
and Fifty Dollars

The defendants by counsel then moved the
court for a new trial in this cause and
filed in said court the following Motion

Now Co Cir Court
The Chicago St Charles and
Mississippi Air Line RR Co
vs

Daniel Kelly

May Term AD 1857

And the said Defendants
by Barry and Fugmore

Attorneys. Come and move the Court for a new trial in this case for the following reasons

- 1st The court erred in admitting improper and irrelevant testimony on the part of the plaintiff & overruling the Defendants objections to the same
- 2^d The court erred in rejecting proper pertinent and material testimony offered by the Defendants
- 3^d The verdict is contrary to law and the instructions of the Court
- 4th The verdict is contrary to the evidence in the case
- 5th The Court erred in refusing instructions by the defendants
- 6th The court erred in giving each and every instruction given for the Plaintiff
- 7th The Court erred in qualifying instructions asked by the defendants

Barry and Fingersh
Attys for Defend

Which Motion was overruled by the Court to which decision of the Court in overruling said Motion for a new trial the said defendants then then and at the same time by their counsel, excepted and moved the Court to sign and seal this Bill of exceptions which is done

Dated July 10th 1857
R. B. Knight Clerk

Isaac J. Wilson Judge

and afterwards to wit on the 29th day of July 1857 an appeal Bond was filed in the clerk's office of our said circuit court which is the words and figures following to wit

Know all men by these that we the Chicago St. Charles and Mississippi air line Rail Road Company as principals and Elisha C Litchfield and Ira Minard as sureties are held and firmly bound unto Daniel Kelly in the penal sum of four thousand dollars for the payment of which sum well and truly to be made we bind ourselves our heirs executors and administrators jointly severally and firmly by these presents Sealed with our seal and dated this 14th day of July AD 1857. The conditions of the above obligation is such that whereas the said Daniel Kelly at the May term AD 1857 of the same County circuit court recovered a judgment against the said Rail Road Company for the sum of 1850 Eighteen hundred and fifty dollars and cost from which said judgment the said Rail Road Company has taken an appeal to the supreme court of the State of Illinois, Now if the said Chicago St. Charles and Mississippi air line Rail Road company shall prosecute their said appeal with effect and shall pay said judgment cost and interest and damages in case 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 Rail Road Company is hereto affixed this 14th day of July AD 1857

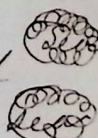
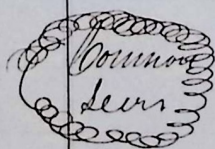
attest J. D. Brewer Secy

Elisha C Litchfield

Ira Minard

Filed July 29th 1857

P. R. Wright clerk



87 State of Illinois } S.D.
Kane County } I Paul R. Knight Clerk of Kane
County Circuit Court in the State
of said do hereby certify that the foregoing is a true
and complete copy of the following papers filed in
the foregoing cause, to wit, "Process" "Answer" "Pleadings"
"Replication" "Demurrer" "Supplemental County Circuit Court Record,"
"Bill of Exceptions" and "Appellate Bond" - And also
of all orders and proceedings had and entered of
Record in our said Kane Circuit Court, in said cause
as appears from the files and Records of my office -
Witness Paul R. Knight Clerk of said
Court and the Seal thereof at Geneva
in said county this 15th day of April 1888.



P. R. Knight
Clerk

Kane Circuit Court

Daniel Kelly
~~225~~ 723 ~~323~~

Chicago St Charles ^{and}
Mississippi Air Line R.R. Co.
April
Record

Filed April 22, 1858
L. Deland
Clerk

Filed May 5, 1858
L. Deland Clerk

— \$500

Bury & Bartman

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