

12284

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

# Supreme Court of Illinois

Ill. Cent. R. R. Co.

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vs.

Cassell.

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71641  7



State of Illinois vs Pleas before the Honorable Edwin  
L. S. Leland presiding judge of the  
north judicial Circuit of the State  
of Illinois at a Circuit Court commenced and  
held in and for the County of LaSalle and State of  
Illinois at the Court House in Ottawa on the second  
Monday of November in the year of our Lord one  
thousand eight hundred and fifty four and of  
the Independence of the United States the twenty  
eighth

Present the Honorable Edwin L. S. Leland Presiding Judge  
Phil Lindley Clerk  
W. H. S. Wallace State Attorney  
Richard Thomas Sheriff

On the 18<sup>th</sup> day of October 1854 a process was filed in  
the office of the Clerk of the Circuit Court of said County  
in the words and figures following to wit:

"LaSalle Circuit Court November Term 1854  
Willis M. Chubb & vs  
Augustus Caspell vs  
vs

The Illinois Central & Springfield  
Rail Road Company vs Damages \$1000.00  
vs

The Clerk of said Court will  
please issue summons as above returnable to wit:  
J. 1854  
Dickens & Wallace  
for Plffs"

On which process a summons was issued in  
the words and figures following to wit:



"State of Illinois, The People of the State of Illinois  
LaSalle County 3/4 to the Sheriff of said County Greeting

We command you that you summon  
The Illinois Central Rail Road Company if they shall 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 Ottawa in said County, on the thirtieth  
day of November next, to answer unto Willis.

The Illinois and Augustus Caprell in a plea of  
Trespas on the case upon promises to the damage  
of the said plaintiffs as they say in the sum of One  
thousand dollars. And here you then and then  
this writ, with an endorsement thereon in what  
manner you execute the same.

Witness Phil Lindley Clerk of said  
Court and the Seal thereof at Ottawa this  
18<sup>th</sup> day of October A.D. 1834  
P. Lindley Clerk"

On the 28<sup>th</sup> day of October 1834 said summons was  
returned with the following endorsement thereon viz;

"Executed this writ by reading the same to J.B.  
Blackstone resident engineer of said road & by  
leaving a copy of the writ with him Oct. 26, 1834  
R. Thom Sheriff"

On the 18<sup>th</sup> day of October 1834 the plaintiffs filed  
their Declaration in the words and figures following,  
to wit:

"State of Illinois LaSalle County and Circuit  
Court thereof of the November term of said Court  
A.D. 1834



The Illinois Central Rail Road Company  
Defendant in this suit was summoned to answer  
unto Willis McHenry and Augustus Caspell  
plaintiffs in this suit in a plea of trespass on the  
case upon promises, and thereupon the said  
plaintiffs by Dickey & Wallace their attorneys  
Complain

For that whereas the said defendants  
heretofore to wit: on the first day of September in the  
year of our Lord One thousand eight hundred  
and fifty four, in the County aforesaid was  
indebted to the plaintiffs in the sum of One thousand  
dollars for the price and value of five hundred  
cords of fire wood then and there bargained and  
sold by said plaintiffs to the said defendant, at  
said defendants request; and in the sum of one  
thousand dollars for the price and value of work  
then and there done and materials for the same  
then and there provided by the plaintiffs for the said  
defendant, at said defendants request - and in the  
sum of One thousand dollars for money then  
and there lent by the plaintiffs to the defendant,  
at defendants request, and in the sum of One  
thousand dollars for money then and there  
received by the said defendant to and for the use  
of the said plaintiffs, and in the sum of One  
thousand dollars for the price and value of goods  
and chattels then and there sold and delivered  
by the said plaintiffs to said defendant at said  
defendants request - and in the sum of One  
thousand dollars for money found to be due  
from the said defendant to said plaintiffs on  
an account then and there stated between them



- And whereas the said defendant afterwards to wit;  
on the day and year last aforesaid in the County  
aforesaid in consideration of the premises respectively  
promised to pay the said several moneys respectively  
to the said plaintiffs on request - yet the said  
defendant hath wholly disregarded its said  
promises and hath not paid any of the said  
moneys or any part thereof, tho. after request  
to plaintiffs damage of One Thousand dollars  
wherefore he sues &c

Dickens & Wallace  
Attys for plffs."

Copy of account sent on  
Illinois Central R.R. Co to

|                                        |           |
|----------------------------------------|-----------|
| Willis McCune & Augustus Caspell Ds,   |           |
| "To 500 Cords fire wood                | \$1000.00 |
| "To work & materials done & furnished  |           |
| "at your request                       | 1000.00   |
| "To money lent                         | 1000.00   |
| "To money had & received by you for us | 1000.00   |
| "To goods & chattels sold & delivered  | 1000.00   |
| "To balance on account stated          | 1000.00   |

And afterwards to wit; on Tuesday November  
20<sup>th</sup> 1884 the same being one of the days of the  
November term of said Court for said year 1884  
the following order was entered of record in said  
Court viz:

|                                  |                    |
|----------------------------------|--------------------|
| Willis McCune & Augustus Caspell | 3                  |
| Illinois Central Railroad        | 3                  |
| Company                          | 3                  |
|                                  | 3 On motion of the |



plaintiffs of Dicker & Wallace their attorneys it is  
ordered that the Sheriff have leave to amend his  
return made on the summons herein. and on  
their further motion it is ordered that this suit be  
continued at the costs of the plaintiffs to be taxed."

And afterwards, to wit: on Saturday November 21<sup>st</sup>  
1885, the term being one of the days of the November  
term of said Court for the year 1885 the following  
agreement was entered of record viz:

"Willis McChung & Augustus Cassell

vs  
By Agreement of

Illinois Central Rail Road Company

By agreement of  
parties it is ordered that this cause be set for trial  
on Tuesday of the 4<sup>th</sup> week of this term"

And afterwards, to wit: on the 13<sup>th</sup> day of December  
1885 the defendant filed his plea in the words and  
figures following viz:

"Willis McChung & Augustus Cassell

vs  
Le Salle les Cienitis  
By Court November  
term 1885

Ill. Central R. R. Co

And now comes the said defendant by Steinbach  
his atty. and defends &c where &c & says action now &c  
because it says it never promised the plaintiff in  
manner & form as in said declaration is  
alleged & of this it puts itself upon the Country"

& the plffs do the like by Wallace atty"



"And for a further plea in this behalf defendant says  
reiterum &c because it says that before the commencement  
of this suit to wit: on the first day of October 1854  
to wit: at the County aforesaid it fully paid to the  
plaintiffs the said several sums of money in the  
plaintiffs declaration mentioned & thus he is ready to  
swear wherefore he prays judgment &c  
Strain & Cook"

"And the said plffs for replication to said defendants  
second plea above pleaded says praecludi non  
re because they say that the said deft did not at  
the said time when &c fully pay the said several  
sums as in said plea alleged nor any part thereof  
and this they pray may be enquired of by the  
Court &c  
Wallace for  
plffs."

And afterwards, to wit: on said 13<sup>th</sup> day of December  
last aforesaid, the same being one of the days of the  
said term of said Court for the year 1855  
the following matter was entered of record in said  
cause viz:

"Willis McLung & Augustus Caspell  
vs  
Winnipeg Central Rail Road Company  
3

This day came the  
plaintiffs by Wallace & Schand their attorneys and the  
defendants by Strain & Cook & Strain their attorneys and  
the following persons of a jury to wit: Mr. W. Dimock  
Archibald Sharp, W. Potter, James Prescott, D. W. C. Garding  
Sydney Cook, O. J. Prime, D. C. Lippins, S. O.  
Miller, Gideon Meace, W. W. Griddle and Daniel



Thompson who are duly elected tried and sworn to  
well and truly try the issues herein according to the  
evidence, and after hearing the evidence and a  
part of the arguments of counsel, the further  
hearing of this cause is postponed until nine o'clock  
to-morrow morning."

And afterwards to wit: on the 14<sup>th</sup> day of December  
1885 the same being one of the days of said last named  
November term the following further order was entered of  
record in said cause viz:

"Willis M. Cherry & Augustus Caswell 2  
v. 1. 2 Appraiser.  
Illinois Central Rail Road Company 3

This day again came  
the parties hereto by their attorneys, together with the jury  
sworn herein, and after hearing the balance of the  
arguments of counsel, and the Instructions from the  
Court the jury return to consider of their verdict; and  
after due deliberation thereon had, return into Court  
the following verdict to wit: We the jury find the issues  
joined in favor of the plaintiffs and assess their  
damages at One hundred and twenty six dollars.

Defendants Counsel move the Court for  
a new trial"

And again afterwards to wit: on Thursday December  
20<sup>th</sup> 1885 the same being one of the days of said  
November term for said year 1885 the following  
final order was entered of record in said cause,  
that is to say:



"Willis McLung & Augustus Casper 2  
vs 2 Appraisers  
Illinois Central Rail Road Company 3

The parties hereto again come by their attorneys and after hearing the arguments of counsel, the Court after due consideration thereon had, overrule the motion for a new trial.

It is therefore considered by the Court that the plaintiffs have and recover of the defendants the sum of Two hundred and twenty six dollars for their damages, and their costs and charges by them herein expended and that they have execution therefor.

Whereupon the defendants by their clerk their attorneys may an appeal to the Supreme Court of this State, which is granted upon condition that the defendants within forty days from this date give an appeal bond payable to the plaintiffs in the penal sum of Five hundred dollars with Boston C. Cook as their security.

And afterwards to wit: on the 24th of December, 1885 the defendants counsel filed their Bill of Exceptions in the words and figures following viz:

"Augustus Casper and  
Willis McLung 2

vs 2 Appraisers  
The Ill Central Rail 3  
Road Company 3  
Be it remembered  
that on the trial of this case  
the said plaintiffs to maintain  
the issue on their part introduced Henry Casper  
as a witness who testified as follows, I know the



plaintiffs. I hauled wood for them from the bluff to the bank of Illinois river. I hauled 292 cords for plaintiffs, we men to cord it on the bank. I saw Porter there once, he said he was acting for the Ill Central Rail Road Co - I commenced hauling Nov 24<sup>th</sup> 1883 and ended in April 8<sup>th</sup> 1884 - I kept an account of the number of piles that I hauled from the wood I supposed the piles to contain a cord - my brother Michael Cassel hauled eight cords -

Cross examined - I did not measure the wood or see it measured. I only know how much was contained by McChings wood, I dont know what became of the wood I know drifts got a part of it (Walter G. Porter printed out) I think this is the man who was there. I dont know whether the dependant or the Steamboats got the wood I dont know what the Company got as much as 3444 cords.

(Re examined) I usually hauled a cord at a load I did not measure it the wood was corded on the bank 8 feet high. I measured it with a 10 foot pole -

Re cross Q - did not measure the pile, dont know whether Porter made the pile I am a brother of Cassels think Porter was there in the fall

Peter Bushner I hauled 228 cords of wood for plaintiffs to the bank of the river began about 15<sup>th</sup> Dec 1883 & quit in April 1884 I know the amount because it was corded in the timber. I could haul a cord at a load Henry Cassel Michael Cassel & Sanford Hubbard hauled wood to same place for plaintiffs Hubbard hauled about 12 cords during the last week that I hauled I hauled soon after Henry Cassel quit.



Cross Ex.

Dont know who got the word whether the Co or Steam boats I measured the last lot of cords dont know who got that I never saw Porter there I saw boats there in the Spring dont recollect that I saw any in the fall the place is about 6 miles below Pease Steam Boats run on the river in the fall and Spring The Co cords was put on the bank about the middle of April dont know what became of it.

Re. Ex.

Merry Lassie had got through hauling before I measured the Co cords this was the last day I was there. Jeff then called Wm Ross who testified

William Ross

I hauled 15 cords of wood for plaintiff to the bank of the river in the last of October 1833 a man calling himself Porter was there with a boat, the wood was piled up on the bank I put some of it into a boat & saw men loading a boat.

Cross Ex.

I should think there was a couple of cords in the boat it was about the last of October I remember the circumstance because Porter told me to drive down to the boat to have my wood thrown into the boat I did so & got a horse drowned.

Re. Ex.

There was no house nearer than 2 miles that I know of Steamboats were running on the river.

The plaintiff then called William A. Pennell who testified as follows

I have dealt with Mer Porter as the agent of the Central Rail Road Company I told the Co wood two years ago delivered it to Porter it was paid for by Jenkins it was delivered about 6 or 7 miles below Pease I cant remember distinctly any conversation I had with Porter he once said he was afraid of high water would not receive any wood unless it was piled 8 feet high.



The Plaintiff then read in evidence without objection  
a contract in the words & figures following to wit:

Illinois Central R.R. Co. Bt of Cassel &  
McChung. Three hundred cords wood now  
delivered and being hauled and piled on the  
bank of the Illinois river at \$2.00 pr cord.  
The above wood is to be piled 8 feet high &  
delivered to said Co when called for

Augustus Cassel & W. McChung

Which contract was produced by defendants  
upon notice from plaintiffs

The plaintiff here rested his case.

The defendants then read in evidence the following  
receipts without objection

Illinois Central Rail Road Company, LaSalle  
Station. To Cassel & McChung Dr.  
March 1854 For Two hundred eighty six cords  
wood delivered on Illinois river @ \$2.00 \$572.00  
dated LaSalle Mar 31, 1854.

Received of the Illinois Central Rail Road Company  
the sum of Five hundred seventy two dollars \$572  
in full for the above account. Cassel & McChung

Illinois Central Rail Road Company, LaSalle Station  
To Cassel & McChung Dr.  
June 24, 1854 For 58 cords wood delivered on  
bank Illinois river @ \$3.00 \$174.00

Dated LaSalle June 24th 1854

Received of Illinois Central Rail Road  
Company the sum of One hundred & seventy four  
dollars (\$174) in full for the above account

Cassel & McChung

The defendants then called Walter G. Foster who



testified

I am agent for the Central Rail Road Company for the purchase of wood was in 1833 & 4 had charge of that business at LaSalle. I purchased the wood of plaintiffs mentioned in the contract read in evidence. I measured the wood at one time in the winter at the time this contract was signed there was about 100 cords of wood then on the bank. I took this contract & advanced to plaintiffs one dollar per cord, took this contract & took a receipt from plaintiffs for the money advanced. I gave this receipt to McElroy at the time he gave the receipt for \$572, it was counted in that receipt. In the Spring I measured the wood again there was 286 cords this included the 100 cords I had before measured at the time of the measurement of the 286 cords plaintiffs were hauling wood to the bank Defts kept taking away the wood until the bank was clear. witness did not remain at the bank after the measurement loaded it on teams & took it away. I measured the wood accurately <sup>for</sup> saw 500 cords had been taken out of one of the piles of somebody that I observed, less was there when the 100 cords was measured & the contract made. I gave the amount of the measurement of the 286 cords to Cassell, I saw him afterwards he said he had drawn the money, he made no claim that the wood was measured wrong or that he had more wood there nor did he claim pay for more wood — afterwards Wells went down and got some wood there, after the last lot was got & we had done hauling wood I saw McElroy at



The said Illinois Central Rail Road Company in  
the Circuit Court of LaSalle County in the State  
of Illinois at the November term A.D. 1835 for the  
Sum of \$226. besides costs from which said judgment  
the said Rail Road Company has prayed for and  
obtained an appeal to the Supreme Court of said  
State. Now if the said Illinois Central Rail Road  
Company shall prosecute said appeal with effect  
and shall pay said judgment with such damages  
interest & costs as may be adjudged against said  
Company in case said judgment shall be affirmed  
in said Supreme Court then this bond to be void  
otherwise in full.

*[Signature]*

The Illinois Central R.R. Co

by W. H. Osborn Pres

B. C. Cook Secy

State of Illinois of J. John A. Nash Clerk of the Circuit  
LaSalle County of Illinois do hereby certify that the above & foregoing  
comprises a true, full, perfect and complete record in  
the case of Willis Mc Elroy & Augustus Caswell vs The  
Illinois Central Rail Road Company as the same appears  
of record and on file in my office.

In Testimony Whereof I have hereunto set  
my hand and the Seal of said Court at  
my office in Ottawa this first day of  
February A.D. 1836

J. A. Nash Clerk



And now come the said of plaintiff and see  
that in the record & proceedings a person came  
in the rendition of the Judgment & for same  
the manifest error in this to wit:

1<sup>st</sup> The court erred in giving each of the  
instructions asked for by plaintiffs

2<sup>nd</sup> The court in giving the qualification asked  
by plaintiffs to defendant's instruction

3<sup>rd</sup> The court erred in giving the qualification  
asked by plaintiffs to defendant's instruction

4<sup>th</sup> The court erred in granting motion for  
new trial

5<sup>th</sup> The court erred in rendering the Judgment  
aforesaid in manner & form aforesaid

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William's Central

Paul Reed Company

vs

Augustus Dabbier

Wm. H. Dabbier

Plend

Filed June 1856

L. Leland

Clerk

See

\$5.75 paid



The Ill Central R.R. Co

vs

Augustus Bassett &  
Willis McBlung

Appeal from J. A. Sallen

The pliffs below read in evidence a contract as follows

"Ill. Central R.R. Co got of Bassett & McBlung three hundred cords wood now delivered and being hauled & piled on the bank of the Illinois River at \$2.00 per cord. The above wood is to be piled 8 feet high and delivered to said Company when called for -

The proof shows that this contract was made in the winter of 1853-4 - (see Porter's testimony) It was proven that the place on the bank of the River where the wood was piled was 6 or 7 miles below Peru -

It was proven that Bassett & McBlung had hauled and piled on the bank of the Illinois River in fall of 1853 and in the winter following 495 Cords & in April 1854 - 60 Cords making in all 555 Cords -

There is proof showing that the Central R.R. Co. got some of this wood, but no proof tending to show that more than 344 Cords was ever received by them. Each of the plaintiffs witnesses expressly state that they do not know what became of the wood, and that steamboats were running on the River in the spring & fall -

Pliffs proved by Porter who was their agent that he made the Contract in the winter of



1853, that he then measured the wood, that there was then 100 Cords piled on the bank, that the contract was then signed, that in the spring he measured the wood again, that he measured it correctly, and then there was 286 cords on the bank, including the 100 Cords before mentioned, and they took it away. Wells afterwards got <sup>about</sup> 60 cords for the R. R. Co and this was all that he ever knew the R. R. Co to get from them. It was also proven by Wells that he got <sup>about</sup> 60 Cords for the R. R. Co.

When R. R. Co proved that in March 1854 - Cassell & McBlung rendered a bill to the R. R. Co for 286 Cords of Wood amounting to \$572 - & received payment of the same - And in June 1854 - they rendered a bill for 58 Cords of wood amounting to \$174 - & received payment therefor -

When the first bill was rendered & paid Cassell & McBlung made no claim for wood not paid for, and no claim that there was a wrong measurement - When the second bill was paid for, they claimed that there was an error of some 10 or 12 cords made in that measurement -

The state of facts then is as follows: The Appellees Contracted to sell to the Appellants 300 cords of wood at \$2.00. They proved that they had on the bank at various times 555 Cords - They showed that the R. R. Co did get 344 Cords - And claimed pay for all the balance of the 555 cords without ever showing what became of it -



And the jury allowed them pay for the whole.

Now can it be contended that the Company were liable to pay for more wood than they contracted for or actually did receive? They contracted for 300 cords; they received 344 cords and paid for it. Ought they therefore to become insurers of all the wood placed upon the bank?

But it will be argued that the proof tended to show that at the time the first wood was taken away, they got more than 286 cords. And the following portion of Porter's evidence will be relied on to sustain that proposition "At the time of the measurement of the 286 cords pliffs were hauling wood to the bank, "Dfts kept taking away the wood till the bank was clear" And it will be insisted that this proves that the balance of the 155 cords was then taken. I insist that this is not a correct view for several reasons.

1<sup>st</sup> It is not shown that the 155 cords was delivered at that time. The receipt for the payment of this wood was dated March 24<sup>th</sup> 1854. The <sup>286 cords of</sup> wood had been delivered before that time for after that time Porter gave the measurement to Jenkins upon which the money was paid. And Bassells testimony shows that he continued to haul till April 8<sup>th</sup>. Burnham says he quit hauling in April, so that the wood was not then there.

2<sup>d</sup> Porter does say in express terms that he did not remain at the bank after the measurement, so that he could not know what they took



Besides witness Porter swore expressly that he does not know of the R.R. Co ever receiving more than 286 cords & the wood Wells got & measured, about 60 cords, 58 cords as the receipt shows, making in all 344 cords - Can it be said then that on his testimony they can recover payment for 211 cords more than he ever knew of the R.R. Co. having got?

Besides the Appellees rendered a bill for 286 cords, and did not pretend that they had delivered any more.

I submit that there is no evidence showing that the R.R. Co ever got more than the 344 cords. They did not contract for more than 300 cords, the remainder may have been sold by Bassell & McBlung, may have been washed away, but more probably it was taken by Steamboats.

The real contest is, who shall pay for the lost wood. I submit that it is most grossly inequitable and unjust to compel the R.R. Co to pay for it - Juries are apt to be hard on Rail Road Companies, but this is the most palpable case of injustice it has been my misfortune to meet with.

The Company certainly did not contract for more wood than 300 cords, if the Court can find any proof that they got the other 211 cords they can find proof in the case that I can not.

Again: is it credible that if the Company had got 211 cords of wood more than they paid for in March, that in June when the last



lot was paid for, and McBlung (who is the man that did the business, as shown by the proof) then claimed that there had been a mistake <sup>of 10 cords</sup> in the last measurement, should say nothing of the great mistake in the first lot, but if there was such a mistake?

Wells swears that when the last wood that was ever received by the Company was got, McBlung said they had got 10 cords more than was paid for, no claim at all was made for the 200 cords which he now says was taken by the Company long before.

Porter swears he was the Agent of the Company, had charge of the business of buying wood, at that point, that he never knew of the R.R. Co. having received from Appellants more than the 344 cords. They entirely fail to prove that we have received more, and we make a strong prima-facie case that we never did.

The 1<sup>st</sup> Instruction is wrong: It is -

"If the jury believe from the evidence that the plaintiffs delivered wood to defendants on the bank of the Illinois River; then the Dept. is liable to plaintiffs for the wood so delivered at the contract price; and the jury should render a verdict for whatever was not paid for."

There are at least two errors in this Instruction, there was no dispute about the delivery of the 300 cords of wood contracted for. The Instruction says if the plaintiffs below delivered more wood than mentioned in the contract, defendants were liable for the same,



It means this or nothing, they had sought to show that 555 cords had been piled on the bank, we did not deny our liability to pay for the contract amount, we had paid for it - But the Court says, if they delivered wood to us on the bank, which means if they put it on the bank for the Company, the Company are liable for all they put there - In other words, if the wood was delivered on the bank it was at the risk of the company - If this was true of the 300 cords, it was not true as to the remainder - a simple delivery does not constitute a contract to receive and pay for the wood not included in the contract before made between the parties -

I submit to the Court whether the mere delivery to the Company on the Banks of the River of 211 Cords of Wood never contracted for along with the 300 cords contracted for is sufficient of itself to constitute a contract binding the Company -

2 Even if we were compelled to pay for the 211 cords of wood not included in the contract because it was delivered on the bank of the River, how were we obliged to pay the contract price - The contract was for 300 Cords, we were obliged to pay \$2 per cord for that, the contract price, when the 300 cords were delivered the contract was at an end - If we had more wood of them, we might be liable on a quantum valebant, but certainly we could not be compelled to pay \$2 per cord, because



we had agreed to pay that sum for the 300 cords. The Instruction is wrong every way.

The 2<sup>d</sup> Instruction is wrong (see Abstract for the Instructions). The contract says that the wood was to be delivered by Bassell & Co. belong to the Company when called for. The Instruction says that the construction of the Contract is, the wood was to become the property of the Company when piled up; and consequently at their risk till called for. This reverses exactly the terms of the contract; the plaintiffs below had contracted to keep it so as to deliver it when called for.

There is another manifest error in the Instruction. It is not confined to the wood mentioned in the contract, about this wood there was no dispute, but the instruction embraces all the wood piled up on the bank of the River. The jury were undoubtedly by this misled.

The 3<sup>d</sup> Instruction is wrong. As to the 300 cords of wood mentioned in the contract it might be right, but it includes all the wood in controversy. The Court will observe that neither the 2<sup>d</sup> or 3<sup>d</sup> Instructions are limited to the wood included in the contract. The Instruction would make the Company liable for all the wood delivered on the bank of the River even if it had been taken by others. There was no testimony tending to show that any besides the contract wood was called for by the agents of the Company. This Instruction manifestly misled the jury.



The case turned upon the question, who was liable for the wood which was placed upon the bank and never was received by the Company. The jury, under these instructions said the loss should fall on the R. R. Co.

The result arrived at may be stated thus: The Company purchased 300 cords of wood to be delivered on demand the bank of the Illinois when called for. Therefore they are insurers of all the wood placed on the bank by Bassell + McBling. This is as clear as the logic of the man who argued thus. Moses was a meek man, and Job was a patient man; therefore St Paul was shipwrecked.

The qualification given to the 2<sup>d</sup> Instruction of the defendants below was not properly given.

There is no proof in the case tending to show that there was any understanding between the parties that the wood over and above the 300 cords was to become the property of the R. R. Co. when delivered on the bank of the River.

And this qualification would only have the effect to mislead the jury. The Court is respectfully asked to look into the evidence which is short, and is all set out in the abstract. And I submit that no evidence can be found tending to show that the Co. had agreed to receive any other wood, or had any understanding that more wood than <sup>the</sup> 300 cords mentioned in the contract should be turned out to them on the bank.

It is true that if when the last load of wood was got, they did get 44 cords more than



Enough to make up the 300 cords, they would be liable to pay for the 44 cords what it was worth, but I submit that this does not tend to prove that there had been a previous understanding which would make the company liable for all the wood over 300 cords which might have been placed on the bank of the River and taken away by Steamboats and others.

If there was no evidence on which to base this qualification, it was wrong to give it, and it had a manifest tendency to mislead the jury.

I respectfully submit 1<sup>st</sup> that the evidence shows clearly that all the wood contracted for or received by the Company was paid for according to the bills rendered by Appellus and there is no evidence at all upon which to base this verdict. The matter stands thus:

|                                         |           |        |   |              |
|-----------------------------------------|-----------|--------|---|--------------|
| Amount 1 <sup>st</sup> rec'd by Company | 286 Cords | at \$2 | = | \$572        |
| Amount rec'd last time                  | 58 Cords  | at \$3 | = | \$174        |
|                                         |           |        |   | <u>\$746</u> |

|                                    |  |       |
|------------------------------------|--|-------|
| Amount paid by Co. as per receipts |  | \$746 |
|------------------------------------|--|-------|

211 cords over and above the 300 cords placed on the bank, and which the Company never contracted for and never got

|                   |              |
|-------------------|--------------|
| Amount of verdict | \$422        |
|                   | <u>\$226</u> |

It is difficult to see upon what principle they could on this evidence have \$226 and not \$422. I suppose it was a compromise upon the principle that if a man claims of me \$500 & I owe him nothing it is about right to compromise at \$250.



I submit that each of the Instructions given for Appellees was wrong and calculated to mislead the jury, and consequently the court erred in giving each of said instructions, and in overruling the motion for a new trial.

In conclusion: In such a case as this Rail Road Companies are peculiarly liable to be wronged. They can not appeal with the same effect as private citizens to the sense of justice of a jury, and unless they are protected by the Courts of Law they are to a great degree defenceless.

Book  
of Counsel for Appellant.



The Defendant - R. R. Co

vs.

Baselle & McBlung

Argument for

Appellant.

Filed June 24 1856,

L. Leland  
Clerk

R. R. Co



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The Ill Central R. Co. }  
vs. }  
Augustus Capell 3

The plaintiff below proved the delivery on the bank of the Illinois river & at the same place on the bank between Oct. 1853 & April 1854 & in these months 555 cords of wood. The defendant proved a receipt for 286 cords of \$572 dated March 1854 & a receipt for 58 cords of \$174 dated June 1854.

The written contract the date of which is not definitely fixed, is for 300 cords at 2.00 -

That there was some parcel arrangement for wood - Some verbal contract in addition to the written contract, is apparently, because 3.00 was paid for the 58 cords & because the quantity for which the receipts were given exceeds the 300 cords. If there was such other parcel contract, then it is fair to infer from the fact that the wood was at a distance, some cut & some riven & that it was delivered at the same place, & that wood was taken away by the defendant, at various times out of the quantity there, that all the wood delivered at that place on the bank was for the rail road Company. This is strengthened,



if our construction of the contract is right that the calling for the wood was a calling for the wood at the distance & in the timber to be delivered at the place of delivery on the bank.

If there was an additional parol agreement, it would have been likely that the additional wood under the additional parol contract was to be called for when at the place where it was cut to be delivered at the same place on the bank where the other wood mentioned in the contract & in the two receipts was to be delivered. The 58 cords were undoubtedly so delivered & it was evidently not a part of the wood delivered under the written contract, because the price was different.

If this last mentioned wood was delivered on the bank with the written contract wood, it was fair for the jury to presume or infer that the other wood not included in the 58 cords & in the 286 cords ( $58 + 286 = 344$  cords taken from 555 leaves 211 cords) delivered at the same place, was for the company, especially when there is evidence that some of it was taken by them & no evidence of a taking by any one else. The evidence of the railroad agent that he got no more than the 344 cords <sup>is a circumstance of little weight</sup> - He says that at the time he measured the 286 cords, plaintiffs were hauling wood to the bank &



defendants kept taking away wood until the bank was clear, what became of the wood being delivered & being taken away at & after the time of the measurement of the 286 cords? He did not remain after the measurement & yet it is evident that wood was there & afterwards taken away in the scows. There is evidence enough that ~~555 cords were delivered to the defendants~~ <sup>wood not mentioned in the two receipts was</sup> to sustain the finding of this fact by the jury; at any rate it is not so weak as to require this court to decide that the court below erred in not setting the verdict aside as against the weight of evidence on the subject of the delivery. The evidence of the payment for the ~~241 cords~~ <sup>wood not included in the receipts</sup> if delivered is weak & unsatisfactory. The witness thinks the wood delivered in the fall was paid for, because he would in the course of business, have been likely to have paid for it. The fact that he took receipts may have satisfied the jury that if he had paid for the whole he would in the ordinary course of business have taken receipts for the whole. The jury may have thought that the boatmen may have omitted to deliver at La Salle all they received in their boats.

If the wood was delivered on the bank at several times & taken away at several times & several measurements made, the fact



That the Plaintiff complained about the weight for a lot about which there was a misunderstanding as to quantity, and did not complain about other lots about which there was no misunderstanding, & which may have been measured by other agents of the Company amounts to but very little, & the fact that he may have received pay for one measured lot, is by no means conclusive evidence that other lots measured & taken away or taken without measurement, had been paid for.

Are the instructions wrong?

The objections to the 1<sup>st</sup> are not well taken.

If the wood was delivered to defendants they should pay the contract price for the wood - this instruction don't mean that the defendants should pay the 2.00 or the 3.00 but the contract price for the wood delivered. 2.00 for the 286 cords 3.00 for the 58 cords & either the two or the three or any other sum for the 211 as they should believe the price to be - Nor does it say that a delivery on the bank is a delivery to defendants.



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and did not complain about other  
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The 2<sup>d</sup> instruction is right or wrong according to the construction of the Contract. We construe the Contract in the same way Porter understood it. He says he took the Contract because ~~he~~ "considered that it would protect the wood so that it could not be sold to others" - that is, when the wood was delivered & <sup>piled</sup> on the bank, the property was changed & the plaintiffs could not sell it.

The wood at the time it was bought was partly on the bank, partly cut in the woods, & partly in the tree.

We insist under these circumstances the expression "when called for" means when the plaintiffs are called upon so to do they are to haul the wood in from the timber & deliver it to the defendants piled up on the bank. After it should be piled up on the bank, the wood was to be the property of the defendants & the ~~control~~ <sup>control</sup> of the plaintiffs over it ceased. "It could not then be sold by them to others".

The instruction in relation to the construction of the Contract applies of course only to the wood mentioned in the Contract. How could the jury understand that the construction of the Contract would apply to wood not in it?

The 3<sup>d</sup> instruction is right. It is surely if the Company were not to be the owners of the wood



till they took it into their boats by the understanding between them and plaintiffs, yet, if they actually did receive it before & thus changed the arrangement into one making the delivery on the bank sufficient to change the property, then the property did become changed by such second arrangement in relation to the delivery.

If our construction of the Contract is right, then the loss of the wood after the delivery on the bank by being taken away by steam boats or otherwise, would be the loss of the Company.

As to how the jury arrived at \$226 I don't know. They did, I suppose as all juries do when there is a conflict of evidence, yielded to one <sup>another</sup> and then till they agreed. They thought the quantity delivered was overestimated probably, by the drawers who were paid by the Card for hauling & interested in making their Cards rather small.

E. S. Leland

for att in error



Ill Cant R Road  
no  
Augustus Caput

Augt-<sup>pa</sup> d<sup>pl</sup> in  
m<sup>er</sup>.

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Illinois Gen. R R Company

vs

Augustus Cassell,

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1856

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