

No. 13326

Supreme Court of Illinois

Moss et al

vs.

John M. Johnson

71641  7

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

KELLOGG, MOSS & Co. vs. JOHN M. JOHNSON.

DEFENDANT'S ARGUMENT, BY H. M. WEAD.

I. As to the refusal to change the *venue*.

1. The *notice* of application was given on the 7th; the case was tried on the 8th April. The application for a change of venue was made on the 8th. The petition shows that a knowledge of the prejudice existing against the plaintiffs had come to their knowledge within the last ten days; i. e. they had known of the prejudice *nine* days, and yet neglected to give *notice* of the intended application until the case was in *fact ready for trial*. Then, when the case was called for trial, on the evening of the 7th, they gave the notice and got the case put over till morning, and then applied for a change of venue. The statute requires that proper notice of the intended application should be given, and fixes the time at 10 days, unless the facts have come to the knowledge of the party making the application since that time. In all cases, reasonable notice should be required. Here there was not reasonable notice. There is no pretence that they did not know the facts long before the notice was given. The plaintiff below had prepared for trial; he was a poor man, ruined and maimed for life by the accident; he had at great expense procured the attendance of his witnesses, and kept them in attendance for several days. All this time the defendants below, with a full knowledge of the facts, failed to give notice of their intended application until the case was called for trial. This was clearly wrong and ought not to be tolerated.

It was a common practice in some courts for attorneys to apply for a change of venue when the case is called for trial, in order to get a *continuance*. That was the sole object in this case. Up to the day the case was first called for trial, they were looking hourly for a witness, who did not come; then, in order to get a continuance of the case, the application for a change of venue was made. And this has become a common practice in some courts. The law authorizing a change of venue is very loose, and, in my judgment, no change should ever be granted unless the *causes inducing the conclusions* of the petitioner are set forth. The statute is a prolific source of perjury, and every court should require a complete and perfect fulfilment of its letter and spirit, before granting a change of venue. There clearly was no such compliance in this case, and the application was properly rejected.

Berry vs. Wilkinson et al., 1 Scammon, 164.

2. There had already been a change of venue, on application of the plaintiff, from Peoria county.

II. The real question in this case is as to the right of the plaintiff to recover, he being engaged in the service of defendants below.

He had no control over the engine or cars, and no authority on the train. The freight cars, being open box cars, were placed behind the passenger car. They were loaded, two of them with iron and two of them with ties. This was clearly wrong and unusual. The passenger car should have been placed behind the loaded cars, but Johnson could not direct as to this. He was in the defendant's employment, just as an attorney would have been. He was in their employment, just as a book keeper would have been. He was not employed to run the hazards incident to a negligent running of the cars. The case of

15th Illinois, does not apply to him.

The case of *Gillenwater vs. Railroad Co.*, 5 Indiana, 339, is directly in point and decisive of this case.

I desire also to call the attention of the Court to reasoning in that case, and also to the case of *Railroad Co. vs. Keary*, 3 Ohio State Rep., 201.

The following cases are decisive :

Gillenwater vs. R. R. Co., 5 Indiana, 339.

R. R. Co. vs. Keary, 3 Ohio State Rep., 201.

R. R. Co. vs. Stevens, 20 Ohio Rep., 415.

Fitzpatrick vs. R. R. Co., 7 Indiana, 436.

Railroad Co. vs. Yandell, 17 B. Munroe, 587.

Dixon vs. Ranken, 1 Am. Railway Cases, 569.

¹¹⁶
Kellogg Map & Lea

vs

J Mc Johnson

Deft

Brief

~~13275~~

Filed April 27 1859

L. Leland

clerk

13326