

12863

No. _____

Supreme Court of Illinois

Mecum

vs.

Peoria & Oquawka R.R.Co

71641  7

159-42.

Robert R. Meenan

vs

The Peoria & Oquawka
Rail Road Company

~~160~~

~~161~~

12863

1859

Be it remembered that hereafter to wit, on the 16th day of November A. D. 1858 there was filed in the office of the clerk of the circuit court in the county of Peoria in the state of Illinois an declaration and copy of causes of action in the words and figure following, to wit:

State of Illinois, } ss.
COUNTY OF PEORIA, }

In the County Court,
Of the September Term, A. D. 1857.

Robert H. Mecum }
vs. }
P. & C. R. Co. }

Declaration

In Assumpsit

Robert H. Mecum
Plaintiff-- in this suit by Charles C. Bonney
his attorney-- complains of The Peoria and
Oquawka Railroad Company

defendants in
this suit, of a plea of trespass on the
case upon promises;

For that whereas heretofore,
to wit: on or about the 9th day of
October A.D. 1854, at Moundmouth:
to wit: in the County of Peoria
aforesaid, the said defendants,
by A. C. Harding, their agent,
in that behalf, made and con-
cluded with the said plaintiff
a certain agreement or instru-
ment in writing, in substance
as follows, to wit:

This agreement made
October 9th, 1854, between Robert
R. Mecum, of the one part, and the
Peoria and Aquawha Railroad Com-
pany, of the other part, witnesseth
as follows:

The said Mecum here-
by agrees in consideration of the
premises on the part of the said
company hereafter made that
he will give and grant to said
company the right of way for
their railroad over and across
the north-east quarter of section
thirty-six, and twenty acres off
the east side of north-west quar-
ter of said section in township

eleven north one west, in Warren County, Illinois, of the width of fifty feet, and of so much greater width, not exceeding one hundred feet, as may be necessary for the purpose of constructing their said road.

And said Company on their part agree in consideration of the premises that they will make and keep in repair, on both sides of said road, a sufficient fence as soon as practicable after the commencement of running the trains across said land, not exceeding twelve months; that they will make cattle guards where the road enters upon and leaves said land; that they will make two cattle passes over said road; and that they will pay to said Mecum, the sum of six hundred dollars, one hundred dollars of which shall be paid by the construction of a cattle pass under said road, at the large slough across which the same passes, and five hundred dollars remaining to be paid by the note

of said company, due in one year with interest, with the privilege to said Mecum to take five shares of stock in the said company, in lieu of said five hundred dollars and interest, if he elects to do so at any time before said note is due.

This contract and agreement to be binding and obligatory upon both the parties aforesaid, if approved by the Board of Directors of said company; else to be void.

Robert H. Mecum.
Peoria & Aquawake R.R. Co.
by J. C. Harding.

Witness
J. Quimby.

And whereas, afterwards, to wit: on or about the 10th day of October, 1854, at Peoria, to wit, in the County of Peoria aforesaid, the Board of Directors of said company approved the said agreement; and whereas the said defendants then and there took and appropriated to their own use, and thenceforth hitherto have used and enjoyed the right of way mentioned in the said agree-

ment; and whereas the said defendants by reason of the premises became liable, and therefore in consideration thereof, then and there promised the said plaintiff that they, the said defendants, would make and keep in repair on both sides of the way for their railroad mentioned in said agreement, a sufficient fence, as soon as practicable, after the commencement of running the trains along said way, and within the term of twelve months from the date of said agreement, which period has long since elapsed; and further promised the said plaintiff that they, the said defendants, would make good and sufficient cattle guards for the use of said plaintiff, where their said road enters upon, and where it leaves the land mentioned, in said agreement, within a reasonable time not exceeding the same term of twelve months, which period has elapsed; and further promised the said plaintiff that they, the said defendants, would make two good and sufficient

cattle passes, for the use of said plaintiff, over said railroad, across said way, and upon said land, within a reasonable time, not exceeding the same term of twelve months, which period has elapsed; and further promised the said plaintiff that they, the said defendants, would pay to the said plaintiff, the sum of six hundred dollars, that is to say, would expend the sum of one hundred dollars in and about the construction of a cattle pass under their said railroad, at a point on said land, called the Large slough, and would pay to said plaintiff the further sum of five hundred dollars, with interest, in one year from and after the date thereof, and of said agreement according to the tenor and effect of the certain promissory note of the said defendants, which said note, thereupon then and there made by said defendants, by George C. Bestor, their President, and delivered to said plaintiff, is in substance as follows, to wit:

Leoria, October 9th, 1854.

\$500.

Twelve months after date the
Leoria and Aquawka Railroad Company
promises to pay to the order of
Robert H. Mecum, five hundred
dollars, with interest at the rate
of six per cent, for value received.

The Leoria & Aquawka
Rail Road Company
by George C. Bestor
Pres. -

Which period of twelve months
has elapsed; yet the said defendants
have disregarded their promises and
undertakings above mentioned, and
though often requested so to do,
have not made and kept in repair
any fence on both sides of said way
or road, or any part thereof; and
have not made any cattle-guards
for the use of said plaintiff, at
the points where the said railroad
enters upon and leaves said land
or elsewhere; and have not made
any cattle passes for the use of
said plaintiff over said railroad,
and across said way; and have

not paid to the plaintiff the said sum of six hundred dollars or any part thereof; and have not expended in the construction of a cattle-pass under said railroad, for the use of said plaintiff, the ^{said} sum of one hundred dollars, or any part thereof; and have not paid to said plaintiff the said sum of five hundred dollars, or any part thereof, according to the tenor and effect of such promissory note or otherwise, but have wholly neglected and refused, and still do neglect and refuse so to do.

And whereas also the said defendants, on the 9th day of October, A. D. 1854, at Peoria, to wit, in the County of Peoria aforesaid, by A. C. Harding their agent in their behalf, made their certain other agreement in writing with the plaintiff, which agreement is in substance as follows, to wit:

This agreement made October 9th, 1854, between ~~Robert H.~~ Robert H. McCum of the one part, and the

Peoria and Aquanoha Railroad Company, of the other part, witnesseth as follows:

The said McCune hereby agrees in consideration of the premises on the part of the said company hereinafter made, that he will give and grant to said company the right of way for their Railroad over and across the north-east quarter of section thirty six, and twenty acres of the east side of the north west quarter of said section in township eleven north one west, in Warren County, Illinois of the width of fifty feet and of so much greater width, not exceeding one hundred feet, as may be necessary for the purpose of constructing their said road.

And said company on their part agree in consideration of the premises ^{that} they will make and keep in repair on both sides of said road, a sufficient fence as soon as practicable after the commencement of running the trains across said land, not exceeding twelve months.

that they will make cattle-guards where the road enters upon and leaves said land; that they will make two cattle passes over said road; and that they will pay to said Mecum the sum of six hundred dollars, one hundred dollars of which shall be paid by the construction of a cattle-pass under said road, at the large slough across which the same passes, and five hundred dollars remaining to be paid by the note of said Company, due in one year with interest, with the privilege to said Mecum to take five shares of stock in the said Company, in lieu of said five hundred dollars and interest, if he elects so to do at any time before said note is due.

This contract and agreement to be binding and obligatory upon both the parties aforesaid, if approved by the Board of Directors of said Company, else to be void.

Witness
J. Quincy

Robert R. Mecum.
Georgia & Aquawha R.R. Co.
by J. C. Harding.

And delivered the same agreement to the said plaintiff, and thereby then and there became liable, and thereupon in consideration thereof, then and there undertook and promised the said plaintiff that they, the said defendants, would well and faithfully comply with, and in all things perform their said agreement, according to the tenor and effect thereof; and the plaintiff avers that afterwards, to wit; on or about the 10th day of October A.D. 1854, the Board of Directors of said Company approved the said agreement; yet the said defendants have not kept and performed the same or any part thereof, but have in all things neglected and refused, and still do neglect and refuse so to do.

And ~~For that~~ ^{also} whereas ~~the~~ Defendant on the
Ninth day of October in the year
of our Lord 1854 at Peoria,
to wit, in the County of Peoria aforesaid, made their
^{other} Promissory Note in writing, and delivered the same to the
Plaintiff-- and thereby, by ~~the name and style of~~ Geo. C.
Bestor their President, promised
to pay to the Plaintiff-- ~~by the name and style of~~ _____
_____ the sum
of Five Hundred Dollars
and interest at the rate of ~~cents~~ six per cent, Twelve Months
after the date thereof, which period has now elapsed.

And whereas also the said defendants on the 9th
day of October A. D. 1854 at Peoria
to wit, in the county of Peoria aforesaid, made
their certain other instrument in writing, in substance as fol-
lows, to wit: Peoria October 9th 1854
\$500, Twelve months after date, the Peoria
and Aquawha Rail Road Company
promises to pay to the order of Robert
R. Mecum, Five Hundred Dollars, with
interest at the rate of six per cent for
value received. - (signed) The Peoria and
Aquawha Rail Road Company by
Geo. C. Bestor, Pres.

and delivered the same to the said plaintiff-- and thereby then
and there became liable, and thereupon in consideration thereof
promised to pay to the said plaintiff-- the sum of money therein
specified, according to the tenor and effect thereof.

And Whereas also the defendants on the 5th day of September A. D. 1857 at Peoria to wit, in the county of Peoria aforesaid, were indebted to the Plaintiff in the sum of Three Thousand Dollars, for the price and value of goods then and there sold and delivered by the Plaintiff to the Defendants at their request.

And in the sum of Three thousand Dollars, for the price and value of work then and there done, and materials for the same provided by the Plaintiff for the defendants at their request.

And in the sum of Three thousand Dollars, for money then and there lent by the Plaintiff to the defendant S at their request.

And in the sum of Three thousand Dollars for money then and there paid by the Plaintiff for the use of the defendant S at their request.

And in the sum of Three thousand Dollars, for money then and there received by the defendant S for the use of the Plaintiff.

And in the sum of Three thousand Dollars, for money found to be due from the defendant S to the Plaintiff on account then and there stated between them.

And whereas the defendant afterwards, to wit, on the day and year last aforesaid, at the place, to wit, in the county of Peoria aforesaid, in consideration of the premises respectively, then and there promised to pay the said last mentioned several monies respectively, to the plaintiff on request:

Yet the said defendant S have disregarded their promises, and have not paid any of the said monies in this declaration mentioned, or any part thereof, And the said plaintiff of saith that by reason of all the premises he hath sustained damages to the amount of three thousand Dollars and therefore he brings suit, &c.

Charles C. Bonney
Attorney for Plaintiff.

Robt. R. McCum
 vs.
 P. J. O. R. R. Co.

In the County Court,

The following copies of the notes and
 agreements mentioned in the foregoing declaration
 are set out therein.

Account Do.
 P. J. O. R. R. Co. Defendant &
 To Robt. R. McCum Plaintiff --

To amount of damages by failure to keep up	\$ 3000.00
" " " " " " " "other "	3000.00
" Goods, wares & merchandize	3000.00
" Work, ^{labor} & materials	3000.00
" Money lent &c.	3000.00
" Money paid &c.	3000.00
" Money received &c.	3000.00
" Money due on account stated	3000.00

And on the same day to wit; the 16th day of November A.D. 1858 there was filed in the office of the clerk of said court instructions in the words and figures following, to wit;

In the County Court.

Robert R. Mecum

vs.

P. & C. R. R. Co.

Declaration and Copy of Causes
of Action.

Filed Sep. 8 1857
Charles Rottelle Clk.
per Geo. W. Rottelle
filed Nov. 16, 1858 Apt.
E. P. Sloan, clk.

Charles C. Bonney

Attorney for Plaintiff.

"Mecum
v.
R. R. Co.

Ex Off Instructions -

If the jury believe from the evidence that the performance by the defendants of the contract in evidence was to be received by the plaintiff, in payment for the right of way, and that the defendants had such right of way according to the contract, and continued to use the same, and that the defendants did not perform the contract on their part, then the jury will find for the plaintiff the value in money of what the defendants contracted but failed to perform, build, pay, provide or furnish to or for the use of the plaintiff in payment for such right of way -

Endorsed on back as follows, to wit:

Mecum

vs
Q. and R. R. Co.

Filed February 2d. 1858
Charles Pettelle clk
per G. W. Pettelle Spsy
per Geo. W. Pettelle Spsy

Filed, Nov. 16. 1858

G. W. Pettelle clk.

Accorn
 v
 R. R. Co.

Plaintiffs
 Instructions

Refused

If the jury believe from
 the evidence that the plaintiff actu-
 ally paid or compensated the defen-
 dants for the building of the fence,
 passes &c. in and by giving them
 the right of way as stated in the
 contract, and that the defendants
 did not build them then the jury
 will find for the plaintiff the value
 of such fence &c. - according to such
 payment or compensation -

Endorsed on back as follows,

Accorn
 vs
 R. R. Co.

Filed February 2nd 1858
 Charles Nettelle Clk
 Geo. H. Nettelle Dpty

R. Meem vs P. & O. R. R.
~~L. Meem vs P. & O. R. R.~~ Instructions for
the defendant

The true measure of damages is
the damage which has been shown
by the evidence, the plaintiff has sus-
tained from the non fulfillment of
the contract or which the jury believe
from the evidence has resulted to the
plaintiff from the non construction
of the fence passes &c. as required
by the contract. and not the value
of the fence, cattle passes or cat-
tle guards or the cost of building
them - "

Endorsed on back as follows:

Filed Nov. 16. 1858
E. P. Glover, Clerk

McCann

v.

P. & O. R. R. Co.

Instructions of
County Court

And on the same day, to-wit: on the 16th day of November A.D. 1878
there was filed in the office of the clerk of said court a Transcript in
the words and figures following, to-wit:

Wm. C. Donney

"Proceedings of the County Court Peoria County - State of Illinois, began and held at the Court House, in the City of Peoria, in said County, on Monday October 5 A.D. 1857 - for judicial and other business. Present Hon. Thomas Bryant, Judge, Charles Pettelle Clerk and Francis W. Smith Sheriff -

Robert R. McCum

vs.

Assumpt

Peoria and Aquawha
Rail Road Comp^y

By agreement of Parties,
this cause is ordered to be continued un-
til November Term -

Proceedings of the County Court of Peoria County, began and held at the Court House in the City of Peoria and County of Peoria, ^{State of Illinois,} on Monday November 2nd A.D. 1857 - for judicial and other business. Present - Hon. Thomas Bryant Judge, Charles Pettelle Clerk and Francis W. Smith, Sheriff -

Wednesday November 11th - 1857 -
Robert R. McCune

vs.

Assumpsit

Peoria and Aquawaka
Rail Road Company

By agreement of Parties
this cause is ordered to be continued until
December Term A. D. 1857 -

Proceedings of the County Court, -
Peoria County, State of Illinois, began
and held at the Court House in the city of
Peoria on Monday January 4th A. D. 1858
for Judicial and other business - Present, Hon.
Wellington Loucks, Judge, and Charles Ret-
telli Clerk, and Francis W. Smith, Sheriff -

Wednesday January 6th. 1858 -
Robert R. McCune

vs.

Assumpsit

Peoria and Aquawaka
Rail Road Company

By agreement of Parties
this cause is ordered to be continued until
February Term A. D. 1858 -

Proceedings of the County Court, Peoria
County, State of Illinois, began and
held at the Court House in the City of
Peoria in said County on Monday Febru-
ary 1st 1858, for Judicial and other busi-
ness - Present - Hon. Wellington Loucks
Judge - Charles Kettelle Clerk and Fran-
cis W. Smith, Sheriff

Tuesday February 2nd 1858 -
Robert R. Mecum

vs-

Peoria and Aquawake
Rail Road Company

This day came the
said Plaintiff by Charles C. Bonney his
attorney, and the said defendants by Purple
and Pratt their attys. and the issues be-
ing joined herein it is ordered by the
Court that a Jury come to try said
issues. Whereupon came a Jury of Twelve
good and lawful men to try said
cause. To wit - David Maxwell, Seth Griff-
fen, David Wheeler, James Delano,
Matthew Taggart, John Meikhan, E. Clap-
son, Geo. C. Babcock, Edwin Matthews, Isaac
Moore, E. Smith and Gideon Cutter, who
were duly chosen, tried and sworn to

well and truly try the said cause, and a true verdict render according to the evidence given.

Wednesday February 3rd. 1858 -
Robert R. Mecum

vs

Asspt.

Peoria and Aquawha
Rail Road Company

This day came again both parties and also the Jury empanelled yesterday in this cause, and the said Jury having heard the evidence in the case and the arguments of counsel returned into court the following verdict: "We the Jury find for the Plaintiff and assess his damages at the sum of Twelve Hundred and Sixty two Dollars and thirty seven cents (\$1262.37)". Thereupon the said defendants entered their motion for a new trial of this cause for the following reasons 1st The verdict of the Jury is against the instructions of the Court. 2d The verdict of the Jury is against the law. 3d The damages are excessive. The Court having heard the arguments of counsel, and being fully advised in the premises, doth sustain the said motion and orders that this

cause be re-set for trial.

Proceedings of the County Court of
Peoria County, State of Illinois (under
its extended Jurisdiction) began and held
at the Court House in the city of Peoria
in said County on Monday March 1st
1858 for Judicial and other business -
Present, Hon Wellington Loucks Judge
Charles Kettelle Clerk and Francis W.
Smith, Sheriff

Robert R. Mecum

vs

Assumpsit

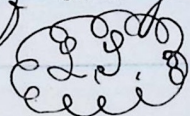
The Peoria and Aquanoha
Rail Road Company

By agreement of Parties
it is ordered by the Court that the venue
in this cause be changed to the Circuit
Court of the County of Peoria and that the
Clerk transmit the papers in this cause
to the Clerk of said Court also a true
transcript from the Records of the Pro-
ceedings herein -

State of Illinois
 Peoria County-

I Charles Kettelle,
 Clerk of the County Court within and
 for said County, Do hereby certify that
 the foregoing is a true transcript from
 the Records of the Proceedings had in a
 cause entitled Robert R. Mecum, vs.
 Peoria and Aquawka Rail Road Company
 as appears of Record in my office.

Witness my hand and seal this 8th day
 of May 1858



Charles Kettelle clerk.

Endorsed on back as follows -

Transcript
 Mecum
 vs -
 Peoria and Aquawka
 R. Rd. Co.
 filed Nov. 16. 1858
 E. P. Hoan, clk.

Proceedings at a term of the Circuit Court began and held at the Court house in the City and County of Peoria, State of Illinois, on the third Monday in the month of November in the year of our Lord one thousand eight hundred and fifty eight, it being the fifteenth day of said month, Present, E. H. Powell, judge of the Sixteenth Judicial Circuit in said State, Francis H. Smith, Sheriff and Enoch P. Sloan, Clerk, to wit:

Thursday November 18th A. D. 1858

Robert A. McCum

vs

Venue from County Court.

Peoria & Aquawka

Rail Road Company

This day came the plaintiff by Bonney his attorney and the defendant by Purple its attorney, and waive trial by jury, and submit this cause to the court for trial, on agreed case.

Saturday December 18th A. D. 1858

Robert A. McCum

vs

Venue from Co. Court.

Peoria and Aquawka

Rail Road Company.

This day came the plaintiff by Bonney his attorney and the defendant by Purple & Pratt its attorney, and this cause came on to be heard on an agreed case, and the Court having heard the argument of counsel, and not being satisfied in the premises takes time to consider.

~~Saturday December 18th A. D. 1858~~

Monday December 20th A. D. 1858
Robert R. McCune :

Venue from Co. Court.

^{vs}
Peoria & Aquawka
Rail Road Company

This day this cause again came on, and the Court now being fully advised in the premises, do find for the plaintiff, and assess his damages at the sum of seven hundred and forty five dollars and ten cents. Whereupon the plaintiff by his attorney moved the Court for a new trial, which motion on consideration of the Court, was overruled. Therefore it is considered that ~~that~~ the said Robert R. McCune have and recover of the said Peoria and Aquawka Rail Road Company, the said sum of seven hundred and forty five dollars and ten cents, his damages aforesaid, and also his costs and charges by him about his suit in this behalf expended and that execution issue therefor.

And on the same day, to wit, on the twentieth day of
December in the year of our Lord one thousand
eight hundred and fifty eight there was filed in the office
of the clerk of said court in said case a Bill of Exceptions
in the words and figures following, to wit.

State of Illinois
County of Peoria
In the Court

In the Circuit Court
of the November Term A.D.
1850.

Robert H. Mecum

2.

The Peoria & Equanoka
Rail Road Company

Assumpt

Be it remembered, that on the trial of this cause, before the court the following agreed case was read in evidence on behalf of both the parties to ~~this~~^{this} case, that is to say:

State of Illinois

Courtesy of Peoria

In the Circuit Court

November Term T.D. 1838

Robert R. Mecum

V.

The Peoria & Equiana
Rail Road Company

Assurance -

Change of venue
from County
Court.

Agued Case -

The Board of Directors of said Rail Road Company, approved the contract set out in the declaration, on the 10th day of October 1854. The defendants took the right of way mentioned in said contract, at or about the date of said contract, and have ever since held, used, and run their trains of cars across the same. The defendants have not paid the note declared on. The defendants have never built the fences, passes and cattle guards specified in said contract, or any or either of them, nor has the plaintiff built the same. The cost and value of such fences, passes, and guards is Six Hundred and Sixty Three (663) Dollars - The plaintiff has not shown any special damage, other than the loss of the land which the defendants have taken, and the necessary division of his farm thereby. The plaintiff is entitled to verdict and judgment for the amount of the note declared on and

interest. The only question in the case is, whether the plaintiff ought to recover in addition thereto, the cost and value of such fences, passes, and cattle-guards.

November 18, 1856

(Signed) Manning Pratt Vco.

Atty for Deft.
Charles C. Bonney

Atty for Plaintiff "

This was all the evidence.

The court found for the plaintiff and assessed his damages at Seven hundred and forty five dollars and ten cents.

The plaintiff entered his motion for a new trial as follows, to wit,

"In the Peoria Circuit Court.
Robert R. McCune

v.
The Peoria & Wauwasha
Rail Road Company } Assumpsit.

Motion for New Trial

The Plaintiff moves the court to award a new trial of this cause for the following reasons to wit;

- 1 The finding of the court is against the evidence in the case -
- 2 The finding of the court is against the law of the case -

Charles E. Koney
Att^y for
Plaintiff

The court overruled the motion and gave judgment on the verdict and the plaintiff accepted and prayed the court to sign and seal this bill of exceptions which is accordingly done -

~~Accepted~~ C. V. Lowell (Seal)

Mecum
v.
P. & D. R. R. Co.

Bill of Exceptions

filed Dec. 20. 1858
E. P. Sloan Ck.

State of Illinois
County of Peoria
I, Enock S. Sloan
Clerk of the Circuit
Court in and for the County of Peoria in the
State of Illinois do hereby certify that
the foregoing is a true and correct copy
from the Records and files in my office
in a certain Cause wherein entitled Robert R.
McLean against Peoria and Ogawaska Rail
Road Company

In witness whereof I have
set my hand and affixed the Seal of
said Court at office this 26th
day of March A.D. 18~~58~~ 1859.
Enock Sloan, clerk

State of Illinois vs
In the Supreme Court at Ottawa
Of the April Term A.D. 1859.

And hereupon comes the said Robert K. McCum, by Charles C. Bonney his attorney and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifestly error in this, to wit:

1. The finding and judgment of the Court for the plaintiff in error are for Seven Hundred and Forty Five Dollars and Ten Cents, (\$745.¹⁰) whereas the finding and judgment of the Court ought to have been for Twelve Hundred and Sixty Two Dollars and Thirty Seven Cents (\$1262.³⁷) for said Plaintiff, besides interest.
2. The Court below erred in overruling the motion of the plaintiff in error for a new trial.
3. The record and proceedings aforesaid are otherwise manifestly irregular and contrary to the law of the land.

Charles C. Bonney
attorney for plaintiff
in error

And hereupon come the said Peoria and Equawha Rail Road Company by N. H. Purple — — — their attorney

and say that there is no error either in the record and proceedings aforesaid or in the rendition of the judgment aforesaid and pray that the said Supreme Court now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed &c.

W. H. Purple
counsel atty—

The said Peoria & Ognewka Rail Road Company waive the issuing and service of Scire Facias in this case, and enter their appearance in the Supreme Court for trial at said April Term 1859.

Wm. H. Miller
Att. at Peoria

State of Illinois vs-

Charles C. Bonney attorney for
the plaintiff in error in this case, being sworn
says that the matters presented by the record in
this case of Robert H. Mecum v. The Peoria & Northern
Rail Road Company, were litigated in good faith
within the meaning of the thirty eighth rule
of this court, about a matter in actual contro-
versy between the parties, and that the opinion of
this court is not sought with any other design
than to adjudicate and settle the law relative
to the matter in actual controversy between the parties
to the record.

Subscribed and sworn to before me this
21. day of April A.D. 1859-

Wm

Charles C. Bonney

L. Toland Clk

Robert H. Mecum
Plaintiff in error
versus

P. & N. R. Co.
Defendants in error

Error to Peoria Circuit Court -

Record, Errors &
opinder -

Bonney for Plffs

Purple for Dfts

Filed April 21/85
L. Toland
Clerk

Rec. 4. 15 At 3. 60¢ & 5¢ pd by Bonney

Charles C. Bonney
Atty for Plaintiff in error

STATE OF ILLINOIS, SS. . . . IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

ROBERT R. MECUM,
vs.
THE PEORIA & OQUAWKA RAILROAD CO. }

ERROR TO PEORIA CIRCUIT COURT.

BRIEF OF PLAINTIFF IN ERROR.

1. The Railroad Company entered into a contract in writing with Mecum, for the PURCHASE from him of the right of way for their road across his land.
2. In PAYMENT for that right of way, the Company undertook to build the fences, cattle passes and cattle guards in question, and to give Mecum five hundred dollars in money, according to the terms of the promissory note accompanying the agreement.
3. The Company took possession of Mecum's land, and have ever since held and used it, but they have utterly failed to build the fences, passes and guards, or any of them, and to pay the money or any part thereof.
4. When the time allowed by the agreement for the building of the fences, passes and guards expired, then Mecum had a complete right of action against the Company for so much money as the same would have cost.
5. A jury has once found, and it is now agreed that the value of the fences, passes and guards is \$663. But the Company now seek to avoid the payment of this portion of *the purchase price* of the estate Mecum lost and they gained by the agreement, upon the ground that he has not shown any *special damage* by reason of their failure.
6. This defence the law will not tolerate. It is not for the Company to say whether what they undertook to give Mecum for his land would have benefitted him or not. The verdict of the court below ought to have been for the amount of the note, with interest from maturity, *and* the value of the fences, cattle passes and cattle guards, with interest from the expiration of the time allowed for their construction.
7. In an action merely for a failure to keep the *fences in repair*, the measure of damages would be different; but *such* damages are not now in question.

*See minutes of agreement 1, 2.
3. 4. 5. 6. 7.*

AUTHORITIES:

Sedgwick on Damages 203, and cases cited.
Smith and al. v. Dunlap, 12 Ill. R. 192, and cases cited.
Statute of Negotiable Instruments, Sec. 3, 4.
Vanhooser and al. v. Logan, 3 Scam. R. 389.
Act of Feb. 14, 1855, Purple's Stat. 1077.

CHARLES C. BONNEY,
of Counsel for Plaintiff.

12863-21

In the Supreme Court

Robert R. McCum

[&]
P. & O. R. R. Co.

Error to Georgia Circuit Court.

Brief of Plaintiff

STATE OF ILLINOIS, SS.
IN THE SUPREME COURT AT OTTAWA.

OF THE APRIL TERM, A. D. 1859.

ROBERT R. MECUM, Plaintiff in Error, <i>versus</i> THE PEORIA & OQUAWKA RAIL- ROAD COMPANY, Defendants in Error.	}	ERROR TO PEORIA CIRCUIT COURT.
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PAGE OF
THE
RECORD.

ABSTRACT OF THE RECORD.

¹ Declaration in assumpsit on an instrument in writing, to wit:

² THIS AGREEMENT, made October 9th, 1854, between Robert R. Mecum of the one part and the Peoria and Oquawka Railroad Company of the other part, witnesseth as follows:

The said Mecum hereby agrees, in consideration of the premises on the part of the said Company hereafter made, that he will give and grant to said Company the right of way for their railroad over and across the northeast quarter of section thirty-six, and twenty acres off the east side of northwest quarter of said section, in township eleven north, one west, in Warren county, Illinois, of the width of fifty feet, and of so much greater width not exceeding one hundred feet as may be necessary for the purpose of constructing their said road.

And the said Company on their part agree, in consideration of the premises, that they will make and keep in repair on both sides of said road a sufficient fence, as soon as practicable after the commencement of running the trains across said land—not exceeding twelve months; that they will make cattle guards where the road enters upon and leaves said land; that they will make two cattle passes over said road, and that they will pay to said Mecum the sum of six hundred dollars, one hundred dollars of which shall be paid by the construction of a cattle pass under said road at the large slough across which the same passes, and five hundred dollars remaining to be paid by the note of said Company, due in one year, with interest, with the privilege to said Mecum to take five shares of stock in said Company in lieu of said five hundred dollars and interest, if he elects to do so at any time before said note is due.

This contract and agreement to be binding and obligatory upon both the parties aforesaid, if approved by the Board of Directors of said Company, else to be void.

ROBERT R. MECUM,
PEORIA & OQUAWKA R. R. Co.

Witness: J. QUINBY.

By A. C. HARDING.

⁷ Promissory note accompanying agreement, to wit:

\$500.

PEORIA, OCTOBER 9th, 1854.

Twelve months after date, the Peoria & Oquawka Railroad Company promises to pay to the order of Robert R. Mecum, Five Hundred Dollars, with interest at the rate of six per cent., for value received.

THE PEORIA & OQUAWKA RAILROAD COMPANY.

By GEORGE C. BESTOR, Pres't.

⁸ Second count on same agreement in shorter form.

¹² Third count on the same promissory note.

- 13 Fourth count setting out same note.
- 14-15 Common counts and account thereon.
- 16-17 Instructions refused Plaintiff on trial in County Court.
- 18 Instruction given for Defendant in County Court.
- 19 Proceedings of County Court.
- 21-22 Trial by jury. Verdict for Plaintiff for \$1262 37. Motion for new trial, and motion allowed.
- 23 Change of venue to Circuit Court.
- 25-26 Proceedings of Circuit Court.
- Trial on *agreed case* by the Court without a jury. Verdict for plaintiff for \$745 10. Motion of plaintiff for new trial overruled and judgment.
- 27 Bill of exceptions, containing

1. AGREED CASE, to wit:

The Board of Directors of said Railroad Company approved the contract set out in the declaration, on the 10th day of October, 1854. The defendants took the right of way mentioned in said contract, at or about the date of said contract, and have ever since held, used and run their trains of cars across the same. The defendants have not paid the note declared on. The defendants have never built the fences, passes and cattle guards specified in said contract, or any or either of them; nor has the plaintiff built the same. The cost and value of such fences, passes and cattle guards is six hundred and sixty-three (663) dollars. The plaintiff has not shown any *special damage* other than the loss of the land which the defendants have taken, and the necessary division of his farm thereby. The plaintiff is entitled to verdict and judgment for the amount of the note declared on and interest. The only question in the case is, whether the plaintiff ought to recover, in addition thereto, the cost and value of such fences, passes and cattle guards.

November 18, 1858.

MANNING, PRATT & CO.,
Attorneys for Defendants.
CHARLES C. BONNEY,
Attorney for Plaintiff.

- 29 This was all the evidence. Motion for new trial. Overruled. Bill of excep-
- 31 tions signed. Clerk's certificate.

ERRORS, TO WIT:

- 1. The finding and judgment of the court for the plaintiff are for \$745 10; whereas the finding and judgment of the court ought to have been for \$1262 37 for the plaintiff.
- 2. The court erred in overruling the motion of the plaintiff for a new trial.
- 3. The record and proceedings aforesaid are otherwise manifestly irregular and contrary to the law of the land.

CHARLES C. BONNEY,
Attorney for Plaintiff in Error.

In the Supreme Court

Robert R. McCum

v.

P. & O. R. R. Co.

Error to Peoria Circuit Court.

Abstract

State of Illinois }
In the Supreme Court at Ottawa
Of the April Term A.D. 1859-

Robert R. Mecum

P. & O. R. R. Co. } Error to Peoria
Circuit Court-

Minutes of argument for
plaintiff in error.

In connection with the points made
by the plaintiff in his printed brief,
he makes the following suggestions.

- 1 It is the duty ~~to~~ of the court
to ^{judge} justly while it can, and oppressively,
only when it must.
- 2 Contracts are to be construed accor-
-ding to the intent of the parties;
and if that intent be doubtful,
the court will presume that the
parties intended to act uprightly
with each other, and will inter-
-pret their contract accordingly.
- 3 The obvious meaning of the contract
is, that the company should have

the right-of-way, and that they should compensate McCum therefor, by the fences, passes and guards, and the \$500. or five shares of stock, and should keep the fences &c. in repair. The company took possession of the right-of-way, have ever since used, and now hold it by a title which ~~can~~ in some form be enforced against "all the world". Suppose McCum had elected to take the five shares of stock and the company had refused to let him have them, would he have to show any special damage before he could recover the value of the shares? Then why should he be required to show special damage to recover for the failure to build the fences? And what can be more clear, than that upon the contract in question, McCum ought to recover for a failure to build the fences, passes and guards within the time limited therefor, the value of the same in money, and for any failure to build the fences and keep them in repair, a ~~for~~ com-

= compensation for any damage which he may have sustained thereby?

Under the term special damage, would be included all such injuries as loss or destruction of stock for want of the fence, passes, or guards.

But this action is not brought for any special damage but simply to recover the value of those articles of property which the defendants agreed to furnish pursuant to the ~~agreement~~ contract.

4 But the defendants say that the plaintiff cannot recover for the fence because he has not built it. They forget that he has already paid them for it. Suppose they had undertaken to give him a dozen horses, or a quantity of wheat, instead of the fences, passes, and guards; would he have to show any special damage, before he could recover the value of the horses or the wheat? They have received the consideration of their agreement and in the agreed case acknowledge that McCum is entitled to recover

whatsoever damages the law will
allow for the breaches charged in
the declaration. There is no
ground for any objection of non-per-
formance against the plaintiff.

5 The defendants conclude their brief with the maxim "you cannot have something for nothing"! They have thus far had the plaintiffs right-of-way, which is "something", for "nothing". The plaintiff thinks he ought to have "something", to wit, the value of the consideration they agreed to give him, in return. Out of their own mouths let the defendants be judged!

6 The very substance of the defence is, that if one buys property and agrees to pay for it in anything but money, he may get the property and avoid payment until the vendor can show some special damage by reason of the non-payment! The plaintiff in error thinks this defence inconsistent with "substan

= trial justice," and appeals to this court for protection against it.

7 In the language of the 3rd Section of the Statute of Negotiable Instruments, the Rail Road Company promised or agreed to pay certain articles of personal property, and certain sums of money in articles of personal property with a certain sum of money to ~~measures~~ for the right-of-way across his land. They admit their failure, and the plaintiff insists that the measure of damages is the value of the articles of property, with the sum of money and interest thereon.

Charles C. Bonney
attorney for
plaintiff vs
error

"

Robert R. Mecum

v.

P. & O. R. R. Co.

Minutes of
argument for
plaintiff

Filed May 3, 1859
L. Leland
Clerk

Bourne -

Mecum
vs
P. & O. R. R. Co.
and
Ozawake
R.R. Co.